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## Casey and Its Impact on Abortion Regulation

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Michael F. Moses

## Abstract

Given the Supreme Court's shift from a strict scrutiny standard to an "undue burden" standard in *Planned Parenthood v. Casey*, this article advocates for application of the standard in a way that is deferential to state legislatures. The author finds a number of problems with the holding in *Casey* for which it seeks judicial and legislative action: the undue burden standard is vague; it is unclear whether the burden should be upon everyone or "some people"; and the holding allows court to strike laws that have not gone into effect, therefore evidence of their impact is "speculative."

**KEYWORDS:** abortion, undue burden, strict scrutiny, states' rights

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# CASEY AND ITS IMPACT ON ABORTION REGULATION

*Michael F. Moses\**

This year marks two important anniversaries. *Roe v. Wade*<sup>1</sup> is thirty-one years old. *Planned Parenthood v. Casey*<sup>2</sup> just turned twelve. *Casey* is less of a household name than *Roe*. But in some ways, *Casey* is more important because it changed the way courts review abortion laws. *Casey* did not make it easier to ban abortion. After *Casey*, just as before, the government may not prohibit abortion before viability, nor prevent any abortion necessary to preserve a woman's life or health.<sup>3</sup> But for abortion laws that fall short of a ban, *Casey* declared that courts should use an undue burden standard,<sup>4</sup> a standard that is more lenient than the strict scrutiny used in *Roe*.<sup>5</sup>

Why the change? The Court admitted in *Casey* that in previous cases it had not given enough recognition to the states' interest in protecting human life.<sup>6</sup> Combined with the new standard, this meant that after *Casey* states would be freer to regulate abortion than previous cases had allowed.<sup>7</sup> *Casey* explicitly overruled earlier decisions that had been too begrudging of state efforts to regulate the abortion procedure.<sup>8</sup>

That was how the decision was read by both sides of the abortion debate. Janet Benshoof, a longtime abortion rights advocate,

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

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

3. *Id.* at 879.

4. *Id.* at 877. The joint opinion of Justices O'Connor, Kennedy, and Souter explained that an undue burden is a "state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Id.*

5. *Roe*, 410 U.S. at 155-56. The Court will only uphold regulations that are narrowly drawn to justify compelling state interests in cases in which "fundamental rights, such as those in abortion cases, are implicated." *Id.*

6. *Casey*, 505 U.S. at 871.

7. *Id.* at 879-80.

8. *See id.* at 870; *see also* Janet Benshoof, *Planned Parenthood v. Casey: The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249, 2252-53 (1993).

warned that *Casey* “severely limited [the] women’s constitutional protections” given in *Roe*.<sup>9</sup> A less restrained Planned Parenthood of New York City, two days after *Casey* was decided, placed a full page ad in the New York Times warning that “*Roe v. Wade* is dead.”<sup>10</sup> *Roe*’s demise was greatly exaggerated. There was, however, universal agreement that *Casey* left states in a better position to regulate abortion. Just last term, Justice Scalia reminded us that “*Casey* provided a *less* expansive right to abortion than did *Roe*.”<sup>11</sup>

One way to assess the impact of *Casey* is to therefore to ask whether the courts have kept the promise made in *Casey*. Is it easier now to regulate abortion? Do courts now defer to legislatures more than they did before *Casey*? The answer is mixed.

In the twelve years since *Casey*, judges have rejected some of the more incredible claims made by the abortion industry, but usually only after years of litigation.<sup>12</sup> For example, in Montana, a physician’s assistant challenged a law that said only doctors can perform abortions.<sup>13</sup> It seems just common sense that states do not violate the Constitution if they forbid non-physicians from performing surgery. Abortion is a surgical procedure. But a federal court of appeals struck the law down<sup>14</sup> and it took a Supreme Court decision to get it reinstated.<sup>15</sup>

In Texas, the abortion industry claimed that it was an equal protection violation to impose stricter regulations on doctors’ offices that perform over 300 abortions a year than on those that perform fewer.<sup>16</sup> It is not unusual for legislatures to use numerical cutoffs.<sup>17</sup>

9. Benshoof, *supra* note 8, at 2249.

10. Advertisement, N.Y. TIMES, July 1, 1992, at A17.

11. Lawrence v. Texas, 123 S. Ct. 2472, 2489 (2003) (Scalia, J., dissenting).

12. See, e.g., Mazurek v. Armstrong, 520 U.S. 968 (1997) (approximately two years of litigation); Women’s Med. Ctr. of N.W. Houston v. Bell, 248 F.3d 411 (5th Cir. 2001) (same); A Woman’s Choice East Side Clinic v. Newman, 904 F. Supp. 1434, 1439-40 (S.D. Ind. 1995), *enforced*, 132 F. Supp. 2d 1150 (S.D. Ind. 2001), *rev’d*, 305 F.3d 684 (7th Cir. 2002) (approximately five years of litigation).

13. Armstrong v. Mazurek, 906 F. Supp. 561, 563-65 (D. Mont. 1995), *vacated by* 94 F.3d 566, *rev’d*, 520 U.S. 968 (1997).

14. *Armstrong*, 94 F.3d at 566.

15. See *Mazurek*, 520 U.S. 968.

16. Women’s Med. Ctr. of N.W. Houston v. Archer, 159 F. Supp. 2d 414, 418 (S.D. Tex. 1999), *aff’d in part, and rev’d in part sub nom.* Women’s Med. Ctr. of N.W. Houston v. Bell, 248 F.3d 411 (5th Cir. 2001).

17. For example, many of the employment discrimination laws apply to employers with a certain number of people on their payroll. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e (2003) (applicable to employers with fifteen or more employees); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2003) (applicable to employers with twenty or more employees).

But a federal judge struck down the Texas law<sup>18</sup> and again, it took an appeal to get it reinstated.<sup>19</sup>

In Indiana, Planned Parenthood claimed that a law imposed an undue burden because it required doctors to meet face to face with patients before performing an abortion.<sup>20</sup> The purpose of the law was to simply to see that women got information about their pregnancies and about abortion before undergoing an abortion.<sup>21</sup> It seems clear that nothing in the Constitution prevents states from requiring doctors simply to meet face to face with their patients to talk about a procedure the doctor is about to perform on the patient. But, again, a federal judge struck the law down.<sup>22</sup> And again, it took an appeal to get it reinstated.<sup>23</sup>

All of the claims described above were ultimately rejected. But it took many years of litigation. During all that time, the laws being challenged were not being enforced because they had been enjoined while the litigation was pending.<sup>24</sup>

Unfortunately, some of the bad decisions have not been reversed on appeal. For example, a Texas regulation provided that abortion clinics had to treat patients in a way that would “enhance each patient’s dignity.”<sup>25</sup> A court thought that the notion of “dignity” too vague to be enforceable and struck it down even though federal health regulations use the same word repeatedly in similar contexts.<sup>26</sup> A parental consent abortion law in Arizona was struck

18. *Archer*, 159 F. Supp. 2d at 468.

19. *Bell*, 248 F.3d 411.

20. *See A Woman’s Choice East Side Clinic v. Newman*, 904 F. Supp. 1424, 1439-40 (S.D. Ind. 1995), *enforced*, 132 F. Supp. 2d 1150 (S.D. Ind. 2001), *rev’d*, 305 F.3d 684 (7th Cir. 2002).

21. *See Newman*, 305 F.3d at 702-04.

22. *Newman*, 132 F. Supp. 2d at 1181.

23. *Newman*, 305 F.3d at 693.

24. *See supra* note 12.

25. *Women’s Med. Ctr. of N.W. Houston v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001).

26. *Id.* at 422. Regulatory requirements that patients be treated with dignity are set out in a variety of federal regulations. *See, e.g.*, 38 C.F.R. § 17.33(a)(1) (2003) (patients “have a right to be treated with dignity in a humane environment that affords them both reasonable protection from harm and appropriate privacy with regard to their personal needs”); 42 C.F.R. § 51b.103(c) (2003) (grantees for preventive health services must provide the government with assurances that “services are provided in a manner which preserves human dignity and maximizes acceptance”); 42 C.F.R. § 56.603(k) (2003) (a project for operating a migrant health program must be “operated in a manner calculated to preserve human dignity”); 42 C.F.R. § 59.5(a)(3) (2003) (family planning services must be provided “in a manner which protects the dignity of the individual”); 42 C.F.R. § 405.2138(c) (2003) (suppliers of end-stage renal disease services must treat patients with “consideration, respect, and full recognition of their individuality and personal needs, including the need for privacy in treatment”); 42 C.F.R. § 483.15(a) (2003) (long-term care facilities must “promote

down because, though it had a judicial bypass, it did not have specific deadlines.<sup>27</sup> The Supreme Court has held that bypass petitions have to be heard promptly,<sup>28</sup> but it will never be known how Arizona would have implemented its law because it never got a chance.

That is where things stand today. *Casey* said states should be freer to regulate abortion,<sup>29</sup> but courts are continuing to scrutinize abortion laws closely, and in many cases striking down what appear to be reasonable regulations.<sup>30</sup>

There are three specific problems with *Casey* that have allowed this situation to continue and to fester. First of all, it is not clear what an undue burden is. The Supreme Court defined it as a "substantial obstacle,"<sup>31</sup> but those words seem as vague as the words they define. The dissenters in *Casey* thought the undue burden was "based even more on a judge's subjective determinations than was the trimester framework" that *Casey* rejected.<sup>32</sup> In sum, *Casey* did not give us a clear test.

A second problem is deciding to whom the undue burden test should be applied. Is a law invalid if it unduly burdens *everyone's* right to an abortion or if it burdens only *some* women? Most courts, following the joint opinion in *Casey*, say that it is the latter.<sup>33</sup> But that seems like a throwback to *Roe*. If an abortion law is

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care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality"); 42 C.F.R. § 483.152(b)(4)(iv) (2003) (nurse aide training programs must include training in "[a]llowing the resident to make personal choices, providing and reinforcing other behavior consistent with the resident's dignity").

27. See *Planned Parenthood v. Lawall*, No. 98-15862, 1999 U.S. App. LEXIS 33154, at \*12-13 (9th Cir. June 9, 1999).

28. See *Planned Parenthood v. Lawall*, 193 F.3d 1042, 1044 (9th Cir. 1999) (O'Scannlain, J., dissenting) (citing *Hodgson v. Minnesota*, 497 U.S. 417 (1990)), reprinted as amended by No. 98-15862, 1999 U.S. App. LEXIS 33154.

29. *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992).

30. See *supra* notes 25-27 and accompanying text.

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

32. *Id.* at 965 (Rehnquist, C.J., concurring in part and dissenting in part).

33. See *id.* at 894-95. *Casey* invalidated a spousal notification provision that, in the view of the authors of the joint opinion, unduly burdened the abortion right of a "large fraction" of women out of a total universe of women for whom the law was an actual restriction, excluding those women who voluntarily informed their spouses of an intent to have an abortion and who were not exempt under the statute. *Id.* By choosing such an artificially small universe, it was virtually assured that even a small number of women for whom the law acted as a substantial obstacle would constitute a "large fraction." See *id.*

invalid because it burdens only a few people, that is much like the strict scrutiny *Casey* rejected.<sup>34</sup>

A third problem is that *Casey* has not prevented courts from enjoining laws that have never gone into effect. *Planned Parenthood v. Lawall* is a good illustration.<sup>35</sup> It is often difficult to know or predict what precise impact a law will have if it has never been enforced.<sup>36</sup> Yet courts continue to strike down laws that have never been enforced based frequently on speculative evidence.<sup>37</sup>

Has the Supreme Court done anything since *Casey* to fix these problems? Not yet. The most interesting thing about the last twelve years is just how little the Supreme Court has had to say about abortion. The Court has heard a few cases involving pro-life demonstrators, but those are more about free speech than abortion, at least on the surface.<sup>38</sup> In these cases, which are mostly flitting around the edges of the abortion issue, demonstrators find no natural ally, for those Justices who might be thought most sympathetic to speech rights are generally most committed to the abortion right.<sup>39</sup>

Four years ago the Court took up the partial birth abortion issue in *Stenberg v. Carhart*.<sup>40</sup> It was the first substantive abortion case the Court had heard since *Casey*. Unfortunately, *Carhart* was a step backwards. Usually if the government bans an unsafe medical procedure, the courts will not interfere even if some medical ex-

34. See generally *id.* The strict scrutiny and "large fraction" tests each strike down laws based on their effect on only a few people. For that reason, they each require a tight fit between legislative means and objective. In either case, overbreadth will prove fatal.

35. See *supra* notes 27-28 and accompanying text.

36. See *Planned Parenthood v. Lawall*, 193 F.3d 1042, 1045 (9th Cir. 1999) (O'Scannlain, J., dissenting), *reprinted as amended by* No. 98-15862, 1999 U.S. App. LEXIS 33154.

37. See, e.g., *id.*

38. See *Hill v. Colorado*, 530 U.S. 703 (2000); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

39. Compare for example, the majority and dissenting opinions in *Watchtower Bible and Tract Soc'y v. Village of Statton*, 536 U.S. 150 (2002), and *Stenberg v. Carhart*, 530 U.S. 914 (2000). The Court's dislike of abortion cases, or at least the continuing controversy it has stoked, is evident. *Casey*, 505 U.S. at 844 (noting with apparent displeasure that "the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*"); *Id.* at 999 (Scalia, J., concurring in the judgment in part, dissenting in part) (noting "the marches, the mail, the protests aimed at inducing us to change our opinions" about abortion).

40. 530 U.S. 914 (2000).

perts think it is safe.<sup>41</sup> In *Carhart* there was conflicting, or at least ambiguous evidence about whether partial birth abortion was dangerous for women.<sup>42</sup>

But instead of deferring to the legislature, the Court held that if there is significant or substantial medical authority that an abortion procedure is safe, states cannot ban it even if *other* evidence shows the procedure is dangerous.<sup>43</sup> That means the government can never ban an abortion procedure if the abortion industry can find a few authorities within the industry who say it is safe. It is comparable to saying that a car maker has a right to make a dangerous car, and the government may not interfere, as long as someone with the company says it is safe.

*Carhart* and lower court decisions show rather plainly that the courts have not yet given states the latitude to regulate abortion that *Casey* promised. Could things change? Yes. Even though it has borne little fruit to date, *Casey* could be a pathway for change. *Roe*'s strict scrutiny was usually fatal.<sup>44</sup> *Casey*'s undue burden test at least gives courts room to uphold abortion laws. In twenty years, we have moved from a situation where laws were almost certain to be struck down to one where there is a real chance they can be upheld.

*Casey* may have laid the groundwork for change. Our task now is to encourage the Supreme Court and lower courts to define and apply the undue burden test in a way that truly is more deferential to legislatures. Absent wholesale recognition of the fundamental error made in *Roe*, the courts should honor the promise made in *Casey* to permit greater regulation of abortion and should apply the more lenient standard of judicial review announced in that case.

Four specific areas seem ripe for legislative action. First, states should enact real bans on post-viability abortions. It is true that a post-viability ban requires a life/health under *Roe*<sup>45</sup> and *Casey*.<sup>46</sup> But the exception should not swallow the rule. Ever since *Roe*, the

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41. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 604 (1977) (physician has no right to practice medicine according to his own unfettered judgment); *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) ("there is no right to practice medicine which is not subordinate to the police power of the States").

42. *Stenberg*, 530 U.S. at 932-35.

43. *Id.* at 932.

44. See, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

45. 410 U.S. 113, 163-64 (1973).

46. 505 U.S. 833, 879 (1992).



Court has insisted that the Constitution does not require abortion on demand.<sup>47</sup> That can only be true if the Constitution permits a post-viability ban with teeth.

For example, in 1997, Justice Thomas, joined by two other justices, wrote that he did not read the life/health exception for post-viability abortions to include mental health.<sup>48</sup> Since the Supreme Court has explicitly rejected the notion of abortion on demand, the entire Court and lower courts should agree that the life/health exception excludes psychological and sociological factors, factors that can easily be manipulated to permit abortion on demand.<sup>49</sup>

Second, states can pass laws that protect an unborn child from harm to which the mother has not consented—laws like Laci and Connor's Law, the Unborn Victims of Violence Act.<sup>50</sup> Third, states can pass legislation to ensure that women know about the risks of abortion. That can be done with informed consent laws,<sup>51</sup> government-funded public service ads,<sup>52</sup> and with malpractice suits.

Fourth, states can protect the rights of people and institutions that do not want to pay for or participate in abortion. This last point warrants special attention. The abortion industry and its allies have been arguing that religious denominations and their institutions should not be allowed to be different.<sup>53</sup> They have claimed that if church agencies want to serve the public, receive public

47. *Doe v. Bolton*, 410 U.S. 179, 189 (1973). Thirty years later, the Court continues to note that the abortion right is not absolute. *Lawrence v. Texas*, 123 S. Ct. 2472, 2477 (2003).

48. *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036, 1037 (1998) (Thomas, J., dissenting from the denial of certiorari).

49. Even a "life" exception, loosely defined, is susceptible to manipulation, as in the case of a woman who claimed to be suicidally distraught over her pregnancy, as was claimed in one well publicized case in Ireland. See BBC News, *Irish PM Concedes Abortion Defeat* (Mar. 7, 2002), available at <http://news.bbc.co.uk/1/hi/world/europe/1859287.stm>.

50. See Nat'l Right to Life Committee, *State Homicide Laws That Recognize Unborn Victims* (Feb. 2, 2004), available at [http://www.nrlc.org/Unborn\\_victims/Statehomicidelaws092302.html](http://www.nrlc.org/Unborn_victims/Statehomicidelaws092302.html).

51. See Carrie Gordon Earl, *Abortion Law in the United States*, Citizen Link (Sept. 9, 2003), at <http://www.family.org/cforum/fosi/bioethics/facts/a0027729.cfm>. Thirty states currently have informed consent laws, which mandate that "women receive full medical disclosure of possible risks associated with and alternatives to abortion." *Id.*

52. See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998); *Rust v. Sullivan*, 500 U.S. 173, 194-95 (1991).

53. See, e.g., Catherine Weiss, Director, ACLU Reproductive Freedom Project, testimony before the Health Subcommittee of the U.S. House of Representatives Committee on Energy and Commerce (July 11, 2002) (arguing that religiously affiliated medical and social service providers should not have conscience protection), available at <http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=10513&c=224>.

funds, or hire people beyond their own co-religionists, they must provide their clients and employees, or pay for, what the church agencies object to on moral or religious grounds.<sup>54</sup>

Many states, for example, now mandate health insurance coverage for contraception with limited or no conscientious exemption.<sup>55</sup> And recently there has been a move to make all hospitals provide emergency contraception.<sup>56</sup> Battle lines to date have been drawn largely over contraception. But if a religious denomination and its institutions can be required to provide and pay for contraception in the face of an explicit religious objection,<sup>57</sup> can abortion be far behind? Court cases have been filed in New York and California to challenge state contraceptive mandates with inadequate conscience protection.<sup>58</sup> These cases are important because they involve a church's ability to practice what it preaches. And ultimately that is more than just an abortion or contraception issue—that is an issue of religious and associational liberty as well as free speech.

So far I have been discussing the parameters established by *Casey*. I do however, want to make a few brief remarks about the decision itself. I doubt any criticism of *Casey* has been more devastating than one made recently by Michael Stokes Paulsen.<sup>59</sup> Professor Paulsen does not mince words. He is correct in his description of the dimensions of the tragedy and the stunning injustice that *Casey* perpetuates.<sup>60</sup> By virtue of that decision, as he points out, literally millions of innocent human beings have been (and will continue to be) lost to abortion.<sup>61</sup> This is an evil of unspeakable proportion.

Many of the reasons given for continued recognition of an abortion right seem to have no logical limit to unborn children and therefore prove too much. If pregnancy and childbirth can be a source of emotional or financial distress (hopefully for many they

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54. *Id.*

55. See A. Sonfield, *Twenty States Now Require Contraceptive Insurance Coverage*, 5 GUTTMACHER REP. 3 (2002), available at [http://www.guttmacher.org/pubs/journals/gr0\\_50313a.html](http://www.guttmacher.org/pubs/journals/gr0_50313a.html).

56. See Compassionate Assistance for Rape Emergencies Act, H.R. Res. 2527, 108th Cong. (2003).

57. Conscientious objection to abortion is not unconditionally protected in the federal code. See 42 U.S.C. § 300a-7 (2003).

58. *Catholic Charities v. Superior Court*, 109 Cal. Rptr. 2d 176 (App. 2001), review granted and opinion superseded, 31 P.3d 1271 (Cal. 2001); *Catholic Charities v. Serio*, No. 8229-02 (N.Y. Sup. Ct., Albany 2003) (Lamont, J.).

59. See Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

60. See *id.* at 1026-35.

61. *Id.* at 1027-28.

are also a source of joy and fulfillment), is this any different for households with infant children? Our courts have not made it impossible for legislatures to ban the outright killing of born infants. Everyone recoils in horror when they hear tales of infanticide.

If no sociological, psychological, health, or other factor justifies the taking of a born child's life (and none does), if that child's life is universally to be regarded as inviolable (and it is), how can we reach a *different* conclusion for a child at an earlier stage of development, a child just as human as the one now born? The child's status as a human being rationally cannot hinge on its dependence on others. Newborns and, indeed, many adults are dependent on others for their care and are in no sense less human because of it.

Yet reflexively these arguments, unsound as they are, continue to be made. When debating the ban on partial birth abortion, for example, one senator showed a picture of an unborn child's hand and asked whether it was the hand of a person or a piece of property, to which the bill's chief opponent said, "I am not a doctor and I am not God . . . I trust other human beings to make these decisions."<sup>62</sup> As I say, these arguments prove too much. One cannot be agnostic about the state's power to protect human life at a particular stage of life without, by the same logic, calling into question the state's power to protect human life at any other stage.

One's human status and dignity cannot depend upon an act of will. If the unborn child lost by Laci Peterson<sup>63</sup> was human, as it certainly was, so is the child lost to abortion. If the death of one is a tragedy, so is the death of the other. To hold that only those people are human whom I *want* to recognize as human is to enter a heartless and fundamentally evil world, a world in which human will triumphs over human dignity.

The greatest irony is that abortion is argued as a right at all. There are at least two great principles enshrined in law that abortion violates. One is equal justice for all. Another is the special solicitude that the law has always shown, from its very beginnings, for people who are on the edges of society, the vulnerable, the marginalized. To suggest that freedom and equality are enhanced by recognizing a private power to extinguish the life of an innocent

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62. 149 CONG. REC. S12,921 (daily ed. Oct. 21, 2003) (statement of Sen. Boxer).

63. Laci Peterson was eight months pregnant when she was reported missing from her California home in December, 2002. Her body, and the body of the unborn child she was carrying, was recovered five months later. Her husband, Scott Peterson is currently on trial for murder. See The Official Site of Laci Peterson, *What's Happening* (June 8, 2003), at <http://www.lacipeterson.com/whats happening/index.html>.

person turns every rational understanding of freedom and equality on its head.

Until the Court reverses itself or the Constitution is amended, we are left only with *Casey's* promise to permit greater latitude in the regulation of abortion. Given what is at stake, that promise should be taken up to the fullest extent. The Court will not permit a blanket ban.<sup>64</sup> It will, however, permit restrictions after viability and throughout pregnancy.<sup>65</sup> It will permit requirements designed to ensure informed consent.<sup>66</sup> It will permit the protection of unborn children when the mother does not consent to the child's destruction.<sup>67</sup> It remains to be seen whether the Court will preserve the freedom of our citizenry and their governmental, religious, and other institutions not to participate in abortion.

History suggests that as a rule "constitutional law changes but slowly."<sup>68</sup> *Casey* provides one step toward reversal. It rejects *Roe's* trimester methodology and strict scrutiny approach.<sup>69</sup> Perhaps most importantly, the authors of the controlling opinion in *Casey* could not bring themselves to say that *Roe* was correctly decided.<sup>70</sup> A Court so unsure of *Roe* and so willing to stray from

64. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 878-79 (1992).

65. See *id.*

66. *Casey*, 505 U.S. at 881.

67. *Roe* and *Casey* make clear that the abortion right hinges on the mother's consent to abort the child. No one contests the government's interest in protecting the health and safety of the unborn child where the mother wishes to carry the child to term.

68. Mark E. Chopko, *Webster v. Reproductive Health Services: A Path to Constitutional Equilibrium*, 12 Campbell L. Rev. 181, 214 (1990). See generally Michael Pfeifer, *Abandoning Error: Self Correction by the Supreme Court*, in *ABORTION AND THE CONSTITUTION* 3 (Dennis J. Horan et al. eds., 1987).

69. *Casey*, 505 U.S. at 872-73, 877.

70. *Id.* at 871.

We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding.

*Id.* By thus declining to state that *Roe* was correctly decided, the *Casey* opinion "leaves a reader . . . with the nagging sense that a majority of the Court reaffirmed *Roe*, even though a differently constituted majority (the four dissenters plus one or more of the authors of the Joint Opinion) believed *Roe* to have been wrongly decided." Mark E. Chopko & Michael F. Moses, *Assisted Suicide: Still a Wonderful Life?*, 70 NOTRE DAME L. REV. 519, 549 n.104 (1995) (quoting Paul B. Linton,

essential features of that case will not remain forever committed to a constitutional interpretation that only perpetuates it.

