

LEGAL

COMMENTS ON ROE V. WADE

BY

Justices of the Supreme Court

In *Roe v. Wade*, the U.S. Supreme Court ruled that abortion may not be restricted in the first three months of pregnancy, could be restricted in the second three months only to protect the health of the woman, and, in the final three months, could be restricted or prohibited *except for abortions necessary to preserve a woman's life or health*. Maternal health, in the context of abortion, was defined in *Roe's* companion case, *Doe v. Bolton*, as "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."

In 1992, the Supreme Court abandoned the trimester framework of *Roe*, but reaffirmed the legality of abortion "subsequent to viability" for the "preservation of the ... health of the mother" (*Planned Parenthood vs. Casey*, 505 U.S. 833, 879 (1992)).

Although *Casey* abandoned the trimester framework of *Roe*, quotations by justices that touch on *Roe's* trimester framework have been retained in the following selection.

[Chief Justice Warren Burger](#)
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Chief Justice Warren Burger

"The soundness of our holdings must be tested by the decisions that purport to follow them. If *Danforth* and today's holding really mean what they seem to say, I agree we should reexamine *Roe*."

Chief Justice Burger, dissenting opinion, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, at 785 (1986)

“The Court's astounding rationale for this holding is that such information might have the effect of ‘discouraging abortion,’ ante at 762, as though abortion is something to be advocated and encouraged. This is at odds not only with *Roe*, but with our subsequent abortion decisions as well. As I stated in my opinion for the Court in *H. L. v. Matheson*, 450 U.S. 398 (1981), upholding a Utah statute requiring that a doctor notify the parents of a minor seeking an abortion:

“The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action ‘encouraging childbirth except in the most urgent circumstances’ is ‘rationally related to the legitimate governmental objective of protecting potential life.’”

Chief Justice Burger, in *Thornburgh* dissent (*supra*), at 785

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Justice Ruth Bader Ginsburg

“*Roe v. Wade* sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action.”

Ruth Bader Ginsburg, “Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*,” North Carolina Law Review 63 (1985): 375-386, at 376

“The rulings in *Roe*, and in a companion case decided the same day, *Doe v. Bolton*, were stunning in this sense: they called into question the criminal abortion statutes of every state, even those with the least restrictive provisions.”

Justice Ginsburg (*supra*), at 381

“I earlier observed that, in my judgment, *Roe* ventured too far in the change it ordered. ...

“Professor Paul Freund explained where he thought the Court went astray in *Roe*, and I agree with his statement. The Court properly invalidated the Texas proscription, he indicated, because ‘[a] law that absolutely made criminal all kinds

and forms of abortion could not stand up; it is not a reasonable accommodation of interests.’ If *Roe* had left off at that point and not adopted what Professor Freund called a ‘medical approach,’ physicians might have been less pleased with the decision, but the legislative trend might have continued in the direction in which it was headed in the early 1970s. ... Overall, he thought that the *Roe* distinctions turning on trimesters and viability of the fetus illustrated a troublesome tendency of the modern Supreme Court under Chief Justices Burger and Warren ‘to specify by a kind of legislative code the one alternative pattern that will satisfy the Constitution.’”

Justice Ginsburg (*supra*), at 381-82

“*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy handed judicial intervention was difficult to justify and appears to have provoked, not resolved, the conflict.”

Justice Ginsburg (*supra*), at 385-85

When the Supreme Court decided *Roe v. Wade* in 1973, the “law was changing. Women were lobbying around that issue. The Supreme Court stopped all that by deeming every law – even the most liberal – as unconstitutional. That seemed to me not the way the courts generally work.”

Comments of Justice Ginsburg to law students
at the University of Kansas, Associated Press
story, March 11, 2005

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Justice Sandra Day O’Connor

“The trimester or ‘three-stage’ approach adopted by the Court in *Roe*, and, in a modified form, employed by the Court to analyze regulations in these cases, cannot be supported as a legitimate or useful framework for accommodating the woman’s right and the State’s interests. The decision of the Court today graphically illustrates why the trimester approach is a completely unworkable method of

accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.”

Justice O’Connor, with whom Justices White and Rehnquist join, dissenting, in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, at 453-454 (1983)

“[M]edical technology is changing, and this change will necessitate our continued functioning as the Nation’s ‘ex-officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.’ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 99 (1976) (White, J. ...). Just as improvement in medical technology inevitably will move forward the point at which the State may regulate for reasons of maternal health, different technological improvements will move backward the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother. ...”

“The *Roe* framework, then, is clearly on a collision course with itself.”

Justice O’Connor *et al.* in *Akron* dissent (*supra*), at 456-458

“The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court’s framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes ‘accepted medical practice’ at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.”

Justice O’Connor *et al.* in *Akron* dissent (*supra*), at 458

“Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in *Roe* and employed by the Court today on the basis of *stare decisis*. For the reasons stated above, that framework is clearly an unworkable means of balancing the fundamental right and the compelling state interests that are indisputably implicated.”

Justice O’Connor *et al.* in *Akron* dissent (*supra*), at 459

“The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that ... although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until

the point at which the fetus was viable. The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life. ... The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.”

Justice O'Connor *et al.* in *Akron* dissent (*supra*), at 461

“The Court’s abortion decisions have already worked a major distortion in the Court’s constitutional jurisprudence. ... Today’s decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by the Court when an occasion for its application arises in a case involving state regulation of abortion.”

Justice O'Connor, with whom Justice Rehnquist joins, dissenting, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, at 814 (1986)

“That the Court’s unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe v. Wade*. ...”

Justice O'Connor *et al.* in *Thornburgh* dissent (*supra*), at 814-815

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Chief Justice William Rehnquist

“We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases like *Colautti* and *Akron* making constitutional law in this area a virtual Procrustean bed.”

Chief Justice Rehnquist, writing for the Court, *Webster v. Reproductive Health Services*, 492 U.S. 490, at 518 (1989)

“*Stare decisis* [let the decision stand] is a cornerstone of our legal system, but it

has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. ... We have not refrained from reconsideration of a prior construction of the Constitution that has proved ‘unsound in principle and unworkable in practice.’ ... We think the *Roe* trimester framework falls into that category.”

Chief Justice Rehnquist for the Court in *Webster* (*supra*), at 518

“In the first place, the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework - trimesters and viability - are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. As JUSTICE WHITE has put it, the trimester framework has left this Court to serve as the country's ‘ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.’ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 99 (1976) (White, J. ...)

“In the second place, we do not see why the State’s interest in protecting potential human life should come into existence only at the point of viability. ...”

Chief Justice Rehnquist for the Court in *Webster* (*supra*), at 518-519

“The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade*, 410 U.S. 113 (1973), but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”

Chief Rehnquist, with whom Justices White, Scalia, and Thomas join, concurring in judgment in part and dissenting in part, *Planned Parenthood v. Casey*, 505 U.S. 833, at 944 (1992)

“[T]he state of our post-*Roe* decisional law dealing with the regulation of abortion is confusing and uncertain, indicating that a reexamination of that line of cases is in order. Unfortunately for those who must apply this Court's decisions, the reexamination undertaken today leaves the Court no less divided than beforehand. Although they reject the trimester framework that formed the underpinning of *Roe*, Justices O'CONNOR, KENNEDY, and SOUTER adopt a revised undue burden

standard to analyze the challenged regulations. We conclude, however, that such an outcome is an unjustified constitutional compromise, one which leaves the Court in a position to closely scrutinize all types of abortion regulations despite the fact that it lacks the power to do so under the Constitution.”

Chief Justice Rehnquist *et al.*, in *Casey* dissent (*supra*), at 945

“[The] Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a ‘fundamental right’ that could be abridged only in a manner which withstood ‘strict scrutiny.’ ...

“We believe that the sort of constitutionally imposed abortion code of the type illustrated by our decisions following *Roe* is inconsistent ‘with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does.’ Webster V. Reproductive Health Services, 492 U. S. 490 at 518 (1989) (Rehnquist, W.) ... The Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce*, *Meyer*, *Loving*, and *Griswold*, and thereby deemed the right to abortion fundamental.”

Chief Justice Rehnquist *et al.*, in *Casey* dissent (*supra*), at 953

“The joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view 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. *Ante*, at 871. Instead of claiming that *Roe* was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*. This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe*. *Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to ‘strict scrutiny,’ and could be justified only in the light of ‘compelling state interests.’ The joint opinion rejects that view. *Ante*, at 872-873 ... *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework. *Ante*, at 873.

“ ... Whatever the ‘central holding’ of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give

the illusion of reality.”

Chief Justice Rehnquist *et al.*, in *Casey* dissent (*supra*), at 953-954

“Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.

“The sum of the joint opinion's labors in the name of *stare decisis* and ‘legitimacy’ is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor ‘legitimacy’ are truly served by such an effort.”

Chief Justice Rehnquist *et al.*, in *Casey* dissent (*supra*), at 966

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Justice Antonin Scalia

“The real question, then, is whether there are valid reasons to go beyond the most stingy possible holding today. It seems to me there are not only valid but compelling ones. Ordinarily, speaking no more broadly than is absolutely required avoids throwing settled law into confusion; doing so today preserves a chaos that is evident to anyone who can read and count. Alone sufficient to justify a broad holding is the fact that our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court. We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us--their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will--to follow the popular will. Indeed, I expect we can look forward to even more of that than before, given our indecisive decision today.”

Justice Scalia, concurring in part, and concurring in the judgment in *Webster v. Reproductive Health Services*, 492 U.S. 490, at 534-535 (1989)

“The result of our vote today is that we will not reconsider that prior opinion, even if most of the Justices think it is wrong, unless we have before us a statute that in fact contradicts it--and even then (under our newly discovered ‘no-broader-than-necessary’ requirement) only minor problematical aspects of *Roe* will be reconsidered, unless one expects state legislatures to adopt provisions whose compliance with *Roe* cannot even be argued with a straight face. It thus appears that the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.”

Justice Scalia, separate opinion in *Webster (supra)*, at 537

“As I understand the various opinions today: One Justice holds that two-parent notification is unconstitutional (at least in the present circumstances) without judicial bypass, but constitutional with bypass ...; four Justices would hold that two-parent notification is constitutional with or without bypass ...; four Justices would hold that two-parent notification is unconstitutional with or without bypass, though the four apply two different standards ...; six Justices hold that one-parent notification with bypass is constitutional, though for two different sets of reasons ...; and three Justices would hold that one-parent notification with bypass is unconstitutional One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find in our society's tradition regarding abortion no hint that the distinctions are constitutionally relevant, much less any indication how a constitutional argument about them ought to be resolved. The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer's and hence not in the judge's toolbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so.”

Justice Scalia, concurring in the judgment in part and dissenting in part, *Hodgson v. Minnesota*, 497 U.S. 417, at 479-80 (1990)

“Today's opinion describes the methodology of *Roe*, quite accurately, as weighing against the woman's interest the State's ‘important and legitimate interest in protecting the potentiality of human life.’ *Ante*, at 28-29 (quoting *Roe, supra*, at 162). But ‘reasoned judgment’ does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere ‘potentiality of human life.’ ... The whole argument of abortion

opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its ‘balancing’ is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.”

Justice Scalia, with whom the Chief Justice, Justice White and Justice Thomas join, concurring in the judgment in part and dissenting in part, *Planned Parenthood of Southeastern, Pennsylvania v. Casey*, 505 U.S. 833, at 982 (1992)

“The emptiness of the ‘reasoned judgment’ that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in this and other cases, the best the Court can do to explain how it is that the word ‘liberty’ *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”

Justice Scalia *et al.*, separate opinion in *Casey* (*supra*), at 983

“The Court’s description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress, before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue--as it does over other issues, such as the death penalty--but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state by state resolution, but also that those results would be more stable. Pre-*Roe*, moreover, political compromise was possible.

“*Roe*’s mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral

opprobrium that had attached to the act. ... (‘If the Constitution *guarantees* abortion, how can it be bad?’ -- not an accurate line of thought, but a natural one.) Many favor all of those developments, and it is not for me to say that they are wrong. But to portray *Roe* as the statesmanlike ‘settlement’ of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion umpiring business, it is the perpetuation of that disruption, rather than of any *pax Roecana*, that the Court's new majority decrees.”

Justice Scalia *et al.*, separate opinion in *Casey* (*supra*), at 995-996

“Among the five Justices who purportedly adhere to *Roe*, at most three agree upon the *principle* that constitutes adherence (the joint opinion's ‘undue burden’ standard)--and that principle is inconsistent with *Roe*, see 410 U. S., at 154-156. To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions. ... It is beyond me how the Court expects these accommodations to be accepted ‘as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.’ *Ante*, at 23. The only principle the Court ‘adheres’ to, it seems to me, is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law (which is what I thought the Court was talking about), but a principle of *Realpolitik*--and a wrong one at that.”

“I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced--*against* overruling, no less--by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would “subvert the Court's legitimacy” must be another consequence of reading the error filled history book that described the deeply divided country brought together by *Roe*.”

Justice Scalia *et al.*, separate opinion in *Casey* (*supra*), at 997-998

“[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

“We should get out of this area [of abortion law], where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”

Justice Scalia *et al.*, separate opinion in *Casey (supra)*, at 1002

“The judgment in today's case has an appearance of moderation and Solomonic wisdom, upholding as it does some portions of the injunction while disallowing others. That appearance is deceptive. The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal.”

“But the context here is abortion. A long time ago, in dissent from another abortion related case, Justice O'Connor, joined by then Justice Rehnquist, wrote:

‘This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but--except when it comes to abortion--the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it’.” *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (citations omitted).

“Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.”

Justice Scalia, with whom Justice Kennedy and Justice Thomas join, concurring in the judgment in part and dissenting in part, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, at 784-85 (1994)

“What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the ‘ad hoc nullification machine’ that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. ... Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today’s

decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.”

Justice Scalia, with whom Justice Thomas joins, dissenting, *Hill v. Colorado*, 530 U.S. 703, at 741-42 (2000)

“I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court’s jurisprudence beside *Korematsu* and *Dred Scott*. The method of killing a human child—one cannot even accurately say an entirely unborn human child—proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. And the Court must know (as most state legislatures banning this procedure have concluded) that demanding a ‘health exception’—which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?)—is to give live-birth abortion free rein. The notion that the Constitution of the United States, designed, among other things, ‘to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,’ prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.’

Justice Scalia, dissenting, *Stenberg v. Carhart*, 530 U.S. 914, at 953 (2000)

“In the last analysis, my judgment that *Casey* does not support today’s tragic result can be traced to the fact that what I consider to be an ‘undue burden’ is different from what the majority considers to be an ‘undue burden’—a conclusion that can not be demonstrated true or false by factual inquiry or legal reasoning. It is a value judgment, dependent upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it. Evidently, the five Justices in today’s majority value the former less, or the latter more, (or both), than the four of us in dissent. Case closed. There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome. It has been arrived at by precisely the process *Casey* promised—a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is ‘undue’—*i.e.*, goes too far.”

Justice Scalia, in *Carhart* dissent (*supra*), at 954-55

“Today’s decision, that the Constitution of the United States prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of criticism—as well it should. I cannot understand why those who *acknowledge* that, in the opening words of Justice O’Connor’s concurrence, ‘[t]he issue of abortion is one of the most contentious and controversial in contemporary American society,’ *ante*, at 1, persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed. *Casey* must be overruled.”

Justice Scalia, in *Carhart* dissent (*supra*), at 956

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Justice Clarence Thomas

“Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State may permit abortion, nothing in the Constitution dictates that a State must do so.

“In the years following *Roe*, this Court applied, and, worse, extended that decision to strike down numerous state statutes that purportedly threatened a woman’s ability to obtain an abortion. The Court voided parental consent laws ... legislation requiring that second-trimester abortions take place in hospitals, ... and even a requirement that both parents of a minor be notified before their child has an abortion. ... It was only a slight exaggeration when this Court described, in 1976, a right to abortion ‘without interference from the State.’ ... The Court’s expansive application of *Roe* in this period, even more than *Roe* itself, was fairly described as the ‘unrestrained imposition of [the Court’s] own, extraconstitutional value preferences’ on the American people.” *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting).

Justice Thomas, with whom the Chief Justice and Justice Scalia join, dissenting, *Stenberg v. Carhart*, 530 U.S. 914, at 980-81 (2000)

“Although in *Casey* the separate opinions of *The Chief Justice* and *Justice Scalia* urging the Court to overrule *Roe* did not command a majority, seven Members of that Court, including six Members sitting today, acknowledged that States have a legitimate role in regulating abortion and recognized the States' interest in respecting fetal life at all stages of development.”

Justice Thomas *et al.* in *Carhart* dissent (*supra*), at 981

“We were reassured in *Casey* that not all regulations of abortion are unwarranted and that the States may express profound respect for fetal life. Under *Casey*, the regulation before us today should easily pass constitutional muster. But the Court's abortion jurisprudence is a particularly virulent strain of constitutional exegesis. And so today we are told that 30 States are prohibited from banning one rarely used form of abortion that they believe to border on infanticide. It is clear that the Constitution does not compel this result.”

Justice Thomas *et al.* in *Carhart* dissent (*supra*), at 1020

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Justice Byron White

“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. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. 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 of the power of judicial review that the Constitution extends to this Court.”

Justice White, with whom Justice Rehnquist joins, dissenting, *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179, at 221-222 (1973)

“The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she

carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.”

Justice White *et al.* in *Roe* and *Doe* dissent (*supra*), at 222

“It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in *Roe v. Wade, supra*. These are matters which a State should be able to decide free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.”

Justice White, with whom the Chief Justice and Justice Rehnquist join, concurring and dissenting, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, at 93 (1976)

“[T]he evidence discloses that the result is a desirable one, or at least that the legislature could have so viewed it. That should end our inquiry, unless we purport to be not only the country's continuous constitutional convention but also its ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.”

Justice White *et al.*, concurring and dissenting in *Danforth (supra)*, at 99

“In my view, the time has come to recognize that *Roe v. Wade*, no less than the cases overruled by the Court in the decisions I have just cited, ‘departs from a proper understanding’ of the Constitution and to overrule it.”

Justice White, with whom Justice Rehnquist joins, dissenting in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, at 788 (1986)

“*Roe v. Wade* posits that a woman has a fundamental right to terminate her pregnancy, and that this right may be restricted only in the service of two

compelling state interests: the interest in maternal health (which becomes compelling only at the stage in pregnancy at which an abortion becomes more hazardous than carrying the pregnancy to term) and the interest in protecting the life of the fetus (which becomes compelling only at the point of viability). A reader of the Constitution might be surprised to find that it encompassed these detailed rules, for the text obviously contains no references to abortion, nor, indeed, to pregnancy or reproduction generally; and, of course, it is highly doubtful that the authors of any of the provisions of the Constitution believed that they were giving protection to abortion.”

Justice White *et al.* in *Thornburgh* dissent (*supra*), at 788-789

“If the woman's liberty to choose an abortion is fundamental, then, it is not because any of our precedents (aside from *Roe* itself) command or justify that result; it can only be because protection for this unique choice is itself ‘implicit in the concept of ordered liberty’ or, perhaps, ‘deeply rooted in this Nation's history and tradition.’ It seems clear to me that it is neither. The Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences.”

Justice White *et al.* in *Thornburgh* dissent (*supra*), at 793-794

“A second, equally basic error infects the Court's decision in *Roe v. Wade*. The detailed set of rules governing state restrictions on abortion that the Court first articulated in *Roe* and has since refined and elaborated presupposes not only that the woman's liberty to choose an abortion is fundamental, but also that the State's countervailing interest in protecting fetal life (or, as the Court would have it, ‘potential human life, ...’ becomes ‘compelling’ only at the point at which the fetus is viable. As JUSTICE O'CONNOR pointed out three years ago in her dissent in *Akron v. Akron Center for Reproductive Health, Inc.*, ... the Court's choice of viability as the point at which the State's interest becomes compelling is entirely

arbitrary. The Court's 'explanation' for the line it has drawn is that the State's interest becomes compelling at viability 'because the fetus then presumably has the capacity of meaningful life outside the mother's womb.' ... As one critic of Roe has observed, this argument 'mistakes a definition for a syllogism.' Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 924 (1973)."

Justice White *et al.* in *Thornburgh* dissent (*supra*), at 794-795

"*Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never--not in 1787, 1791, 1868, or at any time since--done any such thing. I would return the issue to the people by overruling *Roe v. Wade*."

Justice White *et al.* in *Thornburgh* dissent (*supra*), at 796-797

"The decision today appears symptomatic of the Court's own insecurity over its handiwork in *Roe v. Wade* and the cases following that decision. Aware that, in *Roe*, it essentially created something out of nothing, and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively. Perceiving, in a statute implementing the State's legitimate policy of preferring childbirth to abortion, a threat to or criticism of the decision in *Roe v. Wade*, the majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*. I do not share the warped point of view of the majority, nor can I follow the tortuous path the majority treads in proceeding to strike down the statute before us. I dissent."

Justice White *et al.* in *Thornburgh* dissent (*supra*), at 813-814

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