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# A Bold Reaffirmation - Planned Parenthood v. Casey Opens the Door for States to Enact New Laws to Discourage Abortion

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# NOTES

## A Bold Reaffirmation? *Planned Parenthood v. Casey* Opens the Door for States to Enact New Laws to Discourage Abortion

Abortion—the very word stirs deep and intense passions among many Americans[1] as well as bitter animosity between persons on opposing sides of the issue.[2] The names chosen by the parties to the controversy reflect their views as to what is at stake. "Pro-Choice" partisans view the issue as one of reproductive freedom implicating the right to personal autonomy over one's body.[3] "Pro-Life" supporters see abortion as the destruction of a person possessing human rights.[4] Since the latter part of the nineteenth century, legislative bodies have dealt with these conflicting opinions employing a variety of laws restricting abortion or banning it altogether.[5] But it has been left to the judicial system in its role as a counter-majoritarian institution to declare what right, if any, a woman has under the Constitution to obtain an abortion. In 1972, in *Roe v. Wade*, the Supreme Court held that a woman has a constitutional right to an abortion, free from state interference in the early stages of pregnancy.[6] The Court constructed a framework that attempted to balance the interests of the pregnant woman, the unborn fetus, and the state.[7] *Roe* marked the beginning of a bitter struggle in the Court over the nature of the regulations states may impose and the point at which states may limit or prohibit abortions. The *Roe* framework has been the subject of bitter attacks both by abortion opponents and members of the Court itself.

*Planned Parenthood v. Casey*[8] provided the Court with an opportunity to issue a definitive statement on the status of abortion rights in the wake of uncertainties created by the Court's changing composition. It was widely expected that the more conservative members of the Court

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1. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 6 (1990).

2. *Id.* at 239.

3. *Id.* at 137-38. Professor Tribe notes that as pregnancy progresses and the fetus develops, most Americans, including those who favor a woman's right to choose abortion, admit that two beings—the mother and the developing fetus—are involved in the issue. *Id.* at 138.

4. *Id.* at 115.

5. *See* Roe v. Wade, 410 U.S. 113, 138-40 (1973).

6. *Id.* at 152-53.

7. *Id.* at 162-63. The *Roe* Court designated the start of each new trimester of a pregnancy as the points at which the various interests of the state and the fetus become compelling. *Id.*; *see infra* notes 96-103 and accompanying text.

8. 112 S. Ct. 2791 (1992).

would seize the opportunity to overrule *Roe* by declaring that states may enact virtually any abortion restrictions so long as they are rationally related to legitimate state interests.[9] A wildcard in the calculus was newly appointed Justice Clarence Thomas, voting in his first abortion case on the Court. Yet it was Justice Kennedy, who previously had sided with the conservative bloc opposing the *Roe* framework, who provided the pivotal vote in *Casey* to reaffirm several essential aspects of the *Roe* holding.[10] While nominally upholding parts of *Roe*, the *Casey* Court left many issues unresolved, thereby creating the prospect of even more divisive court battles in coming years.[11]

The Supreme Court in *Casey* reaffirmed the basic right to abortion, but indicated that it will tolerate greater limits on its availability than at any time since *Roe*.[12] Only one vote short of overturning *Roe*, the *Casey* Court cast further doubt on the future of the right to abortion as states continue to enact more restrictive statutes. Adding to the uncertainty is the adoption by three Justices of the "undue burden" standard of review,[13] a significant departure from the *Roe* Court's application of strict scrutiny to state laws criminalizing abortion.

This Note examines abortion rights as defined in *Roe*.[14] The Note then traces the aftermath of *Roe*, analyzing the series of post-*Roe* decisions that initially reaffirmed[15] but subsequently narrowed abortion rights, even to the point of questioning *Roe*'s validity.[16] The Note concludes that while the Court in *Casey* nominally upheld the fundamental nature of the right to abortion prior to fetus viability,[17] further erosion of

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9. David G. Savage, *The Rescue of Roe vs. Wade*, L.A. TIMES, Dec. 13, 1992, at A1, A28.

10. *Id.* Justice Kennedy, who joined the plurality in Webster v. Reproductive Health Serv., 492 U.S. 490, 513-22, (1989), surprised Chief Justice Rehnquist with his insistence on reaffirming the fundamental right to abortion. *See infra* note 144.

11. The *Casey* decision did not satisfy either side of the abortion issue. "Pro-choice political organizations lamented *Casey* as leaving *Roe* an empty shell. Abortion opponents saw the *Casey* joint opinion as the treachery of two Reagan appointees and a Bush appointee who should have been reliable votes against *Roe*, affording pitifully little latitude for new state antiabortion legislation." Kathleen M. Sullivan, *The Supreme Court 1991 Term: Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 33 (1992). Professor Sullivan noted that each position has merit, but both are overstated. *Id.* at 34.

12. *See infra* notes 44-59 and accompanying text.

13. *Casey*, 112 S. Ct. at 2820 (plurality opinion).

14. *See infra* notes 84-103 and accompanying text.

15. *See infra* notes 104-18 and accompanying text.

16. *See infra* notes 119-40 and accompanying text.

17. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court upheld a Missouri statute defining viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." *Id.* at 63.

*Roe* is likely as states test the limits of *Casey*'s less stringent and less precisely defined undue burden standard.[18] As a result of *Casey*, obtaining an abortion probably will become even more difficult and more expensive in many states with fewer facilities willing or able to satisfy new state requirements. This will leave many women without a real choice whether to continue unwanted pregnancies, effectively rendering the rights guaranteed under *Roe* meaningless.[19]

In *Roe*, the Court held that the right to abortion in the early stages of pregnancy is protected by the Constitution. In an ongoing struggle between states and the Court, it applied strict scrutiny, the highest level of judicial review, to strike down state laws that required women seeking abortions to be given detailed descriptions of fetal development. In *Thornburgh v. American College of Obstetricians and Gynecologists*,[20] decided in 1986, the Court held unconstitutional a Pennsylvania law requiring that women seeking abortions be given information about possible physical and psychological side-effects, the probable gestational age of the fetus, and sources of funding to help cover the costs of childbirth.[21] Despite the setback in *Thornburgh*, Pennsylvania amended its abortion statute to include new requirements similar to those previously struck down.[22] The 1988 and 1989 amendments to the Pennsylvania Abortion Control Act[23] added new provisions including informed consent with a twenty-four hour waiting period,[24] parental consent,[25] spousal notifica-

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18. *See infra* note 114 and accompanying text (discussing the undue burden standard).

19. Sarah Weddington, the attorney for the *Roe* plaintiffs, described her feelings about the *Casey* decision:

> I can't help thinking of the Cheshire cat in *Alice in Wonderland*, sitting on a tree branch but disappearing part by part. The protection of *Roe* is disappearing before our very eyes. Pennsylvania will soon begin enforcing the restrictions the Court has stamped with its approval. Other states that want to pass those same measures know that they are enforceable.

SARAH WEDDINGTON, A QUESTION OF CHOICE 287 (1992); *see infra* note 175 and accompanying text.

20. 476 U.S. 747 (1986); *see infra* note 146.

21. *Thornburgh*, 476 U.S. at 762; *see infra* note 38 (discussing appliction of strict scrutiny review).

22. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1328 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

23. 18 PA. CONS. STAT. ANN. §§ 3201-3220 (1983 & Supp. 1992).

24. Section 3205(a)(1) requires that the referring or performing physician inform a woman considering an abortion of the nature of the procedure, the risks and alternatives, the probable gestational age of the fetus, and the medical risks of carrying a child to term. *Id.* § 3205(a)(1). Section 3205(a)(2) requires that at least 24 hours prior to the abortion, a physician or counselor inform a woman that medical benefits may be available to cover various expenses associated with childbirth, that the father of the child is liable to assist in support, and that the state health department publishes information about fetal development along with

tion,[26] and reporting and public disclosure by facilities performing abortions.[27] The Act also included a medical emergency exception to the informed consent, parental consent, and notification requirements in certain situations.[28]

Five abortion clinics and one physician challenged the constitution-

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lists of agencies offering alternatives to abortion. *Id.* § 3205(a)(2). Prior to the abortion, the woman must certify in writing that the required information has been provided. *Id.* § 3205(a)(3).

25. Section 3206 requires the informed consent of at least one parent for an unemancipated woman under age 18 seeking an abortion, but it also provides a judicial bypass option. A court may authorize an abortion in the absence of parental or guardian consent after determining that the woman is mature and capable of giving informed consent and that she has in fact given consent. If the pregnant woman lacks the maturity to give informed consent, a court may also authorize an abortion, if it determines that an abortion would be "in her best interests." A woman who has been adjudged incompetent may not receive an abortion regardless of her age without the consent of her guardian. *Id.* § 3206.

26. Section 3209 of the Act requires a married woman to sign a statement that she has notified her husband of her intentions before undergoing the procedure. The section includes exceptions to the notification requirement if the husband is not the father, if the husband cannot be located, if the pregnancy is the result of a reported spousal sexual assault, or if the woman has reason to believe that notifying her husband is likely to lead to the infliction of bodily injury by the spouse or another person. The section states that the purpose of the requirement is "to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting prenatal life of that spouse's child." *Id.* § 3209.

27. Section 3207 requires that a facility performing abortions file reports stating its name and address, the name and address of any parent, subsidiary, or affiliated organizations, corporations, or associations, and the name and address of any such related entities having "contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility." *Id.* § 3207. Reports filed by facilities receiving state funding are deemed public information, while those filed by facilities not receiving state money are available only "to law enforcement officials, the State Board of Medicine, and the State Board of Osteopathic Medicine for use in the performance of their official duties." *Id.*

Section 3214 requires that reports be filed for each abortion without identifying the patient. The reports must include the names of the physician performing the abortion, the concurring physician, the second physician, the facility where the abortion was performed, and the referring physician. *Id.* § 3214(a)(1). The section also requires the reporting of the residence of the woman, her age, the number of prior pregnancies and prior abortions, the gestational age of the fetus, the type of procedure used, pre-existing medical conditions, the basis for medical judgment that a medical emergency existed to excuse compliance with any provision of the chapter, whether the abortion was performed on a married woman, and, if so, whether the spouse was notified. When a medically necessary third trimester abortion is performed, the section requires that the physician report the basis for his or her judgment that an abortion was medically necessary and the weight of the aborted child. *Id.* § 3214(a)(2)-(a)(12).

28. The statute defines a medical emergency as:

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

*Id.* § 3203.

ality of the amendments on due process grounds,[29] seeking declaratory and injunctive relief.[30] The United States District Court for the Eastern District of Pennsylvania held that all of the provisions except for certain reporting requirements violated the Due Process Clause of the Fourteenth Amendment and entered a permanent injunction against their enforcement.[31]

The United States Court of Appeals for the Third Circuit reversed the district court on all but the spousal notification requirement, holding the other provisions constitutional.[32] In analyzing the restrictions, the court of appeals applied the undue burden standard of review first articulated by Justice O'Connor in *Akron v. Akron Center for Reproductive Health (Akron I)*.[33] The court of appeals noted that recent Supreme Court opinions had raised questions about the validity of *Roe* and the proper standard of review to apply in cases dealing with abortion.[34] The court concluded that a majority of Supreme Court Justices no longer adhered to the strict scrutiny standard of review endorsed in *Roe*,[35] and that the doctrine of stare decisis required lower courts to follow the opin-

29. The petitioners challenged the constitutionality of the provisions on substantive due process grounds, arguing that the state restrictions constituted "deprivations of personal liberty and autonomy." Brief for Petitioners & Cross-Respondents at 40, *Casey* (Nos. 91-744 & 91-902). The petitioners' Supreme Court brief quoted Justice Harlan's dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), in which he stated that "the full scope of the liberty guaranteed by the Due Process Clause . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Id.* (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

30. *Casey*, 744 F. Supp. at 1328.

31. *Id.* at 1397. The district court held that the abortion rights defined in *Roe* remain undisturbed, *id.* at 1396-97, requiring that regulations significantly limiting the fundamental right to abortion be "narrowly drawn to serve a compelling state interest." *Id.* at 1373-74. The court held that the informed consent, parental consent, spousal notification, and most of the reporting requirements failed this test and thus were unconstitutional. *Id.* at 1396. Nevertheless, the court held that certain sections of § 3214 were constitutional, including the requirements that the marital status of the woman be reported without identifying the individual patient by name. *Id.* The court struck down, however, the requirement that the name of the referring physician and the basis of the physician's medical judgment be reported. *Id.*

32. Planned Parenthood v. Casey, 947 F.2d. 682, 719 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

33. 462 U.S. 416, 453 (1983). In Webster v. Reproductive Health Serv., 492 U.S. 490, 529-30 (1989), Justice O'Connor rejected the argument that the challenged regulation was unconstitutional based on the standard she articulated in *Akron I*. She stated that the provision did "not impose an undue burden on a woman's abortion decision." *Id.* at 530 (O'Connor, J., concurring in part and concurring in the judgment).

34. The court of appeals cited *Webster* and Hodgson v. Minnesota, 497 U.S. 417 (1990), as creating uncertainty as to whether a majority of Justices still adhered to *Roe*'s strict scrutiny standard of review. *Casey*, 947 F.2d at 687-88.

35. *Casey*, 947 F.2d at 697.

ion of "the Justice or Justices who concur on the 'narrowest grounds.' "[36] Although only Justice O'Connor had adopted the undue burden standard, the court of appeals identified it as the middle ground between rational basis and strict scrutiny review.[37] Under Justice O'Connor's standard, strict scrutiny is required only when a regulation creates an undue burden on a woman's right to abortion. If the regulation does not create an undue burden, its validity is to be analyzed using the rational basis test.[38]

Applying Justice O'Connor's standard, the court of appeals held that the informed consent, parental consent, and reporting and public disclosure provisions did not place an undue burden on a woman's abortion decision.[39] The spousal notice requirement, however, was unconstitutional;[40] the court noted that "[b]ecause of the nature of the marriage relationship and the emotional character of human response to pregnancy and abortion, the number of different situations in which women may reasonably fear dire consequences from notifying their husbands is potentially limitless."[41] The court concluded that a woman's fear of these consequences constitutes an undue burden on her abortion decision; the regulation thus requires judicial strict scrutiny.[42] While including the spouse in the abortion decision may be a legitimate state interest, the court held it not compelling.[43]

The Supreme Court upheld the court of appeals' decision on the Pennsylvania provisions, agreeing that all of the restrictions, with the exception of the spousal notification requirement, were constitutional.[44]

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36. *Id.* at 693.

37. *Id.* at 698.

38. To survive strict scrutiny review, regulations limiting fundamental rights must be narrowly drawn to serve a compelling state interest. Roe v. Wade, 410 U.S. 113, 155 (1973). Under rational basis review, however, a law need only be rationally related to a valid state objective to be constitutional. *Id.* at 173 (Rehnquist, J., dissenting) (citing Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955)).

39. *Casey*, 947 F.2d at 719. Because the court of appeals found that the provisions did not create an undue burden, the provisions would only have to be rationally related to legitimate state interests to be constitutional. The court held that this test was satisfied. *Id.*

40. *Id.*

41. *Id.* at 713.

42. *Id.*

43. *Id.* at 715. Judge Alito dissented from the holding that the spousal notification requirement created an undue burden, reasoning that the plaintiffs had failed to carry their burden under a facial attack to the validity of the provision. "Section 3209 does not create an 'absolute obstacle' or give a husband 'veto power.' Rather, this provision merely requires a married woman desiring an abortion to certify that she has notified her husband or to claim one of the statutory exceptions." *Id.* at 722 (Alito, J., concurring in part and dissenting in part).

44. *Casey*, 112 S. Ct. at 2833.

At the same time, by a five-to-four vote, the Court reaffirmed *Roe*'s basic holding—that a woman has a constitutional right to an abortion up to the point of viability.[45]

The majority opinion, written jointly by Justices O'Connor, Kennedy, and Souter, and joined by Justices Blackmun and Stevens,[46] reaffirmed what it called the three essential holdings of *Roe*: the fundamental nature of a woman's right to abortion prior to fetal viability, the state's right to restrict abortions after viability with exceptions for pregnancies endangering the woman's life or health, and the state's legitimate interests from the beginning of pregnancy in protecting the health of the woman and the life of the fetus.[47]

The majority identified the rights to liberty and privacy protected by

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45. *Id.*

46. Justices O'Connor, Kennedy, and Souter also wrote an opinion rejecting *Roe*'s trimester framework and adopting the undue burden standard as the appropriate standard of review. *Id.* at 2816-22 (plurality opinion).

Justice Stevens dissented from the holding that all of the informed consent requirements were constitutional, although he stated that the requirement that the physician inform the woman of the nature and risks of the procedure and of the medical risks of carrying a child to term is not designed to influence a woman's choice and is thus constitutional. *Id.* at 2841 (Stevens, J., concurring in part and dissenting in part). He argued that the informed consent requirements, including the 24-hour waiting period, constitute an undue burden on a woman's right to obtain an abortion. *Id.* at 2843 (Stevens, J., concurring in part and dissenting in part). Justice Stevens concluded that while he agreed that the parental consent requirement with an appropriate judicial bypass was constitutional, he would not join the section of the joint opinion upholding Pennsylvania's requirement because its approval was based on reasons given in the section of the joint opinion upholding the informed consent requirements. *Id.* at 2843 (Stevens, J., concurring in part and dissenting in part). Justice Stevens joined in the holding that reporting and public disclosure requirements were permissible. *Id.* at 2832-33 (plurality opinion).

Justice Blackmun did not join the section of the joint opinion rejecting the trimester framework and adopting the undue burden standard. He instead called for the continued use of strict scrutiny and the trimester framework. *Id.* at 2847-49 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). He stated that, in his view, the Court erred in not striking down all of the Pennsylvania regulations at issue. *Id.* at 2845 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Chief Justice Rehnquist, Justice Scalia, Justice White, and Justice Thomas concurred in the judgment upholding the parental consent, informed consent, and reporting and public disclosure requirements but dissented from the judgment striking down the spousal notification requirements. *Id.* at 2873 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

In sum, seven Justices agreed that it is constitutional for states to require doctors to give certain information to women 24 hours before undergoing abortions and to require that a pregnant minor obtain the consent of one parent as long as a judicial bypass option is available. All but Justice Blackmun agreed that states may impose reporting requirements on clinics performing abortions as long as the names of patients are kept confidential. There was no clear majority view, however, on the appropriate standard of review for analyzing such statutory provisions.

47. *Id.* at 2804.

the Fourteenth Amendment's Due Process Clause as the source of the constitutional right to an abortion:[48]

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[49]

The majority buttressed this view by indicating that in certain respects the decision to obtain an abortion is similar to the decision to use contraceptives, a decision that had been afforded constitutional protection based on the right of privacy as articulated in *Griswold v. Connecticut*,[50] *Eisenstadt v. Baird*,[51] and *Carey v. Population Services International*.[52]

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48. *Id.* "Privacy," though not mentioned explicitly in the Constitution, is an implied aspect of liberty. TRIBE, *supra* note 1, at 83.

49. *Casey*, 112 S. Ct. at 2807 (citations omitted).

50. 381 U.S. 479 (1965). The Court in *Griswold* struck down a Connecticut statute forbidding the use of contraceptives, as violative of the right to marital privacy. *Id.* at 485. The Court recognized that the Bill of Rights creates zones of privacy which the Court must protect against inappropriate governmental intrusions. "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." *Id.* at 482.

51. 405 U.S. 438 (1972). The Court in *Eisenstadt* extended the constitutional right to use contraceptives to unmarried persons. *Id.* at 453. Justice Brennan delivered the opinion of the Court, stating that a state law restricting the use of contraceptives to married couples violated the Due Process Clause:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

*Id.*

52. 431 U.S. 678 (1977). The *Carey* Court struck down a New York law criminalizing the distribution, by anyone, of contraceptives to minors under age 16, *id.* at 699 (plurality opinion), limiting to licensed pharmacists the distribution to persons over age 16, *id.* at 689-91, and also criminalizing the advertisement or display of contraceptives. *Id.* at 700. Justice Brennan, delivering the opinion of the Court, declared that "[t]he decision whether or not to beget or bear a child is at the very heart of [a] cluster of constitutionally protected choices." *Id.* at 685; *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down a ban on inter-racial marriages); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing that the state may not

The *Casey* majority stated that the doctrine of stare decisis required that *Roe* be reaffirmed.[53] *Casey* marks the intersection of two lines of decisions—one protecting liberty in intimate relationships, as exemplified by *Griswold*, and the other based on the principles of personal autonomy and bodily integrity recognized, for example, in *Cruzan v. Director, Missouri Department of Health*,[54] which limited governmental power to require medical treatment.[55] The Court stated that the foundation of *Roe* remains sound in both lines of cases[56] and that preserving the legitimacy of the Court required that *Roe* be reaffirmed:[57]

> Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed . . . , the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.[58]

The majority stated further that to overrule *Roe* in the face of political

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enter the private realm of family life); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (establishing that rights related to marriage and procreation are fundamental); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (recognizing parents' rights to send their children to private rather than public schools); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing that parents have a liberty interest in educating their children in a language other than English). The Court refused to extend this right to privacy to include homosexual sodomy in Bowers v. Hardwick, 478 U.S. 186 (1986). The Court upheld a state statute criminalizing homosexual sodomy, saying that the act was not one of the traditional values protected by the Bill of Rights. *Id.* at 192-94.

53. *Casey*, 112 S. Ct. at 2808.

54. 497 U.S. 261 (1990).

55. *Casey*, 112 S. Ct. at 2810. In *Cruzan*, the Court recognized that individuals have a constitutionally protected liberty interest to refuse unwanted medical treatment, although states could require clear and convincing evidence of a patient's desire to have artificial nutrition and hydration discontinued. *Cruzan*, 497 U.S. at 287-88.

56. *Casey*, 112 S. Ct. at 2810.

57. *Id.* at 2815. The *Casey* majority also cited reliance by persons on the continued application of a rule of law as a factor that must be considered before it may be overruled.

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. . . . [W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

*Id.* at 2809.

58. *Id.* at 2813-14.

pressure absent strong legal justification "would subvert the Court's legitimacy beyond any serious question."[59]

Justices O'Connor, Kennedy, and Souter articulated a proposed reformulation of *Roe* in a joint opinion.[60] The Justices rejected *Roe*'s trimester framework as overly rigid in its approach to defining the respective interests of the pregnant woman and the state.[61] The joint opinion characterized the trimester framework as misrepresenting the pregnant woman's interest and undervaluing the state's interest in potential life.[62]

The joint opinion identified the time of fetal viability as the point at which a state's interest becomes sufficiently compelling that it may restrict a woman's right to abortion.[63] The joint opinion also adopted the undue burden standard for reviewing the constitutionality of abortion

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59. *Id.* at 2815.

60. *Id.* at 2816 (plurality opinion).

61. *Id.* at 2818 (plurality opinion). Justice O'Connor has long viewed the trimester framework with dissatisfaction. In Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 452 (1983), Justice O'Connor stated that

> neither sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the 'stages' of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state regulation occurs.

*Id.* (O'Connor, J., dissenting).

62. *Casey*, 112 S. Ct. at 2818 (plurality opinion).

63. *Id.* at 2816 (plurality opinion). Under the trimester framework announced in *Roe*, the state's interest in protecting potential human life becomes compelling at viability, and states may prohibit abortions during the third trimester except when the life or health of the mother is threatened. *Roe*, 410 U.S. 113, 163-64 (1973). During the first and second trimesters, however, the state may not interfere with the abortion decision. *Id.* The *Casey* joint opinion stated that, as noted by the *Roe* Court, viability "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb." *Casey*, 112 S. Ct. at 2817 (plurality opinion). Because of medical advances, viability is now possible before the start of the third trimester, so that adopting viability as the point at which the state interest in protecting potential life becomes compelling could allow states to proscribe abortions at an earlier time than would be possible under the trimester framework. Claudia Wallis, *Abortion, Ethics and the Law: Advancing Technology Further Complicates a National Dilemma*, TIME, July 6, 1987, at 82. Justice O'Connor noted this in 1983 when she stated that "[t]he *Roe* framework . . . is clearly on a collision course with itself." *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting). Medical technology has improved greatly since *Roe* was decided, improving the odds that premature babies weighing less than two pounds will survive. Jon Van & Peter Gorner, *Medical Gains Test Abortion Arguments*, CHI. TRIB., Apr. 26, 1989, at 1. Even so, few fetuses survive outside the womb at less than 24 weeks after conception. *Id.* The use of viability as a yardstick for allowing state abortion restrictions may create uncertainty due to the great variations in the technology available at medical facilities, meaning that premature babies who may be viable at some modern medical centers would not be at less well-equipped facilities. In addition, future medical advances could mean that viability will occur much earlier in pregnancy. Wallis, *supra*, at 82. The *Casey* joint opinion noted this uncertainty in medical technology, stating that "there may be some medical developments that affect the precise point of

restrictions.[64] It noted that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[65] The Justices stated that if a regulation does not impose a "substantial obstacle" to a woman's right to choose abortion, it will be upheld if reasonably related to legitimate goals such as persuading a woman to choose childbirth over abortion or protecting the health of a woman.[66]

Justice Blackmun, the author of the *Roe* majority opinion, praised the joint opinion as "an act of personal courage and constitutional principle,"[67] but criticized its authors for rejecting the trimester framework and strict scrutiny review.[68] According to Justice Blackmun, the *Roe* framework remained the appropriate method for analyzing abortion restrictions.[69] Applying a strict scrutiny analysis, he noted, would result in a finding that all of the Pennsylvania provisions at issue in the case were unconstitutional.[70]

Justice Stevens concurred in striking down the spousal notification requirement[71] and upholding the reporting requirements for abortion facilities.[72] He criticized the joint opinion, however, for rejecting the trimester framework.[73] In addition, Justice Stevens dissented from the portions of the judgment upholding all of the informed consent require-

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viability . . . but this is an imprecision within tolerable limits." *Casey*, 112 S. Ct. at 2817 (plurality opinion).

64. *Casey*, 112 S. Ct. at 2820 (plurality opinion).

65. *Id.* (plurality opinion).

66. *Id.* at 2821 (plurality opinion). Under the undue burden standard, any regulation that does not pose an undue burden must be only reasonably related to a legitimate state interest. *Id.* (plurality opinion). By contrast, strict scrutiny requires that regulations must be narrowly drawn to serve a compelling state interest. *Roe*, 410 U.S. at 155.

67. *Casey*, 112 S. Ct. at 2844 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

68. *Id.* at 2847 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

69. *Id.* (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Blackmun, who created the *Roe* trimester framework, *Roe*, 410 U.S. at 163-64, stated that strict scrutiny offers the greatest protection of a woman's right to make reproductive decisions and noted that no majority of the Court has ever agreed to an alternative standard. "The factual premises of the trimester framework have not been undermined, and the *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden' standard adopted by the joint opinion." *Casey*, 112 S. Ct. at 2848 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citations omitted).

70. *Id.* at 2850 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

71. *Id.* at 2843 (Stevens, J., concurring in part and dissenting in part).

72. *Id.* at 2832-33 (Stevens, J., concurring in part and dissenting in part).

73. *Id.* at 2839 (Stevens, J., concurring in part and dissenting in part).

ments, arguing that the Court previously had struck down similar requirements designed "to prejudice a woman's choice."[74] Justice Stevens also would have declared unconstitutional the twenty-four hour waiting period because, in his view, it failed both parts of the undue burden test.[75]

Chief Justice Rehnquist, joined by Justices Scalia, White, and Thomas, called for the outright reversal of *Roe*.[76] Chief Justice Rehnquist stated his belief that "*Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases."[77] The Chief Justice stated further that Justice Scalia, Justice White, Justice Thomas, and he would have upheld all of the challenged provisions, applying the approach and standard of review adopted by the *Webster v. Reproductive Health Services*[78] plurality.[79]

Justice Scalia called *Roe* "plainly wrong"[80] and criticized the joint opinion's undue burden standard as being an "amorphous concept" that has been applied inconsistently by the Court.[81] He noted that "[t]he ultimately standardless nature of the 'undue burden' inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis."[82] Justice Scalia also criticized the majority for not recognizing

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74. *Id.* at 2841 (Stevens, J., concurring in part and dissenting in part). See *infra* note 146 for a discussion of a prior case striking down state informed consent requirements, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 762 (1986).

75. *Casey*, 112 S. Ct. at 2843 (Stevens, J., concurring in part and dissenting in part). Although Justice Stevens used the undue burden analysis in discussing the informed consent requirements, he stated that the actual meaning of a standard can be understood only by reviewing the cases in which it is applied. *Id.* at 2843 n.6. (Stevens, J., concurring in part and dissenting in part). He "discounted" Justice Scalia's comments on the standard as well as the joint opinion's discussion of the test. *Id.* (Stevens, J., concurring in part and dissenting in part). While not endorsing the joint opinion's formulation of the test, Justice Stevens left open the door to future use of an undue burden standard:

> The future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion.

*Id.* (Stevens, J., concurring in part and dissenting in part).

76. *Id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

77. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

78. 492 U.S. 490 (1989).

79. *Casey*, 112 S. Ct. at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

80. *Id.* at 2873 (Scalia, J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist, and Justices White and Thomas joined Justice Scalia's opinion.

81. *Id.* at 2876 (Scalia, J., concurring in the judgment in part and dissenting in part).

82. *Id.* at 2878 (Scalia, J., concurring in the judgment in part and dissenting in part).

that the abortion issue should be decided in the state legislatures across the country, rather than by a federal tribunal.[83]

The *Casey* Court's reaffirmation of several key aspects of *Roe*'s holding was just the latest chapter in a continuing struggle for control of the Court on the issue of abortion rights. For nearly two decades the pressure had been building on the Court to overturn *Roe*. Each new appointment to the Court raised the stakes as the *Roe* dissenters sought to gain enough allies to create a majority that would give states broad latitude to enact abortion restrictions. But as the parties on both sides of the abortion issue marked the twentieth anniversary of the landmark case in 1993, the foundation of *Roe* remained intact.

The *Roe* Court's enunciation of abortion rights[84] marked the culmination of a line of cases recognizing the right to privacy with respect to reproductive freedom.[85] The decision effectively invalidated abortion laws in forty-nine states and the District of Columbia.[86]

*Roe* concerned a Texas statute that made obtaining an abortion a crime except for the purpose of saving the life of the mother.[87] Jane Roe,[88] a single woman, alleged that she could not obtain a legal abortion in Texas because her life was not endangered by her pregnancy. "She

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83. *Id.* at 2885 (Scalia, J., concurring in the judgment in part and dissenting in part). "[B]y banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish." *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist stated that the joint opinion "beats a wholesale retreat from the substance" of *Roe*. *Id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist further criticized the joint opinion, stating:

> The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion.

*Id.* at 2866-67 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

84. 410 U.S. 113, 164-66 (1973). Justice Blackmun wrote the opinion of the Court in *Roe*, joined by six other members of the Court—Chief Justice Burger, and Justices Douglas, Brennan, Stewart, Marshall, and Powell. Justices White and Rehnquist dissented. On the same day it announced its *Roe* decision, the Court by the same 7-2 vote struck down sections of a Georgia abortion law requiring that abortions be performed only in accredited hospitals, that the procedure be approved by a hospital staff abortion committee, and that the performing physician's judgment that an abortion be performed be confirmed by two other physicians. Doe v. Bolton, 410 U.S. 179, 201-02 (1973).

85. 410 U.S. 113, 152 (1973); *see supra* notes 50-52 and accompanying text.

86. TRIBE, *supra* note 1, at 13.

87. *Roe*, 410 U.S. at 117-18.

88. Jane Roe was a pseudonym. *Id.* at 120 n.4.

claimed that the Texas statutes were unconstitutionally vague and . . . abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth amendments."[89]

After declaring that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy,"[90] Justice Blackmun, in his opinion for the Court, reasoned that the right to abortion is fundamental.[91] Any laws dealing with abortion must be narrowly drafted to achieve a compelling state interest.[92] Justice Blackmun stated that "[i]n a line of decisions . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[93] Justice Blackmun wrote that the Court or individual Justices have found the roots of the right of privacy in the First, Fourth, Fifth, Ninth, and Fourteenth amendments and "in the penumbras of the Bill of Rights."[94] The *Roe* Court declared that the Fourteenth Amendment was the source of the right to abortion, but left open to future debate the question whether the right could be attributed as well to other constitutional sources.[95]

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89. *Id.* at 120.

90. *Id.* at 152 (citations omitted) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

91. *Id.* at 155.

92. The decision as to the nature of the right abridged and the appropriate standard of review to apply to the statute often effectively decides the outcome of a case.

> The Supreme Court rarely finds such compelling necessity [required under a strict scrutiny analysis] . . . . If the Court decides to treat a right as "fundamental," that right becomes very difficult to abridge. An abridgment of a fundamental right is almost never upheld. On the other hand, if a right is not deemed fundamental, virtually any government action that abridges that right is upheld. Government is free to abridge a nonfundamental right for almost any reason.

TRIBE, *supra* note 1, at 11. Under the less stringent rational basis standard of review, a government regulation need only be rationally related to a legitimate government interest. *See* Richard G. Wilkins et al., *Mediating the Polar Extremes: A Guide to Post-Webster Abortion Policy*, 1991 B.Y.U. L. REV. 403, 419-21.

93. *Roe*, 410 U.S. at 152.

94. *Id.*

95. *Id.* at 153. Justice Blackmun wrote:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.

*Id.* In his concurring opinion, Justice Stewart wrote that the Court's decisions "make [it] clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," thus characterizing abortion as a right based on personal liberty. *Id.* at 169 (Stewart, J., concurring).

The Court rejected the argument that a woman has an absolute right to an abortion throughout her entire pregnancy.[96] At some point in pregnancy, declared the Court, the respective interests of the woman and the state shift so that the state's interest becomes sufficiently compelling to sustain regulation of the abortion decision.[97] "Each [of the compelling interests] grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' "[98] The Court found state interests in protecting the health of the pregnant woman and in protecting the potentiality of human life,[99] and divided pregnancy into trimesters to mark the points when those interests become compelling.[100] During the first trimester, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."[101] During the second trimester the state would be free to regulate abortion "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[102] In the final trimester the state may restrict or prohibit abortion, but must permit the procedure where it is necessary to "preserv[e] . . . the life or health of the mother."[103]

The years following *Roe* were marked by a series of challenges to state statutes that pushed the limits of the *Roe* framework. In *Planned*

96. *Id.* at 153.

97. *Id.* at 162.

98. *Id.* at 162-63.

99. *Id.* at 162. While recognizing the state's interest in protecting potential life, the Court held that the rights of pregnant women could not be overridden through state regulations effectively "adopting one theory of life [over another]." *Id.*

100. *Id.* at 163.

101. *Id.*

102. *Id.* The Court stated that the goal of preserving and protecting the woman's health becomes compelling at the end of the first trimester because prior to this point abortion is less hazardous to the mother than childbirth. *Id.*

103. *Id.* at 164-65. Justice Rehnquist strongly criticized the majority's trimester framework in his dissent, saying that "the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under" the Fourteenth Amendment's Due Process Clause. *Id.* at 173 (Rehnquist, J., dissenting). He stated that "[t]he decision here to . . . outline the permissible restrictions the State may impose in each [trimester], for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." *Id.* at 174 (Rehnquist, J., dissenting). Justice Rehnquist completely rejected the majority's imposition of strict scrutiny review along with its designation of abortion as a fundamental right implicit in the liberty protected by the Fourteenth Amendment: "[L]iberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective." *Id.* at 172-73 (Rehnquist, J., dissenting).

*Parenthood of Missouri v. Danforth*,[104] the Court struck down a Missouri statute containing a spousal consent requirement[105] and a blanket parental consent requirement for unmarried women under the age of eighteen.[106] The Court also struck down a prohibition of an abortion procedure commonly used during the second trimester[107] and a requirement that physicians attempt to preserve the life and health of the fetus regardless of the stage of pregnancy.[108] The Court did, however, uphold the statute's definition of viability,[109] and also a provision requiring the pregnant woman to sign a consent form prior to obtaining an abortion.[110]

In 1983, a majority of six Justices explicitly reaffirmed *Roe* in *Akron v. Akron Center for Reproductive Health (Akron I)*,[111] striking down municipal ordinances requiring informed consent with a twenty-four hour waiting period, parental consent, hospitalization for second-trimester abortions, and compliance with certain guidelines for the disposal of fetuses.[112] In his majority opinion, Justice Powell noted the political pressure to retreat from *Roe*, but stated that respect for the doctrine of stare decisis required *Roe*'s reaffirmation.[113] *Akron* marked Justice O'Connor's first articulation of her "undue burden" standard of review[114] as a middle ground between the stringent strict scrutiny standard

104. 428 U.S. 52 (1976).

105. *Id.* at 69. This requirement challenged the Roe Court's holding that the state could not regulate first trimester abortions. Justice Blackmun wrote that "since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that period." *Id.*

106. *Id.* at 74. As with the spousal notification requirement, the Court held that the state may not delegate veto power to a third person. *Id.* The Court did stop short of saying that every minor is capable of giving informed consent regardless of age or maturity, and in Bellotti v. Baird, 428 U.S. 132 (1976), decided on the same day as *Danforth*, the Court left open the possibility that a parental notification requirement with a judicial bypass procedure would be constitutional. *Id.* at 147-48.

107. *Danforth*, 428 U.S. at 79. The statute prohibited the use of saline amniocentesis as a method of abortion during the second trimester on the grounds that it "is deleterious to maternal health." *Id.* at 76. The Court held that the prohibition of the technique was an "arbitrary regulation designed to inhibit . . . the vast majority of abortions after the first 12 weeks." *Id.* at 79.

108. *Id.* at 83.

109. *Id.* at 63; *see supra* note 17.

110. *Danforth*, 428 U.S. at 66-67.

111. 462 U.S. 416, 420 (1983).

112. *Id.* at 452.

113. *Id.* at 420 n.1.

114. Justice O'Connor noted:

> Our recent cases indicate that a regulation imposed on a "lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.' " In my view, this "unduly burdensome" standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular "stage" of

and the easily satisfied rational basis test.[115] In her dissenting opinion, Justice O'Connor, joined by Justice White and Justice Rehnquist, attacked the *Roe* trimester framework as "a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context."[116] Justice O'Connor wrote that the state's interest in protecting the potentiality of human life is present throughout pregnancy,[117] a view the majority characterized as "wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade*."[118]

Sixteen years after *Roe*, the Court marked a turning point in its treatment of abortion cases: Chief Justice Rehnquist's opinion in *Webster v. Reproductive Health Services*[119] demonstrated a new willingness to allow individual states to restrict access to abortion.[120] *Webster* involved a challenge to a Missouri law containing "findings" that life begins at conception and requiring, before an abortion, various tests to determine the gestational age, weight, and lung maturity of any fetus that

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> pregnancy involved. If the particular regulation does not "unduly burde[n]" the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.

*Id.* at 453 (O'Connor, J., dissenting) (citations omitted) (quoting Maher v. Roe, 432 U.S. 464, 473 (1977) (quoting Bellotti v. Baird, 428 U.S. 132, 147 (1977))). Applying the undue burden analysis involves two steps. First, the challenged regulation must be analyzed to determine whether it places such an undue burden on a woman's right to abortion. If not, the provision must merely be rationally related to a legitimate state interest to be found constitutional. If it does create an undue burden, however, the provision would be subjected to strict scrutiny review under which the provision must be substantially related to a compelling state interest. *Id.*; *see also* Brief for the United States as Amicus Curiae in Support of Petitioners at 4-8, *Akron* (No. 81-746) (calling on the Court to adopt the undue burden standard of review in abortion law cases).

115. Wilkins et al., *supra* note 92, at 432-36. Professor Wilkins has praised the undue burden test as returning policymaking authority to state legislatures. *Id.* at 435-36.

In several cases prior to *Akron I*, the Court had used the phrase "unduly burdensome" to describe the type of abortion restrictions against which the *Roe* framework was designed to protect. In Maher v. Roe, 432 U.S. 464 (1977), Justice Powell stated, "*Roe* did not declare an unqualified 'constitutional right to an abortion' . . . . Rather, the right protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 473-74 (emphasis added); *see also* Bellotti v. Baird, 428 U.S. 132, 148 (1976) (stating that the Court need not determine in that case at what point consent requirements for minors become "unduly burdensome").

116. *Akron I*, 462 U.S. at 454. (O'Connor, J., dissenting); *see supra* note 61 and accompanying text.

117. *Akron I*, 462 U.S. at 459 (O'Connor, J., dissenting).

118. *Id.* at 421 n.1.

119. 492 U.S. 490 (1989). It is interesting to note that while still an Associate Justice, Chief Justice Rehnquist was one of the two *Roe* dissenters, but that sixteen years later, as Chief Justice, he had gained enough support for his position to comand a majority in *Webster*.

120. *See* Mark E. Chopko, Webster v. Reproductive Health Services: *A Path to Constitutional Equilibrium*, 12 CAMPBELL L. REV. 181, 219-20 (1990).

a physician has reason to believe is at least twenty weeks old.[121] In the majority opinion joined by Justices White, Kennedy, O'Connor, and Scalia, Chief Justice Rehnquist wrote that *Roe* "implie[d] no limitation on the authority of a State to make a value judgment favoring childbirth over abortion" and that the statute's preamble "can be read simply to express that sort of value judgment."[122] The majority also upheld a prohibition on the use of public facilities and employees to perform abortions as being permissible under the Constitution, reasoning that "the State's decision . . . to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.' "[123]

A three-Justice plurality in *Webster* rejected the court of appeals' interpretation, which had been that the statute unconstitutionally required doctors to perform all of the tests in all circumstances to determine whether a fetus is viable.[124] The plurality attacked *Roe*'s trimester framework as rigid, and therefore inconsistent with "the notion of a Constitution cast in general terms,"[125] but stated that *Roe* need not be overruled at this time.[126] They distinguished the statute at issue in *Webster*, which stated that viability is the point at which the state's interest in protecting potential life becomes compelling, from the statute in *Roe*, which criminalized all abortions except those performed to save a mother's life.[127] In so doing, Justice Blackmun charged, the plurality opened the door for states to enact statutes challenging the basic foundation of the right of abortion as enunciated in *Roe*.[128]

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121. *Webster*, 492 U.S. at 501. The statute also prohibited public employees from performing or assisting in the performance of abortions not necessary to save the mother's life, as well as the use of public facilities for such abortions. It also prohibited "the use of public funds, employees or facilities for the purpose of 'encouraging or counseling' a woman to have an abortion not necessary to save her life." *Id.* The statute further required that all Missouri laws be interpreted to provide unborn children with rights enjoyed by other persons, subject to the Federal Constitution and Supreme Court precedent. *Id.*

122. *Id.* at 506.

123. *Id.* at 509 (quoting Harris v. McRae, 448 U.S. 297, 315 (1980)).

124. *Id.* at 514 (plurality opinion). The three members of the Court joining in the plurality opinion were Chief Justice Rehnquist, and Justices White and Kennedy. *Id.* at 499.

125. *Id.* at 518 (plurality opinion).

126. *Id.* at 521 (plurality opinion).

127. *Id.*

128. *Id.* at 538 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun argued that *Webster* "implicitly [invited] state . . . legislature[s] to enact more and more restrictive abortion regulations in order to provoke more and more test cases." *Id.* (Blackmun, J., concurring in part and dissenting in part).

> The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right under the Due Process

Justice O'Connor, in a concurring opinion, disagreed with the plurality that the viability tests conflicted "with any of the Court's past decisions concerning [the] state regulation of abortion[s]," contending that there was no need to reexamine *Roe* as the plurality had done.[129] Justice Scalia's concurrence, by contrast, stated that the Court should reexamine and overrule *Roe*, noting that the Court often has spoken more broadly than necessary in order to announce a new rule of constitutional law.[130]

Justices Blackmun, Brennan, and Marshall criticized the plurality's analysis, saying that it completely disregarded the basic foundation of *Roe*: the Court's recognition of the fundamental right to terminate a pregnancy.[131] In so doing, Justice Blackmun continued, the plurality effectively repudiated every principle for which *Roe* stands.[132]

*Webster* left the Court without agreement by a majority on the proper standard of review to apply in cases dealing with statutes restricting abortions. Of the original seven Justices favoring strict scrutiny in *Roe*, only Justice Blackmun, Justice Brennan, and Justice Marshall remained on the Court when *Webster* was decided.

In *Hodgson v. Minnesota*,[133] the Court struck down a Minnesota statute requiring that any woman under the age of eighteen notify both parents at least forty-eight hours before undergoing an abortion.[134] A separate plurality opinion written by Justice Kennedy, however, upheld an alternative provision of the statute requiring parental notification but including a judicial bypass procedure in the event that enforcement of the provision without a judicial bypass was enjoined.[135] In a concurrence

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Clause to terminate a pregnancy free from the coercive and brooding influence of the State.

*Id.* (Blackmun, J., concurring in part and dissenting in part).

129. *Id.* at 525 (O'Connor, J., concurring in part and concurring in the judgment). "When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be enough time to reexamine *Roe*. And to do so carefully." *Id.* at 526 (O'Connor, J., concurring in part and concurring in the judgment).

130. *Id.* at 533 (Scalia, J., concurring in part and concurring in the judgment).

131. *Id.* at 556 (Blackmun, J., concurring in part and dissenting in part).

132. *Id.* at 556-57 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens argued in his opinion that the statute's definition of conception implied regulation not only of pre-viability abortions, but also of common forms of contraception such as the IUD (intrauterine device) and the "morning after pill," and that the preamble containing the definition, therefore, would be unconstitutional under *Griswold*, without implicating *Roe*. *Id.* at 565-66 (Stevens, J., concurring in part and dissenting in part).

133. 497 U.S. 417 (1990).

134. *Id.* at 450-55. The Court held that the two-parent notification requirement without a judicial bypass option was unconstitutional. Justices Brennan, Marshall, Blackmun, and O'Connor joined Justice Stevens to create the majority.

135. *Id.* at 495-97 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy's opinion was joined by Chief Justice Rehnquist, Justice White, and Justice

making her the fifth vote in favor of upholding the provision, Justice O'Connor applied her undue burden standard. She reasoned that if a judicial bypass option was provided, the two-parent notification requirement did not unduly burden a minor's limited right to an abortion.[136]

In *Ohio v. Akron Center for Reproductive Health (Akron II)*,[137] decided on the same day as *Hodgson*, the Court refused to restrict further the power of states to impose parental notification requirements.[138] The Court upheld a statute making it a crime for a physician to perform an abortion on an unmarried minor without providing notice to one of the parents.[139] Although the statute provided a judicial bypass procedure, it required the minor to present clear and convincing proof of her maturity to make the abortion decision.[140]

While not explicitly overruling *Roe*, the Court's opinions in *Webster*, *Hodgson*, and *Akron II* broadened states' powers to regulate abortion and raised questions as to *Roe*'s continued vitality. In addition, the changing composition of the Court, especially the appointments of Justices Souter and Thomas to replace Justices Brennan and Marshall—both members of the original *Roe* majority—led to some expectations that the Court was only waiting for the proper vehicle to overturn *Roe*.[141] *Casey*, it was widely believed, could provide such a vehicle.[142]

Far from resolving the complex issues regarding state regulation of abortions, however, the *Casey* opinion leaves the future of abortion rights clouded with uncertainty. What is clear is that the Court, as currently

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Scalia. Justice O'Connor concurred to create the majority upholding the two-parent notification requirement with a judicial bypass. *Id.* at 461 (O'Connor, J., concurring in part and concurring in the judgment in part).

136. *Id.* (O'Connor, J., concurring in part and concurring in the judgment in part). Justice O'Connor stated that "[i]n a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening the minor's limited right to obtain an abortion." *Id.* (O'Connor, J., concurring in part and concurring in the judgment in part).

137. 497 U.S. 502 (1990).

138. *Id.* at 518-19.

139. *Id.*

140. *Id.* at 507-08. To obtain a judicial bypass, a minor had to present clear and convincing evidence that she had sufficient maturity and information to make the abortion decision, that one of her parents had engaged in physical, emotional, or sexual abuse against her, or that notice was not in her best interest. *Id.* at 508-09. The Court held that the parental notice requirement did not unconstitutionally burden a minor's right to an abortion. *Id.* at 517-18. Writing for the majority, Justice Kennedy stated that "[i]t would deny all dignity to the family to say that the State cannot take this reasonable step in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent." *Id.* at 520.

141. Savage, *supra* note 9, at A1.

142. Laurence H. Tribe, *Write* Roe *Into Law*, N.Y. TIMES, July 27, 1992, at A17.

composed, is unlikely to uphold an outright ban on abortion in the early stages of pregnancy. It is not clear, however, exactly how far states may go in making abortions more difficult to obtain before the Court finds an undue burden, thus triggering strict scrutiny review. Furthermore, the coalition of liberal and moderate Justices that reaffirmed *Roe* is fragile and based its decision on stare decisis and the need to maintain the Court's legitimacy rather than on an endorsement of the legal theories underlying *Roe*.[143] The *Casey* majority was created only by the shift of Justice Kennedy from the *Webster* plurality's rational basis approach to the more centrist position of Justice O'Connor.[144]

While ostensibly upholding *Roe*'s basic principle that women have a fundamental right to obtain pre-viability abortions, the Court approved abortion provisions more restrictive than at any previous time in the post-*Roe* era.[145] *Casey* also overruled the earlier decisions in *Akron I* and *Thornburgh v. American College of Obstetricians and Gynecologists*,[146]

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143. Robert Bork, whose unsuccessful nomination to the Supreme Court in 1987 enabled Justice Kennedy to join the Court and provide the pivotal vote reaffirming *Roe*, has criticized the *Casey* majority's approach as having no basis in the Constitution:

> "Institutional integrity" turns out to mean the Court must not overturn a wrong decision if there has been angry opposition to it. Nothing is said of the possible perception that the Court reaffirms such a decision because there has been angry support for it. There being political forces on both sides, principles of institutional integrity would seem to counsel deciding the case on the merits.

Robert H. Bork, *Again, a Struggle for the Soul of the Court*, N.Y. TIMES, July 8, 1992, at A19.

144. Chief Justice Rehnquist, believing that he could count on the support of Justice Kennedy along with Justices Scalia, White, and Thomas, drafted a majority opinion that would have given states considerable power to enact abortion restrictions. Savage, *supra* note 9, at A1. When voting on the Pennsylvania restrictions in the Court's chambers, Justice Kennedy indicated that he was not prepared to overturn *Roe* but that the Pennsylvania restrictions seemed reasonable. *Id.* Justice Kennedy, who was raised to believe that abortion was a terrible evil, hoped to avoid having to make the ultimate decision as to the constitutionality of abortion, but was left with no choice when Chief Justice Rehnquist indicated that he planned to write a majority opinion giving states broad leeway to enact statutes to protect potential life. *Id.* Justice Kennedy then announced that he would join Justices O'Connor and Souter in affirming the basic right to abortion. *Id.*

145. *See infra* note 148.

146. 476 U.S. 747 (1986). See *supra* notes 111-18 and accompanying text for a discussion of *Akron I*. The Pennsylvania statute struck down in *Thornburgh* required a woman considering abortion to be informed of the physician's name, possible detrimental physical and psychological effects, possible medical risks of the procedure, probable gestational age of the fetus, medical risks of carrying a child to term, medical benefits available to help cover childbirth and related expenses, and the father's potential liability for assistance with the child's support. *Thornburgh*, 476 U.S. at 760-61. In addition, the statute mandated that the woman be informed as to the availability of printed materials describing the fetus and a listing of agencies offering alternatives to abortion. *Id.* Writing for the majority, Justice Blackmun stated that "[t]his is not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice." *Id.* at 762.

which struck down informed consent requirements characterized by the Court in *Akron I* as "designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[147] *Casey* upheld the Pennsylvania requirements that women be informed not only of the risks of the procedure but also of the probable gestational age of the fetus.[148]

Despite the *Casey* Court's greater deference to specifically expressed state interests, statutes banning abortions in most situations cannot be upheld even under *Casey*'s reformulation of the *Roe* framework. *Roe*'s trimester framework delineated the periods of pregnancy at which the competing interests become compelling.[149] The *Roe* Court held that a woman has a fundamental right to obtain an abortion during the first and second trimesters, subject only to regulation by the state to protect the health of the mother during the second trimester.[150] *Casey* reaffirmed this basic holding of *Roe* that the right to abortion is fundamental in the early stages of pregnancy,[151] although the *Casey* joint opinion held that fetal viability rather than the end of the second trimester is the point at which a state's interest becomes compelling.[152] The *Casey* joint opinion also adopted the undue burden test as the standard of review to be used in abortion cases.[153] Thus, reading *Roe* and *Casey* together, a woman has a fundamental right to obtain a pre-viability abortion, a right that may not be subjected to undue burdens by state laws.

The Court appeared to underline its resolve by denying certiorari in the case of *Ada v. Guam Society of Obstetricians & Gynecologists.*[154] The

147. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 444 (1983).

148. *Casey*, 112 S. Ct. at 2823 (plurality opinion). Justices O'Connor, Souter, and Kennedy wrote in their joint *Casey* opinion that:

> To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgement of an important [state] interest in potential life, and are overruled. . . . If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

*Id.* (plurality opinion).

149. Roe v. Wade, 410 U.S. 113, 163-64 (1973).

150. *Id.* at 164.

151. *Casey*, 112 S. Ct. at 2804.

152. *Id.* at 2816 (plurality opinion).

153. *Id.* at 2820 (plurality opinion).

154. 113 S. Ct. 633 (1992). Dissenting from the denial of certiorari, Justice Scalia, joined by Chief Justice Rehnquist and Justice White, contended that the lower court erred in declaring the law unconstitutional on its face, saying "there are apparently some applications of the statute that are perfectly constitutional." *Id.* at 634 (Scalia, J., dissenting). Justice Scalia contended that

> [f]acial invalidation based on overbreadth impermissibly interferes with the state pro-

Court declined to consider the Ninth Circuit Court of Appeals' decision to strike down Guam's abortion statute,[155] which allowed abortions only if two physicians practicing independently determined that continued pregnancy would threaten the life or "gravely impair" the health of the mother, or in cases of ectopic pregnancies.[156] The law made no exceptions for rape or incest.

The denial of certiorari in the *Guam* case marked the first time in twenty years that the Court had declined to hear a major abortion case.[157] Only three Justices voted to hear the case, not including Justice Thomas or any of the five members of the *Casey* majority.[158] Justice Thomas' decision not to join the dissenters may have reflected a tactical decision designed to limit the effect of the Court's order rather than an actual change in position.[159]

Some states, including Louisiana[160] and Utah,[161] have enacted stat-

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> cess of refining and limiting . . . statutes that cannot be constitutionally applied in all cases covered by their language. . . . Under this Court's current abortion caselaw, including *Casey*, I see no reason why the Guam law would not be constitutional at least in its application to abortions conducted after the point at which the child may live outside the womb.

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

155. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

156. *Id.* at 1368.

157. Dick Lehr, *Overrule of Abortion Ban Allowed to Stand; High Court Won't Hear Case on Sweeping Guam Statute*, BOSTON GLOBE, Dec. 1, 1992, at 1.

158. *Id.* Only four votes are required for a grant of certiorari. Had Justice Thomas joined with the three dissenters—Chief Justice Rehnquist, and Justices Scalia and White—to force the issue, the five members of the *Casey* majority simply could have voted to affirm the court of appeals. Affirming the lower court decision would have created a legal precedent, while the decision not to hear the case allows proponents of anti-abortion laws to argue that the Court did not actually decide the validity of the Guam law. *Id.*

159. *Id.*

160. The Louisiana statute criminalizes the administration or prescription of "any drug, potion, medicine, or any other substance to a female," or the use of "any instrument or external force whatsoever on a female" "with the specific intent of terminating pregnancy." LA. REV. STAT. ANN. § 14:87(A) (West Supp. 1992). Exceptions to the statute allow termination of a pregnancy to preserve the life or health of the unborn fetus, to remove a dead fetus, to save the life of the mother, and for pregnancy resulting from rape or incest. The rape and incest exceptions are also subject to the requirements that the victim report the rape or incest to law enforcement officials and that the abortion be performed within the first 13 weeks of pregnancy. Further, rape victims must obtain a physical examination within five days of the rape to determine whether the woman was pregnant prior to the rape. *Id.* § 14:87(B). Sentences of not less than one nor more than ten years of imprisonment at hard labor and fines of not less than $10,000 nor more than $100,000 are imposed on persons convicted of performing an abortion. The penalties do not apply to women obtaining abortions. *Id.* § 14:87(E).

161. The Utah Code allows abortions only to save the life of the mother, to terminate a pregnancy resulting from a reported rape or from incest if the abortion is performed within the first twenty weeks of pregnancy, to prevent grave damage to the pregnant woman's medical

utes that effectively eliminate the right to abortion except for cases of rape and incest or to protect the life or health of the mother. While providing a somewhat larger window of availability for abortions than the *Guam* statute, the statutes are incompatible with *Roe* and *Casey*.[162] The United States Court of Appeals for the Fifth Circuit struck down the Louisiana statute[163] subsequent to the *Casey* decision, saying that the statute, "on its face, is plainly unconstitutional under *Casey* because [it] imposes an undue burden on women seeking an abortion before viability."[164] Despite the Court's refusal to hear the *Guam* case, Louisiana has filed a petition for certiorari.[165]

In a challenge to Utah's statute, *Jane L. v. Bangerter*,[166] the United States District Court for the District of Utah held that the Act was not void for vagueness and did not violate the First Amendment's Establishment or Free Exercise Clauses or the right to freedom of speech; nor did it violate the right to freedom of speech, or the Thirteenth Amendment's prohibition on involuntary servitude.[167] The judge delayed ruling on a privacy challenge to the Act until after the Court's *Casey* decision.[168]

Should the four *Casey* dissenters gain new allies with the appointment of new Justices in coming years, statues similar to those from Louisiana and Utah could be held to be constitutional.[169] The election of

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health, or to prevent the birth of a child with profound defects. UTAH CODE ANN. § 76-7-302 (Supp. 1992). Persons performing unauthorized abortions are guilty of a third-degree felony, but women obtaining unauthorized abortions are not subject to criminal sanctions. *Id.* § 76-7-314. The statute also includes parental and spousal notification and informed consent requirements. *Id.* §§ 76-7-304, 76-7-305 (1990).

162. *See supra* text accompanying notes 149-53.

163. Sojourner T. v. Edwards, 974 F.2d 27, 31 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3481 (U.S. Dec. 21, 1992) (No. 92-1066).

164. *Id.*

165. Petition for Certiorari, Sojourner T. v. Edwards, 974 F.2d 27, 31 (5th Cir. 1992), (No. 92-1066), *published at* 61 U.S.L.W. 3481 (U.S. Dec. 21, 1992).

166. 794 F. Supp. 1537 (D. Utah 1992).

167. *Id.* at 1542-49. In addition to other claims, the plaintiffs took the novel approach of challenging the abortion regulations on Thirteenth Amendment grounds, alleging "prohibiting elective abortions forces women into 'slavery' or 'involuntary servitude' by carrying a child to term." *Id.* at 1549. Judge Green dismissed the claim, saying "[i]t strains credulity to equate the carrying of a child to term with 'compulsory labor,' and the argument borders on the frivolous." *Id.*

168. *Challenge to an Abortion Law is Set Back*, N.Y. TIMES, April 11, 1992, § 1, at 6.

169. Justice Blackmun, the author of the *Roe* opinion, has indicated that the future of abortion rights may well be decided when his successor is appointed. "I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor may well focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds may be made." *Casey*, 112 S. Ct. at 2854-55 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

President Clinton,[170] however, who has promised to appoint Justices supporting abortion rights, makes it unlikely that the group of Justices seeking to overrule *Roe* will be able to garner the necessary fifth vote in the near future.[171]

The Court recently denied certiorari in a case challenging a Mississippi law requiring doctors to counsel women on alternatives to abortion followed by a twenty-four hour waiting period, a decision that may provide some indication of what types of abortion restrictions the Court will tolerate.[172] The Court's denial of certiorari carries no precedential value, of course, but in refusing to hear the case, the Court declined the opportunity to clarify what constitutes an undue burden. Abortion rights lawyers argued that the particular circumstances in Mississippi, a rural state, meant that the law, on its face, placed an undue burden on women.[173] Despite the Court's refusal to hear the case, the law may still be challenged "as applied," once evidence exists of how the waiting period actually affects access to abortions.[174]

*Casey* failed to resolve many issues related to what laws states may enact to regulate abortions. The likely result will be a new wave of state restrictions, similar to those approved in Pennsylvania, that make abortions more expensive and difficult to obtain.[175] Although it is clear that

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170. *A Brighter Day for Choice*, N.Y. TIMES, Dec. 2, 1992, at A28.

171. Savage, *supra* note 9, at A1. One Justice, speaking on condition of anonymity, said after the *Casey* decision that the "battle is over. It will never be overturned now." *Id.*

172. Barnes v. Moore, 970 F.2d 12 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992).

173. Linda Greenhouse, *Justices Decline to Hear Mississippi Abortion Case*, N.Y. TIMES, Dec. 8, 1992, at A22.

174. *Id.*

175. According to 1988 figures, 83% of all counties in the United States lack an abortion provider. Charles Leroux, *Frozen Opinions—19 Years Later, Abortion Issue Entangles Court*, CHI. TRIB., Aug. 9, 1992, § 4, at 1. Professor Laurence Tribe described what he sees as the likely result of *Casey*:

> The five Justices who made history in *Casey* by refusing to overrule *Roe*, and who wrote so forceful a defense of the basic principle that women must be free to choose, unfortunately gave a green light to every state and city to restrict abortion in any way that judges appointed by Presidents Ronald Reagan and Bush do not find an "undue burden."
>
> The result of this newly weakened protection for the right to choose . . . was that women seeking abortion might now be subjected to long delays, repeated and costly trips to distant cities and heightened exposure to harassment and even violence by groups like Operation Rescue.

Tribe, *supra* note 142, at A17.

While *Casey* may encourage new activity in legislatures across the country as states enact more restrictive abortion laws, the decision also has spurred calls on Congress to move forward with the Freedom of Choice Act of 1992, S. 25, 102d Cong., 2d Sess. (1992) (reintroduced as the Freedom of Choice Act of 1993, S. 25, 103d Cong., 1st Sess. (1993)), an attempt to write *Roe* into federal law. The Freedom of Choice Act would prohibit states from restrict-

the Court cannot uphold state laws banning pre-viability abortions under *Casey*,[176] a more difficult question remains unanswered by the case: At what point do restrictions such as longer waiting periods or more intensive counseling become unduly burdensome on a woman's choice?[177] The critical aspect of the analysis is what constitutes a "substantial obstacle." How will the Court define "substantial?" Will the Court apply a consistent definition to the term, or will it, as Justice Scalia contended in *Casey*, merely highlight certain facts in the record and announce that an undue burden does or does not exist?[178] This lack of certainty undoubtedly will lead to new variations of restrictions, more litigation, and even more animosity between the parties to this deeply divisive issue.

Even though *Casey* left undefined the exact parameters of what constitutes an undue burden, it reaffirmed the *Roe* holding that abortion is a fundamental right in the early stages of pregnancy. Nor did the Court undercut *Roe* by adopting a rational basis standard of review that would allow states to enact abortion restrictions that are merely rationally related to legitimate state interests. Since *Casey*, the Court has declined to hear cases from Guam and Mississippi, supporting the view that, while some abortion restrictions are constitutional, outright bans on abortion will not be upheld. In addition, the election of a president who supports abortion rights solidified the view that *Roe*'s basic premises are unlikely to be overturned in the foreseeable future.[179]

The landmark 1973 ruling of *Roe v. Wade*, as reformulated in *Casey*, retains its validity even as it hangs by the thread of a single vote. Far from settling the question of the extent of the constitutional right to abortion, however, the Court's decision in *Casey* to uphold most of Penn-

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ing the right of a woman to choose to have an abortion before fetal viability. The Act would allow states to restrict access to abortions after viability except when necessary to protect the life or health of the woman. The Act would also allow states to impose requirements on abortions if such requirements are medically necessary to protect the life or health of women undergoing abortions. *Id.* Congressional leaders had planned to rush the Act through both houses prior to the 1992 presidential election, in order to present it to President Bush, who had vowed to veto the bill. WEDDINGTON, *supra* note 19, at 269. The reaffirmation of the basic *Roe* principles in *Casey*, however, dissipated the sense of urgency, and the Act has yet to come to a floor vote. Nat Hentoff, *The Fading Freedom of Choice Act*, WASH. POST, Sept. 12, 1992, at A19.

176. *See supra* text accompanying notes 149-53.

177. *See supra* text accompanying notes 64-66.

178. *See supra* notes 80-82 and accompanying text.

179. Savage, *supra* note 9, at A1. President Clinton marked the twentieth anniversary of *Roe* on January 22, 1993, by signing memoranda lifting the Title X "Gag Rule" which restricted abortion counseling at federally-funded clinics, 58 Fed. Reg. 7455 (1993), ending the ban on fetal tissue research, *id.* at 7457, revoking prohibitions on the importation of the French "abortion pill," RU-486, *id.* at 7459, and allowing privately-funded abortions at overseas U.S. military hospitals. *Id.* at 6439.

sylvania's restrictions, combined with the uncertainty of the undue burden standard, is certain to invite further court battles and continuing erosion of *Roe*. Instead of deciding the abortion issue once and for all, *Casey* marks but another chapter in a fiery debate dividing the nation, a chapter likely to intensify the passions and efforts of those on each side of the abortion controversy. The *Casey* majority demonstrated deep concern that caving in to political pressure might severely damage the Court's legitimacy. Rather than defusing political pressure, however, the *Casey* Court by failing to give a definitive statement on the status of abortion rights in America, may in fact only have energized the competing forces in the abortion controversy. The Court boldly announced that it had reaffirmed the principle of *Roe* that women have a right to abortions during the early stages of pregnancy, but in reality, *Roe*'s promise of a universally available fundamental right and its requirement that abortion regulations receive strict judicial scrutiny are distant memories. While *Roe* theoretically remains valid after *Casey*, the ability of women to exercise the right to obtain abortions is almost certain to become more difficult as states copy and expand upon the Pennsylvania provisions upheld by the Court. As a result, the rights guaranteed under *Roe* ultimately may become meaningless.

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