SUPREME COURT OF THE UNITED STATES*

No. XX-###

REAL FEMINISTS FOR MOTHERHOOD COALITION, PETITIONER V. VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[May 4, 2011]

JUSTICE KENNEDY delivered the opinion of the Court, in which CHIEF JUSTICE ROBERTS, and JUSTICES BREYER, STEVENS, and THOMAS joined. CHIEF JUSTICE ROBERTS filed a concurring opinion, in which JUSTICE THOMAS joined. JUSTICE SCALIA filed a dissenting opinion, in which JUSTICE ALITO joined. JUSTICE GINSBERG filed a dissenting opinion, in which JUSTICE SOUTER joined.

Since this Court decided *Roe v. Wade* in 1973,[1] we received numerous requests to reconsider the validity of that ruling or to otherwise limit its application. Petitioner renews this request, asking us to discard our much maligned and now limited *Roe* doctrine. After struggling with this issue for nearly forty years, we are struck by the wisdom of Justice O'Connor's statement, "[l]iberty finds no refuge in a jurisprudence of doubt."[2] We could not agree more and, therefore, lay the issue of abortion law to rest by overruling this Court's prior decision in *Roe v. Wade*. This opinion follows in three parts. First, we consider Petitioner's procedural posture and the constitutional challenge of *Roe v. Wade*. Second, we lay out a historical roadmap of abortion jurisprudence from *Roe v. Wade* to the present. These cases reveal an unreliable and certainly unpredictable standard in the abortion context. Finally, we conclude with the rationale to support our decision to overrule *Roe v. Wade*.

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

2. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

I

A. Petitioner

Real Feminists for Motherhood Coalition ("Real Feminists") is a nonprofit organization aimed at educating and helping underprivileged, pregnant teenagers in the metropolitan Richmond area. The focus of the organization is aimed directly at pre-natal and post-natal care for qualifying women. Real Feminists assert that the main goal of the organization is to help pregnant women who think the only realistic choice is to have an abortion. The Organization's mission statement declares: "Real Feminists for Motherhood is a non-partisan group aimed at enabling the lives of women and helping each woman reach her full potential even when adversity tries to defeat motherhood. Through education, financial assistance, and positive legislation, all women can warmly embrace motherhood."[3] Members of the organization spend a significant portion of their time lobbying, both with representatives in the General Assembly of the Commonwealth of Virginia and with private investors. The lobbying efforts of the organization are dedicated to enacting anti-abortion legislation in Virginia with the intent to undermine this Court's ruling in *Roe v. Wade*. In 2008, Real Feminists relinquished their lobbying efforts in favor of furthering their cause by directly challenging the constitutionality of *Roe v. Wade* and henceforth commenced this claim. Joining Petitioner as amicus curiae, as it has done in at least half a dozen other cases over the last decade, is the United States who again asks us to overrule *Roe*.

B. Procedural Posture

Petitioner initiated this case in the District Court for the Eastern District of Virginia, making several distinct yet intertwined arguments. First, Petitioner argues that the ruling in *Roe* is unconstitutional after the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[4] Petitioner asserts the decision in *Casey* changed the *Roe*

3. Mission Statement of Real Feminists for Motherhood (2002).

4. 505 U.S. 833, 872–73 (1992) (plurality opinion).

doctrine by allowing state regulation of abortions before viability as long as the regulation did not place an undue burden on a woman seeking an abortion.[5] Second, Petitioner challenges the holding in *Roe* as violating the Equal Protection Clause of the Fourteenth Amendment, arguing that due to the vast advancements in medical technology viability of life has changed since 1973. In the simplest form, Petitioner argues that the law must catch up with modern medicine, and to do so, *Roe* must be overruled to align with the law set forth in *Casey*.[6] Finally, Petitioner contends the Court's holding in *Roe* is inconsistent with public policy and as a result created an unreliable doctrine that has chipped away at abortion jurisprudence until little law and constitutional standards remain from our initial holding in *Roe*.[7]

The District Court for the Eastern District of Virginia dismissed the case, and Petitioner appealed to the Court of Appeals for the Fourth Circuit.[8] The Court of Appeals affirmed the District Court's decision but did acknowledge agreement with Petitioner on the merits of public policy holding, "[s]ubstantial changes indeed have occurred since 1973 reflecting shifts in public policy that continue to fuel the abortion debate; however, it is not for this court to decide *Roe*'s continuing validity."[9] The Court of Appeals affirmed the District Court's dismissal. We grant certiorari to examine the depleted *Roe* doctrine and put to rest the jurisprudence of doubt in the abortion context.

5. *See id.* at 874.

6. *See id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

7. *See id.* at 979.

8. Respondents challenge Petitioner's standing as an organization. Specifically, Respondents assert that no members of Real Feminists would have standing on his or her own. Thus, the organization, as a whole, lacks prudential standing. We reject this claim. Real Feminists, as the party asserting a federal jurisdiction claim, meets all the requirements set forth for organizational standing: (1) at least one member of Real Feminists would have standing on her own, (2) neither the claim nor relief sought requires the participation of individual members, and (3) the interest sought to be protected is germane to the organization. We agree with Petitioner. Real Feminists does have standing to bring this case in federal court. *See generally* Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 181 (2000) (explaining the requirements for organizational standing); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (discussing the requirements of standing); Sierra Club v. Morton, 405 U.S. 717, 734–35, 739 (1972) (discussing the injury requirement for organizational standing).

9. ___ S.E.2d ___ (4th Cir. 2010).

II

At the outset it should be noted that there is a longstanding history of law, both on the federal and state level, directed at abortion and its regulation. This longstanding history is by no means one of consistency. In fact, the history of abortion law is one of doubt contributing to no reliability and certainly no predictability in the law. The ruling in *Roe*—that a woman has a right to terminate her pregnancy before viability, and that a state must satisfy a test of strict scrutiny before any type of regulation on abortion would be constitutionally permissible[10]—has been eroded, changed, abused, and dwindled until very little remains intact from the decision. We find this persuasive evidence as proof that a right to abortion is not a right that should be crafted by this Court. As such, we hereby return the regulation of abortion to where it should be—in the hands of the people.

1973: Roe v. Wade

To understand this Court's final ruling, one must first understand this Court's longstanding efforts to continuously regulate abortion, by beginning where we started in *Roe v. Wade*.

In *Roe v. Wade*, we were presented with a Texas statute,[11] one like those enacted in many States at the time, making all abortions illegal except those necessary to save the life of the mother.[12] Writing for the Court, Justice Blackmun began the decision with an extensive review of the history of abortion law noting particularly the advancements in medical technology allowing physicians to perform safe abortions.[13] Through this historical overview, Justice Blackmun laid the foundation for the Court's position that the right to privacy does include a woman's right to abort.[14] But where exactly does the Constitution ex-

10. *See* Roe v. Wade, 410 U.S. 113, 155, 163–64 (1973).

11. *See id.* at 117–18 n.1 (citing TEX. PENAL CODE ANN. §§ 1191–94, 1196 (Vernon 1971)).

12. *See id.* at 117–118 n.1 (citing TEX. PENAL CODE ANN. § 1196).

13. *Id.* at 129–52 (outlining eight distinct developments that changed and advanced abortion procedures from "ancient attitudes" to the then-current position of the American Bar Association on abortion and three reasons why criminal abortion laws were originally enacted).

14. *Id.* at 153.

tend the right to privacy to give a woman the right to choose? The answer was debatable from the beginning. We acknowledged that although the right to choose an abortion could not be found explicitly in the Constitution and, furthermore, we are not even sure where the proper protection of the right was located in the Constitution—the decision was clear that the right nonetheless did exist.[15] To add to the uncertainty, the Court assumed this was not an absolute right, and thus, when met with strict scrutiny, a state could still regulate abortions.[16]

The strongest element of the *Roe* decision was the test for determining when a state could assert a compelling interest that would trump a woman's right to an abortion.[17] We basically equipped legislators with an outline on how to draft abortion regulation that would pass the strict scrutiny test and remain consistent with the ruling in *Roe*. The regulation of abortion was approached on a trimester basis. When dividing a pregnancy into trimesters, a delineable test was established for when and more importantly *how* abortion regulation was necessary and proper.[18] Specifically, the Court held that during the first trimester, the government could not prohibit abortion and the only permissible abortion regulation during this trimester was any regulation imposed on other medical procedures.[19] Thus, a woman was granted total autonomy over her pregnancy during the first trimester.[20] In the second trimester, States

15. *Id.* We stated:

This right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . 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.

Id.

16. *Id.* at 154–55 (noting limitations that could apply are those such as a State's interest in protecting health, medical standards, and prenatal life). The Court created debate surrounding the constitutional protections by refusing to take a stance on when life begins—at least in the legal context:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Id. at 159.

17. *Id.* at 163.

18. *See id.* at 164–65.

19. *See id.* at 163 (noting regulations during the first trimester including requiring abortion physicians and facilities to be licensed).

20. *See id.* It should be noted that the Court seemed hesitant to make this conclusion. Instead, the Court implied that a woman in conjunction with her physician had total autonomy over her pregnancy.

were afforded more leeway. Abortions could not be prohibited during the second trimester, but States could impose regulations "reasonably relate[d] to the preservation and protection of maternal health."[21] In the final trimester, subsequent to viability, abortions could be prohibited except where necessary to save the life or health of the mother.[22]

After explaining the trimester approach in Section X of the decision,[23] the Court created a new section, Section XI, dedicated "[t]o summarize and to repeat" what was set forth in the immediately preceding paragraph.[24] A review of the structure and content of these sections demonstrates that the trimester approach to abortion regulation was the Court's interpretation and application of abortion law in the United States. The problem with this achievement was the trimester approach was completely devoid of any constitutional foundation.[25]

The *Roe* decision was heard and decided along with the much less publicized case of *Doe v. Bolton*.[26] In this companion case, a Georgia statute regulating abortion was challenged.[27] The statute outlawed abortions in all but three circumstances: (1) where it was necessary to save the life of the mother; (2) where the fetus would likely be born with a serious birth defect; or (3) where the pregnancy resulted from rape.[28] The Court found the State statute unconstitutional in the face of the trimester approach set forth in *Roe*.[29]

See id. at 163–64. "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. This Court continues to support the importance of physician autonomy and control. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 932, 946–48, 966–70 (2000) (Stevens, J., concurring) (O'Connor, J., concurring) (Kennedy, J., dissenting) (noting the discretion a physician should have in selecting the best treatment for their parents, including abortions).

21. *Roe*, 410 U.S. at 163.

22. *See id.* at 163–64.

23. *See id.* at 162–64.

24. *Id.* at 164–66 (summarizing the main points of the case, but oddly focusing only on the trimester approach and briefly stating the holding of the case).

25. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873–74 (1992) (plurality opinion) (overruling the trimester approach in favor of the undue burden standard).

26. 410 U.S. 179 (1973).

27. *Id.* at 182–83.

28. *See id.* at 183 (referencing GA. CRIM. CODE § 26-1202 (1968)).

29. *See id.* at 201; *Roe*, 410 U.S. at 164–65.

The decision was flawed from the beginning. Attempts to settle a deeply controversial debate by alluding to constitutionally undefined rationales but with clearly demarcated limitations on regulations would lead to confusion and be destined for challenges. The 7-2 decision in *Roe* had a dissenting opinion from Chief Justice Rehnquist,[30] while Justice White joined Chief Justice Rehnquist on the dissenting side in *Doe*.[31] These dissenters argued that the Constitution should be strictly construed and that the Court should not create new rights not appearing in the Constitution.[32] The dissents in both *Doe* and *Roe* were adamant that abortion regulation should be left to the legislative process, and history has proven the wisdom of this approach.[33]

1989: Webster v. Reproductive Health Services

Fifteen years later, this Court belittled, berated, and publicly denounced the *Roe* decision in *Webster v. Reproductive Health Services*.[34] In this case we were presented with a Missouri Act that declared human life began at conception and every Missouri state law should be construed to provide unborn children with the same rights as other persons.[35] The Act prohibited the use of state funding or state facilities for the performance, encouragement, or counseling of an abortion that was not necessary to save a woman's life.[36] The Missouri Act also required physicians to test for viability of pregnancy believed to be at least twenty weeks along, and only if the fetus was not viable would an abortion be legal after the twenty weeks of pregnancy.[37] In the plurality

30. *See Roe*, 410 U.S. at 171–78 (Rehnquist, J., dissenting).

31. *See Doe*, 410 U.S. at 221–22 (White, J., dissenting).

32. *See id.*; *see also Roe*, 410 U.S. at 172–73 (Rehnquist, J., dissenting). In *Doe*, Chief Justice Burger and Justice Douglas wrote individual concurring opinions, and in *Roe*, Justice Stewart wrote an individual concurring opinion. *See id.* at 207–21 (Burger, C.J., & Douglas, J., concurring); *Roe*, 410 U.S. at 167–71 (Stewart, J., concurring). Chief Justice Burger suggested that it would be constitutional for a State to place medical restrictions on a woman's right to an abortion by requiring at least two physicians to certify the abortion. *See Doe*, 410 U.S. at 208 (Burger, C.J., concurring).

33. *See Doe*, 410 U.S. at 222 (White, J., dissenting); *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

34. 492 U.S. 490 (1989).

35. *Id.* at 504 (citing MO. REV. STAT. § 1.205.1 (1986)).

36. MO. REV. STAT. §§ 188.210, 188.215 (2004).

37. *Id.* § 188.029.

opinion written by Chief Justice Rehnquist,[38] the constitutionality of the Missouri Act was affirmed.[39]

Though there was disdain for *Roe*'s decision, the *Webster* Court did not overrule or even consider a thorough review of the *Roe* doctrine. Instead, we erroneously added to the doubtful legitimacy of the *Roe* doctrine. The plurality opinion attacked the trimester approach and *Roe*'s attempt to balance the interest of the mother against that of the State.[40] Instead of creating or suggesting a new method to balance these conflicting interests, the Court stated that "the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms . . . . The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle."[41] Without overruling *Roe*, we recognized the State's legitimate compelling interest in protecting fetal life from the moment of conception.[42] In a concurring opinion, Justice Scalia stated the plurality decision effectively overruled *Roe*.[43]

Recognizing the doctrinal shift, Justice Blackmun, joined by Justices Brennan and Marshall, stated in the dissenting opinion: "Today, *Roe v. Wade* and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure . . . . For today, at least, the law of abortion stands undisturbed . . . [b]ut the signs are evident and very ominous, and a chill wind blows."[44] We disagree with Justice Blackmun and the plurality opinion and find that the law of abortion was disturbed after the decision in *Webster*. In fact, the changes left the law in total chaos. The trimester and viability elements—key to *Roe*—were changed and stripped from *Roe*'s established framework. Although the plurality opinion did not explicitly overrule *Roe* or even

38. The Chief Justice was joined by Justices White and Kennedy. *See Webster*, 492 U.S. at 498–99.

39. *See id.* at 500–01 (citing MO. REV. STAT. §§ 1.205(1)–(2), 188.029, 188.205, 188.210, 188.215). The Missouri Act, signed into law in 1986, is comprised of twenty statutory provisions of which five were before the Court. *See id.*

40. *See id.* at 517–19.

41. *Id.* at 518.

42. *See id.* at 519.

43. *See id.* at 532 (Scalia, J., concurring in part and concurring in the judgment).

44. *Id.* at 537, 560 (Blackmun, J., dissenting).

take a direct challenge of the decision, the harsh criticism and changes to the doctrine were enough to lead Justice Scalia to believe the decision would overrule *Roe*.[45] Did *Webster* overrule *Roe*? Justice Scalia thought so, but the legal academy and lower courts disagreed and continued to hold *Roe* and its progeny as the standard for constitutional analysis of abortion regulation.

1992: Planned Parenthood of Southeastern Pennsylvania v. Casey

Five years later, there would be no relief from the jurisprudence of doubt from our decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[46] In Planned Parenthood's brief for certiorari, only one question was asked: "Has the Supreme Court overruled *Roe v. Wade*, holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?"[47] When the Court granted certiorari in *Casey*, it seemed evident that we would reexamine the doctrine set forth in *Roe*.[48] We were asked to consider the constitutionality of a Pennsylvania statute regulating abortions by requiring, among other things, a twenty-four hour waiting period, informed consent, parental consent for unmarried minors, and spousal notification before abortions.[49] In a 5-4 decision, this Court reaffirmed the *Roe* doctrine and held that States could not prohibit abortions prior to viability.[50] However, after *Webster*'s harsh criticism of *Roe*, changes had to be made to the *Roe* doctrine.

45. *See id.* at 532 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia stated that *Roe* should be overturned and should be done so more explicitly than the plurality opinion proposed. *See id.* Justice Scalia further opined that the answer to this critical question belongs to the political process and not the judicial. *See id.*

46. 505 U.S. 833 (1992).

47. Petition for Writ of Certiorari, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (No. 91-744).

48. Justice O'Connor suggested in *Webster* that the proper time to reexamine *Roe* would be presented when a State attempted or enacted legislation prohibiting a woman from obtaining an abortion. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 525–26 (1989) (O'Connor, J., concurring in part and concurring in the judgment). Interestingly, the Pennsylvania statute before the Court in *Casey* did not prohibit abortions, but the Court still took this opportunity to reexamine *Roe* even though they had not done so in the past with similar state statutes.

49. *See Casey*, 505 U.S. at 844, 902–11 app. (citing 18 PA. CONS. STAT. ANN. §§ 3203–3220 (West 1990)).

50. *See id.* at 845–46 (plurality opinion).

In *Casey*, this Court made significant changes to the *Roe* doctrine by overruling both the trimester approach and the use of strict scrutiny for assessing regulations on abortion.[51] The joint opinion written by Justice O'Connor and joined by Justices Kennedy and Souter, declared: "We reject the trimester framework . . . . The trimester framework suffers from these basic flaws: in its formation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*."[52] As we explained, the dividing line between a woman's interest and the State's interest in protecting fetal life remained fetal viability.[53] Abortions could be prohibited, after viability, except where necessary to save or protect the life of the mother.[54] In addition to finessing the viability standard, a new standard was set forth for evaluating the constitutionality of a state regulation: the "undue burden" standard. As defined by the Court:

> [t]he undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.
> . . . .
> 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 women seeking an abortion of a nonviable fetus.[55]

From the beginning, the plurality claimed that "the essential holding of *Roe v. Wade* should be retained and once again affirmed."[56] Yet, this gratuitous lip service paid to the *Roe* doctrine was just a slap in the face of abortion jurisprudence. Where, in *Casey*, we claimed to uphold the essential framework of *Roe*, what actually resulted was a new doctrine, replacing the trimester approach with an undue burden test that eliminated the constitutionality test of strict scrutiny for abortion regulation.

The Court's first attempt at applying the new test did not answer the question: What is an undue burden? When analyzing the Pennsylvania statute, the joint opinion upheld the twenty-four hour waiting period

51. *See id.* at 872–73.
52. *Id.* at 873.
53. *See id.* at 879 (reaffirming that the government could not prohibit abortions before viability).
54. *See id.* at 846.
55. *Id.* at 876–77.
56. *Id.* at 846.

and the requirement of informed consent.[57] The Court found the provision requiring spousal notification before a married woman could receive an abortion unconstitutional.[58] Aside from this ruling, the disconcerting factor remained that the plurality failed to explain an undue burden. Most succinctly, the joint opinion held that a State could not act with the purpose of creating obstacles to abortion; or in other words, the State could not act with the purpose of creating an undue burden on a woman's right to abortion.[59] But the joint opinion recognized and even encouraged the State's interest in regulating abortion, noting that "the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion."[60] According to *Casey*, a State could not create obstacles to abortion, but it could act with the purpose of discouraging abortion and encouraging childbirth. But *every* regulation of abortion was intended to discourage abortion and encourage childbirth. So, how does an undue burden distinguish between regulations that are constitutional and those that are not? The undue burden test has shown no ability to guide this distinction.[61]

The dissenting opinions in *Casey* did not offer a sound or stable approach to abortion jurisprudence. Instead, the argument returned to step one: whether a woman has a constitutionally protected interest in obtaining an abortion. Chief Justice Rehnquist's dissenting opinion agreed that women had a protected interest in abortion, but reasoned the State also had an interest in protecting fetal life from the moment of conception.[62] Justice Scalia's dissent denied any such constitutional interest existed in obtaining an abortion.[63] In *Casey*'s only moment of clarity, the

57. *See id.* at 886–87.

58. *See id.* at 892–94.

59. *See id.* at 878.

60. *Id.*

61. *See infra* notes 65–82 and accompanying text (discussing the Court's application of the undue burden test to similar statutes banning partial-birth abortions and the different conclusions); *see also* Gonzales v. Carhart, 550 U.S. 124, 127 S.Ct. 1610 (2007); Stenberg v. Carhart, 530 U.S. 914 (2000).

62. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

63. *See id.* at 980 (Scalia, J., concurring in the judgment and dissenting in part).

dissenters stated, "[w]e believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."[64]

2000 & 2007: Partial-Birth Abortions

After the 1992 ruling in *Casey*, we were manifestly bound to interpret what constituted an undue burden. This opportunity presented itself in *Stenberg v. Carhart*[65] and *Gonzales v. Carhart*.[66] Perhaps it should come as no surprise that the undue burden test, applied in both cases, resulted in different conclusions, although the statutes at issue were nearly identical.

In *Stenberg*, we addressed a Nebraska statute banning partial-birth abortions.[67] Specifically, the Nebraska statute focused on the partial-birth abortion technique known as a dilation and extraction ("D&X").[68] In a 5-4 vote, there were only two justifications for declaring the state statute unconstitutional.[69] First, the law did not allow for an exception to safeguard the health of women.[70] The majority defaulted back to *Casey* and stated a health exception is necessary for the preservation of the mother's life.[71] The Nebraska statute wanted to invoke the health exception only in extreme cases where a D&X procedure was the only way to save the mother's life. However, in *Stenberg*, the Court opined that the situation need not be so severe that an abortion is the only way to preserve the life of the mother.[72] Second, the Court invalidated the

64. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

65. 530 U.S. 914 (2000).

66. 550 U.S. 124, 127 S.Ct 1610 (2007).

67. 530 U.S. at 921–22.

68. *See id.* Notably, the term "partial-birth" abortion is not a medical term used by many medical schools or medical journals. Abortion opponents coined the term in the mid 1990s, and it continued to gain popular use as states enacted partial-birth abortion bans until the federal government stepped in with the Partial-Birth Abortion Ban of 2003. *See also* Gail Glidewell, Note, *"Partial-Birth" Abortions and the Health Exception: Protecting Maternal Health or Risking Abortion on Demand?*, 28 FORDHAM URB. L.J. 1089, 1095 (2001).

69. *Stenberg*, 530 U.S. at 930.

70. *Id.*

71. *Id.*

72. *Id.* at 937.

statute because it failed to meet the undue burden test.[73] The majority based the conclusion substantially on the testimony of abortion doctors who stated that a D&X procedure is the safest method of abortion for some women.[74] Thus, restricting a woman's right to the safest method of abortion placed an undue burden on her right because, if the safest methods were an unavailable choice, then the woman may not have an abortion. What seemed clear from this ruling was that any attempt to regulate or limit an abortion option that potentially dissuaded a woman from choosing an abortion would fail the undue burden test.

After the ruling in *Stenberg*, it seemed obvious when President George W. Bush signed the Partial-Birth Abortion Ban Act of 2003 ("the 2003 Act"),[75] it would fail to pass the muster of the undue burden test. The 2003 Act prohibited any physician from knowingly performing a partial-birth abortion.[76] Specifically, like the Nebraska statute challenged in *Stenberg*, the 2003 Act also sought to prohibit D&X and potentially intact dilution and evacuation ("D&E") procedures.[77] The evidence revealed that Congress closely followed our ruling in *Stenberg*. Through congressional findings and within the statutory language of the 2003 Act itself, Congress took great strides to illustrate that abortion procedures, intended to be prohibited by the 2003 Act, were never medically necessary to save the life of the mother.[78] The 2003 Act did not prohibit partial-birth abortions necessary to save the life of the mother, but the physical complications must be both a direct result of the pregnancy and life threatening for the partial-birth abortion to be legal.[79]

The Court departed from the newly defined stare decisis of *Stenberg* and upheld the constitutionality of the 2003 Act even though there was no health exception to safeguard the mother's life.[80] The majority held the 2003 Act stood on its own and insisted there were other reasonable

73. *Id.* at 930.

74. *Id.* at 931–36. In an attempt to eliminate doubt, it was clearly stated in *Stenberg* that the test for evaluating law regulating abortion would be the undue burden test. *Id.*

75. Pub. L. No. 108-105, § 2, 117 Stat. 1201 (codified as amended at 18 U.S.C. § 1531 (2006)).

76. 18 U.S.C. § 1531(a).

77. *See id.* § 1531(b).

78. Partial-Birth Abortion Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201.

79. 18 U.S.C. § 1531(a).

80. Gonzales v. Carhart, 550 U.S. 124, ___, 127 S.Ct. 1610, 1636–38 (2007).

alternatives for women seeking a second trimester abortion.[81] Therefore, in the Court's eyes, there was no need for a health exception in this federal statute regulating abortion.[82]

Although the 2003 Act did not explicitly state what type of partial-birth abortion procedures were prohibited, these facts were important to ascertain because they weighed in the decision of determining whether the 2003 Act placed an undue burden on a woman's right to an abortion.[83] The D&X procedures were typically performed only when the fetus' skull was too large to fit through the cervix and were very rarely performed. Whether or not the 2003 Act passed the undue burden test hinged on whether the 2003 Act applied to all D&E procedures, or instead only to *intact* D&E procedures.[84] If the 2003 Act applied to all types of D&E procedures, it would place an undue burden on a woman because D&Es are the most prevalent abortion procedure performed in the second trimester.[85] We found no complications with the undue burden test and held that the 2003 Act only applied to *intact* D&Es.[86] Because it included only intact D&Es, the 2003 Act

did not constitute an undue burden and thus, satisfied constitutional standards.[87]

In sum, when this Court laid the foundation for abortion jurisprudence in 1973 and declared the right for women to choose an abortion, one could have anticipated the challenges and questioning of that law. State after state enacted legislation attempting to regulate abortion. The continuous challenges to the *Roe* doctrine made it clear that this Court served as a legal battleground for a political debate. Instead of putting the issue aside, we followed the challenges and questioning of the *Roe*

81. *Id.*, 127 S.Ct. at 1636–37.
82. *Id.*; 127 S.Ct. at 1637–38.
83. *Id.*; 127 S.Ct. at 1619–20.
84. *Id.*; 127 S.Ct. at 1627.
85. *Id.*
86. *Id.*
87. *Id.*

doctrine, until what remained was a much-degraded doctrine, barely resembling the landmark case of *Roe v. Wade*. Without a clear method, test, standard, or means of evaluating attempts to regulate abortion, there can be no predictability and reliability in abortion jurisprudence. In no other case is this more evident than *Roe*. Continuous changes, numerous questions, and several insults created doubt in the stability and underlying constitutional principles in *Roe*.

This doubt carried through *Roe* and into its progeny. In *Casey* we were confronted by our own jurisprudence while the delicate state of abortion law hung in the balance. Did *Casey* overrule *Roe*, or did *Webster*? The joint opinion in *Casey* wanted people to believe *Roe* was retained and reaffirmed,[88] but such retention is impossible to effectuate by changing the doctrine. Chief Justice Rehnquist saw through the muck of abortion jurisprudence and called the *Casey* opinion's bluff by declaring, "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere façade to give the illusion of reality."[89]

In application, *Roe* and its progeny proved to be unreliable and unpredictable. This unpredictability is best demonstrated in the partial-birth abortion cases. There is no way to reconcile *Stenberg* and *Carhart*. Each case concerned statutes attempting to regulate partial-birth abortion procedures. Neither statute provided a health exception to protect the life of the mother, and both statutes restricted a woman's right to access certain abortion procedures. On the one hand, the Nebraska state statute was unconstitutional because it did not provide a health exception and failed the undue burden test by limiting women to only certain types of available procedures. On the other hand, the 2003 Act regulating similar partial-birth abortion procedures was upheld, although it also contained no health exception and restricted certain types of available abortion procedures. Where our own jurisprudence is mired in inconsistency, creating only doubt, we must depart from stare decisis. The time has come for us to abandon this hopeless enterprise and to abandon the ruling that began it all—*Roe v. Wade*.

88. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).

89. *Id.* at 954.

III

We are left with only the claim that stare decisis keeps us from abandoning *Roe* at this late date, and consideration of that doctrine is appropriate in light of our decision today. Stare decisis is not a mandate we must follow. The value of this doctrine is highlighted by Justice Brandeis's statement:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its prior decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.[90]

Justice Brandeis's stated departure from stare decisis would be proper when the precedent never produced a settled workable doctrine and the moral and political concerns of the issue trumped efforts by the Court to follow stare decisis. The *Roe* doctrine has proved a useful tool, by which this Court has made legislative correction difficult, as was evident in the analysis of *Stenberg* and *Carhart*. What exactly must legislation prohibit or regulate for it to pass the inconsistent undue burden test? If these questions were raised, then it indicated *Roe* was not a settled legal doctrine and was, and remains, intrinsically too complicated to apply in any consistent manner. It has proved to be "unworkable" and we have consistently taken it

upon ourselves to tweak the doctrine in ways that suit a particular case, while leaving the *Roe* doctrine intact.[91]

We approach whether the *Roe* doctrine should be removed from the wealth of abortion jurisprudence because of moral and political concerns.

90. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting) (citations omitted).

91. *Casey*, 505 U.S. at 855 (plurality opinion) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

There exists an inherent need to step away from this decision because after years of erosion, there remains little, if any, consistent legal analysis in the *Roe* doctrine. Abortion rights demand predictability and reliability if for no other reason than "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . . ."[92] The American people continued to look toward this Court to resolve and regulate the remaining questions from *Roe* and its progeny. We have been unsuccessful in doing so.

In *Casey*, a plurality of Justices contended that the *Roe* doctrine must stand solely because of stare decisis.[93] Without a doubt, stare decisis demands respect for settled legal doctrine, but it cannot apply to decisions like *Roe*, which never achieved the reliability and predictability commanded by settled legal doctrine. In *Casey*, Justice O'Connor battled the topic of stare decisis as a vehicle to reaffirm *Roe*. She praised Justice Cardozo for his insight on the judicial system and its lack of efficiency if every case had to be examined with fresh eyes,[94] yet this occurred almost every time we granted certiorari and applied the *Roe* doctrine. Each time the *Roe* doctrine has been changed, criticized, or flat out overruled.[95] The value of stare decisis was abandoned long ago in abortion jurisprudence. We remove this doctrine from the shelf in an attempt for a more appropriate branch of government to determine the law of abortion.

IV

To be clear, by overruling *Roe v. Wade* we do not hold that abortion is unconstitutional. Instead we hold that abortion is not a fundamental right afforded protection under the Constitution. Thus, the States are

92. *Id.* at 860.

93. *Id.* at 854–69; *Id.* at 912 (Stevens, J., concurring in part and dissenting in part); *Id.* at 924–25 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 420 (1983).

94. *Id.* at 854 (plurality opinion) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)).

95. *Cf. id.* at 869–73.

free to enact legislation supporting their legitimate interest in protecting the life of the fetus, whether through abortion regulations such as informed consent, waiting periods, or the prohibition of procedures, like partial-birth abortions, or even the prohibition of abortion in its entirety. We agree with Justice White's dissent in *Doe* that abortion "should be left with the people and to the political processes the people have devised to govern their affairs."[96] It is clear that the American people should have the choice to vote and exercise the democracy they love in the abortion debate.[97] With this decision, we bring an epic end to the burning fire of abortion jurisprudence by putting out the flame once and for all. Issues of life and death are most suited for the State realm, where political compromise is possibly and arguably necessary for both sides of the issue. It is time we stop electing presidential candidates based on their abortion platform and move on to other issues. Further, on a selfish note: one hopes this decision will cease to "obscure[] . . . the selection of Justices to this Court . . . ."[98]

The judgment of the Court of Appeals for the Fourth Circuit is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

96. Doe v. Bolton, 410 U.S. 179, 222 (White, J., dissenting).

97. *Casey*, 505 U.S. at 1000 (Scalia, J., concurring in the judgment in part and dissenting in part) (stating famously, "[T]he American people love democracy and the American people are not fools.").

98. *Id.* at 995.

Cite as: ___ U.S. ___ (2011)

Roberts, C.J., Concurring in judgment

CHIEF JUSTICE ROBERTS with whom JUSTICE THOMAS joins, concurring in the judgment.

I join the Court in Part I, II-A, III, and IV of the final decision in overruling *Roe v. Wade*. As to Part II-B, I concur that *Roe* should be overruled and abortion regulation belongs to the States—not this Court. States have a valid interest in regulating—even prohibiting—a woman's attempt to end the life of her unborn baby. With this interest, I believe it not only appropriate, but also imperative that a case of this magnitude be examined directly.[99] In other words, *Roe* should be overruled on the merits of the decision and solely on the merits of such. The plurality takes the easy road by creatively arguing around a jurisprudence of doubt that serves only to implicitly reject *Roe* on the merits. *Roe* and its progeny were wrongly decided because a woman's right to end the life of her unborn baby is not afforded constitutional protection; viability is an ever-changing standard, inappropriate as a constitutional measure; and the undue burden test failed to produce any understanding of the doctrine and its use. I address each of these issues in turn.

A

The right to an abortion was not explicitly enumerated in the Constitution and, as such, was not a right protected by the Constitution or one that could be embedded in the right to privacy. It would be judicial activism to continue to endorse this clearly erroneous concept. The right to privacy and its extension to abortion were conceived before the ruling in *Roe v. Wade*.[100] Although it remains unclear where the right to

99. Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (concurring in part and concurring in the judgment).

100. Chief Justice Earl Warren publicly embraced including abortion in the right to privacy. In oral arguments for *Griswold v. Connecticut*, 381 U.S. 479 (1965), Chief Justice Warren proposed that a constitutional right to privacy would extend to the right to an abortion. Thomas Emerson, in response to the Chief Justice's question stated that the constitutional right of access to contraceptives would not directly lead to the right to an abortion. Chief Justice Warren clearly disagreed and stood by this

abortion derives its initial constitutional underpinnings, it was understood that *somewhere* in the Constitution, the right to privacy protected a woman's right to abort. In a span of two cases, the Court found that the right to privacy *may* exist in no less than six constitutional amendments, but no one was exactly sure where. Justice Scalia stated that the Court substituted its own moral judgment for that of "reasoned judgment" in *Casey* when trying to connect a constitutional approach to the right to abort.[101] Buzz words such as "person's most basic decision," "central to personal dignity and autonomy," "intimate relationships," and "too intimate and personal for state interference"[102] do not upon themselves derive constitutional meaning even though they reach to our core and demand moral acceptance.[103]

B

The decision in *Roe* failed to acknowledge the advancements in medical technology affecting the ever increasing status of viability outside the womb. Viability is fundamental to the holding in *Roe* and that is where the problem occurs. It was only after the point of viability that the State would have a compelling interest in protecting the unborn baby. This compelling interest centers around viability because viability was universally understood as the time a baby would have meaningful life outside the womb of the mother.[104] Even more alarming, Justice

proposition even though his opinion in *Griswold* was not published. *See* BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 239 (1985); Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 232 (1965).

101. *Casey*, 505 U.S. at 982–84 (Scalia, J., concurring in the judgment in part and dissenting in part).

102. *Id.* at 983.

103. This Court has held other acts unconstitutional that would meet the qualification of "reasoned judgment" to be afforded protection. *Id.* at 984. These include polygamy, adult incest, and even suicide, which are proscribed by law and not declared to be fundamental rights. *Id.* The difference, as Justice Scalia suggested in *Casey*, is that society has laws proscribing these behaviors. *Id.* It would be outside the scope of this decision to decide whether abortion should be a right proscribed by law, but it is duly noted that the difference between these issues is a fine line of public acceptance of moral behavior.

104. The Court does not go anywhere near addressing the baby as a life because it would raise other issues the Court is not ready to address—mainly, when life begins or whether the baby should be afforded the protections of the Fourteenth Amendment. But these questions are answered by the Court's position on viability, as if one takes the position that the Court was not protecting the Fourteenth Amendment due process rights of the baby by drawing a line at viability, then whom was the Court

O'Connor acknowledged in *Casey* that since 1973, "advances in neonatal care have advanced viability to a point somewhat earlier. But these facts . . . have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate."[105] But when was viability? By its ordinary meaning, viability meant "the mere *possibility* (not the certainty) of survivability outside the womb."[106] For an element of a doctrine so crucial as to purport constitutional meaning on a right to abortion, viability could not be based on a changing standard. It was impossible to ground a substantial body of law on a principle of viability that was inherently variable.

C

The third problem with the *Roe* doctrine was that the undue burden test failed to produce any understanding of the doctrine and its use. Justice Scalia best articulated the confusion after the Court's useless clarification of an undue burden in *Casey*: "[d]efining an 'undue burden' as an 'undue hindrance' (or a 'substantial obstacle') hardly 'clarifies' the test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what was 'appropriate' abortion legislation."[107] The undue burden test allowed judges to consider each abortion regulation and then to substitute his or her own personal opinion about whether or not there was a "substantial obstacle" in the path of a woman seeking an abortion. I echo the reluctance of the plurality to support the undue burden test because nearly every regulation on abortion sets out to place a substantial obstacle in the path of a woman seeking an abortion. Whether informed consent,[108] waiting periods,[109]

protecting?

105. *Casey*, 505 U.S. at 860 (citations omitted).

106. *Webster*, 492 U.S. at 536–37 (Scalia, J., concurring in part and concurring in the judgment).

107. *Casey*, 505 U.S. at 987 (Scalia, J., concurring in the judgment in part and dissenting in part).

108. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67 (1976) (holding the government may require written informed consents to abortions); *see also* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 446 (1983) (upholding informed consent requirements as long as they are the

or fetal viability tests,[110] the fact remains that all abortion regulations set out to place an obstacle in the path of a woman. These types of regulations served to second-guess a woman's choice to end her pregnancy. As if the choice were not difficult enough to reach on her own, a woman must now be fully informed about the viability of her baby and wait before receiving an abortion. There was just no way to reconcile the chaos created by the undue burden test, and it was indeed a standard "not built to last."[111]

D

In sum, with the majority overruling *Roe* as an attempt to rid American abortion jurisprudence of continuing doubt, I agree but overrule *Roe* on its merits. In addressing whether *Roe* was correctly decided, I develop the idea that abortion is not a fundamental right afforded protection under the Constitution. In doing so, the proper venue for abortion

same for other surgical procedures).

109. In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), the Court declared waiting periods unconstitutional, but when applying the undue burden test in *Casey*, the Court changed its mind and upheld the constitutionality of a twenty-four hour waiting period stating, "under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it." *Casey*, 505 U.S. at 886.

110. *Webster*, 492 U.S. at 517 (upholding the constitutionality of a state law requiring testing and evaluation of fetal viability for all abortions performed after the twentieth week of pregnancy, even with information that this type of test will increase the cost of an abortion).

111. *Casey*, 505 U.S. at 965 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

regulation is within the States for the people to decide. In discussing whether *Roe* created a successful body of law, the plurality opinion overrules *Roe* only on the premise that the doctrine did nothing but create a "jurisprudence of doubt." The *Roe* doctrine was maligned and altered from the first case after *Roe*. The decision produced no workable doctrine and even today, after subsequent changes in the trimester approach, the standard of an undue burden demonstrated that not even changes could create a workable *Roe* doctrine. It has been a long road for the *Roe* doctrine, and with this decision the issue rests with the States where they can learn from our past mistakes and listen to the people to enact appropriate abortion regulating legislation.

JUSTICE SCALIA filed a dissenting opinion, in which JUSTICE ALITO joined.

Many may expect this opinion to follow my other "I-told-you-so" concurring opinions foreshadowing the end of the *Roe* doctrine and how it should be overruled. Today, the Court dismisses *Roe v. Wade* because the doctrine has been severely eroded by subsequent cases, undermining the reliability and predictability so vital to the rule of law. Yet, in this decision, the Court ironically has created more doubt when setting constitutional precedent.

The problem with the *Roe* doctrine was not *Roe* itself. The holding in *Roe* was clear: regulation of abortions before the third trimester was unconstitutional. The jurisprudence of doubt the Court finds so disturbing was created *after* the decision in *Roe*. It was the Court's subsequent attempts to water down the *Roe* doctrine that led to the problem we face today. The Court should overrule all subsequent cases that changed the *Roe* doctrine and restore abortion jurisprudence to that initially established in *Roe*. Doing so would eliminate all the doubt created by subsequent jurisprudence, and it would solve the dilemma the plurality thought was so pressing as to overrule *Roe*.

I dissent from the Court's cowardly approach in overruling *Roe v. Wade*. Perversely, the Court contends that overruling nearly forty years of precedent would clear up any jurisprudence of doubt. The result is just the opposite. In overruling *Roe*, the Court essentially teaches us that losers in court should undermine a court's decision everywhere they can. Perhaps, after continuous wear on the Court, they will prevail, as they have done today. Throwing the issue to the States on a contrived basis of "clearing the issue of any doubt" fails; it will only serve to fuel the very fire the majority sought to extinguish.

JUSTICE GINSBURG filed a dissenting opinion, in which JUSTICE SOUTER joined.

Never has the Court so blatantly manipulated the law in its favor. The manipulation is chock full of moral and religious perversion. The plurality wants us to believe that the problem with abortion is not the lack of constitutional protection, but that it is a decision the Court does not agree a woman should have the right to make. That certainly is not legal justification. As we have seen, the Court embraces and promotes certain liberties not stated in the Constitution, such as marriage and procreation. What is so different with abortion? Justice Rehnquist states, "[u]nlike marriage, procreation, and contraception, abortion 'involves the purposeful termination of a potential life.'"[112] This is a "eureka" moment. There is no legal battle with abortion. By refusing to acknowledge any protection under the Bill of Rights, the Court serves its self interests by imposing its own moral views upon the American people. Since the law cannot operate to eliminate abortion, the Court disguises its own moral decisions as law.

Today's plurality decision lacks any discussion of not only the case before it, but also any analysis of *Roe* on the merits. Forty years of precedent and a case of *Roe*'s historic disposition demands more than a dismissal as nothing more than a continuing annoyance. It is understandable that the Court is discouraged with the ever-changing standard of abortion jurisprudence, but the fact remains that *Roe* deserves more than just a passing glance. For that reason, I join Justice Scalia's dissent that overruling *Roe* without examining the merits of the case furthers the notion of a "jurisprudence of doubt." I write separately to reexamine how *Roe* was discussed on the merits and to show the Court that the *Roe* doctrine reflects a core constitutional value of a reliable and predictable doctrine. Furthermore, the result of leaving abortion solely in the hands of State regulation takes away a woman's control of her own destiny. Overruling *Roe* disregards precedent and the principles of stare

112. *Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

decisis this Court claims to cherish and respect. I cannot join the Court in its decision today—I dissent from its unreasonable disposition.

The Court did not, nor could it, deny the right to privacy; therefore, the concurrence of Chief Justice Roberts is ludicrous to even assert that if a constitutional protection is not explicitly enumerated in the Constitution then it does not exist. Yet, constitutional support exists in several amendments, and this support serves to bolster the argument that abortion is a fundamental right. The debate is moot regarding whether the First, Ninth, or Fourteenth Amendment holds the right to privacy sheltering abortion—the fact remains that the protection exists. Secondly, it is a well-established principle that a major goal of the Constitution is to protect individual liberties. I concede the notion that abortion was not an individual liberty the framers intended to protect. However, the Constitution has the insight, and indeed the power, to confer rights above those enumerated in the Constitution—is this not the beauty of the Ninth Amendment?[113]

A survey of a random sample of the American people from any place in the United States would reveal that nearly all of these people believe they have a right to privacy. Fundamental to the right to privacy is a safeguard from government intrusion on our most private lives. Yet, nowhere in the Constitution is this right to privacy explicitly stated. If we were to follow the constitutional principles of the concurring opinion, as well as those opinions repeatedly expressed by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas in other abortion cases, then many rights that we as Americans hold near and dear to our hearts would not be afforded constitutional protection simply because they are not explicitly stated in the Constitution. These rights include not only the right to privacy, but the right to marry and the right to procreate.[114]

113. Constitutional scholar Erwin Chemerinsky notes that the power behind the Ninth Amendment is that "the framers might have been fearful that enumerating some rights could be taken as implicitly denying the existence of other liberties. Thus, the Ninth Amendment . . . declares: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 5 (3d ed. 2006); *see* U.S. CONST. amend. IX.

114. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Court first recognized marriage as a fundamental

I can think of no right other than abortion that blends ideas of personal and family privacy with that of autonomy, including freedom of thought, belief, and intimate conduct.[115] A woman's right to choose to terminate her pregnancy is deeply personal. It involves not only her bodily integrity, but also includes decisions of family planning not only in the present moment but also those to be made in the future. The freedom of thought and belief is absolutely certain for any woman making decisions about what is appropriate for her body, her life. Time and time again this Court misses the point even when it is right in front of it. I propose that the problem with abortion jurisprudence is not the analysis of the issue, but rather how the Court approaches the topic of abortion. The issue is not whether to obtain an abortion, but the right to *choose* to have an abortion. The distinction is critical. The right to choose is about a woman making a decision for herself and is not limited to abortion; however, the law must afford women all safe and available options so she can make the best decision. Today's decision tells women that the right to choose what is best is not a decision they are capable of making—instead, the decision is one that belongs in the hands of the State. It is nothing short of government regulation of women's bodies by taking the decision away from the individual.

Overruling *Roe* will not stop women from obtaining abortions. It only serves to widen the economic gap in women's health care. Women with financial support will have the means to travel elsewhere to obtain an abortion. Women without the means will resort to desperate measures. Today's decision prevents women from gaining access to safe and

right protected under the liberty interest of the due process clause. 388 U.S. at 12. The Court declared: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Id.* *See generally* Turner v. Safley, 482 U.S. 78 (1987) (finding a Missouri marriage regulation impermissibly burdened the constitutional right of prisoners to marry); Zablocki v. Redhail, 434 U.S. 374 (1978) (finding a Wisconsin statute impinged on the right to marry); Boddie v. Connecticut, 401 U.S. 371 (1971) (discussing the relationship between marriage and due process). The right to procreate was embraced in the 1942 case of *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which held that "[t]his case touches a sensitive and important issue of human rights . . . a right which is basic to perpetuation of a race—the right to have offspring." 316 U.S. at 536.

115. Justice Kennedy explained the notions of liberty in *Lawrence v. Texas*, 539 U.S. 558 (2003): "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct." 539 U.S. at 652.

affordable abortion. The plurality creates a sense of false hope by turning to state regulation of abortion. It seems as if they are offering an olive branch, saying, "Look, we did not declare abortion unconstitutional. We just left that for the States to decide." The trouble with the Court's laziness is that the States do not have laws consistent with this opinion.

An analysis of the current abortion legislation enacted in all fifty states reveals that few states would immediately feel the impact of today's
decision.[116] Most states have either "repealed their [abortion] laws or amended [them] to conform to *Roe v. Wade*."[117] Only three states—Louisiana, Rhode Island, and Utah—enacted legislation after *Roe* challenging the authority of this Court in attempts to prohibit some or most forms of abortion.[118] Even worse is the idea that today's decisions will send States into a legislative panic to enforce laws regulating abortion. Quickly drafted legislation paired with a highly controversial topic is a recipe for disaster. This Court recognizes: "[d]octrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades is *Roe v. Wade*."[119] Have we come full circle with the premise behind a jurisprudence of doubt?

The irony of today's decision is clear. While the Court believes it settled the jurisprudence of doubt surrounding abortion law, the evidence indicates it has in fact created a jurisprudence of doubt concerning other constitutionally protected rights. To echo the words of Justice Blackmun: "I fear for the integrity of, and public esteem for, this Court."[120] The only jurisprudence of doubt resolved by this decision is that abortion law, and indeed the doctrine set forth in *Roe v. Wade*, requires a detailed and thoughtful reexamination. Today's opinion will not silence

116. Paul Benjamin Linton, *The Legal Status of Abortion in the States if* Roe v. Wade *is Overruled*, 23 ISSUES L. & MED. 3, 3 (2007).

117. *Id.*

118. *Id.* at 38. These statutes are currently unenforceable—until this decision is rendered—because federal courts have declared them unconstitutional. *Id.*

119. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

120. Webster v. Reprod. Health Servs., 492 U.S. 490, 538 (Blackmun, J., concurring in part and dissenting in part) (expressing pure displeasure in the Court after the ruling in *Webster* did not give the *Roe* doctrine the attention and respect it deserves).

the issue of abortion before this Court.

In conclusion, today's decision marks a dark day for this Court. It is clear that the moral and religious fervor of this Court is greater than the law and a woman's right to privacy. The victims of today's opinion, the women of the United States, must now accept government regulation of their bodies and acknowledge that the State now determines what is best for her and her unborn fetus. This gigantic step back in women's health does not clear the

jurisprudence of doubt or even create a more reliable and workable standard. The decision in *Roe* was properly decided, and it was the duty of this Court to stand behind that decision. I remain hopeful for the day when the Court understands the error of this decision and sets to correct it.