TAMING UNWORKABILITY DOCTRINE: Rethinking *Stare Decisis*

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Unworkability, a factor in the Supreme Court's analysis of stare decisis, has played a central role in recent blockbuster decisions, including Janus v. American Federation of State, County, and Municipal Employees, Council 31 *and* South Dakota v. Wayfair, Inc. *Since the retirement of Anthony Kennedy, unworkability has taken on additional importance, especially since the Court seems more likely to reconsider decisions including* Roe v. Wade *and* Planned Parenthood v. Casey. *Despite the importance of unworkability jurisprudence, there is relatively little scholarship about its evolution or meaning. This Article offers an original legal history of the surprising relationship between abortion law and unworkability.*

As abortion opponents successfully crafted multiple, sometimes conflicting definitions of unworkability, the Court's approach to stare decisis has grown increasingly muddled, both inside and outside the abortion context. The Court has treated decisions as unworkable because they are open-ended, incremental, controversial, or incoherent. The Court has further blurred the distinction between unworkable decisions and those that are substantively wrong or likely to undermine the rationale stated by the Court. The murkiness of unworkability doctrine is dangerous, offering the Court a way to overturn established precedent without offering a principled or honest reason for doing so.

To rationalize its approach to unworkability, the Court should focus only on whether a precedent is internally incoherent and whether there is a major disconnect between a rule and its stated rationale. By contrast, other considerations that have influenced unworkability doctrine, like the generation of inconsistent results or a lack of guidance for the lower courts, do not reveal anything meaningful about the inherent flaws in a rule. If anything, other definitions allow the Court to undo precedent without transparency or a principled analysis.

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INTRODUCTION

Unworkability, a factor in the Supreme Court's analysis of *stare decisis*, has played a central role in recent blockbuster decisions, including *Janus v. American Federation of State, County, and Municipal Employees, Council 31*[1] and *South Dakota v. Wayfair, Inc*.[2] Moreover, with the exit of Justice Anthony Kennedy, the fate of other major precedents seems uncertain, among them *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[4] Despite the importance of unworkability jurisprudence, there is relatively little scholarship about its evolution or meaning.[5] This Article offers an original legal history of the surprising relationship between abortion law and unworkability.

As abortion opponents successfully crafted multiple, sometimes conflicting definitions of unworkability, the Court's approach to *stare decisis* has grown increasingly muddled, both inside and outside the abortion context. The Court has treated decisions as unworkable because they are open-ended, incremental, controversial, or incoherent. The Court has further blurred the distinction between unworkable decisions and those that are substantively wrong or likely to undermine the rationale stated by the Court. The murkiness of unworkability doctrine is dangerous, offering the Court a way to overturn established precedent without offering a principled or honest reason for doing so.

To rationalize its approach to unworkability, the Court should focus only on whether a precedent is internally incoherent and whether there is a major disconnect between a rule and its stated rationale. By contrast, other considerations that have influenced unworkability doctrine, like the generation of inconsistent results or a lack of guidance for the lower courts, do not reveal anything meaningful about the inherent flaws in a rule. If anything, other definitions of unworkability allow the Court to undo precedent without transparency or a principled analysis.

The Article proceeds in four parts. Part I explores the history of the politicization of unworkability elsewhere in the abortion context. This

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1. 138 S. Ct. 2448 (2018).
2. 138 S. Ct. 2080 (2018).
3. 410 U.S. 113 (1973).
4. 505 U.S. 833 (1992) (plurality opinion).
5. *See, e.g.*, Todd E. Freed, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767, 1792–97 (1996); Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1161–63 (2015); Thomas R. Lee, *Stare Decisis Analysis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 676–79 (2000); Lauren Vicki Stark, Note, *The Unworkable Unworkability Test*, 80 N.Y.U. L. REV. 1665 (2005).

campaign shaped the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[6] and following *Casey*, abortion opponents promoted even more definitions of unworkability. Part II examines the Court's unworkability doctrine, considering how abortion law has influenced the Court's conflicting definitions of unworkability. Part III proposes an improved definition and explores how it would apply in recent cases. Part IV briefly concludes.

I. CREATING UNWORKABILITY: A HISTORY

Unworkability has increasingly become a touchstone in the Court's analysis of whether a precedent deserves ongoing support.[7] Other commentators have taken the Court to task for failing to define unworkability, especially as it appears in abortion doctrine.[8] But where did this idea of unworkability come from, and what are its political and constitutional stakes?

As this Part shows, unworkability has always been a part of the Court's approach to *stare decisis*, but as the attack on *Roe v. Wade* intensified, pro-life attorneys politicized the idea of unworkability and sought to radically expand it. This Part next considers how the antiabortion unworkability campaign emerged. In the mid-1980s, after abortion foes unsuccessfully tried to convince the Court to replace *Roe*'s trimester framework with a more relaxed standard of review, pro-life attorneys observed inconsistencies in the Court's prior abortion decisions. These potential conflicts, in turn, served as the foundation of a new plan of attack: pro-life lawyers could generate evidence that *Roe* was unworkable and use this proof to demand that the 1973 decision be overruled. This Part traces the rise of this strategy and its reception in *Casey*. This Part examines how *Casey* both reflected and transformed these arguments about unworkability. After *Casey*, as this Part documents, pro-life attorneys did not abandon an unworkability strategy. Instead, antiabortion lawyers offered new definitions of unworkability—a process that accelerated following the Court's 2016 decision in *Whole Woman's Health*.[9] By defining unworkability more broadly, antiabortion attorneys offered the Court more ways to undo *Roe*. Their campaign helped to inject more confusion into the Court's unworkability jurisprudence.

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6. *See infra* Part I and accompanying text.
7. *See infra* Part III and accompanying text.
8. *See, e.g.*, Stark, *supra* note 5.
9. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

A. The Unworkability Factor Emerges

The abortion wars did not create the idea of unworkability. Indeed, in modern cases, the Court occasionally invoked unworkability before 1992 in setting aside an established precedent. For example, the concept played a part in the decision in *Swift & Co. v. Wickham*, a 1965 case involving a company that sold frozen stuffed turkeys.[10] Believing that New York law required labeling practices that seemed to conflict with a relevant federal law, Swift contended that New York's law violated the Commerce Clause and the Fourteenth Amendment.[11] Under a then-applicable statute, Swift requested that a three-judge district court hear the appeal.[12] In an earlier case, *Kesler*, the Court had handed down a rule for determining when a three-judge panel was required, distinguishing between cases in which a constitutional issue was immediately evident from those in which substantial interpretation was first required.[13] The Court overruled *Kesler* largely because it had proved unworkable.[14] What did *Swift* seem to mean by unworkability? The Court noted several factors: 1) an apparent scholarly consensus that *Kesler* was a bad decision; 2) efforts by the lower courts to decide cases without addressing the issues central to *Kesler*; and 3) evidence that the lower courts did not understand *Kesler* or find enough guidance in the original decision to apply it faithfully.[15]

Before the 1990s, however, the Court rarely discussed unworkability and never did so at any length. This Part turns next to the legal and political history of efforts to establish that *Roe* was unworkable, tracing how they influenced the Court's decision in *Casey*—and the Court's understanding of unworkability. Pro-lifers' approach to unworkability came after a period of experimentation. At first, antiabortion attorneys, dismayed by *Roe*, searched for any regulation that the Court might uphold. When the justices did sustain some abortion regulations, pro-lifers hoped for more and began looking for a doctrinal alternative to the trimester framework in *Roe.* In particular, abortion foes seized on the idea that only some laws were unduly burdensome. But in the 1980s, a majority did not adopt the undue-burden standard, and the Court strongly reaffirmed that the Constitution protected abortion.

Looking for a new tactic, abortion foes recognized that the very inconsistency of the Court's decisions could be a weapon. Regardless of whether the Constitution protected abortion, as these abortion opponents

10. Swift & Co. v. Wickham, 382 U.S. 111 (1965).
11. *Id.* at 113–14.
12. *Id.* at 114.
13. Kesler v. Dep't of Pub. Safety, 369 U.S. 153, 157 (1962).
14. *Swift*, 382 U.S. at 124–27.
15. *Id.* at 124–25.

argued, *Roe* had proven unworkable. To demonstrate the unworkability of *Roe*, pro-lifers would seek out wins but settle for conflicting outcomes that would help to build the case against *Roe.*

B. Any Law that the Court Would Tolerate

In the years after *Roe v. Wade*, abortion foes seemed to have limited options in the courts. The Supreme Court had invalidated most of the nation's abortion restrictions and seemed unlikely to tolerate many new ones.[16] *Roe* had set out a trimester framework: in the first trimester, the government had very little ability to regulate abortion.[17] In the second trimester, states could act to protect women's health, and only after fetal viability could the government protect fetal life.[18] Notwithstanding a major defeat in *Roe*, abortion foes almost immediately proposed laws that obviously applied in the first trimester, including laws banning public funding for abortion, mandating counseling, or requiring the consent of a parent or spouse.[19] What was the point of these laws? For the most part, pro-life attorneys channeled their energies into seeking a constitutional amendment banning abortion.[20] Moreover, the kind of incremental laws proposed in the states might not stop any abortions.[21]

At a 1973 strategy meeting, abortion opponents offered insight into the reasons for promoting these new incremental restrictions.[22] One activist explained the value of experimenting to see what *Roe* meant—and how far state lawmakers could go in limiting abortion.[23] Even if a court ultimately struck down a law, such regulations might reduce the number of pregnancies terminated while a challenge made its way through the courts.[24]

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16. *See, e.g.*, LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 203, 211 (1992).

17. Roe v. Wade, 410 U.S. 113, 164–65 (1973).

18. *Id.*

19. For an overview of these laws, see Meeting Minutes from the NRLC Ad Hoc Strategy Meeting (Feb. 11, 1973) (on file with the Gerald Ford Memorial Library, University of Michigan) [hereinafter NRLC Ad Hoc Strategy Meeting].

20. *See, e.g.*, Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE 128, 144 (Donald T. Critchlow ed., 1996).

21. On the tensions created by an incremental approach see, for example, Caitlin E. Borgmann, *Roe v. Wade's 40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights Movement?*, 24 STAN. L. & POL'Y REV. 245, 245–49 (2013).

22. NRLC Ad Hoc Strategy Meeting, *supra* note 19, at 4–12.

23. *See id.*

24. *Id.*

Antiabortion attorneys had to develop a doctrinal framework that would allow states to experiment with abortion restrictions. In court, pro-life lawyers insisted that *Roe* did not disallow all restrictions in the first trimester.[25] Attorneys first experimented with this strategy in *Planned Parenthood of Central Missouri v. Danforth*, the first case after *Roe* to make it to the Supreme Court.[26] The case involved a multi-part Missouri law, including a new definition of viability, prohibition of saline abortions, and requirements of informed consent, parental consent, and spousal consent.[27]

Rather than demanding that *Roe* be overturned, Missouri and antiabortion amici asserted that each part of the law was constitutional under *Roe*.[28] John Danforth, the Missouri Attorney General, first argued that *Roe* did not prohibit first-trimester regulations that aided women making a decision about abortion.[29] "By requiring that the woman consent in writing to the abortion the State seeks to formalize the decision-making process, to increase the woman's opportunity to reflect upon a serious decision and to enable her to recognize that in the final analysis only she can decide to terminate her pregnancy," Missouri contended in defending the informed-consent law.[30]

Similarly, when it came to the spousal-consent provision, Americans United for Life (AUL), a pro-life group, emphasized that *Roe* had deliberately avoided addressing such regulations.[31] Moreover, as AUL saw it, a spousal-involvement requirement was perfectly in line with the logic of *Roe*.[32] AUL argued that much as *Roe* recognized that unwanted parenthood could be a source of trauma for women, the deprivation of wanted parenthood would emotionally scar men.[33] And *Roe*'s trimester framework, as AUL saw it, dealt only with the relationship between women and the government—not the fundamental parental rights of men.[34]

At first, in *Danforth* and subsequent cases, antiabortion attorneys simply looked for any way to convince the Court to uphold an abortion regulation. But the approach taken in *Danforth* yielded some results: while the Court

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25. *See infra* notes 29, 31 and accompanying text.
26. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).
27. *Id.* at 58.
28. *See infra* notes 29, 31 and accompanying text.
29. *See* Brief of John C. Danforth, Attorney General of Missouri at 29–33, *Danforth*, 428 U.S. 52 (Nos. 74-1151, 74-1419), 1976 WL 178720, at *29–33.
30. *Id.* at *14.
31. *See* Motion and Brief, Amicus Curiae of Dr. Eugene Diamond and Americans United for Life, Inc., in Support of Appellees in 74-1151 and Appellants in 74-1419 at 104–08, *Danforth*, 428 U.S. 52 (Nos. 74-1151, 74-1419), 1976 WL 178721, at *104–08.
32. *See id.*
33. *See id.* at *107.
34. *See id.* at *106–07.

struck down most of the Missouri law, the justices upheld a mandated-counseling provision, relying on reasoning similar to that used by Missouri and antiabortion amici.[35] "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences," *Danforth* explained.[36] "The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent."[37]

After *Danforth*, pro-life attorneys hoped to build on their limited past successes, suggesting that some abortion regulations passed muster under *Roe*. AUL, then the nation's largest antiabortion public interest litigator, next experimented with this approach in the context of laws banning the use of public funding or facilities for abortion.[38] The Court took on a trio of cases that dealt with this issue.[39] The lead case, *Maher v. Roe*, involved a Connecticut law prohibiting Medicaid reimbursement for non-therapeutic abortions.[40] Connecticut defended the law by arguing that it did not interfere with women's ability to make decisions about abortion but rather only with their ability to receive welfare benefits.[41] AUL elaborated on this argument, reasoning that *Roe* recognized a right to freedom from state interference but in no way guaranteed women the ability to effectuate their decision.[42]

Maher upheld the disputed regulation, and its language held out more promise for abortion foes looking for a reversal strategy.[43] After surveying recent abortion cases, the Court concluded that Connecticut's law differed from those previously invalidated under *Roe*.[44] "*Roe* did not declare an unqualified 'constitutional right to an abortion,'" *Maher* held.[45] "Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[46] As the Court saw it, the obstacle created in *Maher*—poverty—came not from the government

35. *Danforth*, 428 U.S. at 65–67.
36. *Id.* at 67.
37. *Id.*
38. *See infra* note 41 and accompanying text.
39. Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).
40. *Maher*, 432 U.S. at 466.
41. Brief of the Appellant at 9–19, *Maher*, 432 U.S. 464 (No. 75-1440).
42. *Id.* at 6–9.
43. *Maher*, 432 U.S. at 473–74.
44. *Id.*
45. *Id.* at 473.
46. *Id.* at 473–74.

but from circumstances not under the state's control.[47] As a result, Connecticut's statute did not create an undue burden.[48]

C. A New Doctrinal Framework

As the Court prepared to hear a challenge to the Hyde Amendment, a federal prohibition on the Medicaid funding of abortion, pro-life attorneys began arguing that after *Maher*, some (or perhaps all) abortion regulations fell under an alternative to the trimester framework—the unduly-burdensome approach.[49] *Maher* had used similar language in upholding Connecticut's funding law.[50] So did an earlier decision involving the abortion rights of minors.[51] To be sure, it was far from clear whether this language constituted a full-fledged doctrinal approach. The Court had made clear that minors' rights were different, and abortion funding also touched on subsidies for rights—a different issue than the civil or criminal sanctions tied to most abortion regulations.[52] But antiabortion attorneys seized on this language to argue that the trimester framework did not always—or ever—apply.

If the Court adopted a less-exacting test, then more abortion regulations would survive. As important, by suggesting that more than one constitutional test applied, abortion foes could introduce more confusion into abortion doctrine, showing that it was impossible to predict how the Court would evaluate abortion regulations.

In defending the Hyde Amendment, National Right to Life Committee (NRLC), the largest national antiabortion group, for example, argued that there were already three tests applicable in the abortion context.[53] According to NRLC, rational basis applied when an obstacle did "not impact upon the woman's freedom to make a constitutionally protected decision, or if they merely [made] the physicians' work more laborous [sic] or less independent without any impact on the patient."[54] NRLC reasoned that if a restriction did impact a woman's abortion decision, then the Court would strike it down only if it "*unduly burdens* the abortion decision *and* is not supported by a

47. *Id.* at 474.
48. *Id.*
49. *See infra* notes 56, 62 and accompanying text.
50. *Maher*, 432 U.S. at 473–74.
51. *See* Bellotti v. Baird, 428 U.S. 132, 148–50 (1976).
52. *See supra* notes 48, 49 and accompanying text.
53. Brief Amicus Curiae of the National Right to Life Committee, Inc. for Appellants Williams and Diamond at 6, Williams v. Zbaraz, 448 U.S. 358 (1980) (No. 79-4).
54. *Id.*

compelling state interest."[55] NRLC leaders hoped that such arguments would convince the Court to uphold more abortion laws.[56] As important, by sowing confusion in abortion doctrine, NRLC played a longer game. Introducing conflicting rules would help to suggest that *Roe* was unworkable and make the case that the Court should overturn *Roe.*

McRae upheld the Hyde Amendment, encouraging antiabortion attorneys who hoped that the justices might officially reject the trimester framework in favor of a less protective approach.[57] When the Court agreed to hear a challenge to an Akron, Ohio, abortion ordinance, pro-life lawyers submitted briefs suggesting that the undue-burden standard already applied to all abortion regulations.[58] How did the undue-burden regulation differ from abortion regulations? As abortion foes framed it, the test allowed not just for funding bans but for abortion regulations that helped women.[59] According to Akron and antiabortion amici, several restrictions met this standard, including laws that required mandated counseling and laws requiring that second-trimester abortions be performed in hospitals.[60]

In *City of Akron v. Akron Center for Reproductive Health*, this strategy delivered mixed results. On the one hand, Justice Sandra Day O'Connor, the first nominee chosen by President Ronald Reagan, seemed receptive to the undue-burden standard.[61] "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" Justice O'Connor wrote, echoing the argument in NRLC's brief.[62] In Justice O'Connor's view, few regulations would create such a burden—only those involving "absolute obstacles or severe limitations on the abortion decision."[63] Justice O'Connor's dissenting opinion held out the possibility that the Court might retreat from protecting abortion rights.[64] But only two other justices joined Justice O'Connor's opinion, and the majority struck down most of the Akron ordinance.[65] It was

55. *Id.* at 7.
56. *Id.*
57. Harris v. McRae, 448 U.S. 297, 326–27 (1980).
58. *See* Brief Amicus Curiae of Americans United for Life in Support of Petitioner, City of Akron at 2–3, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (No. 81-746); Petition for a Writ of Certiorari at 10–11, *Akron Ctr. for Reprod. Health*, 462 U.S. 416 (No. 81-746).
59. *See supra* note 58 and accompanying text.
60. *See supra* note 58 and accompanying text.
61. *Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452–53 (1983) (O'Connor, J., dissenting).
62. *Id.* at 463.
63. *Id.* at 464.
64. *See id.* at 464–66.
65. *Id.* at 452.

far from clear whether pro-lifers' reversal strategy would work in the foreseeable future.

Changes in the Court's composition offered further reason to change course. By the mid-1980s, pro-life attorneys revised their strategy: rather than advocating for a new doctrinal approach (like the undue-burden standard), antiabortion attorneys would use the disparate results of past abortion decisions as evidence that *Roe* was unworkable.

D. Doctrinal Chaos

The first step in using unworkability as a weapon came in the Reagan Administration's amicus curiae brief in *Thornburgh v. American College of Obstetricians and Gynecologists*.[66] *Thornburgh* addressed a multi-part Pennsylvania law.[67] Abortion foes hoped to distinguish the law from the one struck down in *City of Akron* and did not contend that *Roe* should be overruled.[68] In its amicus brief, by contrast, the United States argued that *Roe* had become unsound in principle and unworkable in practice.[69]

What made *Roe* unworkable? In part, the United States pointed to the reasoning of the original decision, especially the Court's reliance on viability.[70] This move made sense: after all, in *Akron I*, the dissenting justices skeptical of *Roe* had highlighted how much viability could change as technology develops.[71] Moreover, as the United States argued, the "increasingly complex line-drawing of its progeny" proved that *Roe* was unworkable.[72] If a decision left questions open or required careful factual distinction, as the United States argued, that suggested that a decision was unworkable.[73] And the fact that neither the public nor the legal community uniformly accepted *Roe* evidenced its unworkability.[74] As the United States reasoned, the very fact that parties continued to litigate abortion cases

66. Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

67. *Id.* at 750.

68. *See, e.g.*, Brief Amicus Curiae of the National Right to Life Committee, Inc., for Appellants Richard Thornburgh, et al. at 6–10, *Thornburgh*, 476 U.S. 747 (No. 84-495); Brief Amici Curiae of Olivia Gans, Terryl Carlson and Suzi Dewing for Appellants Richard Thornburgh, et al. at 8–29, *Thornburgh*, 476 U.S. 747 (No. 84-495).

69. Brief for the United States as Amicus Curiae in Support of Appellants at 16–17, *Thornburgh*, 476 U.S. 474 (Nos. 84-495 and 84-1379).

70. *Id.* at 20–23.

71. *Id.* at 22–23.

72. *Id.* at 23.

73. *Id.* at 22–23.

74. *See id.* at 27–28.

demonstrated that *Roe* was not a viable precedent.[75] "Each time, the set of rules will get longer and more intricate," the United States explained.[76] "This is an inappropriate burden to impose on any court, or on any Constitution."[77]

Thornburgh motivated pro-lifers to develop a more elaborate strategy to prove that *Roe* was unworkable.[78] Although a majority struck down the entire Pennsylvania law, four justices dissented, asking fundamental questions about the validity of *Roe*.[79] It seemed that the doctrinal inconsistency characterizing abortion law had helped to convince the dissenters that *Roe* should be overruled.[80]

Now that it seemed possible to overturn *Roe* in the near term, abortion foes could deliberately try to produce more doctrinal chaos. And *Thornburgh* showed that abortion foes were one vote shy of a majority potentially willing to overturn *Roe*.[81] Establishing the unworkability of *Roe* would give skeptical justices the reason they needed to overturn the 1973 decision. These arguments appeared inside and outside of Court.[82] For example, James Bopp Jr. and Richard Coleson of the National Right to Life Committee, helped to publicize the unworkability of *Roe*.[83] Bopp and Coleson foregrounded the "instability and uncertainty" created by inconsistent results.[84] As they argued, these decisions made it impossible for states to know which regulations were permissible.[85] "[I]t is difficult, if not impossible, to predict what the Court will do with any regulation."[86]

After the Court decided another abortion case, *Webster v. Reproductive Health Services*,[87] pro-life attorneys believed that it might be possible to undo *Roe* in the near term. Decided in the summer of 1989, *Webster* did not overturn *Roe*, but a plurality reasoned that *Roe* was unworkable in practice, energizing those seeking to make related arguments.[88] Some, like Antonin

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75. *See id.* at 28–30.
76. *Id.* at 23.
77. *Id.*
78. *See Thornburgh*, 476 U.S. 747, 773–82 (Stevens, J., concurring).
79. *Id.* at 782–85 (Burger, C.J., dissenting); *id.* at 785–814 (White & Rehnquist, JJ., dissenting); *id.* at 814–33 (O'Connor, J., dissenting).
80. *See supra* note 78 and accompanying text.
81. *See supra* note 78 and accompanying text.
82. *See, e.g.*, *infra* note 83 and accompanying text.
83. *See, e.g.*, James Bopp, Jr. & Richard Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181, 201 (1989).
84. *Id.*
85. *See id.*
86. *Id.*
87. 492 U.S. 490 (1989).
88. *Id.* at 518–21.

Scalia, thought that the time had come to overturn *Roe* directly.[89] A majority, however, concluded that the Missouri statute was far narrower than the one at issue in *Roe*.[90] Because the fate of the 1973 decision was not directly before the Court, *Webster* declined to overturn *Roe*.[91] Yet many on the Court seemed to accept that *Roe* was unworkable.[92] The unusual nature of the trimester framework troubled the plurality.[93] "Since the bounds of the inquiry are essentially indeterminate," *Webster* explained, "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."[94]

Following *Webster*, abortion foes set out to create even more doctrinal confusion, using this chaos as a justification for overruling *Roe*.[95] Bopp and Coleson advanced this strategy in a Louisiana case, *Sojourner T v. Edwards*, that involved a model antiabortion law proposed by NRLC after 1989.[96] The law outlawed most abortions, allowing for the procedure only in limited circumstances, like cases of rape, incest, or a threat to a woman's life.[97] Louisiana passed the model law, and abortion-rights supporters challenged it in court, arguing that it was unconstitutional.[98]

Bopp and Coleson responded that while the law might have been unconstitutional under *Roe*, *Webster* had overturned *Roe* and implemented a new constitutional standard.[99] According to Bopp and Coleson, *Webster* had jettisoned the trimester framework and recognized that the government had compelling interests in maternal health and fetal life throughout pregnancy.[100] Bopp and Coleson reasoned that *Webster* might require the most forgiving form of review, rational basis, or might still demand that the government have a compelling interest.[101] In either case, the two claimed that the law was

89. *See id.* at 532–35 (Scalia, J., dissenting).
90. *See id.* at 518–21.
91. *See id.*
92. *See id.*
93. *See id.*
94. *Id.* at 518.
95. *See infra* notes 96, 99 and accompanying text.
96. Sojourner T v. Edwards, 974 F.2d 27, 29–30 (5th Cir. 1992).
97. *Id.* at 29.
98. *See id.* at 30.
99. *See* James Bopp, Jr. & Richard Coleson, *Webster and the Future of Substantive Due Process*, 28 DUQ. L. REV. 271, 272 (1989).
100. *See id.* at 272–76.
101. *See id.*

constitutional.[102] Bopp and Coleson made discussion of abortion doctrine murkier, creating confusion about what *Webster* as well as *Roe* required.[103]

E. Unworkability and Casey

After *Webster*, many believed that it was only a matter of time before the Court overturned *Roe.*[104] Although some states passed aggressive laws, the Court agreed to hear a challenge to a multi-restriction Pennsylvania law.[105] The Third Circuit had applied a version of Justice O'Connor's undue-burden standard, striking down every provision but a spousal-notification regulation.[106]

Moreover, as abortion foes politicized unworkability, the Court offered a more comprehensive account of what it entailed in *Payne v. Tennessee*.[107] In *Payne*, a death-penalty case, the Court revisited its past rulings on the consideration of victim-impact statements by juries, overturning an earlier precedent erecting a per-se bar preventing jurors from considering such evidence.[108] During the litigation of *Payne*, the parties specifically drew on ideas of unworkability that emerged in the abortion context. Pervis Payne, the defendant, justified the earlier per-se ban by comparing it to the rule in *Roe*.[109] The test for unworkability, Payne suggested, was whether "experience demonstrates that it has spawned an 'unworkable scheme' that has resulted in 'a major distortion in the Court's constitutional jurisprudence.'"[110] Quoting a dissent from the Court's abortion decision in *Thornburgh*, Payne suggested that the standard for unworkability came from the abortion context and that his case did not meet it.[111] Tennessee similarly cited *Thornburgh*'s dissent as the standard for unworkability, asking whether the per-se ban had created a "major distortion" in the Court's jurisprudence.[112]

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102. *See id.*

103. *See id.*

104. *See, e.g.*, Dawn Johnsen, *Abortion: A Mixed and Unsettled Legacy*, *in* THE REHNQUIST LEGACY 301, 316 (Craig Bradley ed., 2006).

105. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843–45 (1992).

106. *See* Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 687–92 (3d Cir. 1991).

107. 501 U.S. 808 (1991).

108. *See id.* at 824–29.

109. *See* Brief of Petitioner at 17–18, Payne v. Tennessee, 501 U.S. 808 (1991) (No. 90–5721).

110. *Id.* (citing Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting)).

111. *See id.*

112. Brief of Respondent at 29, *Payne*, 501 U.S. 808 (No. 90–5721).

Payne overturned the precedents that had created the per se ban, suggesting that it was unworkable without clearly explaining why.[113] What clues were there that the ban was unworkable? The Court pointed first to the nature of the disagreement among the justices when the bar was originally created, suggesting that it was both foundational and unusually heated.[114] This level of conflict, as *Payne* framed it, was a sign that something was wrong.[115] Second, *Payne* indicated that a plurality of justices were no more convinced as time went on.[116] This ongoing dispute suggested that time had not mitigated dissenters' original objections.[117] Finally, *Payne* stressed that the lower courts had not consistently interpreted its previous precedents, suggesting a lack of internal coherence.[118]

While the Court considered *Casey*, antiabortion amici joined Pennsylvania in building on *Payne*, offering new and expansive definitions of unworkability. One amicus brief submitted by Representative Henry Hyde and other antiabortion lawmakers contended that disagreement within the Court proved that *Roe* was unworkable.[119] The brief explained that because "*Roe* [was] no longer viewed as stable or fully intact," it had proven unworkable.[120] Second, *Roe* was unworkable because it was politically divisive: "public opinion polls show[ed] consistent majority support for restrictions on abortions far more stringent than allowed by *Roe*."[121] Finally, because *Roe* tied the trimester framework to a changing date of viability, it was unworkable because it would generate inconsistent results over time.[122]

NRLC also adopted multiple contrasting definitions of unworkability. NRLC first stressed that *Roe* had promised legislators more regulatory latitude than subsequent cases permitted.[123] In this way, NRLC suggested that *Roe* was unworkable because "the Court [had] effectively removed from the states' elected representatives the ability to regulate abortion."[124] Second, NRLC contended that *Roe* was unworkable because abortion remained

113. *See Payne*, 501 U.S. at 826–28.
114. *See id.* at 828–29.
115. *See id.*
116. *See id.* at 826–29.
117. *See id.*
118. *See id.*
119. *See* Brief Amicus Curiae of Hon. Henry Hyde et al. at 18–27, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91–744, 91–902).
120. *Id.* at 3.
121. *Id.* at 11.
122. *See id.* at 12–13.
123. *See* Brief Amicus Curiae of National Right to Life, Inc. Supporting Respondents/Cross-Petitioners at 6, *Casey*, 505 U.S. 833 (No. 91–744, 91–902).
124. *Id.*

politically controversial.[125] "Because of its weak foundation, *Roe* exacerbated the abortion controversy," NRLC argued.[126] Finally, NRLC defined *Roe* as unworkable because it had encouraged the lower courts to adopt what the organization saw as erroneous ideas about fetal rights in tort, property, and other areas of the law.[127] Unworkability, as NRLC saw it, could mean unduly broad, unpopular, or likely to create undesirable consequences.[128] Catholics United for Life, another antiabortion group, added that *Roe* was unworkable because it failed to recognize the personhood of the unborn child.[129]

For abortion opponents, unworkability could signal several distinct concepts. Invoking unworkability could speak to the political divisiveness of an opinion.[130] Unworkability could further serve as shorthand for problems with the substance of an opinion, such as its conclusions about fetal rights or the power of states to regulate abortion.[131] Finally, unworkability could come into play when a decision generated inconsistent interpretations in the lower courts.[132] By giving the Court so many competing definitions of unworkability, antiabortion briefs hoped to convince the Court that *Roe* was not worth saving.

Abortion-rights supporters, many of whom expected to lose their case, challenged these expansive definitions of unworkability. First, the petitioners maintained that the breadth of the right recognized in *Roe* made it more, not less, workable.[133] *Roe* offered "clear mandates" that put lawmakers on notice that few regulations would pass muster.[134] The petitioners asserted that *Roe* had simply recognized and protected a constitutional right, not issued an unworkable standard.[135] And to the extent that *Roe* required careful case-by-case decision-making, the petitioners saw no evidence of unworkability.[136]

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125. *See id.* at 7.

126. *Id.*

127. *Id.* at 7–12.

128. *See id.* at 3–17.

129. *See* Brief of Catholics United for Life et al. as Amici Curiae in Support of Respondents and Cross-Petitioners at 20–24, *Casey*, 505 U.S. 833 (No. 91–744, 91–902).

130. *See supra* notes 117, 121 and accompanying text.

131. *See* Brief Amicus Curiae of the Hon. Henry J. Hyde et al. in Support of Respondents, *supra* note 119, at 21–26; Brief Amicus Curiae of the National Right to Life, Inc. Supporting Respondent/Cross Petitioners, *supra* note 123, at 7–12.

132. *See* Brief Amicus Curiae of the National Right to Life, Inc. Supporting Respondent/Cross-Petitioners, *supra* note 123, at 13–17.

133. *See* Brief for Petitioners and Cross-Respondents at 30, *Casey*, 505 U.S. 833 (No. 91–744, 91–902).

134. *Id.*

135. *See id.* at 28.

136. *See id.* at 30.

An amicus brief submitted by abortion-rights lawmakers offered a different perspective on why *Roe* was workable.[137] First, the legislators asserted that workability touched on the viability of other precedents that the Court wanted to retain.[138] The brief suggested that if *Roe* was unworkable, other decisions involving "[t]he freedom that enables individuals to make their own choices about matters of reproduction and family" must be too.[139] As the brief suggested, unworkability depended partly on the soundness of the precedents from which a decision like *Roe* derived.[140] The brief also reiterated that inconsistent cases following *Roe* did not make the original precedent unworkable.[141] "[T]he existence of inevitable distinctions at the margin of a constitutional doctrine does not in any way suggest that its underlying principles are unworkable," the brief reasoned.[142] "The constitutional principles of freedom of speech and of the press, for example, are still considered to be workable, notwithstanding cases drawing fine lines."[143]

In June 1992, when the justices handed down their decision, *Casey* refused to overturn *Roe* but offered a fresh definition (or definitions) of unworkability.[144] *Casey* retained what the plurality called the "essential" holding of *Roe* that the Constitution protected a woman's decision to terminate a pregnancy.[145] In reaching its decision, *Casey* elaborated on the considerations underlying *stare decisis* and then evaluated how they applied in *Casey*.[146] The Court set forth four considerations that came into play when evaluating whether to overturn a precedent:

> whether [a] central rule has been found unworkable; whether [a] rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left [a] central rule a doctrinal anachronism[;] . . . and whether [the] premises of fact have so far changed in the ensuing two decades as to render its central holding

137. *See* Brief for Representatives Don Edwards et al. as Amici Curiae in Support of Petitioners at 24, *Casey*, 505 U.S. 833 (No. 91–744, 91–902).
138. *See id.* at 4.
139. *Id.* at 19.
140. *See id.*
141. *See id.* at 24.
142. *Id.*
143. *Id.*
144. *Casey*, 505 U.S. at 845–46, 854–55.
145. *Id.* at 845.
146. *See id.* at 854–70.

> somehow irrelevant or unjustifiable in dealing with the issue it addressed.[147]

Much of the Court's analysis focused on the final three factors. *Casey* explained that women had ordered their lives around the availability of legal abortion and the certainty that women could avoid pregnancy while pursuing a career or education.[148] When assessing the compatibility of *Roe* with subsequent precedents, *Casey* insisted that later cases strengthened *Roe*, suggesting that the Constitution did respect individual autonomy in key decisions.[149] And the Court did not think that later factual developments, including medical and technological advances, had undermined the principles set forth in *Roe*.[150]

Notwithstanding the centrality of workability in briefs in the case, however, the Court only briefly discussed unworkability, offering little insight into what it meant.[151] Nevertheless, the Court offered a few clues about what did (and did not) define workability.[152] The Court acknowledged that *Roe* required "judicial assessment of state laws."[153] The questions left open by *Roe*, however, did not convince the plurality that it was unworkable.[154]

Nor did the fact that lawmakers or voters disagreed with *Roe*.[155] The plurality acknowledged intense political and moral disagreement about abortion after *Roe*.[156] But according to *Casey*, the fact that the 1973 decision had "engendered disapproval" did not make *Roe* unworkable.[157] If anything, *Casey* suggested that popular disapproval or the resistance of a specific group militated against overturning a precedent.[158] According to the *Casey* Court, succumbing to political pressure would "subvert the Court's legitimacy beyond any serious question."[159] Given that pressure to overturn *Roe* had become more intense, the Court reasoned that public discontent should increase, rather than decrease, reluctance to overturn a precedent.[160]

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147. *Id.* at 855.
148. *Id.* at 856.
149. *Id.* at 860–61.
150. *Id.* at 860.
151. *Id.* at 855–56.
152. *See id.*
153. *Id.*
154. *See id.*
155. *Id.*
156. *Id.* at 850, 869.
157. *Id.* at 860.
158. *See id.* at 867.
159. *Id.*
160. *See id.* at 867–68.

Yet the Court suggested that *Roe*'s trimester framework was unworkable, adopting the undue-burden standard as an alternative. What did unworkability mean in this context? The Court suggested that the framework neither captured the nature of fundamental rights nor the spirit of the 1973 opinion.[161] The fact that women had a liberty interest in choosing to terminate a pregnancy did not mean that all regulations of that right were constitutionally problematic.[162] The framework, as the Court saw it, struck the wrong balance between constitutional considerations and was unworkable as a result.[163] The second way that the trimester framework was unworkable was what the plurality described as a logical flaw. *Roe* had held that the state had an interest in protecting "the potentiality of human life" after viability.[164] But if the government was interested in protecting fetal life, as *Casey* saw it, there was no logical reason that interest came into being only after viability.[165]

F. Unworkability After Casey

Although the effort to convince the Court that *Roe* was unworkable fell short in *Casey*, abortion opponents continued trying to build a case against *Roe*. Indeed, abortion foes retooled their definitions of unworkability, seeking to directly challenge the premises of *Casey*.[166] AUL put out a memo explaining the opportunities created by *Casey*—including a chance to redefine unworkability.[167] First, AUL planned to argue that *Roe* remained unworkable because it did not allow the states to ban or restrict abortion.[168] "*Roe* has been 'workable' only when the Court has abandoned various aspects of *Roe* to uphold abortion regulations," AUL insisted.[169] "Workability must be demonstrated . . . by whether federal courts have been able to apply *Roe* in such a way as to give real meaning to both the state's interests and the woman's interests that *Roe* itself created."[170] AUL also noted that *Casey*

161. *See id.* at 872–78.
162. *Id.* at 875.
163. *See id.* at 872–78.
164. *Id.* at 875–76 (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)).
165. *Id.* at 876.
166. *E.g.*, *infra* note 167 and accompanying text.
167. *See* Clarke D. Forsythe, *AUL Briefing Memo: The Good News About* Planned Parenthood v. Casey, AMERICANS UNITED FOR LIFE, Jul. 1992, *in* The Pro-Life Newsletters Collection (on file at Carton 1, Americans United for Life Folder, Schlesinger Library, Harvard University).
168. *See id.* at 7.
169. *Id.*
170. *Id.*

allowed for mandatory counseling laws.[171] These statutes would allow pro-lifers to show that women should not rely on abortion because it "undermine[s] secure, independent, and healthy lives for American women."[172] AUL thus championed a different idea of unworkability: one centered on the idea that *Casey* struck the wrong balance between fetal rights and abortion autonomy.[173]

As abortion opponents promoted new definitions of unworkability, the Court revisited the concept more often in other decisions. In 1993, *United States v. Dixon* addressed when the Double Jeopardy Clause barred a subsequent prosecution.[174] Conventionally, the Court applied the same-elements test: "whether each offense contains an element not contained in the other; if not, they are the 'same offence' [within the Clause's meaning,] and double jeopardy bars additional punishment and successive prosecution."[175] In a later decision, *Grady v. Corbin*, the Court had added an additional wrinkle: "if, to establish an essential element of an offense charged in that prosecution, the government [had to] prove conduct that constitutes an offense for which the defendant has already been prosecuted," jeopardy applied.[176] *Dixon* ultimately held that *Grady* had proven unworkable.[177] What defined unworkability for the *Dixon* Court? *Dixon* stressed that *Grady* had become "unstable in application," that lower courts had complained about *Grady*, and that the Court had divided consistently about the correctness of *Grady*.[178]

Casey and *Dixon* handled unworkability in markedly different ways. In *Casey*, the Court suggested that neither political controversy nor varying lower court interpretations rendered *Roe* unworkable.[179] By contrast, *Dixon* pointed to controversy about *Grady* in the Supreme Court and lower courts as evidence that the latter was unworkable, and the *Dixon* Court regarded conflicting lower court opinions as proof that *Grady* was impractical to

171. *See id.* at 4–5, 10.

172. *Id.* at 7.

173. *See id.*

174. United States v. Dixon, 509 U.S. 688, 691 (1993).

175. *Id.* at 696. *See also* Blockburger v. United States, 284 U.S. 299, 304 (1932) (holding "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not").

176. Grady v. Corbin, 495 U.S. 508, 510 (1990).

177. *Dixon*, 509 U.S. at 711–12.

178. *Id.* at 709.

179. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–57 (1992).

apply.[180] The Court offered yet another definition of unworkability in *Hudson v. United States*, focusing on the incoherence of the original precedent.[181]

And the Court's definitions of unworkability continued to shift. In 2003, in *Lawrence v. Texas*, a decision striking down criminal sodomy bans, the Court suggested that precedents became unworkable when they generated uncertainty, created inconsistent results, and encouraged litigation.[182] The Court reiterated that vague or open-ended precedents were unworkable the following year.[183] The tension between competing definitions of unworkability was not lost on members of the Court. Those justices who seemed unwilling to overturn *Roe* continued to insist that both *Casey* and *Roe* were unworkable.[184] In 2000, for example, Justice Antonin Scalia insisted that *Casey* was unworkable because it was vague, open to interpretation, and "ultimately standardless."[185] According to Scalia, *Casey* was also unworkable because it failed to settle controversy about abortion.[186]

Abortion opponents took greater interest in unworkability arguments when it again seemed possible that the Court would gut *Roe*. In 2007, the Court upheld a federal ban on so-called partial birth abortion, the non-medical name given a late-term abortion procedure in which a fetus was removed intact rather than in parts.[187] Less than a decade earlier, the Court had struck down a similar Nebraska ban in *Stenberg v. Carhart*.[188] But *Gonzales v. Carhart* distinguished the federal Partial Birth Abortion Ban Act, reasoning that it more clearly defined the prohibited procedure than did the law invalidated in *Stenberg*.[189] Moreover, the Court held that the law did not constitute an unconstitutional undue burden.[190]

Pro-life attorneys saw in *Gonzales* evidence that the undue-burden test might lead the Court to uphold most abortion regulations.[191] First, the Court in *Gonzales* seemed to recognize new—and potentially expansive—justifications for regulating abortion.[192] While *Casey* had balanced women's

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180. *Dixon*, 509 U.S. at 711–12.
181. *See* Hudson v. United States, 522 U.S. 93, 101–05 (1997).
182. *See* Lawrence v. Texas, 539 U.S. 558, 577–78 (2003).
183. *See* Vieth v. Jubelirer, 541 U.S. 267, 279–81 (2004).
184. *See infra* note 185 and accompanying text.
185. Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting).
186. *Id.* at 955–56.
187. *See* Gonzales v. Carhart, 550 U.S. 124, 156–60 (2007).
188. *See Stenberg*, 530 U.S. at 914–18.
189. *See Gonzales*, 550 U.S. at 151–57.
190. *Id.* at 161–67.
191. *See, e.g.*, Mary Ziegler, *Substantial Uncertainty:* Whole Woman's Health v. Hellerstedt *and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 98.
192. *See Gonzales*, 550 U.S. at 159–60.

liberty and the preservation of fetal life, *Gonzales* discussed an interest in "respect for the dignity of human life."[193] *Gonzales* suggested that the government could regulate to shape attitudes about fetal life—and could do so without clear evidence that respect for fetal life was lacking or would be improved by a particular enactment.[194]

Gonzales also suggested that the government could prohibit partial-birth abortion to preserve the reputation of doctors and to protect women from the regret they would suffer if they had an abortion without understanding what the procedure entailed.[195] The Court had not previously recognized either of these interests as justifications for abortion regulations.[196] To some observers, *Gonzales* suggested a willingness to allow the government more latitude in regulating and finding new reasons to do so.[197]

Gonzales's reading of the effect prong of *Casey* also reassured abortion opponents. Those challenging the law had emphasized its lack of a health exception.[198] At trial, attorneys on opposing sides had clashed about whether the disputed procedure was ever the safest for women.[199] *Gonzales* recognized this dispute but concluded that when a matter was scientifically uncertain, the Court would defer to legislators' reading of the facts.[200] "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty," *Gonzales* explained.[201]

According to AUL, *Gonzales* showed that the Court had "an increasing willingness to blunt attempts by abortion extremists to use the courts to unilaterally impose their radical agenda on the American public, and an increasing willingness to let the people decide abortion policy."[202] AUL pointed to several aspects of the decision as transformative.[203] The organization thought that *Gonzales* defined women's health narrowly and

193. *Id.* at 157.
194. *See id.* at 157–60, 163.
195. *Id.* at 157, 159–60.
196. *See id.* at 157–60.
197. *See id.* at 163.
198. *Id.* at 165–67.
199. *See id.*
200. *Id.* at 163.
201. *Id.*
202. Denise M. Burke, Gonzales v. Carhart*: One Year Later: Letting the People Decide*, AMERICANS UNITED FOR LIFE (Apr. 23, 2010), http://www.aul.org/law-articles/gonzales-v-carhart-one-year-later-letting-the-people-decide/.
203. *See* Clarke D. Forsythe, *A New Dawn:* Gonzales v. Carhart *Begins a New Day in Abortion Law*, AMERICANS UNITED FOR LIFE (May 1, 2007), http://www.aul.org/law-articles/a-new-dawn-gonzales-v-carhart-begins-a-new-day-in-abortion-law/.

therefore opened "the door to more aggressive regulation of abortion."[204] The group recognized that five justices were unprepared to overturn *Roe* but still saw a path to establishing that *Roe* or even *Casey* harmed women and was therefore unworkable.[205]

NRLC commentators also believed that *Gonzales* marked a turning point.[206] The organization explained that after *Gonzales*, elite medical groups like the American Medical Association would no longer have the final word on scientific questions about abortion.[207] "Where there is no medical consensus, the testimony of abortionists as to 'health' issues will no longer be final," explained the *National Right to Life News*.[208]

Instead of primarily showing that *Casey*/*Gonzales* were unworkable, groups like NRLC and AUL experimented with other reversal strategies. In 2012, AUL lawyers recognized that the conditions for overturning *Roe* were not yet in place, given that public opinion did not support an abortion ban and that there were not enough votes on the Court.[209] The group explored other ways of simultaneously restricting abortion and shaping public opinion, including the introduction of laws requiring abortion clinics to meet the standards set for ambulatory surgical centers.[210] These laws might make it easier to reverse *Roe* as would efforts to show that "[a]bortion is bad for women" and a campaign to establish that "[t]he people should decide the abortion issue, not the Supreme Court."[211] By 2013, AUL had refined this strategy, promoting statutes that banned or regulated "late-term abortions based on increasing evidence of the negative impact that such abortions have on women's health, as well as concerns about the pain felt by an unborn child."[212] These laws helped set the stage for reversal because they undercut

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204. *Id.*

205. *See id.*

206. *See* Susan Wills, Gonzales v. Carhart*: An Important Step Forward*, NAT'L RIGHT TO LIFE NEWS (May 2007), https://www.nrlc.org/archive/news/2007/NRL05/Wills.html.

207. *See id.*

208. *Id.*

209. *See* Clarke D. Forsythe, *The Road Map to Overturning* Roe v. Wade*: What Can the States Do Now?*, 2012 DEFENDING LIFE 109, 111, http://www.aul.org/wp-content/uploads/2012/04/road-map-overturning-roe.pdf [https://web.archive.org/web/20180127001348/https://aul.org/wp-content/uploads/2012/04/road-map-overturning-roe.pdf] [hereinafter Forsythe, *The Road Map*].

210. Olga Khazan, *Planning the End of Abortion*, ATLANTIC (July 16, 2015) https://www.theatlantic.com/politics/archive/2015/07/what-pro-life-activists-really-want/398297/.

211. Forsythe, *The Road Map*, *supra* note 209, at 115.

212. *AUL Launches the "New Frontier" in Protecting Women from Abortion Industry Abuses*, AMERICANS UNITED FOR LIFE (Dec. 9, 2013), http://www.aul.org/2013/12/aul-launches-the-new-frontier-in-protecting-women-from-abortion-industry-abuses/.

the "assumption that abortion is good for women and beneficial to women's health."[213] NRLC similarly focused on laws designed to build on *Gonzales*, including statutes banning dilation and evacuation, the most common second-trimester abortion procedure, and laws outlawing all abortions after the twentieth week of pregnancy, the point at which some lawmakers found that unborn children could suffer pain.[214]

Those defending similar laws began redefining unworkability, offering new and conflicting definitions. AUL offered several understandings of unworkability in labeling *Roe* and *Doe* the "[m]ost [u]nconstitutional [d]ecisions of [a]ll [t]ime."[215] Clarke Forsythe of AUL maintained that "*Roe* and *Doe* [had] proven to be utterly unworkable" because "legislators constantly struggle[d] to construct legislative language that will pass the current 'test' used by the Supreme Court in abortion jurisprudence" and because both conflicted with "in-depth scientific information about when life begins" and "public health data showing the substantial and negative physical and psychological impact of abortion on women."[216]

Forsythe elaborated on this argument in 2014. First, he defined a decision as unworkable when it stood in tension with the common law or with medical evidence and became "contrary to the best data."[217] Next, he viewed *Roe* as unworkable because it ignored how real abortion practice affected women.[218] "Despite assuming the role of the national abortion control board, . . . the Justices have been oblivious to what is happening in clinics," Forsythe argued. "It's easy to pronounce something 'workable' if you consistently ignore it."[219] Finally, Forsythe again defined *Roe*, *Casey*, and *Gonzales* as unworkable because the lower courts interpreted them in different ways.[220]

Unworkability concerns played a prominent part in the next major abortion case to reach the Court, *Whole Woman's Health v. Hellerstedt*. *Whole Woman's Health* disappointed abortion foes who had hoped that *Gonzales* would be the first of several favorable decisions. The Court's decision also revived unworkability arguments, convincing pro-life attorneys

213. *Id.*

214. *See* Ziegler, *supra* note 191, at 110, 112.

215. *Why* Roe v. Wade *and* Doe v. Bolton *Are the Most Unconstitutional Decisions of All Time*, AMERICANS UNITED FOR LIFE (Sept. 17, 2010), http://www.aul.org/2010/09/why-roe-v-wade-and-doe-v-bolton-are-the-most-unconstitutional-decisions-of-all-time/.

216. *Id.*

217. Clarke Forsythe, *Why Roe/Casey Is Still Unsettled*, HUM. LIFE REV. (Sept. 28, 2014), https://www.humanlifereview.com/roecasey-still-unsettled/.

218. *See id.*

219. *Id.*

220. *See id.*

to claim that the undue-burden standard (and *Whole Woman's Health*) could not be consistently applied.

G. Whole Woman's Health *and the New Unworkability*

Whole Woman's Health involved two Texas regulations, both derived from AUL's model legislation.[221] One measure required physicians performing abortions to have admitting privileges at a hospital within thirty miles.[222] A second mandated that abortion clinics comply with the regulations governing ambulatory surgical centers (even if they did not perform surgical procedures).[223] The parties agreed that if Texas enforced its regulations, the number of abortion clinics operating in the state would drop dramatically.[224]

Whole Woman's Health required the Court not only to address the constitutionality of the Texas regulations but also to clarify the meaning of the undue-burden standard.[225] Antiabortion amici asserted that the undue-burden test was highly deferential—close or perhaps identical to rational basis review.[226] Those challenging the law, by contrast, maintained that the undue-burden standard was more demanding in two ways.[227] First, the abortion providers and abortion-rights amici argued that the standard required the Court to weigh the benefits and burdens of the law.[228] If a statute served no useful purpose, then it would be unconstitutional, even if it did not severely restrict abortion access.[229] Second, abortion-rights supporters insisted that the standard required concrete proof of both the benefits and burdens of a law, not unquestioning deference to the findings made by lawmakers.[230]

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221. *See* Ziegler, *supra* note 191, at 102.

222. *Id.*

223. *See id.* at 77.

224. *See id.* at 103–04.

225. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–16 (2016).

226. *See, e.g.*, Amicus Curiae Brief of 44 Texas Legislators in Support of Defendants-Appellants and Reversal of the District Court at 15, Whole Woman's Health v. Lakey, 769 F.3d 285 (5th Cir. 2014) (No. 14–50928), 2014 WL 6647162.

227. *See, e.g.*, Brief of Constitutional Law Scholars Ashutosh Bhagwat et al. at 14–33, Whole Woman's Health v. Cole, 136 S. Ct. 499 (2015) (No. 15–274), 2016 WL 106616; Brief for Amicus Curiae Information Society Project at Yale Law School in Support of Petitioners at 26–32, Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (No. 15–274), 2016 WL 74992; *see also* Brief for Petitioners at 36–42, *Cole*, 790 F.3d 563 (No. 15–274), 2015 WL 9592289.

228. *See* sources cited *supra* note 226 and accompanying text.

229. *See* sources cited *supra* note 226 and accompanying text.

230. *See* sources cited *supra* note 226 and accompanying text.

Whole Woman's Health struck down both regulations and clarified the meaning of the undue-burden standard.[231] The Court held that the test required consideration of both the benefits and burdens of a law.[232] Moreover, in determining the benefits and burdens of the law, the Court explained that judges should not blindly defer to legislators when matters are scientifically uncertain.[233] Instead, courts had a duty "to review factual findings where constitutional rights are at stake."[234]

In practice, what did this mean? First, *Whole Woman's Health* suggested that a law could have no benefits if it did not solve a real problem.[235] For example, because the Court thought that abortion was relatively safe, an admitting-privilege requirement had very little benefit.[236] *Whole Woman's Health* also clarified what constituted a burden and how it could be proven.[237] Texas argued that there was not enough evidence that the regulations had caused the clinic closures.[238]

The Court credited the district court's finding that the law was responsible, relying on amicus briefs from leading medical organizations.[239] In discussing the disputed requirements, the Court also illustrated what counted as a burden, suggesting that the law would result in "fewer doctors, longer waiting times, and increased crowding" and a lack of "individualized attention, serious conversation, and emotional support."[240] The fact that the law did not prohibit any abortions was not dispositive.[241] A far lower quality experience could count as a burden, as could increased travel times.[242]

Whole Woman's Health devastated abortion foes and triggered a debate about the future of antiabortion strategy. NRLC leaders initially championed laws involving fetal rights rather than women's health, emphasizing that much of the logic of *Whole Woman's Health* seemed to apply to women's-health laws more than other abortion restrictions.[243] AUL attorneys instead

231. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–12 (2016).
232. *Id.* at 2298.
233. *See id.*
234. *Id.* at 2310 (emphasis omitted) (quoting Gonzales v. Carhart, 550 U.S. 124, 165 (2007)).
235. *See Hellerstedt*, 136 S. Ct. at 2298–99.
236. *See id.* at 2311–17.
237. *See id.*
238. *See id.* at 2301.
239. *See id.* at 2315.
240. *Id.* at 2313, 2318.
241. *See id.* at 2310–18.
242. *Id.* at 2318.
243. *See* Ziegler, *supra* note 191, at 110–12.

began looking for a strategy to reverse both *Casey* and *Whole Woman's Health*.[244]

The organization first tried to collect evidence that abortion clinics were unsafe, publishing a comprehensive report on safety code violations.[245] AUL also built on an existing reversal strategy centered on workability. After *Whole Woman's Health*, Forsythe elaborated on these arguments.[246] He suggested that *Whole Woman's Health* made abortion doctrine more "unworkable, leaving substandard clinic conditions and practitioners in its wake."[247] Unworkability, Forsythe suggested, depended on a mismatch between *Roe*'s rationale and the reality of abortion in American clinics.[248] And unworkability arose when the meaning of a rule, such as the undue-burden standard, was unclear or seemed to have changed.[249] Finally, in Forsythe's view, *Roe* was unworkable because it led to undesirable policy results, tying the hands of lawmakers who wanted to restrict abortion or ban it outright.[250]

After *Whole Woman's Health*, states have generated conflicting lower court decisions that could demonstrate the supposed unworkability of *Roe* and its progeny.[251] While abortion providers challenged a range of laws, some quite closely resembled the policies at issue in *Whole Woman's Health*.[252] One such case, *Planned Parenthood of Arkansas and Eastern Oklahoma v. Jegley*, addressed a slight variation of the admitting-privilege requirement at issue in *Whole Woman's Health*. [253] The Arkansas law at issue applied to medication abortion.[254] State lawmakers found that medication abortion was more dangerous than surgical abortion and imposed additional regulations on

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244. *See infra* notes 245, 247 and accompanying text.

245. *See* AMERICANS UNITED FOR LIFE, UNSAFE: HOW THE PUBLIC HEALTH CRISIS IN AMERICA'S ABORTION CLINICS ENDANGERS WOMEN (2016), http://www.unsafereport.org/wp-content/uploads/2016/12/AUL_UNSAFEreport.pdf.

246. Clarke D. Forsythe, *Symposium: Pro-Life in the Time of Trump*, HUMAN LIFE REV. (Jan. 24, 2017) https://www.humanlifereview.com/symposium-pro-life-in-the-time-of-trump/#clarkedforsythe.

247. *Id.*

248. *See id.*

249. Clarke D. Forsythe, *The Supreme Court Sows Confusion About Abortion Law*, NAT'L REV. (Mar. 21, 2018, 6:30 AM), https://www.nationalreview.com/2018/03/supreme-court-abortion-law-confusion-hellerstedt-decision/.

250. *See id.*

251. *See, e.g.*, Leah M. Litman, *Unduly Burdening Women's Health: How Lower Courts are Undermining* Whole Woman's Health v. Hellerstedt, 116 MICH. L. REV. ONLINE 50 (2017).

252. *See infra* note 254 and accompanying text.

253. Planned Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 955 (8th Cir. 2017).

254. ARK. CODE ANN. §§ 20-16-1501 to -1510 (West 2016).

doctors prescribing it.[255] Doctors offering medication abortion had to have admitting privileges at a designated hospital and a contract with a physician who agreed to handle emergencies resulting from the use of medication abortion.[256] A local Planned Parenthood affiliate sought to enjoin the law before it went into effect, arguing that it unduly burdened women's abortion access.[257] The district court granted Planned Parenthood a preliminary injunction, and the state appealed.[258]

The Eighth Circuit reversed, relying on an argument made by Arkansas and antiabortion attorneys about the probability that Planned Parenthood could succeed on the merits of its claim.[259] The state had claimed that even after *Whole Woman's Health*, a law was not unduly burdensome unless it burdened a large fraction of women seeking abortion in the state.[260] According to Arkansas, there was not enough proof that the law would affect a large fraction of women who had previously sought abortions in Fayetteville or would force a large number of women to travel extensive distances.[261] The Eighth Circuit agreed, finding that the district court had failed to make adequate findings about the number of women who faced burdensome travel instances, women who would delay abortions, and women who would forgo them altogether.[262] The court offered little guidance to the district court on remand, suggesting that there need be no exact calculation but that more specificity was required.[263] The litigation in *Jegley* continues at the time of this writing. Although the Supreme Court declined to hear an appeal of the Eighth Circuit's decision,[264] the district court on remand again granted Planned Parenthood a preliminary injunction, stressing that medication abortion would be unavailable, that between eleven and twenty-eight percent of women would be altogether unable to access abortion, and that between forty-three and seventy-one percent of women would face longer travel distances.[265] Although the ultimate outcome of *Jegley* is unsettled, abortion foes hope that similar decisions help to make the case that

255. *Id.* § 20-16-1502.
256. *Id.* § 20-16-1504.
257. *Jegley*, 864 F.3d at 956.
258. *Id.* at 957.
259. *Id.* at 958–61.
260. *See id.* at 958–59.
261. *See id.* at 959–60.
262. *Id.* at 959–60.
263. *Id.* at 960.
264. Petition for Writ of Certiorari, Planned Parenthood of Ark. & E. Okla. v. Jegley, 138 S. Ct. 2573 (2018) (No. 17-935).
265. Planned Parenthood of Ark. and E. Okla. v. Jegley, No. 4:15-cv-00784-KGB, 2018 WL 3029104, at *15, *21, *25, *47 (E.D. Ark. 2018).

Whole Woman's Health is unworkable: the existence of conflicting interpretations or open questions suggests that a precedent should not be retained.

Other states have similarly reinterpreted *Whole Woman's Health*. States have defended a variety of laws, including fetal-disposal laws, bans on a common second-trimester abortion procedure, and ultrasound requirements, arguing that *Whole Woman's Health* applied only to laws claimed to protect women's health, not to laws protecting fetal life.[266] Other states suggest that *Whole Woman's Health* changed the undue-burden standard very little, at most requiring careful consideration of record evidence.[267] Still other states have advocated the approach taken in *Jegley*, suggesting that *Whole Woman's Health* did not require much consideration of the benefit achieved by a law and did require more extensive evidence of how many women would be negatively affected by a law.[268]

As Leah Litman has shown, states have designed these strategies to undercut *Whole Woman's Health*.[269] After all, *Whole Woman's Health* did require careful analysis of the potential benefit of a law and did not ask those challenging a law to define with specificity how many women would be affected by it.[270] But the strategies at work in cases like *Jegley* reflect a broader agenda. By generating inconsistent interpretations of *Whole Woman's Health*, abortion foes hope to show that the 2016 decision is unworkable. As important, by tracing the supposed flaws in *Whole Woman's Health* to *Casey* and to *Roe*, pro-life lawyers once again aim to set the stage for the overturning of *Roe*.

For example, Clarke Forsythe of AUL has pointed to ongoing litigation after *Whole Woman's Health* as evidence that the 2016 decision—and the entire idea of an abortion right—are unworkable.[271] Forsythe cited what he described as changes to the undue-burden standard over time as evidence that the approach is unsalvageable.[272] He notes that the Court did not explain how compelling evidence of a law's benefits had to be and whether a law's impact had to be considered in the context of a broader statutory scheme.[273] "Confusion prevents state and local officials from effectively doing what the justices have repeatedly said the states have the authority to do: protect the

266. Litman, *supra* note 251, at 51–53.
267. *See, e.g.*, *id.* at 55.
268. *See id.* at 53–55.
269. *Id.* at 59–60.
270. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–18 (2016).
271. *See* Forsythe, *supra* note 249.
272. *Id.*
273. *See id.*

states' interest in fetal life and maternal health," Forsythe writes. "After 45 years, the Court's abortion doctrine shows no signs of ever being settled or workable."[274]

As recent litigation suggests, states resist *Whole Woman's Health* not just to defend existing abortion regulations but also to create proof that *Whole Woman's Health*, *Casey*, and *Roe* are unworkable. As part of this strategy, in both the courts and the political arena, abortion opponents have championed several deeply different concepts of unworkability: 1) unworkability as ongoing political controversy; 2) unworkability as vagueness or open-endedness; 3) unworkability as inconsistency with the rationale of a decision; and 4) unworkability as substantive error. Increasingly, as unworkability became a central part of the debate, the Court itself has adopted some of the contradictory ideas circulating in abortion politics. Part II explores this issue next.

II. THE MANY DEFINITIONS OF UNWORKABILITY

While the justices seem to discuss a single concept of unworkability, more than one understanding runs through the case law. Abortion law has reshaped—and confused—the Court's unworkability doctrine. And by viewing unworkability through so many lenses, the Court has confused *stare decisis* analysis.

A. Unworkability and Unpredictability

At times, the Court has treated precedents as unworkable when they generate unpredictable results in the lower courts.[275] Abortion opponents urged the Court to define unworkability in this way, labeling unworkable any decision that could be interpreted in different ways or that left open key questions.[276] Relatedly, the Court has deemed precedents unworkable in other contexts when they are inherently vague, confusing, or standardless (and presumably therefore likely to create inconsistent results).[277]

For example, in *Vieth v. Jubelirer* (2004), the Court heard a challenge to Pennsylvania's electoral map.[278] Since the decision of *Davis v. Bandemer* (1986), the Court had treated partisan gerrymanders as unconstitutional under

274. *Id.*
275. *See infra* Part III.
276. *Id.*
277. *Id.*
278. Vieth v. Jubelirer, 541 U.S. 267, 271 (2004).

the Equal Protection Clause.[279] In *Vieth*, Pennsylvania successfully argued that *Bandemer* was unworkable and should be overturned.[280] What made the 1986 precedent unworkable? *Vieth* first emphasized that *Bandemer* had never offered a clear answer about how to identify an unconstitutional partisan gerrymander.[281] In later years, as *Vieth* explained, neither the Supreme Court nor the lower courts had put in place a more principled framework.[282] Inconsistent results, in turn, provided evidence of the vagueness and indeterminacy of the original opinion in *Bandemer*.[283] "Eighteen years of essentially pointless litigation" convinced the *Vieth* majority that the time had come to overturn *Bandemer*.[284]

The Court has used a similar definition of unworkability in recent cases. In *Johnson v. United States* (2015), the justices revisited a constitutional challenge to part of the Armed Career Criminal Act of 1984.[285] That dimension of the law—known as the residual clause—subjected defendants to more severe punishment if they were convicted of three or more violent felonies—a crime that "involves conduct that presents a serious potential risk of physical injury to another."[286] The defendant contended that the law was unconstitutionally vague—a claim that the Court had previously rejected.[287]

In deciding to overturn earlier residual clause cases, the Court focused on their unworkability. What made this body of law unworkable? Justice Scalia's majority emphasized that residual clause opinions had failed to create any clear principle for the lower courts to follow and had made plain the "unavoidable uncertainty and arbitrariness of adjudication under the residual clause."[288] The Court echoed this idea of unworkability in another 2015 case, *Kimble v. Marvel Entertainment*.[289] In *Kimble*, the parties disputed the validity of *Brulotte*, a case that held that patent holders could not receive royalties for sales made after the expiration of a patent.[290] The patent holder argued, among other things, that *Brulotte* was unworkable, proposing the "rule of reason" from antitrust law as a preferable alternative.[291] The *Kimble*

279. *See* Davis v. Bandemer, 478 U.S. 109, 139–43 (1986).
280. *Vieth*, 541 U.S. at 304–06.
281. *Id.* at 301–06.
282. *Id.*
283. *See id.*
284. *Id.* at 306.
285. Johnson v. United States, 135 S. Ct. 2551, 2555 (2015).
286. 18 U.S.C. § 924(e)(2)(B)(ii) (2018).
287. *Johnson*, 135 S. Ct. at 2562.
288. *Id.*
289. Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2411 (2015).
290. *Id.* at 2406–12 (discussing Brulotte v. Thys Co., 379 U.S. 29 (1964)).
291. *Id.* at 2408, 2411.

Court rejected this argument, explaining that *Brulotte* was workable because it was simple and relatively cheap to apply, especially by contrast to the "high litigation costs and unpredictable results" associated with the rule proposed by the patent holder.[292]

In cases like *Johnson*, the Court suggests that precedents are unworkable when they lead (or could lead) to unpredictable or inconsistent results. At times, the Court has treated a rule as vague because it is open-ended, making it easier for both the Supreme Court and the lower courts to justify conflicting interpretations. The Court may also treat a rule as unworkable because it is complex or difficult to apply—another potential source of inconsistent results. This idea of unworkability predates the abortion wars, but pro-life attorneys and their allies in the state reinforced it, encouraging the Court to see as unworkable any case that required careful line-drawing or left for another day key constitutional questions. But this is not the only idea of unworkability that the Court has articulated.

B. Unworkability and Conflicts with Later Case Law

Since *Casey*, the Court has also concluded that a precedent becomes unworkable when subsequent doctrinal developments undercut it. In some way, this idea of unworkability relates to the one articulated in cases like *Vieth* and *Johnson*: the Court often reasons that doctrinal developments could create uncertainty about an earlier opinion's precedential force or reinterpretation and sow the kind of confusion complained of in other unworkability cases.[293] But the core definition of unworkability in these cases is still distinct. For example, in *Lawrence v. Texas*, the Court considered a constitutional challenge to a ban on same-sex sodomy.[294] As part of its analysis, the Court reconsidered *Bowers v. Hardwick*, a 1986 case that had upheld a similar sodomy ban.[295] The Court's reasons for overturning *Bowers* went beyond unworkability: the majority stressed that *Bowers* was conceptually flawed from the start, relied on a problematic historical analysis, and conflicted with changes in public attitudes, criminal prohibitions, and even international law.[296]

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292. *Id.* at 2411.

293. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003).

294. *Id.* at 562.

295. Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

296. *See Lawrence*, 539 U.S. at 573–78.

When it came to workability, the Court focused on the tension between *Bowers* and two recent decisions, *Romer v. Evans* and *Casey*. *Romer* had struck down Colorado's Amendment 2, a law that stopped any government actor from prohibiting sexual orientation discrimination.[297] What difference did it make that *Bowers* did not seem in line with the principles set out in *Casey* or *Romer*? The Court suggested that conflicts with later case law created the kind of uncertainty that made the law complicated, expensive, and inconsistent to apply.[298] "*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding," *Lawrence* explained.[299]

The Court offered a similar definition of unworkability in *Leegin Creative Leather Products, Inc. v. PSKS*.[300] In that case, Leegin, a manufacturer, entered into minimum-price agreements with its retailers.[301] PSKS, a retailer, lowered the price of Leegin products below the agreed-upon price, and Leegin responded by dropping the retailer.[302] PSKS sued, alleging that Leegin had violated the Sherman Antitrust Act.[303] PSKS relied on a 1911 Supreme Court case, *Dr. Miles Medical Co.* that held that minimum-price agreements were always illegal.[304] *Leegin* overturned *Dr. Miles* partly because of workability considerations.[305] The Court pointed to several recent rulings that conflicted with *Dr. Miles*, narrowing its reach and calling its validity into question.[306]

C. Unworkability as Incoherence

After *Casey*, the Court has also treated precedents as unworkable because they are internally incoherent, either because of a logical inconsistency or because of the disconnect between a rule and the goals it serves. For example, in *Hudson v. United States*,[307] the Court revisited its approach to double

297. Romer v. Evans, 517 U.S. 620, 635–36 (1996).
298. *See Lawrence*, 539 U.S. at 573–78.
299. *Id.* at 577.
300. *See* 551 U.S. 877, 900–04 (2007).
301. *Id.* at 882–85.
302. *Id.* at 884.
303. *Id.*
304. *See id.* (discussing Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)).
305. *See id.* at 887–909.
306. *See id.*
307. 522 U.S. 93 (1997).

jeopardy in *United States v. Halper*.[308] In *Halper*, the Court had held that double jeopardy constraints applied whenever a law imposed "punishment," regardless if that statute was criminal in nature.[309] To make this determination under *Halper*, a court asked if a sanction was so grossly disproportionate to the defendant's conduct as to constitute punishment.[310]

Hudson overruled *Halper* partly because of concerns about unworkability.[311] First, the Court noted that because all civil sanctions are punitive, *Halper*'s distinction between different type of civil penalties made little sense.[312] *Hudson* also noted a disconnect between the principles of double jeopardy and the operation of *Halper*: to determine if a sanction was weighty enough, courts had to wait until after a civil disposition was complete.[313] Ordinarily, however, double-jeopardy principles forbade prosecutors from attempting to sanction a defendant twice for the same behavior.[314] As the *Hudson* Court explained, *Halper* made little sense either on its own terms or in the broader context of double jeopardy jurisprudence.[315]

When the Court discusses unworkability, the justices sometimes spotlight opinions that are open-ended or subject to different interpretations. On other occasions, the Court identifies unworkable opinions primarily by looking at the fallout in the lower courts: the more inconsistent rulings that a precedent generates, the more unworkable it seems. Unworkability concerns also come up when the Court concludes that later precedents have undercut a rule, creating doctrinal uncertainty. And unworkability can serve as shorthand for the incoherence of a specific approach to the law.

Casey and its progeny have helped to reinforce the confusion in the Court's approach to unworkability. Although the Court offered a comprehensive analysis of when precedents no longer deserved deference, *Casey* said virtually nothing about what workability meant. At most, the Court suggested that judges were competent to do the analysis required by *Roe* (or by abortion jurisprudence). Abortion opponents have built a long case for the unworkability of *Roe*, pushing multiple definitions. The Court has adopted some of these interpretations and defined unworkability inconsistently. Part III examines the problems with some of the definitions of

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308. *See* United States v. Halper, 490 U.S. 435, 448 (1990), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997).

309. *Halper*, 490 U.S. at 448–49.

310. *Id.* at 449.

311. *Hudson*, 522 U.S. at 101–02.

312. *See id.* at 102.

313. *See id.* 101–02.

314. *Id.* at 102.

315. *See id.* at 101–02.

unworkability adopted by the Court and proposes a narrower and more principled approach.

III. THE SEMBLANCE OF UNWORKABILITY

The Court looks for evidence of unworkability by identifying inconsistent lower-court decisions, by pinpointing contradictory subsequent doctrinal developments, by illuminating the vagueness of a decision, or by spotlighting the incoherence of a rule. The political and legal history of unworkability in the abortion context suggests that some of these definitions are untenable. This Part begins by explaining the problems with some of the ways that the Court defines unworkability. Next, this Part proposes an alternative and explores how it would apply.

A. Unworkable Definitions

Most often, the Court identifies precedents as unworkable because the lower courts interpret them in conflicting ways. *Casey* and the history leading up to it illustrate the problems with defining unworkability in this way.

Commentators have consistently criticized *Roe* for deciding too much too soon.[316] Cass Sunstein, for example, champions one-case-at-a-time incrementalism that preserves space for democratic deliberation and that permits experimentation and subsequent policy developments.[317] Scholars from William Eskridge to Richard Posner have raised similar concerns about *Roe*, as have both Antonin Scalia and Ruth Bader Ginsburg.[318] By taking a more gradual approach, however, the Court necessarily leaves many questions unresolved. Take the approach Sunstein would have preferred in *Roe*: a decision suggesting that the government could not constitutionally ban

316. *See* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 96 (2006) ("When the Supreme Court struck some of these abortion restrictions down in the late 1970s and '80s, it finally energized abortion opponents who otherwise would have had to make their case in the political arena."); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985) ("*Roe v. Wade* sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action." (footnote omitted)).

317. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 24–28 (2001).

318. *See* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 242 (2010); RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 79, 124–27 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 998–1002 (1992) (Scalia, J., dissenting in part); Ginsburg, *supra* note 316, at 381–82.

abortion in cases of rape or incest (Jane Roe, one of the petitioners in the case, claimed that she had been raped).[319] Such a decision would create significant ambiguities.[320] Would many abortion restrictions be unconstitutional under this version of *Roe* or just a few? Would a spousal-involvement law pass muster under such an approach?

In retooling *Roe*, *Casey* created a more incremental, open-ended approach.[321] To be sure, *Casey* is not in every way a minimalist decision: as Reva Siegel and Robert Post have written, *Casey* stood out because of its "forthright articulation of competing constitutional ideals."[322] But *Casey*'s undue-burden standard appears fact-intensive, asking courts to evaluate the benefits and burdens of specific laws at certain points in time.[323]

This flexibility makes sense in the abortion context. *Casey* retained viability as a dividing line, and technological evolution will allow courts to adapt as law and medicine change.[324] The undue-burden standard also allows courts to adjust as new evidence emerges about the real-world effect of specific policies or the benefit (or lack thereof) tied to some regulations.[325] Rather than settling every question at one time, the undue-burden standard creates breathing room for courts to consider important constitutional issues with the benefit of additional experience and a fuller record.[326]

Open-ended decisions can be desirable in other contexts. A clear, sweeping rule can be more disruptive, making the adjustment for lawmakers more painful and sudden. By taking a smaller step and leaving other issues unresolved, the Court can also minimize the chances of costly errors, permitting the lower courts to respond to new evidence or fresh arguments.

B. Unworkability and Incrementalism

The history considered here suggests another problem with looking at inconsistent rulings as proof of unworkability. *Casey* emerged partly because

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319. *See* SUNSTEIN, *supra* note 317, at 37.

320. *See id.*

321. *See, e.g.*, David D. Meyer, *The Constitutionalism of Family Law*, 42 FAM. L.Q. 529, 567 (2008) (using *Casey* as an example of decisions that "shun bright lines for fact-intensive, indeterminate balancing of competing interests"); Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 353 (2006) (identifying *Casey* with "a contextualized, fact-intensive analysis").

322. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 429 (2007).

323. *See supra* note 321 and accompanying text.

324. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).

325. *See supra* note 321 and accompanying text.

326. *See id.*

many commentators and judges believed that *Roe*'s trimester framework sacrificed important constitutional nuances in the name of clarity.[327] The trimester approach was nothing if not simple to apply: before the second trimester, all abortion regulations would be problematic.[328]

But because abortion is so controversial, and because many (including some on the Court) felt that *Roe* undervalued the government's interest in fetal life, the very clarity of the trimester framework helped to create inconsistency.[329] Increasingly, the justices created exceptions to the trimester rule, allowed some regulation in the first trimester, and left open questions about the precedential force of *Roe*.[330] *Casey* adopted a balancing approach that more fully acknowledged the constitutional interests on either side of the abortion issue—a rule that allowed courts to account for both the significance of the abortion right and the government's interest in fetal life.[331]

The Court has adopted balancing analyses for similar reasons in other constitutional contexts. In applying the right to vote under the Equal Protection Clause, for example, the Court in *Harper v. Virginia State Board of Elections* (1966) initially applied strict scrutiny, invalidating Virginia's poll tax because it had no bearing on voter qualifications.[332] While never overturning *Harper*, the Court retreated from it, adopting a more case-by-case approach in *Anderson v. Celebrezze* (1983).[333] As *Anderson* and the Court's recent decision in *Crawford v. Marion County Election Board* (2008) explained, *Harper* seemed to undervalue important governmental interests in ensuring "the integrity and reliability of the electoral process itself."[334] Rather than applying strict scrutiny, the Court now "must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."[335] As in the abortion context, the Court recognized that an inflexible approach was neither tenable nor appropriate given the stakes of voting-rights cases.

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327. Indeed, in *Webster* and earlier decisions, *Roe*'s skeptics on the Court focused on the rigidity of the trimester framework. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 517–18 (1989).

328. *See* Roe v. Wade, 410 U.S. 113, 157–63 (1973).

329. *See, e.g.*, Post & Siegel, *supra* note 322, at 424–29.

330. *See, e.g.*, *id.* at 428–30.

331. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992); Post & Siegel, *supra* note 322, at 428–30.

332. *See* 383 U.S. 663, 669–70 (1966).

333. *See* 460 U.S. 780, 789 (1983).

334. 553 U.S. 181, 189–90 (2008) (plurality opinion); *Anderson*, 460 U.S. at 788 n.9.

335. *Crawford*, 553 U.S. at 190 (quoting *Anderson*, 460 U.S. at 790).

Balancing approaches like *Casey* and *Crawford* necessarily lead to inconsistent results. Lower courts applying such an approach might easily disagree about the proper balance to strike. Consider as an example a law requiring women to receive information about the possibility of the reversal of medication abortion. A medication abortion involves a two-drug protocol: mifepristone and misoprostol, taken twenty-four to forty-eight hours apart.[336] Reversal proponents claim that women who have taken mifepristone may save a pregnancy by taking heavy doses of progesterone as soon as possible.[337] In April 2018, George Delgado, a reversal proponent, published a relatively large study suggesting that reversal is "safe and effective."[338] Critics of reversal, by contrast, claim that doses of progesterone provide no additional benefit and that such laws primarily serve to intimidate and confuse women.[339] At the time of this writing, Delgado has temporarily withdrawn the study because his university's ethical review board did not approve the collection of the additional data reviewed in the study.[340] Nevertheless, studies like Delgado's make it likely that courts with different perspectives on abortion will reach inconsistent conclusions on reversal laws.

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336. *See, e.g.*, *Medication Abortion*, HENRY J. KAISER FAM. FOUND. (June 1, 2007), https://www.kff.org/womens-health-policy/fact-sheet/medication-abortion/.

337. *See, e.g.*, Ruth Graham, *A New Front in the War over Reproductive Rights: 'Abortion Pill Reversal'*, N.Y. TIMES MAG. (July 18, 2017), https://www.nytimes.com/2017/07/18/magazine/a-new-front-in-the-war-over-reproductive-rights-abortion-pill-reversal.html.

338. For the study: George Delgado, Steven J. Condly, Mary Davenport, Thidarat Tinnakornsrisuphap, Jonathan Mack, Veronica Khauv & Paul S. Zhou, *A Case Series Detailing the Successful Reversal of the Effects of Mifepristone Using Progesterone*, 33 ISSUES L. & MED. 21, 29 (2018). For coverage of the study, see, for example, Ariana Eunjung Cha, *As Controversial 'Abortion Reversal' Laws Increase, Researcher Says New Data Shows Protocol Can Work*, WASH. POST (Apr. 4, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/04/03/as-controversial-abortion-reversal-laws-multiply-researcher-says-new-data-shows-it-can-work-critics-are-still-skeptical/?utm_term=.fdc7dd5a74d4; Ruth Graham, *Abortion Reversal Seems Possible. We Still Shouldn't Promote It.*, SLATE (Apr. 5, 2018, 12:17 PM), https://slate.com/technology/2018/04/abortion-reversal-seems-possible-but-we-shouldnt-promote-it.html.

339. For criticisms of reversal laws, see FACTS ARE IMPORTANT: MEDICATION ABORTION "REVERSAL" IS NOT SUPPORTED BY SCIENCE, AM. CONG. OBSTETRICIANS & GYNECOLOGISTS (2017), https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactsAreImportantMedicationAbortionReversal.pdf?dmc=1&ts=20180206T1955451745; Kimberly Truong, *"Abortion Reversal" Is a Dangerous Myth—Why Is It Still Spreading?* REFINERY29 (Feb. 2, 2018, 2:50 PM), https://www.refinery29.com/2018/02/189712/abortion-reversal-effectiveness-reproductive-rights-trump.

340. *See, e.g.*, Scottie Andrew, *Study Claiming Abortions Are 'Reversible' Retracted, Not Based on Science*, NEWSWEEK (July 18, 2018, 5:33 PM), https://www.newsweek.com/abortion-reversal-study-didnt-receive-ethical-approval-1031845.

Courts evaluating such a law could easily apply *Casey*'s balancing approach in different ways. As an initial matter, the medical evidence about reversal is contested, making the benefit provided by the law subject to disagreement. And even assuming that reversal works, courts could disagree about whether the value of informing women about the possibility would outweigh the stigma that could follow from telling women that they can (and implicitly should) change their minds.

Courts adopt balancing approaches like *Crawford* and *Casey* because there are constitutionally compelling values on either side of certain questions that a bright-line rule would systematically discount. Treating such a rule as unworkable would force the Court to disregard one of these important values.

C. Unworkability as Political Controversy

And lower courts may issue inconsistent rulings not because of any inherent flaws in a ruling but because a precedent touches on a politically explosive topic. In the 1990s and beyond, abortion opponents equated unworkability and political divisiveness. As pro-lifers framed it, *Roe* and its progeny were unworkable because they did not settle the moral, medical, and religious abortion wars.[341] The *Casey* plurality rejected this argument, insisting that political controversy did not militate in favor of overturning a well-established rule.[342]

In practice, however, it is difficult to distinguish inconsistent results and evidence of political controversy. Litigation about abortion will likely continue regardless of the reasoning or holding of any specific decision. The same seems to be true of decisions involving same-sex marriage and the death penalty. If the public remains divided about a subject, then the Court will not transform popular opinion overnight.[343] To be sure, the fact that a precedent touches on a political controversy does not mean that it was correctly decided—*Bowers v. Hardwick*, *Plessy v. Ferguson*, and other precedents make this point unavoidable. Nevertheless, controversy can create inconsistent results. Judges with different political leanings may view similar laws in different ways. Courts will be receptive to varying degrees to challenges to a precedent. *Casey* reasons that political controversy and unworkability are entirely distinct.[344] Looking to inconsistent results often confuses the two concepts.

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341. *See supra* Part I.

342. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

343. *See, e.g.*, MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE, at ix–x (2013).

344. *See Casey*, 505 U.S. at 867.

The conflation of political controversy and inconsistent results also allows litigators to use unworkability strategically as abortion foes have after *Whole Woman's Health*. Courts interested in predictability and consistency should be reluctant to overturn established precedents. Litigators can pursue inconsistent outcomes all too easily and use these results as an argument for departing from precedent. The Court should revisit its past cases when an original rule is seriously flawed or incompatible with later factual or legal developments, not every time attorneys manage to game the system.

D. Unworkability as Error

The Court has also suggested that precedents are unworkable because they are wrong—either incompatible with subsequent doctrinal developments, with facts on the ground, or with the best legal arguments.[345] It makes sense to overturn a decision if the Court obviously got it wrong. But the history of unworkability politics offers reason to distinguish erroneous decisions from unworkable ones. Unworkability signals that a precedent cannot be logically applied, even by those who agree with the substance of the original opinion. By conflating unworkability and substantive flaws, the Court can avoid a principled explanation of why an original opinion deserves reconsideration, depriving lower courts and the public of a reasoned explanation for a decision. Equating unworkability and error also creates redundancies. Unless the Court wishes to eliminate unworkability as a factor, the justices should separate it from other *stare decisis* considerations.

How should the Court define unworkability? The next Part proposes a more principled understanding.

IV. DEFINING UNWORKABILITY

There are reasons to rehabilitate unworkability doctrine. First, the Court seems intent on considering unworkability.[346] Although inconsistently, the Court has invoked unworkability for decades and seems likely to continue to do so.[347] Creating a more coherent and transparent framework for unworkability analysis matters as long as the Court seems interested in addressing it. As important, there are sound reasons for considering workability, independently of the correctness of a decision. A precedent may

345. *See supra* Part II.
346. *See supra* Part II.
347. *See supra* Part II.

seem correct at the time the Court decides it and turn out to be impractical or infeasible once the lower courts apply it in practice.

To evaluate if a precedent has become unworkable, the Court should focus on two factors: any illogic or incoherence in a rule or disconnect between a rule and the goals it serves. If an opinion is illogical, it may draw distinctions that do not withstand careful analysis, or one part of an opinion may contradict another. Several examples may better illustrate the point. Consider *Geduldig v. Aiello*, a famous decision in which the Court upheld a California employee disability policy that excluded pregnancy but included similarly incapacitating conditions.[348] The Court reasoned that California had not classified employees on the basis of sex because not all women were pregnant—in other words, the State drew a line between pregnant workers and non-pregnant workers, including men and women.[349] Although transgender men can get pregnant,[350] among cisgender individuals (those discussed by the Court in *Geduldig*) only women (and no men) can gestate a pregnancy.[351]

Geduldig certainly deserves an early retirement for other reasons. The decision ignores the extent to which discrimination against women intersects with their capacity to become pregnant. But the idea that there is any meaningful distinction between sex and capacity to become pregnant defies common sense. Any attempt to differentiate sex and capacity to gestate is plainly unworkable.

Halper, the decision overturned by *Hudson*, offers another example of an illogical decision. In *Halper*, the Court found that jeopardy attached whenever a law imposed civil or criminal "punishment[s]."[352] In evaluating whether a sanction was punitive, in turn, the Court examined how severe a punishment was in relation to the defendant's conduct.[353] As the Court later

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348. 417 U.S. 484, 488–90 (1974).

349. *Id.* at 496 n.20.

350. *See, e.g.*, Jackie Molloy, *She Wants You to See a Family, Not Just a Pregnant Man*, N.Y. TIMES (June 22, 2018), https://www.nytimes.com/2018/06/22/insider/transgender-baby-see-a-family-not-just-a-pregnant-man.html.

351. For more on criticisms of *Geduldig*, see *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 590 (Ohio App. 1993) (Petree, J., concurring in part and dissenting in part) ("*Geduldig* . . . has not been accorded much favor in the larger picture of constitutional law. The case, though apparently still good law at the federal level, has been criticized and is rarely cited by the United States Supreme Court itself."); *Scott v. American Bar Ass'n*, 652 F. Supp. 1419, 1421 (E.D. Pa. 1987) ("[S]ubsequent Supreme Court decisions have restricted *Geduldig*'s precedential value.").

352. United States v. Halper, 490 U.S. 435, 448 (1990).

353. *See id.*

pointed out, civil and criminal sanctions by their very nature punish.[354] A court may be able to distinguish harsher versus gentler penalties, but asking a judge to identify "punitive" punishments invites arbitrary results.

A precedent or part of a precedent should also be considered unworkable if the results generated by a rule plainly contradict its stated rationale. A few examples may illustrate how precedents are unworkable in this way. *Casey* deemed *Roe*'s trimester framework unworkable because of the disconnect between its stated purpose and effect.[355] In *Roe*, the Court recognized a constitutionally important right to terminate a pregnancy but also stressed that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[356] In theory, the trimester framework should have enabled lower courts to strike a careful balance between abortion rights and the governmental interests that *Roe* identified.[357] In practice, as *Casey* noted, because courts applying the framework disallowed most or all regulations early in pregnancy, the trimester framework did not deliver the balance that *Roe* described.[358] And as the Court recognized, the rest of *Roe*—the recognition of a liberty to make core decisions about pregnancy—was workable in a way that the trimester framework was not.[359]

The Court's decision in *Michael H. v. Gerald D.* on the nature of parental rights is also unworkable in this way. In that case, Michael, a biological father, had established a parental bond with his daughter, Victoria.[360] Michael's former lover, Carole, had vacillated between her relationship with Michael and a partnership with Gerald, a man she eventually married.[361] California law at the time created an irrebuttable presumption that children born in an intact marriage were the legitimate issue of the husband.[362] Michael contended that the California law violated his parental rights under the Fourteenth Amendment.[363] He invoked earlier precedents on the rights of unwed fathers, including *Lehr v. Robertson*,[364] which required men to have a

354. *See* Hudson v. United States, 522 U.S. 93, 101–02 (1997).
355. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872–73 (1992).
356. *Id.*
357. *See id.*
358. *See id.*
359. *See id.*
360. *See* Michael H. v. Gerald D., 491 U.S. 110, 114 (1989).
361. *See id.* at 116–18.
362. *See id.*
363. *See id.*
364. 463 U.S. 248 (1983).

biological relationship with a child and take some concrete step to establish a relationship.[365]

The majority reinterpreted *Lehr* and the cases preceding it, instead asking whether someone in Michael's position would have had parental rights as a matter of history and tradition.[366] The Court fragmented about how to measure the relevant tradition; Justice Scalia would have defined Michael's claim as narrowly as possible because it would have provided more "precise guidance" and would better limit judicial discretion.[367] Justice O'Connor joined the majority but disagreed about how to define tradition,[368] as did the dissenters.[369]

The Court looked to history and tradition to limit judicial discretion in identifying parents and to provide clarity about who should have rights in the family.[370] Yet even in *Michael H.*, the Court offered three contradictory definitions of tradition.[371] A tradition-centered approach seemed to allow for unlimited judicial improvisation. Given the existence of contradictory traditions and historical evidence, the rule in *Michael H.* contradicts the stated goals of stare decisis—predictability, consistency, and limited judicial power.[372]

How would recent decisions in which unworkability has been a factor come out if the Court adopted this definition? Recall that *Johnson*, a 2015 decision, dealt with the residual clause of the Armed Career Criminal Act, which allowed for a longer term of imprisonment for anyone convicted of three or more violent felonies, including "*conduct that presents a serious potential risk of physical injury to another.*"[373] In previous cases, defendants had unsuccessfully challenged the residual clause as void for vagueness.[374] *Johnson* overturned these decisions in large part because they were unworkable.[375] The Court deemed residual-clause jurisprudence unworkable, in turn, because interpretations of it were inconsistent and unpredictable.[376] But unpredictable results alone do not make a precedent

365. *Id.* at 261–62.
366. *See Michael H.*, 491 U.S. at 122.
367. *See id.* at 128 n.6.
368. *See id.* at 132–33 (O'Connor, J., concurring in part).
369. *See id.* at 133–48 (Brennan, J., dissenting); *id.* at 157–63 (White, J., dissenting).
370. *See supra* notes 359–60 and accompanying text.
371. *See id.*
372. *See id.*
373. 18 U.S.C. § 924(e)(2)(B) (2018) (emphasis added).
374. *See* Johnson v. United States, 135 S. Ct. 2551, 2556 (2015).
375. *See id.*
376. *See id.*

unworkable. The lower courts could offer different answers because an earlier precedent deliberately left a question open or took an incremental approach. The inconsistent results cited in *Johnson* are troubling, to be sure. And especially in the context of notice and vagueness, contradictory results seem to signal that the Court got it wrong in upholding the residual clause. But prior precedents on the residual clause deserve overruling because they are incorrect, not unworkable, and the Court should say so.

Unworkability also played a role in the fate of mandatory union dues. In *Janus v. American Federation of Municipal, State & County Employees*, the Court considered whether to overturn *Abood v. Detroit Board of Education*, a case holding that some, but not all, collective bargaining fees did not violate the First Amendment.[377] In *Abood*, a Michigan law allowed for an "agency shop" arrangement whereby every employee represented by a union had to pay union dues even if she was not a union member.[378] A government employee argued that the arrangement violated the Free Speech Clause of the First Amendment, forcing employees to subsidize union speech with which they disagreed.[379] *Abood* agreed when it came to the use of fees funneled into union lobbying or political speech but concluded that union fees were constitutional if they applied only to collective bargaining.[380]

In requesting that the Court overturn *Abood*, amici and the state employee challenging the law insisted that the Court's precedent was unworkable. Why? In an amicus brief, the Cato Institute maintained that courts could not predictably distinguish between collective bargaining on the one hand and political activity on the other.[381] "No one should have to have their constitutional rights to speech and association treated like playdough through such subjective 'judgment calls,'" the Cato Institute explained.[382] Mark Janus, the employee challenging the law, agreed, citing as evidence: 1) fragmented Supreme Court opinions about how to distinguish collective bargaining fees and political activity; 2) inconsistent lower court rulings; and 3) substantive errors.[383] Janus claimed that *Abood* was unworkable because it did "not

377. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2456 (2018); Abood v. Detroit Bd. of Ed., 431 U.S. 209, 223 (1977).

378. *See Abood*, 431 U.S. at 212–16.

379. *See id.*

380. *See id.* at 217–38.

381. *See* Brief for the Cato Institute et al. as Amici Curiae in Support of Petitioner at 26–32, *Janus*, 138 S. Ct. 2448 (No. 16-1466); Brief for the Cato Institute as Amici Curiae in Support of the Petition for Certiorari at 11–12, *Janus*, 138 S. Ct. 2448 (No. 16-1466).

382. Brief for the Petition for Certiorari, *supra* note 381, at 13 (quoting Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 541 (1991) (Scalia, J., concurring in part and dissenting in part)).

383. *See* Reply Brief for Petitioner at 14–15, *Janus*, 138 S. Ct. 2448 (No. 16-1466).

adequately protect employees' First Amendment rights because it depends on unions to determine, under vague and subjective criteria, what fees they can constitutionally seize from nonmembers."[384]

The Court agreed with Janus, holding that *Abood* was unworkable.[385] *Janus* first emphasized that "the line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision."[386] The fact that *Abood* spawned fact-intensive litigation was a sign that it could not be corrected.[387] So too was the vagueness of the standard, which meant that those challenging union dues had to engage in a "daunting and expensive task."[388]

Are these signs that *Abood* was unworkable? The fact that the Court disagrees about whether a ruling is correct or how to clarify an earlier precedent on its own says nothing about the workability of an earlier precedent. The Court can splinter because of differences of opinion about the correctness of an opinion or even the politics of a dispute. Nor do inconsistent lower court rulings signal unworkability. The Court may have good reasons for requiring a fact-intensive inquiry, especially in cases like *Abood*, when there are legitimate First Amendment concerns present. Or the Court may choose to proceed incrementally, declining to issue a broad, bright-line ruling.

It is certainly legitimate to worry that the line drawn in *Abood* is vague. But the remaining concerns about the workability of the Court's test boil down to a contention that *Abood* is wrong. Error in a decision is not the same thing as unworkability and should not be used as an excuse for refusing to address the substance of *Abood*'s analysis of the First Amendment.

Nor is it clear that *Abood*'s rule either contradicts its rationale or is internally incoherent. Without a close examination of the facts, it may be hard to predict ahead of time whether an activity will qualify as collective bargaining or political activity, but the distinction is not illogical. Unions negotiate on behalf of employees about working conditions and wages. This activity differs from lobbying or funding specific political parties or candidates. That a line is hard to draw does not render the distinction incoherent.

The rationale for *Abood* is also in line with the rule that the Court set out. The Court treated collective bargaining differently from political activity

384. *Id.* at 15.
385. *Janus*, 138 S. Ct. at 2482.
386. *Id.* at 2481.
387. *See id.*
388. *Id.* at 2482.

because of the importance of the government's interest in facilitating collective action on the part of labor. The Court stressed the "important contribution of the union shop to the system of labor relations established by Congress."[389] Forcing the lower courts to distinguish political activity and collective bargaining reflected the Court's deference to the importance of union negotiating.[390] Unions no longer play as large a role in employment law or indeed in the larger economy as they did at the time *Abood* came down.[391] But there is no disconnect between the rule and rationale of *Abood.* Whatever the Court thinks of *Abood*, it is not unworkable.

Unworkability came up in a dramatically different context in *South Dakota v. Wayfair, Inc.* (2018).[392] That case asked the Court to reconsider the collection of state sales taxes in an economy increasingly driven by e-commerce.[393] In 1992, in *Quill Corp. v. North Dakota*, the Court had held that the Commerce Clause prohibits states from requiring retailers to collect sales tax unless the business had a physical presence in the state.[394] The litigation of *Wayfair* reinforces how differently parties—and the Court—have defined unworkability. Wayfair and Overstock, the respondents, reasoned that the physical-presence rule is workable because it is relatively straightforward to apply and has generated an insignificant amount of litigation in the twenty-five years since the decision of *Quill*.[395] By contrast, amici supporting South Dakota pointed to disagreement between (and within the lower courts).[396] The United States defined *Quill* as unworkable because the very idea of a physical presence does not mean the same thing in an age of e-commerce.[397]

The Court agreed that *Quill* was unworkable.[398] The majority emphasized that *Quill* was burdensome to apply, highlighting the "complexities of

389. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977).

390. *See id.*

391. On the decline of unions, see, for example, ROBERT E. BALDWIN, THE DECLINE OF US LABOR UNIONS AND THE ROLE OF TRADE 65–69 (2003); Raymond Hogler, *What's Behind the Decline of American Labor Unions?*, NEW REPUBLIC (Nov. 30, 2016), https://newrepublic.com/article/139078/whats-behind-decline-american-unions; James Sherk, *Why Union Membership Is Declining*, HERITAGE FOUND. (Feb. 1, 2013), https://www.heritage.org/jobs-and-labor/commentary/why-union-membership-declining.

392. 138 S. Ct. 2080 (2018).

393. *See id.* at 2087, 2095.

394. 504 U.S. 298, 301–02 (1992).

395. *See* Respondents' Brief at 42–45, *Wayfair*, 138 S. Ct. 2080 (2018) (No. 17-494).

396. *See, e.g.*, Brief for Colorado and 40 Other States et al. as Amici Curiae Supporting Petitioner at 15–16, *Wayfair*, 138 S. Ct. 2080 (No. 17-494).

397. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 30, *Wayfair*, 138 S. Ct. 2080 (No. 17-494).

398. *Wayfair*, 138 S. Ct. at 2097.

physical presence in the Cyber Age."[399] *Wayfair* also stressed the resistance of states to *Quill*: because lawmakers had introduced statutes that may or may not comply with *Quill*, more litigation would ensue, and *Quill* seemed less workable as a result.[400]

Did *Wayfair* get it right? It is worth considering whether there is a disconnect between *Quill*'s rule and rationale. The Court justified the physical-presence rule by establishing "the boundaries of legitimate state authority," decreasing litigation, encouraging "settled expectations," and "foster[ing] investment by businesses and individuals."[401]

On the one hand, as e-commerce expands, the physical-presence rule has hardly reduced litigation. States began experimenting with techniques to circumvent *Quill* not long after the Court issued its decision, and in recent years, states have joined a "kill *Quill*" movement designed to create a direct confrontation with the Court's original decision.[402] Because *Quill* did not anticipate the growth of e-commerce, the Court's decision does not entirely encourage settled expectations either, especially given that states are testing the boundaries of when *Quill* applies.[403] On the other hand, e-commerce businesses have certainly benefitted from *Quill* much as mail-order businesses once defended the physical-presence rule.[404] For the most part, however, the difficulty of translating the physical-presence rule to a digital economy has created a gap between *Quill*'s rule and rationale.

And *Quill* may no longer be coherent. What counts as a physical presence given how many transactions are pure e-commerce? Massachusetts and Ohio, for example, have argued that e-commerce companies like Amazon, Overstock, or Wayfair have a physical presence in their states because they store apps or cookies in customers' devices in state, using in-state software, or providing content-distribution networks in state.[405] Should this count as a physical presence? It is increasingly hard to determine what constitutes a

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399. *Id.*

400. *Id.* at 2097–98.

401. *Quill Corp. v. North Dakota*, 504 U.S. 298, 315–16 (1992), *overruled by Wayfair*, 138 S. Ct. 2080.

402. On efforts to circumvent or eliminate *Quill*, see, for example, Rebecca Newton-Clarke, *Nexus Considerations: Navigating the "Kill Quill" Revolt*, THOMPSON REUTERS: TAX & ACCT. BLOG (Jan. 22, 2018), https://tax.thomsonreuters.com/blog/checkpoint/nexus-considerations-navigating-the-kill-quill-revolt.

403. *See id.*

404. For an estimate of the revenue lost because of *Quill*, see Ezra Klein, *The Long Shadow of* Quill Corp. v. North Dakota, WASH. POST: WONKBLOG (July 9, 2012, 6:51 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/09/the-long-shadow-of-quill-corp-v-north-dakota/.

405. *See* Newton-Clarke, *supra* note 402.

physical presence, and *Quill*'s rule has become increasingly illogical. It seems right to conclude that *Quill* has become unworkable.

What would a principled definition of unworkability tell us about *Casey* or *Whole Woman's Health*—the targets of an antiabortion strategy centered on unworkability? Abortion foes suggest that *Whole Woman's Health* is unworkable because it described an undue-burden standard in a "vague and ambiguous" manner. Clarke Forsythe of AUL insisted that given the open-ended nature of *Whole Woman's Health*, the decision cannot be "clearly understood and effectively applied in court" and therefore is unworkable.[406] To further establish the unworkability of *Whole Woman's Health*, Forsythe encourages pro-lifers to collect evidence on the safety of abortion and to build up a work of scholarship critical of *Whole Woman's Health*.[407]

The case for the unworkability of *Whole Woman's Health* rests largely on the fact that the Court has embraced a fact-intensive balancing test. Abortion foes suggest that *Whole Woman's Health* will inevitably generate contradictory results.[408] Even before certain abortion restrictions come before the courts, *Whole Woman's Health* supposedly offers little guidance to the lower courts.[409] But inconsistent results say nothing about the inherent flaws of a rule—or about any mismatch between a rule and rationale. If anything, *Whole Woman's Health*, like *Casey*, adopts a fact-intensive balancing analysis because the Court has recognized important considerations on either side of the abortion debate. To strike the proper balance between a woman's liberty and the government's interest in fetal life, the Court pays attention to the benefits and burdens of specific statutes. A bright-line rule would not honor these competing constitutional values as well as the balancing test *Whole Woman's Health* lays out.

Something similar is true of *Casey* and *Roe*. Litigation has certainly continued in the decades since *Casey*, and the Court left open the constitutionality of many abortion restrictions. But in an area defined by high stakes, emotion, and political controversy, the Court does not create unworkable precedent simply by proceeding cautiously and taking seriously the facts of each individual case. Nor is the political controversy surrounding *Casey* evidence of unworkability. In theory, a precedent is unworkable because of its inherent flaws, not because a particular social movement or advocacy groups dislikes that precedent and continues to challenge it in the courts and on election day. Strategic litigation is not intrinsically problematic,

406. AMERICANS UNITED FOR LIFE, DEFENDING LIFE 353 (2018), http://www.aul.org/wp-content/uploads/2018/01/Defending-Life-2018.pdf.

407. *Id.* at 352–54.

408. *See id.*

409. *See id.*

and those upset by a decision have every right to continue to chip away at it. Nonetheless, for unworkability to have any real meaning, the Court should be able to separate the unsoundness of a decision from evidence that some communities dislike that precedent and will manufacture evidence of problems with it.

A clearer definition of unworkability is overdue. The Court can move beyond the politicization of the concept produced by a long conflict about abortion.

V. CONCLUSION

The Court has forged unworkability doctrine in the shadow of abortion law. As pro-life attorneys looked for new ways to undo *Roe*, they championed multiple, often conflicting ideas of what had made the 1973 decision unworkable. Increasingly, abortion jurisprudence became a touchstone for what defined unworkability, and the imprecision and contradiction characterizing abortion foes' arguments crept into the Court's definitions of unworkability in many contexts. A clearer definition should discourage strategic behavior and allow the Court to separate truly impractical decisions from those that are divisive or simply flawed. The principles guiding *stare decisis* are incredibly important, and unworkability has played an important part in the Court's analysis. When it comes to explaining when a precedent must go, the Court can and should do better.