

Dobbs v. Jackson Women’s Health Organization: An Opportunity to Correct a Grave Error

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KEY TAKEAWAYS

Roe v. Wade was wrongly decided and is one of the most criticized decisions in history; most Americans consistently oppose the abortions that *Roe* made legal.

Roe v. Wade is based on fictional abortion history, not a legitimate reading of the Constitution; even liberal scholars cannot defend this deeply flawed decision.

The *Dobbs* case allows the Supreme Court to correct its grave error and acknowledge that *Roe* was wrongly decided.

The Supreme Court’s 1973 decision in *Roe v. Wade*,¹ writes Professor Mary Ziegler, “serves as the most prominent example of the damage judicial review can do to the larger society.”² In *Roe*, the Court held that its previously created “right to privacy...is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”³ This holding, and the Court’s rules for implementing it, effectively invalidated abortion laws of all kinds passed by every state legislature in the previous 150 years. *Roe* remains one of the most controversial judicial decisions in American history for both its result and the means the Court used to reach it.

The Supreme Court reaffirmed *Roe* in 1983,⁴ its “general principles” in 1986,⁵ and its “essence” in 1992.⁶ The Court’s current abortion policy has the following features:

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- States may not prohibit abortion before viability, or when an unborn child is “potentially able to live outside the mother’s womb,”⁷ which occurs at approximately 24 weeks of pregnancy.⁸ “The woman’s right to terminate her pregnancy before viability” is the “central principle of *Roe v. Wade*.”⁹
- States may not restrict or regulate abortion before viability with “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹⁰
- States may prohibit abortion after viability “except when it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”¹¹
- The “health” exception encompasses “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”¹² These factors include the reasons a woman wants an abortion in the first place.¹³

The Supreme Court has thus created one of the most permissive abortion regimes in the world; the United States, for example, is one of only seven nations allowing elective abortions after 20 weeks of pregnancy.¹⁴ More importantly, this regime is far more permissive than under either the common law or statutes during centuries of English or American law. Many support this extreme policy, many others oppose it, but the issue for the Supreme Court is whether the Constitution of the United States requires it.

A case on the Supreme Court’s docket during the 2021–2022 term provides an opportunity to reconsider the answer to that question and decide whether *Roe*’s answer was an error that must be corrected. *Dobbs v. Jackson Women’s Health Organization* challenges the constitutionality of a Mississippi statute that bans most abortions after 15 weeks of pregnancy, well before viability. The Supreme Court signaled that it will focus squarely on *Roe*’s “essential holding”¹⁵ by agreeing to decide whether all bans on elective abortion before viability are unconstitutional. This *Legal Memorandum* examines *Dobbs* in the context of abortion in America, including both the history of abortion and public opinion, and abortion in the Supreme Court.

Abortion in America: The “History of Abortion”

Justice Harry Blackmun devoted more than half of his majority opinion in *Roe v. Wade* to an account of “the history of abortion, for such insight as that history may afford us.”¹⁶ This narrative preceded any legal analysis and, rather than any interpretation of the Constitution,¹⁷ is *Roe*’s real foundation. While it has acquired the status of “orthodox abortion history,”¹⁸ however, this narrative has been crumbling since it was created.

As *Roe* was heading for the Supreme Court, Cyril Means, General Counsel of the National Association for the Repeal of Abortion Laws,¹⁹ was constructing a “radically revisionist history”²⁰ of abortion in America. His goal was to paint a long-term picture of abortion as a common procedure that the law treated lightly, if at all, in order to support the argument that abortion should be recognized as a constitutional right.

To that end, Means made two primary claims that the Supreme Court would later embrace: American women enjoyed a “liberty of abortion” under the common law “at every stage of gestation,”²¹ and the 19th-century statutes that replaced the common law were enacted “to protect the health of mothers, not to protect the lives of unborn children.”²² This narrative “simply left the unborn child out of the moral and legal equation.”²³

The legal team challenging the Texas abortion statute in *Roe* placed Means’ narrative at the center of their argument despite their own concern, reflected in an internal memorandum, that his conclusions “sometimes strain credibility.”²⁴ This was a profound understatement, as a vast amount of scholarship and commentary, including by abortion rights supporters, has exposed the Means–Blackmun narrative as selective at best—and fiction at worst.²⁵ This analysis will highlight only a few of its glaring omissions.

Midwife Regulations. Blackmun’s claim that abortion was unrestricted until “well into the 19th century”²⁶ not only distorted the common law and statutes in both England and America, but entirely ignored other sources of legal control over abortion. Municipal ordinances and regulations, for example, had long prohibited midwives, who almost exclusively handled reproductive matters, from performing or procuring abortion throughout pregnancy.

These regulations existed in England as early as 1512²⁷ and were replicated in America long before independence. In July 1716, for example, the Common Council of New York City enacted a “Law Regulating Mid Wives within the City of New York.” It required midwives to take an oath not to “give any counsel or administer any...thing to any woman being with child” to induce a miscarriage or abortion.²⁸

Pro-Life Feminists. The Means–Blackmun narrative also ignored the near-unanimous consensus among 19th-century feminists that abortion should be prohibited as “child murder.”²⁹ Elizabeth Cady Stanton and Susan B. Anthony, for example, regularly condemned abortion in *The Revolution*, a weekly newspaper they published from 1868 to 1872. In one editorial, for example, they called abortion a “crying evil” and a “revolting outrage against the laws of nature and our common humanity.”³⁰ These feminists exposed how the sexual exploitation of women often included pressure to get abortions—but they never allowed a *reason* for abortion to become a *justification* for abortion.

Excising 19th-century feminists from this narrative was deliberate. More than 400 historians, for example, promoted the Means–Blackmun narrative in an *amicus curiae* brief filed in *Webster v. Reproductive Health Services*.³¹ A year later, the brief’s organizers admitted that, like Means had prior to *Roe*, they had simply “suspend[ed] certain critiques to make common cause.”³² Professor Sylvia Law, for example, admitted that the historians’ brief in *Webster* was “constructed to make an argumentative point rather than to tell the truth”³³ and that ignoring 19th-century feminists’ opposition to abortion was a “major deficiency.”³⁴ Professor Estelle Freedman was even more candid: The “political strategy of the brief,” she wrote, required “selective use of evidence, or lack of evidence.”³⁵

Pro-Life Physicians and Legislators. The Means–Blackmun narrative’s claim that protection of unborn children played no part in the enactment of increasingly restrictive 19th-century abortion laws blatantly defies a clear historical record. At its May 1859 meeting, for example, the American Medical Association (AMA) heard a report that rejected the “mistaken and exploded medical dogma”³⁶ that the unborn child has no “independent and actual existence...as a living being.”³⁷ The AMA unanimously adopted a resolution that condemned the “unwarrantable destruction of human life”³⁸ and “the slaughter of countless children”³⁹ and sought “the zealous co-operation of the various state Medical Societies” in pressing for laws prohibiting abortion, “at every period of gestation,” except when necessary to save the mother’s life.

Pro-life physicians during the 19th century included some of the first women to enter the medical profession. They included:

- Dr. Elizabeth Blackwell, the first woman to receive a degree from an American medical school, who wrote in her diary that the “gross perversion and destruction of motherhood by the abortionist filled me with indignation” so that “I finally determined to do what I could do” to stop this “form of hell.”⁴⁰

- *The Revolution* published accounts of lectures by Dr. Anna Densmore, a hospital reformer and ardent opponent of abortion, in which she often explained how an unborn child is a living human being “even before the mother...realiz[es] the movement of the child.”⁴¹ She condemned abortion as a “most deadly crime” that “stain[s] our hands with the blood of the innocent.”⁴²
- Dr. Charlotte Lozier was also one of the first female physicians in the United States. While a professor of physiology at the New York Medical College for Women, she campaigned both against abortion and for women’s rights, serving as the first vice president of the National Working Women’s Association.⁴³

In both England and America and under both the common law and statutes, the law treated abortion as the homicide of an unborn child, with its classification, prosecution, and punishment reflecting current knowledge about prenatal life and development. “Ensoulement,” the marker in the 13th century,⁴⁴ gave way to “quickening,” or the point when a pregnant woman can feel her unborn child move. By 1868, when the 14th Amendment was ratified, 30 of the then-37 states had statutes banning abortion, and 27 of them prohibited abortion before quickening.⁴⁵

Professor Glanville Williams, himself an advocate of legalized abortion⁴⁶ and a renowned criminal law scholar, wrote that physicians led the 19th-century campaign to restrict abortion “primarily because they believed unborn children must not be sacrificed unless the life of the mother was truly at stake.”⁴⁷ Were it otherwise, states would not have denominated acts causing the death of the unborn child as “manslaughter” or “murder.”⁴⁸ Because the clear public record on this critical issue was apparently an “inconvenient truth,”⁴⁹ Blackmun, like Means before him, created a “revisionist history.”

By the mid-1960s, 44 states banned abortion except to save the mother’s life, and the rest had narrow exceptions for the mother’s physical health or if the pregnancy resulted from rape.⁵⁰ Legislation to reform these laws was introduced in all but five states,⁵¹ and 17 of them did so. Of these, 13 states modified their abortion bans to allow abortions in a few narrow circumstances, and four states allowed abortions for any reason, but only during early pregnancy.⁵²

Public Opinion About Abortion

The Supreme Court itself made public opinion about abortion relevant by basing *Roe*'s holding on the "history of abortion,"⁵³ including "man's attitudes toward the abortion procedure over the centuries."⁵⁴ In addition, one of the factors the Supreme Court considers when deciding whether to overrule a precedent is whether it has been "universally accepted, acted on, and acquiesced in by...the general public."⁵⁵

In this context, the issue is whether the general public supports the legality of the abortions that would have remained illegal without *Roe v. Wade*. These abortions are performed for reasons defined by how women wish to live their lives and correspond to the factors covered by the Court's definition of "health," such as "physical, emotional, psychological, familial, and the woman's age."⁵⁶ The abortions made legal by *Roe v. Wade* are also sought to avoid the "detriment" that the Court said prohibiting abortion would impose, including "the distress, for all concerned, associated with the unwanted child...[and] the additional difficulties and continuing stigma of unwed motherhood."⁵⁷

Polls About Unspecified Circumstances. Many polls ask whether abortion should be legal in all circumstances, no circumstances, or unspecified "certain" circumstances. Especially since the middle unspecified category is the largest, these polls are unhelpful without knowing more about whether "certain" is a broad or narrow category. The few polls that have focused on this question have found that it is the latter.

- In 1977 and 1979 Gallup polls, 55 percent said abortion should be legal "only under certain circumstances."⁵⁸ The poll then asked these respondents about abortion's legality in specific circumstances. Even in the first trimester, majority support was limited to cases of danger to the mother's life or physical health, rape, and incest.⁵⁹
- In recent CNN polls, an average of 51 percent of respondents said that abortion should be legal "under only certain circumstances." The polls then found that three-quarters of these respondents defined "certain circumstances" as "a few" rather than "most."

Polls About Specific Circumstances. Most polls asking whether abortion should be legal in specific circumstances focus only on those that occur very rarely, such as danger to a mother's life or physical health, fetal deformity, or pregnancy resulting from rape or incest. Combined, these

“hard cases” constitute only about five to 10 percent of abortions.⁶⁰ Most Americans support the legality of abortion in these situations, and states had begun making them legal prior to *Roe v. Wade*.

Studies show that, in America and around the world,⁶¹ most women cite multiple reasons for seeking abortion. The most common reasons are avoiding interference with education or career (74 percent), financial considerations (73 percent), or the desire not to be a single mother (48 percent).⁶² These are among the abortions that *Roe v. Wade* made legal, and most Americans oppose them.

- In similar 2003 and 2018 Gallup polls, a majority, even in the first three months, said that abortion should be illegal “[w]hen the woman does not want the child for any reason.” Opposition rose to three-quarters in the last three months.
- In a June 2021 Associated Press poll that did not specify a period of pregnancy, 50 percent of respondents said that it should not be possible “for a pregnant woman to obtain a legal abortion if [she] does not want to be pregnant for any reason.”⁶³

Polls About Stage of Pregnancy. Polls consistently show that support for legal abortion, in general and even for rare “hard case” reasons, declines rapidly as pregnancy progresses.

- Multiple CBS News and Harris polls have found that support for legal abortion dropped from an average of 64 percent in the first three months of pregnancy to 23 percent in the second three months and 10 percent in the last three months.⁶⁴
- In a Quinnipiac University poll, support for abortion being “legal without restriction” dropped by 25 points from “up to 20 weeks” to “up to 24 weeks” of pregnancy.
- Polls by *USA Today* and Gallup during two decades show that support for abortion being “generally” legal fell from an average of 64 percent in the first three months of pregnancy to 25 percent in the second three months and 9 percent in the final three months.
- A June 2021 poll by the Associated Press found that support for abortion being legal in “all” or “most” cases declined from 61 percent in the

first three months to 34 percent in the second three months and 19 percent in the final three months.⁶⁵

Summary. Polls about the legality of abortion in unspecified and specific circumstances, as well as during different periods of pregnancy, show that a large and consistent majority of Americans do *not* support the legality of most abortions that the Supreme Court made legal in *Roe v. Wade*.

Abortion in the Supreme Court: Pre-*Roe* Cases

Griswold v. Connecticut. Justice Harry Blackmun observed in *Roe* that the Supreme Court “or individual Justices” have “recognized that a right of personal privacy...does exist under the Constitution.”⁶⁶ Two of these precedents have frequently been identified as “*Roe*’s predecessors.”⁶⁷

In *Griswold v. Connecticut*,⁶⁸ the Supreme Court found unconstitutional a state law prohibiting the use or assistance to use contraceptives. The executive director and medical director of the Planned Parenthood League of Connecticut, both physicians, were found guilty as accessories of giving information and medical advice to married persons about “the means of preventing conception.”⁶⁹ They challenged the fine they received, arguing that the statute violated the 14th Amendment.

The Supreme Court found the law unconstitutional, but for a different reason. Individual provisions of the Bill of Rights, Justice William Douglas wrote for the majority, not only protect “specific rights” but have “penumbras, formed by emanations from those guarantees,”⁷⁰ that protect associated “peripheral rights.”⁷¹ The peripheral rights give the specific rights “life and substance”⁷² and make them “fully meaningful.”⁷³ In *Griswold*, however, the Court held that the penumbral emanations from “several fundamental constitutional guarantees”⁷⁴ collectively create a separate, free-standing right to privacy.

Eisenstadt v. Baird. After a 1967 lecture on birth control and overpopulation at Boston University, activist William Baird gave a package of contraceptive foam to a student attendee. He was convicted of violating a Massachusetts statute that prohibited “giv[ing] away...[any] article whatever for the prevention of conception.” The only exceptions were for a physician or pharmacist filling a prescription for “a married person.”⁷⁵ The Supreme Court concluded that treating married and unmarried persons differently violated the 14th Amendment’s Equal Protection Clause.⁷⁶ Douglas wrote for the majority:

If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁷⁷

United States v. Vuitch. The Supreme Court decided one abortion-related case prior to *Roe*. In *United States v. Vuitch*,⁷⁸ a physician challenged his indictment for violating a District of Columbia law that allowed only abortions that are “necessary to preserve the mother’s life or health.”⁷⁹ The Supreme Court rejected Vuitch’s argument that the statute was unconstitutionally vague, construing the word “health” broadly to include “psychological as well as physical well-being.”⁸⁰ Vuitch did not raise, and the Court did not address, the issue of a constitutional right to abortion.

Roe v. Wade

By the time the Court decided *Roe v. Wade*, the Supreme Court’s privacy jurisprudence was already in disarray. *Griswold* said that the right to privacy is found in the penumbra of the Bill of Rights, *Eisenstadt* extended *Griswold* but on equal protection grounds, and the district court in *Roe* said that the right to abortion is found in the Ninth Amendment. In *Roe*, the Supreme Court added multiple jurisprudential wrinkles by holding that the right to privacy is instead “founded in the Fourteenth Amendment’s concept of personal liberty.”⁸¹ The Court thus appeared to transplant the requirement of a “compelling state interest” for infringing on a “fundamental” right from the equal protection to the due process context,⁸² but failing to apply this standard at all. Dissenting in *Roe*, Justice William Rehnquist wrote that the Court “will accomplish the seemingly impossible feat of leaving this area of the law more confused than [the Court] found it.”⁸³

Justice Clarence Thomas has explained that federal judges “interpret and apply written law to the facts of particular cases.”⁸⁴ The Supreme Court, however, eschewed this basic approach in *Roe v. Wade*, putting off any examination of the constitutional issue at the heart of the case until Section VIII, nearly 40 pages into a 54-page majority opinion. Blackmun acknowledged both that “[t]he Constitution does not explicitly mention any right of privacy”⁸⁵ and that the presence of the unborn child makes abortion “inherently different” from other unenumerated rights that the Court had deemed to be fundamental.⁸⁶ Because the right to abortion had no connection to the Constitution’s text—and barely any connection to precedent—Blackmun justified creating the right to abortion by offering a list of “detriment[s]” that “denying this choice” would impose.⁸⁷

Rather than defending what the Supreme Court actually said in *Roe*, some scholars resort to “rewriting”⁸⁸ it or suggesting “what *Roe v. Wade* should have said.”⁸⁹ Just 14 years after *Roe* was decided, the critical literature had so proliferated that three scholars organized it into 12 different categories.⁹⁰ Scholars and commentators across the ideological spectrum have shown how little, if anything, *Roe* has to commend it.

- Professor John Hart Ely, who candidly favored *Roe*’s result,⁹¹ called it a “very bad decision...because it is...not constitutional law and gives almost no sense of an obligation to try to be.”⁹²
- Professor Kermit Roosevelt, who similarly supports recognition of a constitutional right to abortion, writes: “As constitutional argument, *Roe* is barely coherent. The court pulled its fundamental right to choose more or less from the constitutional ether. It supported that right via a lengthy, but purposeless, cross-cultural history review of abortion restrictions.”⁹³
- Professor Richard Morgan writes: “The stark inadequacy of the Court’s attempt to justify its conclusions” suggests that “the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function.”⁹⁴
- Professors Philip Heymann and Douglas Barzelay write that *Roe* “leaves the impression that the abortion decisions rest in part on unexplained precedents, in part on an extremely tenuous relation to provisions of the Bill of Rights, and in part on a raw exercise of judicial fiat.”⁹⁵
- Professor Mark Tushnet writes that “[m]ost academic commentators probably believe that, as a matter of sound public policy, access to abortions should be relatively unrestricted. But *none* has been able to provide conclusive arguments that the Supreme Court correctly found that policy in the Constitution.”⁹⁶

Post-*Roe* Cases

In *Casey*, two decades after *Roe*, the Supreme Court claimed that it was “resolv[ing]...[this] intensely divisive controversy”⁹⁷ by “call[ing] the contending sides...to end their national division by accepting a common

mandate rooted in the Constitution.”⁹⁸ The Court may have made that call, but neither side of the controversy appeared to be listening.⁹⁹ Including *Roe*,¹⁰⁰ the Supreme Court has decided more than two dozen cases with written opinions involving the right to abortion.¹⁰¹ Several of these cases challenged abortion bans,¹⁰² while others challenged regulations of the abortion decision-making process¹⁰³ or how abortions are performed.¹⁰⁴ Several cases challenged the refusal of state governments or Congress to subsidize abortion,¹⁰⁵ holding that the government “has no affirmative duty to ‘commit any resources to facilitating abortions.’”¹⁰⁶ A policy choice to subsidize childbirth but not abortion “places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.”¹⁰⁷

These cases produced nearly 90 majority and separate opinions, with the average number of opinions per case higher after *Casey* claimed to have ended the national division. Even Justices who were in the majority in *Roe* and *Casey* later complained that those decisions were being misapplied. Chief Justice Warren Burger was in the *Roe* majority but, within little more than a decade, joined a dissent arguing that the Court was striking down abortion restrictions that *Roe* was supposed to allow¹⁰⁸ and then writing his own dissent to say that *Roe* should be reexamined.¹⁰⁹

Similarly, Justices Anthony Kennedy and David Souter were in the plurality responsible for the joint opinion that “represents the holding of the Court” in *Casey*.¹¹⁰ Eight years later, in *Stenberg v. Carhart*, Kennedy joined a dissent accusing the majority of “repudiat[ing]” *Casey*’s recognition that state legislatures have a “vital” role in addressing “grave and serious issues” such as “promot[ing] the life of the unborn.”¹¹¹ In 2007, Souter joined a dissent in *Gonzales v. Carhart* accusing the majority of “refus[ing] to take *Casey* and *Stenberg* seriously” and “[r]etreating from [those] prior rulings.”¹¹²

Public Opinion About *Roe v. Wade*

Abortion rights advocates cite polls in which a majority of Americans say that the Supreme Court should not overrule *Roe v. Wade*. For example:

- January 2017 (Pew): 69 percent oppose the Supreme Court “completely overturning” *Roe v. Wade*.¹¹³
- July 2018 (NBC/WSJ): 71 percent oppose overturning *Roe v. Wade*.¹¹⁴
- June 2019 (PBS/Marist): 77 percent support upholding *Roe v. Wade* “in some form.”¹¹⁵

Skepticism about these results, however, is warranted for several reasons. First, many Americans know nothing about *Roe*, and much of what others do know is incorrect. According to Pew Research Center polls, for example, nearly 40 percent of all Americans and 57 percent of those under 30 cannot associate *Roe* with any particular subject or believe that it involved issues such as school desegregation or environmental protection.¹¹⁶

Second, many polls asking about support for *Roe v. Wade* describe it in ways that falsely inflate its support. Polls by the Pew Research Center and NBC News, for example, frequently say that *Roe* established “a woman’s constitutional right to an abortion, *at least in the first three months of pregnancy.*”¹¹⁷ Acceptance of this incorrect description inflates support for *Roe* because support for legal abortion is highest in the same period.¹¹⁸ Support for *Roe* would likely decline significantly if these polls accurately described it as establishing “a woman’s constitutional right to an abortion *during all nine months of pregnancy.*” Research has yet to find polls that include such an accurate description.

Third, opinions of *Roe* are likely influenced by what people think would happen if it were overturned. CBS News polls asking if *Roe* should be overturned, for example, say that it “made abortion legal.”¹¹⁹ Respondents who incorrectly believe that overturning *Roe* would automatically make abortion illegal may oppose doing so for that reason alone.

Roe v. Wade* and *Stare Decisis

Stare decisis is a judicial doctrine creating a rebuttable presumption that a court will follow its own past decisions.¹²⁰ *Stare decisis* must be a presumption in a system of limited government based on the rule of law.¹²¹ Alexander Hamilton explained that “[t]o avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”¹²² Similarly, Justice Samuel Alito explained during his January 2006 confirmation hearing that *stare decisis* is “a fundamental part of our legal system...because it limits the power of the judiciary.”¹²³

This *stare decisis* presumption must also be rebuttable.¹²⁴ If it were not, the Supreme Court would ultimately control, rather than be subject to, the Constitution’s meaning. In that event, wrote Thomas Jefferson, the Constitution would become “a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.”¹²⁵ This would eliminate the distinction, critical for properly defining the “judicial function,” between interpretation and “amendment in the guise of interpretation.”¹²⁶

Stare decisis, therefore, is the “preferred course,”¹²⁷ but it is not a “mechanical formula of adherence to the latest decision.”¹²⁸ The Supreme Court applies what it calls “principles of *stare decisis*”¹²⁹ to determine whether “strong grounds”¹³⁰ exist to rebut the presumption in favor of following a precedent.¹³¹ Justice Elena Kagan identified the context for applying these principles at her 2010 confirmation hearing, describing the “long-standing” and “very well accepted” principle that *stare decisis* plays a less important role in the context of constitutional decisions.¹³² This is because, short of a constitutional amendment, the Court’s willingness to overrule its past decisions is the only way to correct an erroneous constitutional interpretation.¹³³

With that general principle in mind, the Court will use several factors to determine whether a precedent was “wrong in the first place”¹³⁴ and whether “less harm will result from overruling the decision than from allowing it to stand.”¹³⁵ Put differently, the Court uses these factors to identify “judicial error, the seriousness of the error, and the cost of correcting the error.”¹³⁶ The factors include the quality of a precedent’s reasoning,¹³⁷ its “workability,”¹³⁸ its consistency with related decisions, whether the understanding of relevant facts has changed, and the reliance interests implicated by the prior decision.¹³⁹

The first step in this analysis is perhaps the easiest: No one honestly argues that *Roe v. Wade* was correctly decided in the first place. In Professor Ely’s words, *Roe* “is not constitutional law, and gives almost no sense of an obligation to try to be.”¹⁴⁰ The decision does not come close to meeting the standard of being “universally accepted, acted on, and acquiesced in by courts, the legal profession, and the general public.”¹⁴¹

Despite its assertion in *Casey*, the Court’s abortion cases have settled nothing—and the general public has consistently opposed most of the abortions that *Roe* made legal. Rather than defending *Roe*, abortion rights activists are left trying to defend *keeping* it, some claiming that *Roe* is a “super” precedent, virtually immune from being overruled because it has been reaffirmed dozens of times.

A past decision’s reaffirmance strengthens its precedential weight,¹⁴² but like any judicial holding, that reaffirmance must be explicit. “Most important, the court must have decided the issue for which the precedent is claimed; it cannot merely have discussed it in dictum, ignored it, or assumed the point without ruling upon it.”¹⁴³ To be counted as a “reaffirmance,” the issue of *Roe*’s validity as a precedent must have been “brought to the attention of the court” and “ruled upon”¹⁴⁴ through a “dispositive judgment”¹⁴⁵ or a “determinate holding.”¹⁴⁶ Only three Supreme Court decisions meet this standard.

1. In *Akron v. Akron Center for Reproductive Health*,¹⁴⁷ the Court voted 6–3 that while “the doctrine of *stare decisis* [is] perhaps never entirely persuasive on a constitutional question...[w]e respect it today, and reaffirm *Roe v. Wade*.”¹⁴⁸
2. In *Thornburgh v. American College of Obstetricians and Gynecologists*,¹⁴⁹ the Court voted 5–4 to reaffirm “the general principles laid down in *Roe* and in *Akron*.”¹⁵⁰
3. In *Planned Parenthood v. Casey*,¹⁵¹ the Court also voted 5–4 to reaffirm *Roe*’s “central holding”¹⁵² that “the Constitution protects a woman’s right to terminate her pregnancy in its early stages.”¹⁵³

By declining margins, therefore, the Supreme Court has reaffirmed some aspect of *Roe v. Wade* three times in nearly 50 years. As Senator Orrin Hatch (R–UT) has written, there is nothing “super” about *Roe v. Wade* as a precedent.¹⁵⁴ Should the Court reconsider whether *Roe* remains a valid precedent, it will apply traditional principles of *stare decisis* to determine if *Roe* should be retained or abandoned.¹⁵⁵ The case to be argued on December 1, 2021, provides that opportunity.

***Dobbs v. Jackson Women’s Health Organization:* Mississippi’s Gestational Age Act**

On March 19, 2018, Mississippi enacted House Bill 1510, the Gestational Age Act¹⁵⁶ (“Act”). The Act limits all abortions in the state to fifteen (15) weeks’ gestation¹⁵⁷ except in cases of medical emergency or severe fetal abnormality.¹⁵⁸ The Act provides that:

- (a) Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not perform, induce, or attempt to perform or induce an abortion unless the physician or the referring physician has first made a determination of the probable gestational age of the unborn human being.... The determination of probable gestational age shall be made according to standard medical practices and techniques used in the community.
- (b) Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.¹⁵⁹

Two features of the law are central to this litigation. First, it is a ban, rather than a regulation, on the performance of abortions. Second, this ban operates well before viability,¹⁶⁰ which the Supreme Court established in *Roe*, and reaffirmed in *Casey*, is the “critical fact.”¹⁶¹ The Court might find it necessary, in the context of a constitutional challenge to such a pre-viability ban, to first determine whether viability, and therefore *Roe*’s “central principle”¹⁶² itself, remains legitimate.

The Act asserts that the state has an interest in protecting maternal health because the maternal risks from abortion increase proportionately relative to gestational age. In addition, the abortion method used after 15 weeks, known as dilation and evacuation, is “a barbaric procedure, dangerous for the maternal patient, and demeaning to the medical profession.”¹⁶³ Echoing emphasis by 19th-century physicians on current medical knowledge,¹⁶⁴ the Act highlights facts about fetal development that were unavailable to the Supreme Court in *Roe* or even in *Casey*. Modern medicine reveals, for example, that a 15-week-old unborn child has all major organs,¹⁶⁵ moves all fingers separately,¹⁶⁶ exhibits a preference for right or left-handedness,¹⁶⁷ and is responsive to pain.¹⁶⁸

The Litigation. The only abortion clinic in Mississippi, Jackson Women’s Health Organization, and one of its doctors, Dr. Sacheen Carr-Ellis, filed suit challenging the Act¹⁶⁹ on the day it was signed into law. They sought a temporary restraining order to prevent the Act’s enforcement while its constitutionality was being litigated and summary judgment on the merits. On November 20, 2018, the U.S. District Court concluded that, since the Supreme Court said that pre-viability bans must not be allowed, this ban’s constitutionality “hinges on a single question: whether the 15-week mark is before or after viability.”¹⁷⁰

The U.S. Court of Appeals for the Fifth Circuit affirmed,¹⁷¹ explaining that the state’s interests would have been relevant if this law regulated, rather than banned, abortion. The Supreme Court, however, had clearly held that viability “marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”¹⁷² As a result, “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.”¹⁷³ Since Mississippi had conceded in this litigation that it had no evidence of viability at 15 weeks of gestation, the appeals court held that the ban was inconsistent with *Roe* and *Casey*.¹⁷⁴

On June 15, 2020, Mississippi formally asked the Supreme Court to review the Fifth Circuit’s decision, raising three issues:

1. Whether all pre-viability bans on elective abortion are unconstitutional;
2. The proper legal standard¹⁷⁵ for evaluating laws that operate before viability to promote state interests such as protecting women's health, the dignity of unborn children, and the integrity of the medical profession; and
3. Whether abortion providers have legal standing to challenge a law that protects women's health from the dangers of late-term abortions.

The Justices delayed consideration of the *Dobbs* petition until their January 8, 2021, conference; they then went on to consider the petition 12 more times¹⁷⁶ before finally announcing on May 17, 2021, that they would grant *certiorari*. However, their review would be limited to only one of the three questions presented: whether all pre-viability prohibitions on elective abortions are unconstitutional.¹⁷⁷

Since the Court, in both *Roe* and *Casey*, effectively answered this question in the affirmative, agreeing to revisit this question suggests that the Court will reconsider the basic validity of these precedents.

Mississippi's Arguments. Recall that the Supreme Court concluded that the Constitution protects a right to abortion without actually interpreting the Constitution.¹⁷⁸ Mississippi fills this gap in its brief to the Court, in which Attorney General Lynn Fitch argues that nothing in the Constitution's text, structure, history, or tradition supports a constitutional right to abortion. In the absence of such a right, Mississippi may legislate on abortion as it does on other subjects.

When assessing any democratically enacted law that does not implicate a constitutional right, courts will generally uphold the law if there is a rational basis to conclude that the law will help achieve a legitimate objective of the state.¹⁷⁹ The state argues:

Roe and *Casey* are...at odds with the straightforward, constitutionally grounded answer to the question presented. So the question becomes whether this Court should overrule those decisions. It should. The...case for overruling *Roe* and *Casey* is overwhelming.... *Roe* and *Casey* have proven hopelessly unworkable. Heightened scrutiny of abortion restrictions has not promoted administrability or predictability. And heightened scrutiny of abortion laws can never serve those aims. Because the Constitution does not protect a right to abortion, it provides no guidance to courts on how to account for the interests in this context.... *Roe* and *Casey* have inflicted significant damage.¹⁸⁰

Mississippi targets viability as the key constitutional concept. While often placed at approximately 24 weeks, viability is an inherently subjective standard and depends on many variables. Medical advances have now made the survival of even 22-week-old unborn children possible.¹⁸¹ Nearly four decades ago, in *Akron*, Justice Sandra Day O'Connor observed: "As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."¹⁸² Viability is no more an objective standard today than it was then.

With O'Connor's support, the Supreme Court in *Casey* appeared to simplify its method of evaluating abortion restrictions by abandoning *Roe*'s system of different rules for different trimesters in favor of a two-part framework. Mississippi points out, however, that all the Court succeeded in doing was creating another subjective, unworkable standard of whether a restriction is an "undue burden" on the right to abortion. Mississippi argues that there "is no objective way to decide whether a burden is 'undue,'" and in case after case, the court has been deeply divided "not just over what result *Casey* requires...but also over what *Casey* even means."¹⁸³

Mississippi's brief also addresses *Roe*'s real foundation, namely, the "detriment" that prohibiting abortion would impose on women.¹⁸⁴ The circumstances that pregnant women face have changed markedly in the past 50 years. These include expansion of the type and flexibility of work opportunities, laws preventing pregnancy discrimination, provision of sick and family leave time, access to childcare and affordable contraception, and "safe-haven" laws.¹⁸⁵ Women today are, more than ever before, able to avoid the "detriment" that the Supreme Court described in 1973 as practically inevitable. Women have, Mississippi reminds the Court, reached "the highest echelons of economic and social life independent of the right bestowed on them by seven men in *Roe*."¹⁸⁶

Amicus Briefing in *Dobbs*. *Amicus curiae* ("friend of the court") briefs are filed in a particular case by individuals or groups that are not litigants but who seek to provide perspective, information, or arguments for the Supreme Court's consideration. Justice Hugo Black once observed that "[m]ost cases before this Court involve matters that affect far more people than the immediate record parties,"¹⁸⁷ and *amicus* briefing can address this broader context. *Amicus* briefs are filed in roughly two-thirds of the civil cases argued before the Supreme Court each year, and multiple filings are common.¹⁸⁸ During its 2019–2020 term, for example, a total of 911 *amicus* briefs were filed in 57 cases, an average of 16 *amicus* briefs per case.¹⁸⁹

The highest number of *amicus* briefs filed in a single case is 148 in *Obergefell v. Hodges*,¹⁹⁰ which created a right to same-sex marriage, and 136

in *National Federation of Independent Business v. Sebelius*,¹⁹¹ which found the Affordable Care Act's health insurance mandate to be constitutional under Congress' power to tax. *Dobbs* is close behind at 132 *amicus* briefs: 81 supporting Mississippi and 51 supporting the abortion clinic. Most of these *amicus* briefs, however, are filed on behalf of multiple parties. These *amicus* briefs each make particular (often overlapping) arguments. In combination, however, this volume of briefs and parties shows not only the visibility and interest in this case, but is striking evidence that abortion law, as represented by *Roe* and *Casey*, is anything but settled.

***Dobbs* Analysis.** The difficulty of anticipating, let alone predicting, how the Supreme Court will rule in any individual case certainly intensifies when the Court reconsiders precedent as significant as *Roe v. Wade*. Many thought, for example, that the Court would do so in *Webster v. Reproductive Health Services*,¹⁹² which drew a then-record 78 *amicus* briefs. However, the Court declined even to reconsider *Roe*. That said, some current considerations support the possibility that the Court will take this step in *Dobbs*.

To be sure, as discussed above,¹⁹³ there exists a rebuttable presumption that the Court will follow its precedents. This presumption, however, is weakest regarding precedents that interpreted the Constitution. Of the 233 cases in which the Supreme Court has reversed its own prior precedents,¹⁹⁴ more than 60 percent involved constitutional questions.¹⁹⁵ These include overruling a precedent even where “[m]ore than 20 States ha[d] statutory schemes built on [it]” and “[t]hose laws underpin[ed] thousands of ongoing contracts involving millions of employees.”¹⁹⁶

A study conducted by the University of Pennsylvania Law School found that in cases in which the Supreme Court grants review, the party appealing to the Supreme Court is successful 60 percent of the time, compared to 37 percent for the responding party. The authors opined that at least one factor motivating the Court to grant review of a case is the perception that at least some Justices thought that the case below was wrongly decided.¹⁹⁷

As the Court of Appeals for the Fifth Circuit was duty bound in *Dobbs* to affirm the trial court's grant of summary judgment for plaintiff abortion providers because of *Roe* and *Casey*'s unyielding grasp, and because the Supreme Court limited its review of the *Dobbs* case to the sole question of whether pre-viability restrictions on abortion are unconstitutional, it is highly likely that at least four of the Justices now believe its abortion precedents deserve re-examination.

The Court's most recent decision¹⁹⁸ in an abortion case may also provide some insight. *June Medical Services v. Russo*¹⁹⁹ was a 5–4²⁰⁰ decision to strike down a Louisiana law requiring physicians performing abortions to have

admitting privileges at a hospital within 30 miles of where an abortion is performed or induced.

Chief Justice John Roberts agreed with the result in *June Medical*, even though he had taken the opposite position in *Whole Woman's Health v. Hellerstedt*,²⁰¹ which struck down an identical law in Texas four years earlier. Roberts explained that the contrary result was now required since *Hellerstedt* is now a relevant precedent. The “legal doctrine of stare decisis,” Roberts wrote in a separate opinion, “requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana’s law cannot stand under our precedents.”²⁰²

Justice Clarence Thomas dissented in *June Medical*, arguing that, the *Hellerstedt* precedent notwithstanding, the Court was perpetuating its ill-founded abortion jurisprudence by “enjoining a perfectly legitimate state law and doing so without jurisdiction.... Our abortion precedents are grievously wrong and should be overruled.”²⁰³ He also explained that, while the laws challenged in *Hellerstedt* and *June Medical* were similar, the objective sought by the respective plaintiffs were not. In *June Medical*, the plaintiffs wanted the Court to establish a blanket rule that abortion providers have legal standing to challenge abortion restrictions simply because they perform abortions, that is, “based solely on their role in the abortion process.”²⁰⁴ The right created in *Roe* and continued in *Casey* belongs to women, not to abortion providers.

Justices Samuel Alito and Brett Kavanaugh²⁰⁵ also dissented and wrote separate opinions, apparently unpersuaded by Roberts’ argument about precedent. In particular, Alito pointed out that Louisiana had not asked the Justices to re-examine *Casey* but also argued that *Casey* ruled out the balancing test adopted in *Whole Woman's Health v. Hellerstedt*, and that because it misinterpreted *Casey*, it should be overruled.²⁰⁶ In his brief dissent, Kavanaugh noted that “the factual record at this stage of plaintiffs’ facial, pre-enforcement challenge does not adequately demonstrate that the three relevant doctors...cannot obtain admitting privileges or, therefore, that any of the three Louisiana abortion clinics would close as a result of the admitting-privileges law.”²⁰⁷ In short, without more information, Kavanaugh argued that the abortion providers had failed to demonstrate there was sufficient proof of an undue burden on the right of Louisiana women to get an abortion sufficient to invalidate the law.

Justice Neil Gorsuch’s strongly worded dissent in *June Medical*, in which he focused on the extent of states’ authority to regulate abortion and how the courts may properly be utilized to challenge such laws, may

prove particularly significant. In that dissent, Gorsuch explained that “[t]he judicial power is constrained by an array of rules” about whether parties may bring suits to court, how courts must handle those suits, and the kind of relief that courts may provide to successful litigants. “[C]ollectively,” Gorsuch wrote, “these rules...help keep us in our constitutionally assigned lane, sure that we are in the business of saying what the law is, not what we wish it to be.”²⁰⁸

The decision in *June Medical*, Gorsuch wrote:

doesn’t just overlook one of these rules. It overlooks one after another. And it does so in a case touching on one of the most controversial topics in contemporary politics and law, exactly the context where this Court should be leaning most heavily on the rules of the judicial process. In truth, *Roe v. Wade*...is not even at issue here. The real question we face concerns our willingness to follow the traditional constraints of the judicial process when a case touching on abortion enters the courtroom.²⁰⁹

After hearing oral arguments on December 1, 2021, the Supreme Court will likely not announce its decision in *Dobbs* until late in its term, which will likely conclude at the end of June.

Given the conflict between the plain terms of the Act, and the Court’s determinations in *Roe* and *Casey* that states may not prohibit abortions prior to viability, taken together with the Court’s caution that states possess interests “from the outset of the pregnancy in protecting (1) the health of the mother and (2) the life of the fetus that may become a child,”²¹⁰ many legal scholars consider the *Dobbs* case to be the ripest opportunity the Court has had yet to revisit *Roe*, and that “good reasons exist for the Court to reevaluate its jurisprudence.”²¹¹

Possible outcomes include:

- **Mississippi wins, *Roe* and *Casey* are reversed.** By eliminating a constitutional right to abortion, this decision would restore the states’ authority to regulate or prohibit²¹² abortion as they see fit. Based on laws currently in place,²¹³ 18 states would ban abortion while 13 states and the District of Columbia would recognize a largely unrestricted right to abortion. The remaining states would be free to legislate in this area.
- **Mississippi wins, *Roe* and *Casey* are further undermined.** The Court could conceivably find that Mississippi’s abortion ban is

constitutional by further limiting or reconfiguring *Roe* and *Casey*. The way the Court articulates a new standard would determine how much additional flexibility states would have to restrict abortion. The Court could, for example, relax its rigid rule against all pre-viability abortion bans and make more flexible its rule that abortion restrictions may not impose an “undue burden” on the right to abortion.

- **Mississippi loses, *Roe* and *Casey* are reaffirmed.** In this scenario, the Court could once again assert that viability is the constitutional dividing line and that all pre-viability bans constitute an unconstitutional “undue burden.”

Conclusion

Speaking in the same year that *Casey* was decided, Justice Ruth Bader Ginsburg²¹⁴ observed that the Supreme Court has a “will for self-preservation and the knowledge that they are not a bevy of Platonic Guardians, and the Justices generally follow, they do not lead, changes taking place elsewhere in society.”²¹⁵ *Roe* was an egregious and glaring exception; the Supreme Court attempted to lead the country in a different direction on abortion, but the country has not followed.

Roe v. Wade remains one of the most controversial judicial decisions in American history. Even after 50 years, dozens of additional abortion decisions, and an ongoing vigorous national debate, most Americans oppose most of the abortions that *Roe* made legal. Even the most creative legal scholars have failed to find a reasonable constitutional justification for *Roe*, and most have stopped trying. *Roe*’s abortion regime is far more permissive than the common law or statutes, in England or America, have ever provided. Lower courts have never been able consistently to discern and apply the subjective holdings in the Court’s abortion cases. And even the Court’s chosen basis for creating the right to abortion—the detriment that prohibiting abortion would impose—has been significantly undermined by dramatic economic, legal, and social changes in society and culture.

From changing public sentiment on abortion to advances in medical technology that reveal the mysteries of fetal development to expanding opportunities for women, the redefinition of their societal roles, and a wanting connection between abortion and women’s economic and social progress, it is appropriate for the Court to—as Justice Ginsburg rightly noted—follow the changes that have occurred elsewhere in society and put a halt to its misguided leadership on the issue of abortion.

The only solution to this crisis is for the Supreme Court to correct its grave error and acknowledge that the Constitution does not protect a right to abortion. *Roe* and *Casey* went beyond distorting or incorrectly interpreting the Constitution; they ignored the Constitution altogether, exceeding the judiciary's proper authority in the process. *Dobbs v. Jackson Women's Health Organization* provides an opportunity for the Court to correct this grave error.

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Endnotes

1. 410 U.S. 113 (1973).
2. Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, 71 WASH. & LEE L. REV. 969,969 (2014).
3. *Roe v. Wade*, 410 U.S. at 153.
4. *Akron v. Akron Center for Reproductive Health*, 462, U.S. 416,420 (1983).
5. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747,759 (1986).
6. *Planned Parenthood v. Casey*, 505 U.S. 833,870 (1992).
7. *Roe*, 410 U.S. at 160. See also *Stenberg v. Carhart*, 530 U.S. 914,921 (2000); *Gonzales v. Carhart*, 550 U.S. 124,146 (2007).
8. Viability usually occurred at “approximately 28 weeks” when the Court decided *Roe* in 1973, 410 U.S. at 160, and “sometimes” at 23–24 weeks when the Court decided *Casey* in 1992. 505 U.S. at 860. The 24-week mark has become the generally accepted point of viability. See G. H. Breborowicz, *Limits of Fetal Viability and Its Enhancement*, EARLY PREGNANCY, January 2001, at 49–50 (viability is at “approximately 24 weeks of gestational age.”); *Obstetric Care Consensus: Perivable Birth*, OBSTETRICS & GYNECOLOGY, October 2017, at e188 (survival rate of 23–27 percent for babies born at 23 weeks, 42–59 percent for babies born at 24 weeks).
9. *Casey*, 505 U.S. at 871. See also *id.* at 860 (viability remains “the critical fact”).
10. *Id.* at 877. See also *Stenberg*, 530 U.S. at 921; *Gonzales*, 550 U.S. at 146.
11. *Casey*, 505 U.S. at 879, quoting *Roe*, 410 U.S. at 165. See also *Stenberg*, 530 U.S. at 921. For analysis of the Court’s life-or-health exception, see Stephen G. Gilles, *Roe’s Life-or-Health Exception: Self-Defense of Relative-Safety*, 85 NOTRE DAME L. REV. 525 (2010).
12. *Doe v. Bolton*, 410 U.S. 179,192 (1973).
13. In *Roe*, the Court listed detriments that prohibiting abortion would impose such as “a distressful life and future...the distress, for all concerned associated with the unwanted child...[and] the additional difficulties and continuing stigma of unwed motherhood.... All of these are factors the woman and her responsible physician necessarily will consider in consultation.” 410 U.S. at 153.
14. See Angelina Baglini, *Gestational Limits on Abortion in the United States Compared to International Norms*, Charlotte Lozier Institute, February 2014. Examining this claim, the *Washington Post* observed that it “correlates with another similar report” published by the Center for Reproductive Rights. See Michelle Ye Hee Lee, *Is the United States One of Seven Countries that “Allow Election Abortions After 20 weeks of Pregnancy?”*, WASH. POST, October 9, 2017, <https://wapo.st/38cZUPI>. The *Post* concluded that “the data back up the claim.” *Id.*
15. *Casey*, 505 U.S. at 846.
16. *Roe*, 410 U.S. at 129.
17. See Justin Buckley Dyer, *The Constitution, Congress and Abortion*, 11 N.Y.U. J. L. & LIBERTY 394,397 (2017) (the Supreme Court in *Roe* “made no serious effort to wrestle with the text, logic, and structure of the Constitution.”).
18. Justin Dyer, *Fictional Abortion History*, NAT’L REV., December 24, 2012, <https://www.nationalreview.com/2012/12/fictional-abortion-history-justin-dyer/>.
19. Means published two articles that Blackmun cited more than any other sources. Cyril Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y. L.F. 411 (1968) (Means I); Cyril Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Ashes of a Fourteenth-Century Common-Law Liberty?* 17 N.Y. L.F. 335 (1971) (Means II). Neither article identifies Means’ NARAL affiliation.
20. Gilles, *supra* note 11, at 541 (2010). Means published his narrative with the intention of influencing the Supreme Court’s decision in *Roe* and *Doe*. See Means II, *supra* note 19, at 336.
21. Means II, at 336.
22. Joseph W. Dellapenna, *The Historical Case Against Roe v. Wade*, NLA REV., Spring 1998, at 2.
23. Justin Buckley Dyer, *Constitutional Confusion: Slavery, Abortion, and Substantive Constitutional Analysis*, 76 AM. J. ECON. & SOC. 33,61 (2017).
24. See *id.* at 60. James Mohr, who authored a well-known history of abortion in America, also viewed Means’ work as more advocacy than legitimate scholarship, believing that “Means...was less than convincing on several points” and his conclusions were “open to serious questions.” JAMES MOHR, *ABORTION IN AMERICA: THE ORIGIN AND EVOLUTION OF NATIONAL POLICY, 1800–1900* 29–30 (1978).

25. See, e.g., J. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006); FREDERICK N. DYER, *THE PHYSICIANS' CRUSADE AGAINST ABORTION* (1999); JOHN KEOWN, *DOCTORS, MEDICINE, AND THE LAW* (1988); Joseph Dellapenna, *Abortion and the Law: Blackmun's Distortion of the Historical Record*, in *ABORTION AND THE CONSTITUTION: REVERSING Roe v. Wade THROUGH THE COURTS* 137–58 (D. Horan, E. Grant & P. Cunningham eds. 1987); Joseph Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359 (1979); James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985); Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975); Francis J. Beckwith, *The Supreme Court, Roe v. Wade, and Abortion Law*, 1 LIBERTY U. L. REV. 37,46–56 (2006); John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES IN LAW & MED. 3 (2006); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15,103-19 (1993) (Appendix A).
26. *Roe*, 410 at U.S. 141.
27. See Dennis J. Horan & Thomas J. Marzen, *Abortion and Midwifery: A Footnote in Legal History*, in *NEW PERSPECTIVES ON HUMAN ABORTION* 200 (1981).
28. *Id.* at 199.
29. Editorial, *Child Murder*, THE REVOLUTION, March 12, 1868, at 146. Matilda A.J. Gage, Letter to the Editors, *Is Woman Her Own?* THE REVOLUTION, April 9, 1868, at 215.
30. *Id.* at 147. See also Susan B. Anthony, *Marriage and Maternity*, THE REVOLUTION, July 8, 1869, at 4 (calling abortion a “horrible crime” that she “earnestly” desired to see suppressed).
31. 492 U.S. 490 (1989). Many of the same historians filed a similar brief in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See Brief of 250 American Historians as Amici Curiae in Support of Planned Parenthood in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, No.91-744,91-902 (1992). Other briefs provided a different reading of abortion history. See, e.g., Brief of the American Academy of Medical Ethics as Amicus Curiae in Support of Respondents in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Nos.91-744,91-902 (1992).
32. Brief of 250 American Historians, *supra* note 31, at 32.
33. Sylvia A. Law, *Conversations Between Historians and the Constitution*, 12 THE PUBLIC HISTORIAN 11,16 (1990).
34. *Id.* at 15.
35. Estelle B. Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the Webster Amicus Brief*, 12 THE PUBLIC HISTORIAN 27,32 (1990). Jane Larson and Clyde Spillenger similarly conceded that the brief amounted to “politically engaged scholarship” that “omitted...rather than confronted” the “inconvenient fact” of 19th-century feminists’ support for laws restricting abortion. Jane E. Larson & Clyde Spillenger, *“That’s Not History”: The Boundaries of Advocacy and Scholarship*, 12 THE PUBLIC HISTORIAN 33 (1990).
36. *Id.*
37. *Id.* at 76.
38. *Id.* at 78.
39. *Id.* at 76.
40. Cat Clark, *Dr. Elizabeth Blackwell*, Feminist Foremothers, <https://www.feministsforlife.org/herstory/elizabethblackwell/>.
41. *Lectures of Dr. Anna Densmore*, THE REVOLUTION, March 19, 1868. See also DYER, *supra* note 25, at 200–01 (discussing other “strongly antiabortion women physicians”).
42. *Lectures*, *supra* note 41. The Means–Blackmun narrative also ignored other evidence, such as state court decisions construing and applying state statutes, that protecting unborn children was a purpose of 19th-century laws. See, e.g., *Smith v. State*, 33 Me. 48,57 (1851); *State v. Howard*, 32 Vt. 380,399 (1859); *State v. Moore*, 25 Iowa 128,135–36 (1868); *State v. Crook*, 51 P. 1091,1093 (Utah 1898); *Dougherty v. People*, 1 Colo. 514,523 (1872); *Worthington v. State*, 48 A. 355,357 (Md. 1901); *Trent v. State*, 73 So. 834,836 (Ala. 1816); *State v. Bassett*, 194 P. 867, 868 (N.M. 1921).
43. *The New York Times* obituary for Dr. Lozier noted that she was “identified with the Women’s Suffrage Workingwomen’s Associations organized by Miss ANTHONY [sic].” *Death of Dr. Charlotte Lozier*, N.Y. TIMES, January 4, 1870, <https://timesmachine.nytimes.com/timesmachine/1870/01/04/80203253.pdf>.
44. See Keown, *supra* note 25, at 5.
45. See Witherspoon, *supra* note 25, at 33–34. For the abortion laws in place when the 14th Amendment was ratified, see *Roe*, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting).
46. See Dennis H. Wrong, *The Sanctity of Life and the Criminal Law. By Glanville Williams.*, 7 BUFF. L. REV. 526,527 (1958) (Williams “is in favor of legalizing voluntary sterilization, artificial insemination, abortion, and euthanasia.”).
47. GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 141 (1958). See also Clarke D. Forsythe and Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEXAS REV. L. & POL. 301,310 (2006) (concluding that “the purpose of the state laws prohibiting abortion in the nineteenth century was to protect the life of the unborn child”).
48. See Linton, *supra* note 25, at 113 n.48.

49. AL GORE, *AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT* (2006).
50. Heather D. Boonstra, Rachel Benson Gold, Cory L. Richards and Lawrence B. Finer, *Abortion in Women's Lives*, 11 (Guttmacher Institute 2006).
51. Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?* 6 GUTTMACHER POL'Y REV. 8, 9 (March 2003).
52. See Boonstra et al., *supra* note 50, at 12; Harvey L. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L. 3 (1969); KAREN J. LEWIS, MORTON ROSENBERG AND ALLISON I. PORTER, CONG. RSCH. SERV. IB74019, *ABORTION: JUDICIAL AND LEGISLATIVE CONTROL* 3 (1981); *Human Life Federalism Amendment, Report of the S. Comm. on the Judiciary*, 98th Cong. 5 (1983).
53. *Roe*, 410 U.S. at 129.
54. *Id.* at 117. See also *id.* at 140 (legal analysis includes assessment of "how abortion was viewed").
55. BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 404 (2016).
56. *Doe*, 410 U.S. at 192.
57. *Roe*, 410 U.S. at 153.
58. Except where indicated, the polls discussed in this *Legal Memorandum* are collected at <https://pollingreport.com/abortion.htm>.
59. Raymond J. Adamek, *30-Plus Years of Abortion Polls: What Have We Learned?* 10 (2002).
60. See, e.g., Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 110,114 (2005) (most important reasons for an abortion include health concerns for the mother or child (7 percent), pressure from parents or spouse (<0.5 percent), and rape (<0.5 percent)). A 2013 study found that only 12 percent mentioned any health-related reason, equal to the percentage saying they would not be able to provide a child with a good life. M. Antonia Biggs, Heather Gould and Diana Greene Foster, *Understanding Why Women Seek Abortion in the US*, 13 BMC WOMEN'S HEALTH No. 29 (2013). State-level data show that approximately 4 percent of abortions are performed because of the life or health (physical or mental) of the mother or that the pregnancy resulted from rape or incest.
61. See, e.g., Sophia Chae et al., *Reasons Why Women Have Induced Abortions: A Synthesis of Findings From 14 Countries*, 96 CONTRACEPTION 233,235 (2017); Akinrinola Bakole, Susheela Singh and Taylor Haas, *Reasons Why Women Have Induced Abortions: Evidence from 27 Countries*, 24 INT'L FAM. PLANNING PERSP. 117 (1998).
62. Finer et al., *supra* note 60, at 113. See also Biggs, *supra* note 60; Luu Ireland, *Who Are the 1 in 4 American Women Who Choose Abortion?* UMASS MED. NEWS, May 30, 2019 (86 percent give reasons such as timing is wrong, do not want to be a single mother, or interference with education or career plans; 4 percent say physical health problems), <https://www.umassmed.edu/news/news-archives/2019/05/who-are-the-1-in-4-american-women-who-choose-abortion/>. These are also the most common reasons around the world.
63. *The June AP-NORC Center Poll* at 14, <https://apnorc.org/wp-content/uploads/2021/06/Abortion-topline.pdf>.
64. Adamek, *supra* note 59, at 11.
65. *The June AP-NORC Center Poll*, *supra* note 63.
66. *Roe*, 410 U.S. at 152.
67. *Scope and Myths of Roe v. Wade: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30 (2006) (statement of Professor Karen O'Connor).
68. 381 U.S. 479 (1965).
69. *Id.* at 480.
70. *Id.* at 484.
71. *Id.* at 483.
72. *Id.* at 484.
73. *Id.* at 483.
74. *Id.* at 485 (emphasis added).
75. *Eisenstadt v. Baird*, 405 U.S. 438,440-41 (1972).
76. *Id.* at 447.
77. *Id.*
78. 402 U.S. 62 (1971).
79. *Id.* at 68.
80. *Id.* at 72.
81. *Roe*, 410 U.S. at 153.
82. *Id.* at 155.

83. *Id.* at 173 (Rehnquist, J., dissenting).
84. *Gamble v. United States*, 139 S.Ct. 1960,1984 (2019) (Thomas, J., concurring).
85. *Roe*, 410 U.S. at 152.
86. *Id.* at 159. Ironically, this echoed the view of the 19th-century feminists whom the Supreme Court ignored. For them, the unborn child made abortion inherently different than contraception as a means of birth control. See Brief of Amicus Curiae Joseph W. Dellapenna in Support of Petitioners in *Dobbs v. Jackson Women's Health Organization*, No.19-1392 (2020).
87. *Roe*, 410 U.S. at 153.
88. See, e.g., Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569,1569 (1979) ("The result in the case—the establishment of a constitutional right to abortion—was controversial enough. Beyond that, even people who approve of the result have been dissatisfied with the Court's opinion.").
89. WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin, ed., 2003).
90. Dennis Horan, Clark Forsythe and Edward Grant, *Two Ships Passing in the Night: An Interpretivist Critique of the White–Steven Colloquy on Roe v. Wade*, 6 ST. LOUIS U. PUB., L. REV. 229,230 n.8 (1987).
91. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920,926 (1973).
92. *Id.* at 947.
93. Kermit Roosevelt, *Shaky Basis for a Constitutional Right*, WASH. POST, January 22, 2003. See also Witherspoon, *supra* note 25, at 30 (1985) (The Court based [its] conclusions most fundamentally on its assertion of historical fact").
94. Richard Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724, 1724 (1979).
95. Phillip Heymann and Douglas Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 784 (1979).
96. Mark Tushnet, *The Supreme Court on Abortion: A Survey*, in ABORTION, MEDICINE, AND THE LAW 165 (J. Butler & D. Walbert eds.) (3rd ed. 1986) (emphasis added).
97. *Casey*, 505 U.S. at 866.
98. *Id.* at 867.
99. See Linton, *supra* note 25, at 15–16 (in *Casey*, "a badly divided Court...could not muster a majority in support of any standard of review and [its] opinion is virtually certain to exacerbate the political and social tensions created by Roe and intensify the national debate over the Court's claimed authority to impose a regime of abortion upon the American people.").
100. These include *Doe v. Bolton*, 410 U.S. 179 (1973), which the Supreme Court decided with *Roe*. It challenged a Georgia statute enacted in 1968, one of the less restrictive laws based on the model drafted by the American Law Institute. *Id.* at 182. It allowed abortion if the pregnancy "would endanger the life of the pregnant woman or would seriously and permanently injure her health"; the unborn child "would very likely be born with a grave, permanent, and irremediable mental or physical defect"; or "the pregnancy resulted from forcible or statutory rape." *Id.* at 183.
101. This list does not include six cases that challenged the denial of public funds, facilities, or employees for abortion because these cases involved statutory construction or other constitutional issues. These cases are *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980); and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
102. In addition to *Roe* and *Bolton*, these include *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (struck down Missouri statutory ban on saline amniocentesis abortion after 12 weeks); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (struck down Nebraska law banning partial-birth abortion); and *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upheld federal law banning partial-birth abortion).
103. See *Danforth* (upheld requirement of informed consent, struck down requirements of parental and spousal consent); *Bellotti v. Baird*, 443 U.S. 622 (1979) (struck down Massachusetts statute requiring parental consent for minors); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upheld Utah statute requiring parental notification); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (upheld requirement of parental or judicial consent for minors); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (struck down ordinance requiring parental consent for minors); *Thornburgh v. ACOG*, 476 U.S. 747 (1986) (struck down informed-consent requirements); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (upheld ordinance requiring parental notification for minors); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upheld Minnesota statute requiring two-parent notification for minors); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upheld Pennsylvania statute requiring parental consent for minors); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (upheld statute requiring one-parent notification for minors).
104. See *Connecticut v. Menillo*, 423 U.S. 9 (1975) (upheld abortion ban as applied to nonphysicians); *Danforth* (struck down standard of care and upheld reporting/recordkeeping requirement); *Colautti v. Franklin*, 439 U.S. 379 (1979) (struck down standard of care); *Akron* (struck down requirement that second-trimester abortions be performed in hospital); *Ashcroft* (1983) (struck down hospital requirement for abortions after 12 weeks and upheld requirement of second physician present for post-viability abortions); *Simopoulos v. Virginia*, 462 U.S. 506 (1983) (upheld requirement that second-trimester abortions be performed in licensed clinics); *Thornburgh* (struck down reporting requirements, standard of care, and second-physician requirement); *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (upheld requirement that abortions be performed by licensed physician); *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016) (struck down requirement that physicians performing abortions have hospital admitting privileges); *June*

- Medical Services v. Russo, 140 S.Ct. 2103 (2020) (struck down admitting-privileges requirement).
105. *Beal v. Doe*, 432 U.S. 438 (1977) (Title XIX of the Social Security Act does not require states participating in the Medicaid program to pay for nontherapeutic abortions); *Maier v. Roe*, 432 U.S. 464 (1977) (same result from equal-protection clause; *Poelker v. Doe*, 432 U.S. 519 (1977) (equal-protection clause does not require city to perform abortions at public hospitals); *Harris v. McRae*, 448 U.S. 297 (1980) (Title XIX does not require funding of medically necessary abortion; Hyde Amendment does not violate Constitution); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (state law abortion funding restriction does not violate the Constitution); *Rust v. Sullivan*, 500 U.S. 173 (1991) (federal statute restricting abortion advocacy by recipients of Title X grants does not violate the Constitution).
 106. *Rust*, 500 U.S. at 201 (1991), quoting *Webster*, 492 U.S. at 511.
 107. *Id.*, quoting *Harris*, 448 U.S. at 315.
 108. *Colautti v. Franklin*, 439 U.S. 379,409 (1979) (White, J., dissenting).
 109. *Thornburgh*, 476 U.S. at 783,785 (1986) (Burger, C.J., dissenting).
 110. *Stenberg*, 530 U.S. at 952 (Rehnquist, C.J., dissenting).
 111. *Id.* at 957 (Kennedy, J., dissenting).
 112. *Id.* at 171 (Ginsburg, J., dissenting).
 113. Hannah Fingerhut, *About Seven-in-Ten Americans Oppose Overturning Roe v. Wade*, January 3, 2017, <https://www.pewresearch.org/fact-tank/2017/01/03/about-seven-in-ten-americans-oppose-overturning-roe-v-wade/>.
 114. Michael C. Bender, *Record 71% of Voters Oppose Overturning Roe v. Wade*, WALL ST. J., July 23, 2018, <https://www.wsj.com/articles/record-71-of-voters-oppose-overturning-roe-v-wade-1532379600>.
 115. Rachel Frazin, *Poll: 77 Percent Say Supreme Court Should Uphold Roe v. Wade*, THE HILL, June 7, 2019, <https://thehill.com/policy/healthcare/abortion/447397-77-percent-say-supreme-court-should-uphold-roe-v-wade>.
 116. Pew Research Center, *Roe v. Wade at 40: Most Oppose Overturning Abortion Decision*, January 16, 2013, <https://www.pewforum.org/2013/01/16/roe-v-wade-at-40/>.
 117. See also *Scope and Myths of Roe v. Wade*, *supra* note 67, at 2 (statement by Rep. Steve Chabot (R-OH) that “there remains a great misunderstanding by the public as to the real scope of *Roe v. Wade*...that is exhibit[ed] in polling questions stating that *Roe* protects a right to an abortion in only the first 3 months of pregnancy.”).
 118. The percentage of respondents in these inaccurate “first three months” polls saying that *Roe v. Wade* should not be overturned matches exactly the percentage in other polls saying that abortion should “generally be legal” in the first three months of pregnancy.
 119. Similarly, ABC News/*Washington Post* polls about overturning *Roe* say that it is the basis for “abortion law in the United States,” implying that overturning *Roe* would, by itself, undermine or eliminate abortion law.
 120. See Thomas Jipping and Zack Smith, *Stare Decisis* 101, HERITAGE FOUND. LEGAL MEMORANDUM No. 277, February 3, 2021.
 121. See *id.* at 3–4.
 122. THE FEDERALIST No. 78 (Alexander Hamilton). See also Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363,369 (2007) (the “most significant” virtue of *stare decisis* “is the stability, continuity, and predictability it lends to the law.... Stability and certainty reduce judicial discretion.”).
 123. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 318 (2006).
 124. See Jipping and Smith, *supra* note 120, at 4–6.
 125. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), THE JEFFERSON CYCLOPEDIA, at 190 (John P. Foley ed. 1900). See generally Thomas L. Jipping, *Which Is To Be Master?: The People, Judges, and the Constitution’s Meaning*, 2 LIBERTY U. L. REV. 419 (2008).
 126. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379,404 (1937) (Sutherland, J., dissenting).
 127. *Payne v. Tennessee*, 501 U.S. 808,827 (1991).
 128. *Helvering v. Hallock*, 309 U.S. 109,119 (1940). As Justice O’Connor put it at her confirmation hearing, *stare decisis* is “not set in stone but is very important.” *Nomination of Sandra Day O’Connor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 97th Cong. 83 (1981).
 129. See e.g., *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446,449 (2015); *Montejo v. Louisiana*, 556 U.S. 778,815 (2009) (Breyer, J., dissenting); *Dickerson v. United States*, 530 U.S. 428,433 (2000); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258,274 (2014); *Arizona v. Gant*, 556 U.S. 332,354 (2009) (Breyer, J., dissenting). For discussion of these principles, see Orrin G. Hatch, *There’s Nothing “Super” About Roe v. Wade*, 29 STAN. L. & POL’Y REV. ONLINE 1,6–14 (March 12, 2018).
 130. *Ramos v. Louisiana*, 140 S.Ct. 1390,1415 (2020) (Kavanaugh, J., concurring in part) (citations omitted).

131. See Jipping and Smith, *supra* note 120, at 6–8.
132. *Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 111th Cong. 211 (2010).
133. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393,406–07 (1932); GEORGE COSTELLO, CONG. RSCH. SERV., RL33172, THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT: AN OVERVIEW 2 (2005) (the Supreme Court “has shown less reluctance to overrule its decisions on constitutional questions than its decisions on statutory questions”); GARNER ET AL., *supra* note 55, at 352 (2016).
134. GARNER ET AL., *supra* note 55, at 396. See also *Casey*, 505 U.S. at 864 (“[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”); Jipping and Smith, *supra* note 120, at 7.
135. GARNER ET AL., *supra* note 55, at 396.
136. Clarke D. Forsythe and Rachel N. Morrison, *Stare Decisis, Workability, and Roe v. Wade: An Introduction*, 18 AVE MARIA L. REV. 48,50 (2020).
137. See Alito Hearing, *supra* note 123, at 854; BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT 2,13 (2018).
138. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877,924 (2007) (Breyer, J., dissenting) (“a decision [that] creates an ‘unworkable’ legal regime argues in favor of overruling.”).
139. MURRILL, *supra* note 137, at 18–25.
140. Ely, *supra* note 91.
141. GARNER ET AL., *supra* note 55, at 404.
142. At his confirmation hearing, Justice Alito agreed that “when a precedent is reaffirmed, that strengthens the precedent.... I think that when a precedent is reaffirmed, each time it’s reaffirmed that is a factor that should be taken into account in making the judgment about stare decisis.” Alito Hearing, *supra* note 123, at 321. See also *id.* at 455 (“[W]hen a decision is challenged and it is reaffirmed that strengthens its value as stare decisis.”); *id.* at 531 (“[W]hen a decision is reaffirmed, that strengthens its value as stare decisis.”).
143. GARNER ET AL., *supra* note 55, at 6.
144. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157,169 (2018), quoting *Webster v. Fall*, 266 U.S. 507,511 (1925).
145. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211,219 (1995).
146. Judith M. Stinson, *Teaching the Holding/Dictum Distinction*, 19 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 192 (2011).
147. 462 U.S. 416 (1983).
148. *Id.* at 420.
149. 476 U.S. 747 (1986).
150. *Id.* at 759.
151. 505 U.S. 833 (1992).
152. *Id.* at 845.
153. *Id.* at 844.
154. See *Hatch*, *supra* note 129.
155. See Paul Benjamin Linton and Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of Roe v. Wade? A Critique of Planned Parenthood v. Casey*, 70 CASE W. RES. L. REV. 283 (2019).
156. Gestational Age Act, Miss. Laws Ch. 393, §1 *et seq.* (codified at MISS. CODE ANN. § 41-41-191 (2018)). The act was passed in the Mississippi Senate on a vote of 35 to 14, with 3 “no votes,” and in the House (as amended from the Senate) on a vote of 75–34, with 11 “no votes.” See Legiscan page for M.S. H.B. 1510 (2018), Regular Session, available at <https://legiscan.com/MS/votes/HB1510/2018>.
157. Both in the Act and within obstetric medical practice, “gestation” is defined as “the time that has elapsed since the first day of the woman’s last menstrual period.” MISS CODE ANN. § 41-41-191, § (3)(e). See also, William A. Engle, American Academy of Pediatrics, Committee on Fetus and Newborn, *Age Terminology During the Perinatal Period*, 114 PEDIATRICS 1362, 1362 (November 2004).
158. The Act has been criticized by liberal pundits and scholars as being designed precisely as a vehicle to overturn *Roe*. See, e.g., Elizabeth Nash, Jonathan Bearak, Rachel K. Jones, Naomi Li, & Lauren Cross, *Mississippi Is Attacking Roe v. Wade Head On—the Consequences Could Be Severe*, The Guttmacher Institute (August 17, 2021), <https://www.guttmacher.org/article/2021/08/mississippi-attacking-roe-v-wade-head-consequences-could-be-severe> (accessed Nov. 3, 2021).
159. MISS CODE ANN. § 41-41-191(4)(a)-b).
160. See *supra* note 8.
161. *Roe*, 410 U.S. at 860.

162. Casey, 505 U.S. at 871.
 163. Miss Code Ann. § 41-41-19(4)(a–b).
 164. See *supra* notes 35–38 and accompanying text.
 165. Katrina Furth, Ph.D., 15 Facts at 15 Weeks, Charlotte Lozier Institute, 3 On Science 1, 2 (September 2021).
 166. Tryphena Humphrey, Some Correlations between the Appearance of Human Fetal Reflexes and the Development of the Nervous System, 4 Progress in Brain Research, 93–135 (Dominick P. Purpura and J. P. Schädé eds.), 4 Growth and Maturation of the Brain (1964), [https://doi.org/10.1016/S0079-6123\(08\)61273-X](https://doi.org/10.1016/S0079-6123(08)61273-X).
 167. P.G. Hepper et al., Lateralised Behaviour in First Trimester Human Foetuses, 36 Neuropsychologia 531, 531–534 (1998).
 168. Carlo V. Bellieni, Analgesia for Fetal Pain During Prenatal Surgery: 10 Years of Progress, 89 Pediatric Rsch, 1612, 1612–1618 (September 24, 2020) <https://doi.org/10.1038/s41390-020-01170-2>; see also Humphrey, *supra* note 166.
 169. In the trial court, the defendant was Mary Currier, state health officer of the Mississippi Department of Health. Currier announced her retirement on November 1, 2018, and was replaced in her official position and in the Mississippi litigation by Thomas Dobbs, M.D., M.P.H, state health officer of the Mississippi Department of Health. Also named in the litigation was Kenneth Cleveland, M.D., in his official capacity as Executive Director of the Mississippi State Board of Medical Licensure.
 170. Jackson Women’s Health Org. v. Currier, 349 F. Supp. 3d 536, 539 (S.D. Miss. 2018).
 171. Jackson Women’s Health Org. v. Dobbs, 945 F. 3d 265 (5th Cir. 2019).
 172. *Id.* at 273 (citing Casey, 505 U.S. at 878).
 173. *Id.* (citing Casey, 505 U.S. at 846).
 174. Judge James C. Ho authored a separate concurrence in the judgment but pointed out that “[n]othing in the text or original understanding of the Constitution establishes a right to an abortion. Rather, what distinguishes abortion from other matters of health care policy in America—and uniquely removes abortion policy from the democratic process established by our Founders—is Supreme Court precedent. The Parties and amici therefore draw our attention not to what the Constitution says, but to what the Supreme Court has held. A good faith reading of those precedents requires us to affirm.” *Id.* at 277–278. Judge Ho also took umbrage with the critical and depreciatory language used by the trial court (including calling the State’s interest in protecting women’s health, “gaslighting”) in assessing the State’s arguments in defense of the act, stating, “I find it deeply disquieting that a federal court would disparage millions of Americans who believe in the sanctity of life as nothing more than ‘bent on controlling women and minorities’ and ‘disregarding their rights at citizens.’ Those insults not only directly conflict with the Supreme Court’s admonitions that both sides of the debate deserve respect—they are also demonstrably incorrect.” *Id.* at 283). Judge Ho’s comments further reflect sentiment even among the federal circuits that Roe and Casey are settled law only insofar as they have yet to be overturned by the high court.
 175. Specifically, Mississippi asked the court to clarify whether the validity of a pre-viability law should be analyzed under Casey’s “undue-burden” standard or Hellerstedt’s balancing of benefits and burdens. See Hellerstedt, *supra* note 104.
- In addition to invalidating a Texas law requiring physicians who perform abortions to have hospital admitting privileges, the Court in *Hellerstedt* interpreted *Casey* to require a balancing test weighing burdens against benefits when assessing whether an abortion restriction placed an undue burden on a woman’s right to the same. Under its scheme, to assess whether a law regulating abortion poses an “undue burden,” a court had to independently review the legislative findings upon which the law rested and weigh the law’s “asserted benefits against the burdens” it imposes on abortion access. *Hellerstedt* has been roundly criticized for unnecessarily muddying the waters on *Casey*’s undue-burden standard, and some legal scholars have posited that in it, the Supreme Court styled the federal judiciary as a “national abortion control board,” inflated the footprint of “undue burden” into new areas, and allowed federal courts to employ “its eminently pliable test to invalidate laws previously held constitutional, such as parental notice laws, outpatient surgical regulations, and even, in one case, a prohibition on taxpayer funding of elective abortion.” See Catherine Glenn Foster, *Symposium: Undue Burden, Balancing Test or Bright Line? Court Should Take the Louisiana Admitting-Privileges Case to Clarify the Meaning of Whole Woman’s Health*, SCOTUSblog (March 5, 2019), <https://www.scotusblog.com/2019/03/symposium-undue-burden-balancing-test-or-bright-line-court-should-take-the-louisiana-admitting-privileges-case-to-clarify-the-meaning-of-whole-womans-health/>.
176. Amy Howe, Court to Weigh In On Mississippi Abortion Ban Intended to Challenge Roe v. Wade, SCOTUSblog (May 17, 2021), <https://www.scotusblog.com/2021/05/court-to-weigh-in-on-mississippi-abortion-ban-intended-to-challenge-roe-v-wade/>.
 177. Dobbs v. Jackson Women’s Health Org., 141 S. Ct. 2619 (mem.), 209 L.Ed.2d 748, 21 Cal. Daily Op. Serv. 4429, Daily Journal D.A.R. 4715 (2021).
 178. See *supra* notes 87–89 and accompanying text.
 179. See, e.g., *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (“If a legislative classification or distinction ‘neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.’”) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).
 180. Brief for Petitioners, at 1–2.
 181. Pam Belluck, Premature Babies May Survive at 22 Weeks If Treated, Study Finds, N.Y. Times, May 6, 2015, <https://www.nytimes.com/2015/05/07/health/premature-babies-22-weeks-viability-study.html>.
 182. Akron, 462 U.S. at 458 (O’Connor, J., dissenting).

183. Brief for Petitioners, at 19.
184. See *supra* notes 13, 56–57 and accompanying text.
185. Safe haven laws (known also as “Baby Moses laws”) were first enacted in 1999 in Texas and now exist in all 50 states. They incentivize mothers in crisis to safely relinquish their babies to specific locations—such as a shelter, firehouse, or hospital—where infants will be protected and provided with medical care until a permanent home is found. Safe haven laws also protect the anonymity of the birth parent and insulate those parents from criminal liability in exchange for surrendering the infant to a designated safe location. See Child Welfare Information Gateway, *Infant Safe Haven Laws*, U.S. Department of Health and Human Services, Children’s Bureau (2017), <https://www.childwelfare.gov/pubpdfs/safehaven.pdf>.
186. Brief for Petitioners, at 35. See also, Brief of 240 Women Scholars and Professionals, and Pro-life Feminist Organizations as Amici Curiae in Support of Petitioners, p. 13 et. seq, *Dobbs v. Jackson Women’s Health Organization*, ___ U.S. ___ (2021) (No. 19-1392) (Amici argue, inter alia, that expanding opportunities for women and the redefinition of their societal roles predate the judicial creation of a right to abortion in *Roe* by at least 50 years and that there is no credible evidence that women, as a group, have enjoyed greater economic and social opportunities because of the availability of abortion. As a result, the societal “reliance interest” so often referenced by defenders of *Roe* who argue against its overturning, is both misplaced and unproven.).
187. *Order Adopting Revised Rules of the Supreme Court of the United States*, 346 U.S. 945, 947 (1954) (statement of Black, J.).
188. Karen O’Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hackman’s “Folklore,”* 16 *Law & Soc’y Review* 311, 317 (1982).
189. Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, *Nat’l L.J.* (November 18, 2020), <https://www.arnoldporter.com/-/media/files/perspectives/publications/2020/11/amicuscuriae-at-the-supreme-court.pdf>.
190. 576 U.S. 644 (2015).
191. 567 U.S. 519 (2012).
192. 492 U.S. 490 (1989).
193. See *supra* notes 120–122 and accompanying text.
194. Cong. Rsch. Serv., *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, *Constitution Annotated* (September 24, 2018), <https://constitution.congress.gov/resources/decisions-overruled/>.
195. *Murrill*, *supra* note 137.
196. *Janus v. AFSCME*, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting).
197. Joseph D. Kearney & Thomas W. Merrill, *Influence of Amicus Curiae Briefs on the Supreme Court*, 148 *U. Penn. L. Rev.* 743, 787 (2000).
198. This discounts a pair of cases yet to be decided on Texas’s Fetal Heartbeat Act, which bans abortions at approximately six weeks (the time at which a fetal heartbeat is detected). Controversial not only for its limiting time line, the Texas law also operates by way of civil enforcement—not using state officials to enforce the law’s operation, but instead utilizing a mechanism seen only in state and federal fraud claims wherein any individual may file a civil enforcement action against anyone performing, aiding, or abetting an abortion, and if successful, collect \$10,000 per violation.
- Whole Women’s Health v. Jackson* No. 21-463 (2021) and *United States v. Texas* No. 21-588 (2021) were argued before the Court on November 1, 2021, after expedited briefing on a grant of certiorari before judgment—one month prior to scheduled arguments in *Dobbs*. The central questions in each were procedural in nature, namely: (1) whether a state can insulate from federal court review a law that prohibits the exercise of a constitutional right by delegating its enforcement to the general public, and (2) whether the United States can bring suit in federal court to obtain declaratory or injunctive relief against the state to prohibit the Texas Heartbeat Act from being enforced.
199. *June Medical Services L. L. C. v. Russo*, 140 S. Ct. 2170 (June 2020).
200. In *June Medical*, Justice Breyer delivered the opinion of the Court, and was joined by Justices Kagan, Sotomayor, and Ginsburg. Chief Justice Roberts concurred in the judgment. Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented. After Justice Ginsburg’s death, her seat was filled on October 27, 2020, by Justice Amy Coney Barrett. By simple analysis, and because a state law, democratically enacted (as both Louisiana’s and Mississippi’s laws were) is once again before the Court, it would seem that at a minimum, a 5–4 ruling in favor of upholding Mississippi’s Gestational Age Act is possible.
201. See *Hellerstedt*, *supra* note 104.
202. *June Medical* at 2134 (Roberts, C.J., concurring in the judgment).
203. *Id.* at 2142 (Thomas, J., dissenting).
204. *Id.* at 2143 (Thomas, J., dissenting). The question of whether abortion providers have third-party standing to invalidate a law regulating abortion was raised also by petitioner State of Mississippi in *Dobbs*, but the Court declined to grant review on it, limiting consideration only to the question of whether all pre-viability prohibitions on abortion were unconstitutional.
205. During his Senate Judiciary confirmation hearing, Justice Brett Kavanaugh declined invitations to promise he would not overrule *Roe v. Wade*, but called it “important precedent” that has been “reaffirmed many times.” However, a 2003 memo authored by the future Justice noted that: “I am not sure that all legal scholars refer to *Roe* as the settled law of the land at the Supreme Court level since Court [sic] can always overrule its precedent.” Joan Biskupic, *Roe v. Wade is ‘Precedent,’ Kavanaugh Says, But There’s More to the Future of Abortion*, *CNN.com* (Sept. 6, 2018), <https://www.cnn.com/2018/09/05/politics/kavanaugh-roe-v-wade-planned-parenthood-casey/index.html>.

206. The question of whether the Texas Heartbeat Act should be analyzed under Casey's undue-burden standard or Hellerstedt's balancing of benefits of burden was also raised by petitioner State of Mississippi in *Dobbs*, but on this question, too, the court declined to grant review.
207. *June Medical* at 2182 (Kavanaugh, J., dissenting).
208. *June Medical* at 2172 (Gorsuch, J., dissenting).
209. *Id.*
210. *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007).
211. *MKB Mgmt. Cor. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015).
212. Some have argued that the abortion procedure is itself unconstitutional, as the unborn possess legal personhood and, therefore, enjoy the guarantees of the 14th Amendment to the U.S. Constitution. See U.S. Const. amend. XIV (adopted July 9, 1868) (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”). In the absence of explicit constitutional text on the question, arguments regarding the personhood of the unborn stem most often from historical understanding and practice, the structure of the Constitution, and the jurisprudence of the Supreme Court during the period of debate and ultimate adoption of the 14th Amendment. See e.g., Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 *Issues in L. & Med.* 3, 185 et seq. (2020).
213. Several states have enacted abortion-limiting laws, some of which are designed for automatic operation in the event the Court overturns *Roe*. Between January 1, 2011, and July 1, 2019, states enacted 483 new abortion restrictions, accounting for nearly 40 percent of all abortion restrictions enacted by states in the decades since *Roe v. Wade*. See *State Facts About Abortion: Mississippi*, Guttmacher Institute (January 2021), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-mississippi#>. As of September 1, 2021, 43 states have restricted abortion at specific stages of fetal development: Of these states, 17 have restricted abortions beginning at the stage of fetal viability, and 13 have restricted abortions beginning at 20 weeks post-fertilization. See *Abortion Regulations by State*, Ballotpedia, https://ballotpedia.org/Abortion_regulations_by_state#cite_note-5.
214. Even Justice Ginsburg herself expressed concern that the wholesale abandonment of state abortion restrictions in *Roe* went too far, too fast. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 *New York U. L. Rev.* 6, 1185 et seq. (1992).
215. *Id.* at 1208 (internal citations omitted).