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ROE'S LIFE-OR-HEALTH EXCEPTION: SELF-DEFENSE OR RELATIVE-SAFETY?

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INTRODUCTION

Roe v. Wade[1] famously holds that fetuses are not persons within the meaning of the Fourteenth Amendment prior to birth.[2] *Roe* also holds, however, that states have a "compelling" interest in fetal life once the fetus is viable,[3] that is, "potentially able to live outside the mother's womb, albeit with artificial aid."[4] Before viability, a woman may obtain an abortion whenever she and her doctor conclude it would be in her best interest.[5] After viability, a state may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[6] Thus, the general rule that states may protect viable fetal life through abortion bans and regulations is subject to a constitutional life-or-health exception to which state laws must conform.

1 410 U.S. 113 (1973).
2 *Id.* at 158.
3 *Id.* at 163.
4 *Id.* at 160.
5 *Id.* at 164.
6 *Id.* at 165.

Much depends, therefore, on what the life-or-health exception means. As formulated in *Roe*, the exception turns out to be deeply ambiguous in rationale and scope. The exception could be shaped in accordance with self-defense principles, on the theory that the state's interest in viable fetal life should yield to the woman's right to self-preservation.[7] On that understanding, the exception would apply only when a doctor reasonably believes that continued pregnancy would put the mother in grave danger of death or serious injury. Alternatively, the life-or-health exception could stem from a judgment that the state's interest in viable fetal life—while strong enough to require a woman to accept the ordinary burdens of becoming a mother—must yield when, in addition, continued pregnancy would pose greater risks to her life or health than an abortion.[8] On that understanding, the exception would apply whenever, in a doctor's good-faith judgment, the abortion is *relatively safer for the mother* than pregnancy, because its overall health risks are believed to be smaller.

These competing interpretations of the life-or-health exception[9] have very different practical implications. The self-defense approach would rarely block the application of a ban on postviability abortions because very few pregnancies nowadays pose grave dangers of death or serious health impairment that can only be avoided by abortion.[10]

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7 *See* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1816 (2007) ("*Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* secure not just a previability right to abortion as reproductive choice, but also a separate postviability right to abortion as medical self-defense when pregnancy threatens a woman's life." (footnotes omitted)).

8 *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 294 (2007) (describing "two different rights to abortion"—"a woman's right not to be forced by the state to become a mother and thus to take on the responsibilities of parenthood" and "a woman's right not to be forced by the state to bear children at risk to her life or health").

9 The constitutionally mandated life-or-health exception can also be characterized as a second abortion right, over and above the right to an elective abortion. *See supra* notes 7–8. A proponent of the self-defense interpretation might call this the right to a life-or-health-preserving abortion, while a proponent of the relative-safety interpretation would prefer to call it the right to a therapeutic abortion. In light of this Article's descriptive character, I have chosen to refer throughout to the life-or-health exception, rather than to speak in terms of a second abortion right.

10 I include in the term "abortion" any deliberate termination of pregnancy that poses grave danger to the life of the fetus, even if done in a manner (such as induced labor or C-section) chosen to maximize the viable fetus's chance of survival. Some doctors contend that it is *never* necessary, in order to preserve maternal life, to perform an abortion in the narrower sense of a procedure *intended* to kill the fetus and thereby end the pregnancy. They acknowledge, however, that premature termination of pregnancy by methods that do not involve direct killing of the fetus (but are likely to result in fetal death) is sometimes necessary to preserve maternal life or health.

By contrast, the relative-safety approach would apply in the far more frequent situations in which pregnancy and childbirth are believed to pose marginally greater risks to the mother's physical or mental health than a postviability abortion would.[11] Those increased health risks need not be likely to occur, nor need they involve severe health impairment.[12] All that is required is that the increased health risks could lead a doctor, *focusing exclusively on what is best for the pregnant woman's health, without regard to the life of the fetus,* to recommend that she have an abortion.[13]

The two approaches would also generate different results in the other major setting in which the postviability life-or-health exception applies: state regulation of abortion *methods* that seeks to maximize the chances that the viable fetus will survive an abortion and receive appropriate neonatal care.[14] Consider, for example, a hypothetical statute requiring that postviability abortions be performed by inducing premature labor—a method that is quite safe for most women, and that (unlike the standard late-term "dilation and evacuation" (D&E) method) often enables viable fetuses to be born alive.[15] Under the self-defense approach, the statute would be constitutional, provided it contained a life-or-health exception for the subset of cases in which inducing labor would be dangerous to the mother. Under the relative-safety approach, the statute would be unconstitutional on its face, because although induced labor is very safe, it is generally accepted that the standard (and fetal-lethal) D&E method has even lower risks, and hence is *relatively safer.*[16]

See, e.g., Interview by Priests for Life with Dr. George Isajiw, former president of Catholic Med. Ass'n, 1998, *available at* http://www.priestsforlife.org/media/interview isajiw.htm.

11 *See infra* text accompanying notes 204–06.

12 *See infra* text accompanying note 182.

13 *See infra* text accompanying note 182.

14 As Part III.C explains, after *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Roe*'s life-or-health exception also applies to *pre*viability abortion regulations. In the previability context, the most important applications of the life-or-health exception are (1) to medical-emergency provisions that excuse doctors from compliance with otherwise applicable abortion regulations, and (2) to restrictions on abortion methods. Although this Article's primary focus is on the application of *Roe*'s life-or-health exception to postviability abortions and abortion methods, Parts III and IV also discuss the exception's application to previability state abortion regulations.

15 The D&E method involves dismembering the fetus and removing it in pieces. Gonzales v. Carhart, 550 U.S. 124, 135–36 (2007).

16 *See* Stenberg v. Carhart, 530 U.S. 914, 926 (2000) (describing studies showing that D&E is safer than "the next safest" procedure, induced labor).

The Supreme Court has never definitively embraced either the self-defense or relative-safety interpretation of the life-or-health exception. This Article does not address the central normative question (which approach *should* the Court adopt), in the conviction that the foundation for an informed debate on that question should be a thorough and rigorous descriptive analysis of the Court's decisions dealing with the life-or-health exception. To the best of my knowledge, no other commentator has undertaken the close reading and in-depth analysis of the Court's cases dealing with the life-or-health exception that this Article presents.[17]

In brief, that analysis demonstrates that the Court has vacillated between—and at times straddled—these two approaches, without ever offering anything resembling a reasoned explanation for its actions. *Roe* and its companion case, *Doe v. Bolton*,[18] left the life-or-health exception undefined and ambiguous—thereby enabling pro-life audiences to view it through self-defense eyes and pro-choice audiences to see it with relative-safety ones.[19] In *Thornburgh v. American College of Obstetricians & Gynecologists*,[20] the Court implicitly endorsed an absolutist version of the relative-safety interpretation. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[21] the Court implicitly rejected *Thornburgh* and introduced a new (but ambiguous) phrase—"significant health risks"[22]—to describe the circumstances that must be covered by the health exception. In *Stenberg v. Carhart*,[23] the Court reverted to the relative-safety interpretation (albeit a more moderate version than it had posited in *Thornburgh*).[24] Most recently, in *Gonzales v. Carhart*,[25] the Court implicitly endorsed a version of the self-defense approach[26]—but did so in a half-hearted manner that sends only a muted signal to lower courts and legislatures.

Although this Article is primarily descriptive, it does make one normative claim: that the Supreme Court's failure to explain the life-

17 The most extensive analysis of which I am aware is presented in Gail Glidewell, *"Partial Birth" Abortion and the Health Exception: Protecting Maternal Health or Risking Abortion on Demand?*, 28 FORDHAM URB. L.J. 1089 (2001).

18 410 U.S. 179 (1973).

19 *See infra* Part I.D.

20 476 U.S. 747 (1986), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

21 505 U.S. 833 (1992).

22 *Id.* at 880 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

23 530 U.S. 914 (2000).

24 *Id.* at 934–35.

25 550 U.S. 124 (2007).

26 *See id.* at 164.

or-health exception's rationale and scope is utterly irresponsible.[27] In *Casey*, the joint opinion of Justices O'Connor, Souter, and Kennedy solemnly declared that "[l]iberty must not be extinguished for want of a line that is clear,"[28] and that, unlike legislatures, courts "must justify the lines we draw."[29] When it comes to the life-or-health exception, the Court has neither drawn clear lines nor justified them. The liberal, pro-*Roe* Justices have tried to have it both ways, intimating that postviability abortions are rare, yet supporting the relative-safety approach that makes them routinely available. The conservative, anti-*Roe* Justices have angrily objected to the relative-safety approach, yet neglected even to articulate, much less make the case for, the obvious self-defense alternative. The one point on which they all apparently agree is that the less said about *Roe*'s life-or-health exception, the better.

This abdication of the Court's basic responsibility to say what the law is—particularly when the Court itself has made that law—has received little attention or criticism. How has the Court gotten away with it? In part, I surmise, because the Court's failure to decide has been almost as good as outright victory from the pro-choice standpoint favored by elite, professional, and media opinion. The law in action tilts decisively toward the relative-safety interpretation. Twenty-one of the thirty-six states with a postviability ban in force simply track the language of *Roe*'s life-or-health exception;[30] the other fifteen use

27 *Cf.* Randy Beck, Gonzales, Casey, *and the Viability Rule*, 103 Nw. U. L. REV. 249, 271 (2009) (criticizing the Court's failure to articulate a nonconclusory rationale for the rule that the right to elective abortion continues until viability).

28 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

29 *Id.* at 870.

30 Postviability prohibitions that make an exception for abortions "necessary to preserve the woman's life or health," or words to that effect, include ARIZ. REV. STAT. ANN. § 36-2301.01 (2000); ARK. CODE ANN. § 20-16-705 (1985); CAL. HEALTH & SAFETY CODE §§ 123464–123468 (West 2002); CONN. GEN. STAT. § 19a-602(b) (1990); FLA. STAT. § 390.0111(1) (1999); GA. CODE ANN. § 16-12-141(c) (2009); 720 ILL. COMP. STAT. ANN. 510/5 (1984); IOWA CODE ANN. § 707.7 (1996); KY. REV. STAT. ANN. § 311.780 (LexisNexis 1974); LA. REV. STAT. ANN. § 40:1299.35.4(A) (2001); ME. REV. STAT. ANN. tit. 22, § 1598 (1993); MD. CODE ANN., HEALTH–GEN. § 20-209 (West 2005); MINN. STAT. ANN. § 145.412(3) (West 1998); MO. ANN. STAT. § 188.030 (West 1979); NEB. REV. STAT. § 28-329 (1984); OKLA. STAT. tit. 63, § 1-732 (1997); S.C. CODE ANN. § 44-41-20(c) (1995); S.D. CODIFIED LAWS § 34-23A-5 (1973); TENN. CODE ANN. § 39-15-201(c)(3) (West 1989); WASH. REV. CODE §§ 9.02.110 (1992); WIS. STAT. ANN. § 940.15 (2001). California's statutory exception is arguably broader than *Roe* requires, because it allows a postviability abortion unless "[i]n the good faith medical judgment of the physician, continuation of the pregnancy posed no risk to life or health of the pregnant woman." CAL. HEALTH & SAFETY CODE § 123468.

more restrictive language suggesting a self-defense interpretation.[31] (Fourteen states have no prohibition on postviability abortions in force, either because they have no postviability statutes, or because their postviability statutes contains no health exceptions, and thus are plainly unconstitutional under *Roe*.[32]) Absent an unambiguous endorsement of the self-defense approach by the Supreme Court, the lower federal courts are likely to interpret *all* these statutes in accordance with the relative-safety interpretation. I base this prediction on three considerations: (1) the established practice of interpreting statutes, where reasonably possible, to avoid constitutional questions;[33]

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31 Alabama, Kansas, and Pennsylvania require a "substantial and irreversible impairment of a major bodily function." ALA. CODE §§ 26-22-1 to -5 (1997); KAN. STAT. ANN. § 65-6703(a) (1998); 18 PA. CONS. STAT. ANN. § 3211(b)(1) (West 1984). Indiana requires a "substantial permanent impairment of the life or physical health" of the woman. IND. CODE § 16-34-2-1(a)(3)(c) (1997). Massachusetts and North Dakota require a "substantial risk of grave impairment of her physical or mental health." MASS. GEN. LAWS ch. 112, § 12M (1997); N.D. CENT. CODE § 14-02.1-04 (1979). Montana requires "a risk of substantial and irreversible impairment of a major bodily function." MONT. CODE ANN. § 50-20-109(4) (2005). Nevada and North Carolina require a "substantial risk" that continuance of the pregnancy would endanger the woman's life or "gravely impair" her physical or mental health. NEV. REV. STAT. § 442.250 (West 1985); N.C. GEN. STAT. § 14-45.1(b) (1997). New Mexico requires that the procedure is necessary to preserve the life of a woman, or to prevent great bodily harm to a woman, because of physical disorder, illness, or injury. N.M. STAT. §§ 30-5A-1 to -5 (2000). Ohio requires a "serious risk of the substantial and irreversible impairment of a major bodily function." OHIO REV. CODE ANN. § 2919.16(J) (LexisNexis 2002). Texas requires a "substantial risk of serious impairment" to her physical or mental health. TEX. HEALTH & SAFETY CODE ANN. § 170.002(b)(2) (Vernon 1998). Utah requires "serious risk of substantial and irreversible impairment of a major bodily function." UTAH CODE ANN. § 76-7-302(3)(b)(i)(B) (2009). Virginia requires that the pregnancy be likely to result in the woman's death or "substantially and irremediably impair" her physical or mental health, VA. CODE ANN. § 18.2-74(b) (2009), and Wyoming requires that the woman be in "imminent peril that substantially endangers her life or health," WYO. STAT. ANN. § 35-6-102 (1957). The Ohio and Utah statutes have been declared unconstitutional by lower federal courts on other grounds. *See* Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 210 (6th Cir. 1997); Jane L. v. Bangerter, 102 F.3d 1112, 1118, (10th Cir. 1996).

32 The Delaware, Idaho, Michigan, New York, and Rhode Island postviability statutes make an exception only for the life of the mother. *See* DEL. CODE ANN. tit. 24, § 1790(a)(1) (1995); IDAHO CODE ANN. § 18-608(3) (1973); MICH. COMP. LAWS § 750.323 (1979); N.Y. PENAL LAW § 125.05(3) (McKinney 1970); R.I. GEN. LAWS § 11-23-5(a) (1975). Nine states (Alaska, Colorado, Hawaii, Mississippi, New Hampshire, New Jersey, Oregon, Vermont, and West Virginia) have no laws prohibiting postviability abortions.

33 *See, e.g.*, Miller v. French, 530 U.S. 327, 341 (2000) (discussing the "canon of constitutional doubt," which permits courts to construe statutes to avoid constitu-

(2) the Supreme Court's admonition to lower courts to follow Supreme Court precedent even if the Court's own later cases make it likely that the Court will overrule that precedent;[34] and (3) the fact that, as this Article will show, the Court's decisions supporting the relative-safety interpretation have been clearer and more emphatic than its decisions supporting the self-defense interpretation.[35]

A similar pattern holds when it comes to state statutes requiring that postviability abortions use the method most likely to spare the life of the fetus. Although some of these statutes contain life-or-health exceptions that could be construed in self-defense terms,[36] others apply whenever compliance would subject the mother to increased health risks.[37] In some cases, the relative-safety language of the statute represents a legislative attempt to comply with the Supreme Court's decisions in *Colautti v. Franklin*[38] and *Thornburgh*—rulings that have since been undermined, but not openly overruled.[39]

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tional questions unless "the saving construction" is plainly contrary to legislative intent).

34 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

35 *See infra* Part I.B.4.

36 *See, e.g.*, ALA. CODE §§ 26-22-1 to -5 (1997) (requiring doctors to use the abortion method most likely to save the fetus unless it poses a significantly greater risk of the woman's death or of a "substantial and irreversible impairment of a major bodily function" as compared with other available methods); OHIO REV. CODE ANN. § 2919.16(J) (LexisNexis 2002) (same); 18 PA. CONS. STAT. ANN. § 3211(b)(1) (West 1984) (same).

37 *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2301.01 (2000) (requiring a doctor to use the abortion method most likely to save the life of the fetus unless the method poses a greater risk to the woman's life or health than another available method); ARK. CODE ANN. §§ 20-16-701 to -707 (1985) (same); FLA. STAT. § 390.0111(4) (1999) (requiring a doctor to take measures to save the fetus, except that "the woman's life and health shall constitute an overriding and superior consideration to the concern for the life and health of a fetus when such concerns are in conflict").

38 439 U.S. 379 (1979).

39 For example, the Pennsylvania statute at issue in *Colautti* required doctors to use the abortion method most likely to save the fetus "'so long as a different technique would not be necessary in order to preserve the life or health of the mother.'" *Id.* at 381 n.1 (quoting 35 PA. STAT. ANN. § 6605(a) (West 1977) (repealed 1982)). After that provision was held unconstitutional on vagueness grounds in *Colautti*, *id.* at 400–01, the Pennsylvania legislature adopted a broader exception that applied whenever the fetus-saving method "'would present a significantly greater medical risk to the life or health of the pregnant woman.'" Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768 (1986) (quoting 18 PA. CONS. STAT. § 3210 (1982)), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833

What does all this mean in practice? Although reliable data are unavailable, the evidence suggests that there may well be five thousand (or more) postviability abortions per year in the United States.[40] Most of these abortions do not involve serious threats to the woman's life or health, and hence would be unlawful under state laws that incorporated the self-defense version of the life-or-health exception. Moreover, in the subset of pregnancies that do involve a serious threat to maternal health, there is usually an abortion method that is safe for the woman and that would preserve whatever chance of survival the viable fetus has.[41] But rather than perform postviability abortions using techniques that maximize the chances that viable fetuses will survive, abortion doctors employ techniques calculated to ensure fetal death.[42] Under the relative-safety approach, these practices are frequently defensible: so long as a doctor believes in good faith that the *safest* abortion technique for the mother is one that entails fetal death,

(1992). Subsequently, some states adopted even broader exceptions that apply whenever the fetus-saving method poses "a greater risk to the woman's life or health." *E.g.*, MO. ANN. STAT. § 188.030 (West 1979); *see also supra* note 37 (citing statutes).

40 According to the Guttmacher Institute, only about 1.1% of the roughly 1.21 million abortions performed each year occur at or beyond twenty-one weeks gestational age. *See* GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES 1 (2008), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf. This works out to over 13,000 abortions per year performed at or beyond twenty-one weeks; however, some of these abortions occur just *prior* to viability (a status that normally attaches at around twenty-three weeks). Unfortunately, neither the Centers for Disease Control and Prevention (CDC) nor the Guttmacher Institute disaggregates the data for abortions after twenty weeks. For both legal and practical reasons, I would expect that a substantial percentage of post-twentieth week abortions occur prior to viability. Consistent with that expecation, a 1996 Guttmacher Institute study estimated that in 1992 (when there were an estimated total of more than 1.5 million abortions) about 63% of post-twentieth week abortions occurred in weeks 21 or 22, and the remaining 37% in week 23 or later. *See* Guttmacher Inst., The Limitations of U.S. Statistics on Abortion (Jan. 1997), http://www.guttmacher.org/pubs/ib14.html. Applying those percentages to the 2008 estimate of 13,300 post-twentieth week abortions yields in excess of 4900 post-viability abortions.

41 Writing shortly after *Roe* was decided, Laurence Tribe observed that "[s]ince the procedures for removal of a viable fetus typically present the same risks to the woman whether the fetus is saved or destroyed, it seems questionable that the Court actually intended to mandate a choice in favor of the latter." Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4 n.24 (1973) (citation omitted). Intended or not, that has been one effect of the Court's Delphic pronouncements concerning the life-or-health exception.

42 As already noted, the standard D&E method is almost inevitably fatal to the fetus. *See supra* note 15 and accompanying text. In addition, abortion doctors routinely administer pre-abortion lethal fetal injections as part of their standard late-term abortion protocol. *See* David J. Garrow, *Significant Risks:* Gonzales v Carhart *and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 31.

the health exception applies. Under the self-defense approach, that would rarely if ever be true: so long as the fetus-sparing technique is *safe* for the mother, the health exception would not apply.

In sum, the Supreme Court's long-running game of hide-the-ball has created a regime in which thousands of viable fetuses are killed each year even though their deaths are not justifiable on self-defense grounds. Whether that result is ultimately right or wrong, surely the Court should not impose it on the nation without explanation.

I. *ROE*'S AMBIGUOUS POSTVIABILITY HEALTH EXCEPTION

The first order of business is to take a close look at Justice Blackmun's brief and elliptical treatment of the constitutional life-or-health exception in *Roe*. Here are the two key passages (the second purports merely "[t]o summarize and to repeat" the first[43] but adds an important qualification):

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[44]
>
> . . . .
>
> For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[45]

A. *The Prima Facie Case for the Self-Defense Interpretation*

At first blush, these formulations seem clearly grounded in self-defense principles. The most natural reading of the phrase "necessary to preserve the life or health of the mother" is "necessary to *avoid the loss* of the mother's life or health."[46] This is the language of self-preservation, the raison d'être of self-defense.

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43 Roe v. Wade, 410 U.S. 113, 164 (1973).

44 *Id.* at 163–64.

45 *Id.* at 164–65.

46 A typical dictionary definition of "preserve" is "to keep from harm, damage, danger, evil, etc.; to protect; save." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1423 (2d ed. 1979).

Moreover, self-defense law is preeminently concerned with when an actor should be able to claim that self-preservation justifies the use of deadly force (that is, force likely to cause death or serious bodily harm) against another human being.[47] Even after viability, abortion exposes the fetus (at a minimum) to a serious risk of death, and thus constitutes the use of deadly force.[48] To be sure, under *Roe* even a viable fetus is not a Fourteenth Amendment person.[49] But *Roe*'s recognition that states have a "compelling" interest in viable fetal life presupposes that after viability the fetus may be counted as an

47 *See* MODEL PENAL CODE § 3.04 (Official Draft and Revised Comments 1985) (defining the circumstances under which "the use of deadly force" is "justifiable"); RESTATEMENT (SECOND) OF TORTS § 65 (1965) (defining the circumstances in which "an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm").

48 After viability, by definition, the fetus has a realistic chance of surviving outside its mother—but only if (contrary to prevailing abortion practice) it is removed from her body by a nonviolent method such as inducing labor. When that is done, the fetus's chance of survival increases rapidly during the first several weeks after viability (around twenty-three weeks). *See* Jay D. Iams, *Preterm Birth*, *in* STEVEN G. GABBE ET AL., OBSTETRICS 755, 812 (4th ed. 2002) ("As many as 15 percent of infants born at 23 weeks, 56 percent at 24 weeks, and 80 percent at 25 weeks may now survive to hospital discharge in the postsurfactant era."). By the twenty-eighth week, the fetus has approximately a ninety percent chance of survival. *See* Mayo Clinic, Fetal Development: The Third Trimester, www.mayoclinic.com/health/fetal-developmdevelopment/PR00114 (last visited Nov. 23, 2009). But most postviability abortions occur before twenty-eight weeks, and even a ten percent chance of death obviously puts the fetus in grave danger. Consequently, even if the method used maximizes the chance it will survive, a postviability abortion constitutes the use of deadly force against the fetus.

49 The law of self-defense "contemplates a human attacker," and therefore applies only to the use of "deadly force against humans." Karen L. Bell, *Toward a New Analysis of the Abortion Debate*, 33 ARIZ. L. REV. 907, 926 (1991). Here the argument threatens to turn normative: one could argue that viable fetuses *are* humans, and so within the implicit protection conferred on each of us by the legal limits on deadly force in self-defense. That argument lies outside the scope of this Article. For its descriptive purposes, the key point is that *Roe* can be read as acknowledging that viable fetuses are, so to speak, human enough that states may elect to treat them as persons against whom deadly force may not be used except in self-defense. In this connection, it also bears mention that legislatures are empowered to restrict the use of deadly force against nonhuman animals for valid public purposes. For example, an individual who kills an animal protected by the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006), is subject to civil and criminal penalties unless the killing was "based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species." *Id.* § 1540(a)(3), (b)(3); *see* United States v. Clavette, 135 F.3d 1308, 1311 (9th Cir. 1998).

independent human life.[50] By definition, a viable fetus is presently capable of being born alive and has a realistic chance of surviving indefinitely after birth.[51] Were a viable fetus to be born alive, it would indisputably be a Fourteenth Amendment person—indeed, a citizen of the United States, and of the state in which it resided.[52] The state's interest in protecting these potential citizens is directly advanced by prohibiting the woman from terminating her pregnancy, because—depending on the method used—there is at least a serious risk (and at most a virtual certainty) that abortion will kill the fetus.

This reasoning explains why *Roe* permits states to prohibit abortions after viability—and why *Roe* mandates that such prohibitions contain a life-or-health exception. The state's interest in viable fetal life can override the woman's liberty to choose an abortion but cannot override her traditional right to self-preservation. Our legal tradition has long recognized each individual's right to use deadly force when reasonably necessary to avoid serious threats to life or limb, even though the result may be that the threatening person suffers injury or death.[53] Thus, a woman's right to self-preservation can plausibly be deemed so fundamental that it overcomes the state's otherwise compelling interest in the life of her viable fetus.[54]

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50 *See* Roe v. Wade, 410 U.S. 113, 163 (1973) ("[T]he 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."). Indeed, Jed Rubenfeld has gone farther, arguing that in *Roe*, "despite its vocabulary of potential life, the Court in all essential respects made a determination about when the states could deem the fetus a person." Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 635 (1991).

51 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("[T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb . . . .").

52 U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."). The United States presumably also has a compelling interest in protecting the lives of those who, but for their temporary location inside their mothers' bodies, would be its citizens.

53 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *126 ("Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion.").

54 The qualification "plausibly" is an important one. Some people think the deliberate killing of a viable fetus should be unlawful even if necessary to save the mother's life. Others think that while danger to the mother's life is a sufficient justification (or excuse), danger to her health is not. Although worthy of serious normative

Self-defense principles are also consistent with the fact that *Roe*'s exception extends to the mother's health as well as her life. Self-defense law generally authorizes the use of deadly force if an actor reasonably believes that he or she is in imminent danger of death or serious bodily harm.[55] By analogy, a woman is entitled to a self-defense abortion when continuation of her pregnancy places her in imminent danger of death or serious bodily harm—that is, when an abortion is "necessary to preserve" her "life or health."

It could be argued that the analogy is defective because fetuses, far from being deliberate aggressors, are entirely innocent—indeed, are not even voluntary actors. That may explain why the strict anti-abortion laws of the late nineteenth century construed the mother's self-defense rights narrowly by permitting abortion only when necessary to preserve her *life*.[56] But modern self-defense law, as exemplified by the Model Penal Code, takes a broader view, allowing the use of

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consideration these views are obviously inconsistent with *Roe*'s life-or-health exception.

55 *See* MODEL PENAL CODE § 3.04(2)(b) (Official Draft and Revised Comments 1985) ("The use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat . . . ."); RESTATEMENT (SECOND) OF TORTS § 65(1) (1965) (stating that, in general, an actor is privileged to use deadly force in self-defense "when he reasonably believes that (a) the other is about to inflict upon him an intentional contact or other bodily harm, and that (b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force").

56 *See* 4 BLACKSTONE, *supra* note 53, at *186 ("There is one species of homicide *se defendendo* [in self-defense], where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish."). In addition to self-defense, the common law also recognized the closely related defense of "necessity," and the Model Penal Code generalized the latter defense in its "choice of evils" provisions. *See* MODEL PENAL CODE §§ 3.01–3.02 (Official Draft and Revised Comments 1985). Moreover, the commentary on the Model Penal Code's abortion provisions speaks of "necessity" rather than self-defense in connection with exceptions in abortion statutes, *see* MODEL PENAL CODE § 207.11 cmt. 3 (Tentative Draft No. 9, 1959), as do some English authorities, *see generally* D. Seaborne Davies, *The Law of Abortion and Necessity*, 2 MOD. L. REV. 126 (1938). In this Article, I put to one side such questions as whether and why abortion on maternal life or health grounds is better understood in terms of self-defense, or, alternatively, in terms of necessity or the choice-of-evils defense. Although there are significant differences between the two defenses, their strong similarities—particularly as compared with the relative-safety approach—warrant this simplification. (Nor do I consider the possibility that a life-or-health exception should be viewed as an *excuse*, rather than a justification, in which case the defense of "duress" might furnish the closest analogy. *See* MODEL PENAL CODE § 2.09 (Official Draft and Revised Comments 1985).

deadly force even against an innocent aggressor.[57] Consistent with that approach, long before *Roe* a few states (and the District of Columbia) allowed abortions if necessary to preserve the life or *health* of the mother.[58] Similarly, the Model Penal Code, on which fourteen states patterned their laws at the time of *Roe*,[59] permitted abortions if a doctor believed "there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother."[60]

Roe's second formulation of the life-or-health exception qualifies the word "necessary" with the phrase "in appropriate medical judgment."[61] This too can be explained in self-defense terms. In most self-defense settings, there is no alternative to allowing the threatened victim to decide whether or not to use deadly force in self-defense. In the abortion setting, there is an alternative: to place the initial decision whether or not an abortion is justified in the hands of the woman's doctor, who can be expected to be more knowledgeable and objective about the gravity of the risks pregnancy poses to her life or health. Self-defense law, which permits persons to use deadly force in defense of others, is consistent with this aspect of *Roe* as well.[62] But self-defense principles also suggest that, contrary to some lower court precedent, a doctor's medical judgment must be reasonable, as well as made in good faith, in order to qualify as "appropriate."[63]

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57 The Model Penal Code simply requires that the actor invoking self-defense be threatened with "unlawful force," which includes cases such as a psychotic aggressor or an involuntary aggressor. *See* Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 512 (2006); Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051, 1107 (1997). The *Second Restatement of Torts* "expresses no opinion as to whether there is a similar privilege of self-defense against conduct which the actor recognizes, or should recognize, to be entirely innocent." RESTATEMENT (SECOND) OF TORTS § 66 caveat (1965).

58 The earliest examples of which I am aware are the 1868 Colorado statute and the 1869 Wyoming statute, both of which authorized abortions believed necessary to avoid "serious and permanent bodily injury" to the mother. *See* COLO. REV. STAT. ch. 22, § 42 (1868); Wyo. Laws 1869, c. 3, § 25, *repealed by* Wyo. Laws 1890, § 32.

59 *See* Roe v. Wade, 410 U.S. 113, 140 n.37 (1973).

60 MODEL PENAL CODE § 230.3(2) (Proposed Official Draft 1962).

61 *Roe*, 410 U.S. at 165.

62 The fact that, even today, self-abortion of a second- or third-trimester pregnancy would be extremely dangerous suggests another reason for treating doctors as the gatekeepers for postviability abortions.

63 *See* RESTATEMENT (SECOND) OF TORTS § 65(1) (1965) (requiring that the person acting in self-defense "reasonably believe[ ]" that he or she is "in peril of death or serious bodily harm or ravishment"); *cf.* MODEL PENAL CODE § 3.04 note (Official Draft and Revised Comments 1985) ("[T]he actor's actual belief is sufficient to sup-

B. *The (Complicated) Prima Facie Case for the Relative-Safety Interpretation*

Prior to 1968, the general understanding in both the legal and medical professions was that restrictive abortion laws were intended to protect fetuses and mothers alike[64] by banning abortions unless the mother's life or (in a few jurisdictions)[65] health was gravely endangered.[66] As the twentieth century wore on, an increasing number of doctors chose to perform "therapeutic" abortions where pregnancy

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port the defense; if his belief is mistaken and is recklessly or negligently formed, he may then be prosecuted for an offense of recklessness or negligence . . . ."). This Article will not attempt to resolve the contested question of whether *Roe*'s life-or-health exception permits states to impose criminal penalties on a doctor whose judgment about whether the life-or-health exception applies is unreasonable, but made in good faith. *See* Voinovich v. Women's Med. Prof'l Corp., 523 U.S. 1036, 1347–40 (1998) (Thomas, J., dissenting from denial of certiorari) (arguing that the Court should review a Sixth Circuit decision invalidating, inter alia, a statutory requirement that a doctor's finding of medical necessity be made "'in good faith and in the exercise of reasonable medical judgment'" (quoting OHIO REV. CODE ANN. § 2919.17(A)(1) (West 1996))). Plainly, the self-defense approach is more likely than the relative-safety approach to include a reasonableness requirement. *See* 40 AM. JUR. 2D *Homicide* § 152 (2008) ("In order to justify or excuse a homicide on the ground of self-defense, the accused must not only have entertained the belief, but there must have been reasonable grounds for his or her belief, that the accused was in imminent danger of loss of life, or of suffering serious bodily harm, at the hands of the person killed.").

64 *See* JOSEPH W. DELLAPENA, DISPELLING THE MYTHS OF ABORTION HISTORY 267 (2006); James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 45–50 (1985).

65 Witherspoon, *supra* note 64, at 45 n.49.

66 As Joseph Dellapenna explains, arguments for the maternal-life exceptions in nineteenth-century abortion statutes "were grounded on appeals to a maternal right of self-defense, not on a rejection of fetal personhood. The 'self-defense' argument was made explicitly in the United States at least as early as 1866." DELLAPENNA, *supra* note 64, at 279. Space constraints preclude even a representative sampling of the evidence for this proposition. I will confine myself to two of the more important cases. In *Worthington v. State*, 48 A. 355 (Md. 1901), the Maryland Court of Appeals suggested that the repression of the crime of abortion "can only be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child. . . . The corpus delicti of the offense of abortion is the destruction of the unborn infant . . . ." *Id.* at 357. As to the dangerousness of abortion, the court explained that whereas formerly abortion had been very dangerous,

> [i]n these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to the great increase of the crime, to the establishment of a class of educated pro-

posed serious danger to the mother's health, even if the applicable statute permitted only life-preserving abortions.[67] But this broader understanding of when abortions were justifiable was still rooted in the mother's right of self-preservation.[68] Law-abiding doctors did not argue that an abortion was per se life-preserving whenever a woman's

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fessional abortionists, *and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense.*

Id. at 356–57 (emphasis added). As for the scope of the life-only exceptions, the Maine Supreme Judicial Court stated the common understanding in *State v. Rudman*, 136 A. 817 (Me. 1927):

> It is well known that occasion arises where, in the exercise of proper surgical advice and care, it becomes necessary, in order to save the mother's life, to remove the unborn foetus. To such highly honorable and proper acts, in accord with the highest ethics of the medical profession, the dictates of humanity, and all legal precepts, the statute has, and can have, no application. But to the destruction of unborn life for reasons, whatever they may be, other than necessity to save the mother's life, the law is intended, we believe, to be an express and absolute prohibition.

Id. at 819; *see also* Paul Benjamin Linton, Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 109–15 (1993) (collecting cases nationwide regarding the self-defense argument).

67 *See* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 45–47 (1984).

68 For example, in 1914, Dr. William R. Nicholson addressed the Obstetrical Societies of New York and Philadelphia on the topic, "When, under the present code of medical ethics, is it justifiable to terminate pregnancy before the third month?" Here is the "working hypothesis" he advanced:

> Abortion is justifiable first, when the mother is in danger of losing her life or health if the pregnancy be allowed to continue, because of some pathological condition directly dependent upon the pregnancy itself; and second, when the continuation of the pregnancy threatens an aggravation of an independent pathological condition, which will eventually destroy life or health, even though neither is actually threatened at the time the interference is proposed. In other words we are in favor of a wide latitude always provided that the decision be made by a man, or better, and this for many reasons, by men who by their experience are qualified to make such a decision righteously.
>
> The justification for the above attitude is based on the inherent right of self-preservation possessed by the pregnant woman in common with all other human beings, which right she is by no means obliged to resign in order to attempt to bring into existence a merely possible life. Statute laws give the individual the right to protect his life at the expense of another adult life if necessary, and therefore the life of the unborn child may be sacrificed if, to use an old common law term, the life of the mother is in duress through the child *in utero.*

William R. Nicholson, *When, Under the Present Code of Medical Ethics, Is it Justifiable to Terminate Pregnancy Before the Third Month; What Should Our Attitude Be Toward a Patient upon Whom a Criminal Operation Has Been Performed; What Should Be Our Attitude Toward*

statistical chances of dying were greater if she carried the fetus to term than if she had an abortion.[69]

1. Cyril Means's Advocacy of the Relative-Safety Test

All this changed rapidly with the appearance of the first of two influential law review articles by Professor (and NARAL General Counsel) Cyril Means.[70] The first article presented a radically revisionist history of the restrictive nineteenth-century abortion statutes.[71] Means argued that the *sole* purpose of the statutory prohibitions on

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Those Suspected of the Performance of Criminal Operations?, 69 AM. J. OBSTETRICS & DISEASES WOMEN & CHILD. 1004, 1005 (1914) (emphasis omitted).

69 In 1959, Herbert L. Packer and Ralph J. Gampell published their famous law review article, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959). Packer and Gampell gave eleven case histories to a representative sample of California hospitals and asked each (among other things) whether it would perform a therapeutic abortion on such a patient. *Id.* at 431–44. The applicable law was the California statute, which made it a felony to perform an abortion on a woman "'unless the same is necessary to preserve her life.'" *Id.* at 418 (quoting CAL. PENAL CODE § 274 (West 1955) (repealed 2000)). The main theses of the article were that the statutory standard was not being strictly complied with, and that there was considerable uncertainty about which cases came within the statutory exception, and considerable variation from hospital to hospital in the interpretation of the law. *See id.* at 447. But if one reads the article with a different question in mind—did the authors think some doctors and hospitals would perform abortions whenever they believed the overall health risks of abortion to be lower than those of pregnancy?—the answer is clearly no. None of the eleven cases described a situation in which the health risks of abortion were marginally lower than those of pregnancy for the particular woman in question. Rather, the focus was on the absolute gravity of the risks posed by continued pregnancy to the woman's physical or mental health. *See id.* at 431–44. When the authors did mention the relative risks of pregnancy and abortion, they did so to highlight the seriousness of the pregnancy-related risks. *See id.* at 432 ("The effect of the pregnancy on her life expectancy cannot be accurately measured but it is felt that the risk of the patient dying during or immediately following this pregnancy would be at least thirty times greater than if she were not pregnant.").

70 Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y. L.F. 411 (1968) [hereinafter Means, *The Law of New York*]; Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L.F. 335 (1971) [hereinafter Means, *Abortional Freedom*]. For Means's affiliation with NARAL, see DELLAPENNA, *supra* note 64, at 143–44.

71 As its title suggests, Means's first article focused on New York abortion law, but he argued that New York law was typical, and also that it had strongly influenced legislation in other states. Means, *The Law of New York*, *supra* note 70, at 418, 452, 506. In his second article, Means famously argued that abortion had never been a crime at common law, even after quickening. Means, *Abortional Freedom*, *supra* note 70, at 336–59.

abortion throughout pregnancy was to protect women from the grave nineteenth-century risks associated with abortion in an era before antisepsis and antibiotics.[72] In adopting the statutory exceptions for abortions necessary to preserve the life of the mother, Means contended, legislatures

> expected physicians . . . to weigh the patient's chance of surviving a surgical abortion against her chances of surviving continuance of pregnancy. In the case of most women—all healthy women and many unhealthy ones—in their day, childbirth was the safer alternative; so abortion was forbidden. But in the case of an unhealthy woman whose condition combined with pregnancy could be dangerous, abortion might be the safer alternative; if it was, then the doctor was to go ahead and abort her, under the therapeutic exception.[73]

Although Means did not use the phrase, he was clearly proposing the relative-safety interpretation: a statute with a life-only exception authorized abortion when pregnancy posed even greater risks to the mother's life; a statute with a life-or-health exception expanded on the same basic idea by authorizing abortion when pregnancy posed greater risks to the mother's life or health.

Later scholars, particularly Joseph Dellapenna, Philip Rafferty, and James Witherspoon, have convincingly demonstrated that Means was wrong: the protection of fetal life was a central purpose of the nineteenth-century abortion statutes, whether they applied throughout pregnancy or only after quickening; and the life-only or life-and-health exceptions were intended to recognize only the narrow circumstances in which an abortion would be justified on self-defense grounds.[74] For present purposes, however, what matters is not where the historical truth lies, but the impact Means's relative-safety thesis

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72 Means, *The Law of New York*, *supra* note 70, at 418.

73 *Id.* at 513 n.261. Means also failed to recognize that even if the nineteenth-century abortion laws had been motivated exclusively by a desire to protect maternal life and health, it would not necessarily follow that their exceptions for abortions to save the life of the mother were intended to adopt the relative-safety approach. Suppose a nineteenth-century legislature was convinced (a) that abortion was extremely dangerous to women, but also (b) that some doctors, for financial reasons, would abuse any exception the legislature adopted. These premises might lead the legislature to reject the relative-safety test in favor of a more stringent self-defense test.

74 DELLAPENNA, *supra* note 64, at 275–88; PHILIP A. RAFFERTY, *ROE V. WADE* 72–77 (1992); Witherspoon, *supra* note 64, at 45. *See also* John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3, 18-29 (2006) (arguing that protecting the unborn was a central purpose of nineteenth-century abortion laws).

had on courts, including the Supreme Court—and above all the *Roe* Court.

As abortion-rights litigators began challenging restrictive abortion laws in the late 1960s, it gradually became clear that Means's thesis could be used to make three distinct arguments: (1) that the nineteenth-century laws had become unconstitutional because their sole purpose (protecting maternal life and health) was now disserved by bans on early abortions; (2) that the nineteenth-century laws were unconstitutionally vague, because they failed to inform doctors of whether their legal obligations were determined by the self-defense test or the relative-safety test; and (3) that the nineteenth-century laws were constitutional, but permitted far more abortions than anyone had previously realized, because their actual meaning was captured by the relative-safety test. Means had emphasized the first argument, but, as we shall now see, the most important judicial decision lending credence to the relative-safety test relied on the second argument (while also finding some merit in the third).

2. *People v. Belous*

In *People v. Belous*,[75] the California Supreme Court struck down the California statute prohibiting abortion on the grounds that the words "'unless the same is necessary to preserve her life'"[76] were unconstitutionally vague.[77] The court rejected several possible interpretations that would have required danger of death in varying degrees.[78] It then turned to the construction Means had suggested: "[A]bortion was permitted when the risk of death due to the abortion was less than the risk of death in childbirth and that otherwise abortion should be denied."[79] This test, the court suggested, was "probably in accord with the legislative intent at the time the statute was

75 458 P.2d 194 (Cal. 1969) (in bank).

76 *Id.* at 197 (quoting CAL. PENAL CODE § 274 (West Supp. 1967) (repealed 2000)).

77 *Id.* at 197–98.

78 Specifically, the Court held that (1) to construe the statute as requiring that "death be certain" would infringe the woman's constitutional right to life, *id.* at 199; (2) to construe the statute as referring "to a possibility of death different from or greater than the ordinary risk of childbirth" would make the statute "virtually meaningless" because almost any woman facing an unwanted pregnancy could satisfy that test; and (3) that to "read[ ] it as 'substantially or reasonably' necessary to preserve the life of the mother" would if anything increase the uncertainty as to the statute's meaning. *Id.* at 204.

79 *Id.* at 204.

adopted."[80] Moreover, this test "would serve to make the statute certain," because it called for a judgment within the realm of "[m]edical science" ("the proper method to treat a patient to minimize the risk of death") rather than one calling for a value judgment "outside medical competence" ("the circumstances in which the safest treatment should be rejected and a more dangerous treatment followed in order to protect an embryo or fetus").[81]

Nevertheless, the court refused to adopt this construction of the statute, holding instead that its language was unconstitutionally vague.[82] The court reasoned that "[t]he language of the statute, 'unless the same is necessary to preserve her life,' does not suggest a relative safety test, and no case interpreting the statute has suggested that the statute be so construed."[83] Moreover, "[n]one of the parties or numerous amici who have filed briefs in the instant case suggest that the statute applies a relative safety test."[84] As the court memorably put it, "men of 'common' intelligence, indeed of uncommon intelligence, have not guessed at this meaning."[85] In other words, until

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80 *Id.* The Court cited no evidence to support this speculation, but offered the following argument in its defense:

> As we have seen, at the time of the adoption of the statute abortion was a highly dangerous procedure, and under the relative safety test abortion would be permissible only where childbirth would be even more dangerous. In light of the test and the then existing medical practice, the question whether abortion should be limited to protect the embryo or fetus may have been immaterial because any such interest would be effectuated by limiting abortions to the rare cases where they were safer than childbirth.

Id. This argument unintentionally highlights an important difference between two versions of Means's thesis: (1) that the nineteenth-century laws were unconstitutional because their purpose (protecting maternal life and health) was now disserved by bans on early abortions; and (2) that the nineteenth-century laws were constitutional, because their actual meaning was captured by the relative-safety test. The *Belous* court's argument for version (2) backfires. The legislature could have written a ban on abortions "unless an abortion would be safer than childbirth." Had it done so, abortions in 1850 would still have been rare, but by 1950 would have become quite common. Instead, and still supposing that the legislature's purpose was solely to protect maternal life and health, the legislature banned abortions "'unless . . . necessary to preserve her life.'" *Id.* at 197 (quoting CAL. PENAL CODE § 274). Given how dangerous abortions were in 1850, the legislature might very well have intended by this language to authorize abortion only if otherwise the mother would probably die—thereby ensuring that abortions would be limited "to the rare cases where they were safer than childbirth." *Id.* at 204.

81 *Id.*

82 *Id.* at 205–06.

83 *Id.* at 205.

84 *Id.*

85 *Id.*

Cyril Means published his article, it had been universally understood that the statute *did* require that, in some circumstances, "the safest treatment should be rejected and a more dangerous treatment followed in order to protect an embryo or fetus."[86] But whereas the dissenting justices concluded that the statute's common sense meaning (an abortion was justified only if necessary to save the mother from serious danger of dying) had been reasonably clear to persons of average intelligence for more than a century,[87] the *Belous* majority found no such consensus, and hence deemed the statute intolerably vague.[88]

Although the *Belous* court declined to construe the 1850 statute as adopting the relative-safety approach, that is exactly how—in dictum—it construed California's 1967 Therapeutic Abortion Act.[89] The 1967 statute, influenced by the Model Penal Code, permitted abortions during the first twenty weeks of pregnancy if "'[t]here is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother.'"[90] In the teeth of this language, the *Belous* court asserted that

> [t]he . . . criteria for determining whether an abortion is permissible is the pregnant woman's physical and mental health. . . . [T]he test established is . . . whether the pregnant woman's physical and mental health will be furthered by abortion or by bearing the child to term . . . . There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an interest in the embryo.[91]

This dictum proved short lived, and rightly so. The court's rationale for interpreting the 1850 statute as intended to protect the lives of women, not fetuses, was that "at the time of the adoption of the statute abortion was a highly dangerous procedure."[92] By 1967, however, as the *Belous* court pointed out, it was considered "safer for a woman to have a hospital therapeutic abortion during the first trimes-

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86 *Id.* at 204.

87 *Id.* at 207–09 (Burke, J., dissenting); *id.* at 211–12 (Sullivan, J., dissenting). The dissenters did not explicitly make their case in self-defense terms. They simply argued that the 1850 statute rested on concern for fetal life as well as maternal life, and accordingly limited abortions to those necessary to save the mother's life. *See id.* at 209 (Burke, J., dissenting).

88 *Id.* at 206 (majority opinion).

89 CAL. HEALTH & SAFETY CODE §§ 25950–25954 (West Supp. 1968) (repealed 1995).

90 *Belous*, 458 P.2d at 205 (quoting CAL. HEALTH & SAFETY CODE § 25951(c)(1)). The new California statute was not applicable in *Belous* because the defendant's conviction preceded its enactment. *See id.* at 197.

91 *Id.* at 205.

92 *Id.* at 204.

ter than to bear a child."[93] If the Therapeutic Abortion Act were motivated solely by concern for maternal health, one would therefore have expected it to authorize *all* first-trimester abortions. The *Belous* court's claim that the Act's restrictive life-or-health exception was intended to adopt the relative-safety test was, to put it mildly, implausible—so much so that, three years later, the California Supreme Court repudiated it.[94] But by then, *Belous* had already figured prominently in the litigation that led to the U.S. Supreme Court's important pre-*Roe* decision in *United States v. Vuitch*.[95]

3. *United States v. Vuitch*

In 1901, Congress liberalized what had originally been a standard nineteenth-century abortion statute by authorizing abortion when "done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine."[96] The legislative history is silent on the reason for the change or the meaning of the new statute.[97] In 1968, as part of the nationwide litigation campaign against abortion laws that culminated in *Roe*, a District of Columbia abortion provider challenged the statute as unconstitutionally vague.[98] Judge Gesell, writing for the district court, held that the statute was vague for two reasons: it failed to indicate whether it included "mental as well as physical health," and it failed to specify "what degree of [harm to] mental or physical health or combination of the two" was required to justify an abortion.[99] Echoing *Belous*, the district court found that "[n]o body of medical knowledge" supplied an answer to the degree-of-harm conundrum,

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93 *Id.* at 200–01.

94 In *People v. Barksdale*, 503 P.2d 257 (Cal. 1972) (in bank), the California Supreme Court struck down the 1967 Therapeutic Abortion Act on vagueness grounds. The *Barksdale* Court retracted the *Belous* dictum, acknowledging that "[i]t seems more probable . . . that the legislative intent was to require some impairment to health greater or of a different nature than that attendant upon normal pregnancy." *Id.* at 264. Accordingly, the Court found the 1967 Act's "gravely impair" language void for vagueness because it could not "ascertain within the meaning of the statute either the nature of the diminished health required or that degree of diminution which stamps it as 'gravely impaired.'" *Id.*

95 402 U.S. 62 (1971).

96 D.C. CODE ANN. § 19-809 (1901), *repealed by* Elimination of Outdated Crimes Amendment Act of 2003, § 15-154. Prior to 1901, the statute allowed abortion only when necessary to save the woman's life. *Vuitch*, 402 U.S. at 70 n.5.

97 *See Vuitch*, 402 U.S. at 71.

98 *Id.* at 63.

99 United States v. Vuitch, 305 F. Supp. 1032, 1034 (D.D.C. 1969).

and suggested that *Belous* had identified "other uncertainties" in the statutory language that "need not be repeated here."[100]

The Supreme Court was sharply divided by a technical question lurking in *Vuitch*: whether the Court had jurisdiction under the Criminal Appeals Act[101] to hear a direct appeal from the United States District Court for the District of Columbia.[102] Beyond that, the Justices were also divided on the merits of the district court's vagueness ruling.[103] When the dust settled, there were two different majorities. In an opinion by Justice Black, a 5–4 majority held that the Court had jurisdiction.[104] On the merits, Black's opinion for a different 5–2 majority (which included two of the jurisdictional dissenters) held that the D.C. statute was not unconstitutionally vague.[105]

By the time it granted review in *Vuitch*, the Court was well aware that multiple challenges to state abortion laws were underway in the lower courts, and that it would soon be asked to decide whether abortion was a constitutionally protected right in light of *Griswold v. Connecticut*.[106] Indeed, the challengers in *Vuitch* (and their amici) asked the Court to decide that question.[107] The Court declined to do so.[108] Instead, it held the abortion cases on which it had not yet granted review—including *Roe* and *Doe*—for evaluation after *Vuitch* was decided.[109] The Court finally granted certiorari in *Roe* and *Doe* one day after *Vuitch* was decided on April 22, 1971.[110]

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100 *Id.*

101 18 U.S.C. § 3731 (1971) (codified as amended at 18 U.S.C. § 3731 (2006)); *see Vuitch*, 402 U.S. at 63–64.

102 *Vuitch*, 402 U.S. at 64.

103 *See, e.g., id.* at 73 (White, J., concurring) (arguing that the statute was not vague on its face because it put everyone on notice of the standard and because "[n]o one of average intelligence could believe that under this statute abortions not dictated by health considerations are legal").

104 *Id.* at 67 (majority opinion). Chief Justice Burger and Justices Douglas, Stewart, and White joined the jurisdictional portion of Black's opinion. *Id.* at 63 n.*. Justice Harlan, joined by Justices Brennan, Marshall, and Blackmun, dissented as to jurisdiction. *Id.* at 81 (Harlan, J., dissenting).

105 *Id.* at 72 (majority opinion). Chief Justice Burger and Justices White, Harlan, and Blackmun joined Black on the merits. *Id.* at 63 n.*. Justices Douglas and Stewart filed separate dissents on the merits. *Id.* at 74 (Douglas, J., dissenting); *id.* at 96 (Stewart, J., dissenting). Justices Brennan and Marshall expressed no opinion on the merits.

106 381 U.S. 479 (1965).

107 DAVID J. GARROW, LIBERTY AND SEXUALITY 476–78 (1994) (describing oral argument in *Vuitch*).

108 *See Vuitch*, 402 U.S. at 72–73.

109 GARROW, *supra* note 107, at 480.

110 *Id.* at 491.

Under these circumstances, it comes as no surprise that Justice Black's opinion on the merits disposed of the vagueness issue on narrow grounds. Black ignored the district court's invitation to discuss *Belous*, which he did not even deign to cite.[111] Nor did he discuss alternative interpretations of the D.C. statute.[112] Instead, taking a page from the Solicitor General's brief in defense of the statute,[113] Black endorsed recent rulings by lower federal courts construing it to allow abortions for mental health reasons[114]:

> Certainly this construction accords with the general usage and modern understanding of the word "health," which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being . . . sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.[115]

This argument satisfactorily responds to the district court's objection that the statute failed to make clear whether it applied to mental health. A statute that says "health" and means "only physical health" arguably fails to give doctors fair warning of what conduct is forbidden.[116] If the statute says "health" and means "physical or mental health," this problem disappears.

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111 The Court had previously denied certiorari in *Belous*. California v. Belous, 397 U.S. 915 (1970). Justice Douglas cited *Belous* in his dissent. *Vuitch*, 402 U.S. at 76 (Douglas, J., dissenting).

112 One amicus brief in *Vuitch* explicitly invoked self-defense principles, arguing that

> there is analogy to be found in the usual rule of criminal law which treats as justifiable homicide, killing done to repel a threat of substantial bodily injury. Thus, where a pregnancy constitutes a threat to the duration of the life of a mother by grave impairment of her health, there is a conflict between her interests in being free of such impairment and the fetus' interest in life.

Brief of Dr. William F. Colliton, Jr., et al. Amici Curiae in Support of Appellant at 41, *Vuitch*, 402 U.S. 62 (No. 84).

113 *See* Brief for the United States at 38–39, *Vuitch*, 402 U.S. 62 (No. 84).

114 *See Vuitch*, 402 U.S. at 72 (citing cases construing the statute to permit abortions for mental health reasons).

115 *Id.* (alteration in original).

116 The Court did not discuss the possibility that the legislature may have intended to allow abortion only when justified by self-defense principles, understood as limited to threats of death or serious bodily harm. If that intent had been generally understood by doctors for decades, the statute might not be vague although it would not include impairment of mental health unless physical harm were also involved.

But what about the district court's second objection—that the statute failed to specify what *degree* of health impairment is required to justify an abortion? Black's cryptic response came in the last sentence quoted above, when he asserted that "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."[117] The first-cut meaning of this statement is simply that the statutory standard is not vague because it is the familiar one doctors routinely use in deciding whether other types of surgery are necessary for a patient's health.

On reflection, however, that statement has momentous implications. The Court was surely cognizant that doctors normally make judgments about whether surgery is necessary solely by assessing its expected effects on the patient's health. If the health benefits outweigh the health risks, the surgery is (as the Court put it) "necessary *for*" the patient's health—that is, expected to *improve* the patient's health. Gone is the statutory reference to "the preservation of" the patient's health, with its self-defense overtones. In its place is a ruling that the statute authorizes an abortion under the same standard that doctors use to authorize, say, a tonsillectomy. That standard focuses exclusively on what is best for the woman's health, thus giving no weight at all to the life of the fetus *as against the woman's health.*[118] In short, *Vuitch* implicitly construed the D.C. statute as adopting the relative-safety test.[119]

4. The Relative-Safety Approach as an Interpretation of *Roe*'s Life-or-Health Exception

In light of *Vuitch*, the relative-safety approach must be recognized as a plausible interpretation of *Roe*'s life-or-health exception. Linguistically, it is more than a little awkward to read the phrase "necessary to preserve the life or health of the mother" to mean "necessary to *reduce risks to* the life or health of the mother." Yet that is essentially how the *Vuitch* Court read the equivalent language of the D.C. statute. Techni-

117 *Vuitch*, 402 U.S. at 72.

118 The thrust of the Solicitor General's brief in *Vuitch* was that the D.C. statute was intended to protect fetuses, but only by prohibiting abortions not based on legitimate health reasons. *See* Brief for the United States, *supra* note 113, at 28–29.

119 Particularly in light of the fact that Justice White joined Black's opinion, one could argue that the *Vuitch* Court left open the possibility that D.C. doctors—as a matter of medical practice and custom—used more restrictive criteria to decide whether abortions were "necessary" than whether other surgeries were "necessary." It matters not, because by 1971 whatever limits medical custom might once have imposed on therapeutic abortions were fading fast.

cally, *Vuitch*'s tacit construction, coming as it did in the context of a vagueness challenge to a statute that applied to abortions before as well as after viability, had no direct bearing on the meaning of *Roe*'s postviability life-or-health exception. Nevertheless, Justice Blackmun must have realized that, after *Vuitch*, the language in which he framed the life-or-health exception could plausibly be interpreted in relative-safety terms—and therefore that the exception itself was ambiguous.

Moreover, the relative-safety approach arguably squares with *Roe*'s premises. The argument is that maternal health should trump viable fetal life because: (1) women are Fourteenth Amendment persons, and fetuses are not; and (2) a woman has an even more fundamental interest in choosing to protect her health than she does in deciding whether or not to accept the inherent burdens of pregnancy and motherhood. Prior to viability, the state must permit the woman to choose whether to bear those burdens. After viability, the state's interest in fetal life is strong enough to justify requiring the woman to bear them; accordingly, states may prohibit "elective" abortions based on considerations *other* than the woman's health. But risks to health stand on a different footing, because they implicate both the woman's autonomy and her bodily integrity.[120] If the pregnancy proves to involve material risks to the woman's life or health that could be avoided by a postviability abortion, her fundamental interest in her own good health should trump the state's interest in fetal life.[121]

120 *See* Richard M. Cooper, *Response*, 121 HARV. L. REV. F. 31, 33 n.7 (2008) (responding to Volokh, *supra* note 7) ("Deciding whether to abort or to accept a risk to maternal life or health . . . is a different type of private decision from deciding whether to abort in the absence of such a risk because (1) it involves the woman's interest in deciding whether to risk her own health or life, and (2) the state's interest, although strong enough post-viability to override the woman's choice to abort in the absence of risk to herself, simply is not strong enough to defeat the woman's interest in deciding whether to risk her own life or health.").

121 It might be objected that the relative-safety test completely nullifies the state's power to protect viable fetal life, because states could invoke *maternal health* to justify banning all abortions that have incrementally greater health risks than pregnancy for particular women. The objection fails because its premise is almost certainly wrong: the Court would presumably hold that women are constitutionally entitled to make an informed choice in favor of bearing some increased health risks in order to avoid the burdens of pregnancy and childrearing. The Court might, however, permit states to ban abortions that are *dangerously* riskier than pregnancy on maternal-health grounds. If this analysis is correct, under the relative-safety test, the state's interest in viable fetal life allows it to ban the following category of postviability abortions that could *not* be banned on maternal-health grounds: abortions whose risks *equal or exceed those of pregnancy and childbirth, but are not so great as to make them dangerous for the mother.*

C. *The Life-or-Health Exception as an Instance of Studied Ambiguity*

Justice Blackmun's opinion in *Roe* was clearly influenced in some respects by Means's revisionist history, which he repeatedly cited.[122] But he made no reference to Means's claims about the meaning of life-only and life-or-health exceptions. Nor did he refer to *Vuitch*'s construction of the D.C. statute's life-or-health exception. Instead, Blackmun simply presented *Roe*'s life-or-health exception, without explanation, as the rule to which postviability state abortion bans must conform.[123] He said nothing one way or the other about whether the self-defense interpretation or the relative-safety interpretation was intended. Under these circumstances, the only reasonable inference is that the *Roe* Court left that question for another day.

Some might argue, to the contrary, that Justice Blackmun may have thought it too obvious to warrant explanation that a life-or-health exception applies whenever an abortion is "necessary" to benefit the woman's physical or mental health. After all, the Court in *Vuitch* had tacitly adopted the relative-safety interpretation of the D.C. life-or-health exception without even mentioning the self-defense interpretation. Why should we assume, then, that Blackmun thought *Roe*'s life-or-health exception was ambiguous as between these two meanings?

This argument is fallacious. To begin with, the *Vuitch* Court did not purport to have discovered a generally understood meaning for the words "necessary for the preservation of the mother's life or health." Rather, in the absence of legislative history, case law, or other evidence that the D.C. statute's language *had* a generally understood meaning, the Court agreed with the Solicitor General's interpretation of the D.C. statute.[124]

Beyond that, had Justice Blackmun thought *Vuitch* established the settled and unambiguous meaning of the words "necessary for the preservation of the mother's life or health," standard opinion-writing practice would have been to add a sentence along the following lines

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122 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 132–33, 134 (1973) (citing Means, *The Law of New York*, *supra* note 70, at 411–12); *id.* at 136, 139 (citing Means, *Abortional Freedom*, *supra* note 70, at 375–76).

123 *Id.* at 183.

124 *Compare* Brief for the United States, *supra* note 113, at 39 (arguing that the statute required doctors to make "a judgment that physicians are called upon to make almost every time surgery is contemplated"—namely, whether a "surgical procedure is necessary to preserve the health of an individual"), *with* United States v. Vuitch, 402 U.S. 62, 72 (1971) ("[W]hether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.").

to his opinion in *Roe*: "An abortion may be deemed necessary to preserve the mother's life or health if pregnancy is believed to pose greater risks to her physical or mental health than an abortion would. *Cf. United States v. Vuitch*." Instead, Blackmun offered no explanation of the life-or-health exception and made no mention of *Vuitch* in the relevant portions of his opinion.[125]

Nor is it credible that Blackmun was unaware of the self-defense interpretation—or unaware of its standing as the traditional understanding of the life-of-the-mother exceptions contained in most state abortion laws. Even Cyril Means acknowledged that his relative-safety interpretation of the nineteenth-century statutes ran counter to the conventional wisdom.[126] Indeed, Justice Blackmun's opinion in *Roe* describes several exceptions to prohibitions on abortion that can only be interpreted along self-defense lines. For example, consider the English Abortion Act of 1967,[127] which, as Blackmun explained, permitted a doctor to perform an abortion when two other doctors concur "'that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman . . . greater than if the pregnancy were terminated,'"[128] or "without the concurrence of others, to terminate a pregnancy where he is of the good-faith opinion that the abortion 'is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.'"[129] The first of these exceptions explicitly adopts the relative-safety approach—and the second explicitly adopts the self-defense approach. The language Blackmun used in *Roe*, of course, more closely resembles the second exception.

Finally, there is the fact that no later opinion of the Court touching on the meaning of *Roe*'s life-or-health exception—including two in which Justice Blackmun nudged the law in the direction of the relative-safety approach—has *ever* claimed that *Roe* itself adopted that test, or rejected the self-defense approach. It is simply incredible that if a

125 Blackmun did cite *Vuitch* as support for *Roe*'s holding that fetuses are not Fourteenth Amendment persons, "for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection." *Roe*, 410 U.S. at 159.

126 Means, *The Law of New York*, *supra* note 70, at 509–11.

127 Abortion Act, 1967, c. 87 (Eng.).

128 *Roe*, 410 U.S. at 137 (quoting Abortion Act, 1967, c. 87, § 1(1) (Eng.)).

129 *Id.* at 138 (quoting Abortion Act, 1967, c. 87, § 1(4) (Eng.)).

colorable argument to that effect could have been made, Blackmun would have passed over it in silence.[130]

In short, *Roe* does not decide between the two competing interpretations that best fit the life-or-health exception's ambiguous language. Clearly, in the wake of *Belous* and *Vuitch*, Blackmun's failure to endorse either the self-defense or relative-safety approaches was no oversight, but a deliberate choice. What explains this crucial omission from an opinion that, in its author's view, appropriately contained more dicta than most?[131]

It seems likely that Justice Blackmun left the scope of the life-or-health exception unresolved either because the seven Justices in the majority would have had difficulty reaching agreement on this issue, or because they wanted to gauge public reaction to *Roe* before committing themselves. Although the Justices by all accounts underestimated the extent of the backlash *Roe* generated, they certainly

130 Had Justice Blackmun attempted to construct such an argument, he might have invoked *Roe*'s recognition that the state also has a compelling interest in maternal health. *See id.* at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."). The state's compelling interest in maternal health, the argument goes, counterbalances its compelling interest in protecting viable fetal life whenever pregnancy poses greater health risks than abortion. Under those circumstances, the woman's privacy or autonomy right to choose whether or not to terminate her pregnancy should prevail.

Assuming it survives the rejection of *Roe*'s trimester framework in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872–76 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.), this argument depends on the dubious premise that when two compelling state interests conflict, they should be deemed to be in equipoise, so that a tie-breaker is needed. What seems called for is not equipoise, but rather an inquiry into the *extent* to which these two compelling state interests are at stake. A postviability ban that is subject to the self-defense version of the life-or-health exception exposes women to substantial health risks, but not to highly dangerous ones, and hence still affords considerable protection to the interest in maternal health. By contrast, the relative-safety version of the life-or-health exception severely undermines the protection of viable fetal life, because in most unwanted pregnancies a doctor can assert in good faith that a postviability abortion is safer for the mother's overall health (physical and mental) than pregnancy. Indeed, if a future technological breakthrough were to make even postviability abortions as safe as first-trimester abortions are now, the relative-safety test would render state bans on postviability abortions nugatory.

131 Justice Blackmun's cover memo to his colleagues, accompanying his revised draft opinion after reargument in *Roe*, noted that "'[i]n its present form it contains dictum, but I suspect that in this area some dictum is indicated and not to be avoided.'" GARROW, *supra* note 107, at 580 (quoting Memorandum from Justice Harry A. Blackmun to the Conference (Nov. 21, 1972)).

anticipated that the decision would be controversial.[132] *Roe*'s *only* concession to the pro-life standpoint was its acknowledgement that the state has a sufficiently compelling interest in viable fetal life to prohibit abortions. If the *Roe* Court had simultaneously announced that the mandatory life-or-health exception applied whenever a doctor believed in good faith that an abortion would involve fewer maternal health risks than pregnancy and childbirth, it would have been evident to everyone that the exception had largely swallowed the concession. Instead, by electing not to explain the life-or-health exception, the *Roe* Court was able to keep its options open while credibly claiming, as Justice Blackmun wrote in *Doe*, that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand."[133]

Whether or not these speculations are correct, the key point for descriptive legal analysis is simply this: *Roe*'s ambiguous formulation of the life-or-health exception is consistent with either the self-defense interpretation or the relative-safety interpretation.[134] As we'll see next, *Roe*'s less well-known companion case, *Doe v. Bolton*, did not settle this question either.

D. The Myth of Doe v. Bolton

Many pro-life commentators have suggested a different explanation for *Roe*'s silence on the meaning of the life-or-health exception: that Justice Blackmun stealthily used the Court's opinion in *Doe v. Bolton* to endorse a virtually limitless right to postviability abortions for "health" reasons. As Mary Ann Glendon puts it, "when *Roe* is read with *Doe*, third-trimester restrictions are effectively ruled out as well—for *Roe*'s dictum that such restrictions might be permissible if they did not interfere with the mother's health was negated by *Doe*'s definition

132 *Id.* at 587 (discussing Justice Blackmun's suggestion that issuance of the opinions in *Roe* and *Doe* "be accompanied by an unprecedented eight-page explanatory statement").

133 Doe v. Bolton, 410 U.S. 179, 189 (1973).

134 In the first years after *Roe*, some commentators noted that the scope of the life-or-health exception was uncertain. *See, e.g.*, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 79 n.24 (1973) ("The practical effect of this part of the decision is particularly unclear."). Others seemed, if anything, to favor the self-defense interpretation. *See, e.g.*, MODEL PENAL CODE § 230.3 cmt. at 444 (Official Draft and Revised Comments 1980) ("Only in the final trimester of pregnancy, after viability of the fetus, is abortion still subject to the essentially ethical restrictions long enforced by the criminal law and retained in qualified form under Section 230.3.").

of 'health' as 'well-being.'"[135] I will argue that this argument is mistaken. Not until Justice Blackmun's later decisions in *Colautti*[136] and *Thornburgh*[137] did he publicly espouse an expansive version of the life-or-health exception; and when he did, it was the relative-safety interpretation. *Doe v. Bolton* does not suggest—even in dictum—that "health" means "well-being" for purposes of the life-or-health exception.

Patterned on the Model Penal Code, the Georgia statute at issue in *Doe* criminalized abortions unless, in a doctor's "'best clinical judgment . . . an abortion is necessary'" (1) to preserve the woman's life or health, (2) to avoid the birth of a gravely defective fetus, or (3) because the pregnancy resulted from rape.[138] Relying on *Griswold v. Connecticut*, a three-judge district court held the statute unconstitutional insofar as it limited abortions to these three situations.[139] The lower court then *upheld* the redacted statute, which now unqualifiedly authorized abortions at any stage of pregnancy whenever "necessary" in a physician's "best clinical judgment."[140]

Not content with this victory, the appellants claimed that the redacted statute was unconstitutionally vague because "the word 'nec-

135 Mary Ann Glendon, *The Women of* Roe v. Wade, 134 FIRST THINGS 19, 20 (2003); *see also, e.g.*, DELLAPENNA, *supra* note 64, at 695 ("Blackmun's definition of a women's [sic] 'health' in *Doe* as encompassing anything affecting her 'well-being' virtually precluded any possible regulation of abortion during the entire months of pregnancy."); RAMESH PONNURU, THE PARTY OF DEATH 10 (2006) ("*Roe* required that any ban on late-term abortion include an exception allowing abortion to protect a woman's health; *Doe* defined that exception so broadly that it swallowed up any possibility of a ban."). Pro-life legislators have proceeded on this same understanding. *See* HENRY J. HYDE, CATCH THE BURNING FLAG 138 (2008) ("*Roe* v. *Wade* allows abortions up to the moment of birth. The unborn have been summarily stripped of any legal protection since 1973."); *id.* at 154 ("[A]ny 'health' exceptions are so broadly construed by the courts as to make a ban meaningless."); *see also* STAFF OF S. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON THE HUMAN LIFE BILL 5 (Comm. Print 1981) ("The exception for maternal health has been so broad in practice as to swallow the [restrictive standard for the third trimester]."). For an early evaluation along the same lines by a prominent pro-choice critic of *Roe*, see John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 921 & n.19 (1973).

136 *See* Colautti v. Franklin, 439 U.S. 379, 400–01 (1979).

137 *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768–69 (1986), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

138 Doe v. Bolton, 410 U.S. 179, 183 (1973) (alteration in original) (quoting GA. CODE ANN. § 26-1202(a) (rev. 1971)). The statute omitted the Model Penal Code's specific exception for incest. Georgia assured the *Doe* Court, however, that the statute's "reference to 'rape' was intended to include incest." *Id.* at 183 n.5.

139 Doe v. Bolton, 319 F. Supp. 1048, 1055 (N.D. Ga. 1970).

140 *Doe*, 410 U.S. at 191.

essary' does not warn the physician of what conduct is proscribed."[141] Unsurprisingly, Justice Blackmun's opinion for the Court ruled that this vagueness challenge was meritless in light of *Vuitch*.[142] The lower court had construed the redacted statute to allow the doctor, in determining whether an abortion was necessary, to exercise "his professional, that is, his 'best clinical,' judgment in light of *all* the attendant circumstances."[143] This, the *Doe* Court reasoned, was the kind of all-things-considered judgment about whether an operation is "necessary" that *Vuitch* had said doctors "routinely" are expected to make.[144]

Having thus rejected the vagueness challenge, the *Doe* Court proceeded to emphasize its agreement with the lower court's interpretation of the redacted statute, under which a doctor's "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health."[145] Glendon and others view this language as effectively defining maternal health in all-inclusive terms *for purposes of both elective abortions and postviability abortions*.[146] What else, after all, could explain why the *Doe* Court went out of its way to endorse this apparent equation of health with overall well-being?

There is a simple answer: because otherwise the redacted statute would have been unconstitutional under the standard for *elective*, previability abortions announced in *Roe*. It is often forgotten nowadays that *Roe* phrased the right to elective abortion in iatrocentric terms: "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, *in his medical judgment*, the patient's pregnancy should be terminated."[147] *Roe* stressed that these "medical judgments" should take into account the full range of harms that can befall women who are denied abortions:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise,

141 *Id.*
142 *Id.* at 191–92.
143 *Id.* at 191.
144 *Id.* at 192.
145 *Id.*
146 Glendon, *supra* note 135, at 20.
147 Roe v. Wade, 410 U.S. 113, 163 (1973) (emphasis added).

> to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. *All these are factors the woman and her responsible physician necessarily will consider in consultation.*[148]

Doe's ballyhooed list of "factors" is nothing more than a shorthand version of the foregoing passage from *Roe*: the Georgia statute is constitutional, but only because it permits the doctor's "medical judgment" about whether an elective abortion is "necessary" to be based on "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[149] *Doe* thus applies and reiterates *Roe*'s mandate that, in the context of *elective* abortions, doctors should consider everything about the pregnant woman's situation that affects her "well-being."[150] This is not a constitutional definition of "health": it is an affirmation that previability abortions must be permitted even if they involve concerns about the woman's "well-being," rather than her health.

Granted, *Roe* and *Doe* assert that in assessing pregnancy's impact on a woman's well-being, a doctor is still making a "medical judgment," as evidenced by the fact that the factors affecting her well-being "may relate to health."[151] We can fairly infer that the *Doe* Court believed that elective abortions (like other elective surgeries) could sometimes increase a woman's well-being in ways that would promote her health.[152] This inference, however, does not mean that the Court

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148 *Id.* at 153 (emphasis added).

149 *Doe*, 410 U.S. at 192. Indeed, the *Doe* Court probably thought it was *limiting* the right to an elective abortion by permitting the state to require that the attending doctor make a good-faith professional judgment that abortion is in the woman's best interest. The three-judge district court in *Doe* had opined that "although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician." Doe v. Bolton, 319 F. Supp. 1048, 1055 (N.D. Ga. 1970). It argued that the Georgia statute reflected a reasonable decision to "treat the problem as a medical one" by requiring doctors to "to judge concurrently the basis as well as the risk inherent in such a decision." *Id.*

150 That *Doe* was so understood is confirmed by Utah's previability abortion statute, which, as the Court noted in *H.L. v. Matheson*, 450 U.S. 398 (1981), "expressly incorporates the factors we identified in *Doe v. Bolton*, as pertinent to exercise of a physician's best medical judgment in making an abortion decision." *Id.* at 404 (citation omitted).

151 *Doe*, 410 U.S. at 192; *see Roe*, 410 U.S. at 163.

152 In this connection, it is noteworthy that the redacted Georgia statute called upon doctors to make their "'best *clinical* judgment[s]'" as to whether "'an abortion is necessary.'" *Doe*, 410 U.S. at 183 (emphasis added) (quoting GA. CODE ANN. § 26-1202(a) (rev. 1971)).

equated "health" and "well-being" in the elective-abortion context.[153] And even if it did, that would tell us absolutely nothing about what "health" means when the question is whether—in the face of a state's assertion of its power to ban postviability abortions *for the purpose of protecting fetal life*—an abortion is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[154] On the contrary, *Roe*'s critical distinction between previability and postviability regimes presupposes that "health," as used in the postviability exception, has a narrower meaning than "overall well-being." The most salient (but as we shall see not the only) alternative is the "modern understanding" endorsed in *Vuitch*: unimpaired soundness of body and mind.[155] Before viability, states may not protect fetal life by prohibiting abortions; by the same token, abortion doctors may base their "medical judgments" exclusively on the woman's interests—that is, her well-being (including but not limited to her health). After viability, *Roe* permits states to protect fetal life, *even at the expense of maternal well-being*, unless the mother's life or health is endangered. That holding would be absurdly self-contradictory if "health" meant "well-being."[156]

E. The Mental-Health Problem

Even accepting my revisionist interpretation of *Doe*, however, isn't *Roe*'s life-or-health exception inconsistent with self-defense princi-

153 In this connection, consider again the language in which *Vuitch* approved the lower court's conclusion that the D.C. statute authorized abortions for mental health reasons: "Certainly this construction accords with the general usage and modern understanding of the word 'health,' which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the '[s]tate of being . . . sound in body [or] mind.'" United States v. Vuitch, 402 U.S. 62, 72 (1971) (alterations in original)). The *Vuitch* Court's reference to "psychological as well as physical well-being" clearly was not intended to suggest that psychological and physical well-being are the same as *overall* well-being (meaning happiness, utility, and so forth). On the contrary, *Vuitch* uses "well-being" to mean well-*working*; that is why the Court treats well-being of body and mind as equivalent to being "sound in" body and mind.

154 *Roe*, 410 U.S. at 165.

155 *Vuitch*, 402 U.S. at 72.

156 In theory, one can imagine a rule restricting postviability abortions by requiring that continued pregnancy be thought to pose a serious threat to the woman's well-being. For example, if pregnancy meant the woman were likely to lose her well-paying job, she would be entitled to a postviability abortion. By contrast, if there were only a remote possibility she would lose her job, or if her family's income would be adequate even without it, she would not be entitled to a postviability abortion. So far as I am aware, no Justice or commentator has endorsed this interpretation of *Roe*'s life-or-health exception.

ples—and hopelessly expansive in practice—because it encompasses *mental* health? Subject to qualifications I discuss below, I will assume that the premise of this objection is correct: as used, in the exception, "health" includes mental health, understood as soundness of mind. The problem then is that, as usually stated, the right to use deadly force in self-defense requires that one be threatened with death or serious *bodily* harm.[157] Nevertheless, it is exceedingly difficult to defend a conception of self-defense that categorically bars persons from defending themselves against threats of serious mental injury. Imagine, for example, that someone is attempting to shoot you with a tiny drug-laden dart that poses no risk of serious physical injury, but will make you irreversibly schizophrenic or psychotic. There would be something seriously amiss with a conception of self-defense that prohibited you from using deadly force to defend yourself from an attack of this dangerousness. Consistent with that intuition, self-defense law has long allowed persons who are imminently threatened with rape to use deadly force against their attackers—whether or not they expect to suffer serious physical injuries—because of the grave emotional and dignitary injuries rape typically inflicts.[158] And in any event, serious mental illnesses often *do* involve a serious "physical" or "bodily" injury, namely, an injury to (or dysfunction of) the brain.[159] If indeed *Roe*'s life-or-health exception encompasses serious threats to the mother's mental health, then that is not inconsistent with the self-defense interpretation.

Nor is the floodgates objection persuasive. Obviously the self-defense approach will not yield a *broader* mental-health exception

157 *See* O. Carter Snead, *Unenumerated Rights and the Limits of Analogy: A Critique of the Right to Medical Self-Defense*, 121 HARV. L. REV. F. 1, 3 (2007) (arguing that "[t]he right to post-viability abortion is not rooted in self-defense principles," because it encompasses "[t]hreats to mental health," which "are never sufficient to justify lethal self-defense").

158 *Cf.* Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 250 (1992) (arguing that contemporary rape laws are written for the purpose of protecting "the physical, *emotional, and dignitary interests* of the woman" (emphasis added)). *See generally* Arlette Grabczynska & Kimberly Kessler Ferzan, *Justifying Killing in Self-Defense*, 99 J. CRIM. L. & CRIMINOLOGY 235, 251 (2009) (book review) (discussing how author Leverick believes the use of self-defense should be extended beyond physical cases because "rape is a denial of humanity"); Amy J. Sepinwall, *Defense of Others and Defenseless "Others,"* 17 YALE J.L. & FEMINISM 327, 381 (2005) (contemplating the limits of "the right to use deadly force to safeguard one's dignity").

159 *See generally* Nancy C. Andreasen, *Linking Mind and Brain in the Study of Mental Illnesses: A Project for a Scientific Psychopathology*, 275 SCIENCE 1586, 1586 (1997) (discussing the relationship between mind and body, in which "aberrations of mental illnesses reflect abnormalities in the brain/mind's interaction with its surrounding world").

than the relative-safety approach. The real objection, therefore, must be that the mental-health exception will cause the self-defense approach to expand so widely that it will in practice be *indistinguishable* from the relative-safety approach. If that is true, the argument goes, why not just adopt the relative-safety approach and be done with it? But there is no convincing reason to accept this alleged equivalence.[160] On self-defense principles, only a threat of *severe* mental illness would suffice to trigger the life-or-health exception.[161] An unscrupulous psychologist or psychiatrist can certify with impunity that pregnant women are anxious, nervous, or depressed. That would be far less likely to be true, however, if the required diagnosis involved severe depression, schizophrenia, psychosis, or other disabling mental illness. Abuses would undoubtedly still occur, but at least there would be solid grounds on which charges of abuse could be predicated. And the message sent by state laws that limited postviability abortions to pregnancies presenting a substantial risk of death or severe impairment of physical or mental health would be consistent with self-defense principles, not a mere pretext for postviability abortion on demand.

As for the status and scope of the mental-health component of *Roe*'s life-or-health exception, it too is unsettled in important respects. Neither *Roe* nor *Doe* holds that postviability abortions must be permit-

160 This is not to deny that it would be trickier to place workable limits on the mental-health branch of a self-defense exception than the physical-health branch. The same could be said, however, of the relative-safety test. Doctors' judgments about whether the physical health risks of abortion are smaller than those of pregnancy are less open-ended and manipulable than their judgments about whether the combined physical and mental health risks of abortion are smaller than those of pregnancy.

161 Exhibit A for the proposition that mental-health exceptions will lead to rampant abuses is California's experience with the 1967 Therapeutic Abortion Act, which defined the requisite injury to mental health as "mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint." CAL. HEALTH & SAFETY CODE § 25954 (West Supp. 1968) (repealed 1995). As the California Supreme Court noted in *Barksdale*, this standard "appears to be, with only minor modifications, a statement of the former standard for involuntary commitment to a mental institution." People v. Barksdale, 503 P.2d 257, 264 (Cal. 1972) (in bank). Yet in 1970, more than 98% of all abortions in California (more than 60,000 in total) were approved on mental health grounds. *Id.* at 265. This prompted the California Supreme Court to deadpan that "[s]erious doubt must exist that such a considerable number of pregnant women could have been committed to a mental institution." *Id.* While this example is undoubtedly worrisome, the California statute did not take the approach I have tentatively suggested (restricting the exception to serious risks of severe, disabling mental illness); instead, by borrowing civil commitment standards, it invited unscrupulous doctors to make nonfalsifiable predictions that their patients were potentially suicidal.

ted on mental-health grounds. In light of *Vuitch*'s conclusion that "health" includes mental health as a matter of "general usage and modern understanding,"[162] however, it seems clear that *Roe*'s undefined reference to the "health of the mother" after viability should also be read to include mental health.[163] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, however, the Supreme Court upheld a medical emergency exception that was limited to "'avert[ing] . . . death or for which a delay will create serious risk of substantial and irreversible *impairment of a major bodily function.*'"[164] Because the medical conditions that were at issue in the *Casey* litigation involved only physical health, the plurality had no occasion to address (and said nothing about) whether this statutory language excluded some or all risks to mental health.[165]

Responding to *Casey*, the Ohio legislature banned postviability abortions unless a doctor determined "in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman."[166] In *Women's Medical Professional Corp. v. Voinovich*,[167] a divided Sixth Circuit held that this prohibition was unconstitutional because it contained no "mental health" exception.[168] The

162 United States v. Vuitch, 402 U.S. 62, 72 (1971).

163 Similarly, in *Beal v. Doe*, 432 U.S. 438 (1977), the Court recognized (albeit in a nonconstitutional setting) that whether an abortion is "medically necessary" turns on the pregnancy's expected impact on the woman's physical *and* mental health. *See id.* at 442 n.3; *see also id.* at 450 n.* (Brennan, J., dissenting) (arguing for an even broader conception of health equivalent to well-being).

164 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (emphasis added) (quoting 18 PA. CONS. STAT. § 3203 (1990)).

165 Interestingly, the Third Circuit's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3d Cir. 1991), stated that "[t]he essence of the definition . . . is that it allows a woman and her doctors to forego many of the Act's requirements when there is a medical emergency to the woman's *physical* health." *Id.* at 701 (emphasis added); *see also id.* at 702 ("Physically threatening emergencies are covered . . . ."). This dictum seemingly implies that risks that solely concern mental health fall outside the medical-emergency provision, while leaving it unclear whether (and at what point) mental-health risks might qualify because of their expected effects on the functioning of the woman's brain.

166 OHIO REV. CODE ANN. § 2919.17(A)(1) (LexisNexis 2006).

167 130 F.3d 187 (6th Cir. 1997).

168 *Id.* at 207–10. In dissent, Judge Boggs argued that the statutory exception should be construed to include threats of severe mental harm, because "[i]t is counterintuitive to say that sufficiently severe mental harm is not an impairment of a major bodily function; if anything, it could be seen as an impairment of the *most* significant bodily function." *Id.* at 217 (Boggs, J., dissenting).

Sixth Circuit reasoned "*Doe* and *Vuitch* . . . strongly suggest that a State must provide a maternal health exception to an abortion ban that encompasses situations where a woman would suffer severe mental or emotional harm if she were unable to obtain an abortion."[169] It "recognize[d] the problems associated with a mental health exception," but viewed them as manageable if the exception was limited to "*severe* irreversible risks of mental and emotional harm."[170]

The Supreme Court denied certiorari, over a dissent by Justice Thomas in which Chief Justice Rehnquist and Justice Scalia joined.[171] The dissenters argued that *Doe* was not controlling, and that whether state postviability bans were required to include explicit mental health exceptions was an important and unresolved question the Court should address.[172] The question has remained in this somewhat unsettled posture ever since. That said, the exception for "severe" mental and emotional harm crafted by the Sixth Circuit is arguably consistent with self-defense principles.[173] Whether that exception is sufficiently limited to avoid the floodgates problem that the Sixth Circuit acknowledged is a question I leave for another day.[174]

F. Is the Self-Defense Approach Unconstitutionally Vague?

Before turning to the post-*Roe* adventures of the life-or-health exception in the Supreme Court, it is necessary to address the most radical objection to the self-defense approach: that it is unconstitutionally vague. This objection could mean two different things: (1) a statute that reads "necessary to preserve the life or health of the mother" is unconstitutional if given a self-defense interpretation, because the statute's language does not give fair warning of this meaning; or (2) a statute that reads "necessary to avoid a threat to the mother's life or health that justifies her use of deadly force in self-defense," or otherwise unambiguously adopts the self-defense approach, is unconstitutionally vague *because self-defense principles fail to*

169 *Id.* at 209.

170 *Id.*

171 Voinovich v. Women's Med. Prof'l Corp., 523 U.S. 1036, 1037–40 (1998) (Thomas, J., dissenting from denial of certiorari).

172 *Id.*

173 For an argument that a mental health exception for postviability abortions is ill-advised, see Brian D. Wassom, Comment, *The Exception that Swallowed the Rule?* Women's Medical Professional Corporation v. Voinovich *and the Mental Health Exception to Post-Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799, 837–66 (1999).

174 The Sixth Circuit's inclusion of "*severe* irreversible risks of . . . *emotional* harm" may be especially problematic. *See Voinovich*, 130 F.3d at 209 (second emphasis added).

give doctors fair warning of what the law requires.[175] As I will now show, *Vuitch* arguably lends some support to the first objection, but not the second; and only the second objection poses an insuperable obstacle to the self-defense approach.

Although the *Vuitch* Court did not reiterate the point in discussing the vagueness issue, it had already invoked (in connection with a different issue) the canon that "statutes should be construed whenever possible so as to uphold their constitutionality."[176] This canon probably played a role in the Court's decision to construe the statute in accord with the relative-safety approach. By interpreting the life-or-health exception so that it called for nothing more than a judgment about whether abortion was better for the woman's health than pregnancy, the *Vuitch* Court was able to make a slam-dunk case that the statute was not vague.

But suppose that this saving construction had not been available—for example, because the lower courts had authoritatively construed the statute to require a grave threat to the mother's life or health. Then doctors could argue, with some plausibility, that the statute's language did not give them fair warning of its restrictiveness, because they could reasonably have believed the statute adopted the relative-safety approach. Even under these circumstances, there is a strong counterargument. If the statute had long been generally understood to employ the self-defense approach, doctors could reasonably be expected to know that abortions were not justifiable unless the woman's life or health was in serious danger. In the end, it makes little difference which argument prevails, because the thrust of this vagueness challenge is simply that the *statute* is ambiguous. If there is intolerable ambiguity, it can readily be cured by clearer drafting.

The second objection, on the other hand, makes the more radical claim that the self-defense approach is *inherently* vague. According to this objection, even a statute that unambiguously adopts the self-defense approach nonetheless fails to give doctors fair warning of what it requires. If *Vuitch* means that even an *explicit* self-defense exception would be unconstitutionally vague, the self-defense approach is obviously untenable as an interpretation of the constitutional life-or-health exception. It cannot be that the Constitution, as

175 An alternative self-defense statute would provide that "to protect the life of the fetus, no abortion shall be performed unless necessary to save the mother's life, or prevent serious and permanent injury to her health."

176 United States v. Vuitch, 402 U.S. 62, 69–70 (1971) (discussing whether the D.C. statute assigned the burden of persuasion to the defendant once the prosecution proved the fact of abortion).

interpreted by the Supreme Court, authorizes states to adopt unconstitutionally vague prohibitions on postviability abortions.

This question deserves a more complete analysis than the brief response I can offer here.[177] That said, so far as I know, it has never been seriously contended that the law of self-defense—in either its common-law or statutory versions—is unconstitutionally vague. Yet individuals risk prison time whenever they use deadly force in the face of what they genuinely believe to be an imminent danger of death or serious bodily injury.[178] If a jury determines that an individual's belief was unreasonable, that the perceived risk of serious injury was too small to qualify as dangerous, that the perceived danger was not imminent, or that it involved only minor bodily injury, the plea of self-defense will fail, and criminal and civil liability will attach.[179] Moreover, individuals must frequently make *immediate* decisions about whether and by what means to defend themselves under these somewhat fuzzy standards. Doctors, by contrast, normally have plenty of time to evaluate whether the health risks associated with a particular woman's pregnancy rise to the level that would justify an abortion on self-defense grounds.

Second, even accepting for argument's sake that *some* statutory incarnations of the self-defense approach may be unconstitutionally vague, surely more detailed statutory drafting could cure any vagueness problem. If a court were ever to strike down a state's general self-defense statute on vagueness grounds, it is unthinkable that the remedy would be either (1) that self-defense was eliminated or (2) that persons now enjoyed a right to use deadly force against one another whenever they believed in good faith that this would make them safer. Instead, the court would presumably explain how the legislature could more clearly spell out just what persons must do to justify their use of deadly force. It should be equally feasible, if the Constitution requires it, to craft a self-defense life-or-health exception that clearly spells out the criteria doctors are to apply in evaluating women's requests for postviability abortions.

In short, there is no good reason to think that the self-defense version of a life-or-health exception is inherently void for vagueness.[180] *Vuitch* is not *Belous*.

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177 The argument I make here draws on the analysis in Jane Lang McGrew, Comment, *To Be or Not to Be: The Constitutional Question of the California Abortion Law*, 118 U. PA. L. REV. 643, 647–49 (1970).

178 6 AM. JUR. 2D *Assault and Battery* § 52 (2008) [hereinafter *Assault and Battery*].

179 *Id.*

180 Of course, a self-defense exception may not provide as much guidance to doctors about what conduct is forbidden as a relative-safety exception would. But the

II. THE RISE OF THE RELATIVE-SAFETY APPROACH

We have seen that *Roe* and *Doe* leave open the fundamental choice between the self-defense and the relative-safety interpretations. The stakes in choosing between these two rationales for the life-or-health exception are very high. Consider the most important doctrinal issues raised by the exception: what counts as a risk to the mother's life or health? To trigger the exception, how likely must it be that continued pregnancy will lead to impairment of the mother's health, and how serious must that potential impairment be? Does *Doe*'s "appropriate medical judgment" refer to the good-faith judgment of the woman's doctor, to an objective reasonableness standard, or to some combination of both? On self-defense principles, only risks of death or serious bodily harm count, there must be a substantial risk of serious health impairment,[181] and the doctor's evaluation must be objectively reasonable. On the relative-safety rationale, all non-negligible health risks count, an abortion is justified whenever the expected health risks of pregnancy exceed those of abortion, and

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void-for-vagueness test obviously does not require legislatures to choose the substantive content of criminal law based on which lines are clearest.

181 The question of how likely the threatened harm must be to justify the use of deadly force is not one to which self-defense law offers a well-defined answer. Nevertheless, the principle of proportionality supplies some guidance. The idea of proportionality is built into the rule that one may not use deadly force unless threatened with deadly force or serious bodily harm. *Assault and Battery*, *supra* note 178, § 52. A person who uses deadly force to repel an attack that was expected at most to inflict a broken finger would not be acting in self-defense, because he or she would be using force disproportionate to the threatened harm. Proportionality should also have a role to play in defining what constitutes a *danger* of death or serious bodily harm. Proportionality does not require equality: if you reasonably believe there is a ten percent chance you will be killed unless you use your shotgun at close range, you are justified in firing even if there is, say, a fifty percent chance your attacker will die as a result. But now suppose your attacker aims a gun at you from a very great distance, so that there is only a 1 in 10,000 chance you will be injured if he in fact fires. May you defend yourself from this attack by means that would subject your attacker to the same fifty percent chance of death as in the previous example? No, because in order for a belief in danger to be reasonable, there must appear to be a substantial chance of death or serious bodily harm. *See id.* § 51. The implicit definition of danger in the law of self-defense, I suggest, is "a risk of serious harm sufficiently probable that the use of deadly force in self-defense is not disproportionate to that risk." *See* Sangero, *supra* note 57, at 479 (explaining that proportionality requires "a reasonable correlation between the force of attack and the force of defense, between the expected injury to the person attacked, if prevented from defending herself, and the anticipated injury to the aggressor if defensive force is applied"). Thus, a test based on self-defense principles would require that there be a *substantial* chance the mother would suffer death or serious health impairment absent an abortion.

the doctor's good-faith judgment amounts to a "physician veto" over the application of a statutory prohibition on postviability abortion.[182]

In the decade after *Roe*, the pro-*Roe* majority shrank as Justice O'Connor replaced Justice Stewart,[183] and Chief Justice Burger (and to a lesser extent Justice Powell) defected on some issues.[184] But the pro-*Roe* majority also grew more inflexible, subjecting state abortion regulations to ever stricter scrutiny. Without ever squarely defining the scope of the life-or-health exception, the Court made it increasingly clear that state prohibitions on postviability abortions would survive only if they were toothless. The state's supposedly compelling interest in viable fetal life repeatedly yielded to the woman's interest in minimizing risks of harm to her health.[185] The decisive rulings involved state restrictions on postviability abortion *methods*—restrictions designed to increase the chances that viable fetuses would survive abortions and receive appropriate postnatal care.[186]

A. Colautti v. Franklin

In *Colautti v. Franklin*, the Court considered a vagueness challenge to a Pennsylvania statute requiring that, after viability,[187] "'the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or

182 *See* Peter M. Ladwein, Note, *Discerning the Meaning of* Gonzales v. Carhart*: The End of the Physician Veto and the Resulting Change in Abortion Jurisprudence.*, 83 NOTRE DAME L. REV. 1847, 1860–61 (2008).

183 Although she ultimately voted to reaffirm *Roe*'s "essential holding[s]" in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992), Justice O'Connor extensively criticized *Roe* in her dissent in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

184 *See, e.g.*, Harris v. McRae, 448 U.S. 297, 312–26 (1980) (rejecting, by a vote of 5–4, constitutional challenges to the Hyde Amendment's prohibition on the use of federal funds to pay for Medicaid abortions except in cases of rape, incest, or danger to the mother's life).

185 *See* Stenberg v. Carhart, 530 U.S. 914, 931 (2000).

186 *Id.*

187 The Court had previously invalidated a Missouri provision requiring abortion providers to exercise the same care "'to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted'" on the ground that this provision was not limited to postviability abortions. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 82–83 (1976) (quoting H.B. 1211, 77th Gen. Assem. (Mo. 1974)). The *Danforth* Court did not suggest that this provision would be unconstitutional if it applied only to postviability abortions.

health of the mother.'"[188] Because the language of the statutory exception was virtually identical to the language of *Roe*'s life-or-health exception ("except when it is necessary to preserve the life or health of the mother"[189]), one might have expected the Supreme Court summarily to reject the vagueness claim. Instead, in an opinion by Justice Blackmun, the Court held 6–3 that the statute was unconstitutionally vague:

> [The statute] directs the physician to employ the abortion technique best suited to fetal survival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother" (emphasis supplied). In this context, the word "necessary" suggests that a particular technique must be indispensable to the woman's life or health—not merely desirable—before it may be adopted. And "the life or health of the mother," as used in § 5 (a), has not been construed by the courts of the Commonwealth to mean, nor does it necessarily imply, that all factors relevant to the welfare of the woman may be taken into account by the physician in making his decision. Cf. *United States v. Vuitch*, 402 U.S., at 71–72; *Doe v. Bolton*, 410 U.S., at 191.
>
> Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.[190]

The chutzpah on display in these paragraphs is breathtaking.[191] The ambiguity the Court discerned in the statute is precisely the ambi-

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188 Colautti v. Franklin, 439 U.S. 379, 381 n.1 (1979) (quoting 35 PA. STAT. ANN. § 6605(a) (West 1977)).

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

190 *Colautti*, 439 U.S. at 400–01 (quoting § 6605(a)).

191 Not that chutzpah was the only problem. In particular, Blackmun's "Cf." cite to *Vuitch* and *Doe* was tendentious and misleading. The impression this citation seems intended to convey is that in *Vuitch* and again in *Doe*, the Court construed "the life or health of the mother" to mean that "all factors relevant to the welfare of the woman may be taken into account by the physician in making his decision" about an abortion. As we've seen, the Court made no such leap in either of those cases. *See supra* Parts I.B.3, I.D. *Vuitch* construed "the life or health of the mother" to include physical and mental health, understood as soundness of body and mind—not overall welfare. *See* United States v. Vuitch, 402 U.S. 62, 72 (1971). And *Doe* did not construe "the life or health of the mother" at all; it simply indicated that a doctor, in deciding whether *elective* abortions are "necessary," should consider all "factors . . . relevant to the well-

guity that inhered in *Roe*'s life-or-health exception, promulgated without explanation as it had been.[192] In dissent, Justice White tried to limit the damage by asserting that "the Court has not yet invalidated a statute simply requiring abortionists to determine whether a fetus is viable and forbidding the abortion of a viable fetus except where necessary to save the life or health of the mother."[193] But that is exactly the result that follows if *Colautti*'s logic is taken seriously: a state ban on postviability abortions that contains a life-or-health exception lifted verbatim from the Supreme Court's opinion in *Roe* is void for vagueness!

What accounts for this seemingly absurd result? To use the terms employed in this Article, Justice Blackmun's basic point was that the statutory life-or-health exception fails to specify whether it adopts some version of a self-defense approach (which "requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival"[194]) or the relative-safety approach (which "permits the physician to consider his duty to the patient to be paramount to his duty to the fetus"[195]).[196] Consequently, the vagueness argument goes, a doctor does not have fair warning as to what conduct is prohibited.

Assuming arguendo that this reasoning is correct, the ultimate responsibility for the statutory exception's fatal ambiguity rests entirely on *Roe*'s undefined life-or-health exception. In *Colautti*, Justice Blackmun apparently recognized that the Court could not credibly condemn legislatures for following its example without giving them some guidance as to how to proceed. The obvious solution would have been to remove the underlying constitutional ambiguity by endorsing either the self-defense approach or the relative-safety approach as the correct understanding of *Roe*'s life-or-health excep-

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being of the patient," while adding that "[a]ll these factors may relate to health." Doe v. Bolton, 410 U.S. 179, 192 (1973).

192 Ironically, Justice Blackmun's suggestion that the word "necessary" in the context of the Pennsylvania statute means "indispensable to the woman's life or health—not merely desirable," *Colautti*, 439 U.S. at 400, applies with equal force to the word "necessary" in the context of *Roe*'s life-or-heath exception.

193 *Colautti*, 439 U.S. at 409 (White, J., dissenting).

194 *Id.* at 400 (majority opinion).

195 *Id.*

196 So far as I know, Justice Blackmun never publicly acknowledged the possibility that self-defense principles could supply a coherent interpretation of *Roe*'s life-or-health exception. As his description shows, however, Blackmun clearly perceived the essential practical difference between an approach that seeks to protect fetal life by requiring maternal-health "tradeoffs" to enhance the chances of fetal survival, and an approach under which maternal health is always "paramount."

tion.[197] The legislature could then have enacted new legislation in conformity with the Court's clarification.

Whether because he lacked the votes or for other reasons, Justice Blackmun did not issue a definitive holding on the meaning of *Roe*'s life-or-health exception in *Colautti*. Instead, he sent the following signals to state legislatures and the lower federal courts: (1) statutory language adopting the relative-safety approach would be substantively constitutional and immune from vagueness attack; and (2) statutory language adopting any form of self-defense approach would raise "[s]erious ethical and constitutional difficulties"—that is to say, might very well be substantively unconstitutional. In other words, the Court was inclined to construe *Roe*'s life-or-health exception in accord with the relative-safety approach, but found it unnecessary and/or imprudent so to hold.

B. Thornburgh v. American College of Obstetricians & Gynecologists

Seven years later, in the 5–4 decision in *Thornburgh*, Justice Blackmun issued the holding *Colautti* foreshadowed. In an attempt to comply with *Colautti*, the Pennsylvania legislature had revised its postviability restriction on abortion methods by enacting a broader exception that applied whenever compliance "'would present a significantly greater medical risk to the life or health of the pregnant woman.'"[198] The Third Circuit struck this provision down, falsely describing *Colautti* as having held that the earlier Pennsylvania statute impermissibly required the doctor "to 'make a trade-off between the woman's health and . . . fetal survival,'" and finding that "[t]he new

197 Alternatively, Justice Blackmun could simply have accepted what he claimed was Pennsylvania's interpretation of its own statute. According to Blackmun, Pennsylvania's position was that the fetal-care provision "simply requires that when a physician has a choice of procedures of equal risk to the woman, he must select the procedure least likely to be fatal to the fetus." *Colautti*, 439 U.S. at 390. Blackmun responded that "[t]he statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict." *Id.* at 400. Although Pennsylvania's brief was not a model of clarity on this issue, the state's actual position appears to have been that the statute required the doctor to "determine whether in any given case a procedure exists to safely abort a woman in a manner most conducive to the continuation of viable fetal life." Brief for Appellants at 21, *Colautti*, 439 U.S. 379 (No. 77-891).

198 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768 (1986) (quoting 18 PA. CONS. STAT. § 3210(b) (1982)), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

Pennsylvania statute, like the old, fails to require that maternal health be the paramount consideration."[199]

Writing for a 5–4 majority, Justice Blackmun asserted that *Colautti* had "recognized the undesirability of any 'trade-off between the woman's health and additional percentage points of fetal survival.'"[200] He avoided having to defend this no-trade-off rule by pointing out—quite accurately—that Pennsylvania did not "take any real issue with this proposition."[201] Instead, he characterized Pennsylvania as arguing that "the statute's words 'significantly greater medical risk' for the life or health of the woman do not mean some additional risk (in which case unconstitutionality apparently is conceded) but only a 'meaningfully increased' risk."[202] Blackmun agreed with the Third Circuit that this reading was incompatible with the statute's language, because "the adverb 'significantly' modifies the risk imposed on the woman" and "the adverb is 'patently not surplusage.'"[203] He held the statute facially invalid because it was "'not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus.'"[204]

Although this edict was issued in connection with a postviability restriction on abortion methods, its logic was equally applicable to postviability prohibitions on abortions. The categorical priority *Thornburgh* assigned to maternal health dictates that if continuing a pregnancy would "'require the mother to bear an increased medical risk in order to save her viable fetus,'"[205] she must be allowed to have an abortion—even if that risk is minuscule compared to the risks to the fetus. At last, the life-or-health exception had been given definite content: it is triggered whenever a pregnancy poses "an increased medical risk" *of any degree or kind* as compared to an abortion.[206] With *Thornburgh*, the relative-safety exception effectively became the law of the land (albeit by implication rather than by a direct holding). The Court offered no rationale for its decision, but its message was clear

199 Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283, 300 (3d Cir. 1984) (quoting *Colautti*, 439 U.S. at 400).

200 *Thornburgh*, 476 U.S. at 769 (quoting *Colautti*, 439 U.S. at 400).

201 *Id.*

202 *Id.* Blackmun's summary of Pennsylvania's position here was misleading. The State's contention was that, to avoid "constitutional problems," "the term 'significantly' should be construed to mean, in the context of this statute, a 'meaningful' increased risk . . . [rather than] a 'substantial' increased risk." Brief for Appellants at 85, *Thornburgh*, 476 U.S. 747 (No. 84-495).

203 *Thornburgh*, 476 U.S. at 769 (quoting *Thornburgh*, 737 F.2d at 300).

204 *Id.* (quoting *Thornburgh*, 737 F.2d at 300).

205 *Id.* (quoting *Thornburgh*, 737 F.2d at 300).

206 *Id.*

and uncompromising—so much so that Chief Justice Burger, who had joined *Roe* on the understanding that it did not authorize abortion on demand throughout pregnancy, finally urged that the Court "should reexamine" that decision.[207]

C. *Justice White's* Thornburgh *Dissent*

Justice White's dissent in *Thornburgh* has the distinction of being the first and only opinion by a Supreme Court Justice to present a reasoned argument about the proper meaning of the constitutional life-and-health exception. It has influenced the Court's postviability abortion jurisprudence ever since, though not in the manner White would have preferred.

White began with a narrow argument that echoed Pennsylvania's defense of its statutory provision. He challenged the Court's holding that the statute's use of the term "significantly" necessarily meant that the mother was required to "bear an increased medical risk."[208] To the contrary, he argued that in context the word "significant" was "most naturally read as synonymous with the terms 'meaningful,' 'cognizable,' 'appreciable,' or 'nonnegligible.' That is, the statute requires only that the risk be a real and identifiable one."[209] Maternal health risks falling below that minimal threshold, White wrote, could not possibly trump what *Roe* had acknowledged to be the state's compelling interest in viable fetal life.[210]

White then turned to a more ambitious claim: that the statute was constitutional even if it required the pregnant woman "to endure a method of abortion chosen to protect the health of the fetus despite the existence of an alternative that *in some substantial degree* is more protective of her own health."[211] In support of this contention, White offered two arguments—one based on *Roe*'s life-or-health exception, and the other based on the state's concededly compelling interest in viable fetal life. The crux of the life-or-health exception argument was that *Thornburgh*'s per se ban on "tradeoffs" of maternal health against fetal life "directly contradicts one of the essential holdings of *Roe*—that is, that the State may forbid *all* postviability abortions except when *necessary* to protect the life or health of the pregnant woman."[212] In White's view, it was "evident" that this holding "involves a tradeoff

207 *Id.* at 785 (Burger, C.J., dissenting).
208 *Id.* at 807 (White, J., dissenting).
209 *Id.*
210 *Id.*
211 *Id.* at 808 (emphasis added).
212 *Id.* at 809.

between maternal health and protection of the fetus, for it plainly permits the State to forbid a postviability abortion even when such an abortion may be statistically safer than carrying the pregnancy to term, provided that the abortion is not medically necessary."[213]

White's state interest argument was based on "the usual understanding of the term 'compelling interest,' which we have used to describe those governmental interests that are so weighty as to justify substantial and ordinarily impermissible impositions on the individual."[214] Pointing to the examples of the military draft and compulsory vaccination, White argued that "a compelling state interest may justify the imposition of some physical danger upon an individual."[215] Consequently, he concluded, *Thornburgh*'s prohibition on trading off the woman's health against fetal survival was starkly inconsistent with *Roe*'s holding that the state has a compelling interest in fetal life.[216]

Let's now step back and evaluate Justice White's arguments. Unless the term "compelling" is to be drained of all meaning, White's narrow argument that a state may at least impose *insignificant* health risks on women to protect viable fetuses must be right. But that proposition falls far short of establishing a self-defense approach to the life-or-health exception. White's invocation of *Roe*'s life-or-health exception was also problematic. White wrote as if it were self-evident that *Roe*'s life-or-health exception does not adopt the relative-safety test. The ambiguity of the life-or-health exception, in historical context, belies this claim.

White was on more solid ground when he inferred from *Roe*'s concession that states have a "compelling" interest in viable fetal life that states can require women to bear "some degree of risk of physical harm."[217] Here, too, however, *Roe* proved an elusive target,[218]

213 *Id.* at 809–10. Justice White did not explain what criteria he thought doctors used to determine whether an abortion is "medically necessary."

214 *Id.* at 808.

215 *Id.* at 809.

216 *Id.*

217 *Id.* at 808–09.

218 The passage in which Justice Blackmun refers to the state's interest in viable fetal life as "compelling" does not cite any compelling state interest cases. Earlier in *Roe*, however, Blackmun cited three precedents for the proposition that "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" Roe v. Wade, 410 U.S. 113, 155 (1973) (citing Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963)). *Kramer* did not decide whether the state interest asserted in that case (limiting the franchise to persons primarily interested in a school board election) was compelling, *see* 395 U.S. at 632 n.14; *Shapiro*, which involved a rule mandat-

because in the same breath *Roe* also implied that *at some undefined level of risk* the woman's interest in her life and health trumped the state's interest in fetal life.[219] White was surely right that the examples of the military draft and compulsory vaccination suggest that compulsory state interests may require individuals to accept "substantial" risks of serious harm.[220] But some interests may be more "compelling" than others, and White offered no reason why a state's interest in viable fetal life, in particular, should justify "the infliction of some degree of risk of physical harm." Justice White's reasoning suffered from his failure to invoke self-defense principles and (relatedly) to explain at what point the imposition of a "risk of physical harm" on pregnant women would, in his view, satisfy the life-or-health exception. Nevertheless, Justice White's arguments were sufficiently cogent that Justice Blackmun offered no response to *any* of them.

D. Justice O'Connor's Thornburgh *Dissent*

Justice O'Connor[221] did not join White's opinion, which included a full-throated argument that Roe should be overruled.[222] Her separate dissent raised procedural objections to the Court's sweeping rulings on the merits,[223] and reiterated her adherence to the "undue burden" approach she first proposed in her dissent in *City of Akron v.*

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ing that new residents wait one year before receiving welfare benefits, ruled that the administrative purposes the state invoked were not advanced by the waiting period, *see* 394 U.S. at 638; and *Sherbert* held that the state failed to establish any compelling state interest in denying unemployment benefits to a worker who was discharged for refusing to work on her religion's Sabbath day, *see* 374 U.S. at 406–07. None of these decisions supplies *any* guidance as to the kinds of individual interests that can outweigh a compelling state interest.

219 Imagine that the *Roe* Court had added this gloss on the life-or-health exception: "The state's interest becomes compelling at viability, and therefore states may ban abortions that are not necessary to avoid meaningful risks to the mother's physical or mental health." *Roe*'s critics could have argued that the Court was debasing the word "compelling," creating an exception that would prove limitless in practice, and thus effectively mandating abortion on demand throughout pregnancy. But they could not have accused the Court of violating any *principle* contained in *Roe*. The *Roe* Court would simply have been more forthcoming about the nature of the balance it had decided to strike—namely, the one embodied in the relative-safety test.

220 *Thornburgh*, 476 U.S. at 808 (White, J., dissenting).

221 I clerked for Justice O'Connor during the 1985–86 Term, when *Thornburgh* was argued and decided.

222 *See Thornburgh*, 476 U.S. at 786–97 (White, J., dissenting).

223 *Id.* at 814 (O'Connor, J., dissenting). The Supreme Court followed the Third Circuit's lead in ruling on the merits of the constitutional issues, notwithstanding that the district court had merely denied the plaintiffs' request for a preliminary injunction (and hence there had been no trial on the merits). *See id.* at 815.

Akron Center for Reproductive Health, Inc.[224] O'Connor did, however, agree with White that the Pennsylvania statute could reasonably be read to require "only that the risk be a real and identifiable one."[225] Because it was unlikely that "risks falling below that threshold" would constitute an undue burden,[226] O'Connor found it unnecessary to decide "the point at which a 'trade-off' between the health of the woman and the survival of the fetus would rise to the level of an undue burden."[227]

When *Thornburgh* was decided in 1986, Justice O'Connor was not the swing vote in abortion cases. That role still belonged to Justice Powell, who provided the fifth vote in *Thornburgh* despite having written, in *Planned Parenthood v. Ashcroft*,[228] of "those rare situations where there are compelling medical reasons for performing an abortion after viability."[229] But O'Connor's vote would become pivotal soon enough. In hindsight, her characteristically cautious *Thornburgh* dissent suggests that she may have seen in White's fallback argument (and in the language of the post-*Colautti* Pennsylvania statute) the basis for an interpretation of the life-or-health exception that would allow states seeking to protect viable fetal life to require women to bear *some* health risks—so long as they were not *significant* risks. The sixty-four-thousand-dollar question for that interpretation, of course, is what "significant" means. White's dissent was convincing testimony that it *could* denote anything from "substantial" at one extreme to "nonnegligible" at the other.[230] As we shall see, what it *does* denote

224 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting). O'Connor's undue burden approach, as described and applied in her *Akron* dissent, would have permitted significantly more state regulation of abortion than the undue burden test that she (along with Justices Kennedy and Souter) adopted in *Casey*. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 988–90 (1992) (Scalia, J., dissenting) (describing the inconsistencies between the two versions of undue burden analysis).

225 *Thornburgh*, 476 U.S. at 832 (O'Connor, J., dissenting).

226 *Id.*

227 *Id.*

228 462 U.S. 476 (1983).

229 *Id.* at 484 n.7 (plurality opinion of Powell, J.).

230 Justice O'Connor's *Akron* dissent provides an earlier example of the use of "significant" to refer to substantial—indeed quite serious—risks. The ordinance at issue in *Akron* contained a medical-emergency exception for cases in which "'continuation of the pregnancy poses an immediate threat and grave risk to the life or physical health of the pregnant woman.'" *Akron*, 462 U.S. at 449 n.42 (quoting AKRON, OHIO, CODIFIED ORDINANCES § 1870.12 (1978)). As part of her argument that the ordinance's twenty-four-hour waiting period did not impose an undue burden, O'Connor construed this exception to mean that "should the physician determine that the waiting period would increase risks significantly, he or she need not require the woman to wait." *Id.* at 473 (O'Connor, J., dissenting).

remains one of the riddles that bedevils the Court's abortion jurisprudence.

III. *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY* AND THE "SIGNIFICANT HEALTH RISKS" TEST

To date, *Thornburgh* has proved to be the high-water mark for the relative-safety interpretation of the life-or-health exception. As the Court's composition changed, the number of Justices who were known to be unqualified supporters of *Roe* shrank below the magic number five. By the time *Webster v. Reproductive Health Services*[231] came before the Court in 1989, many observers expected *Roe* to be overruled. But Justice O'Connor balked, refusing to address *Roe*'s validity on the grounds that the Missouri statutory provisions at issue in *Webster* were consistent with *Roe* and subsequent cases.[232] The upshot was that there appeared to be four votes substantially to curtail *Roe*,[233] four votes to keep *Roe* unchanged[234]—and Justice O'Connor, whose concurring opinion in *Webster* reiterated her view that the correct standard for a previability abortion restriction was whether it "'unduly burdens the right to seek an abortion.'"[235] Essentially the same pattern recurred the following year in *Hodgson v. Minnesota*.[236]

It was against this backdrop that Planned Parenthood asked the Court to review the Third Circuit's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[237] rejecting constitutional challenges

231 492 U.S. 490 (1989).

232 *Id.* at 525–26 (O'Connor, J., concurring in part and concurring in the judgment).

233 Only Justice Scalia voted to overrule *Roe* in *Webster*. *Id.* at 532 (Scalia, J., concurring in part and concurring in the judgment). Chief Justice Rehnquist, joined by Justices White and Kennedy, voted to narrow *Roe* by employing a form of reasonableness review instead of strict scrutiny, while reserving judgment as to whether it should be overruled. *Id.* at 520 (plurality opinion).

234 Justices Brennan and Marshall joined Justice Blackmun's partial dissent in *Webster*, which vigorously defended *Roe*. *Id.* at 537 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens wrote a separate partial dissent, which included a passage reiterating his view that *Roe* followed ineluctably from *Griswold*. *See id.* at 564–65 (Stevens, J., concurring in part and dissenting in part).

235 *Id.* at 530 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting)).

236 497 U.S. 417 (1990). In *Hodgson*, Justice O'Connor cast the decisive fifth vote to strike down a parental-notification statute without a judicial bypass provision, but she did so only after finding an undue burden. *Id.* at 458 (O'Connor, J., concurring).

237 947 F.2d 682 (3d Cir. 1991).

to the Pennsylvania Abortion Control Act of 1982.[238] Among the law's provisions were an informed-consent requirement, a twenty-four-hour waiting period, and spousal and parental notification requirements.[239] Each of these mandates applied both before and after viability; and each was subject to a "medical emergency" exception for cases in which, in the physician's "'good faith clinical judgment,'" an immediate abortion was necessary to "'avert [the woman's] death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.'"[240]

Our immediate concern, of course, is with the medical emergency exception. If *Thornburgh*'s relative-safety interpretation of the life-or-health exception was still good law, the medical emergency exception's requirement of a "serious risk of substantial and irreversible [health] impairment" was blatantly unconstitutional. The district court struck down the exception for precisely that reason: "'[T]he narrow definition of medical emergency . . . creates an unconstitutional trade off between the woman's health and the life or health of the fetus . . . .'"[241]

A. The Third Circuit's Opinion

On appeal, the Third Circuit ignored *Thornburgh*, focusing instead on Justice O'Connor's "undue burden" approach. As Judge Stapleton's opinion (joined by then-Judge Alito and Judge Seitz) explained, in light of *Webster*, "Justice O'Connor's undue burden standard is the law of the land, and we will apply that standard to all provisions of the Pennsylvania Act at issue in this appeal."[242] Oddly, however, the Third Circuit's discussion of the medical emergency provision made no mention of Justice O'Connor's brief undue burden

238 18 PA. CONS. STAT. §§ 3203–3220 (1990) (as amended in 1988 and 1989); *see Casey*, 947 F.2d at 719 (rejecting all challenges to the statute except for the spousal notice requirement).

239 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

240 *Id.* at 879 (quoting 18 PA. CONS. STAT. § 3203).

241 Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1377 (E.D. Pa. 1990) (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 686 F. Supp. 1089, 1137 (E.D. Pa. 1988)).

242 *Casey*, 947 F.2d at 698. The Third Circuit arguably overstepped its bounds, particularly with regard to *Thornburgh*. Even though Justice O'Connor's votes in *Webster* and *Hodgson*, and the undue burden rationale on which she based them, were controlling as to the issues raised in those cases, neither *Webster* nor *Hodgson* involved the application of *Roe*'s life-or-health exception. Under those circumstances, the Third Circuit should perhaps have applied *Thornburgh* and left it to the Supreme Court to decide whether or not to overrule *Thornburgh*'s prohibition on maternal-health "tradeoffs."

analysis of the "significantly greater risk" issue in her *Thornburgh* dissent.[243] Instead, the Third Circuit relied on what it took to be the "definition" of the undue burden standard used by O'Connor in *Webster* and *Hodgson*: an "absolute obstacle or severe limitation" on the woman's decision to have an abortion.[244]

Turning to the medical emergency exception, the Third Circuit began by (correctly) deriving from *Roe*'s life-or-health exception the broader rule that "any abortion regulation which might delay or prevent an abortion must contain a medical emergency exception."[245] It noted Pennsylvania's concession that its statutory exception would be unconstitutional unless it included "situations in which compliance would pose a serious risk to the life or health of the woman."[246] But the medical emergency exception by its terms *did* apply whenever "'a delay [would] create serious risk of substantial and irreversible impairment of major bodily function.'"[247] The question, therefore, was whether the set of risks that qualified as "serious" under the statute was sufficiently inclusive to comply with the constitutional life-or-health exception.

That question would seem to call for an inquiry into both the meaning of the statute and the scope of *Roe*'s life-or-health exception. Rather than directly tackling the latter issue, the Third Circuit folded an implicit interpretation of the life-or-health exception into its explicit interpretation of Pennsylvania's medical emergency exception:

> [W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman. We believe it should be interpreted with that objective in mind. While the wording seems to us carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for noncompliance, we decline to construe "serious" as intended to deny a woman the uniformly recommended treatment for a condition that can lead to death or permanent injury.[248]

Let's now compare this passage with the emergency exception's requirement that "'a delay will create serious risk of substantial and

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243 *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 814–33 (1986), *overruled in part by Casey*, 505 U.S. 833.

244 *Casey*, 947 F.2d at 698 n.14.

245 *Id.* at 699.

246 *Id.*

247 *Id.* (quoting 18 PA. CONS. STAT. ANN. § 3203 (1983 & Supp. 1991)).

248 *Id.* at 701.

irreversible impairment of a major bodily function.'"[249] In effect, the Third Circuit construed this language to mean a *significant* (but meaning what?) risk of a *serious* (i.e., substantial and irreversible) impairment of a major bodily function. This reading of the statute arguably lowers the legislature's intended threshold for the likelihood of harm, while preserving the intended threshold for the severity of harm.

The Third Circuit's implicit definition of the life-or-health exception, then, seems to be that a postviability abortion is justified when pregnancy poses "a significant threat"—meaning a significant risk of serious harm—to the woman's life or health. This understanding of the exception seems to straddle the self-defense and relative-safety interpretations. Consistent with self-defense principles, it requires that the threatened risk involve death or serious impairment of health. But by introducing the vague and undefined word "significant," it leaves the door open to the relative-safety approach. If *any* non-negligible risk of serious health injury suffices to justify a postviability abortion, we have left the limits of self-defense behind. Conversely, if "significant" refers to a *substantial* risk of serious injury, we are back to Justice White's preferred position in *Thornburgh*, which can readily be reconciled with self-defense principles.

In any event, having so construed the medical emergency provision, the Third Circuit rejected Planned Parenthood's claim that the provision failed to cover three risky conditions—preeclampsia, inevitable abortion, and prematurely ruptured membrane.[250] The parties agreed that each of these conditions could lead to the "substantial and irreversible impairment of a major bodily function."[251] But whereas Pennsylvania argued that this sufficed to constitute a "serious risk" within the meaning of the statute, Planned Parenthood argued that "no such 'serious risk' exists until the woman has actually experienced shock or contracted an infection."[252] The Third Circuit concluded that Planned Parenthood's interpretation was too restrictive, because the fact that the risk of serious health impairment is "quantitatively less at the onset [of these conditions] than after shock has occurred . . . does not mean the risk at onset is not 'serious.'"[253]

The Third Circuit's decision can fairly be read as a prediction about how the Supreme Court (and Justice O'Connor in particular) would define the life-or-health exception and apply it to Penn-

249 *Id.* at 699 (quoting PA. CONS. STAT. ANN. § 3203).

250 *Id.* at 699–700.

251 *Id.* at 700.

252 *Id.* at 701.

253 *Id.*

sylvania's medical emergency provision. Judged by that standard, the Third Circuit was right on target.[254] What the Third Circuit may not have anticipated, however, was the extent to which the Justices, instead of *analyzing* the issues the court of appeals had identified and provisionally resolved, would simply cut and paste excerpts from the lower court's opinion—and in the process restore much of its original ambiguity to *Roe*'s life-or-health exception.

B. The Joint Opinion of Justices O'Connor, Kennedy, and Souter

In the Supreme Court, *Casey* proved to be the watershed case in which the Court finally reconsidered *Roe*. In an elaborately argued joint opinion, Justices O'Connor, Kennedy, and Souter provided the decisive votes to retain the tripartite "essential holding" of *Roe*,[255] but also to modify *Roe* in several important respects.[256] Parts I, II, and III of the joint opinion were joined by Justices Blackmun and Stevens and so constituted the opinion of the Court;[257] they presented an "explication of individual liberty" (including the liberty to have an abortion) and explained why "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by [that] explication . . . combined with the force of *stare decisis*."[258]

Justices Blackmun and Stevens did not join Part IV of the joint opinion, in which Justices O'Connor, Kennedy, and Souter rejected *Roe*'s trimester framework and adopted the undue burden standard.[259] Nevertheless, although Part IV was only a plurality opinion, its standards were controlling, because it represented the "'position

254 The Third Circuit may also have intended to invite the Supreme Court to explore another approach to the life-or-health exception: what we might call the wanted-pregnancy test. The Third Circuit floated this idea by pointing out that, for "all three conditions pointed to by the clinics . . . an immediate abortion. . . . was the recommended treatment in all pregnancies in which these conditions arose, including planned and desired pregnancies." *Id.* This suggests that the life-or-health exception should apply when the maternal health risks are sufficiently serious that there is a medical consensus that they would warrant an immediate abortion even in a "planned" or "desired" pregnancy. None of the Justices in *Casey* discussed this intriguing idea.

255 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

256 *See id.* at 869–79 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

257 *Id.* at 844–69 (majority opinion). I will cite the parts of the joint opinion to which Blackmun and Stevens subscribed as the "majority opinion," and the other parts as the joint opinion of Justices O'Connor, Kennedy, and Souter. In text, however, I will refer to the "joint opinion" unless it is important to deviate from that usage.

258 *Id.* at 853.

259 *Id.* at 869–79 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

taken by those Members who concurred in the judgments on the narrowest grounds.'"[260] Part IV acknowledged that "from the outset the State can[ ] show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted."[261] Invoking stare decisis, but also reasoning that viability was the fairest and most "workable" line available, the joint opinion reaffirmed *Roe*'s decision to make viability the cutoff point past which states may prohibit elective abortions.[262]

The joint opinion then proceeded to make two important changes in abortion jurisprudence. Whereas *Roe* had banned previability legislation aimed at protecting fetal life, Justices O'Connor, Kennedy, and Souter ruled that what *Roe* termed the State's "important and legitimate interest in protecting the potentiality of human life"[263] was strong enough to justify some types of state intervention *throughout* pregnancy.[264] Whereas *Roe* and later cases had applied strict scrutiny to state regulation of previability abortions, the joint opinion adopted the undue burden test, under which a state regulation is unconstitutional if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[265]

After a detailed explanation of the undue burden test, the plurality took up *Roe*'s holding that postviability abortions may be prohibited subject to the life-or-health exception.[266] Abruptly, explanation

260 *Id.* at 944 (Rehnquist, C.J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682 (3d Cir. 1991). Justice Blackmun favored continuing *Roe*'s strict scrutiny approach, *Casey*, 505 U.S. at 926; Justice Stevens appeared to favor a more demanding version of the undue burden standard, *see id.* at 920 (opinion of Stevens, J.); and the three authors of the joint opinion favored the undue burden standard. *Id.* at 871–79 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). The remaining four Justices (Chief Justice Rehnquist and Justices White, Scalia, and Thomas) favored rational basis review. *Id.* at 966 (Rehnquist, C.J., dissenting).

261 *Id.* at 869 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

262 *Id.* at 870. Although the plurality presented its reaffirmation of the viability line as a holding, there is a forceful argument for characterizing it as dictum. *See* Randy Beck, *The Essential Holding of* Casey*: Rethinking Viability*, 75 UMKC L. REV. 713, 715–19 (2007).

263 Roe v. Wade, 410 U.S. 113, 162 (1973).

264 *Casey*, 505 U.S. at 876 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

265 *Id.* at 877.

266 The joint opinion elsewhere refers to "exceptions for pregnancies which endanger the woman's life or health," *id.* at 846 (majority opinion), to "those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest," *id.* at 851, and to "the third trimester, when the fetus is viable, [and] prohibitions are permitted provided the life or health of the mother is

ceased, and Justices O'Connor, Kennedy, and Souter simply cast their votes in favor of Roe's *ipse dixit*:

> We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[267]

So ends Part IV of the plurality opinion, with its joint authors neither explaining why they believed that holding to be correct, nor what they understood it to mean.

Nevertheless, Planned Parenthood's challenge to Pennsylvania's medical emergency provision made it impossible for Justices O'Connor, Kennedy, and Souter to duck the life-or-health exception issues altogether. In Part V.A of the joint opinion, they held that, "as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right."[268] Justice Stevens joined Part V.A—and so did, astonishingly, Justice Blackmun,[269]thus making it the opinion of the Court.

C. *The* Casey *Court's Treatment of the Medical Emergency Provision*

Let's turn, then, to the *Casey* Court's discussion of Planned Parenthood's challenge to Pennsylvania's medical emergency provision. One might have expected that, in evaluating the medical emergency provision, the Court would begin with *Thornburgh*'s no-trade-offs test for postviability abortions. If that test was still good law, the medical emergency exception, requiring as it did a "'serious risk of substantial and irreversible impairment of a major bodily func-

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not at stake." *Id.* at 872 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). While these formulations manage to convey the impression that the life-or-health exception is a narrow one, they are also careful to make no definite representations about its content or rationale.

267 *Id.* at 879 (quoting *Roe*, 410 U.S. at 164–65).

268 *Id.* at 880 (majority opinion).

269 Justice Blackmun also joined Part V.C, but that part of the joint opinion invalidated the husband-notification provision. *See id.* at 922 (Blackmun, J., concurring in part and dissenting in part). Blackmun dissented from Parts V.B (upholding the informed-consent provision), V.D (upholding the one-parent consent requirement), and V.E (upholding the recordkeeping and reporting provisions). *See id.* Thus, the medical-emergency provision was the *only* challenged provision of the Pennsylvania statute that Blackmun voted to uphold. Justice Stevens, by contrast, also voted to uphold the one-parent consent requirement and the recordkeeping and reporting provisions. *See id.* at 922 & n.8 (Stevens, J., concurring in part and dissenting in part).

tion,'"[270] was plainly unconstitutional. As Planned Parenthood's Supreme Court brief correctly pointed out, it was impossible to construe this statutory language "to ensure that a woman's health remains the . . . paramount consideration," as *Thornburgh* required.[271]

Nevertheless, the majority opinion managed to uphold the medical emergency exception while completely ignoring *Thornburgh*'s no-trade-offs test.[272] It focused exclusively on Planned Parenthood's alternative argument that the medical emergency provision unconstitutionally "forecloses the possibility of an immediate abortion despite some significant health risks."[273] The Court agreed that "[i]f the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[274]

This sentence artfully accomplishes two things. First, it confirms that the life-or-health exception applies to state abortion regulations *before* viability as well as after. Prior to *Casey*, that proposition was true but inconsequential, because previability state regulation of abortions to protect fetal life was per se unconstitutional. After *Casey*, it became very important indeed. Absent special circumstances, *Casey* permits previability state regulation of abortions only if (1) the regulation does not impose an undue burden, and (2) *it contains an adequate life-or-health exception.*[275] As the First Circuit has explained, "Complementing the general undue burden standard, the Supreme Court has also identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of a pregnant woman's health."[276]

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270 *Id.* at 879 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting 18 PA. CONS. STAT. § 3203 (1990)).

271 Brief for Petitioners and Cross-Respondents at 61, *Casey*, 505 U.S. 833 (No. 91-744).

272 The very next section of the joint opinion, by contrast, explicitly overruled the limitations imposed by *Thornburgh* on previability informed consent requirements. *See Casey*, 505 U.S. at 883.

273 *Id.* at 880 (majority opinion).

274 *Id.*

275 *See* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 327–28 (2006). Under *Gonzales v. Carhart*, 550 U.S. 124 (2007), there is an exception to this rule for statutes that the legislature reasonably concludes will rarely, if ever, impose a significant health risk. *See Gonzales*, 550 U.S. at 166–67.

276 Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 58 (1st Cir. 2004), *vacated sub nom* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006).

Second, the sentence speaks to the *content* of the life-or-health exception: state abortion laws—including prohibitions on postviability abortions—are unconstitutional if they impose "significant health risks" on a woman, that is, if compliance with them "would constitute a threat to her health."[277] These formulations run directly counter to *Thornburgh*'s assertions that the Constitution categorically forbids any and all "tradeoffs" of fetal life against maternal health, and consequently that a state "'[may] not require the mother to bear an increased medical risk in order to save her viable fetus.'"[278] Under *Casey*, states may require such tradeoffs so long as they do not involve "significant health risks" that pose a threat to the mother's health.

On the other hand, the phrase "significant health risks" is itself ambiguous.[279] Does "significant" mean "*substantial*" (i.e., weighty, profound, grave, important),[280] as Justice White's *Thornburgh* dissent suggested would be justifiable in light of the state's compelling interest in viable fetal life? Or does it mean merely that the risks must be "appreciable," "meaningful," "nonnegligible," "real and identifiable," as White had argued in the alternative?[281] In *Thornburgh*, Justice O'Connor had agreed with White that states could at least impose risks that fell below the latter—and lower—threshold, while declining

277 *Casey*, 505 U.S. at 880.

278 *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 769 (1986) (quoting Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283, 300 (1984)), *overruled in part by Casey*, 505 U.S. 833. In explaining his decision to join Part V.A of the joint opinion, upholding the medical emergency provision, Justice Blackmun passed over in silence the glaring inconsistency with his opinion in *Thornburgh*. *See Casey*, 505 U.S. at 925 n.2 (Blackmun, J., concurring in part, and dissenting in part). The only justification he offered for his vote on this issue was that "[a]s the Court notes, its interpretation is consistent with the essential holding of *Roe* that 'forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health.'" *Id.* (quoting majority opinion).

279 So is the phrase "threat to her health," which could refer to anything from an imminent danger to a distant risk.

280 *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1817 (2d ed. 1979) (listing, inter alia, the four quotations as synonyms of "substantial"); *cf. id.* at 1688 (listing "important; momentous" as the second definition of "significant").

281 The United States was of little help to the Court on this point. The Solicitor General's brief conflated the two standards, arguing in the same breath that due process "does not require the State to avoid placing insignificant health risks on individuals for the public benefit," and that the state's compelling interest in fetal life "'justif[ies] substantial and ordinarily impermissible impositions on the individual,' including 'the infliction of some degree of risk of physical harm.'" Brief for the United States as Amicus Curiae Supporting Respondents at 27, *Casey*, 505 U.S. 833 (No. 91-744) (alteration in original) (quoting *Thornburgh*, 476 U.S. at 808–09 (White, J., dissenting)).

to take a position on the constitutionality of the higher one.[282] Did she and her *Casey* coauthors keep their options open on this score, or does the remainder of the joint opinion's disposition of the medical emergency issue remove that ambiguity?

As I will explain below, the Court's opinion leaves that ultimate issue unresolved, while providing some guidance on other important questions. To enable readers to make their own assessments, I set out the passage in full:

> The District Court found that there were three serious conditions which would not be covered by the statute: preeclampsia, inevitable abortion, and premature ruptured membrane. Yet, as the Court of Appeals observed, it is undisputed that under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences. While the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the phrase "serious risk" to include those circumstances. It stated: "[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." . . . "Normally, . . . we defer to the construction of a state statute given it by the lower federal courts." Indeed, we have said that we will defer to lower court interpretations of state law unless they amount to "plain" error. This "'reflect[s] our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.'" We adhere to that course today, and conclude that, as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right.[283]

Although it is a poor substitute for an explicit discussion of the life-or-health exception (or even of the phrase "significant health risks"),[284] this passage establishes several important points. First, the

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282 *Thornburgh*, 476 U.S. at 827–28 (O'Connor, J., dissenting).

283 *Casey*, 505 U.S. at 880 (alterations in original) (citations omitted) (quoting Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 701 (3d Cir. 1991); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499–500 (1985); Palmer v. Hoffman, 318 U.S. 109, 118 (1943); Frisby v. Schultz, 487 U.S. 474, 482 (1988)).

284 Interestingly, the Court's first use of the phrase "significant health risk" came not in an abortion case, but in a famous risk-regulation case. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), Justice Stevens's plurality opinion construed section 3(8) of the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 3(8), 84 Stat. 1590, 1591 (codified at 29 U.S.C. § 652 (2006)), to require the Secretary of Labor, in issuing a health and safety standard for a toxic substance, "to find, as a threshold matter, that the toxic substance in question poses a significant health risk in the workplace and that a new, lower stan-

expected harm necessary to trigger the life-or-health exception must involve a risk of *serious* injury to health. The conditions the Court indicated would justify an abortion involved health risks that were conceded to be "serious" in the sense that they could lead to substantial, irreversible health impairment if left untreated. For example, "failure to obtain an abortion when a woman is diagnosed with preeclampsia can lead to irreversible damage to the liver, kidneys and more."[285] The Third Circuit's construction of the medical emergency provision, which the *Casey* majority accepted,[286] did not dilute the statutory requirement that the threatened risk involve "substantial and irreversible impairment of a major bodily function."[287]

Second, *Casey* indicates that the risk of serious health impairment need not be *imminent* to satisfy the life-or-health exception. Even though the specified conditions do not inevitably lead to shock, infection, or other problems that make irreversible damage imminent,[288] the Court agreed with the court of appeals that a woman suffering from any of them is entitled to an "immediate abortion."[289] We can safely conclude that a state may not require that the risk of serious injury to bodily health be imminent.

Third, although the risk need not be imminent, it must be more than a remote possibility. Consider, for example, a pregnant woman who is at high risk of developing the most common of the three threatening conditions Planned Parenthood cited—preeclampsia.

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dard is therefore 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'" *Indus. Union*, 448 U.S. at 614–15 (quoting § 3(8)). Subsequently, in *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court dealt at some length with what constitutes a significant health risk in the context of the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2006). *Bragdon*, 524 U.S. at 649–55.

285 *Casey*, 947 F.2d at 700.

286 The *Casey* plurality can also be seen as informally signaling that lower courts should follow the Third Circuit's lead, construing state restrictions on abortion somewhat narrowly if feasible, and upholding them as so narrowed. One advantage of that approach is that the Supreme Court would often be freed from the burden of deciding abortion cases. The Court could simply defer to the lower courts' construction of state law—provided that the lower courts faithfully applied the Court's basic doctrine.

287 *Casey*, 947 F.2d at 700.

288 For example, even when preeclampsia is left untreated, it frequently does not develop into eclampsia. Babyloss.com, Pre-eclampsia, http://www.babyloss.com/pdfs/babyloss_preeclampsia.pdf, at 2 (last visited Oct. 30, 2009). And even when it does, although eclampsia is indisputably a dangerous condition, the mortality rate associated with it in advanced societies is reportedly around two percent. *See* K.A. Douglas & C.W.G. Redman, *Eclampsia in the United Kingdom*, 309 BRIT. MED. J. 1395, 1397 (1994).

289 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 880 (1992).

Should preeclampsia actually occur, *Casey* requires that she be allowed to have an immediate abortion, even after viability; the state may not require the woman to wait to see whether her preeclampsia leads to full-blown eclampsia.[290] But *Casey* does not suggest—indeed, Planned Parenthood did not contend—that a woman is entitled to an immediate abortion to avoid the risk that she may develop preeclampsia. Why the difference? Because prior to the onset of preeclampsia there is no *present danger* of the harmful complications that can ensue once it occurs. The woman's condition can be monitored, and an abortion may ultimately be necessary. But the state's interest in fetal life outweighs the as-yet remote risk of serious health impairment.

What, if anything, can we deduce from these implicit rulings about *how likely* a risk of serious health impairment must be in order to qualify as a "significant health risk"? Very little. As the Third Circuit pointed out, while the risk of serious health impairment "will be quantitatively less at the onset" of the conditions in question than after they lead to further complications (e.g., shock or infection), "this does not mean the risk at onset is not 'serious.'"[291] How likely were these "serious" risks believed to be? The Third Circuit did not say, nor did the joint opinion for the Court.

Similarly, *Casey*'s implicit requirement that the risk of health impairment not be remote does not tell us at what point an actual risk is too improbable to satisfy the life-or-health exception. Imagine, for example, a hypothetical condition that develops in the second trimester, results in sudden maternal death in 1 out of 10,000 cases, and is harmless in the other 9999. Does the presence of that condition entitle a woman to a postviability abortion, or not? Self-defense principles would say no, because the risk to the woman is too low to make continuing her pregnancy dangerous. The relative-safety approach would say yes, because a 1 in 10,000 risk of death is clearly "nonnegligible," and might well be material in the decisionmaking of reasonable doctors and patients.

If this analysis is right, *Casey* does not tell us whether a very small risk of death or severe health impairment qualifies as a "significant" health risk. In Justice White's terms, *Casey* left unresolved whether a "significant" health risk is better understood as a "substantial" risk of serious harm or as a "nonnegligible" risk of serious harm.[292] In so doing, the Court also left open the choice between the relative-safety

290 *Id.*

291 *Casey*, 947 F.2d at 701.

292 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 807 (1986) (White, J., dissenting), *overruled in part by Casey*, 505 U.S. 833.

and self-defense interpretations of the life-or-health exception. For, as I will now explain, those alternative interpretations correspond, at least roughly, to the alternative versions of the "significant health risks" test.

The relative-safety approach can readily be softened from *Thornburgh*'s absolutist version while retaining its essential character. The revised, post-*Casey* version concedes that the significant health risks test permits *some* tradeoffs of maternal health against fetal life. But, the argument goes, those tradeoffs are limited to the kinds of *insignificant* risks Justice White described in *Thornburgh*: risks that are "negligible." States are permitted to impose them precisely because risks of this magnitude would not be material in the decisionmaking of a reasonable woman and her physician. Put another way, a woman cannot justify an abortion by pointing to a health risk that she would disregard in other contexts.

As for the self-defense approach, it too is qualified somewhat. Self-defense principles normally require that the threat of death or serious bodily harm be imminent, and *Casey* rejects that requirement. But this deviation may make good sense, because the fetus is not a conscious aggressor that may abandon a threatened attack before it gets underway.[293] In any event, the core requirement of this approach—that there be a substantial risk of death or serious health impairment to justify a postviability abortion—conforms closely to self-defense principles.

What explains the reticence of the *Casey* majority when it comes to the life-or-health exception? If we assume that the authors of the joint opinion were concerned with gaining a majority for their disposition of the medical emergency provision, the answer seems obvious: at a minimum, Justice Blackmun or Justice Kennedy would probably have defected had the joint opinion unequivocally embraced either competing interpretation of the life-or-health exception. The consequences, however, would have been much more dramatic had Kennedy defected. He might either have joined with the four anti-*Roe* dissenters on this issue, or written a separate opinion that would have become the governing law on the scope of the life-or-health exception. Blackmun's defection, by contrast, would simply have meant that the plurality opinion's disposition of the medical emergency pro-

293 For example, if the fetus poses an inevitable but distant danger (e.g., an ectopic pregnancy in which the danger will become acute later in pregnancy), there is no reason to delay an abortion. *Casey*'s implicit rejection of the imminence requirement, however, seems to go beyond such situations, and to that extent is difficult to reconcile with self-defense principles.

vision lacked the extra cachet attendant on opinion-of-the-Court status.

Under these circumstances, it seems reasonable to infer that Kennedy had the stronger bargaining position, and consequently that *Casey*'s treatment of the life-or-health exception more closely reflected his position than Blackmun's. Conversely, from the standpoint of Justice Blackmun and any Justices who agreed with him, the less the joint opinion said about the life-or-health exception, the better.[294] *Casey*'s ambiguous "significant health risks" language—and ambiguous application thereof—kept the life-or-health exception issue alive for the future. As Part IV will discuss, the issue did not resurface again until after Blackmun's retirement. When it did, in *Stenberg v. Carhart*, Justice Kennedy openly parted ways with Justices O'Connor and Souter (his *Casey* coauthors) on the meaning of "significant health risks," and more generally on the meaning of *Casey* itself.[295]

D. Justice Stevens's Attempt to Lay a Foundation for the Relative-Safety Test

The plurality opinion's barebones reaffirmation of *Roe*'s life-or-health exception, together with the majority's ambiguous new "significant health risks" test, created an irresistible opportunity for Justice Stevens to give a subtle boost to the relative-safety interpretation. Stevens used his partial concurring opinion, inter alia, for this purpose. Part IV of the plurality opinion omitted any reference to *Roe*'s holding

294 One of Justice Blackmun's concerns was presumably that lower courts not interpret *Casey* as overruling *Thornburgh*'s relative-safety interpretation of the life-or-health exception. If so, his hopes bore fruit in *Jane L. v. Bangerter*, 61 F.3d 1493 (10th Cir. 1995), *rev'd on other grounds sub nom* Leavitt v. Jane L., 518 U.S. 137 (1996) (per curiam). In *Bangerter*, the Tenth Circuit struck down a Utah statute requiring that "a doctor perform a post-viability abortion in a manner that 'will give the unborn child the best chance of survival' unless that method would cause 'grave damage to the woman's medical health.'" *Id.* at 1502 (quoting UTAH CODE ANN. §§ 76-7-307 to -308 (1995)). The Tenth Circuit rejected the state's argument that "the relevant portions of *Thornburgh* were uprooted by *Casey*." *Id.* at 1503. Because "*Casey* explicitly reaffirms *Roe*'s approach to post-viability abortions," the Tenth Circuit reasoned that "*Roe* . . . continues to govern the relevant portion of *Thornburgh* dealing with choice of method restrictions on post-viability abortions." *Id.* at 1504. The Tenth Circuit accordingly held the Utah statute unconstitutional because it failed to comply with *Thornburgh*'s requirement "that the woman's health must be the physician's 'paramount consideration.'" *Id.* at 1504 (quoting *Thornburgh*, 476 U.S. at 768–69).

295 Stenberg v. Carhart, 530 U.S. 914, 964–72 (2000) (Kennedy, J., dissenting).

that fetuses are not persons within the meaning of the Fourteenth Amendment.[296] Stevens exploited this opening as follows.

First, he insinuated that the life-or-health exception itself might be questionable as an original matter, by stating that "[s]tare decisis also provides a sufficient basis for . . . agreement with the joint opinion's reaffirmation of *Roe*'s postviability analysis."[297] Second, he claimed that *Roe*'s holding that fetuses are not Fourteenth Amendment persons was "implicit in the Court's analysis."[298] Third, he asserted that the joint opinion's implicit acceptance of this holding was ipso facto "a reaffirmation of *Roe*'s explanation of *why* the State's obligation to protect the life or health of the mother must take precedence over any duty to the unborn."[299] Fourth, that explanation, according to Stevens, is to be found in the proposition that "as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.'"[300] Fifth, as a result, "the state interest in potential human life is not an interest *in loco parentis*," but "instead, an indirect interest sup-

296 *Casey*, 505 U.S. at 869–79 (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *cf.* Roe v. Wade, 410 U.S. 113, 158 (1973) (holding that the unborn are not persons within the meaning of the Fourteenth Amendment).

297 *Casey*, 505 U.S. at 912 (Stevens, J., concurring in part and dissenting in part) (emphasis omitted).

298 *Id.*

299 *Id.* at 912–13. Justice Stevens apparently believes that if viable fetuses are not Fourteenth Amendment persons, the state cannot have a compelling interest in protecting their lives. To see why he is wrong, imagine that the *Roe* Court had added this gloss to the life-or-health exception: "Although viable fetuses are not Fourteenth Amendment persons, the state has a compelling interest in protecting their lives, and may therefore restrict abortions, in accordance with the mother's fundamental right of self-preservation, to those necessary to avoid grave danger of death or serious impairment of her physical or mental health." Would proponents of the relative-safety test approach have been able to construct a convincing argument that the Court was contradicting itself by allowing states to treat viable fetuses as if they were Fourteenth Amendment persons? Not according to Justice Blackmun's famous "dilemma" footnote, which suggested that if fetuses *were* Fourteenth Amendment persons, states might be required to forbid all abortions—even those necessary to save the mother's life. *See Roe*, 410 U.S. at 158 n.54 ("[I]f the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception [for the life of the mother] appear to be out of line with the Amendment's command?"). The more limited authority the *Roe* Court actually gave the states—i.e., to ban postviability abortions subject to the life-and-health exception—stemmed, therefore, from the Court's judgment that the state interest in viable fetal life is "compelling" even though viable fetuses are *not* Fourteenth Amendment persons.

300 *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part).

ported by both humanitarian and pragmatic concerns."[301] Specifically, the state has "a legitimate interest" in minimizing the offense to those citizens who believe that abortion "reflects an unacceptable disrespect for potential human life," as well as "a broader interest in expanding the population" to benefit from "additional productive citizens."[302] And sixth—here I am drawing a connection at which Stevens only hinted—it seems highly doubtful, as an original matter, that these state interests should outweigh the woman's right to an elective abortion merely because the fetus has become viable and hence is "approaching personhood."[303]

If Stevens's reasoning were to command a majority of the Court, the life-or-health exception, assuming it survived at all, would almost certainly be interpreted in line with the relative-safety test. The state has a constitutional "obligation to protect the life or health of the mother," and no such obligation to protect the life or health of the fetus.[304] Where the two interests conflict, the mother's life or health obviously prevails.[305] Therefore, a state must permit abortion, even after viability, whenever continued pregnancy and childbirth would present greater risks to the mother's life or health.

But the joint opinion in *Casey* is plainly inconsistent with Stevens's reasoning. To begin with, the joint opinion neither says nor implies that because viable fetuses are not Fourteenth Amendment persons, states may not endow them with "what is sometimes described as a 'right to life.'"[306] On the contrary, the joint opinion argues that both *Roe* and subsequent cases failed to live up to *Roe*'s recognition of the state's "important and legitimate interest" in "protecting the potentiality of human life."[307] According to Justices O'Connor, Kennedy, and Souter, "there is a substantial state interest in potential life throughout pregnancy," and *Roe*'s trimester framework must be rejected because it "undervalues" that interest.[308] Moreover, this state interest increases as the fetus develops, until, after viability, "the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted."[309]

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301 *Id.* at 914.

302 *Id.* at 914–15.

303 *See id.* at 915.

304 *Id.* at 912.

305 *Id.* at 912–13.

306 *Id.* at 913.

307 Roe v. Wade, 410 U.S. 113, 162 (1973).

308 *Casey*, 505 U.S. at 875–76 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

309 *Id.* at 869.

The theory that justifies these restrictions is not, as Justice Stevens would have it, that the state has an overriding interest in avoiding offense to pro-life citizens or swelling society's ranks. Instead, it is that "*the independent existence of the second life* can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[310] This "State[ ] intervention on behalf of the developing child"[311] takes the form of prohibiting its abortion—thereby enforcing its 'right to life'—subject only to *Roe*'s life-or-health exception.

So does it follow that Justices O'Connor, Souter, and Kennedy committed themselves to the self-defense version of *Roe*'s life-or-health exception? Clearly not. Even if states may confer "what is sometimes described as a 'right to life'" on viable fetuses, that right is trumped by the life-or-health exception. The decisive issue, therefore, is the scope of that exception—and as we've already seen, *Casey*'s "significant health risks" formulation fails to choose between the relative-safety and self-defense approaches.

E. The Plurality's Failure to Endorse Roe *'s Compelling-State-Interest Holding*

The joint opinion in *Casey* omitted any reference to *Roe*'s holding that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability."[312] Instead, the joint opinion described the state's interest as having "sufficient force so that the right of the woman to terminate the pregnancy can be restricted."[313] This omission is unlikely to have been inadvertent. But is it substantively significant, and if so, how?

One obvious possibility is that this omission was intended to clear the way for the eventual adoption of the relative-safety test. As we have seen, Justice White argued forcefully in his *Thornburgh* dissent that, in order to advance a "compelling" interest, states may require individuals to bear substantial risks to their lives and health.[314] If the state's interest in viable fetal life is merely "substantial"[315] (or "'important and legitimate'"),[316] rather than "compelling," that objection no longer applies.

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310 *Id.* at 870 (emphasis added).

311 *Id.*

312 *Roe*, 410 U.S. at 163.

313 *Casey*, 505 U.S. at 869 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

314 *See supra* Part II.C.

315 *Casey*, 505 U.S. at 876 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

316 *Id.* at 875–76 (quoting *Roe*, 410 U.S. at 162).

This reading of the joint opinion cannot be right. It asks us to believe that the authors of the joint opinion agreed that *Roe*'s recognition of the "compelling" state interest in viable fetal life was not one of its "essential holdings," was erroneous, and should be overruled notwithstanding stare decisis—and moreover should be overruled *sub silentio*. An overruling of that kind would have been a departure from the Court's ordinary practice, and an even greater departure from the joint opinion's careful and respectful treatment of the *Roe* holdings it *did* discuss (whether it reaffirmed them or not). Beyond that, it would mean that Justices O'Connor, Kennedy, and Souter intended, on the one hand, to permit substantially *more* state regulation of previability abortions (as the undue burden test does), and on the other, to permit substantially *less* state regulation of postviability abortions (as would presumably result if the state's interest in viable fetuses is deemed less than compelling). Nothing in the joint opinion provides even colorable support for that interpretation.[317]

317 Justice O'Connor had previously taken the position that "the State possesses compelling interests in the protection of potential human life . . . throughout pregnancy," City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting); *see also* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting), *overruled in part by Casey*, 505 U.S. 833 (same); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in part and dissenting in part) (same), and Justice Kennedy had joined Chief Justice Rehnquist's opinion in *Webster*, which treated that proposition approvingly, but only "in the context of the *Roe* trimester analysis," which Rehnquist's opinion rejected. Webster v. Reprod. Health Servs., 492 U.S. 490, 519 (1989) (plurality opinion). Interestingly, the most straightforward interpretation of Justice O'Connor's prior view is that states can ban abortions throughout pregnancy, subject to *Roe*'s life-or-health exception (and perhaps other exceptions as well). There are hints in *Casey* that the authors of the joint opinion may have given serious consideration to this alternative before ultimately rejecting it. *See Casey*, 505 U.S. at 850–51 ("The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest"); *id.* at 871 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest [in fetal life] 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."). It seems extremely unlikely that a Justice who would have chosen, as an original matter, a constitutional rule allowing states to ban nontherapeutic abortions throughout pregnancy, would also have been prepared to conclude—contrary to *Roe*'s holding—that the state's interest in fetal life is not compelling even after viability. In any event, if Justices O'Connor, Kennedy, and Souter *had* chosen to eliminate the right to an elective abortion, the stakes involved in defining the life-or-health exception would have been enormous. One

The *Casey* joint opinion's failure to discuss the "compelling" status *vel non* of viable fetal life comes into clearer focus when we compare its undue burden approach with *Roe*'s strict scrutiny. As the joint opinion explained, *Roe* and subsequent cases "decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest."[318] *Roe*'s trimester framework was part and parcel of the strict-scrutiny approach: state regulation to promote maternal health was prohibited until "the State's important and legitimate interest in the health of the mother" became "compelling" at the end of the first trimester;[319] while state regulation to protect fetal life was prohibited until "the State's important and legitimate interest in potential life" became "compelling" at viability (in 1973, approximately the end of the second trimester).[320] Part IV of the joint opinion, by abandoning strict scrutiny and the trimester framework in favor of the undue burden approach, made it *unnecessary* to characterize the relevant state interests as "compelling" (or not).[321] So long as the state acts for "a valid purpose,"[322] and does not impose an undue burden on the woman's choice, it may regulate previability abortions.[323]

After viability, of course, the undue burden approach ceases to apply, and states may prohibit abortions subject to *Roe*'s life-or-health exception.[324] The joint opinion fails to explain whether this is because (1) a compelling state interest is necessary to override the woman's right to choose, and the state's interest in viable fetal life is compelling, or (2) a compelling state interest is *not* necessary to over-

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salient compromise would have been to define the life-or-health exception in relative-safety terms early in pregnancy, and in self-defense terms later in pregnancy (whether after viability or after the point at which abortion becomes statistically less safe than pregnancy and childbirth).

318 *Casey*, 505 U.S. at 871 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

319 *Roe*, 410 U.S. at 163.

320 *Id.*

321 Consistent with this analysis, the joint opinion is also silent on whether (as *Roe* holds) the state has a compelling interest in maternal health. *See Casey*, 505 U.S. at 878 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.").

322 *Id.* at 874.

323 *Id.* at 877. In particular, measures "designed to foster the health of a woman seeking an abortion," or "designed to persuade her to choose childbirth over abortion," are constitutional if they do not constitute an undue burden and are reasonably related to their goals. *Id.* at 878.

324 *Id.* at 879.

ride the woman's right to choose, and the state's interest in viable fetal life meets whatever lower standard *is* necessary. In either case, the same conclusion follows: the joint opinion neither holds nor implies that the state's interest in viable fetal life is less than compelling.[325] Consequently, Justice White's remark in *Thornburgh* still applies: "In *Roe*, the Court conceded that the State's interest in preserving the life of a viable fetus is a compelling one, and the Court has never disavowed that concession."[326]

*F. The Anti-*Roe *Coalition's Treatment of the Medical Emergency Exception*

Chief Justice Rehnquist's dissenting opinion in *Casey*, which Justices White, Scalia, and Thomas joined, would have overruled *Roe* and replaced it with rational basis review of state restrictions on a woman's liberty to have an abortion.[327] Like the plurality opinion, Rehnquist's dissent dealt only briefly with the medical emergency provision.[328] The dissenters offered no explanation for why, on their approach, a

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325 Justice Scalia's dissent in *Casey* included a paragraph pointing out the inconsistencies between the joint opinion and Justice O'Connor's prior opinions describing her version of the undue burden approach. *See id.* at 988–89 (Scalia, J., dissenting). To avoid possible misunderstanding, one of Scalia's charges needs to be addressed here. He wrote:

> Gone too is Justice O'Connor's statement that "the State possesses *compelling* interests in the protection of potential human life . . . throughout pregnancy" . . . . [I]nstead, the State's interest in unborn human life is stealthily downgraded to a merely "substantial" or "profound" interest. (That had to be done, of course, since designating the interest as "compelling" throughout pregnancy would have been, shall we say, a "substantial obstacle" to the joint opinion's determined effort to reaffirm what it views as the "central holding" of *Roe*.).

Id. at 989 (citations omitted) (quoting City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting)). Scalia was certainly right that O'Connor's change of position was necessary to reaffirming the right to previability elective abortion. But Scalia's claim that the joint opinion "downgraded" the state's interest in fetal life to a "merely 'substantial' or 'profound' interest" failed to mention that the joint opinion acknowledged that the state's interest, already "substantial" at the outset of pregnancy, grows stronger once the fetus reaches viability. *See id.* at 869 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). Moreover, had Justice Scalia believed that the joint opinion also disavowed *Roe*'s holding that the state has a compelling interest in *viable* fetal life, we can be certain he would have added that to his indictment.

326 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 808 (1986) (White, J., dissenting), *overruled in part by Casey*, 505 U.S. 833.

327 *Casey*, 505 U.S. at 966 (Rehnquist, C.J., dissenting).

328 *Id.* at 949.

medical emergency exception should be required at all. Indeed, they did not even refer to *Roe*'s life-or-health exception, let alone explain whether they agreed that a woman is constitutionally entitled to an abortion if pregnancy threatens her life or health.

Instead, the dissenters simply asserted that they would uphold the statute, as interpreted by the court of appeals, as "eminently reasonable."[329] Like the plurality, the dissenters referred approvingly to the court of appeals' "significant threat" language.[330] Unlike the plurality, however, they did not use the phrase "significant health risks" as shorthand for risks states may not require women to bear. Moreover, the dissenters described the three contested medical problems as "dangerous conditions," thus seeming to suggest that they would allow states to forbid abortions unless the woman's life or health is *endangered*.[331] Insofar as the dissenters were prepared to recognize the life-or-health exception as surviving *Roe*, then, they implicitly favored a self-defense approach.[332] Yet neither in Chief Justice Rehnquist's dissent, nor in Justice Scalia's accompanying one, did the dissenters link their interpretation of *Roe*'s life-or-health exception to self-defense principles and explain why those principles should be controlling.

The dissenters may have had their reasons for not wanting to be drawn into a discussion of abortion after viability. For that discussion might well have exposed fault lines within the anti-*Roe* coalition. Specifically, it would have brought to the fore the question whether, even if *Roe* were to be overruled, the Court should recognize a more limited right to an abortion when necessary to preserve the life or health of the mother. In substance, that is simply the postviability life-or-health exception in the form of a right that applies throughout pregnancy.[333]

In his dissent in *Roe*, Justice Rehnquist indicated his belief that a statute that "prohibit[ed] an abortion even where the mother's life is in jeopardy . . . would lack a rational relation to a valid state objective."[334] Justice White went farther in his *Roe* dissent (which Rehnquist joined), suggesting that it was possible that due process requires

329 *Id.* at 979.

330 *Id.*

331 *Id.* at 978.

332 The dissenters did not directly refer to the Third Circuit's use of the wanted-pregnancy test, but they did point out that the Third Circuit had "noted that the medical profession's uniformly prescribed treatment for each of the three conditions is an immediate abortion." *Id.* This suggests that the dissenters may have seen some potential in the wanted-pregnancy test.

333 For a brief discussion of this approach, see *supra* Part II.B.

334 Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

that a woman, whose pregnancy poses a "threat to her mental or physical health," be permitted to have an abortion.[335] Neither White nor Rehnquist explained the rationale for their views, but it seems a fair conjecture that they had traditional self-defense principles in mind.

Justices Scalia and Thomas, on the other hand, while continuing to call for overruling *Roe v. Wade* (and *Casey*), have to this day never said whether they would be prepared to accept a limited right to abortion on maternal life-or-health grounds.[336] Often, Justice Scalia's language has sounded like a call for the complete abolition of federal abortion rights.[337] At times, his calls for repeal have focused on elective abortions, as when he wrote in *Casey* that "[t]he States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so."[338] But it seems unlikely that Scalia and Thomas would stop there. As they also asserted in *Casey*: "The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[339]

It is entirely possible, then, that the anti-*Roe* Justices disagreed among themselves about whether to overrule *Roe*'s life-or-health exception along with its right to elective abortion. Had it commanded a majority, Rehnquist's opinion would have left that question for another day. There was a rational basis for the state's medical emergency exception to its various (and likewise rational) regulations of abortion, and nothing more needed to be said.

335 *Id.* at 222 (White, J., dissenting).

336 At least, not in a Supreme Court opinion.

337 *See* Stenberg v. Carhart, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) ("Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so."); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) ("I continue to believe . . . that the Constitution contains no right to abortion." (citation omitted)).

338 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

339 *Id.*

IV. THE LIFE-OR-HEALTH EXCEPTION SINCE *CASEY*: THE *CARHART* DECISIONS

A. *The Return of the Relative-Safety Approach in* Stenberg v. Carhart[340]

By the time *Stenberg v. Carhart* came before the Court, Justices Ginsburg and Breyer had replaced Justices White and Blackmun.[341] As *Stenberg* confirmed, this meant that Justice O'Connor returned to the role of swing voter in the Court's abortion cases. In that role, she provided the decisive fifth vote for an opinion that essentially adopted the relative-safety version of the life-or-health exception under the aegis of *Casey*'s "significant health risks" language.[342]

Nebraska, like many other states, had enacted legislation banning partial-birth abortions (in medical terminology, "intact D&E" abortions) throughout pregnancy, except when necessary to save the *life* of the mother.[343] In an opinion by Justice Breyer, the Court held this statute unconstitutional because, inter alia, it lacked a maternal-health exception.[344] In reaching this result, *Stenberg* interpreted *Casey*'s "significant health risks" test as banning state imposition of *material* health risks—that is, risks a reasonable woman and her doctor would take into account in deciding which abortion method should be used.[345] This is a relative-safety approach, albeit a less absolutist one than *Thornburgh*'s ban on all maternal-health "tradeoffs."

The *Stenberg* Court's critique of Nebraska's failure to include a maternal-health exception opened by quoting the postviability life-or-health exception as stated in *Roe* and reaffirmed in *Casey*.[346] The Nebraska law, however, banned intact D&E abortions whether performed before or after viability.[347] The Court indicated that this

340 530 U.S. 914 (2000).

341 *Id.* at 918–19.

342 *Casey*, 505 U.S. at 880 (majority opinion).

343 *Stenberg*, 530 U.S. at 921–22.

344 The Court also held that the statute violated the undue burden test, because (as the Court construed it) the statute banned the most widely used late abortion method (standard D&E) as well as the partial-birth (intact D&E) procedure. *Id.* at 938. Nebraska conceded that its statute imposed an undue burden if it also applied to the "more commonly used" standard D&E. *Id.* I have argued elsewhere that, in light of *Gonzales v. Carhart*, there is a good chance that the Court would now rule that a ban on all D&E abortions does *not* impose an undue burden. *See* Stephen G. Gilles, *As Justice Kennedy Said . . .*, FIRST THINGS, Jan. 2008, at 18, 18–21.

345 The *Stenberg* opinion does not use the phrase "material health risks," but the analysis in text shows, I believe, that this is a fair characterization.

346 *Stenberg*, 530 U.S. at 930.

347 A restriction on previability abortion methods will not directly save any fetal lives, because nonviable fetuses will die no matter what method is used to abort them.

"aggravate[d] the constitutional problem," because the state's interest in restricting abortion is "considerably weaker" before viability.[348] But rather than crafting and applying a potentially broader previability life-or-health exception, the Court proceeded to strike the statute down because it failed to meet the *postviability* standard.[349]

Nebraska argued that no statutory health exception was necessary, because there are no circumstances in which intact D&E is the only safe abortion method.[350] The Court did not dispute Nebraska's factual premise. Instead, it responded that the district court "found that the [intact D&E method] was significantly *safer* in certain circumstances."[351] Because intact D&E "would be the safest procedure" in some situations, the Court held that the absence of a health exception would "create significant health risks for women."[352]

The *Stenberg* Court's reasoning, while directly addressed to the need for a statutory health exception, also applies to the postviability life-or-health exception. Indeed, for the first time in thirty years, the Court actually construed the exception's language:

> The word "necessary" in *Casey's* phrase "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered

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Even as applied after viability, Nebraska's ban on partial-birth abortions was unlikely to save any fetal lives, because (as construed by Nebraska) its ban did not apply to the standard D&E method, which is invariably fatal to the fetus. *See id.* at 940. That raises important questions I cannot pursue here: whether the State could invoke its interest in protecting fetal life on the ground that the statute would indirectly save fetal lives, and what other legitimate state interests, if any, were advanced by the partial-birth abortion ban. *See id.* at 930–31 (alluding to, but not deciding, these questions); *id.* at 946 (Stevens, J., concurring) (arguing that Nebraska has no "legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty"); *id.* at 960–64 (Kennedy, J., dissenting) (arguing that Nebraska has several legitimate interests in its partial-birth abortion ban). Of course, under the *Stenberg* majority's construction of the statute as prohibiting *both* D&E methods, it could very well have saved the lives of some viable fetuses, because the remaining method (induced labor) often allows the fetus to be born alive. For the *Stenberg* Court, however, the Nebraska statute's supposed breadth was an independent ground on which to hold it unconstitutional.

348 *Id.* at 930 (majority opinion).

349 *Id.* at 938.

350 *Id.* at 931.

351 *Id.* at 934.

352 *Id.* at 931.

> appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases.[353]

This interpretation is tantamount to a holding that a postviability abortion is justified whenever it is "appropriate" in light of the "estimated comparative health risks (and health benefits)" of abortion and pregnancy in a particular woman's case.[354] That, of course, is the essence of the relative-safety approach. But to take that approach to its logical conclusion (as *Thornburgh* had) would have required jettisoning *Casey*'s "significant health risks" language; and that would have clashed with the central rhetorical trope of Justice Breyer's *Stenberg* opinion—that the Court was breaking no new ground, but merely reaching a result compelled by the joint opinion in *Casey*.[355]

Justice Breyer's solution was to retain the "significant health risks" formulation, but make plain that risks are "significant" if they are nonnegligible, that is, if they would be material in the decisionmaking of women and their doctors.[356] This understanding of "significant" risks is implicit in *Stenberg*'s discussion of safe-versus-safest abortion methods. What kinds of risks make one concededly safe abortion method significantly riskier than another? Clearly not *serious* health risks, for then the second-best method could not be deemed "safe." The differences between safe and safer methods must involve risks that are neither negligible nor serious—risks that, while small, are "significant" enough to be worth considering when choosing among methods. So it is that we find Justice Breyer quoting with approval an American Medical Association (AMA) policy statement asserting that an intact D&E should be performed only when "'*alternative procedures pose materially greater risk to the woman.*'"[357] Thus, *Stenberg* implies that a woman is entitled to an abortion via the prohibited abortion method whenever the perceived risks of the safest legal abortion method are materially greater. As applied to a prohibition on postviability abortions, this means that the life-or-health exception is triggered whenever the health risks of pregnancy are materially greater than those of abortion. Even an extremely small chance of death or serious health impairment is likely to satisfy that test.

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353 *Id.* at 937 (citation omitted) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

354 *Id.*

355 *See id.* at 921 (asserting that the Court was merely applying the rules laid down in *Casey*).

356 *Id.* at 931.

357 *Id.* at 935 (quoting Late Term Pregnancy Termination Techniques, AMA Policy H-5.982).

This analysis is confirmed by a look at the medical disagreement in *Stenberg* between doctors who think intact D&E is safer and doctors who think standard D&E is safer. The reason why neither school of thought can claim a decisive victory is precisely that the distinctive risks associated with each of these procedures involve only very small chances of a serious injury. Doctors who believe intact D&E is safer than standard D&E argue that the former involves less risk of uterine perforation, cervical laceration, and retained fetal tissue.[358] These possible complications of D&E are rare[359] as are the risks that other doctors believe make intact D&E the riskier procedure.[360] Yet *Stenberg* holds that differences of this order of magnitude can constitute "significant health risks."[361] *Stenberg* thus revives, in less absolute form, the relative-safety understanding of the life-or-health exception that first emerged in *Thornburgh*. And, as in *Thornburgh*, it does so without providing any rationale for that result.

B. Justice Kennedy's Stenberg *Dissent*

Justice Kennedy (joined by Chief Justice Rehnquist) wrote an impassioned dissent in *Stenberg*, arguing that the Court had breached the plurality's promise in *Casey* that states would now have greater leeway to protect fetal life by regulating abortions throughout pregnancy.[362] Kennedy raised multiple objections to *Stenberg*'s various rulings, including its holding that the Nebraska statute unconstitutionally lacked a maternal-health exception. Much of his dissent was devoted to a lengthy argument that the Court failed to give appropriate deference to the Nebraska legislature's judgment about the relative safety of the banned (intact D&E) method and the permitted (standard D&E) method, and conversely, gave virtually unfettered discretion to individual abortion providers.[363] Of more interest for our

358 *See* Brief of Amici Curiae American College of Obstetricians and Gynecologists et al. in Support of Respondent at 21–22, *Stenberg*, 530 U.S. 914 (No. 99-830).

359 *See* Gonzales v. Carhart, 550 U.S. 124, 164 (2007).

360 *See Stenberg*, 530 U.S. at 933 (citing Brief Amici Curiae of Association of American Physicians and Surgeons et al., *supra* note 358, at 21–23). Some of the risks associated with intact D&E include "cervical incompetence caused by overdilitation, injury caused by conversion of the fetal presentation, and dangers arising from the 'blind' use of instrumentation to pierce the fetal skull while lodged in the birth canal." *Id.* at 933.

361 This is not to say that *Stenberg* holds that every health risk, however minimal, is "significant." If pressed, Justice Breyer could no doubt have come up with some low-probability risk of a minor health problem that is not "significant" because it never leads to more serious complications.

362 *Stenberg*, 530 U.S. at 956–57 (Kennedy, J., dissenting).

363 *Id.* at 964–72.

purposes, Kennedy argued that the Court had misunderstood *Casey* by holding that a ban on an abortion procedure must "include an exception permitting an abortionist to perform [that procedure] *whenever he believes it will best preserve the health of the woman.*"[364]

Whereas the *Stenberg* majority used *Roe*'s life-or-health exception as the touchstone for its analysis, Kennedy made no reference to that exception. Nor did he quote *Casey*'s "significant health risks" language. Instead, he used *Casey*'s undue burden test, asking whether the partial-birth abortion ban posed "'a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'"[365] As part of that analysis, he also applied what he described as *Casey*'s requirement that "a regulation . . . impose a 'significant threat to the life or health of a woman' before its application would impose an undue burden."[366] In applying the undue burden test, the crucial fact for Kennedy was that even if the intact D&E method "may present an unquantified lower risk of complication for a particular patient[,] . . . other proven safe procedures remain available even for this patient."[367] Consequently, Nebraska's ban "deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman."[368] Nor, for the same reason, did the statute impose a "'significant threat to the life or health of a woman.'"[369] The "marginal" health differences between the forbidden method and the standard alternative[370] "created a substantial risk to no woman's health."[371]

Justice Kennedy was undoubtedly right that Nebraska's ban on intact D&E abortions did not violate the undue burden test. The question for undue burden purposes is whether the burdens attributable to the ban—whether they involve health risks, emotional distress, pecuniary cost, or some combination thereof—can be expected to deter or impede a significant number of women from choosing abortion over continued pregnancy and childbirth. The relevant comparison, therefore, is between the *permitted* abortion methods (standard

364 *Id.* at 964 (emphasis added).

365 *Id.* at 965 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

366 *Id.* at 967 (quoting *Casey*, 505 U.S. at 880 (majority opinion)).

367 *Id.*

368 *Id.* at 965.

369 *Id.* at 967 (quoting *Casey*, 505 U.S. at 880 (majority opinion)).

370 *Id.* at 967–68.

371 *Id.* at 969.

D&E) and *childbirth*.[372] Given the consensus that the standard D&E procedure is very safe, it would be preposterous to claim that the ban on intact D&Es will deter women from having abortions. The *Stenberg* majority did not argue otherwise.

What should we make of Justice Kennedy's failure to acknowledge that *Casey*'s "significant health risks" formulation was derived from *Roe*'s life-or-health exception, and as such constitutes an independent limitation on previability abortion regulations? The answer, if there is one, remains unclear.[373] Fortunately, the issue is moot: Kennedy's more recent opinion for the Court in *Gonzales* uses both the "significant health risks" test and the general undue burden test.[374] For now, the key point is that Kennedy's view of the *postviability* life-or-health exception is presumably at least as restrictive of abortion rights as the *previability* undue burden analysis in which he engaged in *Stenberg*. Kennedy's analysis, transposed to the postviability context, implies that the life-or-health exception applies if continued pregnancy would not be "safe." The mere fact that abortion might be *safer* for a particular woman is not enough. Kennedy did not attempt to define what a "safe" abortion is. But his focus on whether an abortion is "safe" suggests that he would limit *Roe*'s life-or-health exception to cases in which continued pregnancy would be *unsafe*—that is, dangerous. Whereas Breyer's majority opinion comes down in favor of the relative-safety approach, Kennedy's dissent has the hallmarks of a self-defense approach.

C. *Justice Thomas's* Stenberg *Dissent*

Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) also filed an elaborate dissent in *Stenberg*, which included a

372 When the life-or-health exception is applied to a postviability abortion ban, the relevant comparison should likewise be between the maternal-health risks of abortion and those of continued pregnancy and childbirth. But when the life-or-health exception is applied to a ban on a particular abortion *method*, the relevant comparison should be between the maternal health risks of the prohibited method and those of the safest *permitted* method.

373 Kennedy may have written his analysis primarily in undue burden terms to preserve the possibility that the postviability life-or-health exception should be narrower than whatever health exceptions an undue burden analysis might require before viability. Alternatively, Kennedy may have avoided discussing the life-or-health exception to make it easier for Chief Justice Rehnquist to join both his dissent and Justice Thomas's dissent. *See* discussion *infra* Part IV.C (discussing Thomas's argument that the life-or-health exception has no application to regulation of abortion methods).

374 *See* discussion *infra* Part IV.E.

renewed plea to overrule *Roe* and *Casey*.[375] When he turned to the statute's lack of a health exception, Thomas's lead-off argument was that *Roe*'s life-or-health exception, and the decisions applying it, "address[ ] only the situation in which a woman must obtain an abortion because of some threat to her health from continued pregnancy" and "say nothing at all about cases in which a physician considers one prohibited method of abortion to be preferable to permissible methods."[376] This argument is untenable. Because the Court's pre-*Casey* abortion-method decisions (in particular, *Colautti* and *Thornburgh*) dealt with *postviability* restrictions, the women affected by those restrictions necessarily had pregnancy-related health problems that arguably satisfied the life-or-health exception. But the legal issue in the abortion-method cases was whether the *additional* health risks, if any, attributable to the state's regulation of abortion methods were consistent with *Roe*'s life-or-health exception. The life-or-health exception plays the same role in abortion-method cases as in abortion-prohibition cases: it limits the health risks a state may require women to bear in pursuit of the state's interest in protecting fetal life (or any other legitimate interest the state may have). As Justice Breyer correctly observed in response to Thomas, the Court's cases "make clear that a risk to a women's [sic] health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely."[377]

Justice Thomas's next objection was considerably more perceptive:

> I assume that the Court does not discuss the health risks with respect to undue burden, and instead suggests that health risks are relevant to the necessity of a health exception, because a marginal increase in safety risk for some women is clearly not an undue burden within the meaning of *Casey*. At bottom, the majority is using the health exception language to water down *Casey*'s undue-burden standard.[378]

Thomas was correct: under the majority's relative-safety version of *Roe*'s life-or-health exception, "a marginal increase in safety risk for

375 *Stenberg*, 530 U.S. at 980 (Thomas, J., dissenting).

376 *Id.* at 1010.

377 *Id.* at 931 (majority opinion). Justice Breyer's response also sought to use the formula "significant health risks" to rationalize the Court's pre-*Casey* abortion-methods cases, which did not use that language. *See id.* ("Our cases have repeatedly invalidated statutes that in the process of regulating the methods of abortion, imposed significant health risks." (emphasis omitted)).

378 *Id.* at 1011 n.20 (Thomas, J., dissenting).

some women" is unconstitutional *even if it would not deter or impede those women from choosing an abortion.*

But so what? *Roe*'s life-or-health exception is undeniably a constitutional limitation separate and apart from the undue burden test. In response, the *Stenberg* Court could therefore have argued that Thomas's criticism simply reflects the fact that prior to the undue burden test, *Roe*'s strict scrutiny test invalidated virtually all previability state regulations. Now that the more permissive undue burden test has replaced strict scrutiny, the argument goes, it should not be surprising that some previability state regulations run afoul of the life-or-health exception while passing the undue burden test.

The rejoinder to this argument is that these consequences are strong evidence that the relative-safety test is a misinterpretation of *Roe*'s life-or-health exception, as reaffirmed in *Casey*. Why should a life-or-health exception designed for postviability situations in which the state's interest is *strongest* invalidate laws that survive the undue burden test, designed as it was for previability situations in which the state's interest, while legitimate, is not as strong? Under the self-defense test, this anomaly disappears: a law that passes the undue burden test will rarely if ever violate the life-or-health exception—indeed, some laws that *fail* the undue burden test will still not contravene the exception. Any previability law that significantly increases the maternal health risks of abortion as compared with those of pregnancy is likely to fail the undue burden test because these increased risks will deter many women from choosing abortion. Yet because the baseline health risks of pregnancy are very small in contemporary America, increased risks associated with state restrictions on abortion methods may nevertheless fall below the level of dangerousness needed to trigger the life-or-health exception.

Consider this example: a state law that permits only one abortion method after the first trimester—hysterotomy, i.e., an early C-section—but that also contains a life-or-health exception phrased in explicit self-defense terms. The mortality risks of hysterotomy are roughly 48 per 100,000,[379] far higher than the mortality risks of childbirth (roughly 12 per 100,000),[380] or of a D&E abortion (roughly 5 per 100,000).[381] It seems clear that the requirement that an abortion be done by C-section would deter many women from choosing to have

379 *See* David A. Grimes & Kenneth F. Schulz, *Morbidity and Mortality from Second-Trimester Abortion*, 30 J. REPROD. MED. 505, 512 (1985).

380 DONNA L. HOYERT, DEP'T OF HEALTH & HUMAN SERVS., MATERNAL MORTALITY AND RELATED CONCEPTS 1 (2007), *available at* http://www.cdc.gov/nchs/data/series/sr_03/sr03_033.pdf.

381 *See* Grimes & Schulz, *supra* note 379, at 512.

one, both because of the greater mortality risks and because of the other burdens associated with abdominal surgery. Therefore, as applied to abortions between weeks thirteen and twenty-two, the hypothetical statute imposes an undue burden. But the statute does *not* trigger the self-defense version of the exception, because a mortality risk of 48 per 100,000, while significant, is still disproportionately small for self-defense purposes.[382] (Of course there are some women for whom a hysterotomy would be much more dangerous than this statistical risk. They would be entitled to invoke the hypothetical statute's life-or-health exception.)

Justice Thomas did not present the argument as I have just sketched it, but he made the same basic point:

> [T]he majority expands the health exception rule articulated in *Casey* in one additional and equally pernicious way. Although *Roe* and *Casey* mandated a health exception for cases in which abortion is "necessary" for a woman's health, the majority concludes that a procedure is "necessary" if it has any comparative health benefits. . . . But such a health exception requirement eviscerates *Casey*'s undue-burden standard and imposes unfettered abortion on demand. The exception entirely swallows the rule.[383]

To clinch his case, Justice Thomas attempted to show that the *Stenberg* majority's approach would have required the invalidation, on health-exception grounds, of regulations that the Court *upheld* in *Casey*. Specifically, he pointed out, the plurality in *Casey* held that a twenty-four-hour waiting period did not impose an undue burden, even though it recognized that "there were women for whom the regulation would impose some additional health risk who would not fall within the medical emergency exception."[384] Under *Stenberg*'s version of the life-or-health exception, by contrast, a twenty-four-hour waiting period would be unconstitutional because it would create a "marginally higher health risk" for some women.[385]

Justice Thomas is correct that *Casey*'s "significant health risks" test cannot mean that an abortion is "necessary" on health grounds whenever it has *any* "comparative health benefits." But that's a straw man; *Stenberg*'s position is that an abortion is "necessary" when its health risks are *significantly* (as in, materially) lower than those of pregnancy. As against that understanding of the life-or-health exception,

382 Indeed, it is an order of magnitude smaller than the maternal mortality risk of childbirth in 1915, which is estimated to have been 608 per 100,000. HOYERT, *supra* note 380, at 1.

383 *Stenberg*, 530 U.S. at 1012 (Thomas, J., dissenting).

384 *Id.* at 1014.

385 *Id.*

Thomas's argument is unpersuasive. In upholding the twenty-four hour waiting period, the *Casey* plurality stated: "The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any *appreciable* health risk."[386] On that basis, the plurality concluded, "we cannot say that the waiting period imposes a *real* health risk."[387] These statements suggest that the plurality—or at least the author of this section of the joint opinion—may have viewed "significant" health risks as roughly synonymous with "real" or "appreciable" health risks.[388] If we think back to Justice White's laundry list of synonyms for "significant" (in its weaker meaning) in *Thornburgh*, it is noteworthy that both "real" and "appreciable" are among them—along with "nonnegligible."[389] Had he bothered to respond to Justice Thomas on this issue, Justice Breyer could have argued with some plausibility that the twenty-four hour waiting period discussion in *Casey* actually lent a modicum of support to *his* interpretation of "significant health risks."

D. A Unanimous Interlude: Ayotte v. Planned Parenthood of Northern New England

Chief Justice Roberts and Justice O'Connor served on the Court together from October 2005 until O'Connor's successor, Justice Alito, was confirmed on January 31, 2006.[390] During that brief period, the Roberts Court managed to achieve rare unanimity in an abortion case—and the new Chief Justice assigned the opinion to O'Connor.

386 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (emphasis added).

387 *Id.* at 886 (emphasis added).

388 In light of his subsequent dissent in *Stenberg*, it seems unlikely that Justice Kennedy realized this implication of the joint opinion when Casey was decided. Given the lineup in *Casey*, any point on which the three Justices in the plurality disagreed should, in theory, have been "won" by the Justice with the most restrictive standpoint in terms of abortion rights. For example, suppose hypothetically that Justice Kennedy favored a self-defense interpretation of significant health risks, while Justices O'Connor and Souter did not. At the time of *Casey*, Justice Kennedy could have forced the issue—had he perceived that the disagreement existed. But by the time of *Stenberg*, it was too late. Justice White's retirement had tipped the balance of the Court and made Justice O'Connor the swing voter. This may be one reason why Justice Kennedy's dissent in *Stenberg* conveys such a sense of betrayal.

389 *See* Thornburg v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 807 (1986) (White, J., dissenting), *overruled in part by Casey*, 505 U.S. 833.

390 U.S. Senate, Supreme Court Nominations, http://senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Nov. 25, 2009).

O'Connor's opinion in *Ayotte v. Planned Parenthood of Northern New England*[391] expressly disclaimed any intent to "revisit our abortion precedents," and addressed only "a question of remedy: If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response?"[392] The Court unanimously held that "invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."[393] As we'll see, *Ayotte*'s remedial holding was an important one. In addition, although *Ayotte* broke no new substantive ground, it is worth attending carefully to which doctrinal propositions all the Justices agreed on—for the time being.

Ayotte involved a facial challenge to New Hampshire's 2003 Parental Notification Prior to Abortion Act,[394] which prohibited a doctor from performing an abortion on a pregnant minor until forty-eight hours after notifying her parent or guardian.[395] In addition to containing a judicial bypass provision, the statute provided that notice was not required if the doctor certified that "'the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice.'"[396] The plaintiffs claimed that the Act unconstitutionally failed to allow immediate abortions to minors whose health would be endangered by compliance with the notice requirement.[397] Invoking *Stenberg*, the First Circuit struck down the Act in its entirety because it contained no health exception.[398]

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391 546 U.S. 320 (2006). The Court's opinion was announced on January 18, 2006. *Id.* Justice Alito's confirmation hearing ended on January 13; the Senate Judiciary Committee voted 10–8 in favor of confirmation on January 24, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006); and he was confirmed 58–42 on January 31. *See* Supreme Court Nominations, *supra* note 390. Justice O'Connor's resignation, which she had announced on July 1, 2005, was effective upon the confirmation of her successor. Letter from Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, to George W. Bush, President, United States (July 1, 2005), *available at* http://www.supremecourtus.gov/publicinfo/press/oconnor070105.pdf.

392 *Ayotte*, 546 U.S. at 323.

393 *Id.*

394 N.H. REV. STAT. ANN. §§ 132:24–132:28 (2005).

395 *Ayotte*, 546 U.S. at 323–24.

396 *Id.* at 324 (quoting N.H. REV. STAT. ANN. § 132:26(I)(a)).

397 *Id.* at 325 (quoting Complaint at ¶ 24, Planned Parenthood of N. New England v. Heed, 390 F.3d 53 (1st Cir. 2004) (No.03-W-00491)).

398 *See* Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 62 (1st Cir. 2004), *vacated sub nom* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006).

Justice O'Connor summarized the applicable law as follows: "New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"[399] Two paragraphs later, she stated, "New Hampshire has conceded that, under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks."[400] It seems safe to treat these statements as equivalent—and hence to infer that all the Justices agreed that, as a matter of precedent, the life-or-health exception applies if pregnancy would subject a woman to significant health risks. That unanimity contrasts with *Stenberg*, in which Justice Breyer's majority opinion deployed "significant health risks" as the controlling formula, while the four dissenters pointedly refrained from using it.[401]

Let us turn now to the shift in the Court's remedial abortion jurisprudence that makes *Ayotte* so important. As Justice O'Connor explained, "the courts below chose the most blunt remedy—permanently enjoining the enforcement of New Hampshire's parental notification law and thereby invalidating it entirely."[402] She acknowledged that this was "understandable" because the Supreme Court, in *Stenberg*, had likewise invalidated Nebraska's partial-birth abortion ban in *its* entirety for want of a health exception.[403] But whereas Nebraska had not asked for "relief more finely drawn," New Hampshire urged—and the Court unanimously agreed—that "the lower courts need not have invalidated the law wholesale."[404]

In a brief discussion of remedial principles in constitutional litigation, Justice O'Connor explained that, in general, "when confronting a constitutional flaw in a statute" the better course is" to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact."[405] These practices, however, were subject to

399 *Ayotte*, 546 U.S. at 327 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (joint opinion of Kennedy, O'Connor, and Souter, JJ.)) (internal quotation marks omitted).

400 *Id.* at 328.

401 The change may be attributable to the fact that *Ayotte*, like *Casey* itself, involved a medical-emergency exception, whereas *Stenberg* involved a restriction on abortion methods. Or it may reflect a recognition on the part of the dissenters in *Stenberg* that they could live with the "significant health risks" language, provided it could be given a more restrictive reading than the relative-safety interpretation that *Stenberg* adopted.

402 *Ayotte*, 546 U.S. at 330.

403 *Id.* at 331.

404 *Id.*

405 *Id.* at 328–29 (citations omitted).

two important qualifications: courts should not invade the legislature's domain by rewriting statutes, nor should they use their remedial powers to circumvent the legislature's intent.[406] The first qualification, O'Connor concluded, should not be an obstacle to following the normal rule: the plaintiffs conceded that "carefully crafted injunctive relief"[407] was feasible, and "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem."[408] The second qualification called for a severability analysis focusing on whether the legislature would "have preferred what is left of its statute to no statute at all."[409] Accordingly, the Court held—subject to resolution of the severability issue on remand—that the lower courts could issue declaratory and injunctive relief prohibiting the statute's unconstitutional application[410]

On remand, the First Circuit returned the case to the district court for further proceedings, while allowing the injunction to remain in place.[411] In February 2007, the district court stayed the case pending anticipated action by the New Hampshire legislature.[412] After the legislature repealed the Act in June 2007, the district court dismissed the case as moot.[413] As a result, we cannot be sure how the district court would have crafted a narrower injunction prohibiting unconstitutional applications of the Act. The most straightforward approach would seemingly have been to enjoin the application of the statute in any case in which an abortion provider concluded that the delay from compliance with the Act's notification requirement would create "significant health risks," and therefore that an immediate abortion was necessary to preserve the life or health of the pregnant minor.

Ayotte thus turns out to be a compromise in which the liberal Justices agreed to follow the Court's normal remedial practices, and the conservative Justices agreed to let the lower courts apply the "significant health risks" test as described and applied in *Stenberg*. *Stenberg*'s relative-safety version of the significant health risks test, however, did not last long.

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406 *Id.* at 329–30.

407 *Id.*

408 *Id.* at 331.

409 *Id.* at 330.

410 *Id.* at 331.

411 *See* Planned Parenthood of N. New England v. Ayotte, 571 F. Supp. 2d 265, 270 (D.N.H. 2008).

412 Procedural Order, *Ayotte*, 571 F. Supp. 2d 265 (No. 03-cv-491).

413 *Ayotte*, 571 F. Supp. 2d at 271.

E. Gonzales v. Carhart*: A Hemi-Demi-Semi Victory for the Self-Defense Approach*

Like the Nebraska statute in *Stenberg*, the federal partial-birth abortion ban statute in *Gonzales v. Carhart* lacked a health exception. With Justice Alito replacing Justice O'Connor, there was now a 5–4 majority to uphold the law.[414] One might accordingly have expected Justice Kennedy's majority opinion squarely to address the meaning of *Casey*'s "significant health risks" test, repudiate *Stenberg*'s expansive interpretation thereof, and adopt a narrower, self-defense interpretation of *Roe*'s life-or-health exception.[415] That, in turn, would have made it easy for the Court to hold that Congress had reasonably determined that a statutory health exception was not necessary, on the ground that the prohibited partial-birth procedure was never the only available abortion method that would not *seriously endanger* the mother's health.

Instead, Justice Kennedy's opinion primarily revisited a different theme from his *Stenberg* dissent: that legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[416] The *Stenberg* Court had rejected that proposition, mandating a health exception as long as "substantial medical authority supports the proposition that banning a particular abortion procedure *could* endanger women's health."[417] The *Gonzales* Court took the opposite view, holding that the "documented medical disagreement" over whether the ban on intact D&E would "impose significant health risks on women"[418] sufficed to *uphold* the federal act against a facial challenge.[419] However, the Court recognized that an as-applied challenge to the Act's lack of a health exception would be proper "if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by

414 In her concurring opinion in *Stenberg*, Justice O'Connor indicated that "a ban on partial birth abortion" would be constitutional, in her view, if (1) it applied only to the intact D&E procedure, and (2) it "included an exception to preserve the life and health of the mother." *Stenberg*, 530 U.S. at 951 (O'Connor, J., concurring). The federal ban at issue in *Gonzales* satisfied only the first condition.

415 One amicus brief in *Gonzales* made a sustained argument that the Court should revisit, clarify, and narrow *Roe*'s life-or-health exception. *See* Brief Amici Curiae of Christian Legal Society et al. in Support of Petitioner at 22–27, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-1382).

416 *Gonzales*, 550 U.S. at 163.

417 *Stenberg*, 530 U.S. at 938 (emphasis added).

418 *Gonzales*, 550 U.S. at 162.

419 *See id.* at 164.

the Act must be used."[420] *Gonzales* thus acknowledged the possibility of unusual cases in which the ban on partial-birth abortions might impose significant health risks on an individual woman, while insisting that Congress reasonably found that the ban will *not* impose such risks in the vast majority of cases.

Remarkably, *Gonzales* managed to come to these conclusions without ever explaining what constitutes a significant health risk. In Part IV.B of his opinion for the Court, Justice Kennedy framed the question as "whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where 'necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.'"[421] That in turn depends, "under precedents we here assume to be controlling," on whether it "'subject[s] [women] to significant health risks.'"[422] Whatever the qualification "we here assume" may portend, this much is clear: the "significant health risks" test is the current legal standard to which restrictions on abortion methods must conform.

But having elected to use the "significant health risks" test, Justice Kennedy sidestepped the question of its legal meaning. He pointed out that, in Congress and in the lower courts, "whether the Act creates significant health risks for women has been a contested *factual* question,"[423] and found that "both sides have medical support for their position."[424] After describing the conflicting medical evidence in some detail, he went on to hold, as already noted, that in the presence of this "medical uncertainty" Congress could reasonably have concluded that a health exception was not necessary.[425] Intriguingly, Kennedy's description of the conflicting medical testimony reveals two very different factual disagreements. Although Kennedy's opinion does not clearly distinguish them, it permits us to do so—and in the process to draw some inferences about Kennedy's conception of "significant health risks."

The first point of disagreement concerned whether the prohibited "intact D&E" abortions are ever safer than the dominant alternative method, the standard (or dismemberment) D&E. The plaintiffs presented evidence that intact D&E was safer, but this evidence was "contradicted by other doctors who testified . . . that the alleged

420 *Id.* at 167.

421 *Id.* at 161 (alteration in original) (quoting Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 327–28 (2006)) (internal quotation marks omitted).

422 *Id.* (second alteration in original) (quoting *Ayotte*, 546 U.S. at 328).

423 *Id.* (emphasis added).

424 *Id.*

425 *Id.* at 163.

health advantages were based on speculation without scientific studies to support them."[426] Obviously, even under the relative-safety test, there would be no need for a health exception if the prohibited method *never* had "'safety advantages over other second-trimester abortion procedures.'"[427] Thus, this factual disagreement tells us nothing about the *Gonzales* majority's conception of "significant health risks."

The importance Justice Kennedy attached to the second factual disagreement, on the other hand, is clearly inconsistent with the relative-safety approach. Kennedy asserted that the plaintiffs' evidence in favor of intact D&E was "contradicted" by the testimony of doctors who "considered D&E always to be a safe alternative."[428] At first blush, this seems nonsensical. There is no contradiction between testimony that standard D&E is always "safe" and testimony that the intact D&E method is *safer*. Depending on the criterion for "significance," however, there may or may not be a contradiction as to whether intact D&E is *significantly* safer. If any material risk qualifies as "significant," there is still no contradiction: an abortion method could be a "safe" alternative, yet still possess materially greater risks. On the other hand, if Kennedy understands a "significant" health risk to mean one that poses a *serious* threat to a woman's health, there *is* a contradiction. Because an abortion method that involved a serious threat to a woman's health would clearly *not* be "safe," the existence of a "safe" alternative method is powerful evidence that the statutory prohibition does not impose "significant health risks" on women.

Justice Kennedy's defense of the Act's failure to include a health exception confirms that this analysis is correct. Kennedy reiterated that "[a]lternatives are available to the prohibited procedure,"[429] and highlighted the widely used standard D&E (dismemberment) method, which the lower courts found "to have extremely low rates of medical complications," and which experts for both sides agreed was "safe."[430] After additional discussion, he concluded that the statute was facially constitutional "where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, *given the availability of other abortion procedures that are considered to be safe alternatives.*"[431] Kennedy's thinking seems clear: if a legal abortion

426 *Id.* at 162.

427 *Id.* (quoting Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004)).

428 *Id.*

429 *Id.* at 164.

430 *Id.*

431 *Id.* at 166–67 (emphasis added).

method is "safe" for a particular woman, resort to the prohibited abortion method is not "necessary to preserve [her] health," even if the prohibited method is marginally safer.[432] The same reasoning would establish that *Roe*'s life-or-health exception applies only when continued pregnancy is not "safe" for the woman.[433]

In sum, Justice Kennedy's *Gonzales* opinion implicitly rejects the relative-safety approach. But in favor of what? *Gonzales* gives us no explicit guidance about what counts as "safe," although it seems likely that small statistical risks are consistent with "safe" status—and hence are not "significant"—even if they involve death or serious impairment of health.[434] Also missing from *Gonzales* is any explanation of

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432 Justice Kennedy also distinguished the ban in *Gonzales* from the one at issue in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 77–79 (1976) (invalidating a ban on saline amniocentesis, then the most widely used second-trimester abortion method):

> The Court found the ban in Danforth to be "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.

Gonzales, 550 U.S. at 165 (citation omitted) (quoting *Danforth*, 428 U.S. at 79). The point of this passage is obviously that the federal ban does not violate the undue burden test by impeding women's access to previability abortions. Thus, *Gonzales* confirms that a previability restriction on abortion methods must comply with *both* the "significant health risks" test and the undue burden test.

433 The Court's analysis in Part IV.B of *Gonzales* seems at times to conflate the health-exception question with the distinct question of whether the Act creates an undue burden. *See Gonzales*, 550 U.S. at 164 ("The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden."). Analytically, the health-exception issue turns on whether the health risks created by a ban on partial-birth abortions are "significant." The relevant comparison is between the prohibited method and the permitted alternative methods. By contrast, the undue burden issue turns on whether the ban will deter enough women from having abortions to warrant finding that the ban creates a "substantial obstacle." The relevant comparison here is between the permitted alternative abortion methods and childbirth.

The most likely explanation for *Gonzales*'s failure clearly to distinguish the health-exception and undue-burden questions is that the availability of safe alternatives to intact D&E is relevant to *both* inquiries. Without safe alternatives, a ban on intact D&E would create serious health risks that might endanger women's health, necessitating a health exception. Without safe alternatives, a ban on intact D&E might even cause abortion to be more dangerous than childbirth, thus presumably deterring many women from having abortions. In fact, however, given the availability of safe alternative abortion methods, it seems perfectly obvious that the federal ban on partial-birth abortions will not deter women from having abortions.

434 *Cf.* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 642 (1980) (plurality opinion) ("'[S]afe' is not the equivalent of 'risk-free.' There are

why the health exception should be interpreted to require serious health risks rather than just nonnegligible ones. *Gonzales* refuses to "interpret[ ] *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer,"[435] and insists that states may require women to bear "marginal" health risks in order to protect fetal life.[436] But it provides no rationale for these tradeoffs, nor any account of the limits within which they are permitted.

F. Justice Ginsburg's Gonzales *Dissent*

Justice Ginsburg's opinion for the four dissenting Justices in *Gonzales* managed to go even farther than *Stenberg* in the direction of a relative-safety interpretation of the life-or-health exception. A first clue is that Ginsburg did not quote *Casey*'s "significant health risks" test—even though *Ayotte* had placed the Court's unanimous imprimatur on that formulation, and *Stenberg* had given it a relative-safety reading. Instead, Ginsburg wrote that "the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health."[437] Her dissent's repeated references to the need to "safeguard" women's health suggest that she would return to *Thornburgh*'s absolutist ruling that no trade-offs of fetal life against risks to a woman's health are permitted.[438]

Ginsburg also stressed *Stenberg*'s argument that the life-or-health exception entails the right to an abortion whenever the abortion provider thinks continuing the pregnancy would involve greater health risks; and as a corollary, includes the right to have an abortion by whatever method the abortion provider thinks appropriate "'in light of estimated comparative health risks (and health benefits)'" in the particular case.[439] In her view, there was ample expert testimony attesting that intact D&E is in some cases and for some women "safer than alternative procedures and necessary to protect women's

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many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment, nevertheless, few people would consider these activities 'unsafe.' Similarly, a workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm.").

435 *Gonzales*, 550 U.S. at 158.

436 *Id.* at 166 ("Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.").

437 *Id.* at 172 (Ginsburg, J., dissenting).

438 *See, e.g., id.* at 171–73, 181, 189.

439 *Id.* at 174 (quoting Stenberg v. Carhart, 530 U.S. 914, 937 (2000)).

health."[440] For the *Gonzales* dissenters (as for the *Stenberg* majority), the absence of a health exception is unconstitutional because there is significant medical authority for the proposition that intact D&E is the safest abortion method in some circumstances.[441] The safety benefits need not be large (or even material); it suffices that "intact D&E carries *meaningful* safety advantages over other methods."[442]

G. *The Implications of* Gonzales*'s Ruling Limiting Facial Challenges*

Gonzales strongly implies—but does not explicitly hold—that a majority of five Justices think that the life-or-health exception applies only in the presence of substantial risks of serious health impairment, while four Justices believe that the exception applies whenever the perceived health risks of pregnancy are "meaningfully" greater than those of abortion.[443] What explains the majority's reticence? One plausible explanation is that some of the Justices in the majority want to wait until these kinds of issues are presented in the more concrete factual context of an as-applied challenge. Justice Kennedy seemed to signal as much in the final part of his opinion in *Gonzales*, which ruled that "these facial attacks should not have been entertained in the first instance."[444] Instead, the Court held, a "preenforcement, as-applied challenge[ ]" was "the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used."[445] The rationale for this ruling was that "[i]n an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."[446] That rationale—which *Gonzales* applied to a challenge to the federal Act's failure to contain a health exception—would seem to apply with full

440 *Id.* at 177.

441 *Id.* at 180 (alterations in original) (quoting *Stenberg*, 530 U.S. at 932).

442 *Id.* at 176 (emphasis added); *cf.* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 807 (1986) (White, J., dissenting) (listing "meaningful" as a synonym for "significant").

443 The text was written before Justice Souter announced his retirement in June 2009. It remains to be seen whether his replacement, Justice Sotomayor, will prove to be as unwavering a supporter of abortion rights as Souter was.

444 *Gonzales*, 550 U.S. at 167.

445 *Id.* Although Kennedy did not refer to the medical-emergency litigation in *Casey*, that would seem to be a good example of the kind of as-applied litigation he had in mind: Planned Parenthood identified certain specific conditions that were likely to occur and in which an abortion would be necessary to preserve the life or health of the mother, and argued that these cases were not covered by Pennsylvania's medical-emergency provision.

446 *Id.*

force to a challenge to the scope of a statutory life-or-health exception.

Suppose a state enacted a statutory life-or-health exception framed in explicit self-defense terms; for example, banning postviability abortions "unless necessary to avoid grave danger of death or of serious, permanent health impairment." *Gonzales* seems to say that a facial challenge to this law would be improper, because it would not be unconstitutional in a "large fraction" of the cases to which it applies.[447] The challengers would therefore need to bring a pre-enforcement as-applied challenge, in which they identified particular medical conditions in which an abortion would allegedly be "necessary to preserve the life or health of the mother" (or, equivalently, in which continued pregnancy would impose "significant health risks"). The litigation could then proceed on the basis of in-depth evidentiary submissions concerning the medical risks involved.

Perhaps the *Gonzales* Court is right that judicial deliberations about health-exception issues would be facilitated by fuller and more concrete development of the relevant medical risks through as-applied litigation. The difficulty, however, is that Planned Parenthood and other repeat players in abortion rights litigation may well decide to refrain from bringing an as-applied challenge to legislation of this kind. From their perspective, such a challenge would be very risky. If this hypothetical statute reached the Supreme Court, the *Gonzales* majority would probably uphold it.[448] That would encourage pro-life activists to push hard for similar legislation in other states. Abortion-rights advocates might well prefer to take the position that the law is unconstitutional, and quietly advise their clients not to obey it. Only if a state or local prosecutor actually brought criminal charges against a doctor for performing a postviability abortion in violation of the hypothetical statute would judicial resolution of the constitutional issue be necessary.[449] Although the statute's tougher

447 *See id.* at 167–68 (declining to resolve the conflict in the Court's cases as to the proper burden that must be met by a party bringing a facial challenge, because the challengers in *Gonzales* "have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases," and thus failed to meet even the less demanding burden).

448 This prediction is based on Justice Kennedy's dissent in *Stenberg* and his majority opinion in *Gonzales*. I have hedged it because neither opinion commits him to a self-defense standard as restrictive as the one in the hypothetical statute.

449 Something akin to this may have happened in connection with the federal Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531 (2006), the Court upheld in *Gonzales*. Responding to the majority's directive, Justice Ginsburg wrote: "One may anticipate that such a preenforcement challenge will be mounted swiftly, to ward off serious, sometimes irremediable harm, to women whose health would be endangered by the

language may improve the odds, experience since *Roe* was decided suggests that such prosecutions are rare. The *Gonzales* majority, then, both missed an opportunity to define the life-or-health exception in self-defense terms, and made it considerably less likely that such an opportunity would come its way again.[450]

Nor is it likely that the lower federal courts will find sufficiently clear guidance in *Gonzales* to impel them to recognize that the Court has rejected the relative-safety approach. Suppose, for example, that the New Hampshire legislature had not repealed the parental notification act that was at issue in *Ayotte*, and that the district court had crafted a narrower remedy enjoining the Act's application when parental notification would impose "significant health risks" on the pregnant minor. What would have happened if, after *Gonzales*, the State had returned to the district court requesting modification of that injunction to make clear that only "serious" or "substantial" risks of major health impairment qualify as "significant health risks"? While it is conceivable that the district court could be persuaded by the kind of close reading of *Gonzales* I have presented, it seems considerably more likely that the average judge would stick to the risk-averse strategy of leaving "significant health risks" undefined.

CONCLUSION

For more than thirty-five years the Justices have clung to the fiction that the meaning of *Roe*'s life-or-health exception is clear and unambiguous. It is not: a reasonable interpretive case can be made

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intact D&E prohibition." *Gonzales*, 550 U.S. at 189 (Ginsburg, J., dissenting). It has now been more than two years since *Gonzales* was decided, and so far as I can tell no pre-enforcement challenge has been forthcoming. In part, this is because the federal act contains an enormous loophole: it prohibits only the partial-birth abortion of a *living* fetus. *See* § 1531(b)(1)(B) (requiring an "overt act . . . that kills the partially delivered living fetus"). Consequently, abortion providers who prefer (for whatever reasons) to use the intact D&E method can simply kill the fetus by means of a lethal injection prior to the abortion. *See Gonzales*, 550 U.S. at 164 (acknowledging this "alternative"). But that's not the whole story. If the Court's composition shifted so that there were five reliable votes for the relative-safety approach, a pre-enforcement challenge would be mounted soon enough. As to whether partial-birth abortions of living fetuses continue to occur in circumstances in which the abortion doctor believes this method is significantly safer for the woman, I have no information one way or the other. That said, what are the chances that a United States Attorney would bring charges in such a case?

450 From a pro-life standpoint, the silver lining is that legislation adopting the self-defense approach to statutory life-or-health exceptions (whether in conjunction with postviability abortion bans or restrictions on abortion methods) is less likely to be challenged in federal district court than in the past.

for both the self-defense and relative-safety readings. In the face of this ambiguity of its own making, the Court should stop procrastinating, engaging in sophistry, and flip-flopping, and make a reasoned and explicit choice between these competing approaches. Or, if the Court believes that *Casey*'s "significant health risks" language should be given an intermediate meaning, it should explain what justifies this alternative and what legal test it entails.

As Part I showed, when Justice Blackmun wrote *Roe*'s life-or-health exception, he must have realized that the language he used could plausibly be understood to require either that the woman's life or health be in serious danger, or merely that abortion be safer for her than continued pregnancy. In his subsequent opinions for the Court, Blackmun signaled (in *Colautti*) and ultimately held (in *Thornburgh*) that the latter, relative-safety interpretation was correct. But he never claimed that *Roe* itself had so held. Nor did Justice Blackmun offer any response to Justice White's argument that *Roe*, by recognizing a compelling state interest in fetal life, necessarily envisioned that state prohibitions on postviability abortions could constitutionally subject women to *some* increased health risks (perhaps even substantial ones). *Thornburgh* brought temporary clarity to the meaning of the life-or-health exception, but by *force majeure* rather than reasoned argument.

And then along came *Casey*. The joint opinion in *Casey* reaffirmed what it took to be "*Roe*'s essential holding[s]," including "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."[451] But although the joint opinion undertook to re-examine and defend "the State's power to restrict abortions after fetal viability," it was silent as to the life-or-health exception's rationale and scope. Moreover, the joint opinion asserted that the doctrine of stare decisis should apply to *Roe*'s viability line, because while "[a]ny judicial act of line-drawing may seem somewhat arbitrary . . . *Roe* was a reasoned statement, elaborated with great care."[452] But again, whether or not *Roe*'s discussion of viability qualifies as a "reasoned statement," *Roe*'s

451 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (majority opinion). The Court described *Roe*'s "essential holding" as having "three parts": in addition to the holding quoted in text, these were "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State," and "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Id.*

452 *Id.* at 870 (joint opinion of Kennedy, O'Connor, and Souter, JJ.).

unelaborated recitation of the life-or-health exception obviously does not.

Judged by the standards recited in the *Casey* joint opinion itself, *Casey*'s cryptic treatment of *Roe*'s life-or-health exception is indefensible—indeed, illegitimate. *Casey* invokes the supposedly "inescapable fact" that the "adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment";[453] asserts that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation";[454] contends that *Roe* (and, by implication, *Casey* itself) is the rare case in which "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution";[455] and urges that in such cases "only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance."[456] Well and good. But what reasoned judgment underlies *Roe*'s life-or-health exception, and what legal principle does it adopt? *The Court has never said.* How can the Court conceivably expect the Nation to unite around "a common mandate" when the Court has failed to specify what that mandate requires, let alone bothered to explain how it is "rooted in the Constitution"?

Nor does it suffice to trot out the phrase "significant health risks" from *Casey* as if that settled matters. True, the *Casey* plurality's application of that language suggests a version of the life-or-health exception that requires an actual (but not imminent) threat of serious health impairment. As such, the "significant health risks" test rejects *Thornburgh*'s absolutist version of the relative-safety test, apparently in favor of a relatively permissive self-defense test. Absent any explanation of the rationale for this middle-of-the-road outcome, however, the joint opinion remains in violation of its own admonition that

> [t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and

453 *Id.* at 849 (majority opinion).

454 *Id.* at 866.

455 *Id.* at 867.

456 *Id.*

> political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.[457]

Finally, there is the Court's inconsistent—and consistently question-begging—employment of *Casey*'s "significant health risks" language in its subsequent decisions. In *Stenberg*, the Court implicitly adopted a relative-safety interpretation when it signaled, without explanation, that a postviability abortion must be permitted whenever abortion is "significantly safer" than pregnancy.[458] In *Gonzales*, the Court implicitly adopted a self-defense interpretation when it signaled, again without explanation, that a postviability abortion must be permitted only if continued pregnancy and childbirth would not be "safe."[459] These results should surprise no one. As this Article has shown, the "significant health risks" test is susceptible to practically the same wide range of competing interpretations as the life-or-health exception it glosses. Yet the liberal Justices pretend that *Casey*'s language self-evidently refers to all nonnegligible health risks, while their conservative counterparts treat it as equally self-evident that it refers only to genuinely dangerous ones. When it comes to *Roe*'s life-or-health exception, both factions (and Justice Kennedy, whose vote currently determines which one prevails in any particular case) have long forgotten that it is the "duty," not only its "province," to "say what the law is"[460]—especially that law was crafted by the Court itself.

457 *Id.* at 865–66.

458 *See* Stenberg v. Carhart, 530 U.S. 914, 934 (2000) (emphasis omitted).

459 *See* Gonzales v. Carhart, 550 U.S. 124, 167 (2007).

460 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).