


6-7-2019

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Recommended Citation

Kathryn N. Peachman, *The Need to Codify Roe v. Wade: A Case for National Abortion Legislation*, 45 J. Legis. 272 (2018).
Available at: <https://scholarship.law.nd.edu/jleg/vol45/iss2/6>

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THE NEED TO CODIFY *ROE V. WADE*: A CASE FOR NATIONAL ABORTION LEGISLATION

Kathryn N. Peachman[†]

INTRODUCTION

Forty-six years ago, the Supreme Court ruled that a woman had a fundamental legal right to decide whether to end her pregnancy under substantive due process protection. Yet today, that right sometimes appears to remain no more solidified than it did in 1973 with the decision of *Roe v. Wade*. This country has remained extremely divided on the issue of abortion, and courts and state legislatures continue to erode the effectiveness of the right given by *Roe* and limit the opportunities women have to exercise control over their own bodies. There is perhaps only a handful of political issues that create more intense debate and emotional rise in Americans than abortion. When asked whether you consider yourself pro-choice or pro-life, a Gallup poll from May 2018 found the country was split evenly: 48% of people surveyed identified as pro-choice and 48% identified as pro-life.¹

However, when we look beyond the labels of pro-choice and pro-life and consider the issue on a spectrum that cannot be simply black and white, opinion polls tell a slightly different story. In 2018, a Pew Research Center poll on Public Opinion on Abortion found that 58% of American adults believe abortion should be legal in all or most cases.² The same Gallup poll from May 2018 found that 79% of American adults believe abortion should be legal under some circumstances.³ When society is forced to think about abortion beyond a simplistic nature and consider its complexity, we find that there is much less agreement within each party. Issues are only as complex as we allow them to be. For an issue that raises questions regarding life and death, bodily autonomy, legal rights and equal protection of women, and life-altering consequences for parents and children, it deserves to be an issue that we examine with the utmost attention and scientific understanding.

With the October 2018 confirmation of Justice Brett Kavanaugh, who is surely a reliable anti-abortion vote, there is perhaps no more pressing time than now for Congress to pass legislation that reflects America's opinion about abortion, before the issue reaches the Supreme Court. While the Court has a historical record in

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¹ *Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited Mar. 24, 2019).

² *Public Opinion on Abortion: Views on abortion 1995-2018*, PEW RESEARCH CTR., (Oct. 25, 2018), <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>.

³ GALLUP, *supra* note 1.

consistently upholding the ultimate holding of *Roe* over time, the majority of cases regarding abortion that reach the Supreme Court leave the Court closely divided, with many limiting the effectiveness and scope of *Roe*. Outside the courts, laws across the country, sometimes called TRAP laws (Targeted Regulation of Abortion Providers), impose strict regulations on abortion clinics that are, more often than not, arbitrary and medically unnecessary. These TRAP laws are essentially implemented to close abortion clinics and make it as difficult as possible to provide abortion services. There are currently seven states that have only one abortion clinic in the entire state, presenting burdensome challenges for a woman in need of an abortion.⁴ Because of this, it is essential that Congress take legislative action on this issue, particularly because regulating abortion is an action more rightfully held by Congress and not the Supreme Court in our federal system. Separation of powers does not allow the judicial branch to legislate or create public policy. The American public should not be satisfied with national abortion policy coming from the Supreme Court, which is isolated from public opinion, cannot be held politically accountable in elections, and consists only of a nine-member body appointed for life.

This Note will examine the need to codify *Roe v. Wade* in federal legislation that will cement a woman's right to obtain an abortion, while allowing for common sense restrictions on that right. Common sense restrictions include a ban on abortion after twenty-two weeks, but with the option for women to access abortion beyond twenty-two weeks in specific, limited circumstances, such as life and health dangers for the mother and serious fetal health and development defects. Section I discusses the historical context of abortion and the Supreme Court's abortion jurisprudence. Section II explores the general modern justifications for abortion and why the country cannot turn back the clock and make the procedure illegal. The true starting point is thus where we must start within the abortion debate: answering the question of when life begins. Section III will specifically examine two failed pieces of federal abortion legislation: the Freedom of Choice Act and the Pain-Capable Unborn Child Protection Act. This Note will argue that by incorporating aspects from both of these bills into a common-sense compromise, it is more likely to pass in Congress. This Section will also discuss the constitutionality of federal abortion legislation and the specific wording of the proposed legislation. This Note concludes by discussing the importance of solidifying a woman's right to personal liberty and bodily autonomy while balancing the federal interest in protecting the potential life of a fetus. Ultimately, abortion legislation must recognize the historical, social, and economic need to control reproduction, which arises not just from a woman's biological capacity to bear children, but from the life-changing consequences of motherhood and childrearing.

⁴ Sasha Ingber, *1 Abortion Clinic Remains Open in Missouri, Following New State Requirements*, NPR (Oct. 3, 2018), <https://www.npr.org/2018/10/03/654030995/one-abortion-clinic-remains-open-in-missouri-following-new-state-requirements>. The six states currently that have only one abortion clinic are Kentucky, West Virginia, Wyoming, South Dakota, North Dakota, Missouri, and Mississippi.

I. HISTORICAL AND JURISPRUDENTIAL CONSIDERATIONS

A. *THE HISTORICAL PRACTICE OF ABORTION*

The need for women to control their reproductive lives is not a recent development.⁵ Though opponents often argue as if abortion is a modern consequence of feminism, increased promiscuity, or lack of societal morality, abortion has been and will continue to be an important part of women's health care, regardless of its legal status. Generations of women spanning hundreds of years have sought to control their reproductive lives, and abortion is one means of doing so.

The American common law attitude toward abortion was generally less restrictive and laws were "grounded in the female experience of their own bodies."⁶ Abortions were illegal only after "quickening," or the moment a pregnant woman begins to feel fetal movements which occurs at approximately the fourth month of a pregnancy. Quickening was considered a defining moment in a pregnancy, and once quickening occurred, "women recognized a moral obligation to carry the fetus to term."⁷ The fetus was regarded as part of the mother before quickening and its destruction was not considered morally problematic. Abortion "was neither morally nor legally wrong in the eyes of the vast majority of Americans."⁸ Prior to quickening, the majority belief was that a human life did not exist.⁹

Further, the common law history of the criminal status and punishment for abortion has been doubted. Though an early opinion in the thirteenth century was that abortion after quickening was homicide, "the later and predominant view [...] has been that it was, at most, a lesser offense."¹⁰ Later scholars found that abortion after quickening was not murder, though "a great misprision" to be considered manslaughter.¹¹ However, a more modern examination of these viewpoints seems to reveal that even post-quickening abortion was never established as a common-law crime.¹² Ultimately, the Court in *Roe* concluded that it was "doubtful that abortion

5 See JOHN RIDDLE, *CONTRACEPTION AND ABORTION FROM THE ANCIENT WORLD TO THE RENAISSANCE* (1992) (Women from ancient Egyptian times to the fifteenth century regulated fertility using an extensive pharmacopoeia of herbal abortifacients and contraceptives).

6 LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, 8 (1996).

7 *Id.* at 9.

8 Tracy A. Thomas, *Misappropriating Women's History in the Law and Politics of Abortion*, 36 SEATTLE U. L. REV. 1, 21 (2012), (quoting JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 5 (1978)).

9 REAGAN, *supra* note 6, at 8.

10 *Roe v. Wade*, 410 U.S. 113, 134-35, n.2 (1973) (citing 2 H. BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* 279 (T. Twiss ed. 1879) ("Bracton took the position that abortion by blow or poison was homicide 'if the foetus be already formed and animated, and particularly if it be animated.'").

11 *Roe*, 410 U.S. at 136 ("In a frequently cited passage, Coke took the position that abortion of a woman 'quick with child' is 'a great misprision, and no murder.').

12 *Id.* (citing CC Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L. F. 335 (1971)) ("Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common-law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon-law crime.").

was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.”¹³

The legislative history of abortion also seems to lean towards greater protection of women’s autonomy, as the earliest efforts to regulate abortion centered on “concerns about poisoning, not morality, religion, or politics.”¹⁴ The first statutes regulating abortion, passed in the 1820s and 1830s, were actually poison-control laws.¹⁵ The purpose of these laws was to ban the sale of commercial abortifacients, not abortion itself, and were designed to protect pregnant women taking the drugs, which often killed the women who took them.¹⁶ The concern was not about abortion, but about the commercialization of these abortifacients, which were advertised in newspapers and openly available for purchase. The aim of these regulations was to protect women from injury, not to punish them.

B. THE MOVEMENT AGAINST ABORTION AND FOUNDATIONS FOR ROE

The movement toward prohibiting abortions started from a surprising source. The American Medical Association (“AMA”) was founded in 1857 and “initiated a crusade to make abortion at every stage of pregnancy illegal.”¹⁷ The reasons for this movement are important to analyze. First, abortion created competition between midwives and physicians, who desired control and power within the medical community. The AMA hoped to give exclusive rights to control and practice medicine to “regulars”, or certified physicians, and the “best way to accomplish their goal was to eliminate one of the principle procedures that kept [their] competitors in business.”¹⁸ Additionally, this movement coincided with the fight by male general physicians to keep women out of medical schools and hospitals.¹⁹ The main force behind the AMA’s anti-abortion movement was Dr. Horatio Storer, a graduate of Harvard Medical School and a practicing gynecologist, who opposed women’s entrance to Harvard Medical School and stated “the true wife [did not seek] undue power in public life ... [or] privileges not her own.”²⁰ The anti-abortion campaign by the AMA, though outwardly concerned with the morality around abortion, was “antifeminist at its core” and more concerned with the shifting dynamics of women in society.²¹

Additionally, concerns over immigration and declining birth rates of white

¹³ *Roe*, 410 U.S. at 136.

¹⁴ Jessica Ravitz, *The surprising History of Abortion in the United States*, CNN (June 27, 2016), <https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html>.

¹⁵ REAGAN, *supra* note 6, at 10.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *History of Abortion*, NAT’L ABORTION FED’N, <https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/> (“Rather than openly admitting to such motivations, the newly formed American Medical Association (AMA) argued that abortion was both immoral and dangerous. By 1910 all but one state had criminalized abortion except where necessary, in a doctor’s judgment, to save the woman’s life. In this way, legal abortion was successfully transformed into a “physicians-only” practice.”).

¹⁹ REAGAN, *supra* note 6, at 11.

²⁰ *Id.*

²¹ *Id.*

Protestant women may also have fueled the movement towards anti-abortion during the mid-nineteenth century. The practice of abortion by middle-class women “generated anxieties among American men of the same class.”²² Opponents of abortion grew concerned that immigrants would out populate native-born white Protestants. Dr. Storer even stated “Shall [our country] be filled by our own children or by those of aliens? This is a question our women must answer; upon their loins depends the future destiny of the nation.”²³ Ultimately, this hostility to immigrants, Catholics, and people of color helped fuel the campaign to criminalize abortion, as “white male patriotism demanded that maternity be enforced among white Protestant women.”²⁴

To enforce the anti-abortion movement, men condemned women for having abortions and blamed female doctors and midwives for the practice. The AMA campaign “developed the caricature of the married woman who willfully aborted pregnancy and rejected the domestic and maternal role men had constructed for her.”²⁵ The woman who sought an abortion was portrayed as selfish, frivolous, dangerous, and destructive for rejecting her social duty to bear children.²⁶ They attempted to destroy the idea of quickening which, dependent on female self-diagnosis and judgment, gave women the power over male physicians. Dr. Storer argued that quickening could not be used as an indicator of fetal life, demeaning women’s perceptions by joking that many women never quicken at all, “though their children are born living.”²⁷ Physicians successfully implemented criminal abortion laws by appealing to white, native-born males’ anti-women prejudices.

By 1880, most states passed laws restricting abortions, with limited exceptions for the health and safety of the mother’s life.²⁸ The Comstock Law, passed in 1873 during an anti-vice campaign lead by Anthony Comstock, characterized abortion and birth control as obscene, and made it a federal offense to disseminate contraceptives or provide services across state lines.²⁹ However, the illegalization of abortion did not make the procedure disappear. In fact, illegalization arguably did not succeed in significantly decreasing the number of women who sought to obtain abortions. Practitioners continued to offer abortion procedures, just behind closed doors in dangerous conditions.³⁰ This practice continued for decades. In fact, by the “early 1960s, [illegal] abortion-related deaths accounted for nearly half, or 42.1%, of the total maternal mortality in New York City.”³¹ From the 1880s until 1973, many women were harmed by these “back-alley abortions”, disproportionately hurting

22 *Id.*

23 *Id.*

24 *Id.*

25 Thomas, *supra* note 8, at 23.

26 *Id.*

27 REAGAN, *supra* note 6, at 12.

28 *Id.*

29 Comstock Act, 17 Stat. 598 (1873); *see also* Margaret A. Blanchard & John E. Semonche, *Anthony Comstock and his Adversaries: The Mixed Legacy of this Battle for Free Speech*, 11 COMM. L. & POL’Y 317 (2006).

30 REAGAN, *supra* note 6, at 11.

31 *Id.*

lower income and minority women.³²

By the mid-twentieth century, the foundations were being laid for the Supreme Court's decision in *Roe*. In 1965, the Supreme Court held in *Griswold v. Connecticut* that a state statute prohibiting the use of birth control measures by married couples was an unconstitutional invasion of the right of privacy.³³ Though the Constitution does not explicitly grant a right to privacy, the Supreme Court viewed prior cases as creating various zones of privacy and penumbras of protection from government interference.³⁴ The Court also adopted a broad definition of liberty, finding that liberty:

[D]enotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.³⁵

In a series of decisions prior to *Roe*, the Court extended this rationale to include the right to marry,³⁶ the right to parental decisions regarding their children's education,³⁷ and the right to make personal decisions about procreation.³⁸ These cases helped lay the foundation for the privacy rights inherent in women making decisions about their reproductive lives, sexuality, bodily autonomy, and ultimately, the decision to terminate a pregnancy.

C. THE SUPREME COURT'S ABORTION JURISPRUDENCE

Though many consider *Roe v. Wade* to be "judicial activism at either its enlightened best or its high-handed worst," placing *Roe* within the historical context of the time shows that it may have just been a logical response to the growing concerns regarding illegal abortions.³⁹ Rather than creating a court-sponsored legislative enactment, the Supreme Court may have just responded to a long build-up of necessary societal change, unable or unwilling to be addressed by Congress.

32 *Id.* See also Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189 (2017).

33 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

34 *Id.*

35 Linda L. Schlueter, *40th Anniversary of Roe v. Wade: Reflections Past, Present and Future*, 40 OHIO N.U. L. REV. 105, 119 (2013).

36 *Loving v. Virginia*, 388 U.S. 1 (1967).

37 *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

38 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.")

39 Katha Pollitt, *Abortion in American History*, THE ATLANTIC (May 1997), <https://www.theatlantic.com/magazine/archive/1997/05/abortion-in-american-history/376851/>.

As a result, women were left unable to safely access a medical procedure guaranteed to them by the contours of privacy embedded in our Constitution. It is in this context that twenty-one-year-old Norma McCorvey, better known by her legal pseudonym “Jane Roe,” discovered she was pregnant with her third child.

I. *ROE V. WADE*

The Texas statutes at issue in *Roe* made it a crime to “procure an abortion” except when necessary for the purpose of saving the life of the mother. Roe, a single mother of two children residing in Dallas, Texas, alleged that the Texas statutes were unconstitutional. She represented not just herself, but all women who wanted abortions but could not obtain them legally or safely. In a 7-2 decision, the Court found the Texas statutes violated a woman’s constitutional right of privacy, which is implicit in the liberty guarantee of the due process clause of the Fourteenth Amendment, which guarantees no state shall “deprive any person of life, liberty, or property, without due process of law.”⁴⁰

The Court began its analysis with a summary of the privacy rights it recognized as existing under the Constitution, and found the right to privacy to be broad enough to encompass a woman’s decision whether or not to terminate a pregnancy.⁴¹ However, the Court also recognized the balance of state interests in regulating abortion, which include safeguarding women’s health and protecting potential life. Ultimately, the Court concluded that “the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”⁴²

This conclusion was then applied directly to the stages of pregnancy in order to weigh or balance the woman’s rights with State interests. The *Roe* holding can be summarized as follows:

- (1) Prior to the end of the first trimester, the decision to obtain an abortion must be left to medical professionals;
- (2) After the first trimester, the State may choose to regulate abortion in ways that are reasonably related to its interest in promoting the health of the mother;
- (3) Post-viability, the State may choose to regulate or prohibit abortion in its interest of protecting the potentiality of human life, except where it is necessary to preserve the life or health of the mother.⁴³

The *Roe* opinion gave the country this basic framework, but left out the contours and details that have become the subject of more regulations and restrictions. Though *Roe* remains the country’s seminal case on abortion, the confirmation that women may legally obtain an abortion was just the beginning of a long battle over abortion rights.

40 U.S. CONST. amend. XIV.

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

42 *Id.*

43 *Id.*

2. *PLANNED PARENTHOOD V. CASEY*

The reasoning of the Court in *Roe* was altered in the 1992 case *Planned Parenthood v. Casey*, though the Court upheld and reaffirmed the essential holding in *Roe*.⁴⁴ Although *Roe* is the case cited most frequently in conversations about abortion rights and the Supreme Court, the holding in *Casey* is what currently controls, and therefore merits a more thorough examination. The *Casey* opinion is more comprehensive in its analysis of what the right to an abortion entails, and takes a more middle-ground approach in determining how to protect the rights of both the woman and the fetus.

At issue in *Casey* were five provisions enacted in Pennsylvania that placed various requirements on women prior to obtaining an abortion. These restrictions included a spousal notification for married women, parental notification for minors (but with a judicial bypass alternative), abortion provider requirements regarding consent and the mandatory information to be given to the woman, and certain reporting requirements on facilities providing abortion services.⁴⁵

Writing for the majority of the 5-4 decision, Justice Kennedy explained that “men and women of good conscience can disagree ... about the profound moral and spiritual implications of terminating a pregnancy, even at its earliest stage,” but personal feelings cannot control the court’s decision.⁴⁶ “Our obligation”, Justice Kennedy wrote, “is to define the liberty of all, not to mandate our own moral code.”⁴⁷ The Court reasoned that while the government may generally enact laws where reasonable people may disagree, it cannot do so when that choice intrudes upon a protected liberty. The Fourteenth Amendment protects those matters “involving the most intimate and personal choices a person may make in a lifetime, choices central to dignity and autonomy” and “at the heart of liberty, is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁴⁸

Immediately, the Court disregarded those arguments calling for the overruling of *Roe*. The Court stated that “any reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”⁴⁹ After almost twenty years, the Court determined that the liberty guarantee given to women in *Roe* prevailed, though limited by the ability and option for states to further their own interests in protecting life to some degree.

The Court strongly affirmed three of *Roe*’s bedrock principles. First, a woman has the right “to choose to have an abortion before viability and to obtain it without undue interference from the State.”⁵⁰ Second, states retain the power to restrict

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

45 *Id.* at 843.

46 *Id.* at 851.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* at 846.

abortion after fetal viability so long as the law “contains exceptions for pregnancies which endanger the woman’s life or health.”⁵¹ Third, the State has “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.”⁵²

However, the Court provided clarification where Roe was in need of it. The Court thus rejected the trimester framework taken in Roe and replaced it with the viability test.⁵³ As noted in Roe, “the concept of viability ... is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”⁵⁴ Though legislatures may draw lines without justification, the Court “must justify the lines we draw. And there is no line other than viability which is more workable.”⁵⁵

Ultimately, the Casey Court found some regulations appropriate that the Roe Court may have struck down. Rather than place regulations in the trimester framework, in which almost all regulations in the first trimester would not be upheld, the Court held that “only where state regulation imposes an undue burden on a woman’s ability to make [decisions regarding abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”⁵⁶ The Court found that an undue burden exists when “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” and found this statute is “invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”⁵⁷ Thus, under Casey, a statute that places substantial obstacles in the path of woman’s choice “cannot be considered a permissible means of serving its legitimate ends.”⁵⁸

The Court found that the provisions at issue in this case all passed the undue burden test, with the exception of the spousal notification provision. The outdated and misogynistic view that “a woman had no legal existence separate from her husband” was rejected by the Court.⁵⁹ It held that “women do not lose their constitutionally protected liberty when they marry.”⁶⁰ Instead,

The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything,

51 *Id.*

52 *Id.*

53 *Id.*

54 *Casey*, 505 U.S. at 870 (*citing Roe*, 410 U.S. at 163).

55 *Id.*

56 *Id.* at 874 (emphasis added). See *Hodgson v. Minnesota*, 497 U.S. 417, 458–59 (1990) (O’Connor, J., concurring in part and concurring in the judgment in part); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 519–20 (1990) (opinion of Kennedy, J.).

57 *Casey*, 505 U.S. at 925.

58 *Id.* at 878.

59 *Id.* at 897.

60 *Id.* at 898.

it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁶¹

The decision of *Casey* was ultimately a compromise: the Court rejected *Roe*'s rigid trimester framework in favor of the more malleable undue burden test, but it upheld the essential holding of *Roe*, maintaining that a woman had a constitutional right to an abortion, and solidified the *Roe* decision as legal precedent, thus affording *Roe* greater protection from future legal challenges. Though the *Roe* framework was revised to allow greater opportunities for states to protect the life of the unborn, it also affirmed a woman's right to decide whether to carry a pregnancy to term. Under *Casey*, "states can protect potential life by persuading a woman to carry a pregnancy to term, but may not do so by obstructing her access to abortion."⁶² The undue burden test ultimately "imposed crucial restrictions on the *means* by which the government could protect fetal life."⁶³

The *Casey* court placed great emphasis on the precedent of *Roe* and the negative implications, for both society and the Court, that would occur if *Roe* were overturned, noting that generations of women have "come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions."⁶⁴ Women have built their lives around decisions regarding reproduction and family planning, and the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."⁶⁵ We must live in a society that continues to allow women this freedom.

3. AFTER CASEY

After *Casey*, the Supreme Court applied the undue burden test three times. The first case upheld a Montana requirement that abortions can only be performed by physicians.⁶⁶ The Court held that the law did not create a substantial obstacle to abortion and also that the State may impose this type of regulation, even without medical evidence that it would be necessary, stating "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others."⁶⁷

The other two cases dealt with a specific procedure that has been known as the

61 *Id.* (citing *Eisenstadt*, 405 U.S. at 453).

62 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) (emphasis in original).

63 *Id.*

64 *Casey*, 505 U.S. at 860.

65 *Id.* at 856. See also ROSALIND P. PETCHESKY, ABORTION AND WOMAN'S CHOICE 109, 133 (rev. ed. 1990).

66 *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

67 *Id.*

partial-birth abortion, though the Court's decisions came down differently. The first, *Stenberg v. Carhart*, involved a Nebraska law which essentially banned physicians from performing partial-birth abortions, by making it a felony to perform this type of procedure, with an exception in cases where it would be necessary to save the life of the mother.⁶⁸ The Supreme Court held that the law was unconstitutional for two reasons. First, the law had the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" by encompassing within its statutory definition not only partial-birth abortion, but also the abortion procedure most commonly used during the second trimester of pregnancy—dilation and evacuation ("D&E").⁶⁹ Second, the exception within the Nebraska statute providing only for saving the life of the mother was too narrow. The statute must have a health exception that allows for the partial-birth abortion procedure if necessary to preserve the life or health of the mother.

The second case, *Gonzales v. Carhart*, was upheld by the Supreme Court seven years later.⁷⁰ In response to *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act of 2003.⁷¹ The Supreme Court deemed the language of the Act to be more specific and precise than the language of the Nebraska statute in *Stenberg*, as it prohibited only partial-birth abortion and did not encompass the commonly used D&E procedure. The Act also contained an exception if necessary to save the life of the mother, though notably did not include the health component. Further, the Supreme Court applied the undue burden test from *Casey*, finding that, based on Congress's stated reasons for the Act and description of the prohibited abortion procedure, that the purpose was to: (1) "express[] respect for the dignity of human life" and (2) "protect[] the integrity and ethics of the medical profession."⁷² The Court held that:

Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.⁷³

The Court then determined that the Act did not impose an undue burden by barring partial-birth abortion.⁷⁴ The Court explained that "the Act would be unconstitutional, under precedents we here assume to be controlling, if it subject[ed] [women] to significant health risks."⁷⁵ However, the Court noted "documented medical disagreement whether the Act's prohibition would ever impose significant health

⁶⁸ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

⁶⁹ *Id.* at 938.

⁷⁰ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁷¹ 18 U.S.C. § 1531.

⁷² *Gonzales*, 550 U.S. at 156–57.

⁷³ *Id.* at 158.

⁷⁴ *Id.*

⁷⁵ *Id.* at 161 (alteration in original) (internal quotation marks omitted).

risks,”⁷⁶ and held that this medical uncertainty foreclosed facially invalidating the act based on an undue burden:

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.⁷⁷

After *Gonzales*, many assumed the undue burden framework from *Casey* “meant little more than rational basis deference to legislative decision making.”⁷⁸ The Supreme Court appeared to be moving in a direction that would be more open to upholding limitations and restrictions to abortion. Few were confident that the Court would respond to laws more strictly regulating abortion and challenging women’s access to abortion clinics.

However, in 2016, there appeared to be a slight resurgence in the judicial protection afforded to women seeking abortions. *Whole Woman’s Health v. Hellerstedt* involved a Texas statute containing various provisions related to abortion.⁷⁹ The first challenged provision required a physician performing an abortion to have admitting privileges at a hospital within thirty miles of the location where the abortion would be performed. The second provision required all abortion clinics to comply with standards set for ambulatory surgical centers. The stated purpose of these provisions was to raise “the standard and quality of care for women seeking abortions and [to] protect the health and welfare of women seeking abortions.”⁸⁰ Notably, these requirements would leave the entire state of Texas with only seven or eight functioning abortion facilities.

The Court held in a 5-3 decision that the two provisions at issue were unconstitutional because each provision placed an undue burden on a woman’s access to abortion.⁸¹ Though the State has a “legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient,” a State cannot enact legislation which places a substantial obstacle in the path of a woman’s choice in order to serve that legitimate interest.⁸² Under *Casey*, the relevant inquiry is whether the burden imposed on abortion access is “undue” and thus the courts are required to perform a balancing

76 *Id.* at 162.

77 *Id.* at 163–64.

78 Greenhouse & Siegel, *supra* note 62.

79 *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

80 *Id.* at 2303.

81 The decision in *Whole Woman’s Health* was 5-3 due to the passing of Justice Scalia. Justice Breyer wrote the majority opinion, in which Kennedy, Ginsburg, Sotomayor, and Kagan joined. Justice Ginsburg filed a concurring opinion, Justice Thomas filed a dissenting opinion, and Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justice Thomas joined. The decision with Justice Scalia’s vote would likely have been 5-4, thus the current holding would remain.

82 *Id.* at 2309 (*citing Roe*, 410 U.S. at 150).

test, considering the burdens as well as the benefits conferred by the law. In addition, while courts will review legislative fact-finding with deference, the “Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”⁸³

Upon review, the Court found the evidence on record to clearly indicate that both provisions placed substantial obstacles in the path of a woman’s choice. Though the stated purpose was to ensure the health and safety of women undergoing abortion procedures, the lower court “found that it brought about no such health-related benefits” and that “[t]he great weight of evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.”⁸⁴ Thus, while the state had a valid interest, the law failed to advance any such interest.

Specifically, the purpose of the admitting privileges provision was to “help ensure that women have easy access to a hospital should complications arise during an abortion procedure.”⁸⁵ However, the evidence included the following:

- In the first trimester, when over 90% of abortions occur, the highest complication rate was less than one-quarter of 1%.
- A study conclusion finding the incidence of complications during abortions was 2.1% and the incidence of complications requiring hospital admission was 0.23%.
- In respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot; these women will likely seek medical attention at the nearest hospital.⁸⁶

Similarly, the evidence in regard to the surgical center requirement indicated that the provision “does not benefit patients and is not necessary.”⁸⁷ The lower court noted that women “will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility.”⁸⁸ In fact, many procedures that took place outside of hospitals, such as colonoscopies and liposuction, are more dangerous than abortion. Yet, Texas did not apply its surgical-center requirements to those procedures.⁸⁹

The Court also looked to the effect of these provisions on Texan women’s access to abortion clinics. In addition to the closure of the majority of abortion clinics in the state, the surgical-center requirement would mean two million women of reproductive age would be living more than fifty miles from the nearest abortion

83 *Gonzales*, 550 U.S. at 165.

84 *Whole Woman’s Health*, 136 S. Ct. at 2303 (citing *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)).

85 *Whole Woman’s Health*, 136 S. Ct. at 2311.

86 *Id.*

87 *Id.* at 2315.

88 *Id.* (citing *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d at 684).

89 *Whole Woman’s Health*, 136 S. Ct. at 2303.

clinic.⁹⁰ This would force women to travel far distances only to arrive at facilities that are overcrowded and, by inference, providing a lower quality of care. In her concurrence, Justice Ginsburg wrote that laws like these Texas provisions that “do little or nothing for health, but rather strew impediments to abortion’ cannot survive judicial inspection.”⁹¹

The *Whole Woman’s Health* decision provides courts with insight into the identification and balancing of the burdens and benefits of health regulations that obstruct access to abortion. Though the majority opinion “never explicitly states that Texas enacted the admitting privileges and surgical center requirements with a purpose to obstruct women’s access to abortion, the Court’s deep skepticism of the state’s actual motivation shines through the opinion.”⁹² The concurrence went a step further, with Justice Ginsburg boldly naming the Texas statute a Targeted Regulation of Abortion Providers (TRAP) law, calling into question the constitutionality of other TRAP laws throughout the country.

II. SCIENTIFIC, PHILOSOPHIC, AND PRACTICAL CONSIDERATIONS

Outside the courts, abortion continues to be a controversial topic in modern day America. Although it raises heated debates and sparks protests and marches, as previously mentioned, a significant majority of Americans actually agree that abortion itself should be legal under some circumstances.⁹³ In July 2018, a Gallup poll asked, “Would you like to see the Supreme Court overturn its 1973 Roe versus Wade decision concerning abortion, or not?”⁹⁴ Sixty-four percent of respondents answered no.⁹⁵ Additionally, the statistics on abortion provide some insight into what exactly is being so viciously fought over: the result is smaller than one may think for an issue so hotly contested.

The number of abortions has consistently decreased over time, with a steady decline since 1990, largely due to the increase of available contraceptives and birth control methods.⁹⁶ The Centers for Disease Control and Prevention (“CDC”) last released abortion statistics in 2014, when a total of 652,639 abortions were reported.⁹⁷ Ninety-five percent of abortions were performed at the thirteenth week of gestation or earlier and 67% were performed at the eighth week or earlier.⁹⁸ An additional 7.2% were performed between fourteen and twenty weeks’ gestation.⁹⁹ Only 1.3% were performed beyond twenty-one weeks.¹⁰⁰ In 2014, 1.3% of abortions was just

90 *Id.* at 2302.

91 *Whole Woman’s Health*, 136 S. Ct. at 2321 (citing *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F. 3d 908, 912 (7th Cir. 2015)).

92 Greenhouse & Siegel, *supra* note 62.

93 GALLUP, *supra* note 1.

94 *Id.*

95 *Id.*

96 *Abortion Fast Facts*, CNN (Nov. 23, 2018), <https://www.cnn.com/2013/09/18/health/abortion-fast-facts/index.html>.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

under 8,500 total. The vast majority of abortions, therefore, are performed within the first trimester. Only 1.3% of abortions would even be affected by this Note's proposed national legislation. Further, a large percentage of those abortions performed after twenty-one weeks occur due to health concerns for the mother and/or child that could not have been foreseen prior to that time.

A. THE START OF LIFE

It is clear that, at a certain point of gestation, the majority of Americans agree that abortion should no longer be permitted. The start of debate on abortion should revolve around answering this question: when does life begin? It is a question that may never have a clear answer, but the answer could be dispositive on the issue. Once life has begun, whether as early as conception or as late as at birth, it seems that society would agree that an abortion should be impermissible in most circumstances. Thus, my analysis will begin on working towards a greater understanding of when a life starts and how that should impact national legislation on abortion.

The most simplistic answer to the start of life question is conception: from the moment an ovum is fertilized by sperm, a life has begun. However, even religious traditions opposed to abortion have difficulty ascertaining the moment of ensoulment. "You might be surprised to know", according to Daniel Sulmasy, a Catholic bioethicist and Director of the Program on Medicine and Religion at the University of Chicago, "that the Catholic Church has never dogmatically defined when life begins."¹⁰¹ Instead, the Catholic Church's belief that a woman should not interfere with her pregnancy focuses more on the knowledge of potential life, not on knowledge of when life begins.

In the past few decades, much has been made about the first twenty-four to forty-eight hours post-conception. First, many embryologists and medical or scientific institutions, including the American College of Pediatricians, conclude that a "unique human life starts when the sperm and egg bind to each other in a process of fusion of their respective membranes and a single hybrid cell called a zygote, or one-cell embryo, is created."¹⁰² This process of fertilization may take twenty-four hours to complete. Though not a focus of this Note, this view of the start of life could have an impact on discussions regarding emergency contraception, such as Plan B, and whether they may be considered abortion or abortion-inducing medication.

Another scientific understanding considers fertilization an incomplete view of the start of life. A fertilized egg would still not qualify as "life" until it has attached to the wall of the uterus. Without the process of implantation, which can take anywhere from six to ten days to complete, a human life cannot have begun since it is the attachment to the uterus that fully completes the process of fertilization and begins embryonic development.¹⁰³

¹⁰¹ Elissa Strauss, *When Does Life Begin? It's Not So Simple.*, SLATE (Apr. 4, 2017), <https://slate.com/human-interest/2017/04/when-does-life-begin-outside-the-christian-right-the-answer-is-over-time.html>.

¹⁰² *When Human Life Begins*, AM. COLL. OF PEDIATRICIANS, (Mar. 2017), <https://www.acped.org/the-college-speaks/position-statements/life-issues/when-human-life-begins>.

¹⁰³ AvaWorld, *When Does Implantation Occur*, AVA (Oct. 11, 2016), <https://www.avawomen.com/ava-world/when-does-implantation-occur/>.

The occurrence of ectopic pregnancies can be used in conjunction with this viewpoint. An ectopic pregnancy occurs when the fertilized egg does not attach to the uterus, but instead potentially to the fallopian tube, abdominal cavity, or cervix.¹⁰⁴ The embryo will not be able to develop to term if this occurs. It is estimated that ectopic pregnancies occur in about one of every fifty pregnancies.¹⁰⁵ Ectopic pregnancies will cause the death of the mother if treatment is not provided. Treatment options vary but may include medication that induces a miscarriage or the removal of the embryo, and possibly part of the affected fallopian tube, in a medical procedure.¹⁰⁶ This specific type of failure for an embryo to attach to the uterus is used here to highlight the fact that the procedure to remove an embryo—which generally would be considered an abortion—is not determined to be an abortion in this context. However, the Catholic Church maintains the position that the only morally acceptable approach to save a woman’s life with an ectopic pregnancy is to remove the entire fallopian tube.¹⁰⁷ Though this results in reduced fertility, the Church contends the removal of the entire tube is morally appropriate because the intended result is to eliminate the cause of a life-threatening condition, with the secondary, unintended effect of ending the life of the embryo.

Another interesting philosophical perspective on this issue comes from a rather surprising source: a Jesuit priest named Norman Ford. In his 1988 book titled *When Did I Begin?*, Dr. Ford takes a more contemporary approach based on science, philosophy, history, and theology.¹⁰⁸ His conclusion is based on the appearance of the “primitive streak” of embryonic development, which occurs at fourteen days.¹⁰⁹ Before fourteen days, an embryo is developed only to sixteen undifferentiated cells, which can develop into any type of cell that makes up the human body, or even not develop into part of the embryo at all, but would form part of the placenta.¹¹⁰ However, at fourteen days, the “primitive streak appears, twinning is no longer a possibility, and the cells develop into particular lineages.”¹¹¹ Prior to fourteen days, it can be argued there is no “ontological individuality”, and therefore an embryo has limited moral value.¹¹² The dominant view in the ethics of stem cell research thus permits “the instrumental use of embryos [at this stage], in light of their relative moral value.”¹¹³

104 *Ectopic Pregnancy*, AM. PREGNANCY ASS’N, <http://americanpregnancy.org/pregnancy-complications/ectopic-pregnancy/> (last visited March 24, 2019).

105 *Id.*

106 *Id.*

107 Kathy Schiffer, *When Pregnancy Goes Awry: The Moral Ending to an Ectopic Pregnancy*, NAT’L CATHOLIC REGISTER (Nov. 17, 2015), <http://www.ncregister.com/blog/kschiffer/xxxxwhen-pregnancy-goes-awry-the-moral-ending-to-an-ectopic-pregnancy>.

108 See generally, NORMAN FORD, *WHEN DID I BEGIN?: CONCEPTION OF THE HUMAN INDIVIDUAL IN HISTORY, PHILOSOPHY, AND SCIENCE* (1988).

109 C. Cameron & R. Williams, *In the World of Dolly, When Does a Human Embryo Acquire Respect?*, 31 J. MED. ETHICS 215, 216 (2005), <https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC1734124&blobtype=pdf>.

110 *Id.*

111 *Id.*

112 Guido de Wert & Christine Mummery, *Human Embryonic Stem Cells: Research, Ethics, and Policy*, 18 HUM. REPROD., 672 (Apr. 2003), <https://doi.org/10.1093/humrep/deg143>.

113 *Id.*

Many view viability, the point at which a fetus can survive outside the womb, as recognition of the existence of life.¹¹⁴ The leading scientific consensus on the age of viability is twenty-four weeks, according to most medical experts.¹¹⁵ However, a study from 2015 found that a very small percentage of babies born at twenty-two weeks and medically treated survived with few health problems (though the majority died or suffered serious health issues).¹¹⁶ Dr. David Burchfield, the Chief of Neonatology at the University of Florida stated that this study “confirms that if you don’t do anything, these babies will not make it, and if you do something, some of them will make it, [though] many who have survived have survived with severe handicaps.”¹¹⁷ This raises questions as to whether the point of viability should be lowered. While the majority of infants born at twenty-two weeks will not survive, the potential, though unlikely, is possible.

The point of this discussion is not to convince readers of when life begins, or at what point it becomes clear that abortion should not generally be permitted, but rather to show just how difficult it is to answer that question. Legislation must involve line-drawing, and that almost always means there will be some over or under inclusivity. The line must be drawn not arbitrarily or religiously or philosophically, but rather should be drawn where there is consensus among a cross-section of societal values, norms, and ideals that indicates a specific point at which society would choose not to permit abortion any longer. This Note will argue that line should be drawn at twenty-two weeks.

B. SUPPORT FOR NATIONAL LEGISLATION

Congress should enact national legislation permitting women in every state to have unfettered access to abortion until twenty-two weeks because of the wide variety of state rules and regulations of abortion. Many states, most recently Iowa and Ohio in 2018, have introduced legislation known as “Heartbeat Bills” that allow a woman to obtain an abortion only prior to the detection of the fetal heartbeat.¹¹⁸ The problem with these bills is that a fetal heartbeat can be detected as early as six weeks, a time where many women may still not be aware they are pregnant.¹¹⁹ Dr. Jamila Perritt, a fellow with Physicians for Reproductive Health, notes that “the likelihood that an individual can miss her period, get a pregnancy test, then make an appointment to see an abortion provider, take time off of work if she’s working, find child care for her other children, get in to get her abortion and have all of that done prior to a six-week time period is absolutely unrealistic and unreasonable.”¹²⁰ Practical considerations

114 *Casey*, 505 U.S. at 854.

115 Pam Belluck, *Premature Babies May Survive at 22 Weeks if Treated, Study Finds*, N.Y. TIMES (May 6, 2015), <https://www.nytimes.com/2015/05/07/health/premature-babies-22-weeks-viability-study.html>.

116 *Id.* (“22-week-old babies did not survive without medical intervention. Of the 78 cases where active treatment was given, 18 survived, and by the time they were young toddlers, seven of those did not have moderate or severe impairments. Six had serious problems such as blindness, deafness, or severe cerebral palsy.”).

117 *Id.*

118 Sasha Ingber, *Iowa Bans Most Abortions as Governor Signs ‘Heartbeat’ Bill*, NPR (May 5, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/05/608738116/iowa-bans-most-abortions-as-governor-signs-heartbeat-bill>.

119 *Id.*

120 *Id.*

regarding when a woman will know she is pregnant are thus highly relevant in relation to the restrictions placed on a woman's abortion rights.

The logic of national legislation on abortion is clear by reason of consistency. Abortion policy generally has been left entirely to states and has produced a wide variety of laws, with some states taking harshly restrictive stances and others far more permissive ones. Some governors have expressly stated goals to shut down every abortion clinic in their state.¹²¹ This creates an unstable national approach to abortion, with women in many states left with little to no options to obtain abortions. Women in states like Missouri, Kentucky, and South Dakota have only one abortion clinic provider in the state and would have to travel long distances of hundreds of miles, take time off work, and have finances for both the travel and the procedure. Under the undue burden test, these types of conditions should surely qualify.

Further, a federal statute would balance the inherent unfairness created in a system where only those with the socio-economic means would be able to obtain an abortion. Middle-to-upper-class women living in states with stricter regulations on abortion may be able to spend time and money to travel. They also may be able to afford abortion earlier in the pregnancy, while other women struggle to fund the abortion before the allowable time has passed. Further, the Hyde Amendment, passed soon after the *Roe v. Wade* decision, prohibits federal financial support for abortion, and only sixteen states use their own funds to pay for abortions.¹²² This lack of funds makes abortion distinctly less accessible for poor women. Additionally, women living in rural areas may have a harder time accessing an abortion clinic compared with women in urban centers and large cities. Only a federal statute can guarantee all women a minimum level of protection.

Lastly, and most importantly, a woman's right to obtain an abortion rests on almost half a century of stare decisis and national reliance. As the *Casey* ruling made clear, stare decisis is "indispensable" unless "a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."¹²³ The Court has laid out three instances where it may depart from a prior ruling:

- (a) the holding has become unworkable,
- (b) legal principles have developed to such an extent that the holding becomes no more than a remnant of abandoned doctrine, or
- (c) factual developments leave the old rule inapplicable or unjustified.¹²⁴

Stare decisis requires that the Court not overrule a prior precedent "merely because Justices hostile to that decision replaced Justices who favored it."¹²⁵ Though critics claim the *Casey* Court's rejection of the trimester framework in favor of the undue

121 Sheryl Gay Stolberg, *Legal Fight Could Make Kentucky Only State with No Abortion Clinic*, N.Y. TIMES (May 2, 2017), <https://www.nytimes.com/2017/05/02/us/kentucky-abortion-clinic.html>.

122 *An Overview of Abortion Laws*, GUTTMACHER INST. (Jan. 1, 2019), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

123 *Casey*, 505 U.S. at 854.

124 Anthony Dutra, Note, *Men Come and Go, but Roe Abides: Why Roe v. Wade will not be Overruled*, 90 B.U. L. REV. 1261 (2010).

125 *Id.* at 1275.

burden test weakened the stare decisis argument, the *Casey* application of stare decisis is in fact “faithful to *Roe* because it adheres to the *Roe* Court’s determination that the Constitution protects a woman’s right to choose to have an abortion.”¹²⁶ That is the ultimate principle safeguarded by *Roe* and affirmed by *Casey*: it “adheres to *Roe* in terms of its analysis of operative propositions, but revises the decision rules crafted to implement those operative propositions.”¹²⁷ Stare decisis requires the members of the Supreme Court to uphold that essential *Roe* principle, whether they personally agree with it or not.

Further, the Supreme Court’s decisions have national, lasting, and direct impacts on American lives. As the *Casey* Court stated, “for two decades of economic and social developments, 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 abortion in the event that contraception should fail.”¹²⁸ Even beyond that, women’s roles in society depend upon their ability to control their reproductive lives. As stated by Susan Faludi, American journalist, author, and Pulitzer Prize winner, “[a]ll of women’s aspirations—whether for education, work, or any form of self-determination—ultimately rest on their ability to decide whether and when to bear children.”¹²⁹ Easier and cheaper access to contraceptives affords women the ability to make those life decisions, and the societal goal should be to hope for a day when the use of contraceptives replaces the need for a woman to make the painful and difficult decision to obtain an abortion. Currently, however, the United States has one of the highest rates of unintended pregnancy in the whole industrialized world.¹³⁰ The reliance that women have placed on the ability to access abortion certainly adds to the importance of maintaining *Roe* in American jurisprudence.

III. LEGISLATIVE HISTORY, CONSTITUTIONALITY, AND PROPOSED LEGISLATION

A. THE FREEDOM OF CHOICE ACT AND THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT

The Freedom of Choice Act is a bill that was introduced in the House and Senate in January 2004 and reintroduced in 2007.¹³¹ The goal of this legislation was to codify *Roe v. Wade*. Earlier versions had been introduced in the 1990s, but without much support or attention. The latest version was introduced in the Senate in April 2007 by Senator Barbara Boxer, but never came to a vote.¹³² The bill solidifies as law that every woman has the fundamental right to choose to terminate a pregnancy

¹²⁶ *Id.* at 1277.

¹²⁷ Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1317 (2008).

¹²⁸ *Casey*, 505 U.S. at 856.

¹²⁹ SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 422 (1991).

¹³⁰ *Id.* (citing Nadine Strossen, *Reproducing Women’s Rights: All Over Again*, 31 VT. L. REV. 1, 3 (2006)).

¹³¹ H.R. 3719, 108th Cong. (2004); S. 2020, 108th Cong. (2004); H.R. 1964, 110th Cong. (2007); S. 1173, 110th Cong. (2007).

¹³² S. 1173, 110th Cong. (2007).

prior to fetal viability, or to terminate post-viability when necessary to protect her life or health. Viability is defined as the “stage of pregnancy when, in the best medical judgment of the attending physician based on the particular medical facts of the case before the physician, there is a reasonable likelihood of the sustained survival of the fetus outside of the woman.”¹³³ Noting the uncertainty involved in abortion policy and the desire to protect *Roe*, the Freedom of Choice Act ultimately focuses on protecting a woman’s right to make her own reproductive health care decisions, in consultation with family and health care providers. This bill is clearly a left-wing approach to abortion legislation, with an emphasis on personal choice, liberty, and privacy, and with a vague definition of viability.

By contrast, the Pain-Capable Unborn Child Protection Act is a bill that would ban abortion after twenty weeks of pregnancy on the (mistaken) belief that after twenty weeks, a fetus is capable of experiencing pain.¹³⁴ The bill is also referred to as Micah’s Law, after six-year-old Micah Pickering was born at twenty-two weeks in July 2012 and was able to survive with intensive care treatment, though statistically the majority of babies born that prematurely will not survive.¹³⁵ The bill has passed in the House of Representatives three times in the past five years, but has yet to pass the Senate.¹³⁶ Most recently, it was reintroduced in the House by Arizona Representative Trent Franks on January 3, 2017 and passed on October 3, 2017 by a vote of 237-189.¹³⁷ The bill was then introduced in the Senate by Senator Lindsey Graham of South Carolina.¹³⁸ In January 2018, it failed to receive the sixty votes needed for cloture; there were fifty-one votes in favor, forty-six against.¹³⁹ That same day, President Trump issued a statement expressing his administration’s support for the Pain-Capable Unborn Child Protection Act.¹⁴⁰

The bill allows for four exceptions: (1) the abortion is necessary to save the life of the pregnant mother; (2) the pregnancy is the result of rape, and the woman has obtained medical treatment and counseling for the rape; (3) the pregnancy is the result of reported rape or incest against a minor; and (4) in case of risk of death or substantial physical injury to the mother.¹⁴¹

There are a few problems with this Act. First, the bill does not include an exception for the general or mental health of the mother, only for death or life threatening physical injury. A woman’s overall health should include conditions

133 *Id.*

134 H.R. 36, 115th Cong. (2017).

135 Belluck, *supra* note 115.

136 The Pain-Capable Unborn Child Protection Act was passed in the 113th Congress on June 18, 2013, in the 114th Congress on May 13, 2015, and in the 115th Congress on January 3, 2017. As of this writing, the bill has never passed in the Senate.

137 Sophie Tatum, *House Passes Ban on Abortion after 20 weeks of Pregnancy*, CNN (Oct. 3, 2017), <https://www.cnn.com/2017/10/03/politics/house-vote-abortion-after-20-week-ban/index.html>.

138 S. 1922, 115th Cong. (2017).

139 *Roll Call Vote 115th Congress, Second Session*, U. S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00025.

140 *Statement by President Donald J. Trump on the Senate’s Failure to Advance the Pain-Capable Unborn Child Protection Act*, THE WHITE HOUSE, (Jan. 29, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-senates-failure-advance-pain-capable-unborn-child-protection-act/>.

141 H.R. 36, 115th Cong. (2017).

such as mental health, drug and/or substance abuse, or the potential of physical complications. For example, a pregnant woman may be diagnosed with a condition that *could* become life-threatening but whose life is not currently at risk at the time of the diagnosis, posing the concern that a woman must wait to be sick enough or have her condition worsen to a point where there is a higher risk of complications. While her physical health may not presently be in serious danger, a woman would be taking the risk that delayed treatment and exacerbation of her illness could potentially take her life and, with it, her child's life.

Second, the bill does not provide an exception for those instances where the fetus will not survive delivery or there are serious medical complications—such as missing organs, cardiac abnormalities, or lethal genetic issues—that should allow a woman the option of discontinuing her pregnancy. Surely a woman who is told that her child will not survive outside the womb should be able to make a decision of whether she must carry the child to term and bury it, or terminate the pregnancy and grieve her loss. The intimate nature of these decisions should leave the government cautious and cognizant of the reasons why women may seek abortions after twenty weeks.

Additionally, a significant problem with the Pain-Capable Unborn Child Protection Act is that science does not support the fetal pain argument at twenty weeks. A study by the Journal of American Medical Association from 2005 found that the evidence indicates that fetal perception of pain is unlikely before the third trimester (or at the twenty-eighth week).¹⁴² The American College of Obstetricians and Gynecologists also concluded that a fetus does not have the capacity to experience pain until after viability.¹⁴³ Because pain is “an emotional and psychological experience that requires conscious recognition of a noxious stimulus”, a fetus does not have the physiological capacity to perceive pain until at least twenty-four weeks gestation.¹⁴⁴ Additionally, the “occurrence of intrauterine fetal movement is not an indication that a fetus can feel pain.”¹⁴⁵

The evidence concluding that the human fetus cannot feel pain at twenty weeks does not indicate that the desire to ban abortions at twenty weeks is not an admirable objective. However, our health policies should be based on scientific fact. Currently, there is no scientific confirmation or consensus that fetal pain exists at twenty weeks. To pass the Pain-Capable Unborn Child Protection Act would be to place the government's seal of approval on the factually incorrect statement that fetuses at twenty weeks can experience pain.

142 Susan J. Lee, et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, JAMA NETWORK (Aug. 31, 2005), https://jamanetwork.com/journals/jama/fullarticle/201429?hc_location=ufi.

143 AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, FETAL PAIN (2013), <https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactAreImportFetalPain.pdf>.

144 *Id.* (citing ROYAL COLL. OF OBSTETRICIANS & GYNECOLOGISTS, FETAL AWARENESS: REVIEW OF RESEARCH AND RECOMMENDATIONS FOR PRACTICE (2010)).

145 *Id.*

B. CONSTITUTIONALITY OF FEDERAL ABORTION LEGISLATION

Prior to the Court's decision in *Roe*, Congress had never addressed abortion through legislation. However, after *Roe*, abortion became a front and center social and political concern. The debate shifted from the Court to state legislative bodies. Each state has the ability to restrict abortion as it chooses, so long as those restrictions comply with the Constitution and Supreme Court jurisprudence.

In order for the federal government to pass abortion legislation, Congress must show it has the power to do so. The most likely way is through the Commerce Clause: abortion services substantially affect interstate commerce. Additionally, though it has yet to be tested, there is a potential Fourteenth Amendment argument that could also sustain abortion legislation.

The congressional power to regulate interstate commerce is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than [those] prescribed in the [C]onstitution."¹⁴⁶ Congressional regulations regarding purely local activities have been sustained by the Court when those activities have a substantial effect on interstate commerce.¹⁴⁷ While the performance of an abortion is itself a local activity, the activity may still be reached by Congress because of the volume of abortions performed nationally and the interstate travel that occurs due to stark contrasts in abortion policy by neighboring states.

The equal protection argument begins by claiming that because abortion is only applicable to women, abortion restrictions are a sex-based legislation and would therefore be viewed through intermediate scrutiny. Abortion laws would thus have to "serve important governmental objectives and must be substantially related to achievement of those objectives."¹⁴⁸ As the Court found in *Whole Woman's Health*, government restrictions on abortion are not always created to protect a woman's health or fetal life, but rather to close down abortion clinics and restrict women's access to abortion. Additionally, when a state chooses to restrict abortion access, the number of abortions may not actually decrease. Instead, the state may have just increased the number of unsafe abortions that will be performed. While states may have legitimate purposes for enacting abortion restrictions, the means taken must effectuate that purpose.¹⁴⁹ Unfortunately, there are "factors that point to abortion restrictions being a product of gender stereotypes."¹⁵⁰ The only time a state has the ability to co-opt a person's body and force a body to sustain and support another, is in the abortion context and thus only women are being controlled by the state in this way.¹⁵¹ Potentially, prior to viability, a state's interest has much less to do with protecting a potential life and more to do with reinforcing gender roles and co-opting female bodies.¹⁵²

Abortion restrictions may presumptively violate the Equal Protection Clause. A

¹⁴⁶ *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).

¹⁴⁷ See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁴⁸ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁴⁹ *Dutra*, *supra* note 124, at 1284-85.

¹⁵⁰ *Id.* at 1286.

¹⁵¹ *Id.* at 1285.

¹⁵² *Id.*

state carries the burden of proving the validity of their abortion restrictions through evidence of the following sort:

By showing that the state does all in its power to promote the welfare of unborn life by noncoercive means, supporting those women who do wish to become mothers so that they are able to bear and raise healthy children; by demonstrating that the sacrifices the state exacts of women on behalf of the unborn are in fact commensurate with those it exacts of men - and the community in general - to promote the welfare of future generations; and, even, by showing that the state is ready to compensate women for the impositions and opportunity costs of bearing a child they do not wish to raise.¹⁵³

Women build their lives around the ability to make decisions about pregnancy. By restricting access to abortion, the state “conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care.”¹⁵⁴ The assumption that women can be forced to “accept the ‘natural’ status and incidents of motherhood rest[s] upon a conception of women’s roles” that triggers the protection of the Equal Protection Clause.¹⁵⁵

Though the Equal Protection argument has not yet been tested, it raises valuable points about women’s roles in society, the reasonableness of a state overriding bodily autonomy, and the legitimacy of state means to restrict abortion.

C. PROPOSED LEGISLATION

The objective of federal legislation regulating abortion should be to establish a floor of minimum protections. Currently, the extreme variation of abortion access from state to state is confusing, unfair, and discriminatory to women in conservative states. National legislation would allow individual states to be more permissive of abortion or apply different restrictions on abortion clinics (so long as they do not pose undue burdens). For example, states may still have different requirements regarding waiting periods, parental consent or notification, sonogram requirements, etc. However, the legislation must solidify a woman’s constitutional right to abortion.

I would propose to include the following language:

- (a) The decision to terminate a pregnancy prior to 22 weeks’ gestation of the fetus shall be solely that of the pregnant woman in consultation with her physician.

¹⁵³ *Id.*

¹⁵⁴ Chemerinsky & Goodwin, *supra* note 32, at 1211.

¹⁵⁵ *Id.*

- (b) After 22 weeks' gestation, no abortion may be performed upon a pregnant woman, except when necessary to preserve and protect the life or health of the pregnant woman or in cases in which the fetus has life-threatening developmental defects or is no longer viable.

I believe this language is a strong compromise that many legislators will find persuasive, particularly when faced with the alternative of waiting for the Supreme Court to make its own decision regarding this issue. The reason this proposed text will be more successful than the previous federal abortion legislation bills is two-fold.

First, the language removes any reference to fetal pain. As discussed above, the fetal pain argument is unsupported and should not be the basis for abortion restrictions. Instead of having a fetal perspective of abortion, the focus of the language is on woman's health and reproductive decisions. The bill includes exemptions beyond twenty-two weeks for life and health risks for the mother and/or fetus, and allows for abortions for any reason prior to twenty-two weeks. This language is similar to the Freedom of Choice Act in the sense that it focuses on a woman's personal choice and allows for life and health exemptions. This will appeal to more liberal Congress members, who approach the abortion issue from the lens of the liberty, privacy, and personal choice of women.

Second, the language places a strict ban on elective abortion after the fetus has reached twenty-two weeks. This is a specific time deadline and is two weeks earlier than the current scientific understanding of viability. The proposed bill makes clear that the only exceptions beyond twenty-two weeks are for the life and health of the mother, or serious medical deficiencies for the fetus. For example, this would include a situation in which a fetus is diagnosed with a fatal illness or a condition with a profoundly poor prognosis, in which the decision to terminate a pregnancy is deeply personal and difficult. It would also include situations where a woman is diagnosed with a life-threatening condition during her pregnancy in which her life is at significant risk without medical intervention, and a decision must be made regarding her own health and the health and life of her fetus, which again, is profoundly intimate and is best left with a woman, her doctor, and loved ones. This proposed bill is also similar to the Pain-Capable Unborn Child Protection Act in the sense that it places a strict time limit on which women may exercise their right to abortion freely and without undue interference. This aspect will appeal to more conservative legislators, who approach the abortion issue from the lens of protection of potential fetal life.

Considering that only about 1% of abortions occur after twenty-two weeks, this bill is not changing the current state of abortion.¹⁵⁶ Rather, it is solidifying in legislation the system Americans already accept. Women have already been granted a federal right to make personal reproductive decisions. That right must be cemented by Congress before it reaches the Supreme Court, which cannot be held politically accountable to the public at large and could upend the entire system of reproductive

156 MATTHEW B. BARRY, CONG. RESEARCH SERV., R45161, ABORTION AT OR OVER 20 WEEKS' GESTATION: FREQUENTLY ASKED QUESTIONS 2 (2018), <https://fas.org/sgp/crs/misc/R45161.pdf>.

healthcare.

CONCLUSION

Within the month of this writing, New York passed its own state law protecting a woman's right to choose to terminate her pregnancy and codified *Roe v. Wade*. The response to this legislation has been both positive and negative. Supporters of choice declare this legislation as a victory for women's rights.¹⁵⁷ Critics claim that this allows women to obtain an abortion any time, for any reason up until birth.¹⁵⁸ This piece of legislation is very similar to what I propose Congress pass and, understandably, I imagine a national public response will be just as heated.

New York Governor Andrew Cuomo expressed his stance on the bill in an opinion piece for the *New York Times* after President Trump attacked the bill during the State of the Union address on February 5, 2019.¹⁵⁹ The Reproductive Health Act was a direct response to the "continual anxiety that the Court will overrule the *Roe* precedent."¹⁶⁰ The New York bill "guarantees a woman's right to abortion in the first twenty-four weeks of pregnancy or when the fetus is not viable, and permits it afterward only when a woman's life or health is threatened or at risk."¹⁶¹ Cuomo dismisses those claiming the bill allows a woman to terminate her pregnancy at any time, citing directly to the language and affirming that late-term abortions will not occur unless serious medical complications arise.

The fear of late term abortions was the single largest criticism and concern of the New York bill. However, I would argue that fear is largely unfounded. I suspect it is rare that a woman wakes up after carrying a fetus for twenty-six weeks and decides she no longer wants to carry her baby. By that point in a pregnancy, women want their children and are preparing to become mothers. Instead, they are faced with painful and difficult decisions regarding their own health and the health of their child. The idea that somehow a large percentage of the 1.3% of abortions that occur after twenty-one weeks are elective abortions is degrading and offensive to the majority of women and mothers.

However, even with backlash, the government should still solidify a woman's right to choose to have an abortion prior to twenty-two weeks. The Constitution guarantees the right of privacy, and nothing is more intimate and private than a woman's bodily autonomy and reproductive health. The Supreme Court has further guaranteed the right to obtain an abortion to women without undue governmental burdens prior to viability. Additionally, the majority of the public is clearly in favor

157 Meg Kelly, *Abortion legislation in New York wouldn't do what Trump said*, WASH. POST (Feb. 5, 2019), https://www.washingtonpost.com/politics/2019/live-updates/trump-white-house/live-fact-checking-and-analysis-of-trumps-2019-state-of-the-union-address/abortion-legislation-in-new-york-wouldnt-do-what-trump-said/?utm_term=.92513833073e.

158 Caleb Parke, *New York 'Celebrates' Legalizing Abortion Until Birth as Catholic Bishops Question Cuomo's Faith*, FOX NEWS (Jan. 23, 2019), <https://www.foxnews.com/politics/new-york-celebrates-legalizing-abortion-until-birth-as-catholic-bishops-question-cuomos-faith>.

159 Andrew M. Cuomo, *Trump's Assault on Abortion Rights Must Be Rejected*, N.Y. TIMES (Feb. 6, 2019), <https://www.nytimes.com/2019/02/06/opinion/cuomo-roe-abortion-trump.html>.

160 *Id.*

161 *Id.*

of some right of choice and only a small fraction of voters take the extreme stance that abortion should be illegal under all circumstances. The proposed legislation is a way to compromise by placing a nation-wide ban on abortion after twenty-two weeks (with exceptions for the life and health of the mother and fetus) while confirming that women have the right to abortion. The only way to pass this type of legislation is for congressmen and congresswomen to see that unless they take action and compromise, the decision will be left to nine individuals sitting on the Supreme Court. I do not underestimate how difficult this will be—and potentially—it may never be achieved. But if society looks to the alternative of allowing the Supreme Court to dictate women's healthcare decisions, I suspect a larger number of Americans would be more inclined to support Congressional action. If we wait, are we enabling five middle-aged men to do away with decades of precedent, leaving American women without the most basic, fundamental sense of personal liberty, bodily autonomy, and dignified privacy? That is a chance we should not be willing to take.