

# Aborting Reason and Equality: A Religious Pro-Life Critique of *Roe*, *Casey*, and Abortion Rights Rhetoric

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The conventional way of analyzing abortion and religion presumes that abortion rights are the normative baseline grounded in constitutionalism, rationality, scientific fact, and non-discrimination.<sup>1</sup> Religion, to the degree that it contradicts that normative baseline, is implicitly the opposite: aberrant, constitutionally suspect, harmful, irrational, unscientific, and discriminatory.<sup>2</sup> Once the matter is framed that

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1. See Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 TEX. L. REV. 1189 (2017); Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFF. L. REV. 107 (1982); Justin Buckley Dyer, *The Constitution, Congress and Abortion*, 11 N.Y.U. J. L. & LIBERTY 394 (2017); Huscina Sulaimanee, Note, *Protecting the Right to Choose: Regulating Conscience Clauses in the Face of Moral Obligation*, 17 CARDOZO J.L. & GENDER 417, 419 (2011) (“This Note argues that provider conscience clauses for abortion services not only deny women a fundamental right guaranteed by the United States Constitution, but they also violate informed consent principles and the separation of church and state set out in the Establishment Clause.”).

2. See PAUL A. OFFIT, *BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE* (2015); Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others*, 104 GEO.L.J. 1111 (2016); Michele Goodwin & Allison M. Whelan, *Constitutional Exceptionalism*, 2016

way, the question of whether to grant religious liberty exceptions to the normative baseline is problematic. To the degree such exceptions are allowed, the constitutionally-based normative baseline has been breached. Rationality has given way to irrationality, science to superstition, equality to discrimination, protection to harm.

Of course, these presumptions are usually implicit rather than explicit. But it is these structures of thought, these presuppositions behind the analysis, that have been formative.

This article turns these presumptions on their head. Upon examination, the abortion liberty is based on the raw assertion of judicial power without resort or regard to reason. Rather than being a right grounded in science, the abortion right has obscured and confused the relevant science. It is religious liberty, rather than the abortion liberty, that should define the constitutional baseline, given the explicit protection of religious freedom in the First Amendment and the lack of any equivalent textual, structural, or historical support for the abortion liberty.<sup>3</sup> The abortion right movement is profoundly discriminatory, denying the unborn, even at nine months of pregnancy, the right to recognition as a person before the law,<sup>4</sup> while seeking to discriminate against religious persons and organizations who object to participating in abortion. Further, upon examination it is the abortion rights movement that has little interest or respect for the conscience and viewpoints of women in regard to abortion. The abortion liberty, in turning the woman against her offspring, protects neither and harms both. It is the abortion liberty that is the aberration in relationship to our society's fundamental values and norms.

Thus, religion's role in regard to abortion is primarily that of calling society to apply to the abortion issue society's own values of rationality, respect for human dignity, constitutionalism, democratic governance, science, and non-discrimination. Further, resistance to the abortion right is grounded not in idiosyncratic religious dogma or irrational belief, but in presuppositions shared broadly in American society. Hence, religion and religious organizations involved in anti-abortion activism are not seeking an aberrant exception to society's norms, but rather are participants in a broader movement founded in the most fundamental norms of our society.

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U. ILL. L. REV. 1287, 1329 (2016); Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015); Sarah M. Stephens, *The Search for Authenticity and Manipulation of Tradition: Restrictions on Women's Reproductive Rights in the United States and Egypt*, 19 CARDOZO J.L. & GENDER 325, 327 (2013). On the problem of competing "rationalities," see ALALDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988). On the debate over whether religion is intrinsically irrational, see Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043 (2014), reviewing BRIAN LETTER, *WHY TOLERATE RELIGION?* (2013).

3. U.S. CONST. amend. I.

4. See *Roe v. Wade*, 410 U.S. 113, 158 (1973).

## I. RAW JUDICIAL POWER WITHOUT RECOURSE TO REASON

The abortion rights movement has generally relied on the Supreme Court's abortion decisions for legitimation of the abortion rights position, while at the same time often seeking, literally or in effect, to rewrite those decisions in order to make them more persuasive.<sup>5</sup> Abortion rights organizations reflexively defend *Roe v. Wade*<sup>6</sup> as foundational and view any threat to that decision as an attack upon abortion rights.<sup>7</sup> Yet, unlike other foundational modern Supreme Court decisions, such as *Brown v. Board of Education*,<sup>8</sup> the Court's abortion decisions have failed to create consensus in society or settle the underlying issue.<sup>9</sup> Hence, as a matter of persuasion and rhetoric, rather than power, the Court's abortion decisions have failed. Upon examination, the reasons for this failure become apparent. *Roe v. Wade* and the Court's subsequent abortion rights decisions lack foundation in reason, in the literal sense of failing to provide *reasons* for the Court's central abortion holdings. The Court has been eloquent in justifying its own authority to create binding rules on abortion for the entire nation, but at key analytical points has provided little in the way of justification for those rules.

A. *Roe v. Wade*

Prior to *Roe v. Wade*, state legislation and enforcement were the primary determinants of abortion law and policy in the United States.<sup>10</sup> Advocating actively in that realm, the abortion rights movement had substantial, but incomplete, success particularly in the decade prior to *Roe v. Wade*.<sup>11</sup> Thus, in 1900, almost all states prohibited abortion throughout pregnancy, with the only exception being for the life of the mother.<sup>12</sup> On the eve of *Roe v. Wade*, only about thirty states, including

5. See WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin ed., 2005); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Michele Goodwin & Meigan Thompson, *In the Shadow of the Court: Strategic Federalism and Reproductive Rights*, 18 GEO. J. GENDER & L. 333 (2017); Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385 (2013); Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

6. *Roe*, 410 U.S. 113.

7. See, e.g., *About Us*, NARAL PRO-CHOICE AMERICA, <https://www.prochoiceamerica.org/about/> [<https://perma.cc/WUB9-PGU3>] (last visited July 10, 2018); *Roe v. Wade*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/roe-v-wade> [<https://perma.cc/3RXE-N'TSB>] (last visited July 10, 2018).

8. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

9. See, e.g., Jack M. Balkin, *Roe v. Wade, An Engine of Controversy*, in WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 5, at 3.

10. Joseph Dellapenna, *The History of Abortion: Technology, Morality and Law*, 40 U. PITT. L. REV. 359, 407 (1979).

11. *Id.*

12. *Id.* at 406; Harvey M. Adelstein, Note, *The Abortion Law*, 12 W. RESERVE L. REV. 74, 75 (1960); Mark A. Graber, *The Ghost of Abortion Past: Pre-Roe Abortion Law in Action*, 1 VA. J. SOC. POL'Y & L. 309 (1994); Zad Leavy & Jerome M. Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123, 127–28 (1962); Jone Johnson Lewis, *Abortion History: The Controversy in the U.S.*, THOUGHTCO. (Oct. 2, 2017), <https://www.thoughtco.com/history-of-abortion-3528243>

Texas, retained this strict form of abortion prohibition.<sup>13</sup> Four jurisdictions had created elective abortion statutes, legalizing abortion to various points in the second trimester.<sup>14</sup> A significant group of about thirteen states had enacted legislation similar to the Model Penal Code (MPC),<sup>15</sup> providing for fairly broad categories of permissible abortions through an expansion of the concept of therapeutic abortion.<sup>16</sup>

*Roe v. Wade* invalidated the abortion laws of all states and the District of Columbia, including the recently enacted statutes of the elective abortion jurisdictions.<sup>17</sup> *Roe* replaced localized democratic governance of abortion with nationalized judicial governance, at least as to the core issue of legalizing elective abortion until viability.<sup>18</sup> Further, the Court's legalization of elective abortion through viability, which in 1973 meant through two-thirds of pregnancy, was in the global context a rather extreme settlement of the issue at the time, extending elective abortion beyond that of most European states.<sup>19</sup>

Commentators and Justices have noted the lack of support for *Roe* in the text, history, or structure of the Constitution.<sup>20</sup> For example, Justice White noted in dissent:

I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes . . . . As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but, in my view, its judgment is an improvident and extravagant exercise

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[<https://web.archive.org/web/20180608162322/https://www.thoughtco.com/history-of-abortion-3528243>].

13. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

14. David J. Garrow, *Abortion Before and After Roe v. Wade: A Historical Perspective*, 62 ALB. L. REV. 833 (1999).

15. MODEL PENAL CODE (AM. LAW INST. 1962).

16. Jon F. Merz et al., *A Review of Abortion Policy: Legality, Medicaid Funding, and Parental Involvement, 1967-1994*, 17 WOMEN'S RTS. L. REP. 1, 4 (1995).

17. *Roe v. Wade*, 410 U.S. 113, 165 (1973); see also Merz et al., *supra* note 16, at 5; Rachael K. Pirner & Laurie B. Williams, *Roe to Casey: A Survey of Abortion Law*, 32 WASHBURN L.J. 166, 171-72 (1993).

18. *Id.*

19. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 759 (2004); see also *Abortion Legislation in Europe*, LIBR. CONGRESS, <https://www.loc.gov/law/help/abortion-legislation/europe.php#comparative> [<https://perma.cc/W4HA-7DLG>] (last updated Sept. 15, 2016).

20. See Teresa Stanton Collett, *Judicial Modesty and Abortion*, 59 S.C. L. REV. 701 (2008); Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85 (2005); Paul Benjamin Linton & Kevin J. Todd, *The Framers Did Not Incorporate a Right to Abortion*, 81 ILL. B.J. 31 (1993); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 17 (1993).

of the power of judicial review that the Constitution extends to this Court.<sup>21</sup>

In *Roe*, the long historical passages perhaps obscured for some the Court's creation of something quite new in the Constitution. Nevertheless, the pretense of *Roe v. Wade* as a historically grounded, originalist decision never was very persuasive to most people on either side of the issue. Thus, in *Planned Parenthood v. Casey*,<sup>22</sup> the Court was ready to concede that *Roe* was based on an evolving interpretative method not bounded by historical understandings.<sup>23</sup> Thus, the Court conceded that *Roe* "was, of course, an extension" of prior substantive due process precedents which themselves had gone through a period of development.<sup>24</sup> Indeed, the Court specified that its interpretations of substantive due process were not historically bounded and thus were continually open to new extensions not bounded by the original intention.<sup>25</sup> Hence, the Court ultimately rested the authority of *Roe* on the Court's own "reasoned judgment,"<sup>26</sup> which was not bounded by text, history, tradition, or precedent.<sup>27</sup>

This reliance on the Court's own "reasoned judgment," unbounded by traditional sources of interpretation, would seem to require that the Court provide clear justifications and reasons for its specific holdings.<sup>28</sup> This is particularly true since the Court admitted that abortion was a matter that required not just acknowledgment of the woman's right but also a weighing of that right against other interests, including especially the State's interest in protecting "prenatal life."<sup>29</sup> Thus, the core dilemma in *Roe* is how to balance or weigh the competing rights or interests of the pregnant woman and the human embryo or fetus. This dilemma is what separates the abortion issue from many other sexuality issues, as indeed the Court conceded in *Roe* itself.<sup>30</sup>

*Roe* failed to provide "reasons" for its weighing of the respective rights and interests. This difficulty begins with the section of *Roe* that holds that the unborn, even at nine months gestation, are not constitutional persons under the Fourteenth Amendment.<sup>31</sup> The Court decided this issue solely on originalist grounds.<sup>32</sup> Amidst the many pages of *Roe* and all of the Court's subsequent abortion decisions, however, there is not one word of explanation or justification for the Court using an originalist method of interpretation in evaluating the constitutional rights of the

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21. *Roe*, 410 U.S. at 221–22.

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

23. *Id.* at 854.

24. *Id.* at 853.

25. *Id.* at 849.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 853.

30. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

31. *Id.* at 158.

32. *Id.* at 156–59. For a contrasting analysis of the personhood question from an originalist perspective, see Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO STATE L. J. 14 (2012).

unborn, while using a far more generous, evolving method of constitutional interpretation when evaluating the claim of abortion rights.<sup>33</sup> Obviously the Court is stacking the deck by using a rather generous interpretative method to evaluate one set of rights claims while using another, much stricter interpretative method to evaluate the competing set of rights claims. The choice is even more peculiar when one considers the immense changes in medical and scientific knowledge about prenatal life, which would seem to provide an excellent basis for evolving constitutional understanding of the rights of the unborn. Certainly, medical and scientific knowledge of human procreation and prenatal life was rudimentary in 1787 and 1868 as compared to 1973.<sup>34</sup> However, the Court, in *Roe* and ever since *Roe*, has evaluated rights and interests pertaining to the unborn without ever discussing the biological facts of embryonic and fetal development. Similarly, the Court has failed to discuss developments in medical knowledge about the fetus or how what we know now is different than what was thought at the time of the Fourteenth Amendment.

This claimed reliance on originalist analysis and precedent as to the rights of the unborn allows the Court to frame abortion as a clash between the rights of the woman and state interests in prenatal life, rather than as the clash of rights between persons. Further, the Court makes this essential analytic move without a single word of true explanation, as though its holding is dictated by history and precedent—which of course it is not, since in *Roe* the Court was bound by neither history nor precedent as to the woman's right.

The *Roe* Court's encounter with the unborn in the guise of a medical and scientific reality occupies only a few lines of *Roe*. Here, the Court famously admits: "The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the definitions of the developing young in the human uterus."<sup>35</sup>

The Court then issues another famous pronouncement:

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this

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33. *Roe*, 410 U.S. at 179.

34. See Salim Al-Gailani & Angela Davis, *Introduction to "Transforming Pregnancy Since 1900,"* 47 *STUD. HIST. & PHIL. BIOLOGICAL & BIOMEDICAL SCI.* 229 (2014); Karen Wellner, *A History of Embryology (1959), by Joseph Needham*, EMBRYO PROJECT ENCYCLOPEDIA (June 28, 2010), <https://embryo.asu.edu/pages/history-embryology-1959-joseph-needham> [<https://perma.cc/Q2LG-6ZCV>]; *Women, Power, and Reproductive Healthcare*, OHSU, <http://www.ohsu.edu/xd/education/library/about/collections/historical-collections-archives/exhibits/women-power-and-reproductive.cfm> [<https://perma.cc/8PCV-ZZNQ>] (last visited July 10, 2018).

35. *Roe*, 410 U.S. at 159.

point in the development of man's knowledge, is not in a position to speculate as to the answer.<sup>36</sup>

The Court's statement is unscientific. There is no reasonable scientific debate as to whether an embryo or fetus at risk of being surgically aborted is an individual human life. The embryo and fetus are genetically distinct from the pregnant woman; approximately half are a different gender from the mother.<sup>37</sup> Clearly the embryo and fetus are not merely a part of the woman's body. Embryonic and fetal life from a strictly scientific perspective are merely stages in the development and life of the human organism: as are, of course, infancy, childhood, and adolescence.<sup>38</sup> Hence, a standard Embryology textbook states:

Human development is a continuous process that begins when an ovum from a female is fertilized by a sperm from a male . . . . Most developmental changes occur during the embryonic and the fetal periods, but important changes also occur during the other periods of development: childhood, adolescence, and adulthood . . . . Although it is customary to divide development into *prenatal* and *postnatal* periods, it is important to realize that birth is merely a dramatic event during development resulting in a distinct change in environment.<sup>39</sup>

The post-*Roe* development of Assisted Reproductive Technologies (ART), including especially in vitro fertilization (IVF), has raised new bioethical issues and caused some to consider a different status for the pre-implantation embryo.<sup>40</sup> While the very early embryo is still a genetically distinct living human organism, the capacity for twinning and the high wastage rate, along with the medical practice of ART, has contributed to inconsistent use of the terminology of “pre-embryo” for the pre-implantation embryo, although the term does not seem to have become predominant.<sup>41</sup> In addition, since *Roe*, pregnancy has been redefined in many official medical contexts as occurring at implantation rather than at fertilization, although apparently many physicians still prefer the conception or fertilization definition.<sup>42</sup> In any event, the period between fertilization and implantation is not relevant to the question of surgical abortion that was before the Court in *Roe*.

36. *Id.*

37. Steven N. Austad, *The Human Prenatal Sex Ratio: A Major Surprise*, 112 PNAS 4839 (2015); Steven Orzack et al., *The Human Sex Ratio from Conception to Birth*, PNAS, Mar. 30, 2015, at E2102.

38. *See, e.g.*, AM. ACAD. OF PEDIATRICS, BRIGHT FUTURES: GUIDELINES FOR HEALTH SUPERVISION OF INFANTS, CHILDREN, AND ADOLESCENTS (Joseph F. Hagan, Jr., et al. eds., 4th ed. 2017); KEITH MOORE ET AL., THE DEVELOPING HUMAN: CLINICALLY ORIENTATED EMBRYOLOGY (10th ed. 2015).

39. *See* KEITH L. MOORE, THE DEVELOPING HUMAN: CLINICALLY-ORIENTATED EMBRYOLOGY (3d ed. 1982). Moore's text is now in the Tenth Edition. *See infra* note 39. The first edition was published in 1973, the year *Roe* was decided.

40. *See, e.g.*, GREGORY E. PENCE, MEDICAL ETHICS 96–139 (6th ed. 2011).

41. *See, e.g.*, *Davis v. Davis*, 842 S.W.2d 588 (1992) (quoting the American Fertility Society).

42. *See* Kerry Grens, *When Does Pregnancy Begin? Doctors Disagree*, REUTERS (Nov. 17, 2011, 11:21 AM), <https://www.reuters.com/article/us-when-does-pregnancy-begin/when-does-pregnancy-begin-doctors-disagree-idUSTRE7AG24B20111117> [<https://perma.cc/FZ8V-YP7V>].

Certainly, by the time that a pregnancy can be established and surgical abortion is an option, there is no medical issue as to whether the human organism is biologically alive, human, and distinct—genetically or otherwise—from the pregnant woman.

Of course if the embryo or fetus is dead, an abortion, as understood in the law, would no longer be possible, since removal of a dead fetus is by definition not an abortion.<sup>43</sup> Indeed, a dead fetus is generally an indication for medical intervention.<sup>44</sup> By contrast, the physician's alleged failure to appropriately intervene to preserve the life and health of the fetus during pregnancy or labor, leading to neonatal death or the birth of an infant with health impairments, is a common cause of medical malpractice claims.<sup>45</sup> It is here that the Court casts doubt on what are medical and scientific certainties that courts and the medical field otherwise in practice treat as settled facts. Certainly an obstetrician who could not tell the difference between a dead or live fetus would not be fit to practice. The Court completely confuses a philosophical, theological, or legal debate on the status and characterization of human prenatal life, often termed the debate on "personhood,"<sup>46</sup> with the established medical and scientific facts about the embryo and fetus as stages of human development.<sup>47</sup>

This distinction between the "personhood" debate and the scientific facts of human development is illustrated by the debate over the status of the neonate and infant.<sup>48</sup> Certainly some people, both in modern times and also in the past, have regarded early infancy as a stage prior to the attainment of "personhood," and some have used this exclusion from personhood to justify or minimize the harm of infanticide.<sup>49</sup> However, that does not change the scientific certainty that infants are

43. See *Abortion*, BLACK'S LAW DICTIONARY (5th ed. 1983) (defining abortion as the "knowing destruction of the life of an unborn child or the intentional expulsion or removal of an unborn child from the womb other than . . . removing a dead fetus").

44. HARVEY J. KLIMAN, INTRAUTERINE FETAL DEATH (2004), [https://medicine.yale.edu/obgyn/kliman/placenta/research/Fetal%20Death%20UpToDate%20Feb04\\_196028\\_284\\_18220\\_v1.pdf](https://medicine.yale.edu/obgyn/kliman/placenta/research/Fetal%20Death%20UpToDate%20Feb04_196028_284_18220_v1.pdf) [<https://perma.cc/J6K7-WWDZ>].

45. See J.I.B. Adinma, *Litigations and the Obstetrician in Clinical Practice*, 6 ANN. MED. HEALTH SCI. RES. 74 (2016); Robert J. Stiller, *4 Ways to Lower Your Risk of an Obstetric Malpractice Suit*, MODERNMEDICINE NETWORK (Apr. 1, 2014), <http://www.contemporaryobgyn.net/health-law-policy/4-ways-lower-your-risk-obstetric-malpractice-suit> [<https://perma.cc/JW5B-LDZ6>].

46. See, e.g., PENCE, *supra* note 40, at 82–84, 152; Mary Midgley, *Persons and Non-Persons*, in IN DEFENSE OF ANIMALS 52 (Peter Singer ed., 1985); Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 MONIST 43 (1973), reprinted in THOMAS A. MAPPES & DAVID DEGRAZIA, BIOMEDICAL ETHICS 456 (4th ed. 1973).

47. See MOORE ET AL., *supra* note 38.

48. See, e.g., PENCE, *supra* note 40, at 152; SOCIAL SCIENCE PERSPECTIVES ON MEDICAL ETHICS 270 (George Weisz ed., 1990) (discussing the status of personhood conferred on neonates).

49. See LARRY W. HURTADO, DESTROYER OF THE GODS, EARLY CHRISTIAN DISTINCTIVENESS IN THE ROMAN WORLD 144–48 (2016) (discussing Roman practice of infant exposure); JAMES Z. LEE & WANG FENG, ONE QUARTER OF HUMANITY: MALTHUSIAN MYTHOLOGY AND CHINESE REALITIES, 1700 – 2000, at 61 (1999); PENCE, *supra* note 40, at 152; MICHAEL TOOLEY, ABORTION AND INFANTICIDE (1983); Alberto Giubilini & Francesca Minerva, *After-Birth Abortion: Why Should the Baby Live?*, 39 J. MED. ETHICS 261 (2012); William Saletan, *After-Birth Abortion*, SLATE (Mar. 12, 2012), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2012/03/after\\_birth\\_abortion\\_the\\_pro\\_choice\\_case\\_for\\_infanticide\\_.html](http://www.slate.com/articles/health_and_science/human_nature/2012/03/after_birth_abortion_the_pro_choice_case_for_infanticide_.html)

live human organisms, nor does it allow us to accurately refer to the neonate as “potential life”—as the Supreme Court wrongfully refers to the fetus.<sup>50</sup> An anti-abortion state legislator was recently ridiculed and criticized for not realizing that removal of a dead fetus is not an abortion, leading to discussions of the difficult experience of carrying a dead fetus whose heart is not beating and who is no longer moving—although the legislator corrected her error within a day.<sup>51</sup> The obvious question is why the Supreme Court is not similarly ridiculed for not realizing that the fetus subject to an abortion is clearly and by medical and legal definition alive—a mistake the Court has failed to correct over many decades.

Some might argue that the Court’s confusion is an insignificant mistake in terminology rather than substance. There clearly is a debatable question of “personhood,”<sup>52</sup> and some within that debate could label the fetus as a “potential person,” and hence the fact that the Court uses the wrong terminology and speaks about uncertainty over when “life begins” and refers to “potential life” is arguably insignificant. To the contrary, however, this error matters. It matters that the Court obscures and negates the scientific fact that the fetus is an individual human life, for it allows the Court, in confronting the legal issues, to avoid responsibility for the creation of legal rules that strip personhood and state protection from organisms that are clearly individual human lives. The refusal to acknowledge the scientific certainties about the embryo and fetus also lead the Court to never, in hundreds of pages of opinions on abortion, review the scientific literature on embryonic and fetal development. One would think that our nation’s definitive opinions about the legal status of prenatal life would include a careful review of the medical facts. There are many points of developmental significance in prenatal human development that could be discussed. What about the significance of the embryonic development of the primitive streak at day fifteen? What is the significance of the medical change in terminology from embryo to fetus at eight weeks of development? When does the heart start to beat? What is the course of development of the brain and nervous system? When does fetal hearing begin? What are the characteristic activities of the fetus in the uterus at various stages of development? What do we know about

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[[https://web.archive.org/web/20180608171013/http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2012/03/after\\_birth\\_abortion\\_the\\_pro\\_choice\\_case\\_for\\_infanticide.html](https://web.archive.org/web/20180608171013/http://www.slate.com/articles/health_and_science/human_nature/2012/03/after_birth_abortion_the_pro_choice_case_for_infanticide.html)].

50. See *Roe v. Wade*, 410 U.S. 113, 116 (1973) (stating that “the fetus, at most, represents only the potentiality of life”); Hutton Brown et al., *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 693, 703 (1986).

51. See Danielle Campoamor, *I Carried My Dead Baby to Term & This Is What Anti-Choice Lawmakers Will Never Understand*, ROMPER (Apr. 3, 2017), <https://www.romper.com/p/i-carried-my-dead-baby-to-term-this-is-what-anti-choice-lawmakers-will-never-understand-48720> [<https://web.archive.org/web/20180608171729/https://www.romper.com/p/i-carried-my-dead-baby-to-term-this-is-what-anti-choice-lawmakers-will-never-understand-48720>]; Lucy Westcott, *A Politician Claims Mistake About Miscarriage in Abortion Debate*, NEWSWEEK (Mar. 31, 2017), <http://www.newsweek.com/iowa-abortion-shannon-lundgren-miscarriage-dead-fetus-term-577289> [<https://web.archive.org/web/20180617101857/http://www.newsweek.com/iowa-abortion-shannon-lundgren-miscarriage-dead-fetus-term-577289>].

52. See *supra* notes 46–49 and accompanying text.

maternal-fetal interaction, and even bonding? Both *Roe v. Wade* and subsequent decisions show a remarkable lack of engagement with the scientific and medical facts of embryonic and fetal life, which suggests that the nation's rules for abortion can be fairly debated and determined without discussing such matters. As Professor/Judge Noonan summarized well, “[t]he Court’s opinion appeared to rest on the assumption that the biological reality could be subordinated or ignored by the sovereign speaking through the Court.”<sup>53</sup>

The Court’s denial of the scientific facts, and refusal to discuss or analyze the medical facts about prenatal life, set the stage for debating abortion on an unscientific basis. The Court’s confusions will become the Nation’s confusion. Uncertainty about the social construct of “personhood” is not the same as the Court’s claimed uncertainty about “life,” and that difference matters—analytically, practically, and rhetorically. This is a category confusion with consequences, particularly when made and continued by the United States Supreme Court in the opinions that mandate for the nation the legal rules governing abortion. Given the prestige of science and medicine, it matters that the Court refuses to acknowledge the medical and scientific certainties related to the fetus.

Further, the Court’s claim of agnosticism on when “human life begins” clashes with the Court’s decisions that the unborn throughout pregnancy are not constitutional persons, and that the State’s interests in fetal life do not become “compelling” until viability.<sup>54</sup> Judicial uncertainty about “when life begins”<sup>55</sup> could rationally lead to providing protection as a precautionary matter, for if there is a reasonable risk that pre-viable fetuses are human life, one might want to protect against what otherwise could be millions of deaths. Alternatively, judicial uncertainty about the status of the unborn could lead the Court to defer to democratic actors. Instead, the Court defied the medical and scientific certainties about prenatal life and issued a definitive opinion that mostly stripped the unborn of legal protections, at least in the context of abortion.<sup>56</sup> Indeed, the Court implicitly criticized Texas for “adopting one theory of life,” as though there were any other reasonable scientific or medical views of embryonic and fetal life.<sup>57</sup> The scientific facts relating to the embryonic and fetal stages of human life indeed are not a theory but a matter of reasonable scientific certainty, as is the medical distinction between a dead and living fetus.<sup>58</sup> Similarly, the Court denigrated these scientific certainties regarding embryonic and fetal life by referring to the State’s interest as “protecting the potentiality of human life,”<sup>59</sup> or “potential life,”<sup>60</sup> as though a human fetus

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53. John Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668, 673 (1984).

54. *Roe*, 410 U.S. at 155–56.

55. *Id.* at 152, 159.

56. *Id.* at 158.

57. *Id.* at 162.

58. See AM. ACAD. OF PEDIATRICS, *supra* note 38; MOORE ET AL., *supra* note 38; see also *supra* text accompanying note 38.

59. *Roe*, 410 U.S. at 162.

60. *Id.* at 163.

merely has the “potential” for life. Indeed, one can search in vain through many medical textbooks without finding a single one that states that a human fetus is only “potentially alive,” which would be just as nonsensical a statement as to assert that a human neonate or adolescent was only “potentially alive.”<sup>61</sup>

As to the viability line, the Court’s only explanation is contained in three brief sentences:

With respect to the State’s important and legitimate interest in potential life, the ‘compelling point’ is at viability. This is so because the fetus then presumably has the capacity of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justification.<sup>62</sup>

As has been long-noted,<sup>63</sup> this “seems to mistake a definition for a syllogism.”<sup>64</sup> All the Court has done is restate the definition of viability, without providing a word of explanation as to why viability is the line. The statement’s reference to “biological justification” is also a clear misuse of science, for a pre-viable fetus is not “biologically” less a living human organism than a viable human organism, particularly since “viability” is not a condition of the fetus but rather of the relationship between the fetus and changing medical technology.<sup>65</sup> Thus, as the Court will later discover, but was already anticipated at the time of *Roe*, as medical technology improves, the definition of viability changes without any corresponding change in the fetus as a biological organism, creating the odd situation that the legal status of the fetus changes due to factors completely extrinsic to the fetus.<sup>66</sup>

Obviously, arguments could be constructed as to why being profoundly dependent on another, as in the form found in human pregnancy, makes one less worthy of protection. The Court, however, never bothers to make that argument. From a pro-life perspective, the opposite would be true, for it is particularly the responsibility of the State to protect those who are most vulnerable, dependent, and unable to protect themselves.<sup>67</sup> Certainly the weak and dependent are not less worthy of protection. In any event, debating the Court on viability is useless, for the Court is not a part of the conversation, having never explained, in *Roe* or since, why viability is a satisfactory dividing point for when the State’s interest in prenatal life

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61. I will discuss below whether the Court implicitly left this determination of the status of the unborn with each pregnant woman.

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

63. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

64. *Id.* at 924.

65. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (O’Connor, J., dissenting); Ely, *supra* note 63.

66. See *Casey*, 505 U.S. 833; *Akron*, 462 U.S. 416. This problem was noted at the time of *Roe*. See Ely, *supra* note 63.

67. See Anne-Marie Slaughter, *3 Responsibilities Every Government Has Towards Its Citizens*, WORLD ECON. F. (Feb. 13, 2017), <https://www.weforum.org/agenda/2017/02/government-responsibility-to-citizens-anne-marie-slaughter/> [https://perma.cc/6MJK-FYK9].

can outweigh the woman's abortion liberty. The Court may be using its "reasoned judgment," but if so, it is not willing to give publicly accessible arguments and reasons.

### B. Planned Parenthood v. Casey

The Court's failure to provide publicly accessible reasons for its resolution of the abortion issue continued in the Court's 1992 decision in *Planned Parenthood v. Casey*.<sup>68</sup> In *Casey*, the Court responded to the legitimacy critique of *Roe* with an explicit embrace of an evolving constitution not limited by the text, history, or structure of the document, and with the doctrine of stare decisis.<sup>69</sup> Both of these approaches were about the Court and its power, rather than about the abortion issue itself. In neither case did the Court truly defend, substantively, the balance it had struck between abortion rights and the rights of (or state interests in) prenatal life.

In *Casey*, the Joint Opinion of Justices Kennedy, O'Connor, and Souter at every point represents a majority of Justices and hence speaks for the Court. To the degree the Joint Opinion reaffirmed *Roe*, or invalidated abortion restrictions, the opinion is supported by Justices Blackmun and Stevens, and hence is the opinion of the Court.<sup>70</sup> To the degree the Joint Opinion overruled *Roe's* trimester framework, applied an undue burden standard to limit the application of strict scrutiny, and upheld statutory restrictions on abortion, the holdings are implicitly supported by Chief Justice Rehnquist, and Justices Scalia, White and Thomas. Indeed, this group of four Justices would have gone much farther than the Joint Opinion by overruling *Roe v. Wade's* holding that abortion is a fundamental right, and thereby would have allowed states to prohibit previability abortions, presumably with exceptions for life of the mother and likely other specified circumstances.<sup>71</sup>

The Joint Opinion's explicit embrace of evolving constitutionalism, and rejection of historically-bounded originalism, was eloquent, even poetic, in arguing for evolving constitutionalism as a basis for a fundamental abortion liberty.<sup>72</sup> While the Joint Opinion's discourse on women and abortion was distorted from a pro-life perspective, which will be addressed below, what is most striking is the Joint Opinion's continuing failure to apply evolving constitutionalism to the rights of the

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68. *Casey*, 505 U.S. 833. The three-Justice Joint Opinion in *Planned Parenthood v. Casey* in all of its parts constitutes the binding rules and precedent of the case, under standard rules of constitutional construction.

69. *Casey*, 505 U.S. at 845–46. For a fuller critique of the Court's stare decisis discussion, see Linton, *supra* note 20.

70. *Casey*, 505 U.S. at 912, 922; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 846–47 (4th ed. 2011); Stephen G. Gilles, *Why the Right to Elective Abortion Fails Casey's Own Interest-Balancing Methodology—And Why It Matters*, 91 NOTRE DAME L. REV. 691, 696 n.26 (2015).

71. *Casey*, 505 U.S. at 944; CHEMERINSKY, *supra* note 70, at 847–48; Gilles, *supra* note 70, at 696 n.26.

72. *Casey*, 505 U.S. at 846–53.

unborn.<sup>73</sup> Thus, the Joint Opinion justified the abortion liberty in terms of the “right to define one’s own concept of existence,”<sup>74</sup> but ignored the unborn child’s very right to exist. From a pro-life perspective, the Joint Opinion pondering the “mystery of human life”<sup>75</sup> is an odd juxtaposition to an abortion right often effectuated by tearing apart the living body of a fetus.<sup>76</sup> For the fetus, perhaps the Joint Opinion could have reflected instead on the mystery of death? The Joint Opinion is tone-deaf; its intentionally-elevated rhetoric on the abortion right demonstrates that it never truly considers the impact of abortion on the unborn child.

The Joint Opinion repeated *Roe’s* failure to explain its one-sided application of evolving constitutionalism only to the abortion right, and not to prenatal life. Hence, while there are many pages justifying evolving constitutionalism and its application to the abortion liberty, there is not a single word on the possibility of applying this vaunted evolving constitutionalism to prenatal life. If evolving constitutionalism is the correct method of constitutional interpretation, why not apply it fully to the abortion issue, including to the rights of the unborn? Indeed, prenatal life is barely mentioned, occupying only a few lines.<sup>77</sup> As a quantitative matter, there are six and one-half pages devoted to justifying the abortion liberty,<sup>78</sup> comprising well over 200 lines of text, and perhaps five lines of text analyzing the opposing consideration of prenatal life.<sup>79</sup> On a quantitative basis, the abortion liberty gets perhaps 98% of the Joint Opinion’s attention, that of prenatal life perhaps 2%, and the possibility of unborn life having constitutional rights, 0%.

The Joint Opinion followed *Roe’s* line of reducing discussion of prenatal life to a very brief mention of the “State interest” involved,<sup>80</sup> as though abortion is simply a matter of personal liberty versus the oppressive hand of the law, rather than a potential conflict of one human being’s liberty against another human being’s right to exist. The Joint Opinion whitewashed the death of the unborn under the antiseptic language of “terminating a pregnancy,”<sup>81</sup> thus allowing itself and the reader to pass quickly over the obvious point that when a “pregnancy is terminated” a life is also ended. Certainly, there is nothing in the Joint Opinion to give the impression that the Court was considering, even for a moment, the possible application of evolving constitutionalism to the rights of the unborn. The unborn are the hidden ghosts, the elephant in the room, the skeleton in the Court’s closet,

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73. *Id.*

74. *Id.* at 851.

75. *Id.*

76. *See* *Stenberg v. Carhart*, 530 U.S. 914, 925 (2000) (describing “the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus”); *see generally* WARREN M. HERN, *ABORTION PRACTICE* (1990).

77. *Casey*, 505 U.S. at 852–53.

78. *Id.* at 846–53.

79. *Id.* at 852–53.

80. *Id.* at 853.

81. *Id.* at 850, 853.

the virtually unmentionable. It is as though the Court wants to justify its abortion decisions while giving only a glancing consideration of what abortion is and does. This is hardly a giving of “reasons.”

Among its brief mentions of prenatal life, the Joint Opinion does speak of consequences “depending on one’s beliefs, for the life or potential life that is aborted.”<sup>82</sup> This language of “beliefs” and “potential life” repeats *Roe*’s fundamental confusion about the science of prenatal life.<sup>83</sup> While the philosophical and legal “personhood” of the fetus is debatable, the fetus is every much as “alive” as anyone reading this page, and the status of the individual fetus as dead or alive is ascertainable as a medical fact.<sup>84</sup> The Court again confuses philosophical and religious debate over “personhood” which is a matter of “belief,” with the scientific certainties. This confusion matters, for it allows the Court to pretend that whether abortion takes a human life is a matter of “belief” rather than scientific fact.<sup>85</sup>

The Joint Opinion’s failure to consider rights and interests related to prenatal life, however, is not merely implicit. The Joint Opinion explicitly and specifically refused to defend the balance dictated in *Roe* between the abortion liberty and the life of the unborn.<sup>86</sup> The Joint Opinion stated that the balance “was a subject of debate both in *Roe* itself and in decisions following it,” and that “the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”<sup>87</sup> Thus, the Joint Opinion declined to even assert that the balance struck in *Roe* was correct, apart from *stare decisis*, let alone defend it with reasons.

The Joint Opinion’s long discussion of *stare decisis* repeated this specific refusal to substantively defend *Roe*’s respective weighing of the abortion liberty and prenatal life. Hence, the Court stated:

On the other side of the equation is the interest of the State in the protection of potential life. The *Roe* Court recognized the State’s ‘important and legitimate interest in protecting the potentiality of human life.’ . . . The weight to be given this state interest, not the strength of the woman’s interest, was the difficult question faced in *Roe*. We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interests came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*’s wake we are satisfied

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82. *Id.* at 852.

83. *Id.*

84. See AM. ACAD. OF PEDIATRICS, *supra* note 38; MOORE ET AL., *supra* note 38; MOORE, *supra* note 39; see also *supra* text accompanying notes 38–39.

85. See sources cited *supra* note 84.

86. *Casey*, 505 U.S. at 846–53; Gilles, *supra* note 70, at 692–95, 717–20.

87. *Casey*, 505 U.S. at 853.

that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding.<sup>88</sup>

One point must be emphasized: the Joint Opinion determined that the “soundness of *Roe's* resolution of the issue” was not relevant to their decision.<sup>89</sup> Hence, the *Casey* Court substantively refused to even attempt to defend the core of *Roe*, its resolution of the conflict between the abortion liberty, and prenatal life. Further, even as the Court refused to defend *Roe*, the Court repeated *Roe's* flawed and unscientific language of “the potentiality of human life.”<sup>90</sup>

The Court's approach to justifying its abortion holdings is like a shell game where the justifications are always to be found somewhere else and remain ever hidden. Despite the length of the Court's opinion in *Roe v. Wade*, the Court failed to provide reasons for the most important parts of its decision, including the viability line, and its failure to consider the rights of the unborn in the light of evolving constitutionalism and new developments in scientific knowledge about prenatal life. Indeed, the known scientific facts about embryonic and fetal development are never mentioned in *Roe*, and thus are treated as irrelevant. *Casey* repeats these same failures as to viability and the rights and status of the unborn by essentially passing over these issues without cogent explanation. *Casey* goes further, however, by explicitly refusing to examine, let alone defend, the correctness of *Roe* as a matter of constitutional law and interpretation. *Casey* hence looks back to *Roe* to justify holdings that *Roe* itself never actually justified, in terms of providing reasons. Since *Roe* and *Casey* are the primary, and really only, moments in the Court's many abortion cases and numerous decisions, when it either creates or reevaluates its core abortion holdings, the result is that the Court has never provided reasons for the balance it has struck between the abortion liberty and prenatal life. It is not merely that the Court's reasoning is weak, but rather that the Court fails and refuses to provide reasons at all. Hence, *Roe* and *Casey* are acts of power lacking in reason. The Court's opinions are about the Court's power, and it is that power, rather than the Court's substantive abortion holdings, that the Court defends.

The *Casey* Court's long discussion of stare decisis continues this emphasis, in the Court's abortion decisions, on justifying the Court's power rather than the Court's decisions. The Joint Opinion refuses to say whether *Roe* is right, but argues that reaffirming even an erroneous decision on a highly contentious issue is better for the nation than overruling it in the midst of public controversy.<sup>91</sup> The Joint Opinion thus argues that democratic activism against a decision of the Supreme Court is a reason for the Court to reaffirm that decision regardless of its correctness as a matter of constitutional interpretation.<sup>92</sup> Instead of showing respect for public

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88. *Id.* at 871.

89. *Id.*

90. *Id.*

91. *Id.* at 864–69.

92. *Id.*

and democratic activism on an issue of public concern, the Court treats such activism as an affront to the Court and even to the rule of law.

The Joint Opinion seems obsessed with opposition to *Roe*, noting it repeatedly.<sup>93</sup> Indeed, the Court is obsessed with its own inability to stop that opposition, characterizing *Roe* as a case where the Court “calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”<sup>94</sup> Yet the Court is frustrated by the fact that [abortions] “divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense.”<sup>95</sup>

Here, the Court gets its history entirely wrong. However controversial abortion was in the late 1960s and early 1970s, its grip on the national consciousness was minor compared to the major issues of the day, including the Vietnam War, and racial, economic, and environmental issues.<sup>96</sup> Abortion itself was only one part of a broader subset of the larger issues related to the sexual revolution and the women’s movement, and from the vantage point of that time not the most important.<sup>97</sup> Religious groups like the Southern Baptist Convention that would later become bastions of a strict anti-abortion position were trying to position themselves as presenting a compromise position regarding what they viewed as “difficult decisions about abortion.”<sup>98</sup> Indeed, some argue that Southern Baptists generally were “pro-choice” at the time of *Roe*.<sup>99</sup> Views on abortion were typically not a high priority in evaluating candidates for the Supreme Court. Democratic candidate George McGovern was lambasted by anti-abortion Democrats as the candidate of “acid, amnesty and abortion,”<sup>100</sup> even though he viewed abortion as an issue best

93. *Id.* at 853, 860, 861, 867, 869.

94. *Id.* at 867.

95. *Id.* at 869.

96. See Jennifer Rosenberg, *Vietnam, Watergate, Iran and the 1970s*, THOUGHTCO. (May 7, 2018), <https://www.thoughtco.com/1970s-timeline-1779954> [<https://web.archive.org/web/20180608172554/https://www.thoughtco.com/1970s-timeline-1779954>]; *The Sixties: Moments in Time*, PBS SOCAL, [http://www.pbs.org/opb/thesixties/timeline/timeline\\_text.html](http://www.pbs.org/opb/thesixties/timeline/timeline_text.html) [<https://perma.cc/R83F-DEV3>] (last visited July 10, 2018).

97. See JEFFREY ESCOFFIER, GLBTQ, THE SEXUAL REVOLUTION, 1960-1980 (2004), [http://www.glbqtarchive.com/ssh/sexual\\_revolution\\_S.pdf](http://www.glbqtarchive.com/ssh/sexual_revolution_S.pdf) [<https://perma.cc/SXV4-K8C8>]; *The 1960s-70s American Feminist Movement: Breaking Down Barriers for Women*, TAVAANA, <https://tavaana.org/en/content/1960s-70s-american-feminist-movement-breaking-down-barriers-women> [<https://perma.cc/FP92-YKEK>] (last visited July 10, 2018) (“The feminist movement of the 1960s and ‘70s originally focused on dismantling workplace inequality, such as denial of access to better jobs and salary inequality, via anti-discrimination laws.”).

98. *Southern Baptist Convention Resolutions on Abortion*, JOHNSTON’S ARCHIVE (Nov. 7, 2010), <http://www.johnstonsarchive.net/baptist/sbcabres.html> [<https://perma.cc/Q9VQ-LEVU>].

99. See Joshua Holland, *When Southern Baptists Were Pro-Choice*, MOYERS (July 17, 2014), <http://billmoyers.com/2014/07/17/when-southern-baptists-were-pro-choice/> [<https://web.archive.org/web/20180608173756/http://billmoyers.com/2014/07/17/when-southern-baptists-were-pro-choice/>]; *Resolutions Search*, S. BAPTIST CONVENTION, <http://www.sbc.net/resolutions/year/1971> (Resolutions Search “1971”).

100. See Timothy Noah, “*Acid, Amnesty, and Abortion*”: *The Unlikely Source of a Legendary Smear*, NEW REPUBLIC (Oct. 21, 2012), <https://newrepublic.com/article/108977/acid-amnesty-and-abortion-unlikely-source-legendary-smear> [<https://web.archive.org/web/20140813035636/>

left to the states, while Richard Nixon positioned himself as personally pro-life but instructed the federal government to defer to the States, even when the States legalized abortion.<sup>101</sup> States were coming to diverse conclusions as they engaged the issue legislatively and democratically, and the overall trend of the law was toward “liberalization of abortion statutes,” as noted in *Roe*.<sup>102</sup> Abortion had not yet settled fully into the left v. right, Democratic v. Republican, identity politics of our day, and hence there was room for fluidity on the issue in the culture. The truth is that *Roe*, rather than helping end a national division on abortion, radically increased divisions on abortion, and helped nationalize what had been primarily a state law issue.<sup>103</sup>

It is surprising that the Joint Opinion would have such a distorted historical understanding of *Roe*, when the contrary historical understanding has been well described by one of the Court’s strongest advocates of abortion rights, Justice Ginsburg. Hence, Justice Ginsburg famously opined that:

*Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures. In place of the trend “toward liberalization of abortion statutes” noted in *Roe*, legislatures adopted measures aimed at minimizing the impact of the 1973 rulings . . . .<sup>104</sup>

The Court’s distorted historical understanding is matched by the Court’s distorted understanding of its relationship to the people, country, and Constitution. From the Court’s point of view, to admit error in *Roe*, “if error there was,” would undermine the very legitimacy of the country.<sup>105</sup> The Court’s first premise in this strange argument is that correcting error would undermine the Court’s legitimacy, while refusing to overrule an erroneous ruling on a major constitutional issue would uphold the Court’s legitimacy.<sup>106</sup> The Court’s second premise is that reconsidering and overruling a controversial decision amidst continued opposition would undermine legitimacy, rather than be seen as a sign of appropriate reconsideration.<sup>107</sup> The Court’s third premise is that an undermining of the Court’s legitimacy would similarly undermine the country’s legitimacy, the rule of law, and

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<https://newrepublic.com/article/108977/acid-amnesty-and-abortion-unlikely-source-legendary-smear>; Gerhard Peters & John T. Woolley, *Richard Nixon: Statement About Policy on Abortions at Military Base Hospitals in the United States*, AM. PRESIDENCY PROJECT (Apr. 3, 1971), <http://www.presidency.ucsb.edu/ws/?pid=2963> [<https://perma.cc/4KNK-BP3N>].

101. Peters & Woolley, *supra* note 100.

102. *Roe v. Wade*, 410 U.S. 113, 139–40 (1973).

103. *Id.*

104. Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985) (footnote number omitted).

105. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).

106. *Id.* at 866–68.

107. *Id.*

the self-confidence of the American people.<sup>108</sup> Hence, the belief of the people in themselves as:

[A] Nation of people who aspire to live according to the rule of law . . . is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country . . . The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.<sup>109</sup>

Thus, reversing an erroneous decision and correcting it would undermine the rule of law and the very legitimacy of the nation.<sup>110</sup>

The Court's rhetoric is that of any sovereign who claims they must cling to power and not admit a mistake "for the sake of the people" rather than themselves, and is just as believable. There are echoes here of Sophocles' King Creon, who refused to reconsider his cruel decree lest it show weakness and bring the law and state into disrepute, producing anarchy.<sup>111</sup> One would hope the Justices do not believe their own rhetoric, but suspects that their self-delusion does rise to that level. Somehow, the Justices persuaded themselves that for the Court to overrule *Roe*, even if *Roe* was wrongly decided, would undermine the very legitimacy of the nation.

The Court's rhetoric turns to the bizarre when it portrays Americans as being "tested by following" the Supreme Court.<sup>112</sup> These brave patriots who "follow" the Supreme Court do so by bravely refusing to "force" the "reversal" of the Court's decisions.<sup>113</sup> Of course there is no way to actually "force" the reversal of a Supreme Court decision, but the language is a clue as to the Court's distorted thinking. Another clue is the Court's implicit comparison of opposition to *Brown I*<sup>114</sup> to opposition to *Roe*.<sup>115</sup> After *Brown I & Brown II*,<sup>116</sup> governmental officials flagrantly refused to implement the Court's desegregation ruling for nearly a generation.<sup>117</sup> Fifteen years after *Brown*, the vast majority of African-American children in the South were still attending fully segregated schools, and in some states not a single African-American child was attending a publicly integrated school.<sup>118</sup> The

108. *Id.*

109. *Id.* at 868.

110. *Id.*

111. See Sophocles, *Antigone*, in CLASSICAL TRAGEDY GREEK & ROMAN 253, 266–80 (Robert W. Corrigan ed., Dudley Fitts & Robert Fitzgerald trans., 1990).

112. *Casey*, 505 U.S. at 868.

113. *Id.* at 867.

114. *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483 (1954).

115. *Casey*, 505 U.S. at 867.

116. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294 (1955).

117. See *Brown v. Board at Fifty: "With an Even Hand": The Aftermath*, LIBR. CONGRESS, <http://www.loc.gov/exhibits/brown/brown-aftermath.html#obj182> [https://perma.cc/PB2C-TPNR] (last visited July 10, 2018).

118. Walter Goodman, *Brown v. Board of Education: Uneven Results 30 Years Later*, N.Y. TIMES, May 17, 1984, <http://www.nytimes.com/1984/05/17/us/brown-v-board-of-education-uneven-results-30-years-later.html?pagewanted=all>.

opposition to *Brown* occurred through government officials directly disobeying the Court's decision.<sup>119</sup> As to abortion, however, there is nothing comparable. *Roe* instantly and successfully legalized elective abortion throughout the United States.<sup>120</sup> The Court's order was obeyed by government officials everywhere.<sup>121</sup> There have been tens of millions of legal abortions performed in the United States since *Roe v. Wade*.<sup>122</sup> The *Casey* Court has fundamentally confused the normal and appropriate uses of democratic channels and freedom of speech with disobeying a court order and precedent.

For the Court to consider that it has a right to command the people to *accept* a constitutional decision, in the sense of giving up all efforts to use democratic and lawful channels to overrule and limit it, is a profound misunderstanding of *Marbury v. Madison*<sup>123</sup> and of the role of the Court in a democracy. The Court cannot command the minds of the people as to the meaning of the Constitution for we are not a totalitarian society. The Court has a constitutional obligation to be able to perceive the difference between legitimate and longstanding disagreement with the Court's precedents, and disobedience of a precedent. Without such a distinction democracy falls and the principle of judicial review is pushed to the breaking point. At the point at which the Court perceives lawful and democratic opposition to its decisions as a reason not to reconsider or overrule even an erroneous decision, the Court has moved far beyond its mandate. The Court has moved from being the servant of the Constitution and the people, to attempting to make the people the servant of the Court.

The Court's explicit statements demonstrate clearly that it did *not* truly reconsider the correctness of *Roe* in *Casey*, but instead relied on a distorted understanding of *stare decisis* to avoid truly reconsidering the decision on its constitutional merits. *Roe* and *Casey* are acts of raw judicial power, but they do not provide reasons for the most important rules the Court imposes on the country. Indeed, *Roe* and *Casey* adapt the old adage of "my country right or wrong" to "my Court right or wrong." For those who still seek to use reason to discern what is "right" about the Constitution and abortion, neither *Roe* nor *Casey* can supply answers.

Indeed, the most obvious reading of *Casey* is that the majority viewed *Roe* to be substantively incorrect, as a matter of constitutional interpretation. Four Justices

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119. *Brown at 60: The Southern Manifesto and "Massive Resistance" to Brown*, NAACP LDF, <http://www.naacpldf.org/brown-at-60-southern-manifesto-and-massive-resistance-brown> [<https://perma.cc/UJ22-FENR>] (last visited July 10, 2018).

120. See Sarah Kliff, *CHARTS: How Roe v. Wade Changed Abortion Rights*, WASH. POST, Jan. 22, 2013, [https://www.washingtonpost.com/news/wonk/wp/2013/01/22/charts-how-roe-v-wade-changed-abortion-rights/?utm\\_term=.abea8781401b](https://www.washingtonpost.com/news/wonk/wp/2013/01/22/charts-how-roe-v-wade-changed-abortion-rights/?utm_term=.abea8781401b).

121. See *id.*

122. Susan B. Hansen, *State Implementation of Supreme Court Decisions: Abortion Rates Since Roe v. Wade*, 42 J. POL. 372 (1980).

123. *Marbury v. Madison*, 5 U.S. 137 (1803).

directly stated that *Roe* should be overruled.<sup>124</sup> As one of them, Chief Justice Rehnquist, noted, the Joint Opinion “cannot bring itself to say that *Roe* was correct as an original matter . . . .”<sup>125</sup> Presumably, if all three Justices of the Joint Opinion believed *Roe* was correctly decided, they would have said so, and not felt the need to hide behind *stare decisis*. The Joint Opinion rather coyly states that “[w]e do not need to say whether each of us . . . would have concluded, as the *Roe* Court did,” that bans on abortion prior to viability, even when “subject to certain exceptions” are unconstitutional.<sup>126</sup> Why include such a sentence if it does not signal the substantive constitutional views of at least one of the authors? Hence, the logical conclusion is that somewhere between five and seven Justices believed *Roe* was incorrect “as an original matter,” with only two Justices, including the author of *Roe*, willing to assert *Roe*’s substantive correctness.<sup>127</sup> Upon examination, then, *Casey* is an exercise in reaffirming a prior decision that the majority most probably believe to be, as an original matter, erroneous; the ultimate basis of that reaffirmation is not that the decision is correct but rather that the Court must defend its institutional integrity and reputation by not admitting its mistakes.

## II. WOMEN’S RIGHTS AND GENDER EQUALITY

The conventional narrative views abortion rights as fundamental to women’s rights and gender equality. This narrative is so well-known that it needs little elaboration. The abortion liberty is seen as fundamental to women’s autonomy in allowing them control over their lives, bodies, sexuality, and reproductive functions. This autonomy is perceived as necessary to allow women to compete equally with men in the spheres of employment, education, politics, and civic life, and to free women from patriarchal control. Given the burdens of stereotyped gender expectations related to maternity and pregnancy, women’s equality requires the abortion liberty.<sup>128</sup>

Upon examination, the abortion rights movement is based on presuppositions that imply the inferiority of women. The abortion rights movement distrusts women profoundly, both individually and as a group. Further, the abortion liberty in the context of contemporary American society may hurt women more than it helps

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124. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 944 (1992).

125. *Id.* at 953.

126. *Id.* at 871.

127. See Gilles, *supra* note 70, at 717–20.

128. See, e.g., WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 5; Ginsburg, *supra* note 104; Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53–59 (1977); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Katha Pollitt, *Can a Feminist Be Pro-Life?*, NATION (Mar. 10, 2017), <https://www.thenation.com/article/can-a-feminist-be-pro-life/> [https://perma.cc/P4JB-TNZX]. For further citations, see Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL’Y 889, 891 n.3 (2011).

them, as it is based on a misunderstanding of the primary obstacles to equality and flourishing for women in contemporary America.<sup>129</sup>

#### A. *Roe and Women's Rights*

It is generally recognized that *Roe v. Wade* was not written as a women's rights or gender equality opinion.<sup>130</sup> Indeed, the Court's summary statement focused on how the Court's holdings vindicate the physician's, rather than the woman's, control over abortion:

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently and primarily, a medical decision, and basic responsibility for it must rest with the physician.<sup>131</sup>

Indeed, the Court strangely states as well, in summary of its rule creating elective abortion until viability: "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."<sup>132</sup>

The Court's language seems strangely backwards, as it sounds literally as though the abortion decision belongs to the physician in consultation with the woman, rather than belonging to the woman in consultation with her doctor. The reference that the pregnancy "should be terminated" in the doctor's "medical judgment"<sup>133</sup> is very strange in a context where the vast majority of abortions will not have any medical need or indication.<sup>134</sup>

Justice Ginsburg aptly commented that in *Roe*, "the view you get is the tall doctor and the little woman who needs him."<sup>135</sup> Professor Petchesky, another feminist abortion rights advocate and the sole author cited by the *Casey* Joint

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129. See, e.g., Bachiochi, *supra* note 128; Sidney Callahan, *Abortion & the Sexual Agenda*, in 62 REFERENCE SHELF 34, 44 (Janet Podell ed., 1990); Erika Bachiochi, *A Putative Right in Search of a Constitutional Justification: Understanding Planned Parenthood v. Casey's Equality Rationale and How it Undermines Women's Equality*, 35 Quinnipiac L. Rev. 593 (2017).

130. See CHEMERINSKY, *supra* note 70, at 844; Ginsburg, *supra* note 104, at 382–83.

131. *Roe v. Wade*, 410 U.S. 113, 165–66.

132. *Id.* at 163.

133. *Id.*

134. GUTTMACHER INST., FACT SHEET: INDUCED ABORTION IN THE UNITED STATES (2018), [https://www.guttmacher.org/sites/default/files/factsheet/fb\\_induced\\_abortion.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf) [<https://perma.cc/GEH3-WMTU>]; Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. SEXUAL & REPROD. HEALTH 110 (2005).

135. Robert Barnes, *The Forgotten History of Justice Ginsburg's Criticism of Roe v. Wade*, WASH. POST, Mar. 2, 2016, [https://www.washingtonpost.com/politics/courts\\_law/the-forgotten-history-of-justice-ginsburgs-criticism-of-roe-v-wade/2016/03/01/9ba0ea2e-dfe8-11e5-9c36-e1902f6b6571\\_story.html?utm\\_term=.689c643c6def](https://www.washingtonpost.com/politics/courts_law/the-forgotten-history-of-justice-ginsburgs-criticism-of-roe-v-wade/2016/03/01/9ba0ea2e-dfe8-11e5-9c36-e1902f6b6571_story.html?utm_term=.689c643c6def).

Opinion in regard to gender equality and abortion,<sup>136</sup> is in accord: “Of course the actual formulation of *Roe v. Wade* and *Doe v. Bolton* did not stress the woman’s right or capacity to choose so much as the physician’s; they were decisions that relied on and bolstered medical authority.”<sup>137</sup>

As a matter of constitutional doctrine, the *Roe* Court’s reference to “the right of the physician to administer medical treatment according to his professional judgment”<sup>138</sup> is clearly erroneous. Since the Court’s rejection of economic substantive due process rights in 1937, there has been no such thing as a fundamental right to practice a profession, job, or vocation at all, let alone a fundamental right to practice in a manner contrary to the dictates of governmental regulation.<sup>139</sup> The one exception would be in the context of the Comity Clause, but the Clause is only relevant if there is discrimination as to state or local residence.<sup>140</sup> Physicians are only permitted to bring challenges to abortion statutes by virtue of third-party standing, which allows the physician to rely on the woman’s abortion right, since the physician has no right of his or her own to assert.<sup>141</sup> Justice Blackmun is thus clearly in error to summarize his decision as vindicating physician rights to practice medicine free of governmental control, for such right does not exist.<sup>142</sup>

Nonetheless, this error indicates that Justice Ginsburg and Professor Petchesky are correct about *Roe* and physicians: in the mind of the author, Justice Blackmun, and apparently the entire Court, the opinion is really about the freedom of doctors rather than the freedom of women. This is also underscored by the one regulation of abortion which the *Roe* opinion explicitly permits in the first trimester, which is the requirement that abortions be performed only by physicians.<sup>143</sup> Hence, *Roe* frees women from the control of the State as to abortion, only to hand her over to what was in 1973 an overwhelmingly male-dominated medical profession.<sup>144</sup>

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136. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (citing ROSALIND P. PETCHESKY, ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 109, 133 n.7 (2d. ed. 1990)).

137. PETCHESKY, *supra* note 136, at 309.

138. *Roe*, 410 U.S. at 165.

139. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Wayne McCormack, *The Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397 (1993); Note, *State Views on Economic Due Process: 1937-1953*, 53 COLUM. L. REV. 827 (1953).

140. See U.S. CONST. art. IV, § 2, cl. 1; Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

141. See Singleton v. Wulff, 428 U.S. 106 (1976); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 306–11 (1984).

142. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 939 (1992).

143. *Roe*, 410 U.S. at 165.

144. See ANN K. BOULIS & JERRY A. JACOBS, THE CHANGING FACE OF MEDICINE: WOMEN DOCTORS AND THE EVOLUTION OF HEALTH CARE IN AMERICA (2008); Eliza L. Chin, *Historical Perspective*, in THIS SIDE OF DOCTORING: REFLECTIONS FROM WOMEN IN MEDICINE 1 (Eliza L. Chin ed., 2002); Aaron Young et al., *A Census of Actively Licensed Physicians in the United States*, 101 J. MED. REG. 8 (2014).

Justice Ginsburg's statement that the *Roe* Court envisions "the little woman" who needs the "tall doctor" further suggests that *Roe* itself is based on a demeaning view of women.<sup>145</sup> Rhetorically and practically, it seems that the *Roe* Court did not really trust women with the abortion right, and hence felt the need to place women under the control of a male-dominated medical profession.<sup>146</sup> While a charitable view of the *Roe* Court would state that the Court placed women in the hands of the medical profession to protect the safety of women, given the Court's erroneous rhetoric about physician's rights, this charitable view is not a complete explanation. How do you explain the Court preferring to summarize the abortion right in terms of a nonexistent physician's right, rather than in terms of the women's right the Court had just established? In addition, the *Roe* Court stressed the safety of abortion, stating that it was much safer in the first trimester than continuing the pregnancy and proceeding to childbirth.<sup>147</sup> If abortion is so safe, could it not perhaps be performed by other competent medical personnel, besides doctors, and hence made more accessible? *Roe* rhetorically and practically subjects women to the control of physicians' judgment, even as to nonmedical aspects of the abortion decision, suggesting that more than safety is at issue in the Court's focus on physicians' rights and lack of focus on women's rights.

### B. *Casey and Equality*

The Court in *Casey* would have certainly been well aware of the critique of *Roe* as insufficiently attentive to gender equality concerns, particularly given that the critique had been publicly voiced by a member of the Court.<sup>148</sup> While the Court did not attempt to supplement the *Roe* Court's substantive due process analysis with formal analysis under the equal protection clause, the Joint Opinion did discuss equality in the section on stare decisis.<sup>149</sup> There, in discussing the reliance interest of *Roe* as a precedent, the Joint Opinion stated: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>150</sup>

Abortion rights proponents seem not to have noticed the problematic nature of such a claim, and in particular how its presuppositions imply the inferiority of women. First, one needs to ask: why do women need abortion to be "equal" to men? The obvious answer is that men don't get pregnant, and therefore an abortion is the closest a woman can come to being like a man. Abortion liberty allows a woman seemingly to escape what a man automatically escapes, the risk of becoming pregnant, through the liberty to end that pregnancy at will. But isn't basing women's equality on needing to be like—or as nearly like as possible—a man, itself a

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145. See Ginsburg, *supra* note 104.

146. See *Casey*, 505 U.S. at 953.

147. *Roe*, 410 U.S. at 145–46.

148. See Ginsburg, *supra* note 104.

149. *Casey*, 505 U.S. at 862.

150. *Id.* at 856.

discriminatory premise?<sup>151</sup> Are abortion rights advocates, including the Court in *Casey*, not implicitly admitting that they believe male sexuality and being male is superior to female sexuality and being female? Rex Harrison famously sang, in a classic presentation of sexism: “Why can’t a woman be more like a man?”<sup>152</sup> It seems that the abortion rights movement is singing off the same song sheet.<sup>153</sup>

It is interesting how few struggle, in American culture, with the inability of men to become pregnant and bear children, and how that might mark men as inferior or disadvantaged. By contrast, the concern that women’s capacity to become pregnant might disadvantage women is foundational to abortion rights literature and rhetoric.<sup>154</sup> It would seem that this foundational prejudice and sexism in our culture has been absorbed as a presupposition by the abortion rights movement.<sup>155</sup> Hence, pro-life feminist Sidney Callahan notes:

While Margaret Mead stressed the ‘womb envy’ of males in other societies, it has been more or less repressed in our own. In our male-dominated world, what men don’t do, doesn’t count. Pregnancy, childbirth, and nursing have been characterized as passive, debilitating, animal-like. The disease model of pregnancy and birth has been entrenched. This female disease or impairment, with its attendant “female troubles,” naturally handicaps women in the ‘real’ world of hunting, war, and the corporate fast track. Many . . . cite the ‘basic injustice that women have to bear the babies,’ instead of seeing the injustice in the fact that men cannot . . . ; unfortunately, many women have fallen for the phallic fallacy.<sup>156</sup>

Practically speaking, moreover, the abortion liberty does nothing to help women compete with men, unless women are willing to use it by actually undergoing abortions. Women have to pay a price to be “nearly like” a man: they have to choose and undergo an abortion. Men, of course, do not have to pay such a price to avoid pregnancy. Hence, if women need abortion to be equal to men, they will never be equal, because they have to pay a higher price for this equality than the man: actually choosing and undergoing abortion.

A part of this higher price that women must pay for equality is, in significant part, the willingness to choose an act which many, perhaps most, women view as

151. See Callahan, *supra* note 129.

152. See, e.g., *A Hymn to Him Lyrics*, ST LYRICS, <https://www.stlyrics.com/lyrics/myfairlady/ahymntohim.htm> [<https://perma.cc/Q7JN-DBMT>] (last visited July 10, 2018); cf. Geoffrey P. Hunt, *Why Can't a Woman Be More Like a Man*, AM. THINKER (Mar. 25, 2012), [http://www.americanthinker.com/articles/2012/03/why\\_cant\\_a\\_women\\_be\\_more\\_like\\_a\\_man.html](http://www.americanthinker.com/articles/2012/03/why_cant_a_women_be_more_like_a_man.html) [<https://perma.cc/8RR5-9355>].

153. See Bachiochi, *supra* note 129, at 633-34.

154. See Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L.L. REV. 329 (2010); Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323 (1995).

155. See Callahan, *supra* note 129.

156. *Id.*

causing the death of her offspring.<sup>157</sup> Here is where the abortion rights movement runs into one of its fundamental problems: women who have various degrees of anti-abortion views.

If such women were rare, the problem would be difficult enough. However, to the contrary, polling over several decades has shown little gender gap on abortion. For example, “Gallup’s abortion polling since the mid-1970s finds few remarkable distinctions between men’s and women’s views on the legality of abortion.”<sup>158</sup> The polling by Pew similarly reveals “[n]o gender gap in views on whether abortion should be legal.”<sup>159</sup> Interestingly, polling in the U.K. finds women to be more anti-abortion than men.<sup>160</sup> Behind this polling on the legality of abortion, moreover, it appears that a majority of Americans believe that life either begins at conception or by implantation, and hence by implication would believe that all surgical abortions and most pharmaceutical abortions would end a human life.<sup>161</sup>

Abortion polling is notoriously subject to how the questions are worded, leading both sides able to manipulate the questions and to some degree the results.<sup>162</sup> However, it is fairly clear that among both women and men there are minorities who truly exemplify either the pro-life orthodoxy of prohibiting all abortions (except those necessary to save the life of the mother), or the abortion rights orthodoxy of supporting elective abortion through viability or later, as well as supporting late term abortion methods such as intact D & X abortion (also known as partial birth abortion). Most women and men are somewhere in the middle, with their views of abortion dependent on the stage of pregnancy and the circumstances of the woman.<sup>163</sup> Most Americans when asked support *Roe*, but at the same time a large majority of both women and men say they would support prohibiting abortion after the first trimester, a position inconsistent with *Roe*.<sup>164</sup> Polling varies on whether

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157. *Id.* at 44.

158. Lydia Saad, *Education Trumps Gender in Predicting Support for Abortion*, GALLUP (Apr. 28, 2010), <http://news.gallup.com/poll/127559/education-trumps-gender-predicting-support-abortion.aspx> [<https://web.archive.org/web/20180709174325/https://news.gallup.com/poll/127559/education-trumps-gender-predicting-support-abortion.aspx>].

159. *No Gender Gap in Views on Whether Abortion Should Be Legal*, PEW RES. CTR. (Apr. 7, 2016), [http://www.pewresearch.org/fact-tank/2017/07/07/on-abortion-persistent-divides-between-and-within-the-two-parties-2/ft\\_16-04-07\\_abortion\\_demographics/](http://www.pewresearch.org/fact-tank/2017/07/07/on-abortion-persistent-divides-between-and-within-the-two-parties-2/ft_16-04-07_abortion_demographics/) [<https://perma.cc/JD8N-WC7P>].

160. Martin Robbins, *Why Are Women More Opposed to Abortion?*, GUARDIAN, Apr. 30, 2014, <https://www.theguardian.com/science/the-lay-scientist/2014/apr/30/why-are-women-more-opposed-to-abortion> [<https://perma.cc/YW4Z-PAZY>].

161. *Newsweek Poll Shows Majority of Americans Believe Life Begins at Conception*, LIFESITE NEWS (June 2, 2003), <https://www.lifesitenews.com/news/newsweek-poll-shows-majority-of-americans-believe-life-begins-at-conception> [<https://perma.cc/45YM-9QVR>].

162. See William Saletan, *Do Most Americans Think Most Abortions Should Be Illegal?*, SLATE (Jan. 22, 2014), [http://www.slate.com/blogs/saletan/2014/01/22/abortion\\_polls\\_2014\\_do\\_most\\_americans\\_think\\_most\\_abortions\\_should\\_be\\_illegal.html](http://www.slate.com/blogs/saletan/2014/01/22/abortion_polls_2014_do_most_americans_think_most_abortions_should_be_illegal.html) [<https://perma.cc/9XTE-FFJ6>].

163. Lydia Saad, *Americans’ Attitudes Toward Abortion Unchanged*, GALLUP (May 25, 2016), <http://news.gallup.com/poll/191834/americans-attitudes-toward-abortion-unchanged.aspx> [<https://web.archive.org/web/20180122075228/http://news.gallup.com/poll/191834/americans-attitudes-toward-abortion-unchanged.aspx>].

164. *See id.*

the pro-life or pro-choice label are more popular, but significant pluralities of Americans of similar proportions embrace both labels.<sup>165</sup> For example, in 2016 Gallup reports 47% of Americans identifying as pro-choice and 46% identifying as pro-life.<sup>166</sup> Since far more Americans embrace such labels than actually hold pure pro-life or pure pro-choice viewpoints, the decision to accept such labels seems as much a matter of identity as one's actual position on abortion. Hence, there is a surprising degree of overlap in views on a number of specific abortion issues among those who accept the purportedly conflicting pro-life and pro-choice labels.<sup>167</sup>

The abortion rights mantra embraced by the Supreme Court in *Casey*—that women need abortion rights to compete with men in American society—is particularly problematic for the more than 40% of American women who identify as pro-life.<sup>168</sup> The message for pro-life women is that they must choose between their conscience and equality. From this perspective, “equality” logically requires pro-life women to violate their consciences and choose to abort an embryo or fetus whom the woman regards as her unborn daughter or son. After all, if abortion is what allows women to compete with men, the possibility of being able to abort does no good unless one is willing to follow through and actually undergo an abortion when a pregnancy occurs at the “wrong” time of life.

Indeed, abortion practitioners regularly perform abortions on women who perceive abortion to be wrong, and even murder, at the time of the abortion.<sup>169</sup> The abortion rights movement explicitly or implicitly labels such women hypocrites, and sometimes evidences a certain degree of contempt for them.<sup>170</sup> Indeed, the movement seems to assume that such women are representative generally of pro-life women, as though some degree of inconsistency or hypocrisy was the unique preserve of pro-life women.<sup>171</sup>

However, perhaps the deeper problem is that the success of the abortion rights movement has created a situation where some pro-life women have embraced the sexist presumption that a woman must choose between her equality and future life on one hand, and her conscience and the life of her unborn child on the other hand.

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165. *See id.*

166. *Id.*

167. Lydia Saad, *Plenty of Common Ground Found in Abortion Debate*, GALLUP (Aug. 8, 2011), [http://news.gallup.com/poll/148880/Plenty-Common-Ground-Found-Abortion-Debate.aspx?g\\_source=abortion&g\\_medium=search&g\\_campaign=tiles](http://news.gallup.com/poll/148880/Plenty-Common-Ground-Found-Abortion-Debate.aspx?g_source=abortion&g_medium=search&g_campaign=tiles); Lydia Saad, *U.S. Abortion Attitudes Stable; No Consensus on Legality*, GALLUP (June 9, 2017), <http://news.gallup.com/poll/211901/abortion-attitudes-stable-no-consensus-legality.aspx> [<https://web.archive.org/web/20180612235547/http://news.gallup.com/poll/211901/abortion-attitudes-stable-no-consensus-legality.aspx>].

168. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

169. Joyce Arthur, *The Only Moral Abortion Is My Abortion: When Anti-Choice Choose*, PRO-CHOICE ACTION NETWORK (Sept. 2000), <http://www.prochoiceactionnetwork-canada.org/articles/anti-choices.html> [<https://perma.cc/TLZ4-ER42>].

170. *Id.*

171. *See* Arthur, *supra* note 169; Joyce Arthur, *Personhood: Is a Fetus a Human Being?*, PRO-CHOICE ACTION NETWORK (Aug. 2001), <http://www.prochoiceactionnetwork-canada.org/articles/fetusperson.html> [<https://perma.cc/2WHD-NG36>].

This set of presumptions puts pro-life women in a box under which they lose regardless of which choice they make.

Pro-life feminist Sidney Callahan put the matter quite well decades ago:

Pitting women against their own offspring is not only morally offensive, it is psychologically and politically destructive. Women will never climb to equality and social empowerment over mounds of dead fetuses . . . . As long as most women choose to bear children, they stand to gain from the same constellation of attitudes and institutions that will also protect the fetus in the woman's womb—and they stand to lose from the cultural assumptions that support permissive abortion. Despite temporary conflicts of interest, feminine and fetal liberation are ultimately one and the same.<sup>172</sup>

### *C. The Abortion Liberty, Equality, and Personal Life*

Beyond the issue of whether abortion rights help women attain equality and success in regard to employment and careers, is the issue of how it impacts their personal lives. Here, abortion rights feminist Petchesky, writing more than fifteen years after *Roe*, expressed frustration with young women:

Even during the most liberal years of teenage access to abortion and contraception, the potentially liberating impact of that access was muffled by the persistence of a male-dominant culture and social relations of sex. The openness and legitimacy of nonmarital heterosexual activity continued to be encumbered with traditional risks and pain for young teenage women, inasmuch as they played for different stakes (commitment, love, romance) than males, and often lost. A clear feminist vision, an alternative culture of sexuality embracing passion and play as well as love, has not penetrated the consciousness of younger generations . . . .<sup>173</sup>

This is a very odd passage, and observes situations where young women have different sexual and relational goals than young men.<sup>174</sup> Petchesky seems profoundly disappointed that these single young women, handed the liberations of abortion and contraception, still yearn for “commitment, love, [and] romance . . . .”<sup>175</sup> Petchesky implicitly acknowledges that these liberations cannot help young women attain “commitment, love, romance,” and she wants young women to change their personal goals toward what might be termed a more liberated sexuality.<sup>176</sup>

It is revealing to see a feminist from an earlier generation criticize a younger generation of women for wanting to attain stable, loving partnerships with men, as though that goal represented some basic deficiency. The abortion liberty appears to be a part of a broader agenda to redirect the personal sexual and reproductive goals and practices of women. Rather than helping women achieve their sexual, relational,

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172. Callahan, *supra* note 129, at 44.

173. PETCHESKY, *supra* note 136, at 397.

174. *Id.*

175. *Id.*

176. *Id.*

and reproductive goals, the abortion liberty may be designed to alter those goals. The abortion liberty may be both the symptom and cause of an unraveling and reshaping of the intricate relationships between women and men, women and children, and men and children. That unraveling and reshaping may indeed make committed long-term partnerships between women and men less available in society, and thus can become a self-fulfilling prophecy. This reshaping of women's sexual and reproductive goals may be pursued in the name of furthering gender equality and women's rights, and freeing women from patriarchal control. Nonetheless, the entire project appears misogynist, as it seeks to make women's sexuality in effect more like men's, in the sense of being unburdened by the possibility of pregnancy, and being modeled after the more unattractive forms of male sexual practice.<sup>177</sup>

Thus, to the degree that the sexual and reproductive goals of young women are focused on commitment, love, and romance, in the form of long-term partnerships with men, the abortion liberty may hinder, and does not help, achieve such goals. The abortion liberty is hence about changing women's sexuality, rather than meeting the sexual and reproductive goals of women. This point is further underscored by the next topic, that of "abandoning women to their privacy."

#### *D. Abortion as a Privacy Right: Abandoning Women to Their Privacy*

Both abortion rights feminists and pro-life feminists have noted the difficulties created, for women, of defining the abortion right as a privacy right. Hence, Petchesky states:

The claim for 'abortion rights' seeks access to a necessary service, but by itself it fails to address the social relations and sexual divisions around which responsibilities for pregnancy and children is assigned. In real-life struggles, this limitation exacts a price, for it lets men and society neatly off the hook.<sup>178</sup>

Similarly, Callahan writes:

Permissive abortion, granted in the name of women's privacy and reproductive freedom, ratifies the view that pregnancies and children are a woman's private individual responsibility. More and more frequently, we hear some version of this old rationalization: if she refuses to get rid of it, it's her problem. A child becomes a product of the individual woman's freely chosen investment, a form of private property resulting from her own cost-benefit calculation. The larger community is relieved of moral responsibility.<sup>179</sup>

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177. Callahan, *supra* note 129, at 46–51. To be clear, I am not asserting that all male sexual practices are unattractive, and am not implying that male sexuality is inherently aberrant; rather, I assert simply that some male sexual practices are unattractive or irresponsible.

178. PETCHESKY, *supra* note 136, at 7.

179. Callahan, *supra* note 129, at 45.

Thus, the woman's "choice" becomes a social obligation to abort so as to not inconvenience others, with her capacity to demand co-responsibility with the father, her family, and society undermined. The woman who refuses to abort in the face of a complex or difficult situation can be abandoned to her privacy by those who no longer feel any responsibility for the pregnancy or the resulting birth of any children. Hence, the abortion right is turned against women and used by male sexual partners, family members, and society at large to justify their failure to take joint responsibility with the woman for pregnancy and childrearing. Petchesky sees this negative result as perhaps caused by the contexts in which the abortion liberty is exercised,<sup>180</sup> while Callahan argues that the abortion liberty is itself partly responsible for undermining the woman's social situation.<sup>181</sup>

Either way, in the real-world situation in the United States, with its neo-liberal economic system and privatized concepts of family life, the abortion liberty's promise of "choice" undermines many women's capacity to insist on the conditions that could empower her to give birth, keep her baby, and thrive. As Callahan notes, the woman, instead of being empowered, faces "the debilitating reality of *not* bringing a baby into the world; *not* being able to count on a committed male partner; *not* accounting oneself strong enough, or the master of enough resources, to avoid killing the fetus."<sup>182</sup>

Hence, the Supreme Court's doctrinal grounding of abortion in autonomy, privacy, and liberty may ultimately undermine woman's equality, particularly in the context of American society. Ultimately, the realization of women's equality, particularly in the spheres of sexuality, reproduction and family life, requires more than abandoning women to their "privacy," but rather requires a context of co-responsibility. The abortion liberty becomes a self-fulfilling defeat for many women: because many men, families, and communities are unreliable, women are granted the abortion liberty. However, the reality and rhetoric of an abortion liberty becomes an additional permission and validation of many men, families, and communities to continue to be unreliable.<sup>183</sup>

Perhaps the abortion rights movement has miscalculated regarding the fundamental obstacles many women face in achieving practical equality and empowerment. The classic story of empowerment is liberation from overcontrol and oppression—for women the need to be liberated from patriarchal control. While problems of patriarchal control surely continue, perhaps the greater problem for many young women in contemporary America is not overcontrol but abandonment. The problem for many young women is not that fathers, boyfriends, or husbands are controlling their lives and sexual and reproductive functions, but rather that they lack stable families of origin or reliable and responsible life partners. Worse, abandonment, exploitation, and patriarchal control may co-exist as sexual

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180. PETCHESKY, *supra* note 136, at 7–8.

181. Callahan, *supra* note 129, at 45; *see also* Bachiochi, *supra* note 128, at 919–24.

182. Callahan, *supra* note 129, at 49.

183. *See id.*

“liberation” reinforces male entitlement and impunity. The abortion right in some contexts may facilitate forms of patriarchy that marry a purported ethic of sexual liberation with continuing exploitation of women’s bodies. True liberation in post-sexual revolution America may require the creation of contexts in which co-responsibility, mutual respect, and commitment can thrive. Otherwise, freedom in modern America may be, as Janis Joplin put it long ago, “just another word for nothing left to lose.”<sup>184</sup>

#### *E. Democracy and Women in Contemporary America*

Perhaps the most obvious way in which the abortion rights movement distrusts women as a group is the demand to remove abortion as much as possible from the democratic process. *Roe v. Wade* of course invalidated the democratically-created laws of all fifty states and the District of Columbia.<sup>185</sup> As noted above, this was done in the name of physician’s rights more than women’s rights, as a way of shielding medical practice from majoritarian control in regard to abortion.<sup>186</sup> If one repudiates the physician’s rights rationale of abortion and tries to substitute the women’s rights rationale, however, the decision to remove abortion from the democratic sphere becomes problematic. Women, after all, comprise a majority of voters in contemporary America.<sup>187</sup> Thus, if one truly trusted women as a group, it would seem natural to entrust the abortion decision to the democratic process. Thus, Erika Bachiochi notes: “It is particularly ironic that a women’s movement which began with the quest to ensure women political participation through the franchise would favor, generations later, removing the privilege and power of democratic participation from women through the Court’s sharp intervention in the abortion debate.”<sup>188</sup>

Abortion rights proponents, however, must be painfully aware that even if only women were allowed to vote on abortion, the result would not reflect the positions of the abortion rights movement. As noted above, women’s views on abortion are not markedly different from that of men, and over 40% of American

184. Janis Joplin, *Me and Bobby McGee*, GENIUS, <https://genius.com/Janis-joplin-me-and-bobby-mcgee-lyrics> [<https://perma.cc/9DW6-L47S>] (last visited July 10, 2018).

185. *Roe v. Wade*, 410 U.S. 113, 165 (1973); see also Merz et al., *supra* note 16, at 5; Rachael K. Pirner & Laurie B. Williams, *Roe to Casey: A Survey of Abortion Law*, 32 WASHBURN L.J. 166, 171–72 (1993).

186. See *supra* Section II.A.

187. See CTR. FOR AM. WOMEN & POLITICS, GENDER DIFFERENCES IN VOTER TURNOUT (2017), <http://www.cawp.rutgers.edu/sites/default/files/resources/genderdiff.pdf> [<https://perma.cc/3723-4R87>]; Catherine Rampell, *Why Women Are Far More Likely to Vote than Men*, WASH. POST, July 14, 2014, [https://www.washingtonpost.com/opinions/catherine-rampell-why-women-are-far-more-likely-to-vote-then-men/2014/07/17/b4658192-0de8-11e4-8c9a-923ecc0c7d23\\_story.html?utm\\_term=.239d693606f9](https://www.washingtonpost.com/opinions/catherine-rampell-why-women-are-far-more-likely-to-vote-then-men/2014/07/17/b4658192-0de8-11e4-8c9a-923ecc0c7d23_story.html?utm_term=.239d693606f9).

188. Bachiochi, *supra* note 129, at 632 n.163; cf. Akhil Reed Amar, *Concurring in Roe, Dissenting in Doe, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 5, at 152, 152 (arguing that laws enacted after women were granted the constitutional right to vote should be viewed differently than laws enacted when women were denied the right to vote).

women self-identify as pro-life.<sup>189</sup> Hence, the decision to move the locus of control of abortion from the democratic process to the Supreme Court is a decision to distrust women as political actors.

Distrusting women as political actors is reflective of the deeply problematic nature of a movement that purports to speak for women, and yet which advocates views that most women reject. The abortion rights movement, after all, defends late term abortions which the vast majority of women reject.<sup>190</sup> The abortion movement defended an abortion movement, D & X abortion (partial birth abortion), which most women reject.<sup>191</sup> The abortion movement opposes many regulations of abortion which most women support.<sup>192</sup> Hence, the abortion rights movement seeks to maintain the locus of control over abortion policy in courts in part because it allows the movement to continue its illusion of speaking for American women, even as it profoundly distrusts the viewpoints of a majority of American women.

#### F. *Deciding Not to Abort in Contemporary America*

The riddle of anti-abortion women who abort has suited the abortion rights movement, for it offers an opportunity to respond to a significant problem: the lack of allegiance of women to the movement. It is, after all, awkward for a movement that purports to advocate for women to face the opposition of nearly half of women who self-identify as pro-life, and the ambivalence of many others who reject many forms of abortion which the abortion rights movement supports.<sup>193</sup> The abortion rights movement has implicitly argued that if anti-abortion women anyway choose abortion, then anti-abortion women as a group can be dismissed, their views discarded without the necessity of reply. Of course, reasoning from anecdote in this fashion is hardly logical. It can hardly be surprising that a significant number of anti-abortion women abort, given the extreme pressures individuals experience to abort, often from family members and male partners, the tendency in American life and culture to abandon and isolate women in their “right to privacy,” the cultural expectation to abort as the purportedly best response to a crisis pregnancy, and the all too familiar human capacity to rationalize a seemingly “pragmatic” even if

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189. See *supra* notes 158–67 and accompanying text.

190. See *Abortion*, GALLUP, <http://news.gallup.com/poll/1576/abortion.aspx> [<https://web.archive.org/web/20180710115053/http://news.gallup.com/poll/1576/abortion.aspx>] (last visited July 10, 2018) (finding that in 2007, 72% of those polled thought “late term” and “partial birth” abortions should be illegal); *Poll: 80 Percent of Women Support Late-Term Abortion Bans*, FEDERALIST (Jan. 19, 2016), <http://thefederalist.com/2016/01/19/poll-80-percent-of-women-support-late-term-abortion-bans/> [<https://perma.cc/V2T9-LQL2>]; Emily Swanson & Mark Blumenthal, *Abortion Poll Finds Support for 20-Week Ban*, HUFFINGTON POST (July 11, 2013, 7:25 AM), [https://www.huffingtonpost.com/2013/07/11/abortion-poll\\_n\\_3575551.html](https://www.huffingtonpost.com/2013/07/11/abortion-poll_n_3575551.html) [<https://perma.cc/RR8T-S499>].

191. See *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Abortion*, *supra* note 190 (finding that in 2007, 72% of those polled thought “late term” and “partial birth” abortions should be illegal).

192. See *supra* notes 189–91 and sources cited therein.

193. See *supra* notes 158–67, 190–91 and accompanying text.

unethical decision. Nonetheless, from some number of anti-abortion women who abort the abortion rights movement has tended to take the inference that pro-life beliefs make no little or difference at all in individual women's abortion decisions.<sup>194</sup>

For example, Petchesky states:

The same woman who avers that abortion is “terrible” or “wrong” may also insist on her need or right to have one; at the very least, she will act on that belief, whatever her professed convictions. Escalation of the “right to life” propaganda campaign depicting abortion as murder and fetuses as innocent babies has apparently influenced how people feel and talk about abortion, but not what they choose to do about it.<sup>195</sup>

This tendency to dismiss as irrelevant the views of the majority of women who either identify as pro-life, or who remain in the ambivalent middle on abortion, illustrates the profound disrespect of the abortion rights movement toward women. Since some anti-abortion women purportedly speak by their actions of undergoing abortions, the views and words of all anti-abortion women are disregarded. Anti-abortion women are dismissed as hypocritical, inconsistent, and naïve, and influenced by anti-abortion “propaganda,” and rigid religious teaching.<sup>196</sup> By such reasoning the abortion rights movement tends to dismiss as irrelevant women's moral reasoning on abortion.

This dismissal of women's moral reasoning on abortion is reflected in the research articles of the Guttmacher Institute.<sup>197</sup> The Guttmacher Institute certainly provides useful and significant research on a variety of reproductive issues, but from an explicitly abortion rights, rather than neutral, perspective.<sup>198</sup> It seems fair to regard Guttmacher as simultaneously a useful research institute and also as a part of the abortion rights movement, given the organization's explicit and consistent advocacy for reproductive rights including specifically the legal availability of abortion services.<sup>199</sup>

In this context, it is fascinating that while Guttmacher states a purpose in “examining the factors underlying women's decisions to terminate their pregnancies,”<sup>200</sup> the Institute seems eager to dismiss the possibility that women's moral choices on abortion could have anything to do with the dramatic decline in the numbers and rates of abortion in the United States.<sup>201</sup> The decline is dramatic

194. See, e.g., PETCHESKY, *supra* note 136, at 369; *infra* notes 169-71, 197-203 and accompanying text.

195. See PETCHESKY, *supra* note 136, at 369.

196. See, e.g., Arthur, *supra* note 171; Arthur, *supra* note 169.

197. GUTTMACHER INST., STRATEGIC PLAN: 2016–2020 (2016), [https://www.guttmacher.org/sites/default/files/report\\_pdf/guttmacherstrategicplan2016.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/guttmacherstrategicplan2016.pdf) [<https://perma.cc/EYZ4-GLTZ>].

198. *Id.*

199. *Id.*

200. *Id.* at 4.

201. See Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States*, 49 PERSP. ON SEXUAL REPROD. HEALTH 17 (2017) (suggesting that the decline in abortion rates was due to some combination of increased contraceptive use and decreased access to abortion services due to facility closure or newly implemented state policies); Joerg Dreweke, *New*

as current abortion rates are the lowest ever recorded in the more than forty years since *Roe*, with the numbers of abortions per 1,000 women of reproductive age cut by about 50% from the peak in this period.<sup>202</sup> The details of the debate over the causes of these declines in abortion are beyond the scope of this paper. What is important here is that the Guttmacher-related publications either ignore entirely the very question of whether women's moral reasoning on abortion might have an impact on the steeply declining numbers and rates of abortion, or else seek to debunk the possibility of women's moral reasoning having an impact, perceiving the very concept as essentially anti-abortion propaganda.<sup>203</sup> This eagerness to dismiss the possibility that women's moral reasoning may play a role in abortion rates represents another aspect of the abortion rights movement's disrespect toward women, and in particular toward the moral reasoning of women.

The abortion rights movement's dismissal of the moral reasoning of women regarding abortion is a part of the movement's agenda of being pro-abortion rather than merely "pro-choice." If the movement were truly neutral on the morality of abortion but simply trying to protect and empower women's moral choices on abortion, the movement would welcome and seek evidence that women's moral choices on abortion were consequential to the rate of abortions. Instead, the movement assumes that abortion is moral, and indeed is the best response to many or most unintended pregnancies.<sup>204</sup> Abortion rights literature, such as the Guttmacher Institute's reports and statements, portray abortion as an innately moral and helpful medical service furthering the agenda of reproductive health and rights, rather than a profoundly personal and difficult question of personal morality.<sup>205</sup> Thus, women who choose not to have abortions in circumstances of unintended pregnancies compounded by difficult life circumstances are seen as implicitly irresponsible, in the way that anyone who declines a useful and effective medical treatment could be seen as irresponsible.<sup>206</sup>

Thus, even abortion rights advocate Petchesky notes: "For the liberal, it is not the woman who gets an abortion who is 'selfish,' but the one who doesn't—when she is too young or too poor or too 'incompetent.'"<sup>207</sup> Petchesky roots this "liberal-

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*Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy Is Driving Recent Abortion Declines*, GUTTMACHER INST. (Mar. 18, 2016), <https://www.guttmacher.org/gpr/2016/03/new-clarity-us-abortion-debate-steep-drop-unintended-pregnancy-driving-recent-abortion> [https://perma.cc/M7DP-RR6Y] (arguing instead that the decline in abortion rates was due to a decrease in unwanted pregnancies, most plausibly resulting from increased contraceptive use).

202. *Induced Abortions in the United States*, GUTTMACHER INST. (Jan. 2018), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> [https://perma.cc/7GMN-EE8N].

203. See, e.g., Jones & Jerman, *supra* note 201; Dreweke, *supra* note 201.

204. See, e.g., GUTTMACHER INST., *supra* note 197; KATHA POLLITT, PRO: RECLAIMING ABORTION RIGHTS (2015).

205. See, e.g., GUTTMACHER INST., *supra* note 197.

206. Cf. *id.*; PETCHESKY, *supra* note 136, at 376.

207. PETCHESKY, *supra* note 136, at 376.

utilitarian”<sup>208</sup> perspective in a legacy of “eugenics” and “bourgeois morality” that “justifies abortion in the name of ‘quality over quantity’” and teaches that “‘maternal duty’ involved rational planning and budgeting, of children as well as household economies.”<sup>209</sup> The rhetoric of the Guttmacher Institute falls into this “liberal-utilitarian” camp, with its constant monitoring of unintended pregnancies and explicit endorsement of the view that “reducing the unintended pregnancy rate is a national public health goal.”<sup>210</sup> From this perspective, abortion of unintended pregnancies itself becomes a kind of public health mandate, given Guttmacher’s view that “[b]irths resulting from unintended or closely spaced pregnancies are associated with adverse maternal and child health outcomes, such as delayed prenatal care, premature birth, and negative physical and mental health effects for children.”<sup>211</sup>

From this pro-abortion (rather than simply pro-choice) perspective, the anti-abortion and morally-ambivalent views of women are an obstacle to be overcome, in service of a “liberal-utilitarian” public health agenda. Hence, the dismissal of women’s moral reasoning regarding abortion is not an accident, but deeply woven into the structure and foundations of the current abortion rights movement.

The theme of the anti-abortion women influenced by rigid religious teachings and anti-abortion propaganda is also common in abortion rights literature, sometimes with the implication that women are essentially victims of their own religious and moral beliefs.<sup>212</sup> Again, a truly “pro-choice” movement would not need to constantly attack, belittle and bemoan the religious and moral anti-abortion views of women, but rather would respect the agency of women.

This dismissal of the role of women’s anti-abortion viewpoints on the numbers of abortions is flawed. While some anti-abortion women choose to abort when faced with unintended pregnancies and difficult circumstances, many others choose to nonetheless give birth. Anecdotes exist in both directions, indicating that there must logically be some statistical significance to anti-abortion viewpoints.<sup>213</sup>

208. *Id.*

209. *Id.* at 375.

210. *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> [https://perma.cc/684H-C6B8].

211. *See id.*

212. *See* PETCHESKY, *supra* note 136; Arthur, *supra* note 169; Arthur, *supra* note 171.

213. *Cf.* PETCHESKY, *supra* note 136; Arthur, *supra* note 169; Arthur, *supra* note 171; Christina Doell, *I Told Planned Parenthood I Was Keeping My Baby and They Said They Couldn’t Help*, STUDENTS FOR LIFE (Feb. 10, 2017), <http://studentsforlife.org/2017/02/10/i-told-planned-parenthood-i-was-keeping-my-baby-and-they-said-they-couldnt-help/> [https://perma.cc/33H5-VMXA]; *From Relief to Regret: Readers’ Experiences of Abortion*, BBC (Jan. 30, 2017), <http://www.bbc.com/news/magazine-38775641> [https://perma.cc/7BX9-EUDH]; *I Don’t Know if I Should Get an Abortion or Keep the Baby?*, BABYCENTER (Feb. 1, 2012), [https://www.babycenter.com/400\\_i-dont-know-if-i-should-get-an-abortion-or-keep-the-baby\\_11087255\\_799.bc](https://www.babycenter.com/400_i-dont-know-if-i-should-get-an-abortion-or-keep-the-baby_11087255_799.bc) [https://web.archive.org/web/20180608195414/https://www.babycenter.com/400\_i-dont-know-if-i-should-get-an-abortion-or-keep-the-baby\_11087255\_799.bc]; Raquel Kato, *I’m That Girl - That Girl That Got Pregnant*, FOCUS (Oct. 19, 2012),

Indeed, even according to Guttmacher Institute statistics, close to half of all pregnancies in the United States are unintended, with about 40% ending in abortion and about 60% ending in birth.<sup>214</sup> Thus, the majority of unintended pregnancies are not aborted, despite Guttmacher's essentially negative viewpoint of such pregnancies.<sup>215</sup>

Deciding not to abort in contemporary America requires resistance to the "liberal-utilitarian" moral viewpoints portraying abortion as a moral duty. Hence, Petchesky notes that "[m]any subjects in abortion studies 'want a child' but say that abortion is the necessary and harder choice because of external circumstances."<sup>216</sup> Many women face what Petchesky characterizes as oppressive conditions and harsh realities in which "parents are unsupportive or condemning, boyfriends angry or withdrawn, school peers taunting and stigmatizing . . . conditions in which the genuine desire for a child is thwarted by poverty, inadequate housing, lack of a supportive partner, or the unavailability of child care."<sup>217</sup> Indeed, women articulate not just that they want "a child" as Petchesky delicately puts it, but "the baby,"<sup>218</sup> indicating a consciousness that a non-fungible human being already exists, with abortion perceived as "still taking a life."<sup>219</sup> It is fascinating that Petchesky is at pains to argue that "the oppressiveness of the conditions does not negate the authenticity of the decision" to undergo an abortion,<sup>220</sup> but has no interest in those similarly situated women who meet the "oppressiveness of the conditions" with a decision to not abort and give birth instead. The lack of interest in these women, and in the "authenticity" of their decisions, provides the clue that no matter how sympathetically women may appear to be listened to, it is through the lens of a pro-abortion, rather than merely pro-choice, agenda.

In addition, one might have thought that women's rights advocates would express more concern with the apparently common situation of women who would prefer to continue a pregnancy and specifically want "the baby," choosing to undergo an abortion due to oppressive situations. The additional aspect that many of these women believe that the abortion they are choosing is "taking a life" similarly does not appear to concern most abortion rights advocates, except insofar as they perceive the woman's anti-abortion views as an obstacle to the woman's liberation, or a reason to negate anti-abortion viewpoints. The abortion rights movement in short appears to care far more about advocating for abortion than advocating for

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<https://focusoncampus.org/content/im-that-girl-that-girl-that-got-pregnant> [<https://perma.cc/NP8F-M7XB>].

214. See GUTTMACHER INST., *supra* note 134.

215. See *Unintended Pregnancy in the United States*, *supra* note 210.

216. PETCHESKY, *supra* note 136, at 372.

217. PETCHESKY, *supra* note 136, at 372–74 (Petchesky's exact language is "harsh realities" and "the oppressiveness of the conditions.").

218. *Id.* at 373 (citing CAROL GILLIGAN, *IN A DIFFERENT VOICE* 77 (1982)).

219. *Id.* (citing GILLIGAN, *supra* note 218).

220. *Id.*

women; the movement seems more interested in explaining away women's views of prenatal life and abortion, than in respecting those views.

### III. RELIGION, RELIGIOUS FREEDOM, AND ABORTION

While obvious, it bears repeating that the First Amendment to the United States Constitution explicitly protects religious freedom,<sup>221</sup> while by contrast the abortion right was written into the Constitution by the Supreme Court in 1973.<sup>222</sup> It is a part of the hubris of evolving constitutionalism to think that a right viewed as fundamental from the origins of the Constitution, more than two hundred years ago, should consistently give way to a right created by the Court two generations ago. The hostility of so many today to religious liberty in the name of judicially-created rights is a sign that evolving new rights is not cost-free, but comes with the risk and actuality of displacing those rights that were originally provided in the written Constitution.

That being said, the point of this Article is that religious proponents of the pro-life perspective are not aberrant eccentrics seeking to harm women in the name of obscure and outmoded religious dogma. Rather, religious proponents, in general, are seeking to remind American law and culture of fundamental values deeply rooted and still prized in American culture. Religious pro-life proponents present publicly accessible reasons for their positions which are understandable in both secular and religious terms. In addition, religious proponents are not seeking to set aside settled science in favor of sacred scripture or long-held tradition, but rather are reminding the courts and society *not* to obscure or set aside the basic scientific facts of prenatal human life. Religious proponents of the pro-life position, many of whom are women, moreover are presenting a reasonable interpretation of what it would mean to respect women, as a group and individually, in the context of abortion—and of why abortion rights in fact are built upon a lack of respect for women, both as a group and individually.

Further, religious and secular pro-life proponents are not trying to take society back to some idealized or demonized past stage, but are trying to remind society of what abortion means today, in the context of today's scientific understandings and in the context of today's issues related to gender relations, sexuality, and family life. Indeed, it seems that many abortion rights activists are still focused almost exclusively on past battles of freeing women from patriarchal control, while many younger women and men experience a world where abandonment and lack of commitment are also significant issues. The abortion liberty may facilitate forms of patriarchy that marry a purported ethic of sexual freedom with continuing exploitation of women's bodies.

Fundamentally, it is the abortion rights movement that is discriminatory: against the unborn and against religious persons and organizations. The abortion

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221. U.S. CONST. amend. I.

222. *See* *Roe v. Wade*, 410 U.S. 113 (1973).

rights movement is also discriminatory against women in several senses. The movement is built upon a lack of respect for women as democratic actors, a lack of respect for the conscience and views of individual women, and attempts to build female equality on making women more like men.

Thus, while certain laws or lawsuits may present the issue of a religious accommodation regarding abortion, such constellation of legal issues should not confuse the fundamental position of religion in American society as to the abortion issue. Pro-life religious beliefs are a call to inclusion of all human beings as deserving of recognition before the law as persons, an application of contemporary scientific understandings, and recognition of the deeply problematic dilemmas women face in relationship to abortion.

Of course, this is an idealized portrayal of religious pro-life activism; however, while not always accurate, it is accurate enough to form a basis for recasting the relations of religion and abortion. Religious proponents must dare to come to the table regarding abortion as full participants unbowed by demands to present themselves as conscientious objectors to the values of American society. At their best, pro-life religious advocates represent broadly-held and deeply-rooted American values, and make a valid, if uncertain, case for representing the future of America.