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# State Legislatures Have the Courage to Pass Antiabortion Laws and Test the Ideology of the "New" United States Supreme Court

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**Abstract:** Many state legislatures are racing to pass antiabortion laws that will give the current Supreme Court the opportunity to review its stance on the alleged constitutional right to have an abortion. While the number of abortions reported to be performed annually in the United States has declined over the last decade, according to the most recent government-reported data, the number of abortions performed on an annual basis is still over 600,000 per year. Abortion has been legal in the United States since 1973, when the Supreme Court recognized a constitutional right to have an abortion prior to viability (i.e. the time when a baby could possibly live outside the mother's womb). States currently have the right to forbid abortions after viability. However, prior to viability, states may not place an "undue burden" in the path of a woman seeking an abortion. The recent appointments of two new Supreme Court justices, Neil Gorsich and Brett Kavanaugh, give pro-life states the best chance in decades to overrule the current abortion precedent. The question is whether these two new justices will shift the ideology of the court enough to overrule the current abortion precedent.

**Keywords:** abortion, anti-abortion, United States Supreme Court, law, state legislatures, state law.

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## 1. Introduction

Many state legislatures had the courage to pass new abortion laws that will give the current Supreme Court the opportunity to review its stance on the alleged constitutional right to have an abortion. [1] Abortion is a controversial issue with many proponents and opponents who vigorously defend their views. One may ask, "Is abortion even common in the United States?" The answer is yes! While the number of abortions reported to be performed annually in the United States has declined over the last decade (Jatlaoui et. al., 2018, Table 1), the number of abortions performed on an annual basis is astounding. In 2015, the most recent year for which data is available, the Centers for Disease Control and Prevention (CDCP) reported 638,169 [2] abortions were performed in the United States (Jatlaoui et. al., 2018, Table 1) In addition, the CDCP reported the abortion ratio as 192 abortions per 1,000 live births for the same year. These numbers equate to a ratio of nearly one abortion for every five live births. In other words, for every five babies born, one baby's life is ended. Another study found that approximately one in four women in the United States will have an abortion (Jones & Jerman, 2017).

The only way to get the United States Supreme Court ("Supreme Court" or "Court" or "High Court") to review a particular law such as abortion law is by having a lawsuit that goes through the court system. Many states are passing pro-life laws, knowing that the laws are unconstitutional under the current abortion precedent. The passage of these new state laws is a deliberate attempt to entice pro-choice defendants to challenge the laws in court, eventually opening the door for the "new" Supreme Court to review the current abortion precedent. The sheer volume and timing of the passage of new state abortion laws is no coincidence. Pro-life legislatures know that now is the best chance to overrule the precedent created by *Roe v. Wade* (410 U.S. 113) in 1973.

Court cases begin in a trial court in the state or federal court system (Beatty, Samuelson, & Abril, 2019, p. 60). The party that loses at the trial-court level has an automatic right to appeal to the appropriate intermediate appellate court. In the federal court system, the loser(s) at the intermediate appellate court may then file a petition for a *writ of certiorari*, which asks the Supreme Court to hear the case (Beatty et.al., 2019, p. 67). The Supreme Court then decides whether they would like to hear the case. Four of the nine Supreme Court justices must vote to grant the writ of certiorari in order for the case to be heard. Many states are giving the Supreme Court a smorgasbord of anti-abortion cases, from which to choose to hear and decide. The question is whether the new justices on the Supreme Court will "seize the day" and overrule *Roe v. Wade.*[3]

[1] The statements in this section reflect the state of affairs regarding the law at the time this paper was published.

[2] This number represents the number of abortions in 2015 reported to the CDCP from 49 of the 52 total reporting areas. The 49 reporting areas included the District of Columbia, New York City, and 47 states. This number would have been higher if the other three reporting areas (i.e. California, New Hampshire, and Maryland) had reported their statistics to the CDCP. (Jatlaoui, et. al., 2018).

[3] This article represents the opinions of Dr. Jill M. Oeding, not necessarily the university for which she works. Dr. Oeding has a passion for defending the unborn baby. If Dr. Oeding had lived during the time of slavery in the United States, she would hope that she would have had the courage to defend the helpless slaves who had little to no legal rights. Dr. Oeding does not live in the time of slavery, but, rather, during the time of legalized abortion. For laws to change people need to speak up and have a voice for the voiceless.

## 2. Brief History of Substantial Supreme Court Abortion Cases

Before looking at the current state of abortion law in the United States, the author shall provide a brief history of how the United Supreme Court came to define the "constitutional right" to have an abortion. The following section will detail a few substantial United States Supreme Court decisions regarding abortion.

### 2.1. Roe v. Wade

*Roe v. Wade* (410 U.S. 113, 1973) was the first in a series of cases legalizing abortion. In *Roe v. Wade*, a pregnant, single woman brought an action challenging the constitutionality of a Texas criminal statute enacted in 1857 which forbade abortion except in the case of saving the mother's life (410 U.S. at 118-120, 1973). At the time of the *Roe* decision, the majority of states had similar anti-abortion laws in existence (410 U.S. at 118, 1973).

The *Roe* Court detailed the history of abortion, stating that the criminal anti-abortion laws "are not of ancient or even of common law origin" but rather "derive from statutory changes effected, for the most part, in the latter half of the 19th century" (410 U.S. at 129, 1973). In other words, the Supreme Court emphasized that anti-abortion statutes had been in effect for "only" a little over one hundred years in the United States, when *Roe* was decided.

The Court mentioned the concept of quickening frequently throughout its historical review. Quickening refers to the baby's first movement in the womb which is recognized by the mother. At common law, an abortion performed prior to quickening was not considered a crime (410 U.S. at 132, 1973). Quickening is an antiquated concept of in light of current medical evidence proving life within the womb long before quickening. In prior centuries quickening would have been used, prior to ultrasound technology, as a way of knowing when the baby was alive. (*Roe*, 410 U.S. at 133, 1973). However, once the baby was "confirmed" to be alive through the first recognizable movement of the baby, abortion became a crime. Now in the twenty-first century, ultrasound technologies prove that a baby is alive long before quickening.

The Supreme Court in *Roe* relied on archaic medical evidence and legal traditions in deciding whether abortion should be legal or criminal (*See* 410 U.S. at 132, 1973). In striking down the Texas anti-abortion statute, the High Court also sidestepped the Hippocratic Oath which stated, "I will give no deadly medicine to anyone if asked, nor suggest any such counsel, and in like manner, I will not give to a woman a pessary to produce abortion" (410 U.S. at 130-31, 1973).

The Supreme Court struck down the 1857 Texas anti-abortion statute as violating the Due Process Clause of the Fourteenth Amendment (*Roe*, 410 U.S. at 164, 1973). The Supreme Court found that women have a constitutional right to privacy to make the decision whether or not to terminate a pregnancy (410 U.S. at 153, 1973). The right to privacy was founded in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action" (410 U.S. at 153, 1973). In addition, the Court found that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn" (410 U.S. at 158, 1973). However, the Court in *Roe* concluded that the right of personal privacy regarding the abortion decision is qualified with the following stages of pregnancy:

a. During the first trimester the abortion decision had to be left to the mother's attending physician (410 U.S. at 163-64, 1973).
b. During the stage after the first trimester, states had the power to regulate the abortion in as long as the regulation was

"reasonably related to maternal health" (410 U.S. at 164, 1973).

c. During the stage after viability (i.e. the possibility of life outside of the mother's womb)(410 U.S. at 163-65, 1973), the State had the power to "regulate, or even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (410 U.S. at 165, 1973).

## 2.2. Planned Parenthood of Southeastern Pennsylvania v. Casey

In 1992, an immensely divided Supreme Court reviewed and modified the *Roe* opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. at 878 (joint opinion of O'Connor, Kennedy, and Souter). The 5-4 *Casey* decision produced five separate opinions, none of which was a majority opinion. In *Casey*, the plurality rejected the trimester framework of *Roe v. Wade.*

In an attempt to protect the "central right [to have an abortion] recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life," the court adopted an "undue burden" analysis in assessing whether a state anti-abortion statute is constitutional (505 U.S. at 878, 1992). The court defined an "undue burden" as a law which placed a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (505 U.S. at 878, 1992). The "undue burden" analysis survived decades of scrutiny and is still being used by the Supreme Court today. *See Box v. Planned Parenthood of Indiana and Kentucky*, 587 U.S. at_, 2019)

The *Casey* court found that a woman's right to terminate her pregnancy prior to viability is a constitutional liberty (505 U.S. at 869-70, 1992). The court reaffirmed *Roe's* holding that states may regulate or forbid abortion subsequent to viability, except when an abortion is necessary for the preservation of the life of the mother (505 U.S. at 879, 1992). The *Casey* court also approved the states' right throughout pregnancy to take measures to make sure the women's choice is informed (505 U.S. at 878, 1992).

The *Casey* decision is a prime example of how closely divided the alleged constitutional right to have an abortion is in the United States. Justice Blackman stated the division well by saying, "In one sense, the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short – the distance is but a single vote" (Blackman, concurring in part, concurring in the judgment in part, and dissenting in part, 505 U.S. 923).

In deciding not to overrule the constitutional right to have an abortion established in *Roe*, the *Casey* Court was concerned for the people who have relied on the right to have an abortion. The court stated, "The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be[ing] dismissed" (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (joint opinion of O'Connor, Kenney, and Souter)(1992)). Reliance on poor law is a weak argument for continuing legalized abortion. Abraham Lincoln likely did not consider this argument when deciding that slavery was reprehensible; rather, Lincoln chose to do what he believed was the right and moral course. Plantation owners who were accustomed to using slaves had to "reorder their thinking and living" because people in their time had the courage to challenge the issue of slavery. (*See Casey*, 505 U.S. at 856, 1992). People should consider the consequences of intercourse. It is likely that if abortion would not be legal, women would likely be more cautious about becoming

pregnant if they are not interested in carrying a baby or being a mother.

### 2.3. Stenberg v. Carhart

In 2000, in a pro-choice decision, the Supreme Court struck down a Nebraska partial-birth anti-abortion statute in violation of the Constitution (*Stenberg v. Carhart*, 530 U.S. at 922, 2000). In making its decision, the court concluded that the law (1) lacked an "exception 'for the preservation of the . . . health of the mother'" (*Stenberg*, 530 U.S. at 930 (citing *Casey*, 505 U.S. at 879, 2000)(joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.)), and (2) "impose[d] an undue burden on a woman's ability' to choose" a particular type of abortion (530 U.S. at 930, 2000). The *Stenberg* decision was another 5-4 decision, showing the close nature of the decision.[4]

### 2.4. Gonzales v. Carhart

A few short years later Congress passed the Partial-Birth Abortion Ban Act of 2003 (Act) which prohibited a particular type of abortion, which was typically performed in the second trimester (*Gonzales v. Carhart,* 550 U.S. at 133, 2007). Congress found 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'" (550 U.S. at 141, 2007 (quoting notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV., P (1)). The majority opinion detailed the following powerful description of a nurse who testified before the Senate Judiciary Committee and had witnessed a "partial birth abortion," also known as an intact dilation and evacuation, on a 26½ week unborn baby:

Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right inside the uterus…

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'" (*Gonzales*, 550 U.S. at 139, 2007 (quoting H.R. Rep. No. 108-58, p. 3 (2003)).

In upholding the constitutionality of the federal statute banning partial-birth abortions, the Supreme Court distinguished the federal partial-birth statute in *Gonzales* from the Nebraska statute in *Stenberg* by finding the Nebraska statute was more vague in defining the illegal act (*Gonzales*, 550 U.S. at 141-150, 2007). The High Court concluded that the federal statute (1) was not "void for vagueness," (2) did not impose an undue burden for the woman seeking the abortion, and (3) was not facially invalid (550 U.S. at 147, 2007). The Nebraska statute, on the other hand, described the delivery of a "'substantial portion' of a fetus" (550 U.S. at 152, 2007 (quoting *Stenberg*, *supra*, at 944)), whereas the federal Partial-Birth Abortion Ban Act of 2003 was more specific and required a fatal, "overt act" to occur after "delivery to an anatomical landmark" (*Gonzales*, 550 U.S. at 147-148, 2007 (quoting 18 U.S.C. §1531(b)(1)(A)). The federal act also specifically defined what amounted to a partial-birth abortion as delivering the "entire fetal head . . . outside the body of the mother" in the case of a head-first

[4] The five justices who formed the majority were Breyer, Stevens, O'Connor, Souter, and Ginsburg, and the four justices who dissented from the majority were Rehnquist, Scalia, Kennedy, and Thomas (*Stenberg v. Carhart*, 530 U.S. 914, 2000).

presentation or the "fetal trunk past the navel . . . outside the body of the mother" in the case of breech presentation (*Gonzales*, 550 U.S. at 147-148, 2007 (quoting 18 U.S.C. §1531(b)(1)(A)).

The Court also found the federal Act had clear, scienter requirements alleviating any concerns of vagueness (*Gonzales*, 550 U.S. at 149, 2007). The scienter requirement in the federal law required an intent on the defendant's part to commit a partial-birth abortion. In order to be convicted under the federal statute, the physician must have "deliberately and intentionally" delivered the baby to one of the "anatomical landmarks" (550 U.S. at 148, 2007). If a physician accidentally delivered a baby beyond the Act's anatomical landmarks, the accidental nature of the action would preclude the physician's criminal liability (550 U.S. at 154-55, 2007).

The overall tone of the majority opinion in *Gonzales* seemed to be moved by the brutality of the partial-birth abortion method. The majority opinion states, "Partial-birth abortion . . . confuses the medical, legal, and ethical duties of physicians to preserve and promote life. . ." (550 U.S. at 157, 2007 (quoting Congressional Findings ¶(14)(J)). The court also stated, "The government may use its voice and its regulatory authority to show its profound respect for the *life* within the woman" (550 U.S. at 157, 2007) (emphasis added).

One of the interesting points of the *Gonzales* case was the justices who formed the majority and dissenting opinions. Since Justice Kennedy sided with the conservative justices in the *Gonzales* case, the conservative justices' ideology prevailed, permitting the federal partial-birth statute to be upheld. Kennedy actually wrote the majority opinion and was joined by Roberts, Scalia, Thomas, and Alito (*Gonzales v. Carhart,* 550 U.S. at 132, 2007), three of whom were dissenters in the *Stenberg* case (530 U.S. at 952).

### 2.5 Erosion of Roe v. Wade

As shown by the previous cases, the Supreme Court has slowly whittled away at the law created by the *Roe v. Wade* decision without completely overruling the "constitutional right" to have an abortion. Supreme Court decisions have flip-flopped back and forth, even on similar laws such as the partial-birth abortion laws, showing the Court is not in consensus. In addition, these cases show how the Supreme Court justices have been torn as to whether there even is a constitutional right to have an abortion or whether this issue should be left to the states to decide. It is time to completely overrule *Roe v. Wade* and protect the life of the baby within the womb.

## 3. President Trump Appoints Two New Supreme Court Justices

By the end of 2018, President Donald Trump appointed two Supreme Court justices. When Trump first took office as President of the United States in January 2017, the Supreme Court consisted of four justices appointed by Republican presidents (i.e. Kennedy, Thomas, Roberts, and Alito), four justices appointed by Democratic presidents (i.e. Ginsburg, Breyer, Sotomayor, and Kagan), and an open seat (Justices 1789 to Present, n.d.). The open seat was left by Justice Scalia, who passed away while still serving on the court in February of 2016. At the time of his passing, Justice Scalia was the longest serving justice on the court and was widely known as a pro-life justice (Biography of Former Associate Justice Antonin Scalia, n.d.; Shin, 2016). Trump appointed and the Senate confirmed Neil M. Gorsuch to fill Scalia's open seat. Gorsuch took his seat on the Supreme Court on April 10, 2017 (Current Members, n.d.; Justices 1789 to Present, n.d.). Please see Table 1 for the make-up of the Supreme Court when Trump took his office as president.

**Table 1** Supreme Court Justices when Donald J. Trump became President in January 2017

| Name of Justice | Appointed By | President's Political Party | Service Began |
|---|---|---|---|
| 1. Anthony M. Kennedy * | Ronald Reagan | Republican | 1988 |
| 2. Clarence Thomas | George H.W. Bush | Republican | 1991 |
| 3. John G. Roberts, Jr. | George W. Bush | Republican | 2005 |
| 4. Samuel A. Alito, Jr. | George W. Bush | Republican | 2006 |
| 5. Ruth Bader Ginsburg | William Clinton | Democratic | 1993 |
| 6. Stephen G. Breyer | William Clinton | Democratic | 1994 |
| 7. Sonia Sotomayor | Barack Obama | Democratic | 2009 |
| 8. Elena Kagan | Barack Obama | Democratic | 2010 |
| 9. Open Seat** | | | |

Table 1 Sources: Justices 1789 to Present, n.d.; Press Release: June 27, 2018 Release; Biographyof Former Associate Justice Antonin Scalia, n.d.
* Anthony Kennedy retired from the Supreme Court in July of 2018.
** The open seat was left by Justice Scalia, who passed away while still serving on the court in February of 2016.

**Table 2** Supreme Court Justices as of December 2019

| Name of Justice | Appointed By | President's Political Party | Service Began |
|---|---|---|---|
| Clarence Thomas | George G. H.W. Bush | Republican | 1991 |
| John G. Roberts, Jr. | George W. Bush | Republican | 2005 |
| Samuel A. Alito, Jr. | George W. Bush | Republican | 2006 |
| Neil M. Gorsuch | Donald J. Trump | Republican | 2017 |
| Brett M. Kavanaugh | Donald J. Trump | Republican | 2018 |
| Ruth Bader Ginsburg | William Clinton | Democratic | 1993 |
| Stephen G. Breyer | William Clinton | Democratic | 1994 |
| Sonia Sotomayor | Barack Obama | Democratic | 2009 |
| Elena Kagan | Barack Obama | Democratic | 2010 |

Table 2 Sources: Justices 1789 to Present, n.d.

Trump filled a second seat on the Supreme Court the following year when Justice Anthony Kennedy retired his Supreme Court bench in July of 2018 (Press Release: June 27, 2018). Kennedy was a Republican appointee on the Court; however, Kennedy did not strictly vote along party lines. The opportunity to replace Justice Kennedy was especially impactful because Kennedy was widely known as the "swing voter" as to several issues including abortion (Dwyer, 2018; Reilly, 2018; Zimmer, 2018).

Justice Kennedy earned this nickname by his willingness to side with either the liberal or the conservative wings of the Court, depending on the case.

As to the issue of abortion, Kennedy was known as the moderate voter on the court who could lean right or left. For example, in 1992, on the issue of abortion, Kennedy voted to uphold a woman's constitutional right to have an abortion prior to viability (*Casey*, 505 U.S. 833). However, in 2006, Kennedy sided with the conservative justices in *Gonzales* in

upholding the federal statute prohibiting partial-birth abortions (550 U.S 124, 2007).

President Trump nominated Kavanaugh, who later took his seat on the High Court on October 6, 2018 (Current Members, n.d.). Please see Table 2 for the current members of the Supreme Court. The important question is how Kavanaugh and Gorsuch, the newest members of the court, will affect the ideology of the court on many issues including abortion.

Many states rushed to pass new state anti-abortion laws. The timing of these new laws is a deliberate attempt to give the new Supreme Court the opportunity to reexamine the law regarding the alleged constitution right to have an abortion. The recent appointments of Gorsuch and Kavanaugh give pro-life states the best opportunity in decades to overrule *Roe* and *Casey*.

The "new" Court already bypassed the opportunity to review *Roe* and *Casey* precedent in *Box v. Planned Parenthood of Indiana and Kentucky* (587 U.S.__, 2019) in May of 2019; however, the Court chose not to confirm nor deny its position toward the "constitutional" right to have an abortion or whether this decision should be left up to the states to decide.

In *Box*, two questions were briefed to the Court regarding two new provisions of Indiana law. The first question related to the disposition of fetal remains. Specifically, the law forbade abortion providers from incinerating fetal remains along with surgical products. As to the first question presented, in a very brief opinion, the Court unanimously upheld the Indiana law related to the disposal of fetal remains. The second question presented to the Court in *Box* related to a new Indiana provision which prohibited the "knowing provision of sex-, race-, or disability-selective abortions by abortion providers." (587 U.S.__, 2019). However, the Court punted by "express[ing] no view on the merits of the second question presented." (587 U.S. at ___, 2019) It appears as though the Supreme Court was not yet ready to dig into the *Roe* precedent.

Justice Clarence Thomas wrote a couple of concurring opinions in 2019 emphasizing his disdain for abortion. Thomas found the new Indiana law in *Box* complemented a "state's compelling interest in preventing abortion from becoming a tool of modern-day eugenics" (587 U.S. at__, 2019, concurring opinion). Justice Thomas defined eugenics as the "the science of improving [human] stock," attempting to improve its quality. Thomas went into great detail to describe how Planned Parenthood founder Margaret Sanger embraced the idea of eugenics as a way to decrease the black population. Among other horrid beliefs, Sanger saw eugenicists as a means to "reduc[e] the 'ever increasing, unceasingly spawning class of human beings who never should have been born at all'" (587 U.S. at__, 2019, concurring opinion). In addition, Justice Thomas noted that when comparing current statistics, the ratio for the number of abortions per 1,000 live births for black women is "nearly 3.5 times the ratio for white women" (587 U.S. at___, 2019, concurring opinion).

Thomas wrote another concurring opinion in *Harris v. West Alabama Women's Center* (588 U.S._, 2019). *Harris* dealt with an Alabama law that prohibited dismemberment abortions. While quoting the Alabama statute, Thomas stated, "The law does not prohibit women from obtaining an abortion, but it does prevent abortion providers from purposefully 'dismember[ing] a living unborn child and extract[ing] him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments' that 'slice, crush, or grasp . . . a portion of the unborn child's body to cut or rip it off'" (588 U.S. ___, 2019, citing Alabama Code §26–23G–2(3), concurring opinion). Thomas found that nothing in the Constitution "prevents States from passing laws prohibiting

the dismembering of a living child" (588 U.S. ___, 2019, concurring opinion). Thomas later states, "This case serves as a stark reminder that our abortion jurisprudence has spiraled out of control."

In these two recent concurring opinions, Justice Thomas did not mince words in clarifying that he has had enough of the current abortion precedent. Thomas is clearly ready to take on the issue of abortion and protect the lives of unborn babies in the United States. The question is whether he will be able to rally four other justices including the new appointees to vote to overrule the current precedent.

## 4. Abortion Law activity related to the timing of Pregnancy during the first half of 2019

Many states are racing to pass laws that would make it a crime to have an abortion prior to the viability standard set by *Roe,* giving the Supreme Court the opportunity to review the *Roe* and *Casey* precedent. The recent lawmaking activity is attempting to set up a tee from which the Supreme Court may launch a landmark abortion decision. For example, Terri Collins, a Republican state representative who sponsored an anti-abortion bill said, "This bill is about challenging *Roe v. Wade* and protecting the lives of the unborn because an unborn baby is a person who deserves love and protection" (Wax-Thibodeaux and Brownlee, 2019).

In the first six months of 2019, the following nine states passed anti-abortion laws with a time period[5] ranging from six to eighteen weeks of pregnancy after which abortion would be illegal in their state: Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Ohio, and Utah (Levenson, 2019; Milligan, 2019). All of these laws generally outlaw abortion at a time period prior to viability, which would be unconstitutional under the "viability" standard set by *Roe* and affirmed by *Casey*. See Table 3 for the state laws passed in 2019 criminalizing abortions performed after a certain point in pregnancy; these state laws essentially have been blocked by lower federal court judges.

### 4.1 Alabama Legislatures Passed the Most Restrictive Law

Alabama passed the most restrictive anti-abortion law in the entire country in 2019, which prohibits an abortion at any point during a pregnancy, except in the case of a medical emergency. The law states that it shall be "unlawful for any person to intentionally perform or attempt to perform an abortion" unless an "attending physician licensed in Alabama determines that an abortion is necessary in order to prevent a serious health risk to the unborn child's mother" (House Bill 314, Alabama Legislative Acts, §§ 4(a) and (b)). The Alabama law made a most profound statement regarding the atrocity of abortion in the United States:

> It is estimated that 6,000,000 Jewish people were murdered in German concentration camps during World War II. 3,000,000 people were executed by Joseph Stalin's regime in Soviet gulags; 2,500,000 people were murdered during the Chinese "Great Leap Forward" in 1958; 1,500,000 to 3,000,000 people were murdered by the Khmer Rouge in Cambodia during the 1970s; and approximately 1,000,000 people were murdered during the Rwandan genocide in 1994. All of these are widely acknowledged to have been crimes against humanity. By comparison, more than 50 million babies have been aborted in the United States since the Roe decision in 1973, more than three times the number

[5] Many different types of abortion laws are being passed in the United States. This paper specifically addresses the pro-life laws that relate to the timing, after which point an abortion would normally be illegal.

who were killed in German death camps, Chinese purges, Stalin's gulags, Cambodian killing fields, and the Rwandan genocide combined (House Bill 314, Alabama Legislative Acts, 2019 §2(i)).

These statements emphasize that abortion in the United States is a genocide of gargantuan proportion.

**Table 3** Pro-life State Abortion Laws Passed in 2019 Related to the Timing of Abortion

| State | Signed into Law | Prohibits Abortion After: | Exceptions for: | Blocked by Lower Federal Court |
|---|---|---|---|---|
| Kentucky | March 15, 2019 | Detection of fetal heartbeat* | Medical emergencies | Yes |
| Arkansas | March 15, 2019 | 18 weeks of pregnancy | Rape, incest, and Medical Emergencies | Yes |
| Mississippi | March 21, 2019 | Detection of fetal heartbeat* | Medical emergencies | Yes |
| Utah | March 25, 2019 | 18 weeks of pregnancy | Rape, incest, and Medical Emergencies | Yes |
| Ohio | April 11, 2019 | Detection of fetal heartbeat* | Medical Emergencies | Yes |
| Georgia | May 7, 2019 | Detection of fetal heartbeat* | Medical Emergencies | Yes |
| Alabama | May 15, 2019 | Conception | Medical emergencies | Yes |
| Missouri | May 24, 2019 | 8 weeks of pregnancy | Medical Emergencies | Yes |
| Louisiana | May 30, 2019 | Detection of fetal heartbeat* | Medical Emergencies | Yes |

Table 3 Sources: House Bill 136 - Abortion Amendments, Utah State Legislature; House Bill 314, Alabama Legislative Acts, 2019; House Bill 481, Georgia General Assembly 2019; Missouri Revised Statute § 188.056; Senate Bill 9, Kentucky General Assembly, 2019; Senate Bill 23, Ohio Legislature, 133rd General Assembly; Senate Bill 184, John Bel Edwards, Office of the Governor; Chokshi and Taylor, 2019; Gershman & Holland, 2019; Kelly & Kupperman, 2019; Levenson, 2019; Milligan, 2019; Rojas & Blinder, 201; Siemaszko, 2019; Smith, 2019; Zaveri, 2019.
*Research shows that a baby's heartbeat within a womb begins to beat around 6 weeks into the pregnancy (Merchiers, Dhont, & De Sutter 1991).

## 4.2 Passage of Heartbeat Laws

The most common state anti-abortion law passed in 2019 was the so-called "heartbeat" laws. Research shows that a baby's heartbeat within a womb begins to beat at approximately six weeks into the pregnancy (Merchiers et. al., 1991). "Heartbeat" laws prohibit an abortion once a heartbeat may be detected. One argument for drawing the line at heartbeat is because a fetus has a 95-98% chance of survival once a fetus displays cardiac activity, whereas the miscarriage rate for pregnancies in general may be as high as 30% (Forte, 2013).

Six states passed "heartbeat" laws by June of 2019. In May of 2018, Iowa was the first state to pass a heartbeat law, which was struck down by a state court judge as unconstitutional (Reynolds, 2019).[6] In the first half of 2019, the five other states including Iowa, Louisiana, Mississippi, Ohio, Georgia, and Kentucky listed followed Iowa's suit by passing heartbeat laws. (Levenson, 2019; House Bill 481, Georgia General Assembly, 2019; Senate Bill 9, Kentucky General Assembly, 2019; Senate Bill 23, The Ohio Legislature, 2019; Edwards, John Bel, Office of Louisiana Governor, 2019).

State legislatures in Missouri, Arkansas, and Utah passed laws criminalizing abortion at a point later than six weeks into the pregnancy. Missouri's law prohibits abortion after eight weeks of pregnancy and makes exceptions for medical emergencies, but not rape or incest (Missouri Revised Statute § 188.056). Legislatures from both Utah and Arkansas set the line of prohibition at eighteen weeks of pregnancy. However, both Utah and Arkansas permit an abortion in the cases of rape, incest, and medical emergencies (House Bill 136 Abortion Amendments, Utah State Legislature, 2019; Levenson, 2019).

Drawing the legal line for abortion any time after conception will involve killing a human life. While the author certainly prefers heartbeat over viability as the line of protection for unborn babies, the author is not convinced that the heartbeat laws are the answer to the abortion issue because it delineates a point after child's life begins at conception when an abortion may be "acceptable." Voluntarily choosing to take a baby's life any time after conception is intent to kill, otherwise known as murder. The *Roe* Court attempted to draw a line at viability, which does not work because the baby's life began long before viability. Setting the legal standard at fetal heartbeat will only open the door for future litigation, showing that child began before a heartbeat was apparent.

[6] The governor of the state of Iowa decided not to appeal the ruling.

## 5. How the Supreme Court could choose to overrule roe and casey

Given the new makeup of the Supreme Court and the advancements in medical science since *Row* and *Wade*, the Court could choose to view abortion in a new light. Justices over the last several decades have given a variety of clues as to how the Supreme Court could decide to protect unborn babies. Two of the most obvious approaches to overruling *Roe* and *Casey* would be 1) to allow each state to decide whether abortion may be legal within its own borders, or 2) to recognize unborn babies as people with their own constitutional rights.

### 5.1 States May Decide Whether Abortion is Legal within their Borders

In overruling the standards set in Roe and Casey, the Court could choose to allow states to decide whether abortion will be legal within their borders. Evidence for this position may be found in a recent concurring opinion where Justice Thomas found that nothing in the Constitution "prevents States from passing laws prohibiting the dismembering of a living child" (Harris v. West Alabama Women's Center, 588 U.S.__, 2019, concurring opinion). However, allowing states to decide whether abortion is legal in their state would permit states to legalize abortion within their borders, effectively still permitting the genocide of unborn babies in the United States.

### 5.2 Unborn Babies are People

The better option for the United States Supreme Court would be to recognize the baby within the womb as a separate life with constitutional rights. The Supreme Court in *Roe v. Wade* found that women have a

constitutional right to privacy to make the decision whether or not to terminate her pregnancy (410 U.S. at 153). The right to privacy was founded in the "liberty" of the Fourteenth Amendment. (410 U.S. at 153). The Fourteenth Amendment of the U.S. Constitution states, "[N]or shall any State deprive any *person* of *life*, liberty, or property, without due process of law" (Constitution of the United States).[7] The Court could focus on the word "life" rather than "liberty." Current laws are depriving the child within the womb of *life*. The mother's constitutional "right to privacy" or "liberty" should be confined to the decision of whether or not to engage in intercourse, not to kill a human life through abortion, unless the abortion is absolutely necessary to preserve the life of the mother.

In *Roe v. Wade*, the Supreme Court found that an unborn baby is not included within the definition of a "person" within the Fourteenth Amendment (410 U.S. at 158-159). This precedent should be overruled. Unborn babies should be included in the definition of a "person" within the Constitution. Current medical evidence proves that unborn babies are "alive" long before quickening or viability (Merchiers et. al., 1991; Forte, 2013). If unborn babies are interpreted as "people" within the confines of the constitution, an unborn baby would be afforded the constitutional right to "life" and "liberty" under the Fourteenth Amendment as well as other constitutional rights.

In choosing to recognize unborn babies as a "person" who has constitutional rights on their own, the Supreme Court could choose to review Biblical law. Many of the laws in the United States are based on Biblical principles (Welch, 2002, p. 619). The Bible says, "If people are fighting and hit a pregnant woman and she gives birth prematurely" and "[i]f there is serious injury, you are to take *life* for *life*, eye for eye, tooth for tooth, hand for hand, foot for foot, . . ." (Exodus 21:22-24, NIV, emphasis added). The Biblical passage recognizes the baby within the womb is a life separate from the mother.

The Supreme Court could also consider how criminal laws treat unborn babies. For example, federal criminal law recognizes unborn babies as a legal victim separate from the baby's mother if the baby is injured or killed through a violent crime (Unborn Victims of Violence Act of 2004). It is not rational to conclude that a baby within the womb of the victim of a violent crime is any more or less of a baby than the baby within the womb of a mother who does not want the baby.

Another finding the Supreme Court could make is that current law is "depriving" life to a class of people who are perceived to be inferior in violation of the Fourteenth Amendment; the class of people is unborn babies (Oeding & Seitz, 2017, p. 420). The author challenges each Supreme Court justice to spend one full day in an abortion clinic observing abortions and seeing the brutality of the act of abortion; the justices would see firsthand that abortion is an act of violence against the *life* of a human being.

By recognizing the baby within the womb as a life separate from the mother, the Supreme Court would force women to make a "choice" to act responsibly prior to creating a life if they are not interested in having a baby. The constitutionally-protected "choice" or right should be a decision to engage or not to engage in intercourse, that may result in the creation of human life. The "choice" in a civilized country should not be whether or not to end human life.

## 6. Conclusion

Abortions are a prevalent practice in the United States, amounting to over 600,000 abortions performed per year. Abortion has

[7] The Fifth Amendment of the United States Constitution also states that no person shall be "deprived of life, liberty, or property, without due process of law. . ."

been legal in the United States since 1973, when the Supreme Court recognized a constitutional right to have an abortion prior to viability (i.e. the time when a baby could possibly live outside the mother's womb). Current precedent permits states to pass laws forbidding abortions after viability. However, prior to viability, states may not place an "undue burden" in the path of a woman seeking an abortion.

Pro-life state legislatures are racing to pass anti-abortion laws, knowing these new laws are unconstitutional under the current Roe and Casey precedent. These new state laws are intended to give the Supreme Court the opportunity to review and overrule current abortion precedent. The recent appointments of two new Supreme Court justices, Neil Gorsuch and Brett Kavanaugh, give pro-life states the best chance in decades to overrule the current abortion precedent. The question is whether these two new justices will shift the ideology of the court enough to overrule the current abortion precedent. As Justice Scalia said in his dissent in Stenberg, "I am optimistic enough to believe that, one day [the constitutional right to have an abortion] will be assigned its rightful place in the history of the Court's jurisprudence beside Korematsu and Dred Scott" (530 U.S. at 953, 2000). Hopefully, that "day" will be soon.

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