LOWER COURT "DISSENT" FROM *ROE* AND *CASEY*

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I. INTRODUCTION

There has been much recent speculation[1] about the fate of *Roe v. Wade*[2] and *Planned Parenthood v. Casey*.[3] Supporters of *Roe* and *Casey* contend that the decisions are "settled law" that the Supreme Court should not overrule.[4] But, in reality, *Roe* and *Casey* are not settled, as the frequent and varied opposition to these decisions reflects. One intriguing source of opposition has been from lower court judges. While still following these precedents, an increasing number of these judges have expressed disagreement with the Court's decisions.[5] This paper examines these lower court opinions, which may serve to make the overruling of *Roe* and *Casey* more likely.

II. *ROE* AND *CASEY* AND STARE DECISIS

With the changing composition of the United States Supreme Court, there has been increasing speculation about the fate of *Roe* and *Casey*.[6] Many think

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1. *See, e.g.*, Josh Gerstein, *Will the Supreme Court Take up a* Roe v. Wade *Showdown in 2020?*, POLITICO, (May 22, 2019), https://www.politico.com/story/2019/05/22/supreme-court-roe-vs-wade-2020-1340075.

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

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

4. In a recent column, Megan McArdle stated: "Supporters of abortion rights are fond of saying that *Roe v. Wade* is 'settled law.' The phrase is supposed to convey a finality that borders on irrevocability." *See* Megan McArdle, Opinion, *The Supreme Court Should Have Never Intervened on Abortion*, WASH. POST (May 16, 2019), https://www.washingtonpost.com/opinions/2019/05/16/supreme-court-should-have-never-intervened-abortion/.

5. *See* Greg Land, *11th Circuit Abortion Ruling Ramps Up Lower Court Attacks on 'Roe v. Wade,'* LAW.COM DAILY REPORT (Aug. 24, 2018), https://www.law.com/dailyreportonline/2018/08/11th-circuit-abortion-ruling-ramps-up-lower-court-attacks-on-roe-v-wade/.

6. *E.g.*, Scott Lemieux, *Yes, Roe Really is in Trouble*, VOX (May 15, 2019), https://www.vox.com/2019/5/15/18623073/roe-wade-abortion-georgia-alabama-supreme-court.

that the new conservative majority will overrule *Roe* and *Casey*.[7] A number of state legislatures are acting on this assumption and have passed laws that are clearly unconstitutional under current law but that, these legislatures believe, the new Supreme Court will uphold.[8]

But the Court is hard to predict. At the time of *Casey* in 1992, it appeared the Court was poised to overrule *Roe*.[9] Apparently, the Court voted to do just that, but Justice Kennedy changed his vote[10] and *Roe* (in a modified form) was preserved.[11]

Roe and *Casey* have remained in place and, at least in confirmation battles, are treated as "settled law."[12] During their confirmation hearings, nominees to the Court are expected to promise that they will respect Supreme Court precedent.[13] But it is not at all clear what that means.

There has been much attention to the extent to which *Roe* and *Casey* are insulated from reversal by the doctrine of stare decisis.[14] This is particularly

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7. *See, e.g., id.*; Jeffrey Toobin, *The Abortion Fight and the Pretense of Precedent*, NEW YORKER (May 19, 2019), https://www.newyorker.com/magazine/2019/05/27/the-abortion-fight-and-the-pretense-of-precedent.

8. In commenting on newly enacted pro-life legislation, Jeffrey Toobin asserted: "The supporters of these statutes recognize that they violate existing Supreme Court precedent—and that's the point. Legislators passed them on the assumption that, when they come before the current Court, the two Trump appointees, plus Chief Justice Roberts, and Associate Justices Clarence Thomas and Samuel Alito, will use the case to vanquish *Roe* once and for all." Toobin, *supra* note 7 at 19–20 (italics added).

9. *See* Richard S. Myers, *Reflections on the Twentieth Anniversary of* Planned Parenthood v. Casey, *in* LIFE & LEARNING XXII: THE PROCEEDINGS OF THE TWENTY-SECOND UNIVERSITY FACULTY FOR LIFE CONFERENCE 53, 57 (Joseph W. Koterski ed., 2018).

10. *Id.* at 57.

11. *See id.* at 57, 60–62. *Casey* modified certain elements of the *Roe* framework. Some argue that *Casey* drastically narrowed the right to an abortion but that reading is not very persuasive. Under *Casey's* undue burden approach, states may regulate but not actually prohibit abortions. *Id.* at 60–62.

12. *See* Garrett Epps, Opinion, *Kavanaugh's Unsettling Use of "Settled Law,"* ATLANTIC (Sept. 3, 2018), https://www.theatlantic.com/ideas/archive/2018/09/kavanaughs-unsettling-use-of-settled-law/569212.

13. *See* Nancy Northup, *"Settled Law" is Not Enough to Protect* Roe v. Wade, THE HILL (Sept. 4, 2018), https://thehill.com/opinion/judiciary/404934-settled-law-is-not-enough-to-protect-roe-v-wade. This does not only apply to abortion. As Professors Barnett and Blackman noted, "less than a year after then-judge Sotomayor testified that *Heller* was 'settled law,' she voted in *McDonald* to jettison the precedent." Randy Barnett & Josh Blackman, *The Next Justices*, WKLY. STANDARD (Sept. 14, 2015), https://www.washingtonexaminer.com/weekly-standard/the-next-justices; *see also* Josh Blackman, *Originalism and Stare Decisis in the Lower Courts* 4 (July 22, 2019) (footnotes omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424348 ("Nominees across the spectrum give the same evasive answers. Yet, shibboleths like 'settled law' and 'super-duper precedents' are meaningless.").

14. *See* Northup, *supra* note 13.

true because *Casey* discoursed on stare decisis at length[15] and viewed *Roe* as having "rare precedential force." [16]

Most observers, though, believe that stare decisis will have little impact on the Court's approach to this issue.[17] This assessment has been reinforced by the Court's recent decision in *Franchise Tax Board v. Hyatt*.[18] In *Hyatt*, the Court (by a 5-4 majority) almost casually overruled *Nevada v. Hall*.[19] The Court did so without so much as mentioning *Casey* and its discussion of stare decisis. That overruling led Justice Breyer to state—"Today's decision can only cause one to wonder which cases the Court will overrule next."[20] Many observers viewed Justice Breyer's comment as a warning that *Roe* is in danger of being overruled.[21]

This speculation was reinforced the next month when the Court decided *Knick v. Township of Scott*.[22] In *Knick*, the same 5-4 majority overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[23] The dissent argued that the majority did not have a special justification for overruling and that the majority was changing course simply because five Justices disagreed with *Williamson County*. Justice Kagan ended her dissent with this paragraph:

> Just last month, when the Court overturned another longstanding precedent, Justice Breyer penned a dissent. He wrote of the dangers of reversing course "only because five Members of a later Court" decide that an earlier ruling was incorrect. He concluded: "Today's decision can only cause one to

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15. Myers, *supra* note 9, at 59.

16. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 867 (1992). For commentary on *Casey's* discussion of stare decisis, see Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 18–31 (1992); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L. J. 1535, 1537, 1543–67 (2000); *see also* Myers, *supra* note 9, at 65–68.

17. *See* Epps, *supra* note 12.

18. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019).

19. *Id*. at 1490; Nevada v. Hall, 440 U.S. 410 (1979).

20. *Hyatt*, 139 S. Ct. at 1506 (Breyer, J., dissenting).

21. *See, e.g.*, Mark Joseph Stern, *The Supreme Court's Liberals Are Warning Us That* Roe v. Wade *Is in Mortal Danger*, SLATE (May 13, 2019), https://slate.com/news-and-politics/2019/05/stephen-breyer-hyatt-dissent-roe-v-wade-kavanaugh-supreme-court.html.

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

23. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), *overruled by Knick*, 139 S. Ct. 2162. In *Williamson County*, the Court "held that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law." *Knick*, 139 S. Ct. at 2167.

> wonder which cases the Court will overrule next." Well, [Justice Kagan continued] that didn't take long. Now one may wonder yet again.[24]

I think the view that stare decisis will have little impact on the Court's evaluation of whether to overrule *Roe* and *Casey* is correct. There are many reasons why stare decisis is likely not to have much influence in this context. The principal reason is that the Court does not really adhere to a stare decisis norm. Professor Schauer recently stated:

> [F]or the Supreme Court of the United States, with its small and self-selected docket heavily populated by issues of high moral and political valence, there does not appear to be in place a stare decisis norm—a norm pursuant to which most of the Justices most of the time would feel compelled by internal belief or external pressure actually to adhere to past decisions even when those Justices believed those decisions to be mistaken.[25]

Professor Schauer went on to state that:

> [S]tare decisis will serve almost entirely as a rhetorical weapon against opponents of what the wielder of the weapon believes to be the right result, questions of stare decisis aside. Stare decisis will continue not to constrain, and accusations of failure to adhere to stare decisis will continue to be part of the rhetorical arsenal of those who agree with a past decision and lament its overturning. So it has been in the past, and so it is likely to continue in the future.[26]

Even if one thought that there was a stare decisis norm that the Court followed (as a presumptive rule), there are particularly strong reasons not to adhere to past precedents in this context. Beyond the fact that *Roe* and *Casey* were wrongly decided, the interests in overruling seem to be particularly

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24. *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting) (quoting *Hyatt*, 139 S. Ct. at 1506 (Breyer, J., dissenting)). After *Knick*, one observer said that "the elephant in the room . . . is *Roe v. Wade*[.]" Kimberly Robinson & Greg Stohr, *Kavanaugh Key Vote as Justices Overturn Property Rights Case*, BLOOMBERG LAW (June 21, 2019, 4:04 PM), https://news.bloomberglaw.com/us-law-week/kavanaugh-key-vote-as-justices-overturn-property-precedent (quoting Jim Burling of the Pacific Legal Foundation). In a later story, Greg Stohr stated: "The U.S. Supreme Court's conservative majority may be ready to overturn a longstanding precedent for the third time in recent weeks—perhaps foreshadowing the vulnerability of its rulings on abortion rights." Greg Stohr, *Supreme Court's Conservative Justices Weigh Scrapping Another Precedent*, BLOOMBERG (June 26, 2019), https://www.bloomberg.com/news/articles/2019-06-26/supreme-court-conservatives-weigh-scrapping-another-precedent.

25. Frederick Schauer, *Stare Decisis: Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 142.

26. *Id.* at 143.

compelling. *Roe* and *Casey* prevent states from "protecting those who will be citizens if their lives are not ended in the womb."[27]

> If this judgment, i.e., that the state does not have a compelling interest in protecting human life, were regarded as incorrect, it is difficult to imagine how the Court would be justified in not abandoning error. Although the values furthered by stare decisis, . . . are surely important, any such interests pale in comparison to the interests on the other side.[28]

Moreover, *Roe* and *Casey* are not, in fact, settled law. A deeply divided Court has reaffirmed *Roe* (or at least portions of *Roe*[29]) and *Casey*, but the decisions have been called into question and regularly challenged in various venues for many years.

Roe and *Casey* have, of course, been challenged by Justices on the Supreme Court. Justices White and Rehnquist dissented in 1973.[30] It is often remarked that the dissenting opinions were inadequate,[31] although the dissents did make some effective points. For example, Justice White's critique of the Court's judicial activism is often quoted. Justice White noted, "As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."[32] But on the whole, the dissents were weak.[33] More recent dissents by Justice Scalia in

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27. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting).

28. Richard S. Myers, *The End of Substantive Due Process?*, 45 WASH. & LEE L. REV. 577, 599 (1988); *see* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1029 (2003).

29. As the dissenting opinions in *Casey* explained, the Court (despite invoking stare decisis) actually altered key features of *Roe v. Wade*. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 953–66 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 993–94 (Scalia, J., concurring in the judgment in part and dissenting in part).

30. Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting).

31. John Hart Ely stated in 1973: "[w]ere the dissents adequate, this comment would be unnecessary. But each is so brief as to signal no particular conviction that *Roe* represents an important, or unusually dangerous, constitutional development." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 920 n.3 (1973). Paulsen has also noted the weaknesses in the dissents. Paulsen, *supra* note 28, at 1022.

32. *Doe*, 410 U.S. at 222 (White, J., dissenting).

33. Richard S. Myers, *Re-reading* Roe v. Wade, 71 WASH. & LEE L. REV. 1025, 1037–38 (2014) (noting the weaknesses of the dissents).

Casey[34] and *Stenberg*[35] and by Justice Thomas in *Stenberg*[36] have been much more effective.

Roe and *Casey* have also been challenged in the scholarly literature.[37] Early critiques by John Hart Ely and Richard Epstein, for example, are still quite powerful.[38] And there have been many other, more recent critiques.[39] And, perhaps most interestingly, no one defends the Court's opinion in *Roe*. As Professor Paulsen has observed: "I know of no serious scholar, judge, or lawyer who attempts to defend *Roe's* analysis on textual or historical grounds."[40] Many scholars, Paulsen has noted, support the result in *Roe*, but most scholarly efforts try to rewrite the opinion to find alternative justifications for an unrestricted right to abortion.[41]

Roe and *Casey* have also been challenged by Congress and by state legislatures, as we have seen increasingly in recent years.[42] Laws such as the federal Unborn Victims of Violence Act (and their state counterparts) challenge the premises of *Roe*, even though they are written to avoid a direct clash with *Roe*.[43] Moreover, states have been increasingly aggressive in passing laws that challenge the framework of *Roe* and *Casey*.[44] Alabama's decision to prohibit most abortions is the most recent and far reaching example.[45]

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34. *See Casey*, 505 U.S. at 979–1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

35. Stenberg v. Carhart, 530 U.S. 914, 953–56 (2000) (Scalia, J., dissenting).

36. *Id*. at 980–1020 (Thomas, J., dissenting).

37. *See, e.g.*, Myers, *supra* note 33; *see also* Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 GEO. J.L. PUB. POL'Y 445 (2018) (citing critical commentary).

38. *See* Ely, *supra* note 31; Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973).

39. *See, e.g*., Paulsen, *supra* note 28.

40. *Id.* at 1007.

41. *Id.* at 1008–11; *see also* Richard S. Myers, *A Comment on "The Constitutional Law and Politics of Reproductive Rights," in* LIFE & LEARNING XX: THE PROCEEDINGS OF THE TWENTIETH UNIVERSITY FACULTY FOR LIFE CONFERENCE 105, 109–10 (Joseph W. Koterski ed., 2017).

42. Forsythe, *supra* note 37, at 484–85.

43. *See Key Facts on the Unborn Victims of Violence Act*, NAT'L RIGHT TO LIFE (Apr. 1, 2004), https://www.nrlc.org/federal/unbornvictims/keypointsuvva/.

44. Forsythe, *supra* note 37, at 484–85.

45. *See* Rachel Sandler, *Here's How Alabama's New Abortion Law Will Set Up a Challenge to* Roe v. Wade, FORBES (May 16, 2019), https://www.forbes.com/sites/rachelsandler/2019/05.15/alabama-law-would-set-stage-for-roe-v-wade-challenge/#5dfd0b128ee. The Alabama law has been challenged in court. The state has conceded that portions of the new law are inconsistent with Supreme Court precedent, but the state believes that the case will provide a vehicle to overturn *Roe* and *Casey*. *See* Mary Anne Pazanowski, *Alabama Fights for Abortion Ban While Recognizing Current Law (1)*, BLOOMBERG LAW NEWS (Aug. 6, 2019), https://news.bloomberglaw.com/us-law-week/alabama-fights-for-abortion-ban-while-acknowledg

Roe and *Casey* have also been challenged in the broader culture. Clarke Forsythe has demonstrated that the Court's decisions are inconsistent with public opinion.[46] According to Forsythe,

> [w]hat makes abortion uniquely controversial is that the Justices sided with a small sect—7 percent of Americans—who support abortion for any reason at any time. And the Justices have for forty years prevented the 60–70 percent of Americans in the middle from deciding differently. That conflict between public opinion and the Supreme Court's nationwide policy is one key reason why *Roe* is uniquely controversial.[47]

And this controversy is likely to continue since recent opinion polls demonstrate increasing pro-life sentiment.[48]

An intriguing instance of opposition to *Roe* and *Casey* has been among lower court judges. This is a bit surprising since most think that vertical stare decisis is a very strong norm.[49] It is not uncommon for lower court judges to express disagreement with decisions of superior courts,[50] but in this context the nature of the "dissent" seems out of the ordinary. Linda Greenhouse made this point in a column discussing the court cases that potentially threaten the right to abortion. In commenting on lower court opinions that reflect disagreement with *Roe* and *Casey*, Greenhouse stated: "I've seen a lot in decades of paying close attention to decisions coming out of the federal appeals courts, but I can't remember seeing such expressions of outright

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ing-current-law?utm_source=rss&utm_medium=LWNW&utm_campaign=0000016c-66d3-d689-a97f-6ed7dc5a0001.

46. CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 289–309 (2013).

47. *Id*. at 296.

48. Dave Andrusko, *Latest Gallup Poll Shows Strong Increases in Pro-life Sentiment*, NRL NEWS TODAY (June 25, 2019), https://www.nationalrighttolifenews.org/2019/06/latest-gallup-poll-shows-strong-increases-in-pro-life-sentiment/; Michael J. New, *New Gallup Poll Shows Pro-Life Progress*, CORNER (July 2, 2019, 10:53 AM), https://www.nationalreview.com/corner/new-gallup-poll-shows-pro-life-progress/.

49. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 923–24 (2016). These opinions by lower court judges are, in fact, adhering to stare decisis. They are following the Court's decisions despite the judges' disagreement with the cases. Some do not think that lower court judges ought to adhere to stare decisis. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1597 n.169 (2000). But the lower court opinions discussed in this paper are not examples of that sort of dissent. Rather, these opinions are expressing disagreement (sometimes in very strong terms) while still adhering to the cases they believe are wrongly decided.

50. For scholarly discussions of lower court judges expressing disagreement with Supreme Court decisions, see Brannon P. Denning, *Can Judges Be Uncivilly Obedient*, 60 WM. & MARY L. REV. 1 (2018), and Re, *supra* note 49.

contempt for the Supreme Court."[51] I think Greenhouse is correct about this, and, moreover, I think this lower court dissent may prove (at least somewhat) important when the Court considers whether to retain *Roe* and *Casey*, which it is likely to do in its next Term. These lower court "dissents" serve to destabilize *Roe* and *Casey* to some degree and make it somewhat more likely that the Court will modify or overrule *Roe* and *Casey*.[52]

III. LOWER COURT "DISSENT"

This section explores these lower court "dissents" from *Roe* and *Casey*. To some extent, the lower court "dissents" mirror other criticism of *Roe* and *Casey*.

One major criticism of *Roe* has long been that the Court created a right that is not expressly protected in the Constitution.[53] Justice Thomas made this point in his important opinion in *Box v. Planned Parenthood*.[54]

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51. Linda Greenhouse, Opinion, *The Flood of Court Cases That Threaten Abortion*, N.Y. TIMES (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/opinion/abortion-supreme-court.html.

52. A recent example of the sort of dynamic that may happen with respect to the Court's abortion cases is the Court's discussion of the continuing validity of the *Lemon* test. In *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067 (2019), the Court considered the continuing validity of the *Lemon* test to resolve Establishment Clause cases. In criticizing *Lemon* and deciding not to use the *Lemon* test to resolve *American Legion*, the plurality opinion by Justice Alito noted lower court critiques of *Lemon*. *Id.* at 2081 (Alito, J., plurality).

53. As Professor Ely commented:

> What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. . . . At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.

Ely, *supra* note 31, at 935–37.

54. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782–93 (2019) (Thomas, J., concurring). In *Box*, the Court upheld the constitutionality of Indiana's law requiring the humane disposal of fetal remains, and also declined to review the Seventh Circuit's decision invalidating a provision of Indiana law that prohibited abortions motivated solely by the race, sex, or disability of the fetus. *Id.* at 1782. The Court explained that the Seventh Circuit (which had invalidated the Indiana law prohibiting abortions due to the race, sex, or disability of the unborn child) was the first federal court of appeals to review such a law. *Id.* Accordingly, the Court explained that it would "follow [its] ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Id*.

Justice Thomas concurred and wrote a lengthy opinion exploring Indiana's "compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Id.* at 1783 (Thomas, J., concurring). Justice Thomas emphasized that:

> [the] decision to allow further percolation should not be interpreted as agreement with the decisions below. Enshrining a constitutional right to an abortion based solely on the race, sex, or disability of an unborn child, as Planned Parenthood advocates, would constitutionalize the views of the 20th-century eugenics movement. In other contexts, the Court has been zealous in

He stated:

> Although the Court declines to wade into these issues today, we cannot avoid them forever. 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.[55]

This same criticism (that the Court has wrongly protected a right that is not in the Constitution) has been made by lower court judges. For example, Judge Manion's opinion in *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner*,[56] made it clear that he did not agree with *Roe* and *Casey*.[57] In fact, he explicitly stated that he "continue[s] to agree with the dissenting justices in *Roe* and *Casey*."[58] Judge Manion's wide-ranging critique included numerous objections to the judicial activism that characterizes the Court's decisions in this area. He agreed with the majority that Indiana's Sex Selective and Disability Abortion Ban was unconstitutional. He said that conclusion was "regrettable" and then noted: "[b]ut the fact remains that under the *Casey* regime, the purported right to have a pre-viability abortion is more ironclad even than rights enumerated in the Bill of Rights."[59] He also noted that the right to an abortion was "an unenumerated right judicially created just 45 years ago."[60] He further stated "[t]hat 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."[61]

> vindicating the rights of people even potentially subjected to race, sex, and disability discrimination.

Id. at 1792. Justice Thomas's opinion is important for several reasons, most notably its lengthy discussion of the eugenics aspects of abortion. *Id*. at 1783–93; *see also*, Myers, *supra* note 33, at 1033–36 (discussing eugenics and abortion). Justice Thomas's opinion has engendered much discussion. *See, e.g.*, Jason L. Riley, Opinion, *Justice Thomas on Abortion and Eugenics*, WALL ST. J. (June 4, 2019), https://www.wsj.com/articles/justice-thomas-on-abortion-and-eugenics-1159687789.

55. *Box*, 139 S. Ct. at 1793 (Thomas, J., concurring).

56. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300 (7th Cir. 2018), *rev'd in part, cert. denied in part sub nom*. Box, 139 S. Ct. at 1780.

57. *Id*. at 314 (Manion, J., concurring in the judgment in part and dissenting in part).

58. *Id*.

59. *Id*. at 310.

60. *Id*. at 312.

61. *Id*. at 313.

Judge Dubina's short special concurrence in *West Alabama Women's Center v. Williamson*[62] is similar.[63] In *West Alabama*, the Eleventh Circuit, seemingly begrudgingly, affirmed a lower court ruling invalidating Alabama's Unborn Child Protection from Dismemberment Abortion Act.[64] The majority opinion by Chief Judge Carnes began with this comment: "Some Supreme Court Justices have been of the view that there is constitutional law and then there is the aberration of constitutional law relating to abortion. If so, what we must apply here is the aberration."[65] Carnes also noted that: "In our judicial system, there is only one Supreme Court, and we are not it. As one of the 'inferior Courts,' we follow its decisions."[66] Judge Dubina's opinion stated:

> I concur fully in Chief Judge Carnes's opinion because it correctly characterizes the record in this case, and it correctly analyzes the law. I write separately to agree on record with Justice Thomas's concurring opinion in *Gonzales v. Carhart*, with whom then Justice Scalia also joined. Specifically, Justice Thomas wrote, "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." The problem I have, as noted in the Chief Judge's opinion, is that I am not on the Supreme Court, and as a federal appellate judge, I am bound by my oath to follow all of the Supreme Court's precedents, whether I agree with them or not. Therefore, I concur.[67]

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62. W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018), *cert. denied sub nom.* Harris v. W. Ala. Women's Ctr., 139 S. Ct. 2606 (2019). Justice Thomas, who concurred in the Court's denial of the petition for writ of certiorari, wrote an opinion that concluded with this paragraph:

> This case serves as a stark reminder that our abortion jurisprudence has spiraled out of control. Earlier this Term, we were confronted with lower court decisions *requiring* States to allow abortions based solely on the race, sex, or disability of the child. Today, we are confronted with decisions *requiring* States to allow abortion via live dismemberment. None of these decisions is supported by the text of the Constitution. Although this case does not present the opportunity to address our demonstrably erroneous "undue burden" standard, we cannot continue blinking the reality of what this Court has wrought.

Harris, 139 S. Ct. at 2607 (Thomas, J., concurring) (citations omitted).

63. *Williamson*, 900 F.3d at 1330 (Dubina, J., concurring specially).

64. *Id*. at 1314 (majority opinion). For commentary on the Eleventh Circuit ruling, see Daniel Jackson, *Eleventh Circuit Begrudgingly Allows Alabama Abortions*, COURTHOUSE NEWS SERV. (Aug. 23, 2018), https://www.courthousenews.com/eleventh-circuit-begrudgingly-allows-alabama-abortions/; Land, *supra* note 5.

65. *Williamson*, 900 F.3d at 1314 (footnote omitted).

66. *Id*. at 1329.

67. *Id*. at 1330 (Dubina, J., concurring specially) (citations omitted) (quoting Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring)).

In an opinion that some commentators view as questioning the validity of *Roe*,[68] Judge Ho of the Fifth Circuit expressed the view that "nothing in the text or original understanding of the Constitution prevents a state from requiring the proper burial of fetal remains,"[69] a conclusion consistent with the Court's recent ruling in *Box*.[70] In his opinion, Judge Ho also noted "the moral tragedy of abortion"[71] and then commented on the legitimacy of people of faith "believing in the sanctity of life."[72]

Another major criticism of *Roe* and *Casey* has been that the Court did not acknowledge that the state has a sufficiently valuable interest in the life of the unborn to justify prohibiting abortion.[73] The Court did conclude that states have a compelling interest in protecting the unborn after viability,[74] although the Court eviscerated that conclusion by its broad life and health exceptions.[75] The arbitrary "viability" line has been subject to much criticism by Supreme

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68. *See* Mark Joseph Stern, *Trump-Appointed Judge Bemoans the "Moral Tragedy" of Abortion, Accuses Lower Court of Anti-Christian Bias*, SLATE (July 16, 2018), https://slate.com/news-and-politics/2018/07/judge-james-ho-attacks-abortion-rights-while-accusing-a-lower-court-of-anti-christian-bias.html.

69. Whole Woman's Health v. Smith, 896 F.3d 362, 376 (5th Cir. 2018) (Ho, J., concurring).

70. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019).

71. Smith, 896 F.3d at 376.

72. *Id.* For another more recent opinion by Judge Ho, see *Jackson Women's Health Organization v. Dobbs*, 945 F.3d 265 (5th Cir. 2019). In *Jackson Women's Health Organization*, the Fifth Circuit affirmed a lower court opinion invalidating Mississippi's ban on abortions after fifteen weeks gestational age. Because he considered himself bound by Supreme Court precedent, Judge Ho voted to affirm, but he wrote a separate opinion concurring in the judgment. In that opinion, Judge Ho noted: "Nothing in the text or original understanding of the Constitution establishes a right to an abortion." *Id.* at *277 (Ho, J., concurring in the judgment). Judge Ho went on to state that he was

> deeply troubled by how the district court handled this case. The opinion issued by the district court displays an alarming disrespect for the millions of Americans who believe that babies deserve legal protection during pregnancy as well as after birth, and that abortion is the immoral, tragic, and violent taking of innocent human life.

Id. at 278 (Ho, J., concurring in the judgment). Judge Ho further critiqued the district court opinion for "equat[ing] a belief in the sanctity of life with sexism, disregarding the millions of women who strongly oppose abortion." *Id.* Judge Ho further critiqued the district court's opinion for its comments about the racial implications of the Mississippi law. Judge Ho stated: "And, without a hint of irony, [the lower court opinion] smears Mississippi legislators by linking [the Mississippi law in question] to the state's tragic history of race relations, while ignoring abortion's own checkered racial past. *Id.* (Ho, J., concurring in the judgment).

73. Myers, *supra* note 33, at 1031–32; *see also* Stephen G. Gilles, *Why the Right to Elective Abortion Fails* Casey's *Own Interest-Balancing Methodology—And Why It Matters*, 91 NOTRE DAME L. REV. 691, 692–93, 695 (2016).

74. Roe v. Wade, 410 U.S. 113, 162–63 (1973).

75. *Id.* at 164. For a discussion of the life and health exception, see Richard S. Myers, *The Constitutionality of Laws Banning Sex-Selection Abortion*, *in* LIFE & LEARNING XXVIII: THE PROCEEDINGS OF THE TWENTY EIGHTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 65, 67 (Joseph W. Koterski ed., 2018).

Court Justices[76] and also by lower court judges. For example, in *MKB Management Corp. v. Stenehjem*,[77] the Eighth Circuit (in the course of invalidating North Dakota's heartbeat law) noted that "good reasons exist for the Court to reevaluate its jurisprudence [dealing with abortion.]"[78] In particular, the court focused on problems with the viability line; the court stated that "[m]edical and scientific advances further show that the concept of viability is itself subject to change. . . ."[79] and that "[t]he viability standard will prove even less workable in the future."[80] The court concluded that "the continued application of the Supreme Court's viability standard discounts the legislative branch's recognized interest in protecting unborn children."[81] In a concurring opinion in *Isaacson v. Horne* (a Ninth Circuit decision holding unconstitutional Arizona's ban on abortions at twenty weeks gestational age),[82] Judge Kleinfeld (who began by noting that "the current state of the law compels [him] to concur. . . ."[83]) made a similar point about the problems with "viability." Judge Kleinfeld stated: "Viability is the 'critical fact' that controls constitutionality. That is an odd rule, because viability changes as medicine changes."[84]

In *McCorvey v. Hill*,[85] Judge Edith Jones began her concurrence by endorsing Justice White's comment that Justice Blackmun's opinion in *Roe* was an "exercise of raw judicial power."[86] Judge Jones later noted that, with respect to abortion, "the facts no longer matter."[87] Judge Jones later focused on problems with "viability" and concluded:

> Hard and social science will of course progress even though the Supreme Court averts its eyes. It takes no expert prognosticator to know that research on women's mental and physical health following

76. *See* Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 HASTINGS CONST. L.Q. 187, 192 (2016) (discussing criticisms of the viability line from Supreme Court Justices); Forsythe, *supra* note 37, at 467.

77. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768 (8th Cir. 2015).

78. *Id*. at 773.

79. *Id*. at 774.

80. *Id*. at 775.

81. *Id*. at 776.

82. Isaacson v. Horne, 716 F.3d 1213, 1217 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127 (2014).

83. *Id*. at 1231 (Kleinfeld, J., concurring).

84. *Id*. at 1233 (footnote omitted).

85. McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004), *cert. denied*, 543 U.S. 1154 (2005).

86. *Id.* at 850 (Jones, J., concurring) (quoting Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting)).

87. *Id*. at 852.

> abortion will yield an eventual medical consensus, and neonatal science will push the frontiers of fetal "viability" ever closer to the date of conception. One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly. That the Court's constitutional decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication.[88]

And the broader point—that the Court has insufficiently valued the state's interest in the unborn—has also been made with great force. Most notably, this point has been made in a series of opinions from the Alabama Supreme Court.[89] For example, in *Ex parte Phillips*,[90] Justice Parker urged the United States Supreme Court to overturn the "legal anomaly and logical fallacy that is *Roe v. Wade*."[91]

Justice Parker detailed the many ways states have increasingly protected the unborn and concluded:

> A national survey of the laws of the states demonstrates that unborn children have numerous rights that all people enjoy. . . . "[T]he only major area in which unborn children are denied legal protection is abortion, and that denial is only because of the dictates of *Roe* [*v. Wade*]." In *Roe*, the United States Supreme Court, without historical or constitutional support, carved out an exception to the rights of unborn children and prohibited states from recognizing an unborn child's inalienable right to life when that right conflicts with a woman's "right" to abortion. The judicially created exception of *Roe* is an aberration to the natural law and the positive and common law of the states. Of the numerous rights recognized in unborn children, an unborn child's fundamental, inalienable, God-given right to life is the only right the states are prohibited from ensuring for the unborn child; the isolated *Roe* exception, which is increasingly in conflict

88. *Id.* at 852–53.

89. *See Ex parte* Phillips, No. 1160403, 2018 WL 10398375, at *53 (Ala. Oct. 19, 2018) (Parker, J., concurring specially) *cert. denied* 140 S. Ct. 184 (2019); Stinnett v. Kennedy, 232 So. 3d 202, 220–24 (Ala. 2016) (Parker, J., concurring specially); Hicks v. State, 153 So. 3d 53, 72–84 (Ala. 2014) (Parker, J., concurring specially); *Ex parte* Ankrom, 152 So. 3d 397, 421–29 (Ala. 2013) (Parker, J., concurring specially); Hamilton v. Scott, 97 So. 3d 728, 737–47 (Ala. 2012) (Parker, J., concurring specially).

90. *Ex parte* Phillips, 2018 WL 10398375.

91. *Id.* at *53 (Parker, J., concurring specially) (citation omitted).

> with the numerous laws of the states recognizing the rights of unborn children, must be overruled. As states like Alabama continue to provide greater and more consistent protection for the dignity of the lives of unborn children, the *Roe* exception is a stark legal and logical contrast that grows ever more alienated from and adverse to the legal fabric of America.[92]

After noting that "[j]udicial activism created the *Roe* exception[] [and that] blind adherence to *Roe's* judicially imposed dogma allows it to linger[,]"[93] Justice Parker concluded:

> It is my hope and prayer that the United States Supreme Court will take note of the crescendoing chorus of the laws of the states in which unborn children are given full legal protection and allow the states to recognize and defend the inalienable right to life possessed by every unborn child, even when that right must trump the "right" of a woman to obtain an abortion.[94]

IV. CONCLUSION

The Court will have an opportunity to consider the fate of *Roe* and *Casey* in the near future.[95] I don't believe that stare decisis will have a constraining effect on the Court when it considers whether to overrule *Roe* and *Casey*. In reality, stare decisis is not much of a constraint. Even if it had some limited value (as a presumptive rule), there are compelling reasons not to be influenced by stare decisis in the context of the Court's abortion decisions. One such reason is the long-standing criticism of *Roe* and *Casey*, including the criticism of those decisions by lower court judges, as I've sought to outline in this paper.

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92. *Id.* (Parker, J., concurring specially) (alterations in original) (citations and footnote omitted).

93. *Id.* at *61 (Parker, J., concurring specially).

94. *Id.* (Parker, J., concurring specially) (footnote omitted).

95. The Court is expected to hear *June Medical Services* in its next Term. June Med. Servs., LLC 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). *See* Gerstein, *supra* note 1 (discussing the prospects of the Court agreeing to hear this case).