STARE DECISIS, WORKABILITY, AND *ROE V. WADE*: AN INTRODUCTION

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INTRODUCTION

Stare decisis—whether to overturn precedent—involves three key questions: the identification of judicial error, the seriousness of the error, and the cost of fixing the error. To answer the three stare decisis questions, the Justices look at six primary factors, one of which is workability. Workability is a factor that virtually all of the Justices accept, at least in the abstract. Throughout its history, the United States Supreme Court has overturned precedent more than 230 times, and it does so at the rate of approximately two to three cases per term.[1] During the past several Supreme Court terms, stare decisis has become the subject of growing attention by justices, scholars, and legal commentators.[2] Much of this attention to precedent has been sparked by one controversial and unsettled decision: *Roe v. Wade*.[3] One legal commentator claimed that every Supreme Court opinion touching on stare decisis was a pretext for the coming battle over *Roe*.[4] Both the continuing

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1. CONG. RESEARCH SER., S. DOC. NO. 112-9, THE CONSTITUTION OF THE UNITED STATES: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 26, 2013, at 2573–85 (2013).

2. *See, e.g.*, BRYAN A. GARNER, ET AL., THE LAW OF JUDICIAL PRECEDENT (2016); RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 110 (2017) (approving workability factor); Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121; Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189 (2014).

3. Roe v. Wade, 410 U.S. 113 (1973).

4. Interview by Audie Cornish, Host, NPR, with Nina Totenberg, Legal Affairs Correspondent, Byline (June 26, 2019), https://www.npr.org/2019/06/26/736344189/supreme-court-justices-continue-to-struggle-with-precedent ("CORNISH: So what is this all really about? TOTENBERG: First and foremost, it's about *Roe vs. Wade* and the court's other abortion precedents.").

validity of *Roe* and the proper role of stare decisis are pressing constitutional issues.[5]

In Justice Stephen Breyer's dissent from the Supreme Court's 2019 decision in *Franchise Tax Board of California v. Hyatt*[6] overturning *Nevada v. Hall*,[7] he queried: "Today's decision can only cause one to wonder which cases the Court will overrule next."[8] Breyer argued that *Hall* was a "well-reasoned decision that has caused no serious practical problems the four decades since we decided it," explaining that precedent should only be overruled if it is "obviously wrong."[9]

> It is one thing to overrule a case when it "def[ies] practical *workability*," when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[10]

While Justice Breyer acknowledged the workability factor, he did not find the rule in the case unworkable.

What makes a rule unworkable? To date, no academic article has systematically compiled and analyzed Supreme Court decisions on workability. This article attempts to do just that by conducting the first survey of Supreme Court workability decisions. This survey reveals that there is no one Supreme Court opinion laying out a comprehensive doctrine of workability; rather workability is the product of an inductive, or case-by-case, analysis reached by a majority of the justices in a particular case. Workability is a broad label that encompasses many dimensions. Whether a precedent is or has become unworkable is a practical judgment that examines how a legal rule has impacted the Court, federal and state judges, legislators, and other stakeholders, including the American people.

Roe v. Wade is perhaps the quintessential example of unworkability; it is a decision that remains radically unsettled forty-seven years after it

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5. *See, e.g.*, Thomas J. Molony, *Taking Another Look at the Call on the Field:* Roe, *Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. PUB. POL'Y ___ (forthcoming 2020).

6. Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485 (2019).

7. Nevada v. Hall, 440 U.S. 410 (1979).

8. *Hyatt*, 139 S. Ct. at 1504–06 (Breyer J., dissenting) (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854–55 (1992), for the proposition that "*stare decisis* requires us to follow *Hall*, not overrule it.").

9. *Id.* at 1505–06.

10. *Id.* at 1506 (alteration in original) (emphasis added) (quoting *Casey*, 505 U.S. at 854–55).

was decided.[11] The workability of *Roe* may be a critical factor in the Court's determination whether to overrule that case, and as such, the workability (or lack thereof) of *Roe* deserves closer examination. This Article attempts to provide an introduction both to the workability factor of stare decisis and workability as applied to *Roe*.

In Part I, this Article begins with a summary of the six factors of stare decisis and then examines workability in general and in the context of stare decisis specifically. This Article does this by presenting the first thorough survey of Supreme Court workability decisions to discern the key aspects of the Court's inductive workability doctrine. In Part II, this Article shifts to reasons why *Roe v. Wade*, in particular, is unworkable.

I. STARE DECISIS AND WORKABILITY

A. *Six Primary Factors of Stare Decisis*

Precedent is one of the major sources of direction and authority for judges.[12] Traditionally, when considering whether or not to follow or overturn a precedent, the Supreme Court looks at six factors of stare decisis: (1) whether the precedent is settled, (2) whether the precedent is wrongly decided, (3) whether the precedent is unworkable, (4) whether factual changes have eroded the original precedent, (5) whether legal changes have eroded the original precedent, and (6) whether reliance interests in the original precedent are substantial.[13] These six factors are focused on identifying error, the seriousness of the error, and the cost of correcting the error. Although all six factors are not present in *every* decision overruling precedent, each of the six have been repeatedly cited by the Supreme Court in its decisions considering

11. *See generally* Forsythe, *supra* note 4, at 459 nn.113–15 (collecting sources); Paul Benjamin Linton & Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of* Roe v. Wade*? A Critique of* Planned Parenthood v. Casey, 70 CASE W. RES.L. REV. 283 (2019); Steven H. Aden, *Driving Out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 14 (2013); David J. Garrow, *Significant Risks:* Gonzales v. Carhart *and the Future of Abortion Law*, 2007 SUP. CT. REV. 1; Dahlia Lithwick, *Foreword:* Roe v. Wade *at Forty*, 74 OHIO ST. L.J. 5, 5–6 (2013) ("Whereas to read the pro-choice daily press is to experience *Roe* as a memory that is rapidly vanishing in the rearview mirror, a case that lives on in name only as it is hollowed out to become the law in name only."); Mark Strasser, *The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies*, 65 OKLA. L. REV. 177, 193 n.120 (2013) ("Some commentators do not seem to appreciate the instability of current abortion jurisprudence."); Mary Ziegler, *Substantial Uncertainty:* Whole Woman's Health v Hellerstedt *and the Future of Abortion Law*, 2016 SUP. CT. REV. 77.

12. GARNER, *supra* note 2, at 1–2.

13. *See* Forsythe, *supra* note 4, at 450.

stare decisis over the past half century.[14] For example, in *Janus v. AFSCME*,[15] the Court expressly cited all of the factors of stare decisis, except whether the precedent was settled, in deciding to overrule *Abood v. Detroit Board of Education*.[16]

But whether a precedent is "settled" is the starting point for stare decisis. Stare decisis comes from the Latin phrase: "*stare decisis et non quieta movere*—to adhere to precedents and not to unsettle things which are established."[17] An unsettled precedent does not contribute to "the evenhanded, predictable, and consistent development of legal principles."[18] Leaving unsettled what is unsettled undermines rather than contributes to the rule of law. It demonstrates indecision by the courts. In short, stare decisis is about leaving settled precedents settled.[19] Oft-cited pragmatic concerns about overruling precedents—such as uncertainty, stability, reliance, and "the evenhanded, predictable, and consistent development of legal principles"[20]—depend on whether the precedent is settled. The application of a precedent without a reaffirmation of its foundation and reasoning does not make the precedent settled.

Apart from the six factors of stare decisis, there appears to be the additional requirement of "special justification." Since the Court's 1984 decision in *Arizona v. Rumsey*,[21] most Justices have said that overruling a precedent requires "special justification," including Justice Alito, joined by Chief Justice John Roberts and Justice Brett Kavanaugh, in the Court's 2019 decision in *Gamble v. United States*.[22] While the factors of stare decisis seem

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14. *See* BRANDON J. MURRILL, CONG. RESEARCH SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 11–12 (2018) (compiling data on constitutional overrulings).

15. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); *see also* Ramos v. Louisiana, No. 18-5924, 2020 U.S. LEXIS 2407 (U.S. April 20, 2020) (with numerous opinions by the Justices addressing several stare decisis factors).

16. *Id.* (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

17. Bonner v. City of Prichard, 661 F.2d 1206, 1211 (11th Cir. 1981) (en banc) (emphasis added) (internal quotation marks omitted).

18. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

19. *Bonner*, 661 F.2d at 1211.

20. *Payne*, 501 U.S. at 827.

21. Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)).

22. Gamble v. United States, 139 S. Ct. 1960, 1969 (2019) (quoting *Rumsey*, 467 U.S. at 212); Allen v. Cooper, No. 18-877, 2020 WL 1325815, at *6 (Mar. 23, 2020) (Kagan, J., majority opinion, with whom Roberts, Alito, Sotomayor, Gorsuch, & Kavanaugh, JJ., joined, stating that "[t]o reverse a decision, we demand a 'special justification,' over and above the belief 'that the precedent was wrongly decided'"

to be aimed at the justification for overturning precedent, several Justices apparently require "special justification" as an additional factor necessary beyond the conclusion that the precedent was "wrongly decided," if the case involves "a long-settled precedent."[23] Justice Clarence Thomas questioned this position in his concurrence in *Gamble*, where he emphasized that the "wrongly decided" factor is of singular importance, especially in constitutional cases.[24] This reveals that the so-called conservative block is not in lock-step on stare decisis, and any discussion by the Justices on what is required to overturn precedent will be closely watched in future decisions involving stare decisis.

B. *The Workability of Legal Rules*

In general, the workability of a legal rule, regardless of its connection to stare decisis, is a critical issue of jurisprudence.[25] Legal rules endorse activities, interests, and rights; identify interests, separate them, and authorize their scope; bind personal and corporate behavior; define and weigh risk; and give direction to or prohibit action by persons and governmental officials. Thus, the workability of precedent recognizes that the legal rules of judicial decisions impact the lives of citizens and those who have to work under, follow, and obey them. Because workability recognizes the practical impact of judicial decisions, it may be one of the most important factors of stare decisis. Legal rules, whether statutes or judicial decisions, may be unworkable only in the light of experience, as they are applied to the facts of concrete cases, or, as the Court has repeatedly said, "unworkable in practice."[26]

(quoting Haliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)) (Thomas, J., concurring in part and concurring in the judgment but refusing to join in that passage of the majority opinion).

23. *Erica P. John Fund, Inc.*, 573 U.S. at 266; *see also Gamble*, 139 S. Ct. at 1969 (opinion by Alito, J., with whom Roberts, C.J., and Kavanaugh, J., joined) ("special justification" needed); Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (quoting *Rumsey*, 467 U.S. at 212) (noting that "departures from precedent are inappropriate in the absence of a 'special justification'"); Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) ("Who ignores [stare decisis] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).").

24. *Gamble*, 139 S. Ct. at 1981–82, 1984–86 (Thomas, J., concurring).

25. *See* GARNER, *supra* note 2; *see also* United States v. Drummond, 354 F.2d 132, 143 (2d Cir. 1965) ("[U]nless we explain our decisions of today with all the precision and exactitude at our command, today's holdings will become but simple fiat and will provide no guidelines for tomorrow's problems.").

26. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019) ("state-litigation requirement has also proved to be unworkable in practice"); Carpenter v. United States, 138 S. Ct. 2206, 2224 (2018) (Kennedy, J., with whom Thomas & Alito, JJ., joined, dissenting) ("draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other"); *id.* at 2244 (Thomas, J., dissenting) ("[T]he *Katz* test also has proved unworkable in practice."); Perry v. MSPB, 137

S. Ct. 1975, 1987 (2017) ("In practice, the distinction [between the Board's 'jurisdictional rulings and the Board's procedural or substantive rulings for purposes of allocating judicial review authority between district court and the Federal Circuit'] may be unworkable."); Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 392 (2015) (Scalia, J., with whom Roberts, C.J., joined, dissenting) (preemption rule "will prove unworkable in practice"); Salinas v. Texas, 570 U.S. 178, 190 (2013) ("[N]ot persuaded . . . that applying the usual express invocation requirement where a witness is silent during a noncustodial police interview will prove unworkable in practice."); Williams v. Illinois, 567 U.S. 50, 114 (2012) (Thomas, J., concurring) ("[A] primary purpose inquiry [for extrajudicial statement under the Confrontation Clause] divorced from solemnity is unworkable in practice."); Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 699 n.1 (2010) (Stevens, J., concurring) ("This proposition [distinction between religious status and belief] is not only unworkable in practice but also flawed in conception."); Boumediene v. Bush, 553 U.S. 723, 842 (2008) (Scalia, J., with whom Roberts, C.J., Thomas, & Alito, JJ., joined, dissenting) ("The rule that aliens abroad are not constitutionally entitled to habeas corpus has not proved unworkable in practice; if anything, it is the Court's 'functional' test that does not (and never will) provide clear guidance for the future."); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 501 (2007) (Scalia, J., with whom Kennedy & Thomas, JJ., joined, concurring in part and concurring in the judgment) ("The *McConnell* regime is unworkable because of the inability of any acceptable as-applied test to validate the facial constitutionality of § 203—that is, its inability to sustain proscription of the vast majority of issue ads."); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring) ("The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice."); Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) ("undue burden" standard for abortion is "hopelessly unworkable in practice" (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 985–86 (1992) (Scalia, J., dissenting))); United States v. Morrison, 529 U.S. 598, 640 (2000) (Souter, J., with whom Stevens, Ginsburg, and Breyer, JJ., joined, dissenting) ("[H]istory has shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory."); Holder v. Hall, 512 U.S. 874, 892 (1994) (Thomas, J., with whom Scalia, J., joined, concurring in the judgment) ("But the gloss we have placed on the words 'standard, practice, or procedure' in cases alleging dilution . . . has proved utterly unworkable in practice."); United States v. Dixon, 509 U.S. 688, 759 (1993) (Souter, J., with whom Stevens, J., joined, concurring in the judgment in part and dissenting in part) ("[F]ails to reveal that *Grady*'s conclusion was either 'unsound in principle,' or 'unworkable in practice.'" (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985))); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 533 (1993) (Souter, J., with whom White, Blackmun, & Stevens, JJ., joined, dissenting) ("adopt a scheme that will be unfair to plaintiffs, unworkable in practice"); Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 783 (1992) ("unworkable in practice" (quoting *Garcia*, 469 U.S. at 546)); *Casey*, 505 U.S. at 985–86 (Scalia, J., dissenting) (predicting that "undue burden" standard would prove "unworkable in practice"); Cty. of Allegheny v. ACLU, 492 U.S. 573, 669 (1989) (Kennedy, J., with whom Rehnquist, C.J., White, & Scalia, JJ., joined, concurring in the judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us."); Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (*Roe* trimester framework "has proved 'unsound in principle and unworkable in practice.'" (quoting *Garcia*, 469 U.S. at 546)); *Garcia*, 469 U.S. at 546 ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation . . . ."); *Swift & Co.*, 382 U.S. at 116 (1965) ("[A] procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice . . . ."); White v. Winchester Country Club, 315 U.S. 32, 40 (1942) ("We reject the doctrine of the *Weld* case as being intrinsically unsound, and as having been demonstrated by subsequent cases to be unworkable in practice."); United Ry. & Elec. Co. v. West, 280 U.S. 234, 291 (1930) (Stone, J., dissenting) ("[A] rule of law which seems not to follow from *Smyth v. Ames*, and to be founded neither upon experience nor expert opinion and to be unworkable in practice.").

There are many reasons why a legal rule could be deemed unworkable. A legal rule can be unworkable if it is vague, imprecise, ambiguous,[27] or "too indeterminate to apply."[28] For example, Justice John Paul Stevens in *Smith v. United States*,[29] questioned the workability of the "contemporary community standards" test for obscenity established in *Miller v. California* because of the test's vague and imprecise nature.[30] Similarly, numerous Supreme Court decisions have questioned the clarity of the Armed Career Criminal Act of 1984 (ACCA),[31] because "the failure of 'persistent efforts . . . to establish a standard' [by a federal statute] can provide evidence of vagueness."[32] Likewise, judicially-created rules, like statutes, may be unworkable if they fail to give people sufficient notice of what is required (flouting due process) or create incongruities in the law.

Legal rules may be unworkable if they breed judicial confusion, fail to be useful in deciding future cases, become obsolete, or are abandoned by lack of use. For example, in *American Legion v. American Humanist Association*,[33] Justice Alito in his majority opinion noted that in many Establishment Clause decisions since *Lemon v. Kurtzman*,[34] "this Court has either expressly declined to apply the test or has simply ignored [the *Lemon* test]."[35] "This pattern is a testament to the *Lemon* test's shortcomings. As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them."[36] Pointing to

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27. Kisor v. Wilkie, 139 S. Ct. 2400, 2408, 2410 (2019).

28. Johnson v. United States, 135 S. Ct. 2551, 2573 (2015) (Kennedy, J., concurring).

29. Smith v. United States, 431 U.S. 291, 314–15 (1977) (Stevens, J., dissenting).

> [I]n some ways the community standard concept is even more objectionable than a national standard. As we have seen in prior cases, the geographic boundaries of the relevant community are not easily defined, and sometimes appear to be subject to elastic adjustment to suit the needs of the prosecutor. Moreover, although a substantial body of evidence and decisional law concerning the content of a national standard could have evolved through its consistent use, the derivation of the relevant community standard for each of our countless communities is necessarily dependent on the perceptions of the individuals who happen to compose the jury in a given case.

Id.

30. *Id.* at 313–16 (Stevens, J., dissenting) (citing Miller v. California, 413 U.S. 15 (1973)).

31. 18 U.S.C. § 924 (2020).

32. *Johnson*, 135 S. Ct. at 2558 (first alteration in original) (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 91 (1921)); *see also* Sykes v. United States, 564 U.S. 1 (2011); Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008); James v. United States, 550 U.S. 192 (2007).

33. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

34. Lemon v. Kurtzman, 403 U.S. 602 (1971).

35. *Am. Legion*, 139 S. Ct. at 2080.

36. *Id.*

the Court's failure to apply the *Lemon* test over decades, Justice Kavanaugh concluded in *American Legion* that the *Lemon* test is "not good law," explaining that he would replace the *Lemon* test with a "history and tradition test."[37] Echoing Justice Alito's criticism of *Lemon* in *American Legion*, Justice Thomas's concurrence referred to the *Lemon* test as "the long-discredited test," citing the "enormous confusion in the States and the lower courts" caused by the *Lemon* test as a reason to overrule the decision.[38] Over nearly fifty years and multiple iterations of Justices on the Court, the *Lemon* test has not been used, yet has not been overruled. Perhaps the Court in *American Legion* did not overrule *Lemon* because a majority of Justices could not agree on a legal test to replace *Lemon*.

Legal rules may be unworkable because they are overbroad, too sweeping, or all-encompassing in their reach. For instance, in *American Legion*, Justice Alito noted: "the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause," but the Court has since "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[39] As Justice Antonin Scalia explained in his earlier dissent in *McCreary County v. ACLU of Kentucky*,[40] the *Lemon* test has "been manipulated to fit whatever result the Court aimed to achieve."[41] As the *Lemon* test shows, if a majority finds a legal rule to be unworkable, the alternative to overruling it outright is to ignore it.

The Court has also eschewed cases or requests to create legal rules involving political questions because they lack "judicially discoverable and manageable standards for resolving [them]."[42] For example, in the 2019 case *Rucho v. Common Cause*, the majority and dissent argued over whether there was a workable standard for identifying unconstitutional partisan gerrymanders.[43] While the dissent asserted that it had identified a workable standard, the majority rejected the invitation to wade into political gerrymandering because the dissent's judicially-created standard was not grounded in the text of the Constitution.[44]

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37. *Id.* at 2092–93 (Kavanaugh, J., concurring).

38. *Id.* at 2097 (Thomas, J., concurring).

39. *Id.* at 2087 (majority opinion).

40. McCreary Cty. v. ACLU of Ky., 545 U.S. 844 (2005).

41. *Id.* at 900 (Scalia, J., dissenting).

42. Rucho v. Common Cause, 139 S. Ct. 2484, 2496 (2019) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

43. *Id.* at 2515 (Kagan, J., dissenting).

44. *See id.* at 2506–07 (majority opinion); *id.* at 2515 (Kagan, J., dissenting).

Reasons for why a legal rule is unworkable may overlap with other legal doctrines. As Professor Caleb Nelson has pointed out, if a statute was "completely indeterminate" in the sense that interpreters could read it to establish any rules they pleased, then "we would say either that it violated the nondelegation doctrine or that it was void for vagueness."[45]

Finally, workability includes a preventive use, where the Justices will forecast that a judicially-created rule will be unworkable. For example, in *Crawford v. Marion County Election Board*,[46] the Court upheld an Indiana law that required citizens voting in person to present a government-issued photo identification. Though he did not use the specific word workability, Justice Scalia in a concurring opinion, joined by Justices Thomas and Alito, questioned the workability of adopting an "individual-focused approach."[47]

> Even if I thought that *stare decisis* did not foreclose adopting an individual-focused approach, I would reject it as an original matter. This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless.[48]

Justice Scalia was unwilling to create a new legal rule based on his prediction that the rule would be unworkable.

Another preventive example is found in *Caperton v. A.T. Massey Coal Co.*, where the Court, by a 5-4 decision, adopted a rule of "probability of bias" in determining a due process violation when a judge fails to recuse.[49] Chief Justice John Roberts, in his dissent, predicted that the majority's solution would be inadequate and counterproductive: "[A] 'probability of bias' cannot be defined in any limited way. The Court's new 'rule' provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be."[50] He elaborated that: "the

45. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 6 n.18 (2001) (citing Touby v. United States, 500 U.S. 160, 165 (1991) (discussing the nondelegation doctrine) and Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497–99 (1982) (discussing vagueness doctrine)).

46. Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

47. *Id.* at 208 (Scalia, J., concurring).

48. *Id.*

49. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883–84 (2009).

50. *Id.* at 890–91 (Roberts, C.J., dissenting).

standard the majority articulates—'probability of bias'—fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally."[51] Chief Justice Roberts outlined forty questions that future courts might need to address to probe the "probability of bias."[52] He compared the lack of an adequate recusal standard with the Court's past frustrating experience with partisan gerrymanders.[53] "The Court's inability to formulate a 'judicially discernible and manageable standard' strongly counsels against the recognition of a novel constitutional right."[54] Only experience with this new rule will provide evidence to evaluate the validity of his concerns.

C. *Workability in the Context of Stare Decisis*

Workability is a broad label that encompasses the many diverse ways in which judicially-created rules may be defective. Given the criticism of legal rules for their indeterminacy, it should not be surprising that unworkability is a "traditional ground" for overruling a precedent by the Supreme Court[55] (as

51. *Id.* at 893.

52. *Id.* at 893–98.

53. *Id.* at 898–99.

54. *Id*. at 898.

55. Numerous Justices have endorsed workability as a stare decisis factor in the abstract or emphasized the unworkability of legal rules. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2423 (2019) (Kagan, J., majority opinion) (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)); Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); South Dakota v. Wayfair, 138 S. Ct. 2080 (2018); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) (Roberts, C.J., majority opinion); Citizens United v. FEC, 558 U.S. 310, 362–63 (2010); Montejo v. Louisiana, 556 U.S. 778 (2009); John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 924 (2007) (Breyer, J., dissenting) (citing Payne v. Tennessee, 501 U.S. 808, 827–28 (1991) and Swift & Co. v. Wickham, 382 U.S. 111, 161 (1965)); Randall v. Sorrell, 548 U.S. 230, 265 (2006) (Thomas, J., concurring); FCC v. Fox TV Stations, Inc., 556 U.S. 502, 541 (2009) (Stevens, J., dissenting) (suggesting *Pacifica* rules are unworkable); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 501 (2007) (Scalia, J., concurring in part and concurring in the judgment) (citing *Payne*, 501 U.S. at 827); Vieth v. Jubelirer, 541 U.S. 267 (2004); United States v. Morrison, 529 U.S. 598, 663 (2000) (Breyer, J., dissenting) ("[T]ime and experience may demonstrate . . . the unworkability of the majority's rules . . . ."); Witte v. United States, 515 U.S. 389, 406–07 (1995) (Scalia, J., concurring) ("This is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well, and so persist in my refusal to give that jurisprudence *stare decisis* effect."); Nichols v. United States, 511 U.S. 738, 759 (1994) (Blackmun, J., dissenting); United States v. Dixon, 509 U.S. 688, 712 (1993) (proving Grady v. Corbin, 495 U.S. 508 (1990), unworkable); Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992); *Patterson*, 491 U.S. at 173; Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (plurality opinion addressed unworkability of *Roe v. Wade*); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 453–54 (1983) (O'Connor, J., dissenting) ("The trimester or 'three-stage' approach adopted by the Court in *Roe*, and, in a modified form, employed by the Court to analyze the regulations in these cases, cannot be

well as a traditional factor cited by state courts[56]). Despite the Supreme Court's established use and reference of workability in stare decisis opinions, there seems to be no case in which the Court has set out a comprehensive explanation of its workability doctrine. Our survey of workability caselaw below reveals that the best explanation for the lack of a comprehensive workability doctrine is that workability is an inductive process.

Although the idea of "workability" has been a factor of stare decisis for decades, that exact word has not always been used by the Court. For instance, although *Swift & Co. v. Wickham*[57] from 1965 is sometimes cited as the first decision by the Court identifying workability as a factor of stare decisis,[58] the concept, if not the specific language, goes back even further. What came to be called "workability" in *Swift* was addressed in earlier years with other terms, like "untenable," or as a manifestation of other legal doctrines.

Workability was arguably at work in the two 1932 dissents in *Burnet v. Coronado Oil & Gas Co.*, in which the Court by a 5-4 majority opinion by Justice James Clarke McReynolds held that federal taxation of income the

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supported as a legitimate or useful framework for accommodating the woman's right and the State's interests. The decision of the Court today graphically illustrates why the trimester approach is a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.") (footnote omitted); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), because it was unworkable); *see also* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 76 (2002) ("Although the Justices often disagree intensely about whether a particular rule is workable, . . . no Justice of the current Court has disputed the relevance of workability to the stare decisis analysis."). *But see* Gamble v. United States, 139 S. Ct. 1960, 1986 (Thomas, J., concurring) ("Considerations beyond the correct legal meaning, including . . . workability . . . are inapposite.").

56. Audrey Lynn, Note, *Let's (Not) Make This Work! Why Stare Decisis Workability Should Be a Sword but Not a Shield*, 31 REGENT U. L. REV. 91, 95 n.34 (2018) (collecting state court cases incorporating workability as a stare decisis factor).

57. Swift & Co. v. Wickham, 328 U.S. 111 (1965).

58. Professor Ziegler makes the claim that "pro-life attorneys" manipulated and expanded the workability factor since *Roe v. Wade*, but that notion is untenable. Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1218–20 (2018). As Justice O'Connor noted in her dissent in *City of Akron*:

> The trimester or "three-stage" approach adopted by the Court in *Roe*, and, in a modified form, employed by the Court to analyze the regulations in these cases, cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests. The decision of the Court today graphically illustrates why the trimester approach is a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.

City of Akron, 462 U.S. at 453–54 (O'Connor, J., dissenting) (footnote omitted). The stare decisis factor and its application to *Roe* clearly preceded *Webster* and *Casey*. When the United States Solicitor General's Office invoked the factor in *Webster* and *Casey*, it was clearly applying what had become an established factor of stare decisis. *See* Brief for United States as Amicus Curiae Supporting Appellants, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

state derived from oil and gas leases was unconstitutional.[59] Justice Louis Brandeis' dissent is famous for cataloguing the Court's prior decisions overruling precedent. He emphasized that the precedent in question, *Gillespie v. Oklahoma*,[60] was "wrongly decided" and should be "frankly overruled."[61] Justice Brandeis essentially wrote that an unworkable rule could not be solved by strictly construing it: "Merely to construe strictly its doctrine will not adequately protect the public revenues."[62] Likewise, though Justice Harlan Stone's dissent did not use the specific word workability, he emphasized that *Gillespie* created a conflict in precedents. *Gillespie* resulted in an "irreconcilable conflict in the theories upon which two of its decisions rest," and he criticized the "blind adherence to conflicting precedents."[63] In that sense, both dissents viewed *Gillespie* as unworkable.

The first instance we have identified where the Court overruled a legal rule deemed unworkable—though the Court did not use that word specifically—was in 1938 in *Erie Railroad v. Tompkins*.[64] There, the Court, by a 6-2 vote, overturned the 1842 diversity jurisdiction rule of *Swift v. Tyson*[65] and held that, moving forward, when a court exercises jurisdiction over a case on the basis of diversity of citizenship, it must apply the law of the state rather than general common law. The Court held that "[t]here is no federal general common law," and that federal courts must apply state law in diversity cases except in matters governed by the United States Constitution or by acts of Congress.[66] Although Justice Brandeis did not use the word workability, he laid out the concept:

> Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties. On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended

59. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 400–01 (1932).
60. Gillespie v. Oklahoma, 257 U.S. 501 (1922).
61. *Burnet*, 285 U.S. at 405 (Brandeis, J., dissenting).
62. *Id.*
63. *Id.* at 404–05 (Stone, J., dissenting).
64. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938).
65. Swift v. Tyson, 41 U.S. 1 (1842).
66. *Erie R.R. Co.*, 304 U.S. at 78–79.

> discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.[67]

Justice Brandeis essentially pointed out that the rule did not work as expected, with detrimental consequences, including violations of equal protection of the law.

The concept of workability is also found in the Court's 1946 decision in *New York v. United States*, involving state immunity from federal taxation.[68] In a 6-2 decision, the Court disavowed prior caselaw for being unworkable (though again, not with that specific word). Justice Felix Frankfurter's majority opinion explained that the prior rule "does not furnish a satisfactory guide for dealing with such a practical problem as the constitutional power of the United States over State activities."[69] Resting "the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion."[70] The Court, as Justice Frankfurter explained,

> edged away from reliance on a sharp distinction between the "governmental" and the "trading" activities of a State, by denying immunity from federal taxation to a State when it "is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the state."[71]

Justice Frankfurter rejected "limitations upon the taxing power of Congress derived from such untenable criteria as 'proprietary' against 'governmental'

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67. *Id.* at 74–75. Justice Brandeis' reasons are contestable. See the debate between Suzanna Sherry and Donald Earl Childress III as to whether *Erie* is one of the worst Supreme Court decisions of all time *in Symposium: Supreme Mistakes*, 39 PEPP. L. REV. 1, 129–62 (2013).

68. New York v. United States, 326 U.S. 572, 573–74 (1946).

69. *Id.* at 580.

70. *Id.*

71. *Id.* (quoting Helvering v. Powers, 293 U.S. 214, 227 (1934)).

activities of the States."[72] The concurring opinion of Justice Stone (joined by Justices Stanley Reed, Frank Murphy, and Harold Burton) explained that the Court "regard[ed] as untenable the distinction between 'governmental' and 'proprietary' interests on which those cases rest to some extent."[73] But the majority did not expressly overturn *South Carolina v. United States*.[74]

Nearly twenty years later in 1965 in *Swift & Co. v. Wickham*,[75] the Court used the term "unworkable" in overruling the preemption rule of *Kesler v. Department of Public Safety*.[76] The federal district court in *Swift* faced the question whether New York's poultry labeling law was preempted by the federal Poultry Products Inspection Act of 1957. Based on the *Kesler* rule applying 28 U.S.C. § 2281, it was unclear when a preemption claim should be decided by a single judge or required a three-judge district court. In an opinion by Justice John Marshall Harlan, the Court concluded:

> We are now convinced that the *Kesler* rule, distinguishing between cases in which substantial statutory construction is required and those in which the constitutional issue is "immediately" apparent, is in practice *unworkable*. Not only has it been uniformly criticized by commentators, but lower courts have quite evidently sought to avoid dealing with its application or have interpreted it with uncertainty. As Judge Friendly's opinion for the court below demonstrates, in order to ascertain the correct forum, the merits must first be adjudicated in order to discover whether the court has "engaged in so much more construction than in *Kesler* as to make that ruling inapplicable." Such a formulation, whatever its abstract justification, cannot stand as an every-day test for allocating litigation between district courts of one and three judges.[77]

This criticism by Circuit Judge Henry Friendly was undoubtedly influential in the Court's understanding of workability.[78] In this instance, the Court explicitly overruled *Kesler*.

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72. *Id.* at 583.

73. *Id.* at 586 (Stone, J., concurring).

74. *See id*. at 572–84. Justice Douglas, joined by Justice Black, in dissent, would have overruled *South Carolina v. United States*, 199 U.S. 437 (1905). *New York*, 326 U.S. at 591 (Douglas, J., dissenting).

75. Swift & Co. v. Wickham, 382 U.S. 111 (1965).

76. Kesler v. Dep't of Pub. Safety, 369 U.S. 153 (1962).

77. *Swift & Co.*, 382 U.S. at 124 (emphasis added) (footnotes omitted) (citation omitted).

78. *See* Judge Richard A. Posner, *Foreword* to DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA xii (2012) ("Friendly's opinions and academic writings, in field after field, proposed revisions and clarifications of doctrine that time after time the Supreme Court gratefully adopted.").

The Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[79] which overruled *National League of Cities v. Usery*,[80] is probably the Court's leading precedent on workability today. *Garcia* dealt with the confusing distinction between "traditional" and "nontraditional" functions of government for purposes of state immunity under the Commerce Clause, with which lower courts had struggled.[81] In a majority opinion by Justice Harry Blackmun, the Court held that "[an] attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only *unworkable* but is also inconsistent with established principles of federalism . . . ."[82] As such, the "traditional governmental function" rule was deemed unworkable.[83] The Court stated:

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.[84]

Similarly, *Patterson v. McLean Credit Union* from 1989, which involves statutory stare decisis, is often cited for the principle that unworkability is a stare decisis factor.[85] In *Patterson*, the Court in an opinion by Justice Anthony Kennedy explained that an unworkable rule causes "inherent confusion" or "poses a direct obstacle to the realization of important objectives embodied in other laws."[86] The Court ultimately decided that the standard for unworkability was not met and declined to overturn its decision in *Runyon v. McCrary*,[87] which held that 42 U.S.C. § 1981 reached private conduct and prohibited racial discrimination in the making and enforcement of private

79. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

80. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

81. *Garcia*, 469 U.S. at 530.

82. *Id*. at 531 (emphasis added).

83. *Id.* at 546–47. The Court cited *New York v. United States* as support for its workability doctrine: "It was this uncertainty and instability that led the Court shortly thereafter, in *New York v. United States*, unanimously to conclude that the distinction between 'governmental' and 'proprietary' functions was 'untenable' and must be abandoned." *Id.* at 542 (citation omitted) (quoting New York v. United States, 326 U.S. 572, 583 (1946)).

84. *Id.* at 546–47.

85. Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

86. *Id.* at 173.

87. Runyon v. McCrary, 427 U.S. 160 (1976).

contracts. The Court held that the "special justification" for overruling a precedent was not demonstrated in that case.[88] While the Court preserved *Runyon*, it did limit its reach.

Chief Justice William Rehnquist's 1991 opinion in *Payne v. Tennessee*[89] has been frequently cited as a precedent for the workability factor of stare decisis.[90] "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"[91] *Payne* overturned two previous decisions that had barred victim impact statements from the penalty phase of a capital case. Chief Justice Rehnquist wrote that the two prior decisions "have defied consistent application by the lower courts."[92] While the splintered opinions in the prior cases had fostered confusion, the wrongly decided factor seems to have been the dominant factor prompting the overruling in *Payne*.[93]

1. *Confusion in the Courts*

Over the last several decades, the Court has identified several dimensions of unworkability. The leading criterion is persistent confusion by the lower courts in applying a legal rule.

For example, eliminating judicial confusion was the Court's aim in *Hudson v. United States*,[94] where the Court disavowed its eight-year-old decision in *United States v. Halper*,[95] involving the double jeopardy clause of the Fifth Amendment. The Court disavowed *Halper*'s analysis and reaffirmed the rule in *United States v. Ward*.[96] The Court explained, "[a]s subsequent cases have demonstrated, *Halper*'s test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable" creating confusion "by attempting to distinguish between 'punitive' and 'nonpunitive' penalties"; moreover, "some of the ills at which *Halper* was directed are addressed by other constitutional provisions."[97]

88. *Patterson*, 491 U.S. at 173.
89. Payne v. Tennessee, 501 U.S. 808 (1991).
90. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 792 (2009) (citing *Payne*, 501 U.S. at 827).
91. *Payne*, 501 U.S. at 827 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).
92. *Id.* at 829–30.
93. *Id*. at 830.
94. Hudson v. United States, 522 U.S. 93, 101–02 (1997).
95. United States v. Halper, 490 U.S. 435 (1989).
96. *Hudson*, 522 U.S. at 101–05.
97. *Id.* at 102–03.

Likewise, eliminating lower court confusion was also emphasized in *Seminole Tribe of Florida v. Florida*,[98] which revisited the splintered plurality opinion in *Pennsylvania v. Union Gas*.[99] The Court explained, "Since it was issued, *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision."[100] Although there is no extended discussion of workability in *Seminole Tribe*, the Court observed that "the plurality opinion in *Union Gas* allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause."[101]

The Court has also determined that other splintered decisions are unworkable based on the confusion they created. For instance, in *Nichols v. United States*,[102] the Court returned to the question raised in *Baldasar v. Illinois*[103] over whether the Sixth Amendment "prohibits a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense."[104] *Baldasar* was decided by three concurring opinions with differing rationales, and this splintered opinion predictably created substantial confusion in federal and state courts.[105] In *Nichols*, the Court was able to form a 6-3 majority, and the opinion for the Court by Chief Justice Rehnquist explained, "[t]his degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision."[106]

Once the Court has determined that a decision is confusing, it may either fix the confusion or overturn the decision. The wider or more persistent the confusion, the greater the possibility that the Court will consider overruling precedent. Take, for example, *United States v. Dixon*,[107] which involved "[w]hether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court."[108] There, the Court

98. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 61 (1996).

99. Pennsylvania v. Union Gas, 491 U.S. 1 (1989).

100. *Seminole Tribe*, 517 U.S. at 64.

101. *Id.* at 63.

102. Nichols v. United States, 511 U.S. 738 (1994).

103. Baldasar v. Illinois, 446 U.S. 222 (1980).

104. *Nichols*, 511 U.S. at 740.

105. *Id.* at 742–46 n.7.

106. *Id.* at 746.

107. United States v. Dixon, 509 U.S. 688 (1993).

108. *Id.* at 694 (alteration in original) (quoting Petition for Writ of Certiorari, *Dixon*, 509 U.S. 688 (No. 91-1231)).

overruled the "same conduct" rule of *Grady v. Corbin*,[109] concluding that *Grady* had "proved unstable in application."[110] The Court explained that less than two years after *Grady* came down, it was "forced to recognize a large exception to it" in *United States v. Felix*.[111] In *Felix*, the Court "concluded that a subsequent prosecution for conspiracy to manufacture, possess, and distribute methamphetamine was not barred by a previous conviction for attempt to manufacture the same substance."[112] Its justification was to avoid "a 'literal' (*i.e.*, faithful) reading of *Grady* 'longstanding authority' to the effect that prosecution for conspiracy is not precluded by prior prosecution for the substantive offense."[113] The Court recognized that "[o]f course, the very existence of such a large and longstanding 'exception' to the *Grady* rule gave cause for concern that the rule was not an accurate expression of the law."[114] As such, the Court concluded that "*Grady* is a continuing source of confusion and must be overruled."[115]

Similarly, in *Solorio v. United States*,[116] the Court overruled its decision in *O'Callahan v. Parker*,[117] and its "service connection" test for the jurisdiction of martial courts. There, Chief Justice Rehnquist in his opinion for the Court emphasized the confusion caused by the "service connection" test.[118] He noted that the confusion had been forecast by Justice Harlan in his dissent in *O'Callahan*.[119] Shortly after *O'Callahan*, the Court "found it necessary to expound on the meaning of the decision, enumerating a myriad of factors for courts to weigh in determining whether an offense is service connected."[120] But "the service connection approach, even as elucidated [by the Court] in [a subsequent opinion] *Relford*, has proved confusing and difficult for military courts to apply."[121]

> Since *O'Callahan* and *Relford*, military courts have identified numerous categories of offenses requiring specialized analysis of the service connection

109. Grady v. Corbin, 495 U.S. 508, 522 (1990).
110. *Dixon*, 509 U.S. at 709–10.
111. *Id.* at 709 (citing United States v. Felix, 503 U.S. 378, 388–91 (1992)).
112. *Id.* (citing *Felix*, 503 U.S. at 388–91).
113. *Id.* (citing *Felix*, 503 U.S. at 388–91).
114. *Id.* at 709–10.
115. *Id.* at 710.
116. Solorio v. United States, 483 U.S. 435, 436 (1987).
117. O'Callahan v. Parker, 395 U.S. 258 (1969).
118. *Solorio*, 483 U.S. at 448.
119. *Id.* (citing *O'Callahan*, 395 U.S. at 284 (Harlan, J., dissenting)).
120. *Id.*
121. *Id.*

> requirement. For example, the courts have highlighted subtle distinctions among offenses committed on a military base, offenses committed off-base, offenses arising from events occurring both on and off a base, and offenses committed on or near the boundaries of a base. Much time and energy has also been expended in litigation over other jurisdictional factors, such as the status of the victim of the crime, and the results are difficult to reconcile. The confusion created by the complexity of the service connection requirement, however, is perhaps best illustrated in the area of off-base drug offenses. Soon after *O'Callahan*, the Court of Military Appeals held that drug offenses were of such "special military significance" that their trial by court-martial was unaffected by the decision. Nevertheless, the court has changed its position on the issue no less than two times . . . , each time basing its decision on *O'Callahan* and *Relford*.[122]

While some confusion may be remedied, a majority may find that, as in *Solorio*, too much confusion requires abandoning the rule altogether, rather than tinkering with it after repeated failed attempts.

In contrast, lower court confusion over the years has sometimes not been enough to persuade a majority of Justices to overturn a rule. For example, in *Altria Group, Inc. v. Good*, a 5-4 majority declined to overturn the fractured *Cipollone v. Liggett Group, Inc.* opinion, which involved the scope of preemption of state laws by Congress.[123] Yet, as Justice Thomas explained in his dissent: "'courts remain divided about what the decision means and how to apply it' and that '*Cipollone*'s distinctions, though clear in theory, defy clear application.' Other courts have expressed similar frustration with the *Cipollone* framework."[124]

2. *Unanticipated Consequences*

In addition to confusion among courts, the Court has determined that a rule may be unworkable because of unanticipated consequences. Such consequences may, with experience, make a rule unworkable. For example, in *Knick v. Township of Scott*,[125] the Court concluded that the state-litigation requirement of *Williamson County* had become "unworkable in practice."[126] The Court offered, as additional reasons, that the state-litigation requirement

122. *Id.* at 449–50 (footnotes omitted) (citations omitted).

123. Altria Group, Inc. v. Good, 555 U.S. 70, 91 (2008).

124. *Id.* at 97 (Thomas, J., dissenting) (citation omitted) (quoting Good v. Altria Group, Inc., 436 F. Supp. 2d 132, 142 (D. Me. 2006)).

125. Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

126. *Id.* at 2178.

"imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled."[127] The *Williamson County* Court did not anticipate the consequences:

> The state-litigation requirement has also proved to be unworkable in practice. *Williamson County* envisioned that takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under § 1983. But, as we held in *San Remo*, the state court's resolution of the plaintiff's inverse condemnation claim has preclusive effect in any subsequent federal suit. The upshot is that many takings plaintiffs never have the opportunity to litigate in a federal forum that § 1983 by its terms seems to provide. That significant consequence was not considered by the Court in *Williamson County*.[128]

Similarly, the Court focused on the unanticipated disparate impact in different states in *Montejo v. Louisiana*, which involved the Sixth Amendment right to counsel for indigent defendants.[129] The Court in *Michigan v. Jackson*[130] had created a rule "forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding."[131] The *Montejo* Court held that the rule adopted by the lower court—that a criminal defendant must request counsel, or otherwise assert his Sixth Amendment right at a preliminary hearing, before the *Jackson* protections were triggered—"would lead either to an unworkable standard, or to arbitrary and anomalous distinctions between defendants in different States."[132] Neither option "would be acceptable."[133] The Court's reexamination of *Jackson* was caused, at least in part, by the unanticipated consequences of the differing application of the *Jackson* rule in different states. The Court explained:

> This rule would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made, which usually occurs after the court has informed him that he will receive counsel if he asks for it. That is how the system works in Michigan, . . . whose scheme produced the factual background for this Court's decision in

127. *Id*. at 2167.
128. *Id.* at 2178–79.
129. Montejo v. Louisiana, 556 U.S. 778, 780, 783 (2009).
130. Michigan v. Jackson, 475 U.S. 625 (1986).
131. *Montejo*, 556 U.S. at 780–81.
132. *Id.* at 782–83.
133. *Id.* at 783.

> *Michigan v. Jackson.* Jackson, like all other represented indigent defendants in the State, had requested counsel in accordance with the applicable state law. But many States follow other practices. In some two dozen, the appointment of counsel is automatic upon a finding of indigency, and in a number of others, appointment can be made either upon the defendant's request or *sua sponte* by the court. Nothing in our *Jackson* opinion indicates whether we were then aware that not all States require that a defendant affirmatively request counsel before one is appointed; and of course we had no occasion there to decide how the rule we announced would apply to these other States.[134]

In *Arizona v. Gant*,[135] Justice Stevens' majority opinion noted that in *New York v. Belton*,[136] "[w]e granted certiorari because 'courts ha[d] found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile.'"[137] In *Belton*, the Court acknowledged that articles in the passenger compartment of a car are not always within an arrestee's reach, but "[i]n order to establish the workable rule this category of cases requires," the Court adopted a rule that categorically permits the search of a car's passenger compartment incident to the lawful arrest of an occupant.[138] As such, the Court will sometimes substitute a new rule for one found unworkable in practice.

3. *Unsettled Precedent*

Court confusion alone may not be enough to make a rule unworkable. Ultimately, the Court may find it outweighed by other factors. For instance, in *Allied-Signal, Inc. v. Director, Division of Taxation*,[139] a 5-4 decision with an opinion authored by Justice Kennedy (joined by Justices White, Stevens, Scalia, and Souter), the Court declined to overrule the "unitary business principle" of numerous decisions, including *Mobil Oil Corp. v. Commissioner of Taxes*.[140] The majority considered the jurisprudence "settled"—it was workable in practice, the principles were well-established, and the reliance interests were significant. As such, the majority dismissed the diverging opinions by lower federal courts:

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134. *Id.* at 783–84 (citations omitted).
135. Arizona v. Gant, 556 U.S. 332 (2009).
136. New York v. Belton, 453 U.S. 454 (1981).
137. *Gant*, 556 U.S. at 340 (second alteration in original) (quoting *Belton*, 453 U.S. at 460).
138. *Belton*, 453 U.S. at 460.
139. Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 770, 772–73, 785 (1992).
140. Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425 (1980).

> If lower courts have reached divergent results in applying the unitary business principle to different factual circumstances, that is because, as we have said, any number of variations on the unitary business theme "are logically consistent with the underlying principles motivating the approach," and also because the constitutional test is quite fact sensitive.[141]

Allied-Signal demonstrates that if the reliance interests are significant enough, it could weigh against finding a rule unworkable.

On the flip side, a rule can become unworkable by becoming unsettled, and thus whether a precedent is unsettled can overlap with whether a precedent is workable. In *Harmelin v. Michigan*,[142] the Court limited its decision in *Solem v. Helm*[143] (a 5-4 decision with a majority opinion by Justice Powell), involving the question whether a proportionality analysis is inherent in the Eighth Amendment. *Solem* had "used as the criterion for its application the three-factor test that had been explicitly rejected" in two intervening decisions.[144] These decisions caused confusion in the lower courts for eight years, making *Solem* unsettled. Finally, in *Harmelin*, the Court limited *Solem*'s proportionality analysis.

4. *Changes in Law, Society, or Technology*

Changes outside of legal decisions may make a rule unworkable. For example, changes in legal practice may render a legal rule obsolete and unworkable. In *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, the Court overruled the Enelow-Ettelson doctrine, which allowed a denial of an equitable injunction to be immediately appealable, stating: "A half century's experience has persuaded us, as it has persuaded an impressive array of judges and commentators, that the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals."[145] The Court concluded that "the Enelow-Ettelson doctrine is, in the modern world of litigation, a total fiction."[146]

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141. *Allied-Signal, Inc.*, 504 U.S. at 785 (citation omitted).

142. *E.g.*, Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (plurality opinion) ("*Solem* was simply wrong."); *id.* at 1004 (Kennedy, J., concurring) ("*Solem* . . . did not announce a rigid three-part test."); *see also* McGruder v. Puckett, 954 F.2d 313, 316 (5th Cir. 1992) ("Only four [J]ustices [in *Harmelin*] . . . supported the continued application of all three factors in *Solem*, and five [J]ustices rejected it. Thus, this much is clear: disproportionality survives; *Solem* does not.").

143. *McGruder*, 954 F.2d at 316 (discussing Solem v. Helm, 463 U.S. 277 (1983)).

144. *Harmelin*, 501 U.S. at 965.

145. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283, 287 (1988).

146. *Id.* at 283.

Likewise, changes in society and technology can also lead to unworkability. For instance, in *South Dakota v. Wayfair*,[147] the Court overruled the physical presence doctrine of *Quill*. It explained:

> Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful. The *Quill* Court did not have before it the present realities of the interstate marketplace. In 1992, less than 2 percent of Americans had Internet access. Today that number is about 89 percent. When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller. The Internet's prevalence and power have changed the dynamics of the national economy.[148]

Notably, in *Wayfair*, two factors of stare decisis—workability and changed facts that eroded the original precedent—overlapped.

5. *No Judicially Discernible or Manageable Standard*

Concern for the unworkability of rules may involve the lack of a judicially discernable standard. In this sense, the Court avoids adopting a rule predicted to be unworkable.

One example of concern over "judicially discernible and manageable standards" involves partisan gerrymanders. The difficulty—with which the Court has grappled in several cases since the 1970s—has been twofold: to identify a constitutional text which authorizes the Supreme Court to police partisan gerrymanders and to identify a judicially manageable standard. In *Vieth v. Jubelirer*,[149] the Court reviewed the standard for determining the existence of an unconstitutional political gerrymander amidst the uncertainty of "judicially discernable standards."[150] The federal courts were confused for eighteen years, because *Davis v. Bandemer*[151] failed to articulate manageable standards. The *Vieth* plurality noted, "[T]o think that this lower court jurisprudence [since *Bandemer*] has brought forth 'judicially discernible and manageable standards' would be fantasy."[152] Because "no judicially discernible and manageable standards for adjudicating political gerrymander

147. South Dakota v. Wayfair, 138 S. Ct. 2080 (2018).
148. *Id.* at 2097 (citations omitted).
149. Vieth v. Jubelirer, 541 U.S. 267 (2004).
150. *Id.* at 278–81.
151. Davis v. Bandemer, 478 U.S. 109 (1986).
152. *Vieth*, 541 U.S. at 281.

claims have emerged," the plurality concluded "that *Bandemer* was wrongly decided."[153] Furthermore, the plurality concluded, "[b]ecause this standard was misguided when proposed, has not been improved in subsequent application, and is not even defended before us today by the appellants, we decline to affirm it as a constitutional requirement."[154] Although the petitioners in *Vieth* proposed a variation of the original standard from *Bandemer* and tried to refine it, it was rejected by the plurality.[155]

Vieth, and a series of cases preceding it, undoubtedly influenced a Court majority in 2019 to declare political gerrymanders to be nonjusticiable. In *Rucho v. Common Cause*,[156] the Court reviewed its inability to create a standard for policing partisan gerrymanders and expressed concern about creating an unworkable standard. The majority evaluated possible standards for deciding what might be an unconstitutional partisan gerrymander: "Any standard for resolving [partisan gerrymandering] claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'"[157] "[T]he question is one of degree: How to 'provid[e] a standard for deciding how much partisan dominance is too much.'"[158] The Court concluded that "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so."[159] And the question was not just any standard but a standard derived from the Constitution: "There are no legal standards discernible in the Constitution for making such judgments."[160] Partisan gerrymander claims are different from "one-person, one-vote" claims.[161] The Court concluded that none of the proposed tests "meets the need for a limited and precise standard that is judicially discernible and manageable."[162] As such, the Court refused to adopt a rule predicted to be unworkable.

153. *Id.* at 281.

154. *Id.* at 283–84.

155. *Id.* at 284, 290.

156. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

157. *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306–08).

158. *Id.* (second alteration in original) (quoting League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 420 (2006) (plurality opinion)).

159. *Id.* at 2499.

160. *Id.* at 2500.

161. *See id.* at 2501.

162. *Id.* at 2502.

6. *One of Many Factors*

Finally, workability may be only one of many factors the Court looks at when deciding whether to overturn a precedent. The Court looks to the degree of unworkability, as well as the overlap of unworkability with the other five factors of stare decisis. In any particular stare decisis decision, workability could be a dominant factor or overshadowed by another factor. For example, in *Janus v. AFSCME*, which involved whether to overrule the Court's 1977 decision in *Abood v. Detroit Board of Education*, the Court looked at workability along with other factors.[163] In an opinion by Justice Alito, the majority concluded that *Abood* was unworkable because "*Abood*'s chargeable-nonchargeable line suffers from 'a vagueness problem,' that it sometimes 'allows what it shouldn't allow,' and that 'a firm[er] line c[ould] be drawn.'"[164] But the majority also emphasized several other factors of stare decisis that weighed in favor of overruling *Abood*, such as the fact that *Abood* had been unsettled by *Harris* and *Knox*.[165] As such, regardless of whether or not a legal rule is workable, the Court's decision will often also depend on the other factors of stare decisis, to inform the Court's decision whether or not to overrule precedent.

7. *The Workability of Workability*

We have surveyed how the Supreme Court has applied unworkability over the years, but is workability really "workable"? Some critics claim that the Supreme Court's doctrine of unworkability is itself unworkable. They aim to narrow the definition of "unworkable" by heightening the bar for what is required to find unworkability.[166] Others contend that unworkability can be adequately addressed by resolving lower court confusion, clarifying precedent, or through the doctrine of justiciability, or other means, rather than by overturning precedent.[167] As the caselaw surveyed above demonstrates, workability is more—and requires more—than the claim, as one critic has put

163. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018).

164. *Id.* at 2481 (alterations in original) (quoting Transcript of Oral Argument at 47–48).

165. *See id.* at 2463; Harris v. Quinn, 573 U.S. 616, 645–46 (2014); Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 311 (2012).

166. Ziegler, *supra* note 58, at 1263.

167. Lauren Vicki Stark, Note, *The Unworkable Unworkability Test*, 80 N.Y.U. L. REV. 1665, 1691–92 (2005) (arguing unworkability doctrine should be abandoned entirely and replaced by the nonjusticiability doctrine).

it, that "a ruling is incremental, requires fact-intensive analysis, or produces political controversy."[168]

Admittedly, workability is a broad label. There are numerous ways in which a judicially created rule is or has become unworkable. Like *Auer* deference, workability "depends on a range of considerations."[169] But the multiplicity of reasons does not make workability inconsistent or unworkable. It merely recognizes that legal rules can be unworkable for many different reasons.

The survey of Supreme Court workability decisions reveals that the workability factor of stare decisis is clearly an inductive, case-by-case factor. Like stare decisis itself, it is a pragmatic, prudential judgment reached by a majority of the Court.[170] The original rule may cause confusion in the courts; lead to unanticipated consequences; rest on unverified assumptions; or lack an adequate foundation in history, law, or fact. Legal rules may be untenable in their sweep and scope or be the subject of consistent criticism by judges and scholars. The unworkability of a rule may be determined by the Court at the outset, or experience may be necessary to see its unworkability. The Court may choose to overrule the rule or modify the rule. But even after multiple attempts to correct a rule, the rule may still create confusion and be deemed unworkable.

II. REASONS WHY *ROE V. WADE* IS UNWORKABLE

Considering all of the factors reflected in our survey of Supreme Court workability decisions, *Roe v. Wade* stands out as the paradigm of unworkability. While Justices, judges, and scholars have addressed several of the stare decisis factors in relation to *Roe* (including whether *Roe* was "wrongly decided" and its reliance interests[171]), there has been little discussion of the workability factor. Although workability was addressed in a very brief and cursory manner by the plurality in *Planned Parenthood v. Casey*,[172] it has

168. Mary Ziegler, *The Anti-Abortion Movement's Unworkability Strategy*, TAKE CARE BLOG (Sept. 23, 2019), https://takecareblog.com/blog/the-anti-abortion-movement-s-unworkability-strategy.

169. Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

170. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992) (O'Connor, Kennedy, & Souter, JJ., plurality opinion) ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations . . . .").

171. *See, e.g.*, *Casey*, 505 U.S. 833; Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); *see also* Forsythe, *supra* note 4, at 458–59 nn.113–15 (collecting sources).

172. *Casey*, 505 U.S. at 855. The plurality dispatched "workability" in one sentence: "[a]lthough *Roe* has engendered opposition, it has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable." *Id.* (citation omitted). *But see* Charles Adside, III,

never been thoroughly examined in relation to *Roe v. Wade*. That is what this Article aims to do by exploring several of the ways in which *Roe* can be considered unworkable.

A. *The Court Lacks the Tools to Competently Fulfill the Expansive Role it Created for Itself*

Roe v. Wade and its companion case, *Doe v. Bolton*, are unique Supreme Court precedents. In *Roe* and *Doe*, the Court did not simply invalidate the Texas and Georgia laws, but prescribed in great detail a national rule for abortion regulation that all states must follow. By writing this detailed national rule in *Roe*,[173] and dictating that *Roe* and *Doe* "be read together," the cases cumulatively created an unprecedented role for the Supreme Court as the country's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States."[174]

This role that the *Roe* Court adopted is substantially different from any of the Court's prior privacy decisions. As the plurality pointed out in *Webster v. Reproductive Health Services*:

> *Griswold v. Connecticut*, unlike *Roe*, did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. As such, it was far different from the opinion, if not the holding, of *Roe v. Wade*, which sought to establish a constitutional framework for judging state regulation of abortion during the entire term of pregnancy.[175]

Undue Schizophrenia: Split Decisions, Confused Scholars, and Reversing Unworkable Abortion Precedent, 54 WILLAMETTE L. REV. 219, 222 n.2 (2018) (citing sources on judicial confusion); Elizabeth A. Schneider, *Workability of the Undue Burden Test*, 66 TEMP. L. REV. 1003, 1031–35 (1993).

173. Roe v. Wade, 410 U.S. 113, 164–65 (1973); *see also* DORSEN, *supra* note 78, at 191 ("[T]he rigid and overly detailed majority opinion in *Roe v. Wade* . . . ."); *id.* at 349 (quoting Judge Friendly's statement: "the abortion decisions which, with their prescription of different standards for each trimester of pregnancy, read like a statute rather than a judicial decision."); *cf. Webster*, 492 U.S. at 518–21 (Rehnquist, White, & Kennedy, JJ., plurality opinion) (criticizing detailed rule).

174. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 99 (1976) (White, J., concurring in part and dissenting in part); *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326 (2016) (Thomas, J., dissenting); *Webster*, 492 U.S. at 519 (Rehnquist, J., plurality opinion) (quoting *Danforth*, 428 U.S. at 99 (White, J., concurring in the judgment in part and dissenting in part)); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting) (quoting *Danforth*, 428 U.S. at 99 (White, J., concurring in the judgment in part and dissenting in part)).

175. *Webster*, 492 U.S. at 520 (Rehnquist, White, & Kennedy, JJ., plurality opinion).

The Court's unprecedented role stretches as far as the scope of the abortion license it created. In *Roe* and *Doe*, the Court effectively created an expansive license for abortion in all fifty states. The Court suggested that states could prohibit abortion after fetal viability, "except where it is necessary . . . for the preservation of the life or health of the mother,"[176] but then required that all fifty states allow abortion after fetal viability for any "health" reason, which includes "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[177]

The expansive license for abortion created in *Roe* made the United States an outlier in international law. The United States is one of only seven nations that allows abortion for any reason after twenty weeks,[178] and one of only five countries that allows abortion for any reason after fetal viability.[179]

The unprecedented role of the Court, coupled with the broad license to abortion, means that the Court occupies and controls the entire field of elective abortion—a procedure allowed for any reason, at any time of pregnancy, and in every state.[180] As Justices White, O'Connor, and Thomas have successively emphasized, the Court has enforced its power "to . . . disapprove medical and operative practices and standards throughout the United States."[181]

The Court is unable to effectively implement the expansive role it fashioned for itself. In practice, the Court cannot administer its role apart from

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176. *Roe*, 410 U.S. at 164–65.

177. Doe v. Bolton, 410 U.S. 179, 192 (1973). Justice Thomas has disagreed that this was a constitutional holding. Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 203, 211 (6th Cir. 1997) (affirming the district court's holding that post-viability regulation "impermissibly limited the physician's discretion to determine what measures were necessary to preserve her health, including mental health"), *cert. denied*, 523 U.S. 1036, 1037 (1998) (Thomas, J., dissenting from the denial of cert., with whom Rehnquist, C.J., and Scalia, J., joined). But the federal courts have required a health reason, and the Supreme Court has never overturned a broad reading of "health" after viability.

178. Roper v. Simmons, 543 U.S. 551, 625–26 (2005) (Scalia, J., dissenting) (citing international data); *see also The World's Abortion Laws*, CTR. FOR REPROD. RTS. (May 2008), http://www.reproductiverights.org/sites/crr.civicactions.net/files/pub_fac_abortionlaws2008.pdf.

179. The other four countries are: Canada, China, Vietnam, and North Korea. *The World's Abortion Laws*, *supra* note 178; *cf.* U.N. Dep't of Econ. & Soc. Affairs Population Div., *World Abortion Policies 2011*, https://www.un.org/en/development/desa/population/publications/abortion/abortion-policies.asp (last visited Oct. 18, 2019).

180. In contrast, in other areas of constitutional law, the Court has, over the past three decades, withdrawn from public school desegregation, *see* Missouri v. Jenkins, 515 U.S. 70, 97–100, 102 (1995); Freeman v. Pitts, 503 U.S. 467, 471 (1992); and Bd of Educ. v. Dowell, 498 U.S. 237, 249 (1991), and partisan gerrymanders, *see* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

181. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 99 (1976) (White, J., concurring in the judgment in part and dissenting in part); *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326 (2016) (Thomas, J., dissenting); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting).

appellate litigation. The Court is a passive institution; it cannot monitor clinic conditions, provider standards, or medical safety. It cannot confidently or comprehensively survey developments in medical data, domestic or international. It cannot intervene or regulate. It cannot even choose the abortion regulations that are challenged in the courts or appealed.[182]

Likewise, when Justices consider the constitutionality of an abortion regulation, they are bound by the record in the specific case before them. This poses many limits on the effectiveness of the Court's adjudication, as their decision can only be as good as the evidence and arguments before them. For example, based on the record evidence before the Court in *Whole Woman's Health v. Hellerstedt*,[183] the Court invalidated two provisions of Texas' H.B.2—which required abortion doctors to have admitting privileges at a local hospital to be able to quickly and smoothly transfer medical records and a patient who experiences complications after the abortion procedure to the hospital and abortion facilities to follow certain surgical center standards—as creating an undue burden on abortion access.[184] The Court explained that the district court "applied the correct legal standard" when it "considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony,"[185] citing the record twenty-two times in the majority opinion.[186]

At the time this Article is published, there is a case currently pending before the Supreme Court, *June Medical Services v. Russo*,[187] which involves a materially similar law to Texas' admitting privileges law at issue in *Hellerstedt*. The three-judge panel on the Fifth Circuit Court of Appeals had ruled 2-1 in favor of Louisiana's law, explaining that that case, a pre-enforcement facial challenge, contained a very different record—there were "stark differences" between the facts and evidence in the Texas case and the facts and evidence in the Louisiana case.[188] Unlike in Texas, there was no

182. *See* Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 910–12 (2016) (noting that judicial power is "constrained by its dependence on the adversarial system to identify the issues and arguments for decision.").

183. *Hellerstedt*, 136 S. Ct. at 2300, 2318.

184. *Id.* at 2300.

185. *Id.* at 2310.

186. *See, e.g.*, *id.* at 2311 ("We have found nothing in Texas' record evidence that shows . . ."); *id.* at 2312 ("[T]here was no evidence in the record of such a case . . . ."); *id.* ("[T]he record evidence indicates . . . ."); *id.* at 2313 ("[T]he record contains sufficient evidence that . . . ."); *id.* ("Record evidence also supports the finding that . . . ."); *id.* at 2314 ("The Record contains nothing to suggest . . . .").

187. June Med. Servs., L.L.C. v. Gee, 905 F.3d 787 (5th Cir. 2018), *reh'g en banc denied*, 913 F.3d 573 (5th Cir. 2019), *cert. granted*, 140 S. Ct. 35 (2019) (mem.).

188. *June Med. Servs., L.L.C.*, 905 F.3d at 790–91.

reliable evidence that any abortion clinic would close in Louisiana as a result of the law.[189] At issue before the Court is whether the undue burden analysis is a state-specific, record-bound analysis or if the law is invalid under the Court's *Hellerstedt* decision.[190]

B. *There Is No Reliable National Abortion Data System*

The Court issued *Roe* without any effective national system of abortion data collection, analysis, or reporting, and none exists forty-seven years later. Despite other western countries requiring such reporting,[191] there continues to be a vacuum of reliable health and safety data on abortion in the United States.[192] Consequently, all abortion data in the United States is based on *estimates*, not hard data that could be secured from registry-based abortion data systems, like those that exist in other countries, such as Denmark and Finland. The lack of abortion data hinders the Court in applying *Roe* and the States in protecting their interests.

1. *Federal Reporting*

Currently, there are only two national organizations in the United States that collect abortion data—the Alan Guttmacher Institute (AGI) and the United States Centers for Disease Control and Prevention (CDC). But reporting to both is completely *voluntary*.[193] The AGI collects voluntary data directly from abortion clinics, and upwards of 40–50% of clinics may not report data in any given year.[194] The CDC collects voluntary data from the states, and while most states report at least some information to the CDC,

189. *Id.* at 791.

190. Transcript of Oral Argument at 10, June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 35 (2019) (Nos. 18-1323 & 18-1460).

191. Burk Schaible, *Improving the Accuracy of Maternal Mortality and Pregnancy Related Death*, 29 ISSUES IN L. & MED. 231, 232 (2014) (citing countries).

192. To address this public health vacuum, Senators Tom Cotton of Arkansas and Joni Ernst of Iowa introduced legislation in October 2019 that would strengthen abortion reporting requirements in the United States, the Ensuring Accurate and Complete Abortion Data Reporting Act of 2019. *See* Michael New, *Want Better Data? Support Stronger Abortion Reporting Requirements*, WASH. EXAMINER (Oct. 10, 2019), https://www.washingtonexaminer.com/opinion/op-eds/want-better-data-support-stronger-abortion-reporting-requierments.

193. Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6, 7–8, 15 (2008) (collected data from responses to mailed questionnaires and recognized limitations of failing to identify certain abortion providers and other abortion providers failing to respond or sending in incomplete responses); *see also* Schaible, *supra* note 191, at 232.

194. Jones et al., *supra* note 193, at 7 n.‡; *see also* Schaible, *supra* note 191, at 232.

several do not, including California—by far the most populous state in the U.S.[195] "Neither California nor New Hampshire has reported abortion data to the CDC since 1997. Maryland has not reported abortion data to the CDC since 2006."[196] "Since California constitutes nearly a quarter of all the induced abortions in the United States, much of the data regarding induced abortion is entirely immune to analysis."[197] Of the states that do report, state reporting requirements vary widely, with many states suffering from lax enforcement or voluntary reporting requirements of their own.[198] The voluntary and inconsistent nature of abortion reporting makes the CDC's report incomplete at best and skewed by selective reporting at worst.

The CDC recognizes some of the shortcomings of its data, and when it comes to "abortion mortality"—or the number of times an abortion procedure is fatal to the patient—the CDC resorts to third-party sources, such as state vital records, media reports, and reports from healthcare professionals and private organizations.[199] Perhaps even more problematic is the fact that the CDC's *Abortion Surveillance Report* on the status of abortion in the United States is published with a three-year time lag.[200]

Abortion reporting is important to accurately compare death from abortion with death from childbirth, but this "remains an impossible task given the current limitations within the CDC['s] *Abortion Mortality Surveillance System* and [the World Health Organization's] *International Statistical Classification*

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195. *See* U.S. CENSUS BUREAU, POPULATION DIV., TABLE 1. ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2018 (NST-EST2018-01), 2018, https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.hml (estimating California's population at 39.6 million, or approximately 8.3% of the United States' estimated population of 327.2 million).

196. New, *supra* note 192; *see also* Tara C. Jatlaoui et al., Ctrs. for Disease Control & Prevention, *Abortion Surveillance—United States, 2016*, MORBIDITY & MORTALITY WKLY. REP., Nov. 29, 2019, at 13 [hereinafter Jatlaoui et al., *2016 Report*], https://www.cdc.gov/mmwr/volumes/68/ss/ss6811a1.htm; Michael J. New, *New Data Show the U.S. Abortion Rate Continues to Decline*, NAT'L REV. (Dec. 2, 2019), https://www.nationalreview. com/corner/new-data-show-the-u-s-abortion-rate-continues-to-decline/; Tara C. Jatlaoui et al., Ctrs. for Disease Control & Prevention, *Abortion Surveillance—United States, 2015*, MORBIDITY & MORTALITY WKLY. REP., Nov. 23, 2018, at 11 [hereinafter Jatlaoui et al., *2015 Report*], https://www.cdc. gov/mmwr/volumes/67/ss/ss6713a1.htm.

197. Schaible, *supra* note 191, at 232.

198. *See* Schaible, *supra* note 191, at 232.

199. Jatlaoui et al., *2015 Report*, *supra* note 196, at 5; Jatlaoui et al., *2016 Report*, *supra* note 196, at 4–5.

200. *See, e.g.*, Jatloaui et al., *2016 Report*, *supra* note 196, at 1; New, *supra* note 192 (four-year lag); Jatlaoui et al., *2015 Report*, *supra* note 196, at 5; Tara C. Jatlaoui et al., Ctrs. for Disease Control & Prevention, *Abortion Surveillance—United States, 2014*, MORBIDITY & MORTALITY WKLY. REP., Nov. 23, 2018, at 5, https://www.cdc.gov/mmwr/volumes/66/ss/ss6625a1.htm?s_cid=ss6625a1_w (corrected and republished in 2018, creating a four-year time lag).

of Diseases and Related Health Problems (ICD)."[201] "These systems lack a systematic and comprehensive method of collecting complete records regarding abortion outcomes in each state" and "the ICD-10 classification does not identify the most proximal cases of death related to induced abortion."[202] The CDC admits some limitations of its system, such as noting that reporting abortion-related deaths is "not federally mandated."[203] That means that accurate data on abortion deaths in the United States is not available, and so no valid comparison can be made between deaths from abortion and childbirth.

In addition to abortion mortality, there is an inability to reliably track abortion complications in the United States. The federal government through the CDC does not reliably track abortion numbers, abortion complications (morbidity), or abortion deaths (mortality), leaving a vacuum. And the numbers of annual abortions reported by the CDC and the AGI differ by 15% or more.[204]

2. *State Reporting*

Some states have sought to remedy this lack of accurate and complete data on abortion by passing laws requiring abortion reporting or enhancing existing reporting laws,[205] including Indiana in 2016, Idaho in 2018, and Arizona in

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201. Schaible, *supra* note 191, at 232; *see also* WORLD HEALTH ORGANIZATION, 2 INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS 99 (10th revision 2004).

202. Schaible, *supra* note 191, at 238–39.

203. Jatlaoui et al., *2016 Report*, *supra* note 196, at 2; Jatlaoui et al., *2015 Report*, *supra* note 196, at 2.

204. Karen Pavol et al., Ctrs. for Disease Control & Prevention, *Abortion Surveillance—United States, 2008*, Morbidity & Mortality Rep., Nov. 25, 2011, at 10, https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6015a1.htm.

> During 1999–2008, the total annual number of abortions recorded by CDC was 65%–69% of the number recorded by the Guttmacher Institute (12), which uses numerous active follow-up techniques to increase the completeness of the data obtained through its periodic national survey of abortion providers (12). Although most reporting areas collect and send abortion data to CDC, this information is given to CDC voluntarily. Consequently, during 1999–2008, seven of the 52 reporting areas did not provide CDC data on a consistent annual basis, and for 2008, CDC did not obtain any information from California, Maryland, or New Hampshire.

Id.

205. Consistent with other laws and regulations requiring reporting of health interventions by medical professionals, abortion reporting laws would include: (a) the demographics of the woman who had an abortion, (b) whether the abortion was chemical or surgical, (c) how the abortion was paid for, (d) at what point of gestation the unborn human was aborted, and (e) any complications related to the abortion procedure. MODEL ABORTION REPORTING ACT §§ 2(b), 4(a)–(b), 5(b) (AMS. UNITED FOR LIFE 2018). This information is necessary, not only to provide women with accurate information for informed consent, but to ensure and improve the health and safety of women who choose abortion. *See* § 2(b).

2019.[206] Typically, abortion providers meet these laws with stiff resistance, lobbying against the bills before they are passed and filing lawsuits challenging them after they are enacted. For example, Planned Parenthood sued to stop both Indiana's and Idaho's reporting laws from going into effect.[207] What is Planned Parenthood trying to hide by avoiding these reporting requirements? If abortion is so safe and complications are as rare as they claim, abortion providers should have nothing to fear from reporting abortion safety information to state and federal governments. This public health data is important for women and their medical history. Without accurate data on the risks of an abortion procedure, patients cannot be fully informed or truly consent.

When states do collect abortion data, it is often haphazard.[208] States do not use a "standardized reporting form."[209] So state reporting of essential demographic data—"age, race, ethnicity, type of abortion, outcome of the procedure"—is inconsistent.[210] Hence, "the number of reported abortions does not reflect the actual number of abortions."[211] And "[u]ntil progress is made in collecting more accurate data, comparing abortion-related death and pregnancy-related death would best be done within systems that include a complete and accurate medical record."[212]

The dysfunctional state of abortion data collection and reporting is a direct risk to the health of women. Providers are not operating with accurate data. Providers are not giving accurate data about abortion mortality and morbidity to women. More reliable international studies have found that mortality rates are higher for abortion than childbirth.[213] Without adequate reporting, no one can understand the exact short-term and long-term risks that a woman faces.

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206. ARIZ. REV. STAT. ANN. § 36-2161(A), (D) (2020); IDAHO CODE §§ 39-9501, -9504(1)–(2) (2019); IND. CODE §§ 16-34-2-4.7(b)–(e), -2-5(a)–(b), -2-5.1 (2020).

207. *See* Planned Parenthood of the Great Northwest & the Hawaiian Islands v. Wasden, 350 F. Supp. 3d 925, 927 (D. Idaho 2018); Planned Parenthood of Ind. & Ky. v. Comm'r of the Ind. State Dep't of Health, 194 F. Supp. 3d 818, 822 (S.D. Ind. 2016).

208. *See* Schaible, *supra* note 191, at 232; *see* Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6, 7 n.3 (2008) ("Many state health departments are able to obtain only incomplete data from abortion providers, and in some states, only 40–50% of abortions are reported.").

209. Schaible, *supra* note 191, at 232.

210. *Id.*

211. *Id.*

212. *Id.* at 239.

213. *See id.* at 232–33 (explaining that Finland and Denmark "show up to a four-fold increased risk of mortality following induced abortion compared to childbearing.").

This means that states are unable to ensure that women receive accurate information to make an informed decision and consent to the procedure.

3. *Private Reports*

That vacuum of reliable data on abortion that exists in the United States creates incentives for abortion providers and special interest groups to create their own reports on the safety of abortion (as is true of other industries), which, in turn, leads to its own problems. There is an incentive for abortion advocates to fund their own reports on the supposed safety of abortion. But these reports have inherent weaknesses; they are often based on too-small-to-be-representative samples, or too-small-to-be-statistically-significant samples, or self-selected samples (groups of women). Data produced by private organizations lacks accountability.[214]

Recently, two major abortion reports—initiated, sponsored, and funded by pro-abortion and population control advocacy foundations—have been published: the National Academy of Sciences, Engineering, and Medicine (NAS) March 2018 abortion report and the report from the group Advancing New Standards in Reproductive Health (ANSIRH) at the University of California San Francisco.

There are many problems with the March 2018 NAS abortion report, starting with the fact that it was proposed and funded by abortion-advocacy foundations.[215] Much of the data cited in the NAS report is highly selective and is by no means comprehensive. For example, the NAS report relies on the defective ANSIRH report—discussed and analyzed in more detail below—

214. *See* David C. Reardon, *The Embrace of the Proabortion Turnaway Study: Wishful Thinking? Or Willful Deceptions?*, 85 LINACRE Q. 204, 210 (2018). The problem with hot house data by interest groups is that there is no accountability. The data and analyses are not subject to review by other researchers. For example, after the publication of studies on mental health outcomes by Advancing New Standards in Reproductive Health (ANSIRH),

> ANSIRH has refused requests to publish their complete questionnaire, much less to make any of their data available for reanalysis. They have even published results in journals, which require data to be made available to others, but have claimed and received exemptions from doing so based on an assertion of their duty to protect patient privacy.

Id. Such could be claimed for any medical study based on patient experience, but the professional standard is to allow reanalysis. That is because when data is "deidentified, there is no legitimate privacy or compliance issues with the Health Insurance Portability and Accountability Act (HIPAA)." *Id.* The denial of access to reanalyze "is a direct violation of the American Psychological Association's (2010) standards, which uphold as an ethical obligation the duty to make data available for reanalysis by other researchers." *Id.*

215. NAT'L ACADS. OF SCIS., ENG'G & MED., THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES (2018), https://www.nap.edu/read/24950/chapter/1#viii (including The David and Lucille Packard Foundation, The Grove Foundation, and Tara Health Foundation).

while ignoring a large body of international, peer-reviewed research.[216] The NAS report fails to review the literature on coerced abortion and the relation of abortion to intimate partner violence and sex trafficking.[217]

The ANSIRH report, known as the "Turnaway Study," was likewise done by a pro-abortion advocacy group. The author's label of a "prospective longitudinal cohort study" is misleading and conveys a more rigorous methodology than actually was used.[218] It was not a rigorous study. It was "merely a case series report on a highly self-selected sample with a very high attrition rate," and not (as the author claims) a "prospective longitudinal cohort study," because there was no authentic control (unexposed) group.[219] There

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216. *See, e.g.*, David C. Reardon, *The Abortion and Mental Health Controversy: A Comprehensive Literature Review*, 6 SAGE OPEN MED. 1 (2018); Joel Brind et al., *Induced Abortion as an Independent Risk Factor for Breast Cancer: A Systematic Review and Meta-Analysis of Studies on South Asian Women*, 33 ISSUES L. & MED. 33 (2018); Donald Paul Sullins, *Abortion, Substance Abuse and Mental Health in Early Adulthood: Thirteen-year Longitudinal Evidence from the United States*, 4 SAGE OPEN MED. 1 (2016) (examining data from the National Longitudinal Study of Adolescent to Adult Health); Angela E. Lanfranchi & Patrick Fagan, *Breast Cancer and Induced Abortion: A Comprehensive Review of Breast Development and Pathophysiology, the Epidemiologic Literature, and Proposal for Creation of Databanks to Elucidate All Breast Cancer Risk Factors*, 29 ISSUES L. & MED. 3 (2014). *See generally* Clarke Forsythe, *The Medical Assumption at the Foundation of* Roe v. Wade *& Its Implications for Women's Health*, 71 WASH. & LEE L. REV. 827, 873–92 (2014) (three appendices citing hundreds of international peer-reviewed studies on long-term risks of pre-term birth, mental trauma, and breast cancer after abortion).

217. *See* Catherine Coyle, *Intimate Partner Violence*, *in* PEACE PSYCHOLOGY: PERSPECTIVES ON ABORTION 9, 12–13 (Rachel M. MacNair ed., 2016); Catherine Coyle, *Coercion and/or Pressure*, *in* PEACE PSYCHOLOGY: PERSPECTIVES ON ABORTION 21, 21–26 (Rachel M. MacNair ed., 2016); Catherine Coyle, *Sex Trafficking*, *in* PEACE PSYCHOLOGY: PERSPECTIVES ON ABORTION 36, 36–39 (Rachel M. MacNair ed., 2016).

218. *Turnaway Study*, ANSIRH, https://www.ansirh.org/research/turnaway-study (last visited Nov. 23, 2019). Two of the reports have been published as M. Antonia Biggs et al., *Women's Mental Health and Well-Being 5 Years after Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74 JAMA PSYCHIATRY 169–78 (2017), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2592320?resultClick=1, and Corinne H. Rocca et al., *Decision Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study*, PLOS ONE (July 8, 2015), https://journals.plos.org/ plosone/article?id=10.1371/journal.pone.0128832.

The notion that the women were "turned away" by enforceable legal limits simply ignores the fact that there are few enforceable legal limits in the United States. While some states have twenty-week limits on the books, these are subject to injunction by courts. Isaacson v. Horne, 716 F.3d 1213, 1217 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127 (2014) (striking down Arizona's twenty-week limit); McCormack v. Hiedeman, 900 F. Supp. 2d 1128 (D. Idaho 2013), *aff'd sub nom.*, McCormack v. Herzog, 788 F.3d 1017, 1021–22 (9th Cir. 2015) (striking down Idaho's twenty-week limit).

219. Reardon, *supra* note 214, at 208; *see also* Ingrid Skop, *Abortion Safety: At Home and Abroad*, 34 ISSUES L. & MED. 43, 51 (2019) (analyzing the ANSIRH report); *The Turnaway Study Analyzed by WECARE Director: The Latest Attempt to Reverse Evidence-based, Women-Centered Advances in Abortion Policy*, WECARE, https://www.wecareexperts.org/content/turnaway-study-analyzed-wecare-director-latest-attempt-reverse-evidence-based-women-centered (last visited Dec. 19, 2019) (analyzing the ANSIRH report).

was no randomized selection process; instead, the sample was a self-selected group, recruited by abortion advocates, of women at thirty abortion clinics—an "unrepresentative, highly biased sample."[220] This is confirmed by the study protocol: "It is up to the clinic staff at each recruitment site to keep track of when to recruit abortion clients to match to the turnaways recruited."[221]

The study's numerous defects undermine any general conclusions about women's outcome after abortion. "[O]ver 68 percent of the women they sought to interview refused," resulting in a very low participation rate.[222] After repeated invitations and inducements, "only 27 percent of the invited women participated at the first six-month interview and only 17 percent participated through the end of the five-year period."[223] The study is more accurately called the "Drop Out Study," not the "Turnaway Study." Any suggestion of a high retention rate is inaccurate, and the small percentage of women that continued to participate invalidates any claim of long-term follow-up or that the sample is representative. Previous studies have concluded that women who drop out of abortion studies may do so precisely because of negative outcomes and would be the least likely to participate in a study that explored their feelings.[224] That suggests that only those who felt good initially stayed in, and the results are even more skewed. Any uniformity of responses by the small minority left in the study cannot overcome the small sample size, the selection bias, and the participation bias.

Unfortunately, despite the defects in this study, there have been approximately twenty retailed studies published since 2015 that heavily rely on this original study, sparking headlines that women who have abortions feel good about it and only women denied abortions have a negative outcome.[225] These subsequent studies inherit all of the same defects from the original study.

Ironically, the ANSIRH study's claim that women denied abortion have a negative outcome is actually contradicted by the study itself. Buried in the

220. Reardon, *supra* note 214, at 204–05.

221. *Id.* at 207.

222. *Id.* at 204.

223. *Id.* at 205.

224. *See, e.g.*, Anne Nordal Broen et al., *The Course of Mental Health After Miscarriage and Induced Abortion: A Longitudinal, Five-year Follow-up Study*, BMC MED. (Dec. 12, 2005), https://bmcmedicine.biomedcentral.com/articles/10.1186/1 (finding that women who had induced abortions experienced higher levels of anxiety and were less likely to want to continue participating in the study than women who had miscarriages); Nancy E. Adler, *Sample Attrition in Studies of Psychosocial Sequalae of Abortion: How Great a Problem?*, 6 J. APPLIED SOC. PSYCHOL. 240, 240 (1976) ("[W]omen for whom the abortion was more stressful are less likely to be represented in the final sample.").

225. Reardon, *supra* note 214, at 204, 210.

details of the study is the finding that women denied an abortion who carried to term "had significant improvements in anxiety, depression, and self-esteem."[226] ANSIRH's evidence further suggests that "*there are no persistent mental health risks associated with women being denied an abortion*."[227]

Contrary to the alleged conclusions of the ANSIRH study, two studies, based on New Zealand's Christchurch Health and Developmental Study, contained "the most extensive preabortion history data of any abortion studies [sic] ever published" and found "that abortion is significantly associated with increased rates of suicidal tendencies, substance abuse, depression, [and] anxiety."[228]

In addition, a recent review by Professor Helen Alvaré summarized the problems with the claim that abortion is good for women and prevents negative outcomes.[229] "At the same time, soon after abortion became legal, and numbers of abortions *rose* precipitously in the United States, women's levels of happiness *declined* so that for the first time in recent history, women reported themselves less happy than men."[230]

Conversely, it is not only women's labor force rates that are increasing, but their

> rates for higher education have also soared during the last several decades' declines in abortion numbers and rates. In 1991, for example, women achieved parity with men regarding the completion of four years of college. Today, when abortion rates are about half of their 1991 figures, 6% more American women are annually completing a four year college education, and women in the United States are now generally *more likely* than men to have a bachelor's degree.[231]

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226. *Id*. at 209.

227. *Id.*

228. *Id*. at 208 (citing David M. Fergusson et al., *Abortion and Mental Health Disorders: Evidence from a 30-year Longitudinal Study*, 193 BRIT. J. PSYCHIATRY 444–51 (2008); David M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD. PSYCHOL. & PSYCHIATRY 16–24 (2006)).

229. Helen M. Alvaré, *Abortion and Democracy: Evaluating the Case for Maintaining a Broad Abortion Right at the State Level*, ___ HOW. HUM. & C.R.L. REV. ___ (forthcoming 2020) (manuscript at 7–31) (on file with authors) [hereinafter Alvaré, *Abortion and Democracy*]; *see also* Helen M. Alvaré, *Abortion, Sexual Markets and the Law*, *in* PERSONS, MORAL WORTH, AND EMBRYOS: A CRITICAL ANALYSIS OF PRO-CHOICE ARGUMENTS 255 (Stephen Napier ed., 2011).

230. Helen M. Alvaré, Testimony Before Vermont Legislature (on file with the authors); *see also* Alvaré, *Abortion and Democracy*, *supra* note 229.

231. Alvaré, Testimony Before Vermont Legislature, *supra* note 230; *see also* Alvaré, *Abortion and Democracy*, *supra* note 229 (manuscript at 25, 30–31).

Professor Alvaré's observations are backed up by United States federal labor, education, and health care databases—reliable data that has not been skewed by abortion advocacy.[232] These databases reveal:

> [A]bortion rates declined steadily and every single year from 1991 to 2014 both in terms of absolute numbers and in ratios. In 1991, there were nearly 1.4 million abortions (338 for every 1000 live births, and 24 per 1000 women of reproductive age). By 2014, the federal government reported 650 thousand abortions (192 for every 1000 live births, and 12 per every 1000 women of reproductive age). During that same time, however, rates of women's labor force participation grew from about 66.6% in 1991 to 70.2% in 1996, peaking at 71.2% in the year of the Great Recession, and settling around 70.8% currently. Over the past six decades, including the past three during which abortion rates and numbers have been declining, the percentage growth of the labor force for women has been greater than for men.[233]

C. Roe *Was Based on the Unverified Assumption That "Abortion Is Safer Than Childbirth"*

Forty-seven years after *Roe* and *Doe*, the Court's fundamental medical premise for legalizing abortion nationwide in the United States—that abortion is safer than childbirth—has not and still cannot be verified.

First, there was no evidentiary foundation for *Roe* or *Doe*. The Court first accepted *Roe* and *Doe* for review in April 1971 to address jurisdictional issues, not abortion. It was only later, after the retirements of Justices Hugo Black

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232. Alvaré, *Abortion and Democracy*, *supra* note 229 (manuscript at 31) (citing U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, REP. NO. 1071, WOMEN IN THE LABOR FORCE: A DATABOOK 31–37 tbl.7 (2017) (Women's Employment Status, March 1975 to March 2016); NAT'L CTR. FOR EDUC. STATISTICS, NCES 95-768, THE CONDITION OF EDUCATION 1995: THE EDUCATIONAL PROGRESS OF WOMEN (1995), https://nces.ed.gov/pubs/96768.pdf; CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU, P20-578, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015 8 fig.6 (2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf (Percentage of the Population 25 Years and Older With a Bachelor's Degree or Higher by Sex: 1967 to 2015); NAT'L CTR. FOR EDUC. STATISTICS, NCES 93442, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 67–68 (1993); Jatlaoui et al., *2015 Report*, *supra* note 196, at 20 tbl.1 (Number, percentage, rate, and ratio of reported abortions—selected reporting areas, United States, 2006–2015); Laurie D. Elam-Evans et al., Ctrs. for Disease Control & Prevention, *Abortion Surveillance—United States, 1999*, MORBIDITY & MORTALITY WKLY. REP., Nov. 29, 2002, at 1, 3, 5, https://www.cdc.gov/mmwr/preview/mmwrhtml/ss5109a1.htm).

233. Alvaré, *Abortion and Democracy*, *supra* note 230 (manuscript at 30–31) (footnotes omitted) (citing U.S. DEP'T OF LABOR, supra note 232, at 31–37 tbl.7, https://www.bls.gov/spotlight/2017/women-in-the-workforce-before-during-and-after-the-great-recession/home.htm (Women's Employment Status, March 1975 to March 2016)).

and Harlan in September 1971, that the Court used the cases to sweep away the abortion laws.[234] Neither *Roe* nor *Doe* involved any trial below.[235] Contrary to the Court's traditional practice, *Roe* and *Doe* were decided without a "full-bodied record."[236] The thin record available to the Court might have been adequate to decide the jurisdictional issues, but not to address the complexities of abortion, much less the sweeping way that the Court addressed abortion.

Both cases were appealed directly to the Court from a three-judge district court, without any intermediate appellate review. All of the factual, medical, and sociological assertions in the *Roe* and *Doe* opinions were either assumptions adopted from parties' and amicus briefs, or the result of Justice Blackmun's personal research, as highlighted and criticized by the distinguished Judge Henry Friendly:

> [T]he main lesson I wish to draw from the abortion cases relates to procedure—the use of social data offered . . . for the first time in the Supreme Court itself. . . . The Court's conclusion in *Roe* that "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth" rested entirely on materials not of record in the trial court, and that conclusion constituted the underpinning for the holding that the asserted interest of the state "in protecting the woman from an inherently hazardous procedure" during the first trimester did not exist. If an administrative agency, even in a rulemaking proceeding, had used similar materials without having given the parties a fair opportunity to criticize or controvert them at the hearing stage, reversal would have come swiftly and inexorably . . . . The Court should set an example of proper procedure and not follow a course which it would condemn if pursued by any other tribunal.[237]

The Court picked up on the claim that abortion was "safer than childbirth" from special interest group briefs, which were filed in the Court and raised the claim for the first time.[238] The Court built the superstructure of *Roe*—the historical assumptions about abortion and abortion practice, the prohibition of health and safety regulations in the first trimester, the deference to "medical

234. CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 17–24 (2013).

235. *Id*. at 160; Forsythe, *supra* note 216, at 840–42.

236. Forsythe, *supra* note 216, at 837 n.44 (quoting Pub. Affairs Assocs. v. Rickover, 369 U.S. 111, 113 (1962)).

237. Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 36–38 (1978) (third alteration in original) (footnotes omitted).

238. *Id.* at 36–37.

judgment," the identity and strength of the state interests, the viability rule, and the health exception after viability—on this unverified assumption, which became the single most important medical claim in *Roe*.[239]

Without any evidentiary record, the Court cited seven medical sources for the assertion that abortion is safer than childbirth, though none of the sources contained reliable data demonstrating that assertion.[240] In a later abortion case, *City of Akron v. Akron Center for Reproductive Health*,[241] the Court referred to this assertion as "*Roe*'s factual assumption,"[242] and said that "the State retains an interest in ensuring the validity" of this assumption.[243] In the numerous abortion cases at the Supreme Court since *Roe*, the Court has never verified the "factual assumption" of *Roe*; it merely repeats it as though it was fact.[244] This safety assumption is part of the foundation for the claim in

239. FORSYTHE, *supra* note 234, at 155–80.

240. For a detailed review of the seven sources, see FORSYTHE, *supra* note 234, at 162–70.

241. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).

242. *Id.* at 430 n.12.

243. *Id*.

244. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016) (Ginsburg, J., concurring) ("Many medical procedures, including childbirth, are far more dangerous to patients . . ."), Stenberg v. Carhart, 530 U.S. 914, 923 (2000) ("The procedure's mortality rates for first trimester abortion are, for example, 5 to 10 times lower than those associated with carrying the fetus to term."). *City of Akron*, 462 U.S. at 429 n.11 ("*Roe* identified the end of the first trimester as the compelling point because until that time -- according to the medical literature available in 1973 – 'mortality in abortion may be less than mortality in normal childbirth.' There is substantial evidence that developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions, have extended the period in which abortions are safer than childbirth." (citing *Roe*, 410 U.S., at 163; LeBolt, Grimes, & Cates, *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J. A. M. A. 188, 191 (1982) (abortion may be safer than childbirth up to gestational ages of 16 weeks)); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 78 (1976) ("The State, through § 9, would prohibit the use of a method which the record shows is one of the most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth."); Connecticut v. Menillo, 423 U.S. 9, 11 (1975) ("But the insufficiency of the State's interest in maternal health is predicated upon the first trimester abortion's being as safe for the woman as normal childbirth at term, and that predicate holds true only if abortion is performed by medically competent personnel under conditions insuring maximum safety to the woman."); Doe v. Bolton, 410 U.S. 179, 216-217 (1973) (Douglas, J., concurring) ("In light of modern medical evidence suggesting that an early abortion is safer healthwise than childbirth itself, it cannot be seriously urged that so comprehensive a ban is aimed at protecting the woman's health." (footnote omitted)); Roe v. Wade, 410 U.S. 113, 149 (1973) (footnote omitted) ("Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."); *id.* at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in light of the present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established

Planned Parenthood v. Casey that American women have positively relied on abortion (reliance being one of the six factors of stare decisis).[245]

Abortion advocates rely on two post-2011 studies—drawn from the United States' dysfunctional abortion data collection and reporting system—to perpetuate the claim that abortion is safer than childbirth. Both studies are superficial, inadequate, and fail to demonstrate that abortion is in fact safer than childbirth.

The first, a February 2012 article by Dr. Elizabeth Raymond and Dr. David Grimes published in *Obstetrics & Gynecology*, claims to update previous pro-abortion advocacy articles by Dr. Grimes.[246] The dogmatic conclusions about abortion safety in the article by Dr. Raymond and Dr. Grimes mask the underlying unreliable data.[247] All of Dr. Grimes' articles are based merely on "estimates" of abortions and abortion rates. The 2012 article relies on a category called "reported" deaths.[248] But as discussed above, there is no federally mandated requirement to report abortion deaths and data on abortion deaths is not systematically collected in the United States. Dr. Raymond and Dr. Grimes implicitly admit this by not relying on either the CDC or the AGI and by conducting an independent research of the "literature."[249]

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medical fact referred to above . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."). *Cf.* Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 729 (2004), https://journals.lww.com/greenjournal/Fulltext/2004/ 04000/Risk_Factors_for_Legal_Induced_Abortion_ Related.20.aspx ("Compared with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes.").

245. *Casey*, 505 U.S. at 856. For a rebuttal to the reliance claim, see Alvaré, *Abortion and Democracy*, *supra* note 229; Erika Bachiochi, *A Putative Right in Search of a Constitutional Justification: Understanding* Planned Parenthood v. Casey*'s Equality Rationale and How It Undermines Women's Equality*, 35 QUINNIPIAC L. REV. 593 (2017); Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889 (2011); Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85 (2005).

246. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012).

247. As discussed in *supra* Parts II.B.1 and II.B.2, abortion reporting in the United States is not required by either the CDC or by most states.

248. Raymond & Grimes, *supra* note 246.

249. Byron Calhoun, *Systematic Review: The Maternal Mortality Myth in the Context of Legalized Abortion*, 80 LINACRE Q. 264, 264 (2013); *see also* Skop, *supra* note 219, at 54–56; John M. Thorp Jr., *Public Health Impact of Legal Termination of Pregnancy in the US: 40 Years Later*, SCIENTIFICA, Oct. 2012, at 4–5.

A second article, in the January 2015 issue of *Obstetrics & Gynecology*, suggests that the complication rates after abortion are exceedingly low.[250] But the fine print reveals that one out of sixteen women (in their study sample) who have an abortion will visit an emergency room within six weeks after the abortion.[251] And, given the inherent weaknesses of the article, that figure likely represents the floor of the rate of complications, not the ceiling.

In addition to the assumption about the safety of abortion, the Court in *Roe* relied on the supposition that abortion is medically necessary. But abortion in 95% of cases is elective—not medically indicated or medically necessary. Elective medical procedures do not have a medical rationale; they are based on social or personal reasons.[252] Generally, elective procedures are regulated *more* vigorously than medically indicated procedures, because they are by definition, not necessary. Likewise, informed consent for elective procedures is *more* vigorous. But abortion in the United States is exempted from such normal standards by the courts applying *Roe*.

With no reliable national system of data collection and analysis, the Supreme Court cannot accurately know the safety of abortion. The Court did not decide *Roe* based on reliable abortion data, and it is unable to adjudicate abortion cases today with reliable data about abortion. In sum, *Roe* is unworkable because it was based on faulty assumptions.

D. Roe*'s Assumption That Abortion Would Become Medically Mainstream Is Unfulfilled*

Unsupported by an evidentiary record, the Court in *Roe* assumed that the American medical profession would step in and readily do abortions, according to the highest standards of medicine.[253] That assumption has failed to materialize. On the whole, American doctors have rejected abortion; 86%

250. Ushma D. Upadhyay et al., *Incident of Emergency Department Visits and Complications After Abortion*, 125 OBSTETRICS & GYNECOLOGY 175, 175 (2015).

251. *Id.*

252. *Abortion*, *in* WILLIAMS OBSTETRICS 357 (F. Gary Cunningham et al. eds., McGraw Hill Education 25th ed. 2018).

> *Therapeutic abortion* refers to a termination of pregnancy for medical indications . . . . The term *elective abortion* or *voluntary abortion* describes the interruption of pregnancy before viability at the request of the woman, but not for medical reasons. Most abortions done today are elective, and thus, it is one of the most frequently performed medical procedures.

Id.

253. *See* Roe v. Wade, 410 U.S. 113, 148–50 (1973).

will not do abortions.[254] As a federal district court in Alabama described in 2014:

> A severe scarcity of abortion doctors exists nationwide and particularly in the South. As of 2005, 69% of metropolitan counties nationwide and 97% of non-metropolitan counties had no abortion doctors at all. Between the years of 1982 and 2005, the number of abortion providers in the country decreased by 38%. Only 14% of OB/GYNs in the United States provide any abortion services, including abortions for fetal anomalies or to save the life of a mother, and only 8% percent of OB/GYNs in the South perform any abortions at all, compared to 26% in the Northeast.[255]

The unfulfilled assumption of the *Roe* Court that the American medical profession would readily do abortions creates incentives for substandard providers to enter the practice of abortion. The lack of doctors willing to perform abortion, coupled with the Court's approval in *Roe* and *Doe* of stand-alone abortion clinics with its invalidation of Georgia's hospitalization requirement, encourage the segregation of abortion in stand-alone clinics. These stand-alone clinics contribute to the reality that women's abortion experiences are separated from their overall medical history and from the care of their regular obstetrician-gynecologist. As such, *Roe* is unworkable because it was based on an unfulfilled assumption.

E. Roe *Created an Inconsistent and Shifting Standard of Review*

1. *The Abortion "Right"*

For the first time in 1973, the United States Supreme Court created in *Roe* a federal constitutional right of a woman "to decide whether or not to terminate her pregnancy."[256] The right created in *Roe* was clarified in *Casey*, but has been consistently, specifically, and narrowly defined as the personal right *of a woman* to "terminate her pregnancy."[257] Most recently in 2016, the Supreme

254. Planned Parenthood Southeastern, Inc. v. Strange, 33 F. Supp. 3d 1330, 1348 (M.D. Ala. 2014).

255. *Id.*; *see also* Debra B. Stulberg et al., *Abortion Provision Among Practicing Obstetrician-Gynecologists*, 118 OBSTETRICS & GYNECOLOGY 609, 609 (2011) (finding "[a]mong practicing [obstetrician-gynecologists], 97% encountered patients seeking abortions, while 14% performed them.").

256. *Roe*, 410 U.S. at 170 (Stewart, J., concurring).

257. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846, 869 (1992); *see, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 938 (2000) ("[T]o terminate her pregnancy . . . ."); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 420 n.1 (1983) ("terminate her pregnancy"); Harris v. McRae, 448 U.S. 297, 316 (1980) ("[T]he freedom of a woman to decide whether to terminate her pregnancy . . . .");

Court in *Hellerstedt*, reaffirmed that the right in *Casey* was that *of a woman* "to decide to have an abortion."[258] Despite the Court's clear articulation of the abortion right, pro-abortion groups are trying to expand the abortion right from a woman's choice to obtain an abortion, to the government's responsibility to provide a woman with an abortion.

When abortion providers bring a claim seeking to invalidate an abortion regulation, the right they represent is *the woman's* personal right to choose an abortion, not their personal right to provide abortions. Any right of abortion providers to provide abortions is solely derivative of a woman's right to terminate her pregnancy.[259] But despite the specificity of what the right is and who it belongs to, many abortion providers attempt to broaden the right from the right of their patient to choose an abortion to their own right to provide abortions (and be free from regulation as "medically necessary").[260]

2. *The Shifting Standard of Review*

Although the "right" has ostensibly remained the same, the test that the Court uses to determine whether that right has been violated keeps changing. In its 1973 *Roe* decision, the Court's standard of review to determine whether a woman's constitutional right to abortion was violated was a "compelling state interest test" based on a trimester framework.[261] During the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[262] But after the first trimester, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."[263] Once a fetus is viable, a State, in order to promote its interest in "the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the

Maher v. Roe, 432 U.S. 464, 473–74 (1977) ("[H]er freedom to decide whether to terminate her pregnancy."); *Roe*, 410 U.S. at 153 ("a woman's decision whether or not to terminate her pregnancy").

258. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016). Thus, even though *Hellerstedt* modified the undue burden standard, as discussed in *infra* Part II, it did not modify the underlying right to abortion.

259. *See Casey*, 505 U.S. at 884 (O'Connor, Kennedy, & Souter, JJ., joint opinion).

260. *See* Brief for Petitioner at 3, Gee v. June Med. Servs., L.L.C., 140 S. Ct. 35 (2019) (No. 18-1323).

261. *See Roe*, 410 U.S. at 164–65; *id.* at 173 (Rehnquist, J., dissenting) (referring to the Court's test as a "compelling state interest test").

262. *Id.* at 164. Note that the Court's statement assumes that the person performing an abortion is a physician.

263. *Id.*

mother."[264] In *Roe*'s companion case, *Doe*, which the Court said should "be read together" with *Roe*, the health exception is defined as a "medical judgment [that] may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[265] This legalized abortion on demand through all nine months of pregnancy.

The inability to consistently apply the same standard in abortion cases is evident from the outset. As Justice Powell pointed out in his concurrence in *Carey v. Population Services International*, in contrast to what *Roe* purported to adopt, *Doe* did not refer to the "compelling state interest" standard, but instead used the "reasonably related" test.[266]

Nearly twenty years after *Roe* and *Doe*, the Court changed the standard of review in 1992 by creating the "undue burden" standard in *Casey* to determine whether laws regulating abortion procedures violate the Constitution.[267] "[A]n undue burden is an unconstitutional burden," and there is an undue burden when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[268]

Again, over two decades later in 2016, the Supreme Court in *Hellerstedt* modified (but did not replace) *Casey*'s undue burden standard. The *Hellerstedt* Court announced that the undue burden standard requires "that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[269] While the Court's clarification in *Hellerstedt* in no way abolished *Casey*'s underlying requirement that a law must create a substantial obstacle to be an undue burden, it did change and confuse the application of *Casey*'s undue burden standard by lower courts.[270]

After *Hellerstedt*, abortion providers began claiming that a law's benefits must outweigh any harm the law allegedly causes. This effectively shifts the

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264. *Id*. at 164–65.

265. Doe v. Bolton, 410 U.S. 179, 192 (1973).

266. Carey v. Population Servs. Int'l, 431 U.S. 678, 704 (1977) (Powell, J., concurring).

267. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877 (1992); *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) (holding that the undue burden standard applies "when determining the constitutionality of laws regulating abortion procedures . . . .").

268. *Casey*, 505 U.S. at 877 (plurality opinion).

269. *Hellerstedt*, 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887–98); *see also id*. at 2310 (stating that the district court applied the correct legal standard when it "weighed the asserted benefits against the burdens"). In *Hellerstedt*, after weighing the benefits and burdens, the Court ultimately invalidated two provisions of Texas' H.B. 2 because "[e]ach place[d] a *substantial obstacle* in the path of women seeking a previability abortion." *Id.* at 2300 (emphasis added).

270. *See generally* Stephen G. Gilles, *Restoring* Casey*'s Undue-Burden Standard After* Whole Woman's Health v. Hellerstedt, 35 QUINNIPIAC L. REV. 701 (2017).

burden of proof from the plaintiffs to prove that the law creates a substantial obstacle to the defendants to prove the law's benefits.

In addition, a coordinated effort by a number of abortion-rights groups has brought a novel challenge to abortion regulations under *Hellerstedt*—a cumulative burden challenge, which asserts that the entire abortion regulatory scheme, or all the state's abortion laws together, cumulatively create an undue burden.[271] One district court judge so far has thrown this claim out, and a Fifth Circuit panel has held that *Hellerstedt* "is not precedent" for this novel claim.[272]

In *Hellerstedt*, the Court explicitly relied on *Casey* to invalidate two provisions of Texas' law regulating abortion (H.B. 2).[273] Nowhere in the opinion did the Court imply that where there is no benefit, *any* demonstrated burden—no matter how minimal—renders the law unconstitutional. Rather, as the Court reiterated in *Hellerstedt*, *Casey*'s standard "asks courts to consider whether any burden imposed on abortion access is '*undue*.'"[274] A burden is undue when the requirement places a "substantial obstacle to a woman's choice."[275] Ultimately, after weighing the benefits and burdens, the Court invalidated the two provisions because "[e]ach place[d] a *substantial obstacle* in the path of women seeking a previability abortion . . . ."[276] Thus, despite the claims of abortion-rights groups, the undue burden standard cannot be a strict balancing test requiring that an abortion regulation's benefits *must* outweigh its burdens. Rather, plaintiffs in a specific case have the burden to prove that a regulation causes a substantial obstacle.[277]

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271. *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 9, Planned Parenthood of Ariz., Inc. v. Brnovich, No. 4:19-cv-00207-JGZ (D. Ariz. Apr. 11, 2019); Complaint, Whole Woman's Health All. v. Hill, 377 F. Supp. 3d 924 (S.D. Ind. 2018) (No. 18-cv-01904); Amended Complaint, June Med. Servs., L.L.C. v. Gee, No. 17-00404, 2018 WL 3708150 (M.D. La. 2018); Amended Complaint, Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536 (S.D. Miss. 2018) (No. 18-171); Complaint at 2, 8–9, Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938 (W.D. Tex. 2017) (No. 1:17-cv-690); Complaint, Falls Church Med. Ctr., LLC v. Oliver, 346 F. Supp. 3d 816 (E.D. Va. 2018) (No. 3:18-cv-428).

272. *See Oliver*, 346 F. Supp. 3d at 830 (dismissing plaintiffs' cumulative burden claim); *In re* Gee, 941 F.3d 153, 173 (5th Cir. 2019) (denying petition for Writ of Mandamus, but stating *Hellerstedt* does not support "cumulative-effects challenges").

273. *Hellerstedt*, 136 S. Ct. at 2300 ("We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey*."); *id.* at 2309 ("We begin with the standard, as described in *Casey*."); *id.* ("The rule announced in *Casey*, however, requires . . . .").

274. *Id.* at 2310 (emphasis added).

275. *Id.* at 2313 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 895 (1992)).

276. *Id.* at 2300 (emphasis added).

277. *See id.* at 2313 (finding that based on the record in that case, "petitioners *satisfied their burden to present evidence of causation* . . . that H.B. 2 in fact led to the clinic closures" (emphasis added)); *see also id.* ("In our view, the record contains sufficient evidence that the admitting-privileges requirement led to

3. *When Does the Undue Burden Standard Apply?*

When read in context, the undue burden standard created in *Casey* and modified in *Hellerstedt* applies "when determining the constitutionality of laws *regulating abortion procedures*."[278] The Supreme Court has never applied or indicated that the undue burden standard applies to *any* law tangentially related to abortion or to an abortion provider no matter how attenuated the regulation is to the abortion procedure itself (such as the policy choice of the government to provide subsidies for non-abortion family planning services).[279] It does not make sense that the undue burden standard is applicable to *any* regulation that might happen to apply to an abortion provider.

For example, if the last abortion clinic in a state has to close down because it unlawfully sold drug products or committed Medicaid fraud, this would presumably create an undue burden on the ability of women in that state to choose abortion. However, it defies reason that the undue burden standard would apply in such a way that abortion providers can get a free pass to disregard or de facto invalidate any regulation they claim they cannot (or will not) comply with, so long as enforcing the law would allegedly prevent them from continuing to provide abortions. As such, the undue burden standard does not apply to a regulation just because it affects abortion providers, including government funding regulations, as explained below.

4. *Who Has Standing to Challenge Abortion Regulations?*

There are, perhaps, so many legal challenges to abortion regulations because (especially after *Hellerstedt*) the Court has given judges much leeway in determining whether to invalidate an abortion regulation and has allowed abortion providers to sue on behalf of patients to invalidate these regulations. Ordinarily, parties must bring a lawsuit on their own behalf, but sometimes third parties can bring a lawsuit on behalf of another. But this changed after the Court's decision in *Singleton v. Wulff*, where a plurality of Justices stated

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the closure of half of Texas' clinics, or thereabouts."); *id.* at 2344 (Alito, J., dissenting) ("[T]here can be no doubt that H.B. 2 caused some clinics to cease operation . . . .").

278. *Id.* at 2310 (emphasis added).

279. Thomas J. Molony, *Liberty Finds No Refuge: The Doubt-Filled Future of* Casey*'s Undue Burden Standard*, 2019 MICH. ST. L. REV. 23, 52–64 (discussing the need to limit the *Hellerstedt* undue burden test to situations in which the court determines "whether a measure purporting to serve the state's interest in maternal health reasonably might be thought to offer medical benefits and, if the measure would place a substantial obstacle in the path of a woman seeking an abortion, whether the benefits are commensurate with the obstacles it imposes").

"it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision."[280] Since then and based on this generality, many lower courts and even the Supreme Court have generally assumed *carte blanche* that abortion providers have third-party standing on behalf of women seeking abortion without any meaningful, particularized analysis (as is required in other contexts).[281] Usually, the Court's third-party standing doctrine requires: (1) a "close" relationship between the third party and the person who possesses the right and (2) a "'hinderance' to the possessor's ability to protect his own interests."[282] The practice of expanding third-party standing in abortion cases has been called into question by academics, members of the judiciary, and raised by parties in lawsuits.[283] *Russo v. June Medical Services*, currently pending before the Supreme Court, asks the Justices to decide whether abortion providers challenging a health and safety abortion regulation on behalf of their patients must prove they have a close relationship with their patients and that there is a hinderance to their patients' ability to sue on their own behalf.[284] One would think that there is an inherent conflict of interest between abortion providers and their patients when it comes to state health and safety regulations. It seems obvious that it is impossible for abortion clinics and doctors to share or represent the interests of their patients when they seek to eliminate the very regulations designed to protect their patients' health and safety.[285]

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280. Singleton v. Wulff, 428 U.S. 106, 118 (1976).

281. *Cf. Hellerstedt*, 136 S. Ct. at 2322 (Thomas, J., dissenting) ("[A] plurality of this Court fashioned a blanket rule allowing third-party standing in abortion cases.").

282. Kowalski v. Tesmer, 543 U.S. 125, 130 (2004).

283. *See, e.g.*, *Hellerstedt*, 136 S. Ct. at 2321–23 (Thomas, J., dissenting) (noting that "the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake" and calling into question the appropriateness of this practice); Defendant Vicki Yates Brown Glisson's Memorandum of Law in Support of Motion for Summary Judgment at 24–26, EMW Women's Surgical Ctr. v. Beshear, 2017 WL 4011111, 283 F. Supp. 3d 629 (W.D. Ky. 2017) (No. 3:17-cv-16-DJH); Conditional Cross-Petition at *6–*7, Gee v. June Med. Servs., L.L.C., 140 S. Ct. 35 (2019) (No. 18-1460), 2019 U.S. S. Ct. Briefs LEXIS 1893 (presenting the question "Can abortion providers be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients absent a 'close' relationship with their patients and a 'hindrance' to their patients' ability to sue on their own behalf?"); Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion Suits Deserves A Closer Look*, 84 NOTRE DAME L. REV. 1369 (2009) (arguing that abortion providers generally fail to meet the prudential requirements for asserting third-party standing on behalf of their patients).

284. Gee, 140 S. Ct. at 35 (granting cross-petition).

285. Brief for Americans United for Life as Amici Curiae Supporting Cross-Petitioner at 5–10, Gee v. June Med. Servs., L.L.C., 140 S. Ct. 35 (2019) (Nos. 18-1323 & 18-1460) (June 24, 2019) (detailing the long history of health and safety violations by Louisiana abortion clinics and professional disciplinary actions and substandard medical care by Louisiana abortion doctors).

5. *Continual Confusion and Criticism*

There is much judicial confusion over what the standards in *Roe*, *Casey*, and *Hellerstedt* actually require. *Roe*, *Casey*, and *Hellerstedt* have been repeatedly criticized by numerous federal and state judges for standards that cannot be consistently applied.[286] Many judges and even the Solicitor General of the United States have called for the reconsideration and overruling of the

286. *See, e.g.*, Isaacson v. Horne, 716 F.3d 1213, 1233 (9th Cir. 2013) (Kleinfeld, J., concurring) ("Viability is the 'critical fact' that controls constitutionality. That is an odd rule, because viability changes as medicine changes. As *Planned Parenthood v. Casey* noted, between *Roe v. Wade* in 1973 and the time *Casey* was decided in 1992, viability dropped from 28 weeks to 23 or 24 weeks, because medical science became more effective at preserving the lives of premature babies." (footnote omitted)), *cert. denied*, 134 S. Ct. 905 (2014); Planned Parenthood of the Rocky Mountains Servs. Corp. v. Owens, 287 F.3d 910, 931 (10th Cir. 2002) (Baldock, J., dissenting) ("True to Justice White's words, state lawmakers continue to test the limits of *Roe* and courts continue to police those limits with no foreseeable end to the struggle."); A Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002) ("When the Justices themselves disregard rather than overrule a decision—as the majority did in *Stenberg*, and the plurality did in *Casey*—they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books."), *cert. denied*, 537 U.S. 1192 (2003); Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999) (Wiener & Parker, JJ.) ("The *Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake to determine whether a regulation has the 'purpose' of imposing an undue burden on a woman's right to seek an abortion."); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 218–19 (6th Cir. 1997) (Boggs, J., dissenting) ("The post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the *Peanuts* comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only *this time* he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment. Here, our court's judgment is that Ohio's legislators, like poor Charlie Brown, have fallen flat on their backs. I doubt that the lawyers and litigants will ever stop this game. Perhaps the Supreme Court will do so."), *cert. denied*, 523 U.S. 1036 (1998); Margaret S. v. Edwards, 794 F.2d 994, 995 (5th Cir. 1986) ("It is no secret that the Supreme Court's abortion jurisprudence has been subjected to exceptionally severe and sustained criticism."); Cincinnati Women's Servs., Inc. v. Taft, 466 F. Supp. 2d 934, 941 (S.D. Ohio 2005) ("At this point, it is evident that *Casey* produces decisions that seem to be based more on intuition than application of a discernible legal standard. The need for more clarity is acute because, as Judge Boggs and others have noted, legislatures will continue to legislate in this area, pro-choice advocates will continue to challenge such legislation, and the federal courts will continue to be caught in the middle."); Women's Med. Ctr. of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1143 n.5 (D.R.I. 1982) ("I agree with the Seventh Circuit that the concept of 'undue burden' used by the Supreme Court in analyzing some recent cases involving alleged restrictions on the right to an abortion causes some confusion regarding the standard to be applied in cases involving first trimester restrictions. The confusion appears to stem from attempts to reconcile the position taken by the Court in *Roe v. Wade*, which arguably holds that there are no compelling state interests that ever justify a state-imposed burden on the right to a first trimester abortion, with the Court's position in *Danforth* that limited informed consent requirements may be imposed by the state during the first trimester, and with its position in *Maher v. Roe*, and *Harris v. McRae*, that the state may discourage indigents from exercising their right to an abortion by refusing to pay for the procedure . . . . Two approaches have emerged as lower federal courts have struggled with the line of Supreme Court abortion decisions." (citations omitted)).

Court's abortion jurisprudence.[287] As Justice Thomas has pointed out, *Roe* is one of "the Court's most notoriously incorrect decisions"[288] and "has no basis in the Constitution."[289]

F. Roe*'s Rigid Viability Rule Clashes with Public Opinion and Medical Data on Safety*

As discussed above, the Supreme Court adopted the viability rule in *Roe* without any evidentiary record and without any reliable medical data. It

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287. *See, e.g.*, Planned Parenthood of Ind. & Ky. v. Comm'r of the Ind. State Dep't. of Health, 888 F.3d 300, 313 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part) ("That today's outcome is compelled begs for the Supreme Court to reconsider *Roe* and *Casey*. But assuming the Court is not prepared to overrule those cases, it is at least time to downgrade abortion to the same status as actual constitutional rights."); *Ex parte* Phillips, 284 So. 3d 101, 165–66, 175 (Ala. 2018) (Parker, J., concurring specially) ("I write specially to expound upon the principles presented in the main opinion and to note the continued legal anomaly and logical fallacy that is *Roe v. Wade*; I urge the United States Supreme Court to overrule this increasingly isolated exception to the rights of unborn children . . . . [T]he isolated *Roe* exception, which is increasingly in conflict with the numerous laws of the states recognizing the rights of unborn children, must be overruled . . . . [T]he foundation of the *Roe* exception is crumbling." (citation omitted)).

The United States has told the Supreme Court at least six times that *Roe* was wrongly decided and should be overruled. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992) ("[T]he United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*."); *see also* Brief for the United States as Amicus Curiae Supporting Respondents at 8, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 & 91-902) ("As we explained in our briefs in *Akron I*, *Thornburgh*, *Webster*, *Hodgson*, and *Rust v. Sullivan*, *Roe v. Wade* was wrongly decided and should be overruled. We strongly adhere to that position in this case." (citation omitted)); Brief for the Respondent at 13, Rust v. Sullivan, 500 U.S. 173 (1991) (Nos. 89-1391 & 89-1392) ("We continue to believe that *Roe* was wrongly decided and should be overruled."); Brief for the United States as Amicus Curiae Supporting Respondents and Supporting Cross-Petitioners at 11–12, Hodgson v. Minnesota, 497 U.S. 417 (1990) (Nos. 88-1125 & 88-1309) ("[W]e continue to believe that *Roe* was wrongly decided and should be overruled."); Brief for the United States as Amicus Curiae Supporting Appellants at 8, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605) ("*Roe v. Wade* should be reconsidered and, upon reconsideration, overruled."); Brief for the United States as Amicus Curiae in Support of Appellants, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379) ("The second, compelling ground for our urging reconsideration of *Roe v. Wade* is our belief that the textual, historical and doctrinal basis of that decision is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided." (footnote omitted)).

288. Timbs v. Indiana, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring) (calling *Roe*, along with *Dred Scott v. Sandford*, 60 U.S. 393 (1857), "some of the Court's most notoriously incorrect decisions").

289. Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade* has no basis in the Constitution." (citation omitted)); *see also* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring) ("Having created the constitutional right to an abortion, this Court is dutybound to address its scope. In that regard, it is easy to understand why the District Court and the Seventh Circuit looked to *Casey* to resolve a question it did not address. Where else could they turn? The Constitution itself is silent on abortion.").

considered only the relationship to fetal life, and not maternal health. No party or amicus asked the Court to expand the right to fetal viability. And as such, the viability rule was self-conscious dictum.[290] It has been subject to sustained criticism ever since.

In *Casey*,[291] the plurality summarily pronounced *Roe* workable with one assertion: "Although *Roe* has engendered opposition, it has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable."[292] The Court further defended the viability rule with the second simple assertion that "there is no line other than viability which is more workable."[293] In effect, these assertions were an admission that *Roe* would collapse without the viability rule, so there could be no reconsideration. But these naked assertions cannot be called a reaffirmation since there was no attempt to review the underlying principle and the assertions were unsupported by anything in the *Casey* record, any consideration of public support, or any consideration of the impact on maternal health. As such, it should be no surprise that *Casey* did nothing to quell the criticism of the viability rule.

The American public has rejected the viability rule. Four decades after *Roe*, a super majority of Americans believe that abortion should be presumptively illegal after the first trimester. "Polls stretching back for decades show that two-thirds or more of the public believe abortion should generally be illegal in the second trimester of pregnancy."[294]

Medical data also does not support the viability rule. A widely respected 2004 study by Linda Bartlett shows the greatly increased rate of maternal mortality for abortion after twenty weeks.[295] Twenty-one states have adopted a twenty-week limit on abortion,[296] which "enjoys extremely broad support in

290. Randy Beck, *Self-Conscious Dicta: The Origins of* Roe v. Wade*'s Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 507–29 (2011).

291. *Casey*, 505 U.S. at 833.

292. *Id.* at 855 (citation omitted).

293. *Id.* at 870.

294. Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 HASTINGS CONST. L.Q. 187, 190–92, 199 (2016) [hereinafter Beck, *Twenty-Week Abortion Statutes*]; Randy Beck, *Fueling Controversy*, 95 MARQ. L. REV. 735, 737 (2011) ("*Roe*'s extension of abortion rights through the second trimester of pregnancy created a structural misalignment between constitutional law and popular sentiment.") (reviewing polling data). Numerous problems with the Court's viability rules are detailed in Randy Beck, Gonzales, Casey, *and the Viability Rule*, 103 NW. U. L. REV. 249, 254, 258–61, 266 (2009).

295. Bartlett et al., *supra* note 244, at 729.

296. Beck, *Twenty-Week Abortion Statutes*, *supra* note 294, at 187–88 n.1; *see also* IOWA CODE § 146C.2(2)(b) (2019); KY. REV. STAT. ANN. § 311.782(1) (West 2019); S.C. CODE ANN. § 44-41-450(A) (2019); S.D. CODIFIED LAWS §§ 34-23A-3, -4, -5, -67, -69 (2019) (although South Dakota allows abortions up to twenty-two weeks for medical emergencies, South Dakota criminalizes abortions after twenty weeks in the absence of a medical emergency).

public opinion polls, with even higher support among women than men."[297] Yet, federal courts have invalidated twenty-week limits by rigidly applying the viability rule.[298]

The Court has never adequately justified the viability rule. The plurality in *Casey* held that "a decision without principled justification would be no judicial act at all."[299] But by that measure, the viability rule is judicially illegitimate.

G. Roe *Collides with Growing Recognition of and Protection for Prenatal Human Beings*

The two compelling interests recognized in *Roe* are the state interests in protecting fetal life and maternal life and health. Regarding protecting fetal life,[300] *Roe* and its progeny have unduly limited a state's ability to do so. First, and most obviously, a state is unable to ensure that prenatal human beings will not be killed in utero. Second, it is an open question whether a state can prohibit eugenic abortions targeting unborn humans based solely on their sex, race, or disability, including Down syndrome.[301]

The Court has allowed the regulation of one inhumane and gruesome abortion procedure. In *Gonzales v. Carhart*,[302] the Court upheld the constitutionality of the Partial-Birth Abortion Ban Act passed by Congress in 2003, which made it a federal crime to perform the partial-birth abortion procedure, where an abortion doctor partially delivers the child outside the mother's body and then sucks out the content of the child's brain.[303] Similarly, many states have passed laws prohibiting dismemberment abortions, or the

297. Beck, *Twenty-Week Abortion Statutes*, *supra* note 294, at 189.

298. McCormack v. Herzog, 788 F.3d 1017, 1033 (9th Cir. 2015) (Idaho); Isaacson v. Horne, 716 F.3d 1213, 1217 (9th Cir. 2013) (Arizona), *cert. denied*, 571 U.S. 1127 (2014).

299. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865 (1992).

300. Some court opinions refer to "potential life," but science and biology tell us that an unborn human is alive and that the act of abortion ends the life of a separate, unique living human being. *See* Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and the Terminology Revisited*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 44 (2013).

301. *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1792 (Thomas, J., concurring) ("*Casey* . . . did not decide whether the Constitution requires States to allow eugenic abortions. It addressed the constitutionality of only 'five provisions of the Pennsylvania Abortion Control Act of 1982' that were said to burden the supposed constitutional right to an abortion." (citing *Casey*, 505 U.S. at 844)).

302. Gonzales v. Carhart, 550 U.S. 124, 133 (2007) (upholding the federal Partial-Birth Abortion Ban Act as constitutional).

303. 18 U.S.C. § 1531 (2020).

tearing of a child in utero limb from limb.[304] Most of these laws are currently in litigation,[305] and it is also an open question whether the Court will find that the Constitution *prohibits* states from stopping such an inhumane procedure.

Creating a cognitive and legal disconnect with the Court's abortion jurisprudence, the federal government and states recognize and treat unborn humans as human beings. For example, the federal Unborn Victims of Violence Act defines "unborn child" as a "child in utero," which means "a member of the species homo sapiens, at any stage of development, who is carried in the womb."[306] Many state laws mirror this definition or adopt a version of their own.[307] Outside the context of a legal abortion, both federal and state laws criminalize and provide remedies for killing an unborn human.[308] The Unborn Victims of Violence Act makes it a federal crime to kill or cause bodily injury to an unborn human in utero.[309] Thirty-seven states currently treat the killing of an unborn human as homicide, with thirty states criminalizing the act from conception.[310] Nearly all fifty states, as well as the District of Columbia, have wrongful death statutes, allowing recovery for the death of an unborn human or the subsequent death of an infant born alive who

304. Paul Benjamin Linton, *The Pro-Life Movement at (Almost) Fifty: Where Do We Go From Here?*, 18 AVE MARIA L. REV. 15, 26 (2020).

305. *Id*.

306. 18 U.S.C. § 1841(d) (2020).

307. *See, e.g.*, ALASKA STAT. § 11.81.900(b)(66) (2019); ARK. CODE ANN. § 5-1-102(13)(B)(i)(b) (2019); FLA. STAT. § 775.021(5)(e) (2019); GA. CODE ANN. § 52-7-12.3(a) (2019); 720 ILL. COMP. STAT. § 5/9-2.1(d) (2019); KAN. STAT. ANN. § 21-5419(a)(2) (2020); KY. REV. STAT. ANN. § 507A.010(1)(c) (West 2020); LA. STAT. ANN. § 14:2(7), (11) (2019); MINN. STAT. § 145.4241(8) (2019); MISS. CODE ANN. § 97-3-37(1) (2019); N.C. GEN. STAT. § 14-23.1 (2019); OKLA. STAT. tit. 63, § 1-730(A)(4) (2019); S.C. CODE ANN. § 16-3-1083(C) (2019); WIS. STAT. § 939.75(1) (2019).

308. *See generally* Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 141 (2011) (cataloguing the protection of the prenatal child in tort, criminal, property, guardianship, and health care law).

309. 18 U.S.C. § 1841(a)(1).

310. *See, e.g.*, ALA. CODE § 13A-6-1(a)(2)–(3) (2019); ALASKA STAT. § 11.41.150(a) (2019); ARIZ. REV. STAT. ANN. § 13-1102 (2020); ARK. CODE ANN. §§ 5-10-101 to -105 (2019) (as defined by § 5-1-102(13)); FLA. STAT. § 775.021(5); GA. CODE ANN. § 16-5-80(a)–(b) (2019); IDAHO CODE § 18-4001 (2019); 720 ILL. COMP. STAT. 5/9-1.2(a)–(b) (2019); IND. CODE § 35-42-1-1(4) (2020); KAN. STAT. ANN. § 21-5419(c); KY. REV. STAT. ANN. § 507A.020(2); LA. STAT. ANN. § 14:32.5 (2019); MICH. COMP. LAWS § 750.322 (2020); MINN. STAT. § 609.2114 (2019); MISS. CODE ANN. § 97-3-19(1)(d) (2019); MO. REV. STAT. § 565.020 (2019) (as defined by § 1.205(3)); NEB. REV. STAT. § 28-389(2) (2020); N.C. GEN. STAT. §§ 14-23.1–14-23.8 (2019); N.D. CENT. CODE § 12.1-17.1-02(2) (2019); OHIO REV. CODE ANN. § 2903.01(A)–(B) (LexisNexis 2019); OKLA. STAT. tit. 21, § 691 (2019); 18 PA. CONS. STAT. § 106(a)(1), (b)(1) (2020); S.C. CODE ANN. § 16-3-1083(A)(1); S.D. CODIFIED LAWS § 22-16-1.1 (2019); TENN. CODE ANN. § 39-13-214 (2019); TEX. PENAL CODE ANN. § 19.02(b) (West 2019) (as defined by § 1.07(a)(26)); UTAH CODE ANN. § 76-5-201(1)(a) (LexisNexis 2020); VA. CODE ANN. § 18.2-32.2 (2019); W. VA. CODE § 61-2-30 (2019); WIS. STAT. § 940.04 (2020).

was injured while in utero.[311] In addition to criminal laws, states have increasingly afforded unborn humans the protections of the law and recognized unborn humans as "persons" with legally enforceable rights in the areas of tort law, guardianship law, healthcare law, property law, and family law.[312]

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311. *See, e.g.*, ALA. CODE § 6-5-410 (2019) (as interpreted by Mack v. Carmack, 79 So. 3d 597, 611 (Ala. 2011)); ALASKA STAT. § 09.55.585(a) (2019); ARIZ. REV. STAT. ANN. § 12-611 (2020) (as interpreted by Summerfield v. Superior Court, 698 P.2d 712, 724 (Ariz. 1985)); ARK. CODE ANN. § 16-62-102(a)(1) (2019); COLO. REV. STAT. § 13-21-202 (2019) (as interpreted by Espadero v. Feld, 649 F. Supp. 1480, 1484 (D. Colo. 1986)); CONN. GEN. STAT. § 52-555 (2019) (as interpreted by Florence v. Town of Plainfield, 849 A.2d 7, 19 (Conn. Super. Ct. 2004)); DEL. CODE ANN. tit. 10, § 3724 (2019) (as interpreted by Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557, 557 (Del. Super. Ct. 1956)); D.C. CODE § 12-101 (2020) (as interpreted by Greater Se. Cmty. Hosp. v. Williams, 482 A.2d 394, 395 (D.C. 1984)); FLA. STAT. § 768.19 (2019) (as interpreted by Stern v. Miller, 348 So. 2d 303, 308 (Fla. 1977)); GA. CODE ANN. § 19-7-1(c) (2019) (as interpreted by Porter v. Lassiter, 87 S.E.2d 100, 103 (Ga. Ct. App. 1955)); HAW. REV. STAT. § 663-3 (2019) (as interpreted by Wade v. United States, 745 F. Supp. 1573, 1579 (D. Haw. 1990)); IDAHO CODE § 5-310 (2019) (as interpreted by Volk v. Baldazo, 651 P.2d 11, 14 (Idaho 1982)); 740 ILL. COMP. STAT. 180/2 (2019) (as interpreted by Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88, 91 (Ill. 1973)); IND. CODE § 34-23-2-1 (2020); KAN. STAT. ANN. § 60-1901 (2020); KY. REV. STAT. ANN. § 411.130 (West 2020) (as interpreted by Mitchell v. Couch, 285 S.W.2d 901, 906 (Ky. 1955)); LA. CIV. CODE ANN. art. 2315.2 (2019) (as defined by *id.* art. 26); ME. REV. STAT. ANN. tit. 18-c, § 2-807 (2019); MD. CODE ANN., CTS. & JUD. PROC. § 3-904(d) (LexisNexis 2020) (as interpreted by State *ex. rel.* Odham v. Sherman, 198 A.2d 71, 73 (Md. 1964)); MASS. GEN. LAWS ch. 229, § 2 (2020) (as interpreted by Mone v. Greyhound Lines, Inc., 331 N.E.2d 916, 917 (Mass. 1975)); MICH. COMP. LAWS § 600.2922a (2020); MINN. STAT. § 573.02 (2019) (as interpreted by Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949)); MISS. CODE ANN. § 11-7-13 (2019); MO. REV. STAT. § 537.080 (2019) (as defined by § 1.205.2); MONT. CODE ANN. § 27-1-513 (2019) (as interpreted by Strzelczyk v. Jett, 870 P.2d 730, 731 (Mont. 1994)); NEB. REV. STAT. § 30-809 (2020); NEV. REV. STAT. ANN. § 41.085 (2019) (as interpreted by White v. Yup, 458 P.2d 617, 623–24 (Nev. 1969)); N.H. REV. STAT. ANN. § 556:7 (2020) (as interpreted by Poliquin v. MacDonald, 135 A.2d 249, 251 (N.H. 1957)); N.J. REV. STAT. ANN. § 2A:31-1 (West 2019) (as interpreted by Graf v. Taggert, 204 A.2d 140, 141, 145–46 (N.J. 1964)); N.M. STAT. ANN. § 41-2-1 (2019) (as interpreted by Salazar v. St. Vincent Hosp., 619 P.2d 826, 830 (N.M. Ct. App. 1980)); N.C. GEN. STAT. § 28A-18-2 (2020) (as interpreted by DiDonato v. Wortman, 358 S.E.2d 489, 495 (N.C. 1987)); N.D. CENT. CODE § 32-21-01 (2019) (as defined by § 14-10-15); OHIO REV. CODE ANN. § 2125.01 (West 2019) (as interpreted by Werling v. Sandy, 476 N.E.2d 1053, 1056 (Ohio 1985)); OKLA. STAT. tit. 12, § 1053(F)(1) (2019); OR. REV. STAT. § 30.020 (2019) (as interpreted by Libbee v. Permanente Clinic, 518 P.2d 636, 639–40 (Or. 1974)); 42 PA. CONS. STAT. § 8301 (2020) (as interpreted by Amadio v. Levin, 501 A.2d 1085, 1088 (Pa. 1985)); 10 R.I. GEN. LAWS § 10-7-1 (2020) (as interpreted by Presley v. Newport Hosp., 365 A.2d 748, 754 (R.I. 1976)); S.C. CODE ANN. § 15-51-10 (2019) (as interpreted by Fowler v. Woodward, 138 S.E.2d 42, 44–45 (S.C. 1964)); S.D. CODIFIED LAWS § 21-5-1 (2019); TENN. CODE ANN. § 20-5-106 (2019); TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001–.002 (West 2019); VT. STAT. ANN. tit. 14, §§ 1491, 1492 (2019) (as interpreted by Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc., 425 A.2d 92, 93–94 (Vt. 1980)); VA. CODE ANN. § 8.01-50(B) (2019); WASH. REV. CODE § 4.24.010 (2019) (as interpreted by Moen v. Hanson, 537 P.2d 266, 266 (Wash. 1975)); W. VA. CODE § 55-7-5 (2019) (as interpreted by Baldwin v. Butcher, 184 S.E.2d 428, 436 (W. Va. 1971)); WIS. STAT. § 895.03 (2020) (as interpreted by Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107, 112 (Wis. 1967)).

312. *See Ex Parte* Phillips, 284 So. 3d 101, 166 (Ala. 2018) (Parker, J., concurring specially) (surveying state laws demonstrating that "unborn children have numerous rights that all people enjoy").

Roe did not and could not foresee the advances in medical science that have revealed the undeniable humanity of the unborn. *Roe* is unworkable because its regime creates a disconnect with other areas of law that recognize and protect prenatal human life.

H. Roe *Created a Public Health Vacuum That Cannot Be Filled*

The Court in *Roe* and *Doe* effectively swept away all abortion laws in all fifty states. Justice Blackmun knew this would create a vacuum, but assumed that states would quickly fill the vacuum, and sought to release the decision as early as possible in January 1973 in advance of the state legislative sessions.[313] But when states sought to fill the vacuum, the Court rejected state efforts throughout the 1970s and 80s,[314] and, most recently, in *Hellerstedt*[315] in 2016.

The Court cannot fill the vacuum. As discussed above, it cannot monitor or regulate. It cannot keep abreast of the international medical studies on the long-term risks of abortion, including the increased risk of pre-term birth,[316] the increased risk of mental trauma, and the increased risk of breast cancer after abortion.[317] It cannot address medical crises. It cannot act decisively or quickly. It cannot reach out to order cases; it must wait for cases to be appealed.

The Court also will not let states fill the vacuum. Despite what the Court said in *Roe* and *Casey* about the states' interests in maternal health, the States have been hampered in their ability to apply health and safety regulations. When the Court in *Roe* struck down all of the abortion laws in all fifty states, it made it difficult for states to regulate abortion clinics in any way. The Court made abortion the only medical procedure declared to be a constitutional right. In effect, this makes abortion exempt from the normal government regulation applicable to all other areas of medicine, and the Court's abortion doctrine

313. FORSYTHE, *supra* note 234, at 53.

314. Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 VILL. L. REV. 45, 62–65 (2012) (detailing the caselaw).

315. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

316. Emmanuel A. Anum et al., *Health Disparities in Risk for Cervical Insufficiency*, 25 HUM. REPROD. 2894, 2899 (2010) (concluding that "prior pregnancy termination is a major risk factor for cervical insufficiency").

317. *See* John M. Thorp, Jr. et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 OBSTETRICAL & GYNECOLOGICAL SURV. 67 (2002) (assessing long-term consequences). The international medical literature on the long-term risks are the subject of the documentary, *Hush. See Hush: The Documentary*, HUSH, http://www.hushfilm.com (last visited Dec. 29, 2019) (surveying the international peer-reviewed medical studies on the increased risks of breast cancer, pre-term birth, and mental trauma through interviews and analysis of data).

created a double standard that prevents the application of the same regulations to abortion clinics as are applied to other ambulatory surgical treatment centers.

Over the last forty-six years, States have struggled to enact enforceable health and safety regulations. Any such regulation is opposed by abortion advocates as imposing an "undue burden" on abortion access.[318] Abortion providers routinely bring legal challenges against state health and safety regulations.[319] These cases often involve the unsubstantiated claims that the health and safety regulations will close clinics or force abortion doctors to stop providing services to women.[320] Yet despite these doomsday predictions,

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318. In fact, abortion-rights groups have started bringing "cumulative-effects challenges," alleging that a group of abortion laws cumulatively, or together, create an undue burden. This is a novel claim that has never been recognized by the Supreme Court. So far, this claim has been raised in seven cases out of Arizona, Indiana, Louisiana (two cases), Mississippi, Texas, and Virginia: Complaint for Declaratory and Injunctive Relief at 9, Planned Parenthood of Ariz., Inc. v. Brnovich, No. 4:19-cv-00207-JGZ (D. Ariz. Apr. 11, 2019); Complaint at 39, Whole Woman's Health All. v. Hill, 388 F. Supp. 3d 1010 (S.D. Ind. 2019) (No. 1:18-cv-1904); Complaint, June Med. Servs., L.L.C. v. Gee, No. 3:17-cv-00404, 2017 WL 2794298, (M.D. La. 2017); Amended Complaint, June Med. Servs., L.L.C. v. Gee, No. 17-00404, 2018 WL 3708150 (M.D. La. 2018); Amended Complaint, Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536 (S.D. Miss. 2018) (No. 18-171); Complaint, Whole Woman's Health All. v. Paxton, No. 1:18-cv-00500, 2018 WL 3121180 (W.D. Tex. 2018); Complaint, Falls Church Med. Ctr., LLC v. Oliver, 346 F. Supp. 3d 816 (E.D. Va. 2018) (No. 3:18-cv-428) (dismissed on September 26, 2018, in *Falls Church Med. Ctr., LLC v. Oliver*, 346 F. Supp. 3d 816 (E.D. Va. 2018)).

319. *See* RACHEL N. MORRISON, AMS. UNITED FOR LIFE, LIFE LITIGATION REPORT—SEPTEMBER 2019 (2019), https://aul.org/wpcontent/uploads/2019/10/AUL_Life_Litigation_Report_September_ 2019. pdf (compiling over thirty cases pending in the courts challenging state health and safety abortion regulations).

320. *See, e.g.*, Planned Parenthood of Ind. & Ky. v. Box, 2019 U.S. App. LEXIS 32553 (7th Cir. 2019) (Easterbrook, J., concurring in denial of petition for rehearing and rehearing en banc filed by defendants-appellants) ("Talk is cheap, which makes it easy for the plaintiffs in a pre-enforcement suit to predict the worst and demand that an injunction issue before the disaster comes to pass. If the judge issues the injunction, the prediction cannot be tested—unless by chance a similar rule in some other state is not enjoined, and then the judiciary can learn by that experience. Unless a baleful outcome is either highly likely or ruinous even if less likely, a federal court should allow a state law (on the subject of abortion or anything else) to go into force; otherwise the prediction cannot be evaluated properly. And principles of federalism should allow the states that much leeway. Talk of the states as laboratories is hollow if federal courts enjoin experiments before the results are in." (citation omitted)); Okpalobi v. Foster, 244 F.3d 405, 410 (5th Cir. 2001) (en banc) (health and safety regulation will "force physicians in Louisiana to cease providing abortion services to women"). These doomsday predictions are also present in cases involving funding regulations, such as in the litigation involving a new Title X rule. *See, e.g.*, California v. Azar, 927 F.3d 1068, 1079–80 (9th Cir. 2019), *reh'g en banc granted*, 927 F.3d 1045 (9th Cir. 2019); Mayor of Balt. v. Azar, 778 F. App'x 212, 214 (4th Cir. 2019) (Thacker, J., dissenting); Family Planning Ass'n of Me. v. U.S. Dep't of Health & Human Servs., 404 F. Supp. 3d 286, 290, 301 (D. Me. 2019).

abortion clinics remain open and doctors continue to provide abortions, even when the regulations do go into effect.[321]

Not only do abortion clinics and doctors fight against common-sense health and safety regulations, but they fail to follow existing and legally enforceable health and safety regulations. There have been documented, persistent health and safety problems in abortion clinics across the country. For example, the 2018 report by Americans United for Life, *Unsafe: America's Abortion Industry Endangers Women*, documents over 1,400 health and safety deficiency citations at 227 facilities in thirty-two states between 2008 and 2016.[322] Violations include the failure to ensure a safe and sanitary environment, and failure to accurately document patient records and keep patient medical information confidential. Facilities were also cited for allowing unlicensed, unqualified, or untrained staff to provide patient care, and having expired medications and medical supplies.[323] The chaos in the clinics has been regular and unremitting.[324] There is a long record of scandals in abortion clinics across the country,[325] including a long-line of notorious providers, including Brian Finkel, Krishna Rajanna, John Biskind,[326] Kermit Gosnell, Steven Chase Brigham, and Ulrich Klopfer, to name just a few.[327] Early on, there was the problem of late term abortions resulting in live births,[328] and most recently, after abortion doctor Ulrich Klopfer's death, there were 2,246 medically preserved fetal remains from abortions he performed discovered on his Illinois property.[329]

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321. *See, e.g.*, LA. STAT. ANN. § 9:2800.12 (2019) (Act 825 currently in effect); *see also Okpalobi*, 244 F.3d at 410 (claiming that if Act 825 goes into effect, it will "eliminate abortions in Louisiana").

322. *See generally* AMS. UNITED FOR LIFE, UNSAFE: AMERICA'S ABORTION INDUSTRY ENDANGERS WOMEN (2018), https://aul.org/wp-content/uploads/2018/10/AUL-Unsafe-2018-Final-Proof.pdf.

323. *Id*.

324. Forsythe & Kehr, *supra* note 314, at 65–70 (citing the long history of clinic scandals and squalid conditions); Paige Comstock Cunningham & Clarke D. Forsythe, *Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion*, *in* ABORTION, MEDICINE, AND THE LAW 100, 131–34 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992) (detailing clinic scandals from the 1970s and 1980s).

325. Forsythe & Kehr, *supra* note 314, at 65–70.

326. Forsythe & Presser, *supra* note 245, at 2, 28; Sarah Terzo, *Kansas Clinic Operated Under Horrific Conditions; Planned Parenthood Ignored Complaints*, LIVE ACTION (Dec. 6, 2014), https://www.liveaction.org/news/the-kansas-clinic-that-operated-under-horrific-conditions-planned-parenthood-ignores-complaints/; Forsythe & Kehr, *supra* note 314, at 66 n.107 (citing 1998 death of Louann Herron and February 1995 death of another woman after an abortion by Biskind).

327. Forsythe & Kehr, *supra* note 314, at 65–70 (citing incidents).

328. *See* Floyd v. Anders, 440 F. Supp. 535 (D.S.C. 1977) (state criminal prosecution of doctor for death of twenty-five-week-old "fetus" born alive after abortion), *vacated and remanded per curiam*, Anders v. Floyd, 440 U.S. 445 (1979).

329. *See Fetal Remains Discovered in Unincorporated Will County*, WILL COUNTY SHERIFF OFFICE PRESS RELEASE (Sept. 13, 2019), http://www.willcosheriff.org/pressreleases/?title=fetal-remains-

Abortion doctors and clinics often challenge health and safety regulations, such as requirements that abortion doctors have safeguards in place to smoothly transfer a patient who suffers complications from an abortion procedure to a local hospital, and even that a doctor should be the one performing the abortion procedure in the first place. For example, a legal challenge against Louisiana's law requiring doctors have admitting privileges at a local hospital was brought against a backdrop of serious health and safety violations by Louisiana abortion clinics and professional disciplinary actions and substandard medical care by Louisiana abortion doctors.[330]

In recent years, the number of abortion clinics in several states has been reduced to one.[331] The last abortion clinic in states has gotten special

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discovered-in-unincorporated&more=1; *see also* Vic Ryckaert, *What We Know: 2,411 Fetal Remains Found in Possession of Ex-Indiana Abortion Doctor*, INDIANAPOLIS STAR (Sept. 16, 2019), https://indystar.com/story/news/crime/2019/09/16/fetal-remains-found-illinois-home-ex-indiana-abortion-doctor/2339342001/; *2,246 Fetal Remains Found on Property of Abortion Doctor Who Recently Died*, FOX CHICAGO (Sept. 13, 2019), https:www.fox32chicago.com/news/2246-fetal-remains-found-on-property-of-abortion-doctor-who-recently-died; Mike Pence (@VP), TWITTER (Sept. 16, 2019, 3:09 PM), https://twitter.com/VP/status/1173720470706892801?s=20 ("The horrific discovery of 2,246 fetal remains in abortionist Dr. Klopfer's Illinois home is appalling & should shock the conscience of every American. While I was Governor of Indiana we took his medical license away & passed a law requiring fetal remains be treated with dignity." "His actions should be fully & thoroughly investigated, the remains of the unborn must be treated with dignity & respect & this abortionists [sic] defenders should be ashamed. We will always stand for the unborn."); Niki Kelly, *State Yanks Doctor's License*, J. GAZETTE (Aug. 26, 2016), http://www.journalgazette.net/news/local/state-yanks-doctor-s-license; Amanda Gray, *Women's Pavilion to Close March 18, Ending 38 Years of Controversy*, SOUTH BEND TRIB. (Mar. 12, 2016), https://www.southbendtribune.com/news/local/women-s-pavilion-to-close-march-ending-years-of-controversy/article_06d287c2-b2c3-59b9-b6be-2c00bc295dbf.html; Derrick Bryson Taylor, *More Than 2,200 Preserved Fetuses Found at Property of Dead Doctor, Officials Say*, N.Y. TIMES (Sept. 14, 2019), https://www.nytimes.com/2019/09/14/us/dr-ulrich-klopfer-fetal-remains.html; David Mastio, *Abortionist Ulrich Klopfer Kept Thousands of Dead Babies but Inspires Little Curiosity*, USA TODAY (Sept. 18, 2019), https://www.usatoday.com/story/opinion/2019/09/18/ulrich-klopfer-abortion-gosnell-buttigieg-fetal-remains-illinois-indiana-column/2355359001/ ("How does a doctor amass enough dead bodies in his garage to do a passable imitation of a World War II mass grave? . . . How does a story this sensational . . . not get more than cursory attention from the national news media?"); *cf.* Thomas J. Molony, *Can the State Proclaim Life After Death?* Hellerstedt *and Regulating the Disposition of Fetal Remains*, 70 FLA. L. REV. 1047 (2018). *See generally* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019) (allowing Indiana fetal remains law to go into effect).

330. *See* June Med. Servs., L.L.C. v. Gee, 905 F.3d 787, 790–92 (5th Cir. 2018), *reh'g en banc denied*, 913 F.3d 573 (5th Cir. 2019), *cert. granted*, 140 S. Ct. 35 (2019); *see also* Brief for Americans United for Life as Amicus Curiae Supporting Cross-Petitioner, *supra* note 287, at *5–*24 (detailing the long history of health and safety violations by Louisiana abortion clinics and professional disciplinary actions and substandard medical care by Louisiana abortion doctors); Brief for Americans United for Life as Amicus Curiae Supporting Respondent & Cross-Petitioner, Gee v. June Med. Servs., L.L.C., 140 S. Ct. 35 (2019) (Nos. 18-1323 & 18-1460).

331. Holly Yan, *These 6 States Have Only 1 Abortion Clinic Left. Missouri Could Become the First with Zero*, CNN (June 21, 2019), https://www.cnn.com/2019/05/29/health/six-states-with-1-abortion-clinic-map-trnd/index.html.

privileges.[332] Access to abortion is exalted over safety conditions and qualified providers.[333]

The Court has also added to the hurdles that states face by introducing legal changes that do not apply in other areas of law or medicine. The Court has authorized easy facial challenges in abortion cases, which allows abortion clinics to challenge regulations wholesale without a rigorous factual examination and lifts the responsibility of judges to look carefully at how a regulation applies in specific situations. *Hellerstedt* is example number one.[334]

I. Roe *Made the Court an Intense Political Target*

In *Roe*, the Court nationalized the abortion issue, centralizing control of the abortion issue in the Justices. Unsurprisingly, this has made the Court an intense political target. As Justice O'Connor wrote in *City of Akron*,[335] "when we are concerned with extremely sensitive issues, such as the one involved here [abortion], 'the appropriate forum for their resolution in a democracy is the legislature.'"[336] Scholars have noted this problem for decades.[337]

No single issue other than *Roe* provokes such intense opposition to nominees. Starting with the nomination of Judge Robert Bork to the Supreme Court in 1987, it became clear that abortion advocates were willing to mount a campaign of personal destruction against any Supreme Court nominee who would not promise to reaffirm *Roe*. The opposition campaigns have grown in intensity ever since.

During Justice Brett Kavanaugh's confirmation process, it was clear that protecting *Roe* was a major motivating factor for opposition groups.[338] *Roe*

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332. *See, e.g.*, Jamie Ducharme & Tara Law, *Missouri's Last Abortion Clinic Won't Close at Midnight, Judge Rules*, TIME (May 31, 2019), https://time.com/5597728/planned-parenthood-missouri-hearing/ (explaining that a Missouri judge gave the last abortion clinic in Missouri special treatment when it allowed the clinic to stay open without a license).

333. *See generally* Randy Beck, *Prioritizing Abortion Access Over Abortion Safety in Pennsylvania*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 33 (2013); Forsythe & Kehr, *supra* note 314.

334. *See* discussion *supra* Part II.E.2 and Part II.E.4.

335. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).

336. *Id*. at 465 (O'Connor, J., dissenting) (quoting Mo., K. & T. Ry. Co. v. May, 194 U.S. 267, 270 (1904) (Holmes, J., majority opinion)).

337. Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245, 255, 258 (2001); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 871–81 (1999).

338. *See Brit Hume on Calls for Brett Kavanaugh's Impeachment*, FOX NEWS (Sept. 16, 2019), https://video.foxnews.com/v/6086857036001#sp=show-clips (stating that the ultimate motivation for attack on Justice Kavanaugh in 2018 and again in September 2019 was preserving *Roe v. Wade*).

was a motivating factor that induced Christine Blasey Ford to make her allegations, as her attorney Debra Katz disclosed to a conference at the University of Baltimore in May 2019:

> In the aftermath of these hearings, I believe that Christine's testimony brought about more good than the harm misogynist Republicans caused by allowing Kavanaugh on the Court . . . . [H]e will always have an asterisk next to his name. When he takes a scalpel to *Roe v. Wade*, we will know who he is, we know his character, and we know what motivates him, and that is important; it is important that we know, and that is part of what motivated Christine.[339]

Almost a year after Justice Kavanaugh's confirmation, uncorroborated allegations were again publicized in the *New York Times*,[340] sparking an intense reaction in September 2019 from Senate Majority Leader Mitch McConnell and from Senator Charles Grassley, who was chairman of the Senate Judiciary Committee at the time of Justice Kavanaugh's hearings.[341]

Allegations like these are intended to damage the reputation of the nominee, and do so, even if the nominee is confirmed. This in turn damages the reputation and institution of the Court. The Court can only avoid this political controversy by decentralizing the abortion issue and returning it to the states where it constitutionally belongs.

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339. RYAN LOVELACE, SEARCH AND DESTROY: INSIDE THE CAMPAIGN AGAINST BRETT KAVANAUGH 143 (2019); Gregg Re, *Kavanaugh Accuser's Lawyer Said Allegations Could Help Undermine Abortion Rulings: "Part of What Motivated Christine"*, FOX NEWS (Sept. 4, 2019), https://www.foxnews.com/politics/christine-blasey-ford-attorney-says-she-came-forward-to-get-asterisk-on-kavanaughs-name-ahead-of-abortion-rulings; Mary Margaret Olohan, *Exclusive: Video Shows Anti-Kavanaugh Lawyer Saying Christine Blasey Ford Wanted "Asterisk" by Justice's Name*, DAILY CALLER (Sept. 4, 2019), https://dailycaller.com/2019/09/04/christine-ford-abortion-kavanaugh.

340. Robin Pogrebin & Kate Kelly, *Brett Kavanaugh Fit In With the Privileged Kids. She Did Not.*, N.Y. TIMES (Sept. 14, 2019), https://www.nytimes.com/2019/09/14/sunday-review/brett-kavanaugh-deborah-ramirez-yale.html?searchResultPosition=8 (Editors' Note of September 15, 2019):

> An earlier version of this article, which was adapted from a forthcoming book, did not include one element of the book's account regarding an assertion by a Yale classmate that friends of Brett Kavanaugh pushed his penis into the hand of a female student at a drunken dorm party. The book reports that the female student declined to be interviewed and friends say that she does not recall the incident. That information has been added to the article.

Id.

341. *Majority Leader McConnell on Justice Kavanaugh Allegation*, C-SPAN (Sept. 16, 2019), https://www.c-span.org/video/?464306-2/majority-leader-mcconnell-justice-kavanaugh-allegation; *Senator Grassley on Justice Kavanaugh Allegation*, C-SPAN (Sept. 16, 2019), https://www.c-span.org/video/?464306-4/senator-grassley-justice-kavanaugh-allegation.

CONCLUSION

The unworkability of *Roe* is caused by numerous factors, including the unfulfilled, unprecedented, national role the Court adopted for itself in managing a medical procedure; the lack of any reliable and comprehensive national system of abortion data reporting, collection, and analysis, both at the time of *Roe* and today; false assumptions about abortion safety and expected acceptance within the medical community, assumptions that have been overtaken by advances in the medical and legal understanding about developing human life; a sweeping legal rule that clashes with medical data and public opinion, and is extreme even by international standards; a standard of review that is constantly in flux and creates substantial confusion among lower court judges; inadequate tools by the Court and the ability of states to manage and oversee abortion clinics; and centralization and control of the abortion issue, making the Court an unusual target for extreme political attacks.

Unlike Justice Breyer's assessment of *Hall*, *Roe* is not a well-reasoned decision and it has caused "serious practical problems . . . since [the Court] decided it."[342] It "def[ies] practical workability," and should be overruled.[343] The unworkability of *Roe* is one of many reasons that *Roe* is unsettled, and persistent adherence to unsettled decisions undermines, rather than promotes, the goals of stare decisis—predictability, consistency, stability, and reliance. As Justice Thomas has said, the Court created the abortion mess, and "it is [the Court's] job to fix it."[344] The Court has tried and failed to fix the problems of *Roe* by modifying the underlying legal rule. It is time for the Court to release its grip on the abortion issue by overruling *Roe* and returning the issue to the states.

342. Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting).

343. *Id.* (alteration in original).

344. Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting).