

## Articles

### Abortion: A Woman’s Private Choice

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#### Introduction

Abortion rights in the United States are in serious jeopardy. Despite the fact that a legal abortion is medically safer than carrying a pregnancy to term in the United States, that right may soon be more illusory than real.<sup>1</sup> Both before and after his 2016 election as President of the United States, Donald Trump expressed the view that *Roe v. Wade*<sup>2</sup> should be overruled.<sup>3</sup>

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1. See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 216 (2012) (noting that a woman is fourteen times more likely to die by carrying a pregnancy to term than a legal abortion).

2. 410 U.S. 113 (1973).

3. See, e.g., Emily Schultheis, *Trump Talks to “60 Minutes” About Same-Sex Marriage, Abortion and the Supreme Court*, CBS NEWS (Nov. 13, 2016),

Mr. Trump predicts that the Supreme Court will reverse itself on abortion rights, and after, states will determine women's access to abortion; some states will ban the procedure and others may allow abortion services. Such a system would undoubtedly produce a two-tier system of abortion access, causing significant health burdens for women generally and reifying fundamental inequities in society, particularly for low-income women. In a nationally televised interview, President Trump dismissed such concerns, stating: "Yeah, well, they'll perhaps have to go, they'll have to go to another state."<sup>4</sup>

If *Roe* is overturned, lessons from the era preceding that landmark decision underscore the broad harms women will encounter, particularly because 49% of pregnancies in the United States are unintended.<sup>5</sup> In traditionally conservative states, the rates of unintended pregnancies are even higher: 54% in Texas,<sup>6</sup> 55% in Alabama<sup>7</sup> and Arkansas,<sup>8</sup> 60% in Louisiana,<sup>9</sup> and 62% in Mississippi,<sup>10</sup> among others. For women aged 20–24, 64% of pregnancies are unintended.<sup>11</sup> As one prominent study explains, "[s]ince 2001, the United States has not made progress in reducing unintended pregnancy. Rates increased for nearly all groups and remain high overall."<sup>12</sup>

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<http://www.cbsnews.com/news/trump-promises-pro-life-justices-supreme-court-same-sex-marriage/> [<https://perma.cc/W3TM-CQS6>] (noting that Trump said: "I'm pro-life . . . . The judges will be pro-life.").

4. *Id.*

5. See Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 *CONTRACEPTION* 478, 478–80 (2011) (noting that "the percentage of unintended pregnancies . . . are some of the most essential [health-status] indicators in the field of reproductive health"); *Unintended Pregnancy Prevention*, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan. 22, 2015), <https://www.cdc.gov/reproductivehealth/unintendedpregnancy/> [<https://perma.cc/PB8G-5ZDV>].

6. *State Facts About Unintended Pregnancy: Texas*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-texas> [<https://perma.cc/RU8P-QHNU>]. The economic costs of unintended pregnancies spread beyond Texas. For example, "in 2010, 133,200 or 73.7% of unplanned births in Texas were publicly funded," with over \$2.05 billion paid by the federal government. *Id.*

7. *State Facts About Unintended Pregnancy: Alabama*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-alabama> [<https://perma.cc/QA2F-9C29>] (highlighting that in Alabama "in 2010, the federal and state governments spent \$323.2 million on unintended pregnancies; of this, \$250.5 million was paid by the federal government and \$72.6 million was paid by the state.").

8. *State Facts About Unintended Pregnancy: Arkansas*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-arkansas> [<https://perma.cc/MAD9-8LE5>].

9. *State Facts About Unintended Pregnancy: Louisiana*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-louisiana> [<https://perma.cc/3573-QFWZ>].

10. *State Facts About Unintended Pregnancy: Mississippi*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-mississippi> [<https://perma.cc/79UD-CVXS>].

11. CENTERS FOR DISEASE CONTROL & PREVENTION, *supra* note 5.

12. Finer & Zolna, *supra* note 5, at 478.

Affluence will not spare women the indignity of traveling to another state or country to obtain abortions.<sup>13</sup> For poorer women, including the working-class populations President Trump appealed to during his campaign, the options will be far more dire. According to the Guttmacher Institute, “[t]he toll the nation’s abortion laws took on women’s lives and health in the years before *Roe* was substantial.”<sup>14</sup> Estimates vary, but reports suggest that about one million illegal abortions took place each year, prior to *Roe v. Wade*, with hundreds ending in death and numerous others requiring emergency hospital interventions.<sup>15</sup> Sometimes women were left infertile as a result of illegal procedures.<sup>16</sup> In fact, by the “early 1960s, [illegal] abortion-related deaths accounted for nearly half, or 42.1 percent, of the total maternal mortality in New York City.”<sup>17</sup> Sadly, these deaths were preventable, because legal abortions are even safer than childbirth.<sup>18</sup>

According to Leslie Reagan, author of *When Abortion Was a Crime: Women, Medicine, and Law in the United States*, “[p]hysicians and nurses at Cook County Hospital saw nearly one hundred women come in every week for emergency treatment following their abortions.”<sup>19</sup> She writes that “[s]ome barely survived the bleeding, injuries, and burns; others did not.”<sup>20</sup> Cook County Hospital and other medical facilities devoted entire wards to address “abortion-related complications,” which impacted “[t]ens of thousands of women every year” who needed emergency care following self-induced or back-alley abortions.<sup>21</sup> Deaths were particularly acute among women of color.<sup>22</sup>

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13. However, affluence does contribute to a two-tiered system of healthcare generally, and particularly with regard to reproductive healthcare, decision making, privacy, and opportunity. KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (forthcoming 2017) (manuscript at 6) (observing that “absent unique circumstances,” privately insured women can avoid and be spared painfully invasive interrogations and intrusions by government into their personal lives when pregnant). Nevertheless, we argue that even more affluent women experience the indignities of marginalized privacy within the legal framework and construction of reproductive rights cases.

14. Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER POL’Y REV. 8, 8 (2003).

15. Symposium, *Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 420–21 (1967) [hereinafter Guttmacher] (statement of Alan F. Guttmacher).

16. NARAL PRO-CHOICE AM., *THE SAFETY OF LEGAL ABORTION AND THE HAZARDS OF ILLEGAL ABORTION 1* (2016), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-distorting-science-safety-legal-abortion.pdf> [<https://perma.cc/NPU2-MAV6>].

17. LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867–1973*, at 214 (1997).

18. See, e.g., Michele Goodwin & Allison M. Whelan, *Constitutional Exceptionalism*, 2016 U. ILL. L. REV. 1287, 1324 (noting that “pregnancies are fourteen times more likely to cause a woman’s death than an abortion”).

19. REAGAN, *supra* note 17, at 210.

20. *Id.*

21. *Id.* at 210–11.

22. *Id.* at 212–13 (explaining that “[t]he racial differences in abortion-related deaths and access to safe therapeutic abortions mirrored the racial inequities in health services in general and in overall

Numerous essays and interviews recount the grave indignities, health risks, and even deaths of women who sought illegal abortions in the pre-*Roe* era.<sup>23</sup> One telling example from Polly Bergen, consistent with the accounts we have researched, tells the story of desperation. In her case, she recounts:

A greasy looking man came to the door and asked for the money as soon as I walked in. He told me to take off all my clothes except my blouse; there was a towel to wrap around myself. I got up on a cold metal kitchen table. He performed a procedure, using something sharp. He didn't give me anything for pain—he just did it. He said that he had packed me with gauze, that I should expect some cramping, and that I would be fine. I left.<sup>24</sup>

In many instances, the most horrific accounts come from women who sought back-alley abortions as teenage girls.<sup>25</sup>

America's past experiences with illegal abortions paint a grim picture for the future. However, the threat to women's reproductive autonomy reaches beyond denying access to an abortion—it now includes criminal punishment. In an interview, candidate Trump declared that women who obtain abortions should be punished, before recanting hours later.<sup>26</sup> Some pundits dismiss such statements as unlikely, empty threats, geared at revving up an excitable and active base of supporters.<sup>27</sup> They claim that Americans really do not know what the new president will do because of Trump's

health” and noting that “[m]aternal mortality rates of black women were three to four times higher than those of white women”).

23. See, e.g., NARAL FOUND., CHOICES: WOMEN SPEAK OUT ABOUT ABORTION 11 (1997); Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes 'Punishment' for Women, Then Recants*, N.Y. TIMES (Mar. 30, 2016), <https://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html> [<https://perma.cc/3NFN-33YL>]. For accounts that further capture women's painful, coercive experiences, see Dorothy Fadiman, *When Abortion Was Illegal: Untold Stories*, CONCENTRIC MEDIA, [http://concentric.org/films/when\\_abortion\\_was\\_illegal.html](http://concentric.org/films/when_abortion_was_illegal.html) [<https://perma.cc/VVP6-BPQQ>]; Stephanie Hallett, *8 Stories That Show What Abortion Was Like Before Roe v. Wade*, MS. MAGAZINE BLOG (Jan. 19, 2016), <https://msmagazine.com/blog/2016/01/19/8-stories-that-show-what-abortion-was-like-before-roe-v-wade/> [<https://perma.cc/DDW7-5TNG>]; Lisa Woods, *9 Older Women Share Their Harrowing Back Alley Abortion Stories*, THOUGHT CATALOG (Dec. 30, 2015), <http://thoughtcatalog.com/lisa-woods/2015/12/9-older-women-share-their-harrowing-back-alley-abortion-stories/> [<https://perma.cc/HW5V-MLJQ>].

24. NARAL FOUND., *supra* note 23, at 11.

25. E.g., Hallett, *supra* note 23 (chronicling the stories of women who, after receiving back-alley abortions, either died or suffered from peritonitis and infection).

26. Flegenheimer & Haberman, *supra* note 23.

27. See, e.g., Nancy LeTourneau, *Why Would Anyone Take What Trump Says Seriously?*, WASH. MONTHLY (June 21, 2016), <http://washingtonmonthly.com/2016/06/21/why-would-anyone-take-what-trump-says-seriously/> [<https://perma.cc/MD2Y-A9H3>] (“Saying outrageous things to get media attention is how he made a name for himself in the entertainment world and won the Republican primary.”); Sarah Smith, *Taking Trump Literally and Seriously*, BBC NEWS: US & CANADA (Dec. 7, 2016), <http://www.bbc.com/news/world-us-canada-38188074> [<https://perma.cc/FK63-NT5V>] (describing supporters saying that they responded to his campaigning but did not expect him to govern the same way).

contradictory statements on a number of issues.<sup>28</sup> Despite urgings that Americans should hope for the best, we are concerned, for reasons we explain below.

First, the Republican Party platform repeatedly mentions eliminating abortion rights; no less than thirty-five times it references abortion.<sup>29</sup> The platform lauds “states’ authority and flexibility to exclude abortion providers from federal programs such as Medicaid and other healthcare and family planning programs,”<sup>30</sup> calls for “a permanent ban on federal funding and subsidies for abortion and healthcare plans that include abortion coverage,”<sup>31</sup> urges the “codification of the Hyde Amendment,”<sup>32</sup> and even opposes contraception being referred to or counseled about in school-based health clinics and sexual-education programs.<sup>33</sup> Tellingly, the attack on contraceptive education and access reveals that the battle against women’s reproductive-healthcare access is about more than abortion. Rather, it touches on women’s most basic fundamental rights: privacy and bodily autonomy.<sup>34</sup>

Second, for those who doubt a president’s ability to shape the future of fundamental rights, it is worth considering the scope of power that office wields and President Trump’s authority to shape the future Supreme Court. President Trump’s statements on abortion, as well as his promises to eliminate abortion access and only appoint judges who oppose this fundamental constitutional right to fill Supreme Court vacancies, cannot be dismissed. In light of aggressive state and federal efforts to constrain reproductive-healthcare access, including more antichoice legislation

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28. See, e.g., Jared Bernstein, *I Don't Know What Trump Will Do. Here's Some of What He Can Do.*, WASH. POST: POSTEVERYTHING (Nov. 16, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/11/16/i-dont-know-what-trump-will-do-heres-some-of-what-he-can-do/?utm\\_term=.e6e4daa05664](https://www.washingtonpost.com/posteverything/wp/2016/11/16/i-dont-know-what-trump-will-do-heres-some-of-what-he-can-do/?utm_term=.e6e4daa05664) [<https://perma.cc/2635-SGYG>] (arguing that “we cannot yet know” what Trump will do or “how seriously to take him”); Jim Galloway, *We've Elected Mr. Trump. Now It's Time to See What We've Bought.*, AJC.COM (Nov. 9, 2016), <http://politics.blog.ajc.com/2016/11/09/weve-elected-mr-trump-now-its-time-to-see-what-weve-bought/> [<https://perma.cc/93JB-E9N3>] (“Trump’s was a campaign of wispy generalities—vows and threats that appeared, disappeared, then re-appeared, morphing as the situation demanded.”).

29. See generally REPUBLICAN PARTY PLATFORM COMM., REPUBLICAN PLATFORM 2016, (2016); Steven Ertelt & Micaiah Bilger, *Republicans Adopt Most Pro-Life Platform Ever Condemning Abortion and Planned Parenthood*, LIFENEWS.COM (July 18, 2016, 4:47 PM), <http://www.lifenews.com/2016/07/18/republicans-adopt-most-pro-life-platform-ever-condemning-abortion-and-planned-parenthood/> [<https://perma.cc/8ZDZ-4WZN>] (describing the new Republican platform as the “strongest pro-life platform the . . . party has ever adopted”).

30. REPUBLICAN PARTY PLATFORM COMM. 2016, *supra* note 29, at 24.

31. *Id.* at 37.

32. *Id.*

33. *Id.* at 34.

34. For example, the insightful scholarship of Khiara Bridges explicates how profoundly and unjustly privacy rights of poor, vulnerable women of color are impaired. See, e.g., BRIDGES, *supra* note 13.

proposed and enacted between 2010 and 2015 than the prior thirty years,<sup>35</sup> the threats to women’s privacy and abortion are real.<sup>36</sup>

President Trump promised to replace Justice Antonin Scalia’s vacated seat on the Supreme Court with a staunch opponent to abortion rights.<sup>37</sup> In Justice Neil Gorsuch we predict that he has found such a person. Despite the fact that Justice Gorsuch is new to the Supreme Court, his record on women’s rights while sitting on the Tenth Circuit Court of Appeals causes deep concern. Gorsuch’s judicial record on contraceptive care access<sup>38</sup> and defunding Planned Parenthood,<sup>39</sup> as well as his views on discrimination

35. Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, GUTTMACHER POL’Y REV. (Mar. 1, 2014), <https://www.guttmacher.org/gpr/2014/03/surge-state-abortion-restrictions-puts-providers-and-women-they-serve-crosshairs> [<https://perma.cc/L662-22RQ>] (noting that a “wave of state-level abortion restrictions” have “swept the country over” in the past few years, and calling this uptick “unprecedented” and “startling”); Elizabeth Nash & Rachel Benson Gold, *In Just the Last Four Years, States Have Enacted 231 Abortion Restrictions*, GUTTMACHER INST. (Jan. 5, 2015), <https://www.guttmacher.org/article/2015/01/just-last-four-years-states-have-enacted-231-abortion-restrictions> [<https://perma.cc/3QQJ-7TYS>] (“During the 2014 state legislative session, lawmakers introduced 335 provisions aimed at restricting access to abortion.”); see generally Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781 (2014) (describing state initiatives to pass fetal-protection laws and their effects on a variety of constituencies).

36. For example, in 1985, fewer than twenty antiabortion measures were even proposed in the United States. Boonstra & Nash, *supra* note 35. However, in 2011, over 90 antiabortion laws were enacted that year in the United States. *Id.*

37. See, e.g., Ariane de Vogue, *How Trump’s Election Reignites the Abortion Wars*, CNN (Dec. 14, 2016), <http://www.cnn.com/2016/12/14/politics/trump-abortion-supreme-court/> [<https://perma.cc/3T2L-FTUL>] (citing Mr. Trump’s statement that “[t]he judges will be pro-life” and noting that one of his stated contenders for nomination to the Supreme Court, Judge William Pryor, referred to *Roe v. Wade* as an “abomination”).

38. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152–59 (10th Cir. 2013) (Gorsuch, J., concurring) (referring to the Religious Freedom Restoration Act (RFRA) as “something of a ‘super-statute’” which trumps all other legislation, including federal laws like the Affordable Care Act, which mandates contraceptive health coverage for women); see also, *Little Sisters of the Poor Home for the Aged v. Burwell* 799 F.3d 1315 (10th Cir. 2015) (Judge Gorsuch dissenting from a denial of en banc review, where a Tenth Circuit panel ruled that the government’s “accommodation scheme relieves [nursing home owners] of their obligations under the [Affordable Care Act’s contraceptive mandate] and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights.” (quoting *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1160 (10th Cir. 2015)). Even though the plaintiffs did not issue a petition for rehearing, Gorsuch urged and voted for an en banc review of the court’s decision because he and fellow dissenting judges believed the opinion was “clearly and gravely wrong.” *Id.* at 1316.

39. As a judge on the Tenth Circuit Court of Appeals, Neil Gorsuch wrote an opinion dissenting from the denial of en banc review in a case where the circuit court upheld an injunction against Utah Governor Gary Herbert’s attempt to defund Planned Parenthood. *Planned Parenthood Association v. Herbert*, 839 F.3d 1301, 1307 (10th Cir. 2016) (Gorsuch, J., dissenting). Gorsuch urged an en banc rehearing in the case (although the Governor did not appeal the court’s decision). *Id.* The court denied the en banc rehearing, and in Gorsuch’s dissent, he wrote that, “if the Governor discontinued funding,” because he believed Planned Parenthood affiliated with illegal fetal tissue sellers, “as he said he did” then “no constitutional violation had taken place.” *Id.* Troublingly, Gorsuch’s dissenting opinion gave judicial authority to Governor Herbert’s unsubstantiated claims that illegally obtained, surreptitiously filmed, and deeply edited videos purporting to show Planned

against pregnant women,<sup>40</sup> and statements on privacy rights<sup>41</sup> indicate enmity and opposition to women's reproductive rights.

Justice Gorsuch's appointment—along with filling vacancies that could emerge from retirements of Justices Ruth Bader Ginsburg, Anthony Kennedy, or Stephen Breyer during his term—almost surely will create a majority to overrule *Roe*. That is, since 1960, seventy-eight years old is the average age at which a Justice has left the bench.<sup>42</sup> Justice Scalia surpassed that by one year: he was seventy-nine when he died on February 13, 2016.<sup>43</sup> At the time of Trump's election, Justice Ginsburg was eighty-three, Kennedy was eighty, and Breyer was seventy-eight.<sup>44</sup>

It is possible that each of these Justices will still be on the bench on January 20, 2021, when a new president could be inaugurated. However, it means that abortion rights depend on the physical and mental health of three

Parenthood staff negotiating over fetal body parts were credible evidence against the organization. *See id.*

40. Justice Gorsuch has denied claims made by two female law students that on April 19, 2016, nearly a year before his Supreme Court nomination hearings, he indicated women abuse maternity leave policies, thereby harming the interests of employers—and that women engage in such behavior with alarming frequency. Sean Sullivan, *Gorsuch Denies Former Student's Allegation on Maternity Benefits Question*, WASH. POST (Mar. 21, 2017), [https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-denies-former-students-allegation-on-maternity-leave-question/?utm\\_term=.aafb968514c6](https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-denies-former-students-allegation-on-maternity-leave-question/?utm_term=.aafb968514c6) [<https://perma.cc/UK5D-K5S9>]. Specifically, when asked by Senator Richard J. Durbin (D-Ill.) whether he asked “students in class . . . to raise their hands if they knew of a woman who had taken maternity benefits from a company and then left the company after having a baby?” *Id.* Gorsuch answered, “No.” *Id.* However, Justice Gorsuch refused to clarify his position as to whether he believes women abuse maternity leave policies or whether employers should be entitled to ask family planning questions that currently violate federal law. *Judge Gorsuch Confirmation Continues*, CNN: TRANSCRIPTS (March 21, 2017), <http://transcripts.cnn.com/TRANSCRIPTS/170321/wolf.01.html> [<https://perma.cc/432L-SBCD>]. For example, when Senator Durbin asked, “whether employees should or should not make inquiries into whether an applicant or employee intends to become pregnant.” *Id.* Justice Gorsuch deflected the question, quoting Socrates. *Id.* He told Senator Durbin that “it sounds like you are asking about a case or controversy” and, “with all respect, when it comes to cases and controversies, a good judge will listen.” *Id.* For a discussion of Justice Gorsuch's former clerks' position on the allegations, see Arnie Seipel & Nina Totenberg, *Amid Charges by Former Law Student on Gender Equality, Former Clerks Defend Gorsuch*, NPR (March 20, 2017), <http://www.npr.org/2017/03/20/520743555/former-law-student-gorsuch-told-class-women-manipulate-maternal-leave> [<https://perma.cc/J8XA-MYL9>].

41. In an amicus brief written in 1996, before Justice Gorsuch entered the bench, he expressed that countless problems “plagued the Court's abortion jurisprudence.” Brief for the American Hospital Association as Amicus Curiae Supporting Petitioners, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 96-110, 96-1858) 1996 WL 656278 (“[T]he plurality's opinion rests at heart upon stare decisis principles, upholding the abortion right largely because of the need to protect and respect prior court decisions in the abortion field.”). He surmised that *Planned Parenthood v. Casey* was a case rooted in stare decisis rather than the Court affirmatively upholding abortion rights. *Id.*

42. Erwin Chemerinsky, *Chemerinsky: What Will the Presidential Election Mean for SCOTUS?*, ABA J. (Sept. 6, 2016), [http://www.abajournal.com/news/article/chemerinsky\\_what\\_will\\_the\\_coming\\_election\\_mean\\_for\\_scotus](http://www.abajournal.com/news/article/chemerinsky_what_will_the_coming_election_mean_for_scotus) [<https://perma.cc/PC47-BGQX>].

43. *Id.*

44. *Id.*

individuals who by that time would be eighty-seven, eighty-four, and eighty-two. If Mr. Trump is a two-term president, it is implausible that all (or perhaps even any) of these three Justices will still be on the bench on January 20, 2025.

Finally, Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito have voted to uphold every restriction on abortion that has come before the Court during their tenure.<sup>45</sup> There is nothing in the writings or opinions of Roberts, Thomas, and Alito that causes reason to doubt that they will overrule *Roe v. Wade* if given the chance.<sup>46</sup> Indeed, the separate, vehement dissents by these three Justices in *Obergefell v. Hodges*,<sup>47</sup> the Supreme Court's decision protecting a right to marriage equality for gays and lesbians, shows a conservative jurisprudence of each of these Justices that leaves us little doubt that they would vote to overrule *Roe*.<sup>48</sup>

The uncertainty about abortion rights makes it especially important to provide a strong constitutional foundation for their protection. This, of course, still may not be enough if there are five Justices committed to overruling *Roe*. Yet, abortion rights should have the best possible constitutional defense. That is our purpose in this Article.

We actually contemplated this as a very different contribution to the literature on abortion. As we anticipated the replacement of Justice Scalia with Chief Judge Merrick Garland or a Democratic appointee,<sup>49</sup> we wanted to write an article urging the new Court, with a majority of Justices appointed by Democratic presidents, to reconsider prior decisions upholding restrictions on abortion, such as the denial of public funds for abortions and the ban on so-called "partial-birth abortions." We still believe that these changes in constitutional law are desirable and will explain why in this Article. For the immediate and foreseeable future, there will not be a Supreme Court to expand abortion rights, but one that well could place all constitutional protections of reproductive autonomy in jeopardy.

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45. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting); *Gonzales v. Carhart*, 550 U.S. 124, 167–69 (2007) (upholding the federal Partial-Birth Abortion Ban Act).

46. At the very least, they are certain votes to uphold the almost infinite variety of state laws adopted in recent years to impose restrictions on abortion, including the challenged Texas legislation in *Whole Woman's Health*. Upholding targeted restrictions of abortion providers (TRAP laws) and other antiabortion legislation will make the procedure unavailable to most women in the United States, even if *Roe v. Wade* is not overruled.

47. 135 S. Ct. 2584 (2015).

48. See *id.* at 2611 (Roberts, C.J., dissenting) (arguing that when the Constitution does not clearly create a right, the question of that right's existence is to be left to the states); *id.* at 2640 (Alito, J., dissenting) (same).

49. See, e.g., Domenico Montanaro, *NPR Battleground Map: Hillary Clinton Is Winning—And It's Not Close*, NPR (Oct. 18, 2016), <http://www.npr.org/2016/10/18/498406765/npr-battleground-map-hillary-clinton-is-winning-and-its-not-close> [<https://perma.cc/E7PV-M374>] (predicting that Hillary Clinton would easily win the 2016 presidential election, which would presumably result in a Democratic appointee to the Supreme Court).



We begin in Part I by explaining the flawed foundation for the protection of reproductive rights under the Constitution. The problem began in *Griswold v. Connecticut*,<sup>50</sup> the first case to protect reproductive freedom. Notwithstanding the fact that there is much to praise about Justice Harry Blackmun's opinion in *Roe v. Wade*, we believe that it was flawed in failing to clearly explain why the choice of whether to continue a pregnancy or have an abortion must be regarded as a private choice of a woman. From a reproductive-justice standpoint, women's bodily autonomy and privacy should encompass choices along a spectrum of pregnancy that no more favors abortion over pregnancy or pregnancy over abortion. In this Part, we explain why we do not believe that abortion should have been resolved by legislatures, precisely because of women's marginalized status in society during the *Roe* era and even now.

In subsequent decisions, especially in *Planned Parenthood v. Casey*,<sup>51</sup> the Court has seriously erred by abandoning strict scrutiny and using an "undue burden" test for evaluating government regulation of abortions. Even the most recent abortion ruling, *Whole Woman's Health v. Hellerstedt*,<sup>52</sup> came to a desirable result in striking down restrictions on abortion that would have closed most facilities in Texas where abortions were available, but used the undesirable "undue burden" test.<sup>53</sup>

In Part II, we seek to reconceptualize abortion rights and underscore the value and relevance of a reproductive justice framework, including taking serious account of women's lived lives. We begin by justifying the protection of rights not found in the text of the Constitution, something the Court has done throughout American history. Foremost among these rights is control over one's body and over one's reproduction. Based on this, we offer our normative argument that the right to abortion should be seen as a private choice left to each woman.<sup>54</sup>

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50. 381 U.S. 479 (1965).

51. 505 U.S. 833 (1992).

52. 136 S. Ct. 2292 (2016).

53. *Id.* at 2300.

54. We recognize the critiques of some prior scholarship on privacy and abortion, such as criticisms about the exclusionary focus or concentration only on the concerns of elites in society, rendering women of color and their social, economic, legal, and medical concerns invisible and their interests unacknowledged and unaddressed. See LORETTA J. ROSS, SISTERSONG WOMEN OF COLOR REPROD. HEALTH COLLECTIVE, UNDERSTANDING REPRODUCTIVE JUSTICE 6 (2006), [https://d3n8a8pro7vhnmx.cloudfront.net/rrfp/pages/33/attachments/original/1456425809/Understanding\\_RJ\\_Sistersong.pdf?1456425809](https://d3n8a8pro7vhnmx.cloudfront.net/rrfp/pages/33/attachments/original/1456425809/Understanding_RJ_Sistersong.pdf?1456425809) [https://perma.cc/BV28-87UV]. Ross explains:

[Women of color] were also skeptical about the motivations of some forces in the pro-choice movement who seemed to be more interested in population restrictions rather than women's empowerment. They promoted dangerous contraceptives and coercive sterilizations, and were mostly silent about the economic inequalities and power imbalances between the developed and the developing worlds that constrain women's choices.

Finally, in Part III we discuss what it would mean for abortion to be regarded as a private choice. In this Part, we identify three implications: restoring strict scrutiny to examining laws regulating abortions, which would mean that the government must be neutral between childbirth and abortion; preventing the government from denying funding for abortions when it pays for childbirth; and invalidating the countless types of restrictions on abortion—often referred to as “targeted restrictions of abortion providers”—that have the purpose and effect of limiting women’s access to abortion rather than promoting safety and health. We especially focus on “informed consent” and waiting period laws and show that they are inconsistent with regarding abortion as a private choice for each woman.

Before *Roe v. Wade*, women faced the horrific choice between an unsafe back-alley abortion and an unwanted child; we know women who encountered these untenable options. We write this Article because we believe it is essential that the country never go back to those days. We write this Article because we think it important to explain why the Constitution must be interpreted to protect reproductive freedom, including recognizing that abortion is a private choice for each woman.

#### I. The Flawed Foundation for the Constitutional Protection of Reproductive Rights

The Court’s misguided approach to reproductive autonomy began with its first decision on the subject: its tragically wrong decision in *Buck v. Bell*.<sup>55</sup> *Buck v. Bell* upheld the ability of the government to involuntarily sterilize individuals with mental disabilities.<sup>56</sup> In *Buck*, the Supreme Court stated that it was constitutional for the state of Virginia to sterilize Carrie Buck, pursuant to a law that provided for the involuntary sterilization of the mentally retarded or “feeble minded” who were in state institutions.<sup>57</sup> In reality, the law and similar legislation in other states imposed the grave indignity of sterilization on people simply because they were poor, uneducated, vagrants, “illegitimate,” homeless, or had parents with histories of alcoholism or drug

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*Id.*; see also ALEXANDER SANGER, BEYOND CHOICE: REPRODUCTIVE FREEDOM IN THE 21ST CENTURY 289–90 (2004) (advocating that those in favor of abortion rights embrace evolutionary biology as an argument for reproductive freedom); RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA 252 (2005) (criticizing the creation of “conditions for maternal legitimacy that give special treatment to white, middle-class women and threaten almost all other women” as a “vehicle for institutionalizing racism and other forms of oppression”).

55. 274 U.S. 200 (1927); see ERWIN CHERMERINSKY, THE CASE AGAINST THE SUPREME COURT 1–4 (2014) (discussing *Buck v. Bell*); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 236–79 (2008) (discussing *Buck v. Bell* and its aftermath).

56. *Buck*, 274 U.S. at 207.

57. *Id.* at 205–07.

addiction.<sup>58</sup> Carrie fit into the latter category: her mother was institutionalized for being an unkempt woman.<sup>59</sup>

Carrie was raped at sixteen years old and was eighteen when her case came before the United States Supreme Court.<sup>60</sup> Justice Oliver Wendell Holmes, in some of the most offensive language found anywhere in the United States Reports, declared: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."<sup>61</sup> He opined that states' authority was broad enough to cover "cutting the Fallopian tubes."<sup>62</sup>

The legacy of *Buck v. Bell* echoed for decades throughout the United States, particularly in southern states like North Carolina, which expanded eugenic sterilizations to include cases of rape, incest, and poverty—often without informing the women undergoing the procedures.<sup>63</sup> In the case of Elaine Riddick, an African-American woman raped as a fourteen-year-old child, doctors removed the baby resulting from that sexual assault and sterilized Riddick in the process.<sup>64</sup> A reporter who followed her case notes, "[a] consent form shows the 'X' mark of her illiterate grandmother."<sup>65</sup> In

58. *Id.* at 205.

59. See Trevor Burrus, *The United States Once Sterilized Tens of Thousands—Here's How the Supreme Court Allowed It*, CATO INST. (Jan. 27, 2016), <https://www.cato.org/publications/commentary/united-states-once-sterilized-tens-thousands-heres-how-supreme-court-allowed> [<https://perma.cc/485S-GPTB>] ("In the Colony, Carrie was reunited with her mother. Colony records describe Emma Buck as a widow who 'lacked moral sense and responsibility.' She had a reputation as 'notoriously untruthful,' had been arrested for prostitution, and had allegedly given birth to illegitimate children. Perhaps most shockingly, her housework was 'untidy.' Emma was stamped with a diagnosis: 'Mental Deficiency, Familial: Moron.'")

60. *Buck*, 247 U.S. at 205; see LOMBARDO, *supra* note 55, at 140–41 (noting that Carrie gave birth after she had been raped by a relative of her foster parents at 16).

61. *Buck*, 274 U.S. at 207. Subsequently, in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), the Court held a forced sterilization law unconstitutional and declared:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. . . . He is forever deprived of a basic liberty.

62. *Buck*, 274 U.S. at 207.

63. Valerie Bauerlein, *North Carolina to Compensate Sterilization Victims*, WALL STREET J. (July 26, 2013), <http://www.wsj.com/articles/SB10001424127887323971204578629943220881914> [<https://perma.cc/J7BH-D3JB>] (reporting that "North Carolina sterilized 7,600 people from 1929 to 1974 who were deemed socially or mentally unfit"). Elaine Riddick, one of the victims who was sterilized by the state, became pregnant after being raped—North Carolina's response was to sterilize her. *Id.*; Julie Rose, *N.C. Considers Paying Forced Sterilization Victims*, NPR (June 22, 2011), <http://www.npr.org/2011/06/22/137347548/n-c-considers-paying-forced-sterilization-victims> [<https://perma.cc/24HN-RKQB>].

64. Rose, *supra* note 63.

65. *Id.*

North Carolina, 26% of forced sterilizations were carried out on children “under age 18” and 60% of all sterilization victims were African-Americans.<sup>66</sup>

The Court’s failure to recognize pregnant women’s privacy and autonomy during the notorious eugenics period in the United States serves as a potent landmark for reproductive justice and rights in this nation. Autonomy and privacy in pregnancy relate not only to terminating a pregnancy, but also a woman’s dignity to carry a pregnancy to term if she wishes to do so. When the State makes judgments as to who should or should not be granted autonomy over her reproductive decision making, it engages not only in social determinism, but also an unconstitutional and discriminatory practice.

As Professor Dorothy Roberts explains: “Governmental policies that perpetuate . . . subordination through the denial of procreative rights, which threaten both racial equality and privacy at once, should be subject to the most intense scrutiny.”<sup>67</sup> In hindsight, scholars and lawmakers have come to agree with the assessment that *Buck v. Bell* was wrongly decided and that it perpetuated nativism and sex discrimination. However, given this history, the foundation for recognizing a privacy right in women’s reproductive health sphere rests on disappointingly unstable ground,<sup>68</sup> because a woman’s control over her body was not deemed a fundamental right even in the aftermath of rape and a subsequent pregnancy.

Thus, the constitutional protection of abortion rights is made more difficult by the failure of the Court to provide a persuasive explanation for why reproductive autonomy should be deemed a fundamental right. This problem began with the Court’s first decision concerning contraception and abortion, *Griswold v. Connecticut*, and continues through its most recent ruling, *Whole Woman’s Health v. Hellerstedt*. The flawed foundation makes these rights more susceptible to criticism, more subject to restrictions, and more vulnerable to overruling.

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66. See Bauerlein, *supra* note 63 (noting that “[a]bout 2,000 of the 7,600 who were sterilized were under age 18” and 60% of all sterilization victims were black).

67. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 308 (1997).

68. Despite the Court’s subsequent ruling in *Skinner v. Oklahoma*, overturning a law that criminalized petty thefts with the punishment of sterilization, *Buck v. Bell* remains “good law” in that it has never been overturned. 316 U.S. at 540–41. In *Skinner*, the Supreme Court ruled that the right to bear children is “one of the basic civil rights of man,” and struck down the Oklahoma Habitual Criminal Sterilization Act on the grounds that it fostered unequal treatment between classes of criminal offenders who committed similar acts. *Id.* at 536, 541, 543. Habitual petty thieves were subjected to sterilization whereas habitual embezzlers and white-collar offenders were not. *Id.* at 541–42.

### A. Griswold v. Connecticut

The first case to consider a right to prevent procreation was *Griswold v. Connecticut*, where the Supreme Court declared unconstitutional a state law that prohibited the use and distribution of contraceptives.<sup>69</sup> A Connecticut law stated: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.”<sup>70</sup> The law also made it a crime to assist, abet, or counsel a violation of the law.<sup>71</sup>

The case involved a criminal prosecution of Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, a physician and Yale Medical School professor who openly ran a Planned Parenthood clinic from November 1 to November 10, 1961.<sup>72</sup> Connecticut prosecuted Griswold and Buxton for providing contraceptives to a married woman.<sup>73</sup>

The Supreme Court, in an opinion by Justice Douglas, found that the right to privacy was a fundamental right and that the Connecticut law violated this right.<sup>74</sup> Although we, of course, believe that the result in this case was unquestionably correct, Justice Douglas wrote a poor opinion explaining the basis for the decision and thus created a weak and unstable foundation for future protection of reproductive rights.

First, the Court found the right to privacy to be protected under the “penumbra” and “emanations” of the Bill of Rights, an approach justifiably subjected to much ridicule.<sup>75</sup> Justice Douglas expressly rejected the argument that the right was protected under the liberty right of the due process clause. He stated: “[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation as we did [in many other cases].”<sup>76</sup>

Instead, Justice Douglas found that privacy was implicit in many of the specific provisions of the Bill of Rights, such as the First, Third, Fourth, and Fifth Amendments. He declared: “The foregoing cases suggest that specific

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69. 381 U.S. 479, 485–86 (1965); see CONN. GEN. STAT. §§ 53-32, 54-196 (1958) (repealed 1969).

70. *Griswold*, 381 U.S. at 480 (internal quotations omitted).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 485–86.

75. *Id.* at 484; see Robert G. Dixon Jr., *The “New” Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43, 84 (arguing that in *Griswold*, Justice Douglas “skipped through the Bill of Rights like a cheerleader—‘Give me a P . . . give me an R . . . an I . . . ,’ and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right”).

76. *Griswold*, 381 U.S. at 481–82 (citations omitted).

guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.”<sup>77</sup> Penumbras and emanations are a flimsy foundation for fundamental rights, which is why they never again have been mentioned by the Court. We believe it would have been far better for the Court to explain why reproductive autonomy is safeguarded under the liberty right of the Due Process Clause, as Justice Harlan urged.<sup>78</sup> As Justice Harlan wrote, “the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values ‘implicit in the concept of ordered liberty.’”<sup>79</sup> Besides, Justice Douglas failed even in his efforts to avoid substantive due process: the Bill of Rights is applied to the states through the Due Process Clause of the Fourteenth Amendment.

Second, astoundingly, Justice Douglas’s majority opinion never mentions a right to avoid procreation or to make reproductive choices. While this may be implicit in the broader reading of the case, this principle of autonomy to avoid procreation lacks explicit mention in the decision. Instead, Justice Douglas focuses on how objectionable it would be for police to search the bedroom of a married couple, which was totally irrelevant to this case. Justice Douglas writes: “Would we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”<sup>80</sup> Most importantly, the Court never explains why the ability to control reproduction should be regarded as a fundamental right under the Constitution. Ironically, the first Supreme Court case to address reproductive autonomy never mentioned reproductive autonomy.

Subsequent to *Griswold*, the Supreme Court recognized a right to purchase and use contraceptives based on a right of individuals to make decisions concerning procreation. In *Eisenstadt v. Baird*,<sup>81</sup> the Supreme Court declared unconstitutional Massachusetts’ “Crimes Against Chastity, Morality, Decency and Good Order”<sup>82</sup> law that prohibited distributing contraceptives to unmarried individuals and only allowed physicians to distribute them to married persons.<sup>83</sup> In that case, Bill Baird—famously

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77. *Id.* at 484 (citation omitted).

78. *See* *Poe v. Ullman*, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting) (noting that Connecticut’s anti-birth control laws “violate[d] the Fourteenth Amendment, in that they deprive[d] appellants of life, liberty, or property without due process”).

79. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969)).

80. *Griswold*, 381 U.S. at 485–86.

81. 405 U.S. 438 (1972).

82. *Id.* at 450 (internal quotations omitted).

83. *Id.* at 443.

known for challenging such laws in various states—was arrested and jailed for violating the Massachusetts law following a speech where he publicly distributed information about birth control to a group of Boston University students and provided one young woman with a foam contraceptive.<sup>84</sup>

The Court stated, as it should have in *Griswold*: “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>85</sup>

### B. *Roe v. Wade*

*Roe v. Wade*, of course, is the key case recognizing a constitutional right to abortion.<sup>86</sup> *Roe* involved a challenge to a Texas law that prohibited all abortions except those necessary to save the life of the mother.<sup>87</sup> A companion case, *Doe v. Bolton*,<sup>88</sup> presented a challenge to a Georgia law that outlawed abortions except if a doctor determined that continuing the pregnancy would endanger a woman's life or health, if the fetus likely would be born with “a grave, permanent, and irremediable mental or physical defect,” or if the pregnancy resulted from rape.<sup>89</sup>

In *Roe*, Justice Blackmun, writing for the Court, exhaustively reviewed the history of abortion from ancient attitudes through English law through American history and to the present.<sup>90</sup> Blackmun also described the development of medical technology to provide safe abortions.<sup>91</sup> With this as background, Blackmun focused on the right to privacy. After reviewing earlier cases addressing family and reproductive autonomy, Blackmun concluded:

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 . . . 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.<sup>92</sup>

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84. *Id.* at 440.

85. *Id.* at 453.

86. 410 U.S. 113, 153 (1973).

87. *Id.* at 117–18.

88. 410 U.S. 179 (1973).

89. *Id.* at 181, 183.

90. *See Roe*, 401 U.S. at 129–47 (detailing the various positions on abortion held by different societies, organizations, and cultures throughout history).

91. *See id.* at 149 (describing how the development of modern medical techniques has led to a decrease in mortality rates for women undergoing early abortions and has resulted in abortions becoming relatively safe medical procedures).

92. *Id.* at 153.

It is notable that the Court did not find privacy, as Justice Douglas did in *Griswold*, in the penumbra of the Bill of Rights, but instead as part of the liberty protected under the Due Process Clause.

The *Roe* opinion then explained why prohibiting abortion infringes on a woman's right to privacy. Justice Blackmun observed that: "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child . . ." <sup>93</sup> Forcing a woman to continue a pregnancy against her will obviously imposes enormous physical, psychological, and economic burdens.

The Court observed, however, that the right to abortion is not absolute and that it must be balanced against other considerations, such as the state's interest in protecting "prenatal life." <sup>94</sup> The Court said that strict scrutiny was to be used in striking the balance because the right to abortion was a fundamental right. <sup>95</sup> The Court reiterated that where "'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." <sup>96</sup>

The Court explicitly rejected the state's claim that fetuses are persons and that there was a compelling interest in protecting potential life. <sup>97</sup> That position was not inconsistent with prior court rulings. <sup>98</sup> Even decades prior to *Roe v. Wade*, appellate courts rejected the notion that fetuses were persons for purposes of civil or criminal law, refusing to adopt the position that an infant could possibly maintain an action against "its own mother" for injuries occurring within the womb. <sup>99</sup> Simply put, a fetus was not considered a

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93. *Id.*

94. *Id.* at 155.

95. *Id.*

96. *Id.* (citations omitted).

97. *See id.* at 162–63 (noting that fetuses have never been recognized in the law wholly as living persons and that with respect to the state's interest in protecting potential life, there is no "compelling" state interest until the point of viability).

98. *See, e.g.,* *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 359 (Ill. 1900) (holding that an unborn child cannot recover damages for an injury sustained while in the womb because while courts have sometimes indulged "the legal fiction that an unborn child may be regarded as [in being] for some purposes," they have never gone as far as "sustaining an action by an infant for injuries [sustained] before its birth"); *Regina v. Knights* (1860) 175 Eng. Rep. 952, 952–53; 2 F. & F. 46, 47 (rejecting the prosecution's theory that a pregnant mother would be guilty of manslaughter for negligently failing to take the precautions to preserve the life of a child after birth); *Rex v. Brain* (1834) 172 Eng. Rep. 1272, 1272; 6 Car. & P. 350, 350 (holding that "[a] child must be actually wholly in the world, in a living state, to be the subject of a charge of murder").

99. *See, e.g.,* *Stanford v. St. Louis-San Francisco Ry. Co.*, 108 So. 566, 566 (Ala. 1926) (holding the representatives of a premature child who died as a result of injuries sustained while in his mother's womb could not recover damages); *Keeler v. Superior Court of Amador Cty.*, 470 P.2d 617, 623 (Cal. 1970) (holding that a live birth is a prerequisite for a homicide conviction); *Allaire*, 184 Ill. at 359 (holding that an unborn child cannot recover damages for an injury sustained while



human child for purposes of law; a fetus could not maintain life apart from a pregnant woman; and courts found the notion of fetal litigation against its mother or criminal actions to be contrary to justice.<sup>100</sup> In England, Australia, and ultimately in the United States, courts agreed that fetuses were not persons, and could not possess rights until they had lives “independent of the mother[s].”<sup>101</sup> Thus, the Court’s opinion in *Roe* fit a long-held view.

Justice Blackmun observed that there was no indication that the term “person” in the Constitution ever was meant to include fetuses.<sup>102</sup> Moreover, he emphasized there was no consensus as to when human personhood begins, but rather enormous disagreement among various religions and philosophies.<sup>103</sup> The Court rejected arriving at a conclusion regarding fetal life, stating: “We need not resolve the difficult question of when life begins.”<sup>104</sup> Blackmun and his fellow Justices expressed ambivalence about shaping law on that question, “[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus . . . .”<sup>105</sup> Given that, he wrote, “the judiciary, at this point in the

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in the womb); *Newman v. City of Detroit*, 274 N.W. 710, 711 (Mich. 1937) (holding that an unborn child does not have a cause of action for injuries sustained while in the womb that later result in the unborn child’s death); *Buel v. United Rys. Co. of St. Louis*, 154 S.W. 71, 73 (Mo. 1913) (asserting a child cannot recover for injuries sustained before its birth); *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 229, 232 (Neb. 1951) (holding that the administrator of the estate of a child born dead cannot bring a wrongful death action for injuries sustained while the child was in the womb); *Endresz v. Friedberg*, 248 N.E.2d 901, 902 (N.Y. 1969) (holding that “a wrongful death action may not be maintained for the death of an unborn child”); *Gorman v. Budlong*, 49 A. 704, 704 (R.I. 1901) (holding that where a mother was injured through the defendant’s negligence so that she gave premature birth to a child, which died as a result of the premature delivery, the child’s father cannot maintain a wrongful death action for the death of the premature child); *Magnolia Coca Cola Bottling Co. v. Jordan*, 78 S.W.2d 944, 949 (Tex. 1935) (holding that a child cannot recover in damages for an injury sustained while in the womb unless the child becomes viable); *Lipps v. Milwaukee Elec. Ry. & Light Co.*, 159 N.W. 916, 916–17 (Wis. 1916) (holding that damages cannot be recovered for a fetus unless the fetus is viable); *Rex v. Pritchard*, 17 TLR 310 (1901) (holding that in order for a child to have a legal existence separate from that of his mother, the child must be able to carry on its being without the help of his mother’s circulation); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], bk. 1, div. 1, tit. 1, § 1 (Ger.) (“The legal capacity of a human being begins on the completion of birth.”); CÓDIGO CIVIL [C.C.] [CIVIL CODE], tit. 2, ch. 1, art. 30 (Spain) (requiring that the fetus be born and living outside of the mother’s womb to be considered born); ERNEST J. SCHUSTER, *THE PRINCIPLES OF GERMAN CIVIL LAW* 18 (1907) (noting that “the completion of the act of birth in the medical sense, coupled with the survival of the child for one moment at least after such completion, is all that is necessary”).

100. See sources cited *supra* note 99.

101. VICTORIAN LAW REFORM COMM’N, *LAW OF ABORTION: FINAL REPORT* 97 (2008), [http://www.lawreform.vic.gov.au/sites/default/files/VLRC\\_Abortion\\_Report.pdf](http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Abortion_Report.pdf) [<https://perma.cc/7ECY-GL8S>].

102. *Roe*, 410 U.S. at 157–58.

103. *Id.* at 159.

104. *Id.*

105. *Id.*

development of man's knowledge, is not in a position to speculate as to the answer."<sup>106</sup>

Instead, the Court announced that in balancing the competing interests, the state had a "compelling" interest in protecting maternal health after the first trimester because it was then that abortions became more dangerous than childbirth.<sup>107</sup> The Court further concluded that "[w]ith 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 mother's womb."<sup>108</sup>

Thus, the Court announced a trimester approach to legalizing abortions. Importantly, during the first trimester, the government could not prohibit abortions and was permitted to regulate abortions only as it regulated other medical procedures, such as by requiring that they be performed by a licensed physician.<sup>109</sup> During the second trimester, the government also could not outlaw abortions. Instead, the government could, "if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."<sup>110</sup> Finally, "[f]or the stage subsequent to viability," the government could regulate, and even prohibit, abortions except if necessary to preserve "the life or health of the mother."<sup>111</sup>

We certainly agree with the Court's conclusion—it is often forgotten that *Roe* was a 7–2 decision—and much of Justice Blackmun's reasoning. The Court clearly explains why a prohibition of abortion infringes on a woman's autonomy. Moreover, we reject as misguided many of the criticisms of *Roe*. For example, some, including Justice Ginsburg, have argued that *Roe* went too fast, that there was a trend towards protecting abortion rights, and that *Roe* triggered a backlash.<sup>112</sup> Justice Ginsburg's argument, though, ignores the reality as the law existed in 1973: the marginalized social status of all women,<sup>113</sup> particularly women of color,<sup>114</sup>

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106. *Id.*

107. *Id.* at 163.

108. *Id.*

109. *Id.* at 164.

110. *Id.*

111. *Id.* at 164–65.

112. Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198–209 (1992).

113. See CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 143 (2005) (discussing the fundamental sex inequality created by forced motherhood); U.N. SOC. STATISTICS & INDICATORS, THE WORLD'S WOMEN 1970–1990: TRENDS AND STATISTICS, at 1–8, U.N. Doc. ST/ESA/STAT/SER.K/8, U.N. Sales No. E.90.XVII.3 (1991) (compiling and analyzing statistical indicators of the social status of women); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 366 (1992) (arguing that compelled pregnancy is historically tied to sexist conceptions of women).

114. See, e.g., PETER M. BLAU & OTIS DUDLEY DUNCAN, THE AMERICAN OCCUPATIONAL STRUCTURE 241 (1967) (describing the "universalistic" entrenchment of "severe" race discrimination in American society that African-Americans "suffer[] at every step in the process

the extreme toll of domestic violence,<sup>115</sup> particularly during pregnancy,<sup>116</sup> and the horrific experiences of girls and women who experienced unintended pregnancies—sometimes from rape.<sup>117</sup>

The reality is that in the early 1970s, sexual harassment in the workplace had yet to be recognized as abnormal, let alone a problem with a remedy in law.<sup>118</sup> Racism continued to burden women of color and limit opportunities for them and their families.<sup>119</sup> Indeed, the advances born from the hopeful activism of the 1950s and 1960s met a backlash for blacks in the 1980s and 1990s as “conservative politicians advanced a series of racial projects designed to limit if not eliminate the social gains” of prior decades.<sup>120</sup> Patricia Hill Collins and other scholars remind us that this backlash was “formidable,” in nearly all aspects of life, particularly for women of color.<sup>121</sup>

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toward achieving occupational success”); PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 110 (2d ed. 2000) (“Since the 1970s, U.S. Black women have been unevenly incorporated into schools, jobs, neighborhoods, and other U.S. social institutions that historically have excluded [them]. As a result, African-American women have become more class stratified than at any period in the past.”); ROBERTS, *supra* note 67, at 22–23 (describing the control slave owners exercised over the reproduction of enslaved people); Toni Cade, *The Pill: Genocide or Liberation?*, in *THE BLACK WOMAN: AN ANTHOLOGY* 162, 168 (Toni Cade ed., 1970) (describing the strained condition of black women who lacked the means to care for their children or themselves); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (explaining that women of color are frequently overlooked in feminist theory, resulting in the further disenfranchisement of black women).

115. See generally PATRICIA TJADEN & NANCY THOENNES, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE* (2000) (analyzing the chilling extent of domestic violence in the United States); U.N. SOC. STATISTICS & INDICATORS, *supra* note 113, at 19–20 (showing statistically the reality of domestic violence faced by women across the world); Jay G. Silverman et al., *Intimate Partner Violence Victimization Prior to and During Pregnancy Among Women Residing in 26 U.S. States: Associations with Maternal and Neonatal Health*, 195 AM. J. OBSTETRICS & GYNECOLOGY 140, 140 (2006) (explaining that “[w]omen experiencing intimate partner violence both prior to and during pregnancy are at risk for multiple poor maternal and infant health outcomes”).

116. See Abbey B. Berenson et al., *Perinatal Morbidity Associated with Violence Experienced by Pregnant Women*, 170 AM. J. OBSTETRICS & GYNECOLOGY 1760, 1760 (1994) (explaining that “[w]omen assaulted in the current pregnancy were twice as likely to have preterm labor as compared with those who denied [ever being] assault[ed],” as well as “a twofold increased risk of chorioamnionitis”); Gilian C. Mezey & Susan Bewley, *Domestic Violence and Pregnancy: Risk Is Greatest After Delivery*, 314 BRIT. MED. J. 1295, 1295 (1997) (finding “[p]regnancy may increase the risk of violence, and the pattern of assault may alter, with pregnant women being more likely to have multiple sites of injury and to be struck on the abdomen”).

117. See sources cited *supra* note 23.

118. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 179 (1979) (discussing Title VII sexual harassment suits in the 1970s).

119. For example, Patricia Hill Collins writes, in the 1970s, “Black women could find work, but it was often part time, low paid, and lacking in security and benefits.” COLLINS, *supra* note 114, at 58–59.

120. *Id.* at 60.

121. *Id.* As Audre Lorde wrote decades ago, men have never “been forced to bear . . . child[ren] [they] did not want or could not support.” She explained, “enforced sterilization and unavailable

Structural systems of racism forged through slavery and honed during Jim Crow dynamically persisted. Racial segregation was among these problems. Racial segregation in education, employment, and housing further undermined the important goals of civil rights legislation, even in Northern cities. Equally, however, black women suffered from the intersectional problems welded by sexism and class stratification combined with racism, which affected the scope and scale of their employment, wages, and status or “invisibility” in society.

In their landmark work tracking job opportunities of working-class women, Sally Hillsman Baker and Bernard Levenson point out the grave racial discrepancies associated with job placement and attainment.<sup>122</sup> They observed how deep patterns of racial oppression impacted working-class women’s job opportunities, resulting in black women earning lower wages and working in the least desirable jobs.<sup>123</sup> As Professor Collins writes, “some of the dirtiest jobs in [American] industries were offered to African-American women,” including in the cotton mills, “as common laborers in the yards, as waste gatherers, and as scrubbers of machinery.”<sup>124</sup> However, intersectional oppressions in day-to-day life extended beyond black women, and also impacted other women of color.

Women were (and continue to be) underpaid compared to their male counterparts when performing the same and similar jobs.<sup>125</sup> During the 1970s and ’80s, women’s standard of living dramatically declined after divorce, while it increased for men.<sup>126</sup> Even for women who desired motherhood, the concept of family leave did not exist and was not available.<sup>127</sup> Given the

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abortions are tools of oppression” against women generally, and especially black women. AUDRE LORDE, *SISTER OUTSIDER* 46 (1984); see also PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984); BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981); BELL HOOKS, *KILLING RAGE: ENDING RACISM* (1995).

122. Sally Hillsman Baker & Bernard Levenson, *Job Opportunity of Black and White Working Class Women*, 22 *SOC. PROBS.* 510, 531–32 (1975).

123. *Id.*

124. COLLINS, *supra* note 114, at 57; see also Evelyn Nakano Glenn, *Racial Ethnic Women’s Labor: The Intersection of Race, Gender and Class Oppression*, 17 *REV. RADICAL POL. ECON.* 86, 96 (1985).

125. See David Cole, *Strategies of Difference: Litigating for Women’s Rights in a Man’s World*, 2 *LAW & INEQ.: J. THEORY & PRAC.* 33, 37 (1984) (“examin[ing] the effects of gender perspective on the [Supreme] Court’s decisions”); Carol Jean Pint, *Value, Work and Women*, 1 *LAW & INEQ.: J. THEORY & PRAC.* 159, 185 (1983) (discussing the lack of economic equality between the sexes and the future efforts required of women to correct the inequality).

126. See Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 *UCLA L. REV.* 1181, 1251 (1981) (describing a study which found that, one year after divorce, “[m]en experienced a 42% improvement in their . . . standard of living, while women experienced a 73% loss”).

127. See 29 U.S.C. § 2601 (2012) (finding that the lack of family leave policies “force[d] individuals to choose between job security and parenting” and that the “responsibility [of parenting] affects the working lives of women more than it affects the working lives of men”).

social status of women, rendered and maintained at least in part by state legislative action and inaction, when were their rights to be elevated and their reproductive autonomy and privacy recognized?

During the 1970s, household labor was generally ignored or considered to be the woman's role in the family and society.<sup>128</sup> Violence was normalized during the period in which Justice Ginsburg thought states should move the abortion question along<sup>129</sup> and was exploited in matrimony, because marital rape was legal.<sup>130</sup> Indeed, some states into the 2000s created exceptions for marital rape or codified it differently than general rape laws such that nonconsensual sex with an incapacitated wife did not qualify as rape.<sup>131</sup> In the infamous case of Trish Crawford's rape, a jury saw a thirty-minute videotape that her husband recorded while he bound and raped her with various objects.<sup>132</sup> Despite this graphic evidence, Dale Crawford was acquitted, as were numerous other men across the United States, because marital rape was legal until the 1990s and sometimes juries believed wives *consented* to torture and rape.<sup>133</sup> In fact, at trial, Mr. Crawford testified on his own behalf, explaining, "No, I didn't rape my wife. How can you rape your own wife?"<sup>134</sup> Sadly, Mr. Crawford killed his third wife a decade later.<sup>135</sup> Neither were girls safe from sexual violence in the household,

128. See Batya Weinbaum & Amy Bridges, *The Other Side of the Paycheck: Monopoly Capital and the Structure of Consumption*, MONTHLY REV., July–Aug. 1976, at 88, 91–92 (discussing "the economic aspect of women's work outside the paid labor force" and arguing that household labor should be considered "work").

129. See Evan Stark et al., *Medicine and Patriarchal Violence: The Social Construction of a "Private" Event*, 9 INT'L J. HEALTH SERVICES 461, 467 (1979) (detailing a 1970s study finding one in four female patients was a domestic violence victim).

130. See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1477–85 (2003) (describing the history of the marital rape exemption from English common law to the law of the United States in the 1970s); Diana E.H. Russell & Nancy Howell, *The Prevalence of Rape in the United States Revisited*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 688, 690 (1983) (noting that 44% of women were victims of either rape or attempted rape in their lifetimes).

131. Thadeus Greenson, *An Evolution of Law: Spousal Rape Recently Prosecutable*, TIMES STANDARD (Mar. 23, 2008), <http://www.times-standard.com/article/zz/20080323/NEWS/803239696> [<https://perma.cc/9J44-H9XW>].

132. Gary Karr, *Woman in Marital Rape Case Urges Rape Victims: 'Take a Stand.'* AP NEWS ARCHIVE (Apr. 21, 1992), <http://www.apnewsarchive.com/1992/Woman-In-Marital-Rape-Case-Urges-Rape-Victims-Take-a-Stand-/id-7ef8a4f1c0a35732613da0cbd55e284a> [<https://perma.cc/M54R-DPZ3>] ("A Lexington County jury took less than an hour Thursday to acquit her husband, Dale. He had videotaped the alleged rape and characterized it as a sex game."); CATHARINE A. MACKINNON, ONLY WORDS 114 n.3 (1996) (offering a theory that Crawford's acquittal was bounded in the notion that his wife consented to rape and torture).

133. RAQUEL KENNEDY BERGEN, WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS 4–5 (1996).

134. Karr, *supra* note 132.

135. Jack Kuenzie, *Man Formerly Charged with Marital Rape Now Charged with Murder of Third Wife*, WISTV.COM (Nov. 26, 2004), <http://www.wistv.com/story/2612294/man-formerly-charged-with-marital-rape-now-charged-with-murder-of-third-wife> [<https://perma.cc/R5P9-CSNL>].

because the law also protected fathers in sexual assaults against their daughters, providing civil immunity in cases of incest.<sup>136</sup>

Prior to the Supreme Court's decision in *Roe v. Wade*, abortion was illegal in forty-six states.<sup>137</sup> Fourteen states enacted laws similar to the provisions of the Model Penal Code,<sup>138</sup> allowing abortion if necessary to protect a pregnant woman's life or health, if a fetus would be born with a "grave physical or mental defect," or if "pregnancy resulted from rape [or] incest."<sup>139</sup> And twenty-five states prohibited abortion except when necessary to save the woman's life.<sup>140</sup>

Thus, the political realities were such that it was highly unlikely that state legislatures would repeal these laws.<sup>141</sup> Yale Professors Reva Siegel and Linda Greenhouse have persuasively shown there was no trend towards significant protection of abortion rights before *Roe* and there was no backlash against *Roe* until 1980 when the Reagan presidential campaign made a concerted effort to gain the support of fundamentalist Christians.<sup>142</sup> More importantly, once the Court concluded that there is a constitutional right to abortion, it should be protected for all women; delaying would mean that countless women would have suffered under laws restricting their ability to exercise a fundamental right. We thus strongly disagree with those who believe that the Court went "too fast" in *Roe*. The protection of a fundamental right that profoundly affects women's lives should not have been delayed and, if anything, should have come much earlier in American history.

Yet, we see problems in Justice Blackmun's opinion in *Roe*. To begin, the Court's analysis of the right to abortion and the ability of the government

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136. See Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 HARV. J.L. & GENDER 503, 512 (2011) (outlining the reasoning and policy behind the parental and familial immunity doctrine that protected rapists from being charged for sexual abuse of family members); Diana E. H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 133, 144 (1983) (conducting a study finding intrafamily sexual abuse as more prevalent than previously thought).

137. Four states—Alaska, Hawaii, New York, and Washington—repealed criminal penalties for abortions performed in early pregnancy by a licensed physician. ALASKA STAT. § 11.15.060 (1970); HAW. REV. STAT. § 453-16 (1970); N.Y. PENAL LAW § 125.05 (McKinney 1970); WASH. REV. CODE §§ 9.02.060–9.02.080 (1970). The Alaska, Hawaii, and Washington statutes contained residency requirements limiting access to abortion to residents of those states.

138. MODEL PENAL CODE § 230.3 (AM. LAW INST., Proposed Official Draft 1962).

139. *Id.* A list of these fourteen state statutes is found in *Roe v. Wade*, 410 U.S. 113, 140 n.37 (1973).

140. *Roe*, 410 U.S. at 139 n.34.

141. In part, the intensity and political power of supporters of restrictive abortion laws created "unusual legislative rigidity" and made reforms unlikely. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 929 (1978). In part, too, because abortion was available to the relatively wealthy, there was much less pressure for repeal of restrictive laws. *Id.* at 930.

142. LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 259–62 (Linda Greenhouse & Reva B. Siegel eds., 2010).

to regulate was based on drawing distinctions among the trimesters of pregnancy. Dividing a woman's pregnancy into three segments, each of three months, seemed arbitrary and based on little except nine being divisible by three. More importantly, the Court made viability the point at which a state could prohibit abortions (except when necessary to protect a woman's life or health). However, that too seems arbitrary. Viability is a moving target, and depending on available local technology, viability may change even while the fetus could not survive on its own without medical intervention.

Why viability as opposed to many other points at which human life can be said to begin: conception, implantation into the uterine wall, individuation of the fetus, detection of a heartbeat, quickening (when the woman detects the movement of the fetus), or birth? The Court declared that it "need not resolve the difficult question of when life begins."<sup>143</sup> But wasn't the Court doing exactly that in choosing viability as the point at which abortion can be prohibited? Moreover, viability changes as neonatal technology improves. Should a constitutional standard depend on the medical technology of the moment?

Indeed, an implication of the determination that the state's interest in the fetus becomes compelling at viability is that medical progress could virtually eliminate all abortions. Scientific advances might make a fetus viable at an early stage of pregnancy. If technology is available to enable the fetus to survive outside the womb after the first month or six weeks of pregnancy, then no abortions would be allowed after that time. The result would be an almost total ban on abortions. Medical science is nowhere near that point, but the possibility shows the difficulty of focusing on technology rather than a woman's control over her body and her reproduction.

Also, the Court, in its opinion in *Roe*, never identified the ways in which laws restricting abortion are inherently discriminatory. Most obviously, they affect women totally differently than they affect men. Almost two decades later, Justice Blackmun, the author of *Roe*, stated this eloquently:

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal

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143. *Roe*, 410 U.S. at 159.

Protection Clause. The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."<sup>144</sup>

*Roe* would have been stronger if it had included this language and analysis.

It has long been recognized that restrictive abortion laws operate to discriminate against indigent women. The relatively wealthy can persuade a friendly doctor to perform the minor surgical procedure or can afford to travel to one of the states that allows abortion on demand.<sup>145</sup> Even when abortion was illegal in all states, wealthier women still had access to abortion by travelling to foreign countries that permitted the procedure.<sup>146</sup> For example, between 1968, when Great Britain liberalized its abortion laws, and 1970, when New York repealed its criminal ban, making legal abortions available in the United States, it is estimated that 5,000 abortions per year were performed on American women in Great Britain.<sup>147</sup>

Poor women desiring an abortion and unable to afford the costs of travel, to say nothing of paying for the procedure itself, faced a cruel dilemma. On the one hand, they could bring the pregnancy to term and give birth to an unwanted child they could not afford. Alternatively, they could "subject themselves to the notorious 'back-street' abortion[,] . . . fraught with the myriad possibilities of mutilation, infection, sterility and death."<sup>148</sup>

In the years prior to *Roe v. Wade*, all too many women made the latter choice and faced exactly those consequences. It is estimated that prior to 1973, one million illegal abortions were performed each year in the United States.<sup>149</sup> And while white women were as likely to have illegal abortions, the death rate from illegal abortions was far higher among women of color. For example, one study indicated that in New York City there were 0.8 abortion deaths for every 10,000 live births by white women.<sup>150</sup> Among black women there were 7.1 abortion deaths per 10,000 births, and for Puerto Rican women the figures were 4.5 deaths for every 10,000 births.<sup>151</sup>

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144. *Planned Parenthood v. Casey*, 505 U.S. 833, 928–29 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citations omitted).

145. Guttmacher, *supra* note 15, at 421.

146. Since more than 60% of the world's population lives in countries where abortion is legal during the first trimester, it is inevitable that rich women will have access to safe abortions while indigent women will not in the United States. William T. Liu, *Abortion and the Social System*, in *ABORTION: NEW DIRECTIONS FOR POLICY STUDIES* 137, 144 (Edward Manier et al. eds., 1977).

147. Richard L. Worsnop, *Abortion Law Reform*, in 2 *EDITORIAL RESEARCH REPORTS* 543, 553 (William B. Dickinson et al. eds., 1970).

148. *YWCA v. Kugler*, 342 F. Supp. 1048, 1074 (D.N.J. 1972).

149. Guttmacher, *supra* note 15, at 420; Worsnop, *supra* note 147, at 554.

150. Guttmacher, *supra* note 15, at 421.

151. *Id.*



According to the Guttmacher Institute, “a clear racial disparity is evident in the data of mortality because of illegal abortion.”<sup>152</sup> Researchers note that “[i]n New York City in the early 1960s, one in four childbirth-related deaths among white women was due to abortion.”<sup>153</sup> However, “in comparison, abortion accounted for one in two childbirth-related deaths among nonwhite and Puerto Rican women.”<sup>154</sup> Even more disturbing, “from 1972 to 1974, the mortality rate due to illegal abortion for nonwhite women was 12 times that for white women.”<sup>155</sup> Importantly, these figures do not even speak of the injuries and illnesses caused by illegal abortions.<sup>156</sup> That these deaths and injuries are a result solely of illegality is indicated by the fact that there was an almost immediate 40% decrease in abortion-related deaths after *Roe v. Wade*.<sup>157</sup>

We recognize, of course, that identifying abortion laws as discriminatory does not address whether the government's interest in protecting fetal life is sufficient to justify the discrimination. We also realize that the Court has found that the poor are not a suspect class and discrimination on the basis of wealth does not trigger heightened scrutiny.<sup>158</sup> But we think *Roe* would have been a more persuasive opinion if grounded in this social reality.

### C. *The Undue Burden Test*

By the 1990s, the change in the composition of the Supreme Court raised questions as to whether *Roe v. Wade* would be overruled. In 1989, in *Webster v. Reproductive Health Services*,<sup>159</sup> four Justices seemed poised to overrule *Roe*.<sup>160</sup> In *Webster*, a Missouri law declared the state's view that life begins at conception, prohibited the use of government funds or facilities from performing or “encouraging or counseling” a woman to have an abortion, and allowed abortions after twenty weeks of pregnancy only if a

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152. Rachel Benson Gold, *Lessons From Before Roe: Will Past Be Prologue?* GUTTMACHER POL'Y REV. (Mar. 1, 2003), <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue> [<https://perma.cc/Z93B-MBEU>].

153. *Id.*

154. *Id.*

155. *Id.*

156. See SOPHIA J. KLEEGMAN & SHERWIN A. KAUFMAN, INFERTILITY IN WOMEN: DIAGNOSIS AND TREATMENT 301 (1966) (asserting that induced illegal abortions often “cause[] . . . subsequent infertility and pelvic disease”).

157. *Abortion-Related Deaths Down 40 Percent Since 1973*, 7 FAM. PLAN. PERSP. 54, 54 (1975).

158. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding that disparities in school funding do not deny equal protection and that discrimination against the poor does not trigger heightened scrutiny).

159. 492 U.S. 490 (1989).

160. *Id.* at 519 (plurality opinion); *id.* at 532 (Scalia, J., concurring in part and concurring in the judgment).

test was done to ensure that the fetus was not viable.<sup>161</sup> The Supreme Court upheld the Missouri law, but without a majority opinion.<sup>162</sup>

Chief Justice Rehnquist, in a plurality opinion joined by Justices White and Kennedy, strongly criticized *Roe*.<sup>163</sup> Rehnquist argued: “[W]e do not see why the State’s interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.”<sup>164</sup> Rehnquist believed that “[t]he State’s interest, if compelling after viability, is equally compelling before viability.”<sup>165</sup> Rehnquist’s opinion did not expressly urge the overruling of *Roe v. Wade*; however, that was the unmistakable and profound implication of declaring that the state has a compelling interest in protecting fetal life from the moment of conception. Rehnquist and White were the two dissenters in *Roe*, and they had consistently argued for overruling it.<sup>166</sup> At the time, it seemed telling that Justice Kennedy—in his first case dealing with abortion—joined their opinion that unmistakably would have overruled *Roe*.

Justice Scalia wrote a separate opinion concurring in part and concurring in the judgment. He said that the plurality opinion “effectively would overrule *Roe v. Wade*.”<sup>167</sup> He said: “I think that should be done, but would do it more explicitly.”<sup>168</sup> He argued that the failure to overrule *Roe* “needlessly . . . prolong[s] this Court’s self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical.”<sup>169</sup>

Justice O’Connor provided the fifth vote for the result in *Webster*, but she ruled only on the specifics of the Missouri law and did not opine on the question of whether *Roe* should be overruled.<sup>170</sup> O’Connor noted that the Missouri law did not prohibit abortions, and thus “there is no necessity to accept the state’s invitation to reexamine the constitutional validity of *Roe*.”<sup>171</sup> She said that “[w]hen the constitutional invalidity of a State’s abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully.”<sup>172</sup>

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161. *Id.* at 501 (plurality opinion).

162. *Id.* at 496.

163. *Id.* at 519.

164. *Id.* (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting)).

165. *Id.*

166. *See, e.g., Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 797 (1986) (White, J., dissenting).

167. 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment).

168. *Id.*

169. *Id.*

170. *Id.* at 522–24 (O’Connor, J., concurring in part and concurring in the judgment).

171. *Id.* at 525.

172. *Id.* at 526.

Between 1989, when *Webster* was decided, and 1992, when *Planned Parenthood v. Casey* was before the Court, Justices Brennan and Marshall resigned and were replaced, respectively, by Justices Souter and Thomas.<sup>173</sup> It was thought that either of them, and particularly Thomas, might cast the fifth vote to overrule *Roe v. Wade*.<sup>174</sup> Indeed, the United States, through the Solicitor General, urged the Court in *Casey* to use it as the occasion for overruling *Roe*.<sup>175</sup>

The Court, however, did not do so. By a 5–4 margin, the Supreme Court reaffirmed that states cannot prohibit abortion prior to viability.<sup>176</sup> We know now, especially through the revelations from Justice Blackmun's papers, that Anthony Kennedy changed his mind and provided the fifth vote to reaffirm *Roe*.<sup>177</sup> However, the plurality opinion by Justices O'Connor, Kennedy, and Souter significantly changed the law with regard to abortion: it overruled the trimester distinctions used in *Roe* and also the use of strict scrutiny for evaluating government regulation of abortions.<sup>178</sup> Instead, the plurality said that government regulation of abortions prior to viability should be allowed unless there is an "undue burden" on access to abortion.<sup>179</sup> Justices Blackmun and Stevens concurred in the judgment and would have reaffirmed the trimester distinctions and the use of strict scrutiny.<sup>180</sup>

The joint opinion reaffirmed viability as the key dividing line during pregnancy. Before viability, the government may not prohibit abortion, but after viability, abortions may be prohibited except where necessary to protect the woman's life or health. The joint opinion, however, explicitly rejected the trimester framework, which the Court did not "consider to be part of the essential holding of *Roe*."<sup>181</sup> O'Connor, Souter, and Kennedy found there to be "basic flaws" in the trimester framework articulated in *Roe*, such as its misconception of "the nature of the pregnant woman's interest."<sup>182</sup> In

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173. James Gerstenzang & David Lauter, *Little-Known Judge Named to Replace Brennan on Court*, L.A. TIMES (July 24, 1990), [http://articles.latimes.com/1990-07-24/news/mn-573\\_1\\_supreme-court-justice](http://articles.latimes.com/1990-07-24/news/mn-573_1_supreme-court-justice) [<https://perma.cc/9PCF-GSXS>]; Maureen Dowd, *The Supreme Court; Conservative Black Judge, Clarence Thomas, Is Named to Marshall's Court Seat*, N.Y. TIMES (July 2, 1991), <http://www.nytimes.com/1991/07/02/us/supreme-court-conservative-black-judge-clarence-thomas-named-marshall-s-court.html> [<https://perma.cc/58UG-796Q>].

174. See sources cited *supra* note 173.

175. *Planned Parenthood v. Casey*, 505 U.S. 833, 842 (1992).

176. *Id.* at 846.

177. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 203–04 (2005) (describing Justice Kennedy's switch of position in *Casey*).

178. *Casey*, 505 U.S. at 873–74 (plurality opinion).

179. *Id.* at 874.

180. *Id.* at 914–16 (Stevens, J., concurring in part and dissenting in part); *id.* at 929–30 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

181. *Id.* at 873 (plurality opinion).

182. *Id.*

addition, they surmised that “in practice, [the trimester framework] undervalues the State’s interest in potential life, as recognized in *Roe*.”<sup>183</sup>

Most importantly, the joint opinion said that the test for evaluating the constitutionality of a state regulation of abortion is whether it places an “undue burden” on access to abortion.<sup>184</sup> The joint opinion explained:

[T]he undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty. . . . A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.<sup>185</sup>

The joint opinion said, however, that “[t]o promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed.”<sup>186</sup> In what has become the foundation (or justification) for much of the antiabortion legislation over the past five years, the Court opened the door to permitting states to regulate abortion in the name of protecting and advancing a pregnant woman’s “informed” decision. Thus, “measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”<sup>187</sup> Despite the Court’s concluding that “[t]hese measures must not be an undue burden on the right,”<sup>188</sup> states have enacted laws that make it virtually impossible for a woman to obtain an abortion. In Mississippi and several other states, there is now only one abortion clinic remaining.<sup>189</sup>

Justices Stevens and Blackmun wrote opinions concurring in part, concurring in the judgment in part, and dissenting in part.<sup>190</sup> These Justices would have used strict scrutiny and continued the basic framework outlined in *Roe*. Justice Blackmun, for example, said:

[A]pplication of this analytical framework is no less warranted than when it was approved by seven Members of this Court in *Roe* [because] [s]trict scrutiny of state limitations on reproductive choice

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183. *Id.*

184. *Id.* at 876.

185. *Id.* at 876–77.

186. *Id.* at 878.

187. *Id.*

188. *Id.*

189. Esmé E. Deprez, *U.S. Abortion Rights Fight*, BLOOMBERGQUICKTAKE (July 7, 2016), <https://www.bloomberg.com/quicktake/abortion-and-the-decline-of-clinics> [<https://perma.cc/5VJZ-RCGJ>].

190. Justice Stevens’s opinion is concurring in part and dissenting in part. *Casey*, 505 U.S. at 911. Justice Blackmun’s opinion is concurring in part, concurring in the judgment in part, and dissenting in part. *Id.* at 922.

still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion.<sup>191</sup>

According to Blackmun, "[t]he factual premises of the trimester framework have not been undermined."<sup>192</sup>

In *Stenberg v. Carhart*,<sup>193</sup> the majority opinion, in striking down a Nebraska law prohibiting so-called "partial birth abortion," expressly adopted and applied the undue burden test, which three Justices had urged in *Casey*.<sup>194</sup> Subsequently, in *Gonzales v. Carhart*,<sup>195</sup> the Court again used the undue burden test, though this time to *uphold* a federal law prohibiting so-called "partial birth abortion."<sup>196</sup>

Most recently, in *Whole Woman's Health v. Hellerstedt*, the Court declared: "[A] statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."<sup>197</sup> To the contrary, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."<sup>198</sup>

In *Hellerstedt*, the Court used the undue burden test to invalidate two provisions of a Texas law, which provided that a doctor could perform an abortion only if he or she had admitting privileges at a hospital within 30 miles and that abortions could be performed only if there were ambulatory surgical-level facilities.<sup>199</sup> The Court, in striking down these provisions as significantly impeding access to abortion, stressed that it is for the judiciary, not the legislature, to determine whether a restriction on abortion is justified in terms of the benefits in protecting women's health.<sup>200</sup>

Justice Ginsburg, in a concurring opinion, went even further and declared: "When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety."<sup>201</sup> She wrote, "so long as this Court adheres to *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, Targeted Regulation of Abortion Providers

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191. *Id.* at 930 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

192. *Id.*

193. 530 U.S. 914 (2000).

194. *Id.* at 921, 946.

195. 550 U.S. 124 (2007).

196. *Id.* at 133, 146–47; *see infra* text accompanying notes 219–23.

197. 136 S. Ct. 2292, 2309 (2016) (quoting *Casey*, 505 U.S. at 877 (plurality opinion)).

198. *Id.* (quoting *Casey*, 505 U.S. at 878).

199. *Id.* at 2300.

200. *Id.* at 2310.

201. *Id.* at 2321 (Ginsburg, J., concurring).

laws like H.B. 2 that ‘do little or nothing for health, but rather strew impediments to abortion,’ cannot survive judicial inspection.”<sup>202</sup>

The respondents argued that the Texas law advanced women’s health by ensuring easy access to a hospital if complications arose during an abortion.<sup>203</sup> However, evidence revealed that the law did not address any actual or likely health issues associated with pregnancy terminations. The Court stated:

“[T]he great weight of evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.”

.....

Expert testimony [shows] . . . that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic.<sup>204</sup>

No evidence suggested that the law would lead to improved treatment for women, and the law created a “substantial obstacle in the path of a woman’s choice.”<sup>205</sup> Indeed, legal abortions are safer than pregnancy.<sup>206</sup> According to the World Health Organization, a legal abortion is as safe as a penicillin shot.<sup>207</sup> However, H.B. 2’s impacts on local abortion clinics were unmistakable and significant. In the months leading up to the law taking effect, the number of abortion clinics in Texas decreased by half: from 40 to 20.<sup>208</sup> Indeed, the new Texas law served the purpose to undermine women’s private choice to have an abortion, because it severely constrained doctors. The Court stated that among other problems,

[I]t would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because “[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital.”<sup>209</sup>

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202. *Id.* (citations omitted).

203. *Id.* at 2311 (majority opinion).

204. *Id.* (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)).

205. *Id.* at 2312 (quoting *Casey v. Planned Parenthood*, 505 U.S. 833, 877 (1992) (plurality opinion)).

206. Raymond & Grimes, *supra* note 1, at 216 (explaining that a woman is fourteen times more likely to die carrying a pregnancy to term than undergoing a legal abortion).

207. WORLD HEALTH ORG., UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008, at 14 (6th ed. 2011), [http://apps.who.int/iris/bitstream/10665/44529/1/978924150118\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/44529/1/978924150118_eng.pdf) [<https://perma.cc/42ZJ-QP27>].

208. *Whole Woman’s Health*, 136 S. Ct. at 2312.

209. *Id.*

Justice Breyer recognized that doctors would not be able to maintain admitting privileges under such circumstances “because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.”<sup>210</sup> In fact, he wrote, “[o]ther *amicus* briefs filed here set forth without dispute other common prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures.”<sup>211</sup> The Court found that admitting privileges do nothing for the health of women in the abortion context because abortions are already very safe.<sup>212</sup>

Notwithstanding the result in *Hellerstedt*, the undue burden test (though it sometimes has been used to strike down restrictions and sometimes to uphold them), was an undesirable change in the law for many reasons. First, the abandonment of strict scrutiny was unjustified. Strict scrutiny is the test that the Court uses when the government has infringed a fundamental right. For the reasons given in *Roe* and discussed above and in Part II, a woman's right to abortion should be regarded as a fundamental right. Strict scrutiny is thus the appropriate test. Anything less makes it too easy for the government to infringe a fundamental constitutional right. The Court's upholding a twenty-four hour waiting period for abortions in *Casey* and the federal Partial Birth Abortion Ban Act in *Gonzales v. Carhart* are examples of laws that almost surely would have been declared unconstitutional under strict scrutiny.

Second, the undue burden test combines three distinct questions into one inquiry. When the Supreme Court considers cases involving individual liberties, there are four issues: Is there a fundamental right; is the right infringed; is the infringement justified by a sufficient purpose; are the means sufficiently related to the end sought? The undue burden test combines the latter three questions. Obviously “undue burden” pertains to whether there is an infringement of the right, but the joint opinion in *Casey* also uses it to analyze whether the law is justified.<sup>213</sup> No level of scrutiny is articulated by the joint opinion; there is no statement that the goal of the law must be compelling or important or that the means have to be necessary or substantially related to the end. Undue burden is thus confusing to apply because it melds together three distinct issues. Again, there is reason for great concern that the lack of analytical clarity makes it easier for courts to uphold laws restricting a woman's right to choose whether to have an abortion.

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210. *Id.*

211. *Id.*

212. *Id.* at 2311.

213. See *Planned Parenthood v. Casey*, 505 U.S. 833, 876–77 (1992) (plurality opinion) (endorsing the undue burden test to not only determine whether a law creates a “substantial obstacle” to a woman's exercising the abortion right but also to “reconcil[e] the State's interest with the woman's constitutionally protected liberty”).

Third, the joint opinion's statement in *Casey* of the undue burden test has an internal tension. The joint opinion says that a law is an undue burden "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."<sup>214</sup> But the joint opinion then says,

[t]o promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.<sup>215</sup>

The problem is that the joint opinion says both that the state cannot act with the purpose of creating obstacles to abortion and that it can act with the purpose of discouraging abortion and encouraging childbirth. Every law adopted to limit abortion is for the purpose of discouraging abortions and encouraging childbirth. How is it to be decided which of these laws is invalid as an undue burden and which is permissible? The joint opinion simply says that the regulation "must not be an undue burden on the right."<sup>216</sup> But this, of course, is circular; it offers no guidance as to which laws are an undue burden and which are not. As we explain below, because abortion should be regarded as a private choice for each woman, the state should not be allowed to take actions to encourage childbirth over abortion.<sup>217</sup>

After *Casey*, the Court compounded the problem of the undue burden test by requiring that there be a showing that a law adversely affects a large fraction of women. In *Casey*, the plurality found that the requirement for spousal notification before a married woman could receive an abortion was an undue burden because *some* women might be adversely affected. The opinion unequivocally stated:

The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.<sup>218</sup>

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214. *Id.* at 878.

215. *Id.*

216. *Id.*

217. See *infra* subpart II(B).

218. *Casey*, 505 U.S. at 894 (citation omitted).



But, in *Gonzales v. Carhart*, in upholding the federal Partial-Birth Abortion Ban Act, the Court said that for a law to be unconstitutional there must be a showing that it would be an undue burden for a “large fraction of relevant cases.”<sup>219</sup> In other words, under the plurality’s approach in *Casey*, the focus is on whether a law is an undue burden likely to keep some women from having access to abortion. But under the subsequent decision in *Gonzales v. Carhart*, a law regulating abortion is unconstitutional only if it would be an undue burden for a large fraction of women. This is a significant change in the law and one which makes it more likely that courts will uphold regulations of abortion. It also is wrong. If a law is an undue burden on any woman’s right to abortion, it should be unconstitutional; the number whose rights are violated is not relevant in determining whether a person’s constitutional rights have been infringed. Violating one person’s speech or privacy or enslaving one person violates the Constitution; it should not be necessary to prove dozens, hundreds, or even thousands suffer harms from the act(s).

The Court’s approach to abortion in *Gonzales v. Carhart* is particularly objectionable. In *Gonzales v. Carhart* the Court upheld the federal Partial-Birth Abortion Ban Act.<sup>220</sup> The Act has no health exception, and, though narrower than the Nebraska law, it is more broadly written than the Court said it would allow in *Stenberg*.<sup>221</sup> Nonetheless, the Court upheld the federal act.<sup>222</sup> Justice Kennedy wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.<sup>223</sup> The key to the case was not in the difference in wording between the federal law and the Nebraska act; it was Justice Alito having replaced Justice O’Connor and thus shifting the Court from 5–4 to invalidate partial-birth abortion laws to 5–4 to uphold them.<sup>224</sup>

The Court concluded that the government’s interest in preventing partial-birth abortion was sufficient to uphold the law. The Court explained:

The Act’s ban on abortions that involve partial delivery of a living fetus furthers the Government’s objectives. No one would dispute that, for many, [partial-birth abortion] is a procedure itself laden with the power to devalue human life. Congress could nonetheless

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219. 550 U.S. at 167–68.

220. *Id.* at 132–33.

221. Compare *Stenberg v. Carhart*, 530 U.S. 914, 938, 946 (2000) (holding a Nebraska statute criminalizing partial-birth abortion unconstitutional as an undue burden on a woman’s right to abort), with *Gonzalez*, 550 U.S. at 133, 141 (upholding a narrower federal act prohibiting the knowing performance of a partial-birth abortion unnecessary to save the mother’s life).

222. *Gonzalez*, 550 U.S. at 133.

223. *Id.* at 130.

224. See David J. Garrow, *Significant Risks: Gonzalez v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 1 (attributing the Court’s ideological shift to Justice Alito’s replacement of Justice O’Connor).

conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.<sup>225</sup>

Congress determined that the abortion methods it proscribed had a “disturbing similarity to the killing of a newborn infant,” and thus it was concerned with “draw[ing] a bright line that clearly distinguishes abortion and infanticide.”<sup>226</sup>

The Court found that the federal law is constitutional even though it has no exception for allowing the procedure where necessary to protect the health of the mother. The dissent argued that the banned procedure is in many cases the safest for the woman.<sup>227</sup> Alternative procedures last longer and involve increased risks of perforation of the uterus, blood loss, and infection.<sup>228</sup> Moreover, the most frequently used alternative is to dismember the fetus in the uterus and remove it piece by piece.<sup>229</sup> This is no less “barbaric” and is more dangerous because it requires repeated surgical intrusions into the uterus.<sup>230</sup> The majority rejected this argument and said that there was medical uncertainty over what was safest and stated:

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.<sup>231</sup>

It also is important to note that the Court changed the rhetoric of abortion rights and expressed much more support for government regulation of abortion. Justice Kennedy’s majority opinion repeatedly referred to the fetus as the “unborn child.”<sup>232</sup> He wrote:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once

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225. *Gonzales*, 550 U.S. at 158.

226. *Id.* (citations omitted).

227. *See id.* at 177 (Ginsburg, J., dissenting) (discussing the extensive scientific evidence finding that partial-birth abortions are often “safer than alternative procedures and necessary to protect women’s health”).

228. *Id.* at 178.

229. *See id.* (discussing dismemberment abortion as the alternative to partial-birth abortion).

230. *See id.* (noting that partial-birth abortion, as compared to dismemberment abortion, “minimizes the number of times a physician must insert instruments . . . and thereby reduces the risk of trauma”).

231. *Id.* at 164 (majority opinion) (citations omitted).

232. *Id.* at 134, 160.

created and sustained. Severe depression and loss of esteem can follow.<sup>233</sup>

This statement is at odds with prior Supreme Court decisions protecting the right to reproductive freedom and harks back to draconian days where the Court found that a woman's life was defined by motherhood and household duties.<sup>234</sup> Simply stated, Justice Kennedy's statement and majority opinion for the Court demeans women. *Roe v. Wade* is based on the fundamental premise that it is for a woman to decide how to regard the fetus before viability and whether to have an abortion. Women—not the legislature or five men on the Supreme Court—are in the best position to decide whether continuing an unwanted pregnancy is best for their psychological and physical well-being.

As Justice Kennedy candidly admitted, there is no reliable data to support the notion that the ban on so-called partial-birth abortions will improve the psychological health of women. The majority ignored the fact that the banned procedure is in many cases the safest for the woman. Alternative procedures take more time and involve increased risks of perforation of the uterus, blood loss, and infection. Nor did the Court pay attention to the psychological benefits women receive from safely terminating an unwanted pregnancy.

Justice Ginsburg, writing for the four dissenters, strongly objected to Justice Kennedy's statement, finding it at odds with prior Supreme Court decisions protecting the right to reproductive freedom and demeaning to women. She wrote:

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society."<sup>235</sup>

In other words, Justice Ginsburg forcefully says that the issue of abortion is a private choice for each woman to make. That is exactly what the Court should have said all along.

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233. *Id.* at 159 (citations omitted).

234. *See Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139, 141 (1872) (affirming Illinois law denying women admission to the bar, reasoning that women are delicate and suited for home duties); *see also Minor v. Happersett*, 88 U.S. 162, 178 (1874) (upholding restrictions barring women from suffrage, opining that the Court's role is not "to look at the hardship of withholding" suffrage from women, but rather to determine whether "it is within the power of a State to withhold").

235. *Gonzales*, 550 U.S. at 185 (Ginsburg, J., dissenting) (citations omitted).

## II. Reconceptualizing Abortion as a Private Choice for Each Woman

### A. *The Constitutional Issues Concerning Abortion*

The Court in *Roe* faced three questions, as would any Court considering the right to abortion. First, is there a right to privacy protected by the Constitution even though it is not mentioned in the document's text? Second, if so, is the right infringed by a prohibition of abortion? Third, if so, does the state have a sufficient justification for upholding laws prohibiting abortion? These same issues will confront the Supreme Court if ever it reconsiders *Roe v. Wade*.

The first question, is there a right to privacy protected by the Constitution, is really the place where opponents of *Roe* have focused their attack, arguing that there is no such right because it is not mentioned in the Constitution and was not intended by its drafters. The most famous critique of the decision was written by then-Harvard Professor John Hart Ely, where he declared: "It is, nevertheless, a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."<sup>236</sup> Ely's objection was that abortion and privacy are not mentioned in the Constitution and therefore no such rights exist. This, of course, is the criticism that conservatives have launched at *Roe* since it was decided.<sup>237</sup>

The problem with this argument is that it fails to acknowledge that its advocates are urging a radical change in constitutional law. Before *Roe*, the Court had expressly recognized a right to privacy, including over matters of reproduction, even though there is no mention of this in the text of the Constitution. As explained above, in *Griswold v. Connecticut*, in 1965, the Court declared unconstitutional as violating the right to privacy a state law prohibiting the sale, distribution, or use of contraceptives.<sup>238</sup> In *Eisenstadt v. Baird*, in 1972, the Court invalidated a state law keeping unmarried individuals from having access to contraceptives and declared: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>239</sup>

In fact, long before these decisions, the Court safeguarded many aspects of autonomy as fundamental rights even though they are not mentioned in the text of the Constitution and were never contemplated by its drafters. For

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236. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (emphasis omitted).

237. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (critiquing *Roe*'s "absence of a commitment to textualism").

238. 381 U.S. 479, 485 (1965).

239. 405 U.S. 438, 453 (1972) (emphasis omitted).

example, the Court has expressly held that certain aspects of family autonomy are fundamental rights and that government interference will be allowed only if the government can prove that its action is necessary to achieve a compelling purpose. In the 1920s, the Supreme Court held that parents have a fundamental right to control the upbringing of their children and used this to strike down laws prohibiting the teaching of the German language and forbidding parochial school education.<sup>240</sup> In the 1940s, the Court ruled that the right to procreate is a fundamental right and declared unconstitutional an Oklahoma law that required the sterilization of those convicted three times of crimes involving moral turpitude.<sup>241</sup>

By the 1960s, the Court proclaimed that there is a fundamental right to marry and invalidated a Virginia law prohibiting interracial marriage.<sup>242</sup> This, of course, was the foundation for the Court declaring that laws prohibiting same-sex marriage are unconstitutional as infringing the fundamental right to marry.<sup>243</sup> Thus, under the rubric of “privacy,” the Court has safeguarded the right to marry, the right to custody of one’s children,<sup>244</sup> the right to keep the family together,<sup>245</sup> the right of parents to control the upbringing of children, the right to procreate, the right to purchase and use contraceptives, the right to refuse medical treatment,<sup>246</sup> and the right to engage in private, consensual homosexual activity.<sup>247</sup>

Unless the Court intends to overrule all of these decisions, it is clear—and it was clear at the time of *Roe*—that the Constitution is interpreted as protecting basic aspects of personal autonomy as fundamental rights even though they are not mentioned in the text of the document. Put another way, the Court never has adopted the position of Justices Scalia and Thomas (and others) who insist that the Constitution is limited to those rights explicitly stated or originally intended at the time of its ratification. In fact, rejecting privacy as a right because it is not in the text of the Constitution would mean repudiating other rights not mentioned that have long been safeguarded, such as freedom of association.<sup>248</sup>

Of course, opponents of *Roe* could argue that all of these decisions were wrong and that there should be no protection of privacy or other nontextual

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240. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 531–32, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400, 403 (1923).

241. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 543 (1942).

242. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

243. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589–90, 2598, 2603 (2015).

244. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

245. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1997).

246. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 277–78 (1990).

247. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

248. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (protecting freedom of association as a fundamental right).

rights.<sup>249</sup> However, this would be a dramatic change in the law. Professor Cass Sunstein has explained: “[The rejection of privacy rights] is a fully plausible reading of the Constitution. But it would wreak havoc with established law. It would eliminate constitutional protections where the nation has come to rely on them—by, for example, allowing states to ban use of contraceptives by married couples.”<sup>250</sup>

The second question before the Court with regard to abortion was whether laws that prohibit abortion infringe a woman’s right to privacy. Interestingly, no one, not even the staunchest opponents of abortion rights, disputes this. Opponents of *Roe* argue against there being a right to privacy or claim that the state has a sufficiently important interest in prohibiting abortion. That said, there is no disagreement that a prohibition of abortion interferes with a woman’s autonomy.

Obviously, forbidding abortions interferes with a woman’s ability to control her reproductive autonomy and to decide for herself, in the words of *Eisenstadt v. Baird*, whether to “bear or beget a child.”<sup>251</sup> Also, no one can deny that forcing a woman to continue a pregnancy against her will is an enormous medical, financial, psychological, and social intrusion on her control over her body. Justice Blackmun forcefully expressed this view in his majority opinion in *Roe*, where he opined that the “detriment” imposed by the State against a pregnant woman when denying her the choice of terminating her pregnancy “is apparent.”<sup>252</sup>

Justice Blackmun and his fellow Justices recognized that “[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved”<sup>253</sup> when denying a pregnant woman the right to an abortion. In addition, the Court underscored how “[m]aternity, or additional offspring, may force upon the woman a distressful life and future.”<sup>254</sup> The Justices stressed that not only might “[p]sychological harm . . . be imminent,” but that “[m]ental and physical health may be taxed by child care.”<sup>255</sup> These were not only concerns for the pregnant woman, as the Court noted, because “for all concerned [or] associated with the unwanted child . . . there is the problem of bringing a child into a family already unable, psychologically and otherwise,

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249. See, e.g., Bradley P. Jacob, *Griswold and the Defense of Traditional Marriage*, 83 N.D. L. REV. 1199, 1214, 1221 (2007) (arguing against nontextual rights in general and “the ‘rights’ to have sex outside of marriage, to redefine marriage, to engage in homosexuality, and to abort children” in particular).

250. CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 81–82 (2005).

251. 405 U.S. 438, 453 (1972).

252. 410 U.S. 113, 153 (1973).

253. *Id.*

254. *Id.*

255. *Id.*

to care for it.”<sup>256</sup> And there was also the stigma and shaming associated with unwed motherhood, which arguably continues in society today. Justice Blackmun wrote, “[i]n other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.”<sup>257</sup>

The third question before the Supreme Court was whether states have a compelling interest in protecting fetal life. Once it was decided that there is a fundamental right to privacy and that laws prohibiting abortion infringe upon it, then the question became whether laws prohibiting abortions are needed to achieve a compelling government interest. This is the test the government must meet whenever it burdens or infringes a fundamental right. The key question at this stage in the analysis was whether the government has a compelling interest in protecting the fetus from the moment of conception.

The Court rejected a state interest in outlawing abortions from the moment of conception and concluded that the state has a compelling interest in prohibiting abortion only at the point of viability, the time at which the fetus can survive outside the womb. Justice Blackmun, writing for the majority, stated: “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 mother’s womb.”<sup>258</sup>

Yet, as many commentators noted, this begs the question of why viability was deemed the point at which the state has a sufficient interest to prohibit abortion.<sup>259</sup> In fact, the choice of viability as the point where there is a compelling government interest seems at odds with Justice Blackmun’s earlier declaration that the Court “need not resolve the difficult question of when life begins.”<sup>260</sup> Justice Blackmun was of the opinion that “[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”<sup>261</sup>

Ultimately, the question is who should decide whether the fetus before viability is a human person: Each woman for herself or the state legislature? Harvard law professor Laurence Tribe, in an article written soon after *Roe*,

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256. *Id.*

257. *Id.*

258. *Id.* at 163.

259. See, e.g., Randy Beck, Essay, Gonzales, Casey, and the Viability Rule, 103 NW. U. L. REV. 249, 252 (2009) (arguing that the Court owes a constitutional justification for the viability rule while noting that viability varies based on factors such as available medical technology and the race and gender of the fetus); Ely, *supra* note 236, at 924 (criticizing the Court’s lack of reasoning for the viability standard).

260. *Roe*, 410 U.S. at 159.

261. *Id.*

put this well: “The Court was not, after all, choosing simply between the alternatives of abortion and continued pregnancy.”<sup>262</sup> Instead, as he explains, “[i]t was . . . choosing among alternative allocations of decisionmaking authority, for the issue it faced was whether the woman and her doctor, rather than an agency of government, should have the authority to make the abortion decision at various stages of pregnancy.”<sup>263</sup>

Why leave the choice as to abortion to the woman rather than to the state? First, there was then, and is now, no consensus as to when human life begins.<sup>264</sup> As Professor Tribe explains: “[T]he reality is that the ‘general agreement’ posited . . . simply does not exist.”<sup>265</sup> In other words, “[s]ome regard the fetus as merely another part of the woman’s body until quite late in pregnancy or even until birth; others believe the fetus must be regarded as a helpless human child from the time of its conception.”<sup>266</sup> Moreover, according to Professor Tribe, “[t]hese differences of view are endemic to the historical situation in which the abortion controversy arose.”<sup>267</sup> The choice of conception as the point at which human life begins, which underlies state laws prohibiting abortion, thus was based not on consensus or science, but religious views.<sup>268</sup>

In fact, historically, abortions were not illegal in the United States. Rather, due to political, medical, and religious movements—particularly the agitation of Anthony Comstock—abortion, contraceptive access, and contraceptive use became crimes.<sup>269</sup> Indeed, states jailed women for violating Comstock’s so-called “chastity laws,” because they disseminated information about human anatomy, family planning, and birth control. Comstock claimed that the women and the materials they distributed promoted vice and thereby implicitly and explicitly associated birth control advocates with men who sex trafficked and bootlegged liquor. In part, one could argue that Comstock’s campaign against contraception and abortion

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262. Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11 (1973).

263. *Id.* (emphasis omitted).

264. See A. Kurjak, *The Beginning of Human Life and Its Modern Scientific Assessment*, 30 CLINICS PERINATOLOGY 27, 27 (2003) (discussing the “seemingly endless debate” about when human life begins).

265. Tribe, *supra* note 262, at 19.

266. *Id.*

267. *Id.*

268. *Id.* at 20–22.

269. See *People & Events: Anthony Comstock’s “Chastity” Laws*, PILL, [http://www.pbs.org/wgbh/amex/pill/peopleevents/e\\_comstock.html](http://www.pbs.org/wgbh/amex/pill/peopleevents/e_comstock.html) [<https://perma.cc/JYC7-Y62W>] (“In 1872 Comstock set off for Washington with an anti-obscenity bill, including a ban on contraceptives, that he had drafted himself. . . . The statute defined contraceptives as obscene and illicit, making it a federal offense to disseminate birth control through the mail or across state lines. . . . Soon after the federal law was on the books, twenty-four states enacted their own versions of Comstock laws to restrict the contraceptive trade on a state level.”).



reflected “a statement of religious faith upon which people will invariably differ widely.”<sup>270</sup>

Legislatures could cloak religious objections to abortion in secular arguments (and often they do this) by claiming that potential human life exists at the point of conception and therefore the state may restrict abortion after that point, because a compelling interest exists in preserving that potential life. As stated in prior work, the problem with that legislative approach is that it is factually absurd and medically inaccurate. According to this line of argument, absent an abortion, all or the overwhelming majority of pregnancies develop fetuses to term and produce babies. This is woefully misguided and inaccurate.

Rather, pregnancy is more precisely described as bounded in uncertainty. For example, statistically, roughly 10%–20% of known pregnancies will spontaneously terminate, resulting in miscarriages. Moreover, two-thirds “of all human embryos fail to develop successfully,” and terminate before women even know they are pregnant.<sup>271</sup> Even in the most controlled, hormone-rich circumstances, such as in vitro fertilization—over 65% of the embryos end in demise.<sup>272</sup> According to the most recent Centers For Disease Control and Prevention (CDC) data on this issue, only 23.5% of implanted embryos result in normal live births (for women over thirty-five years old, the chances of pregnancy resulting in live birth are dramatically lower).<sup>273</sup> In other words, there is not a probable chance that but for an abortion there will be a baby resulting from conception. Instead, there may be a reasonable chance—but clearly no more than that—that there will be a baby but for an abortion.

Equally, the same logic applies to contraception. We agree that a potential life can result from sex without the use of contraception. That is, but for the use of contraception, there is a reasonable possibility that a baby may result. For example, data on fertility and infertility indicates that “[w]hen trying to conceive, a couple with no fertility problem has about a 30 percent chance of getting pregnant each month.”<sup>274</sup>

Our point is this: arguments framed in protecting “potential life” to justify a ban on contraceptives make as little sense they do when applied to

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270. Tribe, *supra* note 262, at 21.

271. Stanford Univ. Med. Ctr., *Which Fertilized Eggs Will Become Healthy Human Fetuses? Researchers Predict with 93% Accuracy*, SCIENCE DAILY (Oct. 4, 2010), <https://www.sciencedaily.com/releases/2010/10/101003205930.htm> [<https://perma.cc/J64B-3YM5>].

272. *Id.*

273. CTRS. FOR DISEASE CONTROL & PREVENTION, 2014 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 13 (2016), <https://ftp.cdc.gov/pub/Publications/art/ART-2014-Clinic-Report-Full.pdf> [<https://perma.cc/EF64-P782>].

274. ERWIN CHERMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* 174 (2010) (internal citations omitted).

abortion. However, the Catholic Church takes this position.<sup>275</sup> When examined closely, as we have here, Professor Tribe's argument that there is no secular basis for a prohibition on abortion and contraception makes profound sense. Put in this way, it becomes clearer why the choice whether to continue a pregnancy or terminate should reside with the pregnant woman and is not for the state to make.

*B. Abortion as a Private Choice*

The best approach to the abortion issue is for the Court to declare that the decision whether to have an abortion is a private judgment which the state *may not* encourage, discourage, or prohibit. Problematically, the state does exactly this within the reproductive-healthcare realm when it favors pregnancies, discourages abortions, misleads women about the safety of abortions, and imposes various prohibitions on this right. Crisis pregnancy centers (CPCs) provide a telling example, particularly because they favor discouraging women from seeking to terminate pregnancies.<sup>276</sup>

According to Jenny Kutner, a reporter for *Salon*, “[m]ore often than not, CPCs—which now outnumber abortion clinics by an estimated 3 to 1—can be misleading, manipulative or downright coercive, pushing a distinctly antiabortion agenda that relies heavily on lying to clients.”<sup>277</sup> Frequently, such centers facilitate those aims in nontransparent and therefore coercive ways, which the government funds.<sup>278</sup> A 2016 report, by Bryce Covert and Josh Israel, revealed that some states even siphon funds intended for Temporary Assistance for Needy Families (TANF) to CPCs, diverting

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275. See PAUL VI, *HUMANAE VITAE* 4–5 (1968) (proclaiming that contraceptives that interfere with the procreative aspect of marital intercourse are “unlawful”); see also CATHOLIC CHURCH, *CATECHISM OF THE CATHOLIC CHURCH* § 2370 (documenting the church’s teaching that methods of contraception other than “[p]eriodic continence” are “intrinsicly evil”).

276. Jenny Kutner, *How Crisis Pregnancy Centers Are Using Taxpayer Dollars to Lie to Women*, SALON (July 14, 2015), [http://www.salon.com/2015/07/14/how\\_crisis\\_pregnancy\\_centers\\_are\\_using\\_taxpayer\\_dollars\\_to\\_lie\\_to\\_women/](http://www.salon.com/2015/07/14/how_crisis_pregnancy_centers_are_using_taxpayer_dollars_to_lie_to_women/) [https://perma.cc/6A5C-NQWE] (reporting that “governments are incentivizing [crisis pregnancy centers] to provide misleading antiabortion counseling”).

277. *Id.*; see NARAL, *CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM 2* (2015), <http://www.prochoiceamerica.org/assets/download-files/cpc-report-2015.pdf> [https://perma.cc/XW5F-FWCV] (advocating that representatives of crisis pregnancy centers “unleash a documented pattern of deception, coercion, and misinformation to discourage [a woman] from abortion, contraception, and comprehensive, medically accurate counseling”).

278. Thirty-four states fund CPCs, including Texas, Arizona, Mississippi, Louisiana, Alabama, Georgia, North Carolina, South Carolina, Florida, Arkansas, Tennessee, Ohio, Kentucky, and West Virginia, among others. See Katie McDonough, *These Are the 34 States That Fund Crisis Pregnancy Centers with Taxpayer Dollars*, SALON (Aug. 16, 2013), [http://www.salon.com/2013/08/16/here\\_are\\_the\\_34\\_states\\_that\\_fund\\_crisis\\_pregnancy\\_centers\\_with\\_taxpayer\\_dollars/](http://www.salon.com/2013/08/16/here_are_the_34_states_that_fund_crisis_pregnancy_centers_with_taxpayer_dollars/) [https://perma.cc/7TKH-R7B8] (stating that “[i]t is no secret that crisis pregnancy centers lie to women” and providing a map of the United States showing the thirty-four states that use taxpayer money to support these crisis pregnancy centers).

urgently needed welfare funds from children and families in dire poverty to antiabortion groups.<sup>279</sup> Currently such practices do not violate law. Under our framework, conditioning access to abortion services on receiving inaccurate and antiabortion messaging in an effort to coerce a pregnant woman from terminating a pregnancy would violate her privacy.

A yearlong investigation by NARAL confirms prior reports of CPCs abandoning or outright disregarding honesty, neutrality, and objectivity in efforts to coerce pregnant women against abortion and even the use of contraception.<sup>280</sup> Findings from the study reveal that “CPCs employ a number of tactics to get women in their doors, including strategically placed online and offline advertisements, locations near comprehensive women’s health-care clinics, and even state-sanctioned referrals. The promise is always the same: counseling for unintended pregnancy.”<sup>281</sup> The report notes that CPC volunteers typically warn women that abortions cause mental and physical health problems, including breast cancer, infertility, and perforated uteruses,<sup>282</sup> despite the fact that a pregnant woman is fourteen times more likely to die in childbirth than in a legal abortion.<sup>283</sup> What pregnant women actually receive from such centers, at taxpayer expense, is antiabortion “counseling,” which some have described as “nerve-racking, emotional,” and “a terrible way to find out you’re pregnant.”<sup>284</sup> Yet, the state must be neutral and leave this choice to each woman to make as she deems appropriate.

279. Bryce Covert & Josh Israel, *The States That Siphon Welfare Money to Stop Abortion: Millions in TANF Dollars Are Flowing to Crisis Pregnancy Centers That Mislead Women*, THINK PROGRESS (Oct. 3, 2016), <https://thinkprogress.org/tanf-cpcs-ec002305dd18#4z8rnf39w> [<https://perma.cc/8C86-EWTJ>].

280. See Jenny Kutner, *Crisis Pregnancy Center Tells Woman Her IUD is “Your Baby,” Plus Countless Other Lies*, SALON (Mar. 18, 2015), [http://www.salon.com/2015/03/18/crisis\\_pregnancy\\_center\\_tells\\_woman\\_her\\_iud\\_is\\_your\\_baby\\_plus\\_countless\\_other\\_lies/](http://www.salon.com/2015/03/18/crisis_pregnancy_center_tells_woman_her_iud_is_your_baby_plus_countless_other_lies/) [<https://perma.cc/7YP7-95PX>] (discussing the results of the NARAL investigation, which indicated “a disturbing trend among CPCs . . . of using whatever means necessary—slut-shaming, fear-mongering, misinformation and straight-up manipulation—to prevent pregnant women from having abortions”).

281. NARAL, *supra* note 277, at 2, 4 (“CPCs also employ online strategies to target women. All too often, when a woman types the words ‘abortion clinic’ into a search engine, she gets results for CPCs, which use false advertising tactics to lure women to their facilities instead of actual health clinics. CPCs advertise through Google, the most-used online search engine.”); see also, Jennifer Ludden, *States Fund Pregnancy Centers That Discourage Abortion*, NPR (Mar. 9, 2015), <http://www.npr.org/sections/health-shots/2015/03/09/391877614/states-fund-pregnancy-centers-that-discourage-abortion> [<https://perma.cc/R7ZB-TLRF>] (explaining how the author performed a simple Google search to find a CPC on the front page “whose aim is actually to guide women out of having the procedure”).

282. NARAL, *supra* note 277, at 7.

283. Raymond & Grimes, *supra* note 1, at 216.

284. NARAL, *supra* note 277, at 2. For some women, CPCs may offer relief and validate their choices. We simply do not believe that the government should lie to women or pay others to do so at such a critical time in their lives. See also Ludden, *supra* note 281 (noting that “counselors . . . told [women that] abortion causes breast cancer and infertility, or leads to drug abuse and depression, none of which is supported by rigorous medical research”).

When the state makes this decision for a woman, against her will, it inscribes her to a fate of its choosing, which for all purposes is to serve as its designated womb or incubator.

In California, CPCs may have resulted in pregnant women's significant underutilization of important medical resources. Seeking to correct this, California legislators enacted the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act), requiring "licensed pregnancy-related clinics disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion."<sup>285</sup> The FACT Act also imposes a duty on unlicensed facilities to disseminate notices that they are not licensed in California, because, "the Legislature . . . found that the ability of California women to receive accurate information about their reproductive rights, and to exercise those rights, is hindered by the existence of crisis pregnancy centers."<sup>286</sup>

According to the Ninth Circuit in *NIFLA v. Harris*,<sup>287</sup> the "[l]egislature found that CPCs, which include unlicensed and licensed clinics, employ 'intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.'" Roughly 200 CPC operate in California, and while the new legislation holds great promise, antiabortion organizations have already sought to enjoin the law's enforcement, albeit unsuccessfully.<sup>288</sup>

The consequence of establishing abortion as a private judgment is that a woman would have the right at any point during her pregnancy to remove a fetus from her body.<sup>289</sup> We believe that (a) postviability abortions of healthy fetuses would be extremely unlikely and rare (and evidence supports this); (b) a state could prescribe a procedure for removing a postviability fetus so as to maximize its chances of survival; but (c) never could a woman be prosecuted for removing the fetus from her body.

Previously, a state's interest in preserving the health of a viable fetus that could independently survive outside the womb has been forced upon a woman without her reproductive autonomy or choice. States have done this

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285. Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 828–29 (9th Cir. 2016).

286. *Id.* at 829.

287. 839 F.3d 823, 829 (9th Cir. 2016) (holding "the proper level of scrutiny to apply to the Act's regulation of licensed clinics is intermediate scrutiny, which it survives," and concluding, "with respect to unlicensed clinics . . . the Act survives any level of scrutiny"). The Court explains that with regard to the free exercise claim, "the Act is a neutral law of general applicability, and that it survives rational basis review." *Id.*

288. *Id.*

289. For a compelling argument that women should have this right, see generally Judith Jarvis Thomson, *A Defense of Abortion*, in *THE RIGHTS AND WRONGS OF ABORTION* 3 (Marshall Cohen et al. eds., 1974).

without any mindfulness toward the dignity of pregnant women. We disagree with this logic. Rather, the state could set standards to ensure that the fetus is removed in the manner most likely to lead to its survival, and it may take the steps it chooses to keep the fetus alive once removed. Nor do we believe that a woman should be responsible economically or in any other manner for the state's decision to maintain the life of a fetus. But whether the fetus will or will not survive removal is irrelevant to the right of the woman to terminate her pregnancy. It is the woman's body and at no point can a state force her to be an incubator.

This approach overcomes the problems of *Roe v. Wade*, discussed above, and while it is not without flaws, it could be defended as principled, not arbitrary, and consistent with precedents. First, the Court could articulate a legal principle to support its decision: it is the right of a person to decide what happens to her body. Insightful lessons from the Nuremberg trials<sup>290</sup> and investigations probing coercive government research conducted on vulnerable African-American subjects in Tuskegee<sup>291</sup> are consistent with our view: respecting and promoting autonomy should be the first principles not

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290. See George J. Annas, *The Legacy of the Nuremberg Doctors' Trial to American Bioethics and Human Rights*, 10 MINN. J.L. SCI. & TECH. 19, 19 (2009) (explaining that the Nuremberg Trials created modern bioethics, the importance of which is apparent with the modern global war on terror in which the United States "uses physicians to help in interrogations, torture, and force-feeding hunger strikers"); JAY KATZ ET AL., EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS, at ix (1972) (describing how the author's own reflections of the Nuremberg trials inspired the author to provide a climate of scholarly analysis for discussing human experimentation to "give some meaning to the suffering of those who were harmed by human experimentation against their will").

291. See FRED D. GRAY, THE TUSKEGEE SYPHILIS STUDY 138 (1998) (observing that as part of President Clinton's 1997 formal apology for the study, he directed the Secretary of Health and Human Services to investigate how to "best involve communities, especially minority communities, in research and healthcare . . . in ways that are positive . . . [because] we must bring [their] benefits to all Americans"); HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 185 (2006) (describing as among the study's cautionary lessons the "banality of evil," "medicine's betrayal by physicians of . . . the very government entity charged with protecting our health," and the "carefully orchestrated complicity" of the powerful and the privileged in exploiting the poor, powerless, and vulnerable); Rob Stein, *U.S. Apologizes for Newly Revealed Syphilis Experiments Done in Guatemala*, WASH. POST (Oct. 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100104457.html> [https://perma.cc/4RNV-ZZAD] (discussing revelations discovered in the papers of "a doctor with the federal government's Public Health Service who later participated in Tuskegee" that the U.S. "government conducted medical experiments in the 1940s in which doctors infected soldiers, prisoners and mental patients in Guatemala with syphilis and other sexually transmitted diseases"); Jean Heller, *Syphilis Victims in U.S. Study Went Untreated for 40 Years*, N.Y. TIMES (July 26, 1972), <http://www.nytimes.com/1972/07/26/archives/syphilis-victims-in-us-study-went-untreated-for-40-years-syphilis.html> [https://perma.cc/X6QC-P3LW] (reporting the existence of the study and the opinion of the then-chief of the venereal disease branch of the Centers for Disease Control & Prevention that "with our current knowledge of treatment and the disease and the revolutionary change in approach to human experimentation, I don't believe the program would be undertaken").

only for medicine, but also for when the state interferes with individuals' bodies.<sup>292</sup>

In both cases of Nuremberg and Tuskegee, state agents shamefully carried out government agendas on vulnerable populations: Jews and disfavored minority groups in Germany, Poland, and other European nations, and in the United States against poor, black farmers. In both instances, states conscripted vulnerable minority groups for their research and other purposes. German and U.S. governments justified their actions as benefiting the greater good. In the case of Tuskegee, the U.S. Public Health Service (PHS) claimed that its research, which denied penicillin to African-American farmers suffering from syphilis, benefitted Southern black communities.<sup>293</sup> Numerous individuals were injured by the governments' actions. The result of these now-refuted studies was the birth of bioethics, and with it foundational, core principles: bodily autonomy, social justice, informed consent, and nonmaleficence.<sup>294</sup> The state can no more compel a pregnant woman to participate in a coercive research study against her will than it can force her to endure a pregnancy for the government's benefit.

The state cannot compel a person to use her body to keep another person alive.<sup>295</sup> Likewise, parents cannot be forced to donate a kidney or even blood to keep a child alive. A corollary of this principle is that it is a private judgment for each person to make as to whether and how her body will be used to sustain another's life. Individuals and religious groups have sharply divergent and irreconcilable views on the morality of abortion. Although everyone can agree that an individual capable of surviving outside the womb should be protected, consensus never will be reached as to the status of the fetus. Professor Robert Bennett persuasively explained the distinction between criminal abortion statutes and other laws three decades ago.<sup>296</sup>

Bennett explains that "criminal statutes often reflect values that are held with near unanimity in the society."<sup>297</sup> In other words, he notes that even the most deviant members of society, such as murderers, "likely do not think that they are being treated unfairly if they are severely punished for their

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292. Cf. Nicholas D. Kristof, *Unmasking Horror—A Special Report: Japan Confronting Gruesome War Atrocity*, N.Y. TIMES (Mar. 17, 1995), <http://www.nytimes.com/1995/03/17/world/unmasking-horror-a-special-report-japan-confronting-gruesome-war-atrocity.html> [<https://perma.cc/W7W6-VM74>] (detailing the atrocities that the Japanese Army inflicted upon live human experiments including vivisection, the testing of biological weapons, and field testing of new weaponry to measure effectiveness).

293. See WASHINGTON, *supra* note 291, at 157, 159 (noting the high incidence of syphilis infections in Alabama in 1929 and PHS's explanation that the study was designed to examine the disease's progression, as it was long claimed to manifest differently in blacks than whites).

294. Goodwin, *supra* note 35, at 818–20; see also Annas, *supra* note 290, at 19.

295. Thomson, *supra* note 289, at 5.

296. Robert W. Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U. L. REV. 978, 1007 (1981).

297. *Id.*

crimes.”<sup>298</sup> By contrast, he explained that “doctors and women and others involved in abortions usually feel little culpability, because the society is sharply divided about whether substantial culpability attends an abortion.”<sup>299</sup>

Second, this approach avoids the arbitrary line drawing of *Roe* and *Casey*. No longer does the Court have to defend viability or any other point at which the woman cannot remove the fetus from her body. It is the woman's body and, in the words of *Eisenstadt v. Baird*, it is for each person to make the profound decision of whether to “bear or beget a child.”<sup>300</sup> Moreover, this approach would be consistent with traditional tort and criminal law principles. It's “a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or in need of assistance. . . . [O]ur law does not require people to be Good Samaritans.”<sup>301</sup> Just as the law does not require individuals to donate body organs to save other people's lives, so should the state not require a woman to donate her body, against her will, to house a fetus.<sup>302</sup>

Third, troubling racial and class disparities exist in how states intervene in the lives of pregnant women. It is long overdue to take these matters seriously and develop a legal approach that avoids arbitrariness and racial discrimination in reproductive healthcare. Indeed, this is the point of recognizing reproductive healthcare and rights as reproductive-justice issues. Poor women are less likely to have access to urgently needed medical services whether they desire to obtain contraception, carry pregnancies to term, or terminate their pregnancies. Yet, poor pregnant women disparately encounter arbitrary criminal and civil interventions in their pregnancies that result in punishment, stereotyping, and stigma.<sup>303</sup>

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298. *Id.*

299. *Id.* Bennett notes another distinction between criminal abortion statutes and other laws: outside of the abortion context, “criminal statutes seldom burden innocent individuals, except perhaps incidentally.” *Id.*

300. 405 U.S. 438, 453 (1972).

301. Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569 (1979).

302. Perhaps it could be argued that under the “Good Samaritan” principle a woman who has become pregnant has consented to providing assistance and therefore must continue to do so by bearing the child. This, though, would require assuming that a woman is consenting to pregnancy every time she has sex. The law should not make this assumption. Obviously, it would not apply in instances of rape or incest. It also would not apply in instances of contraceptive failure. And thankfully there would be no way for the law to know if a pregnancy was the result of this. Put another way, entirely apart from involuntary pregnancies due to rape, even “[i]f contraceptive methods of very high effectiveness, say 98%, were used carefully and consistently, there would be hundreds of thousands of pregnancies . . . caused by contraceptive failure.” *Id.* at 1594. As such, it is inaccurate and unjust to women to regard pregnancy as a purely voluntary condition.

303. Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1202 (1990).

Moreover, criminal prosecutions of pregnant women are deeply racialized in the U.S. The criminal prosecutions of Regina McKnight,<sup>304</sup> Paula Hale,<sup>305</sup> Rennie Gibbs,<sup>306</sup> and Bei Bei Shuai,<sup>307</sup> to name a few, underscore our point. Ms. Gibbs was fifteen when the state of Mississippi charged her with depraved heart murder after her pregnancy resulted in stillbirth. McKnight was pressured into a plea deal after she suffered a stillbirth. She served twelve years in prison before the conviction was overturned. In Hale's case, although it was documented that she had been raped and physically abused prior to her pregnancy, she along with dozens of African-American women were dragged out of the Medical University of South Carolina (MUSC) in shackles and chains and prosecuted for abusing and endangering their fetuses.<sup>308</sup> Bei Bei Shuai, a Chinese immigrant, was charged with first degree murder for attempting suicide during her pregnancy.<sup>309</sup>

One need only look to Wisconsin's recent forced civil confinement of Alicia Beltran at fourteen weeks into her pregnancy to understand the seriousness of our attention to these matters. In that case, the state denied Ms. Beltran access to a lawyer, although she requested one three times. Wisconsin authorities held Beltran for more than seventy days, supposedly to protect the fetus. In fact, although the state denied Alicia Beltran an attorney, a lawyer was appointed to represent her fetus. Eventually, Wisconsin released Beltran, but by that time, she had lost her job and housing.<sup>310</sup>

The cases described above reflect troubling patterns embedded in law that disparately impose penalties on poor pregnant women, especially women of color, whether they seek to carry pregnancies to term or end them. Our conclusion is that a woman always has autonomy over her body and the state never has the authority to force her to continue a pregnancy. Whether to remove the fetus should be regarded by law as a private choice for each woman to make.

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304. McKnight v. State, 661 S.E.2d 354, 356–57 (S.C. 2008).

305. Lynn Paltrow, *South Carolina: First in the Nation for Arresting African-American Pregnant Women—Last in the Nation for Funding Drug and Alcohol Treatment*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Jan. 8, 2003), <http://advocatesforpregnantwomen.org/issues/briefingpaper.htm> [https://perma.cc/ZSA6-UCQV].

306. Associated Press, *Court to Hear Case of Woman Accused in Stillbirth*, JACKSON FREE PRESS (Apr. 1, 2013), <http://www.jacksonfreepress.com/news/2013/apr/01/court-hear-case-woman-accused-stillbirth/> [https://perma.cc/RE2Z-U9KA].

307. Charles Wilson, *Ind. Mom's Lawyer: Cause of Baby's Death Unproven*, SAN DIEGO UNION-TRIB. (Oct. 10, 2012), <http://www.sandiegouniontribune.com/sdut-ind-moms-lawyer-cause-of-babys-death-unproven-2012oct10-story.html> [https://perma.cc/FPY6-W8ED].

308. Ferguson v. City of Charleston, 532 U.S. 67, 69–75 (2001); Paltrow, *supra* note 305.

309. Wilson, *supra* note 307.

310. Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES (Oct. 23, 2013), <http://www.nytimes.com/2013/10/24/us/case-explores-rights-of-fetus-versus-mother.html> [https://perma.cc/L4P4-8W6K].



### III. The Implications of Seeing Abortion as a Private Choice for Each Woman

#### A. *Restoring Strict Scrutiny: The Government Cannot Favor Childbirth Over Abortion*

At the very least, the Supreme Court should restore strict scrutiny in evaluating government regulation of abortions. For the reasons described in Part II, and for that matter articulated in *Roe v. Wade*, a woman's right to decide whether to have an abortion should be regarded as a fundamental right. Fundamental rights trigger strict scrutiny. As Justice Blackmun declared: "Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion."<sup>311</sup>

We are not alone in this view that abortion is a fundamental right. Professor Michael Dorf recently wrote, "although *Casey* and other post-*Casey* cases contain some confusing language, taken as a whole, these cases are best read as preserving the status of abortion as a fundamental right."<sup>312</sup> Other legal scholars, including Reva Siegel, Sylvia Law, Khiara Bridges, Dorothy Roberts, as well as colleagues responding to this Article, Leah

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311. *Planned Parenthood v. Casey*, 505 U.S. 833, 930 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

312. Michael C. Dorf, *Abortion is Still A Fundamental Right*, SCOTUSBLOG (Jan. 4, 2016, 11:28 AM), <http://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right/> [<https://perma.cc/7FPN-GN6N>]; see also Khiara Bridges, "Life" in the Balance: *Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1313 (2013) ("[A] finding of an undue burden-qua-infringement should result in the application of strict scrutiny and an inquiry into whether the state has a compelling interest in infringing the right."); Valerie J. Pacer, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 313 (1995) ("The undue burden standard . . . allows the current political majority to actively interfere with its citizens' exercise of their fundamental rights, so long as such interference does not amount to an undue burden."); Neil S. Siegal & Reva B. Siegal, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160, 165 (2013) (adopting an "equality-informed understanding of Casey's undue burden test," which "prohibits government from coercing, manipulating, misleading, or stereotyping pregnant women"); Scott Skinner-Thompson, Sylvia A. Law & Hugh Baran, *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 139 (2016) ("Because the woman's right to choose whether to bear a child is fundamental, 'regulation limiting these rights may be justified only by a "compelling state interest" . . . [and] legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.'").

Litman,<sup>313</sup> Kimberly Mutcherson,<sup>314</sup> Aziza Ahmed,<sup>315</sup> Noya Rimalt, and Karin Carmit Yefet<sup>316</sup> recognize abortion as a fundamental right, although they take different philosophical and legal approaches in addressing the issue.

The joint opinion in *Casey* premised its adoption of the “undue burden” test rather than strict scrutiny on the claim that a state has a valid interest in encouraging childbirth over abortion. The joint opinion said, however, that

[t]o promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.<sup>317</sup>

However, once it is determined that abortion is a private choice for each woman, no longer should the state be able to use its regulatory power or resources to interfere or influence a woman’s choice. In other words, the explicitly stated premise for using the undue burden test rather than strict scrutiny—that the state has a valid interest in encouraging childbirth over abortion—cannot be reconciled with abortion being a private choice for each woman. Indeed, recognizing that abortion is a private moral choice for each woman means that no longer will the government have the power to regulate abortion based on its desire to encourage childbirth over abortion. So-called “informed consent” laws, special waiting periods for abortions, and prohibitions of “partial birth abortions” all should be deemed unconstitutional.

### B. *Reconsidering the Abortion-Funding Decisions*

Nor is the Court’s jurisprudence on abortion funding acceptable. In fact, the abortion-funding cases point to the problematic nature of states coercing motherhood upon poor, pregnant women. The Supreme Court repeatedly has

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313. Leah M. Litman, *Potential Life in the Doctrine*, 95 TEXAS L. REV. SEE ALSO (forthcoming 2017) (warning that “[t]he threat to abortion rights is real, but it is not just from the undue burden standard; it is from politicians who, with the help of lawyers, will continue to try and legislate abortion out of existence and drain the legal standards governing abortion of any meaning”).

314. Kimberly Mutcherson, *Fetal Rights in the Trump Era*, 95 TEXAS L. REV. SEE ALSO (forthcoming 2017) (recognizing the “dangerous territory that we are entering” and considering “how activists, inside and outside of academia, can prepare to protect some of the vital gains that women have achieved in the passage of time since *Roe* was decided”).

315. Aziza Ahmed, *Abortion in a Post-Truth Moment: A Response to Erwin Chemerinsky and Michele Goodwin*, 95 TEXAS L. REV. SEE ALSO (forthcoming 2017) (urging that the legal analysis about abortion rights, including efforts to restore strict scrutiny as the legal basis for abortion rights, must take into account the problematic nature of living in a “post-truth” era).

316. Noya Rimalt & Karin Carmit Yefet, *Rethinking the Choice of “Private Choice” in Conceptualizing Abortion: A Response to Erwin Chemerinsky and Michele Goodwin’s Abortion: A Woman’s Private Choice*, 95 TEXAS L. REV. SEE ALSO (forthcoming 2017) (referring to *Casey* as providing a “lenient level of scrutiny” and urging an equal protection framework for addressing abortion).

317. *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion).

held that the government is not constitutionally required to subsidize abortions even if it is paying for childbirth. In three cases in 1977, the Court upheld the ability of the government to deny funding for “nontherapeutic abortions”—that is, abortions that were not performed to protect the life or health of the mother. In *Beal v. Doe*,<sup>318</sup> the Supreme Court held that the federal Medicaid Act did not require that states fund nontherapeutic first-trimester abortions as part of participating in the joint federal–state program.<sup>319</sup> In *Maher v. Roe*,<sup>320</sup> the Supreme Court upheld the constitutionality of a state law that denied the use of Medicaid funds for nontherapeutic first-trimester abortions, although the law provided funding for medically necessary first-trimester abortions.<sup>321</sup> And, in *Poelker v. Doe*,<sup>322</sup> the Court found that it was constitutional for a city to refuse to pay for nontherapeutic first-trimester abortions in its public hospital.<sup>323</sup>

In two cases in 1980, the Supreme Court went further and upheld the constitutionality of laws that denied public funding for medically necessary abortions except where necessary to save the life of the mother. In *Harris v. McRae*,<sup>324</sup> the Court upheld a federal law, the Hyde Amendment, that prohibited the use of federal funds for performing abortions “except where the life of the mother would be endangered if the fetus were carried to term, or except for [cases] . . . of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.”<sup>325</sup> Similarly, in *Williams v. Zbaraz*,<sup>326</sup> the Supreme Court found constitutional a state law that prohibited the use of state funds for performing abortions except where the mother’s life was in danger.<sup>327</sup>

Nearly a decade later, in *Webster v. Reproductive Health Services*,<sup>328</sup> in 1989, the Court upheld a state law that prohibited the use of public employees and facilities to perform or assist the performance of abortions except where necessary to save the mother’s life.<sup>329</sup> The Court said that this law was indistinguishable from the earlier cases that allowed the government to deny funding of abortions.<sup>330</sup>

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318. 432 U.S. 438 (1977).

319. *Id.* at 445–46.

320. 432 U.S. 464 (1977).

321. *Id.* at 465–66, 474.

322. 432 U.S. 519 (1977).

323. *Id.* at 521.

324. 488 U.S. 297 (1980).

325. *Id.* at 302 (internal citations omitted).

326. 448 U.S. 358 (1980).

327. *Id.* at 368–69.

328. 492 U.S. 490 (1989).

329. *Id.* at 511.

330. *Id.* at 509–11. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court held that the government does not violate the First Amendment if it denies funding to Planned Parenthood clinics that perform abortion counseling or make abortion referrals. *Id.* at 178.

In all of these cases, the Court gave the same basic reasons as to why it is constitutional for the government to deny funding or facilities for abortions, even though it pays for childbirth. First, the Court often said that the existence of a constitutional right does not create a duty for the government to subsidize the exercise of the right.<sup>331</sup> In other words, the government has no affirmative duty to make constitutional rights a reality or meaningful.

For example, in *Harris v. McRae*, the Court declared: “It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their children to a private school,”<sup>332</sup> that the state “therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.”<sup>333</sup>

This is in accord with a more general principle that the government rarely has an affirmative constitutional duty to provide benefits or to facilitate the exercise of rights. In *Webster*, the Court furthered this principle, stating, “our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”<sup>334</sup>

Second, the Court asserted that denial of public funding places a woman in no different position than she would have been if there was no Medicaid program or no public hospital. In *Maher v. Roe*, the Court reasoned that the state law denying use of Medicaid funds does not place obstacles, either “absolute or otherwise—in the pregnant woman’s path to an abortion.”<sup>335</sup> Instead, the Court came to the conclusion that “[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth.”<sup>336</sup>

In *Maher*, the Court further explained that although poverty may deeply constrain a pregnant woman’s options, “mak[ing] it difficult—and in some cases, perhaps, impossible—for some women to have abortions,” their status and circumstances are “neither created nor in any way affected by the Connecticut regulation.”<sup>337</sup> Justices Brennan, Marshall, and Blackmun offered a vigorous dissent to the Court’s opinion, highlighting the “distressing insensitivity to the plight of impoverished pregnant

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331. *E.g., id.* at 201.

332. 448 U.S. 297, 318 (1980) (citations omitted).

333. *Id.*

334. *Webster*, 492 U.S. at 507 (quoting *DeShaney v. Winnebago Cty. Dept. of Social Servs.*, 489 U.S. 189, 196 (1989)).

335. 432 U.S. at 464, 474 (1977).

336. *Id.*

337. *Id.*

women . . . inherent in the Court's analysis."<sup>338</sup> Their bristling dissent emphasized that "[t]he stark reality for too many, not just 'some,' indigent pregnant women is that indigency makes access to competent licensed physicians not merely 'difficult' but 'impossible.'"<sup>339</sup>

Nevertheless, the Court came to a similar conclusion in *Harris v. McRae*. The Court said that the prohibition of the use of federal funds for abortions "leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all."<sup>340</sup>

Third, the Court emphasized that the government constitutionally could make the choice to encourage childbirth over abortion. We disagree with this position. In *Maher*, the Court wrote that *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."<sup>341</sup>

Ultimately, the Court decided that the question of whether or not the government should subsidize abortions is a matter for the legislature to decide. They said that the ultimate choice as to "whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided."<sup>342</sup> The Court went on to urge that "when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature."<sup>343</sup>

The Court was wrong in these decisions. The Supreme Court's decisions in the abortion-funding cases were premised on the assumptions that the government has a valid interest in discouraging abortion and that there is a difference between prohibiting abortion and creating an incentive in favor of childbirth. Neither of these assumptions would be consistent with the view that abortion is a private moral judgment. In his dissent in *Harris*, Justice Brennan argued: "[T]he State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion."<sup>344</sup>

Initially, it must be recognized that the distinction between discouraging abortions and prohibiting them is meaningless for many indigent women. The effect of the refusal to pay for abortion is to compel many women to bear

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338. *Id.* at 483 (Brennan, J., dissenting).

339. *Id.*

340. *Harris v. McRae*, 448 U.S. 297, 317 (1980).

341. *Maher*, 432 U.S. at 474.

342. *Id.* at 479.

343. *Id.*; *Harris*, 448 U.S. at 326.

344. *Harris*, 448 U.S. at 330 (Brennan, J., dissenting).

and have children.<sup>345</sup> Even the Court recognized that failure to fund abortions under Medicaid programs meant that some women would be forced to forego abortions.<sup>346</sup>

In fact, the undeniable purpose of the funding restrictions was to accomplish precisely such a decrease in abortions. The government did not refuse to subsidize abortions as a way to save money: childbirth is much more expensive than abortion. Justice Stevens observed this in his dissent in *Harris*, noting that one lower court found that while publicly funded abortions cost an average of less than \$150, the average cost to the state of childbirth exceeded \$1,350.<sup>347</sup> Clearly then, “[a]bortion funding restrictions are not enacted for the sake of frugality or to encourage the welfare client to practice contraception or sexual self-restraint.”<sup>348</sup> The sole purpose of the funding restrictions was to decrease the number of abortions.

The question, therefore, is whether the government may enact laws that have the purpose and effect of preventing abortions. If abortion is viewed as a private judgment, then the decision whether to bear or abort the fetus is to be left entirely to each pregnant woman. The state must adopt a position of neutrality. The government may not take actions which have the purpose and effect of preventing abortions because those policies, by definition, deny a woman the right to make an autonomous decision.<sup>349</sup> Regarding abortion as a matter of private choice, the state may not involve itself in the choice of whether or not to have an abortion. The laws restricting use of government funds for abortion were intended to do exactly what should not be allowed: publicly interfere with a private decision. If the Court were to treat abortion as a purely private decision, as we urge, then it could not consistently hold that the state has a sufficient interest in protecting “potential life.”<sup>350</sup>

The point is not that the government has an affirmative duty to subsidize abortions, or any other medical procedure. Rather, the point is that the government may not use its resources and power to prevent abortions. The

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345. Michael J. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1244 (1978) (arguing that the Court's abortion-funding decisions “mean that some indigent women, perhaps many, will be unable to have abortions. These are the very women *most* likely to have unwanted pregnancies and *least* able to accommodate additional children.”). Empirically, studies have shown a decrease in abortions as a result of funding cutbacks. One study of the impact of the Hyde Amendment in Ohio and Georgia indicates that over 20% of the female Medicaid recipients who desired an abortion could not get one because of the absence of funds. James Trussell et al., *The Impact of Restricting Medicaid Financing for Abortion*, 12 FAM. PLAN. PERSP. 120, 129 (1980).

346. *Maher*, 432 U.S. at 474.

347. *Harris*, 448 U.S. at 355 n.9 (Stevens, J., dissenting).

348. Dennis J. Horan & Thomas J. Marzen, *The Moral Interest of the State in Abortion Funding: A Comment on Beal, Maher & Poelker*, 22 ST. LOUIS U. L.J. 566, 573 (1979).

349. See Perry, *supra* note 345, at 1244 (“There is simply no way to justify, consistently with *Roe v. Wade*, a governmental scheme the sole purpose of which is to curtail abortion [for moral reasons].”).

350. *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion).

government is under no obligation to subsidize childbirth expenses. But if it chooses to do so, since childbirth and abortion are the *only* possible outcomes of pregnancy, it must also subsidize abortions. The state may not make the moral judgment about whether the fetus should be aborted, and it may not attempt to coerce decisions through its power of the purse.

This is hardly a novel conclusion. The Court repeatedly has held that “states burden fundamental interests involving freedom of choice when they threaten to withhold or withdraw such discretionary benefits unless a person exercises his or her constitutionally protected option in a particular way.”<sup>351</sup> For example, in the area of free exercise of religion, the Court has rejected any distinction between prohibiting and discouraging religious conduct. In cases such as *Sherbert v. Verner*<sup>352</sup> and *Thomas v. Review Board of Indiana*,<sup>353</sup> the Court rejected as unconstitutional state-funding schemes that have the effect of discouraging individuals from following their religious beliefs. Just as religion is a matter of individual conscience, which the state may not try to influence, so must the abortion decision be left to each woman, uninfluenced by the state.<sup>354</sup> In fact, if the Court were to take the approach to the abortion issue suggested above, it would be declaring a right to “free exercise” in making abortion decisions. Government discouragement is *per se* inconsistent with individual free exercise.

This concept of free exercise in the area of abortion decisions shows the fallacy of the Court's analogy between the government's refusal to fund abortions and its failure to subsidize parochial schools. The Court rightly noted that while the state could not prevent children from attending private schools, the state did not necessarily have an obligation to pay for parochial education.<sup>355</sup> The Court drew the analogy to abortions, concluding that while the state may not prohibit abortions, it has no obligation to subsidize them.<sup>356</sup>

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351. Gary J. Simson, *Abortion, Poverty and the Equal Protection of the Laws*, 13 GA. L. REV. 505, 509 (1979).

352. See 374 U.S. 398, 409–10 (1963) (holding that a worker who quit a job rather than work in contradiction to her religious belief requiring observance of the Sabbath was entitled to unemployment compensation).

353. See 450 U.S. 707, 709, 720 (1981) (holding that a worker who quit his job rather than work in a job requiring production of armaments in contradiction to his religious beliefs was entitled to unemployment compensation).

354. Justice Powell, writing for the majority in *Maher v. Roe*, attempted to distinguish failure to fund abortions from refusing to pay unemployment compensation to workers who quit their jobs for religious reasons. 432 U.S. 464, 474 n.8 (1977). Powell argued that *Sherbert* is not analogous because it involved withholding of benefits from persons who were otherwise entitled to the benefits on the ground that those persons exercised a fundamental right. *Id.* But this argument begs the key question: by funding childbirth and not abortion is not the state penalizing women who choose to exercise their fundamental right to have an abortion?

355. *Harris v. McRae*, 448 U.S. 297, 318 (1980); *Maher*, 432 U.S. at 477 (citing *Norwood v. Harrison*, 413 U.S. 455, 462 (1973)).

356. See *supra* notes 318–43 and accompanying text.

Though this analogy seems plausible at first, it does not withstand critical analysis.

First, private and public education are functionally the same. If a student cannot afford private education, the student still receives an education. By contrast, if a pregnant woman cannot afford an abortion, she has a baby. Abortion and childbirth obviously are not alike. The state's choice to fund public and not parochial schools has an effect different in kind from its choice to fund childbirth and not abortions.

Second, the purpose of the government's failure to fund parochial schools is different from its motive for not funding abortions. At the very least, the state's failure to subsidize private schools is a simple resource-allocation decision. The state is not hostile to parochial education, but instead chooses to put its scarce resources in a single school system. The state's motive for funding only public education is not to prevent students from attending parochial schools. By denying funds for abortions, however, the government's purpose is to prevent, in the only way available to the state, abortions. It is not a matter of resource allocation because the government is willing to pay for the more expensive medical procedures attendant to childbirth. The purpose of denying funds for abortion while providing funds for childbirth is impermissible: interference with the "free exercise" of indigent women's decision-making authority.

Finally, the Court's analogy to funding of parochial schools is inapt because the government could not constitutionally subsidize parochial education even if it wanted to do so. Government funding of parochial schools would violate the Establishment Clause of the First Amendment.<sup>357</sup> Therefore, the failure to fund parochial schools is not at all similar to the failure to fund abortions. In the former, the state has no choice since it cannot act, whereas in the latter, the state is making an impermissible choice to discourage abortions.

Simply stated, if, as we argue, the Court took the position that abortion is a private moral judgment, it would be impossible to sustain statutes whose purpose was to prevent abortions. When we began working on this Article, we were hopeful that in the near future the Court would reconsider the abortion-funding decisions. We remain hopeful that this will happen, even though it will not happen imminently.

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357. See, e.g., *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646, 653 (1980) (holding that a government school-funding scheme would violate the Establishment Clause if its primary purpose or effect was to advance religion); *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472, 479–82 (1973) (holding that a statute violated the Establishment Clause because it constituted impermissible aid to religion and religious instruction); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (creating the famous three-part *Lemon* test for determining if a statute violates the Establishment Clause—that is, the statute must have a secular purpose, must neither advance nor inhibit religion, and must not excessively entangle government with religion).



C. *Informed Consent Laws and Waiting Periods*

Many states have adopted various types of laws requiring that women be informed of the characteristics of the fetus at the time of abortion.<sup>358</sup> Some have gone so far as to require that a woman have an ultrasound and be shown pictures of the fetus before undergoing an abortion.<sup>359</sup> States have also adopted laws requiring waiting periods before abortions, even though waiting periods of this sort are not required for other medical procedures.<sup>360</sup>

When the Court used strict scrutiny for abortion, it invalidated such requirements. In *City of Akron v. Akron Center for Reproductive Health*,<sup>361</sup> the Court declared unconstitutional a part of a city ordinance that required physicians to inform a woman seeking an abortion about the development of her fetus, that “the unborn child is a human life from the moment of conception,”<sup>362</sup> “the date of possible viability, [and] the physical and emotional complications that may result from an abortion.”<sup>363</sup> The Court said “that much of the information required is designed not to inform the woman’s consent but rather to persuade her to withhold it altogether.”<sup>364</sup> That is, “[b]y insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed ‘obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.’”<sup>365</sup>

Similarly, in *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>366</sup> the Court invalidated a Pennsylvania law that required, in part, that women be given seven different kinds of information at least twenty-four hours before they consent to abortions.<sup>367</sup> This information included telling the woman “that there may be [unforeseeable] detrimental physical and psychological effects” to having an abortion, the possible availability of prenatal and childbirth medical care, and the father’s liability

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358. Scott W. Gaylord & Thomas J. Molony, *Casey and a Woman’s Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 598 (2012) (“[T]en states currently require a woman to have an ultrasound prior to having an abortion . . . . Pursuant to mandatory speech-and-display requirements in each of these states, a woman must have an ultrasound, and the images must be displayed so that she can see them. Moreover, and more controversially, the physician who is to perform the abortion must explain the images, providing a medical description that includes ‘the dimensions of the embryo or fetus’ and ‘the presence of external members and internal organs.’”).

359. *Id.* (noting that at least three states—namely, Texas, North Carolina, and Oklahoma—have enacted such stricter ultrasound requirements).

360. Samantha Allen, *6 in 10 Women Now Subjected to Abortion Waiting Period Laws*, DAILY BEAST (Feb. 29, 2016, 11:01 PM), <http://www.thedailybeast.com/articles/2016/03/01/6-in-10-women-now-subjected-to-abortion-waiting-period-laws.html> [<https://perma.cc/2BXL-GB5L>].

361. 462 U.S. 416 (1983).

362. *Id.* at 444 (internal citations omitted).

363. *Id.* at 442.

364. *Id.* at 444.

365. *Id.* at 445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)).

366. 476 U.S. 747 (1986).

367. *Id.* at 760.

to pay child support.<sup>368</sup> Also, the physician had to inform the woman of the availability of printed materials that describe the “anatomical and physiological characteristics of the [fetus] at two-week gestational increments.”<sup>369</sup> The Court said that, as in *Akron*, the Pennsylvania law was unconstitutional because it was motivated by a desire to discourage women from having abortions and because it imposed a rigid requirement that a specific body of information be communicated regardless of the needs of the patient or the judgment of the physician.<sup>370</sup>

In *Casey*, however, the Court upheld a provision virtually identical to that invalidated in *Thornburgh*. The joint opinion said:

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the [abortion] procedure, the attendant health risks and those of childbirth, and the “probable gestational age” of the fetus, those cases . . . are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.<sup>371</sup>

Specifically, the Court upheld a section of the statute that required that women be told information about the health risks of abortion and childbirth, be informed of the availability of other materials that describe the fetus, and be provided information about medical care for childbirth and a list of adoption providers.<sup>372</sup>

The shift from *Akron* and *Thornburgh* to *Casey* reflects the Court’s abandonment of strict scrutiny and the position that the state may not regulate abortions in a way to encourage childbirth. Such requirements are undoubtedly motivated by the state’s desire to discourage abortion. This purpose is impermissible because, as explained earlier, the state must take a neutral position on the abortion issue. Laws with the purpose and effect of discouraging abortion are unconstitutional. Recognizing abortion as a private choice for each woman would mean that the “informed consent” and waiting-period laws are unconstitutional.

## Conclusion

The issue of abortion obviously is not going away. The election of Donald Trump as President and the Justice—perhaps Justices—he will appoint to the Supreme Court mean that there soon could be a Court that will reconsider *Roe v. Wade*. We write this fearful that a right that has existed for over forty years, and that generations of women have relied on and even taken

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368. *Id.* at 760–61.

369. *Id.* at 761.

370. *Id.* at 762.

371. *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992).

372. *Id.* at 881, 887 (“The informed consent requirement is not an undue burden on that right.”).

for granted, may cease to exist. We are mindful of what that would mean for women's lives, especially for poorer women and for teenagers.

Abortion can be examined from countless perspectives. Ours is from the perspective of constitutional law. We believe that *Roe* was unquestionably correct in its conclusion and that subsequent cases—such as those shifting to the undue burden test and upholding restrictions on abortion—were misguided. All of this, we believe, is made clearer if abortion is regarded under the Constitution as a private choice for each woman.