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Elizabeth Samuels April 1, 2020

# Religion, Abortion, & Law: An Analysis of How Religiously Informed Conceptions of Personhood Shape U.S. Supreme Court Rulings on Abortion

by

Elizabeth Samuels

Stu Marvel
Adviser

Women's Gender, and Sexuality Studies (WGSS)

Stu Marvel

Adviser

Dabney Evans

Committee Member

John Blevins

Committee Member

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Abstract

Religion, Abortion, & Law: An Analysis of How Religiously Informed Conceptions of Personhood Shape U.S. Supreme Court Rulings on Abortion
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Has religion covertly become an integral part of American abortion and reproductive health law despite the formal constitutional separation of Church and State? If so, How? And what might we learn from an investigation into whether and how religious conceptions of personhood have been transferred from conservative Christian contexts to national abortion law? To answer this interlocking set of questions, I traced the advent of America's Religious Right and their role in creating the modern anti-abortion advocacy movement. I then analyzed nine Supreme Court rulings that form the legal framework for our nation's status quo regarding abortion. I found that while many liberal Justices acknowledge the role religion plays in informing deeply held conceptions of personhood, they defer to secular arguments and argue that the Court's neutral role requires the upholding of abortion's legality. Conversely, conservative Justices have increasingly emphasized the personhood of the fetus while denying the role of religion in informing anti-abortion views. Their strategy mirrors that of the anti-abortion advocacy movement. I argue that through the use of language and argumentation containing implicit religious sentiments, conservative Christian understandings of personhood (i.e., that life begins at conception) have had great and lasting impact on restricting women's access to abortion. And that although in name a neutral and impartial institution, the Supreme Court reflects the proliferation of conservative Christian notions at the highest level, impacting all jurisprudence and laws below it. I conclude by arguing that the First Amendment's Establishment Clause is an important legal avenue by which this undue influence on abortion law should be challenged.

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Table of Contents

# Chapter 1: Introduction

## Research Question

"One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion" Justice Harry Blackmun, *Roe v. Wade*, 420 US 113, 116 (1973).

"The intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate." Justice Paul Stevens, *Webster v. Reprod. Health Servs.,* 492 U.S. 490, 571 (1989).

Has religion covertly become an integral part of American abortion and reproductive health law despite the formal constitutional separation of Church and State? If so, how precisely has religion influenced and presented itself in abortion jurisprudence? And finally, what might we learn from an investigation into whether and how religious conceptions of personhood have been transferred from conservative Christian contexts to national abortion law?

To answer this interlocking set of questions, I analyze nine Supreme Court rulings that form the legal framework for our nation's status quo regarding abortion, first establishing its broad legality and subsequently enabling many current features and restrictions of access to the procedure. I hypothesize that through the use of language and argumentation containing implicit religious sentiments, conservative Christian understandings of personhood (i.e., that life begins at conception) have had great and lasting impact on restricting women's access to abortion. And that although in name a neutral and impartial institution, the Supreme Court reflects the proliferation of conservative Christian notions at the highest level, impacting all jurisprudence and laws below it.

**Method and Theory**

In this project I examine how religiously charged language – specifically surrounding conceptions of fetal personhood – functions to frame and produce concrete results in the legal realm of abortion and reproductive rights. I analyze a series of relevant and influential Supreme Court cases, examining whether and how the Religious Right's beliefs about when life begins have pervaded legal conceptions of personhood. This project is written as part of the Women/Gender Studies Honors program, and the work of feminist scholars and activists are a crucial authority in this research. Through my project, which aims to understand and analyze the ways in which reproductive rights are restricted and challenged through law, I hope to further the feminist goals of women's equality and champion reproductive justice.[1] There are countless ways to study the issue of abortion: researchers look at perceptions, laws, and practices, and do so in reference to individuals, clinics, local areas, states, and countries. In narrowing down, I wanted to focus on legal aspects of abortion in the United States, in order to thoroughly follow the progress and history of one country's trajectory.

I pull from several different social science theories in creating my methodology. Socio-legal theory contends that an "analysis of law is directly linked to analysis of the social situation in which the law applies."[2] I am therefore interested in looking at how the societal "situation" of abortion, made up by the beliefs, practices, and discourse surrounding the procedure, contributes to and is in turn influenced by law. Legal discourse analysis looks at the link between law and language,[3] emphasizing the importance of linguistics and phrasing in the law, something I am

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[1] SisterSong, a women of color reproductive justice collective, defines reproductive justice as: "the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities." *Reproductive Justice*, SISTERSONG, https://www.sistersong.net/reproductive-justice.
[2] David N. Schiff, *Socio-Legal Theory: Social Structure and Law*, 39 THE MODERN LAW REVIEW 287 (1976).
[3] Beverly Brown, *Legal discourse*, ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (1998), https://www.rep.routledge.com/articles/thematic/legal-discourse/v-1.

delving into by looking at phrasing and argumentation in Court opinions. Similarly, theories of framing[4] look at how the way issues are presented shapes their reality. Lastly, narrative analysis[5] looks at how stories are told and shared; the stories told by the court—in dissents and majority opinions, over decades—create a lasting legal narrative of abortion that shapes our practices.

By examining how an issue is addressed at the highest level of jurisprudence, it is possible to observe the culmination of decades of an entire nation's discourse surrounding the most contentious and significant legal questions relating to fetal personhood.[6] Supreme Court opinions reveal the most common conflicting arguments and the voices of stakeholders and everyday citizens, both in the decisions of the Justices themselves and the credence they often give to amicus briefs and popular opinion. The Supreme Court Justices are the most powerful voices in U.S. jurisprudence, and they reflect a wide array of sources that constitute America's legal discourse, including lower Court decisions, relevant precedents, and references to outside scientific findings and commonly-held beliefs.

The primary alternative method of research I considered was looking at specific state laws regarding fetal personhood and abortion. However, the vast diversity and quantity of legislation relating to abortion, including bills which never passed or exist in political limbo, would require too much arbitrary discrimination in defining the 'best' statutory representation of legal discourse. In contrast, case law offers a bird's eye view of trends and patterns over time and across all 50 states. For example, a key subset of abortion legislation, the Targeted Regulation of

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[4] Discussed further in Chapter 2, page 20.
[5] Mike Allen, *Narrative Analysis*, THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS (2017), https://methods.sagepub.com/reference/the-sage-encyclopedia-of-communication-research-methods/i9374.xml
[6] The practice of evaluating significant cases is widely accepted as the principal method by which to understand U.S. law, as reflected in the use of the casebook method in U.S. law schools. *See* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 ILLINOIS LAW REVIEW 819 (2002). *See also* the example of Harvard: *The Case Study Teaching Method*, HARVARD LAW SCHOOL, https://casestudies.law.harvard.edu/the-case-study-teaching-method/

Abortion Providers ("TRAP" laws), are encompassed comprehensively in the landmark cases I cover.[7] The exception to this rule is the newer trend of "fetal heartbeat" early abortion bans, which have not been addressed by the Supreme Court to date.

For my analysis, I selected nine Court rulings on abortion that are considered significant by relevant legal scholars and activists.[8] Cases are generally considered landmark because of their historical significance and lasting impact; some cases such as *Roe v. Wade* are considered landmark for initiating enduring and dramatic shifts in national law. Others such as *Maher v. Roe* might be less universally recognizable but are considered influential in the arena of reproductive justice.

For each opinion, I examine the way fetal personhood is conceptualized, choosing specific language and narratives that I hypothesized to be avenues by which implicit religion has pervaded legal discourse. I did a close reading of specific sections that articulate ideas of when life begins and the status of the fetus under the law, as well as descriptive language characterizing fetuses. Some key phrases I noted are: "unborn baby/infant," "unborn child," "fetal life," and the use of "baby" or "child" as an alternative to fetus. These are significant phrases or conceptions identified by anti-abortion organizations who encourage their intentional use.[9] I was heavily inspired by my internship at the Center for Reproductive Health Research in

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[7] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Discussed further on page 73.

[8] For some of the sources I consulted in choosing the nine SCOTUS cases *see* MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE (2019); MELISSA MURRAY, KATHERINE SHAW & REVA SIEGEL, REPRODUCTIVE RIGHTS AND JUSTICE STORIES (2019); *Landmark United States Supreme Court Cases*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/public_education/Programs/constitution_day/landmark-cases/; *TIMELINE OF IMPORTANT REPRODUCTIVE FREEDOM CASES DECIDED BY THE SUPREME COURT*, ACLU, https://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court; *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RESEARCH CENTER, https://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/; *Reproductive Rights: U.S. Supreme Court Cases*, FINDLAW, https://family.findlaw.com/reproductive-rights/reproductive-rights-u-s-supreme-court-cases.html.

[9] Discussed further in chapter 3 on page 30.

the Southeast (RISE) with public health scholars Drs. Dabney P. Evans and Subasri Narasimhan, as well as their excellent paper "A narrative analysis of anti-abortion testimony and legislative debate related to Georgia's fetal "heartbeat" abortion ban."[10] Evans and Narasimhan identify many of these key phrases as "lexical bridges" for anti-abortion rhetoric, and as strategies for linking fetuses with personhood. They examine how these phrases factor into larger narrative trends and assess common legal arguments in their analysis of state legislative debates regarding early abortion bans.

I also examine words and phrases I consider to be avenues for expression of religious beliefs, such as "value judgments" and "moral concerns." In addition, for each individual case I noted the presence or absence of explicit mentions of religion, such as *Roe v. Wade's* exploration of how religion informs a wide variety of conflicting views on abortion, and Justice Stevens' dissent in *Webster v. Reproductive Health Services*, where he argues that the statute at issue constitutes a violation of the Establishment Clause of the First Amendment[11] by declaring a that life begins at conception in its preamble. I am not doing the data analysis that RISE's highly skilled research team is executing, but their narrative analysis was a crucial guide and key inspiration for my methodology.

I acknowledge that there are some limitations to my approach. As a solo researcher, I could have easily missed important instances of religion and personhood. Similarly, by narrowing my research to these nine rulings, I am excluding other Supreme Court rulings, lower court rules, legislation, and regulations that might also illuminate the development of personhood and

[10] Discussed further in chapter 2 on page 22. Dabney P. Evans & Subasri Narasimhan, *A narrative analysis of antiabortion testimony and legislative debate related to Georgia's fetal "heartbeat" abortion ban*, 28 SEXUAL AND REPRODUCTIVE HEALTH MATTERS 1 (2020).

[11] Which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" U.S. CONST. amend, I.

religion in American law. I also understand that my analysis could be critiqued for its subjectivity, since it involves my own discretion in choosing and interpreting notable phrases and sections. A future researcher could consider doing a more data-driven assessment of the Court opinion language I present here, such as a content analysis of these opinions by coding key phrases I have selected. I also acknowledge limitations with my assumption that religious conceptions of life beginning at conception are necessarily are intertwined with a conservative ideology; although this appears to be the most common affiliation, secular conceptions of personhood are not necessarily aligned with progressive politics, and many might have religious beliefs that life begins at conception but still advocate for abortion access for other reasons.

In what follows I use the word "rhetoric," but I do not mean to imply that the use of political strategy is necessarily malicious or ill-founded, or to demean the seriousness of religious beliefs. Many draw from their faiths sincere beliefs about morality and humanity—myself included. In addition, I do my best to differentiate between the views that particularly make up anti-abortion advocates as opposed to Evangelical, Catholic, and other Christian viewpoints in America, which of course can and do vary widely.[12] I am also using the terms "anti-abortion" and "abortion rights" for simplicity, and to avoid the "pro-life"/"pro-choice" labels that in themselves are worthy of an Honors thesis on the functioning of rhetorical strategy.

[12] As discussed on the following page.

## Chapter 2: Background, Lit Review, Where My Research Fits

### Background

#### *Abortion in the U.S.*

Abortion law in the early United States followed English Common law tradition, which banned the procedure after quickening,[13] although these laws were rarely enforced or strictly regulated.[14] From the mid-1800s into the following century, abortion was banned in most circumstances across the country.[15] Dangerous and illegal abortions were common during this period, disproportionately impacting poor women and disadvantaged minorities.[16] However, the 1960s saw a shift in abortion law, as the second wave feminist movement began campaigning for expanded abortion access on the basis of women's equal right to control their bodies.[17] Seventeen states soon legalized abortion in a variety of circumstances, although only four states had the broader legality that would soon become law of the land.[18] In 1973, the Supreme Court ruling *Roe v. Wade* legalized abortion in the U.S. under a penumbra of constitutional amendments dictating the right to privacy, with increasing restrictions throughout a pregnancy's progression.[19]

Following the ruling, *Roe v. Wade* was not even the day's top headline, as former President Lyndon B. Johnson had just passed away, and 52% of Americans reported their support for the decision.[20-21] However, the case would soon become a lightning rod of opposing

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[13] When the mother can first feel the fetus in the womb.
[14] Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue*? 6 GUTTMACHER POLICY REV. (2013).
[15] *Id.*
[16] *Id.*
[17] *See generally* GEOFFREY R. STONE, SEX & THE CONSTITUTION 376-287 (2017). Includes details on the transformation in the feminist movement to reframing abortion as a right.
[18] Gold, *supra* note 14.
[19] Drawn from precedent of *Griswold v. Connecticut*, 381 U.S. 479 (1965) which legalized contraception under a right to privacy emanating from the "penumbras" of various constitutional guarantees. *See* Murray, Shaw & Siegel, *supra* note 8, at 13.
[20] STONE, *supra* note 17, at 394-395.
[21] This is not that controversial of a Supreme Court decision compared to some others-- for example, 79% of Americans disapproved when SCOTUS ruled against prayer in public school. STONE, *supra* note 17, at 394-395.

moral criticism and fervent support. Abortion would soon become one of the most contentious issues in modern American politics, with passionate "pro-choice" and "pro-life" movements springing up around the issue. Subsequent Supreme Court decisions began to alternatively affirm and chip away parts of the decision in *Roe v. Wade* in response to a vast amount of state laws regarding funding and regulation of the procedure.

In 2017, there were 862,320 abortions estimated to be performed legally, an all-time low since *Roe v. Wade* and part of a long-term trend of decline.[22] The PEW research center has found that as of 2019, a 61% majority of Americans now support legalizing abortion in all or most cases and 70% oppose overturning *Roe v. Wade*.[23] These attitudes are split along party lines: 82% of Democrats or Democrat-leaning independents think abortion should be *legal* in all or most cases, while 62% of Republicans think abortion should be *illegal* in all or most cases.[24]

***Abortion and Religion***

Religion plays an important role in determining people's views on the legality of abortion.[25] Christianity, the most common religion in the U.S., encompasses myriad attitudes regarding the procedure. The official positions of some of the largest mainline Protestant groups,

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[22] Rachel K. Jones, Elizabeth Witwer, & Jenna Jerman, *Abortion Incidence and Service Availability in the United States*, GUTTMACHER INSTITUTE (2017), https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017.

[23] *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade*, PEW RESEARCH CENTER (2019), https://www.people-press.org/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade/.

[24] *Id.* Republican views are split by ideology—77% of conservative Republicans support general illegality compared to 41% of moderate and liberal republicans.

[25] Of those who think abortion should be legal, 37% think religion plays an important role in their lives, while of those who think abortion should be illegal, 73% think religion plays a very important role in their lives. *Religious Landscape Study: Views about abortion*, PEW RESEARCH CENTER, https://www.pewforum.org/religious-landscape-study/views-about-abortion/.

the United Methodist Church,[26] the Presbyterian Church,[27] the Evangelical Lutheran Church, [28] and the Episcopal Church[29] oppose abortion bans, although all advocate for the procedure to be obtained with thoughtful consideration and not in all circumstances. Of practicing mainline Protestants in the U.S., 60% of White members and 64% of Black members' support abortion in all or most cases.[3031] Conversely, a large majority (77%) of White evangelical Protestants want abortion to be banned.[32] The official stance of the largest evangelical denomination in the United States, the Southern Baptist Convention, is that life begins at conception and therefore abortion should be banned. Their 1971 "Resolution on Abortion" states that society must pass laws to affirm "the sanctity of human life, including fetal life," although it advocates for exceptions in such cases as rape, incest, and to protect the life or health of the mother.[33]

The Roman Catholic Church takes a strict stance in opposition to abortion in all circumstances; in 2009 the Vatican reaffirmed their stance that life must be "protected absolutely from the moment of conception" and that abortion is "the deliberate killing of an innocent human being" regardless of the situation.[34] However, a majority of American Catholics (56%) support legalizing abortion in all or most cases.[35-36] Additionally, the official Mormon stance is strictly

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[26] *Social Principles: The Nurturing Community*, THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH (2016), https://www.umc.org/en/content/social-principles-the-nurturing-community#abortion.
[27] THE OFFICE OF THE GENERAL ASSEMBLY PRESBYTERIAN CHURCH (U.S.A.), REPORT OF THE SPECIAL COMMITTEE ON PROBLEM PREGNANCIES AND ABORTION (1992).
[28] *Abortion,* EVANGELICAL LUTHERAN CHURCH IN AMERICA, https://www.elca.org/Faith/Faith-and-Society/Social-Statements/Abortion.
[29] General Convention, JOURNAL OF THE GENERAL CONVENTION OF...THE EPISCOPAL CHURCH 323-35 (1994).
[30] *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade, supra* note 23.
[31] For sources on Protestant abortion rights views, *see Protestant*, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, https://rcrc.org/protestant/.
[32] *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade, supra* note 23.
[33] *Resolution On Abortion*, SOUTHERN BAPTIST CONVENTION (1971), http://www.sbc.net/resolutions/13/resolution-on-abortion.
[34] *Congregation for the Doctrine of the Faith: Clarification on procured abortion*, VATICAN (2009), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20090711_aborto-procurato_en.html.
[35] *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade, supra* note 23.
[36] For sources on Catholic abortion rights views, *see The Catholic Case for Choice*, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, https://rcrc.org/catholic/.

against abortion,[37] and a majority (70%) of their members oppose the procedure's legality.[38] Of the minority religions in America, 82% of Jews support abortion's wider legality,[39] as well as 55% of Muslims,[40] 68% of Hindus,[41] and 82% of Buddhists.[42,43 ,44]

## Literature Review

### *Abortion Scholarship Begins*

Feminist scholarly literature on the politics of abortion in the United States is wide-ranging and diverse, and took off with great ferocity in response to the landmark decision of *Roe v. Wade* in 1973. Many Conservative legal scholars argued that the penumbra of several constitutional amendments by which Justice Blackmun derived the right to abortion was an overreach of the judiciary's role and distorted Constitutional law.[45] Other observers voiced their support for the decision, but questioned whether privacy was the correct basis for deriving reproductive

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[37] *Abortion*, The Church of Jesus Christ of Latter-Day Saints (2004) https://www.churchofjesuschrist.org/topics/abortion?lang=eng.

[38] *Religious Landscape Study: Views about abortion, supra* note 25.

[39] Reform, Conservative, and Reconstructionist Judaism largely subscribes to an abortion rights stance, as Jewish law states that humans do not have a soul until after birth and that life begins "at first breath." However Orthodox Judaism is more commonly against abortion's legality, except in cases to save the mother's life. For a discussion of Jewish views on abortion, *See* Rabbi Raymond A. Zwerin & Rabbi Richard J. Shapiroe, *Jewish Perspectives on Abortion*, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, https://rcrc.org/jewish/.

[40] Islamic law makes allowances for abortion up to 16 weeks into the pregnancy, and beyond if the mother's life is at risk. The Hadith points to ensoulment as occurring 3-4 months into pregnancy when the angel "breathes into him the spirit." The minimum time period of when abortion is banned by Islamic legal scholars is 40 days, while the more liberal schools allow abortion any time before 120 days. For a discussion of Islamic views on abortion, *See* Khaleel Mohammed, *Islam and Reproductive Choic*e, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, https://rcrc.org/muslim/ and Anonymous, *In the Shade of Allah's Mercy: Islam, Embodiment, and Abortion*, 33 JOURNAL OF ISLAMIC STUDIES 204-215 (2013).

[41] For a discussion of Hindu views on abortion, *see* Swami Abhipadananda and Swami Jyotir Vakyananda, *Hindus and Choice*, Religious Coalition for Reproductive Choice, https://rcrc.org/hindu/.

[42] For these statistics, *see Religious Landscape Study: Views about abortion, supra* note 25.

[43] *Buddhism and Reproductive Choice*, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, https://rcrc.org/buddhist/.

[44] Additionally, "Those who are not affiliated with a religion are among the most supportive of legal abortion: 83% say abortion should be legal in all or most cases." *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade, supra* note 23.

[45] *E.g.,* Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765 (1973) (arguing *Roe v. Wade* follows no precedent); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 THE YALE LAW JOURNAL 920 (1973) (arguing Roe v. Wade is incorrectly derived from the constitution); Lynn D. Wardle, *Rethinking Roe v. Wade*, 1985 BYU L. REV. 231 (1985) (an argument for rewriting *Roe*); Arnold H. Loewy, *Why Roe v. Wade Should Be Overruled*, 67 N.C. L. REV. 939 (1989) (arguing that Roe is an overreach of judicial powers and a denial of the legislative process).

freedoms.[46] Supreme Court Justice Ruth Bader Ginsburg famously wrote in 1985 that *Roe v. Wade* was incorrectly decided, and should have been entirely framed as an equal rights issue, not justified by privacy and medical rights.[47] Her more recent dissent in *Gonzales v. Carhart*, reiterated this position.[48]

An argument for the Equal Protection Clause of the Fourteenth Amendment[49] as the basis for abortion law is used by anti-abortion legal scholars as well as feminist legal scholars, albeit in very different ways: the former to assert the personhood of the fetus, and the latter to assert that women's equal status as citizens guarantees their right to reproductive choice.[50] In reference to the segment in *Roe v. Wade* where author Justice Blackmun contends that if fetal "personhood is established, the appellant's case, of course, collapses,"[51] conservative legal scholar Rita M. Dunaway explains that "it was presumably only in this context, where the unborn child could be designated a nonperson, that the outcome of the Court's balancing test in Roe could favor the mother's privacy rights."[52-53] Therefore, Dunaway argues that the best legal strategy to overturn

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[46] *E.g.,* Donald H. Regan, REWRITING ROE V. WADE, MICHIGAN LAW REVIEW, 77 Symposium on the Law and Politics of Abortion 1569 (1979) (arguing for the rewriting of Roe under an Equal Protection Clause justification) and Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281 (1991) (arguing for a reconsideration of Roe as an issue of sex equality). MacKinnon says: "The private is a distinctive sphere of women's inequality to men. Because this has not been recognized, the doctrine of privacy has become the triumph of the state's abdication of women in the name of freedom and self-determination. Theorized instead as a problem of sex inequality, the law of reproductive control would begin with the place of reproduction in the status of the sexes."

[47] *See generally* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985). In this paper, she considers herself just one of many to articulate this view and emphasizes that her views reflect the consensus of many feminist legal scholars.

[48] *Gonzales v. Carhart*, 550 U.S. 124 (2007).

[49] Which reads: "No State shall… deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend, XIV, § 1.

[50] For further explanation of how the pro-life movement is using the Fourteenth amendment argument, *see* Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J. OF L. & MED., 573 (2013). "[Their] logic being, that if the legal personhood of fetuses is established, then this would prompt federal constitutional protection of the fetuses' lives at the expense of women's choice."

[51] *Roe v. Wade*, 420 US 113 (1973).

[52] Rita M. Dunaway, *The Personhood Strategy: A State's Prerogative to Take Back Abortion Law*, 47 WILLAMETTE LAW REVIEW 327 (2011).

[53] Dunaway's anti-abortion perspective is a helpful example of a scholar who defines personhood in terms of science, not religion, asserting that biology proves that life begins at conception.

*Roe v. Wade* is to make a fetus a person in the eyes of the law.[54] She argues that a large shift in individual state laws asserting fetal personhood under the Fourteenth Amendment could demonstrate an updated national consensus that would justify the Court overruling their precedent.[55]

Dunaway is optimistic that this legal transformation has been occurring; she discusses the Supreme Court opinion *Webster v. Reproductive Health Services* as the first example following *Roe* of the Court's shift towards acknowledging legal fetal personhood.[56] The views that she expresses are not limited to the field of anti-abortion scholarly understanding; the conception that *Roe v. Wade* contains a "loophole" by which it can be invalidated if fetal personhood is established is a motivator of anti-abortion strategy.[57]

***Establishing Personhood***

In a widely cited 1986 article, feminist scholar Dawn E. Johnson traces the development of legal fetal rights.[58] She writes that the first legal assertions of fetal rights pertained to issues of inheritance, but after 1946, tort law recognized fetal rights to allow for claims of prenatal injury.[59] Johnson argues that these cases, where the fetus is only recognized when there is a live birth, help right wrongs against pregnant women and prevent attacks upon them, and "actually enhance[s] the protection of pregnant women's interests"[60] while a newer area of fetal rights recognition, criminal law, does the opposite. She contends that the turn towards criminal liability

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[54] Dunaway, *supra* note 52*,* at 327.
[55] Dunaway, *supra* note 52*,* at 351. She explains "Because of the existence of a new source of rights for the unborn, the reviewing court would presumably endeavor to balance the state-conferred fundamental rights of the unborn and the state interest in protecting the unborn child against the federal privacy rights of the mother."
[56] Dunaway, *supra* note 52, at 331. She explains "The Court retreated slightly from its Roe v. Wade decision, announcing that the State may protect "potential life" even before the point of viability."
[57] Discussed further in chapter 4 on page 43.
[58] Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE LAW JOURNAL 599 (1986).
[59] Johnson, *supra* note 58, at 601.
[60] Johnson, *supra* note 58, at 603.

is a "dangerous conceptual move"[61] which can and has led to the policing and regulation of women's bodies and behavior during pregnancy.[62] I won't be exploring the tort and criminal law aspect of abortion law in this paper, but I believe it is important to acknowledge Johnson's central argument: through the development of legal fetal rights there emerged an "adversarial relationship between the woman and her fetus."[63-64] She argues that the trend towards increased fetal rights places the woman and fetus at odds, and that "to deprive women of their right to control their actions during pregnancy is to deprive women of their legal personhood."[65] Like many other feminists, [66] she believes that the Fourteenth Amendment should primarily protect women's personhood, never making it secondary to the protection of the fetus.

In researchers Glen A. Halva-Neubauer and Sara L. Zeigler's 2010 paper, the authors argue that throughout the decades, anti-abortion advocates have shifted their rhetoric from championing an adversarial relationship between woman and fetus to advocating a loving, codependent relationship between mother and child. [67] The authors focus on two main strategies used to establish fetal personhood incrementally after the early 1980s: advocating fetal homicide

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[61] Johnson, *supra* note 58, at 603.
[62] Johnson, *supra* note 58, at 607. She argues "Pregnant women will "live in constant fear that any accident or "error" in judgment could be deemed "unacceptable" and become the basis for a criminal prosecution by the state or a civil suit by a disenchanted husband or relative."
[63] Johnson, *supra* note 58, at 660.
[64] Johnson, *supra* note 58, at 73, and Diane di Mauro & Carole Joffe, *The Religious Right and the Reshaping of Sexual Policy: An Examination of Reproductive Rights and Sexuality Education*, 4 JOURNAL OF NSRC 67 at 72 (2007). They argue that the Religious Right "promote[d] the notion of an adversarial relationship between the fetus and its potential enemy— the woman who would abort" through their push for ultrasounds and inserting the fetus as an independent actor in legislation."
[65] Johnson, *supra* note 58, at 612.
[66] *E.g.* Johnson *supra* note 58, Ginsburg *supra* note 47, and Reva Siegel, *Reasoning from the Body: An History Perspective on Abortion Regulation and Questions of Equal Protection* 44 STAN. L. REV. 261 (1992).
[67] Glen A. Halva-Neubauer & Sara L. Zeigler, *Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement after Planned Parenthood v. Casey*, 22 FEMINIST FORMATIONS 101 (2010).

laws and promoting a mainstream acceptance of the existence of fetal pain.[68-69] To analyze anti-abortion messaging, they examined the websites of the National Right to Life Committee (NRLC), Americans United for Life (AUL), and American Life League (ALL). Their findings "illustrates this shift from portraying the pregnant woman as the enemy" to one who has "an intimate connection to the life within her, who requires education at worst and who can serve as an advocate for the fetus at best."[70-71] The groups reject any perceived antagonism between woman and fetus, instead arguing that messaging that antagonizes the two is a creation of the abortion rights movement.[72,73 ,74]

Next, Halva-Neubauer and Zeigler conducted a statutory analysis of anti-abortion legislation, categorizing them into two categories:[75] legislation that seeks to establish legal personhood, such as fetal homicide laws or ultrasound requirements, and legislation that "addresses the purported brutality and cruelty of abortion," such as banning late-term abortion procedures where the fetus

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[68] Halva-Neubauer & Ziegler, *supra* note 67, at 105. They explain "Prolife advocates were involved in nearly every account of state legislative debates on fetal homicide" and fetal pain was pushed after the release of The Silent Scream in 1984, a film who's "central claim that the fetus feels pain."

[69] Halva-Neubauer & Ziegler, *supra* note 67, at 107.

[70] Halva-Neubauer & Ziegler, *supra* note 67*,* at 108.

[71] This is messaging frequently seen as part of crisis pregnancy centers, organizations that attempt to persuade women from having abortions, often masquerading as health clinics. Many of these organizations have explicit religious ties as well. Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical,* AMA JOURNAL OF ETHICS (2018).

[72] Halva-Neubauer & Ziegler, *supra* note 67*,* at 109.

[73] In a somewhat similar vein, Siegel argues that anti abortion advocates have a view of reproduction focusing solely on physiological aspects of reproduction and women's bodies that essentially conflates motherhood with womanhood. They conflate women's social roles as mothers with physiological capacity to bear children, "naturalizing motherhood as women's inevitable destiny." Siegel, *supra* note 66 at 267-68. *See also* MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 772 (2019) (arguing that *Gonzales v. Carhart* represents a similar conflation between maternal love and physiological personhood of fetus, which is express through post-abortion stress syndrome)

[74] Halva-Neubauer and Ziegler explain "The characterization of the fetus as a baby is nothing new, but what is new is the imagery linking the woman and the fetus and the language indicating that the two have an intimate connection. Even more startling is the fact that such rhetoric is embedded in seemingly "neutral" educational initiatives, such a antismoking campaigns aimed at reducing smoking during pregnancy and efforts to prevent prenatal exposure to harmful substances." Halva-Neubauer & Ziegler, *supra* note 67, at 110.

[75] Halva-Neubauer & Ziegler*, supra* note 67, at 112

is most infant-like.[76] As an example, the authors discuss the intentional push of the anti-abortion movement in the late 1990s to use the phrase "partial-birth abortions" to demonstrate the gruesomeness of the dilation and extraction (D&E) procedure.[77]

The fight against the D&E method culminated in the 2003 Supreme Court opinion, *Gonzales v. Carhart*, which upheld the Partial-Birth Abortion Ban Act. In Justice Ginsburg's dissent, which I further explore in Chapter 4 because of the attention it calls to the majority's use of anti-abortion personhood language, she chastises the Justices for using terms like "partial-birth abortion" and "unborn child" instead of medical terminology. Her dissent has been the subject of much recent scholarship. In 2010, prolific feminist scholar Reva B. Siegel cited the dissent as proof that members of the Court are distancing themselves from anti-abortion fetal personhood arguments. Instead, they are moving toward the long-held feminist argument that the Equal Protection Clause of the Fourteenth Amendment, not the right to privacy, should be the basis for abortion jurisprudence.[7879] Siegel argues that Justice Ginsburg's dissent is groundbreaking as it "attempts, for the first time in the [C]ourt's history, to justify the right to abortion squarely in terms of women's equality rather than privacy."[80-81]

Rita M. Dunaway also discusses *Gonzales v. Carhart* from the opposing side, arguing that the majority opinion marks momentous progress for the anti-abortion movement; she only mentions Justice Ginsburg's dissent to explain the liberal argument against the majority.[82]

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[76] Halva-Neubauer & Ziegler, *supra* note 67, at 115.
[77] Halva-Neubauer & Ziegler, *supra* note 67, at 113.
[78] Siegel, *supra* note 66.
[79] Funnily, Justice Ginsberg had cited Siegel's earlier work saying such in the very dissent in *Gonzales v. Carhart* that Siegel discusses here.
[80] Siegel, *supra* note 66.
[81] Writing in 2010, Siegel was perhaps overly optimistic about a transition from a privacy to a sex equality justification for abortion rights: the court has since flipped to a majority conservative Justices and instances of legal personhood arguments seem more prevalent than ever.
[82] Dunaway, *supra* note 52, at 327.

Dunaway maintains that the majority opinion is an unprecedented assertion of fetal personhood rights by the Court as it unequivocally rules the balancing test in favor of the fetus over the mother.[83-84]

In analyzing the most recent decade of anti-abortion law, scholars such as health law researcher Jonathan F. Will[85] look at the personhood movement's strategy to shape legislation. He cites a 2011 Mississippi personhood measure, where a piece of legislation failed and its language was subsequently heavily edited with the goals of asserting fetal personhood while minimizing the fears of the public who voted in opposition. Will explains how the modern rhetorical strategies of the personhood movement, such as how "Personhood advocates choose terms like 'fertilization,' or phrases such as 'human being at any stage of development,' to identify the 'person'-defining moment in the reproductive process"[86] are demonstrated throughout this bill.

Measure 26 was an amendment to the Bill of Rights of the Mississippi Constitution that defined the term "person" or "persons" to "include every human being from the moment of fertilization, cloning, or the functional equivalent thereof."[87] When it failed by public

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[83] Referencing that, for the first time, the Court approves the lack of health exception and allows for a total ban of one kind of abortion procedure, she says, "A reading of the majority opinion conveys, perhaps for the first time in the Supreme Court's abortion jurisprudence, the impression that this interest in the life of the unborn (however nebulously described) is increasingly important relative to a woman's "right" to have an abortion." Dunaway, *supra* note 52, at 336.

[84] Dunaway uses Justice Ginsburg's dissent as evidence that "this decision indicates a shift in the balance of interests involved in abortion cases" since the pro-choice advocate Justice Ginsburg would not else write scathingly that this case "surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices." Dunaway, *supra* note 52, at 336.

[85] Will, *supra* note 50.

[86] Under the bill, the term "personhood" applies "to every human being regardless of the method of creation," where "human being" means "a member of the species [H]omo sapiens at any stage of development." Throughout development, there are a variety of "person-defining" moments in the reproductive process they hope to bring to attention: fertilization, "heartbeat," brain activity, and development of certain capacities such as the ability to feel pain or be self-conscious. Fetal viability is also used to further mark personhood. *See* Will, *supra* note 50*,* at 581-588.

[87] Will, *supra* note 50, at 594.

referendum, the two most common reasons indicated for voting against it were fears of adverse effects on medical treatment of pregnant women, specifically those with ectopic pregnancies as well as a decrease in the availability of IVF.[88]

Fears were stoked when the communications director of Personhood USA, one of the bill's major advocates, admitted that abortion would not be permitted for pregnant women with cancer under the statute. To quell worries, and mostly walk back this statement, the new language stated that while "the intentional killing of any innocent person is prohibited . . . medical treatment for life-threatening physical conditions intended to preserve life shall not be affected," where such medical treatment included treatment for cancer and ectopic and molar pregnancies.[89] In addition, through new language reflecting nervousness that miscarriages might result in a woman being investigated, the statute emphasized the law did not apply to "spontaneous miscarriage" which was defined as "the unintentional termination of a pregnancy."[90-91] Will looks at this bill to show a tension between the assertion of fetal rights and the legitimate fears of women that with the assertion of fetal personhood comes the denigration of their own health and wellbeing. He also eloquently summarizes why it is important to analyze the question of personhood in abortion law:

> The United States Constitution does not define the word "person," specifically, it does not clearly delineate who or what is included in the concept of "person" for purposes of bestowing the rights and protections that are found in the document. Nor does the Constitution tell us when life begins. Some may argue that defining "personhood" or "life" is best left to philosophers and theologians, *but regardless of the philosophical or religious nature of these questions, the answers have profound implications for the law.*[92]

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[88] Will, *supra* note 50, at 595.
[89] However, the phrase "life-threatening" was not defined, which Will notes as an worrisome discrepancy; could a pregnant woman still be denied from both an abortion and receiving chemo if there was a chance she would survive without it? *See* Will, *supra* note 50*,* at 590.
[90] Will, *supra* note 50, at 590-591.
[91] Fears of investigations are well-founded; studies observe the "chilling effects" of criminalized abortion. *See* Louise Finer & Johanna B. Fine, *Abortion Law Around the World: Progress and Pushback*, 103 AM J PUBLIC HEALTH 585–589 (2013).
[92] Will, *supra* note 50. (emphasis mine).

***Framing Abortion***

Sociologists Robert D. Benford and David A. Snow argue in a widely cited paper that the way an issue is framed is how it is legitimized.[93] Some scholars have already explored the importance of framing abortion, such as an influential 1987 article by Rosalind Petchesky, where she argues that no visual image can be truly objective because of the inescapable presence of power dynamics and cultural assumptions. [94] This has important implications for how ultrasound requirements and other forms of visual images are used by the anti-abortion movement to further their goal of having women conceptualize the fetus as a person.[95-96] Disseminating fetal images has been a staple of anti-abortion strategy for decades—in 1984 the NRLC distributed *The Silent Scream* film to the public, Congress, and the Supreme Court which depicts an abortion ultrasound where a fetus appears to be screaming in pain. [97] Today, anti-abortion advocates often use graphic photos of abortions and ultrasounds during marches and protests to communicate the grotesqueness of abortion.[98] Although not a focus of this paper, visual images have been important to how anti-abortion rhetoric shapes legal discourse.[99]

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[93] Robert D. Benford & David A. Snow, *Framing Process and social movements: an overview and assessment, 26* ANNU. REV. SOCIOL. 611, 614, 627 (2000).
[94] Rosalind Petchesky, Fetal Images: The Power of Visual Culture in the Politics of Reproduction, 13 FEMINIST STUD. 263, 277 (1987)
[95] Murray & Luker, *supra* note 73*,* at 772.
[96] Another popular more recent piece says ultrasound creates image of the fetus separate from woman--an "astronaut...in space;" they erase women from the picture. *See* Carol Sanger, *Seeing and Believing: Madatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 358, 270 (2008). *See also* MacKinnon, *supra* note 46*,* at 1311. She says "Presenting the fetus from this point of view, rather than from that which is uniquely accessible to the pregnant woman, stigmatizes her unique viewpoint as subjective and internal. This has the epistemic effect of making the fetus more real than the woman, who becomes reduced to the "grainy blur" at the edge of the image."
[97] *See generally* SARA DUBOW, OURSELVES, UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA (2010)
[98] *See e.g.* ANGELA DENKER, RED STATE CHRISTIANS 41 (2019).
[99] One approach to looking at how images frame abortion rhetoric is a recent study by coder and multimedia artist Cindy Sherman Bishop, as part of the MIT Media lab. She looks at how images are being used by both right and left leaning media outlets in reference to abortion to see how the issue is being framed. Bishop created interactive maps that code headlines and images from popular news sources. One finding was that "from these maps, I could clearly see that not only has the term "unborn child" entered conservative mainstream vernacular, but the accompanying image often features a baby or infant." She also noted that "A survey of pro-life media leads one to believe that images of a blastocyst, an embryo, a fetus or a baby can be used interchangeably, as metonyms of each other." *See*

In writing on the intersection between framing and abortion, Jessica Gerrity writes about how abortion is framed in politics: "interest groups framed the terms of the partial-birth abortion debate, and pro-lifers in Congress mirrored those frames."[100] David C. Reardon is one example of the power of framing abortion in politics; [101] he's known as the "creator of a rhetorical shift in anti-abortion discourse" from heavy emphasis on the fetus to one that he calls "pro-life and pro-woman," which focuses on supposed harms of abortion to women.[102] Reardon is an important example of the impact of anti-abortion rhetoric on Supreme Court decisions; Justice Kennedy echoed some of his ideas in *Carhart* with an appeal to 'post-abortion syndrome' as a reason to require women to have certain information before an abortion (even though the syndrome has been disputed by scholars and scientists as paternalistic and scientifically invalid).[103-104]

***Religion and Abortion***

While many of these scholars focus on personhood, abortion, and anti-abortion rhetoric in secular terms, they often acknowledge the impact of religion on abortion in the U.S. In a pre-*Roe v. Wade* 1969 legal comment, retired Supreme Court Justice Tom C. Clark discussed the myriad of religious views on abortion, contending that "throughout history religious belief has wielded a vital influence on society's attitude regarding abortion… at the center of the ecclesiastical debate is the concept of 'ensoulment' or 'personhood.'"[105] In arguing that a precedent of individual privacy should allow for abortion legislation, he writes that "Despite the fact that religious belief

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Cindy Sherman Bishop, *A story in images: the abortion media storm of 2019*, MIT MEDIA LAB (2019), https://medium.com/mit-media-lab/a-story-in-images-the-abortion-media-storm-of-2019-fcc93bd427f6.
[100] Halva Neubauer & Ziegler, *supra* note 67, at 117.
[101] David C. Reardon, *A Defense of the Neglected Rhetorical Strategy* (NRS), 18 ETHICS & MED. (2002).
[102] Murray & Luker, *supra* note 73, at 774.
[103] Murray & Luker, *supra* note 73, at 774.
[104] Murray & Luker, *supra* note 73, at 819. They also refer to Emily Bazelon, *Is There a Post-Abortion Syndrome*?, N.Y. TIMES MAG., Jan. 21, 2007, an example of counter research to dispute a women-protective argument and post-abortion syndrome's existence.
[105] Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loy. U.L.A. L. REV. 1 at 6 (1969).

continues to permeate our attitude toward abortion, most people today agree… that 'moral predilections must not be allowed to influence our minds in settling legal distinctions.'"[106]

More recent writing continues to focus on the intersection between religion and the role of the Supreme Court.[107] Writing in 2006, feminist scholars Diane Di Mauro and Carole Joffee argue that the "judiciary is one of the prime sites where the Religious Right has been rewarded by Republican presidents for its support," pointing out the introduction of litmus tests on abortion for judicial nominations have become guided by the Religious Right's platform.[108] They observed that,

> The Religious Right's ability to act as broker in the selection of Supreme Court nominees was in full display in summer 2005, when the movement convened a number of what it called judicial Sundays, when pastors and congregants across the country took part in a teleconference with White House officials and high-ranking Republican legislators to discuss possible nominees.[109]

Di Mauro and Joffee ultimately argue that the Religious Right has had undue influence on American politics, and that their political influence has been characterized by "the near disappearance of the line separating church and state."[110] Through interviews and ethnography, former Lutheran pastor Angela Denker looks at how evangelical Christians prioritized Supreme Court picks who would outlaw abortion as their principal issue for the 2016 election.[111] Their support helped secure the election of President Donald Trump, as he made the appointment of anti-abortion Justices a main feature of his campaign platform.[112] Legal scholar Geoffrey R.

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[106] *Id.* at 6.
[107] Stone, *supra* note 17, at 369-440.
[108] di Mauro & Joffe, *supra* note 64, at 72.
[109] di Mauro & Joffe, *supra* note 64, at 72 (internal citations omitted).
[110] di Mauro & Joffe, *supra* note 64, at 70.
[111] DENKER, *supra* note 98.
[112] *Id.* at 41-43. She explains "For many Red State Christians, voting with gritted teeth for Trump, their decision came down to a simple, heartfelt belief: he will save the Supreme Court"and "In a show of support for Evangelical values, Trump released a list of potential Supreme Court nominees shortly after being sworn in. All were conservative; all were supported by the influential Federalist Society and Heritage Foundation."

Stone noted that the *Gonzales v. Carhart* ruling "raised awkward questions about the possible influence of religious belief in judicial decisions" as the 2007 Court had for the time in history, five Catholic justices who all voted for to uphold the Partial-birth Abortion Ban Act.[113][114]

From other angles, feminist legal health scholars Susan Berke Fogel and Lourdes Rivera[115] discuss the increasing prevalence of Catholic hospitals, which often forbid procedures such as abortion and euthanasia. Their rise raises the questions about the role of religion in health care, as in many places these hospitals are the only nearby option, thus imposing Catholic views on abortion on all citizens who happen to live in the vicinity. Legal scholar W. Cole Durham argues that abortion debates in the U.S. have taken a "morality-based and highly public confrontational path."[116] He attributes the contentiousness of the debate to the fact that to many, *Roe's* ruling "reinforces the perception among political actors that courts can entrench their moral preferences when the political system will not" and "the American public is overall more religious than its European counterpart, making morality-based debates like abortion more contentious."[117-118]

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[113] Stone, *supra* note 17, at 427-428. He further explains, "In some sense, this could easily be explained by the fact that those five justices generally shared a "conservative" judicial philosophy that would naturally make them skeptical of Roe. But what was jarring about Gonzales was that these five justices felt compelled even to hear the case, in light of the recent decision in Stenberg and the unanimous judgments of the lower courts, all which invalidated the challenged federal law. Ordinarily in such circumstances, even with a change in the makeup of the Court, one would expect the Court simply to follow its own recent precedent. That the five justices in the majority Gonzales could not bring themselves to do so naturally gave rise to speculation that the religious beliefs of the justices might have influenced their judicial behavior."

[114] Stone, *supra* note 17, at 427-428. He discusses how popular opinion also recognized this possible influence of religion: "The *Philadelphia Inquirer* published a cartoon that showed the justices in the majority wearing bishops' mitters; the *Washington Post* ran a story that began with the question: "Is it significant that the five Supreme Court justices who voted to uphold the federal ban on a controversial abortion procedure also happen to be the Court's Roman Catholics?"; and the *New York Times* published an article observing that the debate over the influence of religion on the justice has now "moved from the theoretical to the concrete.""

[115] Susan Berke Fogel & Lourdes, *Saving Roe is Not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725, 727-29 (2003).

[116] W. COLE DURHAM, LAW, RELIGION, CONSTITUTION: FREEDOM OF RELIGION, EQUAL TREATMENT AND THE LAW at 396 (2013).

[117] *Id.,* at 396.

[118] John Blevins discusses the discovery in many sociological studies of religion of the rise of the "nones," meaning a rising percentage people with no religious affiliation in America. It will be interesting to see in the future how this

**Where my Research Fits**

As previously mentioned, Dr. Dabney P. Evans and Dr. Subasri Narasimhan are currently conducting a narrative analysis of the state level policymaking process surrounding early abortion bans in the U.S. South. They are looking specifically the recent wave of bills banning abortion at six weeks into a pregnancy, beginning in Georgia and eventually expanding to other Southern states. As outlined in their recent paper, they began by recording the state legislative debates surrounding Georgia's House Bill 481, which bans abortions at six weeks, then coding the language and analyzing the rhetoric and strategy used by both supporters and adversaries of the bill. [119]

So far, their findings have revealed the main strategies of the bill's proponents are to misrepresent medical science, as well as to appropriate historically progressive legal strategies (such as arguing that fetuses should be a protected class under the Equal Protection Clause of the Fourteenth Amendment). Although the study isn't specifically looking at the role of religion, Evans and Narasimhan have already found that there were no explicit mentions of God or religion in any Georgia legislative debates on the bill.[120] This is notable in a state like Georgia, where the Republican state legislature is largely made up of self-described Christians.[121] In a more recent review of South Carolina legislative debates, they did in fact record instances of

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demographic change will influence American society. Will religion continue to hold such an influential place in our society; will my claims here become obsolete? *See* JOHN BLEVINS, CHRISTIANITY'S ROLE IN UNITED STATES GLOBAL HEALTH AND DEVELOPMENT POLICY: TO TRANSFER THE EMPIRE OF THE WORLD 155 (2019).

[119] Evans & Narasimhan, *supra* note 10.

[120] Evans & Narasimhan, *supra* note 10.

[121] *See Who We Elect: An Interactive Graphic*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/about-state-legislatures/who-we-elect-an-interactive-graphic.aspx (Download Table for Religion). 70% of Georgia lawmakers identified as Protestant, 4% as Catholic or other Christian.

religious argumentation, such as by Pastors who quoted scripture and multiple references to God.[122]

My thinking has also been influenced by the research paper "It's Not Business, It's Personal: Implicit Religion in the Corporate Personhood Debate" by then-Ph.D. candidate at University of Texas, Austin, David McClendon.[123] He argues that implicit religious sentiments have formulated conceptions of corporate personhood as demonstrated in the Supreme Court Case, *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), which held that corporations were protected from government restrictions on campaign donations by the First Amendment.[124] McClendon wants to acknowledge the "hidden ways in which religious sensibilities and discourses remain relevant in contemporary American politics, even in what are ostensibly 'secular' legal debates."[125] McClendon grapples with important questions to consider for my paper—how can one argue that religion necessarily exists within debates that many argue are secular? Can there be a secular understanding of personhood?

To answer these questions, he turns toward the work of religious scholar Edward Bailey, who addresses "locating the 'religious' in the 'secular.'"[126] Bailey asks, "Can our understanding of apparently secular behaviors be enhanced by asking whether they contain within themselves (in addition to all their other characteristics, that are the concern of other approaches), any element of some kind of religiosity that may be inherent to themselves?"[127] McClendon contends

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[122] Personal Communication with Dabney Evans and Subasri Narasimhan, The Center for Reproductive Health Research in the Southeast, in Atlanta, Georgia. (2020).
[123] David McClendon, *It's Not Business, It's Personal: Implicit Religion in the Corporate Personhood Debate*, 17 IMPLICIT RELIGION 47 (2014).
[124] It's worth noting that "fetal heartbeat" abortion restriction Georgia House Bill 481, for example, defined natural persons relative to corporations as persons, as was found in *Citizens United*. *See* Living Infants Fairness and Equality (LIFE) Act, H.B. 481, O.C.G.A. § 5-6-34 (G.A. 2019).
[125] McClendon, *supra* note 123.
[126] McClendon, *supra* note 123.
[127] McClendon, *supra* note 123.

that while ontology and ideas about personhood are not always conscious religious formulations, linguistic practices are "never value-neutral" and by nature express "deeply held beliefs about how the world works and the agency of its inhabitants," which are often religious.[128] We are "ideologically and morally invested in our language and the ways in which we and others use it," a phenomenon anthropologist Webb Keane calls "semiotic ideology." The fact that we discuss corporations as persons and rights as inherent to personhood, instead of expressing corporate rights in terms of "privileges," for example, show a theological notion of persons as an essential part of existence.[129]

McClendon argues that because these religious conceptions are so ingrained, researchers can analyze hidden religiosity in secular behaviors even if, as Bailey points out, the behavior "will probably not be perceived by its actors as religious."[130] As they are underlying and pervasive, personhood conceptions are what philosopher Charles Taylor called an "'inescapable framework," by which McClendon believes "both sides of the *Citizens United* debate make sense of corporate personhood and its implications for American democracy."[131] Essentially, religion is so permeated through the American history and consciousness that it will manifest itself throughout any sort of discourse that questions the nature of humanity or society.

I have become convinced that while secular understandings of when life begins and personhood can exist, religion has permeated the discussion in America both unintentionally, as an inescapable framework, and intentionally, as religious groups merge with, and their causes are taken up by, political groups. The inescapable framework is a useful tool to clarify how "value judgments" and morally charged language have been permitted and even advanced by the

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[128] McClendon, *supra* note 123.
[129] McClendon, *supra* note 123.
[130] McClendon, *supra* note 123.
[131] McClendon, *supra* note 123.

Supreme Court, without any acknowledgement that Church and State could be unconstitutionally overlapping.[132] McClendon concludes by reasoning that other researchers could explore "once-explicit religious ideas and motivations that are now implicitly part of political discourse," in ways beyond corporate personhood, such as fetal personhood in abortion laws. His research and arguments are aligned with this paper; in some ways I aim to do exactly what he proposes—studying how conservative Christianity ideology implicitly shapes conceptions of personhood embodied in U.S. law.

There exist numerous differing conceptions of when personhood begins and how it functions, and thus countless ways people use their religious beliefs to inform their personal views on abortion. For example, this past year, Democratic presidential contender and former mayor Pete Buttigieg used the Bible to defend the morality of abortion[133] and there are religiously affiliated advocacy organizations that promoting preserving or expanding access to abortion, such as Religious Coalition for Reproductive Choice and Interfaith Voices For Reproductive Justice.[134] And as I discuss in Chapter 4, *Roe v. Wade* features explicit and lengthy considerations of the wide array of religious views and holds them in contention with scientific and medical assertions. Later on, Justice Stevens argues that the "intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate."[135] While it wouldn't be fair to make blanket assertions about religion in general driving American law, it is important to explore the ways in which religion

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[132] As we'll see in Chapter 4 on page 59, Justice Stevens is the only member of the Court to advance such an argument in relation to abortion jurisprudence.

[133] Former mayor Buttigieg a cites the Old Testament statement that life begins at "first breath." *See* Jonathan Dudley, *When the 'Biblical View' for Evangelicals Was That Life Begins at Birth*, REWIRE.NEWS (2019), https://rewire.news/religion-dispatches/2019/09/27/when-the-biblical-view-for-evangelicals-was-that-life-begins-at-birth/.

[134] RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, https://rcrc.org/; INTERFAITH VOICE FOR REPRODUCTIVE JUSTICE, http://iv4rj.org/.

[135] *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 505 (1989).

does influence politics: namely how prominent, politically influential religious groups' rhetoric and advocacy are directly reflected in U.S. jurisprudence and legislation.

## Chapter 3: The Religious Right and the Anti-Abortion Movement

### *The Religious Right Forms*

Beginning in the 1950s, America saw early indications that evangelicalism was re-emerging in American politics.[136] According to religion and public health scholar Dr. John Blevins, "evangelicals began more direct, active political engagement" during President Eisenhower's administration.[137] In the 1960s and 1970s, America witnessed this early fervor transforming into a new political movement—commonly referred to as the "Religious Right." Largely made up of Catholics and evangelicals, the group formed primarily as backlash to the blossoming women's liberation and gay rights movements. [138] The Religious Right focused on a perceived demise of the American family and persecution of traditional Christian values, and specifically opposed the Equal Rights Amendment, abortion, sex-education, and same-sex relationships.[139-140]

The Religious Right aligned itself with the Republican party, which in turn embraced and adopted 'traditional' stances on gender roles, sexuality, and reproduction as part of its platform.[141] Early leaders of the movement, "realizing the electoral potential of religious voters, moved effectively to bring these newly politicized individuals into the Republican Party."[142] A 1979 meeting between Republican Party operative Paul Weyrich and televangelist Reverend Jerry Falwell led to the official formation of the Moral Majority.[143] The organization aimed to

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[136] Blevins, *supra* note 118.
[137] Blevins, *supra* note 118, at 155. Blevins references KEVIN KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA (2015).
[138] di Mauro & Joffe, *supra* note 64, at 67.
[139] di Mauro & Joffe, *supra* note 64, at 68.
[140] Stone, *supra* note 17, at 403.
[141] Stone, *supra* note 17, at 401.
[142] di Mauro & Joffe, *supra* note 64, at 68.
[143] di Mauro & Joffe, *supra* note 64, at 68.

"make abortion a litmus test for millions of voters all over the country, particularly those voting in Republican primaries."[144]

Blevins explains that, while once largely absent from the political sphere due to mistrust and distaste for American culture, evangelicals began to "leverage their numerical, sociological, and economic power to influence government priorities and policies" in the 1980s.[145] Scholars Di Mauro and Joffe argue that the, "instrumental role that religious conservatives affiliated with the New Right played in the election of Ronald Reagan in 1980… marked the recognition of this movement as a key constituency of the Republican Party."[146] Bolstered by their support, President Reagan embraced anti-abortion rhetoric and argued for the passing of a constitutional amendment to ban abortion.[147] The transformation was noticeable in 1984, when 80% of evangelical Christians voted Republican, while only a decade earlier a majority had supported Democrats.[148] The largest evangelical Protestant denomination in America, the Southern Baptist Convention, went through "a bitter fight between moderates and fundamentalists regarding control" of the denomination, with the fundamentalists winning and beginning to set the

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[144] "The Reverend Jerry Falwell claimed that he had an epiphany when he read news of the Roe v. Wade decision, on January 23, 1973. He instantly knew in his heart, he said, that evangelicals needed to organize into a vast pro-life movement to undo the Supreme Court's decision. By 1980, Falwell's organization, the Moral Majority, would try to make abortion a litmus test for millions of voters all over the country, particularly those voting in Republican primaries." Evan Thomas, *How the Supreme Court Justice Sandra Day O'Connor Helped Preserve Abortion Rights*, THE NEW YORKER (2019), https://www.newyorker.com/news/news-desk/how-the-supreme-court-justice-sandra-day-oconnor-helped-preserve-abortion-rights.

[145] Blevins writes "Evangelicals had long avoided engagement in the broader society which was seen as misguided at best and dangerous at worst. This separatist impulse meant that Evangelicals kept a distance from politics. But beginning in the early 1980s, evangelicals began to leverage their numerical, sociological, and economic power to influence government priorities and policies." Blevins*, supra* note 118*, at 159-160.*

[146] di Mauro & Joffe, *supra* note 64*,* at 68.

[147] Stone, *supra* note 17*,* at 405-406.

[148] Stone, *supra* note 17, at 407.

denomination's agenda.[149] The group's position on abortion shifted dramatically from supporting legality in most circumstances to supporting outright bans.[150]

The Religious Right attracted growing support; in 1989, over 60,000 people protested *Roe v. Wade* on the National Mall.[151] Newly inaugurated President George H. W. Bush, formerly a supporter of Planned Parenthood, addressed the crowd, telling them "the time had come to overrule Roe."[152] Blevins argues that "the political motivations of Evangelical Protestants and the sense of persecution… solidified" in the decades since evangelical activism first reappeared. By the mid-1990s, Republicans controlled Congress, and the new class of legislators were "more socially conservative than many of their predecessors, reflecting the incorporation of the Religious Right into the mainstream of the Republican Party."[153] Religious Right groups were becoming increasingly influential in D.C., and by President George W. Bush's second term, noted political commentator Kevin Phillips observed "the transformation of the GOP into the first religious party in U.S. history."[154] The official Republican party platform states that the nomination of anti-abortion Justices to the Supreme Court is imperative, and questioning nominees on their *Roe v. Wade* opposition is essential confirmation hearing procedure.[155]

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[149] Blevins, *supra* note 118, at 157.
[150] Blevins explains how The Southern Baptist Convention shifted their views strongly: "In 1971, messengers to the annual meeting of the denomination passed a resolution on abortion which read in part, 'we call upon Southern Baptists to work for legislation that will allow the possibility of abortion under such conditions as rape, incest, clear evidence of severe fetal deformity, and carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother.' 14 In 1974, a year after the Supreme Court issued its legal decision making abortion legal across the nation, messengers reaffirmed the 1971 resolution. Since those two resolutions were approved over 40 years ago, Southern Baptists have since passed 48 other resolutions which reference abortion; of the 50 in total, 22 have abortion or the phrase 'the sanctity of human life' in the resolution title and 12 refer sexual and reproductive health issues more broadly in the title. 15 The first five resolutions (from 1971 to 1979) demonstrate nuanced positions while revealing differences in focus; beginning with the 1980 resolution in calling for abortion to be outlawed the resolutions are unequivocal in their position." Blevins, *supra* note 118, at 158.
[151] Thomas, *supra* note 144.
[152] Thomas, *supra* note 144.
[153] Halva-Neubauer & Zeigler, *supra* note 67, at 116-117.
[154] di Mauro & Joffe, *supra* note 64, at 68.
[155] Stone, *supra* note 17, at 409.

Many organizations advocating for abortion restrictions came out of the Religious Right movement. Faith2Action, one of the key originators of early abortion ban model legislation,[156] is a Christian organization whose website states "Faith2Action provides pro-active, strategic, and unified ways to ADVANCE the cause of Christ and the kingdom of God. We are turning people of faith into people of *action* to WIN the cultural war *together* for life, liberty, and the family."[157-158] Abort73 is a ministry driven anti-abortion nonprofit that identifies as "Motivated by our Christian calling" to educate people against abortion.[159] The influential National Right to Life Committee (NRLC) has Christian origins, but early on morphed into a secular organization because they believed this best suited their goals.[160]

***Anti-Abortion Advocacy & Language***

The NRLC is one of the most prominent anti-abortion organizations in the country. Founded in 1968 as a project of the National Conference of Catholic Bishops, they split off to become an independent organization in 1972.[161] According to their website, the NRLC presently has 50 state affiliates and more than 3,000 local chapters nationwide.[162] Their website demonstrates how many of their strategies reflect and reiterate the larger positions of the anti-abortion movement.

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[156] Discussed further on page 35.
[157] FAITH2ACTION, http://www.f2a.org/about.php
[158] Faith2Action's founder, Janet Porter, has used Christianity to justify anti-LGBT stances such as a belief in conversation therapy. She also spoke out in defense of accused sexual predator Roy Moore when he ran for the Alabama Senate seat saying "he's like the least likely man in America to do the things they accused him of" because of "his stand for the Ten Commandments." *See* Jessica Glenza, *The anti-gay extremist behind America's fiercely strict abortion bans*, THE GUARDIAN (2019), https://www.theguardian.com/world/2019/apr/25/the-anti-abortion-crusader-hopes-her-heartbeat-law-will-test-roe-v-wade.
[159] ABORT73.COM, https://abort73.com/about_us/.
[160] Robert N. Karrer, *The National Right to Life Committee: Its Founding, Its History, and the Emergence of the Pro-life Movement Prior to Roe v. Wade*, 97 THE CATHOLIC HISTORICAL REVIEW 527 (2011).
[161] *Id.*
[162] About NRLC, NATIONAL RIGHT TO LIFE, https://www.nrlc.org/about/.

The organization emphasizes the importance of language in advocating for their cause in their pamphlet titled "When They Say… You Say-- Defending the Pro-Life Position & Framing the Issue by the Language We Use," marketed as a resource for activists to combat common abortion rights arguments.[163] In the pamphlet, the NRLC encourages the use of specific language to articulate their conception of personhood; it states that "the one who successfully frames the issue persuades the most people" and says "pro-abortionists are masters at this."[164] They specifically warn supporters against using abortion rights language, which they admit has pervaded public discourse, to the point where their own advocates use certain phrases unintentionally.[165] The pamphlet states that "to be truly effective advocates we must learn how to best frame the defense of vulnerable human beings by carefully selecting the language we use."[166] The pamphlet provides a chart with two columns: "Say" and "Don't Say" with presumed abortion rights language on the "Don't Say" side; for example "fetus" is under "Don't Say" and "unborn child" is under "Say," while "prohibit abortion" is under "Don't Say" while "protect unborn children from abortion" is under "Say."[167]

[163] OLIVIA GANS TURNER & MARY SPAULDING BALCH, WHEN THEY SAY… YOU SAY: DEFENDING THE PRO-LIFE POSITION & FRAMING THE ISSUE BY THE LANGUAGE WE USE. *See* Table 1 on next page.
[164] *Id.* at 9.
[165] *Id.* at 9. "For instance, how often have we seen or heard parental involvement laws referred to as "restrictive" abortion laws, or the unborn child described as a "fetus"?"
[166] *Id.* at 9.
[167] *Id*. at 7.

TABLE 1: WHEN THEY SAY… YOU SAY: DEFENDING THE PRO-LIFE POSITION & FRAMING THE ISSUE BY THE LANGUAGE WE USE[168]

| SAY | DON'T SAY |
|---|---|
| DECISIONS, ALTERNATIVES, OPTIONS | CHOICE |
| UNBORN CHILD, PRE-BORN CHILD, BABY | FETUS |
| SHE OR HE | IT (ABOUT THE BABY) |
| MOTHER | (PREGNANT) WOMAN |
| ABORTIONIST | DOCTOR, PHYSICIAN |
| ABORTION FACILITY | CLINIC, HOSPITAL |
| ABORTION INDUSTRY | REPRODUCTIVE HEALTH CARE PROVIDERS, FAMILY PLANNING CENTERS |
| ABORTION | REPRODUCTIVE HEALTH CARE, TERMINATION OF PREGNANCY |
| PRO-ABORTION | PRO-CHOICE |
| PRO-LIFE | ANTI-ABORTION |
| PROTECT UNBORN CHILDREN FROM ABORTION | PROHIBIT ABORTION |
| EXTREME "ABORTION ON DEMAND" LAWS | LIBERAL ABORTION LAWS |
| COMPLETELY UNPROTECTIVE LAWS | PERMISSIVE ABORTION LAWS |
| ABORTION PROMOTERS | REPRODUCTIVE RIGHTS ADVOCATES/SUPPORTERS |
| KILLING | MURDER |

The NRLC specifically warns supporters against using explicit religious argumentation and language, stating that abortion rights proponents will often dismiss their arguments as a "'religious' issue" which they argue is "misleading beside-the-point rhetoric."[169] They acknowledge many in the anti-abortion movement might be tempted to "engage in a discussion of the theological origins for a person's pro-life position," but they specifically warn their activists that "usually the religious arguments are just another attempt by pro-abortionists to evade the powerful truth you are presenting."[170] There are dozens of other anti-abortion organizations doing similar work to advocate their cause politically and raise conscious and

[168] *Id.* 7.
[169] *Id.* at 9.
[170] *Id.* at 10.

support; many reflect the NRLC's strategy as they have been an anti-abortion leader since before *Roe v. Wade*.[171]

***Anti-Abortion Model Bills***

While organizations such as the NRLC focus on education and political activism, The Americans United for Life (AUL) is a central figure in the anti-abortion movement whose work centers almost exclusively on the creation of legislation. A New York Times headline refers to them as "The most significant anti-abortion group you've never heard of," wherein reporter Susan Roberts describes their purpose as not to "generate headlines or to energize advocates" but rather to "fram[e] proposals that will be palatable to state legislatures, can be discussed in ways that will generate less political backlash and will appeal to the courts that will eventually have to review legislative intent and discussion."[172]

To complete their goal of generating the most successful legislation with the least political backlash, the AUL hones in on palatable language and tried-and-true legal arguments. This includes the exclusion of any religious language: Roberts notes that the AUL's "proposals and public commentary have no references to religion."[173] This has been true since the founding of their organization.[174] Officially a law firm and advocacy group, their website self-identifies as "the legal architect of the pro-life movement and the nation's premier pro-life legal advocates."[175] Their main activities include drafting and distributing model legislation and legal analysis, as well as providing expert testimony in legislatures, where they promote the use of

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[171] Karrer, *supra* note 160.
[172] Susan Roberts, *Surprised by all these abortion bans? Meet Americans United for Life — the most significant antiabortion group you've never heard of*, THE WASHINGTON POST, May 2019.
[173] *Id.*
[174] *Id.* George Williams, Harvard divinity professor and 1972 AUL chairman, describes the AUL's mission as pursuing "the full range of arguments against abortion: biological, medical, psychological, sociological, legal, demographic and ethical;" the religious is notably excluded.
[175] AMERICANS UNITED FOR LIFE, https://aul.org/about/.

"life-affirming language."[176] On the front page of the "Action" section of their website, they spotlight a quote from U.S. Supreme Court Justice and President Trump appointee Neil Gorsuch.[177]

In addition, the AUL regularly publishes a "pro-life playbook" called "Defending Life" to guide lawmakers with model legislation and analysis.[178] The 2018 playbook includes sections such as a ranking of "Best and Worst States for Life" and recommendations for anti-abortion measures for every state.[179] In the entire 494 page document, there's no use of the word religion, God, the Bible, or Christianity. "Unborn child" on the other hand, is used 483 times and "unborn infant" is used 116 times. Their "Infants Protection Project" section give several of their model legislation examples.[180] It includes the preamble from a 1986 Missouri bill, which states

> The [Legislature] of the State of [Insert name of State] finds that:
> (a) The life of each human being begins at conception;
> (b) Unborn children have protectable interests in life, health, and well-being; and
> (c) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn children.[181]

The playbook contains dozens of model bills for "infant protection" as well as the "Women's Protection Project" and "Patient Protection Project" (including bills such as those opposing physician-assisted suicide).[182] Their role in drafting model bills is essential to the legislation currently being introduced in Congress: "AUL claims that one of its pieces of model legislation,

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[176] *Id.*
[177] The quote reads: "We treat people as worthy of equal respect because of their status as human beings and without regard to their looks, gender, race, creed, or any other incidental trait—because in the words of the Declaration of Independence, we hold it as self-evident that all men and women are created equal and enjoy certain unalienable rights and that among these are life." *Id.*
[178] AMERICANS UNITED FOR LIFE, DEFENDING LIFE (2019), https://aul.org/wp-content/uploads/2019/04/Defending-Life-2019.pdf.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*

the Abortion Reporting Act, directly influenced measures in Indiana, Idaho, and Arizona."[183] Each year, around 30 bills based on AUL model legislation or written with the help of their attorneys are passed in legislatures.[184]

The model bill phenomenon has been essential in recent years to the proliferation of anti-abortion rhetoric and legislation. The article "For Anti-Abortion Activists, Success of 'Heartbeat' Bills was 10 Years in the Making" outlines how the legislative strategies are deliberate, often "copied from 'model legislation' that is intentionally designed for a cut-and-paste approach within individual states."[185] In an investigative journalism report by USA TODAY and The Arizona Republic, reporters found widespread usage of model bills being used daily: "at least 10,000 bills almost entirely copied from model legislation were introduced nationwide in the past eight years, and more than 2,100 of those bills were signed into law."[186] Relating to abortion specifically, since 2018 "more than 400 abortion-related bills that were introduced in 41 states were substantially copied from model bills written by special-interest groups" and 69 of them were passed into law in various states.[187]

We can see how language choices are utilized in model bills created by Faith2Action,[188] the organization responsible for originating many of these model bills, particularly the early abortion bans they refer to as "fetal heartbeat" bills.[189] They define the term "Unborn human individual," subsequently used widely throughout the bill, to mean "an individual organism of

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[183] Roberts, *supra* note 172.
[184] Anne Ryman & Matt *Wynn, For Anti-Abortion Activists, Success of* 'Heartbeat*' Bill was 10 Years in the Making,* THE CENTER FOR PUBLIC INTEGRITY *(2019),* https://publicintegrity.org/state-politics/copy-paste-legislate/for-anti-abortion-activists-success-of-heartbeat-bills-was-10-years-in-the-making/.
[185] *Id.*
[186] Rob O'Dell & Nick Penzenstadler, *You Elected Them to Write New Laws. They're Letting Corporations Do it Instead,* USA TODAY, June 2019.
[187] Ryman & Wynn, *supra* note 184.
[188] MODEL HEARTBEAT BILL, FAITH2ACTION, *http://f2a.org/images/Model_Heartbeat_Bill_Apr._2019_version.pdf*.
[189] Ryman & Wynn, *supra* note 184.

the species homo sapiens from fertilization until live birth."[190] This is differentiated from "fetus," which is defined as "the human offspring developing during pregnancy from the moment of conception and includes the embryonic stage of development."[191] The bill calls for attention to be paid to the "the life of an unborn human individual who may be born," and uses typical anti-abortion lexical bridges like "unborn child."[192]

In accordance with anti-abortion strategy, the bill contains no references to God or religion. The bill emphasizes the importance of the "fetal heartbeat" as a "key medical predictor that an unborn human individual will reach live birth."[193] The language of "heartbeats" has been used intentionally to associate the first signs of cardiac activity with the legislators' desired absolute cutoff date for abortion.[194] This heartbeat language is an essential part of today's anti-abortion rhetoric. Ohio Right to Life, the leading anti-abortion group in the state, "invoked the term "heartbeat" eight times in 300 words in a news release welcoming the A.C.L.U.'s legal challenge."[195]

***Anti-Abortion Legislation***

Over the intervening decades since the formation of the Religious Right, anti-abortion advocates have formulated and adapted their strategies to the needs of the movement, namely, emphasizing the personhood of the fetus and minimizing any religious influence on their views.

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[190] MODEL HEARTBEAT BILL, *supra* note 188.
[191] Fertilization and conception are sometimes differentiated in these bills, see Measure 26 discussion on page 17.
[192] MODEL HEARTBEAT BILL, *supra* note 188.
[193] MODEL HEARTBEAT BILL, *supra* note 188.
[194] The use of the term "heartbeat" is a scientific misnomer; all that is detectable at this early state is the first signs of cardiac activity. A fully formed heart will not be found until significantly later in a pregnancy. An OB/GYN explains: "To wit: though pulsing cells can be detected in embryos as early as six weeks, this rhythm — detected by a doctor, via ultrasound — cannot be called a 'heartbeat,' because embryos don't have hearts. What is detectable at or around six weeks can more accurately be called "'cardiac activity.'" *Katie Heaney, Embryos Don't Have Hearts, The Cut,* https://www.thecut.com/2019/05/embryos-dont-have-hearts.html.
[195] Amy Harmon*, 'Fetal Heartbeat' vs. 'Forced Pregnancy': The Language Wars of the Abortion Debate,* THE NEW YORK TIMES *(2019)* https://www.nytimes.com/2019/05/22/us/fetal-heartbeat-forced-pregnancy.html.

When it comes to enacting these laws in state legislatures, the anti-abortion movement utilizes intentional language, enacting modifications when specific language fails elsewhere, such as the changes in language enacted in Measure 26 in the Mississippi.[196-197] With these laws, there is an intentional push to connect a fetus with personhood, therefore deserving of the same individual rights as citizens.[198]

Through these organizations' efforts, we see an intentional adoption of personhood language and the omission of religious justifications being used across the anti-abortion movement. Model bills are advocated by politicians, who introduce and garner support for these bills. Grassroots organizers' emphasis on personhood prevails, all the while implicit religious conception of personhood lies beneath the surface. These advocacy strategies diffuse across the political spectrum, and make their way up to the country's highest Court.

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[196] Will, *supra* note 50.
[197] As discussed in Chapter 2 on page 17.
[198] Dunaway, *supra* note 52, argues that the personhood labeling will create "a new source of rights for the unborn" and therefore, "the reviewing court would presumably endeavor to balance the state-conferred fundamental rights of the unborn and the state interest in protecting the unborn child against the federal privacy rights of the mother." This is discussed further in Chapter 4 on page 43.

## Chapter 4: Supreme Court Opinions and Findings

### ROE V. WADE (1973)

One of the most well-known and wide-reaching Supreme Court decisions in US history, *Roe v. Wade*, 420 US 113 (1973) (Hereinafter *"Roe v. Wade*" or "*Roe"*) dramatically altered the reproductive rights landscape in America. *Roe* legalized abortion on the basis of a constitutional right to privacy, encompassed by a penumbra of several amendments, that shaped all subsequent abortion jurisprudence. *Roe* was chosen over its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), one that would have framed abortion rights entirely as a healthcare decision between a woman and her doctor.[199] What emerged in the final decision was what feminist scholar Reva B. Siegel called a "transitional decision that straddled the medical and women's rights models."[200] The decision was made 7-2 by an all-male Supreme Court, and authored by Justice Harry Blackmun, a Nixon appointee turned liberal and a former Mayo Clinic counsel. The opinion created a trimester framework to balance the interests of a mother's health with the potential life of the fetus, allowing for increasing regulation of the procedure throughout a pregnancy.[201-202]

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[199] Reva B. Sigel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875 (2010).
[200] *Id.*
[201] The opinion provides the following balancing test: "The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. 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." *See Roe v. Wade*, 410 U.S. 113, 150 (173) (Hereinafter *"Roe v. Wade*" or "*Roe"*).
[202] The ruling created a trimester rule allowing for increasing amounts of state regulation of abortion throughout a pregnancy. The opinion ruled that the first trimester would be a time of unfettered legal abortion access. During the second semester, the state could regulate abortion in the interest of protecting maternal health, and during the third semester, the state could regulate or even prohibit abortion in the interest of preserving potential life. *See Roe* 410 U.S at 163-64.

Although the strict trimester rule devised in the opinion was eventually discarded,[203] the essential holding of *Roe* has been consistently reaffirmed by the Court.[204]

Writing that the question of personhood is a "most sensitive and difficult question," in the opinion Justice Blackmun acknowledges the wide-ranging and often contradictory attitudes and laws regarding abortion throughout history:

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[205]

One of the many abortion viewpoints Blackmun references[206] is the official stance of the American Medical Association (AMA) Committee on Criminal Abortion's 1850 report, which argued against the then-popular idea that fetuses only become living beings after quickening, and argued for acknowledgement of the fetus as a human life. The AMA turned to religious leadership for assistance in spreading this stance, calling for "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females--aye, and men also."[207]

Blackmun then delves into a lengthy discussion about the role of religion in informing ideas on abortion and personhood. He acknowledges the "strong support for the view that life does not begin until live birth," which is the "predominant, though not unanimous attitude of the Jewish faith," and "may be taken to represent also the position of a large segment of the

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[203] *Planned Parenthood v. Casey,* 505 U.S 833 (1993) (Hereinafter "*Casey*") rejected the three trimester rule.
[204] See *Webster v. Reproductive Health Services,* 491 U.S. 490 (1989), *Casey*, 505 U.S., *Gonzales v. Carhart*, 550 U.S. 124 (2007) (hereinafter "*Carhart"*), *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).
[205] *Roe*, 410 U.S. at 116 (1973).
[206] Justice Blackmun gives credence to a wide array of conflicting attitudes including ancient attitudes of Persia and Rome (noting "ancient religion did not bar abortion"), the Hippocratic Oath (which dissuaded abortion), English common law (which notably lacked in criminalizing pre-quickening abortion). He also details the history of American reproductive rights law, where abortion before quickening was made a crime in 1860, and was currently trending towards liberalization at the time of writing. *See generally* Roe 410 U.S.
[207] *Roe,* 410 U.S. at 142 (internal quotation marks omitted).

Protestant community."[208] He explains how this position is sharply divergent from "[t]hose in the Church…[who] would recognize the existence of life from the moment of conception."[209] Blackmun attributes the latter position to the official view of the Roman Catholic Church, although he adds that, "as one brief amicus discloses, this is a view strongly held by many non-Catholics as well, and by many physicians."[210] Amidst a discussion about conflicting religious doctrines and attitudes surrounding the beginning of life are the positions of physicians and scientists regarding fetal viability and when life begins.[211]

After this discussion, Blackmun writes that the Court "need not resolve the difficult question of when life begins" as "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."[212] Although Blackmun explicitly declines to make a blanket assertion on when life begins, he denies legal fetal personhood: "All this… persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn."[213] By "all this," he is referencing judicial precedent, namely that mentions of "persons" in the Constitution have thus far never been applied to fetuses,[214] as well as the history of abortion procedures, which were not banned or criminalized in the era of the Founding Fathers.[215] However, the opinion grants considerable importance to

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[208] *Roe*, 410 U.S. at 160.
[209] *Roe*, 410 U.S. at 160–61.
[210] *Roe*, 410 U.S. at 161.
[211] This section is included in the middle of a paragraph about religious beliefs: "Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *See Roe*, 410 U.S. at 160.
[212] *Roe,* 410 U.S. at 159.
[213] *Roe*, 410 U.S. at 158.
[214] *See Roe*, 410 U.S. at 157. "In nearly all these instances [when the Constitution refers to persons], the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application."
[215] *See Roe*, 410 U.S. at 158.

"potential life" as a limbo stage that can justify restrictions on abortion later in a pregnancy and outweigh a woman's right to seek an abortion. Crucially, Blackmun contends that "If this suggestion of personhood[216] is established, the appellant's case, of course, collapses."[217] The ruling of *Roe* rests on the legal declaration that a fetus is not considered a person under U.S. law; otherwise, one could reasonably assert that abortion constitutes ending a human life.

**FINDINGS/ANALYSIS**

An understanding of *Roe v. Wade* is essential for any academic analysis of abortion jurisprudence. For this project, two elements of the opinion are particularly relevant. First, *Roe* explicitly recognizes the crucial role of religion in informing conceptions of personhood and attitudes towards abortion. Second, the denial of legal fetal personhood sets the stage for today's anti-abortion personhood rhetoric and strategy.

*Roe* creates an important precedent by explicitly citing the role of religion in informing attitudes towards when life begins and the legality of abortion. The candid discussion of the range of abortion positions across a wide variety of religious traditions and cultures[218] reveals a sympathetic understanding of the moral dilemmas brought forth by the procedure. Justice Blackmun continuously intersperses medical and scientific viewpoints with religiously-based viewpoints, which serves to give an impression that they are of comparable weight. There is no question in Justice Blackmun's mind that attitudes regarding abortion are regularly informed by these beliefs, and the Court fully acknowledges that it is these deeply held beliefs that make the issue so fraught.

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[216] *Roe*, 410 U.S. at 156. The phrase "This suggestion" refers to "The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development."
[217] *Roe,* 410 U.S. at 156.
[218] Including Aristotelian theories in the Middle Ages and Renaissance Europe, Roman Catholic Dogma, Stoic views, and Jewish teachings. *Roe*, 410 U.S. at 160-161.

However, Justice Blackmun ultimately defers to scientific knowledge: the choice to obtain an abortion is framed as one between a woman and her doctor, not her rabbi or priest. No individual stance on personhood is adopted. Instead, Justice Blackmun follows legal precedent and historical tradition in omitting fetuses from the legal definition of personhood. Although clearly interested in respecting the polemical views of Americans, Justice Blackmun's past as a Mayo Clinic counsel and view of abortion from a public health context appears to have influenced his decision.[219] And although *Roe* was chosen instead, companion case *Doe v. Bolton* was an even clearer medical framing of the issue, making the case almost entirely about the rights of doctors, not women, or others who might influence her decision. While Justice Blackmun doesn't explicitly call upon the Establishment Clause of the First Amendment in declining to adopt a theory of when life begins, he ultimately defers to secular sources (i.e., legal precedent and medical science) over religious views.

As the first landmark abortion case, *Roe* is the baseline for the legal language used today in reference to abortion and the question of fetal personhood. Justice Blackmun discusses the areas of property, inheritance, and prenatal injury law, where fetuses have been recognized as possessing some degree of rights or interests.[220-221] However, this section is followed by the assertion that "the unborn have never been recognized in the law as persons in the whole sense" and that these legal areas concern "potentiality of life" more than legitimate personhood.[222] The legal concept of "potential life" established here influences all subsequent abortion restrictions and Court rulings. Many statutes are introduced or enacted to defend potential life by restricting

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[219] As a former Mayo clinic attorney, Blackmun saw abortion as a heath care concern far more than a gender equality concern. *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 93 (2006).

[220] Justice Blackmun actually uses the phrase "unborn children," but as this is before the anti-abortion movement took off we can assume he was not influenced by anti-abortion rhetorical strategies.

[221] *Roe*, 410 U.S. at 161-162.

[222] *Roe*, 410 U.S. at 162.

abortion access, but the concept has also become contentious with many anti-abortion advocates who argue that a fetus is not mere potential life, but life already formed.

The statement, "If this suggestion of personhood is established, the appellant's case, of course, collapses" is essential to the fetal personhood argument happening today. Modern anti-abortion advocates understand this as somewhat of a 'loophole' to *Roe:* if fetuses can be understood to be persons, *Roe* will rendered obsolete.[223-224] Most, if not all, of the rhetoric we see in subsequent cases is a response to this ruling, and an attempt to capitalize on this personhood loophole in order to ban abortion. The anti-abortion rhetorical strategy of framing fetuses as persons aims to allow for the reimagining of this fundamental basis of abortion jurisprudence.

**MAHER V. ROE (1977)**

*Maher v. Roe,* 432 U.S. 464 (1977) (Hereinafter "*Maher"*) is an important follow-up to *Roe v. Wade* in which the court validated that the government could express "value judgments" on abortion through the allocation of federal funding. Although it reiterated the central holdings of *Roe,* the case ruled in favor of a Connecticut Welfare Department regulation that limited state Medicaid benefits for first-trimester abortions to only those medically necessary. The opinion emphasized that *Roe* "did not declare an unqualified 'constitutional right to an abortion,'" and only "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[225] The opinion affirmed the Connecticut law as merely "State encouragement of alternative activity consonant with legislative policy"[226] and therefore not a direct interference with a woman's constitutional right to seek a legal abortion.

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[223] See *Roe*, 410 U.S. at 159. "We… would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection."
[224] As discussed in Chapter 2 on page 11.
[225] *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) (Hereinafter "*Maher"*).
[226] *Maher*, 432 U.S. at 475.

The Court acknowledged the wide array of "values" that might be held by citizens and might contradict the issue at hand, but ultimately permits the state to express its values through federal funding. The Justices emphasize that their conclusion is "not based on a weighing of [the statute's] wisdom or social desirability," as laws aren't struck down simply "because they may be unwise, improvident, or out of harmony with a particular school of thought."[227] Instead, the Court must solely consider whether the statute is a violation of constitutional rights. The opinion states that *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[228]

In *Maher*, the Court views nontherapeutic abortions[229] as particularly contentious procedures set apart from other medical procedures due to the involvement of "termination of a potential human life" and thus abortion is a place where it is more appropriate for "values" to permeate law.[230-231] Though it asserts that these value judgments constitute acceptable state encouragement instead of undue state interference,[232] the Court does not define value judgment.

[227] *Maher*, 432 U.S. at 479 (internal citations and quotation marks omitted).
[228] *Maher*, 432 U.S. at 474.
[229] Abortion procedures that are not medically necessary.
[230] *Maher*, 432 U.S. at 480.
[231] *Maher*, 432 U.S. at 479.
[232] *Maher*, 432 U.S. at 475. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."

**FINDINGS/ANALYSIS**

This opinion is an early test of *Roe.* The Court affirms their previous ruling, but validates a statute that would chip away some women's access to abortion procedures beyond the confines of *Roe's* trimester framework. There is not yet notable rhetoric (such as use of lexical bridges like "unborn child" and "infant") explicitly linking the fetus with personhood coming from the Court. However, this initial allowance of "value judgments" sets an important precedent for how the state is permitted to express subjective values and morals surrounding personhood and abortion. The Court sees value judgments—an undefined term—as rightfully allowed in the arena of abortion law because the procedure is so morally fraught (explicitly, because it involves the "termination of potential life," unlike other areas of law).

This begs the questions: What *is* a value judgment? How is it different than a religious judgment? We've just seen the Court acknowledge in *Roe* that 'values,' as related to abortions, are frequently and reasonably informed by religious conceptions of when life begins. Yet in this opinion, there's no mention of religion or what might inform one's values regarding abortion or when life begins. If value judgments were outwardly linked with religion, it would seemingly make the government's right to express them more complicated. It could easily trigger a challenge based on the Establishment Clause of the First Amendment.[233] But in this opinion, "value judgments" are conceptualized in somewhat of a vacuum—just something understood to reflect the uniquely contentious nature of abortion and therefore allowable.

**HARRIS V. MCRAE (1980)**

*Harris v. McRae,* 448 U.S. 297, 316 (1980) (Hereinafter "*Harris*") is a landmark case in the field of reproductive rights. It upheld the constitutionality of the Hyde Amendment, which bars

[233] In *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989) discussed on page 57.

the use of federal funding to pay for abortions. The Hyde Amendment's creation was in many ways religiously charged; legislative debates surrounding the amendment featured discussions of the "immortal soul" and Herod's slaughter of innocents, while the Republican-led House of Representatives utilized a Catholic Conference advisor when writing the Amendment.[234] The statute has remained controversial since its inception; former Vice President and 2020 Democratic Presidential candidate Joe Biden did not revoke his support until 2019 despite generally supporting abortion rights.[235] Authored by Justice Stewart, the ruling holds that a woman's right to seek a legal abortion does not demand "a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[236] Calling on *Maher* as precedent, the opinion reiterates the legality of the state to express "value judgments" through allocation of federal funding.[237] This time, however, the Court addresses two constitutional challenges regarding religious freedom.

The opinion considers but ultimately rejects two issues of First Amendment religious freedom violations by the Hyde Amendment. At issue is whether the statue violates the Free Exercise Clause[238] of a woman seeking an abortion as aligned with her religious beliefs, and whether the statue violates the Establishment Clause by mandating an abortion restriction aligned with the teachings of the Roman Catholic Church. Reviewing the lower court decision, Justice Stewart writes that the trial involved questions about "the medical reasons for abortions and the diverse religious views on the subject."[239] Importantly, the lower Court held that

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[234] Linda Greenhouse, *Let's Not Forget the Establishment Clause*, THE NEW YORK TIMES (2019), https://www.nytimes.com/2019/05/23/opinion/abortion-supreme-court-religion.html.
[235] Katie Glueck*, Joe Biden Denounces Hyde Amendment, Reversing His Position Video*, THE NEW YORK TIMES (2019), https://www.nytimes.com/2019/06/06/us/politics/joe-biden-hyde-amendment.html.
[236] *Harris v. McRae*, 448 U.S. 297, 316 (1980) (Hereinafter "*Harris*").
[237] *Harris*, 448 U.S. at 314.
[238] The Free Exercise Clause of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend, I.
[239] *Harris*, 448 U.S. at 305.

> As to the Free Exercise Clause of the First Amendment, the court held that insofar as a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant and Jewish tenets, the funding restrictions of the Hyde Amendment violate that constitutional guarantee as well.[240]

The Supreme Court rejected the lower court's above reasoning, arguing that the appellees did not have standing to bring forth the issue because "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion"[241] which the plaintiffs did not demonstrate. Some of the appellees were denied because "none alleged, much less proved, that she sought an abortion under compulsion of religious belief," while others did not allege that they were in fact pregnant or eligible for Medicaid.[242] In addition, they Court rejected the argument that the statute violated the Establishment Clause[243] in this key section:

> the District Court properly concluded that the Hyde Amendment does not run afoul of the Establishment Clause. Although neither a State nor the Federal Government can constitutionally pass laws which aid one religion, aid all religions, or prefer one religion over another, it does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions. That the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.[244]

In his dissent, Chief Justice Brennan's responds with some notable arguments:

> The Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual… it imposes

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[240] *Harris,* 448 U.S. at 306.
[241] *Harris*, 448 U.S. at 321 (internal quotation marks omitted).
[242] *Harris*, 448 U.S. at 299.
[243] "It is well settled that a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion." *See Harris v. McRae,* 448 U.S. at 219 (internal citations and quotation marks omitted).
[244] *Harris*, 448 U.S. at 319-20 (internal citations and quotation marks omitted).

> that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality.[245]

He accuses the court of imposing its own moral preferences, although he makes no explicit reference to these positions being religiously based. The phrase "state-mandated morality" is a significant jab at the Court; Justice Brennan essentially argues that the allowance of "value judgments" in this case paves the way for states to impose their own subjective moral judgments on citizens.

**FINDINGS/ANALYSIS**

Thus far in the reproductive rights judicial canon, there has not been language linking the unborn with personhood. But as with *Maher*, the *Harris* opinion stresses that the involvement of "the purposeful termination of a potential life" is what sets abortions cases apart from other medical procedures and warrants the government to restrict abortion access based on value judgments. In *Roe*, the role of religion in informing questions of personhood was discussed at length, and the link between one's religious views and one's views on abortion was recognized, even as the right to abortion was assured based on secular principles. In this case, the Court explicitly rejects two claims that religion is present in the formation of the Hyde Amendment.

First, *Harris* denies that a woman could be seeking an abortion because of her religion. The opinion states that one woman failed to allege or prove that her religion influenced her desire for an abortion, and that the appellees might have religious views that justify their abortions, but did not have standing as they were not pregnant. This statement implies that if a

[245] *Harris*, 448 U.S. at 332.

woman could prove she was getting an abortion for religious reasons, she could credibly allege the Hyde Amendment restricts her expression of religion.[246]

The opinion furthermore denies that the Hyde Amendment constitutes government imposition of religion, and rules that the law merely constitutes a permissible expression of government values. Any overlap with the teachings of the Roman Catholic Church is dismissed as inconsequential and value judgments are continuously upheld without any discussion of what might inform such values.[247] This denial that the Amendment violates the Establishment Clause is essentially a denial that value judgments are equivalent to religious judgments. However, value judgments remain undefined. Justice Brennan accuses the Court of permitting "state mandated morality" by allowing value judgments, seemingly implying an argument that the Court is overreaching its neutral role by permitting value judgments, although he doesn't explicitly argue that this "morality" is necessarily religiously based. As we'll see later on, Justice Stevens makes the argument in a dissent that such abortion restrictions *do* violate religious freedoms as they impose decisions on women who are contemplating their own theological positions on the procedure.[248-249]

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[246] In most relevant Supreme Court abortion cases following this one, we see clinics or providers involved, not individual pregnant women or women who are not pregnant, in part due to this finding. Standing will be an important issue in the pending Supreme Court case *June Medical Services v. Russo* because the Court may rule on the standing of clinics and doctors to make claims on behalf of patients. *See* Leah Litman & Steve Vladeck, *Symposium: June Medical Services and the future of Article III standing in abortion cases*, SCOTUSBLOG (2019), https://www.scotusblog.com/2020/02/symposium-june-medical-services-and-the-future-of-article-iii-standing-in-abortion-cases/.

[247] This is particularly interesting given the religious legislative debates and advisors who contributed to the bill's creation.

[248] i.e. as in *Gonzales v. Carhart* discussed on page 67.

[249] For example, Jewish law teaches that life begins at first breath and that the life of the mother outweighs the survival of the fetus, so potentially such an argument could work in a case where a woman was denied a health exception for an abortion.

**City of Akron v Akron Center for Reproductive Health (1983)**

*City of Akron v. Akron Center for Reproductive Health* 462 U.S. 416, 422-25 (1983) (Hereinafter "*Akron*") ruled that an Akron city ordinance violated a woman's constitutional right to seek an abortion. The ruling rejected several specific provisions of the ordinance[250] and expressly reaffirmed the holdings of *Roe v. Wade*. An "informed consent" provision required doctors to recite specific language to patients reading "the unborn child is a human life from the moment of conception,"[251] violating *Roe*'s implication that "a State may not adopt one theory of when life begins to justify its regulation of abortions."[252] Additionally, *Akron* reiterated the crucial authority of doctors and medical science regarding abortion practices.[253-254]

In a dissent by Justice O'Connor, joined by Justices White and Rehnquist, she writes that the trimester approach established in *Roe* is a "completely unworkable" method of balancing a woman's right to an abortion with the state's interests of ensuring women's health and protecting potential life. Justice O'Connor reasons that the trimester framework cannot account for rapidly changing scientific development, which is moving the point of necessary state regulation for maternal health during pregnancy forward as the procedure becomes increasingly safe, while simultaneously moving the point of fetal viability backward as medical developments can aid increasingly premature infants.[255] She also argues that "*potential* life is no less potential in the

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[250] These rejected provisions included: mandates that second-trimester abortions be held in a hospital, that women to be subject to a 24-hour waiting period before the procedure, that unmarried patients need parents' permission, and that fetal remains be disposed of in certain ways. *See City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 422-25 (1983) (Hereinafter "*Akron*").
[251] *Akron*, 462 U.S. at 444.
[252] *Akron,* 462 U.S. at 444.
[253] *Akron*, 462 U.S. at 447.
[254] See *Akron,* 462 U.S. at 444-45. "The Court thus rejected the informed consent provision for demanding improper 'speculation' on the part of the physician as well as containing multiple medical inaccuracies, such as 'dubious' statements incorrectly implying that abortion is a dangerous procedure that will be followed by a 'parade of horribles.'"
[255] *Akron*, 462 U.S. at 456-57.

first weeks of pregnancy than it is at viability or afterward" and thus "there is the *potential* for human life" during an entire pregnancy, which the trimester framework ignores.[256]

Justice O'Connor never quite makes the leap to equate a fetus with a person, and does not use phrases like "unborn child" to assert fetal personhood. Instead, she refers to "fetal life" as having unique value and status, such as when she argues that the waiting period provision is "surely a small cost to impose to ensure that the woman's decision is well-considered in light of its certain and irreparable consequences on fetal life."[257] She believes the Court should exhibit moral neutrality, omitting the Justices' personal preferences. She writes that members of the Court are not "Platonic Guardians" and have no right to strike down laws just because "they do not meet our standards of desirable social policy, wisdom, or common sense."[258] Ultimately, Justice O'Connor asserts that "extremely sensitive issues" such as this one, especially where scientific best practice is ever-changing, belong to the legislature, not the courts.[259]

**FINDINGS/ANALYSIS**

This opinion once again affirms *Roe* and rejects restrictive abortion provisions such as waiting periods and the adoption of one theory of life (that it begins at conception) in the preamble. Although the ordinance at issue refers to the fetus repeatedly as an "unborn child," the majority opinion and dissent do not. We see no mentions of religion in this opinion, and the adoption of one theory of life by the statute is struck down, consistent with *Roe*. This ruling is significant for how it sets the stage for future abortion cases; the next several cases address statutes with very similar restrictions and declarations of life's beginnings to this one.

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[256] *Akron,* 462 U.S. at 461.
[257] *Akron*, 462 U.S. at 474.
[258] *Akron*, 462 U.S. at 435 (international quotation marks omitted).
[259] *Akron*, 462 U.S. at 465.

In her dissent, Justice O'Connor does not go as far as establishing legal fetal personhood by any means, but she emphasizes giving value and consideration to the fetus when considering abortion laws. She critiques the idea of "potential life" as it has been articulated by the Court—she argues that if the fetus actually constitutes potential life, it would do so equally throughout a pregnancy, and thus the trimester framework is arbitrary in its regard to protecting such life. To her, fetuses are not equal to persons, but fetal life exists throughout a pregnancy and is a limbo stage of personhood; it is more than just mere "potential."

Justice O'Connor reiterates that the legislature can make value judgments but the Court cannot. She expresses her belief that court is a morally neutral institution and thus should refrain from contradicting legislative measures on abortion. This articulation is echoed in later cases by herself and others. In her dissent we see increased focus on the importance of the fetus relative to a woman's right to an abortion. Although not expressed in the majority, it is still an important turn towards emphasizing some degree of fetal personhood by members of the Court. However, her dissent still marks a conservative perspective that doesn't feed into an outright assertion of fetal personhood—something Justice O'Connor never fully embraces—clearing the way for her to be a crucial swing vote to uphold abortion in *Planned Parenthood v. Casey*, where she accomplishes her goal of discarding the trimester framework.

**Thornburgh v. American College of Obstetricians & Gynecologists (1986)**

In the 1986 case *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 761 (1986)* (Hereinafter "*Thornburgh*") Justice Blackmun once again took up the pen to reaffirm the central holdings of his most famous case, *Roe v. Wade.* Similarly to the provisions nullified in *Akron*, the Pennsylvania statute at issue includes an informed consent section, in which doctors were required to recite language emphasizing the personhood of the fetus, such as

telling the patient about "characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival."[260] The language in the statute heavily leans into lexical bridges such as "unborn child," suggests personhood status begins as early as fertilization, and includes contentious phrases such as "aborted alive."[261] The opinion and corresponding concurrence and dissent address the conflicting values that underlie attitudes towards abortion. Justice Blackmun reiterates the important role of personal religious beliefs regarding abortion that he first vocalized in Roe, that "abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly," but emphasizes the Court's duty to nonetheless "apply the Constitution faithfully."[262]

In Justice White's impassioned dissent, he advocates for completely overturning *Roe.* He emphasizes the importance of "the State's countervailing interest in protecting fetal life" and amends in parenthesis "or, as the Court would have it, 'potential human life.'"[263] This is an interesting side comment; he intentionally echoes Justice O'Connor's dissent in *Akron*. Justices White and O'Connor see fetal life as something more legitimate and tangible than the "potential life" status established by the Court in preceding cases. However, Justice White goes further to essentially equate a fetus with a mature adult:

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[260] *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 761 (1986) (Hereinafter "*Thornburgh*").

[261] The entire invalidated section of the statute at issue: "Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment. The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree." *Thornburgh,* 476 U.S. at 768.

[262] *Thornburgh*, 476 U.S. at 772.

[263] *Thornburgh*, 476 U.S. at 794.

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that *there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being*.[264]

In this section, Justice White seems to be outwardly rejecting theological or even legal arguments. He argues for a more basic, common sense understanding of personhood based on features such as the uniqueness of DNA, a common anti-abortion argument,[265] and the unclear line between fetus, child and adult. Justice White contends that by invalidating the statute at issue, the majority opinion "engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences."[266] Once again reiterating Justice O'Connor in *Akron*, he stresses that the Court should play a morally neutral role: value judgments may be expressed by the legislature, not the courts.

In his concurrence, Justice Stevens responds directly to the dissent, writing "surely Justice White is quite wrong in suggesting that the Court is imposing value preferences on anyone else."[267] While Justices O'Connor and White view the Court's obstruction of state abortion restrictions as inappropriate expressions of the Justices' personal values, Justice Stevens argues that for the court to *not* take part in this issue would be improper, as permitting the provisions would infringe on the personal values of citizens whose views don't align with the legislature.[268] Justice Stevens thus argues that the non-medically informed consent requirements should be overturned by the state. While people are "free to preach the evils of birth control and

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[264] *Thornburgh*, 476 U.S. at 792 (emphasis mine).
[265] Evans & Narasimhan, *supra* note 10.
[266] *Thornburgh*, 476 U.S. at 794.
[267] *Thornburgh*, 467 U.S. at 778.
[268] Justice Stevens states: "no individual should be compelled to surrender the freedom to make that decision for herself simply because her "value preferences" are not shared by the majority." *See Thornburgh*, 467 U.S. at 777.

abortion and to persuade others to make correct decisions," a woman should be allowed to face the "serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul" without interference from government or from those who do not "share her own value preferences."[269]

This is one of many instances in this ruling of Justice Stevens acknowledging the individual religious beliefs that inform abortion decisions. Stevens further writes "I recognize that a powerful theological argument can be made," for believing life begins at conception, but that "our jurisdiction is limited to the evaluation of secular state interests."[270] He rejects Justice White's argument that "fetal life" is equally critical throughout a pregnancy, and calls out Justice White's apparent denial of the role of theology in informing conceptions of personhood (a denial which Justice Stevens seems to think is inauthentic) in this paragraph:

> For, unless the religious view that a fetus is a "person" is adopted—a view Justice White refuses to embrace—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.[271]

Justice White directly responds to this section in a footnote: "Contrary to Justice Stevens' suggestion, this is no more a "theological" position than is the Court's own judgment that viability is the point at which the state interest becomes compelling."[272] Here Justice White denies any religious bases to his own arguments; he once again attributes fetal personhood not to legal or religious understanding, but common sense moral reasoning.

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[269] *Thornburgh*, 476 U.S. at 781.
[270] *Thornburgh*, 467 U.S. at 778.
[271] *Thornburgh,* 476 U.S. at 779 (internal citations omitted).
[272] *Thornburgh*, 476 U.S. at 795 (internal citations and capitalizations omitted).

**FINDINGS/ANALYSIS**

Justice White reiterates many of the assertions Justice O'Connor's made in her *Akron* dissent: he writes that fetal life is different from and more tangible than the "potential life" that the Court speaks of, although he goes even further than Justice O'Connor. Justice White's dissent essentially equates a fetus with a child or an adult when he contends that the line between them is arbitrary. Parroting Justice O'Connor in *Akron*, Justice White additionally argues that the Court cannot express personal values, and thus believes the Court should stay out of abortion decisions.

Case by case, we've seen an increase in allowances of value judgments to justify abortion restrictions: first *Maher* allowed states to omit non-medically necessary abortions from Medicaid funding, then *Harris* took this a step further and sanctioned a ban on federal funding for all abortions. Additionally, we've seen an increase in references to fetal personhood in the dissents: first in Justice O'Connor's dissent in *Akron,* where she argues that "fetal life" is a compelling interest throughout a pregnancy, and then in Justice White's dissent here where he contends that the line between fetus and child is arbitrary. Even as *Roe* is repeatedly reaffirmed, it is important to note the rhetoric and language coming from the conservative dissenters. Although not yet echoed in the majority, these arguments will eventually be incorporated into binding decisions as the makeup of the Court shifts. The increasing assertions of fetal personhood will become the basis for upholding increasing restrictions on abortion.

The clash between Justice White and Justice Stevens in their respective dissent and concurrence is a key section, as we see conservative Justice White claiming to be expressing a non-theologically-backed position on allowing abortion restrictions. Meanwhile, we see liberal Justice Stevens contending that Justice White's views actually *are* theologically backed, and thus

should be disregarded. Justice Stevens argues that the only way for abortion restrictions to be constitutionally upheld in the way Justice White advocates would be to adopt a theological understanding of life beginning at conception. Justice White completely rejects this argument—he asserts that attitudes towards abortion can originate from common sense, non-religious convictions. Although he refutes Justice Stevens' implications that this reflects a religious conception of personhood, to me, Justice White's statements read as a theological assertion of when life begins.

Additionally, Justice Stevens articulates the role religion plays in informing views on abortion references the importance of protecting women's ability to act according to their religious views (for the "the salvation of her own immortal soul" and with those who "share her own value preferences"[273]). Justice Stevens will later argue more explicitly on these points: as there is no secular consensus of when life begins, outward adoption of one theory seems inseparable from theological influence.

**Webster v. Reproductive Health Services (1986)**

*Webster v. Reprod. Health Servs., 492 U.S. 490, 505 (1989) (Hereinafter "Webster")* is a landmark abortion case that upheld a Missouri abortion statute similar to the ones previously overturned in *Thornburgh* and *Akron*. Missouri legislators referred to the statute as a "kitchen sink" law, adding every abortion restriction they could imagine.[274] The justices became inundated with mail regarding the decision: "letters with photos of dead fetuses in one pile, letters with photos of coat hangers (symbol of back-alley abortions in the pre-Roe era) in

[273] *Thornburgh,* 476 U.S. at 781.
[274] Thomas, *supra* note 144.

another."[275] At issue were several restrictive provisions[276] and the statute's preamble, which bluntly stated that "[t]he life of each human being begins at conception."[277]

The majority opinion upheld the preamble and all provisions, and though it reaffirmed the central holding of *Roe*, the Justices expressed dissatisfaction with the "unworkable" trimester framework and argued that potentiality of life should be considered compelling throughout a pregnancy in the future, echoing Justice O'Connor's dissent in *Akron*. In authoring the opinion, Justice Rehnquist writes that the preamble is simply another instance of the state expressing a value judgment, as was deemed acceptable in *Maher*.[278] Conversely, Justin Stevens' argues in a dissent that the preamble is an unconstitutional expression of religious beliefs.

After asserting that life begins as conception, the Missouri statute's preamble contends that "[u]nborn children have protectable interests in life, health and well-being;" thus they should have "all the rights, privileges, and immunities available to other persons, citizens, and residents of this state."[279] Although the lower Court invalidated this preamble based on *Akron's* reiteration of *Roe* that the "state may not adopt one theory of when life begins to justify its regulation of abortion,"[280] here the Court claims "the Court of Appeals misconceived the meaning of the dictum in *Akron.*"[281] The Court now argues that the state merely cannot "'justify' any abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State's view

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[275] Thomas, *supra* note 144.
[276] The provisions were: restricting public employees and facilities from performing abortions unnecessary to save the mother's life, prohibiting public funding of counseling on abortions, and requiring that physicians perform viability tests upon women 20 or more weeks into pregnancy. *See Webster v. Reprod. Health Servs*., 492 U.S. 490, 505 (1989) (Hereinafter "*Webster*")
[277] *Webster*, 492 U.S. at 505.
[278] *Webster*, 492 U.S. at 506.
[279] Webster, 492 U.S. at 504.
[280] *Webster,* 492 U.S. at 505.
[281] *Webster*, 492 U.S. at 506.

about when life begins,"[282] and accepts the appellees argument that the preamble at issue does not place any "substantive restrictions" on abortion.[283]

In Justice Stevens' dissent,[284] he directly attacks the majority opinion for upholding the preamble, arguing that the statute is unconstitutional as it *does* impose "substantive impact" on one's reproductive freedom by permitting doctors to discriminate in their provision of contraceptive procedures,[285] Additionally, he argues that the preamble violates the Establishment Clause of the First Amendment by asserting theologically based legislative "findings."[286] Expanding on his *Thornburgh* dissent, Justice Stevens writes that "[t]here is unquestionably a theological basis" for rejecting certain contraceptive procedures depending on whether they occur before or after fertilization, but that the Court "require[s] a secular basis for valid legislation."[287] Under this logic, the lack of secular basis (i.e., medical consensus) for Missouri's assertion of when life begins means the preamble violates the Establishment Clause.

Justice Stevens emphasizes that his argument does not rest on the preamble simply coinciding with the tenets of one religion, as was ruled an invalid basis for an Establishment Clause violation in *Harris*,[288] but instead because the preamble constitutes "an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths [and] serves no identifiable secular purpose."[289] Justice Stevens hypothesizes that if the views of St. Thomas, for

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[282] *Webster*, 492 U.S. at 506.
[283] *Webster,* 492 U.S. at 505.
[284] In Justice Blackmun's dissent, he quotes Justice Stevens' argument about religion from the previous case and has statements worth noting for their derision towards the majority opinion and dire pronouncements for the future of abortion law: "The opinion contains not one word of rationale for its view of the State's interest. This 'it-is-so-because-we-say-so' jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place" and "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." *See Webster*, 492 U.S. at 552 and 560.
[285] *Webster,* 492 U.S. at 571.
[286] *Webster*, 492 U.S. at 571-572.
[287] *Webster*, 492 U.S. at 565-66.
[288] *Webster,* 492 U.S. at 566.
[289] *Webster,* 492 U.S. at 566-67.

example, that "female life begins 80 days after conception and male life begins 40 days after conception," were codified, the Court would "promptly conclude that such an endorsement of a particular religious tenet is violative of the Establishment Clause."[290] He writes that "the difference between that hypothetical statute and Missouri's preamble reflects nothing more than a difference in theological doctrine"[291] and presents his own medically-based secular argument for why the preamble theory is provably false.[292]

Justice Stevens' contends that "the intensely divisive character" of national abortion debates "reflects the deeply held religious convictions of many participants in the debate."[293] He argues that Missouri cannot "inject its endorsement of a particular religious tradition into this debate for [t]he Establishment Clause does not allow public bodies to foment such disagreement."[294] Because of the theological nature of the debate, the statute constitutes state imposition of religion and infringes on freedom of women's religious expression: "Contrary to the theological "finding" of the Missouri Legislature, a woman's constitutionally protected liberty encompasses the right to act on her own belief that—to paraphrase St. Thomas Aquinas—until a seed has acquired the powers of sensation and movement, the life of a human being has not yet begun."[295]

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[290] *Webster,* 492 U.S. at 568.
[291] *Webster*, 492 U.S. 568.
[292] His secular argument: "There is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9–month–gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid. In fact, if one prescinds the theological concept of ensoulment—or one accepts St. Thomas Aquinas' view that ensoulment does not occur for at least 40 days—a State has no greater secular interest in protecting the potential life of an embryo that is still "seed" than in protecting the potential life of a sperm or an unfertilized ovum." *Webster,* 492 U.S. at 569.
[293] *Webster*, 492 U.S. at 571.
[294] *Webster,* 492 U.S. at 571 (internal quotation marks omitted).
[295] *Webster,* 492 U.S. at 572.

**FINDINGS/ANALYSIS**

The majority opinion notably leaves unchallenged the statute's repeated use of "child" and "unborn child," at times using it without quotation marks when referencing the words of the statute. Although she does not use this terminology herself, Justice O'Connor notes the way in which this phrase is utilized by the state to equate personhood with the moment of conception when she writes, "This process often produces excess fertilized ova ("unborn children" under the Missouri Act's definition)."[296]

The preamble, despite obviously asserting one theory of when life begins, is permitted by the Court because it is not seen as being applied in a "concrete" way—a complete reversal from the Court's decision regarding an almost identical issue in *Akron*. This opinion's assessment, that the lower Court incorrectly applied *Akron*, which clearly held that "a state may not adopt one theory of when life begins," seems to be a complete disregard for the ways in which framing[297] can influence a law. Here we see a clear instance of how formulations of personhood make their way into jurisprudence, but are permitted by the Court because they are not acknowledged as religiously-based or unconstitutionally restrictive.

Justice Stevens' dissent is hugely significant for this research; Justice Stevens contends that "deeply held religious convictions" are what makes the abortion debate so fraught.[298] This claim reflects the basis for my project: the idea that stated or unstated, conflicting theories of when life begin cannot be resolved by medical science and thus reflect theological conceptions. This is clearly a controversial view: we just saw in the previous case that Justice White denied the

[296] *Webster*, 492 U.S. at 552.
[297] See chapter 2 on page 18.
[298] *Webster,* 492 U.S. at 571.

presence of religion in his subtle assertion of a theory of life, and implied that believing life begins at conception reflects common-sense morals, not any one theological belief.

Justice Stevens disagrees with the majority's application of constitutional law; he argues that the preamble of the statute *does* impose substantive restrictions for how it guides doctors trying to following its provisions. He directly accuses the preamble of containing religiously charged language, and argues that therefore the law not only violates the ruling in *Akron* by asserting one theory of life, but violates the Establishment Clause by imposing religiously-based restrictions. Even though the statute might not reference Christian conceptions of personhood or God for example, and even if those asserting such conceptions of personhood might not even themselves think they are expressing a religious judgment, it clearly expresses a theory of life. And as discussed in Chapter 2 on page 24, the "inescapable framework" model conceives that is impossible to separate the religious from the secular concerning our conceptions of human nature and personhood. Therefore, to adhere to any one theory of when life begins is an improper imposition of religion and personal values on people who might have different conceptions of personhood guiding their views towards abortion.

**Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)**

*Planned Parenthood v. Casey,* 505 U.S 833 (1993) (Hereinafter *"Casey*") is a landmark abortion case, possibly the most influential after *Roe v. Wade*. By 1991, all of the Justices in *Roe*'s majority decision had been replaced aside from Justice Blackmun, who feared the new conservative majority would overturn *Roe*.[299] Amidst wide public speculation and fervor over this possible outcome, Justices O'Connor, Kennedy, and Souter, all Republican appointees,

[299] Stone, *supra* note 17, at 411-415.

began secretly meeting to "save" abortion rights.[300-301] Ultimately, the co-conspirators jointly authored a majority opinion that reaffirmed much of *Roe,* highlighting the gravitas of their decision[302] and musing on the importance of *stare decisis*. To frame their opinion, the Justices acknowledge the differing ways that moral and "spiritual"[303] views factor into abortion decisions and lead to conflict over "the life or potential life that is aborted,"[304] but stress that the role of the Court is not to "mandate our own moral code."[305]

The case identifies and upholds three of *Roe*'s central holdings: women have the right to seek an abortion before fetal viability, the state has a right to restrict abortion past viability, and the state possesses legitimate interests in protecting women's health and potential life.[306] However, the Court replaces the former trimester framework with a new "undue burden" test, with the justification that the trimester framework "misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life."[307]

This more lenient assessment allows for greater abortion regulation throughout a pregnancy, provided the restrictions do not place a "substantial obstacle" in front of a woman seeking an

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[300] Evan Thomas explains that*:* "The 'welcome news' was that three Justices—Kennedy, David Souter, and O'Connor—had been meeting secretly to save a woman's right to abortion. The Troika, as they became known, was cobbling together a joint opinion that, when added to the pro-abortion votes of Blackmun and John Stevens, would effectively negate Rehnquist's effort to gut Roe v. Wade." Thomas, *supra* note 144. The role of Justice O'Connor in preserving the constitutional right to an abortion is an interesting turn from her earlier decisions, where we saw her often on the opposing end of abortion rights. In Thomas' autobiography of Justice O'Connor, he describes how she went through something of a personal crisis, thought she was going to be sick the morning of the decision, and acknowledged that despite being anti-abortion, she was old enough to be immune from any impact of the ruling. As the only woman on the Court at the time, its understandable she would feel uniquely responsible for the decision.
[301] Stone, *supra* note 17 at 417.
[302] See *Casey*, 505 U.S. at 851: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." And *Casey,* 505 U.S. at 867: "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.*"
[303] *Casey,* 505 U.S. at 850.
[304] *Casey,* 505 U.S. at 852.
[305] *Casey,* 505 U.S. at 850.
[306] *See Casey*, 505 U.S. at 834.
[307] Casey, 505 U.S. at 873.

abortion.[308] *Casey* evaluates several provisions of a Pennsylvania abortion law, including informed consent language, a 24 hour waiting period, a requirement that minors' gain parents' consent for an abortion, and that married women inform their husbands about the procedure.[309] Under the new undue burden test, the provision that women inform their husbands was struck down, although the rest of these regulations were deemed acceptable.[310]

The decision to reaffirm *Roe* came much to the relief of Justices Blackmun and Stevens,[311] although the two voiced their opposition to the upheld regulations. In Justice Stevens' dissent, he contends that the undue burden standard is too lenient, and he opposes the weight given to the fetus over women's health; he asserts "the state interest in potential human life is not an interest *in loco parentis,* for the fetus is not a person."[312] Justice Blackmun similarly pushes back on a shifting emphasis toward the fetus, reminding the Court that while the interest in potential life is legitimate, the Court has found that fetuses do not possess Fourteenth Amendment personhood protections. Thus, "protecting fetal life" is not a compelling interest grounded in the Constitution and no weight can be given to any "theological or sectarian" concerns regarding personhood due to the Establishment Clause.[313] Therefore, "fetal life" cannot be given priority over women's health.

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[308] *See Casey,* 505 U.S. at 837: "Roe's rigid trimester framework is rejected. To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right." And see Casey, 505 U.S. at 877: "undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."
[309] *See Casey,* 505 U.S. 833.
[310] *See Casey,* 505 U.S. at 898. Justified because: "Women do not lose their constitutionally protected liberty when they marry."
[311] Thomas, *supra* note 144.
[312] *Casey*, 505 U.S. at 914.
[313] *Casey*, 505 U.S. at 932.

Justices Rehnquist, writing with Justices White, Scalia, and Thomas, concurred with the upheld regulations but dissented regarding the reasoning, boldly declaring that "*Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."[314] These Justices would instead uphold the requirement that women inform their husbands about the procedure, saying "a husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones" and that "the provision makes it more likely that the husband will participate in deciding the fate of his unborn child."[315]

In an additional dissent, Justice Scalia emphasizes that the right to seek an abortion appears nowhere in the Constitution, and therefore the abortion judicial canon constitutes an overreach of the judiciary's proper role. He writes that

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life.* Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.[316]

Here, Justice Scalia points out the differing "values" that shape views on abortion—even affirming that use of the phrase "unborn child" as opposed to "fetus" is an expression of such values. Affirming that the issue is so fraught with value judgments that the Court could not possibly make an assertion without endorsing either side, he believes the Court must leave the case up to the legislature.

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[314] *Casey,* 505 U.S. at 944.
[315] *Casey*, 505 U.S. at 974.
[316] *Casey,* 505 U.S. at 982.

**FINDINGS/ANALYSIS**

While *Casey* is a landmark case for upholding the legalization of abortion two decades after Roe despite a liberal-minority Court, it also signifies a chipping away at the previously stricter framework for government interference with the procedure. It is important to note the justification given for discarding the trimester framework is in large part that "in practice it undervalues the State's interest in potential life."[317] The importance of "fetal life" or "potential life" is highlighted throughout the majority opinion, and increasingly emphasized by the Court in order to justify an allowance of increased regulation of the procedure. The first dissent is also notable for the overt use of 'unborn child' absent quotation marks. This continues the gradual adoption of such personhood language into the Court, from its initial appearance in quoted sections of bills to being adopted by the Justices in dissenting opinions.[318]

The concurrences reiterate that a fetus is not a person under the Fourteenth Amendment, something they think the majority is beginning to forget as they discard the trimester framework.[319] Justice Blackmun also pointedly reminds the Court that theological views are not a valid legal basis to deny women their constitutional right to seek an abortion. In some ways, Justices Scalia and Stevens have a similar argument: for the Court to make an assertion on personhood is for them to inappropriately impose their own values on Americans. However, they reach completely opposing conclusions on the implications of their common argument—Justice Stevens would thus legalize abortion so those who believe in it can get it (he believes for the Court to *allow abortion bans* is to express a value judgment), Justice Scalia would uphold the ban since it is an appropriate expression of state values (he believes for the Court to *block*

[317] *Casey,* 505 U.S. at 873.
[318] And as we'll see in the next case, appearing in the majority opinions.
[319] *Casey,* 505 U.S. at 913 and 933.

*abortion bans* is to express a value judgment.) In the previous case, Justice Stevens argued that religion is inextricably tied to the way one conceptualizes theories of personhood and life. Justice Scalia makes no such claim, but interestingly alludes to a similar understanding of the entanglement between theology and personhood when he refers to a variety of different views on personhood. He also affirms that unborn child is a loaded rhetorical phrase intended to accentuate the personhood of the fetus.

**Gonzales v. Carhart (2007)**

*Gonzales v. Carhart*, 550 U.S. 124 (2007) (hereinafter "*Carhart"*), is an opinion penned by Justice Kennedy that upheld the Partial-Birth Abortion Ban Act of 2003. This act banned abortions where a doctor "vaginally delive[rs] a living fetus," which the Court acknowledges could apply to "dilation and extraction" ("intact D&E") procedures, a method sometimes used in the second and third trimesters. Although the statute lacked an exception for women's health, the Court held that the it did not constitute an undue burden upon a woman seeking an abortion. A nearly identical law was struck down in a previous Court opinion, *Stenberg v. Carhart,* 530 U.S. 914 (2001). However, the statute in question differs slightly from the previous one as it changes "'delivering... a living unborn child, or a substantial portion thereof" to "delivers a living fetus" when defining "partial-birth abortion,"[320-321] as well as identifying more clearly what parts of the fetus need to be identifiable in order to clarify what constitutes a prohibited procedure under the Act. [322]

In a departure from precedent, the Act applies pre- and post- viability, but is upheld because, "by common understanding and scientific terminology, a fetus is a living organism within the

[320] *Carhart,* 550 U.S. at 152 (internal citations omitted).
[321] The statute was changed in order to clarify to which procedures the Act applies. *See Carhart,* 550 U.S. at 151-52.
[322] *Carhart*, 550 U.S. at 127.

womb, whether or not it is viable outside the womb."[323] The Court rejects respondents' claims that the statute was created solely to be an obstacle for women, writing instead the purpose included "protecting innocent human life from a brutal and inhumane procedure"[324] as part of the government's prerogative to "show its profound respect for the life within the woman."[325] The Court relies heavily on Congressional findings, citing Congress' comparison between intact D&E and infanticide[326] and their assertion that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion ... is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[327]

The opinion gives detailed descriptions of the procedure and cites a nurse's testimony, where she voices perceived similarities between the intact D&E procedure and killing an infant,

> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall… The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp… He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.[328]

In light of these graphic and undeniably distressing descriptions, Justice Kennedy frames the decision as a natural result of sustaining "the legitimate interest of the Government in protecting the life of the fetus that may become a child"[329] established in *Roe*. The opinion offers a multitude of further justifications for the law on these grounds, concluding "No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life."[330]

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[323] *Carhart*, 550 U.S. at 126.
[324] Carhart, 550 U.S. at 128.
[325] *Carhart*, 550 U.S. at 128.
[326] *See Carhart*, 550 U.S. at 128. "Congress determined that such abortions are similar to the killing of a newborn infant."
[327] *Carhart*, 550 U.S. at 141.
[328] *Carhart*, 550 U.S. at 138-39 (internal quotation marks omitted).
[329] *Carhart*, 550 U.S. at 158.
[330] *Carhart*, 550 U.S. at 158.

Justice Kennedy also makes the unsupported claim that many women come to regret their abortions, arguing a hypothetical woman would "struggle with grief more anguished and sorrow more profound" upon learning she "allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."[331-332]

In response, Justice Ruth Bader Ginsburg authored a succinct dissent, joined by Justices Stevens, Souter, and Breyer, strongly criticizing the Act for lacking an exception for women's health and prohibiting a procedure reliably deemed medically necessary on some occasions by health professionals. She criticizes the Court for relying on questionable Congressional findings that "arbitrarily relied upon the opinions of doctors who claimed to have no (or very little) recent and relevant experience with surgical abortions."[333] She points out the irony of Justice Kennedy conveying that "respondents have not shown that a health exception is necessary for a large fraction of second-trimester abortions," since "The very purpose of a health *exception* is to protect women in *exceptional* cases."[334]

Justice Ginsburg argues that the act endangers women's health while doing nothing to protect potential life as claimed: "But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion."[335] She contends the real purpose of the law is obvious:

> Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. ("Congress could ... conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."). Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By

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[331] *Carhart*, 550 U.S. at 159-60.
[332] Myths that women often come to regret their abortions and suffer mentally and emotionally because of this regret have been widely refuted. *See, e.g.*, *Abortion and Mental Health*, AMERICAN PSYCHOLOGICAL ASSOCIATION, https://www.apa.org/pi/women/programs/abortion/; *Turnaway Study*, UNIVERSITY OF CALIFORNIA SAN FRANCISCO, https://www.ansirh.org/research/turnaway-study.
[333] *Carhart*, 550 U.S. at 175 (internal quotations omitted).
[334] *Carhart*, 550 U.S. at 188-89.
[335] *Carhart*, 550 U.S. at 181.

> allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent.[336]

In response to the Court ignoring precedent by letting the Act apply before and after viability she adds, "One wonders how long a line that saves no fetus from destruction will hold in face of the Court's 'moral concerns.'"[337]

Lastly, Justice Ginsburg contends that "The Court's hostility to the right *Roe* and *Casey* secured is not concealed," as demonstrated by the majority opinion's language choices, such as calling surgeons and obstetrician-gynecologists "not by the titles of their medical specialties, but by the pejorative label 'abortion doctor'" and dismissing "the reasoned medical judgments of highly trained doctors" as "'preferences' motivated by 'mere convenience.'"[338] Most notably, she highlights language choices, pointing out that a "fetus is described as an 'unborn child,'" by the Court and as a 'baby' by the quoted nurse.[339]

In opposing the majority Opinion, Justice Ginsberg's dissent hints towards a different justification of abortion law; she positions the right to seek an abortion as something deeper than privacy, but instead fundamental to women's equality.

> As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's control over her [own] destiny… There was a time, not so long ago when women were regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution. Those views, this Court made clear in *Casey,* are no longer consistent with our understanding of the family, the individual, or the Constitution. Women, it is now acknowledged, have the talent, capacity, and right to participate equally in the economic and social life of the Nation. Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives. Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, *and thus to enjoy equal citizenship stature.*[340]

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[336] *Carhart,* 550 U.S. at 182 (internal citations omitted).
[337] *Carhart,* 550 U.S. at 186.
[338] *Carhart*, 550 U.S. at 186-87.
[339] *Carhart*, 550 U.S. at 187.
[340] Carhart, 550 U.S. at 171-72 (internal citations and quotation marks omitted, emphasis mine).

Here we see a codified reiteration of her 1980s legal note;[341] Justice Ginsburg writes that to deny abortion is to deny women's position as equal citizens. She cites Reva Siegel,[342] noted feminist legal scholar in so contending.

**FINDINGS/ANALYSIS**

This opinion surrounds a particularly contentious abortion procedure that undoubtedly stirs up an exceptional level of emotional reactions and moral objections, especially in light of the nurse's graphic descriptions likening the procedure to infanticide. As a consequence, we see fetal personhood language and framing appear to an unprecedented degree. For example, the Justices validate the ban by repeatedly stressing the importance of "fetal life," and rarely mention "potential life,"[343] previously a common phrase and central justification in these opinions. Additionally, this is the first time we see an abortion restriction apply both before and after viability, rationalized by the assertion that "common understanding and scientific terminology" indicates the fetus is a "living organism" at all stages of a pregnancy. This argument comes very close to an explicit assertion that life begins at conception. The emphasis on fetal personhood is used particularly to ban intact D&E, but clears the way for a vast change in abortion-related jurisprudence. The successful use of fetal personhood assertions here is shown to swing the balancing test established in *Roe* in favor of the fetus at the expense of women's health. This outcome has dangerous consequences for women; the Justices ignore the warnings given by credible medical authorities and rely on biased congressional findings to permit an abortion ban with no health exception.

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[341] As discussed in chapter 2 on page 11.
[342] *See* Siegel *supra* note 66; Reva B Siegel, *Law, Rethinking Sex and the Constitution*, 132 U. PA. L.REV. 955, 1002–1028 (1984).
[343] Fetal life is mentioned five times; potential life is only mentioned twice.

Justice Kennedy rejects the argument that the Act was created solely as an obstacle for women, and argues its goals of protecting human life are in line with government interests. However, Justice Ginsburg argues that the "moral concerns," the Court uses to validate this claim (and in particular, justify the ban's application pre-viability) have no grounding in legitimate legal reasoning and work against credible medical science. Although Justice Ginsburg never explicitly states these moral concerns are religiously based, she does imply they are simply a pretext for preventing women from accessing abortions. Here is where Justice Stevens' argument in *Webster* feels most prescient; I argue *Carhart* demonstrates that theological conceptions of personhood shape rulings on abortion in a way that ignores secular principles and defies scientifically-backed legal precedent (i.e., always having a health exception).

Justice Ginsburg pointedly criticizes the Court for using biased language such as "unborn child" and "baby" to describe fetuses. We have seen that these terms are key language choices used in anti-abortion rhetoric, and Justice Ginsberg's criticism is the second time a Supreme Court Justice has noted that the terms are loaded and value-laden (the other being Justice Scalia in his *Casey* dissent mentioned on page 65). Justice Ginsburg also condemns the Court for blatantly ignoring credible scientific findings and cherry-picking arguments to justify the ban. Her most groundbreaking argument is to frame abortion as an equal rights issue. Even though it is not part of the binding majority, this assertion is a notable first for the Court.[344] While the majority recognizes fetal personhood to an unprecedented degree, threatening the right to an abortion that exists under much disputed privacy rights, Justice Ginsberg boldly articulates a much stronger argument for abortion rights grounded in women's equal status as persons.

[344] As discussed in Chapter 2 on page 15.

This opinion is an interesting case study that illustrates why the makeup of the Court matters. Here we see essentially the exact same statute that was at issue in *Stenberg v. Carhart*, but a reverse in ruling after the Court lost a liberal majority and gained Justice Kennedy's crucial swing vote due to the uniquely contentious nature of the intact D&E procedure. As I mentioned in Chapter 2 on page 21, legal scholar Geoffrey R. Stone would argue the religious makeup of the Court—all five justices in the majority were Catholic—might be worth exploring further. Regardless, it is important that we understand how the changing nature of the Court, and the backgrounds of those who sit on the bench, change the course of essential rulings.

**Whole Woman's Health v. Hellerstedt (2016)**

*Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (Hereinafter "*Whole Woman's Health*") is a recent Supreme Court ruling that overturned two provisions of Texas House Bill 2 for imposing an undue burden upon women seeking abortions. The provisions required abortion facilities to meet regulatory standards for ambulatory surgical centers and equip their physicians with active admitting privileges at a hospital within 30 miles of the facility. These bills, part of a wider national legislative trend often called "TRAP" laws ("Targeted Regulation of Abortion Providers")[345] were found by the District Court to have forced half of Texas' operating facilities to close, causing substantial increases in the number of women living prohibitively far from an abortion facility and leading to extensive overcrowding at remaining facilities.[346] Authored by Justice Breyer, the majority opinion found that both of the

[345] *Targeted Regulation of Abortion Providers (TRAP) Laws,* GUTTMACHER INSTITUTE *(*2020), https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws.

[346] The District Court made extensive findings, including, but not limited to: as the admitting-privileges requirement was enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20; this decrease in geographical distribution meant that the number of women of reproductive age living more than 50 miles from a clinic had doubled, the number living more than 100 miles away has increased by 150%. Additionally, the number of women living more than 150 miles away increased by more than 350%, and the number living more than 200 miles away increased by about 2,800%. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2296–97 (2016) (Hereinafter "*Whole Woman's Health*").

provisions constituted an "undue burden" because they provided few, if any, health benefits for women[347] while placing a "substantial obstacle" in the path of a woman seeking abortions.[348]

Justice Thomas' dissent, although mostly devoid of personhood arguments and more concerned with a perceived errors in judicial review,[349] repeatedly uses the phrase "unborn child" and argues the Court "should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests."[350] Like Justice Scalia, Justice Thomas accuses the Court of allowing value judgments to color their decisions regarding abortion.[351]

**FINDINGS/ANALYSIS**

This case overturns restrictive abortion statutes that have no conceivable health benefit, revealing that the women's health justification behind these TRAP laws is clearly just a pretext for preventing women from seeking abortions. Justice Thomas repeats many of the conservative arguments we have seen by accusing the majority opinion of imposing improper value judgments. Largely devoid of personhood rhetoric, Justice Thomas and Justice Alito, in another dissent, focus on perceived logistical and standing errors made by the majority in their review of the case.

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[347] "We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case." And *Whole Woman's Health,* 136 S. Ct. at 2315. "Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion." *See Whole Woman's Health*, 136 S. Ct. at 2311-12.

[348] *Whole Woman's Health*, 135 S. Ct. at 2296.

[349] I.e., that this case constituted a break in Court decorum as a previous version was already litigated pre-application. Justice Thomas also complains about he way undue burden is being applied and a perceived arbitrariness of standards of review.

[350] *Whole Woman's Health*, 136 S. Ct. at 2328.

[351] He writes that the majority opinion is an instance of the Court "reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear[s]." *Whole Woman's Health*, 136 S. Ct. at 2330.

This opinion is significant to my research because it is the most recent key Supreme Court abortion decision, one which may soon become either obsolete or reaffirmed as the Court takes up *June Medical Services LLC v. Russo* in 2020, a case looking at an extremely similar example of state TRAP laws.[352] Since 2016, the Court's makeup has shifted to an overtly conservative majority. President Donald Trump appointed two strongly conservative Justices, Justice Gorsuch, to replace the 2016 vacancy after Justice Scalia's passing, and Justice Kavanagh, to replace swing-vote Justice Kennedy. We can assume that the Court is retrying a nearly identical case to *Whole Woman's Health* because a reversal seems within reach, as demonstrated by the reversal of *Stenberg v. Carhart* by *Gonzales v. Carhart*.[353]

[352] Elizabeth Nash & Megan K. Donovan, *Admitting Privileges Are Back at the U.S. Supreme Court with Serious Implications for Abortion Access*, GUTTMACHER POLICY REV. (2019).
[353] For some background and speculation on the possibly outcomes of the *June Medical Services v. Russo* ruling *see e.g.,* Fatima Goss Graves, *Symposium: The rule of law is at stake — the Supreme Court must take June Medical Services v. Gee and uphold the right to abortion*, SCOTUSBLOG (2019), https://www.scotusblog.com/2019/03/symposium-the-rule-of-law-is-at-stake-the-supreme-court-must-take-june-medical-services-v-gee-and-uphold-the-right-to-abortion/; Amy Howe, *Abortion could return to the Supreme Court: In Plain English*, SCOTUSBLOG (2019), https://www.scotusblog.com/2019/03/abortion-could-return-to-the-supreme-court-in-plain-english/; Jamille Fields Allsbrook & Nora Ellmann, *June Medical Services v. Russo*, CENTER FOR AMERICAN PROGRESS (2020), https://www.americanprogress.org/issues/women/reports/2020/02/06/480156/june-medical-services-v-gee/.

## Chapter 5: Conclusions

In conducting my research, I asked: Has religion covertly become an integral part of American abortion and reproductive health law despite the formal constitutional separation of Church and State? And if so, how precisely has religion influenced and presented itself in abortion jurisprudence? And finally, what might we learn from an investigation into whether and how religious conceptions of personhood have been transferred from conservative Christian contexts to national abortion law?

I began this paper with a literature review examining how scholars across fields such as law, feminist studies, public health, religion, and sociology have looked at the intersection of personhood conceptions, theology, and abortion. I found that *Roe v. Wade* prompted a wide array of analysis about the decision to ground abortion rights in the realm of privacy. Legal scholars soon recognized a personhood "loophole" in *Roe*—namely, that the ruling could be reimagined if fetuses were to be protected as persons under the Fourteenth Amendment. This then became the basis of an anti-abortion rhetorical strategy, which aims to frame fetuses as full persons.

To explore whether and how religious conceptions of personhood are transferred from Conservative Christian contexts to law, I traced the formation of the Religious Right and its role in shaping the anti-abortion movement in the U.S. Key anti-abortion advocacy organizations spawned from the Religious Right, and became closely tied with conservative politics in America. I identified the rhetorical strategy of this movement, as exemplified by its advocacy tactics and model bills: using specific language to emphasize the personhood of the fetus, while minimizing any overtly religious influence.

Finally, I examined a chronological set of nine landmark abortion rulings to evaluate whether and how theological conceptions of personhood influence abortion jurisprudence**. I argue that in these nine Supreme Court cases, religion plays a covert role in shaping abortion jurisprudence in America, despite the Constitutional separation of Church and State.** An examination of these cases provides a bird's-eye view of societal and legal discourse and narratives surrounding abortion. The Justices took into account social movements, societal

discourse, state legislation, and lower court decisions, as well as the findings, research, and beliefs of relevant stakeholders. Over time, these opinions increasingly included fetal personhood argumentation and rhetoric, in both authoritative majority opinions and nonbinding dissents.

Beginning with *Roe v. Wade* in 1973, Justice Blackmun set the tone by positioning abortion as a morally fraught issue, in which attitudes are frequently informed by theological conceptions of personhood. He balances the interests of women's health with the "potential life" of the fetus, and ultimately grounds abortion's legality in medical science and the Constitutional definition of personhood. In *Maher v. Roe*, the Court first allows "value judgments"—an undefined term—to formulate abortion laws. In *Harris v. McRae,* value judgments were once again permitted by the Court, and First Amendment religious freedom and establishment challenges brought forth by appellees were denied. In effect, this ruling dictated that governmental value judgments were not equivalent to religious judgments, although they remain undefined. Ignoring the Court's previous acknowledgement that religion informs conceptions of personhood, the allowance of subjective value judgments appears to be a key area in which theologically-backed views on abortion permeate law.

In *Akron*, while abortion restrictions were struck down, Justice O'Connor articulated in her dissent that fetal personhood was inadequately valued by the Court, as the "potential life" considered in *Roe* was insufficient to account for the ongoing significance of fetal life throughout a pregnancy. In *Thornburgh*, Justice White reiterated these points but went a step further, contending in his dissent that "potential life" is an inadequate descriptor of the status of a fetus, and that moreover the line between fetus and adult is arbitrary—a statement very nearly asserting that life begins at conception. In response, Justice Stevens accuses Justice White of

inappropriately advocating for the theological view that life begins at conception. Justice Stevens expands on this point in his dissent in *Webster,* wherein he argues that the abortion restrictions upheld by the statute, which boldly asserted that life begins at conception, were an improper imposition of religion by the state, violating the Establishment Clause. His argument is critical to my conclusions here; he makes the case that theories of when life begins are inseparable from religious beliefs, and thus there is no legitimate secular basis for any one theory.

In 1992, the Court ruled on *Planned Parenthood v. Casey*, possibly the most influential abortion ruling after *Roe*, signifying a marked shift in abortion jurisprudence. Although *Roe's* central holding was reaffirmed, the balancing test began to shift in favor of the fetus, justifying the abolition of the trimester framework. In a dissent, Justice Scalia writes that positions on abortion and personhood are inherently expressions of subjective value judgments. Interestingly, this is a similar argument to Justice Stevens, but they come to opposite conclusions on how the Court should respond when the state expresses these value-laden assertions of personhood. *Gonzales v. Carhart* stresses fetal personhood to an unprecedented degree. In upholding a ban on intact D&E, the court rules in favor of fetal life over women's health: the law contained had no health exception despite medical findings that such exceptions are necessary. The ruling includes an exceptional level of personhood language and framing—the fetus is repeatedly described as an "unborn child" or "baby," and fetal life, more than potential life, dictates the ruling. In Justice Ginsburg's dissent, she accuses the Court of grounding the case in "moral concerns" that are merely a pretext for banning abortion. Finally, the most recent case, *Whole Women's Health v. Hellerstedt*, struck down several TRAP laws in 2016, but a nearly identical case is set to be tried this term.

Liberal-leaning Justices Blackmun and Stevens explicitly acknowledge the ways in which religious views on personhood form Americans' viewpoints on abortion. They respond to these views sympathetically, but ultimate grant superiority to secular arguments (legal precedents and medical science) and argue that the Court's neutral role requires the upholding of abortion's legality. On the other hand, conservative-leaning Justices refrain from articulating or outright deny the role religion plays in shaping views on abortion, instead implying that common sense views or even medical science can authoritatively say that life begins at conception. Thus, they argue that it is their duty to permit abortion bans passed by the legislature, who have every right to allow such value judgments. In their decisions, the conservative justices included arguments, rhetoric, and language reflective of the Religious Right's anti-abortion strategies, considering and emphasizing fetal personhood to an increasing degree over time.

Throughout these cases, conservative Justices in the Court have increasingly emphasized the personhood of the fetus while denying the role of religion in informing anti-abortion views. In essence, they are perfectly mirroring the strategies of the anti-abortion movement. Even anti-abortion groups with religious origins or current religious affiliations have found that the most effective legal strategy involves minimizing any theological dimension within their stated views. Similarly, a Supreme Court Justice obviously cannot make a sound legal argument using explicit religious argumentation without violating the constitutional separation of Church and State. Yet religion *does* in fact inform the anti-abortion movement's conceptions of personhood. New "conscience rules" under President Trump allow health care workers to deny abortion and contraception based on religious beliefs, fulfilling a promise to his supporters on the Religious

Right.[354-355] Another Trump Administration "Religious Exemption Rule" would allow Affordable Care Act providers to opt-out of providing birth control based on religious objections,[356] enabled by the 2014 *Hobby Lobby* Supreme Court victory, which allowed for-profit corporations to deny health care on the same premise.[357] Prominent anti-abortion groups like Faith2Action and conservative Christian leaders often explicitly tie their views to a Christian mission in certain contexts.[358-359] And in Chapter 2, I summarized the many ways in which religion informs conceptions of personhood, as widely acknowledged across scholarly research and by everyday Americans.[360] As philosopher Charles Taylor contends, religion is an "inescapable framework" in American society: theological conceptions of the nature of being and personhood are so ingrained in our beliefs, they permeate society, even without conscious acknowledgement.[361]

This examination of how religion has influenced American jurisprudence has many implications for the future. I argue that the Establishment Clause is an important legal avenue by which abortion law should be challenged.[362] While this kind of legal challenge is understandably

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[354] Margot Sanger-Katz, T*rump Administration Strengthens 'Conscience Rule' for Health Care Workers*, The New York Times (2019), https://www.nytimes.com/2019/05/02/upshot/conscience-rule-trump-religious-exemption-health-care.html.

[355] Linda Greenhouse explains "This month, the administration issued an expanded "conscience rule" to permit health care workers, down to the level of receptionist, to opt out of involvement with procedures to which they have moral or religious objections… These new measures, carrying out the president's pledge to serve the interests of his allies on the religious right, will undoubtedly be the subject of lawsuits." Greenhouse, *supra* note 234.

[356] Greenhouse, *supra* note 234.

[357] *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

[358] Refer to chapter 2 page 30. (Faith2Action mission statement)

[359] Greenhouse explains: "Back in Alabama, the state's governor, Kay Ivey, issued this official statement when she signed the abortion ban into law: 'To the bill's many supporters, this legislation stands as a powerful testament to Alabamians' deeply held belief that every life is precious and that every life is a sacred gift from God.'" Greenhouse, *supra* note 234.

[360] *Religious Landscape Study: Views about abortion, supra* note 25. Of those who think abortion should be legal, 37% think religion plays an important role in their lives, while of those who think abortion should be illegal, 73% think religion plays a very important role in their lives.

[361] As discussed by McClendon in Chapter 2 on page 23.

[362] *See* Greenhouse, *supra* note 234. Greenhouse makes the case for the Establishment Clause in a New York Times op-ed. She says "it's past time for the rest of us to step back and consider the impact of religion's current grip on

a difficult area of law to adjudicate, especially since anti-abortion advocacy often involves the denial of religious influence, we must acknowledge that religion has had undue influence on our abortion jurisprudence. Even if the Establishment Clause is not yet a successful basis for challenging abortion law, my research demonstrates how religion has had an inappropriately strong role in influencing our highest court. In order to preserve the separation of Church and State that is so crucial to American society, it is important to investigate how religion influences secular beliefs, and to interrogate how religion infiltrates ostensibly secular areas of law. Similarly, we need to focus on the role of pretext in abortion law. In these cases we have seen women's health and "moral concerns" used successfully to uphold abortion bans, when in reality, these are but pretexts for theological conceptions of the nature of being and personhood.[363] We've have seen mixed results regarding the allowance of pretext in our judicial system in recent years: the Supreme Court blocked President Trump from adding a citizenship question to the census, writing that the reasons given for adding the question were mere pretext; yet that same Court had previously upheld the so-called "Muslim ban" travel ban prohibition, overturning a lower court injunction on the ban.[364-365]

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public policy," and points out that Justice Stevens has been the only Justice to make the explicit link between abortion and the Establishment Clause.

[363] *See* Aziza Ahmed, *Symposium: Will the Supreme Court legitimate pretext*, SCOTUSBLOG (2020), https://www.scotusblog.com/2020/01/symposium-will-the-supreme-court-legitimate-pretext/. Ahmed questions whether in *June Medical Services v. Russo*, the Supreme Court will reverse their *Whole Women's Health* ruling and allow the pretext of protecting women's health be a valid justification for upholding the statute at issue, even though medical expertise tells us the admitting privileges don't in fact benefit women's health. The concern is that "pretextual factual claims – generated by opponents of abortion with no basis – have been treated by the Supreme Court [such as in *Carhart*] and lower courts as on par with medical expertise… This has the effect of courts' legitimating the ideas being generated by conservative groups."

[364] *See* Amy Howe, *Trump administration ends effort to include citizenship question on 2020 census*, SCOTUSBLOG (2019), https://www.scotusblog.com/2019/07/trump-administration-ends-effort-to-include-citizenship-question-on-2020-census/.

[365] *See* Amy Howe*, Opinion analysis: Divided court upholds Trump travel ban,* SCOTUSBLOG (2018), https://www.scotusblog.com/2018/06/opinion-analysis-divided-court-upholds-trump-travel-ban/. *See Also First Amendment — Establishment Clause — Judicial Review of Pretext — Trump v. Hawaii*, 132 HARVARD LAW REVIEW 327 (2018).

Looking forward, *June Medical Services v. Russo*, a near replica of the *Whole Women's Health* ruling, was heard this session. We saw how what was rejected in one case—the preamble declaring one theory of life in *Akron*—was later upheld in *Webster*, much like how *Gonzales* overturned the ruling of *Stenberg*. The critical factor in these ruling reversals was a change in Court makeup—and the current Supreme Court has recently shifted to a conservative majority. We can expect that if a ruling comes down this time in favor of TRAP laws or if the future Court takes up the issue of "fetal heartbeat" bans, the Court may well include personhood argumentation, and omit any discussion of theological conceptions of personhood informing abortion rights. It is possible that personhood argumentation could even culminate in Fourteenth Amendment protection for fetuses, leaving *Roe v. Wade* essentially defunct. However, the makeup of the Court is ever-changing, and Justices have been known to provide unexpected decisive swing votes, as Justice Kennedy and Justice O'Connor did in *Casey*. It is possible, if not in this session then someday in the future, that women's abortion rights will be grounded not in their right to privacy, but in their equal status as citizens. Moreover, it is worth pursuing an Establishment Clause argument that would acknowledge the undue influence of religion in abortion law as described in this paper and ensure that future reproductive rights decisions are grounded in secular reasoning.