



Will the Supreme Court Continue to Chip Away At, or Overrule, the Constitution's Protection of Reproductive Choice?

The Constitution at a Crossroads

Introduction

"We don't have to see a *Roe v. Wade* overturned in the Supreme Court to end it. . . . We want to. But if we chip away and chip away, we'll find out that *Roe* really has no impact. And that's what we are doing."

Pat Mahoney, Christian Defense Coalition

No issue has divided the Supreme Court more sharply, along ideological lines, than the question whether the Constitution protects a fundamental right to reproductive choice. In the nearly forty years since the Court decided *Roe v. Wade*,¹ the Justices have vehemently disagreed about whether the Constitution protects fundamental rights not explicitly enumerated in the text of the Constitution, about whether a woman's right to reproductive choice is one of the fundamental rights that states must respect, and about how courts should review state laws restricting that right. In 1992, after being repeatedly urged year after year by the Justice Department under Presidents Ronald Reagan and George H.W. Bush to overrule *Roe*, the Supreme Court, in its 5-4 ruling in *Planned Parenthood v. Casey*,² substantially reaffirmed the ruling, relying in large measure on the doctrine of *stare decisis*. Surprising virtually everyone, Justice Kennedy, who had joined the anti-*Roe* bloc in decisions upholding restrictive laws in 1989, 1990, and 1991,³ became the fifth vote to reaffirm *Roe*'s protection of a right to reproductive freedom. Since *Casey*, Justice Kennedy has drifted back to the right on this issue, joining the Court's conservative Justices in a pair of decisions concerning the constitutionality of federal and state laws banning so-called "partial birth" abortions.⁴ In these cases, Justice Kennedy – alone among *Roe*'s supporters – gave a narrow construction to constitutional protection for reproductive freedom and a broad one to the authority of states to enact laws that promote the potential life of the fetus.

Today, almost two decades after *Casey*, *Roe* still hangs on by a thread, with supporters of a woman's right to reproductive freedom dependent on the vote of Justice Kennedy, who has only once –

¹ 410 U.S. 113 (1973).

² 505 U.S. 833 (1992).

³ See *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁴ *Gonzales v. Carhart*, 550 U.S. 124 (2007) (opinion of the Court authored by Kennedy, J.); *Stenberg v. Carhart*, 530 U.S. 914, 956-79 (2000) (Kennedy, J., dissenting).

in *Casey* itself – voted to strike down a restrictive state law.⁵ During the last several years, the Justices have been silent on these issues, but in the wake of the 2010 elections, state after state has passed new restrictions, requiring a woman to view a sonogram of the fetus, receive potentially misleading medical information about the risks of abortion, and, in one state, even submit to an interview and counseling by members of an anti-abortion crisis pregnancy center.⁶ Other states have gone even further, banning all abortions after twenty weeks of pregnancy.⁷ Over the next decade, Supreme Court decisions that address the constitutionality of these measures will give the Court’s conservatives further opportunities to chip away at a woman’s right to reproductive choice, possibly even setting the stage for a future showdown over *Roe* itself.

The Great Debate over the Constitution’s Protection of Substantive Liberty

There is little doubt, in the words of Chief Justice Roberts during his confirmation hearings that, under the Constitution, liberty is “protected not simply procedurally, but as a substantive matter as well.”⁸ In drafting the Fourteenth Amendment, the framers explained that the Amendment would “forever disable every one of the[] [States] from passing laws trenching upon . . . fundamental rights and privileges.”⁹ The list of substantive fundamental rights the Fourteenth Amendment was designed to protect began with the Bill of Rights, but it did not end there. The framers regularly affirmed a long list of fundamental rights – such as the right to freedom of movement, the right to bodily integrity, and the right to have a family and direct the upbringing of one’s children – that have no obvious textual basis in the Bill of Rights.¹⁰ These were core rights of personal liberty and personal security; it did not matter that they were not enumerated elsewhere in the Constitution. While the framers of the Fourteenth Amendment designed the Privileges or Immunities Clause to be the “natural textual home for . . . unenumerated rights,”¹¹ the Supreme Court gutted that Clause in its 1873 decision in the *Slaughter-House Cases*¹² and, ever since, the Court has turned to the Amendment’s Due Process Clause to protect substantive fundamental rights.¹³

⁵ *Casey*, 505 U.S. at 887-898 (striking down husband-notification provision).

⁶ For a description of the new laws, see Dahlia Lithwick, *The Death of Roe v. Wade*, SLATE, April 19, 2011.

⁷ See Erik Eckholm, *Several States Forbid Abortion After 20 Weeks*, N.Y. TIMES, June 26, 2011.

⁸ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Cong., 1st Sess., Sen. Hrg. 109-158, at 147 (2005).

⁹ Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

¹⁰ See DAVID H. GANS & DOUGLAS T. KENDALL, *THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT* 7-8 (2008).

¹¹ Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990). For discussion of the text and history of the Privileges or Immunities Clause, see GANS & KENDALL, *THE GEM OF THE CONSTITUTION*, *supra*.

¹² 83 U.S. (16 Wall.) 36 (1873).

¹³ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1926); *Griswold v. Connecticut*, 381 U.S. 465 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967).

In *Roe*, *Casey*, and many other cases, the Supreme Court has reaffirmed that the Due Process Clause of the Fourteenth Amendment – now sometimes called “the Liberty Clause”¹⁴ – secures to all persons “a realm of personal liberty that the government may not enter.”¹⁵ In *Casey*, in a joint opinion authored by Justices Anthony Kennedy, Sandra Day O’Connor, and David Souter, a 5-4 majority of the Court reasoned that the Constitution’s protection of substantive liberty safeguards the right of self-determination and autonomy concerning “personal decisions relating to marriage, procreation, contraception, family relationships, and education. . . . These matters, involving the most intimate and personal choices a person may make in a life time, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”¹⁶ *Casey* recognized that women’s reproductive freedom was critical to their equal citizenship. If women were to be self-governing citizens, the State could not “insist upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society.”¹⁷ Thus, as Justice Ruth Bader Ginsburg put it more recently, “legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life course, and thus to enjoy equal citizenship stature.”¹⁸

The dissenters in *Roe*, *Casey*, and other reproductive freedom cases firmly rejected the notion that the Due Process Clause should be read to protect the right to reproductive freedom. *Roe*, *Casey* and others rulings in this area, they charged, were “a new mode of constitutional adjudication that relies not on text and traditional practices to determine the law but upon what the Court calls ‘reasoned judgment,’ which turns out to be nothing but philosophical predilection and moral intuition.”¹⁹ There was no basis, they argued, for extending constitutional protection to a right that has no grounding in the traditions of the American people, and was proscribed by the states for many years. As Chief Justice Rehnquist explained in his *Casey* dissent, “[a]t the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 states and 8 Territories had statutes banning or limiting abortion. By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. . . . 21 of the restrictive laws in effect in 1868 were still in effect in 1973 when *Roe* was decided On this record, it can scarcely be said that any deeply rooted tradition . . . supported classification of the right to abortion as ‘fundamental’ under the Due Process Clause”²⁰

¹⁴ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3091-92 (2010) (Stevens, J., dissenting); *Confirmation Hearing on the Nomination of Elena Kagan to be Associate Justice of the Supreme Court* (June 29, 2010) (available at <http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY2.pdf>).

¹⁵ *Casey*, 505 U.S. at 847.

¹⁶ *Id.* at 851.

¹⁷ *Id.* at 852.

¹⁸ *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting).

¹⁹ *Casey*, 505 U.S. at 1000 (Scalia, J., concurring in part and dissenting in part).

²⁰ *Id.* at 952 (Rehnquist, C.J., concurring in part in dissenting in part); *id.* at 980 (Scalia, J., concurring in part and dissenting in part) (arguing that “the longstanding traditions of American society permit [abortion] to be legally proscribed”).

Further, the dissenters argued that the right to terminate a pregnancy was different from other substantive constitutional rights the Court had recognized. “One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of the fetus.”²¹ “The whole argument of abortion opponents,” Justice Scalia observed, “is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with . . . is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment.”²² Thus, the dissenters concluded that *Roe* and the entire line of cases following it should be overruled and “we should get out of this area where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”²³

The Emerging Undue Burden Standard

By a 5-4 vote, a narrow majority of the Court in *Casey* rejected these arguments for overturning *Roe*, and crafted the “undue burden” standard to govern challenges to restrictive abortion laws. While Justices Kennedy, O’Connor, and Souter joined Justice Harry Blackmun and Justice John Paul Stevens in reaffirming “*Roe*’s essential holding,”²⁴ the joint opinion departed from *Roe* in significant measure by giving states broad leeway to enact regulations to promote the state’s interest in the potential life of the fetus throughout pregnancy. Under *Casey*’s undue burden standard, states may not impose regulations with “the purpose or effect of placing a substantial obstacle in the path of the woman seeking an abortion of a nonviable fetus,”²⁵ but they “may take measures to ensure that the woman’s choice is informed,” including giving truthful, non-misleading information designed to “persuade the woman to choose childbirth over abortion.”²⁶ As the joint opinion put it, “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”²⁷ As Justice Kennedy later wrote, “*Casey* . . . struck a balance” giving “the State, from the inception of pregnancy . . . its own regulatory interest in protecting the life of the fetus that may become a child”²⁸ Citing this balance, Justice Kennedy has consistently sided with the Court’s conservatives in rejecting challenges to abortion regulations.²⁹

Today, the contours of *Casey*’s undue burden standard are still uncertain. In the last decade, the Court has granted plenary review of cases involving abortion restrictions only twice, in both instances reviewing the constitutionality of laws prohibiting so-called “partial birth” abortions, a method

²¹ *Id.* at 952 (Rehnquist, C.J., concurring in part and dissenting in part).

²² *Id.* at 982 (Scalia, J., concurring in part and dissenting in part) (emphasis in original).

²³ *Id.* at 1002 (Scalia, J., concurring in part and dissenting in part).

²⁴ *Casey*, 505 U.S. at 846.

²⁵ *Id.* at 877.

²⁶ *Id.* at 878.

²⁷ *Id.*

²⁸ *Gonzales*, 550 U.S. at 146, 158.

²⁹ See, e.g. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Stenberg v. Carhart*, 530 U.S. 914, 956-79 (2000) (Kennedy, J., dissenting); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

of abortion used after the first trimester of pregnancy.³⁰ Notably, these laws criminalized “partial birth” abortions even when the prohibited procedure was the one best suited to safeguard the health of the woman. In a pair of sharply divided 5-4 rulings, the Court in 2000 *struck down* a Nebraska law in *Stenberg v. Carhart* and then, in 2007, following Justice O’Connor’s retirement and Justice Alito’s confirmation to succeed her, *upheld* a similar federal ban in *Gonzales v. Carhart*, with Justice Alito siding with the *Stenberg* dissenters.³¹ While the opinion of the Court in *Gonzales* tried its best to distinguish *Stenberg*, insisting that the federal ban was narrower than the Nebraska law, Justice Kennedy’s opinion for the Court’s conservative majority effectively overruled the 2000 ruling and rejected its reasoning.³² As the four dissenting Justices observed, “the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of ‘the rule of law’ and the ‘principles of *stare decisis*.’”³³

In *Gonzales*, Justice Kennedy’s opinion for the Court held that the Partial-Birth Abortion Ban Act (“the Act”) was a constitutionally permissible effort to protect potential life without impinging on the woman’s liberty, consistent with the balance struck in *Casey*. “Whatever one’s views concerning the *Casey* joint opinion, it is evident that a premise central to its conclusion – that the government has a legitimate and substantial interest in preserving and promoting fetal life – would be repudiated” were the Court to strike down the federal ban.³⁴ The Court’s five-Justice conservative majority reasoned that the government had ample power to forbid physicians from performing “partial birth” abortions, procedures that Congress singled out as especially gruesome and ethically suspect,³⁵ and that could be particularly emotionally damaging to women who came to regret their decision to have an abortion.³⁶ While recognizing that *Casey* had reaffirmed that an abortion regulation must contain an exception to protect a woman’s health, Justice Kennedy refused to “interpret[] *Casey*’s requirement of a health exception so that it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer,” explaining that the “law need not give abortion doctors unfettered choice in the course of their medical practice”³⁷ Given the alternative methods of abortion available, Justice Kennedy concluded that the Act did not impose an undue burden.

In a sharply worded dissent, Justice Ginsburg, joined by Justices Breyer, Souter, and Stevens, argued that “the Act and the Court’s defense of it, cannot be understood as anything other than an

³⁰ In two other cases, the Court issued *per curiam* summary reversals that broke no new legal ground, upholding challenged state laws under the Court’s prior precedents. See *Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding Montana’s parental notification requirement with judicial bypass); *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (upholding Montana statute requiring that abortions be performed by licensed physicians).

³¹ *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007). Justice O’Connor provided the fifth vote to strike down the Nebraska statute in *Stenberg*; following her retirement, Justice Alito voted with the dissenters in *Stenberg* to uphold the federal ban on so-called “partial birth” abortions.

³² Compare *Stenberg v. Carhart*, 530 U.S. 914 (2000) with *Gonzales v. Carhart*, 550 U.S. 124 (2007). On stealth overruling, see Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

³³ *Gonzales*, 550 U.S. at 191 (Ginsburg, J., dissenting).

³⁴ *Id.* at 145.

³⁵ *Id.* at 158 (calling the procedure “laden with the power to devalue human life”).

³⁶ *Id.* at 159-60.

³⁷ *Id.* at 158, 163.

effort to chip away at a right declared again and again by this Court – and with increasing comprehension of its centrality to women’s lives.”³⁸ By upholding the federal ban, Justice Ginsburg explained, “the Court deprives women of the right to make an autonomous choice, even at the expense of their safety” and “for the first time since *Roe* . . . blesses a prohibition with no exception safeguarding a woman’s health.”³⁹ Justice Ginsburg found the suggestion that the Act furthered any interest in protecting potential life baseless, explaining that the “law saves not a single fetus from destruction for it targets only a *method* of performing abortion.”⁴⁰

Possible Developments in the Future

The most dramatic potential future development in the area of reproductive freedom would be if the Court again reviewed and this time overturned “*Roe*’s essential holding” that the Constitution protects a fundamental right to reproductive choice. This seems unlikely with the current make-up of the Court and, in particular, given Justice Kennedy’s ruling in *Casey* and his subsequent opinion in *Lawrence v. Texas*,⁴¹ which relied heavily on *Casey* in protecting a right to intimate sexual conduct. But it certainly is possible that the Court would overturn *Roe* if Justice Kennedy or one of the Court’s more liberal justices were replaced by the nominee of a conservative President.

The more immediate battleground over reproductive choice will almost certainly be the new restrictive state laws, many enacted throughout the country in 2011. These laws push the envelope on the authority *Casey* gave to the states to ensure that the woman’s decision is informed, some requiring doctors to deliver to women an anti-abortion message, while others require women to view a sonogram of the fetus, or submit to counseling by an anti-abortion crisis pregnancy center. Still others blatantly challenge current Supreme Court precedent, banning abortions after twenty weeks of pregnancy, without any medical evidence that a fetus is viable at that point. In Arizona, Gov. Jan Brewer signed into law a ban that went even further, effectively prohibiting abortion at eighteen weeks by dating a woman’s pregnancy by the first day of her last menstrual period, which occurs two weeks before conception.⁴² The challenges to these laws, now making their way through the lower federal courts,⁴³ will give the conservative majority of the Roberts Court plenty of opportunities to continue chipping away at women’s right of reproductive freedom.

³⁸ *Id.* at 191 (Ginsburg, J., dissenting).

³⁹ *Id.* at 184, 171 (Ginsburg, J., dissenting).

⁴⁰ *Id.* at 181 (Ginsburg, J., dissenting).

⁴¹ 539 U.S. 558 (2003).

⁴² See Amanda Peterson Beadle, *Why Arizona’s New Anti-Abortion Bill Is Worse Than It Seems* (Mar. 30, 2012) (available at <http://thinkprogress.org/health/2012/03/30/455643/why-arizonas-new-anti-abortion-bill-is-worse-than-it-seems/>).

⁴³ See, e.g. *Planned Parenthood Minnesota v. Rounds*, 653 F.3d 662 (8th Cir.) (striking requirement that physician inform a woman of increased suicide risk from obtaining abortion), *reh’g en banc granted*, 662 F.3d 1072 (8th Cir. 2011); *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012) (reversing preliminary injunction against Texas sonogram statute); *Stuart v. Huff*, 2011 WL 6330668, No. 1:11CV804 (M.D.N.C. Dec. 19, 2011) (preliminarily enjoining North Carolina statute requiring a physician, before performing an abortion, to show the woman an ultrasound of her fetus and describe the images seen on the ultrasound); *Planned Parenthood Minnesota v. Daugaard*, 799 F.Supp.2d 1048 (D.S.D. 2011) (preliminarily enjoining South Dakota statute requiring woman to submit to counseling by crisis pregnancy center).

For example, the Court could uphold the some or all of the new abortion counseling laws on the basis of the precedents in *Casey* and *Gonzales*, reasoning that that state has wide latitude to dissuade a woman from terminating the life of the fetus, including by requiring her to be told of all of the conceivable risks of the procedure, by requiring that she view a sonogram of the fetus, or by requiring that she consult with a third party who can offer a different perspective on the decision.⁴⁴ Indeed, in *Gonzales*, Justice Kennedy already accepted the idea that “some women come to regret their choice to abort the infant life they once created and sustained,” necessitating a substantial role for states “in ensuring [that] so grave a choice is well informed.”⁴⁵

In the cases seeking to invalidate these recent laws, plaintiffs have challenged them not merely as creating undue burdens on women, but also as a violation of the physician’s First Amendment right to be free from government-mandated speech, seeking to take advantage of the fact that the Roberts Court has aggressively expanded First Amendment rights in other areas such as campaign finance law and commercial speech.⁴⁶ Were the Court to apply *Sorrell v. IMS Health* and conclude that these new abortion regulations must be subject to “heightened scrutiny” because they enact “speaker- and content-based burden on protected expression,”⁴⁷ that go well beyond the requirements of informed consent and established medical practice, it is likely that these new measures would be invalidated.⁴⁸ But so far, the Supreme Court has refused to place any First Amendment checks on the authority of the states to regulate abortion, noting in *Casey* that the “physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable and licensing and regulation by the State.”⁴⁹ In *Gonzales*, the Court’s conservative majority rejected the idea that physicians had constitutional rights to practice medicine that trumped state regulation to the contrary, explaining that “the State has a significant role to play in regulating the medical profession” and that “the law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other members of the medical community.”⁵⁰ These statements suggest that First Amendment claims may not fare any better than undue burden claims in the Roberts Court.

It is even possible that the conservative Justices on the Roberts Court would uphold the new twenty-week bans on abortion, perhaps citing legislative findings that current medical technology shows that, at twenty weeks, a fetus is capable of feeling pain, though not viable outside the womb. Upholding these recent state bans on abortion after twenty weeks, of course, would require Justice Kennedy to join in overruling the Court’s holdings in *Roe*, *Casey*, and other cases that “viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on . . .

⁴⁴ See *Texas Medical Providers*, 667 F.3d at 574-76 (relying heavily on *Casey* and *Gonzales*).

⁴⁵ *Gonzales*, 550 U.S. at 159.

⁴⁶ See, e.g. *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). For discussion, see Crossroads Chapter 4 (“The First Amendment, Political Speech, and the Future of Campaign Finance Laws”) & Chapter 6 (“Protecting Commercial Speech and Privacy in the Internet Age”).

⁴⁷ *Sorrell*, 131 S. Ct. at 2667.

⁴⁸ See *Stuart*, 2011 WL 6330668 at **2-6 (applying strict scrutiny in preliminarily enjoining requiring physician to display to a woman seeking an abortion an ultrasound of the fetus).

⁴⁹ *Casey*, 505 U.S. at 884.

⁵⁰ *Gonzales*, 550 U.S. at 157, 163.

. abortions,”⁵¹ a step he may be reluctant to take. But Justice Kennedy has already demonstrated a willingness to narrow *Roe* considerably and might be persuaded to depart from *Roe*’s viability line on the ground that that states should have the authority to balance the interests of the woman and the fetus in a way that respects the woman’s right up until the point that the fetus may feel pain from the procedure. No less than at viability, Justice Kennedy might reason, “a woman who fails to act” after twenty weeks of pregnancy “has consented to the State’s intervention on behalf of the developing child.”⁵²

If the composition of the Court changes and moves the Court in a more conservative direction, conservative state legislatures would likely respond by passing a new wave of restrictive laws, some possibly going so far as to ban abortion outright. With another conservative Justice on the bench, the Roberts Court would be in a position to significantly scale back constitutional protection for a woman’s right to reproductive freedom, if not reconsider *Roe* and *Casey*.

To date, the Roberts Court has appeared content to avoid most questions on the hot-button topic of reproductive rights. The Court has only granted review of one abortion case since John Roberts was confirmed as Chief Justice – *Gonzales v. Carhart* – and in that case, Justice Kennedy had already staked out his position that the government may prohibit the type of abortion procedure labeled a “partial birth” abortion. But this relative quiet on this divisive front is unlikely to continue. New state laws will almost force the current Court to address new questions under *Casey*’s undue burden test, and changes in the Court’s composition, should they occur, could again put the essential holding of *Roe* very much in play.

⁵¹ *Casey*, 505 U.S. at 860.

⁵² *Id.* at 870.