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Uprooting Roe

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ESSAY

UPROOTING *ROE*

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It's official—the U.S. Supreme Court is likely poised to overturn *Roe v. Wade*[1] in a matter of months.[2] Yet, the roots of *Roe* run both wide and deep, and to uproot *Roe* would be to uproot the Constitution's promise of equality in a radical way. Uprooting reproductive liberty is radical as jurisprudence, but even more shocking is the cavalier reversal of more than a century's work to abolish the claims of coverture and biological destiny as women's[3] gendered legal fate. As each step in women's emergence from bio-destiny generated a new and robust status as full citizens, so will an uprooting of *Roe* and its companion principles work to restore the iron rules of gender difference. Liberty, meet equality–and say farewell.

The body of reasoning that built the jurisprudence of reproductive autonomy started long before *Roe v. Wade*, with *Skinner v.*

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1. 410 U.S. 113 (1973).

2. *See, e.g.,* Noah Feldman, *The Supreme Court Seems Poised to Overturn Roe v. Wade*, Bloomberg Op. (Dec. 1, 2021), https://www.bloomberg.com/opinion/articles/2021-12-01/the-supreme-court-seems-poised-to-overturn-roe-v-wade.

3. The authors recognize that not only women can become pregnant—trans and nonbinary people may also become pregnant and need abortions. Yet this Essay often uses the term "women" because of its focus on the way in which abortion restrictions have traditionally targeted women specifically. The revival of a gendered policing of cisgender women will have a devastating impact on the liberty of fertile women, writ large as a biologically defined group. But the attack on liberty affects all persons, with special impact on the individuals, whatever their gender identity, who become pregnant and are denied personal choice in a critical life decision.

Oklahoma[4] in 1942. In *Skinner*, the Supreme Court struck down a law requiring sterilization of people convicted of certain felonies.[5] The Court emphasized the danger of denying to a class of persons "the right to have offspring" on the basis of a poorly reasoned and classist theory that their criminality was somehow heritable.[6] Subsequent cases *Griswold v. Connecticut*[7] and *Eisenstadt v. Baird*[8] recognized a right to contraception, but reproductive liberty reached its zenith in *Roe v. Wade*. From a rule protective against infringements on "perpetuation of a race" in *Skinner*,[9] the Court moved to a rule protective of an individual's control over her reproductive health in *Roe*.[10] *Roe* required courts to carefully scrutinize abortion restrictions,[11] which led to many restrictive laws being struck down—including waiting periods required before a person could proceed with an abortion provided by a doctor and laws giving private parties veto rights over a woman's choice about a pregnancy.[12] While *Skinner* protected the right *to* procreate and *Roe* the right *not* to procreate, both assumed a fundamental right of individuals to control their own reproductive lives without state interference. The jurisprudence of reproductive liberty began to evolve with the addition of conservative justices, appointed by Ronald Reagan, to the Supreme Court. The landmark case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[13] in 1992, revisited *Roe* and its demanding standard of scrutiny for abortion restrictions, insisting the state has a "substantial interest in potential life" throughout pregnancy.[14] Cases decided after *Casey* divided the Court as it vacillated about the meaning of *Casey*'s new standard of review—that a law was constitutional unless it imposed an "undue burden" on abortion access before viability[15]—

4. 316 U.S. 535 (1942).
5. *Id.* at 541–43.
6. *Id.* at 536, 541–42.
7. 381 U.S. 479, 485–86 (1965).
8. 405 U.S. 438, 454–55 (1972).
9. *Skinner,* 316 U.S. at 536.
10. Roe v. Wade*,* 410 U.S. 113, 117–18 (1973).
11. *Id.* at 155–56 (holding that abortion restrictions must be narrowly tailored to serve a compelling government interest).
12. *See, e.g.,* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 450–51 (1983) (ruling a 24-hour waiting period unconstitutional), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 69, 74 (1976) (holding that a state may not condition the right to terminate a pregnancy on receiving spousal or parental consent).
13. 505 U.S. 833 (1992).
14. *Id.* at 876.
15. *Id.*

in terms of the Court's role in assessing the facts underpinning a regulation.[16]

Yet, *Casey* was a disappointment to anti-choice advocates, who had thought the Reagan appointees would vote to overturn *Roe v. Wade*.[17] And indeed, *Casey* contained a lengthy paean to stare decisis—the principle that courts should respect precedent—arguing that the passage of time had not weakened *Roe*'s vitality; that generations of women had come to rely on *Roe*; and that a consistent, workable legal approach to deciding the constitutionality of abortion restrictions was possible.[18] In fact, the Court claimed in *Casey* that overruling *Roe* because it felt pressured to do so, rather than because developments in law and society required it, would undermine the Court's legitimacy.[19]

While less protective of reproductive liberty than *Roe*, *Casey*, for the first time, recognized the extent to which reproductive liberty is intertwined with gender equality.[20] Even more importantly, *Casey* highlights the extent to which, in the domain of reproductive liberty, equality and respect for precedent are intertwined. While recognizing that abortion is often an "unplanned response to the consequence of unplanned activity," the *Casey* plurality understood the reliance interests at stake holistically.[21] As *Casey* reminded us, for five decades now, "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion . . . ."[22] Women's place in society and their very understanding of themselves as equal citizens is rooted in the promise

16. *Compare* Stenberg v. Carhart, 530 U.S. 914, 933–38 (2000) (conducting an independent review of the evidence in the record regarding the necessity of a health exception to an abortion restriction), *and* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016), as revised (June 27, 2016) (stating that the Court places "considerable weight upon evidence and argument presented in judicial proceedings," rather than deferring to the legislature), *with* Gonzales v. Carhart, 550 U.S. 124, 165 (2007) (stating that congressional factfinding is subject to a "deferential standard" of review).

17. *See, e.g.,* Jamin B. Raskin, Roe v. Wade *and the* Dred Scott *Decision: Justice Scalia's Peculiar Analogy in* Planned Parenthood v. Casey, 1 Am. U. J. Gender & L. 61, 61 n.1 (1993) (discussing President Reagan's "willingness to use the federal judiciary" to overturn *Roe* within the context of his three Court appointees).

18. *Casey*, 505 U.S. 854–61.

19. *Id*. at 864 ("[O]verruling *Roe's* central holding would not only reach an unjustifiable result under principles of s*tare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.").

20. *Casey*, 505 U.S. at 896–98 (emphasizing sex equality considerations in striking down Pennsylvania's spousal notice requirement for married women seeking abortions).

21. *Id.* at 856.

22. *Id.*

of *Roe* as well as its preservation. Mandated childbirth is thus biological destiny rising from its grave, defying the protections of deep-seated precedent woven into the constitutional concept of liberty, and starting the return trek for women to a servitude imposed on them.

One front in the battle over abortion rights since *Casey*, and particularly over stare decisis, has been "TRAP" laws—targeted regulation of abortion providers that creates significant administrative burdens for clinics and providers with little or no countervailing benefit.[23] That battle played out in the 2016 case *Whole Woman's Health v. Hellerstedt*, in which the pro-reproductive liberty side prevailed.[24] *Whole Woman's Health* was notable for the Court's careful review of the facts underlying the legislature's claims that certain abortion restrictions were necessary to protect patients' health and safety.[25] Yet, only four years later, in *June Medical Services v. Russo*, decided after Justice Kennedy was replaced by Justice Kavanaugh, a more splintered Supreme Court cast serious doubt on the *Whole Woman's Health* approach and its continuing vitality.[26]

Now, after its defense of stare decisis in *Casey* and its lukewarm embrace of that principle in *June Medical Services*, the Supreme Court seems poised to send us back to the years well before *Roe*, as if the recognition of women's claims to equal dignity in that case had never occurred. Notably, originalism—a view espoused to some degree by all six of the conservative justices on the Supreme

23. *See, e.g.*, *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Jan. 2020), https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws.

24. 136 S. Ct. 2292, 2319–21 (2016).

25. *Id.* at 2311–18.

26. 140 S. Ct. 2103, 2183 (2020) (Kavanaugh, J., dissenting) (pointing out that although a majority of the Court concluded the Louisiana abortion law should be struck down, "five Members of the Court reject[ed] the *Whole Woman's Health* cost-benefit standard").

Court[27]—points toward a fairly ready willingness to overturn precedent on the basis it was always wrong.[28] For this reason, the *Casey* language stressing the importance of maintaining the Court's legitimacy is unlikely to carry much weight with the new Court majority, as oral argument in the Mississippi abortion case, *Dobbs v. Jackson Women's Health Org.*, unequivocally suggested.[29] This leaves us to ask: what is really at stake in the rush to overturn *Roe*? A triumphal and partisan celebration of a newly gained power over women's lives, one cemented in a dream of bringing women back to their destiny, and doing it now? Why so urgent, one might ask a conservator of the Court and its good name?

The thought of overturning *Roe* may seem simple—one and done, with the result that states are free to make laws regulating abortion in line with popular views in the state. To begin with, that vision is an overly simplistic depiction of state law-making. How does "scrupulous neutrality" by the Court translate to visions of state policies made in the spirit of compromise?[30] Are abortion bans with no exception for rape or incest the sort of outcome the Court has in mind as the estimable products of democratic deliberation? Polling on views of abortion consistently show support for the right of a pregnant person to make their own decision whether to become a parent, albeit with some limitations for later abortions.[31] But state legislatures have been passing increasingly dra-

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27. *See, e.g.*, Anthony P. Picadio, *In Scalia's Wake: The Future of the Second Amendment Under an Originalist Supreme Court Majority*, 92 PA. B.A. Q. 145, 149 (2021) ("Counting Justice Thomas, there are now four avowed originalists. And most recently, Justice Alito has sent a strong signal that he too will henceforth join the originalists and make an effort to lead the others in shaping and applying Scalia's thinking."); Tom McCarthy, *Amy Coney Barrett Is a Constitutional 'Originalist' – But What Does It Mean?* THE GUARDIAN (Oct. 26, 2020), https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-originalist-but-what-does-it-mean; *see generally* Todd Ruger & Sandhya Raman, *Abortion Case Tests Supreme Court's Rightward Shift after Trump,* CQ ROLL CALL (Nov. 30, 2021) (quoting legal scholar Josh Blackman as saying, "[f]or the first time in eight decades or so, we have six conservative justices on the court").

28. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.").

29. Transcript of Oral Argument, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619, 91–95 (2021) (No. 19-1392) (Alito, J.).

30. *Id.* at 77 (Kavanaugh, J.) (asking respondents to counter petitioner's argument that "because the Constitution is neutral . . . [the] Court should be scrupulously neutral on the question of abortion" and leave the decision to the states).

31. Ariel Edwards-Levy, *CNN Poll: As Supreme Court Ruling on Roe Looms, Most Americans Oppose Overturning It*, CNN (Jan. 21, 2022) (reporting results of a recent poll finding that 69% of Americans opposed overturning *Roe v. Wade*, and that 59% would like their states to adopt less restrictive abortion laws), https://www.cnn.com/2022/01/21/politics/cnn-poll-abortion-roe-v-wade/index.html; Hannah Hartig, *About Six-in-Ten Americans*

conian laws that are out of alignment with measures of public attitudes—including, most notably, the recent "private bounty" law in Texas, opposed by a clear majority of Americans.[32]

Moreover, *Roe*'s roots run deep, in that they profoundly impact individuals' lives. Young women have come of age in an era when they could rely on having control over their reproductive capacity. They have not lived in the type of genuine fear that young women once shared during their reproductive years and, especially in their very young years, over the complications of negotiating the extent of sexual intimacy with young men whom they dated but did not regard as their reproductive partner. One can only speculate what measures women who are habituated to the assumptions of full citizenship and the exercise of liberty would take if the state begins mandating birth. Yet, Justice Amy Coney Barrett seemed to embrace such a world when she asked about why the option of carrying to term and then abandoning the baby at a safe surrender point would not be sufficient to safeguard women's liberty.[33] It would be difficult to find a more direct analogy to the handmaid's role than this: forcing rape and incest victims to birth babies for (more privileged) others who would like to adopt them.[34] Aside from the dystopian world evoked by Barrett's casual volunteering of young women as incubators for the childless, perhaps more shocking was the strange embrace of consumerism gone to a new level. Are fertile women a link in the supply chain for newborn babies as a consumer item in short supply?

As well as deep, *Roe*'s roots are wide: The amount of law that would be uprooted by a simple voiding of *Roe* and *Casey*, moreover, is breathtaking in its reach. Unmooring of the whole swath of protections for reproductive liberty looms large in any good-faith consideration of *Casey*'s statement on stare decisis. First, the line of cases beginning with *Roe* underscores and supports gender equality. Indeed, even as *Casey* modified and weakened *Roe*, it reinforced the lesson that *Roe* helped teach: The State may not delegate to another person, i.e., a husband, a power the state itself did not possess over a pregnant person's choice whether to continue or

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Say Abortion Should be Legal in All or Most Cases, PEW RSCH. CTR. (May 6, 2021), https://www.pewresearch.org/fact-tank/2021/05/06/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases/.

32. *NPR/PBS NewsHour/Marist National Poll: Abortion, Texas Abortion Restrictions October 4, 2021*, MARISTPOLL (Oct. 4, 2021), https://maristpoll.marist.edu/polls/npr-pbs-newshour-marist-national-poll-abortion-texas-abortion-restrictions-october-4-2021/.

33. Transcript of Oral Argument at 56–57, *Dobbs*, 141 S. Ct. 2619 (No. 19-1392) (Barrett, J.).

34. MARGARET ATWOOD, THE HANDMAID'S TALE (1986).

terminate a pregnancy.[35] *Casey* held that a legal mandate, even with exceptions and workarounds, could not decree that a woman inform her husband that she was going to end a pregnancy.[36] The Court, with seeming input from Justice O'Connor, explained at some length the perils that many pregnant persons face in marriages where violence may be a lurking presence, and the special risks that a disclosure of a pregnancy and a consequent plan to end it may trigger.[37] This principle—that a husband may not exercise a power that the state lacks, and such a third-party power violates the core liberty and equality of a person—could become a nullity if *Roe*'s generative logic of liberty is rejected. If states are freed from *Casey*'s liberty-protecting deep logic tied to equality, without a constitutional framework, we could see a return of laws now considered relics of a bygone day of female subjugation. Whatever right the state confers by grace on a married woman could be placed under the supervision of her spouse.

Second, with marriage equality entering stage left under *Obergefell v. Hodges*,[38] one can only speculate exactly how states would negotiate the gendered complications that the spouse may not be male but may be an egg donor or the facilitator of a family sperm donation. Uprooting the protections created by *Casey* when we lived in a world of gendered marriage would throw older conceptions of liberty and of women's lesser claim on liberty into a new state of confusion and cultural disarray. Indeed, the fundamental rights of same-sex intimacy and marriage themselves are built on *Casey's* foundation of personal autonomy and may not stand for long once that foundation crumbles. If women are restored to a gendered minimization of personal liberty and equality currently shared with men as a constitutional "birthright," would we not "return to those thrilling days of yesteryear"—as the *Lone Ranger* radio show invited us to do—and thus to a revival of biology as destiny?[39] In those thrilling days, "man" is freed by nature

35. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 896–98 (1992) (citing Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976)); Roe v. Wade, 410 U.S. 113, 163–167 (1973).

36. *Casey*, 505 U.S. at 896–98.

37. *See id.* at 888–94.

38. 576 U.S. 644, 675 (2015) (holding that "same-sex couples may exercise the fundamental right to marry").

39. CLASSIC MEDIA, INC., THE LONE RANGER (1933–1954) (opening and closing theme).

to "make the most of what equipment he has," and with the endowments of nature, to bring law and order to a world made for "every man."[40]

And now, the extraordinary Texas statute empowering "any person" to sue any other person or entity that aids a woman seeking an abortion surrounds any pregnant person, rewarding monitors set on minimizing her freedom of association with suspiciously knowledgeable sources of insight or useable information.[41] *Roe*'s logic disempowered husbands as women's overseers. The end of *Roe* is already moving toward the specter of a state empowered over women's present and future as equal and free persons. In Texas, the state has chosen to share this coverture-restoring power not just with spouses but with every member of the public as potential spousal substitutes, awarding rights of control even greater than those placed in the hands of a marital claimant to property in a woman's womb. Meanwhile, the pregnant person herself—deprived of agency and therefore legal responsibility, as women were under the old rules of coverture—cannot be liable for participating in her own reproductive decision under the Texas law. The little woman must be encircled, monitored, and protected: she is too frail in mind and body for all but childbirth.

What about the life chances of minors who become pregnant? Under *Roe*'s logic, the teaching easily emerges to establish that a minor must have a means of protecting her liberty interest in controlling a decision that is life-determinative.[42] Her minority may demand aid and protection to enable her to make a choice that preserves her liberty interest in charting a path to a life unencumbered by coercive control delegated by the state to another person's will. Again, the liberty that *Roe* protects radiates into lives freed of coercion asserted over them by parents as well as spouses. Moreover, remitting minors to a legal regime of forced birth may well produce fewer births, as the premise for state counseling disappears and minors turn to desperate measures to end a pregnancy in the absence of safe and legal abortion methods. The withdrawal of aid from children—pregnant teens—could result in unsafe abortions and preclude future healthy births by adult women capable

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40. FRAN STRIKER, THE LONE RANGER CREED, https://www.npr.org/templates/story/story.php?storyId=18073741.

41. S.B. 8, 87th Legis., Reg. Sess. (Tex. 2021) at §171.208(a).

42. *See* Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976); Bellotti v. Baird, 443 U.S. 622, 644 (1979).

of choosing to bear and care for a child.[43] In addition, as childbirth—already fraught with danger in a shockingly high proportion of cases, particularly for people of color[44]—is increasingly surrounded by state coercion and state-induced fear, it would not be surprising to find many more people avoiding pregnancy altogether.

When young women knew that pregnancy could mean disaster, they were not free or equal. They existed in a state of qualified liberty, a liberty they could lose because the state decreed that their liberty was bounded by their body's vulnerability. One can readily see that there is no counterpart for males. Those who wish to argue that pregnancy justifies a deep and coercive intrusion into the lives of persons capable of becoming pregnant are advocating for a return of women to a condition in which their citizenship lacks the robust meaning implicated by the core benefits of liberty and equality. The specter of force capable of altering women's control over their lives and destinies would be ever present. In the case of rape, physically wrongful coercion would be backed by a state mandate of force, almost rendering the rapist an agent of the state for mandated reproduction. The entrapment of women in an ancient rule limiting their liberty by way of raw physical force and legal erasure would require a large excavation of equality and liberty principles and disfigure American equality jurisprudence.

The liberty principle in *Roe* is not just about a single moment when a pregnant person undergoes a procedure available to her as a free person in control of her own health, and, as is said so often, her body. The principle that persons capable of becoming pregnant are free and equal citizens is not only about a moment in a clinic. It is about freedom and equality writ large and control of each person over their destiny. The intertwining of abortion jurisprudence with the entire edifice of constitutional reasoning about limits on the state's reach into basic liberties of association and personal autonomy emerges in sharp relief as we see the possible end of the

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43. Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality*, REV. OBSTETRICS & GYNECOLOGY, Spring 2009, at 122 (discussing the nonfatal long-term health complications of unsafe abortions, including infertility, and the correlation between unsafe abortion and restrictive abortion laws). Of course, in 2022, there are methods of safe self-managed abortion by means of medication that were not available when *Roe* was decided. *See, e.g.*, Jennifer Conti & Erica P. Cahill, *Self-Managed Abortion*, 31 CURRENT OP. IN OBSTETRICS & GYNECOLOGY 435 (2019). Nonetheless, it is questionable whether all or even most pregnant people are financially and logistically able to access these methods.

44. *See, e.g., Centers for Disease Control and Prevention, Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths* (Sept. 5, 2019), https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html.

liberty principle that grounded *Roe* and *Casey* and was given deepened meaning over many years by the Court. The termination of the liberty interwoven into our constitutional framework by the freeing acknowledgement in *Roe* and *Casey* of equal citizenship and personal autonomy of all citizens would be radical and reactionary in ways not seen in our jurisprudence.[45]

Courts have maintained a status quo and strengthened the often oppressive power of existing arrangements, but the Supreme Court has yet to issue a decision rolling back the integration into American life of an advancing recognition of a fundamental human liberty. Liberty cannot exist in a nation that would make women's bodies the common property of the state in a new and strange collectivized coverture. The Court must not take that step into an America shorn of liberty for fertile women.

45. This is not to suggest that the equal citizenship promised by *Roe* and *Casey* has been perfectly realized. Indeed, thanks in part to decisions such as *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that the fundamental right to terminate a pregnancy is not violated by restricting Medicaid coverage to medically necessary abortions), and *Harris v. McRae*, 448 U.S. 297, 317–18 (1980) (upholding refusal of Medicaid program to cover abortion except where they are life-saving or result from rape or incest), true reproductive liberty has long been available largely only to those who have the means to afford it. That we still have imperfect recognition in constitutional jurisprudence of equal citizenship for fertile persons calls upon the Court to continue the effort made by the Court in *Casey* to engage in "reasoned judgment" for the purpose of meeting the Court's "obligation [] to define the liberty of all." *Casey*, 505 U.S. at 849–50, The simple obliteration of half the population's liberty in one radical act by a newly empowered conservative bloc hardly serves to shore up the principles of liberty and equality.