THE JURISPRUDENCE OF UNCERTAINTY: KNOWLEDGE, SCIENCE, AND ABORTION

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While the outcome of abortion cases seems to depend exclusively on the undue-burden standard, we have mostly missed the linchpin of recent decisions: conclusions about who has the authority to resolve uncertain scientific or moral questions. Using original archival research, this Article traces the history and present-day impact of the law and politics of uncertainty doctrine in abortion law.

The Article makes sense of the inconsistency running through the Court's abortion jurisprudence: that the Court has not applied a single, coherent definition of uncertainty. Specifically, the Court has confused objective uncertainty, involving gaps in knowledge that can theoretically be closed through research, and subjective uncertainty, involving moral, ethical, or philosophical questions. Conflating these two kinds of uncertainty has led the Court to inject moral disapproval and disgust into what theoretically are questions of fact.

The Article proposes that the Court should formally distinguish between objective and subjective uncertainty. In cases of subjective uncertainty, the Court should generally defer to legislatures' views on matters like the value of fetal life or equality for women, balancing them against the constitutional liberty recognized in *Casey* and *Roe*. When dealing with objective uncertainty, the Court should look for evidence on the purpose and effect of a law as the Court recently explained in *Whole Woman's Health v. Hellerstedt*. Disentangling the two forms of uncertainty will make abortion jurisprudence more coherent, consistent, and faithful to the balance of competing constitutional values that *Casey* and *Whole Woman's Health* command.

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INTRODUCTION

While the outcome of abortion cases seems to depend exclusively on the undue-burden standard, we have mostly missed the linchpin of recent decisions: conclusions about who has the authority to resolve uncertain scientific or moral questions. Using original archival research, this Article traces the history and present-day impact of the law and politics of uncertainty doctrine in abortion law.

Uncertainty has stood at the center of abortion litigation since *Roe v. Wade*.[1] In the early 1970s, supporters of legal abortion argued that if there was disagreement about the science or morality surrounding the beginning of human life, lawmakers could not justifiably force everyone else to adopt one position on the matter.[2] Later, as part of the campaign to see *Roe* overruled, pro-life attorneys presented the moral and scientific uncertainty surrounding abortion as a reason that *Roe* had become unworkable.[3] *Planned Parenthood v. Casey*[4] launched a new era in uncertainty jurisprudence. Based on a reading of *Casey*, anti-abortion attorneys maintained that the very possibility of serious pain and suffering caused by abortion gave legislators a justification for action.[5] Over time, the Supreme Court has also woven this idea of uncertainty into constitutional law on abortion.[6]

The Article makes sense of the inconsistencies running through the Court's abortion jurisprudence: the Court has not applied a single, coherent definition of uncertainty. Specifically, the Court has confused objective uncertainty, involving gaps in knowledge that can theoretically be closed through research, and subjective uncertainty, involving moral, ethical, or philosophical questions. Conflating these

1. 410 U.S. 113 (1973).
2. *See infra* Part I.
3. *See infra* Part II.
4. 505 U.S. 833 (1992) (plurality decision).
5. *See infra* Part III.
6. *See infra* Part IV.

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The Article proceeds in five parts. Part I begins with the history of efforts to marshal uncertainty as an argument for abortion rights. This Part traces the social movement origins of these arguments and illuminates how these claims shaped Supreme Court decisions from *Roe v. Wade* through *Harris v. McRae*.[8] Part II starts by examining how pro-life groups developed their own uncertainty strategy in pushing mandated-consent laws. Pro-lifers deliberately described uncertainty in both factual and moral terms, inviting the courts to confuse the two. By blurring the two kinds of uncertainty, anti-abortion attorneys emphasized that *Roe* had become unworkable. Part III studies the new uncertainty strategy forged in the aftermath of *Casey* and written into recent abortion decisions. After *Casey*, anti-abortion activists argued that if there is a possibility of grievous harm, then legislators should have the ability to restrict or ban abortion. This Part considers how this idea of uncertainty influenced the Court's decisions in *Casey* and *Gonzales v. Carhart*[9] before evaluating the role of uncertainty in *Whole Woman's Health*. Part IV illuminates the problems with the Court's present approach to uncertainty and proposes a new take on uncertainty doctrine, and then briefly concludes.

I. MORAL UNCERTAINTY AND ABORTION DOCTRINE

In the early 1970s, when confronted with an energized opposition, supporters of abortion rights developed a powerful legal and political uncertainty argument. This Part begins by tracing the history of the idea of moral uncertainty at work in the Court's foundational abortion

7. 136 S. Ct. 2292 (2016).
8. 448 U.S. 297 (1980).
9. 550 U.S. 124 (2007).

case, *Roe v. Wade*. Legally, abortion-rights activists believed that uncertainty represented the best argument against claims that the government had a compelling interest in protecting fetal life. Supporters of abortion rights insisted that because there was no certain answer to the question of when human life began, the state could not have a compelling interest in adopting any single definition. Political activists wove this idea into an emerging argument for a right to choose, contending that the opposition did not respect anyone's beliefs about life but their own. This Part turns next to how this idea of uncertainty took hold in *Roe v. Wade* and shaped decisions issued throughout the 1970s. Finally, this Part establishes how abortion doctrine began defining uncertainty differently in *Harris v. McRae*. It was in 1980, when supporters of abortion rights tried to take these claims to their logical conclusion, that the Court backed away from *Roe*'s idea of uncertainty.

A. Uncertainty as an Argument for Abortion Rights

Although opposition to abortion reached back decades, an organized pro-life movement did not fully take shape until the mid-1960s.[10] Drawing funding and organizational support from the Catholic Church, state and local groups formed to block efforts to repeal or reform abortion laws.[11] These organizations made deliberately secular arguments, spotlighting what pro-lifers described as the right to life of the unborn child.[12] Pro-lifers popularized slide shows of late abortion, insisting that the real issue was when human life began.[13]

This focus on fetal life raised new challenges for the abortion-rights movement. In demanding legalization, movement members had primarily emphasized the rights violated by abortion bans, pointing to the right to privacy, invoking equal protection for women, and discussing freedom from involuntary servitude.[14] Pro-lifers tried to turn the constitutional conversation back to the reasons that states outlawed abortion—a subject in which abortion-rights supporters had invested

10. *See, e.g.*, MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 30–31 (2015).

11. *See, e.g.*, *id.*

12. *See, e.g.*, *id.* at 31–45; *see also* DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 115–31 (2016).

13. *See, e.g.*, WILLIAMS, *supra* note 12 at 137–40.

14. On the arguments made by supporters of abortion rights before *Roe*, see generally BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (Linda Greenhouse & Reva Siegel eds., 2010).

less time.[15] Anti-abortion lawyers first argued that the fetal personhood was a scientific fact, proven by the overwhelming weight of the evidence.[16] Science could demonstrate "factually that abortion destroys an individuated and unique human life."[17] If pro-life lawyers could establish that the fetus was a person for the purpose of the Fourteenth Amendment, then movement members planned to argue that legal abortion violated both the Due Process and Equal Protection Clauses.[18] Abortion would violate due process by allowing women to kill unborn children without affording those children a trial or any other procedural protections.[19] Abortion would violate equal protection, pro-lifers believed, by allowing women to discriminate against fetuses for invidious reasons, such as age and residence in the womb.[20] A related tactic argued that the government had a compelling interest in protecting fetal life from the moment of conception.[21]

For supporters of abortion rights, the best response to these claims was far from obvious. Attorneys could have tried to poke holes in the opposition's claims: in the equal-protection context, for example, there were arguably real, biological differences between unviable fetuses and children after birth. In general, however, activists gravitated toward an alternative: arguing that the question of when life began was too uncertain for lawmakers to impose any single answer on the public.[22] At first, scholars seeking a compromise solution on abortion pointed to the difficulty of defining personhood or the beginning of life.[23] For these commentators, conflicting definitions of the beginning of life drove home the need to balance both women's rights and the dignity of

15. On pro-life constitutional strategy before *Roe*, see Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 869–900 (2014).

16. *See, e.g.*, Robert M. Byrn, *Abortion-on-Demand: Whose Morality*, 46 NOTRE DAME L. REV. 5, 16 (1971); A. James Quinn & James A. Griffin, *The Rights of the Unborn*, 3 JURIST 577, 578 (1971); Note, *The Unborn Child and the Constitutional Conception of Life*, 56 IOWA L. REV. 994, 997–1003 (1971).

17. Byrn, *supra* note 16, at 16.

18. *See, e.g.*, Ziegler, *supra* note 15, at 859–900.

19. *See, e.g.*, David Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 234–48 (1969).

20. *See, e.g.*, Robert M. Byrn, *Abortion in Perspective*, 5 DUQ. U. L. REV. 125, 134–35 (1967).

21. *See, e.g.*, Brief for Appellee at 8–9, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) (arguing that "[t]he state has a legitimate, if not compelling, interest in prohibiting abortion except under limited circumstances" and that "[i]n the light of recent findings and research in medicine, the fetus is a human being and the state has an interest in the arbitrary and unjustified destruction of this being").

22. *See infra* notes 25 and 27 and accompanying text.

23. Note, *The Unborn Child in Georgia Law: Abortion Reconsidered*, 6 GA. L. REV. 168 (1971).

human life.[24] One scholar advocated for court decisions setting "an arbitrary point . . . that would strike some balance between these two competing interests."[25] According to its proponents, such a middle-ground solution was necessary because the law could offer no clear answers about when life began.[26] "A human being can be defined in any one of several ways—biologically, psychologically, physiologically, socially, culturally—no one of which is preemptive," the article argued.[27] "Thus, the definition of a human being must, in the end, become a question of personal philosophy."[28]

But by the late 1960s, those seeking the outright repeal of abortion restrictions used uncertainty to a quite different end: arguing that the law could not constitutionally impose one answer on the subject on everyone else.[29] Writing in 1968, Garrett Hardin, a veteran proponent of population control and legal abortion, picked up this argument in explaining that abortion reform had not gone far enough.[30] In the mid-1960s, some states had adopted a version of the American Law Institute's Model Penal Code that allowed abortion only under a certain, limited set of circumstances.[31] Supporters of abortion rights grew frustrated with these laws, concluding that they obstructed access for many, particularly, young, single, poor, and non-white women.[32] For Hardin and his allies, it made sense to use the uncertainty arguments that had formed part of the campaign for reform to argue for more radical forms of change.

Writing in 1968, Hardin argued that contrary to what pro-lifers had argued, personhood and the beginning of life resisted any clear

24. *See id.*

25. *See id.* at 192.

26. *See, e.g.*, *id.* at 190–91.

27. *Id.* at 190.

28. *Id.*

29. *See, e.g.*, *infra* note 30 and accompanying text.

30. *See* Garrett Hardin, *Abortion—or Compulsory Pregnancy?* 30 J. MARRIAGE & FAM. 248, 250–51 (1968); *see also* Joseph S. Oteri et al., *Abortion and the Religious Liberty Clauses*, 7 HARV. C.R.-C.L. L. REV. 559, 563 (1972) ("Whether and at one point the fetus has a soul is a metaphysical question that cannot be empirically answered.").

31. *See, e.g.*, GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 164 (2005); SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 14 (1991). For the text of the proposal, see MODEL PENAL CODE § 230.3 (Am. Law Inst., Proposed Official Draft 1962); MODEL PENAL CODE § 207.11 (Am. Law Inst., Tentative Draft No. 9 1959).

32. On frustration with the reform laws, see, e.g., LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND THE LAW IN THE UNITED STATES, 1867–1973 230–43 (1997).

definition.[33] Instead of a scientific question, when life began was inherently contested and subjective.[34] "Whether the fetus is or is not a human being is a matter of definition, not fact," Hardin wrote, "and we can define it any way we wish."[35] Politically, Hardin's claim figured centrally in efforts to describe the pro-life movement as a front for the Catholic Church.[36] If the question of when life began was inherently subjective, it was easier to claim that pro-life claims were a front for impermissibly religious views.

Constitutionally, when the courts began considering challenges to abortion bans, uncertainty arguments also played an important role. In *Roe v. Wade* and its companion case, *Doe v. Bolton*,[37] supporters of abortion rights relied heavily on these claims in refuting the government's case. Texas had argued that it had a compelling interest in protecting life from the beginning—the moment of conception.[38] A feminist amicus curiae brief for the New Women Lawyers and other organizations responded that the beginnings of life were too uncertain to justify governmental intervention.[39] "There is a great variation in positions as to when the essential 'humanness' which causes society to protect the life of its citizens actually develops," the brief argued. "In fact, the final determination is a philosophical or religious one."[40] Because the question was inherently uncertain, the law could not permissibly force one answer on women.[41]

The attorneys leading the attack on Texas's law elaborated on this strategy.[42] The appellants' brief began by stressing that Texas did not treat the unborn child as a human being, refraining from prosecuting women who terminated their own pregnancies and not recognizing the personhood of an unborn child unless she was born alive.[43] But the brief also recognized that many arguments about the beginning of life looked to science rather than legal precedent.[44] Quoting Hardin, the

33. *See* Hardin, *supra* note 29, at 250–51.
34. *See id.*
35. *Id.* at 250.
36. On efforts to equate the pro-life movement with the Catholic Church, see ZIEGLER, *supra* note 10, at 38–44.
37. 410 U.S. 179 (1973).
38. Brief for Appellee, *supra* note 21, at 8–9.
39. Motion for Permission to File Brief and Brief Amicus Curiae on Behalf of New Women Lawyers et al., at 50–51, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40).
40. *Id.* at 51.
41. *See id.*
42. *See* Brief for Appellants at 118–24, *Roe*, 410 U.S. at 113 (Nos. 70-18).
43. *See id.* at 119–20.
44. *See id.* at 120–22.

brief did not highlight his conclusion that there was nothing unique enough about fetal life to warrant protection.[45] Instead, the brief stressed that the very existence of views like Hardin's demonstrated that there was no consensus about when life began.[46]

The brief then turned to the question of who should decide if the start of life was uncertain.[47] The appellants acknowledged that it did not make sense to leave certain decisions up to individuals.[48] But when it came to abortion, the question was so inherently subjective that "[a] representative or majority decision making process [had] led to chaos."[49] When a question was both moral and subjective, it was impossible for the government to take a position that would rise to the level of a compelling interest.[50] "Whether one considers the fetus a human being is a problem of definition rather than fact," the appellants argued.[51] "Given a decision which cannot be reached on the basis of fact, the State must give way to the individual for it can never bear its burden of demonstrating that facts exist which set up a compelling state interest for denying individual rights."[52]

B. Roe v. Wade *and Moral Uncertainty*

The *Roe* Court reworked ideas about uncertainty pioneered by abortion-rights lawyers and wrote them into constitutional law. In *Roe*, the lead case, the Court dealt with uncertainty first in dealing with the interests that Texas advanced in defending its abortion ban.[53] The Court had held that the right to privacy was broad enough to cover a woman's interest in terminating her own pregnancy.[54] But the question remained: could Texas show that its laws were properly tailored to serve a compelling government interest?

Roe first took up the question of fetal personhood.[55] The opinion made apparent the stakes of the question.[56] "If this suggestion of personhood is established, the appellant's case, of course, collapses,"

45. *See id.*
46. *See id.*
47. *See id.* at 123–25.
48. *See id.*
49. *Id.*
50. *See id.*
51. *Id.* at 124.
52. *Id.*
53. *Roe v. Wade*, 410 U.S. 113, 155–63 (1973).
54. *See id.* at 152–55.
55. *See id.* at 155–58.
56. *See id.*

Roe reasoned, "for the fetus' right to life would then be guaranteed specifically by the Amendment."[57] But what would the Court consider in determining whether a fetus counted as a person? Was the question predominantly scientific and factual? Was it religious and philosophical? Could it be answered by consulting legal precedent?

Without explicitly explaining the path the majority had chosen, *Roe* treated personhood as a matter that turned on the intentions of the framers of the Fourteenth Amendment.[58] Rather than looking to what Texas and its allies described as "the well-known facts of fetal development," *Roe* looked at the use of the word "person" throughout the Constitution and the abortion practices common at the time of the amendment's ratification.[59] This evidence convinced the Court that the amendment's framers did not intend to include the unborn child within the category of persons with constitutionally protected rights.[60]

Roe's treatment of the subject implicitly endorsed the idea that personhood was an inherently subjective matter, one on which reasonable people would never entirely agree.[61] If personhood would always be uncertain, the Court suggested, it made sense to ask what the Constitution meant when it spoke of persons rather than assuming that only one answer made sense.

The influence of abortion-rights arguments about uncertainty was clearer when the Court took up Texas's second defense of its law: that the state had a compelling interest in protecting human life from the moment of conception.[62] For *Roe*, the question of when life began created two kinds of uncertainty. One involved the difficulty of arriving at a consensus on the matter, and a second addressed which institutions or individuals were competent to decide when life began.[63] The Court tackled the second question by suggesting that judges were particularly unqualified to weigh in.[64] "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus," the Court reasoned, "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[65] Framed in this way, the question of when life began was both factually uncertain and highly complex—a matter that

57. *Id.*
58. *See id.*
59. *Id.*
60. *See id.* at 158.
61. *See id.* at 157–58.
62. *See id.* at 159–162.
63. *See id.*
64. *See id.* at 159.
65. *Id.*

should be reserved for experts, not generalist judges charged with resolving the case at bar.[66]

But the Court also adopted abortion-rights arguments that popular majorities could not properly answer the question either.[67] The Court suggested that "the wide divergence of thinking on this most sensitive and difficult question" made evident that lawmakers could not prefer one theory of when life began over any other.[68] After canvassing different religious and medical definitions, the Court concluded that the "unborn had never been recognized in law as persons in the whole sense."[69] For *Roe*, even the proper definition of conception was uncertain, especially in light of "new embryological data that purport to indicate that conception is a 'process' over time, rather than an event[.]"[70]

The Court reasoned that this uncertainty weakened the government's interest in protecting life.[71] If no one could agree on when life began, then forcing everyone to adopt the state's position was unfair and illogical.[72] "In view of all this," the Court concluded, "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."[73]

Roe reinforced abortion-rights activists' investment in uncertainty arguments. Movement members worked particularly hard to establish that women and physicians should be the ones to resolve the uncertainty surrounding when life began. This effort unfolded in two key legal battles: one involving Medicaid funding for abortion and a second involving the timing of viability. The Article discusses these battles in turn.

C. Viability, Uncertainty, and Competence

From the moment *Roe* was handed down, pro-life organizations pushed regulations on late abortions, particularly procedures taking place near the point of fetal viability, taking advantage of language in *Roe* allowing the government to protect fetal life after viability.[74] The

66. *See id.*
67. *See id.* at 160.
68. *Id.* at 160–61.
69. *Id.* at 162.
70. *Id.* at 161.
71. *See id.* at 161–63.
72. *See id.*
73. *Id.* at 162.
74. *See id.* at 164–65 ("For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it choose, regulate, and

movement introduced a variety of viability-based laws, including laws requiring more than one physician to be present when an unborn child might be viable,[75] mandating that a certain standard of care be used during these abortions,[76] or redefining viability.[77] Uncertainty jurisprudence quickly became tangled up with these laws. One such case began in 1974, when Pennsylvania passed the Abortion Control Act.[78] Part of the statute set a standard of care for certain abortions at or after the point of viability.[79] The law stated in pertinent part:

> Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus.[80]

In the fall of 1974, a group of abortion providers challenged the law, relying on the uncertainty surrounding viability in making their constitutional case.[81] At trial, witnesses clashed about whether it was possible to arrive at a single, agreed-upon definition of viability.[82] Of course, the case dealt with a different kind of uncertainty than the one described in *Roe*. No one in the case asserted that viability was a matter of personal opinion or individual belief. It seemed obvious that viability, whenever and whatever it was, was a matter of fact.[83] Instead, the uncertainty in the case turned on whether the medical community had reached agreement on the matter and what should be done if there was no consensus.[84]

On appeal to the Supreme Court, those on both sides focused as much on who was competent to resolve the definition of viability as

even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.").

75. *See, e.g.*, MO. REV. STAT. § 188.028 (2018).

76. *See, e.g.*, 35 PA. CONS. STAT. § 6605(a) (1977), *repealed by* 1982, June 11, P.L. 476, No. 138, 18 PA. CONS. STAT. § 3211(c)(2) (2018).

77. *See, e.g.*, MO. ANN. STAT. § 188.015(2).

78. *See supra* note 76 and accompanying text.

79. *See supra* note 76 and accompanying text.

80. *See supra* note 76 and accompanying text.

81. *See Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554, 555, 569 (E.D. Pa. 1975).

82. *See id.* at 569–72.

83. *See id.*

84. *See id.*

they did on whether its definition was uncertain. When it came to the definition of viability at work in the statute, Pennsylvania acknowledged that there would always be some uncertainty surrounding viability.[85] The state contended that because of this uncertainty, the legislature had the power to order physicians to maintain a certain standard of care when a fetus might be viable.[86] Just the same, Pennsylvania maintained that the determination was not so "subjective and uncertain" as to require invalidation of the statute.[87] Pennsylvania argued that because viability was a medical matter, any reasonable physician would know when a child might be viable.[88]

Who had the competence to resolve the uncertainty surrounding viability? Pennsylvania denounced the "elitist view that physicians and hospitals should regulate abortion practice as opposed to the federal government or state legislatures."[89] The Court could rightly weigh in on whether there was a constitutional abortion right or when a state law violated it.[90] But because the definition of viability was a question of fact, Pennsylvania argued that the Court could not legitimately second-guess the legislature's understanding.[91] Nor did Pennsylvania think that it made sense to have physicians resolve the definition of viability.[92] Pennsylvania reasoned that because the definition of viability was so uncertain, the government should have more freedom to select its own understanding.[93]

Those challenging the law deployed a very different idea of uncertainty, building on the strategy at work in *Roe*. In an amicus brief submitted by the American Public Health Association and the ACLU, abortion-rights supporters insisted that viability was so uncertain that the Pennsylvania law was void for vagueness.[94] As importantly, the brief maintained that uncertainty militated in favor of delegating the decision to physicians, who had the most expertise in medical matters.[95] The kind of judgment made by legislative majorities—questions that

85. *See* Brief for Appellants at 26–28, *Colautti v. Franklin*, 439 U.S. 379 (1979) (No. 77-891).

86. *See id.* at 28–31.

87. *Id.* at 30.

88. *See id.* at 31.

89. *Id.* at 32.

90. *See id.* at 30–31.

91. *See id.* at 32–34.

92. *See id.*

93. *See id.* at 26–28.

94. *See* Brief for Amici Curiae the Am. Public Health Ass'n et al. at 4–5, *Colautti*, 439 U.S. at 379 (No. 77-891).

95. *See id.* at 29–31.

were moral—differed significantly from the medical calls tied up with viability.[96] "As with so many other difficult judgments in our society, however, reasonable doctors may and, often, do disagree about a given prediction or diagnosis[,]" the brief argued.[97] "In medicine, as in law, predictive and diagnostic judgments do not lend themselves to objective determinations of right and wrong."[98] The brief argued that to allow doctors to resolve the uncertainty surrounding viability, the Court had to insulate physicians from criminal prosecution.[99]

The case, later called *Colautti v. Franklin*,[100] offered the Court an opportunity to clarify who had the capacity to weigh in when the answer to a question was uncertain.[101] The Court noted several ambiguities inherent in the statute, holding that it was void for vagueness.[102] *Colautti* also offered further guidance about what defined uncertainty and how it mattered in the abortion context:

> The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables . . . Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability. The prospect of such disagreement . . . could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.[103]

96. *See id.*
97. *Id.* at 30–31.
98. *Id.* at 31.
99. *See id.*
100. 439 U.S. 379 (1979).
101. *See id.*
102. *See id.* at 393–94.
103. *Id.* at 395–96.

Colautti defined a form of uncertainty quite different from the one at work in *Roe*. There, the Court had described the beginnings of life as an inherently philosophical, personal subject—one on which there would never be a meaningful consensus.[104] By contrast, the viability determination at work in *Colautti* was uncertain because it depended on too many scientific variables.[105] But when any kind of uncertainty was at work, *Colautti*, like *Roe*, reasoned that the courts had to take special care to protect the constitutional rights at work in a case.[106] If a matter was factually uncertain, then allowing legislators to pick a definition of viability would have a particularly acute chilling effect on constitutional rights.[107] *Colautti* concluded that for this reason, uncertain scientific questions were best left to courts, not legislators or even individual medical practitioners.[108]

Because *Colautti* seemed to define uncertainty more expansively, abortion-rights activists renewed their use of related tactics in the fight against bans on public funding for abortion. Pro-life organizations had always promoted laws prohibiting Medicaid funding for abortion, but following several unsuccessful efforts, Congress passed the Hyde Amendment, an appropriation rider that banned Medicaid abortion funding.[109] Constitutionally and politically, activists opposed to the Hyde Amendment experimented with several strategies, including those centered on uncertainty. Abortion-rights lawyers and activists asserted that the Hyde Amendment violated not only women's abortion rights but also the Free Exercise and Establishment Clauses.[110]

In a 1977 model letter to members of Congress, the National Abortion Rights Action League (NARAL) wove uncertainty into its arguments about freedom of religion:

> We do not shrink from the difficulties inherent in a woman's decision to abort. Nor do we have the definitive answer to the important question, when does life begin. The answer, as the Supreme Court recognized, is that there is no consensus . . . That being the case, we must never let our viewpoint—be it

104. *See supra* notes 61, 63, 65 and accompanying text (discussing uncertainty in *Roe*).

105. *Colautti*, 439 U.S. at 394–95.

106. *See id.* 394–96.

107. *See id.*

108. *See id.*

109. On the fight for funding bans, see ZIEGLER, *supra* note 10 at 39–43.

110. *See infra* notes 111 and 125 and accompanying text.

> that of a few individuals or a religious denomination—to be imposed on all citizens.[111]

NARAL and its allies also used the idea of uncertainty to argue against proposals to narrow the exceptions written into the Hyde Amendment. Every year, Congress considered how broad to make exceptions governing matters from rape and incest to medical necessity.[112] Alleging that there was no principled definition of medical necessity, pro-life members of Congress proposed that the exception be eliminated or replaced with a list of specific medical conditions.[113] NARAL and its supporters in the medical profession responded that because reasonable professionals would disagree about when an abortion was medically necessary, it was unconstitutional and immoral for Congress to decide the question.[114] Here, supporters of abortion rights unambiguously argued that physicians, not courts or legislatures, were best suited to resolve medically uncertain questions.[115]

"Use of the term 'medical necessity' places the burden for determination of when an abortion is necessary squarely in the hands of those best qualified to decide—the physicians," NARAL explained.[116] The American Medical Association and American College of Obstetricians and Gynecologists similarly argued that those with the most expertise should resolve questions with uncertain answers.[117] "Each patient is different and must be evaluated individually," argued James Sammons of the American Medical Association.[118] "Therefore, the determination of whether or not a proper medical procedure should be performed should not be defined by Congress."[119]

111. NARAL, Model Letter to Member of Congress (Jan. 21, 1977) (on file with Schlesinger Library, Harvard University, Box 28, Folder 11).

112. On the battle about Hyde Amendment exceptions, see Mary Segers, *The Catholic Church as a Political Actor*, *in* PERSPECTIVES ON THE POLITICS OF ABORTION 98 (Ted Jelen ed., 1995); ZIEGLER, *supra* note 10, at 132.

113. *See* Carol Werner to Members of Congress, *Restrictions on the Federal Funding of Abortion* (July 13, 1977) (on file with Schlesinger Library, Harvard University, in the NARAL Papers, Box 48, Folder 10) (describing the opposition approach).

114. *See id.*; *see also* Erwin Nichols of ACOG to Sen. Edward Brooke (Jul. 21, 1977) (on file with Schlesinger Library, Harvard University, in the NARAL Papers, Box 41, Folder 10); James Sammons of AMA to Sen. Edward Brooke (Jul. 19, 1977) (on file with Schlesinger Library, Harvard University, in the NARAL Papers, Box 41, Folder 10).

115. *See* Werner, *supra* note 113.

116. *See supra* note 111 and accompanying text.

117. *See* Sammons, *supra* note 114.

118. *Id.*

119. *Id.*

Similar ideas about uncertainty shaped the constitutional challenge to the Hyde Amendment. Lawyers faced a particularly rough challenge because of a series of cases that the Supreme Court had decided in 1977. *Maher v. Roe*,[120] the lead case, involved a Connecticut welfare regulation that prohibited Medicaid reimbursement for elective abortions.[121] The Court had rejected the equal-protection argument often made against funding bans, reasoning that the privacy right recognized in *Roe* at most required freedom from governmental interference.[122] According to *Maher*, poor women could not get abortions because of their poverty, not because of any government-created obstacle.[123] When the Hyde Amendment came before the Supreme Court, abortion-rights lawyers had to find a way to distinguish their case from *Maher*.

D. Uncertainty and Value Judgments About Abortion

In *Harris v. McRae*, lawyers Sylvia Law and Rhonda Copelon partly pointed to the fact that the Hyde Amendment was more expansive than the state ban upheld in Connecticut, prohibiting funding for both medically necessary and elective abortions.[124] But the two also emphasized the establishment-clause and free-exercise claims often made in the political arena. Describing the beginning of life as a religious matter, the brief argued that legislatures could not constitutionally or fairly arrive at an answer on the issue.[125] The brief insisted that because of the moral and spiritual dimensions of the abortion decision, the choice to terminate a pregnancy was protected under the Free Exercise Clause of the First Amendment:

> Like conscientious objection to military service, the abortion decision demands the protection of the Free Exercise Clause. Pregnancy ineluctably requires immediate, direct, intimate and profound confrontation with questions of life and death. The response may be immediate and instinctive or the result of a long, soul-searching process. For some women, the fetus

120. 432 U.S. 464 (1977).

121. *See id.* at 466.

122. *See id.* 470–75.

123. *See id.* at 474.

124. *See Harris v. McRae*, 448 U.S. 297, 312 (1980) (detailing the argument that denying funding for medically necessary abortions unconstitutionally burdened women's rights).

125. *See* Brief for Appellees at 153–55, *McRae*, 448 U.S. at 297 (No. 79-1268).

> is inviolable, and conscience precludes consideration of abortion even at tremendous risk to life and health. For others, pregnancy requires balancing the potential of human life against questions of survival, purpose, lifelong responsibility, and ultimately the meaning of human existence and fulfillment. For these women, conscience may dictate the necessity of terminating an unwanted and health-threatening pregnancy.[126]

Because abortion dealt with religious questions to which there was no right answer, the Hyde Amendment impermissibly suppressed dissenting views about the morality of abortion and the beginning of life.[127] The brief further argued that because the definition of human life was a religious, subjective matter, the Hyde Amendment had "enact[ed] a religious belief" in violation of the Establishment Clause.[128] Arguing that the beginning of life was a religious matter, the brief maintained that democratically elected lawmakers were particularly ill-suited to resolve the question of when life began.[129]

Those defending the Hyde Amendment worked to undercut the uncertainty argument that *Roe* had adopted. Intervening on behalf of Representative Hyde and other lawmakers, Americans United for Life (AUL) argued that the government could legitimately take sides in inherently subjective, secular, moral debates.[130] According to the brief, it did not matter that not everyone agreed about when life began.[131] The subjectivity of the question neither indicated that it was religious nor established that individual women were especially well-suited to making the decision.[132] "The legitimacy of the State's interest in potential human life does not vanish because some or even a majority of the Members of Congress believe that the fetus is actual human life," the brief contended.[133]

McRae ultimately offered a perspective on the role of uncertainty in abortion law that differed significantly from the one set out in *Roe*:

126. *Id.* at 154–55.
127. *See id.* at 153–56.
128. *Id.* at 111.
129. *See id.* at 110–11.
130. *See* Reply Brief of Intervening Defendants-Appellants James L. Buckley et al. at 18–20, *McRae*, 448 U.S. at 297 (No. 79-1268).
131. *See id.*
132. *See id.*
133. *Id.* at 19.

> Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion.[134]

Whereas *Roe* pointed to religious and scientific disagreement as a reason that the government's interest in protecting life could not be compelling before a certain point in pregnancy, *McRae*, like *Maher*, assumed that the government could appropriately make "a value judgment favoring childbirth over abortion."[135] In part, the difference turned on the fact that *McRae* and *Maher* involved a decision to fund one decision and not another: the Court emphasized in both cases that there was no obligation to fund the exercise of any constitutional right.[136]

But *McRae* and *Maher* also made it harder to understand how much authority the government had when a matter was morally or scientifically uncertain.[137] Both decisions suggested that the government had the power to express its own views on when life began, at least within certain limits.[138] But after *McRae* and *Maher*, it was not clear what kind of uncertainty the Court believed was at stake in the "value judgment" that the government had made. Had the government expressed a moral preference for childbirth, or had lawmakers instead acted on a recognizable, factual difference between abortion and childbirth?

McRae convinced some anti-abortion leaders that an uncertainty-based strategy held out real promise, particularly because the Court had not drawn a clear line between subjective and objective uncertainty. In the next several decades, the movement introduced mandated-consent laws and other measures that invited the courts to elide the differences

134. *McRae*, 448 U.S. at 319.
135. *Id.* at 314 (citing *Maher v. Roe*, 432 U.S. 464, 474 (1977)).
136. *See McRae*, 448 U.S. at 314–15; *Maher*, 432 U.S. at 474.
137. *See McRae*, 448 U.S. at 324–26; *Maher*, 432 U.S. at 473–74.
138. *See McRae*, 448 U.S. at 324–26.

between factual and moral uncertainty. Pro-lifers believed that by doing so, their movement could find a more effective way of undermining *Roe*'s holdings on the beginning of life and fetal personhood. If pro-lifers could not directly convince the Court to overrule *Roe*'s conclusions on fetal life, then perhaps the idea of uncertainty could be used to chip away at *Roe*'s foundation.

II. UNCERTAINTY JURISPRUDENCE FROM *AKRON I* TO *CASEY*

After *McRae*, pro-life groups worked to develop their own doctrinal approach to uncertainty. Activists did so partly in the context of mandated-consent laws. These statutes required physicians to recite certain information before women could obtain an abortion. This Part begins by showing how anti-abortion groups used mandated-consent laws, statutory preambles, and other techniques to develop an alternative understanding of uncertainty in abortion law, one that blurred the line between morality and science. Next, this Part examines the Supreme Court's response to this argument. While mostly striking down mandated-consent laws before 1989, the Court treated morally charged, arguably subjective statements indistinguishably from questionable assertions of fact. Thus, while pro-lifers did not convince the Court to uphold mandated-consent laws, the plan to blur the line between moral and factual uncertainty did pay some dividends. As this Part shows next, as the Supreme Court retreated from protecting abortion rights, the Court increasingly drew no clear line between subjective and objective uncertainty.

A. Akron I*, Informed Consent, and Uncertainty*

Anti-abortion groups had experimented with mandated-consent laws since 1973, and after the Court decided its first major post-*Roe* case, pro-lifers' reasons for investing in such claims were even clearer.[139] In *Planned Parenthood of Central Missouri v. Danforth*,[140] the Supreme Court struck down parts of a disputed Missouri law but upheld one involving informed consent.[141] "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and

139. On pro-lifers' experiments with informed-consent laws, see, e.g., ZIEGLER, *supra* note 10, at 38–42.

140. 428 U.S. 52 (1976).

141. *Id.* at 63–83.

imperative that it be made with full knowledge of its nature and consequences," *Danforth* explained.[142]

Pro-lifers seeking to build on their victories in *Maher* and *McRae* treated mandated-consent as a promising starting point for the attack on the kind of uncertainty claim at work in *Roe*. The model law that would serve as a blueprint throughout the country developed in Akron, Ohio.[143] Drafted by leading anti-abortion law professors and lawyers, the law required physicians to inform women of:

> [(1)] The number of weeks elapsed from the probable time of the conception . . . ; [(2)] That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child . . . ; [(3)] That her unborn child may be viable; [(4)] That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances; [(5)] That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.[144]

Pro-life groups in Akron defined all of these statements as facts, indistinguishable from one another.[145] Jane Hubbard, the President of Akron Right to Life, insisted that the law's aim was "to ensure that a woman who decides to abort her child will have . . . scientifically and medically accurate information[.]"[146] Marvin Weinberger, one of the

142. *Id.* at 67.

143. *See, e.g.*, CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 284 (2000); Reginald Stuart, *Akron Divided by Heated Abortion Debate*, N.Y. TIMES, Feb. 1, 1978, at A10.

144. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 424 n.5 (1983).

145. *See infra* notes 146 & 147.

146. Tracy A. Thomas, *Back to the Future: The Future of Regulating Abortion in the First Trimester*, 29 WIS. J.L. GENDER & SOC. 47, 55 (2014) (quoting Jane

leaders of Citizens for Informed Consent, reinforced this point. "We are not trying to cause guilt feelings," he told the *New York Times*.[147] "All we're giving [women] are the biological facts."[148]

But the kinds of assertions at issue in the Akron ordinance fell into many categories. Some of the mandated information was unquestionably factual, such as the number of weeks elapsed since a woman's last menstrual period. Other statements, such as the one asserting that the unborn child was "a human life from the moment of conception," had an element of moral judgment or subjectivity. Still others could be considered either false or misleading. The claim that abortion caused psychological damage or sterility was contested by scholars and activists.[149] A statement suggesting that women could easily receive child support might be considered misleading since the law understated the obstacles facing those seeking it out. Just the same, pro-lifers described each of these statements as equally factual.

Supporters of abortion rights fired back that all of the information mandated under the ordinance was false or misleading. Cheryl Swain, a feminist from Akron, told the media that the ordinance would mislead women about the reality of adoption or child support.[150] Jane Hodgson, a Minnesota obstetrician-gynecologist and leading figure in the abortion-rights movement, testified that the medical risks detailed in the ordinance were illusory.[151] But while challenging the authority and expertise of those defending the statute, supporters of abortion rights did not mention the differences between the moral, scientific, and legal claims made in the statute.[152]

The litigation of *City of Akron v. Akron Center for Reproductive Health* (*Akron I*)[153] put different theories of uncertainty on trial. In a brief submitted for Feminists for Life, Americans United for Life (AUL) contended that the ordinance covered only "factual information," downplaying the differences between morals claims and

Hubbard, Letter to the Editor, *Should City Monitor Abortion?*, AKRON BEACON J., Nov. 21, 1977, at A6).

147. *See* Stuart, *supra* note 143, at B1.

148. *Id.*

149. On studies on post-abortion trauma, see Nancy B. Kaltreider, *Psychological Impact on Patients and Staff*, *in* SECOND-TRIMESTER ABORTIONS: PERSPECTIVES AFTER A DECADE OF EXPERIENCE 239–48 (Gary S. Berger et al. eds., 1981).

150. *See* Stuart, *supra* note 143, at A10.

151. *See, e.g.*, Jane Hodgson, Testimony Presented to the Akron City Council, Re: Proposed Regulations Governing Abortion Clinics (Feb. 4, 1978) (on file with the Minnesota Historical Society, Akron File, in The Jane Hodgson Papers, Box 15).

152. *See, e.g.*, *supra* notes 149 & 151 and accompanying text.

153. 462 U.S. 416 (1983).

medical assertions.[154] An amicus brief submitted by the United Families Foundation (UFF), another anti-abortion group, argued that there was "compelling evidence" that abortion caused both physical and psychological harm.[155] As proof, the group cited conclusions drawn by the Supreme Court, Senate testimony, and common sense.[156] The fact that the ordinance framed harm to women as certain rather than possible did not change UFF's conclusion.[157] The mere potential of a correlation between abortion and harm made the ordinance factual enough.[158]

While *Akron I* struck down the disputed ordinance, the Court did not fully explain why the kind of uncertainty at issue in the case was constitutionally problematic.[159] In part, the majority focused on the purpose behind the ordinance, arguing that it impermissibly put forward information "designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[160] The Court described statements set out in the ordinance as "dubious" or "speculat[ive.]"[161] When it came to the statement concerning human life, the Court concluded that the law was "inconsistent with the Court's holding in *Roe* v. *Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions."[162]

But the kinds of uncertainty that plagued the ordinance were more complex than *Akron I* suggested. The Court did not clearly distinguish between the concern about disputed factual assertions, like those involving post-abortion trauma, and statements with moral undertones, like those involving the humanity of the fetus. While pro-life groups did not convince the Court to uphold the Akron ordinance, the movement did help to blur the line between different kinds of uncertainty in the Court's jurisprudence.

Moreover, writing in dissent, Justice O'Connor set out a very different idea of scientific uncertainty.[163] O'Connor stressed that medically uncertain matters ran throughout the Court's abortion

154. Brief Amicus Curiae for Feminists for Life in Support of Pet., the City of Akron, 1819, *City of Akron*, 492 U.S. 416 (No. 81-1172).

155. Brief of Amicus Curiae for the United Families Found. & Women Exploited at 2–5, *City of Akron*, 462 U.S. 416 (No. 81-1172).

156. *See id.* at 23–24.

157. *See id.*

158. *See id.*

159. *City of Akron*, 462 U.S. at 442–50.

160. *Id.* at 444.

161. *Id.*

162. *Id.*

163. *See id.* at 454–59 (O'Connor, J., dissenting).

jurisprudence.[164] But while the majority suggested that only individual doctors had the competence to make medical calls in ambiguous circumstances, O'Connor argued that uncertainty made it inappropriate for the courts to intervene.[165] She explained:

> It is . . . difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area.[166]

As O'Connor's opinion made plain, uncertainty jurisprudence had a transformative impact on abortion rights, shaping the level of deference courts paid to lawmakers and even the basic conclusion that judges were competent to weigh on the matter at all.

B. Unworkability

As the Court gradually retreated from *Roe*, the line between subjectivity and uncertainty became no clearer. In *Thornburgh v. American College of Obstetricians*,[167] the Court struck down variations on the kind of informed-consent and viability-definitions provisions considered in *Akron I* and *Colautti*.[168] Generally, however, *Thornburgh* did not emphasize the accuracy of the assertions built into the disputed Pennsylvania law, instead carving out a firmer rule regarding statutory exceptions for women's health or the importance of discretion for physicians.[169]

In *Webster v. Reproductive Health Services*,[170] with a majority skeptical of *Roe* on the Court, a different idea of uncertainty began to more clearly emerge. In an amicus curiae brief, the National Right to Life Committee (NRLC), a major pro-life group, quoted Justice O'Connor's dissenting opinion in *Akron I*, urging courts not to meddle

164. *See id.* (O'Connor, J., dissenting).
165. *See id.* (O'Connor, J., dissenting).
166. *Id.* at 456. (O'Connor, J., dissenting).
167. *See* 476 U.S. 747 (1986).
168. *See Thornburgh*, 476 U.S. at 760–62.
169. *See id.*
170. *See* 492 U.S. 490 (1989).

in scientifically uncertain matters.[171] Because new information could change the complexion of scientific questions, recognizing an abortion right ensured that "the lower courts [would be] left in disarray by changes in medical technology."[172]

AUL took this argument a step further. In an amicus brief submitted on behalf of a group of pro-life legislators, AUL cited public opinion polls, scholarship, and partisan polarization as evidence that courts were incompetent to resolve disputes about abortion.[173] AUL's argument suggested that inherently divisive questions were best left to legislatures partly because elected bodies could better negotiate compromises that would de-escalate conflict.[174] Without drawing a line between subjective and objective uncertainty, the organization also highlighted evidence of fetal personhood, suggesting that courts—more so than legislators—had no competence to sort through scientific evidence.[175] Blurring the line between different kinds of uncertainty, AUL stressed that "the history of conflict over Roe has proven that this Court is ill-positioned to resolve the myriad legal, moral, medical, and social issues that are elements of the abortion debate."[176]

The idea of uncertainty informed two parts of the Court's decision. It first addressed the preamble of a Missouri statute stating that life began at conception and that unborn children had certain fundamental rights.[177] Those challenging the law argued, among other things, that Missouri had impermissibly adopted one definition of when life began, violating the principle in *Roe* that the state could not enforce one view on the subject.[178] The Supreme Court disagreed.[179] Acknowledging that the precise impact of the preamble was not clear, *Webster* left more room for the states to operate in cases of moral uncertainty.[180] The

171. *See* Brief Amicus Curiae of the Nat'l Right to Life Comm. at 15–16, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605).

172. *Id.* at 16.

173. *See* Brief Amici Curiae of the Hon. Chris Smith et al. in Support of Appellants at 24–28, *Webster*, 492 U.S. 490 (1989) (No. 88-605); *see also* Brief of Certain Am. State Legislators as Amici Curiae in Support of Appellants at 1, *Webster*, 492 U.S. 490 (No. 88-605).

174. *See* Brief Amici Curiae of Hon. Christopher H. Smith et al., *supra* note 171, at 2.

175. *See id.* at 8.

176. *Id.* at 27–28.

177. *See Webster*, 492 U.S. at 504–07.

178. *See id.* at 505.

179. *See id.* at 504–07.

180. *See id.*

government could define life however it wished as part of a "value statement favoring childbirth over abortion."[181]

The Court also analyzed medical uncertainty in evaluating part of the Missouri law requiring doctors to test for fetal viability at twenty weeks gestation.[182] Those challenging the law emphasized that it superimposed regulation on the discretion of the physician, the constitutional problem recognized in *Akron I* and *Thornburgh*.[183] *Webster* recognized that the point of fetal viability was uncertain—researchers disputed how early viability could occur, and at the time, estimates of viability could be off by as much as four weeks.[184]

This uncertainty, according to *Webster*, did not point to concerns about legislators second-guessing doctors' medical decisions.[185] Instead, *Webster* reasoned that because abortion law dealt with matters of scientific uncertainty, the courts had neither the authority nor the competence to weigh in.[186] "Since the bounds of the inquiry are essentially indeterminate," *Webster* explained, "the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine."[187]

Webster implied a different way of analyzing uncertainty in the abortion context. First, the plurality drew a bright line between questions of constitutional law and scientifically uncertain matters that the courts did not have the capacity to address.[188] By emphasizing courts' lack of expertise on medical matters, *Webster* overrode the idea articulated in *Roe* and its progeny that legislators would not have the competence to resolve uncertain scientific questions.[189] *Webster* also re-framed questions of moral uncertainty.[190] While *Roe* had suggested that philosophical questions such as the definition of human life were inherently personal, subjective, and inappropriate for legislators to resolve, *Webster* suggested that the government could make its own value judgment on morally ambiguous matters.[191]

181. *Id.* at 506 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

182. *See* MO. REV. STAT. §188.029 (1986), repealed by L.2011, H.B. No. 213, § A; L.2011, S.B. No. 65, § A.

183. *See Webster*, 492 U.S. at 516–18.

184. *See id.* at 515–16.

185. *See id.* at 515–17.

186. *See id.* at 518.

187. *Id.*

188. *See id.* at 515–20

189. *See id.* at 504–07.

190. *See id.*

191. *See id.*

C. *Uncertainty in* Casey

Pro-life groups carried forward *Webster*'s definition of uncertainty in asking for *Roe* to be overruled. When the Supreme Court decided to hear an appeal in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, many expected the Court to overrule *Roe*, and pro-life lawyers made uncertainty an argument for doing so.[192] "By tying the states' ability to regulate abortion to ever-shifting medical technology and 'accepted medical practice,' the Court effectively removed from the states' elected representatives the ability to regulate abortion and placed such decisions within the hands of the medical profession," NRLC argued.[193] "Instead of engendering stability in the law, this has led to extreme instability in the law."[194] NRLC suggested that uncertainty militated in favor of a resolution by elected officials rather than courts because the latter had a responsibility to provide consistent, clear legal guidance.[195] Abortion law was unstable because of two kinds of uncertainty. Moral uncertainty ensured that Americans would never agree on whether abortion was right or wrong.[196] Scientific uncertainty meant that courts would have to constantly tweak the law to reflect new developments.[197]

When the Supreme Court decided *Casey*, the plurality did not act on the uncertainty argument that pro-life lawyers had promoted so energetically. Anti-abortion attorneys had suggested that the moral and medical uncertainty surrounding abortion had made *Roe* unworkable.[198] *Casey* rejected this idea, drawing on ideas of uncertainty articulated in *Roe* and earlier cases.[199] First, the plurality suggested that there was nothing special about allowing courts to resolve abortion cases, since substantive due process asked the courts to exercise "reasoned judgment."[200] When touching on the kinds of moral uncertainty that always came into play in abortion cases, *Casey* acknowledged that "[i]t is conventional constitutional doctrine that, where reasonable people

192. *See, e.g.*, *infra* note 193 and accompanying text.

193. Brief Amicus Curiae of Nat'l Right to Life, Inc. Supporting Respondents/Cross-Petitioners at 6, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-901).

194. *Id.*

195. *See id.*

196. *See supra* note 188 and accompanying text.

197. *See* Brief Amicus Curiae of Nat'l Right to Life, Inc., *supra* note 193, at 6.

198. *See, e.g.*, *id.*

199. *See Casey*, 505 U.S. 833, 846–53 (1992).

200. *Id.* at 849.

disagree, the government can adopt one position or the other."[201] Nevertheless, the Court framed the abortion decision as deeply personal, a matter that should not be left to the government or even a physician to make.[202] "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society," *Casey* explained.[203]

Nor did the plurality find it relevant that medical technology made application of *Roe* medically uncertain.[204] Whenever viability occurred, *Casey* emphasized that "divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[205] While discarding the trimester framework, the Court was not receptive to the idea that uncertainty made *Roe* unworkable in principle or practice.[206]

But as abortion opponents later recognized, *Casey* hinted at another form of uncertainty—one involving the possibility of harm to women. The plurality replaced the trimester framework with the undue-burden standard, a rule that rendered abortion regulations unconstitutional if they had the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.[207] When applying the standard to a Pennsylvania informed-consent measure, the plurality upheld the disputed restriction, emphasizing the possibility of harm as a rationale:

> It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be

201. *Id.* at 851.
202. *See id.* at 851–52.
203. *Id.* at 852.
204. *Id.* at 835–36.
205. *Id.* at 877.
206. *See id.*
207. *Id.* at 877 (O'Connor, J., concurring).

> made available to the woman is truthful and not misleading, the requirement may be permissible.[208]

In analyzing the purpose of the informed-consent law, *Casey* did not hold that there was evidence that women would regret an abortion.[209] The plurality did not even conclude that it was certain that any woman would experience psychological distress as a result of abortion.[210] Instead, states could impose informed-consent regulations to "reduc[e] the risk" of harm.[211]

Casey's analysis of informed consent inspired a new form of uncertainty strategy in anti-abortion circles. Instead of focusing on institutional competence, anti-abortion attorneys re-framed both moral and scientific matters as uncertain. Blurring the line between the two, pro-life lawyers argued that states could justifiably restrict abortion to prevent the potential of grievous harm, regardless of the state of the evidence.

III. LEGISLATING AWAY UNCERTAIN HARMS

In the aftermath of *Casey*, uncertainty arguments took on more importance. As this Part shows, anti-abortion groups reacted to the Court's decision by highlighting the possibility of grievous harm. If abortion could cause lasting damage, as pro-lifers saw it, lawmakers were justified in introducing far-reaching regulations to foreclose the possibility. Moreover, abortion opponents increasingly blurred the line between moral and scientific uncertainty, encouraging judges to inject their own disgust with abortion into analysis of the facts. Next, this Part studies how fights about uncertainty played out in the Court's most recent decisions: *Stenberg v. Carhart*,[212] *Gonzales v. Carhart*,[213] and *Whole Women's Health v. Hellerstedt*.[214] While *Whole Women's Health* defined uncertainty in radically different terms, the Court did not challenge the understandings of uncertainty—or the confusion of moral and medical ambiguity—that defined earlier decisions.[215]

208. *Id.* at 882 (O'Connor, J., concurring).
209. *See id.* (O'Connor, J., concurring).
210. *See id.* (O'Connor, J., concurring).
211. *Id.* (O'Connor, J., concurring).
212. 530 U.S. 914 (2000).
213. 550 U.S. 124 (2007).
214. 136 S. Ct. 2292 (2016).
215. *See id.*

A. The Possibility of Harm

While *Casey* devastated abortion opponents, AUL members saw in the decision the seeds of a new uncertainty strategy, one centered on the idea that abortion hurts women. Even before the Court's decision, some members of the group pushed for a change in strategy.[216] In 1989, AUL President Guy Condon promoted a woman-protective message at a gathering for anti-abortion leaders, insisting that "pro-lifers needed to show love not only to unborn children but to their young moms who feel trapped."[217] AUL members charged with messaging also emphasized the importance of reaching women.[218] At an AUL conference for state legislators, Laurie Ann Ramsey summarized the results of market research on the image of the anti-abortion movement: "[W]e are also seen as extremist . . . violent, intolerant, and unconcerned about women, the homeless, and the poor."[219] "The [movement's] focus on concern for the unborn child neglects . . . the mother," Mary Ellen Jensen, a public-relations specialist at AUL explained at the time.[220] "Communicating greater concern for the woman . . . must be a key objective."[221]

Casey energized abortion opponents who hoped to use the same scientific-uncertainty argument to convince state legislators. After all, in discussing informed-consent regulations, the Court recognized as a valid purpose Pennsylvania's interest in reducing the risk of harm.[222] Without requiring any evidence that post-abortion trauma occurred, the Court suggested that the possibility of grievous harm could sometimes justify intervention.[223] Recognizing the importance of uncertainty for the *Casey* Court, Paige Cunningham of AUL announced "a major rhetorical shift" in the organization's agenda, one focused on "right to

216. *See infra* notes 217 & 219 and accompanying text.

217. Marvin Olasky, *Pro-Life Pivot*, WORLD MAG. (Jan. 17, 2009), [https://perma.cc/HBN3-V5L2].

218. *See infra* notes 220 & 221 and accompanying text.

219. Laurie Ann Ramsey, "How Public Opinion Polls Should Guide Pro-Life Strategy," Americans United for Life Legislative Conference (1991), 3–4, (on file with Schlesinger Library, Harvard University in The Mildred Jefferson Papers, Box 13, Folder 5).

220. Mary Ellen Jensen, "How Public Opinion Polls Should Guide Pro-Life Strategy" (1989), 5, (on file with Schlesinger Library, Harvard University in The Mildred F. Jefferson Papers, Box 13, Folder 6).

221. *Id.*

222. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870–71 (1992) (O'Connor, J., concurring).

223. *See id.*

know laws" patterned on *Casey*.[224] "We must help people to understand that abortion hurts women too," she insisted.[225] By the fall of 1993, the organization had announced a major fifteen-year plan.[226] "Our first goal is to shatter the myth that abortion helps women," the framers of the plan explained.[227]

In the lead-up to the Supreme Court's decisions in *Stenberg* and *Gonzales*, uncertainty also shaped the campaign to ban what pro-lifers called "partial birth abortion." At a 1992 conference hosted by the National Abortion Federation, Dr. Martin Haskell presented a paper on a procedure that he claimed would improve outcomes for women in some later abortions.[228] The procedure required a provider to remove a fetus intact rather than in pieces.[229] Members of Minnesota Citizens for Life got hold of the paper and began running advertisements featuring details about the procedure in a campaign against a major piece of pro-choice legislation, the Freedom of Choice Act.[230] By 1995, working with Representative Chris Canaday, NRLC lobbied for a bill banning "partial birth abortion."[231]

From the beginning, the campaign turned partly on uncertainty about everything from fetal pain late in abortion to when and how the disputed procedures were performed.[232] While members of NRLC maintained that the procedure, dilation and extraction, was performed often and throughout pregnancy, witnesses for organizations like Planned Parenthood and National Abortion Federation stated that the procedure was rare and performed only late in pregnancy in cases of a threat to a woman's health or fetal abnormality.[233]

224. AUL Board Meeting Minutes (Apr. 24, 1993) (on file with Schlesinger Library, Harvard University *in* The Mildred F. Jefferson Papers, Box 13, Folder 5).

225. *Id.*

226. *See* AUL Board Meeting Minutes (Oct. 20, 1993), (on file with Schlesinger Library, Harvard University in The Mildred F. Jefferson Papers, Box 13, Folder 5).

227. *Id.*

228. JOHANNA SCHOEN, ABORTION AFTER ROE 221 (2015).

229. *See, e.g.*, H. Rep. 108–58, at 2–4 (2003).

230. Freedom of Choice Act, S. R. 2020, 108th Cong. (2004).

231. Partial-Birth Abortion Act, H. R. 929, 105th Cong. (1997).

232. *See, e.g.*, *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary H.R.*, 104th Cong. 77, 94 (1995) (statement of Mary Ellen Morton).

233. *See, e.g.*, *id.*

Anti-abortion witnesses also introduced uncertainty about whether dilation and extraction caused fetal pain.[234] A nurse who had contacted NRLC testified that during a dilation and extraction procedure, she had witnessed what she believed were unmistakable signs of fetal pain.[235] "I think every member should be marched into an operating room and made to watch an actual abortion, and then you make your own decisions," she explained.[236] Another nurse refuted this testimony, asserting that at no point during a procedure was "there any movement that would indicate awareness of pain and struggle."[237]

Other witnesses injected uncertainty into debate about whether dilation and extraction was ever the safest procedure for women.[238] The NAF and Planned Parenthood stressed that under some circumstances, dilation and extraction would reduce the risks of complications and future threats to a woman's fertility.[239] "Abortion providers' highest priority is the safety of their patients," wrote the National Coalition of Abortion Providers.[240] "The physicians who perform this procedure believe that it is the safest for the woman."[241]

In the summer of 1996, a group called Physicians' Ad Hoc Coalition for Truth (PHACT), formed by physicians and obstetricians opposed to abortion, began a campaign to dispute this claim.[242] In August 1996, for example, PHACT put out a statement claiming that "partial-birth abortion is *never* medically indicated to protect a woman's health or her [future] fertility."[243]

234. *See id.* at 77 (Statement of Mary Ellen Morton); *see also Partial Birth Abortion Ban Ok'ed, But Clinton Vows Veto*, NAT. RIGHT TO LIFE NEWS, Dec. 20, 1995, at 19.

235. *See Partial-Birth Abortion: Hearing*, *supra* note 232, at 77.

236. *Id.*

237. *Id.* at 94–95 (rebuttal of Morton's testimony).

238. *See, e.g.*, *infra* notes 239 & 243 and accompanying text.

239. For NAF and NARAL's testimony, see *Partial Birth Abortion: The Truth: Joint Hearing Before the S. Comm. on the Judiciary and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Congress 32–33 (1997) (statement of Vicki Saporta); *id*. at 77 (statement of Kate Michelman).

240. Letter from Ron Fitzsimmons to NCAP Members (Feb. 1997) (on file at Bingham Library, Duke University in The NCAP Papers, Box 2, Folder 65).

241. *Id.*

242. On the founding of PHACT, *see* letter from Denis Cavanaugh et al. to Frederic Frigoleto (Jan. 29, 1997), [https://perma.cc/5RMF-ZWGD].

243. Nancy Romer et al., Physicians' Ad Hoc Coalition for Truth (PHACT), *Partial-Birth Abortion is Bad Medicine*, WALL ST. J., Sept. 19, 1996, at A22.

B. From Stenberg to Gonzales

While Bill Clinton vetoed bans on dilation and extraction in 1995 and 1996,[244] similar laws spread through the states, including the one considered by the Supreme Court in *Stenberg*. The Nebraska statute at issue in the case outlawed "partial birth abortion" unless it was necessary to save the life of a woman.[245] Uncertainty arguments shaped the outcome in the case. The ACLU and its allies first argued that the law was vague, sweeping in dilation and evacuation, the most common second-trimester procedure, and thereby imposing an undue burden on a woman's right to choose.[246] The ACLU further contended that even if the Court read the Nebraska law to apply only to dilation and extraction, uncertainty about the health benefits of the procedure meant that a ban could not stand.[247] By contrast, NRLC and its allies argued that in the face of uncertainty, the government should have more latitude to prevent the more obvious fetal harm created by the abortion.[248] "In the present case, there is no convincing evidence that the woman must bear any health risk as the result of choosing available methods of abortion other than the D&X [dilation and extraction]," argued James Bopp, Jr. of NRLC.[249] "But assuming arguendo there were some health advantage to D&X in some circumstances, there is no evidence that it is sufficiently significant to justify the conclusion that failure to include a generalized health exception in the Nebraska statute would represent an undue burden."[250]

244. On the vetoes, see, e.g., Alison Mitchell, *Clinton, in Emotional Terms, Explains His Abortion Veto*, N.Y. TIMES, Dec. 14, 1996, at 1; Alissa J. Rubin, *Bill to Ban Abortion Method Vetoed; Legislation: Measure Outlawing So-Called Partial-Birth Procedure was Similar to One President Clinton Rejected Last Year. Override Fight Seen*, L.A. TIMES, Oct. 11, 1997, at A2.

245. *See* NEB. STAT. ANN. § 28-328(1) (1999).

246. *See, e.g.*, Brief of Amici Curiae for the Am. Civil Liberties Union et al. in Support of Respondent at 4–14, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830); Brief of Amicus Curiae for the American Coll. of Obstetricians & Gynecologists et al. Supporting Respondent at 9–18, *Stenberg*, 530 U.S.914 (No. 99-830); Brief of the Naral Found. et al. as Amici Curiae in Support of Respondent at 11–22, *Stenberg*, 530 U.S. 914 (No. 99-830).

247. *See* Brief of Amici Curiae of the Am. Civil Liberties Union et al., *supra* note 246, at 14–24.

248. *See, e.g.*, Brief of Amici Curiae Nat'l Right to Life Comm. et al. in Support of Petitioners at 28–29, *Stenberg*, 530 U.S. 914 (No. 99-830); Brief of the Am. Ctr. for Law & Justice & the Thomas More Soc'y as Amicus Supporting Petitioners at 9–18, *Stenberg*, 530 U.S. 914 (No. 99-830).

249. Brief of Amici Curiae Nat'l Right to Life Comm. et al., *supra* note 248, at 28–29.

250. *Id.*

Stenberg expanded on the idea of uncertainty spelled out in *Roe*, suggesting that a risk to a woman's health was enough to require a health exception to any abortion ban.[251] Nebraska emphasized the uncertainty surrounding the health benefits of dilation and extraction.[252] The state highlighted expert testimony and peer-reviewed studies suggesting that the procedure had no benefits and was never necessary to save a woman's life.[253] According to Nebraska, a lack of studies on the safety of dilation and extraction—either on its own or compared to dilation and evacuation—also meant that the government should have more room to regulate.[254]

The Court rejected this reasoning. Relying on the findings of the district court, an amicus brief submitted by the American College of Obstetricians and Gynecologists, and the very uncertainty surrounding the need for dilation and extraction, the Court held that a health exception was required:

> [T]he division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. That division here involves highly qualified knowledgeable experts on both sides of the issue. Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasoning supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.[255]

The *Stenberg* majority borrowed anti-abortion arguments about the possibility of harm and turned them on their head.[256] If the lack of a health exception threatened women's health, the Court reasoned, then the tiebreaker in the face of uncertainty should go to those who believed

251. *See Stenberg*, 530 U.S. at 937–38.
252. *See id.*
253. *See id.*
254. *See id.* at 933.
255. *Id.* at 937.
256. *See id.*

that dilation and extraction would deliver better outcomes for women.[257] The Court further held that the law was impermissibly vague and threatened women's access to dilation and evacuation as well as dilation and extraction.[258]

Writing in dissent, Justice Kennedy relied on a different idea of uncertainty.[259] Like the majority, Kennedy acknowledged conflicting evidence on the health benefits of dilation and extraction.[260] But when the answer to a question was uncertain, Kennedy concluded that the government should have more power to regulate.[261] "Unsubstantiated and generalized health differences which are, at best, marginal, do not amount to a substantial obstacle to the abortion right."[262] Kennedy also disagreed with the majority about who was best equipped to weigh in on uncertain questions.[263] While the majority emphasized the expertise possessed by those leading medical organizations and the extensive findings made by lower courts, Kennedy maintained that legislatures had better tools to resolve medically uncertain matters.[264] Citing the superior fact-finding tools of legislators, Kennedy also took the Court to task for returning to the "physician-first approach" of *Roe*.[265] According to Kennedy, *Casey* had repudiated the idea that doctors were the ones who should resolve uncertain medical matters. Instead, the government deserved deference in "light of divided medical opinion."[266]

Three years later, President George W. Bush signed a federal ban on dilation and extraction into law.[267] The new federal statute, The Partial Birth Abortion Ban Act, contained a narrower definition of the prohibited procedure designed to cure the problem noted by the *Stenberg* majority,[268] but anti-abortion groups argued that the moral and medical uncertainty surrounding dilation and extraction pointed to the

257. *See id.*
258. *See id.* at 938–40.
259. *See id.* at 957–80 (Kennedy, J., dissenting).
260. *See id.* at 967–68 (Kennedy, J., dissenting).
261. *See id.* (Kennedy, J., dissenting).
262. *Id.* (Kennedy, J., dissenting).
263. *See id.* at 968–72 (Kennedy, J., dissenting).
264. *Id.* at 968 (Kennedy, J., dissenting).
265. *Id.* (Kennedy, J., dissenting).
266. *Id.* at 972 (Kennedy, J., dissenting).
267. *See, e.g.*, Richard Stevenson, *Bush Signs a 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.
268. *See* 18 U.S.C. § 1531 (2012).

constitutionality of the federal law.[269] Pro-life briefs picked up on Kennedy's argument that the government should have more power to take sides in moral disputes when scientific evidence on a question was disputed. "The pain suffered by the substantially born child as the result of the partial-birth procedure cannot be entirely discounted, as a matter of constitutional law, in face of less than substantial health risks to the child's mother," NRLC contended.[270] A brief submitted on behalf of the Association of Pro-Life Physicians made the same point.[271] "[D]ifferences of opinion do not hamstring Congress in its efforts to regulate and protect the integrity of the medical profession," the group's brief asserted.[272] "Instead, Congress is permitted to take sides in the debate and establish a regulation that best fulfills the legislature's goals to promote maternal health, preserve the integrity of the medical profession and promote respect for human life."[273] Anti-abortion briefs also asked the Court to defer to lawmakers when they acted to prevent the possibility of severe harm to women.[274]

Gonzales wrote this idea of uncertainty into abortion doctrine, blurring the line between moral and medical uncertainty and pointing to either one as a justification for legislative action.[275] In addressing the purposes of the law, the Court not only deferred to a value judgment made by the government about the humanity of the unborn child but also suggested that Congress made the right moral judgment.[276] Justice Kennedy's majority concluded that the statute "expresses respect for the dignity of human life."[277]

Moral and medical uncertainty also got confused in Kennedy's analysis of the claim that a partial-birth abortion ban would prevent harm to women. Kennedy presented moral conclusions as statements of fact.[278] "Respect for human life finds an ultimate expression in the bond

269. *See infra* notes 270 & 271 and accompanying text.

270. Brief Amicus Curiae of the Horatio Storer Found., Inc. in Support of Petitioner at 16, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-380, 05-1382).

271. *See* Brief for Amici Curiae Jill Stanek and the Ass'n of Pro-Life Physicians in Support of Petitioner at 13–14, *Gonzales*, 550 U.S. 124 (No. 05-380, 05-1382).

272. *Id.* at 23.

273. *Id.*

274. *See, e.g.*, Brief of Sandra Cano, the former "Mary Doe" of Doe v. Bolton & 180 Women Injured by Abortion as Amici Curiae In Support of Petitioner at 6–26, *Gonzales*, 550 U.S. 124 (No. 05-380, 05-1382).

275. *See Gonzales*, 550 U.S. at 156–64.

276. *Id.* at 156–57.

277. *Id.* at 157.

278. *See id.*

of love the mother has for her child," he wrote, calling this moral view a "reality."[279]

Kennedy further recognized that there was "no reliable data to measure the phenomenon" of post-abortion regret, but found it "unexceptionable to conclude that some women regret their decision to abort."[280] The very possibility of regret militated in favor of upholding the statute. "The State has an interest in ensuring so grave a choice is well informed," *Gonzales* reasoned.[281] "It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."[282] The moral debate about dilation and extraction convinced the majority that regret was possible, if not certain.[283] And the moral and medical uncertainty on the issue of dilation and extraction justified Congress's intervention.[284]

Gonzales again dealt with uncertainty when addressing whether dilation and extraction was ever the safest procedure for women.[285] The majority acknowledged that there was "documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women."[286] Again, however, Kennedy reasoned that uncertainty gave lawmakers more room to maneuver. According to *Gonzales*, "state and federal legislatures [had] wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[287]

Almost a decade after *Gonzales*, the Court addressed another question defined by medical and moral uncertainty. In *Whole Woman's Health*, the Court heard a challenge to two parts of Texas's H.B. 2 claimed to protect women's health. The majority not only struck down H.B. 2 but also put more bite in *Casey*'s undue-burden standard. However, as this Part shows next, *Whole Woman's Health* did nothing to clarify the difference between moral and medical uncertainty or to explain how the Court's decision could be reconciled with *Gonzales*.

279. *Id.* at 159.
280. *Id.*
281. *Id.*
282. *Id.* at 159–60.
283. *See id.*
284. *See id.*
285. *See id.* at 162–66.
286. *Id.* at 162.
287. *Id.* at 163.

C. Uncertainty in Whole Woman's Health

Many expected *Whole Woman's Health* to be the next step in the expansion of the uncertainty doctrine set out in *Gonzales*. The case involved a challenge to two parts of Texas's H.B. 2, a law passed in 2013. One required any physician performing an abortion to have admitting privileges at a hospital within thirty miles.[288] A second mandated that clinics comply with state regulations governing ambulatory surgical centers (ASC).[289] In December 2013, pursuant to this provision, the state introduced comprehensive regulations that applied only to abortion clinics, including those that had been in operation before H.B. 2 passed.[290] Most abortion clinics did not have the resources to comply with the law, given that the changes required by H.B. 2 would reach roughly $3 million for new clinics and between $600,000 and $1 million for existing facilities.[291]

In 2013, a group of Texas abortion providers challenged several provisions of HB2, including the admitting-privileges requirement.[292] Following a trial on the merits, the district court issued an order and judgment holding the requirement unconstitutional.[293] In May 2014, the Fifth Circuit reversed, reasoning that the admitting-privileges law did not create an undue burden under *Casey*.[294] After the adoption of the December 2013 regulations and the impact of the admitting-privileges requirement on existing clinics, the *Whole Woman's Health* petitioners challenged both the admitting-privileges and ASC measures.[295] At the conclusion of an extensive trial on the merits, the district court

288. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1)(A) (2017); 25 TEX. ADMIN. CODE §§ 139.53(c)(1), 139.56(a)(1) (2018).

289. *See* TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (2017); 25 TEX. ADMIN. CODE § 139.40 (2018).

290. *See* 25 TEX. ADMIN. CODE § 139.40 (2018); 25 TEX. ADMIN. CODE §§ 135.4–135.6 (2018).

291. *See* Brief for Petitioners at 7–8, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274).

292. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 896–97 (W.D. Tex. 2013).

293. *See id.*

294. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 587, 599–600 (5th Cir. 2014).

295. *See* Brief for Petitioners, *supra* note 291, at 11.

concluded that both provisions created an undue burden,[296] and the Fifth Circuit again reversed.[297]

Anti-abortion groups had expected the Court to extend the uncertainty principle articulated in *Gonzales*. Recognizing that there was a dispute about whether H.B. 2 would protect women's health, anti-abortion groups cited *Gonzales,* arguing that lawmakers should enjoy considerable deference when addressing a risk of harm to women. The Court's decision defied these expectations. A five-to-three majority struck down both parts of H.B. 2 and suggested that the undue-burden test would provide more meaningful protection than many had previously believed.[298] After concluding that the petitioners' claim was not barred by *res judicata*, Justice Breyer's majority took up the proper application of the undue-burden test:

> The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.[299]

Whole Woman's Health also made clear that courts retained the power to reach conclusions about uncertain matters.[300] "The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law," Justice Breyer reasoned.[301] The Court first concluded that regardless of conflicting claims, there was no evidence that the admitting-privileges requirement benefitted women.[302] Pointing to peer-reviewed studies and expert testimony, the Court relied on the district court's finding that "there was no significant health-related problem that the new law helped to cure."[303] When evaluating the effect of the requirement, the

296. *See Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 678–79 (W.D. Tex. 2014).

297. *See Whole Woman's Health v. Hellerstedt*, 790 F.3d 563, 567 (5th Cir. 2015); *cert. granted* 136 S. Ct. 499 (2015).

298. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2298–322 (2016).

299. *Id.* at 2309.

300. *See id.* at 2310–11.

301. *Id.* at 2310.

302. *See id.* at 2310–14.

303. *Id.*

Court dealt with a different kind of uncertainty: the causation of the closure of a significant number of clinics in the wake of H.B. 2.[304] The majority sustained the district court's finding that H.B. 2 was to blame, spotlighting "direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures."[305]

The Court similarly dealt with causal and medical uncertainty in analyzing the ASC provision.[306] Discussing the purported benefit of the law, the Court relied on an amicus brief submitted by the American College of Obstetricians and Gynecologists and findings made by the district court.[307] Based on this evidence, the Court concluded that the ASC provision would not address most abortion-related complications, given that some first-trimester procedures involved medication rather than surgery, the additional safeguards related to surgery would not apply to abortion procedures, and the complications did not usually develop until after a woman left an abortion facility.[308]

Whole Woman's Health then turned to causal questions surrounding the effect of the law.[309] Because the parties had stipulated that only a handful of clinics would stay open if the ASC provision went into effect, the only question was whether the remaining facilities could meet the demand of women seeking to terminate their pregnancies.[310] *Whole Woman's Health* first noted that "common sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs."[311] The Court also pointed to expert testimony that facilities would either have to turn women away or significantly lower the quality of care they received.[312]

Whole Woman's Health seemed to reject the uncertainty argument that had worked so well in *Gonzales*.[313] The Court had not deferred to Texas's reading of uncertain evidence of the health benefits of HB2.[314]

Just the same, the Court left open possibilities that anti-abortion activists hoped to exploit in the aftermath of the decision. First, *Whole*

304. *See id.*
305. *Id.* at 2313.
306. *See id.* at 2314–18.
307. *See id.*
308. *See id.*
309. *See id.* at 2316–18.
310. *See id.*
311. *Id.* at 2317.
312. *See id.* at 2316–17
313. *See id.* at 2310–17.
314. *See id.*

Woman's Health did not distinguish between the different kinds of uncertainty that have shaped abortion doctrine.[315] Part of what drove the Court's decision in *Gonzales* was confusion between moral, medical, and causal uncertainty.[316] *Gonzales* took moral conclusions about abortion—such as those involving a mother-child bond or the dignity of human life—as matters of fact or reality.[317] The Court also assumed that women would more likely regret abortions—itself an uncertain proposition—because of the moral dimensions of late abortion.[318]

Indeed, in discussing post-abortion regret, the Court also wove in causal uncertainty.[319] Even assuming that women regretted abortions, the Court assumed that that regret stemmed from the nature of the abortion procedure rather than other factors, including the woman's preexisting views on abortion and mental state.[320] Confusion between moral and medical uncertainty also characterized the Court's analysis of medical ethics.[321] Suggesting that dilation and extraction was morally objectionable, the majority reasoned that not regulating late abortion might risk lowering the esteem in which the medical profession was held.[322] The disgust with which the Court viewed the procedure was assumed to inform the predicted reaction of members of the public rethinking their attitudes toward medical professionals.[323]

Whole Woman's Health did not touch on the differences between moral, medical, and causal uncertainty.[324] Indeed, the Court discussed both medical and causal uncertainty without drawing a clear line between the two, and moral uncertainty played no explicit role in the Court's reasoning.[325] In evaluating expert testimony, amicus briefs, and findings by the district court, *Whole Woman's Health* attached the same weight to a given piece of evidence.[326]

315. *See id.*
316. *See Gonzales v. Carhart*, 550 U.S. 124, 159–67 (2007).
317. *See id.* at 159–63.
318. *See id.*
319. *See id.*
320. *See id.*
321. *See id.*
322. *See id.*
323. *See id.*
324. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2210–17 (2016),.
325. *See id.*
326. *See id.*

IV. APPROACHING UNCERTAINTY

What is at stake when a court conflates different kinds of uncertainty? This Part begins by considering the difficulties created by the Court's recent uncertainty jurisprudence. Next, it proposes a new approach to uncertainty in abortion law that might make the law more transparent, predictable, and faithful to the balance outlined in *Casey*.

A. The Problems with Uncertainty

Abortion doctrine has become known for inconsistency and incoherence.[327] Those on both sides of the abortion conflict have bemoaned what they call abortion law exceptionalism—doctrinal twists or interpretations that seem applicable only in abortion cases.[328] By moving back and forth between moral and factual uncertainty, the Court has introduced a new level of instability into abortion doctrine. Because the undue-burden standard turns on questions of fact, the Court has sent a confusing message about what kind of evidence matters. Does information designed to provoke disgust or moral outrage about abortion tell us anything useful about the purpose or effect of a law, or would such evidence be more prejudicial than probative? When can a moral objection to abortion outweigh the problems with a law with dubious health benefits? What about a law with a heavily burdensome effect? The Court often lumps two very different kinds of uncertainty together, offering no answers to these questions.

Conflating moral and medical uncertainty also raises questions of institutional competence. Particularly in the abortion context, scholars have asked whether the courts have the capacity to satisfactorily resolve questions about abortion.[329] Ever since *Roe*, some have argued that

327. *See infra* note 328 and accompanying text.

328. *See, e.g.*, Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1190–94 (2014); Linda Greenhouse & Reva Siegel, Casey *and Clinic Closures: When Protecting Health Obstructs Choice*, 125 Yale L.J. 1428, 1432–52 (2016); Jay Sekulow & John Tusky, *The "Center" Is in the Eye of the Beholder*, 40 N.Y. SCH. L. REV. 945, 946–68 (1996); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1724 (1995); *"Abortion Exceptionalism" to be Reviewed by U.S. Supreme Court*, LIFE LEGAL DEF. FOUND. (Sept. 12, 2013), [https://perma.cc/7D6Z-NZPU]; *see also* Teresa Stanton Collett, *Judicial Modesty and Abortion*, 59 S.C. L. REV. 701, 701–30 (2008).

329. *See, e.g.*, Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991); *see also* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE

courts should not try to resolve moral disputes that continue to divide the country.[330] And when it comes to disputed scientific evidence, scholarship on everything from constitutional law to evidence has offered a reason to doubt the institutional competence of the courts.[331]

We should be particularly concerned when judges blur the line between moral and technical matters. When courts intervene in morally-divisive issues and transparently give principled reasons for their decisions, a decision does not truly put a stop to democratic debate on a question. Take *Roe* as an example. While the Court struck down the majority of abortion laws then on the books in the states, popular objections to the decision began almost immediately and continued until the Court issued *Casey*, a decision considered to be more in line with public attitudes about whether and how much abortion should be regulated.[332] But when the Court obscures the reasons for a decision, public engagement with the Court's decision tends to be much more muted. Muddled outcomes likely tamp down public reaction, as do unclear rationales.

And we should be more concerned with the Court's ability to grapple with scientific evidence when judges do not avail themselves of the tools available in highly technical cases. Courts almost necessarily struggle with scientific evidence under the best circumstances. Judges lack the training to weigh scientific evidence or evaluate expert witnesses who make such claims.[333] This dearth of experience stings more because many legal cases arise when a question is far from settled in the scientific community.[334] When there is one of the now-notorious battles of the experts, judges or juries with no scientific background have to answer questions that still divide those who know the scientific evidence best.[335]

L.J. 1279, 1312–13 (2005); Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 286 (1997).

330. *See supra* note 331 and accompanying text.

331. *See, e.g.*, David Bernstein, *What to Do About Federal Agency Science: Some Doubts About Regulatory* Daubert, 22 GEO. MASON L. REV. 545, 573 (2015); Niel Vidmar, *Assessing the Impact of Statistical Evidence, A Social Science Perspective*, *in* THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 279, 297–99 (Stephen E. Fienberg ed., 1988).

332. *See, e.g.*, Robert Post & Reva B. Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–405, 418–31 (2007); Neil Siegel, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1318–30 (2009).

333. *See, e.g.*, Stephen Breyer, *Introduction*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 1–12 (3d ed., 2011).

334. *See, e.g.*, *id.* at 4–5.

335. *See, e.g.*, *id.*

By confusing medical evidence and moral suppositions, courts magnify these handicaps. In recent decades, courts and public-interest law groups have proposed ways of improving judicial performance in highly technical cases.[336] To improve judicial handling of scientific evidence, courts have experimented with strategies including "pretrial conferences to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, or the appointment of specially trained law clerks or scientific special masters."[337] The National Conference of Lawyers and Scientists, a joint committee of the American Association for the Advancement of Science (AAAS) and the Science and Technology Section of the American Bar Association, helps judges to locate experts who can weigh in on scientific matters.[338] But judges are less likely to avail themselves of these resources in abortion cases partly because past decisions have made it so hard to tell when a court is dealing with a scientific question rather than a moral one.

Finally, conflating moral and scientific uncertainty threatens the constitutional balance described by the Court in *Planned Parenthood v. Casey*. *Casey* established that abortion involves two important considerations, the government's interest in protecting fetal life and a woman's constitutional liberty and equality.[339] Since these considerations are often diametrically opposed, it is hard for the courts to strike the right balance. By injecting moral views into the analysis of factual questions, the Court makes the task all but impossible.

Consider how the analysis of uncertainty in *Gonzales* shaped the balancing *Casey* commands. Following a description of dilation and extraction and related procedures, the Court described Congress's response to *Stenberg*.[340] Among the factual findings to which the Court deferred was an obviously-ethical conclusion that "a moral, medical, and ethical consensus that partial-birth abortion is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[341]

The Court used similar logic in analyzing the purposes of the law.[342] The kinds of matters that the Court treated as factually uncertain

336. *See, e.g.*, *id.*

337. *Id.* at 6.

338. *See, e.g.*, *id.* at 8.

339. *See, e.g.*, Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right after* Whole Woman's Health, 126 YALE L.J. F. 149, 155 (2016).

340. *See Gonzales v. Carhart*, 550 U.S. 124, 159–64 (2007).

341. *Id.* at 124.

342. *See id.* at 159–64.

included whether there was a moral consensus that dilation and extraction was "gruesome" and "inhumane," whether abortion coarsened attitudes toward life or improved them, and whether physicians' role should be to "preserve and promote life."[343] *Whole Woman's Health* establishes that courts must examine whether a law solves a real problem and whether lawmakers' proposed solution is effective.[344] Confusing moral propositions and factual assertions, as *Gonzales* does, makes this task all but impossible. How should courts evaluate whether a law solves a problem when a moral view underlies the statute in question? How can a judge evaluate the efficacy of a law without separating out factual claims about its impact from moral assertions about its desirability?

Confusing moral and medical uncertainty may also slant the Court's analysis of the facts. The Court's moral suppositions about dilation and extraction colored *Gonzales*'s conclusions that dilation and extraction was "laden with the power to devalue human life."[345] Moral reasoning, too, shaped the conclusion that "some women come to regret their choice to abort the infant life they once created and sustained."[346] If women *should* find dilation and extraction gruesome and inhumane, it is natural to assume that physicians would not inform women about the procedure or that women would regret the choice to use it. If, by contrast, women might view the choice of dilation and extraction as irrelevant or even a decision with beneficial health consequences, it might seem unreasonable to assume that women would regret an abortion decision—especially often enough to justify banning a particular procedure outright. The Court's moral conclusions shaped the analysis of whether the law addressed a real problem and whether it did so effectively.

The confusion of moral and medical uncertainty also muddied *Gonzales*'s analysis of the effect of the Partial Birth Abortion Ban Act. Highlighting the importance of the government's interest in "promoting respect for human life at all stages in the pregnancy," the Court interpreted the evidence on dilation and extraction as uncertain largely on the strength of testimony offered by avowedly anti-abortion witnesses.[347] While recognizing factual errors in Congress's findings, the Court took at face value Congress's conclusions about the medical

343. *Id.* at 157.

344. *See Whole Woman's Health Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–15 (2016).

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

346. *Id.* at 159.

347. *Id.* at 163–68.

uncertainty surrounding dilation and extraction.[348] By separating moral and scientific uncertainty, the Court would have deferred less to Congress and would, as *Whole Woman's Health* requires, independently weighed the evidence on point.

B. Distinguishing Moral and Scientific Uncertainty

How should the Court approach the line between moral and scientific uncertainty? Precedent clearly instructs that the states can make a "value judgment" about abortion.[349] There is good reason for courts to recognize and defer up to a point to legislative judgments about the morality of abortion. Some of the controversy surrounding *Roe* stemmed from the fact that the Court was unable to resolve moral controversy about abortion: the opinion satisfied neither those opposed to abortion nor those who believed that abortion was a moral decision necessary to guarantee equality for women. It may seem that "value judgments" about abortion will always expand the government's ability to regulate abortion, but that should not be the case. There is a moral conclusion implicit in governments' decisions not to regulate abortion or to facilitate access to it.

Moreover, even if the Court recognizes and defers to a government's moral judgment about abortion, concerns about a woman's liberty may outweigh the government's interest. *Casey* took at face value that Pennsylvania expressed a moral objection to abortion but still struck down parts of the challenged statute.[350] As *Whole Woman's Health* makes clear, abortion jurisprudence weighs the importance of the government's interest against the degree of burden that a law creates. Even if the government can weigh in on the morality of abortion, that judgment will not justify heavy burdens of the kind struck down in *Whole Woman's Health*.

When it comes to scientific uncertainty, the Court should begin with the approach detailed in *Whole Woman's Health*, but it should not stop there. *Whole Woman's Health* instructs courts to conduct a searching, thorough review of facts in abortion cases, but the Court did not address how courts poorly equipped to address scientific matters should try to improve their performance in this regard.[351] Nor does

348. *See id.*

349. *Harris v. McRae*, 448 U.S. 297, 314–15 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977).

350. *See Planned Parenthood v. Casey*, 505 U.S. 833, 850–77 (1992).

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

Whole Woman's Health explain when a scientific question is uncertain in the first place.[352]

If, as *Gonzales* suggests, the presence of any disagreeing expert creates uncertainty, it is easy to manufacture uncertainty even when there is a strong scientific consensus. And scientific conclusions are by their very nature uncertain, subject to revision if further evidence comes to light.[353] The Court should recognize uncertainty only when a question has not been studied significantly or when there is substantial conflicting evidence (not just any evidence) on either side of a factual question.

What about institutional competence? Judges worry about their unfamiliarity with scientific evidence when it comes to the admission of expert testimony. But in abortion cases, trial and appellate judges weigh in on scientific questions, and the same concerns about judges' understanding of scientific conclusions comes into play. If anything, in morally-charged abortion cases, courts may be even more worried that expert witnesses would let their substantive views alter their views of the evidence. In the abortion context, then, courts should be encouraged to appoint special experts to analyze conflicting scientific evidence rather than relying arbitrarily on amicus briefs, individual witnesses, or legislative fact-findings.

How might current abortion laws fare if the Court took this approach to uncertainty under *Casey*'s undue-burden standard? First, consider fetal-pain laws, many of which outlaw abortion after the twentieth week of pregnancy. AUL's model twenty week ban, the Women's Health Defense Act, relies on two factual justifications: the supposed "pain felt by an unborn child during a late-term abortion" and the higher mortality risks for women that the organization links to abortion after the twentieth week of pregnancy.[354] Although the *Whole Woman's Health* Court recognized in dicta that abortion is generally safe, AUL can cite medical literature documenting that the risks of abortion increase beyond the first trimester.[355] The timing and nature of

352. *See id.* at 2310–17.

353. *See, e.g.*, ROBERT NOLA & HOWARD SANKEY, THEORIES OF SCIENTIFIC METHOD: AN INTRODUCTION 72 (2007); William R. Freudenberg & Violetta Muselli, *Reexamining Climate Change Debates: Scientific Disagreements or Scientific Certainty Argument Methods (SCAM's)?*, 57 AM. BEHAV. SCIENTIST 777, 777–95 (2013).

354. *Women's Health Defense Act: Model Legislation and Policy Guide for the 2016 Legislative Year*, AM. UNITED FOR LIFE (2016), [https://perma.cc/73VB-EBCH].

355. On the comparably higher rates of complications in the second trimester, *see, e.g.*, Daniel Grossman, Kelly Blanchard & Paul Blumenthal, *Complications After Second Trimester Surgical and Medical Abortions*, REPRODUCTIVE HEALTH MATTERS, May 2008 at 173, 173–82.

fetal pain is also contested. A 2005 study published in the *Journal of the American Medical Association* concluded that fetal perception of pain is unlikely before the third trimester, but emphasized that evidence on the subject was limited.[356] As recently as 2013, the American College of Obstetricians and Gynecologists (ACOG) has emphasized that no new evidence has challenged the results of the 2005 study.[357]

Nevertheless, pro-lifers can take advantage of remaining uncertainty on the question of fetal pain. At the state and federal level, the organization sponsors laws that ban abortion after twenty weeks, the time that NRLC argues that "unborn children are capable of experiencing pain."[358] Together with Doctors on Fetal Pain,[359] an anti-abortion organization focused on the issue, NRLC relies on a variety of peer-reviewed studies.[360] The authors of these studies have questioned whether their research supports the conclusions draw by abortion opponents.[361] But because the measurement of pain is subjective, it is hard to settle on a single indicator of when pain is possible.[362] While ACOG emphasizes that the experience of pain depends on the development of the cerebral cortex,[363] a sophisticated part of the brain that would allow for the perception of pain, abortion opponents stress that pain receptors are present in the brain as early as twenty weeks.[364] Pro-life groups claim that the uncertainty surrounding fetal pain gives legislators more freedom to act. "While some dispute the capacity of the 20-week unborn child to experience pain," NRLC asserts, "Justice Kennedy's opinion for the Court in [*Gonzales*] makes clear that medical

356. *See, e.g.*, Susan Lee et al., *Fetal Pains: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947, 947–48 (2005).

357. *See* Press Release, Am. College of Obstetricians & Gynecologists, Facts Are Important: Fetal Pain (July 2013), [https://perma.cc/58BS-SV9X].

358. *Pain Capable Unborn Child Protection Act*, NAT'L RIGHT TO LIFE (Jan. 9, 2017), [https://perma.cc/72Y9-V3AH].

359. On the position of Doctors on Fetal Pain, see *Fetal Pain: The Evidence*, DOCTORS ON FETAL PAIN [https://perma.cc/64NU-RGYQ].

360. *See Pain Capable Unborn Child Protection Act*, *supra* note 358.

361. *See, e.g.*, Pam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES (Sep. 13, 2013), http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html.

362. *See, e.g.*, Sara Miller, *Do Fetuses Feel Pain? What the Science Says*, LIVE SCIENCE (May 17, 2016, 5:22 PM), [https://perma.cc/X6UA-B6EE?type=image].

363. *See, e.g.*, *id.*

364. *See, e.g.*, DOCTORS ON FETAL PAIN, *supra* note 359.

unanimity is not required in order for legislatures to make and act on determinations of medical fact."[365]

How should courts approach the uncertainty surrounding fetal pain? First, a court should separate out the moral considerations underlying such laws (a belief that fetal pain is unacceptable or disturbing) from the scientific questions surrounding when an unborn child can experience pain. A court should accept at face value that some legislatures legitimately seek to prevent fetal pain, just as other lawmakers might not view fetal pain as an important concern.

Next, a court should consider the scientific uncertainty surrounding fetal pain. As an initial matter, a court would determine whether there is enough disagreement about fetal pain to treat the matter as uncertain. A court could reasonably conclude that there are not studies establishing that unborn children can experience pain as early as twenty weeks; most studies and medical bodies have concluded that the ability to experience pain develops later. If a court does conclude that the question is uncertain, both parties would have to bring forward evidence that fetal pain is possible as early as twenty weeks, that banning abortion would effectively prevent fetal pain, and the benefits achieved in mitigating fetal pain outweigh limits on women's ability to access abortion. Since the evidence of fetal pain is disputed, it would be hard for a state to justify the burden such a law would impose, especially since it would prohibit all abortions after a certain point in pregnancy rather than simply limiting the number of available clinics or lowering the quality of care.

Contested findings of fact are also at the center of the campaign for bans on dilation and evacuation (D&E), the most common second-trimester abortion procedure. Such laws have passed in a handful of states.[366] The case made for so-called dismemberment laws relies on disputed factual assertions. NRLC emphasizes that D&E procedures—the most widely-used method that is commonly believed to be safe—do not "have wide support in the medical community" and are "never medically necessary to preserve the life of the mother in an acute . . . emergency."[367] NRLC also claims that the law protects fetal life from "feel[ing] the pain of being ripped apart."[368]

365. Memorandum from Mary Spaulding Balch, Director, State Legislation Dep't to Whom it May Concern (July 2013), [https://perma.cc/LC8J-74JF].

366. *See* Guttmacher Inst., *Bans on Specific Abortion Methods Used After the First Trimester* (April 1, 2018), [https://perma.cc/9RYR-ES9Z].

367. Nat'l Right to Life Comm., *Talking Points: Unborn Child Protection from Dismemberment Abortion Act* 3–4 (Jan. 2015), [https://perma.cc/U2P6-QCSD].

368. *Id.* at 2.

These arguments do not command widespread agreement. In its description of D&E, the American College of Obsetricians and Gynecologists (ACOG) states that "[a]bortion is a low-risk procedure," even later in pregnancy.[369] The American Medical Association (AMA) acknowledges that D&E is the procedure the most "commonly used to induce abortion after the first trimester."[370] Arguing that the medical community as a whole rejects D&E seems implausible, but movement members have less trouble arguing that the legitimacy of D&E is disputed, given the position of organizations that oppose the use of the procedure like the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG).[371]

Nor is it obvious that D&E (or any abortion procedure) is never necessary to save a woman's life. ACOG has concluded that abortion is sometimes required to save a woman's life, including in cases of heart failure, severe infections, and grave cases of preeclampsia.[372] Again, however, pro-life physicians and medical professionals challenge the conclusion that women would ever die if they did not terminate their pregnancies.[373] The Court's willingness to treat certain facts as uncertain has convinced NRLC leaders that dismemberment bans are more than "just another doomed attempt to reverse *Roe v. Wade*."[374] The organization claims that states passing such legislation simply advance the interests that "the Court recognized in the 2007 *Gonzales* case, that states have a separate and independent compelling interest in fostering respect for life by protecting the unborn child from death by dismemberment abortion and in protecting the integrity of the medical profession with passage of this law."[375]

How would these laws fare if the Court took a more principled approach to uncertainty doctrine? First, a court would separate out the moral justifications for such a ban—such as suggestions that physicians oppose dilation and evacuation on ethical grounds—from disputed

369. Am. Coll. of Obstetricians & Gynecologists, *Frequently Asked Questions: Induced Abortion* (May 2015), [https://perma.cc/6JEN-6SKG].

370. AM. MED. ASS'N, H. 5.982 Late-Term Pregnancy Termination Techniques, *in* HEALTH AND ETHICS POLICIES OF THE AMA HOUSE OF DELEGATES, [https://web.archive.org/web/20161013100136/http://www.ama-assn.org/ad-com/polfind/Hlth-Ethics.pdf].

371. On the founding of AAPLOG, see *About Us*, AM. ASS'N PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS (2016), [https://perma.cc/9NUZ-EW9W].

372. *See, e.g.*, Kim Painter, *Doctors Say Abortions Do Sometimes Save Women's Lives*, USA TODAY (Oct. 19, 2012, 7:31 PM ET), [https://perma.cc/7JZ8-A5E8].

373. *See, e.g.*, *id.*

374. NAT'L RIGHT TO LIFE COMM., *supra* note 367.

375. *Id.* at 4.

scientific assertions, such as claims that abortion is unsafe or likely to cause fetal pain early in the second trimester of pregnancy. While lawmakers may conclude that dilation and evacuation is immoral or that physicians should believe it to be so, courts should not view as factual arguments that dilation and evacuation is viewed as gruesome or inhumane. When it comes to the scientific premises of such laws, courts should be skeptical of the claim that the safety of abortion is uncertain relatively early in a pregnancy. While the risks of the procedure increase as a pregnancy progresses, as *Whole Woman's Health* recognizes, abortion is not unsafe for most or all of pregnancy.[376] To the extent the matter is uncertain, a court should demand actual evidence of the risks of abortion rather than accepting legislators' conclusions with little analysis.

Uncertainty will also come into play as the courts deal with the robust new mandatory counseling laws promoted by the pro-life movement in some states. One model statute stresses the claim that medication abortions can be reversed. Another proposal recommends that lawmakers "enhance their informed consent laws by requiring information on fetal pain, the availability of ultrasounds, [and] the link between abortion and breast cancer ('ABC link')."[377] Although AUL admits that the connection between breast cancer and abortion is not "undisputed," the organization maintains that enough studies reveal an "increased risk of breast cancer as a result of the loss of a protective effect of a first full-term pregnancy."[378]

Under the approach suggested in this Article, the courts would first consider whether the uncertainty at issue in the case was moral, scientific, or a combination of the two. While some mandatory-counseling laws imply a moral judgment, the new generation of laws most often touches on scientific questions, such as the connection between abortion and breast cancer or infertility. The outcome in such cases would be closer partly because the burden imposed by mandatory

376. *See, e.g.*, Bonnie Rochman, *Why Abortion Is Less Risky than Childbirth*, TIME (Jan. 25, 2012), [https://perma.cc/TSF4-FKW4]; *see* Sarah Kodjak, *Landmark Study Concludes that Abortion in the U.S. Is Safe*, NPR (Mar. 6, 2018), [http://web.archive.org/web/20180402172148/https://www.npr.org/sections/health-shots/2018/03/16/593447727/landmark-report-concludes-abortion-is-safe].

377. *Women's Right to Know Act: Model Legislation and Policy Guide for the 2016 Legislative Year*, AM. UNITED FOR LIFE (2016), [https://perma.cc/TH72-Q685].

378. *Summary of Known Health Risks of Abortion: How Abortion Harms Women and Why Concerns for Women's Health Must Be Part of Abortion-Related Policies and Media Debate*, AM. UNITED FOR LIFE (2013), [https://perma.cc/6LKK-WLJ2]. On the AUL model showcasing the supposed dangers of medication abortions, see *Abortion-Inducing Drugs Safety Act: Model Legislation and Policy Guide for the 2016 Legislative Year*, AM. UNITED FOR LIFE (2016), [https://perma.cc/29PH-U5EQ].

counseling laws would be considerably less onerous than an outright ban or a restriction of the safest and most-common second trimester procedure. Nevertheless, under *Whole Woman's Health*, if the Court defines uncertainty in a meaningful way, then the purpose analysis of the undue-burden standard may still pose a problem. It seems that there is not enough evidence that abortion causes breast cancer or infertility to create meaningful scientific uncertainty. In both cases, the matter has been relatively well-researched, and some consensus exists. The burdens of a mandatory counseling law might well outweigh the benefit of informing women of something that is unproven and potentially false.

CONCLUSION

The unpredictability of abortion jurisprudence arises partly from an unexamined dimension of the Court's jurisprudence: a changing, and often contradictory, definition of uncertainty. *Roe* defined moral uncertainty as a reason that the government did not have a compelling interest in protecting life from the moment of conception. Anti-abortion lawyers responded by arguing that legislatures, not courts, had the competence to resolve moral or scientific uncertainty. Moreover, movement lawyers deliberately blurred the distinction between the two.

Over time, abortion opponents also began pointing to moral and scientific uncertainty as reasons that *Roe* had become unworkable. While the Court did not adopt this approach, abortion jurisprudence drew no clear line between different kinds of uncertainty. As *Gonzales* shows, the confusion of the concepts grew after *Casey* when abortion opponents began describing the potential of harm as a reason for letting lawmakers act in uncertain circumstances. *Whole Woman's Health* did not resolve this confusion.

By recognizing the importance of uncertainty doctrine, we can identify some of the reasons that the Court's abortion case law has been so inconsistent. And we can see a way of better guaranteeing that the balance commanded by *Casey* is more than an empty letter.