MEN COME AND GO, BUT *ROE* ABIDES: WHY *ROE V. WADE* WILL NOT BE OVERRULED

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INTRODUCTION

Few Supreme Court cases have generated such fiercely divisive political mobilization as *Roe v. Wade*.[1] The abortion issue is perhaps the hottest of all hot-button issues, and the lines have been drawn in the streets, in our law schools, in our state and federal legislatures, and in our courts.

Personal perspectives about *Roe* and abortion in general are often tied to strong feelings and passionately held beliefs. Some believe that abortion is murder, full stop. For these people, even the smallest concession on the issue is tragic. Others believe that the abortion choice is central to a woman's liberty and autonomy: to permit the state to dictate decisions about procreation –

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[1] Roe v. Wade, 410 U.S. 113 (1973).

decisions that so fundamentally affect women – would deny them equal citizenship and personhood.

Legally, the abortion issue implicates the precarious tightrope walk between constitutionally guaranteed rights and the rights of states in our federalist governmental structure. Since the day the Court handed it down, *Roe* has engendered scathing criticism and much academic debate. In the wake of major Supreme Court decisions on abortion rights and restrictions, scholars on both sides of the debate analyze the decision and articulate strategies for the future.[2] Others write from an eschatological perspective and attempt to map out what the legal landscape for abortion would be if *Roe* were overruled.[3] Even if *Roe* were to be overruled, state constitutional and statutory law, if unchanged, would provide most women with a general right to choose to terminate their pregnancies.[4]

This Note takes a separate path. Rather than arguing that *Roe* should or should not be overruled, I argue instead that it will not be overruled. As such, this Note fills a critical void in the scholarly literature. Although others have surmised that *Roe* will not be overruled, there has been no comprehensive analysis of why this is so.

Perhaps more importantly, this Note questions the vast amount of time, energy, and money spent by both sides of the abortion debate. If *Roe* will not be overruled, efforts to do so will continue to be unsuccessful. The resources spent by anti-abortion forces in an attempt to overrule *Roe* and by pro-choice forces defending *Roe* will be mostly wasted.

This Note begins by exploring the contours of the abortion right. Part I begins with an examination of the Supreme Court's abortion jurisprudence. Over the past thirty-seven years, the Court has substantially modified the rule first announced in *Roe*. The Court's abortion cases demonstrate a continual clarification of *Roe*: rather than chipping away at *Roe*, these cases should be seen as trimming away the fat, leaving only *Roe*'s elemental nature.

Part I continues by examining the current breadth of a woman's right to choose to terminate her pregnancy. It is clear that even under *Roe* this right is not very expansive. For some women, state abortion restrictions may make it extremely difficult to obtain an abortion, but this difficulty might not violate

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[2] *See, e.g.*, Steven G. Calabresi, *How to Reverse Government Imposition of Immorality: A Strategy for Eroding* Roe v. Wade, 31 HARV. J.L. & PUB. POL'Y 85 (2008) (providing guidance to anti-abortion advocates on strategies for overruling *Roe*); Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989) (criticizing *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and directing their legal analysis to Justice O'Connor who was thought to be the swing vote on the abortion issue).

[3] *See* Paul Benjamin Linton, *The Legal Status of Abortion in the States if* Roe v. Wade *Is Overruled*, 23 ISSUES L. & MED. 3 (2007) (conducting a comprehensive survey of state abortion law); *see also* Stephen Gardbaum, *State and Comparative Constitutional Law Perspectives on a Possible Post-*Roe *World*, 51 ST. LOUIS U. L.J. 685 (2007).

[4] Linton, *supra* note 3, at 39.

the right to choose to procure an abortion. The narrow protections *Roe* now affords will help ensure that it is not overruled because few abortion restrictions would even implicate *Roe*.

Part II provides additional justification for *Roe*'s continued viability. The doctrine of stare decisis requires the Court to follow *Roe*. Although the Court is sometimes justified in overruling prior judgments, none of those situations apply to *Roe*. Additionally, the Court's continued legitimacy would be threatened if the Court were to overrule *Roe*. Women's continued reliance on *Roe* also further insulates it from attack.

Part II continues by probing an alternate justification for *Roe*'s holding: one grounded in the Equal Protection Clause of the Fourteenth Amendment. This rationale has been professed by scholars and Supreme Court Justices alike. Growing support for the equal protection argument would in turn help bolster *Roe*.

The abortion issue is politically divisive. One clear manifestation of this is the role the abortion issue plays in the Supreme Court confirmation process. This politicization minimizes the likelihood that the Senate would confirm a potential justice who is staunchly opposed to abortion. In this way, the confirmation process helps minimize the effect of the political efforts to overrule *Roe*.

Additionally, the Court has expressed a desire to walk away from the abortion issue. Although overruling *Roe* would seem to permit them to do so, in fact it does not. One way that the Court could extricate itself from the abortion issue is to refuse to grant certiorari on such cases. The Court's use of certiorari coupled with its desire to be free of the abortion issue indicates that the Court will not overrule *Roe*.

Finally, the abortion issue may be taken from the Court altogether. Congress has expressed interest in codifying *Roe*, and President Obama would likely assent to its attempt to do so. If Congress were to pass such legislation successfully, *Roe* would not even be implicated by challenges to abortion restrictions.

Each of the foregoing arguments is subject to criticism; Part II addresses these major issues. Yet none of the criticisms effectively negate these justifications. On balance, though none of these justifications is independently weighty enough to ensure that *Roe* will not be overruled, together they provide ample support. Part III concludes by discussing the benefits of abandoning the fight over *Roe*. Because *Roe* is unlikely to be overturned, the continued fight over *Roe* is an inefficient use of resources. Despite the vast sums already spent by those in the anti-abortion movement, *Roe* still abides. Furthermore, it is unclear whether the few restrictions anti-abortion forces have been able to enact since *Roe* have caused a decline in the rate at which abortions are performed. The time, effort, and resources spent by anti-abortion forces would be better directed toward efforts that may actually reduce the rate of abortions by providing services and support to pregnant women who may otherwise choose to terminate their pregnancy. Similarly, resources spent by the pro-

choice movement would be better directed toward educating women on proper contraceptive use and by providing services and support to women who lack the means to procure an abortion.

I. THE CONTOURS OF THE ABORTION RIGHT

Prior to the Supreme Court's decision in *Roe v. Wade*, there was no clearly recognized federal right to procure an abortion. In the thirty-seven years since *Roe* was decided, the Court has struggled to clearly articulate this right. This Part begins by examining *Roe*.[5] The discussion then chronicles limitations on the right to procure an abortion and a discussion of how broad the abortion right currently is.[6]

A. Roe v. Wade*: Establishing a Fundamental Abortion Right*

In the early 1970s, most states had some form of legislation in place restricting a woman's access to procure an abortion.[7] Texas, like many states, had restricted abortion for more than one hundred years,[8] and the Texas statutes restricting abortion in 1970 were essentially the same as Texas's original abortion restrictions.[9] These statutes made it a crime for a person to provide the means to "procure an abortion"[10] unless "procured or attempted by medical advice for the purpose of saving the life of the mother."[11]

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[5] *See infra* Part I.A (summarizing the Court's abortion jurisprudence).

[6] *See infra* Part I.B (describing the effects of the current, less robust abortion right).

[7] *See* Roe v. Wade, 410 U.S. 113, 118 n.2 (1973); Mark A. Graber, *The Ghost of Abortion Past: Pre-*Roe *Abortion Law in Action*, 1 VA. J. SOC. POL'Y & L. 309, 313 (1994) ("From 1900 until 1970 the penal code in every state included a section that banned abortion except in certain narrowly defined instances.").

[8] *See Roe*, 410 U.S. at 174-76 & n.2 (Rehnquist, J., dissenting).

[9] *Id.* at 119 (majority opinion).

[10] TEX. PENAL CODE ANN. § 1191 (Vernon 1961) ("If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."). Articles 1191 to 1196 of the Texas Penal Code all dealt with abortion. *Id.* §§ 1191-1196. In 1973, Texas enacted a new penal code, and these articles were transferred to articles 4512.1 through 4512.6 of the Civil Statutes. *See* 1973 Tex. Gen. Laws 995-96, 996e (organizing the transfer of unrepealed Texas penal statutes into one, unified penal code). The text of these articles is no longer published in West's annotated version. *See* TEX. REV. CIV. STAT. ANN. §§ 4512.1-4512.6 (Vernon 1976).

[11] TEX. PENAL CODE ANN. § 1196.

Jane Roe[12] was an unmarried pregnant woman from Texas who wanted to terminate her pregnancy.[13] Because Roe did not have a life-threatening condition, she was prevented from procuring a "legal" abortion in Texas.[14] Unable to afford to travel to another state for an abortion and unwilling to seek an illegal abortion in Texas, Roe instead challenged the constitutionality of the Texas statutes "on behalf of herself and all other women similarly situated," claiming that the statutes infringed upon her right to privacy guaranteed under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.[15]

Perhaps anticipating the controversy the case would generate, Justice Blackmun's decision in *Roe v. Wade* first discussed the foundations of legal and ethical thought about abortion.[16] Justice Blackmun began with a survey of the history of abortion restrictions from antiquity through modern times, determining that abortion was relatively unrestricted until "the latter half of the 19th Century."[17] Additionally, Justice Blackmun recognized that historical opposition to abortion within the medical profession had begun to lessen.[18] Finally, the Court indicated that the legal community also seemed to favor greater access to abortion.[19]

The Supreme Court explicitly recognized a personal privacy right in *Griswold v. Connecticut*.[20] *Griswold* concerned the constitutionality of a statute that prohibited the use of contraceptives.[21] The Court noted that certain rights enumerated under the Bill of Rights – for example the freedom of speech and freedom of the press – had been expanded to ensure that the fundamental

[12] Jane Roe is a pseudonym. The plaintiff's real name is Norma McCorvey. She has chronicled her story in NORMA MCCORVEY WITH ANDY MEISLER, I AM ROE: MY LIFE, *ROE V. WADE*, AND FREEDOM OF CHOICE (1994). A couple, using the pseudonyms John and Mary Doe, and Dr. James Huber Hallford, were also appellants to the Supreme Court. *Roe*, 410 U.S. at 120-22 (explaining that the Does "filed a companion complaint" and that Dr. Hallford "sought and was granted leave to intervene in Roe's action"). The Court affirmed the District Court's dismissal of the Does' complaint and dismissed Dr. Hallford as an intervenor for lack of standing. *Id.* at 125-29.

[13] *Roe*, 410 U.S. at 120.

[14] *Id.*; *see also* TEX. PENAL CODE ANN. §§ 1191, 1196.

[15] *Roe*, 410 U.S. at 120.

[16] *Id.* at 129-47 (discussing "[a]ncient attitudes," the Hippocratic Oath, the common law, English and American statutory law, and the positions of the American Medical Association, American Public Health Association, and the American Bar Association).

[17] *Id.* at 129. Justice Blackmun's historical analysis has been heavily criticized. *See, e.g.*, Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 307 (2006).

[18] *Roe*, 410 U.S. at 141-46.

[19] *Id.* at 146 n.40, 147 n.41.

[20] 381 U.S. 479, 485 (1965).

[21] *Id.* at 480.

aspects of these guarantees are protected.[22] Indeed, it is the "penumbras" extending from these explicit rights which help shape these guarantees.[23] The Court declared that the specific protections provided by the Bill of Rights create a "zone of privacy," which includes the marital relationship.[24] The Connecticut statute restricting access to contraceptives was found to violate this right of marital privacy – a right that the Court claimed preceded the Constitution.[25]

In *Roe*, the Court found this "fundamental"[26] right of privacy to be "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[27] Yet the Court explained that this right, though fundamental, is not absolute[28]: a state may place restrictions on a fundamental right if the regulation is "narrowly drawn" to address a "compelling state interest."[29]

The first legitimate state interest related to abortion is the safety of the pregnant woman.[30] The Court held that abortion is relatively safe in the early stages of pregnancy,[31] but as the pregnancy progresses toward term, "the risk to the woman increases."[32] According to the Court, the legitimate interest in maternal health becomes a compelling state interest "at approximately the end of the first trimester."[33]

Another state interest which could restrict the abortion right is the protection of the fetus.[34] The Constitution does not explicitly guarantee a fetus's right to life because a fetus is not a "person" as the term is used in the Fourteenth Amendment.[35] Nonetheless, the *Roe* Court held that a state has a legitimate

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[22] *Id.* at 482-83.

[23] *Id.* at 484.

[24] *Id.* at 485.

[25] *Id.* at 486 ("We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system.").

[26] Roe v. Wade, 410 U.S. 113, 152 (1973) ("[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Some scholars have argued that the abortion right is not a fundamental right. *See* Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 101-02 (2005).

[27] *Roe*, 410 U.S. at 153.

[28] *Id.* at 154.

[29] *Id.* at 155.

[30] *Id.* at 150.

[31] *Id.* at 149 (discussing how advances in medical techniques have lowered mortality rates for first trimester abortions below those for childbirth).

[32] *Id.* at 150.

[33] *Id.* at 163.

[34] *Id.* at 150 ("[A]s long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.").

[35] *Id.* at 158.

interest in the preservation of the "potentiality of human life."[36] This interest becomes compelling when the fetus reaches viability.[37]

Balancing the fundamental right to an abortion against the compelling state interests yields the following framework[38]:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State, in promoting its interests in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[39]

The Court decided a companion case, *Doe v. Bolton*,[40] at the same time as *Roe v. Wade*. These two decisions "are to be read together."[41] In *Doe*, the Court clarified that the right to choose to procure an abortion did not grant a woman "an absolute constitutional right to an abortion on her demand."[42] However, the Court granted doctors wide discretion in deciding whether an abortion is necessary for the preservation of the life and health of the mother, effectively limiting the states' ability to restrict abortion post-viability.[43] Thus, the abortion right created in *Roe* was particularly expansive, even if it was not abortion on demand.[44]

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[36] *Id.* at 162.

[37] *Id.* at 163 (arguing that a viable fetus has the potential for independent life).

[38] This is often referred to as the aptly named *Roe* trimester framework. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989).

[39] *Roe*, 410 U.S. at 164-65.

[40] 410 U.S. 179 (1973) (holding certain procedural restrictions on abortion providers unconstitutional).

[41] *Roe*, 410 U.S. at 165.

[42] *Doe*, 410 U.S. at 189.

[43] *Id.* at 192 ("[M]edical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being 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.").

[44] *See* Forsythe & Presser, *supra* note 26, at 96 ("In effect, then, though abortion had been subject to criminal penalties for most of American history in all places, abortion was now legal everywhere, at any time in pregnancy.").

Although *Roe* established a fundamental abortion right,[45] it gave mixed messages about who held this right. Texas, the Court said, may not "override the rights of the pregnant woman that are at stake."[46] However, in balancing the interests involved, it was the physician's interests – not the woman's – which the Court weighed against the State's interests.[47] Furthermore, the Court stressed that *Roe*'s holding "vindicates the right of the physician."[48] Thus, although couched in personal privacy, the right to terminate a pregnancy under *Roe* is not personal to the woman.

B. Roe v. Wade*: The Potemkin Village?*

In his dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Chief Justice Rehnquist derisively referred to *Roe v. Wade* as a "sort of judicial Potemkin Village."[49] Rehnquist believed that *Casey* modified *Roe*'s holding so substantially, that it ushered in "an entirely new method of analysis."[50] Thus, like the fake villages constructed by Russian minister Grigori Aleksandrovich Potemkin to give the impression they were really inhabited, Rehnquist asserted that *Casey* transformed *Roe* into little more than a hollow façade.[51]

The image of *Roe* as a Potemkin Village has some merit. In addition to its legal significance, *Roe* also holds an important place in American culture and psyche.[52] However, the right to procure an abortion announced by *Roe* more than thirty-seven years ago is now much different than the right that the Court originally formulated. Presumed dead by many after *Webster v. Reproductive Health Services*,[53] *Roe* was resurrected in *Casey*.[54] But rather than reviving an authentic version of *Roe*, this new incarnation of the abortion right only "retains the outer shell of *Roe v. Wade*,"[55] and left *Roe* essentially

[45] *See supra* note 26 and accompanying text.

[46] *Roe*, 410 U.S. at 162.

[47] *Id.* at 164-66.

[48] *Id.* at 165.

[49] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., dissenting).

[50] *Id.*

[51] *Id.*

[52] John A. Robertson, Casey *and the Resuscitation of* Roe v. Wade, HASTINGS CTR. REP., Sept.-Oct. 1992, at 24, 24 (stating that *Casey*'s reaffirmation of *Roe* "reflects how deeply the right to abortion resonates in the public psyche").

[53] 492 U.S. 490, 556 (1989) (Blackmun, J., dissenting) (stating that the significance of the Court's decision was "that *Roe* is no longer good law"); *see also id.* at 532 (Scalia, J., concurring) (agreeing with Justice Blackmun that the Court's decision "effectively would overrule *Roe v. Wade*").

[54] 505 U.S. at 922 (Blackmun, J., concurring) (comparing *Roe* to a nearly extinguished flame that, after *Casey*, "has grown bright").

[55] *Id.* at 944 (Rehnquist, C.J., dissenting).

"redefined."[56] This Section explores the ways in which *Roe* has been modified by the Court's subsequent jurisprudence.

First and foremost, the right to choose to have an abortion is now examined under a different level of constitutional review. Prior to *Casey*, abortion had been considered a fundamental right subject to strict scrutiny.[57] Post-*Casey*, abortion restrictions are now subjected to an "undue burden" test.[58]

The Court initially conceived the "undue burden" analysis as a threshold test to determine whether strict scrutiny review was appropriate. As the Court said in *Akron I*, "[t]he 'undue burden' required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard."[59] If an abortion restriction does not impose an undue burden on that right, the Court should analyze the constitutionality of the statute under rational basis review.[60] However, as some have observed this standard is far less exacting than strict scrutiny:

> Substantially changing the standard of review used to evaluate the constitutionality of abortion regulations, the Justices in *Casey* rejected the strict scrutiny standard of review mandated by *Roe*, adopting instead the more permissive "undue burden" standard. Under this new standard, the right to choose abortion is no longer a fundamental right and thus, women seeking abortions are no longer entitled to the strong protections afforded other fundamental rights, such as the right to free speech and the right to vote.[61]

Furthermore, the "undue burden" test, in practice, seems to provide a much lower level of constitutional protection because the Court found that the Partial-Birth Abortion Ban Act of 2003 imposed no undue burden on a woman's right to choose to have an abortion despite substantial evidence that the act could jeopardize the health of pregnant women seeking an abortion.[62]

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[56] Nadine Strossen & Ronald K.L. Collins, *The Future of an Illusion: Reconstituting* Planned Parenthood v. Casey, 16 CONST. COMMENT. 587, 588 (1999).

[57] *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986) (invalidating an abortion restriction because it did not "further legitimate compelling interests").

[58] *Casey*, 505 U.S. at 874 (O'Connor, Kennedy, Souter, JJ., plurality opinion).

[59] City of Akron v. Akron Ctr. for Reprod. Health, Inc. (*Akron I*), 462 U.S. 416, 463 (1983).

[60] *Id.* at 462.

[61] Kathryn Kolbert & David H. Gans, *Responding to* Planned Parenthood v. Casey*: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1154 (1993).

[62] Gonzales v. Carhart, 550 U.S. 124, 166-67 (2007) ("The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health . . . .").

The effect of this change is that the availability of abortion will likely be more limited for some women because the weakened standard of review permits the Court "to consider seriously, and to sustain, many plausible measures that may impose real restrictions on abortion."[63] Additionally, the many restrictions on the right to choose to procure an abortion that have already been upheld under the more stringent strict-scrutiny review would continue to be permissible under the less stringent undue burden test.

Thus, there are many ways in which a state may restrict a woman's access to abortion while not imposing an undue burden on the woman's right. For example, a state need not fund non-therapeutic abortions.[64] A state can even discriminate in favor of childbirth by providing funding to support pregnant women who choose to give birth while refusing to fund abortions.[65] Additionally, a state can prevent publicly funded hospitals from providing non-therapeutic abortions.[66]

A state may regulate abortion providers in many ways. For example, a state may require physicians to determine whether the fetus is viable prior to performing an abortion.[67] A state may require abortion providers to distribute to patients state-mandated information about the abortion procedure and alternatives to abortion before obtaining the patient's consent.[68] States can prohibit physicians from performing the so-called partial birth abortion procedure unless medically necessary to preserve the life of the pregnant woman.[69] States may also require facilities performing abortions to report to the state certain data about the abortions performed at the facilities.[70]

A state can place restrictions on the patient as well. A pregnant woman may be required to profess that she is giving her *informed* consent to the abortion procedure.[71] Additionally, a state can require a woman to wait twenty-four hours after giving informed consent before she can abort her fetus.[72] Parental

[63] Hadley Arkes, *Great Expectations and Sobering Truths: Partial-Birth Abortion and the Commerce Clause*, 1 U. ST. THOMAS J.L. & PUB. POL'Y 5, 6 (2007).

[64] Beal v. Doe, 432 U.S. 438, 447 (1977).

[65] Maher v. Roe, 432 U.S. 464, 474 (1977).

[66] Poelker v. Doe, 432 U.S. 519, 521 (1977) (per curiam); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 510-12 (1989) ("Nothing in the Constitution requires States to enter or remain in the business of performing abortions.").

[67] *Webster*, 492 U.S. at 513, 519-20, 525, 532.

[68] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882-83 (1992) (O'Connor, Kennedy, Souter, JJ., plurality opinion).

[69] Gonzales v. Carhart, 550 U.S. 124, 164 (2007).

[70] *Casey*, 505 U.S. at 900-01.

[71] *Id.* at 887; *id.* at 967 (Rehnquist, C.J., concurring in part).

[72] *Id.* at 885-87 (O'Connor, Kennedy, Souter, JJ., plurality opinion).

consent statutes that include a judicial bypass also do not impose an undue burden on a minor's right to elect to have an abortion.[73]

The practical effect of these restrictions is that some women may have the right to choose to terminate their pregnancy, but may not be able to do so. For example, Mississippi, North Dakota, and South Dakota each have only one abortion provider, and South Dakota's facility only provides abortions one day each week.[74] The availability of the abortion option appears particularly restricted in Wyoming: only about a dozen abortions are reportedly performed each year in that state.[75] Additionally, "87% of United States counties have no abortion provider."[76] Because of twenty-four-hour waiting periods, some women in these counties may need to make two trips, covering hundreds of miles.[77] Nonetheless, such restrictions do not offend the Constitution.[78]

The constitutional protection of the right to choose to have an abortion has been limited in another way. Prior to *Gonzales v. Carhart*, "[v]irtually all of the major abortions cases brought before the Supreme Court have involved facial challenges to state and federal abortion statutes."[79] However, the Court has declared that it will no longer entertain facial challenges to an abortion statute.[80] Facial challenges generally require the plaintiff to show that "no set of circumstances exists under which the Act would be valid."[81] Nonetheless, the Court had historically permitted facial challenges to abortion statutes, and invalidated a statute merely upon a showing that it might theoretically be unconstitutional as applied to some other person.[82] Thus, members of the Court had effectively "transposed the burden of proof. Instead of requiring the

[73] *See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510-20 (1990); *see also Casey*, 505 U.S. at 899-900; *id.* at 970 (Rehnquist, C.J., concurring in part).

[74] Janessa L. Bernstein, Note, *The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash*, 73 BROOK. L. REV. 1463, 1485 & nn.99-100 (2008).

[75] *See* Ctrs. for Disease Control & Prevention, *Abortion Surveillance – United States, 2005*, MORBIDITY & MORTALITY WKLY. REP., Nov. 28, 2008, at 19 tbl.4, *available at* http://www.cdc.gov/mmwr/pdf/ss/ss5713.pdf (reporting that fourteen legal abortions were performed in Wyoming in 2005); Ctrs. for Disease Control & Prevention, *Abortion Surveillance – United States, 2002*, MORBIDITY & MORTALITY WKLY. REP., Nov. 25, 2005, at 19 tbl.4, *available at* http://www.cdc.gov/mmwr/pdf/ss/ss5407.pdf (reporting that ten legal abortions were performed in Wyoming in 2002).

[76] Bernstein, *supra* note 74, at 1500.

[77] *See Casey*, 505 U.S. at 885-86.

[78] *Id.* at 886.

[79] Jill Hamers, Note, *Reeling in the Outlier:* Gonzales v. Carhart *and the End of Facial Challenges to Abortion Statutes*, 89 B.U. L. REV. 1069, 1074 (2009); *see also id.* at n.34 (collecting cases).

[80] *See* Gonzales v. Carhart, 550 U.S. 124, 167 (2007).

[81] United States v. Salerno, 481 U.S. 739, 745 (1987).

[82] *See Casey*, 505 U.S. at 887-95 (invalidating a spousal consent provision because it imposed an undue burden in "a large fraction of the cases in which [it] is relevant").

[plaintiffs], who are challenging the [abortion restriction], to show that it is invalid in all its applications, they have required the [government] to show that it is valid in all its applications."[83] Because the Court has refused to hear facial challenges to abortion statutes in the future, abortion restrictive statutes will not be invalidated wholesale. Abortion restrictions will generally be upheld unless they actually impose an unconstitutional restriction on the plaintiff or through "preenforcement, as-applied challenges."[84]

Since *Roe* was first handed down, efforts have been made at both the state and federal level to regulate, and in some cases, proscribe the abortion procedure. In many ways this is perfectly in line with *Roe*'s holding,[85] and yet at other times it seems at odds with *Roe*.[86] Yet for more than thirty-seven years, a very basic right to choose to terminate a pregnancy has been guaranteed: generally, at the inception of pregnancy, states cannot materially prevent a woman from terminating her pregnancy, but as the fetus develops, states are permitted greater latitude in both the type and the breadth of the restrictions they can impose.[87]

Although *Roe* created a very broad rule, the rule's breadth has been narrowed through the Court's subsequent abortion jurisprudence.[88] Many view this narrowing as a systematic undermining of a woman's right to choose to terminate her pregnancy.[89] A better explanation is that the Court had gone too far with *Roe* and later attempted to clarify the true boundaries of this relatively new right.[90] In doing so, the Court has remained faithful to the general

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[83] City of Chicago v. Morales, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting). Though *Morales* did not deal with an abortion statute, Justice Scalia's reasoning is similarly applicable to this discussion.

[84] *Carhart*, 550 U.S. at 167.

[85] *See* Roe v. Wade, 410 U.S. 113, 164-65 (1973).

[86] *Carhart*, 550 U.S. at 168 (upholding the partial birth abortion ban despite the lack of a health exception).

[87] *See* Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 427-32 (1992) (arguing that "states do not have the power simply to forbid abortion altogether," and that "[s]tates do have a legitimate interest in regulating the abortion decision," but that it might be constitutionally permissible to bring forward the line delineating when a state can substantially inhibit the woman's right to choose to terminate her pregnancy).

[88] *See supra* notes 49-73 and accompanying text (discussing limitations on the abortion right).

[89] *See, e.g.*, Brent Weinstein, *The State's Constitutional Power to Regulate Abortion*, 11 J. CONTEMP. LEGAL ISSUES 461, 462 (2000).

[90] *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381 (2007) ("Those opposed to the innovations of the Warren Court . . . threw their support behind Reagan because he pledged to nominate Justices who would adopt a 'philosophy of judicial restraint.'" (quoting Ronald Reagan, *Statement on Senate Confirmation of Sandra Day O'Connor as an Associate Justice of the*

constitutional interpretation of the *Roe* Court – that a woman has a right to choose to terminate her pregnancy – even as it modified the doctrine applied to that interpretation.

The process of shaping the abortion right is what has helped *Roe* endure. Although the Court's application of *Roe* has changed slightly though the years, for more than thirty-five years the Court has faithfully adhered to *Roe*'s central constitutional premise. The next Part explores why that very basic conception of the abortion right has been sustained, and posits that *Roe* will not be overruled.

II. THE SUPREME COURT WILL NOT OVERRULE *ROE V. WADE*

Although the right to choose to have an abortion has been continually under assault since *Roe v. Wade* was decided, *Roe*'s core holding still stands. This is true despite the fact that eight of the twelve Supreme Court Justices appointed since *Roe* were appointed by Republican Presidents, many of whom shared a belief that *Roe* should be overruled.[91] True, the right to choose to procure an abortion under *Roe* is not as expansive as some once assumed, but *Roe* lives on nonetheless.[92]

This Part explores the many reasons for *Roe*'s enduring legacy. I argue that *Roe* will ultimately withstand future attacks because of the principle of stare

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Supreme Court of the United States, 1981 PUB. PAPERS 819 (Sept. 21, 1981), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=44281&st=&st1=)).

[91] Chief Justice Roberts and Justice Alito were appointed by President George W. Bush, Justices Thomas and Souter were appointed by President George H.W. Bush, Justices Scalia, Kennedy, and O'Connor were appointed by President Reagan, and Justice Stevens was appointed by President Ford. Roberts, Alito, Thomas, Scalia, Kennedy, and O'Connor have all voted to uphold restrictions on abortions. Roberts, Alito, Thomas, Scalia, and Kennedy comprised the majority in *Gonzales v. Carhart*, 550 U.S. 124 (2007). O'Connor concurred and voted to uphold viability testing in *Webster v. Reproductive Health Services*, 492 U.S. 490, 522 (1989) (O'Connor, J., concurring). Although they have typically voted to invalidate abortion restrictions, Justice Souter and Justice Stevens were both originally thought to hold more restrictive views on abortion rights prior to their confirmation. *See* Al Kamen, *For Liberals, Easy Does It with Roberts*, WASH. POST, Sept. 19, 2005, at A15 (discussing opposition by abortion advocates to the confirmation of Supreme Court Justices); *see also* Teresa L. Scott, *Burying the Dead: The Case Against Revival of Pre-*Roe *and Pre-*Casey *Abortion Statutes in a Post-*Casey *World*, 19 N.Y.U. REV. L. & SOC. CHANGE 355, 362 (1992) ("Republicans have explicitly stated their intention to appoint judges who will work to overturn *Roe*."). *But see* Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 720-21 (7th Cir. 1975) (Stevens, J.) ("[T]he constitutional protection given to the pregnant woman's right to decide whether or not to bear her child is clearly not dependent on respect for the institution of marriage; it respects the individual's interest in a decision which, by any standard, is certainly of fundamental importance and implicates basic values.").

[92] *See, e.g.*, Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175, 181 (2008).

decisis and the need for the continued legitimacy of the Court,[93] the reliance on *Roe* by millions of women,[94] the Equal Protection Clause,[95] the increasing politicization of the Supreme Court Justice confirmation process,[96] the Court's discretion to grant certiorari[97] and its desire to remain out of the "abortion-umpiring business,"[98] and the possibility of federal legislation protecting a woman's right to choose to have an abortion.[99] Granted, none of these factors alone guarantee that *Roe* will not be overruled. Yet none must do so independently. When considered together these factors form a compelling argument that *Roe* will endure. The votes of only five Supreme Court Justices are needed to retain *Roe*, and each Justice could decide to do so for different reasons. Anti-abortion advocates have been unsuccessful in their attempts to overrule *Roe* for thirty-seven years, and these aforementioned reasons will continue to ensure *Roe*'s viability.

A. *Stare Decisis and Judicial Legitimacy*

Stare decisis is a legal principle, under which a court must follow earlier precedent when ruling on the same issue of law.[100] Adherence to the constitutional doctrines and precedents developed by the Court is "[t]he most important component in Supreme Court decision-making."[101] The stare decisis argument for the continued retention of *Roe* was most fully articulated in *Casey*.[102] As the Court explained, the principle is "indispensable" unless "a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."[103] Stare decisis demands that a departure from precedent – even in constitutional cases – be particularly justified.[104] Thus, the Court should adhere to prior rulings unless (a) the holding has become unworkable, (b) legal principles have developed to such an extent that the holding becomes "no more than a remnant of abandoned

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[93] *See infra* Part II.A.

[94] *See infra* Part II.B.

[95] *See infra* Part II.C.

[96] *See infra* Part II.D.

[97] *See infra* Part II.E.

[98] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting).

[99] *See infra* Part II.F.

[100] BLACK'S LAW DICTIONARY 1443 (9th ed. 2009).

[101] Robert A. Sedler, *The Supreme Court Will Not Overrule* Roe v. Wade, 34 HOFSTRA L. REV. 1207, 1208 (2006).

[102] *Casey*, 505 U.S. at 854-69 (contrasting *Roe* with *Lochner v. New York*, 198 U.S. 45 (1905), and *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

[103] *Id.* at 854.

[104] Webster v. Reprod. Health Servs., 492 U.S. 490, 558 (1989) (Blackmun, J., dissenting) ("[E]ven in ordinary constitutional cases 'any departure from . . . *stare decisis* demands special justification.'" (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984))).

doctrine," or (c) factual developments leave the old rule inapplicable or unjustified.[105] For this reason, the Court has never explicitly overruled a prior precedent merely because Justices hostile to that decision replaced Justices who favored it.[106]

A comparison of *Roe v. Wade* to the earlier Supreme Court cases *Lochner v. New York* and *Plessy v. Ferguson* is helpful.[107] The *Lochner* Court invalidated a statute restricting the number of hours a baker could work in a week because the statute violated the "right of contract between the employer and employees," a right the Court found to be "part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[108] *Lochner* was later used as justification for invalidating a number of popular labor reforms.[109]

Plessy v. Ferguson recognized that the aim of the Fourteenth Amendment was "to enforce the absolute equality of the two races before the law."[110] Nonetheless, the Court claimed that "[l]aws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other."[111] The *Plessy* Court upheld a statute requiring black and white passengers to ride in separate railcars.[112] For sixty years, states were permitted to continue forced racial segregation under *Plessy*'s "separate but equal" doctrine.[113]

Because of their controversial nature, many people came to find *Roe*, *Lochner*, and *Plessy* disdainful.[114] Yet, changing public opinion was not

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[105] *Casey*, 505 U.S. at 854-55.

[106] *See* Sedler, *supra* note 101, at 1209 ("The Court has never overruled a decision, at least not explicitly, on the ground that the composition of the Court has changed, and a majority of the present Justices would have decided the case differently had they been on the Court at the time of the decision.").

[107] *Casey*, 505 U.S. at 861 (finding that *Lochner* and *Plessy* were the "[o]nly two such decisional lines from the past century [to] present themselves for examination").

[108] Lochner v. New York, 198 U.S. 45, 53 (1905).

[109] *See, e.g.*, Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 545 (1923) (citing *Lochner* for the invalidation of a federal statute instituting a minimum wage for women and children in the District of Columbia). The *Lochner* era of invalidating labor reforms ended when *Adkins* was overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

[110] Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

[111] *Id.*

[112] *Id.* at 550-51.

[113] The term "separate but equal" is found only in Justice Harlan's dissent. *Id.* at 552 (Harlan, J., dissenting) ("By the Louisiana statute, the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons . . . ."). The "separate but equal" doctrine was explicitly rejected in *Brown v. Board of Education*. 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

[114] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861 (1992).

enough to justify departure from the weight of precedent; both *Lochner* and *Plessy* were overturned because the premises upon which they had been founded were no longer true.[115] The same could not be said for *Roe*. The *Casey* Court felt compelled to follow *Roe*'s central holding because the holding had neither proven to be "unworkable" nor been undermined by the evolution of legal principles or changes to the factual assumptions upon which *Roe* had been premised.[116]

The stare decisis argument is not without detractors. While saying on the one hand that stare decisis required a reaffirmation of *Roe*'s central holding, the *Casey* Court rejected the trimester framework and introduced the undue burden test.[117] This "transparently manipulable" version of stare decisis has led some to call *Casey* "the worst constitutional decision of the United States Supreme Court of all time."[118] Critics contend that a seemingly arbitrary adherence to stare decisis cannot justify the continuing viability of *Roe*.[119] A Justice willing to apply this weak and malleable version of stare decisis, in theory, should be able to reject *Casey*'s recasting of *Roe*'s holding.[120]

An initial problem with *Roe* was the overly broad rule it created.[121] A decision which announces a broad rule of law poses a difficult dilemma for future courts because they may agree with the decision in principle, but be disinclined to follow a rule which seems to overreach. Future courts may attempt to demonstrate a faithful adherence to precedent by re-characterizing the prior holding or drawing a strong distinction between holding and dicta.[122] But this view of stare decisis cannot be considered a faithful adherence to precedent because "almost anything can become dictum."[123]

Nonetheless, the seemingly contradictory application of stare decisis by the *Casey* Court can be justified. The formulation of a constitutional rule of law

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[115] *Id.* at 861-64.

[116] *Id.* at 854-61.

[117] *See supra* notes 54-63 and accompanying text.

[118] Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001, 1035 (2003).

[119] *See, e.g.*, *Casey*, 505 U.S. at 993 (Scalia, J., dissenting) (calling the *Casey* plurality's "keep-what-you-want-and-throw-away-the-rest version" of stare decisis "contrived").

[120] *See* Paulson, *supra* note 118, at 1035.

[121] *See* Roe v. Wade, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting) ("[T]he Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885))); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381 (1985) ("[I]n my judgment, Roe ventured too far in the change it ordered."); Moss & Raines, *supra* note 92, at 184 & nn.37-40.

[122] *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 25-27 (1996).

[123] Kermit Roosevelt III, *Polyphonic* Stare Decisis*: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1315 (2008).

should be viewed as a three-step process: the meaning of the Constitution is discerned, a doctrine is created to implement that meaning, and the doctrine is applied to the case at hand.[124] The *Casey* plurality's application of stare decisis is faithful to *Roe* because it adheres to the *Roe* Court's determination that the Constitution protects a woman's right to choose to have an abortion.[125] In rejecting the trimester framework and adopting the "undue burden" test, the *Casey* plurality "revise[d] the decision rules crafted to implement" *Roe*'s central holding.[126] Because the Court applied this new doctrine to the Pennsylvania statute challenged in *Casey*, the decision is not inconsistent with the Court's earlier applications of *Roe*'s holding.[127]

The continued application of stare decisis ensures that the Court will have no compelling reason to overrule *Roe* unless the constitutional underpinnings upon which *Roe* is founded are undermined. This seems particularly true given the Court's minimalist approach. Although a handful of Supreme Court Justices have unequivocally called for *Roe*'s reversal, the Court, as a whole, has refused to reconsider *Roe* when presented opportunities to do so.

The stare decisis effect has another dimension: if the Court were to overrule *Roe* without having sufficient justification, it would significantly undermine the Court's own legitimacy.[128] The abortion debate is a highly contentious one. Because of the political landmines that surround the abortion issue, the Supreme Court will continue to tread cautiously.[129] Courts are intended to be the impartial arbiter of what the law is, and "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[130] Overruling *Roe* in the absence of clear legal or factual change would undercut the authority of the Court, because it would appear that the Court was cowing to "social and political pressures."[131]

The legitimacy of the Court is particularly important because the Justices are appointed for life. Unlike the other branches of government, if the Court's legitimacy is undermined, it cannot be quickly restored through the elections.[132] The continued legitimacy of the Court is therefore critical because "the legitimacy of the Court must be earned over time."[133]

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[124] *Id.* at 1316.

[125] *Id*.

[126] *Id.* at 1317.

[127] *See id.*

[128] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865-69 (1992) (O'Connor, Kennedy, Souter, JJ., plurality opinion).

[129] *Id.* at 866-77.

[130] *Id.* at 866.

[131] *Id.* at 865-66.

[132] *Id.* at 868.

[133] *Id.*

Although judges are supposed to be immune to political pressure, the continued legitimacy of the judiciary demands that judges at least be cognizant of principles that Americans widely hold.[134] This is even more important for Supreme Court Justices. Ultimately, the Court's legitimacy will be more secure when its decisions do not seem activist, contrary to the concepts of federalism, or aligned with counter-majoritarian views.[135] The majority of Americans support a restricted right to abortion,[136] and the current status of the abortion right reflects the popular will of the American people.[137] Maintaining the status quo is critical because "[t]he most certain consequence of overruling *Roe* would be a massive political upheaval."[138]

Many scholars criticize the legitimacy argument. Critics argue that the public pays little attention to actual rationale the Court uses to justify its decisions, and therefore overruling precedent has little effect on the Court's legitimacy.[139] Furthermore, when the Court did make an abrupt about-face, the Court's legitimacy was not undermined.[140]

This critique has some merit. However, the two historical examples of dramatic reversals by the Court that critics cite are the Court's reversal of *Lochner* and the expansion of rights by the Warren Court's "liberal interventionists."[141] The Court had used *Lochner* to invalidate popular labor protections, but the Court's reversal of its pro-business jurisprudence paved the

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[134] Post & Siegel, *supra* note 90, at 374.

[135] *See Casey*, 505 U.S. at 865.

[136] *See, e.g.*, Jeffrey Rosen, *The Day After* Roe, ATLANTIC MONTHLY, June 2006, at 56, 58 (stating that polls consistently indicate "around 75 percent are in favor of [abortion restrictions with] exceptions for rape, incest, and fetal defect, as well as the life and health of the mother"); *see also* Peter Hart & Neil Newhouse, *NBC News/Wall Street Journal Survey, Study 6086*, WSJ.COM, 17 (Sept. 2008), http://online.wsj.com/public/resources/documents/WSJ_NBC_POLL090908.pdf (indicating that sixty-one percent of registered voters responded that they believed abortion should be legal most of the time or illegal with exceptions); *Abortion*, GALLUP, http://www.gallup.com/poll/1576/Abortion.aspx (last updated May 2010) (reporting that a majority do not wish to ban abortions, but do favor some limitations such as parental consent requirements for minors, spousal consent, and prohibitions of "partial birth abortions"). *But see* Forsythe & Presser, *supra* note 26, at 164-65 (arguing that public opinion polls show that Americans are generally opposed to abortion).

[137] *See supra* notes 64-78.

[138] Michael S. Greve, *Why* Roe *Won't Go*, 51 ST. LOUIS U. L.J. 701, 701 (2007).

[139] Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 25 (1992) ("[P]articularly where divisive moral issues are involved, it seems more likely that the public will focus its attention primarily on substantive implications of the judgment itself, rather than the strength of the reasoning underlying the judgment.").

[140] *Id.* at 21-24.

[141] *Id.* at 22-24.

way for many important progressive labor protections.[142] The Warren Court's interventionism expanded the protection of such rights as the right to counsel and voting rights and overturned discriminatory laws.[143]

Roe is distinguishable from these two historical examples. Overruling *Lochner* did not undermine the Court's legitimacy because "the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law."[144] This shift in economic understanding permitted the Court to maintain an outward view of impartiality and ensured that the legitimacy of the Court was not substantially undermined.[145] No changes have fundamentally weakened *Roe*,[146] so the Court could not project a similar appearance of impartiality if it were to overrule *Roe*.

The Warren Court decisions are distinguishable on other grounds. Whereas the Warren Court expanded the scope of constitutional rights by overruling certain restrictive precedents, overruling *Roe* would eliminate a right. Thus, unlike the Warren Court decisions that did not cause additional burdens on average citizens, a "terrible price would be paid for overruling" *Roe*.[147]

Additionally, *Roe*'s critics place too much weight on these historical examples. Though it is enlightening that prior paradigm shifts by the Court may not have sacrificed the Court's legitimacy, there is no guarantee that in the future, such shifts will not do so. Furthermore, it is not necessarily the actual public perception of the Court's legitimacy that is important. Rather, it is the Court's perception of how their decisions might affect public opinion. At least one third of the *Casey* Court believed that overruling *Roe* would damage the Court's perceived legitimacy.[148] If Justices on the Court even perceive that overruling a decision will undermine the Court's legitimacy, they will be less likely to vote to overturn the precedent. In this way, the Court's concern for the continued legitimacy of the judiciary strengthens *Roe*'s precedential weight and further ensures that *Roe* will not be overruled.

[142] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861 (1992) (O'Connor, Kennedy, Souter, JJ., plurality opinion).

[143] Maltz, *supra* note 139, at 23.

[144] *Casey*, 505 U.S. at 862.

[145] Maltz, *supra* note 139, at 22.

[146] *Casey*, 505 U.S. at 864 ("[N]either the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed . . . .").

[147] *Id.*

[148] *Casey* consisted of five separate opinions including a plurality opinion authored by three of the nine Justices and four separate opinions that partially concurred and partially dissented.

B. *Reliance*

The reliance argument is directly tied to the stare decisis argument.[149] After American society begins to rely on and act within a particular legal framework, changes to that framework should be made thoughtfully. Changes to the Court's constitutional interpretation have the potential to significantly impact the lives of Americans who have reasonably relied on the Court's prior constitutional rulings, and the Court has taken steps to ensure that the changes it makes to constitutional jurisprudence are made judiciously.[150] Among the "pragmatic considerations" the Court weighs when deciding whether to overrule precedent is "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation."[151]

Reliance has a special place in the abortion forum because no form of contraception can completely remove the risk that sexual intercourse may result in pregnancy.[152] As the *Casey* Court stated, "for 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."[153] The weight of this reliance argument has gained force in the eighteen years since *Casey*: almost every American woman of childbearing age has always been able to rely on the right to choose to have an abortion.[154] Furthermore, this reliance argument carries weight because the United States "has one of the highest rates of unintended pregnancy in the whole industrialized world."[155]

Defenders of *Roe* are quick to point out the important role that reproductive autonomy plays in the lives of women. As Pulitzer Prize-winning journalist and author Susan Faludi states, "All of women's aspirations – whether for education, work, or any form of self-determination – ultimately rest on their

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[149] *Casey*, 505 U.S. at 854-56.

[150] *Id.* at 854 ("[W]hen 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.").

[151] *Id.*

[152] *See* ROBERT A. HATCHER ET AL., CONTRACEPTIVE TECHNOLOGY 792 (18th ed. 2004).

[153] *Casey*, 505 U.S. at 856.

[154] A woman of childbearing age is any woman that has already entered puberty but has not yet reached menopause. For demographic purposes, childbearing age is typically defined either to be between the ages of fifteen and forty-four or fifteen and forty-nine. Given that *Roe* was decided thirty-six years ago, a forty-nine year old woman alive today would have been thirteen at the time *Roe* was decided.

[155] Nadine Strossen, *Reproducing Women's Rights: All Over Again*, 31 VT. L. REV. 1, 3 (2006).

ability to decide whether and when to bear children."[156] Thus, reliance on *Roe*, for many women, is critical to their place in society.

Women's historical reliance on *Roe* is reasonable. The Court referred to the right of a woman to terminate her pregnancy as a "fundamental constitutional right."[157] As such, women reasonably rely on and believe in its continuing existence.[158] Furthermore, this reliance is rational because "the Court has never overruled a decision recognizing a constitutional liberty interest or for that matter any other constitutionally-protected interest."[159]

Opponents of *Roe* call this reliance argument "unconvincing."[160] They offer two main criticisms of the reliance argument. First, they assert that the Court showed no evidence of actual reliance on *Roe*.[161] These critics find the reliance argument unpersuasive because there is no evidence that women make decisions about their educational and employment paths based upon the availability of abortion.[162] Second, reliance on erroneous decisions like *Plessy v. Ferguson*[163] and *Lochner v. New York*[164] did not prevent the Court from overruling them.[165] Similarly, the critics argue that reliance should not "prevent [the Court] from correctly interpreting the Constitution" and overruling *Roe*.[166] In addition to these arguments, critics also contend that reliance is inappropriate given the mutability of the law.

The first criticism – that the reliance argument is unconvincing in absence of actual proof of reliance – is persuasive. It is somewhat troubling to think that Justices would make decisions on constitutional law based not upon actual evidentiary findings, but upon their presuppositions of what may be happening in society.[167] Yet, the absence of actual proof does not mean that many women have not, in fact, made life decisions in reliance on the continued existence of

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[156] SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 414 (1991).

[157] *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 537 (1989) (Blackmun, J., dissenting).

[158] *See id.* at 557.

[159] Sedler, *supra* note 101, at 1209; *see also Webster*, 492 U.S. at 558 ("To overturn a constitutional decision that secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history.").

[160] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 956 (Rehnquist, C.J., dissenting).

[161] *Id.*; Maltz, *supra* note 139, at 20.

[162] *See* Maltz, *supra* note 139, at 20 ("[T]he Court's reliance argument is persuasive if, and only if, one believes that a substantial number of women would not have entered the workforce if they had believed that the constitutional protection for abortion might be removed.").

[163] 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[164] 198 U.S. 45 (1905), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[165] *Casey*, 505 U.S. at 957.

[166] *Id.*

[167] *See* Forsythe & Presser, *supra* note 26, at 109.

the right to procure an abortion. Even critics of *Casey*'s reliance argument admit that women have likely relied on this right.[168] However, rather than producing social and economic benefits for women, critics contend that reliance, if any, has only harmed women.[169]

Evidence clearly suggests that women have made great strides in the workplace over the last thirty-seven years. Additionally, there has been a marked trend of women choosing to delay bearing children until later in life.[170] Though these two facts, when taken together, do not definitively prove women have made choices in reliance on *Roe*, they certainly help support the reliance argument. There is another dimension to the reliance argument. Not only do women likely rely on *Roe*, but employers do as well.[171] Commerce relies on a productive and experienced workforce, and the availability of the abortion choice helps ensure that female employees who do not wish to give birth are not unnecessarily removed from the workforce due to an unplanned pregnancy.

At first blush, the second criticism of the reliance argument seems convincing: the Court has an established history of overruling longstanding constitutional precedents regardless of whether people had relied on them. However, deeper analysis renders the second criticism less compelling. As the *Casey* Court stated, reliance is but one justification for not overruling a precedent.[172] The reliance argument gains traction when these other considerations are inapplicable or not compelling in their own right. Reliance in and of itself was not sufficient to retain *Lochner* or *Plessy* because the legal and factual foundations upon which they stood had been undermined.[173] Because the foundations of *Roe* have not been undermined, the reliance argument is not overwhelmed by these competing concerns.

The third criticism is premised on the idea that reliance on the rule of law cannot be reasonable because the law is constantly changing and evolving. This argument clearly has merit when applied to legislation. As a political branch, Congress is called upon to address current issues, concerns, and changes facing the nation. To meet these challenges effectively, a thoughtful

[168] *See* Maltz, *supra* note 139, at 20.

[169] Forsythe & Presser, *supra* note 26, at 109-36.

[170] Clearly the availability of contraceptives has played a role in this. However, as Justice O'Connor pointed out in *Casey*, women "rel[y] on the availability of abortion in the event that contraception should fail." *Casey*, 505 U.S. at 856 (O'Connor, Kennedy, Souter, JJ., plurality opinion).

[171] *See* Kristen Gerencher, *Pregnant and Fending Off Discrimination*, PITTSBURGH POST-GAZETTE, Oct. 28, 2007, at J-1 (indicating that employers discriminate against women of childbearing age out of fear that the women may become pregnant).

[172] *Casey*, 505 U.S. at 854-55 (listing four points of inquiry when considering whether to overrule precedent: whether the rule is unworkable, whether overruling will cause harm to those who have relied on it, whether changes in the law have made the rule anachronistic, and whether a change to the facts supporting the rule has rendered the rule irrelevant or unjustifiable).

[173] *See supra* notes 107-116, 141-147 and accompanying text.

process must be in place to mitigate constant vacillations in the law. The legislative process provides the necessary degree of thoughtfulness because Congress is a democratically elected body and because it accomplishes legal changes through a process focused on deliberation. Because the legislature can freely add, amend, or repeal laws, reliance on the continued existence of a particular law may not be appropriate.

Reliance upon a continued expression of the Court's constitutional interpretation is more appropriate. The Constitution can be modified through the amendment process,[174] but this has been accomplished only twenty-seven times.[175] Outside of the amendment process, changes to constitutional law are primarily effected by the judiciary.[176] Although the Court has overruled constitutional decisions, "a longitudinal analysis indicates that over a period of time comparatively few decisions have been overruled."[177] Furthermore, the Court has historically protected constitutional rights: "Where the Court has overruled cases involving constitutional rights, it has been to overrule a case rejecting a claimed constitutional right and to hold that the claimed right is indeed protected by the Constitution."[178] Thus, the reliance on *Roe* is reasonable because there has been little reason to believe that the Court would take such an unprecedented step.

To be sure, the reliance argument cannot independently justify retaining *Roe*. It is also unclear whether judges would place much weight on this argument. But in the absence of countervailing justifications, reliance further entrenches *Roe*'s place in American jurisprudence.

C. *Equal Protection Arguments for Retaining* Roe

Since it was decided, *Roe v. Wade*'s constitutional justification has been rooted in the Fourteenth Amendment's Due Process Clause.[179] An alternate justification, one grounded in the Fourteenth Amendment's Equal Protection Clause, has been offered by many scholars to bolster *Roe*'s legitimacy.[180]

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[174] U.S. CONST. art. V.

[175] One could argue that the Bill of Rights, containing the first ten amendments constitutes one modification of the Constitution, and thus the Constitution has only been amended eighteen times.

[176] Some may argue that constitutional law is not "changed" by the judiciary, but rather interpreted (or, perhaps, reinterpreted). This is splitting hairs.

[177] Sedler, *supra* note 101, at 1208.

[178] *Id.* at 1209.

[179] *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("[T]he Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (O'Connor, Kennedy, Souter, JJ., plurality opinion).

[180] *See, e.g.*, Eileen McDonagh, *The Next Step After* Roe*: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY

Certain Justices have at times echoed equal protection concerns in its abortion jurisprudence, most notably by Justices Blackmun, Stevens, and Ginsburg. In *Webster*, for example, Justice Blackmun stated that he "fear[ed] for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided."[181] In *Casey*, Justice Blackmun added that he believed that "restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality."[182] Justice Stevens similarly wrote that "*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."[183] Finally, Justice Ginsburg has most clearly stated support for the Equal Protection argument in *Gonzales v. Carhart*: "[L]egal challenges to undue restrictions on abortion procedures . . . center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[184] Although there are legitimate concerns about the equal protection foundation for *Roe*,[185] growing support for the equal protection argument on the Court would provide additional support for retaining *Roe*.[186]

The primary benefit of an equal protection argument in support of *Roe* is that it "acknowledges the possibility that fetuses are in important respects human beings."[187] By doing so, abortion restrictions can be struck down as unconstitutional while at the same time conceding the anti-abortion argument that abortion is morally wrong.[188] Instead of focusing on the fetus, the argument focuses on the way in which the state acts on the woman and prevents the state from treating women differently than men.[189]

Professor Reva Siegel develops two arguments for why abortion restrictions could violate the Equal Protection Clause: (1) abortion restrictions are a form of gender-based discrimination, and (2) the restrictions effectively use state

L.J. 1173, 1174 (2007); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 351 (1992).

[181] Webster v. Reprod. Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting).

[182] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring).

[183] *Id.* at 912 (Stevens, J., concurring).

[184] Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting); *see also* Ginsburg, *supra* note 121, at 386.

[185] *See infra* notes 226-33 and accompanying text.

[186] *See* David J. Garrow, *Significant Risks:* Gonzales v. Carhart *and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 38-40 (describing the warning from one "long-time prolife lawyer" and "veteran Supreme Court litigator" that an equal protection rationale "would jeopardize all current laws on abortion").

[187] Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 32 (1992).

[188] *Id.*

[189] *Id.*

power to subordinate women.[190] Another equal protection justification for *Roe* may lie in a fundamental rights model.[191]

1. Equal Protection Arguments Based on Gender Discrimination

The gender discrimination argument is based on the premise that abortion restrictions are a form of sex-based legislation.[192] As a form of sex-based legislation, abortion restrictions would have their constitutionality judged by applying intermediate scrutiny; thus they "must serve important governmental objectives and must be substantially related to achievement of those objectives."[193] As the Court stated in *Mississippi University for Women v. Hogan*, this analysis is performed in two ways:

> Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. . . . If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present.[194]

Historically, abortion restrictions in America were premised on illegitimate views about the nature and roles of men and women.[195] Men and women are free to choose to adhere to these stereotypical views, but they cannot be forced to do so by the government.[196]

Restricting abortion could reflect a state's legitimate interest in preserving the "potentiality of [fetal] life."[197] Rather than protecting fetal life, however, the actual purpose of abortion restrictions may be to force women to carry unwanted pregnancies to term.[198] The view that abortion is the killing of a fetus rather than the refusal of a woman to permit her body to be used to sustain the fetus "is simply a product of the perceived naturalness of the role of

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[190] *See* Siegel, *supra* note 180, at 347-80.

[191] *See* McDonagh, *supra* note 180.

[192] Siegel, *supra* note 180, at 354 ("I premise my discussion on the assumption that laws forbidding or impairing women's practical access to abortion are sex-based.").

[193] Craig v. Boren, 429 U.S. 190, 197 (1976). This heightened level of scrutiny was coined "intermediate" scrutiny by Justice Rehnquist in his dissent. *Id.* at 218 (Rehnquist, J., dissenting).

[194] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982).

[195] Siegel, *supra* note 180, at 356-57 ("Laws criminalizing contraception and abortion were explicitly premised on the view that women are 'child-rearers,' and that 'the female [is] destined solely for the home and the rearing of the family. . . .'" (quoting *Hogan*, 458 U.S. at 726 n.11)).

[196] McDonagh, *supra* note 180, at 1176.

[197] Roe v. Wade, 410 U.S. 113, 162 (1973).

[198] Siegel, *supra* note 180, at 358-59.

women as childbearers."[199] In this way, these restrictions reflect archaic views: the stereotype that the proper role for women is childrearing, the stereotype that women should be restricted from active participation in the workforce and politics, and "the exclusions and indignities this society *still* inflicts upon women who gestate and nurture human life."[200]

There are additional factors that point to abortion restrictions being a product of gender stereotypes. Only in the abortion context does the state co-opt a person's body, forcing her to sustain and support another, and only women are co-opted in this manner.[201] The inequity of subjecting bodily co-optation on women alone indicates that abortion restrictions grounded in the government's interest in fetal life are actually illegitimately dependent upon gender stereotypes.[202] Furthermore, as a practical matter, abortion restrictions do not actually reduce the number of abortions.[203] Rather than fetal lives being saved, women's lives are jeopardized because they seek dangerous abortions in unsafe conditions.[204] Abortion restrictions manifest a purpose based upon impermissible notions of gender roles rather than a desire to protect fetal life, because the effect they achieve is to reinforce gender roles and not to save fetuses. Thus, because the purpose of abortion restrictions reflects "archaic and stereotypic notions,"[205] on their face, abortion restrictions seem "deeply suspect – if not illegitimate."[206]

Even if the legislature has a legitimate purpose in enacting abortion restrictions, they still need to effectuate that purpose through legitimate means.[207] Siegel argues that the analysis of the means-ends relationship is clouded because the woman's body is used in a purely utilitarian manner.[208] Proper analysis, she asserts, requires one to answer such questions as how the state's decision to compel pregnancy as a means to preserve fetal life may have been prompted by assumptions about appropriate gender roles, and "[w]hat view of women prompted the state's decision to use them as a means to an end."[209] Siegel asserts that this process is likely tainted by unconstitutional

[199] Sunstein, *supra* note 187, at 32.

[200] Siegel, *supra* note 180, at 358.

[201] Cass Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 619 (1990) ("[O]utside of the abortion context, the government never imposes similar obligations on its citizens, even when human life is uncontroversially at stake.").

[202] *See id.*

[203] *Id.*

[204] *Id.*

[205] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

[206] Siegel, *supra* note 180, at 359.

[207] *Hogan*, 458 U.S. at 725.

[208] Siegel, *supra* note 180, at 359-60.

[209] *Id.* at 360.

judgments about women.[210] She argues that abortion restrictions presumptively violate the Equal Protection Clause, and a state carries the burden of proving the validity of their abortion restrictions through evidence of the following sort:

> [B]y showing that the state does all in its power to promote the welfare of unborn life by noncoercive means, supporting those women who do wish to become mothers so that they are able to bear and raise healthy children; by demonstrating that the sacrifices the state exacts of women on behalf of the unborn are in fact commensurate with those it exacts of men – and the community in general – to promote the welfare of future generations; and, even, by showing that the state is ready to compensate women for the impositions and opportunity costs of bearing a child they do not wish to raise.[211]

If the reasonableness of abortion restrictions based on the intent to preserve fetal life is determined against a backdrop of archaic and stereotypic assumptions about women, these restrictions "offend constitutional guarantees of equal protection."[212] This argument, if accepted by the Court, would help invigorate *Roe*, and help ensure that it is not overruled.

2. Antisubordination Equal Protection Arguments for the Retention of *Roe*

The use of the Equal Protection Clause to invalidate abortion restrictions is not limited to the premise that the restrictions are a form of discriminatory gender-based legislation. Rather than focusing on the intent or purpose of the legislation, the Equal Protection Clause could also be used to examine the impact of abortion regulations on women.[213]

Abortion restriction directly harms women in various ways. Legislation restricting abortion "coerces women to perform, not only the work of childbearing, but the work of childrearing as well."[214] Thus, women are forced by the state to accept both the social and physical burdens of pregnancy, including potential scorn and lost economic prospects.[215] Furthermore, by restricting the availability of abortion, the state thrusts a lifetime of childrearing – a responsibility that falls disproportionately sharply on women – upon women who are prevented from terminating their pregnancies.[216] In addition to childrearing being undervalued and undercompensated in our society, a woman who is forced to accept motherhood likely "compromise[s]

[210] *Id.*
[211] *Id.* at 366-67.
[212] *Id.* at 363.
[213] *Id.* at 370.
[214] *Id.* at 371.
[215] *Id.* at 375.
[216] *Id.* at 375-76.

her already constrained opportunities and impair[s] her already unequal compensation in the work force."[217]

Beyond impacting women individually, the forced motherhood that results from restricted access to abortion harms women as a whole. Forcing women into motherhood reinforces the archaic notions of the proper role of women.[218] In this way, abortion regulations not only restrict the abortion procedure, but also prevent women from achieving equal status in society and from exercising legitimate liberty interests.[219] This is the type of state action that the Equal Protection Clause prohibits.

3. Equal Protection Fundamental Rights Justification for the Retention of *Roe*

Related to the anti-subordination equal protection argument is a fundamental rights equal protection argument. The argument is premised on the belief that in an unwanted pregnancy, a fetus causes serious physical transformations and trauma to the woman and seriously restricts her liberty – all without the woman's consent.[220] Therefore, some argue that pregnant women are entitled to a "private right of self-defense to use deadly force to protect themselves" against the serious bodily harm caused by the fetus.[221]

American citizens are guaranteed a fundamental right to life and liberty,[222] but citizens are not guaranteed a right to compel the state to take affirmative steps to ensure their safety.[223] When a state takes affirmative steps to protect a citizen's fundamental rights, however, the Equal Protection Clause demands that they do so for all people who are similarly situated.[224] Because the state takes positive steps to prevent human beings from harming other human beings without their consent, the Equal Protection Clause commands that they take affirmative steps to prevent a fetus from harming a pregnant woman without her consent.[225]

4. Criticism of the Equal Protection Argument

The primary criticism of the equal protection argument is that it has failed to achieve critical mass: until the Supreme Court emphatically enunciates a clear support of *Roe* on equal protection grounds, the argument will not carry much

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[217] *Id.* at 376.

[218] *Id.* at 378.

[219] *See id.* at 378-79.

[220] McDonagh, *supra* note 180, at 1180.

[221] *Id.* at 1181.

[222] *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[223] McDonagh, *supra* note 180, at 1177.

[224] *Id.* at 1179.

[225] *Id.* at 1181 ("[T]he fundamental rights model of equal protection analysis [] establish[es] that once the state acts to stop human beings from harming other human beings . . . then the state *must act* to stop the fetus from harming a woman.").

weight. Critics contend that "the Court has previously refused to consider abortion restrictions as evidence of discriminatory intent or a violation of equal protection."[226] Additionally, a shift in *Roe*'s justification from the Due Process Clause to the Equal Protection Clause may signal that *Roe* does not have legitimate constitutional justification at all.[227]

The Court's abortion jurisprudence indicates that the right to terminate a pregnancy cannot be justified under the Equal Protection Clause. Even *Roe* itself declares that states have an "important and legitimate interest in [the] potential life" of the fetus.[228] Because gender-based legislation under the Equal Protection Clause is reviewed under intermediate-level scrutiny, this state interest would be sufficient: "Strict abortion restrictions therefore could be upheld under intermediate scrutiny."[229] Furthermore, demonstrating that the legislation impacts women more harshly is insufficient; abortion restrictions would not be invalid unless it is shown that they were enacted because of this disparate impact.[230]

Critics also attack the assumption that the motivations behind abortion restriction are to force women into stereotypical roles of motherhood. Even if this were to some extent true, it does not negate the stated purpose of protecting fetal life: "[P]urity of motivation is not required for social action, so long as the end sought is proper."[231] The fact that respect for fetal life is

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[226] David M. Smolin, *Why Abortion Rights Are Not Justified by Reference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621, 638 (1990).

[227] Richard Posner had this to say about the illegitimacy of *Roe*:

> *Roe v. Wade* is the Wandering Jew of constitutional law. It started life in the Due Process Clause, but that made it a substantive due process case and invited a rain of arrows. Laurence Tribe first moved it to the Establishment Clause of the First Amendment, then recanted. [Ronald] Dworkin now picks up the torch but moves the case into the Free Exercise Clause, where he finds a right of autonomy over essentially religious decisions. Feminists have tried to squeeze *Roe v. Wade* into the Equal Protection Clause. Others have tried to move it inside the Ninth Amendment (of course – but if I am right it has no "inside"); still others (including Tribe) inside the Thirteenth Amendment. I await the day when someone shovels it into the Takings Clause, or the Republican Form of Government Clause (out of which an adventurous judge could excogitate the entire Bill of Rights and the Fourteenth Amendment), or the Privileges and Immunities Clause. It is not, as Dworkin suggests, a matter of the more the merrier; it is a desperate search for an adequate textual home, and it has failed.

Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 441-42 (1992).

[228] Roe v. Wade, 410 U.S. 113, 163 (1973).

[229] Smolin, *supra* note 226.

[230] *See* Moss & Raines, *supra* note 92, at 192 ("One of the more established equal-protection precedents, however, is that the Clause bans only *purposeful* discrimination. Laws with merely a *disparate impact*, or even a dramatic and foreseeable impact, on a particular group are permissible. Accordingly, a plaintiff must show that the challenged policy was not only adopted *in spite of* its disparate impact on women (or racial minorities), but *because of* that impact." (internal quotations omitted)).

[231] Smolin, *supra* note 226, at 627.

positively correlated with traditional views of gender roles does not make the governmental interest in protecting fetal life less valid.[232] Additionally, because women actually comprise a majority, they have the political strength to prevent "majoritarian oppression and enduring subjugation."[233]

One final critique of the equal protection argument is that it is unlikely to persuade those who have firmly decided that *Roe* should be overruled. "Justices who would diminish or reverse *Roe* will not be persuaded by those arguments, and Justices who defend constitutional abortion rights would prefer to cite stare decisis rather than new constitutional theories divorced from *Roe* itself."[234]

D. *The Supreme Court Confirmation Process*

The Constitution says little about the Supreme Court confirmation process: the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."[235] Although this process appears simple, the increasingly political battles waged in the confirmation of Supreme Court justices reduce the likelihood of *Roe* being overturned.

For good or bad (mostly bad[236]), the judicial confirmation process has become a single-issue debate: abortion in general – and *Roe* in particular – has been the most central issue of the Supreme Court confirmation process for the last twenty years.[237] Judge Robert Bork's Supreme Court nomination faced widespread opposition, and the Senate ultimately did not confirm Bork because

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[232] *See* Posner, *supra* note 227, at 443.

[233] LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 105 (1990).

[234] *See* Moss & Raines, *supra* note 92, at 195.

[235] U.S. CONST. art II, § 2, cl. 2.

[236] *See* Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 558 (2002) ("By being organized to discuss only one issue, Senate confirmation hearings have lacked meaning and focus.").

[237] *See* Forsythe & Presser, *supra* note 17, at 303 ("The abortion issue has increasingly charged and burdened the confirmation hearings of federal judges over the past twenty years since the Senate hearings on Judge Robert Bork's nomination in 1987. Abortion was at the center of the confirmation hearings of Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006."); Gallagher, *supra* note 236, at 558 ("While Senator Hatch was Senate Judiciary Committee Chairman during President Clinton's second term, Senator Hatch unfairly accused many Clinton nominees of being 'left-wing' judicial activist hell-bent on legislating from the bench. While Senator Leahy was Senate Judiciary Committee Chairman during the past two years, Senator Leahy unfairly accused many Bush nominees of being 'right-wing' judicial activist hell-bent on overturning *Roe*."); Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 891-92 (2005); Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 456 (2008).

of his anti-*Roe* stance.[238] Chief Justice Roberts, Justice Alito, and Justice Thomas all faced contentious confirmation hearings because of their perceived opposition to *Roe*.[239] This is not to say that *Roe* was the single issue that concerned the Senate – for example, Justice Thomas was questioned extensively about his alleged sexual harassment of Anita Hill.[240] But at both the Supreme Court and the lower court levels, ideological differences on the abortion issue have contributed to delays in the confirmation of federal judges and, in some cases, helped prevent judges' confirmations.[241]

A viable candidate to the Supreme Court bench must have views that fall "within the 'mainstream.'"[242] The politicization of the Supreme Court confirmation process is attributable to Senators seeking to confirm only judges who share their "mainstream" ideologies rather than focusing on the competency of the nominees.[243] If a judge opposes *Roe*, his views would fall outside the "mainstream."[244]

Justice Sotomayor's confirmation can be seen as a recent example of this reality. Sotomayor did not decide significant abortion related cases when she served on the Second Circuit Court of Appeals, and thus, her jurisprudence did "not provide any genuine insight on how she would rule on questions related to a constitutional right to abortion."[245] During Sotomayor's confirmation

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[238] Goldman, *supra* note 237, at 876.

[239] Presser, *supra* note 237, at 462-63.

[240] *See The Nomination of Clarence Thomas to be Associate Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 102nd Cong. 157-269 (1991) (testimony of Clarence Thomas, J., United States Court of Appeals for the District of Columbia Circuit).

[241] Goldman, *supra* note 237, at 889-92.

[242] *See* Gallagher, *supra* note 236, at 564 (quoting Statement by Senator Charles E. Schumer, *in Senate Committee Hearings on the Judicial Nomination Process*, 50 DRAKE L. REV. 429, 509 (2002)).

[243] *Id.* at 571; Presser, *supra* note 237, at 445-51 (offering the opposition of Senators Biden and Schumer to Chief Justice Roberts's confirmation despite the fact he was admittedly extremely qualified as examples of Senators voting on ideological grounds).

[244] Gallagher, *supra* note 236, at 564 ("Does opposition to [*Roe*] place a nominee 'outside the mainstream?' If recent history is any indication, the answer to that question is yes.").

[245] Tom Goldstein, *Judge Sotomayor and Abortion*, SCOTUSBLOG (May 31, 2009, 13:38 EST), http://www.scotusblog.com/wp/judge-sotomayor-and-abortion. As this Note is going to publication, the Senate is considering President Obama's second nomination to the Supreme Court, Solicitor General Elena Kagan. Because she has no judicial experience, Kagan similarly lacks a body of jurisprudence that would reveal her views on the right of a woman to terminate her pregnancy. Little of Kagan's legal work reveals her stance on the issue, and that which does, provides mixed messages. *See* Christi Parsons & James Oliphant, *Decoding Kagan's Stance on Abortion; Conservatives Cite Critical '80s Essay; Clinton Memo Worries Liberals*, CHI. TRIB., May 16, 2010, at C31. Because Kagan's views are unclear, Kagan may come under attack from both pro-choice senators and anti-abortion senators, opening her to the possibility of a contentious confirmation battle.

hearings, several Republican Senators inquired into her stance on abortion. Sotomayor dodged abstract hypothetical questions about abortion and instead referred to *Casey*, saying that the pertinent question is whether "the state regulation regulating what a woman does [imposes] an undue burden."[246] Rather than focusing on abortion, Senators mostly questioned Sotomayor on her decision in *Ricci v. DeStefano*,[247] her stance on gun control, and her "wise Latina" comment.[248] In the end, Sotomayor was confirmed 68-31, with every Democrat, two Independents, and nine Republicans voting to confirm her nomination.[249] Commentators noted that Sotomayor's views fell "well within the mainstream," and thus supported her confirmation.[250]

It does not appear that political fights over judicial confirmation will be appreciably less contentious in the future. A minority of senators can hold up the confirmation process by invoking a filibuster.[251] The vote of three-fifths of the Senate (or sixty members of the fully assembled Senate) is needed to end a filibuster. Because senators will continue to confirm or reject judicial appointments on ideological grounds, Supreme Court nominees will need to have moderate views that fall within the "mainstream" both to prevent Senate filibuster and to garner the necessary votes for confirmation.[252] If anti-*Roe* sentiment is truly "outside the mainstream," the likelihood that the Court will gain the necessary votes to overrule *Roe* will continue to decrease.

[246] Amy Goldstein, Paul Kane & Robert Barnes, *Sotomayor Avoids Pointed Queries: Supreme Court Nominee Is Elusive About Abortion and Other Issues*, WASH. POST, July 16, 2009, at A1.

[247] 530 F.3d 87 (2d Cir. 2008) (per curiam) (upholding New Haven fire department's refusal to certify promotion examination results because promotion based upon the exam results would create a disparate racial impact upon minority firefighters), *rev'd*, 129 S. Ct. 2658 (2009).

[248] Peter Baker & Neil A. Lewis, *Republicans Press Judge About Bias and Activism*, N.Y. TIMES, July 14, 2009, at A1 ("[Sotomayor] retreated from or tried to explain away some past statements, most notably her much-criticized comment that she hoped a 'wise Latina woman' might reach better conclusions than white males without the same experiences.").

[249] Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court*, N.Y. TIMES, Aug. 7, 2009, at A1. Senator Ted Kennedy was ill at the time and was unable to participate in the voting.

[250] Editorial, *Justice Sotomayor: An Inspiring Ascent, a Historic Vote*, WASH. POST, Aug. 7, 2009, at A20 ("These senators were within their rights to dislike the outcomes, but they were wrong to overlook the fact that in each of these cases Judge Sotomayor either followed settled law or appropriately exercised judgment that was well within the mainstream.").

[251] John Cornyn, *Restoring Our Broken Judicial Confirmation Process*, 8 TEX. REV. L. & POL. 1, 2 (2003). Cornyn is currently a U.S. Senator from the State of Texas.

[252] *See* Goldman, *supra* note 237, at 899. Justice Sotomayor's nomination was virtually filibuster proof. *See* Paul Kane, Robert Barnes & Amy Goldstein, *Senate Republicans Won't Block Vote on Sotomayor: Decision All but Ensures Confirmation to Supreme Court*, WASH. POST, July 17, 2009, at A1.

E. *Certiorari*

The Supreme Court has great latitude over the cases it hears.[253] A Circuit Court decision or a final decision by the highest court in any state "may be reviewed by the Supreme Court by writ of certiorari."[254] But the Court only grants review of a case if there are "compelling reasons" to do so.[255] The Court generally will grant certiorari only if federal law has been misapplied, if there is a disagreement among lower federal or state courts on an important issue of law, or if a state's highest court has decided on first impression an important issue of federal law.[256] Under the "Rule of Four," the Supreme Court will not hear a case unless at least four Justices vote to grant certiorari.[257] This discretionary certiorari process provides another justification for why the Court will not overrule *Roe v. Wade*.

Essentially, there are two ways an abortion case could be appealed to the Supreme Court. A court could uphold a restriction on abortion, and the affected parties could appeal, or a court could invalidate a restriction on abortion, and the government could appeal.[258] In the first situation, four Justices would need to grant certiorari because they believe that the restriction is unconstitutional. This would likely be a pre-viability restriction on a woman's right to choose to have an abortion that violated *Casey*'s undue burden test.[259] The second situation would require the opposite – four Justices who believed that the restriction was valid. Again, this would most likely occur because they believed that the pre-viability restriction does not impose an undue burden. Although the Court could, in theory, use either situation to reexamine *Roe*, "[i]t is not the habit of the court to decide questions of a

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[253] *See* SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").

[254] 28 U.S.C. § 1257 (2006); *see also id.* § 1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .").

[255] SUP. CT. R. 10.

[256] *Id.* (providing a non-comprehensive list of possible "compelling reasons").

[257] *See* Straight v. Wainwright, 476 U.S. 1132, 1134 (1986) (Brennan, J., dissenting) ("A minority of the Justices has the power to grant a petition for certiorari over the objection of five Justices. The reason for this 'antimajoritarianism' is evident: in the context of a preliminary 5-to-4 vote to deny, 5 give the 4 an opportunity to change at least one mind.").

[258] There are a couple of other possibilities. Two or more courts could rule differently on similar or identical restrictions, and the Court could grant certiorari to settle the law. However, the Court would grant certiorari on a case fitting one of the two aforementioned types to do so. A fourth situation – that a statute is ruled partially valid and partially invalid – does not add anything appreciable to the argument because each challenged provision would either be upheld or invalidated.

[259] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (O'Connor, Kennedy, Souter, JJ., plurality opinion).

constitutional nature unless absolutely necessary to a decision of the case."[260] Neither of these situations necessarily implicates *Roe* because the Court could dispose of both situations simply by applying *Casey*'s undue burden test.

There are two situations that could directly implicate *Roe*. The first situation is a post-viability restriction that does not contain an exception to preserve the life and health of the pregnant woman.[261] This could present an opportunity to overrule *Roe* if the Court were inclined to find such a restriction constitutionally valid. But there is no reason to believe that it would. Even critics of *Roe* on the Court have not argued for the validity of an abortion ban that does not contain an exception for the life and health of the mother.[262]

The second situation that would present an opportunity to revisit *Roe* involves a statute regulating pre-viability abortion that is invalidated for being an undue burden. The Court would have to reexamine *Roe* if four Justices believed that the restriction imposed an undue burden, but was nonetheless constitutional. This position would question both *Casey*'s undue burden test and *Roe*'s absolute prohibition on first trimester abortion restrictions.[263]

There is reason to believe that the second situation is unlikely. The undue burden test is not a very strict test, and states can restrict abortion in a variety of ways.[264] It is unclear what type of restrictions states would pass that would impose an undue burden. Clearly, an outright ban of pre-viability abortion – even one with an exception for the health and life of the mother – would fail the undue burden test.[265] A state also cannot require an adult woman to inform her husband about her decision to terminate her pregnancy prior to procuring an abortion.[266] Short of these restrictions, however, the Court has provided little clarification of the undue burden test.

There is little motivation for a state to pass overly restrictive abortion legislation. Most people believe that abortion should be legal at least some of the time.[267] Additionally, major anti-abortion forces are putting their weight

[260] Burton v. United States, 196 U.S. 283, 295 (1905); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 521 (1989) (refusing to "revisit the holding of *Roe*" because the facts of the case slightly differed from *Roe*).

[261] *See Casey*, 505 U.S. at 879 ("We also reaffirm *Roe*'s holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973))).

[262] *See Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting) ("If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective. . . . ").

[263] *See Casey*, 505 U.S. at 874; *Roe*, 410 U.S. at 164.

[264] *See supra* notes 54-63 and accompanying text.

[265] *Casey*, 505 U.S. at 879.

[266] *Id.* at 898.

[267] *See supra* note 136.

behind a very narrow and incremental approach to restricting abortion.[268] Thus, it is unclear that a state would pass the type of legislation that would be invalid under the permissive undue burden test. Smaller still is the probability that a state would expend the resources to argue the constitutionality of a broad restriction on abortion all the way to the Supreme Court.

South Dakota can be seen as a prime example of this. South Dakota has enacted some of the most restrictive abortion laws in the country.[269] On March 2006, South Dakota Governor Mike Rounds signed HB 1215, the Women's Health and Human Life Protection Act, one of the most restrictive bans on abortion.[270] The act criminalized abortion in all cases except where necessary to preserve the life of the mother.[271] Many perceived the bill as a test case: the law clearly violated *Roe* and *Casey*, and the South Dakota government saw it as an opportunity to argue for *Roe*'s reversal.[272] The South Dakota government never got that chance because the law was too far removed from the will of the people of South Dakota. Despite the fact that the bill had "bi-partisan sponsorship and strong bi-partisan support in both houses,"[273] the statute was repealed at the polls later that year.[274] Supporters of the bill placed a less stringent version on the ballot two years later, but that referendum was also handily defeated.[275] A similarly restrictive referendum failed in Colorado as well.[276]

[268] *See* Garrow, *supra* note 186, at 34-43 (describing the infighting among the anti-abortion camp over this incremental strategy).

[269] Americans United for Life ranked South Dakota third on their Defending Life 2009 State Rankings. *Defending Life 2009: Your State*, AMS. UNITED FOR LIFE, http://dl.aul.org/your-state (last visited Feb. 23, 2010). South Dakota apparently has only one abortion provider. *See S.D. Doctors Must Say Abortion Ends a Life*, DESERET MORNING NEWS (Salt Lake City), July 18, 2008, *available at* http://www.deseretnews.com/article/700244078/SD-doctors-must-say-abortion-ends-a-life.html.

[270] *See* Gov. Mike Rounds, Statement on the Signing of House Bill 1215, (Mar. 6, 2006) (transcript available at 2006 Legis. Bill Hist. SD H.B. 1215 (LEXIS)) (stating that the Act's "purpose is to eliminate most abortions in South Dakota").

[271] *See* Act of Mar. 6, 2006, ch. 119, §§ 2, 4, 2006 S.D. Sess. Laws 171.

[272] *See* Rounds, *supra* note 270 ("Because this new law is a direct challenge to the Roe versus Wade interpretation of the Constitution, I expect this law will be taken to court and prevented from going into effect this July. That challenge will likely take years to be settled and it may ultimately be decided by the United States Supreme Court.").

[273] *Id.*

[274] *See* Megan Myers, *S.D. Rejects Abortion Ban*, ARGUS LEADER (Sioux Falls, S.D.), Nov. 8, 2006, at 1A ("South Dakota voters on Tuesday firmly rejected a law banning almost all abortions . . . .").

[275] *See* Terry Woster, *Abortion Fight Keys on S.D.*, ARGUS LEADER (Sioux Falls, S.D.), Nov. 9, 2008, at 1A.

[276] *See* Glenn Kessler, *California Voters Narrowly Approve Same-Sex Marriage Ban; Limits on Abortion Rejected in Colorado and South Dakota*, WASH. POST, Nov. 6, 2008, at A44 ("Colorado voters, by 73 percent to 27 percent, rejected a measure that would have

Assuming the unlikely event that a state has the political support to pass a sweeping restriction on abortion and continue to litigate it all the way to the Supreme Court, the Court would still need to grant certiorari. For the Court to grant certiorari in a case such that it would implicate *Roe*, at least four Justices would have to find that the law imposes an undue burden but is still permissible. In this way, the Court would be actively seeking an opportunity to overrule *Roe*.

Ever since *Roe* was decided, there have been Supreme Court Justices who have argued that it should be overruled.[277] These critics believe that the Court should remove itself from the "abortion-umpiring business."[278] A decision to overrule *Roe*, rather than extricate the Court from the abortion issue, would further enmesh it in abortion jurisprudence.[279] If the Court is serious about freeing itself from the abortion mess, there is one sure way it can do so: the Court can refuse to grant certiorari on abortion cases in the future.

The Court need not grant certiorari to any abortion cases. Even if the Court were inclined to do so, few state restrictions on abortion directly implicate *Roe*, and the anti-abortion agenda is shifting away from supporting such broad restrictions. Situations that do implicate a potential reversal of *Roe* would require a Court willing to grant certiorari to do so. In this way, the certiorari procedure cuts against the likelihood that *Roe* will be overruled.

F. *The Freedom of Choice Act and the Limiting Role of Congress*

In 2007 both houses of Congress introduced bills to enact the Freedom of Choice Act ("FOCA").[280] Then-Senator Obama was one of the cosigners of the Senate version of the bill. Although the bill was never enacted, while campaigning in 2007 President Obama stated, "The first thing I'll do as president is sign the Freedom of Choice Act."[281]

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defined human life as beginning at fertilization, raising the possibility that abortion would be made the legal equivalent of murder.").

[277] Justice Rehnquist dissented in *Roe*, finding "the enunciation of the substantive constitutional law in the Court's opinion" improper. Roe v. Wade, 410 U.S. 113, 177 (1973) (Rehnquist, J., dissenting). Nineteen years later, Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, again declared opposition to *Roe*. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.").

[278] *Casey*, 505 U.S. at 996 (Scalia, J., dissenting).

[279] *See* Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 611-53 (2007).

[280] *See* H.R. 1964, 110th Cong. (2007); S. 1173, 110th Cong. (2007).

[281] *See* Lanz Christian Bañez, *'Choice' Measure Worries Pro-Lifers*, VALLEJO TIMES HERALD (Cal.), Jan. 19, 2009. Clearly, this statement was political rhetoric. President Obama not only did not make this his first presidential act, but one hundred days into his first term, he declared that FOCA was not his "highest legislative priority." Susan Milligan,

The stated purpose of FOCA is "[t]o protect, consistent with Roe v. Wade, a woman's freedom to choose to bear a child or terminate a pregnancy."[282] The Act would prevent any federal, state, or local government from enacting restrictions that would "deny or interfere with a woman's right to choose to terminate a pregnancy prior to viability[] or to terminate a pregnancy after viability where termination is necessary to protect the life or health of the woman."[283] Additionally, the government cannot discriminate in the way it provides "benefits, facilities, services, or information" between a pregnant woman who choose to terminate her pregnancy and one who wishes to give birth.[284] FOCA would not merely prevent the government from enacting legislation that would restrict abortion; it would invalidate all laws that currently do so.[285]

Were Congress to enact FOCA or similar legislation, that act would help insulate *Roe v. Wade* from future attacks. If a party was to challenge the legality of an abortion restriction passed after FOCA or similar legislation was enacted, *Roe* would not be implicated. The Court would analyze the challenged abortion restriction under FOCA because "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."[286] Because *Roe* would not be implicated, *Roe* would not be in jeopardy of being overruled.

Using FOCA to justify *Roe*'s continued viability clearly has some flaws. First and foremost, FOCA has not been enacted. However, NARAL Pro-Choice America has projected that a majority of both the House of Representatives and the Senate are either "Pro-Choice" or "Mixed Choice."[287] Given President Obama's clear endorsement of FOCA, it appears that FOCA could be enacted if reintroduced in the current Congress.[288]

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100 Days in, Obama Warns of Work to Do; Says Policies on Healthcare, Energy Remain Big Challenges, BOS. GLOBE, Apr. 30, 2009, at A1.

[282] S. 1173.

[283] *Id.* § 4.

[284] *Id.*

[285] *See id.* § 6 (applying the Act to any government "action enacted, adopted, or implemented before, on, or after the date of enactment of this Act").

[286] Burton v. United States, 196 U.S. 283, 295 (1905).

[287] *See Choice Composition of the 111th Congress*, NARAL PRO-CHOICE AM., http://www.prochoiceamerica.org/elections/2008-congressional-results.html (last visited Feb. 26, 2010) (estimating that 42% and 19% of the House is Pro-Choice and Mixed Choice, respectively, and 41% and 19% of the Senate is Pro-Choice and Mixed Choice, respectively).

[288] The political landscape is not entirely clear, however. When Scott Brown was elected to replace Senator Ted Kennedy, Democrats lost a filibuster-proof majority in the Senate. If the fight over abortion in the recently passed Affordable Healthcare for America Act is any indication, it is questionable that Congress would enact FOCA if reintroduced. *See* Laura Meckler, *The Healthcare Decision: Order on Abortion Solidifies Support*, WALL ST. J., Mar. 22, 2010, at A5.

The second weakness in the argument that FOCA would insulate *Roe* is that FOCA itself may be unconstitutional. Without going into too much detail, I will briefly discuss some of the potential constitutional conflicts that FOCA may present. On its face, certain sections of the bill have dubious validity. For example, the Act purports to prevent future Congresses from enacting abortion restrictions.[289] This provision would clearly be unconstitutional as applied if it were interpreted to limit future Congresses from enacting abortion-restrictive legislation because the precept "that one legislature cannot abridge the powers of a succeeding legislature" is incontrovertible.[290] This flaw should not fundamentally undermine FOCA, however, because FOCA has a severability clause.[291]

The more interesting constitutional issue is whether Congress even has the authority to pass such a bill. The bill's proponents assert that Congress's authority to enact FOCA comes from the Commerce Clause of Section 5 of the Fourteenth Amendment.[292] Nonetheless, a future Court might find that Congress lacks the authority under either constitutional provision.

Congressional power to regulate interstate commerce under the Commerce Clause "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[293] The Court has permitted Congress "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[294] For example, Congress can regulate the growing and cultivating of crops for personal use because this local activity, when aggregated together, can profoundly affect the overall interstate supply and demand for the commodity.[295] Nonetheless, providing abortion is a service and not a "fungible commodity."[296] It does not seem that there is an interstate market for abortion services or that providing (or restricting) abortions locally would have some interstate impact on the supply or demand for such services.

Even if, as FOCA claims, abortion restrictions have an impact on interstate commerce,[297] the Act may still be an invalid exercise of Congress's Article I authority. Rather than a law of general applicability, FOCA applies directly to

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[289] S. 1173, § 6.

[290] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).

[291] S. 1173, § 5.

[292] *Id.* § 2(14).

[293] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

[294] Gonzales v. Raich, 545 U.S. 1, 17 (2005)

[295] *See id.* at 17-22 (upholding federal legislation restricting the possession of home-grown marijuana for personal consumption even though it was never intended to enter the sales market).

[296] *Id.* at 18.

[297] *See* S. 1173, § 2(15) (describing three ways in which abortion providers impact interstate commerce).

the states.[298] As the Court said in *New York v. United States*, "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[299] Some believe that FOCA would therefore be an "illegitimate" exercise of Article I power.[300]

The Court's decision in *City of Boerne v. Flores*[301] draws into question Congress's authority to enact FOCA under Section 5 of the Fourteenth Amendment. The *Boerne* Court declared that "[t]he design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."[302] Because the Court has held that many types of abortion restrictions are constitutional, FOCA's apparent invalidation of these statutes would be a substantive modification of the right to choose to have an abortion. Thus *City of Boerne* seems to address the constitutionality of FOCA. More likely, given the severability clause, FOCA would be validly applied to abortion restrictions that violate *Casey*'s undue burden test.

This discussion does, to a certain extent, put the cart before the horse: discussing the potential constitutionality of an un-enacted bill is admittedly premature. Nonetheless, if there were enough support in Congress to pass FOCA, it is likely that FOCA would be a valid codification of *Casey*'s current formulation of *Roe*'s holding. In this way, FOCA presents another possible justification for *Roe*'s retention.

III. THE BENEFITS OF ABANDONING THE FIGHT OVER *ROE*

Because the Court will not overrule *Roe*, anti-abortion forces should abandon their efforts toward this goal. At the local, state, and federal levels, tremendous resources have been spent on the fight over *Roe*.[303] Yet it appears

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[298] *See id.* § 4(b) ("A *government* may not deny or interfere with a woman's right to choose . . . ." (emphasis added)).

[299] New York v. United States, 505 U.S. 144, 162 (1992).

[300] Douglas A. Axel, Note, *The Constitutionality of the Freedom of Choice Act of 1993*, 45 HASTINGS L.J. 641, 656 (1994) (arguing that an earlier, less restrictive version of FOCA was not proper under the Commerce Clause); *see also* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 41 (1993) ("It is by no means clear that the disparity among states produced by 'non-unduly-burdensome' regulations can plausibly be said to create the sort of interstate distortions required to justify the use of the commerce power.").

[301] 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as applied to the states).

[302] *Id.* at 519.

[303] Over the last twenty years, almost seven million dollars has been donated by anti-abortionists in federal elections alone. *See Abortion Policy/Pro-Life: Long-Term Trends*,

that this money has been ill-spent. *Roe* is still good law, in spite of these efforts. True, the rate of abortion has dropped steadily since 1992,[304] but there is no reason to believe this is due primarily to attempts to overturn *Roe*. Although abortion restrictions may have contributed to this, the drop is likely related to an increase in sexual education and an increase in contraceptive use.[305] Increasing availability of the so-called "morning after" pill has also significantly contributed to the decline in abortions.[306] Additionally, teenage pregnancy rates dropped significantly from 1991 to 2005.[307] Thus, the time, money, and energy spent attacking and supporting *Roe* has likely had little real effect on the abortion rate. If this is true, then this money is better spent elsewhere.

For anti-abortionists, diverting these resources to projects that help educate women about abortion alternatives and provide assistance to pregnant women in crisis would likely be more effective. If anti-abortionists are sincere in their desire to eliminate abortion, legal roadblocks are ill-equipped to achieve this goal: women procured abortions before *Roe* and women will continue to procure them despite the legal landscape.[308] Providing financial assistance to desperate or poor women who believe abortion is their only choice may

OPENSECRETS.ORG, http://www.opensecrets.org/industries/indus.php?ind=Q14 (last visited Feb. 26, 2010) (including only contributions in excess of $200 by individuals and Political Action Groups reported to the Federal Election Commission). Pro-choice forces have spent significantly more. *See Abortion Policy/Pro-Choice: Long-Term Trends*, OPENSECRETS.ORG, http://www.opensecrets.org/industries/indus.php?ind=Q15 (last visited Feb. 26, 2010) (reporting over eighteen million dollars contributed by pro-choice forces). Federal anti-abortion contributions pale in comparison to state and local contributions. *See California Spending at a Glance*, ASSOC. PRESS, Feb. 3, 2009, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/02/03/state/n180650S85.DTL (reporting that anti-abortion forces spent $3.2 million and pro-choice forces spent $9.5 million on one California abortion-restrictive initiative alone).

[304] *See* Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. SEXUAL & REPROD. HEALTH 7, 9 tbl.1 (2008), *available at* http://www.guttmacher.org/pubs/journals/4000608.pdf.

[305] *See* Nancy Gibbs, *Why Have Abortion Rates Fallen*, TIME, Jan. 21, 2008, *available at* http://www.time.com/time/nation/article/0,8599,1705604,00.html.

[306] *See* Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000-2001*, 34 PERSP. SEXUAL & REPROD. HEALTH 294, 300 (2002), *available at* http://www.guttmacher.org/pubs/journals/3429402.pdf ("[E]mergency contraception could account for 43% of the decrease in abortions.").

[307] *See* Joyce A. Martin, et al., *Births: Final Data for 2006*, NAT'L VITAL STAT. REP., Jan. 7, 2009, at 2, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf.

[308] *See generally* Graber, *supra* note 7 (discussing the availability of abortion pre-*Roe* and the general lack of enforcement of abortion restrictions).

encourage other options and reduce the prevalence of abortion.[309] Efforts can also be focused on making adoption a more viable alternative to abortion.

Similarly, pro-choice forces should continue to work at the grass-roots level to "educate and inform and provide assistance so that the choice guaranteed under our constitution either does not ever have to be exercised or only in very rare circumstances."[310] Research shows that both prior and subsequent to *Roe*, the access poor and minority women had to abortion services was relatively more restricted than to affluent white women.[311]

Because states are not required to fund non-therapeutic abortions and state hospitals are not required to provide them, a woman's access to abortion services may be more restricted for practical reasons than legal reasons.[312] Those dedicated to maintaining access to abortion services may better ensure this access by providing financial assistance to those who, for practical reasons, are unable to procure an abortion.[313]

By shifting the abortion debate to address those most impacted by abortion rather than on overturning *Roe*, those on both sides of the debate can realize their goals more fully. In doing so, both those opposed to abortion and those opposed to restricting the abortive choice can heed President Obama's call:

> So let us work together to reduce the number of women seeking abortions, let's reduce unintended pregnancies. Let's make adoption more available. Let's provide care and support for women who do carry their children to term. Let's honor the conscience of those who disagree with abortion, and draft a sensible conscience clause, and make sure that all of our health care policies are grounded not only in sound science, but also in clear ethics, as well as respect for the equality of women.[314]

Beyond helping both anti-abortion and pro-choice advocates better achieve their goals, abandoning the fight over *Roe* would benefit society at large. For many, elections boil down to one issue: abortion. For example, Catholics have been instructed that "a candidate's position on a single issue that involves an intrinsic evil, such as support for legal abortion . . . , may legitimately lead a

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[309] Just as charitable organizations propose that prospective donors "adopt" a poor family in a third world country, organizations seeking to limit abortions could propose that prospective donors "adopt" the baby of a woman who might otherwise abort it.

[310] Sen. Hillary Clinton, Address in Albany, NY (Jan. 24, 2005), *quoted in* William Saletan, *Safe, Legal, and Never: Hillary Clinton's Anti-Abortion Strategy*, SLATE, Jan. 26, 2005, http://www.slate.com/id/2112712.

[311] *See* Graber, *supra* note 7, at 311-12.

[312] *See supra* notes 64-78 and accompanying text.

[313] *See* Bernstein, *supra* note 74, at 1497-501 (discussing the many ways in which women seeking an abortion can be supported by the "abortion underground railroad").

[314] Barack Obama, U.S. President, Remarks by the President in Commencement Address at the University of Notre Dame (May 17, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Notre-Dame-Commencement.

voter to disqualify a candidate from receiving support."[315] Although Catholic Bishops counsel that Catholics should not be "single-issue voters," many are.[316] As such, these voters do not have much real input into other important issues facing the nation. By acknowledging that *Roe* will not be overturned, we can effectively take the abortion issue off the agenda, and a wider range of issues can be discussed and considered. In this way, both Congress and the Presidency will better reflect our true ideals.

Additionally, abandoning the legal fight over *Roe* could substantially improve the federal judiciary. Abortion is not the sole cause of the contentiousness in the Supreme Court confirmation process, but it has clearly exacerbated it.[317] Eliminating the fight over *Roe* may result in a more efficient Supreme Court confirmation process. Yet the benefits to the judiciary would not be limited to the Supreme Court. In his first eight months in office, President Obama nominated eighteen replacements for the ninety-five vacant district court and appeals court vacancies.[318] The Senate has only confirmed two of these nominations, leaving ninety-three vacancies unfilled.[319] Given the assertions by some that backlogs in the federal caseload have become a crisis,[320] a less combative and more efficient judicial confirmation process may provide greater judicial access to litigants.

CONCLUSION

For more than thirty-seven years, crusaders have ardently fought to overrule *Roe*. Yet despite these efforts, *Roe* has weathered the onslaught. There is much at stake in the debate over abortion, but *Roe*'s fate is not in jeopardy. The many reasons for *Roe*'s continued legacy will continue to ensure that *Roe* survives future challenges. There is much to gain by abandoning the fruitless fight over *Roe*.

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[315] U.S. CONFERENCE OF CATHOLIC BISHOPS, FORMING CONSCIENCES FOR FAITHFUL CITIZENSHIP: A CALL TO POLITICAL RESPONSIBILITY FROM THE CATHOLIC BISHOPS OF THE UNITED STATES 13 (3d ed. 2008), *available at* http://www.usccb.org/faithfulcitizenship/FCStatement.pdf.

[316] *Id.*

[317] *See supra* notes 235-52 and accompanying text.

[318] Larry Margasak, *Inside Washington: Obama Moving Slowly on Judges*, ASSOCIATED PRESS, Oct. 2, 2009, http://hosted.ap.org/dynamic/stories/U/US_REMAKING_THE_COURTS?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT. This total does not include Sonia Sotomayor's nomination and confirmation to the Supreme Court, but does include the vacancy she left on the Second Circuit Court of Appeals.

[319] *Obama's Nominees for Federal Court Vacancies*, ASSOCIATED PRESS, Oct. 2, 2009, http://www.cbsnews.com/stories/2009/10/02/ap/preswho/main5359613.shtml.

[320] *See, e.g.*, Symposium, *The Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 319 (2008).