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ARTICLE

ROE AS POTEMKIN VILLAGE: FALLACIES, FACADES, AND STARE DECISIS

Scott W. Gaylord*

ABSTRACT

The abortion debate has escalated once again, taking on a new urgency in the wake of the Supreme Court's previously denying emergency relief in *Whole Woman's Health v. Jackson* and now deciding *Dobbs v. Jackson Women's Health Organization*. In *Whole Woman's Health*, a majority of the Court declined the request to enjoin a Texas statute banning abortions at roughly six weeks, thereby permitting the law to go into effect. In *Dobbs*, the Court reconsidered and overturned *Roe's* "essential holding," which had established roughly fifty years ago that pre-viability bans on abortion were unconstitutional.

Supporters of abortion rights understandably worried that *Whole Woman's Health* indicated that a majority of the Court would overturn or severely limit *Roe*. In defense of *Roe* and its progeny, these individuals frequently invoked *Casey* and *stare decisis* to justify retaining *Roe's* viability standard, which held sway for almost half a century. What these supporters did not do was adopt *Roe's* constitutional analysis—and for good reason. As this Article explains, *Roe's* argument in support of viability rests on seven informal fallacies and at least one formal fallacy. While commentators on both sides of the abortion debate have highlighted problems with *Roe's* reasoning, none have undertaken this type of detailed argument reconstruction.

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A careful review of *Roe*'s reasoning reveals that *Casey*'s use of *stare decisis* to preserve *Roe* is a Potemkin village—a tribute to a longstanding precedent that, when scrutinized, is seen to lack a constitutional foundation.

That *Roe*'s constitutional argument is severely wanting put supporters of *Roe* between the horns of a dilemma. A key factor for the Court when determining whether to overrule a prior decision is the quality of the reasoning in the earlier case. Regardless of one's views on abortion, *Roe* was poorly reasoned. Its viability standard is not predicated on the Constitution's text, original meaning, or general purposes. As this Article explains, it is grounded in a series of fallacies that do not support its holding. While *Dobbs* does not engage in this type of detailed argument reconstruction, this Article provides additional support for the majority's conclusion that *Roe* was "more than just wrong. It stood on exceptionally weak grounds." Thus, if the Respondents in *Dobbs* parroted *Roe*'s argument, they harmed their *stare decisis* argument (given that the quality of *Roe*'s reasoning is not strong). On the other hand, if those defending *Roe* advanced new arguments to supplement *Roe*'s reasoning, they risked having the Court not apply *stare decisis* at all. As Chief Justice Roberts explained in *Citizens United*, *stare decisis* is "a doctrine of preservation, not transformation." If those defending *Roe* presented novel arguments, the Court need not (and ultimately did not) defer to *those* arguments because the Court was considering them for the first time. As the *Dobbs* majority noted in rejecting Chief Justice Roberts's concurrence, "a new rule that discards the viability rule cannot be defended on *stare decisis* grounds."

INTRODUCTION

The abortion debate has remained at the forefront of the Nation's consciousness since the Court decided *Roe v. Wade* in 1973,¹ sometimes simmering under the surface and at other times, like now, erupting into the public square.² There are at least two reasons for the upsurge in both the calls to retain *Roe* and its progeny as well as the claims that those cases should be overturned. First, the United States Supreme Court granted certiorari in *Dobbs v. Jackson Women's Health Organization*,³ which is likely to be one of the most consequential cases in the last fifty years.⁴ In placing *Dobbs* on its calendar, the Court agreed to consider "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional."⁵ *Dobbs*, therefore, presents a direct challenge to the "essential holding" of *Roe*—that viability is the constitutionally mandated standard.⁶ Whichever side of the debate one is on, *Dobbs* matters. A lot. Second, in *Whole Woman's Health v. Jackson*,⁷ the Court refused to enjoin a Texas law, known as S.B. 8, which banned abortion after roughly

¹ 410 U.S. 113 (1973).

² On June 24, 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, 2022 WL 2276808 (U.S. 2022). Because this Article was written months before *Dobbs* issued, it frequently refers to *Dobbs* as pending before the Court. The Article remains highly relevant in the wake of *Dobbs*, though, as the Nation begins the next chapter in the longstanding debate about abortion. A majority in *Dobbs* says that it is "return[ing] the issue of abortion to the people's elected representatives." *Id.* at *7. Thus, the States will begin hearing more abortion-related cases, with supporters of *Roe* arguing in favor of abortion rights under State constitutions and opponents championing *Dobbs*. State and federal legislatures are apt to propose and debate abortion regulations and policies that build on, restrict, or abolish the right recognized in *Roe* and *Casey*. Accordingly, a clear understanding of *Roe*'s reasoning remains critically important going forward.

³ 141 S. Ct. 2619, 2619 (2021).

⁴ See, e.g., Ryan T. Anderson & Robert P. George, Opinion, *Roe v. Wade Was a Lousy Decision. The Supreme Court Should Take the Opportunity To Overturn It.*, USA TODAY (Aug. 3, 2021, 5:00 AM), <https://www.usatoday.com/story/opinion/2021/08/03/abortion-appears-nowhere-constitution-roe-wade-casey/5407906001/?gnt-cfr=1> [<https://perma.cc/R9T8-V9Y3>] ("[*Dobbs*] will prove to be the most watched—and most important—Supreme Court case in nearly half a century . . .").

⁵ Petition for Writ of Certiorari at (i), *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392), https://www.supremecourt.gov/DocketPDF/19/19-1392/145658/20200615170733513_FINAL%20Petition.pdf [<https://perma.cc/8M2T-Q3C2>].

⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

⁷ *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021).

six weeks, leaving all participants in the abortion discussion to wonder what *Whole Woman's Health* portends for *Roe*.⁸

Those championing *Roe* (including the Respondents in *Dobbs*) rely heavily on the fact that *Roe* and *Casey* have protected the right to abortion for the past forty-eight years.⁹ Like the plurality in *Casey*, current supporters of *Roe* rely on the lengthy period of time that the Court has recognized the constitutional right to abortion pre-viability to reinforce its importance and inviolability.¹⁰

Yet very few (perhaps none) of the critics of the Mississippi statute in *Dobbs* or the Texas law in *Whole Woman's Health* invoke *Roe*'s constitutional argument to defend the privacy right at issue, relying instead on its *holding*. In this way, *Roe*'s defense of viability remains, "but only in the way a storefront on a western movie set exists: a mere façade to give the illusion of reality."¹¹ Even *Casey* did not embrace *Roe*'s legal analysis,¹² relying primarily on *stare decisis* to preserve *Roe*'s "essential [viability] holding" while discarding other aspects of the decision.¹³ That *Roe* still dominates the abortion debate reinforces the illusion of a rigorous, detailed

⁸ See, e.g., Ian Millhiser, *The Staggering Implications of the Supreme Court's Texas Anti-Abortion Ruling*, VOX (Sept. 2, 2021, 2:30 PM), <https://www.vox.com/22653779/supreme-court-abortion-texas-sb8-whole-womans-health-jackson-roe-wade> (describing *Whole Woman's Health* as "one of the most monumental decisions of our era" that was reached with "virtually no reasoning" in a "shadow docket order").

⁹ Brief for Respondents at 9, *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392) ("Thirty years later, *stare decisis* presents an even higher bar to upending this 'rule of law and [] component of liberty.' *Casey* is precedent on top of precedent—that is, precedent not just on the issue of whether the viability line is correct, but also on the issue of whether it should be abandoned.") (quoting *Casey*, 505 U.S. at 871).

¹⁰ See, e.g., Mary Ziegler, *Supreme Indifference: What the Texas Case Signals About the Court's Treatment of Abortion*, SCOTUSBLOG (Sept. 1, 2021, 3:28 PM), <https://www.scotusblog.com/2021/09/supreme-indifference-what-the-texas-case-signals-about-the-courts-treatment-of-abortion/> [<https://perma.cc/E5AL-H6UH>] ("Besides, the best chance for supporters of abortion rights is to lean on precedent. . . . Reversing *Roe* and *Casey* would upend nearly a half century of jurisprudence.").

¹¹ *Casey*, 505 U.S. at 954 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

¹² See *Dobbs*, 2022 WL 2276808 at * 32 ("*Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new problematic test with no firm grounding in constitutional text, history, or precedent.").

¹³ In one of its only references to *Roe*'s constitutional analysis, *Casey* stated only that "*Roe* was a reasoned statement, elaborated with great care." *Id.* at 870 (plurality opinion). The plurality did not go so far as to credit *Roe* with a reasoned *argument*, which might have contributed to "the reservations" that some of the members of the plurality had "in reaffirming the central holding of *Roe*." *Id.* at 853.

constitutional foundation underlying its holding. What the dissenters said in *Casey*, though, remains true today:

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 façade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of State laws regulating abortion.¹⁴

The criticisms of *Roe*'s constitutional analysis, though, are not limited to the “conservatives” on the Court. Commentators from all segments of the political spectrum, including many who firmly support abortion, acknowledge that *Roe* lacks any stable foothold in the Constitution.¹⁵

Although these judges and scholars have highlighted specific deficiencies in the Court's reasoning, they have not provided a detailed reconstruction of the majority's argument in support of viability. This Article does just that, filling a gap in the literature by peering behind *Roe*'s conclusion—that the Constitution safeguards a right of privacy that “is broad enough to encompass a woman's decision whether or not to terminate her pregnancy” at least pre-viability¹⁶—to evaluate the Court's step-by-step reasoning. This careful reconstruction reveals that *Roe*'s argument is predicated on seven informal fallacies and at least one formal fallacy. Regardless of one's political, social, or moral views on abortion, *Roe* “is bad constitutional law, or rather . . . is *not* constitutional law and gives almost no sense of an obligation to try to be”¹⁷ because such fallacious reasoning does not logically

¹⁴ *Id.* at 966 (Rehnquist, C.J., concurring in the judgement in part and dissenting in part).

¹⁵ See, e.g., Laurence Tribe, *The Supreme Court, 1972 Term—Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) (“One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935–37 (1973) (“What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it. . . . At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.”).

¹⁶ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹⁷ Ely, *supra* note 15, at 947.

support its viability standard. Thus, this Article contends that *Roe* is “a decision without principled justification” and, according to *Casey*, is “no judicial act at all.”¹⁸

That *Roe* and *Casey* (which affirmed *Roe*’s central holding without providing an additional or different argument in support of viability)¹⁹ lack principled justification bears directly on the Court’s consideration of *stare decisis* in *Dobbs*. The strength or quality of the Court’s reasoning in a prior case is a critical factor for the Court when deciding whether to overturn a prior decision.²⁰ And identifying the specific fallacies upon which the majority relies at each stage of its argument demonstrates that *Roe*’s analysis was and remains fundamentally flawed. Accordingly, these logical errors provide a strong basis for not deferring to the Court’s longstanding abortion case law. But this Article also argues that those defending *Roe* need to be concerned about *Roe*’s erroneous reasoning for another reason. The lack of any valid, sound constitutional argument undercuts *Casey*’s reliance on *stare decisis* and might provide the Court with a basis for not applying *stare decisis* in *Dobbs* at all. Because *Roe*’s reasoning is fallacious and not rooted in the Constitution, those challenging the Mississippi statute must advance new and different constitutional arguments to support the claimed constitutional right to abortion. Yet *stare decisis* is “a doctrine of preservation, not transformation.”²¹ That is, under *stare decisis*, “[t]here is . . . no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.”²² Chief Justice Roberts and other members of the Court might

¹⁸ *Casey*, 505 U.S. at 865.

¹⁹ *Id.* at 865; *see also id.* at 870 (adhering to *Roe*’s viability principle in part based on “the doctrine of *stare decisis*,” and noting that “*Roe* was a reasoned statement, elaborated with great care”).

²⁰ *See Dobbs*, 2022 WL 2276808 at *27 (“Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered.”); *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting) (“Although [the Court] must be mindful of the ‘desirability of continuity of decision in constitutional questions . . . when convinced of former error, [the] Court has never felt constrained to follow precedent.’” (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))); *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting) (“The Court has therefore adhered to the rule that *stare decisis* is not rigidly applied in cases involving constitutional issues . . . and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution.”) (citation omitted).

²¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 384 (Roberts, C.J., concurring).

²² *Id.*

conclude that the “preservation of the rule of law” rationale simply does not apply when the original constitutional reasoning has been rejected (because it is fallacious) in favor of a new or distinct line of argument that the Court has not reviewed previously.

I. ARGUMENT

Given the ongoing controversy surrounding abortion, *Roe* remains one of the most divisive decisions in the Court’s catalog of privacy cases.²³ Just the mention of *Roe* stirs deep-seated social, political, religious, and moral reactions from those on all sides of the abortion debate. Among other things, *Roe* introduced a framework that was novel to the Constitution generally and to the Court’s privacy cases in particular—trimesters, viability, and a sliding scale of interests that triggered different levels of scrutiny at different points during gestation. Because none of these concepts were part of the express architecture of the Constitution or the Court’s precedents, the majority fashioned an *ad hoc* argument for its holding in *Roe*. The protracted series of premises and sub-conclusions, which span seventeen pages in the U.S. Reports, was meant to prove that, among other things, the Constitution prohibits States from banning abortion pre-viability.

The Court’s argument has been subjected to extensive criticism from members of the Court²⁴ and commentators²⁵ alike. Even legal scholars who are personally in favor of legalized abortion have acknowledged that *Roe*’s holding is not rooted in the Constitution and does not hold up to any type of serious review. As Laurence Tribe put the point in 1973, “[o]ne of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is

²³ Given that *Dobbs* overturns *Roe* and *Casey*, there is little doubt that *Dobbs* will assume the mantle of one of the Court’s most divisive decisions, flipping the supporters and challengers of *Roe* into challengers and supporters of *Dobbs*.

²⁴ See, e.g., *Roe v. Wade*, 410 U.S. 113, 173–77 (1973) (Rehnquist, J., dissenting); *Akron Ctr. for Reproductive Health*, 462 U.S. at 452–64 (O’Connor, J., dissenting); *Thornburgh*, 476 U.S. at 814 (White, J., dissenting); *Casey*, 505 U.S. at 950–66 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Casey*, 505 U.S. at 980–1000 (Scalia, J., concurring in the judgment in part and dissenting in part).

²⁵ Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003); JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006); Charles Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. REV. 1059 (1973); Robert Bryn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); Clark D. Forsythe, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85 (2005).

nowhere to be found.”²⁶ John Hart Ely echoed this criticism, decrying the decision as “bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”²⁷ Even a former clerk to Justice Blackmun acknowledged that *Roe*’s argument and conclusion are not grounded in the Constitution:

As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible. . . . [I]t has little connection to the Constitutional right it purportedly interpreted. A constitutional right to privacy broad enough to include abortion has no meaningful foundation in constitutional text, history, or precedent—at least, it does not if those sources are fairly described and reasonably faithfully followed.²⁸

Yet despite the persistent commitment to *Roe* (by those on one side of the abortion debate) and the continuing criticisms of that decision (by those on the other side), commentators have not provided a detailed reconstruction of the majority’s argument, identifying the specific steps—and logical flaws—in the Court’s legal analysis. This Article attempts to do just that. The first section provides a comprehensive reconstruction of *Roe*’s reasoning in support of its viability standard. This reconstruction reveals that *Roe*’s central argument in favor of viability is

²⁶ Tribe, *supra* note 15, at 7.

²⁷ Ely, *supra* note 15, at 947. Professor Ely further highlighted the lack of a constitutional foundation for the Court’s decision: “What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure. . . . At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.” *Id.* at 935–37.

²⁸ Edward Lazarus, *The Lingering Problems with Roe v. Wade, and Why the Recent Senate Hearings on Michael McConnell’s Nomination Only Underlined Them*, FINDLAW (Oct. 3, 2002); see also Kermit Roosevelt, *Shaky Basis for a Constitutional ‘Right’*, WASH. POST (Jan. 22, 2003) (“As constitutional argument, *Roe* is barely coherent. The court pulled its fundamental right to choose more or less from the constitutional ether. It supported that right via a lengthy, but purposeless, cross-cultural historical review of abortion restrictions and a tidy but irrelevant refutation of the straw-man argument that a fetus is a constitutional ‘person’ entitled to the protection of the 14th Amendment.”); Jeffrey Rosen, *Worst Choice*, THE NEW REPUBLIC (Feb. 24, 2003) (“Thirty years after *Roe*, the finest constitutional minds in the country still have not been able to produce a constitutional justification for striking down restrictions on early-term abortions that is substantially more convincing than Justice Harry Blackmun’s famously artless opinion itself. As a result, the pro-choice majority asks nominees to swear allegiance to the decision without being able to identify an intelligible principle to support it.”).

predicated on a series of informal fallacies and one formal fallacy. Such defective reasoning does not logically support the Court's contentious conclusion that the Constitution precludes States from prohibiting abortion prior to viability. Given the errors in the majority's reasoning, *Roe* is properly viewed as an act of force or will, not legal judgment—what Justice White referred to as “an exercise of raw judicial power.”²⁹

The second section of the Article then explores two ways in which the lack of a sound constitutional argument might affect the Court's *stare decisis* analysis in *Dobbs*. First, the lack of a well-reasoned defense of viability goes directly to a key *stare decisis* factor—the quality of the reasoning in the Court's prior (and now challenged) decision.³⁰ That *Roe*'s analysis is predicated on numerous fallacious arguments strongly supports overturning *Roe*'s viability standard under the Court's established *stare decisis* doctrine.³¹ Second, a majority of the Court may not even apply *stare decisis* because “the defenders of the precedent do not attempt to ‘defend [its actual] reasoning.’”³² Those arguing that *Roe* should be retained, like Jackson Women's Health Organization in *Dobbs*, do not invoke *Roe*'s constitutional analysis; instead, they rely on *stare decisis* and the fact that *Roe*'s viability standard has been in place for roughly half a century. Yet *Roe* relied only on the fallacious reasoning discussed below—not any new constitutional arguments that might be offered to support viability. As a result, the Court may conclude, consistent with the Chief Justice's view in *Citizens United*, that “[t]here is . . . no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have

²⁹ *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting); see also THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the judiciary has “neither FORCE nor WILL but merely judgment”). The majority in *Dobbs* refers to *Roe* as an exercise of “raw judicial power” at least five times in its opinion. See, e.g., *Dobbs*, 2022 WL 2276808 at *26 (“Rather, wielding nothing but ‘raw judicial power,’ [*Roe*] usurped the power to address a question of profound moral and social importance that the Court unequivocally leaves for the people.”).

³⁰ *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018).

³¹ See *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2178 (2019) (overturning a prior case whose “reasoning was exceptionally ill founded”); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (“Although [the Court] must be mindful of the ‘desirability of continuity of decision in constitutional questions[,] . . . when convinced of former error, [the] Court has never felt constrained to follow precedent.’” (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

³² *Janus*, 138 S. Ct. at 2481 n.25 (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 363 (2010)).

since been abandoned or discredited.”³³ Given that “a decision without principled justification [is] no judicial act at all,” the Court may look past *Casey*’s *stare decisis* analysis, focusing on the merits of the constitutional arguments for and against the viability standard.³⁴

A. *Roe’s Central Argument Is Based on a Series of Informal Fallacies That Do Not Support Its Viability Standard*

The argument reconstruction below tracks the Court’s argument in *Roe*, highlighting the key premises and sub-conclusions that build to the holding that is under review in *Dobbs*—that States are constitutionally disqualified from prohibiting abortion pre-viability. The heading of each subsection is a premise or sub-conclusion in the overarching argument related to viability, not the trimester framework generally. Each subsection then includes an analysis of the reasoning proffered in support of the specific premise or sub-conclusion.

1. Jane Roe Claims the Right to Choose an Abortion at Any Stage of Pregnancy³⁵

This is a factual premise. The Appellant, Jane Roe, asserts that the Constitution protects a broad right to abortion, one that leaves the decision to the woman throughout the pregnancy.

After introducing this premise, though, the Court provides a broad and sweeping overview of the history of abortion regulations. This history of abortion—which starts with the Persians and Greeks, moves up through the evolving views of the American Medical Association, and culminates in the positions of the American Public Health Association and the American Bar Association in the 1970s—is meant to inform (or perhaps persuade) the reader “that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage . . . deriv[ing]

³³ *Citizens United*, 558 U.S. at 384 (Roberts, C.J., concurring).

³⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992). This was the view of the *Casey* dissenters: “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.” *Id.* at 944 (Rehnquist, C.J., concurring in the judgement in part and dissenting in part). The *Dobbs* majority overrules *Roe* after analyzing five *stare decisis* factors, including “the quality of the reasoning.” *Dobbs*, 2022 WL 2276808 at *26.

³⁵ *Roe v. Wade*, 410 U.S. 113, 129, 153 (1973).

from statutory changes effected, for the most part, in the latter half of the 19th century.”³⁶

There are at least three problems with the Court’s historical analysis. First, it is not at all clear that the Court’s historical account is accurate. Commentators have criticized *Roe*’s cursory history, which, at a minimum, creates doubt and uncertainty as to the historical record.³⁷ Second, even if the Court’s historical account were correct, that history would support State bans from at least quickening—a point during gestation considerably earlier than the viability standard that the Court ultimately approves.³⁸ The court never clarifies how longstanding restrictions on abortion that are *more restrictive* than *Roe*’s viability standard provide any evidence for the Court’s more permissive constitutional framework, which precludes prohibitions on abortion pre-viability. Third, the majority does not explain what role this historical account plays in its *legal* argument.³⁹ Having set out its historical overview, the Court never returns to it, which is not surprising given that none of the conflicting historical views even mention, let alone adopt, the novel viability

³⁶ *Id.* at 129.

³⁷ See, e.g., JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006); JOHN KEOWN, *ABORTION, DOCTORS AND THE LAW* (1988); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 103 app. A (1993); James Bopp Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute and Ripe for Reversal*, 3 B.Y.U. J. PUB. L. 181 (1989); James Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L.J. 29 (1985); Lynn D. Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. REV. 231; Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250 (1975).

³⁸ The Court tells us, among other things, that the Persian Empire “severely punished” abortions, the Hippocratic Oath stated that “I will not give to a woman an abortive remedy,” the common law authorities never “firmly established [abortion] as a common-law crime even with respect to the destruction of a quick fetus,” English statutory law “made abortion of a quick fetus a capital crime” with lesser penalties for having an abortion prior to quickening (although a 1967 abortion law was more permissive than the earlier statutes), abortion of a quick fetus was a crime in Connecticut as early as 1821, and Connecticut criminalized abortion pre-quickening in 1860. *Roe*, 410 U.S. at 715–20. New York prohibited abortion pre- and post-quickening but imposed different penalties, and “[b]y the end of the 1950s a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.” *Id.* at 129–39. From all of this, the Court concluded that “at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, . . . a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.” *Id.* at 720. Here again, even if the Court correctly captured the historical record, it provides no explanation how this history establishes a constitutional right that is “substantially broader” than the limitations imposed on abortion throughout western history up to 1973.

³⁹ See *Dobbs*, 2022 WL 2276808 at *28 (*Roe* featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included.).

standard that the Court concludes is constitutionally mandated. As one commentator has noted:

[t]he Court does not seem entirely clear as to what this [historical] discussion has to do with the legal argument, and the reader is left in much the same quandary. It surely does not seem to support the Court's position, unless a record of serious historical and contemporary dispute is somehow thought to generate a constitutional mandate.⁴⁰

Accordingly, while the lengthy historical overview may have some rhetorical force, the Court does not incorporate that history into its constitutional argument, leaving the reader to wonder what constitutional lesson is to be drawn from the longstanding disagreements over abortion.

2. Texas Alleges That It Has a Duty to Protect the Fetus, Which Is a Human Life⁴¹

It is an undisputed factual premise that the State of Texas contends that “a new human life is present from the moment of conception,” thereby triggering its right and obligation to protect that human life.⁴² Whereas the Court accepts the first premise (that Roe claims an unlimited right to abortion) without modification, the Court amends (and weakens) Texas's claim that the fetus is a human life. Instead of addressing that claim—a claim that the Court will later say is beyond the scope of human knowledge and not necessary to answer when assessing whether the State has a legitimate State interest⁴³—the Court substitutes the term “potential life” for the term “human life,” treating the two terms as equivalent.⁴⁴ The Court then uses its

⁴⁰ Ely, *supra* note 15, at 925 n.42.

⁴¹ *Roe*, 410 U.S. at 150.

⁴² *Id.*

⁴³ *Id.* at 150 n.55 (“Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth.”).

⁴⁴ *Id.* at 162 (“By adopting one theory of life, Texas may [not] override the rights of the pregnant woman that are at stake. . . . [H]owever, . . . the State does have an . . . important and legitimate interest in protecting the potentiality of human life.”).

preferred terms, “potential life” or “potential human life,” throughout the rest of the opinion.⁴⁵

The Court’s shift in terminology is subtle but significant. As is frequently the case with the fallacy of equivocation, the more subtle the shift in meaning, the more persuasive the informal fallacy. The Court suggests that it is doing Texas a favor, adopting the “less rigid claim” that Texas has an interest in potential life.⁴⁶ The Court indicates that this change does not matter because either claim—that the fetus is a “human life” or only a “potential human life”—enables a State to “assert interests beyond the protection of the pregnant woman alone.”⁴⁷ Yet the two terms are not the same, and the Court never justifies the shift in terminology. A potential human life is *not* an actual human life. The latter *is* human; the former *might be* human at some undisclosed point in time. Texas claims a compelling interest in the fetus as a presently existing human life while the Court affirms only a legitimate interest in the fetus as a potential life.

Equivocation involves taking similar words to be the same even though they are not. The majority uses these terms in different ways in the course of its protracted argument. While States may have an interest in both a potential human life and a human life, the fact that the State’s interest in a potential human life is “less rigid” tilts the conceptual playing field in favor of the Court’s ultimate conclusion—that the right of a pregnant woman outweighs Texas’s interest in a potential human life. But, as discussed in step eight below, there is no scientific question that the fetus or the embryo, and *a fortiori* the fetus, is (in a biological sense) a unique human life.⁴⁸ Thus, the Court’s shift in terminology seeks to deny the existence of the actual human life of the fetus by *ipse dixit*.

⁴⁵ In footnote 55, the Court mentions “human life” but only because it is quoting a Wisconsin abortion statute that used the term. *See id.* at 158 n.55.

⁴⁶ *Id.* at 150.

⁴⁷ *Id.*

⁴⁸ *See id.* at 141 (describing how the AMA Committee on Criminal Abortion “deplored abortion and its frequency” and decried “a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the fetus is not alive till after the period of quickening”).

3. This Case Involves “These Interests, and the Weight to Be Attached to Them”⁴⁹

The Court frames the case through the lens of these two competing interests, thereby requiring the Court to determine the proper weights of each interest. As noted, though, the Court does not start with the balance set to zero. Through its equivocation in step two, the Court assumes that the fetus is only a potential human life without providing any argument about the humanity or potentiality of the fetus. This ensures that the calibration is off, that the scale is skewed in favor of the woman (an actual human life), which becomes evident throughout the rest of the Court’s argument.

4. “The Right of Privacy [Under the Fourteenth Amendment] . . . Is Broad Enough to Encompass a Woman’s Decision Whether or Not to Terminate Her Pregnancy”⁵⁰

The Court asserts that a woman has a right to choose based on its prior privacy cases. The strength of this conclusion rests on the strength of the analogy between abortion and these other privacy decisions. Although the majority simply proclaims this premise, it implicitly reasons as follows. The Constitution safeguards privacy in making specific decisions—marriage, procreation, contraception, family relationships, child rearing, and education. These privacy precedents involve personal, intimate decisions that, if not protected under the Constitution, would impose hardships on the individuals involved.⁵¹ Abortion also involves a personal,

⁴⁹ *Id.* at 152.

⁵⁰ *Id.* at 153.

⁵¹ In *Casey*, the plurality made the connection to the Court’s earlier privacy cases more explicitly, highlighting the intimate nature of the decisions at issue: “Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither

intimate decision that, if left unprotected, would impose a “detriment” that is “apparent.”⁵² The Court then lists some of the “specific and direct harm[s]” that threaten women if the Constitution does not protect abortion.⁵³ Thus, the Constitution also protects the abortion decision (at some level).

The problem is that the Court has relied on the ordinary language fallacy known as weak analogy. Because none of the Court’s prior privacy cases involve the termination of human life, the analogy between abortion and the privacy cases does not (without more) support the Court’s conclusion.⁵⁴ To see why, consider a situation involving intimate, personal choices that impose the same or similar harms. Young post-natal children or a live-in parent suffering from Alzheimer’s may impose similar “detriments,” creating “a distressful life and future,” imposing imminent

supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.”); *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

⁵² *Roe*, 410 U.S. at 153.

⁵³ *Id.* One might wonder if the Court is directly defining a right to privacy under the Constitution as freedom from governmental interference that results in specific harms of the type listed. On this view, the right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,” *Roe*, 410 U.S. at 153, because of the State-imposed detriment that flows from the ban on abortion. Although the Court does not tell us precisely what it is doing, this interpretation suffers from at least two problems. First, it ignores the somewhat lengthy list of privacy cases that the Court sets out in the preceding paragraph. *See id.* at 152–53. These cases articulate a privacy right that “is broad enough to encompass a woman’s decision.” *Id.* at 153. As discussed below, the analogy to the prior cases is a weak one, but it has the rhetorical advantage of situating the abortion decision within a long line of privacy cases. Second, the harm imposed on those considering abortion “has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests.” Ely, *supra* note 15, at 932. All sorts of governmental regulations impose varying types of harms but do not implicate privacy. *See Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting) (“A transaction resulting in an operation such as this is not ‘private’ in the ordinary usage of the word. Nor is the ‘privacy’ that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.”).

⁵⁴ In *Casey*, the Court mirrors *Roe* in suggesting that the privacy cases govern in the abortion context: “It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood” *Casey*, 505 U.S. at 849. But *Casey* also acknowledges that such cases do not resolve the issue because abortion is distinctive: “Abortion is a unique act. It is . . . fraught with consequences for others” *Id.* at 852. *Casey*, though, never explains why the unique features of the abortion context do not distinguish *Roe* and *Casey* from the Court’s privacy precedents. Instead, *Casey* turns its focus to *stare decisis*. *See id.* at 854–69.

“[p]sychological harm,” taxing “[m]ental and physical health,” and causing “distress” if the individuals are not wanted or if the “family already [is] unable, psychologically and otherwise, to care for [them].”⁵⁵ Such very young children and elderly parents may or may not be “persons” depending on how that term is defined, although all are undoubtedly human beings.⁵⁶ Nevertheless, a law precluding the termination of a post-natal child or a parent with Alzheimer’s would not implicate a constitutional right to privacy—and, even if it did, the Constitution presumably would safeguard such individuals from laws going in the other direction, *i.e.*, laws permitting the termination of young children and cognitively (or otherwise) impaired

⁵⁵ *Roe*, 410 U.S. at 153.

⁵⁶ As discussed more fully below, the Court contends that a fetus is not a Fourteenth Amendment person but never attempts to define that term—at the time of the founding, at the ratification of the Fourteenth Amendment, or in 1973 when *Roe* was decided. While there is no current dispute as to the fact that human life begins at conception, “those trained in the respective disciplines of medicine, philosophy, and theology” do disagree as to the proper understanding of “personhood.” *Id.* at 159. There are two main views of moral personhood—one based on having a rational nature and the other grounded in rational functions. Boethius supplied (what is frequently viewed as) the classical philosophical account of the former: “Person is an individual substance of rational nature. . . . Man alone is among the material beings person, he alone having a rational nature.” BOETHIUS, A TREATISE AGAINST EUTYCHES AND NESTORIUS, ch. 3 (PL 64, col. 1343); *see also* Francis J. Beckwith, *Abortion, Bioethics, and Personhood: A Philosophical Reflection*, S. BAPTIST J. THEOLOGY, Spring 2000, at 16, 20, http://d3pi8hptl0qhh4.cloudfront.net/documents/sbjt/sbjt_2000spring3.pdf (“[W]hat is crucial morally is the *being* of a person, not his or her functioning. A human person does not come into existence when human function arises, but rather, a human person is an entity who has the natural inherent capacity to give rise to human functions, whether or not those functions are ever attained.”). John Locke advanced the latter, more modern approach—that persons *use* reason or engage in rational functions. According to Locke, a person is “a thinking intelligent Being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness, which is inseparable from thinking, and as its seems to me essential to it.” AN ESSAY CONCERNING HUMAN UNDERSTANDING, Bk. 2, ch. 27, section 9 at 335 (Peter H. Nidditch ed.) (Oxford Univ. Press 1990). The modern view has taken different forms, focusing on self-consciousness, autonomous actions, participation in social relationships, and the list goes on. *See, e.g.*, Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 *MONIST* No. 4 (1973) (defining “person” as one who can, among other things, engage in consciousness, problem solving, advanced conversation, and self-awareness). A fetal human life, a newborn, and a person with advanced Alzheimer’s are persons in the Boethian sense but likely not persons under many of the Lockean functional approaches (because they may lack self-awareness, the ability to reason or plan, or the capacity to engage in social relationships). *Roe*, of course, appeals to a constitutional view of personhood, which appears to apply only to post-natal humans: “In short, the unborn have never been recognized in the law as persons in the whole sense.” 410 U.S. at 162. Under this view, a constitutional person is one to whom the Court has applied some (or possibly all) constitutional rights. A constitutional person is distinct from a moral person as well as a legal person, given that fetal homicide and wrongful death laws protect unborn human beings’ pre-viability even though post-*Roe* the Constitution does not. Yet the Court’s own historical account does not explain why, given the history of protection of the fetus pre-viability, a fetal human life is not and cannot be viewed as a constitutional person pre-viability.

individuals who impose detriments on their caretakers.⁵⁷ Neither *Meyer*, *Pierce*, *Skinner*, *Loving*, nor *Griswold* speaks to this situation because none of these privacy cases involves the termination of another actual or potential human being (or person).⁵⁸

As the example illustrates (and as the *Roe* Court subsequently acknowledges in passing), abortion is *sui generis*.⁵⁹ It involves the intentional termination of human life, which (as step two describes above) the *Roe* Court and post-*Roe* cases refer to as merely—potential human life.⁶⁰ Consequently, even if the Court is correct about the harm to a woman who is precluded from choosing abortion, the fetus is extinguished. No such destruction of human life is present in marriage, procreation,

⁵⁷ John Ely makes a similar consideration:

It might be noted that most of the factors enumerated also apply to the inconvenience of having an unwanted two-year-old, or a senile parent, around. Would the Court find the constitutional right of privacy invaded in those situations too? I find it hard to believe it would; even if it did, of course, it would not find a constitutional right to “terminate” the annoyance—presumably because “real” persons are now involved. But what about ways of removing the annoyance that do not involve “termination”? Can they really be matters of constitutional entitlement?

Ely, *supra* note 15, at 932 n.81.

⁵⁸ The *Roe* Court might contend that the prohibition on terminating such individuals would be justified because they are full or whole humans (or persons), not merely potential human lives. But at this stage in the Court’s argument, it has not defined “human being” or “person,” and, in fact, never does so, going so far as to disclaim the ability to resolve the question when life begins. *See Roe*, 410 U.S. at 159.

⁵⁹ *Id. See Dobbs*, 2022 WL2276808 at *20 (“What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn human being.’ None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite.”) (citation omitted).

⁶⁰ *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 325 (1980) (“Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.”); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting) (describing how the abortion decision must “be recognized as *sui generis*,” which differs from other protections the Court has discussed “under the rubric of personal or family privacy and autonomy”).

contraception,⁶¹ child rearing, or education context.⁶² Thus, the Court's privacy cases do not *ipso facto* establish a right to terminate a pregnancy because abortion is not an entirely private decision.⁶³ It necessarily affects another individual entity—whether that entity is considered a human life, a potential human life, or a person.⁶⁴

⁶¹ Some individuals and groups contend that specific methods of contraception act as abortifacients, which result in the termination of another human life. *See, e.g.,* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 701, 703 (2014) (explaining how the plaintiffs objected to providing “certain contraceptive methods that they consider to be abortifacients,” such as Ella, Plan B, and two types of intrauterine devices, because they “believe life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point”). Under the Court's analysis of human life and personhood in *Roe*, no form of contraception would involve the termination of an actual, fully human life because a fetal life is only a potentially human life. *See, e.g., Roe*, 410 U.S. at 163 (“With respect to the State's important and legitimate interest in potential life, the ‘compelling’ point is at viability.”). The debate over contraception, therefore, goes beyond the scope of this Article. For present purposes, the Supreme Court's privacy cases do not treat contraception as involving the destruction of a human life or person, thereby reinforcing the *sui generis* nature of abortion in relation to those precedents.

⁶² Moreover, it is not clear why, from a constitutional perspective, a mother's decision to abort a fetus must prevail over a State's interest in protecting the fetus even if the fetus lacks constitutional rights. Even if one agrees with *Casey*'s mystery passage—“[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life”—that liberty right is not absolute and does not permit one to foist one's own view of existence on others or on the State. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). Despite the liberty “right to define one's own concept of existence,” *id.*, States can make suicide and assisting suicide illegal. *See Washington v. Glucksberg*, 521 U.S. 702, 711 (1997) (“[F]or over 700 years, the Anglo-American common law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”). States also can preclude individuals from killing animals even though animals are not objects of Fourteenth Amendment protection (being neither human nor persons) and regardless of whether one defines existence and the mystery of life so as to include animals. *See Ely, supra* note 15, at 926 (“[I]t has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person. Dogs are not ‘persons in the whole sense’ nor have they constitutional rights, but that does not mean the state cannot prohibit killing them.”). Thus, even if a fetus is not a person or a full-fledged “person” under *Roe*'s analysis, the Court's privacy cases do not address the termination of another living entity.

⁶³ *See Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in the judgment and dissenting in part) (“One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus.”).

⁶⁴ *See Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989) (plurality opinion) (“[To look] at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body.”).

5. “[T]he Right of Personal Privacy Includes the Abortion Decision, But . . . This Right Is Not Unqualified and Must Be Considered Against Important State Interests in Regulation”⁶⁵

The Court rejects Roe’s claim that the abortion right is absolute.⁶⁶ Given that States “may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life, . . . these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.”⁶⁷ “[A]t some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.”⁶⁸

This premise provides the foundation for the Court’s trimester framework.⁶⁹ The Court asserts that the weighting of the competing interests varies as the pregnancy progresses.⁷⁰ The Court, therefore, must specify (and justify) the particular points during gestation at which the relative interests shift. Given that *Casey* subsequently rejects the trimester structure while retaining viability, the question presented in *Dobbs* deals only with viability.⁷¹

6. If the Fetus Is a Person, “The Appellant’s Case, of Course, Collapses, for the Fetus’ Right to Life Would Then Be Guaranteed Specifically by the Amendment”⁷²

This premise is important to the Court’s analysis because Texas contends that the fetus is both a person and a human life.⁷³ According to the Court, if established, the personhood of the fetus would be dispositive.⁷⁴ The Court does not develop its

⁶⁵ *Roe v. Wade*, 410 U.S. 113, 154 (1973).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 155.

⁶⁹ *Id.* at 163.

⁷⁰ *Id.* at 163–64.

⁷¹ *Casey*, 505 U.S. at 873; *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (granting certiorari limited to the question of whether all pre-viability prohibitions on elective abortions are unconstitutional).

⁷² *Roe*, 410 U.S. at 156–57.

⁷³ *Id.* at 156.

⁷⁴ *Id.* at 156–57.

reasoning for this claim either, but the general concession seems to be as follows. The Fourteenth Amendment guarantees due process to persons.⁷⁵ If the fetus is a person, then the Fourteenth Amendment extends due process protection to the fetal human life. The fact that the woman and the fetus would both be persons protected under the Fourteenth Amendment alters the Court's balancing of interests so as to make abortion unconstitutional. The Court, however, never discusses the balancing of interests between these competing Fourteenth Amendment rights—the right to life and the right to an abortion.

Because the Court believes that the personhood claim (if established) threatens its conclusion that abortion is constitutionally protected, the Court directly addresses and rejects that claim for two reasons.⁷⁶ First, as discussed in step seven below, the Court contends that the fetus is not a person for Fourteenth Amendment purposes based on the text and understanding of “person” in the mid-nineteenth century, thereby implying that abortion is constitutional.⁷⁷ Second, the Court ultimately concludes that abortion is constitutional (*i.e.*, that a woman has a right to choose an abortion within the trimester framework that the Court establishes in *Roe*),⁷⁸ which means that (if the Court's argument is sound, which it is not) the fetus is not a person via *modus tollens*. *Modus tollens* is a valid argument form: if A, then B; not B; therefore, not A. The Court does not expressly complete the *modus tollens* argument in the text of its opinion, but the conclusion that the fetus is not a person follows necessarily from the Court's holding that the Constitution safeguards the abortion decision.⁷⁹

⁷⁵ U.S. CONST. amend XIV, § 1.

⁷⁶ *Roe*, 410 U.S. at 157–58.

⁷⁷ See *infra* Section II(a)(7).

⁷⁸ *Id.*

⁷⁹ The full *modus tollens* argument goes like this: If the fetus is a person, “the appellant's case, of course collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.” 410 U.S. at 156–57. *Roe*'s case does not collapse (given that the Constitution protects her right to choose to have an abortion within the trimester framework that the Court articulates in *Roe*). *Id.* at 164 (“The statute, therefore, cannot survive the constitutional attack made upon it here.”). Therefore, the fetus is not a person. The soundness of the conclusion, though, depends on the Court's analysis supporting its claims that *Roe*'s case does not collapse, which depends on the strength of the argument analyzed in this section.

7. The Fetus Is Not a Person⁸⁰

Recognizing how important the preceding premise is to the overall argument, the Court proffers three reasons why it does not believe that the fetus is a person under the Fourteenth Amendment.⁸¹ At the end of the majority's discussion of personhood, the Court acknowledges that, even if it could prove that the fetus is not a person, that by itself would not prove that abortion is constitutional: "This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations."⁸² The fact that a particular sufficient condition for a conclusion is false does not mean that the conclusion is false. There may be another sufficient condition that is true and that supports the conclusion. This is why denying the antecedent is a formal fallacy and *does not* establish the Court's conclusion that abortion is constitutional.⁸³ What it does is change a sufficient condition into a necessary one (leading the Court to suggest that the fetus's not being a person entails the constitutionality of abortion).

Yet the Court spends several pages trying to convince the reader that the antecedent is false (*i.e.*, to prove that the fetus is not a person).⁸⁴ The Court's arguments against fetal personhood are rhetorically powerful and are designed to reinforce the Court's holding that abortion is constitutionally protected. Unfortunately for the majority, none of its arguments relating to the personhood of the fetus is persuasive.

⁸⁰ *Id.* at 158.

⁸¹ *Id.* at 157–58.

⁸² *Id.* at 159.

⁸³ A non-constitutional example may help to illustrate the point. If it rains, then A will not go to the party. It does not rain. Therefore, A goes to the party. The problem is that, even if it does not rain, there may be other sufficient conditions why A does not go to the party—A might get sick, need to run an errand, get into a disagreement with the host, et cetera. Rain is a sufficient condition for not going, but it is not a necessary condition.

⁸⁴ *Roe*, 410 U.S. at 157–62.

a. “[A]ppellee Conceded on Reargument That No Case Could Be Cited That Holds That a Fetus Is a Person Within the Meaning of the Fourteenth Amendment”⁸⁵

This one-sentence observation is meant to cast doubt on the personhood of the fetus. Without more, however, the observation does not support either party. This concession tells us, at most, that prior to *Roe*, the Court had not decided the issue. The Court previously noted that more recent lower court “results are divided” regarding the constitutionality of abortion regulations.⁸⁶ But all this observation does is confirm that the issue remains unresolved. And any suggestion that the lack of a case holding that a fetus is a person supports the Court’s conclusion introduces another informal fallacy—an appeal to ignorance—implying a definite conclusion (that the fetus is not a Fourteenth Amendment person) based on the fact that something has not yet been proven (the lack of cases finding that the fetus is a person). Whatever conclusions lower courts have reached, it is “emphatically the province and duty of the judicial department to say what the law is.”⁸⁷ The majority must argue to its conclusion, not simply cite to lower court cases (or the absence of such cases) that reach a particular result.

The lack of court cases, therefore, does not resolve the question to be decided. The Court’s observation suggesting the contrary is neither inductively strong (because there are no Supreme Court cases resolving the prenatal personhood issue) nor deductively valid. This probably explains why the Court turns from this observation to the text of the Constitution and past practice.

b. The Court Contends That “Person” Does Not Include a Fetus Because, as Used in Various Provisions in the Constitution, the Term “Has Application Only Postnatally”⁸⁸

The Court concedes that its quick excursion into constitutional interpretation does not conclusively resolve the personhood issue: “None [of these constitutional provisions using ‘person’] indicates, *with any assurance*, that it has any possible

⁸⁵ *Id.* at 157.

⁸⁶ *Id.* at 155.

⁸⁷ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁸⁸ *Roe*, 410 U.S. at 157.

prenatal application.”⁸⁹ Of course, none of the provisions the Court cites conclusively establishes that the fetus is not a person or that the Constitution as originally enacted even attempted to address the status of the fetus. The seven Articles of the Constitution established and limited the federal government. The lack of safeguards for individual rights was addressed through the Bill of Rights, restricting the federal government’s exercise of its authority and reserving other powers to the States.⁹⁰ *Roe*’s own abortion history reveals that States took these reserved powers to include the authority to regulate and even ban abortion.⁹¹ Connecticut banned abortion after quickening in 1821 and extended the ban to non-quick fetuses in 1860.⁹² In 1828, New York prohibited the termination of the fetus at any stage but imposed differing penalties depending on whether the fetus was quick.⁹³ Texas enacted the precursor to the law at issue in *Roe* in 1857, and “[b]y the time of the adoption of the Fourteenth Amendment in 1868, there were at least thirty-six laws enacted by state or territorial legislatures limiting abortion.”⁹⁴ After ratification of the Fourteenth Amendment, many more States passed legislation banning or restricting abortion, such that “[b]y the end of the 1950’s a large majority of the jurisdictions banned abortion . . . unless done to save or preserve the life of the mother.”⁹⁵

Moreover, prior to the adoption of the Fourteenth Amendment, the medical understanding of the fetus changed significantly, as the 1859 report of the AMA Committee on Criminal Abortion demonstrates.⁹⁶ Thus, contrary to *Roe*, one might contend that the shift toward greater protection of the fetus in the nineteenth century was embodied in the Fourteenth Amendment. At a minimum, though, the “lack of any assurance” does not establish that the fetus is not a person, especially given that

⁸⁹ *Id.* (emphasis added).

⁹⁰ See THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

⁹¹ See *Roe*, 410 U.S. at 138.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 174–75 (Rehnquist, J., dissenting).

⁹⁵ *Id.* at 139.

⁹⁶ *Id.* at 141.

the Court does not undertake any effort to determine what the term “person” meant at the founding or at the ratification of the Fourteenth Amendment.⁹⁷

To strengthen its position, the majority suggests in a footnote that Texas’s argument (that the fetus is a person) confronts a “dilemma.”⁹⁸ If the fetus is a person, then there are two persons affected by the decision to terminate a pregnancy, and both are entitled to due process. A life exception, like the one granted in Texas, permits a mother whose life is endangered to choose her life over that of the fetus. The Court rhetorically asks whether “the Texas exception appear[s] to be out of line with the Amendment’s command.”⁹⁹ The Court also wonders why “the woman [is] not a principal or an accomplice” and whether “the penalties [for abortion may] be different” from the penalties for murder.¹⁰⁰

These are difficult and important questions that highlight the *sui generis* nature of abortion. In the Court’s hypothetical, two persons are impacted directly by the abortion decision. The life of one of those persons is in jeopardy. If nothing is done, one or both of the persons will die. The Constitution does not speak to the issue. Instead, Texas and other States provide a life exception, which may be justified in various ways. For example, under double-effect reasoning, Texas may believe that it cannot choose between the two (innocent) lives at issue. Given that one will die, the State leaves the decision—whether to pursue treatment to preserve the mother’s life or to carry the baby to term—to the mother. In such a situation, the intent is not to kill the unborn child; the goal is to save the mother’s life. That painful and complex decision carries with it an unintended consequence—the death of the child. Double-effect reasoning gets its name from there being these two effects, one intended and one not. Under this ethical theory, the death of the unborn person may be permitted provided it is not willed, and the good effect (saving the mother’s life) must be sufficiently important to counterbalance the bad effect.¹⁰¹

⁹⁷ Instead of addressing the meaning of “person,” *Casey* focuses on *stare decisis*. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–69 (1992).

⁹⁸ See *Roe*, 410 U.S. at 157 n.54.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II-II, q. 64, art. 7 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1948); 2 *CATH. UNIV. OF AM., NEW CATHOLIC ENCYCLOPEDIA* 70 (2d ed. 2003).

The Court may disagree with this form of ethical argument and believe that a “dilemma” remains. But a constitution that does not decide between the economic theories of Adam Smith and John Maynard Keynes would not seem to mandate a particular ethical theory, whether Millian consequentialism, Kantian deontological ethics, or Thomistic natural law.¹⁰² After all, “as th[e] Court has been reminded throughout our history, the Constitution ‘is made for people of fundamentally differing views.’”¹⁰³ Consequently, given that there are different ethical theories for addressing the unique moral issues that arise in the abortion context, the Court presents Texas with a difficult problem but a false dilemma. An actual dilemma arises only if the Court adopts an ethical theory that does not permit a health exception—a theory that Texas does not share and that the Constitution does not mandate.

c. The Fetus Is Not a Person for Constitutional Purposes Because “Throughout the Major Portion of the 19th Century Prevailing Legal Abortion Practices Were Far Freer Than They Are Today”¹⁰⁴

The Court’s use of nineteenth century legal abortion practices is nothing if not innovative. The Court relies on an unbroken pattern from 1821 through 1973 of States enacting abortion regulations (which were more restrictive than *Roe*’s viability standard) to support a constitutional interpretation that would invalidate most (if not all) of the abortion bans and regulations that States enacted during this 152-year period.¹⁰⁵ Even the Court’s preferred period from the early to mid-1800s saw bans on abortion both pre- and post-viability and, therefore, does not support imposing greater restrictions on State abortion regulations through an entirely new, Court-created trimester framework. To the extent that history bears on the abortion

¹⁰² See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”); *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) (“Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.”).

¹⁰³ *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting) (quoting *Lochner*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

¹⁰⁴ *Roe*, 410 U.S. at 158.

¹⁰⁵ *Id.* at 138–40. The *Dobbs* majority notes “*Roe*’s faulty historical analysis” and spends several pages attempting to “set the record straight.” 2022 WL 2276808 at 12–16.

question, it strongly suggests that the States had the authority to regulate abortion.¹⁰⁶ As the Court has noted, “a page of history is worth a volume of logic.”¹⁰⁷

Furthermore, the Court’s historical account indicates that the more permissive abortion regulations up through the middle of the nineteenth century were based on a false estimation of when human life begins. By the time the States ratified the Fourteenth Amendment, the medical understanding of fetal life had changed dramatically. As the Court notes, the AMA Committee’s 1859 Report on criminal abortions rejected the earlier common law view that human life began at quickening because it was based on “a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the fetus is not alive till after the period of quickening.”¹⁰⁸ These earlier beliefs about the fetus were “based, and only based, upon mistaken and exploded medical dogmas” that failed to acknowledge “the independent and actual existence of the child before birth, as a living being.”¹⁰⁹ As the erroneous nineteenth century assumptions about the fetus were replaced, States adopted more restrictive abortion regulations, providing greater protection for prenatal human life. Regardless of whether those ratifying the Fourteenth Amendment viewed a fetus as a person, it is undisputed that States retained and exercised their authority to regulate abortion.

¹⁰⁶ The history of abortion regulations in the United States demonstrates that States not only had the power to regulate abortion, but also adopted laws that restricted abortion to a greater extent than allowed under *Roe*’s viability standard:

The common law which we inherited from England made abortion after ‘quickening’ an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 states and 8 territories had statutes banning or limiting abortion. By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the states prohibited abortion unless necessary to preserve the life or health of the mother.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 952 (Rehnquist, C.J., concurring in the judgement in part and dissenting in part) (citation omitted).

¹⁰⁷ See *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921).

¹⁰⁸ *Roe*, 410 U.S. at 141.

¹⁰⁹ *Id.*

8. A “Pregnant Woman Cannot Be Isolated in Her Privacy” Because at Some Point a State Can Determine That “Another Interest, That of Health of the Mother or That of Potential Human Life, Becomes Significantly Involved”¹¹⁰

Although the Court did not mention that abortion is *sui generis* in step four above, here the Court acknowledges that its other privacy cases are “inherently different” from *Roe*.¹¹¹ The unique nature of abortion is what caused the analogy to the Court’s privacy cases to be weak, but it is not until six pages later that the Court recognizes the flaw in that reasoning.¹¹² Yet instead of trying to strengthen the analogy, the Court simply shifts its focus back to the weight to be given to the competing interests, avoiding any explication of the inherent differences between abortion and the Court’s privacy precedents.¹¹³

Texas argues that, regardless of the personhood question, human life begins at conception such that the State has a compelling interest in protecting the prenatal human life from that point forward.¹¹⁴ If the fetus is a human life from conception forward, then there are two human lives affected by the abortion decision. Texas knows that one of the two (the fetus) will be terminated through the abortion procedure and claims a compelling interest in protecting that life (while allowing an exception when the mother’s life is in danger so that at least one of the two lives at risk may be saved). Given the State’s interests in the health of both the woman and the fetus, the majority concedes that “[t]he pregnant woman cannot be isolated in her privacy.”¹¹⁵ To reach the conclusion that abortion is constitutionally protected, then, the Court must explain why the fetus is not a human being such that the States’ interest in the fetal human life does not become compelling until viability.

Unfortunately, the Court never answers that central question. Instead, the Court disclaims the ability to know when human life begins:

¹¹⁰ *Id.* at 159.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

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 point in the development of man's knowledge, is not in a position to speculate as to the answer.¹¹⁶

According to the Court, all that is required, what “should be sufficient,” is “to note briefly the wide divergence of thinking on this most sensitive and difficult question.”¹¹⁷

This response is troubling (and inadequate) for several reasons. First, the Court already equivocated, substituting “the less rigid claim” that the fetus is only a “potential human life.”¹¹⁸ Throughout its opinion, the majority uses the term “potential life,” but the majority imbues its preferred term with at least two meanings. At certain points, the Court suggests that “potential human life” and “human life” are the same,¹¹⁹ which is why the reader is not supposed to be concerned with the substitution in step 2 above. At others, the potential human life is viewed as a “less rigid”¹²⁰ position, as something that is not actually—but only potentially—human. Accordingly, this shift in nomenclature is important because it directly affects the weighting of interests. To properly weigh the competing interests in the abortion context, the Court must determine whether there is an actual human life and then value that life (as well as the State's interest in that life), something the Court never does.

Second, when human life begins (*i.e.*, when a distinct human organism is formed) is no longer a “difficult question” and does not require the Court “to speculate as to the answer.”¹²¹ Science has confirmed what the AMA Committee Report suggested in 1859: human life begins at conception.¹²²

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 160.

¹¹⁸ *Id.* at 150, 159.

¹¹⁹ *See, e.g., id.* at 154, 156.

¹²⁰ *Id.* at 150.

¹²¹ *Id.* at 159.

¹²² *See, e.g.,* RONAN O'RAHILLY & FABIOLA MILLER, *Human Embryology and Teratology* 8 (Wiley-Liss, 3d ed. 2001) (“Although life is a continuous process, fertilization . . . is a critical landmark because, under ordinary circumstances, a new genetically distinct human organism is formed when the chromosomes of the male and female pronuclei blend in the oocyte.”); Signorelli et al., *Kinases, phosphatases and proteases during sperm capacitation*, 349 CELL TISSUE RES. 765 (Mar. 20, 2012) (“Fertilization is the

Third, even if “when life begins,” remains an open question from a philosophical, religious, or social perspective—one that fosters disagreement among medical doctors, philosophers, and theologians—there is no basis for *the Court* to wade into the fray and answer the question.¹²³ In fact, in answering this inscrutable question against the backdrop of such uncertainty, the majority once again commits the informal fallacy of appeal to ignorance—reaching a particular conclusion (that Texas is wrong to assert that human life begins at conception) based on the premise that no one can “resolve the difficult question of when life begins.”¹²⁴ The error in reasoning is the same as concluding that astrology is nonsensical (or reasonable) based on the premise that people have attempted to provide conclusive proof of the veracity (or falsity) of astrology for hundreds of years without success.¹²⁵ If no one can or does know when life begins, then the Court cannot and does not know whether the fetus (at conception or some other point) is an actual or potential human life. To claim otherwise might cause one to wonder, along with Chief Justice Roberts in *Obergefell*, “[j]ust who do we think we are?”¹²⁶

In fact, much of what the Chief Justice said in *Obergefell* applies to *Roe*’s analysis of abortion:

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. . . . [A]s this Court has been reminded throughout our history, the Constitution “is made for people of fundamentally differing views.” Accordingly, “courts are not concerned

process by which male and female haploid gametes (sperm and egg) unite to produce a genetically distinct individual.”); KEITH L. MOORE, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 16 (Saunders, 7th ed., 2003) (“Human life begins at fertilization, the process during which a male gamete or sperm (spermatozoon) unites with a female gamete or oocyte (ovum) to form a single cell called a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual.”).

¹²³ See *Dobbs*, 2022 WL 2276808 at *22 (“Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.”).

¹²⁴ *Roe*, 410 U.S. at 159.

¹²⁵ In the astrology example, the premises do not give us any information about astrology; instead, they recount what some (unidentified) people have tried unsuccessfully to do. Of course, if a qualified expert or experts in astrology (whoever that might be) had conducted the investigation in a systematic, methodical way, then the strength of the argument might increase. As it stands, though, the premises are not relevant to the conclusion.

¹²⁶ *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

with the wisdom or policy of legislation.” The majority neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people [were] engaged in a vibrant debate on that question.¹²⁷

Moreover, *Roe* and *Casey* “answer[ed] that question based not on neutral principles of constitutional law, but on [their] own” understanding of when human life begins.¹²⁸ How do we know that? Because the Court expressly stated that no one can “resolve the difficult question of when life begins.”¹²⁹ Thus, *Roe*’s determination that a fetus is merely a potential life is necessarily grounded in the Court’s own sense of the beginning (and meaning) of human life.

The vibrant debate over abortion has remained despite *Roe*’s constitutionalizing the issue, with many States continuing to enact abortion regulations that test the limits of this Court’s fractured and confusing abortion precedents.¹³⁰ In *Gonzales v. Carhart*, the Court connected an undue burden with regulations that “prohibit any woman from making the ultimate decision to terminate her pregnancy.”¹³¹ In *Whole Woman’s Health v. Hellerstedt*, the Court held that the undue burden test requires that “courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”¹³² In *June Medical Services LLC v. Russo*, the Chief Justice applied *Hellerstedt* even though he expressly stated that he disagreed with its reasoning: “I joined the dissent in *Whole*

¹²⁷ *Id.* at 687–88 (citations omitted).

¹²⁸ *Id.*; see also *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) (“The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.”).

¹²⁹ *Roe*, 410 U.S. at 159.

¹³⁰ See *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991) (“[W]hen governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’ *Stare decisis* is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision.’ This is particularly true in constitutional cases, because in such cases ‘correction through legislative action is practically impossible.’”) (citations omitted); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985) (rejecting “a rule of state immunity from federal regulation” because “[a]ny such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and . . . breeds inconsistency precisely because it is divorced from those principles.”).

¹³¹ *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)).

¹³² *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

Woman's Health and continue to believe that the case was wrongly decided.”¹³³ In addition, outside the abortion context, many States have expanded the protections afforded prenatal human life, moving away from viability toward a broader recognition of the humanity of the fetus.¹³⁴

Given all of this, there is reason for the Court to heed Justice Scalia's admonition in *Casey* and “get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”¹³⁵ Given that *Roe* and *Casey* lack a “principled justification,”¹³⁶ State legislation restricting or even banning abortion does not “invade[] a substantive constitutional right or freedom,” even though it embodies a policy decision that directly affects women who are pregnant, the unborn, extended families, and the larger society.¹³⁷ Yet, as explained in *Harris v. McCrae*, the Court “cannot, in the name of the Constitution, overturn duly enacted statutes simply ‘because they may be unwise, improvident, or out of harmony with a particular school of thought.’”¹³⁸ Instead, such difficult and oftentimes contentious issues are left to elected officials: “When an issue involves policy choices as sensitive as those implicated [here] . . . the appropriate forum for their resolution in a democracy is the legislature.”¹³⁹

¹³³ *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring).

¹³⁴ *See* *Hamilton v. Scott*, 97 So. 3d 728, 737–40 (Ala. 2012) (Parker, J., concurring specially).

¹³⁵ *Casey*, 505 U.S. at 979, 1002 (Scalia, J., concurring in the judgement in part and dissenting in part) (“The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”).

¹³⁶ *Casey*, 505 U.S. at 865.

¹³⁷ *Harris v. McCrae*, 448 U.S. 297, 326 (1980).

¹³⁸ 4 *Harris v. McCrae*, 448 U.S. 297, 326 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955)); *see also* *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (“[The liberty protected under the Fourteenth Amendment] is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. . . . [T]he Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.”).

¹³⁹ *Maher v. Roe*, 432 U.S. 464, 479 (1977); *see also* *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 45 (1983) (O'Connor, J., dissenting) (“[W]hen we are concerned with extremely sensitive issues, such as the one involved here [abortion], ‘the appropriate forum for their resolution in a democracy is the legislature. . . .’” (quoting *Maher*, 432 U.S. at 479)); *Dobbs*, 2022 WL 2276808 at *36 (“This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a

Finally, the Court states that “[i]t should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question” but does not tell us for what end this “divergence” is “sufficient.”¹⁴⁰ The Court invokes the Stoics, certain Jewish denominations, “a large segment of the Protestant community, insofar as that can be ascertained,” the common law, some undisclosed number of “[p]hysicians and their scientific colleagues,” people in the Middle Ages and Renaissance in Europe, and the Catholic faith.¹⁴¹ But the question is not whether people have disagreed about the status of the fetus or the onset of human life; the question is when does human life begin (and possibly whether the Court has the authority or competence to make that determination). If the Court’s appeal to the views of a variety of people is meant to support its position, it is an argumentum ad populum (an appeal to popular opinion), another type of informal fallacy. The fact that various groups have differing views about when life begins, however, does not address the constitutional question: whether a State can ban abortion pre- or post-viability. The Court presents its weighing of interests as a compromise between and among these competing views. Yet the Court does not explain the weight that should be given to fetal human life—as an actual human life—or to the States’ interest in that life. Instead, it restricts its analysis only to, what it views as, the States’ legitimate interest in potential human life.

9. But “The Unborn Have Never Been Recognized in the Law as Persons in the Whole Sense”¹⁴²

Despite the fact that in 1973 Texas and a majority of other States banned abortion (except when necessary to save the life of the mother),¹⁴³ the Court concludes that the unborn have never been viewed as full or “whole” persons.¹⁴⁴ The Court appeals to legal developments outside the context of criminal abortion to buttress this premise.¹⁴⁵ The Court’s alleged evidence, however, does not support its

departure from the ‘original constitutional proposition’ that ‘courts do not substitute their social and economic beliefs for the judgment of legislative bodies.’”) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963)).

¹⁴⁰ *Roe*, 410 U.S. at 160.

¹⁴¹ *Id.*

¹⁴² *Id.* at 162.

¹⁴³ *Id.* at 118 n.2.

¹⁴⁴ *Id.* at 162.

¹⁴⁵ *Id.* at 161–62.

desired conclusion. For starters, the Court relies on certain areas of the law that take live birth to be critical.¹⁴⁶ Yet the Court's own resolution of the abortion issue (viability and the now repudiated trimester framework) does not turn on live birth.¹⁴⁷ Thus, historical practice is not dispositive. Moreover, as discussed above, State laws going back to 1821 banned and regulated abortion pre-viability, suggesting that States had the authority to legislate in this religiously, morally, and politically charged area of law.¹⁴⁸

Second, as noted above, there is strong evidence that the Court relied on an inaccurate account of the relevant legal history.¹⁴⁹ Although a detailed study of that history goes beyond the scope of this Article, the historical inaccuracies in *Roe* further undermine its claim that "the unborn have never been recognized in the law as persons in the whole sense."¹⁵⁰

In addition, in the wake of *Roe*, State laws relating to prenatal injury, wrongful death, and fetal homicide have moved away from *Roe*'s viability standard toward greater protection of the unborn.¹⁵¹ With regard to fetal homicide statutes, "[a]t least 38 states have enacted fetal-homicide statutes, and 28 of those statutes protect life

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 162–64; *Casey*, 505 U.S. at 873.

¹⁴⁸ Justice Rehnquist summarized the widespread regulations of abortion at the State and territorial level when the Fourteenth Amendment was ratified in 1868:

By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today. Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and 'has remained substantially unchanged to the present time.'

Roe, 410 U.S. at 174–77 (citation and footnotes omitted).

¹⁴⁹ See, e.g., JOSEPH DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 126 (2006) ("[T]he history embraced in *Roe* would not withstand careful examination even when *Roe* was written."); David Kadar, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 652 (1980) (describing how *Roe*'s account of prenatal death recovery "was perfunctory, and unfortunately largely inaccurate, and should not be relied upon as the correct view of the law" at that time).

¹⁵⁰ *Roe*, 410 U.S. at 162; see also *Hamilton v. Scott*, 97 So. 3d 728, 742 n.17 (Ala. 2012) (Parker, J., concurring specially) (collecting authorities that discuss the historical inaccuracies in *Roe*'s legal history).

¹⁵¹ See *Hamilton*, 97 So. 3d at 737–40 (discussing how States have expanded the protections for fetal human life).

from conception.”¹⁵² To take only one example, in 1975, Alabama amended its homicide statute “to include protection for ‘an unborn child in utero at any stage of development, regardless of viability.’”¹⁵³ In interpreting this statute, the Alabama Supreme Court directly addressed *Roe*’s viability standard and concluded that the law should fully protect an unborn child at every stage of development:

[I]t is an unfair and arbitrary endeavor to draw a line that allows recovery on behalf of a fetus injured before viability that dies after achieving viability but that prevents recovery on behalf of a fetus injured that, as a result of those injuries, does not survive to viability . . . ; instead “logic, fairness, and justice” compel the application of the Wrongful Death Act to circumstances where prenatal injuries have caused death to a fetus before the fetus has achieved the ability to live outside the womb.¹⁵⁴

Third, the Court concludes this section of its argument by eliding the distinction between “human being” and “person.”¹⁵⁵ Section IX.B began with the Court disclaiming anyone’s ability to determine when human life begins but ends with the Court’s asserting that “the unborn have never been recognized in the law as persons in the whole sense.”¹⁵⁶ Texas made two separate arguments—that the fetus is a person under the Fourteenth Amendment and that the fetus is a human life.¹⁵⁷ This section of the opinion deals only with the latter, yet the Court draws a conclusion about the former without any argument establishing that “person” and “human life” are the same.¹⁵⁸ Consequently, neither the history of States’ criminalizing abortion pre-*Roe* nor the subsequent history of State laws outside the criminal abortion context supports the Court’s premise.

¹⁵² *Id.* at 738 (citing *State v. Courchesne*, 998 A.2d 1, 50 n.46 (Conn. 2010)).

¹⁵³ *Mack v. Carmack*, 79 So. 3d 597, 611 (Ala. 2011) (quoting ALA. CODE § 13A-6-1(a)(3) (1975)).

¹⁵⁴ *Id.*; *see also* *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 355 (Ala. 1974) (“Logic, fairness and justice compel our recognition of an action, as here, for prenatal injuries causing death before a live birth.”).

¹⁵⁵ *Roe*, 410 U.S. at 158.

¹⁵⁶ *Id.* at 162.

¹⁵⁷ *Id.* at 156–59.

¹⁵⁸ *See id.*

10. Thus, Given the Uncertainty Surrounding When Human Life Begins, Texas Cannot “Override the Rights of the Pregnant Woman” Simply “By Adopting One Theory of Life”¹⁵⁹

As noted in step 3, the Court emphasizes that this case concerns “the weight to be attached” to the woman’s right to choose an abortion and the States’ interests in the health of the mother and the potential human life.¹⁶⁰ Given the lack of consensus about the status of the fetus, the Court claims that Texas cannot stack one side of the balance simply by adopting a particular theory of human life.

The problem is that the Court does exactly that. Despite the same uncertainty regarding the status of the fetus, the Court adopts a specific position, namely, that the fetus is only a potential human life.¹⁶¹ The Court does not explain why it has unique competence to decide this inscrutable question, which it takes to be dispositive up until at least viability. The majority provides no sound, valid argument for its holding, relying on the informal fallacies discussed above. In fact, the majority simply begs the question about the status of the fetus—whether it is a person and/or a human life. The Court states (without any argument regarding what it is to be a “person”) that the fetus is not a person and admits that no one can decide when human life begins.¹⁶² Yet without an understanding of personhood—what it is to be a “person”—there is no way to determine whether (1) the fetus is or is not a “whole” person or (2) the Court can equate potential human life and non-whole personhood.

Having assumed that the fetus is not a “whole” person and is only a potential human life, weighing the competing interests is straightforward for the Court. The woman (a whole person and a human being) has a constitutionally protected privacy right; the potential human life has no inherent protection under the Constitution. States must assert an interest in the potential life, which interest intensifies throughout the pregnancy. Thus, the woman’s right to terminate her pregnancy is weightier and must be respected at least during the first and second trimesters. As the Court puts the point, during this early stage of pregnancy, “the attending physician, in consultation with his patient, is free to determine, without regulation

¹⁵⁹ *Id.* at 162.

¹⁶⁰ *Id.* at 152.

¹⁶¹ *Id.*

¹⁶² *Id.* at 159; *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 982 (1992).

by the State, that, in his medical judgment, the patient's pregnancy should be terminated."¹⁶³

Of course, given *Doe v. Bolton*'s broad reading of the "health" exception, the States' authority to prohibit abortion post-viability also is severely limited. According to Justice Blackmun:

medical judgment [as to maternal health] may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.¹⁶⁴

Under this interpretation of "maternal health," a State's purported ability to "regulate, and even proscribe, abortion" post-viability is another façade.¹⁶⁵ As the Sixth Circuit noted, "*Roe*'s prohibition on state regulation when an abortion is necessary for the 'preservation of the life or health of the mother' must be read in the context of the concept of health discussed in *Doe*."¹⁶⁶ Given the broad discretion conferred on the doctor performing the abortion to determine what bears on maternal health, the exception threatens to swallow the rule, transferring the power to balance the competing interests (and, therefore, to regulate the abortion decision post-viability) to the doctor performing the abortion.¹⁶⁷

¹⁶³ *Roe*, 410 U.S. at 163.

¹⁶⁴ *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

¹⁶⁵ *Roe*, 410 U.S. at 165.

¹⁶⁶ *Women's Medical Pro. Corp. v. Voinovich*, 130 F.3d 187, 209 (6th 1997).

¹⁶⁷ *But see Voinovich v. Women's Medical Prof. Corp.*, 523 U.S. 1036, 1039 (1998) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting from the denial of certiorari) ("Our conclusion that the statutory phrase in *Doe* was not vague because it included emotional and psychological considerations in no way supports the proposition that, after viability, a mental health exception is required as a matter of federal constitutional law. *Doe* simply did not address that question.").

11. Although a Woman's Privacy Right Is Absolute During the First Trimester, Each of the States' Interests "Grows in Substantiality as the Woman Approaches Term and, at a Point During Pregnancy, Each Becomes 'Compelling'"¹⁶⁸

The Court's sliding scale of interests serves as the foundation for its (much maligned) trimester framework. The trimester structure does not follow directly from the Court's premises, which leads *Casey* to reject that framework. In its place, *Casey* excises and retains what it takes to be the "essential holding" of *Roe*—viability. But *Casey* does not champion or expound on *Roe*'s argument for viability, mustering at best a tepid endorsement. *Roe*'s articulation of the viability standard "was a reasoned statement, elaborated with great care."¹⁶⁹ Because *Casey* adopted that standard, though, a few points about viability are important to note.

First, the Court's analysis is circular. The Court defines viability as the point at which "the fetus . . . presumably has the capability of meaningful life outside the mother's womb."¹⁷⁰ The Court then claims that viability is the critical point at which the States' interest in the potential life becomes compelling because this is when the fetus is able to live outside the womb. The Court's premise and conclusion say the same thing. To see why one need only substitute the definition of "viability" for the term itself: the time the fetus is capable of meaningful life outside the mother's womb is the critical point because that is when the fetus can live meaningfully outside the womb. In this way, "the Court's defense seems to mistake a definition for a syllogism."¹⁷¹

The argument is valid; if the premise is true, then the conclusion is necessarily true (because they are one in the same). But it is not at all clear that the argument is sound. The Court provides no independent reason to justify taking viability as a point, let alone *the only point*, when the States' interest in fetal human life becomes compelling. As Justice White noted in *Thornburgh*, "[t]he State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom."¹⁷²

¹⁶⁸ *Roe*, 410 U.S. at 162–63.

¹⁶⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 870 (1992).

¹⁷⁰ *Roe*, 410 U.S. at 163.

¹⁷¹ Ely, *supra* note 15, at 924–25 (1973).

¹⁷² *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (White, J., dissenting).

Furthermore, the majority asserts that viability “has both logical and biological justifications,” but it never offers any such justifications.¹⁷³ The Court’s perfunctory history of laws dealing with the unborn outside the abortion context focuses on quickening. The numerous States that banned abortion pre-*Roe* took conception to be the critical point. Some non-abortion-related laws depended, at least in part, on live birth. Prior to the Court’s decision in *Roe*, only prenatal-injury law invoked viability, but that trend started only in the 1940s and was dissipating by the 1960s.¹⁷⁴ Despite (1) all of these different possibilities (and others like fetal pain, heart auscultation, and brain activity) and (2) the fact that the Constitution is silent on the matter, *Roe* asserts that viability is the pivotal point during gestation. This determination was arbitrary in 1973, and *Casey* simply perpetuated the mistake by adopting viability based on *stare decisis* instead of critically analyzing *Roe*’s fallacious argument.

Second, because the Court provides no independent basis for viability, the selection of viability as the critical juncture is wholly arbitrary. Justice Blackmun conceded the point in his Internal Supreme Court Memo: “You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.”¹⁷⁵ Justice O’Connor echoed this sentiment in her *Akron* dissent. If the fetus is only a potential human life, then it has that same potentiality—“capability” in *Roe*’s terms¹⁷⁶—before, at, and after viability:

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. Although the Court refused to “resolve the difficult question of when life begins,” the Court chose the point of viability—when the fetus is *capable* of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which

¹⁷³ *Roe*, 410 U.S. at 163.

¹⁷⁴ See Charles A. Lintgen, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 600 (1962).

¹⁷⁵ DAVID J. GARROW, *LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 580 (1994) (quoting Memorandum from Justice Harry A. Blackmun to the Conference, Re: No. 70-18-Roe v. Wade (Nov. 21, 1972) (on file at the Library of Congress, in the Harry A. Blackmun Papers, Manuscript Division, Box 151, Folder 6)).

¹⁷⁶ *Roe*, 410 U.S. at 163 (1973).

the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.¹⁷⁷

Selecting viability as the key constitutional moment, then, lacks any constitutional or historical basis and is illogical because (even assuming that the fetus is only a potential human life) the capability of meaningful life outside the womb is inherent in the fetus at conception and every other stage of the pregnancy.¹⁷⁸

Finally, while the *Casey* plurality upholds the viability standard, it also implicitly confirms the arbitrary nature of choosing any specific point before, at, or after viability: “Any judicial act of line-drawing may seem somewhat arbitrary.”¹⁷⁹ The plurality’s defense of viability is lukewarm at best: “There is no line other than viability which is more workable.”¹⁸⁰ To say that no line works better than viability is not to justify the line chosen as the proper or only line; rather, it intimates that all lines are arbitrary. Other standards may work just as well, even if they do not work better. *Roe* and *Casey* needed to explain why this specific standard—viability—is constitutionally mandated. If it is merely one among many equally workable alternatives, then the Constitution would seem to leave to the States the decision as to which standard (conception, heart auscultation, brain activity, fetal pain, quickening, etc.) is appropriate. The majority provides no basis for its choosing one line over others—other than the personal predilection of the Justices, which constitutes “an act of will, not legal judgment.”¹⁸¹

¹⁷⁷ *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 461 (1983) (O’Connor, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁷⁸ *See Casey*, 505 U.S. at 989 n.5 (Scalia, J., concurring in the judgement in part and dissenting in part) (“The arbitrariness of the viability line is confirmed by the Court’s inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child’s life ‘can in reason and all fairness’ be thought to override the interests of the mother.”); *Thornburgh*, 476 U.S. at 795 (White, J., dissenting) (“[T]he State’s interest, if compelling after viability, is equally compelling before viability.”); *Dobbs*, 2022 WL 2276808 at *67 (Roberts, C.J., concurring in the judgment) (“In short, the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate.”).

¹⁷⁹ *Casey*, 505 U.S. at 870.

¹⁸⁰ *Id.*

¹⁸¹ *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting); *Adamson v. California*, 332 U.S. 46, 90 (1947) (Black, J., dissenting) (expressing concern over interpretations of the Constitution that “license this Court . . . to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.”).

B. *Because Roe’s Analysis Does Not Withstand Careful Analysis and Supporters of Roe Do Not Rely on Its Argument, Stare Decisis Is Unlikely to Carry the Day as It Did in Casey*

The Court developed the doctrine of *stare decisis* for well-known rule-of-law reasons.¹⁸² The doctrine “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”¹⁸³ In general, *stare decisis* embodies the Court’s judgment that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”¹⁸⁴ More recently, the Court has identified at least five factors to consider when determining whether to overrule a prior decision: “the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.”¹⁸⁵ As *Casey* demonstrates, though, the Justices have not always agreed on the factors to use or how those factors apply to a particular case.¹⁸⁶

Moreover, the Court also has instructed that “[s]tare decisis is not an inexorable command”¹⁸⁷ and “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our

¹⁸² *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

¹⁸³ *Id.*

¹⁸⁴ *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citation omitted).

¹⁸⁵ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018). The *Dobbs* majority relies on a similar list of factors: “the nature of [*Roe*’s and *Casey*’s] error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.” 2022 WL 2276808 at *26.

¹⁸⁶ *Compare Casey*, 505 U.S. at 855 (considering whether *Roe*’s core holding was “unworkable,” whether removing the rule would create “serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it,” whether changes in the law “left *Roe*’s central rule a doctrinal anachronism,” and whether its “premises of fact have so far changed . . . as to render its central holding somehow irrelevant or unjustifiable”), *with id.* at 944 (Rehnquist, C.J., dissenting) (“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.”).

¹⁸⁷ *Payne*, 501 U.S. at 828 (1991).

prior decisions.”¹⁸⁸ This helps to explain why the Court has overruled (either expressly or impliedly) more than 230 decisions in its history.¹⁸⁹

In *Dobbs*, the only certified question is whether the Court should overturn *Roe v. Wade*, a watershed case that has fueled the abortion debate for the past 48 years.¹⁹⁰ The focus here is on only the first factor identified in *Janus*—the quality of *Roe*’s reasoning—leaving it to the parties in *Dobbs* and other commentators to address the remaining *stare decisis* factors.¹⁹¹ The soundness and strength of the challenged decision’s reasoning is “[a]n important factor,”¹⁹² perhaps even the most important one for some Justices.¹⁹³ After all, as the plurality in *Casey* acknowledged, if a case

¹⁸⁸ *Agostini*, 521 U.S. at 235.

¹⁸⁹ See *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONSTITUTION ANNOTATED, <https://constitution.congress.gov/resources/decisions-overruled/> (last visited June 22, 2022). *Dobbs* also provides a partial list of “important constitutional decisions” that the Court has overruled. 2022 WL 2276808 at *25 n.48.

¹⁹⁰ *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619, 2619–20 (2021) (limiting grant of certiorari to the question of whether all pre-viability prohibitions on elective abortions are unconstitutional).

¹⁹¹ *Dobbs* discusses the “quality of the reasoning” in *Roe* at some length. See *Dobbs*, 2022 WL 2276808 at *27–32. In a passage that already has generated much commentary, the majority also “emphasize[s] that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” *Id.* at *37. Any challenges to another due process decision (e.g., *Griswold*, *Lawrence*, or *Obergefell*) would be “subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.” *Id.* at *39. For its part, the dissent is dubious at best. See *id.* at *82 (Justices Breyer, Sotomayor, and Kagan, dissenting).

¹⁹² *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018).

¹⁹³ See *United States v. Scott*, 437 U.S. 82, 101 (1978) (“[I]n cases involving the Federal Constitution, . . . [t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”) (citation and internal punctuation omitted); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 955 (1992) (Rehnquist, C.J., concurring in the judgement in part and dissenting in part) (“Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question.”); *Casey*, 505 U.S. at 955 (“It is therefore our duty to reconsider constitutional interpretations that ‘depar[t] from a proper understanding’ of the Constitution.” (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985))); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627–28 (1974) (Powell, J., concurring) (“It is not only [the Court’s] prerogative but also [its] duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question.”); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (overturning *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), because the majority concluded that “the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).

lacks a “principled justification,” it is “no judicial act at all.”¹⁹⁴ That *Roe*’s central argument in support of viability is fallacious and unsound, therefore, bears directly on—and may govern—the Court’s *stare decisis* analysis in *Dobbs*.¹⁹⁵ In *Knick*, the Court overruled a case because, among other things, “[i]ts reasoning was exceptionally ill founded.”¹⁹⁶ And *Janus* concluded that “the fact that ‘[t]he rationale of [the prior case] does not withstand careful analysis’ is a reason to overrule it. And that is even truer when, as here, the defenders of the precedent do not attempt to ‘defend [its actual] reasoning.’”¹⁹⁷

As discussed above, *Roe*’s reasoning is (like that of the precedent in *Knick*) “exceptionally ill founded,” and those defending *Roe* (like those supporting *Abod* in *Janus*) generally do not advocate for *Roe*’s reasoning, relying instead on *Casey* and *stare decisis*. Two examples illustrate the point. In their brief, the *Dobbs* Respondents rely directly on *Casey*:

[t]hirty years [after *Casey*], *stare decisis* presents an even higher bar to upending this ‘rule of law and [] component of liberty.’ *Casey* is precedent on top of precedent—that is, precedent not just on the issue of whether the viability line is correct, but also on the issue of whether it should be abandoned.¹⁹⁸

The viability line is said to be correct, not because *Roe*’s argument is compelling or sound, but because *Casey* upheld that standard.¹⁹⁹ And the Court should not overturn *Roe* now for the same reason—*Casey* retained viability in 1992. The Respondents’ brief goes on to discuss *Casey* at some length, but the Respondents

¹⁹⁴ *Casey*, 505 U.S. at 865.

¹⁹⁵ The plurality’s invocation of *stare decisis* has been criticized as being selective, being used to support viability while at the same time being ignored when the plurality overturned parts of *Akron* and *Thornburgh* as well as *Roe*’s trimester framework, its finding of a fundamental right, and the application of strict scrutiny. See *Casey*, 505 U.S. at 860. See generally Michael S. Paulsen, *Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis*, 86 N.C.L. REV. 1165 (2008).

¹⁹⁶ *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2178 (2019).

¹⁹⁷ *Janus*, 138 S. Ct. at 2481 n.25 (citations omitted).

¹⁹⁸ See generally Brief of Respondent, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392), 2021 WL 4197213.

¹⁹⁹ *Id.* See also *Dobbs*, 2022 WL 2276808 at *39 (“The dissent characterizes *Casey* as a ‘precedent about precedent’ that is permanently shielded from further evaluation under traditional *stare decisis* principles.”).

do not rely on *Roe*'s actual argument. Instead, they effectively ask the Court to defer to *Casey*'s assessment, not carefully review *Roe*'s reasoning for itself.²⁰⁰

Similarly, another commentator recently invoked *stare decisis* to contest the majority's refusal to enjoin S.B. 8, the Texas law banning abortion around six weeks, in *Whole Woman's Health*.²⁰¹ According to this commentator, the Texas case signaled that the "Republican-appointed justices . . . are ready to overturn the Court's 1973 decision in *Roe v. Wade*, [which struck] down anti-abortion laws across the nation as violating a woman's right to privacy under the fourteenth amendment to the Constitution."²⁰² Instead of providing a defense of the constitutional right to abortion, however, he appealed to *Casey*'s playbook, championing the idea that "[t]he authority [or "legitimacy" in *Casey*'s language²⁰³] of the supreme court derives entirely from Americans' confidence and trust in it" and advancing a particular view of the Court's role that is found nowhere in *Roe* itself or the Constitution—"the fundamental role of the supreme court is to balance the scales in favor of those who were powerless."²⁰⁴ Even if the Court may provide special consideration (through heightened scrutiny) for "discrete and insular minorities" in certain contexts,²⁰⁵ that does not mean this is the Court's "fundamental role"²⁰⁶ nor

²⁰⁰ *See id.* at 25–36.

²⁰¹ *See generally* Robert Reich, *The US Supreme Court is Now Cruel, Partisan—and Squandering its Moral Authority*, THE GUARDIAN (Sept. 2, 2021), <https://www.theguardian.com/commentisfree/2021/sep/02/us-supreme-court-texas-abortion-law-cruel-partisan>.

²⁰² *Id.*

²⁰³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) ("The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

²⁰⁴ Reich, *supra* note 201. Although Mr. Reich's view of the judicial role is interesting and controversial, it is not clear whether *Roe* was rightly decided under a "balancing of power in favor of the powerless" regime. Even assuming that the Supreme Court should exercise its authority to assist those who are unable to get due consideration of their concerns through the political process—"discrete and insular minorities" from *Carolene Products*' famous footnote 4—some certainly would contend that fetuses are truly powerless to protect themselves such that the Court should provide *greater*, not lesser, protection of *their* interests. *See* Ely, *supra* note 15, at 934–35. As Professor Ely put the point, "Compared with men, women may constitute such a 'minority'; compared with the unborn, they do not. I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer." *Id.*

²⁰⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

²⁰⁶ *See, e.g., Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Obergefell v. Hodges*, 576 U.S. 644, 686 (2015) (Roberts,

does it tell us how that balancing should go in the abortion context. Moreover, *Roe* did not expressly or impliedly proffer an argument supporting a “protect the powerless” rationale; instead, the Court attempted to ground the right to abortion in the right to privacy,²⁰⁷ which plays no role in such criticisms of *Whole Woman’s Health*.

Given the lack of reasoning supporting its conclusion,

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 façade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion.²⁰⁸

Stare decisis and *Casey* are invoked to preserve *Roe*, but when one looks behind the claim that the Court should retain the viability standard, there is no independent constitutional argument supporting the standard. *Casey* stands as a more recent, shinier edifice supporting *Roe*’s essential holding, but that constitutional standard rests primarily on the length of time viability has been around, not on any solid and enduring constitutional argument. Adapting the Court’s analysis in *Knick* to the present situation, “[b]ecause of its shaky foundations, [*Roe*’s viability] requirement has been a rule in search of a justification for over [48] years.”²⁰⁹ The unwillingness and inability to defend *Roe*’s fallacious reasoning provides the Court with an even stronger reason for overruling that decision under the doctrine of *stare decisis*.²¹⁰

Of course, those arguing that the Constitution does (or should) protect the right to abortion are “free to do so,” but in so doing they must supply the constitutional foundation that is missing in *Roe*.²¹¹ The right to abortion in *Roe* does not follow from the Court’s historical overview of abortion, its prior privacy cases, the allegedly intractable question of when life begins, its begging the question about personhood

C.J., dissenting) (“Under the Constitution, judges have the power to say what the law is, not what it should be.”).

²⁰⁷ *Roe v. Wade*, 410 U.S. 113, 172 (1973).

²⁰⁸ 505 U.S. at 966 (Rehnquist, C.J., concurring in the judgement in part and dissenting in part).

²⁰⁹ *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2178 (2019).

²¹⁰ *See Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2481 n.25 (2018).

²¹¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 385 (2010) (Roberts, C.J., concurring).

and the value of fetal human (or potential human) life, or *Roe*'s arbitrary balancing of interests at viability.²¹² The problem for those defending *Roe* on the merits is that, in making new constitutional arguments to reinforce *Roe*'s fallacious ones, they risk undercutting their ability to rely on *stare decisis*, which is "a doctrine of preservation, not transformation."²¹³ The value of preserving the rule of law (*i.e.*, "promot[ing] the evenhanded, predictable, and consistent development of legal principles"²¹⁴) is lost when the constitutional basis for the rule has been rejected in favor of a different argument:

[t]here is . . . no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited. . . . This approach would allow the Court's past missteps to spawn future mistakes, undercutting the very rule-of-law values that *stare decisis* is designed to protect.²¹⁵

Even in the context of statutory interpretation, where *stare decisis* enjoys even greater force, three Justices (Alito, Roberts, and Thomas) have indicated a willingness to depart from *stare decisis* when a past decision "had no basis in the law" and "[i]ts reasoning has been thoroughly disproved."²¹⁶ Given that these Justices are willing to depart from *stare decisis* when confronted with "thoroughly disproved" arguments in the context of statutory interpretation, they may be all the

²¹² In *Dobbs*, the majority summarized its main problems with *Roe*: "*Roe* found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent." 2022 WL 2276808 at *27.

²¹³ *Id.* at 384 (Roberts, C.J., concurring). The *Dobbs* majority invokes this quote when criticizing Chief Justice Roberts's concurrence, which the majority contends replaces viability with a "new rule" that "cannot be defended on *stare decisis* grounds." 2022 WL 2276808 at *40.

²¹⁴ *Janus*, 138 S. Ct. at 2478.

²¹⁵ *Citizens United*, 558 U.S. at 384 (Roberts, C.J., concurring); *see also* *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2178 (2019) ("The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of *stare decisis*"); *Janus*, 138 S. Ct. at 2472 ("Respondents' reliance on *Pickering* is thus 'an effort to find a new justification for the decision in *Abood*.' And we have previously taken a dim view of similar attempts to recast problematic First Amendment decisions." (quoting *Harris v. Quinn*, 573 U.S. 616, 652 (2014))).

²¹⁶ *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 470 (2015) (Alito, J., dissenting). The dissenters in *Kimble* also noted that the prior decision "poses economic barriers that stifle innovation" and "unsettles contractual expectations." *Id.*

more likely to depart from *stare decisis* when dealing with wholly discredited arguments in the realm of constitutional interpretation.²¹⁷

This concern helps to explain why so many commentators who support *Roe* do not critically engage *Roe*'s constitutional reasoning (which *Casey* largely ignored) and rely instead on the longstanding nature of its central holding (which *Casey* affirmed). On this view, the main support for *Roe* is the fact that it has held sway for 48 years, but the only constitutional support for its holding sway is *Casey*'s (uninspiring) *stare decisis* defense of that decision, which did not engage or defend the reasoning undergirding the viability standard. As the Court noted in a different context, “[w]hile this perfect circularity has a certain esthetic appeal, it has no logic.”²¹⁸

Under the Chief Justice’s view of *stare decisis* in *Citizens United*, if *Roe*'s constitutional reasoning is fallacious (which it is), then there is no basis for retaining that precedent simply because it has been around for roughly fifty years. And it is somewhat ironic that, if the current Court revisits and overturns *Roe*, those defending viability will undoubtedly claim that the Roberts Court acted extra-constitutionally, exceeding its authority under the Constitution—even though the majority in *Roe* failed to ground the alleged right to abortion in the text, original meaning, history, structure, or general values of the Constitution. When a decision lacks any constitutional foundation, overturning that decision recognizes the supremacy of the Constitution and removes the Court from an issue reserved to the States; retaining such a decision threatens both the vertical and horizontal separation of powers, elevating the prior decision over the Constitution.²¹⁹ As Justice Thomas explained in *Gamble*, “[a] demonstrably incorrect judicial decision, by contrast, is tantamount to making law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power.”²²⁰ Thus, setting *stare decisis* aside when confronted with wholly discredited constitutional arguments (while still entertaining new and different defenses of an alleged constitutional right) recognizes

²¹⁷ *See id.* (“*Stare decisis* is important to the rule of law, but so are correct judicial decisions.”).

²¹⁸ *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

²¹⁹ *See, e.g., Dobbs*, 2022 WL 2276808 at *26 (describing how in *Roe* “the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.”).

²²⁰ *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”).

the supremacy of the Constitution and protects the States and other branches of the federal government from judicial overreach:

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.²²¹

Justice O'Connor echoed this sentiment in her *Akron* dissent:

[i]rrespective of what we may believe is wise or prudent policy in this difficult area, “the Constitution does not constitute us as ‘Platonic Guardians’ nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, ‘wisdom,’ or ‘common sense.’”²²²

Instead, when defending a Supreme Court decision enshrining such a contentious and (pre-*Roe*) novel constitutional right, commentators (and Supreme Court Justices) need to do more than simply invoke the longstanding nature of the decision or the legitimacy of the Court, which, while important, is neither dispositive nor self-explanatory.²²³ After all, some Justices (perhaps several on the current Court) would contend that the legitimacy of the Court is best ensured when the Court admits that a prior constitutional decision was wrong and then corrects that decision (regardless of the public pressure for or against the particular precedent): “The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of

²²¹ See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, at 139 (1989); see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (“[Federal s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.”).

²²² *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) (quoting *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting)).

²²³ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

Government comport with the Constitution.”²²⁴ Even *Casey* recognized that “the Court’s legitimacy depends on making *legally principled* decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”²²⁵ “[A] decision without principled justification,” like *Roe*, “would be no judicial act at all”²²⁶ and, therefore, may not warrant any deference under *stare decisis*.

II. CONCLUSION

The majority in *Roe* takes comfort in its “feel[ing]” that *Roe*’s holding “is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day.”²²⁷ What is most striking about this list is what it leaves out—the Constitution. The Court openly balances competing interests in formulating a national abortion policy as if it was legislating instead of even attempting to ground its analysis in the text, history, or underlying purposes of the Constitution.²²⁸ Although *Roe* makes powerful points about “social policy and considerations of fairness,” its “decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this

²²⁴ *Casey*, 505 U.S. at 963 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); see also *id.* at 983 (Scalia, J., concurring in the judgment in part and dissenting in part) (“Surely, if ‘[t]he Court’s power lies . . . in its legitimacy, a product of substance and perception,’ . . . the ‘substance’ part of the equation demands that plain error be acknowledged and eliminated. *Roe* was plainly wrong—even on the Court’s methodology of ‘reasoned judgment,’ and even more so (of course) if the proper criteria of text and tradition are applied.” quoting Plurality Op. at 865)); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 363 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), because, among other things, “*Austin* was not well reasoned”); *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (“The rationale of *Bowers* does not withstand careful analysis. . . . *Bowers* was not correct when it was decided, and it is not correct today.”); *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (“[*Stare decisis* cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court.”); *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (“When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.”).

²²⁵ *Casey*, 505 U.S. at 866 (emphasis added).

²²⁶ *Id.* at 865.

²²⁷ *Roe v. Wade*, 410 U.S. 113, 165 (1973).

²²⁸ Ely, *supra* note 15, at 935–36 (“What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.”).

Court's precedents."²²⁹ Rather than relying on "reasoned judgment,"²³⁰ the majority constructs its argument out of a protracted string of informal fallacies, failing to ground the alleged right to abortion in the text of the Constitution or the Court's prior privacy cases.²³¹

The debate over abortion rages on;²³² people of good will on both sides of the issue have staunchly different views on the political, social, religious, and moral ramifications of abortion and abortion regulations. *Roe* attempted (unsuccessfully) to resolve that debate by adopting a novel standard that was unknown to the Constitution as well as the common law, the founding generation, and those who ratified the Fourteenth Amendment. That the Court props its legal argument up on the shoulders of fallacious argument does not, by itself, establish that there is no constitutional right to abortion (for that conclusion would itself be based on a fallacy—an argument from fallacy or *argumentum ad logicam*) because a poorly reasoned argument does not entail a false conclusion. But it does highlight that *Roe*'s constitutional analysis lacks a "principled justification"²³³—which probably is why the plurality in *Casey* framed "the immediate question" as "not [being about] the soundness of *Roe*'s resolution of the issue, but the precedential force that must be

²²⁹ *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting); see also Rosen, *supra* note 28 ("Thirty years after *Roe*, the finest constitutional minds in the country still have not been able to produce a constitutional justification for striking down restrictions on early-term abortions that is substantially more convincing than Justice Harry Blackmun's famously artless opinion itself. As a result, the pro-choice majority asks nominees to swear allegiance to the decision without being able to identify an intelligible principle to support it."); Roosevelt, *supra* note 28 ("As constitutional argument, *Roe* is barely coherent. The court pulled its fundamental right to choose more or less from the constitutional ether. It supported that right via a lengthy, but purposeless, cross-cultural historical review of abortion restrictions and a tidy but irrelevant refutation of the straw-man argument that a fetus is a constitutional 'person' entitled to the protection of the 14th Amendment.").

²³⁰ *Casey*, 505 U.S. at 849.

²³¹ *Id.* at 953 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and come nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986))).

²³² In this regard, Justice Scalia seems to have accurately summarized the impact of *Roe* on the ongoing abortion debate: "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." *Casey*, 505 U.S. at 995 (Scalia, J., concurring in the judgment in part and dissenting in part).

²³³ *Id.* at 865.

accorded to its holding.”²³⁴ A majority of the current Court is likely to focus more directly on *Roe*’s discredited constitutional arguments than on its precedential force, concluding that *Roe* “was not just wrong . . . [i]ts reasoning was exceptionally ill founded.”²³⁵ This puts supporters of *Roe* in a catch-22 situation. If they adopt *Roe*’s logically flawed arguments, a majority of the Court is apt to take the poorly reasoned justifications as an important factor weighing in favor of overturning *Roe*. On the other hand, if they advance new constitutional arguments to support the viability standard, the Court might forego the *stare decisis* analysis, taking the novel arguments to confirm that *Roe* and *Casey* were constitutional facades that lacked a valid constitutional foundation.

²³⁴ *Id.* at 953. Jackson Women’s Health Organization (understandably) relies heavily on *Casey*’s *stare decisis* analysis and the longstanding protection afforded abortion under *Roe* and its progeny. *See, e.g.*, Brief for Respondent, *supra* note 9, at 12 (“In an ‘unbroken’ line of cases spanning five decades, this Court has consistently held that the Constitution guarantees ‘the right of the woman to choose to have an abortion before viability.’” quoting *Casey*, 505 U.S. at 846, 870)). The Respondents, however, largely summarize and restate the arguments the Court espoused in *Roe* and *Casey*, repeating some of the same fallacies such as the Court’s begging the question about human life and personhood, *id.* at 12–13, circular reasoning, *id.* at 13, and weak analogy, *id.* at 17–18.

²³⁵ *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2178 (2019).