THE DEFINITION OF "PERSON": APPLYING THE *CASEY* DECISION TO *ROE V. WADE*

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I. INTRODUCTION

Perhaps no Supreme Court case is as well known or as hotly debated as *Roe v. Wade*.[1] This sentiment was again proven true during the recent confirmation hearings of Justice Samuel Alito. In the course of those hearings, those who support the *Roe* decision found themselves on the one hand arguing that *Roe* was "well settled" law, while on the other hand voicing concern that Alito might become the swing vote that would eventually overturn *Roe*.[2] Senator Dianne Feinstein of California was one of those who, despite acknowledging Alito's qualifications, concluded that "[i]f one is pro-choice in this day and age, with the balance of the Court at stake, one cannot vote to confirm Judge Alito."[3] Therefore, one must ask: is *Roe* subject to being overturned, or is it settled law?

In the last major challenge to *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court acknowledged the "sustained and widespread debate" that the *Roe* decision had provoked.[4] In its attempt to quell this debate, the Court enunciated a strict standard of review by which the principle of stare decisis might be overcome,[5] thereby limiting future opportunities to reverse a previous holding of the Court.[6] "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[7]

Citing *West Coast Hotel Co. v. Parrish*[8] and *Brown v. Board of Education*,[9] the Court stated that for a case to overcome stare decisis it must show that either the facts behind the constitutional resolution of the earlier case are no longer true or society's previous understanding of

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1 410 U.S. 113 (1973).

2 *See* 152 CONG. REC. S153-54 (daily ed. Jan. 26, 2006) (statement of Sen. Feinstein) (discussing the Senate confirmation hearings of Justice Samuel Alito).

3 *Id.* at S153.

4 505 U.S. 833, 861 (1992).

5 *See id.* at 854–55.

6 While the reason for this standard was to demonstrate that neither the facts nor the understanding of the facts supporting the *Roe* decision had changed, and that therefore there was no reason to overturn *Roe*, this essay will examine whether such change has *now* occurred.

7 *Casey,* 505 U.S. at 854.

8 300 U.S. 379 (1937), *overruling* Adkins v. Children's Hosp., 261 U.S. 525 (1923).

9 347 U.S. 483 (1954), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896).

those facts justifying the earlier decision have changed.[10] While *Casey* then held that "neither the factual underpinnings of *Roe*'s central holding nor our [society's] understanding of it has changed,"[11] it now appears that both the cited underpinnings and understanding may be eroding. In other words, while the *Casey* decision was framed in such a way as to demonstrate the difficulty of overcoming stare decisis, specifically with respect to reversing *Roe*, it may in fact have opened the door to just such a reversal.

In *Roe*, the constitutional question focused on the competing rights of three parties: (1) a pregnant woman, (2) her unborn child, and (3) the State of Texas.[12] The mother asserted a right to privacy over her own body, as opposed to the unborn child's right to life and the state's interest in protecting that right to life.[13] The Court decided that the Fourteenth Amendment's use of the word "person"[14] did not refer to the unborn, and that, therefore, there was no constitutional right to life.[15] Additionally, the Court found that while the state did have a right to protect the *potentiality* of the life of a fetus, that interest was not strong enough to completely abrogate the mother's right to privacy.[16]

In contrast to that original ruling, there has been an evolution in lawmaking across the country that has either established or strengthened a state's right to protect the life of the unborn.[17] These measures have grown from basic tort laws that compensate parents for the loss of an unborn child,[18] to criminal codes that enable a state to prosecute the killer of an unborn child for murder.[19] Perhaps the most crucial aspect of this legislative activity is that many state criminal codes now define "person" to include the unborn at any stage of development.[20] The public support for these laws is also on the rise,[21]

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10 *Casey*, 505 U.S. at 863–64.

11 *Id.* at 864.

12 Roe v. Wade, 410 U.S. 113, 129, 153–54, 156–57 (1973).

13 *Id.*

14 *See* U.S. CONST. amend. XIV, § 1.

15 *Roe*, 410 U.S. at 158.

16 *Id*. at 159.

17 *See infra* Part II.B.

18 *Roe*, 410 U.S. at 162 ("In a recent development . . . some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.").

19 *E.g.*, TEX. PENAL CODE ANN. § 1.07(a)(26), (38) (Vernon Supp. 2006-2007).

20 *See infra* notes 50 (listing the twenty-four states that have homicide laws that cover unborn victims at any stage of development), 52–56 (citing specific homicide laws from five states that protect the life of human beings from fertilization until birth).

21 In a 2003 Fox News poll, 79% of the nine hundred registered voters polled answered "yes" when asked "[i]f a violent physical attack on a pregnant woman leads to the death of her unborn child, do you think prosecutors should be able to charge the attacker

particularly in response to high profile crimes like the murders of Laci and Conner Peterson.[22] As a result, it appears that not only is the applicable legal interest of states being solidified, but also society's understanding of the competing rights at issue in *Roe*.

This essay will attempt to measure these legal and societal changes to determine whether they meet the *Casey* standard for overturning *Roe v. Wade.* As part of that discussion, this essay will analyze some of the initial conclusions of *Roe* and compare them with the evolving legislation regarding fetal protection.

II. ROE V. WADE

A. The Definition of "Person" and the Fourteenth Amendment

One of the primary questions before the Court in *Roe* was whether a fetus qualifies as "a person within the meaning of the Fourteenth Amendment."[23] The importance of this question, put forth by the State of Texas, cannot be overemphasized, for had the Court agreed with the premise, the constitutional "right to life" would have given the states the authority to protect that life with whatever legislation they deemed necessary.[24]

Since the drafting of the Constitution, the definition of "person" and the rights afforded to such "persons" has continued to evolve. That process, however, has not always led to immediate change, as demonstrated by previous Supreme Court decisions. In *Bradwell v. Illinois*, Justice Bradley concurred with the decision to affirm the state's right to refuse a woman admittance to the state bar, claiming that one of the maxims of our common law system of jurisprudence had been that "a woman had no legal existence separate from her husband."[25] Likewise, in *Dred Scott v. Sandford*, the Court was unequivocal in its position that black slaves did not possess the same constitutional rights as white Americans.[26] The Court argued that even the language of the Declaration of Independence demonstrated this separation:

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with murder for killing the fetus?" National Right to Life, One Victim or Two?, http://www.nrlc.org/Unborn_Victims/UnbornPolls110703.html (last visited Nov. 10, 2006).

22 Scott Peterson was convicted of killing his wife Laci Peterson when she was eight-months pregnant with their son, Connor. Brian Skoloff, '*Callous' Peterson Sentenced To Die for Killing Wife, Fetus*, TORONTO STAR, Mar. 17, 2005, at A19, *available at* 2005 WLNR 4111617.

23 *Roe*, 410 U.S. at 157.

24 *Id.* at 156–57 ("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument.").

25 83 U.S. (16 Wall.) 130, 141 (1872).

26 60 U.S. (19 How.) 393, 410–11 (1856).

> "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights ; that among them [sic] is [sic] life, liberty, and the pursuit of happiness . . . ."
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> The general words above quoted would seem to embrace the whole human family . . . . But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted . . . .[27]

The Court went on to state that even if there was a change in public sentiment, the Framers' attitude toward blacks should be followed in any constitutional interpretation:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.[28]

Despite this rationale, both women and blacks eventually came to be seen as "persons" entitled to full constitutional recognition.[29] Further, while the decision in *Dred Scott* relied heavily on the Framers' supposed understanding of persons and rights, the Court recognized corporations as "persons" less than thirty years later in the landmark case of *Santa Clara County v. Southern Pacific Railroad Co.*[30]

In determining whether a fetus qualifies as a person under the Fourteenth Amendment, the *Roe* Court, though noting that "[t]he Constitution does not define 'person' in so many words"[31] found that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[32] To reach this conclusion, the Court turned to other portions of the Constitution, specifically the listing of qualifications for Congress[33] and for President,[34] and consequently determined that "in nearly all these instances, the use of the word 'person' was such that it has application only postnatally."[35] Like the *Dred Scott* Court before it,

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27 *Id.* at 410 (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

28 *Id.* at 426.

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

30 118 U.S. 394 (1886).

31 Roe v. Wade, 410 U.S. 113, 157 (1973).

32 *Id.* at 158.

33 *Id.* at 157 (citing U.S. CONST. art. I, §§ 2–3).

34 *Id.* (citing U.S. CONST. art. II, § 1).

35 *Id.*

the *Roe* Court was not so much interpreting a given definition as it was extrapolating a definition from legal contexts and usage.

This is clearly a departure from the more recent *Santa Clara County* decision in which the Court held, prior to ruling, that "[c]orporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States."[36] Were the *Roe* standard of textual usage applied to corporations, they too would clearly be excluded as persons within the meaning of the Constitution, since a corporation is clearly not qualified to hold a congressional or the presidential office. Yet the Court in *Santa Clara County* abandoned that interpretive strategy, choosing instead to recognize the importance of expanding the constitutional definition of "person" beyond that which the Framers originally had in mind.

It is important to note that such an expansion does not necessarily violate the Constitution itself, but rather may serve to achieve the ideals set forth in its text. For instance, while the phrase "all men are created equal"[37] is a timeless ideal captured in the Declaration of Independence, its drafters' perceived understanding of the word "men" in *Bradwell* and *Dred Scott* severely limited the realization of that ideal by limiting the application of the principle to only white males. Only a later acceptance of blacks as people enabled the idea of equality to draw closer to fulfillment. Although expanding legal recognition to women, blacks, and corporations might have gone beyond the original intent of the Framers, in so doing, the original ideal behind these protections—equality for all men—has been more fully realized.

This interpretative philosophy has already been applied by the Supreme Court in relation to other constitutional amendments. In *Trop v. Dulles*, the issue was whether the penalty of denationalization, or the loss of citizenship, was a constitutionally appropriate punishment for wartime desertion.[38] The Court determined that it was not, as the punishment violated the Eighth Amendment's prohibition against cruel and unusual punishment.[39] In explaining this decision, the Court expressed the following rationale:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . [Therefore, t]he Amendment must

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36 Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 394–95 (1886) (statement of facts).

37 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

38 356 U.S. 86, 87 (1958).

39 *Id.* at 101.

> draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[40]

The Court recognized that while the Framers' goal of prohibiting cruel and unusual punishment must be upheld, their concept of what constituted "cruel and unusual" must be subject to revisions that correspond with society's current concept of cruelty and the unusual. In other words, the Court has found that the evolving standards of a maturing society are legitimate tools for constitutional interpretation.

If that approach is valid, then one must wonder what the results would be if the same "evolving standard" were applied to the definition of "person." While the *Roe* decision was accurate in pointing out that "person" as used in the Fourteenth Amendment did not specifically refer to the unborn, it is clear from *Roe* that the exclusive meaning of "person" was also not specifically located within the amendment. Therefore, it appears that the constitutional parameters of "person" remain open not only to the same interpretive expansion that previously has been manifested in the legal status of women, blacks and corporations, but that it may also be subject to reinterpretation based on a maturing society's evolving standard of decency. As such measures have previously been critical to the realization of equality for men and the prevention of cruel and unusual punishment, similar actions should not be excluded from consideration in any future analysis of the definition of person.

B. The States' Interest in Protecting Life

The second main argument asserted by the State of Texas in *Roe* was 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."[41] The Court found this argument unconvincing, however, choosing instead to focus on the legal standing of the unborn in the legislation of that day: "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."[42]

As the Court reasoned that the legal rights of the unborn were only actually acquired at birth, it correspondingly limited the state's compelling interest in protecting the unborn to the point of viability.[43] However, in basing its limitation of a state's interest in the protection of

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40 *Id.* at 100–01.

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

42 *Id.* at 161.

43 *Id.* at 163.

the unborn on existing legislation, the Court opened the door to the possibility that future legislative changes might erode the foundation of their decision.

This is remarkable when one considers that the *Roe* decision had already noted the beginning of a shift in laws regarding the unborn:

> In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would *appear to be* one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life.[44]

This development, however, would prove significantly more than what it "appeared to be." Over the past three decades, fetal-rights legislation has exploded. At first, this legislation, while no longer limiting itself to the "born alive" rule noted in *Roe*, still maintained a "viability" standard and was enacted in only "some states."[45] Thus, recovery in tort law was preserved for situations in which the pregnancy-ending injury occurred after the fetus was "viable."[46] Now, however, only fourteen states continue to adhere to the "born alive" rule,[47] and six states currently allow for recovery for wrongful death even if the fetus was not viable at the time of the injury.[48]

This trend has also been followed by a host of state criminal laws intended to protect the unborn from harm. Currently, ten states have passed legislation criminalizing the death of a fetus that was either *quick*[49] or viable, and twenty-four states have passed laws that recognize fetal victims from the point of fertilization.[50] In addition, some states

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44 *Id.* at 162 (emphasis added) (footnote omitted).

45 *Id.* at 161.

46 *See id.* at 162 (noting the emergence of this "recent development" in a "few courts").

47 Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising From the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 37 AKRON L. REV. 41, 45–52 (2004).

48 *Id.* at 71–74.

49 *See* BLACK'S LAW DICTIONARY 1282 (8th ed. 2004) (defining "quickening" as "[t]he first motion felt in the womb by the mother of the fetus, usu. occurring near the middle of the pregnancy").

50 National Right to Life, State Homicide Laws that Recognize Unborn Victims (June 16, 2006), http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html [hereinafter State Laws]. The ten states that have enacted partial protection for the unborn are Arkansas, California, Florida, Indiana, Maryland, Massachusetts, Nevada, Rhode Island, Tennessee, and Washington. *Id.* The twenty-four states that protect infants throughout the prenatal period are Alabama, Alaska, Arizona, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *Id.* For a list of applicable state code sections and case law, see *id.*

have passed laws that criminalize battery of the unborn, regardless of the viability of the fetus.[51] While some members of the *Roe* Court might still have interpreted these developments as the protection of potential life, it is clear that the language of some of these state provisions is well beyond that position. For example, in Mississippi "the term 'human being' includes an unborn child at every stage of gestation from conception until live birth and the term 'unborn child' means a member of the species homo sapiens, at any stage of development, who is carried in the womb."[52] In Illinois, "'unborn child' shall mean any individual of the human species from fertilization until birth."[53] Texas's definition of "person" now includes "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth."[54] Likewise, Louisiana holds that "'[p]erson' includes a human being from the moment of fertilization,"[55] and Nebraska law states that "person" includes "an unborn child in utero at any stage of gestation."[56]

With these definitions in place, it is clear that the legal landscape has shifted significantly since *Roe*. The *Roe* Court claimed that the law had been reluctant to recognize that human life began before birth.[57] As illustrated above, however, that position is no longer a valid one. Consequently, the *Casey* claim that "neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed,"[58] is no longer tenable.

C. Casey *and Stare Decisis*

According to *Casey*, "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. . . . [T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[59] Out of this "respect for precedent," the *Casey* Court insisted that for a prior decision to be reversed, either the facts behind

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51 Aaron Wagner, Comment, *Texas Two-Step: Serving up Fetal Rights by Side-Stepping* Roe v. Wade *Has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 TEX. TECH L. REV. 1085, 1104 (2001) (citing 720 ILL. COMP. STAT. ANN. 5/12-3.1 (West 1993)).

52 MISS. CODE ANN. § 97-3-37 (2006).

53 720 ILL. COMP. STAT. 5/9-1.2 (2005).

54 TEX. PENAL CODE ANN. § 1.07(a)(26), (38) (Vernon 2003 & Supp. 2006–2007). In contrast, the *Roe* Court stated that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. 113, 158 (1973).

55 LA. REV. STAT. ANN. § 14:2(7) (2006).

56 NEB. REV. STAT. § 30-809 (2006).

57 *Roe*, 410 U.S. at 161.

58 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

59 *Id.* at 854 (citation omitted).

the decision, or else society's understanding of the facts, must be shown to have changed.[60]

After subjecting the facts of *Roe* to this examination, the *Casey* Court confirmed its earlier assertion that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973."[61] The same conclusion could not be reached today. One of the foundational legal principles behind the *Roe* decision was that "the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth."[62] Today, however, a majority of states have legislation in place that recognizes and protects the life of the unborn.[63] Some, as noted in Part II.B, *supra*, have gone so far as to recognize that human life begins at conception.[64] Thus, while the *Casey* Court attempted to solidify *Roe* by establishing a strict standard for overcoming stare decisis, it appears that very standard may now have been met, opening the door to a reversal of *Roe*.

The importance of this legislative shift is strengthened when one takes into account the Court's statement in *Gregg v. Georgia* regarding societal endorsement: "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty . . . ."[65] In other words, the Court itself recognizes that such a legislative majority constitutes a clear indication of society's position on an issue. Thus it would seem appropriate for the Court to reach a similar conclusion with regard to the legislation of the thirty-four states that currently recognize a fetus as a person[66] and conclude that society endorses the legal recognition of human life prior to birth. If, then, society's understanding of the factual basis of *Roe*—the fetus's lack of personhood—has changed significantly, another *Casey* standard for reversal may have already been met.

When the *Casey* Court set societal understanding of an issue as a standard for overruling a previous decision, it based its rationale on the *Brown v. Board of Education* ruling, which had overturned the Court's previous decision in *Plessy v. Ferguson* upholding segregation.[67] In the 1896 *Plessy* decision, the Court held that segregation did not violate the

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60 *Id.* at 854, 863–64.

61 *Id.* at 857.

62 *Roe*, 410 U.S. at 161.

63 *See supra* note 50 and accompanying text.

64 *See supra* notes 52–56 and accompanying text.

65 428 U.S. 153, 179–80 (1976) (footnote omitted).

66 *See supra* note 50 and accompanying text.

67 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 862–63 (1992) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

Equal Protection Clause of the Fourteenth Amendment.[68] By 1954, however, that understanding had changed:

> The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect . . . . Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896.[69]

Importantly, while the Court concluded that society's understanding of segregation had changed, this was clearly not the opinion of all Americans, as those in the South opposed to desegregation made clear in the following months and years. With that in mind, it seems that in the eyes of the *Casey* Court, "society" does not require "unanimity."

Today, there is convincing evidence that society's understanding is no longer aligned with the *Roe* decision. As noted in the introduction, public support of fetal homicide laws is overwhelmingly positive.[70] Accordingly, state legislatures have been quick to enact laws that reflect this shift in public sentiment.[71] Consequently, the *Casey* Court's assertion that the nation's understanding of the facts underlying the *Roe* decision had not changed is outdated.

It appears, therefore, that both of the standards *Casey* established for overturning a precedent-setting case have been met. *Roe*'s finding that the unborn are not people due legal protection, and its rejection of the states' interest in protecting life from conception, rested primarily upon the absence of existing legal recognition of the unborn. This "factual underpinning" has eroded substantially, as the vast majority of states have since enacted homicide laws protecting the unborn as individuals, with almost half the states enacting homicide laws that protect the unborn at any stage of development.[72] Likewise, *Casey*'s assertion that the nation's understanding of the facts underlying *Roe* has not changed is outdated as well, evidenced by this same legislative action of society's elected representatives, empowered to implement the will of the people. Accordingly, despite the current lack of a national consensus on the issue of abortion, it seems that *Roe* may now be vulnerable to reversal.

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68 Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

69 *Casey*, 505 U.S. at 863.

70 *See supra* note 21.

71 *See supra* notes 50–56 and accompanying text.

72 State Laws, *supra* note 50; *see also supra* notes 52–56 and accompanying text.

III. RELIANCE AND RIGHTS

A. Casey *and Reliance*

While thus far this essay has addressed *Roe*'s potential vulnerability as a result of state-enacted legislation granting legal recognition to the unborn, the question remains: Is *Roe* subject to being overturned? To answer this question, one must first readdress the *Casey* decision, for in its defense of the principle of stare decisis the Court mandated that, before a previous ruling can be overturned, an inquiry into the reliance on that previous ruling must be made.[73]

While stare decisis is seen as a method of protecting reliance interests, those interests are most commonly seen in the commercial context.[74] The reasoning behind such a principle is clear: once a legal rule is established, decisions involving the allocation of resources are made in reliance upon that rule remaining valid.[75] To reverse that legal rule, without analyzing the resulting costs of such a decision to those who had relied upon the rule, would be irresponsible.

In *Casey*, however, the Court acknowledged that under this traditional approach to analyzing reliance, "some would find no reliance worthy of consideration in support of *Roe*."[76] Accordingly, the Court chose to recognize a more indirect economic reliance that had developed as a result of personal reliance on the *Roe* decision:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. 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.[77]

Unlike traditional approaches to reliance that measure the cost of past investments made in reliance on a legal rule, the *Casey* Court chose to recognize a type of future reliance, whereby women are said to economically rely on the future availability of abortion.[78] In reality, the Court was not so much recognizing reliance, but rather the right to reliance, and through that, continued reliance.

In his dissent from the *Casey* decision, Chief Justice Rehnquist described this "as an unconventional—and unconvincing—notion of

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73 *Casey*, 505 U.S. at 855.

74 Michael S. Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1553 (2000).

75 *Id.*

76 *Casey*, 505 U.S. at 856.

77 *Id.*

78 *Id.*

reliance."[79] In further critiquing the majority's claims of reliance upon *Roe*, Rehnquist added: "The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their 'places in society' in reliance upon *Roe*."[80]

Years later, Justice Scalia would also comment on *Casey*'s assertion of women's reliance on *Roe*:

> This falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have *permitted* the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired).[81]

Scalia's comments address both the more traditional reliance test and the modified future reliance as presented in *Casey*. Regarding traditional reliance, Scalia points out that while people have relied on the availability of abortion as protected by *Roe*, were *Roe* to be overturned, the right to terminate pregnancies that were the result of intimate relationships entered into under that reliance, would still be protected up until the point of viability. Accordingly, there would be no "loss" associated with one's past reliance on *Roe*.[82] Addressing the *Casey* Court's declaration of a future reliance, Scalia contends that since not all states would ban abortion, that avenue would remain available even if the Court overturned *Roe* and returned the right to legislate abortion to the states.[83]

While these arguments may adequately address the *Casey* assertion of a personal reliance on *Roe*, the majority opinion in *Casey* also presented the idea of a societal reliance on *Roe*, pointing out that "while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."[84]

As Rehnquist points out in his dissent, however, "at various points in the past, the same could have been said about this Court's erroneous decisions that the Constitution allowed 'separate but equal' treatment of minorities."[85] In fact, when one considers the social and economic reliance that was placed on segregation, "[t]he 'reliance' argument for

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79 *Id.* at 956 (Rehnquist, C.J., dissenting).

80 *Id.* at 956–57 (Rehnquist, C.J., dissenting).

81 Lawrence v. Texas, 539 U.S. 558, 591–92 (2003) (Scalia, J., dissenting).

82 *See id.*

83 *See id.* at 592.

84 *Casey*, 505 U.S. at 856.

85 *Id.* at 956 (Rehnquist, C.J., dissenting).

retaining *Roe* is far weaker than the reliance argument for keeping *Plessy*."[86] Rehnquist, in dismissing the majority's reliance argument, concluded that "the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here."[87]

In addition to these reliance-based arguments, the majority in *Casey* also proposed that the principle of stare decisis should be even more rigidly adhered to when "the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*."[88] The Court stated that

> whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution . . . its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. . . . So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.[89]

While this decision would seem to imply that controversial decisions are to be considered nearly beyond reproach, eleven years later the Court would come to a completely different position on divisive rulings.

In *Lawrence v. Texas*, the Court ruled that a Texas statute that criminalized sexual intimacy between same sex partners was an unconstitutional violation of the Due Process Clause.[90] This holding directly overturned the Court's previous ruling in *Bowers v. Hardwick*, in which the Court held that a similar sodomy statute in Georgia did not violate the rights of homosexuals.[91] Apparently disregarding the *Casey* requirement of "an equally rare precedential force,"[92] the Court in *Lawrence* acknowledged that the "criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects,"[93] and then reversed itself, pronouncing that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."[94]

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86 Paulsen, *supra* note 74, at 1555.

87 *Casey*, 505 U.S. at 956 (Rehnquist, C.J., dissenting).

88 *Id.* at 866.

89 *Id.* at 867.

90 539 U.S. 558, 578–79 (2003).

91 478 U.S. 186, 192, 196 (1986).

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

93 *Lawrence*, 539 U.S. at 576.

94 *Id.* at 578.

Therefore, at least in *Lawrence*, the Court recognized that regardless of the principle of stare decisis, bad decisions must be corrected. It seems, then, that while "[t]he doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law[, i]t is not . . . an inexorable command."[95] This approach has led two recent commentators to agree with Professor Paulsen's evaluation of the *Casey* Court's presentation of stare decisis: "In practical terms, the doctrine means that precedent is followed, except when it isn't."[96]

This, of course, leaves open the question of whether *Roe* should be upheld simply because of stare decisis, or whether, if it were found to be "bad law," it should be overruled in spite of it. This uncertainty is further compounded by the *Casey* reliance standard, which is not only in itself a strong departure from traditional ideas of protecting economic interests, but is also viewed as a departure from historical rulings such as *Brown v. Board of Education*, where similar reliance interests were found to be secondary to constitutional adherence. Therefore, while neither the doctrine of reliance nor the doctrine of stare decisis can be seen as providing a clear avenue for reversal of *Roe*, it is equally true that neither provides a particularly safe harbor for it.

B. Determining Rights

As this essay indicated at the outset, the *Roe* case was about rights. In the end, the Court ruled that the unborn have virtually no rights, states have a limited right to protect the unborn, and a woman's right to privacy gives her the majority of power in reproductive decision-making.[97] However, as discussed earlier in this essay, the rights of the unborn, along with the states' ability to protect them, have increased dramatically over the past three decades.[98] It is this shift in legal recognition that has arguably served to meet the *Casey* standard for overcoming stare decisis as the legal foundation for *Roe*.

One aspect of *Roe* that has remained unchanged over the years, however, is a woman's right to privacy and the control that this right gives her in reproductive planning. Yet even this central holding may have been jeopardized by the Court's 1997 ruling in *Washington v. Glucksberg*.[99] In *Glucksberg*, the Court rejected the idea that physician-

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95 *Id.* at 577.

96 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, 106 (2005) (quoting Paulsen, *supra* note 74, at 1542).

97 Roe v. Wade, 410 U.S. 113, 152, 158, 163 (1973).

98 *See supra* Part II.B.

99 521 U.S. 702 (1997).

assisted suicide was a constitutionally protected right.[100] Though the Court avoided terminating the reproductive rights created in *Roe*, its analysis in *Glucksberg* "rejected the type of substantive due process reasoning that produced *Roe*."[101] In other words, while the *Glucksberg* ruling left the ultimate findings of *Roe* intact, it invalidated the method used to obtain those findings.

Years later in *Lawrence*, Justice Scalia, applying the *Glucksberg* analysis to the *Casey* standard for overcoming stare decisis, remarked:

> *Roe* and *Casey* have been equally "eroded" by *Washington v. Glucksberg*, which held that *only* fundamental rights which are "'deeply rooted in this Nation's history and tradition'" qualify for anything other than rational-basis scrutiny under the doctrine of "substantive due process." *Roe* and *Casey*, of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort *was* rooted in this Nation's tradition.[102]

In speaking of "erosion," Justice Scalia presents the argument that yet another legal foundation for *Roe* has been removed: the Court has recognized that the process behind its decision to expand a woman's right to privacy was flawed. Therefore, while the *Casey* Court argued that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973,"[103] "it is absolutely clear that *Roe* could not have resulted in 1973 from the jurisprudence of substantive due process announced in *Glucksberg* in 1997."[104] Thus, as one set of rights are being expanded beyond the limits initially recognized in *Roe* (namely, the growing state recognition of the personhood of the unborn), another right established by *Roe* may be on the verge of being curtailed.

IV. CONCLUSION

Is *Roe* subject to being overturned? Or is it settled law? Though supporters of *Roe* point to the establishment of a fundamental right and the doctrine of reliance as reasons for maintaining the ruling, it appears that the legal facts and reasoning that lay behind the original decision have become either outdated by state-enacted legislation and evolving standards of decency, or rejected by subsequent Court decisions. "In fact, it is no exaggeration to say that the 'development of constitutional law since [*Casey*] was decided has implicitly . . . left *Roe* behind as a mere

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100 *Id.* at 728.

101 Paulsen, *supra* note 74, at 1557.

102 Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (citation omitted).

103 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992).

104 Paulsen, *supra* note 74, at 1558.

survivor of obsolete constitutional thinking.'"[105] It is therefore the conclusion of this essay that, as the *Casey* standards for overcoming stare decisis have been met, *Roe* is indeed in legal jeopardy and subject to reversal by the Court.

105 *Id.* at 1557–58 (quoting *Casey*, 505 U.S. at 857).