

If our desire is for the AFF to be housed exclusively in the pro-life literature then the resolution should include Roe and not Casey.

You are correct that some describe Casey as upholding and solidifying Roe. The piece of evidence below is strongest argument I found in support of this interpretation and there are numerous law review articles taking a similar stance.

**----Casey wedded the Supreme Court to a commitment to preserve Roe and abortion rights. It is an overwhelmingly pro-choice decision**

**Garrow 99** - Presidential Distinguished Professor @ Emory University School of Law. [David J. Garrow, "ABORTION BEFORE AND AFTER ROE v. WADE: AN HISTORICAL PERSPECTIVE," *Albany Law Review*, 62 *Alb. L. Rev.* 833, pg. In]jedlee

[\*845] But the third and most important point of all about Planned Parenthood v. Casey is that Casey resolved the basic constitutional question of abortion for all time. The Court has made crystal clear that after Casey, there is simply no going back. Anyone who is attracted to or tempted by the "pipe dream" argument that Roe v. Wade is potentially reversible by some future Supreme Court ought to be required to explain why, for example, Brown v. Board of Education<sup>78</sup> also could be reversed by some future Court. For the three "trio" justices, O'Connor, Kennedy, and Souter, Casey was not first and foremost an abortion case. It was instead a case about the role and stature and institutional responsibilities of the Supreme Court. It ought to be very difficult for anyone to read the Casey opinion with any sort of independent or quasi-objective attitude toward this question and come away from that opinion with any doubt about whether this is a declaration on which the Court somehow could ever go back. The rare and special gesture of making that opinion a joint opinion, formally co-authored by all three justices rather than by one individual author, as is the Court's regular style, was only the second time in the entire history of the Court that such a device has been employed. The one prior time occurred in Cooper v. Aaron,<sup>79</sup> the famous Little Rock school desegregation case of 1958, in which the Court reaffirmed its 1954 ruling in Brown v. Board of Education in the strongest possible terms. Casey's implicit invocation of Cooper's reaffirmation of Brown was something those three justices did very purposefully in order to send a clear symbolic message, and the explicit manner in which the trio opinion compared the constitutional import of Roe to the constitutional import of Brown<sup>80</sup> should leave no one uncertain as to how strong and unbreakable an institutional commitment the Supreme Court has made to constitutional protection for women's right to choose.<sup>81</sup>

There were also some articles that mentioned a concern that the Supreme Court was going to use the Casey decision to overrule Roe.

However, a substantial body of the literature counters Garrow's claim about the Casey decision and paints a much for negative picture of the decisions impact on abortion rights.

**---Casey upholds the core findings of Roe but it also is used by anti-choice legislators as an open invitation to enact restrictive legislation.**

**Cavendish 02 - Vice President and Legal Director & General Counsel at NARAL Foundation** [Elizabeth A. Cavendish, "UNBURDENING THE RIGHT TO ABORTION: CASEY'S UNDUE BURDEN STANDARD CASEY REFLECTIONS," *American University Journal of Gender, Social Policy & the Law*, 10 Am. U.J. Gender Soc. Pol'y & L. 305, pg. InJedlee

In 1992, the Court rendered its most important decision regarding abortion since Roe. 13 In Casey, five justices voted to reaffirm some interpretation of Roe, while at the same time sharply restricting its protections. 14 The controlling opinion in Casey was co-authored by Justices O'Connor, Kennedy and Souter, each appointed by a Republican president seeking to overturn Roe. 15 Although the joint opinion reaffirms the Court's role in protecting the right to privacy, as a practical matter it has been read by anti-choice legislators as an open invitation to enact restrictive legislation. The joint opinion articulated the undue burden standard, which replaced Roe's strict scrutiny standard. 16 An "undue burden" is a "substantial obstacle" to a woman's ability to obtain an abortion. 17 Within this framework, the Court struck down Pennsylvania's spousal notification provisions, but upheld the requirement that doctors furnish biased counseling information, the 24-hour waiting period, the filing of reports on abortions performed, and the parental consent/judicial bypass requirement. 18 In upholding these provisions, the authors of the joint opinion, despite their reaffirmation of Roe, explicitly overruled parts of Akron and Thornburgh. 19 Indeed, Roe's 7-2 majority in favor of reproductive rights had become so eroded that Casey can be seen on the one hand as a victory because it had been widely anticipated - and feared - that the Court would rescind the right entirely. On the other hand, Casey's political [\*308] and legal effects have been so dire for the right to choose that it was, in an important sense, a loss.

This should concern the topic committee because Casey functionally makes the the debate on abortion bidirectional. The AFF gets to choose whether they want want to defend Garrow's or Cavendish's interpretation of Casey's impact on Roe and the negative must research both sides of the debate.

AND .... There is lot of support for the argument that Casey undermined Roe and overturning the decision will be a win for the pro-choice movement.

**Justice Kennedy's decision in Stenberg v. Carhart proves that some members of the Supreme Court already interprets Casey as giving states the power to curtail abortion rights.**

**Cavendish 02 - Vice President and Legal Director & General Counsel at NARAL Foundation** [Elizabeth A. Cavendish, "UNBURDENING THE RIGHT TO ABORTION: CASEY'S UNDUE BURDEN STANDARD CASEY REFLECTIONS," *American University Journal of Gender, Social Policy & the Law*, 10 Am. U.J. Gender Soc. Pol'y & L. 305, pg. InJedlee

The most recent decision regarding a woman's right to choose, Stenberg v. Carhart, struck down Nebraska's restriction on so-called "partial-birth" abortions by only a five-four margin. 45 The ban was so sweeping that it forbade almost all second trimester surgical abortions, and it contained no protection for women's health. 46 Justice Kennedy's dissent indicated that bans on safe and common abortion procedures are in his judgment constitutional under Casey. 47 This interpretation renders Casey toothless, as states would be free to eliminate abortion procedure by procedure. Justice Kennedy is explicit in subordinating women's health to legislative fiat and answers the question "Who Decides?" resoundingly in favor of the government, not the woman. Accordingly, it would take just one new anti-choice justice to undermine Roe (assuming he or she joined Rehnquist, Scalia, Thomas and Kennedy), and two justices to overturn Roe entirely.

**Casey's undue burden standard gives legislature the greenlight to curtail access to abortions**

**Misner 95** - Associate with sole practitioner in Takoma, Washington. [Christina L. Misner, J.D., University of Puget Sound School of Law, "WHAT IF MARY SUE WANTED AN ABORTION INSTEAD? THE EFFECT OF DAVIS v. DAVIS ON ABORTION RIGHTS," *The American University Journal of Gender & the Law*, 3 Am. U. J. Gender & Law 265, pg. In]edlee

In 1992, the Court came precariously close to overturning Roe in Planned Parenthood v. Casey.<sup>23</sup> Although there have been many important reproductive rights cases decided in the thirty years since Roe, Casey arguably has had the most significance in terms of dictating what types of legal arguments can be made today in defense of the right to choose. In Casey, the Court gave states the right to regulate abortion at any point prior to viability provided that the state did not "unduly burden" a woman's right to choose.<sup>24</sup> As a result of the decision in Casey, reproductive rights organizations must challenge anti-choice legislation under the nebulous "undue burden" standard. Anti-choice legislators have used their legislative powers to implement many requirements that restrict abortion access. For example, twenty-six states now require counseling and/or mandatory delays before abortion procedures, [\*64] forty-four states have enforceable restrictions on minor's access to abortion (i.e., requiring parental or adult consent), and twenty states have passed laws that impose burdensome regulations on abortion providers and clinics (known as Targeted Regulation of Abortion Providers ("TRAP") laws).<sup>25</sup> These laws have proven difficult to challenge under the undue burden standard because courts have significant discretion to determine what constitutes an "undue burden."<sup>26</sup>

**AND ... Literature exist that Casey overruled Roe**

**Misner 95** - Associate with sole practitioner in Takoma, Washington. [Christina L. Misner, J.D., University of Puget Sound School of Law, "WHAT IF MARY SUE WANTED AN ABORTION INSTEAD? THE EFFECT OF DAVIS v. DAVIS ON ABORTION RIGHTS," *The American University Journal of Gender & the Law*, 3 Am. U. J. Gender & Law 265, pg. In]edlee

Click here to return to the footnote reference.<sup>n14</sup> 112 S. Ct. 2791 (1992). For further discussions concerning Casey's impact on a woman's right to abort, see generally Jon D. Anderson, Abortion: State Regulation - Planned Parenthood v. Casey, 505 U.S. , 112 S. Ct. 2791 (1992), 76 Marq. L. Rev. 317 (1992) (setting forth Casey's facts and procedural posture, evaluating each opinion in the case, and proposing alternative approaches the Supreme Court could have utilized); Kathryn Kolbert & David H. Gans, Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law, 66 Temp. L. Rev. 1151 (1993) (suggesting that principles of state neutrality should be utilized to provide women greater constitutional protection in the post-Casey world); Paul B. Linton, Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court, 13 St. Louis U. Pub. L. Rev. 15 (1993) (arguing that, realistically, Casey overruled Roe v. Wade).

**Finally .... This interpretation is well supported in the literature and this card is just 1 footnote**

**Allen 04** - Professor of Law @ Stetson University College of Law [Michael P. Allen, "THE CONSTITUTION AT THE THRESHOLD OF LIFE AND DEATH: A SUGGESTED APPROACH TO ACCOMMODATE AN INTEREST IN LIFE AND A RIGHT TO DIE," *American University Law Review*, June, 2004, 53 Am. U.L. Rev. 971, pg. In]edlee

n104. A major criticism of the Court's decision in Casey was that the right to have a pre-viability abortion that had been deemed fundamental in Roe v. Wade, 410 U.S. 113 (1973), was essentially rendered non-fundamental through the operation of the undue burden standard. See, e.g., Annette E. Clark, Abortion and the Pied Piper of Compromise, 68 N.Y.U. L. Rev. 265, 321 n.278 (1993) (implying that the undue burden standard in Casey involves less than strict scrutiny analysis and that Casey questions the holding in Roe that the right to terminate a pregnancy is a fundamental right); C. Elaine Howard, Note, The Roe'd to Confusion: Planned Parenthood v. Casey, 30 Hous. L. Rev. 1457, 1488 (1993) (adding that although the Casey Court did not overrule Roe's fundamental right to an abortion, the Court did not protect the right from further regulation); Kathryn Kolbert & David H. Gans, Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law, 66 Temp. L. Rev. 1151, 1154 (1993) (finding that Casey rejected the strict scrutiny standard adopted in Roe and instead applied the less demanding undue burden test); Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court, 13 St. Louis U. Pub. L. Rev. 15, 20 n.30 (1993) (questioning whether, after Casey, there is a fundamental right to an abortion and observing the difficulty of weighing competing interests without a useful guide); Nadine Strossen & Ronald K.L. Collins, The Future of an Illusion: Reconstituting Planned Parenthood v. Casey, 16 Const. Comment. 587, 588 (1999) (flouting the redefinition of the fundamental right and strict scrutiny in Roe to the deferential undue burden standard in Casey).

The question of whether or not to include Casey is ultimately a question of what literature we want the AFF to be responsible for defending. If the committee wants AFF ground to be the “Anti-Roe” or “pro-life” literature then Casey is the wrong choice. If we desire to give the AFF some flexibility then Casey looks like a better choice.

I predict that the most popular version of an “overturn Casey” AFF is one in which the AFF argues that it overturns the SC’s undue burden standard and subsequently undermines the basis in which the States aggressively regulating access to abortion. Overturning Casey would reinvigorate the Roe decision. The question of the truthfulness of this interpretation is dependent on the Court’s written opinion after the decision. Because we will not have this, the AFF’s interpretation is well supported in the literature.

Roe is a much more stable decision and has a plethora of literature on both sides.

#### ---Roe v. Wade has a wide literature base and impacts beyond access to abortion

Steinbock 99 - Professor and Chair of Philosophy at State University of New York at Albany. [Bonnie Steinbock, “OPENING REMARKS,” *Albany Law Review*, 62 Alb. L. Rev. 805, pg. In]edlee

Roe v. Wade is one of the most criticized Supreme Court decisions in history. 26 It is hard to find a law professor who has anything positive to say about it. Perhaps it is because I am not a law pro [\*809] fessor that I think that the Court did a good job, even if the trimester analysis is outdated. The decision discusses the burdens imposed by an unwanted pregnancy, even if it does not explicitly base the right to abortion on equal protection grounds. 27 Instead, the Court based the right to have an abortion on two factors: the woman's constitutional right to privacy 28 and the status of the unborn. 29 Why is the status of the unborn important? Because if the fetus were - as the state of Texas claimed in Roe - a full legal person, 30 then not only could states ban abortion, they probably would have to. However, as the Court pointed out, outside of abortion law, the unborn has never been given the full protection of the law prior to live birth. 31 All fetal rights are contingent on live birth. 32 This raises the question, what if a woman plans not to abort, but to go to term and have a live birth? Can there be moral or legal obligations to a fetus who will be a child? This thorny issue will be addressed by some of the speakers today. The other part of the Court's decision in Roe had to do with the constitutional right of privacy: the idea that there are some areas of human existence so personal, so intimate, so meaningful to individuals, that the state should not intrude upon them, but rather let people make their own decisions. 33 One of the interesting things about Roe is that it has had implications far beyond abortion law. Indeed, when the composition of the Supreme Court changed under President Reagan, 34 and it was feared that Roe might be overturned, some commentators were concerned about the implications this might have for the right to refuse medical treatment 35 And more recently, some have taken Sandra Day O'Connor's remark in [\*810] *Planned Parenthood v. Casey*, 36 that "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment" 37 as support for a constitutional right to physician-assisted suicide. 38 Thus, the impact of Roe v. Wade on medical practice, on the lives of women, and on constitutional analysis, cannot be overestimated. Twenty-five years later, we are still learning about the changes it effected. Today's conference will continue that lesson and discussion.

**---Overturning Roe v. Wade provides the AFF with lotsa advantage ground**

**Wardle 99** - Professor of Law, J. Reuben Clark Law School, Brigham Young University. [Lynn D. Wardle, "THE QUANDARY OF PRO-LIFE FREE SPEECH: A LESSON FROM THE ABOLITIONISTS," Albany Law Review, 62 Alb. L. Rev. 853, pg. In]jedlee

The legal consequences of Roe v. Wade discussed herein are as follows: (1) Roe radically changed the substance of abortion law; (2) Roe resurrected and expanded substantive due process; (3) Roe affected a substantial change in federalism by shifting regulatory power from the states to the federal government; (4) Roe also affected a transformation of the balance of power, taking authority to set public policy on this controversial topic from the legislative branch and giving it to the judicial branch; (5) Roe undermined respect for the rule of law and contributed to the decline of principled judicial analysis; (6) Roe exacerbated the decline of legal ethics; and (7) Roe spawned a growing effort to suppress pro-life free speech, including the denial of the First Amendment protections extended to other proponents of unpopular dissenting speech and protests.

**MY CONCLUSION IS THAT ROE IS PREFERABLE IF WE WANT TO AVOID A BIDIRECTIONAL TOPIC AND CASEY IS PREFERABLE IF WE ARE CONCERNED ABOUT AFF FLEXIBILITY AS FAR AS THE ABORTION DEBATE IS CONCERNED**

Other Cases to consider ..... None of them are as good as Roe or Casey. Both have an outstanding literature base that has explored the decisions impact on the Court, other governmental actors, and other areas of the law. Roe and Casey were mentioned in over 3000 law reviews on lexis. None of this can be said about the case listed below.

Webster v. Reproductive Health Services - Mentioned in 808 law review articles on lexis

**----Webster v. Reproductive Health Services - State testing schemes useful in making viability determinations prior to performing an abortion and state bans on the use of public facilities and staff in the performance of non-therapeutic abortions are constitutional. It did not substantial deviate from its predecessors**

**Levine 94** - J.D. candidate at Albany Law School of Union University [Eric M. Levine, "THE CONSTITUTIONALITY OF COURT ORDERED CESAREAN SURGERY: A THRESHOLD QUESTION," *Albany Law Journal of Science & Technology*, 4 Alb. L.J. Sci. & Tech. 229, pg. In]edlee

Although more recent Supreme Court decisions on abortion, including Webster v. Reproductive Health Services, 247 and Planned Parenthood v. Casey, 248 serve to increase the authority of the state to intervene to protect the potentiality of life, 249 both Webster and Casey provide the state with no more of an interest to intervene in the cesarean context than it had under Roe and its pre-Webster progeny. Webster involved a challenge to the constitutionality of a Missouri abortion statute. 250 However, little new law developed out of the case. 251 The Court could only muster three votes for abandoning the Roe trimester framework and permitting the state to regulate abortion from conception, 252 and only one vote for expressly overruling Roe. 253 Five justices, however, upheld the constitutionality of the portion of the Missouri statute requiring a physician, who had reason to know that a patient requesting an abortion was carrying a fetus of twenty or more weeks gestation, to perform certain tests to determine viability. 254 The plurality read the statute to require the tests only when they were useful in determining viability and not when the physician in her medical judgment determined that they would pose a danger to the mother or the fetus. 255 The plurality, consisting of Justices Rehnquist, White, and Kennedy, agreed that the state had a compelling interest in preserving potential life and mandating tests to determine viability furthered this interest by ensuring that post-viability abortions were not performed. 256 Justice O'Connor upheld the viability testing provision, finding that it did not impose an undue burden on a woman seeking an abortion. 257 Justice Scalia voted to uphold the testing requirements against constitutional attack, but only because he wished to have the Court overturn Roe v. Wade. 258 Additionally, five members of the Court voted to uphold a ban on the use of public facilities and staff in the performance of nontherapeutic abortions, 259 which arguably expanded on previous cases merely holding that a state need not provide funding for abortions. 260 Although the ultimate tone of the Court in Webster suggests a willingness to expand the permissible scope of state regulation on abortion and thus narrow the pregnant woman's privacy interests, the only mandatory authority to spring from Webster is that state testing schemes useful in making viability determinations prior to performing an abortion and state bans on the use of public facilities and staff in the performance of non-therapeutic abortions are [\*266] constitutional. 261 Although one commentator contends that "Webster will impact court-ordered cesarean cases . . .," 262 a careful examination of the case reveals this is not so. Viability testing schemes and public facility bans have no bearing on a pregnant woman's right to refuse a cesarean section. Viability testing schemes have no impact on court-ordered cesareans because virtually all cesareans occur at or near term, long after the fetus attains viability. 263 Statutes providing for public facility and staff bans apply only to abortions; a statute prohibiting a public facility or staff member from participating in a vaginal delivery when the physician insists on a cesarean is unimaginable. Furthermore, Webster did not purport to modify the "trade-off" protection established in Colautti and Thornburgh, 264 which affords protection to a preg [\*267] nant woman who wishes to refuse a cesarean. 265

Thornburgh v. American College of Obstetricians and Gynecologists Mentioned in 630 law review articles on lexis

### **Thornburgh v. American College of Obstetricians and Gynecologists - State's interest in protecting the fetus is outweighed by the pregnant woman's interest in health**

**Levine 94** - J.D. candidate at Albany Law School of Union University [Eric M. Levine, "THE CONSTITUTIONALITY OF COURT ORDERED CESAREAN SURGERY: A THRESHOLD QUESTION," *Albany Law Journal of Science & Technology*, 4 Alb. L.J. Sci. & Tech. 229, pg. In]edlee

The Supreme Court has made it clear that maternal health cannot be compromised in favor of the fetus. 205 In *Colautti v. Frank* [\*259] lin, 206 the Supreme Court expressed its difficulties with a Pennsylvania statute, which provided in pertinent part that a physician must exercise reasonable care to preserve the life or health of the fetus and employ an "abortion technique . . . that . . . would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary . . . to preserve the life or health of the mother." 207 While the Court held this provision void for vagueness, 208 the Court found the provision "much more problematic[]." 209 The Court alluded to the fact that the provision "did not clearly specify . . . that the pregnant woman's life and health must always prevail over the fetus' life and health when they conflict," and also found that the term "necessary" meant "that a particular technique must be indispensable to the woman's life or health--not merely desirable--before it may be adopted." 210 The Court, in dictum, opined that the statute's ambiguity concerning "whether it required the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival" posed "serious . . . constitutional difficulties." 211 Approximately seven years later, the Supreme Court reaffirmed its position taken in *Colautti*. In *Thornburgh v. American College of Obstetricians and Gynecologists*, 212 the Court held that a similar Pennsylvania statute, which required a physician performing a post-viability abortion to exercise reasonable care to preserve the life and health of the fetus and to perform an abortion technique that would provide the fetus with the best chance to be aborted alive unless it would pose a significantly greater medical risk to maternal life or health, was unconstitutional because it required a trade-off between maternal health and fetal survival and "failed to require that [the mother's] health be the physician's paramount consideration." 213 The foregoing cases stand for the proposition that there can be no trade-off between maternal health and fetal survival. 214 The [\*260] compelling interest of the state in preserving the potentiality of life is outweighed by the pregnant woman's interests in her life and health. 215 One commentator notes that "if state-imposed tradeoffs are unconstitutional for [post-viability] abortions, they must be unconstitutional for deliveries as well." 216 When a physician recommends cesarean surgery merely for the benefit of the fetus, maternal health is subject to an increased risk since cesarean surgery poses a greater risk to a pregnant woman than vaginal delivery. 217 Thus, providing the fetus with an increased chance of survival at the expense of maternal health, as will be the case when the cesarean is performed merely for the benefit of the fetus, defies the mandates of *Colautti* and *Thornburgh* since there is an impermissible trade-off between maternal health and fetal survival. 218

Stenberg v. Carhart Mentioned in 438 law review articles on lexis

### **---Stenberg v. Carhart - Invalidated a ban on "partial-birth" abortions**

**Gans 05** - Acting Assistant Professor @ New York University School of Law. [David H. Gans, "STRATEGIC FACIAL CHALLENGES," *Boston University Law Review*, December, 2005, 85 B.U.L. Rev. 1333, pg. In]edlee

Nearly ten years after *Casey*, in *Stenberg v. Carhart*, the Court facially invalidated a Nebraska statute that banned so-called "partial-birth" abortions except when necessary to save the woman's life. 92 The Court gave two reasons for striking the ban on its face. First, the statute lacked an exception permitting a "partial-birth abortion" when necessary to safeguard the woman's health. 93 Second, the statute prohibited the dilation and evacuation ("D&E") procedure, the most common method for abortions after the first trimester, thereby imposing a substantial obstacle on the right to choose abortion. 94 [\*1355] The first ground for striking the Nebraska statute - the lack of a health exception - is a categorical defect of the sort *Salerno* seems to demand. The statute lacks a constitutionally required exception; therefore, it is unconstitutional on its face. But should that be enough to invalidate the entire statute? The lack of a health exception does not render the statute invalid as applied to all individuals; it only affects women for whom an abortion procedure defined under the law as a partial-birth abortion is necessary to protect their health. So why not enjoin the law only as applied to these women? 95 The Court rejects this approach, most likely because the second ground for invalidating the law involves not merely the exception to the ban, but the ban itself. Echoing overbreadth reasoning, the Court invalidates the ban because it prohibits the procedure most commonly used after the first trimester (D&E), thereby chilling physicians from performing second trimester abortions and erecting a substantial obstacle to the abortion choice. By impermissibly banning the most common second trimester abortion procedure, the statute imposes an unconstitutional burden in a substantial number of cases, and thus cannot stand. It does not matter that the statute could be applied validly to the rarer dilation and extraction ("D&X") procedure. 96 In a large majority of cases, the statute is unconstitutional, and thus, as in *Casey*, the statute is void on its face.