THE FUTURE OF *ROE V. WADE*: DO ABORTION RIGHTS END WHEN A HUMAN'S LIFE BEGINS?

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While legal scholars and Supreme Court Justices on both sides of the national abortion controversy argue that Roe v. Wade *was incorrectly decided, this Article accepts the Court's decision as a provisional holding that was based on the relevant societal, scientific, and legal records available to the Court in 1973. However, the* stare decisis *analysis outlined by the Court in* Planned Parenthood v. Casey *dictates that precedent can be overturned when a change in relevant facts robs a ruling of its original justification. If the Court agrees to hear a challenge to* Roe*, it will likely assess whether the relevant factual records relied upon by the Court in* Roe *are still responsive to present realities.*

In 1973, the Court in Roe *held that a state's interest in protecting life becomes compelling at fetal viability and fetuses do not have constitutional rights. The Court made these determinations because it could not find a consensus view on when life begins and it found that states were reluctant to recognize fetuses as legal persons outside of the abortion context. Today, the Court can take notice of recent scientific and legal developments: (1) an academic study found a consensus of biologists around the world (96%) agree with the biological fact that a human's life begins at fertilization and (2) there are now eight legal contexts in which fetuses are protected as human persons under the law; today, thirty-eight states have fetal homicide laws that recognize non-abortive killings of fetuses as homicides or murders of human persons.*

If the Court considers these developments, which establish fetuses as humans in fact and persons under the law, then it would likely hold that Casey*'s* stare decisis *standard for reexamining precedent has been satisfied and* Roe*'s viability standard has been robbed of its original justification. Because U.S. senators and Supreme Court Justices have held that all humans are persons within the meaning of the Fourteenth Amendment to the Constitution, these developments could also lead the*

Court to recognize that all humans have the constitutional right to equal protection under the law throughout their lives, from fertilization until death. Whether the Court overturns Roe *and returns the abortion issue to the states, recognizes fetal rights, or uses a new justification to retain or expand abortion rights, this Article argues that the Court cannot allow our Nation to be governed by abortion jurisprudence that rests on outdated and incorrect factual records of the science of fetal development and the legal status of preborn humans.*

INTRODUCTION

In 2020, states continue to enact abortion restrictions that challenge the constitutionality of the United States Supreme Court's landmark decision in *Roe v. Wade* ("*Roe*").[1] Most recently, Governor Lee of Tennessee signed into law a 'fetal heartbeat bill'[2] that criminalized abortions performed after the sixth week of pregnancy, which is approximately the time an embryo's[3] heart first beats. Citing the Court's[4] abortion jurisprudence, specifically *Roe* and its progeny, a federal judge blocked the abortion restriction within minutes of it being signed into law.[5]

This is the current state of abortion legislation in America. States pass and enact statutes that protect previable human fetuses by

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1. 410 U.S. 113 (1973). The plurality in *Planned Parenthood v. Casey* reaffirmed the central holding of *Roe*: "Our adoption of the undue burden analysis does not disturb the central holding of *Roe* v. *Wade*, and we reaffirm that holding[: A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. 833, 879 (1992). States that challenge *Roe* agree with the underlying logic of the holding, that a state's right to protect life supersedes the liberty right to abort, but they reject the viability standard as an arbitrary restriction of their right to protect a human throughout their life. *See infra* note 10 and accompanying text.

2. 2020 Tenn. Pub. Acts 0764.

3. In the sixth week of development, "embryo" is the appropriate scientific term. "Zygote" describes a mammalian organism from fertilization until the fifth week of development; he or she is then an "embryo" until roughly the tenth week of development and a "fetus" thereafter and until birth. *Fetal Development*, MEDICINENET (June 30, 2019), https://medlineplus.gov/ency/article/002398.htm.

4. Where possible, I will refer to the United States Supreme Court as "the Court."

5. Memphis Ctr. for Reprod. Health v. Slatery, No. 3:20-CV-00501, 2020 WL 3957792 (M.D. Tenn. July 13, 2020); Kaylin Jorge & Caitlyn Shelton, *Judge Blocks Tennessee 'Heartbeat' Abortion Law Minutes After Being Signed by Gov. Lee*, FOX 17 NASHVILLE (July 13, 2020), https://fox17.com/news/local/judge-blocks-tennessee-abortion-law-minutes-after-being-signed-by-gov-lee.

banning abortion at the sixth, fifteenth,[6] or twentieth week of development.[7] These laws are then ruled unconstitutional by federal judges who cite *Roe*'s central holding that a state's interest in protecting fetal life is compelling and can overcome the liberty right to have an abortion only after a fetus can survive outside of the womb. This point of fetal viability is currently accepted as starting at the twenty-fourth week of fetal development, but some have survived after being delivered even earlier.[8]

While the Court has described *Roe* as its attempt to issue a mandate that could end the national abortion controversy,[9] forty-seven years later, legislators who have sworn to support and defend the U.S. Constitution continue to pass previability abortion restrictions that they believe are constitutional.[10] The argument is that *Roe* is an unconstitutional restriction on a state's right to protect life reserved to states under the Tenth Amendment and its duty under

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6. MISS. CODE ANN. § 41-41-191 (2018); *see* Brief for Amicus Curiae Illinois Right to Life in Support of Petitioners, Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. *petition for cert. filed* July 20, 2020).

7. Eyder Peralta, *Supreme Court Ends Arizona's Bid to Reinstate 20-Week Abortion Ban*, NPR (Jan. 13, 2014, 10:05 AM), https://www.npr.org/sections/thetwo-way/2014/01/13/262071819/supreme-court-refuses-appeal-of-arizonas-20-week-abortion-ban.

8. 'Fetal viability' describes the point at which a fetus's lungs are sufficiently developed such that the fetus can survive on a ventilator until he or she can breathe on their own. Franklin Foer, *Fetal Viability*, SLATE (May 25, 1997, 3:30 AM), https://slate.com/news-and-politics/1997/05/fetal-viability.html. However, this is not a fixed developmental point either historically (at the time of *Roe*, fetal viability was recognized at twenty-eight weeks while it is set at twenty-four weeks, today) or regionally (twenty-three-week fetuses who are being treated in a low-income area with basic hospital care are less likely to survive than twenty-three-week fetuses who are being treated in an affluent area with access to leading neonatologists). *Id.*; *See* D.D., *The Limit of Viability*, ECONOMIST (May 20, 2015), https://www.economist.com/the-economist-explains/2015/05/19/the-limit-of-viability#correction.

9. "It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

10. A 2019 Guttmacher Institute report found that 1,271 abortion restrictions have been enacted since *Roe* was decided in 1973; in the first half of 2019, fifteen states considered or enacted six-week abortion bans, and approximately 150 abortion bans were introduced. Elizabeth Nash, *A Surge in Bans on Abortion as Early as Six Weeks, Before Most People Know They Are Pregnant*, GUTTMACHER INST., https://www.guttmacher.org/article/2019/03/surge-bans-abortion-early-six-weeks-most-people-know-they-are-pregnant (last updated June 4, 2019).

the Fourteenth Amendment to provide equal protection of the laws[11] to all persons[12] within their jurisdiction and to not deprive any person of life without due process.[13]

These unrelenting challenges[14] have led legal commentators to suggest *Roe* is "doomed."[15] Some speculate that the recent addition of two Republican-appointed Justices has tipped the ideological balance

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11. The Fourteenth Amendment's Equal Protection Clause ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.") memorialized this liberal principle on which our Nation was formed. U.S. CONST. amend. XIV, § 1. In the Declaration of Independence, our founding fathers held it self-evident that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Benjamin Franklin admonished against inequal protection ("The ordaining of laws in favor of *one* part of the nation, to the prejudice and oppression of *another*, is certainly the most erroneous and mistaken policy") and proclaimed that "[a]n *equal* dispensation of protection, rights, privileges, and advantages, is what every part is entitled to, and ought to enjoy . . . ." BENJAMIN FRANKLIN, EMBLEMATICAL REPRESENTATIONS (1774), *reprinted in* 4 THE WORKS OF BENJAMIN FRANKLIN 457 (Jared Sparks ed., 1840); James Madison argued that "[e]qual laws protecting equal rights are found as they ought to be presumed, the best guarantee of loyalty & love of country . . . ." Letter from James Madison to Jacob De La Motta (Aug. 1820) (on file with National Archives).

12. *See infra* Part III.B.4. Some cite the Citizenship Clause of Section One of the Fourteenth Amendment ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.") as evidence that one must be born to be recognized as a "person." U.S. CONST. amend. XIV, § 1. Apart from this entailing the unconstitutional position that non-citizens are not protected under the Amendment (*see infra* note 475), it ignores the central argument that fetuses are persons within the meaning of Section One's Equal Protection Clause ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.") *Id.; See* John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 4 S. ILL. U. L.J. 1, 13 n.67 (1979).

13. By permitting legal abortion without any due process for fetuses, some argue that it violates the Due Process Clause ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .") U.S. CONST. amend. XIV, § 1. For instance, Germany recognizes fetal rights (*see infra* note 362) but, because it permits abortion in the first trimester, it can be said to provide due process to fetuses by requiring that women must undergo mandatory counseling that "serves to protect the unborn life . . . [and] encourage[s] the woman to carry the child to term . . . [so t]he woman must thereby be aware that at every stage of the pregnancy the unborn child has its own right to life." Strafgesetzbuch [StGB] [Penal Code] § 219, para. 1, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).

14. *See supra* note 10 and accompanying text.

15. *See, e.g.*, Jack Heretik, *CNN Analyst:* Roe v. Wade *Is 'Doomed'*, WASHINGTON FREE BEACON (June 27, 2018, 4:59 PM), https://freebeacon.com/issues/cnn-analyst-says-roe-v-wade-doomed.

of the Court and wrested power away from the Justices who support *Roe*. Indeed, while the Court's recent overturning of a Louisiana abortion regulation caused commentators to second-guess the new majority's willingness to overturn *Roe*, Chief Justice Roberts clarified that the Court did not refuse to overturn *Roe* because attorneys for Louisiana did not even ask the Court to reassess *Roe*.[16] Thus, this fear for *Roe*'s fate is still well-founded. There has been no shortage of law professors and Justices, on both sides of the abortion debate, who have argued that the majority's opinion in *Roe* is in some way deficient and susceptible to being overturned.

Some legal scholars argue *Roe* was more of an expression of the Justices' policy preferences than a holding rooted in the Constitution;[17] some use originalism and textualism to argue that the Court erred in its interpretation of the Fourteenth Amendment because it should have been read to encompass fetuses' constitutional rights;[18] some argue the Court in *Roe* relied on biased and faulty legal scholarship;[19] and others simply argue *Roe* was incorrectly decided.[20] Many members of the Court have also taken issue with the holding as at least seven Supreme Court Justices have observed critical flaws in the decision that serves as the foundation of the Court's abortion jurisprudence.[21]

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16. June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring); *see also* Steve Jacobs, *Chief Justice Roberts Should Not Be the Pro-Life Movement's Scapegoat*, HILL (July 14, 2020, 5:00 PM), https://thehill.com/opinion/civil-rights/507286-chief-justice-roberts-should-not-be-the-pro-life-movements-scapegoat.

17. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) ("[*Roe*] is *not* constitutional law and gives almost no sense of an obligation to try to be.").

18. *See, e.g.*, Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 568–69 (2017).

19. *See generally* JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006).

20. *See, e.g.*, Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 20 (1996); Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4 (1973). For a list of prominent pro-choice legal scholars' opinions of *Roe*, see also Timothy P. Carney, *Honest Pro-Choicers Admit* Roe v. Wade *was a Horrible Decision*, WASHINGTON EXAM'R (Jan. 22, 2011, 12:00 AM), https://www.washingtonexaminer.com/honest-pro-choicers-admit-roe-v-wade-was-a-horrible-decision; Derek Smith, *Roe vs Roe*, HUM. DEF. INITIATIVE (Oct. 12, 2020, 11:13 AM), https://humandefense.com/roe-vs-roe.

21. For a collection of Justices' opinions on *Roe*, see U.S. CONF. CATH. BISHOPS, COMMENTS ON *ROE V. WADE* BY JUSTICES OF THE SUPREME COURT (n.d.).

Justices have argued that the Court should abandon *Roe*'s central holding and return the abortion issue to the states.[22] Chief Justice Burger called on the Court to reexamine *Roe*.[23] Justice Ginsburg, before joining the Court, argued that the rule was based on an "incomplete justification" because the decision reflected "[h]eavy-handed judicial intervention [that] was difficult to justify and appears to have provoked, not resolved, the [national abortion] conflict."[24] Justice O'Conner suggested that "[t]he *Roe* framework . . . is clearly on a collision course with itself," "there is no justification in law or logic for the trimester framework adopted in *Roe*," and "[t]he choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward . . . [so] the State's interest in protecting potential human life exists throughout the pregnancy."[25] The four-Justice joint opinion in *Planned Parenthood v. Casey* ("*Casey*")[26] even went as far as to argue that "*Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."[27] Justice Thomas has made it no secret that he believes *Roe* was wrongly decided, most recently arguing that *"Roe* is grievously wrong for many reasons, but the most fundamental is that its core holding—that the Constitution protects a woman's right to abort her unborn child—finds no support in the text of the Fourteenth Amendment."[28]

While legal scholars and Justices attack *Roe*, this Article takes a different tack. Starting an analysis of a precedent with the charitable assumption that the Justices were impartial jurists—setting aside assumptions that they acted incorrectly, incompetently, or ideologically—permits one to set aside the question of whether *Roe*

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22. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in part and dissenting in part) ("We should get out of this area [of abortion law], where we have no right to be, and where we do neither ourselves nor the country any good by remaining.").

23. "I agree we should reexamine *Roe*." Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 785 (1986) (Burger, C.J., dissenting).

24. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 382–86 (1985); *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992).

25. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458–61 (1983) (O'Connor, J., dissenting).

26. 505 U.S. 833 (1992).

27. *Id.* at 944. (Rehnquist, C.J., concurring in part and dissenting in part).

28. June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2150 (2020) (Thomas, J., dissenting).

was correctly decided and focus on the question of whether it is appropriate today.

The majority's opinion in *Roe* can be seen as a rational ruling when it is viewed as explicitly premised on the relevant factual circumstances of abortion in 1973 that served as the Court's evidentiary record. The Court signaled that it was issuing a provisional holding[29] when it justified the decision in light of the "demands of the profound problems of the present day."[30] The Court's hedging, which is in the first section of the reasoning offered after the Court summarized and repeated its holding, is clear indicia that the Court was not issuing a timeless ruling driven by theory or principle—the Court was making a fact-dependent decision it felt was needed at that time.[31] It further utilized this approach in its rejection of Texas's essential argument: fetuses are human persons deserving of constitutional rights and states' protection under the law because a human's life begins at conception.

The Court did not reject this view on when life begins because it disagreed; rather, it rejected this view because it could not find a consensus view and did not want to speculate at that "point in the development of man's knowledge . . . ."[32] Similarly, instead of rejecting Texas's argument because humanity or personhood were philosophical concepts that entail sentience, viability, or physical independence, the Court reasoned that: "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life . . . begins before live birth or to accord legal rights to the unborn . . . ."[33]

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29. This interpretation of *Roe* is not crucial to this Article's overall argument; many judicial opinions are provisional and all are subject to review despite the weight of precedent and *stare decisis*.

30. Roe v. Wade, 410 U.S. 113, 165 (1973).

31. *Id.* at 165–66. If my nephew asked me for ice cream right before bed and I wanted to explain that the behavior was never acceptable, I would not say, "Based on the circumstances of today, you cannot eat ice cream before bed." I would tell him, "You cannot eat ice cream before bed."

32. *Id.* at 159. When the Court considered the "difficult question of when life begins," it was not able to arrive at an answer because it could not determine whether the question should be answered from a scientific, philosophical, or religious perspective; so, because it could find no consensus among experts in 1973, the Court showed judicial humility by arguing that it "could not speculate as to the answer." *Id.* As detailed in Part II of this Article, the majority of Americans (80%) view it as a scientific matter that should be determined by biologists; because it is an incontrovertible scientific fact that a human's life begins at fertilization and countless biologists, abortion doctors, and abortion rights advocates agree that fetuses are humans, the Court can now recognize the humanity of fetuses. *See infra* Part II.

33. *Roe*, 410 U.S. at 161.

Thus, the decision to reject Texas's argument was made simply because the Court could not find evidence to support it; there was no consensus on when life begins and fetuses had "never been recognized in the law as persons in the whole sense."[34]

Whether or not the Court's opinion was strategically written this way, the Court did not represent the holding as 'written in stone,' so *Roe* should not be viewed as the final say on abortion for the duration of the American Republic.[35] As the plurality in *Casey* pointed out, *Roe* was simply the Court's attempt to end a national controversy and the Court's best attempt to resolve a contentious national policy debate.[36] Indeed, Justice Blackmun, who wrote the majority opinion in *Roe*, likely had a good faith belief that most Americans, at that time,[37] wanted abortion to be a decision solely in the province of a woman's relationship with her doctor.[38] These perspectives can help to explain

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34. *Id.* at 162.

35. Justice O'Connor has described *Roe* as being "on a collision course with itself. . . . As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception." Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

36. "It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

37. While reviewing Justice Blackmun's *Roe* case file, Professor Linda Greenhouse found a clipping of a Washington Post article on a 1972 Gallup poll that found that 64% of Americans agreed that "the decision to have an abortion should be made solely by a woman and her physician . . . ." Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions about Backlash*, 120 YALE L.J. 2028, 2031 (2011).

38. Abortion is no longer a decision made by a pregnant woman and her physician as it is now a decision made by a pregnant woman who typically goes to an abortion clinic for a procedure performed by a traveling abortion doctor. S*ee, e.g.*, Abby Johnson, *Abby Johnson Kentucky State Testimony*, YOUTUBE (Feb. 16, 2019), https://www.youtube.com/watch?v=zj7S75Dp3GQ; Kat Stoeffel, *The Heroic Commutes of Abortion Providers*, CUT (Dec. 13, 2013), http://nymag.com/thecut/2013/12/heroic-commutes-of-abortion-providers.html. In 1973, the doctor-patient relationship was often a special, life-long connection, but today, abortion doctors often travel to clinics across state lines, spending a matter of minutes with each patient; this relationship between a pregnant woman and their abortion doctor is drastically different from the relationship between a pregnant woman and a primary care physician. Some have even argued this significant change to the nature of the doctor-patient relationship can be grounds for reviewing *Roe*. *See, e.g.*, Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 GEO. J.L. & PUB. POL'Y 445, 480–81 (2018).

the Court's hedging and its discussion of the logical linchpins in *Roe*'s central holding. Both are at the heart of this Article's assessment of *Roe*'s future.

In 1992, the Court reasoned in *Casey* that "[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations."[39] The Court analyzed the *stare decisis* factors for overruling precedent and considered "whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable."[40]

The plurality in *Casey* held that "no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it" so the Court upheld *Roe*'s central holding.[41] However, such changes could have transpired in the ensuing decades. Because the Court has continued to hold that a Supreme Court decision can be overturned when "dramatic technological and social changes" undermine a precedent,[42] the Court can reexamine *Roe* to see if its holding is still responsive to today's circumstances surrounding abortion.[43]

As outlined in Justice Kavanaugh's recent discussion of Justice Brandeis's "canonical opinion in *Burnet*," the Court often overrules its constitutional decisions when "correction through legislative action is practically impossible."[44] Because *Roe* is consistently used to overturn abortion legislation that aims to correct *Roe*'s outdated and incorrect factual premises of science and law[45]—which currently serve as the basis for the Court's restriction of the constitutional rights of both states and prenatal human persons—the Court is uniquely able to provide correction.

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39. *Casey*, 505 U.S. at 864.

40. *Id.* at 855.

41. *Id.* at 860.

42. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2095 (2018) (quoting Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring)).

43. For instance, if the Court takes judicial notice of the fact that a fetus is a human, then *Roe*'s central holding could be in jeopardy. Justice Stevens has suggested that "there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures." Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986). This opinion was echoed by Justices Blackmun, Brennan, and Marshall in *Webster v. Reproductive Health Services*. 492 U.S. 490, 503 (1989).

44. Ramos v. Louisiana, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting)).

45. *See infra* Part II.B.

This Article proceeds as follows. Part I describes *Roe* as a provisional holding that was responsive to the Court's evidentiary records related to the profound problems facing pregnant women, the state of 'man's knowledge' on when life begins, and states' legal treatment of fetuses[46] in non-abortive contexts. Part II details recent developments that reflect changes in the circumstances of abortion since *Roe*: (1) societal developments, through government programs and legislation, have addressed many of the detriments pregnant women faced in 1973; (2) scientific developments have proven that it is an incontrovertible scientific fact that a human's life begins at fertilization, and an international study that found there is a consensus of biologists who agree fetuses are humans (96%);[47] (3) legal developments, on both the state and federal levels, have shown fetuses are now widely recognized as legal persons in 2020—while the Court in *Roe* argued that fetuses were not legally recognized outside of the context of abortion, there are now eight contexts in which fetuses are legally recognized and protected as human persons. Part III discusses the *stare decisis* factors outlined in *Casey* and assesses whether changed circumstances might impose new obligations on the Court. This Article then concludes by arguing that these recent

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46. This Article commonly uses "fetuses" as an inclusive term for all prenatal humans—zygotes, embryos, and fetuses—because that is a common phrasing, but it uses the specific terms when appropriate.

47. *Roe* considered whether there was a consensus on when life begins among experts "trained in the respective disciplines of medicine, philosophy, and theology." Roe v. Wade, 410 U.S. 113, 159 (1973). Some in the judiciary have argued that biological findings are "aimed only at one facet" of the difficult question of when life begins. Bilbao v. Goodwin, 217 A.3d 977, 991 n.8 (Conn. 2019). Others have shown a willingness to recognize the supremacy of biological reality over beliefs based on identity or ideology. United States v. Varner, 948 F.3d 250, 258 (5th Cir. 2020). On the question of whether a fetus is a human, consider the relevance of philosophers' or theologians' possible disagreement with scientists; given the current respect for science as the dominant epistemic frame for understanding the physical world, and determining when a human's life begins: "80% of 4,107 Americans surveyed selected biologists as the group most qualified to determine when a human's life begins." *See* Steven Andrew Jacobs, Balancing Abortion Rights and Fetal Rights: A Mixed Methods Mediation of the U.S. Abortion Debate 164 (June 25, 2019) (Ph.D. dissertation, University of Chicago) (on file with Knowledge@UChicago). A fact finder discounting the scientific fact that fetuses are humans in favor of a philosophical or theological belief that fetuses are not humans in order to justify abortion would be akin to a court using theological beliefs to conclude a blood transfusion would be harmful to a child's physical health in order to justify a Jehovah's Witness refusal to permit their child to receive a life-saving blood transfusion.

developments have rendered the 1973 decision in *Roe* obsolete,[48] so the Court must update its abortion jurisprudence to reflect the realities of abortion by taking judicial notice[49] of the fact that human zygotes, embryos, and fetuses are humans and are, therefore, persons within the meaning of the Due Process and Equal Protection[50] Clauses of the Fourteenth Amendment to the U.S. Constitution.[51]

I. UNDERSTANDING *ROE V. WADE* AS A PROVISIONAL HOLDING

This Part proceeds with a textual and holistic analysis of *Roe* in the broader context of the case's oral argument and reargument sessions. Such a review reveals that the Court was not making a context-independent interpretation of the Constitution; nor was the Court tapping into the Aristotelian form of appropriate abortion jurisprudence for any society, at any point in history, based on perfect information about abortion. The Court recognized that its determinations of fact and law were limited by and contingent on the facts available to the Justices in 1973.

The Court did not abstractly assess whether pregnant women have a liberty right to have an abortion but considered whether pregnant women have a liberty right to free themselves from the significant challenges and discrimination associated with pregnancy and child-rearing in 1973.[52] The Court did not assess whether states have a right to protect all prenatal humans or whether fetuses have rights[53] because it could not find a consensus on when life begins. The

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48. Based on the framing used by Justice Thomas in his concurrence in *Gamble v. United States*, it could also be said that recent developments show *Roe* is "demonstrably erroneous" and that *stare decisis* should not be invoked to protect that precedent as it is "outside the realm of permissible interpretation" of the Fourteenth Amendment. 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

49. FED. R. EVID. 201.

50. In *Doe v. Hunter*, the Tenth Circuit considered but did not reject the argument that the lack of fetal protections is violative of the Fourteenth Amendment's Equal Protection Clause; rather, it argued that "[i]f any equal protection injury exists, it . . . [comes] from *Roe* and *Casey*." 796 Fed. App'x 532, 538 (10th Cir. 2019).

51. Some might suggest that the Fourteenth Amendment only protects against state action, but can it be said that the Amendment would permit state action to protect one class of persons (e.g., Asian-Americans) and inaction in their refusal to protect another class (e.g., African-Americans)? For more discussion, see Craddock, *supra* note 18, at 569–70.

52. *See infra* notes 84–89.

53. It is a minor distinction, but it is important to note that legal protections do not necessarily confer rights; the killing of dogs is illegal in California, but there is no law that protects canine rights. CAL. PENAL CODE § 597 (West 2020). Protecting

Court also did not assess whether abortion was a justifiable homicide due to a pregnant woman's constitutional right to abort; rather, it determined when a state's interest in protecting the potentiality of life is sufficiently compelling to outweigh a pregnant woman's right to end her pregnancy.

A. An Overview of Roe v. Wade

In 1969, Norma L. McCorvey was pregnant with her third child and sought an abortion.[54] Using the alias 'Jane Roe,' a pseudonym in the vein of 'Jane Doe,' lawyers Linda Coffee and Sarah Weddington filed suit on her behalf against Dallas County District Attorney Henry Wade as the state representative of Texas.[55] Later that year, a three-judge panel of the United States District Court for the Northern District of Texas unanimously held that the Texas law was an unconstitutional violation of Roe's right to privacy under the Ninth Amendment.[56] Wade petitioned for *certiorari* and the U.S. Supreme Court agreed to hear the case.[57]

During the reargument session, Weddington detailed the detriments pregnant women faced at that time and argued that "a woman, because of her pregnancy, is often not a productive member of society."[58] Justice Harry Blackmun wrote the majority opinions in *Roe* and *Doe v. Bolton* ("*Doe*"),[59] the 1973 companion case that was

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fetuses with abortion laws does not establish independent rights for fetuses as it could instead mean that legislators simply believe that conduct should be deterred or that those who participate in abortions are deserving of punishment.

54 Roe v. Wade, 410 U.S. 113, 120 (1973). Some take issue with the characterization of a fetus as "a child" as they take it to mean "post-birth human." Setting aside the long history of the state of pregnancy being referred to as being "with child," here, I use the term relationally to refer to the fetus as "her child." To wit, as a thirty-five-year-old man, it would be difficult to claim that I am "a child," but my saint of a mother would be correct in saying that I am "her child."

55. *Id.*

56. *Id.* at 122.

57. *Id.*

58. Transcript of Oral Argument at 12–14, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18); Transcript of Oral Reargument at 47, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

59. In *Doe*, the same 7-2 majority invalidated the medical approval requirement of a Georgia abortion law. Doe v. Bolton, 410 U.S. 179, 201–02 (1973). The Court grounded its decision in the holding that a woman's right to privacy is "broad enough to include the decision to abort a pregnancy." *Id.* at 186. *Doe* went further than *Roe*, creating a legal exception for post-viability abortions in the case of the mother's health. *Id.* at 192. Not only did the Court create an exception, it construed a pregnant woman's

released on the same day as *Roe*,[60] and he likely took notice of Weddington's arguments because the opinions had the clear purpose of remediating pregnancy-related discrimination.[61]

In January 1973, a 7-2 majority overturned the Texas law by holding that a "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" entailed a pregnant woman's right to abort her pregnancy.[62] Because the right to abortion was construed as a fundamental right under the Constitution, the high judicial review bar of strict scrutiny was triggered.[63] While laws that do not limit or interfere with a person's fundamental constitutional rights are upheld so long as they are rationally related to any state or government interest, as the Court then employs the rational basis test, which is the lowest judicial review bar, restrictions on fundamental rights can only be justified when the Court finds government action is necessary to further a "compelling state interest" and it is "narrowly drawn" to achieve this purpose.[64]

To assess whether Texas's interest was compelling, the majority sought to define Texas's interests in regulating abortion and set forth two legitimate interests on behalf of the state: (1) to protect pregnant women's health and (2) to protect the potentiality of human life.[65] The majority recognized that Texas's interest, or duty, in protecting prenatal humans "rests on the theory that a new human life is present from the moment of conception."[66] However, because the Court could not determine when life begins,[67] the majority held that they "do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."[68]

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health as broadly as possible: "The medical judgment [to determine whether abortion is necessary] may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." *Id.* Effectively, the holding licensed states to permit abortion in all conceivable cases.

60. *Id.* at 179.

61. *Roe*, 410 U.S. at 153.

62. *Id.*

63. *Id.* at 153–55.

64. "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155 (internal citations omitted).

65. *Id.* at 150.

66. *Id.*

67. *Id.* at 159.

68. *Id.* at 162.

The majority argued that it could "not resolve the difficult question of when life begins,"[69] so it held that a state's interest in protecting fetuses becomes compelling at the moment of viability.[70] While the majority stated that it could not and need not resolve the difficult question of when life begins, viability was ostensibly used as a proxy for: (1) when life begins and (2) when the government's interest in protecting fetal life is compelling.[71] Thus, the majority held that the Constitution permits states to protect viable fetuses and infringe upon a pregnant woman's fundamental constitutional right to have an abortion after fetal viability.[72]

The Court also considered the argument of Texas and some *amici* that "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment" based on "the well-known facts of fetal development" that show a fetus is a human.[73] The majority recognized that *Roe*'s case would collapse if fetuses were recognized as persons under the Fourteenth Amendment,[74] but the lack of consensus on

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69. *Id.* at 159. Note that the majority did not say that the question of when life begins was irrelevant because it lacked the evidentiary record required to resolve the question, but it could still render a decision in the case by setting the question aside. *Id.* ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

70. *Id.* at 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications."). Justice Stevens later explained that the majority in *Roe* had memorialized "a fundamental and well-recognized difference between a fetus and a human being . . . ." Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 552–53 (1989) (Blackmun, J., dissenting) (quoting *Thornburgh*, 476 U.S. at 779).

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

72. *Id.* at 154.

73. *Id.* at 156.

74. *Id.* at 156–57 ("If this suggestion of personhood is established, [Roe's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. [The attorney for Roe] conceded as much on reargument."). The majority in *Roe* thus recognized that a fetus's right to life under the Fourteenth Amendment would supersede a woman's Fourteenth Amendment liberty right to abort. Indeed, in the oral reargument session, Justice Stewart asked Roe's attorney: "Well, if—if—it were established that an unborn fetus is a person within the protection of the Fourteenth Amendment, you would have almost an impossible case here, would you not?" This caused the attorney to admit: "I would have a very difficult

when life begins was used to suggest that the evidentiary record was insufficient to recognize a fetus as a human.[75] The majority then analyzed the Constitution's references to "person,"[76] but it declined to recognize fetal rights after finding that some references did not apply to fetuses.[77]

B. The Right to be Free from Pregnancy-related Detriments

While some have argued that *Roe* was issued to address the maternal deaths associated with illegal abortions in the 1970s,[78] and the attorney for Roe did discuss it at the oral argument session,[79] this

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case." Transcript of Oral Reargument at 20–21, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18). This is because abortion would then be recognized as a homicide and seen as the legal equivalent of killing an infant or a child.

75. *Roe*, 410 U.S. at 162.

76. *See supra* note 12 and accompanying text. Generally, "person" is just another term for "human," but it is also used as an inclusive term to encompass non-humans who are deemed deserving of rights and legal protection. *See, e.g.*, Valeria Roman, *Argentina Grants an Orangutan Human-Life Rights*, SCI. AM. (Jan. 9, 2015), https://www.scientificamerican.com/article/argentina-grants-an-orangutan-human-like-rights. Setting aside the historically dangerous and deadly discriminatory decision to pick and choose which classes of humans are legally protectable persons and which ones are not, because a fetus is an organism with human DNA who is living in an early stage of the human life cycle, he or she is a human and thus a person. A fetus's lack of sentience, or any other characteristic used to recognize nonhumans as persons, is irrelevant. The claim that human fetuses are humans but not persons is akin to a daughter who, after learning her father willed his fortune to his living children and all living relatives who loved him dearly, claims her brother is not deserving of his share of the inheritance because he did not love their father dearly; the absence of dear love for the father is irrelevant because the brother is entitled to the inheritance as a living child of the father.

77. *Roe*, 410 U.S. at 157. Some argue that the Court erred in this regard because most of the references similarly did not apply to infants. Craddock, *supra* note 18, at 552.

78. *See, e.g.*, THOM HARTMANN, THE HIDDEN HISTORY OF THE SUPREME COURT AND THE BETRAYAL OF AMERICA 91–93 (2019) (noting that "[the Court] recognized the growing number of young women dying from illegal procedures" and found a fundamental right to abortion before viability based on the notion that "legal abortions unequivocally save women's lives").

79. Transcript of Oral Argument at 12, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) ("In the absence of . . . legal medically safe abortions, women often resort to the illegal abortion, which certainly carries risks of death, all the side effects, such as severe infection, permanent sterility, all the complications that result. And, in fact, if the woman is unable to get either a legal abortion or an illegal abortion in our State, she can do a self-abortion, which is certainly, perhaps by far the most dangerous . . . .").

issue was not prominently featured in the Court's opinion.[80] The claim that 5,000 to 10,000 American women were dying from illegal abortions each year was powerful rhetoric for proponents of abortion rights,[81] but members of the Court could have found the argument uncompelling, and they could have been aware that the statistic had been disproven by a Planned Parenthood medical director who found that maternal deaths from illegal abortion in the 1960s numbered in the hundreds each year.[82] While this might have played a role in the Justices' thoughts on abortion rights, the majority opinion directly addressed other issues raised by the attorney for Roe.

Sarah Weddington detailed women's need for legal abortion access by arguing that pregnant women in the 1970s were often forced to quit their jobs because they were seen as having an obligation to focus on their pregnancies.[83] Women in Texas were often forced to quit high school and college if they became pregnant.[84] Pregnant women did not receive unemployment benefits during their pregnancies, so they often faced financial hardships when they could not get welfare or a job to provide for themselves.[85] It is obvious that pregnancy could be a much more precarious time in the 1970s. Due to pregnancy-related discrimination, women had less autonomy and freedom to be self-sufficient, which presented a higher risk of abuse.

The Justices made their decision after the oral argument session where Weddington informed them that "a pregnancy to a woman is perhaps one of the most determinative aspects of her life. It disrupts her body, it disrupts her education, it disrupts her employment, and

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80. *See Roe*, 410 U.S. at 150.

81. BERNARD N. NATHANSON & RICHARD N. OSTLING, ABORTING AMERICA 193 (1979) ("How many deaths were we talking about when abortion was illegal? In NARAL (National Association for Repeal of Abortion Laws) we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always 5,000 to 10,000 a year. I confess that I knew the figures were totally false, but in the 'morality' of our revolution, it was a *useful* figure, widely accepted.").

82. Glenn Kessler, *Planned Parenthood's False Stat: 'Thousands' of Women Died Every Year Before Roe*, WASHINGTON POST (May 29, 2019), https://washingtonpost.com/politics/2019/05/29/planned-parenthoods-false-stat-thousands-women-died-every-year-before-roe. Mary Calderone, former medical director of Planned Parenthood, "attributed the decline in the mortality rate to antibiotics and the fact that [90%] of illegal abortions were done by trained physicians" in the years leading up to *Roe*. *Id.*

83. Transcript of Oral Argument at 13, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

84. *Id.*

85. *Id.*

it often disrupts her entire family life."[86] In the oral reargument session, she further claimed that "a woman, because of her pregnancy, is often not a productive member of society. She cannot work, she cannot hold a job, she's not eligible for welfare, [and] she cannot get unemployment compensation."[87] This argument was not explicitly referenced in *Roe*, but it was central to Justice Douglas's concurrence in *Doe*.[88]

A full reading of *Roe* makes it clear that remedying these challenges was a main object in recognizing a constitutional right to abort.[89] The Court justified the right by arguing that: (1) there is potential medically diagnosable harm in pregnancy; (2) becoming a mother might force a woman to have a distressful life and future; (3) a mother having another child might force a woman to have a distressful life and future; (4) psychological harm might be caused by raising a child; (5) medical and physical health can be harmed by child care; (6) there is distress in bringing an unwanted child to a family that cannot care for it; and (7) unwed motherhood was stigmatized at that time.[90]

Notice that the majority merely mentioned potential harms directly related to pregnancy without expounding on them. The majority opinion, instead, justified the need for abortion access with a discussion of the hardships associated with child-rearing.[91] Primarily focusing on the burdens of *unwanted child-rearing* instead of *unwanted pregnancy*, the Court framed child-rearing as dooming a

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86. *Id.* at 14.

87. Transcript of Oral Reargument at 47, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

88. Doe v. Bolton, 410 U.S. 179, 214–15 (1973) (Douglas, J., concurring) ("Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.").

89. Roe v. Wade, 410 U.S. 113, 153 (1973). The majority in *Roe* grounded the right to abort in an implicit right of privacy that the Court felt was "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," which it argued was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*

90. *Id.*

91. *Id.*

person to have a distressful life and future where "[p]sychological harm may be imminent."[92] The Court claimed that a person's health, both mental and physical, could be harmed by having to care for a child.[93] Interestingly, the Court also used the possible hardships endured by a pregnant woman's family to justify her right to have an abortion.[94] Finally, the Court recognized that unwed parenthood posed additional difficulties and social costs to pregnant women in the 1970s.[95]

Given the majority's preference to focus on detriments associated with child-rearing, rather than the imposition of having to carry a fetus to term and give birth to an infant, the Court seems to have focused on remedying social costs pregnant women and mothers might face; it was not focused on protecting and enshrining a pregnant woman's intrinsic right to end her pregnancy. This was most clear when the Court described its holding as consistent "with the demands of the profound problems of the present day,"[96] suggesting that its decision might have been dependent on the societal realities of the 1970s.

C. The Lack of Consensus on When Life Begins

The Court considered Texas's assertion that it had a right to protect fetuses throughout pregnancy based on the view that a human's life begins at conception.[97] However, the Court disposed of this argument because it could find no consensus on when life begins among relevant experts.[98] The Court argued that "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[99] Thus, it is important to understand their determination in the context of the state of man's knowledge in 1973.

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92. *Id.*
93. *Id.*
94. *Id.* ("There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.").
95. *Id.*
96. *Id.* at 165.
97. *Id.* at 150.
98. *Id.* at 159.
99. *Id.*

Roe was decided before the use of ultrasound technology became widespread[100] and at a time when the respect for science as the dominant epistemic frame had not yet gained the prominence that it has today,[101] as the Court's analysis of the history of 'when life begins' focused on theological views.[102] The Court talked about the beliefs of the Stoics, the view of those in the Jewish faith, and Protestant and Catholic views on when life begins.[103] After a cursory discussion of fertilization, in which it was listed among viability and live birth as interesting events for physicians and other scientists, the Court dismissed it by suggesting that there are "[s]ubstantial problems" for defining fertilization based on embryological data that indicated conception was a process rather than an event.[104]

Because the Court could not determine when life begins, it used viability as a proxy view and created the viability standard. The Court held that previable fetuses could not be legally protected because it felt it was unable to establish a consensus view that a previable fetus is a human.[105] *Roe*'s viability standard operates from the principle that the right to abortion ends when a human's life begins,[106] so it is

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100. *See, e.g.*, S. Campbell, *A Short History of Sonography in Obstetrics and Gynaecology*, 5 FACTS, VIEWS & VISION OBGYN 213, 219 (2013).

101. To wit, there is no mention of "fertilization" in *Roe* but many references to "conception." The former is a purely scientific framing of the process, and the latter is fraught with philosophical and religious overtones. Indeed, Americans are more likely to recognize the statement "human life begins at conception" as stating a philosophical or religious belief (60%) than the statement "human life begins at fertilization" (51%). Jacobs, *supra* note 47, at 211.

102. *Roe*, 410 U.S. at 160–61; *see* Matthew Bell, *When Does Life Begin? It Might Depend on Your Faith*, WORLD (May 17, 2019, 2:00 PM), https://www.pri.org/stories/2019-05-17/when-does-life-begin-it-might-depend-your-faith (discussing how different faiths determine when life begins).

103. *Roe*, 410 U.S. at 160–61.

104. *Id.* at 161. However, "moment," as defined by the Oxford Dictionary, refers to "a very brief period of time"; according to common usage, it refers to an indeterminate amount of time. *Moment*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2010). Whether a human's life can be said to begin when the sperm first penetrates the ovum or when the sperm and egg fuse, in the context of abortion laws, a human is present when an abortifacient is taken or an abortion procedure takes place because both are well past even the latest possible point in the 'process' of fertilization. *See generally* GREGG GUNDERSEN, FERTILIZATION (n.d.) (discussing fertilization as a multi-step process).

105. *Roe*, 410 U.S. at 159.

106. This is also evinced by *Roe's* discussion on when life begins and its assessment of Texas's view; the Court never suggested that a human is only protectable after they reach some developmental landmark—it instead crafted the

important to explore the history of laws that restricted abortion at the point legislators believed that a human's life begins.

1. History of the Connection Between Abortion Laws and Contemporaneous Views on When Life Begins

In English common law, which was the basis of U.S. common law, "ensoulment" (the point at which a human's soul enters their body) was the initial point recognized as the beginning of a human's life,[107] but it was later replaced by 'quickening' (the point at which a pregnant woman experiences a fetus stirring in the womb).[108] Inspired by Sir Edward Coke, Sir William Blackstone explicitly defended this English common law view in 1770 when he argued that "[l]ife . . . is a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[109] This right was legally protected; law professor Joseph Dellapenna has documented prosecutions and executions for abortions that transpired over the course of several centuries in England.[110]

In 1803, England passed its first criminal abortion statute, Lord Ellenborough's Act,[111] which established that post-quickening abortions were punishable by death.[112] However, prosecutions were rare because it was difficult for nineteenth-century judges to prove that a lost pregnancy was due to an abortion procedure.[113] Given the prominence of the long-held view that life began at quickening, the operative legal principle was that abortion should be restricted and punished at quickening because that is when they believed a human's

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viability standard and suggested a human is protectable once their life begins. For further discussion, see *infra* note 143 and accompanying text.

107. *Roe*, 410 U.S. at 133.

108. There is debate over whether ensoulment was naturally replaced by quickening or if the two were originally seen as fungible or connected by early Anglo-Saxons as they might have believed that a fetus could not move until their soul entered their body. *See*, *e.g.*, Olga Khazan, *Bringing Down the Flowers: The Controversial History of Abortion*, ATLANTIC (Mar. 2, 2016), https://www.theatlantic.com/health/archive/2016/03/bringing-down-the-flowers-the-controversial-history-of-abortion/471762/.

109. 1 WILLIAM BLACKSTONE, COMMENTARIES *4, *130.

110. *See generally* DELLAPENNA, *supra* note 19.

111. Lord Ellenborough's Act 1803, 43 Geo. 3 c. 58 (Eng.).

112. *Roe*, 410 U.S. at 136.

113. *See, e.g.*, Duane L. Ostler, *Rights Under the Ninth Amendment: Not Hard to Identify After All*, 7 FED. CTS. L. REV. 35, 78 (2013).

life began and when an abortion could be viewed as a form of homicide.[114]

Abortion was legal before quickening because an unquickened fetus was not seen as a living human; people at that time viewed unquickened fetuses in the same way people today view sperm and eggs.[115] Thus, they viewed the legal permissibility of terminating pre-quickening pregnancies in the same way people today view the permissibility of contraceptive methods.[116] Abortion was illegal before quickening not because it was the permissible destruction of a fetal life but rather because it was understood as the mere prevention of a fetal life, if it was seen as preventing life at all.

In her seminal work on the history of abortion in the United States, Leslie Reagan notes that most induced miscarriages before quickening were not intentional.[117] At the time, any break in a woman's menstrual cycle was perceived as "a worrisome imbalance in the body" that signaled a "need to bring the body back into balance by restoring the [menstrual] flow."[118] Therefore, taking abortifacients—substances that can cause early pregnancy miscarriages—was not likely recognized as an action against a fetus or a pregnancy but rather merely as a woman's attempt to improve her health.[119] However, the fetus's first kick was an experience that could make her confident that she was pregnant.[120] This analysis is the basis of Reagan's argument that "[q]uickening was a moment recognized by women and by law as a defining moment in human development" and the moment when "women recognized a moral obligation to carry the fetus to term"[121] because people at that time did not recognize a liberty

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114. *See Homicide*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/homicide (last visited Nov. 11, 2020) (defining homicide as "when one human being causes the death of another").

115. *Roe*, 410 U.S. at 132–33.

116. The majority opinion in *Roe* suggested the holding was consistent "with the lenity of the common law." *Id.* at 165. However, while the common law's treatment might have been lenient in practice, it was conceptually the same as it was when all states banned abortion throughout the nineteenth and twentieth centuries and even in the majority's opinion in *Roe*: abortion was subject to restriction at the point that people believed life began. While changing beliefs on when life begins have shifted the point at which abortion is restricted, the law has always recognized that abortion rights end when life begins.

117. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 8–9 (1997).

118. *Id.* at 8.

119. *Id.* at 9.

120. *Id.*

121. *Id.*

right to abortively kill a fetus. This archaic understanding of the beginning of life was later disproven by scientific discoveries.

Karl Ernst von Baer first proposed the four laws of animal development in 1828 after he discovered that most animals commonly start their lives as embryos and then become morphologically distinct organisms based on the uniqueness of their genetic codes.[122]

This led to states reforming their abortion laws:

> In the mid-nineteenth century, American courts began to discard the obsolete "quickening" rule in order to "protect the unborn from [the point of] fertilization." The Pennsylvania Supreme Court's ruling in 1850 that "the moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . [and there] was therefore a crime at common law," is indicative of the national mood regarding abortion in that era. The Supreme Judicial Court of Maine similarly upheld a statute repudiating the quickening standard in *Smith v. State*.[123]

After this view gained prominence in scientific literatures, the American Medical Association ("AMA") adopted it and spread the biological view that a human's life begins at fertilization.[124]

In 1857, Dr. Horatio Storer, a member of the AMA who specialized in obstetrics and gynecology, founded the AMA's Committee on Criminal Abortion to educate legislators on this scientific discovery.[125]

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122. M. Elizabeth Barnes, *Karl Ernst von Baer's Laws of Embryology*, EMBRYO PROJECT ENCYC. (Apr. 15, 2014, 4:15 PM), http://embryo.asu.edu/handle/10776/7821. While von Baer is recognized as the first person to discover a mammalian egg and the first to recognize that mammals started their lives as embryos, which has since been updated to reflect that they start their lives as zygotes, Oscar Hertwig is recognized as the first person to discover the process of fertilization in sea urchins. *See* Dean Clift & Melina Schuh, *Restarting Life: Fertilization and the Transition from Meiosis to Mitosis*, 14 NATURE REVS. MOLECULAR CELL BIOLOGY 549, 551 (2013).

123. Craddock, *supra* note 18, at 555 (internal citations omitted).

124. *See* Roe v. Wade, 410 U.S. 113, 141 (1973).

125. The Committee was comprised of a prestigious medical professor, a medical school dean, and a former president of the AMA. *See* FREDERICK N. DYER, HORATIO ROBINSON STORER, M.D. AND THE PHYSICIANS' CRUSADE AGAINST ABORTION 5 (2005); Ryan Johnson, *A Movement for Change: Horatio Robinson Storer and Physicians' Crusade Against Abortion*, 4 JAMES MADISON UNDERGRADUATE RSCH. J. 15, 18–19 (2017).

The AMA accepted the Committee's Report[126] in 1859 with a unanimous vote and proclaimed they had "proved the existence of fetal life before quickening has taken place or can take place, and by all analogy and a close and conclusive process of induction, its commencement at the very beginning, at conception itself," so they were "compelled to believe unjustifiable abortion always a crime."[127]

The Committee worked with state medical associations to help state legislators update abortion statutes to reflect the scientific view that abortion at any stage of pregnancy ends the life of a human.[128] Some have argued that the effort to criminalize abortion was not about protecting fetuses but rather the lobbying efforts served as evidence that physicians wanted to aggregate the power of physicians by driving midwives and homeopaths out of the medical profession as they performed and provided most abortions at the time. Historians James Mohr and Leslie Reagan have suggested that such legislative efforts were indeed a smokescreen.[129] In their historical accounts of abortion laws in the nineteenth century, they argue that the AMA's efforts were more about the desire to marginalize midwives in pursuit

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126. The report stated, in part, the following resolutions:

> [W]hile physicians have long been united in condemning the act of producing abortion, at every period of gestation, except as necessary for preserving the life of either mother or child, it has become the duty of this Association, in view of the prevalence and increasing frequency of the crime, publicly to enter an earnest and solemn protest against *such unwarrantable destruction of human life* . . . . [T]he Association request the zealous co-operation of the various State Medical Societies in pressing this subject upon the legislatures of their respective States; and that the President and Secretaries of the Association are hereby authorized to carry out, by memorial, these resolutions.

12 AM. MED. ASS'N, THE TRANSACTIONS OF THE AMERICAN MEDICAL ASSOCIATION 77–78 (1859) (emphasis added).

127. HORATIO R. STORER, ON CRIMINAL ABORTION IN AMERICA 13 (1860). The logic suggests that they viewed the elective killing of a preborn human as a crime under homicide statutes that addressed the killing of born humans. *See* SUFFOLK DIST. MED. SOC'Y, REPORT OF THE COMMITTEE ON CRIMINAL ABORTION 8 (1857) ("[T]he child is really alive from the very moment of its conception, and from that very moment is, and should be considered, a distinct being.").

128. JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 155–56 (1978).

129. *Id.* at 34–37; REAGAN, *supra* note 117, at 90–112.

of their goal to professionalize medicine and less about abortion or the protection of fetuses.[130]

However, an attempt to marginalize these paraprofessionals could have been rooted in the desire to restrict the supply of abortion practitioners. This is a more parsimonious and reasonable explanation than one that centers on a conspiracy among university-trained medical physicians. The strength of the language in the statutes, in which abortion was often described as "child-murder," suggests that the legislative efforts had the primary purpose of casting abortion as a violent crime.[131]

If their sole focus was on strengthening their control of the profession, and they were unconcerned with protecting the rights of preborn humans, then it is curious why they did not advocate for the standardization and medicalization of abortion as that would grow their business and expand their share of pregnancy-related services. The fact that they did not seize that opportunity—and in fact ceded their potential market share by making abortion illegal—flies in the face of the inference that physicians solely, or even primarily, advocated for the restriction of abortion for professional, business, or financial reasons.

The more reasonable inference is that physicians in the late nineteenth century sought to reform abortion laws because they felt a need to update laws to reflect scientific developments and they recognized abortion as an form of homicide, especially because that was the stated reason in their AMA reports, medical articles, legal articles, and tracts.[132] Historian James Mohr is a strong proponent of the view that physicians' motivations were rooted in professional concerns, but he admitted that there were also "personal factors" and

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130. MOHR, *supra* note 128, at 145; REAGAN, *supra* note 117, at 90–112.

131. *See* 63 GENERAL AND LOCAL LAWS AND JOINT RESOLUTIONS, PASSED BY THE FIFTY-SEVENTH GENERAL ASSEMBLY OF THE STATE OF OHIO 202–03 (1867). In the report that recommended the passage of Ohio's statute to restrict abortion, which was passed in the same legislative session in which they ratified the Fourteenth Amendment, the senate committee stated abortion was "child-murder" because quickening was a "ridiculous distinction" and "[p]hysicians have now arrived at the unanimous opinion that the fetus in utero is alive from the very moment of conception," determining that "the willful killing of a human being, at any stage of its existence, is murder." *Id.* at 233–34; *see also* Justin Buckley Dyer, *The Constitution, Congress and Abortion,* 11 N.Y.U. J.L. & LIBERTY 394, 416–17 (2017) ("[T]he Ohio Senate Committee on Criminal Abortion that drafted the statute described abortion as 'child-murder'" and "the Ohio legislators who voted to ratify the Fourteenth Amendment thought unborn human beings were persons.").

132. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 142 (1973).

"a no doubt sincere belief on the part of most regular physicians that abortion was morally wrong."[133]

Because nineteenth-century developments in embryology and biology coincided with nationwide restrictions of abortion throughout pregnancy, it is important to consider the expressed legislative intent of nineteenth-century abortion laws in the context of the contemporaneous passage and ratification of the Fourteenth Amendment.[134] Indeed, Supreme Court Justice Hugo Black argued that "[t]he history of the [Fourteenth] Amendment proves that the people were told that its purpose was to protect weak and helpless human beings."[135] Thus, if legislators who ratified the Fourteenth Amendment were also of the mind that abortion ended the life of a human, given the AMA's work to spread the stance that life begins at fertilization, legislators could have seen these laws as required by the Amendment's Equal Protection Clause.[136] While this history might make a compelling case for the fertilization view, the attorneys for Texas were not able to persuade the Court.[137]

2. Why *Roe* Established Viability as a Proxy for When Life Begins

Roe characterized Texas's interest in protecting prenatal humans as being predicated on "the theory that a new human life is present from the moment of conception."[138] The Court argued that it lacked an evidentiary record to "resolve the difficult question of when life begins" and that "at [that] point in the development of man's knowledge, [the judiciary was] not in a position to speculate as to the answer" because "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus."[139]

It is remarkable that the Court considered experts in philosophy and theology as having expertise relevant to the question of when life begins as it suggests that members of the majority did not consider

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133. MOHR, *supra* note 128, at 164–65.

134. *See infra* note 473.

135. Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1938) (Black, J., dissenting).

136. *See generally* Daniel Gump, *Criminal Abortion Before the Fourteenth Amendment*, HUM. DEF. INITIATIVE (Nov. 2, 2020, 2:00 PM), https://humandefense.com/criminal-abortion-before-the-fourteenth-amendment (citing various criminal abortion laws to the nineteenth century).

137. *Roe*, 410 U.S. at 158.

138. *Id.* at 150.

139. *Id.* at 159.

the question as a purely scientific assessment of physical reality but rather as a matter of inquiry subject to metaphysical concepts and supernatural beliefs. Indeed, the majority opinion included discussions on how both the Stoics and those of the Jewish faith believed that a human's life does not begin until birth, the Aristotelian theory of mediate animation, and pre-nineteenth-century Roman Catholic dogma on ensoulment.[140] As to why the Court did not solely focus on the scientific perspective, which seems reasonable because the question of when a living thing is properly classified as a member of a certain species fits squarely in the domain of biology ('the science and study of living things'), consider how Texas's attorneys represented their views in oral arguments.

During the oral argument session for *Roe*, Texas Assistant Attorney General Jay Floyd cast doubt on the scientific view of when life begins.[141] After Justice Thurgood Marshall questioned Floyd about the scientific basis for Texas's stance on when life begins, Floyd eventually relented: "Mr. Justice, there are un-answerable questions in this field."[142] Justice Blackmun similarly interrogated Floyd's replacement during the *Roe* reargument session, but Floyd's replacement Texas Assistant Attorney General Robert C. Flowers also failed to provide a definitive statement:

> QUESTION: . . . Is it not true, or is it true that the medical profession itself is not in agreement as to when life begins?
> MR. FLOWERS: I think that's true, sir. But from a layman's standpoint, medically speaking, we would say that at the moment of conception from the chromosomes, every potential that anybody in this room has is present, from the moment of conception.
> QUESTION: But then you're speaking of potential of right.
> MR. FLOWERS: Yes, sir.[143]

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140. *Id.* at 160–61.

141. Transcript of Oral Argument at 45, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

142. *Id.*

143. Transcript of Oral Reargument at 25–26, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18). This can be said to be a crucial concession that crippled Texas's case because it opened the door for the Court to shift the discussion from whether a state has a compelling interest in protecting a prenatal human to when a state's interest in potential life is compelling. *See Roe*, 410 U.S. at 162–63. The Court claimed that the shift made Texas's case easier, but it could be seen as a semantic sleight of hand that

Given the lack of scientific certitude, the Court could not be confident that there was a scientific consensus or even that it was a question science could answer.[144] Without a consensus view, or a scientific view in which they could be confident, the members of the majority looked to the law but, as will be discussed in the next section, they found that life was typically recognized as starting at birth. Unable to determine when life begins, the Court crafted the viability standard as a practical and pragmatic proxy for when life begins.[145]

Because the Court effectively held that a human's life begins at viability and recognized that a state's right to protect a viable fetus supersedes a woman's right to have an abortion, it overturned abortion laws that protected fetuses at fertilization. However, it upheld and strengthened the legal principle that abortion rights end when a human's life begins.

D. The Legal Status of Fetuses in Non-abortive Contexts

The Court presented its analysis of the law's recognition of fetuses as persons in its discussion of Texas's interest to protect life. However, the holding that "the unborn have never been recognized in the law as persons in the whole sense" also factored into the Court's assessment of the constitutional status of fetuses.[146] Indeed, the majority argued that states were "reluctant" to recognize that life begins before birth or "accord legal rights to the unborn."[147] Finally,

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allowed the majority to create the viability standard. *Id.* at 150 ("In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone."). The Court ostensibly argued that a previable fetus is a potential life—as they only have the potential to live a full life if they continue to subsist on the mother's body—and ceases to be a potential life, and in fact becomes an actual life, once they reach fetal viability because they can then live a full life without the aid of their mother's body. *Id.* at 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.").

144. *Roe*, 410 U.S. at 159.

145. *See* discussion *supra* notes 106 and 143.

146. *Roe*, 410 U.S. at 162. Justice Douglas's concurrence in *Doe* cited Justice Clark's reasoning that fetuses are not legal persons because "[n]o prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life." Doe v. Bolton, 410 U.S. 179, 218 (1973) (Douglas, J., concurring); *see also* Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1, 9–10 (1969).

147. *Roe*, 410 U.S. at 161 ("In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or

the Court looked to explicit references to "person" in the Constitution to assess the claim that a fetus is a person within the meaning of the Fourteenth Amendment's Equal Protection Clause.[148]

The majority assessed references to "person" in the Constitution and concluded that "[n]one indicates, with any assurance, that ["person"] has any possible pre-natal application."[149] The Court's determination was based on an intertextual analysis of the Constitution that focused on its use and meaning of "person."[150] The Court cited thirteen sections of the Constitution and its amendments outside of the target Fourteenth Amendment[151] that included references to "person."[152] Out of the thirteen sections, eleven similarly do not apply to infants[153] and only two can be argued to apply to infants but not fetuses, but it cannot be assumed that infants were counted in the census in the eighteenth century under the Apportionment Clause[154] or that the tax under the Migration and Importation provision would have applied to infants.[155]

Using the majority's standard for assessing whether a fetus is a "person," one could similarly argue that none of the thirteen sections indicated with any assurance that "person" has any possible application to infants. Yet it would be difficult to imagine the Court using such an analysis to show that infants are not persons within the meaning of the Fourteenth Amendment. The Court, however, did not stop its analysis there, arguing that inconsistencies between Texas's abortion law and other homicide laws precluded a fetus from being recognized as a person under the Fourteenth Amendment.[156]

The majority argued against fetal rights by citing the fact that Texas did not proscribe all abortions. Because the statute included exceptions,[157] the Court suggested that the inclusion of an exception

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to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.").

148. *Id.* at 156–59.

149. *Id.* at 157.

150. *Id.*

151. Analyzing the references to "person" in the Fourteenth Amendment in trying to understand what "person" means under the Fourteenth Amendment would betray the exercise.

152. *Roe*, 410 U.S. at 157.

153. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 8 (no infant could conceivably hold an "Office of Profit or Trust"); *id.* art. IV, § 2, cl. 2 (no infant could conceivably be charged with a crime); *see also* Craddock, *supra* note 18, at 552.

154. U.S. CONST. art. I, § 2, cl. 3 (Apportionment Clause).

155. *Id.* art. I, § 9, cl. 1 (Migration and Importation Provision).

156. *Roe*, 410 U.S. at 157–58 nn.54–55.

157. *Id.* at 157–58 n.54.

to save the life of the mother cuts against the argument that a fetus has a constitutional right to life.[158] The Court also pointed out that a woman is not punished for an abortion and that the penalty for abortion is less than the penalty for murder under the Texas law.[159] Thus, the Court cited Texas's leniency and mercy in its treatment of pregnant women who have abortions as a reason why fetuses do not deserve constitutional protections.[160]

In sum, the majority in *Roe* argued that fetuses are not persons with rights based on its holding that: (1) fetuses are not recognized or protected as persons outside of the context of abortion; (2) constitutional references to "person" did not apply to fetuses; and (3) abortion statutes were not as restrictive or punitive as other homicide statutes. The question is if that argument would prevail today in light of recent developments.

II. RECENT SOCIETAL, SCIENTIFIC, AND LEGAL DEVELOPMENTS

The preceding Part demonstrated that *Roe* did not defend the liberty right to abort as an abstract principle; it defended the right by arguing that there were significant detriments related to pregnancy and secondary risk factors related to child-rearing. The Court sought to address these issues by recognizing and protecting abortion rights at a time when it was not definitively or widely known when life began, or even from what perspective that should be determined, and at a time when states did not typically recognize fetuses as humans outside of the abortion context.

This Part details the following: (1) state and federal lawmakers' strides in addressing issues that affect pregnant women and young mothers; (2) scientific evidence that shows Americans recognize 'when life begins' as a fundamentally scientific question and biologists from around the world affirm the view that life begins at fertilization; and (3) progressive state laws that now recognize fetuses as humans, persons, and victims in various legal contexts, including homicide and murder statutes.

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158. The exception could reflect Texas's interest to build an affirmative defense of self-defense into the law. Whatever the state's motivation, this was an exception to a state power; however, it was not an exception to a fetus's rights.

159. *Roe*, 410 U.S. at 157–58 n.54. Homicide and murder statutes are complicated legislation that use normative judgments to disparately punish premeditated killings, killings in a moment of passion, and deaths that result from negligence. It is not clear how these distinctions would suggest any of the victims are not human persons with rights under the Constitution or how such an analysis of fetal rights would avail.

160. *Id.* at 151.

A. Protections for Pregnant Women in 2020

Over the last fifty years, America has made huge strides in gender equality and countering the notion that parents must be married.[161] These efforts have provided protection, resources, and entitlements to pregnant women and mothers, which has increased their engagement in our economy and society. While more men (16%) graduated college than women (10%) in 1973, more women (35%) than men (34%) graduated college in 2017.[162] In 2016, for the first time, women outnumbered men in law school.[163] Women earn the majority of doctoral degrees and outnumber men 141 to 100 in graduate school programs.[164] In 1973, over 75% of men participated in the workforce compared to 45% of women,[165] but by 2018 the gap between men (69%) and women (57%) had shrunk significantly.[166] While some have attributed women's economic strides to legal abortion access,[167] these social changes have followed the advent of laws and government programs designed to protect the educational and economic opportunities of pregnant women.

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161. *See, e.g.*, Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018), https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents ("Since 1968, [there has been] a fourfold increase in the number of unmarried parents.").

162. Erin Duffin, *Percentage of the U.S. Population with a College Degree, by Gender 1940-2019*, STATISTA (Mar. 31, 2020), https://www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by-gender.

163. Staci Zaretsky, *There Are Now More Women in Law School Than Ever Before*, ABOVE THE L. (Mar. 7, 2018, 12:27 PM), https://abovethelaw.com/2018/03/there-are-now-more-women-in-law-school-than-ever-before.

164. Mark J. Perry, *Women Earned Majority of Doctoral Degrees in 2019 for 11th Straight Year and Outnumber Men in Grad School 141 to 100*, AM. ENTER. INST. (Oct. 15, 2020), https://www.aei.org/carpe-diem/women-earned-majority-of-doctoral-degrees-in-2019-for-11th-straight-year-and-outnumber-men-in-grad-school-141-to-100.

165. Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789, 808 fig. 3 (2017).

166. *Civilian Labor Force Participation Rate by Age, Sex, Race, and Ethnicity*, U.S. DEP'T OF LAB. STAT. (Sept. 1, 2019), https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm.

167. *See, e.g.*, Jeff Jacoby, *Chelsea Clinton's Twisted Argument About Abortion and Economic Growth*, BOS. GLOBE (Aug. 21, 2018, 11:03 PM), https://www.bostonglobe.com/opinion/2018/08/22/chelsea-clinton-twisted-argument-about-abortion-and-economic-growth/6ajP713rANYAOizO30hLeN/story.html.

Title IX of the Education Amendments of 1972 ("Title IX"),[168] a federal civil rights law that prohibits discrimination, protects pregnant women and new parents, ensuring that they are fully able to participate in educational programs and activities.[169] Title IX also permits pregnant women to take medically necessary leaves of absence and protects them from harassment, intimidation, or any other form of discrimination related to their pregnancy.[170]

In 1978, the United States Congress passed the Pregnancy Discrimination Act, which protects pregnant women from being treated differently from non-pregnant workers.[171] The Family and Medical Leave Act ("FMLA"),[172] which is effective for most employers, was also passed to protect employees who need to take a leave of absence for family or medical reasons. Under the FMLA, pregnant women's jobs are protected for up to twelve weeks in each twelve-month period for specified family and medical reasons, which includes pregnancy.[173] Congress has worked to improve upon the FMLA by providing pregnant women with paid leave for up to twelve weeks,[174] and the administration of President Donald Trump signed into law an act guaranteeing twelve weeks of paid parental leave for federal civilian employees.[175] Apart from support in the early stages of child-rearing, government programs have been instituted to help ensure young parents and young children have access to proper nutrition and health insurance.

The U.S. Department of Agriculture's Food and Nutrition Service, which is a set of federal programs that provides grants to states, has a program for Women, Infants, and Children ("WIC"). Under WIC, low-income pregnant women and children up to five-years old can receive subsidized supplemental food, health care referrals, and nutrition education.[176] The Pregnancy Assistance Fund ("PAF") grant program, established as part of the 2010 Affordable Care Act passed

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168. 20 U.S.C. § 1681 (2018).

169. 34 C.F.R. § 106.40(a) (2019).

170. *Id.* § 106.40(b)(5).

171. *See* 42 U.S.C. § 2000e(k) (2018).

172. 29 U.S.C. § 2612 (2018).

173. *Id.* § 102.

174. *See* Claire Zillman, *Kirsten Gillibrand is Giving Her Paid Family Leave Proposal Its First Trump-Era Test*, FORTUNE (Feb. 7, 2017, 3:00 PM), http://fortune.com/2017/02/07/trump-paid-family-leave-gillibrand.

175. *See* Memorandum from Dale Cabaniss, Dir., U.S. Off. of Pers. Mgmt., to Heads of Exec. Dep'ts & Agencies (Dec. 27, 2019).

176. *Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)*, U.S. DEP'T OF AGRIC., https://www.fns.usda.gov/wic (last visited Jan. 10, 2021).

by Congress,[177] was founded as part of a federal strategy to support "expectant and parenting teens, women, fathers, and their families."[178] Support of pregnant women has become such a public policy concern that there are now programs to support pregnant wards of states.[179] Babies can even be insured for free through the Children's Health Insurance Program ("CHIP").[180] However, perhaps the most important development since 1973 focuses on a young parent's ability to relinquish custody of their child.

In 1973, due to child abandonment laws, parents were required to care for their children until the age of eighteen to avoid criminal penalty.[181] It was thus reasonable for the Court in *Roe* to envision child-rearing as a great detriment for people as life circumstances change and it could greatly hurt both parties if a parent is unable to care for their child.[182] With Safe Haven Laws, young parents are now able to leave their newborns at any fire department, police department, or state agency and legally relinquish the custody of their children.[183] This first developed in Alabama after a string of infanticides[184] and was first passed as a state law by Texas in 1999;[185] all fifty states now have Safe Haven Laws.[186] There are also laws pursuant to the Adoption and Safe Families Act[187] that permit parents to terminate their parental rights for various reasons. Compared to the past when some would leave their newborn babies in dumpsters and others would have to find someone to take responsibility for their children, any parent can now protect

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177. 42 U.S.C. § 18202 (2018).

178. *About PAF*, OFF. POPULATION AFF., https://opa.hhs.gov/grant-programs/pregnancy-assistance-fund-paf/about-paf (last visited Sept. 4, 2020).

179. *See, e.g.*, *Teen Parenting Service Network (TPSN)*, CAL. EVIDENCE-BASED CLEARINGHOUSE FOR CHILD WELFARE, http://www.cebc4cw.org/program/teen-parenting-service-network/detailed (last visited Sept. 4, 2020).

180. *See Medicaid & CHIP: The Children's Health Insurance Program (CHIP)*, HEALTHCARE.GOV, https://www.healthcare.gov/medicaid-chip/childrens-health-insurance-program (last visited Sept. 4, 2020).

181. *See, e.g.*, TEX. PENAL CODE ANN. § 25.05 (West 1973).

182. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992) ("[T]he inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent.").

183. *See* CHILD WELFARE INFO. GATEWAY, INFANT SAFE HAVEN LAWS 1 (2016).

184. Stacie Schmerling Perez, *Combating the "Baby Dumping" Epidemic: A Look at Florida's Safe Haven Law*, 33 NOVA L. REV. 245, 251 (2008).

185. *Id.*

186. CHILD WELFARE INFO. GATEWAY, *supra* note 183, at 2.

187. *See* 42 U.S.C. § 675(5)(E) (2020).

themselves from the costs and detriments of child-rearing by relinquishing custody of a child at a moment's notice.[188]

Advocates of abortion legalization viewed it as necessary in a twentieth-century climate that discouraged birth control and failed to educate women on how to control their reproduction.[189] However, today, men and women have access to a bevy of contraceptive methods that have greatly reduced the need for abortion.[190] Twenty-first-century women have access to numerous forms of contraceptives and are able to purchase emergency contraception; indeed, 99% of American women report having used contraception.[191]

Back in the 1970s, some women felt pressured to drop out of school when they became pregnant.[192] Today, there is such availability of daycare and such support for it, on top of the option to utilize adoption services, that women are no longer put in a position to choose between having a child and pursuing their education. To summarize, the pressure on pregnant women has gone down significantly due to the feedback loop of society and law. Today, all fifty states even have laws that require the father of a child to pay or reimburse expenses related to the pregnancy and birth.[193]

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188. *See* Perez, *supra* note 184, at 248.

189. *See generally* Sarah McCammon, *How the Approval of the Birth Control Pill 60 Years Ago Helped Change Lives*, NPR (May 9, 2020, 9:44 AM), https://www.npr.org/2020/05/09/852807455/how-the-approval-of-the-birth-control-pill-60-years-ago-helped-change-lives (showcasing the stigma surrounding birth control in the mid-twentieth century).

190. *See, e.g.*, Emily Crockett, *The Abortion Rate is at an All-time Low – and Better Birth Control is Largely to Thank*, VOX (Jan. 18, 2017, 11:00 AM), https://www.vox.com/identities/2017/1/18/14296532/abortion-rate-lowest-ever-because-birth-control.

191. GUTTMACHER INST., CONTRACEPTIVE USE IN THE UNITED STATES 1 (2020); *see also* Rachel K. Jones, *People of All Religions Use Birth Control and Have Abortions*, GUTTMACHER INST. (Oct. 19, 2020), https://www.guttmacher.org/article/2020/10/people-all-religions-use-birth-control-and-have-abortions (stating the following percentages of women "have *ever* used a contraceptive method other than natural family planning" according to 2017 data: "99.6% of women with no religious affiliation have done so; 99.0% of Catholics; 99.4% of mainline Protestants; 99.3% of evangelical Protestants; and 95.7% of people with other religious affiliations.").

192. *See, e.g.*, Ben Cosgrove, *Fighting Teen Pregnancy: Portrait of a Radical High School Program, 1971*, LIFE, https://www.life.com/history/teen-pregnancy-high-school-1971/ (last visited Sept. 4, 2020).

193. *See* Daniel Gump, *A Discussion of Prenatal Child Support Laws*, HUM. DEF. INITIATIVE (Feb. 5, 2020, 1:30 PM), https://humandefense.com/a-discussion-of-prenatal-child-support-laws.

In 1972, during the oral reargument session for *Roe*, Sarah Weddington, the attorney for *Roe*, argued that "a woman, because of her pregnancy, is often not a productive member of society. She cannot work, she cannot hold a job, she's not eligible for welfare, she cannot get unemployment compensation."[194]

In 2020, a woman, despite her pregnancy, is often a productive member of society.[195] She can work.[196] She can hold a job.[197] She's eligible for welfare.[198] She can get unemployment compensation.[199] Thus, the reality of being pregnant in 1973 and most of the profound problems pregnant women faced at that time, which were cited by *Roe*, no longer exist. The Court no longer needs to protect abortion rights simply to ensure a pregnant woman can be a productive member of society.

B. The Scientific Consensus on When Life Begins

In the oral reargument session for *Roe*, Justice Stewart signaled the importance of resolving who should determine when life begins: "Now, how should that question be decided, is it a legal question, a constitutional question, a medical question, a philosophical question,

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194. Transcript of Oral Argument at 47, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

195. Pregnant women can be physically active. *See, e.g.*, Elizabeth Narins, *10 Extremely Pregnant Women Working Out Life It's NBD*, COSMOPOLITAN (Jan. 10, 2017), https://www.cosmopolitan.com/health-fitness/a8579714/pregnancy-workouts. Pregnant women can also have stellar academic achievements. *See, e.g.*, Kerry Breen, *Single Mom Gives Birth to Twins During Grad School, Earns Two Degrees*, TODAY (July 25, 2019, 1:53 PM), https://www.today.com/parents/single-mom-has-twins-graduate-school-earns-two-degrees-t159462?fbclid=IwAR0wZBcfsrXjYhZ4BXtBwpgW5MXiUjsHj3KwiNIudE7VDTdn6INuPA8pZ4.

196. Pregnant women can finish a state bar exam while in labor. *See, e.g.*, David Lat, *Pregnant Woman Takes Bar Exam While in Labor, Delivers Baby Right After!*, ABOVE THE LAW (July 29, 2011, 1:35 PM), https://abovethelaw.com/2011/07/outstanding-bar-performance-pregnant-woman-takes-bar-exam-while-in-labor-delivers-baby-right-after.

197. Many pregnant women work jobs. *See, e.g.*, George Gao & Gretchen Livingston, *Working While Pregnant is Much More Common Than it Used to Be*, PEW RSCH. CTR. (Mar. 31, 2015), https://www.pewresearch.org/fact-tank/2015/03/31/working-while-pregnant-is-much-more-common-than-it-used-to-be/.

198. *See, e.g.*, *Temporary Assistance for Needy Families (TANF)*, ILL. DEP'T HUM. SERVS., https://www.dhs.state.il.us/page.aspx?item=30358 (last visited Sept. 4, 2020).

199 S*ee, e.g.*, Alison Doyle, *Does Pregnancy Affect Unemployment Benefits?*, BALANCE CAREERS (May 2, 2020), https://www.thebalancecareers.com/unemployment-eligibility-when-you-are-pregnant-2064170.

or a religious question, or what is it?"[200] The majority opinion in *Roe* similarly framed the question as possibly relevant to multiple domains: "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[201]

In my dissertational research, I surveyed Americans to explore their interpretations of the question 'When does a human's life begin?'[202] Based on the Court's discussion of relevant disciplines, a list of five groups of arbiters was developed and presented to participants: biologists, philosophers, religious leaders, Supreme Court Justices, and voters.[203]

Eighty percent of the 4,107 Americans[204] surveyed "selected biologists as the group most qualified to determine when a human's life begins."[205] Americans who identified as pro-choice were more likely to select biologists (86%) than Americans who identified as pro-life (69%).[206] In response to a follow-up essay question that asked participants why they made their selection,[207] those who selected biologists wrote that they viewed biologists as "objective experts in the study of life (91%)."[208] Given these responses, the theological analyses in *Roe* seem to no longer avail in 2020 as most Americans now embrace science and science-based policy.

When asked to anticipate the biological view on when life begins

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200. Transcript of Oral Reargument at 23, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

201. Roe v. Wade, 410 U.S. 113, 159 (1973).

202. *See* Jacobs, *supra* note 47, at 206.

203. *Id.* at 207–08. Participants were asked to answer the following item: "Which group is most qualified to answer the question 'When does a human's life begin?'" and were presented the following options: "Biologists," "Philosophers," "Religious Leaders," "Supreme Court Justices," and "Voters."

204. *Id.* at 164. "[T]he sample was predominantly pro-choice (62%), liberal (63%), socialist (54%), and Democratic (66%). The sample was well-educated (63% graduated from college) and had more females (57%) than males (43%)." *Id.*

205. *Id.* at 208. Participants were asked this question in five versions of the survey and a majority of participants selected biologists in each survey (range: 76–81%). *Id.* at 208 n.201.

206. *Id.* Many of those who identified as pro-life selected religious leaders for strategic purposes (e.g., they believe that religious leaders are more likely to say that a human's life begins at fertilization) and not because they see the question as a fundamentally theological matter.

207. *Id.* Participants were presented the following essay prompt: "Why do you think they are most qualified?" *Id.* at 208 n.203.

208. *Id.*

that is held by most biologists,[209] Americans who identified as pro-choice were less likely (23%) to select fertilization than those who identified as pro-life (54%).[210] Pro-choice participants were also less likely to predict that biologists would say a human's life begins at some point before viability (58%) than participants who identified as pro-life (91%).[211]

Given the lack of agreement of Americans on when life begins and the clear showing that most Americans believe "when life begins" is a scientific question, biologists' views are important. Indeed, when biologists were presented with the question of which group is most qualified to determine when a human's life begins, a majority selected biologists (64%); when they were informed that 80% of Americans had selected biologists as the group most qualified, they were asked if they agreed with Americans' selection, and 68% agreed with Americans' view that biologists are the most qualified group to determine when a human's life begins.[212]

1. International Study of Biologists' Views

Before reporting the study's methods and results, it is important to note that assessing individual scientists' opinions is not one of the required steps of the scientific method.[213] However, this method of assessing a scientific view has "contributed to debates about evolution and anthropogenic climate change."[214] It is particularly useful in such controversial debates when the general public is reluctant to accept a scientific view because of the potential social, political, and legal implications; while the public can distrust a small group of experts,

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209. *Id.* at 209. "Participants were asked to assess the following item: 'If biologists were asked, "From a biological perspective, when does a human's life begin?", what would most biologists select as the point at which a human's life begins?' and were presented the following options: 'The moment of conception/fertilization', 'The moment a fetus' heart beats', 'The moment a fetus shows brain activity', 'The moment a fetus can feel pain', 'The moment a fetus can be viable outside the womb', 'The moment a fetus is born', and 'Other'; those who responded 'Other' were [innumerous so they were] excluded from analyses as outliers." *Id.* at 209 n.209.

210. *Id.* at 209.

211. *Id.*

212. *Id.* at 243.

213. A fifteenth-century survey that found most "cultivators of science" rejected the heliocentric view would not have made it any less true.

214. Jacobs, *supra* note 47, at 237 (internal citations omitted); *see, e.g.*, Gayathri Vaidyanathan, *How to Determine the Scientific Consensus on Global Warming,* SCI. AM.: CLIMATEWIRE (July 24, 2014), http://www.scientificamerican.com/article/how-to-determine-the-scientific-consensus-on-global-warming.

casting them as biased actors, it is more difficult to discount the view of thousands or the showing that virtually all of those consulted are in agreement.

A large sample can also allow for comparisons of groups with different ideological or political stances. Nuanced analyses could help explain "whether the finding is ubiquitous among all groups of biologists or if the finding was being driven by a certain religious belief (e.g., Atheism, Catholicism), a stance on abortion (e.g., pro-choice, pro-life), or a [certain] life circumstance (e.g., not having children, having four children)."[215] If there is consensus in each sub-group of biologists, then it would support a reading of the overall finding as robust, reliable, and immune from concerns of personal or ideological bias.

a. Methodology

Faculty members of biology departments from colleges, universities, and institutes around the world were recruited to participate.[216] Using lists that ranked the top biology programs in America and throughout the world,[217] over 1,000 academic institutions were targeted for recruitment. The "institutions' biology and life science faculty webpages" were used to collect "[c]ontact information of post-docs, lecturers, professors, and professors emeriti" and, in sum, 62,469 academic biologists[218] were asked to complete a survey on how biology applies to broader social issues.[219] As 7,402 participated in the study, there was a 12% survey response rate.[220]

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215. Jacobs, *supra* note 47, at 238.

216. *Id.* Initially, participants were only recruited from American universities, but the study expanded to academic institutions throughout the world.

217. *Id.*; *see also Best Biological Sciences Programs*, U.S. NEWS (2018), https://www.usnews.com/best-graduate-schools/top-science-schools/biological-sciences-rankings; *QS World University Rankings by Subject 2015 - Biological Sciences*, TOP UNIVS. (2015), https://www.topuniversities.com/university-rankings/university-subject-rankings/2015/biological-sciences.

218. Jacobs, *supra* note 47, at 238. "From [July of 2016] to [January of 2018,] e-mails were sent to academic biologists; the prolonged period allowed for refinements of the survey instruments, which shared many identical items throughout the total of nine survey versions—75% of the participants were presented all of the same items, and five of the versions were [pilot experiments and were only] presented to a combined 6% of participants." *Id.* at 238 n.36.

219. *Id.* at 237–39.

220. *Id.* at 238–39. This response rate is typical in studies of this type and similar to what was found in a recent study of sociologists. *See* Mark Horowitz et al., *Sociology's Sacred Victims and the Politics of Knowledge: Moral Foundations Theory*

In sum, 5,577 scientists of 1,058 academic institutions affirmed or rejected at least one of the five operative statements of the view that a human's life begins at fertilization. 95% of the sample held a Ph.D. and most participants identified as non-religious (63%).[221] The sample had "more liberals (89%) than conservatives (11%)" and more "Democrats (92%) than Republicans (8%)."[222] Importantly, as to their ideological leanings on abortion, more participants identified as pro-choice (85%) than pro-life (15%). The international sample included biologists "born in [eighty-six] countries around the world."[223]

b. The Survey

Biologists were asked to assess the biological view that a human's life begins at fertilization,[224] which is based on the scientific

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and Disciplinary Controversies, 49 AM. SOCIOLOGIST 459, 464 (2018). It is important to note that each survey collection was cut off within days of the start of its distribution period, and no follow-up e-mails could be sent because of institutional and IRB issues. Sending out e-mails to numerous professors at institutions caused some universities to worry that the recruitment e-mails were 'spam,' and this was exacerbated by some pro-abortion participants who took issue with being asked to assess the biological humanity of fetuses. *See* Josh Hammer, *HAMMER: A World-Renowned University Suppressed Important Abortion Research. Here's The Full Story.*, DAILY WIRE (July 2, 2019), https://www.dailywire.com/news/hammer-world-renowned-university-suppressed-josh-hammer; Steve Jacobs, *I Asked Thousands of Biologists When Life Begins. The Answer Wasn't Popular*, QUILLETTE (Oct. 16, 2019), https://quillette.com/2019/10/16/i-asked-thousands-of-biologists-when-life-begins-the-answer-wasn't-popular.

221. Jacobs, *supra* note 47, at 239. For example, American participants included biologists from Harvard University, Princeton University, Stanford University, and Yale University. Other participants included biologists from the Indian Institute of Technology Bombay, University of Cambridge, University of Oxford, and University of Chinese Academy of Sciences. For a complete list of all of the participants' institutions, see ILL. RIGHT TO LIFE, THE SCIENTIFIC CONSENSUS ON WHEN LIFE BEGINS: SOURCES THAT ESTABLISH THE CONSENSUS VIEW THAT A HUMAN'S LIFE BEGINS AT FERTILIZATION 24–50 (n.d.).

222. Jacobs, *supra* note 47, at 239. Because this was an international survey, it is possible that participants who work in schools outside of the U.S. might not have known to what 'Democrat' and 'Republican' refer; however, participants were able to skip the question, and the same patterns were observed in samples of participants who work outside of the U.S., as none had more than 10% of participants identify as Republican.

223. *Id.* "Participants rated themselves on three scales from 1–10 that had "pro-choice", "liberal", and "Democratic" (1 through 5) on one end and "pro-life", "conservative", and "Republican" on the other end (6 through 10)." *Id.* at 239 n.40.

224. "This view represents when a fetus is properly described as a biological human (i.e., an organism with a human genome that is developing in one of the stages of the human life cycle); this represents the most objective descriptive view of a fetus,

conventions of the human life cycle and genetics-based biological classifications.[225] According to the Carnegie stages of human development,[226] a human's life cycle begins at fertilization.

> A review of recent discoveries and the development of scientific literature since *Roe* [establish the incontrovertible scientific fact] that sperm-egg plasma membrane fusion (fertilization) is the [ontogenetic] starting point of a human organism (a human being). Dr. Maureen Condic, who is a member of the National Science Foundation's National Science Board which "advises Congress and the Administration on issues in science," writes: 'From the moment of sperm-egg fusion, a human zygote acts as a complete whole . . . . The zygote acts immediately and decisively to initiate

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as it is free from arbitrarily-selected criteria like independence, [sentience], or viability—to say one is a biological human is to say that they are unique from non-human species and they are unique from other cells and tissue that have human DNA but are not developing in one of the stages of the life cycle; it is simply a definitional term based on when biologists classify a human fetus as a biological human [with the same method] that they [use to] classify an infant or [an] adult [as] a biological human." *Id.* at 240 n.42.

225. With recent technological advancements, biologists are now able to use observable genomic DNA to biologically classify a single-celled organism as a member of a species. Modern biological classification methods make use of such genetic analyses in concert with classic methods that analyze morphological and phenotypical characteristics. *See generally* Mariko Kouduka et al., *A Solution for Universal Classification of Species Based on Genomic DNA*, INT'L J. PLANT GENOMICS, 2007. This is not to say that there are no philosophical or metaphysical dimensions to the question as even the principle 'all humans are humans' requires the law of noncontradiction, but there is a crucial difference between the degree to which this view, as any other scientific concept, entails some epistemic or metaphysical components and a philosophical view that is predicated on biological and developmental landmarks (e.g., humans are capable of physiological independence, so a human's life begins at viability).

226. "[T]he Carnegie Stages of Early Human Embryonic Development were instituted in 1942 by the National Museum of Health and Medicine's Developmental Anatomy Center . . . . They are based on internationally acclaimed research going back to the 1880's and have been consistently updated since then to the present by the international nomenclature committee consisting of [twenty to twenty-three] Ph.D.'s in human embryology from around the world." Dianne N. Irving, *Carnegie Stages for Issues Concerning the Early Human Embryo*, LIFEISSUES.NET (Jan. 1, 2015), http://www.lifeissues.net/writers/irv/irv_226new.url.html; *see also* Brooke Stanton, Roe v. Wade *Has Spread Scientific Illiteracy About When Life Begins*, WASHINGTON EXAM'R (Jan. 18, 2019), https://www.washingtonexaminer.com/opinion/op-eds/roe-v-wade-has-spread-scientific-illiteracy-about-when-life-begins.

> a program of development that will, if uninterrupted by accident, disease, or external intervention, proceed seamlessly through formation of the definitive body, birth, childhood, adolescence, maturity, and aging, ending with death. This coordinated behavior is the very hallmark of an organism.' A human organism's self-directed "program of development" initiated by fertilization . . . is the human life cycle. A necessary and sufficient condition for an organism with human DNA to be classified as a human being is simply that it is developing in one of the stages of the life cycle [which begins at] fertilization.[227]

From a biological perspective, a human zygote is a human because: (1) it has a complete human genome, which will dictate its development and remain throughout the entirety of the human life cycle and (2) it is developing in the human life cycle.[228] Thus, based on biological classification principles, "a human zygote is as much a human being as an infant, a teenager,[229] or an adult—it is simply a human being in an earlier stage development."[230] In fact, the Court has recognized that human zygotes are organisms.[231]

Scientific papers routinely advance this view.[232] For instance, leading scientific journals like *Nature* and *Science* have published

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227. Brief of Amicus Curiae Illinois Right to Life Supporting Respondent-Cross-Petitioner at 9–11, June Med. Servs., L.L.C. v. Gee, 905 F.3d 787 (5th Cir. 2018) (Nos. 18-1323, 18-1460) (internal citations omitted).

228. *Id.* at 11.

229. Dr. Alfred Bongiovanni, University of Pennsylvania School of Medicine, concluded in his testimony for the 1981 U.S. Senate hearing on the Human Life Bill: "I am no more prepared to say that these early stages [of development in the womb] represent an incomplete human being than I would be to say that the child prior to the dramatic effects of puberty . . . is not a human being. This is human life at every stage albeit incomplete until late adolescence." *The Human Life Bill: Hearing on S. 158 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong. 45 (1981) (statement of Dr. Alfred Bongiovanni, University of Pennsylvania School of Medicine).

230. Brief of Amicus Curiae Illinois Right to Life, *supra* note 227, at 11–12.

231. "[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. . . . We do not understand this point to be contested by the parties." Gonzales v. Carhart, 550 U.S. 124, 147 (2007) (internal citation omitted).

232. For over 200 quotes that affirm this view from peer-reviewed journals, medical textbooks, and other sources, see generally WHEN DOES LIFE BEGIN?, 2020 REPORT: SCIENTIFIC, LEGAL, PRO-LIFE, & PRO-CHOICE SOURCES ON WHEN A HUMAN'S LIFE BEGINS (2020).

articles that, respectively, state: "The life cycle of mammals begins when a sperm enters an egg"[233] and "fertilization is the sum of the cellular mechanisms that pass the genome from one generation to the next and initiate development of a new organism."[234] Thus, the survey's statements described the biological view that "a human's life begins at fertilization"[235] as it is the leading view in the scientific literature and among both scientific experts and Americans.[236]

Most items in the survey "called for participants' assessments of whether a statement was 'Correct' or 'Incorrect.'"[237] "Participants were also given an open-ended survey question on their biological view of 'when a human's life begins.'"[238] The other five operative questions varied in how explicitly they framed the descriptive view on when life begins, so all were used to develop a robust understanding of participants' assessments of the view.[239]

> However, all could be argued to be logically and biologically equivalent.[240] The implicit statements represent the 'textbook view' that fertilization produces an organism at the beginning of the ontogenetic developmental process of mammals (i.e., the mammalian life cycle). The explicit statements

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233. Yuki Okada et al., *A Role for the Elongator Complex in Zygotic Paternal Genome Demethylation*, 463 NATURE 554, 554 (2010).

234. Paul Primakoff & Diana G. Myles, *Penetration, Adhesion, and Fusion in Mammalian Sperm-Egg Interaction*, 296 SCI. 2183, 2183 (2002).

235. Jacobs, *supra* note 47, at 241.

236. *See, e.g.*, MORNING CONSULT, NATIONAL TRACKING POLL #190555 (2019); T.A. Elliott et al., *'When Does Life Begin?' Results of an Online Survey*, 90 FERTILITY & STERILITY S65, S66 (2008); Knights of Columbus, Marist Poll: Americans' Opinions on Abortion 10 (Jan. 2018); Peter Moore, *Three Quarters Say Longmont Attack is Murder,* YOUGOV (Apr. 7, 2015, 10:41 AM), http://today.yougov.com/topics/politics/articles-reports/2015/04/07/three-quarters-say-longmont-attack-murder.

237. Jacobs, *supra* note 47, at 240. "On Question 1, a small number of participants (394 out of 4993) were asked to assess it as 'Accurate' or 'Inaccurate' on earlier versions of the survey and these participants affirmed the statement as 'Accurate' (89%) at a similar rate as those who affirmed the statement overall (91%); further, in the other unique assessment, one of the versions of the survey used an interval scale (e.g., a 1–10 rating from 'Incorrect' to 'Correct') and 97% affirmed the item as they selected a rating between 6–10." *Id.* at 240 n.42.

238. *Id.* at 240.

239. *Id.* at. 241.

240. *Id.* Indeed, many participants complained in the comments section about how these questions seemed repetitive, and many responded to the essay question by saying, 'I've already answered this question multiple times.'

> focus on a specific species of mammals, 'humans' (i.e., *Homo sapiens sapiens*), and concretely frame[d] the implied ontogenetic life cycle as 'a life'—these elements are collectively represented by the phrase 'a human's life.' While [these items] . . . were assessments of the specific view on when life begins, the open-ended essay question . . . was incorporated to learn the view biologists would focus on when they were free to write about the biological view they believe[d] to be most correct.[241]

c. Results

On the first formulation of the biological view that a human's life begins at fertilization,[242] 91% of participants affirmed the statement (4,555 out of 4,993); biologists who identified as very pro-choice[243] (90%) affirmed it at a lower rate than those who identified as neutral (94%) and very pro-life (97%).[244] On the second item,[245] 88% of participants affirmed the statement (3,984 out of 4,510); biologists who identified as very pro-choice (88%) affirmed it at a similar rate as those who identified as neutral (88%) and at a lower rate than those who identified as very pro-life (92%).[246] For the third item,[247] 77% of

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241. *Id.* at 241–42. "Almost all higher animals start their lives from a single cell, the fertilized ovum (zygote) . . . [at t]he time of fertilization represents the starting point in the life history, or ontogeny, of the individual." *See* BRUCE M. CARLSON, PATTEN'S FOUNDATIONS OF EMBRYOLOGY 3 (6th ed. 1996).

242. "Question 1: Implicit Statement 'The end product of mammalian fertilization is a fertilized egg ('zygote'), a new mammalian organism in the first stage of its species' life cycle with its species' genome.'" Jacobs, *supra* note 47, at 244.

243 *Id.* Abortion stances in Q1–Q6 were based on their responses to the question, "How would you rate your opinion?," with which they were presented a scale from 1–10 where "Pro-Choice = 1, Pro-Life =10," and, as in Table 1, (see *infra* p.813) stances were broken "down with a quintile split, those who rated their opinion as 1–2 were coded as 'very pro-choice', 3–4 as 'pro-choice', 5–6 as 'neutral', 7–8 as 'pro-life', and those who rated their opinion as 9–10 were coded as 'very pro-life'." Jacobs, *supra* note 47, at 244 n.53.

244. *Id.* at 244.

245. "Question 2: Implicit Statement 'The development of a mammal begins with fertilization, a process by which the spermatozoon from the male and the oocyte from the female unite to give rise to a new organism, the zygote.'" *Id.*

246. *Id.* at 245.

247. "Question 3: Implicit Statement 'A mammal's life begins at fertilization, the process during which a male gamete unites with a female gamete to form a single cell called a zygote.'" *Id.*

participants affirmed the statement (3,153 out of 4,078); biologists who identified as very pro-choice (72%) affirmed it at a lower rate than those who identified as neutral (88%) and very pro-life (92%).[248]

On the fourth item,[249] 75% of participants affirmed the statement (2,500 out of 3,334);[250] biologists who identified as very pro-choice (69%) affirmed it at a lower rate than those who identified as neutral (86%) and pro-life (92%).[251] On the fifth item,[252] 69% of participants affirmed the statement (2,744 out of 3,980); biologists who identified as very pro-choice (64%) affirmed it at a lower rate than those who identified as neutral (80%) and very pro-life (89%).[253]

Table 1. Biologists' Affirmation Rates of Items Separated by Demographics.[254]

Gender	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
Male	91% (N = 2,472)	89% (N = 2,233)	79% (N = 2,004)	77% (N = 1,654)	69% (N = 1,954)
Female	91% (N = 1,425)	88% (N = 1,349)	74% (N = 1,187)	72% (N = 978)	71% (N = 1,132)

Language	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
Native English	92% (N = 2,150)	89% (N = 2,166)	74% (N = 1,863)	73% (N = 1,743)	70% (N = 1,828)
Non-Native English	90% (N = 964)	87% (N = 974)	80% (N = 933)	81% (N = 843)	63% (N = 864)

248. *Id.*

249. "Question 4: Explicit Statement 'In developmental biology, fertilization marks the beginning of a human's life [because] that process produces an organism with a human genome that has begun to develop in the first stage of the human life cycle.'" *Id.* at 254.

250. *Id.*

251. *Id.*

252. "Question 5: Explicit Statement 'From a biological perspective, a zygote that has a human genome is a human because it is a human organism developing in the earliest stage of the human life cycle.'" *Id.*

253. *Id.* at 246.

254. *Id.* at 246–49.

Table 1 (Continued)

Education	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
Master's	94% (N = 139)	82% (N = 136)	79% (N = 127)	80% (N = 118)	73% (N = 114)
MD	99% (N = 69)	87% (N = 62)	86% (N = 55)	87% (N = 47)	79% (N = 52)
MD/PhD	91% (N = 330)	89% (N = 313)	80% (N = 296)	78% (N = 264)	65% (N = 280)
PhD	91% (N = 4,417)	89% (N = 3,975)	77% (N = 3,578)	74% (N = 2,896)	69% (N = 3,514)

Specialty	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
Anatomy	93% (N = 135)	92% (N = 107)	84% (N = 106)	90% (N = 89)	86% (N = 99)
Biochemistry	92% (N = 385)	86% (N = 297)	71% (N = 269)	65% (N = 207)	60% (N = 266)
Botany	93% (N = 256)	85% (N = 216)	81% (N = 203)	79% (N = 164)	73% (N = 200)
Cellular Biology	93% (N = 420)	88% (N = 426)	77% (N = 375)	70% (N = 311)	65% (N = 366)
Developmental Biology	90% (N = 155)	83% (N = 151)	80% (N = 135)	76% (N = 118)	64% (N = 132)
Ecology	88% (N = 894)	87% (N = 848)	77% (N = 770)	73% (N = 617)	74% (N = 767)
Genetics	92% (N = 546)	89% (N = 441)	76% (N = 372)	75% (N = 290)	68% (N = 353)
Molecular Biology	92% (N = 610)	89% (N = 602)	78% (N = 542)	77% (N = 436)	68% (N = 529)
Physiology	95% (N = 353)	90% (N = 352)	79% (N = 318)	72% (N = 246)	67% (N = 311)
Zoology	92% (N = 431)	91% (N = 298)	83% (N = 274)	83% (N = 210)	79% (N = 266)
Other	91% (N = 794)	90% (N = 765)	74% (N = 706)	75% (N = 651)	64% (N = 683)

Stance on Abortion	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
Very Pro-Choice	90% (N = 2,821)	88% (N = 2,606)	72% (N = 2,280)	69% (N = 1,919)	64% (N = 2,217)
Pro-Choice	92% (N = 616)	88% (N = 561)	81% (N = 492)	80% (N = 437)	71% (N = 466)
Neutral	94% (N = 291)	88% (N = 275)	88% (N = 257)	86% (N = 207)	80% (N = 242)
Pro-Life	92% (N = 224)	91% (N = 203)	90% (N = 198)	92% (N = 168)	83% (N = 180)
Very Pro-Life	97% (N = 329)	92% (N = 309)	92% (N = 294)	92% (N = 257)	89% (N = 286)

Table 1 (continued)

Ideological Identity	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
Very Liberal	91% (N = 1,399)	89% (N = 1,417)	73% (N = 1,248)	70% (N = 1,139)	64% (N = 1,202)
Liberal	92% (N = 1,065)	88% (N = 1,055)	75% (N = 937)	76% (N = 856)	68% (N = 901)
Neutral	91% (N = 425)	86% (N = 435)	79% (N = 389)	77% (N = 376)	72% (N = 371)
Conservative	93% (N = 175)	93% (N = 178)	91% (N = 169)	92% (N = 164)	83% (N = 163)
Very Conservative	94% (N = 67)	99% (N = 70)	96% (N = 69)	96% (N = 69)	91% (N = 68)

Political Identity	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
Strong Democrat	91% (N = 1,520)	89% (N = 1,536)	75% (N = 1,354)	74% (N = 1,240)	65% (N = 1,314)
Democrat	91% (N = 783)	87% (N = 778)	71% (N = 676)	72% (N = 623)	67% (N = 642)
Neutral	91% (N = 469)	88% (N = 472)	79% (N = 433)	78% (N = 321)	72% (N = 420)
Republican	98% (N = 101)	93% (N = 106)	91% (N = 101)	88% (N = 101)	85% (N = 98)
Strong Republican	89% (N = 35)	97% (N = 37)	94% (N = 36)	94% (N = 35)	85% (N = 34)

# of Children	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
0	91% (N = 1,033)	88% (N = 955)	75% (N = 821)	75% (N = 684)	68% (N = 802)
1	91% (N = 686)	87% (N = 635)	76% (N = 566)	73% (N = 440)	68% (N = 522)
2	91% (N = 1,516)	90% (N = 1,397)	75% (N = 1,254)	73% (N = 1,044)	68% (N = 1,219)
3	91% (N = 461)	89% (N = 422)	87% (N = 388)	84% (N = 323)	76% (N = 381)
4+	98% (N = 164)	88% (N = 147)	85% (N = 137)	84% (N = 118)	79% (N = 137)

Table 1 (Continued)

Religious Identity	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
Agnostic	90% (N = 524)	88% (N = 537)	72% (N = 446)	72% (N = 406)	65% (N = 434)
Atheist	90% (N = 854)	90% (N = 857)	72% (N = 749)	70% (N = 697)	63% (N = 721)
No Religion	91% (N = 511)	85% (N = 509)	77% (N = 470)	78% (N = 422)	66% (N = 427)
Buddhist	86% (N = 43)	89% (N = 46)	76% (N = 41)	78% (N = 40)	56% (N = 39)
Hindu	96% (N = 27)	93% (N = 27)	85% (N = 27)	81% (N = 26)	87% (N = 23)
Muslim	96% (N = 22)	86% (N = 21)	79% (N = 19)	90% (N = 19)	68% (N = 19)
Jewish	93% (N = 110)	90% (N = 112)	70% (N = 95)	68% (N = 90)	62% (N = 93)
Catholic	93% (N = 304)	91% (N = 308)	85% (N = 294)	82% (N = 271)	79% (N = 282)
Lutheran	97% (N = 58)	90% (N = 57)	68% (N = 57)	70% (N = 50)	70% (N = 53)
Protestant	94% (N = 429)	90% (N = 435)	84% (N = 390)	81% (N = 375)	74% (N = 392)

School Continent	**Q1 Implicit**	**Q2 Implicit**	**Q3 Implicit**	**Q4 Explicit**	**Q5 Explicit**
Asia	91% (N = 154)	91% (N = 150)	85% (N = 149)	86% (N = 132)	60% (N = 139)
Africa	96% (N = 45)	95% (N = 43)	86% (N = 42)	97% (N = 38)	79% (N = 38)
Australia	95% (N = 220)	92% (N = 210)	86% (N = 200)	82% (N = 186)	74% (N = 189)
Europe	90% (N = 1,027)	88% (N = 1,019)	83% (N = 987)	83% (N = 904)	67% (N = 925)
North America	92% (N = 3,373)	88% (N = 2,985)	74% (N = 2,608)	69% (N = 2,035)	70% (N = 2,595)
South America	77% (N = 30)	82% (N = 28)	76% (N = 25)	82% (N = 22)	50% (N = 26)

Of those who assessed multiple statements, 96% affirmed at least one of the statements (4,463 out of 4,650) and only 4% rejected each statement (187 out of 4,650).[255] "85% affirmed at least half of the statements they assessed ([3,936] out of [4,650])."[256] Overall, "there were 37,479 assessments of statements that represented the view that

255. *Id.* at 249.
256. *Id.*

a human's life begins at fertilization, and 80% [of responses affirmed the view] ([30,044] out of [37,479])."[257] Considering every "[instance] in which an answer was provided, which includes non-assessments, 67% of responses affirmed the view ([30,044] out of [44,707]), 17% rejected the view (7435 out of 44707), and 16% [said they did not know or they could not answer] ([7,228] out of [44,707])."[258]

Because Q4[259] and Q5[260] "went beyond statements and took the form of arguments, as they entailed justifications" for the view, the affirmation rates on these items could be suppressed; the participants could have agreed with the initial statement and yet disagreed with the justification.[261] However, this seems unlikely as the affirmation rates for Q3 and Q4 are similar even though the former did not contain an argument and the latter did.[262] Overall, the high affirmation rates of Q4 and Q5 suggest that participants do not only affirm the view, but that they also affirm the well-established justification.[263]

These data would then not only suggest that biologists recognize fetuses as biological humans but that they recognize fetuses as humans *because* fetuses are organisms with human DNA developing in the human life cycle, which is consistent with the scientific literature.[264] This suggests that biologists recognize that the human life cycle describes the entire ontogenetic chronology of a human's life.[265] "Thus, the beginning of the chronology is consonant with the beginning of life."[266]

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257. Most participants were presented the five questions twice: once before they were asked questions about their abortion attitudes, and once again after they were asked those questions. Previous results solely reported the initial responses to the first iteration of the questions, but this measure is an overall assessment of each item they answered, which included both iterations. *Id.* at 249–50.

258. *Id.* at 250.

259. "Question 4: Explicit Statement 'In developmental biology, fertilization marks the beginning of a human's life [*because*] *that process produces an organism with a human genome that has begun to develop in the first stage of the human life cycle*.'" *Id.* at 245 (emphasis added).

260. "Question 5: Explicit Statement 'From a biological perspective, a zygote that has a human genome is a human *because it is a human organism developing in the earliest stage of the human life cycle*.'" *Id.* (emphasis added).

261. *Id.* at 250.

262. *Id.*

263. *Id.*

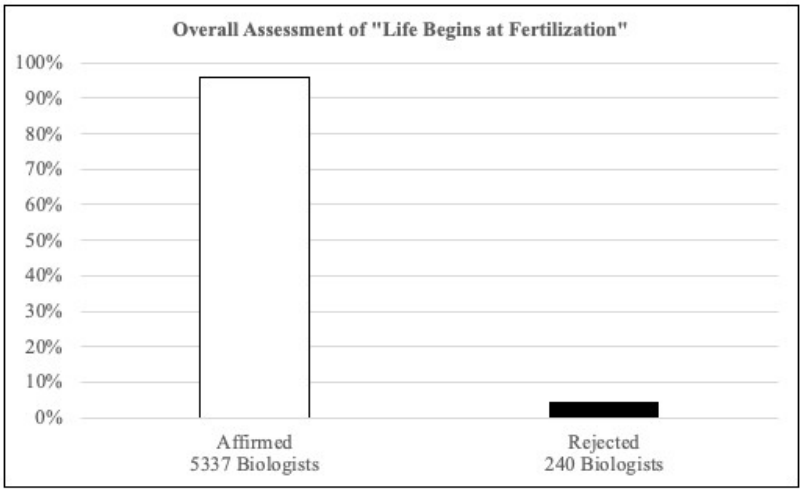
264. *Id.*

265. *Id.*

266. *Id.*

> Overall, as depicted in [Figure 1 below], 5,577 participants assessed at least one of the five statements [(96%)], and only 240 participants did not affirm at least one of the statements (4%). 86% affirmed at least half of the items they assessed, and 64% affirmed each item they assessed. Thus, regardless of the phrasing of the question, a majority of biologists affirm[ed] the underlying biological view that a human's life begins at fertilization.[267]

Figure 1. Biologists' Overall Assessment of the View 'Life Begins at Fertilization.'[268]



Because participants affirmed "a stated biological view in the previous measures, it was important to learn" whether they would write about this same view when answering "an open-ended essay question."[269]

> Most participants wrote about various points during pregnancy: when the sperm fertilizes the egg, when the zygote implants in the uterus, cell differentiation, neurogenesis, the first heartbeat, the first brain

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267. *Id.*

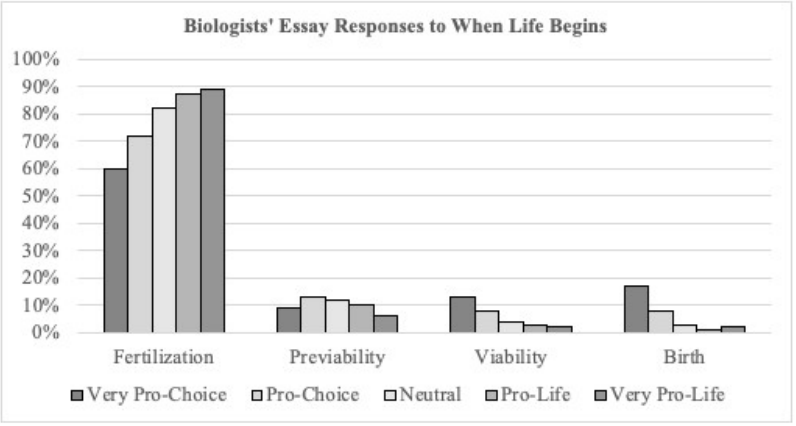
268. *Id.* at 251.

269. *Id.* "Question 6: Open-Ended Essay Question 'From a biological perspective, how would you answer the question 'When does a human's life begin?'" *Id.* at 252.

> waves, the first pain response, fetal viability, and birth. Since a small percent of participants wrote about each of the various points after fertilization and before viability, they were grouped and given the code 'pre-viability.'[270]

Altogether, as depicted in Figure 2 below, "responsive answers were given one of four codes: fertilization, previability, fetal viability, and birth."[271] Consistent with biologists' affirmation of the biological view that a human's life begins at fertilization in Q1–Q5, a consensus of biologists wrote about fertilization (68%).[272] Ten percent were given the code "previability," 10% wrote about fetal viability, and 12% wrote about birth.[273]

Figure 2. Biologists' Coded Essay Responses to "When Does Life Begin?"[274]



270. *Id.* at 251.

271. *Id.* at 252. Nonresponsive answers did not represent a fetus's developmental point or state during pregnancy; many of the nonresponsive answers simply refused to seriously respond to the question while others focused on the beginning of 'human life' (phylogeny) rather than 'a human life' (ontogeny) and claimed that life never really begins or ends as it has continued in an unbroken chain from the first humans to modern humans.

272. *Id.*

273. *Id.*

274. *Id.* at 253. "Question 6: Open-Ended Essay Question 'From a biological perspective, how would you answer the question 'When does a human's life begin?'" *Id.* at 252.

As with the other items, participants who most strongly identified as pro-choice wrote about fertilization "at a lower rate (60%) than those who were neutral in their stance on abortion (82%) and those who identified most strongly as pro-life (89%)."[275] Unsurprisingly, most of the biologists who wrote that a human's life begins at viability or birth identified as very pro-choice or pro-choice, and very few neutral, pro-life, or very pro-life participants did.[276] Figure 2, above, "shows that [the majority of] biologists across the ideological spectrum" not only affirm the view that a human's life begins at fertilization, but believe it is the most correct biological view.[277] Thus, whatever effect ideology might have had on individual biologists' scientific understanding of when life begins was washed out in the large sample. Legislators and the Court can be confident that there is a robust scientific consensus on when life begins.

d. Replicability and Robustness

"Multiple survey versions were utilized in this study."[278] The reported results aggregated the findings from each of the surveys to represent all of the data collected.[279] This permitted a comparison of the results between surveys to address concerns about the study's replicability and the findings' robustness, which are invoked by a broader 'replication crisis' that has plagued the social sciences in recent years.[280]

Before analyzing differences in the results of the surveys, "it is important to compare the participants who participated in each survey. For instance, some surveys only had participants from American universities, while others [drew from universities around the world]."[281] "In terms of the distributions on abortion stances, each survey had a majority of participants who identified as pro-choice (range: 81–90%). Similarly, each survey had a majority of participants who identified as liberal (range: 86–97%) and Democratic ([range:] 89–96%)."[282] In comparing the results across the surveys, the

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275. *Id.* at 252.
276. *Id.*
277. *Id.* at 254.
278. *Id.* at 254.
279. *Id.* at 254–55.
280. *Id.* at 255; Ed Yong, *Psychology's Replication Crisis Can't Be Wished Away*, ATLANTIC (Mar. 4, 2016), https://www.theatlantic.com/science/archive/2016/03/psychologys-replication-crisis-cant-be-wished-away/472272/.
281. Jacobs, *supra* note 47, at 255.
282. *Id.*

statements in the five questions were affirmed by a majority of biologists throughout the different versions of the survey.

> Question 1 was asked in nine non-identical surveys, so it was asked in nine different contexts. 91% of participants affirmed the [item throughout the surveys] (range: 87–97%). Question 2 was asked in seven different surveys; overall, 88% affirmed the statement . . . (range: 85–100%). Question 3 was asked in seven different surveys; overall, 77% affirmed the statement . . . (range: 75–89%). Question 4 was asked in seven different surveys; overall, 75% affirmed the statement . . . (range: 64–85%). Question 5 was asked in seven different surveys; overall, 88% affirmed the statement . . . (range: 49–89%). Finally, in the essay question, fertilization was consistently the most [common] selection across seven different surveys (range: 56–75%).[283]

As a measure of consistency, 1,044 participants assessed all six items and consistently affirmed or rejected the fertilization review in each item. 1,011 participants affirmed all five statements and wrote about fertilization in response to the essay question (97%), and thirty-three participants rejected all five statements and wrote about some later point (3%).[284] "Of those participants who consistently rejected the view that a biological human's life begins at fertilization, [twenty-nine] were very pro-choice, three were pro-choice, one was neutral, and none were pro-life or very pro-life."[285]

> Altogether, a [consensus of] biologists affirmed items that contain the following scientific propositions: (1) a human zygote is an organism, (2) a mammal's development begins at fertilization, (3) a mammal's life begins at fertilization, (4) [a human's life begins at fertilization,] (5) a human's life begins at fertilization because it is developing in the first stage of the human

283. *Id.* at 255–56. "Question 5 had a wider range because there was a survey that was an outlier (49%), which was much lower than the survey with second-lowest affirmation rate (63%); this could have been due to the small sample size (n = 49)." *Id.* at 256 n.65.

284. *Id.* at 256.

285. *Id.* at 256–57.

> life cycle, (6) a human zygote is a human, and (7) a human zygote is a human because it is developing in the human life cycle. Thus, a large majority of biologists believes that "a human's life begins at fertilization" is not only a correct biological statement, but it is the correct biological view on when a human's life begins.[286]

e. Relevance and Significance

Despite the overwhelming evidence that there is little dispute of this view in the scientific community, as it has been common knowledge among scientists since Karl Ernst von Baer first proposed the four laws of animal development in 1828,[287] the Court's abortion jurisprudence does not reflect the current scientific record; this could be due to the overall informational asymmetry between biologists and the American public of which Justices are a part.

In 1933, Dr. Alan Guttmacher, the namesake of the Guttmacher Institute,[288] wrote that "it is difficult to picture a time when it was not part of the common knowledge" that a human's life begins at fertilization.[289] Yet, today, a minority of Americans recognizes this straightforward biological fact.[290] Only 38% of Americans believe, from a biological perspective, that a human's life begins at fertilization.[291] This misunderstanding of biology is not trivial.

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286. *Id.* at 257.

287. Barnes, *supra* note 122.

288. *The History of the Guttmacher Institute*, GUTTMACHER INST., https://www.guttmacher.org/about/history (last visited Jan. 11, 2021).

289. ALAN F. GUTTMACHER, LIFE IN THE MAKING: THE STORY OF HUMAN PROCREATION 3 (1933).

290. Only 35% of pro-choice Americans and 59% of pro-life Americans said they viewed the statement, 'human life begins at conception' as a biological fact. Knights of Columbus, *supra* note 236, at 11. In a more recent national poll, 19% of those who *opposed* strict abortion laws and 67% of those who *supported* strict abortion laws stated that they believe human life begins at conception; interestingly, only 9% of young Democrats held this view. MORNING CONSULT, *supra* note 236, at 16. In a recent survey, 23% of pro-choice Americans and 59% of pro-life Americans selected fertilization as the point a human's life begins from a biological perspective. Jacobs, *supra* note 47, at 209–10.

291. Jacobs, *supra* note 47, at 257. A 2019 poll similarly found that 38% of Americans believe that a human's life begins at conception. MORNING CONSULT, *supra* note 236, at 16.

Americans' abortion attitudes primarily depend on their beliefs on when life begins.[292] 90% of pro-choice Americans believe that abortion rates would go down if it became common knowledge that a human's life begins at fertilization, and 83% believe the propagation of the fertilization view would reduce support for legal abortion access.[293] Thus, in both the Court and society at large, "support for unborn children's legal rights might be artificially suppressed, and support for abortion rights artificially inflated" because most do not know that a human's life begins at fertilization and that each successful abortion ends the life of a human.[294]

2. Expert Testimony in Legislative Hearings

During hearings conducted by the Senate Judiciary Subcommittee on Senate Bill 158, the "Human Life Bill," numerous scientific experts testified on the question of when life begins. After hours of testimony by scientists and medical doctors, the Official Senate Report reached the following conclusion: "Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being—of a being that is alive and is a member of the human species. There is overwhelming agreement on this point in countless medical, biological, and scientific writings."[295]

In the hearings, French geneticist Dr. Jerome Lejeune testified that "[l]ife has a very, very long history, but each individual has a very neat beginning—the moment of its conception" because "[t]o accept the fact that after fertilization has taken place a new human has come into being is no longer a matter of taste or of opinion . . . it is plain experimental evidence."[296] Dr. Hymie Gordon, professor of medical genetics and physician at the Mayo Clinic, testified: "[N]ow we can say, unequivocally, that the question of when life begins—is no longer

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292. Among factors predicting Americans' abortion attitudes (e.g., religion, political ideology, value placed on children, beliefs about rights and equality), one's stance on when life begins was by far the strongest predictor. Namely, the earlier one believes life begins, the more likely one is to support restrictions on abortion. Jacobs, *supra* note 47, at 217–19.

293. *Id.* at 213.

294. Hammer, *supra* note 220.

295. STAFF OF THE SUBCOMM. ON SEPARATION OF POWERS OF THE COMM. ON THE JUDICIARY, 97TH CONG., REP. ON THE HUMAN LIFE BILL 7 (1981).

296. *The Human Life Bill: Hearing on S. 158 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong. 8–10 (1981) (statement of Dr. Jerome Lejeune, Professor of Fundamental Genetics, Medical College of Paris, France).

a question for theological or philosophical dispute. It is an established scientific fact. Theologians and philosophers may go on to debate the meaning of life or the purpose of life, but it is an established fact that all life, including human life, begins at the moment of conception."[297]

Experts from leading institutions testified that there are no alternative theories on when a human's life begins in the scientific literature. Dr. Gordon testified: "I have never encountered in my reading of the scientific literature—long before I concerned with abortion, euthanasia, and so on—anyone who has argued that life did not begin at the moment of conception, or that it was not a human conception if it resulted from the fertilization of a human egg by a human sperm. As far as I know, there has been no argument about these matters."[298] This lack of any published alternative scientific theories was also attested to by Dr. Micheline Matthew-Roth, who worked as a principal research associate in the Department of Medicine at the Harvard Medical School.[299]

Most recently, the legislature in South Dakota took up this issue through their Abortion Task Force after a bill was passed to evaluate abortion.[300] The report from South Dakota concluded that "abortion terminates the life of a unique, whole, living human being."[301] While these legislative hearings could have been primarily comprised of experts whose beliefs about abortion were congenial to the view that fetuses are humans at fertilization, there are many abortion doctors and opponents of fetal rights who similarly support this biological view.

3. Views of Abortion Doctors and Abortion Rights Advocates

In a 1970 editorial for the medical journal *California Medicine*, the writers presciently suggested that abortion advocates would need to "separate the idea of abortion from the idea of killing," but that this would reflect a "curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception."[302] Some

297. *Id.* at 13–17.

298. *Id.* at 21.

299. *Id.* at 16.

300. H.B. 1233, 2005 Leg. Assemb., 80th Sess. (S.D. 2005).

301. S.D. ABORTION TASK FORCE, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 13 (2005).

302 Malcolm S. M. Watts, *A New Ethic for Medicine and Society*, 113 CAL. MED. 46, 47 (1970).

might try to ignore this fact, but many supporters of abortion rights have conceded it.[303]

At a National Abortion Federation conference in 2015, Dr. Lisa Harris, the medical director of Planned Parenthood of Michigan, urged members of the pro-choice movement to stop disputing the humanity and personhood of fetuses.[304] Speaking about the pro-life movement's use of images of fetal remains: "I actually think that we should be less about denying the reality of those images . . . [because] we actually see the fetus the same way . . . [and] we might actually both agree that there's violence in here . . . . [I]t's a person, killing."[305] She argued that "ignoring the fetus is a luxury of activists and advocates," but abortion doctors "can't ignore the fetus."[306] Indeed, many abortion doctors have publicly recognized fetuses as humans and abortion as the killing of a human.

Dr. Leroy Carhart, the abortion doctor named in the landmark Supreme Court case on the legality of "partial birth abortion,"[307] was recently interviewed by the BBC and referred to a fetus as a "baby" on multiple occasions.[308] When asked if he had a problem killing a baby in an abortion, he suggested that he has "no problem if it's in the mother's uterus."[309] Another abortion doctor, Dr. Curtis Boyd, said in an interview: "Am I killing? Yes, I am. I know that."[310] Dr. William J. Sweeney similarly described the abortions he performs as "lethal" and went on to say: "[Abortion] kills the baby in the womb. Then the woman whose fetus was too large to abort by suction curette must go

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303. Derek Smith, *Pro-Choice Concedes: Prominent Abortion Proponents Concede the Barbarity of Abortion*, HUM. DEF. INITIATIVE (Nov. 7, 2018, 9:16 AM), https://humandefense.com/prochoice-concedes/.

304. *NAF Conference Transcript: Planned Parenthood of Michigan Workshop*, CLINIC QUOTES (Oct. 27, 2015), https://clinicquotes.com/naf-conference-transcript-planned-parenthood-of-michigan-workshop.

305. *Id.*; *see also* Ctr. for Med. Progress, *Undercover Video*, FACEBOOK (May 26, 2017, 9:59 AM), https://m.facebook.com/watch/?v=10158803278780008&_rdr.

306. *NAF Conference Transcript: Planned Parenthood of Michigan Workshop*, *supra* note 304.

307. Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

308. LifeSiteNews, *BBC Reporter Stunned as Top US Abortionist Admits He's a 'Baby' Killer*, YOUTUBE (Aug. 14, 2019), https://www.youtube.com/watch?v=Sx2nhx98mfs (resharing a segment from *Panorama: America's Abortion War* (BBC Aug. 31, 2019)).

309. *Id.*

310. CreativeMinority, *Abortion Doctor: 'Am I killing? Yes, I am'*, YOUTUBE (Nov. 6, 2009), https://www.youtube.com/watch?time_continue=1&v=bfWB7tcAdhw&feature=emb_logo (resharing a segment from *Interview of Dr. Curtis Boyd* (KVUE Austin Nov. 6, 2009)).

through labor and finally, twenty-four or thirty-six hours later, exhausted, she delivers a dead baby."[311] In a recent debate with fetal rights advocate Dr. Mike Adams,[312] abortion doctor Dr. Willie Parker confirmed that "[a]bortion kills a human being."[313] Not only do physicians who perform abortion procedures recognize fetuses as humans,[314] academics who support broad abortion rights do as well.

Ethicist Peter Singer has suggested that "[w]hether a being is a member of a given species is something that can be determined scientifically, by an examination of the nature of the chromosomes in the cells of living organisms" and stated "there is no doubt that from the first moments of its existence an embryo conceived from human sperm and eggs is a human being."[315] Philosopher David Boonin also sees this as an unassailable factual premise:

> Perhaps the most straightforward relation between you or me on the one hand and every human fetus . . . on the other is this: All are living members of the same species, *homo sapiens*. A human fetus, after all, is

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311. DR. WILLIAM J. SWEENEY III & BARBARA L. STERN, WOMAN'S DOCTOR: A YEAR IN THE LIFE OF AN OBSTETRICIAN-GYNECOLOGIST 207 (1973).

312. I did not have the pleasure of interacting with Dr. Adams, but I have followed the recent coverage of his tragic passing and have heard from a number of people whose lives he touched. To memorialize his life and passing, I cite to his closing argument in a 2019 debate on abortion: "I came here this evening and I argued that it is wrong to intentionally kill an innocent human being . . . arguing that each and every single one of us is valuable not by virtue of the kinds of things that we do, but simply by virtue of the kinds of things we are." Summit Ministries, *The Abortion Debate – Dr. Willie Parker vs Dr. Mike Adams*, YOUTUBE (Feb. 27, 2019), https://www.youtube.com/watch?v=lTIpSmzlMwo.

313. CreatedEqualFilms, *Practicing Abortionist: "Abortion Kills a Human Being"*, YOUTUBE (Feb. 22, 2019), https://www.youtube.com/watch?v=9WxzAvhpd_s.

314. Many former abortion doctors have given statements that represent their view that an abortion kills a human. *See, e.g.*, *Testimony of Dr. Anthony Levatino - Former Abortion Provider,* PRIESTS FOR LIFE, https://www.priestsforlife.org/testimonies/1127-testimony-of-dr-anthony-levatino---former-abortion-provider (last visited Jan. 11, 2021) (Dr. Anthony Levatino: "As a doctor, you know that these are children; you know that these are human beings with arms and legs and heads and they move around and they are very active."); *Testimony of Dr. Paul Jarrett, Former Abortion Provider*, PRIESTS FOR LIFE, https://www.priestsforlife.org/testimonies/1125-testimony-of-dr-paul-jarrett-former-abortion-provider (last visited Jan. 11, 2021) (Dr. Paul Jarrett: "My [twenty-third] abortion changed my mind about doing abortions forever. . . . Inside the remains of the rib cage I found a tiny, beating heart. I was finally able to remove the head and looked squarely into the face of a human being—a human being that I had just killed.").

315. PETER SINGER, PRACTICAL ETHICS 85–86 (2d ed. 1993).

> simply a human being at a very early stage in his or her development.[316]

Professor Cecili Chadwick, during a debate in which she defended abortion rights, asserted: "[A]bortion undoubtedly ends life; I am not here to argue that today. Of course a fetus is a human being."[317] Further, advocates who have dedicated their lives to defending abortion rights have also recognized that fetuses are humans.

Margaret Sanger, the founder of Planned Parenthood has said that: "[N]o new life begins unless there is conception."[318] Dr. Alan Guttmacher, a former president of Planned Parenthood, wrote that:

> We of today know that man . . . starts life as an embryo within the body of the female; and that the embryo is formed from the fusion of two single cells, the *ovum* and the *sperm*. This all seems so simple and evident to us that it is difficult to picture a time when it was not part of the common knowledge.[319]

Indeed, in an early-twentieth-century brochure, Planned Parenthood published a pamphlet that stated: "An abortion requires an operation. It kills the life of a baby after it has begun."[320]

Dr. Bertram Wainer, an Australian doctor who successfully lobbied for abortion rights in Victoria, has said: "[A]bortion is killing. Nobody can argue with that."[321] He went on to explain: "When the fetus is inside the uterus it is alive and when the pregnancy is terminated it is dead—that by any definition is killing. . . . I think abortion is the destruction of something which is potentially irreplaceable, human and of great value, which is the tragedy of abortion."[322]

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316. DAVID BOONIN, A DEFENSE OF ABORTION 20 (2003).

317. Maven, *Abortion Debate: 2 of 7 Cecili Chadwick's Opening Argument*, YOUTUBE (Apr. 23, 2010), https://www.youtube.com/watch?v=-H1weKzhBkk.

318. MARGARET SANGER, THE POPE'S POSITION ON BIRTH CONTROL (1932); MARGARET SANGER, THE SELECTED PAPERS OF MARGARET SANGER 148 (2006).

319. GUTTMACHER, *supra* note 289, at 3.

320. Newsroom, *Planned Parenthood Pamphlet from 1952 Admits: Abortion 'Kills the Life of a Baby'*, LIVEACTION (May 17, 2017, 7:40 PM), https://www.liveaction.org/news/planned-parenthood-in-1952-abortion-kills-the-life-of-a-baby.

321. MIRIAM CLAIRE, THE ABORTION DILEMMA: PERSONAL VIEWS ON A PUBLIC ISSUE 59 (1995).

322. *Id.*

Feminist author Naomi Wolf has called for supporters of abortion rights to stop "[c]linging to a rhetoric about abortion in which there is no life and no death," arguing there is a "need to contextualize the fight to defend abortion rights within a moral framework that admits that the death of a fetus is a real death."[323]

While there might be ideological, strategic, or psychological reasons to dispute the view that fetuses are humans at fertilization,[324] many proponents of abortion rights have conceded that there is no real debate on whether a human fetus is, in fact, a human.

4. Alternative Views

Some scientists oppose the consensus view that human life begins at fertilization. Some reject the view and argue that life began billions of years ago because they conflate the ontogenetic question ("When does a human being's life begin?") with the phylogenetic question ("When did all life begin?").[325] This is so even though the two questions are obviously distinct as the former refers to the starting point of an organism's development and the latter refers to the first moment carbon-based life came into existence on Earth. Another counterargument that reflects a similar error is the conflation of a human zygote with a human gamete.

Biologist PZ Myers, in an article that critiqued the international survey of biologists' views on when life begins, asked "[W]hy doesn't he mention gametes?" and equated zygotes with sperm and ova, despite the fact that zygotes are complete diploid organisms developing in the human life cycle while sperm and ova are not; unlike zygotes, sperm and ova are haploid cells that have not resulted from

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323. Naomi Wolf, *Our Bodies, Our Souls*, NEW REPUBLIC, Oct. 16, 1995, at 26.

324. For a discussion of how 'motivated reasoning,' 'cultural cognition,' and 'identity-protective cognition' are powerful psychological mechanisms that might prevent supporters of abortion rights from recognizing fetuses as humans and abortion as a form of homicide, see Jacobs, *supra* note 47, at 223–27. For a review, see also Dan M. Kahan, *Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition* 1 (Cultural Cognition Project, Working Paper No. 164, 2017), https://ssrn.com/abstract=2973067.

325. *See generally The Human Life Bill Appendix: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong. 414 (1982) (Dr. Thomas D. Gelehrter, M.D., in his letter to Senator Max Baucus in opposition to The Human Life Bill, wrote: "[T]he question you have posed is beyond the reach of science. Scientific evidence would suggest that life is a continuum, that living cells including both sperm and egg all contain the essential elements of life.").

sexual reproduction.[326] His article further reflected another semantic issue that confuses the discussion. In arguing that human zygotes are human in all of the relevant ways as cells cultured from a human kidney (HEK293 cells), he reflected the failure to recognize the difference between 'human' (adjective), which applies to both, and 'a human' (noun), which only applies to the former.[327] Another counterargument focuses on monozygotic twinning and chimerism.

For up to two weeks after fertilization, a zygotic can twin and become two zygotes (monozygotic twinning) and two zygotes can fuse into one zygote (chimerism). The argument goes: 'Because humans cannot split into two humans and two humans can't fuse into one, a human zygote cannot be a human.' However, just as some humans can walk while others cannot, some humans can sexually reproduce while others cannot; human zygotes can twin or fuse while others cannot. Humanity is not defined by one's abilities or inabilities, but by being a human organism developing in one of the stages of the human life cycle.

Interestingly, some argue that biological principles are incapable of classifying organisms[328] despite the fact that scientific authorities under the relevant branch of biology, taxonomy, have classified countless species of animals and other species for centuries. Others suggest that a human zygote must be physiologically independent to be considered a human individual.[329]

> Setting aside the fact that infants are also wholly dependent on other humans for survival, this definition of human rejects the humanity of conjoined twins who are physiologically dependent on each other's bodies for survival. It is also sometimes claimed that a human zygote is not yet a human being because many fetuses fail to survive pregnancy and childbirth. . . . [W]hether a human being [will survive over the course of the next year of his or her life] is not a condition of his or her status as a human being. A

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326. PZ Myers, *That a Zygote Is Human Does Not Imply that It Is a Person*, FREE THOUGHT BLOGS: PHARYNGULA (Dec. 3, 2019), https://freethoughtblogs.com/pharyngula/2019/12/03/that-a-zygote-is-human-does-not-imply-that-it-is-a-person.

327. *Id.*

328. Richard J. Paulson, M.D., *The Unscientific Nature of the Concept that "Human Life Begins at Fertilization," and Why It Matters*, 107 FERTILITY & STERILITY 566, 566–67 (2017).

329. *Id.*

> human life is always a life with potential, which [will be realized to varying degrees].[330]

In sum, scientists do not hold any valid substantive alternative views based on science. Most opposing arguments to the scientific consensus that a human's life begins at fertilization typically confuse some aspect of the view or focus on aspects of life that are not relevant to the biological classification of humans.

C. States' Progressive Attitudes on Recognizing Fetuses as Human Persons

Justice Douglas's concurrence in *Doe v. Bolton* cited Justice Clark's reasoning that fetuses are not legal persons because "[n]o prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life."[331]

This was a major factor in the Court's refusal to recognize the abortion laws' purported purpose of protecting fetal life.[332] The logic goes: 'If states did not prosecute the non-abortive killing of a fetus, then why should the Court restrict women's liberty right to abort by upholding laws under which physicians and pregnant women could be prosecuted for the abortive killing of a fetus?'

This inconsistency played into the rhetoric that abortion laws were merely attempts to control women and that there was no good faith basis to believe that fetuses should be legally protected or recognized as persons. However, in the ensuing decades after *Roe*, dozens of states have made it clear that they view prenatal humans in the same way they view all other humans. The primary indication of this legal development, which has further undermined the born-alive rule,[333] is the recent passage of fetal homicide laws.[334]

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330. Brief of Amicus Curiae Illinois Right to Life, *supra* note 227, at 11–12.

331. 410 U.S. 179, 218 (1973) (Douglas, J., concurring); *see also* Clark, *supra* note 146, at 9–10.

332. *Doe*, 410 U.S. at 218.

333. 1 U.S.C. § 8 (2018). "In determining the meaning of any Act of Congress . . . the words 'person', 'human being', 'child', and 'individual', shall include every infant member of the species homo sapiens who is born alive at any stage of development." *Id.*

334. Some claim that the born-alive rule suggests that fetuses deserve no legal recognition before birth, but this argument ignores the fact that *Roe* clearly permits states to protect fetuses and the many legal contexts in which fetuses are legally recognized and protected. *See supra* pp. 829–30 and *infra* pp. 831–32.

In 2018, the National Conference of State Legislatures reviewed such legislation[335] and found that thirty-eight states had laws under which people can be charged with causing the death of a fetus outside of the context of legal abortion.[336] This nationwide legal development followed the highly-publicized case involving Scott Peterson's double-murder conviction[337] for the killing of his wife, Laci, who was pregnant with his preborn son, Conner. Federal legislation, "Laci and Conner's Law," was passed to deter violence against fetuses with sentencing enhancements for certain felonies when they result in the "[d]eath or injury of an unborn child."[338]

Whether states recognize fetuses as "humans," "persons," "homicide victims," or "murder victims," these laws show that the legal treatment of fetuses in 1973 ("the unborn have never been recognized in the law as persons in the whole sense")[339] is no longer true. Indeed, these fetal homicide laws are part of a broader trend of states' willingness to recognize and protect prenatal humans as persons under the law.

In the four decades since *Roe*, federal and state lawmakers have

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335. *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONF. OF ST. LEGISLATURES (May 1, 2018), http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx.

336. *See, e.g.*, ALA. CODE § 13A-6-1 (2006); ALASKA STAT. § 11.41.150 (2005); ARIZ. REV. STAT. ANN. § 13-1102 (2005); ARK. CODE ANN. § 5-1-102 (2013); CAL. PENAL CODE § 187(a) (West 1996); FLA. STAT. §775.021(5) (2014); GA. CODE ANN. § 16-5-80 (2006); IDAHO CODE § 18-4001 (2002); 740 ILL. COMP. STAT. 180/2 (2017); 2018 Ind. Legis. Serv. 203-2018 (West); KAN. STAT. ANN. § 21-5419 (2011); KY. REV. STAT. ANN. § 507A.010 (West 2004); LA. STAT. ANN. § 14:2(7), (11) (2019); MD. CODE ANN., CRIM. LAW § 2-103 (West 2013); Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984); MINN. STAT. § 609.205 (1995); MISS. CODE ANN. § 97-3-37 (2011); MO. REV. STAT. § 1.205 (2017); MONT. CODE ANN. § 45-5-102 (2013); NEB. REV. STAT. § 28-388 (West 2002); NEV. REV. STAT. § 200.210 (1995); S. 66-FN, 2017 Sess. (N.H. 2017); 2011 N.C. Sess. Laws, art. 6A, sec. 14-23 (2011); N.D. CENT. CODE § 12.1-17.1-01 (1987); OHIO REV. CODE ANN. § 2903.01 (West 2019); OKLA. STAT. tit. 21 § 691 (2006); 18 PA. CONS. STAT. § 2601 (1997); 11 R.I. GEN. LAWS § 11-23-5 (repealed 2019); S.C. CODE ANN. § 16-3-1083 (2006); S.D. CODIFIED LAWS. § 22-16-4 (2005); TENN. CODE ANN. § 39-13-107 (1989); TEX. PENAL CODE ANN. § 1.07(26) (West 2019); UTAH CODE ANN. § 76-5-201 (West 2010); VA. CODE ANN. § 18.2-32.2 (2004); WASH. REV. CODE § 9A.32.060 (2011); W. VA. CODE § 61-2-30 (2005); WIS. STAT. § 940.04 (2) (2019).

337. *Scott Peterson Trial Fast Facts*, CABLE NEWS NETWORK (Aug. 25, 2020, 2:29 PM), https://www.cnn.com/2013/10/15/us/scott-peterson-trial-fast-facts/index.html.

338. 18 U.S.C § 1841 (2018). If a person harms a "child in utero," defined as a member of the *Homo sapiens* species at any stage of in utero development, in the commission of one of over sixty listed violent crimes under federal law, then they can be charged with a separate criminal offense.

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

been progressive in their willingness to extend protections to fetuses as legal persons. Today, some states recognize fetuses' independent rights[340] and fetuses are recognized as persons in eight different legal contexts: (1) laws that restrict abortion at some point in fetal development;[341] (2) fetal homicide laws;[342] (3) restrictions on capital punishment of a pregnant woman;[343] (4) recovery for fetal deaths under wrongful death statutes;[344] (5) the inheritance rights of preborn children and posthumously born children under property law;[345] (6) legal guardianship of prenatal humans;[346] (7) the rights of preborn children to a deceased parent's Social Security and Disability;[347] and (8) prenatal child support laws.[348] There are also "trigger laws" for *Roe*, which state a legislative intent to protect fetuses throughout pregnancy as these abortion restrictions would go into effect if *Roe* is overturned.[349] These laws describe a state interest in recognizing the

340. *See, e.g.*, LA. STAT. ANN. § 40:1061.8 (2015) ("[T]he unborn child is a human being from the time of conception and is, therefore, a legal person . . . entitled to the right to life."); MO. REV. STAT. § 1.205 (2017) ("The life of each human being begins at conception . . . . [T]he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons."); United States v. Denoncourt, 751 F.Supp. 168, 171 (D. Haw. 1990) ("The Hawaii Legislative Committee Reports for Hawaii Revised Statute § 453-16, define human life, together with entitlement to all rights of human beings, as beginning at viability and viability as occurring when the fetus can exist individually outside of the mother's womb.").

341. Forty-three states restrict abortion at some point in fetal development and only Alaska, Colorado, the District of Columbia, New Hampshire, New Jersey, New Mexico, Oregon, and Vermont do not restrict abortion access at a certain point in a fetus's life. *An Overview of Abortion Laws,* GUTTMACHER INST. (Aug. 1, 2020), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

342. *See State Laws on Fetal Homicide*, *supra* note 335.

343. Paul B. Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 141, 146 n.27 (2011).

344. *Id.* at 148–50 n.32–38.

345. *Id.* at 153–54 n.44–46; *see also* Alea Roberts, *Where's My Share?: Inheritance Rights of Posthumous Children*, AM. BAR ASS'N (June 13, 2019), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2019/inheritance-rights-posthumous-children.

346. Linton, *supra* note 343, at 154 n.47.

347. SSR 6822, 1968 WL 3913 (1968)

348. Daniel Gump, *The History of Prenatal Child Support in the United States*, HUM. DEF. INITIATIVE (Aug. 6, 2020, 1:03 PM), https://humandefense.com/the-history-of-prenatal-child-support-in-the-united-states.

349. For a discussion, see Marie Solis, *Eight States Will Immediately Ban Abortion If* Roe v. Wade *Is Overturned [Updated],* VICE (May 24. 2019, 12:15 PM), https://www.vice.com/en_us/article/nea7e7/which-states-will-ban-abortion-if-roe-v-wade-is-overturned.

rights of fetuses because they view them as legally protectable persons.[350]

States' view of prenatal humans has been echoed by President Donald Trump: "As President I am dedicated to protecting the lives of every American including the unborn."[351] His support was memorialized on January 22, 2018, the National Sanctity of Human Life Day, when President Trump announced that "[t]oday, we focus our attention on the love and protection each person, born and unborn, deserves regardless of disability, gender, appearance, or ethnicity[,] . . . [and] no class of people should ever be discarded as 'non-human.'"[352]

The President later made this proclamation on the world's stage in his 2019 address to the United Nations: "Global bureaucrats have absolutely no business attacking the sovereignty of nations that wish to protect innocent life. Like many nations here today, we in America believe that every child, born and unborn, is a sacred gift from God."[353] Under the President's direction, the U.S. Department of Health and Human Services ("HHS") updated its strategic plan to recognize this view.[354] While some have accused such moves as political

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350. *Id.*; *see, e.g.*, 720 ILL. COMP. STAT. 510/1 (2016) ("[T]he unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State."). While this language was recently removed by the legislature, this remained the position of the State for over forty years.

351. Steven Ertelt, *President Donald Trump: Unborn Babies Have a "Basic and Fundamental Human Right, the Right to Life"*, LIFENEWS.COM (June 28, 2018, 11:42 AM), http://www.lifenews.com/2018/06/28/president-donald-trump-unborn-babies-have-a-basic-and-fundamental-human-right-the-right-to-life.

352. *President Donald J. Trump Proclaims January 22, 2018, as National Sanctity of Human Life Day*, WHITE HOUSE (Jan. 19, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-proclaims-january-22-2018-national-sanctity-human-life-day.

353. LifeSiteNews, *Trump Rebukes UN on Abortion: 'Americans Will Never Tire of Defending Innocent Life'*, YOUTUBE (Sept. 25, 2019), https://www.youtube.com/watch?v=aHUT2AbJFYE. President Trump's administration recently memorialized this stance, joining thirty-four other nations in declaring "in mutual friendship and respect, our commitment to work together to . . . [r]eaffirm that there is no international right to abortion, nor any international obligation on the part of States to finance or facilitate abortion." Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family (Oct. 22, 2020), https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english-11-10-2020.pdf.

354. *Strategic Goal 3: Strengthen the Economic and Social Well-Being of Americans Across the Lifespan,* U.S. DEP'T HEALTH & HUM. SERVS. (Feb. 2018), https://www.hhs.gov/about/strategic-plan/strategic-goal-3/index.html.

maneuvering, a HHS representative rejected this claim: "No, the department is finally looking to and acknowledging science."[355] States have recently passed legislation based on this scientific view,[356] and federal judges have confirmed it.

South Dakota passed an informed consent statute that required abortion doctors to inform their patients "that the abortion [terminates] the life of a whole, separate, unique, living human being."[357] After a Planned Parenthood affiliate challenged the constitutionality of the statute, the Eighth Circuit Court of Appeals held that it was a statement of scientific fact, not of ideology, and was part of the informed consent process owed to each patient.[358] Altogether, this growing, pervasive, and progressive legal recognition of fetuses is consistent with senators'[359] and Supreme Court Justices'[360] understanding of "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The recognition of independent fetal rights is not without precedent in the Western legal tradition.[361]

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355. John Burger, *HHS Draft Plan Recognizes that Life Begins at Conception,* ALETEIA (Oct. 14, 2017), https://aleteia.org/2017/10/14/health-and-human-services-draft-plan-recognizes-that-life-begins-at-conception.

356. In 2018, Oklahoma legislators passed a fetal education bill to teach high school students that life begins at fertilization. *See* 63 OKLA. STAT. tit. 63, §1–753(1) (2016). In the bill, the state legislature allocated funds for Oklahoma high schools to provide fetal education to its students. *Id.* Ohio recently proposed similar legislation. *Ohio Bill Would Introduce Fetal Development into School Curriculum*, CATH. NEWS AGENCY (July 11, 2019, 12:42 AM), https://www.catholicnewsagency.com/news/ohio-bill-would-introduce-fetal-development-into-school-curriculum-62603.

357. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2017).

358. Planned Parenthood v. Rounds, 530 F.3d 724, 729 (8th Cir. 2008) (en banc).

359. *See infra* p. 847.

360. Supreme Court Justice Hugo Black said that "[t]he history of the [Fourteenth] Amendment proves that the people were told that its purpose was to protect weak and helpless human beings." Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1938). Justice Stevens has also suggested that fetuses would be recognized and protected as persons under the Fourteenth Amendment if it was shown that fetuses are humans. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring). His opinion was echoed by Justices Blackmun, Brennan, and Marshall in Webster v. Reprod. Health Servs., 492 U.S. 490, 552–53 (1989) (Blackmun, J., dissenting).

361. Poland bans abortion throughout pregnancy and recognizes "that life is a fundamental right of a human being, and that life . . . shall be subject to special protection by the State" and that "[t]he right to life shall be subject to protection, including in the prenatal phase." The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of Jan. 7, 1993, art. 1, No. 17, Item 78 (1993). Similarly, Malta, a European country that bans abortion throughout

In the 1975 German Constitutional Court abortion decision, the German court found that Article 2.2 of the Basic Law guarantees the right to life of all preborn humans: "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."[362]

The recognition of all humans, born and unborn, as persons under the law is also consonant with human rights principles, as the United Nations' Universal Declaration of Human Rights declares that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and "[e]veryone has the right to recognition everywhere as a person before the law."[363] In the International Covenant on Civil and Political Rights, the United Nations later put a finer point on the right to life of all humans: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[364]

In 1969, these human rights principles applied to fetuses in the American Convention on Human Rights. Article 4 on the "Right to Life" states that "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."[365] Twenty-five nations ratified this treaty;[366] while the United States signed it in 1977, it has yet to ratify it. Our nation's failure to recognize fetal rights has led to today's moment in which a twenty-three-week, nine-ounce premature infant is recognized as a person who is equally protected under the law, pursuant to the Fourteenth

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pregnancy, passed the Embryo Protection Act of 2012 and established the Embryo Protection Authority to "provide for the protection of human embryos." *See generally* Embryo Protection Act, ch. 524 (2013).

362. *See* Grundgesetz, [GG] [Basic Law], art. 2, § 2, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0023.

363. G.A. Res. 217 (III) A, art. 6 (Dec. 10, 1948).

364. G.A. Res. 2200A (XXI), at 4 (Dec. 16, 1966).

365. Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

366. *American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32),* ORG. AM. STATES (Nov. 22, 1969), https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm. Signatories included: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panamá, Paraguay, Perú, Dominican Republic, Suriname, Trinidad & Tobago (*later denounced*), Uruguay, and Venezuela (*later denounced*). *Id.*

Amendment,[367] but a forty-week, nine-pound fetus has no constitutional protections before he or she is born.[368]

III. REASSESSING *ROE* IN LIGHT OF CHANGED CIRCUMSTANCES

The preceding part outlined recent changes to the factual circumstances of abortion that have progressed the evidentiary records available to the Court. While some might see *Casey* as the relevant precedent in 2020, and *Roe* as 'precedent on precedent,'[369] *Casey* upheld *Roe*'s central holding.[370] States are not enjoined from protecting previable fetuses because of *Casey*, but because of *Casey*'s reaffirming of *Roe*'s original justification.

The Court in *Casey* held that "changed circumstances may impose new obligations,"[371] and the Court recently affirmed that it is willing to overturn precedent when "dramatic technological and social changes" occur.[372] Thus, the question is whether the societal, scientific, and legal developments since *Roe* can serve as grounds for the Court to reexamine the central holding in *Roe*, which serves as the current basis for the Court's abortion jurisprudence. Simply put, if *Roe*'s viability standard is overturned, then *Casey*'s viability standard would collapse, and states could protect previable fetuses from abortion.

This Part proceeds by outlining *Casey* and the *stare decisis* factors it established for overturning precedent. It concludes with an analysis of a potential reexamination of *Roe* in the context of landmark cases

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367. Bobby Allyn, *Saybie, Born at 8.6 Ounces, Is Now Believed to Be the World's Tiniest Surviving Baby*, NAT'L PUB. RADIO (May 29, 2019, 8:32 PM), https://www.npr.org/2019/05/29/728118503/saybie-born-at-8-6-ounces-in-san-diego-is-now-the-worlds-tiniest-surviving-baby.

368. At least one Ninth Circuit court has recognized that, pursuant to Hawaii Revised Statutes § 453-16, a viable fetus can be entitled to rights and the same rights of all human beings, yet the Supreme Court has not recognized any rights protections for fetuses. United States v. Denoncourt, 751 F. Supp. 168, 171 (D. Haw. 1990).

369. Bob Egelko, Roe vs. Wade*: What Kavanaugh May Have Meant by 'Precedent on Precedent'*, S.F. CHRON. (Sept. 5, 2018, 6:44 PM), https://www.sfchronicle.com/nation/article/Roe-vs-Wade-What-Kavanaugh-may-have-meant-by-13207759.php. As evinced by states' repeated challenges of *Roe* and its progeny, this central holding of *Roe* is not a settled point, and it has not reached superprecedent status. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1735 n.141 (2013).

370. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861 (1992).

371. *Id.* at 864.

372. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2095 (2018) (quoting Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring)).

that the Court has overturned, a discussion on whether abortion could be understood as a form of self-defense, and an assessment of whether twenty-first-century Americans' reliance on *Roe* could be a bar for overruling it.

A. An Overview of Planned Parenthood v. Casey

In 1992, the Court agreed to hear *Casey*.[373] At issue was Pennsylvania's Abortion Control Act of 1982. Planned Parenthood of Southeastern Pennsylvania filed a lawsuit against Robert P. Casey, the Pennsylvania governor at the time, and challenged five provisions of the law: (1) twenty-four-hour waiting period, which required a woman seeking an abortion to give informed consent prior to the procedure and required the doctor to provide her with certain medical information on the risks of abortion twenty-four hours before the procedure; (2) spousal notice, which required married women to provide signed statements confirming that they had given their husband advance notice before undergoing an abortion procedure; (3) parental consent, which required minors to get the informed consent of at least one parent or guardian; (4) definition of medical emergency, which limited acceptable emergency abortions to ones where an immediate abortion would be necessary to prevent the pregnant woman's death; and (5) reporting requirements, which required abortion providers and clinics to keep records and report them to the state.[374]

The Justices upheld the essential holding of *Roe* which it deemed to consist of three parts: (1) women have the right to have an abortion before viability; (2) the State can restrict post-viability abortions as long as there is an exception for pregnancies that threaten a woman's life or health; and (3) the State has legitimate interests in protecting the health of pregnant women and their fetuses from the moment a pregnancy begins.[375]

The plurality opinion abandoned *Roe*'s discussion of a trimester framework and solely focused on fetal viability. It also held that laws prohibiting abortions before viability are unconstitutional because they pose an undue burden on a woman's fundamental right to abortion, which reflected another change to the Court's abortion jurisprudence.

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373. *Casey*, 505 U.S. at 844.
374. *Id.*
375. *Id.* at 846.

The Court had previously held that the strict scrutiny standard of judicial review should be applied to abortion laws, but the new undue burden standard did not require states to narrowly tailor abortion laws or assert a compelling government interest; it only required states to pass laws that do not pose an undue burden on a woman's exercise of her right to have an abortion.[376] Using this new standard of review, the Court upheld four of the restrictions and only struck down the spousal notification requirement of the Pennsylvania statute.[377] The Court held that requiring a pregnant woman to notify her spouse was an undue burden on the exercise of her abortion rights and was, thus, unconstitutional.[378]

The plurality opinion in *Casey* did not reexamine *Roe* or hold that the Court's prior ruling was correct; instead, it upheld the central holding of *Roe* as a command of *stare decisis*.[379] *Stare decisis et non quieta movere* ("[t]o stand by things decided, and not to disturb settled

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376. In *Whole Woman's Health*, this undue burden standard was later shifted to a judicial balancing test, which required abortion laws to pose benefits to women that outweighed their costs. Whole Woman's Health v. Hellerstedt, 136 U.S. 2292, 2324–35 (2016). In *June Medical Services*, the Court shifted the standard of review back to the undue burden standard. June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020). For further discussion, see Erika Bachiochi, *Symposium: The Chief Justice Restores the* Casey *Standard Even While Undermining Women's Interests in Louisiana*, SCOTUSBLOG (June 30, 2020, 11:44 AM), https://www.scotusblog.com/2020/06/symposium-the-chief-justice-restores-the-casey-standard-even-while-undermining-womens-interests-in-louisiana.

377. *Casey*, 505 U.S. at 900–01.

378. *Id.* at 901.

379. The plurality in *Casey* explained:

> The weight to be given this state interest, not the strength of the woman's interest, was the difficult question faced in *Roe*. We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly [twenty] years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.

Id. at 871; *see, e.g.*, Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 14 (2011).

points")[380] is the legal doctrine that underlies and supports the use of precedent, and it is grounded in goals of predictability in the legal system. *Casey* argued the significant justification of *stare decisis* is that the judicial system cannot function without it.[381] However, while the rule of law requires respect for precedent, the Court in *Casey* recognized that *stare decisis* is not an "inexorable command"[382] and held that it can reexamine a prior ruling by considering a series of "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law."[383] While *Casey*'s plurality opinion in 1992 found no grounds for overturning *Roe*, the factors the *Casey* Court cited, which were taken from several Supreme Court precedents, would likely be used to assess *Roe* and its progeny in light of recent developments.

1. *Stare Decisis* Factors Outlined in *Casey*

The plurality opinion's *stare decisis* analysis of *Roe* focused on the following factors: (1) "whether the rule has proven to be intolerable simply in defying practical workability";[384] (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation";[385] (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of

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380. *Stare decisis et non quieta movere*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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

382. *Id.* (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting)). While this Article presents the case for reexamining *Roe* with full deference to *stare decisis*, using the factors set out by *Casey* to show there are grounds to overturn the Court's prior abortion decision, some legal scholars have recently pushed for lower deference to the Court's prior rulings. *See, e.g.*, Josh Hammer, *Overrule* Stare Decisis, 45 NAT'L AFF. 140, 153 (2020) ("It is time for the Court to formally overrule one of its most ancient maxims: its long-held presumption against overruling its own precedents.").

383. *Casey*, 505 U.S. at 854. Justice Kavanaugh recently reaffirmed and expanded on these factors for overturning precedent, summarizing and operationalizing them as follows: (1) "[I]s the prior decision not just wrong, but grievously or egregiously wrong?"; (2) "[H]as the prior decision caused significant negative jurisprudential or real-world consequences?"; and (3) "[W]ould overruling the prior decision unduly upset reliance interests?" Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part).

384. *Casey*, 505 U.S. at 854 (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)).

385. *Id.* at 854 (citing United States v. Title Ins. & Tr. Co., 265 U.S. 472, 486 (1924)).

abandoned doctrine";[386] and (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[387] Thus, the Court looked at whether: *Roe*'s central rule has been found unworkable; overturning the rule would pose a significant problem to all who rely on it; the development of law has left the rule as irrelevant; and the rule's premises of facts have so changed that the ruling is irrelevant or unjustifiable.[388]

First, *Casey* found no grounds on which to argue that the precedent had proved to be unworkable.[389] Second, in assessing people's reliance on *Roe*, the Court recognized that significant reliance is usually understood in commercial contexts where people incurred financial expenses and liabilities.[390] Yet, the Court did state: "[P]eople 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."[391] While the extent of this reliance was not quantified,[392] the Court justified its finding of some measure of reliance on the notion that "[t]he 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."[393]

Third, the Court found no legal principle had evolved to weaken *Roe*'s doctrinal footings and no development of constitutional law had left *Roe* as an abandoned ruling. The Court recognized that abortion had been upheld as a liberty right in subsequent cases.[394] In this line of cases since *Roe*, the Court had upheld the notion that a state's

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386. *Id.* at 855 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989)).

387. *Id.* (citing *Burnet*, 285 U.S. at 412 (Brandeis, J., dissenting)).

388. *Id.*

389. It is important to note that 207 members of Congress argued that *Casey*'s undue burden standard has proved to be unworkable. Brief of Amici Curiae of 207 Members of Congress in Support of Respondent and Cross-Petitioner at 29, June Med. Servs., L.L.C. v. Gee, 905 F.3d 787 (5th Cir. 2018) (Nos. 18-1323, 18-1460); *see also* Clarke D. Forsythe & Rachel N. Morrison, Stare Decisis*, Workability, and* Roe v. Wade*: An Introduction*, 18 AVE MARIA L. REV. 48, 49 (2020) (arguing that *Roe* is unworkable).

390. *Casey*, 505 U.S. at 855–56.

391. *Id.* at 856.

392. "The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." *Id.*

393. *Id.*

394. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977).

interest in life falls short of an absolute right to protect life.[395] The Court further supported *Roe*'s doctrine with regards to the liberty right to abort[396] and argued that "[e]ven on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty."[397]

Finally, the Court considered whether any of *Roe*'s factual assumptions have been overtaken by time. Citing *Akron*,[398] the Court held that medical advances had made late-term abortions safer than they were in 1973 and had established fetal viability earlier in pregnancy.[399] However, those developments had no bearing on the validity of *Roe*'s central holding. Thus, the Court held that viability still served as the compelling moment just like it did at the time of *Roe* because no change in *Roe*'s factual underpinnings had made its central holding obsolete. In sum, the plurality opinion in *Casey* held that no relevant change supported an argument for overruling *Roe* because: (1) people had come to assume *Roe*'s conception of liberty; (2) the principle of liberty and autonomy had not eroded so as to leave *Roe*'s central holding a remnant of old doctrine; (3) there were no developments that undermined the precedent; and (4) "no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips."[400]

B. How the Court Could Reexamine Roe's *Central Holding*

Given the developments outlined in this Article, with regards to *Roe*'s viability standard, the pressing question is "whether facts have so changed, or come to be seen so differently, as to have robbed the old

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395. *See generally* Riggins v. Nevada, 504 U.S. 127, 135 (1992); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990); Washington v. Harper, 494 U.S. 210 (1990); Rochin v. California, 342 U.S. 165 (1952); Jacobson v. Massachusetts, 197 U.S. 11, 24–30 (1905).

396. *Casey*, 505 U.S. at 857.

397. *Id.* at 858.

398. *Id.* at 860 (citing Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 429 n.11 (1983)).

399. "The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately [twenty-eight] weeks, as was usual at the time of *Roe*, at [twenty-three to twenty-four] weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future." *Id.*

400. *Id.* at 860–61.

rule of significant application or justification."[401] Because *Casey* provided analyses of cases in which a change in facts led the Court to overturn its previous constitutional decisions, a future reexamination of *Roe* can be assessed against the backdrop of those previous cases.

The Court argued that due to the sustained and widespread controversy on abortion, there was reason to consider *Roe* in the context of other major cases that arose out of and responded to other national controversies: the line of cases related to *Lochner v. New York* ("*Lochner*") and *Plessy v. Ferguson* ("*Plessy*").[402] In *Lochner*, the Court imposed limitations on legislation that infringed upon Americans' economic autonomy in favor of promoting health and welfare interests.[403] *Lochner* and its progeny were notably upheld in *Adkins v. Children's Hospital of District of Columbia* ("*Adkins*"),[404] in which the Court held that requiring employers to pay a minimum wage to adult women infringed on the "constitutionally protected liberty of contract."[405] Thirty-two years after the Court ruled in *Lochner*, it overruled that doctrine in *West Coast Hotel Co. v. Parrish* ("*West Coast Hotel*")[406] after the Great Depression revealed that the Court's interpretation of contractual freedom relied on fundamentally false factual assumptions related to an unregulated market's ability to achieve minimum standards of human welfare. Since the premises of fact in *Lochner* and *Adkins* had been proven false, the Court held that their overruling was not only justified but required: "[T]he clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law."[407]

In *Plessy*, the Court held that legislatively mandated racial segregation did not deny African-Americans equal protection under the Fourteenth Amendment.[408] The Court justified its decision with the implication that laws that mandate segregation did not stamp African-Americans with "a badge of inferiority."[409] The understanding of the facts of segregation, as well as the ruling and its justification, were then repudiated by *Brown v. Board of Education of Topeka* ("*Brown*").[410] *Brown* rejected the factual underpinnings of *Plessy* and

401. *Id.* at 855.
402. *Id.* at 861–62.
403. Lochner v. New York, 198 U.S. 45, 64 (1905).
404. 261 U.S. 525, 560–61 (1923).
405. *Casey*, 505 U.S. at 861.
406. 300 U.S. 379, 398–400 (1937).
407. *Casey*, 505 U.S. at 862.
408. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).
409. *Id.* at 551.
410. 347 U.S. 483 (1954).

overturned that precedent because "[s]eparate educational facilities are inherently unequal" and legally sanctioned segregation deprives some Americans "of the equal protection of the laws guaranteed by the Fourteenth Amendment."[411]

As in the case of *West Coast Hotel*, the Court overturned its previous constitutional decision because "[s]ociety's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896."[412] Again, the Court did not merely recognize this as grounds for overturning precedent but as a requirement: "[T]he *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required."[413]

Altogether, the plurality in *Casey* argued that "*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions."[414] The Court recognized that it has a duty to update an outdated and incorrect understanding of relevant facts, so it took notice of facts the country had come to learn and understand after the previous decisions; the overruling cases were "comprehensible," "defensible . . . applications of constitutional principle to facts as they had not been seen by the Court before."[415] While *Casey* used this analysis to distinguish *Roe* from *West Coast Hotel* and *Brown*, the Court clearly set the standard for reexamining *Roe* by holding: "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty."[416]

1. Reduced Detriments of Pregnant Women

As argued in Parts I and II of this Article: (1) government programs and legal protections have obviated the need for the Court to recognize abortion rights to protect against pregnancy-related discrimination; (2) given advances to contraceptive technology, education, and access, abortion is simply not the important protection

411. *Id.* at 495.
412. *Casey*, 505 U.S. at 863.
413. *Id.*
414. *Id.*
415. *Id.* at 864.
416. *Id.*

against detriments from pregnancy and child-rearing that it was in 1973; and (3) the rise of adoption and the development of Safe Haven Laws show that an unwanted pregnancy without legal abortion access is not inextricably linked to child-rearing. Thus, forty-seven years of post-*Roe* developments have drastically reduced the potential harms associated with a lack of legal abortion access.

First, in 2020, a woman is no longer subject to the pregnancy-related discrimination that she might have suffered in 1973, thanks in part to Safe Haven Laws,[417] Title IX,[418] the Pregnancy Discrimination Act,[419] the FMLA,[420] the Special Supplemental Nutrition Program for WIC,[421] and the Patient Protection and Affordable Care Act.[422] As described in Part II of this Article, a woman is a full member of society with autonomy over her life; she is likely to be more educated than a man and often has more power than a man. She also has the ability to control her reproduction in a way that people merely dreamed of in the 1970s.[423]

Second, given the contraceptive developments over the last half century, one cannot argue that legal abortion access is necessary for families to control their number of children.[424] Contraceptives, phone apps for the rhythm method, natural family planning, birth control pills, emergency contraception, and long-acting contraception methods have all developed to equip men and women with an astounding level of control of their reproduction.[425] Of sexually active women who are at risk of unwanted pregnancy, only 11% are not using at least one form of contraception.[426] 99% of women have tried at least one form of contraception, and contraception use is on the rise.[427]

Third, Safe Haven Laws and the proliferation of adoption services serve as major changes in the circumstances surrounding *Roe*.[428] *Roe* and its progeny typically discussed the right to abortion as the ability

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417. *See generally* CHILD WELFARE INFO. GATEWAY, *supra* note 183.

418. 20 U.S.C. §§ 1681–1688 (2018).

419. 42 U.S.C. § 2000e(k) (2018).

420. 29 U.S.C. § 2601 (2018).

421. *Special Supplemental Nutrition Program*, *supra* note 176.

422. *See* 42 U.S.C. § 18202 (2018).

423. JO JONES ET AL., CURRENT CONTRACEPTIVE USE IN THE UNITED STATES, 2006–2010, AND CHANGES IN PATTERNS OF USE SINCE 1995, at 3 (2012).

424. *Id.* at 11.

425. *Id.* at 6.

426. *Id.* at 1.

427. *Id.* at 2; *see also* GUTTMACHER INST., *supra* note 191, at 1; Jones, *supra* note 191.

428. CHILD WELFARE INFO. GATEWAY, *supra* note 183, at 2.

to decide whether to raise a child; while this might have been the case in 1973 when there was more of a responsibility to raise a child to whom you had given birth,[429] this connection is far more attenuated today. Due to Safe Haven Laws, a woman can now legally relinquish custody of her child at a moment's notice, so an abortion right is not the right to decide whether or not to raise a child; it is the right to decide whether to carry a pregnancy to term and deliver a living infant or to have an abortion and deliver a dead fetus.[430]

The Court can hold that these changes in facts have robbed *Roe* of its original justification for abortion rights because *Roe*, at least in part, was justified based on past detriments related to pregnancy and child-rearing.[431] However, it seems unlikely that this factor on its own could be used to repudiate a constitutional right that has been protected by the Court for over forty-seven years.[432] The right to abortion did not require a justification rooted in the costs associated with the denial of the right, but the majority did use this argument to justify its holding in *Roe*, so the Court could use these changes in facts as a basis for reexamining *Roe*[433] as part of a broader discussion of recent developments.

2. The Development of Man's Knowledge on When Life Begins

Given the development in our understanding of when a human's life begins, the question is whether the Court would find this change in *Roe*'s premises of fact sufficient grounds to reexamine the central holding of *Roe*. *Plessy* was recognized as a proper decision until the Court found that psychological knowledge showed that segregating children "solely because of their race generates a feeling of inferiority as to their status in the community . . . ."[434] While the Court has thus far recognized *Roe* as a proper decision, that could change if the Court takes notice of the scientific consensus on the incontrovertible scientific fact that a human's life begins at fertilization.

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429. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851–52 (1992); Roe v. Wade, 410 U.S. 113, 153 (1973).

430. CHILD WELFARE INFO. GATEWAY, *supra* note 183, at 2.

431. *Roe*, 410 U.S. at 153.

432. While many of these developments happened after *Casey*, the Court suggested that "[t]he weight to be given this state interest, not the strength of the woman's interest, was the difficult question faced in *Roe*." *Casey*, 505 U.S. at 871.

433. *Roe*, 410 U.S. at 153.

434. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 (1954).

The Court previously suggested that no group of experts agreed on when life begins.[435] Now, there is research that suggests a majority of Americans believe biologists are the relevant experts (80%) and 96% of 5,577 biologists from over 1,000 academic institutions around the world agree on the biological view that a human's life begins at fertilization.[436] This view is further affirmed by scientific articles,[437] expert testimony in legislative hearings,[438] and even numerous abortion doctors and abortion rights advocates.[439] Clearly, a state seeking to protect a fetus for the duration of their mother's pregnancy would no longer do so by "adopting one theory of life" but would instead have the credible legal aim of protecting all humans within its jurisdiction.[440] The Court no longer needs to speculate as to the answer on when a human's life begins. The Court has it. A human's life begins at fertilization.[441]

If the Court were to examine these findings, it could acknowledge that the facts related to whether previable and viable fetuses are humans have changed and have come to be seen very differently since *Roe*.[442] The only question is to what degree these findings cut against the Court's justification of the viability standard. The majority's determination that experts could not agree on when life begins was central in its disposing of Texas's argument that it had a compelling interest in protecting a fetus from the start of his or her life.[443] The rejection of that argument served as the impetus for the Court's adoption of the viability standard.[444] Moving forward, one approach to assessing the viability standard's justification is to consider how that standard would function given what we know now.

If it were recognized that a fetus is a human throughout pregnancy and that the state interest in restricting abortion is

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435. "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe*, 410 U.S. at 159.

436. Jacobs, *supra* note 47, at 243, 250–51.

437. *See supra* Part II.B.1.

438. *See supra* Part II.B.2.

439. *See supra* Part II.B.3.

440. *Roe*, 410 U.S. at 162.

441. For over 200 quotes that affirm this view from peer-reviewed journals, medical textbooks, and other sources, see generally WHEN DOES LIFE BEGIN?, *supra* note 232.

442. Jacobs, *supra* note 47, at 300.

443. *Roe*, 410 U.S. at 159.

444. *Id.* at 163–64.

properly recognized as an interest in protecting each human life from its very beginning, the viability standard would be a limitation on that interest.[445] The principle would be 'a state's interest in protecting human life is only compelling when a human is capable of surviving on a respirator,' which would be an arbitrary dividing line that distinguishes humans that cannot be legally protected from humans that can.[446]

Holding that only some humans are deserving of legal protection would set such a dangerous precedent that it does not even warrant the obvious historical explanation or further discussion. Thus, this change in facts has robbed the viability standard of its original justification, as the Court can no longer say there is no consensus on when life begins. The viability standard needs to be reexamined as it is arguably an arbitrarily discriminatory limit on which humans states are constitutionally permitted to protect under the rights reserved by the Tenth Amendment.[447]

It is worth noting that the scientific recognition of a fetus as a human is also relevant to analyses of whether fetuses are persons and the nature pregnant women's interest in the liberty right to abortion. The recognition that fetuses are humans tends to show that fetuses are natural persons, who are also legal persons, and a pregnant women's liberty right to abortion cannot be seen as some right to make a medical decision or a decision solely about her life; the assertion of an abortion right is now known to entail the death of a human who is recognized as a person in various legal contexts.

3. The Development of Legal Protections for Fetuses

The majority in *Roe* argued that outside of the context of criminal abortion, the law had been reluctant to recognize fetuses as persons or that life begins before birth.[448] There were practical reasons behind this. Because fetuses do not typically social interactions with other people, as their primary interactions are with their mothers who are carrying them, it was reasonable that legislators predominantly

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445. *Id.*

446. The Court has made it clear that its holdings cannot be based on arbitrary distinctions: "Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

447. *Id.*

448. *Roe*, 410 U.S. at 161.

focused on fetuses in the context of abortion.[449] *Roe* did discuss laws that recognized fetuses' inheritance rights and torts that treated fetuses as victims of prenatal injuries, but the majority ultimately held that "the unborn have never been recognized in the law as persons in the whole sense."[450] However, in the four decades since *Roe*, federal and state lawmakers have been progressive in their recognition of fetuses as persons under the law.

On the federal level, the U.S. Congress passed the "Unborn Victims of Violence Act" to ensure the "[p]rotection of unborn children," which includes any "member of the species homo sapiens, at any stage of development, who is carried in the womb."[451] Today, states recognize fetuses' independent rights,[452] and there are several contexts in which fetuses are legally recognized as persons: (1) abortion restrictions; (2) fetal homicide laws; (3) restrictions on the capital punishment of pregnant women; (4) wrongful death statutes; (5) inheritance rights under property law; (6) legal guardianship; (7) Social Security and Disability benefits; and (8) prenatal child support laws.[453] Because the law has developed to recognize fetuses as legal persons throughout pregnancy,[454] the Court can take notice of these legal developments and reexamine *Roe*'s rejection of fetuses' constitutional rights.[455]

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449. *Id.*

450. *Id.* at 161–62.

451. 18 U.S.C. § 1841 (2004).

452. *See infra* note 481.

453. *See supra* pp. 831–32.

454. In *Casey*, the Court concluded that fetuses are not persons because no Justice had ever claimed that fetuses are persons within the meaning of the Fourteenth Amendment. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 913 (1992) (Stevens, J., concurring). The Court supported this denial of fetal personhood with a quote from Professor Dworkin that suggested states cannot unilaterally recognize entities as persons as such necessarily decreases rights of others, suggesting that declaring trees as persons would somehow limit the right to free speech. *Id.* at 913 (citing Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should be Overruled*, 59 U. CHI. L. REV. 381, 400–01 (1992)). However, the Court in *Roe* did find this factor relevant, assessing state laws to determine whether fetuses were "recognized in the law as persons;" thus, in its assessment of recent developments in the law, the Court can take notice of states' protection of fetuses as persons in various contexts. *Roe*, 410 U.S. at 162.

455. While equal protection is typically operationalized as a "between-groups" concept, in determining whether one group receives equal protection compared to another group, it can also be thought of as a "within-groups" concept, that is, whether members of a group receive equal protection compared to other members of a group. Thus, the Court could consider the following question: "Does *Roe* violate the notion

The plurality in *Casey* held that "[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty."[456] Given the development of man's knowledge on when life begins and the development of the law's recognition of fetuses, the Court would likely need to assess whether these changed circumstances impose on the Court the new obligation of overturning *Roe*'s viability standard or holding that fetuses are persons within the meaning of the Fourteenth Amendment.

4. Fetal Rights Under the Fourteenth Amendment

It is important to start this analysis by noting that the proponent of the abortion regulation in *Roe* was not an advocate for the rights of fetuses. Because there was no representative for fetuses, no full-throated argument was made on their behalf. When asked at *Roe*'s oral reargument session whether "any case anywhere [has] held that an unborn fetus is a person within the meaning of the Fourteenth Amendment," the attorney for the state said, "No, Sir."[457]

The state thus failed to cite the 1970 federal case *Steinberg v. Brown* ("*Steinberg*"), which itself cited "authority for the proposition that human life commences at the moment of conception" and held that "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it."[458] While the Justices in *Roe* were aware of this case, as it was listed amongst federal cases that had sustained state abortion restrictions,[459] the Court did not cite to *Steinberg*'s recognition of fetuses' constitutional rights, so it seemed to have erred in suggesting that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."[460]

While the lack of zealous representation for fetuses would have

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that the U.S. Constitution guarantees equal protection under the law to all persons when previable fetuses are protected by fetal homicide laws in the majority of states yet *Roe*'s central holding prohibits states from protecting previable fetuses in the abortion context?"

456. *Casey*, 505 U.S. at 864.

457. Transcript of Oral Reargument at 24, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

458. 321 F. Supp. 741, 746–47 (N.D. Ohio 1970).

459. *Roe*, 410 U.S. at 155.

460. *Id.* at 157.

permitted the Court to perfunctorily dismiss the claim, the majority did analyze whether fetuses could be recognized as persons under the Fourteenth Amendment.[461] However, because the Court failed to cite *Steinberg*'s recognition of fetal rights, it was able to argue that it could find no precedent for recognizing fetuses' constitutional rights and concluded that fetuses are not "persons" within the meaning of the Amendment.[462] In the Court's subsequent decisions, Justices explained that fetuses were not recognized as persons because the Court could not establish fetuses as humans.

Justice Stevens's concurrence in *Thornburgh v. American College of Obstetricians & Gynecologists* ("*Thornburgh*") made this clear: "[T]here is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures."[463] In the dissent of *Webster v. Reproductive Health Services* ("*Webster*"),[464] Justices Blackmun, Brennan, and Marshall endorsed Justice Stevens's view by stating they could not "improve upon" what Justice Stevens wrote.[465]

The words of these Justices, who either found in favor or endorsed *Roe*, imply that the Court would recognize states have a compelling interest to protect a human's life at fertilization and a constitutional duty to do so if it takes notice of the biological facts that show there is no fundamental or well-recognized difference between a

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461. *Id.*

462. *Id.* at 157–58. Justices could have read *Steinberg v. Brown* as suggesting but not holding that a fetus deserves recognition as a person within the meaning of the Fourteenth Amendment. They could have also read it as suggesting that fetuses have constitutional rights without explicitly arguing that fetuses were "persons." *See id.*

463. 476 U.S. 747, 779 (1986) (Stevens, J., concurring). Justice Stevens summarized the holding in *Roe* as follows: "In the final analysis, the holding in *Roe v. Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny." *Id.* at 781. By framing abortion as an "incorrect decision" and not the possible infringement of a fetus's right to life, Justice Stevens represented his view that abortion opponents merely wanted to restrict abortion based on their aversion to abortion, and not based on their belief that abortion is an unjustifiable form of homicide that infringes on a fetus's constitutional rights to life and due process: "The majority remains free to preach the evils of birth control and abortion and to persuade others to make correct decisions." *Id.*

464. 492 U.S. 490, 552–53 (1989) (Blackmun, J., dissenting) (citing *Thornburgh*, 476 U.S. at 779).

465. *Id.* at 552; *see also* Allyn, *supra* note 367 (considering what is the fundamental and well-recognized difference between a twenty-three-week, nine-ounce newborn infant and a forty-week, nine-pound fetus).

human zygote and a human being.[466] However, the Court is not bound to accept these Justices' understanding of the term "person" within the meaning of the Fourteenth Amendment.[467] The Court could find that not all humans or natural persons are persons with rights under the Constitution, despite the obvious danger in establishing such a precedent. If the Court uses a textualist or originalist approach, it would likely need to consider how the Fourteenth Amendment was understood by the Nineteenth-century legislators who were responsible for the passage and ratification of the Amendment.

In 1866, U.S. Senator Jacob Howard argued that the legislative purpose of the Fourteenth Amendment, which he sponsored, was to "disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process," which includes the "most despised of the [human] race."[468] In 1868, during the Thirty-Ninth Congress, U.S. Senator Lyman Trumbull from Illinois advocated for the Thirteenth and Fourteenth Amendments on behalf of President Abraham Lincoln and voted for the Fourteenth Amendment.[469] Specifically referring to the inclusive spirit of the Fourteenth Amendment, he hoped to move forward with fellow senators "hand in hand together to the consummation of this great object of securing to every human being within the jurisdiction of the republic equal rights before the law . . . ."[470] In 1875, U.S. Senator Allen Thurman similarly spoke to the radically inclusive intent of the Fourteenth Amendment, stating

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466. It is obvious that there are morphological differences between a unicellular human zygote and what one tends to picture in their mind when they think of a human being. When one imagines a human being, they think of a bipedal, fairly hairless creature who can walk, communicate with language, sexually reproduce, create hierarchical social structures, and reshape the world in his or her image. However, there are also differences between that concept of a human being and a nonverbal, pre-pubescent infant who is unable to walk, yet no one would use the statement of Justice Stevens to suggest that infants are not deserving of protection under the Fourteenth Amendment because "there is a fundamental and well-recognized difference" between an infant and a human being; this is so because infants are fundamentally human beings because they are organisms with human DNA that is developing in the human life cycle. *Webster*, 492 U.S. at 552–53. For the same reason, there is not a "fundamental and well-recognized difference" between a human zygote and a human being; the former is the latter. *Id.*

467. *Id.* at 552–54.

468. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (cited by Craddock, *supra* note 18, at 560).

469. EDWARD MCPHERSON, A POLITICAL MANUAL FOR 1866, at 102 (1866).

470. WILLIAM H. BARNES, HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 132 (1868).

that it: "covers every human being within the jurisdiction of a State. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State from any deprivation of an equal protection of the laws."[471] In 1938, Justice Hugo Black confirmed this view: "The history of the [Fourteenth] Amendment proves that the people were told that its purpose was to protect weak and helpless human beings."[472]

Consistent with these contemporaneous statements from legislators, legal scholars have argued the confluence of events surrounding the ratification of the Fourteenth Amendment and the ensuing passage of nationwide abortion restrictions throughout pregnancy suggest that legislators were enshrining Fourteenth Amendment protections in state abortion restrictions.[473] Others use a

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471. 3 CONG. REC. 1,794 (1875) (statement of Sen. Thurman).

472. Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1938) (Black, J., dissenting).

473. While historian Leslie Reagan did not make this connection in her seminal book, her title tacitly draws it. *See generally* REAGAN, *supra* note 117. Abortion, throughout pregnancy, became a crime in 1867 while legislators were ratifying the Fourteenth Amendment that was passed to protect all humans, and it stopped being a crime in 1973 when the Court overturned those laws. *See id.* at 244–45. Law professor Charles Lugosi has explicitly made this connection:

> In 1867, the same time it ratified the Fourteenth Amendment, Ohio made abortion at any stage of pregnancy illegal. The same year, Illinois also ratified the Fourteenth Amendment and passed laws stiffening penalties for committing abortion. In 1869, in the same session that Florida ratified the Fourteenth Amendment, Florida also passed laws prohibiting abortion at any stage of gestation. Vermont and New York each passed laws that increased protection of unborn human beings after these states ratified the Fourteenth Amendment. By 1875, [sixteen of the twenty-eight] ratifying states had in place tough laws against abortion at any stage of gestation, allowing for abortion only when the life of the mother was in real danger. Congress complemented the action of the various states by enacting the Comstock Laws in 1873 to prevent the dissemination of literature that promoted abortion. The legal protection of unborn human beings at the time the Fourteenth Amendment was ratified was consistent with the guarantee of equal protection and the right to life, to every 'person,' whether born or unborn.

Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 185–86 (2006); *see*, *e.g.*, Gump, *supra* note 136.

textualist and originalist approach to argue that the usage of "person" in nineteenth-century state abortion laws suggests the term would have been understood to include fetuses by those who passed and ratified the Amendment:

> By the time of the Fourteenth Amendment's adoption, "nearly every state had criminal legislation proscribing abortion," and most of these statutes were classified among "offenses against the person." The original public meaning of the term "person" thus incontestably included prenatal life. Indeed, "there can be no doubt whatsoever that the word 'person' referred to the fetus." In twenty-three states and six territories, laws referred to the preborn individual as a "child."[474]

Given these arguments, biologists' consensus on when life begins, the view of Justices, and nineteenth-century legislators' statements, it becomes obvious that the Fourteenth Amendment entails the protection of fetuses because they are humans, and the Amendment's purpose was to protect all weak and helpless human beings.[475] In 2020, which group of humans in the world is more weak and helpless than preborn humans? Each year, approximately 19% are killed in

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474. To compellingly make the originalist argument for fetal rights, it is not crucial that legislators had recognized the unborn as persons. Much like how the First Amendment's protection of free speech applies to motion pictures despite the fact that ratifiers could not have recognized the right extending to motion pictures because they did not exist at the time of the Amendment's ratification, the Fourteenth Amendment's protections of life, due process, and equal protection under the law apply to fetuses because they apply to all humans, whether or not the ratifiers recognized the Amendment extending to fetuses. *See* Craddock, *supra* note 18, at 552.

475. Some suggest that recognizing fetuses as persons under the Fourteenth Amendment could be a death knell for birthright citizenship. *See, e.g.*, Michael H. LeRoy, *The Unborn Citizen*, 108 GEO. L.J. ONLINE 118, 119 (2020) ("By granting rights to an unborn child, the amendment . . . [has] significant implications for immigration, specifically birthright citizenship."). However, nineteenth-century explanations of the Amendment clearly show that it applied to citizens and non-citizens alike. *See supra* note 12 and accompanying text. The Court has held that non-citizen persons can be entitled to due process without being ensured citizenship. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 211 (1982); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

abortions in the U.S.[476] and approximately 34% are killed in abortions around the world.[477]

To summarize and repeat, while legislators before 1973 were reluctant to recognize fetuses as persons under the law in contexts outside of abortion, the majority of states in 2020 recognize fetuses as persons from the moment of fertilization in several legal contexts. Fetuses are recognized as medical patients when they are operated on prenatally,[478] they are deemed homicide and murder victims under states' fetal homicide laws,[479] and they are protected as unborn victims of violence under federal law.[480] Some states have even recognized the independent rights of fetuses.[481] It is no longer true that the law is reluctant to recognize fetuses as human persons, so the Court cannot uphold *Roe*'s argument that the law's treatment of fetuses cuts against their constitutional personhood.

Some scholars have tried to use *McFall v. Shimp*,[482] a Pennsylvania state court decision which held that a person cannot be legally compelled to donate bodily tissue to a family member, to justify

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476. *See* Joyce A. Martin et al., *Births: Final Data for 2018*, CDC: NAT'L VITAL STAT. SYS. (Nov. 27, 2019), https://www.cdc.gov/nchs/fastats/births.htm (noting that 3,791,712 births occurred in 2018); *see also* Elizabeth Nash & Joerg Dreweke, *The U.S. Abortion Rate Continues to Drop: Once Again, State Abortion Restrictions Are Not the Main Driver*, GUTTMACHER POL'Y REV. (Sept. 18, 2019), https://www.guttmacher.org/gpr/2019/09/us-abortion-rate-continues-drop-once-again-state-abortion-restrictions-are-not-main (noting that 862,000 abortions occurred in 2017).

477. *See* Hannah Ritchie, *How Many People Die and How Many Are Born Each Year?*, OUR WORLD DATA (Sept. 11, 2019), https://ourworldindata.org/births-and-deaths (noting that the UN reported that 141 million births occurred in 2015); *see also Unintended Pregnancy and Abortion Worldwide*, GUTTMACHER INST. (July 2020), https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide (noting that 73 million abortions occur each year).

478. *Fetal Surgery*, MAYO CLINIC (Sept. 14, 2019), https://www.mayoclinic.org/tests-procedures/fetal-surgery/about/pac-20384571.

479. *See State Laws on Fetal Homicide*, *supra* note 335.

480. 18 U.S.C. § 1841 (2004).

481. *See, e.g.*, LA. STAT. ANN. § 40:1061.8 (2015) ("[T]he unborn child is a human being from the time of conception and is, therefore, a legal person . . . entitled to the right to life."); MO. REV. STAT. § 1.205 (2017) ("The life of each human being begins at conception . . . the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons."); United States v. Denoncourt, 751 F. Supp. 168, 171 (D. Haw. 1990) ("The Hawaii Legislative Committee Reports for Hawaii Revised Statute[s] § 453-16, define human life, together with entitlement to all rights of human beings, as beginning at viability and viability as occurring when the fetus can exist individually outside of the mother's womb.").

482. 10 Pa. D. & C. 3d 90 (1978).

abortion rights in the face of fetal rights.[483] It is worth considering, despite *Roe*'s determination that abortion rights would collapse under the weight of fetal rights and the determination of Justices, who had found in favor of abortion rights,[484] that fetuses would have to be protected from abortion if they are shown to be humans.[485]

A state legally compelling a person to remove a part of their body to donate it to another person with whom they have no obvious special relationship and to whom they owe no duty is incomprehensible with the argument that a state can use laws to regulate or criminalize the act of abortion, which, in most cases, can be explicitly described as physician-assisted homicide. Setting aside the obvious differences between the nature of the relationships and the nature of the conduct, the chasm between how the law views the government-compelling action and the government-restricting action is so wide that it does not warrant further discussion. However, 'self-defense' is a clear and obvious path to holding that abortion rights supersede fetal rights, which has precedent in the 'life of the mother' exceptions to virtually all abortion laws throughout history and around the world today.[486]

C. Abortion as Self-defense

Self-defense is the ability to "use such force as reasonably appears necessary to defend herself against an apparent threat of unlawful and immediate violence from another."[487] While courts have found that a self-defense claim cannot succeed when a claimant was the initial aggressor or the cause of the original interaction,[488] which might prevent such a claim for abortions of pregnancies that result from consensual sex, the doctrine could be modified or expanded to fit elective abortions.[489]

Recognizing fetuses as persons under the Fourteenth Amendment would not require an all-out ban on abortions because there are

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483. *Id.* at 92; *see, e.g.*, DAVID BOONIN, BEYOND *ROE*: WHY ABORTION SHOULD BE LEGAL—EVEN IF THE FETUS IS A PERSON (2019).

484. Roe v. Wade, 410 U.S. 113, 156–57 (1973).

485. *See* discussion *supra* Part III.B.2.

486. *An Overview of Abortion Laws*, *supra* note 341.

487. GEORGE E. DIX, GILBERT LAW SUMMARIES: CRIMINAL LAW (19th ed. 2016) (emphasis omitted).

488. United States v. Peterson, 483 F.2d 1222, 1231 (D.C. Cir. 1973).

489. *Cf.* Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFFS. 74, 74 (1994) ("[T]he intentional or foreseeable killing in self-defense of such an innocent person who is not about to die soon anyway is unjustifiable . . . .").

permissible forms of killing known as 'justifiable homicide.'[490] There are legitimate interests that compete with the right to life and justify a homicide (e.g., self-defense, necessary use of police force, capital punishment).[491] In the present case, fetal rights would not be absolute because they would need to be balanced against the rights of pregnant women.

Indeed, virtually all abortion restrictions have exceptions for procedures performed for pregnancies that significantly endanger the pregnant woman's life through possible medical complications or a higher risk of suicide in pregnancies resulting from rape or incest.[492] These specific motivations can serve as legal justifications for abortions that represent a conflict between a pregnant woman's right to life and a fetus's right to life. In such a conflict, an abortion necessary to save the life of the mother could be protected using the same logic as the self-defense doctrine.

The first court to propose that certain abortions can be justified with the right to self-defense issued an opinion in 1970 defending the position.[493] However, the court construed this right narrowly as the

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490. Nancy Davis, *Abortion and Self-Defense*, 13 PHIL. & PUB. AFFS. 175, 192 (1984).

491. "['Justifiable homicide' is t]he taking of a human life under circumstances of justification, as a matter of right, such as self-defense, or other causes set out in statute." *Justifiable Homicide*, CORNELL L. SCH. – LEGAL INFO. INST., http://www.law.cornell.edu/wex/justifiable_
homicide (last visited Sept. 6, 2020); *see, e.g.*, MISS. CODE ANN. § 97-3-3(1)(b) (West 1997).

492. Over one thousand "experienced practitioners and researchers in obstetrics and" gynecology signed the Dublin Declaration and affirmed "that direct abortion—the purposeful destruction of the unborn child—is not medically necessary to save the life of a woman," arguing "that the prohibition of abortion does not affect, in any way, the availability of optimal care to pregnant women" because there is "a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child." DUBLIN DECLARATION ON MATERNAL HEALTHCARE (2012), https://www.dublindeclaration.com.

493. *See* Steinberg v. Brown, 321 F. Supp. 741, 746–47 (N.D. Ohio 1970) ("Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it. Obviously, of course, there are limits to the protection which the state can and must extend to human life, but these are clear and well-marked in the law, and have been for centuries, essentially on the basis that 'self-preservation is the first law of nature.' Thus throughout the development of our law, self-defense has always been recognized as a justification for homicide. Hence the provision in the statute here in question that abortion is noncriminal when it is necessary, or declared by two physicians to be necessary, to preserve the life of the mother. One human life may

right to defend one's life in the instance that a fetus represents an imminent threat to the life of the pregnant woman.[494] Thus, the Supreme Court's recognition that the Constitution ensures the protection of fetal rights would not necessarily sound the death knell for legal abortion access like some abortion rights supporters might fear.[495]

D. Americans' Reliance on Roe

While there are grounds to reexamine *Roe*, women's reliance on the precedent would be considered because the grounds for overruling precedent need to be balanced against the cost of repudiating the central holding in *Roe*. The Court has previously recognized that significant reliance is usually understood in commercial contexts where people incurred expenses and liabilities.[496]

As this Article has outlined, *Roe* was decided at a time when the Court was compelled to take notice of arguments that pregnant women faced discrimination, could not work, could not receive welfare, and were often unable to be productive members of society. Because pregnant women today are protected against such forms of discrimination, they are afforded benefits during pregnancy and early parenthood, and they have the ability to relinquish custody of their newborn at a moment's notice, the reliance on *Roe* is not at the level of significance of *Lochner* and *Plessy*.[497]

Because the Court in *West Coast Hotel* found that reliance was not a bar for overruling a precedent—even though the holding fundamentally changed the employer-employee relationship and the government's oversight of that relationship, and nor did the Court in *Brow*n, despite radically transforming commerce, buildings, and the social dynamics and relationships related to race—it would seem

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legally be terminated when doing so is necessary to preserve or protect another or others.")

494. *Id.* at 747.

495. However, to be fair, it is not clear whether abortion can be seen as a form of self-defense when approximately 700 women die as a result of pregnancy or delivery complications in the United States each year, yet there are 3,791,712 live births each year. *See Pregnancy-Related Deaths*, CDC (Feb. 26, 2019), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm; *see also Births and Natality*, CDC (Jan. 20, 2017), https://www.cdc.gov/nchs/fastats/births.htm. It could be argued to be an overreach to suggest there is an absolute self-defense right to have an abortion to mitigate a .0002% chance of death.

496. United States v. Title Ins. & Tr. Co., 265 U.S. 472, 486 (1924).

497. *See generally* Lochner v. New York, 198 U.S. 45 (1905); Plessy v. Ferguson, 163 U.S. 537 (1896).

difficult for the Court to find reliance on legal abortion access an insurmountable bar.[498] There are now protections against women losing their employment, housing, or educational opportunities due to their pregnancies.[499] Restricting abortion access would merely incentivize them to more diligently avail themselves of the multitude of contraceptive methods, and it would solely limit a woman's ability to legally end her child's life in an abortion. Due to Safe Haven Laws and adoption programs, this would not impose any child-rearing burden after the pregnancy has come to its fruition.[500]

The Court in *Casey* stated that "the effect of reliance on *Roe* cannot be exactly measured" but noted that there is a cost to those who order "their thinking and living around that case."[501] Justice Kavanaugh, detailing a consideration that can assist the Court in assessing whether there is a "special justification" or "strong grounds" for overruling a prior holding of the Court, used this question to assess a previous constitutional decision made by the Court: "[W]ould overruling the prior decision unduly upset reliance interests?"[502]

While the Court might find some reliance on *Roe* and some cost of overruling it, to answer this question, the Court would need to assess them against such a decision's benefit, correctness, or dueness. *Roe*'s central holding forestalls a preborn human's right to equal protection under the Fourteenth Amendment and infringes on a state's Tenth Amendment right to protect humans for the first twenty-four to forty weeks of their lives. Clearly, the Court would need to find tremendous reliance for it to serve as a bar for reexamining or overruling *Roe*.

CONCLUSION

The legality of abortion access should not be seen as merely a matter of preference or opinion but rather a matter of what the U.S. Constitution and the law command. This important aspect of modern life greatly impacts millions of American lives.[503] At stake, each year,

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498. *See generally* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

499. *See* 20 U.S.C. § 1681 (2018) (Title IX); 29 U.S.C. § 2612 (2018) (FMLA); 42 U.S.C. § 2000e(k) (2018) (Pregnancy Discrimination Act); 34 C.F.R. § 106.40(a), (b)(5) (2019).

500. *See generally* CHILD WELFARE INFO. GATEWAY, *supra* note 183.

501. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

502. Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part).

503. One side believes abortion rights are essential for a progressive, gender-equal society and uses rhetoric that suggests legal restrictions of elective abortion access can

are the lives of approximately 4.5 million prenatal humans who dwell within the jurisdiction of the United States and the ability of approximately 4.5 million pregnant women to end those lives by abortion.[504]

In the forty-seven years since *Roe*, over 60 million humans in the U.S. have been legally killed in abortion procedures under the protection of the Supreme Court's interpretation of the Constitution.[505] The approximately 150 million Americans born after *Roe* could have been legally killed in the first several months of their lives. Each year, nearly fifty times as many abortive homicides[506] take place as postnatal homicides[507] in the U.S. In the American abortion debate, while the Court deliberates, bodies accumulate.

In 1973, the Court might have believed that the majority of Americans did not want the government to have a say in abortion, but that is not true today. In a 2020 Marist Poll, only 30% of Americans reported supporting legal abortion access after the first trimester, and 80% stated that abortion laws can protect both the pregnant woman and her preborn child.[508] Clearly, most are principally opposed to *Roe*'s lack of any protections for fetuses.[509] If the Court takes notice of

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bring about a religious theocracy where women are slaves to men. *See, e.g.*, John Bowden, *Harris Invokes 'Handmaid's Tale' After Alabama Lawmakers Pass Abortion Law*, HILL (May 15, 2019), https://thehill.com/homenews/campaign/443839-harris-invokes-handmaids-tale-after-alabama-lawmakers-pass-abortion-law (discussing U.S. Senator Kamala Harris' comparison of an Alabama abortion restriction to such a fictional future). The other side views the legalization of abortion as the greatest human rights violation in human history, pointing to the approximately 1 billion humans who have been killed in abortion since the year 2000. *See* calculation *supra* note 483.

504. *See* calculation *supra* note 483.

505. David Sivak, *Fact Check: Have There Been 60 Million Abortions Since* Roe v. Wade?, CHECK YOUR FACT (July 3, 2018, 3:22 PM), https://checkyourfact.com/2018/07/03/fact-check-60-million-abortions.

506. "Approximately 862,320 abortions were performed in 2017." *Induced Abortion in the United States*, GUTTMACHER INST. (Sept. 2019), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states.

507. "[T]he estimated number of murders in the nation was 17,284." *2017 Crime in the United States*, FED. BUREAU INVESTIGATION (2017), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/murder.

508. *See generally* Knights of Columbus, Marist Poll: Americans' Opinions on Abortion (Jan. 2020).

509. Some report polls that suggest 77% of Americans want the Court to uphold *Roe*. *See, e.g.*, Rachel Frazin, *Poll: 77 Percent Say Supreme Court Should Uphold* Roe v. Wade, HILL (June 7, 2019, 5:00 AM), https://thehill.com/policy/healthcare/abortion/447397-77-percent-say-supreme-court-should-uphold-roe-v-wade). But the actual poll suggests that only 16% want the Court to keep *Roe* as it is,

the developments discussed in this Article, the question is whether the Court would recognize the constitutional rights of fetuses or merely permit states to protect fetuses throughout their lives.

Justice Scalia strongly opposed the Court's attempt to end the national abortion controversy.[510] He argued that *Roe* not only failed to end the controversy, but in all likelihood the Court's decision has exacerbated it.[511] This leads some to argue that the Court should lower the standard of review for state abortion statutes to the rational basis test, effectively returning the issue of legal abortion back to the states.[512] There would be some value to that as part of an incremental approach to reform; the Court could then revisit the issue after states have had the opportunity to pass the legislation that their representatives and citizens believe to be the best balance of their constitutional duty and public policy interests. But as the legal maxim goes: 'Justice delayed is justice denied.'[513]

When the Court reexamines *Roe*, it should not put its finger in the air to determine which way the wind blows, taking America's pulse to determine what people prefer so it can make a Solomonic decision on how to craft the legislative bounds it predicts is most likely to retard the flames of the U.S. abortion debate.[514] It should also not

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61% want the Court to modify *Roe*, and 13% want the Court to overturn *Roe*. Domenico Montanaro, *Poll: Majority Want to Keep Abortion Legal, But They Also Want Restrictions*, NPR (June 7, 2019, 5:00 AM), https://www.npr.org/2019/06/07/730183531/poll-majority-want-to-keep-abortion-legal-but-they-also-want-restrictions). Further, my research has shown that most Americans have misconceptions about *Roe*, so these results should be considered in the broader context of the numerous polls that show a large majority of Americans support laws that restrict abortion access before fetal viability, which *Roe* deems unconstitutional. Jacobs, *supra* note 47, at 189.

510. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting).

511. *Id.* This opinion was shared by Justice Scalia's friend and colleague, Justice Ginsburg: "[*Roe*] appears to have provoked, not resolved, the [national abortion] conflict." Ginsburg, *Some Thoughts on Autonomy*, *supra* note 24, at 386; *see also* Ginsburg, *Speaking*, *supra* note 24, at 1199.

512. The same effect could also be achieved by recognizing that a state has a compelling interest in protecting fetuses at fertilization because it would overcome the fundamental liberty right to abortion before viability, but it would not require states to pass such laws.

513. *See generally* Tania Sourdin & Naomi Burstyner, *Justice Delayed is Justice Denied*, 4 VICTORIA U. L. & JUST. J. 46, 46 (2016) (quoting Prime Minister William Gladstone).

514. This would fundamentally reflect the same kind of mistake the Court made in *Dred Scott v. Sandford*, which is often cited as one of the worst decisions in the Court's centuries-long, illustrious history. 60 U.S. 393, 454 (1856). Justices had ruled

strategically seek to incrementally grow the ability of states to restrict abortion—without establishing fetal rights, or at least recognizing that fetuses are humans and states have a compelling interest to protect humans throughout their lives—because such a tack would smack the proverbial left shoe of the judiciary on the right foot.[515] The Court should fulfill its duty to faithfully interpret the Constitution and ensure that the rights enshrined by the Fourteenth Amendment are protected.[516]

The majority in *Roe* held that the Fourteenth Amendment entails the liberty right to terminate a pregnancy and to be free from detriments related to child-rearing before the fetus has reached viability because it could not find a consensus that agreed with Texas's view that life begins at conception. The Court could not find evidence that fetuses are persons within the meaning of the Fourteenth Amendment, so it ruled that fetuses do not deserve equal

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based on their policy preferences when they should have focused on their duty to faithfully interpret the Constitution. By failing to use their constitutional authority to recognize the constitutional rights of all humans, and in actually ruling against that precept, the Justices in *Dred Scott* legitimized Southern opposition to equality, effectively trying to put out a national fire with lighter fluid. While this Article casts no aspersions on the Justices in *Roe*'s majority, the Court can be said to have committed the same error with the viability standard, as it seemingly sought to strike the balance between both sides and between state's right to protect life and a woman's liberty right to abort.

515. If the Court slowly erodes abortion rights by limiting access, then it could be perceived as a biased actor that is allowing the pro-life part of this nation to infringe on the human, civil, and constitutional rights of women. However, if the Court takes notice of scientific and legal developments, declares that a fetus is a human, and interprets the Fourteenth Amendment to find that a fetus is a person no less deserving of equal protection than any other, then Americans can accept that man's knowledge on the humanity has progressed and the viability standard is simply outdated and incorrect:

> It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*.

Casey, 505 U.S. at 867. This Article argues that, to finally put out the flames of the national abortion controversy, the Court should use the fire extinguisher of fetuses' biological humanity and constitutional right to equal protection.

516. U.S. CONST. amend XIV, § 1.

protection under the law.[517] Yet those determinations were made at a time when many pregnant women's lives were subject to discrimination and significant detriments related to pregnancy and child-rearing, when the Court did not know that each abortion ends the life of a human, and when the Court noted that states were reluctant to recognize fetuses as persons.

As this Article has outlined, in 2020: (1) government programs and legislative protections have dramatically reduced those detriments; (2) biologists and supporters of abortion rights agree that fetuses are humans at fertilization; and (3) states recognize fetuses as persons in numerous legal contexts. The majority in *Roe* recognized that abortion rights collapse under the weight of fetal personhood.[518] In subsequent cases, Justices Brennan, Blackmun, Marshall, and Stevens have recognized that the Constitution would guarantee fetal rights and protections against abortion if it can be established that a fetus is indeed a human.

Based on these developments in the decades after *Roe*, *Casey*'s *stare decisis* standard has been satisfied as "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[519] Like in *Brown*, these changes in facts do not only support overruling the Court's prior decision but command it.[520] Similarly, under Justice Kavanaugh's updated *stare decisis* standard,[521] *Roe* should be overturned because it is "grievously or egregiously wrong," the decision has caused "significant negative real-world consequences," and overruling it would not "unduly upset reliance interests."[522]

Roe's central holding needs to be overruled because it wrongfully infringes on a state's compelling interest in protecting life reserved to

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

518. *Id.* at 156.

519. *Casey*, 505 U.S. at 855 (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

520. The *Casey* Court argued that "the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required." *Id.* at 863.

521. *See* Egelko, *supra* note 369.

522. The prior ruling is "grievously or egregiously wrong" because it is based on an outdated and incorrect understanding of science and the law. The reality that tens of millions of preborn humans have been killed with legal impunity since 1973 shows the holding has had "significant negative real-world consequences," and overruling it cannot be said to "unduly upset reliance interests" because its overruling can protect the rights and lives of millions of Americans who come into existence each year. *Id.*

states under the Tenth Amendment and fetuses' rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses.[523] These rights are guaranteed by the Constitution and, as the Court has held,[524] they supersede abortion rights.[525]

Because *Roe*'s original justification has been rendered obsolete, upholding abortion rights due to *stare decisis* would be to protect a

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523. For instance, Missouri recognizes fetuses as humans with rights throughout pregnancy: "The life of each human being begins at conception[.] . . . [T]he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons." MO. REV. STAT. § 1.205 (2017). Because the statute recognizes fetuses as biological humans and protects them equally under criminal homicide and murder statutes, how can Missouri legislators feel able to carry out their constitutional duty to provide all humans within its jurisdiction equal protection under the law when they cannot protect each Missourian for the first twenty-four weeks of his or her life? What explanation can they give their constituents? In 1973, they could have said: 'The Supreme Court found that there is no consensus on when life begins, so we technically do not know when a fetus is a human deserving of equal protection.' Today, they would have to say: 'While we know that biologists around the world recognize fetuses as humans and most states have laws that protect fetuses from the moment of fertilization in non-abortive contexts, we cannot equally protect unwanted fetuses because the Court in 1973 made a decision based on its limited understanding biological humanity and legal personhood of fetuses, which has recently shown to be outdated and incorrect.' That is simply unacceptable.

524. For *Roe*'s discussion, *see supra* note 74 and accompanying text. For other Justices affirming this view, *see supra* note 43 and accompanying text.

525. Seventy percent of Americans agree that the right to life supersedes the right to liberty, which is the overarching right that encompasses the right to abortion. *See* Steve Jacobs, *How Views on 'When Life Begins' Drive Americans' Abortion Attitudes*, HETERODOX: THE BLOG (July 3, 2020), https://heterodoxacademy.org/social-science-abortion-attitudes. Life is the more fundamental right (because one can have life without liberty but not the reverse), life is the more absolute right (because the right to liberty is infringed upon in countless ways—as it is balanced against, and secondary to, compelling state interests and higher rights of others—while their right to life can be infringed upon in no more than a handful of circumstances), and the right to liberty is derogable and can be suspended in times of war while life is a non-derogable right and cannot be suspended. A non-derogable right is defined as "[a] right that, at least in theory, cannot be taken away or compromised . . . In human rights conventions certain rights have been considered so important that they are non-derogable" which includes "the right to life." *Non-derogable Right,* UNTERM, https://unterm.un.org/unterm/Display/record/UNHQ
/non-derogable_right/D4DBB9694E5B40DA8525751B0077E882 (last visited Sept. 6, 2020). This hierarchy is most clear in homicide laws that limit a potential killer's right to liberty, recognizing that it is secondary to a potential victim's right to life. It is the spirit of this analysis that likely undergirded the position of the majority in *Roe* and other Supreme Court Justices.

"demonstrably erroneous"[526] interpretation of the facts and how they relate to the Tenth and Fourteenth Amendments. Thus, to continue to protect abortion rights, the Court would need to find there is overwhelming reliance on *Roe* or chart a new path: The Court can determine that not all humans are persons deserving of rights or that abortion is a constitutionally protected form of homicide. In any case, no longer can the Court find refuge in the jurisprudence of doubt; it needs to give an answer to this divided nation where some support absolute abortion rights and most believe in rights for the unborn.[527]

To summarize and repeat, if the Court reexamines *Roe,* and takes judicial notice[528] of the fact that fetuses are now recognized as biological humans and legal persons, then it will likely spell the end of *Roe v. Wade*'s viability standard. Both sides of the national abortion controversy could then accept a mandate rooted in the Constitution[529] and start to heal their division.

This claim might sound overly-optimistic, but so too would a 1950s proclamation that Americans could accept *Brown* and embrace a desegregated nation that one day elects and re-elects an African-American President;[530] yet, in a few short years after *Brown*, public

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526. Gamble v. United States, 587 U.S. 1960, 1981 (2019) (Thomas, J., concurring).

527. It is important to note that the juxtaposition of the nation fundamentally divided on abortion (i.e., 'pro-life v. pro-choice') is mostly nominal, today. In surveys of Americans, only 23% of those who identify as pro-choice are aware that, from a biological perspective, a human's life begins at fertilization. This might explain why 93% of Americans suggest that a human's life is worthy of legal protection once it begins, yet so many believe a fetus is not worthy of such protection. It is not likely due to their support of liberty over life (as 70% suggest that in the abstract, the right to life supersedes the right to liberty) but rather because they do not recognize a fetus as a human with a right to life because they believe that a human's life begins at viability or birth. *See* Jacobs, *supra* note 525.

528. FED. R. EVID. 201.

529. "It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

530. It is important to note that if states refuse to follow the Court's recognition of fetal rights, or even bolster abortion rights, the Court can assert its judicial supremacy as rooted in *Marbury v. Madison*. 5 U.S. (1 Cranch) 137 (1803). *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 19 (1958) (compelling Arkansas state officials to desegregate schools based on the Court's holding in *Brown*). However, this would be complicated by some towns' recent efforts to pass ordinances to establish themselves as "sanctuary cities for the unborn" and others' calls for similar efforts to protect

sentiment of a nation with a history of slavery and Jim Crow laws shifted from the ardent stance that blacks and whites should not be educated together to widespread support for racially-integrated schools.[531]

Those who believed *Obergefell v. Hodges*[532] would change Americans' attitudes toward same-sex marriage would have also seemed overly-optimistic; yet, support for same-sex marriage among Americans rose after the Court recognized a right to same-sex marriage.[533] Indeed, as President Barack Obama said around the time of the *Obergefell* decision: "A decade ago, politicians ran against LGBT rights. Today, they're running towards them . . . [b]ecause they've learned what the rest of the country knows—that marriage equality is about our civil rights, and our firm belief that every citizen should be treated equally under the law."[534] In 2020, mere years after the Court intervened, 70% of Americans support the rights of gay and lesbian couples to get married.[535] The same can happen with fetal rights.

Generally, when the Supreme Court recognizes civil rights rooted in fact and based on solid constitutional grounds, the Court can build consensus among Americans and reduce tensions on controversial issues. In a survey of Americans, supporters of abortion rights

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abortion access on the local level. *See* Caleb Parke, *Banning Abortion, More Texas Towns Become 'Sanctuary Cities for the Unborn'*, FOX NEWS (Jan. 16, 2020), https://www.foxnews.com/us/texas-abortion-city-sanctuary); *see also* Marie Solis, *Pro-Choice 'Sanctuary Cities' Could Help Expand Abortion Access*, VICE (Jan. 16, 2020, 6:00 AM), https://www.vice.com/en_us/article/bvgnvm/abortion-sanctuary-cities-proposal-could-help-expand-abortion-access.

531. Polls conducted before *Brown* suggest that about two-thirds of whites wanted racially-segregated public schools. Taeku Lee, *Polling Prejudice*, AM. PROSPECT (Mar. 9, 2011), https://prospect.org/article/polling-prejudice. But a majority supported integration two years after *Brown* was decided; support among Americans reached 86% in 1972 and climbed to 95% in 2007. Erica Frankenberg & Rebecca Jacobsen, *Trends–School Integration Polls*, 75 PUB. OP. Q. 788, 789 (2011).

532. 576 U.S. 644 (2015).

533. *Attitudes on Same-Sex Marriage*, PEW RSCH. CTR. (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage.

534. Barack Obama, President of the U.S., Remarks by the President at LGBT Pride Month Reception (June 24, 2015).

535. *Dueling Realities: Amid Multiple Crises, Trump and Biden Supporters See Different Priorities and Futures for the Nation*, PUB. RELIGION RSCH. INST. (Oct. 19, 2020), https://www.prri.org/research/amid-multiple-crises-trump-and-biden-supporters-see-different-realities-and-futures-for-the-nation.

suggested they believe that the Court's recognition of fetuses' humanity could help to reduce the national abortion controversy.[536]

The Court needs to move past *Roe* and update its abortion jurisprudence to be responsive to the realities of the twenty-first century. One side of the Supreme Court's building prominently displays the words "Equal Justice Under Law" while the other displays the phrase "Justice, the Guardian of Liberty." Today, *Roe* and its progeny have led the Court to turn a blind eye to the fact that humans in America have no rights, justice, or liberty for the first six to nine months of their lives. While the liberty rights of pregnant women are important, can there be any equal justice under law until fetuses are at least recognized by the Court as human persons with the right to due process and equal protection under the law?[537]

The U.S. abortion debate has recently jeopardized the Court's reputation,[538] it led the minority leader of the U.S. Senate to threaten sitting Supreme Court Justices on the steps of the Supreme Court Building,[539] and it has undermined the stability of America's democratic political institutions.[540] We cannot continue down this path. Each member of the Court has the title of "Justice" because they were appointed to the role that serves as the embodiment and

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536. Eighty-three percent of pro-choice Americans believe the public's recognition of fetuses' humanity would reduce support for legal abortion access if it became common knowledge that a human's life begins at fertilization, and 90% believe that it would reduce the abortion rate. Jacobs, *supra* note 47, at 213.

537. Equal protection is guaranteed under the Fourteenth Amendment of the Constitution. U.S. CONST. amend XIV, § 1.

538. Consider recent efforts to stop the U.S. Senate from confirming nominees to the Supreme Court who were not recognized as absolute supporters of *Roe*. *See, e.g.*, Mollie Hemingway, *Blasey Ford Attorney Admits Abortion Support 'Motivated' Anti-Kavanaugh Accusations*, FEDERALIST (Sept. 4, 2019), https://thefederalist.com/2019/09/04/blasey-ford-attorney-admits-abortion-supported-motivated-anti-kavanaugh-accusations; *see also* Emma Green, *No One Likes Amy Coney Barrett's Abortion Answer*, ATLANTIC (Oct. 13, 2020), https://www.theatlantic.com/politics/archive/2020/10/amy-coney-barrett-roe-v-wade/616702; Adam Liptak, *Amy Coney Barrett, Trump's Supreme Court Pick, Signed Anti-Abortion Ad*, N.Y. TIMES (Oct. 1, 2020), https://www.nytimes.com/2020/10/01/us/amy-coney-barrett-abortion.html.

539. *Schumer Threatens the Court*, WALL ST. J. (Mar. 4, 2020, 7:34 PM), https://www.wsj.com/articles/schumer-threatens-the-court-11583368462.

540. Multiple 2020 presidential candidates suggested they would 'pack' the Court to counteract the recent appointments of Republican-nominated Justices to the Court, which has been commonly recognized as a threat to *Roe*. *See, e.g.*, Pema Levy, *How Court-Packing Went from a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), https://www.motherjones.com/politics/2019/03/court-packing-2020.

ultimate arbiter of justice in our nation. It is time that each member of the Court fulfills that role and provides equal justice for all humans.

A. Coda

To establish fetal rights and require that states restrict legal abortion access, the Court would need to establish that: (1) a fetus is a human; (2) a fetus is a person within the meaning of the Fourteenth Amendment; and (3) fetal rights supersede abortion rights.

Based on available evidence, the scientific literature[541] and a consensus of biologists[542] have established that a fetus is a human. A review of the history of the Amendment,[543] which was confirmed by Supreme Court Justices,[544] has established that all humans are persons. A fetus, by virtue of being a human, is a person deserving of rights and legal protection. The Justices in the majority of *Roe* have held that a fetus's rights supersede the right to abortion,[545] and this was confirmed by Justices in subsequent cases.[546]

As the facts are understood today, the Fourteenth Amendment commands that both previable and viable fetuses, from the moment of fertilization, are constitutionally entitled to equal protection under

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541. *See* discussion *supra* pp. 807–11. "A review of recent discoveries and the development of scientific literature since *Roe* [establish the incontrovertible scientific fact] that sperm-egg plasma membrane fusion (fertilization) is the [ontogenetic] starting point of a human organism (a human being)." Brief of Amicus Curiae Illinois Right to Life, *supra* note 227, at 11–12 (internal citations omitted).

542. *See* discussion *supra* Part II.B.1.c. "5,577 participants assessed at least one of the five statements [(96%)], and only 240 participants did not affirm at least one of the statements (4%) [that represented the view that a human's life begins at fertilization]." Jacobs, *supra* note 47, at 250.

543. *See* discussion *supra* Part III.B.4. Nineteenth-century U.S. Senators Howard, Trumbull, and Thurman stated that the Fourteenth Amendment protects all humans.

544. *See* discussion *supra* Part III.B.4. Justice Hugo Black confirms this view: "The history of the [Fourteenth] Amendment proves that the people were told that its purpose was to protect weak and helpless human beings." Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1938).

545. *See supra* notes 524–25 and accompanying text (discussing Americans' affirmation and an analysis of life as the more fundamental, absolute, and non-derogable right). This is further evinced by the fact that the *Roe* Court ruled a state's compelling right to protect life supersedes the liberty right to abortion.

546. Justices Blackmun, Brennan, Marshall, and Stevens held that if a fetus is a human, "the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures" because the fetus's protection would be guaranteed by the Fourteenth Amendment. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring).

the law. As human persons, they deserve due process and protection from legal abortion access.