

# Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government

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## INTRODUCTION

Forty-three years after issuing a decision intended to settle the abortion dispute once and for all,<sup>1</sup> and twenty-four years after calling on the “contending sides of a national controversy to end their national division,”<sup>2</sup> the Supreme Court is at it again.<sup>3</sup> But just as the

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1. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 580–99 (1994) (discussing the Supreme Court’s drafting of its *Roe* decision).

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

fates of *Roe v. Wade* (in 1973) and *Planned Parenthood v. Casey* (in 1992) were ultimately left to elected officials, interest groups, and the like, the Court's handiwork will be judged yet again by whether it is well or poorly suited to 2016 political conditions. So let's have at it.

This Article will argue that now is the time for the Court to decisively intervene in the abortion controversy by issuing a maximalist *Roe*-like decision; today's politics do not support an indeterminate standard like *Casey*'s undue burden test. In other words, assuming that there is a constitutional right to abortion,<sup>4</sup> today's Court should assume the heroic role Erwin Chemerinsky embraces in *The Case Against the Supreme Court* and other writings;<sup>5</sup> specifically, the Court should "protect the rights of minorities who cannot rely on the political process."<sup>6</sup> For Chemerinsky, protecting the rights of minorities is the "primary reason for having a Supreme Court," and is "why the Justices of the Supreme Court . . . are granted life tenure."<sup>7</sup>

In explaining why today's Court should decisively protect abortion rights, this Article will evaluate a common criticism of *Roe v. Wade*, that the decision unnecessarily perpetuated counterproductive, divisive backlash by seeking to short circuit the political process and mandate an abortion code generally unacceptable to the nation. Left-leaning academics, advocates, and judges have made this criticism—including Ruth Bader Ginsburg, Cass Sunstein, Jeff Rosen, Mike

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3. On November 13, 2015, the Supreme Court granted certiorari in *Whole Women's Health v. Cole*, a constitutional challenge to a 2013 Texas statute that both requires physicians who perform abortions to have admitting privileges at nearby hospitals and mandates that abortion clinics have facilities equal to an outpatient surgical center. 136 S. Ct. 499 (2015). For discussion of the possible implications of the death of Justice Antonin Scalia on the *Whole Health* decision, see Dahlia Lithwick, *The Conservative Era is Over*, SLATE (Mar. 8, 2016), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/03/antonin\\_scalia\\_s\\_death\\_has\\_changed\\_the\\_way\\_the\\_supreme\\_court\\_and\\_conservative.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/03/antonin_scalia_s_death_has_changed_the_way_the_supreme_court_and_conservative.html) [<https://perma.cc/2Y3T-2YAX>]. For further discussion, see *infra* notes 292–294.

4. As will become clear, this Article advances a theory about when the Supreme Court should issue minimalist or maximalist opinions. My concern is the scope of judicial rulings; the question of whether there is a constitutional right to abortion is not addressed.

5. Prominent examples include ERWIN CHEMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

6. ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 10 (2014). No doubt, pro-life interests see fetuses as minorities and deserving of constitutional protection for this reason. See, e.g., Ronald Reagan, *Abortion and the Conscience of the Nation*, HUMAN LIFE REV. (Feb. 3 1983), <http://www.humanlifereview.com/abortion-and-the-conscience-of-the-nation-ronald-reagan-the-10th-anniversary-of-the-supreme-court-decision-in-roe-v-wade-is-a-good-time-for-us-to-pause-and-reflect-our-nationwide-policy-of-abortion-o/> [<https://perma.cc/TTG2-4ZTT>]. If that view were accepted, there would be no right to abortion; my Article, however, assumes there is a constitutional right to abortion.

7. CHEMERINSKY, *supra* note 6, at 9–10.

Klarman, Gerald Rosenberg, and Bill Eskridge.<sup>8</sup> In earlier writings, I too criticized *Roe* on these grounds and, correspondingly, celebrated *Pennsylvania v. Casey* for recalibrating abortion rights in ways that matched prevailing views of popular opinion and elected official preferences.<sup>9</sup>

In the pages that follow, I will argue that I and others miscalculated the possible virtues of a rigid decisional rule. In particular, I will explain how party polarization and the related rise of the Tea Party calls into question the benefits of an indeterminate standard in the modern abortion context. And while I will not disavow earlier writings, I will contend that events of the past five years suggest that proponents of the *Casey* compromise need to recognize that today's political dynamic is far different than the political dynamic in 1973 (when *Roe* was decided) or 1992 (when *Casey* was decided)—so much so that any theory of constitutional rights moored to an understanding of the political process must take recent developments into account.<sup>10</sup> For much the same reason, theories of Supreme Court decisionmaking that look to the people or elected officials to engage in constitutional deliberation must too be updated to take into account party polarization.<sup>11</sup>

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8. See, e.g., JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 95 (2006) (discussing divisiveness of state abortion laws after *Roe*); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 262–64 (2d ed. 2008) (same); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, 114–15 (1999) (analogizing post-*Roe* liberalization of abortion laws to physician-assisted suicide); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 519 (2001); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992) (same); Jason Keyser, *Ruth Bader Ginsburg: Roe v. Wade Ruling Flawed*, HUFFINGTON POST, (July 11, 2013), [http://www.huffingtonpost.com/2013/05/11/ruth-bader-ginsburg-roe-v-wade\\_n\\_3261187.html](http://www.huffingtonpost.com/2013/05/11/ruth-bader-ginsburg-roe-v-wade_n_3261187.html) [<https://perma.cc/2KVV-6CWK>] (same); Michael J. Klarman, *Roe's Backlash*, BALKINIZATION (Sept. 11, 2008), <http://balkin.blogspot.com/2008/09/roes-backlash.html> [<https://perma.cc/6PLG-2EML>] (same).

9. I have made this claim on several occasions, including in NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE (1996) [hereinafter DEVINS, SHAPING]; Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318 (2009) [hereinafter Devins, *Abortion Wars*]; Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1981–82 (1999) [hereinafter Devins, *Democracy-Forcing*] (reviewing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999)).

10. Examples of such theories include judicial minimalism (the focus of this Article), the debate over rules versus standards, and related backlash theories that call upon the Supreme Court to moderate their decisionmaking to take potential elected government resistance into account. For one prominent example, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

11. See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (calling for populist control of constitutional interpretation); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (calling for the

In particular, an indeterminate standard may facilitate political discourse—but only if political discourse is possible.<sup>12</sup> In the 1970s and even around 1992 (when *Casey* was decided), political discourse on abortion rights was possible—as the issue did not deeply divide Democrats and Republicans and, relatedly, we did not live in a world of red-state, blue-state politics where one political coalition or the other dominates state political discourse on divisive social issues.<sup>13</sup> Today, political discourse is not possible in deep-red or deep-blue states, and there is more reason for the Supreme Court to opt for a decisional rule that provides greater guidance to lower courts.<sup>14</sup> Indeed, one of the striking features of the *Roe* to *Casey* period is that less polarized political actors actually sought common ground immediately after *Roe*, and post-*Roe* legislation was rarely in direct conflict with *Roe*.<sup>15</sup> Today, red state political actors are not interested in compromise; in an effort to demonstrate their pro-life bona fides, 288 abortion restrictions have been enacted since 2011, fifty-seven of them in 2015.<sup>16</sup> Red state lawmakers, moreover, are now enacting legislation directly in conflict with the one determinate holding of *Casey*—that states cannot outlaw abortion until fetal viability.<sup>17</sup>

My assessment is a first cut at the question of how party polarization impacts our understanding of constitutional theories grounded in Court-elected government dialogue; specifically, I will focus my discussion on judicial minimalism theory. Judicial minimalism dates back to at least Alexander Bickel's 1961 call for the Court to exercise the "passive virtues" and leave things undecided, so that elected government could initially resolve constitutional questions;<sup>18</sup> it was updated by Cass Sunstein, Richard Fallon, Mike Dorf, and Neal Katyal around 2000.<sup>19</sup> Minimalism remains vibrant

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abandonment of judicial review from the Courts—so that elected government, most notably Congress, can take ownership of the Constitution).

12. Political discourse is valued in some but not all theories that call for the Supreme Court to take political context into account. For reasons I will discuss *infra* Part II, it is critical to judicial minimalism theory, which is the focus of this Article.

13. See *infra* notes 63–154.

14. See *infra* notes 183–251.

15. See *infra* notes 103–104.

16. See Editorial, *The Reproductive Rights Rollback of 2015*, N.Y. TIMES (Dec. 19, 2015), [http://www.nytimes.com/2015/12/20/opinion/sunday/the-reproductive-rights-rollback-of-2015.html?\\_r=0](http://www.nytimes.com/2015/12/20/opinion/sunday/the-reproductive-rights-rollback-of-2015.html?_r=0) [<https://perma.cc/L4D9-MC2N>].

17. See *infra* discussion accompanying notes 224–230.

18. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

19. See SUNSTEIN, *supra* note 8 (arguing for judicial minimalism); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998) (advocating judicial

and is almost certainly the most important contemporary constitutional theory that formally takes into account the dynamic between the Supreme Court and elected government.<sup>20</sup>

My analysis will be organized as follows: In Part I, I will provide a quick tour of minimalism theory, contrasting minimalism to the heroic vision of the Supreme Court championed by Erwin Chemerinsky. Part I will also summarize minimalist critiques of *Roe* and explain the relevance of party polarization to the minimalism debate. Part II, the heart of this Article, will use abortion as a case study to examine when minimalism should be embraced and when it should be disavowed. By contrasting state practices around the time of *Roe* and *Casey* (when there was comparatively little polarization) to state practices today (when there is extreme polarization), I will argue both that an indeterminate *Casey*-like standard would have been better suited to the less polarized 1973 period and that a rule-like *Roe* standard would be better suited to today's world of highly polarized red and blue states. I will also consider the transitional 1992–2009 period, explaining why the *Casey* compromise—which had largely stabilized abortion politics during this period—was nonetheless doomed to fail in the face of continuing polarization.<sup>21</sup> In Part III, I will again consider minimalism theory, arguing that minimalism theory is incomplete in that it does not meaningfully consider decentralized decision making by the states and the related possibility that state actors will register entrenched political differences (rather than engage in the constructive constitutional dialogues embraced by minimalists).<sup>22</sup>

## I. MINIMALISM THEORY AND ABORTION

Judicial minimalism is a counter to the heroic vision of judging championed by Erwin Chemerinsky. “Heroes believe in a large and potentially transformative role for the federal judiciary in the Constitution’s name[;]” most significantly, they are “entirely willing to invoke an ambitious understanding of the Constitution to invalidate

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minimalism in statutory interpretation); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998) (suggesting judicial “advicegiving” can achieve judicial minimalism).

20. On the continued salience of minimalism, see J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 97–98 (2012).

21. In this discussion, I will seek to harmonize my earlier writings on abortion and minimalism with my current thinking on these topics. See *infra* notes 180–185.

22. I do not mean to suggest that minimalism theory never references political context; it sometimes does and I will discuss that in Part I. My point is that minimalism theory needs to be updated to formally take account of pervasive party polarization.

the decisions of the federal government.”<sup>23</sup> *The Case Against the Supreme Court*, for example, takes on the Warren Court for doing “much less than it needed to and should have done, even in the areas of its greatest accomplishments, such as school desegregation and ensuring counsel for criminal defendants.”<sup>24</sup> Under this view, the Court was wrong to take into account potential backlash to its decision by denying certiorari and otherwise avoiding desegregation and related controversies in the immediate aftermath of *Brown*.<sup>25</sup> The Court likewise committed error by embracing a vague indeterminate standard—“all deliberate speed”—in its initial remedial order; the Court, instead, should have told “the lower courts that would be responsible for implementing *Brown* about what they were supposed to do,” including “deadlines or timelines” and “techniques or approaches to desegregating schools.”<sup>26</sup>

On abortion, *The Case Against the Supreme Court* is largely silent. Chemerinsky notes that abortion is “enormously controversial” and that “[t]ens of millions of women have had safe, legal abortions that would not have occurred without *Roe v. Wade*.”<sup>27</sup> In other recent writings, Chemerinsky has defended *Roe*, arguing that the state’s interest in fetal life begins with viability and that it would impermissibly promote religion to say that fetal life begins any time earlier.<sup>28</sup> More to the point, from a heroic perspective, the Supreme

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23. CASS R. SUNSTEIN, *CONSTITUTIONAL PERSONAE* 5 (2015). Sunstein notes that heroes come in all ideological stripes—some, like Chemerinsky, “emphasize equality on the basis of race, sex, and sexual orientation” while others “stress the limited power of the national government and the importance of private property and freedom of contract.” *Id.*

24. CHEMERINSKY, *supra* note 6, at 155.

25. *Id.* at 139–40 (noting the long delay after *Brown* and before the issuing of its busing order in 1971); see also Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 *YALE L.J.* 1423, 1475–76 (1994) (noting the Justices’ refusal to decide an anti-miscegenation issue in 1956 was linked to risks of such a ruling “thwarting” or “undermining” *Brown*); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 *GEO. L.J.* 1, 34–44 (1979) (noting compromises of Justices in reaching unanimity in *Brown* and, relatedly, showing the Court’s concern that the decision be accepted as legitimate by elected officials).

26. CHEMERINSKY, *supra* note 6, at 139.

27. *Id.* at 289. Reviews of the book noted that Chemerinsky largely steers clear of abortion. See Terry Eastland, *Book Review: ‘The Case Against the Supreme Court’ by Erwin Chemerinsky*, *WALL ST. J.* (Sept. 24, 2014, 6:44 PM), <http://www.wsj.com/articles/book-review-the-case-against-the-supreme-court-by-erwin-chemerinsky-1411598692> [<http://perma.cc/4YAN-3B96>]; David G. Savage, *Review: ‘The Case Against the Supreme Court’ Pushes for Reforms*, *L.A. TIMES* (Sept. 19, 2014), <http://www.latimes.com/books/jacketcopy/la-ca-jc-erwin-chermerinsky-20140921-story.html> [<https://perma.cc/6KBD-5WV8>].

28. CHEMERINSKY, *supra* note 5, at 173–74. This position is critiqued by Eric Posner in his review of the book. See Eric A. Posner, *One Side Now*, *NEW REPUBLIC* (Jan. 1, 2011), <https://newrepublic.com/article/78394/one-side-now-warren-court> [<https://perma.cc/7KRP-HHPP>] (arguing that religious values can inform public debate and that not all criticism of the viability

Court did in *Roe* what it failed to do in *Brown*. The trimester standard essentially served as a legislative code that instructed lower court judges on how to implement the ruling.<sup>29</sup> The Court correspondingly eschewed an incremental approach that would obviate potential backlash or encourage democratic experimentation. By choosing viability as the point where the state's interest in future life became compelling, the Justices embraced a rule at odds with public opinion—as public opinion at the time generally supported first but not second trimester abortions.<sup>30</sup>

*Roe v. Wade*, in other words, seems exemplary of Chemerinsky's "all in" approach; an approach that sees the Court's primary function as vindicating constitutional rights for those unprotected in the political process—and vindication means muscular decisions that do not countenance delay or narrow, indeterminate rulings. In sharp contrast, judicial minimalists embrace a far more modest role for the courts and, relatedly, a larger role for elected officials. Minimalists, in varying degrees, value democratic deliberation, take account of potential backlash, and recognize other limits in judicial capacity that might result in a more modest ruling.<sup>31</sup>

Judicial minimalism comes in two forms.<sup>32</sup> Procedural minimalism (championed by Alexander Bickel) calls for the Supreme Court to defer a decision on the merits by denying certiorari or concluding that it lacks jurisdiction to decide a case. Substantive minimalism (championed by Cass Sunstein and other New Judicial Minimalists) envisions that the Supreme Court will decide the dispute at hand but issue "narrow and shallow" decisions, which leave it to the political process and future Court decisions to sort out most aspects of the larger policy issue.<sup>33</sup>

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line is, in fact, religious). For a competing review that praises the book, see Tim Rutten, *Book Review: 'The Conservative Assault on the Constitution' by Erwin Chemerinsky*, L.A. TIMES (Oct. 6, 2010), <http://articles.latimes.com/2010/oct/06/entertainment/la-et-rutten-20101006> [<https://perma.cc/5R8S-W6GW>].

29. This feature of the decision was extremely controversial, even among the Justices that supported abortion rights. See Bob Woodward, *The Abortion Papers*, WASH. POST (Jan. 22, 1989), <http://groups.csail.mit.edu/mac/users/rauch/nvp/roe/woodward.html> [<https://perma.cc/7UFH-AH2R>].

30. See Klarman, *supra* note 8. For a competing view, see sources cited *infra* note 89.

31. One other limit is institutional constraints on the courts' ability to understand the relevant facts, including rapidly changing technology. See SUNSTEIN, *supra* note 8, at 174 (discussing how the Internet and other changes in communications technology might caution a minimalist approach to free speech regulation).

32. For a catalogue and assessment of different iterations of minimalist theory, see Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000).

33. Minimalist theory is neither determinate nor monolithic. The determination of whether a decision is, in fact, narrow or shallow is largely "in the eye of the beholder." Jeffrey Rosen, *The*

In critical respects, both procedural and substantive minimalism seek to facilitate constructive constitutional dialogues between the Court, elected government, and the people. For Bickel, the Court is dependent upon the political branches in two interrelated ways. As a practical matter, Bickel recognized that the Court's authority ultimately extends as far as the political process chooses to recognize it. More philosophically, Bickel believed that the principles from which good constitutional decisions are wrought ultimately come from colloquy among the three branches of government. Delay, therefore, has the advantage of allowing the "full political and historical context, the relationship between the Court and the representative institutions of government" to be made clearer.<sup>34</sup> Once a constitutional principle has suitably ripened, however, Bickel thought that the Court may rule broadly, for the Court was the branch best suited to "dealings with matters of principle."<sup>35</sup>

Unlike the juricentric focus of procedural minimalism, substantive minimalism is motivated primarily by polycentrism.<sup>36</sup> For New Judicial Minimalists, political decision making is preferred to judicial decision making. Some New Minimalists argue that the Court should articulate fundamental values but then "leave the implementation of those values mostly to the political process."<sup>37</sup> Others imagine a more vigorous, but nonetheless minimalist, judicial role. Cass Sunstein, for example, sees the Court playing the role of active facilitator—catalyzing democratic processes "rather than preempt[ing] democratic deliberation."<sup>38</sup> In this way, minimalism "attempts to promote the democratic ideals of participation, deliberation, and responsiveness" and "allows continued space for

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*Age of Mixed Results*, NEW REPUBLIC (June 27, 1999), <https://newrepublic.com/article/74083/the-age-mixed-results> [<https://perma.cc/53AZ-AHV7>]. Moreover, minimalism has been subject to criticism as "ambiguous" and Sunstein's thinking has evolved over the course of his numerous writings on the subject. See James E. Fleming, *The Odyssey of Cass Sunstein*, 43 TULSA L. REV. 843 (2008) (synthesizing iterations of Sunstein's minimalism into a series of "maximalist" questions); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1957 (2005) (dubbing Sunstein's minimalism "ambiguous"). Nonetheless, the core of minimalism remains the same and it is that core that I am most concerned with, that is, the idea that the Supreme Court should leave space for democratic outlets to interpret the Constitution and shape the meaning of constitutional values. For my purposes, minimalism (whether advanced by Sunstein or someone else) will be considered at that level of generality.

34. BICKEL, *supra* note 18, at 124.

35. *Id.* at 25

36. Differences in procedural and substantive minimalism are spelled out in Christopher J. Peters & Neal Devins, *Alexander Bickel and the New Judicial Minimalism*, in THE JUDICIARY AND AMERICAN DEMOCRACY 45 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

37. *Id.* at 60 (citing Dorf, *supra* note 19, at 79).

38. SUNSTEIN, *supra* note 8, at xiv.

democratic reflection from Congress and the states.”<sup>39</sup> Furthermore, narrow and shallow decisions avoid “takin[ing] on other people’s deeply held moral commitments,” leaving questions of high complexity to debate in the forum of public opinion and the legislative chamber.<sup>40</sup> Under this view, Court decisions should be indeterminate because democratic deliberation best occurs in the shadow of uncertainty. Contending that the “connection between judicial minimalism and democratic self-government” is his “most important goal,”<sup>41</sup> Sunstein concludes that the Court should only issue a “maximalist” opinion when such a decision would cement a preexisting societal consensus.<sup>42</sup>

As the above makes clear, the New Minimalists and Bickel have fundamentally different views of how the courts should collaborate with elected government. For the purposes of this Article, I will treat procedural and substantive minimalism as two tools available to jurists who do not want to settle a constitutional dispute by issuing a maximalist opinion. In particular, can the minimalist project of facilitating democratic deliberation be advanced by delaying a decision or issuing a narrow indeterminate ruling? More to the point, would the Court have facilitated democratic deliberation on abortion rights if it had pursued a minimalist strategy?

The answer to this question hinges both on whether a maximalist decision frustrates democratic deliberation and, relatedly, whether a minimalist decision facilitates discourse. Minimalist critics of *Roe* make both claims—suggesting that a minimalist decision would have facilitated constructive discourse in ways that *Roe* did not. Moreover, minimalist critics make the related argument that *Roe* spurred on backlash counterproductive to the goals of reproductive and women’s rights. To start, minimalists criticize *Roe* for stifling political discourse.<sup>43</sup> Bill Eskridge speaks of the decision “preempt[ing] the normal operation of politics . . . [by] hard-wiring the political process against pro-life people.”<sup>44</sup> For Cass Sunstein, *Roe* prompted

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39. *Id.* at x.

40. *Id.* at 5.

41. *Id.* at xiv.

42. *Id.* at xiv.

43. This criticism is widespread. See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011) for collected sources. For a constructive counterargument suggesting that *Roe* did not frustrate political discourse, see MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015).

44. Eskridge, *supra* note 8, at 519. For a more detailed statement of Eskridge’s thinking on why *Roe* was anti-democratic and, ultimately, counterproductive, see William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312–13 (2005) (“In the early 1970s . . . [t]he matter [of abortion] was one of intense political debate, and the country was hardly at rest. Under such circumstances, the

“destructive and unnecessary social upheaval”;<sup>45</sup> “the decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women’s movement by spurring opposition and demobilizing potential adherents.”<sup>46</sup> The Court, instead, should have proceeded narrowly, “engaging in a form of dialogue with the political process.”<sup>47</sup>

In previous writings, I too argued that the Court should have pursued a minimalist strategy in *Roe* by issuing a less ambitious decision and then steering clear of the controversy for several years.<sup>48</sup> A decision limiting abortion rights to rape victims (as *Roe* claimed to be) would have “appeared less extreme and, as such, may not have galvanized pro-life interests.” Such a decision, moreover, “might well have spurred the pro-choice community into action.” Rather than rely on the courts to vindicate abortion rights, “pro-choice and pro-life interests would have pursued abortion legislation in the shadow of constitutional uncertainty. Over time, it is possible that some consensus would have emerged.”

When advancing that claim in 1999, there was good reason to think that such a minimalist strategy was sound. *Roe*’s sweeping recognition of abortion rights seemed to prompt political discord. More than that, the Court’s 1992 modification of *Roe* in *Pennsylvania v. Casey* seemed to quiet the abortion wars by replacing *Roe*’s maximalist trimester test with an undue burden test that seemed indeterminate and minimalist.<sup>49</sup> By 2009, I was so confident that minimalist decision-making in abortion would stave off political conflict that I titled an article *How Casey (Pretty Much) Settled the Abortion Wars*.

Today, the political landscape has changed in ways that call into question minimalist claims about *Roe*.<sup>50</sup> The post-*Casey* compromise I wrote of in 2009 now seems a distant memory. Instead,

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Court should have exercised its agenda-setting authority to deny review in *Roe* and other cases so that the issue could ripen.”).

45. SUNSTEIN, *supra* note 8, at 114.

46. Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991); see also Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 286 (1997) (arguing that *Roe* “mobilized a right-to-life opposition that continues to play a prominent role in American politics to the present day.”) For further discussion (suggesting this claim too sweeping), see *infra* notes 100–106, 127–132.

47. SUNSTEIN, *supra* note 8, at 114. Indeed, Sunstein claimed that *Roe*’s effectiveness “has been limited, largely because of its judicial source.” CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 147 (1993).

48. This paragraph is drawn from Devins, *Democracy-Forcing*, *supra* note 9, at 1981–82.

49. See Devins, *Abortion Wars*, *supra* note 9, at 1328–29 (discussing this transformation).

50. Those claims may be overstated for other reasons. Recent histories of the pre- and post-*Roe* periods suggest that *Roe* was less a divisive lightning rod than suggested by minimalist critics. See *infra* notes 128–132, 144–148.

party polarization and the rise of red and blue states suggests that there is little prospect of meaningful democratic deliberation on abortion. Put another way (and at the risk of stating the obvious): polarization cuts against compromise, consensus, and discourse; minimalism, correspondingly, is a strategy best pursued when competing sides of an issue are not divided in ways that make discourse impossible.

In Part II, I will back up these claims and explain why judicial minimalism would have worked at the time of *Roe* or *Casey*, but not today. My analysis will focus on New Minimalism's goal of facilitating democratic deliberation through narrow indeterminate rulings.<sup>51</sup> I will also argue that now is the time for *Roe*-like maximalism. In so doing, I will provide what I hope is a useful rethinking of judicial minimalism with respect to issues where party polarization impairs democratic deliberation. Specifically, by paying attention to the on-the-ground facts of state legislative efforts to restrict abortion rights, I will both examine and extend generally stated claims linking the desirability of minimalist decision making to the realities of democratic deliberation. Sunstein, for example, argues that the "Court usually does best if it proceeds narrowly,"<sup>52</sup> but recognizes that Chemerinsky's heroism is better than minimalism in a society in which "judges make the right judgments about justice" and in which "democratic processes work exceedingly poorly, in the sense that they do not live up to democratic ideals, and also in which political majorities invade fundamental rights."<sup>53</sup> Sunstein and other minimalist critics of *Roe*, however, have yet to think about the realities of party polarization and its impact on abortion decision making<sup>54</sup> or minimalism in general.<sup>55</sup> For reasons I will explain in Part II, the red-state, blue-state divide severely undermines the judicial minimalism project and, correspondingly,

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51. I will also make mention of counterproductive backlash risks but will draw a line between backlash concerns (which have nothing to do with democratic deliberation but, instead, focus on the best means of advancing favored policy goals) and democratic deliberation goals (which would accept suboptimal policy on the underlying issue, for the principal goal is facilitating discourse among elected officials, interest groups, and the American people).

52. Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1903 (2006).

53. SUNSTEIN, *supra* note 23, at 65; *see also* Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867, 2867–68 (2006).

54. In his 2009 book, *Radicals in Robes*, and his 2015 book, *Constitutional Personae*, Sunstein continues to make the same arguments about *Roe*. *See* CASS R. SUNSTEIN, RADICALS IN ROBES 106 (2009); SUNSTEIN, *supra* note 23, at 29, 100.

55. Party polarization also shapes judicial decision-making and therefore pervades decision-making by all parts of government. In other words, the conditions that cut against minimalism may also cut against heroism. For additional discussion, *see infra* Part II.

provides important support for the expansive view of judicial authority championed by Chemerinsky.

## II. WHAT ABORTION POLITICS TELLS US ABOUT JUDICIAL MINIMALISM

Judicial minimalism's critique of *Roe* had some force at the time of *Roe*, but now seems misplaced. Instead, the saga of abortion politics speaks to the critical impact of party polarization on democratic discourse and, correspondingly, the workability of judicial minimalism theory. First, contrary to claims that *Roe* triggered the abortion wars when it was decided in 1973, recent scholarship about politics at the time of *Roe* suggests both that the right-to-life movement was energized before *Roe* and that there was some prospect of constructive political discourse in the immediate post-*Roe* period.<sup>56</sup> More generally, Democrats and Republicans did not divide over abortion at that time and, consequently, constructive democratic deliberation was more possible during the less polarized 1970s. That is not to say that *Roe* and its rigid trimester test matched public opinion (it did not), nor is it to say that the decision did not trigger a backlash (it did);<sup>57</sup> a minimalist ruling would have fit the times better than the overly legislative *Roe* ruling. Second, today's abortion fight is linked to the post-1980 efforts of Democrats and Republicans to win favor with their constituents by staking out hard-line positions on abortion.<sup>58</sup> In other words, the Court was (and is) "being played for political profit" in a fight that is no longer about abortion rights but, instead, is "about American politics more generally."<sup>59</sup> In truth, Democrat and Republican voters did not divide on abortion until 1988; consequently, cross-party dialogue and bipartisan decision making was very much possible in the period leading up to and including the 1992 *Pennsylvania v. Casey* decision.<sup>60</sup> Third, the Court's embrace of an indeterminate minimalist standard in *Casey* highlights the limits

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56. On the rise of the right-to-life movement, see GARROW, *supra* note 1; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 407 (2007). On the possibility of political discourse at the time of *Roe*, see Mary Ziegler, *Beyond Backlash: Legal History, Polarization and Roe v. Wade*, 71 WASH. & LEE L. REV. 969, 995–96 (2014) (discussing possibility of dialogue and compromise in period immediately following *Roe*).

57. See *supra* notes 44–47; see also *infra* notes 120–123.

58. See *infra* notes 112–119 and accompanying text.

59. Barry Friedman, *The Subterranean World of Abortion Politics*, BALKINIZATION (Sept. 18, 2008, 6:35 AM), <http://balkin.blogspot.com/2008/09/subterranean-world-of-abortion-politics.html> [<https://perma.cc/38B2-48JA>].

60. See *infra* notes 120–126 and accompanying text (discussing both public opinion polls and responses to *Roe* up to and including the bipartisan Pennsylvania statute that the Court ruled on in *Casey*).

of minimalism in today's polarized environment. During the 1992–2008 period, the laws approved by the Court in *Casey* were politically popular and *Casey* served as a generally acceptable legislative template.<sup>61</sup> By 2010, however, that template became less and less acceptable to pro-life interests in red states. Today, the red-state, blue-state divide on abortion is so acute that political compromise seems impossible.<sup>62</sup> Correspondingly, democracy-forcing judicial minimalism now seems a pipedream; the Court has more reason today, than at any time throughout the abortion imbroglio, to rule broadly and decisively.

### A. *Roe v. Wade*

When *Roe* was decided, Democrats and Republicans often worked together and there was little ideological division between the two parties. In 1968, for example, Democrats occupied every ideological niche; conservative Southern Democrats were key to the Democratic coalition.<sup>63</sup> Republicans were likewise ideologically diverse; liberal Rockefeller Republicans (mainly from the North) were key to the Republican coalition.<sup>64</sup> At that time and throughout the 1970s, there was virtually no gap in the median liberal-conservative scores of the two parties.<sup>65</sup> For this reason, George Wallace justified his 1968 presidential bid by claiming that there was not a “dime’s worth of difference” between Democrats and Republicans.<sup>66</sup> Democrats and Republicans in Congress shared committee staff and came together to resist presidential encroachments—enacting the War Powers Resolution of 1973 over President Nixon’s veto and the 1974 Impoundment Control Act (with no dissenters in the Senate and only six in the House).<sup>67</sup>

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61. See Devins, *Abortion Wars*, *supra* note 9, at 1334–35 (discussing general acceptance of *Roe* in its aftermath).

62. See *infra* notes 183–251 and accompanying text.

63. See SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 23 (2008) [hereinafter THERIAULT, PARTY POLARIZATION]; Sean M. Theriault, The Case of the Vanishing Moderates: Party Polarization in the Modern Congress 16–17 (Sept. 23, 2003) (unpublished manuscript), <https://www.msu.edu/~rohde/Theriault.pdf> [<https://perma.cc/2F2B-6Z59>].

64. See THERIAULT, PARTY POLARIZATION, *supra* note 63, at 23–26.

65. See Steven S. Smith & Gerald Gamm, *The Dynamics of Party Government in Congress*, in CONGRESS RECONSIDERED 147, 151 (Lawrence C. Dodd & Bruce Oppenheimer eds., 9th ed. 2009) (reporting the lack of ideological divide).

66. Richard Pearson, *Ex-Gov. George C. Wallace Dies at 79*, WASH. POST (Sept. 14, 1998), <https://www.washingtonpost.com/archive/local/1998/09/15/ex-gov-george-c-wallace-dies-at-79-in-alabama/f77a36e4-0689-4086-9b96-b0d9a293cd57/> [<https://perma.cc/8RYV-Q59N>].

67. For a discussion of congressional committee practices, see Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 753–54 (2011); for a discussion of bipartisanship in enacting legislation asserting

At the time of *Roe*, moreover, affluent, well-educated Democrats and Republicans tended to agree with each other on issues that divided their parties.<sup>68</sup> On issues involving civil rights and liberties, several studies pointed to a gap between elite and popular opinion; “[s]ocial learning, insofar as it affects support for civil liberties, is likely to be greater among the influentials (that is, political elites) of the society than among the mass public.”<sup>69</sup> Democratic and Republican elites, for example, agreed on the need for judicial protection of powerless minorities.<sup>70</sup> 1965–1980 attitudes towards abortion likewise revealed a striking gap between the mass public and Republican and Democrat elites; indeed, the best predictor of abortion attitudes was one’s level of education.<sup>71</sup> Correspondingly, public opinion polls reveal that there was no Republican-Democrat divide on abortion during the 1970s; in a poll taken shortly before *Roe* was decided, sixty-eight percent of Republicans and fifty-eight percent of Democrats supported the statement that the decision to have an abortion should be made by a woman and her physician.<sup>72</sup> Reviews of the General Social Surveys data showed that Democrats and Republicans held generally similar views; in fact, respondents who identified as Republican were more likely to identify as pro-choice from 1972–1987.<sup>73</sup>

The absence of a party divide on abortion is also revealed in state efforts to either liberalize or strengthen abortion restrictions in the decade leading up to *Roe*. At that time, pro-choice interests scored several victories: four states repealed previous restrictions, thirteen states reformed their laws, and the American Medical Association and Model Penal Code backed limited abortion rights.<sup>74</sup> Of the states that

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congressional prerogatives, see Neal Devins, *Presidential Unilateralism and Political Polarization*, 45 WILLAMETTE L. REV. 395, 399–404 (2009).

68. For a general treatment of this topic (comparing elite attitudes in the Warren Court era with attitudes today), see Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L. REV. 661 (2013).

69. HERBERT McCLOSKEY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES 233 (1983).

70. Graber, *supra* note 68, at 685.

71. Donald Granberg & Beth Wellsman Granberg, *Abortion Attitudes, 1965-1980: Trends and Determinants*, 12 FAMILY PLANNING PERSPECTIVES 250, 254 (1980).

72. Greenhouse & Siegel, *supra* note 43, at 2067–68.

73. Greg D. Adams, *Abortion: Evidence of Issue Evolution*, 41 AM. J. POL. SCI., 718, 731 (1997). For similar findings, see sources collected in Greenhouse & Siegel, *supra* note 43, at 2070–71.

74. See DEVINS, SHAPING *supra* note 9 at 58–59; Sarah Kliff, *Thirteen Charts That Explain How Roe v. Wade Changed Abortion Rights*, WASH. POST (Jan. 22, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/01/22/thirteen-charts-that-explain-how-ro-v-wade-changed-abortion-rights> [<https://perma.cc/JVN2-R8FN>].

repealed their laws, two were strongly Democratic, one leaned Republican, and one was split;<sup>75</sup> of the states that liberalized their laws, nine were Democratic, three Republican, and one split.<sup>76</sup>

Equally telling, states that either resisted legislative reform or strengthened abortion restrictions were neither Democrat nor Republican. States enacting abortion restrictions at the time of *Roe* included Massachusetts, Pennsylvania, and Connecticut; states that resisted reform efforts included Michigan and North Dakota.<sup>77</sup> Likewise, the one amicus brief that states filed in *Roe* was from a bipartisan coalition of five states, represented by three Republican and two Democratic Attorneys General.<sup>78</sup>

At the federal level, the abortion issue was largely dormant. No member of Congress filed an amicus brief in *Roe*, and a broad bipartisan coalition of more than two hundred lawmakers filed a 1980 brief defending Congress's appropriations power to deny federal funding of abortion.<sup>79</sup> Indeed, up until 1979, "Senate Republicans were split over abortion in about the same proportion as House Democrats. Looking across both chambers, abortion was not a particularly partisan issue."<sup>80</sup>

For its part, the Nixon White House largely steered clear of abortion. In 1970, Nixon instructed speechwriters: "On abortion, get off it."<sup>81</sup> After *Roe*, he likewise directed his aides to "keep out" of the

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75. The four states that repealed were Alaska (split), Hawaii (Democrat), New York (lean Republican), and Washington (Democrat). Information about legislative composition at the time of *Roe* is drawn from THE COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES 1972–1973*, at 66, [http://knowledgecenter.csg.org/kc/system/files/bos\\_1972\\_2.pdf](http://knowledgecenter.csg.org/kc/system/files/bos_1972_2.pdf) [<https://perma.cc/K2N4-XM93>].

76. Liberalizing states with Democrat legislatures were California, Arkansas, Florida, Georgia, Maryland, New Mexico, North Carolina, South Carolina, and Virginia. *See id.* Liberalizing states with Republican legislatures were Colorado, Delaware, and Kansas. *Id.* Oregon was the split state. *Id.* Some Democratic liberalizing states had Republican governors; one example is New Mexico where Republican Governor David Cargo signed the bill notwithstanding his personal opposition to abortion. GARROW, *supra* note 1, at 369.

77. *See* GARROW, *supra* note 1, at 369. For a more detailed treatment of state politics at this time, see *id.* at 546–617.

78. *See* Brief Amicus Curiae of the Attorneys General of Arizona, et al., *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18). The brief focused on federalism principles. *Id.* at 9–10.

79. Information on congressional amicus briefs in abortion is drawn from Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RES. L. REV. 933, 946–47 (2015).

80. Adams, *supra* note 73, at 723.

81. KEVIN J. MCMAHON, *NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* 172 (2011). In 1972, Nixon's Department of Justice was the legal representative of the District of Columbia in a legal challenge to the D.C. abortion prohibition. *Id.* at 177. The Justice Department did not take a substantive position on abortion but, instead, successfully sought to have the case dismissed on jurisdictional grounds. *Id.*

case.<sup>82</sup> The reason: when running for reelection in 1972, Nixon thought seriously about taking a strong position against abortion in order to win over Democratic Catholic voters. His advisor, Pat Buchanan, strongly counseled him to do so, stating that abortion was “a gut issue with Catholics” and a “divisive factor within the Democratic party.”<sup>83</sup> Nixon, however, backed away after polling data of Republicans and Roman Catholics revealed that he could not gain political advantage by staking out a pro-life position on abortion.<sup>84</sup>

Abortion was anything but a wedge issue when *Roe* was decided: party identity had nothing to do with whether a state pursued liberalization or reaffirmed restrictions. Perhaps more telling, there was no political advantage for Democrats or Republicans to embrace pro-choice or pro-life policies; the battle line, instead, was principally about religion and class. Catholic interest groups opposed abortion,<sup>85</sup> while elites supported abortion rights as compared to the working and lower middle class.<sup>86</sup> Catholic interests, in particular, propelled the right-to-life movement, capitalizing on “imperfections in the political marketplace” and “thwarting” pro-choice public opinion in the years leading up to *Roe*.<sup>87</sup>

The question remains: could pro-choice and pro-life interests have engaged in constructive political discourse at the time of *Roe*? Progressive *Roe* critics suggest that reform efforts were afoot, with one-third of states liberalizing abortion restrictions and public opinion increasingly supporting limited abortion rights.<sup>88</sup> Defenders point to the rise of powerful right-to-life interests, the failure of liberalization

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82. DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 252 (2001); see also MCMAHON, *supra* note 81, at 178–79 (discussing Nixon's refusal to take action in response to an entreaty from Philadelphia Archbishop John Cardinal Krol).

83. *Presidential Campaign Activities of 1972: Hearings on S. 60 Before the S. Select Comm. on Presidential Campaign Activities*, 93d Cong. 4197, 4201 (1973) (memorandum from “Research” to Att’y Gen. H.R. Haldeman (Oct. 5, 1971)). At around this time, Nixon signaled opposition to abortion by stating his opposition to “abortion on demand” and by directing military bases to conform to state abortion laws. See MCMAHON, *supra* note 81, at 172.

84. Greenhouse & Siegel, *supra* note 43, at 2058–59. Nixon's interest in abortion, like nearly all constitutional questions, was ultimately driven by political considerations and not ideology. MCMAHON, *supra* note 81, at 177.

85. See Greenhouse & Siegel, *supra* note 43, at 2047–52 (describing the attitude of Catholic voters toward abortion). Catholic voters, however, supported some abortion rights. See *infra* note 102.

86. See *supra* note 71 (discussing elite support); Peter Skerry, *The Class Conflict Over Abortion*, 52 THE PUB. INT. 69, 74–75 (1978), [http://www.nationalaffairs.com/doclib/20080528\\_197805205theClassConflictOverAbortionPeterskerry.pdf](http://www.nationalaffairs.com/doclib/20080528_197805205theClassConflictOverAbortionPeterskerry.pdf) [<http://perma.cc/EJ7B-FGVN>].

87. Kathleen M. Sullivan, *Law's Labors*, NEW REPUBLIC, May 1994, at 42, 44.

88. See Ginsburg, *supra* note 8, at 1205 (discussing the progressive nature of abortion politics); Eskridge, *supra* note 44, at 1312 (discussing the shift in public opinion toward abortion).

efforts in states with lopsided pro-choice majorities, and the strengthening of abortion restrictions in some states immediately before *Roe*.<sup>89</sup> Defenders also point to evidence that some states with a strongly pro-choice electorate failed to reform abortion laws, and other states that had reformed such laws came close to repealing those reforms. Vermont, for example, did not reform its laws notwithstanding the fact that more than seventy percent of Vermont residents favored liberalization in 1972;<sup>90</sup> in New York, a 1972 veto by Republican governor Nelson Rockefeller blocked legislation seeking to overturn New York's 1970 repeal of abortion prohibitions.<sup>91</sup>

For reasons Dave Garrow and others (including me) have detailed elsewhere, there is good reason to think that the liberalization movement was stalled at the time of *Roe*.<sup>92</sup> On the other hand, the rigid *Roe* trimester test did not match public opinion. In the decade before *Roe*, changing attitudes on maternal health (and especially the risk of fetal deformity) resulted in overwhelming public support for *limited* abortion rights.<sup>93</sup> A study of state and federal court invalidations of abortion restrictions in the pre-*Roe* period shows that judicial invalidations matched public opinion in these states.<sup>94</sup> Abortion on demand, however, was without support. Only twenty-six percent of Americans supported second trimester abortions and the

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89. See David J. Garrow, *History Lesson for the Judge: What Clinton's Supreme Court Nominee Doesn't Know About Roe*, WASH. POST, June 20, 1993, at C3, <http://www.davidgarrow.com/File/DJG%201993%20WashPostOutlookRBGRoe20June.pdf> [<http://perma.cc/Y9QZ-GWM5>]; Post & Siegel, *supra* note 56 at 412–13; Greenhouse & Siegel, *supra* note 43, at 2046. For an excellent presentation of arguments that *Roe* vindicated majoritarian preferences in the face of interest group resistance, see Corinna Barrett Lain, *Upside Down Judicial Review*, 101 GEO. L. J. 113, 133–44 (2012); see also BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 295–99 (2009) (suggesting that abortion rights, even without the sweeping *Roe* decision, were products of their time).

90. Jonathan P. Kastellec, *Empirically Evaluating the Counter-Majoritarian Difficulty: Public Opinion, State Policy, and Judicial Decisions Before Roe v. Wade* 20, 4 J. OF L & COURTS 1 (2016) [http://www.princeton.edu/~jkastell/Pre\\_Roe\\_Countermajoritarian/kastellec\\_pre\\_roe\\_countermajoritarian.pdf](http://www.princeton.edu/~jkastell/Pre_Roe_Countermajoritarian/kastellec_pre_roe_countermajoritarian.pdf) [<http://perma.cc/XT6D-WKRL>].

91. This episode is discussed in David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALA. L. REV. 833, 840–41 (1999).

92. See Garrow, *supra* note 89 (discussing how *Roe* came during a time of slowness for liberal ideals); Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433, 1467–68 (1995) (discussing how *Roe* emerged during a downturn in liberal thought); see also Kastellec, *supra* note 90, at 25 (noting disjunction between state public opinion favoring repeal and state legislation, concluding that “[f]or the Supreme Court to have not weighed in at all on the constitutionality of abortion restrictions would have likely had the effect of keeping many unpopular policies in place”).

93. See Kastellec, *supra* note 90, at 12 (detailing trends in public opinion); Lain, *supra* note 89 at 135–37 (noting changing attitudes with respect to fetal deformity risks).

94. See Kastellec, *supra* note 90, at 9 (stating that state judges often did not threaten the status quo in their rulings).

public was sharply divided about whether a desire not to have children outside of marriage or not having enough money to support another child were valid reasons for women to have abortions.<sup>95</sup> Reform efforts largely reflected public opinion; states that liberalized abortion laws principally enacted exceptions into abortion prohibitions to take into account fetal and maternal health as well as pregnancies that were the result of rape or incest.<sup>96</sup> *Roe*, in other words, did more than correct a deficiency in the political marketplace. *Roe* matched elite opinion and was an effort to foreclose political discourse and codify elite preferences.<sup>97</sup>

This foreclosure of political discourse had two independent effects: one particularly relevant to my analysis, one less so. One effect (hotly debated but less relevant to my analysis) is whether *Roe* effectively advanced abortion rights or, instead, triggered a backlash that effectively undercut the pursuit of robust abortion rights.<sup>98</sup> The other effect (central to this Article) is whether *Roe* overreached by foreclosing democratic discourse.<sup>99</sup>

The next subpart will examine how elected officials and, to a lesser extent, interest groups responded to *Roe*. That discussion will reveal that *Roe* limited, but did not foreclose, democratic deliberation. It will also suggest that a minimalist ruling would have been more constructive. For reasons I will now detail, I think the *Roe* Court should have understood that democratic deliberation was a real possibility, if not a certainty. More than anything, the political parties were not polarized and there was no Republican-Democrat divide on

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95. See Klarman, *supra* note 8 (conveying that many Americans only support abortion for a limited number of reasons); Kestel, *supra* note 90, at 12 (discussing public perception of the reasons a woman may choose to get an abortion).

96. See Klarman, *supra* note 8 (noting that thirteen states adopted “therapeutic” abortion laws between 1967 and 1971, which the public overwhelmingly supported).

97. See Granberg & Granberg, *supra* note 71 (examining the relationship between socioeconomic characteristics and opinions about abortion laws); Skerry, *supra* note 86, at 75 (noting early 1970s opinion poll data showing that “the college-educated are decidedly more in favor of nonmedical reasons for abortion than are those of lesser education”). For additional discussion, see MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 144–45 (1996).

98. This is the core of Gerald Rosenberg’s argument against *Roe*; namely, that *Roe* accomplished very little in paving the way for abortion rights. See ROSENBERG, *supra* note 8 (discussing legislative reform that was occurring before *Roe*). For my evaluation of Rosenberg’s claim (highlighting ways that *Roe* was consequential), see Neal Devins, *Judicial Matters*, 80 CALIF. L. REV. 1027, 1057–62 (1992). This question is also at the heart of THE CASE AGAINST THE SUPREME COURT; Chemerinsky is most interested in maximizing the protection of minority rights. See CHEMERINSKY, *supra* note 6, at 288–89 (analyzing the arguments for and against *Roe*).

99. See *supra* notes 44–47 (discussing these very claims by Bill Eskridge and Cass Sunstein).

the abortion issue; bipartisanship, not winner-take-all approaches, was a real possibility.<sup>100</sup> And while right-to-life interests were able to stall the reform effort at the time of *Roe*, there were important countervailing forces that made political discourse and compromise possible if not certain: namely, public support for limited abortion rights and the rise of the women's movement.<sup>101</sup> Most Catholics supported limited abortion rights and this figured prominently into Nixon administration calculations that a hardline anti-abortion stance would win over predominantly Democratic Catholics.<sup>102</sup> Moreover, the pro-life and pro-choice communities were not uniformly unyielding; some pro-life and pro-choice interests were open to discourse and compromise.<sup>103</sup> None of this is to say that democratic deliberation would have been robust, nor is it to say that reforms would have come anywhere close to the protections afforded by the *Roe* trimester test. It is to say that the possibility of discourse was real, however, and *that* should be sufficient for minimalists who value democratic deliberation more than specified outcomes.

### B. From *Roe* to *Casey*

At the national level, the period from *Roe* to *Casey* was one where abortion emerged as a wedge issue dividing the parties. At the state level and among voters, however, abortion did not sharply divide Democrats and Republicans. Legislation was typically pursued on a bipartisan basis and there was no red-state, blue-state divide. More than that, while an impassable divide emerged between pro-choice and pro-life interest groups, there is also evidence of some efforts to find common ground, especially at the start of this period.<sup>104</sup> In short, democratic deliberation was very much possible. I will argue that it occurred and that a minimalist decision in *Roe* would have furthered democracy-deliberating goals. This is particularly true with respect to state lawmakers; the very lawmakers who were enacting abortion restrictions in the shadow of the *Roe* decision.<sup>105</sup>

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100. See *supra* notes 63–67 (discussing bipartisan politics).

101. See *supra* notes 72–73 (noting opinion data, including data showing Democrats and Republicans both supported abortion rights). On the linkage between abortion and gender equality, see Graber, *supra* note 68, at 687–88; Greenhouse & Siegel, *supra* note 43, at 2042–46.

102. For polls showing Catholic support for abortion rights, see Greenhouse & Siegel, *supra* note 43, at 2058; Skerry, *supra* note 86, at 74.

103. See Ziegler, *supra* note 56, at 982–83 (discussing the period immediately after *Roe*).

104. See ZIEGLER, *supra* note 43. I rely here principally on one source and am therefore less certain of this claim.

105. Congress did not seek to directly regulate abortion until it pursued a federal ban on partial birth abortion in the 1990s, legislation vetoed by President Bill Clinton and eventually

To start, the divide between Republicans and Democrats on abortion and the related intransigence of interest groups has its origins in the late 1970s—when the burgeoning conservative movement and the Ronald Reagan presidential campaign simultaneously pursued anti-abortion planks. Conservative interests “mobilized against abortion in order to protect traditional family roles.”<sup>106</sup> In particular, the so-called New Right “had begun to focus on abortion as an issue around which to build party discipline in Congress.”<sup>107</sup> The Republican Party and its presidential candidate Ronald Reagan also saw conservatism in general, and abortion in particular, as ways to strengthen the GOP through a basic realignment of the parties. The ascendancy of “Ronald Reagan’s GOP” was linked to the defeat of the moderate-to-liberal wing of the Republican Party.<sup>108</sup> Building on a political realignment in the South tied to 1960s civil rights reforms, conservative “Southern Democrats” became Southern Republicans.<sup>109</sup> Liberal “Rockefeller Republicans” also defected to the Democratic Party. The result: the Republican Party became more conservative and the Democratic Party more liberal.<sup>110</sup> Correspondingly, Democrats and Republicans embraced conflicting messages on issues that were intended to divide the parties—abortion being one of them.<sup>111</sup>

The 1980 election formally split Republicans and Democrats on abortion. Reagan ran on a platform that “support[ed] . . . a constitutional amendment to restore protection of the right to life for

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signed by George W. Bush in 2003. See Richard W. Stevenson, *Bush Signs Ban On a Procedure For Abortions*, N.Y. TIMES (Nov. 6, 2003), <http://www.nytimes.com/2003/11/06/us/bush-signs-ban-on-a-procedure-for-abortions.html> [<https://perma.cc/UK7D-YXHE>] (discussing the bill’s passage). Starting in 1982, however, presidents have weighed in on the constitutionality of state abortion procedures through amicus briefs filed by the Justice Department; starting in 1986, Republican presidents have called for the overturning of *Roe*. See DEVINS, SHAPING, *supra* note 9, at 109–11 (discussing the pro-life positions of the executive).

106. Post & Siegel, *supra* note 56, at 420.

107. Greenhouse & Siegel, *supra* note 43, at 2061.

108. Kate O’Beirne, *Rockefeller Republicans Take Manhattan*, NAT’L. REV. (July 7, 2004, 8:39 AM), <http://www.nationalreview.com/article/211389/rockefeller-republicans-take-manhattan-kate-obeirne> [<https://perma.cc/99CV-P7ET>].

109. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 288–97 (2011) (discussing the effects of disfranchisement on American politics).

110. See Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 47 AM. J. POL. SCI. 305, 306 (2003) (tracing the growth of Southern Republicans as a percentage of southern lawmakers).

111. See C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 217, 219–26 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001) (discussing the message priorities of political parties).

unborn children,”<sup>112</sup> proclaimed that *Roe* denied the “value of certain human lives” and was as divisive and wrong as the decision in *Dred Scott*,<sup>113</sup> pursued a range of pro-life regulatory initiatives,<sup>114</sup> and used his appointments power to advance pro-life objectives, most notably, the overturning of *Roe*. He pushed his Justice Department nominees to call for the overturning of *Roe*,<sup>115</sup> and he nominated ardent *Roe* foe Robert Bork to the Supreme Court.<sup>116</sup>

In Congress, a partisan abortion divide also began to emerge around 1980. Up until 1979, the parties were generally in lockstep: “Senate Republicans were split over abortion in about the same proportion as House Democrats [and] looking across both chambers, abortion was not a particularly partisan issue.”<sup>117</sup> 1980 was the beginning of the end of moderates in Congress (moderates made up forty percent of Congress at that time as compared to five percent today).<sup>118</sup> At the same time, the partisan divide—while growing—was not vast. In 1980, 239 lawmakers filed an amicus brief backing Congress’s appropriations power to withhold federal funds for abortions but not other medical procedures; no member filed an amicus brief on issues involving state regulatory authority until 1986, and, in 1987, several Republican Senators joined a bipartisan coalition to defeat Robert Bork’s Supreme Court nomination.<sup>119</sup> In other words, the *Roe* to *Casey* period was one of emerging partisanship in Congress.

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112. Republican Party Platform of 1980, AM. PRESIDENCY PROJECT (July 15, 1980), <http://www.presidency.ucsb.edu/ws/index.php?pid=25844> [https://perma.cc/F93Q-A3V8]. All Republican platforms since 1980 have had strong anti-abortion planks and related calls “for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.” Republican Party Platform of 1984, AM. PRESIDENCY PROJECT (Aug. 20, 1984), <http://www.presidency.ucsb.edu/ws/index.php?pid=25845> [https://perma.cc/M6ZN-6ARU].

113. RONALD REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION 19 (1984).

114. For an inventory, see DEVINS, SHAPING, *supra* note 9, at 97–120.

115. It was widely reported that the appointment of Charles Fried to Solicitor General was tied to Fried’s willingness to call for the overturning of *Roe*—a claim that Fried denies. For an account, see THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 161 (2004).

116. For an excellent overview of the Bork nomination, see ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989). For Bork’s views on the right to privacy, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

117. Adams, *supra* note 73, at 723.

118. See *The Polarization of the Congressional Parties*, VOTEVIEW (Mar. 21, 2015), [http://voteview.com/political\\_polarization\\_2014.htm](http://voteview.com/political_polarization_2014.htm) [https://perma.cc/R25W-3VGB] (mapping the changes in Congressional polarization over time).

119. On congressional briefs, see Devins, *supra* note 79, at 946–48. On Bork, see BRONNER, *supra* note 116, at 326–27.

Partisanship had metastasized by the end of the period, but not until then.

At the state level, there was no Democrat-Republican divide: thirty-three states passed anti-abortion measures between 1973 and 1978;<sup>120</sup> forty-eight states had passed 306 abortion measures by 1989.<sup>121</sup> A survey of state legislation from 1973–1989 underscores the absence of a partisan divide:<sup>122</sup> fifteen “challenger” states enacted roughly half the laws, taking the lead “challenging” the boundaries of *Roe* through the enactment of waiting periods, informed consent, and other requirements; twelve “codifier” states rewrote their abortion laws to conform to *Roe* but subsequently approved restrictions (i.e., funding, parental consent) that had been approved by the courts; twelve “acquiescer” states largely steered clear of abortion; and nine “supporter” states backed abortion rights through state funding and greater access to abortion. A survey of each category of states over the 1973–1989 period reveals that there was not a clear pattern of states in any category being dominated by Republicans or Democrats.<sup>123</sup> As Table 1 reveals, challenger states included Illinois, Massachusetts, and Minnesota; supporter states included Arkansas, Kansas, and New Hampshire.

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120. LEE EPSTEIN & JOSEPH FISKE KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 212 (1992).

121. DEVINS, *SHAPING*, *supra* note 9, at 60.

122. This categorization of states is drawn from Glen Halva-Neubauer, *Abortion Policy in the Post-Webster Age*, 20 *PUBLIUS* 27, 32–41 (1990).

123. See Supplemental Memorandum from Phil Giammona to Neal Devins on *Roe* to *Casey* (Nov. 13, 2015) (on file with author) (summarizing research findings, including spreadsheet detailing partisan composition of challenger and acquiescer states at different moments in time between *Roe* and *Casey*).

**Table 1**  
**Post-Roe Policymaking Approaches, 1973-1989**

Challengers	Codifiers	Aquiescers	Supporters
ID (10)*	AZ (8)	AL (2)	AK (0)
IL (15)	CA (5)	AR (4)	CO (1)
IN (9)	FL (8)	DE (4)	CT (0)
KY (13)	GA (8)	IA (4)	HI (1)
LA (12)	ME (6)	MD (4)	KS (1)
MA (11)	MT (7)	MI (3)	NH (1)
MN (11)	OH (5)	MS (3)	OR (1)
MO (13)	OK (7)	NJ (3)	VT (1)
NB (9)	SD (8)	NM (3)	WA (1)
NV (9)	VA (5)	NY (3)	
ND (16)	WI (5)	NC (3)	
PA (14)	WY (7)	SC (3)	
RI (9)		TX (3)	
TN (11)		WV (2)	
UT (14)			

SOURCES: 1973-1980, Family Planning/Population Reporter; 1981-1989, "State Legislative Record-Fertility-Related Bills and Laws," published by the Alan Guttmacher Institute, Washington, D.C.

\*Numbers in parentheses represent enactments. Hence, the table does not reflect abortion battles that occurred before enactment, such as close defeats, tabled bills, and sustained vetoes.

Consider too the very statute that was the subject of *Casey*: the Pennsylvania Abortion Control Act of 1989. The statute was enacted by a majority Republican legislature with broad bipartisan support (it passed the state House by a vote of 143 to 58 and Senate by a vote of 33 to 17);<sup>124</sup> it was signed into law by a pro-life Democratic governor, Robert Casey.<sup>125</sup> The minority leader of the state Senate, Democrat Robert Mellow, supported the measure and praised it because it "helps

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124. See Stephen Drachler, *Senate OKs Abortion Limits—Governor Expected to Sign Bill*, MORNING CALL (Nov. 15, 1989), [http://articles.mcall.com/1989-11-15/news/2716296\\_1\\_bar-abortions-abortion-control-act-legal-abortions](http://articles.mcall.com/1989-11-15/news/2716296_1_bar-abortions-abortion-control-act-legal-abortions) [<http://perma.cc/N42T-EHKU>] (discussing the likely passage of the law); Robert Zausner, *Pa. House OKs Limits on Abortion*, PHILA. INQUIRER (Oct. 25, 1989), [http://articles.philly.com/1989-10-25/news/26119333\\_1\\_anti-abortion-bill-abortion-foe-limit-abortion](http://articles.philly.com/1989-10-25/news/26119333_1_anti-abortion-bill-abortion-foe-limit-abortion) [<http://perma.cc/277T-U9JN>] (discussing the House's passage of the law).

125. See DEVINS, SHAPING, *supra* note 9, at 73. When signing the measure, Casey spoke of protecting "unborn life" and praised the state legislature for "speak[ing] forcefully" and not "cutting and running." *Id.*

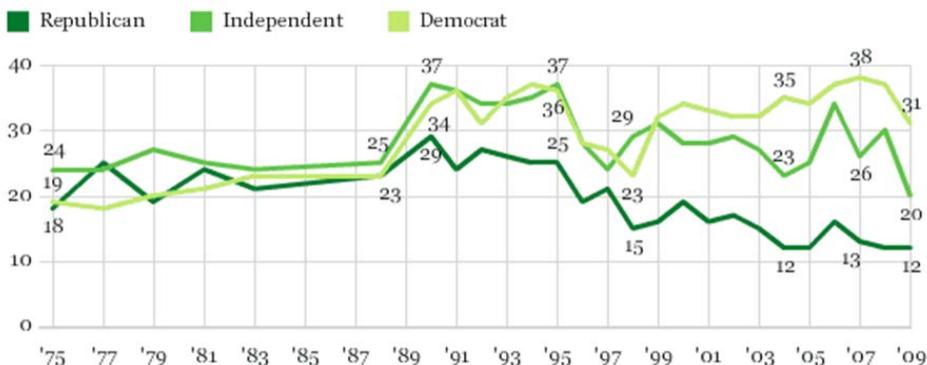
protect the rights of the unborn, the sanctity of life.” The Senate majority leader, Republican Robert Jubilirer, opposed the measure as inordinately restrictive, calling it “repugnant” and an unnecessary intrusion on women’s rights.

The absence of a partisan divide reveals general voter attitudes during the *Roe* to *Casey* period. General Social Surveys data as well as Gallup polls reveal that Republicans were more supportive of abortion rights at least until 1985 and probably until 1988.<sup>126</sup> Table 2 shows nearly identical Democratic and Republican attitudes from 1975–1988—when answering the question of whether abortion should be legal under any circumstances.

**Table 2**

*1975-2009 Trends in U.S. Views on Abortion, by Party ID*

% Legal under any circumstances



Figures based on average of all polls conducted in each calendar year

GALLUP\*

The *Roe* to *Casey* period was one of emerging partisan divisions that were yet to manifest themselves with respect to state regulation of abortion and, more generally, Democratic and Republican voters. There are three features to this period worth highlighting, as they suggest democratic deliberation on abortion was a real possibility and, for reasons I will soon explain, that a minimalist decision would have

126. See Adams, *supra* note 73, at 731–32 (reporting tabulations based on General Social Surveys data); Greenhouse & Siegel, *supra* note 43, at 2070–71 (reviewing Gallup and other data, concluding that attitudes started to diverge in 1988); Samantha Lucks & Michael Salamone, *Abortion*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 80, 98–99 (Nathaniel Persily et al. eds., 2008) (concluding that Democrat and Republican attitudes started to diverge in 1985).

facilitated such discourse. First, most of the laws enacted were politically popular, not divisive. States were not mandating that women view ultrasounds or be told they would suffer psychological harm if they terminated their pregnancies, nor seeking to shut down abortion clinics by mandating that the clinics be mini-hospitals with doctors who also have admitting privileges to nearby hospitals.<sup>127</sup> States, instead, were largely enacting widely popular laws that did not directly contradict *Roe*: public funding, parental consent, informed consent, waiting periods, hospital-only abortions. “Typically, more than 85% of Americans approve a requirement that doctors provide information about abortion alternatives to those seeking abortions, and between 70 and 80% of Americans approve of a twenty-four-hour waiting period and parental consent law.”<sup>128</sup> Second (and relatedly), states did not challenge the Court’s authority. Decisions invalidating politically popular responses to *Roe* were accepted as binding; with the notable exception of Missouri (in 1989), states did not seek to overturn *Roe*.<sup>129</sup> States argued that their legislation was a reasonable regulation of maternal health—something that *Roe* specifically approved.<sup>130</sup> Put another way: state action in the *Roe* to *Casey* period sought to engage the judiciary in a dialogue on the sweep of abortion rights. Third, the fact that an avalanche of abortion restrictions were enacted may mean only that state legislatures saw no downside in catering to pro-life interest groups, for pro-choice interests were content to leave it to the courts to enforce abortion rights.<sup>131</sup> In other

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127. I speak here of the vast majority of state laws. Some states enacted laws mandating hospital only abortions; Louisiana and Utah would have effectively outlawed abortion. Devins, *Abortion Wars*, *supra* note 9, at 1328. But there was a dramatic difference to the laws of this era to the laws of the past five to seven years.

128. Lucks & Salamone, *supra* note 126, at 94.

129. In *Webster v. Reproductive Health Services*, the state of Missouri argued that *Roe* was such “a source of instability in the law that this Court should reconsider” and then “abandon” the decision. Brief for Appellants at 9, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127643, at \*9. At the same time, Missouri did not double down and argue that its statute could not be upheld without overturning *Roe*; the state, for example, sought to treat the preamble to the statute (stating that life begins at conception) as nonbinding and hence legally irrelevant—so that the Court could uphold the statute without overruling *Roe*. *See id.* at \*9, \*21–22.

130. In *Casey*, for example, the state of Pennsylvania sought to distinguish its position (upholding the law under *Roe*) from the position of the George H. Bush administration (calling for *Roe*’s overturning). *See* Brief for Respondents, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 551421, at \*34–42; *see also* Brief for Appellants, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (No. 84-495), 1985 WL 669698, at \*49–52; Brief for Petitioner, *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (Nos. 81-746 & 81-1172), 1982 U.S. S. Ct. Briefs LEXIS 1503, at \*45–57.

131. *See* DEVINS, SHAPING, *supra* note 9, at 67–73; for additional discussion, *see infra* notes 135–142.

words, rather than speak to extreme disapproval or political instability, *Roe* arguably created position-taking opportunities for lawmakers who would not be punished for enacting pro-life legislation.<sup>132</sup>

*Roe*, however, did not facilitate democratic deliberation. Its absolutism proved a useful foil to conservative interests and, relatedly, Republican party leadership. In particular, as Reagan Solicitor General Charles Fried observed, the “Reagan administration made *Roe v. Wade* the symbol of everything that had gone wrong in law, particularly constitutional law.”<sup>133</sup> Correspondingly, *Roe* helped propel party polarization: the New Right movement linked their support of the Republican party to opposition to *Roe*; the Reagan administration used it as a lever to make the Republican party more conservative and more ideological.<sup>134</sup> Finally (and ironically), *Roe* stifled political discourse by telling pro-choice interests that the Court had their back and that they did not need to engage in grassroots battles (or dialogue) with pro-life interests. Pro-choice interests, for example, admitted they had been “lazy, complacent, and because of that caught off guard”<sup>135</sup> when a plurality of the Court signaled in the 1989 *Webster v. Reproductive Health Services* decision that the Court might reconsider *Roe*, calling “the rigid *Roe* framework” unworkable.<sup>136</sup>

The fallout following *Webster* provides a revealing if imperfect glimpse as to the ways *Roe* distorted the political marketplace. In particular, one-sided political discourse dominated by pro-life interests gave way to an era where pro-choice forces were “going to take names and kick ankles.”<sup>137</sup> In the years following *Webster*, pro-choice groups

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132. See Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 512–15 (2001) (discussing—in a far different context—incentives for lawmakers to enact position taking legislation without regard to whether the legislation will subsequently be invalidated). For this reason, state officials may have been quietly pleased by the *Roe* decision. It relieved them of the responsibility of deciding the scope of abortion rights and restrictions. Indeed, in his justly famous commentary on *Roe*, John Hart Ely spoke of “the sighs of relief as this particular albatross was cut from the legislative and executive necks.” John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920, 947 (1973). Mark Graber reaches the same conclusion in his article detailing why lawmakers sometimes seek cover in court decisions. Mark A. Graber, *The Nonmajoritarian Difficulty*, 7 STUD. IN AM. POL. DEV. 35, 53–61 (1993).

133. CHARLES FRIED, *ORDER AND LAW* 72 (1991).

134. See *id.* (discussing New Right movement and Reagan administration efforts to transform the Republican party).

135. CATHERINE WHITNEY, *WHOSE LIFE? A BALANCED COMPREHENSIVE VIEW OF ABORTION FROM ITS HISTORICAL CONTEXT TO THE CURRENT DEBATE* 126 (1991).

136. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (1989). The plurality also signaled a new era of abortion politics by recognizing that “our holding today will allow some governmental regulation of abortion that would have been prohibited under [*Roe*].” *Id.* at 521.

137. 135 Cong. Rec. 18170 (1989) (statement of Rep. AuCoin).

experienced unprecedented growth in contributions and membership. The National Abortion Rights Action League saw a four-fold increase in membership and funding;<sup>138</sup> the number of pro-choice PACS registered with the Federal Election Commission jumped from five in 1988 to fifteen in 1990.<sup>139</sup> *Webster* also proved a bonanza to pro-choice politicians running against right-to-life candidates.<sup>140</sup> Perhaps more telling, governors and legislators that had previously taken pro-life positions either refused to pursue anti-abortion statutes or vetoed pro-life legislation.<sup>141</sup> From 1989–1992, only fourteen statutes were enacted, nine pro-choice and five pro-life.<sup>142</sup>

One final comment about the *Roe* to *Casey* period: In the decade following *Roe*, there was a real chance at dialogue and some compromise between pro-choice and pro-life interests. As Mary Ziegler notes in her study of this period, “polarization resulted neither immediately nor inevitably from the Supreme Court’s [*Roe*] ruling.”<sup>143</sup> Some pro-choice advocates pursued a broader agenda, including family planning, child care, sterilization abuse, workplace discrimination, and health care.<sup>144</sup> Some abortion opponents also pursued a broader agenda that likewise included workplace discrimination, contraception funding, child care, and health care.<sup>145</sup> Indeed, pro-life and pro-choice activists collaborated successfully in achieving protections for young mothers and bans of discrimination on the basis of being pregnant, with both sides “agree[ing] that true choice would require state assistance.”<sup>146</sup>

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138. See Carol Matlack & Maya Weber, *Abortion Lobbyists Striking a Vein of Gold*, 11 NATL. J. 632 (1991). Pro-life groups saw a modest increase in fundraising during the same period, although fundraising by pro-life political action committees saw a slight decline during the 1989–90 election cycle. See *id.*

139. See *id.*

140. Prominent examples include pro-choice gubernatorial candidates in Virginia (Doug Wilder) and New Jersey (James Florio); in both races, the abortion issue shaped the campaign and arguably proved decisive in the election. See DEVINS, SHAPING, *supra* note 9, at 69–70.

141. The Florida legislature, for example, refused to pass a single abortion restriction in a special session called a few days after the *Webster* decision by Governor Bob Martinez. See *id.* at 71. Governors in Idaho and Louisiana put aside their pro-life leanings and vetoed controversial abortion restrictions enacted by state legislatures after *Webster*. See *id.* at 72–73.

142. NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 181 (2015).

143. ZIEGLER, *supra* note 43, at xv.

144. *Id.* at 128–56; see also Ziegler, *supra* note 56, at 973 (noting that some pro-choice activists “supported some form of fetal rights, considering them in the larger context of debate about medical ethics, human experimentation, and human dignity.”).

145. ZIEGLER, *supra* note 43, at 219–40. See also Ziegler, *supra* note 56, at 983–93 (noting a pro-life push for maternity leave and other pro-life measures that facilitate reproductive choice).

146. Ziegler, *supra* note 56, at 982–83. For a modern day call for competing sides of the abortion debate to seek common ground on issues involving wealth disparity, including child care

Would a minimalist ruling in *Roe* have resulted in the competing sides of the abortion debate seeking common ground or pursuing compromise measures that recognized limited abortion rights? There is no way to know. At the same time, however, it is quite clear that *Roe* did not facilitate democratic deliberation. The decision distorted the political marketplace and helped fuel a more fundamental realignment in American politics. But *Roe* did not instantaneously transform American or abortion politics. During the *Roe* to *Casey* period, the abortion issue did not divide the states or the American people; states adhered to Supreme Court authority over abortion while pursuing broadly popular restrictions on abortion rights. It may well be that the same measures would have been pursued if the Court had issued a minimalist decision in 1973. The difference would have been that the pursuit would not have been shaped by a Supreme Court decision intended to facilitate, not short-circuit, political discourse.

### C. *Casey and Beyond*

In *Casey*, by substituting the minimalist undue burden standards for the maximalist trimester test, the Court approved waiting period and informed consent measures. The Court also repudiated earlier decisions that had rigidly applied *Roe* to invalidate these politically popular abortion restrictions.<sup>147</sup> Minimalist critics of *Roe* point to the journey from *Roe* to *Casey* as proof positive that the heroic *Roe* decision went too far and the Court should have pursued a minimalist strategy all along.<sup>148</sup> For reasons just detailed, although a minimalist decision would have better served democracy-enhancing goals, the anti-*Roe* backlash theory is overstated.<sup>149</sup> In other words, the *Roe* to *Casey* period shows that political context is as relevant as the scope and sweep of judicial rulings in assessing backlash risks

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and family planning, see Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009).

147. *Casey* overturned *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). *Casey* also approved a parental consent provision and recordkeeping and reporting requirements. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878, 900 (1992).

148. See *supra* notes 43–47 (detailing criticisms of *Roe* going too far and focusing on backlash risks and/or the benefits of political discourse).

149. See *supra* notes 120–146. Also, for reasons detailed previously, *Roe* contributed to, but did not cause, the growing polarization between Democrats and Republicans. See also Greenhouse & Siegel, *supra* note 43, at 2068 (arguing that political realignment was tied to larger social forces and that post-*Roe* divisions are the consequence not cause of those forces).

and, relatedly, whether a decision facilitates or undermines political discourse.

The period after *Casey* reinforces this point. The success or failure of *Casey*'s minimalism has more to do with the political circumstances surrounding the decision than it does with the decision itself. Following *Casey*, pro-choice and pro-life interests agreed on one thing—that *Casey* would destabilize abortion politics, prompting “dozens of new laws restricting abortion,” including “new legislative models.”<sup>150</sup> That prediction matches the abortion conflagration that started after the 2010 elections, but does not match the period from *Casey* to 2010.

From 1992 to 2009, the post-*Casey* period can be seen as the triumph of minimalism. For reasons I detailed in 2009,<sup>151</sup> *Casey* seemed to stabilize state abortion politics. “The template of laws approved by the Supreme Court in *Casey* were politically popular at the time of *Casey* and remain politically popular today. Indeed, since Pennsylvania has always been one of the most restrictive states when it comes to abortion regulation, very few states are interested in pushing the boundaries of what *Casey* allows. And while a handful of outlier states have pushed the boundaries of what *Casey* allows, these states (which account for a quite small percentage of abortions) have largely worked within parameters set by the Court in *Casey*.”<sup>152</sup> The Supreme Court too seemed sanguine with *Casey*; aside from its 2000 partial birth abortion decision, the Court did not address the scope of state abortion authority since *Casey* (as compared to eleven Supreme Court cases on this issue decided between *Roe* and *Casey*).<sup>153</sup>

My 2009 accounting of the post-*Casey* period was not shared by others. Dawn Johnsen, in particular, argued that I focused too much on the laws states enacted post-*Casey* (which generally supported my claim that the *Casey* template was guiding other states and therefore promoting stability). She thought instead that the focus should be the increasingly incendiary rhetoric of anti-abortion interests and the corresponding rise in efforts (many of which were unsuccessful at that time) to push the boundaries of *Casey*.<sup>154</sup> With the benefit of twenty-

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150. Tamar Lewin, *Long Battles Over Abortion Are Seen*, N.Y. TIMES, June 20, 1992, at A18.

151. Devins, *Abortion Wars*, *supra* note 9, at 1322.

152. *Id.* at 1318.

153. *Stenberg v. Carhart*, 530 U.S. 914 (2000), invalidated state partial birth bans. For a listing of Supreme Court abortion rulings from *Roe* to *Casey*, see *Major U.S. Supreme Court Rulings on Reproductive Rights*, LAW STUDENTS FOR REPROD. JUSTICE (2008), [http://lsrj.org/documents/factsheets/08-09\\_Supreme\\_Court\\_Rulings.pdf](http://lsrj.org/documents/factsheets/08-09_Supreme_Court_Rulings.pdf) [<https://perma.cc/S2ZK-RFJ2>].

154. Johnsen initially took issue with aspects of what I wrote in a balkanization symposium on abortion rights and elaborated on those comments in Dawn Johnsen, *TRAPing Roe in Indiana*

twenty hindsight I think that criticism was fair, as I now think I misperceived the direction of abortion politics at that time. So why did the *Casey* compromise come undone, and what does this tell us about the workability of judicial minimalism?

In this subpart, I will address these issues. Initially, I will highlight how it was that, notwithstanding ever-growing polarization between the parties, *Casey* was largely a stabilizing force until 2010. I will then turn my sights to the recent wave of state legislative attacks on abortion rights and explain why *Casey*'s minimalism no longer facilitates stability or elected government discourse.

### 1. 1992–2009

To start, the 1992 to 2009 period was one of growing polarization, including the rise of partisan divisions on social issues like abortion. In Congress, the gap between Northern liberals and Southern conservatives had been replaced by a sharp divide between the parties.<sup>155</sup> Throughout the 1990s, this divide grew. By 2004, measures of ideology revealed that the “two parties are [almost] perfectly separated in their liberal-conservative ordering.”<sup>156</sup> By 2009, the distance between the two parties was greater than at any other time in the nation's history.<sup>157</sup> Table Three illustrates this divide, evaluating roll call votes in Congress.

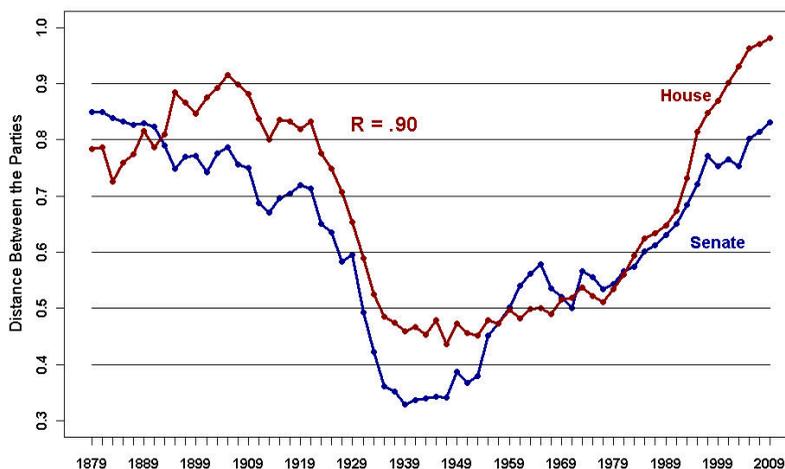
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*and a Common-Ground Alternative*, 118 YALE L.J. 1356 (2009). For another critique of my claims, see FRIEDMAN, *supra* note 89 (arguing that *Roe* was subsumed by larger social forces and that the *Roe* backlash may speak less to the decision itself and more to those larger forces).

155. See Roberts & Smith, *supra* note 110, at 306.

156. For House and Senate rank orderings, see *HOUSE\_SORT10 Rank Ordering*, VOTEVIEW, [http://voteview.com/HOUSE\\_SORT108.HTM](http://voteview.com/HOUSE_SORT108.HTM) (last visited May 10, 2016) [<https://perma.cc/D5AN-AK5P>]; *SENATE\_SORT108 Rank Ordering*, VOTEVIEW, [http://voteview.com/SENATE\\_SORT108.HTM](http://voteview.com/SENATE_SORT108.HTM) (last visited May 10, 2016) [<https://perma.cc/Q846-YBAS>]. See also THERIAULT, PARTY POLARIZATION, *supra* note 63; Sean M. Theriault & David W. Rohde, *The Gingrich Senators and Party Polarization in the U.S. Senate*, 73 J. POL. 1011 (2011).

157. See Smith & Gamm, *supra* note 65, at 147, 151.

Table 3<sup>158</sup>

On abortion, the emerging divide between Republicans and Democrats in Congress was fully cemented. Party-line voting on judicial nominees, competing amicus briefs by large coalitions of Democratic and Republican lawmakers, and the switching of political parties (from Republican to Democrat) of anti-Bork Senator Arlen Specter were hallmarks of this period.<sup>159</sup> Unlike earlier periods, polarization also defined elite attitudes, and to a lesser extent, the attitudes of the mass public.

“Elite status [no longer] trumped ideology and partisanship.”<sup>160</sup> 2005 survey data by the Pew Research Group shows that the most liberal Americans were affluent, well-educated Democrats and the most conservative Americans were affluent, well-educated Republicans.<sup>161</sup> These studies also highlight growing polarization among elites, and, in particular, highlight dramatic changes among strong political conservatives since the 1980s. In the 1980s,

158. For source information on this chart, see POLARIZED AMERICA, <http://polarizedamerica.com> (last visited May 16, 2016). Chart information also available at VOTEVIEW, [http://voteview.com/HOUSE\\_SORT108.HTM](http://voteview.com/HOUSE_SORT108.HTM) (last visited May 10, 2016).

159. On party line voting, see Sarah A. Binder & Forrest Maltzman, *Advice and Consent: The Politics of Confirming Federal Judges in CONGRESS RECONSIDERED* 265 (Lawrence C. Dodd and Bruce I. Oppenheimer eds., 10th ed. 2013). On competing amicus briefs, see Devins, *supra* note 79, at 946–50, 1005–15. On Specter’s switch, see Carl Hulse, *Specter Switches Parties*, N.Y. TIMES (Apr 28, 2009), <http://thecaucus.blogs.nytimes.com/2009/04/28/specter-will-run-as-a-democrat-in-2010> [<https://perma.cc/6FGR-ELRJ>].

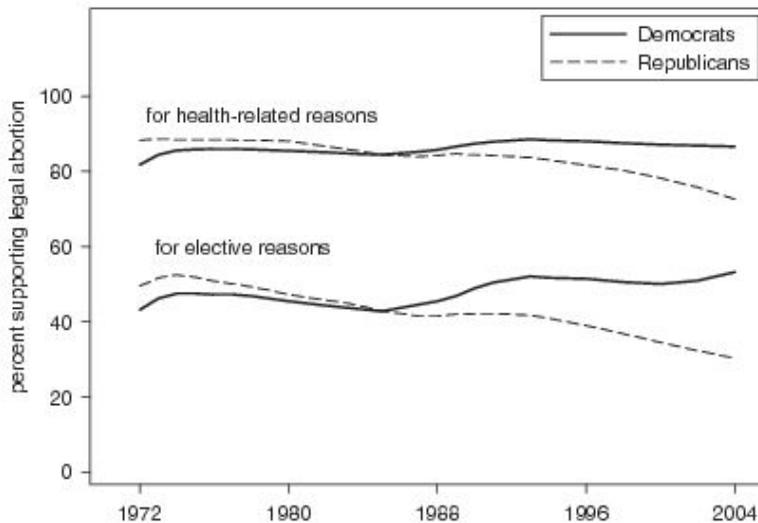
160. Graber, *supra* note 68, at 688.

161. The Pew Study correlates income and education to political beliefs. See *The 2005 Political Typology*, PEW RES. CTR. (May 10, 2005), <http://www.people-press.org/files/legacy-pdf/242.pdf> [<https://perma.cc/BK3D-8HF9>].

conservatives divided into two groups—social conservatives and economic conservatives (who were often socially moderate or liberal); by 2005, economic conservatives had adopted the cultural beliefs of social conservatives.<sup>162</sup> Liberal Democrats too became more liberal, especially on social issues. Polling on same-sex marriage, abortion rights, and civil liberties showed that members of the most affluent and well-educated Democrats were “far more liberal” than other Democrats.<sup>163</sup>

Public opinion polls also revealed a growing public divide between Democrats and Republicans on abortion. Beginning around 1990, Republicans and Democrats began to diverge, and that divergence continued throughout the post-*Casey* period. Table Two traces that divergence on the question of whether abortion should be legal under any circumstances; Table Four shows that there is a similar divergence on health-related abortions. Moreover, by 2008, “if pollsters ask if someone is strongly pro-choice, strongly pro-life, or only somewhat committed to one of the positions, 70% of the public identify with one of the two poles.”<sup>164</sup>

**Table 4**  
**Support for Legal Abortion by Party Identification**<sup>165</sup>



162. *Id.* at 53.

163. Graber, *supra* note 68, at 698.

164. NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES 5 (2010) (collecting polling data).

165. For source information on this chart, see Luks & Salamone, *supra* note 126.

At the state level, changing attitudes on moral issues implicating family structure and gender roles became increasingly salient.<sup>166</sup> Republican-dominated red states had different policies and norms than Democrat-dominated blue states. In the aftermath of the 2004 presidential election, researchers observed that “those first-day stories about moral values—and the red-and-blue maps that went with them—conveyed something real”;<sup>167</sup> indeed, the leading academic study of this topic was titled *Red Families v. Blue Families*.<sup>168</sup>

On abortion, there were certainly differences between red and blue states before 2010.<sup>169</sup> At the same time, *Casey* largely stabilized abortion politics. There were relatively few laws passed during this period, especially the first several years following *Casey*.<sup>170</sup> More significant, lawmakers in Republican-dominated states largely acquiesced to the template of abortion restrictions enacted by Pennsylvania and approved by the Supreme Court in *Casey*. By 2009, twenty-four states had waiting period laws, thirty-three states had informed consent laws, and forty-three states had parental consent or notice laws.<sup>171</sup> There are three principal related explanations for this acquiescence: First, the Pennsylvania template matched both public opinion and the preferences of most pro-life states.<sup>172</sup> Pennsylvania was ranked by the National Abortion Rights Action League as among

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166. See Stephen Ansolabehere et al., *Purple America*, 20 J. ECON. PERSP. 97, 107 (Spring 2006).

167. John C. Green & Mark Silk, *Why Moral Values Did Count*, RELIGION IN THE NEWS (Spring 2005). State office holders did not track the red state-blue state presidential divide until after 2010; before 2010, around half of all states had some form of divided Republican-Democrat government. After 2010, states became purely red or blue. For a discussion of both the changing face of state politics and its impact on state abortion laws, see *infra* notes 185–251 and accompanying text.

168. CAHN & CARBONE, *supra* note 164, at 19 (discussing differences in family strategies in predominantly Republican and Democratic states).

169. See *id.* at 92–105.

170. See DEVINS, SHAPING, *supra* note 9, at 74 (“[S]tate responses to *Casey* reinforce the . . . trend of diminishing state intervention in abortion. Most strikingly, according to Alan Guttmacher Institute studies, ‘antiabortion legislators [have] heeded . . . [*Casey*] and curtailed their attempts to make abortion illegal.’ In 1994, for example, no legislation was introduced to outlaw abortion.”).

171. GUTTMACHER INST., *State Policies in Brief, The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review* 1 (2009), <https://www.guttmacher.org/pubs/MandatoryCounseling.pdf> [<https://perma.cc/Y8V3-XZXJ>]; NARAL PRO-CHOICE AM. FOUND., WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS 19 (18th ed. 2009); see also DEVINS, SHAPING, *supra* note 9, at 74 (noting that focus of state legislatures after *Casey* was enactment of laws upheld in *Casey*).

172. See *supra* notes 124–125 (documenting public support for Pennsylvania’s restrictions on abortion).

the seven most restrictive states regarding abortion<sup>173</sup>—so, very few states were interested in enacting restrictions more stringent than Pennsylvania. Second, Republican lawmakers were not interested in being foot soldiers (or even officers) in the abortion wars. Public opinion (which also includes the forty-two percent of voters who consider themselves independent) had been fairly stable and supported limited abortion rights, not the evisceration of abortion rights.<sup>174</sup> Moreover, lawmakers at that time generally sought to steer clear of divisive controversy. As one lawmaker described the Ohio House of Representatives: “There are ten strong pro-choice people, ten strong pro-life, and 79 legislators who would rather the issue would go away.”<sup>175</sup> Third, as was true in the *Roe* to *Casey* period, lawmakers in most states preferred to operate within boundaries set by the Supreme Court.<sup>176</sup> Indeed, no state pursued the spousal notification provision struck down in *Casey*—a politically popular provision that undoubtedly would have been enacted in a great many states if it had been upheld in *Casey*.<sup>177</sup>

The one notable exception to this pattern is partial-birth abortion, and it is the exception that proves the rule. With polls showing only seventeen percent of people thinking partial-birth abortions should be legal,<sup>178</sup> thirty-two states passed such bans between 1995 and the Supreme Court’s 2000 decision invalidating the Nebraska ban.<sup>179</sup> Following the 2000 decision, no state enforced its ban. More strikingly, neither Samuel Alito joining the Court in 2006 nor the Supreme Court’s approval of a federal partial-birth ban in

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173. NARAL, *supra* note 171, at tbl. Pennsylvania was also a handful of so-called challenger states in the *Roe* to *Casey* period—leading the charge in enacting abortion restrictions. *See supra* tbl. 1.

174. *See* Luks & Salamone, *supra* note 126, at 101; GALLUP, *In Depth: Topics A to Z: Abortion*, <http://www.gallup.com/poll/1576/Abortion.aspx?> [<https://perma.cc/6UB7-TJWE>] (highlighting fact that Americans have believed from the time of *Roe* to 2008 that abortion should be legal with restrictions).

175. Graber, *supra* note 132, at 58. *See id.* for additional examples. *See also supra* notes 129–132.

176. *See supra* notes 129–130.

177. Sixty-nine percent of the public supported this provision but nevertheless no state pursued such a provision after *Casey*. *See* Devins, *Abortion Wars*, *supra* note 9, at 1346 n.122.

178. *Clinton and Giuliani Seen as Not Highly Religious; Romney’s Religion Raises Concerns*, PEW RES. CTR. (Sept. 6, 2007), <http://www.pewforum.org/2007/09/06/clinton-and-giuliani-seen-as-not-highly-religious-romneys-religion-raises-concerns> [<https://perma.cc/6DHB-EWSW>].

179. For a listing of states with bans, see *Bans on “Partial Birth” Abortion*, GUTTMACHER INST. (Jan. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_BPBA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_BPBA.pdf) [<https://perma.cc/W28Z-5RG9>].

2007 impacted overall state legislation restricting abortion rights.<sup>180</sup> The *Casey* compromise seemed intact in 2009.

At the same time, party polarization was growing, and the *Casey* compromise was increasingly fragile. Pro-life interests were pushing for more draconian restrictions and a handful of outlier states were pushing the boundaries of what *Casey* allowed.<sup>181</sup> In 2009, these states (Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, and South Dakota) accounted for less than three percent of abortions.<sup>182</sup> The laws they were enacting, moreover, were not being pursued by other states: mandatory ultrasounds, fetal pain laws, and informed consent laws that talked about suicide risks or a link between abortion and breast cancer.<sup>183</sup> In 2009, I discounted these outlier states—concluding that they were true outliers and not changing the content of the abortion debate.<sup>184</sup> That assessment proved incorrect. Changes in state legislatures starting around 2010 transformed abortion politics yet again. For the balance of this section, I will detail these changes, showing that the *Casey* compromise no longer holds and that democratic deliberation on abortion rights is no longer possible.

## 2. 2010–2015

Three interrelated phenomena undid the *Casey* compromise after the 2010 elections. First, there was a rapid rise in party polarization. With the advent of the Tea Party, Republicans became noticeably more conservative and more willing to push the boundaries of their preferred policies.<sup>185</sup> Correspondingly, Democrats became

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180. See Devins, *Abortion Wars*, *supra* note 9, at 1324. Alito joining the Court was consequential because he replaced Sandra Day O'Connor—the Justice who cast the deciding vote in the 5-4 decision invalidating state bans on partial birth abortion. See Linda Greenhouse, *Consistently, A Pivotal Role: Groundbreaking Justice Held Balance of Power*, N.Y. TIMES, July 2, 2005, at A10. The Supreme Court's approval of the federal ban was consequential because the Court signaled a new willingness to uphold abortion bans. See Reva B. Siegel, *Dignity and The Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1700–01 (2008); Dahlia Lithwick, *Father Knows Best: Dr. Kennedy's Magic Prescription for Indecisive Women*, SLATE (Apr. 18, 2007, 7:21 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/04/father\\_knows\\_best.2.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/04/father_knows_best.2.html) [<https://perma.cc/2S8Y-DBHE>].

181. Devins, *Abortion Wars*, *supra* note 9, at 1338.

182. Based on data representing the number of legal abortions in each state in 2005, these states collectively account for 2.94% of U.S. abortions. Stanley K. Henshaw & Kathryn Kost, *Trends in the Characteristics of Women Obtaining Abortions, 1974 to 2004*, GUTTMACHER INST. 18–19 (2008), <https://www.guttmacher.org/pubs/2008/09/23/TrendsWomenAbortions-wTables.pdf> [<https://perma.cc/RQ5W-JR5A>].

183. See Devins, *Abortion Wars*, *supra* note 9, at 1338–49.

184. See *id.* at 1339–40.

185. See *infra* notes 191–214 and accompanying text.

more liberal and a growing number of independents left both parties. Second, there was a stronger identity with one party or the other when voting. Republican voters rarely crossed over to vote Democratic and vice-versa; relatedly, there was less incentive for elected officials to compromise and greater incentive to pursue agendas that would appeal to the party faithful who voted in primaries.<sup>186</sup> One inevitable outgrowth of this was that Republicans and Democrats would be more ideological in both their agenda and their refusal to compromise.<sup>187</sup> Third, with voters gravitating to one party or the other, state legislatures tended to be controlled similarly. In the post-2010 period, this proved a boon to the Republican Party.<sup>188</sup>

The consequence of all this was both a spike up in the number of Republican-controlled states and a stronger commitment among Republican officeholders to aggressively pursue a conservative agenda, including the pursuit of a broad array of pro-life measures. Before turning to these measures, let me provide some additional details of the dramatic changes that took place after the 2010 elections—as these details put into focus why *Casey*-like minimalism is unsuited to today's political environment. To start, the ideological gap between Republicans and Democrats grew at an exponential rate starting around 2004. The median Republican is now more conservative than nearly all Democrats (ninety-four percent), and the median Democrat is more liberal than ninety-two percent of Republicans.<sup>189</sup> This is compared to 2004 levels of ideological division, when the median Republican was more conservative than only sixty-eight percent of Democrats, and the median Democrat was more liberal than seventy percent of Republicans.<sup>190</sup> The rate of polarization jumped between 2004 and 2014, while staying fairly steady between 1994 and 2004.<sup>191</sup> Specifically, an increased twenty-two percent of Republicans became more conservative than the median Democrat between 2004 and 2014, along with the liberalization of an additional twenty-six percent of Democrats over the same period.<sup>192</sup>

A contributing factor to the rightward movement of Republicans (voters and elected officials alike) on social issues is the

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186. See *infra* notes 202–203, 209–211.

187. Abortion is a prime example. See *infra* notes 218–249 and accompanying text.

188. See *infra* Table 6.

189. See *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/section-1-growing-ideological-consistency/#interactive> [<https://perma.cc/S24B-Y2GA>].

190. *Id.*

191. *Id.*

192. *Id.*

rise of the Tea Party.<sup>193</sup> What initially started as an economic movement swept up conservatives across the board, including the Religious Right.<sup>194</sup> Eighty-five percent of Tea Party supporters (as compared to twenty-nine percent of non-supporters) describe themselves as conservative.<sup>195</sup> A 2010 poll conducted by the Public Religion Research Institute found that about half of Tea Party members identified as part of the Religious Right and another Washington Post poll found that most white evangelicals supported the movement.<sup>196</sup> On abortion, sixty percent of Tea Party members think that abortion should be illegal (as compared to nineteen percent of the general population).<sup>197</sup> With Tea Party members disproportionately voting in party primaries,<sup>198</sup> Republican nominees are often social conservatives committed to the evisceration of abortion rights.<sup>199</sup>

The increasing conservatism of Republicans is evidenced in other important ways. Republicans have seen significant increases in support from pro-life religious groups: Evangelicals (five percent increase between 2008 and 2012), Mormons (twelve percent increase), and Catholics (eight percent and moved from majority Democrat to

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193. The rise of the Tea Party is often linked to Republicans becoming more conservative—especially in state elections—starting in 2010. See Louis Jacobson, *Welcome to the Tea Party*, 37 STATE LEG., Sept. 2011, at 12.

194. See Michelle Boorstein, *Tea Party, Religious Right Often Overlap, Poll Shows*, WASH. POST (Oct. 5, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/05/AR2010100501491.html> [https://perma.cc/H5C3-GUK8]; Alan I. Abramowitz, *Partisan Polarization and the Rise of the Tea Party Movement*, at 11, <http://faculty.washington.edu/jwilker/353/AbramowitzTea.pdf> [https://perma.cc/X3D3-WVVH] (demonstrating tea party as a haven for religious conservatives).

195. See Abramowitz, *supra* note 194, at 10.

196. See Boorstein, *supra* note 194.

197. See Jon Brand, *Tea Party: Libertarian Revolt or Religious Right in Disguise?*, CHRISTIAN SCI. MONITOR (Apr. 21, 2011), <http://www.csmonitor.com/USA/Politics/2011/0421/Tea-party-Libertarian-revolt-or-religious-right-in-disguise> [https://perma.cc/LV9B-FB2N]; see also Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 PERSP. ON POL., Mar. 2011, at 25–43, (stating that the Tea Party movement deems the regulation of abortion clinics as morally necessary).

198. Alec Tyson, *Tea Party Republicans Exert Stronger Influence in GOP Primaries*, PEW RES. CTR. (Aug. 7, 2013), <http://www.pewresearch.org/fact-tank/2013/08/07/tea-party-republicans-exert-stronger-influence-in-gop-primaries/> [https://perma.cc/K7B9-N6XX]. One prominent example of this phenomenon is the 2012 Texas Senate race. At that time, Ted Cruz was an upstart backed by the Tea Party; Tea Party support in the Republican primary was critical to Cruz. See Manny Fernandez, *Ted Cruz's Senate Bid That Didn't Stop At The Senate*, N.Y. TIMES (Nov. 30, 2015), <http://www.nytimes.com/2015/12/01/us/politics/ted-cruz-first-campaign.html> [https://perma.cc/BTN9-WM9J].

199. See Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. (forthcoming 2016).

majority Republican).<sup>200</sup> On the abortion issue, Democratic elected officials are uniformly pro-choice and Republicans pro-life. There are only four “pro-life” identifying Democrats at the federal level and 122 at the state level, or about 1.7% and 4% of elected Democrats respectively.<sup>201</sup> Pro-choice Republicans are almost as rare with seven elected at the federal level (2.3%) and anecdotal evidence suggesting next-to-no pro-life Republicans at the state level.<sup>202</sup>

Just as Republicans are moving to the right, Democrats are moving to the left—so that there no longer are moderate elected officials. As noted earlier, party polarization had eviscerated moderate Congressman and Senators by around 2010.<sup>203</sup> At the state level, “voters are increasingly being offered candidates who are either very liberal or conservative in elections, and there are far fewer moderates that we used to see win.”<sup>204</sup> A study of state legislature roll call votes from 1996 to 2013 reaches the same conclusion: Democrats have moved to the left and Republicans to the right.<sup>205</sup> In Republican-controlled states, moreover, the ideological gap between median legislators is narrowing—suggesting greater ideological conformity

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200. *Trends in Party Identification of Religious Groups*, PEW RES. CTR. (Feb. 2, 2012), <http://www.pewforum.org/2012/02/02/trends-in-party-identification-of-religious-groups/> [<https://perma.cc/2GFF-HTWM>] (from 2008 to 2014, the gap between Republicans and Democrats who consider themselves very religious increased from 4% to 14%).

201. DEMOCRATS FOR LIFE OF AMERICA, *Elected Pro-Life Democrats* (Oct. 25, 2013), <https://web.archive.org/web/20151004041436/http://democratsforlife.org/index.php/big-tent/elected-pro-life-dems/pro-life-democrats> [<https://perma.cc/REA8-CC32>].

202. *Republicans For Choice*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Republicans\\_for\\_Choice](http://en.wikipedia.org/wiki/Republicans_for_Choice) [<https://perma.cc/5E48-Z9SS>] (federal list). At the state level, the rarity of pro-choice Republicans prompted Salon to title a profile of a pro-choice Republican lawmaker. Katie McDonough, *Yes, Pro-Choice Republicans Are Real!*, SALON (Aug. 12, 2013), [http://www.salon.com/2013/08/12/yes\\_pro\\_choice\\_republicans\\_are\\_real/](http://www.salon.com/2013/08/12/yes_pro_choice_republicans_are_real/) [<https://perma.cc/Q5V6-HNDQ>].

203. See *supra* notes 154–162.

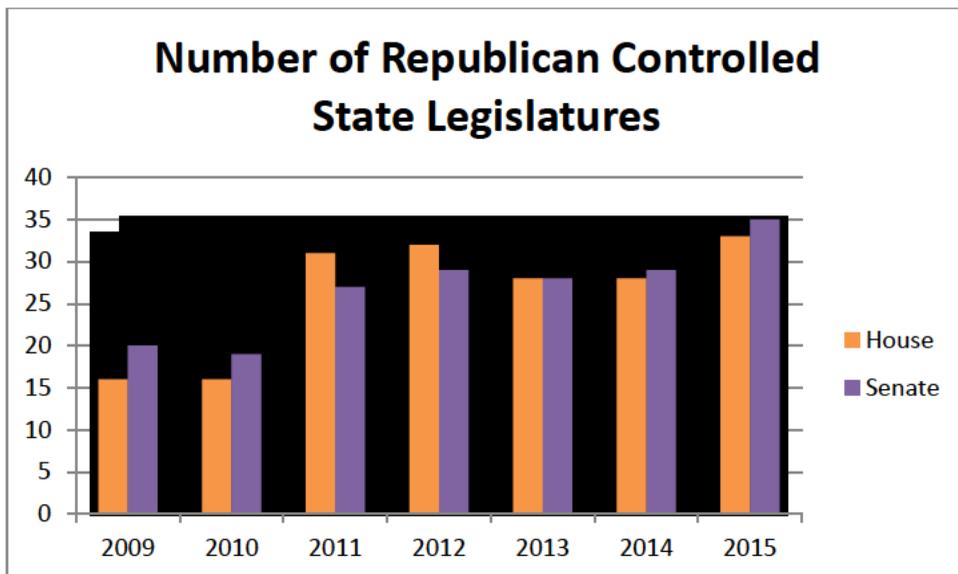
204. Valerie Richardson, *Is One-Party Rule Dividing America? Concentration of Power Can Lead to Overreach, Backlash*, WASH. TIMES (June 27, 2013), <http://www.washingtontimes.com/news/2013/jun/27/one-party-rule-in-states-is-dividing-america/?page=all> [<https://perma.cc/PY5D-G4EV>] (quoting political scientist Seth Masket).

205. See Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546 (2011); Boris Shor, *How U.S. State Legislatures are Polarized and Getting More Polarized*, WASH. POST (Jan. 14, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/14/how-u-s-state-legislatures-are-polarized-and-getting-more-polarized-in-2-graphs/> [<https://perma.cc/HS8G-6BR2>]; Ana Swanson, *These Political Scientists May Have Discovered Why U.S. Politics Are a Disaster*, WASH. POST (Oct. 7, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/10/07/these-political-scientists-may-have-discovered-the-real-reason-u-s-politics-are-a-disaster/> [<https://perma.cc/57MD-PMWH>]; John Voorheis, Nolan McCarty & Boris Shor, *Unequal Incomes, Ideology, and Gridlock* (Aug. 21, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2649215](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649215) [<https://perma.cc/Y4KX-FFRP>].

and, relatedly, that Republican-controlled legislatures are trending more and more conservatively with each election.<sup>206</sup>

Combining with this growing ideological divide and related spike in Republican conservatism, Republican control of state legislatures and governorships has seen a rapid rise. “As the Democrat party has shrunk nationally over the course of the last 15 years, the disproportionate effect has been the replacement of moderate Democrats with [increasingly conservative] Republicans.”<sup>207</sup> Table Five tracks changes in Democrat-Republican seats in state legislatures; Table Six tracks changes in party control of state governments.

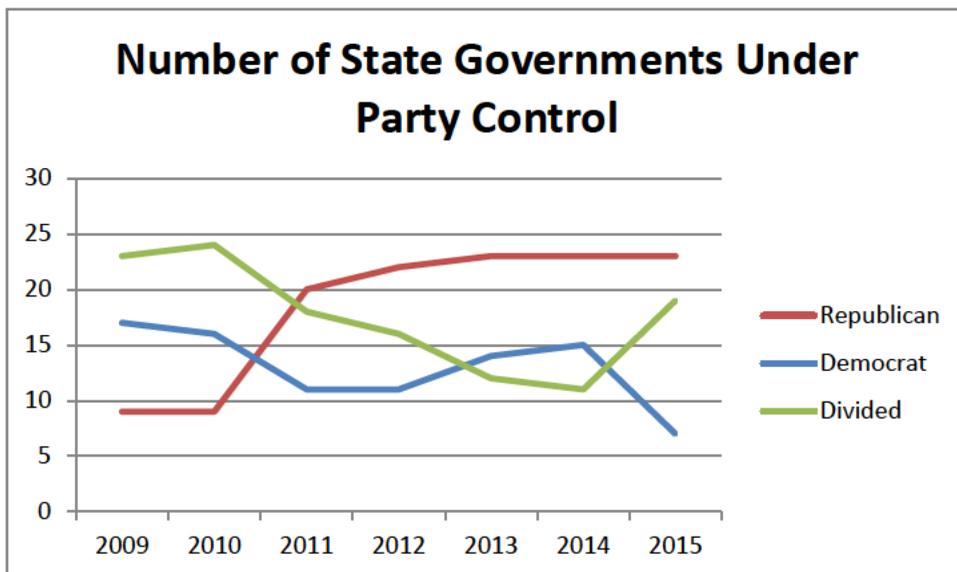
Table 5



206. See Shor & McCarty, *supra* note 205, at 543.

207. Swanson, *supra* note 205 (quoting Princeton political scientist Nolan McCarty).

Table 6



Republicans went from controlling both chambers in only fourteen states at the beginning of 2010 to controlling twenty-five in 2011, twenty-six in 2013, and thirty in 2015. Democrats (in 2015) control twelve, and eight are split.<sup>208</sup> In less-partisan periods, Democrats were often in control. In 1978, eleven state houses were controlled by Republicans and thirty-two by Democrats; in 1982, Democrats controlled thirty-four state legislatures.<sup>209</sup>

Republicans dominated Democrats in other measures, all of which helped fuel the dramatic increase of abortion legislation after 2010. Democrats have lost 900 legislative seats since 2009; Republicans, in 2015, held 4,111 seats in state legislatures and Democrats 3,163. More significantly, this growing gap is not spread evenly throughout the nation, but is concentrated in states that were Republican or leaning Republican.<sup>210</sup> In other words, Republican states are more solidly Republican than before—further shifting

208. See Drew Desilver, *Ahead of Redistricting, Democrats Seek to Reverse Statehouse Declines*, PEW RES. CTR. (Mar. 2, 2015), <http://www.pewresearch.org/fact-tan/2015/03/02/ahead-of-redistricting-democrats-seek-to-reverse-statehouse-declines> [<https://perma.cc/Z7CS-SQUK>] (providing year-by-year data of political party control of both chambers of state legislatures).

209. See *id.* The fact that a great number of states were enacting restrictions on abortion rights is further evidence that a state's willingness to pursue anti-abortion legislation was nonpartisan during the post-*Roe* period.

210. See *supra* tbl. 5.

power to conservative party loyalists who vote in party primaries. Correspondingly, while there are fewer Democratic states, those states are more solidly under Democratic control: Connecticut, California, Hawaii, Maryland, Massachusetts, and New Mexico.<sup>211</sup> The inevitable outgrowth of this bifurcation is that states tend to be controlled by one party or the other, that that party is more likely now than ever before to hold a super-majority in the legislature and the governorship, and that party is likely to be the Republican party.<sup>212</sup> In 2015, there were twenty-three single-party Republican states (where Republicans-controlled the legislature and governorship) and seven single-party Democratic states.<sup>213</sup>

The most visible effects of Republican gains are Republican efforts to “gain partisan advantage” by “eviscerat[ing] liberal policies” and “entrench[ing] the political power of the right.”<sup>214</sup> Abortion regulation is key to this effort as are voter identification laws, tax reform, and the elimination of public sector unions.<sup>215</sup> On abortion, there have been dramatic changes both in the number of laws enacted, and in the severity of state restrictions. From 2011 to 2013, 205 abortion restrictions were enacted—a dramatic increase from the 2001–2010 decade, when 189 restrictions were enacted. In 2015, fifty-seven restrictions were enacted. According to the Alan Guttmacher Institute, thirteen states were hostile towards abortion in 2000; in 2010, the number was twenty-two with five considered very hostile; in 2014, twenty-seven states were considered hostile and eighteen very hostile.<sup>216</sup>

The types of laws have also changed. Before 2009, one state (Oklahoma) mandated that a woman undergo an ultrasound before

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211. *See id.*

212. See Louis Jacobson, *The Year of Single Party Control and Supermajorities*, GOVERNING.COM (Jan. 7, 2013), <http://www.governing.com/blogs/politics/gov-year-single-party-control-supermajorities.html> [<https://perma.cc/GC5C-5AKT>].

213. *State and Legislative Partisan Composition Post-Election*, NCSL.ORG (Dec. 16, 2015), [http://www.ncsl.org/Portals/1/Documents/Elections/Legis\\_Control\\_2015\\_Post\\_Election12\\_16\\_4pm.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2015_Post_Election12_16_4pm.pdf) [<https://perma.cc/REV9-VSTT>].

214. Thomas B. Edsell, *The State-by-State Revival of the Right*, N.Y. TIMES (Oct. 8, 2014), [http://www.nytimes.com/2014/10/08/opinion/the-state-by-state-revival-of-the-right.html?\\_r=0](http://www.nytimes.com/2014/10/08/opinion/the-state-by-state-revival-of-the-right.html?_r=0) [<https://perma.cc/9SP3-QX4X>]. Democrats too seek partisan advantage in the states that they control. New York and Maryland Democrats passed gun control legislation in 2013 over fierce Republican opposition. See Louis Jacobson, *Are States Deepening the Nation's Red-Blue Divide?*, GOVERNING.COM (Apr. 23, 2013), <http://www.governing.com/blogs/politics/gov-states-deepening-nations-red-blue-divide.html> [<https://perma.cc/ZW59-CNJX>].

215. See Edsell, *supra* note 214.

216. In *Just the Last Four Years, States Have Enacted 231 Abortion Restrictions*, GUTTMACHER INST. (Jan. 5, 2015), <http://www.guttmacher.org/media/inthenews/2015/01/05/> [<https://perma.cc/MZ9P-VJEJ>].

obtaining an abortion and that the provider must show and describe the image to the woman. Four other states have now enacted similar legislation (Louisiana, North Carolina, Texas, Wisconsin).<sup>217</sup> States have also ratcheted up waiting period lengths (three states—Alabama, Arizona, Tennessee—now have forty-eight-hour waiting periods and five others—Missouri, North Carolina, North Dakota, Oklahoma, South Dakota, Utah—have seventy-two-hour waiting periods); seventeen states now require that require women be told of a link between abortion and breast cancer and/or negative psychological effects of abortion and/or that the abortion procedure is painful to the fetus.<sup>218</sup> Few of these measures were in place in 2009.<sup>219</sup>

The most dramatic changes involve two sets of laws enacted after 2009<sup>220</sup>—hospital admitting privileges (eleven states) and twenty-week abortion bans (twelve states).<sup>221</sup> Admitting privilege laws are draconian in their effect, as revealed in litigation involving Mississippi (where the only clinic would have shut down), Texas (where around two-thirds of abortion clinics would shut down), and Wisconsin (where two of the state’s four abortion clinics would shut down).<sup>222</sup> Proponents of these laws were well aware of their consequences: Mississippi governor Phil Bryant spoke of the state doing “an admirable job” protecting the unborn and that his “goal is to end abortion in Mississippi.”<sup>223</sup> In Texas, state lieutenant governor David Dewhurst—when the bill was under consideration—tweeted a photo showing abortion clinics likely to close under the bill, writing: “We fought to pass SB5 thru the Senate last night, & this is why!”<sup>224</sup>

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217. See *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (Dec. 10, 2015), [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf) [<https://perma.cc/NW5Q-2BCM>].

218. See *State Policies in Brief: An Overview of Abortion Laws*, GUTTMACHER INST. (Mar. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf) [<https://perma.cc/NW5Q-2BCM>].

219. See Theodore Joyce et al., *The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review*, GUTTMACHER INST. (Apr. 2009), <https://www.guttmacher.org/pubs/MandatoryCounseling.pdf> [<https://perma.cc/EK96-642R>].

220. See Sarah Kiff, *The Landscape of Abortion Bans*, in *One Must-see Map*, WASH. POST (Mar. 28, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/03/28/the-landscape-of-abortion-bans-in-one-must-see-map/> [<https://perma.cc/7855-VAX2>].

221. See GUTTMACHER INST., *supra* note 216. Before 2009, several states banned abortions after viability and some at 24 weeks. See *id.*

222. See Greenhouse & Siegel, *supra* note 43, at 23–24.

223. *Mississippi State of State Address*, C-SPAN (Jan. 22, 2014), <http://www.c-span.org/video/?317373-1/mississippi-state-state> [<https://perma.cc/6SMA-8SFY>]. For similar statements by bill sponsor Sam Mims, see M.J. Lee, *Bill Dooms Only Miss. Abortion Clinic*, POLITICO.COM (Apr. 5, 2015), <http://www.politico.com/news/stories/0412/74871> [<https://perma.cc/HNF3-3WUT>].

224. Greenhouse & Siegel, *supra* note 43, at 24.

Twenty-week bans are largely symbolic (ninety-nine percent of abortions take place earlier in the pregnancy),<sup>225</sup> but are telling nonetheless. Although *Casey*'s minimalist undue burden standard gave states substantial leeway to experiment,<sup>226</sup> *Casey* formally set viability (roughly twenty-four weeks) as the point at which states might ban abortion,<sup>227</sup> the twenty-week ban—based on disputed claims about fetal pain<sup>228</sup>—is flatly inconsistent with *Casey*. For the first time,<sup>229</sup> a substantial number of states are doing more than testing boundaries: they are acting in direct contradiction of Supreme Court dictates and, as such, these laws are testament to the ascendancy of the “aggressive wing of the antiabortion movement.”<sup>230</sup>

The changing face of abortion politics is about more than the increasing willingness of states to place substantial restrictions on women seeking abortions and abortion clinics;<sup>231</sup> it is also about the

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225. See Kliff, *supra* note 74.

226. See Devins, *Abortion Wars*, *supra* note 9, at 1329 (arguing that pro-life Justices could uphold virtually any law a state is likely to enact under *Casey*). Indeed, federal courts of appeal were divided on the constitutionality of admitting privileges laws that shut down most state abortion clinics. See Greenhouse & Siegel *supra* note 43, at 38.

227. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992).

228. See Pam Belluc, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES (Sept. 16, 2013), <http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html> [<https://perma.cc/F77C-DGKW>].

229. See *supra* notes 129–132 (noting how lawmakers did not challenge *Roe* before *Casey*); *supra* notes 169–177 (noting lawmaker acquiescence to *Casey* before 2009).

230. Sarah Kliff, *What North Dakota's Six Week Abortion Ban Says About the Antiabortion Movement*, WASH. POST (Mar. 15, 2013) <https://www.washingtonpost.com/news/wonk/wp/2013/03/15/what-north-dakotas-6-week-abortion-ban-says-about-the-antiabortion-movement/> [<https://perma.cc/Y3N2-H7F2>]. Given *Casey*'s clear holding, no lower court has upheld a twenty-week ban. See *Recent Abortion Ban Litigation*, REPRODUCTIVERIGHTS.ORG (Mar. 11, 2016), <http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Previability-Litigation-With-Chart-for-Sept-20-week-ban%20vote.pdf> [<https://perma.cc/UKR4-GSCX>]. For news stories discussing how pro-life legislation increasingly caters to advocates of more assertive restrictions, see Jeremy W. Peters, *G.O.P. Pushes New Abortion Limits to Appease Vocal Base*, N.Y. TIMES (June 17, 2013), [http://www.nytimes.com/2013/06/18/us/politics/undaunted-by-2012-elections-republicans-embrace-anti-abortion-agenda.html?\\_r=0](http://www.nytimes.com/2013/06/18/us/politics/undaunted-by-2012-elections-republicans-embrace-anti-abortion-agenda.html?_r=0) [<https://perma.cc/5NVD-PBHR>]; Molly Redden, *Pro-Lifers Aren't Even Trying to Make Abortion Restrictions Sound Nice Anymore*, THE NEW REPUB. (Aug. 27, 2013), <https://newrepublic.com/article/114480/abortion-laws-without-rape-exceptions-are-proliferating> [<https://perma.cc/2BRK-DX7Y>].

231. I have highlighted some but hardly all of the ways that states are now regulating abortion. Other examples include banning an established drug protocol for medication abortions and requiring abortion clinics to meet the same building, equipment, and staffing standards as ambulatory surgical facilities. See *Medication Abortion*, GUTTMACHER INST. (Mar. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_MA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MA.pdf) [<https://perma.cc/7WAS-UCPT>]; *Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Mar. 4, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_TRAP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf) [<https://perma.cc/PV74-L2ET>]; see also Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Put Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL'Y REV. 1 (Winter 2014), <http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.html> [<https://perma.cc/E5EA-K5YH>];

way in which these laws are passed—ways that cast doubt on the democracy-enhancing benefits of minimalist decision making. Specifically, party-line voting, interest group capture, and the manipulation of the lawmaking process are part and parcel of abortion politics today—all of which are anathema to democratic discourse.

Most significantly and most obviously, abortion now divides the parties in ways that stand against compromise and deliberation across parties or within parties. Consequently, just as Democrats usually stand together in deep-blue states to pursue gun control legislation,<sup>232</sup> Republicans similarly stand together on abortion.<sup>233</sup> Examples abound.<sup>234</sup> In 2015, North Carolina Republicans passed a seventy-two-hour waiting period requirement on a party-line vote—ignoring complaints from Democrats that there was no evidence that the bill served women’s health interests.<sup>235</sup> The Florida state Senate took one hour to approve a twenty-four-hour waiting period, rejecting all eight Democratic amendments; the straight party-line vote was described as

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Lydia DePillis, *States Are Passing Hundreds of New Abortion Restrictions*, WASH. POST (Jan. 9, 2015), <https://www.washingtonpost.com/news/storyline/wp/2015/01/09/states-are-passing-hundreds-of-new-abortion-restrictions-heres-what-its-like-to-operate-in-one-of-them/> [https://perma.cc/PUS2-V9UD]; Eric Eckholm, *Access to Abortion Falling as States Pass Restrictions*, N.Y. TIMES (Jan. 3, 2014), <http://www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html> [https://perma.cc/28VR-RUG5].

232. See Jacobson, *supra* note 212 (discussing Democrat party-line voting in New York and Maryland).

233. Democrats too stand together on abortion. For example, Democrats back the movement to allow nurse practitioners to perform abortions in the first months of pregnancy. In 2013, California passed such legislation on a nearly party-line vote. See Associated Press, *Bill Would Let Non-Physicians Perform Abortions*, CBS LOS ANGELES (Aug. 26, 2013), <http://losangeles.cbslocal.com/2013/08/26/bill-would-let-non-physicians-perform-abortion/> [https://perma.cc/2RK8-QFNU].

234. While party line voting dominates, there are a handful of counterexamples. Several North Dakota Republicans opposed fetal heartbeat legislation (that would ban abortions after six weeks), Kentucky Democrats joined Republicans in backing mandatory ultrasound legislation, and West Virginia Democrats joined Republicans in supporting fetal pain legislation. See *HB1456 - Prohibits Abortion If Fetal Heartbeat Is Detected - Key Vote*, VOTESMART.ORG, <http://votesmart.org/bill/16253/45648/prohibits-abortion-if-fetal-heartbeat-is-detected#.VpL8dJMrJsM> (last visited Apr. 5, 2016) [https://perma.cc/WF4F-G5NM ]; *Johnny Turner’s Voting Record on Abortion*, VOTESMART.ORG, <http://votesmart.org/candidate/key-votes/35125/johnny-turner/2/abortion#.VpL8IjMrJsM> (last visited Apr. 5, 2016) [https://perma.cc/4LYN-VXTH]; *West Virginia House Bill 2568*, LEGISCAN.COM, <https://legiscan.com/WV/bill/HB2568/2015> (last visited Apr. 5, 2016) [https://perma.cc/F5QD-TYFA].

235. See *North Carolina House of Representatives*, NCLEG.GOV, <http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2015&sChamber=H&RCS=682> (last visited Apr. 5, 2016) [https://perma.cc/ST6P-9VG7] (House of Representatives vote); see also *North Carolina House Bill 465*, LEGISCAN.COM, <https://legiscan.com/NC/rollcall/H465/id/453448> (last visited Apr. 5, 2016) [https://perma.cc/U9ZV-N5H3] (Senate Vote).

“emotional” and lasted all of one hour.<sup>236</sup> Wisconsin passed a twenty-week abortion ban in 2015 without the support of a single Democrat.<sup>237</sup> Arkansas Republicans voted as a block to override Democratic Governor Mike Bebee’s 2013 veto of human heartbeat legislation that would outlaw most abortions after twelve weeks.<sup>238</sup> In Idaho, Democrats proposed an amendment to 2015 legislation requiring a pregnant woman to undergo an in-person exam and counseling before being allowed to undergo a chemical abortion. The amendment, intended to highlight that Republicans were not interested in maternal health, would have imposed safety standards on the chemical prescription; the amendment was turned down on a straight party-line vote.<sup>239</sup>

Beyond party-line voting, Republican lawmakers increasingly look to pro-life interest groups when drafting abortion measures. Indeed, by making use of model legislation drafted by Americans United for Life (AUL),<sup>240</sup> lawmakers essentially shut off democratic discourse and put into place the legislative priorities of a single set of interests. Specifically, AUL has put together a self-described “playbook” containing forty-four model bills, bills “developed by AUL legal experts to assist legislators and policymakers in drafting,

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236. Brendan Farrigan, *Bill Passes Senate 26-13: Abortion Waiting Period Measure Goes to Scott*, THE LEDGER (Apr. 24, 2015), [www.theledger.com/article/20150424/POLITICS/1504296333](http://www.theledger.com/article/20150424/POLITICS/1504296333); see also *Senate Poised to Approve Abortion Waiting Period Bill*, CBS MIAMI (Apr. 23, 2015), <http://miami.cbslocal.com/2015/04/23/senate-poised-to-approve-abortion-waiting-period-bill/> [<https://perma.cc/Y5UZ-8W73>]. Florida is not alone; Michigan lawmakers moved at similar breakneck speed in 2013 when considering a bill that would prohibit insurers from paying for abortions. The measure was brought up by Republican House and Senate leadership just after 4:00 PM and was voted on in both chambers by 5:20 PM. See Jonathan Oosting, *Michigan Legislature Approves Controversial Abortion Insurance Bill*, MICHIGAN LIVE (Sept. 11, 2013), [http://www.mlive.com/politics/index.ssf/2013/12/michigan\\_legislature\\_approves\\_1.html](http://www.mlive.com/politics/index.ssf/2013/12/michigan_legislature_approves_1.html) [<https://perma.cc/28L8-VW5Y>].

237. See *Scott Walker Signs Anti-Abortion Bill into Law*, WISC. GAZETTE (July 20, 2015), <http://wisconsingazette.com/2015/07/20/scott-walker-signs-anti-abortion-bill-into-law/> [<https://perma.cc/X5MZ-7LQF>].

238. See Corrie MacLaggan, *Arkansas Senate Votes to Override Veto of Bill Limiting Abortion*, REUTERS (Mar. 5, 2013), <http://www.reuters.com/article/2013/03/05/us-usa-abortion-arkansas-idUSBRE92413820130305> [<https://perma.cc/5WNH-XWZZ>].

239. See George Prentice, *Idaho House GOP Approves Chemical Abortion Restrictions*, BOISE WEEKLY (Mar. 2, 2015), <http://www.boiseweekly.com/CityDesk/archives/2015/03/02/idaho-house-gop-approves-chemical-abortion-restrictions> [<https://perma.cc/DQ9L-6K8G>].

240. AUL describes itself as a “pro-life legal team” that works in legislative processes to create and “enforce pro-life laws.” *About*, AMERICANS UNITED FOR LIFE, <http://www.aul.org/about-aul/> (last visited Apr. 5, 2016) [<https://perma.cc/LGD4-2NBM>]. For overview treatments of AUL and its efforts, see Emily Bazelon, *Charmaine Yoest’s Cheerful War on Abortion*, N.Y. TIMES MAG. (Nov. 2, 2012), [http://www.nytimes.com/2012/11/04/magazine/charmaine-yoests-cheerful-war-on-abortion.html?\\_r=0](http://www.nytimes.com/2012/11/04/magazine/charmaine-yoests-cheerful-war-on-abortion.html?_r=0) [<https://perma.cc/GL87-UP3B>]; Olga Khazan, *Planning the End of Abortion*, THE ATLANTIC (July 16, 2015), <http://www.theatlantic.com/politics/archive/2015/07/what-pro-life-activists-really-want/398297/> [<https://perma.cc/8U4W-9Y3J>].

debating, and passing life-affirming laws.”<sup>241</sup> In 2012–2013, AUL claims it received 2,500 requests for model legislation;<sup>242</sup> AUL assisted states in passing many of the forty-five abortion restrictions enacted in 2013, and it provided model language for twenty-eight state laws enacted in 2011.<sup>243</sup> In 2014, legislators from several states specifically acknowledged AUL’s role in passing legislation that restricts abortion overages in state-funded health care exchanges.<sup>244</sup> A recent study of this “opt out” legislation found that the AUL model served as the primary text for laws in six states;<sup>245</sup> specifically, after AUL provides the model legislation to state lawmakers, the act is then transcribed into an official bill that is largely passed intact.<sup>246</sup>

Expedited hearings, streamlined debates, and other procedural moves to avoid traditional legislative processes are a third and—for my purposes—final measure of post-2010 lawmaker disinterest in engaging in any kind of dialogue over the scope of abortion rights. In Ohio, only proponents spoke at 2015 hearings regarding a bill that would prohibit abortion solely as a result of a Down Syndrome test;<sup>247</sup>

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241. AMERICANS UNITED FOR LIFE, DEFENDING LIFE 2013: DECONSTRUCTING ROE: ABORTION’S NEGATIVE IMPACT ON WOMEN xv (2013), [http://www.aul.org/featured-images/AUL-1301\\_DL13%20Book\\_FINAL.pdf](http://www.aul.org/featured-images/AUL-1301_DL13%20Book_FINAL.pdf) [<https://perma.cc/29W3-JRVW>]. This “playbook” includes model legislation for twenty-week bans, informed consent laws, parental involvement laws, regulations of abortion facilities and providers, defunding abortion providers, and other issues.

242. *Id.* at x.

243. See Eliza Gray, *The Saleswoman*, THE NEW REPUBLIC (Mar. 29, 2012), <http://www.newrepublic.com/article/politics/magazine/102119/aul-abortion-yoest-pro-life-virginia> [<https://perma.cc/FQ5Q-LLCX>] (2011 statistics); Julie Hirschfield Davis, ‘Roe v Wade’ Is State Anti-Abortion Laws’ Ultimate Target, BLOOMBERG BUSINESSWEEK (July 11, 2013), <http://www.bloomberg.com/news/articles/2013-07-11/roe-v-dot-wade-is-state-anti-abortion-laws-ultimate-target> [<https://perma.cc/6EUR-9CAT>] (2013 statistics).

244. See Kristin N. Garrett & Joshua M. Jansa, *Interest Group Influence in Policy Diffusion Networks*, 15 ST. POL. & POL’Y Q. 1, 8 (2015), <http://spa.sagepub.com/content/early/2015/07/02/1532440015592776.full.pdf?ijkey=B3bH3mS18kUNLz&keytype=finite> [<https://perma.cc/U2LG-Q4EM>].

245. The six states are Alaska, Arizona, Georgia, Mississippi, Oklahoma, and Nebraska. See Erica Hellerstein, *Inside the Highly Sophisticated Group That’s Quietly Making It Much Harder to Get an Abortion*, THINK PROGRESS (Dec. 2, 2014), <http://thinkprogress.org/health/2014/12/02/3597770/americans-united-life-abortion/> [<https://perma.cc/P4HY-FS8E>].

246. This is precisely what happened in Oklahoma where only ten words were changed to the model bill’s language. See *id.* For another example of AUL working with state lawmakers to enact a “cut and paste model bill” drafted by AUL, see Davis, *supra* note 243 (discussing AUL work with North Dakota state senator Bette Grande).

247. See, e.g., *Hearing on H.B. 135 Before Cmty. & Family Advancement Comm.*, 131st General Assembly (Ohio 2015), <http://www.ohiohouse.gov/committee/community-and-family-advancement> [<https://perma.cc/YW8C-BLT3>]; Leah Barkouskis, *Ohio Committee Passes Bill to Ban Abortions Based on Down Syndrome*, TOWHALL.COM (June 17, 2015), <http://townhall.com/tipsheet/leahbarkouskis/2015/06/17/ohio-committee-passes-bill-to-make-it-the-second-state-to-ban-abortions-based-on-down-syndrome-n2013783> [<https://perma.cc/V7W8-3HAF>].

in Louisiana, most Republican committee members left the hearing room when opponents of a 2014 admitting privileges bill testified.<sup>248</sup> In Texas, a 2015 fetal abnormality abortion bill was brought up for a committee vote at night after the House recessed and all seven committee Democrats were absent—the measure was then approved by an 8-0 vote.<sup>249</sup> In North Carolina, pro-life Republicans proposed amending a bill prohibiting the recognition of foreign law in family courts to include a raft of anti-abortion restrictions (physician opt-out, ban on sex-selection abortions, mandating primary doctors to stay in the room throughout the abortion, and more).<sup>250</sup> The amendment was introduced at 5:30pm the Friday before July 4<sup>th</sup> weekend; it was approved by both the committee and the full Senate on the next business day. Following a threatened veto, the provision was removed and subsequently attached to a motorcycle safety bill (that the governor was willing to sign).<sup>251</sup>

No doubt the *Casey* compromise broke down in the period since 2010. Bipartisanship, civility, and a general willingness to operate within boundaries set by the Supreme Court have given way to party-line voting, interest group capture, procedural maneuvering, and a willingness to push out or even contradict boundaries set by the Supreme Court. Democratic discourse does not take place in such a winner-take-all environment; correspondingly, as the political discord of the past few years demonstrates, *Casey*'s indeterminate undue burden standard no longer furthers judicial minimalism's goal of enhancing democratic deliberation. Instead, the undue burden

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248. See Teddy Wilson, *Louisiana Senate Committee Passes Omnibus Anti-Abortion Bill*, RH REALITY CHECK (May 7, 2014), <http://rhrealitycheck.org/article/2014/05/07/louisiana-senate-committee-passes-omnibus-anti-abortion-bill/> [https://perma.cc/N5ST-M38S]. Democrats did precisely the same thing—all but two left to listen to opposing testimony. See *id.*

249. See Alex Ura & Julián Aguilar, *House Will Take Up Abortion Insurance Coverage Ban*, THE TEXAS TRIBUNE (May 24, 2015), <http://www.texastribune.org/2015/05/24/abortion-ban-aca-insurance-plans-all-dead/> [https://perma.cc/7G3R-RLJ8]. Texas Democrats have also made use of procedural devices and engaged in party-line voting. In 2013, Senator Wendy Davis temporarily stalled an anti-abortion bill by launching a filibuster that prevented a vote before the end of a special legislative session; specifically, Davis's filibuster stopped the anti-abortion measure from being put on a fast track that would exempt it from certain procedural rules. See Manny Fernandez, *Filibuster in Texas Senate Tries to Halt Abortion Bill*, N.Y. TIMES (June 25, 2013), [http://www.nytimes.com/2013/06/26/us/politics/senate-democrats-in-texas-try-blocking-abortion-bill-with-filibuster.html?\\_r=0](http://www.nytimes.com/2013/06/26/us/politics/senate-democrats-in-texas-try-blocking-abortion-bill-with-filibuster.html?_r=0) [https://perma.cc/HY96-ERG9].

250. See Mark Binker, *Senate Tacks Sweeping Abortion Legislation onto Sharia Law Bill*, WRAL.COM (July 2, 2013), <http://www.wral.com/senate-tacks-sweeping-abortion-legislation-onto-sharia-law-bill/12621503/> [https://perma.cc/2RGS-64BJ].

251. See Katie McDonough, *North Carolina Passes Sweeping Abortion Restrictions Planted in Motorcycle Safety Bill*, SALON (July 26, 2013), [http://www.salon.com/2013/07/26/north\\_carolina\\_passes\\_sweeping\\_abortion\\_restrictions\\_planted\\_in\\_motorcycle\\_safety\\_bill/](http://www.salon.com/2013/07/26/north_carolina_passes_sweeping_abortion_restrictions_planted_in_motorcycle_safety_bill/) [https://perma.cc/X32W-5A84].

standard encourages the politically powerful to enact laws that further their agenda; perhaps the law will be upheld<sup>252</sup> and, if not, the very enactment of these laws strengthens intra-party allegiance (party-line voting) and strengthens party ties to interest group constituents that back these laws. Indeed, as is generally true of position-taking measures, what matters most is taking a position—not the judicial validation of that position.<sup>253</sup> In other words, the political incentives underlying today's abortion wars are likely to fuel even more abortion battles—especially if the Supreme Court continues to adhere to an open-ended standard that encourages lawmakers and their constituents to experiment with new abortion regulations.

### III. RETHINKING JUDICIAL MINIMALISM

Let me now connect the dots between my observations of changes in abortion politics and the larger question of whether the Supreme Court can facilitate constructive legal-political discourse by favoring *Casey*-like minimalism over *Roe*-like maximalism. To start, abortion politics underscore the need to take context into account when assessing two of the principal virtues of minimalism: that minimalism shifts attention away from the Court as the center of controversy and, in so doing, that it provides space for competing sides of divisive issues to engage in political discourse.<sup>254</sup> The lesson here is striking—the quality of political discourse and the related possibility of backlash is tied much more to context than it is to whether the Court issued a maximalist decision intended to settle the issue and foreclose discourse.

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252. See Devins, *Abortion Wars*, *supra* note 9, at 1330–34 (arguing that *Casey*'s indeterminacy allows pro-life Justices to uphold nearly any abortion regulation that a state might approve); Greenhouse & Siegel, *supra* note 199, at 32–39 (highlighting conflicting interpretations of *Casey* by federal court of appeals judges).

253. See *supra* note 133.

254. Minimalism may be preferred for other reasons. The Court might fear judicial error by basing a maximalist opinion on facts that are disputed or an incomplete factual record. SUNSTEIN, *supra* note 8, at 154, 255. The Court might also prefer the flexibility afforded by malleable opinions—so that they can subsequently moderate without overruling. See Devins, *Abortion Wars*, *supra* note 9, at 1322. Relatedly, the Court might prefer minimalism simply because the Justices cannot agree on a maximalist standard; relatedly, the Justices might prefer to rule unanimously and a minimalist standard cloaks disagreements in their thinking. See Adam Liptak, *Compromise at the Supreme Court Veils Its Rifts*, N.Y. TIMES (July 1, 2014), <http://www.nytimes.com/2014/07/02/us/supreme-court-term-marked-by-unanimous-decisions.html> [<http://perma.cc/AZS6-UV5K>]; Robert Barnes, *For These Supreme Court Justices, Unanimous Doesn't Mean Unity*, WASH. POST (July 1, 2014), [https://www.washingtonpost.com/politics/courts\\_law/for-these-supreme-court-justices-unanimous-doesnt-mean-unity/2014/07/01/94003590-0132-11e4-b8ff-89afd3fad6bd\\_story.html](https://www.washingtonpost.com/politics/courts_law/for-these-supreme-court-justices-unanimous-doesnt-mean-unity/2014/07/01/94003590-0132-11e4-b8ff-89afd3fad6bd_story.html) [<https://perma.cc/9VDZ-DSWV>].

*Roe*'s maximalism did not stop pro-choice and pro-life interests from talking with each other in the years following the decision. At that time, the parties were not sharply divided over abortion and party politics did not stand in the way of conversations related to abortion rights.<sup>255</sup> Indeed, Republicans were marginally more pro-choice than Democrats during the 1973–1992 period and, perhaps for this reason, state efforts to limit abortion rights were bipartisan, politically popular, and rarely challenged judicial authority.<sup>256</sup> That is not to say that *Casey*-like minimalism would not have facilitated democratic deliberation at that time. In particular, *Roe* contributed to an emerging party realignment—where Democrats and Republicans would divide over issues in ways that cut against discourse and consensus.<sup>257</sup> *Roe*, too, undermined discourse by giving pro-choice interests incentives to go to court and not engage in political discourse with pro-life interests.<sup>258</sup> And while there is no way of knowing whether a minimalist opinion at the time of *Roe* would have allowed for a bipartisan, populist consensus to form around limited abortion rights, it is certain that the journey from *Roe* to *Casey* was a bumpy one.<sup>259</sup> At the same time, *Roe* critics overstate the decision's deleterious impact on politics and the related backlash.<sup>260</sup>

*Casey* likewise underscores that the question of whether minimalism works or does not work is inextricably linked to the question of whether opposing sides of an issue can engage in meaningful discourse with each other. From 1992–2009, *Casey*'s minimalism worked fairly well at the state level. Unlike Congress and the White House (where partisan polarization was in full flight), the states were not similarly divided.<sup>261</sup> Ideological rankings of state lawmakers—based on 1996 to 2006 data—suggest that state identity was, at that time, a more useful proxy of ideology than party

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255. These conversations were not necessarily about the scope of abortion rights. Pro-choice and pro-life interests at the time of *Roe*, for example, sought common ground on child welfare policy. See Ziegler, *Beyond Backlash*, *supra* note 56.

256. See *supra* tbl. 2.

257. See *supra* notes 112–119.

258. For a related discussion of how such “judicial overhang” limits constitutional discourse in Congress, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

259. *Casey*, after all, overruled Supreme Court decisions rejecting twenty-four-hour waiting requirements and informed consent. If the Court had initially issued a minimalist opinion and then allowed a consensus to form around such laws, the Court could have abated much of the post-*Roe* rancor.

260. See *supra* notes 129–132, 143–149.

261. See *supra* notes 112–123.

identity:<sup>262</sup> Republican lawmakers in liberal states were not especially conservative and Democrats in conservative states were not very liberal.<sup>263</sup> A study of 1970–2004 voters similarly suggested that voters linked ideology and party identity at the federal level but not at the state level.<sup>264</sup> Before 2010, moreover, half the states were under divided party control and most had been under divided control in recent years.<sup>265</sup> The consequence of this is that state lawmakers were more willing to compromise across party lines and more likely to attend to public opinion.<sup>266</sup> On abortion, public preferences generally cut in favor of moderation: 2008 polling data showed a substantial number of Democrats (one-third) were pro-life and an equally large number of Republicans (one-third) were largely pro-choice.<sup>267</sup> Against this backdrop, state lawmakers did not follow the lead of their federal counterparts by using abortion as a wedge to divide the parties; for the most part, state lawmakers came together in bipartisan ways to enact broadly popular legislation. This was especially true in the first several years after *Casey* when a broad cross-section of states enacted many of the laws approved by the *Casey* Court.<sup>268</sup> In other words, *Casey*'s ability to facilitate dialogue and mitigate backlash varied with the degree of polarization in government: *Casey* did not calm the abortion flames at the federal level while, at the same time, it seemed to advance the goals of minimalism at the state level.

Following the 2010 elections and the advent of one party control of state government, *Casey*-minimalism no longer works. Today, forty-two states are under single-party control (thirty

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262. See Gerald C. Wright & Nathaniel Birkhead, *The Macro Sort of the State Electorates*, 67 POL. RES. Q. 426, 426–39 (2014).

263. See *id.* at 432.

264. See John Dinan & Jac Heckelman, *Convergence and Divergence in State Political Behavior, 1970–2004*, 47 SOC. SCI. J. 689, 689–97 (2010).

265. See Dan Balz, *Red, Blue States Move in Opposite Directions in a New Era of Single-Party Control*, WASH. POST (Dec. 28, 2013), [https://www.washingtonpost.com/politics/red-blue-states-move-in-opposite-directions-in-a-new-era-of-single-party-control/2013/12/28/9583d922-673a-11e3-ae56-22de072140a2\\_story.html](https://www.washingtonpost.com/politics/red-blue-states-move-in-opposite-directions-in-a-new-era-of-single-party-control/2013/12/28/9583d922-673a-11e3-ae56-22de072140a2_story.html) [<https://perma.cc/X5M5-XXHS>].

266. See *id.*; see also Jeffrey R. Lax & Justin H. Phillips, *The Democracy Deficit in the States*, 56 AM. J. POL. SCI. 148, 148–61 (2012).

267. This data and its implications are discussed in Alan I. Abramowitz & Morris P. Fiorina, *Polarized or Sorted? Just What's Wrong with Our Politics, Anyway?*, AM. INT. (Mar. 11, 2013), <http://www.the-american-interest.com/2013/03/11/polarized-or-sorted-just-whats-wrong-with-our-politics-anyway/> [<https://perma.cc/PSD3-PT9A>].

268. See *supra* notes 170–171; Devins, *Abortion Wars*, *supra* note 9, at 1339. With that said, a handful of deep red states—towards the end of this period—began pushing the boundaries of what *Casey* allowed; in those states, Republicans were firmly in control of the state legislature and those lawmakers worked closely with pro-life groups committed to the undoing of abortion rights. See *id.* at 1345–49; *supra* notes 181–183.

Republican and twelve Democrat);<sup>269</sup> unified control—as detailed in political science studies—cuts against negotiation and increases the likelihood of state policy being “far more polarized than public preferences.”<sup>270</sup> Consequently, even though median voter attitudes on abortion are largely stable,<sup>271</sup> elected officials and their interest group constituents advocate for partisanship and against compromise and conversation. State lawmakers push the boundaries of (and even contradict) *Casey*;<sup>272</sup> they also shut out those who disagree with them through party-line voting, pursuing model legislation written by interest groups, and engaging in procedural moves intended to stymie pro-choice lawmakers.<sup>273</sup> In other words, today’s political conditions are ill-suited for democracy-enhancing judicial minimalism.

The future is also bleak for judicial minimalism. There is no indication that the modern era of single party politics will abate and, if anything, there is increasing evidence that today’s partisanship will accelerate—especially with respect to the willingness of lawmakers and their constituents to compromise and consider opposing positions.<sup>274</sup> Democrats and Republicans alike have become more sharply divided into ideological camps that view each other with hostility, a process that has been labeled ‘affective polarization.’<sup>275</sup> In part, this growth is a product of partisan sorting, which causes partisan identification to reinforce ideological identification. Whatever its cause, the effect is that political opponents hate each other—so much so that party affiliation is a form of “personal identity” that shapes not just politics “but also decisions about dating, marriage and

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269. See *supra* note 208.

270. Lax & Phillips, *supra* note 266, at 149; see also Balz, *supra* note 265; Karl Kurtz, *These Unified States*, LEGISLATURES, May 2013, [http://www.ncsl.org/Portals/1/Documents/magazine/articles/2013/SL\\_0513-UnifiedStates.pdf](http://www.ncsl.org/Portals/1/Documents/magazine/articles/2013/SL_0513-UnifiedStates.pdf) [<https://perma.cc/2GGG-EBWD>]. For general treatments of the disjunction between highly polarized political class and median voters, see Morris P. Fiorina & Matthew S. Levendusky, *Disconnected: The Political Class Versus the People*, in RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA’S POLARIZED POLITICS 49, 51–52 (Pietro S. Nivola & David W. Brady eds., 2002); Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563 (2008).

271. See *Abortion: Gallup Historical Trends*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> (last visited Mar. 8, 2016) [<https://perma.cc/D4RT-H27M>] (tracing 1975–2015 abortion attitudes).

272. See *supra* notes 214–230.

273. See *supra* notes 232–251.

274. See Alan I. Abramowitz, *Partisan Nation: The Rise of Affective Polarization and the American Electorate*, in THE STATE OF THE PARTIES 23, 23–36 (John C. Green et al. eds., 7th ed. 2014) (tracking ever-increasing partisanship among the American electorate from 1972–2012); Abramowitz, *supra* note 194, at 14–16 (arguing that the Tea Party movement and Republican conservatism have deep roots and are likely to continue).

275. See Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405, 406 (2012).

hiring.”<sup>276</sup> Needless to say, affective polarization’s greatest impact is on matters involving politics and policy. Using a 100 point scale, a person’s own party is ranked a seventy-two and the opposing party a thirty in 2012; in the 1980 to 1992 period, the rankings were around seventy for one’s own party and forty to forty-five for the opposing party.<sup>277</sup> Perhaps more telling, a 2013 study found that individuals with excellent quantitative skills were particularly likely to ignore or discount statistical information that cut against their political views—making it particularly difficult for competing camps to agree on the underlying facts of a policy dispute.<sup>278</sup> And if that is not enough, voters rarely seek out information, and the information they seek out has little to do with educating themselves.<sup>279</sup> Instead, information is typically sought out to back up preexisting policy preferences.<sup>280</sup> In the context of elections, “the behavior of partisans resembles that of sports team members acting to preserve the status of their teams rather than thoughtful citizens participating in the political process for the broader good”;<sup>281</sup> correspondingly, campaigns increasingly focus on bringing out the “partisan base,” and increasingly make use of negative advertising that is most likely to appeal to partisan dislike of

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276. Cass R. Sunstein, *‘Partyism’ Now Trumps Racism*, BLOOMBERG VIEW (Sept. 22, 2014), <http://www.bloombergview.com/articles/2014-09-22/partyism-now-trumps-racism> [<https://perma.cc/5XVM-5HXR>]. For example, half of all Republicans and one-third of all Democrats now say they would be upset if their child were to marry someone from the other party (as compared to five percent in 1960). *Id.*

277. For a discussion of this and other related studies, see Ezra Klein & Alvin Chang, “*Political Identity Is Fair Game for Hatred: How Republicans and Democrats Discriminate*,” VOX (Dec. 7, 2015), <http://www.vox.com/2015/12/7/9790764/partisan-discrimination> [<https://perma.cc/23S4-SLXT>].

278. See Dan M. Kahan et al., *Motivated Numeracy and Enlightened Self-Government* 1–31 (Yale Law Sch., Pub. Law Working Paper No. 307, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2319992](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319992) [<https://perma.cc/UQ68-7NKT>].

279. For this reason, minimalism—even in times of low polarization—should not be pursued to shift power to the American people to engage in so-called “popular constitutionalism.” There is simply no reason to think that increasing judicial deference to decision making by elected officials will result in more engaged constitutional discourse by the American people. See Neal Devins, *The D’Oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1340–46 (2007); Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1340–52 (2004).

280. Ilya Somin has written extensively on this topic, highlighting social science data showing that “unreflective bias actually represents rational behavior for most voters.” Ilya Somin, Opinion, *The Disturbing Growth of Partisan Bias*, WASH. POST (Dec. 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/09/this-is-your-brain-on-politics-the-disturbing-growth-of-partisan-bias/> [<https://perma.cc/QJL6-UQZV>]; see also ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 62–89 (2013); Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255, 260–62 (2006).

281. Patrick R. Miller & Pamela Johnston Conover, *Red and Blue States of Mind: Partisan Hostility and Voting in the United States*, 68 POL. RES. Q. 225, 225 (2015).

the other party.<sup>282</sup> The consequences of affective polarization are profound: the very virtues of minimalism (compromise and discourse) are turned on their head and a minimalist decision is particularly likely to prove divisive as competing sides seek to fill in gaps in highly partisan ways.

None of this is to say that Erwin Chemerinsky's heroic vision of Supreme Court decision making is without its own risks. Even assuming that Chemerinsky is right and that the Court's *raison d'être* is the protection of minority rights,<sup>283</sup> the Court might overvalue one political minority at the expense of another.<sup>284</sup> The Court might also galvanize political opponents of the ruling. As responses to *Roe*, *Casey*, and many other decisions make clear,<sup>285</sup> the Supreme Court cannot—as it did in *Casey*—simply call on “contending sides of a national controversy to end their national division” and accept the Court's decision as binding.<sup>286</sup>

At the same time, judicial minimalism does not suit today's hyper-polarized political environment. Correspondingly, it does not matter if Erwin Chemerinsky overstates matters when arguing that the Supreme Court is “more important” than any other institution “in ensuring liberty and justice for all”;<sup>287</sup> the benefits of Chemerinsky's heroic model seem stronger today than ever before. First, a potential failing of the heroic model—its reliance on the Court at the expense of democratic deliberation—is arguably a strength in today's world of winner-take-all politics. Red states will enact one set of laws and blue states another set of laws.<sup>288</sup> In the world of single-party control of

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282. Iyengar et al., *supra* note 275, at 424 (campaigns are increasingly negative and partisan); Matt Levendusky, *Sorting in the U.S. Mass Electorate 2* (Mar. 21, 2005) (unpublished manuscript) (on file with author) (campaigns increasingly focus on bringing out the partisan base).

283. See, e.g., Erwin Chemerinsky, *Thinking About the Supreme Court's Successes and Failures*, 69 VAND. L. REV. 919 (2016); Brian Fitzpatrick, *A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology*, 69 VAND. L. REV. 991 (2016); Corinna Barrett Lain, *Three Supreme Court “Failures” and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1022–23 (2016); Gerald N. Rosenberg, *The Broken-Hearted Lover: Erwin Chemerinsky's Romantic Longings for a Mythical Court*, 69 VAND. L. REV. 1075, 1092 (2016).

284. On abortion, for example, pro-life interests claim that the fetus is an unprotected minority. On affirmative action, interest groups representing Asian Americans claim that affirmative action wrongly elevates the interest of one set of minorities ahead of other minorities. See Ellen Wexler, *This Case Shouldn't Be Here Again': Activists Outside the Supreme Court on Fisher' and Race*, CHRON. OF HIGHER EDUC. (Dec. 9, 2015), <http://chronicle.com/article/This-Case-Shouldn-t-Be/234552> [<https://perma.cc/8KC4-G9FV>].

285. Chemerinsky, *supra* note 283, at 932; Rosenberg, *supra* note 283, at 1092.

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

287. CHEMERINSKY, *supra* note 6, at 342.

288. Along the same lines, red and blue state attorneys generally divide over whether to defend same sex marriage bans, gun control laws, and other laws that divide the parties. See

deep-red or deep-blue states, minimalism simply allows the dominant political coalition to have its way; there is no prospect that judicial minimalism facilitating constructive democratic discourse and even minimalism's best known proponent, Cass Sunstein, has written about "the destructive power of partyism."<sup>289</sup> Indeed, there is reason to think that minimalism exacerbates political discord; its very open-endedness suggests that competing sides of a political dispute can seek judicial validation of their political victories—so that the pursuit of mandatory ultrasounds, admitting privileges, and other laws is arguably tied to the fact that these laws might be upheld as constitutional.

Second (and relatedly), the benefits of the Court setting forth clear rules that provide guidance to lower courts is stronger in today's polarized world. One of the arguments for minimalism is that it allows lower courts to incrementally sort out facts and engage in a dialogue with each other, political actors, and the Supreme Court over time.<sup>290</sup> At the same time, if there is little pay-out for minimalism vis-à-vis the facilitation of beneficial discourse, it may be that the argument for predictability in law weighs in favor of maximalism, not minimalism.<sup>291</sup> In particular, it is increasingly true that minimalism—by failing to dictate whether a court should uphold or invalidate<sup>292</sup>—allows increasingly partisan judges to apply vague standards in ways that support desired policy choices.<sup>293</sup> In the *Whole Health* case now

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Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2100 (2015).

289. Sunstein, *supra* note 276.

290. See SUNSTEIN, *supra* note 8; Peters, *supra* note 32, at 1460–76.

291. Predictability comes in two forms and it is important to draw a distinction between the two—one type of predictability (which is what I refer to) is the binding effect of Supreme Court decisions on lower courts. See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 1–59 (2009) (defending vertical maximalism within judicial branches). The other type of predictability is the supremacy of Court rulings over political actors. I think that neither is possible nor desirable. For a defense of judicial supremacy precisely because law should stabilize and provide predictability, see Larry Alexander & Fred Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359–87 (1997). For my critique of Alexander-Schauer, see Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 83–106 (1998).

292. Minimalism, in other words, eschews rules in favor of standards. Rules provide ex ante instruction of whether behavior is legal or illegal; standards do not provide such instruction and give content ex post, that is, after a state has acted. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557–629 (1992).

293. On how it is that party labels and judicial decision making are increasingly linked, see Lawrence Baum & Neal Devins, *Split Definitive*, SLATE (Nov. 11, 2011, 5:27 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/11/supreme\\_court\\_s\\_partisan\\_divide\\_and\\_obama\\_s\\_health\\_care\\_law.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/11/supreme_court_s_partisan_divide_and_obama_s_health_care_law.html) [https://perma.cc/3YB7-2A3N]; Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), <http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html> [https://perma.cc/WMF2-JAJJ]; Adam Liptak, *For Justices, Free Speech Often Means 'Speech I Agree With'*, N.Y. TIMES (May 5, 2014),

before the Supreme Court, for example, it seems quite relevant that Texas's admitting privileges statute was reviewed by the conservative Fifth Circuit Court of Appeals.<sup>294</sup> Other circuits have invalidated admitting privileges requirements and, more generally, federal courts of appeal have divided over the application of the *Casey* undue burden standard.<sup>295</sup> Against this backdrop, it is little wonder that partisans on the Senate Judiciary Committee now fight tooth and nail over federal court of appeals nominations—so much so that the then-Democratic majority suspended the Senate filibuster rule in 2013 in order to push through the confirmation of Obama court of appeals picks.<sup>296</sup> And while the embrace of maximalism will not end such political fights,<sup>297</sup> the benefits of higher courts dictating outcomes to lower courts still seem stronger.

Third and finally, critics of *Roe* and other heroic decisions overstate how much minimalism mitigates backlash risks. Resistance to the Court is tied at least as much to political context as it is to the scope and sweep of judicial rulings. *Roe* critics overstate the backlash following that decision; states, in particular, sought to operate within the decision's boundaries.<sup>298</sup> In contrast, states have pushed harder at

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<http://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html> [https://perma.cc/8Q9M-MWLL] (discussing partisanship in conjunction with studies conducted by Lee Epstein).

294. See Linda Greenhouse, *Abortion at the Supreme Court's Door*, N.Y. TIMES (Oct. 15, 2015), <http://www.nytimes.com/2015/10/15/opinion/abortion-at-the-supreme-courts-door.html> [https://perma.cc/H9N3-ZV4F]. The Texas law also includes ambulatory surgical facilities requirements—so the Fifth Circuit ruling speaks to the combined impact of these provisions.

295. See Devins, *Abortion Wars*, *supra* note 9, at 1330–34 (noting that *Casey* was sufficiently indeterminate that pro-choice Justices could regularly invalidate and pro-life Justices could regularly approve a broad spectrum of abortion regulations); Greenhouse & Siegel, *supra* note 199, at 33–40 (detailing the dispute over the application of the undue burden standard in the context of admitting-privileges litigation).

296. On the general topic of judicial confirmation politics and courts of appeals nominees, see Binder & Maltzman, *supra* note 159; Carl Hulse, *Blocked Bids to Fill Judgeships Stir New Fight on Filibuster*, N.Y. TIMES (Mar. 8, 2013), <http://www.nytimes.com/2013/03/09/us/politics/filibuster-stirs-a-new-battle-on-us-judges.html>; David Leonhardt, *The Endless Battle Over Judicial Nominees*, N.Y. TIMES (June 22, 2013), <http://www.nytimes.com/2013/06/23/opinion/sunday/the-endless-battle-over-judicial-nominees.html> [https://perma.cc/SVL5-VQKH]; Rachel Weiner, *White House Withdraws Caitlin Halligan Nomination*, WASH. POST (Mar. 22, 2013), <https://www.washingtonpost.com/news/post-politics/wp/2013/03/22/white-house-withdraws-caitlin-halligan-nomination/> [https://perma.cc/3LPB-JZSH]. On the suspension of the filibuster, see Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), [https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html?hpid=z1](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html?hpid=z1) [https://perma.cc/D89M-9XG2].

297. Maximalism rarely eliminates all discretion and, of course, there are many issues that the Supreme Court is yet to address—where the lower court ruling will be binding unless the Supreme Court formally grants review to consider the question.

298. See *supra* notes 129–132, 143–149.

*Casey*'s boundaries since 2010 and twenty-week bans are flatly inconsistent with the decision.<sup>299</sup> In other words, a Supreme Court Justice should not choose *Casey* minimalism over *Roe* maximalism simply to obviate backlash risks. Indeed, it is possible that minimalism prompts backlash by triggering political discord.

I want to close on a personal note: After thirty years of writing about the benefits of constitutional dialogues between the Court and elected government (including critiques of Erwin Chemerinsky's heroic vision of judicial review), I find it a bit strange to herald the advantages of the heroic model and the impossibility of democracy-forcing minimalism. But, sadly, that is how I feel about the state of politics today; the Court might as well take the lead, provide guidance to lower courts, and recognize that Court decision making is less influential in shaping today's polarized political discourse than I (or others) had imagined. In making this point though, I also recognize that polarized politics mean a partisan Court and that it is unlikely that the Supreme Court will advance Erwin Chemerinsky's brand of heroism. Whether that happens or not, the Court might as well advance its legal policy vision as it sees fit; the Court should not leave things undecided so as to obviate backlash or facilitate democratic discourse.

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299. *See supra* notes 220–230.