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Symposium

A PUTATIVE RIGHT IN SEARCH OF A CONSTITUTIONAL JUSTIFICATION: UNDERSTANDING PLANNED PARENTHOOD V. CASEY’S EQUALITY RATIONALE AND HOW IT UNDERMINES WOMEN’S EQUALITY

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Ethics & Public Policy Center

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I. INTRODUCTION

*Roe v. Wade*\(^1\) ranks among the most controverted Supreme Court decisions in the nation's history, joining the likes of *Dred Scott v. Sandford*,\(^2\) *Plessy v. Ferguson*,\(^3\) and *Lochner v. New York*.\(^4\) Both Justice Rehnquist, in his *Roe* dissent,\(^5\) and constitutional law scholars since 1973 have drawn analogies between *Roe* and one or another of these cases over the years,\(^6\) with a majority of the Court attending to, and rejecting, such analogies in *Planned Parenthood v Casey*.\(^7\)

The *Casey* court suggested that the facts underlying those putatively analogous decisions—or at least the nation’s understanding of those facts—had changed, such that "a terrible price [...] would have been paid" had the Court not reversed course in those prior decisions.\(^8\) By contrast, according to the Joint Opinion,\(^9\) the right to abortion enunciated in *Roe* had been relied upon to such an extent in the intervening nineteen years that, in the Court’s view, the “certain cost[s]” of overruling *Roe* were too extensive\(^10\)—even if the original decision had been made in error.\(^11\) That

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5. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) (“While the Court’s opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 74 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case.”).
8. *Id.* at 864 (“The examination of the conditions justifying the repudiation of [*Lochner* and] *Adkins* by *West Coast Hotel* and *Plessy* by *Brown* is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did.”).
9. The Joint Opinion in *Casey* (also referred to as the plurality opinion) was co-authored by Justices O’Connor, Souter and Kennedy.
10. *Id.* at 856 (“The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.”).
11. *Id.* at 858.
is, even though the justices who coauthored the Joint Opinion were expressly unable to endorse the decision in *Roe* as an original matter, the court in *Casey* still held that *Roe*'s "central holding" must be reaffirmed, on the basis of the Joint Opinion’s "explication of individual liberty...and the force of stare decisis."\(^{13}\)

In this article, I revisit and critique *Casey*’s controversial decision anew, attending in Part II to the Joint Opinion’s "explication of individual liberty," and in Part III to the "reliance interest" analysis of its stare decisis holding. In sum, I argue that the justices’ concerns about women’s equality are the key interpretative lens through which to understand the controversial reaffirmance of *Roe*, but one which has been inadequately explored and critiqued on the part of those critical of *Casey*. I aim to fill that void.

Over the last few decades, *Casey*’s critics have made much of the Court’s stare decisis holding, undermining the validity of upholding a constitutional decision the plurality was unable to endorse as an original matter. Justice Scalia’s *Casey* dissent was the first and remains the most well-known of such critiques.\(^ {14}\) But as compelling as these critiques are—and they seem to me both correct and weighty as a matter of constitutional law—they neither reach nor offer a substantive challenge to the important concern undergirding the *Casey* court’s reaffirmance: women’s equality.

In a word, though critics are right to point out that the *Casey* court expressly revealed its discomfort with *Roe*’s holding as to the weight of the state’s interest in protecting fetal life, \(^ {15}\) critics have inadequately

\(^{12}\) *Casey*, 505 U.S. at 871 ("We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded as the *Roe* Court did, that its weight is sufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.").

\(^{13}\) *Id.* at 853.

\(^{14}\) *Casey*, 505 U.S at 993 (Scalia, J., dissenting); see also *infra*, note 24.

\(^{15}\) *Id.* at 872 ("Yet it must be remembered that *Roe* v. *Wade* speaks with clarity in establishing not only the woman’s liberty but also the State’s ‘important and legitimate interest in potential life.’ That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. ... In resolving this tension, we choose to rely upon *Roe*, as against the later cases.” (internal citations omitted)). For a sophisticated treatment comparing the *Roe* and *Casey* court’s use of the biological referent “potential life” (and others like it) as distinguished from normative referent “new human life,” see Stephen G. Gilles, *Why the Right to Elective Abortion Fails Casey’s Own Interest-Balancing Methodology—and Why It Matters*, 91 NOTRE DAME L. REV. 691, 713-714 (2016) ("[F]or the purposes of constitutional reasoning, *Casey* (like *Roe*) holds that the truth of the proposition that new human life begins at conception cannot be established with sufficient clarity that the state may enact it into law by prohibiting pre-viability abortions... [But] the plurality opinion [in *Casey*] held that the state may assert a very weighty interest in the pre-viable fetus on the same theory *Roe* permitted—that new life whose nature is to become normatively human is
explored the fact that the Joint Opinion shows no such skepticism of Roe’s view of women’s liberty (but rather extends it to include concerns about women’s equality). That is, if the court in Casey had indeed thought that Roe had erred as an original matter, that error (“if error there was”\(^{16}\)) was as to the inadequate weight that Roe had afforded the state’s interest, and not—the Casey court itself says—to the “recognition afforded by the Constitution to the woman’s liberty.”\(^{17}\) Indeed, the Casey court held that “no erosion of principle going to liberty or personal autonomy has left Roe’s central holding a doctrinal remnant . . . .”\(^{18}\) Rather, the Joint Opinion described Roe as an “exemplar of Griswold liberty,”\(^{19}\) stating that it “fit comfortably” within the line of cases protecting “personal decisions ‘relating to marriage, procreation, contraception, family relationships, childrearing, and education.’”\(^{20}\) In addition, the Joint Opinion suggested, though with qualification, that Roe also might be regarded as a rule of “personal autonomy and bodily integrity.”\(^{21}\)

In fact, the Joint Opinion emphasized women’s liberty to a far greater extent than Roe did, extending its analysis well beyond the “privacy” rationale offered in Roe, to include a discussion of women’s liberty that treats, in particular, concerns about women’s equality. So, although the Joint Opinion was not as forthright as Justice Blackmun’s concurrence in Casey, in which Blackmun suggests that abortion restrictions “implicate constitutional guarantees of gender equality,”\(^{22}\) and certainly in no way alters the constitutional basis from due process to equal protection as Blackmun suggests it should,\(^{23}\) the Joint Opinion’s use of stare decisis—

\(^{16}\) Casey, 505 U.S. at 869.

\(^{17}\) Id. at 858 (“Even on the assumption that the central holding of Roe was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman’s liberty.”).

\(^{18}\) Id. at 860 (“urgent claims of the woman to retain the ultimate control over her destiny and her body [are] implicit in the meaning of liberty . . . .”).

\(^{19}\) Id. at 857.


\(^{21}\) Casey, 505 U.S. at 857 (“Roe, however, may be seen not only as an exemplar of Griswold liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity. . . .”). See my response to the bodily autonomy argument at Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL’Y 889, 897, 928 (2011); see also Erika Bachiochi, *40 Years Later: How to Undo the Autonomy Argument for Abortion Rights*, PUBLIC DISCOURSE (August 19, 2011), http://www.thepublicdiscourse.com/2011/08/3559/.

\(^{22}\) Casey, 505 U.S. at 928 (Blackmun, J., dissenting).

\(^{23}\) For my own article length treatment of equal protection and abortion, see Bachiochi,
in particular its discussion of “reliance interests”—does nearly the same work, without abandoning the substantive due process framework. I thus seek to critique Casey from that vantage point.

I suggest that, however misguided, the Casey court’s justification for its use of stare decisis to uphold a decision that some of its members thought may have been originally in error unfolded as follows. Although it is likely that at least one justice among the Casey troika thought that Roe had originally struck the wrong balance between unborn life and women’s liberty in 1973, he or she also believed that since that balance had been struck—and for almost twenty years “relied” upon—Roe’s conception of women’s liberty as inclusive of the right to abortion ought to continue to enjoy constitutional protection. That is to say, if one or more of the justices in the plurality believed that the state’s interest in protecting fetal life was greater than Roe had claimed it to be, and perhaps even that such an interest should have trumped women’s liberty so as to uphold the Texas statute in Roe (in whole or in part), that justice (or justices) also believed that, by 1992, women’s liberty interests had grown strong enough to render the initial balance in Roe in need of mere adjustment (via the newly minted “undue burden” standard), not wholesale abandonment. The justice(s) in the plurality believed this even though—indeed, perhaps due to the fact that—it was the Roe court itself that had created the reliance interest in the first place.

In short, stare decisis in Casey was required, according to the Joint Opinion, because liberty interests were created by the Court’s own action nineteen years prior—when it discovered a right to abortion in the Constitution. Importantly, in the Casey court’s view, that right had been relied upon to facilitate social and economic developments, and especially women’s participation within them. When, in the Joint Opinion, the Court declared that “[a] terrible price would be paid for overruling [Roe],” it was pointing not to a concern for the legitimacy of the Court itself, which Scalia and others have judged to be the Court’s primary concern,24 but

supra note 21, at 897.

24 Casey, 505 U.S. at 993 (Scalia, J., dissenting). See also Michael Stokes Paulsen, Abrogating Stare Decisis: May Congress Remove the Precedential Effect of Roe and Casey?, 109 YALE L.J. 1535, 1542, 1564 (2000) (“[R]eaffirmation of Roe rested almost entirely on the policy of adhering to precedent, ‘whether or not it was mistaken,’ in order to spare the Court the damage to its prestige and to public perceptions of its legitimacy. . . [Judicial integrity] is clearly the factor about which the Justices authoring the joint opinion felt most strongly.”). Paulsen, supra note 6, at 1029; Gilles, supra note 15, at 718 (suggesting that the Casey court reaffirmed Roe for “reasons of ‘institutional integrity’ and ‘the rule of stare decisis.’”); Clarke D. Forsythe & Steve B. Presser, The Tragic Failure of Roe v Wade: Why Abortion Should Be Returned to the States, 10 TEX. REV. L. & POL 85, 105 (2005-2006) (“The criticism of Roe was
rather to the impact reversal would have upon, inter alia, women’s enhanced status in society.\(^{25}\)

Having just contrasted the social circumstances surrounding \textit{Roe} to those involved in both \textit{Plessy} and the \textit{Lochner} line of cases,\(^{26}\) the \textit{Casey} court concludes, “In the present case[] . . . as our analysis to this point makes clear, the terrible price would be paid for overruling.”\(^{27}\) At this point in the opinion, the Court has discussed both women’s liberty and “reliance interests”; only after this declaration does the Court then turn to a discussion of implications for the Court’s own authority.\(^{28}\) This is not to say that the latter concern on the part of the Court was not important to the decision, for surely the space afforded and the sheer energy manifest in the claims in Part III.C of the opinion reveal that it was.\(^{29}\) It is to say, however, that women’s constitutionally protected “liberty” to access abortion to “participate equally” in the “economic and social developments” of the nation is, in my view, the key concept undergirding the controversial reaffirmation in \textit{Casey}. (Though an analysis of Part III.C of the Joint Opinion is beyond the scope of this article, I think it possible that the Court’s concern about its own institutional integrity may have gone hand in hand with worries about how the Court would have been perceived for upending the constitutional right to abortion—what had become, over the intervening nineteen years, the \textit{sine qua non} of the modern day women’s movement.) My point here is not to disturb others’ critiques of the stare decisis or institutional integrity arguments; my point is only that critics of \textit{Casey} have not taken the underlying equality rationale seriously enough.\(^{30}\)

so severe and significant that the plurality opinion in . . . \textit{Casey}. . . abandoned the historical, substantive due process justification for \textit{Roe} and relied exclusively on stare decisis.”).

\(^{25}\) \textit{Id.} at 864. \textit{See infra, Part III.}

\(^{26}\) \textit{Id.} (“The examination of the conditions justifying the repudiation of \textit{Adkins} by \textit{West Coast Hotel} and \textit{Plessy} by \textit{Brown} is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did.”). \textit{But see infra} note 188.

\(^{27}\) \textit{Id.} (Emphasis added).

\(^{28}\) \textit{Id.} (“Our analysis would not be complete, however, without explaining why overruling \textit{Roe}’s central holding would not only reach an unjustifiable result under principles of stare decisis, but would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.”) \textit{Id.} at 864–65.

\(^{29}\) \textit{Casey}, 505 U.S. at 865.

\(^{30}\) Notable exceptions include Paige C. Cunningham and Clarke D. Forsythe, \textit{Is Abortion the ‘First Right’ for Women?: Some Consequences of Legal Abortion, in ABORTION, MEDICINE AND THE LAW 154 (J. Butler & D. Walbert eds., 4th ed. 1992)} and Forsythe & Presser, \textit{supra} note 24, at 124 (“One of the key sociological assumptions of \textit{Roe}—made explicit in \textit{Casey}—is the contention that the availability of abortion is needed to promote the social equality of women. Substantial empirical data since 1973 contradicts the assumption that abortion serves the needs of women. Instead, this data suggests that the availability of abortion serves the sexual
If I am correct, and assuming any reconsideration of Roe and Casey would take place within the "reasoned judgment/interest-balancing" jurisprudential framework in which "personal liberty" cases have been adjudicated recently, it would behoove those seeking to critique these cases to better scrutinize the stock the Joint Opinion put in abortion as an important element of women’s equality. This may seem counter-intuitive, as many critical of Roe and its progeny, myself included, regard the weight of scientific evidence concerning the humanity of the unborn child to be indisputable—and the philosophical attempts at distinguishing the rights-bearing human person unconvincing—and so would seek to urge the Court to reconsider on those grounds. But, without a wholesale abandonment of the Court’s current jurisprudence, likely possible only through a strong rightward shift in the Court’s composition, Casey will have to be undermined according to its own terms—ones in which women’s liberty, and indeed, women’s equality, are paramount. The Casey court suggests that “a decision to overrule [Roe] should rest on some special reason over and above the belief that a prior case was wrongly decided.”

In Part II, I summarize the jurisprudential shift from Roe to Casey, focusing in particular on the Casey court’s desire to afford greater attention to the state’s interest in protecting fetal life. I then focus on the Casey court’s affirmation of Roe as “an exemplar of Griswold liberty”—with a lengthy note on Casey’s untenable comparison of contraception and abortion—and on how Casey “liberty” extends beyond “decisional autonomy” into concerns with women’s equal status in society.

In Part III, I review and analyze the “reliance interests” portion of the Casey court’s discussion of stare decisis, summarily critiquing equality arguments for abortion as unjustly setting up the male body as impulses of men more than women.”).

31 See, notably, Gilles, supra note 15, at 727–28 ("[W]hen we treat the viable fetus (or the full-term infant) as a normatively human being, we must be giving greater weight to its ’potential’ to further develop its rudimentary capabilities than to those capabilities as they then are. And if this is so, consistency requires us to give equally great weight to the ’potential’ of the pre-viable fetus, which currently lacks those rudimentary capabilities, but whose future development will gradually perfect them. . . [E]ven assuming the validity of Roe’s holding that the state can’t claim normatively human status for pre-viable fetal life, the state should be able to assign great value to the fetus beginning at conception, and to assert an interest in protecting the pre-viable fetus that is almost as great as its interest in protecting the viable fetus or the full-term infant."). See also CHRISTOPHER KACZOR, THE ETHICS OF ABORTION: WOMEN’S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE (Routledge Annals of Bioethics, 2010).

32 Casey, 505 U.S. at 863.
the norm for legal equality. I conclude the second part by offering a new way that the abortion cases share a methodological kinship with *Lochner v. NY*. I suggest that, like *Lochner*, the Court in *Roe* and more explicitly in *Casey* illicitly appropriated into constitutional decision-making one particular “theory”\(^{33}\) (in *Roe/Casey*’s case) of women’s liberty and equality, peculiar to the 1970s and beyond. As in *Lochner*, the Court inserted itself forcefully into a complex, emerging issue at a time of rapid societal change, putting the weight of the Court’s authority on one particular way of responding to that change. The Court’s intervention, arguably illegitimate as a matter of constitutional law,\(^{34}\) also disenabled innovative solutions to newly emergent cultural advances (viz, women’s equality) in connection with the perennial need to care for dependents. *Casey* doubled-down on this intervention, making explicit the Court’s view that societal “reliance” upon abortion for women’s equality was an unmitigated good. Yet rather than promote women’s authentic equality, I argue that the constitutional right to abortion actually hinders women’s equality by promoting cultural hostility to pregnancy and motherhood, demanding that women model themselves after the normative “unencumbered male” with whom they seek to compete in the public sphere. Women’s equality so conceived has rendered childbearing a consumer choice with harmful, unintended consequences for disadvantaged women especially, in both the home and workplace.

II. *CASEY*’S “EXPICATION” OF LIBERTY

The line of Supreme Court “personal liberty” cases, beginning with *Griswold v. Connecticut* in 1965, has been subject to intense scrutiny for decades, with special ire directed at the Court’s extension of *Griswold* in *Roe*.\(^{35}\) Much of this criticism concerns disputed methods of constitutional interpretation as well as questions of judicial authority, important debates that if resolved differently would render the questions I take up here moot.\(^{36}\) My purpose here is a much narrower one, focused specifically on

\(^{33}\) Compare with Justice Holmes: “[The] Constitution is not intended to embody a particular economic theory.” *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting); see *infra*, Part III.C.

\(^{34}\) See *infra*, note 36.

\(^{35}\) See, for instance, Ely, *supra* note 6.

\(^{36}\) In particular, I will not assess in a systematic way whether the judiciary is warranted to first ascertain and then protect substantive liberties through the Due Process Clause, or if it is, how that sort of liberty-determining analysis should proceed. However, I will show my cards in Part II.C when I compare *Roe/Casey* to *Lochner* and attempt to draw out an analogy that helps illustrate an important underlying rationale for judicial restraint when the Constitution’s text,
achieving a better understanding of the way in which the justices in *Casey* shifted the Court's lens from concerns with privacy at issue in *Roe* to a focus on both women's liberty, and especially equality.

**A. Casey Reframes the Question**

As the nation awaited the Supreme Court's decision in *Casey*, many commentators suggested the high court was poised to overturn the much-maligned *Roe v. Wade*. Twelve years of Republican judicial appointments had altered the high court's composition, and in 1983, Justice O'Connor had already announced her disfavor of the 1973 opinion in her dissent in *City of Akron v. Akron Center*.\(^3\) But rather than overturn *Roe*, *Casey* altered the test under which state regulations of abortion would be reviewed in order to provide more solicitude for state protections for viable fetal life. In an opinion signed jointly by Justices O'Connor, Kennedy, and Souter, the Court held that the trimester framework *Roe* had erected,\(^3\) the strict level of scrutiny *Roe* had required,\(^3\) and the cases subsequent to *Roe* interpreting the same, had all "too little acknowledge[ed]" *Roe*'s own express regard for the state's "important and legitimate interest in potential life."\(^4\) The Joint Opinion thus inserted in place of *Roe*'s framework a revised version of the "undue burden" standard O'Connor had previewed in her dissent in *Akron* ten years prior. *Casey* held that a state abortion regulation is unconstitutional if it has "the purpose or effect of placing a substantial obstacle in the path of a woman

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\(^3\) *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 454, 458 (1983) (O'Connor, J., dissenting) ("The decision of the Court today graphically illustrates why the trimester approach is a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context. . . . The *Roe* framework, then, is clearly on a collision course with itself.").

\(^3\) *Casey*, 505 U.S. at 875 ("[E]ven in *Roe*'s terms, in practice, [the trimester approach] undervalues the State's interest in the potential life within the woman.").

\(^3\) *Roe*, 410 U.S. at 155 ("Where certain "fundamental rights" are involved, the Court has held that 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.").

\(^4\) Id. at 871 ("Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.' That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. . . . Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases." Internal citations omitted.).
seeking an abortion of a nonviable fetus." In announcing this new standard, the *Casey* court upheld several state regulations and overturned two high court opinions in which similar regulations had been struck down in the years following *Roe*.

Curiously, the *Casey* court suggested at several different points in the Joint Opinion that even as it reaffirmed the "central holding in *Roe,*" it was not able to endorse the 1973 decision, due to *Roe*’s underappreciation of the state’s "profound" interest in fetal life (as *Casey* described such interests). Indeed, the Joint Opinion suggests that, as an original matter, it may have decided *Roe* differently.

We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and, coming as it does after nearly 20 years of litigation in *Roe*’s wake 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. And we have concluded that the essential holding of *Roe* should be reaffirmed. Yet, even as it reaffirmed *Roe*’s "essential holding," the *Casey* court also eschewed the status *Roe* had given to abortion as a "fundamental right." *Casey* instead reframed the issue at bar as one requiring "interest balancing"—recalling in particular the "reasoned judgment" approach Justice Harlan first articulated in dissent in the 1961 contraception case, *Poe v Ullman.* The shift in tests from "strict scrutiny" in *Roe* to "undue

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41 *Casey,* 505 U.S. at 877.
43 Id. at 878.
44 Id. at 871.
45 *Casey,* 505 U.S. at 877.
46 *Poe v. Ullman,* 367 U.S. at 543 (1961) (Harlan, J., dissenting) ("Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. This 'liberty' is not a series of isolated points pricked out... It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes... that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.").
“burden” in *Casey* thus represented the *Casey* court’s attempt to correct the *Roe* court’s failure to attend adequately to the state’s interest in protecting (viable) fetal life.

Looking back at the *Roe* decision, now through its new “interest balancing” lens, the *Casey* court suggested that the “balance” *Roe* struck in 1973 between, quoting Harlan, “[individual] liberty and the demands of an organized society” was potentially wrong. But however poorly the *Roe* court may have balanced competing interests (even if that’s not how the *Roe* court understood itself), the Joint Opinion was clear that the error in *Roe*—“if error there was”—concerned the inadequate weight afforded “potential life,” not the liberty interests of the woman. Moreover, the *Casey* court implied, as I will discuss in Part III, that those liberty interests had actually grown in the intervening decades since *Roe*, and importantly, had been reinforced by concerns about women’s equality.

The *Casey* court’s reliance on Harlan’s *Poe* dissent in the abortion-as-individual-right context is particularly ironic given the passage found further on in which Harlan maintains that (c)onstitutional doctrine in this area” must be built upon those laws “confining sexuality to lawful marriage”: “The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up...confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis...[T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.

*Id.* at 546. This would all seem to justify Harlan’s concurrence in *Griswold*, where the Court sought to protect the marital relationship from state interference, see discussion, infra. But, notably, Harlan was no longer on the Court seven years later when *Eisenstadt* v. *Baird* declared an individual right to contraception. 405 U.S. 438 (1972). See my discussion of *Eisenstadt’s* influence on *Roe infra*, section A2. See also a discussion of *Casey’s* reliance upon Harlan’s dissent in *Poe*, in Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight From Reason In The Supreme Court, ST. LOUIS UNIV. PUB. L. REV. 13, 23–28 (1993) (“[The] legal and societal consensus against abortion strongly suggests that the methodology employed by Justice Harlan in evaluating substantive due process claims would not have yielded the same results claimed for it by the authors of the Joint Opinion.”).


48 *Casey*, 505 U.S. at 982 (Scalia, J., dissenting) (“Today’s opinion describes the methodology of *Roe* quite accurately, as weighing against the woman’s interest the State’s ‘important and legitimate interest in protecting the potentiality of human life.’”)

49 *Id.* at 871 (“The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe* v. *Wade*. It is a rule of law and a component of liberty we cannot renounce. On the other side of the equation is the interest of the State in the protection of potential life. The *Roe* Court recognized the State’s “important and legitimate interest in protecting the potentiality of human life.” *Roe*, 410 U.S. at 162. The weight to be given this state interest, not the strength of the woman’s interest, was the difficult question faced in *Roe*.”).
Because of the Joint Opinion’s unique admission that the case it was reaffirming may have been wrong as an original matter, some have suggested *Casey* did not actually reaffirm *Roe on the merits*, but actually super-charged the doctrine of stare decisis to reach an end the Court thought necessary for its own institutional integrity (or more cynically, political expediency). Given the overwhelming length—and grandiose tone—in which the Joint Opinion discusses the judicial role, this critique is important. But, I believe, it is incomplete: as Justice Rehnquist’s dissent alluded to but did not fully challenge as a substantive matter, the Joint Opinion based its use of stare decisis upon prior concerns for women’s liberty and equality. For although the Joint Opinion was critical of *Roe* for its inadequate attention to “potential life,” the *Casey* court both acquiesced in, and expanded the rationale for, the right to abortion afforded to women nineteen years prior.

*Casey*’s “unconventional” notion of “reliance interests” ultimately determining its decision—however misguided as an instantiation of a doctrine traditionally used in the commercial setting—was grounded in a prior affirmation (and extension) of *Roe*’s view of women’s liberty. That is, the decision to conform to an ill-begotten precedent to protect institutional integrity did not come first, with concerns about women’s liberty and equality discussed as a sideshow; rather, women’s right to abortion as “implicit in the meaning of liberty” and as necessary to women’s “ability to participate equally in the economic and social life of the nation” was the foundation upon which the stare decisis analysis was built. That is not to say it was a strong foundation, as I will discuss in Part III. Indeed, perhaps it was the plurality’s sense that it was ruling (once again, as in *Roe*) upon such a weak constitutional foundation that led to its aggressive statement as to institutional integrity, or perhaps concerns about women’s equality were so strong that the justices in the plurality thought any “back-sliding” would itself impugn the Court’s authority; we cannot be sure. My point is not that the critiques of stare decisis are at all

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50 See *supra* note 24.

51 *Casey*, 505 U.S. at 957 (Rehnquist, J., dissenting) (“The joint opinion thus turns to what can only be described as an unconventional—and unconvincing— notions of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to ‘two decades of economic and social developments’ that would be undercut if the error of *Roe* were recognized. The joint opinion’s assertion of this fact is undeveloped, and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their ‘places in society’ in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society’s increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.” Internal citations omitted.).
wrong; my point is that those critical of *Casey's* own account of stare decisis have not fully understood it, and thus it has not been as well criticized as it could be.\(^5^2\) My aim is to supply more clarity in order to enhance that critique.

**B. *Casey* Liberty**

While the justices in the Joint Opinion were intent on granting more authority to states to regulate abortion to both safeguard women’s health and better protect viable fetal life, they also were intent on reconfirming the view that the Constitution protected women’s right to abortion: “The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”\(^5^3\) The justices in the plurality reconfirmed this view even as they admitted they may not have voted to strike down the Texas law had they sat on the Court nineteen years prior: “Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman’s liberty.”\(^5^4\) Again, in its discussion of stare decisis, discussed in Part III, the Joint Opinion suggested that women’s liberty interest in abortion had actually grown

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\(^5^2\) The pro-*Casey* literature is much more apt to consider the case as one that protects “equality” interests than is the anti-*Casey* literature. Most notably, Justice Ginsburg, in her fiery dissent in *Gonzales v. Carhart*, relies specifically upon *Casey* when she states:

> As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman’s ‘control over her [own] destiny.’ ‘There was a time, not so long ago,’ when women were ‘regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution.’ Those views, this Court made clear in *Casey*, ‘are no longer consistent with our understanding of the family, the individual, or the Constitution.’ Women, it is now acknowledged, have the talent, capacity, and right ‘to participate equally in the economic and social life of the Nation.’ Their ability to realize their full potential, the Court recognized, is intimately connected to ‘their ability to control their reproductive lives.’ **Thus,** legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.


\(^5^3\) *Casey*, 505 U.S. at 871.

\(^5^4\) *Id.* at 858.
stronger since Roe, not weaker.

After a summary of both the Pennsylvania statute under review and the appellate court history, the Joint Opinion begins with a statement reaffirming Roe’s “essential holding.” Boiled down to three dominant parts or principles, Casey renders Roe’s essentials as follows: the recognition of women’s right to abortion prior to viability, without undue interference from the State; confirmation of the state’s authority to restrict abortions post-viability (with exceptions for the health and life of the mother); and finally, an affirmation of the state’s interest in protecting women’s health and fetal life throughout the pregnancy. Seeking to achieve a better balance of these principles than Roe or subsequent cases had, the Joint Opinion presented its new “undue burden” standard, unveiled later in the opinion, as one that would, in the justices’ view, better serve all three principles.

Without judging the workability of the Casey standard, whether it actually adhered, as it claimed, to the “essential holding” in Roe, or even still, whether stripping all but “the essentials” of the holding was a legitimate use of stare decisis at all, the important point here is that Casey itself claims to have grounded its reaffirmation of Roe’s “essentials” in both “the strength of’’ stare decisis—and in its own “explication of individual liberty.”

A review and critique of that “explication” now follows.

In spite of voicing personal reservations about reaffirming Roe, the Joint Opinion treated Roe as settled precedent as it concerned women’s liberty. (“The weight to be given the state interest, not the strength of the woman’s interest, was the difficult question faced in Roe.”) The discussion of liberty in Casey commences with an acknowledgment that the Court’s view of the Due Process Clause follows those cases that adhere to a “substantive” rather than “literal” reading, critiquing in

55 Id. at 846. Many have argued that the broadly construed health exception, first defined in Roe’s companion case, Doe v. Bolton, thwarts the state’s authority to protect unborn human life, wherein the exception swallows the rule. “[T]he medical judgment may be exercised in the light of all factors —physical, emotional, psychological, familial, and the woman’s age —relevant to the wellbeing of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.” Doe, 410 U.S. at 191.

56 Id. at 993 (Scalia, J., dissenting) (“It insists upon the necessity of adhering not to all of Roe, but only to what it calls the “central holding.” It seems to me that stare decisis ought to be applied even to the doctrine of stare decisis, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version.” Id. at 993).

57 Id. at 853.

58 Id. at 872.
particular an alternative rendering it imputes, however improperly, to Justice Scalia. Next, *Casey* sets in with a summary review of authority, citing many of the cases that *Roe* too had cited for authority. *Casey* concludes, "It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."

But even as *Casey* underscores its view that *Roe* is settled as a matter of constitutional law, *Casey* not only undercuts *Roe* by granting more latitude to states to regulate the procedure; the Joint Opinion also attempts to shore up a better constitutional footing for the disputed right it now seeks to affirm. Just pages before referring to *Roe* as an "exemplar of Griswold liberty," *Casey* recapitulates the "right to privacy" that *Griswold* first enunciated, *Eisenstadt v. Baird* extended, and *Roe* ostensibly relied on.

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59 Id. at 846-47. ("It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989). But such a view would be inconsistent with our law.") Justice Scalia, in dissent, takes umbrage, suggesting the Joint Opinion misunderstood his point:

The Court destroys the proposition, evidently meant to represent my position, that 'liberty' includes only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified, ante, at 847 (citing Michael H. v. Gerald D., 491 U.S. 110, 127, n.6 (1989). That is not, however, what *Michael H.* says; it merely observes that, in defining 'liberty,' we may not disregard a specific, 'relevant tradition protecting, or denying protection to, the asserted right.'

*Casey*, 505 U.S. at 981 (Scalia, J., dissenting).


61 Characteristic of Scalia's approach in dissent, he pokes fun at the Court's strained attempt to articulate anew a rationale for women's liberty interest in abortion:

The emptiness of the 'reasoned judgment' that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in this and other cases, the best the Court can do to explain how it is that the word 'liberty' must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.

*Id.* at 983 (Scalia, J., dissenting).

upon. Emphasizing instead Roe’s nod toward “personal liberty,” Casey suggests that Griswold and Roe (and the line of authority Casey cites repeatedly) stands for the proposition that the Constitution protects the individual’s “right to make personal choices . . . central to personal dignity and autonomy.”

In so doing, however, Casey itself seems to acknowledge that Griswold’s “zones of privacy”—the sacrosanct marital bed the Court in 1965 judged the state had no authority to enter—had been transformed rather profoundly in Roe into something much broader. That something Casey names, inter alia, “zone[s] of conscience and belief.” The Court’s view is most famously characterized by its quintessential post-modern rendering of liberty as follows: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

Yet, however much the Joint Opinion cites authority for the proposition that the Constitution limits governmental interference with personal “decisions” and “choices,” it also recognizes that abortion itself represents something more than the popularly rendered “right to choose”: “Though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act . . . fraught with consequences.”

In the second subsection below, I review the comparison the Court undertakes of contraception and abortion, in which it seeks to connect the two by way of the intimate nature of the decision-making underlying the distinctive acts. But, as I suggest, the Court is obviously unsatisfied with its own reasoning (as it should be). Thus, even as Casey maintains that the right to abortion “fits comfortably within the framework of the Court’s prior decisions”—decisions protective of decisional autonomy, as in the contraception cases—the Joint Opinion’s “explication of liberty” does not

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64 Roe, 410 U.S. 152–53.
65 Id. (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).
66 Casey, 505 U.S. at 851.
67 Griswold, 381 U.S. at 484 (“Various guarantees create zones of privacy.”).
68 Casey, 505 U.S. at 852.
69 Id. at 851.
70 Casey, 505 U.S. at 852.
71 Id. at 858. (Emphasis added.)
rest upon those precedents alone. Insisting that its reliance upon authority only "begin[s] our analysis of the woman’s interest" in abortion, the Casey court looks for a firmer basis for upholding Roe and thinks it finds it in concerns with women’s equality. \footnote{72} Though much of the Court’s animating concern with women’s equality is explored in its stare decisis discussion, described and critiqued below, \footnote{73} the Court hints at its underlying concern in the language it uses to describe the “unique liberty” of women in the body of its argument explicating women’s liberty.

1. The “Unique Liberty” of Women

After properly turning its attention from “conscience” to “conduct,” the Casey court insists that the reason the “conduct” of abortion cannot be proscribed “in all instances” \footnote{74} is due to the “unique liberty” of the

\footnote{72} The Court uses one other argument in favor of its affirmance of the “liberty” prong in Roe:

The soundness of this prong of the Roe analysis is apparent from a consideration of the alternative. . . indeed the woman’s interest in deciding whether to bear and beget a child had not been recognized as in Roe, the State might as readily restrict a woman’s right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example.

\textit{Id.} at 858. This argument is weak: even Scalia’s approach would protect against the state imposing such limits. Scalia’s response in a footnote of his dissent suffices:

There is, of course, no comparable tradition barring recognition of a “liberty interest” in carrying one’s child to term free from state efforts to kill it. For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court’s contention, ante at 859, that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.

\textit{Id.} at 980–81 (Scalia, J., dissenting).

\footnote{73} See Part III.

\footnote{74} Neither the Pennsylvania statute at bar in Casey, nor the more liberal Georgia statute in Doe v. Bolton (decided the same day as Roe), nor even the Texas statute in Roe sought to "proscribe [abortion] in all instances" (emphasis added). Furthermore, as even Justice Ginsburg noted, the Court could have struck down the far-reaching statute in Roe without eviscerating the abortion regulations of every state. Ginsburg, \textit{Speaking In A Judicial Voice}, 67 N.Y.U. L. REV. 1185, 1199 (1992) ("[T]he Texas law ‘except[ed] from criminality only a life-saving procedure on behalf of the [pregnant woman].’ Suppose the Court had stopped there, rightly declaring unconstitutional the most extreme brand of law in the nation, and had not gone on, as the Court did in Roe, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force. Would there have been the twenty-year controversy we have witnessed, reflected most recently in the Supreme Court’s splintered decision in Planned Parenthood v. Casey? A less encompassing Roe, one that merely struck down the extreme Texas law and went no further on that day, I believe . . . might have served to reduce rather than to fuel controversy." (Internal citations omitted.).)
woman: "Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition, and so, unique to the law."\(^75\)

The language the Court chooses to express the "unique liberty" of the pregnant woman to be free of state interference to procure an abortion is notably like the way the Court, since the 1970s, has articulated illicit "sex role stereotyping" under the Equal Protection Clause. Per the Joint Opinion: "[The woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture," and, "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."\(^76\) Even though the plurality never mentions the Equal Protection Clause in its discussion of women's "unique liberty"—unlike Blackmun's explicit mention in concurrence—"woman's role" and "destiny" are terms of art in equal protection jurisprudence.

A similar sounding analysis can be found, for instance, in the early sex discrimination case, *Frontiero v Richardson*, wherein a plurality of the Court struck down a military regulation that required proof of spousal dependency for servicewomen but not servicemen. The plurality declared that the government had engaged in "stereotyping" when it assumed female spouses would be dependent upon their husbands, while male spouses of servicewomen would not.\(^77\) Though the strict level of scrutiny the plurality in *Frontiero* suggested should govern such cases did not hold in later cases, the "sex role stereotyping" rationale surely did.\(^78\)

As first enunciated in *Frontiero* and repeated in other cases, sex discrimination jurisprudence has been particularly sensitive to eradicating any statutory or regulatory remnants of Justice Bradley's concurrence in *Bradwell v State* in 1873: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the

75 *Casey*, 505 U.S. at 852.
76 *Id.* (Emphasis added.).
78 In *Craig v. Boren*, a majority of the Court settled on an intermediate level of scrutiny for sex discrimination cases. *Craig v. Boren*, 429 U.S. 190 (1976). For another case relying on sex-role stereotyping as a framework for adjudicating sex discrimination, see *Weinberger v Wiesenfeld*, in which the Court struck down a provision of the Social Security Act as illicitly based on the "archaic and overbroad generalization" since "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).
According to Justice Brennan in *Frontiero*, “As a result of notions such as [Bradwell's], our statute books gradually became laden with gross, stereotyped distinctions between the sexes, and women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.” Over the decades since, the Court has made clear that, under the Equal Protection Clause, the state may not insist upon “its own vision of the woman’s role,” especially as traditionally (and exclusively) cast as wife and mother. It is no surprise that in an opinion so concerned with women’s equality, the justices would borrow language from equal protection jurisprudence, even as they resist altering the constitutional basis of their decision.

The Casey court is right to notice that pregnancy is unique to the human condition, and uniquely in the experience of women—even as it is the means by which every human being enters the world. The asymmetrical nature of human reproduction vis-à-vis men and women, and the attendant questions this sexual asymmetry raises for legal equality are of paramount importance in the law, especially since the Court properly interpreted the 14th amendment of the Constitution to require legal equality between men and women. But the Court draws a spurious conclusion from this important observation. It simply does not follow that because “the liberty of the woman is [uniquely] at stake” in this case—in that women are impacted by pregnancy in a way that men are not—that women ought to enjoy greater liberties to engage in otherwise unlawful conduct (e.g., taking innocent life). State legislatures may wish (and arguably, have the duty) to respond in various ways to reproductive asymmetry (especially as paternal abandonment and maternal poverty can create acutely disproportionate and unjust conditions in the lives of women who have children); but in no way does it follow from reproductive asymmetry that the Constitution requires a license to end the life of one’s nascent and dependent child.

The Joint Opinion is hardly systematic in its treatment of the equality

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80 *Frontiero*, 411 U.S. at 685.
81 For a further discussion of “sex role stereotyping” and the framework’s lack of applicability in the case of abortion, see generally, Bachiochi, supra note 21, at 926 (“[C]urrent equal protection jurisprudence is interested solely in preventing the legal perpetuation of traditional sex-role expectations, not in maintaining a misguided illusion of the biological identity of the sexes. Thus, states are very much within constitutional bounds when they legislate on the basis of the distinct biological roles men and women play in reproduction.”).
rationale undergirding its affirmation of a constitutional right to abortion, and certainly does not assert it with the force and confidence Blackmun does in concurrence. Rather, it creeps toward such a rationale in the language it chooses to describe woman’s “unique liberty”; as discussed in Part III, it rushes more headlong in its exploration of stare decisis. Yet even without a full-throated equal protection treatment on the part of the Court, concerns with both illicit governmental imposition of traditional sex roles (in its liberty analysis) as well as with hampering women’s progress (in its stare decisis analysis) are, I suggest, the shaky foundation upon which the Casey court reaffirms Roe. In Part III, I further discuss and critique this foundation.

2. A Note on the Contraception Cases

Before analyzing the Joint Opinion’s use of stare decisis as a means to shore up concerns about women’s equality in Part III, it is necessary to look with some care at Casey’s treatment of the contraception cases as laying the groundwork for its recapitulation of Roe. Again, Casey suggests that “Roe [] may be seen [] as an exemplar of Griswold liberty,” since,

82 Casey, 505 U.S. at 928 (Blackmun, J., dissenting) (“A State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality.”). See infra, Part III.A for full quote.

83 The Casey court also uses similar language from equal protection jurisprudence when it strikes down the spousal notice provision as imposing a substantial obstacle to women’s right to obtain an abortion in section V.C. After quoting Bradwell to demonstrate married women’s status as legal non-entities at common law (i.e., coverture), the Casey court writes:

Only one generation has passed since this Court observed that ‘woman is still regarded as the center of home and family life,’ with attendant ‘special responsibilities’ that precluded full and independent legal status under the Constitution. Hoyt v. Florida, 368 U.S. 57, 62 (1961). These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

Casey, 505 U.S. at 897. The Court reasons that the statutory spousal notice provision would give a husband an “effective veto” over his wife’s decision, too “reminiscent” of coverture at common law: “Women do not lose their constitutionally protected liberty when they marry.” Id. at 898. This, of course, begs the question as to whether the putative right to abortion is such a liberty. Moreover, considering the high risk of domestic abuse suffered by pregnant women, one wonders how seriously the Court thought about the possibility that husbands or boyfriends would use similar tactics to coerce pregnant wives or girlfriends to undergo abortion against their will. Anecdotal evidence of such coercion is abundant; further documentation and research is necessary. See, for instance, Jeanne E. Hathaway et al., Impact of Partner Abuse on Women’s Reproductive Lives, 60 J. AM. MED. WOMEN’S ASS’N 42, 44 (2005) (half of battered women interviewed who had reported partner’s interference in reproduction disclosed that they were pressured or forced to have abortions).

84 Casey, 505 U.S. at 857.
in the Court's view, the decision to use contraception and to have an abortion are "in some critical respects...of the same character." They both involve "personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it." Because the Casey court has "no doubt as to the correctness of [the contraception] decisions," it suggests that Roe itself stand on the same solid footing. But the Casey court assumes too much as it generalizes from contraception to abortion—and the Court seems to acknowledge the weakness of its argument in its concluding statement on the matter: "Roe, of course, was an extension of those [contraception] cases." But no rationale for the extension from contraception to abortion is offered in Casey, just as none was offered in Roe.

To review, in Griswold, the Court struck down a Connecticut statute that prohibited married couples from using contraceptives. In a decision that sought to promote the "noble" marital association, Griswold objected specifically to the government's authority to enter the privacy of the marital bed: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Griswold itself was controversial for having invented an innovative constitutional basis for its decision (viz. "guarantees in the Bill of Rights have penumbras, formed by emanations"). But as John Hart Ely noted, the Court in Griswold was concerned not with enshrining a constitutional right to contraception in the individual or even in the married couple—that would come in Eisenstadt—but with the restriction

85 Id. at 852.
86 Id. at 853.
87 Id.
88 See Ely, supra note 6, at 931–32 concerning Roe's untenable reliance on the contraception cases ("[T]he Court provides neither an alternative definition nor an account of why it thinks privacy is involved. It simply announces that the right to privacy 'is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'" (Emphasis added.)).
89 Griswold, 381 U.S. at 485.
90 Id. at 485–86.
91 See, for instance, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 264 (1990). The Roe court itself mentions the Griswold majority's inventive reasoning among a list of possible constitutional justifications for the "right to privacy" it extends to abortion. But the court in Roe then states, however tentatively, that they "feel" the "right to privacy" can be "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." Roe, 410 U.S. at 152. The Joint Opinion in Casey, by referencing Harlan's concurrence in Griswold and dissent in Poe rather than the majority in Griswold, expressly favors Harlan's "reasoned judgment" approach for. But see supra note 46.
upon the power of government to engage in "intrusive modes of data-gathering."\textsuperscript{92}

A short-staffed Court then extended \textit{Griswold} substantially in \textit{Eisenstadt} seven years later.\textsuperscript{93} The Court, in an opinion sounding in equal protection, struck down a Massachusetts law that had limited the sale of contraceptives to married couples.\textsuperscript{94} \textit{Eisenstadt} declared that an \textit{individual}—whether married or unmarried—had a right to "be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to \textit{bear} or \textit{beget a child}."\textsuperscript{95} Argued a mere month before \textit{Roe}, it was \textit{Eisenstadt} that set the stage for extending the newly-conceived individual "right to privacy" to abortion.

This oft-quoted language, crafted by Justice Brennan in \textit{Eisenstadt}, offered what one law clerk remembered as a "rhetorical bridge" from contraception to abortion, even as the language relevant to abortion in \textit{Eisenstadt} was entirely \textit{dicta}.\textsuperscript{96} That is, "whether to bear a child" was superfluous to the equal protection reasoning the \textit{Eisenstadt} court used to extend to individuals the right to use contraception—a right the Eisenstadt court now claimed \textit{Griswold} had guaranteed to married couples.\textsuperscript{97} According to a number of accounts, Justice Brennan inserted the \textit{dicta} with the then pending abortion case(s)\textsuperscript{98} specifically in mind. As the former law clerk of Blackmun recounted:

Brennan knew well the tactic of 'burying bones'—secreting language in one opinion to be dug up and put to use in another down the road . . . . \textit{Eisenstadt} provided the ideal opportunity to build a rhetorical bridge between the right to

\begin{itemize}
\item \textsuperscript{92} Ely, \textit{supra} note 6, at 929–30 ("Commentators tend to forget, though the Court plainly has not, that the Court in \textit{Griswold} stressed that it was invalidating only that portion of the Connecticut law that proscribed the use, as opposed to the manufacture, sale, or other distribution of contraceptives. That distinction (which would be silly were the right to contraception being constitutionally enshrined) makes sense if the case is rationalized on the ground that the section of the law whose constitutionality was in issue was such that its enforcement would have been virtually impossible without the most outrageous sort of governmental prying into the privacy of the home. And this, indeed, is the theory on which the Court appeared rather explicitly to settle.")
\item \textsuperscript{93} \textit{Eisenstadt}, 405 U.S. at 446. Justices Harlan and Black had retired but their vacant seats had not yet been filled.
\item \textsuperscript{94} \textit{Id.} at 454.
\item \textsuperscript{95} \textit{Id.} at 453 (Emphasis added).
\item \textsuperscript{96} EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 365 (Times Books, 1998).
\item \textsuperscript{97} Again, as Ely notes, see \textit{supra} note 92, \textit{Griswold} did not enshrine a constitutional right to contraception, but defined the outer limits of state authority, holding that the state could not reach into the marital bedroom.
\item \textsuperscript{98} \textit{Doe} v. \textit{Bolton}, 410 U.S. 179 (1973), the companion case to \textit{Roe}, was also pending.
\end{itemize}
use contraception and the abortion issue pending in Roe. And taking full advantage, Brennan slipped into Eisenstadt the tendentious statement explicitly linking privacy to the decision to have an abortion. As one clerk from that term recalled, “We all saw that sentence, and we smiled about it. Everyone understood what that sentence was doing.” It was papering over holes in the doctrine.\textsuperscript{99}

The development of (or, as it were, “papering over holes in”) legal doctrine from Griswold to Roe has been sharply criticized as a matter of constitutional law (never mind the more recent revelations regarding the machinations of the justices themselves).\textsuperscript{100} But is Casey’s attempt to recreate a kinship between contraception and abortion—based explicitly in decisional autonomy—any more adequate as a matter of doctrinal development or even good legal reasoning? Does the private and intimate nature of the “personal” decision-making common to the distinctive acts of contraception and abortion do justice to the significant differences of the acts themselves? That is, as Casey well notes, abortion is more than “a philosophic exercise” about the “meaning of procreation.” This is true about contraception too, of course, as one not only considers the matter and then makes a decision to use contraception; one then acts upon that decision. But is not the difference between the acts themselves that which must be scrutinized, rather than the fact that a common goal (i.e., sexual intercourse but no childbearing) underlies these acts? Does the intimate and personal nature of the common circumstances underlying these acts (i.e., sexual intercourse) obviate the need to scrutinize the distinctive acts themselves? After all, I may have a goal to retaliate against an enemy, but the means I use to do so (warning others of his bad character vs. giving him a blow to the head) is surely of consequence—to both my enemy and my own legal culpability, even if, in this case, “my enemy” is my intimate companion and both acts occur in the privacy of my own home. Intimacy and privacy do not obviate the need to make sound legal distinctions.

Indeed, the acts of contraception and abortion are very different \textit{in kind}. Justice White said as much in his dissent in Thornburgh v. American College of Obstetricians and Gynecologists in 1986: abortion “involves the destruction of another entity: the fetus,” which renders it different in kind from the decision not to conceive in the first place.\textsuperscript{101} This critical


\textsuperscript{100}Ely, \textit{supra} note 6, at 947. (“[Roe] is bad because it is bad constitutional law, or rather because it is \textit{not} constitutional law and gives almost no sense of an obligation to try to be.”). \textit{See generally} Forsythe, \textit{supra} note 99.

\textsuperscript{101}Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814
distinction—a basic matter of biology—is entirely missed in *Casey*, as it was in *Roe*.  

*Casey*’s attempt to tie together contraception and abortion on the basis of the individual’s general intentionality reads as follows:

As with abortion, reasonable people will have differences of opinion about [contraception]. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term, no matter how difficult it will be to provide for the child and ensure its wellbeing. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Casey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant. It was this dimension of personal liberty that *Roe* sought to protect, and its holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person. *Roe* was, of course, an extension of those cases...  

The “same concerns” are undoubtedly present when a woman decides to attempt to avoid pregnancy (via contraception) as when she “confronts the reality” that her attempts have failed; obviously so. But this is not an argument for extending her liberty from an act of prevention to one of destruction. It is, after all, one thing to say government has no authority to encroach on marital privacy (*Griswold*), and a step further to say the government’s lack of authority to intervene in “the sacred precincts of marital bedrooms” affirmatively protects the unmarried individual’s private attempts, through pharmaceuticals or technology, to decouple sexual intercourse from its procreative potential (*Eisenstadt*). But it is another thing altogether to say that a woman enjoys a constitutional right to end the life of a nascent human being—her own dependent unborn


102 Stephen Gilles suggests that by this comparison between contraception and abortion, *Casey* means to imply that a woman’s protected liberty interests in not reproducing include ensuring that the fetus is killed. Stephen Gilles, *Does the Right to Elective Abortion Include the Right to Ensure the Death of the Fetus?*, 49 U. RICH. L. REV. 1009, 1021–22 (2015) (“Lest one think the common ground between abortion and contraception is solely that both enable a woman to avoid pregnancy and childbirth, *Casey* highlights the plight of a woman who believes that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. Although *Casey* does not spell out how the right to an elective abortion enables this woman to avoid bringing a child she is unable to care for into the world, there can be only one answer: by ensuring that her fetus does not survive the abortion. *Casey*’s reasoning thus implies that the woman’s liberty interest in not reproducing is protected by the right to elective abortion as well as by the right to use contraception.”).

103 *Casey*, 505 U.S. at 853 (emphasis added).
child, to whom she would otherwise owe special duties of care.

Casey’s comparison of contraception and abortion treats a woman’s choice about whether or not to avoid pregnancy as no different from her choice about whether or not to terminate a pregnancy. That is false, even in Casey’s own terms. Would the Court really say that contraception is an “act fraught with consequences for the woman who must live with the implications of her decision” in the same way as abortion? Of course not. In the latter case, she knows (or at least ought to know) that she is ending a nascent human life (the life of her own developing child, no less) rather than preventing a new human life from coming into existence. It is simply dishonest to conflate the act of contraception with the act of abortion. Rehnquist’s analysis hits the mark when, in his Casey dissent, he writes: “The abortion decision must [] be recognized as sui generis, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.”

The Casey discussion of the common “decisional” character of contraception and abortion adds nothing to Roe; it merely asserts, as Roe did before it, that the right to “privacy” (in Casey, “liberty”) is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” The Casey court, or at least the authors of the Joint Opinion, suspects the authority it rests upon is as weak as its assertion, so it goes searching elsewhere.

III. “RELYING” ON STARE DECISIS AS A MEANS TO PROMOTE WOMEN’S EQUALITY

A. A Putative Right in Search of Constitutional Justification

The legal academy near-universally criticized Roe v Wade after the Supreme Court rendered the decision in 1973. Even those in favor of “abortion rights” found fault with the “privacy” rationale of Roe, most famously John Hart Ely, who excoriated the decision the very year it was rendered. In the decades that followed, a cottage industry arose within

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104 I am indebted to Stephen Gilles for posing this rhetorical question just so.
105 Id. at 952 (Rehnquist, J., dissenting). See both Part III.B.2 and references at supra note 21 for my responses to the autonomy arguments for abortion rights.
106 Roe, 410 U.S. at 133.
107 But perhaps garnering votes also provides a way to understand the analysis in this part of the Joint Opinion: Justices Blackmun and Stevens joined this part but, as indicated in their separate opinions, do not view the existence of new human life as having legal consequence.
108 See Ely, supra note 6.
the law journals in search of an alternative constitutional justification for the beleaguered right.

With almost unanimity, that alternative was equal protection, first fully articulated by UCLA law professor Kenneth Karst in 1977. Karst wrote:

Cases such as [ ] Eisenstadt [and] Roe v. Wade [ ] — all these can be seen as “woman’s role” cases. So viewed, they implicate the principle of equal citizenship, for they involve some of the most important aspects of a woman’s independence, her control over her own destiny . . . . The abortion question was not merely a “women versus fetuses” issue; [citing Ely] it was also a feminist issue, an issue going to women’s position in society in relation to men. The focus of equal citizenship here is not a right of access to contraceptives, or a right to an abortion, but a right to take responsibility for choosing one’s own future. 109

The Equal Protection Clause had been put to new use, beginning in 1971 and in the decade that followed, as the Court began to strike down statutes and regulations it deemed to have arbitrarily discriminated on the basis of sex.110 Influential expositors of the law—most notably Ruth Bader Ginsburg, the advocate most responsible for the Court’s new turn—latched onto Karst’s equality rationale for abortion rights.111 With Ginsburg’s influence especially, equality reasoning became the prevailing means by which legal scholars and then advocates defended the Roe regime, even if the Roe opinion itself had few defenders.112 It is no surprise that nearly twenty years after Roe, when the Court sought to replant the right to abortion on more solid constitutional footing, the justices had equality reasoning in mind.

In his concurrence, Justice Blackmun revealed that he had been steeped deeply in the law journals since penning the widely criticized, doctor-focused, privacy rationale for abortion rights in Roe:


110 Reed v. Reed, 404 U.S. 71 (1971)

111 Ruth Bader Ginsburg, Sex Equality and the Constitution: The State of the Art, 4 WOMEN’S RTS. L. REP. 143 (1978) (explicitly relying on Karst for the view that the sex-role stereotyping equal protection framework could be applied to issues of contraception and abortion); Ruth B. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. REV. 375(1985) (“Professor Karst’s commentary is indicative of the perspective not developed in the High Court’s opinion; he solidly linked abortion prohibitions with discrimination against women. The issue in Roe, he wrote, deeply touched and concerned "women’s position in society in relation to men."”)

112 See Bachiochi, supra note 21, for a list of articles in favor of the equal protection rationale for abortion rights.
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 Protection Clause.\textsuperscript{113}

The \textit{Casey} plurality, however, was not willing to go that far, and with good reason: even given the extraordinary development of equal protection doctrine as to sex discrimination, that doctrine does not reach abortion regulations. This is because the Equal Protection Clause governs those regulations that discriminate between persons who are similarly situated, and men and women are biologically dissimilar when it comes to reproduction.\textsuperscript{114} As I’ve written elsewhere:

\begin{quote}
a legislature does not engage in sex-role stereotyping when it passes a law that is based upon the biological facts of childbearing (for example, that women, and not men, gestate and bear children), but that it is sex-role stereotyping when a law seeks to define traditionally the social roles of men and women in reliance upon those biological facts (for example, because women bear children, they care less about their professional work).
\end{quote}

Unwilling to alter equal protection jurisprudence, as Blackmun and many in the legal academy suggested it should, the \textit{Casey} court instead expanded \textit{Roe} liberty and the traditional use of stare decisis. Just as \textit{Casey} widened its definition of due process liberty to include an equality-focused liberty “unique to women” to avoid “insisting on its own vision of the woman’s role,” it also sought to show, via an unprecedented application of stare decisis, that this liberty interest had grown, not lessened, in the years since \textit{Roe}. But the underlying assumption that

\begin{footnotes}
\item[113] \textit{Casey}, 505 U.S. at 928 (Blackmun, J., concurring).
\item[114] Tigner v. Texas, 310 U.S. 141, 147 (1940) (“The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”).
\item[115] Bachiochi, supra note 21, at 905. \textit{See also} Michael Stokes Paulsen, \textit{Dissenting, in WHAT ROE V. WADE SHOULD HAVE SAID} 204–05 (Jack M. Balkin ed., 2005) (“Abortion restrictions impose legal burdens not on the basis of gender but on the basis of the asserted presence and value of a human life in utero. To be sure, only women become pregnant. But [abortion restrictions do] not regulate women as a class; [they] regulate[] the conduct of men and women relevant to the commission of or assistance in abortion. . . “).
\end{footnotes}
women's equality requires abortion rights (or even that abortion rights serve women's equality) is one that, not uncontroversially, views abortion through the lens of a peculiar feminist theory that had gained currency in the 1970s. It is an assumption that flies in the face of the American suffragists' strong opposition to the practice, and by pro-life feminists and many others to this day.\footnote{16}

\section*{B. Stare Decisis}

As noted in Part I, the \textit{Casey} court was uniquely expressive in its hesitancy about upholding \textit{Roe}, stating:

\begin{quote}
We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the \textit{Roe} Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.\footnote{17}
\end{quote}

It sought instead to remedy what it took to be \textit{Roe}'s single greatest defect—inadequate concern for viable fetal life—by altering the trimester framework and level of scrutiny, to allow states more leeway in regulating abortion, at least after fetal viability.\footnote{18} But even as the Joint Opinion was


\footnote{17} \textit{Casey}, 505 U.S. at 871.

\footnote{18} \textit{Id}. at 872. If the Court were really to have taken seriously the state's “profound” interest
unable to endorse the decision in *Roe* as an original matter, the Court reaffirmed its central holding on the basis of its “explication of individual liberty . . . and the force of stare decisis.” It is to the latter point I now turn.

The holding in *Roe* was as broad as it was consequential, striking down all fifty states’ laws regulating abortion. But the Court in *Roe* seemed particularly focused on ensuring that a pregnant woman in distress (whether that distress be physical, mental, financial or familial) be allowed, in consultation with her doctor, to procure an abortion. The *Casey* court repeated this concern for distressed pregnant women in its “explication” of women’s liberty, but also suggested, in its stare decisis discussion, that legal abortion had, over the last two decades, come to represent, and to enable, something far broader in the lives of women.

The *Casey* court not only reaffirmed the constitutional right to abortion in order to assist women in crisis; it also did so because that very right, according to the Court, had enabled women’s participation and progress in the “economic and social life of the Nation.” And so, nearly twenty years in, the justices find themselves unable to stand in the way, whatever they believed the Constitution required.

That is, even if the *Casey* plurality (or even a single justice among them) thought *Roe* was wrong as a matter of constitutional law in 1973—in that the Court had perhaps struck the wrong “balance” between “liberty and an organized society”—by 1992, the plurality now believed that legal abortion has so facilitated “economic and social developments,” and in particular, women’s progress, that “a terrible price would be paid” were the Court to reverse course. The Court reasoned that the potentially erroneous decision nineteen years prior had created certain “reliance in protecting fetal life, this concession—via the “undue burden” standard—would hardly have been enough. But, importantly, the *Casey* court is now balancing this “profound” state interest with what it sees to be women’s enhanced liberty and equality interests, and evidently, still finds the former, in comparison to the latter, wanting.

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119 *Roe*, 410 U.S. at 153 (“The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. 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.”).

120 *Casey*, 505 U.S. at 856.

121 Id.
interests" in the decision—and thus, Roe liberty has become “a rule of law and a component of liberty we cannot renounce.”\textsuperscript{122} The Court declares that the doctrine of stare decisis—wherein the Court “stands by a prior decision”—makes this so.\textsuperscript{123}

The Joint Opinion describes its use of stare decisis as a means to reaffirm Roe as follows:

[\textit{When this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. ... So in this case, we may inquire whether Roe’s central rule has been found unworkable; whether the rule’s limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the rule in question; whether the law’s growth in the intervening years has left Roe’s central rule a doctrinal anachronism discounted by society; and whether Roe’s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.}]\textsuperscript{124}

Many have ably critiqued the Court’s use of stare decisis in\textit{Casey} both as a general matter and by taking each of these considerations one by one.\textsuperscript{125} I intend only to supplement those critiques with a closer look at the Joint Opinion’s discussion of societal “reliance interests” in abortion and how the Court uses this doctrine to promote a particular view of women’s equality, peculiar to the 1970s and beyond.\textsuperscript{126} By fully exploring

\begin{itemize}
  \item \textsuperscript{122} Id. at 871.
  \item \textsuperscript{123} For a full treatment of stare decisis in\textit{Casey}, see Paulsen, \textit{supra} note 24, at 1538 n.8 ("'[S]tare decisis' may be defined, crudely but not inaccurately, as the policy of adhering to precedent 'whether or not mistaken.' The essence of the doctrine—the feature that gives the doctrine any genuine, independent weight in judicial decision making (if it in fact does have such weight)—is adherence to earlier decisions, in subsequent cases, simply and purely because they were once decided a particular way, even though the court in the subsequent case otherwise would be prepared to say, based on other interpretive criteria, that the precedent decision's interpretation of law is wrong. One does not need a doctrine of stare decisis to explain a court's decision to adhere to a prior interpretation of law that it thinks is correct, on independent criteria.").
  \item \textsuperscript{124} \textit{Casey}, 505 U.S. at 855. Emphasis added.
  \item \textsuperscript{125} See Paulsen, \textit{supra} note 24, at 1547; Linton, \textit{supra} note 46; \textit{Casey}, 505 U.S. at 944 (Rehnquist, J., dissenting); \textit{Casey}, 505 U.S. at 979 (Scalia, J., dissenting).
  \item \textsuperscript{126} Clarke Forsythe and Steven Presser also discuss reliance interests in\textit{Casey} but from a different angle in\textit{Tragic Failure}, \textit{supra} note 24, at 108 (“The bottom-line rationale of\textit{Casey} is that ‘reliance interests’ in abortion—as a backup to failed contraception—justified the rule in\textit{Roe}.”) The Forsythe/Presser article offers medical and sociological data to substantiate their central claim that “reliance” on abortion has been “detrimental” to women, physically, psychologically, emotionally, and socially. The authors also offer a brief, but compelling,
Casey's reliance analysis as it regards both abortion as a back-up to failed contraception as well as a means for women's equal participation, I seek to undermine the false assumptions that underlie this analysis. I will conclude by suggesting a new way in which the constitutional right that the Roe court created and the Casey court affirmed shares a deep kinship with the right notoriously proclaimed by the Lochner court generations before: both Court-created rights improperly cast the Court's authority on one particular way of responding to an emerging problem in the midst of a large-scale and rapid cultural revolution and in so doing thwarted more humane and creative responses that would have emerged (and did after Lochner was overturned) were the engine of American ingenuity and compromise allowed to run its course.

1. Relying on Abortion in “Intimate Relationships”: Contraception Revisited

After acknowledging that “reliance interests” are generally applicable only in the commercial context “where advance planning of great precision is most obviously a necessity,” the Joint Opinion seeks to anticipate those who would argue against the applicability of a reliance analysis in the abortion context. The Court notes that opponents might suggest that “reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.”

If the Court were applying stare decisis in an ordinary manner, as directly analogous to the commercial context, the very capacity to change one’s practices in response to a new judicial decision would eliminate the reliance claim.

Likewise, as the argument the Court anticipates goes, individual actors who previously would have relied on abortion “in the
case of contraceptive failure” could simply change their behavior so as not to rely.\textsuperscript{130}

The Court, however, is making a broader claim as to “societal” reliance upon the legal right to abortion and, \textit{as a descriptive matter}, there is good data to support such a phenomenon. In the decades since \textit{Casey}, economists and other social scientists have shown that “reliance” upon the availability of abortion is at work in sexual decision-making in contexts where abortion is readily available, as it had been made in \textit{Roe}.\textsuperscript{131} And so, \textit{as a descriptive matter}, it is altogether accurate to state, as the Court does: “people have organized intimate relationships...in reliance on the availability of abortion in the event that contraception should fail.”\textsuperscript{132} But, the reliance impact of abortion access, as studied over time, is much more far-reaching (and corrosive) than the Court here seems to presume.

The Court’s basic assumption is that abortion is used as a “back-up” to contraceptive failure in individual cases (“\textit{in the event that contraception should fail}”).\textsuperscript{133} But, unbeknownst to the Court, easy abortion access is far more notable, according to economists, for its moral hazard effect: for inspiring a large-scale, societal-wide increase in sexual risk-taking on the part of sexual actors. Rather than merely offer a practical fail-safe “\textit{in the event}” of a contraceptive failure, easy abortion access has been shown to increase sexual activity and disincentivize contraceptive use, thus leading to more abortion and more nonmarital births.\textsuperscript{134} As one noted economist explains:

\begin{quote}
The problem with this view [that abortion impacts only the individual or couple] is that abortion decisions may also lead to something that economists call an “externality,” “in which the behavior of one individual has implications for the well-being of others ... [and] that externality may be positive or negative for society.”\textsuperscript{135}
\end{quote}

How does easy access to abortion produce this externality? As analogized to insurance, abortion offers “complete protection” against the

\begin{footnotes}
\item[\textsuperscript{130}] \textit{Casey}, 505 U.S. at 856 (“[E]xcept on the assumption that no intercourse would have occurred but for \textit{Roe}’s holding, such behavior may appear to justify no reliance claim.”). Stephen Gilles explores this argument at some length, \textit{supra} note 15, at 735.
\item[\textsuperscript{131}] See generally, PHILLIP LEVINE, \textit{SEX AND CONSEQUENCES: ABORTION, PUBLIC POLICY, AND THE ECONOMICS OF FERTILITY} (Princeton, 2007) (showing that when the “cost” of pregnancy is low due to easy access to abortion, sexual partners take more sexual risks).
\item[\textsuperscript{132}] \textit{Casey}, 505 U.S. at 856.
\item[\textsuperscript{133}] Id. (Emphasis added).
\item[\textsuperscript{134}] See \textit{infra} notes 138–141.
\item[\textsuperscript{135}] Levine, \textit{supra} note 131, at 5. Conspicuously missing in this analysis, of course, is the certain impact of abortion upon the developing unborn child.
\end{footnotes}
“risk” of child-bearing. Complete protection against risk, economists tell us, tends to lead to riskier behavior. Relatively easy access to abortion, then, working as a kind of secondary insurance to the primary insurance of contraception, has been shown to “change [sexual actors’] behavior” in favor of greater sexual risk-taking, thus increasing “the likelihood of [abortion] being needed.” Richard Posner describes the sort of unintended consequences as such: “if abortion is cheap, [] intercourse will be more frequent and . . . may generate more unwanted pregnancies, not all of which will be aborted. This should help us to understand the combination of cheap contraceptives, frequent abortions, and yet a high rate of unwanted births in our society . . . .” Strikingly, the rate of nonmarital births over the last several decades has increased most dramatically among poor women, for whom the attitudinal decoupling of sex and childbearing and of childbearing and marriage, ushered in by this new sexual insurance policy, has been most acute.

Were abortion less readily accessible (or more “costly”), economists suggest that contraceptive use (and greater avoidance of sexual intercourse) would increase and that both the abortion rate and unintended pregnancies would likely decrease (though never to a vanishing point). Steve Gilles too cites similar studies in his 2015 article in the Notre Dame Law Review, suggesting: “The high rate of women who have abortions

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136 *Id.* at 3-4 (“[I]f this form of insurance [abortion] is available at a very low cost, it may lead to changes in behavior that increase the likelihood of its being needed [altering] decisions regarding sexual activity and contraception that would affect the likelihood of becoming pregnant. . . . Since using contraception or abstaining from sexual activity may be viewed as costly, women/couples may choose to do so less frequently, in essence substituting abortion for contraception, as abortion becomes even more accessible.”).


Despite using some form of contraception is inflated by the availability of elective abortion: if abortion were unavailable, many of them would use contraception more consistently, or reduce their levels of sexual activity. With abortion readily available (and given the Supreme Court’s imprimatur), neither the reproductive potential of sexual intercourse nor the possibility of contraceptive failure are taken as seriously as they ought to be.

Notably, over the last several years we have witnessed a significant decrease in the abortion rate. Pro-choicers have credited increased contraceptive use. Pro-lifers have credited recent legislative restrictions on abortion at the state level. Perhaps both are true: modest restrictions on abortion have made abortion a bit “more costly” and therefore have created incentives toward greater awareness of the reproductive potentialities of sexual activity, leading to increases in both sexual inactivity and contraceptive use, both of which also have been documented recently. A high court decision that enunciated the significant difference in kind between contraception and abortion—rather than solely expressing their less consequential commonality as to

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141 The coupling of abortion with contraception—as a right of decisional autonomy—has led some to conclude that the line of personal liberty cases from Eisenstadt to Casey and beyond has erected a constitutionally protected right to sexual expression (which includes the right to a dead fetus, if necessary, see Gilles, supra note 15). See Robin West, From Choice to Reproductive Justice: De-constitutionalizing Abortion Rights, 118 YALE L.J. 1394 (2009) (“What Roe does, along with Griswold, Eisenstadt, and Lawrence, is protect an individual’s right to have nonreproductive sex.”). But sexual intercourse remains potentially reproductive, especially due to user and method failure rates of most contraception (excepting irreversible kinds). For a discussion of the reasonableness of relying on fallible contraception for “nonreproductive sex” see infra note 157.


goal\textsuperscript{146}—would also serve this educative function, alerting those engaging in sexual intercourse to the serious reproductive potential of their act.

In summary, it is undoubtedly true that since 1973, “people have organized intimate relationships . . . in reliance on the availability of abortion” and even that “people . . . have ordered their thinking and living around” the availability of abortion. But this descriptively accurate account is entirely question-begging as a prescriptive matter, especially as it concerns women’s equality: as economists have shown, it is likely that our societal-wide “reliance” and “re-ordering” of thinking around abortion has had a distortive, detrimental effect on society, giving way to increased rates of unintentional pregnancy, abortion, and non-marital childbearing—\textit{all of which disproportionately affect women, especially those who are poor}.\textsuperscript{147}

At the very least, the “reliance interest” analysis that the Court hoped to be a straightforward application of a traditional legal doctrine to a new area of law was anything but.\textsuperscript{148} Unintentional consequences perdure.

2. Relying on Abortion for Women’s Equal Participation

The Casey court is not only interested in how people have “organized intimate relationships”; the Court is also concerned with people’s “places in society,” and in particular, the place of women in society.

For two decades of economic and social developments, people have . . . made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.\textsuperscript{149}

First, it is important to highlight the lack of evidence the Court offers for this bold assertion, as it regards abortion. Rehnquist, in his \textit{Casey} dissent, says as much:

\textsuperscript{146} See my prior discussion in Part II.B.2.

\textsuperscript{147} See generally Erika Bachiochi, \textit{Women, Sexual Asymmetry & Catholic Teaching}, 19 CHRISTIAN BIOETHICS 153–55 (2013) (exploring the “sexual economics” literature and offering evidence that the sexual revolution has disproportionately harmed women, especially those who are poor).

\textsuperscript{148} Paulsen, \textit{supra} note 24, at 1551 (arguing that the reliance interest analysis in \textit{Casey} involves “precisely the type of social-policy determinations or legislative fact-finding that are quintessentially within the province of Congress.”).

\textsuperscript{149} \textit{Casey}, 505 U.S. at 856.
Surely it is dubious to suggest that women have reached their 'places in society' in reliance upon Roe, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society’s increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.150

One can also point to both the state and congressional initiatives in support of women’s equal opportunity in the workplace, as well as the many anti-discrimination cases won at the high court since the 1970s, to highlight a more obvious set of causes for women’s educational and professional advancement in society.151

The Court cites as authority for its proposition that abortion is necessary for women’s equal participation both a page and a footnote from a 1984 book (revised in 1990), entitled Abortion and Woman’s Choice, by Professor Rosalind Pollack Petchesky.152 The introduction of the book announces that Petchesky will offer a perspective on “reproductive freedom” that is both “Marxist” and “feminist”.153

The page of Petchesky’s book that the Casey court references falls in a chapter that discusses, inter alia, the correlation between women’s decreased rates of fertility with women’s increased rates of education and employment, especially in the decades prior to Roe, during and after the second world war.154 Such a correlation is unsurprising and uncontroversial, and the author is good to point out that the causal

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150 Casey, 505 U.S. at 957 (Rehnquist, J., dissenting). Rehnquist later enunciates his general agreement with the Court’s anti-discrimination jurisprudence when he makes use of the “sex-role stereotyping” rationale in his opinion for the Court in Nevada Department of Human Resources v. Hibbs, Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003) (“Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.”).

151 See Cunningham & Forsythe, supra note 30, at 154 (“Roe is rarely cited as precedent for women’s rights in any area other than abortion. Virtually all progress in women’s legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from Roe v. Wade.”).


153 Id. at 2 (“[A] coherent analysis of reproductive freedom requires a perspective that is both Marxist and feminist. This dual perspective is also necessary on the level of political practice.”).

154 Id. at 101–38.
relationship between the two is uncertain.\textsuperscript{155} But, importantly, the *Casey* court is not simply making a claim about women's decreased rates of fertility; it is making a claim specifically about abortion. That is, in declaring in a case concerning abortion that women's participation in social and economic life is "facilitated by their ability to control their reproductive lives," the Court is making the much more specific claim that *abortion* is necessary for such participation.\textsuperscript{156}

But Petchesky does not say this. On the particular page that the Joint Opinion references for this claim, Petchesky instead offers a more complex hypothesis (which she plainly recognizes is based on an assumption):

> While we cannot establish a direct 'causal' link with rising (illegal) abortions and pill use (the pill was introduced in 1960), it is safe to assume that the growing labor force participation and college attendance of women in their childbearing years motivated at least as much as they were 'caused' by those trends.\textsuperscript{157}

\textsuperscript{155} *Id.* at 133 ("In the postwar United States, where the relationship seems strongest [between lowered fertility in women and higher labor force participation], it may be true both that women have fewer babies in order to work or when work opportunities expand and that they more readily seek work when there are fewer children to care for.” (emphasis added))

\textsuperscript{156} The claim that abortion is necessary for women's economic and social participation has only grown among abortion rights advocates since *Casey* reaffirmed *Roe* in this way. See, for instance, Whole Women's Health v. Hellerstadt, Brief of Janice Macavoy, Janie Schulman, et al. (amici curiae in support of petitioners)(providing anecdotal accounts of 113 individual women to substantiate their common claim that “I'm a lawyer because I had an abortion.”); see also Whole Women's Health v. Hellerstadt, Brief of National Women's Law Center et al. (amici curiae in support of petitioners) (arguing that the impact of abortion restrictions on the poor ought to be considered in accessing "undue burden" of said restriction). These briefs rightly report that economic factors (including low wages, inflexible work schedules, childcare costs, health care costs, earning disparities between men and women, diminished earnings for mothers over time, etc.) play a large role in women's reported reasons for procuring abortions. The latter brief also suggests that these economic factors ought to be considered in the "undue burden" calculus, such that access to abortion is not made more "burdensome" to poor women by an insensitivity to their poverty. But nowhere do the briefs explain precisely why it is that a license to end the unborn lives of dependent children is what is necessary to facilitate poor women's participation in social and economic life. One would think that organizations claiming to stand for poor women would expend their time and resources not asserting poor women's putative rights to rid themselves of their nascent children but rather lobbying for policies (or engaging in other efforts) that would more directly (and humanely) assist the poor on the road out of poverty. See a full discussion of this topic at Bachiochi, *supra* note 21, at 919.

\textsuperscript{157} Petchesky, *supra* note 152, at 109 (Emphasis added). Later, in a chapter on the relationship between contraception and abortion, Petchesky gives a more fitting rationalization
Petchesky's hypothesis is hardly evidence for the Court's strong claim that women have relied upon abortion for increased participation in the workforce.

The Joint Opinion also cites a footnote on another page in Petchesky's book. Here, the author is even more hesitant to claim anything approaching the Court's confidence about abortion reliance, noting the complexity of even the lower fertility/higher labor force participation data she is discussing: "Demographers have long pointed to the close relationship between lowered fertility among women and their higher labor force participation rates. Yet the enormous literature on this subject leads to the conclusion that it is a complex and variable relationship, not subject to generalization." But generalize is exactly what the Court does.

for the Court's "reliance" argument, though to my mind more damning. After acknowledging that the increase in contraceptive use and abortion rates rose simultaneously in the 1970s, Petchesky offers this searching analysis concerning the impact of the advent of the (less than perfectly effective) pill on the quest for abortion rights:

A uniquely effective, but not foolproof, method of contraception had been developed, distributed, and absorbed into popular practice on an unprecedented scale. What was the impact of the pill and the 'pill culture' on rising abortion rates? To what extent did the reality and the 'aura' of the pill... create changed expectations about reliable fertility control that helped also to legitimate abortion?... To what extent did the pill's failure to meet these expectations directly increase the need for abortion? [Paraphrasing a feminist demographer, she continues] The pill, with all its flaws, acts as a kind of catalyst that helped change women's expectations to include the possibility and the right to reliable contraception.

Id. at 169–70 (emphasis added).

And so, this begs the question: were women (and men) reasonable in thinking they could absolutely control fertility, considering the user- and method- failure rates of all (reversible) contraceptive methods (still now, fifty years later)? And does the (as yet unreasonable) desire to so control fertility justify granting that desire at all costs, including the taking of nascent human life? Put differently: is it even rational for sexual actors to rely upon an effective (but not perfectly so) contraceptive method whose failure would require the death of a nascent human being in order to attain one's "contraceptive" goal? Is it also not plausible to suggest that society's "reliance upon" the private, legal killing of nascent human beings would work to disincentivize that society's discovery of methods of fertility regulation that did not involve such killing? Finally, as I ask elsewhere:

Might there be something awry in a sexual ethic in which the pleasure of adults trumps the life of a human being? And, would we not want to rethink how to properly satisfy the human need for intimacy if such satisfaction, as currently pursued, often ignores the reproductive potential of the sexual act (a biological reality that can never be entirely within our control)?)

Bachiochi, supra note 21, at 946. See also Bachiochi, supra note 147, at 162–63 (describing how natural fertility regulation attends more honestly to the reproductive potential of sexual intercourse and more justly, as between men and women, to the sexual asymmetry inherent in sexual intercourse and reproduction).

Petchesky, supra note 152, at 133 (emphasis added.).
To summarize: in grounding its reaffirmation of a decision it suspects was wrongly decided as an original matter, the *Casey* court relies upon a generalization unsupported by the very reference it cites. That is, even if lower fertility rates do lead to higher rates of education and employment (or vice versa), the Court does not offer any evidence that abortion (rather than fertility regulation of various kinds) is specifically correlated with higher rates of education and employment.\(^{159}\)

Putting aside the Court’s lack of evidence for its broad claim, and even assuming, arguendo, that women’s *equal participation* in economic and social life is an appropriate proxy for gender equality,\(^{160}\) the Joint Opinion’s further assumption that abortion is necessary for such equality could be construed instead as deeply misogynistic. As I have described at length elsewhere,\(^{161}\) the equality argument for abortion rights rests upon a 1970s-feminist philosophy that reduces sexual equality to sameness, setting up the male experience and especially the male body as the norm.

This disembodied theory of equality marks a dramatic departure from a prior generation of feminists—the suffragists no less— who instead insisted that women’s unique capacity to bear children did not undermine their fundamental equality with men. For the suffragists, abortion was a symbol of ongoing male oppression, and many, like Elizabeth Cady Stanton, presumed the repugnant practice would be abolished by the

\(^{159}\) To date, we still have no such evidence. The current sociological literature is far more bullish on the impact of the pill on women’s educational and professional advancement than on abortion. See, for instance, Goldin, Claudia \& Lawrence F. Katz, *The Power Of The Pill: Oral Contraceptives And Women’s Career And Marriage Decisions*, 110 JOURNAL OF POLITICAL ECONOMY 730, 764 (2002) (detailing how the pill has had the single greatest impact on women’s career advancement); Bailey, Martha \& DiPrete, Thomas, *Five Decades of Remarkable but Slowing Change in U.S. Women’s Economic and Social Status and Political Participation*, RSF: THE RUSSELL SAGE FOUNDATION JOURNAL OF THE SOCIAL SCIENCES, August 2016, at 1–32 (surveying the literature and reporting that while abortion access has been shown to reduce the birthrate slightly, “evidence is more limited . . . that changes in abortion access translated into changes in women’s labor-force outcomes”).

\(^{160}\) In our constitutional tradition, which prizes freedom over equality of social station, legal equality is associated with promoting equal opportunity, not equal outcomes. The role of selectivity in occupation (including homemaking) continues to play a significant part in overall outcome inequalities in employment. Joni Hersch, *How Opting Out among Women with Elite Education Contributes to Social Inequality*, 3 IND. J. L. \& SOC. EQUALITY 192 (2015). Evidence also shows that some of the most sex-segregated educational and occupational markets are found within the most egalitarian societies, where women have achieved marked political and social equality. See, for instance, THE SOCIAL ISSUES RESEARCH CENTRE, THE CHANGING FACE OF MOTHERHOOD IN WESTERN EUROPE: NORWAY (2012), http://www.sirc.org/publik/motherhood_in_Norway.pdf. See also my lengthy discussion of abortion as necessary for “equal citizenship” in *supra* note 21, at 909–12.

\(^{161}\) *Supra* note 21.
elevation, education, and enfranchisement of women. The feminists of the late nineteenth and early twentieth centuries fought for suffrage, in part, to enable women the political means to work toward a more humane society—one that would be more hospitable to women and their children, both born and those still developing in their mothers' wombs. Indeed, it was not until the 1970s that agitating for abortion rights would take central stage in feminist advocacy: when Betty Friedan penned the

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162 After reprinting an excerpt from the New York Tribune lamenting “the murder of children, either before or after birth,” Elizabeth Cady Stanton wrote: “We believe the cause of all these abuses lies in the degradation of women [the remedy of which was] the education and enfranchisement of woman.” Elizabeth Cady Stanton, Infanticide and Prostitution, Revolution, February 5, 1868. Sarah Norton (who worked successfully for the admission of women to Cornell University): “Perhaps there will come a day when . . . the right of the unborn to be born will not be denied or interfered with.” Sarah Norton, Woodhull's & Claffin's Weekly, November 19, 1870. Mattie Brinkerhoff:

When a man steals to satisfy hunger, we may safely conclude that there is something wrong in society — so when a woman destroys the life of her unborn child, it is an evidence that either by education or circumstances she has been greatly wronged. But the question now seems to be, how shall we prevent this destruction of life and health? Mrs. Stanton has many times ably answered it—by the true education and independence of women.

Woman and Motherhood, Revolution, September 2, 1869. Ironically, today’s mainstream feminists assume that women’s elevated status depends upon easy access to abortion. This is a reversal of substantial consequence.

163 It is particularly ironic that a women’s movement which began with the quest to ensure women political participation through the franchise would favor, generations later, removing the privilege and power of democratic participation from women through the Court’s sharp intervention in the abortion debate.

164 While leading suffragists such as Susan B. Anthony and Elizabeth Cady Stanton gained traction for the vote with appeals to universal rights, the passage of the nineteenth amendment would depend a great deal upon the efforts of Frances Willard, president of the Women’s Christian Temperance Union, to persuade the Union’s hundreds of thousands of members that the vote could “greatly increase [women’s] humane and civilizing effect on society.” Christina Hoff-Sommers, Freedom Feminism, AEI Press, 2013, 33. See also Nancy F. Cott, The Bonds of Womanhood: “Woman’s Sphere” in New England, 1780–1835 7 (1997) (detailing the many reform movements led by women in the Progressive Era, including the first industrial strikes in the U.S., health reforms, the temperance movement, moral reforms attacking the sexual immorality of men).

165 Victoria Woodhull (the first woman to run for president, nominated by Equal Rights Party in 1872): “The rights of children, then, as individuals, begin while they yet remain the fetus.” Woodhull & Claflin’s Weekly, December 24, 1870. Woodhull again:

Many women who would be shocked at the very thought of killing their children after birth, deliberately destroy them previously. If there is any difference in the actual crime we should be glad to have those who practice the latter, point it out. The truth of the matter is that it is just as much a murder to destroy life in its embryotic condition, as it is to destroy it after the fully developed form is attained, for it is the self-same life that is taken.

Woodhull, When Is It Not Murder to Take a Life?, Woodhull & Claflin’s Weekly, October 8, 1870.
original statement of purpose for the National Organization for Women ("NOW") in 1966, it did not include abortion at all.\textsuperscript{166} But the following year, NOW changed course, and in 1968, included abortion rights in its eight-point national women’s rights program.\textsuperscript{167} Abortion has remained the \textit{sine qua non} of the movement ever since.

The equality argument for abortion suggests that just as men can physiologically avoid the reproductive potential of sexual intercourse—men’s bodies do not experience the consequences of their fertility within them—so too should women be enabled. As Laurence Tribe argues, “While men retain the right to sexual and reproductive autonomy, restrictions on abortion deny that autonomy to women.”\textsuperscript{168} But it is not abortion restrictions that deny autonomy to women: the state of pregnancy itself points to the biological fact that, when pregnant, a woman is not autonomous. She is carrying a new, albeit dependent and vulnerable human life within her. Thus, unlike a man who has fathered a child, a pregnant woman cannot simply walk away: to approach the desired autonomy of the child-abandoning man, she must engage in a life-destroying act.\textsuperscript{169} It is a peculiar breed of feminism that relies on the subordination of and violence against another class of human beings in its efforts to elevate women.\textsuperscript{170}

\textsuperscript{166} Statement of Purpose, NATIONAL ORGANIZATION FOR WOMEN, http://now.org/about/history/statement-of-purpose/ ("With a life span lengthened to nearly 75 years it is no longer either necessary or possible for women to devote the greater part of their lives to child-rearing; yet childbearing and rearing which continues to be a most important part of most women’s lives — still is used to justify barring women from equal professional and economic participation and advance." (Emphasis added.)).

\textsuperscript{167} National Organization for Women Bill of Rights, 1968 ("The right of women to control their own reproductive lives by removing from penal codes the laws limiting access to contraceptive information and devices and laws governing abortion.") Population control advocates and NARAL co-founders, Larry Lader and Bernard Nathanson, convinced Betty Friedan and other leaders of NOW that abortion was necessary to the feminist demands for equality in education and workplace. BERNARD NATHANSON, ABORTING AMERICA (Toronto: Life Cycle Books, 1979); Serrin Foster, The Feminist Case Against Abortion, in BACHIOCHI, THE COST OF CHOICE: WOMEN EVALUATE THE IMPACT OF ABORTION (Encounter Books, 2004), 34.


\textsuperscript{170} Cindy Osborne, Pat Goltz, Catherine Callaghan, and the Founding of Feminists for Life, in PROLIFE FEMINISM: YESTERDAY AND TODAY 219, 222–23 (Derr et al. eds., 2d ed. 2005) ("Having known oppression, we cannot stand by and allow the oppression of an entire class of weaker human beings. Having once been owned by our husbands, we cannot condone a position that says the unborn are owned by their mothers. Remembering a time when our value
“Relying” on abortion to “facilitate” gender equality then is seeking a kind of faux equality for women by way of imitation of (irresponsible) men. Instead of insisting upon cultural acceptance of the distinctive reproductive capacity of women and (cultural respect and support for the caregiving women still disproportionately undertake), 1970s feminism seeks to facilitate gender equality through legitimating violence against nascent, dependent children, to whom both mothers and fathers—and society at large—properly owe duties of care.

Furthermore, as I will argue in the next subsection, the right to abortion arguably hinders the authentic equality of women by promoting cultural hostility toward pregnancy and motherhood, the paradigmatic care work the suffragists and now a newer generation of (care) feminists are eager to see society support and promote. Thus, the same sort of critique offered above regarding the relationship between contraception and abortion will be explored in Section C below: does not society’s “reliance” upon abortion for women’s equality beg the very question of whether that reliance actually advances women’s equality?

Finally, beyond the lack of evidence for the claim that abortion has facilitated women’s progress, the Court offers no argument that abortion is a social good worth relying upon; it merely assumes so. Indeed, the entire “reliance” analysis is based upon this assumption. But, given the
violent nature of the abortion procedure, committed against the innocent nascent child, that assumption on the part of the Court is reminiscent of the sort made of prior social evils that our nation also “relied upon” for other positive social goods.

In this vein, Michael Stokes Paulsen compares “reliance interests” in Roe and Plessy. Describing the “investment-backed expectations” or “sunk costs” generally at issue in commercial reliance claims, Paulsen writes: “There is . . . less investment-backed social expectation in a particular legal regime concerning abortion than there was for continuation of ‘separate but equal’ under Plessy v Ferguson.” Paulsen continues: “[F]or ‘decades of economic and social developments,’ in vast regions of the nation, people organized personal relationships and defined their views of themselves and their places in society in reliance on the legal regime of segregation.”

The same, too, can be said for the putative “property rights” the Court notoriously upheld via the Due Process Clause in Dred Scott: the entire Southern economic system had relied on slavery for its own economic and social developments. That they did so rely does not, in itself, speak to the reasonableness, rightness, or constitutional bearing of the reliance claim. Just as we can say that a flourishing economy is a social good—but relying on slaves to furnish such an economy is a great social evil—we can also say that women’s participation in economic and social life is a social good, but that endowing women with a high court license to end the lives of their unborn children is, I would argue—echoing the suffragists—a great social evil. As Rehnquist wrote in his Casey dissent regarding the indeterminate nature of a “reliance” interest: “[T]he simple fact that a generation or more


\[175\] Paulsen, supra note 24, at 1554–55

\[176\] Id. at 1555 (emphasis added) (noting that reliance interests in the commercial context are at their apex when, inter alia, the legal rule is so well settled that actors do not “discount” the rule in order to account for its unpredictability or instability . . . As a general proposition, the greater the stability of the legal rule, the more it has led to the commitment of investment-backed expectations.” Id. at 1553).
had grown used to these major decisions [Lochner and Plessy] did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here."

C. "A Constitution is not Intended to Embody a Particular [Feminist] Theory": Another Way that Roe is Like Lochner

As Justice Rehnquist suggested in his Roe dissent, and repeated in his dissent in Casey, Justice Holmes’ dissent in Lochner ought to have been equally applicable in Roe. In 1905, the Lochner court had struck down a labor regulation limiting bakers’ hours, holding that the Due Process Clause of the Fourteenth Amendment protected the "liberty of contract." Justice Holmes’ dissent famously derided the majority for deciding the case upon “a [laissez-faire] economic theory which a large part of the country does not entertain,” arguing that the court is not permitted to determine the constitutionality of a law on the basis of the justices’ own opinions as to its merits.

Many have analogized Roe to the now largely discredited Lochner, arguing that in both cases the high court illicitly overstepped its judicial authority in interpreting the provisions of the Due Process Clause substantively, others, favorable to abortion rights, but embarrassed by Lochner, have sought to distinguish the two cases; still others, enthusiastic for both the sexual liberties represented by Roe as well as economic liberties represented by Lochner (currently experiencing a renaissance in legal scholarship), applaud the kinship between the two cases.

My purpose here is not to make a thoroughgoing argument for this or that theory of judicial authority or constitutional interpretation with recourse to the similarities (or dissimilarities) between Roe and

177 Casey, 505 U.S. at 957.
178 Id. at 961-62; Roe, 410 U.S. at 174 (Rehnquist, J., dissenting) (“While the Court’s opinion quotes from the dissent of Mr. Justice Holmes in Lochner v. New York, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case.”).
179 Lochner, 198 U.S. 45 (1905).
180 Id. at 75.
181 See supra note 6.
183 See, for example, David E. Bernstein, Lochner v. New York: A Centennial Retrospective, 85 WASH. U. L. QUARTERLY 1469–1528, 1522–23 (2005) (presenting the case that the Court in both Lochner and Roe chose the right role for the Court, as “defender of last resort of fundamental rights,” even if Lochner itself has been misunderstood)
Lochner.\textsuperscript{184} I mean only to showcase a parallel between the two in order to underscore the social consequences of high court intervention in a hotly contested cultural issue about which the Constitution does not speak: the Court in each respective era put the weight of its authority on one particular (disputed) approach to an emergent social issue, and in so doing, short-circuited important democratic debate—and characteristic American creativity and innovation—that ought to have transpired during a time of large-scale cultural upheaval.

Specifically, when Holmes wrote in his \textit{Lochner} dissent that “a constitution is not intended to embody a particular economic theory,”\textsuperscript{185} I would suggest that these words are equally applicable to \textit{Roe}, and more explicitly to \textit{Casey}, if one replaces “economic theory” with “feminist theory.” For by constitutionalizing the right to abortion in \textit{Roe}, and reaffirming it through equality reasoning in \textit{Casey}, that is precisely what the Court was doing: it illicitly appropriated a particular feminist theory, newly popularized in the 1970s, into the Court’s interpretation of 14\textsuperscript{th} Amendment—with social consequences that remain salient for women today.

The 1960s and 70s were decades awash in new questions that emerged with the revolutionary release of the birth control pill alongside women’s increased social status and the unprecedented entry of mothers of young children into the workforce. As the distinct feminist and sexual revolutions moved apace alongside one another (but not yet together), society had before it a newly emergent set of yet unforeseen and entangled questions: 1) how to enable women to participate more fully in the public sphere, 2) how to manage the significant “technology shock” created by the advent of the birth control pill (effective, but importantly, not 100% so), and 3) how to maintain utmost societal concern for the perennial need to care for dependent children who heretofore had been the primary

\textsuperscript{184} Suffice it to say, I believe the Constitution’s text, structure, and history favors non-judicial solutions to pressing societal problems (unless otherwise detailed in the document itself).

\textsuperscript{185} A number of scholars have challenged Holmes’ understanding of what the Court in \textit{Lochner} was doing, suggesting that, in fact, Justice Peckham was not appropriating “laissez-faire economics” into his view of “liberty” but was bringing a “natural rights” philosophy to the text, perhaps to rehabilitate an original understanding intended for the Privilege and Immunities Clause. See, for instance, Randy Barnett, \textit{Foreword: What’s So Wicked About Lochner?}, 1 N.Y.U. J. L. & LIBERTY 325 (2005) (suggesting that if \textit{Lochner} was wrong, it was only because the Court was trying to remain loyal to the original meaning of the 14th amendment as a whole—and particularly the original meaning of the Privileges and Immunities Clause which, in Barnett’s view, protects substantive, natural rights—a meaning that had been gutted by \textit{The Slaughter-House Cases} in 1873).
responsibility of their mothers?

Just as the *Lochner* court put its thumb on the scale of one particular theory of how the state could respond to the dramatic shifts in bargaining power in the employer/employee relationship after the upheaval of the Industrial Revolution, *Roe* championed a particularly inhumane way of responding to the new circumstances posed by women’s changing social status and the revolutionary impact of the birth control pill on sexual relationships.

Until the *Lochner* era decisions were overturned in *West Coast Hotel v. Parrish*, the Court had thwarted diverse political measures state and federal bodies were passing in response to growing asymmetries in the employer/employee relationship. Just so, it is my contention that the *Roe* regime, slightly amended but affirmed in *Casey*, has thwarted more diverse and humane responses to the asymmetries that naturally exist—and socially persist—due to women’s disproportionate role in human reproduction. As in *Lochner*, the Court in *Roe* and *Casey* disenabled (or at least disincentivized) the myriad non-judicial elements in society to creatively and humanely respond to these newly emergent cultural shifts, and so, have hampered authentic progress for women.

It may be that when the *Casey* court suggested that “an entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society,” it is, again, descriptively accurate. But this description of societal “reliance” upon abortion more readily cuts against the Court’s concern with women’s equality, not in favor of it. By doubling down on the constitutional right to abortion, employers and other public institutions have been “free” to remain unchanged by women’s participation in them. Through women’s legal right to abort their nascent children to participate in the market

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186 *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding the constitutionality of state minimum wage legislation).
187 For instance, the Court upheld the National Labor Relations Act of 1935 (Wagner Act) two weeks later in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Act conferred statutory rights to organize labor unions and bargain collectively.
188 Describing why *West Coast Hotel* properly overturned the *Lochner* era cases, the *Casey* court suggests that “the interpretation of contractual freedom protected in Adkins [and *Lochner*] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.” *Casey*, 505 U.S. at 862. It would be just as plausible to say that *Roe* and *Casey* rest on false factual assumptions about the capacity of an increasingly “unregulated” sexual market—enabled, economists report, by relatively “low-cost” abortion—to satisfactorily acknowledge and justly respond to the sexual asymmetries in both sexual intercourse and human reproduction. See Akerlof, *supra* note 138; Bachiochi, *supra* note 147.
189 *Casey*, 505 U.S. at 860.
economy, women have learned to model themselves after the "unencumbered men"\textsuperscript{190} with whom they seek to compete. Easy abortion access has thus made it unnecessary for businesses and other institutions in the United States to acknowledge the essential cultural reality that most working persons are (or ought to be) deeply encumbered by their prior obligations to their families, and to the dependent and vulnerable at large.\textsuperscript{191}

Given the centrality of abortion rights in the feminist movement today, it is no surprise that work-family balance remains a pressing issue facing women today,\textsuperscript{192} and that it is women's status as mothers—not their status as women—that for many still causes the greatest inequities socially and professionally, despite remarkable gains to women overall.\textsuperscript{193} The

\textsuperscript{190}See generally Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It (2000) (arguing that present day employment understandings in both law and policy take as their model the autonomous male worker, unencumbered by responsibilities to children and other dependents); see also Alvaré, supra note 172, at 444 ("Denying that women are drawn to their unborn children, as well as to spending considerable time and effort rearing born children, only results in policies reinforcing an outdated and largely male model of social life and employment—a model in which no institution need 'flex' or change to allow women and men to meet children's needs. On the other hand, recognizing that both men and women feel keen obligations to their children at the same time that they have work or school obligations to meet is both more realistic and a more likely premise for a successful argument in favor of family friendly and education policies. This is true even if, as past decades have shown, women are more likely than men to take advantage of these policies by, for example, working flexible or part-time hours.").

\textsuperscript{191}Professor Michael Selmi writes:

Increasing workplace equality will require persuading men to behave more like women, rather than trying to induce women to behave more like men. Achieving this objective would create a new workplace norm where all employees would be expected to have and spend time their children, and employers would adapt to that reality.


\textsuperscript{192}Kim Parker & Wendy Wang, Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family, Pew Research Center, March 14, 2013 (56% working mothers find it very or somewhat difficult to balance work and family); Wendy Wang, Mothers and work: What's 'ideal'?, Pew Research Center, Aug 19, 2013 (finding that nearly half of women with a child at home would prefer part time work, including 44% of mothers currently working full-time).

\textsuperscript{193}See generally Sylvia Ann Hewlett, Off-Ramps and On-Ramps: Keeping Talented Women ON THE ROAD To Success, 10 (2007) (describing the stigma experienced by women who take "time out" to care for their children); Gillian Thomas, Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work (St Martin's Press, 2016) 229 (arguing that motherhood still remains key barrier to women's equality); Shelley J. Correll & Stephen Benard, Getting a Job: Is there a Motherhood Penalty, Am. J. Sociology, Vol. 112, No. 5 (March 2007), 1297–1339 (offering evidence that mothers were discriminated based on their status as mothers); Tamar Kricheli-Katz, Choice, Discrimination, and the Motherhood Penalty, Law & Society Rev., Volume 46, Issue 3
idea that the right to abortion offers a solution to that problem—or, as I have argued, has exacerbated the same—is a question ripe for serious debate within feminism itself. It is a debate the Supreme Court has forestalled with its abortion rights jurisprudence, to the great detriment, in my view, of the poorest of women.

Pro-choice constitutional law scholar Robin West has similarly suggested that an inherent “tension” exists between the constitutional right to abortion and a legislative agenda that better values caregiving. Parenting, West writes, has merely become an expensive consumer choice:

As Roe and the choice it heralds to opt out of parenting become part of the architecture of our moral and legal lives, we increasingly come to think of the decision to parent, no less than the decision not to parent, as a chosen consumer good or lifestyle—albeit a very expensive one. . . .

Thus, constitutionalizing this particular right to choose simultaneously legitimates . . . the lack of public support given parents in fulfilling their caregiving obligations. By giving pregnant women the choice to opt out of parenting by purchasing an abortion, we render parenting a market commodity. . . . The right to an abortion gives women a right not to be a caregiver, but at the cost of rhetorically making the difficulties of caregiving all the harder to publicly share, should she opt for it. For privileged women, this is not such a terrible trade off . . . . The woman only marginally capable of supporting even herself, however, faces a choice between parenting and severe impoverishment, on the one hand, and forgoing children on the other.


Debate within feminism is especially necessary given the findings that women’s overall happiness has declined during the same period when women have achieved marked educational, professional and economic advances. Betsey Stevenson & Justin Wolfers, The Paradox of Declining Female Happiness, AM. ECON. J.: ECONOMIC POLICY, vol. 1(2), 190-225 (2009). For an intriguing analysis of these trends, see Catherine Ruth and Burke, Joseph, The New Battle of the Sexes: A 2 X 2 Model of Female Alienation (March 25, 2014). Available at SSRN: https://ssrn.com/abstract=2416480.

Michelle J. Budig & Melissa J. Hodges, Differences in Disadvantage Variation in the Motherhood Penalty across White Women’s Earnings Distribution, 75 AM. SOCIOLOGICAL REV. 705–28 (2010) (showing that though a significant motherhood penalty exists at all earnings levels, motherhood inflicts the largest penalty on low-wage women).

Most still understand children and the work of parenting as a public good.

Robin West, From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights, 118 YALE L.J. 1394, 1409-11 (2009). (“Pro-life and pro-choice movements have a common interest in reducing the incidence of abortion, both by minimizing the number of
But, without *Roe*, and with Ginsburg's commendable wins in core sex discrimination cases in the 1970s, workplaces would have had to adjust much more quickly to women—and men—with dependents (and so the demands of the family more generally). The legislature was designed for the sort of pull and tug that could have occurred between different feminist, business, family, and social organizations, much like what happened in Western Europe after the sexual revolution. There, they saw a far more limited abortion allowance with strong statements and policies in support of caregiving. Though the United States would likely extol and support caregiving far differently—its penchant for free markets, innovation, and subsidiarity—it would have been a priority much sooner without the "reliance" on abortion the *Casey* court so boldly affirms.

As I have written elsewhere,

The cultural view we take of unborn human life, whether it be high or low, translates directly into the respect or disrespect pregnancy affords a woman, both socially and professionally. If pregnancy is just like any other medical condition—or worse, is a condition treated as a burden to women, a state that symbolizes their inability to compete with wombless men—pregnancy will never be accorded the respect and accommodation it deserves. Not all women become mothers, but those who do depend upon a cultural esteeming of the state of pregnancy—the nurture of an individual and unique human being—for their social and professional support. To belittle the moral status of the unborn child is to belittle the state of pregnancy, and so the pregnant woman. Indeed, the sacrifices that pregnant women endure during their pregnancies would be more

unintended pregnancies and lowering the cost of mothering. They should also have a common interest in protecting the ordinary legal rights and interests of pregnant women who complete their pregnancies—rights that also are threatened by a legal regime that generally neglects the demands of reproductive justice. It might be time to give ordinary politics a chance to achieve common goals.” *Id.* at 1427).

198 Claudia Goldin & Lawrence F. Katz, *The cost of workplace flexibility for high-powered professionals, in 638 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 45–67 (2011) (showing that workplace flexibility has improved, in some high end professions, due, in part, to increased numbers of women); *see also* Mary Ann Glendon, *Is the Economic Emancipation of Women Today Contrary to a Healthy Functioning Family?, in THE FAMILY, CIVIL SOCIETY, AND THE STATE*, 93 (Christopher Wolfe ed., 1998) (“Promoting women’s exercise of all their talents, rights, and responsibilities without undermining their roles within the family will require calling not only husbands and fathers to their family responsibilities but also governments and private employers to their social duties. That will involve nothing less than a cultural transformation.”).

199 *See generally MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW* (1989).

200 Linton, *supra* note 46, at 46 (“Genuine equality between the sexes will be reached on that day when women can affirm what makes them unique as women and still be treated fairly by the law and society. By not overruling Roe, the Casey Court has delayed the arrival of that day.”).
honored (and perhaps more rewarded) were we as a culture honest about the dignity of the human beings who have been entrusted to their care.201

I do not pretend to know precisely the sort of public and private initiatives that would best assist those who both participate in the “social and economic life of the Nation” and care for dependents, but that is really the point: the Court in Roe and Casey short-circuited the initiative and inventiveness characteristic of the American people when it put the gavel down on one (inhumane and deeply controversial) way of responding to the issue.202

IV. CONCLUSION

With a rightward shift in the Court’s composition, not unthinkable in the near future given a Republican White House, Republican majorities in both houses of Congress, and the ages of Justices Kennedy, Ginsburg, and Breyer, Roe and Casey could be revisited with little attention paid to Casey’s controversial due process and stare decisis justifications. An approach to constitutional adjudication that sought to restore the Constitution to its text, structure and history—one that had a humbler view of the judicial role in cases in which the Constitution has not expressly spoken—could reconsider Roe and Casey with little consideration of how the Court in those cases weighed competing interests. Roe, after all, remains a decision bereft of solid constitutional footing, and Casey, despite the plurality’s creative attempts, did not improve upon the Court’s original justification. Were the Court to reconsider Roe and Casey within the current jurisprudential framework, however, attention ought to be paid to the way in which the Casey court assumed that societal reliance on abortion has facilitated women’s progress in society.

The Casey court attempted to fashion an inventive constitutional foundation for a beleaguered constitutional right. In so doing, the Court

201 Supra note 21, at 942–43.

202 One assumes that the on-going technological revolution may have a significant role to play in enabling the sort of flexibility in both hours and location of work so that those with professional responsibilities are not shortchanging their familial responsibilities. See Claudia Golden, A Grand Gender Convergence: Its Last Chapter, 104 AM. ECON. REV. 1091–1119 (2014) (arguing that solution to work/family balance ought to involve how jobs are structured and remunerated to enhance “temporal flexibility.”); see also Amber Lapp & David Lapp, Work-Family Policy in Trump’s America, INST. FOR FAMILY STUDIES, (2016) https://ifstudies.org/ifs-admin/resources/lapp-ohio-survey.pdf (finding that among working-class cohort studied, flexibility and fairness in scheduling were critically important).
made an assumption about the relationship between abortion rights and women’s equality, based on a peculiar, if currently fashionable, feminist theory. This highly disputed feminist assumption—emblazoned in constitutional jurisprudence for a quarter of a century—has amassed “certain costs,”203 and not only for the millions of nascent human lives lost to abortion since Roe.204 Society’s “reliance” on abortion as a faux equalizer of the sexual and reproductive asymmetries between men and women has forestalled the development of authentic solutions to a set of familial and cultural issues at the intersection of women’s increased participation in the public sphere and women’s disproportionate role in reproduction (and in caregiving too). Constitutionalizing the right to abortion in 1973 has not resolved these issues for modern families: how to balance work and family remains the most pressing issue facing most mothers and fathers today.

203 Casey, 505 U.S. at 835.
204 Approximately one million abortions occur each year.
I. INTRODUCTION

Stephen G. Gilles's work on *Casey v. Planned Parenthood*, both in this volume and in a 2015 *Notre Dame Law Review* article, should be mandatory reading for anyone who wants to dive into the possible trajectories of abortion jurisprudence in the United States. I fully endorse his commitment to working within the *Casey* framework. Also like Gilles, my fundamental commitment to do so has not changed after *Whole Women's Health*. Perhaps unlike Gilles, though, I believe there may be good reasons for those of us who are working to find a way out of the abortion wars to be heartened by *Whole Women's Health*.

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2 My argument here responds primarily to Gilles's 2015 piece in the Notre Dame Law Review, see supra note 1, but it also engages his work in this volume. See Stephen G. Gilles, *Restoring Casey's Undue-Burden Standard after Whole Women's Health v Hellerstedt*, 35 QUINNIPIAC L. REV. 593 (2017). The article will follow the outline of an argument I made in greater detail in a 2015 book attempting to find common ground and move beyond the binary life/choice abortion wars. See CHARLES C. CAMOSY, *BEYOND THE ABORTION WARS* (2015). Here I will focus more narrowly on jurisprudence, and particularly on how *Whole Woman's Health v. Hellerstedt* reimagined *Casey's* undue burden test. I should acknowledge at the outset, though, that my methodology is that of a bioethicist and not a legal scholar.
As Gilles points out, the Casey Court “never explained its judgement [on undue burden] on merits.” Further, that judgement remains unexplained, even after Whole Women’s Health. Although it is frustrating for those of us who would have preferred that Casey stood on firmer moral and jurisprudential footing, the lack of explanation presents a significant opportunity for those of us who have a view about what that footing should look like.

Roe v. Wade was mistaken in implying that, if a fetus is a person under the Fourteenth Amendment of the United States Constitution, all states would have to ban abortion. Pregnancy is a unique biological and moral situation, requiring a complicated balancing of goods and interests. I argue below that the interest-balancing test made explicit in Whole Women’s Health (though apparently already in wide use in lower court decisions interpreting Casey) can more authentically capture the U.S. abortion debate.

More particularly, I argue that the interest-balancing test hinted at in Casey, and made explicit in Whole Women’s Health permits courts to (1) give considerable weight to the moral status of the prenatal child (particularly given developments since Roe), (2) adopt a more authentically feminist understanding of the benefits and burdens of abortion restrictions, and (3) defer to local communities on the complex policy determinations about restrictions on abortion.

In arguing for working within the Casey framework, Gilles highlights shifting Court membership and the fact that Justice Kennedy’s views on these matters are still in flux—particularly when it comes to balancing a state’s interest in fetal life with the burdens such protections have on women. Indeed, the possibility of the Court becoming even more sympathetic with arguments focused on protecting prenatal human life may be behind the plaintiffs in the case that would become Whole Women’s Health refusing to challenge Texas’s new ban on abortion beyond 20 weeks gestation. The most logical explanation for their refusal is that they believed (with good reason) that they would likely lose their challenge. As a result, the judgement in Whole Women’s Health had almost nothing to do with the central moral and legal question in the abortion debate: how should the moral status of the fetus be weighed against the interests of her mother?

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3 Gilles, supra note 1, at 754.
II. INTEREST-BALANCING TESTS AND THE MORAL STATUS OF THE PRENATAL HUMAN BEING

Gilles, as we can see in this volume, is no fan of the interest-balancing test in *Whole Women's Health*. He goes even further than Justice Thomas' dissent, arguing "that the balancing version of undue-burden scrutiny is unsound both in terms of *Casey*’s general principles, and more broadly as a matter of reasoned judgment." That it may be (at least when it comes to aligning with the plain text of and intentions behind *Casey*), but the interest-balancing test may also be an important step toward introducing more authentic and careful moral considerations into the abortion debate. Discussions previous to *Whole Women's Health* were limited to judgements about whether a particular law constituted a "substantial obstacle" to a woman’s access to abortion, almost completely bypassing the moral and legal status of the fetus. But an honest and authentic attempt to perform an interest-balancing test forces a court to directly address both matters being weighed. Even the *Whole Women's Health* majority was willing to uphold the Texas law if that state could have shown that the law actually secured a state interest proportionate with the burden it would place on women. Pro-lifers ought to take the Supreme Court up on this challenge, and confidently argue for the good of protecting the prenatal child as it compares to the burdens of such protections as they fall on women.

Gilles and others may object here, arguing that one should stay closer to the text of *Casey*. But my reading of the law—though, again, it is as a bioethicist and not a legal scholar—is that the “undue burden” test as laid out in *Casey* is underdetermined. I suppose I find myself in the camp of Justice Scalia who, in his *Casey* dissent, called the test “rootless” and thus open to a wide variety of different meanings. The length, complexity, and compromise-nature of *Casey* has built-in tensions that have quite naturally led nearly everyone (from legal scholars to district courts to Supreme Court justices) to have differing opinions about what it means. A single Justice has even adopted different interpretations of “undue burden” at different times: Justice Kennedy’s understanding of the term developed not only when he signed onto Breyer’s opinion in *Whole Women's Health*, but also from *Casey* to *Carhart*, when he clearly moved in the direction of more protection for the fetus. Indeed, Justice Kennedy’s increasing

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4 See Gilles, *supra* note 2, at 713.
concern for the fetus continues to cause consternation for pro-choice activists.\(^6\)

As a practical matter, pro-lifers should assume the validity of the interest-balancing test and see if we can work within it. Its most obvious virtue is that it requires a court to directly and carefully address the moral value of the prenatal human being. *Roe* completely punted on this question, but at least that Court (mistaken though it was) had the kind of radical focus on individual privacy and autonomy which permitted such a judgement. *Casey* and *Whole Women's Health*, by contrast, both propose tests that cannot be meaningful without coming to terms with the relative values of the interests involved. If prenates have close to zero moral value, virtually no restrictions on abortion would be warranted. If they have moderate value, some restrictions would be warranted. And if they have full moral value—that of a person—then a very large number of restrictions would be warranted.

Though I believe *Roe* was mistaken to punt on this question, at the time there was at least some plausibility to the Court's claim that the culture was so fractured on the moral status of the fetus that it would be better not to take a stand on whether she should count as a person under the Fourteenth Amendment.\(^7\) But by the time of *Casey* (and certainly in our own time) there was no longer any debate about the humanity of the prenatal child. She is very clearly a human organism, an individual member of the species *Homo sapiens*. As such an organism, the arguments that she is "mere tissue" or "part of her mother" are now widely understood to be biological nonsense. She has homeostasis as an organism separate from (though obviously closely-related to) her mother. Indeed, her mother's body must release a special hormone or the mother's immune system attacks the prenate as foreign tissue.

As I have written elsewhere:

> [P]renatal children do things we expect from human animals. They feel, see, and hear. Though we aren't sure at exactly what stage these various senses "kick on", a fetus can feel pain, hear and recognize sounds, and react to different kinds of light. Pregnant women describe their prenatal children as able recognize and react to the voice of their mother and father, dance to music (and remember the tune when the same songs are played to them after birth), and even to follow a light source around the room. Especially with increased study of twins, we are

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\(^7\) See *Roe v. Wade*, 410 U.S. 113, 116–17 (1972)
learning even more about the kinds of interactions of which fetuses are capable. Researchers at the University of Padova, for instance, found that by week 14 prenatal twins start reaching for and touching the other one—even more often than they touch themselves. The study found that they even used distinct gestures when reaching for their twin sibling. Their hands lingered when they touched each other. The study was clear: “Performance of movements towards the twin is not accidental.”

The fact that we have 3D and 4D ultrasounds of prenatal humans moving and kicking and dancing—all widely shared on social media—has helped change cultural mores about the humanity of pre-natal children. Some of my students, born from the IVF process, have pictures of themselves as embryos. Smart phone applications can record the prenatal child’s heartbeat as early as seven weeks gestation. The miracles of neonatal intensive care have brought the reality of preterm infants into the broad experience of the culture. Significantly, such preterm patients are sometimes visited by pregnant family members who bear a child inside them who is older and more developed than the child in the NICU bed.

Given these facts, it is no wonder that our culture almost never uses the antiseptic term “fetus” except in a biology course, medical journal article, or discussion about abortion. The OB-GYN tells the mother (well before viability) that her “baby is doing great.” A mother (again often well before viability) will ask her partner to “come quick” because for the first time he can feel that “the baby is kicking.” And when perusing magazine covers while waiting in the grocery store line no one ever reads of celebrity’s new “fetus bump.” It is, of course, her “baby bump.”

Certainly, when evaluating the interests of the unborn child, a court or state legislature could find that being a living Homo sapiens organism is not what is morally significant for counting as a person. Rejection of this standard, however, puts one in the awkward position of either (1) picking a “high” moral trait (like self-awareness or moral sensibilities) which exclude human beings who are newly born or have profound disabilities or (2) picking a “lower” trait (like capacity to feel pain or brain

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9 The application can be downloaded at https://itunes.apple.com/us/app/my-babys-beat-prenatal-listener/id420859056?mt=8
development) which would be forced to conclude that mice and rats count as legal persons.

Nor should appeals to dependence or viability affect a moral status judgement. I make a more detailed case for these and the above arguments in my book,\textsuperscript{10} but I hope anyone arguing that those who are radically dependent deserve less protection of the law would take a moment to consider the moral implications of this position—especially if they have the view that government’s most important job is to protect and support the most vulnerable. Viability used as a standard for moral status judgements also produces strange and even absurd results. Given that viability of a child changes based on the relative state of technology, one is forced into claims that a twenty-three week old prenate has one kind of moral status in Sacramento but a very different one in Sucre. Or the same prenatal child would have one kind of moral status in 2017 Chicago and a different one in 1977 Chicago. And with the coming development of an artificial placenta,\textsuperscript{11} the absurdity of using viability as a standard for moral status will be laid bare for everyone to see as eleven or twelve week-old prenatal children will be able to live outside their mothers. Did the development of this technology suddenly change the moral status of these children? No, the moral status of beings who count as persons does not come from the fact that our culture currently has technology to keep them alive as totally independent beings. Their moral status comes from the kind of being they are, and nothing else.

The intuition many have about the significance of viability, though absurd to use as an indication of moral status, may be important for thinking about how the interest a state has in protecting prenatal human life should be balanced against the burden abortion restrictions have on women. And it is to this second aspect of the interest-balancing test we now turn.

III. RETHINKING THE BURDEN OF ABORTION RESTRICTIONS

With what, precisely, is the state interest in the protection of prenatal human life to be balanced? This is underdetermined in \textit{Casey} and its successor cases, but the two foci appear to be the “liberty interests” and “reliance interests” of women that the Constitution protects. But the

\textsuperscript{10} Camosy, \textit{supra} note 2, at Chapter 2.

methodology of the *Casey* Court in determining such interests reflected both cultural and structural biases which favors male bodies over female bodies. Given these assumptions, an interest-balancing test actually reinscribes the very structural biases against women that *Casey* was ostensibly attempting to resist.

*Casey*’s understanding of the interests of women flowed from the reasoning and assumptions of the *Roe* Court. But as feminist ethicists have since pointed out, what *Roe* defended was the patriarchal *status quo*—not genuine structural change that would enable women to function with equal liberty as substantially different from men. And given the major players who agitated for abortion-on-request, that is hardly surprising.

Hugh Hefner and his Playboy Foundation funded the lower court cases designed to provoke *Roe*, a Court decision many pro-life activists feared would be the final victory of the Playboy philosophy. Ironically, Hefner claims that, in the context of his activism in this area, he “was a feminist before there was such a thing as feminism.” The person most responsible for the founding and growth of the organization that would become the National Abortion Rights and Action League was Dr. Bernard Nathanson. The recent death of Norma McCorvey (“Jane Roe”) was an occasion for everyone, including pro-choice activists, to remember how badly her lawyers manipulated this young woman for the purposes of generating the legal outcome they desired.

And, of course, the entire *Roe* Court was male. Women of all kinds have roundly and consistently criticized the decision, especially for its patriarchal, individualistic understanding of the human person. Some of the harshest criticism has come from people who are broadly supportive of abortion rights. Linda Greenhouse, a pro-choice journalist who covered the Supreme Court for the *New York Times* from 1978–2008 had the following to say:

> To read the actual opinion, as almost no one ever does, is to understand that the seven middle-aged to elderly men in the majority certainly didn’t think they were making a statement about women's rights: women and their voices are nearly absent from the opinion. It’s a case about the rights of doctors – fellow professionals, after all – who faced criminal prosecution in states across the

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country for acting in what they considered to be the best interests of their patients.\textsuperscript{15}

Another supporter of abortion and women’s rights—none other than Justice Ruth Bader Ginsburg—shares Greenhouse’s skepticism. The following is taken from the AP story on her 2013 appearance at the University of Chicago Law School:\textsuperscript{16}

The ruling is also a disappointment to a degree, Ginsburg said, because it was not argued in weighty terms of advancing women’s rights. Rather, the Roe opinion, written by Justice Harry Blackmun, centered on the right to privacy and asserted that it extended to a woman’s decision on whether to end a pregnancy.

The concept of liberty operative in Roe—and absorbed by Casey—was understood and argued for by men. And, as legal scholar Helen Alvare notes, it was full of patriarchal assumptions about the assumed harm that women suffer without access to abortion.\textsuperscript{17} Feminist bioethicist Sidney Callahan also argues that the model they used for thinking about how women suffer was based on nothing remotely approaching authentic feminism. Completely absent, for instance, is a feminist critique of an individualist, unrelated, hierarchical, autonomy-focused view of the person. Indeed, this patriarchal view of the person was precisely the one that the men of the Roe Court used. They imagined women to be disconnected and isolated individuals—in a more privileged position than their prenatal children on a hierarchy of value—who must be given the private space to make individualist, autonomous decisions about the life or death of their prenatal child.

The result of this patriarchal view forming the basis of the central holding of Roe, upheld by Casey, is that women’s liberty was seen through a patriarchal lens. Women were made “free” to act on the basis of male assumptions—to imagine themselves living sexual, reproductive, economic, professional and parental lives as men do. On this model, pregnancy and childbirth are a burden and cause of distress relative to what really matters: economic gain, professional advancement, and sexual

\textsuperscript{17} See Helen M. Alvare, Constitutional Abortion and Culture, CHRISTIAN BIOETHICS: NON-ECUMENICAL STUDIES INTO MEDICAL MORALITY, August 2013, at 140–42, http://cb.oxfordjournals.org/content/19/2/133.full.pdf+html.
autonomy. Many different kinds of feminists have widely criticized this “disease model” of pregnancy.

In *Casey* the Court reaffirmed *Roe’s* general framework and, by extension, this understanding of the person. They looked back at the American social landscape since *Roe* and offered the following assessment:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.¹⁸

Notice how the Court claims that women, in order to participate equally in society, must have the reproductive consequences of a man. Controlling one’s reproductive life means treating all bodies as if they are male. Social equality for women does not mean being paid a just and equal wage. It does not mean mandatory pregnancy leave and affordable child care. It does not mean strict anti-discrimination laws in hiring practices relative to family status. What is essential for women’s equality, according to the *Casey* Court, is the distressingly patriarchal view that women must be free to take the lives of their prenatal children when they constitute a burden on their economic and social interests.

But pregnancy and raising a child is so burdensome for women precisely because the economic and social structures that *Casey* assumed were designed by and for people who cannot get pregnant. Indeed, it is no accident that privileged men like Hugh Hefner led the charge for abortion on request in the 1960s—keeping their privilege safe by refusing to challenge social structures and practices from which men disproportionately benefited—and which structurally coerced and oppressed women. The claim that abortion on request in this context is liberating for women is a deeply confused position.

Indeed, this has led many pro-life feminists to call abortion for women “the unchoice.”¹⁹ Asking women to choose between (1) honoring the difference of their bodies and reproductive lives and (2) equal participation in the economic and social life of the nation is no choice at all. It is, again, structural coercion and oppression.

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And the data bear this out. A *Medical Science Monitor* study found the following about women seeking abortions the U.S.: 20

- Over half said they “needed more time” to make the decision
- Less than 30% received counseling
- 64% said they felt pressured by others to have the abortion
- 28% said they were sure about the decision to have the abortion
- Over half thought that the abortion was “morally wrong”

The *New York Times* story titled “What Happens to Women Who Are Denied Abortions?” looked at instances where abortion was sought, but for various reasons the women were denied getting one. The result? Only *five percent* were found to have later regretted not getting the abortion. 21 Given these realities, it would not be surprising to find out that having an abortion often dramatically impacts a woman’s well-being and happiness. The previously-mentioned study discovered the following about American women after their abortions: 22

- Relationship with partner improved: 0.9%
- Felt better about myself: 0.9%
- Felt more in control of my life: 0.3%
- Felt guilt: 77.9%
- Felt that “part of me died”: 59.5%
- Unable to forgive self: 62.2%
- Met full diagnostic criteria for post-traumatic stress disorder: 14%

One response to studies like this is to insist that anyone with an unplanned pregnancy is likely to have strained mental health whether or not they have an abortion. But a huge meta-analysis of the data published in the prestigious *British Journal of Psychiatry* found that when women who aborted were compared to the control group who delivered the baby, women who aborted were still *55%* more likely to experience mental health problems. This data is from the largest quantitative estimate available in the world, and it is unambiguous. 23

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22 See supra note 20.

23 Priscilla K. Coleman. *Abortion and Mental Health: A Quantitative Synthesis and
Aside from mental health, it is sometimes asserted that the right to abortion on request is necessary for women’s physical health. This is also inconsistent with the numbers. Ireland, which bans most abortion in light of a Constitutional right to life given to the prenatal child, has significantly better maternal health than abortion-permissive countries like the United States and its neighbor the United Kingdom.\(^\text{24}\) Chile, which has some of best maternal health numbers in the American hemisphere, also bans most abortions. Remarkably, it saw its maternal health numbers get better when it broadly restricted access to abortion.\(^\text{25}\) Far from being necessary for women’s physical health, abortion on request can actually be associated with worse health outcomes when compared to the results of neighboring countries that broadly restrict abortion.

Despite being told at every turn that abortion on request is necessary for equal participation in the culture, women nevertheless hold views on abortion similar to those of men. And when it comes to certain kinds of abortion restrictions (like broadly restricting abortion beyond 20 weeks) women are actually more supportive than men of legal protection for prenatal children.\(^\text{26}\) Women, after all, have very intimate experiences of the fact that abortion on request actually serves the interests of men more than it serves their interests. They know far better than men that, far from making them genuinely free, it has brought about a new kind of harmful coercion. Perhaps that is why even left-leaning media organizations (like The Huffington Post, Vox.com, The Atlantic, etc.) are taking a careful, even sympathetic look at pro-life feminism.\(^\text{27}\)


One important way in which the interest-balancing test as understood by *Casey* is flawed comes from the fact that it uncritically assumes abortion restrictions cause certain burdens on women. This view (at best) makes something quite complex into something far too simple or (at worst) has the point exactly backwards: abortion on request may actually put a heavier burden on women than limited access to abortion.

But another important consideration that an updated version of the interest-balancing test must address is the fact that the burden women face today as a result of abortion restrictions is not the same as it was in 1992. Here are just a few examples of support for women that came about since *Casey*:

- Family and Medical Leave Act (1993)
- Mickey Leland Childhood Hunger Relief Act (1993)
- Mental Health Parity Act (1996)
- Newborns’ and Mothers’ Health Protection Act (1996)
- SCHIP – The State Child Health Insurance Program (1997)
- Unemployment Compensation Act (2010)

Perhaps the most important development since 1992, however, was the passage of the Affordable Care Act in 2010. This not only provided for a very important expansion of Medicaid health benefits to poor women (and men), but the law gave substantial government assistance in buying health insurance to other vulnerable women (and men). Furthermore, the Affordable Care Act included provisions of the Pregnant Woman Support Act, legislation that has been pushed by “pro-lifers” for many years. Among other things, this part of the Affordable Care Act:

- increases the tax credit for adoption and makes it permanent
- eliminates pregnancy as a “preexisting condition”
- requires SCHIP to cover pregnant women and their prenatal children
- requires that prenatal care now be covered by all insurance carriers
- makes grant money available to states for home visits by nurses, campus child care, pregnancy counseling, ultrasound equipment, etc.

These substantial victories in support for women and children have substantially lowered the burden women in our day face without access to abortion when compared to the burden women faced in 1992. More needs to be done (things like paid family leave and support for child care, in

addition to being matters of justice for women, would make the burden of abortion restrictions even lower), but if the Court is to authentically evaluate the burden of abortion restrictions today these important developments must be taken into consideration.

IV. THE NECESSITY OF LOCAL DECISION MAKING

American law on abortion is dramatically out of step with most of the rest of the world. We are one of only seven countries, for instance, which permits abortion on request beyond 20 weeks gestation.\(^\text{29}\) Waiting periods, considered "infantilizing and unreasonably burdensome" by abortion rights activists in the U.S., are not at all controversial in Europe.\(^\text{30}\) The U.S. is also woefully behind the rest of the world when it comes to supporting pregnant women and other mothers. Shamefully, we rank dead last among developed countries when it comes to paid maternity leave.\(^\text{31}\) Child care is hopelessly expensive—in many situations even outpacing college expenses when it comes to total family dollars spent.\(^\text{32}\) That we lag so far behind the rest of the world on both sets of issues is not unrelated. As shown above, the expectation that women will have abortions in order to maintain their social and economic standing is built into our patriarchal American cake.

Any return to the central holding of Roe as interpreted by Casey and Whole Women’s Health should start here. Why does the U.S. lag so far behind the rest of the world when it comes to supporting women and protecting their prenatal children? The three-part answer, I argue, is that our abortion jurisprudence has not authentically wrestled with (1) the interest states have in protecting prenatal children, (2) the deep and profound burdens heaped on women given the patriarchal expectations of abortion on request, and (3) the relationship between the abortion


regulations and relative levels of social support for women. If the Court would authentically wrestle with these matters, significantly fewer abortion restrictions would be ruled out as undue burdens, and U.S. policy in this area would cease to be such a dramatic outlier.

In shifting to this more authentic approach, should a court, say, rule summarily against the constitutionality of “twenty week bans”? At least within the Casey framework, the answer would have to be in the negative. Different states will have different views on the moral status of the prenatal child. They will have different views on a mother’s duty to sustain her child with her body—particularly with regard to sustaining before or after viability. They will have different levels of support for women, different adoption laws, and different understandings of how to handle difficult, exceptional cases. All this means (again, working within the Casey framework) that the interest-balancing test would play out differently in different states.

The Court should not offer sweeping, specific rulings on these matters. Instead, state legislatures and local courts should do the primary arguing about the interest-balancing, giving voice to the values of local populations whose views on these matters vary widely across the country. A state like Arkansas, for instance, might consider the prenatal human being to have a very high moral status, while a state like Oregon may not. A state like New York may offer women and mothers significant protection and support, while a state like Alaska may not. These and many other factors would play into a complex, particular decision about the balancing of interests.

That is not to say the Supreme Court could not hand down some general guidelines for determining whether a particular abortion restriction was an undue burden. Mandates about abortion’s general availability in the cases of sexual violence and when the mother’s life is in danger could be part of such guidance. There might also be general guidance given for what would be required (say, substantial paid family leave or child care subsidies) to broadly restrict abortion before viability.

But a great virtue of Whole Women’s Health’s interest-balancing test is that it leaves room for local and state legislatures to engage in complex policy decisions around pregnancy and abortion based on the circumstances and values particular to their own communities.

V. CONCLUSION

Although Whole Women’s Health might have appeared to be a setback for supporters of restrictions on abortion in the United States, I
respectfully disagree with Gilles's assessment that it was “unquestionably a defeat.” The same interest-balancing analysis that enabled the Supreme Court to invalidate the regulatory measures in that case also provides a broad field for future legislators to enact measures that serve the genuine interests of women and their prenatal children, as determined by the best social science currently available, not by the chauvinistic assumptions of nine middle-aged men in 1973. Pro-life activists should capitalize on this opportunity by encouraging courts to (1) give greater weight to the interests of prenatal children, (2) reconceptualize the interests of women according to what we now know about what those interests actually are, and also in light of the social supports that are now available to pregnant women and new mothers, and (3) give great deference to the judgments of local and state governments about how to balance the complex and sensitive interests of women and children in their communities.

33 See Gilles, supra note 2.
INTRODUCTION

I am honored to be part of this symposium in honor of the scholarship and impact of Professor Stephen Gilles, whom I have had the honor of knowing—gosh, for thirty years now!—as an academic colleague, as a sometimes co-counsel, and as a cheerful co-combatant in the cause of protecting the lives of the unborn. Steve Gilles is simply the best. His careful, doctrinal scholarship on the constitutional law of abortion is unparalleled. His intellect and insights are unfailingly keen and

* Distinguished University Chair and Professor of Law, The University of St. Thomas (Minneapolis, Minnesota). Copyright 2017. All Rights Reserved. I would like to thank my friend Stephen Gilles both for assembling the wonderful symposium of which this article is a part, and for his comments on earlier drafts. My thanks as well to the other conference participants for their comments and suggestions, and to the editors of the Quinnipiac Law Review for outstanding editing and wonderful patience. All of these people made my article better and should share in the credit. None of them is responsible for the views (and errors) that I insisted on including, and should share none of the blame.
unfailingly principled. More than that, he is the consummate gentleman
and scholar. This is worthy of note. The academic scholarship surrounding
abortion contains more than its fair share of vitriol and invective,
reflecting, understandably enough, the enormous human stakes of the
issue. (I am guilty of more than a little heated rhetoric—unabashed,
passionate, and sometimes distressingly direct language—myself.)\(^1\) In an
academic sea of stormy stridency, Stephen Gilles is an island of calm and
respectfulness.

Fittingly enough, Steve has convened this conference around a pro-
life, anti-abortion theme. And true to our contrasting styles, I would like
to pick up that theme and throw down a few gauntlets. In this essay, I will
offer five provocative pro-life proposals for our day—five principled,
provocative, and yet (I hope), nonetheless, promising proposals. They are
provocative in that they challenge, head-on, the fundamental premises of
the Supreme Court's abortion decisions and are, in material respects, in
direct conflict with different aspects of those decisions. They do not (for
the most part) nibble around the edges or seek to work within the
parameters of the Court's existing abortion doctrine. My five proposals
are fundamental assaults on the fortress of the Court's abortion-law
doctrine, in multiple respects.

My proposals are meant to be principled as well as provocative, in
that they involve no compromise with what I believe is the unequivocal
moral and constitutional wrong of abortion. Often, pro-life advocates will
seek to advance positions that implicitly or explicitly accept, to a greater
of lesser degree, the governing premises of \(Roe v. Wade\).\(^2\) This is
understandable: half a loaf is better than none; saving some lives is better
than saving none; and if one hopes to get an abortion-loving Court to
accept a legal argument for restricting abortions, there is tactical merit to
narrowing the field of disagreement. But I am somewhat more
sympathetic to the stance of those who cannot tolerate, even for the sake
of argument ("arguendo," as we lawyers like to say), indulging any of the
legal premises of \(Roe\) and its progeny.

Similar tactical disagreements within the pro-life legal movement
concern the usefulness of laws that nibble around the edges of the Court's

\(^1\) For a sampling, see, e.g., Michael Stokes Paulsen, Paulsen, J., dissenting., in WHAT
\(ROE V. WADE\) SHOULD HAVE HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S
MOST CONTROVERSIAL DECISION 196–218 (2005) [hereinafter Paulsen, J., dissenting.;
Michael Stokes Paulsen, The Worst Constitutional Decision of All Time, 78 NOTRE DAME L.
REV. 995, 995–1043 (2003); Michael Stokes Paulsen, The Unbearable Wrongness of Roe, THE

abortion doctrine, but barely attempt, if they attempt at all, to challenge its core premises. Do efforts to widen, ever so slightly, perceived loopholes in the Court’s near-absolute abortion right constitute commendable incremental gains? Or do they at some level implicitly concede too much ground, precisely because they argue for so little, or because the “wins” they yield seem so empty and futile? Think of the battle over partial-birth abortion prohibitions, leading to two different 5–4 decisions of the Supreme Court. First, there was the horrific decision in Stenberg v. Carhart, holding that one such state law imposed a substantial burden on pre-viability abortion and failed to provide a suitable health exception for post-viability abortions. That was followed, seven years later, by the disappointingly and almost absurdly narrow decision in Gonzales v. Carhart, where the Court upheld the federal partial-birth ban (but did not overrule Stenberg), on the reasoning that Stenberg permitted states to ban an abortion method, but only as long as there remains an equally non-burdensome and “healthy” (to the mother, that is—not the child) method available to abort the life of the unborn child. One can reasonably wonder, and fairly debate, whether such a pro-life victory accomplishes much of anything in point of principle, or as a practical matter.

Differences over such matters of tactics—and principle—sometimes divide advocates within the pro-life movement. My goal, in the proposals I set forth here, is to satisfy, insofar as possible, both sides of this intramural debate. My proposals are meant to be practical—achievable steps—but without sacrificing principle in any respect. Political and legal circumstances define the realm of the possible. The proposals I sketch here are, I submit, of the sort that it is possible to envision Congress adopting, in the right set of circumstances. They are also proposals that it is possible to envision the Supreme Court upholding—again, in the right set of circumstances. But they concede nothing in point of principle to Roe nor are they mere nibbles. On the contrary, they are concrete proposals that directly challenge Roe’s premises. It is possible to imagine the

5 See id. at 164–67; id. at 156 (“Respondents have not shown that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the vast majority of D&E abortions. The Act, then, cannot be held invalid on its face on these grounds.”); id. at 164–65 (“If the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure . . . . Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.”).
Supreme Court upholding such proposals; yet it would be impossible to uphold them without seriously undermining the premises and validity of *Roe*. That is precisely the objective of this enterprise: No one could say that the proposals are constitutional, but only because they leave the substance and justification for the core right to abortion, as set forth in *Roe* and *Casey*, essentially unimpaired. These proposals would impair *Roe* and *Casey*. They restrict, each in a somewhat different way, the substance of the "right" created in *Roe* and perpetuated in *Casey*. And they assault, each in a somewhat different way, the *reasoning* thought to support that right.

My proposals share in common a further constitutional premise: that the power of constitutional interpretation is not exclusive to the Supreme Court, but is shared, equally, with other branches of government and, indeed, with all political actors in our constitutional system. Specifically, *Congress has an independent and co-equal power, duty, and responsibility of faithful constitutional interpretation.* Congress has many powers with which to press, in entire good faith, its understanding of the Constitution. To be sure, Congress cannot literally control the decision-making of the Supreme Court in particular cases. But neither does the Court properly control the constitutional judgment of Congress.

In what follows, I sketch with broad strokes five specific proposals. Some I have set forth and developed in greater detail in other writing; others are proposals borrowed from others. In combination, they comprise a principled, provocative, present-day pro-life legal agenda.

First, Congress should declare its constitutional understanding that unborn, living human embryos and fetuses should be considered legal "persons" within the meaning of the Fourteenth Amendment (and the

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7 See Paulsen, *Irrepressible Myth*, supra note 6, at 2727–31 (discussing independent interpretive province and powers of Congress).

8 Id. at 2728.

Fifth Amendment), and therefore entitled to the legal protections of these constitutional provisions.

Second, Congress should repudiate the absurd definition of “health” set forth in Roe’s companion case, Doe v. Bolton—an absurdity that the Court in Roe shoehorned back into its “trimester” legislative framework for abortion and that has effectively created an unjustifiable “second abortion right,” of an extreme nature, even where the unborn child could live outside his or her mother’s womb.

Third, Congress should contest the feature of the Court’s stated abortion-law doctrine, set forth in Planned Parenthood v. Casey, that forbids laws that have the ostensibly forbidden “purpose” of imposing a substantial obstacle to a woman obtaining a pre-viability abortion—seemingly whether or not the law actually has such an effect. In effect, this feature of abortion-law doctrine is a gag order against anti-abortion motivation in legislation. Congress should remove the gag: it should enact into federal statutory law the view that a state or federal legislative desire to save human lives from abortion does not and cannot itself violate any supposed right to abortion or aspect thereof. Legislative measures restricting or regulating abortion, if measures the courts otherwise would uphold, are never properly rendered invalid by virtue of the pro-life (anti-abortion) motivations of the legislature that enacted them. Legislatures have the right to be motivated by a desire to restrict abortion and to publicly state such positions.

Fourth, Congress should ban sex-selection abortions—abortions had for the reason of the sex of the child—for three reasons. First, it would frame a direct challenge, in a setting sympathetic to protecting the life of the unborn, to the Court’s doctrine that pre-viability abortion may be had for any reason and that any and all legislative restrictions on abortion during that period constitute an “undue burden” on abortion. (A corollary: a sex-selection ban, as applied to post-viability abortions, would be a rhetorically powerful challenge to any reading of the “health” exception as embracing such “family” or “emotional” or “psychological” reasons for abortion.) Second, a sex-selection ban would constitute an important foot-in-the-door, symbolic statement of the humanity of the

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13 See id. at 878.
fetus—vividly illustrated by the fact that the human fetus has a sex: that “it” is a girl or a boy. Third, a sex-selection ban would make for an effective and convincing “turnaround” to the pro-abortion argument (sometimes cast in constitutional terms) that abortion is necessary to protect the “equal rights of women.”14 The “women’s rights” argument for a freedom to abort for any reason becomes rhetorically and morally unsustainable when used to justify sex-selection abortion of female unborn babies when committed simply because they are baby girls.

Fifth, Congress should abrogate the judicial doctrine of stare decisis as applied to Roe v. Wade, Planned Parenthood v. Casey, and other abortion cases—an important measure clearing the ground for the other four proposals, as each involves a direct challenge to existing abortion-law doctrine in some significant respect. Interestingly, abrogating stare decisis in abortion cases—as radical (or at least dramatic) as it might sound to some ears—is the only one of my proposals that does not challenge a feature of existing abortion-law doctrine. Nothing in any U.S. Supreme Court decision treats adherence to judicial precedent as a constitutional requirement. Rather, the judicial practice of (sometimes) following precedent, even where believed wrong, is a matter of mere judicial policy and practice. To the extent that Planned Parenthood v. Casey reaffirmed Roe in substantial part on the basis of the policy of stare decisis,15 Congress may displace that policy and require the Court to revisit the merits of Roe without a thumb on the scale in favor of adhering to a decision the Court might otherwise conclude is wrong.16

Each of these propositions might well justify a full-length article all its own. Indeed, I have written on some of these propositions elsewhere, and I will draw on that work here. But each such proposition can be sketched in brief, more compact form. That is what I seek to do here. Together, they compose a package of pro-life proposals that might readily be adopted; that challenge existing doctrine directly; and that nonetheless stand a reasonable chance of being upheld by the judiciary.

14 See id. at 852 (making the argument that a pregnant woman’s “suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role” and “[t]he destiny of the woman must be shaped to a large extent on . . . her place in society”); see also Neil S. Siegel & Reva B. Siegel, Equality Arguments for Abortion Rights, 60 UCLA L. REV. DISCOURSE 160, 162 (2013) (“But in the four decades since Roe, the U.S. Supreme Court has come to recognize the abortion right as an equality right as well as a liberty right.”).
15 See Casey, 505 U.S. at 845–46.
16 I have defended this proposal at length in other writing. Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?, 109 YALE L.J. 1535 (2000).
I. Proposal One: A Human Life Statute: A Declaratory Act of Constitutional Interpretation

Does the Constitution affirmatively protect the right to life of the unborn? Or does it merely say nothing at all about abortion—a conclusion that renders the creation of an abortion right in Roe illegitimate but would leave in place state laws that might confer or embrace a right to abort the life of the unborn child? Disagreement on this score is among the points of intramural division within pro-life legal ranks. Most pro-life legal scholars incline to the latter, more limited view: the Fifth and Fourteenth amendments do not create a right to abortion, but neither do they in any way shield unborn human beings in utero from private or government violence. This is also the view, seemingly, of most originalist judges and justices. No Supreme Court justice opposed to Roe has embraced the more sweeping affirmative-right-to-life legal position. All have adopted the more modest position that the Constitution simply does not create a right to abortion. The matter is left to legislative choice.

On its face, the “the-Constitution-says-nothing” view appears the more easily defensible position. The Due Process clauses do not in terms afford substantive liberties; they are guarantees of legal regularity. They are not freestanding creations of affirmative rights to “life, liberty, and property” with resulting freewheeling implications for judicial extrapolation of specific instances of such rights. They instead command that such rights, where they exist by virtue of other positive law, cannot be taken away from persons except in accordance with the rule of law and a fair process for assuring that the substantive law’s requirements actually have been satisfied. On this view, the Due Process Clause does not itself confer a generic substantive right to “life” (for the unborn or for anyone else for that matter) any more than it confers a generic substantive right to “liberty” (whether or not stretched to include a right to kill fetal life by abortion).

So too the Equal Protection Clause’s command that state governments not deprive any “person” of the equal protection of its laws—that it not yield up certain persons or classes of persons to private violence or depredations committed by others (or directly engage in unequal treatment by the state itself)—is not self-defining with respect to whether the term “person” includes unborn living human fetuses. Thus, a

See Paulsen, The Worst Constitutional Decision of All Time, supra note 1, at 1011–16.
19 Id.
good case can be made that it lies beyond the bounds of legitimate judicial power to find in either of these constitutional provisions a sufficiently determinate, affirmative prohibition of abortion enforceable as a constitutional rule of law.

But perhaps not so fast: In a recent article in the Ohio State Law Journal, entitled *The Plausibility of Personhood*, I suggest that the constitutional argument in favor of legal “personhood” for unborn living human beings—and thus for affirmative constitutional protection against abortion—is stronger than usually acknowledged. While not a knockdown argument, the argument that Fourteenth Amendment (and Fifth Amendment) rights extend to unborn (living) human beings is actually quite plausible, on the basis of standard arguments from constitutional text (which is at worst ambiguous on the issue and at best leans in the direction of an assumed broadly inclusive understanding of “person”), the linguistic and logical structure of the Constitution’s provisions (including intra-textual comparisons of usage of the term “person” elsewhere in the document), history and original intention (including backdrop English legal understandings of legal personhood, such as Blackstone’s explicit embrace of legal personhood for the unborn beginning at the point where a distinct new human life’s presence is discernible on objective criteria—analysis embraced by American legal thought both at the time of the framing of the original Constitution and the subsequent adoption of the Fourteenth Amendment), precedent (which, pre-Roe, was ambiguous but can be read as favoring legal personhood and consequent protection

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21 See id. at 18–32.

22 See id. at 32–45 (discussing “inratextual” arguments concerning usage of the word “person” in other provisions of the Constitution and what linguistic light such usage might or might not shed on the word’s meaning in the specific context of the Fifth and Fourteenth amendments; and further discussing the Constitution’s implied structural “default rules” concerning the range of fair interpretive discretion and application by different actors within our constitutional system, as a consequence of separation of powers and distinct institutional powers and limitations, where the meaning of a particular constitutional provision is ambiguous or indeterminate).

23 See id. at 45–52 (discussing evidence of probable intention of framers of the Fourteenth Amendment concerning abortion and the probable personhood of the unborn). Blackstone’s understanding of legal personhood as including the unborn, where a distinct human life is detectable, is also highly probative of the meaning of the text itself, as it appears to have formed part of a well-understood legal term-of-art meaning to the word “person.” See id. at 21–32.
PROVOCATIVE PRO-LIFE PROPOSALS

for the unborn),\(^{24}\) and finally, to the extent one judges such considerations appropriate,\(^ {25}\) policy and substantive justice considerations.

The textual-structural-historical case for the constitutional personhood of the unborn is, I argued in that article, fairly debatable. It therefore might not be appropriate for courts, because of intrinsic constitutional limitations on the scope of “the judicial Power,” to invalidate legislative enactments (or failures to enact) or executive action (or inaction) on the ground that they violate affirmative constitutional rights of the unborn because it cannot be said with sufficient confidence that such legislative or executive conduct is in conflict with a determinate rule of law supplied by evidence of the text’s necessary irreducible meaning. But Congress is under no such disability, when acting within the scope of its enumerated powers, fairly construed. Simply put: Congress, in the exercise of its affirmative grants of legislative power—including its powers to enforce the requirements of the Due Process and Equal Protection guarantees of the Fourteenth Amendment—legitimately may judge, and declare and enact in a statute, that the Constitution protects the rights of unborn persons to live; to not be deprived of their lives by the state without due process of law; and to receive the protection of the state from the commission of acts of private violence against them, the same as born persons.\(^ {26}\)

The idea of such a declaratory statute would be for Congress to stake out a position directly opposed to that of the Supreme Court in \textit{Roe} on the constitutional issue of Fourteenth Amendment legal personhood for unborn, living embryonic and fetal human beings, and to employ that standard consistently in the exercise of its other legislative powers. Such legislative constitutional interpretation—and action pursuant to such interpretation—is a vital part of the separation-of-powers, “checks-and-balances” dynamic.

Of course, Congress cannot constitutionally \textit{actually coerce} the Court to accede to Congress’s position: The Court’s own independent province of constitutional interpretation is likewise a function of the Constitution’s separation-of-powers; the judiciary gets to stick to its own judgment as to the Constitution’s meaning and to press its views with the (more limited) powers at \textit{its} disposal. But Congress may take a position, maintain it in the face of judicial opposition, and press it vigorously in

\(^{24}\) See Paulsen, \textit{Plausibility}, supra note 20, at 52–60.
\(^{25}\) See id. at 61–68.
\(^{26}\) Id. at 40–45, n.134.
resistance to the views of the courts, with all the legislative powers it possesses.\textsuperscript{27}

Three short points of explanation and amplification of this proposal: First, Congress possesses legitimate enumerated power (putting \textit{Roe} to one side) to enact such a stance in the form of a declaratory statute. Second, Congress legitimately may, in the exercise of such a power, oppose the Court’s position on constitutional questions; that is, Congress may take a position in direct contravention of the Court’s, as part of the exercise of Congress’s independent prerogative and duty of faithful constitutional interpretation. Third, Congress may press its position with all the “checking,” cajoling, persuading, inducing, and pressuring powers at its disposal. A further word about each of these steps in the argument:

\textit{First}, as to congressional power: Congress certainly possesses enumerated constitutional power to pass such a “declaratory” act pursuant to any of a number of its enumerated legislative powers. (I will note several such powers in a moment.)\textsuperscript{28}

A brief but necessary digression: Note that the claim that Congress possesses enumerated legislative powers that can be used to enact laws concerning abortion is a distinct proposition from the further claim that, where it has such legislative powers, Congress may engage in constitutional interpretation. That latter proposition deserves a short preview here.

Simply put, the fact that courts have power to pass on constitutional questions in the course of exercising the judicial power does not mean Congress therefore lacks power to pass on constitutional questions in the exercise of its legislative powers; the existence of judicial power to “say what the law is” in no way necessitates repudiation of legislative power to interpret the Constitution. Quite the contrary: Members of Congress swear an oath to support the Constitution—just as judges do—by virtue of the constitutional command of Article VI’s Oath Clause.\textsuperscript{29} To take such an oath necessarily entails assuming a personal responsibility of faithful constitutional interpretation and application. The oath also very strongly implies independent judgment and independent responsibility. The structure and logic of the Constitution’s separation of powers reinforces the correctness of that inference: the two branches are constitutionally independent of each other and may exercise independent constitutional

\textsuperscript{27}See Paulsen, Checking the Court, supra note 9, at 36.
\textsuperscript{28}See \textit{U.S. Const.} art. I, § 8, cl. 18.
\textsuperscript{29}See \textit{U.S. Const.} art. VI, cl. 3
judgment within their respective spheres, each in the exercise of its respective powers. 30

I will have more to say about this (but not too much more) presently. My point here is that the exercise of such independent constitutional judgment can come in connection with the exercise by Congress of any of its ordinary legislative powers. 31 And such legislative powers clearly extend to matters implicating abortion. Congress’s powers to regulate commerce, to appropriate funds, and to impose taxes are commonplace examples. Each might intersect with the question of abortion: human abortion is a large, nationwide commercial industry with substantial interstate economic effects; and the practice of abortion is something that obviously might be favored or disfavored by government in its spending and taxing decisions (setting to one side Roe’s purported constitutional restrictions on such powers and considering only the question of enumeration). 32

Moreover, and significantly, Congress’s sweeping power under the Enforcement Clause, section five of the Fourteenth Amendment, necessarily entails the exercise of constitutional interpretive power to construe and apply the general language of section one of the amendment’s prohibition of state action denying due process or withholding equal protection of the law to any “person” within its

30 I have made a version of this point several times in other writing. See Michael Stokes Paulsen, The Constitution of Necessity, 79 NOTRE DAME L. REV. 1257, 1261–67 (2004) (emphasizing personal, non-abdicable duty of independent, faithful presidential constitutional interpretation, by virtue of the Presidential Oath Clause); id. at 1292–93 (noting parallel constitutional responsibility of Congress and its checking function); Paulsen, Irrepressible Myth, supra note 6, at 2711–31 (2003) (arguing that the logic of Marbury v. Madison’s argument for judicial review, including the independence of the branches, the necessity of direct personal recourse to the document by all who exercise the power of constitutional interpretation, and the moral as well as constitutional duty imposed by the Oath Clauses, cohere to support the independent duty and province of constitutional interpretation by each branch of government — and then applying that principle to deduce parallel powers of executive and legislative constitutional review); Paulsen, The Most Dangerous Branch, supra note 6, at 257–62 (1994) (noting the importance of the Oath Clause in support of independent constitutional interpretive power by the political branches of the national government).

31 In addition, such independent constitutional judgment can (and should) be brought to bear in Congress’s exercise of its more extraordinary, quasi-legislative or purely “checking” powers: these include the Senate’s role in appointments and both houses’ role in the impeachment-and-removal checking power. See generally Paulsen, Checking the Court, supra note 9.

32 See Gonzales v. Raich, 545 U.S. 1, 64–73 (2005) (Thomas, J., dissenting) (noting the issue of the scope of enumerated powers and criticizing the “substantial effects” test); Harris v. McRae, 448 U.S. 297, 326–27 (1980) (holding abortion funding restrictions under the Hyde Amendment constitutional).
The power "to enforce" the prohibitions of section one with legislation Congress judges "appropriate" for carrying into effective force such prohibitions—a conscious linguistic echo of *McCulloch v. Maryland*’s paraphrase of the Necessary and Proper Clause—is perforce a power to interpret the prohibition being enforced, at least as an initial matter. Congress’s exercise of interpretive power, within its sphere of enumerated powers, is not binding on the judicial branch in the exercise of its power to decide cases and controversies within its jurisdiction. Independence runs both ways. But for courts to hold (as they unfortunately have done, in colossal error) that their interpretations bind Congress in the exercise of its independent legislative judgment, is clearly wrong.

It follows that Congress necessarily does and appropriately can interpret the word "person" when it seeks to enforce by legislation the Fourteenth Amendment’s restrictions on what states can do (and

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33 U.S. CONST. amend. XIV, § 5.
35 The Supreme Court is fond of declaring its supremacy over the other branches in matters of constitutional interpretation (however question-begging and self-serving this might be). For a collection of several such statements—there are many more—see Paulsen, *The Most Dangerous Branch*, supra note 6, at 225 n.18 (1994). The Court likewise has asserted that Congress does not possess co-equal constitutional interpretive power, at least not in the exercise of its powers “to enforce” the provisions of the Thirteenth, Fourteenth, and Fifteenth amendments. See, e.g., *City of Boerne v. Flores*, 518–29 U.S. 507 (1997) (stating that Congress has only a remedial power to enforce).

*City of Boerne* is, I believe, untenable. It depends on premises of judicial interpretive supremacy that are indefensible in general and particularly indefensible in the context of the sweeping legislative powers granted under the Enforcement Clauses of the three Reconstruction amendments. See Paulsen, *Plausibility*, supra note 20, at 43–44 nn.128–130 (collecting sources criticizing *City of Boerne*); Paulsen, *Irrepressible Myth*, supra note 6, at 2731 n.73. The stronger case by far is that, within the broad range of judgment afforded by the general language of the Fourteenth Amendment’s prohibitions on state action, the language, structure, logic, and history of the amendment commit such judgments primarily to Congress in the exercise of its specific enumerated legislative power “to enforce” those provisions by “appropriate” legislation—and not to the judiciary. See Paulsen, *J., dissenting*, supra note 1, at 200–01 (historically implausible, in light of the Supreme Court’s then-recent outrageous decision in *Dred Scott*, to read the Fourteenth Amendment as primarily a delegation to the judiciary to fill in the meaning of the amendment’s open-ended provisions); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARVARD J. LAW & PUB. POL’Y 991, 994 (2008) (“Where a constitutional provision has a legitimate range of meaning—where there is ambiguity or open-endedness—and the legislature has acted pursuant to a view fairly within that range, a court may not properly invalidate what the legislature has done.”); id. at 1002-03 & nn.49-51 (developing and applying this principle to the Fourteenth Amendment’s grant of legislative power to Congress in Section Five). See also *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (noting that the text of the Fourteenth Amendment does not say that “the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged.”).
requirements of what states must do) with respect to persons subject to their jurisdiction and authority. Reduced to the most simple proposition: Congress has legislative power to enforce its understanding of the meaning and scope of the word “person,” when enacting legislation to enforce the Constitution’s individual rights guarantees. If Congress judges persons to include unborn, living human beings gestating in their mothers’ wombs, it has constitutional power to declare and enforce such an understanding, as an aspect of its section five power to enforce the Fourteenth Amendment.36

Second, Congress, in the exercise of its legislative power, may stake out a position opposed to the Court on matters of constitutional interpretation. I have already outlined much of the support for this claim in the course of discussing the point that Congress possesses several general legislative powers that constitutionally support and justify Congress in enacting a declaratory human life statute. To punch the point home here: Congress, in the exercise of its legislative powers, necessarily and appropriately engages in constitutional interpretation as to the scope of those powers and any rights-limitations on their exercise. And where it does so, Congress possesses the power and duty of exercising its constitutional interpretive power independently. Congress is not bound by the judiciary’s interpretation of the Constitution in the exercise of its legislative powers any more than the judiciary is bound by Congress’s interpretation of the Constitution in the exercise of its judicial power. This

36 The position sketched here is set out in more detail in Paulsen, Plausibility, supra note 20, at 40–44. In that article (and again now), I gratefully acknowledge the influence of the important work of Stephen Galebach’s classic early article, A Human Life Statute, HUM. LIFE REV., WINTER 1981, at 3, on my own thinking. Id. at 42–43.

It should be noted that, even on the (erroneous) view that such an understanding of “person” would not be open to Congress to make because it is not constitutionally correct—because contrary to Roe (and because the Court’s interpretations are supposedly supreme and binding on all branches of government)—Congress surely still has the power to make a bare declaration of its views. As noted above, the Supreme Court has adopted a narrow (and in my view unsound) reading of Congress’s section five enforcement clause power, in the case of City of Boerne v. Flores, 521 U.S. 507 (1997), under which Congress may not “enforce” through direct prohibition of state power a measure that depends on a reading of section one that contradicts or exceeds the Supreme Court’s understanding of the scope of section one. See id. at 43–44. City of Boerne invalidated the legal effect of a congressional statute as a purported prohibition of state power. But nothing even in the shamelessly judicial-supremacist City of Boerne opinion supports the yet more extreme conclusion that Congress may not even say what it thinks on such matters. A pure declaratory statute is not invalid, even under City of Boerne, because it does not enact a legal prohibition but a legal viewpoint. Congress’s stating its views is not itself an unconstitutional prohibition. And Congress surely has the power to simply state its views concerning matters within its legislative province.
is in the very nature of the Constitution's separation of powers. And it is in the nature of the independent duty and responsibility conferred by the oath to support the Constitution.

To repeat: Congress cannot bind the Court to Congress's understanding of the Constitution. But Congress can say what it thinks. It rightfully may take a position in direct contravention of the Supreme Court on a question of constitutional meaning. Resistance is not futile and impudence is not unconstitutional. To be sure, the Supreme Court might not like what Congress has to say and might assert that Congress is wrong in saying it. But any argument that Congress may not say what it thinks—that the very act of doing so is unconstitutional—should be thought of as almost laughably frivolous.

Third, Congress, having exercised legislative power and interpreted the Constitution in the course of doing so, and having taken a position opposed to that adopted by the Supreme Court, may seek to press its position with all of the "checking," cajoling, persuading, inducing, and pressuring powers at its disposal. Congress may pass a statute declaring its understanding that the Constitution's protections of human life—protections against government deprivations without due process of law and against denials by government of equal protection from violence or harm by third parties—extend to unborn living human beings. Congress may legislate prohibitions of abortion based on this viewpoint. (It cannot bind the Court to such an understanding, of course, and thus cannot literally prevent the Court from striking down such laws insofar as judicial application is concerned. But Congress may assert and maintain its position.) The Senate may use such a constitutional understanding as a standard for the exercise of its power to consent (or not) to the proposed appointment of federal judges, including Supreme Court justices. The respective houses of Congress may even use such an understanding as a baseline for judging violations of constitutional duty by federal executive and judicial officers, in the exercise of their powers with respect to impeachment.

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37 Paulsen, The Most Dangerous Branch, supra note 6, at 222; Paulsen, Irrepressible Myth, supra note 6, at 2728–31.
38 Id. at 2736–37; Paulsen, The Most Dangerous Branch, supra note 6, at 257–60.
39 See supra notes 32–39 and accompanying text (discussing Congress's power to exercise independent constitutional judgment).
41 Paulsen, Checking the Court, supra note 9, at 67–90 (discussing impeachment power); Paulsen, Irrepressible Myth, supra note 6, at 2728–30.
its constitutional view as to the status of unborn, living human beings as legal persons, and seek to enforce that understanding.

What good would any of this do? I submit that a declaratory statute could have important symbolic and practical effects. To begin with, there is a powerful, persuasive, public impact to a statute—an Act of Congress—adopting an authoritative view of the legislative branch of the nation concerning the human life and legal personhood of the unborn. Such a statute could change individual minds, and it could change the public mind. Lincoln said, in his famous debates with Douglas, "public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decision possible or impossible to be executed." 42

A large part of the point of a declaratory human life statute is simply to shape the public mind, to mold public sentiment in support of the humanity and personhood of the unborn child. That goes deeper than (mere) substantive legislative enactments, as Lincoln knew. Indeed, it ultimately is what enables every other pro-life substantive enactment to be achieved, maintained, enforced, and judicially sustained.

Lincoln's comment came in the context of debating an awful Supreme Court decision and disputing its purported binding effect on political actors and political action (such prospective binding effect being Senator Douglas's position). Lincoln's observation about public sentiment was made in service of an attack on Douglas for shaping public opinion to support the notion that there was a constitutional and moral duty to acquiesce in the Supreme Court's decision in Dred Scott. So too here, there is an important symbolic force to challenging the Supreme Court's constitutional conclusions, to puncturing the pretense of judicial supremacy, and to making a direct public challenge to the legitimacy and correctness of a specific decision.

Such a step would be, in the political history of the United States, somewhat extraordinary. And the resort to extraordinary steps has a symbolic importance of its own. It would not quite be an unprecedented step, however: Congress legislated in direct contravention of—in defiance of—the Supreme Court's decision in Dred Scott, when it prohibited slavery in federal territories and in the District of Columbia just five years after the Court had held any such enactments unconstitutional. 43 If

42 Abraham Lincoln, Selected Speeches and Writings (Library of America) at 150 (First Lincoln-Douglas Debate, August 21, 1858).
43 Paulsen, Lincoln and Judicial Authority, supra note 6, at 1295.
Congress legitimately could do that, with respect to Dred Scott, then it can do this too, with respect to Roe. Indeed, the fact that a congressional declaratory statute with respect to Roe would have, as its best historical analogue, similar action with respect to Dred Scott, would also be symbolically important and reinforce the close analytic and moral resemblances of the two decisions.44

A declaratory statute might also have a more immediate and direct practical effect: it conceivably could change the course of judicial decisions in this area. The Court (sometimes) accords a degree of deference to congressional judgment on questions of constitutionality, including on matters of interpretation of the scope of the Fourteenth Amendment’s congressionally enforceable meaning.45

This might make a difference. Consider in this regard Roe’s fudging and fidgeting on the question of when human life begins and whether unborn humans can be considered legal persons. The Court in Roe held, as the first legal premise of its creation of an abortion right, that unborn living human fetuses were not legal persons;46 the Court thought that a necessary predicate for everything else it would legislate in the Roe opinion. Yet the Court simultaneously (and somewhat inconsistently) asserted its inability to judge when human life begins, and appeared to acknowledge that a different answer to this factual/legal question could make a vital difference to its constitutional judgment.47 “If this suggestion of personhood is established,” Justice Blackmun wrote at one point, the case for recognizing a Fourteenth Amendment right to abortion “collapses”—collapses!—“for the fetus’ right to life would then be guaranteed specifically by the Amendment.”48 Just a few pages later, however, Justice Blackmun rejected Texas’s position that a compelling interest in protecting human life existed throughout pregnancy (on the theory that a new human life is present from the point of conception).49 That premise was not established, the Court said. The question of when

44 See Paulsen, The Worst Constitutional Decision of All Time, supra note 1, at 1011–16; Paulsen, J., dissenting., supra note 1, at 203.
45 The Court is not consistent in this regard. Compare, e.g., Nevada v. Hibbs, 538 U.S. 721, 727, 734–36 (2002) (deferring to Congress’s judgment about the enforceable scope of the Fourteenth Amendment with respect to sex-based discrimination and remedial powers), with City of Boerne v. Flores, 521 U.S. 507, 536 (1996) (declining to defer to Congress’s judgment about the enforceable scope of the Fourteenth Amendment with respect to the right to the free exercise of religion).
47 Id. at 159–60.
48 Id. at 156–57.
49 Id. at 159.
human life begins was *unsettled*—or at least so the Court thought at the time—and *therefore* could not form the basis for an asserted state law prohibiting abortion in order to save human life: "We need not resolve the difficult question of when life begins," the Court began. 50 "When 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." 51

*Roe* declared agnosticism (albeit both a somewhat incoherent and still somehow dogmatic agnosticism) on a point concededly crucial to the outcome. What if the point of supposed uncertainty became the subject of an authoritative congressional finding? What if Congress, acting as a body of elected representatives of the people, were to arrive at a true democratic consensus on this fundamental question? Who is to say whether the Supreme Court might not, in the not-too-distant future (with not-too-different personnel), turn to a congressional determination and declaration of the constitutional personhood of the unborn in support of a conclusion that *Roe v. Wade* should be overruled?

At all events—whether it persuades the Court or not—Congress should make the declaration, because it is properly within Congress's power to do and because it is right: Congress should "hold," as a matter of the exercise of its independent constitutional powers, that living human embryos and fetuses gestating in their mothers' wombs are, legally, persons within the meaning and protections of the Fourteenth Amendment.

II. PROPOSAL TWO: A FRONTAL ASSAULT ON *DOE V. BOLTON*'S DEFINITION OF "HEALTH"

My second proposal is less fundamental, but still important. It builds on the same premises of Congress's coequal province and duty of constitutional interpretation. My proposal is that Congress, in addition to declaring the legal personhood of the unborn, *should specifically repudiate the definition of a woman's "health" that the Court has employed in its abortion cases on the ground that it is constitutionally unjustified, vague, misleading, and ultimately indefensible.*

The Court has employed "health" as a bizarre term-of-art to justify abortion throughout pregnancy—including abortion after the point at

50 *Roe*, 410 U.S. at 159.
51 *Id.*
which the unborn child could live outside his or her mother’s womb—and when committed for essentially any imaginable emotional, psychological, or family reason. In a very real sense, this stylized definition of “health” creates, under current Supreme Court doctrine, a second, overlapping abortion right: first, under Roe and subsequent cases, there is a constitutional right to kill a human fetus for any reason up to the point of fetal viability (that is, up until the point when the child could survive outside the womb); and second, under Roe, together with its companion case, Doe v. Bolton (reaffirmed in subsequent cases), there is a constitutional right to kill a human fetus for any “health” reason, even after the point of viability—right up to the point of birth. And “health” is defined in a ridiculously broad fashion. Congress should specifically repudiate this definition of health, limit it to true instances of substantial danger to physical health, and thereby repudiate this misleading “second abortion right” of the Court’s abortion jurisprudence.

A short description of the way the “health” argument works within the Court’s abortion jurisprudence: Distilled to its essence, Roe created a “trimester” framework for the substantive-due-process abortion liberty the Court created and vested with the status of a fundamental constitutional right. Under Roe, the right to abortion was plenary during the first trimester (roughly the first three months) of pregnancy. The right to abortion was subject to state regulation in the second trimester, but only in the interest of protecting the “health of the mother.” That is, an abortion still could be had for any reason the mother wished, in the second trimester (roughly the fourth through sixth months of pregnancy), but the abortion procedure, however—the practice itself—could be regulated in the interest of protecting maternal health. Put differently, the mother’s reason for having an abortion remains completely up to her: the right to have an abortion remains plenary. Finally, in the third trimester, roughly corresponding (in Roe’s judgment) to the point in time “subsequent to viability”—i.e., where the child has developed to the point where he or she is physically capable of living outside of his or her mother’s womb—Roe posited that abortion could be limited by the state “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”

52 See supra note 10 and accompanying text.  
54 Id. at 164.  
55 Id.  
56 Id. at 163–64; Doe, 410 U.S. at 192.  
57 Roe, 410 U.S. at 164–65 (emphasis added).
That’s the “health exception,” as loosely formulated by Roe: Even after viability, abortion is permitted if “in appropriate medical judgment” it is necessary for preserving the “health of the mother.” Who makes the medical judgment? And what all is comprehended by “health”?

Enter Doe v. Bolton, which rendered Roe’s health exception even looser—and much, much larger—than it might initially appear. Doe held that “health” considerations relevant to the decision to have an abortion encompass “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”

That was at the time, and remains today, a loophole big enough to drive a truck through: not just physical, but psychological health reasons might justify abortion; further, “emotional” factors might justify abortion—meaning, presumably, emotional considerations going beyond “psychological” health; “familial” reasons, whatever those might be, can justify abortion; and “age” considerations likewise can justify abortion on “health” grounds. That was at the time, and remains today, a loophole big enough to drive a truck through: not just physical, but psychological health reasons might justify abortion; further, “emotional” factors might justify abortion—meaning, presumably, emotional considerations going beyond “psychological” health; “familial” [sic] reasons, whatever those might be, can justify abortion; and “age” considerations likewise can justify abortion on “health” grounds.

“All these factors may relate to health[,]” the Court said in Doe. And Doe’s specific holding vested the judgment as to whether these “health” justifications warrant abortion in the individual abortion doctor. Doe invalidated two-doctor and hospital review committee requirements, and construed a state statutory reasons-of-health statute broadly to permit abortion for all these described reasons, in order to match the results required by the Court’s Roe framework, and to avoid the constitutional invalidity that the Court believed would result from any more abortion-restrictive understanding.

Roe, in turn, cross-referenced and incorporated Doe’s stylized, sweeping definition of “health” in its statement of when abortion must be permitted for “health” reasons, even past the point when the unborn child was capable of living outside the womb. This fit, really quite naturally, with the Roe opinion’s statements of some of the social reasons why abortion might be desired by the woman and perhaps even desirable in the view of society: the woman’s interest in avoiding “a distressful life and future,” the “[m]ental and physical health” drains of child care, the “problem of bringing a child into a family already unable, psychologically and otherwise, to care for it” (paralleling Doe’s “familial” reasons as well

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59 Id.
60 Id.
61 Id.
62 Roe, 410 U.S. at 163–64.
as giving less a medical and more a colloquial flavoring to “psychological”), and the “difficulties and continuing stigma” of being an unwed mother (perhaps explaining “woman’s age”?). The two cases, Roe and Doe, and their respective uses of the term “health,” are interlocked. The Court in Roe, after reprising and summarizing its trimester framework, noted Doe’s holdings and remarked: “That opinion and this one, of course, are to be read together.”

In my teaching of the abortion cases to law students, I explore the meaning of the “health” exception of Roe-Doe by posing a series of hypotheticals (which are now contained in my co-authored casebook, The Constitution of the United States):

Is the health exception narrow – in which case most late-term abortions could be prohibited? Or broad – in which case a woman could almost always have an abortion, even in the eighth or ninth month of pregnancy? The answer depends on what considerations are included in “health” and who has the discretion to decide how serious a health impairment must be in order to justify a third-trimester abortion. What if carrying a child to term would delay for six months the ability of the mother to receive radiation treatment for cancer, with increased risk of death? Most everyone would agree that this is a serious risk to health – even to life. Similarly, what if a woman is unlikely to die from the pregnancy or childbirth, but might suffer from gestational diabetes, with potentially detrimental health effects for the rest of her life? But proceed down the slope further and it becomes increasingly less obvious that the health exception should apply: How serious must the detrimental health effects be? Would the prospect of temporary but debilitating hip pain be sufficient to permit a late-term abortion? What if having a child would be a psychological burden? What if having a child would be emotionally troubling (and what sort of things should count in this category)? What if having a child would be financially difficult? An obstacle to career plans? A social embarrassment? A hateful reminder of a now despised lover? What if one feels one already has too many children?

The answers to these questions, under Doe’s definition of “health” (and its reincorporation back into Roe’s analysis), are disturbing even to those who are otherwise in sympathy with Roe’s creation of an abortion right. For under Doe’s definition, nearly all of these reasons might well fit under the umbrella of emotional “health” or “familial” considerations, at least if the application of this expansive standard is

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63 Id. at 153.
64 Id. at 165.
66 Roe, 410 U.S. at 192
left to the pregnant woman seeking an abortion and her abortion provider
/ physician -- which is where Roe and Doe leave the decision.67

The upshot is that Roe's health exception, in tandem with Doe's
definition of health, permits the pregnant woman to choose abortion for
essentially any personal, familial, or emotional reason, even very late in
the pregnancy. The breadth of the formulation would appear to include a
constitutional right to have an abortion for essentially any reason that one
might imagine, throughout all nine months of pregnancy.68

67 Id. at 219-20; Roe 410 U.S. at 163.
68 The most careful, thorough, sophisticated, and sensitive doctrinal analysis of the
"health" exception comes—appropriately enough—from the work of Professor Stephen Gilles.
Stephen G. Gilles, Roe's Life-or-Health Exception: Self-Defense or Relative-Safety, 85 Notre
Dame L. Rev. 525 (2010). Gilles argues that the health exception is, on its own terms,
ambiguous as between a self-defense scope and a relative-safety scope, with major differences
in result. He argues—contrary to my argument here—that Doe v. Bolton's expansive definition
of "health" does not (or at least did not originally) embrace the incredible and seemingly
ridiculous exception-swallows-the-rule scope that its critics (and usually its supporters) give it.
Id. at 526-34; 554-58.

With all due respect—and much such respect is indeed due, as Gilles's argument is an
extraordinarily careful, nuanced parsing of the convoluted reasoning of Roe and Doe—the flaw
in the argument is the assumption of care, rationality, consistency, and good logical sense in
Justice Harry Blackmun's opinions for the Court in Roe and in Doe. While Gilles's reading is
a commendable attempt to rationalize and render more sensible the Court's "health"
explanation—a "saving construction" as it were—it unfortunately does not accord with what the
Court actually said and did, nor does it accord with how the Court itself (and subsequent lower
court decisions) have construed and applied the health exception, as Gilles's analysis at later
points in his article acknowledges. Id. at 550-54; 557-62; 566-72; 575-615.

The short of it (in my view) is that Doe adopts an irresponsibly broad, sloppy definition
of "health" and then Roe plops that definition back into Roe's trimester framework to create an
irresponsibly broad, sloppy "health" exception to the (almost entirely illusory) power of
government to restrict or prohibit abortion when the child would be capable of living outside
his or her mother's womb. To be sure, the Roe-Doe definition does not make sense. To be sure,
the Roe-Doe definition is illogical. To be sure, the Roe-Doe definition renders the supposed
power of the state to regulate late abortion incoherent and self-contradictory. But there it is, in
black and white. The attempt to render Roe-Doe less incoherent, capricious, and bizarre simply
ignores the embarrassing and tragic reality that that is the pervasive character of the opinions
and holdings themselves. With respect, I think it is better to be clear-eyed about the extremism,
illogic, and lawlessness of Roe than to attempt to impose upon it a rationality and honesty it
lacks. See generally Michael Stokes Paulsen, The Unbearable Wrongness of Roe, THE PUBLIC

The same goes for the vacillating, meandering, but persistently pro-abortion course of
the Court's subsequent abortion jurisprudence—and the lack of clear or consistent treatment of
the extent of the "health" exception within that jurisprudence. Gilles's thorough treatment of the
Court's course in this respect is a tour de force of careful intellectual study, fine parsing,
and sensible inference. Would that the Court's abortion cases actually were appropriate for
study using such fine, refined tools! I mean no knock on Gilles, but only on the Court, to say
that Professor Gilles is attempting to impose rationality and care where none appears to exist.
This is monstrous. And it might not even have been intentional: as Professor Gilles has shown, convincingly, the extreme breadth of the exception makes very little linguistic sense, legal sense, or common sense. Surely this is not what the Court meant to say! It is ludicrous (is it not?) to say, in one breath, that the state has a “compelling interest,” theoretically overriding the abortion right, in protecting the life of the unborn child once the point of viability has been reached and then to say, in the next breath, that that compelling interest can itself be overcome by a seemingly limitless litany of “health” justifications that range from the serious to the trivial.69

Yet there it is, set forth pretty clearly—if also very nearly ridiculously—in the Roe and Doe opinions.70 The exception has been treated variously, and somewhat inconsistently, in the Court’s subsequent decisions, as Professor Gilles has also shown.71 There is reasoning in some of them that does not make entire sense except on the assumption of a more limited scope to the health exception—again, as Professor Gilles has shown.72 But the Court has never repudiated, or even at all clearly retreated from, the Roe-Doe one-two punch, shell-game definition of “health.” Recent abortion decisions appear to reaffirm its ongoing vitality.73 The Court has modified its trimester framework but the humongous “health” loophole remains essentially unaltered.

69 Gilles, supra note 68, at 526.
70 Roe, 410 U.S. at 164–65; Doe, 410 U.S. at 191–92.
71 Gilles, supra note 68, at 529; 566–614.
72 Id. at 575–96 (discussing Planned Parenthood v. Casey). Casey upheld, against a challenge that it was unacceptably narrow, and thus imposed an “undue burden” on previability abortion, a “medical emergency” exception to Pennsylvania’s statutory provisions requiring a 24-hour waiting period, provision of certain “informed consent” information, and parental consent to a minor’s abortion. The medical emergency exception in terms was limited to situations where an “immediate abortion” was necessary to avert the woman’s death or where delay would “create serious risk of substantial and irreversible impairment of a major bodily function.” Casey, 505 U.S. at 879–87; 899–900. The Court of Appeals had construed the exception to embrace the conditions of preeclampsia, inevitable abortion, and premature ruptured membrane and the Supreme Court found that, as so construed, the definition “imposes no undue burden on a woman’s abortion right.” Id. at 880. One could argue (albeit with some difficulty) that if the scope of physical health impairments covered by the emergency exception (as construed) was sufficient for those purposes, a similarly narrow scope of physical health impairments should be sufficient under the required “health” exception to any restriction of late term abortions. There would be a certain logical consistency to such a position (though not logical necessity). The legal issues, however, are simply different in the two different settings, under the Court’s (admittedly contrived) abortion jurisprudence. Nothing in Casey requires, or even supports, the extension of the one to the other. Casey simply does not revise the Roe-Doe “health exception” definition.
73 See Gilles, supra note 68, at 529; 566–614.
Nonetheless, there are good reasons to believe, or at least to hope, that the Court would be open to reconsidering and revising the definition of "health." It is foolishly broad, of course. It is likely the justices in Roe did not consider it carefully or think-through its sweeping implications. The composition of the Court today is different. And the Court has shown a willingness to adjust its abortion jurisprudence in material respects, at least with respect to details of the Roe framework.

I therefore propose a direct legislative challenge to the Doe health exception's breadth: Congress should declare and define the "health" exception (to the supposedly conceded power to restrict post-viability abortions) narrowly and reasonably, as (1) limited to physical health only and (2) limited to those threats to or direct impairments of physical health that create a substantial and demonstrable risk of serious and permanent harm to a major bodily function—analogous to common law principles governing genuine "self-defense"—and, finally, as (3) specifically excluding social, economic, personal, familial, and emotional "health" arguments for post-viability abortions.

Such a proposal is provocative enough, in challenging head-on the sweep of the Court's "second abortion right." It is principled, in that it does not concede any legitimacy to the Roe-Doe-Casey framework itself; it merely challenges one particularly indefensible aspect of that paradigm. And it is promising, in that it might actually be enacted into law and sustained by a shifting Supreme Court.  

III. PROPOSAL THREE: A DIRECT CHALLENGE TO THE SUPPOSED UNCONSTITUTIONALITY OF ABORTION RESTRICTIONS ATTRIBUTABLE SOLELY TO THEIR PURPOSE OF DISCOURAGING ABORTION OR REDUCING ITS INCIDENCE

My third proposal is for Congress to challenge, head-on, a seemingly minor feature of the Court's current abortion jurisprudence as articulated in Planned Parenthood v. Casey: the asserted invalidity of abortion regulations motivated by the purpose of placing an "obstacle in the path of a woman seeking an abortion of a nonviable fetus," apparently irrespective of whether the regulation actually has such an effect.

74 And if, as Professor Gilles maintains, the "health" exception should not be read so broadly even as a matter of current doctrine, the argument is even easier: Congress should declare that my proposed statutory definition of "health" considerations that might justify a post-viability abortion is not necessarily even inconsistent with current judicial doctrine, and should be embraced as an important clarification of a doubtful point.  
75 Casey, 505 U.S. at 877.
Congress should enact by legislation the view that this aspect of the Court's abortion doctrine is wrong, illegitimate, and (in Congress's view) legally inoperative. Imagine a simple one-line directive: "A legislature's purpose or motivation for enacting an abortion regulation shall not furnish grounds to declare it unconstitutional in any federal court." Such a directive might also explicitly call upon the Court to repudiate this aspect of abortion-law doctrine.  

The point of staking out such a position is to advance a symbolic, but fundamentally important, proposition: It is entirely proper for Congress (and state legislatures) to legislate with the purpose, objective, and desire of saving unborn human lives from being killed—that is, to enact legislation with the explicit purpose of stopping or deterring abortion. And it is entirely proper for legislatures to be open, forthright, and public about such an intention and purpose. Congress and state legislatures are entitled to be motivated by opposition to the existence, and the exercise, of the abortion right declared in Roe and other cases, and to say so. For courts to hold that laws expressing such a view or embodying such an intention are, for reason of such purpose or motivation alone, unconstitutional, is fundamentally at odds with core principles of representative democracy and democratic freedom. It punishes the public expression of, or nonpublic holding of, a particular viewpoint.

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76 I hope to take up in future work the general proposition that Congress possesses legitimate constitutional authority to prescribe (correct) rules of constitutional and statutory interpretation for the judiciary, as an aspect of its constitutional power to enact laws necessary and proper for carrying into execution the judicial power of the United States. Michael Stokes Paulsen, Abolishing Judicial Activism by Statute: A "Rules of Decision Act" for Federal Question Cases (unpublished outline and partial manuscript) (on file with the author). While Congress cannot, constitutionally, literally control the federal courts' independent exercise of "[t]he judicial Power," Congress can in the exercise of its own independent power specify what Congress regards as correct rules of constitutional law. And if those rules are correct ones, the courts should be expected, in the exercise of their independent power, to follow them. The specific rule suggested in the text—that legislative motivation or purpose supplies no proper ground for judicial invalidation of an abortion regulation—is simply one illustration of this principle. The rule should be upheld and enforced by courts if it is the correct rule. There is nothing independently problematic about Congress stating that it is the correct rule if in fact it is.

77 I refrain from saying in the text that such a doctrine violates the First Amendment because I understand First Amendment free speech rights to be possessed only by private persons and groups against government, not by government bodies or institutions themselves. (The First Amendment restricts what government may do; it does not itself create free-speech rights for governments.) Nonetheless, the principle is closely analogous: representative institutions of government have the fundamental political right to express the positions they wish to express, in the manner in which they wish to express them (so long as doing so does not violate some private rights of individuals or groups to be free from such government expression, specifically). Government legislative expression as a fundamental political freedom is an
Vindication of this principle—the right to be pro-life and to act with a pro-life, abortion-thwarting purpose—is essential, symbolically and practically. A rule of constitutional law that posits that simply having a motivation in conflict with the Court’s proclamations of rights in and of itself serves to invalidate laws passed with such motivation, is subtly but seriously authoritarian. It seeks to shut up dissent—to suppress disagreement with the Court wherever that disagreement is overtly expressed and embodied in legislative policy. Such a doctrine is simply outrageous, heaping authoritarian insult upon humanitarian injury: It is not enough, apparently, that Roe recognizes and Casey reaffirms a right of some human beings to kill other human beings; the “purpose” prong of Casey’s undue-burden doctrine asserts that laws motivated by an idea in opposition to the Court’s abortion regime are, for that reason alone, unconstitutional. Trying to prevent abortions from occurring is a legislative thought crime, in the Court’s view.

Is this an overstatement? If so, not by much: The Court’s formulation in Casey is reasonably explicit in making a specific motivation, without more, sufficient to render an anti-abortion law unconstitutional. “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. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”

The response might be that Casey merely makes unconstitutional a deliberate attempt by government to violate what are assumed to be constitutional rights. What could be wrong with that? Presumably, laws have the effects they are intended to have. (A too-heroic assumption,
Casey merely makes unconstitutional an attempt to produce an unconstitutional effect.

Let's break down the purpose-or-effect formulation into its logical possibilities and see why this is problematic. On the one hand, if one assumes that the legislative enactment in question does not have the supposed forbidden effect of actually burdening the exercise of a constitutional right, then invalidity based on the law's motivation alone is the constitutional-law equivalent of a thought crime: a forbidden mental state (or at least its public expression) renders an otherwise constitutional enactment unconstitutional. On the other hand, if the legislative enactment in question does have the supposed forbidden effect, then the "purpose" prohibition adds nothing—except gratuitous condemnation of a mental state for its own sake. It is hard to avoid the conclusion that the only function of the "purpose" prong of the substantial-burden text is to prohibit, punish, penalize—or simply shut illegitimate.

The use of supposed improper "legislative motivation" or "purpose" to invalidate a statute which a court otherwise would find constitutional is deeply problematic as a general matter. The Court has, several times, in other contexts, disapproved of such reasoning, noting that evidence of subjective intention is susceptible to manipulation and abuse; that it makes little sense for a given enactment to be constitutional or not depending on what is said in its favor by legislators; and, further, that permitting forbidden purpose to invalidate a law would create perverse incentives for a legislator to "poison" a bill he or she opposes by purporting to favor it but for supposedly legally improper reasons. 80

In the relatively few instances where the Court has relied on motivation to invalidate government action, most (but not all) have involved situations where demonstrated motivation serves as evidence of

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80 See, e.g., United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it[.]. . . We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."); Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. . . . Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."); see also Edwards v. Aguillard, 482 U.S. 578, 637-39 (1987) (Scalia, J., dissenting). For a provocative (and in certain respects highly debatable) recent treatment of this cluster of issues, see Richard H. Fallon, Jr., Constitutionally Forbidden Legislative Intent, 130 HARV. L. REV. 523 (2016).
a law’s improper substantive content—such as where evidence of discriminatory intent shows that a law or practice, seemingly neutral on its face but resulting in a racially disparate impact, is in fact discriminatory. Demonstrated intention, in this setting, serves to resolve uncertainty as to whether a law’s effects—which are real effects—are in fact the result of actual intentional discrimination rather than accident. Other times, evidence of intention may serve as a “trigger” of more searching scrutiny of a statute’s effects: where there’s smoke, there may well be fire lurking, even if not immediately evident. In such cases, however, it’s the fire that’s the problem; the smoke alone, without more, typically would not be a constitutional problem. Still other times, it must be acknowledged that the Court has invoked evidence of supposed improper intention wrongly to invalidate laws that simply are not unconstitutional as a substantive matter, under the provisions challenged—just as I argue with respect to the purpose inquiry of the "undue burden" test.

81 Washington v. Davis, 426 U.S. 229, 238–45 (1976) is the paradigm case for such use of “purpose” or motivation as proof of discrimination. In Equal Protection Clause cases, evidence of discriminatory motivation operates either as a de facto “trigger” of heightened “scrutiny” of a law’s or practice’s effects or as a way of showing that demonstrably racially disparate effects are not accidental or incidental but are in fact intentionally discriminatory (and therefore are to be treated in the same fashion as directly discriminatory classifications). In these situations, evidence of discriminatory purpose or motivation functions as an additional requirement on top of a showing that a law has a disparate impact on the basis of race (or sex) – since the latter showing alone would not otherwise be sufficient. Other cases fitting this model (or that are best explained in such terms) include Gomillion v. Lightfoot, 364 U.S. 339 (1960) and Yick Wo v. Hopkins, 118 U.S. 356 (1886). Other cases involve contestable applications of this same general principle. Cf. Hunter v. Underwood, 471 U.S. 222, 233 (1985) (invalidating law with disparate racial impact based on evidence of a discriminatory motivation in 1901). In certain Free Speech Clause situations, where the substantive rule is that government may not regulate speech or expressive conduct because of the ideas expressed, but only for (non-pretextual) content-neutral reasons, evidence of motivation can likewise be a relevant source of proof of prohibited conduct. See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281–87 (1977).

In none of these cases, however, did an improper discriminatory motivation alone—without any disparate impact resulting from the operation or administration of an ostensibly neutral law or classification—invalidate the government’s action.

82 In only two areas of constitutional law (of which I am aware) is a supposedly improper legislative purpose, or motivation, alone, sufficient to establish a constitutional violation. One is the Supreme Court’s (rightly) much-maligned three-pronged “Lemon test” for Establishment Clause violations, under which a secular legislative “purpose” is an independent prong. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 55–56 (1985); Edwards v. Aguillard, 482 U.S. 578, 585 (1987. See generally, Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 339 (1986); Michael Stokes Paulsen, Lemon is Dead, 43 CASE W. RES. L. REV. 795, 800–04 (1992-1993). The other is the “purpose or effect” formulation of the “undue burden” standard in the
In the context of the Court's "undue burden" test for abortion restrictions, the "purpose prong" serves no legitimate function as an independent basis for invalidating an abortion regulation; its only role is to suppress honest anti-abortion public advocacy and legislative expression. Think about it: assume that an abortion regulation otherwise survives under the undue burden test, in terms of whether it has the (supposed) forbidden effect of posing too-substantial an obstacle to a woman's exercising the choice to have an abortion. Take, for example, the 24-hour waiting period or informed-consent literature requirements upheld in *Casey*, itself. Now, posit a prefatory statement or "findings" section or "whereas" clause in the bill enacting such a provision (or statements in committee reports or by individual legislators), to the following effect:

The Legislature believes that abortion -- the willful killing of a separate living human being, at an early stage of its life when it is still dependent on the mother for sustenance and life -- is a horrific atrocity. We mean by this legislation to impose absolutely as substantial an obstacle to women obtaining abortions as can be sustained under the Supreme Court's abortion jurisprudence, to press the boundaries of that jurisprudence, to make women think about the reality of what they are contemplating, and to make it as hard as we possibly can to effectuate the life-destroying action that is involved in abortion as a form of judicially authorized violence. We know that waiting periods can add expense, and inconvenience, to exercising the choice to have an abortion. We mean to impose such expense and inconvenience, to the end of discouraging abortion. We know that informed consent requirements, by forcing women contemplating abortion to confront the reality of what they are considering in its full awfulness, will impose on some an emotional and psychological burden—a burden that for some might prove a substantial obstacle to having an abortion. We mean to impose precisely such an obstacle and hope that it achieves such a result. We mean by this legislation to save as many lives as possible. We mean to make abortion as difficult, expensive, inconvenient, and emotionally troubling as possible, so as to prevent it. That is our purpose, and we do not shrink from the public declaration of it, because we believe it is a right, just, and noble purpose.

Should a legislative restriction or regulation of abortion—one that the courts otherwise would not regard as imposing a substantively unconstitutional "undue burden" on the *Roe-Casey* right to abort for whatever reason a woman chooses—somehow be considered to become

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Casey, 505 U.S. at 877.

*Id.* at 879–87; 899–900.
unconstitutional because of such an expression of legislative views or purpose? The foregoing discussion suggests that it should not. Evidence of an abortion-preventing or abortion-deterring legislative motivation or purpose might flag a regulation as, potentially, *actually imposing* a "substantial burden" on abortion. Such a motivation might conceivably lead a judge to engage in more rigorous scrutiny of an abortion regulation to see if it has such an effect. But absent an actual effect rising to the level of the (amorphous) standard of a regulation imposing an "undue burden" on the choice to abort, the mere legislative purpose of wishing to impose barriers to abortion should not itself render such a restriction unconstitutional, under any conceivable doctrinal scenario.

For the Court to purport to find that laws enacted by a legislature, which the Court otherwise would regard as substantively valid, become unconstitutional because the motivation underlying the law or statements made in its support affirmatively and openly contest the legitimacy of the Court’s abortion jurisprudence and seek to thwart the exercise of the "rights" that that jurisprudence creates, is nothing less than a crypto-totalitarian assault on democracy and the freedom of public discourse. Congress should say so and directly contest this aspect of the Court’s abortion dogma.

IV. PROPOSAL FOUR: BAN SEX-SELECTION ABORTIONS

May I offer a brief reprise before forging ahead, in order to place my next proposition in context? My first proposal is a direct challenge to *Roe’s* first premise: that unborn human beings are not legally "persons" within the meaning of the Constitution.85 Congress properly can contest that premise through the exercise of its own independent power of constitutional interpretation. Congress’s constitutional power to make such a determination, in the exercise of good faith constitutional judgment, differs from—and is considerably broader than—the judiciary’s lesser power to invalidate legislative acts, which exists only when such an act is affirmatively in conflict with a rule of law set forth with sufficient definiteness in the Constitution.

My second proposal is a direct challenge to *Roe-Doe’s* expansive definition of "health" that, taken seriously, permits abortion, even of viable fetal human life, for essentially any reason.86 Congress should

85 *Roe*, 410 U.S. at 158.
86 *Id.* at 164–65; *Doe*, 410 U.S. at 191–92.
exercise its co-equal province of constitutional interpretation to repudiate that absurd, ridiculously broad, Orwellian re-definition of “health.”

My third proposal directly confronts the Court’s insidious insistence that a congressional (or state legislative) purpose to impose meaningful barriers to the abortion choice (based on the legislature’s belief and desire that abortion should be prevented by law whenever possible) renders a law unconstitutional as an “undue burden” on pre-viability abortion, even when the law does not otherwise affect the ability of a woman to choose abortion aside from the symbolic force of the legislature’s expressed purpose. Congress should exercise its legislative power of constitutional interpretation to maintain exactly the reverse: that a legislative motivation to thwart the exercise of what the legislature believes is an illegitimate judicially-invented “right” to kill other human beings is entirely proper and that the Court’s doctrine is an authoritarian judicial threat to legitimate expression of legislative dissent.

My fourth proposal picks up with another, quite different, direct challenge to the Court’s “undue burden” standard: Congress (and state legislatures) should prohibit abortion when had for reason of the sex of the unborn child, regardless of the stage of pregnancy. I have set forth this proposal, in brief form, in other writings and hope to develop it more fully in a longer, systematic article addressing the full panoply of doctrinal issues presented by a sex-selection ban.

The argument, however, can be sketched in broad strokes: Current doctrine permits pre-viability abortion to be had for literally any reason the pregnant woman desires. That same doctrine permits post-viability abortion to be had (for reasons explained above in connection with my second proposal concerning the definition of “health”) for—again—essentially any reason the pregnant woman desires. Pre-viability,
abortion plainly can be had for reasons of sex-selection of the child that would be born. Post-viability, abortion for such a reason at least arguably fits within the “health” reasons (including “emotional” and “familial” reasons) for which abortion may be had. This extreme consequence of the Court’s abortion jurisprudence strikes most sensible people as monstrous: surely it cannot be right that abortion can be had solely for the reason that the child that otherwise would be born is a girl! (Or, equally, because he is a boy.) This moral intuition is almost universally shared and is indisputably justified on any of a number of grounds.

That intuition, however, is in conflict with current abortion-law doctrine—which, as noted, permits abortion for reasons of sex selection. It is in conflict also with the most basic (if often unstated) premise of “pro-choice” rhetoric: the “it-ness” of the fetus—its lack of human status, with the consequence that having an abortion lacks serious moral consequence. A ban on sex-selection abortion forces one to confront reality. “It” is a girl, or a boy. If killing a living human fetus is not the taking of human life, but a matter of more indifferent consequence, then it does not matter that the taking of that life is for reasons of its sex: the unborn mass of tissue is not “really” female.

But this gargantuan fiction of course simply blinks reality. There is a reason why, because of cultural preferences for male children combined with the technological ease of discerning the sex of the unborn child early in pregnancy plus widely available legal abortion, there are enormous and hugely statistically improbable sex differentials in birth rates. Statistically, world-wide, it is readily demonstrated that 160 million female human beings are “missing”—their lives ended deliberately before or shortly after birth by abortion or infanticide. If the fetus is an “it,” of course, this is inconsequential. The figure does not really say anything at all about baby girls, because the aborted female fetuses were not human children, ever. The birth rate discrepancy cannot be ignored as an astronomically improbable statistical fluke, to be sure. But it is simply morally irrelevant, at least under the extreme pro-choice/pro-abortion ideological view.

Conversely, if it does matter—if it is wrong—to kill a human fetus because of her sex, that suggests a broader indictment of pro-choice/pro-abortion ideology. Whatever makes it wrong to kill a human fetus because

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89 See supra Part II; see generally Roe, 410 U.S. at 164; Casey, 550 U.S. at 846.
of her sex is not merely the consequence of sex-selection abortion for other, born humans (such as the detrimental social impacts of sex-differential birth rates or the symbolic devaluing of women’s lives—though these are real harms, too). Sex-selection abortion is wrong because of the clear moral wrong of killing female human fetuses and embryos for being female—of killing girls simply for being girls.

If the moral intuition of the wrongness of sex-selection abortion has salience, it is because of the implicit recognition of the humanity of the fetus. To repeat: It’s a girl. That produces an unavoidable “aha!” moment: Isn’t the girl still a girl, even when abortion is being had ostensibly for some other reason? If it’s wrong to kill a girl because she’s a girl, isn’t it also wrong to kill a girl for some other reason?91 (And the same could be said, of course, in the less common case where sex-selection abortion is had because the child to be born is a boy.)

Finally, it is useful to think about how the “gender equality” (or sex equality) arguments sometimes made for abortion rights, including arguments premised on the Equal Protection Clause of the Constitution, boomerang completely when the issue at hand is sex-selection abortion. It is bitterly ironic—but revealing—that the argument for abortion on demand, ostensibly premised on (certain) feminist notions of “women’s rights,”92 ends up producing a plenary right to abortion even for the reason that the child that otherwise would be born is female. By the same token, it is ironic that, were a prohibition on sex-selection abortion to be upheld, it would necessarily be on some ground that both undercut the pretense, implicit in all arguments for abortion rights, that the unborn child is not an independent human life worthy of respect and protection in her own right.

Upholding a sex-selection ban would likewise undercut the Court’s current abortion-law doctrine at one or more of several junctures: either prohibiting a reason for having an abortion, even of a non-viable fetus, is not an “undue burden” on the right to choose abortion (a conclusion that would involve a major change in the Court’s doctrine); or “undue burden” is not the proper test (a slightly different major change); or there is a “compelling interest” in protecting fetal life from abortion throughout pregnancy, at least from gender-based killing (a major change in the

91 I set to one side, for purposes of this discussion, the question of when abortion might be morally (and legally) justifiable in situations of genuine self-defense, in order to save or safeguard the life of the mother.

Court's doctrine); or the human fetus is a legal "person" with her own constitutional rights (a huge and important change). In addition, a ban on sex-selection abortion, to be upheld, would seemingly require the judiciary to hold that "familial" so-called health reasons for abortion do not extend to such considerations.

There are certain collateral questions involved in banning abortion when had for one particular reason—sex-selection—but not others. Is it constitutionally legitimate to ban abortion when had for one reason but not others—to ban an otherwise lawful act by a private person when done out of a particular motivation? The answer is yes, for the same reasons that it is legitimate to ban employment decisions based on race or sex, even if the same decision might have been made on other grounds.93

How does one prove a forbidden motivation for an act that might otherwise lawfully be done—indeed, that otherwise would be constitutionally protected conduct? Again, the answer is supplied by analogy to employment discrimination law, where there exists a well-developed arsenal of conceivable tests and burden-of-proof paradigms for addressing precisely such issues of possible independent justification, mixture of motives, and pretext.94

And finally—to return to my third proposal, concerning the propriety of a legislative purpose to restrict abortion—is there something suspect, or improper, in a law whose explicit purpose is to place a substantial forbidden-motivation-for-abortion obstacle in the path of women desiring an abortion and whose further purpose is to pose a direct challenge to the Court's current abortion-law doctrine? The answer is no, again, for the reasons discussed above.

How might such a law fare in the courts?95 Faced with a square conflict between an overwhelmingly clear moral intuition and present
abortion-law doctrine, what would the Supreme Court do? It is always hazardous to place bets on what the Supreme Court will do in abortion cases (and Congress’s willingness to enact bold challenges to scandalous Supreme Court doctrine should not be based on any such predictive assessment of likely judicial success). But there is a plausible argument that the Court, under the proper conditions, might well modify its abortion doctrine in small-to-large ways in order to sustain such a ban: *Roe*’s rhetoric of “choice” seems less applicable, where the relevant choice is not the choice “whether or not to bear or beget a child”—that choice implicitly already having been made if the reason for abortion is the sex of the child, not the fact of pregnancy itself; *Casey*’s “undue burden” standard is hopelessly vague and malleable, and would seem, like *Roe*, to contemplate situations where the relevant choice being burdened is the choice whether to have a child, not whether to have one of a particular sex (meaning that the Court could sustain such a ban with only mild embarrassment and minimal intellectual dishonesty); and the “health” exception is utterly indefensible as a justification for late-pregnancy sex-selection abortion.

In short, if the Court wished to sustain a ban on sex-selection abortion, it could do so by altering its eminently alter-able, fluid abortion-law doctrine. To be sure, doing so would undermine the premises on which that abortion-law doctrine rests, and potentially lay the groundwork for a more sweeping judicial repudiation of *Roe* and *Casey*, just as it lays the groundwork in the public mind for a more general rejection of the idea of legal elective abortion. That is precisely the objective. Still, the Court

not challenged by Planned Parenthood. See, e.g., Thomas J. Molony, Roe, Casey, and Sex-Selection Abortion Bans, 71 WASH. & LEE L. REV. 1089, 1094–95 (2014)). How then would a case presenting this issue arise? One possibility is that Congress could seek to confer, by statute, “standing” to seek a declaratory judgment concerning the constitutionality of such a ban on a non-traditional party, like a public prosecutor charged with enforcing such a ban or a guardian ad litem for a class of anticipated beneficiaries of the statute’s prohibition. Congress might also consider conferring upon the living, unborn child a protectable legal interest in not being aborted for reasons of sex-selection, authorize suit against any person or business that threatens that interest, and authorize the appointment of guardians ad litem to represent the unborn child as “next friend.” Another possibility might be to require all abortion businesses to post signs saying “Pursuant to the Sex-Selection Abortion Prohibition Act of 20xx, this abortion business will not provide abortions for reasons of selection of the sex of a child to be born.” Such an explicit sign requirement might provoke a challenge from an abortion business (or prospective client) that might not otherwise occur.

Of course, a justiciable challenge to a ban on sex-selection abortions might readily arise from (1) a challenge brought by an abortion clinic that does them and wishes to keep the business, or (2) a criminal prosecution against an abortion clinic or doctor for doing a sex-selection abortion (or agreeing to do one in response to an inquiry from an undercover investigator).
might well take the intermediate step of upholding a sex-selection ban without going all the way down the road to overruling Roe.

On the other hand, the Court might strike down a ban on sex-selection abortion, which could have one of two uncertain political consequences. The public might accept such a right to sex selection abortion as necessarily embraced within the broader scheme of constitutionalized abortion rights—and that would be that. But the public might also rebel, finally, at the outrage of an outrageous judicial doctrinal framework creating an atextual and unqualifiedly plenary right to abortion on demand literally for any reason, including the most unimaginably unjustifiable one of sex selection. Such a decision might prove the judicial straw that breaks the proverbial camel’s back of public support for the decisions of the Supreme Court. Faced with such a prospect, a political, politicized Supreme Court might well choose the path of upholding the ban, and starting the judiciary on the road to a more comprehensive judicial revision or repudiating of the right to abortion.

V. PROPOSAL FIVE: ABROGATING THE DOCTRINE OF STARE DECISIS BY STATUTE (IN ABORTION-LAW CASES)

All of the above proposals involve, to some degree or another, head-on confrontation by Congress of the Supreme Court’s abortion jurisprudence—direct challenges to existing doctrine. They also involve, at least implicitly, invitations by Congress to the Court to change its constitutional doctrine with respect to abortion. My fifth and final proposal in this essay—one that I developed at length in a substantial law review article seventeen years ago—is that Congress constitutionally can, and should, clear the way for such doctrinal change in abortion law by enacting a statute abrogating the judge-made doctrine of stare decisis, at least insofar as it applies to the Court’s abortion precedents—that is, to direct that the Supreme Court (and possibly even lower federal courts and state courts) consider these constitutional questions afresh, as it were on a “clean slate,” on the basis of their objective constitutional merits and without any thumb on the scales by virtue of the Court’s prior decisions.96

Does Congress possess valid constitutional power to do this? Absolutely it does. While the argument is set forth at far greater length in my earlier article, it can be briefly summarized and reprised here. The argument, distilled to its essentials, consists of three steps.

96 Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?, supra note 16, at 1541.
First, it is clear—conceded by the Court, repeatedly and consistently—that the doctrine of *stare decisis* is not itself of constitutional dimension. That is, *stare decisis* is not in any sense constitutionally required (and never has been so understood) but is instead a rule of judicial policy, fashioned by the judiciary. Its policy judgments and accommodations are just that—matters of judicial policy. Considerations of workability, reliance, stability, gradual change, adaptation of decision to new facts and circumstances, and concerns for the appearance of judicial consistency and integrity—all of these are matters of court-fashioned policy. As such, they are (at best) a kind of judicially created “federal common law” displaceable by Congress, if Congress should weigh the policy considerations differently or simply prefer correct judicial decision on the merits over non-constitutional judicial policy considerations that would operate to reach a result at variance with correct decision on the merits.

Second, and relatedly, legislative alteration of the judicial doctrine of *stare decisis* does not interfere with the Article III “judicial Power” of the courts. One could argue that, even though the doctrine of *stare decisis* (or any particular version of such a doctrine) is not itself constitutionally required, it is an unalterable feature of the judicial power either (a) to prescribe the binding prospective force of its own precedents, for itself; or (b) to determine what principles it will use, and what sources it will draw upon, to determine constitutional meaning. Such an argument, however, is unsustainable. At its core, the judicial power is a power to resolve cases in accordance with governing law; it is not an autonomous power of decision however a court likes (irrespective of governing law) or according to whatever principles of decision it likes. As I wrote on this point in the earlier article: “The constitutional text simply cannot be read to support the assertion of a plenary judicial power to vest precedent with quasi-legislative force, effectively altering the meaning of the Constitution’s commands for purposes of judicial interpretation in

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97 *Id.* at 1537.
98 *Id.* at 1540.
99 *Id.* at 1540, 1551, 1563.
100 Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, supra note 16, at 1540, 1567. One need not go further and embrace (as I do) the proposition that *stare decisis*, in the strong sense of deliberate adherence to a decision one otherwise would consider wrong on first-best interpretive criteria, is unconstitutional. *Id.* at 1548–49, n.38 (suggesting this possibility and collecting authorities for it). See also Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2731–34 (2003) (developing this argument).
subsequent cases.”101 Put differently: Just as there is no “Stare Decisis Clause” in Article III (or in Article VI, as part of the Supremacy Clause) there is no “Stare Decisis Power”—law-making power—vested in the judiciary by virtue of the grant of the judicial power.

The absence of any constitutional judicial power to prescribe a doctrine of stare decisis is consistent with the best reading of the evidence of the original historical understanding of Article III102: “[I]n short, the available historical evidence tends to show that the argument for an autonomous judicial power to assign binding precedential weight to their decisions was not within the contemplation of the framing generation, and was not a subject of serious discussion at the time of the Constitution’s adoption.”103

Any assertion to the contrary would also be inconsistent with the logic of the Constitution’s structure. While the constitutional independence of judges created by Article III excludes a congressional power to direct courts to reach particular results in cases before them or to displace their judgments by legislative edict,104 that hardly means that the courts possess an autonomous power to create general rules or principles of decision at variance with the Constitution and to give those rules or principles (like precedent) priority over correct constitutional decision. The argument would entail a claim of “the existence of penumbral judicial powers to prescribe rules of policy that trump the rules of law that the courts would otherwise find to be contained in the Constitution, statutes, and treaties of the United States.”105 Such a claimed power would be fundamentally at odds with constitutional supremacy and inconsistent with first principles of separation of powers:

If the basis for the argument is a supposed structural inference from the Constitution’s system of separation of powers, its toleration of an uncheckable judicial power to prescribe rules at variance with the Constitution is fundamentally at odds with the regime of separation of powers that is thought to yield it.106

102 Id. at 1571–78.
103 Id. at 1576.
104 Id. at 1540.
105 Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?, supra note 16, at 1581.
106 Id.
And to be clear, if the claim is not that the Constitution dictates any particular rule of stare decisis, the claimed aspect of judicial power would need to be "that the judiciary is constitutionally empowered to devise one of its own choosing, without limitation, by virtue of Article III’s grant of ‘[t]he judicial Power’ and the idea of separation of powers generally." That is simply implausible—to say nothing of being, well, unprecedented.

Finally, any claim of autonomous judicial power to create a binding doctrine of *stare decisis*—to fashion procedural rules of decision or interpretation that exclude Congress’s legislative power—would be inconsistent with pervasive constitutional practice from the beginning of the republic. If there were an autonomous judicial power to prescribe *how* the courts would go about deciding legal and factual issues, a wealth of longstanding federal laws, continuously in force, would be unconstitutional: the Rules of Decision Act (1789), the Full Faith and Credit Act (1790), and the Anti-Injunction Act (1793). In addition, the Federal Rules of Civil Procedure (and Criminal Procedure, and Appellate Procedure) and the Federal Rules of Evidence would all likewise be constitutionally infirm, on the ground that they interfered with the autonomous judicial power to decide cases in the manner of their choosing. And there is considerably more.

The preceding paragraph leads naturally into the third step of the argument: Congress possesses legislative power to carry the judicial power into execution by prescribing rules of practice, procedure, evidence, choice-of-law, finality-of-judgments, and substantive decision. There is, in short, no question of Congress possessing enumerated constitutional power to enact a statute abrogating the non-constitutional judicial policy of *stare decisis*, in all or some subset of federal-law cases.

The conclusion is well nigh unavoidable—and not in any way in conflict with any decision or doctrine of the Supreme Court. Stare decisis is not constitutionally required; there is no judicial power to prescribe such a doctrine at variance with the Constitution; and Congress has legislative power to displace it. Doing so does not direct a judicial decision on the merits—and thus does not affect the courts’ power to decide cases on their merits—but merely directs that *that* be the enterprise in which the

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107 Id.
108 Id. at 1582-90.
courts engage: decision on the merits, rather than on the basis of precedent in conflict with governing law.

If the Supreme Court were to decide the merits of abortion cases in accordance with the meaning of the Constitution, without any decision-altering weight being supplied by precedent at variance with that meaning, it is readily possible to envision several of my other proposals being sustained.

CONCLUSION

A brief reprise and coda: First, Congress should enact a declaratory human life statute. While such a declaration is in conflict with the first step of Roe v. Wade, it properly lies within the power of Congress to interpret ambiguous or indeterminate language within constitutional provisions it is charged with enforcing, and to give them meaningful content in contestable situations. If it is not within the rightful scope of judicial power.) The Supreme Court should sustain such a declaration as within the scope of Congress's independent interpretive power, irrespective of the fact that it conflicts with the Court's own exposition of the Constitution. Whether the Court would sustain it or not, Congress should enact such a declaration, for its own important symbolic force. And Congress should maintain the ongoing legal force of its own declaration.

Second, Congress should authoritatively interpret, at variance with the Court's indefensible doctrine, the proper scope and meaning of the so-called "health exception" and limit its applicability. If asked—in invited—to reconsider this question on a clean slate, there exists a significant likelihood that the Supreme Court would retreat, rapidly, from the most extreme and foolish formulations of its claimed right to abort, throughout pregnancy, because of considerations of psychological, emotional, and familial "health," and age.

Third, Congress should proclaim—loudly and insistently—the legitimacy of legislative motives to thwart the obtaining of abortions. Whatever laws are otherwise valid in their effects (on whatever criteria) should not be invalid because of the motivations or anti-abortion purposes of the men and women constituting the democratic process that enacted

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10 See supra Part I; Roe, 410 U.S. at 158.
11 See supra Part II.
12 Id.; Doe, 410 U.S. at 192 (broadly defining "health" "in the light of all factors—physical, emotional, psychological, familial, and the women’s age—relevant to the well-being of the patient.").
them. The Court could say otherwise, of course, but once again Congress can stick to its guns and insist on the validity and importance of its own declaration, notwithstanding any contrary judicial decision. Fourth, Congress should prohibit sex-selection abortions—immediately, and throughout all nine months of pregnancy—as a direct challenge to the “undue burden” standard; as a direct challenge to the notion that pre-viability abortions ought to be available for any reason or no reason at all; as a direct challenge to corrupted notions of sex equality that perversely create a right to kill female human infants simply because they are female, if their mother so elects; and as a powerful symbolic measure designed to teach the lesson of the humanity of the fetus. The Court might strike down such an enactment—it is manifestly contrary to the Court’s abortion doctrine—but it would do so at great peril to its legitimacy and its effective power. Or the Court might choose the situation of such an enactment as the occasion for beginning the long road home to a sound interpretation of the Constitution’s provisions.

Fifth, in order to achieve all of this, it is useful to start fresh. Congress should abrogate the doctrine of stare decisis, and remove the precedential weight of Roe and Casey.

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113 See supra Part III.
114 Id.
115 See supra Part IV; Casey, 505 U.S. at 876–77.
116 See supra Part V; see also Roe, 110 U.S. 113 (1973); Casey, 505 U.S. 833 (1992).
RESTORING CASEY’S UNDUE-BURDEN STANDARD AFTER WHOLE WOMEN’S HEALTH V. HELLERSTEDT

Stephen G. Gilles*

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VI. WHOLE WOMEN'S HEALTH AND THE SUPREME COURT'S ABORTION PATHOLOGIES

I. INTRODUCTION

The Whole Women's Health decision was unquestionably a significant defeat for anyone who thinks that the Constitution does not support a right to elective abortion, or who believes that abortion in most
circumstances is gravely wrong because it ends a new human life.\textsuperscript{1} In a 5-3 decision authored by Justice Breyer, the Supreme Court struck down two provisions of a Texas statute known as H.B. 2—a requirement that abortion providers have admitting privileges at a nearby hospital, and a requirement that abortion clinics meet the same standards as ambulatory surgical-centers—that were enacted with the ostensible purpose of reducing the maternal-health risks associated with elective abortions.\textsuperscript{2} The Court could easily have done so, consistently with its controlling decision in \textit{Casey v. Planned Parenthood of Southeastern Pennsylvania},\textsuperscript{3} by holding \textit{only} that both provisions imposed "substantial obstacles" to women's access to elective abortions by forcing most abortion clinics in Texas to close. That ruling—which the Court in fact included in its opinion\textsuperscript{4}—is questionable: the principal dissent, by Justice Alito, took vigorous issue with the causal inferences on which it depends.\textsuperscript{5} But at worst it would have been a fact-specific misapplication of \textit{Casey}'s undue-burden standard. Better yet, the Court could have avoided the controversy over the regulations' impact on Texas abortion clinics by ruling, in light of the trial court's findings that H.B. 2's provisions would yield minimal (or even negative) maternal-health benefits, that they were not "reasonably related" to a legitimate state interest, as \textit{Casey} requires.\textsuperscript{6} That approach would also have been consistent with \textit{Casey}, and would have provided a firmer basis on which to invalidate them on their faces.

Unfortunately, the \textit{Whole Women's Health} Court instead endorsed the wrong side in a recently-created conflict in the lower courts over the proper interpretation of the "undue-burden standard," which \textit{Casey} adopted as the test for determining the constitutionality of laws that regulate (but do not prohibit) elective abortions prior to viability. As Justice Thomas argued in dissent, Justice Breyer's majority opinion transforms the undue-burden test into "something much more akin to strict scrutiny."\textsuperscript{7} It does so, \textit{inter alia}, by directing courts to "consider the burdens a law imposes on abortion access together with the benefits those

\textsuperscript{1} See generally Stephen G. Gilles, \textit{Why The Right to Elective Abortion Fails Casey's Own Interest-Balancing Methodology – and Why It Matters}, 91 NOTRE DAME L. REV. 691 (2015) (arguing that the right to elective abortion is unsound under both an originalist analysis and a living constitutionalist analysis).

\textsuperscript{2} \textit{Whole Women's Health v. Hellerstedt}, 136 S. Ct. 2292 (2016).


\textsuperscript{4} \textit{Whole Women's Health}, 136 S. Ct. at 2300.

\textsuperscript{5} Id. at 2344–49 (Alito, J., dissenting).

\textsuperscript{6} See infra note 69 for discussion of \textit{Casey}'s "reasonably related" test.

\textsuperscript{7} \textit{Whole Women's Health}, 136 S. Ct. at 2324 (Thomas, J., dissenting).
laws confer," and by ratcheting up the degree of means-ends fit that the
"reasonably related" criterion of abortion regulations requires. Because
the undue-burden standard applies to regulations that seek to protect fetal
life, as well as to maternal-health regulations such as those at issue in
Whole Women’s Health, these developments pose a grave threat to the full
range of pro-life legislation enacted since Casey.

As bad as Whole Women’s Health’s new version of undue-burden
scrutiny is, it is important to keep this setback in perspective. The
supposed compromise arrived at in Casey by Justices O’Connor,
Kennedy, and Souter—the co-authors of the controlling Joint Opinion in
Casey—has always been tilted heavily against protecting fetal life. Casey
reaffirmed the core right Roe v Wade invented—a woman’s right to an
abortion for any reason prior to fetal viability. That holding ensured that
the states would remain largely powerless to protect pre-viable fetuses.
Even when it came to post-viability abortions, Casey did nothing to
improve on Roe’s vague assurance that prohibitions on such abortions are
constitutional unless an abortion is “necessary, in appropriate medical
judgment, to preserve the life or health of the mother.”

Casey’s one (less than redeeming) virtue was the plurality’s rejection
of Roe’s strict scrutiny of regulations of pre-viability abortions, in favor
of the undue-burden standard. Under Casey’s version of that standard, an
abortion regulation is unconstitutional if it “has the purpose or effect of
placing a substantial obstacle in the path of a woman seeking an abortion
of a nonviable fetus.” On its face, this standard requires that abortion
regulations neither be intended to create a substantial obstacle to abortion
access, nor succeed in doing so. The central doctrinal issues in Whole
Women’s Health concerned both parts of this test: What type of scrutiny
should a court employ in determining whether a regulation has the
forbidden purpose (an inquiry that ordinarily turns on whether the
regulation is “reasonably related” to a legitimate state interest)? And in
determining whether a regulation has the forbidden effect, should a court
simply ask whether the regulation creates a “substantial obstacle” to
women’s access to abortion, or should it balance the extent to which the
regulation advances the state’s valid interests against its burdensome
effects on women seeking abortions?

8 Id. at 2309.
9 Id. at 2309.
11 Casey, 505 U.S. at 846.
12 Roe, 410 U.S. at 165.
13 Casey, 505 US at 877.
As we will see, the Whole Women’s Health Court explicitly adopted and applied the balancing approach. It also held that the overall undue-burden inquiry requires scrutiny that is less deferential than rational-basis review, and made use of several heightened-scrutiny techniques in evaluating H.B. 2’s provisions. On both counts, the Court’s one and only argument was that it was applying the controlling law set forth in Casey. After supplying the necessary background in Part I, Part II of this article will take up Justice Breyer’s claim that an abortion regulation constitutes an “undue burden” if its burdens on women’s access to abortions outweigh the benefits it actually yields. To refute that argument, I will show that Casey applied the “substantial obstacle” criterion to evaluate regulatory effects, to the exclusion of balancing. In Part III, I will argue that Casey’s version of the undue-burden test is also normatively superior to Justice’s Breyer’s balancing approach. Even if stare decisis leads the Court to adhere to balancing in the context of maternal-health regulations such as H.B. 2, these arguments furnish compelling reasons not to extend it to the category of fetal-protective regulations with which Casey was primarily concerned.

Part IV turns to Justice Breyer’s treatment of the overall level-of-scrutiny issue. I show that under Casey, the substantial obstacle test for the effects prong, and Casey’s version of a reasonably related test for the purpose prong, determines the level of scrutiny. Although both prongs require more than minimal rational-basis scrutiny, neither of them permits a reviewing court to weigh regulatory benefits and burdens, or to use heightened-scrutiny techniques such as least-restrictive-alternative analysis and narrow tailoring. The reasonably-related test, however, does require that a regulation be “reasonably”—not merely “rationally”—related to protecting maternal health or fetal life. Under that modestly heightened but still deferential level of scrutiny, the challenged provisions of H.B. 2 were arguably unconstitutional in light of the trial court’s findings that their health benefits were negligible. Rather than adopting

14 I was the principal author of an amicus brief in Whole Women’s Health in support of Texas. See Brief for CatholicVote.org Legal Defense Fund & University of St. Thomas Prolife Center as Amici Curiae Supporting Respondents, Whole Women’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274). This article draws on that brief, which was largely devoted to the balancing and level-of-scrutiny issues, and on a short essay I wrote for Casetext shortly after the decision in Whole Women’s Health was announced. See Stephen G. Gilles, Justice Kennedy’s Disastrous Defection – and its Likely Limits, CASETEXT (June 29, 2016) (on file with author).

15 See Barry McDonald, A Hellerstedt Tale: There and Back Again, 85 U. CINNATI L. REV. (forthcoming 2017) (arguing that Justice Breyer’s opinion should be construed as applying only to maternal-health regulations, as opposed to regulations protective of fetal life).
that rationale, Breyer’s opinion stealthily revives the pre-Casey approach to “reasonably related” review, which employs least-restrictive-alternative analysis and narrow tailoring (as well as balancing).

When the Court’s decision in Whole Women’s Health was announced in June 2016, the chances seemed slim that the arguments advanced in this Article could, in the foreseeable future, persuade a majority of the Justices to undo or limit the damage done by Whole Women’s Health. Hillary Clinton was the odds-on favorite to succeed President Obama, and had she done so a five-Justice liberal majority would have been virtually inevitable. Instead, the election of Donald Trump has resulted in Justice Gorsuch replacing Justice Scalia. As a result, it appears likely that Justice Kennedy will resume his role as the “swing” Justice in hot-button areas of constitutional law, including abortion rights. That is all the more reason to demonstrate, as this Article aims to do, that Justice Breyer’s stricter, balancing-infused interpretation of the undue-burden standard threatens to undermine Casey’s commitment—and Kennedy’s—to the proposition that “[t]he political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential.” Fortunately, although Kennedy joined Breyer’s opinion in Whole Women’s Health, it is not too late for him to disavow that opinion’s glaring doctrinal errors.

II. “Radically Rewrit[ing]” Casey’s Undue-Burden Test

A. The Whole Women’s Health Litigation

Empowered by the increasing Republican dominance of state legislatures, over the past decade the pro-life movement managed to enact a variety of new abortion regulations. Some of these laws aim to persuade women who are considering elective abortion to forego them, thus protecting fetal life. As Justice Kennedy’s opinion for the Court in

17 The phrase is Justice Thomas’s. See Whole Women’s Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting).
18 Laws in this category include strengthened informed-consent requirements, see Guttmacher Institute, https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion (last visited Sept. 1, 2017); mandates that women be offered an opportunity to view a fetal ultrasound before having an abortion, see Guttmacher Institute, https://www.guttmacher.org/state-policy/explore/requirements-ultrasound (last visited Sept. 1, 2017); and bans on sex-selection abortions. See Guttmacher Institute, https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-


*Gonzales* observed, laws of this kind may also enable some women to avoid abortions they would have come to deeply regret, thereby advancing women’s psychological health. Other measures, however, are justified solely as maternal-health regulations intended to reduce the health risks associated with elective abortions.

In the aftermath of the discovery of abortion doctor Kermit Gosnell’s horrific practices at his clinic in Philadelphia—and his 2011 convictions of murder and manslaughter—pro-life groups undertook a nationwide effort to enact tighter maternal-safety regulations of abortion clinics. Legislatures in a number of states, including Texas, enacted health and safety regulations advocated by pro-life organizations. Challenges to two such Texas regulations eventually reached the Supreme Court.

The two provisions at issue were contained in House Bill 2, which the Texas legislature enacted in 2013. The “admitting privileges requirement,” as the Supreme Court called it, provided that a “physician performing or inducing an abortion” must “have active admitting privileges at a hospital” located within 30 miles of the abortion facility. The second provision, which the Court referred to as the “surgical-center requirement,” provided that each “abortion facility” must comply with the “minimum standards... for ambulatory surgical centers” under pre-existing Texas law.

The procedural history of the challenges the Court reviewed in *Whole Women's Health* is complicated, and this Article bypasses the ensuing procedural issues that also divided the Justices. Suffice it to say that the Fifth Circuit, in addition to holding that res judicata barred some of the clinics’ principal claims, reversed the District Court’s sweeping statewide rulings that both provisions were facially unconstitutional.

When the Supreme Court granted certiorari, advocates on both sides were optimistic. Pro-choice groups viewed the case as a vehicle for...
attacking a wide range of recently enacted statutes they labelled “TRAP” (short for Targeted Regulation of Abortion Providers) laws. Pro-life groups thought that, in light of his opinion for the Court in *Gonzales v Carhart* (“Gonzales”)—which upheld the federal ban on partial-birth abortions against an undue-burden challenge—the chances were good that Justice Kennedy would provide the necessary fifth vote to uphold the challenged provisions.\(^{24}\)

After the case was fully briefed in the Supreme Court, but before it was argued, Justice Scalia died unexpectedly. At that point, the most realistic scenario for a pro-life victory became a 4-4 tie, which would have resulted in an affirmance of the Fifth Circuit’s judgment by an equally divided Court. Instead, the Supreme Court reversed the Fifth Circuit in a 5-3 decision authored by Justice Breyer, and joined in full by Justice Kennedy. On the merits, the Court held that the Fifth Circuit had misinterpreted the undue-burden test. Properly construed, Breyer concluded, each provision “constitutes an undue burden on abortion access,” because “neither . . . offers medical benefits sufficient to justify the burdens upon access that each imposes,” and “[e]ach places a substantial obstacle in the path of women seeking a previability abortion.”\(^{25}\)

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissented, and Thomas also dissented separately for himself alone. Neither dissent challenged the majority’s affirmance of the district court’s factual findings concerning the negligible health benefits of the admitting-privileges and surgical-center requirements. The principal theme of Alito’s dissent was that the Court had failed to apply the ordinary rules of res judicata “in a neutral fashion” in this abortion case, and that a neutral application of them would have barred statewide relief on the challenge to the admitting-privileges provision, and altogether precluded the facial

\(^{24}\) *Gonzales v. Carhart*, 550 U.S. 124 (2007). In Kennedy’s opinion for a five-Justice majority, the Court upheld the federal law banning partial-birth abortions against an undue-burden challenge. In so doing, *Gonzales* also limited the 2000 decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which struck down state laws banning the same procedure. Kennedy’s undue-burden analysis contained language from which the Fifth Circuit deduced that rational-basis review should be used in applying the undue-burden standard. *See Cole*, 790 F.3d at 575 (quoting *Gonzales*, 550 U.S. at 158 (“[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”)). I discuss this language *infra* note 227.

\(^{25}\) *Whole Women’s Health*, 136 S. Ct. at 2300.
challenge to the surgical-center requirement. On the merits, Alito’s only argument was that the petitioners had failed to prove that either provision created a “substantial obstacle” to abortion access. Although that argument necessarily implies that he disagreed with Justice Breyer’s balancing approach, Alito said nothing about the balancing issue.

Justice Thomas, by contrast, argued that in striking down the challenged regulations, the majority had “radically rewrit[ten] the undue-burden test” by, inter alia, requiring courts to compare the burdens and benefits of a challenged regulation, and requiring abortion regulations to have “more than a ‘reasonabl[e] relat[ion] to . . . a legitimate state interest.” In addition, he offered broader criticisms of the Court’s relaxed standing rules in abortion cases, and of its levels-of-scrutiny and preferred-rights jurisprudence.

B. The Turn Toward Balancing

For almost a quarter-century after Casey, the undue-burden test generally enabled states to enact reasonable regulations that sought to persuade women to carry their pregnancies to term, or required abortion clinics to adhere to standards conducive to maternal health. As we will see, that is what Casey’s co-authors intended it to do. Two key features of Casey’s undue-burden test were crucial to preserving this modest leeway for pro-life legislation: courts understood that review of regulatory purposes (including means-ends fit) was to be deferential, and they understood that a regulation’s effects would constitute an undue burden only if they imposed a “substantial obstacle” on women’s access to abortion.

Beginning with a 2013 opinion by Judge Posner for the Seventh Circuit, however, some lower courts began ruling that the effects prong of the undue-burden standard calls for balancing the challenged regulation’s benefits against its burdens on women’s access. In Judge Posner’s re-definition, “an undue burden” becomes any burden that is “excessive in relation to the aims of the statute and the benefits likely to be conferred by it.” Under this approach, a court could rule that a regulation imposes an undue burden if the court thought its burdens

26 Id. at 2330 (Alito, J., dissenting).
27 Id. at 2324 (Thomas, J., dissenting).
28 See, e.g., Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999).
29 Planned Parenthood of Wisconsin v. Van Hollen, 738 F.3d 786, 799 (7th Cir. 2013); Planned Parenthood Arizona, Inc. v. Humble, 703 F.3d 905, 913 (9th Cir. 2014).
30 Planned Parenthood of Wisconsin, Inc. v. Schimel, 806 F.3d 908, 921 (7th Cir. 2015).
exceeded or outweighed its benefits—even if the burdens, standing alone, would not qualify as a “substantial obstacle” for the relevant group of women.

Justice Breyer tends to favor balancing tests, so it was no surprise that he would endorse a version of the undue-burden standard that requires weighing regulatory benefits and burdens. What is surprising is that his opinion made no attempt to provide a normative justification for that choice. Instead, Breyer relied exclusively on precedent. After acknowledging the state’s legitimate interest in maximizing the safety of women who have abortions, he invoked Casey’s statement that “[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.” He then described the Fifth Circuit’s understanding of the undue-burden standard, under which “a state law is ‘constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest.’” Breyer claimed that both parts of the Fifth Circuit’s test were inconsistent with Casey:

The rule announced in Casey . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. See 505 U.S., at 887–898 (opinion of the Court) (performing this balancing with respect to a spousal notification provision); id. at 899–901 (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (same balancing with respect to a parental notification provision). And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. See, e.g., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955). The Court of Appeals’ approach simply does not match the standard that this Court laid out in Casey, which asks courts to consider whether any burden imposed on abortion access is “undue.”

By contrast, Justice Breyer asserted, the District Court had adhered to the Court’s precedents:

32 Cf. Heller, 554 US at 690–91 (Breyer, J., dissenting) (advancing normative arguments in favor of using interest-balancing in the Second Amendment context).
34 Id. (quoting Cole, 790 F.3d at 572).
35 Id. at 2309–10.
It did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.  

On the basis of this laconic characterization of *Casey*'s undue-burden standard, Justice Breyer held:

"[N]either of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution."

Justice Breyer arrived at these conclusions through a fact-intensive appraisal of the District Court’s opinion. He accepted the District Court’s finding that the admitting-privileges requirement would not achieve its stated purpose of protecting women’s health should complications arise, both because abortions in Texas were already “extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure,” and because admitting privileges would not be more helpful than a transfer-protocol agreement even when complications arose. Turning from benefits to burdens, Breyer argued that the admitting-privileges requirement created a “substantial obstacle,” because “the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas’ clinics, or thereabouts.” In turn, those closings led to “fewer doctors, longer waiting times, and increased crowding,” along with much longer driving times for a substantial number of women. He ruled that these burdens, “when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court’s ‘undue burden’ conclusion.”

As for the surgical-center requirement, Justice Breyer adopted the District Court’s “well supported” findings that the risks of abortions are not “appreciably lowered” at ambulatory surgical centers, nor will women “obtain better care or experience more frequent positive outcomes at an

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36 *Id.* at 2310.
37 *Whole Women’s Health*, 136 S. Ct. at 2300.
38 *Id.* at 2311.
39 *Id.* at 2313.
40 *Id.*
41 *Whole Women’s Health*, 136 S. Ct. at 2313.
ambulatory surgical center as compared to a previously licensed facility.” Moreover, because Texas did not apply its surgical-center requirement to many other medical procedures that are riskier than abortions, Breyer found that the regulation “simply is not based on differences” between abortion and other surgical procedures “that are reasonably related to” preserving women’s health, the asserted “purpos[e] of the Act in which it is found.” He concluded that “[t]he record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.”

Once again turning from benefits to burdens, Justice Breyer also found “adequate evidentiary support for the District Court’s conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion” by further reducing the number of abortion facilities that remained open in Texas. Accordingly, he held that the surgical-center requirement “provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an ‘undue burden’ on their constitutional right to do so.”

C. The Need for a Comprehensive Refutation of Justice Breyer’s Balancing Interpretation of Casey’s Undue-Burden Standard

Justice Breyer’s brief and conclusory treatment of Casey’s undue-burden test purports to be doing nothing more than faithfully applying Casey. Yet he does not examine the evidence from Casey bearing on the level of scrutiny appropriate in assessing an abortion regulation’s purpose, or on whether the existence of a “substantial obstacle” depends on balancing the regulation’s benefits and burdens. Instead, he treats it as self-evident that some degree of heightened scrutiny must be appropriate because the right to elective abortion is “a constitutionally protected personal liberty,” yet never specifies what type of heightened scrutiny he has in mind. Similarly, rather than explaining his grounds for claiming that the Casey Court “perform[ed] this balancing” of regulatory benefits and burdens when reviewing two of the five statutory provisions addressed in Casey, he simply cites to those subsections of Casey as if that description were indisputable. Breyer’s casual vagueness raises suspicions, and his deliberate selectivity redoubles them. If the undue-
burden standard contains a requirement that every abortion regulation’s benefits exceed its burdens, one would expect *Casey* to have “perform[ed] this balancing” for every challenged provision of the statute—particularly the provisions the Court upheld. Yet Breyer does not suggest that the Court engaged in balancing when it upheld those other provisions.⁴⁶

To refute the balancing interpretation of *Casey*’s undue-burden test, Part III will closely examine the evidence from *Casey*, and explain why the passages in *Casey* on which Justice Breyer relies cannot bear the meaning he apparently ascribes to them. The language *Casey* uses to describe the undue-burden standard, the reasons why the plurality chose that standard, and the joint opinion’s applications of that standard are all inconsistent with the balancing approach. Neither Breyer nor the judges in the Courts of Appeals who embraced the balancing approach have pointed to anything in *Casey* that, when carefully examined in context, supports their interpretation of undue-burden analysis.⁴⁷

Although Justice Breyer did not make a normative argument in favor of the balancing interpretation, others have already begun to do so.⁴⁸ Part III will argue, to the contrary, that the balancing version of undue-burden scrutiny is unsound both in terms of *Casey*’s general principles, and more broadly as a matter of “reasoned judgment.” Whether or not one agrees with the “reasoned judgment” approach to fundamental-rights questions, it was central to *Casey*,⁴⁹ and a majority of the Court has recently endorsed that approach in *Obergefell v Hodges*.⁵⁰ Whatever explains Justice Kennedy’s decision to provide the decisive fifth vote for Breyer’s opinion (an opinion Kennedy likely assigned to Breyer)—Kennedy’s own principles should impel him to disavow Breyer’s balancing test, and to explain the result in *Whole Women’s Health* on other grounds consistent with *Casey*.

All this may seem quixotic to some. But although five Justices in *Whole Women’s Health* unambiguously embraced the balancing approach, the battle is by no means over. Because it rests solely on a

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⁴⁶ His citations to *Casey* are “see” cites, not “see, e.g.” ones.

⁴⁷ Some scholars have also argued that *Casey* intended balancing to be part of the undue-burden standard. See, e.g., R. Randall Kelso, *The Structure of Planned Parenthood v Casey Abortion Rights Law: Strict Scrutiny for Substantial Obstacles on Abortion Choice and Otherwise Reasonableness Balancing*, 34 QUINNIPIAC L. REV. 75 (2015).

⁴⁸ See, e.g., Kelso, *supra* note 47, at 114 (arguing that it would be “anomalous” not to employ “a reasonableness balancing test” for abortion rights, in light of the Court’s “widespread use” of such a test for “less-than-substantial burdens on fundamental rights.”).


demonstrably erroneous reading of Casey, the case for overruling Whole Women’s Health, or at least confining its balancing test to maternal-health abortion regulations, is particularly strong. Viewed solely through the lens of stare decisis, Whole Women’s Health should be overruled because it departed from stare decisis without justification (or even acknowledgement). Viewed through the lens of “institutional integrity” (another factor that played a decisive part in Casey’s reaffirmation of Roe’s “essential holding”), Whole Women’s Health should be overruled because it neither is nor appears to be the kind of “legally principled decision” on which, as Casey explains, “the Court’s legitimacy depends.”

What’s more, the stakes in this dispute are high. Adding a balancing test to the undue-burden standard is not a “tweak”—it is a paradigm shift that jeopardizes abortion regulations of every stripe, and that decisively upsets the “balance” Casey itself struck. Imperfect as Casey’s undue-burden standard is, it is far better than Justice Breyer’s. In my view, it would be better still were the Court to go down the road almost taken in Casey, and recognize that the state’s interest in protecting fetuses is sufficiently weighty “to justify a ban on abortions prior to viability . . . when it is subject to certain exceptions.” But because that would require Justice Kennedy to disavow Casey, it is an unlikely prospect absent changes in the Court’s composition. Although Kennedy joined the opinion in Whole Women’s Health, its claim to be nothing more than a faithful application of Casey provides reason to hope that he has not abandoned his long-standing commitment to “the principles set forth in the joint opinion.” If so, the arguments presented in this Article should persuade him—and anyone else who believes Casey is settled law—that Breyer’s interpretation of the undue-burden standard is a betrayal of those “principles.”

51 See McDonald, supra note 15 (suggesting that lower courts should interpret Whole Women’s Health as applying only to maternal-health regulations). That suggestion may find few takers. Although Justice Breyer’s opinion does not explicitly claim that his “balancing” approach is equally applicable to regulations that seek to protect fetal life, nothing in his opinion suggests that there are two separate undue-burden standards—and both of Breyer’s examples of alleged undue-burden balancing in Casey involve regulations intended to protect fetal life.

52 Casey, 505 U.S. at 846.
53 Id. at 866.
54 Id. at 871.
III. CASEY’S UNDUE-BURDEN STANDARD: WHAT IT IS AND IS NOT

Justice Breyer claims that Casey “requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer,” in order to “weigh[] the asserted benefits against the burdens.” That claim cannot survive a careful examination of Casey’s explanation, and applications, of its undue-burden standard.

A. The Casey Plurality Adopted The Undue-Burden Standard Rather than Strict Scrutiny or A Balancing Test

A superficial reading of Casey could incline a casual reader to expect that the undue-burden test includes some sort of balancing. The Joint Opinion in Casey describes Roe’s “essential holding”—that women have a right to elective abortion prior to fetal viability—in interest-balancing terms, and characterizes the undue-burden standard as “the appropriate means of reconciling the State’s interest [in fetal life] with the woman’s constitutionally protected liberty.” One might therefore anticipate that the test used to implement this reconciliation would likewise rely on balancing. As this Part will show, however, Casey’s explanation of the undue-burden standard—and its applications of that standard—demonstrate that it neither is nor incorporates a balancing test.

Casey reaffirmed Roe’s holding that states may not prohibit elective abortions prior to viability, and described that holding as based on a judgment that “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion.” Casey’s co-authors broke with precedent, however, when it came to the standard of review that should apply to laws that regulate elective abortions, rather than prohibit them. But before explaining the new standard they were adopting, Justices O’Connor, Kennedy, and Souter acknowledged that, “as an original matter,” one or more of them might have concluded that the state’s interest in fetal life was sufficiently weighty “to justify a ban on abortions prior to viability when it is subject to certain exceptions.” Nevertheless, they refused to say how they would have decided this issue, on the grounds that “the immediate question is not the soundness of Roe’s resolution of the

57 See Gilles, supra note 1, at 701–04.
59 Id. at 846.
60 Id. at 871.
issue, but the precedential force that must be accorded to its holding." 61 That question, of course, had already been addressed earlier in the Joint Opinion, when the Court reaffirmed the right to elective abortion on the strength of its "explication of individual liberty . . . combined with the force of stare decisis." 62

Against this background of profound doubt about the soundness of the right to elective abortion on the merits, Casey's co-authors turned to the undue-burden standard. They asserted that Roe's recognition of the state's important interest in protecting fetal life had been "given too little acknowledgement and implementation by the Court in its subsequent cases." 63 Accordingly, they rejected the strict scrutiny approach, under which any abortion regulation "must be drawn in narrow terms to further a compelling state interest." 64 Similarly, because the state's interest in fetal life is important throughout pregnancy, they overruled Roe's trimester framework, which "undervalues the State's interest in potential life." 65

In theory, it might have been possible for the plurality to replace the Roe regime with a balancing test that weighed the extent to which a regulation actually protected fetal life against the burdens it placed on women's ability to obtain elective abortions. To take this approach, however, would have required Casey's co-authors to specify how much weight to assign to the state's interest in pre-viable fetal life as against the woman's liberty interest in an elective abortion. Although reaffirming Roe necessarily presupposes that the woman's interest must be deemed to outweigh the state's interest in fetal life, the outcome of balancing could in many cases depend on whether the state's interest is viewed as almost as weighty, substantially less weighty, or dramatically less weighty than the woman's. Having already refused to answer this question, it is unsurprising that Justices O'Connor, Kennedy, and Souter chose not to adopt a balancing test that would have required them to do so—or else to have delegated that momentous issue to federal trial judges employing a "balancing test" on a case-by-case basis. 66

61 Id. at 871.
62 Casey, 505 U.S. at 853.
63 Id. at 871.
64 Id. at 871.
65 Id. at 873.
66 The Joint Opinion makes clear that its goal was to settle the matter of abortion rights once and for all, not to reallocate that responsibility to the lower courts. See Casey, 505 U.S. at 867 (arguing that Roe—and by extension, Casey itself—was the rare case in which "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end
The conclusion to which this explanation of the *Casey* plurality’s thinking leads is confirmed by the Joint Opinion’s subsequent effort “to clarify what is meant by an undue burden”:

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. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other 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. * * *

On its face, this explanation is irreconcilable with Justice Breyer’s contention that the undue-burden standard authorizes courts to decide whether a regulation’s burdens are “undue” by comparing them with the extent to which it advances the state’s legitimate interests. *Casey* states, on the contrary, that the term “undue burden” is “a shorthand” for the conclusion that a regulation has either the purpose or the effect of creating a substantial obstacle to women’s access to abortion—and is therefore “invalid.” This two-part “substantial obstacle” test—not the shorthand term “undue burden”—supplies the substantive meaning of the undue-burden standard. The “purpose prong” asks whether an abortion regulation is intended to create a “substantial obstacle” to a woman’s ability to obtain an abortion, and the “effects prong” asks whether the

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67 *Casey*, 505 U.S. at 876.

68 As applied to regulations intended to protect fetal life, *Casey* unquestionably holds that “an undue burden is an unconstitutional burden.” *Id.* at 877. That result follows from the global interest-balancing judgment *Casey* attributes to *Roe*, and reaffirms as part of *Roe’s* essential holding. *See id.* at 846. It is arguable that *Casey* similarly ruled that maternal-health regulations are per se invalid if they violate the undue-burden standard. *See id.* (“[b]efore viability, the state’s interests are not strong enough to support . . . the imposition of a substantial obstacle to the woman’s effective right to elect the procedure”). Even if so, in my judgment *Casey* leaves open for future adjudication the question whether some other state interest could ever justify a regulation that created a substantial obstacle to abortion access. *Casey’s* separate consideration of whether the state’s interest in the father’s rights could justify the undue burden that Pennsylvania’s spousal-notification provision created supports this interpretation. *See infra* notes 79–93.

69 Although *Casey* provides very little guidance about how the purpose prong of the substantial-obstacle test is meant to work, the Joint Opinion makes clear that abortion regulations do not satisfy the purpose prong unless they are “reasonably related” to a legitimate state interest. *Casey*, 505 U.S. at 878. As Part IV will explain, this “reasonably related” test is somewhat less deferential than minimal rational-basis review, but does not entail the use of
regulation actually has the effect of "placing a substantial obstacle in the path of a woman's choice." A regulation whose purpose is to obstruct women's access to abortions fails the purpose prong even if its actual results are not as burdensome as the legislature hoped; and a regulation that clearly does advance a legitimate state interest will nevertheless fail the effect prong if its impact on women's access to abortions constitutes a "substantial obstacle."

The specific purpose behind the undue-burden standard provides an additional reason why its substantial-obstacle test does not include balancing regulatory benefits and burdens. The *Casey* plurality designed its undue-burden standard to give states more leeway to protect fetal life, while still ensuring that abortion regulations not impose (or attempt to impose) so great a burden on access to abortion as to "deprive[] women of the ultimate decision." The state may seek to persuade the woman not to have an abortion by enacting "regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term," as well as state assistance if she does so. What the state may not do is coerce women by enacting regulations that will deter them from obtaining wanted abortions. For that very reason, the focus of the undue-burden inquiry is on a regulation's actual or intended impact on women's ability to choose abortion, not on somehow balancing its aggregate benefits against that impact. Whether a regulation coerces one group of women obviously does not depend on how many other women it persuades to forgo abortions (or on how many other women obtain safer abortions by virtue of its requirements).

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70 *Casey*, 505 U.S. at 877.
71 The post-*Casey* per curiam opinion in *Mazurek v Armstrong*, 520 U.S. 968 (1997), questioned whether "a legislative purpose to interfere with the constitutionally protected right to abortion without the effect of interfering with that right . . . could render . . . [a] law invalid." *Id.* at 972. But even if some significant interference is required to render a law invalid under the purpose prong, *Casey* clearly indicates that a legislative purpose to create a substantial obstacle violates the undue-burden standard even if the burdensome effects do not rise to the level of a substantial obstacle.
72 *Casey*, 505 U.S. at 875.
73 See also *id.* at 886 ("under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest").
74 *Id.* at 875.
Although *Casey* sets forth the basic structure of the undue-burden standard in terms that are inconsistent with balancing, the Joint Opinion provides little explicit guidance about how a reviewing court should determine whether a regulation's effects constitute a substantial obstacle, or whether the regulation's purpose was to do so. For example, *Casey* does not define or quantify what constitutes a "substantial" obstacle. *Casey* does indicate, however, that abortion regulations do not satisfy the purpose prong unless they are "reasonably related" to a legitimate state interest. Here again, though, the Joint Opinion provides no definition or description of this test. It would be extremely surprising if a test that was intended as a proxy for a "purpose" to create a "substantial obstacle" entailed balancing a regulation's burdens and benefits—particularly since the plurality said nothing of the kind. Nevertheless, *Casey*'s vagueness in these respects necessitates a careful examination of the Joint Opinion's applications of the undue-burden standard. As I will now show, the Joint Opinion did not engage in balancing under either prong of its undue-burden analysis. Instead, it applied the purpose prong by asking whether there was a reasonable means-ends fit between each challenged regulation and its putative purpose, and the effects prong by asking whether the regulation's impact on some women's access to abortion rose to the level of an obstacle that coerced them into forgoing abortions. Having applied the two prongs separately, the Joint Opinion concluded its analysis without adding a third step in which it balanced the regulation's impact against its benefits.

**B. Casey’s Applications of the Undue-Burden Standard Used the Substantial-Obstacle and Reasonably-Related Tests to the Exclusion of Balancing**

Contra Justice Breyer, *Casey*'s applications of the undue-burden standard confirm that it asks only whether a regulation creates (or is intended to create) a "substantial obstacle," rather than balancing its benefits against its burdens on women's access to abortion. Breyer

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75 Id. at 878.

76 The dissenting opinions of Chief Justice Rehnquist and Justice Scalia criticized the undue-burden test on many grounds, but neither dissent criticized the plurality for balancing regulatory benefits and burdens. See, e.g., *Casey*, 505 U.S. at 992 (Scalia, J., dissenting) (describing the undue-burden test as "standardless," "lacking any coherent legal basis," and "invit[ing] the district judge to give effect to his personal preferences about abortion"). Had Scalia thought that *Casey*'s undue-burden test required balancing regulatory benefits and burdens, we can be confident that he would have criticized the additional subjectivity and
asserts that the *Casey* Joint Opinion engaged in undue-burden balancing when it struck down Pennsylvania’s spousal-notification provision, and when it upheld Pennsylvania’s parental-notification provision. He does not suggest—though other federal judges have—that *Casey* engaged in balancing when it upheld the informed-consent and recordkeeping provisions of the Pennsylvania statute against undue-burden challenges. In any event, as I will now show, *Casey* did not engage in undue-burden balancing with regard to *any* of the challenged provisions of the Pennsylvania statute.

1. The Spousal Notification Requirement

Justice Breyer points first to the spousal-notification requirement—the only provision that failed undue-burden review in *Casey*. The *Casey* Court’s undue-burden analysis began and ended with the effects prong. The Court struck the spousal-notification requirement down on the ground that it would deter women who feared that their abusive husbands would harm them (or their children) “as surely as if the Commonwealth had outlawed abortion in all cases,” and would thus impose “a substantial obstacle.” Consistent with the Joint Opinion’s earlier explanation of the undue-burden standard, this ruling was based solely on the Court’s assessment of the degree to which fear of the consequences should their husbands be notified would deter the affected women from having abortions. The Court’s conclusion that the provision was “likely to
prevent a significant number of women from obtaining an abortion\textsuperscript{81} is a judgment about the provision’s impact on women’s ability to choose, not a balancing of its impact against its benefits.

To this point, the Joint Opinion’s treatment of the spousal-notification does not even colorably support Justice Breyer. There is, however, a twist. After striking down the spousal-notification provision because its effects were unduly burdensome, the \textit{Casey} Court rejected the objection that the spousal-consent provision was a justifiable measure to protect what the Court conceded to be the husband’s “deep and proper concern and interest . . . in his wife’s pregnancy and in the growth and development of the fetus she is carrying.”\textsuperscript{82} Moreover, it did so on interest-balancing grounds. The \textit{Casey} Court acknowledged that if both parents are raising a child, the father and mother generally have “equal” interests “in the welfare of the child.”\textsuperscript{83} Before birth, however, the Court found it “an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s.”\textsuperscript{84} That disparate impact had previously led the Court in \textit{Danforth} to hold that a state could not require a pregnant woman to obtain her husband’s consent before having an abortion.\textsuperscript{85} \textit{Casey} holds that the same interest-balancing logic leads to the conclusion that the state may not impose a spousal-notification requirement, which “will often be tantamount to the veto found unconstitutional in \textit{Danforth}.”\textsuperscript{86}

Presumably, this interest-balancing discussion is what Justice Breyer has in mind when he claims that \textit{Casey} engaged in balancing when determining that the spousal-notification provision “constitutes an undue burden.”\textsuperscript{87} If so, Breyer is mistaken. \textit{Casey}’s interest-balancing analysis of the spousal-notification provision immediately follows the Court’s conclusion that the provision “is an undue burden, and therefore invalid,”\textsuperscript{88} and does not purport to be an undue-burden analysis.\textsuperscript{89} The words “undue burden” do not occur in the portion of the Joint Opinion that reprises and applies \textit{Danforth}’s interest analysis.

\begin{itemize}
\item \textsuperscript{81} Id. at 893.
\item \textsuperscript{82} \textit{Casey}, 505 U.S. at 895 (quoting \textit{Danforth}, 428 US at 69).
\item \textsuperscript{83} Id. at 896.
\item \textsuperscript{84} Id. at 896
\item \textsuperscript{86} \textit{Casey}, 505 U.S. at 897.
\item \textsuperscript{87} Whole Women’s Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).
\item \textsuperscript{88} \textit{Casey}, 505 U.S. at 895.
\item \textsuperscript{89} Accord, McDonald, supra note 15 (draft at 19).
\end{itemize}
Why, then, did the *Casey* Court find it necessary to engage in this interest-balancing analysis at all? To rebut the argument that under *Danforth* the spousal-notification provision is justifiable, *even though it creates an undue burden*, because it directly advances an important state interest that lies outside the ambit of the undue-burden standard. Just as the woman’s interest in an elective abortion outweighs the state’s interest in prohibiting abortion to protect the pre-viable fetus—so too does her interest outweigh her husband’s interest in the welfare of his nascent child. As such, this interest-balancing analysis is a variation on a theme the plurality had previously sounded, when it declared that no “law designed to further the state’s interest in fetal life which imposes an undue burden on the woman’s decision before fetal viability could be constitutional.”

Here, the Court reached a parallel conclusion: no law furthering the husband’s interest in the life of his unborn child could be constitutional if it imposed an undue burden. This is not balancing burdens against benefits in the course of applying the undue-burden standard. It is interest-balancing to confirm that the state’s interest in benefitting husbands cannot *justify* an undue burden.

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90 Professor Kelso argues that, under *Casey*, a regulation that imposes an undue burden should be subjected to (and could conceivably survive) “*Roe’s strict scrutiny,*” which would require that it be narrowly tailored to achieve a compelling state interest, and also be the least restrictive alternative. Kelso, *supra* note 47, at 91. As Kelso sees it, *Casey’s* interest-balancing rejection of the state’s attempt to justify its unduly burdensome spousal-notification provision is an application of this strict scrutiny. See *id.* at 91–94. I agree that the joint opinion’s interest balancing constitutes a different and more demanding form of heightened scrutiny than is involved in the undue-burden test itself. But because the joint opinion does not use any of the formulations normally associated with strict scrutiny (e.g., compelling state interest), it may be more accurate to view it as a version of intermediate scrutiny.

91 *Casey*, 505 U.S. at 877.

92 *Id.* at 898 (“The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual’s family. These considerations confirm our conclusion that § 3209 is invalid.”).

93 *See id.* at 896 (“The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses”). *Cf.* Planned Parenthood of Southeastern Pennsylvania v. *Casey*, 947 F.2d 682, 715 (3d Cir. 1991) (applying Justice O’Connor’s *Akron* I version of the undue-burden standard, under which an undue burden triggers strict scrutiny, and holding that the spousal-notification provision “is unconstitutional because it imposes an undue burden on a woman’s abortion decision and does not serve a compelling state interest.”).
2. The Parental Consent Requirement

Justice Breyer also cites *Casey's* treatment of the parental-consent provision, which barred a woman under eighteen from obtaining an abortion unless she and one of her parents both gave informed consent, or a court determined that she was mature enough to consent independently (or that an abortion would be in her best interests).94 *Casey* upheld the parental-consent and judicial-authorization requirements on the strength of the Court's precedents holding that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."95 As Justice Thomas pointed out in his Whole Women's Health dissent, this holding is an application of *stare decisis*, not of the undue-burden test.96 As such, it sheds no light on the proper application of the undue-burden standard.97

The petitioners also argued, however, that the parental consent requirement was "invalid because it requires informed parental consent."98 This contention had not been addressed in the Court's parental-consent precedents. The *Casey* Court rejected it for the same reasons it upheld "the informed consent requirement in general,"99 while adding the observation that "some of the provisions regarding informed consent have particular force with respect to minors."100 *Casey* upheld the general informed-consent requirement because it advanced legitimate state interests (thus satisfying the purpose prong) and did not create a substantial obstacle, not because it passed a balancing test.101 *Casey's* mention of an added benefit

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94 *Casey*, 505 U.S. at 899.
95 Id.
96 See Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("Casey summarily upheld parental notification provisions because even pre-Casey decisions had done so.").
97 The Court's earlier decisions concerning parental-consent statutes sometimes employed "undue burden" language. See, e.g., Bellotti v. Baird, 443 U.S. 622, 647 (1979). The undue-burden test as described in *Casey*, however, was expressly intended as a new beginning. As *Casey* explained: "The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent. Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden." *Casey*, 505 U.S. at 876 (citations omitted). Consequently, even if any of those decisions arguably balanced burdens and benefits in determining whether a parental-consent provision was unconstitutional, *Casey's* reliance on them as still-valid precedents would not constitute a gloss on the future application of *Casey's* undue-burden standard.
98 Id.
99 See id. at 899.
100 Id. at 899.
101 See, e.g., *Casey*, 505 U.S. at 883 (requirement that the woman be informed about fetal
of the informed-consent provision as applied to parents simply expresses a judgment that those provisions have a particularly good means-ends fit in the context of minor women facing unwanted pregnancies. That hardly constitutes balancing.


Casey's treatment of the informed-consent provisions has several parts. In none of them did the Joint Opinion engage in balancing. Applying the purpose prong to the requirement that the woman be informed of information about fetal development and the availability of post-natal assistance, the plurality determined that it was "a reasonable measure to ensure informed consent, one which might cause the woman to choose childbirth over abortion." This application of Casey's reasonably-related test turns on the plurality's common-sense judgment about the efficacy of the challenged requirements in advancing the state's interests, not on balancing those benefits against the associated burdens. As for the effects prong, the plurality summarily concluded that "this requirement cannot be considered a substantial obstacle." It reached that conclusion without balancing the benefits to better-informed women (and their fetuses) against the psychological burdens that receiving this information might place on other women—for example, those who had already made a fully-considered decision to have an abortion.

The same pattern is evident in Casey's evaluation of Pennsylvania's requirement that a physician, rather than a qualified assistant, provide the woman with the information necessary for informed consent. Applying the purpose prong, the plurality concluded that this requirement was "a reasonable means" to the end of ensuring informed consent. Although placing this demand on the physician's time would have the effect of increasing abortion costs, the Court found no record evidence that it

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102 Id. at 899–900 (noting that the 24-hour waiting period could enable a pregnant young woman's parent or parents "to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family.").

103 Id. at 883.

104 Id. at 883.

105 Cf. Casey, 505 U.S. at 936 (Blackmun, J., dissenting) (arguing that the required information is "irrelevant and inappropriate" for many women).

106 Id. at 884–85. In so holding, Casey overruled the Court's contrary holding in Akron I.

107 Id. at 885.

108 See id. at 935 (Blackmun, J., dissenting in part) (describing the District Court's finding
“would amount in practical terms to a substantial obstacle to a woman seeking an abortion.” It upheld the provision without balancing the requirement’s increased costs against the extent to which the woman’s choice would be better informed because she received the information from a physician.

The plurality’s evaluation of the 24-hour waiting period is cut from the same cloth. Its application of the purpose prong again involved only a common-sense judgment about whether the regulation could reasonably be expected to advance the state’s legitimate interest, without any comparison with the expected burdens. Turning to the effects prong, the plurality suggested that the question was a relatively close one, given the District Court’s findings that the 24-hour waiting period had “the effect of ‘increasing the cost and risk of delay of abortions’” and that “the practical effect will often be a delay of much more than a day.” To answer that question, the plurality focused solely on whether the burden on women for whom the waiting period would be most onerous would amount to “a substantial obstacle.” It did not balance those burdens against the extent to which the statute would save fetal lives (or improve women’s well-being) by persuading women to change their minds during the 24-hour waiting period. Instead, the plurality simply concluded that the record did not establish that the waiting period amounted to a substantial obstacle, even for those women as to whom it was “particularly burdensome.”

4. The Recordkeeping and Reporting Provisions

Casey’s treatment of Pennsylvania’s recordkeeping and reporting provisions is of particular interest because those regulations were the only ones the state defended solely on maternal-health grounds. The Casey
to this effect).

109 Casey, 505 U.S. at 884 (emphasis supplied).
110 See id. at 885 (“The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision.”).
111 Id. at 885–86.
112 Id. at 886–87.
113 Casey, 505 U.S. at 886–87. Casey’s refusal to balance is all the more conspicuous when contrasted with Justice O’Connor’s treatment of the 24-hour waiting period at issue in Akron I. She argued that, even if the associated costs constituted an undue burden, “the waiting period is surely a small cost to impose to ensure that the woman’s decision is well-considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own.” Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 473–74 (1983) (Akron I) (O’Connor, J., dissenting).
plurality relied on the Court’s holding in Danforth that such regulations are constitutional if they are “reasonably directed to the preservation of maternal health and . . . properly respect a patient’s confidentiality and privacy.”114 Applying that standard, the plurality held that Pennsylvania’s requirements “relate to health,” because collecting patient information “is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult.”115 As that holding strongly suggests, the plurality equated Danforth’s “reasonably directed” standard with Casey’s “reasonably related” test. Moreover, it indicates that the plurality viewed the reasonably-related test as a means of identifying regulations whose only purpose is to obstruct women’s access to abortions. That role calls for an inquiry into the regulation’s expected benefits, not an attempt to compare them with its burdens.

As for the effects prong: without balancing, the plurality found that the recordkeeping requirements would at most “increase the costs of some abortions by a slight amount,” and thus did not “impose a substantial obstacle to a woman’s choice.”116 It also acknowledged that “at some point increased costs could become a substantial obstacle.”117 As that observation confirms, the existence of a substantial obstacle depends on the magnitude of a regulation’s burdens, not on balancing them against its benefits.118

It is instructive to compare the plurality’s application of the undue-burden standard to these maternal-health regulations with the standard Justice Blackmun defended in his Casey dissent, under which “[r]egulations can be upheld if they have no significant impact on the woman’s exercise of her right and are justified by important state health

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114 Casey, 505 U.S. at 900 (quoting Danforth, 428 U.S. at 80).
115 Id. at 900–01.
116 Id. at 901.
117 Id.
118 But see Planned Parenthood v. Abbott, 769 F.3d 330, 332 (5th Cir. 2014) (Dennis, J., dissenting from denial of rehearing en banc). Judge Dennis describes Casey’s recordkeeping analysis as “balancing the State’s legitimate interest in collecting patient information—which the Court deemed a ‘vital element of medical research’—against what was only a ‘slight’ increase in cost of abortions, and therefore upholding the challenged recordkeeping and reporting requirements.” Id. at 338. The structure of the Joint Opinion’s analysis belies this characterization. Casey’s observation about the value of patient information was the basis for a judgment that the recordkeeping requirements were reasonably related to protecting maternal health. That judgment satisfied the purpose prong. Casey then made a separate judgment that the slight increase in costs did not constitute a substantial obstacle, while acknowledging that a sufficiently large increase might change the analysis.
objectives."119 Blackmun’s test has two components: a “significant impact” test, and a heightened-scrutiny balancing test. Casey’s test also has two components: a much less demanding “substantial obstacle” test, and a much less demanding reasonably-related test. Even if Justice Breyer’s opinion had been carefully limited to maternal-health regulations, this comparison shows that he has effectively replaced Casey’s undue-burden standard with Justice Blackmun’s much stricter scrutiny.

C. Proponents of Undue-Burden Balancing Have Failed to Identify Any Plausible Support in Casey

We have seen that Casey’s description of the undue-burden standard and its applications of that standard employ the two-pronged substantial obstacle test without engaging in balancing. In applying the effects prong, Casey requires a reviewing court to focus on whether a regulation’s burdens are sufficiently onerous to constitute a substantial obstacle for some identifiable group of women. In applying the purpose prong, Casey requires a reviewing court to focus on whether a regulation’s actual or expected benefits suffice to support a conclusion that it is reasonably related to protecting fetal life, maternal health, or some other legitimate state interest. Casey does not instruct courts to balance or weigh a regulation’s burdens against its benefits at either stage of the analysis.120

I have already addressed Justice Breyer’s only explicit argument to the contrary, and shown that the portions of the Casey Joint Opinion on

119 Casey, 505 U.S. at 929 n.5 (Blackmun, J., dissenting in part).
120 Professor Kelso argues that “the best reading of Casey” is that “a substantial obstacle... triggers Roe’s strict scrutiny approach, while a less-than-undue burden on abortion choice triggers a reasonableness balancing approach higher than minimum rationality review.” Kelso, supra note 47, at 79. He argues that Casey’s reasonably-related test was intended to adopt the “reasonableness balancing” approach, and claims that “careful attention” to Casey’s applications of the undue-burden standard confirms this interpretation. Id. In fact, however, the only balancing Kelso identifies comes when the Casey Court, after finding that the spousal-notification provision creates an undue burden, addresses the argument that it is justified by the state’s interests in the father’s rights and the life of the fetus. See id. at 93. Under Kelso’s own theory, this interest-balancing analysis was part of the Court’s application of strict scrutiny, and not an application of the reasonably-related test. As to the other provisions Kelso addresses (the informed consent regulations and the 24-hour waiting period), he and I agree that the Joint Opinion engaged in reasonableness review. See id. at 94–97. But he presents not a single example of “reasonableness balancing.” Instead, he simply assumes that every reference to reasonableness in Casey is a reference to balancing. Were that true, the Joint Opinion would have engaged in balancing in evaluating these less-than-substantial-obstacles. As I have shown in text, the Joint Opinion had multiple opportunities to do so—and took none of them.
which he relies do not support his claim that *Casey* balanced regulatory burdens and benefits as part of undue-burden review. Breyer’s opinion does, however, signal agreement with at least one of the additional claims about *Casey*’s meaning that the circuit court judges who first proposed the balancing interpretation of the undue-burden standard have put forward. Because they may play a role in future cases, I next examine and refute these purported interpretations of *Casey*, some of which have also garnered scholarly support.121 For readers who find the evidence I have already presented conclusive, and who wish to skip the unavoidably somewhat detailed analysis this section contains, the results can be summarized as follows: Justice Breyer’s opinion would have been longer, but equally unconvincing, had he explicitly adopted any of these contentions about *Casey*’s undue-burden standard. If the Court is to be faithful to *Casey*—the proposition on which Breyer’s opinion purports to rest—it should overrule *Whole Women’s Health*’s holding that the undue-burden standard requires courts to determine whether a regulation’s benefits “justify” its burdens.122

1. The Argument that the Term “Undue Burden” Refers to Balancing

Justice Breyer’s opinion implicitly endorses the textual argument that the phrase “undue burden” implicitly refers to balancing. Breyer asserts that the Fifth Circuit’s approach (which rejects balancing) “simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is ‘undue.’”123 Read in light of the court of appeals opinions creating a circuit split over balancing, that assertion indicates that the term “undue burden” should be read as an instruction that a regulation’s burdens must be weighed against its benefits.

If this reading of *Casey* were obvious—or even plausible—one would expect some courts of appeals to have adopted it soon after the Court decided *Casey* in 1992. In fact, for more than two decades, the courts of appeal used the two-part substantial-obstacle test without even considering the possibility of benefits-burdens balancing.124 The first

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121 See, e.g., Kelso, *supra* note 47, at 87–88, 97–103 (making the argument by analogy to the Court’s ballot-access cases, which I discuss *infra* notes 149–158).


123 *Id.* at 2310.

124 See, e.g., Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 734 F.3d 406, 413 (5th Cir. 2013) (applying purpose and effect prongs of substantial-obstacle test
appellate decision to hold that an “undue burden” is any burden that fails a balancing test was Judge Posner’s 2013 opinion for the Seventh Circuit upholding a preliminary injunction against Wisconsin’s admitting-privileges requirement. After first ruling that the admitting-privileges requirement would probably fail the purpose prong because it failed to confer any health benefits on women, Posner turned to the law’s effects. He asserted that “[t]he feebler the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous,” and held that the regulation would likely fail this test as well. He offered no evidence from Casey in support of this novel interpretation, and did not discuss the contrary circuit-court authority.

The Ninth Circuit quickly followed suit. In Planned Parenthood Arizona, Inc. v. Humble, Judge Fletcher’s opinion cited Judge Posner’s opinion (along with a dictionary), and held that “[i]f a burden significantly exceeds what is necessary to advance the state’s interests, it is ‘undue.’”

to challenged provisions of H.B. 2); Karlin v. Foust, 188 F.3d 446, 481 (7th Cir. 1999) (“a court’s proper focus must be on the practical impact of the challenged regulation and whether it will have the likely effect of preventing a significant number of women for whom the regulation is relevant from obtaining abortions.”); Planned Parenthood Southwest Ohio Region v. DeWine, 696 F.3d 490, 514 (6th Cir. 2012) (affirming summary judgment for the state because “the record simply does not give rise to a reasonable inference that the Act imposes a substantial obstacle for Ohio women deciding whether to abort a pregnancy”); Greenville Women’s Clinic v. Bryant, 222 F.3d 157, 170 (4th Cir. 2000) (“having determined that [the challenged regulation] serves a valid purpose, we must still consider whether the cost imposed by the lawfully directed regulation presents “a substantial obstacle to a woman seeking an abortion”); A Woman’s Choice-E. Side Women’s Clinic v. Newman, 305 F.3d 684, 691 (7th Cir. 2002) (“only a law that ‘has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus’... is an “undue” burden”) (emphasis in original); Tucson Women’s Clinic v. Eden, 379 F.3d 531, 541–42 (9th Cir. 2004) (applying the substantial obstacle test to health regulations); Jane L. v. Bangerter, 102 F.3d 1112, 1116–17 (10th Cir. 1996) (finding that a Utah statute was both intended to, and did, create a substantial obstacle, and therefore violated the undue-burden standard); Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127, 144 (3d Cir. 2000) (striking down a state ban on partial-birth abortions because it “erects a substantial obstacle,” without discussing statute’s benefits); Fargo Women’s Health Organization v. Schafer, 18 F.3d 526, 533 (8th Cir. 1994) (“there is no [challenged] state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion”).

125 Planned Parenthood of Wisconsin v. Van Hollen, 738 F.3d 786 (7th Cir. 2013).
126 Id. at 798.
127 Id.
128 Planned Parenthood Arizona, Inc. v. Humble, 753 F.3d 905, 913 (9th Cir. 2014) (citing Webster’s Third New Int’l Dictionary 2492 (1993) (defining “undue” as “excessive” or “unwarranted”)). Judge Fletcher claimed that the Ninth Circuit had previously adopted a balancing approach in Tucson Women’s Clinic v. Eden, 379 F.3d 351 (9th Cir. 2004). On the contrary, Eden stated that the Supreme Court’s decision in Mazurek v. Armstrong, 520 U.S. 968, 973 (1997), “compels us to hold that where a health regulation of abortion is not facially pretextual or irrational with respect to the interest it purports to assert, it is subject to the
In his second undue-burden opinion for the Seventh Circuit—this time upholding a permanent injunction against Wisconsin’s admitting-privileges requirement—Posner returned the favor, quoting Fletcher’s version of a balancing test, and propounding a revised version of his own.129 In the meantime, Fifth Circuit Judge Dennis, dissenting from the denial of en banc review in the first round of litigation challenging H.B. 2, also endorsed the balancing interpretation.130

None of these opinions offers more than an assertion in favor of its understanding of the term “undue burden.” Judges Posner, Fletcher, and Dennis—and, by implication, Justice Breyer—are correct that the term “undue burden” could refer to a regulatory burden that outweighs its corresponding benefits. But the dictionary meanings of “undue” also include “not just; not lawful; not legal,” “improper; not appropriate or suitable,” and “erring by excess; excessive; unreasonable.”131 A burden can be “undue,” therefore, if it is greater—or more coercive—than is lawful. As we have already seen, that is the meaning of “undue” in the undue-burden standard.132 In Casey’s words, “the right protected by Roe is a right to decide to terminate a pregnancy free of undue interference by the State.”133 Under Casey, state interference becomes “undue” if it creates an obstacle that in “[a] real sense deprive[s] women of the ultimate decision,”134 or is intended to do so. The judges who interpret the term “undue burden” to refer to a balancing approach have entirely failed to explain how their reading can co-exist with Casey’s account of the undue-burden standard.

129 Planned Parenthood of Wisconsin v. Schimel, 806 F.3d 908, 919 (7th Cir. 2015) (holding that the “restrictions” imposed by a maternal-health regulation constitute an undue burden if they are “disproportionate, in their effect on the right to an abortion, to the medical benefits that the restrictions are believed to confer.”). Remarkably, Judge Posner’s opinion in Schimel makes no mention of Casey’s “substantial obstacle” test.
132 See Stenberg v. Carhart, 530 U.S. 914, 955 (Scalia, J., dissenting) (describing the undue burden standard as turning on “whether [a] limitation upon abortion is ‘undue’—i.e., goes too far.”).
134 Id. at 875.
2. The Argument from *Casey*'s Reference to “Unnecessary Health Regulations”

In his opinion for the Ninth Circuit in *Humble*, Judge Fletcher claimed that *Casey* shows that undue-burden analysis requires a court to “weigh the burdens against the state’s justification, asking whether and to what extent the challenged regulation actually advances the state’s interests.”

He asserted that the following sentence from *Casey* supports this version of a balancing test:

“Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”

According to Judge Fletcher, this sentence indicates that “unnecessary” maternal-health regulations violate the undue-burden standard. On his account, “[w]hether a regulation is necessary depends on whether and how well it serves the state’s interest.” A regulation whose burdens are greater than necessary, Fletcher concludes, is an “undue” burden, and therefore unconstitutional.

Although Justice Breyer appears to agree that this sentence from *Casey* (which he quotes twice) is an important gloss on the undue-burden standard, his opinion does *not* suggest that a balancing test should be used to decide whether a regulation is “unnecessary.” Instead, Breyer seems to think that a maternal-health regulation is “not necessary” if the risks it aims to reduce are small to begin with and if it will do little to ameliorate them. Moreover, unlike Judge Fletcher, Justice Breyer treats a finding that a health regulation is “unnecessary” as probative of—rather than sufficient to establish—a violation of the undue-burden standard.

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135 Planned Parenthood Arizona, Inc., v. Humble, 753 F.3d 905, 913 (9th Cir. 2014).
136 *Casey*, 505 U.S. at 878.
137 See *Humble*, 753 F.3d at 913.
138 Id. at 913.
139 Id. at 913 (“If a burden significantly exceeds what is necessary to advance the state’s interests, it is ‘undue.’”).
141 See id. at 2315–16.
142 When he applies the undue-burden standard to the surgical-center requirement, Justice Breyer upholds the district court’s finding that it “does not benefit patients and is not necessary,” *id.* at 2315, and goes on to hold that the record “supports the ultimate legal conclusion that the surgical-center requirement is not necessary.” *Id.* at 2316 (emphasis added). That holding implies that determining whether or not an abortion regulation is “necessary” is a component of the undue-burden standard, at least as applied to maternal-health regulations. But rather than ruling that the surgical-center requirement is unconstitutional for this reason, Breyer goes on to
Nevertheless, in an abundance of caution, and because Breyer’s opinion is more than a little opaque on these issues, I will now show that Casey’s reference to “unnecessary” health regulations cannot mean what Fletcher claims.

Before parsing the language of the sentence on which Judge Fletcher relies, it is essential to place it in context. The sentence is part of the Joint Opinion’s *summary* of its previous explanation of the undue-burden standard. That explanation—which focuses primarily on regulations seeking to protect fetal life—contains only one sentence directly addressing the permissible scope of maternal-health regulations:

“Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.”

When the two sentences dealing with maternal health are read together, it is evident that the summary restates what the earlier explanation says. Maternal-health regulations “are valid if they do not constitute an undue burden”—that is, if they do not “have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.” Thus, the same two-pronged substantial-obstacle test applies to both maternal-health and fetal-protective regulations; and as we have seen, that test does not require balancing a regulation’s benefits against its burdens.

This analysis explains everything in the “summary” sentence on which Judge Fletcher relies—except for the word “unnecessary,” with which the sentence begins. Casey’s addition of the word “unnecessary” thus poses an interpretive conundrum—and there is some room for reasonable disagreement over which interpretation is most likely. Fletcher’s balancing interpretation, however, cannot possibly be correct. It asks us to believe that the Casey plurality, in presenting its summary of the undue-burden standard, added the word “unnecessary” in order to make a major doctrinal change—and then failed to explain what that change entailed. But the Supreme Court, like Congress, “does not . . . hide elephants in mouseholes.” Moreover, this new balancing test would apply *only* to maternal-health regulations. The result would be two

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143 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 978 (“We give this summary . . . ”).

144 Id. at 877–78 (internal citation omitted).

different undue-burden standards—one with balancing, and one without—despite the fact that *Casey* describes and applies a single, uniform standard.\(^{146}\)

Worse yet, Judge Fletcher’s interpretation is fatally inconsistent with the grammar of the sentence on which he relies. If the word “unnecessary” yields a balancing test that applies to all maternal-health regulations, it must do so either by adding that test as a third requirement in addition to the two prongs of the substantial-obstacle test, or by replacing the substantial-obstacle test.\(^{147}\) But if the sentence intended to add an additional requirement that health regulations must be necessary, it would have read: “Unnecessary health regulations, and 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.” And if the sentence were intended to substitute an “unnecessary” test for the substantial-obstacle test, it would have read: “Unnecessary health regulations impose an undue burden on the right.” Thus, Judge Fletcher’s interpretation is impossible to square with *Casey*’s language.

That said, there is a plausible interpretation of *Casey*’s mysterious use of the word “unnecessary” that adds a substantive requirement to the undue-burden standard as applied to maternal-health regulations. It is, however, very different from the undue-burden balancing test Judge Fletcher has in mind. Read literally, the “summary” sentence means “Health regulations impose an undue burden on the right only if they are unnecessary and have the purpose or effect of presenting a substantial obstacle.” This reading implies that necessary health regulations are constitutional even if they impose substantial obstacles to women’s access to abortions. As such, it would exempt “necessary” health regulations from undue-burden scrutiny, thereby expanding the states’ regulatory authority—an effect opposite to the one Fletcher’s interpretation would produce.\(^{148}\)

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\(^{146}\) To avoid this conclusion, one would have to believe that *Casey*’s use of the word “unnecessary” in its summary of the undue-burden standard’s bearing on maternal-health regulations was also intended to transform the meaning of the undue-burden standard as applied to regulations aimed at protecting fetal life.

\(^{147}\) The alternative would be to argue that the word “unnecessary” in *Casey*’s “summary” sentence replaces the substantial-obstacle test with a balancing test. Such a reading is grammatically impossible (it effectively deletes the sentence’s restrictive “that” clause specifying which health regulations impose an undue burden), and substantively untenable in light of *Casey*’s explicit adoption (and repeated application) of the substantial-obstacle test, which Justice Breyer retains (and applies). See, e.g., *Whole Women’s Health*, 136 S. Ct. at 2318.

\(^{148}\) The next question would be what test should be used to determine whether a health regulation is “necessary.” Professor McDonald speculates that the *Whole Women’s Health*
This “literal” solution to *Casey’s* riddle is linguistically sound—and therefore possible, unlike Fletcher’s reading. It is also substantively sound in terms of *Casey’s* global interest-balancing framework. In a nutshell, the idea would be that regulations that are “necessary” to avoid serious danger to women’s lives and health should be constitutional even if they create a substantial obstacle to abortion access. Although it is more than a little counterintuitive that the Joint Opinion would introduce this threshold requirement in such a cryptic manner, the undue-burden standard itself would remain the same whether a regulation protected fetal life or maternal health. The only difference would be that a narrow category of strictly necessary maternal-health regulations would be exempt from undue-burden scrutiny. That may be what *Casey* meant—and even if not the Court would be justified in endorsing this interpretation on normative grounds.

In any event, if the Court rejects this “literal” interpretation the plausible alternative is not Judge Fletcher’s linguistically impossible reading. Rather, it is the following paraphrase, which is consistent with the sentence’s language, ascribes some meaning to the word “unnecessary,” and does not change the substantive meaning of the majority may have adopted balancing out of concern that an exemption for necessary health regulations, combined with deferential review of whether such regulations are necessary, would enable states to create substantial obstacles to abortion access on pretextual maternal-health grounds. McDonald, *supra* note 15 (draft at 25). But if that were the Court’s concern, it could simply have ruled that determining whether a health regulation is “necessary”—like determining whether an obstacle is “substantial”—is a fact-intensive question that does not require the reviewing court to defer to the legislature’s assessment.

This proposition is in considerable tension with the plurality’s statement that “[i]n our considered judgment, an undue burden is an unconstitutional burden.” *Casey*, 505 U.S. at 877. Nevertheless, because the state has a compelling interest in protecting women from serious dangers to their health, a global interest-balancing analysis might warrant making an exception to that general rule.

It is possible, though it seems unlikely, that Justice Breyer’s opinion adopts this interpretation, or alternatively that it was written so as to leave the question open. This possibility exists because Breyer’s opinion indicates that a finding that a regulation is unnecessary is legally relevant to undue-burden review—but does not indicate that such a finding is sufficient to constitute an undue burden. *See Whole Women’s Health*, 136 S. Ct. at 2316. Breyer’s opinion is therefore arguably consistent with the proposition that a maternal-health regulation is constitutional unless it is both (1) unnecessary and (2) violative of the undue-burden standard. On the other hand, Breyer never suggests that he is adopting this interpretation; he addresses whether the surgical-center requirement is unnecessary—but not whether the admitting-privileges requirement is unnecessary, as one would expect him to have done if all necessary health regulations are constitutional; and the general tenor of his discussion of the “unnecessary” character of the admitting-privileges requirement suggests that he viewed this finding as a factor to be given some unspecified weight in undue-burden balancing.
undue-burden standard as applied to maternal-health regulations: “Unnecessary health regulations—that is, 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.” On this reading, the addition of the word “unnecessary” signals the plurality’s expectation that the substantial-obstacle test will give the states sufficient leeway to protect maternal health—and thus, as a predictive matter, that any regulation that violates the substantial-obstacle test will also be “unnecessary.” The constitutionality of a maternal-health regulation, however, continues to turn on whether it imposes (or is intended to impose) a substantial obstacle, not on whether it is unnecessary—and certainly not on whether it passes a balancing test.

In sum, the Court faces a choice, as yet not explicitly resolved, between two plausible interpretations of Casey’s cryptic reference to “unnecessary” health regulations. Neither of them, however, supports the claim that the undue-burden standard includes a balancing test.

3. The Argument from Casey’s Analogy to Voting Rights Cases

Fifth Circuit Judge Dennis argues that Casey implicitly endorsed a balancing test when, in the course of choosing the undue-burden standard, it drew an analogy between the right to elective abortion and voting rights.152 Dennis writes:

The ballot access cases apply a flexible balancing test that provides the State with leeway to regulate for a valid purpose, where such regulation does not unnecessarily infringe upon individuals’ voting rights. The Court explained that the “abortion right is similar” in that courts must weigh the individual woman’s right against the State’s legitimate interests. Id. Therefore, we may look to the ballot access cases for guidance on how to apply the undue burden standard.153

This reasoning rests on two mischaracterizations of Casey. First, although the ballot-access cases to which Casey refers—Anderson v Celebrezze154 and Norman v Reed155—call for “weighing” of the relevant state and individual interests,156 that is not the relevant respect in which

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152 Planned Parenthood of Greater Texas v. Abbott, 769 F.3d 330, 336 (5th Cir. 2014) (Dennis, J., joined by Graves and Costa, JJ., dissenting from denial of rehearing en banc).
153 Id. at 336 (Dennis, J., dissenting from denial of rehearing).
156 See Anderson, 460 U.S. at 789; Norman, 502 U.S. at 288–89.
Casey asserts that "the abortion right is similar" to the right to vote. The similarity Casey identifies is that neither the right of voters "to choose the candidates for whom they wish to vote" nor the woman's right to choose an abortion is absolute:157 in both cases, "the States are granted substantial flexibility in establishing the framework within which" those choices are made.158 That similarity does not imply that the constitutional standard for ballot-access restrictions is the same as (or closely analogous to) the undue-burden standard that Casey subsequently adopts.

Second, contrary to Judge Dennis, Casey does not "explain[]" that the undue-burden standard requires courts to "weigh the individual woman's right against the State's legitimate interests." The contrast between the ballot-access cases and Casey in this respect is dramatic. Both Anderson and Norman explicitly describe the balancing test courts should employ in ballot-access cases.159 Casey neither borrows from nor refers to the passages in Anderson and Norman that set forth a balancing test.160 That is further confirmation that the plurality's use of those precedents had nothing to do with balancing.161

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157 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 873 (1992) ("not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right.").
158 Id.
159 See Anderson, 460 U.S. at 789 ("[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional"); Norman, 502 U.S. at 288–89 ("To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.").
160 Casey cites to Anderson's general explanation of why "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights," Anderson, 460 U.S. at 788, not to its description of interest-balancing, see id. at 789, and provides only a general citation to Norman. See Casey, 505 U.S. at 874 (citing Anderson, 460 U.S. at 788, and citing Norman without a pin cite).
161 Professor Kelso argues that the Court has employed what he calls "reasonableness balancing" not only in the ballot-access cases, but in many other areas of constitutional law, to determine the constitutionality of "less-than-substantial burdens" on fundamental rights. See Kelso, supra note 47, at 97–111. Kelso's only evidence that Casey intended to adopt this approach with regard to less-than-substantial burdens on the right to elective abortion, however, is the analogy drawn in Casey between the abortion right and ballot-access rights. As I have shown in text, the Joint Opinion carefully limited that analogy to avoid the implication on which Kelso's entire argument depends.
IV. The Normative Case Against Justice Breyer's Incorporation of a Balancing Test into the Undue-Burden Standard

The evidence I have presented shows beyond reasonable doubt that Casey's undue-burden standard is not (and does not include) a balancing test. Now that the Court has endorsed the balancing interpretation, however, persuading it to overrule or limit Whole Women's Health may require more than proof that the only argument Justice Breyer made—the argument from Casey's authority—was meritless. Given stare decisis, it may also be necessary to convince some Justices that the balancing approach is wrongheaded and inappropriate. In this Part, I make the case for that proposition, and respond to the central normative arguments made by the federal judges who have embraced it.

Whole Women's Health adds a new hurdle to the undue-burden test: even if an abortion regulation does not impose a "substantial obstacle," it is unduly burdensome if its "asserted benefits" fall short when "weighed . . . against the burdens." This additional "balancing" test will cause several serious problems. First, balancing gives federal trial judges new leeway to strike down abortion regulations they think unwise, even if they do not create substantial obstacles to abortion access. The "substantial obstacle" criterion will presumably continue to invalidate highly burdensome regulations, but it will no longer validate less burdensome ones. Experience also suggests that the federal bench, drawn as it is from the predominantly pro-choice elite bar, often views abortion regulations with skepticism or even hostility. As a result, the balance Casey struck is likely gradually to erode under an accumulation of unfavorable lower-court decisions.

Second, even if balancing produces sensible results in easy cases, it will be largely arbitrary in closer ones. If one accepts the majority's reading of the trial record, H.B. 2's admitting-privileges and surgical-center requirements produce vanishingly little in maternal-health benefits, while forcing many if not most Texas abortion clinics to close, thereby sharply curtailing access to abortion throughout the state. The posited disproportion between benefits and burdens makes resort to balancing seem appealing and innocuous. But, at least for the surgical-center

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163 See id. at 2326 (Thomas, J., dissenting) ("the majority's undue-burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion.").
164 That may be why Judge Posner formulated his balancing test in terms of a
requirement, an alternative reading of the record is plausible: its higher safety standards will confer significant health benefits on some women, and many abortion providers will quickly figure out ways to minimize their compliance costs—for example, by combining their practices or by arranging to use the facilities of existing surgical centers that currently do not perform abortions. Given significant maternal-health benefits and significant but not prohibitive—and likely transient—reduced-access burdens, how is a judge to decide which is weightier?

Third, and most importantly, the benefits and burdens of a regulation will often be incommensurable in practice—particularly when its objective is to persuade women to forego abortions (a goal Casey explicitly treats as legitimate and important).\textsuperscript{165} It is one thing for a court to conclude that a regulation’s maternal-health benefits to women who have abortions are too small to justify the burdens imposed on women seeking abortions. That is much like determining whether the regulation makes women who have abortions better off on average—a difficult and uncertain inquiry, but one that seems answerable in principle. Regulations that burden some women while benefiting fetuses whose mothers are persuaded not to have abortions, however, present an intractable problem, because the Court has steadfastly avoided taking a position on how valuable the life of a pre-viable fetus is, as compared with the life of a newborn child, a pregnant woman, or anyone else lucky enough to have escaped the Egypt of “the unborn,” and made it to the promised land of Fourteenth Amendment personhood.\textsuperscript{166}

Consider an informed-consent provision such as the one upheld in \textit{Casey}, which required women to wait 24 hours after being informed about the nature of abortion and the characteristics and gestational age of the fetus. How is a court to decide whether this regulation will persuade enough women to forgo abortions so that its benefits to fetuses whose lives are spared (together with its benefits to women who avoid abortions they would come to regret)\textsuperscript{167} outweigh the direct and indirect burdens of the

\textsuperscript{165} See \textit{Casey}, 505 U.S. at 876–78 (arguing that the “substantial state interest in potential life throughout pregnancy” implies that states may adopt regulations designed to “persuade [women] to choose childbirth over abortion,” provided they satisfy the substantial-obstacle test).

\textsuperscript{166} See \textit{Roe v. Wade}, 410 U.S. 113, 158 (1973) (“the word person, as used in the Fourteenth Amendment, does not include the unborn.”).

\textsuperscript{167} \textit{Casey} recognizes that the informed-consent provision advances both the state’s interest in maternal psychological health, \textit{Casey}, 505 U.S. at 882, and its interest in protecting fetal life. \textit{Id.} at 883.
mandatory delay on women seeking abortions? Even if one could construct a reliable estimate of the frequencies with which the regulation would induce women to change their minds or (alternatively) unwillingly to abandon the abortion they sought, how is a court to weigh "fetal lives saved" against "women deterred from obtaining an abortion"?\textsuperscript{168} As I discuss below, \textit{Casey} implicitly supports the proposition that, as an original matter, the life of a pre-viable fetus outweighs the woman's liberty interest in an elective abortion. Yet \textit{Casey} holds that, thanks to "the force of stare decisis,"\textsuperscript{69} the right to elective abortion enshrines a contrary judgment in constitutional law. Analytically, that judgment need not mean more than that the state's interest in protecting fetal life is \textit{marginally} less weighty than the woman's interest in an elective abortion. Nevertheless, there is reason to fear that many lower courts will assume that pre-viable fetal life is drastically less weighty than the woman's interests in obtaining an abortion, and will therefore conclude that such a law is invalid even if it saves many fetuses, so long as it deters some women.\textsuperscript{170}

As against these arguments, pro-choice advocates will argue that the right to elective abortion must be protected against regulatory burdens that are excessive as compared to their benefits. Judge Dennis, for example, argues that "absent balancing, the Government could permissibly enact legislation that only marginally advanced its interests while significantly hindering women's access to abortion."\textsuperscript{7} That objection overlooks the role of the purpose prong, which, as Part V will explain, enables courts, using \textit{Casey}'s "reasonably related" test, to invalidate abortion regulations that demonstrably do not advance their legitimate purposes—and to do so without balancing. \textit{Casey}'s substantial-obstacle test has its problems, including the Joint Opinion's failure to give more guidance about how large an obstacle must be to constitute an undue burden for any particular

\textsuperscript{168} See \textit{Casey}, 505 U.S. at 871 (plurality opinion) (refusing to say whether, as an original matter the state's interest in protecting fetal life "is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions"); \textit{Roe}, 410 U.S. at 160 ("We need not resolve the difficult question of when life begins.").

\textsuperscript{69} \textit{Casey}, 505 U.S. at 853.

\textsuperscript{170} One might think that stare decisis would stand in the way of this particular outcome, at least as to any informed-consent provision whose requirements conformed to the one that survived the undue-burden test in \textit{Casey}. But stare decisis may be avoidable, at least as to the 24-hour waiting period, because the Joint Opinion ruled only that "on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden." \textit{Id.} at 887. To skirt that ruling, challengers may seek to combine the new balancing test with a new record documenting the hardships that some women encounter on account of a waiting period.

\textsuperscript{7} \textit{Planned Parenthood of Greater Texas Surgical Health Services v. Abbott}, 769 F.3d 330, 357 (2014).
group of women. Unlike the balancing approach, however, it at least provides a modest safe harbor for abortion regulations that advance the state’s important interests in fetal life and maternal health.

More fundamentally, reasonable-sounding contentions that abortion regulations should be required to pass a balancing test ignore the cracked foundation on which the right to elective abortion rests after *Casey*. As Part II described, the *Casey* plurality was unwilling to affirm that *Roe* was rightly decided as an original matter. The fact that the *Casey* Court was compelled to rely on “principles of institutional integrity and the rule of stare decisis” in order to reaffirm *Roe*’s “essential holding” strongly suggests that a majority of the Justices in *Casey* thought that the state’s interest in protecting fetal life outweighed the woman’s interests in an elective abortion. *That* judgment—that *Roe* was unsound as an original matter—provides yet another reason to reject a balancing test constructed on the erroneous premise that the woman’s liberty interest trumps the state’s interest in pre-viable fetal life.

Beyond that, as I have argued elsewhere, the Justices who did not accept the soundness of the interest-balancing judgment underlying the right to elective abortion were right to do so. Within the Court’s broader “reasoned judgment” framework for fundamental-rights analysis, there are compelling normative arguments for the proposition that, even if pre-

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172 See infra note 216.

173 The same is true of arguments such as Professor Kelso’s, which appeal to the idea that the right to elective abortion should be accorded full status as a fundamental right, and accordingly be protected by a stricter version of heightened scrutiny. See Kelso, supra note 47, at 90. *Casey* does not refer to the right to elective abortion as a fundamental right, see *Casey*, 505 U.S. at 954 (Rehnquist, C.J., dissenting), and that omission is of a piece with the Joint Opinion’s inability to affirm that *Roe* was correctly decided as an original matter.

174 Id. at 845-46.

175 See Gilles supra note 1, at 717-20.

176 In her contribution to this Symposium, Erika Bachiochi shows that the *Casey* majority believed that *Roe*’s recognition of the right to elective abortion had greatly contributed to women’s social and political equality, and argues that this belief (couched in terms of reliance interests) was critical to the Court’s decision to give great weight to stare decisis. As she also argues, however, *Casey*’s judgment about abortion’s contribution to women’s equality is badly flawed—and thus fails to shore up what the *Casey* plurality recognized to be *Roe*’s unsound foundation.

177 Id. at 720-36.

178 In addition to at least one of *Casey*’s co-authors, these Justices include the four dissenters in *Casey*. Together, they constitute a majority of the Justices in *Casey*.

179 The “reasoned judgment” approach, which the Court employed in *Casey*, is (at least for now) its preferred methodology for evaluating fundamental-rights claims involving “marriage and intimacy.” Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015). For discussion of how the “reasoned judgment” approach should be structured in the context of abortion rights, see Gilles supra note 1, at 737-38.
viable fetuses are not Fourteenth Amendment persons, they are biologically human beings who are becoming normatively human. As such, for interest-balancing purposes their lives should be valued even more highly than the weighty liberty interests of their mothers in having elective abortions. Consequently, even if the right to elective abortion survives as a matter of stare decisis, it should be confined to the parameters set forth in Casey, not expanded by grafting a balancing test onto the undue-burden standard.

V. THE OVERALL LEVEL OF SCRUTINY INHERENT IN THE UNDUE-BURDEN STANDARD

I turn now to the second doctrinal issue addressed in Whole Women’s Health: under Casey, what level of scrutiny should a reviewing court employ when engaging in undue-burden review? Casey explicitly rejected the Court’s post-Roe cases holding “that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest.” At the other extreme, it is also clear that Casey’s undue-burden standard was intended to be less deferential overall than the “rationally related to a legitimate state interest” test the dissenters in Casey advocated. We can deduce that the undue-burden standard involves some degree of heightened scrutiny. As Justice Thomas put it, “Casey’s undue-burden test added yet another right-specific test on the spectrum between rational-basis and strict-scrutiny review.”

What is considerably harder to determine is just what that heightened scrutiny entails. Casey’s presentation of the undue-burden standard explains the basic structure and purpose of the substantial-obstacle test, but contains no parallel discussion of the overall level-of-scrutiny issue. Under these circumstances, it makes sense to examine the history of the undue-burden standard, which Justice O’Connor first proposed as a constitutional test in her Akron I dissent—and which the Third Circuit, in Casey, concluded was the controlling legal standard at that time.
Although that comparison does not yield a precise level-of-scrutiny answer, it will enable us to frame the question more precisely, and to get a better sense for the choices the *Casey* plurality made in shaping its much-revised version of an undue-burden standard. I will then show that, as the history would lead one to predict, *Casey*'s reasonably-related test calls for reasonableness review that is somewhat less deferential than minimal rational-basis review, but does not include heightened-scrutiny techniques such as least-restrictive-alternative analysis or narrow tailoring. Justice Breyer was therefore correct to reject the rational-basis scrutiny the Fifth Circuit utilized, but wrong to employ these heightened-scrutiny techniques in conjunction with his balancing test. Finally, I will argue that, although the Court could plausibly have concluded that H.B. 2's provisions were not reasonably related to maternal health because their health benefits were negligible, it would have been contrary to *Casey* to do so by comparing those benefits with the regulations' burdens—even if that comparison did not purport to include balancing.

A. *The Rise and Demise of Roe's Strict-Scrutiny Version of the Reasonably-Related Test*

Under *Roe*'s trimester framework, regulations seeking to protect pre-viable fetal life were per se unconstitutional for want of a compelling state interest. Maternal-health regulations, on the other hand, were presumptively invalid as applied to first-trimester abortions, but

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the Third Circuit unanimously concluded that Justice O'Connor's *Akron I* undue-burden standard displaced *Roe* as the controlling law in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). In *Webster*, three Justices joined Chief Justice Rehnquist's opinion, which rejected a fundamental right to elective abortion and employed a "permissibly furthers" standard that seems equivalent to rational-basis review, *see id. at 555* (Blackmun, J., dissenting) (deriding it as a "dressed-up version of rational-basis review"); Justice Scalia wrote separately, calling for *Roe* to be overruled; and Justice O'Connor, applying her *Akron I* undue-burden standard, concurred in the judgment upholding the challenged regulations. Four Justices dissented, and would have struck them down using strict scrutiny. As the Third Circuit also described, the Court divided along essentially the same lines in its final pre-*Casey* decision, *Hodgson v. Minnesota*, 497 U.S. 117 (1990), with Justice O'Connor supplying the deciding vote to strike down one provision and uphold another. By virtue of the rule in *Marks v. United States*, 430 U.S. 188, 193 (1977) (ruling that the Justice who concurs on the narrowest grounds determines the holding of the Court.), Justice O'Connor's undue-burden approach thus represented the holdings in *Webster* and *Hodgson. Casey*, 947 F.2d at 697.

187 *See Roe v. Wade*, 410 U.S. 113, 163 (1973) (holding that the state's interest in potential life is not compelling prior to viability).

188 *Roe*'s treatment of first-trimester maternal-health regulations was nonsensical. Although first-trimester abortions are generally safer than normal childbirth, it is self-evident that first-trimester abortions conducted without basic precautions would pose serious dangers
thereafter permissible “to the extent that the regulation reasonably relates to the protection and preservation of maternal health.” Neither Roe nor its companion case, Doe v Bolton, explained what level of scrutiny inhere[d] in this “reasonably relate[d]” test. In Doe, however, the Court applied that standard to strike down several provisions of Georgia’s abortion statute. Although Justice Blackmun used language suggestive of rational-basis review, he employed heightened-scrutiny techniques to strike down the challenged provisions: they variously fell for lack of a close fit, for failure to show that a less restrictive alternative would not suffice, because their burdens on women (and their doctors) outweighed their benefits, and because the state did not impose those requirements on comparable medical procedures. Blackmun’s subsequent decision for the Court in Planned Parenthood of Central Missouri v. Danforth continued to use the “reasonably relates” language while engaging in a demanding version of heightened scrutiny.

189 Roe, 410 U.S. at 163. Pre-viability regulations seeking to protect fetal life, by contrast, were per se unconstitutional. 190 See Doe v. Bolton, 410 U.S. 179, 193 (1973) (striking down a requirement that abortions be performed in an accredited hospital because the accreditation standards did not specifically concern abortions). See id. at 195 (striking down a hospitalization requirement because, in light of the plaintiffs’ evidence that appropriately licensed clinics were “entirely adequate to perform abortions,” the state failed “to prove that only the full resources of a licensed hospital . . . satisfy these health interests.”). 191 See id. at 197 (striking down requirement that a hospital abortion committee approve abortions because it “substantially limited” the woman’s right, while other features of the statute protected the interests of doctors and hospitals), id. at 199 (striking down requirement that two other doctors concur in abortion recommendation because physician’s license implies “acceptable clinical judgment,” censure and loss of license adequate remedies, and attending physician can be relied on to know when another doctor should be consulted). 192 See id. at 193 (JCAH accreditation not required for “nonabortion surgery”), id. at 197 (no other surgical procedure “subject to committee approval” under state law), id. at 199 (“no other voluntary medical or surgical procedure . . . requires confirmation by two other physicians . . . .”). 193 Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 76 (1976). In some respects, Danforth seems less strict than Doe. For example, Danforth upheld a basic requirement that the woman sign an informed-consent form prior to her abortion, although Missouri did not require informed consent for most other types of surgery. See id. at 66–67. On the other hand, the Danforth Court struck down Missouri’s ban on saline amniocentesis
In the Court’s next full-scale encounter with maternal-health regulations—a trio of cases decided in 1983—the baton was handed to Justice Powell, but the standard of review was no less demanding. Writing for the Court in City of Akron v Akron Center for Reproductive Health (“Akron I”), Powell dutifully repeated Roe’s pseudo-deferential “reasonably relates” language. But he also made balancing an explicit feature of its application, employed least-restrictive-alternative analysis, and made clear both that the state bore the burden of persuasion, and that it was a heavy one.

Justice O’Connor, dissenting in Akron I, famously proposed an undue-burden test that differs from Casey’s in multiple important respects. For present purposes, however, the important question is how her approach in Akron I differed from the Akron I majority’s.

O’Connor argued that the Court should apply “the exacting ‘compelling state interest’ standard” only if a regulation imposed an undue burden, which she defined narrowly as a “severe” or “absolute” obstacle to abortion access. Regulations that did not impose an undue burden, she
maintained, should be subject only to highly deferential rational-basis review.202

Even as to regulations that did impose undue burdens, Justice O’Connor argued that the Court’s scrutiny had become too strict. Specifically, she asserted that the Court had never actually applied a requirement that regulations be “narrowly drawn” as part of that test, and that the Court acknowledged, even in Akron I, “that ‘[a] State necessarily must have latitude in adopting regulations of general applicability in this sensitive area.’”203 The problem, O’Connor maintained, was that “the Court fails to apply the “reasonably related” standard.”204 For example, she protested that the Court struck down Akron’s hospitalization requirement even though it “reasonably relates’ to its compelling interest in protection and preservation of maternal health under any normal understanding of what ‘reasonably relates’ signifies.”205 Under her approach, by contrast, even if a regulation was unduly burdensome, it would still be constitutional if “justified]” by “the State’s compelling interests in maternal mental and physical health and protection of fetal life.”206 In conducting this heightened-scrutiny review of a regulation that imposed an undue burden, O’Connor’s dissent looked to whether the regulation “reasonably relates to the State’s interest”—and to whether the resulting benefits outweighed the burdens on women.207 Thus, even when conducting strict-scrutiny review, O’Connor rejected the Court’s exacting application of the reasonably-related test; and only in the context of strict-scrutiny review did she employ a balancing approach.

Justice O’Connor’s argument that the Court should adopt—or, as she simultaneously argued, return to—the two-tier undue-burden approach she described in her Akron I dissent failed to sway the pro-Roe majority. Three years after Akron I, in Thornburgh, Justice Blackmun used what

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202 Akron I, 462 U.S. at 453 (O’Connor, J., dissenting) (review should be limited to whether “the regulation rationally relates to a legitimate state purpose.”).
203 Id. at 467 n.11 (O’Connor, J., dissenting).
204 Id.
205 Id. (O’Connor, J., dissenting).
207 See id. (Assuming arguendo that a 24-hour waiting period imposed an undue burden, but arguing that it was justified because “reasonably relate[d] to the State’s interest in ensuring that a woman does not make this serious decision in undue haste,” and because “[t]he waiting period is surely a small cost to impose to ensure that the woman’s decision is well-considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own”); Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 504 (O’Connor, J., dissenting) (assuming arguendo that a hospitalization requirement imposed an undue burden, and arguing that it was nevertheless constitutional because reasonably related to the compelling state interest in maternal health).
was to be his last majority opinion in an abortion case to insist that the
requirement that regulations be “reasonably directed to the preservation
of maternal health” was an exacting one. Blackmun employed narrow
tailoring,\textsuperscript{208} held that several regulations served no legitimate purpose
because they were overbroad,\textsuperscript{209} and emphasized that “close scrutiny” of
all abortion regulations was necessary, lest the states, “under the guise of
protecting maternal health or potential life, . . . intimidate women into
continuing pregnancies.”\textsuperscript{210} In dissent, O’Connor adhered to the undue-
burden test she outlined in \textit{Akron I}, and protested that Blackmun had now
adopted a “prophylactic test” under which “the mere possibility that some
women will be less likely to choose to have an abortion by virtue of the
presence of a particular state regulation suffices to invalidate it.”\textsuperscript{211}

With the Court’s 1989 decision in \textit{Webster}, it became apparent that
Justice Blackmun had at last lost his majority for \textit{Roe’s} strict scrutiny, and
that Justice O’Connor, who continued to adhere to the position she staked
out in \textit{Akron I}, was now the deciding vote in abortion cases. In light of
that development, the Third Circuit held in \textit{Casey} that “Justice
O’Connor’s undue burden standard is the law of the land,” and applied
that standard to the challenged Pennsylvania regulations.\textsuperscript{212} The Third
Circuit struck down the one provision it determined created an undue
burden (the spousal notification requirement),\textsuperscript{213} while upholding every
other challenged regulation under rational-basis review.\textsuperscript{214} After

\begin{itemize}
\item \textsuperscript{208}See \textit{Thornburgh} v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 762 (1986) (“the mandated description of fetal characteristics at 2-week intervals, no matter how objective, is plainly overinclusive” because “not medical information that is always relevant to the woman’s decision.”).
\item \textsuperscript{209}See \textit{id.} at 763 (requiring information about medical assistance and child support would “for many patients . . . be irrelevant and inappropriate,” and therefore “advances no legitimate state interest.”).
\item \textsuperscript{210}See \textit{id.} at 759.
\item \textsuperscript{211}Id. at 829 (O’Connor, J., dissenting).
\item \textsuperscript{212}Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 698 (1991).
\item \textsuperscript{213}After determining that the spousal-notification provision imposed an undue burden, the Third Circuit majority applied strict scrutiny, asking whether the regulation was narrowly tailored to serve a compelling state interest. \textit{Id.} at 713. Then-Judge Alito joined the majority opinion except with regard to the spousal-notification, as to which he would have ruled that it did not impose an undue burden. \textit{Id.} at 720 (Alito, J., dissenting in part).
\item \textsuperscript{214}The Third Circuit generally disposed of the plaintiffs’ rational-basis claims with a succinct explanation of why the legislature could rationally have believed the regulation would advance a legitimate state interest. \textit{See}, e.g., \textit{id.} at 704 (“While the record contains evidence that counselors at the clinics are often capable of informing women about the abortion procedure, that is not the issue; the issue is whether the state may rationally conclude that physicians as a class are better equipped to provide such medical information and answer questions about the abortion procedure and the alternative. We believe the Commonwealth could rationally so
determining that the spousal-notification provision imposed an undue burden, the Third Circuit ruled that it was not narrowly tailored to serve a compelling state interest, and therefore failed strict scrutiny.

The Casey Joint Opinion reached the same result as the Third Circuit as to each of the challenged regulations, while announcing that it was “refin[ing] the undue burden analysis in accordance with the principles articulated above.” Yet the plurality failed to explain what modifications it was making, let alone why those changes flowed from the joint opinion’s “principles.” Nevertheless, the history I have just summarized sheds some light on those changes, and their implications.

Justice O’Connor and her co-authors combined two tests with very different histories—the “substantial obstacle” test and the “reasonably related” test—into Casey’s undue-burden standard. In so doing, they transformed the undue-burden standard from a test determining which level of scrutiny applies to abortion regulations into the standard used to determine their constitutionality. From the standpoint of state legislators, the “substantial obstacle” test is a less forgiving version of Justice O’Connor’s “severe obstacle” test in Akron I. But it is much more forgiving than Roe’s strict scrutiny, under which any legislation designed to protect fetal life was per se unconstitutional, and even maternal-health regulations were invalid if they imposed any significant burdens on access to abortions.

As to the chameleon-like “reasonably related” test, it is striking that the Joint Opinion in Casey chose to use that formulation, rather than

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216 In dissent, Justice Scalia pointedly noted some of the differences. See id. at 988–90 (Scalia, J., dissenting).
217 Casey does not explain just how large or insurmountable the “obstacle” created by a regulation’s effects must be to count as “substantial.” Resort to Casey’s applications of that test provides only limited guidance. The spousal-notification provision the Court struck down plainly had, in the majority’s view, a severe impact on the subset of women who would fear violence from their husbands—indeed, an impact with as much deterrent force as a de jure prohibition. Conversely, the Court upheld the statutory requirement that the woman wait 24 hours after receiving informed-consent materials, despite a trial-court finding that “for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be ‘particularly burdensome.’” Id. at 886. Although these rulings suggest that the threshold for a “substantial obstacle” is high, Casey does not say how high.
218 Accord, McDonald, supra note 15 (draft at 7) (prior to Casey, maternal-health abortion regulations were “subjected . . . to a form of heightened scrutiny” and “almost always invalidated.”).
219 In his Whole Women’s Health dissent, Justice Thomas asserted that “the label the Court
the "rationally related to a legitimate state purpose" language Justice O'Connor had previously proposed for abortion regulations that did not create severe obstacles. But it is equally striking that Justice O'Connor had vigorously contended that the "reasonably related" test should be applied far more deferentially than the Court did in cases such as Akron I and Thornburg, and had made this argument for greater deference even in the context of unduly burdensome regulations. One would predict, therefore, that Justice O'Connor and her co-authors intended Casey's version of "reasonably related" review—which would be outcome-determinative only if a regulation did not create a substantial obstacle—to be somewhat more demanding than minimal rational-basis review, but much more deferential than the heightened scrutiny on display in the Court's pre-Webster decisions. As we will now see, Casey bears out that prediction.

B. A Modest Degree of Heightened Scrutiny is Implicit in the Substantial-Obstacle Test Itself

To determine what level of scrutiny Casey entails, our focus must be on how a reviewing court is to decide whether an abortion regulation (1) creates a substantial obstacle, or (2) lacks a reasonable relationship to a legitimate state interest. Because the Casey Joint Opinion contains no explicit guidance on either of these crucial issues, we are forced to rely primarily on inferences from the structure of the undue-burden standard, and from Casey's applications of the substantial-obstacle and reasonably-related criteria. In doing so, I will first contrast Casey's substantial-obstacle test with minimal rational-basis review, under which a law is constitutional if the legislature could rationally have believed it would

affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it 'rational basis,' intermediate, strict, or something else—is increasingly a meaningless formalism," because the Court "applies whatever standard it likes to any given case." Whole Women's Health v. Hellersteadt, 136 S. Ct. 2292, 2326–27 (Thomas, J., dissenting). Although Thomas may be correct that the Court does this even more often nowadays, the saga of Roe's (and Casey's) "reasonably related" standards shows that the problem is not a new one.

220 This is not to say that Casey's co-authors persuaded any of their colleagues to adopt that understanding. As part of his strict scrutiny review, Justice Blackmun argued that Pennsylvania's recordkeeping and reporting requirements were not "reasonably related" to maternal health. Casey, 505 U.S. at 939 (Blackmun, J., dissenting). Chief Justice Rehnquist argued that the spousal-notification provision "rationally furthers . . . legitimate state interests" because it was "reasonably related to advancing [them]." Id. at 974 (Rehnquist, CJ, dissenting). Not to be outdone, Justice Stevens described the purpose prong deferentially ("lack[ing] a legitimate, rational justification"), id. at 920, and then proceeded to apply the undue-burden standard by using heightened-scrutiny techniques. See infra note 227.
advance a legitimate state interest. Rational-basis review does not involve an inquiry into the legislature’s actual purpose, or the law’s actual (or predicted) effects. Unless the challenger can prove that it is beyond rational belief that a law could advance a legitimate state interest to any degree, the reviewing court must uphold it.\footnote{See United States v. Carolene Products, 304 U.S. 144, 152 (1938) (ordinary regulatory legislation “is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”).}

The effects prong of \textit{Casey}'s substantial obstacle test is inherently more demanding than rational-basis review, because legislation that imposes a substantial obstacle is unconstitutional even if it clearly advances a legitimate (or even an important) state purpose.\footnote{Accord, McDonald, supra note 15 (draft at 32).} Moreover, as \textit{Casey} plainly implies, the undue-burden standard requires reviewing courts to consider evidence about the actual (or predicted) purpose and effects of a challenged regulation. Regardless of what the legislature could rationally have believed, a regulation fails undue-burden review if the plaintiff can \textit{prove} that it has, in practice, created a substantial obstacle that deters (or will deter) many women from obtaining abortions. Although the burden of persuasion remains on the plaintiff,\footnote{See \textit{Casey}, 505 U.S. at 901 (declining to find that the increased costs attributable to recordkeeping amount to a substantial obstacle because “there is no such showing on the record before us.”).} \textit{Casey}'s invalidation of the spousal-notification provision shows that this burden is by no means an insurmountable one. Indeed, the Joint Opinion indicated that its no-undue-burden holdings did not preclude future challenges to provisions similar to Pennsylvania’s, and such challenges might succeed if plaintiffs made stronger factual showings.\footnote{See, e.g., \textit{id} at 877 (upholding the 24-hour waiting period “on the record before us”); \textit{id} at 926 (Blackmun, J., dissenting) (“the joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it”); \textit{id} at 990 (Scalia, J., dissenting) (“the joint opinion relies extensively on the factual findings of the District Court, and repeatedly qualifies its conclusions by noting that they are contingent upon the record developed in these cases.”).}

\textbf{C. \textit{Casey}'s Reasonably-Related Test is a Deferential Version of Reasonableness Review}

The next question is whether, and if so to what degree, \textit{Casey}'s undue-burden standard also differs from rational-basis review with regard to the required means-ends fit between an abortion regulation’s purpose and its effects. \textit{Casey} declares that, provided it does not have the effect of
imposing a substantial obstacle on a woman's "right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal." This requirement—which also applies to maternal-health regulations—implements the purpose prong: an abortion regulation that bears no reasonable relationship to its supposed purpose is presumed to have been intended to deter abortions. Thus, even in the absence of proof that a regulation was intended to create a substantial obstacle, it fails undue-burden scrutiny if the evidence establishes that it is not "reasonably related" to a legitimate purpose.

But what level of means-ends scrutiny does this "reasonably related" test entail? On this question, we have seen that the test's history is only suggestive—and Casey is maddeningly silent. By examining Casey's applications of the purpose prong and the reasonably-related test, however, we can gain some insight into what level of means-ends scrutiny Casey calls for. To begin with, rather than framing the issue in rational-basis terms, Casey's co-authors asked whether it was reasonable to infer from the design of the regulations that they would tend to advance the state's legitimate interests. Nevertheless, Casey's unqualified declaration that a law whose purpose is to create a substantial obstacle violates the undue-burden standard would seem to imply that such a challenge should be permitted, and there is some circuit-court authority to that effect. See generally Lucy E. Hill, Seeking Liberty's Refuge: Analyzing Legislative Purpose Under Casey's Undue Burden Standard, 81 FORDHAM L. REV. 365, 369 (2012).

To the extent that the Joint Opinion focused on the purpose of particular regulations, much of its attention was directed to the question "what counts as a legitimate state interest"? See Casey, 505 US at 877, 882 (holding that a regulatory attempt to persuade the woman to forego an abortion, either for her own sake or that of the fetus, was permissible, contrary to the prior decisions in Akron I and Thornburgh). Thus, Casey gives an interpreter considerably less material to work with concerning the purpose prong and the reasonably-related test than concerning the effects prong and the substantial-obstacle test.

See, e.g., Casey, 505 U.S. at 885 ("The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of
judgment, drawing common-sense inferences in light of the record before them, while also giving significant deference to legislative judgments in some instances.  

Consider, for example, *Casey*’s application of the purpose prong to the requirement that the woman be told that state-provided materials pertaining to fetal development and post-natal assistance were available for her review. The plurality held that this was “a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.” Similarly, when it turned to the purpose of the 24-hour waiting period, the *Casey* plurality found this to be “a reasonable measure to implement the state’s interest in protecting the life of the unborn.” In neither instance did the Court inquire whether there was evidence that these requirements would actually persuade some women to forgo abortions. In the absence of findings that the regulations would not have that effect, the plurality confined its review to whether the legislature’s judgments on that predictive issue were reasonable—that is, plausible. It took the same approach with regard to predictive judgments about maternal health.

Moreover, the Joint Opinion employs none of the heightened-scrutiny techniques that the pro-*Roe* majority had wielded throughout its pre-*Casey* hegemony. As Part III showed, *Casey* does not balance regulatory benefits and burdens as part of undue-burden analysis. *Casey*

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231 See, e.g., *id.* at 885 (upholding the requirement that a physician personally inform the woman as “a reasonable means to ensure that the woman’s consent is informed,” in light of precedents holding that “the Constitution gives the states broad latitude to decide that particular functions may be performed only by licensed professionals.”).

232 *Id.* at 883.

233 *Id.* at 885.

234 *See Casey*, 505 U.S. at 882–83 (finding the purpose prong satisfied with regard to the requirement that the woman be apprised of certain information about fetal development, because it would reduce “the risk . . . [of] devastating psychological consequences” to women who subsequently discovered that their decisions to have abortions were not fully informed).

235 The Joint Opinion’s applications of the undue-burden standard were sufficiently deferential to prompt Justice Stevens, in his partial dissent, to claim that “a correct application” of that standard would result in the invalidation of some of the informed-consent requirements and the 24-hour waiting period. *Id.* at 920 (Stevens, J., dissenting). Unlike the plurality, however, Stevens’ applications of the undue-burden standard placed the burden of proving that a regulation advances a legitimate purpose on the state, *id.* at 921 (no evidence that the 24-hour waiting period served a legitimate purpose), equated overbreadth with irrationality, *see id.* at 921 (required information serves no useful purpose because not helpful to certain categories of women), and implied that any “unnecessary” burden is an undue burden. *Id.* at 922 (informational requirements are “an unnecessary—and therefore undue—burden.”). In other words, Justice Stevens applied a more exacting legal standard than the *Casey* plurality.
assumes that the plaintiff, not the state, bears the burden of persuasion on whether a regulation has the purpose or effect of creating a substantial obstacle, and on whether it is reasonably related to a legitimate state interest.236 Casey does not engage in a highly skeptical inquiry into whether a regulation is intended to make abortions more difficult to obtain.237 Nor does Casey imply that abortion regulations must be scrutinized to see whether they are narrowly tailored238 whether the state is imposing more restrictive regulations on abortions than other comparable medical procedures,239 or whether less restrictive alternatives are available.240

In short, Casey used the “reasonably related” test as a deferential form of reasonableness review that operates in tandem with the substantial-obstacle test. One might also describe it as falling somewhere between rational-basis review and intermediate scrutiny—or in other words, as a form of rational-basis with “teeth” or “bite.”241

236 See Casey, 505 U.S. at 901 (declining to find that the increased costs attributable to recordkeeping amount to a substantial obstacle because “there is no such showing on the record before us.”).

237 See id. at 900–01 (finding the purpose prong satisfied with regard to recordkeeping and reporting requirements because “it cannot be said that the requirements serve no purpose other than to make abortions more difficult.”).

238 See id. (concluding that the recordkeeping and reporting provisions were reasonably related to health because “[t]he collection of information with respect to actual patients is a vital element of medical research,” without examining whether this was true of each type of information being collected). Cf. id. at 939 (Blackmun, J., dissenting in part) (claiming that the state failed to prove that some of the required information “adds to the pool of scientific knowledge concerning abortion.”).

239 In contrast, as Justice Blackmun saw it, “[t]hat the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose.” Casey, 505 U.S. at 936 (quoting Thornburgh, 476 U.S. at 764).

240 See id. at 885 (“upholding a statutory requirement that a physician personally inform the woman of information relevant to her informed consent as a “reasonable means” to ensure informed consent “even if an objective assessment might suggest that those same tasks could be performed by others.”). Cf. Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 448 (1983) (Akron I) (striking down such a requirement “in light of the[ ] alternatives,” such as requiring the physician to verify that the woman was adequately informed and employing trained counselors to provide this information).

241 Although the Supreme Court has never formally said so, there is general agreement that in certain contexts the Court has employed a stricter version of rational-basis review popularly known as “rational basis with teeth.” Robert C. Farrell, Equal Protection Rational Basis Cases in The Supreme Court Since Romer v. Evans, 14 GEORGETOWN J.L. & PUB. POLICY 441, 442 (2016). Individual Justices have occasionally acknowledged this fact. See Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (O’Connor, J., concurring in the judgment) (asserting that the Court has “applied a more searching form of rational basis review” under the Equal Protection Clause if “a law exhibits . . . a desire to harm a politically unpopular group,” particularly if “the challenged legislation inhibits personal relationships.”). The Court has used a more demanding
requires a “reasonable” means-ends fit, rather than a merely rational relationship, but does not call for narrow tailoring, least-restrictive-alternative analysis—or balancing regulatory benefits and burdens.

D. Gonzales v. Carhart Supports The Deferential Reasonableness-Review Interpretation of Casey’s Reasonably-Related Test

The Court’s most important application of Casey prior to Whole Women’s Health—Justice Kennedy’s opinion in Gonzales v. Carhart—is consistent with the rational-basis-with-bite interpretation of Casey’s reasonably-related test. At first blush, it might seem that Kennedy read Casey as calling only for minimal rational-basis review under the purpose prong. Indeed, the Fifth Circuit equated Casey’s “reasonably related” test with rational-basis review on the strength of Kennedy’s statement that

[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.242

One can readily understand why the Fifth Circuit thought Kennedy’s reference to “a rational basis to act” was an endorsement of rational-basis review.243 Given Kennedy’s penchant for employing the language of rationality in opinions that are markedly less deferential than minimal rational-basis review,244 however, this was a risky inference.

version of rational-basis review in both equal protection and substantive due process cases. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (equal protection); Romer v. Evans, 517 U.S. 620 (1996) (equal protection); Washington v. Glucksberg, 521 U.S. 702 (1997) (substantive due process); Lawrence v Texas, 539 U.S. 558 (2003) (substantive due process). What puts the “bite” in rational basis with teeth is the Court’s greater willingness to examine whether the regulation in fact achieves its stated purpose, and to question whether the stated purpose is genuine. But “although rationality-with-bite provides more searching review of regulations, it usually does not involve balancing the burdens and benefits of regulations or examining alternative legislation.” Gillian E. Metzger, Note, Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence, 94 COLUM. L. REV. 2025, 2061 (1994). Nor does it in Casey.


243 That appears to be the conclusion Justice Ginsburg drew. See Casey, 550 U.S. at 187 (Ginsburg, J., dissenting) (“Instead of the heightened scrutiny we have previously applied, the Court determines that a “rational ground” is enough to uphold the Act.”).

244 See Lawrence, 539 U.S. at 578 (a statute banning homosexual sodomy “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”); Romer, 517 U.S. at 635 (Colorado Amendment banning local laws conferring protected status on homosexual orientation or conduct does not “bear a rational relationship to
It was also an inference at odds with Justice Kennedy’s application of the undue-burden standard in Gonzales. Although Gonzales gives substantial deference to legislative judgments in some respects, it does not exhibit the almost-unlimited deference that characterizes true rational-basis review. 245 Kennedy’s application of the purpose prong to the federal ban on partial-birth abortions began by identifying, and defending the legitimacy of, the objectives he identified: promoting respect for human life, protecting fetal life, and preserving the physician’s proper role. Kennedy then turned to whether the federal ban furthers these goals. As to respect for human life, he found that it was “reasonable” for Congress to conclude that partial-birth abortions have even greater “power to devalue human life” than standard second-trimester dismemberment (“D&E”) abortions, because they blur the line between abortion and infanticide. 246 As to protecting fetal life, Kennedy argued that it is “self-evident” that women who regret their abortions will experience even greater grief if they learn that they had partial-birth abortions, and that “[i]t is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term.” 247 And as to regulating the medical profession, he asserted that “[i]t was reasonable for Congress to think that partial-birth abortion . . . undermines the public’s perception of the appropriate role of a physician during the delivery process” more than the D&E method. 248 As in Casey, this was deferential reasonableness review, not true rational-basis review, because Kennedy (and the Court) was plainly making an independent judgment that Congress’s conclusions were plausible—not merely rational. 249

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245 But see McDonald, supra note 15 (draft at 15) (arguing that Kennedy engaged in “classic rational basis review.”). Professor McDonald acknowledges, however, that Kennedy also added “the qualifier that it should not be ‘uncritical deference.’” Id. (draft at 23) (quoting Gonzales, 550 U.S. at 165). In my view, the difference between critical and uncritical deference is another way of describing the considerable difference between minimal rational-basis review and deferential reasonableness review (or rational-basis with teeth).

246 Casey, 550 U.S. at 158.

247 Id. at 159–60.

248 Id. at 160.

249 Equally plainly, Justice Kennedy did not engage in balancing as part of this deferential reasonableness review. Judge Dennis claims that Gonzales “applied Casey’s two-part balancing test” to uphold the federal Act. Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 769 F.3d 330, 339 (2014). Gonzales did no such thing. Kennedy’s opinion first applied the undue-burden standard’s purpose prong (concluding that the Act advanced Congress’s legitimate objectives). Casey, 550 U.S. at 156–60, and then separately applied the effects prong (concluding that the Act did not create a substantial obstacle). Id. at 161–67. Judge
E. Justice Breyer Correctly Held that Casey Requires More than Minimal Rational-Basis Review, and that a Reviewing Court Should Consider Evidence Concerning Regulatory Benefits when Engaged in Undue-Burden Review

In addition to interpreting Gonzales as requiring only that an abortion regulation be “rationally related to a legitimate state interest,” the Fifth Circuit also ruled that Gonzales “made clear that medical uncertainty underlying a statute is for resolution by legislatures, not the courts.” Accordingly, it held not only that “the state is not required to prove that the objective of the law would be fulfilled,” but also that the district court should not have “allow[ed] relitigation of the facts that led to the passage of [the] law.” Therefore, the Fifth Circuit concluded, the district court erred in even considering the plaintiffs’ extensive evidence that the challenged provisions of H.B. 2 would not confer any significant health benefits, rather than simply deferring to the Texas legislature’s contrary judgment.

Consistent with the analysis I have presented, Justice Breyer ruled that the Fifth Circuit was wrong to “equate[] the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue.” Breyer also rightly pointed out that Casey and Gonzales, in

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Dennis describes what the Court did as “[o]n balance” upholding the Act. But it is evident that the Court would have struck down the Act if it failed either prong.

Professor Kelso makes a different, but equally fallacious, argument for the proposition that Justice Kennedy engaged in what Kelso calls “reasonableness balancing” in Gonzales. Kelson, supra note 47, at 113–14. Kelso argues, as I have, that Kennedy’s applications of Casey’s reasonably-related test involve reasonableness review rather than minimal rationality review. See id. But Kelso simply assumes that deferential reasonableness review necessarily involves balancing, and provides no evidence whatsoever that Kennedy actually balanced burdens and benefits at any point in his reasonableness analysis. As the discussion in text shows, that is because Kennedy focused his reasonably-related analysis exclusively on whether the federal Act could plausibly be thought to advance Congress’s various legitimate objectives.


251 Id. at 587.

252 Id. at 587 (quoting the Fifth Circuit’s opinion in the earlier challenge to HB2, Planned Parenthood of Greater Texas v Abbott, 748 F.3d 583, 594 (5th Cir. 2014) (Abbott II)).

253 See Cole, 790 F.3d at 587 (holding that the district court thereby substituted its own judgment for the legislature’s). The Fifth Circuit’s ruling would have been correct if the applicable standard under Casey were minimal rational-basis review. See FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (a legislative decision “is not subject to courtroom factfinding” under rational-basis review).

"determining the constitutionality of laws regulating abortion procedures... placed considerable weight upon evidence and argument presented in judicial proceedings." Accordingly, he ruled that a reviewing court should "consider the existence or nonexistence of medical benefits" when engaged in undue-burden review of a maternal-health regulation, and that the district court had properly done so without "simply substituting its own judgment for that of the legislature." These rulings preserve the balance between deference and independent judicial review that Casey's reasonably-related test requires. Under that test, evidence about the presence or absence of health benefits was highly relevant to whether H.B. 2's provisions bore a plausible relationship to protecting maternal health.

F. Justice Breyer Could Have Struck Down the Challenged Provisions of HB 2, Consistently with Casey, by Ruling that they Were Not Reasonably Related to Protecting Maternal Health

Had Justice Breyer confined his critique of the Fifth Circuit to the rulings we have just examined, he could have written an opinion faithfully applying Casey's "reasonably related" test to strike down the challenged provisions of H.B. 2. The district court found that neither the admitting-privileges requirement nor the surgical-center requirement would yield significant health benefits for women seeking abortions in Texas. Breyer's opinion goes to great lengths to establish that those findings about health benefits were not clearly erroneous—and neither of the dissenting opinions disputes that conclusion. Although a full review of the trial record could conceivably show otherwise, I assume that Breyer was right on this score. Given those facts, a holding that the challenged

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255 Id. at 2310.
256 Id.
257 In Schimel, Judge Posner adopted this line of reasoning as an alternative ground for invalidating Wisconsin's admitting-privileges requirement. Planned Parenthood of Wisconsin, Inc. v. Schimel, 806 F.3d 908, 916 (2015) ("[t]he Wisconsin statute does not 'further[] the legitimate interest' of the state in advancing women's health.").
259 See Whole Women's Health, 136 S. Ct. at 2311–12 (admitting-privileges requirement), id. at 2315 (surgical-center requirement).
260 The analysis in text assumes that, for purposes of applying the reasonably-related test, a reviewing court can consider evidence about a regulation's benefits even if it was not considered by—or available to—the legislature. Although that is certainly what Casey contemplates with regard to evidence about a regulation's burdens under the effects prong, one might question whether such evidence is appropriate with regard to benefits under the reasonably-related test. Because it implements the purpose prong, the focus of the reasonably-
provisions were not "reasonably related" to improving maternal health would have been hard to quarrel with. This approach would also have enabled the Court to invalidate the Texas regulations on their faces without engaging in the "substantial-fraction" gymnastics that Justice Breyer employed to reach that result under the effects prong. A law that is not reasonably related to a legitimate state interest is unconstitutional in all of its applications.

To be sure, a ruling condemning H.B. 2's provisions on trivial-benefits grounds might have encouraged some lower courts to strike down abortion regulations whenever it appeared to the judge that the regulation had insufficient benefits to justify its burdens. But any test that requires a reasonable relationship, rather than merely a rational one, between the legislation's purpose and its effects will be vulnerable to that sort of abuse. For better or worse, that is what Casey calls for. Moreover, it would be far easier for the Supreme Court to police the reasonably-related line than to oversee the value judgments of trial courts about whether an abortion regulation’s benefits justify its burdens, as Breyer’s opinion requires.

Like the substantial-obstacle test, a negligible-benefits test is inherently fuzzy. But it is also simple, focusing the court’s attention on one aspect of a regulation’s effects and signaling that there is a defined threshold that must be crossed before striking it down.

G. Instead, Justice Breyer Added a Balancing Test and Other Heightened-Scrutiny Techniques to the Undue-Burden Standard

Instead, Justice Breyer held that the district court “applied the correct legal standard” when it considered all the evidence before it concerning the effects of the challenged provisions, “and then weighed the asserted benefits against the burdens.” By importing balancing into the undue-related test should arguably be on whether, in light of facts known or available to the legislature, it was plausible to expect the regulation to produce maternal-health benefits (or save fetal lives). This important question is beyond the scope of this Article.

261 The question of how a reviewing court should rule on a facial challenge in which a regulation creates a “substantial obstacle” for some women but not others played an important role in Whole Women's Health. See Whole Women's Health, 136 S. Ct. at 2320 (applying Casey's "large fraction" test); id. at 2343 & n.11 (Alito, J., dissenting) (arguing that the Court's application of the test is incorrect). Due to space constraints, this Article does not address Whole Women's Health's treatment of this important topic. It bears mention, however, that Justice Breyer's balancing test may work in tandem with aggressive application of the "large fraction" test, thereby further raising the bar that fetal-protective regulations must surmount.

262 See Whole Women's Health, 136 S. Ct. at 2300 ("neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes.").

263 Id. at 2310.
burden standard, Justice Breyer took a giant step toward stricter heightened-scrutiny review. In addition, his undue-burden analysis of the admitting-privileges and surgical-center requirements employed—though in scattershot fashion—other heightened-scrutiny techniques that were staples of the pre-Casey "reasonably relates" regime, but are conspicuously missing in Casey: least restrictive alternative analysis, narrow tailoring, and discriminatory-treatment inferences. Thus, while purporting to apply Casey, Justice Breyer instead laid the foundation for a revival of the demanding, all but strict-scrutiny version of "reasonably related" review the Court used prior to Webster and Casey. With the exception of balancing, Justice Breyer did not identify the heightened-scrutiny techniques he was using, or claim that any of them were more than factors in his overall balancing analysis. Nevertheless, their reappearance can only make undue-burden scrutiny more demanding.

The first heightened-scrutiny technique in Justice Breyer's applications of the undue-burden standard appears to be a version of least restrictive alternative analysis. Breyer assumed without explanation that the baseline for assessing a regulation's health benefits is prior state law, rather than simply an absence of regulation on the subject. Thus, Breyer's baseline for the admitting-privileges requirement was not the absence of any regulation designed to ensure that women who experienced abortion-related complications requiring hospitalizations would receive good care. Instead, it was prior law requiring abortion providers to have either admitting privileges or a "working agreement" with a doctor who has admitting privileges at a local hospital. This seems tantamount to a less-
restrictive-alternative approach. If a state had no hospitalization-related requirements, and then enacted an admitting-privileges requirement, a court applying *Whole Women's Health* would presumably evaluate its benefits against the baseline of a working-agreement alternative, because the legislature could have enacted that less burdensome alternative instead. At the same time, by choosing this baseline, Breyer seems to envision that regulatory benefits and burdens will be measured at the margin, rather than overall, thereby increasing the stringency of his new balancing test.

Justice Breyer also revived the Court’s pre-*Casey* practice of drawing adverse inferences whenever a state imposes stricter health and safety requirements on abortions than on comparable medical procedures. In particular, he relied heavily on evidence that Texas does not apply its surgical-center requirements to other medical procedures, such as colonoscopy and liposuction, that involve greater health risks than abortions and are performed outside hospitals. According to Breyer, “[t]hese facts indicate that the surgical-center provision imposes “a requirement that simply is not based on differences” between abortion and other surgical procedures “that are reasonably related to” preserving women’s health, the asserted “purpos[e] of the Act in which it is found.” *Doe v Bolton*—the precedent Breyer quotes—made use of this technique, which it borrowed from equal protection law. But there is no indication in *Casey* that “reasonably related” refers to anything other than whether a regulation’s actual or predicted effects tend to advance the state’s legitimate interest. Nowhere in its undue-burden analysis of Pennsylvania’s abortion regulations did the *Casey* Joint Opinion consider whether the state imposed similar restrictions on other, comparable medical procedures. The plurality did not even bother to respond to Justice Blackmun’s contentions that “the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary

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267 *Id.* at 2315.
268 *Id.* (quoting *Doe*, 410 U.S. at 194).
269 Doe relied on the equal protection decision in *Morey v. Doud*, 354 U.S. 457 (1957), without mentioning that *Morey*—which purported to engage in rational-basis review—was expressly overruled by *City of New Orleans v Dukes*, 427 U.S. 297 (1976). See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term through Romer v. Evans*, 32 IND. L. REV. 357, 407 (1999) (noting that *Morey* was the only case in “more than forty years” in which the Court “invalidated on equal protection grounds a purely business regulation, and that one case was later overruled.”).
surgery or of simple vaccination,” and that this revealed “the anti-abortion character of the statute and its real purpose.”

Finally, without referring to “narrow tailoring” or “overbreadth” by name, Justice Breyer relied on these techniques in his defense of the district court’s finding that the surgical-center requirement “does not benefit patients and is not necessary.” He pointed to evidence that the central provisions of that requirement would not benefit women who have medical (non-surgical) abortions, because any complications they might suffer would occur after leaving the clinic. But clinics typically perform both types of abortions, and the surgical-center requirements could still be beneficial to women having surgical abortions, which constitute the great majority of all abortions in the United States. Similarly, Breyer cited evidence that “many surgical-center requirements are inappropriate as applied to surgical abortions,” and provided several examples. Many other surgical-center requirements, however, presumably do contribute at the margins to patient safety. Why else were six of the largest abortion facilities in Texas—including several operated by Planned Parenthood—already licensed as surgical-centers prior to the enactment of H.B. 2? Unless limited or overruled, Breyer’s opinion will enable plaintiffs to attack abortion regulations simply by identifying instances in which they do not advance their intended purposes—even if they are reasonably related to protecting maternal health or fetal life “under any normal understanding of what ‘reasonably relates’ signifies.”

That is not what Casey intended. The reasonably-related test implements the purpose prong of the substantial-obstacle test, and Casey’s statements about the purpose prong imply that the inquiry should focus on whether the state has “a valid purpose”, rather than attempting to determine whether that purpose is primary. A regulation that plausibly

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271 Whole Women’s Health, 136 S. Ct. at 2315.
272 In 2013, the Centers for Disease Control estimated that medical abortions represented about twenty two percent of abortions in the United States. CENTERS FOR DISEASE CONTROL, ABORTION SURVEILLANCE—UNITED STATES 2013, https://www.cdc.gov/mmwr/volumes/65/ss/ss6512al.htm.
273 Whole Women’s Health, 136 S. Ct. at 2315.
274 See Whole Women’s Health, 136 S. Ct. at 2347 & n.23 (Alito, J., dissenting). As Justice Alito also notes, the number of surgical-centers operating in Texas increased from six to nine after the enactment of H.B. 2. Id. at 2347.
276 See Casey, 505 U.S. at 874 (“The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more
advances a legitimate state purpose has a valid purpose whether or not it is significantly overbroad.

In the undue-burden setting, Casey's more deferential stance also makes far more sense than Justice Breyer's revival of overbreadth analysis. Very few laws can be demonstrated actually to advance the state's asserted interests in most, let alone all, cases to which they apply. That is one of the reasons why the Court applies overbreadth analysis sparingly. Particularly because the "substantial obstacle" test will ensure the invalidation of abortion regulations that erect high barriers to abortion access, scrutiny under the purpose prong should not include an overbreadth requirement.

H. A Rule Requiring Comparison of Regulatory Benefits and Burdens Under the Reasonably-Related Test Would Be Inconsistent with Casey and Normatively Unsound

I have argued that Casey's undue-burden test requires a reviewing court to (1) determine, under the substantial-obstacle test, whether a regulation will coerce a significant number of women to forego wanted abortions, and (2) determine, under the reasonably-related test, whether it is plausible that the regulation will significantly advance a legitimate state interest. I have also argued that Justice Breyer's opinion erroneously adds a balancing test and several heightened-scrutiny techniques to the undue-burden test, thereby greatly increasing its kinship with strict scrutiny. Finally, I have argued that the Court should reject these innovations, and overrule the central doctrinal holding of Whole Women's Health—that Casey requires a court to "weigh[] the asserted benefits against the burdens" when applying the undue-burden standard. In this subsection, I consider and reject the argument that Justice Breyer was half right: Casey's reasonably-related test requires courts to compare regulatory benefits and burdens—though not to balance them by "weigh[ing] the asserted benefits against the burdens," as his opinion also requires.

expensive to procure an abortion cannot be enough to invalidate it."]. See also id. at 901 (concluding that a recordkeeping regulation does not violate the purpose prong because "it cannot be said that the requirements serve no purpose other than to make abortions more difficult.").

277 Whole Women's Health, 136 S. Ct. at 2310.
278 See id. at 2309 (holding that Casey "requires that courts consider the burdens... together with the benefits.").
279 Id. at 2310.
The argument for this interpretation of *Casey* runs as follows. *Casey* uses the reasonably-related test as a substitute for a direct inquiry into whether a regulation was enacted for the purpose of creating a substantial obstacle to abortion access. As we have seen, evidence about the extent of the benefits a regulation will actually produce is therefore relevant to whether it satisfies the reasonably related test. In particular, if, as in *Whole Women’s Health*, a maternal-health regulation is found to have negligible health benefits, the court may infer that it is not reasonably related to its putative purpose.

Evidence about the existence (and extent) of a regulation’s burdensome effects, the argument goes, should also be relevant. If a maternal-health regulation creates significant burdens on access to abortion, and also yields comparatively few benefits, a court would be warranted in finding that it is not reasonably related to advancing maternal health—even if those benefits, considered in isolation, would suggest otherwise. Comparing the extent of a regulation’s benefits and burdens is relevant because, if a regulation seems more closely related to an illegitimate purpose, that strengthens the case for holding that it is not reasonably related to a legitimate one. *Whole Women’s Health* is a case in point: the evidence of negligible benefits, combined with the evidence of significant burdens, provides a firmer basis for invalidating H.B. 2’s provisions than the evidence of negligible benefits alone. Indeed, the argument concludes, that is the opinion Justice Breyer should have written. The most persuasive portion of his opinion is its presentation of the district court’s findings that the admitting-privileges and surgical-center requirements conferred few if any maternal-health benefits, while significantly reducing women’s access to abortion in many parts of Texas.

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280 This argument, it should be emphasized, is nowhere to be found in Justice Breyer’s opinion, which makes virtually no use of the purpose prong or of the reasonably-related test. Although Breyer quotes *Casey’s* purpose-or-effect language, *id.* at 2301, his opinion never addresses whether the “purpose” of the challenged regulations was to create a substantial obstacle. And his only mentions of the reasonably-related test come when he criticizes the Fifth Circuit for using it as rational-basis review, *Whole Women’s Health*, 136 S. Ct. at 2309, and when he uses it (as *Doe v. Bolton* did) to require additional justification for abortion regulations that are more onerous than those imposed on comparable medical procedures. *Id.* at 2315.

281 Justice Breyer went farther than the formulation in text, by determining that the reductions in access were “substantial” within the meaning of *Casey’s* substantial-obstacle test. That finding would make the argument in text superfluous. In light of Justice Alito’s dissent, however, it is debatable whether the challenged regulations created substantial obstacles. By contrast, even Justice Alito acknowledged that H.B. 2’s provisions would significantly reduce women’s access to abortions. See *id.* at 2344 (Alito, J., dissenting) (“there can be no doubt that H.B. 2 caused some clinics to cease operation.”).
The first problem with this argument is that it is inconsistent with Casey's applications of the purpose prong and the reasonably-related test. Throughout its applications of the undue-burden standard, the Casey Joint Opinion considered expected benefits under the purpose prong and expected burdens under the effects prong. Once it concluded that a regulatory requirement could plausibly be expected to yield significant benefits, the plurality turned to whether the regulation's effects constituted a substantial obstacle. At no time did the plurality undertake to compare benefits and burdens side-by-side. Thus, Casey does not authorize courts to compare regulatory benefits and burdens in applying the reasonably-related test.

Comparing regulatory benefits and burdens also entails many of the same problems involved in balancing them. Consider again the example of an informed-consent provision with a 24-hour waiting period. To compare the extent to which the provision saves fetal lives with the extent to which it prevents women from having abortions requires separate metrics (even if not a common one) for these two different effects. If one percent of women change their minds and forgo abortions, is that a minimal benefit, a significant one, or a substantial one? If one percent of women unwillingly forego an abortion due to the burdens of delay and increased expense, are those burdens minimal, significant, or substantial? As with balancing, such comparisons are unnecessary in the extreme cases in which they are intuitively appealing—and arbitrary in the mine-run cases in which they would empower factfinders to invalidate regulations that can reasonably be expected to protect fetal life or maternal health.

Finally, although the distinction between determining whether a regulation's benefits "justify" its burdens and determining whether those burdens significantly exceed the benefits may be sound in theory, it would be exceedingly difficult for trial judges to adhere to in practice—and for appellate courts to police. Very few factfinders could be trusted to decide whether a regulation's burdensome effects exceed its beneficial ones without being influenced by their own views as to whether the burdens outweigh the benefits. Under Casey, a regulation that does not create a

282 Because it avoids the problems associated with placing relative values on the burdens and benefits of regulations that seek to protect fetal life or maternal health, this modification of the reasonably-related test is normatively preferable to Justice Breyer's balancing approach. That is hardly a sufficient reason to adopt an innovation that is inconsistent with Casey and suffers from serious normative problems of its own.

283 Cf. e.g., WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 141 (2d. ed. 1979) (defining the transitive verb "balance" as "to compare by estimating the relative force, importance, or value of different things.").
substantial obstacle should not be struck down unless it "serve[s] no purpose other than to make abortions more difficult." That question can—and, *Casey* implies, should—be answered solely by examining the regulation’s anticipated and actual effects.

VI. **Whole Women’s Health and The Supreme Court’s Abortion Pathologies**

Much of the damage that *Whole Women’s Health* does is doctrinal. The Court’s new balancing requirement, its ruling that courts should employ some unspecified degree of heightened scrutiny, and its use of narrow tailoring, least restrictive alternatives, and non-discrimination as factors in a free-form balancing analysis will make defending maternal-health regulations much more difficult. Worse yet, unless the Court intercedes, *Whole Women’s Health*’s stricter version of the undue-burden standard will extend to abortion regulations seeking to protect fetal life. Nothing in Justice Breyer’s opinion confines his interpretation of the undue-burden standard to maternal-health regulations, and the lower courts will rightly point out that *Casey* created one undue-burden standard, not two.

Important as they are, these harmful shifts in the Court’s abortion jurisprudence are not the end of the story. Rather than acknowledging and defending his reworking of the undue-burden test, Justice Breyer claims to be applying *Casey*. His mischaracterization of controlling precedent, compounded by his refusal to offer any normative argument in favor of his approach, makes a mockery of *Casey*’s claim—and *Obergefell*’s—that the Court’s proper role in substantive due process cases is to exercise "reasoned judgment."

The blame for these shortcomings cannot be placed solely on Justice Breyer and his liberal colleagues. Justice Kennedy, who co-authored *Casey*, joined Breyer’s opinion—and may very well have assigned the task of writing it to him. This despite the fact that Kennedy had considerable leverage, even after Justice Scalia’s death, because a 4-4 tie

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286 Because Justice Kennedy was the senior Justice in the majority, we can infer that he either assigned the opinion to Justice Breyer, or did not vote to strike down the challenged provisions of H.B. 2 until after Breyer’s opinion circulated. Because Kennedy joined the four liberal Justices in voting to stay the Fifth Circuit’s mandate while the case was pending in the Supreme Court, it seems likely that he was in the majority all along. *See Whole Women’s Health v. Cole*, 135 S. Ct. 2923 (2015).
would have affirmed the Fifth Circuit's judgment upholding the challenged provisions. Whatever Kennedy's motivation, he has acquiesced in a stricter version of the undue-burden test in *Whole Women's Health*.

Justice Kennedy's behavior is all the more disappointing because, until *Whole Women's Health*, he had been steadfast in adhering to the "balance" *Casey* struck between abortion liberty and the states' ability to protect fetal life and maternal health. For reasons I have explained, Kennedy's vote to strike down H.B. 2's provisions under *Casey*’s undue-burden test is at least plausible on the record before the district court. His willingness to join Justice Breyer's opinion, by contrast, is impossible to defend as a legal matter. Why not at least write separately to decide the case on the narrower ground that H.B. 2’s provisions were not “reasonably related” to the legitimate purpose of enhancing maternal health? Nevertheless, there is still reason to expect that Kennedy will revert to the principles he has previously embraced when it comes to cases involving regulations protective of fetal life.

Even when it comes to the dissenters, there is some cause for pro-life concern. Justice Thomas remains "fundamentally opposed to the Court's abortion jurisprudence," and we can hope that Justice Gorsuch will share that view. Justice Alito’s opinion, by contrast, begins with the statement that “[t]he constitutionality of laws regulating abortion is one of the most controversial issues in American law, but this case does not require us to delve into that contentious dispute.” Alito and Chief Justice Roberts have been on the Court for more than a decade now. Perhaps we will eventually learn that one or both of them, too, thinks *Roe* and *Casey* are grievously wrong, but has prudently kept silent lest disclosure delay the day when there is a majority to overrule those decisions. Alternatively, however, we may discover, as we did with *Casey*'s co-authors, that one or both of them accepts the right to elective abortion as settled law, whether or not the Court was right to recognize it in the first place. In the meantime, it is puzzling that neither Roberts nor Alito joined Justice Thomas in protesting against Justice Breyer's transformation of the undue-burden standard.

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288 Accord, *McDonald*, supra note 15 (draft at 24) (finding it “difficult to believe Kennedy would... allow courts to balance the benefits and burdens of a regulation designed to persuade a woman to carry a child to term.”).
290 *Id.* at 2330 (Alito, J., dissenting).
Whole Women's Health is one more indication of how little care the Supreme Court takes faithfully to interpret and apply its own precedents in the field of abortion rights (a field the Court "owns," having created it out of whole cloth). That fact, worrisome in itself, ironically provides reason to believe that Whole Women's Health may prove less damaging to pro-life regulations than the analysis to this point has suggested. Nothing, other than the fact that five Justices voted for it, supports Justice Breyer's new "balancing" requirement. Why would Justice Kennedy take it any more seriously than Breyer takes Casey? Assuming he is still on the Court, Kennedy can be expected to balk at aggressive applications of the new "balancing" version of the undue-burden test, particularly those that steeply devalue fetal life.\(^{291}\) At a minimum, he may provide the deciding vote to confine Whole Women's Health's "balancing" requirement to abortion regulations directed solely at maternal health.

In this connection, Justice Thomas's alarm at the majority opinion's failure even to mention the state's substantial interest in preserving fetal life seems premature,\(^{292}\) given that the provisions in Whole Women's Health did not rely on that interest. Although the four un-ambivalent defenders of abortion rights may prefer to sweep fetal life under the rug, it seems entirely possible that Justice Kennedy is simply biding his time on this issue. If so, and if Justice Gorsuch shares his predecessor's view that Roe and Casey should be overruled, a five-Justice majority may insist on giving such great weight to protecting fetal life that the balancing requirement does no harm—or even does some good.\(^{293}\) Alternatively, a Kennedy-led majority could reinterpret Whole Women's Health as standing for the narrow proposition that an abortion regulation is not reasonably related to its valid state purpose if it demonstrably fails to advance that interest to any significant extent.\(^{294}\) In the end, then, the

\(^{291}\) Read together with the Joint Opinion in Casey, Justice Kennedy’s subsequent dissent in Stenberg and his opinion for the Court in Gonzales strongly suggest that he believes protecting fetal life is so important that he would have refused to recognize the right to elective abortion were it not for the force of stare decisis. See Gilles, supra note 1, at 695, 717–20.

\(^{292}\) See Whole Women's Health, 136 S. Ct. at 2326 (Thomas, J., dissenting).

\(^{293}\) See Gilles, supra note 1, at 700 (suggesting that the undue-burden standard be understood as premised on a judgment that the state’s interest in protecting fetal life is almost as weighty as a woman’s interest in an elective abortion). It is even possible, as Professor Camosy suggests, that such a majority would take the position that, now that the Court has injected balancing into the undue-burden test, a sufficiently beneficial regulation can be constitutional even if it imposes a “substantial obstacle” on women's access to abortion. See Charles Camosy, Casey's Undue Burden and Whole Women’s Health's Interest-Balancing Tests are Pro-Life Opportunities, 35 QUINNPIAC L. REV. _, _ (2017).

\(^{294}\) Justice Kennedy’s opinion for the Court in Gonzales employed this approach. He stopped short of overturning Justice Breyer’s opinion for the Court in Stenberg v. Carhart,
disingenuous minimalism of Justice Breyer’s *Whole Women’s Health* opinion may prove to be its one useful characteristic.

instead ruling that “*Stenberg* need not be interpreted to have revived” the “novel” approach to statutory interpretation evident in some pre-*Casey* abortion decisions, and which “*Casey* put . . . to rest.” Gonzales v. Carhart, 550 U.S. 124, 154 (2007).
Symposium

EFFECTIVE ADVOCACY IN THE DIGITAL AGE: TEN SUGGESTIONS FOR TODAY’S PRACTITIONERS

Hon. Douglas S. Lavine and Hon. Maria A. Kahn*

It is not ‘can any of us imagine better?’ but, can we all do better?’ The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise—with the occasion. As our case is new, so we must think anew, and act anew.

Abraham Lincoln. Annual Message to Congress, December 1, 1862.

We are well into a new epoch in history, the digital era. The digital world of today is as far removed from the quiet past of the 1970s, 1980s, and 1990s as the world of the horse and buggy is from the space age. Whether we have been dragged into it kicking and screaming, or entered it enthusiastically, this altered landscape requires that lawyers engaged in the bread and butter of advocacy think anew and act anew.

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We are two state court judges—one a Supreme Court Justice, the other an Appellate Court Judge, both former federal prosecutors. We begin with a disclaimer: we do not—underline not—purport to be experts in technology or electronic discovery. But we do know something about advocacy. Day in and day out, we watch as lawyers seek to argue their cases persuasively for their clients. Human nature does not change, but society never stops changing. Technological advances are moving at breakneck speed. It is apparent to us both that new approaches and insights are required for advocacy to succeed in the digital era. The basic, time-tested constituents of persuasive advocacy are static, but applying them in the new environment we have entered can be a substantial challenge for practitioners. It is our objective in this article to offer some modest advocacy suggestions and guidance to practicing lawyers who are confronting this rapidly changing landscape. It is our goal to raise consciousness about the new challenges the digital age presents to lawyers. We hope this article sparks thought and discussion about a topic that will be with us all from here on in.

We focus on fundamental recurring themes which inform effective advocacy in today’s evolving legal environment. We highlight ten discrete areas which, we believe, call for different thinking and different approaches in light of the changes occurring throughout the world at large, and the legal world in particular. Some of our suggestions are based on general principles and observations, while others grow out of the substantial case law and literature that has developed around issues relating to electronically stored information (“ESI”). We hope that this article is helpful to practitioners with little or no experience in dealing with legal issues relating to ESI, as well as, those with expertise. While much of what we say is applicable to advocacy in any setting, our goal is to target our observations and suggestions to courtroom advocacy in the digital age.

Let’s get started.

SUGGESTION NUMBER ONE: ENGAGE IN A CONCERTED PROGRAM OF SELF-EDUCATION

We begin by stating something absolutely obvious but absolutely necessary. The essential foundations for successful advocacy in the digital age are self-knowledge and the willingness to learn. Let us be more precise. You need to look into the mirror and ask yourself if you are prepared for the challenges that the digital age presents. Then you need to
engage in a concerted, ongoing effort to educate yourself as to how to maneuver in this challenging new environment.

Depending on your age and how tech-savvy you are, you may know a great deal about computer and digital forensics and technology, or pitifully little. If you are 50 or older, chances are good that your kids—if you have kids—know far more than you do about the technologies that surround us. They grew up with them. They are fully conversant with iPhones, iPads, laptops, desktops, the Internet, and a wide variety of other technological devices and digital communications systems. You may not be, and if you are, chances are also good that you have only a rudimentary understanding of all the things these myriad devices can do. Unless you are tech-savvy, it is critically important that you acknowledge your own shortcomings in this area. As Confucius said: “True wisdom is knowing what you don’t know.”

Let us provide an analogy. Suppose you are a lawyer defending a medical malpractice case. The case turns on alleged malpractice relating to the claimed mistreatment of a liver problem. Are you going to enter into the case simply by reading a Wikipedia entry on the liver? Or are you going to do everything within your power to study the liver, its functions, its diseases, treatment of those diseases, and the precise nature of the claim against your client? It would be unthinkable—and legal malpractice to boot—for you to saunter through a case and pick up a bit of knowledge about the liver here, a bit of knowledge there, as you go.

The same is true of issues relating to ESI. A lawyer who isn’t fully prepared to deal with the intricacies of this brave new world is like a lawyer who has never read the rules of discovery, procedure, or evidence in the relevant jurisdiction. This unprepared lawyer is ceding a massive—probably determinative—tactical advantage to any adversary. Long gone are the days when lawyers could claim a lack of understanding of technology.¹ As Magistrate Judge Paul W. Grimm, a leader in the field of ESI, has noted: “[I] lawyers and judges who lament the explosion of social media use and the evidentiary challenges social media presents when

¹ Compare Alexander v. Federal Bureau of Investigation, 541 F. Supp. 2d 274, 277 (D.D.C. 2008) (“Essential errors made by [counsel] during discovery were caused by a lack of familiarity with computer terminology ... [and] the computer expert, simply talked a different language”), with In re A&M Florida Properties II, 2010 WL 1418861 at *7 (Bankr, S.D.N.Y. 2010) (Imposing sanctions, and noting that “had [counsel] fulfilled his obligation to familiarize himself with [his client’s] policies earlier, the forensic searches and subsequent motions would have been unnecessary.”).
offered as evidence need to, in the vernacular of any teenaged Facebook user, just get over it."

Suggestion One, therefore, is simple and straightforward: educate yourself so you have hands-on knowledge of issues relating to ESI. This means read up on it, study it, take courses, obtain training from experts, and do everything you can to increase your digital and technological aptitude. When you have a case, go back to the sources—learn the ins and outs of the technological and legal issues involved. Have an expert start at square one and explain to you everything you need to know to be able to clearly convey information to a judge, jury or other decision maker in understandable language. If an expert is not available through the client, hire one. Do not underestimate the amount of time and effort required to fully understand the technical issues relating to ESI. Due to the constantly increasing amount of ESI involved in a typical case, you may need to utilize significant forensic resources and services. When you step into the courtroom, you want to know more about the technical issues presented than anyone, with the possible exception of the experts in the case. Flying blind is not an option.

SUGGESTION NUMBER TWO: IDENTIFY THE APPROPRIATE SOURCES OF KNOWLEDGE AND EXPERTISE AND ADOPT A TEAM APPROACH TO HANDLING ESI

In the digital context, the complexity of the issues makes complete preparation all the more important. Forensic examination of a single laptop computer can take hours, days or even weeks to complete depending on the complexity of the examination. A typical smart phone contains more information than personal computers did several years ago. Forensic examination of cell phones can result in a large amount of data including email, text messages, pictures, videos, call history, location information, documents, and data from numerous applications, all of which could be important to review and understand. The volume of ESI

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3 We have found Shira A. Scheindlin, Daniel J. Capra, and The Sedona Conference, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE, CASES AND MATERIALS (West, 2nd ed. 2012) to be a useful casebook and reference guide. It contains practical information such as glossaries, guidelines, and checklists. For example, the casebook contains The Sedona Conference Jumpstart Outline for practitioners listing a number of questions attorneys should ask their clients in preparation for a Rule 26(f) Conference. Id. at 284–90.
in large scale litigation often leads counsel to rely on artificial intelligence to conduct document review and to identify pertinent documents. As in other sorts of cases requiring a high degree of specialized knowledge, issues relating to ESI may require you to obtain expert assistance—to understand the issues, to respond to discovery requests, to understand evidentiary problems, and the like. That knowledge and expertise may come from the client, other attorneys and/or an outside expert. So our suggestion number two is this: identify the sources of knowledge and expertise and adopt a team approach to handling ESI.

The *Zubulake* cases provide a wealth of information in this regard. *Zubulake IV* makes it clear that the duty to preserve evidence arises when a party has notice that requested information is relevant to litigation or when a party should have known that evidence may be relevant. But *Zubulake V* goes to the heart of the matter by demolishing the proposition that counsel can play a passive role when faced with a complex request for discovery. *Zubulake V* mandates that counsel must become familiar with a client’s document retention policies and architecture, which involves speaking to IT personnel and “key players,” and must take “affirmative steps” to monitor ongoing compliance.

Counsel’s duty to ensure the ongoing preservation of relevant documents is not a fleeting one. Once a party and counsel have identified all sources of potentially relevant information, counsel is under a continuing duty to retain that information. This means that counsel has an ongoing responsibility to coordinate the ongoing communications between all of the relevant, important players who know where information can be located, to ensure that it is preserved. In some cases, counsel may want to appoint a record custodian and/or hire a forensic expert to capture and preserve the information.

It is manifestly not sufficient for counsel to communicate with the head of IT once and hope for the best. You may want to implement a formal legal hold process or have a plan in place for the identification, collection, and preservation of ESI. Some corporate entities utilize software to track and provide notification to employees subject to a litigation hold. Whether counsel utilize a formal or informal process with in-house staff or third party vendors, counsel must ride herd over the process or risk serious consequences for his/her client. It becomes

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5 Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y.2004) (*Zubulake V*).
counsel’s duty to make sure the left hand knows what the right hand is doing, and that preservation is ongoing. This requires knowledge of the systems involved, and ongoing contact with all of the significant players, including inside and outside counsel.

**SUGGESTION NUMBER THREE: KEEP UP WITH THE DEVELOPING TECHNOLOGY AND CASELAW AS IT RELATES TO ADVANCES IN TECHNOLOGY**

Our suggestion number three is keep up with the developing caselaw, particularly as it relates to evidentiary matters, as well as the growing literature. The caselaw—and literature—is expanding exponentially. Twenty years ago, trial issues relating to ESI were exotic; now they are commonplace. Twenty years ago, written decisions examining evidentiary, or discovery, issues relating to ESI were a rarity; now, they are ubiquitous. Attorneys have a duty to familiarize themselves with the relevant federal and state rules of civil procedure, criminal procedure, evidence, and the burgeoning caselaw applying them to ESI.

One area of significance to practitioners is the developing caselaw pertaining to the authentication of ESI; specifically evidence from social media. Although the rules relating to authentication may not be changing, their application in the digital context is a more frequent challenge for counsel and trial judges. Take the case of *Griffin v. State*, where the Maryland Appellate court held that a MySpace post purportedly posted by the defendant’s girlfriend containing a photograph of the defendant, references to their children, and his girlfriend stating “FREE [defendant’s nickname]!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!,” on its own was insufficient authentication. In a subsequent case, *Tienda v. State*, the Texas Appellate Court held that a MySpace posting containing photos of the defendant and references to defendant’s life were sufficient authentication to allow the jury to assess and weigh the evidence.

In our experience, either or both sides will introduce some form of ESI in nearly every case that results in a trial, typically emails, text messages, or other evidence from social networking sites. It is often

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7 *Griffin v. State*, 19 A.3d 415, 418 (Md. 2011) (quoting the MySpace profile of the defendant’s girlfriend) (internal quotation marks omitted).
surprising to us how unprepared counsel may be for the presentation of this type of evidence.\(^9\)

While many cases focus on the unique characteristics and circumstances of the social networking postings, they often discuss alternative means by which the evidence can be properly authenticated. When it comes to ESI, proper authentication may be dependent on the technology; specifically how the information is created, stored and accessed. For example, in \textit{Vayner}, the Court of Appeals for Second Circuit pointed to the witness’ “cursory familiarity” with a Russian social network site as an indication of the witness’s inability to authenticate the web page profile from that site.\(^{10}\) During cross examination, the witness, a special agent with the State Department’s Diplomatic Security Service, admitted he “had never used the site except to view this single page, and did not know whether any identity verification was required in order for a user to create an account on the site.”\(^{11}\) The Court noted that “[e]vidence may be authenticated in many ways, and as with any piece of evidence whose authenticity is in question, the ‘type and quantum’ of evidence necessary to authenticate a web page will always depend on context.”\(^{12}\) Knowledge of the applicable rules and caselaw, along with the technology, will provide counsel faced with similar evidentiary challenges an understanding about how to introduce or preclude this type of evidence.

\textbf{Suggestion Number Four: Appreciate the New and Expanded Ethical Duties and Responsibilities That Exist in the Digital World}

Imagine a lawyer who is in court, defending against a charge that his client failed to produce documents requested in discovery. The lawyer tells the judge that a miscommunication between the in-house counsel and the lead of the client’s IT department caused the problem.

\(^9\) See State v. Eleck, 23 A.3d 818, 824 (Conn. App. 2011) (ruling that “it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate that the proffered messages did, in fact, come from [the witness] and not simply from her Facebook account,” in case where prosecution witness claimed her Facebook account was hacked); see also United States v. Vayner, 769 F.3d 125, 128–29, 131 (2d Cir. 2014) (prosecution’s failure to utilize a witness with sufficient knowledge to authenticate a web page profile from a Russian social networking site similar to Facebook, was basis for reversal).

\(^{10}\) \textit{Vayner}, 769 F.3d at 128.

\(^{11}\) \textit{Id.} at 128–29.

\(^{12}\) \textit{Id.} at 133.
“Your honor, frankly, as I have routinely done, I relied totally on the information provided to me by in-house counsel.” Twenty years ago—even ten years ago—this explanation might have been greeted with a knowing nod and a sympathetic ear from a judge who knew nothing whatever about ESI. Today, however, such an explanation would fall on deaf ears.

Suggestion number four is simply this: appreciate the new and expanded ethical duties and responsibilities that exist in the digital world. To avoid damage to their clients and their own personal and professional reputations, it is imperative that lawyers understand the scope of professional responsibilities now facing them.

Consistent with the inclusion of ESI in the rules governing discovery, the ethical obligations of lawyers have been expanded to include ESI. In 2015, the Standing Committee on Professional Responsibility and Conduct of the State Bar of California issued an advisory opinion stating:

Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery . . . [and] a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery . . . even where the attorney may otherwise be highly experienced.13

In applying the traditional ethical duty of competence to ESI, the committee noted that the creation and storage of electronic communications “have become commonplace in modern life, and discovery of ESI is now a frequent part of almost any litigated matter.”14 While the opinion focused on the ethical obligations relating to handling a client’s own ESI, arguably the ethical duty of competence would extend to discovery as it relates to an opponent’s ESI/opposing party’s ESI. The reliance on computers, rather than lawyers, to conduct searches of ESI for relevant documents raises both competency and ethical challenges for attorneys and the courts.

The caselaw makes it clear that counsel must pay close attention to new obligations—particularly the duty to preserve relevant documents—in cases involving ESI.15 In 2015, the federal rules of civil procedure were

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14 Id.
15 This obligation raises challenging issues as to when the duty to issue a litigation hold is triggered and the proper scope of that hold. See generally, Michael C. Miller & Jeffrey M. Theodore, A Roadmap for Document Preservation Keeping the Nightmares at Bay, LITIG. J., Fall 2013, at 14–17 (discussing steps to take to preserve relevant documents in litigation);
amended to alleviate the increasing concerns over the explosion of ESI and discovery costs. Federal Rule of Civil Procedure 26(b)(1) was amended to limit the scope of discovery to matters:

relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to the relevant information, the parties’ resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.\(^\text{16}\)

While the amendments provide a standard of proportionality for discovery, counsel must apply that standard to each case and be prepared to argue for or against the preservation and production of relevant ESI.

Until the 2015 amendments to Federal Rule of Civil Procedure 37(e), federal courts had applied different standards in imposing sanctions for failure to issue a timely litigation hold or otherwise preserve ESI.\(^\text{17}\)

FRCP 37 was amended in 2015 to limit the level of sanctions a court may impose for failure to preserve or produce ESI to relief “no greater than necessary to cure the prejudice.”\(^\text{18}\) Nonetheless, if the court finds an intent to deprive the opposing party of the information, the court may presume that the lost information was unfavorable to the party, instruct the jury that it may or must presume the lost information was unfavorable to the party, or dismiss the action or enter a default judgment.\(^\text{19}\) The requirement of a showing of bad faith for an adverse inference instruction

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\(^{17}\) See Zubalake v. UBS Warbug, 229 F.R.D. 422, 437 (S.D.N.Y. 2004) (imposing adverse inference sanction for failure to preserve emails due to gross negligence); Knickerbocker v. Corinthian Colleges, 298 F.R.D. 670, 681–82 (W.D. Wash. 2014) (finding of bad faith in failing to search for and preserve evidence resulted in imposition of fines and costs, but not an adverse inference instruction because the evidence was ultimately recovered); Northington v. H&M Intern., 712 F.3d 1062, 1066 (2013) (requiring evidence of bad faith for imposition of adverse inference sanction); Osberg v. Foot Locker, No. 07CV1358 (KBF), 2014 WL 3767033, at *9–10 (S.D.N.Y. July 25, 2014) (imposing adverse inference sanction based on a finding of simple negligence and that destroyed documents would have been favorable to opponent).

\(^{18}\) Fed. R. Civ. P. 37(e).

\(^{19}\) See id. See also Mazzei v. Money Store, No. 01CV5694 (JGK) (KBF), 2014 WL 3610894, at *6 (2d Cir. July 21, 2014)(noting that the adverse inference for failure to preserve ESI may be given only upon a finding that the party acted with intent to deprive another party of the information’s use in litigation).
or greater sanction affords parties some protection from negligent or incompetent conduct. The new rule, however, still affords courts great latitude in imposing monetary and other sanctions to cure any prejudice resulting from the failure to preserve and produce relevant ESI. To avoid such consequences, it is imperative that lawyers understand their obligations and the means by which they can meet those requirements.

**SUGGESTION NUMBER FIVE: AVOID OVER-RELIANCE ON CLIENTS AND EXPERTS**

Whether it is in the context of pre-trial discovery or presentation of evidence, failing to make proper inquiries of clients and/or experts may lead to disastrous results or possibly sanctions. So our suggestion number five is to avoid over reliance on clients and experts.

Be mindful that clients have a stake in the litigation and may be disinclined to be forthcoming. You do not want to wait until the deposition of your client or another witness to learn about the existence or destruction of key evidence. Over-reliance on clients with representations to the court could lead counsel to violate their ethical obligations as officers of the court. For example, the US Supreme Court issued an order to show cause as to why counsel, who relied on his client to write a petition in a complex patent law case, should not be disciplined. The client, Dr. Schindler, who invented the patent in question, wrote the entire brief, and it contained not only his unique perspective on patent law but used his preferred locutions, acronyms, and prose. In response to the order to show cause, counsel for Attorney Shipley argued that his client was in the difficult position of following his client’s instructions or withdrawing from the case, which would have been detrimental to the client. Moreover, lawyers engaging vendors to collect, review, and identify ESI for discovery purposes are not relieved of their obligations under procedural or ethical rules. Blind reliance on third party vendors will not shield counsel and their clients from sanctions should they fail to meet their obligations.

As with any other field, technology experts or computer experts utilize specific industry terms or language. If lawyers are unfamiliar with

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22 See Mazzei, 2014 WL 3610894, at *8 (awarding costs of accessing data and attorney’s fees where defendants, who outsourced certain legal services, had the legal and practical ability to obtain and preserve the data from that third party vendor).
that terminology, they may not ask the correct questions or illicit correct information. A recent murder trial, illustrates the example of over reliance on experts. The case involved a defendant charged with murder after running the victim down with a motor vehicle. The prosecution called an expert on the Air Bag Module Retrieval System, which contains data about the vehicle prior to impact much like a plane’s black box. The expert was called to explain the results of the Crash Data Retrieval System (CDR) application. The defense attorney wanted to establish that the defendant turned the steering wheel prior to impact to avoid hitting the victim. Counsel relied on the expert’s report which indicated a variation of steering wheel angle degrees from -144 to 16. As the attorney learned during the testimony, however, the actual degree to which the steering wheel was turned depends on the unique specifications of each auto manufacturer and requires a more complex calculation. When those specifications were applied to the vehicle in question the result was that the steering wheel was barely turned. The expert had not been asked about that aspect of his report, however, until he was on the witness stand. Both sides simply accepted the data without further inquiry. The lesson in this is that experts’ opinions are useful but lawyers should not rely on them blindly, but rather probe as to the underlying basis for their conclusions. As with any expert, the reliability of their conclusions is dependent on the accuracy of the data and tools they utilize in reaching those conclusions.

A recent Connecticut Appellate Court decision illustrates the danger in over reliance on expert reports without further inquiry. During a trial involving charges of possession of child pornography, the defendant sought to prove his innocence by introducing an alibi for certain times the forensic examiner’s report indicated the defendant downloaded or accessed child pornography from his computer. Specifically, the defendant introduced employment records showing he was at work during some of the alleged dates and times. On rebuttal, however, the prosecution was able to recall the same forensic examiner to explain that the clock on the defendant’s computer was off by several hours, thereby rendering the alibi defense meaningless. Given the complexity of ESI, attorneys must understand exactly what the experts are saying and learn to explain it in non-technical terms. The experts provide the technical information but it is counsel’s duty to interpret the technical information

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24 Id. at 1058–59.
25 Id.
26 Id. at 1058–60.
they supply and relate it to the case and information that other witnesses provide.

**SUGGESTION NUMBER SIX: ASSIDUOUSLY GUARD YOUR ALL-IMPORTANT CREDIBILITY**

Nothing—we repeat, *nothing*—is more important to successful advocacy than credibility. The digital age offers you rare opportunities to enhance your credibility in the eyes of the decision maker. It also offers you the opportunity to destroy your credibility in one fell swoop. Let us explain.

The importance of credibility in persuasion has been recognized for centuries. In *The Rhetoric*, Aristotle put it this way:

> Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided. . . .

> It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses.  

With credibility, any persuasive task, no matter how enormous, is possible. Without it, nothing is. The following principle can therefore be accepted as gospel: Anything the advocate does to undermine his credibility in the eyes of his audience is potentially fatal to his case; and anything the advocate does to enhance his credibility reaps substantial benefits in an individual case and over a career.

How do you enhance your credibility? There are myriad ways, but they all fall under the rubric of being professional, being well-prepared; and being fair and reasonable. How do you destroy your credibility? Again, there are numerous ways, but they come down to being unprofessional, unprepared, and unreasonable. Let us briefly discuss these attributes—or lack of them—in the digital context.

We perceive twin dangers for advocates in the digital era. The first is undercutting your own credibility by not knowing anything about the subject at hand. The second is undercutting your credibility by thinking you know more than you do about the subject at hand. Either scenario can

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lead to counsel not being forthright with the court and adverse consequences for the client and counsel.

In *Knickerbocker v. Corinthian Colleges*, the court found that counsel’s reliance on technical advice from “an admittedly less-knowledgeable source, its own Corporate Counsel” rather than the director of information technology led to providing the court and opposing counsel with inaccurate information.\(^{28}\) In that case, defense counsel verbally represented to the court, and submitted a declaration from corporate counsel, that emails or data could not be easily extractable from back up tapes.\(^{29}\) Testimony of corporate employees contradicted that information.\(^{30}\) After a hearing, counsel admitted the information provided to the court was incorrect and no efforts had been made to contact the director of technology until the eve of the argument on the motion for sanctions.\(^{31}\) The court concluded that counsel’s attempt to influence (if not misdirect) the court with unsubstantiated information falls below acceptable standards of professional conduct . . . [and] Corinthian’s characterization of the backup tapes has shifted with the winds throughout this litigation, adopting whatever posture is most convenient in the immediate context . . . Throughout the course of the litigation, Corinthian did not once provide a straight-forward explanation of the process and cost of extracting information from the tapes.”\(^{32}\)

The court imposed fines and costs on both Corinthian and its attorneys, but did not give an adverse inference instruction because the documents were ultimately recovered.\(^{33}\)

As the humorist Will Rogers once famously said: “It isn’t what we don’t know that gives us trouble. It’s what we know that ain’t so.”\(^{34}\) One sure fire way to blast your credibility out of the water is to act as if you know more than you do. This can be especially dangerous when dealing with technical or specialized areas, which abound in the digital era. Better to admit that you are over your head than to try to fake knowledge that is simply beyond you.

\(^{29}\) Id.
\(^{30}\) Id. at 679–80.
\(^{31}\) Id. at 679.
\(^{33}\) Id. at 682.
SUGGESTION NUMBER SEVEN: ACKNOWLEDGE THE LIKELIHOOD THE DECISION MAKER KNOWS EVEN LESS THAN YOU DO

A close corollary to our first suggestion is based on the proposition that one of the keys to effective advocacy is understanding your audience and tailoring your arguments to maximize the likelihood of success. Sensing which arguments will resonate with the decision maker, and which will not, is central to effective persuasion.

Abraham’s argument with God, depicted in the Old Testament in chapter 18 of Genesis, beginning at verse 23, provides a vivid example of an advocate targeting an appeal to a receptive audience. God, angry at the sins of the inhabitants of Sodom and Gomorrah, concludes that the two cities must be destroyed. Abraham, whose nephew Lot lives in Sodom, argues the case for leniency. As it is related in the Old Testament, Abraham—Avraham in Hebrew-addresses this directly to God:

Avraham came close and said: Will you really sweep away the innocent along with the guilty? Perhaps there are fifty innocent within the city, will you really sweep it away? Will you not bear with the place because of the fifty innocent that are in its midst? Heaven forbid for you to do a thing like this, to deal death to the innocent along with the guilty, that it should come about: like the innocent, like the guilty, Heaven forbid for you! The judge of all the earth—will he not do what is just?  

YHWH is persuaded and Abraham, like any good aggressive lawyer, pushes the point. He persuades God to spare Sodom if only 45 innocent people can be found there; then 40; and finally 10. Abraham knew precisely how to appeal to his audience; he appealed to God’s sense of justice. As far as he pushed the issue, he learned a lesson that all lawyers come to learn, sooner or later: you can argue a client’s case, but you cannot change a client’s behavior. Unfortunately for the residents of Sodom, not even ten innocents can be found, the city is destroyed, and Lot, ignoring the warnings of God’s angels, turns around and is turned into a pillar of salt. Not a good result.

In the digital age, this boils down to the following reality: it is likely that the judge, or other decision maker, knows as little, or even less, about the technologies involved than you do. Once again, this assumes that all other things are equal—which is often not the case. But you will have to

36 Genesis 18:25–33.
carefully calibrate your persuasive appeals depending on the age and experience and sophistication of your audience. Therefore, suggestion seven is this: Understand that you may be arguing to a blank slate, and plan your argument accordingly. Lest we be misunderstood, we are not asserting that judges are blank slates generally, just that most of them will be lost or overwhelmed when attempting to sort through the plethora of issues that ESI raises. A key component of your job, then, will be to determine, in advance of your argument, the level of technological sophistication of your decision-maker. You will have to educate them by leading them through the technological thicket, using words and concepts they can understand. Once again, this may require the help of an expert—to educate yourself so as to be able to educate the judge and jury.

When utilizing experts on ESI be mindful that experts often utilize unique terminology that may be unfamiliar to your audience. As the District Court in DC noted in an ESI case, "if you don’t use the right words in your question, you won’t get the right answer. You have to learn to ask the question in a number of ways and probe and examine and get into the nitty-gritty to understand what the truth is." Understanding the limitations of your audience and tailoring your presentation to your target audience will ensure effective advocacy.

**SUGGESTION NUMBER EIGHT: THINK AND ARGUE CREATIVELY**

Much has been written about the trial as a sort of morality play, with a beginning, middle and end; good characters and bad characters; and the need to build to a climax. At the heart of successful advocacy is effective storytelling—the ability to draw the listener into the argument so that the listener becomes fully invested in the story being told.

The digital age provides numerous opportunities to think and argue outside-the-box through the use of metaphors, analogies, stories, and technology itself.

If you can appeal to the decision-maker by linking their thinking to something with which they are familiar—in the service of explaining something unfamiliar—you will obtain a direct line into the listener’s thinking process. Suggestion eight, therefore, is this: think and argue creatively.

When it comes to ESI, this will require counsel to flexibly apply legal principles to the evolving technology. For example, in *State v. Spence*, the trial court had to apply the legal principle of constructive possession to

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the contents of a computer located within a residential property.\textsuperscript{39} During the trial, defense counsel argued that in order for the defendant to be found guilty of possession of more than 150 images and videos of child pornography, the state had to prove that he was in constructive possession, had the ability to access and control, the home and the computer.\textsuperscript{40} The jury instructions on constructive possession were written in the context of contraband being found in buildings or vehicles and not computers. Prior to the use of computers, it would be more likely that someone possessing child pornography might do so within a building or premises. The trial court reasoned that given the nature of the computer technology, the premises in that case was the computer and it was sufficient for the jury to find that the defendant was in constructive possession of the computer and its contents.\textsuperscript{41} Thus, the trial court had to modify the standard jury instructions to comport with advances in technology. This modification was a central issue on appeal and the CT Appellate Court, in affirming the trial court, noted that:

\begin{quote}
[find]ing control of the home in this case is not a requirement to infer possession of the contraband when the contraband is contained within another object, here the computer, that itself could be controlled and secured through the use of a password. "To mitigate the possibility that innocent persons might be prosecuted for . . . possessory offenses . . . it is essential that the state’s evidence include more than just a temporal and spatial nexus between the defendant and the contraband . . . While mere presence is not enough to support an inference of dominion or control, where there are other pieces of evidence tying the defendant to dominion and control, the [finder of fact is] entitled to consider the fact of [the defendant’s] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime."\textsuperscript{42}
\end{quote}

Counsel must also think creatively about the best method to present evidence to a jury or a judge. For example, in cases with a heavy reliance on computer forensics, counsel may want to employ a visual depiction of the level of forensic analysis performed. In some cases, it may require a visual tutorial of the forensic steps to an examination. Alternatively, a screen shot of a particular image of a computer analysis may be sufficient.

\textsuperscript{40} \textit{id.}
\textsuperscript{41} \textit{id.}
\textsuperscript{42} \textit{id.} at 1057 (Internal quotation marks omitted.) (\textit{citing} State v. Smith, 891 A.2d 974, 979 (Conn. App. 2006)).
Understanding the technology will assist counsel in thinking about the most effective means of presenting ESI.

Gerry Spence’s argument in the Karen Silkwood case provides a vivid example of taking a fairly complex legal idea—strict liability—and making it easily understandable to a jury. In this case, Spence was arguing on behalf of the estate of Karen Silkwood, who had died after exposure to plutonium. His job was to explain the concept of “strict liability” to the jury. He could have relied on arcane legal abstractions, but instead, here is what Spence said:

> You remember what I told you in the opening statement about strict liability? It came out of the Old English common law. Some guy brought an old lion on his ground, and he put it in a cage—and lions are dangerous—and through no negligence of his own—through no fault of his own, the lion got away. Nobody knew how—like in this case, “nobody knew how.” And, the lion went out and he ate up some people—and they sued the man. And they said, you know: “Pay. It was your lion, and he got away.” And, the man says: “But I did everything in my power—I had a good cage—had a good lock on the door—I did everything I could—I had security—I had trained people watching the lion—and it isn’t my fault that he got away.” Why should you punish him? They said: “We have to punish him—we have to punish you—you have to pay.” You have to pay because it was your lion—unless the person who was hurt let the lion out himself. That’s the only defense in this case: unless in this case Karen Silkwood was the one who intentionally took the plutonium out, and “let the lion out,” that is the only defense, and that is why we have heard so much about it.

The effectiveness of arguments like this is plain to see. They transform complex formulations into recognizable, everyday concepts. They take the indigestible and make it bite-sized.

So, for example, in a murder trial where the presence of an alleged participant at the crime scene is dependent on historical cell site analysis using call detail records, it may be useful to use a map of the area plotting the general location of the participant’s cell phone at a particular time. In some cases, the use of technology may be the most effective means of making a persuasive argument to the jury or judge. In this case scenario, it may be more effective to utilize an interactive PowerPoint that takes the numerical data and plots the exact location of the particular tower and sector that the subject cell phone used to place a call or send a text

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44 Id. at 244.
message. Absent a creative way to present this type of evidence, the data which consists of listings of letter designations and numerical values would be meaningless to a jury and judge alike.

Psychologists will tell you that the way a person frames an issue is crucial to their state of mind. Experienced lawyers also know that the way an issue is framed can often be outcome determinative. That is, persuading the decision-maker to view an issue from your client’s perspective can significantly predetermine the outcome. This applies in all contexts, but, once again, the nature and complexity of issues relating to ESI create a fertile opportunity to engage in creative advocacy. While cellular analysis may be hard to decipher and does not pinpoint the precise location of a cell phone or its user, displaying the data in the form of an interactive map may be quite persuasive in establishing the likelihood of someone’s presence at a crime scene at a particular time.

**SUGGESTION NUMBER NINE: ANSWER QUESTIONS DIRECTLY, HONESTLY, AND PERSUASIVELY; AND ADMIT YOU DO NOT KNOW THE ANSWER RATHER THAN GUESS**

It takes great skill to answer questions from the bench directly and persuasively. But it is a skill that is essential to effective advocacy. The lawyer who answers questions directly and promptly enhances his or her credibility and satisfies the trier’s desire for information. The lawyer who bobs and weaves, or says that they will “get back to that question later,” diminishes in credibility and risks annoying the judge. So when you are asked a question, the best approach is to embrace the first portion of Suggestion Nine: Answer questions directly, honestly and persuasively.

A particular danger exists in the digital age. The danger is that, given the complexity of issues relating to ESI, counsel may not have a clue when asked a question calling for technical expertise. The solution? Embrace the second portion of Suggestion Nine: Admit You Do Not Know the Answer Rather than Guess.

Imagine, for example, that the judge asks you whether your client’s computer system operates with commercially available software or whether it is operated on in-house proprietary software. You have no idea, but you do not want to appear unprepared or uninformed, so you say: “Your Honor I believe the data can be retrieved through commercially available software.” Bad mistake, not only because you are not being candid with the tribunal, but because you have entered onto the slippery slope. Relying on this information and believing the data is readily accessible, the judge may set a discovery schedule that you and your client
may not be able to meet. In short order, you will be revealed as uninformed and deceptive. Far better to say: “Your Honor, I really do not know but I will be glad to get that information for the court;” or “Your Honor, I cannot answer that question but my expert witness is in the courtroom. May I have a moment to confer with him or her?”

Providing the court with inaccurate information, even if unintentional, can lead you to lose credibility with the court and ultimately negatively impact your client’s cause. In some circumstances, this type of mistake could lead to ethical violations or a finding of malpractice.\footnote{See Knickerbocker v. Corinthian Colleges, 298 F. R.D. 670, 680 (W.D. Wash. 2014). (In an effort to avoid sanctions, counsel “painted a particularly optimistic picture of [client’s] ability to recover information from the back-up tapes” and then consistently failed to meet the deadlines).} In \textit{Knickerbocker v. Corinthian Colleges}, the trial court concluded that, in addition to relying on in-house counsel for technical advice rather than consulting with the more knowledgeable source, counsel’s “attempt to influence (if not misdirect) the court with such unsubstantiated information falls below acceptable standards of professional conduct.”\footnote{\textit{Id.} at 679.} The Court went on to conclude that “throughout the course of the litigation, Corinthian did not once provide a straight-forward explanation of the process and cost of extracting information from the tapes.”\footnote{\textit{Id.}} In the digital age, uninformed representations to the court, without further inquiry, could have disastrous consequences for an attorney, the client, or both.

\textbf{SUGGESTION TEN: ESCHEW THE ALL OR NOTHING, GLADIATOR MINDSET IN FAVOR OF A MORE COOPERATIVE MODEL}

One consequence of the new environment is the need for increased cooperation between parties. This may create difficulties for litigators steeped in the gunslinger tradition of all out warfare between the combatants in a legal dispute.

The problem is this: given the present realities of litigation—particularly in cases involving voluminous amounts of data—the old ways of doing things do not work because they do not serve anyone’s interests. Fighting over issues when one should be talking wastes enormous amounts of time, energy, and money. So even in the context of an adversary system which prizes aggressiveness, there must be room for
selective cooperation when such cooperation is to the mutual benefit of the parties.

Experts have recognized the need for a more cooperative mindset; and the idea is embodied in the Federal Rules of Civil Procedure. Rule 26 of the Federal Rules of Civil Procedure imposes a duty on parties, without awaiting a discovery request, to provide extensive information, including ESI, to the other side. The Federal Rules also require the parties to meet and confer to discuss, among other things, issues relating to electronic discovery. It is imperative that opposing counsel meet early on in the discovery process and have a plan in place on how to collect, review, and produce ESI. The Sedona Principles addressing discovery of ESI encourage cooperation by stating that “[p]arties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party’s rights and responsibilities.”

Given the increasing volume of ESI and the exorbitant costs of storing, searching, and producing ESI, cooperation is imperative. To be fair and reasonable is an essential trait that enhances credibility. Why is this so important? It is not merely a matter of surface appearances, although that does matter. When you are fair and reasonable, your persuasive appeal does not depend on brute force or coercive bullying. Rather, it rests on respectful persuasion, which is at the heart of truly effective advocacy.

Cooperation in the search and review methodology may also minimize the risk of inadvertent disclosures. With the increased volume of ESI, the likelihood of producing privileged or confidential information is greater. While counsel generally have an ethical obligation to return any privileged documents, a cooperative approach will promote compliance with ethical obligations. Ultimately cooperation will reduce costs, eliminate waste, and potentially result in favorable resolutions of contested matters.

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CONCLUSION

As lawyers increasingly confront issues relating to electronic discovery and digital evidence, their advocacy skills will be tested in new ways. Thriving in this new environment will take a combination of traditional advocacy skills, plus a willingness to learn about new technologies and to try creative new approaches to persuade. We hope this article will prompt thought, and suggest new approaches, to lawyers facing the humbling, but always exhilarating, task of advocating for a client. We hope this article will place some of the challenges facing counsel in the digital world in context. Most of all, we hope we have helped you to think anew, and ultimately to act anew, as the challenges of the digital age continue to unfold before our eyes.
THE DUTY TO PRESERVE SOCIAL MEDIA EVIDENCE

Matthew K. Curtin

Since the launch of Facebook in 2004, social media has become an increasingly integral aspect of a majority of Americans' lives, and correspondingly, an essential part of discovery. In 2005, only five percent of American adults used a social media platform; in 2011, approximately fifty percent of all Americans used social media; today, sixty-nine percent of all Americans use some form of social media to communicate with family and friends (e.g., Facebook, Instagram, Snapchat, Tumblr, Flickr, MySpace, Vine, Google+, Windows Live Spaces, Meetup.com, Orkut, Gather.com, MSN Spaces, and Twitter), network (LinkedIn, Monster.com, and CareerBuilder.com), and to seek out romantic connections (Tinder). ¹

The hyper-growth in social media use means it is now a necessity for litigators to familiarize themselves with the most popular social media sites (i.e., Facebook, Twitter, LinkedIn, and Instagram), ² and account for potentially relevant social media evidence when assessing preservation obligations. Indeed, given the widespread use of social media and the veritable treasure trove of discoverable information residing on social media sites, in order to competently represent a client, a lawyer must maintain knowledge of benefits and risks of relevant technology that may impact a client. ³ Although not every case will involve social media discovery, “in today’s technological world, almost every litigation matter potentially does.” ⁴

¹ PEW RESEARCH CENTER, SOCIAL MEDIA FACT SHEET, http://www.pewinternet.org/fact-sheet/social-media/
² See id.
³ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 8 (2013) (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”) (emphasis added).
Today, it cannot be disputed that relevant social media evidence is discoverable\(^5\)—even when a social media account is set to private.\(^6\) Thus, failure to account for and preserve potentially relevant social media evidence can have devastating consequences, including severe financial sanctions or even outright dismissal of a case.

I. BASIC CONSIDERATIONS FOR ENSURING PRESERVATION OF POTENTIALLY RELEVANT SOCIAL MEDIA EVIDENCE

A. Issue a Litigation Hold that Accounts for Potentially Relevant Social Media Evidence

A basic tenet of discovery is that parties have a duty to preserve potentially relevant evidence once they are on notice of actual or reasonably anticipated litigation.\(^7\) This basic tenet of discovery applies equally to social media evidence, as social media "materials may be subject to production just as material from a personal diary may be discoverable."\(^8\)

Accordingly, as soon as a party is on notice of actual or reasonably anticipated litigation, counsel should implement a litigation hold that accounts for potentially relevant social media evidence that is in the possession, custody or control of their client.\(^9\) A litigation hold is a written

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\(^5\) See, e.g., Congregation Rabbinical Coll. of Tartikov, Inc. v. Village Of Pomona, 138 F. Supp. 3d 352, 390 (S.D.N.Y. 2015) ("Facebook posts are regularly produced in litigation as evidence of a party’s thoughts and actions . . . .") (citation omitted).

\(^6\) See, e.g., Nucci v. Target Corp., 162 So.3d 146, 153 (Fla. Dist. Ct. App. 2015) ("Facebook itself does not guarantee privacy. . . . By creating a Facebook account, a user acknowledges that her personal information would be shared with others. . . . Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist.") (citations omitted); Patterson v. Turner Construction Co., 931 N.Y.S.2d 311, 312 (N.Y. App. Div. 2011) ("postings on plaintiff’s online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access.") (citation omitted).

\(^7\) See Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003); see also Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (Concluding that the obligation to preserve evidence arises when a "party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.").


\(^9\) As a general matter, individuals that are parties in litigation—for example, a plaintiff in an employment discrimination suit—have possession, custody, or control over their own, personal social networking accounts, as they can access that information at any time. Companies, on the other hand, do not have possession, custody or control over their employees’ personal social media accounts. See, e.g., The Sedona Conference, The Sedona Conference
instruction mandating a party and its agents (e.g., custodians of potentially relevant information, including key players in potential litigation, a company’s IT department, or third parties that maintain potentially relevant documents or electronically stored information (“ESI”) on behalf of a party) preserve potentially relevant evidence and suspend the destruction of documents, including ESI, pursuant to any document retention policies. Although “a litigant is under no duty to keep or retain every document in its possession, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.”

Implementing an initial litigation hold is an important and necessary step towards good-faith compliance with preservation obligations. The initial litigation hold is not the end of ensuring a client complies with its preservation obligations, however. Counsel must actively monitor a client’s compliance with the litigation hold and preservation activities throughout litigation, including issuance of periodic reminders throughout the duration of litigation and assessing if and when custodians should be added to a litigation hold (e.g., if a defendant employer hires new human resources personnel responsible for maintaining potentially relevant information, or a key witness is identified during the course of discovery).

B. Assess and Understand the Client’s Social Media Footprint

To implement a comprehensive and defensible litigation hold and ensure preservation of potentially relevant evidence, a lawyer must assess a client’s social media footprint, i.e., identify all of the client’s social media networks and the scope of potentially relevant evidence therein. For example, the Advisory Committee Notes on the 2015 Amendments to

Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control,” 17 SEDONA CONF. J. 467, 468–573 (2016). See also Matthew Enterprise, Inc. v. Chrysler Group LLC, No. 13-cv-04236, 2015 WL 8482256 (N.D. Ca. Dec. 10, 2015) (holding that employer does not have “possession, custody, or control” over its employees’ personal email accounts, and denying motion to compel production of emails from employees’ personal email accounts).


11 See Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431-32 (S.D.N.Y. 2004) (“A party’s discovery obligations do not end with the implementation of a ‘litigation hold’—to the contrary, that’s only the beginning.”).

Federal Rule of Civil Procedure 37(e) state that, when assessing "reasonable steps" to preserve relevant information, "[i]t is important that counsel become familiar with their clients' information systems and digital data – including social media – to address these issues." Lawyers must be "conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use." These obligations apply equally to individuals in litigation as they do for corporate parties, and counsel representing individuals in litigation.

For example, an attorney representing a defendant in a criminal case should identify whether there are any potentially incriminating or exculpatory pictures or comments on the client's Facebook page. An attorney representing a plaintiff asserting sexual harassment should assess whether the employee has posted any pictures on her Instagram account that negate a claim for emotional distress damages, e.g., if the plaintiff is claiming that she can no longer maintain romantic relationships because

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14 N.Y. STATE BAR ASSOCIATION, SOCIAL MEDIA ETHICS GUIDELINES at 3 (updated June 9, 2015), http://www.nysba.org/socialmediaguidelines/. The NYSBA Social Media Guidelines discuss seven guidelines, including: attorney competence; attorney advertising; furnishing of legal advice through social media; review and use of evidence from social media; communicating with clients; researching jurors and reporting juror misconduct; and using social media to communicate with a judicial officer. These guidelines provide a useful reference for anyone dealing with social media discovery, no matter the level of experience.

15 See IN EMPLOYMENT CASES, EDISCOVERY IS A TWO-WAY STREET, THE FEDERAL JUDGES' GUIDE TO DISCOVERY, 108-15, The Electronic Discovery Institute (Edition 2.0 2015) ("While eDiscovery often focuses on corporate defendants' IT systems and data, litigants should not lose sight that e-Discovery is a two-way street and discovery obligations apply just as forcefully to individual plaintiffs—who often anticipate litigation well before any defendants. Individual plaintiffs have eDiscovery duties and responsibilities and face consequences for failing to fulfill them.... Courts have recognized there are a vast number of sources of electronic data common in today's digital world from which individual plaintiffs may need to preserve, search and produce data, including electronically stored information within or on: personal email accounts; personal computers; social networking sites (including those designated "private"); smart phones, including text and SMS messages and other data; and tweets.").

16 See, e.g., Painter v. Atwood, No. 2:12-CV-01215 (JCM) (RJJ), 2014 WL 1089694, at *6 (D. Nev. Mar. 18, 2014) (entering adverse inference against a plaintiff who deleted Facebook comments in which she stated she enjoyed working for the defendant she had accused of sexual harassment, and rejecting assertion that the deletion of Facebook data should be excused because "Plaintiff is a 22-year old girl who would not have known better than to delete her Facebook comments," instructing: "At the hearing on this matter, Plaintiff's counsel conceded that Plaintiff deleted Facebook comments... and that she deleted those comments after she retained counsel for this litigation." As the Court stated at the hearing, it is of no consequence that Plaintiff is young or that she is female and, therefore, according to her counsel, would not have known better than to delete her Facebook comments. Once Plaintiff retained counsel, her counsel should have informed her of her duty to preserve evidence and, further, explained to Plaintiff the full extent of that obligation.)
of the alleged harassment, pictures of the plaintiff enjoying a vacation with a romantic partner would certainly be relevant to her claims and the employer's defenses. An attorney defending a plaintiff in a personal injury lawsuit should check the plaintiff's Twitter account to see if the plaintiff posted any pictures or comments depicting vigorous physical activity that could negate a claimed injury.

II. SANCTIONS FOR FAILURE TO PRESERVE RELEVANT SOCIAL MEDIA EVIDENCE

Failure to preserve relevant social media evidence can lead to charges of spoliation of evidence. Because social media evidence is no different than any other relevant evidence, spoliation of social media evidence can lead to sanctions, including adverse inference instructions, financial penalties, or terminating sanctions.

There are many cases that illustrate how failure to preserve social media evidence can lead to sanctions. For example, in Allied Concrete Co. v. Lester, the plaintiff's counsel advised the plaintiff to "clean up" his Facebook feed because "[w]e do NOT want blow ups of this stuff at trial." Lester was a wrongful death action in which the husband of the decedent won at trial and the Virginia Supreme Court affirmed the jury's multi-million dollar damages award on behalf of the husband.

The defendant filed multiple post-trial motions, including motions for sanctions requesting a new trial. The defendant complained that the lawyer had instructed the husband, via an email sent by his paralegal, to

17 Spoliation of evidence is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 430 (S.D.N.Y. 2004).
20 Fed. R. Civ. P. 37(e), that sets forth the standards that apply to spoliation of electronically stored information ("ESI"), was amended in December 2015, and now provides that adverse jury instructions or dismissal for the loss of ESI that should have been preserved in the anticipation of litigation can be entered "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2). It is likely the relief afforded in each of the cases discussed herein would have been the same under the amended rule, given the court's finding of intentional misconduct with respect to the social media evidence.
22 Id. at 709.
23 Id. at 705.
"clean up" his Facebook page after the defendant’s lawyers sent a discovery request seeking production of screen prints of the husband’s Facebook page and attached a copy of a photograph from the husband’s Facebook page depicting him wearing a T-shirt "emblazoned with ‘I ♥ hot moms,’” while holding a beer.24 The husband deactivated his Facebook account after receiving this email.25

The Virginia Supreme Court affirmed the trial court’s denial of a new trial, but upheld the trial court’s monetary sanction against the plaintiff’s lawyer in the amount of $542,000.26 The lawyer subsequently agreed to a five-year suspension of his license to practice law “for violating professional rules that govern candor toward the tribunal, fairness to opposing party and counsel, and misconduct.”27

In Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona, the plaintiffs challenged the lawfulness of certain municipal laws prohibiting them from building a rabbinical college.28 During the pendency of the lawsuit, and after defense counsel had issued a litigation hold, one of the individual defendants posted a comment on her Facebook page disapproving of an all-male gathering of Hasidic/Orthodox Jews.29 Despite the litigation hold, the individual defendant deleted the Facebook comment after a heated text message exchange with the mayor of the defendant municipality, in which the mayor expressed concern that the plaintiffs’ counsel would use the Facebook post against the municipality.30 After the post was deleted, the mayor took to Facebook to renounce the comments and explicitly reference the deleted Facebook post.31 Plaintiff’s counsel saw the mayor’s Facebook post and issued a discovery request asking for production of the deleted Facebook post.32 Defense counsel responded that they could not produce the Facebook post because they did not retain a copy, so the plaintiffs moved for terminating sanctions.33

The court declined to issue terminating sanctions, but found that an

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24 Id. at 702.
25 Allied Concrete Co., 736 S.E.2d at 702.
26 Id.
29 Id. at 385.
30 Id.
31 Id. at 385–86.
32 Congregation Rabbinical College of Tartikov, Inc., 138 F. Supp. 3d at 386.
33 Id.
adverse inference instruction was warranted.\textsuperscript{34} The court reasoned that the Facebook post was germane to the lawsuit as it could have been circumstantial evidence of anti-Semitic animus, and that the defendants intentionally destroyed the offending Facebook post to prevent the plaintiffs from using it against the defendants in the lawsuit.\textsuperscript{35} The court therefore held, that the jury would be instructed “that it may infer that the contents of the Facebook Post indicated discriminatory animus towards the Hasidic Jewish population,”\textsuperscript{36} a damaging inference given the subject matter of the lawsuit.

\section*{III. CONCLUSION}

The explosion of social media use means that discovery of social media data is the new normal. Like ESI discovery in general, social media is not going away and lawyers who have not yet familiarized themselves with the core concepts of social media technology must do so to competently represent their clients.

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\textsuperscript{34} Id. at 392.
\textsuperscript{35} Id. at 393.
\textsuperscript{36} Congregation Rabbinical College of Tartikov, Inc., 138 F. Supp. 3d at 393.
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