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INSTITUTIONAL INTEGRITY AND RESPECT FOR PRECEDENT: DO THEY FAVOR CONTINUED ADHERENCE TO AN ABORTION RIGHT?

MICHAEL F. MOSES*

INTRODUCTION

This year marks the 40th anniversary of *Roe v. Wade*.¹ In 1992, at roughly the midpoint of its forty-year history with abortion, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* substantially modified *Roe* by a 7–2 vote.² Four Justices would have overruled *Roe* altogether.³ In a joint opinion, three other Justices rejected *Roe*'s conclusion that abortion is a fundamental right, rejected *Roe*'s use of strict scrutiny, rejected *Roe*'s trimester framework, and expressly overruled cases that had used that framework to invalidate abortion statutes.⁴ The authors of the joint opinion nonetheless voted to retain the rule, announced in *Roe*, forbidding a pre-viability ban on abortion.⁵ Their retention of *Roe*'s viability rule was not based on a conclusion that *Roe* was correctly decided as an initial matter (a

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1. *Roe v. Wade*, 410 U.S. 113 (1973). Reference in this article to the “abortion right” is shorthand for the right to an abortion announced in *Roe*. It should not be taken as a concession that there is such a right.

2. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

3. *Id.* at 944 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part); *id.* at 979 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., concurring in the judgment in part and dissenting in part).

4. *Id.* at 873–76, 878, 881–83, 885. The overruled cases were *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

5. *Casey*, 505 U.S. at 846 (joint opinion of O'Connor, Kennedy and Souter, JJ.). *Roe* also forbids an abortion ban *after* viability when “necessary” to preserve a woman’s life or “health.” *Roe*, 410 U.S. at 164–65. The Court has never clarified, and it has declined the invitation to clarify, what that means. See *Voinovich v. Women’s Med. Prof’l Corp.*, 523 U.S. 1036 (1998) (denying petition for certiorari); *id.* at 1036 (Thomas, J., dissenting from the denial of certiorari).

question on which they expressly and repeatedly reserved judgment),⁶ but was said to rest on respect for precedent (*stare decisis*) and the interest in preventing a loss of public confidence in the judiciary.⁷

This article considers whether either consideration supports continued adherence to an abortion right, whether at viability or any other stage of pregnancy.

I. DOES THE SUPREME COURT'S TREATMENT OF ABORTION CONSTITUTE A STABLE BODY OF PRECEDENT?

Two peculiarities mark the *Casey* joint opinion's treatment of *stare decisis*.

In the first place (and in tension with its lengthy treatment of *stare decisis*), the authors of the joint opinion actually end up rejecting much of *Roe*. This inconsistency is compounded by the fact that the parts of *Roe* that *Casey* retains *depend* upon the parts it rejects. Once abortion is abandoned as a fundamental right, as *Casey* does,⁸ it logically ceases to receive substantive due process protection.⁹ *Casey* thus left in place a conclusion (that there exists a constitutionally-based abortion right), but set aside a pre-

and stating that the Court should clarify what post-viability abortion restrictions are permissible under *Casey*).

6. *Casey*, 505 U.S. at 853, 861 (referring to the "reservations" and "whatever degree of personal reluctance any of us may have" in reaffirming *Roe*); *id.* at 869 (stating that a decision to overrule *Roe* "would address error, if error there was," without deciding whether *Roe* was erroneously decided); *id.* at 871 ("We do not need to say whether each of us, had we been Members of the Court" when *Roe* was decided, "would have concluded, as the *Roe* Court did, that [states may not] ban . . . abortions prior to viability The matter is not before us in the first instance, and . . . we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding."). While declining to say that *Roe* was correctly decided, the joint opinion nonetheless devotes some attention to whether and how *Roe* fits within the Court's previous decisions on substantive due process, *id.* at 846–53, a matter that I take up in Part II.

7. *Id.* at 854–70.

8. *See id.* at 878–79; *id.* at 954 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (commenting on the plurality's rejection of abortion as a fundamental right subject to strict scrutiny).

9. *See Washington v. Glucksberg*, 521 U.S. 702 (1997) (determining that assistance in committing suicide should not receive substantive due process protection because it is not a fundamental right); *Casey*, 505 U.S. at 847 (stating that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States") (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurring opinion)). The Court also asks whether the protected interest is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

mise essential to that conclusion (that abortion is a fundamental right).

“As a general rule,” the Justices have told us, “the principle of *stare decisis* directs [the Court] to adhere not only to the *holdings* of [its] prior cases, but also to their *explanations* of the governing rules of law.”¹⁰ Thus, in contrast to “the English system, which historically has been limited to following the results or disposition” of a case, the American system of *stare decisis* is “based on adherence to both the reasoning *and* the result of a case, and not simply to the result alone.”¹¹ By rejecting *Roe*’s fundamental-rights rationale, *Casey* adheres to a result but abandons the reasons for it, leaving the abortion right as a kind of Potemkin village.

A second peculiarity in *Casey*’s use of *stare decisis* concerns the identification of what precisely is to be upheld. *Stare decisis* assumes the existence of stable precedent—otherwise there is nothing to which one can accord *stare decisis* effect or, rather, one is left to pick and choose among inconsistent precedent. But on what basis is one to make that selection? If past decisions do not line up, if they contradict one another, if they do not constitute a coherent whole, then the question arises as to which decision is normative and which is not. The whole point of *stare decisis* is to avoid an outcome in which a court adopts an entirely new standard each time it decides an issue. That commendable purpose is thwarted if what is asserted as precedent is, in fact, a series of inconsistent decisions all vying with each other. Admittedly there is some refinement of constitutional law over time as courts confront new issues and reconsider old ones. But constitutional interpretation never reaches the point of stability and predictability that *stare decisis* envisions if it changes course with virtually every new decision.

Yet instability and unpredictability are among the most salient characteristics of the Court’s abortion jurisprudence. Those Justices holding to a constitutional abortion right have not agreed on matters as basic as its source, its scope, what rules govern its treatment, or how any given rule should be applied. On the contrary, the judicially-crafted rules on abortion have shifted, often substantially, with virtually each new major case. A rule announced in one case is often ignored or supplanted without explanation in the same case or in later cases.

10. *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added).

11. *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 692 (3d Cir. 1991) (emphasis added), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992).

A few examples, which follow, illustrate the point.

A. *The Roe Case*

Roe announced that the interest in maternal health did not justify *any* regulation in the first trimester because abortion, the Court claimed, was at that time safer than childbirth.¹² Even if one accepts the claim, the explanation plainly does not support the conclusion. “[J]ust because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth,” Justice O’Connor would later note, “it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.”¹³ Barring all first trimester safety regulations based on a finding that abortion is safer than childbirth is like barring regulation of air travel because it is safer than ground transportation.

In any event, the Court began violating the first-trimester rule the very day, and in the very case, in which it was announced. *Roe* indicated that the state, at *any* stage of pregnancy, could require that abortion be performed only by a licensed physician.¹⁴ At the same time, *Roe* cited the qualifications and licensure of the abortion practitioner as examples of what the state could permissibly regulate only *after* the first trimester.¹⁵

Roe repeatedly described abortion not principally as a *woman’s* decision, but rather as her *doctor’s* decision.¹⁶ Justice Blackmun’s real motive in writing *Roe*, it was said, was “getting the law off the backs of physicians.”¹⁷ Framing the issue this way

12. *Roe*, 410 U.S. at 163–64.

13. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 460 (1983) (O’Connor, J., dissenting).

14. *Roe*, 410 U.S. at 165. *Roe* also indicated that an abortion practitioner who “abuses the privilege of exercising proper medical judgment,” *i.e.*, who commits medical malpractice, at any stage of pregnancy, was subject to the “usual remedies, judicial and intra-professional.” *Roe*, 410 U.S. at 166. Judicial remedies and professional discipline are, of course, forms of state regulation designed to serve the patient’s health.

15. *Id.* at 163.

16. “[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision,” the Court wrote, “and basic responsibility for it must rest with the physician.” *Id.* at 166. “[T]he abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.” *Id.* at 164. It was the “attending physician, in consultation with his patient,” who was “free to determine . . . that, in his medical judgment, the patient’s pregnancy should be terminated.” *Id.* at 163.

17. George J. Annas, *The Limits of Law at the Limits of Life: Lessons from Cannibalism, Euthanasia, Abortion, and the Court-Ordered Killing of One Conjoined*

is perhaps what led Chief Justice Burger to conclude that the majority, which he joined, had *not* endorsed abortion on demand.¹⁸ The characterization of the abortion right in terms primarily of the doctor—and only secondarily the woman—would flip the other way in later cases.¹⁹

Roe was equivocal about the source of the abortion right. The “right of privacy,” the Court wrote,

whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.²⁰

Roe’s conclusion that abortion was founded in the Due Process Clause relies upon decisions that are easily distinguishable from abortion.²¹ Likewise, as a surgical procedure, abortion has little to do with privacy.²² Medicine *per se* is not “private” in any constitutionally meaningful way, nor is it immune from government regulation.

B. *The Doe Case*

In *Doe v. Bolton*, decided the same day as *Roe*, the Court struck down a Georgia statute requiring that abortions be per-

Twin to Save the Other, 33 CONN. L. REV. 1275, 1277 (2001). In *Roe*, Justice Blackmun, a former general counsel to the famed Mayo Clinic in Rochester, Minnesota, “seemed more concerned about preventing legislatures from interfering with medical practice than about expanding the rights of women.” *Id.* Justice Ginsburg has made somewhat similar observations. Ruth Bader Ginsburg, *James P. White Lecture on Legal Education*, 40 IND. L. REV. 479, 489 (2007) (“*Roe* was concerned as much about the freedom of doctors to practice their profession without government interference as about a woman’s choice.”).

18. *Roe*, 410 U.S. at 207–08 (Burger, C.J., concurring).

19. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 420 n.1 (1983) (stating that it is the woman herself who has “a fundamental right to make the highly personal choice whether or not to terminate her pregnancy”), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *City of Akron*, 462 U.S. at 429–30 (Until the end of the first trimester, “a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision ‘free of interference by the State.’”) (emphasis added). The physician’s role was merely to “assist[] the woman in the decisionmaking process” and to “implement[] her decision should she choose abortion.” *Id.* at 427 (emphasis added).

20. *Roe*, 410 U.S. at 153.

21. See *infra* notes 85–97 and accompanying text.

22. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”).

formed only in accredited, licensed hospitals, and only after the concurrence of two other examining physicians and a hospital review committee.²³ *Roe* noted that the *Doe* and *Roe* opinions were “to be read together.”²⁴

The *Doe* opinion, read alongside *Roe*, is inscrutable. Though *Roe* calls for a trifurcated analysis, the Court in *Doe* applied the trimester rules either not at all or not in the manner *Roe* prescribed. *Doe* concluded, for example, that Georgia had failed to prove that “only the full resources of a licensed hospital” furthered maternal health and, on that basis, struck down the hospitalization requirement “because it fails to exclude the first trimester”²⁵ Of course, if regulation to further maternal health were permissible only after the first trimester, as *Roe* held, one wonders why, as to the first trimester, such proof would have even been relevant. As applied to subsequent stages of pregnancy, *Roe* would seem to demand upholding the hospitalization and other requirements because they seem at least “reasonably related” to maternal health. Yet all the requirements were struck down in their entirety and without regard to the stage of pregnancy. In striking down the requirement of committee review, for example, the Court did not allude to the rule permitting regulation reasonably related to maternal health after the first trimester. The Court found that the two-physician concurrence requirement had “no rational connection with a patient’s needs,”²⁶ but it seems obvious that second opinions have at least a *rational* connection with patient health. Thus, what the Court said in *Roe* and what it did in *Doe* are irreconcilable.

C. *The Danforth Case*

In 1976, without reference to the trimester rules, the Court upheld a Missouri law, applicable throughout pregnancy, requiring informed consent and the maintenance of certain records.²⁷ Thus, contrary to what *Roe* actually said, the Court in practice permitted some regulation of abortion in the first trimester—but under what standard remained unclear. Justice O’Connor would correctly read the case, *Planned Parenthood v. Danforth*, as “a retreat from the position ostensibly adopted in *Roe* that the State

23. *Doe v. Bolton*, 410 U.S. 179 (1973).

24. *Roe*, 410 U.S. at 165.

25. *Doe*, 410 U.S. at 195.

26. *Id.* at 199.

27. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

had no compelling interest in regulation during the first trimester”²⁸

The *Danforth* Court also struck down, in their entirety, laws requiring spousal and parental consent. In doing so, the Court did not use the trimester test; instead it used a balancing test. As to spousal consent, the Court concluded that “[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.”²⁹ As to parental consent, the Court wrote that “[a]ny independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.”³⁰ Thus with a single stroke, and without applying the rules previously announced in *Roe*, the Court removed any role on the part of fathers and grandparents in the decision whether the lives of, respectively, their unborn children and grandchildren, may be deliberately ended. That result is hard to square with court decisions according constitutional protection to marital and familial relationships.³¹

Finally, and again without reference to the trimester rules announced in *Roe*, *Danforth* struck down a Missouri law that banned a method of abortion known as saline amniocentesis after the first trimester.³² Given the evidence of safer alternative abortion procedures,³³ it would seem beyond dispute that the ban on this now-outdated abortion procedure was at least “reasonably related” to maternal health.

D. *The Akron Case*

A decade after *Roe*, in *City of Akron v. Akron Center for Reproductive Health*,³⁴ the Court, without explanation, introduced modifications to the first and second trimester tests.

28. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 460 n.6 (1983) (O’Connor, J., dissenting).

29. *Danforth*, 428 U.S. at 71.

30. *Id.* at 75.

31. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

32. *Danforth*, 428 U.S. at 75–79.

33. *Id.* at 76–77.

34. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), overruled by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

The Court made no attempt to deny, as earlier cases had, that regulation was permissible during the first trimester. The Court conceded that such regulation is permissible, but only if it (a) has “no significant impact” on the woman’s exercise of her right to have an abortion and (b) is justified by “important state health objectives.”³⁵ The Court warned, however, that “even these minor regulations” (i.e., regulations having no “significant” impact) “may not interfere with physician-patient consultation or with the woman’s choice between abortion and childbirth.”³⁶ Again, as formulated, the rule was seemingly absolute: *any* interference with physician-patient dialogue or the woman’s choice, no matter how slight, would render a regulation invalid during the first trimester. The Court did not explain the basis for the modification, or even acknowledge that it was making a change.

A second change introduced by *Akron* concerned the test for evaluating regulations applicable after the first trimester. During the second trimester, the Court wrote, a regulation must be “reasonably relate[d]” to preserving maternal health (the standard announced in *Roe*) and must not depart from “accepted medical practice” during “a substantial portion of the second trimester.”³⁷ The Court made no attempt to justify this departure from *Roe*. The new test was plainly more rigorous than the mere rationality review for second-trimester regulations adopted in *Roe*. Indeed, to say that regulations cannot depart from “accepted medical practice” is to give the subject of the regulation a kind of veto power over regulators, as it prevents government from requiring physicians and other health care providers to do anything more than, or different from, what they already do.

Having announced these new rules, the Court proceeded at once to ignore them. *Akron* invalidated a requirement, applicable through all stages of pregnancy, that the physician (as opposed to someone else) provide the patient with information about the risks of pregnancy and abortion, post-abortion care, and other information relevant to whether to have an abortion. “[M]uch, if not all” of this information, the Court concluded, “could be given by a qualified person assisting the physician.”³⁸ There is no “vital . . . need” for the physician personally to provide this information, the Court concluded.³⁹ As Justice O’Connor recognized in her dissenting opinion, this begs the question whether the physician-only requirement was reasonably related to important

35. *City of Akron*, 462 U.S. at 430.

36. *Id.*

37. *Id.* at 430–31, 434.

38. *Id.* at 445 n.37.

39. *Id.* at 448.

state objectives, as it surely was.⁴⁰ The state could reasonably have concluded that a physician is in a *better* position than a non-physician to provide a woman contemplating an abortion with information about the procedure and to answer her questions. Striking the requirement down seems at cross purposes with *Roe*, especially given the latter's concern about protecting the *physician-patient* relationship.⁴¹

The Court likewise struck down a requirement that abortions after the first trimester be performed in hospitals. That requirement, as Justice O'Connor noted, is reasonably related to protecting maternal health "under any normal understanding of what 'reasonably relates' signifies," but the majority had again "fail[ed] to apply" that standard.⁴²

E. *The Thornburgh Case*

By 1986, Chief Justice Warren Burger, who had joined the majority in *Roe* based on his understanding that the decision permitted abortion to be regulated for the purpose of advancing important state interests, had had enough. That year, in *Thornburgh v. American College of Obstetricians and Gynecologists*,⁴³ a majority struck down a Pennsylvania law requiring that a woman be informed of medical risks associated with abortion and of the availability of state-funded alternatives. *Thornburgh* also struck down a law requiring care of a viable child that survives an abortion. Dissenting, the Chief Justice observed that these laws serve the state's interest in protecting maternal health, ensuring informed consent, and protecting a viable child—all plainly within the state's authority under *Roe*.⁴⁴ If this is what *Roe* means, the Chief Justice wrote, then "I agree we should reexamine *Roe*."⁴⁵

40. See *id.* at 471 n.15 (O'Connor, J., dissenting) (noting that the Court "inexplicably refuses to determine" whether the informed consent requirement "reasonably relates to legitimate state interests") (internal quotation marks omitted).

41. See *supra* notes 16–17 and accompanying text.

42. *City of Akron*, 462 U.S. at 467 n.11 (O'Connor, J., dissenting).

43. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1983), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

44. *Thornburgh*, 476 U.S. at 782–85.

45. *Id.* at 785.

F. The “Undue Burden” Test

Lest one think *Casey* brought resolution and calm to this sea of confusion, consider the more recent innovations that *Casey* introduced and the disunity it produced in the Court.

The *Casey* plurality endorsed a test, entirely novel to substantive due process cases, in which a law was said to be unconstitutional if it unduly burdened the choice whether to have an abortion.⁴⁶ But what sort of burden is “undue?” That term, like the term “unconstitutional,” seems more a conclusion than a test. The authors of the joint opinion elaborate that a burden is “undue” if it places a “substantial obstacle” on the abortion decision, but that seems to replace one general term with an equally general one.⁴⁷ It still does not get us close to understanding what sort of burden is unconstitutional in a way that can be uniformly applied in subsequent cases.

Given the indeterminacy and malleability of the undue burden test, it is not surprising that the Justices who authored the plurality opinion in *Casey* were themselves unable to reach agreement—indeed they were on opposite sides—when the Court tried to apply that test in two later cases involving the constitutionality of laws banning partial birth abortion (“PBA”).

The first case (“*Carhart I*”) struck down a Nebraska law prohibiting PBA.⁴⁸ The majority, joined by Justices O’Connor and Souter, who had been in the *Casey* plurality, claimed its decision was a “straightforward” application of *Casey*.⁴⁹ But Justice Kennedy, the third member of the *Casey* plurality, concluded that the Court had deviated from *Casey*.⁵⁰

The second case (“*Carhart II*”) upheld a federal law banning PBA.⁵¹ The majority, in an opinion authored by Justice Kennedy, claimed it was following *Casey*.⁵² Justice Souter joined a dissenting opinion, concluding that the majority had deviated from *Casey*.⁵³ (Justice O’Connor by this time had retired from the Court.)

These cases, involving similar statutes but starkly different results, illustrate the difficulty of applying *Casey*’s undue burden

46. *Casey*, 505 U.S. at 874–79.

47. *Id.* at 877.

48. *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914 (2000).

49. *Id.* at 938.

50. *Id.* at 956–79 (Kennedy, J., dissenting).

51. *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124 (2007).

52. *Id.* at 145–46.

53. *Id.* at 169–71 (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting).

test, even on the part of those Justices who devised that test, and raise questions about the test's workability.

G. *The Viability Rule*

Casey reaffirmed *Roe*'s rule forbidding a ban on abortion performed before viability, or after viability if undertaken for reasons of maternal health. Individual Justices, including a member of *Casey*'s plurality, had previously concluded that drawing a constitutional line at viability is entirely "arbitrary."⁵⁴ Viability, of course, is not a legal or biological concept. Viability simply means the point at which an unborn child, given the present state of medical technology, can live outside his or her mother's womb. Thus, under *Casey* as under *Roe*, the unborn child's legal status, rather illogically, depends on the contemporaneous state of medical technology. But from the sheer accident of whether medicine can or cannot prolong a child's life, it does not follow that the state has no interest in protecting his or her life before that point.⁵⁵ To date, the Court has given no reasoned explanation for why it selected viability as the crucial line for determining when an abortion must be allowed.

H. *The Role of Experts*

Carhart I announced that if experts were divided about the safety of an abortion procedure, then the government was constitutionally forbidden to ban it.⁵⁶ This rule cannot be derived from *Casey* and is contrary to how the Court ordinarily treats government regulation. In general, the government is not barred from regulating drugs, the environment, or product safety simply by virtue of the fact that experts disagree over the propriety and effect of the regulation. Were it otherwise, any industry could avoid regulation simply by producing some experts to testify in its favor.

Carhart II returned to the common sense notion that a legislature's hands are not tied by disagreement among experts.⁵⁷ It is precisely the function of government to evaluate competing expert views and make regulatory decisions. On this point, *Car-*

54. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting).

55. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973) (*Roe*'s adoption of the viability rule "seems to mistake a definition for a syllogism"), quoted in *Thornburgh*, 476 U.S. at 794–95 (White, J., dissenting).

56. *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914 (2000).

57. *Carhart II*, 550 U.S. at 124.

hart II unmistakably overrules *Carhart I*, but without saying so explicitly.⁵⁸ The *Carhart II* dissenters correctly identify this “undisguised conflict” between the two cases.⁵⁹

I. The “Large Fraction” Test

The plurality in *Casey* struck down a spousal notice law because, in its view, a “large fraction” of women seeking abortions who did not wish to notify their husbands would be unduly burdened by it. The plurality gave no explanation for the source of its “large fraction” test;⁶⁰ nor did it explain, in the facial challenge presented, why the spousal notice law should not have been upheld under the traditional rule for facial challenges.⁶¹

Carhart II did not resolve the long-unsettled question whether facial challenges to abortion laws, to succeed, must satisfy the “large fraction” test or the “no . . . circumstances” test.⁶² However, the majority in that case concluded that *if* the former is the correct test, then the challenged law must be measured *against the entire universe of women for whom doctors propose to use the banned procedure*.⁶³ The dissenters, by contrast, claimed that the facial validity of any abortion law should be decided by looking *only at those women for whom the law poses a medical risk*, thereby presumably rendering facially unconstitutional an abortion law that creates a medical risk for anyone.⁶⁴ The majority and dissenting opinions in *Carhart II* are inconsistent with each other, and neither is easy to square with *Casey*. The Court to date has

58. *Id.*

59. *Id.* at 179.

60. In addition, it is not clear how large the fraction must be, or how one would prove that some specified fraction of women were unduly burdened by an abortion regulation. Those problems seem inherent in the test. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 973 n.2 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (stating that the joint opinion’s conclusion about how many women are “unduly burdened” by the challenged spousal notification provision “is not based on any hard evidence,” but on speculation, and that “reliance on such speculation is the necessary result of adopting the undue burden standard”).

61. Under that rule, a facial challenge cannot succeed unless there is no set of circumstances in which the challenged law can be constitutionally applied. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

62. Indeed, the Court said it “need not resolve” that question to decide the case. *Carhart II*, 550 U.S. at 167. Fifteen years earlier, the Court had likewise declined an invitation to consider the question. *Ada v. Guam Soc’y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (denying petition for certiorari); see *id.* at 1011 (Scalia, J., dissenting from denial of petition and arguing that the lower court should have applied the *Salerno* test).

63. *Carhart II*, 550 U.S. at 168.

64. *Id.* at 187–89.

not settled which test applies, and has yet to agree on how the various tests work.

To its credit, *Carhart II* concluded that the jurisprudential rules that apply in every other context should apply in abortion cases too.⁶⁵ But the disclaimer is ironic. Were the Court truly to subject abortion to a set of generally applicable rules, it would have to reject the abortion right altogether, as the next section argues. Invariably, the Court's abortion decisions continue to distort traditional rules, typically with no explanatory principle or rationale as to when a particular rule should or should not apply. In turn, this practice (one cannot call it a pattern because it is precisely the absence of a pattern) renders the Court susceptible to a charge that its opinions in abortion cases are, at bottom, driven by desired results. That the abortion right, from its inception, has wandered in new directions with each new case suggests that *Casey* does not achieve the resolution the plurality sought.

II. WAS ROE CORRECTLY DECIDED AS AN INITIAL MATTER?

The question that *Casey* expressly declines to consider, but that seems essential to any discussion of whether the Court should continue to adhere to an abortion right, is whether *Roe* was correctly decided as an initial matter. In 1997, the Supreme Court reiterated the applicable test for deciding whether a right not enumerated in the constitutional text is constitutionally protected:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” . . . and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest.⁶⁶

Abortion fails this test. *Roe* attempted at some length to prove that proscriptions on abortion were a “recent” development in Western and American law,⁶⁷ but subsequent scholarship has demonstrated conclusively that acceptance of abortion is not in any sense deeply rooted in the Nation’s history and tradi-

65. *Id.* at 153–54, 163–64.

66. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted).

67. *Roe*, 410 U.S. at 129, 140–41.

tions. The opposite is true: it is the *prohibition* of abortion that has deep roots in English and American history. Joseph Dellapenna has produced a comprehensive study of the law of abortion in England and America from the beginning of the common law to the present.⁶⁸ He concludes that “[t]he tradition of treating abortion as a crime was unbroken through nearly 800 years of English and American history until the ‘reform’ movement of the later twentieth century.”⁶⁹ Dellapenna cites several thirteenth and fourteenth century cases in which criminal charges were brought against a defendant who had caused the death of a woman’s unborn child, and none of the cited cases indicate any deficiency in the charge based on the stage of pregnancy.⁷⁰ One case, decided around 1280, involved a child of about a month’s gestation and of uncertain gender at the time of death.⁷¹ “Tellingly,” Dellapenna writes, “none of the defendants made an issue of the gestational age of the dead child.”⁷² Despite the suggestion by some modern commentators that these early cases involved crimes against the mother, “even the usually terse language of the plea rolls demonstrates a focus on the unborn child itself, with the child’s death repeatedly recited as the crime and not treated as a mere incident to a crime against the mother.”⁷³ Significantly, this was at a time when “even a serious battery of a woman without her death would not have been indictable as a felony.”⁷⁴

During the subsequent reign of the first two Tudor kings (1485–1547), there were at least ten prosecutions for abortion in the ecclesiastical courts—courts whose authority, like that of other courts at the time, was derived from the Crown.⁷⁵ Eight of those cases involved attempted abortion by ingesting a foreign substance, “removing any doubt about whether such abortions were included within the proscription of abortion already evident in the earlier cases”⁷⁶ As early as 1505, records appear

68. JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006). Dellapenna builds on the work of Philip Rafferty and others. See PHILIP A. RAFFERTY, *ROE V. WADE: The Birth of a Constitutional Right* (1993).

69. DELLAPENNA, *supra* note 68, at xii.

70. *Id.* at 135–41.

71. *Id.* at 140. The case is *Rex v. Code*, JUST 1/789, m.17 (Hampshire Eyre 1281).

72. *Id.*

73. *Id.* at 142.

74. *Id.* at 142–43.

75. *Id.* at 176; see also *id.* at 170 (concerning the derivation of the courts’ authority).

76. *Id.* at 176.

of a common law proceeding based on a voluntary ingestion abortion.⁷⁷

“There is little room to doubt,” Dellapenna continues, “that after 1563, if not before, the law courts took primary responsibility for abortions of all types and that abortion was unequivocally treated as a crime in the law courts.”⁷⁸ A case involving voluntary abortion through ingestion of poison, decided toward the end of Elizabeth I’s reign, belies the notion that abortion was only a crime when non-consensual.⁷⁹ After Elizabeth’s death, “English courts prosecuted abortions fairly routinely under the early Stuarts, Cromwell’s Commonwealth, and the Restoration.”⁸⁰ “[B]y the close of the seventeenth century, the criminality of abortion under the common law was well established. Courts had rendered clear holdings that abortion was a crime, no decision indicated that any form of abortion was lawful, and secondary authorities similarly uniformly supported the criminality of abortion.”⁸¹

Dellapenna identifies a similar tradition in America beginning with colonial times and closing with *Roe* in the late twentieth century. After identifying several criminal prosecutions for abortion in the American colonies, he concludes that “the English law regarding abortion was fully received in the colonies,”⁸² and that “[a]ny supposed ‘common law liberty of abortion’ is as mythical on this side of the Atlantic as on the other side.”⁸³ By the early nineteenth century, state legislatures, like Parliament, had begun codifying these restrictions.⁸⁴

If, as Dellapenna’s research demonstrates, abortion is not grounded in history and tradition—which is essential if it is to qualify for substantive due process protection—can it somehow be shoehorned into the Constitution by likening it to other per-

77. *Id.* at 177–78. The case is *Lex v. Lichefeld*, K.B. 27/974, Rex m.4 (1505).

78. *Id.* at 183.

79. *Id.* at 193. The case is *Regina v. Webb*, ASSI 35/44/7 m.18 (1602), in *SURREY INDICTMENTS*, Eliz. I, at 512 (no. 3146) (J. Cockburn ed. 1980).

80. DELLAPENNA, *supra* note 68, at 194 & nn. 84–86, and cases cited therein.

81. *Id.* at 200.

82. *Id.* at 228.

83. *Id.* at 220.

84. *Id.* at 266, 268–303; *see also* Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 107–108 (1993) (compiling antebellum American statutes banning abortion). Also mistaken is *Roe*’s assertion that nineteenth century statutes banning abortion were intended to protect maternal health rather than protect prenatal life. *Id.* at 109–19.

sonal decisions that have been accorded constitutional protection under the Due Process Clause? *Roe* attempted to do that. It compared abortion to decisions regarding marriage and parenthood that have long been held to enjoy constitutional protection.⁸⁵ But the analogy overlooks obvious and critical differences between those decisions and the decision to have an abortion. *Roe* itself conceded that the situation of the pregnant woman “is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education” with which the Court’s earlier decisions had been concerned.⁸⁶ Moreover, by fashioning an abortion right that can be exercised unilaterally on the part of the mother, *Roe* undermines the very marital and familial rights upon which that decision purported to be based.

Today, under *Casey*, a woman’s husband has no right to participate in, or even be informed of, her decision to abort their unborn child—and legislation requiring such notice, the Court has indicated, cannot pass constitutional muster.⁸⁷ Likewise, any right parents may have to participate in, or even be informed of, health care decisions regarding their minor daughter essentially disappears once the issue turns to abortion. In a series of cases decided after *Roe*, the Court has insisted that minors be given the opportunity to secure *judicial* approval instead of *parental* involvement, a result that seems to assume that government is in a better position than a girl’s own parents to counsel and aid her.⁸⁸ Thus, far from bearing any kinship to recognized constitutional protections for marriage and family, *Roe* positively erodes marital and familial interests that are themselves deeply rooted in American history and tradition.⁸⁹

85. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

86. *Id.* at 159. The fundamental right to bear children upon which the Court relied is, of course, diametrically opposed to the right to destroy one’s child, born or unborn. For example, *Roe* is a universe away from the Court’s past invalidation of state involuntary sterilization laws, declaring that “[m]arriage and procreation are fundamental to the very existence and survival of the race.” *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

87. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–98 (1992).

88. *See, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion); *Bellotti v. Baird*, 428 U.S. 132 (1976).

89. These are not the only legal anomalies created by the abortion right. Certain types of abortion, such as those based on the unborn child’s sex or disability, seem in tension with the law’s treatment elsewhere of discrimination based on gender and disability. *See generally* *United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The right of abortion has also had a racially disparate effect. *See The National Impact, TOO MANY ABORTED*, <http://www.toomanyaborted.com/truth-in-black-and-white/the-national-impact/> (last visited Apr. 8, 2013) (noting that African-Americans

Marital and familial interests are not the only areas of constitutional law in which *Roe* has had a corrosive effect. The right announced in *Roe* and reaffirmed in *Casey* has become a vehicle for upsetting traditional protections for conscience and even the right to life of born persons. If the debate once concerned a woman's "choice" whether to have an abortion, it has now become, in the rhetoric of the abortion industry, about an entitlement to "access."⁹⁰ Over the decades, pressure to choose to perform or fund abortion has led, as a necessary rear-guard action, to the enactment of laws to protect the rights of governments, individuals, and organizations to choose not to participate in or pay for abortion,⁹¹ but the pressure to participate in abortion has not abated.⁹² *Casey*'s unusually expansive statement about a "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" has been cited as an authority for other "personal" decisions that fall wide of any historical marker, including aid in committing suicide.⁹³

Can *Roe* be defended by characterizing abortion as inherent in the right to "bear or beget a child"?⁹⁴ That phrase originates in cases in which the government *prevented* people from having children⁹⁵ or interfered with the decision not to *become* pregnant,⁹⁶ which is different from protecting an unborn child in an established pregnancy. Moreover, the phrase "bear and beget a child" does not satisfy the need, emphasized in *Glucksberg*, for a careful description of the conduct for which constitutional protection is sought. On this point, *Glucksberg* itself is illustrative. Proponents of a constitutional right to assisted suicide had characterized suicide as the right to determine "the time and manner of one's death," the right to "die," the right to "choose how to die," the right to "control . . . one's final days," and the right "to

represent about 12.2% of the U.S. population, but account for 30% of all abortions nationwide) (citing *Facts on Induced Abortion in the United States*, GUTTMACHER INST., http://www.guttmacher.org/pubs/fb_induced_abortion.html#6) (last visited Apr. 8, 2013).

90. See, e.g., Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 FORDHAM URB. L.J. 783 (2004).

91. See, e.g., Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 507(d), 125 Stat. 786, 1111-12 (2012) (forbidding government discrimination against individual and institutional health care entities on the basis that they do not provide, refer for, or pay for abortions).

92. See, e.g., *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010).

93. *Compassion in Dying v. Washington*, 79 F.3d 790, 813 (9th Cir. 1996), *rev'd*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

94. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

95. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

96. *Eisenstadt*, 405 U.S. at 453.

choose a humane, dignified death.”⁹⁷ The Court rejected all such rhetorical sleight of hand, insisting on a careful description of the conduct at issue.

One last factor animating *Roe* warrants extended consideration because it has been a subject of much commentary. *Roe* concluded that requiring a pregnant woman to carry her child to term could have detrimental consequences for the woman. Devoting no more than a single paragraph to this issue, the Court wrote:

Specific and direct harm medically diagnosable even in early pregnancy may be involved. 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, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.⁹⁸

Given the lack of historical grounding for the abortion right, one wonders why the burdens described in this passage are not, in the first instance, legislative rather than constitutional questions. In any event, the quoted passage is remarkable for many reasons. First, it is clear that the Court conflated two distinct sets of consequences—one dealing with pregnancy and childbirth, the other with parenting.⁹⁹ The Court made no attempt to distinguish these sets of consequences from each other, to determine how often any particular detrimental consequence actually occurs or with what degree of severity, or to determine what other outcomes, positive or negative, may be associated with them. Second, the Court did not explore whether alternative means exist to prevent or ameliorate the problems it identified. Third, the Court did not consider whether abortion itself might have negative consequences or create problems of a larger

97. *Glucksberg*, 521 U.S. at 722 (citations omitted).

98. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

99. *Casey* makes similar but abbreviated references to burdens associated with pregnancy and parenting. 505 U.S. 833, 852 (1992) (“The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.”); *id.* at 853 (referring to “the inability to provide for the nurture and care of the infant” as a “cruelty to the child and an anguish to the parent”).

dimension than the ones it was claimed to solve. Fourth and most strikingly, the Court cited no evidence upon which to draw any conclusion as to any claimed burden, whether arising from pregnancy, childbirth, or parenting. The Court's one-paragraph assessment in this regard is entirely conclusory and speculative. Fifth, the Court does not explain why the risk of an adverse consequence should justify the much broader right to take the life of the unborn child for *any* reason (whether related to maternal health or not) before viability.

There is no logical relationship between the adverse consequences the Court claimed for pregnancy, childbirth, and parenting, and the broad right to abortion it fashioned in *Roe*. On the contrary, as taken up in the next two sections, there are fundamental disparities between the right announced in *Roe* and the burdens upon which that right is ostensibly based.

A. *Pregnancy and Childbirth*

Roe devotes one sentence to the burdens associated with pregnancy and childbirth. The Court states, without elaboration or citation of authority, only that “[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved.”¹⁰⁰ If maternal health gave rise to an abortion right, then the right would necessarily be limited to the very few cases in which abortion is done for medical reasons.¹⁰¹ Reliance upon maternal health risks is inconsistent with the broad abortion right announced in *Roe* under which an abortion may be obtained before viability for *any* reason, not just for reasons of maternal health.

In addition, maternal health problems associated with pregnancy and childbirth are generally manageable today by means other than termination of a pregnancy,¹⁰² and any claim about such problems must be viewed in light of evidence, generally unknown at the time *Roe* was decided, concerning the maternal health risks associated with abortion. Today there is a significant

100. *Roe*, 410 U.S. at 153.

101. Maternal health is rarely the reason for an abortion. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 112, 114 (2005) (reporting that women cited concerns about their own health as a reason for abortion in only 12% of cases and as the most important reason in only 4%).

102. OBSTETRIC & GYNECOLOGIC EMERGENCIES xi (Mark D. Pearlman et al. eds., 2004) (“Medical conditions that were formerly thought to be incompatible with pregnancy . . . can be managed with successful outcomes. These conditions include disorders such as sickle cell anemia, cancer after chemotherapy treatment, end-stage renal failure, organ transplantation, and cystic fibrosis.”).

body of medical literature linking abortion to serious short- and long-term physical and mental health risks. Immediate complications include hemorrhage, uterine perforation, cervical lacerations, and complications of anesthesia.¹⁰³ Long-term complications include placenta previa and pre-term delivery in subsequent pregnancies.¹⁰⁴ One authority identifies forty-nine studies that have demonstrated a statistically significant increase in premature births or low birth weight in subsequent pregnancies in women with prior induced abortions, a risk that increases with the number of prior induced abortions.¹⁰⁵ The plausibility of *Roe*'s assumption that abortion is safer than childbirth has likewise been drawn into serious question.¹⁰⁶

B. Parenting

Roe devotes a mere five sentences to the burdens of parenting.¹⁰⁷ It says nothing about any benefit. What it says about parenting burdens could be applied equally to men as to women. Of course, outside of adoption proceedings, in which legal responsibility for a child is shifted from birth parents to adoptive parents, neither birth parent—be it mother or father—has any

103. ELIZABETH RING-CASSIDY & IAN GENTLES, *WOMEN'S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE* 2 (2d ed. 2003); Royal College of Obstetricians and Gynecologists, *The Care of Women Requesting Induced Abortion: Evidence-based Clinical Guideline No. 7*, 29 (Sept. 2004), available at <http://www.rcog.org.uk/womens-health/clinical-guidance/care-women-requesting-induced-abortion>.

104. John M. Thorp, Jr. et al., *Long-Term Physical and Psychological Consequences of Induced Abortion: Review of the Evidence*, 58 *OBSTETRICAL & GYNECOLOGICAL SURVEY* 67, 70–72, 75 (2002); Elizabeth M. Shadigian, *Reviewing the Evidence, Breaking the Silence: Long-Term Physical and Psychological Health Consequences of Induced Abortion*, in *THE COST OF "CHOICE"* 63, 67–68 (Erika Bachiochi ed., 2004).

105. Brent Rooney & Byron C. Calhoun, *Induced Abortion and Risk of Later Premature Births*, 8 *J. AM. PHYSICIANS & SURGEONS* 46, 46 (2003). Low birth weight and premature birth "are the most important risk factors for infant mortality or later disabilities as well as for lower cognitive abilities and greater behavioral problems . . ." *Id.*; see also Byron C. Calhoun, Elizabeth Shadigian & Brent Rooney, *Cost Consequences of Induced Abortion as an Attributable Risk for Preterm Birth and Impact on Informed Consent*, 52 *J. REPROD. MED.* 929 (2007) (finding, based on a review of existing literature, that induced abortion "increased the early preterm delivery rate by 31.5%, with a yearly increase in initial neonatal hospital costs" of over "\$1.2 billion The yearly human cost includes 22,917 excess early preterm births . . . and 1,096 excess CP [cerebral palsy] cases in very low-birth-weight newborns") (quoting the abstract).

106. David C. Reardon et al., *Deaths Associated with Abortion Compared to Childbirth—A Review of New and Old Data and the Medical and Legal Implications*, 20 *J. CONTEMP. HEALTH L. & POL'Y* 279, 281 (2004).

107. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

right, let alone a constitutional one, to avoid the responsibilities that arise from becoming a parent. Along with the mother, a father has legal duties toward his child from which he is not excused even by asserting that the associated pregnancy was unintended, unexpected, or unwanted. That men have no right to avoid the duties associated with fatherhood tends to undermine equality-based claims of an abortion right grounded in the burdens of motherhood.¹⁰⁸

Indeed, the abortion right, to the extent it claims to be based on maternal burdens, seems to create gender *inequality*. One female commenter has observed that those supporting an abortion right based on maternal burdens “force themselves into the unenviable position of arguing that behavior they find indefensible in men [in not shouldering one’s duties as a parent] is perfectly acceptable, even laudable, when practiced by women.”¹⁰⁹

One must also ask whether *Roe*’s depiction of women (but not men) as being “taxed by child care,” the “distress . . . associated with the unwanted child,” and the “problem of bringing a child into a family already unable, psychologically and otherwise, to care for it” does not spring from an antiquated and paternalistic view of women. Abortion advocates themselves often lapse into such rhetoric, sometimes to the point of misstating the facts or the law.¹¹⁰ This is not to diminish the challenges of being a parent, but only to say that those challenges are not exclusive to one sex¹¹¹ and give rise to no general right to avoid one’s responsibility as a parent.

108. Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (plurality) (referring to the right of women “to participate equally in the economic and social life of the Nation”); *Stenberg v. Carhart* (*Carhart I*), 530 U.S. 914, 920 (2000) (referring to the belief, among abortion proponents, that a law forbidding abortion would deprive women of “equal liberty”); *Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures . . . center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”).

109. Rosemary Bottcher, *Feminism: Bewitched by Abortion*, in *TO RESCUE THE FUTURE* 176 (Dave Andrusko ed., 1983).

110. One author claims that “[t]he state does not hold the pregnant woman’s partner accountable for sharing the work of parenting” Reva B. Siegel, in *WHAT Roe v. Wade Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Most Controversial Decision* 77 (Jack M. Balkin ed., 2005). If that is meant to be a claim about the law, it is mistaken. See also LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 102 (1990) (claiming, contrary to biology, that an unborn child “begins as a living part of the woman’s body”).

111. By contrast, to the extent that any of the claimed burdens related to pregnancy and childbirth are borne solely by women, men are not similarly

More fundamentally—and returning to the constitutional question—one finds no support in history or tradition to commit an act of deadly violence against another human being, at any stage of development, based on a claim that he or she is a “burden,” even if he or she were uniquely a burden to either women or men (which, after pregnancy, is not the case in the law). On the contrary, every available historical marker points to a tradition of government *restraint* of private acts of violence. While some claim a fundamental moral distinction between killing an unborn child versus one that has been born, Anglo-American history points in the opposite direction, for the state has protected unborn children from the very earliest traces of the common and criminal law.¹¹² There is certainly nothing in the historical record to suggest that the Constitution *forecloses* a legislative judgment that unborn children are entitled to the same protection against deadly violence as is enjoyed by others.

III. DO THE CONSTITUTIONAL REASONS FOR REJECTING AN ABORTION RIGHT OUTWEIGH THE *STARE DECISIS* REASONS FOR ADHERING TO IT?

A. *Stare Decisis*

Casey’s lengthy consideration of *stare decisis* is puzzling. The authors of the joint opinion rely heavily on *stare decisis*, but with no apparent embarrassment in rejecting much of *Roe* or cases decided under it. Though they claim to be upholding *Roe*’s “central” holding by retaining the abortion right and viability rule, *Roe* itself never characterized its holding in those terms. As recognized by those Justices who would have overruled *Roe* in its entirety, the portions of *Roe* that *Casey* overruled seem at least as “central” as the part retained. Seemingly unfazed and undeterred by *stare decisis*, the plurality abandoned the notion of abortion as a fundamental right (the very reason, as we have seen, for giving it substantive due process protection in the first place), abandoned the rigorous test used to evaluate abortion regulations, abandoned *Roe*’s constraints on regulations early in pregnancy, and explicitly overruled two cases that purported to apply *Roe*. This is as much an overruling as any, and the reader is left to wonder why *stare decisis* should be so compelling a reason to retain the abortion right while apparently too slender a reed to

situated, which would seem to foreclose any equality-based claim. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (opposition to abortion is not opposition to women).

112. See *supra* notes 68–84 and accompanying text.

prevent other aspects of *Roe* from being (for the most part without even discussion of *stare decisis*) jettisoned.

Thus, any discussion of the aims of *stare decisis* in the abortion context has to confront at the outset the strange reality that, while claiming to reaffirm, the *Casey* plurality in fact overruled much of *Roe*. Moreover, subsequent Supreme Court decisions *rejecting* application of *stare decisis* in particular cases have *not* always undertaken *Casey*'s elaborate analysis, but rest on analytical grounds that differ from *Casey*'s.¹¹³ Is it possible, in a principled way, to give *stare decisis* effect to *Casey*'s *stare decisis* rules when those rules themselves have not been followed consistently in later cases?

In any event, even if the Court were consistent in how it understood and applied it, *stare decisis* is subject to several disclaimers and qualifications. *Stare decisis* is "not an inexorable command,"¹¹⁴ the Court has long insisted, but simply reflects a "policy judgment" that it is preferable "in most matters" that the law be "settled than that it be settled right."¹¹⁵ "*Stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision."¹¹⁶ Relevant factors in deciding whether to adhere to precedent include "the antiquity of the precedent" and "whether the decision was well reasoned."¹¹⁷ Another consideration is whether "experience has pointed up the precedent's shortcomings."¹¹⁸ Inconsistency among precedents counts in favor of overruling.¹¹⁹ The policy of *stare decisis* "is at its weakest when," the Court writes, "we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."¹²⁰ Accordingly, *stare*

113. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a state law banning sodomy, thereby overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Justice Scalia's dissent in *Lawrence* points out the disparity between the majority opinion in that case and the *Casey* plurality's treatment of *stare decisis*.

114. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

115. *Agostini*, 521 U.S. at 235 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) ("[I]t is common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case.").

116. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 912 (2010) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

117. *Id.* at 912 (quoting *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088–89 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986))).

118. *Id.*

119. *Id.* (noting such inconsistency in the Court's decision to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)).

120. *Agostini*, 521 U.S. at 235, and cases cited therein.

decisis “has only a limited application in the field of constitutional law.”¹²¹ Finally, the argument for adhering to prior case law is diminished when “the precedent’s underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.”¹²²

The abortion right and viability rule fare poorly when judged by these criteria. *Roe* settled little, if anything, legally or politically. Rather it unleashed social and political movements and legislative reactions that continue to embroil the Court, leading to widespread perceptions of the Court as a political actor and rendering it a target of ongoing political protests to this day. *Roe*’s treatment of the legal history of abortion is seriously mistaken,¹²³ and its reasoning has been roundly criticized by commentators on both sides of the issue.¹²⁴ Experience has only pointed up *Roe*’s shortcomings; *Roe* and later abortion cases are internally inconsistent and irreconcilable with each other, resulting in shifting rules on, and justifications for, an abortion right.¹²⁵ Abortion would seem to be a prime candidate for an area of law in which the Court regularly engaged in “jury-rigging”

121. *Id.* (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result)).

122. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring) (citing *Pearson v. Callahan*, 129 S. Ct. 808, 817 (2009), and *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088–89 (2009) (*stare decisis* does not control when adherence to the prior decision requires “fundamentally revising its theoretical basis”)).

123. See *supra* notes 68–84 and accompanying text.

124. See, e.g., Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1007 (2003) (“The result in *Roe v. Wade* was, to put the matter simply and directly, not warranted by any plausible argument from constitutional text, structure, or history.”); Edward Lazarus, *The Lingering Problems with Roe v. Wade, and Why the Recent Senate Hearings on Michael McConnell’s Nomination Only Underlined Them*, FINDLAW (Oct. 3, 2002), <http://writ.news.findlaw.com/lazarus/20021003.html> (“As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible.”); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 27–29 (1975) (“One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached. This is all the Court could do because moral philosophy, logic, reason, or other materials of law can give no answer.”); Ely, *supra* note 55, at 935–36 (“What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.”); Laurence H. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) (“One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”).

125. See *supra* notes 12–65 and accompanying text.

to create “new and different justifications to shore up the original mistake.”¹²⁶

If the argument for retaining an abortion right is weak when viewed merely through the lens of *stare decisis*, countervailing considerations tip the balance even more decisively against the right. Unlike the non-binding and flexible “policy judgments” characteristic of *stare decisis*, those countervailing considerations, discussed in the next section, are firmly and inexorably rooted in a constitutional text.

B. *Countervailing Constitutional Considerations*

The Constitution places a number of familiar and fundamental constraints on the power of the federal Judiciary. These constraints are not subject to a raft of exceptions or disclaimers.

First, the Constitution derives its authority only from the fact that the People have consented to it, and the power that the Constitution delegates is only that to which the People have consented.¹²⁷ When the Judiciary or any other branch of the federal government purports to exercise some power not constitutionally delegated to it, it violates the principle of consent that animates the entire Constitution. Such an undelegated exercise of power fundamentally undermines the principle of self-government.

A second and related constitutional constraint is that powers not expressly delegated to the federal government (meaning, of course, any branch of the federal government)—that is, the vast reservoir of law making and government power—are reserved “to the States . . . or to the people.”¹²⁸ When the Constitution is silent, any delegation of power to the federal government is foreclosed.

Third, powers expressly delegated to the Judiciary include only judicial, as distinct from legislative and executive, powers.¹²⁹ Because the Judiciary, like all branches of the federal government, has only those powers expressly delegated to it,¹³⁰ it follows that federal courts have no legislative power.¹³¹ Any

126. *Citizens United*, 130 S. Ct. at 921 (Roberts, C.J., concurring).

127. U.S. CONST. pmbl. Unlike state governments, the federal government has no general police power. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

128. U.S. CONST. amend. X.

129. U.S. CONST. art. III.

130. U.S. CONST. art. III and amend. X.

131. *See, e.g.,* *Nw. Airlines v. Transp. Workers Union*, 451 U.S. 77, 95 (1981) (“[W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial branch of government . . .”); *Evans v. Abney*, 396 U.S. 435, 447 (1970) (“The responsibility of this Court . . . is to

attempted exercise of legislative power would violate the doctrine of separation of powers. The animating purpose of that doctrine is to prevent the amassing of power in any one branch of the federal government.

Fourth, the Constitution sets out exclusive processes for amending the Constitution. Most obviously, the Judiciary has no power to propose or adopt amendments to the Constitution.¹³² A judicial declaration of a “constitutional” right or duty not found in, or fairly inferable from, the Constitution would, in effect, be an attempt to amend the document in a manner not prescribed by it. Indeed, judges are “bound by Oath or Affirmation, to support *this* Constitution,” meaning the written document as amended from time to time in the constitutionally-prescribed manner.¹³³

The abortion right violates all these principles. It is not identified in the text of the Constitution or fairly inferable from its provisions. It does not satisfy the criteria that must be met to qualify as a substantive right under the due process clause. Lacking such a relation to the Constitution, the assertion of a judicially-crafted abortion right exceeds powers expressly granted to the Judiciary, and invades powers expressly reserved to other branches of the federal government to the extent of their constitutionally-delegated powers and to the States. Protecting the life and health of one’s citizens—preventing deadly violence in particular—is within the well-recognized police power of the states, a power that the states plainly did not surrender when they ratified the Constitution. A monopoly on deadly force (e.g., military conflict) has been a distinguishing characteristic of modern government since at least the creation of the modern state. The only exception traditionally recognized at law has been defense of oneself or others undertaken to *prevent* deadly violence. There is no historical or textual support for the claim that the Constitution, whose purposes include ensuring domestic tranquility and the blessings of liberty to ourselves and “our posterity,” and whose very text reserves vast police powers to the states, *prevents* the states from preventing deadly violence by non-government actors. The Judiciary’s function is wholly subordinate to *enacted* law, that is, the Constitution and Acts of Congress enacted in furtherance of the Constitution. The Court has no comparable,

construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.”); *Standard v. Olesen*, 74 S. Ct. 768, 771 (1954) (Douglas, J., writing as Circuit Justice) (“[I]t is for Congress, not the courts, to write the law.”).

132. U.S. CONST. art. V.

133. U.S. CONST. art. VI (emphasis added).

inexorable constitutional duty to follow its own prior decisions, as is apparent from the countless occasions on which the Court has overruled itself. Judicial decisions, by their nature, do not have the force of constitutional text, a text the Court has no power to amend.

When the *general* considerations, discussed in the preceding section, for adhering to prior cases are placed on one side of a ledger, and the *constitutional* reasons for overruling, discussed in this section, are placed on the other side, there seems to be little contest. Constitutionally-grounded principles of limited, democratic government; separation of powers and the delegated duties of the Judiciary; the preservation of state governments and the reservation to them of powers not expressly delegated to the federal government; the duty of all judicial and other officers to support the Constitution; the notion of a written Constitution and the Judiciary's lack of power to amend it—no one would dispute that these are, in every sense, fundamental commands. It does not take any great leap to conclude that these considerations, which are essential to the structure of American government, are of much greater weight than the mere “policy judgments” to retain a rule of law announced in a previous case.¹³⁴

IV. DO CONSIDERATIONS OF INSTITUTIONAL INTEGRITY FAVOR RETENTION OF AN ABORTION RIGHT?

In light of what has been said thus far, the question posed in the title of this section virtually answers itself. The Court's abortion decisions have reflected, and continue to reflect, inconsistent, seemingly *ad hoc* rules and outcomes. This fluctuating abortion right has no basis in history or tradition, as would be necessary to rank it as fundamental and thereby subject to the protection of substantive due process, and the Court no longer makes that claim for it. The abortion right has undermined mar-

134. Cf., e.g., *Boys Mkts., Inc. v. Retail Clerk's Union*, 398 U.S. 235, 241 (1970) (noting that *stare decisis* is an inadequate reason to adhere to precedent when adherence “involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience”) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)); *EEOC v. Wyoming*, 460 U.S. 226, 249–50 (1983) (Stevens, J., concurring) (“I think it so plain that [a particular prior decision] not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself, that it is not entitled to the deference that the doctrine of *stare decisis* ordinarily commands for this Court's precedents.”). In addition, the abortion right is in tension with constitutional interests that enjoy explicit or implicit constitutional protection. See *supra* notes 85–93 and accompanying text.

ital and parental interests that are both deeply rooted in the nation's history and traditions and have been regularly ranked as fundamental. It has had a disturbing ripple effect on rights of conscience and has been invoked to support other forms of killing, such as aid in committing suicide. The problems and burdens of pregnancy and parenthood, which *Roe* addressed only in the most cursory fashion, would seem peculiarly within the province of the political branches, and there is no reason to think that the Court has any special expertise or competence in this area. The principle of *stare decisis*, invoked by *Casey* to reaffirm an abortion right, is not a principle to which the Court has adhered in its abortion cases, and *Casey*'s particular explication of that principle has not been followed consistently in subsequent case law. Finally and most fundamentally, the Court's declaration of a constitutionally-based abortion right outstrips the designated role that the Constitution gives to the federal government and to federal courts in particular.

Under these circumstances, *Casey*'s concern about institutional integrity and the public perception of the Court¹³⁵ favor rejection rather than reaffirmation of an abortion right. Far from *undermining* the public's perception of the Court, rejection of an abortion right that purports to be based in the Constitution would serve as an important *corrective* in the public's understanding of the constitutionally-defined role that the Court plays in our government. It would appropriately restore to the People, as it should, the responsibility for making difficult policy decisions about abortion. Considerations of institutional integrity have generally not prevented the Court, when convinced of past error, from overruling its previous decisions in other contexts. In a matter of such grave consequence as abortion, a genuine concern for institutional integrity weighs in favor of judicial repudiation, and not reaffirmation, of an abortion right.

135. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864–69 (1992).