

## RESCUING ROE

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*The fate of Roe v. Wade is clearly hanging in the balance. The Dobbs case that the Supreme Court is deciding this Term squarely raises the question of whether Roe should be overruled, and five, if not six, of the Justices appear to be inclined to vote to overrule it.*

*Can Roe be saved? We believe it can, but only if the Court can be persuaded to recognize that the two propositions that lie at the heart of Roe—that a woman’s right to decide whether to have an abortion is constitutionally fundamental, and that the government’s interest in protecting potential life does not become compelling until the point of fetal viability—rest on a much firmer foundation than the one provided in Roe and later cases.*

*We offer a defense of both propositions that we believe has the capacity to sway those members of the Court who are skeptical of Roe but open to persuasion to stand by it. Our defense has that potential not only because of its novelty and cogency but also because the Court could adopt it without repudiating established doctrines that play a significant role in areas of the law beyond reproductive rights.*

*In large part, the novelty of our defense stems from the use to which it puts a nonlegal source—an article that philosopher Judith Thomson wrote shortly before Roe. We demonstrate that Thomson’s moral argument for a right to abortion has enormous unappreciated force for the current legal debate about abortion.*

*In A Defense of Abortion, Thomson proposed conceptualizing abortion not as killing the fetus but rather as*

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*refusing to continue providing the life-sustaining services essential for the fetus’s health and growth. She then maintained that, even assuming the fetus at every stage in pregnancy has the same right to life as any person, it does not follow that pregnant women are always, or even usually, morally obligated to sustain the fetus’s life. The human right to life, she contended, does not include a right to whatever services one needs for continued life.*

*We begin by discussing Dobbs, the increasing number of laws at least as restrictive of abortion rights as the Mississippi law in Dobbs, and the incompatibility of those laws with the two key propositions in Roe. Next, we draw on Thomson’s argument to explain why the decision whether to have an abortion comes within the fundamental right to privacy. In response to those who have challenged the fundamentality of the abortion right by questioning the fundamentality of the broader privacy right, we offer a distinctive defense of the fundamentality of the privacy right.*

*We then make use of Thomson’s moral argument to establish that, prior to the point of viability, the government’s interest in protecting fetal life is not sufficiently weighty to qualify as “compelling.” We conclude by underlining the importance of our analysis not only for the Court but also for state supreme courts as they interpret state constitutional provisions fairly understood as independent guarantees of the abortion rights recognized in Roe.*

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## INTRODUCTION

Thirty years ago, in its 1991–92 Term, the Supreme Court heard oral argument in a case, *Planned Parenthood v. Casey*,<sup>1</sup> that squarely raised the question of whether the Court should overrule *Roe v. Wade*,<sup>2</sup> its landmark and instantly controversial decision<sup>3</sup> that transformed abortion law in the United States.<sup>4</sup> In light of changes in the composition of the Court in the several years before *Casey*, it seemed almost inconceivable at the time of *Casey* that there were five votes on the Court to prevent *Roe*’s demise.<sup>5</sup> Between 1986 and 1991, four

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<sup>1</sup> 505 U.S. 833 (1992).

<sup>2</sup> 410 U.S. 113 (1973). In *Casey*, before embarking on its detailed evaluation of *Roe*, the Court famously opened its opinion by calling attention to the pressures being exerted on it to overrule *Roe*:

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*. See Brief for Respondents 104-117; Brief for United States as *Amicus Curiae* 8.

*Casey*, 505 U.S. at 844.

<sup>3</sup> See Alex Markels, *Supreme Court’s Evolving Rulings on Abortion*, NPR (Nov. 30, 2005), <https://www.npr.org/templates/story/story.php?storyId=5029934> (“The *Roe* decision immediately sparked a firestorm of criticism that attacked it on both moral and constitutional grounds.”).

<sup>4</sup> See *Roe v. Wade*, CORNELL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/roe\\_v\\_wade\\_\(1973\)](https://www.law.cornell.edu/wex/roe_v_wade_(1973)) (“46 states needed to change their abortions laws as a result of the holding.”); *Roe v. Wade: Its History and Impact*, PLANNED PARENTHOOD 1 (Jan. 2014), [https://www.plannedparenthood.org/files/3013/9611/5870/Abortion\\_Roe\\_History.pdf](https://www.plannedparenthood.org/files/3013/9611/5870/Abortion_Roe_History.pdf) (“At the time the decision was handed down, nearly all states outlawed abortion except to save a woman’s life or for limited reasons such as preserving the woman’s health, or instances of rape, incest, or fetal anomaly. *Roe* rendered these laws unconstitutional.”).

<sup>5</sup> See Linda Greenhouse, *Slim Margin: Moderates on Court Defy Predictions*, N.Y. TIMES (July 5, 1992), <https://www.nytimes.com/1992/07/05/weekinreview/slim-margin-moderates-on-court-defy-predictions.html>. At the time of *Casey*, there was no real doubt that Chief Justice Rehnquist and Justices White, Scalia, and Thomas were prepared to overrule *Roe* and that Justices Blackmun and Stevens staunchly supported *Roe*. Of the remaining three Justices – Kennedy, Souter, and O’Connor – two, Justices Kennedy and Souter, seemed nearly certain to join with the four opponents of *Roe* and one, Justice O’Connor, seemed at least reasonably likely to do the same.

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Justices who were in the majority in the Court’s 7-2 decision in *Roe*—Chief Justice Burger and Justices Powell, Brennan, and Marshall—left the Court and were replaced by four—Justices Scalia, Kennedy, Souter, and Thomas—generally thought to share the anti-*Roe* sentiments expressed by the two Presidents (Reagan and Bush I) who appointed them.<sup>6</sup> By a 5-4 margin, however, the Court in *Casey* expressly “retained” and “reaffirmed” what it termed “the essential holding of *Roe*.”<sup>7</sup> As Justice Blackmun, the author two decades earlier of the Court’s opinion in *Roe*, wrote in a separate, and remarkably personal, opinion, “[N]ow, just when so many expected the darkness to fall, the flame has grown bright.”<sup>8</sup>

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In Justice Kennedy’s several years on the Court prior to *Casey*, the Court decided three abortion cases, and Justice Kennedy was part of the majority that in each case upheld the abortion restrictions under review. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS 285, 288 (5<sup>th</sup> ed. 2008). In one of those cases, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), his willingness to join a plurality opinion that all but declared *Roe* overruled was difficult to understand as anything other than a vote to overrule *Roe*.

At his confirmations hearings in 1990, Justice Souter was such an unknown quantity that he was characterized as a “stealth nominee.” See ABRAHAM, *supra*, at 291. It was widely assumed that he was selected by President Bush as someone whom the President saw as a reliable vote for conservative causes (including overruling *Roe*) and a difficult target for Democratic Senators because of his relative obscurity. See *id.* at 271; Gary J. Simson, *Thomas’s Supreme Unfitness – A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619, 652, 655 (1993). His only vote prior to *Casey* in an abortion-related case, *Rust v. Sullivan*, 500 U.S. 173 (1991), did nothing to cast doubt on his reliability as a vote to overrule *Roe*. He was part of the 5-4 majority that rejected a free speech challenge to a federal law restricting health-care providers’ freedom to provide information that might lead a woman to opt for abortion over childbirth.

In *Webster*, *supra*, Justice O’Connor wrote a separate concurrence in which she pointedly refused to join the plurality opinion because in her view, the case could be decided without addressing the validity of *Roe*. *Webster*, 492 U.S. at 525-26 (O’Connor, J., concurring in part and concurring in judgment). There was good reason to wonder, however, whether her reluctance to join in such an opinion would be short-lived. She did vote, as she had done time and again in the years since her appointment in 1981, to uphold the abortion restrictions under review, and she explained her unwillingness to join the plurality’s attack on *Roe* without saying anything that could be construed as an endorsement of *Roe*.

<sup>6</sup> See *About the Court: Justices 1789 to Present*, SUP. CT. U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) (last visited Sept. 6, 2021). Although Justice Scalia was named to the Court as a result of Chief Justice Burger’s departure, he did not, strictly speaking, “replace” Chief Justice Burger. When Chief Justice Burger retired, he was replaced as Chief Justice by one of the sitting Justices, Justice Rehnquist. The elevation of Justice Rehnquist to Chief Justice opened up the Associate Justice seat that Justice Scalia was named to fill. See *id.*

<sup>7</sup> *Casey*, 505 U.S. at 846.

<sup>8</sup> *Id.* at 922 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

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In May 2021, the Court agreed to hear in its 2021–22 Term a case, *Dobbs v. Jackson Women’s Health Organization*,<sup>9</sup> that again squarely raises the question of whether *Roe* should be overruled.<sup>10</sup> And once again, recent changes in the composition of the Court strongly suggest that *Roe*’s days are numbered. One Justice supportive of *Roe*, Justice Kennedy, retired in 2018 and a second, Justice Ginsburg, died in office two years later. Their seats are now occupied by two Justices, Kavanaugh and Barrett, widely believed to share the antipathy to *Roe* voiced by the President (Trump) who named them.<sup>11</sup> As in 1992, not only is the existence of a fifth vote for sustaining *Roe* not at all apparent, but the existence of even four votes to sustain *Roe* is hardly certain.<sup>12</sup>

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<sup>9</sup> 945 F.3d 265 (5<sup>th</sup> Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021).

<sup>10</sup> The petition for a writ of certiorari in *Dobbs* raised three questions. The first question, “Whether all pre-viability prohibitions on elective abortions are unconstitutional,” plainly goes to the heart of *Roe*. If the Court continues to stand by what *Casey* called the “essential holding of *Roe*,” the Court must answer the question “yes.” The other two questions raised by the petition are much narrower in their implications. Brief for Petitioners at i, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. June 15, 2020). When the Court granted certiorari, it expressly limited review to question 1. *Dobbs v. Jackson Women’s Health Org.*, *cert. granted*, 141 S. Ct. 2619 (2021).

<sup>11</sup> See *About the Court*, *supra* note 6. For discussion of Justice Gorsuch, whom President Trump named to the Court to fill Justice Scalia’s seat, see *infra* note 23.

<sup>12</sup> See *supra* notes 5 and 6 and accompanying text. The strongest evidence to date that a majority of the Court is prepared to overrule *Roe* is the Court’s refusal thus far to enjoin the operation of a Texas statute that bans abortions after approximately six weeks and entrusts enforcement of the prohibition to private citizens. On September 1, 2021, the date the statute went into effect, and December 10, 2021, the Court by a 5-4 margin issued rulings that allowed the statute to continue in effect. See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021); *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (2021). Both of the Court’s newest Justices, Kavanaugh and Barrett, were part of the identical 5-4 majorities. By that time, Justice Kavanaugh had already gone a long way to confirm expectations that he would vote to overrule *Roe* by joining Justice Alito’s fiery dissent in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020). (For a sampling of the tenor of that dissent, consider its characterization of the case at hand: “the abortion right recognized in this Court’s decisions is used like a bulldozer to flatten legal rules that stand in the way.” *Id.* at 2153 (Alito, J., dissenting).) Justice Barrett did not join the Court until after *June Medical*, but by the end of her confirmation hearings in fall 2020, more than enough evidence had come to light to suggest that she would be quite open to overruling *Roe*. See Anna North, *What Amy Coney Barrett on the Supreme Court Means for Abortion Rights*, VOX (Oct. 26, 2020), <https://www.msn.com/en-us/news/us/what-amy-coney-barrett-on-the-supreme-court-would-mean-for-abortion-rights/ar-BB19qUyd>.

Chief Justice Roberts was in dissent in both the September 1 and December 10 decisions, as were the three Justices (Breyer, Kagan, and Sotomayor) who over the years have expressly indicated their opposition to overruling *Roe*. For commentary on the implications of the September 1 decision for the future of *Roe*, see David G. Savage, *The Supreme Court Signals Roe v. Wade Will Fall After Allowing Texas to Ban Most Abortions*, L.A. TIMES (Sept. 2, 2021), <https://www.latimes.com/politics/story/2021->

But will it be, in the immortal words of an American folk hero, “*déjà vu* all over again”?<sup>13</sup> Is history apt to repeat itself and *Roe* escape a demise that now seems a foregone conclusion? We refrain from offering any predictions in this Article. We offer instead a novel defense of *Roe* that we believe has the capacity to sway those members of the Court who are skeptical of *Roe* but open to persuasion to stand by it. Our defense offers new and, we submit, substantially stronger support than the Court in *Roe* and later decisions has provided for the key propositions on which *Roe* rests. Furthermore, it does so without requiring the Court to repudiate established doctrines that play a significant role in areas of the law beyond reproductive rights.

We will not attempt to improve on the Court’s extended discussion in *Casey* of the reasons that adherence to precedent—the doctrine of *stare decisis*—militates strongly in favor of not overruling *Roe*.<sup>14</sup> With the passage of three decades since *Casey* and the passage altogether of almost a half-century since *Roe*, those reasons have only become more

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09-02/the-supreme-court-signals-that-roe-vs-wade-will-fall-now-that-texas-may-ban-early-abortions; Grace Segers, *The Filibuster Is Blocking Roe v. Wade from Becoming the Law of the Land*, NEW REPUBLIC (Sept. 3, 2021), <https://newrepublic.com/article/163528/filibuster-blocking-roe-v-wade>.

Whether the Chief Justice shares the other three dissenters’ opposition to overruling *Roe* is not at all clear. In *June Medical*, a case decided only a few months before Justice Ginsburg’s death, Chief Justice Roberts was part of the 5-4 majority that voted to strike down a Louisiana statute that substantially limited access to abortions by sharply restricting who could perform abortions and where. The Chief Justice made clear in his separate opinion, however, that his concurrence in the judgment was prompted entirely by *stare decisis* and his belief that the statute at hand was functionally indistinguishable from the Texas statute that the Court had struck down by a 5-3 vote in *Whole Women’s Health v. Hellerstedt*, 579 U.S. 582 (2016). Chief Justice Roberts was one of the three dissenters in *Hellerstedt*, and he reaffirmed in *June Medical* his conviction that *Hellerstedt* was “wrongly decided.” 140 S. Ct. at 2133 (Roberts, C.J., concurring in judgment).

In the only other case involving abortion restrictions during Chief Justice Roberts’s time on the Court, *Gonzales v. Carhart*, 550 U.S. 124 (2007), he also voted to sustain the restrictions. He joined the opinion of the Court upholding the federal Partial-Birth Abortion Ban Act. The Court’s opinion purported to distinguish a relatively recent precedent, *Stenberg v. Carhart*, 530 U.S. 914 (2000), which had struck down a Nebraska partial-birth abortion ban. Writing for the four dissenters, Justice Ginsburg characterized the decision as “alarming” and charged that it “refuses to take *Casey* and *Stenberg* seriously.” *Gonzales*, 550 U.S. at 1641 (Ginsburg, J., dissenting). For further insight into the Chief Justice’s views on *Roe*, see JOAN BISKUPIC, *THE CHIEF*, 103–07, 134 (2019).

<sup>13</sup> *Yogi-isms*, YOGI BERRA MUSEUM & LEARNING CTR., <https://yogiberramuseum.org/about-yogi/yogisms/>. As noted in the latter article, “While Yogi Berra’s role in the history of baseball is immeasurable, his ongoing legacy rests also on his enormous contributions to the American language.”

<sup>14</sup> *Casey*, 505 U.S. at 854–69.

potent. We believe that our defense of *Roe* is sufficiently forceful that, if the Court in *Dobbs* were deciding for the first time the basic constitutional question it decided in *Roe*, it most reasonably would render the same “essential holding” as it did in *Roe*. The Court, however, is very much *not* deciding that question for the first time, and we submit that, even if a Justice already skeptical of *Roe* were not to find our defense of *Roe* to be as forceful as we believe it is, he or she would only reasonably find that, in combination with the weight of *stare decisis*, it is forceful enough to require upholding *Roe*. Now, probably even more so than at the time of *Casey*, *stare decisis* counsels that a “terrible price would be paid for overruling” *Roe*.<sup>15</sup>

In large part the novelty of our defense stems from the use to which it puts a nonlegal source—an article that esteemed moral philosopher Judith Thomson wrote a couple of years prior to the Court’s decision in *Roe*. In *A Defense of Abortion*,<sup>16</sup> Professor Thomson proposed conceptualizing abortion not as killing the fetus but rather as refusing to continue providing the life-sustaining services essential for the fetus’s health and growth. She then maintained that even assuming for the sake of argument that the unborn at *every* stage in pregnancy have the same right to life as everyone whose status as a human person is not controversial, it does not follow that pregnant women are always, or even usually, morally obligated to sustain unborn life. The human right to life, she contended, does not include a right to whatever services one needs for continued life.<sup>17</sup>

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<sup>15</sup> *Id.* at 864.

<sup>16</sup> Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

<sup>17</sup> In the years since the publication of Thomson’s article, a number of philosophers have further developed aspects of her approach to the moral issues surrounding abortion. See, e.g., DAVID BOONIN, *A DEFENSE OF ABORTION* (2002); Frances M. Kamm, *Abortion and the Value of Life: A Discussion of Life’s Dominion*, 95 COLUM. L. REV. 160 (1995) (book review essay); Rosalind S. Simson, *What Does the Right to Life Really Entail?*, 14 CONN. PUB. INT. L.J. 107 (2014). A few legal academics have also applied Thomson’s insights in the legal context, but they have taken approaches different from ours. For example, focusing on sex discrimination and the Equal Protection Clause, Professor Tribe has argued that “[t]here should be no ‘woman’s exception’ to our traditional regard for individualism and autonomy. As long as these values remain at the core of our legal system, there is thus a powerful case for the conclusion that laws prohibiting abortion . . . deny women the equal protection of the laws guaranteed to all by the Fourteenth Amendment.”, LAURENCE H. TRIBE, *ABORTION AND THE CLASH OF ABSOLUTES* 135 (1992). Professor Regan has argued for a constitutional right to abortion, but not on the basis of a privacy interest. In his view, the right is best understood as resting on interests “in non-subordination and in freedom from physical invasion.” Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1571 (1979).

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We will demonstrate in this Article that Thomson’s *moral* argument for a right to abortion has enormous unappreciated force for the current *legal* debate about abortion and can provide a framework for thinking about, and responding to, the challenge that *Dobbs* poses to *Roe*. We begin in Part I with a brief discussion of *Dobbs*, the increasing number of laws at least as restrictive of abortion rights as the Mississippi law in *Dobbs*, and the incompatibility of all of those laws with the two key propositions that lie at the heart of *Roe*. In Part II, we draw on Thomson’s argument to explain why the decision whether to have an abortion comes within the fundamental right to privacy recognized by the Court prior to *Roe*. In response to critics of *Roe* who have challenged the fundamentality of the abortion right by questioning the fundamentality of the broader privacy right, we offer a distinctive defense of the fundamentality of the privacy right. That defense places *Roe* on a firmer foundation and is predicated on an approach to constitutional interpretation very much in keeping with the Court’s approach over the years. In Part III, we take advantage of the insights offered in Thomson’s moral argument to establish the validity of the Court’s holding in *Roe* that, prior to the point of viability, the government’s interest in protecting fetal life is not sufficiently weighty to qualify as “compelling” and justify an abortion prohibition. We conclude by underlining the immediate importance of our analysis not only for the Court as it ponders *Roe*’s fate but also for state supreme courts as they interpret state constitutional provisions fairly understood as independent guarantees of the abortion rights recognized in *Roe*.

I.   *DOBBS*, THE CHANGING LEGISLATIVE LANDSCAPE, AND THE  
      “ESSENTIAL HOLDING” OF *ROE*

The Mississippi statute under review in *Dobbs* bans almost all abortions after fifteen weeks of pregnancy.<sup>18</sup> Given that the Court in *Roe* had held that states are barred by the Due Process Clause from banning abortions prior to fetal viability,<sup>19</sup> which today occurs at about twenty-three weeks,<sup>20</sup> there could not be the slightest doubt that the

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<sup>18</sup> The statute, Mississippi House Bill 1510, is entitled the “Gestational Age Act” and is codified at MISS. CODE ANN. § 41-41-191 (2019).

<sup>19</sup> *Roe*, 410 U.S. at 163-64.

<sup>20</sup> Fetal viability is the point in pregnancy where, with state-of-the-art neonatal technology, there is a realistic possibility that the fetus’s life could be sustained outside the womb. See Lydia Mietta Di Stefano et al., *Viability and Thresholds for Treatment of Extremely Preterm Infants: Survey of UK Neonatal Professionals*, 106 ARCHIVES OF



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statute was adopted to test the Court’s resolve to stand by *Roe*. As Federal District Judge Carleton Reeves wrote in obvious exasperation in permanently enjoining what he called “a facially unconstitutional ban”:

The State, of course, has the right to pass legislation that represents the interests of its citizens. . . . The Court’s frustration, in part, is that other states have already unsuccessfully litigated the same sort of ban that is before this Court and the State is aware that this type of litigation costs the taxpayers a tremendous amount of money.

No, the real reason we are here is simple: The State chose to pass a law it knew was unconstitutional to endorse a decades-long campaign, fueled by national interest groups, to ask the Supreme Court to overturn *Roe v. Wade*.<sup>21</sup>

In light of the Supreme Court’s 5-3 decision in 2016 in *Whole Woman’s Health v. Hellerstedt*<sup>22</sup>—a decision striking down certain Texas requirements on doctors and clinics as unduly burdening the right to abortion guaranteed by *Roe*—it is not hard to understand why Judge Reeves would have had a strong sense of “frustration” when the Mississippi legislature in March 2018 enacted a statute obviously inconsistent with *Roe*. After all, although President Trump had managed to fill the seat vacant at the time of the 2016 decision with a Justice, Gorsuch, widely assumed to be a very likely vote to overrule *Roe*,<sup>23</sup> nothing else had changed that would suggest that by March 2018, *Roe* no longer had the support of five members of the Court.

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DISEASE IN CHILDHOOD - FETAL AND NEONATAL ED. 596 (2021), <https://fn.bmj.com/content/106/6/596>.

<sup>21</sup> Jackson Women’s Health Org. v. Currier, 349 F. Supp. 3d 536, 542 (S.D. Miss. 2018).

<sup>22</sup> 579 U.S. 582 (2016).

<sup>23</sup> At the time of Justice Gorsuch’s nomination, the assumption that he would vote to overrule *Roe* was based in large part on President Trump’s campaign pledge in 2016 to name Justices who would be a sure bet to vote that way. See Mark Berman, *Trump Promised Judges Who Would Overturn Roe v. Wade*, WASH. POST (Mar. 21, 2017), <https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/>; Matt Ford, *Gorsuch: Roe v. Wade Is the ‘Law of the Land,’* ATLANTIC (Mar. 22, 2017), <https://www.theatlantic.com/politics/archive/2017/03/neil-gorsuch-confirmation-hearing/520425/>. In 2020, Justice Gorsuch’s joining in full Justice Alito’s dissent in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020) – a dissent discussed *supra* note

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By the time, however, that Judge Reeves handed down his opinion in *Dobbs* in late November 2018, his frustration with the Mississippi legislature was misplaced. If, as seems apparent from his opinion, he regards *Roe* as rightly decided, he had every reason to be angry at the legislature, but his accusation that it was simply squandering taxpayer dollars no longer rang true. In June 2018 Justice Kennedy—one of the five Justices whose votes in the 2016 decision made clear their support for *Roe*—had announced his retirement. When Kennedy’s seat was filled in October 2018 by a Justice, Kavanaugh, generally thought to be predisposed against *Roe*,<sup>24</sup> the possibility had become very real that there were five Justices sitting on the Court ready to overrule *Roe*.

That prospect was not lost on other state legislatures eager to usher *Roe* out the door. Statutes flatly contradictory to *Roe* began to proliferate across the country, particularly in the South and Midwest, and that trend was further fueled by another change in the Court’s membership with obvious implications for the vitality of *Roe*: the death of Justice Ginsburg, a vocal proponent of *Roe*, in the final months of President Trump’s term, and his appointment of a Justice, Barrett, widely seen as deeply opposed to *Roe*.<sup>25</sup>

According to a May 2021 national Gallup poll, 49% of Americans consider themselves pro-choice, while 47% regard themselves as pro-life.<sup>26</sup> Many state legislatures, however, serve an electorate whose views are much less evenly divided. For all practical purposes, over the past few years, states with legislative majorities hostile to *Roe* increasingly have seemed to be in competition with one another to see which could stray further from *Roe*. Although some states have been content to adopt statutes that, like Mississippi’s, generally ban abortions after fifteen or so weeks of pregnancy, others have drawn the line substantially earlier.<sup>27</sup> Some existing laws and various bills under

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12 – strongly suggested that President Trump had delivered on his campaign pledge as far as his naming Justice Gorsuch was concerned. For more on the Gorsuch nomination, see Gary J. Simson, *Should No Garland Mean No Gorsuch?*, NAT’L L.J. (Mar. 20, 2017), <https://www.law.com/sites/almstaff/2017/03/20/should-no-garland-mean-no-gorsuch/>.

<sup>24</sup> See *supra* notes 11 and 12 and accompanying text.

<sup>25</sup> See *id.*

<sup>26</sup> *Abortion*, GALLUP (2021), <https://news.gallup.com/poll/1576/abortion.aspx>.

<sup>27</sup> As this Article was going to press, there were, according to the Guttmacher Institute, twenty-one states with “laws that could be used to restrict the legal status of abortion,” *Abortion Policy in the Absence of Roe*, GUTTMACHER INST. (Mar. 1, 2022), <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe>. In addition, the legislatures of various other states were actively considering bills plainly

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consideration draw the line at the time when an ultrasound first detects electrical cardiac activity, which usually occurs after about six weeks of pregnancy. Such “heartbeat laws” proceed on the view that the sound detected is a beating heart—a view widely rejected by medical experts.<sup>28</sup> But however doubtful the scientific underpinnings of heartbeat laws may be, there is no doubting the devastating impact on pregnant women of banning abortions after only about six weeks. As is hardly a little-known fact, six weeks is “so early” in pregnancy “that many people don’t know they’re pregnant.”<sup>29</sup>

In terms of demonstrating disrespect for *Roe*, the Texas legislature made clear in 2021 that it was determined not to be outdone. It was not content simply to adopt a heartbeat law and include no exceptions for rape and incest. In addition, in a display of what one writer has unadmirably called “sinister brilliance”<sup>30</sup> and that another has characterized as “much more diabolical than the average six-week

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at odds with *Roe*. See Caroline Kitchener et al., *Tracking New Action on Abortion Legislation Across the States*, WASH. POST (Mar. 26, 2022), <https://www.washingtonpost.com/nation/interactive/2022/abortion-rights-protections-restrictions-tracker/>.

<sup>28</sup> See Roni Caryn Rabin, *Abortion Opponents Hear a ‘Heartbeat.’ Most Experts Hear Something Else*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/health/abortion-heartbeat-debate.html>.

<sup>29</sup> Lauren Kelley, *Is This How Roe v. Wade Dies?*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/opinion/texas-abortion-sb8-roe-v-wade.html>.

Although we frame our discussion in this Article in terms of the pregnant woman, we recognize that women are not the only people who experience pregnancy or who desire abortions. Transgender, nonbinary, and gender-expansive individuals whose sex at birth was assigned as female or intersex also are affected by the recently passed bans on abortion early in pregnancy. Although pregnant people in those groups have a good deal in common with pregnant women whose gender identity matches their assigned sex at birth (“cisgender” women), they also have distinctive needs and concerns. See Heidi Moseson et al., *Pregnancy Intentions and Outcomes among Transgender, Nonbinary, and Gender-Expansive People Assigned Female or Intersex at Birth*, 22 INT’L J. TRANSGENDER HEALTH 30 (2021) <https://www.tandfonline.com/doi/full/10.1080/26895269.2020.1841058>. It is beyond the scope of this Article to address the needs and concerns of those other than pregnant cisgender women. For criticism of the view that reproductive rights should be discussed exclusively in gender-neutral terms, see Michelle Goldberg, *The A.C.L.U. Errs on R.B.G.*, N.Y. TIMES (Sept. 27, 2021), <https://www.nytimes.com/2021/09/27/opinion/rbg-aclu-abortion.html> (“Yet I think there’s a difference between acknowledging that there are men who have children or need abortions – and expecting the health care system to treat these men with respect – and speaking as if the burden of reproduction does not overwhelmingly fall on women.”).

<sup>30</sup> Michelle Goldberg, *Republicans Are Giving Abortion Opponents Power Over the Rest of Us*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/opinion/texas-abortion.html>.

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abortion ban,”<sup>31</sup> it adopted an enforcement mechanism designed to impede immensely would-be challengers’ access to courts while intimidating as much as possible women contemplating having an abortion and anyone who would think to help them do so.<sup>32</sup> Drawing on the legislative model employed in some other contexts of using the citizenry as essentially private attorneys general,<sup>33</sup> the statute empowers and incentivizes private individuals to enforce the prohibition and explicitly keeps governmental law enforcement officials out of the picture.<sup>34</sup> The law does not require a private party bringing suit to be a Texas resident or to have any relation whatsoever to the pregnant woman or the abortion provider. Although the law immunizes the pregnant woman from suit, anyone who “performs or induces” an abortion or “aids or abets the performance or inducement” is fair game.<sup>35</sup> As one writer has commented, that vaguely defined group of potential defendants appears to include “clinic staff, friends and family, nonprofits that help fund abortions, and even taxi drivers.”<sup>36</sup> For ferreting out, and proving in court, the forbidden performing, inducing, aiding, or abetting, the plaintiff in this “civil action”<sup>37</sup> recovers from the defendant “statutory damages in an amount of not less than \$10,000 for each abortion” that the defendant performed, induced, aided, or abetted.

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<sup>31</sup> Kelley, *supra* note 29.

<sup>32</sup> See Hila Keren, *Texas Anti-Abortion Law’s Fear Factor Could Backfire*, BLOOMBERG L. (Sept. 23, 2021), <https://news.bloomberglaw.com/class-action/texas-anti-abortion-laws-fear-factor-could-backfire> (“The Texas law deliberately aims to generate fear in people. Such manipulation of human emotions is a severe abuse of legislative power and a colossal breach of the social contract. States are supposed to pass laws that serve their citizens, not the narrow political wishes of their legislators.”).

<sup>33</sup> This model has been “marshaled over the years to discipline fraudulent government contractors, racist or sexist bosses and toxic polluters.” Jon Michaels & David Noll, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES (Sept. 4, 2021), <https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html>. According to Professors Michaels and Noll, the Texas statute is simply the “[m]ost prominent” of various examples in recent years of legislatures “invert[ing] private enforcement laws” and “repurpos[ing] an old tool to new and cruel effect.” *Id.* For a famous two-centuries-old, and more restrained, use of the private attorneys general model, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 320-22 (1819) (setting forth the Maryland statute that was the source of the tax on the Bank of the United States that the Court, in one of Chief Justice Marshall’s most admired opinions, struck down).

<sup>34</sup> For an overview of the law, see Maggie Astor, *Here’s What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/article/abortion-law-texas.html>; Roni Caryn Rabin, *Answers to Questions About the Texas Abortion Law*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/health/texas-abortion-law-facts.html>.

<sup>35</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West Cum. Supp. 2021).

<sup>36</sup> Goldberg, *supra* note 30.

<sup>37</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West Cum. Supp. 2021).

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In addition, as further incentive to suit, the law not only provides that a successful plaintiff recovers court costs and attorney's fees from the defendant, but also makes no provision for a successful defendant to recover court costs and attorney's fees from the plaintiff.<sup>38</sup>

When Whole Woman's Health and other organizations and individuals sought a preliminary injunction to prevent the Texas law from going into effect, a 5-4 Supreme Court majority rewarded the Texas legislature for constructing what two journalists have described as "an Escher staircase for litigators"<sup>39</sup> by denying the plaintiffs relief.<sup>40</sup> In an unsigned opinion, the majority conceded that "[t]he applicants now before us have raised serious questions regarding the constitutionality of the Texas law at issue."<sup>41</sup> More important, however, according to the majority, was that the plaintiffs' application "also presents complex and novel antecedent procedural questions on which they have not carried their burden."<sup>42</sup> The law does not preclude abortion providers, inducers, aiders, and abettors from challenging the constitutionality of the Texas law when they are sued for damages. However, as the lawmakers who drafted the law could not help but be aware, if and when a successful challenge by that route ultimately comes to pass, a great deal of damage already will have been done.<sup>43</sup> When the Court revisited the Texas statute several months later, the same 5-4 majority again refused to enjoin the law's operation and was silent on the merits of the constitutional challenge.<sup>44</sup>

In *Casey*, the Court maintained that "the essential holding of *Roe*" has "three parts," and it described the three parts as follows:

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a

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<sup>38</sup> *Id.* § 171.208(b).

<sup>39</sup> Dahlia Lithwick & Mark Joseph Stern, *The Supreme Court Has Just Two Days to Decide the Fate of Roe v. Wade*, SLATE (Aug. 30, 2021), <https://slate.com/news-and-politics/2021/08/texas-abortion-supreme-court-roe-wade.html>.

<sup>40</sup> *Whole Woman's Health v. Jackson*, 142 S. Ct. 2494 (2021).

<sup>41</sup> *Id.* at 2495.

<sup>42</sup> *Id.*

<sup>43</sup> As explained by Marc Hearron, senior counsel for the Center for Reproductive Rights, in a press call discussed in Goldberg, *supra* note 30, "[Y]ou could have hundreds, thousands of cases, filed across the state, over the same abortion or a handful of abortions," and the burden on defendants of having to defend themselves in various courts "threatens to stop the provision of abortion access across the state."

<sup>44</sup> *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021).

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substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. . . .<sup>45</sup>

The Mississippi law under review in *Dobbs*, the Texas law, and any other state laws that prohibit abortions prior to viability plainly violate the first part of *Roe*’s “essential holding” as it is described above. For any of those laws to stand, the Court must repudiate either or both of the following two propositions that are express or implicit in the above description: women have a fundamental right to decide whether or not to have an abortion; and the state’s interest in protecting the life of the fetus—an interest that the Court often has called an interest in protecting potential life<sup>46</sup>—does not become compelling until the point of viability. We will argue in the remainder of this Article that the Court in *Roe* was right to treat both of those propositions as valid and that the Court today should reaffirm those propositions as it did in *Casey*, strike down the law in *Dobbs*, and make clear that any laws prohibiting abortions prior to viability cannot stand.

Because our focus in this Article is the constitutionality of laws that *prohibit* women from exercising their right to choose to have an abortion, rather than laws that, as in *Casey* or *Hellerstedt*, *burden* women’s exercise of that right,<sup>47</sup> we will not discuss in any detail our

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<sup>45</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). It should be noted that, although some portions of the joint opinion by Justices O’Connor, Kennedy, and Souter did not have the support of a majority of the Court, Part I, which includes the above quotation, plainly had majority support and therefore was part of the opinion of the Court.

<sup>46</sup> *See, e.g., id.* at 871-73; *Roe*, 410 U.S. at 162-64.

<sup>47</sup> In a lengthy interview, Adam Liptak, the principal reporter for *The New York Times* on the Supreme Court, has suggested that the Court in *Dobbs* may seize upon the discussion in *Casey* of laws burdening women’s exercise of their abortion rights to hand down a decision that strikes a compromise of sorts between the demands of the pro-choice and pro-life camps. As Liptak explained, rather than uphold Mississippi’s ban on abortions after fifteen weeks and strike down *Roe* or strike down the ban and uphold *Roe*, the Court may decide to use *Casey*’s burden discussion as a means to uphold both the ban and *Roe*:

Now, *Roe v. Wade* at its core says states can’t ban abortions before viability, which as I’ve said is about 23 weeks. So it’s very hard to reconcile *Roe* with a law that says 15 weeks.

agreement or disagreement with the way in which the Court has dealt with challenges to the latter type of laws. In the interests of clarity and candor, however, we make two points.

First, we have no difficulty *in principle* with the Court’s rendition in the above excerpt from *Casey* as to how the constitutionality of laws burdening, but not prohibiting, a women’s exercise of her right to decide whether to have an abortion should be resolved. In our view, the question of whether the law burdens the woman’s right to an extent that constitutes “undue interference” or “the imposition of a substantial obstacle,” as the Court phrases it in the above excerpt,<sup>48</sup> is the right question to ask. We see it as very much of a piece with the way in which the Court has long dealt with questions of interference with fundamental rights. Explicitly or implicitly, the Court has reserved the rigorous standard of review triggered by a law’s interference with a fundamental right to interference that is substantial.<sup>49</sup> If a law does not

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But the court could draw on earlier cases and say we’re not overruling *Roe*, we’re just revising it, we’re tinkering with it. And it could use some language from earlier cases like undue burden and substantial obstacle and say, listen, 15 weeks most women can still get abortions. 15 weeks doesn’t impose an undue burden, doesn’t present a substantial obstacle, and we’re not overruling *Roe* but we’re going to sustain the Mississippi law. . . .

Interview by Astead W. Herndon with Adam Liptak, *The Most Important Supreme Court Term in Decades*, N.Y. TIMES (Oct. 5, 2021), <https://www.nytimes.com/2021/10/05/podcasts/the-daily/abortion-gun-rights-supreme-court.html?showTranscript=1>.

Could Liptak be right? Stranger things have happened on the Court, but make no mistake about it—and we do not understand Liptak to be suggesting otherwise—such a use of *Casey* would be cynical in the extreme. It would be overruling *Roe* in all but name. In the excerpt from *Casey* quoted above, the Court states as one part of *Roe*’s essential holding that, “Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.” It is difficult to know how the Court could have been clearer: Laws prohibiting abortion before viability and laws burdening a woman’s access to abortion before viability are two very different things. In deciding the constitutionality of a law, like the Mississippi law in *Dobbs*, prohibiting abortion before viability, a court, in keeping with *Roe* and with *Casey*’s explanation of *Roe*, should not be asking itself whether the prohibition is enough of an obstacle or burden to women’s access to abortion before viability. Rather, the court, in keeping with those precedents, simply should strike the prohibition down.

<sup>48</sup> As noted *supra* note 45, that excerpt from the joint opinion was part of the opinion of the Court. A later portion of the joint opinion not joined by any other Justices frequently uses the term, “undue burden,” *Casey*, 505 U.S. at 874-79 (opinion of O’Connor, Kennedy, and Souter, JJ.), but makes clear that it is using it interchangeably with “placing a substantial obstacle” in the woman’s path. *Id.* at 877.

<sup>49</sup> See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 432-34 (1992) (right to vote); *Tony & Susan Alamo Found. v. Sec’y of Lab.*, 471 U.S. 290, 303-04 (1985) (free exercise of

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substantially interfere with a fundamental right, the Court has not applied “strict scrutiny” and asked whether the law is necessary to serve a compelling state interest. Instead, it has been content to uphold the law on the basis of a rational justification, which almost invariably exists.

Second, we have considerable difficulty with the way in which the Court has applied that standard *in practice*. In our view, the Court in several instances has taken an unduly narrow view of when a woman’s abortion decision has been substantially burdened.<sup>50</sup> For present purposes, we see no need to discuss the matter further. We mention it now simply to ensure that our silence not be misconstrued as approval.

## II. THE FUNDAMENTALITY OF THE RIGHT TO DECIDE WHETHER TO HAVE AN ABORTION

The Supreme Court in *Roe* predicated treating the right to decide whether to have an abortion as fundamental on a determination that the right falls within the scope of the privacy right that the Court recognized

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religion); *Cox v. New Hampshire*, 312 U.S. 569, 574-76 (1941) (freedom of speech). For discussion of the importance of distinguishing between substantial and insubstantial burdens in the Court’s free exercise case law, particularly prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), see Gary J. Simson, *Permissible Accommodation or Impermissible Endorsement? A Proposed Approach to Religious Exemptions and the Establishment Clause*, 106 KY. L. J. 535, 564-78 (2018). With regard to the comparable distinction in the Court’s case law on equal protection and fundamental rights, see Gary J. Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 666-67, 673-75 (1977).

<sup>50</sup> In *Casey* itself, for example, we have serious reservations about the Court’s approval of Pennsylvania’s 24-hour waiting period between the physician’s providing specified information to the woman and performing the abortion. According to the joint opinion, the mandatory waiting period did not constitute a substantial obstacle for the woman. *Casey*, 505 U.S. at 885–87 (opinion of O’Connor, Kennedy, and Souter, JJ.). By the same token, in light of the expert testimony underlining the safety advantages that a particular abortion procedure known as “intact D & E” offers women in various circumstances, we very much question the Court’s determination in *Gonzales v. Carhart*, 550 U.S. 124 (2007), that a federal law banning that procedure did not impose a “substantial obstacle.” Moreover, we note that our misgivings about the way in which the Court has applied the substantial-burden concept predate *Casey*. As indicated *supra* notes 48 and 49 and accompanying text, we do not see the substantial-burden concept as originating with *Casey* but rather as a feature of fundamental-rights adjudication. In our view, the Court’s refusal in *Maher v. Roe*, 432 U.S. 464 (1977), to recognize the substantial obstacle imposed by Connecticut welfare regulations that fund childbirth but do not fund abortion unless a physician attests to its medical necessity evidenced the same kind of insensitivity to burdens on women’s abortion rights as the Court’s rulings on the mandatory waiting period in *Casey* and the specified abortion procedure in *Gonzales*. See Gary J. Simson, *Abortion, Poverty and the Equal Protection of the Laws*, 13 GA. L. REV. 505 (1979).



as fundamental several years earlier in *Griswold v. Connecticut*.<sup>51</sup> Although the Court's descriptions in *Griswold* and *Roe* of the scope of the fundamental privacy right are not exactly paragons of clarity, the Court in other cases has been more illuminating. In particular, shortly before *Roe*, the Court in *Eisenstadt v. Baird* described the privacy right as a person's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>52</sup> Two decades later, the Court in *Casey* described the right as a right to decide free from governmental interference "matters [ ] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."<sup>53</sup>

Critics of *Roe*'s characterization of the right to decide whether to have an abortion as fundamental typically have attacked it in either or both of two ways. One is to agree that there is a fundamental right to privacy in the Constitution that includes such autonomy rights as the right to decide whether to marry but then to challenge *Roe*'s claim that the right to decide whether to have an abortion comes within the scope of the fundamental privacy right. The second is to question the cogency of the Court's explanation of the constitutional basis for the privacy right that it has recognized.

Section A below addresses the first of these two lines of attack. For purposes of this section, we will assume both that there is a fundamental right to privacy and that its scope is as the Supreme Court has described it. Our focus will be to defend the claim that the scope of this right includes the right to decide whether to have an abortion. Section B addresses the second line of attack and focuses on the validity of our assumptions in Section A about the right to privacy. Although we concede that there is good reason to question the cogency of the Court's explanation of the constitutional basis for the privacy right that it has recognized, we will argue that the right deserves constitutional recognition as fundamental because it can be cogently defended in terms of constitutional arguments other than those made by the Court.

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<sup>51</sup> 381 U.S. 479 (1965).

<sup>52</sup> 405 U.S. 438, 453 (1972).

<sup>53</sup> *Casey*, 505 U.S. 833, 851 (1992). The statement quoted in the text appears in a portion of the lead opinion by Justices O'Connor, Kennedy, and Souter that was joined by Justices Blackmun and Stevens and therefore had the support of a majority of the Court.

330      *LEGISLATION AND PUBLIC POLICY*      [Vol. 24:313]*A. The Right to Decide Whether to Have an Abortion, and  
The Scope of the Fundamental Right to Privacy*

To support its holding that the fundamental right to privacy encompasses the right to decide whether to have an abortion, the Court in *Roe* pointed to the personal ramifications of that right for the quality of women’s current and future lives. The Court noted that having an unwanted child may lead a woman to have a “distressful life and future” and that when a family is unable “psychologically and otherwise” to care for a child, the woman’s mental and physical health may be undermined.<sup>54</sup> It also noted the “stigma of unwed motherhood,”<sup>55</sup> which is less pervasive today than it was at the time of *Roe* but still prevalent in many communities.<sup>56</sup> Looking back on its decision in *Roe* nineteen years earlier, the Court in *Casey* underlined that, by enhancing women’s “ability to control their reproductive lives,” *Roe* had “facilitated” the “ability of women to participate equally in the economic and social life of the Nation.”<sup>57</sup>

Critics of *Roe* who accept that there is a fundamental right to privacy that protects *some* intimate personal decisions often argue that abortion involves killing human life and that therefore the decision whether to have an abortion must be outside the scope of the fundamental privacy right.<sup>58</sup> This criticism of the fundamentality of the right to decide whether to have an abortion is simply misguided. The Court’s point in *Roe* and later abortion cases in characterizing that right as fundamental was not that, in and of itself, it is of the utmost

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<sup>54</sup> *Roe*, 410 U.S. at 153.

<sup>55</sup> *Id.*

<sup>56</sup> The large increase in the percentage of babies born to unmarried mothers from roughly 10% in 1970 to about 40% today is an indication of the reduced stigma that currently surrounds single motherhood. For discussion of the reasons for, and effects of, this phenomenon, see CARMEN SOLOMON-FEARS, CONG. RSCH. SERV., R43667, NON-MARITAL BIRTHS: AN OVERVIEW (July 30, 2014), <https://fas.org/sgp/crs/misc/R43667.pdf> [<https://perma.cc/MC8B-YEH5>]. Discrimination against unwed mothers and the associated stigma has not entirely disappeared. See Tracy Tully, *An Unmarried Catholic Schoolteacher Got Pregnant. She Was Fired*, N.Y. TIMES (June 28, 2021), <https://www.nytimes.com/2021/06/28/nyregion/pregnant-catholic-school-teacher.html>.

<sup>57</sup> *Casey*, 505 U.S. at 856. As support for that characterization of *Roe*, the Court in *Casey* cited ROSALIND P. PETCHESKY, ABORTION AND WOMAN’S CHOICE 109, 133 n.7 (rev. ed. 1990).

<sup>58</sup> See, e.g., Brief for Petitioners at 2, 13, 16, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. July 22, 2021) (recognizing decisions about whom to marry as within the fundamental right to privacy and distinguishing them from decisions whether to have an abortion).

importance to pregnant women to get to decide whether to kill their unborn. Instead, it was that it is of the utmost importance to allow women to make a decision that, like a decision about whether or whom to marry or how to raise one's children, has such great ramifications for the direction and tenor of their lives. As we will discuss in Part III, the answer to the question of whether states have an interest in protecting the fetus's life that is sufficiently weighty to justify subordinating the woman's right to decide whether to have an abortion depends, in part, on whether abortion is characterized as killing the unborn or, as Thomson suggests, as refusing to provide the unborn with life-sustaining services. Whether the right to decide about having an abortion is fundamental and whether the government's interest in interfering with that right is compelling are two very separate issues that pro-life advocates tend to conflate.

By underscoring that pregnancy is best characterized not as a passive biological state but rather as an active process of providing a fetus with life-sustaining services,<sup>59</sup> Thomson's analysis sheds a great deal of light on why the decision whether to have an abortion is of such momentous personal importance to women. The Court in *Roe* and *Casey* barely scratched the surface of providing a cogent explanation.

Pregnancy requires huge investments of time and energy that can interfere with a woman's ability to care for herself and her family and fulfill other personal obligations. Most obviously, delivering a baby is an intense and exhausting enterprise that typically requires weeks of recovery. Perhaps less evident is the energy that a woman must expend over a protracted period of time in order to gestate a fetus in a way that protects both the fetus's health and her own. Almost invariably, she must manage a variety of physical discomforts, such as nausea, backache, and fatigue.<sup>60</sup> She must eat nutritious food, get adequate rest, and avoid tobacco, alcohol, and other potentially harmful substances.<sup>61</sup> She must make frequent visits to doctors and undergo ultrasounds,

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<sup>59</sup> To help readers conceptualize pregnancy in this way, Thomson asks them to imagine that their circulatory system is tethered to that of an ailing violinist who will die if he is disconnected. Thomson, *supra* note 16, at 49. We discuss this example further in Part III.

<sup>60</sup> See *Pregnancy: Body Changes and Discomforts*, OFFICE ON WOMEN'S HEALTH (Jan. 30, 2019), <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/body-changes-and-discomforts> [<https://perma.cc/8TRV-LPJR>].

<sup>61</sup> See Audra Meadows, *12 Ways to Stay Healthy During Pregnancy*, BRIGHAM HEALTH HUB, <https://brighamhealthhub.org/12-ways-to-stay-healthy-during-pregnancy/> [<https://perma.cc/8MZ3-DJ6B>].

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blood tests, glucose screenings, and more.<sup>62</sup> She may have to make choices between medications that are best for her own health and ones that are safe for a developing fetus.<sup>63</sup> If pregnancy-related health problems develop, she may need to adopt time-consuming and anxiety-provoking regimens. For example, a diagnosis of gestational diabetes may require monitoring blood sugar levels four or more times daily.<sup>64</sup> Doctors frequently prescribe bed rest for an array of pregnancy complications.<sup>65</sup> When this happens, a woman is apt to have little choice but to restructure her life *pronto*. She may need to leave her job, withdraw from school, find someone to look after her children, or make any number of other life-altering changes. Pregnant women's heightened risk of severe illness from the Covid-19 virus highlights the health challenges that pregnancy creates for women.<sup>66</sup>

The nine months of pregnancy are often treacherous for women's career trajectories. Despite the Pregnancy Discrimination Act (PDA) of 1978,<sup>67</sup> pregnant women often experience significant disadvantages in the workplace.<sup>68</sup> The PDA requires only that employers provide pregnant employees with the same accommodations they provide to other employees who temporarily face similar challenges in performing the functions of their jobs. It does not require employers to provide a pregnant employee with even a simple accommodation—for example, an extra bathroom break—unless a non-pregnant employee has requested, and been granted, that accommodation. Nor does it preclude employers from denying reasonable accommodations for conditions (or

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<sup>62</sup> See *Routine Tests During Pregnancy*, AM. COLL. OBSTETRICS & GYNECOLOGY (July 2021), <https://www.acog.org/womens-health/faqs/routine-tests-during-pregnancy> [<https://perma.cc/G3DY-YZXX>].

<sup>63</sup> See Molly M. Lynch et al., *Making Decisions About Medication Use During Pregnancy: Implications for Communications Strategies*, 22 *MATERNAL & CHILD HEALTH J.* 92 (2018).

<sup>64</sup> See *Gestational Diabetes: Diagnosis & Treatment*, MAYO CLINIC (Aug. 26, 2020), <https://www.mayoclinic.org/diseases-conditions/gestational-diabetes/diagnosis-treatment/drc-20355345> [<https://perma.cc/8D3M-JRGZ>].

<sup>65</sup> See *Pregnancy Bed Rest*, CLEVELAND CLINIC (Sept. 24, 2018), <https://my.clevelandclinic.org/health/articles/9757-pregnancy-bed-rest> [<https://perma.cc/S6AK-EVRH>].

<sup>66</sup> See *Pregnant and Recently Pregnant People: At Increased Risk for Severe Illness from COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 24, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnant-people.html> [<https://perma.cc/3X3U-G2V8>].

<sup>67</sup> 42 U.S.C. § 2000e(k).

<sup>68</sup> See Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html>.

a constellation of conditions) distinctive to pregnancy.<sup>69</sup> Without additional protections, many women who would like to hold onto their jobs end up leaving the workforce because of their pregnancies. The result is not only an immediate loss of income and benefits but also typically a setback to future career advancement. Many women who leave the workforce for pregnancy-related reasons never return to their pre-birth earnings path.<sup>70</sup>

Pregnancy is also a time of heightened vulnerability to intimate partner violence.<sup>71</sup> According to the American College of Obstetricians and Gynecologists, one in six women in abusive relationships was first abused while pregnant.<sup>72</sup> At first glance, this statistic may seem surprising, because it is commonly assumed that people tend to go out of their way to be helpful to, and protective of, pregnant women. But for many women that assumption reflects a very romanticized view of pregnancy. Families often experience enormous stress when faced with the prospect of a new baby that they may not have planned for and that they feel ill-equipped to nurture and support.<sup>73</sup> Some partners—in particular, those exposed to intimate partner violence while growing up<sup>74</sup>—react to the stress by abusing the pregnant woman.<sup>75</sup> The woman’s vulnerability is especially great if she feels pressure to stay in the relationship because of economic dependency on her partner.<sup>76</sup>

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<sup>69</sup> For discussion of the PDA’s shortcomings and the proposed Pregnant Workers Fairness Act, see *Fact Sheet: Pregnant Workers Fairness Act (H.R. 2694)*, H. COMM. ON EDUC. & LAB. (Sept. 10, 2020), <https://edlabor.house.gov/imo/media/doc/PWF%20Act%20-%20Fact%20Sheet.pdf> [<https://perma.cc/WD6M-WF89>].

<sup>70</sup> See Danielle H. Sandler & Nichole Szembrot, *Cost of Motherhood on Women’s Employment and Earnings*, U.S. CENSUS BUREAU (June 16, 2020), <https://www.census.gov/library/stories/2020/06/cost-of-motherhood-on-womens-employment-and-earnings.html> [<https://perma.cc/4BEP-UZQG>].

<sup>71</sup> See Christian A. Chisholm et al., *Intimate Partner Violence and Pregnancy: Epidemiology and Impact*, 217 AM. COLL. OBSTETRICS & GYNECOLOGY 141 (2017), [https://www.ajog.org/article/S0002-9378\(17\)30659-2/fulltext](https://www.ajog.org/article/S0002-9378(17)30659-2/fulltext).

<sup>72</sup> *Abuse During Pregnancy*, MARCH OF DIMES, <https://www.marchofdimes.org/pregnancy/abuse-during-pregnancy.aspx> (last visited Oct. 10, 2021).

<sup>73</sup> See *Abuse During Pregnancy*, TEARMANN SOC’Y FOR ABUSED WOMEN, <http://tearmann.ca/about-abuse/abuse-during-pregnancy/> (last visited Oct. 10, 2021).

<sup>74</sup> See C. Nadine Wathen & Harriet L. MacMillan, *Children’s Exposure to Intimate Partner Violence: Impacts and Interventions*, 18 PAEDIATRICS CHILD HEALTH 419 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3887080/> [<https://perma.cc/6SQD-6BTK>].

<sup>75</sup> See *Abuse During Pregnancy*, *supra* note 73.

<sup>76</sup> See Dana Harrington Connor, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. RACE, GENDER, & SOC. JUST. 339, 356–69 (2014).

As every parent knows, the project of providing life-sustaining services by no means ends at birth. Parents are legally required to provide their children with food, shelter, clothing, and basic care until they reach the age of majority, which is eighteen almost everywhere in the United States.<sup>77</sup> Parents of children with disabilities are often legally required to support their children well beyond the age of majority.<sup>78</sup> And, of course, raising a physically and emotionally healthy child requires much more of parents than simply supplying the basic necessities required by law.

American workplaces typically are far from generous in accommodating the needs of workers who are also caregivers for children. Only 19% of employees have access to paid parental leave following the birth or adoption of a child.<sup>79</sup> Moreover, under the Family and Medical Leave Act, only about 56% of employees are eligible for job-protected *unpaid* leave to care for a newborn or for a child with a serious health condition.<sup>80</sup> Only 6% of employers in the U.S. offer childcare benefits to their employees, and only 4% offer onsite childcare programs.<sup>81</sup> Working parents may qualify for some government assistance for childcare, but the qualification requirements tend to be stringent and the amounts—often in the form of tax breaks—typically are not nearly enough to cover the costs.<sup>82</sup>

Much more often than not, the burdens of caring for and raising children fall disproportionately on women. According to the U.S. Census Bureau, roughly 80% of single parents in the United States are

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<sup>77</sup> *Age of Majority by State*, WORLD POP. REV., <https://worldpopulationreview.com/state-rankings/age-of-majority-by-state> [<https://perma.cc/ZMN8-ZKUP>] (last visited Oct. 10, 2021). The exceptions are Alabama and Nebraska, where it is nineteen, and Mississippi, where it is twenty-one.

<sup>78</sup> See Danielle Gadomski Littleton & Susan Stauffer, *Child Support When Disabled Kids Become Adults*, ALERT, Winter 2013, at 2, [https://laslev.org/wp-content/uploads/FINAL-Alert-v29-no3\\_r1.pdf](https://laslev.org/wp-content/uploads/FINAL-Alert-v29-no3_r1.pdf).

<sup>79</sup> Kelly Anne Smith, *The U.S. Birth Rate Is Down Again – Could This Be the Final Push for Paid Parental Leave?*, FORBES (May 6, 2021), <https://www.forbes.com/advisor/personal-finance/us-paid-parental-leave-reform/>.

<sup>80</sup> Scott Brown et al., *Employee and Worksite Perspectives of the FMLA: Who is Eligible?*, U.S. DEP'T OF LABOR (July 2020), [https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD\\_FMLA2018PB1\\_WhoIsEligible\\_StudyBrief\\_Aug2020.pdf](https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018PB1_WhoIsEligible_StudyBrief_Aug2020.pdf) [<https://perma.cc/XZE7-Q3GM>].

<sup>81</sup> Liz Stevens, *Offering Childcare Benefits to Employees*, BEST MONEY MOVES (Jan. 22, 2020), <https://bestmoneymoves.com/blog/2020/01/22/offering-child-care-benefits-to-employees/>

<sup>82</sup> See Kate Ward, *9 Child Care Subsidies Every Family Should Know About*, CARE.COM (Mar. 24, 2021), <https://www.care.com/c/child-care-subsidies-and-programs>.

female.<sup>83</sup> About 30% of custodial parents who are awarded child support fail to receive any, and fewer than half receive the full amount.<sup>84</sup> The poverty rate for families with children headed by single mothers is roughly double the rate for families with children headed by single fathers and six times the rate for families with children headed by a married couple.<sup>85</sup> Even in heterosexual two-parent families, women disproportionately shoulder childcare responsibilities,<sup>86</sup> which leads to their making career sacrifices much more often than their partners. It is therefore hardly a surprise that the wage gap between mothers and fathers is far wider than that between women and men overall.<sup>87</sup>

The Covid pandemic has shone a harsh light on the vulnerabilities of working mothers. More women than men left the workforce, and women have been slower than men to return as economies reopened.<sup>88</sup> A large part of the reason is that the closing of daycare centers and schools led women's caregiving responsibilities to expand far more than men's did.<sup>89</sup> The effects on women's overall participation in the workforce and on their future representation in leadership positions will undoubtedly be felt for many years to come.

Opponents of abortion often tout adoption as a far preferable alternative, but adoption is hardly a panacea for the burdens that giving birth to an unwanted child places on women's future lives. Most women find the process of surrendering their baby a wrenching experience,

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<sup>83</sup> Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2017*, U.S. CENSUS BUREAU 2 (May 2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf> [<https://perma.cc/MT58-76YY>].

<sup>84</sup> *Id.* at 2, 4.

<sup>85</sup> See Amanda Fins, *National Snapshot: Poverty Among Women & Families, 2020*, NAT'L WOMEN'S L. CTR. (Dec. 2020), <https://nwlc.org/wp-content/uploads/2020/12/PovertySnapshot2020.pdf>.

<sup>86</sup> See Maria Cohut, *Women 'Spend More Time on Housework, Childcare Than Men,'* MED. NEWS TODAY (Oct. 10, 2017), <https://www.medicalnewstoday.com/articles/319687>.

<sup>87</sup> See Madison Hoff, *Mothers Make Just 75 Cents for Each Dollar Fathers Make, and It Means a Mom Would Have to Work til May 5 to Earn What a Dad Made Last Year*, BUS. INSIDER (May 5, 2021), <https://www.businessinsider.com/mothers-equal-pay-day-pay-gap-2021-5>.

<sup>88</sup> See Kweilin Ellingrud & Liz Hilton Segel, *COVID-19 Has Driven Millions of Women out of the Workforce. Here's How to Help Them Come Back*, FORTUNE (Feb. 13, 2021), <https://fortune.com/2021/02/13/covid-19-women-workforce-unemployment-gender-gap-recovery/>; Tom Starner, *How the Pandemic Is Affecting Women's Progress to Pay Equity*, HUM. RES. EXEC. (Mar. 24, 2021), <https://hrexecutive.com/how-the-pandemic-is-affecting-womens-progress-to-pay-equity/>.

<sup>89</sup> See Starner, *supra* note 88.

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fraught with feelings of grief, guilt, and shame that may haunt them for years.<sup>90</sup> Women who give up their babies often must deal with the disapproval of parents, partners, and even their other children. In response to strong evidence that adopted children tend to fare better with open rather than with closed adoptions,<sup>91</sup> 95% of U.S. women today who give up their babies accept the responsibility of remaining in some way accessible to those children.<sup>92</sup> Although it can be comforting to a woman to maintain a connection to a child whom she puts up for adoption, it also can invite a host of unforeseeable future life complications.

Of course, many women react joyfully to the news that they are pregnant. Due to some combination of their personalities, life histories, current circumstances, and moral or religious beliefs, they are excited to take on the project of sustaining unborn life and nurturing and raising a child. For all the reasons mentioned above, however, this is far from a universal reaction, and for women who do not share it, the decision whether to continue an unwanted pregnancy has short- and long-term ramifications almost certainly unrivalled by any other decision in their lives. If, as the Court affirmed in *Casey*, there is a fundamental right to privacy that gives everyone the right to decide “matters [ ] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,”<sup>93</sup> that right is only sensibly understood as encompassing a woman’s right to decide whether to accept the burdens of sustaining an unborn life inside her womb.

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<sup>90</sup> See *The Impact of Adoption*, U.S. DEP’T HEALTH & HUM. SERVS. (Oct. 2019) [https://www.childwelfare.gov/pubPDFs/factsheets\\_families\\_adoptionimpact.pdf](https://www.childwelfare.gov/pubPDFs/factsheets_families_adoptionimpact.pdf) [<https://perma.cc/6HE5-PC72>].

<sup>91</sup> See *Could Open Adoption Be the Best Choice for You and Your Baby?*, U.S. DEP’T OF HEALTH & HUM. SERVS. 5–6, <https://www.childwelfare.gov/pubPDFs/openadoption.pdf> [<https://perma.cc/F3G8-L8N4>] (last visited Oct. 10, 2021). In closed adoptions the birth parents have no contact with the adoptive parents before the adoption and no contact with either the adoptive parents or the child after the adoption. Open adoptions allow birth parents to have contact with the adoptive parents and the child. They vary considerably in the amount and type of contact.

<sup>92</sup> *Open vs. Closed Adoption: What Is the Difference?*, AM. ADOPTIONS, <https://www.americanadoptions.com/adopt/open-closed-semi-adoption> (last visited Oct. 10, 2021).

<sup>93</sup> *Casey*, 505 U.S. at 851.



*B. The Fundamentality of the Right to Privacy*

Even if, as argued above, the right to decide whether to have an abortion comes within the privacy right that the Court has recognized as fundamental, the question remains whether the privacy right that the Court has recognized as fundamental indeed deserves such recognition. In this section we explain why it does.

The Court first explicitly recognized a fundamental right to privacy in *Griswold v. Connecticut* in 1965.<sup>94</sup> In the years since, commentators have offered a variety of views on whether the Court was justified in recognizing such a right as fundamental and if so, whether the reasons offered by the Court in *Griswold*, *Roe*, and *Casey* persuasively explain why.<sup>95</sup> Although there surely would be some value in our addressing the abundant scholarly literature on the subject in detail, our doing so would take this Article far afield and tend to obscure the principal insights that we seek to offer. With no disrespect, then, to the commentators who have preceded us, we will focus on critiquing the Court's rationales and articulating the ingredients of our defense, and although we believe that some of those ingredients and the defense in its entirety are quite original, we will not attempt to document their distinctiveness. We will discuss in detail only one commentator, John Hart Ely,<sup>96</sup> and we will do so because we believe that it will facilitate our articulating as clearly and concisely as we can the ingredients of our defense.

As indicated below, we see good reason to question the cogency of the rationales offered by the Court over the years for finding the privacy

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<sup>94</sup> 381 U.S. 479 (1965).

<sup>95</sup> See, e.g., William M. Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Robert G. Dixon, Jr., *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 785 (1973); Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989); A Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J. L. & PUB. POL'Y 1035 (2006); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Arthur E. Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283 (1965).

<sup>96</sup> Ely, *supra* note 95.

right fundamental. We are sympathetic to many of the criticisms that Professor Ely, a leading constitutional law scholar then early in his illustrious career, famously leveled against the Court soon after *Roe* was handed down. Unlike Ely, however, we do not believe that the weaknesses of the rationales offered by the Court establish that the proposition being defended—the fundamentality of the right to privacy—was untenable. Using arguments that we believe avoid criticisms like Ely’s, we will contend that the Court’s recognition in *Griswold* of a fundamental right to privacy and its reaffirmation of that recognition in *Roe* and *Casey* were eminently sound.

*1. The Court’s Rationales for Fundamentality in Griswold, Roe, and Casey*

In 1965 the Court in *Griswold* reversed the convictions of a doctor and a Planned Parenthood director for aiding and abetting a married couple in violating a rarely enforced and, in the words of one of the two dissenting Justices, “uncommonly silly”<sup>97</sup> Connecticut statute criminalizing the use of “any drug, medicinal article or instrument for the purpose of preventing conception.”<sup>98</sup> In an opinion of the Court on behalf of himself and four others, Justice Douglas held that the Connecticut ban on use, which dated back to 1879, violated the married couple’s fundamental right to privacy. As support for the constitutional stature of the right, Douglas did not rely on any one constitutional provision. Instead, after characterizing the right to free association and other rights not named in the First Amendment as constitutionally protected by virtue of lying in a “penumbra” of the First Amendment “where privacy is protected from governmental intrusion,”<sup>99</sup> he pointed to five constitutional provisions—the First, Third, Fourth, Fifth, and Ninth Amendments—as implicitly establishing the fundamentality of the privacy right:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition

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<sup>97</sup> *Griswold*, 381 U.S. at 527 (Stewart, J., joined by Black, J., dissenting).

<sup>98</sup> *Id.* at 480 (opinion of the Court, quoting Connecticut’s then-existing prohibition on using contraceptives, along with its general prohibition against serving as an accessory to an offense).

<sup>99</sup> *Id.* at 483.

against the quartering of soldiers “in any house” in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>100</sup>

When the Court in 1973 revisited the right to privacy in *Roe*, it did so in the exponentially more politically charged context of state abortion laws, and its invalidation of the statute under review had much more far-reaching and controversial effects on laws across the nation. The Court in *Roe* addressed the fundamentality of a woman’s decision whether to have an abortion entirely in terms of whether that decision falls within the scope of the privacy right already declared fundamental. After listing various cases in which “the Court or individual Justices have . . . found at least the roots of that right” in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments and “penumbras of the Bill of Rights,” the Court affirmed that the fundamental privacy right “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>101</sup> Moreover, in so doing, the Court made clear that it saw no need to be all that specific about the constitutional source of the fundamental privacy right. Its listing of multiple amendments and reference to Bill of Rights’ “penumbras” as establishing “the roots of that right” surely evidenced that it was not turning its back on the Court’s identification in *Griswold* of the constitutional source. However, the Court also appeared to go out of its way not to limit itself going forward to the source identified by the *Griswold* Court.

A woman’s decision whether to have an abortion, the Court maintained, comes within the fundamental right to privacy regardless of “whether [that right] 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.”<sup>102</sup> Presumably “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action” encompasses the multi-amendment penumbral source identified

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<sup>100</sup> *Id.* at 484.

<sup>101</sup> *Roe*, 410 U.S. at 152–53.

<sup>102</sup> *Id.* at 153.

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by the Court in *Griswold*, because the Bill of Rights amendments that combine to produce that penumbral source only constitute “restrictions on state action” by virtue of the Fourteenth Amendment’s incorporation of their protections in the “concept of personal liberty” expressed in its Due Process Clause.<sup>103</sup> In addition, however, “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action” encompasses the very distinct source of the Due Process Clause in and of itself and without any reference to notions of incorporation.

In the words of Justice Harlan, who invoked the Due Process Clause in the latter freestanding capacity in his concurring opinion in *Griswold*, this source is the Due Process Clause “on its own bottom.”<sup>104</sup> According to Justice Harlan, the Connecticut statute in *Griswold* failed to meet the demands of the Due Process Clause because it “violates basic values ‘implicit in the concept of ordered liberty.’”<sup>105</sup> As he further explained, to apply that measure of fundamentality in a manner consistent with the Clause, courts must show “respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.”<sup>106</sup>

As indicated above, the Court in *Roe* also suggested that the Ninth Amendment could reasonably be found to be the source of the right to privacy’s constitutional stature. Just as Justice Harlan’s concurring opinion in *Griswold* lay the groundwork for the *Roe* Court’s treating the Due Process Clause in and of itself as justification for holding the right to privacy fundamental, so did another concurring opinion in *Griswold*—one authored by Justice Goldberg and joined by Chief Justice Warren and Justice Brennan—lay the groundwork for the *Roe* Court’s treating the Ninth Amendment as providing such justification. As Justice Goldberg explained:

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically

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<sup>103</sup> For discussion of the incorporation doctrine, see Gary J. Simson, *Constitutional Law and the Culture Wars: When Religious Liberty and the Law Conflict, Which Should Prevail?*, in *FREEDOM & SOCIETY: ESSAYS ON AUTONOMY, IDENTITY, AND POLITICAL FREEDOM* 31, 35-36, 36 n.16 (Yi Deng et al. eds., 2021).

<sup>104</sup> *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in judgment).

<sup>105</sup> *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>106</sup> *Id.* at 501.

mentioned in the first eight constitutional amendments. . . . It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights, and that the specific mention of certain rights would be interpreted as a denial that others were protected.

. . . .  
In determining which rights are fundamental, judges . . . must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] . . . as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105. . . .<sup>107</sup>

Almost two decades after *Roe*, the Court in *Planned Parenthood v. Casey* again discussed the fundamentality of the right to privacy in the heated context of state limitations on abortion rights. While simultaneously reaffirming what it called “the essential holding of *Roe v. Wade*”<sup>108</sup> and enhancing substantially state prerogatives to circumscribe abortion rights, the Court offered a somewhat different explanation of the constitutional stature of the right to privacy than it had offered in *Griswold* or *Roe*. In a portion of the lead opinion by Justices O’Connor, Kennedy, and Souter that was joined by two other Justices and therefore had the precedential force of an opinion of the Court, the Court, like Justice Harlan in *Griswold*, rested squarely on the Due Process Clause, in and of itself, as the source of the right’s fundamentality.<sup>109</sup> In fact, the Court’s eagerness to ally itself with

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<sup>107</sup> *Id.* at 488–89, 493 (Goldberg, J., concurring). As indicated in the above excerpt from Justice Goldberg’s opinion in *Griswold*, much of the language that he used in articulating a standard for fundamentality was borrowed from *Snyder v. Massachusetts*, 291 U.S. 97 (1934). *Snyder* itself had nothing to do with the Ninth Amendment. Herman Snyder was charged with murder. When the trial got under way, the state moved for an order directing the jury to view the scene of the crime. The court granted the motion but denied a motion by counsel for Snyder that Snyder be permitted to accompany the jury to the view. Snyder was convicted and sentenced to death. After stating the facts in *Snyder*, Justice Cardozo, writing for the Court, described the “question in this court” as “whether a view in the absence of a defendant who has made demand that he be present is a denial of due process under the Fourteenth Amendment.” *Id.* at 104–05. The language that Justice Goldberg quoted in *Griswold* was simply part of the next sentence of the opinion – a general statement of the limitations that due process places on state criminal procedure: “The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless, in doing so, it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Id.* at 105.

<sup>108</sup> *Casey*, 505 U.S. at 846.

<sup>109</sup> *Id.* (“Constitutional protection of the women’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no

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Justice Harlan's approach to fundamentality was so palpable that it was almost impossible to miss. Not only did it twice quote at length from a dissenting opinion by Harlan that later figured prominently in Harlan's opinion in *Griswold*,<sup>110</sup> but it went so far as to state the dubious proposition that "the Court adopted his position [in that dissent] four terms later in *Griswold*."<sup>111</sup> For better or worse, there was only one approach to fundamentality endorsed by a majority of the Court in *Griswold*, and it was Douglas's. Harlan's opinion concurring in the judgment in *Griswold* was written and joined by Harlan alone.

One might have expected that, having gone to considerable lengths to express its solidarity with Harlan, the Court in *Casey* would have adopted an approach to fundamentality that mirrored Harlan's. Instead, however, the Court articulated reasons for finding privacy a fundamental right under the Due Process Clause that seem to invoke a standard for fundamentality rather different from Harlan's:

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.<sup>112</sup>

## 2. *Difficulties Inherent in the Court's Rationales*

The ink was barely dry on the Court's opinion in *Roe* when Yale Law Professor John Hart Ely launched a full-scale attack on it in *The Yale Law Journal*.<sup>113</sup> As we discuss below, Ely's criticisms of *Roe* expose major weaknesses in the Court's various rationales for the fundamentality of the right to privacy. We also maintain, however, that those criticisms point the way to a rationale for the right's

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State shall 'deprive any person of life, liberty, or property, without due process of law.' The controlling word in the cases before us is 'liberty.'").

<sup>110</sup> *Id.* at 848-50 (quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)).

<sup>111</sup> *Id.* at 849.

<sup>112</sup> *Id.* at 851.

<sup>113</sup> Ely, *supra* note 95.

fundamentality substantially less vulnerable to attack than any that the Court has offered over the years. Unlike Ely, we do not believe that his criticisms call for the conclusions he reached that the right of privacy is not fundamental and that *Roe* was wrongly decided.

Ely blasted *Roe* as “a very bad decision” and maintained that “[i]t is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”<sup>114</sup> With the Court in *Roe* having held that the right to decide whether to have an abortion is fundamental by virtue of coming within the right to privacy that the Court already had declared fundamental, Ely made the fundamentality of the privacy right the focal point of his attack. He underlined that, if he were a legislator, he would have voted for a law giving women an abortion right comparable in scope to the right that the Court in *Roe* required lawmakers to give to women as a matter of constitutional law.<sup>115</sup> In his view, the flaw in the majority’s reasoning was mistaking the value preferences that they would seek to write into law if they were legislators with the value preferences that, as judges charged with interpreting the Constitution, they were obliged to draw from the Constitution itself.

Ely did not claim that this flaw in judicial reasoning was novel in the annals of constitutional law. In fact, in his view, it was all too reminiscent of the primary flaw in the Court’s reasoning in the infamous *Lochner v. New York*<sup>116</sup> and in the many cases in the next few decades that followed its lead. According to Ely, the Court in *Roe* as in *Lochner* subjected a law to rigorous review on the basis of an individual right that simply lacks the constitutional importance needed to justify judicial application of a high standard of review. Ely readily conceded the legitimacy of demanding a high level of justification for a law interfering with a right explicitly protected by the Constitution, such as the First Amendment’s freedom of speech. Moreover, he also recognized the propriety of a court’s strictly scrutinizing a law that infringes on a right most reasonably understood as implicit in “values

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<sup>114</sup> *Id.* at 947 (emphasis in original).

<sup>115</sup> *See id.* at 926 (“Were I a legislator I would vote for a statute very much like the one the Court ends up drafting.”); *see also id.* at 923 (“Having an unwanted child can go a long way toward ruining a woman’s life. And at bottom *Roe* signals the Court’s judgment that this result cannot be justified by any good that anti-abortion legislation accomplishes. This surely is an understandable conclusion – indeed it is one with which I agree. . . .”).

<sup>116</sup> 198 U.S. 45 (1905). Ely not only analogized *Roe* to *Lochner*, *see Ely, supra* note 95, at 937–40, but went one step further and argued that “although *Lochner* and *Roe* are twins to be sure. . . there *are* differences . . . that suggest *Roe* may turn out to be the more dangerous precedent.” *Id.* at 940.

the Constitution marks for special protection.”<sup>117</sup> He argued, however, that “[w]hat is frightening about *Roe*” is that the “super-protected right” that it features “is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure” as delineated in the Constitution.<sup>118</sup> In short, in his view, the fundamentality of the abortion right and the privacy right of which it is a part was simply inexplicable in terms of text, history, and structure—the ordinary tools of constitutional interpretation—and it was therefore nothing less than lawless for the Court to insist, as it did in *Roe*, that a state could not limit a woman’s right to decide whether to have an abortion unless it could show that the limitation was necessary to a compelling state interest.

In his critique of *Roe*, Ely did not spend a great deal of time discussing the details of the Court’s rationales in *Griswold* and *Roe* for holding the right to privacy fundamental. He did indicate, though, that he regarded the rationale for fundamentality that the Court offered in *Griswold* as the primary one that the Court offered in *Roe*.<sup>119</sup> It therefore seems appropriate to assume that his criticisms were made with the Court’s rationale in *Griswold* principally in mind. But how can that be? On the one hand, Ely insisted that a right is not fundamental unless it is inferable from constitutional text, history, or structure. On the other hand, as Ely acknowledged, the Court’s rationale in *Griswold* for declaring the right to privacy fundamental was that it was inferable from a number of very explicit guarantees in the Bill of Rights. Didn’t the Court’s identification in *Griswold* of five distinct provisions in the text of the Constitution as the source of authority for the fundamentality of the privacy right give Ely just the type of justification that he seemed to be insisting was essential?

Very simply, no. The identification of five constitutional provisions that each protect people against governmental invasion of one or another kind of personal privacy is hardly proof, in and of itself, that the Constitution guarantees people a general right to privacy that encompasses various kinds of privacy outside the scope of the kinds guaranteed by the five provisions. As Ely, tacitly drawing on the well-

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<sup>117</sup> Ely, *supra* note 95, at 937.

<sup>118</sup> *Id.* at 935–36.

<sup>119</sup> *See id.* at 928 (“The general right of privacy is inferred [in *Roe*], as it was in *Griswold v. Connecticut*, from various provisions of the Bill of Rights manifesting a concern with privacy. . .”).



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known semantic canon of interpretation of *expressio unius*,<sup>120</sup> put it, “all” that the *Griswold* Court’s listing of provisions “proves is that the things explicitly mentioned are forbidden, if indeed it does not actually demonstrate a disposition *not* to enshrine anything that might be called a general right of privacy.”<sup>121</sup>

In fairness to the Court in *Griswold*, it did not simply suggest that a general constitutionally protected right of privacy must exist because the Constitution explicitly protects a number of particular kinds of privacy. Instead, it very deliberately explained the link between the explicitly protected privacy rights and the inexplicitly protected general right of privacy. As we already quoted in part:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. . . .

. . . .

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . .<sup>122</sup>

For those not well-versed in astronomy, we note that a “penumbra” is “a part of a shadow in which only some light is blocked” and that the term is “used especially about a shadow made during an eclipse.”<sup>123</sup> We also note that an “emanation” is “something that is emitted or radiated (as a gas or an odor or a light)”<sup>124</sup> and that astronomers commonly refer to “cosmic emanations.”<sup>125</sup> Metaphors undoubtedly can be helpful in expressing what a writer is trying to say, even in a subject like constitutional law. We very much doubt, however, that using them here added anything to the Court’s opinion. More likely, using them

<sup>120</sup> Though commonly referred to as the *expressio unius* canon, the canon as stated in full is *expressio unius est exclusio alterius*, meaning “to express or include one thing implies the exclusion of the other, or of the alternative.” *Expressio unius est exclusio alterius*, BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014).

<sup>121</sup> Ely, *supra* note 95, at 928 (emphasis in original).

<sup>122</sup> *Griswold*, 381 U.S. at 484–85 (citation omitted).

<sup>123</sup> *Penumbra*, CAMBRIDGE DICTIONARY (2021), <https://dictionary.cambridge.org/us/dictionary/english/penumbra>.

<sup>124</sup> *Emanation*, FREE DICTIONARY (2021), <https://www.thefreedictionary.com/Emanations>.

<sup>125</sup> See, e.g., Mitchell C. Begelman, *Cosmic Emanations*, 255 SCI. 1587 (1992) (book review), <https://www.science.org/doi/10.1126/science.255.5051.1587>; Lee Cavendish, *NASA Maps the Extravagant Emanations of Powerful Cosmic Sources in the Sky*, SPACE ANSWERS (May 31, 2019), <https://www.spaceanswers.com/astronomy/nasa-maps-the-extravagant-emanations-of-powerful-cosmic-sources-in-the-sky/>.

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detracted from it, because the Court essentially relied on the metaphors to do a job that required much more help in the way of reasoned explanation.

In short, although the Court's opinion in *Griswold* points to no fewer than five constitutional provisions as its source of authority for inferring a general fundamental right to privacy, its explanation of its logic in inferring the general right from the specific guarantees was casual and cryptic. The Court may fairly be understood as paying only lip service to the notion, central to Ely's criticisms, that a right should not be treated as fundamental unless it is explicitly protected by the Constitution or implicit in "values the Constitution marks for special protection."<sup>126</sup>

Ely did not explicitly address and attempt to refute Justices Harlan and Goldberg's rationales in *Griswold* for treating the right to privacy as fundamental. There could be no real doubt, however, where he stood on both and why. Like the rationale offered years later by the Court in *Casey*, the Harlan and Goldberg rationales share a feature that Ely made clear he regarded as a fatal defect: As a measure of fundamentality, they each use a criterion that appears to lack any express or implicit roots in constitutional text, history, or structure.<sup>127</sup> Harlan gauged a right's fundamentality by whether it is "implicit in the concept of ordered liberty,"<sup>128</sup> Goldberg did so by whether the right is sufficiently deeply "rooted" in the "traditions and [collective] conscience of our people,"<sup>129</sup> and the Court in *Casey* did so by whether the right is

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<sup>126</sup> Ely, *supra* note 95, at 937.

<sup>127</sup> Probably the closest that Ely came to critiquing the Harlan and Goldberg approaches was his critique of an approach to fundamental rights that he attributed to legal academics:

[That approach] agrees that the Court will find little help in the Constitution and therefore has no real choice other than to decide for itself which value preferences to honor, but denies that it should necessarily opt for the preferences favored by the Justices themselves or the President who appointed them. To the extent "progress" is to concern the Justices at all, it should be defined not in terms of what they would like it to be but rather in terms of their best estimate of what over time the American people will make it – that is, they should seek "durable" decisions. This, however, is no easy task. . . .

Whatever the other merits or demerits of this sort of [approach], it plainly is not what it is meant to be – an effective argument for judicial self-restraint. . . .

*Id.* at 946.

<sup>128</sup> See *supra* note 105 and accompanying text.

<sup>129</sup> See *supra* note 107 and accompanying text.

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“central to” or “at the heart of” the “liberty protected by the Fourteenth Amendment.”<sup>130</sup>

Although we have reservations about predicating fundamentality on a criterion not expressly or implicitly tied to constitutional text, history, or structure, we are not as prepared as Ely to dismiss any such approach as indefensible. For present purposes, we take away from his critique the more modest proposition that if the fundamentality of a right can be persuasively explained in terms of constitutional text, history, or structure, a court is always well-served by justifying its determination of fundamentality in those terms. To do so avoids the questions of judicial legitimacy and overreaching that inevitably arise when courts attempt to justify a determination of fundamentality on other grounds. We also take away from his critique—and particularly from the ease with which he sweeps aside the *Griswold* Court’s text-based attempt to explain the fundamentality of the right to privacy—that reliance on constitutional text, history, or structure is seriously inadequate absent carefully reasoned constitutional arguments in support.

### 3. A Proposed Alternative Rationale

“Privacy” is no doubt a useful term to describe a variety of human concerns, but, as we are hardly the first to observe, it is positively misleading as a description of the concerns featured in *Griswold*, *Roe*, and other cases that the Court has grouped together under that rubric. For that reason, we believe that, in setting out our proposed rationale for the fundamentality of the right to privacy, it is important that we begin by explaining our understanding of the essence of that right and then discuss the right in terms that keep that essence in the foreground, rather than obscure it as the term “privacy” tends to do.

Personal autonomy, far more than any sense of personal privacy, is what the right at issue in the Court’s privacy cases is all about. As a general matter, the Court has allowed the government enormous latitude to interfere in people’s autonomy. It has made clear that a rational justification for the interference is sufficient and that a justification counts as rational as long as it has some shred of

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<sup>130</sup> See *supra* note 112 and accompanying text. Granted, the Fourteenth Amendment’s Due Process Clause contains the word “liberty.” That hardly qualifies, however, as a textual basis for the kind of ranking of forms of liberty contemplated by both Harlan’s “implicit in the concept of ordered liberty” criterion and the *Casey* Court’s “central to” or “at the heart of” liberty criterion.

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plausibility.<sup>131</sup> If, however, the government interferes with what the Court in *Casey* called “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,”<sup>132</sup> then a diametrically opposed standard of review applies. Under the Court’s privacy cases, government can only justify interfering with a person’s freedom to make such choices as he or she thinks best if the government can bear the burden of proving that its interference serves a government objective of the utmost importance and that it could not serve that objective as effectively by means that interfere less with individual freedom in making those choices.<sup>133</sup>

Our argument that people’s right to make choices of the sort featured in the Court’s privacy cases is fundamental relies on inference from standard interpretive sources. As an initial matter, we maintain that it is a basic premise of the Constitution that the people of the United States are the nation’s ultimate governors and that the success of the constitutional scheme depends on the people’s meaningful participation in the formulation of public policy. In support of that understanding of the Constitution, we rely on inferences from several constitutional provisions.

Consider first the Constitution’s Preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>134</sup>

The Supreme Court has never suggested that the Preamble is a source of federal lawmaking authority like the Commerce Clause<sup>135</sup> or the Taxing and Spending Clause<sup>136</sup> of Article I, Section 8. The Preamble does stand, however, as a statement by the nation’s founders that the Constitution itself—the law by which the validity of all other laws must be measured—comes from the people and derives its legitimacy from

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<sup>131</sup> See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

<sup>132</sup> *Casey*, 505 U.S. at 851.

<sup>133</sup> See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 384-88 (1978); *Roe*, 410 U.S. at 153-55.

<sup>134</sup> U.S. CONST. pmb.

<sup>135</sup> *Id.* art. I, § 8, cl. 3.

<sup>136</sup> *Id.* art. I, § 8, cl. 1.

them. As Chief Justice Marshall wrote about the Preamble in perhaps his most majestic and far-sighted opinion, “The government proceeds directly from the people; is ‘ordained and established,’ in the name of the people; and is declared to be ordained, ‘in order to form a more perfect union, establish justice. . . .’ ”<sup>137</sup> “The government of the Union, then,” Marshall continued, “is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them.”<sup>138</sup>

Various provisions in the Constitution make clear the centrality to the constitutional scheme of the right to vote. Article I, section 2 establishes that members of the House of Representatives will be “chosen every second Year by the People of the several States,”<sup>139</sup> and no fewer than a half-dozen amendments expand the range of people guaranteed the right to vote or protect against burdens on voting.<sup>140</sup> Voting is the epitome of popular participation in the formulation of public policy. “The right to vote freely for the candidate of one’s choice,” the Court explained in its landmark one person-one vote decision, “is of the essence of a democratic society.”<sup>141</sup> Moreover, as the Court maintained in another leading decision shortly before, “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”<sup>142</sup> Collectively, the Constitution’s numerous provisions on voting rights strongly affirm its profound commitment to, and reliance on, the people of the United States as the ultimate governors upon whose judgment and public-spiritedness so much depends.

The First Amendment’s Free Speech Clause may well be the constitutional provision that most strongly supports the inference that the Constitution presupposes a populace of the sort described above.

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<sup>137</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–04 (1819).

<sup>138</sup> *Id.* at 404–05.

<sup>139</sup> U.S. CONST. art. I, § 2, cl. 1.

<sup>140</sup> If a state denies the right to vote to any men who are twenty-one years old or older and not ex-felons, the Fourteenth Amendment requires a proportionate reduction in the state’s “basis of representation.” *Id.* amend. XIV, § 2. The Fifteenth Amendment prohibits denying the right to vote “on account of race, color, or previous condition of servitude,” and the Nineteenth Amendment prohibits doing so “on account of sex.” *Id.* amends. XV, XIX. The Seventeenth Amendment makes a state’s senators, like its representatives, “elected by the people” of the state. *Id.* amend. XVII. The Twenty-Fourth Amendment precludes treating “failure to pay any poll tax or other tax” as a ground for denying the right to vote, and the Twenty-Sixth Amendment protects anyone eighteen years old or older from being denied the right to vote “on account of age.” *Id.* amends. XXIV, XXVI.

<sup>141</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>142</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

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Justice Brandeis’s classic explanation of the Clause’s philosophical underpinnings makes clear the indispensability of an engaged, independent-minded populace for the guarantee of the freedom of speech to serve the purposes that, by all indications, it was designed to serve:

Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . .<sup>143</sup>

As Brandeis acknowledged, the Free Speech Clause is best understood as serving several vital objectives. Two that he recognized quite explicitly in the above passage are encouraging the robust discussion and sound resolution of issues in the political arena<sup>144</sup> and promoting institutional stability by helping ensure that the government is exposed to probing criticism.<sup>145</sup> A third objective, which Holmes championed in a legendary 1919 dissent<sup>146</sup> and to which Brandeis at least implicitly alluded above, is fostering a marketplace of ideas as a path to truth.

Of paramount importance for present purposes is the utter improbability that free speech could serve any of those objectives well if the people of the United States were what Brandeis termed “an inert people.” As the Court explained in revolutionizing the law of defamation in *New York Times v. Sullivan*, the First Amendment reflects “a profound national commitment to the principle that debate

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<sup>143</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in judgment) (footnote omitted).

<sup>144</sup> For major scholarly contributions building on this political perspective of the Clause, see ROBERT C. POST, *CONSTITUTIONAL DOMAINS* (1995), and CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

<sup>145</sup> For insightful development of this theme, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521 (1977).

<sup>146</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

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of public issues should be uninhibited, robust, and wide-open.”<sup>147</sup> For such debate to be a reality, the individuals engaging in it must be willing and able to do so with independence of spirit and mind.

But are the people of the United States apt to be such individuals if they live in a society in which the government does not allow them to make what the Court in *Casey* called “the most intimate and personal choices a person may make in a lifetime”?<sup>148</sup> Isn’t government interference in people’s autonomy to decide for themselves matters such as whether to marry or divorce or have children—matters so basic to their self-definition, so intimately connected to who they are as persons—a recipe for a society populated by the kind of “inert people” that, as Brandeis so eloquently explained, the Constitution presupposes the people of the United States will *not* be?<sup>149</sup>

In short, we submit that, by inference from the various constitutional provisions discussed above and the conception of the people of the United States that those provisions presuppose, the personal autonomy right that the Court has named a right to privacy deserves the “fundamental” label that the Court has given it. We do not deny that there is room for reasonable disagreement with the inferences we have drawn in making the case for fundamentality. Ultimately, however, we maintain that those inferences are the *most* reasonable to be drawn and that our defense of the right to privacy as fundamental lends strong support to the case for rescuing *Roe*.

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<sup>147</sup> 376 U.S. 254, 270 (1964).

<sup>148</sup> *Casey*, 505 U.S. at 851.

<sup>149</sup> After characterizing “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” as “matters [ ] involving the most intimate and personal choices a person may make in a lifetime,” *id.*, the Court in *Casey* explained that:

[These matters] 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.

*Id.* We suggest that the final sentence of the above quotation lends support both to the point of view expressed in the question we pose in the text and to the significance of that point of view for purposes of constitutional interpretation. We do not give that sentence a more prominent place in our discussion in the text, however, because it is sufficiently ambiguous that we are not entirely confident that the sentence indeed has the relevance that we are inclined to see in it.

### III. THE STATE’S LESS THAN COMPELLING INTEREST IN PROTECTING FETAL LIFE PRIOR TO VIABILITY

Even if a majority of the Court in *Dobbs* accepts that women have a fundamental right to decide whether to have an abortion, *Roe*’s survival is not assured unless a majority also accepts that the state does not have a compelling interest in protecting the life of the fetus prior to viability. We maintain below that a majority should accept that second proposition as well.

#### *A. Framing the Question*

The first step in determining the point during pregnancy at which the state has a compelling interest in protecting fetal life is to decide how to conceptualize abortion: Are pro-life advocates right to see abortion as killing the unborn,<sup>150</sup> or is Professor Thomson right to see it as refusing to provide the unborn with life-sustaining services? This distinction is far from semantic. Failure to appreciate the difference between those two conceptions of abortion is responsible for much of the confusion that surrounds the legal debate about restricting access to abortion. The state clearly has a compelling interest in preventing people from killing one another gratuitously or for personal advantage. As discussed below, however, it is much more debatable whether the state has a compelling interest in ensuring that people provide one another with whatever resources they need to preserve their lives.

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<sup>150</sup> In a classic and widely reprinted statement of the pro-life position, Pope John Paul II defined abortion as “the deliberate and direct killing, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to birth.” Pope John Paul II, *The Unspeakable Crime of Abortion*, ENCYCLICAL: EVANGELIUM VITAE – ON THE VALUE AND INVIOABILITY OF HUMAN LIFE ¶ 58 (Mar. 25, 1995), [https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae.html](https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html). In his well-known philosophical critique of abortion, Professor Marquis has characterized abortion as “killing”:

The claim that the primary wrong-making feature of a killing is the loss to the victim of the value of its future has obvious consequences for the ethics of abortion . . . . Since the reason that is sufficient to explain why it is wrong to kill human beings after the time of birth is a reason that also applies to fetuses, it follows that abortion is *prima facie* seriously morally wrong.

Don Marquis, *Why Abortion Is Immoral*, 86 J. PHIL. 183, 192 (1989). In defending the constitutionality of Mississippi’s prohibition on abortion after fifteen weeks, the Brief for the Petitioner in *Dobbs* does not use the term “killing” in describing abortion. However, it uses language clearly intended to be synonymous on the various occasions when it refers to the abortion right at issue as “a right to destroy a human life.” Brief for Petitioners, *supra* note 10, at 17.



There are good reasons to agree with Thomson that abortion is best characterized, not as killing the unborn, but rather as refusing to provide the unborn with life-sustaining services. Killing extinguishes a life that would have, or at least could have, survived had one simply walked away. Walking away, however, is clearly not an option for a pregnant woman, because the fetus depends on her for life support. Up to the point of viability, the fetus cannot survive anywhere other than in her womb. As discussed in Part II.A, providing the unborn with the services needed to preserve life requires very substantial effort and, in many instances, enormous personal sacrifice. It makes a great deal of sense to view the decision to have an abortion as a refusal to make that effort and sacrifice.

But what about the fact that abortion extinguishes fetal life? Doesn't that make it killing? In our view, the answer is no. If pregnant women had the option of having the fetus removed from the womb and gestated elsewhere, then a woman who instead destroyed her unborn could reasonably be characterized as a killer. But our society is very far from making this option available to women.

In the nearly fifty years since the Supreme Court decided *Roe*, advances in technology have pushed back the gestational age of possible fetal survival outside the womb by only a little over a month, which leave it nowhere near the point before the end of the first trimester by which the vast majority of abortions in the United States are performed.<sup>151</sup> Moreover, almost all the progress made in pushing back the point of viability occurred in the first twenty-five years after the decision in *Roe*.<sup>152</sup> In more recent years, the advances in reproductive technology principally have led to increases in the survival rates of infants born at twenty-two to twenty-eight weeks of gestation

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<sup>151</sup> Currently, the approximate rate of survival until hospital discharge is 10% for infants born at 22 weeks, 50-66% for infants born at 23 weeks, 66-80% for infants born at 24 weeks, 75-85% for infants born at 25 weeks, and over 90% for infants born at 26 weeks. Cheryl Bird, *Micro-Preemie Survival Rates and Health Concerns*, VERYWELL FAM. (Nov. 7, 2021), <https://www.verywellfamily.com/what-is-a-micro-preemie-2748625>. According to a summary prepared for the Centers for Disease Control and Prevention, about 93% of U.S. abortions in 2019 took place in the first trimester, which spans the first thirteen weeks of pregnancy. Katherine Kortsmitt et al., *Abortion Surveillance -- United States, 2019*, CDC MORB. & MORT. WKLY. REP., Nov. 26, 2021, at 1, <https://www.cdc.gov/mmwr/volumes/70/ss/pdfs/ss7009a1-H.pdf> [<https://perma.cc/8PLU-U9LN>].

<sup>152</sup> The largest breakthrough in the treatment of very premature infants was the development of surfactant therapies in the 1990s. *Surfactant Replacement Therapy – A Milestone in Neonatology*, EUR. FOUND. FOR CARE OF INFANTS (June 27, 2018), <https://www.efcn.org/news/surfactant-replacement-therapy-a-milestone-in-neonatology/>.

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and reductions in the incidence of permanent neurodevelopmental disabilities among the infants that do survive.<sup>153</sup> The roadblock to pushing viability back to earlier gestational ages is that current medical interventions require the fetus's organs to be well enough formed to be sustainable by technologies adapted from those used on small babies. For example, the lungs must be capable of taking in oxygen supplied by a ventilator. Although a high frequency ventilator has been developed specifically for premature newborns,<sup>154</sup> it appears that a whole new approach will be needed—something like an artificial womb, designed to mimic the placenta and the uterine environment<sup>155</sup>—to maintain life outside the womb prior to about twenty-two weeks. Research is underway, but such technologies are nowhere near ready for clinical trials.<sup>156</sup> Whether they will ever be successfully developed is at this point unknown. To the extent that a pregnant woman has no way besides abortion to refuse to provide the fetus with life-sustaining services, abortion is most reasonably seen as the *means* by which she withdraws these services.

We suggest, then, that to decide whether the government has a compelling interest in protecting fetal life that allows it to override a woman's fundamental right to decide whether to have an abortion, the relevant question is this: Is the government interest so vital to the general welfare that it can justify preventing a woman from making her own decision about whether to accept the burdens of continuing to provide her unborn with life-sustaining services? Put slightly differently, is that interest so vital that it can justify forcing an unwilling

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<sup>153</sup> The increases have been incremental. At major U.S. research centers, the survival rate of infants born at 22 to 28 weeks improved from 76% in the period from 2008-2012 to 78.3% in the period from 2013-2018. *Survival Rate Increases for Extremely Preterm Infants in NIH-Funded Research Network*, NIH (Jan. 18, 2022), <https://www.nih.gov/news-events/news-releases/survival-rate-increases-extremely-preterm-infants-nih-funded-research-network> [https://perma.cc/2H4W-VXPE]. However, the rates for significant disabilities among very premature infants who survive are still very high. A recent study found that among surviving infants born between 24 and 26 weeks, 28% have moderate to severe neurodevelopmental disabilities and another 39% have mild neurodevelopmental disabilities. *Risk of Developmental Difficulties Remains High Among Children Born Early*, SCIENCE DAILY (Apr. 28, 2021), <https://www.sciencedaily.com/releases/2021/04/210428192712.htm>.

<sup>154</sup> See Irena Kessel et al., *Benefits of High Frequency Oscillatory Ventilation for Premature Infants*, 12 *ISR. MED. ASS'N J.* 144 (2010).

<sup>155</sup> See Elizabeth C. Romanis, *Is Viability Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States*, 7 *J. L. & BIOSCIS.* 1, 13 (2020).

<sup>156</sup> See Felix R. De Bie et al., *Artificial Placenta and Womb Technology: Past, Current, and Future Challenges Towards Clinical Translation*, 41 *PRENATAL DIAGNOSIS* 145 (2021).

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woman to continue providing life support to her unborn regardless of the amount of time, effort, and sacrifice entailed?

It may appear that the answer turns on a question that has historically divided the pro-life and pro-choice camps: Does the unborn have a fully human right to life, and if so, at what point during pregnancy?<sup>157</sup> Thomson's proposal enables us to avoid getting stuck on that divisive question. In keeping with Thomson, let us assume for the sake of argument that, from the very outset of pregnancy, the unborn have the same right to life as everyone who unquestionably should be regarded as a human person. Even if the government's interest in protecting the life of a fetus is just as great as its interest in protecting the lives of all those who clearly count as human persons, is this interest strong enough to justify requiring women to continue their pregnancies?

Before attempting to answer this question, it is important to consider *how* to go about responding to a question of this sort. When philosophers analyze moral dilemmas, they often reflect on how the possible responses would play out in hypothetical—and sometimes even fantastical—situations. Thomson is a master of this approach. To guide our thinking about the morality of choosing abortion in the case of rape, for example, she invites us to think about the following scenario: Imagine waking one morning to find that a member of the Society of Music Lovers has plugged your circulatory system into that of an unconscious famous violinist who has a life-threatening kidney ailment and who can only recover if you allow the plug to remain in place for nine months. Thomson argues that just as you would have no moral obligation to remain connected to the violinist, a pregnant rape victim has no moral obligation to continue her pregnancy.<sup>158</sup>

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<sup>157</sup> The debate about whether or when the unborn has a fully human right to life largely tracks the debate about whether or when the unborn achieves personhood. Some authors, however, have distinguished between the two debates. For example, Professor Marquis maintains that one need not argue that the unborn is a person in order to make a strong case for the immorality of abortion. Abortion is *prima facie* wrong, he argues, because it deprives the unborn of a valuable “future-like-ours” – one filled with experiences, activities, and projects. See Marquis, *supra* note 150, at 189–92. For present purposes, it makes no difference whether one believes that the unborn has a fully human right to life from the outset of pregnancy because, beginning at that point, the unborn possesses personhood or because, beginning at that point, the unborn has a “future-like-ours.”

<sup>158</sup> Thomson, *supra* note 16, at 48–49. Other philosophers have offered variations on Thomson's scenario. See, e.g., BOONIN, *supra* note 17, at 162 (varying the violinist example so that, after checking into the hospital for elective cosmetic surgery, a patient is plugged into the violinist as a result of a computer glitch); Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 *MONIST* 43, 48–51 (1973). (varying

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Examples like this one can be very helpful in enabling us to detach ourselves from the strong emotions that so often interfere with our abilities to think clearly about controversial issues. Nevertheless, hypothetical—and especially, fantastical—scenarios can obscure important real-life implications of the question at issue. In the case of abortion, they can blind us to the social context in which pregnancy is situated in women’s past, current, and future lives.<sup>159</sup>

Keeping the focus on actual, concrete examples is especially important in the legal realm. The question of whether the government’s interest in protecting fetal life qualifies as compelling cannot be answered in the abstract. For example, suppose that we were living in a world with a rapidly dwindling population due to the disastrous effects

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Thomson’s violinist example so that the selection of someone to plug into the violinist is determined by a lottery of those who joined the Society of Music Lovers knowing that there was a chance of being selected).

Professor John Finnis has argued that abortion cannot be conceptualized as the withdrawal of life-sustaining services because abortion, unlike disconnecting oneself from Thomson’s ailing violinist, involves “directly injuring” the fetus and “amounts to an assault” on the latter’s body. John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 PHIL. & PUB. AFF. 117, 139 (1973). Abortion methods have evolved considerably since the time of Finnis’s article. Medical abortions, which are most commonly performed early in pregnancy, are easily understood as the withdrawal of life-sustaining services. In such instances, the woman is first given the drug mifepristone, which causes the uterine lining to thin and the unborn to dislodge, and then given misoprostol, which causes uterine contractions and ultimately the expulsion of the unborn through the vagina. See *Medical Abortion*, MAYO CLINIC (May 14, 2020), <https://www.mayoclinic.org/tests-procedures/medical-abortion/about/pac-20394687>. Surgical abortions, which today are typically performed by dilating the cervix and removing the fetus from the uterus by suction, see *Abortion – Surgical*, MEDLINEPLUS (Nov. 30, 2021), <https://medlineplus.gov/ency/article/002912.htm> [<https://perma.cc/PRY3-K8Z9>], perhaps look more like what Finnis calls “directly injuring” the fetus. But should the particular method used to remove the fetus from the woman’s womb really lead us to understand surgical abortions as different from medical ones? It is difficult to see why the reasons discussed in the text for conceptualizing abortion as the withdrawal of life-sustaining services apply any less strongly to surgical abortions than to medical ones. Functionally, the two procedures are indistinguishable. Both yield the same outcome. Either way, the fetus cannot continue living outside the womb. Neither procedure is more likely than the other to cause the fetus physical suffering or emotional distress. Medical considerations – not a desire to harm or disrespect the fetus, or even an indifference to fetal life – drive the decision as to which procedure to use.

<sup>159</sup> Ethicist Leslie Cannold criticizes Thomson along these lines in *THE ABORTION MYTH: FEMINISM, MORALITY, AND THE HARD CHOICES WOMEN MAKE* 6-8 (2000). See also Kate Greasley’s critique of thought experiments in *ARGUMENTS ABOUT ABORTION: PERSONHOOD, MORALITY, AND LAW* 88-95 (2017). For discussion and evaluation of the claim that abstract thinking about hypothetical situations is characteristic of masculine ways of thinking, whereas attention to context-specific actual situations is characteristic of feminine types of thinking, see Rosalind S. Simson, *Feminine Thinking*, 31 SOC. THEORY & PRAC. 1 (2005).

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of environmental devastation. In such a world, a state might reasonably assert a compelling interest in doing everything possible to preserve *all* human life—including requiring pregnant women to make great efforts and personal sacrifices to sustain the lives of their unborn.<sup>160</sup> If the deluge of Primetime Emmy Awards received by “The Handmaid’s Tale” since it first aired in 2017 are any indication,<sup>161</sup> pondering a scenario of that sort is something that appeals to many people, but when the Supreme Court in *Dobbs* decides whether to overrule *Roe*, its attention needs to be fixed on our *actual* society today, not on a hypothetical society possibly in our future. The relevant question for the Court will be whether *in our current society* the government has a compelling interest in requiring pregnant women to sustain unborn life regardless of the effort and sacrifice entailed.

### *B. Evaluating the State’s Interest in Protecting Fetal Life*

Whether or not a particular state interest is sufficiently important to qualify as “compelling” for purposes of justifying the state’s interference with a fundamental right should be guided, but not controlled, by the importance that the state has been according the

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<sup>160</sup> In his 2019 book, *Beyond Roe*, David Boonin takes an approach that, like ours, embraces Thomson’s conception of abortion as a refusal to provide life-preserving services. In arguing, however, against governmentally imposed abortion restrictions, Boonin relies heavily on fantastical scenarios – in particular, fantastical variations on *McFall v. Shimp*, 10 Pa. D. & C. 3d 90 (C.P., Allegheny Cnty., 1978), a case discussed *infra* Part III.B. In the actual case, McFall needed a lifesaving bone marrow transplant, and Shimp was the only compatible donor. In support of his contention that abortion should be legal in cases of pregnancies that result from contraceptive failure, Boonin asks us to imagine the following: McFall is in the hospital lying beside a “bone marrow transferring machine;” Shimp decides to visit him there and is warned that the floor in McFall’s room is slippery and that if he slips, he might get stuck to the machine, which would instantly begin transferring some of his bone marrow to McFall; Shimp enters the room extremely cautiously, but nevertheless slips and becomes stuck to the machine. Boonin suggests that our intuitions about whether it should be legal for Shimp to detach himself can help us to see why abortion should be legal in the event of pregnancy that results from contraceptive failure. DAVID BOONIN, *BEYOND ROE: WHY ABORTION SHOULD BE LEGAL — EVEN IF THE FETUS IS A PERSON* 25 (2019). The problem with this sort of analysis is that it lacks context. To make judgments about the appropriate legal response to the consequences of risk-taking, it is important to consider the reasons and justification for the risky behavior. We discuss below various real-life factors relevant to the case of contraceptive failure that Boonin’s fantastical thought experiment fails to take into account.

<sup>161</sup> See *The Handmaid’s Tale*, INTERNET MOVIE DATABASE, <https://www.imdb.com/title/tt5834204/> (last visited Feb. 1, 2022) (listing the series’ many Emmy Awards and offering the following one-line description, “Set in a dystopian future, a woman is forced to live as a concubine under a fundamentalist theocratic dictatorship.”).

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interest. On the one hand, because the determination is being made as an essential ingredient of resolving an issue of federal constitutional law, the determination is ultimately a matter of federal, not state, law. On the other hand, in keeping with basic principles of federalism and the respect due to state policy preferences, the court in making that determination should give significant weight to the importance that a state has been according that interest.<sup>162</sup> The question, however, of how much importance a state has been according an interest is more complex than it initially may appear. It cannot be meaningfully answered by focusing simply on the importance that a state has accorded the very specific interest implicated by the case at hand. Instead, it needs to be answered by considering the broader context of interests functionally like the interest at hand.

If a state legislature adopts a law as restrictive of abortion rights as the Mississippi law before the Court this Term in *Dobbs*, it appears to be saying that the interest in protecting a fetus's life is one that embodies values that the state's legislators and the people they represent hold in exceptionally high esteem. As discussed below, however, the interest in protecting a fetus's life in fact embodies values that are very much at odds with broader values held by every state legislature in the United States and the vast majority of the American people. Any notion that deference to state policy preferences calls for treating the interest in protecting fetal life as compelling simply loses the forest for the trees.

To gauge the importance of that interest, we need to think about other situations in which individuals are in positions to safeguard imperiled lives. Does the state in those situations require individuals to provide the needed life-sustaining services, regardless of the effort and sacrifice entailed, and claim as justification a compelling interest in protecting life? The answer is clearly no. Although a great many people in the United States would agree that it is morally admirable—and perhaps even morally obligatory—for individuals to help others in need,<sup>163</sup> there is little support among the American people or the

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<sup>162</sup> See Simson, *Permissible Accommodation*, *supra* note 49, at 594–95; see also *id.* at 579–80 (discussing the Court's analysis of the state interest in *Sherbert v. Verner*, 374 U.S. 398 (1963)).

<sup>163</sup> Thomson offers the following example to support her view that saving others' lives is morally admirable but not morally obligatory:

If I am sick unto death, and the only thing that will save my life is the touch of Henry Fonda's cool hand on my fevered brow, then all the same I have no right to be given the touch of Henry Fonda's cool hand on my fevered

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legislators who represent them for laws mandating that individuals provide others with life-preserving services. In general, there is no legal “duty to rescue” in the United States.<sup>164</sup> Although scholars have taken a variety of positions on whether a duty to rescue should be legally mandated,<sup>165</sup> state and local governments typically abide by the common-law principle that people cannot be held legally responsible for failing to come to the aid of a person in distress. Even the handful of U.S. jurisdictions that do have duty-to-rescue laws typically require nothing more than that those who witness a person in distress make reasonable efforts to call for police or medical assistance.<sup>166</sup>

The “no duty to rescue” principle attracted considerable media attention in 2017 when a group of teens in Florida taunted a man they saw drowning in a pond, used their cell phones to film his death, and posted the video on social media. Prosecutors brought no charges because they concluded that, however deplorable the youths’ behavior

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brow. It would be frightfully nice of him to fly in from the West Coast to provide it. . . . But I have no right at all . . . that he should do this for me.

Thomson, *supra* note 16, at 55. Religious and cultural perspectives on the moral responsibility to help others are noted in Barbara Gutierrez, *Do We Have a Moral Obligation to Help Others?*, U. MIA. NEWS (Apr. 29, 2020), <https://news.miami.edu/stories/2020/04/do-we-have-a-moral-obligation-to-help-others.html>.

<sup>164</sup> Such a duty often exists in civil law countries. See Qingxiu Bu, *The Good Samaritan in the Chinese Society: Morality vis-à-vis Law*, 38 LIVERPOOL L. REV. 138, 144-45 (2017); Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1452 & n.30 (2008)

<sup>165</sup> Scholarly articles in support of a statutory or court-created legal obligation to rescue include Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423 (1985) (arguing for both civil and criminal penalties for failure to render reasonable assistance), and Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980) (arguing for a duty to effect an easy rescue). Articles defending a no-duty-to-rescue principle include Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991 (2000) (arguing against a civil duty of easy rescue but suggesting that civil duty to report child abuse may be more defensible), and Scordato, *supra* note 164 (offering an instrumentalist argument against a tort law duty to rescue).

<sup>166</sup> For a list of states that do impose some minimal duty to help those in need, see Christopher Coble, *In Which States Do I Have a Duty to Help?*, FINDLAW (May 20, 2015),

[https://blogs.findlaw.com/law\\_and\\_life/2015/05/in-which-states-do-i-have-a-duty-to-help.html](https://blogs.findlaw.com/law_and_life/2015/05/in-which-states-do-i-have-a-duty-to-help.html). All fifty states and the District of Columbia have so-called “Good Samaritan Laws” that limit liability for those who try to assist an imperiled person. See Brian West & Matthew Varacallo, *Good Samaritan Laws*, NAT’L CTR. FOR BIOTECH. INFO. (Sept. 20, 2021), <https://www.ncbi.nlm.nih.gov/books/NBK542176/> [<https://perma.cc/5T7V-UB89>].

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may have been, it did not violate any express legal prohibition.<sup>167</sup> Less dramatic, but equally illustrative of our societal resistance to laws requiring individuals to try to save others' lives is our approach to organ donation. Thousands of human deaths in the United States could be prevented each year if everyone would sign up to be a posthumous organ donor.<sup>168</sup> States do not mandate, however, that people make such commitments. In fact, unlike many foreign jurisdictions, they are unwilling to presume consent to organ donation from failure to opt out of organ-donation programs. Those who wish to donate their organs posthumously must take the initiative to opt in.<sup>169</sup>

A 1978 Pennsylvania case seeking an order to compel a bone-marrow donation, *McFall v. Shimp*,<sup>170</sup> helps underscore the uniqueness of the way in which the recently passed early abortion bans treat pregnant women. The defendant, forty-two year-old David Shimp, had refused to provide bone marrow to the plaintiff, his thirty-nine year-old cousin Robert McFall, even though McFall would certainly die without a bone-marrow donation. Shimp was the only potentially suitable donor biologically, and Shimp's reason for resisting was simply a generalized anxiety that something might go wrong during a usually routine procedure.<sup>171</sup> Donating bone marrow is far less onerous and medically risky than nine months of pregnancy and has few, if any, negative ramifications for the donor's future life.<sup>172</sup> Nonetheless, the court ruled that Shimp could not be compelled to make the donation.

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<sup>167</sup> Nick Valencia & Devon Sayers, *Florida Teens Who Recorded Drowning Man Will Not Be Charged in His Death*, CNN (July 21, 2017), <https://www.cnn.com/2017/07/20/us/florida-teens-drowning-man/index.html>.

<sup>168</sup> See *Organ Donation Statistics*, HEALTH RES. & SERVS. ADMIN. (Oct. 2021), <https://www.organdonor.gov/learn/organ-donation-statistics> [https://perma.cc/S857-2M23]. Although many people appear to assume otherwise, the vast majority of religions support organ donation. See *Theological Perspective on Organ and Tissue Donation*, UNITED NETWORK FOR ORGAN SHARING, <https://unos.org/transplant/facts/theological-perspective-on-organ-and-tissue-donation/> (last visited Oct. 10, 2021).

<sup>169</sup> See Richard H. Thaler, *Opting In vs. Opting Out*, N.Y. TIMES (Sept. 26, 2009), [https://www.nytimes.com/2009/09/27/business/economy/27view.html?\\_r=0](https://www.nytimes.com/2009/09/27/business/economy/27view.html?_r=0).

<sup>170</sup> 10 Pa. D. & C. 3d 90 (C.P., Allegheny Cnty., 1978).

<sup>171</sup> See *Anemia Victim McFall Dies of Hemorrhage*, MICH. DAILY (Aug. 11, 1978), <https://news.google.com/newspapers?nid=2706&dat=19780811&id=JdxJAAAAIBAJ&pg=1277,5656020>.

<sup>172</sup> For discussion of the donation process and its risks, see *Donation FAQs*, BE THE MATCH, <https://bethematch.org/support-the-cause/donate-bone-marrow/donation-faqs/> (last visited Oct. 10, 2021).



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In its opinion, the court acknowledged that Shimp’s behavior “appears to be revolting in a moral sense,” but maintained that it was obliged to deny the requested relief:

Our society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another. . . . For our law to compel defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. . . .<sup>173</sup>

In essence, the court held that the government lacked the sort of compelling interest in protecting McFall’s life that would justify requiring Shimp to provide the needed life-preserving services. McFall died several weeks later.

Some might object to the analogy between continuing a pregnancy and rescuing a person in distress on the ground that a fetus ensconced in the womb of a healthy woman is not imperiled. After all, nothing symbolizes comfort and safety better than the womb. But the security of the womb is an illusion that is created when we take for granted, and fail to notice, the work being done by the pregnant woman. Anyone who has watched a premature infant struggle in the neonatal intensive care unit realizes the precariousness of the fetus’s situation—a precariousness that is visible only when the pregnant woman stops providing life-sustaining services.

There are several widely recognized exceptions to the U.S. legal system’s general rejection of a duty to rescue.<sup>174</sup> To establish that the recently enacted early abortion bans impose legal obligations on pregnant women that the government does not impose on people in analogous situations, we will turn now to three such exceptions that, by analogy, may appear to justify requiring women to continue unwanted pregnancies.

One exception is for special relationships. The special relationship most relevant to the abortion controversy is the one between parent and child.<sup>175</sup> States regularly require parents to provide their minor children

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<sup>173</sup> *McFall*, 10 Pa. D. & C. 3d at 91. For discussion of the societal values relevant to the issue of whether government has a compelling interest in mandating that people provide bodily aid to those whose lives are imperiled, see Guido Calabresi, *Do We Own Our Bodies?*, 1 HEALTH MATRIX 5 (1991).

<sup>174</sup> See 2 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. AND EMO. HARM §§ 37-44 (Am. L. Inst. 2012).

<sup>175</sup> *Id.* § 40 cmt. n.

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with food, clothing, shelter, and medical care, regardless of whether doing so requires substantial effort and sacrifice on the parents' part.<sup>176</sup> If we assume, for purposes of argument, that the unborn from the outset of pregnancy have the same right to life as all human persons, then wouldn't the pregnant woman be the unborn's parent? And wouldn't she therefore have the same legal obligations to protect the unborn as all parents have to their children?

The answer is not clear. In our society, parental status is determined not only by biology but also by social norms. For example, a sperm donor has no legal responsibilities to the children he brings into existence.<sup>177</sup> Similarly, a woman who bears a child by surrogacy is generally absolved of parental duties, regardless of whether she uses her own egg or someone else's to conceive the child.<sup>178</sup>

Even if we regard the pregnant woman as having the same legal obligations to the fetus as a mother has to her child, we must recognize that there are limits on parents' legal obligations to care for their children. States generally allow parents a great deal of discretion over decisions that affect their children's wellbeing. This is probably most obvious with regard to decisions implicating parents' religious beliefs. More than two-thirds of the states, including Mississippi, have exemptions to neglect laws for parents who, for religious reasons, withhold crucial medical care from their children.<sup>179</sup> The standard for

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<sup>176</sup> See Amy Morin, *What Is Child Neglect?*, VERYWELL FAM. (July 1, 2021), <https://www.verywellfamily.com/what-is-child-neglect-4151259>. For defense of the claim that special relationships—and, in particular, the relationship between parent and child—generate special moral obligations, see Rosalind S. Simson, *Effective Altruism and the Challenge of Partiality: Should We Take Special Care of Our Own?*, in FREEDOM & SOCIETY, *supra* note 103, at 198, 204–10.

<sup>177</sup> Sperm banks in the United States typically promise to protect the sperm donor's identity unless the donor specifies otherwise. The commercial availability of DNA testing on sites such as Ancestry.com has enabled many children conceived with donated sperm to seek out their biological fathers, but they still typically have no legal rights even to force their biological fathers to communicate with them. See Meghana Keshavan, *'There's No Such Thing as Anonymity': With Consumer DNA Tests, Sperm Banks Reconsider Long-Held Promises to Donors*, STAT (Sept. 11, 2019), <https://www.statnews.com/2019/09/11/consumer-dna-tests-sperm-donor-anonymity/>.

<sup>178</sup> For extensive analysis of the surrogacy laws in the United States, see Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S.: Report of the Columbia Law School Sexuality & Gender Law Clinic*, COLUM. L. SCH. (May 2016), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia\\_sexuality\\_and\\_gender\\_law\\_clinic\\_-\\_surrogacy\\_law\\_and\\_policy\\_report\\_-\\_june\\_2016.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf).

<sup>179</sup> See NAT'L DIST. ATTORNEYS ASS'N, RELIGIOUS EXEMPTIONS TO CHILD NEGLECT 1 (Feb. 2015), <https://ndaa.org/wp-content/uploads/2-11-2015-Religious->

legal intervention is not whether parents have done everything possible—or even reasonable—to safeguard their child.<sup>180</sup>

Of course, parental discretion is not unlimited. States sometimes do override parents' wishes and force them to accept medical treatment for their children. Even when states displace parental authority, however, the duties of care that they impose on parents are not nearly as onerous as the sorts of life-preserving services that women must supply to sustain a pregnancy. States, for example, may force parents to allow their critically ill child to receive a lifesaving bone marrow transplant, but they never require parents to supply their own bone marrow for this purpose.<sup>181</sup> States simply do not compel parents to provide services to their children at all comparable to those that the recently passed early abortion bans require pregnant women to provide to the unborn.

A second widely acknowledged exception to the U.S. legal system's general rejection of a duty to rescue arises in instances in which a person bears at least some responsibility for another person's endangered predicament.<sup>182</sup> Consider the following hypothetical situation: A city puts up a "No Parking" sign adjacent to a crosswalk out of a very reasonable concern that a car parked in that space would block motorists' view of pedestrians crossing at the crosswalk. A

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Exemptions-to-Child-Neglect.pdf. The Mississippi statute on parents' responsibilities to their children provides that "a parent who withholds medical treatment from any child who in good faith is under treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall not, for that reason alone, be considered to be neglectful under any provision of this chapter." MISS. CODE ANN. § 43-21-105(l)(i) (2015). For a compendium of state laws on religious exemptions to child neglect laws, see NAT'L DIST. ATTORNEYS ASS'N, *supra*. For discussion of the constitutional problems raised by religious exemptions, see Simson, *Permissible Accommodation*, *supra* note 49.

<sup>180</sup> See Lee Black, *Limiting Parents' Rights in Medical Decision Making*, 8 VIRTUAL MENTOR: AMA J. ETHICS 676 (2006).

<sup>181</sup> In 1968 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Anatomical Gift Act, and within a few years, every state had adopted the Act. The commissioners promulgated a revised version of the Act in 1987 that was adopted in only about half the states, but the commissioners' promulgation in 2006 of another revised version has proved more successful. That version has been adopted in all but a few states. See *Anatomical Gift Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=015e18ad-4806-4dff-b011-8e1ebc0d1d0f> (last visited Oct. 10, 2021). Under the Act, all individuals are free to refuse to make even posthumous gifts of any part of their bodies, and there is no exception for lifesaving gifts to one's child. See Britta Martinez, *Uniform Anatomical Gift Act (1968)*, EMBRYO PROJECT ENCYC. (Aug. 5, 2013), <https://embryo.asu.edu/pages/uniform-anatomical-gift-act-1968>.

<sup>182</sup> See 2 RESTATEMENT, *supra* note 174, § 39.

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woman wishing to make a quick purchase at a nearby store sees no open spaces to park and, convinced that her errand will take only a few minutes, parks in the no-parking zone. Upon returning to her car a very short time later, the woman witnesses a motorist make a left turn and strike a pedestrian in the crosswalk. Because she bears some responsibility for the accident, the woman would have a legal obligation not shared by passersby in most jurisdictions to make some effort to aid the pedestrian.

In thinking about when, if ever, abortion should be permitted, many people attach great importance to whether a woman is “responsible” for her pregnancy. How else can we explain the thinking of the significant sector of the population that supports banning abortion but wishes to make an exception for rape?<sup>183</sup> The only logical explanation seems to be that in their minds a pregnant rape victim, unlike other pregnant women, bears no responsibility for the unborn in her womb.<sup>184</sup> But is it reasonable to consider all women whose unwanted pregnancies are *not* the result of rape responsible for their unborn’s predicament of being dependent for survival upon another’s life-preserving services? And is it reasonable to maintain that the government therefore is justified in requiring those women to continue their pregnancies, however onerous that might be?

To answer these questions, we need to think about the varied and complex reasons for unwanted pregnancies. Consider, first, that legal

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<sup>183</sup> See *Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited Feb. 18, 2022). Consider, in particular, a May 2018 poll that found that 81% of people believe “abortion should be generally illegal” in the third trimester but that only 42% of people believe abortion should be illegal in the third trimester if “the pregnancy was caused by rape or incest.” *Id.*

<sup>184</sup> If, in keeping with the arguments of pro-life advocates, abortion is viewed as killing the unborn, even an exception for rape is difficult to justify. See I. Glenn Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, 43 J. L. MED. & ETHICS 87 (2015). In the words of Senator Ted Cruz, who opposes a rape exception, “Horrible as that crime is, I don’t believe it’s the child’s fault.” *Ted Cruz on Abortion, ON THE ISSUES*, [https://www.ontheissues.org/social/Ted\\_Cruz\\_Abortion.htm](https://www.ontheissues.org/social/Ted_Cruz_Abortion.htm) (last updated Feb. 5, 2019). But if abortion is viewed as the discontinuation of life-sustaining services, the thinking behind a rape exception is more understandable. Suppose, for example, that a woman stole a sperm sample that a man had donated to a research study and impregnated herself with it. Suppose also that the resulting baby was born with a congenital heart defect that would soon be fatal if not repaired by very specialized, expensive surgery that the woman could not afford. Assuming there is no more to the story – as discussed earlier, it is always essential to consider the full context – it seems evident that the man whose sperm was appropriated should have no legal obligation to pay for the surgery even if he is wealthy and no one else is willing or able to provide the funds. And, of course, paying for surgery hardly compares to going through nine months of an unwanted pregnancy.

definitions of rape do not cover many circumstances in which women say yes to sex—even to unprotected sex—because they do not feel free to say no. Pressures to agree to unwanted sex arise in a variety of contexts.<sup>185</sup> If, for example, a woman is economically dependent on a male partner, she may feel she has little choice but to yield to his express or implicit insistence on having sex. Similarly, even if there is no clear quid pro quo, a woman at the workplace may be so fearful of being demoted or losing her job if she rebuffs a male supervisor’s sexual advances that she feels obliged to acquiesce.

An assortment of complex issues surrounds the use of birth control. It is easy to assume that all women today are knowledgeable about how to avoid pregnancy. Due in part, however, to the inadequate, and often positively misleading, sex education provided in many schools,<sup>186</sup> misconceptions abound about the effectiveness and safety of different methods of birth control.<sup>187</sup> Failed contraception is a common cause of unwanted pregnancy, but many people do not consider it a basis for absolving women of responsibility for their situations. If a woman consents to heterosexual sex and her partner’s condom fails, she is often blamed for not using a more reliable form of birth control. She is cut no slack for allowing concerns about cost,<sup>188</sup> side effects, or health risks<sup>189</sup> to deter her from using the most effective forms of contraception. It is taken for granted that men cannot share the health burdens of hormonal

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<sup>185</sup> For a classic discussion of this issue, see CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 93-102 (1987) (arguing that gender inequality undermines women’s abilities to give voluntary consent for sex). For discussion of empirical research on the issue, see Brandie Pugh & Patricia Becker, *Exploring Definitions and Prevalence of Verbal Sexual Coercion and Its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses*, 8 *BEHAV. SCIS.* 69 (Aug. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6115968/> [<https://perma.cc/JP77-D43M>].

<sup>186</sup> See *American Adolescents’ Sources of Sex Education* GUTTMACHER INST. (Dec. 2017), <https://www.guttmacher.org/fact-sheet/facts-american-teens-sources-information-about-sex#>. For detailed criticism of a widely used form of sex education, “abstinence-only,” see Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment’s Religion Clauses and the Sex Education Debate*, 9 *S. CAL. REV. L. & WOMEN’S STUD.* 265 (2000).

<sup>187</sup> See *Birth Control Myths*, KAISER PERMANENTE (2020), <https://healthy.kaiserpermanente.org/health-wellness/birth-control/myths>.

<sup>188</sup> Kristen Lagasse Burke et al., *Unsatisfied Contraceptive Preferences Due to Cost Among Women in the United States*, SCIENCE DIRECT (June 2020), <https://www.sciencedirect.com/science/article/pii/S2590151620300150?via%3Dihub>.

<sup>189</sup> For a discussion of side effects and health concerns associated with hormonal birth control, see Ann Pietrangelo, *The Effects of Hormonal Birth Control on Your Body*, HEALTHLINE, <https://www.healthline.com/health/birth-control-effects-on-body> (last updated Jan. 26, 2022).

birth control.<sup>190</sup> Few people think to ask why there are no contraceptive pills, patches, implants, or shots available for men.

A common response to failed contraception as a justification for having an abortion is that, given that contraception is never fool-proof, women who are unwilling to go through with an unwanted pregnancy or feel incapable of doing so should simply refrain from heterosexual vaginal intercourse. This response ignores the importance of sex in achieving intimacy in relationships and the role of sexual dissatisfaction as a factor in divorce.<sup>191</sup> Because American women tend to be fertile for over thirty years but typically want no more than two or three children,<sup>192</sup> the notion that women who do not want more children are behaving irresponsibly if they choose contraception over abstinence is problematic from a host of perspectives.

Opponents of abortion also typically do not consider changes in a woman's circumstances a reason to absolve her of responsibility for her unwanted pregnancy. If the partner she was counting on for emotional and financial support unexpectedly abandons her—or even dies—the woman is still expected to continue her pregnancy. Even the fact that having another child will seriously compromise a woman's ability to care for her existing children is generally treated as beside the point.

We are not saying that women are never to blame for their unwanted pregnancies. Although we believe that most women who seek an abortion were more careful in their sexual and reproductive behaviors than pro-life advocates typically assume, we recognize that women, as well as men, sometimes behave irresponsibly when it comes to sex. Moreover, in our view, the fact that a woman may not have been the only irresponsible party does not make her blameless. The question at hand, however, is not whether a particular woman can reasonably be considered responsible for her pregnancy in a moral sense. Rather, it is whether, as a *legal* matter, the state can assert a compelling interest in protecting the fetus's life that justifies requiring women who behaved irresponsibly to continue their pregnancies.

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<sup>190</sup> See Michelle Roberts, *Male Pill – Why Are We Still Waiting?*, BBC (Mar. 26, 2019), <https://www.bbc.com/news/health-47691567>.

<sup>191</sup> See Susan Krauss Whitbourne, *The Secret Reason Why Sex Is Such an Important Part of Relationships*, PSYCH. TODAY (July 4, 2017), <https://www.psychologytoday.com/us/blog/fulfillment-any-age/201707/the-secret-reason-why-sex-is-such-important-part-relationships>.

<sup>192</sup> A June 2018 Gallup poll indicated that “[t]he average number of children U.S. adults think is ideal is now 2.7, up slightly from 2.5 in 2007 and 2011.” Lydia Saad, *Americans, in Theory, Think Larger Families Are Ideal*, GALLUP (July 6, 2018), <https://news.gallup.com/poll/236696/americans-theory-think-larger-families-ideal.aspx>.

In answering that question, it is crucial to bear in mind the virtually insuperable obstacles that stand in the way of the state’s fairly assessing the degree of a woman’s responsibility for her unwanted pregnancy. Who would determine the circumstances that led to an unwanted pregnancy? Doctors? Judges? How would investigators collect relevant information without making intolerable intrusions into people’s intimate lives?<sup>193</sup> The personal values of those making the inquiries would inevitably influence their conclusions, and those too poor or unsophisticated, or both, to make their case well would no doubt disproportionately be denied access to abortion. For all these reasons, it seems clear that even women who might be faulted for their unwanted pregnancies cannot reasonably be included under the “responsibility” exception to the government’s general failure to recognize a legal duty to rescue.

In isolated instances states ascribe a duty to rescue to individuals who did not behave carelessly but who nevertheless caused another person’s needy predicament. The *Restatement (Third) of Torts* gives the example of a driver on an isolated mountain road who, though driving with reasonable care, strikes and injures a hiker, who then asks to borrow the driver’s cell phone to call for aid. If the hiker has no phone of her own, the driver—unlike a passerby—would have a legal duty in some jurisdictions to grant her request.<sup>194</sup>

Drawing on this example, can it be cogently argued that, regardless of whether a particular woman can reasonably be blamed for her pregnancy, the state would be justified in requiring her to sustain her unborn simply because she participated in consensual sex—an act that causally resulted in the creation of an unborn with a critical need for life support? We think not. This is a case of an exception that proves the rule. Being required to loan someone a cell phone to call for medical help is an extremely trivial imposition. If this is the sort of example used to demonstrate a duty to rescue absent negligent behavior, the example actually illustrates how very attenuated the connection normally is between simply causing someone’s needy predicament and having a duty to rescue that person. It certainly does not provide support for requiring women to carry their pregnancies to term.

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<sup>193</sup> Recall Justice Douglas’s memorable rhetorical question at the end of his opinion for the Court in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), where the Court reversed convictions for aiding and abetting a married couple’s violation of Connecticut’s ban on contraceptive use: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”

<sup>194</sup> 2 RESTATEMENT *supra* note 174, §39 cmt. e.

Lastly, a third commonly acknowledged exception to the U.S. legal system's general failure to impose a duty to rescue arises in situations in which a person volunteers to provide someone with assistance but then is remiss in following through.<sup>195</sup> For example, suppose that a woman collapses on a public street. A bystander says he will call for help but then walks away without making the call. Or suppose that someone in a rowboat spots a drowning man. She jumps into the water, swims to the man and begins a life-saving rescue but then changes her mind and releases her grasp. Even in jurisdictions that do not legally require strangers to provide any assistance to someone in obvious distress, the act of volunteering creates some obligations. One cannot simply abandon a rescue project in mid-course.

Is there a strong argument by analogy that a pregnant woman should be legally required to continue an unwanted pregnancy by virtue of having begun to provide assistance to the unborn? The analogy fails for the great majority of unwanted pregnancies that are accidental by-products of sexual activity. In such instances, the woman never "volunteered" to provide life-sustaining services. Moreover, the justification for this exception to the no-duty-to-rescue principle does not apply in the abortion context—not even in instances where a woman chose to become pregnant but then later seeks an abortion due to a change in circumstances. The problem with volunteering assistance and then failing to follow through is that it may lead others who could have provided help to conclude that their assistance is not needed. This scenario bears no resemblance to the case of unwanted pregnancy because no one other than the pregnant woman has the capacity to rescue the unborn. The woman who chose to become pregnant but then changes her mind, like the woman who decides on an abortion after taking some time to weigh her options, might be compared to an adult daughter who allows doctors to insert a feeding tube into her very elderly father but then, upon reflection, decides against continuing to prolong his life in this way. Simply beginning a life-sustaining activity does not in and of itself create an obligation to continue it. This is especially so if, as is so often the case with unwanted pregnancies, continuing to provide assistance requires the person who began providing it to expend a great deal of additional effort and make a great deal of additional sacrifice.

Thus far, our discussion has focused on the analogy between abortion and duty-to-rescue situations in which particular individuals can be identified as needing life-sustaining services. For perspective, it

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<sup>195</sup> *Id.* § 42.



is helpful to think more broadly about our society's far from categorical commitment to preserving human life. It is widely accepted that the state has a compelling interest in preventing people from murdering one another. It is also uncontroversial that the state has a compelling interest in taking at least some measures to safeguard public health—for example, by setting safety standards for the water we drink and the cars we drive. At the same time, however, lawmakers regularly make decisions that implicitly sacrifice human lives in order to promote other values, and by reelecting those lawmakers, the electorate indicates its tacit approval.<sup>196</sup>

Examples of such “tragic choices”<sup>197</sup> abound. Congress has not reversed its 1995 repeal of the fifty-five miles per hour speed limit on interstate roads, despite research showing that higher speed limits have been responsible for nearly thirty-seven thousand roadway fatalities between 1993 (when many states began raising their speed limits) and 2017.<sup>198</sup> Universal healthcare coverage remains a highly contested issue, despite the demonstrated connection between a lack of health insurance and shorter lifespans.<sup>199</sup> Throughout the current pandemic, many jurisdictions have resisted and even banned mask mandates,<sup>200</sup> despite proof that masks and mask mandates reduce fatalities,<sup>201</sup> and despite the fact that someone who refuses to wear a mask not only fails to rescue others but actively endangers them.<sup>202</sup> In these contexts and

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<sup>196</sup> For in-depth analysis of the sorts of tradeoffs governments make, see GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

<sup>197</sup> *See id.*

<sup>198</sup> *Speed Limit Increases Are Tied to 37,000 Deaths over 25 Years*, INS. INST. FOR HIGHWAY SAFETY (Apr. 4, 2019), <https://www.iihs.org/news/detail/speed-limit-increases-are-tied-to-37-000-deaths-over-25-years>.

<sup>199</sup> *See* Andrew P. Wilperet et al., *Health Insurance and Mortality in U.S. Adults*, 99 AM. J. PUB. HEALTH 2289 (2009), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2008.157685>.

<sup>200</sup> Kimberlee Speakman, *These States Have Banned Schools from Requiring Covid Vaccination and Masks*, FORBES (July 16, 2021), <https://www.forbes.com/sites/kimberleespeakman/2021/07/16/these-states-have-banned-schools-from-requiring-covid-vaccination-and-masks>.

<sup>201</sup> Donna K. Ginther & Carlos Zambrana, *Association of Mask Mandates, COVID-19 Case Rates, Hospitalizations, and Deaths in Kansas*, JAMA NETWORK. (June 23, 2021) <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2781283> (demonstrating the effectiveness of mask mandates by comparing cases, hospitalizations, and deaths in Kansas counties that did and did not institute them).

<sup>202</sup> *See* Jason Howland, *Mayo Clinic Minute: Study Shows Masks Can Prevent Covid-19*, MAYO CLINIC (July 29, 2021), <https://newsnetwork.mayoclinic.org/discussion/mayo-clinic-minute-study-shows-masks-can-prevent-covid-19/>. Similar controversy surrounds vaccine mandates, *see*

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others, governments sacrifice human lives in order to promote other values even though the values promoted rarely, if ever, implicate constitutionally fundamental rights.<sup>203</sup> In light of this broader context, we maintain that, in seeking to defend bans on abortion, states simply cannot credibly claim to have a compelling interest throughout a woman's pregnancy in protecting the fetus's life and overriding the woman's fundamental right to decide whether to carry her pregnancy to term.

*C. The Significance of Viability*

The question remains, however, whether at some point during pregnancy the state's interest becomes compelling.<sup>204</sup> In particular, was the Supreme Court in *Roe* and later cases right to ascribe special significance to the point of viability?

We believe it was. The state's depriving a pregnant woman at any stage of her pregnancy of the freedom to decide whether to terminate her pregnancy is a serious infringement of her fundamental privacy right, and under the Court's approach to fundamental rights, the state can only justify such a deprivation by showing that it is necessary to serve a compelling state interest. We have argued that prior to fetal viability, the state cannot make the requisite showing. In our view, however, the calculus changes at the point of viability, and the state can make the requisite showing at that point. By definition, there is a realistic chance at viability that the fetus can be delivered and continue

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Masood Farivar, *Vaccine Mandates Prompt Sharp Legal Debate*, VOICE OF AM. (July 17, 2021),

<https://www.voanews.com/covid-19-pandemic/vaccine-mandates-prompt-sharp-legal-debate>, despite overwhelming evidence of the role of vaccines in preserving lives, see Michael Greenwood, *U.S. Vaccination Campaign Prevented up to 279,000 COVID-19 Deaths*, YALENEWS (July 8, 2021), <https://news.yale.edu/2021/07/08/us-vaccination-campaign-prevented-279000-covid-19-deaths>. Since the start of the pandemic, governments are by no means the only policymakers making decisions that implicitly sacrifice human lives to promote other values. See Gary J. Simson et al., *It's Alright, Ma, It's Life and Life Only: Have Universities Been Meeting Their Legal Obligations to High-Risk Faculty During the Pandemic?*, 48 PEPP. L. REV. 649 (2021).

<sup>203</sup> For discussion of the societal values that compete with preventing death during the Covid pandemic, see GREGORY E. PENCE, PANDEMIC BIOETHICS 53–75 (2021).

<sup>204</sup> Although a large majority of abortions take place during the first trimester of pregnancy, there are a host of strong reasons that often lead women to seek later abortions. A few examples are a diagnosis of a serious fetal abnormality, inability to raise funds earlier, and intimate partner violence. For discussion of these and other reasons, see *Abortion After the First Trimester in the United States*, PLANNED PARENTHOOD FED'N OF AM., [https://www.plannedparenthood.org/uploads/filer\\_public/99/41/9941f2a9-7738-4a8b-95f6-5680e59a45ac/pp\\_abortion\\_after\\_the\\_first\\_trimester.pdf](https://www.plannedparenthood.org/uploads/filer_public/99/41/9941f2a9-7738-4a8b-95f6-5680e59a45ac/pp_abortion_after_the_first_trimester.pdf) (last updated Jan. 2015).

to live outside the pregnant woman's womb. At that point, no longer relying on the unique assistance provided by the woman earlier in the pregnancy, the fetus has much more in common with an infant than with a nonviable fetus. Because of our society's wide and strongly held moral opposition to infanticide, the state plainly has a compelling interest in preventing infanticide. In our view, that compelling interest logically extends to an act—abortion of a viable fetus—very reasonably seen as not materially different than infanticide.<sup>205</sup>

But does this mean that, beginning at viability, the state can insist that pregnant women must carry the fetus to term unless doing so would pose a serious risk to their health? Or is there an alternative way for the state to proceed—what the Court often calls a “less drastic means”—that simultaneously interferes less with the woman's privacy right and serves the state's compelling interest in deterring infanticide equally well? In particular, out of respect for the pregnant woman's privacy right, shouldn't the state be obliged to give a woman who wishes to end her pregnancy after viability the option of delivering prematurely?

Even putting aside for now a number of serious questions of cost,<sup>206</sup> the answer, at least for the foreseeable future, is surely no. Although medical science and technology have progressed far enough that some infants born very prematurely do not have an inordinately difficult time during their weeks in the neonatal intensive care unit and emerge without serious long-term health problems, most have a very different experience. They suffer for many weeks in the neonatal ICU, and if they survive, they often go on to lives beset by serious disabilities. Among the common disabilities resulting from very premature birth are cerebral palsy, cognitive impairment, chronic lung disease, and vision and hearing loss.<sup>207</sup> Even babies born as little as four to six weeks early

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<sup>205</sup> There is a long history of societies that have openly engaged in infanticide, usually driven by concerns about group survival or by values very abhorrent to most Americans. See Sandra Newman, *Infanticide*, AEON (Nov. 27, 2017), <https://aeon.co/essays/the-roots-of-infanticide-run-deep-and-begin-with-poverty>. The resources that our society invests in rescuing preterm and critically ill babies and the long waiting lists of people wishing to adopt infants offer support to the claim that, with rare exception, states have a compelling interest in deterring infanticide.

<sup>206</sup> Most obviously, how much, and who pays? Neonatal ICUs are currently extremely expensive. The charge for a stay of several months can easily exceed a million dollars. See Christina Carron, *A Four Million Dollar NICU Bill: The Price of Prematurity*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/parenting/nicu-costs.html>. How much could those already daunting costs be expected to rise? Would government pick up some or all of the cost and/or require insurers to provide coverage? Is a premature delivery option reasonable if it is open as a practical matter only to the very well-to-do?

<sup>207</sup> Bird, *supra* note 151.

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are at significantly increased risk of long-term behavioral and learning difficulties and Attention Deficit/Hyperactivity Disorder.<sup>208</sup> If and when much safer ways of sustaining a viable fetus outside the womb are developed, the option of premature delivery may become a more realistic alternative, but that is very much not where we are today.

## CONCLUSION

*Roe v. Wade* rests on two key propositions: a woman's right to decide whether to have an abortion is constitutionally fundamental, and the government's interest in protecting potential life does not become compelling until the point of fetal viability. With *Roe*'s fate hanging in the balance in *Dobbs v. Jackson Women's Health Organization*, we have sought to place *Roe* on a firmer footing by offering arguments in support of those propositions that we believe are both novel and more cogent than those provided by the Court in *Roe* or since.

In closing, we would like to highlight two points. First, as stated in the Article's title, our principal objective has been "rescuing *Roe*." In keeping with that objective, we have sought to defend *Roe* in terms that we believe the Court is most likely to find persuasive. Our defense reaffirms the logic, and takes advantage of the claim to precedential respect, of the fundamental-rights framework that the Court in *Roe* and subsequent cases consistently has used to justify the ultimate outcome in *Roe*. Moreover, the Court could adopt our defense without substantially revising longstanding doctrines that have significant implications for other areas of law. With regard to the latter point, consider, for example, the practical impediment to persuading the Court to adopt a defense of *Roe* in terms of sex discrimination and the Equal Protection Clause.<sup>209</sup> Such a defense surely has a great deal of theoretical appeal. Indeed, many of the arguments that we have made in this Article could be used to advantage in framing it. Nonetheless, we very deliberately decided not to pursue a defense along those lines because the Court almost certainly could not adopt it without repudiating its longstanding view that sex classifications are not

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<sup>208</sup> *Short and Long-Term Effects of Preterm Birth*, U. KY. HEALTHCARE, <https://ukhealthcare.uky.edu/wellness-community/health-information/short-long-term-effects-preterm-birth> (last visited Oct. 10, 2021).

<sup>209</sup> For thought-provoking and articulate defenses of *Roe* along those lines, see MACKINNON, *supra* note 185; TRIBE, *supra* note 17; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

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“suspect” under the Equal Protection Clause.<sup>210</sup> The Court in the 1970s plainly rejected the notion that sex classifications are suspect and settled

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<sup>210</sup> As noted throughout this Article, the Court’s holding in *Roe* that states cannot ban pre-viability abortions rests on the propositions that women have a fundamental right to decide whether to have an abortion and the state’s interest in protecting fetal life does not rise to the level of compelling until the fetus is viable. The two propositions are intimately related because if the Court, focusing on the nature of the right, had not determined that it was fundamental, the Court would not have demanded that the state have a compelling justification for interfering with women’s exercise of that right. Instead, the Court presumably would have held that the nature of the right with which the state was interfering triggered no more than a rational basis standard of review, and that standard of review is so undemanding that the state’s interest in protecting fetal life from the moment of conception surely meets it and would support a flat ban on abortions.

A challenge to a law prohibiting pre-viability abortions that focuses, not on the nature of the affected right, but rather on the law’s inherent discrimination on the basis of sex, would trigger more than rational basis review because the Court treats sex classifications as more problematic than the innumerable types of classifications that in its view warrant no more than rational justification. However, because the Court treats sex classifications as less problematic than the few types that it characterizes as suspect, it does not require a compelling government interest to uphold them. It calls for only an “important” interest instead. *See infra* note 212. As a result, the state would not need to have a compelling interest to thwart a sex discrimination/equal protection challenge to a law prohibiting pre-viability abortions. An “important” interest would suffice.

Most obviously, if the state need not show a compelling interest to justify an abortion prohibition, it could justify prohibiting abortions at a point earlier in pregnancy than the point – viability – at which, according to *Roe*, the state’s interest in protecting fetal life has risen to the level of compelling. As far as how much earlier than viability the state could draw the line for an abortion ban, it is very difficult to say. In *Roe* itself, as in the Court’s equal protection and due process precedents more broadly, the Court indicates that it uses the terms “compelling” and “important” differently and that a “compelling” interest is on a higher level of significance than an “important” interest: “With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability.” *Roe*, 410 U.S. at 163. However, neither term, as used by the Court, is a paragon of precision, and the distinction between an important and unimportant state interest is also hardly clear.

The Court in *Roe* describes the state’s interest in protecting potential life as an interest that “grows in substantiality as the woman approaches term and, at a point during pregnancy, . . . becomes ‘compelling.’” *Id.* at 162-63. Based on that description, it is tempting to think that if the Court were trying to identify the point during pregnancy at which the state’s interest becomes “important,” the Court might locate that point somewhere between conception and viability. However, as the Court in *Roe* noted, there appears to be no point between conception and viability comparable in medical significance to those two. *See id.* at 160 (“[In the debate as to when life begins,] the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes ‘viable.’”). As a result, it is entirely possible that the Court would identify the point at which the state has an important interest in protecting fetal life as the moment of conception. Indeed, the *Roe* Court’s characterization, quoted above, of the state’s interest in protecting potential life as “important and legitimate” seems to suggest that

on a kind of “middle-tier” standard of review for sex classifications, rather than the “strict scrutiny” afforded suspect classifications.<sup>211</sup> By all indications, today’s Court is not the least bit inclined to revisit that decision and ratchet up the intensity of judicial review of sex classifications to the level accorded suspect classifications like race. Regardless of whether the Court *should* be willing to revisit that decision and ratchet up the standard of review,<sup>212</sup> any defense of *Roe* that depends on the Court’s *actual* willingness to do so has little, if any, prospect of rescuing *Roe*.<sup>213</sup>

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even the Court in *Roe* was unwilling to treat that interest as any less than important at any point during pregnancy.

In short, under the Court’s approach to sex classifications, a sex discrimination/equal protection defense of *Roe* almost certainly would be inadequate to the task of rescuing *Roe*. The standard of review triggered by such a defense would allow states the latitude to ban some, if not all, pre-viability abortions.

<sup>211</sup> In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court came within one vote of declaring sex a suspect classification. *See id.* at 688 (plurality opinion of Brennan, J., joined by Douglas, White, & Marshall, JJ.) (“[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”) Within a few years, however, one of the four Justices (Douglas) taking that view retired and the others settled for a majority opinion that, without explicitly saying so, relegated sex classifications to a sort of middle tier of suspectness. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[P]revious cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objections.”); *see also id.* at 210 n.\* (Powell, J., concurring) (“[O]ur decision today will be viewed by some as a ‘middle-tier’ approach. . . . [C]ompels the recognition that the relatively deferential ‘rational basis’ standard of review normally applied takes on a sharper focus when we address a gender-based classification.”). Though plainly more rigorous than rational basis review, the *Craig* standard has hardly proved the equal in rigor of the strict scrutiny that the Court applies to racial and other “suspect” classifications. *Compare* *United States v. Virginia*, 518 U.S. 515 (1996), and *Craig, supra* (invalidating sex classifications under review), with *Nguyen v. INS*, 533 U.S. 53 (2001), and *Michael M. v. Super. Ct.*, 450 U.S. 464 (1981) (upholding sex classifications under review).

<sup>212</sup> As indicated in Gary J. Simson, *Separate but Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 450 n.43 (2005), we believe that, in keeping with its treatment of classifications based on race, national origin, and race as suspect, the Court should be willing to add sex to the list of suspect classifications. For present purposes, suffice it to say that our reasons for taking that view overlap with those offered in the plurality opinion in *Frontiero*, 411 U.S. at 682-88, and are suggested by our discussion and application of suspect classification doctrine in Gary J. Simson, *Election Laws Disproportionately Disadvantaging Racial Minorities, and the Futility of Trying to Solve Today’s Problems with Yesterday’s Never Very Good Tools*, 70 EMORY L.J. 1143, 1154-61 (2021), and Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 368-74 (2006).

<sup>213</sup> In light of the role that religion has played in the abortion debate, an attempt to try to defend the outcome in *Roe* in terms of Establishment Clause constraints also has theoretical appeal. Indeed, soon after *Roe* was handed down, Professor Tribe attempted

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Second, we emphasize that, although we have framed our arguments in this Article in terms of the Supreme Court's interpretation of the federal Constitution, we regard those arguments as highly relevant to the way in which state high courts interpret their state constitutions. Obviously, if the objective is to ensure that women throughout the United States retain the abortion rights guaranteed by *Roe*, a Supreme Court reaffirmation of *Roe* would be ideal. It would instantly establish that *Roe* remains the law in every state in the nation. Securing women's abortion rights state by state by arguing for those rights under state constitutional law is not only a much larger and more arduous undertaking, but also one that, as a practical matter, is sure to come up short in some states. Nonetheless, that is no reason not to press state courts to hold that, as a matter of state constitutional law, women have a fundamental right to decide whether to have an abortion and states do not have a compelling interest in protecting fetal life until viability. As Professor Linda Wharton observed in her 2009 study of state constitutional law developments in the abortion area:

[S]tates offer a vast array of constitutional protection for individual rights of liberty and equality that provide fertile ground for protecting reproductive rights. Privacy rights are protected by a variety of state guarantees. Ten state constitutions contain explicit protection for privacy rights. In other states, courts have found protection for individual privacy implicit in a variety of other constitutional texts, such as an inalienable and natural rights clause, a preamble, or a due process guarantee.<sup>214</sup>

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to defend it in those terms. Laurence H. Tribe, *The Supreme Court, 1972 Term -- Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 18-32 (1973). However, Professor Tribe subsequently repudiated his Establishment Clause argument, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1349-50 & nn. 87-89 (2d ed. 1988), and despite our belief that the endorsement test that the Court adopted decades ago in interpreting the Establishment Clause casts doubt on the constitutionality of various laws rarely, if ever, questioned in Establishment Clause terms, *see, e.g.*, Simson & Sussman, *supra* note 186 (maintaining that abstinence-only sex education should be found to violate the Establishment Clause under the Court's endorsement test); Gary J. Simson, *Religion by Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23 COLUM. J. GENDER & L. 132 (2012) (maintaining the same as to prohibitions on same-sex marriage), we recognize that an Establishment Clause challenge to laws prohibiting pre-viability abortions could not succeed without major revision of Establishment Clause doctrine.

<sup>214</sup> Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. RACE, GENDER, & SOC. JUST. 469, 498-99 (2009) (footnotes omitted).

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Over the years, state high courts in various states spanning the political spectrum already have interpreted their state constitutions as guaranteeing to women abortion rights at least as expansive as those recognized by the Court in *Roe* and later cases.<sup>215</sup>

To be sure, as Oregon Supreme Court Justice Hans Linde observed years ago, “to make an independent argument under the state clause takes homework – in texts, in history, in alternate approaches to analysis.”<sup>216</sup> Furthermore, although state courts are in no way bound to interpret their state constitutions in conformity with Supreme Court interpretations of the federal Constitution, it seems clear that they do not lightly depart from those interpretations and chart a course of their own.<sup>217</sup> We suggest, however, that our arguments for the fundamentality of the woman’s decision whether to have an abortion and for the significance of viability in the determination of compelling state interest are sufficiently distinctive from the Court’s to constitute the kind of “alternate approach[ ] to analysis” that Justice Linde saw as apt to persuade a state high court to embark on the development of state constitutional law.

For the reasons that we have urged in this Article, *Roe* was rightly decided, and the Court in *Dobbs* should reject Mississippi’s invitation to overrule it. If, however, the Court does turn its back on *Roe*, the reasoning in this Article provides abortion rights advocates with a template for arguing persuasively that state constitutions guarantee women no less of a right to abortion than the one recognized in *Roe*.

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<sup>215</sup> According to the Center for Reproductive Rights, ten state high courts have done so. See *What If Roe Fell?*, CTR. FOR REPROD. RTS., <https://maps.reproductiverights.org/what-if-roe-fell> (listing Alaska, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Montana, and New Jersey) (last visited Oct. 10, 2021). The California Supreme Court was the first to do so, and it did so in a decision that predated *Roe*. See *People v. Belous*, 458 P.2d 194 (Cal. 1969). The most recent to do so was the Kansas Supreme Court in 2019. See *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019).

<sup>216</sup> Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980).

<sup>217</sup> See Wharton, *supra* note 214, at 531–33; Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).