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MARY ZIEGLER

With President Donald Trump's third Supreme Court nomination, the reexamination of Roe v. Wade *has become a probability. An increasingly conservative Court will almost certainly not embrace the idea of abortion rights. Instead, the fate of abortion rights will likely turn on the meaning of stare decisis, a doctrine requiring the Court to pay some deference to its past decisions. Stare decisis has recently played a starring role in abortion jurisprudence. In his controlling concurrence in* June Medical Services L.L.C. v. Russo*, Chief Justice Roberts invoked stare decisis while gutting the substantive rule written into the precedent to which he proclaimed fidelity. This use of precedent might appear contradictory or even hypocritical. In truth, it emanates from decades of social-movement conflict about what defines a precedent—and what it means for a court to be bound by past decisions.*

This Article chronicles the surprising history of that conflict. Struggles over stare decisis and abortion produced a separation of stare decisis rhetoric from any obligation to adhere to precedent, a willingness to treat a decision's divisiveness as a sign of its failings, and a conflation of one or more stare decisis factors with others. The result is a vision of stare decisis that is opaque, if not outright dishonest. This obfuscation is particularly troubling in the context of abortion jurisprudence, where popular constitutional engagement is intense. The Court has never been more than one participant in a broader dialogue about reproduction and the Constitution. If the Justices reverse Roe*, they have a duty to do so in a way that facilitates, rather than undermines, public engagement.*

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MARY ZIEGLER [*]

INTRODUCTION

With the Supreme Court seemingly poised to overturn *Roe v. Wade*,[1] social movements' effects on constitutional law in the United States have rarely been clearer.[2] Social movements offer substantive reasons for courts to revisit earlier decisions like *Roe*.[3] But the fate of *Roe* may depend on a quite different brand of social-movement politics—one centered on the very meaning of stare decisis. This Article analyzes the surprising social-movement history of debates about how courts, lawmakers, and the people should relate to and value judicial precedent, debates very much anchored to the fate of legal abortion in the United States.[4] These debates were on full display during the confirmation hearings of Amy Coney Barrett, when partisans battled about whether *Roe* counted as settled law (and what counted as settled in the first place).[5] But well before Justice Barrett's confirmation, the Court made debates about stare decisis central to its abortion jurisprudence.[6] In his controlling

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[1] 410 U.S. 113 (1973).

[2] *See generally* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877 (2013) (exploring scholarly literature on how social movements change the law); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (exploring social movement arguments later woven into constitutional law); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (offering a case study of how social movement arguments have influenced abortion doctrine); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (studying the effects of social movement mobilization on sex equality doctrine).

[3] *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 519–20 (2001).

[4] *See generally* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020), *rev'g* June Med. Servs. L.L.C. v. Gee, 905 F.3d 787 (5th Cir. 2018).

[5] On debates about stare decisis during the Barrett hearings, see Brian Naylor, *Barrett Says She Does Not Consider* Roe v. Wade *'Super-Precedent'*, NPR (Oct. 13, 2020, 3:55 PM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent; Jemima McEvoy, *Amy Coney Barrett Says* Roe v. Wade *Is Not 'Super-Precedent'*, FORBES (Oct. 13, 2020, 3:27 PM), https://www.forbes.com/sites/jemimamcevoy/2020/10/13/amy-coney-barrett-says-roe-v-wade-is-not-super-precedent/?sh=4da527fe61f0. *See also* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1714–15, 1722–26, 1728–30 (2013) (developing the concept of super-precedent and explaining its application to *Roe*).

[6] *See June Med. Servs.*, 140 S. Ct. at 2133 (Roberts, C.J., concurring) (exploring the role of precedent in Roberts' deciding vote in the case).

concurrence in *June Medical Services L.L.C. v. Russo*, Chief Justice Roberts invoked stare decisis while gutting the substantive rule written into the precedent to which he proclaimed fidelity.[7] This use of precedent might appear contradictory or even hypocritical. In truth, it emanates from decades of social-movement conflict about what defines a precedent—and what it means for a court to be bound by past decisions.

At first, *June Medical* seems to be a case about woman-protective abortion regulations, not stare decisis.[8] Louisiana had passed a law requiring doctors to have admitting privileges at a hospital within thirty miles.[9] The state argued that the requirement would improve continuity of care for patients.[10] Louisiana also argued that abortion providers should no longer have third-party standing.[11] The state identified what it saw as a dangerous conflict of interest between patients, who would benefit from stricter safety standards, and supposedly profit-oriented providers trying to shirk safety requirements.[12]

Chief Justice Roberts's controlling concurrence, together with the dissenting opinions, put the meaning of precedent at the heart of the case.[13] Roberts would have liked to uphold Louisiana's law.[14] Nevertheless, because of stare decisis, he felt compelled to "treat like cases alike" and struck down the admitting-privilege requirement.[15] The dissenting Justices responded with their own accounts of what made a precedent deserving of deference.[16]

What are we to make of the fact that the Court dedicated so much time to discussing stare decisis in a decision that neither preserves precedent intact nor cleanly overrules it? Or that a Supreme Court nominee, chosen and widely expected to vote against *Roe*, made so much of precedent in her confirmation proceedings? The recent history of social-movement

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[7] *Id.* at 2134–39 (Roberts, C.J., concurring).

[8] *Cf.* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 993 (explaining that the antiabortion movement has "produced a woman-protective antiabortion argument that mixes new ideas about women's rights with some very old ideas about women's roles").

[9] LA. STAT. ANN. § 40:1061.10(A)(2)(a) (2021).

[10] Brief for Respondent/Cross-Petitioner at 85–86, *June Med. Servs.*, 140 S. Ct. 2103 (Nos. 18-1323 & 18-1460).

[11] *Id.* at 23–26.

[12] *Id.* at 41–46.

[13] *See June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring) (noting that stare decisis is "necessary" in the judicial system, that "[r]espect for precedent" has "pragmatic benefits," and, that under Court precedents, Louisiana's law cannot stand); *id.* at 2147, 2151–52 (Thomas, J., dissenting) ("Even under the Chief Justice's approach to *stare decisis*, continued adherence to these precedents cannot be justified.").

[14] *See id.* at 2133 (Roberts, C.J., concurring) (stating that Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), was "wrongly decided" though noting that the Court must adhere to its precedent).

[15] *Id.* at 2141–42.

[16] *See id.* at 2149–53 (Thomas, J., dissenting); *id.* at 2157–58, 2170–71 (Alito, J., dissenting); *id.* at 2180–81 (Gorsuch, J., dissenting).

mobilization over abortion helps make sense of these apparent contradictions. Social movements have encouraged the Court to pay lip service to stare decisis while proposing ever narrower definitions of the core principles defining a precedent.[17] Social movements have also proposed criteria that disqualify an earlier decision as a binding precedent. Beyond the quality of a decision's reasoning, antiabortion lawyers in organizations like Americans United for Life and National Right to Life Committee have redefined "settled law," arguing that any opinion that failed to resolve a deep social divide—or that exacerbated existing polarization—should be overturned.[18] Both modes of reasoning about precedent allow the Court to destabilize existing doctrine while professing respect for stare decisis.

This Article traces the surprising history of social-movement conflict about stare decisis and abortion. It illuminates one of the ways that a Supreme Court concerned with its legacy may unravel abortion rights without triggering the same kind of public reaction we might expect from a direct overruling. But this history has consequences outside of the abortion context. The emptying out of certain liberties is especially troubling in a constitutional system that still nominally treats rights as trumps.[19] "Lowering the stakes of politics" is one of the overriding goals of judicial review in a pluralist democracy.[20] But when courts hollow rights, they "sap[] the losing side in constitutional disputes of the leverage to deliberate toward political consensus."[21] And by leaving some vestige of a right in place, courts incentivize parties to rely on litigation to preserve whatever is left, rather than to pursue more productive strategies.

By separating the rhetoric of precedent and the doctrine of stare decisis, the Court also undermines the very values stare decisis is supposed to serve. Invoking precedent while transforming it does not promote stability or predictability. It involves obfuscation, resulting in a vision of stare decisis that is opaque, if not outright dishonest.

The stakes of this obfuscation run higher in the abortion context, where popular constitutional engagement is commonplace. The Court has never been more than one participant in a broader dialogue about abortion and the Constitution—a dialogue that has produced hundreds of bills, endless political campaigns, and countless popular essays. If the Justices elect to reverse *Roe*, they have a duty to do so in a way that facilitates, rather than

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[17] *See infra* Part I.

[18] *See infra* Part III.A.

[19] *See* Jamal Greene, *The Supreme Court 2017 Term, Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 32–38 (2018) (offering a framework for understanding rights as trumps).

[20] William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1293–94 (2005).

[21] Greene, *supra* note 19, at 37.

obstructs, popular responses. Without a more principled approach to stare decisis, the Court will fail this test.

The Article proceeds in four parts. Focusing on the years before *Planned Parenthood v. Casey*,[22] Part I traces the origins of the constitutional politics of precedent in the abortion conflict. Part II explores how these ideas changed in the decades after *Casey* as antiabortion groups proposed ever-narrower definitions of a constitutional right to abortion. Part III situates *June Medical* and its aftermath in these ongoing constitutional struggles and explores the costs of creating a freestanding rhetoric of respect for precedent. Part IV briefly concludes.

I. ANTI-PRECEDENT, EMPTY PRECEDENT, 1973–1992

At present, the fate of legal abortion seems likely to turn less on the substance of a right to choose than on the meaning of precedent.[23] The Supreme Court has six Justices selected by presidents who opposed legal abortion or vowed to nominate only those who would vote to overturn *Roe*.[24] Perhaps unsurprisingly, few expect the Court's conservative majority to accept arguments about the merits of abortion rights.[25] Instead, the social movements contesting the abortion wars are now fighting about what defines settled law—and whether reversing *Roe* would run contrary to the norms guiding stare decisis.[26] In *June Medical*, pro-choice attorneys focused almost exclusively on the importance of precedent and the potential damage that the Court could do by ignoring it.[27] But social-movement conflict about stare decisis did not begin recently.

This Part traces the origin of that conflict in the 1970s. At first, abortion foes insisted that the Court should immediately discard *Roe* because it violated paramount constitutional principles.[28] Antiabortion leaders quickly recognized that their pleas had fallen on deaf ears. For a time, abortion foes had tried to pass a constitutional amendment that would outlaw abortion

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[22] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[23] *See* Melissa Murray, *Symposium: Party of Five? Setting the Table for* Roe v. Wade, SCOTUSBLOG (July 24, 2019, 3:18 PM), https://www.scotusblog.com/2019/07/symposium-party-of-five-setting-the-table-for-roe-v-wade/ (exploring the likely role for stare decisis in the fate of abortion rights).

[24] *See* Mary Ziegler, *What's Next for Abortion Law?*, BOS. REV. (Sept. 1, 2020), http://bostonreview.net/politics-law-justice/mary-ziegler-whats-next-abortion-law (surveying the political and legal factors pointing toward the dismantling of abortion rights).

[25] *See* The Editorial Board, *John Roberts Is No Pro-Choice Hero*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/2020/06/29/opinion/supreme-court-abortion.html.

[26] *See* Mary Ziegler, *Taming Unworkability Doctrine: Rethinking* Stare Decisis, 50 ARIZ. ST. L.J. 1215, 1217–39 (2018) [hereinafter Ziegler, *Taming Unworkability Doctrine*] (offering a history of social movement struggles over stare decisis norms in the abortion context).

[27] *See* Brief for Petitioners at 17–21, 26–37, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (No. 18-1323) (emphasizing stare decisis principles in asking the Court to strike a Louisiana admitting privileges requirement).

[28] *See infra* Part I.A.

nationwide.[29] But the amendment failed to progress, and antiabortion leaders instead looked for a way to work within the confines of stare decisis—to claim respect for precedent while carving out more room for lawmakers to restrict abortion.[30] Beginning in the early 1980s, antiabortion lawyers separated the idea of a right to make abortion decisions, which the movement would leave untouched for the moment, from the ability to access abortion.[31] The antiabortion movement appealed to the Court to pay lip service to the idea of precedent and the importance of a right to abortion while partially overruling *Roe*.[32]

When many expected a reconfigured Court to overturn *Roe*, antiabortion lawyers developed a parallel strategy to argue that *Roe*'s real-world effects made it undeserving of deference.[33] In a last-ditch attempt to save *Roe*, abortion-rights supporters urged the Court to save *Roe* because of the practical effects of reversal, particularly the potential jeopardy to other constitutional liberties, from the right to use contraception to the right to marry.[34] Antiabortion lawyers responded with their own arguments about the effects of *Roe*, insisting that *Roe* was not settled because it had failed to resolve political fractures surrounding abortion—and it made the nation's political polarization even worse.[35]

In *Casey*, the Court rejected a longstanding campaign to undo *Roe*.[36] Yet, in a way, antiabortion efforts were a success. The *Casey* Court discussed the importance of precedent a great deal but substantially revised what the right to abortion meant.[37] Earlier in the 1980s, antiabortion attorneys had asked the Court to separate the ability to make a decision from the ability to have an abortion.[38] The *Casey* decision did just that.[39]

A. *From Natural Law to Narrow Precedent*

When antiabortion attorneys litigated *Roe v. Wade*, they believed that precedent was on their side. Lawyers for the United States Catholic Conference, Americans United for Life (AUL), and other antiabortion groups emphasized what they saw as the recognition of fetal personhood in

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[29] *See infra* Part I.A.

[30] *See infra* Part I.A.

[31] *See infra* Part I.B.

[32] *See infra* Part I.B.

[33] *See infra* Part I.D.

[34] *See infra* Part I.D.

[35] *See infra* Part I.D.

[36] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833–34 (1992).

[37] *See id*. at 852–53 (stressing the importance of precedent while jettisoning the trimester framework applied in *Roe*).

[38] *See infra* text accompanying note 215.

[39] *See Casey*, 505 U.S. at 851–53, 857–60, 877 ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.").

other areas of the law, from wrongful death to intestacy.[40] Antiabortion litigators also argued that, as a matter of original intent, a fetus or unborn child counted as a rights-holding person for the purposes of the Eighth, Ninth, and Fourteenth Amendments.[41] More ambitiously, some antiabortion lawyers asked the Court to hold that the Constitution *mandated* the recognition of fetal personhood and functionally prohibited any state from allowing abortion.[42] Joseph Witherspoon, a professor at the University of Texas at Austin, made this argument on behalf of a Texas diocese of the Roman Catholic Church. Witherspoon asserted that "the unborn child, however unwanted or considered to be a burden by its parents, has a constitutionally protected right to life."[43]

Witherspoon understood the principles of early antiabortion constitutionalism. He and other antiabortion attorneys and academics appealed to a right to life not spelled out in the text or history of the Constitution.[44] The foundational text for antiabortion lawyers was not so much the Fourteenth Amendment or Bill of Rights as it was the Declaration of Independence.[45] AUL's declaration of purpose represented one version of this constitutional argument: "We believe, in the words of the Declaration of Independence, that 'all men are created equal'; and thus that to be true to its heritage, this nation must guarantee to the least and most disadvantaged among us an equal share in the right to life."[46]

But precedent did have a role to play in pre-*Roe* antiabortion constitutionalism, especially because so many of the movement's arguments turned on the recognition of fetal personhood. For example, Thomas Shaffer, a professor at Notre Dame, argued that legal abortion deprived the fetus of life without due process of law in violation of the Fourteenth Amendment.[47] "If human life is involved, though, [in abortion]," Shaffer explained, "its

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[40] *See* MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 27–57 (2015) [hereinafter ZIEGLER, AFTER ROE] (exploring strategies used to bolster the case for personhood by recognizing fetal rights in other areas of law).

[41] *See* Motion for Leave to Submit a Brief Amicus Curiae: Brief of Women for the Unborn as Amici Curiae in Support of Appellees at 9–10, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) (stressing arguments about personhood); Brief of Americans United for Life, Amicus Curiae, in Support of Appellee at 5–10, *Roe*, 410 U.S. 113 (No. 70-18) (arguing the same); Motion for Leave to File Brief a Brief as Amicus Curiae & Brief of Amicus Curiae Robert L. Sassone In Support of Respondent at 5–8, *Roe*, 410 U.S. 113 (No. 70-18) (arguing the same).

[42] *See* Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 887 (2014) [hereinafter Ziegler, *Originalism Talk*] (referencing the AUL's declaration of purpose); *see also infra* text accompanying note 46.

[43] Brief Amicus Curiae on Behalf of Association of Texas Diocesan Attorneys, in Support of Appellee at 3, *Roe*, 410 U.S. 113 (No. 70-18).

[44] *See* Ziegler, *Originalism Talk*, *supra* note 42, at 896.

[45] *See id.* at 874, 887, 896, 921 (demonstrating that activists "argue[d] for the existence of a fundamental right to life" through the Declaration of Independence).

[46] *Id.* at 887 (quoting AUL's Declaration of Purpose).

[47] Thomas L. Shaffer, *Abortion, the Law and Human Life*, 2 VAL. U. L. REV. 94, 106 (1967).

destruction is a relatively grave matter. Abortion should at least, in that case, be surrounded with procedural protections as great as those given men convicted of crime . . . ."[48] Shaffer framed personhood as a question of biology.[49]

Other antiabortion attorneys, however, recognized that personhood could be a term of art in the law, regardless of how convincing they found biological evidence on the subject.[50] Antiabortion attorneys like Shaffer dealt with this issue by insisting that precedent increasingly looked to biology to define who counted as a person. David Louisell, a professor at the University of California Berkeley, made this argument for fetal personhood.[51] "The progress of the law in recognition of the fetus as a human person for all purposes has been strong and steady and roughly proportional to the growth of knowledge of biology and embryology," Louisell argued in the late 1960s.[52]

Nevertheless, precedent played only a small part in a strategy that relied on substantive due process and human rights.[53] Professor Robert Byrn summarized these arguments as follows:

> The Declaration of Independence holds as self-evident the moral truths "that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The fourteenth amendment institutionalized these principles . . . in the Constitution.[54]

At first, *Roe v. Wade* only hardened the antiabortion movement's conviction that precedent supported the idea of fetal personhood.[55] *Roe* addressed the constitutionality of a Texas law criminalizing most abortions,[56] while its companion case, *Doe v. Bolton*, struck down a version of a common reform bill first promoted by the American Law Institute.[57] The results of *Roe* and *Doe* invalidated the abortion laws then on the books in forty-six states.[58]

The *Roe* majority positioned the right to abortion as a logical extension of existing precedents on child-rearing, marriage, procreation, and family

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[48] *Id.*

[49] *See id.*

[50] *See* Ziegler, *Originalism Talk*, *supra* note 42, at 883–97.

[51] David W. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 234 (1969).

[52] *Id.*

[53] *See* Ziegler, *Originalism Talk*, *supra* note 42, at 883–97.

[54] Robert M. Byrn, *Abortion-on-Demand: Whose Morality*, 46 NOTRE DAME LAW. 5, 19 (1970).

[55] *See* ZIEGLER, AFTER ROE, *supra* note 40, at 38–57.

[56] Roe v. Wade, 410 U.S. 113, 117–19 (1973).

[57] Doe v. Bolton, 410 U.S. 179, 182–84 (1973).

[58] Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 150–51.

relationships.[59] Rather than accepting the argument that precedent required the recognition of fetal personhood, the Court treated personhood as a textual question.[60] Justice Harry Blackmun's majority looked to the uses of "person" elsewhere in the Constitution and suggested that many, if not all, uses applied only after birth.[61]

The Court also rejected a related argument about the government's interest in protecting fetal life.[62] Texas had justified its criminal abortion law by identifying a compelling interest in protecting life from the moment of fertilization.[63] The Court declined to "resolve the difficult question of when life begins."[64] Nevertheless, from the standpoint of social movement conflict, the Court did take sides on what defined personhood, leaving the matter to individual patients rather than allowing the state to impose its preference.[65] *Roe* even dismissed the idea that biology established a clear definition of personhood.[66] A biological definition fell apart in the face of "new embryological data that purport to indicate that conception is a 'process' . . . rather than an event, and by new medical techniques such as menstrual extraction [and] the 'morning-after' pill . . . ."[67] *Roe* treated personhood as a matter of individual conscience, not as a question already settled by precedent.[68]

For a time, *Roe* only deepened the antiabortion movement's commitment to the politics of personhood.[69] In part, antiabortion lawyers did not bother to respond to *Roe*'s holding because the movement's primary goal was a constitutional amendment that would make the 1973 decision irrelevant.[70] As early as 1974, Congress already had several constitutional amendments under consideration, either recognizing fetal personhood or establishing a right to life.[71] But the antiabortion movement also argued that *Roe* did not qualify as the kind of precedent to which the Court should

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[59] *Roe*, 410 U.S. at 152–53.

[60] *Id.* at 156–59.

[61] *Id.*

[62] *Id.* at 159–64.

[63] *Id.* at 159.

[64] *Id.*

[65] *See id.* at 159–64.

[66] *Id.* at 156–58, 160–62.

[67] *Id.* at 161.

[68] *See id.* at 160–62.

[69] *See* ZIEGLER, AFTER ROE, *supra* note 40, at 41–45 (exploring the campaign for a fetal personhood amendment that unfolded in the aftermath of *Roe*).

[70] *See* Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE 128, 144 (Donald T. Critchlow ed., 1996) (describing the details of a Human Life Amendment that would criminalize all abortions, except in cases in which a woman's life was threatened).

[71] *See* NAT'L COMM. FOR A HUM. LIFE AMEND., HUMAN LIFE AMENDMENTS: MAJOR TEXTS 1, 3, 6 (2004), https://www.humanlifeaction.org/downloads/sites/default/files/HLAmajortexts.pdf.

defer.[72] As antiabortion lawyers framed it, the *Roe* majority had ignored everything from natural law to the real meaning of substantive due process.[73]

These arguments defined antiabortion constitutionalism in the first major post-*Roe* abortion case, *Planned Parenthood of Central Missouri v. Danforth*.[74] *Danforth* involved several incremental restrictions, from a written consent requirement to a law mandating parental consultation.[75] AUL submitted a brief that pressed many of the arguments that had defined antiabortion advocacy before 1973.[76] The group asked the Court to set aside its usual respect for precedent because *Roe* conflicted with both natural law and earlier precedent on fetal personhood:

> John Locke, whose influence on the thinking of the founders of this nation is well known, wrote in his Second Treatise of Civil Government of the natural rights to life and property. These basic ideas found their way into the Declaration of Independence of July 4, 1776 . . . . In speaking of the first official action of this nation, which declared the foundation of our government in those words, the United States Supreme Court has said that ". . . it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence." . . . [T]he importance of the right to life in modern political and social theory has remained nearly unscathed as is evidenced not only by the Fourth Article of The Universal Declaration of Human Rights, . . . but also by the Second Article of the European Human Rights Convention, and the movement to abolish capital punishment.[77]

The United States Catholic Conference likewise argued that *Roe* did not deserve deference because it had not followed the principles of substantive due process developed in earlier cases like *Griswold v. Connecticut*[78] and *Eisenstadt v. Baird*:[79]

> The granting of legal personhood . . . is, we submit, properly the product of a constitutional analysis which recognizes the existence of rights which must be said to be implicit in other, more explicitly protected rights. . . . The process used to reach

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[72] *See supra* notes 40–54.

[73] *See supra* notes 49–54; *see also infra* text accompanying notes 77–80.

[74] 428 U.S. 52, 58, 82–83 (1976).

[75] *Id.* at 58–59.

[76] Motion & Brief, Amicus Curiae of Dr. Eugene Diamond & Americans United for Life, Inc., in Support of Appellees in 74-1151 & Appellants in 74-1419 at 35–36, *Danforth*, 428 U.S. 52 (Nos. 74-1151 & 74-1419).

[77] *Id.* (footnotes omitted).

[78] 381 U.S. 479 (1965).

[79] 405 U.S. 438 (1972).

> the penumbral rights enunciated in *Griswold v. Connecticut* is the self-same recognition of necessary implication. . . . There is irony in the fact that the majority in *Roe* not only failed to use the penumbral process with respect to fetal life, but also misapplied it with respect to the pregnant woman.[80]

The lead-up to *Danforth* suggested that the antiabortion movement would stick to its earlier constitutional approach, regardless of what the Supreme Court said.[81] Ironically, however, the decision of *Danforth* and a second case, *Maher v. Roe*,[82] planted the seeds of a new approach to precedent.

Maher involved a Connecticut regulation banning Medicaid reimbursement for elective abortions.[83] The lower courts had struck down the regulation.[84] In particular, the trial court held that, by choosing to fund childbirth but not abortion, the state had violated the Equal Protection Clause.[85] In appealing to the Supreme Court, Connecticut did not set out to reconfigure the Court's approach to precedent.[86] Nevertheless, Connecticut's approach in *Maher* illuminated a new way to grapple with *Roe*.[87]

Connecticut argued for a separation between the right to make a decision and the ability to act on that decision.[88] "There is nothing in the Connecticut regulation which prevents a woman from making a choice to have an abortion," Connecticut argued in its brief before the Supreme Court.[89] "Of course, once that choice has been made, if the woman is indigent, she must now look for a source of funds with which to pay the cost of the abortion."[90] As the government saw it, poverty had nothing to do with the government's actions.[91] *Roe* framed abortion as a matter of privacy, freedom from government interference.[92] As AUL argued in its brief in *Poelker v. Doe*,[93] a companion case, "If the abortion decision is so private . . . it follows that

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[80] Brief of Amicus Curiae for U.S. Catholic Conference at 16–18, *Danforth*, 428 U.S. 52 (Nos. 74-1151 & 74-1419) (footnotes omitted).

[81] *See supra* text accompanying notes 40–73.

[82] Maher v. Roe, 432 U.S. 464 (1977), *rev'g sub nom.* Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975) (*Norton III*).

[83] *Maher*, 432 U.S. at 466–67.

[84] *See* Roe v. Norton, 380 F. Supp. 726 (D. Conn. 1974) (*Norton I*), *rev'd* 522 F.2d 928 (2d Cir. 1975) (*Norton II*), *remanded to* 408 F. Supp. 660 (D. Conn. 1975) (*Norton III*), *rev'd sub nom.* Maher v. Roe, 432 U.S. 464 (1977).

[85] *See Norton I*, 380 F. Supp. at 730. *See also Norton II*, 522 F.2d at 930.

[86] Brief of the Appellant at 4–9, *Maher*, 432 U.S. 464 (No. 75-1440).

[87] *See Maher*, 432 U.S. at 471–80.

[88] Brief of the Appellant, *supra* note 86, at 13–16.

[89] *Id.* at 14.

[90] *Id.*

[91] *See id.* at 15–17.

[92] *See id.* at 13–14 (noting that *Roe v. Wade* "enunciated" women's constitutional right of personal privacy," which includes "the unfettered right to terminate a pregnancy through an abortion . . . during the first trimester").

[93] 432 U.S. 519 (1977).

government should not itself be compelled to respond to the demand of the exercise of that private right."[94] *Maher* suggested the outlines of a new approach to precedent. Rather than asking the Justices to reject *Roe* altogether, antiabortion lawyers could propose narrower and narrower understandings of *Roe*'s essential holding.[95] In Connecticut's view, all that mattered was whether patients could make decisions about abortion;[96] whether anyone could actually end a pregnancy was beside the point.[97]

The decisions in *Danforth* and *Maher* suggested that redefining *Roe* might be a smart strategy. In *Danforth*, the Court invalidated most of the disputed Missouri statute but upheld one measure requiring a woman to give written consent before receiving an abortion.[98] *Danforth* suggested that the Court might narrow abortion rights while still recognizing *Roe* as a precedent.[99] *Maher* reinforced this impression. The Court upheld the disputed Connecticut regulation, reasoning that *Roe* had recognized only a right to make "certain kinds of important decisions free from governmental compulsion."[100] As a result, abortion restrictions violated the Constitution only if they involved "unduly burdensome interference with [a woman's] freedom to decide whether to terminate her pregnancy."[101] The state had not made women poor and therefore had not created any undue burden.[102]

The antiabortion movement argued that *Roe* had no precedential value because it conflicted with natural law. But *Danforth* and *Maher* suggested that the movement would get further by contesting how much a court could reinterpret or even overturn a precedent without appearing indifferent to stare decisis. Antiabortion lawyers experimented with this approach, drafting an ordinance designed to serve as a model for states and cities across the nation.[103] The centerpiece of the law was an informed-consent measure that went considerably further than the one in *Danforth*, forcing patients to hear contested statements about the connection between abortion and everything from depression to infertility.[104] Akron, Ohio, a small, Rust Belt

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[94] Motion & Brief, Amicus Curiae of Americans United for Life, Inc. in Support of Petitioner John H. Poelker at 13, *Poelker*, 432 U.S. 519 (No. 75-442).

[95] *See supra* Parts I.A–B.

[96] *See supra* notes 86–89 and accompanying text.

[97] *See supra* notes 86–90 and accompanying text.

[98] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67 (1976).

[99] *See id.* at 65–67.

[100] Maher v. Roe, 432 U.S. 464, 473–74 (1977) (internal quotation marks omitted).

[101] *Id.*

[102] *See id.* at 474 ("The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.").

[103] *See* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 60–63 (2020) [hereinafter ZIEGLER, ABORTION AND THE LAW IN AMERICA] (detailing the history and strategic importance of the Akron ordinance).

[104] *See id.* at 60–61.

city, became the first to pass the ordinance.[105] Within three years, the Supreme Court agreed to hear a constitutional challenge to the law.[106]

B. *The Rhetoric of Precedent*

By the time the Supreme Court agreed to hear *City of Akron v. Akron Center for Reproductive Health* (*Akron I*),[107] the antiabortion movement's constitutional strategy had changed substantially. The constitutional-amendment campaign, the hallmark of post-*Roe* advocacy, had flamed out.[108] Even after antiabortion Republicans appeared to control the White House and both houses of Congress, abortion foes lacked the votes to pass the kind of absolute ban the movement favored, and the movement remained too divided over what would be the best alternative to get anything done.[109] As important, President Ronald Reagan, the first president to strongly oppose abortion since the decision of *Roe*, had put his first new Justice on the Supreme Court.[110] There was no love lost between the antiabortion movement and Sandra Day O'Connor, a former Arizona state legislator and judge.[111] Carolyn Gerster, then the president of the National Right to Life Committee (NRLC), the nation's largest antiabortion group, believed that Judge O'Connor supported abortion rights and had worked to scuttle any restrictions during her time in the Arizona State Legislature.[112] The antiabortion movement found itself in a quandary: the only way to undo abortion rights was to convince the Supreme Court to overturn *Roe*, but few Justices, even President Reagan's nominee, seemed willing to ignore the principles of stare decisis.

That the Court would not overturn *Roe* seemed to be a given. But, the City of Akron argued that the Court could respect *Roe*'s central holding while upholding the disputed ordinance.[113] In service of this approach, the City argued that *Roe* stood for a right to make a decision about abortion and nothing more.[114] Meanwhile, Akron reasoned that the trimester framework,

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[105] *See id.* at 60–61, 63.

[106] *See id.* at 63–64.

[107] 462 U.S. 416 (1983) (*Akron I*).

[108] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 67.

[109] *See id.*

[110] *See, e.g.*, Patrick Buchanan, *Reagan Letter Fuel for 'Pro-Lifers'*, CHI. TRIB., Aug. 15, 1981, at W7 (detailing abortion foes' opposition to Justice O'Connor); Arthur Siddon, *Abortion Foes Rap Court Nominee*, CHI. TRIB., July 10, 1981, at A2 (detailing the same).

[111] *See* Buchanan, *supra* note 110, at W7.

[112] *See id.* (reporting that Gerster and Judge O'Connor were "longtime acquaintances" and that President Reagan, in nominating Judge O'Connor to the bench, "had betrayed the Right-to-Life movement").

[113] *See* Petition for a Writ of Certiorari at 5–6, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (*Akron I*) (No. 81-746) (arguing that the Court's abortion jurisprudence only invalidated "unduly burdensome" laws, while validating laws, like the Akron ordinance, that helped women).

[114] *Id.*

the rule that actually governed access to abortion, had no precedential value.[115] Indeed, Akron argued that *Maher* and *Danforth* had already eliminated the unimportant parts of *Roe* and adopted a brand-new doctrinal rule.[116]

Roe held that the state could not regulate abortion in the first trimester of pregnancy.[117] Akron insisted that *Roe* instead protected only the right to make a decision.[118] That meant that the state could impose any regulation that aided patients in making a decision or did not take away that power.[119] So long as the state claimed to help patients, the state could "strike[] a reasonable balance between the woman's protected right [of privacy] and the state's interest in maternal health" and ensure the informed consent of the patient.[120]

AUL defined *Roe*'s core holding even more narrowly. *Roe* defined patients' liberty "not as a right to abortion, but as a right to choose."[121] That meant the state could pass laws that "influence a woman to carry her child to term, laws which impact on physicians who provide abortions, laws which assure the medical consultation without which the liberty does not exist, or laws protective of the fetus or of other state interests."[122] Even if the Court did find that a regulation directly affected women's choice, the state could still introduce any law that "benefit[ted]" patients or created an "insubstantial" burden, so long as that burden was not "undue."[123] Under AUL's understanding of *Roe*'s essential holding, the Texas law the Court had struck down—which criminalized all abortions unless a patient's life was at risk—might still be unconstitutional.[124] Virtually any other abortion restriction would likely pass muster.[125]

It was not unusual to argue for an exceedingly narrow interpretation of a past decision. But, antiabortion attorneys expected the Court to signal its fidelity to precedent all while rolling back concrete protection for abortion. The idea was to create a rhetoric of precedent that functioned independently from substantive doctrine. The rhetoric might seem like a strange objective for a movement ultimately focused on criminalizing all abortions, but *Roe* was an unusually well-recognized and hotly contested decision. Regardless of what a judge thought about the merits of *Roe*, she might be worried that

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[115] *See id.* at 6.

[116] *See id.*

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

[118] *See* Petition for a Writ of Certiorari, *supra* note 113, at 2–6.

[119] *See* Brief for Petitioner City of Akron at 15–25, *Akron I*, 462 U.S. 416 (Nos. 81-746 & 81-1172).

[120] *Id.* at 16.

[121] Brief Amicus Curiae of Americans United for Life in Support of Petitioner, City of Akron at 2, *Akron I*, 462 U.S. 416 (No. 81-746).

[122] *Id.*

[123] *Id.* at 3.

[124] *See id.* at 2–6.

[125] *See id.*

overturning it would cause a backlash. Paying lip service to precedent might make the Court more comfortable narrowing or partially overturning *Roe*.

C. Akron I *and Its Aftermath*

In *Akron I*, the antiabortion movement's gambit failed—or at least it seemed that way. The Court struck down every part of the disputed Akron law, even the informed consent provision in which abortion opponents had invested so much.[126] The Court also rejected attempts to create a new rhetoric of precedent. The majority acknowledged that "[c]ertain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives."[127] But, the Court reinterpreted its decisions in *Maher* and *Danforth* as strictly prohibiting any regulation that interfered "with physician-patient consultation or with the woman's choice between abortion and childbirth."[128]

Nor did the Court accept that there was a bright line between decisions about abortion and access to the procedure.[129] Consider the Court's analysis of Akron's requirement that all second-trimester abortions take place in a hospital.[130] The state had argued that the requirement would protect patients' health because the risks of abortion increased later in pregnancy.[131] In invalidating the law, the Court stressed the burdens on access that the law would produce.[132] *Akron I* reasoned that the requirement would heavily limit access both because hospital abortions were much more expensive and because few Akron hospitals would perform them.[133] Laws that created "financial expense and additional health risk" could be unconstitutionally burdensome, even if patients retained the power to make a decision about abortion.[134]

But *Akron I* was not a total loss for abortion opponents looking to forge a new approach to precedent. Justice Sandra Day O'Connor's dissent claimed there was a way to preserve *Roe* while undoing the trimester framework.[135] In Justice O'Connor's view, *Roe*'s central holding was simple: "the right to privacy [was] broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[136] The trimester

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[126] *Akron I*, 462 U.S. at 452.

[127] *Id.* at 430.

[128] *Id.*

[129] *See infra* text accompanying notes 130–131.

[130] *See Akron I*, 462 U.S. at 434–39.

[131] *Id.* at 435–36.

[132] *See id.* at 438–39 ("By preventing the performance of [dilatation-and-evacuation] abortions in an appropriate nonhospital setting, Akron has imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure.").

[133] *Id.* at 434–35.

[134] *Id.* at 435.

[135] *See id.* at 452–66 (O'Connor, J., dissenting).

[136] *Id.* at 452 (quoting Roe v. Wade, 410 U.S. 113, 153 (1973)) (internal quotation marks omitted).

framework, by contrast, could be discarded without showing any fundamental disrespect for precedent: "Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in *Roe*," she wrote.[137]

Justice O'Connor's opinion, together with the ongoing failure of an antiabortion constitutional amendment, convinced the antiabortion movement to focus on overturning *Roe* rather than amending the Constitution.[138] With the right people on the Court, the Justices might be willing to reverse *Roe* or even recognize a right to life.[139]

As Republican presidents remade the Supreme Court, the antiabortion movement developed a different approach to the rhetoric of precedent. Antiabortion lawyers focused less on what the Constitution said about a right to abortion or a right to life and instead primarily developed arguments about what defined a precedent deserving of respect. If a precedent did social, economic, and political damage, that weighed in favor of overruling. Such was supposedly the case with *Roe*.

D. *Precedent Disqualification*

As soon as the Court seemed poised to overturn *Roe*, abortion-rights groups increasingly relied on stare decisis rather than arguing the substantive merits of abortion rights themselves.[140] Assuming that the Justices would reject arguments for abortion, pro-choice attorneys spotlighted what they described as the collateral effects of reversing *Roe*.[141] This strategy had unintended effects. Antiabortion attorneys then suggested that the consequences of *Roe* made it uniquely "unsettled."[142] Instead of resolving conflict about abortion, *Roe* supposedly deepened polarization around the issue, perverted judicial nominations, and damaged national politics.[143] Antiabortion lawyers insisted more broadly that, from the standpoint of stare decisis, real-world consequences could disqualify a precedent.[144]

The need for a new strategy to preserve abortion seemed evident by 1989, when the Supreme Court seemed poised to reconsider its opinions on

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[137] *Id.* at 459.

[138] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 67 ("O'Connor's dissent convinced some in the antiabortion movement that the Supreme Court might deliver the change that Congress could not.").

[139] *See id.* at 76 ("More [J]ustices like O'Connor could make [a] difference.").

[140] *See infra* text accompanying notes 147–148.

[141] *See, e.g.*, Brief for Appellees at 3, 6–7, 9–10, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

[142] Brief Amici Curiae of Hon. Christopher H. Smith et al. in Support of Appellants at 10, *Webster*, 492 U.S. 490 (No. 88-605).

[143] *See id.* at 8; Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil:* Roe v. Wade*'s Whiplash*, 98 TEX. L. REV. 121, 130 (2019).

[144] Brief Amici Curiae of Hon. Christopher H. Smith et al. in Support of Appellants, *supra* note 142, at 20.

abortion. Notwithstanding the failed nomination of Robert Bork, President Reagan placed two new Justices on the Supreme Court.[145] The Court also appeared to have a majority willing to revisit *Roe*.[146] When the Justices agreed to hear a challenge to a multi-restriction Missouri law, abortion-rights attorneys recognized that the Court's new conservative majority did not put much stock in constitutional justifications for abortion rights.[147] Instead, abortion-rights attorneys relied on stare decisis to sway wavering Justices.[148] Representing the appellees in *Webster v. Reproductive Health Services*, Planned Parenthood attorneys Roger K. Evans, Dara Klassel, and their colleagues argued that there was no justification for the Court to take the "radical step" of overturning precedent.[149] Amici bolstered this argument. The National Organization for Women, a feminist group, emphasized that "stare decisis should be given strict adherence where individual rights are at stake."[150]

Amici argued that *Roe* deserved special deference because of its real-world consequences.[151] The Supreme Court had recently, repeatedly, and strongly reaffirmed *Roe*.[152] As a result, many would view the reversal of *Roe* as a response to "popular pressure,"[153] and Planned Parenthood attorneys reasoned that undoing *Roe* would put other fundamental liberties in jeopardy.[154] The *Roe* Court had based its holding partly on other privacy decisions, including those involving contraception, marriage, and parenting.[155] If the Court would undo one such right, Planned Parenthood warned that others might fall soon.[156]

Antiabortion amici responded that *Roe*'s real-world effects proved that the Court had not only failed to settle the abortion issue but had also done

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[145] *See* SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 135 (1991) (noting the "outpouring of pro-choice sentiment against Bork" and its impact on Bork's failed nomination).

[146] *See id.* ("Moreover, [President Reagan's next] nomination was a critical one because [retiring-Justice Lewis] Powell had been a moderate swing vote who had voted with the Court's pro-Choice majority . . . .").

[147] *Webster*, 492 U.S. at 498; *see also* Brief for Appellees, *supra* note 141, at 3–10 (relying on precedent, not constitutional arguments).

[148] Brief for Appellees, *supra* note 141, at 3, 6–7, 9.

[149] *Id.* at 6–10.

[150] Brief for the National Organization for Women as Amicus Curiae Supporting Appellees at 20, *Webster*, 492 U.S. 490 (No. 88-605) (internal capitalization omitted).

[151] *See id. See also* Brief of Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees at 5–12, *Webster*, 492 U.S. 490 (No. 88-605).

[152] *See* Brief of Amici Curiae National Ass'n of Women Lawyers & National Conference of Women's Bar Ass'ns in Support of Appellees at 8, *Webster*, 492 U.S. 490 (No. 88-605) (noting that *Roe* has "many progeny which accept that decision and its reasoning as settled").

[153] *Id.* at 12–13 & n.4.

[154] Brief for Appellees, *supra* note 141, at 3, 5–7, 9.

[155] *See id.*

[156] *See id.*

real political and social damage.[157] Several antiabortion members of Congress asserted that stare decisis principles primarily served to promote consistency and predictability in the law.[158] These members of Congress maintained that *Roe* had "caused great instability and unpredictability in the law."[159] But the problems with *Roe*'s consequences were not merely doctrinal. The brief insisted that stare decisis did not require respect for precedents that had failed to settle a social dispute.[160] "[A] popular rejection of the abortion right"—reflected by ongoing state efforts to restrict abortion—suggested that *Roe* had failed to settle the abortion debate once and for all.[161] As important, if *Roe* continued to deepen polarization, that meant that the state of the law remained unstable and uncertain,[162] which did nothing to serve the values of stare decisis.[163]

Missouri tried to separate the rhetoric of respect for precedent from any obligation to leave the trimester framework alone.[164] The state argued that the Court could uphold the Missouri statute without overturning anything.[165] What the state requested was "not the 'abolition' of a constitutional right but rather a modification of the standard of review."[166] Stare decisis required the Court to preserve the core holding of a decision.[167] Missouri insisted that nothing in stare decisis stopped the Court from strengthening, modifying, or improving its own precedent.[168] In the case of *Roe*, rejecting the trimester framework would "bring [the Court's] rulings in line with the general requirement that state regulations affecting a liberty interest protected by the due process clause need only be procedurally fair and bear a rational relation to valid state objectives."[169]

In *Webster*, the Court upheld all of the disputed Missouri law, including a statutory preamble recognizing fetal personhood, a measure preventing the use of public facilities for abortion, and a provision that required a physician to perform certain tests to determine fetal viability.[170] The Court spent the

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[157] *See* Brief Amici Curiae of Hon. Christopher H. Smith et al. in Support of Appellants, *supra* note 142, at 2–5, 20.

[158] *Id.*

[159] *Id.* at 2.

[160] *See id.* at 2–5.

[161] *Id.* at 14.

[162] *See id.* at 2–3 ("The doctrines of *Roe* have caused great instability and unpredictability in the law, such that reversal is necessary to restore an appropriate balance.").

[163] *See id.* at 2 (stating that "the interests furthered by stare decisis are not served by adherence to *Roe*").

[164] *See* Appellants' Reply Brief at 4–6, *Webster*, 492 U.S. 490 (No. 88-605).

[165] *Id.* at 3.

[166] *Id.*

[167] *See id.* ("There is no reason inherent in constitutional adjudication or the doctrine of *stare decisis* why the Court should not similarly adjust the standard of review . . . .").

[168] *Id.* at 2–3.

[169] *Id.* at 3.

[170] *Webster*, 492 U.S. at 504–20.

most time on the viability provision, recognizing that, under *Roe*, the law might be held to unconstitutionally interfere with a physician's discretion when it came to abortion.[171] A plurality picked up on Missouri's argument that the Court could jettison the trimester framework without overturning *Roe* or offending the principles of stare decisis.[172] *Webster* described *Roe*'s central holding as "a Texas statute which criminalized *all* nontherapeutic abortions unconstitutionally infringed the right to an abortion."[173] The trimester framework, by contrast, was not central enough to *Roe* to require deference.[174] And the *Webster* plurality insisted that the trimester framework was "hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles."[175] While voting that the Missouri law was constitutional, Justice O'Connor did not join the plurality, insisting that *Roe* allowed for Missouri's viability determination.[176]

Webster made it seem as if the antiabortion movement's rhetoric on precedent was already having an effect. The Court seemed willing to give the states more or less free rein to regulate abortion, all while claiming to respect the principles of stare decisis. In the next three years, antiabortion leaders put more energy into arguments about what precedent meant.[177] In *Casey*, these efforts failed to convince the Court to reject *Roe* outright.[178] Indeed, *Casey* rhapsodized about the importance of precedent, the reliance interests that *Roe* produced, and the connection between abortion and equal citizenship for women. But, at the same time, the Court set aside the trimester framework and replaced it with what seemed to be a far less protective standard.[179] While efforts to disqualify *Roe* as a valid precedent fell short, the Court increasingly separated its rhetoric concerning precedent from its respect for the concrete holdings of *Roe* and its progeny. Social-movement conflict about precedent only grew more intense as a result.

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[171] *Id.* at 514–21.

[172] *See id.* at 518–21.

[173] *Id.* at 495.

[174] *See id.* at 514–21.

[175] *Id.* at 518.

[176] *Id*. at 525–26 (O'Connor, J., concurring).

[177] DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 680 (1998); *see also* Clare Collins, *Drawing Up Sides in the Abortion Fight*, N.Y. TIMES (Aug. 27, 1989), https://www.nytimes.com/1989/08/27/nyregion/drawing-up-sides-in-the-abortion-fight.html (noting that antiabortion lobbyists "may have the upper hand" because they have "been [consistently] focused on the issue" of restricting abortion rights legislation).

[178] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860–61 (1992) ("While [*Roe*] has engendered disapproval, it has not been unworkable.").

[179] *Id.* at 872–76.

E. *Remaking Precedent in* Casey

After *Webster*, many expected the Supreme Court to overturn *Roe*.[180] After a plurality had expressed doubt about its ongoing validity, Republican President George H. W. Bush had nominated two new Justices, David Souter and Clarence Thomas, to the Court.[181] It seemed possible that the Court would have as many as seven votes to reverse *Roe*. Antiabortion lawyers rushed to pass abortion restrictions that would give the Court the opportunity to reverse the decision. Some banned abortion at fertilization,[182] and others outlawed abortion except in cases of fetal disability, rape, incest, or certain severe health threats to the patient.[183] In *Casey*, the Supreme Court agreed to hear a challenge to a more conventional set of abortion restrictions.[184] Pennsylvania had introduced a law requiring, among other things, the involvement of parents and spouses and mandatory informed consent.[185] In dealing with the law, antiabortion and abortion-rights lawyers refined their approaches to stare decisis.

Abortion-rights attorneys fully expected the Court to overturn *Roe*. Groups like the ACLU planned to capitalize on this defeat to catapult pro-choice Democrats to success in the presidential and congressional elections of 1992.[186] Attorneys like Kathryn Kolbert and Linda J. Wharton, the lawyers litigating *Casey*, fought for a bill in Congress protecting abortion

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[180] *See* GARROW, *supra* note 177, at 679–80, 699.

[181] On the Thomas nomination, see Terry Atlas et al., *Bush Chooses Conservative for Supreme Court*, CHI. TRIB. (July 2, 1991), https://www.chicagotribune.com/news/ct-xpm-1991-07-02-91031602 58-story.html; Jack Nelson, *A Conservative Black Picked for High Court: Judiciary: Bush Names Clarence Thomas, 43, a Judge on the District of Columbia's U.S. Court of Appeals.*, L.A. TIMES (July 2, 1991), https://www.latimes.com/archives/la-xpm-1991-07-02-mn-1594-story.html. On the Souter nomination, see Jack Nelson, *Bush May Avoid Bitter Confirmation Struggle: Senate: Democrats Join Republicans in Predicting that Souter Will Not Prompt an Election-Year Squabble.*, L.A. TIMES (July 24, 1990), https://www.latimes.com/archives/la-xpm-1990-07-24-mn-572-story.html; Paul Houston, *Lawmakers' Reaction to Bush Choice Favorable but Cautious: Senate: Few People Know Much About Souter's Record. However, Many See Rudman's Enthusiastic Endorsement As a Plus.*, L.A. TIMES (July 24, 1990), https://www.latimes.com/archives/la-xpm-1990-07-24-mn-602-story.html.

[182] *See Guam OKs Restrictive Abortion Bill*, CHI. TRIB., Mar. 16, 1990 (§ 1), at 5 (describing a Guam law banning virtually all abortions).

[183] *See* Tamar Lewin, *Strict Anti-Abortion Law Signed in Utah*, N.Y. TIMES (Jan. 26, 1991), https://www.nytimes.com/1991/01/26/us/strict-anti-abortion-law-signed-in-utah.html (describing a Utah law prohibiting almost all elective abortion, with limited exceptions).

[184] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 111, 114–16 (describing a multi-restriction Pennsylvania abortion statute addressed by the Supreme Court in *Casey*).

[185] Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 840–41 (1992).

[186] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 114–16 ("*Casey* seemed likely to come down months before the 1992 election. A devastating decision might bring voters who supported legal abortion to the polls in unprecedented numbers.").

rights if the 1992 election went the right way.[187] But Wharton and Kolbert made a last-ditch attempt to save *Roe* that leaned heavily on stare decisis.[188]

To some degree, the petitioners' brief in *Casey* echoed arguments made in *Webster* about the consequences of overturning *Roe*.[189] Kolbert and Wharton insisted that the consequences of withdrawing or destroying a constitutional right would be particularly grave.[190] The petitioners also insisted that the Court could not undo *Roe* without putting other protected liberties, like the right to marry or use birth control, at risk.[191]

The petitioners' brief simultaneously took up arguments made by antiabortion lawyers about when a precedent deserved deference.[192] Antiabortion lawyers had insisted that *Roe* did not count as a valid precedent because of its broader legal and social consequences.[193] Wharton and Kolbert agreed that the political, social, and economic consequences of a decision were an important factor in stare decisis.[194] But the petitioners argued that *Roe*'s effects made the preservation of a right to choose even more crucial.[195] The petitioners insisted that *Roe* had "allowed millions of women to escape the dangers of illegal abortion and forced pregnancy" and led to "substantial decreases in the total number of abortion-related deaths and complications."[196]

Their brief identified consequences beyond the medical details of abortion itself.[197] They claimed that *Roe* had allowed women to "continue their education, enter the workforce, and otherwise make meaningful decisions consistent with their own moral choices."[198] Kolbert and Wharton stressed that, if stare decisis turned partly on the political and social ramifications of a decision, then *Roe* should be the last decision the Justices

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[187] *See id.* at 114–15 ("With a solid majority in Congress, abortion-rights supporters could pass a federal law protecting abortion-rights or even restoring funding for abortion.").

[188] *See* Brief for Petitioners & Cross-Respondents at 19, 19–22, *Casey*, 505 U.S. 833 (Nos. 91-744 & 91-902) (arguing that "the doctrine of stare decisis demands reaffirmation of Roe") (internal capitalization omitted).

[189] *See id.* at 27–31, 38–40.

[190] *Id.* at 22.

[191] *Id.* at 21 & n.32 (stating that courts have relied on *Roe* as "the foundation for numerous important freedoms," and noting that these freedoms include, inter alia, the right to use contraceptives, the right to marry, the right to bodily integrity, and the right to be free from both court-ordered contraception or court-ordered abortion).

[192] *See id*. at 17–22.

[193] *See infra* text accompanying notes 194–196.

[194] *See supra* note 106 and accompanying text.

[195] *See* Brief for Petitioners & Cross-Respondents, *supra* note 188, at 31–34 (arguing that "*Roe*'s guarantee of safe, legal abortion has been of profound importance to the lives, health, and equality of American women") (internal capitalization omitted).

[196] *Id.* at 31–32.

[197] *Id.* at 31–34.

[198] *Id.* at 33.

overruled.[199] "[W]omen have experienced significant economic and social gains since *Roe*," Kolbert and Wharton argued.[200]

Antiabortion briefs described this view of *Roe*'s consequences as incomplete, if not outright wrong. The United States Catholic Conference asserted that *Roe* had undermined the legitimacy of the Court's privacy doctrine and damaged relationships between both spouses and parents and children.[201] The National Right to Life Committee (NRLC) contended that *Roe* had warped virtually every area of the law, from tort rules to homicide law to the standards applied to injunctive relief.[202]

Pennsylvania, by contrast, invited the Court to divorce the rhetoric of precedent from the substance.[203] The state argued that *Roe* had never embraced "abortion on demand" but had, in fact, only ruled out a small subset of restrictions very unlike the ones that Pennsylvania adopted.[204] The state maintained that *Roe* had recognized a right to make decisions about abortion that could be reasonably regulated.[205] Pennsylvania paid lip service to precedent but insisted that the trimester framework was not a central part of *Roe*.[206]

The *Casey* plurality defied expectations by declining an invitation to overturn *Roe*.[207] Moreover, in detailing the reasons for preserving an abortion right, *Casey* echoed the petitioners' arguments about the broader—and beneficial—consequences of precedent.[208] Consider *Casey*'s analysis of reliance interests. Often, the Court hesitated to overturn a precedent that would upend contracts or business arrangements that required advanced planning.[209] But, in the traditional sense, abortion generated no reliance interests; patients who sought abortions typically did not plan to become pregnant, much less in advance.[210]

In its analysis of reliance, *Casey* intervened in social-movement debates about whether the real-world effects of a decision should factor into stare decisis. "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their

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[199] *Id.* at 33–34.

[200] *Id.* at 33.

[201] Brief Amicus Curiae of the U.S. Catholic Conference et al. in Support of Respondents & Cross-Petitioners at 8–14, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 & 91-902).

[202] Brief Amicus Curiae of National Right to Life, Inc. Supporting Respondents/Cross-Petitioners at 15–25, *Casey*, 505 U.S. 833 (Nos. 91-744 & 91-902).

[203] *See* Brief for Respondents at 28–32, *Casey*, 505 U.S. 833 (Nos. 91-744 & 91-902).

[204] *Id.*

[205] *See id.*

[206] *See id.*

[207] *Casey*, 505 U.S. at 846 (concluding that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed").

[208] *See infra* text accompanying notes 209–210.

[209] *See id.* at 855–56 (explaining that the Court "weigh[s] reliance heavily in . . . commercial contexts").

[210] *Id.*

views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail," *Casey* reasoned.[211] "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[212] It seemed that antiabortion arguments about the consequences of precedent had backfired.

The plurality also picked up on arguments that reversing *Roe* would undermine the Court's legitimacy because many would interpret that decision as a response to political pressure.[213] But all of this talk about precedent seemed disconnected from the reality of what *Casey* had done. The plurality adopted a longstanding antiabortion interpretation of *Roe*'s essential holding.[214] As early as *Maher v. Roe*, antiabortion lawyers had separated the right to make decisions about pregnancy—a holding that had some precedential value—from any doctrinal rule guaranteeing access to abortion.[215]

Casey adopted a similar interpretation.[216] Much as abortion foes had long argued, the plurality described that essential holding as involving not access but "the right of the woman to choose to have an abortion before viability."[217] In addition to downplaying access, the Court also directly contradicted parts of *Roe*'s original holding.[218] *Roe* held that the government's interest in protecting fetal life began only after fetal viability.[219] *Casey* described as one of *Roe*'s essential holdings that the State had "legitimate interests from the *outset of the pregnancy* in protecting the health of the woman and the life of the fetus."[220]

Casey's modifications of *Roe* went much further. The plurality rejected the trimester framework—arguably the centerpiece of *Roe*—by concluding that it was not central to the 1973 decision.[221] "The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life," the plurality reasoned.[222] *Casey*'s rhetoric of precedent underlined the importance of *Roe* and made a compelling case for

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[211] *Id.*
[212] *Id.*
[213] *See id.* at 867 (noting that reversal would require "only the most convincing justification").
[214] *See id.* at 870–79.
[215] *See supra* Part I.A.
[216] *See Casey*, 505 U.S. at 846, 877.
[217] *Id.*
[218] *See infra* text accompanying note 219; Roe v. Wade, 410 U.S. 113, 163–64 (1973).
[219] *Roe*, 410 U.S. at 163–64.
[220] *Casey*, 505 U.S. at 846 (emphasis added).
[221] *Id.* at 873.
[222] *Id.*

how *Roe* had changed the broader society.[223] At the same time, the plurality undid the part of *Roe* that actually protected abortion the most.[224]

Casey launched a new round of social-movement politics around precedent. Antiabortion leaders insisted that many of the plurality's factual conclusions about the benefits of abortion were wrong. But they also looked to *Casey* for new inspiration, particularly seeking more ways to weave in arguments on the negative consequences of abortion to conventional stare decisis norms, such as unworkability and reliance. More than ever, the fate of legal abortion became intertwined with the politics of precedent.

II. PRECEDENT POLITICS AFTER *CASEY*

While *Casey* disappointed antiabortion attorneys,[225] the plurality decision sparked new ideas about stare decisis. For decades, abortion opponents had urged the Court to separate the rhetoric of stare decisis from a substantive willingness to rewrite doctrinal rules and dump the trimester framework.[226] When the *Casey* Court accepted this invitation, antiabortion leaders used that fact as proof that *Roe* and *Casey* were both unworkable.[227] Antiabortion lawyers argued that, if the Court had to modify or change a precedent, precedent could not be settled law.[228]

The war over a specific procedure known as partial-birth abortion deepened social-movement conflicts over precedent.[229] In 2000, the Court struck down a state partial-birth abortion ban in *Stenberg v. Carhart*.[230] But Republicans gained control of the Senate, and George W. Bush won the race for the White House, making possible the passage of a federal ban.[231] In *Gonzales v. Carhart*, the Court took up the constitutionality of a federal Partial-Birth Abortion Ban Act.[232] While abortion-rights lawyers insisted that *Stenberg* required adherence to precedent, antiabortion leaders insisted that precedents did not deserve deference if they stood in tension with related case law, generated inconsistent results, or failed to settle political controversy.[233] These arguments paid off in *Gonzales*, but the antiabortion movement had a reversal of fortunes in *Whole Woman's Health v. Hellerstedt*, a 2016 case that struck down two Texas laws claimed to protect

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[223] *See id.* at 854–61.
[224] *See id.* at 869–77.
[225] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 117–24.
[226] *See supra* Part I.
[227] *See infra* Part II.A.
[228] *See infra* Part II.A.
[229] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 160–72.
[230] 530 U.S. 914, 922 (2000).
[231] *See infra* Part II.B.
[232] 550 U.S. 124, 132–33 (2007).
[233] *See infra* Part II.B.

women from the dangers of abortion.[234] *Whole Woman's Health* helped to crystallize antiabortion arguments about precedent. Groups like AUL and NRLC argued that *Whole Woman's Health* did not deserve respect as a matter of stare decisis because of the real-world damage it did, the inconsistent results it produced, and the controversy it inspired.[235]

These arguments shaped a fresh challenge in *June Medical*. Ironically, however, Chief Justice Roberts, who cast the deciding vote in *June Medical*, fell back on an earlier social-movement argument about precedent, one that had played a defining role in *Casey* itself.[236] Chief Justice Roberts discussed the value of precedent at great length while overturning the central holding of *Whole Woman's Health.*[237] In *June Medical*, Chief Justice Roberts, at least, suggested that respect for precedent demanded very little from the Court.[238]

A. Casey *as an Argument for Overruling*

Casey did not slow down social-movement debates about the meaning of precedent. Instead, attorneys working for AUL tried to make *Casey* a key piece of evidence that *Roe* and its progeny did not qualify as the kind of precedent that deserved deference.[239] In a 1992 strategy memo, AUL attorney Clarke Forsythe argued that the Court's willingness to rework *Roe* proved that it was unworkable.[240] In this analysis, *Casey* itself helped to prove that *Roe* should not be saved.[241] "*Roe* has been 'workable' only when the Court has abandoned various aspects of *Roe* to uphold abortion regulations," AUL insisted.[242] Of course, antiabortion lawyers had *asked* the Court to rework *Roe* on more than one occasion.[243] But, as antiabortion lawyers framed it, the fact that the Court had modified a precedent became a sign of unworkability.[244]

AUL also tried to redefine what counted as "settled precedent." Antiabortion lawyers suggested that no precedent could be settled if it

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[234] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (concluding that each Texas law "places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution") (internal citations omitted). *See also infra* Part II.C.

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

[236] *See infra* Part III.A.

[237] *See infra* Part III.A.

[238] *See infra* Part III.B.

[239] *See* Ziegler, *Taming Unworkability Doctrine*, *supra* note 26, at 1218–20 (citing CLARKE D. FORSYTHE, AMS. UNITED FOR LIFE, AUL BRIEFING MEMO: THE GOOD NEWS ABOUT *PLANNED PARENTHOOD V. CASEY* (1992)).

[240] *Id.* (chronicling AUL's strategy around workability "centered on the idea that *Casey* struck the wrong balance between fetal rights and abortion autonomy").

[241] *Id.*

[242] *Id.*

[243] *Id.* at 1218.

[244] *Id.*

remained politically controversial.[245] This, too, could be a self-fulfilling prophecy. Antiabortion scholars and activists could ensure that controversy over abortion did not die out.[246] The group also insisted that *Roe* and *Casey* were unworkable because they were wrong—and, in particular, because they did not achieve the task the Court had set for itself: finding "a way as to give real meaning to both the state's interests and the woman's interests that *Roe* itself created."[247] The more the Court conflated erroneous decisions with precedents that had bad effects, the easier it might be to convince the Court to revisit its earlier decisions on abortion.[248]

At first, however, leading antiabortion attorneys mostly sought to build on the model *Casey* had created by promoting informed-consent laws.[249] Some expanded on the ideas in *Casey*, often including controversial claims about the health risks of abortion.[250] These statutes obviously served to limit access to abortion.[251] But antiabortion lawyers also hoped to show that the benefits of legal abortion described by the *Casey* Court were illusory.[252] Notwithstanding the reasoning of the *Casey* Court, AUL insisted that *Roe* and *Casey* "undermine secure, independent, and healthy lives for American women."[253] Proving that abortion undermined women's health would make a stronger case that neither *Roe* nor *Casey* counted as valid precedents.[254]

Questions about the health effects of abortion took center stage in 1994 after Republicans gained control of the House of Representatives for the first time in decades.[255] NRLC moved to pass a ban on dilation and extraction, a procedure that the group called partial-birth abortion.[256] Dilation and

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[245] *Id.* at 1218–19.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 143–44 ("AUL lawyers promoted informed consent laws . . . . 'By guaranteeing that women are informed about fetal development, the risks of abortion, and the availability of compassionate alternatives . . . such laws could help bring about the societal change that has eluded the pro-life movement.'").

[250] *See id.* at 143–46 (providing an example of an antiabortion bill "connecting abortion to suicidal ideation, psychological trauma, and infertility").

[251] *Id.*

[252] *See id.* (providing that antiabortion groups supported statutes that claimed abortion damaged women's health and purported that "women would never achieve equal citizenship by having a procedure that made them sick").

[253] Ziegler, *Taming Unworkability Doctrine*, *supra* note 26, at 1218–20.

[254] *See id.* (exploring the role played by arguments about women's health in the strategy to reverse *Roe*).

[255] On the 1994 election, see SCOTT H. AINSWORTH & THAD E. HALL, ABORTION POLITICS IN CONGRESS: STRATEGIC INCREMENTALISM AND POLICY CHANGE 58 (2011); John C. Green, *The Christian Right and the 1994 Elections: An Overview*, *in* GOD AT THE GRASS ROOTS: THE CHRISTIAN RIGHT IN THE 1994 ELECTIONS 1, 1–3 (Mark J. Rozell & Clyde Wilcox eds., 1995).

[256] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 150 (detailing the campaign to ban dilation and extraction, a procedure framed by antiabortion leaders as partial-birth abortion).

extraction, a relatively rare procedure, involved one pass through the uterus, rather than several passes, and therefore might have minimized the risks of injury to the woman.[257] Antiabortion leaders found the procedure deeply disturbing and argued that it bore a striking resemblance to infanticide.[258] From the beginning, fights about dilation and extraction turned on the need for a health exception.[259] Abortion providers and abortion-rights groups insisted that, under certain circumstances, dilation and extraction would best protect a patient's health or fertility.[260] Antiabortion lawyers responded that evidence on the matter was uncertain—and that, in the face of scientific uncertainty, lawmakers should have more freedom to act.[261]

In *Stenberg v. Carhart*, the Court concluded first that the state's definition of partial-birth abortion was impermissibly vague.[262] As a result, Nebraska's definition likely applied not only to dilation and extraction but also to dilation and evacuation, the most common procedure after the first trimester.[263] The Court likewise held that Nebraska's law constituted an undue burden under *Casey*.[264]

The majority suggested that the need for dilation and extraction was uncertain.[265] But this uncertainty militated in favor of recognizing an exception. "Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary," the Court reasoned.[266] "Rather, the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right."[267]

In his dissent, by contrast, Justice Antonin Scalia picked up on antiabortion arguments that a precedent could not be settled so long as it

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[257] *See* Gonzales v. Carhart, 550 U.S. 124, 135–38 (2007) (describing the general steps of the dilation and evacuation procedure, though concluding that the safety and health benefits of the procedure were unclear); ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 150–54 (describing pro-choice arguments asserting that dilation and extraction was "sometimes the safest procedure for women").

[258] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 150–54 (stating that antiabortion leaders' "descriptions of partial-birth abortion could convince even ambivalent voters that the procedure was closer to infanticide than to an early abortion").

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] 530 U.S. 914, 939–41 (2000).

[263] *Id.*

[264] *See id.* at 945–46 ("[U]sing this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures . . . . All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision.").

[265] *Id.* at 937.

[266] *Id.*

[267] *Id.*

produced political divisions.[268] He described *Casey* as unworkable because it was vague, open to interpretation, and "ultimately standardless."[269] But Scalia's understanding of settled law was broader. He mocked anyone who would "persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, [could] resolve that contention and controversy rather than be consumed by it."[270] Far from settling the abortion conflict, *Roe* and *Casey* had triggered a "firestorm of criticism."[271] And because neither one had settled the abortion controversy, Scalia argued that both should be overturned.[272]

Scalia's dissent energized abortion foes who hoped to build on *Stenberg*, the majority decision notwithstanding. Under this definition, the mere existence of the antiabortion movement—and the fact of its partnership—could prove that *Roe* and its progeny were not settled. The political abortion wars, in turn, could serve as an excuse for a Court looking to overturn *Roe.*

B. *Partial-Birth Abortion and the Politics of Precedent*

Because antiabortion leaders still saw partial-birth abortion as a winning strategy, *Stenberg* kick-started the social-movement politics of precedent. Polls suggested that most Americans supported a ban on the procedure.[273] As important, groups like NRLC believed that more Americans identified as pro-life the more debate focused on partial-birth abortion rather than on other restrictions.[274] Reviving a federal ban seemed crucial to the success of antiabortion politicians and activists.[275] With President George W. Bush in office, passing a law also seemed possible.[276] President Bush signed the federal Partial-Birth Abortion Ban Act into law in 2003, and challenges in federal court began almost immediately.[277]

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[268] *Id.* at 955–56 (Scalia, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 995–96 (1992) (Scalia, J., concurring in part and dissenting in part)).

[269] *Id.* at 955 (quoting *Casey*, 505 U.S. at 987 (Scalia, J., concurring in part and dissenting in part)).

[270] *Id.* at 956.

[271] *Id.*

[272] *See id.* ("If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed. *Casey* must be overruled.").

[273] Lydia Saad, *More Americans "Pro-Life" Than "Pro-Choice" for First Time*, GALLUP (May 15, 2009), http://news.gallup.com/poll/118399/more-americans-pro-life-than-pro-choice-first-time.aspx; *see also* Robin Abcarian, *51% in U.S. Say They're 'Pro-Life'; It's the First Gallup Poll to Find 'Pro-Choice' Outweighed—at 42%—and a Near-Reversal of Last Year's Figures.*, L.A. TIMES, May 16, 2009, at A.20 (reporting on the apparent flip in public sentiment).

[274] *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 187–89 ("Younger abortion-foes might have overestimated the shift in public opinion, but for the first time, a 2009 Gallup poll showed that a majority of Americans identified as pro-life.").

[275] *Id.* at 175.

[276] *See id.* at 168.

[277] *See id.* at 171, 176; Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003) (codified at 18 U.S.C. § 1531).

Given the Court's recent decision in *Stenberg*, the fate of the federal law would obviously turn partly on stare decisis. Attorneys for the Center for Reproductive Rights challenging the law argued that *Stenberg* (and respect for stare decisis) should decide the case.[278] *Stenberg* was a recent decision, one consistently applied by the lower courts.[279] As the Center framed it, Congress's response boiled down to an argument that *Stenberg* was wrong, which was not enough to disturb a precedent.[280] Planned Parenthood, another respondent in the case, echoed this argument.[281] *Stenberg* had not "proven unworkable in practice; doctors at leading medical institutions nationwide ha[d] been trained to use this technique; pregnant women ha[d] benefited from access to safer procedures; *Stenberg* ha[d] been applied consistently by the lower courts; and there ha[d] been no legal or factual developments that would undermine *Stenberg*'s underpinnings," Planned Parenthood explained.[282]

In defending the federal law, Congress picked up on antiabortion arguments about what made a precedent settled.[283] In the wake of *Casey*, AUL had insisted that any inconsistency with or modification of precedent proved an earlier decision to be unworkable.[284] In defending the Partial-Birth Abortion Ban Act, the government flipped this argument on its head, arguing that any later case that conflicted with or modified an earlier ruling should be set aside.[285] Congress argued that *Stenberg* did not deserve deference because the decision was "unfaithful to the Court's prior precedents, including *Casey*."[286] The government also borrowed from antiabortion arguments suggesting that any precedent that was wrong on the merits was likely to be unworkable.[287] *Casey* and *Roe*, the argument went, commanded a *balance* between the government's respect for fetal life and a woman's ability to end a pregnancy.[288] By permitting a procedure of which the government disapproved, *Stenberg* supposedly conflicted with *Casey* by putting society at risk of becoming more indifferent to fetal life.[289]

The government elaborated on these arguments in its reply brief.[290] Congress contended that *Stenberg* was not settled law because it was

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[278] *See* Brief of Respondents at 35, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-1382).

[279] *See id.* at 37.

[280] *See id.* at 36.

[281] Brief of Planned Parenthood Respondents at 29–30, *Gonzales*, 550 U.S. 124 (No. 05-1382).

[282] *Id.* at 30.

[283] *See* Brief for the Petitioner at 43–46, *Gonzalez*, 550 U.S. 124 (No. 05-1382).

[284] *See supra* notes 233, 237–242 and accompanying text.

[285] Brief for the Petitioner, *supra* note 283, at 43–44.

[286] *Id.* at 44.

[287] *See id.* at 29 (arguing that interpreting *Stenberg* to strike down the federal Partial-Birth Abortion act would indicate that *Stenberg* was unworkable, because it would be "difficult to see how any meaningful late-term abortion regulation could survive scrutiny").

[288] *See id.* at 41–42.

[289] *Id.* at 27.

[290] *See* Reply Brief for the Petitioner at 1–2, *Gonzales*, 550 U.S. 124 (Nos. 05-380 & 05-1382).

controversial—because it was "sharply criticized" by members of the Court and politicians, because it produced "conflicting conclusions" in the lower courts, and because it forced trial courts to do a kind of scientific fact-finding for which judges were not qualified.[291] Antiabortion amici suggested that there could be no reliance interests on abortion either, unless a particular technique or reason for abortion had become part of the national culture.[292] "No one orders his or her life around the possibility of recourse to partial birth abortions," wrote Jay Alan Sekulow, the attorney representing the American Center for Life and Justice.[293]

Gonzales vindicated antiabortion efforts to frame *Casey*—or a particularly narrow interpretation of *Casey*—as true precedent (and *Stenberg* as an unfortunate misunderstanding). To be sure, Justice Kennedy distinguished the case from *Stenberg*.[294] Kennedy reasoned that Congress had adopted a different definition of partial-birth abortion, one that would functionally exclude dilation and evacuation and avoid any issues with constitutional vagueness.[295] When it came to application of the undue-burden test, the Court simply ignored *Stenberg*. *Gonzales* concluded that Congress had important governmental interests in protecting the dignity of fetal life and preventing women from regretting abortion.[296] "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained," Kennedy reasoned.[297]

The Court departed from *Stenberg* more explicitly when it came to the issue of scientific uncertainty.[298] *Stenberg* had concluded that the law required a health exception if there was a real chance that patients' health would suffer absent access to the disputed procedure.[299] *Gonzales* worked around this conclusion by emphasizing that Congress had made extensive factual findings on the need for dilation and extraction (or the lack thereof).[300] "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty," Kennedy reasoned.[301] To get past *Stenberg*, *Gonzales* appealed

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[291] *Id.* at 20.

[292] Amicus Brief of the American Center for Law & Justice et al. in Support of Petitioner at 12 n.11, *Gonzales*, 550 U.S. 124 (No. 05-380).

[293] *Id.*

[294] *Gonzales*, 550 U.S. at 132–33, 141–45, 151–54.

[295] *Id.* at 127–28, 151–54.

[296] *Id.* at 159.

[297] *Id.*

[298] *See id.* at 162–63; *infra* text accompanying notes 301–302.

[299] Stenberg v. Carhart, 530 U.S. 914, 936–37 (2000).

[300] *Gonzales*, 550 U.S. at 141.

[301] *Id.* at 163.

to earlier, more venerable precedents, including *Casey*.[302] Kennedy framed his opinion not as a departure from *Stenberg* but rather as a return to the "traditional rule."[303]

In the aftermath of *Gonzales*, antiabortion attorneys hoped again to be able to functionally overrule *Roe* without forcing the Court to confront precedent directly. *Gonzales* seemed to require considerable deference to the findings of fact made by state and federal lawmakers, especially when a medical question seemed scientifically uncertain.[304] It would not be hard to demonstrate such scientific uncertainty. Antiabortion organizations relied on their own experts and sources of data and could supply uncertainty if the courts asked for it.[305]

In the meantime, groups like AUL refined their unworkability arguments. In 2010, AUL presented *Roe*, *Doe*, and *Casey* as "utterly unworkable" because "legislators constantly struggle[d] to construct legislative language that [would] pass the current 'test' used by the Supreme Court in abortion jurisprudence."[306] Of course, the mere fact that the Court recognized a right to abortion made it hard for legislators to devise restrictions that would be constitutional. That was the point: AUL described any abortion right as inherently unworkable.

Clarke Forsythe of AUL later described partisan polarization around abortion as evidence that *Roe* and *Casey* were not settled—and therefore not the kinds of precedents that "should be given 'respect.'"[307] Support for either decision was based on "partisan bias," Forsythe reasoned.[308] Neither *Roe* nor *Casey* had "the steady support of executive departments."[309] Forsythe suggested that a precedent was settled and deserving of respect only if it commanded bipartisan or even universal support.[310] This was a high bar that few precedents might clear. Even fewer precedents would satisfy this standard if, like *Roe* and *Casey*, they touched on a divisive social issue. Significantly, if polarization counted as a reason to discard precedent, social movements themselves could generate evidence of a precedent's flaws. Framed this way, the mobilization of the antiabortion movement—and its influence on US law and politics—counted as a reason to reconsider *Roe*.

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[302] *See id.* (framing deference to legislative factfinding in uncertain matters as the traditional approach).

[303] *Id.*

[304] *Id.*

[305] ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 162–66.

[306] *Why* Roe v. Wade *and* Doe v. Bolton *Are the Most Unconstitutional Decisions of All Time*, AMS. UNITED FOR LIFE (Sept. 17, 2010), https://aul.org/2010/09/17/why-roe-v-wade-and-doe-v-bolton-are-the-most-unconstitutional-decisions-of-all-time/.

[307] Clarke Forsythe, *Why Roe/Casey Is Still Unsettled*, HUM. LIFE REV. (Sept. 28, 2014), https://www.humanlifereview.com/roecasey-still-unsettled/.

[308] *Id.*

[309] *Id.*

[310] *See id.* (suggesting that *Roe* is unsettled because of the controversy it has generated).

Forsythe's understanding of unworkability also empowered social movements to produce their own evidence of a precedent's flaws.[311] Forsythe identified several signs of unworkability: if a precedent had been modified or reinterpreted, if "federal courts ha[d] constantly battled over [its] meaning," and if a rule failed to correct real-world injuries.[312] Based on these criteria, Forsythe readily described *Roe* and *Casey* as unworkable.[313] He stressed that "*Roe*, as originally written, ha[d] not been affirmed and reaffirmed; instead, it ha[d] been repeatedly changed and altered."[314] Both *Roe* and *Casey* had produced inconsistent results in the lower courts, and the Court remained "oblivious to what [had been] happening in clinics."[315] As Forsythe framed it, questions about stare decisis partly turned on whether abortion was safe, but any ambiguity or open-endedness in an original ruling would indicate that it was unworkable, as would any sign that an issue remained politically polarized.

Forsythe also wove political polarization into his analysis of reliance interests.[316] He stressed that *Roe* and *Casey* were not "politically settled" because "legal, social, cultural, and political developments and trends" had kept "*Roe*/*Casey* in flux."[317] Forsythe likewise argued that the reliance interests identified in *Casey* should not be taken seriously because the "reliance of women on abortion as an empirical matter ha[d] not been demonstrated."[318] Polarization also suggested that any reliance interests created by *Roe* and *Casey* were weak because "the Supreme Court has retreated at least three times from the harshest application of *Roe v. Wade*."[319] Forsythe highlighted the spread of abortion restrictions to suggest that no reasonable patient could believe that the abortion issue was settled, particularly state laws that "treat the unborn child as a human being or person from conception."[320] He even proposed considering whether a precedent had politically settled a question as an independent part of stare decisis analysis.[321]

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[311] *See id.*
[312] *Id.*
[313] *Id.*
[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] Gonzales v. Carhart, 550 U.S. 124, 161–63 (2007).
[318] Forsythe, *supra* note 307.
[319] *Id.*
[320] *Id.*
[321] *See id.*

C. *From* Whole Woman's Health *to* June Medical

These ideas about stare decisis influenced the litigation of the Court's next major abortion case, *Whole Woman's Health v. Hellerstedt*.[322] Most simply, *Whole Woman's Health* involved the constitutionality of two provisions based on an AUL model law.[323] One required doctors to have admitting privileges at a nearby hospital,[324] and another mandated that abortion clinics comply with state regulations governing ambulatory surgical centers.[325] Both sides in the case agreed that, if the laws went into effect, most abortion clinics in the state would close.[326] On the surface, *Whole Woman's Health* had little to do with the decades of social-movement conflict about precedent. The case seemed to test the limits of a state's power to restrict abortion in the name of protecting patients. But, *Whole Woman's Health* built on decades of antiabortion work toward separating the rhetoric of precedent from any obligation to adhere to past decisions. Antiabortion lawyers insisted that *Casey* had applied a test similar to rational basis.[327] Adhering to precedent meant recognizing a right to make decisions about abortion, but allowing states more or less free rein to pass any abortion restriction.[328]

Antiabortion lawyers cited *Gonzales*'s treatment of scientific uncertainty as evidence that the undue burden test functioned much like rational basis.[329] In *Whole Woman's Health*, attorneys for the Center for Reproductive Rights responded that *Casey* did not require blind deference to state lawmakers, even in cases where there was a dispute about medical facts.[330] Together with abortion-rights amici, the Center contended that *Casey* required courts to balance the burdens and benefits of a law and to gather concrete evidence of each one, rather than to simply accept legislators' own version of the facts.[331] In theory, under this approach, a pointless law might violate the Constitution if it was only somewhat burdensome.[332]

Antiabortion lawyers not only advocated for a more deferential approach but also for a formal declaration that the undue burden test was

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[322] 136 S. Ct. 2292, 2310 (2016), *rev'g* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) & 790 F.3d 563 (5th Cir. 2015).

[323] *Id.* at 2300.

[324] *Id.* at 2300, 2310.

[325] *Id.* at 2300, 2314.

[326] *See, e.g.*, Amicus Curiae Brief of 44 Texas Legislators in Support of Defendants-Appellants & Reversal of the District Court at 20, Whole Woman's Health v. Lakey, 769 F.3d 285 (5th Cir. 2014) (No. 14-50928) [hereinafter Brief of 44 Texas Legislators] (conceding that clinics might close if the Texas law were allowed to go into effect).

[327] *See id.* at 4–5 (drawing a parallel between rational basis and the undue burden test).

[328] *See id.* at 12–14.

[329] *See id.* at 5.

[330] Brief for Petitioners at 36–40, Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (No. 15-274).

[331] *Id.* at 31–32, 37.

[332] *See id.* at 34, 36–37, 47.

virtually identical to rational basis.[333] In an amicus curiae brief on behalf of state legislators, AUL lawyers argued that, under *Casey* and its progeny, a restriction was constitutional "where there is a rational basis for its enactment and it does not pose an undue burden."[334] In a separate amicus brief, AUL likewise argued that "[t]he first step in the analysis of an abortion regulation . . . is rational basis review."[335] This argument served two purposes.[336] Obviously, a more relaxed standard would allow for more abortion regulations. But by officially redefining the undue burden test, antiabortion lawyers could drive a wider wedge between the rhetoric of precedent and actual deference to the Court's prior abortion decisions. Moreover, antiabortion lawyers could use any modification in the *Casey* framework as evidence of its unworkability.

Whole Woman's Health rejected AUL's take on the undue burden standard.[337] By a 5-3 margin, the Court reasoned that *Casey* required a weighing of both the benefits and burdens of a law.[338] *Gonzales* notwithstanding, courts had a duty "to review factual findings where constitutional rights are at stake."[339]

The Court further clarified what it meant for a law to have no benefits. *Whole Woman's Health* reasoned that Texas's HB2 did not deliver any benefit partly because abortion in the state was safe and resulted in very few complications.[340] The Court also explained what constituted an actionable burden and how one could be proven.[341] Texas had stressed that other factors, like decreasing demand for abortion, might have led to clinic closures.[342] *Whole Woman's Health* credited amicus evidence and expert testimony attributing closures to the introduction of HB2.[343] Texas further argued that HB2 would not eliminate access to abortion since a handful of clinics would remain open.[344] The Court nonetheless found that patients

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[333] *See* Brief of 44 Texas Legislators, *supra* note 326, at 1, 5–16 (urging the Court to clarify that undue burden test operated the same as rational basis).

[334] Amicus Curiae Brief of More than 450 Bipartisan & Bicameral State Legislators & Lieutenant Governors in Support of the Respondents & Affirmance of the Fifth Circuit at 5, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

[335] Brief of 44 Texas Legislators, *supra* note 326, at 5 (alteration in original).

[336] *See id.* at 7 (arguing that "[a] proper analysis . . . clearly demonstrates that the State has a rational basis to require that abortion clinics be regulated as ambulatory surgical centers and that such a requirement does not pose an undue burden on women seeking abortions in Texas").

[337] *See Hellerstedt*, 136 S. Ct. at 2309–18 (explaining that the undue burden did not require uncritical deference to state legislatures).

[338] *Id.* at 2309.

[339] *Id.* at 2310 (quoting Gonzales v. Carhart, 550 U.S. 124, 165 (2007)).

[340] *Id.* at 2310–12.

[341] *See id.* at 2313–14, 2317–18; Brief for Respondents at 42, *Hellerstedt*, 136 S. Ct. 2292 (No. 15-274); *see also infra* text accompanying notes 344345.

[342] *Hellerstedt*, 136 S. Ct. at 2344 (Alito, J., dissenting).

[343] *Id.* at 2310–13 (majority opinion).

[344] Brief for Respondents at 42, *Hellerstedt*, 136 S. Ct. 2292 (No. 15-274).

would face an unconstitutional burden because of increased travel times, expenses, and a lower quality of care.[345]

After *Whole Woman's Health*, antiabortion attorneys once again invested in the politics of precedent. First, following his election, President Donald Trump placed two Justices on the Supreme Court and created what many presumed to be a conservative majority willing to reconsider *Roe*.[346] When President Trump replaced Justice Anthony Kennedy with Brett Kavanaugh of the D.C. Circuit Court of Appeals, many assumed that the Court would reverse *Roe* in the near term.[347] Antiabortion arguments about stare decisis went into overdrive.[348] Clarke Forsythe proposed a draft opinion overturning *Roe* that drew on the precedent-based strategies that abortion opponents had forged over the years.[349] Starting with *Maher* and *Akron I*, antiabortion attorneys had urged the Court to pay lip service to precedent while changing the substantive rules governing abortion access.[350] Those doctrinal modifications would then help make the case that *Roe* and *Casey* should go.[351] Forsythe echoed this approach. Any doctrinal modification proved that "[t]here ha[d] never been consistency in [the] Court's application of *Roe* or *Casey*" and that neither one was settled.[352] Indeed, he argued that the "fundamental test of an authoritative Supreme Court decision" was whether a case had "failed to settle [an] issue."[353] Abortion foes could demonstrate that *Casey* and *Roe* were unsettled by convincing the Republican Party to maintain its opposition to abortion or by encouraging the passage of new abortion restrictions.[354]

Forsythe also proposed an expansive definition of unworkability. He suggested that any standard that failed to produce consistent results in the lower courts qualified as unworkable.[355] That meant that virtually any

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[345] *Hellerstedt*, 136 S. Ct. at 2313, 2317–18.

[346] For coverage of Justice Kavanaugh's confirmation, see Jeffrey Toobin, *Should Democrats Bother Fighting Brett Kavanaugh's Confirmation? History Suggests Yes*, NEW YORKER (July 31, 2018), https://www.newyorker.com/news/daily-comment/should-democrats-bother-fighting-brett-kavanaughs-confirmation-history-suggests-yes. On Justice Gorsuch's confirmation, see Jeanne Mancini, *Neil Gorsuch Will Strengthen the Fight Against Abortion Rights*, TIME (Mar. 20, 2017, 3:49 PM), http://time.com/4705897/neil-gorsuch-anti-abortion/.

[347] *See, e.g.*, Toobin, *supra* note 346 (explaining the potential significance of Kavanaugh's confirmation for abortion rights).

[348] *See infra* Part III.

[349] Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 GEO. J.L. & PUB. POL'Y 445 (2018) [hereinafter Forsythe, *Draft Opinion*].

[350] *See supra* Part I.

[351] *See* Forsythe, *Draft Opinion*, *supra* note 349, at 454–58 (arguing that the Court's tinkering with *Roe* and *Casey* suggested that both were fatally flawed).

[352] *Id.* at 450.

[353] *Id.* at 458.

[354] *See id.* at 455, 457–58 (stressing the fact that *Roe* had failed to effectuate a political settlement on abortion).

[355] *See id.* at 472–79 (suggestion that standards, like the undue burden test, were inherently unworkable, at least in the healthcare context).

balancing test was necessarily unworkable. "The enterprise of applying a standard—whether undue burden or any other standard—to a public health issue such as abortion, with all its complexity, is not suited to the federal courts," Forsythe wrote.[356]

When it came to reliance, Forsythe again stressed that there was no empirical proof or record evidence that patients relied on abortion—or that abortion, rather than contraception, led to advancement for women.[357] He suggested that to the extent fertility control explained women's advancement, it was contraception, not abortion, that had helped women achieve equal citizenship.[358] Whether patients wanted and expected to have access to abortion was irrelevant. Instead, reliance interests applied only if there was empirical proof that abortion access made women more equal.[359] And, even if abortion were safe, patients should recognize that the issue remained unsettled.[360] Understood in this way, there could be no valid reliance interests if a precedent did social, political, or economic damage. And there could be no valid reliance interests if the public was on notice that the law could change.

June Medical came as the culmination of social-movement debates about the meaning of precedent. The Court's decision showed just how much the rhetoric of precedent could function separately from any real commitment to past decisions. With an additional Supreme Court nomination, President Trump seemingly set the Court on a certain path to reversing *Roe.* The politics of precedent took on new importance. For decades, social movements had contested what defined a valid precedent—and whether *Roe* and its progeny qualified. With a reconfigured Supreme Court, the Justices seemed open to adopting these arguments themselves.

III. *JUNE MEDICAL* AND THE FATE OF *ROE*

Observers of *June Medical* could be forgiven for thinking they had seen all of this before. Louisiana passed an admitting privileges requirement virtually identical to the one in *Whole Woman's Health.*[361] The state insisted that the reality of abortion care in Louisiana differed from the Texas experience described by the Court four years earlier.[362] In particular, Louisiana insisted that doctors in the state had not made a good faith effort

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[356] *Id.* at 475.

[357] *Id.* at 486.

[358] *See id.*

[359] *See id.* at 487.

[360] *See id.* at 488–89.

[361] *Compare* June Med. Servs. LLC v. Kliebert, 250 F. Supp. 3d 27, 44–51 (M.D. La. 2017) (analyzing a restriction requiring a doctor to have admitting privileges at a clinic within thirty miles), *with* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (analyzing the same).

[362] *See* Brief for the Respondent/Cross-Petitioner at 54–59, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (Nos. 18-1323 & 18-1460).

to get admitting privileges and that there were real benefits to those privileges in Louisiana.[363] The Fifth Circuit Court of Appeals agreed and upheld the state law.[364] After the Supreme Court agreed to hear the case, Louisiana also asked the Justices to decide whether abortion providers had third-party standing to bring constitutional challenges.[365]

The Court had recognized standing for abortion doctors in *Singleton v. Wulff* in 1976.[366] Louisiana insisted that *Singleton* got everything wrong: abortion doctors could not be trusted to represent patients when their interests were diametrically opposed.[367]

June Medical struck down the Louisiana law.[368] The Court left no doubt that it struck down Louisiana's abortion law because of stare decisis.[369] Chief Justice Roberts, who cast the deciding vote in the case, acknowledged that he had joined the dissent in *Whole Woman's Health* and still saw nothing wrong with admitting-privilege restrictions.[370] Nevertheless, because of stare decisis, Chief Justice Roberts saw no way to distinguish Louisiana's law from Texas's.[371]

But, understood in historical context, the uses of precedent in *June Medical* are far more complex and consequential than it may first appear. This Part begins by considering the ideas about precedent developed in social-movement briefs in *Whole Woman's Health*. Next, this Part traces how *June Medical* both adopted and reworked social-movement arguments about the meaning of precedent. Regardless of the fate of *Roe*, these approaches to precedent will carry new weight as challenges to *Roe* pick up momentum. But this idea of stare decisis is deeply problematic. Increasingly, the Court has made unique—and impossible to meet—demands of precedents in the abortion context. At the same time, the Court has forged a powerfully opaque rhetoric of precedent that makes it hard for the public to understand what has happened to abortion jurisprudence or to respond.

A. *Defining Precedent in* June Medical

Precedent was at the heart of social-movement struggle in *June Medical.* In challenging the Louisiana law, the Center for Reproductive Rights said relatively little about abortion rights, instead castigating the state for seeking "to

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[363] *See id.* at 59, 70.
[364] June Med. Servs. L.L.C. v. Gee, 905 F.3d 787, 791 (5th Cir. 2018).
[365] *See* Brief for the Respondent/Cross-Petitioner, *supra* note 362, at 25–33.
[366] Singleton v. Wulff, 428 U.S. 106, 118 (1976).
[367] *See* Brief for the Respondent/Cross-Petitioner, *supra* note 362, at 36–38, 41–46.
[368] *June Med. Servs.*, 140 S. Ct. at 2112–13.
[369] *Id.* at 2134–42 (Roberts, C.J., concurring).
[370] *Id.* at 2133.
[371] *Id.* at 2141–42.

upend settled law" and "disregard[] stare decisis at every turn."[372] The Center emphasized that the Court had never upheld a law identical to one that had been recently struck down.[373] The Center further stressed that, to side with Louisiana on standing, the Court would need to ignore decades' worth of precedent on both third-party standing and waiver of objection to third party standing.[374]

Antiabortion attorneys certainly tried advancing a narrow interpretation of *Whole Woman's Health*.[375] For example, the antiabortion Susan B. Anthony List insisted that *Whole Woman's Health* was a narrow, as-applied, and intensely factual ruling that did not foreclose any other state from passing an admitting privileges law.[376]

But antiabortion attorneys also insisted that stare decisis *required* the Court to retire its 2016 decision. This drew on earlier antiabortion arguments insisting that adherence to precedent required the overturning of all or most abortion decisions.[377] The Trump administration took this approach in insisting that *Whole Woman's Health* contradicted *Casey*. For this reason, the administration argued that stare decisis required the Court to overrule *Whole Woman's Health* and restore *Casey*'s supposedly less protective test.[378] NRLC likewise maintained that, if *Casey* deserved some deference, *Whole Woman's Health* certainly did not.[379] The group's brief insisted that *Whole Woman's Health* was unworkable because it had "created confusion among lower courts" and because it was an "aberration" that departed from "*Casey*'s lowered scrutiny."[380]

AUL repeated many of the arguments made in Forsythe's 2018 law review article, arguing that *Roe* and *Casey* were unsettled because they were wrong, because they had produced ongoing political polarization, and because they involved a standard, rather than a bright-line rule.[381]

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[372] Response & Reply Brief for Petitioners-Cross-Respondents at 1, *June Med. Servs.*, 140 S. Ct. 2103 (Nos. 18-1323 & 18-1460).

[373] *See id.* at 1–2.

[374] *See id.* at 2.

[375] *See* Brief of Amicus Curiae Susan B. Anthony List Supporting Respondent-Cross-Petitioner at 5, *June Med. Servs.*, 140 S. Ct. 2103 (Nos. 18-1323 & 18-1460) (reasoning that Whole Woman's Health did not meaningfully change the undue burden test).

[376] *Id.*

[377] *See supra* notes 244246 and accompanying text.

[378] *See* Brief for the United States as Amicus Curiae Supporting Vacatur for Lack of Third-Party Standing or Affirmance on the Merits at 21, *June Med. Servs.*, 140 S. Ct. 2103 (Nos. 18-1323 & 18-1460) ("This Court has previously declined to interpret prior abortion decisions to have revived an argument that '*Casey* . . . put to rest.'").

[379] *See* Brief of Amici Curiae National Right to Life Committee & Louisiana Right to Life Federation Supporting Respondent at 30–31, *June Med. Servs.*, 140 S. Ct. 2103 (No. 18-1323) ("[*Whole Woman's Health*] should be deemed an aberration and this Court should return to *Casey's* undue-burden analysis . . . . Under *Casey*'s lowered scrutiny, the Louisiana statute is constitutional.").

[380] *Id.* at 30–31.

[381] *See generally* Brief Amicus Curiae of Americans United for Life in Support of Respondent & Cross-Petitioner, *June Med. Servs.*, 140 S. Ct. 2103 (Nos. 18-1323 & 18-1460).

The Court's decision at first seemed to be a straightforward win for those portraying *Whole Woman's Health* as a valid precedent.[382] The Court voted that Louisiana's law was unconstitutional,[383] and it did not show interest in modifying its doctrine on third-party standing.[384] Most significantly, the long-awaited conservative majority in abortion cases never appeared.[385] Instead, Chief Justice Roberts joined with his more liberal colleagues in striking down the law.[386] Chief Justice Roberts' opinion read as an ode to precedent.[387] Understood in context, however, the role of social movement arguments about precedent in *June Medical* was complex—and it will likely continue to matter even as the Court's composition changes.

B. June Medical*'s Politics of Precedent*

For the plurality, *June Medical* was an easy case. Justice Breyer first addressed Louisiana's standing argument.[388] He insisted that Louisiana had conceded that abortion providers had standing in the district court in a bid to get a quicker ruling on the merits.[389] As a result, the state could not dispute the issue anew.[390] But Breyer reasoned that, even if the state had not waived the standing issue, stare decisis required the Court to respect the decades of precedent on third-party standing for providers.[391] He asserted that physicians served as the "least awkward" and "most 'obvious'" claimants because they would be required to apply for admitting privileges or face penalties for noncompliance.[392] Stare decisis helped the majority dispense with Louisiana's primary argument against standing: that abortion providers and patients had a conflict of interest.[393]

Breyer stressed previous cases allowing third parties to challenge the constitutionality of laws claimed to benefit a rights holder, including in the

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[382] *June Med. Servs.*, 140 S. Ct. at 2133 ("This case is similar to, nearly identical with, *Whole Woman's Health*. And the law must consequently reach a similar conclusion.").

[383] *Id.*

[384] *Id.* at 2117–20.

[385] *See id.* at 2133–42 (Roberts, C.J., concurring).

[386] *Id.*

[387] *Id.*

[388] *Id.* at 2117–20 (plurality opinion).

[389] *Id.* at 2117–18.

[390] *Id.* at 2118.

[391] *See id.* at 2120 ("In short, the State's strategic waiver and a long line of well-established precedents foreclose its belated challenge to the plaintiffs' standing.").

[392] *Id.* at 2119 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

[393] *See id.* at 2117–20 (explaining that well-established precedent supported third-party standing for abortion providers); *see also id.* at 2153, 2166–70 (Alito, J., dissenting) (addressing the "blatant conflict of interest between an abortion provider and its patients" in the case).

abortion context.[394] There was nothing earth-shattering about allowing abortion providers to follow precedent and do the same again.[395]

The dissenting Justices' views on standing reflected antiabortion arguments on when a precedent truly deserved respect. Justice Thomas did not believe that *Singleton*, the Court's third-party standing ruling, deserved deference because it was "[t]he first—and only—time" the Court had addressed third-party standing for doctors.[396] Antiabortion attorneys considered a precedent to be shaky if a Court had often revisited or questioned it.[397] In *June Medical*, Justice Thomas took the opposite position.[398] *Singleton* did not command respect, in his view, because its reasoning was "perfunct[ory]."[399]

In his own dissent, Justice Alito stood ready to do away with *Singleton* because it was "unconvincing."[400] Alito insisted that the "relationship [between providers and patients was] generally brief and very limited."[401] Nor did Alito think that there were real obstacles for patients seeking to assert their own rights.[402] Patients seeking privacy could use a pseudonym.[403] The Court could deal with questions about mootness by leaning on the capable-of-repetition-yet-evading-review exception.[404] To the extent that *Singleton* reflected an approach taken in other third-party cases, Alito reasoned that other precedents were readily distinguishable: in *June Medical*, there was a "glaring" conflict of interest utterly missing from other cases.[405]

In discussing the merits, the plurality and dissent also staked out sharply different positions on stare decisis. The plurality found Louisiana's law identical in its wording and effects to the Texas law struck down in *Whole Woman's Health*.[406] Justice Alito, by contrast, reasoned that the cases were distinguishable: *Whole Woman's Health* was a pre-enforcement challenge, and *June Medical* was not.[407] But, in any case, Justice Alito reasoned that fidelity to precedent required the Court to get rid of *Whole Woman's Health*; in his view, *Casey* functionally adopted a rational basis test.[408] "Many state

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[394] *Id.* at 2117–20 (plurality opinion).

[395] *See id.* (referencing the "long line of well-established precendents").

[396] *Id.* at 2147 (Thomas, J., dissenting).

[397] For arguments that antiabortion attorneys have made against deference to certain precedent, see *supra* notes 33–35, 233235, 239–244, 377380 and accompanying text.

[398] *June Med. Servs.*, 140 S. Ct. at 2146–48 (Thomas, J., dissenting).

[399] *Id.* at 2147.

[400] *Id.* at 2169 (Alito, J., dissenting).

[401] *Id.* at 2168.

[402] *Id.* at 2168–69.

[403] *Id.*

[404] *Id.*

[405] *Id.* at 2166.

[406] *Id.* at 2112–13 (plurality opinion).

[407] *Id.* at 2158 (Alito, J., dissenting).

[408] *Id.* at 2154.

and local laws that are justified as safety measures rest on debatable empirical grounds," Justice Alito wrote.[409] "But when a party saddled with such restrictions challenges them as a violation of due process, our cases call for the restrictions to be sustained if 'it might be thought that the particular legislative measure was a rational way' to serve a valid interest."[410]

The dissenters also previewed future debates about whether *Roe* and *Casey* themselves should go. Justice Thomas invoked his recent approach to stare decisis, which would require the overturning of any "demonstrably erroneous precedent."[411] Justice Gorsuch insisted that "*Roe v. Wade* [was] not even at issue" in the case.[412] Nevertheless, Justice Gorsuch foreshadowed an argument that the consequences of *Roe* and *Casey* required both to be overruled.[413] To protect abortion rights in *June Medical*, Justice Gorsuch argued, "rules must be brushed aside and shortcuts taken."[414] He listed what he saw as perversions of doctrine governing standing, facial challenges, and standards of review.[415] His dissent echoed longstanding antiabortion arguments that *Roe* should be overturned because it had distorted neutral rules that governed any number of disputes.[416] He described a strong temptation for courts to forsake these neutral rules to achieve a specific policy outcome.[417] "Today, in a highly politicized and contentious arena, we prove unwilling, or perhaps unable, to resist that temptation," he stated.[418]

But the dispute about the politics of precedent did not simply pit the Justices who voted to strike down Louisiana's law against those who did not. Chief Justice Roberts' concurrence also reflected entrenched antiabortion arguments about what it meant to respect a precedent in the first place.[419] Chief Justice Roberts certainly drew attention to his support for precedent.[420] While insisting that *Whole Woman's Health* was wrongly decided, he reasoned that "[t]he Louisiana law impose[d] a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons."[421] Stare decisis meant that Louisiana's law could not stand.[422]

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[409] *Id.*

[410] *Id.* (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955)).

[411] *Id.* at 2152 (Thomas, J., dissenting).

[412] *Id.* at 2171 (Gorsuch, J., dissenting) (internal citation omitted).

[413] *See id.* ("The real question we face concerns our willingness to follow the traditional constraints of the judicial process when a case touching on abortion enters the courtroom.").

[414] *Id.* at 2181.

[415] *See id.* at 2173–81.

[416] *See supra* Part I.D.

[417] *June Med. Servs.*, 140 S. Ct. at 2181–82 (Gorsuch, J., dissenting).

[418] *Id.* at 2182.

[419] *Id.* at 2134 (Roberts, C.J., concurring).

[420] *Id.* at 2134–36.

[421] *Id.* at 2134.

[422] *See id.*

But, after celebrating stare decisis at such length, Chief Justice Roberts utterly transformed *Whole Woman's Health*. For years, antiabortion lawyers had urged the Court to pay respect to precedent while being completely free to change substantive doctrine.[423] Chief Justice Roberts took up that invitation.[424] He followed antiabortion lawyers in reasoning that almost all balancing tests were problematic—especially in the context of abortion.[425] He reasoned that, "[u]nder such tests, 'equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; [and] judicial courage is impaired.'"[426] He felt that a balancing approach was particularly disturbing when it came to abortion.[427] "There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values," he wrote.[428] Instead, the Chief Justice considered only whether a restriction caused a substantial burden.[429] Under this test, as Chief Justice Roberts noted, the Court had invalidated only one regulation over the course of several decades.[430] As he understood it, "legislatures [had] wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[431]

Chief Justice Roberts' concurrence was very much in the tradition of *Casey*. In both cases, an opinion proclaimed fidelity to precedent and celebrated the importance of stare decisis, while substantially changing the meaning of that precedent Antiabortion leaders had long promoted this approach. Rhetorical flourishes about stare decisis can send the message that the Court is taking precedent seriously. Fidelity to precedent—or the appearance of fidelity to past decisions of the Court—makes the Court seem to be above the political fray. The reality, however, is that the Court's rhetoric of precedent has made abortion jurisprudence far less transparent. Without transparency, stare decisis cannot deliver much benefit at all.

C. *The Damage Done*

Antiabortion lawyers have redefined settled law, emphasizing the political reaction to an opinion.[432] Arguments about *Roe*'s real-world consequences shape antiabortion claims about reliance interests and

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[423] *See supra* Part II.

[424] *See June Med. Servs.*, 140 S. Ct. at 2135–39 (Roberts, C.J., concurring).

[425] *See id.* at 2135–36.

[426] *Id.* (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989)).

[427] *See id.*

[428] *Id.* at 2136.

[429] *Id.* at 2135–37.

[430] *See id.* at 2136–38.

[431] *Id.* at 2136 (quoting Gonzales v. Carhart, 550 U.S. 124, 163 (2007)) (alteration in original).

[432] *See supra* Part II.

workability.[433] Conventionally, of course, the Court has considered changes in the larger society as part of its stare decisis analysis, albeit in a specific and fairly limited way.[434] The Justices evaluate whether economic, social, or political changes of any kind have undercut a precedent.[435] But antiabortion lawyers have worked to make the negative consequences of a decision an independent criterion for reversing a precedent.[436] The movement has contended that *Roe* should be undone because it produced deep polarization, politicized the judicial nomination process, and even undermined women's health.[437]

The Justices seem to be listening. The most prominent example came in the Court's recent decision in *Ramos v. Louisiana*.[438] *Ramos* involved a longstanding Sixth Amendment problem: whether the Constitution required a unanimous jury verdict to convict someone of a serious offense.[439] Two states, Louisiana and Oregon, permitted 10-2 jury votes to convict, relying on an earlier Supreme Court decision in *Apodaca v. Oregon*.[440] A splintered Court voted to overturn *Apodaca*.[441]

Justice Brett Kavanaugh, who concurred in the decision reversing *Apodaca*, made explicit his belief that the "real-world" consequences of a decision should be an important stare decisis consideration.[442] In conducting that inquiry, Justice Kavanaugh advised the Court to consider jurisprudential consequences "such as workability, as well as consistency and coherence with other decisions."[443] Importantly, Justice Kavanaugh also underlined the importance of the "real-world effects [of a precedent] on the citizenry, not just its effects on the law and the legal system."[444]

Justice Kavanaugh concluded that *Apodaca* had produced this kind of negative consequence: the convictions of defendants who might otherwise have walked free, many of whom were likely to be Black given "the racist origins of the non-unanimous jury."[445] He also emphasized the *appearance* of racism that had followed *Apodaca*.[446] "[N]on-unanimous juries [could] silence the voices and negate the votes of black jurors, especially in cases

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[433] *See supra* Part II. For arguments about *Roe*'s real-world consequences, see *supra* notes 157–163 and accompanying text.

[434] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

[435] *See id.* (considering "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification").

[436] *See supra* Part I.D.

[437] For arguments in favor of undoing *Roe*, see *supra* notes 141–144, 250252, 314320 and accompanying text.

[438] 140 S. Ct. 1390 (2020).

[439] *Id.* at 1394–95.

[440] *Id.* at 1398, 1401; Apodaca v. Oregon, 406 U.S. 404 (1972).

[441] *Id.* at 1390.

[442] *Id.* at 1415 (Kavanaugh, J., concurring in part).

[443] *Id.*

[444] *Id.*

[445] *Id.* at 1417.

[446] *See id.* at 1417–18.

with black defendants or black victims . . . ."[447] Justice Kavanaugh viewed *Apodaca* as problematic regardless of whether the racism that had inspired the non-unanimous jury rule still persisted.[448] A negative impression created by a precedent counted against it.[449] One wonders how far that holding would extend. Would it be enough if people believed that *Roe* caused polarization, even if they were mistaken?

What Justice Kavanaugh made explicit in *Ramos* has been implicit in other recent Supreme Court decisions. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[450] Justice Alito worked the practical harm he thought was done by an earlier precedent, *Abood v. Detroit Board of Education*,[451] into his analysis.[452] *Janus* dealt with the fees that labor unions collected from non-members.[453] In *Abood*, the Court had held that, under the Free Speech Clause of the First Amendment, unions could not put those fees toward political advocacy but could direct them to collective bargaining that might raise the wages of all employees.[454]

The Court generally considers whether time has worn away "the factual underpinnings" of an opinion—the predicate for a precedent's legal conclusions.[455] In *Janus*, Justice Alito addressed the underpinnings of *Abood*, specifically the idea that public-sector unions required a closed shop to thrive.[456] But his analysis went considerably further. He painted a bleak picture of the unionized world that *Abood* had nourished, a world defined by "the mounting costs of public-employee wages, benefits, and pensions," "multiple municipal bankruptcies," polarized "political debate," and "[u]nsustainable collective-bargaining agreements."[457] He suggested that *Abood* should be overturned partly because of the societal damage it had done.[458]

There is good reason to hesitate before making the real-world consequences of a judicial decision a part of the Court's approach to stare decisis. First, there is no principled way to determine whether a particular social, economic, or political consequence is good or bad. In *Ramos*, Justice

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[447] *Id.* at 1418.

[448] *See id.* ("After all, the non-unanimous jury is today the last of Louisiana's Jim Crow laws.") (citation omitted) (internal quotation marks omitted).

[449] *See id.*

[450] 138 S. Ct. 2448 (2018).

[451] 431 U.S. 209 (1977).

[452] *See Janus*, 138 S. Ct. at 2482–84.

[453] *Id.* at 2461–62.

[454] *See Abood*, 431 U.S. at 235–36 (holding that certain agency fees, focused on collective bargaining, could be demanded without violating the First Amendment).

[455] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855, 864 (1992) (inquiring whether "premises of fact have so far changed in the ensuing two decades [since *Roe*] as to render its central holding . . . irrelevant or unjustifiable . . . .").

[456] *Janus*, 138 S. Ct. at 2483.

[457] *Id.*

[458] *See id.*

Kavanaugh cited *Brown v. Board of Education of Topeka*[459] as an example of a decision that properly accounted for practical consequences.[460] But, *Brown* is perhaps the most canonical of the Court's cases.[461] No reasonable jurist would suggest that de jure segregation was wise or desirable.

But most contemporary cases raise much thornier questions. Some may see the "unsustainable" bargaining agreements derided by Justice Alito as one of the last vestiges of a valuable (if seriously weakened) labor movement. If more women join the workforce, is that development good or bad? What about laws that result in fewer gay, lesbian, bisexual, transgender, or queer employees working for religious employers? It is hard to see how the Court could characterize any such outcome as negative without taking a sharply partisan stance.

Even if the Court could objectively identify negative consequences, the Justices have a poor track record of understanding the precise causal role played by a decision. *Casey* provides a potent example of these problems. The plurality saved *Roe* partly because of its positive social, political, and economic consequences.[462] "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives[,]" *Casey* noted, citing political scientist and prominent feminist Rosalind Petchesky.[463] It is concerning for the Court to base so much on a fact that admittedly could not "be exactly measured."[464] Without any historical or empirical evidence, there is no reason the Court will get it right when measuring the consequences of a decision. But, while the field is still very much fluid, subsequent research suggests that the legalization of abortion has enabled more women to join the workforce or achieve better educational outcomes.[465]

To a more significant extent, Justice Antonin Scalia's *Casey* dissent showcases the problems with considering the practical consequences of a decision. Scalia blamed *Roe* for the dysfunction of presidential politics and Supreme Court nominations, as well as for the polarization of both the abortion debate and politics in the United States.[466] But the conflict was extremely polarized well before *Roe.* When reformers focused on a

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[459] 347 U.S. 483 (1954).

[460] Ramos v. Louisiana, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part).

[461] *See* JACK M. BALKIN, LIVING ORIGINALISM 313 (2011) (stating that *Brown* is "both durable and canonical" in today's "constitutional regime").

[462] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835, 855 (1992) ("The inquiry into reliance counts as the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application.").

[463] *Id.* at 856.

[464] *Id.*

[465] For an overview, see ANNA BERNSTEIN & KELLY M. JONES, INST. FOR WOMEN'S POL'Y RSCH., THE ECONOMIC EFFECTS OF ABORTION ACCESS: A REVIEW OF THE EVIDENCE 2, 7–8 (2019), https://iwpr.org/wp-content/uploads/2020/07/B379_Abortion-Access_rfinal.pdf.

[466] *Casey*, 505 U.S. at 995–96 (Scalia, J., concurring in part and dissenting in part).

compromise bill created by the American Law Institute, a measure allowing abortion only in cases of fetal disability, rape, incest, or health threats, the antiabortion movement rejected it outright.[467] And some of the polarization Justice Scalia attributed to *Roe* came from developments well after the decision, including political-party realignment on abortion, a spread of arguments questioning medical consensus about the effects of abortion, and a growing distrust of scientific authorities and the media.[468]

But, even if courts were better at analyzing historic causation, the very idea that the Court can settle a cultural divide is nonsensical. It is certainly true that *Roe* has failed to settle the abortion debate. It is also fair to say that *Griswold v. Connecticut*[469] and *Eisenstadt v. Baird*[470] failed to settle debate about contraception—or that *Burwell v. Hobby Lobby Stores, Inc.*[471] failed to settle fights about religious liberty and the contraceptive mandate of the Affordable Care Act. If the Court overruled *Roe* and *Casey*, no sane person would expect the abortion debate to magically disappear. It seems to be wildly unreasonable to expect any judicial decision to settle a longstanding political conflict. This is especially true when polarization intensifies and diminishes for reasons having nothing to do with the Court.

Requiring a valid precedent to settle a dispute leads only to confusion and obfuscation. The same is true of the Court's recent tendency to conflate various stare decisis factors. Abortion foes have made this kind of conflation a central tactic. The more different stare decisis factors bleed into one another, the easier it may be for the Court to justify departing from precedent.

D. *Collapsing Several Factors into One*

As part of the social-movement debate about precedent, antiabortion lawyers have snuck analysis of a decision's consequences and political reception into the discussion of reliance or workability. Several Justices have seemed interested in a similar gambit. Justice Thomas has openly called for the rejection of any "demonstrably erroneous" precedent, stare decisis

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[467] *See, e.g.*, GENE M. BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 227–335 (2005) (explaining that "discussion of the [abortion] issue was divided and morally charged" well before *Roe*); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2046–47 (2011) (detailing how the conflict escalated before *Roe*, particularly during the 1972 presidential election); Mary Ziegler, *Bad Effects: The Misuses of History in* Box v. Planned Parenthood, 105 CORNELL L. REV. ONLINE 165, 183–85 (2020) [hereinafter Ziegler, *Bad Effects*].

[468] *See* Ziegler, *Bad Effects*, *supra* note 467, at 189–90 (explaining some of the sources of the polarization of the U.S. abortion debate); ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 103, at 151 (detailing how the collapse of consensus about the facts of abortion increased polarization of the debate).

[469] 381 U.S. 479 (1965).

[470] 405 U.S. 438 (1972).

[471] 573 U.S. 682 (2014).

notwithstanding.[472] To date, no other Justice has signed on to Justice Thomas's approach. At times, however, the Court has increasingly conflated the quality of a decision's reasoning with its workability, the polarization it produced, and the reliance interests it created.

Consider how the Court blended these issues together in *Janus*, which held that *Abood* was unworkable because the line between "chargeable and nonchargeable union expenditures ha[d] proved to be impossible to draw with precision."[473] As *Janus* framed it, the fact that judges interpreted *Abood* differently meant that it could not be workable.[474] Inconsistent interpretations of *Abood* also suggested that no one could reasonably rely on it.[475]

But, there is nothing inherently suspicious about a decision that produces inconsistent interpretations. Many bridle at decisions that claim to settle sweeping constitutional questions in one fell swoop.[476] Critics of *Roe* suggest that the decision would have produced less controversy had the Court proceeded more gradually.[477] But a more incremental approach would have left considerable room for interpretation by the lower courts. Cass Sunstein, for example, proposes a decision invalidating a law that banned abortion in cases of rape or incest.[478] But what would such a decision mean for most abortion restrictions? If lower courts cannot be sure of the answer, does that mean that this narrow decision is necessarily unworkable?

Lower courts also often produce conflicting interpretations of fact-intensive balancing approaches like the one announced in *Casey.* Balancing tests make particular sense when there are important values on either side of a dispute. For example, in the context of voting, the Court in *Crawford v. Marion County Election Board* balanced the right to vote and the government's important interest in "the integrity and reliability of the electoral process itself."[479] The stakes of voting and abortion cases are high. Balancing approaches acknowledge that those on either side of a dispute have legitimate, deeply held beliefs. But, balancing approaches like the ones in *Casey* and *Crawford* almost inevitably produce inconsistent results. The

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[472] Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

[473] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2481 (2018).

[474] *See id.*

[475] *See id.* (arguing that inconsistent results were inevitable because the line drawn in *Abood* was "broad enough to encompass just about anything that the union might choose to do").

[476] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 25 (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME] (describing the advantages of an incremental approach to decision-making, especially on questions of major constitutional import).

[477] *See id.* at 24–28 (suggesting that backlash to *Roe* was greater because the Court decided too much too soon); WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 242 (2010) (contending that the *Roe* Court's approach intensified opposition within the antiabortion movement); RICHARD A. POSNER, LAW, Pragmatism, AND DEMOCRACY 79, 124–27 (2003) (arguing the same).

[478] *See* SUNSTEIN, ONE CASE AT A TIME, *supra* note 476, at 37.

[479] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–91 (2008).

parties will necessarily contest the facts, and trial judges will grapple with different records and perhaps react differently to the same evidence. And lower courts may disagree about the relative weight of important interests like election integrity and the franchise. This inconsistency is to be expected when the courts seek to move incrementally, especially when an issue is deeply divisive. And yet, *Janus* positioned inconsistent interpretations of *Abood* as proof that the decision was both erroneous and unworkable.[480] This understanding of workability would push the courts into maximalist decision-making that would denigrate the beliefs of some and likely increase the controversy surrounding an issue.

Janus also conflated the workability and persuasiveness of *Abood* with the ongoing controversy surrounding union dues.[481] The Court suggested that *Abood* was likely wrong because controversy about its holding had raged on since the decision came down.[482] If *Abood* had failed to settle disputes about union dues, then no one could reasonably rely on the Court retaining it.[483] "[P]ublic-sector unions have been on notice for years regarding this Court's misgivings about *Abood*," Justice Alito concluded.[484]

The Court similarly blurred the lines between reliance, workability, and political consequences in *South Dakota v. Wayfair, Inc.*,[485] which dealt with timing issues related to out-of-state sellers who had to collect and remit sales taxes.[486] In an earlier case, *Quill Corporation v. North Dakota*,[487] the Court had held that sellers would have to pay sales tax in a state only if they had a physical presence in the jurisdiction beyond shipping goods to that location. Much of *Wayfair* centered on the negative economic consequences that *Quill* had produced.[488] "[T]he Internet revolution has made its earlier error all the more egregious and harmful," Justice Kennedy wrote of *Quill*.[489] The fact that *Quill* had not settled the issue—and that states continued to ignore or challenge it—suggested that it was unworkable.[490] *Wayfair* also mixed up reliance and workability, suggesting that no one could rely on a rule that produced inconsistent interpretations.[491] "The physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced," Kennedy reasoned.[492]

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[480] *Janus*, 138 S. Ct. at 2481–83.
[481] *Id.* at 2485–86.
[482] *See id.*
[483] *See id.* at 2485.
[484] *Id.* at 2484.
[485] 138 S. Ct. 2080 (2018).
[486] *Id.* at 2087–90.
[487] 504 U.S. 298, 301 (1992).
[488] *Wayfair, Inc.*, 138 S. Ct. at 2097.
[489] *Id.* at 2097.
[490] *See id.* at 2097–102 (stressing state resistance to the *Quill* standard).
[491] *See id.* at 2098.
[492] *Id.*

There are sound reasons for the Court to cast off the influence of social-movement debate about precedent and analyze each stare decisis factor on its own merits. To begin, courts are not particularly good at determining whether a given issue is especially polarized (or the extent to which that polarization stems from a precedent).[493] If a take on reliance interests or workability boils down to a wrong-headed point about a decision's practical effects, the Court's analysis will be that much poorer for it. As important, reliance interests and workability address different dimensions of stare decisis. Workability worries kick in when a precedent is incoherent or disconnected from the goals a rule is supposed to serve. Reliance interests, by contrast, have little to do with the administrability of a rule. Instead, reliance centers on whether a class will suffer harm if a precedent disappears or whether a precedent has become part of our national culture. Conflating these independent concepts increases the risk that the Court will ignore some or all of the values that stare decisis serves.

E. *The Rhetoric of Precedent*

At times, as in *June Medical*, the Court has not announced that it is overturning a precedent, much less explained why stare decisis dictates such a result. The Court may modify or even partially overturn a past decision while praising the idea of stare decisis.[494] Lay readers impressed by the Court's apparent commitment to precedent learn, if they dig deeper, that the Court has rewritten or partially overruled an earlier decision.

Treating respect for precedent as a rhetorical exercise undermines the values that stare decisis is supposed to serve. Respect for precedent is supposed to ensure predictability, consistency, and clarity. But for the Court to deliver on any of the promises tied to stare decisis, some degree of transparency is required. After *June Medical*, for example, reports initially framed the decision as a major victory for both stare decisis and abortion rights.[495]

Stare decisis has also helped to legitimize the Court. No court decision is self-executing. Indeed, there are historical examples, as in the case of

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[493] *See*, *e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting) (rebuking the Court's "abdication" of "checking" partisan gerrymanders that "encouraged a politics of polarization . . . just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims").

[494] *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134–35 (2020) (Roberts, C.J., concurring) (hailing stare decisis as "grounded in a basic humility," "necessary," and "pragmatic and contextual").

[495] *See* Jeffrey Toobin, *John Roberts Distances Himself from the Trump-McConnell Legal Project*, NEW YORKER (June 30, 2020), https://www.newyorker.com/news/daily-comment/john-roberts-dissociates-himself-from-the-trump-mcconnell-legal-project ("This [decision in *June Medical*], simply, is cause for celebration."); Jessica Mason Pieklo, *Did That Really Happen? A Look Back at the Louisiana Abortion Rights Win*, REWIRE NEWS GRP. (July 29, 2020, 12:02 PM), https://rewire.news/article/2020/07/29/did-that-really-happen-a-look-back-at-the-louisiana-abortion-rights-win/ ("We should celebrate!").

school prayer, of third parties ignoring a decision at its inception and continuing to do so years later.[496] Adherence to stare decisis makes the Court appear more legitimate, less partisan, and more committed to neutral, principled decision-making. Indeed, as Lawrence Friedman has shown, crises of legitimacy have plagued the Court before, especially prior to the development of stare decisis doctrine.[497]

Stare decisis confers legitimacy by suggesting that the Court take the law and its own decisions seriously, regardless of any surrounding political dispute.[498] A freestanding rhetoric of precedent—especially one that has nothing to do with substantive respect for the Court's past decisions—raises serious questions about judicial legitimacy. Burying what has happened to a precedent while singing the praises of stare decisis allows the Court to demand legitimacy without adhering to any neutral or principled rules.

Contrary to what the antiabortion movement may otherwise suggest, the Court rarely settles deep social divides. Transparency takes on even more importance for this reason. The Court is but one participant in broader dialogues about everything from abortion to voting to the size of the administrative state. The Justices play a legitimate role in the system only when their decisions enable, rather than undermine, the ability of other actors, including elected officials, social movements, and administrative agencies, to respond. This is especially true as the Court becomes increasingly counter-majoritarian. While Democrats have won the popular vote in the last seven presidential elections, that party has not put a majority on the Supreme Court since 1969.[499] The Court's legitimacy has depended on its ability to appear above the political fray.[500] The Court appears likely to be more partisan and to be perceived as such by the public.[501] This perception, in turn, will make it difficult for the Court to convince anyone of its neutrality. The task will become all the more impossible if the Court's approach to key precedents, including *Roe* and its progeny, smacks of cynicism and evasion. Stare decisis requires transparency to foster popular constitutional dialogue. *June Medical* signals that, when it comes to transparency, the Court is on the wrong path.

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[496] *See generally* MARTIN J. SWEET, MERELY JUDGMENT: IGNORING, EVADING, AND TRUMPING THE SUPREME COURT (2010) (describing acts of defiance among states and individuals who treated the Supreme Court as illegitimate).

[497] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 132 (2d ed. 1985) (chronicling several past crises concerning the legitimacy of the Supreme Court).

[498] *See* THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 19 (2006) ("Judges promote legitimacy because they recognize that it encourages acceptance of and compliance with their decisions.").

[499] *See* Mary Ziegler, *A Dangerous Moment for the Court*, ATLANTIC (Sept. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/09/dangerous-court-legitimacy/616418/.

[500] *See* HANSFORD & SPRIGGS, *supra* note 498, at 19.

[501] Justin McCarthy, *Plurality Says High Court Ideological Makeup 'About Right'*, GALLUP (Sept. 24, 2020), https://news.gallup.com/poll/320798/plurality-says-high-court-ideological-makeup-right.aspx.

CONCLUSION

The Supreme Court's recent decision in *June Medical*—together with the debates surrounding the nomination of Amy Coney Barrett—deliver a powerful reminder that social-movement politics have often centered on the meaning of precedent. Precedent has produced heated movement-countermovement conflict about how, when, and why the Court should defer to its own past decisions. Central to these debates have been strategies that allow movements themselves to manufacture proof that a precedent should be reconsidered.

The politics of precedent promise the Justices a way to dismantle a right to abortion with fewer potential pragmatic consequences. After all, if few in the public understand what the Court has done, any backlash to the Justices' actions will necessarily be muted. In the abortion conflict, social movements have offered the Court what seems to be a way to overturn *Roe* and avoid (or at least manage) backlash. The Justices should resist the temptation to follow that path. The Court has certainly contributed to constitutional dialogue about abortion, but others have also helped to determine the scope of abortion rights, from elected officials to social movement advocates to physicians charged with interpreting state laws in their clinics. The Justices are students of history, and history plainly instructs that popular constitutional engagement with the abortion issue has been lasting and profound. Whatever the Court does with *Roe* should acknowledge this reality—and facilitate a popular conversation about abortion rights that is almost certain to continue.