ABSTRACT

Title of Dissertation:	THE PARADOX OF EXPERTISE: ABORTION LAW FROM 1973-2022
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In the last fifty years, abortion rights in the United States have gone from being criminalized in most states, to being legal on a federal level, to being regulated through individual state legislatures. In 1973, the landmark abortion case *Roe v. Wade* granted fecund persons a federal right to abortion for the first time in this nation's history. To do so, the Supreme Court conceived of abortion rights within a rhetoric of expertise. The Court relied on legal, medical, and personal conceptions of expertise as knowledge, procedure, and deference to ground abortion rights in a precedent of privacy tied to the trimester framework. Since its codification, multiple cases at the Supreme Court and lower court levels have challenged the precedent established in *Roe*. These challenges have worked to both protect and constrict fecund persons' abortion rights to various degrees. Each of these post-*Roe* cases have reconfigured the triangulation of expertise to make sense of abortion rights in their particular political and temporal moments. For instance, the landmark abortion case *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) sought to reinforce the precedent in *Roe* by

clarifying its legal and medical inconsistencies with the undue burden standard. Thirty years later, the Court in *Dobbs v. Jackson Women's Health Organization* (2022) decided such inconsistencies warranted returning the abortion decision back to the states. The ability for abortion rights to undergo such a significant shift legally exposes the rhetorical paradox of expertise. The last fifty years of abortion law indicates the inability of legal and medical knowledge and procedures to consistency define the boundaries of legal abortion. But it also shows how the Court has deferred to these expert institutions time and time again to first expand, and then constrict, fecund persons' personal expertise over the abortion decision.

The Paradox of Expertise explores the complex triangulation of expertise in abortion law through an analysis of three pivotal U.S. Supreme Court cases: *Roe* (1973), *Casey* (1992), and *Dobbs* (2022). In each of these cases, the justices interpreted this triangulation in differential ways to shift the boundaries of legal abortion. In Chapter One, I explore how *Roe* read the legal-medical history of abortion to authorize the trimester framework and regulate fecund persons' abortion rights and expertise. By regulating abortion through the trimester framework, the Court entangled legal, medical, and personal expertise in a complex web that ultimately privileged legal and medical expertise throughout a fecund person's pregnancy. In Chapter Two, I analyze *Casey* to show how the Court responded to the ambiguities presented by the trimester framework. In *Casey,* the Court reinterpreted the precedent in *Roe* to affirm abortion rights under an undue burden standard. Because the Court failed to define this standard in a consistent manner, future courts continued to battle over the ambiguities of abortion law. In Chapter Three, I examine the decision in *Dobbs* to show how such legal battles over expertise allowed the Court to reinterpret abortion history and warrant returning the abortion issue back to the states. But because the *Dobbs* Court failed to clarify the past inconsistencies in abortion law, state

legislators, medical physicians, and fecund persons struggle to make sense of the legal, medical, and personal barriers to abortion access in the present moment. Today, the current landscape of abortion politics is still mired in the paradox of expertise that foreshadows the long road ahead for pro-abortion advocates and those seeking abortion access and care.

THE PARADOX OF EXPERTISE: ABORTION LAW FROM 1973-2022

by

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Dedication

To everyone that has ever needed or wanted an abortion.

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Introduction: The Rhetoric of Expertise

> *Roe*'s invalidation of all extant abortion laws delegated responsibility to another center of power, at least as much as it protected the medical profession. When a critical mass of judges later found medicine to be institutionally unreliable in enforcing social norms, the Court retracted its deference. The expansion and contraction of deference to medicine in the abortion cases has been an epiphenomenon of ideological shifts.
>
> ~ Nan D. Hunter, on Justice Blackmun's legacy in *Roe v. Wade*[1]

On March 30th, 2022, the Kentucky state government passed SB321, an anti-abortion bill that banned abortions at 15 weeks into a pregnancy. This bill, which resembled the then-current Mississippi law under review by the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization*, not only banned abortion before the point of viability (approximately 22 weeks) but also prohibited exceptions for cases of rape or incest. One Kentucky senator, Democrat Karen Berg, gained political prominence as a pro-abortion advocate in the weeks that proceeded SB321's passage. In a standout rebuttal on the House floor, Berg appealed to her professional expertise as a legal authority, her industry knowledge as a diagnostic radiologist, and her personal experience as a woman and mother to oppose the bill on the grounds that it would harm women's rights and access to abortion in Kentucky.[2] In her objections, Berg argued that the proposed legislation "does not follow medicine" or "even purport to listen to medicine." Turning to her fellow committee members and representatives of the state, Berg highlighted that she was the only "physician" and "woman" at the podium present, suggesting that she was unique in her position to challenge the medical claims in SB321 and to advocate for fecund persons' rights to abortion.[3] Despite Senator Berg's protests, the Kentucky Senate passed SB321 31 to 6. On June 24th, 2022, the Supreme Court decision in *Dobbs* fortified Kentucky SB321 as it overruled *Roe v.*

Wade and *Planned Parenthood of Southeastern Pennsylvania v. Casey* and returned abortion regulations back to the states.

Kentucky SB321 joins the growing list of anti-abortion bills to afflict the country over the last few years, leaving U.S. abortion rights and access in a state of uncertainty. Prior to the Supreme Court decision in *Dobbs,* anxieties around the unknown often manifested as concerns for the imminent reversal of the federal right to abortion and increasing state restrictions on abortion access.[4] These anxieties were not unfounded given that at the overturn of *Roe*, abortion was made inaccessible and illegal in at least twenty-six states.[5] But legislation like Kentucky SB321 demonstrates that restrictions on abortion rights and access began long before the overturn of *Roe.* In the months before *Dobbs*, sixteen states challenged medical knowledge by attempting to ban abortion before fetal viability.[6] While court orders blocked most of these attempts, one notable exception was the six-week abortion ban in Texas (SB8). This ban had already been in effect for months before *Dobbs* despite the decision in *Roe* where the trimester framework placed viability at twenty-eight weeks in 1973 (or twenty-two weeks by today's medical standards).[7] At the time of this writing, abortion is illegal in twelve states except for medically necessary reasons concerning "health" and "life."[8] Still, fourteen states continue to regulate abortion up to the point of viability.[9] Collectively, different abortion regulations nationwide exemplify the uncertainty around expertise to govern abortion decisions. Namely, they highlight the ambiguity regarding the meaning and boundaries of medical terms like health and viability, and the ambiguous future of abortion access for fecund persons under the authority of state and lower courts in the wake of *Dobbs*.

The *Dobbs* decision, like the abortion cases that came before, muddles the decision-making power in abortion rights as each abortion case navigates the boundaries of legal, medical,

and personal expertise. In this triangulation of authority, a paradox of expertise arises when the rights to an abortion for fecund persons are denied even when legally allowed or medically permissible.[10] Sometimes, a fecund person is denied a legally or medically permissible abortion because physicians are unable to interpret and reconcile vague abortion laws with their existing medical knowledge. In this way, doctors and healthcare providers in the wake of *Dobbs* are treated as "agents of the state."[11] They are made responsible for not only making sense of state abortion laws for themselves and fecund persons, but also for policing patients who may unknowingly request unlawful abortions, even when medical knowledge supports their decision to acquire one. A resulting paradox unfolds for fecund persons in that no matter what the current law permits, or what the most up-to-date medical knowledge establishes about the safety of abortion, they can still be denied an abortion. In navigating this triangulation of authority, a fecund person's personal expertise becomes restricted if experts in law and medicine cannot come to an agreement on the proper meaning and use of their legal and medical expertise.

Of course, the paradox within this triangulation of expertise is not new. The historical alliance between law and medicine has shaped American jurisprudence on abortion law and systematically worked to restrict abortion rights for fecund persons since at least the beginning of the nineteenth century. In 1973, the *Roe* Court drew upon centuries of abortion history to employ this triangulation: the Court wielded the law and crafted the medical, trimester framework to determine a fecund person's rights to abortion.[12] In theory, the trimester framework outlined in *Roe* provided a roadmap for legal, medical, and personal expertise to jointly determine the boundaries of "maternal health" and "potential life" that become consequential to the abortion decision at various stages along a pregnancy.[13] But *Roe* relied on vague language that ultimately resulted in incongruities in the application of the trimester framework. In 1992, the Court in

Planned Parenthood of Southeastern Pennsylvania v. Casey attempted to clarify these legal, medical, and personal boundaries with the addition of the undue burden clause, which permitted abortion regulations if they did not place "substantial obstacles" in the way of fecund persons' abortion access.[14] The undue burden clause kept intact the central decision in *Roe*—that abortion is "inherently, and primarily, a medical decision,"—but rejected the three-tiered medical-legal parameters the trimester framework previously outlined.[15] Later, state and federal courts would follow suit and employ both the precedent in *Casey* and its procedural rationale to develop and restrict abortion rights and access through appeals to medical expertise. Fifty years after *Roe* and thirty years after *Casey*, the same rhetorical foundation provided the fodder to change the course of abortion history yet again as *Dobbs* reinterpreted contemporary and historical abortion law and the deeply entrenched historical perceptions of legal and medical expertise in the United States to overrule the precedent in *Roe* and limit private rights to abortion.[16] The continual expansion and contraction of abortion rights since *Roe* not only made the 2022 decision in *Dobbs* appear inevitable but also provided the very justification for the *Dobbs* Court to determine the logic in *Roe* and *Casey* unreliable and "unworkable," and therefore unconstitutional.[17]

At root, this project claims that U.S. abortion rights are at once constricted and expanded by differential claims and conceptions of legal, medical, and personal expertise. This study examines the complex triangulation of expertise in abortion discourse by offering an analysis of three pivotal U.S. Supreme Court cases: *Roe v. Wade, Planned Parenthood of Southeastern Pennsylvania v. Casey,* and *Dobbs v. Jackson Women's Health Organization.* In each of these cases, the justices employed legal, medical, and personal expertise in differential ways to shift the boundaries of legal abortion. As this study shows, attempts to constrict or expand abortion rights often leave legal and medical experts with more power over abortion decisions than fecund

persons. This triangulation presents a paradox for fecund persons whose claims to expertise are both expanded through and bounded by the limitations of legal and medical expertise. We cannot have medical recourse to abortion without first enshrining such choices within the current majority interpretations of the law, but we also cannot legally regulate abortion without first deferring to contemporary medical knowledges and practices that regularly shift with technological advancements. And we cannot ignore the paradoxical outcome that the personal fate of fecund persons lies somewhere precariously within the terrain of these uncertain legal and medical compromises.[18] As such, this project demonstrates how abortion rights rhetoric exposes the promise and peril of our collective deference to each of these differential forms of expertise.

Triangulating Expertise: Then and Now

To better understand the complex nature of the paradox of expertise, I frame the abortion problem as a competing triangulation of three differential authorities: the legal, the medical, and the personal. By analyzing each form of expertise as it unfolds throughout the nineteenth century and into the twenty-first, I offer a framework to examine how the law influences our perceptions of abortion as a medical practice, how medical-legal knowledge may constrict personal autonomy over abortion decisions, and how fecund persons must navigate those legal and medical restrictions to negotiate their recourse to abortion access. At its core, this framework incorporates the prevailing assumption that "expertise is what experts do" by acknowledging that legal, medical, and personal experts must interpret changes in law, navigate progressions in medicine, and advocate for personal autonomy, respectively, as abortion discourse shifts.[19] Yet, this project also challenges this simplified explanation of expertise as it applies to abortion specifically. Here, the boundaries of legal, medical, and personal expertise often mingle and

merge as one expert seemingly takes on the expertise of another outside its own domain. In U.S. abortion contexts, legal experts defer to extant medical knowledge to regulate abortion, medical experts look to the law to interpret the legality of abortions and to pregnant persons to navigate abortion options, and personal experts defer to both the law and medicine to exercise their abortion rights. This triangulation paradoxically demonstrates that the personal expertise of fecund persons may be either expanded or constricted by the legal and medical expertise of courts and physicians. This framework thus shows that the complexity and interconnectedness of each form of expertise is built into the very structure and function of abortion law beginning with our nation's early history.

Today, we cannot think about abortion without ushering in thoughts of the physician, prenatal technologies, or the always vulnerable fetal "heartbeat." The colloquial classification of "medical abortions" or "medication abortions," the method often recommended in the early stages of a pregnancy, supports this point.[20] Our collective understanding of abortion as a medical concern can be traced back to the nineteenth century and the establishment of the modern medical profession. Prior to the formation of the American Medical Association (AMA) in 1847 and the subsequent professionalization of medicine, the "quickening doctrine" held prominence for defining the point when a pregnant person could feel the fetus move in utero. This point occurred typically during the fourth month of pregnancy and marked the moment a pregnant person could feel a fetus move within their womb.[21] Before modern medical technology, the quickening doctrine was the primary way that fecund persons confirmed their pregnancies, and doctors determined whether abortion was socially permissible. By the late nineteenth century, the joint efforts of physicians, clerics, and reformers successfully banned abortion at all stages, dismissed the quickening doctrine, and determined that abortion decisions

were the sole right of medical professionals. Since then, the notion that abortion is a medical concern, "a private decision between a woman and her doctor," has been the guiding frame for abortion decisions.[22]

But medical actors in the past and present generally do not govern abortion decisions alone. To better understand how expertise has shifted rights and access to abortion, it is crucial to frame the history of abortion as a history of contested legal, medical, and personal expertise. At the time of this writing, we have yet to experience the full consequences of the *Dobbs* decision, and only time will tell how returning the abortion decision back to the states will alter our perceptions of and assumptions about U.S. abortion law. To narrow the scope and contextualize this triangulation of expertise in *Roe*, *Casey*, and *Dobbs*, I divide the history of U.S. abortion into three general periods: the period before abortion became a crime—approximately the late eighteenth century to the mid-nineteenth century; the period when abortion in the United States was criminalized—roughly the mid-nineteenth century through the *Roe v. Wade* decision in January of 1973; and the period after *Roe v. Wade* that concretized the federal right to abortion—from 1973 through June 2022. As a review of the proceeding literature demonstrates, these time periods and their constituents are not wholly distinct in their ideological, scientific, or practical attitudes toward abortion. Although I have arranged this study more or less chronologically for ease of read, it is important to keep in mind that neither professional or public opinion on abortion was resolute on the legal, medical, or personal concerns surrounding the practice throughout this history.

The Context: Abortion Before Medicine Professionalized

In the eighteenth and early nineteenth centuries, abortion was not considered a crime. For all of the eighteenth century and most of the nineteenth century, abortion was legal under

common law and only illegal after quickening. It was not until the 1820s and 1830s that abortion restrictions emerged through provisions on the commercialization of abortifacients, as was the case with an 1827 Illinois law. But these early abortion restrictions did not stipulate criminal punishments for persons who had abortions and they did not eliminate the common law notion of quickening.[23] It is notable that many of these early restrictions were not even regulated under the purview of medical law but were instead classified under the distinction of "poisoning."[24]

For most of U.S. history, abortion regulations were not even codified legally. With the absence of any formal legislative measures, abortion practice was governed by common law and patients' experiences reported to their physicians. This meant that prior to the early nineteenth century, states regulated abortion through local courts who interpreted the legality of abortion on a case-by-case basis and only if those cases were brought to their attention. Even when members of the court became privy to potential illegal abortions, they had only the word of the physicians to base their decision. Women were not expected to testify in these cases.[25] Since no reliable tests for determining a pregnancy actually existed, physicians could also simply claim they were unaware of a patient's pregnancy. Their claims of ignorance were often difficult to disprove because the treatments for abortion functioned similarly to the treatments for other common conditions and ailments of the time and so were difficult to distinguish from everyday prescriptions for non-abortion related health concerns.

The nineteenth-century doctor-patient relationship was defined by the court's inability to definitively determine the boundaries of legal abortions. Historically, the perception was that only economically-disadvantaged, single, and immigrant women of color, were the primary seekers of abortion. Their reasons for seeking abortions certainly varied, but most Americans believed that women sought abortion to preclude the "social consequences of an illegitimate

pregnancy."[26] The quickening doctrine remained a primary means of governing most abortion decisions during this time. Thus, physicians relied on their patient's knowledge of their individual bodies, and whether they had felt the fetus move, to determine whether abortion was permissible. In this way, patients embodied an authoritative personal expertise that not even their attending physicians could access if patients chose not to disclose their pregnancies. For this reason, physicians who did administer abortions often knew the intricacies of their patients' lives and were at times sympathetic to their plight. But this also meant physicians lacked a standard practice and approach for caring for fecund persons through their pregnancies and abortions.

In the mid-nineteenth century**,** abortion practice shifted alongside the shifting public perception of who acquired abortions. During this period, evidence suggests that a predominant population of "married, native-born, white Protestant women, frequently of middle or upper-class status" contributed most to the upsurge in abortion cases.[27] As the social character of abortion shifted, physicians adjusted their efforts toward protecting this presumed, vulnerable population. The law shifted in tandem: states codified abortion legislation as legislators saw an uptick in abortions among white Protestant women as a public health concern. Notably, these early measures often only included criminal penalties for physicians but did not criminalize women for obtaining abortions.[28] The differential penalties for abortion providers and recipients shows the early shifts in medical mindset as well: physicians had to be even more meticulous about demonstrating their medical expertise and general medical knowledge because they faced substantial consequences for administering abortions that did not comport with legal interpretations of medically-necessary abortions.

The formation of the American Medical Association (AMA) played a significant role in the criminalization of physicians who continued to practice abortions. In 1847, the AMA formed

to professionalize the field of medicine and standardize its practices. The organization's original code of ethics did not mention abortion directly, but in 1857, it formed the Committee on Criminal Abortion and appointed leading anti-abortionist Horatio Storer its chair. Reviewing his life and work, Frederick N. Dyer argues that Storer not only initiated the physicians' crusade against abortion but also contributed greatly to the birth of gynecology as a specialty in the American medical system. Citing his research abroad, Dyer notes Storer's careful interest in women's diseases and the supposed detriments abortion imposed on women's overall wellbeing.[29] In his 1866 essay entitled, "Why Not? A Book for Every Woman," Storer argues that abortion was a source of harm on women's "conscience," "moral character," and "peace of mind" and could even produce "insanity" from the "physical shock" and "remorse" of an induced abortion.[30] Storer not only demonstrated his concern for the effects of abortion on women's mental health and wellbeing but also called for physicians to preserve the *general* public health against abortions. Storer argued that the public had a "right" to look to regular physicians "for counsel, for assistance, and for protection" and expected physicians to draw from their "experience" and "reputation" to protect not only the public wellbeing but their own professional character from the maladies of abortion.[31] The rhetorical upshot of Storer's appeal is that those physicians who committed to protecting their profession against the contempt abortion invoked also benefitted from supporting its criminalization. Thus, physicians willing to stand against abortion practices also maintained their credibility and influential roles as medicine gained standing as a respectable profession by the general public.

Professionalizing Medicine in Practice

Medicine in the late-nineteenth century was paradigmatic of successful professionalization. During this time, physicians gained control over "licensing, training, and

disciplining procedures" as well as expanded the domain of diseases they could treat.[32] Professionalism generally is associated with extensive education and training through which individuals are prepared to act according to the standardized practices and behaviors of their profession.[33] But physicians in the mid-nineteenth century enjoyed a rather relaxed professional training compared to their professional counterparts in, say, religion or law. At the time, medical students were only required to complete a seven-course lecture under an established physician, which they repeated in their second year before writing a thesis and passing an oral examination.[34] However, this seemingly easy educational training did not come without its challenges, especially for medical physicians who continued to practice abortion.

The professionalization of medicine and the question of abortion divided medical actors into two general groups in the nineteenth century: the regulars and irregulars. The regulars were formally educated medical practitioners who showed an increasing interest in what would later emerge as a scientific approach to medicine. They were invested in medical research and intercommunication among other regulars. For this reason, they devoted efforts to organizing formal medical societies and establishing reputable journals to showcase their various research methods and findings.[35] By the mid-nineteenth century, these efforts propelled regular physicians to the fore of the medical field, as their developments would substantially shape both treatments of abortion and broader medical practices into the twentieth century.

Similar to regulars, irregular physicians were also trained by apprentices in medical schools. They also developed separate medical schools and societies on the local, state, and federal levels. Different from regulars, irregulars were less standardized in their group practices and organizing. Irregular physicians were generally less invested in scientific research and medical developments that focused on individual bodily systems. They consisted of mostly

homeopaths—physicians who believed that the body could cure itself and that any interventions on behalf of the physician should be in pursuit of mimicking the behaviors of a healthy body. They focused on their patient's unique conditions to heal the body as a whole with natural remedies. While their methods may have been less effective in accomplishing their desired results, their treatments were also less invasive and damaging to their patients in the long-term, which was likely the reason for their continued existence prior to antiseptic practices.[36]

Regular physicians had the most influence on the developing relationship between law and medicine and its regulatory role on abortion practices in the United States. Regular physicians' appeals to authority, professionalism, and objectivity under the AMA worked to exclude differential knowledge domains from medical practices generally and abortion practices specifically. In this way, regular physicians, regardless of their own gender identity, contributed to the marginalization and eventual dispersal of irregular practitioners, women physicians, and abortionists from standard medical institutions. Proscribing abortion in particular allowed regular physicians to spearhead a national campaign to criminalize abortion and further exert their medical expertise over irregulars.[37] Medical divisions and actors that continued to administer abortion were thus deemed unprofessional and illegitimate: "By using abortion as a wedge issue and publicly opposing it, the AMA was able to portray itself as morally and professionally superior to the practice of midwifery; this allowed the AMA to undercut the influence of midwives."[38] During this time, midwives, irregular physicians, and women physicians more generally were relegated to the margins of the broader professional practice of medicine, if not wholly excluded.

Historically, studies of professional medicine have focused on the masculine nature of the medical sphere which excluded women from the practice both legally and socially.[39] From at

least the colonial period, women have participated in "healing as nurses, midwives, and practitioners of folk medicine."[40] But when the AMA formed and medicine became a professionalized practice in the mid-nineteenth century, women's roles and participation in both abortion and pregnancy-related practices subsequently diminished, and the work they were permitted to perform was not always recognized as reputable medicine.[41] Although women continued to participate in non-institutional forms of medicine, "the identification of formal medical knowledge with men continued until the mid-nineteenth century."[42] Even after this point, increased emphasis on laboratory science and treating the particular disease or ailment rather than the whole patient altered acceptable forms of medical practice. Women physicians and irregulars more broadly thus had to adapt their rhetorical strategies to succeed and be taken seriously in the continually evolving medical space.

Women Physicians in the Nineteenth Century

Women entering the field of medicine during the nineteenth century faced unique trials associated with their gender. While men in the field were actively carving out a space for themselves and their professional identities, women physicians were also working themselves into the profession. This meant that women physicians often had to develop and adapt distinctive strategies to operate in this emergent space alongside still shifting perceptions of the role of male physicians. Some women chose to position their gender as background to their practice of medicine, specifically in their medical writings. In these cases, women physicians adopted the leading language and practice of their male counterparts to highlight their feminine perspectives and medical knowledge.[43] Other women were more direct in the positioning of their gender and saw their femininity as the unique source of their adept medical abilities. Notably, these women

were often interested in irregular medicine and therapies that included "the water cure, mesmerism, and magnetism," as well as abortion.[44]

Scholarly research on nineteenth-century women physicians tends to highlight two competing but intersecting strategies women physicians embraced to develop their professional ethos and residence in the medical field. The first and more popular strategy underscored perceived differences between men and women and emphasized women's unique qualities *as women.* This strategy stressed how changes in institutional practices of medicine created spaces for women physicians to rhetorically develop their own professional ethos grounded in traditional feminine conceptions of empathy and morality. In *Women Physicians & Professional Ethos in Nineteenth-Century America*, Carolyn Skinner traces the development of a professional ethos for women physicians who employed this rhetorical strategy through an examination of their public speech and writings on medical practices. Although Skinner notes that some women physicians accentuated femininity as an asset that provided unique medical insights, the dominant opinion was that femininity, and therefore women themselves, were a hindrance to medical development.[45] Despite the socio-cultural constraints gender presented, many women physicians demonstrated their "knowledge and authority" by underscoring their patients' personal stories and struggles with their bodies and various medical issues.[46]

Elizabeth Blackwell took this approach to her own study and practice of medicine in the nineteenth century. In 1849, Blackwell graduated from New York's Geneva Medical College, making her the first woman to earn a medical degree in the United States. In 1869, with the help of her sister Dr. Emily Blackwell and colleague Dr. Marie Zakrzewska, Blackwell opened the Woman's Medical College of the New York Infirmary. Blackwell was known for her sentimentality, and her Protestant upbringing imparted her work with a "religious vocabulary"

that reflected her broader concern for morality.[47] Her moral sensibilities also influenced her holistic approach to medicine: she often took careful and detailed measures to treat her patients spiritually as well as physically and believed that reformation in "the church, the school, the workshop" all contributed to the health and treatment of her patients.[48] Blackwell's moral commitments infused every aspect of her medical philosophy, including her perspective on the sanctity of maternity. With an emphasis on morality, Blackwell sought to bolster maternity and motherhood through rebranding the term "female physician," which she believed had been denigrated through an association with abortionists like Madame Restell.[49] By strategically employing their gender, women physicians like Blackwell not only built a rapport with their patients but also forwarded a medical perspective that privileged personal experience and granted women autonomy over their maternal health and overall wellbeing. Notably, abortion was excluded from this particular approach to medicine and health as it devalued the importance of maternity that its practitioners considered unique to women physicians and their patients.

Some women physicians also employed a second rhetorical strategy to define their roles in the developing medical sphere of the nineteenth century. This second strategy stressed women's place in the medical profession by emphasizing shared characteristics between men and women. While less accepted, this approach to medicine promoted women's "self-development" and their "ability to contribute to clinical medicine equal to that of any man's."[50] Notably, this second strategy became more dominant at the turn of the century, as scientific approaches to medicine grew in influence and regular physicians excluded abortion from the realm of acceptable professional medical practice. While women physicians in the early nineteenth century had to contend with the general public's indifference to scientific professions, women physicians of the mid-to-late nineteenth century benefited from the public's growing faith in

scientific knowledge.[51] This shift in public perception allowed some women physicians to turn to scientific evidence produced in a laboratory setting to not only support their practices and research in medicine but to also bolster their political and social beliefs about women's roles in society more broadly.

Mary Putnam Jacobi was a leading pioneer of the scientific approach to medicine in the mid-to-late nineteenth century. Putnam Jacobi graduated from the Female College of Pennsylvania in 1864, and after five years of training at École de Médicine, she accepted a faculty position at the Woman's Medical College of the New York Infirmary, where Blackwell herself taught and practiced. Although both Blackwell and Putnam Jacobi advocated for women's medical education and expanding roles in the medical field, their approaches differed in significant ways. Unlike Blackwell, Putnam Jacobi approached medicine with a more empirical lens, choosing to focus on the findings of laboratory examinations and what these findings illuminated about the emerging field of bacteriology and medical diseases. Additionally, while Blackwell's strategy privileged femininity to maintain gender differences and separate gendered spheres, Putnam Jacobi's approach relied on concepts such as "justice" and "equality" to promote women's expansion into the medical sphere alongside their male associates.[52] Putnam Jacobi considered women physician's pursuit of medical knowledge separate from the question of public morality and believed their chief concern of any physician should be to foster scientific inquiry among all participants in the medical profession. Addressing a women's medical association at the turn of the century, Putnam Jacobi famously stated, "We are first physicians, and then women physicians."[53] She identified first and foremost with her profession and both upheld and progressed the professional standards of medicine as a practicing physician.

The birth of gynecology as a medical specialty exemplifies both the professional and social differences in women physicians' rhetorical strategies at the turn of the nineteenth century as well as shifting perspectives on abortion. Both approaches to the professionalization of medicine emerged initially to help frame women physicians' roles in medicine broadly, and to demonstrate how their approaches to medicine as a profession, and later medicine as science, helped construct a rhetorical space for them. But as the field increasingly adopted a scientific methodology, specialization began to replace general medicine, and physicians advocated surgical methods over traditional medicinal practices.[54] This shift undergirds the emergence of gynecology which, because of its reliance on surgery, was often separated from general medicine and "shunned" by the broader medical community.[55] As medicine professionalized, emerging approaches to gynecology and obstetrics practices overtook previous methods in midwifery. However, as regular physician Dr. DeLee noted in 1916, the public's association between gynecology as a specialty and the mortality rates and medical complications associated with midwifery and abortion deterred young physicians from specializing. Dr. DeLee proposed that to shift public opinion, gynecology and obstetrics as a profession should envelop previous practices of the midwife and prescribe abortion only in limited circumstances.[56]

When it came to medical specialization in general and gynecology in particular, Blackwell and Putnam Jacobi maintained their professional differences. Blackwell initially advocated for women physicians to specialize, believing that their unique insights as women could help them build a distinct domain within the field. Putnam Jacobi, however, believed that women needed to integrate themselves fully into the profession: she feared specializing would further separate women from the larger medical community and limit their overall advancement in the field.[57] Despite her views on specialization generally, Putnam Jacobi argued that women

should not shy away from gynecological surgery in particular, and even critiqued Blackwell directly for her moral inhibitions surrounding the "special sanctity" of the ovary.[58] Despite their differences, both Blackwell's and Putnam's medical approaches followed dominant public opinion on the social construction of the body, and thus medical treatments and diagnoses of patients. That is to say, both women physicians were influenced by the centuries-old notion that men's and women's bodies were essentially the same, and that a combination of social status and heat production, not biology itself, caused the major physical differences between the sexes.[59] But as Enlightenment thought in the eighteenth century and medical advancements in the nineteenth century converged to encourage an empirical, scientific approach to medicine, many medical professionals began to study the "science of women" and presumed social and sexual differences on a microscopic level. Within this context, we come to understand how gynecology emerged as a "culmination of two centuries of shifting scientific thinking on the subject of sex difference."[60]

The professional histories of Blackwell and Putnam Jacobi provide a rich background to study the professionalization of medicine throughout the nineteenth century and the competing philosophies that continue to influence medical practices around abortion today. As their history shows, the different strategies women physicians employed to advocate their own professional ethos cannot be easily organized into two distinct groups. Some women who relied on their gendered differences to carve a professional space for themselves were initially seen as irregulars and were increasingly relegated to the margins of the field throughout medicine's professionalization. Even though these women rooted their medical practices in their moral sensibilities, and thus shared an affinity with Storer and other leaders of the AMA who opposed abortion on moral grounds, their contributions were not treated as equal to men who also

promoted gender differences in their medical practices. Likewise, women who adopted more accepted (read: masculine) approaches to medicine may have seen early success in their medical endeavors, but the gradual shift toward a scientific approach to medicine in the latter half of the century impeded these progressions as the AMA worked to relegate the role of women physicians and regulate the practice of abortion within its standard medical practices. Throughout this history, even successful women physicians had to continually work against assumptions about their intellectual and physical capabilities.[61] The scientific approach to medicine and laboratory science intensified these assumptions as physicians found additional rhetorical means to support gender differences socially and biologically, and thus continue to exclude women physicians from the professional field. It is within this general history of the professionalization of medicine that we must attend to the specific ways abortion is figured and treated as a medical procedure.

Professionalizing Medicine/Criminalizing Abortion

The criminalization of abortion continued throughout the mid-to-late nineteenth century, when medicine took a turn toward surgical methods over experience-based, empathetic expertise.[62] Although both women and men physicians rejected the patient-led approach to medicine characteristic of empathetic expertise, it is important to remember that this approach had previously dominated physicians' specific treatment of abortions through the quickening doctrine (physicians relied on their patients' claims to have felt the fetus move in order to determine whether abortion was permissible). In this way, we can understand the rejection of experience-based medicine in favor of scientific medicine as a disavowal of the quickening doctrine, which underwrote the general medical profession's growing contempt for abortion practices broadly. Within this context, anti-abortion advocates motivated legal and medical

institutions to criminalize abortion. Criminalizing abortion thus ensured that scientific medicine maintained a particular professional ethos that removed abortion as an acceptable treatment and practice for all physicians regardless of their sex or personal medical philosophies.

This history also shows that even within the medical profession, physicians disagreed on the most persuasive means to establish themselves as experts. The legal and social dimensions of abortion further complicated the boundaries of their expertise as the safety of abortion was no longer the sole determinant of an abortion decision. Gail Kellough's nineteenth-century abortion study in the United States and Canada contends that while relatively safe procedures for carrying out abortions were available, medical professionals rarely administered them. At the same time, public distribution of more "dangerous" abortion methods circulated seemingly unrestricted.[63] In other words, physicians refrained from administering abortions even when medical knowledge aligned with legal decisions on the safety of abortion. They did so because non-medical information about abortion, however misinformed the source, presented abortion as a dangerous operation. Established physicians could consequently threaten the public perception of medicine if they chose to administer abortions even when their patient's case presented as safe and legal. Since misinformation was abound and "illegal" abortions persisted, it appears control over abortion knowledge for the purposes of preventing abortion was not the medical profession's primary concern for criminalizing the procedure. The medical profession also did not explicitly concern itself with safeguarding knowledge for the purpose of making physicians the sole practitioners of abortion, as they themselves refused to administer even safe and legal abortions. Rather, the primary concern appeared to be the control of knowledge production, or in this case, the concealment of any knowledge, regardless of accuracy, that did not conform to the then-dominant professional medical standards and the progress of medical expertise writ large.

Today, we continue to witness the consequences of both the criminalization of abortion and the professionalization of medicine on abortion decisions. As competitors and collaborators, the law and medicine produced a culture of expertise that sustains the paradox in abortion discourse by persistently suspending responsibility of the final abortion decision between legal and medical experts. Herein lies the conundrum: the historical treatments of the law and medicine that have sustained the U.S. abortion debates are both indisputable and indeterminate to the abortion question.[64] Legal and medical expertise are both necessary to legislate, regulate, and act upon abortion rights, but these differential forms of expertise also necessitate a constant reformulation of the abortion problem. Legal and medical experts lay claim to their specialized areas of expertise but may at any time defer to other expert institutions for their requisite knowledge to determine the permissibility of an individual abortion or to alter existing regulations on abortion writ large. No matter the intent, this process almost always elides the expertise of the fecund person, as their abortion decision is suspended until their expert counterparts decide the most viable course of action for each individual. As paradox, the logic of expertise thus has the potential to both expand abortion rights and access and to conceive a rationale for its undoing. This rhetorical paradox continues to animate abortion discourse today as we navigate the complexities of abortion rights and access in a post-*Dobbs* world.

Expertise in Contemporary Abortion Law

On Friday, June 24th, 2022, the U.S. Supreme Court handed down *Dobbs v. Jackson Women's Health Organization* in a 5-1-3 majority decision and determined that the Constitution does not guarantee a federal right to abortion.[65] Without a federal law to regulate abortion, the responsibility of abortion regulation returned to individual state governments. Abortion regulations vary widely from state to state, with each state fluctuating significantly when it

comes to the types of abortions permitted, the timeframes for legal abortions, and even the criminal punishments permitted for abortions performed illegally.[66] When the Court decided *Dobbs* in June 2022, twenty-six states were either certain or likely to ban abortion. Of those twenty-six states, thirteen had trigger laws in place—laws designed to go into effect precisely at the moment *Roe* was overturned.[67] Many of these laws constituted TRAP laws (targeted regulation of abortion provider laws) and specifically worked to dismantle abortion rights and access by targeting abortion clinics and medical providers.[68] After *Dobbs*, some TRAP laws went into immediate effect in states like Kentucky, which made providing or attempting to provide an abortion a 4 Class D felony, and Louisiana, which made providing an abortion a felony with the possibility of 10 years in prison and a fine of $100,000. Other states' TRAP laws such as those in Idaho did not go into effect for at least thirty days after the *Dobbs* decision but issued similar felony punishments and even went as far as to suspend the licenses of healthcare professionals who provided abortions. In this way, *Dobbs* not only deferred to the legal expertise of state officials to regulate abortions within their jurisdictions but also invoked a centuries-old "self-policing" mechanism among medical professionals who are encouraged to regulate their own abortion practices—at times at odds with their medical knowledge—or else forfeit the advantages that medical expertise affords.[69]

This historical paradox bears repeating. A peculiar result of *Dobbs* is that, in returning abortion regulations back to the states, the decision reverted to self-regulatory nineteenth-century abortion practices whereby emerging criminal abortion laws required physicians to weigh the costs of fulfilling their obligations to their patients or fulfilling their duties to the state. Yet, *Dobbs* also seems to deny this past as it exposed abortion as a site so contested that experts can scarcely agree on the scope and meaning of its legal and medical history in the United States.

To elucidate, we may first look to the Court's rationale to legalize abortion on a federal level in 1973. Here, the *Roe* Court grounded abortion in the privacy precedent held in previous Supreme Court cases and argued that the "medical-legal history" of abortion provided the basis for a private right to abortion.[70] Specifically, the Court in *Roe* found the due process clause of the Fourteenth Amendment, which restricts state actions against personal liberties, to be "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[71] In this way, the Court established the Constitution as the mediator of legal expertise in abortion decisions. But fewer than fifty years later, the *Dobbs* decision called into question the central argument in *Roe* and *Casey* that the Constitution confers the right to abortion. Writing for the Court majority, Justice Samuel Alito argued that the decision in *Roe* "must be overruled" because the *Roe* Court was "egregiously wrong" in its recounting of abortion history, which made their constitutional basis for abortion "exceptionally weak."[72] According to Alito's reasoning, subsequent abortion cases like *Casey* perpetuated these errors when it failed to offer an analysis of *Roe*'s "faulty" historical rationale and reasoning for the decision to support a constitutional right to abortion twenty years earlier.[73] As a result, the *Dobbs* Court argued that no constitutional right to abortion exists and that both *Roe* and *Casey* were wrongly decided.

Certainly, the politics of the *Roe, Casey*, and *Dobbs* Courts are decidedly different. But to read such a reversal of a monumental opinion as merely a result of the changing makeup of the Court overlooks the ways in which the flexibility of judicial interpretation—what we may consider to be an employment of legal expertise—is fundamental to the construction and maintenance of abortion law in the United States. Importantly, as mentioned before, legal expertise is in some sense what legal experts say and do, and the context in which they say and do it. Yet, sometimes not even legal experts can agree on their own interpretative sayings and

doings.[74] The *Dobbs* Court demonstrated this when Justice Thomas suggested that future cases "should reconsider all of this Court's substantive due process precedents," like those in "*Griswold*, *Lawrence*, and *Obergefell*."[75] In doing so, Thomas seemingly ignored the majority opinion's reassurance that *Dobbs* only pertains to abortion and does not implicate other privacy-based rights.[76] Such incongruities amongst Justices position legal expertise as a vague, self-deferential apparatus subject to its own internal logic and reasoning. In some sense, this framing of the law and its processes may help explain how "Constitutional law changes, even though the Constitution remains the same."[77] At its core, an ambiguity of expertise exists in U.S. abortion law that allows the Court to at once interpret the Constitution to determine a constitutional right to abortion in 1973 and deploy the same logic and processes to reverse this right fewer than fifty years later.

For these reasons, a return to *Roe and Casey* is essential to understanding the rhetorical function of legal, medical, and personal expertise that the Court ultimately deploys in *Dobbs*. The legal language in *Roe* authorizes a physician to grant or deny an abortion on the basis of critical terms such as viability, health, and life.[78] Yet as Dr. Jennifer Gunter aptly acknowledges, these terms increasingly present a conundrum for all persons involved. Despite their various meanings and uses, these terms are critical to *Roe* and the boundaries of legal abortion. They determine the points at which a "woman" may invoke their personal expertise and decide to have an abortion, and when a "physician" or the "State" may exercise their medical or legal expertise to assist with, or prevent, abortion.[79] But conceptual ambiguity over these terms in *Roe* was so prevalent that neither doctors trained to administer abortions nor legislators expected to codify abortion law could determine their meanings.[80] Crucially, the initial framework in *Roe* established the conceptions of expertise that *Casey* would later simultaneously constrict and

expand. While the *Casey* Court labored to redefine these ambiguous boundaries and terms with the "unique" disposition of the pregnant person in mind*, Dobbs* ruled them outright "unworkable" and drew upon the statewide differences on abortion to justify returning the abortion decision back to the states.[81] Reading *Roe, Casey,* and *Dobbs* as a triangulation of legal, medical, and personal expertise ultimately provides us better insight as rhetorical scholars and abortion advocates into the complexities of the abortion problem.

Tracing Expertise: A Critical Reading

This project examines how U.S. abortion practices are rhetorically figured as the domain of experts. To better understand the specific function of legal, medical, and personal expertise in abortion law and practice, this study surveys scholarship in rhetoric alongside scholarship in the fields of legal studies, health and medicine (RHM), and feminist studies. I first briefly define rhetoric and then unpack the relationship among the study of rhetoric and law, rhetoric and medicine, and rhetoric and feminism. I then operationalize my conceptions of legal, medical, and personal expertise that will guide my analysis of *Roe*, *Casey*, and *Dobbs* as these three separate Courts grappled uniquely with the abortion problem.

First, this project depends upon a range of historic and contemporary definitions of rhetoric that capture the complexity of abortion precedent and rights. In part, this project relies on the Aristotelian definition of rhetoric as a field primarily concerned with the means of persuasion available to particular rhetors—experts—for specific purposes—restricting or expanding abortion rights and access.[82] As legal precedents, Supreme Court decisions offer instrumental notions of rhetorical effect presumed in Aristotle's definition. Instrumentally, such legal decisions impact abortion practices immediately as physicians and state legislatures are tasked with carrying out SCOTUS decisions in their aftermath.[83] But rhetoric functions not only

instrumentally in its own time but also constitutively across time.[84] For SCOTUS decisions, this means that such decisions are not only made meaning of within their contemporary time period but are also circulated and interpreted within historical, cultural, and ideological commitments that shift over time.[85] This framing goes beyond an Aristotelian notion of effect. Constitutively, the force of Supreme Court decisions is visible in future case law as courts and judges interpret the meanings of such cases in ways that reinforce or challenge the meaning of previous legal precedents. The meanings of these decisions thus shift over time with advances in medicine, changes in public sentiment, perceptions of legal authority, and the ebbs and flows of rights rhetoric. Such constitutive impact is also shown in changes to political and public opinion across time. Views among journalists and political pundits contribute to the meaning-making of case law as they debate its interpretations and impact for decades following a Supreme Court decision. And supporters and opponents of abortion decisions likewise make meaning of such decisions that lead some to galvanize support for abortion rights and others to mount protests to influence future political actions against abortion.

Yet, these texts (case law) are not presented as whole or complete and, as suggested above, are open to interpretation.[86] Exposing these different interpretations may help us to make meaning of our world and surroundings as abortion rights and access continue to shift.[87] In his influential work on "fragmentation," Michael Calvin McGee argued that academic and historical developments in American culture have strengthened the role of "interpretation" in political and public contexts.[88] As fragments, texts—and their contexts—are not only open to interpretation but must be made sense of, changed, and established through the process of interpretation.[89] To understand Supreme Court decisions as textual fragments reinforces the important role of judicial interpretation in such decisions and the precedents they establish. Such decisions are always

contested, always fluid, and thus always open to challenge and reinterpretation by future courts. To analyze the history of abortion law in the United States as a fragmented process of interpretation also helps explain how shifts in perceptions and employments of expertise have destabilized the grounds of legal abortion. This suggests that the Supreme Court imbues cases with specific meanings and interpretations as they construct them, deliver them, and reinterpret them within the domain of legal expertise.

Others outside the purview of legal expertise, such as medical professionals or fecund persons, also impact the interpretation of legal texts. Such experts read, critique, and interpret these cases with their own expertise and knowledge to make their own meanings. In doing so, different experts may also construct their own texts by processing and piecing together different interpretations and shifts in abortion rights and access across time. In the process, multiple meanings about the same text or case law may circulate. This is because, as Leah Ceccarelli reminds us, texts have the potential to encompass multiple meanings contingent on the actor who enacts the "polysemous reading."[90] In the case of abortion law, scholars contend that there exists "many interpretations of *Roe,*" and that there may be multiple "meaning[s]" attached to *Roe* depending on the "movement" that invokes *Roe* for their political goals.[91] When complex texts with multiple potential meanings enter public discourse, they also invite critique.[92] Subject to critique, what is persuasive in one instance by one "audience, rhetor, or critic" may not hold persuasive power at another time, by another person, or for another audience.[93] Such a focus acknowledges that the texts which experts construct are also subject to criticism from other experts. It also acknowledges that multiple experts across time and from potentially differential areas of expertise may play a role in constructing a text and contributing to its polysemous readings.

Second, with this approach to rhetoric, we can begin to see how rhetoric and the law share an important commitment to interpretation that limits legal expertise in abortion law. While rhetoricians may occupy themselves with interpretations of rhetorical texts, legal actors involve themselves with interpretations of legal texts. As legal scholar James Boyd White reminds us, the law is nothing if not interpretative, as the law is but "one set of those means of persuasion" that require the "art of rhetoric to discover."[94] The restrictions of the law's interpretative function and the law's objects of interpretation, however, are debatable. Whereas some legal actors or critics prefer to focus on the results of a legal decision, others emphasize the opinion, its precedent, or the expertise of the actors involved. Here, White points readers to the necessity of "authoritative texts" when analyzing decisions of the Court.[95] These authoritative texts govern judicial actors and determine the "proper scope" and use of their powers. They may be temporally expansive, located somewhere in the "past" or perhaps more "remote or recent"; or, they may differ vastly in structure and function, encompassing the "statute, the opinion, the contract, the constitution, [or] the regulation."[96] That is, texts are the stuff of legal argument.

To this list, we might also add history, not only the history of a text as understood in a specific moment in time, but also the historical significance of that text across time. This is what rhetorical scholar John Angus Campbell refers to as the "interlocking contexts" between "complex texts."[97] Such a framing helps further elucidate legal scholar Mary Ziegler's claim that *Roe* "takes on a range of meanings that reflect differences over national values."[98] Reading *Casey* and *Dobbs* as a response to *Roe* may also allow us to make meaning of the different interpretations of such important abortion texts. Thus, I analyze the Supreme Court's interpretation of constitutional rights to privacy and its reliance on medical knowledge to expand federal abortion rights in *Roe*, to constrict federal abortion rights in *Casey*, and finally to

eliminate federal abortion rights in *Dobbs*. To do so, I look to not only the texts—previous case law or precedent the Court incorporates—but also the contexts these texts activate, or repress, and the meanings that emerge from their circulation.

Importantly, the interpretative power of the rhetoric of law hinges on its ability to be persuasive to universal and particular audiences. To craft an opinion, or a dissent, courts draw from and interpret legal precedent and the social milieu of both their historical and contemporary time periods. In this way, they expose the "situated nature of jurisprudence."[99] But courts are also bound to the Constitution and so any legal decisions, even those that legal experts make through partial judgments, must be concealed under the myth of neutrality to both appear universal and to persuade particular audiences.[100] While certain arguments may be more persuasive to an audience of legal experts, the rhetoric of the law demonstrates that legal actors do not operate in a vacuum and must instead contend with other expert forces and contingencies.[101] In contexts of abortion, legal expertise and the rule of law are in some ways constricted and expanded by the expertise of medical and personal experts.

The rhetoric of law is situated in a reliance on expertise because law is the recourse that citizens appeal to when they encounter injustices that everyday practices of speech cannot remedy alone. The rhetoric of law appears as an answer to a diversity of ails because increasing a person's rights protected under the law has at least the potential to accentuate differences among citizens, thus highlighting their "ascriptive" situatedness.[102] But the law has a history of subsuming "difference" and "lived experience" in an effort to provide universal, objective claims about the world.[103] The courts' dedication to universality in abortion law often elides the particular needs and experiences of fecund persons. Critiquing these commitments, scholar Judith A. Baer reminds us that *Roe* "offers no protection to the woman who cannot pay for an

abortion, cannot find a qualified professional to perform it, [or] needed help in preventing the pregnancy in the first place."[104] Unpacking the tensions between rhetoric and legal studies elucidates the rhetorical paradox at play in the highest offices of the land. The rhetorical paradox in this project demonstrates that legal expertise is limited in its capacity to navigate the differential experiences of fecund persons and expand their abortion rights.

Third, this project draws from rhetorical scholarship in the field of health and medicine to parse the limitations that medical framings confer on abortion. The rich and emerging research in the rhetoric of health and medicine (RHM) helps ground this project as it addresses the role of expertise in health contexts specifically. RHM is a growing field that attracts and calls upon scholars from multiple disciplines including communication, rhetoric, English, and linguistics, to think both analytically and theoretically about what it means to be concerned with health and to act on health concerns.[105] Notably, this area of research is critical of how conceptions of health intersect with medical expertise to advance particular views or agendas that affect patients' and community wellbeing.[106] In abortion contexts, both anti-abortion groups and medical professionals have deployed medical expertise to restrict abortion by linking abortion to increased risks of breast cancer.[107] Such efforts have also catapulted arguments about "postabortion syndrome" (PAS), a condition ostensibly like post-traumatic stress disorder (PTSD), that results from undergoing abortion procedures. While such arguments appear to concern fecund persons' health, research from medical professionals shows that little evidence exists to support a correlation between abortion and breast cancer, or abortion and declining mental health.[108] Yet, these attempts to wield medical expertise to constrict abortion access expose the limitations of medical expertise on expanding abortion rights.

In contexts of abortion law, rhetorical scholars have demonstrated how abortion opponents use medical expertise to advocate for stricter regulations in the form of increased waiting periods, mandated multiple ultrasounds, and amplified hospital specifications.[109] In the wake of these challenges, abortion advocates must continuously pivot to both debunk the misuse of medical knowledge and repurpose medical expertise to support abortion rights and access. For these reasons, the work of RHM is particularly useful as we continue to ponder the precarious state of abortion today. In these times, RHM scholars remind us that "what we say to each other, especially at moments of uncertainty, is enormously important."[110] This is especially true in health contexts where not only is the legality of abortion in question, but physicians tasked with interpreting this legality are increasingly restricted in their ability to act on their deferred expertise.[111] Yet, we cannot forget that while the health of fecund persons rests upon whether physicians enact, or fail to enact, their abortion knowledge, it also rests on whether physicians are able to act upon their knowledge. Grounded in RHM scholarship, this project illuminates the rhetorical paradox undergirding medical expertise: the idea that medical expertise is both called upon and constrained by its deference to the law and legal expertise.

Lastly, this project draws from both rhetorical and feminist scholarship to expose the historical limitations of personal expertise in abortion contexts. As E. Johanna Hartelius shows, the history of medical expertise in particular demonstrates a tension between treatments of expertise as a "source of power" or "knowledge" possession and expertise as an embodied and experience-driven practice.[112] Feminist approaches to the study of health and medicine have long grappled with this tension between power and knowledge, empiricism and lived experience. Feminist scholars Evelyn Fox Keller and Helen E. Longino critique the dominant view of the sciences as an objective enterprise invested in the discovery of "value-neutral" scientific

knowledge through experimental processes.[113] This approach, like the scientific approach to medicine that gained prominence in the mid-nineteenth century, relied heavily on detailed observation and reasoning to conclude general claims and knowledge about the world. Keller and Longino argue that the work of 1960's philosophers of science, which showed the need for context-dependent and "theory-laden" approaches to scientific observation, paved the way for the advent of a feminist scientific model.[114] A feminist approach to science challenges the historic exclusion of women and marginalized persons from traditional scientific paradigms and instead incorporates their lived experiences into both scientific studies and studies of science.[115]

But contemporary feminist scholarship demonstrates that lived experience as a form of expertise has its limitations. Today, personal expertise in contexts of reproduction and abortion is frequently tied to the language of "choice." In 1984, Rosalind Petchesky addressed the issue of abortion as a tenuous marriage between choice and experience. She argues that "the idea of a 'woman's right to choose' is vulnerable to political manipulation" that cannot be divorced from the social and material conditions of the "human experience" that are in a constant, cultural flux.[116] In 1990, Celeste M. Condit conceptualized the term choice as an "ideographic representation of woman's needs," that was also distinctly "indigenous to women's experiences."[117] In 2003, Barbara Pickering took up the issue of choice and experience within her analysis of pro-choice and pro-life films, ultimately arguing for the value of personal testimony given its ability to "empower women to bring their private experiences into the realm of public discourse."[118] In 2013, Carly S. Woods studied the rhetoric of choice deployed in direct-to-consumer advertisements that encouraged women to take oral contraceptives to limit their menstrual cycles, thus denoting a negative valence around menstruation. In this way, Woods argues that the deployment of choice assumes individual agency—the right to regulate

one's own bodily functions—even as agency is co-opted to reinforce negative gender stereotypes—menstruation is portrayed as a bodily function that necessitates concealment.[119]

Feminist analyses of the limitations of lived experience and choice undergird the rhetorical paradox of expertise in abortion law. Wendy Brown's definition of paradox as that which has the potential to both hinder and expand freedoms for historically underprivileged groups is especially useful for this study of abortion. Specifically, Brown claims that issues under the purview of women's rights have the ability to subordinate women even as they seek to elevate their status in society. This is because the more a right pertains to women only, the more likely the conditions of that right will "encode a definition of women upon our subordination in the transhistorical discourse of liberal jurisprudence."[120] In abortion contexts, the right to abortion is grounded in a notion of privacy. In this way, the personal expertise of fecund persons is at once expanded to include the private right to abortion and to increase their individual agency. However, this right to privacy is not absolute and fecund persons are not unrestricted in their abortion choices, regardless of their lived experience. This is because legal and medical forms of expertise draw upon historically entrenched notions of femininity and womanhood to supersede a fecund person's personal expertise to govern their own bodies. Thus, while expertise may promise autonomy to the individual, State and medical interests in a fecund person's health usher in other forms of expertise that determine its operative boundaries.[121] Such restrictions include mandatory waiting periods, informed consent requirements, and regulations on types of abortion procedures available from state-to-state.[122]

The above scholarship demonstrates that the paradox of expertise triangulates legal, medical, and personal expertise in abortion law. Yet, within this triangulation, legal and medical interests to govern abortion supersede fecund persons rights to access abortion in impactful

ways. To clarify this rhetorical paradox of expertise, a more critical reading of expertise is necessary to demonstrate how different forms of expertise influence the meaning of abortion law as fecund rights to abortion shift over time. By elaborating this project's definition of expertise, we may better understand how rhetoric can help us not only make meaning of the law, medicine, or feminism, but also the triangulation of legal, medical, and personal expertise in the abortion cases.

Making Sense of Expertise: Some Useful Definitions

To further unpack the triangulation of expertise, I offer three senses to understand how legal expertise, medical expertise, and personal expertise function in abortion cases, beginning with legal expertise. In the first sense, expertise is obtained through the acquisition of *knowledge* and the validation by others of that knowledge possession. Here, expertise may be understood as the proficiency in a subject matter and the ability of the subject matter expert to recall and apply that knowledge in particular circumstances.[123] In this sense, legal expertise is rhetorically defined by and negotiated through its relationship to the law. To recognize legal expertise in this way is to recognize and validate the authority the Constitution grants the courts to make legal decisions based on their knowledge and experience with the law. But legal expertise is also *how* legal actors and the courts make meaning of their own decisions to solve legal problems. In this second sense, legal expertise is *procedural*: it is the process by which actors of the law make their decisions by employing tools of the trade such as judicial interpretation or judicial review (as established in *Marbury v. Madison*) and invoking history and precedent to legitimize their choices.[124] The decision that emerges from this process has the potential to substantiate both senses of legal expertise. A sound and consistent decision from the court may bolster the public's belief in the courts' authority as subject matter experts in the first sense, and it may also validate

the courts' credibility to wield their expertise and resolve future legal incongruities in the second sense.

Examining the relationship between expertise as knowledge and expertise as procedure helps support the third sense of expertise: expertise as *deferential*. As Hartelius pointedly suggests, the deferential function of expertise is the view that "experts refer to their relationships with other experts as a rhetorical strategy" to "demonstrate to the public that their expertise is linked to other forms of expertise for which the public has high regard."[125] As such, deferential expertise challenges the epistemic definition of expertise—the notion that expertise is simply knowledge that an expert in one field possesses—and instead posits expertise as an overlapping and complex web of different forms of expertise that various experts recognize and negotiate.[126] To position legal expertise as deferential explains how the boundaries of the law are made flexible when the "Constitution is silent or unclear," or when "constitutional rights conflict," and an additional "procedure" is necessary to craft a fitting decision.[127] In these instances, the courts may defer to precedent and the decisions of their former colleagues to offer a judicial opinion; or, they may even deny to hear a case in the first place if they believe the states and their citizens are better suited to answer the question at hand and to govern their own decisions.

Deference also helps explain how the boundaries of legal expertise shift to encompass subject matters and procedures beyond the purview of the law. In this sense, legal expertise may pertain not only to knowledge or procedures of the law *per se*, but also to the tools and contexts of other bodies of expertise that the law and its actors employ to substantiate their own legal knowledge and procedures. But legal expertise is not merely demonstrated through an expert's proficiency in legal know-how or through their consistency in legal interpretation and an equal application of the law. Rather, legal expertise is also changed, challenged, and confirmed

through other subject matter experts and their respective domains of expertise. Notably, the legal expertise of the U.S. Supreme Court is sustained by other legal experts in lower courts and state legislatures. When these institutions cannot agree on the constitutionality of state laws, the Supreme Court must intervene. The Supreme Court is then tasked with employing judicial review to determine if such laws violate the Constitution. To do so, the Court not only interprets the Constitution but also defers to other experts in fields germane to the case. When deferential, legal expertise in abortion law most notably appeals to the reliant interests of medical and personal expertise.

Each of these three senses of expertise—expertise as knowledge possession, expertise as procedure, and expertise as deferential—structure the scope and meaning of not only legal expertise but also medical and personal expertise in the abortion debates as well. Medical expertise as knowledge possession underscores the importance of earning appropriate credentials and degrees to become a practicing physician. It also explains how many of us would still prefer a doctor to perform our medical operations over a "neighbor [who] can view videos of surgery online."[128] To be deemed a knowledge-based expert, we expect physicians to have gone through extensive academic and clinical training in a specific subject area. This is because a specific form of expertise is the "product of specialized training" that "cannot be picked up casually" or as the result of "some other form of learning," unrelated to the specific subject.[129] As procedure, medical expertise is demonstrated through competency and the ability for physicians to administer their hard-earned medical knowledge to solve patient problems.[130] How well physicians administer their knowledge to resolve issues, however, is subject to the scrutiny and approval from "relevant others."[131] These "relevant others" include both patients as personal experts who must validate the care they receive from physicians, and legislators as legal experts

who must regulate physicians' practices to ensure they conform to contemporary legal standards of health and medicine.

Because personal and legal experts legitimate the expertise of physicians, medical expertise must also rely in part on a deference to other authorities. Medical expertise in abortion contexts is sustained through a constant deliberation of the most up-to-date medical knowledge and practices of abortion. Such deliberation involves the distillation of these knowledges and practices from doctors to patients, and doctors to legislators. But to act on their knowledge, physicians must continually defer to abortion law in the state in which they practice and medical literature and technologies that stipulate the safety of abortion procedures. They also must defer to and acknowledge their patients' own medical histories, experiences, and desires when advising on abortion options. Positioning medical expertise as constitutive of and produced by deferential forms of expertise helps elucidate how physicians are bound by the law and its regulation of abortion practices. It also explicates how individuals confront societal deference to medical experts as they employ their personal expertise as patients to request an abortion and advocate for their physical, emotional, or even financial health.

Like its contingent forms, personal expertise as knowledge, procedure, and deference is both constrained by and made manifest by external forms of expertise. In this sense, personal expertise is perhaps the most difficult to bound. Fecund persons must defer to and rely on medical professionals to both maintain a healthy pregnancy to term and to administer abortions for unwanted or potentially harmful pregnancies. In this way, fecund persons recognize that they are limited in their capacity to enact subject matter and procedural expertise in abortion contexts. They also increasingly recognize that their recourse to abortion is not only determined by medical knowledge and processes but is also subject to the regulations of changing state and

federal laws and legal treatments of abortion. Certainly, if fecund persons did not have a need for abortions, then legal and medical experts would not have a reason to draw upon their respective knowledge or to put their abortion knowledge into practice. But as it goes, fecund persons do in fact seek and require abortions for various reasons and as such, they must defer to medical experts, who defer at least in part to legal experts, to enable their own individual expertise and to enact their bodily autonomy.

Of course, the personal expertise of fecund persons is sometimes refuted when their abortions are denied. In these cases, the law may not permit an abortion at their stage of pregnancy, or medical practices may not deem their health at risk if they continued the pregnancy to term. But to identify and recognize personal expertise only when abortions are permitted and granted presents a rather hopeless situation for fecund persons who face increasing restrictions on abortion access.[132] It also dismisses the specific ways in which personal expertise is always already bound by the rhetorical contingencies of medical and legal expertise. No matter how well a fecund person knows their body, or how well they advocate for their personal health, they must ultimately defer to medical and legal experts to acquire an abortion. As legal and medical knowledge and procedures shift, the courts and physicians must renegotiate the scope and meaning of their respective expertise to legitimize their place in the abortion debates. And at the center of these negotiations is the fecund person whose own autonomy invariably shifts with the legitimacy of the courts and the authority of physicians.

The three senses of expertise as knowledge, procedure, and deference both elucidate and trouble the paradox at play in abortion discourse. States and physicians may employ these senses of legal and medical expertise to enable or constrain abortion rights for fecund persons. In doing so, legal and medical experts also reinforce their domain over abortion decisions, which has the

effect of superseding fecund persons' rights to abortion even in instances where the law and medicine seek to protect or expand such rights. Still, possessing the knowledge about legal regulations, medical practices, or private conditions on abortion does not guarantee experts will be able to put their expertise to practice. Likewise, having the authority to act on this knowledge also does not guarantee the decisions experts make will be validated or legitimated by other experts in their respective fields or by outside expert institutions. As such, there are always limitations to legal, medical, and personal expertise. Oftentimes, judges, doctors, and everyday people are met with challenges that require their respective expertise to determine the future course of action. Sometimes, these challenges require experts to make decisions in less-than-ideal circumstances as they may not have the adequate knowledge, procedural access, or support systems to inform their decisions. Yet, decisions are still made within these contexts with the goal of proposing an adequate solution that resolves the present problem.

Outline of Chapters

As this project demonstrates, the members of the Supreme Court labored to provide solutions that oftentimes presented more problems than answers for legal, medical, and personal experts who were in turn challenged with navigating the ever-changing terrain of abortion rights. In each of the proceeding chapters, I offer a critical reading of three landmark U.S. abortion cases: *Roe, Casey,* and *Dobbs.* In each of these cases, the Supreme Court was tasked with deciding the constitutionality of different state abortion regulations in Texas, Pennsylvania, and Mississippi, respectively. To answer these questions, the Court wielded their legal expertise aligned with the then-contemporary medical expertise of physicians to resolve the abortion problem. Oftentimes, the legal-medical resolution the Court offered limited the scope and meaning of fecund persons' personal expertise within abortion decisions even when it labored to

expand abortion rights. Thus, my analysis takes as a starting point the "alliance between medicine and the state" to assert that in all three cases, legal and medical expertise from the courts and the medical sphere overshadowed any claims and enactments of personal expertise from fecund persons.[133]

As illustrated above, nineteenth-century abortion history demonstrated a deference between law and medicine. While this deference is altered in the opinions and decisions in *Roe, Casey,* and *Dobbs*, legal-medical deference remains the foundation for abortion law in the United States. As state legislatures responded to the decision in *Roe,* federal treatments of abortion shifted. This shift altered the relationship between law and medicine and set the groundwork for future abortion regulations in *Casey* and then *Dobbs.* To make meaning of these shifts, I uncover how the deference between law and medicine changed alongside varying legal and medical conceptions of expertise. In each of these three cases, the triangulation of expertise hinges on the Court's interpretations of expertise as *knowledge* and *procedure*, and the degree to which the Court *defers* its legal expertise to make way for physicians' medical expertise. Within these shifting grounds, a paradox emerges as the deference between legal and medical expertise remains intact while the personal expertise of fecund persons is elided or subsumed by its contingent forms.

In Chapter One, "A Return to *Roe*: Reading Triangulations of Expertise," I examine the landmark abortion case *Roe v. Wade* (1973) and the rhetorical means by which the Supreme Court appeals to differential forms of expertise to grant fecund persons a federal right to abortion. I first recount the political and legal exigencies that brought the *Roe* case to the Supreme Court, paying particular attention to the problems the Court was tasked with resolving in its decision and the problems it did, or did not, address. To resolve the abortion problem in

Roe, the Court employed three competing yet overlapping interpretations of expertise: legal, medical, and personal expertise. I read this triangulation of expertise through my analysis of the *Roe* opinion and decision, the Harry A. Blackmun papers, and the correspondence among the Supreme Court Justices and their clerks who deliberated and wrote the *Roe* case. At the center of its decision, the Court relied on the historical deference between medicine and law to conceive of the trimester framework and confer abortion rights to fecund persons.[134] In so doing, the Court also employed knowledge-based assumptions about, and procedural practices of, legal, medical, and personal expertise. As a result, the Court complicated the legal principles of dicta and holding—principles that determine how future courts interpret the boundaries of law. These complications ultimately underline the paradox of expertise in abortion law: the *Roe* Court's employments of expertise solidify abortion as the province of legal and medical authority even as they seemingly expand abortion rights for fecund persons. This paradox eventually laid the groundwork for *Roe*'s undoing in the years after 1973.

In Chapter Two, "A Second Opinion: The *Casey* Court Weighs In," I examine how the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) responded to the failure of *Roe* and the inability of expertise to regulate abortion rights and access. To reinterpret the boundaries of legal abortion, the *Casey* Court jettisoned *Roe*'s trimester framework and offered the "undue burden standard" in its place. I argue that this shift amplifies both legal and medical expertise in abortion law at the expense of personal expertise once more. To unpack this claim, I first analyze the treatments of expertise in the critical abortion cases and amendments before it: *Planned Parenthood of Central Missouri v. Danforth* (1976)*,* the Hyde Amendment (1976 through 1980), *City of Akron v. Akron Center for Reproductive Health* (1983), *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), and

Webster v. Reproductive Health Services (1989). Each of these legal examples helps contextualize the tensions around the abortion concerns that the *Roe* Court either deliberately, or unknowingly, left ambiguous for future courts to determine. Then, I turn to the opinion and decision in *Casey* to show how fecund persons' rights were at once expanded and restricted by the Court's reinterpretation of the relationship between law and medicine in its "undue burden standard."[135]

Legal scholars debate whether the Court's adoption of the undue burden standard, over the trimester framework, signaled a change in the Court's employment of legal expertise from that of strict scrutiny to intermediate scrutiny or rational basis review.[136] These debates confirm, however, that *Casey* favored applying a less rigorous standard of inquiry to abortion regulations, and thus relied on a different degree of judicial interpretation to rule abortion legislation unconstitutional.[137] This shift in legal interpretation of abortion regulations also altered the scope of medical expertise in abortion decisions. With *Casey*, physicians were often tasked with weighing the benefits and costs to fecund persons and the state to determine what constituted an undue *medical* burden, and therefore what constituted a legal abortion. In this way, *Casey* maintains the triangulation of expertise in abortion law even as it restructures the deferential association between law and medicine. This shift in deference ultimately highlights the paradox of expertise in *Casey*: the Court wields medical expertise through knowledge-based-procedures to reinterpret the decision in *Roe* and further chip away at fecund persons' rights to abortion all while maintaining ambiguous legal and medical boundaries for regulating abortion. This ambiguity presented opportunities for future courts to undo the foundations of both *Roe* and *Casey* in the decades after 1992.

In Chapter Three, "Reinterpreting Abortion Rights in *Dobbs*," I examine the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* (2022) to explicate how the Court employs and conceptualizes expertise to eliminate the federal right to abortion. The decision in *Dobbs* (2022) not only overturned the federal right to abortion but also overruled fifty years of precedent in *Roe* (1973) and *Casey* (1992). I unpack this shift in abortion rights by examining the majority opinion and decision, as well as concurring opinions from the justices on the *Dobbs* Court. In doing so, I uncover how the Court justified using its legal expertise to dismiss medical knowledge on abortion and fecund persons' personal rights. Here, the Court reinterpreted legal and medical treatments of abortion in the centuries prior to *Roe* and after *Casey* and argued that *Roe* was "egregiously wrong" in its recounting of abortion history and therefore unconstitutional.[138] The Court's interpretations draw upon knowledge-based and procedural practices about abortion that problematize the deference between law and medicine to reconfigure the triangulation of expertise once more. Ultimately, the decision in *Dobbs* thrust fecund persons' abortion rights into a state of legal and medical uncertainty. These uncertainties have raised legal, academic, and public criticisms of the decision, one of the most salient being that the *Dobbs* Court shirked expectations of legal expertise by dismissing the doctrine of *stare decisis* and overruling precedent in *Roe* and *Casey.*[139] This criticism exposes the paradox of expertise in *Dobbs:* the Court operates with an internal logic that allows the judiciary to dismiss its own established legal principles to restrict abortion rights for fecund persons yet again. The remainder of this chapter explores the assumptions of expertise embedded in the criticism that the Court reinterpreted *stare decisis* to show how our historical and contemporary commitments to legal expertise have eclipsed any potential for medical and personal expertise to advance abortion politics.

In the final chapter, "The Promise of Expertise," I synthesize and build upon the preceding chapters to examine the implications of thinking about and acting upon abortion as an expert's domain. My study shows that the Court in *Roe, Casey*, and *Dobbs* employed differential notions of expertise to confer, constrict, and potentially eliminate abortion rights. At the time of this writing, less than a year has passed since the Supreme Court handed down its monumental decision in *Dobbs.* Yet, state officials, medical professionals, and fecund persons have already felt the repercussions of this decision on their capacity to enact their legal, medical, and personal expertise. In the wake of *Dobbs*, state legislatures attempt to negotiate new political territories, medical physicians must adapt to frequently changing abortion regulations, and fecund persons endeavor to advocate for autonomy over their health decisions. Thus, this chapter examines the terrain of abortion politics in the immediate aftermath of *Dobbs* and investigates how the rhetorical paradox of expertise continues to shape contemporary legislation and public discourse on abortion. In doing so, this chapter also underlines important areas for future research on abortion and the ability of expertise to both conceptualize and negotiate abortion rights and access.

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[1] Nan D. Hunter, "Justice Blackmun, Abortion, and the Myth of Medical Independence," *Brooklyn Law Review*, 72 (2006): 196.

[2] At the time, Kentucky only had two operative clinics offering abortion services in the entire state. Maria Kramer, "Kentucky Passes Legislation Banning Abortion After 15 Weeks," *The New York Times*, March 30, 2022, https://www.nytimes.com/2022/03/30/us/kentucky-abortion-legislation-passed.html.

[3] Following in the footsteps of rhetorician Allison L. Rowland, I adopt the term "fecund persons" to refer to anyone that is potentially fertile and has the potential to bear children. Despite the awkwardness that terms like "fecund person," "persons with uteri," and "people that can become pregnant" may present when writing, I find use of these terms important for capturing the variety of gender identities that can experience pregnancy and its effects, even and especially in time periods when these diverse gender identities were not accepted or recognized. I continue to use the term "woman/women" when citing others' work directly or when speaking about a well-researched historical group such as "women physicians" to honor the work of previous scholars and only shift to "fecund persons" in the same breath to analyze the potential gaps or shortcomings of that work. For an example of the way "fecund persons" has been used in rhetorical scholarship, please see Allison L. Rowland, *Zoetropes and the Politics of Humanhood* (Columbus: The Ohio State University Press, 2020).

[4] See Jia Tolentino, "Another Risk in Overturning *Roe*," *The New Yorker,* February 28, 2022, https://www.newyorker.com/magazine/2022/02/28/another-risk-in-overturning-roe-v-wade-abortion; Adeel Hassan, "What to Know About the Mississippi Abortion Law Challenging *Roe v. Wade*," *The New York Times*, December 1,

2021, https://www.nytimes.com/article/mississippi-abortion-law.html; Mary Ziegler, "We May End Up Living in Three Americas if *Roe v. Wade* is Decimated," *The New York Times*, February 17, 2022, https://www.nytimes.com/2022/02/17/opinion/abortion-florida-15-week-ban.html; Margot Sanger-Katz, "If *Roe* is Reversed, by the Numbers," *The New York Times,* December 14, 2021, https://www.nytimes.com/interactive/2021/12/14/upshot/abortion-roe-wade-numbers.html; and Adam Liptak, "With *Roe* at Risk, Justices Explore a New Way to Question Precedents," *The New York Times*, December 13, 2021, https://www.nytimes.com/2021/12/13/us/politics/supreme-court-roe-v-wade-precedent.html.

[5] Guttmacher Institute, "State Bans on Abortion Throughout Pregnancy," guttmacher.org, April 14, 2022. https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

[6] Ibid.

[7] See *Roe v. Wade*, 410 U.S. 113, at160 for the Court's marking of viability at 28 weeks and Tolentino, "Another Risk in Overturning *Roe*," for more information on how Texas SB8 challenges the Court's ruling on viability.

[8] Guttmacher Institute, "State Bans on Abortion Throughout Pregnancy," guttmacher.org, March 1, 2023. https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

[9] Ibid.

[10] I draw primarily from Wendy Brown's definition of paradox as that which has the potential to both hinder and expand freedoms for historically underprivileged groups. Brown demonstrates that many issues that historically fall under the purview of women's rights have the paradoxical effect of subordinating the very groups they aim to elevate, even as these rights and affordances seemingly expand their capacity as citizens. This is because the more a right pertains to women only, the more likely the conditions of that right will "encode a definition of women upon our subordination in the transhistorical discourse of liberal jurisprudence." The opposite also negatively affects women. The more "gender-neutral" a right, the more likely it is that the law will ignore issues or concerns unique to women or fecund persons. This ensures that such universal rights continue to "privilege men and eclipse the needs of women as subordinates." See "Suffering Rights as Paradoxes," *Constellations* 7, no. 2 (2000): 231. This framing helps support my use and definition of paradox in abortion contexts specifically. Abortion is a procedure whose access, or lack thereof, uniquely affects fecund persons. But the *Roe* Court justified expanding this right by employing stereotypes of femininity and womanhood that ultimately deemphasized fecund persons' status and role in the abortion decision. Furthermore, the Court chose to ground abortion rights in the due process clause of the Fourteenth Amendment, therefore enshrining abortion rights in a sense of equality and universal protection under the law. This framing has a two-fold effect. First, the due process clause of the Fourteenth Amendment, rather than a sex-based equality amendment, fails to account for the specific and unique concerns abortion poses for fecund persons. (For more insight into legal arguments about abortion rights and sex-based equality arguments, see Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade," *North Carolina Law Review* 63, no. 2, (1985): 375-386. Second, grounding abortion rights within universal liberties and privacy concerns of the Fourteenth Amendment elides the relationship between law and medicine integral to the abortion debates. This elision allows legal and medical expertise to seemingly act as an advocate of fecund persons' rights, even when such expertise is actually used to maintain fecund persons' subordinate position.

[11] Ali Rogin and Andrew Corkery, "How doctors are reacting to the decision to overturn Roe v. Wade," pbs.org, June 26, 2022. https://www.pbs.org/newshour/show/how-doctors-are-reacting-to-the-decision-to-overturn-roe-v-wade.

[12] *Roe v. Wade*, 410 U.S. 113, at 117.

[13] Up to the end of the first trimester, the abortion decision is "left to the medical judgment of the pregnant woman's attending physician." From this point through the end of the second trimester, the state may "regulate the abortion procedure in ways that are reasonably related to maternal health." At the point of viability, the state may both "regulate, and even proscribe, abortion except where necessary, in appropriate medical judgement," to protect either fetal life or maternal health. See *Roe v. Wade*, 410 U.S. 113, at 114-115.

[14] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833.

[15] *Roe v. Wade*, 410 U.S. 113, at 166. Whether the *Casey* Court rejected or "displaced" the trimester framework remains a topic of debate among legal scholars, see Michael Dorf, "Symposium: Abortion is still a fundamental right," scotusblog.com, January 4, 2016. https://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right/. However, in this project, I argue that the trimester framework was emptied of its ability to regulate abortion as what constituted an undue burden on abortion rights and access became increasingly difficult for courts and state legislatures to determine. In this way, what constituted an undue burden could potentially overrule the regulations previously outlined in the trimester framework, and therefore could result in restrictions on first trimester abortions. These vague and indiscriminate legal boundaries in turn affected medical professionals and

fecund persons enactment of expertise in abortion decisions. As such, my emphasis is less on debating the intention of the Court's inclusion of the undue burden clause and more on exposing the result—the substitution of the trimester framework resulted in a more ambiguous standard of granting abortion rights to fecund persons and a less rigorous standard for regulating state restrictions on abortion.

[16] Analyzing historical, medical treatments of abortion, Justice Alito, writing for the Court, argues, "[i]n this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy." See *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 23.

[17] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 6.

[18] Legal scholar George P. Fletcher identifies paradoxes in legal thought as "problems of logical…consistency." Issues in consistency arise when legal officials are met with "self-contradictions" that result for time-honored and accepted logic and reasoning. The only way to amend such a paradox is to confront the underlying logic and acknowledge its limitations. Only then can a possible resolution be offered. See George P. Fletcher "Paradoxes in Legal Thought," *Columbia Law Review* 85, no. 6, (1985): 1263-1264. This definition is useful for this project's concept of paradox because it identifies the abortion problem as a problem with the internal logic of expertise employed by the U.S. legal system. The internal logic that establishes the triangulation of legal, medical, and personal expertise in abortion law is at once justified by legal and medical reasoning, as well as personal claims to autonomy, and is also at odds with this very logic. This is because the courts employ legal and medical expertise to recognize fecund persons personal expertise and grant them rights to abortion. Yet, neither legal nor medical expertise can sufficiently govern abortion decisions alone or consistently. Both must work in tandem to interpret and discern the legality and medical safety of an abortion. At the same time, such legal-medical interpretations may only apply in limited circumstances as each fecund persons' abortion case presents unique problems for legal and medical experts to navigate. Thus, to expose the paradox of expertise in abortion law is to acknowledge the limitations of legal and medical expertise in their ability to effectively resolve the abortion problem.

[19] E. Johanna Hartelius, *The Rhetoric of Expertise,* (Lanham: MD, Lexington Books, 2011): 3.

[20] Mayo Clinic, "Medical Abortion," mayoclinic.org. https://www.mayoclinic.org/tests-procedures/medical-abortion/about/pac-20394687; Guttmacher Institute, "Medication Abortion Now Accounts for More Than Half of All US Abortions," guttmacher.org, February, 2022. https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions.

[21] Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973,* (Berkley: University of California Press, 1997): 8.

[22] Jonathan Miller, "How CBS News cover *Roe v. Wade* in 1973," cbsnews.com, January 22, 2023. https://www.cbsnews.com/news/roe-v-wade-1973-abortion-ruling-50-years-cbs-news/.

[23] Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973,* (Berkley: University of California Press, 1997): 10.

[24] Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973,* (Berkley: University of California Press, 1997): 10.

[25] Nancy M. Theriot, "Women's Voices in Nineteenth-Century Medical Discourse: A Step toward Deconstructing Science," *Signs* 19, no.1 (1993): 18. Here, Theriot acknowledges the role of husbands in managing their wives' health. In many cases, it was husbands who brought their wives to physicians to consult on various physical, mental, and emotional concerns that they believed to be present, oftentimes without their wives' acknowledgement prior. With this history, we can better understand how it was custom for women to be denied a place to voice their knowledge and opinions both in the operating room and the courtroom.

[26] James C. Mohr, *Abortion in American: The Origins and Evolution of National Policy* (Oxford: Oxford University Press, 1978): 17.

[27] James C. Mohr, *Abortion in American: The Origins and Evolution of National Policy* (Oxford: Oxford University Press, 1978): 86, and N. E. H. Hull and Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (Lawrence: University of Kansas Press, 2010): 33.

[28] N. E. H. Hull and Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (Lawrence: University of Kansas Press, 2010): 20-21.

[29] Frederick N. Dyer, "Horatio Robinson Storer, M.D. and the Physicians' Crusade Against Abortion," in *Champion of Women and the Unborn: Horatio Robinson Storer, M.D.* (Science History Publications, 1999): 3.

[30] Horatio Robinson Storer, "Why Not? A Book for Every Woman," (Boston, 1866): 13-14

[31] Horatio Robinson Storer, "Why Not? A Book for Every Woman," (Boston, 1866): 12-16

[32] Susan Wells, *Out of the Dead House: Nineteenth-Century Women Physicians and the Writing of Medicine,* (Madison: University of Wisconsin, 2001): 6.

[33] Sarah W. Walden, "Professional Instincts: Professional Mothering Rhetoric and the Revision of Maternal Labor," *Women's Studies in Communication* 41, no. 3 (2018): 206.
[34] Susan Wells, *Out of the Dead House: Nineteenth-Century Women Physicians and the Writing of Medicine,* (Madison: University of Wisconsin, 2001): 7.
[35] *Daily History*, "What was the dominant medical sect in the United States during the 19th century?," dailyhistory.org. https://dailyhistory.org/index.php?title=What_was_the_dominant_medical_sect_in_the_United_States_during_the_19th_Century&mobileaction=toggle_view_desktop.
[36] Ibid, *Daily History*.
[37] Justin Buckley Dyer, *Slavery, Abortion, and the Politics of Constitutional Meaning* (Cambridge: Cambridge University Press, 2013): 109.
[38] Paul Saurette and Kelly Gordon, *The Changing Voice of the Anti-Abortion Movement: The Rise of 'Pro-Woman' Rhetoric in Canada and the United States* (Toronto: University of Toronto Press, 2015): 42.
[39] Carolyn Skinner, "Medical Discovery as Suffrage Justification in Mary Putnam Jacobi's 1894 New York Campaign Rhetoric," *Advances in the History of Rhetoric* 19, no. 3 (2016).
[40] Regina Morantz-Sanchez, *Conduct Unbecoming a Woman: Medicine on Trial in Turn-of-the-Century Brooklyn,* (Oxford: Oxford University Press, 1999): 6.
[41] For more information about the professionalization of medicine see Carolyn Skinner's *Women, Physicians, & Professional Ethos in Nineteenth-Century America* (Carbondale: Southern Illinois University Press, 2014) and Regina Markell Morantz-Sanchez's *Sympathy and Science: Women Physicians in American Medicine* (Oxford: Oxford University Press, 1985). For more information about the professionalization of medicine in relation to changing abortion practices, see Gail Kellough's *Aborting Law; An Exploration of the Politics of Motherhood and Medicine* (Toronto: University of Toronto Press, 1996).
[42] Regina Morantz-Sanchez, *Conduct Unbecoming a Woman: Medicine on Trial in Turn-of-the-Century Brooklyn,* (Oxford: Oxford University Press, 1999): 6.
[43] Susan Wells, *Out of the Dead House: Nineteenth-Century Women Physicians and the Writing of Medicine,* (Madison: University of Wisconsin, 2001): 5.
[44] Susan Wells, *Out of the Dead House: Nineteenth-Century Women Physicians and the Writing of Medicine,* (Madison: University of Wisconsin, 2001): 5-6.
[45] Ibid., 1-2.
[46] Ibid., 61-62.
[47] Regina Markell Morantz, "Feminism, Professionalism, and Germs: The Thought of Mary Putnam Jacobi and Elizabeth Blackwell," *American Quarterly* 34, no. 5 (1982): 464.
[48] Blackwell to Lady Byron, 5 Aug. 1852, Blackwell Manuscripts, Library of Congress, Washington, D.C.
[49] Regina Markell Morantz, "Feminism, Professionalism, and Germs: The Thought of Mary Putnam Jacobi and Elizabeth Blackwell," *American Quarterly* 34, no. 5 (1982): 463.
[50] Regina Markell Morantz, "Feminism, Professionalism, and Germs: The Thought of Mary Putnam Jacobi and Elizabeth Blackwell," *American Quarterly* 34, no. 5 (1982): 471.
[51] Carolyn Skinner, "Medical Discovery as Suffrage Justification in Mary Putnam Jacobi's 1894 New York Campaign Rhetoric," *Advances in the History of Rhetoric* 19, no. 3 (2016): 251.
[52] Regina Markell Morantz, "Feminism, Professionalism, and Germs: The Thought of Mary Putnam Jacobi and Elizabeth Blackwell," *American Quarterly* 34, no. 5 (1982): 471.
[53] Mary Putnam Jacobi, M.D., "Address Before the Women's Medical Association About 1900," *A Pathfinder in Medicine: With Selections From Her Writings and a Complete Bibliography* (Forgotten Books: 2018): 494.
[54] Regina Morantz-Sanchez, *Conduct Unbecoming a Woman: Medicine on Trial in Turn-of-the-Century Brooklyn,* (Oxford: Oxford University Press, 1999): 90.
[55] James V. Ricci, *100 Years of Gynaecology, 1800-1900* (Philadelphia: Blakeston, 1945): 130.
[56] Dr. Joseph B. DeLee, "Progress Toward Ideal Obstetrics," *The American Journal of Obstetrics and Diseases of Women and Children,* 27, (January-June, 1893): 513-527.
[57] Regina Markell Morantz, "Feminism, Professionalism, and Germs: The Thought of Mary Putnam Jacobi and Elizabeth Blackwell," *American Quarterly* 34, no. 5 (1982): 474.
[58] Mary Putnam Jacobi to Victorine Haven Putnam, 29 May, 1867, Life and Letters.
[59] The gender scripts that formed the foundations of the field of biology, which later gave rise to modern medicine, can be traced back to Aristotle's theories of human anatomy. See Aristotle, *The Generation of Animals,* translated by A. Platt in *The Complete Works of Aristotle*, Vol. I, ed. J. Barnes (Princeton: Princeton University Press, 1984). It is

also important to note that although Aristotle never performed human anatomical dissections himself, his theories influenced the ways anatomists hundreds of years later reported their findings through text *and* illustration. See the anatomical illustrations of 16th century figures such as Andreas Vesalius, Charles Estienne, and Jacopo Berengario da Carpi as evidence. See also the work on Galen, *On the Usefulness of the Parts of the Body*, translated by M.T. May (Ithaca: Cornell University Press, 1968) for a closer temporal comparison to Aristotle. The emergence of anatomical dissections in the 16th century may have revolutionized modern medicine in a necessary way, but the products of anatomical developments—the false descriptions of biological processes and inaccurate illustrations of the female body—also indicate a gendered bias. Cast in an infallibly objective light, ancient medical knowledge was perpetuated for centuries despite clear inaccuracies in gross, anatomical findings. These inaccuracies created a gendered bias that not only constituted an erroneous public knowledge of female anatomy (and therefore the social ascriptions afforded to woman) but also affected the ability of women to enter the field of medicine as professional physicians.

[60] Regina Morantz-Sanchez, *Conduct Unbecoming a Woman: Medicine on Trial in Turn-of-the-Century Brooklyn,* (Oxford: Oxford University Press, 1999): 89.

[61] Carolyn Skinner, "Medical Discovery as Suffrage Justification in Mary Putnam Jacobi's 1894 New York Campaign Rhetoric," *Advances in the History of Rhetoric* 19, no. 3 (2016): 23.

[62] Regina Morantz-Sanchez, *Conduct Unbecoming a Woman: Medicine on Trial in Turn-of-the-Century Brooklyn,* (Oxford: Oxford University Press, 1999): 98.

[63] Gail Kellough, *Aborting Law: An Exploration of the Politics of Motherhood and Medicine* (Toronto: University of Toronto Press, 1996): 56.

[64] For an explication of how this relationship altered "social culture and public policies" in medico-legal contexts from the nineteenth century forward, see James C. Mohr, *Abortion in American: The Origins and Evolution of National Policy* (Oxford: Oxford University Press, 1978): 56-75. Also see Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973,* (Berkley: University of California Press, 1997): 3, for a detailed history of the relationship between law and medicine in abortion contexts specifically.

[65] There is some debate about the final breakdown of votes in the *Dobbs* decision. While Justices Alito, Kavanaugh, Thomas, Gorsuch, and Barrett concurred in the opinion and ruling, and Justices Kagan, Sotomayor, and Breyer dissented in full, Justice Roberts dissented in the opinion but ultimately concurred in the ruling. With a split dissent/concurrence from Roberts, the decision could be framed as a 5-1-3 or a 6-3 decision.

[66] Guttmacher Institute, "An Overview of Abortion Laws," guttmacher.org, March, 1, 2023. https://www.guttmacher.org/state-policy/explore/overview-abortion-laws

[67] Guttmacher Institute, "Targeted Regulation of Abortion Providers," guttmacher.org, March 1, 2023. https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers

[68] Rachel K. Jones and Jenna Jerman, "Abortion Incidence and Service Availability in the United States," *Perspectives on Sexual and Reproductive Health*, 49, no. 1 (2017): 17–27.

[69] Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973,* (Berkley: University of California Press, 1997): 3.

[70] *Roe v. Wade*, 410 U.S. 113, at 118.

[71] *Roe v. Wade*, 410 U.S. 113, at 153.

[72] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022).

[73] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022).

[74] Jen Gunter, "Medical School Doesn't Teach the 'Woman's Life Is in Danger' Curriculum," *The New York Times*, May 20, 2019, https://www.nytimes.com/2019/05/20/opinion/abortion-laws.html.

[75] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022).

[76] *The New York Times,* "'Abortion Is Just the Beginning': Six Experts on the Decision Overturning Roe," nytimes.com. https://www.nytimes.com/interactive/2022/06/24/opinion/politics/dobbs-decision-perspectives.html.

[77] Anita L. Allen, "Autonomy's Magic Wand: Abortion and Constitutional Interpretation," *Boston University Law Review* 72, no. 4 (September 1992).

[78] *Roe v. Wade*, 410 U.S. 113.

[79] *Roe v. Wade*, 410 U.S. 113, at 164.

[80] The decision in *Roe* left open more questions than it closed. These questions sparked national debates around the role of the courts and physicians in abortion decisions as well as the role of the fetus and the question of when life begins. In the decades between *Roe* and *Casey,* the decision in *Roe* took on many interpretations and meanings for both advocates and opponents of abortion. Leading abortion scholar Mary Ziegler traces these interpretations of *Roe* in *After Roe: The Lost History of the Abortion Debate* (Harvard University Press: Cambridge, 2015).

[81] *Roe v. Wade*, 410 U.S. 113; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833.
[82] Aristotle, *The Rhetoric of Aristotle: A Translation,* (Cambridge: The University Press, 1909).
[83] In short, instrumental rhetoric is principally concerned with effect and how rhetoric responds to and shapes contemporary discourse in the immediate moments, while constitutive rhetoric is concerned with a more "expansive understanding of discursive effect" that accounts for how rhetoric shapes and responds to moments over and throughout time. Supreme Court decisions serve an instrumental function as the Court is tasked with responding to issues brought before them by lower courts and state legislatures. These decisions often respond to an immediate or urgent question that has reached a critical point in public debate. Lloyd Bitzer called this "urgent" problem an exigency in need of a fitting response. James Jasinksi employs this concept to demonstrate the instrumental effect of rhetoric—the capacity for rhetoric to respond to immediate situations and to produce "circumscribed effects." See Lloyd Bitzer, "The Rhetorical Situation," *Philosophy & Rhetoric* 1 (1968): 1-14; and James Jasinski and Jennifer R. Mercieca, "Analyzing Constitutive Rhetorics: The Virginia and Kentucky Resolutions and the 'Principles of '98'," in *The Handbook of Rhetoric and Public Address*, edited by Shawn J. Parry-Giles and J. Michael Hogan (Blackwell Publishing, 2010): 313. Additionally, we may also think of Supreme Court decisions as instrumental in that they have an immediate impact that can be "measured." We can measure the immediate impact of SCOTUS abortion decisions on lower courts, state legislatures, and any actors that may become involved in future legal actions such as physicians or fecund persons. The deluge of anti-abortion legislation that follows Supreme Court decisions may be one measurement and indicator of the law's instrumental effect. Mary E. Stuckey's use of instrumental rhetoric as that which determines how "issues are defined, determined, and debated" is also helpful for elucidating the effect of SCOTUS decisions, which she argues may have "long term rather than short term" implications and consequences. See Mary E. Stuckey "Jimmy Carter, Human Rights, and Instrumental Effects of Presidential Rhetoric," in *The Handbook of Rhetoric and Public Address*, edited by Shawn J. Parry-Giles and J. Michael Hogan (Blackwell Publishing, 2010): 293-294.
[84] Here, we may consider how Supreme Court decisions serve a constitutive function in that they invite certain interpretations that are inscribed and circumscribed through circulation and discursive practices. These interpretations "enable and constrain subsequent practice(s)" that thus influence and determine future iterations, perspectives, and actions. In the context of Supreme Court decisions, case law serves a constitutive function in multiple ways. First, it draws from cultural and political assumptions about the U.S. and its citizens to expand or constrict particularly situated rights. These decisions have an instrumental affect in that they immediately impact the rights of citizens in progressive or regressive ways, as illustrated in a previous note. But they also have a constitutive effect in that the progressive, or regressive, changes in rights allow for different *future* possibilities for citizens (or rights-bearing individuals). These potential possibilities make way for multiple, shifting realities that encompass past, present, and future subject positions. See James Jasinski and Jennifer R. Mercieca, "Analyzing Constitutive Rhetorics: The Virginia and Kentucky Resolutions and the 'Principles of '98'," *The Handbook of Rhetoric and Public Address*, edited by Shawn J. Parry-Giles and J. Michael Hogan (Blackwell Publishing, 2010): 313-341.
[85] John Angus Campbell, "Between the Fragment and the Icon: Prospect for a Rhetorical House of the Middle Way," *Western Journal of Speech Communication* 54 (1990): 348.
[86] Michael Calvin McGee, "Text, Context, and the Fragmentation of Contemporary Culture," *Western Journal of Speech Communication,* 54 (Summer 1990), 274-289.
[87] Thomas R. Nilsen, "The Interpretative Function of the Critic." While Nilsen does not use the language of polysemy, his emphasis on the interpretation of speeches suggests that multiple interpretations are possible. He also emphasizes the importance of studying the indirect implications of speeches—what is perhaps not said in the speech text itself—to better understand the world in which we are situated and how our situatedness shifts over time.
[88] Michael Calvin McGee, "Text, Context, and the Fragmentation of Contemporary Culture," *Western Journal of Speech Communication,* 54 (Summer 1990), 274-289.
[89] Michael Calvin McGee, "Text, Context, and the Fragmentation of Contemporary Culture," *Western Journal of Speech Communication,* 54 (Summer 1990), 279.
[90] Leah Ceccarelli, "Polysemy: Multiple meanings in rhetorical criticism," *Quarterly Journal of Speech* 84, no. 4 (1998): 397.
[91] Mary Ziegler, *Roe: The History of a National Obsession,* (New Haven: Yale University Press, 2023): xii.
[92] Celeste M. Condit, "Democracy and civil rights: The universalising influence of public Argumentation," *Communication Monographs, 54 (1987): 1-18.*
[93] Leah Ceccarelli, "Polysemy: Multiple meanings in rhetorical criticism," *Quarterly Journal of Speech* 84, no. 4 (1998): 397.

[94] James B. White, ‘‘Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life,’’ *University of Chicago Law Review* 52 (1985): 689. Here, White demonstrates the correlation between rhetoric and the law, and argues that as a branch of rhetoric, the law also takes a “rule” as a set of persuasive means available to legal authorities who must demonstrate its meaning and applicability through discursive practices.
[95] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990): 95.
[96] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990): 95.
[97] John Angus Campbell, “Between the Fragment and the Icon: Prospect for a Rhetorical House of the Middle Way,” *Western Journal of Speech Communication* 54 (1990): 354.
[98] Mary Ziegler, *Roe: The History of a National Obsession,* (New Haven: Yale University Press, 2023): xi.
[99] Katie L. Gibson, “In Defense of Women's Rights: A Rhetorical Analysis of Judicial Dissent,” *Women’s Studies in Communication* 35, no. 2: 126.
[100] Katie L. Gibson, “The Women Take Over: Oral argument, rhetorical skepticism, and the performance of feminist jurisprudence in *Whole Woman's Health v. Hellerstedt*,” *Quarterly Journal of Speech* 105, no. 3 (2019): 319-340.
[101] Gerald B. Wetlaufer, “Rhetoric and its Denial in Legal Discourse,” *Virginia Law Review* 76, no. 8 (1990): 1548-1553.
[102] Rogers Smith, *Civic Ideals: Conflicting Views of Citizenship in U.S. History*, (New Haven and London: Yale University Press, 1997): 6.
[103] Katie L. Gibson, “In Defense of Women's Rights: A Rhetorical Analysis of Judicial Dissent,” *Women’s Studies in Communication* 35, no. 2 (2021): 125.
[104] Judith A. Baer, *Our Lives Before the Law: Constructing a Feminist Jurisprudence* (Princeton: Princeton UP, 1999): 137.
[105] Lisa Melonçon, S. Scott Graham, Jenell Johnson, and John A. Lynch, *Rhetoric of Health and Medicine As/Is* (Columbus: Ohio State University, 2020): 1.
[106] Colin MacDougall, “Learning from differences between ordinary and expert theories of health and physical activity,” *Critical Public Health*, 13, no. 4 (2003): 381-397; Lundy Brau, “Engaging the experts: Popular science education and breast cancer activism,” *Critical Public Health*, 13, no. 3, (2003): 191-206; Timothy Milewa, Martin Buxton & Stephen Hanney, “Lay involvement in the public funding of medical research: expertise and counter-expertise in empirical and analytical perspective,” *Critical Public Health*, 18, no. 3 (2008): 357-366.
[107] Center for Reproductive Rights, “Yet Another Anti-Abortion Scare Tactic: False Claims of Breast Cancer Risk,” reproductiverights.org, April, 1, 2004. https://reproductiverights.org/yet-another-anti-abortion-scare-tactic-false-claims-of-breast-cancer-risk/; Joel Brind, “The Abortion-Breast Cancer Connection,” *Issues in Law & Medicine*, 109, no. 21 (2005): 135; Angela Lanfranchi, “The Science, Studies and Sociology of the Abortion Breast Cancer Link,” *Issues in Law and Medicine*, 95, no. 21 (1996): 98-101.
[108] National Cancer Institute, “Summary Report: Early Reproductive Events and Breast Cancer Workshop,” cancer.gov, 2003. http://www.cancer.gov/cancerinfo/ere-workshop-report; APA Task Force on Mental Health and Abortion, “Report of the APA Task Force on Mental Health and Abortion,” apa.org. Aug. 13, 2008.
[109] Amanda M. Friz, “Technologies of the State: Transvaginal Ultrasounds and the Abortion Debate,” *Rhetoric & Public Affairs* 21, no. 4 (2018): 655-656; Katie L. Gibson, “The Women Take Over: Oral argument, rhetorical skepticism, and the performance of feminist jurisprudence in *Whole Women's Health v. Hellerstedt*,” *Quarterly Journal of Speech* 105, no. 3 (2019): 321.
[110] Judy Z. Segal, *Rhetoric of Health and Medicine As/Is* (Columbus: Ohio State University, 2020): vii.
[111] Sarah McCammon and Lauren Hodges, “Doctors worst fears about the Texas abortion law are coming true,” *National Public Radio*, March 1, 2022. https://www.wbur.org/npr/1083536401/texas-abortion-law-6-months.
[112] E. Johanna Hartelius, *The Rhetoric of Expertise* (Lanham: MD, Lexington Books, 2011): 17.
[113] Evelyn Fox Keller and Helen E. Longino, *Feminism & Science* (Oxford: Oxford University Press, 1996): 1.
[114] Evelyn Fox Keller and Helen E. Longino, *Feminism & Science* (Oxford: Oxford University Press, 1996): 1-2.
[115] Susan Sherwin, *No Longer Patient: Feminist Ethics and Health Care* (Philadelphia: Temple University Press, 1992): 85.
[116] Rosalind P. Petchesky, *Abortion and Woman’s Choice: The State, Sexuality, and Reproductive Freedom* (Boston, MA: Northeastern University Press, 1984): 8-9.
[117] Celeste M. Condit, *Decoding Abortion Rhetoric: Communicating Social Change* (Urbana and Chicago, IL: University of Illinois, 1990), 68.

[118] Barbara Pickering, "Women's Voices As Evidence: Personal Testimony is Pro-Choice Films," *Argumentation and Advocacy,* 40 (2003): 20.
[119] Carly S. Woods, "Repunctuated Feminism: Marketing Menstrual Suppression Through the Rhetoric of Choice," *Women's Studies in Communication* 36 (2013): 267.
[120] Wendy Brown, "Suffering Rights as Paradoxes," Constellations 7, no. 2 (2000): 231.
[121] Wendy E. Parmet, "Beyond Privacy: A Population Approach to Reproductive Rights," in *Reconsidering Law and Policy Debates: A Public Health Perspective,* ed. John G. Culhane, (Cambridge University Press, 2011): 16-39.
[122] See *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 764 (1986), *Webster v. Reproductive Health Services* 492, U.S. 490 (1989), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Stenberg v. Carhart,* 530 U.S. 914 (2000), and *Gonzales v. Carhart,* 550 U.S. 124 (2007).
[123] E. Johanna Hartelius, *The Rhetoric of Expertise* (Lanham: MD, Lexington Books, 2011): 1-2.
[124] In 1803, the U.S. Supreme Court established the practice of judicial review, which granted courts the authority to dismiss and overrule laws and statutes that violated the Constitution. See *Marbury v. Madison*, 5 U.S. 137. For a fuller discussion of expertise as procedure, see Zoltan P. Majdik and William M. Keith, "The Problem of Pluralistic Expertise: A Wittgensteinian Approach to the Rhetorical Basis of Expertise," *Social Epistemology* 25, no. 3 (2011): 276.
[125] E. Johanna Hartelius, *The Rhetoric of Expertise* (Lanham: MD, Lexington Books, 2011): 21.
[126] Here, I challenge the notion that epistemic expertise (knowledge-based expertise) restricts an "expert's judgement" to their "area of training." See Steve Fuller, "The Constitutively Social Character of Expertise," in *The Philosophy of Expertise,* eds. Evan Selinger & Robert P. Crease, 342-356. New York: Columbia University Press, 2006: 342-343.
[127] Susan J. Brison and Walter Sinnott-Armstrong, "Contemporary Perspectives on Constitutional Interpretation: A Symposium," *Boston University Law Review* Volume 27, no. 4 (1992): 681.
[128] Damien Smith Pfister, "Networked Expertise in the Era of Many-to-many Communication: On Wikipedia and Invention," *Social Epistemology* 25, no. 3 (2011): 223.
[129] Steve Fuller, "The Constitutively Social Character of Expertise," in *The Philosophy of Expertise,* eds. Evan Selinger & Robert P. Crease, 342-356. New York: Columbia University Press, 2006: 344.
[130] Zoltan P. Majdik and William M. Keith, "The Problem of Pluralistic Expertise: A Wittgensteinian Approach to the Rhetorical Basis of Expertise," *Social Epistemology* 25, no. 3 (2011): 276.
[131] Zoltan P. Majdik and William M. Keith, "The Problem of Pluralistic Expertise: A Wittgensteinian Approach to the Rhetorical Basis of Expertise," *Social Epistemology* 25, no. 3 (2011): 276.
[132] Center for Reproductive Rights, "After Roe Fell: Abortion Laws by State," reproductiverights.org. https://reproductiverights.org/maps/abortion-laws-by-state/.
[133] Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (Berkley: University of California Press, 1997): 3.
[134] *Roe v. Wade*, 410 U.S. 113, at 115.
[135] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 837.
[136] Emma Freeman, "Giving *Casey* Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis," *Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 279-323; Lauren Paulk, "What is "Undue Burden"? The *Casey* Standard as Applied to Informed Consent Provisions," *UCLA Women's Law Journal* 20, no. 1 (2013): 71-109.
[137] Gillian E. Metzger, "Unburdening the Undue Burden Standard: Orienting "Casey" in Constitutional Jurisprudence," *Columbia Law Review* 94, no. 6 (1994): 2025-2090; Center for Reproductive Rights, "Planned Parenthood v. Casey (1992): Three Judicial Views on Abortion Restrictions," reproductiverights.org, July 9, 2009. https://reproductiverights.org/planned-parenthood-v-casey-1992-three-judicial-views-on-abortion-restrictions/.
[138] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022).
[139] Saralyn Cruickshank, "Inside the '*Dobbs*' decision, hub.jhu.edu, July 1, 2022. https://hub.jhu.edu/2022/07/01/joanne-rosen-insight-dobbs-decision/; American Bar Association, "With *Roe* overturned, legal precedent moves to centerstage," americanbar.org, June 24, 2022. https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/stare-decisis-takes-centerstage/; Isabella B. Cho and Brandon L. Kingdollar, Crimson Staff Writers, "After Roe Dismantled, Harvard Experts Condemn, Defend Landmark Decision, thecrimson.com, June 25, 2022. https://www.thecrimson.com/article/2022/6/25/dobbs-experts-reax/.

Chapter 1: A Return to Roe: Reading Triangulations of Expertise

> "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."
>
> ~ Justice Harry A. Blackmun, writing for the majority opinion in *Roe v. Wade*[1]

Throughout the late nineteenth century, the joint expertise of legal officials and medical professionals motivated the criminalization of abortion nationwide. By 1910, the passage of anti-abortion legislation and criminal codes made abortion illegal in every state across the country.[2] These early regulations determined the state of abortion for the next half century, and by 1967, forty-nine states and the District of Columbia had enacted strict policies that classified abortion as a felony. Although the entire nation had criminalized abortion, the states varied in their approaches to regulating the procedure and prosecuting illegal acts. Some states had exceptions in cases where abortion was necessary to "save the life of the mother," but what constituted a life-saving abortion was ambiguous and ultimately determined by physicians.[3] Beginning in 1967, multiple states began to pass reform legislation to clarify and expand the justifications for legal abortions, often with the help of physicians and medical organizations.[4] But because the medical profession had established itself as an authority on abortion, these reform laws continued to emphasize the power of physicians in abortion decisions.[5] Notably, these reform laws explicitly outlined criminal punishments for physicians who violated the laws but did not punish pregnant persons for obtaining abortions.[6] In this way, legal expertise emphasized the role of physicians' medical expertise in abortion decisions over the personal expertise of fecund persons. Still, the point at which states yielded to physicians to determine lawful abortions, and

vice versa, remained unclear. By 1970, the persistent ambiguities around legal, medical, and personal expertise in abortion reform law sparked a nationwide debate.

In May 1970, Norma McCorvey, an allegedly single and pregnant woman residing in Dallas County, Texas, contested the ambiguous criminal abortion law that led her district to deny her an abortion. At this point, the Texas state legislature had not participated in the nationwide efforts to reform criminal abortion laws. As such, abortions were still illegal in Texas except if "medical advice" provided justification for an abortion to "save the life of the mother."[7] McCorvey's initial attempt to obtain an abortion was denied by the district court in Texas because her "life did not appear to be threatened by the continuation of her pregnancy."[8] Challenging this legal language, the plaintiff charged that "the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy."[9] Three district judges ruled in McCorvey's favor, and in 1971, the Supreme Court agreed to review the disputed Texas legislation and hear her case in *Roe v. Wade*. In 1973, the Supreme Court ruled in favor of McCorvey in a 7-2 decision, determined the Texas legislation unconstitutional, and legalized abortion on a federal level.

The primary task of the Supreme Court in *Roe* was to decide the constitutionality of the Texas Penal Code in question. In the early 1970s, the Texas Penal Code made it a criminal offense to "procure an abortion" except in cases where physicians recommended an abortion for life-saving purposes.[10] Although by 1972, the reform movement had made some progress in decriminalizing abortion across the United States, the Texas Penal Code was representative of the criminal abortion codes that remained active in most states before the Court overruled them in *Roe.* In fact, by the time the Court first heard McCorvey's case in 1972, only thirteen states had reformed their anti-abortion laws, and only four had repealed them completely. When the

Court handed down its decision in 1973, all but five states had introduced abortion reform legislation, but criminal codes remained the law of the land for most of the nation.[11] Many of these criminal codes continued to operate on vague language that privileged the legal-medical bond between the State and the medical sphere. To address the vague language and the constitutionality of the Texas Penal Code specifically, the *Roe* Court found a constitutional basis for fecund persons' abortion rights grounded in the Fourteenth Amendment and the notion of privacy.

Within this legal reasoning, the Court also offered the trimester framework to regulate a fecund person's rights to abortion.[12] Since its adoption into abortion law, the trimester framework has become the cornerstone of legal, academic, and popular criticisms about the *Roe* decision and abortion writ large. The trimester framework legalized abortion prior to fetal viability, the point at which the fetus has the "capability of meaningful life outside the mother's womb."[13] This framework set boundaries for the private right to abortion and thus the relationship between legal, medical, and personal expertise. Yet, various scholars have critiqued the trimester framework for its inconsistencies and unworkability in abortion law. These criticisms tend to highlight *Roe*'s dependence on evolving medical knowledge. Legal scholar Claudia Pap Mangel argues, for instance, that the trimester framework is "inherently bonded to the progress of medical technology."[14] Commenting on the instability of viability, Randy Beck states, "Since the point of viability shifts over time in response to medical advances, the viability rule causes fetal and maternal rights to vary based on the existing state of obstetric medicine or the proximity of the mother to cutting edge medical facilities."[15]

Perhaps most famously, former Justice Ruth Bader Ginsburg criticized the Court's trimester framework and its reliance on medicine. As Ginsburg presciently claimed, "advances in

medical technology would continue to move *forward* the point at which regulation could be justified as protective of woman's health, and to move *backward* the point of viability, when the state could proscribe abortions unnecessary to preserve the patient's life or health." The approach, she thought, compelled legislatures to remain *au courant* with changing medical practices and called upon courts to examine legislative judgments, not as jurists applying "neutral principles," but as "science review boards."[16] Collectively, these criticisms highlight the rhetorical paradox within the *Roe* decision, the notion that the trimester framework simultaneously expands fecund persons' individual rights to abortion and delimits these rights within indeterminate and evolving interpretations of legal and medical expertise.

Although *Roe* seemingly addressed the legal question at hand—the constitutionality of criminal abortion codes—its triangulation of judicial interpretation, medical trimesters, and personal privacy function to confound, rather than clarify, the abortion problem. In its interpretation of previous constitutional precedent, the Court in *Roe* clearly stated that the right to privacy is both "fundamental" and "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[17] Yet, the Court also acknowledged that this privacy right is contingent on medical interpretations of "life," "health," and "viability" and legal agreement on those medical interpretations.[18] These interpretations locate abortion rights and access in a complex web of legal, medical, and personal expertise. For this reason, a return to *Roe* is essential to understand how this landmark case laid the foundation for future legal challenges on the grounds of legal and medical expertise even as it, at least in the short-term, granted fecund persons the right to legal abortions. A return to *Roe* also helps explain how—despite its promise—our commitments to legal and medical expertise continue to contribute to the demise of fecund persons' autonomy over abortion decisions.

Before returning to *Roe* in this chapter I first attend to the politics of abortion in the five years before this landmark decision. These critical years help contextualize the tensions around abortion in state and lower courts that the Supreme Court would later have to contend with in *Roe* in 1973. These tensions raised two distinct yet inseparable questions for the *Roe* Court—the constitutionality of the Texas Penal Code and State interests in the potential life of the fetus—only one of which the Court addressed directly in its final decision. To address the problem of constitutionality, the Court wove together conceptions of legal, medical, and personal expertise to legalize abortion. I read the *Roe* opinion and decision, the Harry A. Blackmun papers, and the correspondence among the Supreme Court Justices and their clerks who deliberated and wrote the *Roe* case through this triangulation of expertise. In understanding *Roe* as a triangulation of expertise, I submit that the Court employed knowledge-based assumptions about, and procedural practices of, legal, medical, and personal expertise to conceive of the trimester framework and confer abortion rights to fecund persons. In doing so, the Court also complicated the legal principles of dicta and holding—principles that determine how future courts interpret the boundaries of law. These complications ultimately underline the paradox of expertise in abortion law: the *Roe* Court's employments of expertise solidify abortion as the province of legal and medical authority even as they confound the parameters of legal abortion for fecund persons. This paradox eventually laid the groundwork for *Roe*'s undoing in the years after 1973.

The Critical Years: 1967-1972

Abortion was severely restricted in most states prior to *Roe.* In the late 1960s, most state anti-abortion laws did not merely prohibit abortion, but also dismissed the quickening doctrine and outright banned abortion practices of any kind, at any stage, unless performed for therapeutic reasons. Since the criminalization of abortion, therapeutic abortions set the standards for

regulating abortion and was the collective term used to encompass any abortion obtained for medical purposes. Criminal abortion codes throughout the 1960s employed the language of "therapeutic" to varying degrees, with some states making exceptions for abortions to protect a fecund person's "health," to prevent "serious permanent bodily injury," and most commonly, to "save the life of the mother."[19] These vague boundaries often necessitated the expertise of medical professionals to determine which health concerns warranted an abortion. The latitude these criminal codes granted to medical experts to determine which conditions permitted "therapeutic" abortions also extended to legal experts and their interpretations of what determined "lawful" abortions. In 1967, three states also had criminal codes that penalized physicians if abortions were "unlawfully performed" or performed "without lawful justification."[20] Notably, the legal and medical boundaries of what was "lawful" or what constituted a "serious" health concern were left to the courts and physicians to decipher.

These vague criminal abortion laws remained active with little change until 1967. In that year, the United States saw its first successful progressive reform of criminal abortion statutes with Colorado's adoption of the Model Penal Code (MPC). The MPC was a decade-long project developed by the American Law Institute to help assist U.S. state legislatures in standardizing legal penalties for people who committed criminal offenses. For the first time since legal and medical experts criminalized abortion, the MPC provided explicit, justifiable reasons for inducing an abortion. Abortions were permitted, the MPC stated, if:

> there is substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse.[21]

These additions were meant to clarify the vague terms that previous criminal abortion codes had left to legal and medical experts to interpret. To address medical discrepancies in the law, the

MPC also stipulated that the opinion of two physicians was necessary to attest that a fecund person's circumstances warranted a therapeutic abortion. Additionally, the MPC marked any abortion "beyond the twenty-sixth week" a felony.[22] In adopting the MPC, Colorado not only validated therapeutic abortions as the primary framing for legal abortions but also reiterated the authority of medical expertise in abortion decisions.[23]

Multiple state legislatures soon followed suit and adopted the MPC to craft their own updated versions of therapeutic abortion laws and refigure the scope of legal expertise over abortion decisions. In 1967, California enacted the Therapeutic Abortion Act, which substantially modified the century-old criminal abortion codes that had previously determined abortion options in the state. Notably, this act deferred heavily to medical expertise to expand the justifiable reasons to permit a fecund person's abortion. Like Colorado, California made concessions for the "physical and mental health of the mother" as well as pregnancies resulting from rape or incest. But California also conceded power to medical authorities by mandating that abortions be conducted only in hospitals accredited by the Joint Committee of Accreditation of Hospitals. Such abortions could happen when a committee of hospital staff that consisted of either two or three physicians (depending on how far along a fecund person was in their pregnancy) was present, and if the fecund person was no more than twenty weeks pregnant.[24] With these additions, legal experts hoped the Therapeutic Abortion Act would bridge the gap between previous criminal abortion codes and medical knowledge that supported the safety of abortion. California state officials also hoped that expanding the justifiable and legal reasons for abortions would align with expectations that both medical experts and the general public supported.[25] In the months that followed, other states passed their own versions of abortion reform legislation, each of which adopted and rejected different appeals to legal and medical

expertise.[26] Despite their efforts to redefine the scope of expertise in abortion decisions, reform laws like those in Colorado and California further confounded the abortion controversy as states, physicians, and fecund persons were left to navigate the legal and medical discrepancies in abortion law from state-to-state.[27] These uncertainties in state legislation paved the way for the historic decision in *Roe v. Wade*.

In the years leading up to *Roe,* many state anti-abortion statutes were challenged on the grounds of vagueness, the violation of fundamental rights to privacy, and a rejection of equal protection for fecund persons.[28] As such, the political atmosphere leading to the dispute in *Roe* regarding the Texas Penal Code*,* and the consequences of the Court's decision on the triangulation of expertise, were not contained within Texas state lines. This is because when the Court found the Texas Penal Code unconstitutional and legalized abortion on the federal level in 1973, it also decriminalized abortion and forbid all states from passing legislation that placed unnecessary government restrictions on persons seeking abortions. The *Roe* decision attempted to clarify the previously vague boundaries of legal abortion by expanding the scope of personal rights over abortion and restricting State regulation of abortion procedures. However, the legal reasoning the Court offered in *Roe* figured legal, medical, and personal expertise in a complex web that mystified, rather than clarified, the issues surrounding the abortion debates. It is to this decision that I now turn to unpack the complexities involving this intricate web of expertise.

The Court Reinterprets Privacy

When the Supreme Court hears a case, the judiciary is typically tasked with leveraging their legal expertise to answer a specific question about the issue at hand and its coherence with the Constitution. In 1973, the *Roe* Court was tasked with determining the constitutionality of the Texas Penal Code and as such, was appealed to resolve two main disputes: first, whether the

Constitution protects a fundamental right to abortion, and second, whether Texas had a compelling State interest in protecting fetal life "from and after conception."[29] To reiterate, the plaintiff in *Roe* charged that "the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy."[30] In taking the case, the Court resolved to address this concern with "constitutional measurement, free of emotion and predilection," and thus began their decision with a detailed survey of respected "medical and medical-legal history" about "attitudes toward the abortion procedures over the centuries."[31] This detailed history began with "ancient attitudes" and worked through the common law to English and American statutory law in the nineteenth and twentieth centuries to provide historical and medical distinctions between quickening and viability.[32] Thus, the Court intertwined law and medicine through explicit references to legal precedent, medical ethics, and legal-medical authority, and deemphasized personal expertise, in its rationalization for the federal right to abortion.[33]

On January 22, 1973, the Supreme Court decided *Roe v. Wade* on a 7-2 decision, legalizing abortion on the federal level. More specifically, *Roe*'s passage decriminalized abortion and forbid states from passing legislation that placed unnecessary government restrictions on persons seeking abortions. To do so, the Court under Chief Justice Harry A. Blackmun found the right of privacy, the same precedent invoked to protect personal liberties related to marriage,[34] procreation,[35] contraception,[36] family relationships,[37] and education,[38] to be "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[39] This ruling attempted to clarify both the previously vague boundaries of legal abortion and the privacy concerns brought to the Court by restricting State regulation of abortion procedures and expanding the scope of privacy to include abortion rights. In doing so, the Court seemingly

extended the interpretative reach of fecund persons' personal expertise over their own bodies and experiences.

To do so, the Court grounded abortion rights in a privacy precedent rooted in the Due Process Clause of the Fourteenth Amendment.[40] The Due Process Clause in the Fourteenth Amendment prevents state intervention into certain liberties without the due process of law, or fair legal procedures (the Fifth Amendment prevented such intervention at the federal level).[41] For *Roe*, this placed "restrictions upon state actions" as they concerned a fecund person's "personal liberty" to abortion rights.[42] Justice Stewart expounded on the justification for this grounding in his concurring opinion in *Roe*. Here, Stewart quotes former Justice Harlan's previous interpretations of the Due Process Clause: "the full scope of the liberty guaranteed under the Due Process Clause" did not simply reflect a "series of isolated points" such as the "freedom of speech, press, and religion." Instead, according to Harlan, and Stewart, the Due Process Clause operated on a "rational continuum" that included a "freedom from all substantial arbitrary impositions and purposeless restraints."[43] The Court cited previous case law and ruled that to protect against such burdens and constraints would require courts to exact a "careful scrutiny of the state needs asserted to justify their abridgement."[44] Applying this logic to the Texas Penal Code on abortion, the Court found the statute to be "inflexible" and a "complete abridgment of a constitutional freedom."[45] With this rationale, the *Roe* Court recognized a need to restrict the domain of legal expertise and State intervention over rights and liberties protected by the Due Process Clause, which for the Court in and after *Roe,* now included rights and liberties to abortion.

To further justify the rationale for a federal right to abortion, the Court proceeded to list several cases in which the Due Process Clause was applied to grant a right to privacy protected

by the Constitution.[46] These liberties included the ability for children to attend non-public schools, the ability for teachers to instruct in languages other than English, and the right to travel regardless of political affiliation.[47] The *Roe* Court extended the privacy precedent for constitutional liberty to encompass "the right of a woman to decide whether or not to terminate her pregnancy."[48] But *Roe* also preserved the possibility of restricting such personal rights and expertise. Here, the Court claimed, "where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'"[49] Thus, abortion rights were not only different than previous privacy-based concerns, but they could also be regulated through additional legal contingencies.

Such legal contingencies exposed the limitations of privacy to afford abortion rights to fecund persons. The Court stated the right of privacy, while "broad enough to cover the abortion decision," is "not absolute" and may be "subject to some limitations."[50] According to the Court, these limitations necessitated the intervention of legal and medical expertise. Expounding, the Court acknowledged that a "pregnant woman cannot be isolated in her privacy" as State interests such as "maternal health" or the "potentiality of fetal life" may become "significantly involved."[51] In this way, the Court delimited the personal rights and expertise of fecund persons as they intersected with legal interests in preserving "maternal health" and "fetal life." When such latter interests are involved, legal expertise could reasonably intervene in the abortion decision as the State may "assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." At some point, these interests "become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."[52]

Likewise, by tying the personal expertise of fecund persons to conceptions of health and life, the Court also reinforced the role of medical expertise to authorize abortion decisions. This

is because the Court identified the medical sphere and the physician in particular as best suited to determine the points at which maintaining "medical standards" of "health" and "potential life" warrant or restrict an abortion procedure.[53] When abortion concerns health or life, the Court argued that the "basic responsibility" of the abortion decision "must rest with the physician."[54] By making the private right to abortion contingent upon these medically determined interests, *Roe* interconnected legal and medical expertise and constrained fecund persons' autonomy over the abortion decision. The alliance between legal and medical expertise allowed such experts to delimit personal expertise and maintain their control over the abortion decision in *Roe* as they had in previous criminal abortion legislation.

The Limitations of Personal Expertise and "Maternal Health"

One primary way in which the Court employed legal expertise to delineate fecund persons' abortion rights within a domain of medical expertise was through its promotion of abortion regulations tied to "maternal health." Throughout its decision, the *Roe* Court repeatedly employed the phrases "health of the mother" and "maternal health" when speaking about the conflicting and overlapping legal, medical, and personal interests of a fecund person's abortion decision.[55] In particular, emphasis on a fecund person's "maternal health" blurred the boundaries of personal and medical expertise. While the Court's interests in protecting "maternal health" and the "health of the mother" acknowledged the fecund person's role in abortion decisions and pregnancies, their personal expertise is ultimately regulated by the medical sphere. It is the physician and their expertise who must, in consultation with the law and legal expertise, decide when maternal health permits or prohibits an abortion procedure. This is supported by the Court's clear articulation that "the abortion decision in all its aspects is inherently, and primarily, a medical decision."[56] Even in instances where *Roe* granted the fecund person agency in the

abortion decision, they must still negotiate their abortion decisions and the terms of their own health "in consultation" with their physician.[57] This emphasis on medicine forwards a rhetoric of the "woman-as-patient" and the "doctor knows best."[58] In this way, the Court's legal interests in "maternal health" continually defer to the medical expertise of physicians over the personal expertise of fecund persons.

Likewise, even when the personal expertise of fecund persons is acknowledged in *Roe*, their expertise is regulated within a rhetoric of motherhood. *Roe* invoked the association of a fecund person with mother both through the frequency with which the Court used the term "mother" and by the sublimation and interchangeability of "woman" and "mother."[59] Additionally, the Court directly acknowledged that a fecund person "cannot be isolated in her privacy," necessitating the regulation of abortion decisions.[60] One rationale the Court gave for regulating abortion was to preserve a fecund person's maternal capacity. This is perhaps best illustrated when the Court recognized that depriving fecund persons of the "choice" of abortion "altogether" would result in many negative consequences for fecund persons forced into "motherhood."[61] These consequences were manifold:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these factors the woman and her responsible physician necessarily will consider in consultation.[62]

Notably, the Court outlined these potential harms to motherhood to justify why the State *should not* have total control over the abortion decision and why privacy rights *should* encompass a fecund person's "decision whether or not to terminate her pregnancy."[63] But in providing these

justifications for abortion rights, the Court invoked preconceived conceptions of fecund persons as mothers.

Such legal justifications presumed the fecund person's maternal commitments and motherly obligations. This is demonstrated through *Roe*'s assumptions that the individuals capable of bearing children are the primary caregivers. In arguing for a fecund person's right to abortion, the Court stated that "maternity or additional offspring may force upon the woman a distressful life and future."[64] In this assertion, the Court assumed that the distress accompanying a full-term pregnancy would be the principal responsibility of the fecund person not only in the immediate aftermath of birth but in the long-term, parenting process that necessarily requires a lifetime dedication to the child's future. This justification in *Roe* presents a rhetorical paradox as the Court wields legal and medical expertise to grant fecund persons' rights to abortion while simultaneously delimiting these rights and expertise to their potential as mothers.

This paradox undergirds the Court's rhetorical slippage between interpretations of the fecund person's personal expertise and autonomy over the abortion decision, and their presumed maternal expertise and responsibility for childrearing. Such an assumption is bolstered through the Court's claim that the abortion "choice" should be granted because if it is not, then the "mental" and "physical" health of the fecund person may be "taxed by child care."[65] This rationale presumes the role of fecund persons as the primary caretaker and frames personal expertise in terms of maternal knowledge, responsibility, and obligation. In a sense, such a framework may elevate maternal expertise by invoking notions of "value" associated with maternal labor and childrearing.[66] The Court's interest in protecting "maternal health" against such taxing labor might even suggest a reverence for motherhood. However, because the "power and expertise" of the abortion decision ultimately rests with the physician, often coded

masculine, a framework rooted in maternal responsibility repeats rather than repeals "patriarchal" assumptions of fecund persons' civic role.[67] This gendered logic helps explain how the *institution* of motherhood, which is invested in ensuring a fecund person's "potential" to reproduce, "remains under male control." This logic also helps explain how motherhood as an *institution* can be elevated at the same time that a fecund person's *agency* as mother is restricted within an apparatus of legal and medical expertise.[68] Sarah W. Walden critiques this logic because it exalts motherhood and denigrates mothers, all while promoting the importance of maternal expertise.[69] In a similar way, the Court contributes to a paradox of expertise when it emphasized the fecund person's maternal role to justify abortion rights. This rationale reinforces legal and medical treatments of fecund persons as primarily maternal vessels. Such reasoning ultimately delimits their personal expertise and capacity to act autonomously within the socially accepted boundaries of motherhood and conceptions of maternal expertise.

This paradox is further demonstrated in the Court's emphasis on legalizing abortion to prevent possible "psychological harm" and distress associated with motherhood.[70] In fact, most of the Court's justifications for legalizing abortion concerned the potential psychological impact of motherhood on fecund persons, which reflects what Catriona Macleod calls "the psychologization of abortion."[71] Macleod identifies this phenomenon as the shifting point in the cultural and political milieu where political discussions of the pregnant person shifted from one "circumscribed by moral, health or gender narratives" to one where their "body, self, emotions, and psyche were rendered visible within psychologized discourses."[72] In a similar way, *Roe* attempts to make visible the experiences of fecund persons and motherhood by outlining justifications for abortion rooted in protectionisms against imminent "psychological harm."[73]

Yet, these justifications reinscribe the traditional conceptions of fecund persons as prone

to psychological instability. Harvard Law Professor Jeannie Suk has argued that *Roe* "featured a discourse of woman's emotional pain" when Justice Blackmun wrote in the majority decision that denying pregnant persons access to abortion was an "apparent" State-imposed "detriment."[74] Such frameworks may recognize "psychological trauma as a core of women's experiences," but they can also be used by courts and legal actors to justify limiting fecund persons' abortion rights and access.[75] Because of the ambiguity around "health" present in criminal abortion codes prior to *Roe*, courts often used concerns for a fecund person's psychological and mental health to *restrict* their access to abortion.[76] Although the *Roe* Court overturned these statutes, it failed to offer a definitive definition of the legal, medical, and personal boundaries of "maternal health." Thus, in predicating abortion rights on the need to prevent vague and uncertain notions of "psychological harm" caused by "motherhood," *Roe* reinforced the stereotype that fecund persons are incapable of employing their own knowledge and experience to make abortion decisions. Such a logic also reinforced concerns about the ambiguous boundaries for regulating abortion that would come to the fore in the *Roe*'s treatments of expertise in the trimester framework.

Ultimately, by arguing for abortion rights to protect against potential harm to maternal health, *Roe* made two mutually implicative provisions for a fecund person's personal expertise. First, the rationale suggested that legal and medical expertise must protect fecund persons from the threats of psychological harm that come with forced motherhood when abortion is denied or restricted because, two, that fecund person has a presumed potential to bear children and to mother at some future point in time. Thus, even as the Court granted a fecund person the right to abortion, their rights were predicated on expectations of motherhood and their presumed roles as mothers. These assumptions sustain the rhetorical paradox of expertise. As such, *Roe* used these

expectations to regulate abortion rights through employments of legal and medical expertise, while simultaneously imbuing the personal expertise and abortion rights of fecund persons with a maternal obligation to the State.

By employing assumptions of a fecund person's physical and mental proclivity toward motherhood, *Roe* re-inscribes the fecund person as proto-mother under the guise of preserving their health and protecting their privacy in abortion decisions. But because the boundaries of maternal health must be regulated through legal and medical expertise, *Roe* repeated, rather than repealed, the relationship between the State and medicine that had once formed the backbone of criminal abortion codes prior to *Roe*. To maintain the legal-medical bond, the *Roe* Court claimed it "reasonable and appropriate for a State to decide that, at some point in time another interest," such as medical questions of "health" or "life," may compel the State to intervene in the abortion decision. The Court accordingly concluded, "a woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly."[77] Because the Court as legal experts clearly reasoned that abortion is "inherently, and primarily, a medical decision," State interference into a fecund person's abortion, and infringement on their personal expertise, relies implicitly on the joint expertise of medical professionals and legal officials.[78] With this decision, the Court introduced the "broad doctrine of abortion privacy into constitutional law" yet simultaneously authorized legal and medical checks on personal expertise in abortion matters.[79]

But the Court also acknowledged that many people opposed grounding abortion rights in a privacy tenet out of fear that this would result in abortion-on-demand. This fear grew out of the perception that fecund persons would have an absolute right to choose what they do with their bodies.[80] One way the Court addressed the fear of abortion-on-demand was to authorize both physicians and the State to make judgments in the application of the trimester framework.[81] The

trimester framework established a three-part mechanism by which fecund persons, medical physicians, and legal officials might enact their expertise in the abortion decision. In the following section, I unpack *Roe*'s trimester framework to show how this triangulation reinforced the paradox in abortion discourse by invoking knowledge-based assumptions about, and procedural practices of, legal, medical, and personal expertise. These assumptions ultimately justified the internal logic of legal expertise and allowed the Court to defer indefinitely to legal and medical experts to regulate fecund persons' personal expertise and rights to abortion.

Trimesters and Triangulations

In addition to addressing privacy concerns, the *Roe* Court had to contend with questions of ambiguity that afflicted previous anti-abortion legislation and their potential violation of the Constitution.[82] Despite the Court's attempts to clarify regulations on abortion rights, conceptual ambiguity over the legality of "privacy" and the medical meaning of "viability" have left the SCOTUS decision mired in numerous controversies. These controversies include conflict over the morality of abortion,[83] women's/fetal autonomy,[84] religious freedoms,[85] medical privacy,[86] medical necessity,[87] and government infringement on (or protection of) abortion access.[88] Some scholars have even critiqued *Roe*'s invocation of privacy for its inventiveness. Legal scholar Richard Epstein supports this point when he claims that the *Roe* Court's use of privacy is of a "totally different sort from that protected in the other contexts in which notions of privacy have been invoked."[89] As if anticipating future criticisms of its extension of privacy rights to abortion, the Court articulated the medical-legal history of abortion to further expand its purview of expertise. The Court ultimately established the trimester framework to "measure,"—or, better yet, regulate—the domain of personal expertise and ambiguities around privacy as they pertained to abortion rights.

Specifically, the trimester framework gave justification for the preservation of abortion before fetal viability—the point at which a fetus could potentially survive outside the womb.[90] The *Roe* Court outlined the trimester framework as it pertained to viability as follows:

> (1) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (2) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (3) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[91]

Roe's trimester framework suggested three ways in which expertise may regulate abortion: through promotion and State interest in "maternal health," deference to "medical judgement," and through "compelling" State interest in preserving the "potentiality of life." Although the Court acknowledged that State interests such as maternal health and potential fetal life may justify the regulation of abortion at different moments in a pregnancy, both medical and legal expertise worked in tandem to regulate the final abortion decision. The role of medical expertise is especially prominent throughout the first trimester, as this is when "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[92] In the second trimester, the State "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health," and in the third trimester, the State may do so aligned with "appropriate medical judgment" to protect "potential life."[93] But even in the second and third trimesters, legal expertise does not operate alone as the "compelling" points of "maternal health" and the "health of the mother" invoke the necessity of medical expertise.[94]

Throughout the trimester framework, the physician is tasked with exercising their best medical judgment to determine the safety, the point of viability, and thus the legality, of abortion at each stage along a person's pregnancy. Representatives of the State or judges in the court system in turn interpret whether physicians exercised their best medical judgment in accordance with the law and existing medical knowledge. In this way, *Roe* reinforces both the role of medical authority and the rule of law to jointly determine the legality of abortion decisions.[95] By legislating abortion through medically defined trimesters, the Court enshrines the *Roe* decision in a differential discourse of expertise that constrains personal expertise and places legal and medical practice in collaborative contest.

Expressly, the Court proposed the trimester framework to outline the points at which legal and medical expertise may intervene to regulate a fecund person's abortion rights and access.[96] For the *Roe* Court, State interests in preserving maternal health or protecting potential fetal life warranted placing limitations on fecund persons' abortion rights. Throughout the trimester framework, "maternal health" or the "health of the mother" are not solely the purview of personal expertise as the Court defers to "medical judgment," and thus medical expertise, to regulate these legal interests.[97] The trimester framework is particularly important because it justifies the protection of fecund persons' abortion rights *before* fetal viability. The Court placed emphasis on viability because at this point in a pregnancy, "the fetus presumably has the capability of meaningful life outside the mother's womb."[98] When a fetus becomes viable (at approximately twenty-eight weeks into a pregnancy in 1973), the State may intervene in abortion decisions to protect "potential life."[99] "After viability," the State "may go as far as to proscribe abortion" except when "necessary to preserve the life or health of the mother."[100] Such interventions, according to the Court, would have both "logical and biological justifications."[101]

As such, the intelligibility of the trimester framework rests implicitly on the development of medical knowledge and the ability of the physician to determine viability. Legal abortion in turn depends on medical interpretations of this knowledge and legal assessments of those medical interpretations.[102] By granting abortion rights up to the point of viability, and tying this critical point to notions of maternal health, the trimester framework entangles the State, physicians, and fecund persons in a complex web of expertise. This triangulation presents a paradox as *Roe*'s trimester framework privileges legal and medical expertise over personal expertise even as the Court attempts to expand fecund persons' rights to abortion.

The First Trimester

Even in moments when fecund persons seemingly have the most autonomy over their abortion decisions, the Court tempered this autonomy by stressing the joint role of legal and medical expertise. The logic undergirding abortion rights in the first trimester tangled legal and medical expertise in ways that make separating the two and their role in early abortions impractical. While at times one knowledge domain, such as medical expertise, may appear more authoritative, *Roe* clearly, and at times unclearly, placed limitations on both legal and medical expertise in the first trimester. Such limitations suggest that neither legal nor medical expertise can alone authorize a first trimester abortion. In the first trimester, the Court acknowledged that the State, and legal expertise, itself may be limited in its ability to regulate abortion:

> The attending physician, in consultation with his patient, is free to determine, *without regulation by the State*, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, *the judgment may be effectuated by an abortion free of interference by the State* (emphasis mine).[103]

But medical interests in protecting maternal health may also override the personal expertise of the fecund person at this stage of pregnancy. Here, the Court articulated that "for the stage prior

to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[104] The emphasis on "medical judgment" in the first trimester underlines medical expertise and positions the physician as the active decision-maker in the abortion decision. Such an emphasis on the physician has caused scholars to critique *Roe*'s "privileging of medical judgment" for ultimately removing "women's judgments, voices, and stories from the Court's historic opinion."[105]

However, it is critical to acknowledge that while State intervention into first trimester abortions is limited by medical expertise, State intervention is not explicitly prohibited in the first trimester. In outlining the trimester framework as a whole, the Court declared that the State may intervene at "compelling" points to protect the "pregnant woman's health."[106] The compelling points that warrant State intervention into an abortion decision are likely to occur later in a pregnancy as such interests "grow in substantiality as the woman approaches term."[107] Clearly, the Court limited State intervention into early abortions because first trimester abortions were considered to be "relatively safe." Here, the Court recognized that previous nineteenth-century criminal abortion laws that prohibited all abortions, including those in the first trimester, were predicated on protecting fecund persons from "submitting to a procedure that placed her life in serious jeopardy." The *Roe* Court dismissed such concerns in 1973 with its statement that "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."[108] This is because at the writing of *Roe,* modern technology and medical knowledge had lowered the mortality rates for abortion to below that of the mortality rates for pregnancies brought to term.[109]

In 1973, the Court clearly deferred to medical expertise to regulate first trimester abortions. However, such a deferral does not remove the role of legal expertise in early abortions entirely. Despite advances in medical knowledge, the Court made clear that even though abortions "prior to the end of the first trimester" are "relatively safe," they are "not without risk." The inclusion of "risk" repeats the logic in previous criminal abortion codes and suggests that State intervention into first trimester abortion is limited *unless* the abortion poses a threat to the fecund person. Although the "State cannot override" a "woman's qualified right to terminate her pregnancy," a risk to the "pregnant woman's health" could potentially compel the State to intervene even within first trimester abortions.[110] Because the Court does not venture to define what "risks" may warrant State intervention, it maintains the vague boundaries of abortion regulations within the early stages of pregnancy and leaves open the future potential for State regulations of first trimester abortions.

Importantly, even when the Court acknowledges how medical expertise has improved the "safety" of abortions, it concedes these developments as they apply to legal abortions only. This concession works to further entangle the bond between legal and medical expertise in abortion decisions. To quote the Court: "Mortality rates for women undergoing early abortions, *where the procedure is legal*, appear to be as low as or lower than the rates for normal childbirth" (emphasis mine).[111] The emphasis on low morality rates is attributed to medical expertise and invoked to justify protecting first trimester abortions. In doing so, the Court declared that first trimester abortions "must be left to the medical judgment of the pregnant woman's attending physician."[112] Yet, the Court's rationale for deferring to medical expertise in first trimester abortions is rooted in a logic of legality. The Court acknowledged advances in medical expertise, thus conceding some legal authority, but only did so as these medical advances concerned

abortions conducted "where the procedure is legal." The emphasis on legal abortions certainly highlights the importance of medical expertise but makes clear the need for such expertise to function within the realm of law and legal expertise.

To further establish the role of legal expertise in first trimester abortions, the Court authorized legal checks on medical criteria for abortion. Within the domain of first trimester abortions, the Court maintained that "important state interests in the areas of health and medical standards do remain." Here, the Court contended that "the State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that ensure maximum safety for the patient."[113] In doing so, *Roe* upheld the "safety of the patient" but ultimately underlined the role of the courts in overseeing and regulating these "medical standards" of safety. The Court granted that the "State['s]…legitimate interest…obviously extend[ed]" to the physician and various knowledges and procedures of abortion. In particular, the Court claimed that "high mortality rates" at "illegal 'abortion mills'" justified State regulation of and supervision over the "performing physician and his staff," "the facilities involved," "the availability of after-care," and "adequate provision for any complication or emergency that might arise."[114] *Roe* conceded that each of these provisions are the domain of medicine, and thus under the purview of medical expertise. However, *Roe* authorized the State to regulate such medical provisions to "ensure maximum safety for the patient," and thus ensured the scope of legal expertise over medical expertise in first trimester abortions.[115]

While *Roe* acknowledged that the State may regulate medical provisions pertaining to first trimester abortions, the Court nevertheless deferred to the physician and their medical expertise to make ultimate meaning of early abortions. Here, the Court deferred to physicians' "medical judgment" to determine the "abortion decision" at the "stage prior to approximately the

end of the first trimester."[116] But even when the State left the abortion decision to the medical expertise of the "attending physician," the State makes clear that it may exercise its legal expertise to regulate the physician's medical knowledge and procedures.[117] This means that in first trimester abortions, physicians must still defer to existing legal regulations on abortion established by the law. This dual deferral exposes the paradox of expertise in first trimester abortions: the Court sought to grant abortion rights to fecund persons in the earliest stages of pregnancy but did so within a complex web of expertise that neither confirmed nor denied the definitive parameters of legal and medical expertise over the abortion decision. By leaving these boundaries between legal and medical expertise unclear, but clearly intertwined, the Court failed to deliver on its promise of rectifying the ambiguity around first trimester abortion rights for fecund persons.

The Second Trimester

The scope and power of legal and medical expertise over personal expertise in abortion decisions is heightened in the second trimester. Importantly, the Court re-emphasized the importance of protecting maternal health at this stage. Outlining abortion regulations in the second trimester, the Court clearly argued that "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."[118] This emphasis appears to position fecund persons' health as a top priority in the abortion decision as their wellbeing is seemingly elevated above that of the potential life of the fetus, which does not become an explicit State interest until the third trimester.[119] Likewise, the physician and medical expertise are not explicitly stressed as an authority in second-trimester abortions. However, the emphasis on regulating abortion in the second trimester based on State interests of "maternal health" implies at least some involvement

of the physician and the medical sphere. This is because "the risk to a woman increases as her pregnancy continues." These risks apply and increase both as fecund persons continue their pregnancies to term and as they seek abortions at later stages of their pregnancies, such as in the second trimester. Such risks have declined as "medical knowledge" has developed, but for the *Roe* Court, "it follows that, from and after this point," the "State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[120] Justifiable legal regulations related to maternal health included:

> [R]equirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.[121]

These legal regulations of medical criteria demonstrate that like abortions in the first trimester, second trimester abortions may be regulated through "important state interests in the areas of health and medical standards."[122] But as the potential risks of abortion increase, the "State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy."[123] This legal-medical logic invokes the pregnant person as patient and positions the fecund person as someone "who is worked *upon"* rather than someone who is capable of exercising their own medical autonomy (emphasis in the original).[124] In this way, the Court portrays the fecund person as "passive and unable to make tough decisions in accordance with their best interests."[125] Such a frame ultimately maintains the legal-medical domain of expertise over abortion decisions throughout a fecund persons' second trimester.

To be clear, the autonomy of fecund persons and the medical parameters of their "maternal health" are articulated as a justification for State intervention into second trimester abortions. While this intervention is intended to promote and protect the "health of the mother," the Court fails to define the scope and meaning of health. This omission makes it unclear as to

whether the State has interests in protecting maternal health for the sake of the fecund person and their autonomy, or for the sake of preserving the reputation of the physician and the medical profession. An extension of this ambiguous logic suggests that State interventions could justify the courts' *denial* or *affordance* of abortion rights and access. This is because an abortion in one instance may be necessary to maintain a fecund person's health, while an abortion in another instance could potentially cause harm to a fecund person's health. Because *Roe*'s legal and medical treatments of "health" do not clearly define the point in a pregnancy at which the benefits of an abortion outweigh its "risks," the boundaries for regulating abortions remain ambiguous. Yet, the legal expertise of courts and legislators must continually confer with the medical expertise of physicians to determine conditions of health, and to grant or deny a fecund person's abortion. Here, the rhetorical paradox of expertise suggests that even in the second trimester when the "health of the mother" appears paramount, legal and medical interests in protecting maternal health could function to either expand or contract fecund persons' abortion rights.[126]

The Third Trimester

The authority of the courts and the medical sphere reaches a critical point in a fecund person's third trimester. In the final stage of pregnancy, the Court articulated an approach to regulating abortion just prior to the point of fetal viability: "the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[127] Here, the Court restated the importance of legal and medical expertise to jointly regulate the abortion decision. In the third trimester, State actors may wield their legal expertise to prohibit abortions unless "appropriate medical judgment" suggests otherwise. Even though the

State maintains a more dominant role in third trimester abortions, legal experts must still consult and align with the judgment and knowledge of medical experts who could ultimately permit or even recommend an abortion for a fecund person. In this way, medical expertise functions in the third trimester in a similar way as it did in the second trimester.

Whether a physician recommends a third-trimester abortion ultimately rests on the risks associated with carrying a pregnancy to term. But unlike in the second trimester, legal and medical experts in the third trimester must weigh the risks associated with preserving "maternal health" against those of protecting potential "human life."[128] However, the Court failed to make clear the risks related to either maternal health or potential fetal life at this stage. In an attempt to clarify the point at which maternal health overrules State interests in potential fetal life, the Court claimed, "Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail."[129] This legal interpretation suggests the potential life of the fetus is prioritized except if the "life of the pregnant mother herself is at stake." Yet, the Court still leaves open the question of what constitutes a risk to maternal health as it provides no clear definition of "maternal health," "health of the mother," or even what it means for the "life of the pregnant mother" to be threatened or susceptible to harm. This omission not only makes navigating the boundaries of legal abortion unclear as they converge on medical interests of "health" and "life," but it also further confounds whose rights to health and life the Court and physicians have an obligation to protect.

By failing to define the legal-medical parameters for protecting maternal health in the third trimester, the Court deprioritized the personal expertise of the fecund person. This exclusion of a critical definition maintains the ambiguity of abortion law. It also helps explain

why in the third trimester, the State may wield its legal expertise to prohibit abortions "except where necessary, in appropriate medical judgment."[130] Still, even in exercising their "medical judgment," the physician cannot alone make the abortion decision. Instead, they must do so in consultation with the law, which maintains its "legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that ensure maximum safety for the patient."[131] In omitting these definitional boundaries, legal and medical expertise left open the possibility for interests in the "potentiality of human life" to fill the gaps.

Read against the *Roe* decision, the inclusion of potential fetal life in the third trimester suggests that while a third-trimester abortion may be prescribed to preserve "maternal health," their health is always weighed against State interests in fetal health. Legal and medical treatments of fetal health and potential life have long-been a cornerstone of philosophical and scholarly debates on abortion.[132] Legal studies typically focus on the rights afforded to the fetus through case law and constitutional precedent, while medical studies focus on notions of medical necessity and fetal development.[133] Feminist studies of potential life acknowledge the complexities between motherhood and abortion and the way that abortion discourse often positions the interests of the fecund person and the fetus as "relational" and dependent upon one another.[134] Despite the Court's promise that "[t]hese interests are separate and distinct," it failed to clearly demarcate when such interests became separately "compelling." This omission mystified the legal, medical, and personal boundaries of third trimester abortions.[135] And despite the Court's efforts to remedy the previously vague language of criminal abortion codes, it is *Roe*'s ambiguity that sustained the rhetorical paradox of expertise in abortion law. In the final stages of legal abortions, the *Roe* Court tied the personal expertise of fecund persons to the

contingencies of potential life but deferred and left such definitional domains and disputes for future courts and physicians to determine.

Trials and Tribulations

While the trimester framework places increasing regulations on fecund persons' rights to abortion as a pregnancy progresses, it is crucial to recognize that abortion rights are limited by the persistent ambiguities of legal and medical expertise from the onset of a pregnancy. Undergirding these ambiguities are the Court's entanglement of medical and legal expertise. It articulated the abortion decision as primarily a medical one and emphasized State intervention on behalf of maternal health or fetal life along a pregnancy.[136] By regulating abortion rights along medically defined trimesters and marking viability as the final point at which abortions are legal, the Court triangulates legal, medical, and personal expertise. The notion of viability assumes a fetus can successfully live outside a fecund person's womb: a framework around viability, then, necessitates the knowledge and practical experience of physicians and medical expertise. But the dependency of the trimester framework on entanglements of legal and medical expertise, as well as evolving medical knowledge and technology, confounds the boundaries of legal abortion. This also makes the point of viability. and thus the points at which either maternal health or potential life become compelling, legally, and medically unclear. The Court attempts to clarify these boundaries by making "maternal health" the compelling point at which State intervention is warranted into second trimester abortions, and the "potentiality of fetal life" the compelling point at which State intervention into third trimester abortions is warranted.

Yet, the scope and domain of either legal or medical expertise remains ambiguous. In the first and second trimesters, both forms of expertise may be employed to either justify a fecund persons' abortion or justify its denial. In the third trimester, legal and medical expertise may be

invoked to protect either the health and life of the fecund person or the potential life of the fetus. This incongruity presents a paradox that has led subsequent legal authorities such as Supreme Court Justice Sandra Day O'Connor to claim that the trimester framework was "on a collision course with itself."[137] Nevertheless, the trimester framework was the resolution the Court offered in 1973 to elucidate the ambiguities around regulating abortion for legal, medical, and personal actors. But because of its fluidity, and legal and medical inconsistency, the trimester framework ultimately suspended the certainty of fecund persons' abortion rights and access.[138]

In triangulating legal, medical, and personal expertise, *Roe*'s trimester framework served an instrumental purpose as it sought to provide an answer to the prevailing abortion problems of the time. However, my analysis of the trimester framework implies that neither legal nor medical expertise can singularly determine the boundaries of legal or safe abortions. At the same time, no single abortion decision can be made without the consultation and agreement of these expert forces. In this way, the indeterminacy of expertise appears to be built into the very foundation of *Roe*. Certainly, when the Court handed down its decision in 1973, there was no way of knowing exactly how medical technology would evolve and confound the application of the trimester framework in future abortion disputes, or how future courts would interpret the precedent in *Roe*. This is why a judicial opinion may be characterized as a model text that "catches and freezes for a moment the legal mind at work," while simultaneously forestalling the "judicial proceeding that might come."[139] Such legal framings acknowledge that it was also highly improbable that the *Roe* Court could capture all the future legal, medical, or personal contingencies of the abortion debate. To address unforeseen disputes, the Court deferred indefinitely to the knowledge of future courts and physicians. But by positioning the fate of fecund persons' abortion rights within legal and medical domains, the Court also exposed the paradox of U.S.

abortion law: the simultaneous impossibility that neither doctors nor legislators can alone interpret the legality of abortion for fecund persons and the assumption that they are most capable. Put simply, this paradox demonstrates how legal and medical expertise can at once expand fecund persons' abortion rights and restrict their autonomy to abortion access. It also demonstrates the limitations of expertise to resolve the abortion problem. The following section unpacks these limitations as they emerged within the internal proceedings of the *Roe* Court and set the uncertain grounds for future applications of the trimester framework.

Trimesters and Tribulations

In confirming the constitutionality of abortion, the *Roe* Court offered the trimester framework tied to privacy to regulate abortion decisions. This predication of abortion rights on a privacy tenet ultimately failed to address two critical questions brought before the Court. First, the *Roe* decision failed to adequately clarify the vague boundaries for regulating abortion that had afflicted previous anti-abortion laws prior to *Roe*. The *Roe* decision relied on the language of viability, health, and life, and regulated these key terms through trimesters. But, as the previous section demonstrated, uncertainty remained over at what point these key terms became critical to the abortion question (first, second, or third trimester), and who ultimately determined the abortion decision (legal, medical, or personal actors). Second, the Court failed to effectively respond to the question of whether Texas had a compelling State interest in protecting fetal life "from and after conception."[140] In many ways, *Roe* knowingly sidestepped these questions by focusing primarily on resolving the privacy concerns brought to the Court over concerns for remedying ambiguous legal language or protecting interests in fetal life. As this section demonstrates, the Court not only failed to navigate these two questions in its decision but also established the trimester framework to deliberately leave open these questions for future courts

and experts to determine. This indefinite deferral of expertise established the ultimate paradox in abortion politics: the Court aligned legal and medical expertise to confer abortion rights to fecund persons but left the boundaries of this right indeterminate, and thus open to future critique and restriction.

What's in a Word? Viability and the Arbitrariness of Expertise

When the SCOTUS was tasked with solving the abortion problem in *Roe*, it first triangulated the constitutional right to abortion within a rhetoric of expertise. Throughout the trimester framework, the courts in conjunction with medical professionals offer their expertise as a suitable solution to the abortion problem. But for expertise to function, experts must create an exigence because, as Hartelius reminds us, "it benefits experts to persuade the public that an exigency exists because when it does, expertise is fitting and necessary."[141] But this exercise of expertise is not static, insular, or singular. Because expert institutions like that of law are concerned with maintaining the guise of neutrality, objectivity, and universality, any judgment rendered from legal actors is presumed to be non-controversial, creating as little spectacle as possible.[142] Certainly, legal decisions can at times invoke dissidence among differently situated populations, as *Roe* certainly did, but the rhetoric of expertise suggests that the law exists to mediate this dissidence. To this point, Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites contend that,

> The courts are so concerned to appear 'apolitical' that they generally avoid the appearance of controversy whenever possible. Significantly, the posture that appears to be the least political is almost always that which appears the most natural to the largest audience, and it is precisely this hegemonic position that the courts tend to reiterate and legitimate.[143]

In other words, in times of "political quiescence," the status quo is more easily maintainable.[144] In adopting the trimester framework to regulate abortion, the *Roe* Court presented medicine as a

possible mediator and "mechanism of civil governance."[145] It also established the regulatory apparatus of key abortion terms such as privacy and viability. In doing so, the Court placed the authority of legal, medical, and personal expertise in contest and expanded the interpretative capacity of expertise to resolve future abortion disputes.

The ability for the courts, physicians, and fecund persons to interpret the boundaries of legal abortion is central to the *Roe* decision. Although a 7-2 decision, not even the Justices in the *Roe* majority were aligned initially on how to interpret constitutional law to grant abortion rights. Before the Court grounded abortion rights in the "penumbra" of privacy afforded by previous decisions, members considered grounding abortion rights within the unenumerated rights protected by the Ninth Amendment as well as within the Equal Protection Clause afforded by the Fourteenth Amendment.[146] The Court eventually grounded abortion rights within the Due Process Clause of the Fourteenth Amendment but concluded that while the right of personal privacy includes abortion rights, this right is "not unqualified" and "must be considered against important state interests in regulation."[147] Here, the Court relied on the medical and legal interpretations of health, life, and viability as mediated through the trimester framework to determine the scope and application of abortion rights.

While the Court eventually arrived at the now infamous trimester framework and identified viability as the mechanism for regulating compelling State interests in abortion matters, the *Roe* Court was also not originally unified in its interpretations of this legal-medical framework. Within internal court memos, Justice William J. Brennan questioned the usefulness of "viability" in clarifying the boundaries of abortion rights for fecund persons as he viewed viability as "a concept that focuses upon the fetus rather than the woman."[148] Contesting the viability standard, Justice William O. Douglas stated, "I favor the first trimester, rather than

viability."[149] Other members such as Justice Potter Stewart claimed that the Court's legal reasoning that initially "fix[ed] the end of the first trimester as the critical point for valid state action" resembled more "legislative" practices than judicial ones. This criticism suggested that the *Roe* Court's employment of judicial interpretation "drew constitutional *lines* but did not advance a constitutional *argument*," and thus failed to provide adequate justification for a constitutional right to abortion (emphasis in original).[150] These various treatments of viability and the trimester framework demonstrate the latitude judicial interpretation offers to those that grace the High Court.

Collectively, these criticisms of the *Roe* decision from members of its own Court also suggest a latent desire for legal expertise to offer a more definitive structure for regulating abortion. But internal court memos that circulated with the 1972 draft of *Roe* intimate that Chief Justice Harry A. Blackmun believed that definitively demarcating State interests in maternal health and fetal life was impossible. Blackmun acknowledged and accepted that the dimensions of each trimester were variable, which necessitated more generalizations than specifications in operationalizing each stage. As such, even the point of viability, though marked at the end of the second trimester, remained indeterminate to the Court. When Blackmun originally proposed a three-tiered framework to regulate abortion, he acknowledged that he marked the first trimester—the point at which the abortion decision is left to the medical judgment of a fecund person's physician—as "critical." In the same flourish of a pen, Blackmun also added that this demarcation is "arbitrary," and that any other point along a pregnancy such as "quickening or viability" is "equally arbitrary."[151] Here, Blackmun stated in full:

> You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.[152]

To label the terms for regulating legal abortions both "critical" and "arbitrary" makes the meaning of legal abortions uncertain. While this logic may be admissible for justices whose role as interpreters allows for interpretations that may be either "right or wrong," such logic perplexes legislative bodies who must legislate based on these indeterminate grounds. As legal scholars aptly note, the difference between the legal process of judicial interpretation and that of constructing legislation is that legislation "cannot make a mistake about meaning." Such logic assumes that because in legislating "there is nothing external to be interpreted, there is nothing to be mistaken about."[153] Yet, if the original interpretation offered by the Court on which future legislation rests is open to interpretation, how can legal experts in legislative positions and lower courts fulfill the process of legislation and adjudication?

While these inconclusive memos never made it to the final draft of *Roe*, Blackmun did acknowledge the limitations of expertise in the final decision. Here, Blackmun stated,

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Thus, in the final opinion, Blackmun recognized that future experts in "medicine, philosophy, and theology," as well as the "judiciary," would have to contend with any legal incongruities, most notably as they pertained to the persistent question of when life begins.[154]

The *Roe* Court ultimately ruled the Texas Penal Code unconstitutional but deflected answering a lingering question about the scope of abortion rights. This question was whether the State maintained interests in protecting fetal life "from and after conception."[155] In fact, in its deflection, the Court actually contended with a different question than it was tasked with answering—the question of when life begins.[156] Here, the *Roe* Court argued that the Fourteenth Amendment's use of "person" only applies "post-natally" and "does not include the unborn."[157]

But because *Roe* is a case chiefly concerned with abortion—a procedure that predominantly occurs before fetal birth commences—the question of personhood is not directly about the personhood of the yet to be born, but the personhood of *potential fetal life*. Analyzing the Court's treatment of personhood against the question of the yet to be born could simply mean that a fetus does not incur the status of "person" until it is born.[158] This appears to be the stance of the Court in articulating a notion of personhood tied to birth. Read against *Roe*'s viability clause, however, the Court's treatment of personhood may be extended to mean that a fetus does not incur the status of "person" until it is viable, and therefore capable of "meaningful life outside the mother's womb."[159] The former typically occurs around forty weeks into a pregnancy, while the latter could occur as early as twenty-two weeks after conception. While defining the relationship between fetal life and fetal personhood is a complex one beyond the scope of this project, this brief speculation into the Court's treatments of these key terms exemplifies the ambiguity of expertise rooted in *Roe*. By articulating a concept of personhood within its decision, the *Roe* Court not only ventured to provide an answer to an unsolicited legal question, but the answer it offered was cautiously indefinite and offloaded the responsibility of answering such questions onto future experts.

Dicta v. Holding: The Limitations of Expertise

As a whole, the decision in *Roe* appears to raise more questions than it answers. In many ways, the Court faltered from the start as it exercised expertise to provide remedies to problems it was never tasked with solving in the first place. These judicial meanderings in SCOTUS decisions are what legal scholars call "dicta," or statements from members of the Court that go beyond the facts presented before them. These statements are thought to represent the opinions of the Court but generally do not embody the resolution of the decision and are therefore not

considered legally binding.[160] Dicta, then, differs from "holding," which represents the Court's answers to the legal questions brought forward in a case. Unlike dicta, the Court's holding is legally binding and lower courts must consider holdings in future cases dealing with similar matters and interests.

To demonstrate the importance of the dicta versus holding debates in *Roe,* it is important to return to the exact questions brought before the Court. In 1973, the Court was tasked with wielding its legal expertise to determine, first, whether the Constitution protects a fundamental right to abortion, and, second, whether Texas had a compelling State interest in protecting fetal life "from and after conception."[161] The Court located the right to abortion within the Due Process Clause of the Fourteenth Amendment and thus seemingly resolved the first question at hand. The Court then argued that the word "person" in the Fourteenth Amendment does not pertain to the "unborn," thus attempting to resolve the second question. But the Court did not stop there. Instead, the SCOTUS went a step further and invoked judicial interpretation tied to medical expertise to offer the trimester framework as a mechanism to regulate the scope of privacy in abortion decisions and to negotiate future abortion disputes. Legal critiques of the *Roe* decision often suggest that the political upheaval over abortion after *Roe* was a result of the procedure by which the Court arrived at its decision. On this note, the late Justice Ruth Bader Ginsburg suggests that the basis of *Roe* was perhaps rushed and "incomplete" and leaned too strongly on "heavy handed judicial intervention" that presented too many difficulties for the Court in later years.[162] By going beyond the scope of the direct legal questions of the case, the *Roe* Court contributed to the ongoing legal debates about the distinctions between holding and dicta that bind the meaning and application of legal expertise.

What is so compelling about the opinion in *Roe* is that what can be reasonably considered the dicta—the trimester framework—has become the basis for critiquing the holding—the grounding of abortion rights within a privacy precedent—in *Roe*. Addressing the criticism that *Roe*'s holding reads more like dicta, Blackmun himself admits in internal memos of the 1972 draft opinion that the difficult question of abortion necessitates, at least in part, "some dictum" that cannot be "avoided."[163] Notably, in the final opinion, the Court referred to the trimester framework directly as "holding" and claimed its inclusion of the trimester framework helped make meaning of the competing "medical and legal" interests abortion decisions involve.[164] Internal court memos between the justices suggest that other members of the Court referred to aspects of the trimester framework as "dicta." Here, Justice Potter-Stewart expressed concerns for an earlier draft of the trimester framework which only emphasized the first trimester: "the specificity of the dictum - particularly in its fixing the end of the first trimester as the critical point for valid state action. . . . I wonder about the desirability of the dicta being quite so inflexibly 'legislative.'"[165]

Yet, legal scholars are skeptical as to whether Blackmun actually meant holding in the technical legal sense or more informally.[166] If the Court meant the former sense of holding, legal scholar Randy Beck argues that the "usage was plainly incorrect and inconsistent" with the Court's previous use of the term and with its "internal correspondence" on *Roe*.[167] While this addition may seem minor, legal actors have long debated the meaning and application of holding versus dicta in jurisprudence. This distinction is important in that a court's holding typically exemplifies legal expertise in the form of "accuracy, judicial authority, and legitimacy."[168] The soundness of the arguments presented as holding, and how they are argued through accepted legal principles, such as *stare decisis*, has the potential to uphold or undermine the expertise of

the Court. For later members of the Supreme Court and lower courts to confuse holding from dicta, whether intentionally or by mishap, not only has the potential to threaten the validity of the law, but also may erroneously present differential forms of authority as legally binding. Such a potential legal contradiction could allow the law to muddle abortion discourse in ways that further complicate the complexities between legal, medical, and personal expertise in abortion decisions. In fact, such contradictions embedded in *Roe* paved the way for future Courts in *Casey* to chip away at fecund person's autonomy under the guise of medical expertise.[169]

Whether the *Roe* Court meant holding or dicta, the decision in *Roe* ultimately suspended abortion rights within an indeterminate paradox of expertise. The ambiguous judgments that higher courts leave lower courts to decipher and apply in future abortion cases often compounds the original challenges brought to the Court in 1973. Likewise, when lower courts employ these ambiguous rulings from higher courts, they further complicate the unresolved issues. At best, ambiguous decisions can intensify existing legal debates about holding versus dicta; at worst, they force the High Court to evaluate cases that conflict with extant decisions, thus forcing justices to contend with their past judgements. Often this means that the Court must begin the interpretative process of law once more. In the case of *Roe*, the inclusion of the faulty trimester framework has paved the way for subsequent abortion cases and their decisions to chip away at the scope of abortion rights and access systematically. Whether the cause be intentional ambiguity, hasty decision-making, or an age-old debate about the true definitions of legal principles, *Roe*'s reliance on medical and legal expertise paved the way for future courts to continuously redefine the boundaries of legal abortion in the United States, often at the expense of fecund persons' autonomy.

The Legacy of Roe

The Supreme Court decision in *Roe* affected some of the most intimate politics in fecund persons' lives. For this reason, the case is more than a mere referendum on State responsibility to fecund persons and their reproductive health. The decision also authoritatively determined the contours of political and social understandings of fecund persons and their autonomy over abortion decisions. Federal, state, and individual understandings of reproductive health derive from the Court's ruling on the right to abortion as based in privacy. But the challenges the *Roe* Court left unanswered in its decision are perhaps just as crucial to the abortion debates as those it attempted to resolve. When *Roe* reached the Supreme Court, various concerns about abortion lingered in state and lower courts. These issues included interests in "informed consent, spousal consent, parental consent, and reporting requirements."[170] As this chapter has demonstrated, the Court failed to resolve the primary concerns around privacy and the vague language in abortion law. In its failure, the Court also left additional abortion issues unresolved. Such issues have since provided a means for differential employments of expertise to emerge within subsequent abortion debates.

Without a doubt, to say the *Roe* Court failed in its decision to offer resolutions for correcting vague abortion language or regulating interests related to privacy is sharp criticism. But to emphasize this failure is to expose the limitations of legal expertise and its ability to standardize abortion decisions. Such a critique also aligns with rhetorical scholar Nathan Stormer's apt account of the "unspoken understanding" of abortion rhetoric and the belief that there can be "closure" in the abortion debate.[171] This assumption supposes that a resolution to all the conflicts that abortion invokes can be achieved when they are simply "refereed by experts."[172] We might consider that the triangulation of expertise was in a strong sense the

Court's solution to the issues brought before it in *Roe*. But that expertise has failed to deliver on its promise is cause for our reconsideration of Stormer's assertion that "abortion is not an issue that can be concluded."[173] Yet, the Supreme Court after *Roe* continued to labor on the constitutionality of abortion after the trimester framework failed as an apparatus to regulate differential interests in abortion rights.

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[1] *Roe v. Wade* 410 U.S. 113, at 165-166.
[2] Planned Parenthood Action Fund, "Historical Abortion Law Timeline: 1850 to Today," plannedparenthoodaction.org. https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today.
[3] Jeff Nilsson and Maude Radford Warren, "The Fight For Women Doctors," saturdayeveningpost.com, January 14, 2016. https://www.saturdayeveningpost.com/2016/01/fight-women-doctors/.
[4] Planned Parenthood Action Fund, "Historical Abortion Law Timeline: 1850 to Today," plannedparenthoodaction.org. https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today.
[5] Carl W. Tyler, Jr., "The Public Health Implications of Abortion," *Annual Review of Public Health* 4 (1983): 223-258.
[6] Nancy B. Reardan, "California's 1967 Therapeutic Abortion Act: Abridging a Fundamental Right to Abortion," *In McGeorge Law Review* 2, no. 1 (1971): 186-205.
[7] Texas Penal Code of 1857, c. 7, Arts. 531-536.
[8] *Roe v. Wade* 410 U.S. 113, at 120.
[9] *Roe v. Wade* 410 U.S. 113, 120.
[10] Texas Penal Code of 1857, c. 7, Arts. 531-536.
[11] Guttmacher Policy Review, "Lessons from Before Roe: Will Past be Prologue?," guttmacher.org. https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue.
[12] *Roe v. Wade* 410 U.S. 113, at 114.
[13] *Roe v. Wade* 410, U.S. 113, at 165.
[14] Claudia Pap Mangel, "Legal Abortion: The Impending Obsolescence of the Trimester Framework," *American Journal of Law & Medicine* 14, no. 1 (1988): 92-93.
[15] Randy Beck, "Self-Conscious Dicta: The Origins of *Roe v. Wade*'s Trimester Framework," *American Journal of Legal History* 51 (2011): 529.
[16] Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review* 63 (1985): 381.
[17] *Roe v. Wade* 410 U.S. 113, at 153-154.
[18] *Roe v. Wade* 410 U.S. 113, at 115.
[19] Karen J. Lewis and Jon O. Shimabukuro, "Abortion Law Development: A Brief Overview," *Report for Congress*, January 2, 2001. https://www.everycrsreport.com/files/20010102_95-724A_ad1f1fd461891bb40b3f054a2027edf9429958dc.pdf.
[20] Ibid., "Abortion Law Development."
[21] American Law Institute, Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962. Philadelphia, PA: The Institute, 1985.
[22] Ibid., Model Penal Code, 230, 3 at 1.
[23] Ibid., Model Penal Code, 230, 3 at 3.
[24] California Health & Safety Code to amend 2377 of the California Penal Code, 25951 (a-c).
[25] Nancy B. Reardan, "California's 1967 Therapeutic Abortion Act: Abridging a Fundamental Right to Abortion," *In McGeorge Law Review* 2, no. 1 (1971): 188.

[26] Carl W. Tyler, Jr., "The Public Health Implications of Abortion," *Annual Review of Public Health* 4 (1983): 223-258.
[27] Linda Greenhouse and Reva B. Siegel, "Before (and After) Roe v. Wade: New Questions About Backlash," *The Yale Law Journal* 120, no. 8 (2011): 2028-2087.
[28] Karen J. Lewis, et al., "Abortion Law Development."
[29] *Roe v. Wade* 410 U.S. 113, at 165.
[30] *Roe v. Wade* 410 U.S. 113, at 120.
[31] *Roe v. Wade* 410 U.S. 113 at 117.
[32] *Roe v. Wade* 410 U.S. 113.
[33] *Roe v. Wade* 410 U.S. 113. Blackmun's weaving of the importance of physician expertise and the history of criminal abortion law is showcased throughout *Roe*. Also of importance here is Blackmun's experience as the first resident counsel for Mayo Clinic and the distinct but mutually implicating relationship he attempted to maintain between the practices of law and medicine.
[34] *Loving v. Virginia*, 388 U.S. 1, at 12 (1967).
[35] *Skinner v. Oklahoma*, 316 U. S. 535, at 541-542 (1942).
[36] *Eisenstadt v. Baird*, 405 U. S., at 453-454 (1972).
[37] *Prince v. Massachusetts*, 321 U. S. 158, at 166 (1944).
[38] *Pierce v. Society of Sisters*, 268 U. S. 510, at 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1919).
[39] *Roe v. Wade*, 410 U.S. 113, at 153.
[40] *Roe v. Wade* 410 U.S. 113, at 154.
[41] U.S. Constitution. amend. XIV, sec. 1, and U.S. Constitution. amend. V.
[42] *Roe v. Wade* 410 U.S. 113, at 154.
[43] *National Mutual Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582 at 646. Qtd. in *Roe v. Wade,* 410 U.S.113, at 168.
[44] *National Mutual Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582 at 646. Qtd. in *Roe v. Wade,* 410 U.S.113, at 168.
[45] *Roe v. Wade* 410 U.S. 113, at 170.
[46] *Roe v. Wade* 410 U.S. 113, at 169.
[47] See *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390; *Kent v. Dulles*, 357 U.S. 116.
[48] *Roe v. Wade* 410, U.S. 113, at 170.
[49] *Roe v. Wade* 410, U.S. 113, at 155.
[50] *Roe v. Wade* 410, U.S. 113, at 155.
[51] *Roe v. Wade* 410, U.S. 113, at 159.
[52] *Roe v. Wade* 410, U.S. 113, at 154.
[53] *Roe v. Wade* 410, U.S. 113, at 156-157.
[54] *Roe v. Wade* 410, U.S. 113, at 166.
[55] *Roe v. Wade* 410, U.S. 113, at 115, 159-165, and n. 40.
[56] *Roe v. Wade* 410, U.S. 113, at 166.
[57] *Roe v. Wade* 410, 113, at 153 and 163.
[58] Katie L. Gibson, "The Rhetoric of *Roe v. Wade:* When the Male Doctor Knows Best," *Southern Communication Journal* 73, no. 4 (2008): 312-331.
[59] In *Roe*, the word "woman," is used 55 times total, while the word "mother" is referenced 43 times, and "maternal" twice. It is perhaps most telling that woman's health becomes "maternal health" only in the Court's detailing of the trimester framework.
[60] *Roe v. Wade* 410, U.S. 113, at 160.
[61] *Roe v. Wade* 410, U.S. 113, at 153.
[62] *Roe v. Wade* 410, U.S. 113, at 153.
[63] Ibid.
[64] *Roe v. Wade* 410, 113, at 153.
[65] *Roe v. Wade* 410, 113, at 153.
[66] Sarah W. Walden, "Professional Instincts: Professional Mothering Rhetoric and the Revision of Maternal Labor*," Women's Studies in Communication,* 41, no. 3 (2018): 206-207.
[67] Ibid. See *Roe v. Wade* 410, 113, at 119-125, and 140-145.
[68] Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* Rev. Ed (Norton, 1995): 13.

[69] Sarah W. Walden, "Professional Instincts: Professional Mothering Rhetoric and the Revision of Maternal Labor," *Women's Studies in Communication,* 41, no. 3 (2018): 207.
[70] *Roe v. Wade* 410 U.S. 113, at 153.
[71] Catriona Macleod, "Feminist Health Psychology and Abortion: towards a politics of transversal relations of commonality," in C. Horrocks and S. Johnson *Advances in Health Psychology: Critical Approaches*, 153-166, (Palgrave Macmillan/Springer Nature, 2012): 153.
[72] Macleod, *Feminist Health Psychology and Abortion*, 154. Also see: N. Rose, "Psychology as a 'Social' Science," in I. Parker and J. Shotter (eds.) *Deconstructing Social Psychology* (London: Routledge, 1990).
[73] *Roe v. Wade* 410 U.S. 113, at 153.
[74] Jeannie Suk, "The Trajectory of Trauma: Bodies and Minds of Abortion Discourse," *Columbia Law Review* 110, no. 5 (2010): 1215.
[75] Suk, "Trajectory of Trauma," 1198.
[76] See the 1962 Moral Penal Code and *United States v. Vuitch*, 402 U.S. 62, at 72 (1971).
[77] *Roe v. Wade* 410, U.S. 113, at 159.
[78] *Roe v. Wade* 410 U.S. 113, at 166.
[79] Lynn D. Wardle, "Rethinking *Roe v. Wade*," *Brigham Young University Law Review*, no. 2 (1985): 231.
[80] *Roe v. Wade*, 410 U.S. 113, at 153.
[81] *Roe v. Wade*, 410 U.S. 113, at 163-164.
[82] *Roe v. Wade* 410 U.S. 113, at 120.
[83] Naomi Wolf, "Our Bodies, Our Selves: Rethinking Pro-Choice Rhetoric," *The New Republic*, (October 1995): 26-35.
[84] Bertha Alvarez Manninen, "The Value of Choice and the Choice to Value: Expanding the Discussion about Fetal Life within Prochoice Advocacy," *Hypatia* 28, no. 3 (2013): 663-683.
[85] William Gouveia, Jr. "Contract and Covenant in American Politics: Religion in the Abortion & Abolition Debates," *The Human Life Review,* (Fall 2009): 29-40.
[86] Jean V. McHale and June Jones, "Privacy, confidentiality and abortion statistics: a question of public interest?," *Law, Ethics, and Medicine* 38 (2012): 31-34.
[87] Daniel Skinner, "The Politics of Medical Necessity in American Abortion Debates," *Politics & Gender* 8 (2012): 1-24.
[88] Brian Kamoie, Joel Teitelbaum, and Sara Rosenbaum, "Law and the Public's Health," *Public Health Reports* 118 (July-August 2003): 379-381.
[89] Richard A. Epstein, "Substantive Due Process by Any Other Name: The Abortion Cases," *The Supreme Court Review* 1973 (1973): 183.
[90] *Roe v. Wade*, 410 U.S. 113, at 163.
[91] *Roe v. Wade*, 410 U.S. 113, at 114.
[92] *Roe v. Wade*, 410 U.S. 113, at 163.
[93] Ibid.
[94] *Roe v. Wade*, 410 U.S. 113, at 165.
[95] *Roe v. Wade*, 410 U.S. 113, at 165.
[96] *Roe v. Wade*, 410 U.S. 113, at 115. Here, the Court claims the State has interests in regulating fecund persons' rights to abortion as they pertain to the "pregnant woman's health" and the "potentiality of human life." As a pregnancy progresses, these interests reach a "compelling" point that may justify State intervention and prohibit abortion. Medical expertise maintains a dominant role throughout a pregnancy as the "physician" is tasked with exercising their best medical judgment to recommend or not recommend an abortion. In this way, both legal and medical expertise restrict fecund persons' rights to abortion.
[97] *Roe v. Wade*, 410 U.S. 113, at 114.
[98] *Roe v. Wade*, 410 U.S. 113, at 164.
[99] Ibid.
[100] *Roe v. Wade*, 410 U.S. 113, at 164-165.
[101] *Roe v. Wade*, 410 U.S. 113, at 164.
[102] There is extensive literature on the inherent flaws in the trimester framework, namely in its dependence on medical technology and evolving medical knowledge. See Nancy K. Rhoden, "Trimesters and Technology: Revamping *Roe v. Wade*," *The Yale Law Journal* 95, no. 4 (1986): 639-697; Randy Beck, "Self-Conscious Dicta: The Origins of *Roe v. Wade*'s Trimester Framework," *The American Journal of Legal History,* 51 (2011): 505-529.
[103] *Roe v. Wade*, 410 U.S. 113, at 163.

[104] *Roe v. Wade*, 410 U.S. 113, at 164.
[105] Katie L. Gibson, "The Rhetoric of *Roe v. Wade:* When the Male Doctor Knows Best," *Southern Communication Journal* 73, no. 4 (2008): 322.
[106] *Roe v. Wade*, 410 U.S. 113, at 115.
[107] *Roe v. Wade*, 410 U.S. 113, at 162-163.
[108] *Roe v. Wade*, 410 U.S. 113, at 150.
[109] *Roe v. Wade*, 410 U.S. 113, at 150, and n. 44.
[110] *Roe v. Wade*, 410 U.S. 113, at 115.
[111] *Roe v. Wade*, 410 U.S. 113, at 150.
[112] *Roe v. Wade*, 410 U.S. 113, at 114.
[113] *Roe v. Wade*, 410 U.S. 113, at 150.
[114] *Roe v. Wade*, 410 U.S. 113, at 151.
[115] *Roe v. Wade*, 410 U.S. 113, at 151.
[116] *Roe v. Wade*, 410 U.S. 113, at 114.
[117] Ibid.
[118] Ibid.
[119] The emphasis on fetal life, while always a potential concern for the courts and physicians, is not given explicit recognition or regulatory boundaries until the third trimester of a pregnancy. See *Roe v. Wade*, 410 U.S. 113, at 115.
[120] *Roe v. Wade*, 410 U.S. 113, at 163.
[121] Ibid.
[122] *Roe v. Wade*, 410 U.S. 113, at 150.
[123] *Roe v. Wade*, 410 U.S. 113, at 151.
[124] Katie L. Gibson, "The Rhetoric of *Roe v. Wade:* When the Male Doctor Knows Best," *Southern Communication Journal* 73, no. 4 (2008): 321.
[125] Katie L. Gibson, "The Rhetoric of *Roe v. Wade:* When the Male Doctor Knows Best," *Southern Communication Journal* 73, no. 4 (2008): 322-323.
[126] *Roe v. Wade*, 410 U.S. 113, at 114.
[127] *Roe v. Wade*, 410 U.S. 113.
[128] *Roe v. Wade*, 410 U.S. 113, at 114.
[129] *Roe v. Wade*, 410 U.S. 113, at 150.
[130] *Roe v. Wade*, 410 U.S. 113, at 114.
[131] *Roe v. Wade*, 410 U.S. 113, at 150.
[132] See Lynn M. Morgan's "The Potentiality Principle from Aristotle to Abortion," *Current Anthropology* 54, no. 7 (2013): S15-S25; Mary Briody Mahowald's "Respect for Embryos and the Potentiality Argument," in *Theoretical Medicine* 25, no. 3 (2004): 209-214; and Mark T. Brown, "The Potential of the Human Embryo," *Journal of Medicine and Philosophy* 32, no. 6 (2007): 585-618.
[133] See Michael Tooley, "Abortion and Infanticide," *Philosophy & Public Affairs* 2, no. 1 (1972): 44; Sharon Elizabeth Rush, "Prenatal Caretaking: Limits of State Intervention With and Without *Roe*," *University of Florida Law Review* 39 (1987): 64.
[134] Lynn M. Morgan, "Fetal Relationality in Feminist Philosophy: An Anthropological Critique," *Hypatia* 11, no. 3 (Summer 1996): 53.
[135] *Roe v. Wade*, 410 U.S. 113, at 163-164.
[136] *Roe v. Wade*, 410 U.S. 113, at 167 and 151.
[137] *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, at 458 (O'Connor, J., dissenting)
[138] See generally, Nancy K. Rhoden, "Trimesters and Technology: Revamping *Roe v. Wade*," *The Yale Law Journal* 95, no. 4 (1986): 639-697.
[139] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press: Chicago, 1990): 90.
[140] *Roe v. Wade* 410 U.S. 113, at 165.
[141] Hartelius, *The Rhetoric of Expertise,* 26.
[142] Katherine Bartlett and Rosanne Kennedy, eds. *Feminist Legal Theory: Readings in Law and Gender* (New York: Routledge, 2018).
[143] Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites, "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate But Equal' Doctrine," *Quarterly Journal of Speech* 82 (1996): 336.

[144] Hasian et al, 336.
[145] Hunter, "Justice Blackmun, Abortion, and the Myth of Medical Independence," 196-197.
[146] *Griswold v. Connecticut*, 381 U.S. 479 (1965). See the *Roe* Court's discussion on how they arrived at grounding abortion rights in the Fourteenth Amendment at *Roe v. Wade* 410 U.S. 113, at 154.
[147] *Roe v. Wade* 410 U.S.113, at 154.
[148] William J. Brennan, Blackmun Papers, Nov. 21, 1972, Box 151, *Roe* Draft at 47. Library of Congress.
[149] William O. Douglas. Blackmun Papers, Nov. 21, 1972, Box 151. Library of Congress.
[150] Joseph F. Kobylka, "Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy," *Missouri Law Review* 70 (2005): 1096.
[151] Blackmun, Nov. 21, 1972, Blackmun Papers, Box 151. Library of Congress.
[152] Blackmun, Nov. 21, 1972, Blackmun Papers, Box 151. Library of Congress.
[153] George P. Fletcher "Paradoxes in Legal Thought," *Columbia Law Review* 85, no. 6 (1985): 1273.
[154] *Roe v. Wade* 410 U.S. 113, at 160.
[155] *Roe v. Wade* 410 U.S. 113, at 165.
[156] *Roe v. Wade* 410 U.S. 113, at 160.
[157] *Roe v. Wade* 410 U.S. 113, at 158.
[158] Madeleine Carlisle, "Fetal Personhood Laws Are a New Frontier in the Battle Over Reproductive Rights," time.com, June 28, 2022. https://time.com/6191886/fetal-personhood-laws-roe-abortion/.
[159] *Roe v. Wade* 410, U.S. 113, 165.
[160] See *State v. Breathette*, 202 N.C. App. 697 (2010) (defining dicta), citing *State v. Jackson*, 353 N.C. 495 (2001) ("general expressions" that "go beyond the case […] may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision")
[161] *Roe v. Wade* 410 U.S. 113, at 165.
[162] Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review* 63 (1985): 375-386, at 376 and 385.
[163] In a memo, Blackmun writes: "In its present form it contains dictum, but I suspect that in this area some dictum is indicated and not to be avoided. You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary." Nov. 21, 1972, Blackmun Papers, Box 151.
[164] *Roe v. Wade* 410 U.S. 113 at 165.
[165] Potter Stewart, Blackmun Papers, Nov. 21, 1972, Box 151. Library of Congress.
[166] Randy Beck, "Self-Conscious Dicta: The Origins of *Roe v. Wade*'s Trimester Framework," *The American Journal of Legal History,* 51 (2011): 506.
[167] Ibid, 506-507.
[168] Judith M. Stinson, "Why Dicta Becomes Holding and Why It Matters," *Brooklyn Law Review*, 76, no.1 (2010): 221.
[169] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[170] Karen J. Lewis et al., "Abortion Law Development."
[171] Nathan Stormer, *Sign of Pathology: U.S. Medical Rhetoric on Abortion, 1800-1960s* (University Park: Pennsylvania State University Press, 2015): 2.
[172] Ibid.
[173] Ibid, 3.

Chapter 2*:* A Second Opinion: The Casey Court Weighs In

"Liberty finds no refuge in a jurisprudence of doubt."

~ Justices O'Connor, Kennedy, Souter delivering the plurality opinion of the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[1]

In the post-*Roe* era, the lower courts and the High Court struggled to apply *Roe*. Some of the most salient unresolved issues in *Roe* fixed on the question of parental and spousal consent, the tractability of the trimester framework, and whether the government had a responsibility for funding abortions that fecund persons could not afford.[2] Each of these issues, as they concerned the fundamental right to abortion, made their way through state legislatures up to the Supreme Court in the years after *Roe*.[3] In each of these instances, the Court had to contend with the inconsistencies of legal, medical, and personal expertise present in *Roe* as these post-*Roe* cases played a part in either directly, or indirectly, chipping away at fecund persons' rights and access to abortion.

By granting a federal right to abortion predicated on a medical framework, *Roe* supposedly resolved several issues regarding the legality of abortion. But as subsequent challenges to *Roe* demonstrated, the abortion rights issue was far from resolved. In the few years after 1973, the *Roe* decision continued to puzzle legal authorities, medical practitioners, and persons seeking abortions who had to navigate the vague boundaries between law, medicine, and privacy. Specifically, *Roe* left unanswered various medical concerns surrounding the abortion decision. In the decades after *Roe*, these unresolved questions brought to light further ambiguities for physicians and fecund persons who had to traverse different abortion requirements from state to state. Discrepancies over abortion law in the doctor's office often led to legal battles in the courtroom. After *Roe*, key abortion cases further exposed the limitations of

legal and medical expertise to regulate abortion. These limitations reached a tipping point in 1992 when the Court attempted to restructure and clarify the decision in *Roe* by reinterpreting the boundaries of expertise in *Planned Parenthood of Southeastern Pennsylvania v. Casey.*

Before examining the Court's employments of expertise in *Casey*, I first analyze the treatments of expertise in the critical abortion cases and amendments before it: *Planned Parenthood of Central Missouri v. Danforth* (1976), the Hyde Amendment (1976 through 1980), *City of Akron v. Akron Center for Reproductive Health* (1983), *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), and *Webster v. Reproductive Health Services* (1989). Each of these legal examples functioned to uphold fecund persons' abortion rights to varying degrees, while maintaining the dominance of legal and medical expertise over the abortion decision. These decisions also help contextualize the tensions around the abortion concerns that the *Roe* Court either deliberately or unknowingly left ambiguous for future courts to determine. Nineteen years after *Roe*, the tensions in these critical cases raised one primary question for the *Casey* Court—whether State regulations on abortion constituted "undue burdens" that have the "purpose or effect" of placing "substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."[4] In answering this question, the *Casey* Court jettisoned *Roe*'s trimester framework and codified the "undue burden standard" in its place. I argue that this shift amplified both legal and medical expertise in abortion law at the expense of personal expertise once more.

To unpack this claim, I turn to the opinion and decision in *Casey* to show how fecund persons' rights were at once expanded and restricted by the Court's reinterpretation of the relationship between law and medicine in its "undue burden standard."[5] This legal-medical frame was first introduced by Justice Sandra Day O'Connor in her dissent in *Akron I* but was not

included in the holding of a majority opinion until the decision in *Casey*.[6] Legal scholars debate whether the *Casey* Court's adoption of the undue burden standard in its majority opinion, rather than the trimester framework, signaled a change in the Court's employment of legal expertise from that of strict scrutiny to intermediate scrutiny or rational basis review.[7] These debates confirm, however, that *Casey* favored applying a less rigorous standard of inquiry to abortion regulations, and thus relied on a different degree of judicial interpretation to rule abortion legislation unconstitutional.[8] This shift in legal interpretations of abortion regulations also altered the scope of medical expertise in abortion decisions. With *Casey*, physicians were tasked with weighing the benefits and costs to fecund persons and the State to determine what constituted an undue *medical* burden and thus a legal abortion. In this way, *Casey* maintains the triangulation of expertise in abortion law but appears to emphasize more heavily the importance of physicians and medical knowledge. This shift in deference ultimately highlights the rhetorical paradox of expertise in *Casey*: the Court wields medical expertise through knowledge-based procedures to reinterpret the centrality of *Roe*'s trimester framework and further chip away at fecund persons' rights to abortion.

The Road to **Casey**

By the time *Casey* arrived at the Supreme Court, several court cases had contested the rationale in *Roe* for its legal and medical ambiguity. This is why analyzing abortion law before *Casey* is crucial to understanding why scholars have characterized *Casey* as having "fallen short of its promise" to secure fecund persons' equality and abortion rights.[9] I follow the lead of legal scholar Emma Freeman, who argued that "because the Justices relied on principles inherited from prior cases, *Casey* is of limited use read in isolation."[10] Because *Casey* followed several important abortion cases, a majority of its rationale and reasoning centered on previous

precedents established in abortion law. The decision in *Casey* followed important abortion cases that affirmed fecund persons' abortion rights but delimited this right within the boundaries of legal and medical expertise. These cases include *Danforth* (1986), the Hyde Amendment (1976-1980), *Akron I* (1983)*, Thornburgh* (1986)*,* and *Webster* (1989). State-imposed regulations concerning parental consent, informed consent, abortion funding, and viability were central to these pre-*Casey* decisions and amendments. Each of these concerns found their way back to the *Casey* Court in 1992. As such, the *Casey* Court also relied on reinterpretations of these key issues and precedents to deliver its decision and redefine the boundaries of legal abortion. Collectively, such precedents, and reinterpretations of those precedents, contribute to the evolving scope and meaning of legal expertise. At its core, the shifts in legal treatments of abortion after *Roe* highlight the limitations of both legal and medical expertise to determine the best and most fitting manner in which to grant fecund persons' personal expertise over their own bodies. It is to these cases that I now turn to further unpack the limitations of expertise that reached a critical point in *Casey*.

Reading Expertise in *Danforth* and Hyde

After 1973, multiple cases that contested the legal-medical language in *Roe* made their way through legislatures, lower courts, and the Supreme Court. One primary way legal-medical framings troubled abortion access after *Roe* was through parental consent laws. In 1974, forty-eight states and the District of Columbia protected the right of fecund persons of at least eighteen years of age to obtain most pregnancy-related health services, including abortion. But only sixteen states and the District of Columbia affirmed the right to abortion for young persons under eighteen. Although the decision in *Roe* invalidated the specific statutes that mandated parental consent for minors, the common law rule that a parent or guardian must consent for the medical

treatment of a minor was still in vogue, especially when it pertained to medical treatments like abortion.[11] This is because while *Roe* legalized abortion on a federal level for adults, the *Roe* decision did not explicitly address the issue of parental consent.[12] This omission permitted state legislatures to invoke legal expertise to govern such regulations on their own. Unsatisfied with the *Roe* Court's indecision, state legislatures in Florida, Indiana, Louisiana, Nevada, Nebraska, South Dakota, and Utah responded by passing legislation that explicitly required parental consent for all unmarried minors seeking abortion.[13]

The Court's framing of abortion as a legal-medical procedure in *Roe* also led to disputes over the constitutionality of individual and spousal consent requirements for abortion in later years. In 1976, the defendants in *Planned Parenthood of Central Missouri v. Danforth* challenged Missouri House Bill 1211, which required written consent of the fecund person before they were able to acquire an abortion. The Missouri law also required written consent from the fecund person's "husband" or "spouse" if they were married, or their "parent" or guardian if they were unmarried and under the age of eighteen.[14] In reviewing the case, the Supreme Court reiterated its position on "consent" in *Roe*:

> We specifically reserved decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed.[15]

In this statement, the *Roe* Court acknowledged that future courts would contend with the question of consent in abortion contexts. In *Danforth*, the Court attended to such questions when it addressed the Missouri law's statute that consent requirements be implemented within the "first 12 weeks of pregnancy," or the first trimester. It was this demarcation that led the Court to ultimately uphold the consent requirement for the fecund person but overrule the spousal consent requirement. In upholding the consent provision for the fecund person, the Court did not offer

additional reasoning but contended that because the "decision to abort is important and often stressful," the "awareness of the decision and its significance may be constitutionally assured by the State to the extent of requiring the woman's prior written consent."[16] But a requirement of written consent from the fecund person constitutes an additional step in the abortion process, which serves as a check on the personal expertise of the fecund person. This is because the Court framed the abortion decision as "stressful," which strengthened the need for the fecund person to be aware of "the decision and its significance." For the Court to then argue that the abortion decision be "constitutionally assured by the State" through written consent suggests that legal expertise must authorize the final abortion decision.[17] In this way, the *Danforth* Court upheld the role of the State in regulating personal expertise through legal means.

By overruling the spousal consent requirement, the Court in effect also dismissed as unconstitutional any "blanket parental consent requirements" for abortion.[18] The Court's logic was that because there were "no significant state interests" in the first trimester, spousal and umbrella parental consent requirements for abortion were unconstitutional. As evidence, the Court in *Danforth* stressed that within *Roe*'s legal reasoning of the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[19] With this assertion, the Court reestablished the primacy of medicine over the State, and medical expertise over legal expertise, at least within first trimester abortions.

Roe's framing of abortion as a medical right overall also impacted fecund persons' abilities to access abortion care through government assistance. In 1976, Congress passed the Hyde Amendment, which prohibited the use of federal funds for abortion for those insured under Medicaid. The original language in the Hyde Amendment mirrored previous criminal abortion codes and only made exceptions for abortion when "the life of the woman would be endangered

by carrying the pregnancy to term." Studies estimate that abortions funded by federal Medicaid funds dropped from nearly 300,000 per year to only a few thousand after the instantiation of the Hyde Amendment.[20] Since 1976, the Hyde Amendment has undergone multiple revisions as legal, medical, and personal experts contest federal restrictions on abortion funding. These revisions have primarily focused on adding exceptions for "rape and incest," as was demonstrated by the changes made in the 1978 version of the Hyde Amendment. In 1980, however, the Court in *Harris v. McRae* determined that the restrictions outlined in the original 1976 version of the Hyde Amendment were constitutional because they did not infringe upon a fecund person's right to privacy and did not restrict the use of federal funds in cases where abortion was necessary to save a fecund person's life.[21]

Although the provisions for "rape and incest" were again added to the Hyde Amendment in 1994, the ability for such important legal-medical aid to undergo multiple revisions and interpretations reinforces the indeterminacy of expertise in abortion law. Specifically, it suggests the inability of both legal and medical expertise as established in *Roe* to provide a definitive approach to regulating the personal expertise and abortion rights of fecund persons. Collectively, concerns for various forms of consent and the issue of funding for abortion remained important, unresolved interests. Such interests resurfaced in later Supreme Court cases and worked to chip away at fecund person's abortion rights while simultaneously reconfiguring the domain of legal and medical expertise over the abortion decision.

The Court Adjourns in *Akron I*

In 1983, *City of Akron v. Akron Center for Reproductive Health (Akron I)* tasked the Court with reconciling its previous decisions in both *Roe* and *Danforth*. At issue in *Akron I* was a 1978 Akron City Council ordinance that had established seventeen provisions to regulate

abortion procedures. Some of these provisions echoed the specific provisions proposed in *Danforth* such as parental consent requirements for unmarried minors. Others more generally focused on what constituted justifiable State interference into the abortion decision to protect maternal health. On this note, the Akron City Council provisions in question mandated that "all abortions performed after the first trimester of pregnancy," i.e., abortions in the second trimester forward, must "be performed in a hospital."[22] Following in the footsteps of previous legislation that took aim at the gaps in *Roe*'s medical framework, the Akron provisions detailed extensive requirements for the medical parameters of legal abortion. Here, they mandated that:

> [t]he attending physician inform his patient of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth, and also inform her of the particular risks associated with her pregnancy and the abortion technique to be employed.[23]

Such provisions constituted "informed consent requirements."[24] Other provisions also included mandates for a twenty-hour waiting period between when the physician first offered counsel and the actual abortion procedure. Collectively, these provisions challenged the Court's previous decisions and the legal and medical boundaries of fecund persons' abortion rights.

Ultimately, in a 6-3 decision, *Akron I* struck down several of the Akron City Council provisions because the Court found they infringed upon a fecund person's right to abortion. For instance, the Court argued that requiring all second trimester abortions be performed in hospital settings prevented the "performance of dilatation-and-evacuation abortions," (D&E) a well-established abortion procedure, in "an appropriate nonhospital setting" such as a clinic. The Court found that such a requirement "imposed a heavy and unnecessary burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure."[25] In this way, the Court recognized how such a provision infringed upon a fecund person's autonomy and

personal expertise. Likewise, the Court found that while the informed consent requirements represented State interests in "the pregnant woman's health," such interests did not give the State "authority to decide what information a woman must be given before she chooses to have an abortion."[26] In this way, the Court also placed checks on legal expertise and suggested that the "information" provided to a fecund person was not knowledge to be dictated under the purview and "authority" of the law. Rather, it was under the guidance of the physician, and medical expertise, that this knowledge appeared to rest. Here, the Court argued that such "lengthy and inflexible" requirements have "unreasonably" positioned "obstacles in the path of the physician." Such justifications suggest that the provisions proposed by the Akron City Council not only "imposed a heavy and unnecessary burden on women's access" to abortion but also imposed similar restrictions on a physician's right to practice medicine.[27]

Despite the *Akron I* Court's interest in preserving abortion rights and expertise for fecund persons, its logic ultimately upheld the role and dominance of medical expertise in abortion law. In framing its holding, the Court recognized that the State maintained its interest in regulating second trimester abortions as these interests "reasonably" related to "health." In its attempts to parse exactly how these regulations squared with issues of health, however, the Court deferred to accepted medical procedures. Here, the Court stated that,

> If, during a substantial portion of the second trimester, the State's regulation departs from accepted medical practice, it may not be upheld simply because it may be reasonable for the remaining portion of the trimester. Rather, the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest may be furthered.[28]

For the Court, it is clear that any provisions on abortion had to uphold standards in "medical practice." What was still not made clear in *Akron I* was the exact standards of medical practice that warranted either physician intervention or State intervention into the abortion decision

during the second trimester. This repeated omission, first from the *Roe* Court and now again in *Akron I,* functioned to further mystify the boundaries of legal and medical expertise in the abortion decision.

Noting this inconsistency, Justice Sandra Day O'Connor invoked her legal expertise to challenge *Roe*'s medical framework in *Akron I*. In its majority opinion, the *Akron I* Court made clear that it "reaffirm[ed]" its decision in Roe to regulate abortion along trimesters.[29] In her dissent, however, O'Connor questioned this stance, and argued that "sound constitutional theory" could not "accommodate an analytical framework that varies according to the 'stages' of pregnancy."[30] Furthermore, O'Connor noted that recent Court cases had decided that any "regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion."[31] Analyzing the abortion regulations in question in *Akron I*, O'Connor suggested that future cases should apply an "'unduly burdensome' standard" to all abortion regulations along any stage of pregnancy.[32] In challenging the trimester framework and offering a new standard for regulating abortion, O'Connor determined the trimester framework to be a "completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context."[33] In this way, O'Connor also acknowledged the limitations of legal, medical, and personal expertise to navigate the boundaries of abortion after *Roe*.

O'Connor's dissent in *Akron I* exposed the overall limitations of legal and medical expertise to regulate abortion. For O'Connor, the "application of neutral principles" could not make sense of the trimester framework whose workability was directly dependent upon "the level of medical technology available" when a specific State regulation or challenge against fecund persons' abortion rights surfaced. But O'Connor did not offer a clear definition of the

"undue burden standard" when she wielded her legal expertise to offer a remedy for the legal and medical irregularities posed by the trimester framework.[34] However, the language of "undue burdens" did not appear only in O'Connor's dissent. In the majority opinion, the Court reasoned that the requirement that post-first trimester abortions be performed only in hospital settings was unconstitutional because it "imposed a heavy and *unnecessary burden* on women's access" to abortion (emphasis mine).[35] But the majority did not provide a definition of "burden" here either. As such, what constituted an undue burden on legal or medical experts, or the fecund person, remained unclear. With this omission, the *Akron I* decision further mystified the boundaries of legal and medical expertise as they regulated the personal expertise of fecund persons and maintained the persistent ambiguities that had plagued previous case law on abortion.

The Trials of *Thornburgh*

Three years after the Court announced its decision in *Akron*, it had to contend with another case challenging the ambiguity of abortion law and state restrictions on abortion rights. In 1986, *Thornburgh v. American College of Obstetricians and Gynecologists* tasked the Court with reviewing Pennsylvania legislation that placed several restrictions on abortion and exploited the vague medical language of previous abortion cases. Like previous cases, the Pennsylvania legislation required the "informed consent" of the pregnant person before they could receive an abortion. Pennsylvania also required the distribution of informative materials on the "particular medical risks" of abortion, as well as information on "alternatives to abortion," to anyone seeking the procedure. Lastly, it required reporting mandates from physicians including a written justification from the physician verifying an unviable fetus exists when performing abortions after the first trimester, and provisions on the medical techniques and procedures for post-viability abortions.[36]

In a 5-4 decision, the Court in *Thornburgh* found the Pennsylvania statute unconstitutional and "reaffirm[ed] the general principles laid down in *Roe* and in *Akron*."[37] In particular, *Thornburgh* found that the Pennsylvania provisions "wholly subordinate[d] constitutional privacy interests and concerns with maternal health."[38] This is because the Court argued that each of the provisions in *Thornburgh* challenged the legal-medical framework in *Roe* and previous case law on abortion. Informed consent requirements were a concern in both *Danforth* and *Akron I,* and like those cases, the *Thornburgh* Court had to address how such provisions could delay or discourage abortion services for fecund persons, and thus infringe on their rights. Different than those cases, however, the informed consent requirements in question under *Thornburgh* required that the fecund person be given information about potential "medical risks" associated with abortion such as supposed "detrimental physical and psychological effects."[39] This requirement revitalized the harm-based justifications in *Roe* but with a twist. In *Roe*, the Court noted potential "psychological harm" induced by forcing fecund persons to care for an "unwanted child" as a justification for *securing* abortion rights.[40] But in *Thornburgh,* the Court was tasked with interpreting a Pennsylvania statute that employed "psychological effects" as a justification for *restricting* abortion access.[41]

Despite these differences, the Court in both cases appealed to "psychological" consequences to justify the role of medical expertise in the abortion decision. The *Roe* Court characterized the potential "psychological" harms as "factors the woman and her responsible physician necessarily [would] consider in consultation."[42] In *Thornburgh,* such potential "psychological effects" reiterated the apparent necessity of medical expertise, as it was the medical expert who was tasked with reviewing the "medical risks" of abortion with the fecund person prior to the procedure. In striking down these provisions, the *Thornburgh* Court argued

that these stipulations functioned to "compound the problem of medical attendance, increase the patient's anxiety, and intrude upon the physician's exercise of proper professional judgment."[43] Yet, even within this rationale, the *Thornburgh* Court repeated the role of medical "judgment" as it sought to overrule such provisions to prevent intrusions into the "physician's exercise" of power and expertise in the abortion decision. In this way, the decision in *Thornburgh* upheld the role of medical expertise over personal expertise even as it sought to protect fecund person's abortion rights.

Additionally, the *Thornburgh* Court argued that the reporting mandates for physicians who performed abortions after the first trimester violated the privacy-based jurisprudence outlined in *Roe*'s medical framework. To reiterate, *Roe*'s trimester framework permitted State interference into second trimester abortions to preserve "maternal health," and third trimester abortions to promote interests in the "potentiality of human life," or to preserve the "life or health of the mother."[44] The *Thornburgh* Court specifically held that the reporting requirements "raise[d] the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy." As such, the Court ruled that these requirements "pose[d] an unacceptable danger of deterring the exercise of that right and must be invalidated."[45] This is because the Court found the provisions also functioned to potentially deter a "woman and her physician" from choosing "an abortion if there exists a possibility that her decision and her identity will become known publicly."[46] In this way, the *Thornburgh* Court sought to protect the "identity" of the fecund person and uphold their personal expertise in the abortion decision. However, the Court tied this reasoning to the physician who would necessarily wield their medical expertise in tandem to "choose an abortion" alongside the fecund person. The Court did not consider the health concerns for the fecund person

independently. As such, the *Thornburgh* Court echoed the doctor-patient relationship that it had established in prior abortion cases.

Another way in which the *Thornburgh* Court contended with medical expertise and ambiguous legal-medical language was in ruling the post-viability requirements unconstitutional. To expound, such requirements in the Pennsylvania state legislation requested:

> A physician performing a postviability abortion to exercise the degree of care required to preserve the life and health of any unborn child intended to be born and to use the abortion technique that would provide the best opportunity for the unborn child to be aborted alive unless it would present a significantly greater medical risk to the pregnant woman's life or health; and that requires that a second physician be present during an abortion performed when viability is possible, which physician is to take all reasonable steps necessary to preserve the child's life and health.[47]

The Court found that post-viability requirements were "inconsistent" because such provisions could place the fecund person's health at risk. This rationale rested on the legislation's vague language of "significantly greater medical risk," whose meaning neither the District Court nor the Court of Appeals could agree on before the Supreme Court heard the case. As such, the Supreme Court ruled the provisions "void for vagueness" because the State was unable to demonstrate that its language did "not require the mother to bear an increased medical risk in order to save her viable fetus."[48] In this way, the Court seemingly acknowledged that legal ambiguity should be scrutinized if courts are unable to clearly demonstrate that such ambiguity does not limit fecund person's rights and access to abortion. Importantly, to place checks on legal expertise, the Court employed its own authority over the law to reinterpret the legality of abortion regulations, and thus reiterated the self-legitimating function of legal expertise.

Throughout the *Thornburgh* decision, the Court maintained the dominant role of legal and medical expertise in abortion decisions. This is most clearly demonstrated in the rationale the Court provided for eliminating the reporting requirements at issue in *Thornburgh*. These

reporting requirements challenged the viability standard outlined in *Roe*. In *Roe,* the Court stated that the point of viability does not become critical until the third trimester.[49] But the reporting mandates in question in *Thornburgh* required that physicians provide "the basis for any determination of nonviability" before proceeding with an abortion. This provision meant that for an abortion to be legal, the physician would need to justify their decision with adequate medical knowledge that confirmed the fetus was not viable and could not survive outside the womb. Notably, this requirement applied "only after the first trimester," which meant even second trimester abortions would be subjected to this regulation.[50]

To require a nonviable determination after the first trimester dismisses *Roe*'s regulations on second trimester abortions. *Roe* specifically authorized State interference into second trimester abortions to promote "interests in the health of the mother."[51] At no point did the *Roe* Court explicitly tie State or medical interests in fetal viability to the second trimester. Instead, the *Roe* Court left the decision for medical or legal interference into second trimester abortions to the medical and legal expertise of the physician and the State. The State works in tandem with medical knowledge to act upon its interests in "maternal health" and determine justifiable reasons for regulating second trimester abortions. Importantly, in reviewing the Pennsylvania legislation, the *Thornburgh* Court did not address how nonviability determinations challenged *Roe*'s trimester framework. Instead, it dismissed these requirements by reinforcing the importance of the "woman and her physician" to "choose an abortion."[52] With this omission, the *Thornburgh* Court may have ruled the Pennsylvania provisions on abortion unconstitutional, but it repeated the Court's deference for medicine and kept the ambiguity around navigating the boundaries of expertise intact. The Court also left open a path for further reinterpretations of the trimester framework.

Once again, Justice O'Connor rose to the challenge. In *Thornburgh*, Justice O'Connor dissented and once again championed the undue burden standard to replace the trimester framework. In doing so, O'Connor not only reiterated a need to replace the trimester framework, but also offered a particularly perplexing approach to invoking medical expertise in abortion law to accomplish this. Here, O'Connor argued that "there is little reason to believe that the required reports, though fairly detailed, would impose an undue burden on physicians and impede the ability of their patients to obtain abortions."[53] For O'Connor, such "reporting requirements are constitutional" because physicians would already have access to the knowledge and "information required" in these reports to perform the abortion in the first place.[54] To require physicians to submit this medical information under new legal provisions like those in the Pennsylvania law, then, would not constitute "an undue burden" on the physician's right to practice medicine, although it may require an additional step in the legal-medical procedure. In offering such a dissent, O'Connor wielded her legal expertise and demonstrated a reverence for medical judgment. Her rationale conceded that the additional legal requirements at question in *Thornburgh* merely reflected a deference for the existing medical knowledge that physicians already supposedly possessed because of their credentials and experience. Thus, in deferring to medical expertise, O'Connor not only reestablished the domain of legal and medical expertise over the abortion decision, but also articulated a rationale for future legal experts to wield medical expertise—not to protect abortion as *Roe* had, but to warrant restrictions on its access. The Court sought to do just that three years later.

Wielding Expertise in *Webster*

Three years after the decision in *Thornburgh*, the Court had to navigate the ambiguities around legal and medical framings of abortion once more. In 1989, the Court in *Webster v.*

Reproductive Health Services was tasked with determining the constitutionality of a Missouri law which placed several provisions on abortion. These provisions included prohibitions on the "use of public employees and facilities to perform or assist abortions not necessary to save the mother's life" and on the use of public funding to supply abortion counseling for fecund persons. The Missouri law also required physicians to perform tests to determine the viability of a fetus "prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant." In crafting a decision, the Court also had to consider the constitutionality of the Missouri law's preamble, which declared the "life of each human being begins at conception."[55] Like the abortion cases before it, each of the provisions in *Webster* challenged the scope and meaning of legal and medical expertise in the abortion decision. These restrictions also reinforced how legal and medical expertise placed potential limitations on a fecund person's personal expertise and autonomy.

Unlike the cases before it, however, in a 5-4 decision *Webster* reversed the rulings of lower courts and held that none of the provisions outlined in the Missouri law were unconstitutional. For this reason, it is important to look at the intricacies of the *Webster* decision in close detail to better understand how the Court triangulated expertise to walk back its previous position on abortion. Beginning with the preamble in the Missouri law, the Court ruled that the Court of Appeals had "misconceived the meaning of the dictum in *Akron v. Akron Center for Reproductive Health*," when it ruled the provision on fetal life to be in violation of *Roe*. In *Akron I*, the Court ruled that "a State may not adopt one theory of when life begins to justify its regulation of abortion."[56] The *Webster* Court clarified this interpretation to mean that a State "could not 'justify' any abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State's views about when life begins." According to the *Webster* Court, the

preamble under question in the Missouri law does not on its own terms function to regulate abortion under its definition of life, and therefore does not violate *Roe*.[57] Yet, the Court conceded that the "language" in the preamble may be interpreted to offer regulations but ultimately left this interpretation to state courts to decide. According to *Webster*, only after such interpretations of the Missouri preamble were applied to "restrict" abortion in "some concrete way," would "federal courts" have a justifiable reason to address the "meaning" of the preamble and its definition of life. With this logic, the Court seemingly recognized the vague language embedded in the preamble, and the potential implications of its ambiguity on future court disputes over *Roe.* In holding the preamble constitutional, the Court also conceded the limitations of the interpretative capacity of legal expertise to make meaning of ambiguous language in abortion law.

The *Webster* Court proceeded to uphold each of the remaining Missouri provisions in turn. In doing so, the Court also reinterpreted the purview of legal expertise over the abortion decision. The *Webster* Court recognized that earlier case law determined that provisions on the use of public funds for abortion may place an emphasis on the State's interests in "childbirth over abortion." However, the Court ultimately argued that such provisions do not themselves infringe upon fecund persons' abortion rights, and therefore do not violate *Roe*. As evidence, the Court relied on the legal knowledge and precedents established in previous case law.[58] In *Webster,* the Court also extended this legal precedent to include regulations on facilities and employees used to procure a fecund person's abortion. Here, the *Webster* Court argued that such provisions are not in violation of *Roe*. While they may prevent "access to a public facility," the Court reasoned, they do not necessarily "narrow or foreclose the availability of abortion." According to the Court, such provisions place "no governmental obstacle in the path of a woman

who chooses to terminate her pregnancy." Instead, they merely "restrict her ability to obtain an abortion only to the extent that she chooses to use a physician affiliated with a public hospital."[59] This interpretation from the Court suggests that the potential restrictions these provisions placed on the fecund person's abortion decision are not regulations placed on abortion from the State but are instead restrictions contingent upon the fecund person's *choice*. The onus is on the fecund person and the facility at which they "choose" to pursue an abortion and the physician they "choose" to perform their abortion. That is to say, the burden of legal abortion rests not with the State and any regulations it places on personal or medical expertise but instead rests with the fecund person and how they employ their personal expertise to make sense of the legal and medical options available to them.

But even as the *Webster* Court seemingly conceded its legal expertise to the personal expertise of the fecund person by framing abortion restrictions as a choice, the Court still maintained its domain over the abortion decision. This is accomplished through the Court's claim that the provisions in the Missouri statute were not in violation of the Constitution: "Nothing in the Constitution requires States to enter or remain in the abortion business or entitles private physicians and their patients access to public facilities for the performance of abortions."[60] In reviewing the Missouri provisions, the Court repeatedly argued that restricting "access" to abortion was not the same as barring "the availability of abortion" and therefore did not constitute a violation of the Constitution or fecund person's abortion rights. Even if abortion access was limited, the potential availability of some abortion services at some medical facilities was enough for the Court to justify that a fecund person's personal rights had not been violated. By hinging the legality of abortion on a question of "access," the Court was able to uphold the

authority of the law in the final abortion decision while it also maintained the guise of protecting fecund person's abortion rights against such restrictions.

To this end, the Court maintained its domain over the abortion decision by arguing that restrictions on abortion access would be a concern if "the State had decided not to operate any hospitals at all."[61] This admission reinforced the legal boundaries placed by the Court on all medical procedures by the State and its conception of abortion as a medical procedure to be conducted in a "hospital setting." Because the Court ruled the Missouri statute constitutional, this admission also suggests that the Court was doing a favor for the fecund person by allowing the State to "operate any hospitals at all," for any medical services. If the State did not provide such facilities, the implication is that the fecund person may not have access to abortion interminably. Furthermore, the Court's reference to the Constitution suggests that how States permit an "abortion business" or "public facility" to authorize abortion services is subject to scrutiny under legal expertise. In this way, the Court preserved its domain of legal expertise over abortion decisions by reiterating the State's role in regulating all medical facilities, including those that may provide abortion services. In tying the "patient" to the "physician" and invoking the decisive authority of the Constitution, the Court also sustained its domain over the autonomy of the fecund person and medical and personal expertise in the abortion decision.

The decision in *Webster* once again left the future of both abortion rights and access in a state of uncertainty. This uncertainty was further fueled by the *Webster* Court's decision to reconsider legal and medical treatments of viability outlined within *Roe*'s trimester framework. In reviewing the twenty-week viability tests defined in the Missouri statute, the Court acknowledged "uncontradicted medical evidence that a 20-week fetus is not viable, and that 23 1/2 to 24 weeks' gestation is the earliest point at which a reasonable possibility of viability

exists." Yet, the *Webster* Court also acknowledged existing medical evidence that "found that there may be a 4-week error in estimating gestational age, which supports testing at 20 weeks." For the Court, this medical discrepancy in viability provided the legal justification necessary to uphold the abortion restrictions in the Missouri statute. Reinforcing the scope of legal expertise, the Court argued that any ambiguity or "doubt" that such discrepancies cast on abortion rights was not a "flaw in the statute," or a fault in legal expertise at the State level. Instead, this "doubt" was "a reflection of the fact that *Roe*'s rigid trimester analysis has proved to be unsound in principle and unworkable in practice." Furthermore, the Court in *Webster* argued that "[i]n such circumstances, this Court does not refrain from reconsidering prior constitutional rulings, notwithstanding *stare decisis*." Following this logic, the plurality opinion penned by Justice Rehnquist diverted from previous case law on abortion and openly criticized *Roe*'s trimester framework:

> The *Roe* framework is hardly consistent with the notion of a Constitution like ours that is cast in general terms and usually speaks in general principles. The framework's key elements—trimesters and viability—are not found in the Constitution's text, and, since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy rather than coming into existence only at the point of viability. Thus, the *Roe* trimester framework should be abandoned.[62]

With this statement, the Court in *Webster* conceded that the trimester and viability "elements" of *Roe* were "indeterminate," and perhaps too vague to preserve the integrity of "constitutional doctrine" and legal expertise. By critiquing the trimester framework, the Court not only altered course from its majority opinion and rationale in *Danforth, Akron I,* and *Thornburgh* but also left open the question of how to interpret the validity of *Roe*'s holding and what, if anything, might replace it.

For Justice O'Connor, this challenge to *Roe* presented another opportunity to advocate for the undue burden standard. After reviewing the viability requirements in question in *Webster,* O'Connor ultimately concurred and argued that such requirements do "not impose an undue burden on a woman's abortion decision." Importantly, while Justice O'Connor joined the plurality opinion, her concurring opinion acknowledged that the decision of the Court could be justified without a need to revisit *Roe*.[63] This divergence between the Justices, and their decision either to reinterpret *Roe* or not, hinged on their interpretation of whether the Missouri statutes in question in *Webster* "conflict[ed] with any of the Court's past decisions concerning state regulation of abortion." By reevaluating *Roe,* the plurality opinion appeared to concede that the statutes diverged from previous rulings and constitutional interpretations. According to O'Connor, however, because the *Webster* Court "upheld" each of the provisions in the Missouri statue "under existing precedents," there was no cause to "decide questions of a constitutional nature" or to return to the legal question in *Roe*.[64] Citing previous case law, O'Connor argued that such actions from the majority signaled a flaw in the "fundamental rule of judicial constraint."[65]

Specifically, O'Connor invoked previous case law to critique the plurality opinion's legal logic in *Webster.* This invocation highlighted a divergence in thought amongst the justices, some of whom O'Connor accused of overstepping their judicial roles to answer questions they were either not tasked with adjudicating or did not need to answer to resolve the legal dispute at hand. Whether or not members of the *Webster* Court overstepped their boundaries, O'Connor's critique of judicial interpretation in a concurring opinion is significant. At a basic level this critique suggests that not even legal experts can agree on the proper employment of a well-established judicial procedure; at a larger level, this critique signals the limitations of legal expertise to make

sense of the abortion problem as different justices may employ legal, knowledge-based procedures and arrive at differential conclusions. In exposing these limitations, O'Connor not only once again advocated for the undue burden standard as the preferred mechanism for interpreting the constitutionality of abortion regulations but also left open the question of *Roe*'s legacy for future Courts:

> When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully.[66]

The Court would finally get their chance to revisit *Roe* another three years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey.*

The Casey *Court Weighs In*

The decisions in *Danforth, Akron I, Thornburgh,* and *Webster* highlighted the inconsistencies of abortion regulations left in the wake of *Roe*. These issues included debates over the scope and meaning of informed consent, parental consent, spousal consent, and reporting requirements for physicians for both pre- and post-viability abortions. Each of these issues resurfaced in some fashion for the Court in 1992. Nineteen years after the passage of *Roe,* the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* attempted to restructure and reclarify the decision in *Roe* by redefining the boundaries of legal abortion.[67] At issue in *Casey* were five provisions of the 1982 Pennsylvania Abortion Control Act. If upheld, these provisions would require:

> [t]hat a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a "medical emergency" that will excuse compliance with the foregoing requirements; and

§§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services.[68]

These provisions echoed previous legal-medical concerns in abortion case law, many of which had been ruled unconstitutional in prior decisions. But in a controversial 5-4 decision, the Supreme Court upheld all of the Pennsylvania provisions' regulations on abortion, except the spousal consent requirement. Like in previous cases, the *Casey* Court also "retained and reaffirmed" the "essential holding" in *Roe*. Unlike previous cases, however, the plurality opinion in *Casey* determined that after an "examination of *Roe v. Wade,* 410 U.S. 113, and subsequent cases," a new standard for determining the validity of abortion restrictions should be enacted. "To protect the central right recognized by *Roe* while at the same time accommodating the State's profound interest in potential life," the *Casey* Court championed the "undue burden standard." In doing so, the Court also determined that "*Roe*'s rigid trimester framework is rejected."[69] Thus, *Casey* upheld the right to abortion as determined in *Roe* but set new standards for regulating this right.

In *Casey,* the Supreme Court upheld a fecund person's federal right to legal abortion but circumscribed this right within a complex web of legal and medical contingencies. Much like *Roe*, the Court in *Casey* ruled that states could regulate abortion to protect State interests in the "woman's life or health" and "the life of the fetus." As if mirroring the trimester framework, the decision in *Casey* upheld *Roe* in three parts:

(1) [A] recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure;

(2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health;

(3) and the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[70]

Collectively, the *Casey* Court's reasoning for upholding *Roe* reiterated the triangulation of expertise. *Casey* restated "a woman's right to choose an abortion" and thus reaffirmed the scope of fecund persons' personal expertise in the abortion decision. Likewise, *Casey* also reiterated the role of legal expertise in regulating abortion by confirming "the State's power to restrict abortions" and reaffirming the State's "legitimate interests" in the abortion decision. Similar to *Roe*, *Casey* also reaffirmed the domain of medical expertise in abortion law. *Casey's* emphasis on "health" and "life," and the Court's history of legal-medical treatments of abortion, worked to reassert the deferential relationship between law and medicine central to abortion discourse. By reaffirming "a woman's right to choose" and making this choice contingent on legal and medical interests in "health" and "life," *Casey* sustained the rhetorical paradox of expertise. *Casey* upheld *Roe* and a fecund person's right to abortion but bound that right within indeterminate legal and medical knowledge and procedures on abortion.

In upholding *Roe*, the *Casey* Court acknowledged a fecund person's personal expertise by advocating for "a woman's right to choose to have an abortion," but made this right contingent upon evolving legal and medical interpretations of lawful abortions. Specifically, the Court recognized that such a right should be upheld "before fetal viability," and that this right should be accessible "without undue interference from the State." While the scope of legal expertise and State "interference" may be restricted before viability, the *Casey* Court maintained the point of viability as the critical point for regulating legal abortions. In tying a legal right to medical terms like viability, *Casey* reiterated the scope of legal and medical expertise in the abortion decision. As with *Roe*, the *Casey* Court determined, "that viability marks the earliest point at which the

State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." By marking the medical determination of viability as the point at which the State may intervene into an abortion decision, the Court appeared to elevate medical expertise over legal expertise. But *Casey* also recognized the limitations of medical expertise to offer a definitive threshold of viability, and thus definitive boundaries for regulating legal abortions. Here, the Court acknowledged the inconsistencies with viability: "maternal health care advances allow for later abortions safe to the pregnant woman, and post-*Roe* neonatal care developments have advanced viability to a point somewhat earlier."[71] In this way, the Court conceded the potential limitations of viability, and thus medical expertise, to effectively govern abortion decisions. Collectively, the *Casey* Court's treatment of viability complicated the legal and medical boundaries of a fecund person's abortion rights.

Ultimately, the Court wielded its legal expertise to reaffirm the significance of viability. Here, the Court stated that despite its incongruities, "whenever it may occur, its attainment will continue to serve as the critical fact."[72] In upholding viability as the "critical" point, the Court echoed a central argument in *Roe.* According to the *Casey* Court, "previability interests are not strong enough to support an abortion prohibition," or to impose "substantial obstacles to the woman's effective right to elect the procedure."[73] With this statement, the Court reiterated the limitations placed on legal expertise and State "intervention" into the abortion decision. Yet, in its reiteration, the Court failed to offer clear boundaries for these limitations. Instead, the Court predicated these limitations on interpretations of "undue interference" and "substantial obstacles," neither of which the Court clearly defined. As a result, the decision in *Casey* upheld a fecund person's right to abortion before viability but stymied this right within nebulous notions of legal and medical expertise.

Such nebulous notions carried through the *Casey* Court's justifications for proscribing abortion after viability. The *Casey* Court confirmed "the State's power to restrict abortions after viability," through additional regulations if such regulations specifically encompassed "exceptions for pregnancies endangering a woman's life or health." In reaffirming this tenet in *Roe*, the *Casey* Court relied on previous interpretations of viability, life, and health. But following in the path of its legal predecessors, the *Casey* Court also failed to offer definitive definitions of any of these seemingly critical terms. This omission is particularly crucial given the third way in which the Court upheld the holding in *Roe.* Here, the decision in *Casey* upheld *Roe* but placed limitations on a fecund person's rights to abortion by solidifying State interests in both the health of the fecund person and fetal life concurrently. To repeat, *Casey* stated that "*Roe*'s essential holding be retained and reaffirmed" through "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[74] In doing so, the Court not only recentered the complex relationship between the fecund person and the fetus in the abortion decision but also relocated State interests in potential life from the third trimester, as it had been in *Roe,* to the "outset of pregnancy." So even while the Court reiterated its power and authority to prohibit abortions after viability, its emphasis on fetal life from the "outset of pregnancy" suggests that the State has an interest in protecting potential life, and thus potentially prohibiting abortion, from the moment of conception.

At root, the decision in *Casey* reaffirmed *Roe*'s central holding that a fecund person's abortion rights are protected under the "Due Process Clause of the Fourteenth Amendment" but discarded *Roe*'s mechanism for regulating and protecting such rights.[75] In jettisoning the trimester framework and codifying the undue burden standard in its place, the Court reconfigured

the domain of legal and medical expertise over the abortion decision. Although the Court maintained the holding in *Roe*, its adoption of an undue burden standard "gave greater deference to state legislatures by allowing restrictions on abortion throughout pregnancy."[76] By granting primacy to legal expertise throughout a pregnancy, *Casey* shifted the relationship between differential forms of expertise in abortion law. The decision ultimately maintained the dominance of legal and medical expertise over personal expertise by leaving ambiguous the boundaries of the undue burden standard, and thus what constituted an undue burden on a fecund person seeking an abortion. This ambiguity left fecund persons to navigate additional legal and medical contingencies in accessing abortion care in the wake of *Casey*. These legal and medical contingencies are further detailed in the *Casey* decision and the Court's rationale for upholding a fecund person's rights to abortion and regulations on abortion access. With these contingencies, the Court sustained the paradox of expertise as it espoused the personal expertise of fecund persons but restricted their personal expertise within indeterminate boundaries of legal and medical expertise. I now turn to the specific Pennsylvania provisions upheld in *Casey* to unpack how the Court wielded its legal expertise and interpretations of medical knowledge to justify refiguring abortion rights within ambiguous legal and medical definitions of the undue burden standard.

To Undue, or Not to Undue

After detailing its rationale for upholding *Roe,* the *Casey* Court turned to reviewing the Pennsylvania provisions in question. To repeat, these provisions included requirements for informed consent, parental consent, spousal consent, and reporting mandates for physicians. The informed consent requirements also included a mandatory twenty-four-hour waiting period between the point of initial contact with a physician and when a fecund person could officially

undergo the abortion procedure. Additionally, the provisions outlined and offered what was termed a "medical emergency" as a justifiable reason for noncompliance with any of the provisions in question.[77] While the Court maintained the decision in *Roe*, it ultimately acknowledged a need to reexamine the landmark decision to substantiate the "assessment of the Pennsylvania statute" and its amenability with existing case law. To this end, the *Casey* Court offered the undue burden standard:

> To protect the central right recognized by *Roe* while at the same time accommodating the State's profound interest in potential life, see id., at 162, the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.[78]

Here, the Court highlighted State interests in "potential life" and the need for the Court to protect such interests without placing "substantial obstacles in the path of a woman seeking an abortion" before fetal viability. As such, the Court reaffirmed *Roe* by reiterating the scope of legal and medical expertise over personal expertise in the abortion decision. The State, in protecting its interest in potential life, may invoke its expertise to regulate abortion. Such regulations are justifiable if they do not impose an "undue burden" on the personal expertise of the fecund person "seeking an abortion." Specifically, the Court mandated that the State may not place an "undue burden" on the "woman seeking an abortion" before the medical determination of viability. Thus, a physician's medical expertise is crucial to determining viability, and therefore validating the enactment of either personal expertise to obtain an abortion or legal expertise to prohibit an abortion. In this way, the Court once again triangulated the expertise of the State, the medical sphere, and the fecund person to determine the boundaries of legal abortion. With this triangulation, the *Casey* Court offered additional "guiding principles" with which it assessed the "validity" of the "challenged provisions" and their adherence with the undue burden standard.[79]

Using these principles, *Casey* upheld the statute's definition of "medical emergency," its informed consent requirements and parental consent requirements, and its reporting mandates for physicians.[80] By upholding each of these provisions, the Court further entrenched the authority of legal and medical expertise in the abortion decision over the personal expertise of the fecund person.

Emergency or Burden?

The Court first applied its "guiding principles" to assess whether the Pennsylvania statute's treatment of legal and medical expertise comported with previous precedent. Immediately following its argument for the undue burden standard, the Court "rejected" *Roe*'s trimester framework as too "rigid," and thus rejected the medical framework established in prior case law. In its place, it offered the more flexible framework of the undue burden standard to accommodate different medical interpretations of legal abortions. Although the *Casey* Court rejected *Roe*'s trimester framework, it reaffirmed abortion as a "medical procedure" under the domain of medical experts. Here, the Court provided the following "guiding principle" to understand the scope of legal and medical expertise under the undue burden standard:

> As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion, but may not impose unnecessary health regulations that present a substantial obstacle to a woman seeking an abortion."[81]

Again, the Court acknowledged that the State may interfere in an abortion decision, like any other medical decision, to protect the "health or safety" of a fecund person. With this framing, the Court also upheld the role of legal expertise. However, the Court made clear that this legal expertise is subject to review by medical experts as the State "may not impose unnecessary health regulations that present a substantial obstacle" for the fecund person "seeking an abortion." To invoke conceptions of "health" necessitates at least some measure of medical

knowledge and thus medical expertise. By prohibiting any "unnecessary health regulations" that posed a "substantial obstacle" to the abortion decision, the Court reiterated the relationship between law and medicine. To determine what is an "unnecessary health regulation" would require both the medical expertise of physicians to confirm potentially life-threatening health concerns and the legal expertise of the courts to determine if the presence of such health concerns violates existing abortion law and constitutes an undue burden. With this reconfiguration, the Court maintained the dominant roles of the rule of law and the medical sphere in the abortion decision.

With this guiding principle in mind, the Court then assessed whether the Pennsylvania statute's definition of "medical emergency" comported with existing legal and medical knowledge about abortion. The Court began with this provision because it found it to be "central to the operation of various other requirements." This suggests that the Court believed defining "medical emergency" was essential to also reifying the scope of medical expertise over the abortion decision. A "medical emergency," according to the Pennsylvania statute, was:

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.[82]

The *Casey* Court found that this definition imposed "no undue burden on a woman's abortion right." As evidence, the Court pointed to previous SCOTUS decisions and the rationale provided by lower courts who first reviewed the statute at issue. The primary dispute lower courts had to contend with concerned the meaning of "serious risk" and whether health conditions such as "preeclampsia," "inevitable abortion," and "premature ruptured membrane" constituted such risks and therefore warranted "immediate abortion." The concern from petitioners was that the definition of "medical emergency" was "too narrow" and potentially "foreclose[d] the possibility

of an immediate abortion despite some significant health risks." The *Casey* Court agreed with the District Court and the Court of Appeals that "these conditions could lead to an illness with substantial and irreversible consequences," and therefore were implied and included in the definition of "medical emergency."[83] In this way, the Court substantiated the role of medical expertise and the knowledge of the physician who would be tasked with determining the presence of significant health concerns such as "preeclampsia" that could warrant an abortion. But it also sutured its own legal expertise to that of the expertise of lower courts when it accepted their previous legal reasoning. In doing so, the *Casey* Court further solidified both medical knowledge and the rule of law over abortion decisions.

Importantly, to reify the scope of legal and medical expertise in *Casey,* the Court tied its rationale for upholding the "medical emergency" definition to concerns for a fecund person's health. Reiterating the stance from the Court of Appeals, the SCOTUS argued that the definition of "medical emergency" was "intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman."[84] Here, the Court invoked their legal expertise to corroborate the intent behind the original regulation. According to the Court, the "intended" effect of the regulation was to protect the "life or health" of the fecund person, and thus preserve their personal expertise over the abortion decision. For this reason, the Court found the statute comported with the undue burden standard because its "purpose or effect" was not to place a "substantial obstacle" in the path of the fecund person seeking abortion.

Yet, the Court acknowledged the potential ambiguity within the "medical emergency" statute as well. In some sense, some ambiguity is necessary as the Court is limited in its ability to definitively determine all the potential "risks" that could endanger "the life or health" of the

fecund person. These limitations are evidenced in the courts disputes as to whether conditions like "preeclampsia" were included within such "risks." They are also evidenced in how the *Casey* decision seemingly resolved this dispute by claiming that such a condition "*could* lead to an illness with substantial and irreversible consequences" (emphasis mine). Even with these ambiguities present, the Court acknowledged that "while the definition could be interpreted in an unconstitutional manner," it would ultimately adopt the lower courts definition of "medical emergency." This definition, according to the Court, implicitly included such health risks, and was therefore constitutional. This conditional framing exposes the rhetorical paradox of expertise operative in abortion law. The constitutionality of a potentially restrictive abortion regulation hinged not only on the presence of serious health conditions (to be determined by physicians) but also on the legal interpretation of those serious health conditions (to be determined by the courts). For this reason, regardless of intent, the Court's affirmation of the medical emergency definition predicated on the undue burden standard functioned to defer indefinitely to the legal expertise of lower courts and the medical expertise of physicians. This deferential relationship between law and medicine delimited the fecund person's capacity to exercise their personal expertise in the abortion decision.

The final way the Court solidified its domain of expertise over abortion was to align its interpretation of "medical emergency" with previous SCOTUS decisions. In particular, the Court cited previous case law to demonstrate a process by which courts could resolve any future discrepancies in its preservation of the "medical emergency" definition. Here, the Court stated:

> As we said in *Brockett v. Spokane Arcades, Inc*., 472 U. S. 491, 499–500 (1985): 'Normally, . . . we defer to the construction of a state statute given it by the lower federal courts.' Indeed, we have said that we will defer to lower court interpretations of state law unless they amount to "plain" error. *Palmer v. Hoffman*, 318 U. S. 109, 118 (1943). This 'reflect[s] our belief that district courts and courts of appeals are better schooled in and

> more able to interpret the laws of their respective States.' *Frisby v. Schultz*, 487 U. S. 474, 482 (1988)[85]

With this rationale, the Court exhibited the three senses of legal expertise as rooted in knowledge, procedure, and deference. Demonstrating the deferential function of legal expertise, the Court claimed it would uphold prior federal law and "defer to lower court[s] interpretations" to make sense of any forthcoming discrepancies in state laws. The Court reaffirmed this decision because it believed lower courts had a better understanding of, and were "better schooled" in the laws of their respective states."[86] In this way, the Court also invoked both the knowledge-based and procedural-based functions of expertise.

Casey employs knowledge and procedural based aspects of expertise by deferring to the implicit process by which a case arrives at the Supreme Court. Undergirding the Court's rationale for "medical emergency" is the accepted practice between lower courts and the Supreme Court as established in Article III of the U.S. Constitution.[87] District courts and courts of appeals constitute a system of lower courts that serve two purposes. First, district courts apply legal principles to determine the facts of a case and the party that is legally right. Second, courts of appeals then determine whether trial courts (i.e., district courts), applied the law correctly. Importantly, the Supreme Court typically hears a case that has already gone through the accepted legal procedures with a court of appeals, although it may decline to hear cases as it sees fit. The court of appeals does not have this same discretionary power. The ability for the Supreme Court to opt out of hearing a case, then, strengthens the importance of its deference for the procedures and knowledge of lower courts. Such a practice also corroborates why the Court in *Casey* emphasized the ability of lower courts to "interpret the laws of their respective States." The underlying presumption here is that lower courts have the most up-to-date information and understanding of their state laws and can determine how such laws do, or do not, comport with

Supreme Court decisions. This assessment can take place without the Supreme Court weighing in. Ultimately, the *Casey* Court deferred to the legal knowledge-based-procedures of the lower courts to legitimize its own employment of legal expertise and its ruling of the "medical emergency" definition as constitutional. By tethering together legal and medical expertise, the *Casey* Court was also able to justify leaving unanswered the question of what explicitly constitutes a "medical emergency." In doing so, the Court maintained the ambiguity of abortion law under the guise of protecting fecund persons from imminent medical emergencies.

Condoning Consent

The Court employed a similar logic to validate the informed consent requirements of the Pennsylvania provisions. To uphold the informed consent requirements, the *Casey* Court first had to reconcile its rationale with previous SCOTUS decisions. Most notably, *Casey* had to justify how it could reject *Roe*'s trimester framework while it simultaneously reaffirmed *Roe*'s essential holding. The Court justified this rejection with the following guiding principle:

> To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.[88]

Here, the Court argued that "the State's interest in potential life throughout pregnancy" justified the State taking "measures to ensure that the woman's choice is informed," if those measures did not pose "an undue burden" on abortion rights. Later, the Court argued more directly that Pennsylvania's "informed consent provision is not an undue burden on a woman's constitutional right to decide to terminate a pregnancy." Citing the decision in *Danforth*, the *Casey* Court maintained "that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion."[89] But, different than *Danforth*, the *Casey* Court had to

contend with petitioners' challenges to the informed consent requirements and the provision's inclusion of "specific information by the doctor and the mandatory 24-hour waiting period."[90] The Court proceeded to review these two inclusions and in doing so, wove together conceptions of legal, medical, and personal expertise.

To authorize the constitutionality of informed consent requirements, the *Casey* Court invoked medical conceptions of health tied to the fecund person's psychological welfare. This is best represented in the Court's statement that "it cannot be questioned that psychological well-being is a facet of health." Continuing, the Court linked the fecund person's psychological health to their assumed concerns for the fetus when they argued that it cannot "be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision." For these reasons, the Court deemed it constitutional for the State to require the sharing of "truthful and not misleading" information with the fecund person, in order to inform their abortion decision. For the Court, such a requirement served both the interests of the fecund person who needed to "apprehend the full consequences of her decision," and the State which had "legitimate" interests in reducing the "risk" and potential psychological harm a fecund person may endure if they chose an abortion. Specifically, Casey expressed an interest in preventing potential psychological harm for fecund persons who may obtain an abortion, "only to discover later, with devastating psychological consequences, that [their] decision was not fully informed."[91] To be clear, this statement directly follows from the Court's assertion that fecund persons consider the "impact" of abortion "on the fetus relevant" to their "decision." Reading this assertion alongside the Court's claim to protect the fecund person's psychological wellbeing and inform their abortion choice, then, suggests that the psychological harm a fecund person may

experience after obtaining an abortion would be caused by psychological regret for choosing to abort a fetus, rather than carrying the fetus to term.

In some sense, the *Casey* Court's justification for the informed consent requirement parallels *Roe*'s previous harm-based arguments. In *Roe*, the Court included "psychological harm" to refer to a fecund person's potential experience if they were forced to bring a pregnancy to term, while *Casey* alluded to psychological harm as something a fecund person may face if they *obtained* an abortion.[92] In both cases, the Court appealed to the psychological health of the fecund person to justify their legal interpretations but to opposite ends. In *Roe*, the Court invoked "psychological harm" to warrant expanding the constitutional right to abortion to protect a fecund person's privacy; in *Casey*, the Court invoked "psychological wellbeing" to validate the State's regulation of abortion to protect "the life of the unborn." In the end, the *Casey* Court maintained that "informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant." This assertion endured even if the information received "might cause the woman to choose childbirth over abortion." Such a possibility was not considered a "substantial obstacle to obtaining an abortion" to the *Casey* Court, and thus not an "undue burden."[93] In this way, the *Casey* decision employed *Roe*'s own logic of psychological harm and potential fetal life to constrict rather than expand abortion rights. Paradoxically, *Casey* acknowledged concerns for the fecund person's psychological health to affirm the essential holding in *Roe*—the fundamental right to abortion—while it simultaneously delimited this right to legal and medical interests in potential life.

The Court also applied its undue burden standard to substantiate the constitutionality of the twenty-four-hour waiting period. Here, the *Casey* Court acknowledged its need to review its prior employments of legal expertise and to return to the decision in *Akron I,* which also dealt

with twenty-four-hour waiting period requirements. In *Akron I,* the Court argued: "Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course."[94] The *Casey* Court rejected this "conclusion" and determined that the twenty-four-hour waiting periods did "not amount to an undue burden." *Casey* justified their overturning of *Akron I* by stating that the twenty-four-hour "period of reflection" did "not strike [them] as unreasonable," especially if during that period, "important information become[s] part of the background of the decision."[95] With this assertion, the Court seemingly invoked and confirmed the personal expertise of the fecund person. Its rationale ostensibly framed the twenty-four-hour waiting period as a "period of reflection" that would bestow upon the fecund person the time and independence to consider freely and carefully the "important information" provided them prior to making such an important decision.

But of course, others would be involved in the abortion decision during the twenty-four-hour waiting period. Specifically, such responsibility would lie with "licensed professionals" such as a "doctor." This is because the *Casey* Court ruled it constitutional for the State to require that "a physician, as opposed to a qualified assistant, provide information relevant to a woman's informed consent." For the Court, requiring a specific kind of medical expert would not "amount in practical terms to a substantial obstacle to a woman seeking an abortion," and therefore would not constitute an "undue burden."[96] The Court invoked its legal expertise to cite previous decisions that corroborate this point. Here, the Court argued that it is constitutional to require that certain "licensed professionals" perform particular tasks, "even if an objective assessment might suggest that those same tasks could be performed by others."[97] The Court then turned to cite extant medical knowledge to further justify its stance. Here, the Court confirmed that a

waiting period does not conflict with its interpretation of a "medical emergency" because "the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk."[98] With these assertions, the Court deferred to established legal procedures and medical knowledge to demonstrate that twenty-four-hour waiting periods supervised by "licensed" physicians do not pose a threat to the health and safety of a fecund person. Collectively, these justifications allowed the Court in *Casey* to wield its legal expertise to uphold additional regulations on abortion rights under the facade of promoting the personal expertise of the fecund person's "period of reflection" and elevating the medical expertise of "licensed" and qualified physicians.

To further substantiate its validation of the informed consent and twenty-four-hour waiting period requirements, the *Casey* Court proceeded to weave together the authority of the physician and the autonomy of the fecund person. According to *Casey*, the primary reason such regulations were considered constitutional is because they did "not interfere with a constitutional right of privacy between a pregnant woman and her physician, since the doctor-patient relation is derivative of the woman's position." Here, the Court not only tied together "the woman and her physician," but specifically demarcated this relationship as "derivative" of the "woman's position." Such a framing seemingly placed the fecund person in a primary position, and the physician in a secondary one. Yet, the Court clearly frames the abortion decision as a "constitutional right of privacy" not for the fecund person alone but "between a pregnant woman and her physician." By repeatedly tying the "woman" to "her physician," rather than the fecund person alone, the *Casey* Court reasserted the dominance of medical expertise over personal expertise. This dominance is reinforced in the twenty-four-hour waiting periods, which physicians necessarily oversee. Such a reliance on the "woman" tied to "her physician" to make

the abortion decision has caused critics to question truly whether it is "women" or "their doctors" who fill the role as "the central actors in the human drama of pregnancy and reproductive decision-making?"[99]

Even when the Court acknowledged the potential financial and emotional harms that twenty-four-hour waiting periods uniquely posed for fecund persons, they continued to invoke legal and medical expertise to uphold such regulations. Here, the Supreme Court noted the "troubling" effects that twenty-four-hour waiting periods presented for fecund persons with the "fewest financial resources," "who must travel long distances," and "those who have difficulty explaining their whereabouts to husbands, employers, or others." Each of these assertions indicated the repercussions that regulating abortion services could have on fecund persons. Under the trimester framework, the District Court found such provisions unconstitutional because they did not "further the state 'interest in maternal health'" and "infringe[d] [upon] the physician's discretion to exercise sound medical judgment." Under the undue burden standard, however, the Supreme Court in Casey found that "while the waiting period does limit a physician's discretion, that is not…a reason to invalidate it." Even though the District Court had found the consequences of the waiting period to be "particularly burdensome," the Supreme Court asserted such a burden is "not of necessity a substantial obstacle." And although the District Court and the Supreme Court came to different conclusions, their rationales employed the language of "medical judgment" and "physician's discretion," and thus again relied on a deference to medical expertise to govern the abortion decision.

But medical expertise in *Casey* did not operate alone. It is important to note that the Court also placed limitations on medical expertise when it upheld the informed consent requirements. Here, the Court argued:

> [t]he physician's First Amendment rights not to speak are implicated only as part of the practice of medicine, which is licensed and regulated by the State. There is no evidence here that requiring a doctor to give the required information would amount to a substantial obstacle to a woman seeking an abortion.[100]

This inclusion reiterates the relationship between legal and medical expertise in the abortion decision. The Court found that requiring a physician to provide the medical information necessary to inform a fecund person's choice did not violate the physician's constitutional rights because such requirements are a "part of the practice of medicine." The Court determined this was because abortion as a medical procedure was not only under the purview of the medical sphere but was also "licensed and regulated by the State." In this sense, it was the State that verified and regulated the licensure and professional credentials of a physician and their affiliated hospital or clinic. Such regulations extended to the medical services provided by physicians, including abortion. As such, the latitude granted medical experts to determine the boundaries of legal abortion are always tied to the State and their regulations of medical expertise.

The (Un)due Burden of Reporting Requirements

How the Court employed its legal expertise to maintain State control over personal and medical expertise culminated in *Casey*'s rationale for upholding reporting requirements for abortion providers. These reporting requirements were extensive and ran the gamut of requiring documentation of any physician involved in the abortion procedure, documentation of a fecund person's prior pregnancies or abortions, documentation of any "medical complications" or "conditions" associated with their previous pregnancies or abortions, and "where applicable, the determination that the abortion was medically necessary." Importantly, the provision also required facilities to make public "quarterly reports showing the number of abortions performed

broken down by trimester." The *Casey* Court upheld each of the reporting requirements in full, given that the fecund person's identity remained "confidential," apart from the spousal consent notification, which it found presented an undue burden on the fecund person seeking abortion.[101]

Like with the other Pennsylvania provisions, the *Casey* Court also had to contend with how these reporting requirements comported with previous SCOTUS decisions, and thus previous employments of legal expertise. To do so, the Court pointed to their decision in *Danforth* where they upheld recordkeeping provisions in a Missouri statute so long as those provisions demonstrated an interest in the "preservation of maternal health" and the fecund person's "privacy." In *Casey*, the Court contended that while the reporting requirements did not reflect "the State's interest in informing the woman's choice," and therefore their personal expertise, the reporting requirements could be interpreted as being reasonably "relate[d] to health" concerns, and therefore medical expertise. To this end, the Court claimed,

> [t]he collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult.

The Court upheld the State's interests in regulating abortion to protect the "health" of the fecund person by tying such interests to investments in "medical research." By tying a fecund person's health to the pursuit of "medical research," the Court elevated medical expertise under the guise of protecting the fecund person's wellbeing. And while the Court was clear that reporting requirements cannot make "abortions more difficult," such regulations could in fact make accessing abortion more challenging. The *Casey* Court all but admitted this point when it claimed that the reporting requirements could "increase the cost of some abortions" for fecund persons, albeit by a "slight amount." Yet, the potential increase in costs was not adequate justification for the Court to overturn the reporting requirements. As such, the Court upheld the

requirements and ruled that they did not constitute an undue burden on "a woman's choice" to abort.[102]

Importantly, by upholding the recordkeeping mandates in *Casey*, the Court also complicated the privacy-based jurisprudence critical to abortion rights. The *Casey* Court clearly stated that the reporting requirements upheld must keep the "identity" of each fecund person "confidential." Like in *Danforth*, the *Casey* Court repeated its interest in upholding the "confidentiality" and "privacy" of fecund persons who underwent abortions and whose information was collected as part of those reporting mandates. In this way, such privacy interests were only seen as valid if they contributed to the medical findings and knowledge domains over abortion. This is demonstrated in how the Court tied these privacy interests to the medical interests of "health" and "research." The Court expressed an interest in protecting the fecund person's privacy insofar as that privacy extended to maintaining confidentiality of their identity, but these State interests did not necessarily encompass a fecund person's autonomy over the abortion decision. Despite the Court's purported interests in the fecund person's "privacy," the Court also repeatedly downplayed the unique experiences and potential limitations such reporting requirements placed on abortion access. In doing so, the Court maintained the dominant role of both legal and medical expertise in the abortion decision.

Reading *Roe* and *Casey*

Ultimately, the decision in *Casey* preserved portions of the *Roe* holding while it simultaneously invalidated others. Importantly, the Court maintained that the right to abortion was preserved in the Due Process Clause of the Fourteenth Amendment. Although not explicitly stated, the Court found that the Constitution protected a "realm of personal liberty" that the government could not infringe upon nor violate.[103] For the *Casey* Court, the right to abortion fell

under the purview of such liberties but was not "unlimited."[104] So like *Roe*, *Casey* placed limitations on fecund persons' rights to abortion. Rejecting *Roe*'s trimester framework, however, the *Casey* Court offered in its place the undue burden standard as a mechanism for weighing the interests of legal, medical, and personal expertise in any given abortion decision.

Like *Roe*, the *Casey* Court was also not tasked with answering the specific question of when life begins. Yet, the rationale *Casey* offered to uphold the Pennsylvania regulations prioritized the State's interests in the "life of the unborn." From the "outset of the pregnancy," the *Casey* Court sought to protect "the health of the woman and life of the fetus that may become a child."[105] Although it maintained its interests in the "health of the woman," the *Casey* Court reconfigured the relationship between fecund health and fetal life within the undue burden standard to offer a less "rigid" approach to weighing such interests. This reconfiguration loosened the standard for reviewing future abortion regulations. As legal scholar Lauren Paulk aptly notes, the Court's "vague definition" of undue burdens left states to determine their own course for regulating abortion after *Casey*. The little guidance the Court did give in defining an undue burden as that which has the "purpose or effect" of restricting abortion access also proved difficult for states to consistently legislate and for lower courts to regulate. After *Casey,* state legislatures proposed increasing regulations on abortion that hinged on the meaning of the term "purpose." This left legal, medical, and personal actors to debate the intent behind such restrictions often at the expense of overlooking the "effect[s]" these restrictions placed on the health and wellbeing of the fecund person.[106]

Collectively, the changes in the Court's legal reasoning from *Roe* to *Casey* shifted the legal basis for abortion rights from that of strict scrutiny in *Roe* to somewhere between intermediate scrutiny and rational basis review in *Casey*.[107] The level of scrutiny afforded to

abortion rights determines how future Courts will interpret the constitutionality of regulations and restrictions on abortion access. That members of the High Court and legal scholars are unable to definitively agree on the level of scrutiny to apply to abortion regulations exposes the limitations of legal expertise to make sense of the abortion problem. Debates over the scope and meaning of these legal principles surfaced in *Casey*'s concurring and dissenting opinions. To acknowledge the core discrepancies in the legal reasoning behind *Casey*, I specifically analyze the concurring opinion of Justice Blackmun who authored the original decision in *Roe v. Wade* and the joint dissenting opinion from Justices Scalia, White, and Thomas. It is to these opinions I now turn to demonstrate the limitations of legal expertise to govern the abortion decision.

Rationalizing a Rational Basis

Behind the scenes of the *Roe* deliberations, the members of the Court debated the scope and meaning of the trimester framework in their private correspondence. But after nearly twenty years of controversial Supreme Court decisions, the members of the *Casey* Court appeared less hesitant to voice their disagreements on the constitutionality of abortion within the decision itself. Like in *Roe,* not all members of the *Casey* Court aligned on the holding in the decision as neither *Roe* nor *Casey* resulted in a unanimous decision. But in *Casey*, the inclusion of the undue burden standard generated dissention amongst even those justices who ultimately joined the plurality opinion. Others like Justice Antonin Scalia outright dissented, arguing that the undue burden clause "will prove hopelessly unworkable in practice."[108] To further uncover the significance of the justice's concurring and dissenting opinions, I first point to the final "guiding principles" that the plurality opinion offered to justify its basis for upholding *Roe* in part. These significant principles read:

> Adoption of the undue burden standard does not disturb *Roe*'s holding that regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
>
> *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" is also reaffirmed.[109]

Importantly, the Court was quick to note that these inclusions did not "contradict" one another or the "essential holding" in *Roe*. Curiously, these guiding principles specifically return us to debates about the true meaning behind legal jurisprudence and accepted legal principles. While such debates in *Roe* hinged on the difference between dicta and holding within interpretations of the trimester framework, similar debates over the scope and meaning of the *Casey* decision centered on the level of scrutiny permitted by the undue burden standard.

When the *Casey* Court proposed the undue burden standard to determine the constitutionality of abortion regulations, it simultaneously rejected *Roe*'s trimester framework and shifted the scope of legal expertise over abortion decisions. Most scholars agree that the *Casey* decision purported to "establish a new standard of constitutional review," and thus a different standard of legal expertise.[110] But some scholars debate whether the undue burden standard constituted a level of legal review "more akin to heightened scrutiny or rational basis review."[111] While the jury is still out on what exactly this new standard entails, even the Justices on the *Casey* Court agreed that the undue burden standard failed to uphold the strict scrutiny standard originally established in *Roe*.[112]

Unpacking the three traditions of constitutional review practiced under the Equal Protection Clause helps clarify what at first may appear to be an esoteric, legal battle of the minds. The most basic level of review is rational basis scrutiny, which Sarah Finnane Hannifan refers to as the "default level" of review.[113] For the courts to uphold a statute under rational basis

requires that they determine any challenged legislation is *reasonably* related to a *legitimate* state interest.[114] Because this level of scrutiny is the most "deferential," courts typically uphold statutes under this standard if parties representing the state legislature can demonstrate that "some plausible set of facts exists that allows the Court to justify the challenged statute."[115] Importantly, rational basis review is only applicable to equal protection claims that do not involve issues of gender or fundamental rights.

The second level of scrutiny is intermediate scrutiny. This standard requires courts to determine that any challenged legislation is *substantially* related to an important state interest. Intermediate scrutiny is traditionally considered more rigorous than rational basis review as it requires courts to demonstrate "a close, though not perfect, fit between the means and ends" of a statute or legislative measure.[116] In other words, courts must determine under intermediate scrutiny if state legislation has justified the relationship between the purpose of the legislation and its rationale for achieving such a purpose. Cases that apply intermediate scrutiny typically involve issues related to gender or illegitimacy of birth.[117] The burden of responsibility in this case lies with the courts who must determine that substantial state interests are involved. Intermediate scrutiny is most like strict scrutiny. Strict scrutiny, the third and highest level of constitutional review, requires courts to determine that any challenged legislation is clearly tailored to support a *compelling* state interest. Like intermediate scrutiny, this burden of responsibility falls on the government. Unlike intermediate scrutiny, a statute passes strict scrutiny review only if courts can determine "the legislative means are absolutely necessary to accomplish their ends."[118] Claims to fundamental rights, voting rights, and "suspect classifications" such as race, nationality, and religion, are reviewed under strict scrutiny.[119]

In 1973, *Roe* clearly established the right to abortion as "fundamental," therefore invoking the strict scrutiny standard. Having penned and delivered the *Roe* decision, Justice Harry A. Blackmun emphasized this point in his concurring opinion in *Casey* when he stated, "the Court has held that limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny." Blackmun then cited *Roe* to demonstrate that the Court had "applied this principle specifically in the context of abortion regulations."[120] However, when *Casey* upheld the "essential holding" in *Roe*—the fundamental right to abortion—it rejected the trimester framework, and therefore the foundation, on which such a holding and fundamental right rested. The plurality opinion in *Casey* rationalized their decision with this statement: "[W]e reject the trimester framework, which we do not consider to be part of the essential holding of Roe."[121] Yet, in its guiding principles, the *Casey* Court cited the third stage of *Roe*'s trimester framework and argued that this "holding" is "reaffirmed."[122] This admission in *Casey* is critical for two reasons. First, this admission appears to validate *Roe*'s original inclusion of the trimester framework as a part of its holding, which reignites the dicta versus holding debates discussed previously. Second, despite the Court's reassurance that such a rationale is not contradictory, this admission does in fact muddle the Court's earlier statements. At one point, the Court rejected the trimester framework because it did "not consider [it] to be part of the essential holding in *Roe*." But later, the Court characterized a critical stage of this very framing as "holding" in its rationale to reaffirm *Roe*. Such a contradiction represents a legal brainteaser of the sort that evidently not even the justices on the High Court could decipher.[123]

Holding or not, the *Casey* Court replaced the trimester framework with the undue burden standard. But in doing so, the Court failed to define in a consistent manner how exactly this standard would be applied to review future abortion regulations. This omission left some

scholars to argue that *Casey* offered future courts something "less than intermediate scrutiny" to evaluate abortion restrictions.[124] Certainly, the rationale the Court offered to justify upholding *Roe* and the fundamental right to abortion while simultaneously eliminating the framework through which *Roe* regulated such a right signaled a shift in constitutional standards of review. But the level of scrutiny *Casey* invoked remains a contested point. This contestation hinges on the lack of clarity around how to apply the undue burden standard. In particular, the uncertainty hinges on the inability for legal experts to determine what exactly is "due" about undue burdens in *Casey*. Here, legal scholar Gillian E. Metzger explains the typical process for applying the undue burden standard:

> A central characteristic of the Court's usual approach to standards that require 'due' treatment is a balancing of the countervailing interests and values at stake in a particular context.[125]

Metzger argues that the term "undue burden" implies this balancing act and requires courts to weigh not only the "justifications offered in defense of a regulation" but also the "extent of its effects" on different parties involved. But Metzger contends that the Court in *Casey* only applied the undue burden standard to "analyze the quantity of burdens imposed." As a result, the *Casey* Court may find a regulation unconstitutional even if it is found to provide important "benefits;" conversely, such a regulation may be deemed an undue burden "no matter how few benefits it brings, provided it is rational."[126]

The uncertainty in the meaning of an undue burden is illustrated in the *Casey* Court's treatments of State interests in potential life and its attempts to reconcile this treatment with *Roe*'s position on potential life. Here, the plurality opinion in *Casey* claimed the State had a "*substantial* interest in potential life"; later, the *Casey* Court invokes *Roe* to suggest the State has a "*legitimate* interest in promoting the life or potential life" (emphasis mine).[127] Many times

throughout the decision, the *Casey* Court appeared to double down on its stance that the State had "legitimate" interests in protecting potential life.[128] Still, this seemingly minor discrepancy from legal experts is critical, especially given the already present ambiguity around the best way to regulate abortion according to the undue burden standard and varying levels of constitutional review.

In fact, such a discrepancy in legal expertise formed the basis of both Justice Blackmun's concurring opinion, and the joint dissenting opinion from Justices Scalia, White, and Thomas. Addressing this discrepancy, Justice Blackmun upheld his decision in *Roe,* arguing in *Casey* that:

> Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion.

Blackmun applied this logic to offer his interpretation of the *Casey* decision and its claim that the State had "legitimate" interests in protecting the "life of the fetus" from the "outset of a pregnancy." Here, Blackmun contested the use of the term "legitimate" and argued that "legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling." This meant that the Court must determine how best to "accommodate the State's interest in potential human life with the constitutional liberties of pregnant women."[129] Echoing such claims, Justice Stevens argued that "the fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty."

Collectively, these statements allude to one common interpretation of the undue burden standard—the idea that there must be a "balancing" of the "legislative goals against the significance of the burdened interest."[130] But in *Casey*, the interests of the fecund person could not be isolated from the "life of the fetus" as fetal life was considered a "legitimate interest from the outset of the pregnancy." As such, the fecund person's health cannot in any clear manner be

balanced against the State interests in fetal life as both are seemingly important at all stages of a pregnancy, and thus an abortion. For these reasons, Blackmun contended that the trimester framework still proved more "administrable" and "far less manipulable" than the undue burden standard. Moreover, Blackmun reminded the Court that no other analytical framework or approach to regulating abortion had earned a majority in a decision since *Roe*. For this reason, Blackmun maintained that "*Roe's* requirement of strict scrutiny as implemented through a trimester framework should not be disturbed."[131] This legal reasoning suggests that a lack of consensus among legal experts on the proper mechanism for regulating abortion is cause for staying the original course outlined in *Roe*. Blackmun ultimately contended that under the standard of strict scrutiny, the "Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion related information must be invalidated."[132]

Naturally, not all the justices agreed with Blackmun's legal interpretations. Employing his own legal expertise, Justice Scalia dissented against the core tenet of *Roe* and *Casey.* Unlike his colleagues, Justice Scalia refuted the idea that abortion was a "liberty" to be "constitutionally protected" for two reasons. First, "the Constitution says nothing about it," and second, because "the longstanding traditions of American society have permitted it to be legally proscribed." Addressing the plurality opinion's holding, Scalia agreed that the decision in *Roe* was invested in "weighing against the woman's interest the State's 'important and legitimate interest in protecting the potentiality of human life.'" However, Scalia disagreed that one could uphold *Roe* through "reasoned judgment" because the disagreements over potential life could in no way be determined as "a legal matter." Such a statement acknowledges the limitations of legal expertise to make sense of a critical dispute in the abortion debates—the scope and meaning of fetal life.

For this reason, Justice Scalia argued that the "error" in *Roe* should be "acknowledged and eliminated."[133]

But neither was Scalia satisfied with the ways the plurality in *Casey* amended *Roe*. For Scalia, the undue burden standard presented in *Casey* failed in its "efforts at clarification," and made "clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice." This is because, according to Scalia, the plurality opinion determined that an undue burden was any "substantial obstacle" evaluated to hinder, rather than merely inform, the fecund person's choice to abort. Squaring this statement with the Court's central claim that States have a legitimate interest in protecting fetal life, Scalia maintained that any regulation invested in "protecting unborn life" would necessarily hinder the fecund person's "decision to have an abortion." Scalia, rather aptly, argued that attempts to clarify this contradiction left the plurality with a circular definition of "undue burden" as meaning an "undue hindrance," i.e., a "substantial obstacle." Such a "verbal shell game" ultimately left the decision in *Casey* with "no principled or coherent legal basis." Ultimately, Scalia argued that this legal ambiguity warranted the application of the "rational basis test" and the upholding of the "Pennsylvania statute in its entirety."[134]

Importantly, not even the originator of the undue burden standard could offer a consistent interpretation of the standard of review the new regulation provided. Given Justice O'Connor's track record with abortion jurisprudence prior to *Casey*, it is only fitting that Justice Scalia and legal scholars alike critiqued O'Connor for her inconsistency in defining the undue burden standard. O'Connor first argued for the undue burden clause in her 1983 dissent in *Akron I.* In this critical case, O'Connor defined an undue burden as that which involved "absolute obstacles or severe limitations on the abortion decision."[135] But as legal scholars note, O'Connor originally

proposed the undue burden standard as a "threshold inquiry," meaning that courts were only tasked with determining whether an undue burden was present, and therefore whether a "threshold" had been reached.[136] After this point, O'Connor proposed in *Akron I* that the strict scrutiny standard could be applied to determine whether the undue burden was justified.[137] This legal rationale stands in stark contrast to O'Connor's interpretation of the undue burden standard less than a decade later in *Casey*. As Justice Scalia noted in his dissent, O'Connor shifted her framing of an undue burden from that which posed an "absolute" obstacle in *Akron I* to that which posed a "substantial" obstacle in *Casey.* This discrepancy not only suggests the Court shifted in its interpretation of the level of scrutiny to apply to abortion disputes but also signals a precarious foundation on which future courts may interpret the constitutionality of abortion regulations and undue burdens. With these critical descriptors "conspicuously missing from the joint opinion," legal expertise failed in its endeavor to definitively define the boundaries of legal abortion.[138]

The Legacy of Casey

The collective plurality, concurring, and dissenting opinions in *Casey* provided a tumultuous terrain through which the Court paved its own uncertain path. In particular, the various routes the justices had to navigate to provide varying interpretations of the undue burden standard expose the limitations and the ambiguities embedded within the knowledge-based procedures of legal expertise. While some of these ambiguities are perhaps intrinsic to the rule of law and legal expertise, the persistent ambiguities around abortion involve legal, medical, and personal expertise.[139] The incongruities between these forms of expertise present a rhetorical paradox as legal and medical experts defer to law and medicine to confer or constrict fecund persons' abortion rights. But as Nathan Stormer reminds us, there has never been medical

consensus on the best way to regulate abortion. For courts and medical professionals to "find some consensus on its legitimacy would mean finding consensus on an extraordinary range of other issues," which is not only unlikely but is nearly impossible for a Court who is tasked with answering particular questions at particular moments in time.[140] As such, abortion is not a problem that can be easily resolved, and abortion jurisprudence may at best answer a fraction of the issues related to abortion such as birth control, health care, or motherhood.[141] Of course, Courts do at times thwart the typical legal process of answering only the questions brought before them. Such appears to be the case in *Roe* when the Court ventured to define fetal personhood. When this happens in abortion jurisprudence, Courts not only confound the boundaries of legal expertise, but they also further muddle the security of abortion rights. As this chapter demonstrated, ambiguity and the thwarting of legal procedures in abortion law in *Roe* exposed complications for future Courts in *Danforth, Akron I, Thornburgh,* and *Webster.* These ambiguities sustained the paradox of expertise through *Casey* as legal experts were tasked with applying the undue burden standard to weigh State interests in fecund health and fetal life against the autonomy of the fecund person.

By employing its legal expertise, the *Casey* Court found that its definition of the undue burden standard affirmed the constitutionality of most of the Pennsylvania provisions and restrictions on abortion access. Ambiguities or not, the Court found that no existing "record" of legal or medical knowledge indicated "substantial" harms had occurred from such undue burdens, and thus the Court upheld them.[142] As if defending the lack of clarity in the undue burden standard, Justice Stevens argued that "the contours of the standard" need not be "authoritatively articulated in any single opinion" as the,

> future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation.[143]

Despite his ardent dissent of the undue burden standard's replacement of the trimester framework, Justice Blackmun, too, echoed the hopeful nature of his colleague. That the *Casey* plurality relied on the "insufficiency of the record before it" and some yet-to-be-discovered knowledge instilled in Blackmun a confidence that,

> in the future evidence will be produced to show that "in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion."[144]

In time, future courts would indeed supply the evidence to fill the extant gaps in legal and medical knowledge about abortion made evident in *Casey*. They would then use that evidence to supply their own justifications for regulating abortion rights unduly and severely. Indeed, as foretold by Justices Stevens and Blackmun themselves, the future would provide clarification on the scope and meaning of the undue burden standard as it would only take another thirty years to completely eradicate a once fundamental right.

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[1] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883 (1992), at 844.
[2] At the time, states like Hawaii, Alaska, and Washington required fecund persons to be residents for at least thirty days before acquiring abortion services. See Rachel Benson Gold, Guttmacher Institute, "Lessons from Before *Roe*: Will Past be Prologue?," guttmacher.org. https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue.
[3] *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976); *Harris v. McRae*, 448 U.S. 297 (1980); *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986); *Webster v. Reproductive Health Services* 492, U.S. 490 (1989).
[4] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[5] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 837.
[6] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983).
[7] Emma Freeman, "Giving *Casey* Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis," *Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 279-323; Lauren Paulk, "What is "Undue Burden"? The *Casey* Standard as Applied to Informed Consent Provisions," *UCLA Women's Law Journal* 20, no. 1 (2013): 71-109.
[8] Gillian E. Metzger, "Unburdening the Undue Burden Standard: Orienting "Casey" in Constitutional Jurisprudence," *Columbia Law Review* 94, no. 6 (1994): 2025-2090; Center for Reproductive Rights, "Planned Parenthood v. Casey (1992): Three Judicial Views on Abortion Restrictions," reproductiverights.org, July 9, 2009. https://reproductiverights.org/planned-parenthood-v-casey-1992-three-judicial-views-on-abortion-restrictions/.

[9] Serena Mayeri, "Undue-ing Roe: Constitutional Conflict and Political Polarization in Planned Parenthood v. Casey," in *Reproductive Rights and Justice Stories,* ed. Murray, Melissa, et al. Murray, Shaw, and Siegel (Foundation Press: Law Stories Series: 2019): 139.
[10] Emma Freeman, "Giving *Casey* Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis," *Harvard Civil Rights-Civil Liberties Law R eview* 48 (2013): 281.
[11] Eve W. Paul, Harriet F. Pilpel and Nancy F. Wechsler, "Pregnancy, Teenagers and the Law, 1974," *Family Planning Perspectives* 6, no. 3 (Summer, 1974): 146.
[12] *Roe v. Wade*, 410 U.S. 113, at 167 and n. 67.
[13] R. Wasserman, "Note, Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation," *Columbia Law Review* 74, no. 237 (1974): 246.
[14] *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976).
[15] *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976) citing *Roe v. Wade,* 410 U.S. 113, at 167 and n. 67.
[16] *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, at 65-67.
[17] Ibid.
[18] *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, at 72-75.
[19] *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976) citing *Roe v. Wade,* 410 U.S. 113, at 164.
[20] American Civil Liberties Union, "Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion," aclu.org, https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion.
[21] *Harris v. McRae*, 448 U.S. 297 (1980).
[22] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983).
[23] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983).
[24] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 442-444.
[25] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983).
[26] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 442-444.
[27] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983).
[28] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 433-434.
[29] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 420.
[30] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 452 (O'Connor, J., dissenting)
[31] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 452 (O'Connor, J., dissenting)
[32] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 453 (O'Connor, J., dissenting)
[33] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 454 (O'Connor, J., dissenting)
[34] Emma Freeman, "Giving *Casey* Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis," *Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 288.
[35] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983).
[36] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986).
[37] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, at 759.
[38] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, at 759.
[39] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986).
[40] *Roe v. Wade* 410, U.S. 113, at 153.
[41] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986).
[42] *Roe v. Wade* 410, U.S. 113, at 153.
[43] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 764 (1986).
[44] *Roe v. Wade* 410, U.S. 113, at 114.
[45] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986).
[46] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 766 (1986).
[47] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 748 (1986).
[48] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986). Cited in footnote 14.
[49] In 1973, the *Roe* Court placed viability at "seven months (28 weeks)" but acknowledged that this point "may occur earlier, even at 24 weeks." Additionally, the word "viability" is only explicitly mentioned in the third stage of the trimester framework. See *Roe v. Wade*, 410 U.S. 113 at 160 and 114 respectively.
[50] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986).
[51] *Roe v. Wade* 410, U.S. 113, at 114.

[52] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 804 (1986), at 766.
[53] *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 804 (1986).
[54] Ibid.
[55] *Webster v. Reproductive Health Services* 492, U.S. 490 (1989).
[56] *Webster v. Reproductive Health Services* 492, U.S. 490 (1989), at 491.
[57] *Webster v. Reproductive Health Services* 492, U.S. 490 (1989), at 491.
[58] Here, the *Webster* Court cited *Maher v. Roe, 432 U. S. 464; Poelker v. Doe, 432 U. S. 519; and Harris v. McRae, 448 U. S. 297* to argue that, "[t]his Court upheld governmental regulations withholding public funds for nontherapeutic abortions but allowing payments for medical services related to childbirth, recognizing that a government's decision to favor childbirth over abortion through the allocation of public funds does not violate *Roe v. Wade.*" See *Webster v. Reproductive Health Services* 492, U.S. 490 (1989), at 491.
[59] *Webster v. Reproductive Health Services* 492, U.S. 490 (1989), at 491-492.
[60] *Webster v. Reproductive Health Services* 492, U.S. 490 (1989), at 492.
[61] Ibid.
[62] Ibid, 494.
[63] A plurality opinion occurs if a majority of the justices cannot agree on the *rationale* for deciding a case. *Webster* reached a plurality opinion because multiple Justice O'Connor and Scalia authored separate concurring opinions in which they joined the majority in judgement but not rationale. For O'Connor's divergence in rationale, see *Webster v. Reproductive Health Services* 492, U.S. 490 (1989), at 525-526. Importantly, *Casey* would also reach a plurality opinion in 1992 because only four of the nine justices backed the rationale in the opinion penned by Justices O'Connor, Kennedy, and Souter (Justice Stevens joined the opinion but did not pen one of his own). Justices Blackmun, Rehnquist, White, Scalia, and Thomas concurred in the judgement only.
[64] Ibid, 525-526.
[65] Qtd. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.,* 467 U. S. 138, at 157 (1984).
[66] Ibid, 526.
[67] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[68] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[69] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 836-837
[70] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 834 (1992).
[71] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 835 (1992).
[72] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 835 (1992).
[73] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 834 (1992).
[74] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 833(1992).
[75] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 834 (1992).
[76] Lauren Paulk, "What is an 'Undue Burden'? The Casey Standard as Applied to Informed Consent Provisions," *UCLA Women's Law Journal* 20, no. 1 (2013): 76.
[77] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 833 (1992).
[78] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 837 (1992).
[79] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 877-879 (1992).
[80] The *Casey* Court ruled the informed consent requirements, the parental consent requirements, the reporting requirements for physicians, and the definition of "medical emergency" constitutional. The Court upheld all provisions except the spousal consent requirement. In what follows, I narrow my analysis to the Court's decision and rationale for upholding informed consent and reporting requirements for physicians as well as its rationale for upholding the definition of "medical emergency." I exclude the Court's treatment of parent consent requirements because this requirement was also upheld in previous abortion case law, which the *Casey* Court does not contest or challenge. I also do not include an analysis of the spousal consent requirement because this is the only requirement the Court does not uphold from the original Pennsylvania provisions.
[81] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 837 (1992).
[82] 18 Pa. Cons. Stat. § 3203 (1990).
[83] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 880 (1992).
[84] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 880 (1992).
[85] Cited in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 880 (1992).
[86] Ibid.
[87] U.S. Const. art. III, §§ 1–2.

[88] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 837 (1992).
[89] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 837 (1992) cites *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, at 67.
[90] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 831.
[91] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 882 (1992).
[92] *Roe v. Wade* 410, U.S. 113, at 153 (1973).
[93] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 883 (1992).
[94] Cited in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 885 (1992); *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, at 450.
[95] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 885 (1992).
[96] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 884-885 (1992).
[97] *Williamson v. Lee Optical of Okla., Inc.,* 348 U. S. 483 (1955).
[98] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 885 (1992).
[99] Linda Greenhouse, "How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse," *Suffolk University Law Review,* 42, no. 1 (Winter, 2008): 42.
[100] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 838 (1992).
[101] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 900 (1992).
[102] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 900-901 (1992).
[103] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 847 (1992).
[104] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 869 (1992).
[105] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 834 (1992).
[106] For a more in-depth overview of the purpose versus effects debate after *Casey*, see Caroline Burnett, "Dismantling Roe Brick by Brick—The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003," *University of San Francisco Law Review* 42 (2007): 251-254; Caitlin E. Borgmann, "Holding Legislatures Constitutionally Accountable Through Facial Challenges," *Hastings Constitutional Law Quarterly* 36 (2009): 563-579; and Gillian E. Metzger, "Abortion, Equality, and Administrative Regulation," *Emory Law Journal* 56 (2007): 865- 892, and n. 124.
[107] It's important to note that scholars disagree as to whether *Casey* definitively established intermediate scrutiny or rational basis review. Emma Freeman, "Giving *Casey* Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis," *Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 279-323; Lauren Paulk, "What is "Undue Burden"? The *Casey* Standard as Applied to Informed Consent Provisions," *UCLA Women's Law Journal* 20, no. 1 (2013): 71-109.
[108] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 834 (1992).
[109] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 837 (1992).
[110] Emma Freeman, "Giving *Casey* Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis," *Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 293.
[111] Ruth Burdick, "The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split over the Salerno Test," *Hastings Constitutional Law Quarterly* 23 (1996): 825-840.
[112] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 926 (Blackmun, J., concurring in the judgment in part and dissenting in part); at 950 (Rehnquist, J., concurring in the judgment in part and dissenting in part); at 987 (Scalia, J., concurring in the judgment in part and dissenting in part).
[113] Sarah Finnane Hanafin, "Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny," *Stetson Law Review* 40 (2011): 435-462.
[114] *Johnson v. Robison,* 415 U.S. 361, at 374–75 (1974) ("A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that persons similarly circumstanced shall be treated alike." (citations and internal quotation marks omitted)).
[115] See Emma Freeman, "Giving *Casey* Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis," *Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 283; Gayle Lynn Pettinga, "Rational Basis with Bite: Intermediate Scrutiny by Any Other Name," *Indiana Law Journal* 62 (1987): 783.
[116] Jeffrey M. Shaman, *Constitutional Interpretation: Illusion and Reality* (Westport: Connecticut, Greenwood Press, 2001): 72.
[117] See *Craig v. Boren,* 429 U.S. 190 (1976) and *Reed v. Campbell,* 476 U.S. 852 (1986).
[118] Jeffrey M. Shaman, *Constitutional Interpretation: Illusion and Reality* (Westport: Connecticut, Greenwood Press, 2001): 72.

[119] Emma Freeman, "Giving *Casey* Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis," *Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 284.
[120] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 929 (1992).
[121] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 986 (1992), (Scalia, J., dissenting)
[122] See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 837 (1992): "*Roe*'s holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother' is also reaffirmed."
[123] Importantly, Justice Scalia notes that the plurality opinion's use of the term "holding" also incited confusion amongst dissenting Justices. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 993-994 (1992), (Scalia, J., dissenting). In reference to the Court throwing out the trimester framework: "I suppose the Court is entitled to call a "central holding" whatever it wants to call a 'central holding'—which is, come to think of it, perhaps one of the difficulties with this modified version of stare decisis."
[124] Gillian E. Metzger, "Unburdening the Undue Burden Standard: Orienting "Casey" in Constitutional Jurisprudence," *Columbia Law Review* 94, no. 6 (1994): 2033.
[125] Ibid., 2033.
[126] Ibid., 2034.
[127] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 876 and 870, respectively (1992).
[128] Ibid., at 834 and 853. Also see Justice Stevens concurring opinion at 914-921 (Stevens, J., concurring).
[129] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 932 (1992).
[130] Gillian E. Metzger, "Unburdening the Undue Burden Standard: Orienting "Casey" in Constitutional Jurisprudence," *Columbia Law Review* 94, no. 6 (1994): 2034.
[131] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 934 (1992).
[132] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 926 (1992).
[133] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 979-983 (1992).
[134] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 981-987 (1992).
[135] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, at 464 (1983).
[136] See Gillian E. Metzger, "Unburdening the Undue Burden Standard: Orienting "Casey" in Constitutional Jurisprudence," *Columbia Law Review* 94, no. 6 (1994): 2033; Susan R. Estrich & Kathleen M. Sullivan, "Abortion Politics: Writing for an Audience of One," *University of Pennsylvania Law Review* 138, no. 1 (1989): 119-135; *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 463. ("The 'undue burden' required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting "compelling state interest" standard.") (O'Connor, J., dissenting)
[137] *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), at 461.
[138] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 989 (1992).
[139] Ralf Poscher, "Ambiguity and Vagueness In Legal Interpretation," in Lawrence M. Solan, and Peter M. Tiersma (eds), *The Oxford Handbook of Language and Law* (2012).
[140] Nathan Stormer, *Sign of Pathology: U.S. Medical Rhetoric on Abortion, 1800-1960s* (University Park: Pennsylvania State University Press, 2015): 4.
[141] For a fuller discussion of the issues related to abortion, see Susan Sherwin, *No Longer Patient: Feminist Ethics & Health Care* (Philadelphia: Temple University Press, 1992) and Kristin Luker, *Abortion & The Politics of Motherhood* (Berkeley: University of California Press, 1984).
[142] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 884, 885, 887, and 901 (1992).
[143] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 921 (1992).
[144] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 926 (1992).

Chapter 3: Reinterpreting Abortion Rights in *Dobbs*

> "When it comes to the interpretation of the Constitution—we place a high value on having the matter 'settled right.'"
>
> ~ Justice Samuel Alito writing for the Court majority in *Dobbs v. Jackson Women's Health Organization,* 2022[1]

In the wake of *Casey,* legal and medical experts were confounded in their efforts to traverse the boundaries of legal abortion. In a May 2019 op-ed for the *New York Times*, gynecologist and obstetrician Dr. Jennifer Gunter reflected on her experiences administering abortions in the wake of such uncertainty.[2] While working in a Kansas hospital in 1998, six years after the landmark decision in *Casey,* Gunter was once asked to provide an abortion for a sick woman in her first trimester. The woman had a physical condition that medical specialists feared could result in kidney failure later in life if she carried the pregnancy to term. Kansas law at the time, however, banned all abortions except when necessary to save the life of a pregnant person. Gunter was unsure how to interpret this woman's circumstances under Kansas abortion law since the woman's life was not in immediate danger. Yet, an abortion then could prevent future medical complications later that could save the woman's life. Gunter faced equal trepidation when she contacted the hospital's attorneys to clarify whether she could legally provide the woman an abortion. And when she reached out to the legislator who wrote the Kansas law in question, he abruptly interrupted her description of the sick woman's circumstances and deferred to Gunter's expertise with a curt, "Whatever you think is best, doctor."[3]

This response infuriated Gunter who felt the legislator, and by default the State, were shirking responsibility by "applaud[ing] this monstrous law in public all the while deferring to a doctor's expertise in private."[4] To be generous, we might first consider the legislator's response to Gunter as a recognition of authority. After all, a medical degree requires a four-year college

education, in addition to extensive medical training, and a subsequent residency program if one wishes to specialize in a subfield like gynecology and obstetrics. After what amounts to a decade or more of preparation, physicians must then take oaths before they practice medicine. They must also acknowledge their role in acting with beneficence and non-maleficence toward the public and within their own medical community.[5] The legislator consequently could simply have chosen to defer to Gunter's medical knowledge and experience to determine the medically necessary measures to "save the life of the pregnant woman" and uphold the law. But as Gunter noted in her op-ed, the legal language of abortion law was too vague for physicians to extricate any real "medical meaning."[6] Whether it was a lack of knowledge or authority, or a fear of potential criminal punishment for administering an illegal abortion, Gunter felt she alone could not properly interpret the law to justify her patient's abortion as medically necessary. So, she turned to the State for approval.

Gunter's decision to consult with the legislator on the legality of abortion exemplifies the rhetorical paradox of expertise central to abortion law. In Gunter's case, neither legal nor medical expertise alone could fully govern the abortion decision. Yet, both forms of expertise were crucial to authorizing the denial or approval of her patient's abortion. Gunter's experience negotiating her own medical knowledge about abortion with the legislator is a representative example of how medical expertise in abortion contexts is sustained through an alliance that relies on a distinct yet inextricable fusion to legal expertise. It reflects the deferential nature of expertise, and in particular, the necessity of both legal and medical expertise to govern the abortion decision.[7] At the center of this negotiation rested the abortion rights granted to the fecund person. As Gunter's experience demonstrated, it is the fecund person whose personal expertise is often delimited by legal and medical expertise. Even when they are permitted to have

an abortion, legal and medical experts must first dispute the terms of legal abortion.[8]

Ultimately, Gunter performed the abortion and her patient's health improved. But because the exchange between Gunter and the legislator failed to produce a concrete interpretation of Kansas abortion law, the exchange exposed the law's inconsistencies. For Gunter, the inconsistencies were represented in the "preposterously vague" language of abortion law, which highlighted the gaps between legislators' legal language and doctors' clinical practice. Specifically, Gunter located the inconsistency in how terms like "risk" and "health" provide no real "medical meaning," resulting in terms that were medically ungrounded as they failed to represent accepted medical knowledge or procedures.[9] These frustrations were buttressed by the context in which Gunter practiced; Gunter was responding to the uncertainty around abortion law in the aftermath of *Casey*, which seemingly upheld *Roe* and abortion rights but without a definitive framework for regulating abortion. Without a definitive framework, the boundaries for regulating abortion remained ambiguous. As previous chapters demonstrate, the ambiguity of abortion law formed the very foundation that allows legal and medical expertise to control the personal expertise of fecund persons' reproductive choices. Legal and medical experts are tasked with debating and reconfiguring the knowledge domains and procedural practices of legal abortion to rectify these ambiguities. Fecund persons consequently must defer to such knowledge and procedures to eventually be denied or granted an abortion.

The ambiguity of abortion law after *Casey* paved the way for state and federal courts to propose restrictions on fecund persons' rights to abortion. These restrictions eventually led to a series of post-*Casey* cases that revisited the legal justifications and medical benefits of such regulations like mandatory waiting periods and informed consent requirements. After 1992, multiple states began to apply their own interpretations of the undue burden standard to uphold

regulations like those upheld in the Pennsylvania statutes at question in *Casey.*[10] Moreover, nearly a third of all abortion regulations passed after *Roe* occurred between 2010 and 2016.[11] More recently, in June 2021, 561 restrictive abortion laws had been introduced in 47 state courts across the country in just six months.[12] As of early August 2021, 97 of those restrictive abortion-statutes went into law, making 2021 the most successful year for anti-abortion legislation prior to the decision in *Dobbs v. Jackson Women's Health Organization*.[13] The restrictions these bills introduced ran the gamut from mandating medically unnecessary requirements (e.g., extended waiting periods and mandatory biased counseling) to so-called born-alive bills that require healthcare for fetuses that are "unsuccessfully" aborted.[14] Collectively, these statutes raised considerable questions about the relationship between legal and medical expertise in abortion discourse. At their core, these restrictive abortion measures chipped away at fecund persons' private rights to abortion before fetal viability. But these statutes also exposed a fundamental flaw in the *Roe* and *Casey* decisions: their interpretation of abortion as a private, *medical* right.

The persistent medical framings around abortion eventually laid the groundwork for subsequent abortion cases to reconfigure medical expertise as a mechanism for delimiting fecund persons' abortion rights. This reconfiguration is represented in the Court's treatment of abortion regulations in *Stenberg v. Carhart* (2000) and *Gonzales v. Carhart* (2007). These cases reinterpreted the ambiguities of law left in the wake of *Casey* to first protect, and then restrain, fecund persons' abortion rights, respectively.[15] The decisions in these landmark abortion cases paved the path for the decision in *Dobbs* (2022) and the overturning of both *Roe* and *Casey*. Before unpacking the decision in *Dobbs,* I first analyze the decisions in *Stenberg* and *Gonzales* to provide a roadmap for how the Mississippi legislation in question in *Dobbs* came to be. I then turn to the Supreme Court decision in *Dobbs* to show how the Court employed and

conceptualized expertise to eliminate the federal right to abortion. I unpack this shift in abortion rights by examining the majority opinion and decision, as well as the concurring opinions from the justices on the *Dobbs* Court. In the majority opinion, the *Dobbs* Court reinterpreted legal and medical treatments of abortion in the centuries prior to *Roe* and argued that *Roe*'s abortion history was "egregiously wrong" and therefore unconstitutional.[16] The Court's interpretations drew upon knowledge-based and procedural practices about abortion that problematize the deference between law and medicine to reconfigure the triangulation of expertise once more.

Ultimately, the decision in *Dobbs* thrust fecund persons' abortion rights into a state of legal and medical uncertainty. These uncertainties have raised legal, academic, and public criticisms of the decision, one of the most salient being that the *Dobbs* Court shirked expectations of legal expertise by dismissing the doctrine of *stare decisis*—the legal doctrine that maintains the preservation of precedents in prior cases that address similarly related issues or concerns—and overruling precedent in *Roe* and *Casey.*[17] This criticism exposes the rhetorical paradox of expertise in *Dobbs:* the Court operates with an internal logic that allows the judiciary to dismiss its own established legal principles to restrict abortion rights for fecund persons yet again. The remainder of this chapter explores the assumptions of expertise embedded in the criticism that the Court reinterpreted *stare decisis* to show how our historical and contemporary commitments to legal expertise have eclipsed any potential for medical and personal expertise to advance abortion politics.

Undue-ing Casey

In the years after *Casey*, courts battled with the legal and medical discrepancies persistent in abortion law. As Gunter's case exemplified, one way in which experts traversed such discrepancies was for legal experts to defer to the medical expertise of physicians to make sense

of uncertain legal parameters. Unsurprisingly, the process of deferral alone did not resolve the lack of clarity around abortion law. As uncertainty over the abortion decision persisted, the Court found itself repeatedly reinterpreting the legal and medical boundaries of abortion. In the aftermath of *Casey*, the Court employed judicial interpretation to reconfigure the relationship between law and medicine and to make sense of the uncertainty around legal abortion. These reconfigurations paved the way for courts to uphold abortion restrictions to protect not the health of the fecund person, but the life of the potential fetus they may carry.

Stenberg v. Carhart & the Debate on "Partial-Birth" Abortions

The struggle over the personal expertise of the fecund person and the potential life of the fetus reached a tipping point for the Supreme Court in 2000. Two years after Gunter's confounding exchange with the Kansas legislator, the Supreme Court released its decision in *Stenberg v. Carhart*. In this case, the Court was tasked with ruling on the constitutionality of a Nebraska law that prohibited "partial-birth abortion." The term "partial-birth abortion" referred to an established medical procedure called "dilation and extraction" (intact D&E), whereby a fetus is surgically removed from the uterus.[18] This procedure is typically recommended for late second trimester or third trimester abortions. The Nebraska law in question made such a procedure a felony, unless that procedure was "necessary to save the mother's life."[19] Violation of the law included jailtime and possible fines, as well as an automatic revocation of a convicted physician's medical license.

In a 5-4 decision, the Supreme Court ruled the Nebraska law unconstitutional under the precedents establish in *Roe* and *Casey*. Delivering the opinion of the Court, Justice Stephen Breyer contended that the primary rationale for striking down the law rested with its omission of the "requisite exception 'for the preservation of the . . . health of the mother,'" as stated in the

plurality opinion in *Casey*.[20] Continuing, the Court argued that the "State may promote but not endanger a woman's health when it regulates the methods of abortion." Because of the ambiguity around the abortion methods that result in "partial-birth," the Court ruled that the Nebraska law "impose[d] an 'undue burden' on a woman's ability to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself."[21] Collectively, the Nebraska law challenged the Court to reinterpret the undue burden standard and its ability to protect a fecund person's abortion rights and the physician's right to practice medicine.

To interpret the Nebraska law as unconstitutional, the Court focused primarily on the different abortion methods available for pre-viability abortions.[22] In doing so, the Court invoked its legal expertise to review the "findings of the trial court," i.e., the lower court, "underlying testimony" from Dr. Carhart himself and other expert witnesses, and "related medical texts" that detailed the different methods of abortion and their attendant "risks" and "benefits."[23] In this way, the High Court deferred to other legal experts as well as medical experts to review the knowledge and procedures available on abortion services. In reviewing the materials, the Court found that the Nebraska law failed to "track the medical differences between D&E and D&X" abortion procedures, which raised doubts as to whether the law was "intended to apply *only* to D&X" abortions, or a broader range of abortion procedures.[24] While there were a number of differences between the two methods, the difference that raised the most contention amongst experts was how the fetus would be removed during the procedure. In common D&E methods, the fetus is dismembered inside the womb and then extracted, whereas in intact D&E or D&X methods, the fetus is kept intact and drawn out to the cervix, where physicians then collapse the fetus' skull. The Nebraska law in question failed to adequately distinguish between these two methods.

This omission was particularly important because, as the *Stenberg* Court's review of medical literature detailed, not all medical experts were aligned on the differences between each abortion procedure. For instance, the Court found that some forms of D&E abortions that were not banned were described in a "manner corresponding" and "sufficiently similar" to the D&X procedure Nebraska sought to ban. These unbanned types included "breech-conversion intact D&E" abortions. As such, the Court determined it could use intact D&E and D&X "terms interchangeably," despite the "technical differences" between the two methods. The Court asserted this interpretation despite its acknowledgement that "medical opinion" on the technical differences and health-related risks of the D&E and D&X procedures were not unanimous. No matter—the Court turned to the precedent in *Casey* to resolve this discrepancy. Here, the *Stenberg* Court interpreted the *Casey* Court's use of the phrase, "necessary, in appropriate medical judgment for the preservation of the life or health of the mother," to mean that "absolute necessity" or "absolute proof" was not essential to rule on the constitutionality of an abortion procedure. Because doctors are likely to interpret health risks and benefits differently, the Court determined that the *Casey* Court's framing of "appropriate medical judgment" must account for the "judicial need to tolerate responsible differences of medical opinion." In this way, the Court conceded the limitations of medical expertise to make sense of the abortion problem as different physicians would necessarily have different medical opinions and preferences. Yet, by tying its legal interpretation to varying medical interpretations of different abortion procedures, the Court triangulated expertise and upheld the paradox of expertise central to abortion law. Although neither legal nor medical expertise could definitively offer concrete boundaries for different abortion procedures in *Stenberg*, both forms of expertise ultimately held the power to either

restrict or expand the personal expertise of fecund persons, and thus restrict or expand their abortion rights.

Lastly, the Court invoked its legal expertise in *Stenberg* to challenge the pre-viability ban presented in the Nebraska law. Here, the Court cited Dr. Carhart's testimony to demonstrate that "the intact D&E procedure," also referred to as D&X, was a common practice "during weeks 16 to 20" because it "reduce[d] the dangers" associated with abortions at that stage of pregnancy. The Court invoked Dr. Carhart's medical testimony alongside other supporting medical evidence from the American Medical Association and the American College of Obstetricians and Gynecologists. The collective medical evidence showed that a ban on D&X abortions without careful attention to the medical differences between abortion methods could result in a ban on abortion before twenty-four weeks (i.e., before viability). In this way, the Court demonstrated that the Nebraska law in question challenged the legal precedents in *Roe* and *Casey*. This legal precedent affirmed medical knowledge on abortion that placed viability at twenty-four weeks and protected a fecund person's autonomy over abortion up to this critical point.

Collectively, the Court's rationale in *Stenberg* relied on extensive medical knowledge to overrule a Nebraska law and uphold a fecund person's abortion rights. Yet, the Court itself admitted some abortion procedures "may seem clinically cold or callous to some" and even "perhaps horrifying to others." The details of the different abortion methods led some Supreme Court justices to vote in favor of the state of Nebraska. Justice Anthony Kennedy, who had previously joined the plurality opinion in *Casey* and upheld the federal right to abortion, authored a scathing dissent of the decision in *Stenberg.* Interpreting the Nebraska law as constitutional, Justice Kennedy called for subjecting D&X and D&E abortions "to the most severe moral condemnation" possible even though he argued there were serious "moral"

concerns that differentiated D&X from D&E abortions. In elaborating his reasoning, Kennedy concluded that,

> This is not inconsistent, however, with the further proposition that as an ethical and moral matter D&X is distinct from D&E and is a more serious concern for medical ethics and the morality of the larger society the medical profession must serve.

Despite the ardent dissent from Kennedy, the Court struck down the Nebraska law, and thus struck down similar bans in more than thirty states across the United States.[25] Such actions resulted in the protection of fecund persons' abortion rights. Yet, with this judgment, the Court triangulated expertise as it reiterated the role of legal and medical expertise over personal expertise in the abortion decision. As Kennedy's dissent anticipated, the "ethical" and "moral" concerns for the "life of the unborn" would continue to complicate the role of medical authority in the abortion decision.[26]

President Bush and the Partial Birth Abortion Ban Act

Three years after the decision in *Stenberg*, President George W. Bush signed into law the Partial Birth Abortion Ban Act (PBA Ban, 2003).[27] This act was passed in the Senate with a 64-33 vote, and in the House with a 282-139 vote. The PBA Ban was the first federal law to ban the D&X abortion procedure. Although the law was struck down after lower courts found it violated the decision in *Stenberg*, the rationale Congress provided in the ban raised important questions about the ability of legal and medical expertise to govern the abortion decision. In particular, the PBA Ban, argued that due to the timeliness of legal procedures, the *Stenberg* Court did not have all the "factual findings" necessary to review the extant medical opinions on abortion, and thus to make an informed decision on the constitutionality of D&X procedures. Here, Congress cited the "overwhelming evidence" compiled from "extensive congressional hearings" held after the "district court hearing in *Stenberg*." Congress summarized these findings and claimed,

> [a] partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care.

These "findings" indicated the Court's dismissal of previous medical interpretations of "partial-birth abortion" methods, and thus signaled a challenge to medical expertise. Congress used these legal "findings" to make its own case against medical, D&X abortion procedures under the guise of protecting fecund persons from "significant health risks." In this way, Congress also triangulated legal, medical, and personal expertise to delimit fecund persons' abortion rights. It employed its legal expertise to justify its opposition to the previous decision in *Stenberg*, arguing that "the United States Congress [was] entitled to reach its own factual findings." That the Court had already "deferred to the Federal district court's factual findings" in *Stenberg* to strike down partial-birth abortion bans gave Congress the confidence to assert that the "Supreme Court accords great deference" to the legal and legislative process of factual findings generally.[28]

Congress further established the Supreme Court's deference for this legislative process by citing previous SCOTUS decisions. Here, Congress referred to the ruling in *Turner Broadcasting System, Inc.* (1994, *Turner I*). In this case, the Court acknowledged its "deference" for Congress over the Court because of the former's ability to "'amass and evaluate the vast amounts of data' bearing upon legislative questions.'"[29] In this way, Congress highlighted the Court's "measure of deference" granted to Congress to "exercise the legislative power." With this deference, Congress detailed its "findings" to challenge medical knowledge about the D&X abortion procedure and to advocate for its ban.[30]

Having established Congress as a legal authority, the PBA Ban then highlighted the discrepancies between *Stenberg*'s medical evidence and other medical knowledge on D&X procedures to challenge the scope of medical expertise in abortion decisions. Here, Congress

asserted that, contrary to the evidence supplied in *Stenberg*, the D&X procedure is a "disfavored procedure" amongst physicians and the "medical community." Furthermore, Congress cited a "prominent medical association" to conclude that "partial-birth abortion is broadly disfavored by both medical experts and the public," and that "there is no consensus among obstetricians about its use."[31] Such statements suggest Congress' deference to medical knowledge and conceded authority to those physicians who were against certain abortion methods. In this way, Congress aligned itself with only medical experts whose perspective on D&X abortions conformed to its own legal interpretations of the procedure. In this triangulation, Congress maintained its dominant role in authorizing only certain forms of medical expertise as valid. Congress also restricted the personal expertise of fecund persons whose abortion choices were limited only to those methods Congress approved. With this logic, Congress aligned itself with medical professionals who challenged previous interpretations and uses of medical knowledge and procedures that upheld abortion access.

Congress also drew from the legal expertise of past Courts to substantiate its passage of the PBA Ban. In particular, Congress linked its legal expertise to differential forms of medical expertise to defend an abortion ban and restrict fecund person's abortion rights. Importantly, the PBA Ban claimed that the language of partial-birth abortion "appropriates" medical terminology and elides the fact that the procedure requires "induced" birth to extract the fetus from the womb. In such reasoning, members of Congress grounded their arguments in the Stenberg Court ruling:

> [a] governmental interest in protecting the life of a child during the delivery process arises by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun.

With this logic, the *Stenberg* Court in 2000 asserted that the life of the fetus becomes compelling as "the child emerges from the maternal body" and is "inches away" from "becoming a

'person.'" Referring to *Stenberg*'s rationale in 2003, Congress in the PBA Ban claimed that the D&X procedure "confuse[d] the role of the physician in childbirth" and "undermine[d] the public's perception of the appropriate role of a physician during the delivery process." This conceptional confusion, according to Congress, allowed for the appropriation of "terminology and techniques used by obstetricians in the delivery of living children," not to protect fetal life but "to end the life of the partially-born child." With these statements, Congress emphasized its legal interpretation of the role of the physician and the responsibility of medical expertise "to preserve and promote life."[32] Although courts struck down the PBA Ban, its language and rationale hinted at the ability of the law to employ and reinterpret medical expertise to constrict, rather than expand, fecund persons' abortion rights.

Unsettling Settled Law in *Gonzales v. Carhart*

In fact, the persistent complexities surrounding the PBA Ban set the stage for the Court's decision in *Gonzales v. Carhart* just four years later. In 2007, the Court in *Gonzales* reversed course and upheld the PBA Ban in a 5-4 decision.[33] The decision in *Gonzales* was significant because the Court upheld an abortion restriction that did not explicitly make exceptions for the health of the fecund person, which had been a major dispute in *Stenberg* itself. Yet, while the Court in *Gonzales* upheld the partial-birth abortion ban, it did not overrule its decision in *Stenberg*. Instead, in penning the majority opinion, Justice Kennedy wielded the legal expertise of the Court to reinterpret the abortion restrictions outlined in the PBA Ban to fit within the legal and medical rationale of the original decision on partial-birth abortion. To do so, the *Gonzales* Court argued that prior courts had not proven the PBA Ban to be "void for vagueness" and had not demonstrated that the Act "impose[d] an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception."[34] As a result, the Court asserted that partial-

birth abortions, as outlined in the PBA Ban, were "not unconstitutionally vague" and did not inflict an undue burden on a fecund person seeking an abortion.[35]

To fit the *Gonzales* decision within previous SCOTUS decisions, the Court drew from the abstract concepts of the rule of law.[36] To accomplish such a feat, the *Gonzales* Court focused primarily on the level of uncertainty permitted to legal and medical experts in the abortion decision. The persistent uncertainty from *Stenberg*, the PBA Ban, and *Gonzales* centered on whether "partial-birth abortions" included all D&E abortion methods or only intact D&E methods. To clarify this discrepancy, the Court stated that interpreting the PBA Ban to "*not* prohibit standard D&E is the most reasonable reading and understanding of its terms" (emphasis mine).[37] In other words, the Court argued that the Act pertained only to intact D&E methods and not other more common methods of D&E. Here, the Court contended that the "Act excludes most D&Es in which the doctor intends to remove the fetus in pieces from the outset." This is because, according to the Court, the Act was clear that the ban pertained only to abortions in which the physician "intended" to first, "deliver the fetus until its head lodges in the cervix, usually past the anatomical landmark for a breech presentation" and then, "proceeds to the overt act of piercing or crushing the fetal skull after the partial delivery."[38] According to the *Gonzales* Court's interpretation of the PBA Ban, only in cases where the physician "intended" to abort the fetus in a manner that resembled the "complete[s] delivery of the dead infant" would the ban be upheld.[39] For this reason, the Court argued that prior challenges to the Act lacked the rationale necessary to interpret the ban to encompass any other type of D&E abortion method outside of intact D&E. In this way, the Court argued that the PBA Ban did not impose an undue burden on fecund person's seeking an abortion as other methods for abortion remained available.

The second way the *Gonzales* Court upheld the PBA Ban without overruling *Stenberg* was to directly challenge the medical necessity around intact D&E abortions. In *Stenberg*, the Court argued that extant medical knowledge and opinion supported the position that intact D&E abortions were sometimes medically necessary to preserve the life and health of the fecund person.[40] Because the Nebraska law did not include exceptions for fecund health and was not clear on the types of D&E abortions that were banned, the *Stenberg* Court ruled the law unconstitutional. Importantly, the Court argued that even if medical opinion differed on the necessity of intact D&E abortions, this dispute amongst medical experts did not negate the potential health risks associated with banning such abortion procedures. The Court's rationale for this argument is important to examine in full. Here, the Court argued:

> Rather, the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.[41]

The primary concern from the *Stenberg* Court was that more common methods of D&E abortions, which the Nebraska law first advocated in 2000, and the PBA Ban and *Gonzales* later advocated, required the dismemberment of the fetus before expulsion from the womb. Yet, medical knowledge suggested that such methods could present potential health risks to the fecund person if surgical instruments or fetal tissue were left inside their uterus. For this reason, some medical experts like Dr. Carhart provided many reasons for their preference for intact D&E abortions over common D&E methods. These reasons included that intact D&E limited the amount of passes a physician would need to make into a fecund person's uterus to remove the fetus, which reduced the risk of "uterine perforation" or "cervical laceration." Additionally, medical experts contended that intact D&E abortions typically "take less time" than other

methods, and the "shorter the procedure" the less a fecund person would be exposed to "blood loss," "trauma," and "anesthesia."[42]

To dismiss these medical justifications from prior courts, the *Gonzales* Court assumed that legal experts would not uphold the ban in circumstances where the fecund person's health was at risk and an abortion was medically necessary.[43] To support their assumption, the Court reinforced the precedent in *Casey,* which confirmed that "the State has an interest in promoting respect for human life at all stages in the pregnancy." For the *Gonzales* Court, the interest and "respect for human life" appeared to encompass fecund health as well.[44] The Court's assumption, then, was that if a fecund person's health was in jeopardy, the ban would not be upheld, and the State would intervene to protect the fecund person.

The *Gonzales* Court then employed this legal assumption to contest the *Stenberg* Court's claim that omitting a health exemption for the fecund person created "uncertainty" around different medical abortion procedures. Here, the *Gonzales* Court stated, "[M]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." In other words, any shortcomings in medical knowledge or procedures, according to the Court, could not restrict the "exercise of legislative power" or legal expertise afforded to state and lower courts.[45] Even if medical disagreements persisted on the benefits of intact D&E procedures, for instance, courts were still permitted to regulate abortion as long as those regulations aligned with some identifiable medical knowledge. In this triangulation, the Court relied on differential medical interpretations to validate abortion regulations and to limit fecund persons' autonomy. If at least some medical knowledge supported such a ban, then the implication from the Court was that those regulations did not pose an undue burden on the fecund person seeking abortion. With this logic, the *Gonzales* Court was able to dismiss previous

legal interpretations of *Stenberg* as having left "no margin of error for legislatures to act in the face of medical uncertainty."

In fact, *Gonzales* suggested that some medical uncertainty in the form of medical discrepancy (different physicians supporting different abortion methods) did not foreclose the possibility of regulating abortion. As such, the *Gonzales* Court also dismissed the impulse for a "zero tolerance policy," or the principle that no "legitimate abortion regulations" would be permissible if some medical experts disagreed on the risks of certain abortion procedures, or "some part of the medical community were disinclined to follow the proscription." According to the Court, such a policy would prove "too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession."[46] In other words, a "zero tolerance policy" toward any medical uncertainty or discrepancy was not only impossible given the differential knowledges on abortion, it was also not a valid option for legal experts whose expertise would be overextended if they had to "regulate the medical profession" according to disagreements among medical professionals. Collectively, the legal logic employed by the *Gonzales* Court demonstrated the deference between law and medicine, while such logic simultaneously acknowledged that neither form of expertise had to be definitive to regulate abortion and restrict fecund person's abortion rights. This rhetorical paradox exposed the limitations of either legal or medical expertise to clarify the boundaries of legal abortion. Ultimately, by grounding its decision in legal precedent, the *Gonzales* Court was able to uphold the PBA Ban, and thus the scope of legal and medical expertise, even in circumstances where "medical uncertainty persists."[47] Future courts would see to it that any uncertainty over legal abortion would function to further undo fecund persons' abortions rights.

The Rhetoric of Medical Necessity

In the years after the landmark decision in *Gonzales v. Carhart,* anti-abortion legislation trended toward adopting medical framings and terminology to drive their advocates' agendas. As both the PBA Ban and *Gonzales* demonstrated, one of the most salient anti-abortion strategies after *Casey* was to rhetorically suture medical-sounding terms and technologies to the question of life. This tactic is revealed through anti-abortion advocates' persistent concerns for fetal heartbeats, born-alive abortions, and an increasing interest in transvaginal-ultrasounds.[48] Terms like ultrasound and heartbeat invoke medical technology and framings, but anti-abortion bills do not rely on the actual function or existence of medical knowledge to ground their legal propositions. In bills where fetal "heartbeats" determine the legality of abortion such as in the 2021 proposed legislation in Texas Senate Bill 8, Dr. Jennifer Gunter reminds us that a heart does not exist at six weeks of fetal development. Any cardiac activity detected at this point stems from a fetal pole—a four-millimeter-wide thickening attached to the yolk sac—not a heart.[49]

Furthermore, anti-abortion legislation after *Gonzales* evolved to demand the use and inclusion of medical technologies to prohibit abortion. Consider the case of the 2012 Virginia House Bill 462, wherein the state proposed transvaginal ultrasounds (TVUs) as a mandatory and medically necessary requirement for a fecund person to receive an abortion in their first trimester. Here, advocates argued that TVUs are necessary to give fecund persons the medical knowledge *visually* that they need to make abortion decisions. As rhetorical scholar Amanda M. Friz argues, such additional mandatory requirements seem merited for their apparent desire to provide more information to people seeking abortions and their support of medical expertise.[50] But TVUs are not actually medically necessary and, as Friz shows, such requirements actually work to create additional obstacles and waiting periods for fecund persons who in theory already

have had the right and access to first trimester abortions under *Roe* and *Casey*. Proposed under the guise of medical expertise, TVU requirements function to restrict a fecund person's personal expertise and their abortion rights.

Anti-abortion legislation after *Gonzales* also evolved to challenge the medical space and location in which abortions could legally take place. In 2016, the Supreme Court decided *Whole Woman's Health v. Hellerstedt*. Rhetorical scholar Katie L. Gibson has called this decision the "most important abortion case to come before the United States Supreme Court since the court decided *Planned Parenthood v. Casey* in 1992."[51] In 2016, the questions raised in *Whole Woman's Health* put the Court's interpretation of the undue burden standard to the ultimate test. Here, the SCOTUS was tasked with considering two medical provisions in Texas HB2: first, that doctors administering abortions have admitting privileges to a hospital within 30 miles of their clinic, and second, that abortion clinics be outfitted to meet the requirements of ambulatory surgical centers. These medical provisions were intended to "help ensure that women have easy access to a hospital should complications arise during an abortion procedure." But as the Court in a 5-3 majority decision maintained, such provisions did not demonstrate adequate medical or "health-related benefit[s]."[52] Again, the Court found that such provisions placed an undue burden on fecund persons seeking abortion.

Although the TVU requirement was ultimately made optional in Virginia HB462, and the SCOTUS struck down Texas HB2 in *Whole Woman's Health*, both cases successfully demonstrated potential ways expertise could be employed to limit a fecund person's abortion rights. The restrictions outlined in both cases subsisted under the guise of promoting health and safety concerns for fecund persons and challenged courts to employ their knowledge-based-procedures of the law to interpret the constitutionality of such provisions. The courts may have

decided that TVUs and admitting privileges were not medically necessary requirements, but they did so only after the courts contended with the relationship between medical technologies and legal precedent under *Roe* and *Casey*. Likewise, the Court majority in *Whole Woman's Health* may have found the provisions in Texas HB2 to have no real medical benefit for the fecund person. But the majority also had to contend with dissention from Justice Clarence Thomas. For Thomas, the "very existence of this suit" presented a "jurisprudential oddity," as typically, "plaintiffs cannot file suits to vindicate the constitutional rights of others." By claiming that the majority Court "employs a different approach to rights that it favors," Thomas suggested that the traditional legal processes by which a case arrives at the Supreme Court were thwarted from the start and that the case should never have reached the High Court in the first place.[53]

At their core, the courts' varying interpretations of legal procedures and medical knowledge after *Casey* display the paradox of expertise central to abortion jurisprudence. They expose how even disagreements about the proper employment and meaning of law and medicine amongst legal and medical experts did not curtail the ability of such experts to chip away at fecund persons' personal expertise and autonomy over the abortion decision. In June of 2022, the Court would land the final blow and dismantle the federal right to abortion under the pretense of upholding unsettled meanings of legal and medical expertise.

The Road to *Dobbs*

In March 2018, the state of Mississippi passed the Gestational Age Act, banning any abortion procedure in Mississippi after the first fifteen weeks of a person's pregnancy. This act followed other then-recent abortion bans, all of which challenged the viability standard in the Supreme Court decision, *Roe v. Wade.*[54] At the time of *Roe*'s writing, "viability," or the point at which a fetus is likely to survive outside the womb, was typically defined as twenty-four to

twenty-eight weeks.[55] But the Gestational Age Act challenged this prevailing standard and only made exceptions for abortions after fifteen weeks in the case of a "medical emergency" or "severe fetal abnormality." The state of Mississippi considered any abortions performed outside of these reasons to be "barbaric," "dangerous," and ultimately "demeaning to the medical profession."[56] Less than twenty-four hours after Mississippi signed the Gestational Age Act into law, a federal district judge filed an injunction and blocked enforcement of the abortion ban. When lower courts affirmed this injunction in December 2019, the state of Mississippi decided to take their case to the U.S. Supreme Court. In December 2021, the Supreme Court heard the appeal in *Dobbs v. Jackson Women's Health Organization*. In June 2022, the Court dismissed the viability standard, overruled *Roe* and *Casey*, and returned abortion regulations back to the states.[57]

The Decision in *Dobbs*

The decision in *Dobbs* (2022) not only overruled fifty years of precedent in *Roe* (1973) and *Casey* (1992) but also thrust abortion politics into a state of further legal and medical uncertainty. *Dobbs* contributed to uncertainty around the law because the decision called into question the Court's legitimacy and legal expertise by casting further doubt on the growing conservative SCOTUS supermajority and its alleged nonpartisan role. In the aftermath of the *Dobbs* decision, Gallup polls reported that Americans had "record-low trust" in the Supreme Court and the federal judiciary.[58] Not only did the American public lose confidence in the judiciary, but it also showed signs of viewing the High Court as a divisive institution. After the *Dobbs* decision, Americans regarded the Supreme Court more negatively and as more "politically polarized" than at any point in the last three decades.[59] Notably, the percentage of Democrats and Democrat-leaning individuals who viewed the SCOTUS favorably declined by

eighteen percent, while the same metric for Republicans increased by eight percent, leaving us with the largest "partisan gap in favorable views of the Supreme Court" since the late 1980s.[60]

Americans' reactions to how the *Dobbs* decision changed abortion regulations are equally telling. According to a Pew Research Center survey conducted days after the Court released the *Dobbs* decision, sixty-two percent of Americans believed abortion should be legal in all or most cases.[61] Of the 6,147 Americans polled between June 27th – July 4th, sixty percent of women strongly disapproved of the *Dobbs* decision. Moreover, Americans' general perception of the Court's judicial ideology shifted after *Dobbs*, with thirty-eight percent of Americans viewing the Court as ideologically conservative after the Supreme Court overturned *Roe* and *Casey*.[62]

In truth, these findings likely do not surprise abortion scholars and adamant court-watchers who have long-witnessed the Court's "slow and subtle" approach to redesigning the highest court in the United States in a conservative fashion.[63] In fact, concerns for both public backlash and criticisms of judicial integrity were two reasons the Court provided for upholding *Roe* in its 1992 decision in *Casey*.[64] While *Dobbs* changed course and overruled established precedent, the Court appeared to do so on the grounds that prior Courts had misinterpreted the Constitution and "short-circuited the democratic process" by upholding a federal right to abortion. This shift allowed the Court to position the *Dobbs* decision as a remedy to the "egregiously wrong" and "faulty historical analysis" that *Roe* and *Casey* established and perpetuated.[65] Such a repositioning also allowed the Court to reconfigure the domain of legal expertise over abortion law and confound the role of medical expertise in abortion decisions.

In the wake of *Dobbs*, and amidst growing concerns of the Court's integrity, it is crucial to examine the assumptions of legal expertise operative in the High Court, beginning with the Justices themselves.[66] In the following sections, I unpack the majority opinion in *Dobbs* penned

by Justice Samuel Alito to illustrate how the Court exercised legal expertise through *stare decisis* to challenge the precedents in *Roe* and *Casey*. The rationale provided in the majority opinion has been described by some legal experts as "maximalist" as it sought to provide no compromise and outright overturned previous decisions.[67] But while the decision reached a 5-4 vote and was decisive in its effects on precedent, the Court in *Dobbs* was anything but unanimous in its rationale. Of the nine Justices who decided *Dobbs*, one authored the majority opinion, two authored their own concurring opinions, one authored a concurring opinion in judgment but not rationale, and three issued a co-authored dissent. The *Dobbs* decision in part reflects the Court's expected direction when interpreting future constitutional matters on abortion. Thus, unpacking the assumptions of legal expertise in *Dobbs* elucidates the triangulation of legal, medical, and personal expertise in post-*Dobbs* abortion legislation: it shows how the Court employed the legal procedure of *stare decisis* to reinterpret the legal-medical history of abortion and restrict fecund persons' abortion rights. For this reason, I also analyze the three concurring opinions from Justices Clarence Thomas, Brett Kavanaugh, and John Roberts to show how opinions need not be unanimous or well-defined for legal and medical expertise to limit fecund person's abortion rights.

Alito Models "Proper" Legal Expertise

The primary question at issue in *Dobbs* was "whether the Constitution, properly understood, confers a right to obtain an abortion." By questioning *Roe*'s precedent, the *Dobbs* Court also questioned the controlling opinion in *Casey*, which reaffirmed *Roe* on the basis of *stare decisis*.[68] According to Justice Alito, sound reasoning and a proper application of *stare decisis* in abortion cases after *Roe* required "an assessment of the strength of the grounds on which *Roe* was based." However, in his majority opinion in *Dobbs*, Alito argued that the ruling

in *Casey* upheld the holding in *Roe* merely on the notion of *stare decisis* without applying the concept in full.[69] This statement echoed previous statements from former Justice Rehnquist whose dissent in *Casey* claimed, "[t]his discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe*."[70] Likewise, Alito reasoned in *Dobbs* that *Casey* failed to offer an analysis of *Roe*'s "faulty historical" rationale and reasoning for the decision to support a constitutional right to abortion twenty years earlier.[71] As a result, the *Dobbs* Court argued that no constitutional right to abortion exists and that both *Roe* and *Casey* were wrongly decided.

A more robust understanding of the doctrine of *stare decisis* and how the Supreme Court posited this legal doctrine in *Dobbs* is pivotal to understanding how legal expertise functions in U.S. abortion law. Latin for "to stand by things decided," s*tare decisis* is a judicial doctrine that determines how lower courts make decisions rooted in prior decisions of higher courts when faced with similar arguments or facts.[72] Although not explicitly written in the Constitution, *stare decisis* has a long history in American jurisprudence, beginning with English common law. In Commentaries on the Laws of England (1765), English jurist Sir William Blackstone argued that judges are obliged to adjudicate based on their "experiences and study" and the "judicial decisions of their predecessors." These judicial decisions were the "principal" and "most authoritative evidence" available to not only constitute common law practices but to also establish the importance of precedent. For Blackstone, abiding by precedent maintained the "scale of justice," and guarded against the formation of new opinions from shifting courts or an individual judge's sentiments.[73] In 1788, Alexander Hamilton echoed these concerns for American governance in Federalist Paper 78. "To avoid an arbitrary discretion in the courts," Hamilton wrote, judges "should be bound down by strict rules and precedents" and "the records

of those precedents must unavoidably swell to a very considerable bulk."[74] Adherence to *stare decisis*, then, functions to both make stable the rule of law and provide validity to an inevitably shifting Court. As former Justice Lewis Powell famously said, "the elimination of the constitutional *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five justices say it is."[75]

After articulating his interpretation of *stare decisis*, Justice Alito's majority opinion in *Dobbs* then proceeded in two parts. First, Alito employed his legal expertise under the principle of *stare decisis* to conduct a review of the legal and medical history of abortion relevant to *Roe* and *Casey*. This procedure demonstrated what the majority opinion considered a "proper application of *stare decisis*," and thus served as a correction to what *Dobbs* considered flawed reasoning in prior SCOTUS decisions. Second, with a proper demonstration of *stare decisis* as context, the *Dobbs* Court offered five principles to consider when overruling a decision or precedent. These principles included considerations of "the nature of the Court's error," "the quality of the reasoning," the "workability" of the rule imposed, the "effects on other areas of law," and any "reliance interests."[76] These principles collectively addressed the "quality" of the arguments in a decision and the "workability" of a decision, or the ability for future courts to apply the precedent consistently and predictably in subsequent and similar cases without later decisions affecting other areas of law or interfering with additional legal interests.

Employing *stare decisis*, the majority opinion first analyzed the Court's prior interpretations of the Constitution and its conferral of a right to abortion. Because the Constitution "makes no express reference to a right to obtain an abortion," Alito argued that the Court must demonstrate "that the right is somehow implicit in the constitutional text."[77] This assertion privileges a textualist approach to interpreting the Constitution as it "relies upon the

actual text of the Constitution to respond to constitutional questions."[78] With this assertion, Alito listed the "no fewer than five constitutional provisions" that prior Courts had reviewed to find a "potential home for the abortion right."[79] These provisions included the Ninth Amendment's reservation of the people's rights, the First, Fourth, and Fifth Amendment's incorporation into the Bill of Rights, and the Fourteenth Amendment's Due Process Clause. The decision in *Roe* eventually grounded abortion rights in a privacy precedent preserved in the Fourteenth Amendment's Due Process Clause. But Alito argued that in doing so, the *Roe* Court was "remarkably loose in its treatment of the constitutional text" as neither the "abortion right" nor the "right to privacy" are "mentioned in the Constitution."[80] This assertion forwarded a strict view of judicial interpretation and advised a proper way to employ the legal principles and expertise of the Court.

The majority opinion also brandished the principle of *stare decisis* to reestablish the correct standard of scrutiny afforded to abortion rights. Here, Alito acknowledged existing arguments for abortion rights protected under the Fourteenth Amendment's Equal Protection Clause. But Alito dismissed these arguments, claiming a "State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny'" afforded to other rights protected under the Equal Protection Clause.[81] Citing previous abortion precedent, the *Dobbs* decision claimed that abortion should be "governed by the same standard of review as other health and safety measures."[82] In this way, *Dobbs* echoed the dissenters in *Casey* who favored rational basis review as the standard for interpreting abortion regulations. This logic also reasserted the triangulation of expertise in abortion law. Although the Court employed its legal expertise to dismiss existing critiques of abortion regulations as "sex-based," its acknowledgement of such critiques highlighted that abortion is a procedure that affects fecund

persons, and thus their personal expertise. The *Dobbs* Court instead chose to review abortion regulations under "other health and safety measures," which emphasized the relevance of medical expertise in the abortion decision. Collectively, *Dobbs* reoriented the abortion decision to exhibit what the majority considered the "proper" principle and application of *stare decisis,* and thus the proper employment of legal expertise.[83]

With this backdrop, the Court turned to addressing the framing of abortion rights as a "liberty" protected under the Fourteenth Amendment's Due Process Clause. The *Dobbs* Court emphasized that "liberty" is a "capacious term" and cautioned "against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy." The majority opinion argued that such tendencies could lead to the recognition of rights not explicitly listed in the Constitution. Thus, *Dobbs* also cautioned the Court against falling "into the freewheeling judicial policymaking that characterized discredited decisions." This assertion suggests there is a correct way to employ legal expertise and enact judicial interpretation to read the Constitution, and to thus prevent the continuation of unfettered judicial interpretation that had disgraced earlier Courts. With these assertions, the majority emphasized a need to return to the Fourteenth Amendment to uncover what it "means" by "liberty," and the importance of using "history and tradition" as a discerning guide.[84]

Dobbs then proceeded to review the same history that the *Roe* Court had reviewed in its decision nearly fifty years prior. *Dobbs* began with the ardent declaration that a constitutional basis for abortion rights had only surfaced just prior to the *Roe* decision and before then, "abortion had long been a *crime* in every state" (emphasis in the original). To back this assertion, *Dobbs* first reviewed common law history and cited precedent to assert that "'eminent common law authorities (Blackstone, Coke, Hale, and the like)'…*all* describe abortion after quickening as

criminal."[85] *Roe* likewise reviewed this same history but came to the opposite conclusion that "post-quickening abortion was never…firmly established as a common law crime."[86] To support their claims, both Courts cited Edward Coke's 17th-century treatise that stated that for a fecund person to abort when "quick with childe" is a "great misprison." Yet, the *Roe* Court also included Coke's assertion that a post-quickening abortion is "'no murder,'" while the *Dobbs* Court asserted that Coke claimed it was "murder."[87]

These discrepancies continued between the two Courts' opinions and their reading of common law history and the abortion knowledge of early legal authorities. Which Court was correct in their reading of said historical knowledge is difficult to determine for the very reason *Roe* suggested—there was a "paucity of common law prosecutions for post-quickening abortion," and thus a scarcity of documented history on post-quickening abortions. But for *Roe*, such "paucity" and lack of documentation made the Court "doubtful that abortion was ever firmly established as a common law crime."[88] Although the *Dobbs* Court did not concede that a dearth of such cases existed, they did acknowledge that the cases that did exist demonstrated that "common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy."[89] The difference between the two Courts' employments of legal expertise here hinged on whether pre-quickening abortions were explicitly criminal acts under the common law. For *Roe*, the "absence of a common law crime" for pre-quickening abortions was evidence enough to suggest they were not an "indictable offense."[90] For *Dobbs*, that a "pre-quickening abortion was not itself considered homicide . . . does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*."[91] These different interpretations of the same historical context demonstrate the flexibility of legal expertise and its inability to make sense of the abortion problem.

As if to clarify the scope of legal expertise, the Court deferred to historical treatments of medical professionals. The *Dobbs* Court tied legal expertise to medical expertise by acknowledging the law's treatment of physicians implicated in patient deaths. Here, the Court stated legal authorities,

> . . . treated abortionists differently from *other* physicians or surgeons who caused the death of a patient 'without any intent of doing [the patient] any bodily hurt.' These other physicians—even if 'unlicensed'—would not be 'guilty of murder or manslaughter.' But a physician performing an abortion would, precisely because his aim was an 'unlawful' one. (internal citations omitted)

With this passage, the *Dobbs* Court recognized that early legal experts looked to different physicians at least in part to determine how to interpret abortion practices. That legal experts considered physicians who performed abortions to have committed "murder" or "manslaughter" not only shows that legal authorities thought "differently" of abortionists but also suggests that only certain types of medical procedures were acceptable under the domain of medicine. This assertion is supported by *Dobbs'* concession that even "unlicensed" physicians were not relegated to the same disgraceful position as those caught performing abortions. Even though they may not have had the same knowledge-base or professional licensures, these "other physicians" had not stooped to performing procedures imbued with malicious "intent."[92] Clearly some physicians still chose to perform abortions in this adverse context. Despite these discrepancies, the *Dobbs* Court was firm in its claim that no authority "endorsed the practice" of abortion.[93]

Dobbs' characterization of the relationship between law and medicine continued through their analysis of abortion law in the nineteenth century. Here, the Court acknowledged the different interpretations of the quickening doctrine and confirmed that "original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear."[94] The

lack of clarity around the quickening doctrine hinged on different legal and medical approaches to the question of fetal life. Like *Roe*, the decision in *Dobbs* was careful to traverse this territory cautiously and did not offer a definitive interpretation of life. Different than the *Roe* Court, however, the Court in *Dobbs* cited legal authorities who outright dismissed the quickening doctrine and its apparent disregard for fetal life. These sources claimed that the quickening distinction was "neither in accordance with the result of medical experience, nor with the principles of the common law."[95] And when the British Parliament outlawed abortion at all stages of a pregnancy in the early nineteenth century, *Dobbs* argued that legal authorities attributed this shift in abortion law to "the medical man's concern that fetal life should be protected by the law at all stages of gestation."[96]

Collectively, these inclusions in *Dobbs'* majority opinion highlight important distinctions and connections between the historical reviews outlined in *Roe* and *Dobbs*. Notably, both cases acknowledge how the question of life contributed to the framing of abortion as a medical concern. While neither decision offered a definitive stance on fetal life, *Roe* claimed this was because "those trained in the respective disciplines of medicine" could not "arrive at any consensus."[97] For this reason, the *Roe* Court did not place emphasis on State interests in potential fetal life until "the stage subsequent to viability."[98] The Court in *Dobbs* also did not venture to define life. However, the legal knowledge *Dobbs* relied on to dismiss *Roe*'s rationale on fetal life clearly supported particular medical perspectives on "fetal life" and the need to protect such life "at all stages of pregnancy."[99] Thus, while both decisions came to different conclusions on the historical treatments of abortion and the role of fetal life in the abortion debates, both cases were decisive in their defining of abortion as a legal-medical decision.

Dobbs' treatment of the legal-medical domain of abortion reflects in part my earlier analyses of nineteenth-century abortion politics during the professionalization of medicine. To reiterate, this era saw the rise of certain medical practices that were formalized and standardized and the denigration of other medical practices that were considered less rigid and homogenous. During this time, practices like midwifery lost credibility amongst professional physicians who were concerned with only espousing medical knowledge and performing medical procedures that were deemed reputable by the American Medical Association.[100] It is this context that is decisively missing from *Dobb*s' analysis of the history of abortion. This context helps explain the shift from the inconclusive medical opinions on abortion during the common law era to the *Dobbs* Court's assertion that "during the 19th century, the vast majority of the States" had criminalized abortion.[101] To frame this shift in abortion opinions as a shift in expertise elucidates why states may have increased their criminal abortion codes at the same time that other professions like medicine were attempting to reconfigure the public perception of their practice and knowledge-domain. Such a change allowed differential forms of expertise and institutional authorities to form an alliance that strengthened their respective professions.

The evidence both *Roe* and *Dobbs* did supply throughout their majority opinions demonstrated that neither legal nor medical opinion on abortion was unanimous throughout common law or nineteenth-century history. Both Courts were also clear that legal and medical experts were not unified in their interpretations of when abortion conflicted with questions of life. As *Dobbs* rightly asserted, some late nineteenth-century courts argued that "[U]ntil the period of quickening there is no *evidence* of life."[102] In 1973, the *Roe* Court interpreted any uncertainty around fetal life to mean that "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer" of "when life begins." In 2022, the

Dobbs Court acknowledged the uncertainty around fetal life but still advanced that some authorities possessed a "sincere belief that abortion kills a human being."[103] For the *Roe* Court, the question of life did not preclude a constitutional justification for abortion rights; for the *Dobbs* Court, *Roe* could not be defended by prior precedent as no prior case "involved the destruction of what *Roe* called 'potential life."[104] Despite these inconsistent conclusions, both Courts employed legal expertise to make meaning of the constitutionality of abortion in their historical time periods. That both Courts interpreted the same legal-medical history but came to different decisions further exposes the rhetorical paradox of expertise and the inability of either legal or medical expertise to make sense of the abortion problem.

Five Reasons to Overturn Precedent

After employing *stare decisis,* the *Dobbs* Court then turned to reviewing five factors that supported the overturning of *Roe* and *Casey.* These five factors included the "nature of [the Court's] error," the "quality of their reasoning," the "'workability' of the rules they imposed on the country," "their disruptive effect on other areas of the law," and "the absence of concrete reliance." These five factors represented an extension of the Court's "proper" enactment of *stare decisis.*[105] In applying these terms when reviewing *Roe* and *Casey*, the *Dobbs* Court illustrated not only its own interpretation of the proper way to review prior legal precedent but also the path by which the Court could reinstate its authority and repair its reputation.

The *Dobbs* Court's attempts at restoration were first represented in its review of the *Roe* and *Casey* Courts' supposed errors. *Dobbs* argued that *Roe* "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." This question, of course, was the issue of "fetal life." Nearly twenty years later, when *Casey* "described itself as calling both sides of the national controversy to resolve their

debate," *Dobbs* stated that the decision "necessarily declared a winning side." As a result, "those on the losing side" with interests in "fetal life" were no longer able to "persuade their elected representatives to adopt policies consistent with their views." Such an event, according to the *Dobbs* Court, "wrongly removed an issue from the people and the democratic process."[106] As a remedy to the Court's error, *Dobbs* argued for the overturn of *Roe* and *Casey.* Deferring to other legal experts, *Dobbs* quoted Justice Bryon White's dissent in *Thornburgh* and argued, "[i]t is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken."[107] With an eye toward restoring the authority and expertise of the Court, *Dobbs* then turned to address the quality of reasoning of both *Roe* and *Casey*.

At its core, *Dobbs* found *Roe*, and by extension *Casey*, to be lacking in explanation for its interpretation of abortion history and the Constitution. To demonstrate what *Dobbs* identified as a "weakness" in *Roe*'s legal reasoning, the Court pointed to the "well-known" fact that the decision was not grounded in "constitutional text, history, or precedent." Even though *Roe* "featured a lengthy survey of history," *Dobbs* found much of this history to be "irrelevant" as the Court "made no effort to explain why it was included."[108] Extending its earlier arguments about *Roe*'s "erroneous" and "faulty" reading of history, *Dobbs* claimed this history was then preserved in *Casey*'s plurality opinion. For *Dobbs*, the primary issue with prior legal reasoning on abortion was that those Courts had failed to provide an explanation supported with "any other cited source" for the establishment of the trimester framework and the critical point of viability. Even when *Casey* "jettisoned the trimester framework," *Dobbs* asserted that the Court simply replaced this faulty framework with an "arbitrary 'undue burden' test and relied on an exceptional version of *stare decisis* that…this Court had never before applied and has never

invoked since."[109] These criticisms expose the Court's view of the trimester framework and the undue burden standard as not being adequately supported with medical knowledge and expertise. These criticisms also demonstrate that not only did *Roe* and *Casey* appear to break from legal history and tradition by upholding a federal right to abortion, but the process by which they did so failed to resemble the accepted legal procedures adopted by the *Dobbs* Court.

As a result, one of *Dobbs'* recurring criticisms of *Roe* and *Casey* was that the decisions looked nothing like a judicial opinion. According to *Dobbs, Roe*'s opinion "spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee." This "fact-finding" process harkens back to the claims Congress made in its avocation for the PBA Ban. For the *Dobbs* Court to criticize its former self for participating in such legal endeavors calls into question the flexibility of legal expertise and how such expertise shifts with the changing makeup of the Court. What may have been an appropriate version of judicial interpretation in 1973 was no longer the case in 2022. Throughout *Dobbs*, the Court repeatedly claimed that the holding in *Roe*, and by extension *Casey*, "*looked* like legislation." Because the trimester framework was in part "based on the [*Roe*] Court's flawed account of history," *Dobbs* argued that the scheme lacked proper judicial reasoning. What remained when such quandaries were removed was "precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests."[110] Collectively, these criticisms identified *Dobbs'* central problem with employments of legal expertise in prior abortion law: the notion that flexible interpretations of history and the law may result in a "totally unreasoned judicial opinion."[111]

Dobbs extended this criticism to *Roe*'s lack of justification and inadequate medical support for the viability rule. After rehashing legal and medical evidence that showed the

timeframe for viability was inconclusive, *Dobbs* questioned *Roe*'s decision to ground abortion rights in such uncertain terms. Quoting the decision in *Marshall v. United States*, the Court argued that *Roe* had broken precedent when it "departed from the normal rule that courts defer to the judgments of legislatures 'in areas fraught with medical and scientific uncertainties.'"[112] This criticism from *Dobbs* acknowledges the limitations of legal expertise to make sense of uncertain medical situations and terms. Historically, when medical knowledge is unclear, the Court has practiced a rational basis review and deferred to the expertise of lower courts who have the legislative capabilities of curating a base of knowledge on medical matters.

But according to *Dobbs*, *Casey* broke tradition when it revisited the abortion issue. *Dobbs* contended that "very little of *Roe*'s reasoning was defended or preserved." *Dobbs* argued that the majority opinion in *Casey* failed to review the "history of the abortion right," failed to "bolster *Roe*'s reasoning," and failed to "remedy one of the greatest weaknesses in *Roe*'s analysis," i.e., the "viability line."[113] Such failures suggested *Casey* improperly executed its legal expertise as the Court did not itself review the legal-medical history outlined in *Roe* to uphold the decision. *Dobbs* also critiqued the *Casey* Court for not deferring to the expertise of lower courts to support its rationale for upholding the medical framing around abortion. Instead of critiquing the possible flaws in *Roe*'s framework, *Casey* simply "rejected *Roe*'s trimester scheme," and replaced it with an "'undue burden' test." But because the basis for this test was obscure, the *Dobbs* Court, and subsequent courts after *Casey*, found it to be riddled with "ambiguities" that made it "difficult to apply" in practice.[114] For *Dobbs* to critique the vague language in *Casey* suggests that there may be a proper way to employ judicial interpretation to review abortion regulations. On some level, *Dobbs'* critique of *Casey* suggests the "proper" method is rooted in constitutional "text, history, and precedent," or displayed through a "proper application of *stare decisis*." Wherever the

rationale lies, *Dobbs* clearly believed that *Casey* failed to meet the "standard grounds for constitutional decisionmaking" necessary to uphold the authority and expertise of the High Court. For this reason, the Court argued that *Casey* perpetuated a flawed understanding of *stare decisis* and legal expertise and found its holding to be "unworkable."[115]

The remainder of the majority opinion reasoned through how the decision in *Casey* lacked the workability needed to uphold its precedent. The Court recounted three "rules" outlined in *Casey* that undermined its workability. Each of these "rules" exposed an "ambiguity" that *Dobbs* found perpetuated the "problem" with applying the undue burden test to any post-*Casey* abortion regulations. Importantly, these rules collectively triangulated expertise as the Court assessed the role of legal, medical, and personal expertise to determine the workability of legal precedent. The first rule *Dobbs* cited was *Casey*'s invalidation of abortion regulations that had the "purpose or effect" of placing a "substantial obstacle in the path of a woman seeking an abortion" before fetal viability. But because what qualified as "substantial" was "often open to reasonable debate," *Dobbs* found there was a "wide gray area" between a "huge burden" and a "trivial one." *Dobbs* argued that such "gray area" presented difficulties for courts who had to determine which burdens were "substantial obstacles" for fecund persons, and thus which burdens placed unlawful regulations on their right to abortion.[116] With this assertion, the Court acknowledged that the legal language in *Casey* was inconclusive and could not definitively determine the legal or medical burdens that may illegitimately challenge fecund persons' autonomy to acquire an abortion.

Dobbs then highlighted a second "rule" in *Casey* that further contributed to the vague reasoning for legal abortion. In *Casey*, the Court had previously argued that any state measures imposed to regulate abortion and "ensure that the woman's choice is informed" were

constitutional so long as they did not "impose 'an undue burden on that right.'" Because this rule applied to "all stages of a pregnancy," *Dobbs* found it conflicted with *Casey*'s first "rule" about undue burdens and viability. Here, *Dobbs* posed a hypothetical problematic: if a first-trimester regulation surfaced that imposed an "insubstantial obstacle but serves little purpose," would the Court find it constitutional because the obstacle was not "substantial?" Or would such a regulation be deemed unconstitutional because the "undue burden" it creates "outweighs its negligible benefits?" Such a hypothetical demonstrates the triangulation of legal, medical, and personal expertise: the Court wielded its legal expertise to review *Casey*'s precedent and determine the relationship between medical "obstacles" and personal "benefits" that abortion regulations impose. The third rule *Dobbs* highlighted from *Casey*'s rationale further complicated this conceptual legal dilemma. *Casey* characterized undue burdens as those restrictions which enforced "[u]nnecessary health regulations" on persons seeking abortion. But because *Casey* failed to "explain the sense in which the term [unnecessary] is used in this rule," *Dobbs* argued it was "vague" and could not be interpreted consistently across varying regulations.[117] In this way, the Court once again triangulated expertise as it employed legal expertise to dismiss appeals to "health" and medicine that it found ambiguous, which thus limit fecund persons' abortion rights. In doing so, the *Dobbs* Court reasserted its power over both medical and personal expertise in the abortion decision.

The *Dobbs* Court's hypothetical problematic also made visible the rhetorical paradox of expertise. It exposed the *Casey* Court's "commitment to the consistency of logical structures" even when such "structures" proved nearly impossible to maintain and keep consistent.[118] Because *Casey* offered the undue burden standard as a corrective to the flawed logic in *Roe*, but failed to clearly define its terms, the *Casey* Court simply kept the paradox intact. The legal

expertise of the *Casey* Court failed to clarify the legal and medical ambiguities around abortion law, which reinforced the necessity and expertise of future legal and medical experts to ascertain the reproductive rights of fecund persons. Yet, when *Dobbs* challenged *Casey*'s rationale, it too sustained the rhetorical paradox of expertise by deferring to lower courts and the medical profession to negotiate differences and discrepancies in abortion legislation and to regulate fecund persons' abortion rights. In some sense, the *Dobbs* decision to overrule *Roe* and *Casey* through its application of *stare decisis* may have been the Court's proposed solution to the abortion problem. However, the inconsistencies around abortion remained because the abortion paradox triangulates legal, medical, and personal expertise. Thus, while the decision in *Dobbs* employed expertise to defer the problem back to other legal experts at the state level, physicians and fecund persons are still implicated in the overall abortion decision. As such, the logic *Dobbs* invoked did not resolve the legal or medical ambiguities around abortion that had restricted fecund persons' abortion rights but merely passed such legal inconsistencies onto state courts to determine. In this way, the *Dobbs'* decision reconfigured the relationship among legal, medical, and personal expertise as the abortion decision was now an issue for state courts, but the problem of abortion itself still leaves fecund persons with limited means to exercise their abortion rights.

Lastly, the *Dobbs* Court employed legal expertise to demonstrate that neither *Roe* nor *Casey* could be upheld because they infringed on other areas of law and did not establish "concrete reliance interests." How the Court employed its legal expertise through applying these two factors is a strong indicator of how the Court may interpret future abortion disputes. *Dobbs* found that *Roe* and *Casey* had "led to the distortion of many important but unrelated legal doctrines," including the dilution of the "strict standard for facial constitutional challenges," the weakening of the "Court's third-party standing doctrine," and the shirking of the "rule that

statutes should be read where possible to avoid unconstitutionality."[119] According to *Dobbs, Roe* and *Casey* had violated each of these established legal principles and procedures. Because these cases represented a departure from what *Dobbs* viewed as correct constitutional doctrine, and thus a departure from proper legal expertise, neither precedent could be upheld.

The *Dobbs* Court also addressed whether overruling these cases would "upend substantive reliance interests." Here, the Court considered the concept of "traditional reliance interests," which are identified in matters where "'advanced planning of great precision is most obviously a necessity.'" Because the *Casey* Court itself admitted that abortion is an "unplanned activity," *Dobbs* ruled that "concrete reliance interests" are not present as the Court is unable to adequately assess the interests of different parties, i.e., fecund persons versus fetal life, in a consistent or reliable manner. Importantly, the Court did consider how different situations and experiences may affect different fecund persons' abilities to acquire an abortion in a timely manner. Yet, the Court ultimately ruled that this "empirical question" was not a question for constitutional law to answer. Here, the Court argued that it possessed "neither the authority nor the expertise to adjudicate" such disputes. This statement suggests that the Court did not consider its legal purview to cover questions related to the balance of interests between the fecund person and the fetus. The Court supported such contentions when it stated that the "weighing of the relative importance of the fetus" versus the "mother" represented a departure from constitutional precedent on reliance interests.[120] At its core, the factors that *Dobbs* invoked to reestablish "proper" legal expertise indicated a strong desire from the Court to return consistency and predictability to the rule of law. Collectively, the Court employed these factors to demonstrate its interpretation of *stare decisis* and to effectively overrule the precedent in *Roe* and *Casey*.

On its face, predictable and quality arguments seem like fine characteristics to adhere to when reviewing the durability of legal precedents. But how the *Dobbs* majority reasoned through these principles raised questions regarding the Court's own internal consistency and logic. The breakdown of the *Dobbs'* decision was somewhat predictable with Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett joining the majority opinion penned by Justice Alito. Justice Roberts concurred in the judgement only but dissented in the rationale, and Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissented in full. But even amongst concurring justices, there seemed to be some discrepancy in how to interpret the ruling in the Court's majority opinion. As we turn to the concurring opinions in *Dobbs*, we see that even justices who agreed with the majority opinion had different understandings of the proper way to interpret *Dobbs*' ruling and to employ legal expertise to regulate not only the abortion problem, but future constitutional disputes.

To Concur, or Not to Concur

Collectively, the concurring opinions in *Dobbs* focused on the scope of due process and emphasized the importance of preserving the Court's impartial position as the wielder of judicial review. While Justice Thomas and Justice Kavanaugh provided rationales that overlapped at times, Justice Thomas also appeared to contradict his own legal logic. In their separate concurring opinions, both Thomas and Kavanaugh reiterated that the overturn of *Roe* did not threaten existing precedents in other cases grounded in the Due Process Clause. For instance, in his concurring opinion, Justice Thomas agreed that the Court's opinion concerning the application of the Due Process Clause should only be applied to precedents concerning abortion. Citing his own dissent in a prior SCOTUS decision, Thomas argued, "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion."[121] But in

the very next sentence, Justice Thomas endorsed the reexamination of "substantive due process precedents" in prior cases that were "demonstrably erroneous." These cases included *Griswold v. Connecticut* (1965), which guaranteed the right for married persons to obtain contraceptives; *Lawrence v. Texas* (2003), which guaranteed the right to engage in private, consensual acts between same-sex persons; and *Obergefell v. Hodges* (2015), which guaranteed rights to same-sex marriage.[122]

While such an assertion certainly may incite fear in persons whose rights are protected under these cases, it also demonstrates a rather troubling view of legal expertise. Thomas believes such cases were wrongly decided to begin with, and so to "'correct the error'" and overrule them would return the Court to what he considers to be its proper domain.[123] To overrule "substantive due process precedents" would also reestablish a more originalist interpretation of the Constitution, or the reading of the Constitution in a manner that represents its meaning at the time of its writing, regardless of social context or political changes over time.[124] For Thomas to assert a particular method of judicial interpretation also "communicates to the public that certain forms of judicial interpretation are more legitimate than other forms."[125] This suggests that there may also be proper figurations and employments of legal expertise. For Thomas, the correct enactment of legal expertise is certainly not "judicial policymaking," which he asserted the Court's abortion jurisprudence resembled. He further supported this point when he stated that, "[t]he right to abortion is ultimately a policy goal in desperate search of constitutional justification."[126] To read the Constitution more narrowly, then, also allows the Court to return the question of abortion and abortion policy to the states. This shift in the law appears more "democratic" as it "separates the political from the legal and leaves the political to

the people."[127] In doing so, the Court could venture to restore its status as the arbiter of the rule of law.

But not all the justices had the same interpretation of the meaning and scope of the Due Process Clause. Following Justice Thomas, Justice Kavanaugh reiterated the majority opinion's stance that overruling *Roe* and *Casey* did not threaten other precedents like those in *Griswold, Lawrence,* or *Obergefell*. Here, Kavanaugh stated in full: "[o]verruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents." Kavanaugh differed from Thomas on how *Dobbs* affected precedent, but they shared a similar view of the Constitution and the role of the Supreme Court. In his concurrence, Justice Kavanaugh elaborated on what the ruling in *Dobbs* meant for the status of the Court and the rule of law. For Kavanaugh, the Court's decision in *Dobbs* "properly returns the Court to a position of neutrality and restores the people's authority to address the issue of abortion."[128] Here, Kavanaugh echoed traditional conceptions of the rule of law and judicial opinion as embodying principles of "neutrality."[129] To return the abortion question to the states, then, returns "difficult moral and policy questions" back to the people, which Kavanaugh firmly argued is what the "Constitution dictates." Because "this Court had no constitutional authority to decide" the abortion issue, Kavanaugh claimed the "*Roe* Court distorted the Nation's understanding of this Court's proper role in the American constitutional system and thereby damaged the Court as an institution."[130] In this way, Kavanaugh positioned the overturn of *Roe* and *Casey* as a belated correction to erroneous judicial partialities. Collectively, such claims bolster a particular view of not only the Supreme Court but also the proper reading of the Constitution and the enactment of judicial expertise.

The final concurring opinion from Justice Roberts is perhaps the most telling for its critiques of the majority opinion's legal expertise. In *Dobbs*, Roberts concurred "only in the judgement." This means that Roberts agreed with the decision to overrule *Roe* and *Casey* but not the majority opinion's reasoning for doing so. This suggests that while Roberts was aligned with the final judicial ruling, he was not aligned with the interpretations of legal principles and procedures that allowed for such a decision. To begin his concurrence, Roberts recognized the Court's careful reading of precedent and the history of abortion and stated that the "Court's opinion is thoughtful and thorough." However, Roberts ultimately argued that "those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us." Such an assertion suggests that the majority in the *Dobbs* Court overreached in its judicial authority, and thus disparaged its legal expertise, when it decided facts beyond the scope of the case at hand. Here, Justice Roberts advocated for the Court's "adherence to [the] simple yet fundamental principle of judicial restraint." With this legal principle in mind, Roberts revisited the problem in the fifteen-week Mississippi abortion ban brought before the Court,

> I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful.

In doing so, Roberts cautioned the Court against deciding "more" than is necessary to address the issues the people and the lower courts had tasked them to decide. For Roberts, to reject the "misguided viability line" would suffice to resolve the issue brought before the Court. But because the Court went further and outright overruled *Roe* and *Casey*, Roberts argued that the Court's opinion displayed a "relentless freedom from doubt on the legal issue" of abortion that he did not "share." Roberts made the case that the Court was charged with answering "whether the previously recognized abortion right bars all abortion restrictions prior to viability." In his

view, the answer to this question was a firm "no" because of the "basic principles of stare decisis and judicial restraint."[131] With this legal reasoning, Roberts concurred with the judgment to overrule *Roe* and *Casey* according to *stare decisis* but exposed the latitude granted judicial interpretation. As such, his concurrence further confounded the scope and meaning of legal expertise even as it decisively eradicated federal abortion rights and restricted the personal expertise of fecund persons.

The Many Interpretations of *Stare Decisis*

The scope and application of *stare decisis* first became a critical focal point for abortion proponents when the leaked draft opinion of *Dobbs* in May 2022 first foreshadowed the imminent overturn of *Roe*. For legal scholars, the focus rested on how the overturn of *Roe* threatened the Court's integrity, the meaning of *stare decisis*, and the general rule of law. The "proper" interpretation of *stare decisis* was also repeatedly expressed in the final majority opinion in *Dobbs* as well as in the concurring opinions from Thomas, Kavanaugh, and Roberts. Leading constitutional scholar and Professor Emeritus at Harvard Law School, Laurence H. Tribe, summarized his review of the leaked draft opinion of *Dobbs*, calling the overturn of Roe risky, underlining the narrowness of the Court's application of *stare decisis*, and forecasting the damage to the Court's "legitimacy."[132] Months later, when the Court overruled the precedent in *Roe*, Tribe called the *Dobbs* decision "reactionary" and "unprincipled" and claimed it "undermined" the "concept of implicit constitutional rights."[133] Of course, this is not the first time the Court has chosen to overrule precedent, having done so at least one-hundred-forty times since first having done so in 1851.[134] But according to Joanne Rosen, senior lecturer at the Bloomberg School of Public Health and an expert on public policy, the overturn of *Roe* signals a significant shift in the Court's interpretation of *stare decisis*. Rosen claims the *Dobbs* decision is

different because it demonstrates, "perhaps for the first time," how the Supreme Court "departed from precedent not to recognize a right it previously neglected but rather to remove one it previously protected. It *deconstitutionalized* a long-standing right." In this way, Rosen echoes Tribe's sentiments that the *Dobbs* decision undermined the Court's "authority."[135] Overall, such criticisms cast further doubt on the scope and meaning of legal expertise and the ability of the Court to adjudicate the abortion problem.

In particular, the *Dobbs* Court's varying interpretations of *stare decisis* rekindled concerns about the legitimacy of the justices and their ability to wield legal expertise to enact the rule of law.[136] To reiterate, the majority opinion in *Dobbs* acknowledged the need to abide by legal precedents through *stare decisis* but disagreed on how previous Courts had employed this legal principle in *Casey* to uphold *Roe*. After careful deliberation over the scope and meaning of *stare decisis*, the *Dobbs* Court offered five principles for considering the overruling of a decision or precedent.[137] In applying these principles through *stare decisis,* the majority opinion sought to restore consistency and predictability to judicial interpretation and the rule of law. The majority opinion analyzed the history of abortion and abortion law in the United States to both demonstrate the proper application of *stare decisis* and to ultimately overrule the federal right to abortion. The concurring opinions from Thomas and Kavanaugh appeared to support the majority's reading of *stare decisis*. Yet, Thomas suggested that this application of *stare decisis* should extend to other precedents outside of abortion while Kavanaugh claimed the legal reasoning and principles employed to overrule *Roe* and *Casey* were uniquely pertinent to the Court's ruling on abortion.[138] Lastly, Roberts' concurring opinion diverged in thought and rationale from the other five justices in the majority opinion, as Roberts argued the "principles of *stare decisis*" warranted the excision of *Roe*'s viability rule and "only that rule."[139]

In many ways, Kavanaugh's concurring opinion does the most crucial work of exposing the inconsistencies of legal expertise as they revolve around the specific issue of abortion. While Kavanaugh acknowledged that the abortion question was a "moral" one, he ultimately contended that the "issue" brought before the Court was "not the policy or morality of abortion." He further substantiated this point when he stated "the Constitution does not grant this Court the authority to decide" the abortion issue. While Kavanaugh's reasoning of the abortion issue was consistent within his own concurring opinion, his declaration that abortion is a moral issue and therefore not an issue the Court can decide, revealed the limitations of legal expertise to resolve the abortion problem.[140] His rationale invoked the Court's internal debate about the true meaning of the Constitution and the correct employment of judicial interpretation. Such a critique allows us to see the changes in abortion law not as a "result of shifting knowledge" on the meaning of abortion per se.[141] Rather, these shifts appear to be a result of the changes in the knowledge and procedures employed by the Court, and the levels of deference the SCOTUS affords other U.S. lower courts as well as members of its own High Court. *Dobbs* ultimately configured these shifts to employ its interpretation of *stare decisis*, which further revealed the particular ways abortion rulings create tensions around legal expertise.

Of course, the history of abortion jurisprudence shows that the Court has shifted its interpretation of abortion rights throughout the last fifty years. Like other contentious issues brought to the Court, abortion rulings from *Roe* forward never reached a unanimous opinion. At least one Supreme Court justice dissented in each of the cases in *Roe*, *Akron I*, *Thornburg*, *Webster*, *Casey*, *Stenberg*, *Gonzales*, and *Dobbs*. Many of these cases also saw varying concurring opinions that elaborated on the constitutional interpretation of abortion rights and the Court's ability to rule on such rights. In *Casey*, the majority expressed a desire to maintain the

Court's "principles of institutional integrity" and so maintained the "rule of *stare decisis*" to uphold *Roe.* In his dissent in *Casey*, Justice Blackmun argued that a proper reading of the issues in *Casey* under *stare decisis* would require the Court to "strike [the Pennsylvania provisions] down" completely to truly preserve the holding in *Roe*. But Justice William Rehnquist offered yet another interpretation of *stare decisis* when he also dissented in *Casey* and argued that "authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact." Debates about the true meaning of *stare decisis* resurfaced in *Dobbs* nineteen years later. But in *Dobbs*, different justices aligned with the majority opinion, authored their own concurring opinions, and employed different interpretations of *stare decisis* to come to varying conclusions about the role of the Court and the longevity of other supposedly settled decisions. The varying legal reasonings offered by the *Dobbs* Court showed that abortion provided the rhetorical means for the Court to dispute different interpretations of *stare decisis* to finally overturn *Roe* and *Casey*, and thus overturn the federal right to abortion.

The Incomplete Legacy of *Dobbs*

The long-term results of the *Dobbs* decision on the public perception of the Court, the medical battles over abortion, and fecund persons' abortion rights are yet to be seen. Unsurprisingly, we have already begun to experience the adverse effects of overturning *Roe* on abortion access. In the first 100 days post-*Dobbs*, at least sixty-six clinics across fifteen states that offered abortion services were forced to shut their doors. Of those fifteen states, only one still had abortion providers available to the public.[142] Without practical access to abortion, many people have been forced to seek abortion options out of state, which can often cause them to incur further financial strain, and emotional stress. Notably, when *Roe* granted fecund persons a constitutional right to abortion in 1973, the Court justified its privacy rationale to protect them

from these very burdens.[143] In the decades after *Roe*, the increased legal efforts of anti-abortion groups made *Roe*'s protections progressively more difficult to enforce and guarantee for fecund persons. These legal efforts, often referred to as TRAP laws, or "targeted regulations aimed at abortion providers," worked to dismantle the infrastructure of abortion clinics to make it arduous and sometimes impossible for providers to administer abortion services and for people to acquire them.[144]

In the wake of *Dobbs*, such uncertainty around the legality of abortion has caused some clinics to completely shift their strategies. Clinics in Oklahoma have since pivoted and increased their efforts to offer other healthcare related services such as "gender-affirming care, family planning and even medication-based opioid treatment."[145] Other states and facilities are continuing the cause for abortion and are experimenting with mobile health care as they offer abortion pills and even some surgical abortion methods in "mobile units."[146] Still, the damage to abortion rights in the wake of *Dobbs* is far from over. When the Court eliminated the constitutional right to abortion, the battle over abortion access simply shifted terrain. At the time of this writing, the legal, medical, and personal conflict over abortion now rests with disputes on the legality of medication abortion, a two-drug regimen most often administered in the first trimester of a pregnancy. The implications of the Court's abortion jurisprudence and the contestations over expertise as they converge on medication abortion are further explored in the conclusion of this project.

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[1] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 39-40.
[2] Dr. Jennifer Gunter is a well-known OB/GYN who takes a feminist approach to healthcare, and specifically abortion care. She has written books on various women's health-related issues include menstruation and menopause with the explicit goal of challenging misconceptions that have been accepted as medical gospel. See *The Vagina Bible: The Vulva and the Vagina—Separating the Myth from the Medicine* (Citadel Press: New York, 2019) and Cityline, "Dr. Jen Gunter explains how you can have a feminist menopause," YouTube Video, 7:47, June 16, 2021, https://www.youtube.com/watch?v=0PmIKeVYJ7w.
[3] Jen Gunter, "Medical School Doesn't Teach the 'Woman's Life Is in Danger' Curriculum," *The New York Times*, May 20, 2019, https://www.nytimes.com/2019/05/20/opinion/abortion-laws.html.

[4] Jen Gunter, "Medical School Doesn't Teach the 'Woman's Life Is in Danger' Curriculum," *The New York Times*, May 20, 2019, https://www.nytimes.com/2019/05/20/opinion/abortion-laws.html.
[5] For such context, we can look to the Court's own ruling on the role of medicine in abortion decisions. Here, the *Roe* Court claimed that the Hippocratic Oath *"*represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day." See *Roe v. Wade* 410 U.S. 164.
[6] Jen Gunter, "Medical School Doesn't Teach the 'Woman's Life Is in Danger' Curriculum," *The New York Times*, May 20, 2019, https://www.nytimes.com/2019/05/20/opinion/abortion-laws.html.
[7] E. Johanna Hartelius, *The Rhetoric of Expertise* (Lanham: MD, Lexington Books, 2011): 21.
[8] In focusing on the relationship between the medical profession and the legal profession, I also want to be careful not to downplay the risk of criminal punishment that Gunter tried to circumvent and that physicians risk today. Physicians have faced the threat of criminal punishment for administering abortions since at least the early-to-mid-nineteenth century—threats that continue into the present day with legislation like Texas SB8.[8] However, to focus on the potential criminal charges physicians face for administering illegal abortions glosses over the ways in which physicians serve as both mediators and key decision-makers in abortion law.
[9] Jen Gunter, "Medical School Doesn't Teach the 'Woman's Life Is in Danger' Curriculum," *The New York Times*, May 20, 2019, https://www.nytimes.com/2019/05/20/opinion/abortion-laws.html.
[10] Ruth Burdick, "The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split over the Salerno Test," *Hastings Constitutional Law Quarterly* 23, no. 3 (Spring 1996): 825-876.
[11]Guttmacher Institute, "Last Five Years Account for More Than One-quarter of All Abortion Restrictions Enacted Since *Roe*," guttmacher.org, January 13, 2016. https://www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe.
[12] Guttmacher Institute, "2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades," guttmacher.org, April 30, 2021. https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades
[13] Elizabeth Nash and Sophia Naide, "State Policy Trends at Midyear 2021: Already the Worst Legislative Year Ever for U.S. Abortion Rights," guttmacher.org, July 1, 2021. https://www.guttmacher.org/article/2021/07/state-policy-trends-midyear-2021-already-worst-legislative-year-ever-us-abortion.
[14] See the language in the *Unborn Victim of Violence Act,* 18 U.S. 1841 (2004) and the *Born-Alive Abortion Survivors Protection Act,* S. 311 (2019).
[15] *Stenberg v. Carhart,* 530 U.S. 914 (2000) and *Gonzales v. Carhart,* 550 U.S. 124 (2007).
[16] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 5.
[17] Saralyn Cruickshank, "Inside the '*Dobbs*' decision," hub.jhu.edu, July 1, 2022. https://hub.jhu.edu/2022/07/01/joanne-rosen-insight-dobbs-decision/; American Bar Association, "With *Roe* overturned, legal precedent moves to centerstage," americanbar.org, June 24, 2022. https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/stare-decisis-takes-centerstage/; Isabella B. Cho and Brandon L. Kingdollar, Crimson Staff Writers, "After Roe Dismantled, Harvard Experts Condemn, Defend Landmark Decision, thecrimson.com, June 25, 2022. https://www.thecrimson.com/article/2022/6/25/dobbs-experts-reax/.
[18] While not an accepted or legitimate medical term itself, "partial-birth abortion" has become the shorthand in anti-abortion legislation focused on most surgical abortion procedures, i.e. any abortion procedure that requires dilation of the uterus and extraction of the fetus.
[19] *Stenberg v. Carhart,* 530 U.S. 914 (2000), at 914.
[20] *Stenberg v. Carhart,* 530 U.S. 914 (2000), at 915 citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 879.
[21] *Stenberg v. Carhart,* 530 U.S. 914 (2000), at 930.
[22] The *Stenberg* Court justified focusing on pre-viability abortions with "three established principles" outlined in *Roe* and *Casey*. These principles included *Casey*'s determination that before viability, "the woman has a right to choose to terminate her pregnancy" and its claim that "'a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional." Thirdly, the Court reiterated the third trimester stipulation in *Roe:* "'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Roe v. Wade* 410 U.S. 113 (1973).
[23] *Stenberg v. Carhart,* 530 U.S. 914 (2000), at 923-930.

[24] *Stenberg v. Carhart,* 530 U.S. 914 (2000), at 939, emphasis in the original. The Court provides an extensive analysis of the different kinds of abortion procedures listed as either D&E or D&X abortions. Some of the differences between these two procedures highlights the surgical materials and tools used in each, the point in a pregnancy at which either procedure becomes an option and presents less risk to the fecund person, and, most notably, how each procedure differs in the removal of the fetus from the womb. This last point presented the most contention amongst legal and medical experts who contested the importance of which fetal body parts were removed first in either a D&E or D&X abortion procedure. This dispute led the Nebraska State Attorney General to argue that the ban's use of the phrase "substantial portion" referred to "the child up to the head," a common practice in D&X abortion procedures, and not the "fetal arm or leg or anything less than the entire fetal body," which was a common practice in D&E abortion procedures. Although legal experts in favor of the Nebraska ban argued the latter was only applicable to the decision in *Stenberg*, the discrepancy between body parts and different abortion procedures would resurface in later lower court and Supreme Court decisions.
[25] Pew Research Center, Fact Sheet, "A History of Key Abortion Rulings of the U.S. Supreme Court," pewresearch.org, January 16, 2013. https://www.pewresearch.org/religion/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/#pba.
[26] *Stenberg v. Carhart,* 530 U.S. 914 (2000), at 963-964. (Kennedy, J. dissenting)
[27] *Partial Birth Abortion Ban Act,* 18 U.S.C. § 1531 (2003).
[28] *Partial Birth Abortion Ban Act,* 18 U.S.C. § 1531 (2003), at 1202.
[29] *Partial Birth Abortion Ban Act,* 18 U.S.C. § 1531 (2003), at 1203 citing *Turner Broadcasting System, Inc. v. Federal Communications Commission,* 512 U.S. 622 (1994) *(Turner I).*
[30] *Partial Birth Abortion Ban Act,* 18 U.S.C. § 1531 (2003), at 1203.
[31] *Partial Birth Abortion Ban Act,* 18 U.S.C. § 1531 (2003), at 1204.
[32] *Partial Birth Abortion Ban Act,* 18 U.S.C. § 1531 (2003), at 1205.
[33] *Gonzales v. Carhart,* 550 U.S. 124 (2007).
[34] *Gonzales v. Carhart,* 550 U.S. 124 (2007), at 125.
[35] *Gonzales v. Carhart,* 550 U.S. 124 (2007), at 126.
[36] Katie Gibson, "*United States v. Virginia*: A Rhetorical Battle between Progress and Preservation," *Women's Studies in Communication* 29, no. 2 (Fall 2006): 133-164.
[37] *Gonzales v. Carhart,* 550 U.S. 124 (2007), at 154.
[38] *Gonzales v. Carhart,* 550 U.S. 124 (2007), at 127.
[39] *Partial Birth Abortion Ban Act,* 18 U.S.C. § 1531 (2003), at 1201.
[40] *Stenberg v. Carhart,* 530 U.S. 914 (2000), at 923-929.
[41] *Stenberg v. Carhart,* 530 U.S. 914 (2000), at 937.
[42] *Stenberg v. Carhart,* 530 U.S. 914 (2000), at 936.
[43] *Gonzales v. Carhart,* 550 U.S. 124 (2007), at 129 and 144, citing *Ayotte v. Planned Parenthood of Northern New Eng., 546 U. S. 320, at 328.* Here, the *Gonzales* Court stated "The Court assumes the Act's prohibition would be unconstitutional, under controlling precedents, if it "subject[ed] [women] to significant health risks."
[44] *Gonzales v. Carhart,* 550 U.S. 124 (2007), at 129, referencing *Casey*.
[45] *Gonzales v. Carhart,* 550 U.S. 124 (2007), at 164.
[46] *Gonzales v. Carhart,* 550 U.S. 124 (2007), at 164-166.
[47] *Gonzales v. Carhart,* 550 U.S. 124 (2007), at 163.
[48] See MS Code § 41-41-34.1 (2019), *Born-Alive Abortion Survivors Protection Act*, S. 311 (2019), and Virginia H. B. 462 (2012).
[49] Greg Greene and Miriam Berg, "Don't Call 6-Week Abortion Bans "Heartbeat" Bills. Here's Why.," plannedparenthoodaction.org, June 2021, 2016. https://www.plannedparenthoodaction.org/blog/dont-call-6-week-abortion-bans-heartbeat-bills-heres-why.
[50] Amanda M. Friz, "Technologies of the State: Transvaginal Ultrasounds and the Abortion Debate," *Rhetoric & Public Affairs* 21, no. 4 (2018): 655-656.
[51] Katie L. Gibson, "The Women Take Over: Oral argument, rhetorical skepticism, and the performance of feminist jurisprudence in Whole Woman's Health v. Hellerstedt," *Quarterly Journal of Speech* 105, no. 3 (2019): 319.
[52] *Whole Woman's Health v. Hellerstedt,* 579 U.S. 582, at 22.
[53] *Whole Woman's Health v. Hellerstedt,* 579 U.S. 582, at 1 (Thomas, J. dissenting). See also Justice Alito's dissent at 1, when he states: "Instead, the dispositive issue here concerns a workaday question that can arise in any case no matter the subject, namely, whether the present case is barred byres judicata. As a court of law, we have an obligation to apply such rules in a neutral fashion in all cases, regardless of the subject of the suit. If anything, when

a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules. The Court has not done so here. On the contrary, determined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases."

[54] These states include Texas, Oklahoma, Louisiana, Georgia, Kentucky, and Missouri, among others.

[55] *Roe v. Wade* 410, U.S. 113, at 161.

[56] Gestational Age Act, MS Code § 41-41-191 (2018).

[57] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022).

[58] Jeffrey M. Jones, "Supreme Court Trust, Job Approval at Historical Lows," news.gallup.com, September 29, 2022. https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx.

[59] Pew Research Center, "Positive Views of Supreme Court Decline Sharply Following Abortion Ruling," pewresearch.org, September 1, 2022. https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/.

[60] Pew Research Center, "Positive Views of Supreme Court."

[61] Pew Research Center, "Majority of Public Disapproves of Supreme Court's Decision To Overturn Roe v. Wade," pewresearch.org, July 6, 2022. https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/.

[62] Carrie Blazina and John Gramlich, "5 facts about the Supreme Court," pewresearch.org, February 25, 2022. https://www.pewresearch.org/fact-tank/2022/02/25/5-facts-about-the-supreme-court/.

[63] Leah Litman and Melissa Murray, "Don't be fooled: This is not a moderate Supreme Court," washingtonpost.com, July 1, 2021. https://www.washingtonpost.com/opinions/2021/07/01/make-no-mistake-this-is-conservative-supreme-court-it-just-sometimes-acts-slowly/.

[64] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 833-834.

[65] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 3-5.

[66] We could start with the political upheaval over Justice Thomas' relationship to billionaire Harlan Crow. See Abbie VanSickle, "Jet-Setting With Clarence Thomas Puts Spotlight on an Eccentric Billionaire," nytimes.com, April 11, 2023. https://www.nytimes.com/2023/04/11/us/politics/clarence-thomas-harlan-crow.html?searchResultPosition=3.; Jamelle Bouie, "Harlan Crow, Clarence Thomas's Benefactor, Is Not Just Another Billionaire," nytimes.com, April 14, 2023. https://www.nytimes.com/2023/04/14/opinion/harlan-crow-clarence-thomas-gifts-collections.html?searchResultPosition=2.

[67] *The New York Tines,* "'Abortion Is Just the Beginning': Six Experts on the Decision Overturning Roe," nytimes.com. https://www.nytimes.com/interactive/2022/06/24/opinion/politics/dobbs-decision-perspectives.html.

[68] Edward D. Re, *Stare Decisis* 1, (Federal Judicial Center), 1975.

[69] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 8.

[70] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) at 954. (Rehnquist, J. dissenting)

[71] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 16.

[72] Article III, Section 1.7.2.1, "Historical Background on Stare Decisis Doctrine," constitution.congress.gov. https://constitution.congress.gov/browse/essay/artIII-S1-5-1/ALDE_00001187/.

[73] "Blackstone's Commentaries on the Laws of England Introduction," https://avalon.law.yale.edu/. https://avalon.law.yale.edu/18th_century/blackstone_intro.asp#2 (69-70), and also William Blackstone, *Commentaries on the Laws of England*, (1765-1769).

[74] Alexander Hamilton, Federalist Papers No. 78, *The Judiciary Department from McLean's Edition, New York*, (1788). See also Alexander Hamilton et al., *The Federalist Papers* (New York: Signet Classics, 2005).

[75] American Bar Association, "With *Roe* overturned, legal precedent moves to centerstage," americanbar.org, June 24, 2022. https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/stare-decisis-takes-centerstage/.

[76] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 5-8.

[77] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 9.

[78] Catherine L. Langford, *Scalia v. Scalia: Opportunistic Textualism in Constitutional Interpretation*, (Tuscaloosa: University of Alabama Press, 2017): 11.

[79] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 10.

[80] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 9.

[81] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 9 citing *Sessions* v. *Morales-Santana*, 582 U. S. 47, ___ (2017) (slip op., at 8).

[82] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 10.

[83] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 8.

[84] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 14-15.
[85] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 16-17.
[86] *Roe v. Wade* 410, U.S. 113 (1973), at 133-134.
[87] See *Roe v. Wade* 410, U.S. 113 (1973), at 134-136, and *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 17.
[88] *Roe v. Wade* 410, U.S. 113 (1973), at 136.
[89] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 19.
[90] *Roe v. Wade* 410, U.S. 113 (1973), at 133.
[91] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 18.
[92] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 19.
[93] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 20.
[94] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 21.
[95] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 22 citing F. Wharton Criminal Law § 1220, p. 606 (rev. 4th ed. 1857).
[96] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 23 citing J. Keown, Abortion, Doctors and the Law, 22 (1988).
[97] *Roe v. Wade* 410, U.S. 113 (1973), at 160.
[98] *Roe v. Wade* 410, U.S. 113 (1973), at 115.
[99] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 23.
[100] *Daily History*, "What was the dominant medical sect in the United States during the 19th century?," dailyhistory.org. https://dailyhistory.org/index.php?title=What_was_the_dominant_medical_sect_in_the_United_States_during_the_19th_Century&mobileaction=toggle_view_desktop.
[101] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 23.
[102] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 21 citing *Evans* v. *People*, 49 N. Y. 86, 90 (emphasis added).
[103] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 29.
[104] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 37 citing *Roe v. Wade* 410, U.S. 113 (1973).
[105] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 5-8.
[106] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 44-45.
[107] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 45 citing *Thornburg*, 476 U.S. at 787 (White, J. dissenting)
[108] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 47.
[109] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 46-47.
[110] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 49.
[111] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 54 citing Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 54 (1988).
[112] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 50 citing *Marshall* v. *United States*, 414 U. S. 417, 427 (1974).
[113] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 55.
[114] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 56.
[115] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 65.
[116] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 57.
[117] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 58.
[118] George P. Fletcher "Paradoxes in Legal Thought," *Columbia Law Review* 85, no. 6, (1985): 1264.
[119] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 62-64.
[120] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 64-65.
[121] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), (Thomas, J. concurring) and citing his opinion in *McDonald*, 561 U. S., at 813.
[122] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Thomas, J., concurring)
[123] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Thomas, J. concurring) and citing himself in *Gamble v. United States*, 587 U. S. ___, ___ (2019) (Thomas, J., concurring) (slip op., at 9).
[124] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Thomas, J., concurring)

[125] Catherine L. Langford, *Scalia v. Scalia: Opportunistic Textualism in Constitutional Interpretation*, (Tuscaloosa: University of Alabama Press, 2017): 10.
[126] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Thomas, J., concurring)
[127] Catherine L. Langford, *Scalia v. Scalia: Opportunistic Textualism in Constitutional Interpretation*, (Tuscaloosa: University of Alabama Press, 2017): 10.
[128] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Kavanaugh, J., concurring)
[129] For a more extensive analysis of the principles bolstering the traditional conceptions of the rule of law, see Gerald B. Wetlaufer, "Rhetoric and Its Denial in Legal Discourse," *Virginia Law Review* 76 (1990): 1545–97.
[130] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Kavanaugh, J., concurring)
[131] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Roberts, J., concurring)
[132] Laurence H. Tribe, "Don't believe those who say ending Roe v Wade will leave society largely intact," theguardian.com, May 23, 2022. https://www.theguardian.com/commentisfree/2022/may/23/roe-v-wade-abortion-laurence-tribe
[133] Laurence H. Tribe, quoted in Isabella B. Cho and Brandon L. Kingdollar, Crimson Staff Writers, "After Roe Dismantled, Harvard Experts Condemn, Defend Landmark Decision, thecrimson.com, June 25, 2022. https://www.thecrimson.com/article/2022/6/25/dobbs-experts-reax/.
[134] American Bar Association, "With *Roe* overturned, legal precedent moves to centerstage," americanbar.org, June 24, 2022. https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/stare-decisis-takes-centerstage/.
[135] Saralyn Cruickshank, "Inside the '*Dobbs*' decision, hub.jhu.edu, July 1, 2022. https://hub.jhu.edu/2022/07/01/joanne-rosen-insight-dobbs-decision/.
[136] Douglas Keith, "A Legitimacy Crisis of the Supreme Court's Own Making," brennancenter.org, September 15, 2022. https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making.
[137] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022), at 5-8.
[138] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Thomas, J., concurring and Kavanaugh, J., concurring)
[139] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Roberts, J., concurring)
[140] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022). (Kavanaugh, J., concurring)
[141] Nathan Stormer, *Sign of Pathology: U.S. Medical Rhetoric on Abortion, 1800-1960s* (University Park: Pennsylvania State University Press, 2015): 3.
[142] Guttmacher Institute, "100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care," guttmacher.org, October 6, 2022. https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care.
[143] *Roe v. Wade* 410, U.S. 113 (1973), at 154.
[144] Rachel K. Jones and Jenna Jerman, "Abortion Incidence and Service Availability in the United States," Perspectives on Sexual and Reproductive Health, 49, no. 1 (2017): 17–27.
[145] Sarah McCammon, "50 years after Roe v. Wade, many abortion providers are changing how they do business," npr.org, January 23, 2022. https://www.npr.org/2023/01/22/1150574240/50-years-roe-v-wade-dobbs-abortion-providers-reinvent.
[146] Sarah McCammon, "Meeting abortion patients where they are: providers turn to mobile units," npr.org, November 2, 2022. https://www.npr.org/2022/11/02/1133454349/meeting-abortion-patients-where-they-are-providers-turn-to-mobile-units.

Conclusion: The Promise of Expertise

> "[I]t is more important that the application of the rule of law be settled than it be settled right."
>
> ~ The United States Supreme Court in *Burnet v. Coronado Oil & Gas Co.* (1932)[1]

Certainly, the decision in *Dobbs v. Jackson Women's Health Organization* has created a rather bleak outlook for abortion proponents who must navigate the terrain of abortion rights from state to state. But as this project demonstrated, the reconfiguration of abortion rights is not new. Both legislation and case law after *Roe* have shifted legal, medical, and personal conceptions of abortion for the last fifty years. These shifts are embedded within case law itself as *Roe* triangulated these different forms of expertise to expand fecund persons' reproductive rights. Such a triangulation has led subsequent courts to revisit the language in the landmark abortion case to reconfigure and reinterpret the scope and meaning of abortion in the United States. Since its establishment in 1973, *Roe* has been subject to a number of subsequent abortion laws that have placed restrictions and limitations on "whether, when and under what circumstances a woman may obtain an abortion."[2] These legislative measures and case laws have invoked legal and medical expertise to constrain a fecund person's abortion rights through increased waiting periods, mandatory counseling, consent requirements, and various seemingly medical-sounding restrictions. As such, abortion history demonstrates that while *Roe* legalized abortion on a federal level, it also paved the way for decades of abortion restrictions that led to the 1992 decision in *Casey.* The proliferation of such restrictions eventually allowed for a decision like *Dobbs* in 2022.

Today, like the past, abortion remains widely contested. This is because the decision in *Dobbs* reversed fifty years of abortion precedent and returned abortion regulations back to state

courts that were already divergent in their abortion rulings. In its aftermath, pro-abortion advocates continue to denounce the *Dobbs* decision and lament the erosion of fecund persons' rights, while abortion opponents celebrate the apparent win for fetal rights.[3] Between these criticisms, legal scholars highlight the discrepancies in judicial authority and practices of abortion law. One consistent criticism from legal scholars in the wake of *Dobbs* emphasizes the Court's interpretation of the Constitution. Here, some scholars underline *Dobbs*' faulty evaluation of *Roe*'s constitutional basis, while others argue that the historical narrative purported in *Roe* has erroneously sustained the "maintenance of constitutional abortion rights" since 1973.[4] Legal experts have had to renegotiate these "many interpretations of *Roe*" as discrepancies in abortion jurisprudence brought the constitutionality of abortion rights back to the Court in *Casey* and *Dobbs*.[5]

These competing meanings of expertise in U.S. abortion jurisprudence provide the throughline of this study. Specifically, this project analyzes the expert reasoning offered by the *Roe* Court in 1973, the justifications given to reinforce the 1992 *Roe* holding in *Casey*, and finally the 2022 logic provided to overturn *Roe* and *Casey* in *Dobbs*. An analysis of these shifting rationales exposed a rhetorical paradox of expertise. The Court's interpretations of abortion rights from *Roe* to *Casey* to *Dobbs* repeatedly deferred to legal and medical knowledge and procedures to clarify previous legal and medical ambiguities around fecund persons' personal rights. In the fifty years since *Roe*, the Court failed to clarify the scope of expertise over abortion rights. This failure exposed the limitations surrounding judicial interpretation and the complexities surrounding medical advancements. Ultimately, such failures made visible the inadequacies of expertise to consistently ensure fecund persons' abortion rights.

At the time of this writing, less than a year has passed since the Supreme Court handed down its monumental decision that returned abortion regulations back to the states. Yet, state officials, medical professionals, and fecund persons have already felt the repercussions of this decision on their capacity to enact their legal, medical, and personal expertise. In the wake of *Dobbs*, state legislatures attempt to negotiate new political territories, medical physicians adapt to frequently changing abortion regulations, and fecund persons advocate for autonomy over their health decisions. In many ways, the current landscape of abortion politics invokes the tumultuous history of abortion rights and restrictions and foreshadows the long road ahead for groups dedicated to reestablishing such abortion rights. In the pages that follow, I synthesize the takeaways from this study on abortion expertise by turning to the past, present, and future of abortion rights in the United States. First, I reiterate the terrain of abortion politics from *Roe* to *Casey* to *Dobbs* to show how the triangulation of expertise shifted as changing political contexts restructured the makeup of the Court and technological advancements altered medical framings of abortion. I then analyze the state of abortion politics in the immediate aftermath of *Dobbs* to show how this triangulation continues to privilege the legal-medical framework of abortion rights at the expense of fecund persons' autonomy. Finally, I point to ways that the rhetorical paradox of expertise may continue to shape contemporary legislation and public discourse on abortion in the years to come.

The Past

A review of this project's case studies indicates a key contribution of this project: the framing of abortion politics as a rhetorical paradox of expertise. Within this paradox, legal, medical, and personal experts are tasked with traversing the boundaries of the law, progressing medical knowledge on abortion, and changing social and political dynamics of fecund persons.

By reading *Roe*, *Casey*, and *Dobbs* as a paradox of expertise, this project demonstrates how the Court's configurations and conceptions of legal and medical expertise have expanded and constricted the personal expertise of fecund persons over the last half-century.

In 1973, the Court triangulated expertise by reading the legal-medical history of abortion and determining that fecund persons should have some autonomy over their abortion decisions. The Court chose to regulate these competing forms of expertise through the trimester framework. But this triangulation proved difficult to regulate consistently in practice. As such, the Court in *Casey* was tasked with clarifying the incongruities in *Roe*'s legal framework and offered the undue burden standard in its place. This standard invoked the medical expertise of physicians and the legal expertise of legislators to regulate abortions based on the presence of undue burdens. At this point, the Court determined that an abortion regulation was illegal if such regulations unduly placed a legal or medical obstacle in the way of a fecund person's abortion choice. This standard proved even more difficult to regulate in the years after 1992, and the courts faced numerous legal battles in the decades leading to *Dobbs*. The 2022 decision in *Dobbs* effectively returned the abortion debates back to individual state courts, and thus constricted a fecund person's abortion rights once more. But because *Dobbs* failed to resolve the legal and medical inconsistencies that brought the case to the Court to begin with, the Court ultimately sustained the rhetorical paradox of expertise. The ability for legal and medical expertise to both constrict and expand abortion rights over the years suggests that legal and medical expertise are incapable of providing a consistent framework to regulate legal abortion. Yet, abortion is so enshrined in a legal-medical domain that it is nearly impossible to conceptualize abortion outside of such boundaries. Today, legal and medical experts maintain their authority over the abortion decision. Thus, reading these case studies as a rhetorical paradox of expertise suggests that

because legal and medical expertise have the power to potentially expand abortion rights for fecund persons once again, expertise is the resolution that we cannot not want.[6]

A central tenet of this project is that the last fifty years of the Court's abortion jurisprudence has been a reserve for our collective turmoil about the state of reproductive politics in the United States. From *Roe* to *Casey* to *Dobbs*, the Court has interpreted and reinterpreted the scope and meaning of abortion rights and access. Each of these decisions triangulated legal, medical, and personal expertise in differential ways to reconfigure the parameters of fecund persons' abortion rights. Since its codification in 1973, *Roe* has received immense criticism from legal scholars, politicians, and activists on both sides of the abortion issue.[7] Everyday people have had to interpret the Court's decisions to make meaning of abortion for themselves. And in the immediate aftermath of the *Roe* decision, lower courts and medical professionals had to contend with unanswered questions in *Roe* regarding concerns like parental consent and informed consent.[8] These unanswered questions provided the foundation for criticisms of *Roe* and the "sharp and deepening divisions among the nine justices over whether the 1973 ruling was correct."[9] Such debates eventually led to the decision in *Casey*, which was intended to promulgate the "undue burden standard" to clarify for "lower courts" how to regulate abortion, to clarify for physicians how to administer abortions, and to clarify for fecund persons when and how to acquire one. But as scholars aptly note, courts after *Casey* remained "largely confused about the standard's requirements and application."[10] Confusion amongst legal experts led to various interpretations of the undue burden standard and differential abortion experiences for fecund persons in states like Nebraska, Texas, and Virginia.[11] As different national abortion regulations proliferated, legislators, physicians, and fecund persons found themselves having to reinterpret and renegotiate abortion access with various levels of success. The discrepancies in

abortion regulations allowed the state of Mississippi to propose a fifteen-week abortion ban, which the Court reviewed in *Dobbs*. The decision in *Dobbs* eventually overturned *Roe* and *Casey* and eroded the federal right to abortion completely.

In the previous chapters, I explored each of these landmark abortion cases to show how the Court interpreted abortion rights within differential forms of legal, medical, and personal expertise. Chapter One, "A Return to *Roe*: Reading Triangulations of Expertise," began with an analysis of the first SCOTUS decision to grant abortion rights to fecund persons in the United States. In examining the landmark abortion case *Roe v. Wade* (1973), I explore how the Court employed its own legal expertise, deferred to the medical expertise of physicians, and acknowledged personal expertise of fecund persons to legalize the federal right to abortion. A recounting of the political and legal exigencies that brought the *Roe* case to the Supreme Court in 1973 indicated that legal, medical, and personal expertise were all interconnected within the abortion problem. The Court grappled with such contingencies when it reviewed the medical-legal history of abortion and expert treatments of abortion across centuries.[12] In doing so, the Court determined a fecund person had more rights to abortion in previous centuries than they did in 1973.[13]

The *Roe* Court ultimately grounded abortion rights in a precedent of privacy that triangulated each form of expertise in a distinct but mutually implicating manner. The Court based fecund persons' abortion rights in a precedent of privacy but bounded this right within conceptions of legal and medical expertise. *Roe* invoked the State to help regulate medical interests in health and life.[14] In this way, the Court authorized legal and medical expertise to regulate the personal expertise of fecund persons in the abortion decision. This triangulation undergirded the Court's rationale to invoke the historical deference between medicine and the

law. By recounting this historical alliance before Roe between medicine and the State and between medical and legal expertise, the Court was able to justify framing a federal right to abortion within legal-medical terms. This allowed the Court to ultimately conceive of the trimester framework to regulate fecund persons' abortion rights.[15] This framework legalized abortion before viability and authorized checks on legal, medical, and personal expertise up to and beyond this crucial point.

My study of *Roe* highlighted how the different stages of the trimester framework configured legal, medical, and personal expertise in conflicting ways. Under the trimester framework, first-trimester abortions were largely regulated by medical expertise as the Court relied on a physician's medical knowledge to determine the abortion decision. At this stage, fecund persons' rights to abortion were the most expansive as the State was not explicitly authorized to regulate abortion in the first trimester. In the second trimester, medical and legal expertise worked in tandem to regulate abortion as the State preserved interests in a fecund person's health. In the final trimester, the State could both regulate and proscribe abortion, based on a physician's medical knowledge, to promote interests in potential fetal life or a fecund person's health. In regulating abortion through trimesters, I argued that the Court also employed knowledge-based assumptions about, and procedural practices of, legal, medical, and personal expertise. As the end of Chapter One illustrated, the trimester framework failed to resolve the issues of ambiguity that had plagued previous legal attempts to regulate abortion. In deferring to a legal-medical web of expertise to regulate abortion, the *Roe* Court sustained the paradox of expertise. Within this paradox, future courts, medical professionals, and fecund persons would have to contend with the workability of the trimester framework as medical technologies developed and disputes over abortion rights and access persisted.

Disagreements over both the constitutionality of abortion and the ability of expertise to determine such constitutionality resurfaced time and time again in the fifty years between *Roe*'s passage and its reversal. In Chapter Two, "A Second Opinion: The *Casey* Court Weighs In," I examined how the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) responded to these disputes and attempted to clarify the boundaries of legal abortion. While perhaps "less of a household name than *Roe*," legal scholars have characterized the decision in *Casey* as "more important because it changed the way courts review abortion laws."[16] These changes have resulted in stark criticism of the *Casey* decision as scholars have found its principles "troublesome" and difficult to apply consistently.[17] As such, this project's analysis of the 1992 decision revealed how *Casey* sought to address the failure of *Roe* and its inability to offer a consistent framework to regulate abortion. To reinterpret the boundaries of legal abortion, the *Casey* Court jettisoned *Roe*'s trimester framework and offered the "undue burden standard" in its place.[18] I argued that *Casey* favored applying a less rigorous standard of inquiry to abortion regulations, and thus relied on a different degree of judicial interpretation to rule future abortion legislation unconstitutional.[19]

This shift in legal interpretations of abortion regulations also altered the scope of medical expertise in abortion decisions. Under the undue burden standard, medical experts were tasked with determining what constituted an undue *medical* burden on a fecund person's rights to seek abortion care. Yet, the *Casey* Court was divided on the meaning of the undue burden standard as the plurality opinion failed to offer consistent definitions of an undue burden. Their attempts to define an undue burden relied on differential notions of legal, medical, and personal expertise but placed a heavy responsibility on medical experts to determine what constituted a "medical emergency," and therefore what constituted an undue burden.[20] But because abortion is not

solely a concern for medical experts, any emergency that warranted a physician's recommendation had to be approved by the State, and thus sanctioned by those exerting legal expertise. Importantly, such decisions often hinged upon the courts weighing of competing interests in fetal life and the health of the fecund person. As such, *Casey* maintained the paradox of expertise: the undue burden standard ensured that legal and medical expertise had to work together once again to regulate fecund persons' ability to actualize their abortion rights.

The uncertain terms surrounding the relationship between the health of the fecund person and the potential life of the fetus allowed lower courts and the Supreme Court to reinterpret expertise and delimit fecund person's abortion rights after *Casey*. In Chapter Three, "Reinterpreting Abortion Rights in *Dobbs*," I examined the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* (2022) to show how the Court employed and conceptualized expertise to eliminate the federal right to abortion. Like in the previous chapters, I began this chapter with an overview of abortion legislation and case law to show the inconsistencies in the application of abortion precedents in the decades after *Casey* and before *Dobbs*. After 1992, multiple courts challenged the trimester framework in *Roe* and the undue burden standard in *Casey*. To reiterate, the trimester framework in *Roe* authorized a physician to grant or deny an abortion on the basis of critical terms such as viability, health, and life.[21] But these terms became even more difficult to parse after the Court replaced the trimester framework with the undue burden standard in *Casey.* After *Casey*, both legal and medical professionals had to determine whether abortion restrictions on "health" and "life" now placed "substantial obstacles" in the way of fecund persons seeking abortions before fetal viability.[22]

Yet, as Dr. Jennifer Gunter has aptly acknowledged, negotiating the terms of legal abortion increasingly presented a conundrum for legislators, physicians, and fecund persons after

Casey. Despite their various meanings and uses, terms like "health" and "life" remained critical to abortion decisions and the boundaries of legal abortion. They determined the points at which the "woman" could decide to have an abortion, and the "physician" or the "State" could intervene to assist with, or prevent, abortion.[23] As my analysis of post-*Casey* cases showed, conceptual ambiguity over the trimester framework and the undue burden standard was so prevalent that neither doctors trained to administer abortions nor legislators steeped in abortion law could effectively determine their meaning and application. Still, in the wake of *Casey*, the law continued to authorize doctors and legislators to make abortion decisions grounded in medical and legal expertise that often removed the personal expertise and autonomy of fecund persons from the debate entirely.

Like the post-*Roe* debates, the post-*Casey* court disputes were not always successful in their attempts to provide concrete or reliable frameworks for legislators, physicians, or fecund persons to act on abortion care. This history revealed that even in cases where deference between one expert and another appeared to result in the approval of an abortion, the meanings of such decisions were not easily discernible. In these cases, neither legal nor medical experts could provide a firm answer as to what made something an undue burden in one state and not in another.[24] This uncertain terrain afforded the path for anti-abortion legislation to proliferate in state and federal courts as political contexts and representatives shifted, and the Supreme Court itself was packed with conservatives and self-proclaimed originalists.[25] Within this context, the Court decided *Dobbs* and overturned the precedent in both *Roe* and *Casey*.

The landscape of abortion rights just prior to *Dobbs* further highlights the triangulation of expertise in abortion law. Before June 2022, abortion had already been effectively banned in many conservative states. In September 2021, the Texas state government passed Senate Bill 8

(SB8), which not only instated a six-week abortion ban but also placed what amounts to a bounty on abortion providers who could be sued by private citizens for aiding or abetting abortion services.[26] In this way, Texas SB8 extended its legal expertise to authorize everyday persons' involvement in the abortion process. By recruiting private citizens to mediate the rule of law, Texas SB8 also placed checks on the medical expertise of abortion providers who may be deterred from offering abortions, and the personal expertise of fecund persons who may be deterred from seeking them. Following suit in April 2022, two months prior to *Dobbs,* conservative Oklahoma governor Kevin Stitt signed into law a copycat bill that made performing an abortion a punishable felony of up to ten years in prison and also permitted private citizens to seek legal action against abortion providers.[27] With the recruitment of private citizens, these laws introduced a new dimension to the abortion debate and intensified providers' collective doubts about their (li)ability to administer abortions. Paradoxically, these laws demonstrate that even when medical experts determine an abortion is necessary, the law may still regulate a fecund person's ability to acquire one.

My analysis of *Dobbs* indicated that the Court reinterpreted legal and medical treatments of abortion in the centuries prior to *Roe* and after *Casey* to offer a "proper" demonstration of *stare decisis*, and thus a proper demonstration of legal expertise.[28] In doing so, *Dobbs* argued that these cases had falsely recounted abortion history and were therefore unconstitutional.[29] The *Dobbs* Court's interpretations drew upon knowledge-based and procedural practices about abortion that problematized the deference between law and medicine to reconfigure the triangulation of expertise once more. The majority opinion in *Dobbs* reviewed the same legal-medical history outlined in *Roe* but came to a different conclusion than its predecessor. For instance, while the *Roe* Court acknowledged that experts in fields like medicine, philosophy, and

theology disagreed on the answer to the question of when life begins, it ultimately decided that such uncertainties should not preclude protections for fecund persons' abortion rights.[30] But the *Dobbs* Court was firm in its conclusion that "ambiguity is a problem" and that *Casey*'s attempts to clarify such ambiguities with the undue burden standard only "muddie[d] things further."[31] As such, the *Dobbs* Court called the 1973 and 1992 precedents unworkable, overturned both cases, and returned the abortion question back to the states.[32] Such a decision once again preserved the rhetorical paradox of expertise: the Court deferred to lower courts and medical professionals to make sense of future inconsistencies or discrepancies in abortion regulations from state to state and to authorize various protections or prohibitions on fecund persons' abortion rights. Ultimately, the decision in *Dobbs* thrust abortion access into a state of legal and medical uncertainty as lower courts, medical professionals, and fecund persons must now navigate the potential health and legal risks of seeking and acquiring abortion care.

As the next section will address, *Dobbs* did not resolve the wranglings over expertise. In fact, as we look to abortion politics in the present moment, medical and legal actors continue to employ their knowledge and procedures to govern and authorize abortion decisions in the aftermath of *Dobbs* because *Dobbs* did not clarify ambiguities around abortion. Legal and medical experts are still tasked with interpreting the boundaries of legal abortion, and these interpretations often prevent fecund persons from acquiring abortions efficiently, and sometimes entirely.

The Present

The decision in *Dobbs* reconfigured the scope and meaning of legal, medical, and personal expertise once again. When *Dobbs* overturned *Roe* and *Casey*, it also triggered existing legislation that banned abortion outright in at least eleven states, including Missouri, Alabama,

and Kentucky. Such trigger laws in states like Texas severely restricted abortion access and have since caused many fecund persons to travel upwards of eight hours out of state to seek abortion services.[33] Physicians and abortion administrators have also felt the effects of *Dobbs* as they continue to navigate new legal territory. In the aftermath of *Dobbs*, some medical facilities have limited the availability of medication abortions—abortions administered at home with the aid of two different prescription pills. These limitations are intended to prevent the possible prosecution of physicians who administer abortion pills in states where the law is unclear. By refraining from offering medication abortions, physicians hope to cut down on the number of patients who may travel with their abortion pills across state lines into areas where abortion of any kind, at any stage, is illegal.[34] The fear of criminal prosecution for administering an illegal abortion in states where the law is unclear has led many medical facilities to stop offering abortion services altogether.[35] While the reduction of medication abortions functions to protect physicians' expertise, such reductions result in fewer options for fecund persons to acquire abortion care and to enact their personal expertise. Still, many physicians who continue to offer pre-viability abortions must act as legal interpreters, reassuring their patients that the abortions they receive are in fact lawful.[36] In this way, medical experts operate as arbiters of the law.

The pre-*Dobbs* state laws in Texas gained even more traction in the post-*Dobbs* era. In a recent lawsuit filed against the state of Texas, the Texas Medical board claims that numerous "pregnant people have been denied necessary and potentially life-saving obstetrical care because medical professionals throughout the state fear liability under Texas's abortion bans."[37] Under such bans, fecund persons are exposed to the "risks of death, injury and illness." Such cases implicate the legal expertise of State officials who are tasked with reviewing lawsuits to determine the health risks associated with prohibiting abortion. They also implicate the medical

expertise of physicians who must weigh the real and life-threatening health risks associated with not providing an abortion against their fears should that abortion be deemed unlawful. Oftentimes the decision comes down to whether physicians can decipher the legal language of abortion bans. Because Texas currently has three different abortions bans that all went into effect after *Dobbs,* the uncertainty around what constitutes a medical necessity, and thus a legal abortion, is ever more heightened.[38] As medical professionals aptly note, getting "clarity" on the law isn't always a viable option because "[i]t can do real harm to real people to wait to get the clarity even if you *can* act."[39] The uncertain legal-medical meanings of Texas abortion law bear most on the fecund person whose approval of an abortion may mean the difference between life and death.

The momentum behind the reversal of *Roe* and *Casey* has thus encouraged those in positions of legal authority to turn their efforts to outlawing abortions before even six weeks. Today, abortion in Texas remains illegal after six weeks of pregnancy. And just recently in the state of Texas, staunch abortion opponent and Trump-appointed federal district judge Matthew Kascmaryk blocked access to the FDA-approved pill mifepristone, a common drug used in early medication abortion methods.[40] Medication abortions have been widely accessible in the United States since 2000, and by 2020, medication abortions accounted for more than half of all abortions acquired in the United States.[41] Medication abortions are also the typical method medical professions recommend to terminate a pregnancy before the tenth week.[42] For medication abortions to no longer be available in a state as large as Texas would severely restrict more than six million fecund persons from accessing a crucial and often life-saving procedure in the earliest weeks of pregnancy.[43] At the time of this writing, the Court has issued an order that temporarily halts the Texas ban on mifepristone, which means the pill is still available in states

where abortion is legal for the time being.[44] However, the dispute over the access of medical abortion drugs, and abortion access generally, is far from over.

As the courts dispute the legality of the mifepristone ban, anti-abortion advocates seek to reignite the Comstock Act.[45] This nineteenth-century regulation prohibited the distribution of any "obscene," "lewd," "lascivious," or "immoral" materials or publications through the mail, including abortifacients.[46] Because many fecund persons rely on mailing services to receive medication abortions, the instantiation of the Comstock Act poses a significant threat to the livelihood and autonomy of millions of Americans.[47] Importantly, the Biden administration has interpreted the Comstock Act to permit the mailing of abortion drugs if such drugs are not "intended for an unlawful use."[48] Yet, debates around the legality and enforceability of the Comstock Act have already surfaced in New Mexico and Texas state courts. In fact, the New Mexico Supreme Court has recently heard two cases involving the Comstock Act, each of which has brought forth different interpretations and conclusions for legal experts to ponder. In one case, legal officials argued that such laws were "irrelevant" to the abortion question and ran "afoul of state law and the state constitution." In the second case, legal officials advocated for the allowance of such laws, stating that the "federal 1873 law trumps New Mexico law and the state constitution."[49] These discrepancies expose the variability of legal interpretations amongst legal experts and the incongruities of legal expertise on matters that could further erode fecund persons' abortion rights and access.

Analyses of the disputes over the Comstock Act suggest that the disparity in legal interpretations is a measured strategy amongst anti-abortion advocates whose aim is to invoke the expertise of the High Court. Tierney Sneed, writer for CNN, argues that "getting multiple courts to interpret the law and create judicial disagreement about its meaning appears to be part

of the anti-abortion movement's strategy for encouraging the US Supreme Court to weigh in."[50] Now at the behest of state and lower courts, abortion issues brought before the U.S. Supreme Court are likely to invoke legal expertise beyond readings of the Constitution. Instead, such issues are likely to force justices "to weigh competing interpretations of the law," and thus differential employments of judicial interpretation.[51] The presence of "self-proclaimed textualists" on the Supreme Court has inspired legal scholar Mary Zeigler to express caution against viewing the resurgence of the Comstock Act as an absurd anomaly and to alert abortion advocates to the long road ahead.[52] Such a claim invokes conceptions of legal expertise and draws attention to the ways in which justices may wield their knowledge to provide interpretations that may be at odds both with the advice of medical experts and the desires of fecund persons.

While the fate of the Comstock Act and the availability of medication abortion remains uncertain, these debates indicate that even in the wake of *Dobbs*, the abortion problem continues to constitute a rhetorical paradox of expertise. The repercussions of the shifting abortion regulations provide a vital and important area of research for scholars of abortion, rhetoric, and expertise to further explore as we navigate the uncertain landscape of abortion rights and access. In particular, such a precarious terrain underscores the potential usefulness of framing abortion as a paradox of expertise as we reflect on how legal and medical knowledge and procedures continue to delimit fecund persons' autonomy and personal expertise over abortion decision making.

The Future

A final mission of this project is to show how incongruities in legal expertise continue to undergird the uncertainty that plagues medical and personal expertise in abortion decisions. With

this, we might consider how legal experts leveraged abortion rights to simultaneously repair the dignity of the Supreme Court and to eliminate the federal right to abortion. In *Dobbs*, Justices Thomas and Kavanaugh claimed a primary goal of their concurring opinions and reasoning to overturn *Roe* and *Casey* was to uphold the virtue of the Constitution and to reassert the authority of the High Court in the U.S. legal system.[53] At present, the Court contains three appointees—Gorsuch, Kavanaugh, and Barrett—that former President Donald Trump hand picked in 2017, 2018, and 2020 at least in part because each had previously questioned the precedent in *Roe*.[54] In 2022, all three of these justices ruled in favor of overturning *Roe* and *Casey*. But the discrepancies amongst the justices and their employments of expertise in *Dobbs* foretells of the potential complications associated with expertise moving forward.

How members of the *Dobbs* Court invoked expertise to arrive at their final opinions suggests not only how justices may employ their judicial philosophies as legal experts, but also how our enduring confidence in the authority of the Court enshrines abortion law in a rhetorical paradox of expertise. As previously discussed in Chapter Three, at least four of the Dobbs' justices differed on their interpretations of the Constitution, the influence of the majority opinion on other precedents, and/or the actual question the Court was meant to answer. Penning the majority opinion, Justice Alito appeared to suggest that the ruling in *Dobbs* applied only to abortion precedents. Justice Kavanaugh conferred on this point but took careful measure to note that because the "Constitution is neither pro-life nor pro-choice," the Court must heed the legal principle of judicial neutrality and return the abortion issue back to the people. Although Justice Thomas concurred, he instead extended the ruling in *Dobbs* and suggested that other precedents rooted in the substantive due process clause should be reexamined. Invoking the "textual command" of the Constitution, Thomas called for the elimination of substantive due process

from American "jurisprudence at the earliest opportunity."[55] Justice Roberts likewise concurred with the majority opinion, but ultimately disagreed with the rationale as he believed the Court did not abide by the constitutional principle of judicial restraint when it overturned *Roe* and *Casey*.[56] He instead called for more subtle erosions of reproductive rights.

That the conservative justices of the same Court cannot agree on the proper meaning and application of their legal expertise portends new layers of contestation over abortion politics going forward. Such disagreements also acknowledge the potential complications that courts are likely to face as they confront imminent medical and personal claims to expertise and abortion care that conflicts with extant legal interpretations. As a rhetorical paradox, this triangulation of expertise illustrates that even when legal expertise cannot provide a unanimous decision, it maintains the ability to defer to medical expertise and to constrict fecund person's personal expertise in the abortion decision. From *Roe* to *Casey* to *Dobbs*, we see that employments of legal expertise allowed for the refiguration of medical expertise and competing interpretations of both legal and medical knowledge and procedures. Within these reconfigurations, the Court was able to protect abortion rights at least for a time but from *Roe* to *Casey* to *Dobbs*, the triangulation of expertise increasingly awarded more authority to legal and medical experts and diminished the expertise of individuals seeking reproductive autonomy. As the debates on abortion deepen across the fifty states, fecund persons and physicians continue to challenge the U.S. Supreme Court's authority over abortion rights. In *Dobbs*, the Court ignored decades of precedent to assert the majority's control over reproductive rights. Yet, the people of Kansas have voted to reject the Court's overreach of power and to uphold abortion rights in their state constitution.[57] Other states like Wisconsin have reinforced their commitment to reproductive rights by electing liberal judges to the State Supreme Court.[58] This battle over abortion rights is

thus far from over. Yet, what is certain is that this triangulation of expertise will continue to animate the debate in the courts as pro-abortion individuals and states try to reconfigure the triangulation to recenter fecund persons' personal expertise and authority in abortion decisions.

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[1] *Burnet v. Coronado Oil & Gas Co*., 285 U.S. 393 (1932).
[2] Guttmacher Institute, *State Laws and Policies: An Overview of Abortion Laws*, guttmacher.com, April 1, 2017. https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.
[3] Macarena Carrizosa, "Beyond Abortion: The Fight Over Fetal Personhood is Here," news.bloomberlaw.com, January 12, 2023. https://news.bloomberglaw.com/us-law-week/beyond-abortion-the-fight-over-fetal-personhood-is-here-video.
[4] Justin Buckley Dyer, *Slavery, Abortion, and the Politics of Constitutional Meaning* (Cambridge: Cambridge University Press, 2013): 110.
[5] Mary Ziegler, *Roe: The History of a National Obsession,* (New Haven: Yale University Press, 2023): xiii.
[6] In the preface of *Of Grammatology*, Gayatri Chakravorty Spivak argues that deconstruction is the process by which we understand how truths are produced. Taking a deconstructionist view to different knowledge domains and systems of power, Spivak argues that deconstruction "is among other things, a persistent critique of what one cannot not want." See also Gayatri Spivak, *Outside in the Teaching Machine* (New York: Routledge, 1993), 44. In "Suffering Rights as Paradoxes," Wendy Brown extends Spivak's work to analyze the complexities around rights-based discourses. Brown argues that appeals to rights that seek to recognize and rectify women's unequal standing in society may at times reinforce those very inequalities. For this reason, Brown argues that we are "[c]onstrained to need and want rights" that may not actually resolve the issues that invoked the desire for such rights in the first place. Such a contradiction constitutes a paradox of rights. I adopted this framing and applied it to the triangulation of expertise in abortion discourse to demonstrate a rhetorical paradox of expertise. Doing so shows how appeals to legal and medical domains comprise the power and authority that fecund persons may need in order to grant their personal rights to abortion and to recognize their personal expertise in the abortion decision. Such a framing is paradoxical because, as this analysis shows, various appeals to legal and medical expertise have worked to constrict abortion rights since the moment *Roe* first expanded them on a federal level in 1973. In this way, the expertise of legal and medical domains is the resolution that we cannot not want. See Wendy Brown, "Suffering Rights as Paradoxes," Constellations 7, no. 2 (2000): 230-231.
[7] The literature on *Roe* is vast and expansive. For a comprehensive look at *Roe* from a legal scholar's perspective, see the works of Mary Ziegler including *Roe: The History of a National Obsession* (2021), *Dollars for Life: The Antiabortion Movement and the Fall of the Republican Establishment* (2022), *After Roe: The Lost History of the Abortion Debate* (2015), and *Beyond Abortion: Roe v. Wade and the Fight for Privacy* (2018). Ziegler's work also offers a comprehensive look at the different perspectives on *Roe* as debates emerged in political, social, and public contexts.
[8] *Roe* deliberatively deferred to future courts to determine how to regulate such concerns. See *Roe v. Wade*, 410 U.S. 113, at 167 and n. 67.
[9] Kathryn Holmes Snedaker, "Reconsidering Roe v. Wade: Equal Protection Analysis as an Alternative Approach," *New Mexico Law Review* 17 no. 1 (Winter 1987): 115.
[10] Ruth Burdick, "The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split over the Salerno Test," *Hastings Constitutional Law Quarterly* 23 (1996): 826.
[11] See *Stenberg v. Carhart,* 530 U.S. 914 (2000), *Gonzales v. Carhart,* 550 U.S. 124 (2007), and *Whole Woman's Health v. Hellerstedt,* 579 U.S. 582 for representative examples.
[12] *Roe v. Wade*, 410 U.S. 113, at 117-118.
[13] *Roe v. Wade*, 410 U.S. 113, at 141.
[14] *Roe v. Wade*, 410 U.S. 113, at 155.
[15] *Roe v. Wade*, 410 U.S. 113, at 115.
[16] Michael F. Moses, "Casey and its Impact on Abortion Regulation," *Fordham Urban Law Journal* 31, no. 3 (2004): 805.
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[21] *Roe v. Wade* 410, U.S. 113 (1973), at 114-115.
[22] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 834.
[23] *Roe v. Wade*, 410 U.S. 113, at 164.
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[29] *Dobbs v Jackson Women's Health Organization,* 597 U.S. __ (2022).
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