

ABORTION RIGHTS IN THE SUPREME COURT: A TALE OF THREE WEDGES

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In mid-May, the Supreme Court granted certiorari in a case designed to overrule *Roe v. Wade*.¹ It's safe to assume that six justices are inclined to repudiate *Roe*, and some of those six would like to go further, declaring a constitutional right to life that would prevent the abortion issue from going “back to the states” at all. One of the six, Chief Justice Roberts, is known to prefer stealth overruling of precedent, and he will likely convince at least one other member of the majority to overrule *Roe* carefully, with an eye toward the Court's credibility and power. The question for the next year is not whether *Roe* will be overruled—it already was, in *Planned Parenthood v. Casey*²—but how far the Court will go.

This essay describes the arc of the Supreme Court's abortion jurisprudence in terms of three wedges—wedges that pry the pregnant woman apart from first, her fetus; second, her doctor; and third, her community. The first two wedges have each taken a turn as the primary rationale for restricting abortion rights. *Roe* itself founded abortion rights on the first wedge as a theory for restricting them: the concept of a state interest in the fetus itself, as an entity distinct from the pregnant woman. As public opinion shifted in support of women seeking abortions, *Casey* shifted to a new rationale for restrictions: distrust of the abortion provider, from whom the woman needed to be protected. Most recently, at least one justice has taken an interest in anti-abortion rhetoric that drives a wedge between the pregnant woman and her community by accusing Black women who have abortions of participating in eugenics and genocide. Professor Melissa Murray has argued that this last wedge may provide the

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1. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted in part*, No. 19-1392, (May 17, 2021).

2. 505 U.S. 833 (1992).

extra bit of force needed to plausibly overcome *stare decisis* and support the open overruling of *Roe*.³

ONE woman / fetus

The first wedge is the ultimate one when it comes to restrictions on abortion. It is the wedge between the woman and the fetus, based on the bio-medical concept of maternal–fetal conflict. The fundamental argument for restricting the right to abortion is the distinct and at times superior personhood of the fetus.

In the beginning, in *Roe v. Wade*, two questions were presented, because constitutional analysis of fundamental rights always has two steps. The first question is whether there is a fundamental right to bodily integrity, to control of your own reproductive biology. That should have been an easy question. Of course that’s a fundamental right. There was clear precedent at the time about reproductive autonomy and about bodily integrity in general.⁴ It was only hard in *Roe* because, in that case, the question was whether women have that right independently of men. The more difficult, second question in *Roe* was when that right gives way to regulation. A woman might have all kinds of fundamental rights, but if the state has a compelling interest in restricting them, it can. That’s true for speech, privacy, religion, the right to bear arms—all our rights have boundaries. The real question in *Roe* was whether the state had a compelling interest that warranted restricting the woman’s rights over her body and reproduction. The answer that the *Roe* Court gave was yes, once the fetus is viable, the state can compel childbirth.⁵

Why does this state interest justify such a significant intrusion on the woman’s body? The *Roe* Court cited two precedents for this invasion. First was *Jacobson v. Massachusetts*,⁶ which recognized the state’s power to require people to be vaccinated against smallpox. The need to protect others outweighed the minimal intrusion. The vaccine case, however, provided at best minimal support for state-compelled childbirth. The burden on the woman prevented from having an abortion is much greater

3. Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2020); see also Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308 (2020).

4. *Rochin v. California*, 342 U.S. 165 (1952) (adopting the “shocks the conscience test” and finding that forced stomach pumping violated a fundamental right); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down forced sterilization as punishment for selected crimes).

5. *Roe v. Wade*, 410 U.S. 113, 163–64 (1973).

6. 197 U.S. 11 (1905), cited in *Roe*, 410 U.S. at 154.

than the burden on someone forced to take a vaccine. And the state's interest in preventing the spread of contagious disease had a long and widely accepted history,⁷ unlike the interest in potential life that was newly formulated in *Roe* itself. The second precedent the Court leaned on in *Roe* was more to the point, because it dealt with the state's power to regulate reproduction. For that principle, *Roe* cited *Buck v. Bell*.⁸ You may remember *Buck v. Bell* as the “three generations of imbeciles are enough” case. That was Justice Holmes's comment about why the State of Virginia could forcibly sterilize Carrie Buck when it deemed her unfit to reproduce.⁹ The proof of Carrie Buck's imbecility was a family history of reproducing out of wedlock. Buck herself was of perfectly sound mind, but she was the daughter of an unwed mother and had herself become an unwed mother at a young age.¹⁰ That, then, was the main precedent in *Roe* for the state's power to restrict abortion. The same power that lets the state sterilize Carrie Buck because it didn't want any potential lives that might come from her also allows the state to force other women to childbirth if it wants the potential lives in them.

That state interest in potential life—which in *Roe* and *Buck* could support either the preservation or the prevention of potential life—has come to define abortion jurisprudence, as well as the political debate over when life begins. Even though *Roe* itself rejected the claim that the fetus was a “person” under the Fourteenth Amendment,¹¹ it put the spotlight on the state's interest on the fetus as its own entity, and that debate continues in many areas of law. State legislatures produce a steady stream of “personhood” bills that drag abortion politics into everything from infertility treatments to domestic violence against pregnant women to “child abuse” prosecutions of women who fall down stairs, attempt suicide, or get in car accidents.¹² Now that we have a Supreme Court that is receptive to the principle of fetal personhood, states like Mississippi, which won the cert grant in *Dobbs*, are passing laws intended as direct challenges to *Roe*, banning abortion outright or from a very early point in pregnancy.¹³ There's also starting to be more openness, occasionally in

7. *Jacobson*, 197 U.S. at 24–25.

8. 274 U.S. 200 (1927), cited in *Roe*, 410 U.S. at 154.

9. *Buck*, 274 U.S. at 207.

10. See generally Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).

11. *Roe*, 410 U.S. at 158.

12. See Mary Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS L. REV. 195, 240–44 (2020).

13. The Mississippi law at issue in *Dobbs* bans abortion after fifteen weeks since the woman's last menstrual period. Other examples include six weeks in Georgia and eighteen weeks in Utah.

bills themselves but certainly in public rhetoric, about the desire to criminalize and punish the woman herself, not only the doctor, for the abortion.¹⁴

The rhetorical severing of the pregnant woman from her fetus is the consistent foundation for forcing women through pregnancy and birth. But there were a couple of decades when arguments along those lines were in retreat. Public opinion sympathized with women seeking abortions, so anti-abortion efforts needed a different target. They chose doctors. Proponents of anti-abortion laws cast women as the victims of abortion, themselves as women's protectors. That's the second wedge—the wedge between women and their doctors.

TWO woman / doctor

In 1992, most observers expected the Supreme Court to use *Casey* to overrule *Roe*. Instead, *Casey* reaffirmed *Roe* in theory while gutting it in practice. And it did two important things to drive in the first wedge and add a second. First, *Casey* consolidated the ideology of the first wedge by authorizing an extremely narrow life and health exception. Under *Casey*, after viability (and even before, when it comes to any other regulations), a woman is entitled to survive her pregnancy with most of her organs intact, but not much more than that.¹⁵ Second, and most famously, *Casey* lowered the standard for restrictions on abortion from “strict scrutiny” to “undue burden.” The undue burden standard is supposed to mean that the state cannot restrict abortion with laws that have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.”¹⁶ That is most of what we've been litigating about ever since *Casey*—which burdens are undue in this sense?

There are two main types of burdens that states like to enact. The first are called TRAPs, which stands for “targeted regulation of abortion provider.” These are nitpicky rules that a state legislature passes to make

SisterSong Women of Color Reproductive Justice Collective v. Kemp, 472 F.Supp.3d 1297 (N.D. Ga. 2020) (striking down the Georgia ban); *Planned Parenthood Ass'n of Utah v. Miner*, No. 2:19-CV-00238 (D. Utah) (pending challenge to the Utah ban).

14. E.g., Tom Kertscher, *In Context: Transcript of Donald Trump on Punishing Women for Abortion*, POLITIFACT (Mar. 30, 2016), <https://www.politifact.com/article/2016/mar/30/context-transcript-donald-trump-punishing-women-ab/>

15. *Casey*, 505 U.S. at 880; cf. Reva Siegel, *Reasoning from the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 365 (1992) (describing similar laws as protecting merely “brute physical survival”).

16. *Casey*, 505 U.S. at 877.

it more difficult and expensive to run an abortion clinic. It is one of the main ways that access to abortion has been decimated since *Casey* was decided, a sort of death-by-a-thousand-cuts harassment of abortion clinics. The federal courts have pretty much rolled over to this kind of regulation. Doctrinally, they do so by focusing almost entirely on speculation about whether a particular restriction really has a “substantial” enough “effect” on women being able to get abortions, and completely ignoring the “purpose” part of the test.¹⁷ The purpose of a TRAP is transparent and obvious, but courts have insisted on simply taking the word of the state’s lawyer, who shows up in court and says, “We’re just trying to protect women.” Courts accept that rather than look at any actual evidence about the purpose of the law.¹⁸ So the litigation since *Casey* has been mired in semantics over what’s “substantial,” and the right to abortion has withered on the vine.

One interesting thing about TRAPs, of course, is that they target the right to abortion indirectly, by targeting the provider rather than the woman’s actual decision to have an abortion. But that’s also what makes this a wedge. TRAPs set up the abortion provider as the suspect character in need of regulation, so the state becomes the woman’s protector, protecting her from her doctor. This is a real shift from *Roe*. *Roe* is well known for its valorization of the doctor who is deciding whether to perform an abortion. If you go back and read *Roe*, you may be surprised by how much it reads as a doctor’s rights opinion not a women’s rights opinion.¹⁹ *Casey* reads much more like a women’s rights decision.²⁰ (It’s not a coincidence that the decision that made abortion a question of women’s rights rather than doctors rights is also the decision in which that right was dramatically weakened.) By the time of *Casey*, we had justices, particularly Justice Kennedy, who looked at the doctor and saw not a

17. See Jennifer S. Hendricks, *Undue Burdens in Texas*, 127 HARV. L. REV. FORUM 145 (2014).

18. Cf. *Trump v. Hawaii*, 585 U.S. ___, 138 S.Ct. 2392(2018) (ignoring the president’s political promise to impose a “Muslim ban” on immigration and accepting the government’s rationale offered in litigation). In 2016, the Supreme Court added a cost-benefit gloss to the undue burden test, suggesting that courts should at least weigh the purported, beneficial purpose of the law against the burdens imposed on women, although it stopped short of holding that an improper purpose would result in the law being struck down. *Whole Woman’s Health v. Hellerstedt*, 579 U.S. ___, 136 S.Ct. 2292 (2016).

19. See, e.g., *Roe*, 410 U.S. at 163 (“[F]or the period of pregnancy prior to this ‘compelling’ point, 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.”).

20. See *Casey*, 505 U.S. at 895–98 (striking down a husband-notification requirement because the state “may not give to a man the kind of dominion over his wife that parents exercise over their children”).

respected professional but an “abortionist”²¹ who couldn’t be trusted. In essence, the price of “saving” *Roe* in *Casey* was that someone would replace the doctor as the paternalistic overseer of the woman’s decision, and that someone was the state.

This new adversariness between the woman and the doctor becomes even more explicit in another kind of regulation, where the state interferes directly with the decision-making process about whether to have an abortion at all. Sometimes the state interferes by giving some third party the right to participate—as with parental consent laws (which have mostly been upheld, as long as there’s judicial bypass) or husband/biological father consent laws (which so far have been struck down).²² But the state also inserts itself into the decision through what it calls informed consent. In their most extreme forms, these are the laws which force women to have medically unnecessary ultrasounds and listen to anti-abortion propaganda before they are allowed to have an abortion—usually with a waiting period thrown in to make it more difficult. In these situations, it is clear that what the state is “protecting” the woman from is the abortion itself. The state is not regulating the safety of a medical facility or protecting the woman’s autonomy through informed consent. It is trying to dissuade her from having an abortion because the abortion will be bad for her and she will eventually regret it.²³

All of these supposedly woman-protective arguments for abortion set up the abortion provider as the enemy, the person from whom the woman needs to be protected. That characterization is coming to its fruition in an argument that a few members of the Supreme Court have started to encourage parties to serve up, which is that abortion providers lack standing to challenge abortion restrictions because they have a “blatant conflict of interest” with their patients.²⁴ The doctors and clinics, on this view, are just raking in money from abortions, preying on women in the process. In any other context, this argument against standing would be rightfully dismissed out of hand. It’s well established that the business providing a service can assert the rights of the customer seeking the

21. Justice Kennedy’s dissent in the first “partial-birth abortion” case, *Stenberg v. Carhart*, 530 U.S. 914 (2000), used the word *abortionist* thirteen times.

22. *Casey*, 505 U.S. at 899 (parental consent), 895–98 (spousal notification).

23. See *Casey*, 505 U.S. at 877 (expressly permitting regulations that “create a structural mechanism by which the State . . . may express profound respect for the life of the unborn”); see also *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (justifying restrictions on abortions on the grounds that women might regret having them).

24. *June Med. Servs. L.L.C. v. Russo*, 591 U.S. ___, 140 S.Ct. 2013, 2153 (2020) (Alito, J., dissenting).

service,²⁵ and making an exception to that for abortion is absurd—unless you see the woman’s decision to have an abortion as inherently suspect and wrong and therefore the abortion provider as a sort of evil, coercive figure. Which is how a majority of the Supreme Court now sees it.

If this argument succeeds, it will be a body blow to the usual litigation strategy for protecting abortion rights. A glance through the names of the important abortion cases in the Supreme Court over the last 50 years reveals that the vast majority have been brought by abortion providers—mostly Planned Parenthood—only occasionally by individual women; *Roe* itself was exceptional in that way. I confess, I see a silver lining when it comes to this wedge. Even as the rhetoric around abortion shifted from doctors’ rights to women’s rights, the doctors took over the litigation program, which in my view has done real harm to the side. For example, the issue of “partial-birth abortion” was litigated as a fight between Justices Breyer and Kennedy over whether the doctor or the legislature, respectively, should decide what kind of abortion a woman should have.²⁶ The loss of third-party standing would require a strategic overhaul, and perhaps control over abortion litigation would shift a bit away from medical providers and back toward feminist activists. The standing issue may, however, be moot if a majority of the Court believes it is politically feasible to repudiate *Roe* entirely next year.

THREE **woman / community**

That brings us to the third wedge, between the woman and her community. As Professor Murray has powerfully demonstrated, this looks like the wedge of the future.²⁷ It starts with trait-selection laws. These are laws that prohibit abortion for particular reasons. The first and most common ones are prohibitions on abortion for the purpose of sex selection or because of a genetic anomaly in the fetus. We know people have abortions for these reasons—probably very few for sex-selection, but more for genetic anomalies, which are widely considered a legitimate reason for abortion, among those in the habit of passing judgment.

25. See Elika Nassirinia, *Third-Party Standing and Abortion Providers: The Hidden Dangers of June Medical Services*, 16 NW. J.L. & SOC. POL’Y 214 (2021).

26. Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 370 (2010) (“Not until Justice Ginsburg’s dissent in *Carhart II* was there any suggestion that the pregnant woman might be an appropriate decision-maker.”).

27. Murray, *supra* note 3, at 2040–41.

Trait-selection laws represent a step away from the idea of the woman as the victim of abortion and move her back into the perpetrator role. With these laws, it's actually the doctor who is supposed to be the front-line enforcer, refusing to perform the abortion if the woman's reason is illegitimate. Trait-selection laws also incorporate a kind of personhood argument. They cast the fetus as the person it could become and make an implicit argument about discrimination against that sort of potential future person. Thus, part of the power of trait-selection laws is that they appeal to left/liberal concerns about social justice, sex and disability discrimination, and how those relate to abortion. They invite observers to make the critical error of conflating two questions: (1) what do I think are good reasons for having an abortion? and (2) when should the state force women through pregnancy and childbirth?

Recently, the Supreme Court's attention was briefly turned to a trait-selection law that adds one more prohibited basis for abortion. In addition to sex and disability, laws in a few states prohibit abortion because of the fetus's race. One of those states was Indiana. Its trait-selection law was struck down by the Seventh Circuit, and the Supreme Court ultimately denied review, but Justice Thomas wrote a concurrence highlighting the question of race-selection in abortion as one the Court must soon face.²⁸

We're used to hearing traits like race, sex, and disability grouped together in discrimination law, but pause and notice what is odd in this context. What is the scenario that the Indiana legislature is imagining, in which a woman considers race as a factor in deciding to have an abortion? One might imagine a scenario in which a White woman decides to abort because she got pregnant with a Black man. For example, a White lesbian couple recently sued a fertility clinic for giving them the wrong sperm. Specifically, they had selected a White sperm donor but were given sperm from a Black donor. Most of their claimed damages flowed from the racial aspect of the error—that they and their daughter would now have to contend with racism in their lives—rather than any of the other characteristics for which they may have selected one donor over another.²⁹ One could imagine that, if the error had been discovered early, the woman who was pregnant might have decided to have an abortion and try again. Under Indiana's trait-selection law, that abortion would presumably have been illegal.

28. *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 587 U.S. ___, 139 S.Ct. 1780, 1782 (2019).

29. *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct. Sept. 29, 2014), 2014 WL 4853400. See generally Camille Gear Rich, *Contracting Our Way to Inequality: Race, Reproductive Freedom and the Quest for the Perfect Child*, 104 MINN. L. REV. 2375 (2020).

This unusual case, however, is not what trait-selection laws are about. Including race in trait-selection laws is a way of invoking a narrative that abortion is a kind of eugenics—specifically, that abortion is “Black genocide.” What that means is that these laws are aimed at Black women—not in a very practical way, but the point is to accuse Black women of participating in eugenics and genocide against the Black community for having abortions. This narrative has been around for a long time. As Professor Murray elucidates, it has a history in the anti-abortion movement but also in the more male-oriented civil rights groups, with, for example, some Black Panthers embracing the argument that White society, by allowing Black women to have abortions, was targeting and trying to eliminate the Black community.³⁰ This is an argument that Justice Thomas has invited states to make in the future as a justification for overturning *Roe* and banning abortion.

This argument picks up on and co-opts arguments from the feminist left, in this case from the reproductive justice movement. “Reproductive justice” is a concept that includes reproductive rights as lawyers traditionally think of them in law but also a much broader struggle against reproductive oppression.³¹ It comes out of the experience and activism of Black women, who among many other concerns have argued that the large, White-dominated feminist organizations put too much emphasis on abortion and contraception and not enough on other forms of reproductive oppression—forced sterilization, environmental racism that leads to infertility, poverty and state-sponsored violence that interfere with being able to raise children with dignity, and family separation policies aimed at children of color. All of those aspects of reproductive justice, and reproductive oppression, contribute to why Black women disproportionately have abortions, and there is no question that the movements for contraception and abortion rights were racist; indeed, the head of Planned Parenthood recently published an opinion piece in the *New York Times* titled, “We’re Done Making Excuses for Our Founder.”³² But what Justice Thomas and others who put this argument forward do is put the blame not on Margaret Sanger and her ilk but on the Black woman seeking the abortion, the woman who is coping with all of that oppression

30. Murray, *supra* note 3, at 2041–45.

31. See generally Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327 (2014); Dorothy Roberts, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 308–12 (2d ed. 2017) (setting out an agenda for incorporating reproductive justice priorities into the legal system’s understanding of reproductive liberty).

32. Alexis McGill Johnson, *I’m the Head of Planned Parenthood. We’re Done Making Excuses for Our Founder*, N.Y. TIMES (Apr. 17, 2021), <https://www.nytimes.com/2021/04/17/opinion/planned-parenthood-margaret-sanger.html>.

and making the best decision that she can see for herself and her family. They're blaming her and calling her the eugenicist.

Where is that argument going? It doesn't really have much to do with trait-selection laws. Rather, as Professor Murray powerfully warns, it is a frontal attack of *Roe* as irretrievably tainted by eugenics, so that it can be overruled as the product of a racist program, a modern-day *Dred Scott*.³³ And be clear. The end-game here is not just to overrule *Roe* in the sense many people continue to naively assume, where abortion gets "sent back to the states." Abortion has already been sent back to the states; *Casey* and the undue burden test did that. The trajectory of this argument is not just to overrule *Roe* but to establish a right to life for the fetus, superior to the rights of the pregnant woman, not through a constitutional amendment but through a Supreme Court decision, so that the Supreme Court would rule not just that abortion is unprotected but that it is, in fact, constitutionally prohibited everywhere in the U.S.³⁴

Conclusion

Justice Breyer should announce his retirement immediately.³⁵

33. Murray, *supra* note 3, at 2071–88.

34. The easiest path for preventing states from allowing abortion would be for the Supreme Court to declare that fetuses are "persons" and that it is a violation of the Equal Protection Clause for states to exclude abortion from criminal homicide laws. *See, e.g.*, Charles I. Lugini, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 4 GEO. J.L. & POL'Y 361, 364–65 (2006) ("The Fourteenth Amendment would thereafter prohibit abortion in every state.").

35. *See* Paul F. Campos, *Justice Breyer Should Retire Right Now*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/opinion/stephen-breyer-supreme-court.html> ("At the moment, no fewer than six Democratic senators over the age of 70 represent states where a Republican governor would be free to replace them with a Republican, should a vacancy occur.")