

NEAL DEVINS

How *Planned Parenthood v. Casey* (Pretty Much) Settled the Abortion Wars

ABSTRACT. More than twenty-one years after Robert Bork's failed Supreme Court nomination and seventeen years after *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the rhetoric of abortion politics remains unchanged. Pro-choice interests, for example, argue that states are poised to outlaw abortion and that *Roe v. Wade* is vulnerable to overruling. In this Essay, I will debunk those claims. First, I will explain how *Casey*'s approval of limited abortion rights reflected an emerging national consensus in 1992. Second, I will explain why the Supreme Court is unlikely to risk political backlash by formally modifying *Casey*—either by restoring the trimester test or by overruling *Roe* altogether. Third (and most important), I will explain how it is that *Casey* stabilized state abortion politics. The national consensus favoring limited abortion rights remains intact. Correspondingly, the template of laws approved by the Supreme Court in *Casey* were politically popular at the time of *Casey* and remain politically popular today. Indeed, since Pennsylvania has always been one of the most restrictive states when it comes to abortion regulation, very few states are interested in pushing the boundaries of what *Casey* allows. And while a handful of outlier states have pushed the boundaries of what *Casey* allows, these states (which account for a quite small percentage of abortions) have largely worked within parameters set by the Court in *Casey*. Perhaps most telling, neither the confirmation of Chief Justice Roberts and Justice Alito nor the Supreme Court's approval of federal partial-birth abortion legislation has significantly impacted state antiabortion efforts. For all these reasons, pro-choice and pro-life interests would be better served shifting their energies away from legalistic fights over abortion regulation and toward shaping the hearts and minds of the women who may seek abortions and the doctors and clinics that may provide abortion services.

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On the eve of the 2008 elections, the reproductive rights community braced itself for the coming Armageddon. Voters in Colorado and South Dakota were set to vote on initiatives that would outlaw nearly all abortions.¹ In Oklahoma, lawmakers in April 2008 overrode a gubernatorial veto and enacted a law mandating that a woman must have an ultrasound before seeking an abortion and that the ultrasound images must be displayed.² Worse yet, following the Supreme Court's five-to-four approval of federal partial-birth legislation, pro-choice interests feared that "the landmark ruling on abortion appears to hang by one vote"³ and that the "fate [of abortion rights] is likely to turn on the 2008 election."⁴ This 2007 decision, *Gonzales v. Carhart*, emphasized the government's power both to recognize "the life within the woman" and to protect women from the "regret" they will feel to abort "the infant life they once created and sustained."⁵

Twenty-one years earlier, pro-choice activists sounded a similar warning. Ronald Reagan called for the overruling of *Roe v. Wade*⁶ and nominated

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1. See Ian Urbina, *Social Initiatives on State Ballots Could Draw Attention to Presidential Race*, N.Y. TIMES, Aug. 11, 2008, at A12. A third antiabortion initiative, in California, would have required physicians to notify the parents of unemancipated minors forty-eight hours before performing an abortion. See *id.*
 2. For a description and analysis, see Emily Bazelon, *Required Viewing: Oklahoma's Gallingly Paternalistic Ultrasound Law*, SLATE, Oct. 22, 2008, <http://www.slate.com/id/2202765/>. Further suggesting that there was "rough weather ahead," the U.S. Court of Appeals for the Eighth Circuit, in June 2008, approved a South Dakota law requiring doctors to inform women that abortions "terminate the life of a whole, separate, unique human being." Robert Post, *Rough Weather Ahead*, Balkinization, Sept. 9, 2008, <http://balkin.blogspot.com/2008/09/rough-weather-ahead.html> (discussing *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008)); see also Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (2007) (assessing the constitutionality of South Dakota's informed consent law).
 3. Jeffrey Rosen, *The Myth of Biden v. Bork*, N.Y. TIMES, Aug. 27, 2008, at A23.
 4. Cass Sunstein, *The Fate of Roe v. Wade and Choice*, BOSTON GLOBE, Sept. 14, 2008, at D9. For its part, the Obama campaign ran radio ads talking about what would happen "[i]f *Roe v. Wade* is overturned." Ben Smith, *Obama Ad Slams McCain on Abortion Rights*, POLITICO, Sept. 2, 2008, <http://www.politico.com/news/stories/0908/13103.html>.
 5. 550 U.S. 124, 157, 159 (2007). For a discussion of right-to-life claims that abortion hurts women and the salience of those claims to the *Carhart* decision, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008) [hereinafter Siegel, *Dignity*]; and Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).
 6. 410 U.S. 113 (1973).

prominent *Roe* critic Robert Bork to the Supreme Court.⁷ On the first day of the Bork confirmation battle, September 14, 1987, Planned Parenthood took out full-page ads warning that the Supreme Court was poised to overturn “decades of Supreme Court decisions . . . about marriage and family, childbearing and parenting” and that “if the Senate confirms Robert Bork, it will be too late.”⁸

Even after the Senate rejected Bork, pro-choice interests feared that the Supreme Court and state lawmakers were poised to repudiate abortion rights. In 1989, a plurality of Justices labeled “the rigid *Roe* framework” unworkable.⁹ For the next three years (until the Supreme Court reaffirmed *Roe* in its June 1992 *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁰ decision), right-to-life interests pushed both for the enactment of legislation that would nullify abortion rights and the election of pro-life lawmakers and governors.¹¹ In the 1992 presidential race, abortion proved to be a defining issue—with Bill Clinton portraying *Roe* as “hanging by a thread.”¹²

At first blush, there are striking similarities between today’s abortion battles and the battles that took place from 1987 to 1992.¹³ In both periods, talk of the Court being one vote away from overturning *Roe* and of states being on the verge of enacting laws outlawing abortion ultimately gave way to the populist recognition of abortion rights. Voters in statewide elections turned

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7. See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1991) (discussing Reagan Administration efforts to reverse *Roe* through Supreme Court arguments and judicial appointments); RONALD REAGAN, *ABORTION AND THE CONSCIENCE OF THE NATION* 19 (1984) (analogizing *Roe* to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)).
 8. Advertisement, *WASH. POST*, Sept. 14, 1987, at A9.
 9. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (1989).
 10. 505 U.S. 833 (1992).
 11. See NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE* 67-73 (1996).
 12. William Schneider, *The Battle for Saliency: The Abortion Issue in This Campaign*, *ATLANTIC ONLINE*, Oct. 1992, <http://www.theatlantic.com/politics/abortion/batt.htm> (quoting then-Governor Bill Clinton).
 13. Indeed, for the pro-choice community, the threat to reproductive liberty is even greater today. Dawn Johnsen, who had served as legal director of NARAL Pro-Choice America during the 1987-1992 period, put it this way: “As bad as things looked in that critical 1987-1992 period, I never imagined that a majority of Justices on the Supreme Court would join an opinion that included some of the language contained in the Court’s 2007 *Carhart* decision.” Dawn Johnsen, *Why the 2008 Election Matters for Reproductive Rights*, *Balkinization*, Sept. 24, 2008, <http://balkin.blogspot.com/2008/09/why-2008-election-matters-for.htm> (italization added).

down antiabortion initiatives and right-to-life candidates in 2008;¹⁴ 1989-1992 efforts to enact laws prohibiting abortions almost always failed, as did the gubernatorial campaigns of pro-life candidates. Likewise, just as voters elected a president committed to nominating pro-*Roe* Justices in 2008, voters likewise elected a pro-choice president in 1992.

Despite these superficial similarities, the abortion battles of today bear no meaningful resemblance to battles of the 1987-1992 era. In the pages that follow, I will argue that *Planned Parenthood v. Casey* significantly settled the abortion dispute, both by establishing a majoritarian split-the-difference standard and, perhaps more importantly, by providing a template that helps states determine what types of abortion regulations can be constitutionally pursued. This standard has proven sufficiently durable as both a judicial and political precedent that there is no push to change the status quo by the states, Supreme Court Justices, or either the President or the Senate through the appointments-confirmation process.

Casey settled the abortion wars in two ways. First, the decision helped create an environment in which the Supreme Court is unlikely either to overturn *Roe* or to return the *Roe* trimester test. Second, the decision helped create an environment in which state lawmakers—if and when *Roe* were overturned—would be unlikely to outlaw abortion or pass more stringent restrictions (than those enacted by Pennsylvania and approved by the Supreme Court in *Casey*).

In Part I of this Essay, I will show that *Casey*'s support of limited abortion rights reflected the political preferences of federal and state lawmakers as well as the American people. 1973-1986 politics made clear that *Roe*'s absolutism was unacceptable; 1987-1992 politics revealed that overruling *Roe* was equally unacceptable. Part I, moreover, will highlight the unwillingness of pro-choice and pro-life interest groups to compromise on abortion rights. In Part II, I will explain why the Supreme Court will stick with the *Casey* undue burden standard. In particular, I will argue that there is nothing to be gained and much to be lost by tossing *Casey* aside. *Casey* is a sufficiently malleable standard that it can be applied to either uphold or invalidate nearly any law that a state is likely to pass. Additionally, the Court would face a fierce backlash if it either repudiated abortion rights by overruling *Roe* or, alternatively, embraced pro-choice absolutism by reinstating *Roe*'s trimester test. Between 1973 and 1986, the Court's rigid application of the trimester test to waiting periods and informed consent requirements figured prominently in pro-life attacks on the

14. See Nicholas Riccardi, *Initiatives To Curb Abortion Defeated*, L.A. TIMES, Nov. 5, 2008, at A18; *infra* note 142 (discussing the electoral defeat of right-to-life prosecutor Phill Kline).

Supreme Court. These attacks translated into the election of pro-life candidates, the enactment of hundreds of anti-choice statutes, and the campaign to overturn *Roe* (through the nomination of judges and the filing of briefs). By the same token, 1987-1992 politics as well as the failure of 2008 initiatives makes clear that the repudiation of *Roe* would trigger a backlash. Most Americans support limited abortion rights and the overturning of *Roe* would almost certainly result in the election of pro-choice candidates, the pursuit of pro-choice policy initiatives, and, ultimately, the nomination of Justices willing to reestablish a constitutional right to abortion.

Part III of this Essay will detail the ways in which *Casey* stabilized state abortion politics. By looking at post-*Casey* legislative enactments, I will demonstrate that (with the notable exception of partial-birth abortion) state lawmakers have typically looked to provisions of the Pennsylvania statute upheld in *Casey* as a template for their own legislative enactments. In part, the laws approved by the Court in *Casey* are the very laws that have been embraced by states who want to place restrictions on abortion. After all, Pennsylvania is ranked by the National Abortion and Reproduction Rights Action League (NARAL) as among the seven most restrictive states when it comes to abortion regulation¹⁵ – so it is unsurprising that very few states are interested in enacting regulations that restrict choice beyond the Pennsylvania limits. More than that, *Casey*'s invalidation of Pennsylvania's spousal notification provision reinforced *Casey*'s stabilizing function. By invalidating at least one provision of the challenged statute, *Casey* legitimated its upholding of the other provisions. More significantly, by showing a willingness to flesh out the undue burden standard by negative examples as well as positive ones, the Court allowed state lawmakers to escape political pressure to push for restrictions on abortion beyond those specifically approved in *Casey*. Knowing that abortion is highly salient to voters and knowing that public opinion on abortion has not changed significantly in the past seventeen years most state lawmakers are more than happy to work within the parameters of the *Casey* template.¹⁶ For this very

15. NARAL PRO-CHOICE AM. FOUND., WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES tbl. (2009). When *Casey* was decided, Pennsylvania was one of a handful of "challenger" states that regularly enacted anti-abortion restrictions. See Glen Halva-Neubauer, *Abortion Policy in the Post-Webster Age*, 20 PUBLIUS 27, 32 (1990).

16. Correspondingly, even though voters may not be aware of the details of complicated regulatory statutes, lawmakers typically prefer to steer clear of contentious, socially divisive issues. See *infra* notes 41, 74 and accompanying text. Put another way, absent a strong pro-life constituency that will reward the pursuit of antiabortion policies, lawmakers will take no chances and simply steer clear of the abortion issue.

reason, neither the nominations of Chief Justice Roberts and Justice Alito nor the Supreme Court's approval of federal partial-birth abortion legislation in *Carhart* has fundamentally altered state regulation of abortion. Likewise, the 2008 presidential elections were of only limited significance to state regulation of abortion rights.¹⁷

Part IV of this Essay will tie these threads together, drawing on the analysis in Part III to make two broader points—one about the Court's role in the abortion dispute and the other about the advisability of pro-choice and pro-life interests pursuing a legalistic agenda (focusing on legislative enactments and judicial review of those enactments). I will suggest that legislative restrictions on abortion access do not fully explain declines both in the abortion rate and the number of health care providers who perform abortions. Pro-choice and pro-life interests should therefore face facts and stop their incendiary battles over the future of *Roe*. Pro-life interests have nothing to gain by continuing to talk about their movement's "basic political task" remaining the same and "a post-*Roe* world remain[ing] in reach";¹⁸ likewise, pro-choice interests should not worry about pro-life forces returning "a year from now" to "take a direct attack on *Roe*."¹⁹ Instead, pro-choice and pro-life interests should turn their attention away from courts and toward the very women who are the target of state regulation.²⁰

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17. In particular, since the states are unlikely to enact significant new restrictions, the judicial appointees of Barack Obama will have few opportunities to meaningfully tighten the *Casey* undue burden standard. At the same time, I am not making the broader point that presidential politics is irrelevant to reproductive rights. Presidential elections, for example, speak to whether pro-choice or pro-life policies will be advanced through presidential directives. See DEVINS, *supra* note 11, at 97-120; Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 304-09 (1994) (reviewing BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* (1993)); Johnsen, *supra* note 13. My argument, instead, is about the basic *Roe* right—that is, the power of states to directly regulate abortion.
 18. Ross Douthat, *Abortion Politics Didn't Doom the G.O.P.*, N.Y. TIMES, Dec. 7, 2008, Week in Review 10.
 19. Faith Bremner, *Related Measures Fail in California, Colorado*, ARGUS LEADER (Sioux Falls, S.D.), Nov. 9, 2008, at 1A (italicization added) (quoting NARAL Pro-Choice America president Nancy Keenan).
 20. For another treatment of this topic, see Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009).

I. RETHINKING THE CASEY COMPROMISE

When the Supreme Court decided *Planned Parenthood v. Casey* in 1992, the political preferences of federal and state lawmakers as well as the American people had coalesced around a limited right to abortion. Two decades earlier, *Roe v. Wade* served as a critical trigger to judicial recognition of abortion rights, overcoming politically potent pro-life interests that had stood in the way of populist abortion reform.²¹ But *Roe* was “inflexibly legislative,”²² preventing states from imposing a range of politically popular restrictions on abortion rights. From 1973 to 1992, federal and state officials as well as the American people engaged in a constitutional dialogue on abortion rights—a dialogue that pushed the Court away from the poles of pro-choice and pro-life absolutisms and toward the middle-ground view that reflected the beliefs of most Americans.

Abortion politics has been and always will be a byproduct of a broad constellation of issues that touch upon gender roles, family life, and the Court’s role in checking democratic outlets. The backlash against *Roe*, in part, was a backlash against “feminism,” for the decision came to embody what have been called “the core aims of the women’s liberation movement.”²³ At the same time, the problem with *Roe* was not simply that the Court had invalidated Texas’s abortion ban; the Court’s embrace of a comprehensive trimester test also sparked controversy.

In the decade leading up to *Roe*, public opinion on abortion had been transformed. Following the very public ordeals of women who were forced to travel overseas or seek illegal abortions after learning that there was a substantial risk of delivering a fetus with significant birth defects, a majority of Americans had come to support limited abortion rights.²⁴ In the 1970s, 64% of

21. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 370-71, 576-77 (1994) (highlighting defeat of pro-choice legislative reform proposals and pro-choice ballot initiatives); Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433, 1445-48 (1995) (review GARROW, *supra*).

22. This is how Justice Potter Stewart, who concurred in *Roe*, depicted Justice Blackmun’s draft opinion. See Bob Woodward, *The Abortion Papers*, WASH. POST, Jan. 22, 1989, at D1.

23. LINDA GORDON, *THE MORAL PROPERTY OF WOMEN* 295 (3d ed. 2002); see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 409-25 (2007) (detailing how mobilization against *Roe* was tied both to opposition to women’s movement and to efforts by evangelicals to link abortion to secular humanism).

24. See GARROW, *supra* note 21, at 285-305. Reflecting this change in public opinion, eighteen states had liberalized their abortion policies—principally to allow women to have abortions

Americans supported first trimester abortions.²⁵ But with only 26% of Americans supporting second trimester abortions, *Roe's* trimester test was doomed to failure.²⁶

From 1973-1989, forty-eight states passed 306 antiabortion measures. Pennsylvania regularly challenged the *Roe* standard during this period, enacting fourteen antiabortion statutes.²⁷ The Supreme Court rejected most of these initiatives (including waiting periods and informed consent laws). In so doing, the Court helped fuel the rise of the Religious Right and, with it, the Reagan Revolution.²⁸ In his 1980 presidential bid, Ronald Reagan pledged "support of a constitutional amendment to restore protection of the right to life for unborn children."²⁹ Once elected, Reagan called for the overturning of *Roe*, making the decision "the symbol of everything that had gone wrong in [constitutional] law."³⁰

When Reagan nominated Bork to replace Justice Lewis Powell, the future of *Roe* seemed very much in doubt. Powell played a decisive role in shaping the *Roe* decision; Bork openly opposed *Roe* as a "wholly unjustifiable usurpation of State legislative authority."³¹ But eight in ten Americans supported some form of abortion rights in 1987 and, not surprisingly, an August/September Gallup poll found that Bork's confirmation was supported by "fewer than [four] in [ten] Americans."³² The Senate rejected Bork's "narrow definition of liberty," defeating the nomination fifty-eight to forty-two, in large measure because of Bork's repudiation of privacy rights.³³

in cases of fetal deformity, rape, incest, or when there was a substantial health risk. See DEVINS, *supra* note 11, at 57-60.

25. See Michael J. Klarman, *Roe's Backlash*, Balkinization, Sept. 11, 2008, <http://balkin.blogspot.com/2008/09/roes-backlash.html>.
26. *Id.*
27. Halva-Neubauer, *supra* note 15, at 32.
28. Barry Friedman, *Will of the People* 489-90 (Oct. 28, 2008) (unpublished manuscript, on file with author).
29. 1980 Republican Platform Text, *reprinted in* 36 CONG. Q. ALMANAC 58-B, 62-B (1980).
30. FRIED, *supra* note 7, at 72.
31. THE WHITE HOUSE REPORT: INFORMATION ON JUDGE BORK'S QUALIFICATIONS, JUDICIAL RECORD & RELATED SUBJECTS, *reprinted in* 9 CARDOZO L. REV. 187, 206 (1988).
32. Joseph Carroll, *Public Supports Roberts Serving on U.S. Supreme Court*, GALLUP NEWS SERVICE, Aug. 1, 2005, <http://www.gallup.com/poll/17578/Public-Supports-Roberts-Serving-US-Supreme-Court.aspx>.
33. S. REP. NO. 100-7, at 20 (1987). Rather than turn the Bork hearings into a formal referendum on abortion rights, however, the Block Bork Coalition focused on Bork's repudiation of *all* privacy rights. See generally MICHAEL PERTSCHUK & WENDY SCHAETZEL,

The defeat of Bork did not end the abortion wars. State lawmakers continued to enact antiabortion restrictions and, in its 1989 *Webster v. Reproductive Health Services*³⁴ decision, the Supreme Court approved second trimester fetal viability tests and, more generally, signaled its willingness to rethink abortion rights. Pro-choice and pro-life interests as well as the news media predicted that *Webster* would prompt an avalanche of antiabortion measures, including outright bans. *Time* calculated that nineteen states would enact significant restrictions on abortion, *Newsweek* put the number at twenty, and (not to be outdone) *U.S. News & World Report* concluded that twenty-seven states would enact abortion restrictions.³⁵

But rather than spur states to action, *Webster* put a sudden halt to most state efforts to limit abortion rights. Although Louisiana and Utah passed laws banning most abortions,³⁶ nearly all state lawmakers “stayed in the ‘safe,’ familiar, middle ground.”³⁷ From 1989 to 1992, only fourteen statutes were enacted, nine pro-choice and five pro-life. The only states that gave serious consideration to new antiabortion measures were states with a long history of enacting legislation challenging *Roe*. Furthermore, pro-choice Democrats used the abortion issue to defeat pro-life Republicans in several gubernatorial contests, most notably New Jersey and Virginia.³⁸ The abortion issue remained salient throughout the 1987-1992 era. In the 1992 presidential elections, Bill Clinton received a significant boost from voters who feared the Supreme Court’s overruling of *Roe*.³⁹

Webster, in other words, prompted a basic realignment in abortion politics—not because public opinion changed in response to the decision but because state lawmakers feared political retaliation for casting anti-choice

THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION 257 (1989) (detailing how the anti-Bork coalition seized on the privacy issue).

34. 492 U.S. 490 (1989).

35. DEVINS, *supra* note 11, at 67.

36. See Ed Anderson, *Legislature Bans Abortions; Roemer’s Veto Overridden*, NEW ORLEANS TIMES-PICAYUNE, June 19, 1991, at A-1; Tamar Lewin, *Strict Anti-Abortion Law Signed in Utah*, N.Y. TIMES, Jan. 26, 1991, at A10.

37. *Overview*, ST. REPROD. HEALTH MONITOR (The Alan Guttmacher Inst., New York, N.Y.), Dec. 1990, at i.

38. See DEVINS, *supra* note 11, at 68-70.

39. See Alan I. Abramowitz, *It’s Abortion, Stupid: Policy Voting in the 1992 Presidential Election*, 57 J. POL. 176, 179 (1995).

votes.⁴⁰ Public opinion polls taken at the time of *Webster* revealed widespread support both for abortion rights and for certain types of state restrictions. Before *Webster*, pro-choice interests relied on the courts to protect abortion rights and, as such, state lawmakers could back antiabortion restrictions with little fear of backlash. Following *Webster*, state lawmakers recognized that there were real risks in pursuing untested reform measures that might not reflect voter preferences.⁴¹

In Louisiana, Utah, and Pennsylvania, however, prevailing political norms backed the enactment of legislation at odds with Supreme Court decisionmaking.⁴² Louisiana and Utah pushed for the overturning of *Roe*, enacting legislation that blocked most abortions. Pennsylvania sought the overturning of Supreme Court decisions on waiting periods and informed consent requirements. Its comprehensive abortion bill included such requirements as well as provisions on parental consent, spousal notification, and reporting requirements for abortion facilities.

By calling for expanded state authority to regulate abortion, not the overturning of *Roe v. Wade*, the Pennsylvania statute reflected public opinion – not just in Pennsylvania but throughout most of the country. “Typically, more than 85% of Americans approve of a requirement that doctors provide information about abortion alternatives to those seeking abortions, and between 70 and 80% of Americans approve of a twenty-four-hour waiting period and parental consent law.”⁴³

In *Planned Parenthood v. Casey*, the Supreme Court embraced this split-the-difference approach. Rejecting right-to-life absolutism, the Supreme Court reaffirmed *Roe*. But the Court also turned back claims by Planned Parenthood that to abandon strict scrutiny review is “to overturn *Roe*.”⁴⁴ Instead, the Court

40. See Samantha Luks & Michael Salamone, *Abortion*, PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 80, 90-92 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (detailing how *Webster* did not impact public opinion).

41. Reflecting the growing confidence of pro-choice interests, pro-choice Congressman Les AuCoin warned that pro-choice forces were “going to take names and kick ankles” of lawmakers who cast anti-choice votes. 135 CONG. REC. 18,170 (1989) (statement of Rep. AuCoin). For additional discussion, see *supra* notes 74-77 and accompanying text.

42. See DEVINS, *supra* note 11, at 70-73.

43. Luks & Salamone, *supra* note 40, at 94. Spousal notification provisions were supported by just under 70% of Americans. Richard Davis, *The Supreme Court Heeds the Voice of the People*, CHRISTIAN SCI. MONITOR, July 1, 1992, at 19.

44. Transcript of Oral Argument at 4, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (No. 91-774) (oral argument of Kathryn Kolbert). Planned Parenthood framed *Casey* this way for political reasons, recognizing that the decision might affect the 1992 presidential race. See EDWARD P. LAZARUS, CLOSED CHAMBERS 460-66 (1998).

made use of an indeterminate “undue burden” standard to uphold all but the spousal notification provisions of the state’s law.⁴⁵

In issuing a decision that tracked the preferences of most voters and elected officials, Justices O’Connor, Kennedy, and Souter called on “the contending sides of a national controversy to end their national division.”⁴⁶ But to a pro-choice advocate, *Casey*’s balance sells out important interests of women and, to a pro-lifer, it permits moral outrages to continue. Indeed, pro-choice and pro-life interests both considered *Casey* a stunning defeat. NARAL President Kate Michaelman condemned the “Court’s smoke screen,” depicting *Casey* as “devastating for women.”⁴⁷ National Right to Life Committee state legislative director Burke Balch lamented, “We’ve been fighting to overturn *Roe v. Wade* for 20 years and if necessary we’ll fight for 20 more, but for now, we’ve lost.”⁴⁸ Pro-choice and pro-life interests, moreover, did not consider the possibility that the *Casey* compromise would stabilize the abortion issue by embracing a standard acceptable to most elected officials and by ratifying the very laws that states are interested in enacting. Following *Casey*, pro-choice and pro-life interests agreed that the decision would prompt “dozens of new laws restricting abortion,”⁴⁹ including “new legislative models.”⁵⁰

In some measure, it is understandable that pro-choice and pro-life interests would see no end to the abortion wars. The 1987-1992 battles were hard fought, with several states considering outright repeals of abortion rights (and some gubernatorial races serving as plebiscites on abortion rights).⁵¹ And while state officials came to embrace limited abortion rights, elected government preferences were very much in flux throughout this period. Additionally, the Court was at war with itself in *Casey*. Four Justices would have overruled *Roe* altogether, making abortion a dominant issue in the 1992 presidential race

45. Underscoring the malleability of the undue burden standard, Justice Stevens would have invalidated both the waiting period and informed consent requirements. *Casey*, 505 U.S. at 917-18 (Stevens, J., concurring in part and dissenting in part). Before the Third Circuit, then-Judge Samuel Alito thought none of these provisions an undue burden. *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 722 (1991).

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

47. Robin Toner, *The Supreme Court, Ruling Eases a Worry for Bush, but Just Wait, His Critics Warn*, N.Y. TIMES, June 30, 1992, at A1.

48. Tamar Lewin, *Long Battles Over Abortion Are Seen*, N.Y. TIMES, June 30, 1992, at A18.

49. *Id.* (quoting NARAL legal director Dawn Johnsen) (internal quotation marks omitted).

50. *Id.*

51. See Devins, *supra* note 11, at 67-73.

between Bill Clinton and George Bush.⁵² Furthermore, at the very time the Court decided *Casey*, antiabortion activists were in the midst of a nationwide campaign to shut abortion clinics down through “blockades, invasions, vandalism, threats and other violence.”⁵³ And while no state countenanced such conduct, it was not until Congress enacted the 1994 Freedom of Access to Clinic Entrance Act that abortion providers had an effective legal remedy to quell Operation Rescue and other antiabortion activists.⁵⁴

Pro-choice and pro-life interests continue to see each skirmish as raising fundamental questions about abortion rights. Each side fearing that the other will seize the moment and take control of the issue, pro-choice and pro-life interests will be the last to admit that the abortion wars have stabilized. The balance of this Essay will examine how *Casey* stabilized the abortion issue. Section II will explain why the Supreme Court will stick with the *Casey* undue burden standard. Section III will discuss post-*Casey* efforts to regulate the abortion procedure.

II. *PLANNED PARENTHOOD V. CASEY*: SUPER-PRECEDENT

Casey has proven a very durable precedent and is more secure today than ever before. To start, the Supreme Court is very much a product of its times. The “great tides and currents which engulf the rest of men,” as Justice Cardozo put it, “do not turn aside in their course, and pass the judges by.”⁵⁵ Accordingly, the very forces that pushed the Supreme Court to embrace the undue burden test make it extremely unlikely that the Court will disavow *Casey* in favor of pro-choice or pro-life absolutism. With more than 80% of Americans embracing some type of abortion rights, pro-life absolutism would trigger a ferocious backlash.⁵⁶ The overruling of *Roe* would, among other

52. See *supra* note 39. In an effort to neutralize the issue, President George Bush signaled his support for limited abortion rights, saying he was “pleased with the Supreme Court’s decision [in *Casey*].” Statement on the Supreme Court Decision on Abortion, 28 WEEKLY COMP. PRES. DOC. 1661 (June 29, 1992).

53. Freedom of Access to Clinic Entrance Act of 1993, H.R. REP. NO. 103-306, at 6 (1993), reprinted in 1994 U.S.C.C.A.N. 699.

54. 18 U.S.C. § 248 (2000).

55. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921). See generally NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004) (detailing ways in which social and political forces shape Supreme Court decisionmaking).

56. “From a crass political perspective,” as Sandy Levinson has argued, “the best thing that could happen to the Democratic Party is the overruling of *Roe* and the full ‘politicization’ of abortion.” Sanford Levinson & Jack M. Balkin, *Should Liberals Stop Defending Roe?*, LEGAL

things, fuel both the election of pro-choice candidates and populist resistance to the pro-life legislative agenda. Likewise, with more than 70% of Americans supporting restrictions on abortion rights, a return to *Roe* is equally problematic.⁵⁷

The appointments and confirmation process also ensures that the Court will not buck “the policy views dominant among the lawmaking majorities.”⁵⁸ Ever since the Bork confirmation hearings, the Senate has insisted that Supreme Court nominees embrace privacy rights and has otherwise made clear that it will not confirm a Supreme Court nominee precommitted to the overturning of *Roe v. Wade*. During the confirmation hearings of John Roberts and Samuel Alito, Senators repeatedly asked the nominees whether they thought *Roe* was settled law.⁵⁹ On the other hand, the Senate has never pushed for a return to *Roe* absolutism, nor has it used its confirmation power to pressure nominees to adhere to a particular view of how *Casey* is applied.⁶⁰

AFF., Nov. 5, 2005, http://www.legalaffairs.org/webexclusive/debateclub_ayotte1105.msp. In particular, Levinson argues that “the overturning of *Roe* would likely produce ‘a sea change in suburban voting patterns.’” *Id.* (quoting Republican Congressman Thomas Davis); see also *supra* notes 29-39 and accompanying text (detailing the political unacceptability of the Republican campaign to overturn *Roe*).

57. See *supra* notes 21-41 and accompanying text (detailing the political upheaval that followed *Roe*).
58. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).
59. See Adam Liptak, *Roberts Drops Hints in “Precedent” Remarks*, N.Y. TIMES, Sept. 18, 2005, at A30; Richard W. Stevenson & Neil A. Lewis, *Court in Transition: The Overview: Alito, at Hearing, Pledges an Open Mind on Abortion*, N.Y. TIMES, Jan. 11, 2006, at A1.
60. Then-Judge John Roberts was asked only one question about the application of *Casey*. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005). Eleven of eighty-five abortion-related questions asked of then-Judge Samuel Alito concerned *Casey*, although very few of these questions spoke to the application of *Casey*. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 323, 382, 401, 506-08, 554 (2006) (statements of Sen. Arlen Specter, Sen. Herbert Kohl, Sen. Diane Feinstein, Sen. Joseph Biden, and Sen. Charles Schumer). Rather than ask Judge Alito what he thought to be an undue burden under *Casey*, senators focused on Alito’s prior statements, writings, or lower court opinions. See, e.g., *id.* at 401 (statement of Sen. Diane Feinstein, Member, S. Comm. on the Judiciary). In particular, most senators asked why Judge Alito would have upheld the very spousal notification provision that Justice O’Connor voted to invalidate. See, e.g., *id.* at 382 (statement of Sen. Herbert Kohl, Member, S. Comm. on the Judiciary). Judge Alito’s answers turned on his understanding of the relevant standard of review before the Supreme Court decision in *Casey*, not the application of the *Casey* undue burden test. See, e.g., *id.* at 319 (statement of Judge Samuel Alito) (discussing *stare decisis*).

The White House, too, seems accepting of *Casey*. Notwithstanding their diametrically opposite views on abortion-related policy initiatives, Presidents Bill Clinton and George W. Bush both backed *Casey*. When nominating then-Judge Ruth Bader Ginsburg to the Supreme Court, Bill Clinton made clear that he was not looking to revive the *Roe* trimester test. In particular, he discounted Judge Ginsburg's claim that *Roe* was unnecessarily divisive and "ventured too far in the change it ordered."⁶¹ For Clinton, "the important thing" was that Judge Ginsburg was pro-choice.⁶² The president did not care about the particular test she would apply in abortion cases – so long as her rulings would back up pro-choice positions. For their part, Republican presidents understand that a nominee precommitted to overturning *Roe* cannot win confirmation. Outspoken opposition to abortion, for example, ruined the chances of George W. Bush appointing conservative Judge Edith Jones to the Court.⁶³ Knowing that the overruling of *Roe* would come at substantial political cost, Republican presidents may well prefer to appoint candidates who do not question abortion rights but, instead, apply the *Casey* standard to approve state regulatory schemes.⁶⁴

By allowing the Supreme Court to back up favored policy positions, *Casey* has proven acceptable to both the President and Senate (irrespective of which party is in control). For identical reasons, the Supreme Court will stick with *Casey*. Very few states are pushing the boundaries of *Casey* and, consequently, the Court is not being pressured to clarify the boundaries of permissible state regulation of abortion rights. The Court can make use of the *Casey* standard to uphold favored laws and invalidate disfavored ones.⁶⁵ The overturning of *Roe* or the reinstatement of the trimester test would therefore be of great symbolic

61. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985); see also Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

62. Supreme Court Nominee, 29 WEEKLY COMP. PRES. DOCS. 1081 (June 15, 1993).

63. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 224 (2007).

64. See Jack Balkin, *Which Is More Likely: Overturning Roe or Attacking Iran*, Balkinization, May 28, 2008, <http://balkin.blogspot.com/2008/05/which-is-more-likely-overturning-roe-or.html>; see also Levinson & Balkin, *supra* note 56 (noting how the Republican Party reaps political benefits by simultaneously attacking *Roe* and appointing Supreme Court nominees who will not overturn *Roe*).

65. For this very reason, a Justice who simply votes her policy preferences will have little reason to revisit the *Casey* precedent. Correspondingly, since very few states are pushing the boundaries of *Casey*, there is little risk that there will be a significant number of federal courts of appeals decisions that are truly out of whack with the preferences of Supreme Court Justices.

but little practical consequence. At the same time, the Court's embrace of either pro-choice or pro-life absolutism would certainly trigger a destabilizing backlash against the Court. That backlash, as Part I detailed, would have an impact on presidential and gubernatorial elections, would shape state abortion politics, and would impact the types of Justices appointed to the Supreme Court as well as the types of legal policy arguments that the state and federal governments would make to the Court.⁶⁶ Justices rarely seek out such destabilizing attacks on Court precedent,⁶⁷ preferring instead to strategically advance their favored policy positions or the Court's institutional reputation.⁶⁸ Only a Justice with strong ideological precommitments would be willing to overturn *Casey* in favor of a more rigid, more divisive test (the very type of nominee that the appointments/confirmation process is most likely to exclude).⁶⁹ Consequently, even if a majority of Justices disapproved of *Casey*,⁷⁰

66. See *supra* notes 29-39, 56.

67. For this very reason, the Court—absent a dominant coalition of Justices committed to the pursuit of a shared ideological agenda—is more likely to embrace fact-specific standards than hard rules. See Neal Devins, *Ideological Cohesion and Precedent (or Why the Court Only Cares About Precedent When Most Justices Agree with Each Other)*, 86 N.C. L. REV. 1399, 1400-20 (2008); Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 380-81 (2008). Likewise, the Court is much more apt to reach desired outcomes by reinterpreting past precedent than by overruling precedent in favor of hard rules. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 34-40 (2008); see also Phillip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 413-39 (2005) (detailing how the Warren Court employed constitutional avoidance in order to minimize political fights over its free speech rulings).

68. For the best statement of how it is that the Supreme Court takes backlash into account, see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 138-77 (1998). For a competing view, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993), which suggests that Justices vote policy preferences. See also *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES* (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing “new institutional” models of judicial behavior—models that emphasize the Court's interest in maximizing legal/institutional objectives, not simply policy objectives).

69. See Neal Devins & Will Fedespiel, *The Supreme Court, Social Psychology, and Group Formation*, in *THE PSYCHOLOGY OF JUDGING* (David Klein & Greg Mitchell eds., forthcoming 2010) (manuscript at 11-15, on file with author); *supra* note 67.

70. With the American people and elected officials supporting limited abortion rights, there is no reason to think that a majority of Justices would both disapprove of the *Casey* standard and coalesce around some other test. It is more likely that some Justices would represent either end of the ideological spectrum and that the median Justice would prefer an indeterminate standard like *Casey*.

the Court would not risk backlash either by reviving the *Roe* trimester test or by doing away with abortion rights altogether. Instead, the Justices would manipulate the *Casey* precedent to support favored policy positions⁷¹—by, for example, upholding or invalidating partial-birth legislation.⁷²

Absent a fundamental shift in the attitudes of voters and elected officials, *Casey* will remain the law of the land. In the seventeen years since *Casey*, as Part III will show, the nation has not rethought abortion rights. Public opinion remains stable and the politically popular laws approved in *Casey* have served as a template for most state regulation of abortion rights.

III. HOW CASEY STABILIZED ABORTION POLITICS

Post-*Casey* abortion politics are relatively stable and the consequences of either a relaxed application of *Casey* or even the overruling of *Roe* would be less consequential than pro-choice and pro-life interests think. None of this should come as a surprise. Pennsylvania was one of a few states that regularly challenged *Roe* pre-*Casey*. Consequently, absent a significant shift in lawmaker or popular opinion on abortion rights, it is to be expected that very few states are interested in imposing greater restrictions on abortion rights than those imposed by Pennsylvania in 1992. Correspondingly, the defeat of pro-life candidates and pro-life regulatory proposals in the 1987-1992 era alerted state lawmakers to the risks of pursuing draconian antiabortion restrictions. As such, even though pro-life interests sometimes push for laws that would effectively close abortion clinics or ban most abortions, most state lawmakers are unwilling to enact measures that risk judicial invalidation and voter backlash.⁷³ Along the same lines, state policymaking has not been significantly impacted by either the appointments of Chief Justice Roberts and Justice Alito or the Court's decision in *Carhart*.

71. See *supra* note 67.

72. Compare *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a state partial-birth ban), with *Gonzales v. Carhart*, 550 U.S. 124 (2007) (distinguishing *Stenberg* and upholding the federal partial-birth abortion ban).

73. Some lawmakers, of course, represent pro-life constituencies or are strongly committed to the pro-life movement. This explains why some states have been willing to push the limits of *Casey*. But, as this Part makes clear, these states are outliers. More than that, even though outlier states are pushing the *Casey* envelope, these states nonetheless are operating largely within the *Casey* framework. For example, *Casey*'s approval of Pennsylvania's informed consent law paved the way for laws mandating ultrasounds as well as the disclosure of possible fetal pain or negative psychological effects of abortion. See *infra* notes 94-102 and accompanying text.

Casey's stabilizing effect is tied to two interrelated phenomena. The first, as already suggested, is that lawmakers in states with weaker pro-life constituencies than Pennsylvania are unwilling to risk electoral defeat by pursuing legislative initiatives that push the envelope of what *Casey* allows. Conscious of the pro-life defeats during the 1987-1992 period, lawmakers in these states understand that they have nothing to gain by defining themselves as strong advocates of pro-life causes. Indeed, since most lawmakers prefer to steer clear of contentious winner-take-all battles over socially divisive issues, the natural impulse of lawmakers is to operate within the safe middle ground rather than push boundaries.⁷⁴ The second phenomenon is tied to the fact that *Casey* made clear that there were both appropriate and inappropriate ways for lawmakers to express discomfort with abortion. By invalidating Pennsylvania's spousal notification provision, *Casey* both added legitimacy to those provisions it upheld and signaled to lawmakers that there were identifiable boundaries to how far they could constitutionally regulate abortion.⁷⁵ In so doing, lawmakers who were already disinclined to pick a fight over abortion had additional reason to seek cover in the politically popular template of abortion laws that the Supreme Court approved in *Casey*.⁷⁶ The consequence is that the only

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74. John Hart Ely's observation about the pre-*Roe* era is particularly salient here. Ely claimed that state lawmakers breathed "sighs of relief" when the Court decided *Roe*, not because they supported abortion rights but because "this particular albatross" was cut from their necks. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973). Along the same lines, most members of Congress prefer to serve on powerful committees that formulate national economic policy than policy committees—like the judiciary committees—which "often face 'no win' policy issues . . . [like] abortion." Mark C. Miller, *Congress and the Constitution: A Tale of Two Committees*, 3 SETON HALL CONST. L.J. 317, 326 (1993).
75. See *infra* note 158-160 and accompanying text (describing how the Court's occasional invalidation of governmental action, in fact, legitimates the Court's usual practice of upholding statutory provisions).
76. On the abortion issue, there is good reason to think that state lawmakers—disinclined to enter this political thicket in the first place—wanted the Supreme Court to define the boundaries of what regulatory schemes could and could not be pursued. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 45-61 (1993) (highlighting efforts by lawmakers to have Supreme Court settle political conflicts over slavery, antitrust, and abortion). More generally, today's lawmakers increasingly look to the courts for guidance on the Constitution's meaning and, as such, prefer to operate within boundaries established by the Supreme Court. See George I. Lovell & Scott E. Lemieux, *Assessing Jurocracy: Are Judges Rulers or Agents?*, 65 MD. L. REV. 100 (2006) (describing burgeoning scholarship on ways in which lawmakers look to courts); Keith E. Whittington, "Interpose Your Friendly Hand": *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 591-93 (2005)

lawmakers who would push the *Casey* boundaries were lawmakers interested in making their mark with pro-life interests. And since Pennsylvania has a stronger pro-life constituency than all but a handful of states, it is unlikely that there will be more than a handful of outlier states willing to test the envelope of what *Casey* allows.⁷⁷

For pro-choice advocates, the rub here is that states that want to limit abortion rights have already attained most of the regulation that their populations are willing to support. Pro-choice interests, moreover, have reason to sound the alarm against pro-life efforts to pursue “helpful legal changes” short of bans that “keep the abortion issue alive and change hearts and minds . . . translat[ing] into more disfavor for all abortions.”⁷⁸ At the same time, the right-to-life community must recognize that they have failed in their campaign to push the *Casey* boundaries. While a handful of states (most notably Oklahoma, Missouri, and South Dakota) are willing to test the limits of *Casey*, other states are not following the lead of these states. In other words, what the pro-choice community sees as its greatest threat in fact speaks to the stability of the *Casey* compromise and the inability of right-to-life activists to profoundly change state regulation of abortion. Along these lines, some right-to-lifers were profoundly disappointed by their failure to turn partial-birth legislation into a broader referendum against abortion rights.⁷⁹ These laws, rather than serve as a wedge to stepped up abortion regulation, did little more than validate longstanding public disapproval of late term abortions.

In explaining how the *Casey* compromise stabilized abortion politics, I will focus on three interrelated measures. First, I will show that states are generally uninterested in pushing the boundaries of *Casey*. With the exception of partial-birth abortion, post-*Casey* legislation is generally modeled after Pennsylvania’s statutory provisions. The few states that have pushed the *Casey* boundaries have not succeeded in spurring on a wave of stringent antiabortion regulation. Second, neither the confirmation of Chief Justice Roberts and Justice Alito nor the *Carhart* decision significantly impacted state policymaking. Outside of partial-birth abortion, where two states (Louisiana and Nebraska) enacted partial-birth bans that mirrored the federal law approved in *Carhart*, states do not see the Court’s apparent shift on abortion rights as a rallying call to enact a

(explaining why lawmakers are especially apt to look to Court for guidance on particularly divisive issues like race and abortion).

77. This is precisely what happened. See *infra* notes 86-136 and accompanying text.

78. Memorandum from James Bopp, Jr., Member, Bopp, Coleson & Bostrom, & Richard E. Coleson, Senior Assoc., Bopp, Coleson & Bostrom, on Pro-Life Strategy Issues 6 (Aug. 7, 2007), <http://www.personhood.net/docs/BoppMemorandum1.pdf>.

79. See *infra* note 145 and accompanying text.

new wave of stringent antiabortion restrictions. Third, the few states that have tested the boundaries of *Casey* now have and have always had low abortion rates. The seven states that sometimes push the envelope of what *Casey* allows (Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, and Utah) now account for 2.94% of U.S. abortions.⁸⁰ In 1992 (when *Casey* was decided), 3.27% of abortions were performed in these seven states.⁸¹ More than that, there is no evidence suggesting that the efforts of outlier states to test the boundaries of *Casey* have meaningfully impacted abortion rates.⁸²

80. Based on data representing the number of legal abortions in each state in 2005, these states collectively account for 2.94% of U.S. abortions overall. STANLEY K. HENSHAW & KATHRYN KOST, GUTTMACHER INSTITUTE, TRENDS IN THE CHARACTERISTICS OF WOMEN OBTAINING ABORTIONS, 1974 TO 2004, at 18-19 (2008).

81. *Id.*

82. Common sense suggests that there will be an inverse relationship between abortion regulations and abortion rates, so there is reason to think that at least some women are dissuaded from having abortions because of increasing state regulations. With that said, the limited empirical evidence on this question provides no support for this common sense proposition. Instead, it appears that women who choose to have abortions have inelastic preferences—so that waiting periods, informed consent requirements, and the like have no statistically significant impact on abortion rates. See *infra* note 102 and accompanying text (discussing fetal pain legislation); *infra* note 142 (discussing the prosecution of a minor who had an abortion). On the other hand, regulations that noticeably impact the cost of abortion will have some statistically significant impact on abortion rates. See *infra* note 141. Studies have shown that the state funding of abortions for poor women has a statistically significant impact on abortion rates. Marshall H. Medoff, *The Response of Abortion Demand to Changes in Abortion Cost*, 87 SOC. INDICATORS RES. 329, 340 (2008). It is unclear, however, whether ultrasound laws or TRAP laws regulating the facilities used by abortion providers have increased the cost of abortion in ways that impact abortion rates. My guess is that these laws have next-to-no impact on abortion rates. Assuming (consistent with existing evidence) that informed consent requirements do not deter women from having abortions, the only women who would be affected by the additional costs associated with onerous TRAP laws or ultrasound requirements would be women who “but for” the additional costs associated with onerous TRAP laws or ultrasound requirement could otherwise afford an abortion. Unlike a state’s decision to fund abortions for poor women (something that does have a statistically significant effect), it is unlikely that this increased marginal cost substantially impacts the abortion decision for many women (especially considering the consistently low abortion rates in these states). In making this point, I am not defending these laws. Pro-choice interests have good reason to depict these laws as a form of harassment of the women who seek abortions and the clinics that provide abortions to these women. By making it harder for these women to access a clinic and by forcing women to come back a second time to a clinic, these laws clearly impose costs on women. At the same time, these laws are not simply outliers—they also are unlikely to meaningfully impact abortion rates.

Instead, recent declines in abortion rates seem tied to social norms, access to contraceptives, and sex education in schools.⁸³

The lesson here is simple: states willing to push the boundaries of *Casey* are few in number and limited in influence. Lawmakers in the vast majority of states (including nearly every state with a significant number of abortions) have stronger pro-choice leanings than lawmakers in Pennsylvania. Against the backdrop of stable public opinion, the 1987-1992 defeats of pro-life candidates, the general disinclination of lawmakers to pursue divisive social issues, and the defeat of pro-life ballot initiatives and candidates in 2008, there is simply no reason to think that outlier states are poised to transform the abortion debate.⁸⁴ Rather, state lawmakers have already enacted the types of restrictions they want to enact and there is little reason to think that the further loosening of judicial standards (including the outright rejection of *Roe*) would significantly impact state regulation of abortion procedures.⁸⁵ By the same token, the tightening of judicial standards will be of little consequence, for there will be few opportunities for the Court to invalidate newly enacted, draconian restrictions on abortion.

A. *The End of Backlash: Lawmaker Acquiescence to the Casey Compromise*

Casey mirrored public opinion in 1992 and it mirrors public opinion today. Indeed, “even though [Supreme Court] abortion rulings have almost certainly shaped the political climate surrounding abortion, since *Roe* no decision of the Supreme Court seems to have directly affected the trajectory or structure of public opinion on abortion rights.”⁸⁶ For this very reason, even though

83. See *infra* note 157 and accompanying text.

84. See *supra* notes 16, 67; text accompanying notes 31-41.

85. I recognize, of course, that states continue to enact abortion regulations. There are only a handful of outlier states that seem willing to enact significant restrictions on abortion. While these outlier states may continue to look for new ways to regulate abortion, the central lesson of this essay is that *Casey* seems to have stabilized abortion politics for nearly every state. Over time, public opinion may change—and this change may impact state practices. Public opinion has been stable for the past thirty-five years. See Luks & Salamone, *supra* note 40, at 101. In particular, even though public opinion has become more politicized and that differences have intensified in the post-*Roe* era, the dominant position throughout this period favors legal abortions but also approves of restrictions that limit abortion rights. See also Gallup Organization, Gallup’s Pulse of Democracy: Abortion, <http://www.gallup.com/poll/1576/Abortion.aspx?version=print> (last visited Mar. 11, 2009) (highlighting the fact that, over the past thirty years, most Americans believe abortion should be legal, but that there should be restrictions).

86. Luks & Salamone, *supra* note 40, at 101.

hundreds of draconian antiabortion proposals are introduced year after year, the politically popular laws approved in *Casey* have served as a template for most post-*Casey* legislation.

To start, *Casey*—unlike *Roe*—did not trigger a backlash by rejecting Pennsylvania’s spousal notification provision and, in so doing, making clear that there were limits to state regulatory authority. Following *Casey*, no state passed a spousal notification law and no state sought to enforce then-existing spousal notification/consent provisions.⁸⁷ *Casey*, instead, prompted a flurry of legislation implementing versions of the very laws that the Supreme Court approved in *Casey*.⁸⁸ At the time of *Casey*, thirteen states had mandatory waiting periods, thirty-five states had parental consent/notice statutes, thirty states had some type of informed consent statute, and nearly every state imposed some reporting and recordkeeping requirements on abortion providers.⁸⁹ Today, twenty-four states have waiting period laws, thirty-three states have informed consent laws, and forty-three states have parental consent or notice laws.⁹⁰

In explaining why today’s abortion wars mirror 1987-1992 battles, pro-choice interests have targeted a handful of post-*Casey* statutes as exemplifying ongoing state efforts to hollow out abortion rights. I think these claims overstated the risk. Before expanding on this, I reiterate one of the central claims of this Essay: Pennsylvania ranks among the most aggressive regulators of abortion rights, and, consequently, very few lawmakers are interested in risking voter backlash by enacting antiabortion measures that push the boundaries of what *Casey* authorized.

The principal targets of pro-choice interests are so-called targeted regulation of abortion providers (TRAP) laws that impose “burdensome

87. For a discussion of spousal consent/notification laws enacted before *Casey*, see Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & FAM. 41 (1989).

88. Devins, *supra* note 11, at 74; *Legislative Proposals and Actions*, ST. REPROD. HEALTH MONITOR (The Alan Guttmacher Inst., New York, N.Y.), Dec. 1993, at I; MICHAEL J. NEW, HERITAGE CENTER FOR DATA ANALYSIS, *ANALYZING THE EFFECTS OF STATE LEGISLATION ON THE INCIDENCE OF ABORTION DURING THE 1990S*, at 2 (2004), http://www.heritage.org/Research/Family/upload/54839_1.pdf.

89. THE NARAL FOUND., *WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS*, at vi-vii (4th ed. 1993).

90. GUTTMACHER INST., *STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION 1* (2009), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf; THE NARAL FOUND., *WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS 19* (18th ed. 2009).

requirements [on abortion providers] that are different and more stringent than regulations applied to comparable medical practices”⁹¹ and a range of informed consent requirements, including fetal ultrasound laws, fetal pain laws, laws requiring physicians to tell women about a possible link between abortion and breast cancer, and a South Dakota statute that requires doctors to tell women that abortion both increased the risk of suicide and that the abortion will “terminate the life of a whole, separate, unique living human being.”⁹² There is little question that these laws are intended to impose costs on women contemplating an abortion; likewise, these laws make clear that state lawmakers disapprove of abortion and would prefer that women carry their fetuses to term. With that said, very few of these laws are a significant departure from the Pennsylvania template. More significantly, the most intrusive of these laws have only been enacted by a handful of states, suggesting that these measures will not serve as prototypes for other states. Furthermore, without minimizing the symbolic importance of these laws, the few states willing to test *Casey*’s boundaries account for 3% of abortions nationwide and there is no evidence that these laws, in fact, deter women from seeking abortions.⁹³

Consider, for example, informed consent laws. In *Casey*, the Court approved Pennsylvania’s mandate that a physician inform women of potential medical and psychological risks of abortion as well as the probable anatomical and physical characteristics of the unborn child, including pictures. Recognizing that these requirements would make it more difficult for women to have abortions, the Court concluded that “a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.”⁹⁴ The only limitation was that these measures were “truthful and not misleading.”⁹⁵

Post-*Casey* informed consent laws generally follow the Pennsylvania template, although six states (Alabama, Arkansas, Louisiana, Mississippi, Oklahoma, South Dakota) have pushed the envelope of what *Casey* allows. Of the new wave of post-*Casey* restrictions, laws mandating that women be told of

91. CTR. FOR REPROD. RIGHTS, TARGETED REGULATION OF ABORTION PROVIDERS: AVOIDING THE “TRAP” 1 (2003), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_avoidingthetrap.pdf.

92. H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005).

93. See *supra* note 82; *infra* note 141.

94. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 886 (1992) (joint opinion of O’Connor, Kennedy, Souter, JJ.).

95. *Id.* at 882. At the same time, “truthful and not misleading” measures would be invalidated if they unduly burdened the exercise of abortion rights.

a potential breast cancer-abortion link are least problematic. Two of the three states with such laws (Minnesota, Mississippi) specify that information must be “medically accurate” and one of those states (Minnesota) informs women that the National Cancer Institute has repudiated earlier studies suggesting a possible link; the third state (Texas) has no such “medically accurate” limitation⁹⁶ but does inform women that “some studies have found no overall risk” in breast cancer from abortion.⁹⁷

Seventeen states have ultrasound laws; four (Alabama, Louisiana, Mississippi, Oklahoma) mandate that an abortion provider perform an ultrasound but only one of these (Oklahoma) requires that a woman be shown the ultrasound; two (Florida and Arizona) require ultrasounds after the first trimester of a pregnancy and that a woman be provided with an opportunity to look at it (but do not require the women to look at it); all other states specify that a woman have the option—if she so chooses—to have an ultrasound (with seven of these states also requiring that, if an ultrasound is performed, the provider offer women the opportunity to view it).⁹⁸ Although the *Casey* Court signed off on the provision of information, including pictures, about fetal development, there is no question that some ultrasound laws extend *Casey*. Most notably, mandatory ultrasound laws seek to “personify the fetus” and, in so doing, “dissuade a woman from obtaining an abortion.”⁹⁹ With that said, only four laws mandate first trimester ultrasounds and only one of these requires that a woman be shown the ultrasound. All of these states are more restrictive than Pennsylvania and other states do not seem poised to enact mandatory ultrasound laws. Unless and until other states follow Oklahoma’s lead or, alternatively, unless evidence is adduced suggesting that ultrasound laws affect a woman’s decision to seek an abortion, these laws—while symbolically important—seem more like a rallying call for pro-life interest groups than a meaningful extension of the *Casey* template.

96. See MINN. STAT. ANN. § 145.4242 (West 2008); MISS. CODE ANN. § 41-41-33 (Lexis 2008); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (Vernon 2008). For additional information about the Minnesota and Texas laws, see MINN. DEPT. OF HEALTH, IF YOU ARE PREGNANT (2005), <http://www.health.state.mn.us/wrtk/pdf/booklet.pdf>; TEX. DEP’T OF HEALTH, A WOMAN’S RIGHT TO KNOW (2003), <http://www.dshs.state.tx.us/wrtk/after-abortion.shtm>.

97. TEX. DEP’T OF HEALTH, *supra* note 96.

98. See NAT’L RIGHT TO LIFE COMM., WOMAN’S RIGHT TO KNOW: STATES THAT OFFER ULTRASOUND OPTION, (2008), <http://www.nrlc.org/wrtk/UltrasoundLaws/StateUltrasoundLaws.pdf>; *Kansas Governor Signs Bill on Fetal Images*, N.Y. TIMES, Mar. 29, 2009, at A19.

99. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND 1 (2009), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

Fetal pain laws, enacted by five states, push slightly at the boundaries of *Casey*'s "truthful and not misleading" requirement. Fetal pain legislation informs women who seek an abortion after twenty-two weeks of pregnancy both about the possibility of fetal pain and about the use of anesthesia in late term parental surgery.¹⁰⁰ In three states (Arkansas, Louisiana, and Oklahoma), however, women are not informed that the weight of medical evidence suggests that fetal pain is not likely to occur until roughly the twenty-ninth week and that anesthesia is used to protect the mother's health, not to alleviate fetal pain.¹⁰¹ Without minimizing the fact that this information is truthful but potentially misleading, the number of women seeking abortions after twenty-two weeks in these three states is miniscule and there is no evidence suggesting that this type of information has had any impact on a woman's ultimate decision.¹⁰² Additionally, Oklahoma and Louisiana are two of a handful of states more restrictive than Pennsylvania, suggesting that very few states will ever enact these largely symbolic laws.

The boundaries of what constitutes "truthful and not misleading" information have also been tested by South Dakota's extraordinary informed consent law. In particular, ideology is presented as science—with doctors compelled to tell women that the fetus they are carrying is a "human being" and to suggest that abortion will cause post-traumatic stress disorder.¹⁰³ This law clearly stretches *Casey*'s validation of an informed consent provision which required doctors to tell women about potential psychological consequences of abortion.¹⁰⁴ At the same time, this law is a true outlier. Its requirements are unique, "unlike those contained in other informed consent laws."¹⁰⁵

TRAP laws, finally, follow the pattern of a handful of outlier states pushing boundaries—with all other states conforming to the *Casey* template. According to NARAL, nearly every state has a TRAP law and 97% of all abortions take

100. See Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111 (2008).

101. See *id.* at 143-48 (comparing recent scientific literature to statements about fetal pain conveyed to women and, in so doing, concluding that nondisclosure of scientific literature makes fetal pain warnings "misleading").

102. See *id.* at 124; see also *infra* note 141 (citing empirical studies on the limited impact of informed consent laws on abortion rates).

103. See Post, *supra* note 2, at 942, 957-58; see also Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 BROOK. J.L. & POL'Y 101 (2008) (discussing ways in which courts ignore shortcomings in legislative factfinding on abortion related issues).

104. See *supra* notes 94-95 and accompanying text.

105. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 741 (8th Cir. 2008) (Murphy, J., dissenting).

place in jurisdictions that have some form of TRAP law (including, of course, states that otherwise have few or no abortion restrictions).¹⁰⁶ The most notorious of these laws is a 2005 amendment to a Missouri law mandating that an abortion provider be licensed as an ambulatory surgical center, be located within thirty miles of a hospital, and adhere to physical plant requirements (including lighting, room dimension, even the number of wall outlets and windows).¹⁰⁷ No other law combines all these ingredients, although other right-to-life states have extensive administrative and physical plant requirements (Kentucky, Louisiana, Mississippi, Utah, Tennessee, South Carolina, and South Dakota). Two of these laws were largely in place at the time of *Casey* (Utah and Mississippi); three were enacted from 1994-1998 (Kentucky, South Carolina, and Tennessee); one was substantially revised in 2003 (Louisiana); and one was enacted in 2006 (South Dakota).¹⁰⁸

TRAP laws, like other post-*Casey* abortion regulation, exemplify the stability of abortion law today. Very few states pursue legislative initiatives that extend the *Casey* template and those states that pursue such legislation have comparatively few abortions.¹⁰⁹ These laws, moreover, do not come close to outlawing abortion – and, for that reason, are a far cry from the laws that were under consideration in the 1987-1992 period. That is not to say that these laws are not important. These laws symbolize state attitudes toward abortion and about the capacity of women to make informed choices about abortion.¹¹⁰ With

106. All information about the substance of TRAP laws contained in this paragraph can be found in NARAL Pro-Choice America, *Who Decides? Fast Facts: Targeted Regulation of Abortion Providers (TRAP)*, http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/fast-facts/issues-trap.html (last visited Apr. 12, 2009). The six states without TRAP laws – Kansas, Montana, New Hampshire, Oregon, Vermont, and West Virginia – account for less than 3% of abortions, based on Guttmacher Institute data on abortion rates. This 3% calculation is based on abortion rate data found in HENSHAW & KOST, *supra* note 80, at 18-19.

107. MO. REV. STAT. §§ 188.080, 197.200 (2008).

108. The relevant statutory provisions include KY. REV. STAT. ANN. §§ 216B.0431, .0435 (LexisNexis 2007); 29 La. Reg. 902-906 (June 2003); MISS. CODE ANN. § 41-75 (2005); 12-000-034 MISS. CODE R. §§ 101.1-501.1 (Weil 2005); TENN. CODE ANN. § 68-11-201(3) (2001); TENN. COMP. R. & REGS. 1200-08-10 (2007); S.D. CODIFIED LAWS §§ 34-23A-46 to -51 (Cumulative Annual Pocket Part 2008) (enacted 2006); UTAH ADMIN. CODE r.432-600-1 to -33 (2008), *available at* <http://www.rules.utah.gov/publicat/code/r432/r432-600.htm>. For an overview of these and other statutory provisions, see NARAL PRO-CHOICE AM. FOUND., *WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES* (2008).

109. See HENSHAW & KOST, *supra* note 80 (discussing state abortion rates).

110. See sources cited *supra* note 5.

respect to the actual exercise of abortion rights, however, these laws do not significantly alter the template approved by the Supreme Court in *Casey*.¹¹¹

B. Carhart and the Future of State Abortion Politics.

Gonzales v. Carhart promised a revolution in abortion politics. Pro-choice and pro-life interests predicted that the decision would encourage the states to pass significant new restrictions on abortion and that some states would look to challenge *Roe* itself. Newspaper commentary spoke of *Roe* “hang[ing] by one vote,”¹¹² predicting that *Carhart* would have “huge political implications”¹¹³ and “inflare political controversy”¹¹⁴ by encouraging “states to pass increasingly unreasonable versions of abortion restrictions designed to frighten, manipulate and discomfit women under the guise of informed consent.”¹¹⁵

These predictions have not materialized, nor will they. The nominations and confirmations of Chief Justice Roberts and Justice Alito as well as the Court’s decision in *Carhart* are largely irrelevant to state enactments of antiabortion restrictions. Instead, the fight over partial-birth abortion and the response to *Carhart* back up earlier points about the stability of post-*Casey* abortion politics.

The battle over partial-birth abortion is especially instructive here. “Partial birth,” as David Garrow put it, was “the legislative and public relations path by which the right to life movement ha[d] regained mainstream respectability” after early 1990s clinic violence prompted Congress to enact clinic access legislation.¹¹⁶ With only 7% of Americans supporting third trimester abortions, thirty states had enacted partial-birth bans from 1995 (when the pro-life movement began its legislative campaign) to 2000 (when the Supreme Court invalidated Nebraska’s ban in *Stenberg v. Carhart*).¹¹⁷ Notwithstanding the

111. See *infra* note 141 (noting that there is no statistically significant correlation between informed consent laws and abortion rates).

112. Rosen, *supra* note 4.

113. Gina Kolata, *Anger and Alternatives on Abortion*, N.Y. TIMES, Apr. 21, 2007, at A11.

114. Post & Siegel, *supra* note 23, at 432.

115. Jack Balkin, *The Big News About Gonzales v. Carhart—It’s the Informed Consent, Stupid*, Balkinization, Apr. 19, 2007, <http://balkin.blogspot.com/2007/04/big-news-about-gonzales-v-carhart.html>.

116. David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 847 (1999).

117. 530 U.S. 914 (2000); see Devins & Fisher, *supra* note 55, at 137. An August 2007 poll likewise revealed that 75% of Americans thought partial-birth abortion should be illegal (as

political appeal of partial-birth bans to state lawmakers, state lawmakers nevertheless acquiesced to *Stenberg*. No longer interested in engaging in open conflict with the Supreme Court, states did not enact new partial-birth bans or otherwise resist the Court's ruling.¹¹⁸ Unlike the 1973-1986 era (when state lawmakers would pursue legislative reforms that the Supreme Court seemed destined to invalidate), state lawmakers signaled their willingness to let the Supreme Court set the boundaries of the *Casey* compromise—lest they be accused of lawless pro-life absolutism.

State responses to *Gonzales v. Carhart* are more revealing than lawmaker acquiescence to *Stenberg*. Rather than serve as a wedge from which right-to-life interests could pursue more far ranging antiabortion legislation, *Carhart* accomplished little more than validating a politically popular abortion restriction that was symbolically important but of little practical consequence. Following the decision, very few states revisited the partial-birth issue. The only state to enact a state ban in 2007 was Louisiana and that law was nearly identical to the federal ban.¹¹⁹ Nebraska is the only other state to have joined the fray, and its law also mirrors the federal ban.¹²⁰

More telling, states have made no effort to reinstate restrictions struck down by the Supreme Court in previous decisions, such as spousal notification or parental consent/notification statutes requiring the involvement of both parents.¹²¹ It did not matter that then-Judge Alito had concluded that Pennsylvania's spousal notification provision did not impose an undue burden

compared to 17% who thought it should be legal). PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, RELIGION IN CAMPAIGN '08: CLINTON AND GIULIANI SEEN AS NOT HIGHLY RELIGIOUS; ROMNEY'S RELIGION RAISES CONCERNS 16 (Sept. 6, 2007), <http://people-press.org/report/353/clinton-and-giuliani-seen-as-not-highly-religious-romneys-religion-raises-concerns>.

118. For reasons noted above, *see supra* note 17, this Essay will limit itself to state regulation of abortion. In other writings, I have detailed how it is that today's Congress also backs Supreme Court control over constitutional questions. *See* Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001); Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337 (2006).
119. *See* 2007 La. Acts 2574; David J. Garrow, *Significant Risks: Gonzales v Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 33-34. In explaining why, bill sponsors said they had no intention of challenging the Court by enacting unconstitutional restrictions. Bill Barrow, *Abortion Bills Born in Both Houses*, TIMES-PICAYUNE, May 18, 2007, at A1.
120. *See* NEB. REV. STAT. § 28-328 (2006).
121. *See* Guttmacher Institute, *Monthly State Update: Major Developments in 2009*, <http://www.guttmacher.org/statecenter/updates/index.html> (last visited Mar. 11, 2009) (noting that spousal notification provisions are not included in a list of post-2003 legislation that has been introduced regarding abortion in all fifty states).

on abortion rights. States consider the book closed on this type of regulation, even if it was politically popular at the time of *Casey*.¹²² More to the point, the *Casey* template is not simply a template of what states can do; it is also a template of what states cannot do. State lawmakers accept the limiting as well as the empowering features of *Casey*. In so doing, *Casey* shields state lawmakers from political pressures to enact restrictions on abortion beyond those specifically approved by the Supreme Court. For pro-life interests, *Carhart*, ultimately, was a disappointment.¹²³ Rather than serve as a battle cry for a new wave of state antiabortion legislation, the decision did little more than reaffirm the stability of the *Casey* compromise.

Carhart, moreover, is yet to serve as a rallying call for pro-life efforts to change abortion discourse pro-life interests had hoped that the decision would spur states to enact stringent informed consent regulations to protect women from making ill-informed choices about the risks of abortion to their own physical or emotional health.¹²⁴ And while Justice Kennedy's *Carhart* opinion picks up on these efforts and explicitly refers to the "regret" that some women will feel after "abort[ing] the infant life they once created and sustained,"¹²⁵ this campaign has had little success outside of South Dakota (where a 2005 abortion task force embraced this new rhetoric)¹²⁶ and Oklahoma (where

122. Sixty-nine percent of Americans supported spousal notification provisions at the time of *Casey*. See Davis, *supra* note 43.

123. See Garrow, *supra* note 119, at 41 (discussing the frustration of pro-life activist Robert Muike with *Carhart*).

124. See Robin Toner, *Abortion Foes See Validation for New Tactic*, N.Y. TIMES, May 22, 2007, at A1.

125. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). *Casey* also referred to a woman's potential regret: "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." 505 U.S. 833, 882 (1992) (joint opinion of O'Connor, Kennedy, Souter, JJ.). Although often overlooked by critics of *Carhart*, *Casey*'s embrace of paternalistic language signals that *Carhart* was less of a break from past practice than suggested by critics of the decision. See Dahlia Lithwick, *Father Knows Best*, SLATE, Apr. 18, 2007, <http://www.slate.com/id/2164512/>. For additional discussion, see Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1608 (2008).

126. Piggybacking on the task force report, South Dakota enacted several antiabortion measures, including a 2005 law mandating that women be provided with information stating that abortion increases "the risk of suicide ideation and suicide." S.D. CODIFIED LAWS § 34-23A-10.1 (Cumulative Annual Pocket Part 2008). South Dakota, while going further than any state, is one of twenty-one states that require woman to be told about psychological effects of abortion. See GUTTMACHER INST., *supra* note 90. These laws are tied to *Casey*'s explicit approval of Pennsylvania's informed consent law, which mandated that women be told of

interest group advocates for a 2008 mandatory ultrasound measure referenced the “testimonies of thousands of women who have been victimized and traumatized by abortionists”).¹²⁷ Likewise, neither the arrival of Justices Roberts and Alito nor *Carhart* has prompted states to enact onerous TRAP restrictions. While some states have considered enacting such laws, nearly all restrictive TRAP laws were in place before the election of President George W. Bush, and none have been introduced and enacted since Chief Justice Roberts and Justice Alito joined the Court.¹²⁸

What, then, of legislative reforms that have been pursued—both in the two years since *Carhart* and, more generally, since the confirmation of Chief Justice Roberts and Justice Alito? The short answer is that states enacted very few significant abortion restrictions during this period. Laws governing fetal pain, breast cancer, negative psychological consequences, and state mandated messages about the termination of a human life were all in place before Justice Alito’s 2006 confirmation. With one exception (South Dakota), restrictive TRAP laws were all enacted before Chief Justice Roberts or Justice Alito were nominated to the Court. Ultrasound laws break from this pattern. Three of the four states with mandatory ultrasound laws (Oklahoma, Louisiana, and Mississippi) enacted their statutes after Justice Alito joined the Court. With that said, ultrasound laws date back to the 1990s and eleven of these laws were in place before *Carhart*.¹²⁹

the potentially negative psychological effects of abortion. See *Casey*, 505 U.S. at 882 (joint opinion of O’Connor, Kennedy, Souter, JJ.). Of these nineteen states, the Alan Guttmacher Institute reports that seven mandate that women be told only about the negative effects of abortion. GUTTMACHER INST., *supra*. Four of these seven have specific statutory mandates; all of which were enacted before 2003 (well before the confirmations of both Justice Alito and Attorney General Alberto Gonzales and the shift in pro-life rhetoric). See MICH. COMP. LAWS ANN. § 333.17015 (West 2008); NEB. REV. STAT. § 28-327-01 (2008); UTAH CODE ANN. § 76-7-305.5 (2003); W. VA. CODE § 16-2I-2 (2006).

127. Melanie Hunter-Omar, *Oklahoma Enacts Ultrasound Bill*, CNSNEWS.COM, Apr. 17, 2008, <http://www.cnsnews.com/public/Content/Article.aspx?rsrcid=23965> (quoting Georgette Forney, co-founder of Silent No More Awareness Campaign). There is no record of the Oklahoma legislature’s explicitly backing this claim. Of the three other states mandating ultrasounds, Alabama enacted a mandatory ultrasound law in 2002, which specifically references the “psychological and physical well-being of a woman considering an abortion.” Woman’s Right To Know Act, No. 2002-419, 2002 Ala. Laws 1074, 1075.
128. See *supra* notes 5, 89, 106. For a discussion of restrictive TRAP proposals, see Johnsen, *supra* note 13.
129. Ultrasound laws from the 1990s include UTAH CODE ANN. §§ 76-7-305(1)(b), 76-7-305.5(5) (2003); and S.C. CODE ANN. REGS. 61-12 § 301(C)(2) (Cumulative Supp. 2007). For additional information, see NAT’L RIGHT TO LIFE COMM., WOMAN’S RIGHT TO KNOW:

Other measures of state antiabortion activity also point to state acquiescence to the Supreme Court's recognition of limited abortion rights. Consider, for example, efforts to repeal abortion rights altogether. Even though pro-life interests have pursued abortion bans in several states (both through legislation and voter initiatives),¹³⁰ state voters and lawmakers do not want to set the stage for a test case that will challenge *Roe v. Wade*. In South Dakota and Colorado, voters turned down efforts to ban abortion rights in 2006 and 2008 ballot initiatives.¹³¹

The South Dakota experience is particularly instructive, for the 2006 vote blocked the implementation of a state law prohibiting nearly all abortions.¹³² More than that, the fact that voters in a strongly antiabortion state twice voted in favor of abortion rights casts doubt on claims that the overturning of *Roe* would trigger the enactment of antiabortion bans.¹³³ For this very reason, too much should not be read into the fact that four states (South Dakota, North Dakota, Mississippi, and Louisiana) have enacted laws which would outlaw abortion if the Supreme Court pulls the trigger by overruling *Roe v. Wade*.¹³⁴

STATES THAT OFFER ULTRASOUND OPTION (2008), <http://www.nrlc.org/WRTK/UltrasoundLaws/StateUltrasoundLaws.pdf>.

130. States that have considered such measures include Colorado, Georgia, Indiana, Kentucky, Missouri, Ohio, Oregon, South Dakota, and Tennessee. See Evelyn Nieves, *S.D. Abortion Bill Takes Aim at 'Roe': Senate Ban Does Not Exempt Rapes, Incest*, WASH. POST, Feb. 23, 2006, at A1; Cynthia L. Cooper, *November Ballots Split Anti-Abortion Strategists*, WOMEN'S ENEWS, Mar. 27, 2008, <http://www.womensenews.org/article.cfm?aid=3540>.
131. See Riccardi, *supra* note 14.
132. The South Dakota law was under consideration before Justice Alito joined the Court and passed shortly after his confirmation. See Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N.Y. TIMES, Mar. 7, 2006, at A1.
133. I do not mean to suggest that no state will ever enact an anti-abortion prohibition. It is certainly possible that one or two states will either enact or come close to enacting abortion bans. Not only did the South Dakota legislature enact such an anti-abortion ban in 2006, the North Dakota legislature is now giving serious consideration to a bill that would specify that life begins at the moment of conception. On February 17, 2009, the North Dakota House passed such a bill. Brian Duggan, *State Rep. Hopes To Fight Roe v. Wade*, BISMARCK TRIB., Feb. 19, 2009, at 1A. The North Dakota Senate, as of April 1, 2009, has yet to take action on this bill. Even if this bill were enacted and were to take effect, the overall impact of this bill would be of huge symbolic but limited practical import. North Dakota accounts for about 1% of all abortions. See HENSHAW & KOST, *supra* note 80, at 19. More than that, it is extremely unlikely that the enactment of an abortion ban would prompt other states to enact such bans. For example, neither the enactment nor Supreme Court approval of federal partial-birth abortion legislation prompted a wave of anti-abortion legislation. See *supra* notes 86-132 and accompanying text.
134. NARAL, *Fast Facts: Near-Total Abortion Bans*, http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/fast-facts/near-total-abortion-bans.html (last visited Mar. 11, 2009). Seven other states have passed policy statements declaring their

These so-called trigger laws speak as much to state acquiescence to the Supreme Court's recognition of abortion rights as they do to state opposition to abortion.¹³⁵ As the sponsor of North Dakota's trigger ban explained, passing a law that remains dormant is a "convenient way for the Legislature to enact its desired policy on abortion without plunging North Dakota into a costly national legal battle."¹³⁶

One final comment before turning to the final section of this Essay: this Section backs up my earlier claim that there is no reason for a pragmatic Justice to risk political backlash by either returning to the *Roe* trimester test or overruling *Roe*. The number of states willing to enact significant new restrictions on abortion is quite small—so that there is little reason for a pragmatic Justice to embrace an absolutist position. There is no need, for example, to revive the *Roe* trimester test. A tightening of the undue burden test would enable the Court to police outlier states that might enact restrictive abortion regulations. Likewise, the overruling of *Roe* would be of little practical import. States are unlikely to enact abortion bans, and the Court can apply *Casey* in ways that almost certainly will uphold any law that a state is likely to enact. Even if some states were willing to outlaw abortion, it is unlikely that these bans would meaningfully impact abortion rates. South Dakota (the only state to enact an antiabortion ban after *Casey*) had about 800 abortions in 2005.¹³⁷ The four states that enacted trigger laws now account for 1.4% of all abortions.¹³⁸ In 1992, these four states accounted for 1.5% of all abortions—suggesting that post-*Casey* reforms in these states had next to no impact on abortion rates in these states.¹³⁹

intention to regulate abortion to the full extent permitted by Supreme Court decisions. GUTTMACHER INST., STATE POLICIES IN BRIEF: ABORTION POLICY IN THE ABSENCE OF *ROE* (2009), http://www.guttmacher.org/statecenter/spibs/spib_APAR.pdf.

135. See Matthew Berns, Note, *Trigger Laws*, 97 GEO. L.J. (forthcoming Aug. 2009).

136. Jonathan Rivoli, *North Dakota Passes Conditional Abortion Ban*, BISMARCK TRIB., Apr. 24, 2007, at 7A (paraphrasing the trigger ban sponsor's words). North Dakota's trigger law was enacted days after *Carhart* and North Dakota State Senator Bob Stenehjem claimed that the state legislature "already had their minds made up" before the decision. *Id.* The Mississippi and South Dakota bans were enacted before Justice Alito joined the Court; the Louisiana bill was under consideration before Justice Alito joined the Court, but enacted after he joined the Court.

137. HENSHAW & KOST, *supra* note 80, at 18–19.

138. See *id.* (detailing abortion rates for the nation and each state).

139. See *id.* At the same time, I recognize that the lives of individual women could greatly be affected by the overturning of *Roe*. If a state were to ban abortion, women would be forced to travel out-of-state to secure an abortion and would otherwise feel stigmatized in their home state. More than that, by forcing women to travel out-of-state and thereby increase

IV. CASEY, CARHART, AND THE FUTURE OF ABORTION RIGHTS

Pro-choice and pro-life interests should recognize that *Casey* largely stabilized state abortion politics, rather than acting as if today's abortion wars mirror the all-or-nothing battles that characterized the 1987-1992 period. In particular, pro-choice interests downplay how little success pro-life forces have had in pushing abortion restrictions more draconian than those approved by the Supreme Court in *Casey*. For nearly every state, there is little interest in moving beyond the Pennsylvania template. And states that have pushed the envelope of what *Casey* allows have not accomplished much. Lower federal courts do not always approve these laws as consistent with *Casey*.¹⁴⁰ Furthermore, there is little reason to think that these laws have impacted abortion rates. Evidence on informed consent laws, for example, suggests that these laws do not dissuade women from following through on their choice to terminate a pregnancy.¹⁴¹ Indeed, even if *Roe* were overturned, there is no reason to think that states would approve abortion bans. The American people still back limited abortion rights and state lawmakers have reason to think that the American people would again resist—as they did in 1987-1992—efforts to nullify abortion rights. Just as voters rejected pro-life gubernatorial and presidential candidates during the 1987-1992 period, there is ample reason to think that pro-life candidates would suffer a similar fate in a post-*Roe* world. In 2006 and 2008, for example, Kansas voters rejected ardent right-to-life prosecutor Phill Kline—first by turning down his reelection bid for state Attorney General and then by denying him the Republican Party nomination

the cost of abortion, the State would dissuade some (but not many) women from having abortions. See *infra* note 141 (showing a statistically significant correlation between the cost of abortion and abortions).

140. Injunctions have (at least temporarily) halted enforcement of the Missouri TRAP law and Oklahoma ultrasound law. See *New Missouri Abortion Law Temporary Blocked*, USA TODAY, Aug. 27, 2007, http://www.usatoday.com/news/nation/2007-08-27-abortion-lawsuit_N.htm; *Judge Stalls Oklahoma Law Requiring Ultrasounds Before Abortions*, ANDREWS HEALTH L. LITIG. REP., Nov. 2008, at 8. For an overview of post-*Casey* litigation, see Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317 (2006).
141. See, e.g., Marshall H. Medoff, *The Determinants and Impact of State Abortion Restrictions*, 61 AM. J. ECON. & SOC. 481 (2002) (finding that abortion restrictions do not impact abortion rates); Medoff, *supra* note 82 (finding that costs of abortion impact abortion rates, but that waiting periods and mandatory counseling have no statistically significant impact on the demand for abortions); Tobin, *supra* note 100, at 124; see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 178-80 (1991) (noting that *Roe* itself did not substantially impact abortion rates); *supra* notes 80-81 (noting that post-*Casey* restrictions on abortion in right-to-life states did not affect abortion rates in these states.).

for the post of Johnson County district attorney.¹⁴² Likewise, just as the Senate turned down Robert Bork in 1987 (and pressed Chief Justice Roberts and Justice Alito about abortion rights in 2005 and 2006), there is good reason to think that pro-choice Presidents and senators would push for the restoration of abortion rights in a post-*Roe* world.

Pro-life interests too need to face facts. Even before the 2008 elections, pro-life interests had reason to doubt the efficacy of legalistic reform. In key respects, the Pennsylvania template approved in *Casey* served as a ceiling to most pro-life efforts to cut back on abortion rights. Their biggest post-*Casey* legislative and judicial success, partial-birth abortion, accomplished very little. Physicians who performed intact dilation and extraction (D&E) procedures could comply with the law by using “fetal injections” that would insure that the fetus was no longer living prior to the removal procedure.¹⁴³ This procedure matched existing preferences of most physicians and nearly 90% of the women who had intact D&Es.¹⁴⁴ More significantly, the issue proved to be self-contained—that is, partial birth failed to serve as a wedge that transformed state abortion politics (either before or after *Carhart*). For pro-life advocate Robert Muisse, “if prohibiting a rare and seldom used procedure by means of a ban that will not save one life is the great success of framing the abortion debate, then the pro-life movement has settled for failure.”¹⁴⁵

I recognize that pro-choice and pro-life interests will resist my claim that *Casey* largely settled the abortion dispute by validating a template of politically popular laws. For both sides of the abortion war, *Casey*'s split-the-difference approach was unsatisfying. Pro-choice interests are ever vigilant of right-to-life efforts to block abortions and stigmatize both the women and medical professionals involved in abortion procedures. Pro-life interests likewise cannot countenance the reality of judicial, legislative, and popular acceptance of more than a million abortions each year. Nevertheless, nearly forty years after *Roe* and twenty years after *Casey*, it seems unlikely that there will be a fundamental

142. Kline became a polarizing national figure when he subpoenaed abortion clinic records in an effort to identify women who had underage sex—so that he could launch criminal prosecutions under a Kansas statute. See Peter Slevin, *A Kansan with Conviction*, WASH. POST, Mar. 20, 2005, at A3. For stories on Kline's electoral defeats, see Diane Carroll, *Kansas Politician Who Crusaded Against Abortion Loses Big*, McCLATCHY, Aug. 5, 2008, <http://www.mcclatchydc.com/homepage/story/46556.html>; and Peter Slevin, *Trounced at Polls, Kansas GOP Is Still Plagued by Infighting*, WASH. POST, Dec. 30, 2006, at A2.

143. David G. Savage, *Enigmatic Jurist Recasts the Debate on Abortion*, L.A. TIMES, Apr. 22, 2007, at A22.

144. Garrow, *supra* note 119, at 31 (citing studies).

145. *Id.* at 41 (quoting Robert J. Muisse).

political and popular realignment on abortion. The point of this Essay has been to show that public opinion and state lawmaking have largely been in sync in the post-*Casey* era. Unlike dynamic issues like same-sex marriage (for which the dramatic split between older and younger Americans ensures that there will continue to be significant shifts in public opinion), public opinion on abortion is largely stable across generations.¹⁴⁶

For pro-choice and pro-life interests, legalistic campaigns that focus on state lawmaking and judicial review of state action are unlikely to significantly alter the status quo. Both sides, instead, should focus on the social mores that impact on abortion. Some social conservatives, for example, advocate that the pro-life movement should turn its attention to “building social programs and developing other assistance for pregnant women to reduce the number of abortions.”¹⁴⁷ These efforts, which began before the 2008 elections, reflect the increasing desire of younger evangelicals to steer clear of divisive winner-take-all battles over abortion and other social issues.¹⁴⁸ While the Pro-Life Action League and U.S. Conference of Catholic Bishops oppose this shift in emphasis,¹⁴⁹ the right-to-life community would be well served by recognizing that all or nearly all states—irrespective of whether *Roe* is ever overruled—will recognize abortion rights.

Pro-choice interests would also benefit by recognizing that, as Robin West put it, fundamental questions about the American identity are better pursued through a moral dialogue, not a legalistic dialogue that looks to courts and the voting booth.¹⁵⁰ Along these lines, it is best to think about what *Roe* did and did not accomplish. *Roe* did very little to change abortion rates.¹⁵¹ Its principal influence was to make abortion safer and more affordable.¹⁵² At the same time, by energizing right-to-life interests, *Roe* contributed to moral opposition to abortion—opposition that resulted in many women seeking out-of-state abortions. In 1979 (when the Supreme Court was vigorously protecting

146. See Luks & Salamone, *supra* note 40, at 94–96.

147. Jacqueline L. Salmon, *Some Abortion Foes Shifting Focus from Ban to Reduction*, WASH. POST, Nov. 18, 2008, at A1.

148. See David D. Kirkpatrick, *The Evangelical Crackup*, N.Y. TIMES, Oct. 28, 2007, (Magazine), at 38.

149. See Salmon, *supra* note 147.

150. Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1155 (2006).

151. See ROSENBERG, *supra* note 141, at 178–80.

152. See Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1057–58 (1992) (reviewing ROSENBERG, *supra* note 141). *Roe*, by legalizing abortion, also had huge symbolic consequences.

abortion rights), anywhere from 22% to 52% of women seeking abortions traveled out of state from right-to-life states like Alabama, Mississippi, North Dakota, and South Dakota.¹⁵³ Fast forward to today: pro-choice interests would accomplish much more by changing physician, medical school, and hospital attitudes toward abortion than by thwarting outlier state efforts to mandate ultrasounds, fetal pain warnings, and the like. Specifically, even though abortion clinic violence has steadily decreased since the 1994 enactment of the FACE statute, the number of abortion providers has also decreased throughout this period.¹⁵⁴ This decline almost certainly impacts abortion rates; this decline is tied more to professional norms and personal beliefs than to restrictive laws. In particular, empirical studies suggest that this phenomenon is a byproduct of the complex interface between the training of doctors (whether abortion was a standard part of a doctor's clinical training), hospital practices (many hospitals do not perform abortions, especially since the rise of hospital mergers), and doctor attitudes toward abortion (defined by the interface of personal or religious beliefs and professional norms).¹⁵⁵ For pro-choice interests, the need to secure safe, cheap and legal abortion should be job one.¹⁵⁶ This is especially true today; states are no longer seeking to ban abortions, very few states enacting laws that push the boundaries of *Casey*, and there is little reason to think that the most controversial post-*Casey* enactments have actually affected abortion rates.¹⁵⁷

153. ROSENBERG, *supra* note 141, at 192.

154. On the decline in violence, see FEMINIST MAJORITY FOUNDATION, 2005 NATIONAL CLINIC VIOLENCE SURVEY 3 (2005), available at http://feminist.org/research/cvsurveys/clinic_survey2005.pdf. On the decrease in abortion providers, see Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services*, 2005, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6, 11 (2008).

155. See Solmaz Shotorbani et al., *Attitudes and Intentions of Future Health Care Providers Toward Abortion Provision*, 36 PERSP. ON SEXUAL & REPROD. HEALTH 58, 62 (2004) (emphasizing the need for abortion to be a regular part of clinic training); Jody Steinauer et al., *Predictors of Abortion Provision Among Practicing Obstetrician-Gynecologists: A National Survey*, 198 AM. J. OBSTETRICS & GYNECOLOGY 39.e1, 39.e5-39.e6 (noting factors having an impact on physician decisions and emphasizing the need for abortion training).

156. West, *supra* note 20, at 1402 (arguing that “the goal of the pro-choice movement should be women’s access to legal and safe abortion, not preservation of a right that may be increasingly hollow”).

157. Declining abortion rates may also be tied to the efforts of pro-choice states to help women avoid unintended pregnancies—both through sex education and by making contraceptives widely available. See Siegel, *Dignity*, *supra* note 5, at 1796 n.86 (discussing the substantial decline in abortion rates in states with few or no abortion restrictions). This, too, should be an even more significant focus of pro-choice interest group activity.

Pro-choice and pro-life interests, finally, need to pay attention to what *Casey* teaches us about the ways in which Supreme Court decisions shape subsequent elected government action. The Pennsylvania template was politically popular, but that is not the only reason it stabilized post-*Casey* abortion politics. The *Casey* compromise worked because the Court did more than simply validate politically popular abortion restrictions; the Court also invalidated Pennsylvania's spousal notification provision. That law also matched public opinion, but its invalidation nevertheless helped stabilize abortion politics.¹⁵⁸ In particular, the Court further legitimated the provisions of the Pennsylvania statute that it upheld by making clear that it would not simply rubber-stamp all state regulations. More than that, the Court signaled to states that laws outside the politically popular *Casey* template might be invalidated, leaving lawmakers to operate within the boundaries of *Casey* without risking voter backlash.¹⁵⁹

Casey, in other words, is proof-positive that the Court's power to legitimate governmental decisionmaking is tied to the power to invalidate. Fifty years ago, Charles Black described this phenomenon and, with it, the real purpose of judicial review:

[T]he prime and most necessary function of the Court has been that of *validation*, not that of invalidation. What a government of limited powers needs, at the beginning and forever, is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers.¹⁶⁰

Casey, in critical respects, performed this validation function. This explains its longevity as a political precedent—something the Court, federal and state officials, and the American people can all accept. Pro-choice and pro-life interests should accept it too; their energy is best spent changing social norms, not constitutional requirements.

158. See *supra* text accompanying note 87 (detailing lawmaker acquiescence to *Casey*'s ruling on spousal notification); *supra* text accompanying note 121 (highlighting the continuing disinterest of lawmakers in spousal notification after Justice Alito cast the fifth vote in *Carhart*).

159. See *supra* note 43 (noting that the *Casey* template is politically popular); *supra* notes 74-76 (describing how most lawmakers steer clear of controversy on divisive social issues).

160. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 52 (1960).