Is *Roe* the New *Miranda*?

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Roe v. Wade and Miranda v. Arizona are among the most notable decisions handed down by the Supreme Court. Issued less than a decade apart, these two opinions are widely recognized as being foundational to our legal system.

This year, Roe finds itself in the legal crosshairs. Two cases, Whole Woman's Health v. Jackson and Dobbs v. Jackson Woman's Health Organization, seek to significantly curtail the right to abortion or to overturn Roe outright. For those wondering what might happen to Roe, examining the fate of Miranda is a fitting place to start. That is because, eighteen years ago, Miranda—much like Roe today—was subject to a significant challenge in two cases that were also concurrently before the Court, Missouri v. Seibert and United States v. Patane.

The Court's resulting decisions in Seibert and Patane, how the press and public reacted to those decisions, and Miranda's aftermath may foreshadow the future of Roe and the battle for reproductive rights, both this year and beyond.

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INTRODUCTION

Sixty or so years ago, the Supreme Court issued a groundbreaking constitutional decision. Almost immediately thereafter, legislatures drafted bills to undercut the decision's central holding, and Presidential candidates promised to nominate Justices to overturn the opinion. Despite such a response, the decision not only survived, but endured. Americans routinely cite the case as one of the most recognizable Supreme Court decisions, with many approving of the result. That popularity, though, hasn't stopped parties from seeking legal review and asking that the original decision be curtailed. And with a differently comprised Court in place, the prospect of an outright reversal has become a real possibility.

You might think I've just chronicled the saga of *Roe v. Wade*,[1] and am nodding now towards *Whole Woman's Health v. Jackson* and *Dobbs v. Jackson Women's Health*,[2] two cases that came before the Court this term. But I'm actually telling a different story—that of *Miranda v. Arizona*.[3]

Nonetheless, in my view, *Miranda* is a valuable lens for understanding what might happen to *Roe*. That is because, even though the two decisions concern two very different areas of the law—reproductive choice and criminal process—they share several remarkable similarities. These include (i) the reaction they received, (ii) efforts to chip away at them incrementally, and (iii) more recent attempts to overturn the decisions outright. In short, if one wants to understand what *Whole Woman's Health* and *Dobbs* might do to *Roe*, then examining the fate of *Miranda* is a good place to start.

I.
LEGAL SKEPTICISM, POLITICAL BACKLASH, AND PUBLIC APPROVAL.

Begin with the reaction to the decisions at the time: "*Miranda* was instantly controversial."[4] Although some scholars offered tentative approval,[5] many more reacted with "anger."[6] A *New York Times* headline—"*Miranda* Decision Said to End the Effective Use of Confessions"—illustrates a prototypical response.[7] Even judges were skeptical of the Court's reasoning: Judge Walter Pope

1. *Roe v. Wade*, 410 U.S. 113 (1973).
2. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021); *Dobbs v. Jackson Women's Health Organization*, 141 S. Ct. 2619 (2021).
3. *Miranda v. Arizona*, 384 U.S. 436 (1966).
4. Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 18 (2010).
5. Yale Kamisar, *A Dissent From the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 63 ("*Miranda* may leave something to be desired, but it deserves a better reception than this.").
6. *Id.* at 59.
7. Miranda *Decision Said to End the Effective Use of Confessions*, N.Y. TIMES, Aug. 21, 1966.

described *Miranda* at the Ninth Circuit Judicial Conference as "break[ing] new ground," and "[u]nquestionably . . . not supported by precedent."[8]

Two years after *Miranda*, then-Presidential candidate Richard Nixon explicitly called out the opinion in his campaign speeches, noting that "[t]he *Miranda* . . . decision[] of the High Court ha[s] had the effect of seriously hamstringing the peace forces in our society and strengthening the criminal forces."[9] His appointment of Warren Burger to the Supreme Court fulfilled his campaign promise. During the first decade after Burger's appointment, "the Court decided ten cases in which the interpretation, application, or scope of Miranda was a principal issue. In *every* one of those cases, the Court ruled against the defendant."[10] Congress likewise legislated in response to *Miranda*, enacting 18 U.S.C. § 3501, which sought to restore the pre-*Miranda* standard—voluntariness—through federal statute (more on this below).

Roe v. Wade saw a similar response. *Time Magazine* described the decision as "stunning."[11] Leading scholars criticized it as "a very bad decision" and "bad constitutional law."[12] Ruth Bader Ginsburg, then a D.C. Circuit judge, questioned the Court's reliance "on a medically approved autonomy idea" to support its decision, rather than a "constitutionally based sex-equality perspective," which she viewed as providing a stronger legal basis.[13]

"Akin to *Miranda*, *Roe* engendered a near immediate legislative response as well: "Many state legislatures . . . reacted to *Roe* . . . with hostility."[14] And the decision, of course, has become a "litmus test": it is usually a measuring stick as to whether a particular Presidential candidate will nominate judges to defend or oppose the case.[15]

The political response and scholarly skepticism to *Miranda* and *Roe*, however, stands in sharp contrast to their enduring public approval. Both

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8. Hon. Walter L. Pope, Escobedo, *Then* Miranda, *And Now* Johnson v. United States, 40 F.R.D. 351, 354 (1966).

9. Richard Nixon's Remarks in New York City: "Toward Freedom from Fear" (May 8, 1968), THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-new-york-city-toward-freedom-from-fear.

10. David Sonenshein, Miranda *and the Burger Court: Trends and Countertrends*, 13 LOYOLA L.J. 405, 416 (1982).

11. *The Law: A Stunning Approval for Abortion*, TIME, http://content.time.com/time/subscriber/article/0,33009,906827-1,00.html (Feb. 5, 1973).

12. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 89 YALE L.J. 920, 947 (1973)

13. Hon. Ruth Bader Ginsburg, *Some Thoughts On Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385–86 (1985); *see also id.* (noting that "[h]eavy-handed judicial intervention"—as reflected by *Roe*'s reasoning—"was difficult to justify and appears to have provoked, not resolved, conflict.").

14. Note, Richard Wasserman, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 COLUM. L. REV. 237, 240 (1974).

15. *E.g.*, Athena Jones, *Gillibrand's* Roe v. Wade *Litmus Test: NY Senator Vows to Only Nominate Judges Who Support Abortion Rights*, CNN, https://www.cnn.com/2019/05/07/politics/kirsten-gillibrand-roe-v-wade-judges/index.html (May 7, 2019).

opinions are frequently listed by the public as among the most notable decisions the Court has ever issued.[16] *Miranda* is perhaps "the most well-known case in criminal law,"[17] and *Roe* is "the starting point for any conversation about the appropriate role of courts in modern life."[18] Both decisions also receive majoritarian support—sometimes supermajoritarian support: between 70% and 94% of Americans support *Miranda*, and around 60% support *Roe*.[19]

II.
INCREMENTAL EFFORTS TO UNDERCUT *MIRANDA* AND *ROE*.

Yet despite their salience and approval by the public, *Miranda* and *Roe*'s place in the modern constitutional canon remains precarious because of two types of legal attacks. The first type has taken issue with the opinions on an incremental basis, seeking to chip away at the rule by creating exceptions, hurdles, and other obstacles. Most Americans probably do not know much about these incremental challenges, because they do not, even when successful (as they often are), result in a direct overruling of the original decision.

Consequently, while the public might be aware of *Miranda*, they are unlikely to have heard of *Harris v. New York*,[20] which permits statements obtained in violation of *Miranda* to be used for impeachment purposes; or *New York v. Quarles*,[21] which creates a public-safety exception; or *Pennsylvania v. Muniz*,[22] which establishes a routine-booking exception.

Nor, too, would most be familiar with *Stenberg v. Carhart*,[23] which upheld the Partial-Birth Abortion Ban Act; or *Harris v. McRae*,[24] which upheld the Hyde Amendment and prohibited public funding for abortions; or *H.L. v. Matheson*,[25] which upheld parental notification of minors seeking an abortion. These cases do real damage to *Miranda* and *Roe* in significant ways, even if they technically keep the underlying decision formally intact.

16. *See* 7 Famous Supreme Court Cases That Changed the U.S., NAT'L L. REV., https://www.natlawreview.com/article/7-famous-supreme-court-cases-changed-us (July 16, 2021).

17. Bruce Peabody, *Fifty Years Later, the* Miranda *Decision Hasn't Accomplished What the Supreme Court Intended*, WASH. POST, June 13, 2016.

18. Dahlia Lithwick, *Foreword:* Roe v. Wade *At Forty*, 74 OHIO ST. L.J. 5, 5 (2013).

19. *See* Friedman, *supra* n. 4, at 34; Lydia Saad, *Americans Still Oppose Overturning* Roe v. Wade, GALLUP, https://news.gallup.com/poll/350804/americans-opposed-overturning-roe-wade.aspx (June 9, 2021).

20. *Harris v. New York*, 401 U.S. 222, 226 (1971).

21. *New York v. Quarles*, 467 U.S. 649, 654–55 (1984).

22. *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (plurality op.).

23. *Gonzalez v. Carhart*, 550 U.S. 124, 133 (2008).

24. *Harris v. McRae*, 448 U.S. 297, 326–27 (1980).

25. *H.L. v. Matheson*, 450 U.S. 398, 409–11 (1981)

III.
DIRECT ATTEMPTS TO OVERRULE *MIRANDA* AND *ROE*.

A. Dickerson and Casey.

Such incremental challenges built towards another type of challenge: a direct attack to the decision's vitality. For *Miranda*, that first came in *Dickerson v. United States*.[26] *Dickerson* involved the constitutionality of 18 U.S.C. § 3501, which provides that, in a federal prosecution, a confession is "admissible in evidence if it is voluntarily given."[27] There was broad agreement that "Congress intended," through § 3501, "to overrule *Miranda*" by restoring the old voluntariness standard by statute.[28] The Justice Department, however, was reluctant to challenge § 3501's constitutionality, and refrained from doing so for several decades.[29]

But the Supreme Court had changed by 2000, when *Dickerson* appeared before it: Justice William Rehnquist, who had long made clear his opposition to *Miranda*, was now Chief Justice,[30] and several other *Miranda* skeptics, including Justice Kennedy, had joined the bench.

Yet *Miranda* did not end up on the chopping block after all. *Dickerson* came out 7-2, with Chief Justice Rehnquist authoring the majority opinion holding § 3501 unconstitutional. As he put it, "[w]e do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[31]

There is a close relationship between *Dickerson* and *Planned Parenthood v. Casey*.[32] Analogous to *Dickerson*, there was a fear that *Casey* would overrule *Roe*: four Justices had, in *Webster v. Reproductive Health Services*, earlier "indicated a willingness to directly overrule" *Roe*, and two other Justices supportive of *Roe*—William Brennan and Thurgood Marshall—had retired and been replaced by David Souter and Clarence Thomas.[33]

Casey didn't, of course, overturn *Roe*. Emphasizing "the terrible price [that] would be paid for overruling," the controlling plurality opinion explained that "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of

26. *Dickerson v. United States*, 530 U.S. 428, 435 (2000).
27. 18 U.S.C. § 3501(a).
28. *Id.* at 436.
29. *Davis v. United States*, 512 U.S. 452, 463–64 (1994) (Scalia, J., concurring) ("[W]ith limited exceptions the provision has been studiously avoided by every Administration.").
30. *See, e.g.*, *Michigan v. Tucker*, 417 U.S. 433, 447–48 (1974).
31. *Dickerson*, 530 U.S. at 443.
32. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
33. Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeast Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 18 (1992).

abortion."[34] That justification—social reliance on a seminal decision—echoes the notion, expressed in *Dickerson*, that *Miranda* had "become embedded in . . . our national culture."[35]

B. Seibert, Patane, and Berghuis.

Miranda and *Roe* survived their first direct challenges, in *Dickerson* and *Casey*. But three cases post-*Dickerson*—*Missouri v. Seibert*, *United States v. Patane*, and *Berghuis v. Thompkins*—again sought to reverse *Miranda*.

Both *Seibert* and *Patane* were heard during the 2003 term.[36] "From the time the Court granted certiorari, the media identified these as cases to be watched."[37] *Seibert* involved the use by police of a "question-first," *Miranda*-second strategy.[38] *Patane* concerned whether failure to provide *Miranda* warnings "require[d] suppression of the [fruits of a] suspect's unwarned but voluntary statements."[39] Of the two cases, *Seibert* was the more eye-catching, with leading editorials emphasizing that "question-first" would—if upheld—essentially create "an end run around *Miranda*."[40]

Yet the Court's resulting opinions neither overruled *Miranda* nor rejected question-first. In *Seibert*, Justice Souter proposed a multi-factor test to examine whether "the warnings effectively advise the suspect that he had a real choice about giving an admissible statement"—factors like whether the warnings are given "close in time" and the interrogation is "similar in content" to the original confession.[41] Although the Court ruled against the police in the specific case, it did not necessarily foreclose "question-first" tactics as a general matter. *Patane* held that the fruits of a *Miranda* violation were admissible, but also did not reverse *Miranda* outright.[42]

Reaction to the *Seibert* and *Patane* decisions was generally positive. Although going in the cases were seen as efforts to gut *Miranda*, the final opinions were more or less celebrated as vindicating *Miranda*'s core holding (or at least not overruling *Miranda*).[43]

Six years later, the Court took up *Berghuis v. Thompkins*, a case where a suspect was interrogated for three hours after receiving *Miranda* warnings.[44] He stayed largely silent during this interrogation.[45] At the end of the interrogation,

34. 505 U.S. at 856, 864 (plurality op.).
35. 530 U.S. at 436.
36. *Missouri v. Seibert*, 542 U.S. 600 (2004); *United States v. Patane*, 542 U.S. 630 (2004).
37. Friedman, *supra* n. 4, at 35.
38. 542 U.S. at 611.
39. 542 U.S. at 634.
40. *Id.* at n.203.
41. 542 U.S. at 612, 613.
42. 542 U.S. at 637.
43. Friedman, *supra* n. 4, at 35 nn.203–05.
44. *Berghuis v. Thompkins*, 560 U.S. 370, 374 (2010).
45. *Id.* at 375.

police asked the suspect whether he "pray[ed] to God to forgive you for shooting that boy."[46] The suspect answered yes, and that answer was admitted as incriminating. According to the Court, the suspect had failed to affirmatively invoke his rights—even though *Miranda* includes no such affirmative requirement—and that failure rendered *Miranda* inapplicable.[47] Although *Berghuis* all but overruled *Miranda*, the resulting coverage was muted—the case did not even make front-page news in most papers.[48]

C. Whole Woman's Health and Dobbs.

There are parallels between *Seibert* and *Patane* on the one hand and *Whole Woman's Health* and *Dobbs* on the other. Like *Seibert* and *Patane*, both *Whole Woman's Health* and *Dobbs* were heard in the same term. Like *Seibert* and *Patane*, there has been more attention paid to one case over the other.

Texas's S.B. 8, the law at issue in *Whole Woman's Health*, is generally viewed as more draconian than Mississippi's H.B. 2, the law at issue in *Dobbs*, because of S.B. 8's shorter abortion window (six weeks to fifteen weeks) and unorthodox enforcement mechanisms.[49] And like *Seibert*, the Court's recent decision in *Whole Woman's Health* is somewhat equivocal. It does not endorse S.B. 8—it, in fact, allows enforcement challenges against some parties to proceed.[50] But the opinion also does not necessarily endorse or overrule *Roe* either.[51]

That leaves a connection between *Patane* and *Dobbs*. There is no question that upholding H.B. 2 would be a serious blow to abortion's availability. But just like *Patane*, which held that admitting the fruits of an improper confession did not overturn *Miranda* outright, Chief Justice Roberts noted at oral argument that H.B. 2 could be upheld without *necessarily* overturning *Roe* and *Casey*, so long as one reads the latter decisions as providing a right to abortion but not necessarily an explicit tie to viability or any other bright line.[52]

That compromise could take some of the air out of the media balloon. Sure, *Whole Woman's Health* and *Dobbs* chipped away at *Roe*, the argument might go. But so too did *Seibert* and *Patane* chip away at *Miranda*. Neither overruled *Miranda*, and *Roe* too might well be formally intact after this Term is over.

If that is the end result, then where do we go from here, and what lessons might be learned from *Miranda*'s fate? Two come to mind. *First*, there is only

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46. *Id.* at 376.
47. *Id.* at 382.
48. Friedman, *supra* n. 4, at 3.
49. *See* BeLynn Hollers, *As SB8 Decision Looms At Supreme Court, Here Are Key Differences in Laws from Mississippi, Texas*, DALLAS MORNING NEWS, Dec. 1, 2021.
50. *Whole Woman's Health*, 142 S. Ct. at 535.
51. *Id.* at 543 ("Th[e] law is contrary to this Court's decision[] in *Roe v. Wade*.") (Roberts, C.J., dissenting).
52. *Dobbs v. Jackson Women's Health Organization*, 19-1392, Oral Argument Tr. at 38, 53, 54 (Dec. 1, 2021) (seeking compromise by imposing a 15-week line, without a tie to viability).

so much oxygen the media can take up when focused on a decision. Shortly after *Roe* was issued, John Hart Ely wrote *The Wages of Crying Wolf*, a seminal article criticizing the opinion.[53] The gist of Ely's argument was that, though *Roe* might have reached a favorable policy result, the decision by litigants to cry wolf to the judicial system resulted in an opinion that "lack[ed] connection with any value [in] the Constitution."[54] There were, Ely predicted, costs to that sort of reasoning.

One might say the same about the media. While *Seibert* and *Patane* were pending, the press raised a great deal of alarm about *Miranda*'s likely overruling.[55] When that did not *technically* come to pass, those warnings lost force. When the next major case challenging *Miranda* came along—*Berghuis*, which had arguably worse facts and more at stake—the coverage was more circumspect.[56]

A similar story might play out in *Whole Woman's Health* and *Dobbs*. Time and again the press has stated, for these two cases, that nothing short of *Roe*'s vitality is at stake.[57] But it is possible that neither case will be *Roe*'s explicit death knell. If that happens, what credibility will the press have lost? And how much attention will the public pay when the next abortion challenge reaches the Court?

A loss of such attention can, correspondingly, give the Court license to take more substantial cuts into the core of *Roe* in the future. After all, *Miranda* was saved in *Dickerson* in large part because the Court recognized that "the warnings ha[d] become part of our national culture," and *Roe* was saved in *Casey* because of the "kind of reliance [interests] that would lend a special hardship to the consequences of overruling."[58] Public attention, in short, held the Court's feet to the fire.[59]

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53. Ely, *supra* n. 12, at 923.

54. *Id.* at 949.

55. *See, e.g.*, *An End Run Around* Miranda, N.Y. TIMES, Dec. 9, 2003; *cf.* Note, Lee S. Brett, *"No Earlier Confession to Repeat":* Seibert, Dixon, *and Question-First Interrogations*, 78 WASH. & LEE L. REV. 451, 470 (2021) ("*Dickerson* guaranteed *Miranda*'a continued vitality and constitutionality. Just four years later, though, *Miranda* came once more under attack.") (footnotes omitted).

56. *See* Mary Sanchez, *Supreme Court Diverges Over* Miranda *Warning*, KAN. CITY STAR, June 7, 2010 ("[*Berghuis*] . . . effectively nipped away at the *Miranda* ruling. . . . [But] [p]erhaps because it is occurring incrementally, few outside the legal community have taken note of the trend."), *available at* https://web.archive.org/web/20100611053630/http://www.kansascity.com/2010/06/07/1999982/supreme-court-diverges-over-miranda.html.

57. *E.g.*, Mark Joseph Stern, *During Arguments Over the Fate of* Roe, *Kavanaugh and Barrett Finally Showed Their Cards*, SLATE, https://slate.com/news-and-politics/2021/12/dobbs-supreme-court-abortion-kavanaugh-barrett.html (Dec. 1, 2021); Mark Gongloff, Roe v. Wade *Is Probably Doomed*, BLOOMBERG, https://www.bloomberg.com/opinion/articles/2021-12-01/dobbs-v-jackson-supreme-court-will-likely-overturn-roe-v-wade (Dec. 1, 2021).

58. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992); *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

59. *Cf.* Friedman, *supra* n. 4, at 33 ("Although public opinion is not often given as a basis for the Court's decisions, it has played a role with regard to stare decisis. . . . [P]art of the concern about overruling in constitutional cases is the way the public will perceive the decision.").

Second, it is worth acknowledging both the reach *and* limits of the law. Most scholars believe *Miranda* has become irrelevant, even if it formally remains on the books.[60] By carving out exception after exception, the Court has created a how-to guide for law enforcement to violate *Miranda* without needing to overrule the case outright.

Likewise, even if in theory *Roe* remains good law, many women are unable to obtain an abortion as a practical matter, because of issues related to cost and access. Mississippi has just one facility providing abortion services—Jackson Women's Health Organization, respondent in *Dobbs*. Five other states also have just one clinic.[61] Neither *Whole Woman's Health* nor *Dobbs* is likely to change this calculus, whatever the result. Part of the reproductive rights battle surely happens in our courthouses. But another part of the fight—perhaps a much larger part—takes place in legislatures, town halls, and classrooms across the country. How that story unfolds remains anyone's guess.

60. Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1521 (2008).

61. Holly Yan, *These 6 States Have Only 1 Abortion Clinic Left. Missouri Could Become the First With Zero*, CNN, https://www.cnn.com/2019/05/29/health/six-states-with-1-abortion-clinic-map-trnd/index.html (June 21, 2019).