Privacy, Due Process, and Morality:

A Legal Analysis of Federal Fetal Personhood

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Abstract

This capstone examines the constitutionality of the proposed federal Sanctity of Human Life Act, HR. 23, which would declare that life, or "personhood," begins at conception. If passed, this act would grant embryos and fetuses all legal and constitutional rights granted to citizens and persons under the US Constitution. Legislators and advocates have introduced similar legislative acts in states across the country, with the functional purpose of outlawing all abortions. This capstone investigates the federal case law and legal principles regarding abortion, privacy, and due process in light of the proposed federal Sanctity of Life Act to determine its constitutionality. The intention of this study is to determine whether it conflicts or could coexist with current federal law, primarily through examining Supreme Court precedent and legal reasoning. The research demonstrates that this bill would be unconstitutional under current Supreme Court privacy and equal protection frameworks and precedent. In order for this law to be upheld, the Supreme Court would need to overturn and reinterpret all current abortion law, including privacy, due process, and equal protection frameworks.

I. Introduction

The Sanctity of Human Life Act was introduced during the 113th Congress on January 3, 2013 as H.R. 23. The purpose of this Act would be to define that human life begins at conception, and thus grant fertilized embryos and fetuses the same rights attributed to people who have been born. The act provides that "the life of each human being begins with fertilization, cloning, or its functional equivalent… at which time every human being shall have all the legal and constitutional attributes and privileges of personhood."[1] The functional purpose of this law would be to outlaw abortion at all stages of fetal development.

Currently, abortion is protected as a Constitutional right, with some restrictions allowed. In *Roe v. Wade* (1973), the Supreme Court held that a woman's right to choose to have an abortion was a part of the constitutional right to privacy and the state cannot place certain restrictions against a woman seeking an abortion. *Roe* also concluded that a fetus was not considered a person for the purposes of equal protection under the Fourteenth Amendment, and found no legal or scientific basis for calling a fetus a person.[2] The Roe decision has been limited over the years, but the basic legal framework still stands as precedent

In *Webster v. Reproductive Health Services* (1990) the Court limited the Roe analytical structure but upheld its basic principles. Further, in *Webster* the Court examined the constitutionality of a statutory preamble to a Missouri state law stating that "the life of each human begins at conception." The Court found that the preamble did not present a ripe constitutional question, as there was no indication that the preamble would limit a women's ability to have an abortion in the state. [3]

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[1] H.R. 23--113th Congress: Sanctity of Human Life Act. (2013).
[2] *Roe v. Wade*, 410 U.S. 113, at p. 150 (1973)
[3] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

The most recent of the major abortion Supreme Court decisions is Planned *Parenthood v. Casey* (1992), which upheld abortion as a protected constitutional right but allowed for some limitations as long as they do not place an "undue burden" on the pregnant woman. [4]

Definitions

For the purposes of this work, the term "abortion" will be used according to the definition used by the United States Government's Center for Disease Control, which defines abortion as "an intervention performed by a licensed clinician (e.g., a physician, nurse-midwife, nurse practitioner, or physician assistant) that is intended to terminate an ongoing pregnancy."[5]

The term conception will refer to the act of a human sperm fertilizing a human egg, creating an embryo. It should be noted that most biologists as well as the Courts recognize conception as a process, and not a definitive instant.[6] The term embryo will be used to refer to a fertilized human egg before it has implanted on a female human uterus. These conditions may include an embryo fertilized inside a female body or in vitro, meaning in a laboratory setting.[7] In vitro fertilization may also include cloning, which is a term "traditionally used by scientists to describe different processes for duplicating biological material," particularly in the reproductive sense.[8] The terms *in utero*, unborn, pre-born, or pre-birth may all be used to describe a fetus that is in the womb at any stage of development. Similarly, the terms *ex utero* and post-born may be used to refer to persons at any stage of life after experiencing birth.

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[4] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)
[5] "CDC's Abortion Surveillance System FAQs." *CDC.gov*. Centers for Disease Control and Prevention, 12 Nov. 2012. Web.
[6] Andrews, Lori B. "The Legal Status of the Embryo." *Loyola Law Review* 32.360 (1986): 357-412 at 362.
[7] "Glossary [Stem Cell Information]." *Glossary [Stem Cell Information]*. National Institutes of Health, n.d. Web.
[8] "Cloning Fact Sheet." *Cloning Fact Sheet*. Oak Ridge National Laboratory, 11 May 2009. Web.

Legal Personhood

Although most other terms used herein can be easily defined, there is no overarching definition of personhood used in the U.S. government, legal system, or courts. There is no definition of "person" in the Constitution, nor has the U.S. Supreme Court ever offered or upheld one.[9] As in the proposed Sanctity of Human Life Act, some federal and state statutes offer a definition of "person" as applicable to their statute and to achieve a certain goal.[10] Most discussions of legal persons tend to discuss personhood in the context of corporations, giving rise to the concept of "juridical persons" in addition to "natural persons." Juridical persons refer to entities, typically corporations, which are not people but are afforded some of the rights of people.[11] The designation of person is given to a being or entity to enable protection of rights. [12]

In addition to never defining personhood, the Court has also stated that a fetus does not necessarily have a right to live or continue to exist, but the state has the right to favor continued development over abortion, an interest that becomes compelling at the point of viability.[13] Thus, the state has never proffered that the fetus has protectable rights, which are enabled by personhood. The proposed Sanctity of Human Life Act seeks to establish and protect these rights to personhood through defining human life at conception, and thus expanding the concept of legal persons to include embryos and fetuses.

It is important to note that fetuses are given some protections under non-abortion law similar to those given to persons. For example, the federal Unborn Victims of Violence Act of

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[9] Berg, Jessica. "Selected Works of Jessica Berg." *"Of Elephants and Embryos: A Proposed Framework for Legal Personhood" by Jessica Berg*. N.p., 17 Dec. 2007 at p. 371.
[10] *Ibid*.
[11] *Ibid*., at 373.
[12] *Ibid*., at 381.
[13] *Doe v. Bolton*, 410 U.S. 179 (1973).

2004 provides for separate offenses for harming a pregnant women and her unborn child, referring to the death or bodily injury of the unborn child.[14] While this act does not define an unborn child as a person and thus does not create fetal personhood, it does offer in utero fetuses similar protections to victims of crimes who are protected as persons under the law.

Legal Issues and Thesis

The present capstone seeks to explore the legal issues that arise from the conflicts between the Constitution and the Sanctity of Human Life Act. This capstone will explore whether the Sanctity of Human Life Act can stand under the current and precedential Constitutional interpretations regarding abortion, privacy, and due process rights, with a focus on decisions by the U.S. Supreme Court. Other issues include whether a statute can overturn the Supreme Court decisions in *Roe v. Wade* and later cases upholding that ruling and whether there is a Constitutional basis for defining personhood. This work will also explore whether a state may create an enforceable definition of life at conception and what the effects might be if the Sanctity of Human Life Act or a similar statute were to pass and the Court was to uphold it.

Under current constitutional jurisprudence and precedent, a fetus cannot be considered a person under federal law. The Court has established that there is no Constitutional basis for defining a fetus as a person.[15] However, based on this law fetuses would be granted full Constitutional rights at conception, including 14th Amendment rights to equal protection and due process, and therefore a right to life.[16] The Sanctity of Life Act as written would violate Supreme Court jurisprudence by obligating states to ban elective abortions, and thereby violating a

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[14] "Unborn Victims of Violence Act" (Public Law 108-212, 1 April 2004), 118 *United States Statutes at Large*, pp. 568-570.
[15] *Roe v. Wade*, 410 U.S. 113, at p. 150 (1973)
[16] U.S. Const., amend. XIV, § 1.

pregnant woman's rights to privacy, due process, and equal protection as guaranteed by the U.S. Constitution. This would violate current federal case law in regards to the standing abortion framework presented by the Court in numerous decisions such as *Roe v. Wade* and *Planned Parenthood v. Casey*. If this law were to be passed it would conflict with current federal abortion case law and statutes. Neither a state not the federal government may not create a law which conflicts with a Supreme Court decision, nor can a state court make a decision contrary to a controlling decision by a higher court, the highest of which is the US Supreme Court. While neither a statute nor lower court can overturn a Supreme Court decision, a new Supreme Court decision can. If the Supreme Court upheld this act the decision would overturn all standing abortion case law, which would restrict a woman's Constitutional rights to privacy and equal protection as established through decades of legal decisions and policies. Upholding this law would open many more legal questions including but not limited to the future of contraceptive use, the rights of IVF embryos, and Equal Protection for pregnant women and their unborn children.

II. The Sanctity of Human Life Act: History, Meaning, and Movement

Although arguments to define personhood as beginning as conception were heard at the federal level as early as 1973 in *Roe v. Wade*, the first Congressional statute introduced on the matter was the Sanctity of Life Act, H.R. 2087, introduced by Texas Representative Steven Stockman in 1995. The purpose of this legislation was to define life as beginning at conception.

However, it only garnered one cosponsor and was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, where it expired.[17]

Ron Paul, another Texas Representative, reintroduced this bill to Congress in 2005 as H.R. 776[18] and under the same name, The Sanctity of Life Act. Paul subsequently reintroduced versions of the bill a total of four additional times, twice in 2007,[19] [20] and once each in 2009 [21] and 2011,[22] each under the name "Sanctity of Life Act." The purpose of these bills was "To provide that human life shall be deemed to exist from conception."[23] Each time the bills earned five sponsors or fewer and expired after referral to a subcommittee. His most recent introduction was H.R. 1096, The Sanctity of Life Act of 2011, to the 112th Congress, which garnered no cosponsors and at last action was referred to the Subcommittee on the Constitution.[24]

Meanwhile, another similar bill was gaining significantly more attention in the House of Representatives. Georgia Republican Representative Paul Broun introduced H.R. 212, The Sanctity of Human Life Act, to the 112th Congress on January 7, 2011. This bill earned sixty-five cosponsors, all Republican, and was referred to the House Committee on the Judiciary. The

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[17] U.S. House. 104th Congress. *[H.R. 2087], Sanctity of Life Act of 1995*. Washington: Government Printing Office, 1995.
[18] U.S. House. 109th Congress. *[H.R. 776], Sanctity of Life Act of 2005*. Washington: Government Printing Office, 2005.
[19] U.S. House. 110th Congress. *[H.R. 1094], Sanctity of Life Act of 2007*. Washington: Government Printing Office, 2007.
[20] U.S. House. 110th Congress. *[H.R. 2597], Sanctity of Life Act of 2007*. Washington: Government Printing Office, 2007.
[21] U.S. House. 111th Congress. *[H.R. 2533], Sanctity of Life Act of 2009*. Washington: Government Printing Office, 2009.
[22] U.S. House. 112th Congress. *[H.R. 1096], Sanctity of Life Act of 2011*. Washington: Government Printing Office, 2011.
[23] *Ibid.*
[24] "Bill Summary & Status 112th Congress (2011 - 2012) H.R.1096." *Bill Summary & Status*. The Library of Congress, n.d.

purpose of this bill was to "provide that human life be deemed to begin with fertilization."[25] Rep. Broun reintroduced this legislation to the 113th Congress on January 3, 2013 as H.R. 23, under the same name and with the same text. As of March 19, 3013 this bill had earned 35 cosponsors, all Republican.[26] The most recent action on this proposed legislation was a referral to the House Committee on the Judiciary and subsequently the Subcommittee on the Constitution and Civil Justice.[27]

In his introduction of this bill to the House, Rep. Broun asserted that Congress has the power to enact this from the Section 5 of Article 14 of the Constitution, in order to protect liberty and Due Process under the 5th Amendment,[28] stating on the Congressional Record:

> *"Congress has the power to enact this legislation pursuant to the following: To accompany: Section 5 of the 14th article of Amendment to the Constitution of the United States, which states ``The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Section one of this article states `` . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The Sanctity of Human Life Act allows for constitutional protection for the unborn that they not ``be deprived of life, liberty, or property, without due process of the law" afforded under the 5th Amendment."* [29]

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[25] "Bill Summary & Status 112th Congress (2011 - 2012) H.R.212." *Bill Summary & Status*. The Library of Congress, n.d.
[26] U.S. House. 113th Congress. *[H.R. 23], Sanctity of Life Act of 2013*. Washington: Government Printing Office, 2013.
[27] "Bill Summary & Status 113th Congress (2013 - 2014) H.R.23." *Bill Summary & Status*. The Library of Congress, n.d.
[28] U.S. Const., amend. XIV
[29] Broun, Paul (GA). "Sanctity of Human Life Act of 2013." Congressional Record 159:1 (January 3, 2013) p. H33. Available from: LexisNexis® Congressional

Under this interpretation by Rep. Broun, Congress has the power to define human life in order to protect life under the Due Process Clause of the 5th Amendment. However, Rep. Broun's seems to use circular logic, arguing that Congress must define fetuses as people in order to protect their rights as people, without citing a Constitutional backing for the definition of person offered. While Rep. Broun's proposed statute and his introduction of it do not explain the Constitutional reasoning for it this is the legal question the Court would examine, since defining a human life as beginning at conception would conflict with the interpretation that abortion is a constitutional right.

National Personhood Movement

This bill and its historically consistent reincarnations are representative of a larger national movement typically referred to as the "Personhood Movement." This movement is championed by the Colorado-based organization Personhood USA, which has branches and partner organizations across the country.[30] They define Personhood as "the cultural and legal recognition of the equal and unalienable rights of human beings," and the stated goal of this organization is for human life to be legally recognized as beginning at conception, granting the unborn Constitutional and legal rights and outlawing abortion.[31]

There is a very strong religious background behind the personhood movement. Specifically, many personhood movements cite the Christian Bible and teachings in their arguments and statements of purpose. Personhood USA itself cites "to serve Jesus" specifically as its mission in a two-sentence statement on the front page of its website. This mission statement reads, "The Primary Mission of Personhood USA is to serve Jesus by being an

[30] "About Us." *Personhood USA*. 2011. Web. 13 Apr. 2013.
[31] "What is Personhood?" *Personhood USA*. 2011. Web. 13 Apr. 2013

Advocate for those who can not speak for themselves, the pre-born child. We serve by starting / coordinating efforts to establish legal 'personhood' for pre-born children through peaceful activism, legislative efforts and ballot-access petition initiatives."[32] By its own definition, the face of the personhood movement is religiously motivated. Of course, the First Amendment to the Bill of Rights of the United States guarantees separation of church and state, stating, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" [33] This means not only can the government not endorse a state religion or prohibit people from practicing their religion, but also that the government cannot use religion as a legal backing for a law, as that would qualify as establishment of religion.[34]

Although this movement is currently the most visible pro-life movement in the media, many pro-life groups and political leaders actually do not support it.[35] While both radical and controversial, Personhood supporters are very visible and active, which has enabled them to attract significant attention to pieces of legislation in states such as Mississippi and Colorado. Both of these initiatives failed to receive support from the popular vote. Opponents cited concerns that the legislation might have "criminalized birth control, affected in vitro fertilization practices and even forced doctors to decline to provide pregnant cancer patients with chemotherapy for fear of legal repercussions."[36]

Recently, the state of North Dakota passed what they hope to be the nation's first state personhood amendment. The measure passed both the state Senate and House in March 2013,

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[32] "Personhood USA | Protecting the Pre-born by Love and by Law." Personhood USA, n.d. Web. 13 April 2013.
[33] U.S. Const., amend. XIV, § 1.
[34] *Edwards v. Aquillard*, 482 U.S. 578 (1987)
[35] Alexander, Rachel. "Is the Personhood Movement Really Pro-Life?" *Townhall.com*. 22 June 2012.
[36] Blake, Aaron. "Anti-abortion 'Personhood' Amendment Fails in Mississippi." *Washington Post*. The Washington Post, 10 Nov. 2011. Web.

and will go to popular vote in November 2014. If it passes, it will add an amendment to the North Dakota Constitution defining that human life begins at the point of fertilization.[37] The lawmakers also passed a series of bills, including one that would ban abortion after a fetal heartbeat could be detected at around six weeks, meaning that essentially as soon as pregnancy can be detected abortion would be outlawed. This would go into effect August 1 unless a legal challenge is filed.[38] Based on the limited history of these proposals, a legal challenge is likely.

The only State Supreme Court to hear a challenge to a personhood case was the Oklahoma Supreme Court, which heard a challenge to a proposed state constitutional amendment that never reached a vote by popular ballot. In their 2012 decision, Oklahoma Coalition for Reproductive Justice v. Cline, the Supreme Court of Oklahoma upheld a trial court's ruling that the statute,[39] was unconstitutional under the controlling U.S. Supreme Court case *Planned Parenthood v. Casey*. The court noted that they did not have the authority to determine cases contrary to a previous determination by the U.S. Supreme Court under the Supremacy Clause of the U.S. Constitution. The decision noted, "Because the United States Supreme Court has previously determined the dispositive issue presented in this matter, this Court is not free to impose its own view of the law."[40] As a result, they determined that the challenge was unconstitutional under *Casey*, noting, "The challenged measure is facially unconstitutional pursuant to *Casey*, 505 U.S. 833. The mandate of *Casey* remains binding on this

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[37] Bassett, Laura. "North Dakota Personhood Measure Passes State House." *The Huffington Post*. TheHuffingtonPost.com, 22 Mar. 2013. Web.
[38] "Health Headlines: March 26, 2013." *Health Highlights*. Department of Health and Human Services Office on Women's Health, 26 Mar. 2013. Web.
[39] House Bill 1970, 2011 Okla. Sess. Laws 1276
[40] *Oklahoma Coalition For Reproductive Justice v. Cline.* 2012 OK 102 (2012).

Court until and unless the United States Supreme Court holds to the contrary." [41] The U.S. Supreme Court declined to review this decision.[42]

While it is clear that a state court or law cannot overturn a decision of the Supreme Court of the United States, the proponents of the Sanctity of Human Life Act and similar state-based initiatives seek to have the Supreme Court review and ultimately overturn their major abortion decisions, which have consistently upheld abortion as a constitutional right, in addition to consistently failing to uphold any argument of fetal personhood. The following sections will discuss the history of abortion and related jurisprudence in the United States, from the conception of a constitutional right to reproductive privacy to the most recent abortion decisions, to understand the Constitutional and reasoning behind the decisions, to understand how challenges such as The Sanctity of Human Life Statute may be received by the Supreme Court.

III. Early Privacy Cases

Griswold v Connecticut

The case *Griswold et. al. v. Connecticut* was the first Supreme Court decision to find a right to reproductive privacy in the US Constitution. In this 1965 case the appellants were accused of providing information and medical advice on the best means of contraception to married persons in violation of sections 53-32 and 54-196 of the General Statutes of Connecticut.[43] Section 53-32 proscribes fines or imprisonment for those who use anything to prevent conception, while section 54-196 provides for equal punishment for anyone who assists

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[41] *Ibid.*
[42] Culp-Ressler, Tara. "Supreme Court Rejects Personhood Appeal In Oklahoma." *ThinkProgress RSS*. Center for American Progress Action Fund, 30 Oct. 2012. Web.
[43] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

or abets such an offense. Appellant Griswold, the Executive Director of the Planned Parent League of Connecticut, and Appellant Buxton, the Medical Director for the League as well as a licensed physician, were both found guilty as accessories to violating these statutes and fined $100 each.[44] The Appellate Division of the Circuit Court and the Supreme Court of Errors both affirmed the decision.

The legal question at issue in this case was whether a married couple has a right to privacy in their intimate lives and in the physician's role in that relationship, therefore questioning whether there is an inherent right to privacy in the Constitution. The Court concluded that there is an inherent right to privacy in the Constitution, thus reversing the decisions of the lower courts and overturning the Connecticut law. Justice Douglas delivered the opinion of the court.

The Court notes that the Constitution has been interpreted to include many rights that are not in the plain text by interpreting the force of rights between amendments as well as the spirit of certain amendments. Notably in *NAACP V Alabama* the Court protected the freedom to associate and privacy within one's associations, establishing freedom to privacy of association as a peripheral First Amendment right. The Court noted that, "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." [45]

The Court goes on to describe where the right to privacy can be found in the Bill of Rights even though it is not explicitly stated. The court outlines this right as follows:

> *Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in it's*

[44] *Ibid.*
[45] *NAACP V Alabama*, 357 U. S. 449 at p. 462 (1958)

> *prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of owner is another facet of privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'*[46]

As this law prohibits the *use* of contraception, rather than production or sale, the Court declared it is in violation of the inherent right to privacy that individuals are granted specifically in the "marriage relationship."[47]

Justices Goldberg, White, and Brennan filed concurring opinions, while Justices Black and Stewart filed dissenting opinions. The concurrence by Justice Harlan focuses on the Due Process Clause, noting that the statute need only to violate the Fourteenth Amendment for it to be unconstitutional, regardless of the supposed zone of privacy rights. [48]

Both dissents argue that the inferred zones of privacy are not found in the Constitution. The dissent of Justice Black argued that the majority opinion and concurrences incorrectly apply the Ninth and Fourteenth Amendments to create rights not found in the Constitution, arguing that there is simply no right to privacy found in the Constitution.[49] In his dissent, Justice Stewart argued that he could find nothing in the First, Third, Fourth, or Fifth Amendments that could

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[46] *Griswold v. Connecticut*, 381 U.S. 479 at p. 485 (1965).
[47] *Ibid.,* at p. 487.
[48] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[49] *Ibid.*

invalidate the law even if one assumes that the Ninth and Fourteenth Amendments apply to states.[50] The criticisms present in these dissents are still popular criticism of privacy rights jurisprudence, particularly by those who subscribe to a literal plain text interpretation of the Constitution.

This decision is still in effect, and the legal reasoning of this case remains precedent. Although this case does not directly address abortion or personhood, it created the foundation of privacy jurisprudence in the context of reproductive and abortion rights cases. The legal reasoning in this case and inferred rights have since been extended, as enumerated in later cases.

Eisenstadt v Baird

Eisenstadt v. Baird, decided in 1972, extended the *Griswold* right to privacy in contraceptive use to unmarried couples. In 1969, Appellant William Baird delivered a lecture on contraception at Boston University and gave a package of vaginal contraceptive foam to a young woman in attendance. He was subsequently convicted in the Massachusetts Superior Court of violating Massachusetts General Laws Ann., c. 272, section 21, which provides for a prison sentence with a maximum of five years for anyone who gives away any method of contraception, with the exception of a registered physician or pharmacist administering, prescribing, or distributing contraception to married persons for the purpose of preventing pregnancy.[51] The District Court dismissed Baird's initial appeal, but The Court of Appeals for the First Circuit vacated the dismissal and reversed. Sherriff Eisenstadt of Suffolk County, Massachusetts appealed to the Supreme Court, who granted cert and heard the case in 1972. The Court and affirmed the decision of the First Circuit in a 6-1 decision written by Justice Brennan.

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[50] *Ibid.*
[51] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

The legal question in this case was whether there was a rational ground to explain why married and unmarried persons are treated differently under Massachusetts state law, and furthermore whether unmarried people should be granted the same reproductive privacy rights as married people. The Court determined that there was not rational basis for this distinction, as the Court could not see prevention of premarital sexual intercourse as the purpose of the law nor could it assume that the state wanted to prescribe pregnancy as punishment for premarital sex.[52] The court further clarifies that although Griswold specifically describes the privacy inherent in a marriage relationship, the married couple is not an independent entity but rather a union of two individuals. The Court noted that barring distribution of contraception to some but not others solely on the basis of marital status was a violation of the Equal Protection Clause of the Fourteenth Amendment.

Notably, the Court clarified what the right to privacy means in terms of reproductive rights, "If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted government intrusion into matters so fundamentally affecting a person as whether to bear or beget a child." [53] This analysis established the right to choose whether to carry and have children as a fundamental right that should be free from governmental intrusion. As we will see in later cases, this reasoning profoundly impacted abortion jurisprudence to establish the right to an abortion as a Constitutionally protected right.

IV. The Turning Point: Roe v Wade, District Attorney of Dallas County

Legal History, Questions, and Holding

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[52] *Ibid.*
[53] *Eisenstadt v. Baird*, 405 U.S. 438, at 454 (1972).

Roe v Wade is by far the most influential abortion case in Supreme Court history, and one of the most famous Supreme Court cases of all time. Although the decision has been narrowed over time it has been consistently upheld and the legal reasoning in the case still stands precedent.

Roe and its companion case *Doe v. Bolton* (discussed below) presented constitutional challenges to state legislation criminalizing abortion in Texas and Georgia, respectively. Specifically, Roe challenged Articles 1191-1194 and 1196 of Texas's State Penal Code which made it illegal to procure or attempt an abortion, with an exception for an abortion "by medical advice for the purpose of saving the life of the mother." [54] The Court notes that similar statutes exist in other states.

Norma McCorvey, identified by the pseudonym "Jane Roe," was an unmarried woman from Texas who brought federal action against the District Attorney based on a state law that prohibited abortions except in cases where the health or life of the mother was in danger, or in cases of rape or incest.[55] She argued the statute impermissibly infringed upon her constitutional right to privacy inherent in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Roe argued that she had the right to end her pregnancy under Fourteenth Amendment Due Process protections. Furthermore, she argued that the statute violated her sexual and reproductive privacy rights, as described in *Griswold* and *Eisenstadt*.

The District Court in Texas ruled in favor of Roe, agreeing with the legal argument that the right to abortion was guaranteed under privacy and Due Process rights, but chose not to grant an injunction against the enforcement of the law. The Supreme Court granted cert and first heard oral arguments in 1971. However, two Justices had recently stepped down and the seven

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[54] *Roe v. Wade*, 410 U.S. 113, at (1973)**.**
[55] *Ibid*. at p. 113.

remaining Justices could not agree on a legal reasoning for affirming the district court's decision, although they all felt the statute should be struck down. The court decided to rehear the case in 1972, and released their decision in 1973.[56]

The legal question in this case was whether the constitutional rights to privacy and Due Process included the right to elect to obtain an abortion. The respondents also put forth an explicit argument claiming that human life begins at the point of conception, and as a result a fetus is a human being with all rights protected under the Constitution. Thus, an underlying question in this case was whether a fetus is considered a person under federal law.

In a seven-two decision, the Court held that the right to choose an abortion is a constitutional right. Furthermore, they outright rejected an argument that a fetus is a person with a right to life. Justice Blackmun wrote for the majority, with Justices Burger, Douglas, and Stewart concurring and Justices White and Rehnquist each submitting dissents.

The Court noted that the state had two legitimate interests in regulating abortion. The first interest was in protecting the life and health of the mother and the second in protecting the "potentiality" of human life.[57] The representatives of the state argued that the fetus should be recognized as a human being and receive equal protection, but the Court reasoned that the fetus need not be a legal person for the State to consider its protection a legitimate interest. Writing for the majority, Justice Blackmun noted,

> *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*

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[56] Greenhouse, Linda. *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*. New York: Times, 2005.
[57] *Roe v. Wade*, 410 U.S. 113, at p. 150 (1973)**.**

> *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*.[58]

The Court recognizes that a state has an interest in protecting the reproductive process and the potential for the human life that the pregnant woman carries, while avoiding the argument that the fetus can be classified as a person. However, this argument is addressed and rejected later in the holding.

The majority decision cited the ancient and modern history of abortion, in addition to its history in common law and English statutory law, before moving on to discuss U.S. law and precedent. The Court noted that mortality rates for women seeking abortion in their first trimester tended to be lower than those of women who go through pregnancy, and the State has a legitimate interest in ensuring that women receive safe, legal abortions instead of high-risk illegal ones.[59]

To determine when the state is able to restrict abortions in any capacity, the Court set up a trimester system of standards. In the first trimester the abortion decision was solely the decision of the woman and her doctor, meaning the state had no right to limit access to abortion in the first trimester. For this declaration they noted medical history that indicated abortions in the first trimester likely have lower mortality rates than childbirth.[60] In the second trimester the Court

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[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid*., at p.163.

declared that a state may regulate abortion in ways that "are reasonably related to maternal health," noting the right of the state in "promoting its interests in the health of the mother."[61]

In the third trimester, the Court determined that the state had the right to limit or outright ban abortion in the interest of protecting potential life. The Court noted that any state interest to protect fetal life is not compelling before the point of viability, which the Court set around this time. "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion."[62] It should be noted that the Court does not declare human life at viability, but rather only asserts that the state interest to protect the potentiality of human life is compelling only after there is a possibility of the fetus having the capacity to survive outside of the womb.

In its conclusion, the Court noted that the abortion decision is most importantly a medical decision, emphasizing both the woman's right to privacy and to obtain an abortion in addition to the important right for a doctor to practice medicine freely. They concluded, "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."[63]

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[61] *Ibid*., at p.164.
[62] *Ibid*.
[63] *Ibid*., at pp. 166-7.

The Personhood Argument

One of the most important arguments discussed in the Roe decision is that of the state's claim that human life begins at conception. The Court notes that the "appellee and certain *amici* argue that the fetus is a person within the language and meaning of the Fourteenth Amendment."[64] However, the Court notes, "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment" and "The Constitution does not define 'person' in so many words."[65] The Court notes that the word "person" is not defined in the Constitution, although it is mentioned many times. It is mentioned several times in the first section of the Fourteenth Amendment, as well as in the Due Process and Equal Protection clauses. It is mentioned other times throughout the Constitution but, as the Court notes, "in nearly all these instances, the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application." [66] Thus, the Court concludes that there is no justification for including unborn fetuses and embryos within the category of "persons" entitled to protection, stating plainly, "The word 'person,' as used in the Fourteenth Amendment, does not include the unborn" and noting that this follows precedent of all other cases in which the definition of person has been at issue.[67]

Within their reasoning, the Court does note that the privacy of the pregnant woman unique and not ultimate, as she is carrying a developing fetus. As such, the state has interests at play beyond protecting the liberty and health of the pregnant woman, namely the interest of protecting the potential life represented by the fetus. The Court notes that this interest is reasonable and

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[64] *Ibid*., at p. 156.
[65] *Ibid*., at p. 157.
[66] *Ibid*.
[67] *Ibid*., at p. 158.

appropriate, but does not overrule the woman's rights, as the fetus is not a person with competing rights to the woman. The Court reasons:

> *The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus... The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that, at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.*[68]

Furthermore, the court discusses the issue of when life begins, ultimately rejecting the argument that the fetus is a life and determining that the state may still have a compelling right to protect a viable fetus even if it is not determined to be a person. Discussing the state's argument that the fetus is a human life, the Court writes,

> *Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.*[69]

The Court chooses not to answer the question of when life begins, noting that mankind does not

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[68] *Ibid*., at p. 159.
[69] *Ibid*., at p. 160.

have the knowledge to determine that. However, they leave the door open to making the determination at some point in the future in which science or knowledge has advanced enough so that there is greater consensus as to this point.

The Court notes that some state laws allow civil and criminal action against those who have harmed a fetus, while noting that most of the time these cases are only valid when the fetus is viable. However, they support that these laws are not defining the fetus as a person but rather reinforcing state interest in the fetus, which "represents only the potentiality of life."[70]

Overall, in this argument the Court rejects the argument that a fetus is a person under the terms of the Constitution. However, they note that if this argument was validated and the fetus was determined to be a person under the Fourteenth Amendment then the argument to a right to abortion would fail, as the Fourteenth Amendment would guarantee the fetus's right to life. "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument." [71] This implies that in the future if history and science, in addition to Constitutional interpretation, can justify a fetal right to life then the right to abortion would likely cease to exist at the moment at which life is determined to begin, as the fetus would be guaranteed a right to life. However, this would give rise to further complications, such as balancing the rights of the mother and unborn child. These complications are discussed further in later sections.

Concurrences and Dissents

The seven-two decision was released with concurrences by Justices Stewart, Burger, and

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[70] *Ibid*., at p. 162.
[71] *Ibid*., at pp. 156-7.

Douglass, and dissents by Rehnquist and White, with whom Rehnquist joined. In his concurrence Justice Stewart reversed his position as stated in his *Griswold* dissent, noting that he now agrees that the right to reproductive privacy, including the right to an abortion, is encompassed in the Due Process Clause of the Fourteenth Amendment.[72] Chief Justice Burger's concurrence expresses concern that the Court seems to be using medical and scientific evidence to make a legal decision. However, he ultimately agreed with the decision and did not think that the Court went outside of its appropriate scope in reaching their conclusion. [73]

Justice Douglas's opinion chronicles the history of privacy decisions, noting that an abortion is a unique right in privacy in that it involves multiple parties, including the woman, the physician, and the unborn fetus. Ultimately, he concludes that he agrees with the majority decision that the Texas statute is too restrictive in its abortion limits and that abortion is a Constitutional privacy right.[74] He also touches upon the matter of fetal personhood, noting that it is not the place of the Court to determine when life begins. He writes, "When life is present is a question we do not try to resolve. While basically a question for medical experts, as stated by Mr. Justice Clark it is, of course, caught up in matters of religion and morality." [75]

The dissent of Justice White notes that the Court is clearly valuing the life of the prospective mother over the life or potential life of the fetus and, while he may personally agree with the decision he reasons that he cannot join the decision since he can find "nothing in the language or history of the Constitution to support the Court's judgment." [76] He further argues that, "The Court simply fashions and announces a new constitutional right for pregnant women

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[72] *Ibid*., at p. 171.
[73] *Ibid*., at p. 209.
[74] *Ibid*., at p. 221.
[75] *Ibid*.
[76] *Ibid*., at p. 222.

and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes… 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the woman, on the other hand."[77] He goes on to reason that the Court is overreaching in its decision, and the decision is more creating policy than interpreting law.[78] Justice Rehnquist's dissent expands upon Justice White's reasoning, citing that the drafters of the Fourteenth Amendment surely did not intend it to deny states the power to make their own determinations in matters such as abortion.

Ongoing Criticisms and Controversies

Roe continues to be seen as the decisive abortion case in U.S. history, while later cases have restricted and clarified this decision, those cases continue to cite their reasoning and holding back to *Roe*. Current criticisms often reflect the concerns of the dissenting Justices, while many others cite morality-based reasons in their efforts.[79] Similarly, many anti-abortion, pro-life, and personhood groups cite overturning *Roe* as one of their main objectives.[80] To date, the privacy, Due Process, and personhood arguments in *Roe* continue to remain tenants of abortion jurisprudence.

V. After Roe: The Important Cases of 1972-1990

Doe v. Bolton

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[77] *Ibid*., at pp. 222-3.
[78] *Ibid*., at p. 223.
[79] "EndRoe.org." *EndRoe.org*. National Committee for a Human Life Amendment, n.d. Web.
[80] *Ibid.*

Doe v. Bolton is considered the lesser-known companion case to Roe v. Wade. Decided the same day, Doe struck down a Georgia's State Criminal Code Sections 26-1201, 26-1202, and 26-1203, which criminalize abortion with exceptions to save the life or health of the mother, in cases of rape, or if the child would have a grave physical disability.[81] It outlines additional requirements for a woman to have an abortion in the state, including that the woman must be a Georgia resident and the abortion must be conducted in a hospital.[82] The court considered this statute different enough from the Texas one decided in *Roe* to warrant its own consideration.[83]

Under this statute a 22-year-old married mother of three was advised by her doctor that pregnancy might be more of a danger to her health than childbirth, and she should seek an abortion. However, this abortion was denied, as the hospital claimed her condition was not an exception to the state law.[84] Under the pseudonym Mary Doe and joined by several others including nine physicians, several nurses, and two non-profits, the woman alleged that the Georgia statute violated her privacy rights as found in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments and as outlined in *Griswold v. Connecticut*.[85] The other plaintiffs argued that the statute deprived them of freely practicing their professions and deprived them of First, Fourth and Fourteenth Amendment rights. [86]

The legal question examined in this case was whether the provisions of the Georgia statute's procedural demands adequately protected the rights of medical professionals and pregnant women. The District Court gave declaratory relief on several aspects of the statute, while failing to grant an injunction and upholding the state interest to protect the life and health

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[81] *Doe v. Bolton*, 410 U.S. 179, at p. 183 (1973).
[82] *Ibid*., at p. 184.
[83] *Ibid*., at p. 183.
[84] *Ibid*., at p. 186.
[85] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[86] *Roe v. Wade*, 410 U.S. 113, at p. 187 (1973)**.**

of the mother.[87] The Supreme Court granted cert and heard the case in 1971 with *Roe*, and again reheard it with *Roe* in 1972. The seven-two decision was released in 1973, with Justice Blackmun writing for the majority, Justices Burger and Douglas filing concurring opinions, and Justices Rehnquist and White filing dissents.

The majority holding noted that under *Roe* women do not have an absolute right to an abortion and emphasized that everything decided in *Roe* is reaffirmed.[88] The Court goes on to note that in light of current medical knowledge, the medical restrictions on the availability of abortion no longer protect women's health and are no longer necessary.[89] The statute was found to not be unconstitutionally vague, as the appellants argued, because the health exception included a consideration of psychological health.[90] The Court did, however, strike down the requirements that the abortion take place in a hospital and that it be allowed only after decision of a committee and with a two-doctor concurrence, noting that these requirements were not adequately connected with state interests and interfered with due process of the doctors and pregnant women alike.[91] The residency requirement was struck down as well, as it denied equal protection to those who entered Georgia in need of medical care.[92]

The dissent of Justice White, joined by Justice Rehnquist, noted that the Court has espoused in this case that the desires and rights of the pregnant women completely overwhelm the state desire to protect the potential for human life of her fetus with any law or policy.[93] He disagrees with this declaration, arguing that there is nothing in the constitution to support the

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[87] *Doe v. Bolton*, 410 U.S. 179, at p. 180 (1973).
[88] *Ibid*., at p. 191.
[89] *Ibid*.
[90] *Ibid*., at p. 193.
[91] *Ibid*., at pp. 195-200.
[92] *Ibid*., at p. 201.
[93] *Ibid*., at p. 222.

overwhelming priority given to the choices of pregnant women over the continued potential life fetuses.[94] However, the Court does not recognize the fetus as a person, and thus priority is given to the life and health of the potential mother. Furthermore, they do not recognize the fetus's right to exist, but rather the state's right to favor the continued growth and development of the potential persons over abortion.

The *Doe* case clarified what restrictions were allowed under *Roe* while reinforcing its main holding, helping to form the basis for abortion rights under privacy, Due Process, and Equal Protection frameworks. Although its basic holding upheld abortion rights, the decision also helped to set the stage for restrictions in later stages of pregnancy which are related to a state's interest to protect the potential for human life and the life and health of the mother.

Planned Parenthood of Missouri v. Danforth

Planned Parenthood v. Danforth clarified the rights enumerated in *Roe* and *Doe* by striking down a state requirement for parental and spousal consent. This case upheld the central holdings in *Roe* and *Doe* while clarifying the viability discussions and the rights of pregnant women relative to non-state actors who may have an interest in protecting the potential life of the fetus. [95]

In this case two physicians, one who practiced at a hospital and the other who practiced at the nonprofit corporation and abortion provider Planned Parenthood, challenged the 1974 House Committee Substitute for House Bill 121. This act defined viability, required written informed consent of the pregnant women, her spouse if she had one, and her parents or a person acting *in*

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[94] *Ibid*., at p. 223.
[95] *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

loco parentis if she was under eighteen.[96] It also held a physician criminally liable if a fetus survived an abortion not performed for the health or life of the mother, and prohibited the use of the saline amniocentesis method of abortion after twelve weeks of gestation.

Plaintiffs challenged this act under the claims that is violated the physicians right to practice medicine freely, the woman's rights to privacy and protection of life and liberty in choosing and accessing an abortion, and the privacy of the doctor-patient relationship.[97] The legal question the court investigated in this case is whether the Missouri law violated the privacy and Due Process rights of the mother and physician by restricting access to abortions throughout pregnancies, including in the first trimester.

The District Court held that all of the provisions withstood the constitutional test, with the exception of the aspect which required the physician to act at all stages of pregnancy to protect the fetus as if it were intended to be born, which they found to be constitutionally overbroad.[98] The Supreme Court granted heard and decided the case in 1976. The court affirmed the decision in part and reversed it in part, with Justice Blackmun delivering the opinion of the Court and several justices concurring or concurring in part, dissenting in part. [99]

On the challenge that the definition of viability in the act was unconstitutional, the Court found that the definition of viability in the act did not conflict with Roe. The act defined viability as "'that state of fetal development when the life of the unborn child may be continued indefinitely outside of the womb by natural or artificial life-supportive systems.'" [100] Although the plaintiffs argued that the definition was invalid under the *Roe* trimester system, as it made no

[96] *Ibid*., at p. 59.
[97] *Ibid*., at p. 58.
[98] *Ibid*., at p. 60.
[99] *Ibid*., at p. 57.
[100] *Ibid*., at p. 64.

reference to gestational age, the majority held that the definition was valid under *Roe* because the *Roe* Court merely indicated that viability is "'usually placed' at about seven months but may occur earlier." [101] The Court further affirmed that by a doctor should determine viability, not a court,[102] which supports both the ability of the doctor to practice medicine freely and to the best of his ability and the privacy rights of the woman and her physician.

The Court held that the requirement to obtain a woman's written consent prior to obtaining an abortion during the first twelve weeks was Constitutional, as it advanced the interest of protecting the potential mother's rights and ensuring the mother's understanding of and desire for the procedure.[103] However, the Court found the requirement that the spouse of the pregnant women give written consent for her to have an abortion during the first twelve weeks, with the exception of abortions performed to save the life or health of the mother, unconstitutional. The Court reinforced the idea that marriage does not create a new being but rather is a union of two people with separate desires and emotions.[104] Furthermore, the spouse partner's interest in protecting the potential life of the fetus is not greater than the pregnant woman's constitutional rights to choose and abortion and the state does not have the right to delegate to a spouse a right that the state does not have. [105]

The requirement that minors under the age of eighteen obtain parental consent or the consent of a person acting *in loco parentis*, or in the place of a parent was similarly found unconstitutional.[106] The Court held that, "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the

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[101] *Ibid*.,
[102] *Ibid*., at p. 65.
[103] *Ibid*., at p. 68.
[104] *Ibid*., at p. 71.
[105] *Ibid*., at p. 72.
[106] *Ibid*., at p. 76.

competent minor mature enough to have become pregnant," [107] thus supporting the right to privacy in reproductive decisions for minors and adult alike. The Court also find the requirement to use the saline amniocentesis method of abortion after twelve weeks to be an arbitrary undue restriction on the physician's free practice of medicine, and thus unconstitutional. [108]

The partial dissent and partial concurrence of Justice White, joined by Justices Rehnquist and Burger, argued that the spouse of a pregnant woman seeking abortion has a special interest in protecting the life of what is presumably his child, and that this interest outweighs any state interest and should therefore be given careful consideration.[109] He makes a similar argument in that the parent of a pregnant minor has a special interest in protecting the family and the life of the potential fetus, and that a parent may act in the best interest of a minor. [110] However, the majority determined that the woman's rights to Due Process and to privacy in reproductive decisions, overwhelms the potential interest of the husband or another family member.

This case reinforces that the right of a pregnant woman to make her own private reproductive health decision and receive Due Process rights overrules the potential interests of others to protect the potential life of a fetus. Neither the interests of the state, the spouse of a married pregnant woman, nor the parent of pregnant minor has a constitutional right to prohibit an abortion in the first twelve weeks. Although the issue of parental consent has been reexamined over time, the essential holding of the promotion of the woman's rights over the potential desire of others to protect the potential life of her fetus in the beginning stages of pregnancy has not been rejected.

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[107] *Ibid*.
[108] *Ibid*., at p. 80.
[109] *Ibid*., at p. 94.
[110] *Ibid*., at p. 95.

Akron v Akron Center for Reproductive Health

The 1983 case *Akron v Akron Center for Reproductive Health* invalidated provisions of an Akron, Ohio city ordinance that required a doctor inform the patient of the stage of fetal development, the supposed health risks of abortion, and the availability of adoption and childbirth resources. Other provisions found unconstitutional included a parental consent requirement, a requirement that abortions after the first trimester be performed in a hospital, and a 24-hour waiting period.[111]

Part of the required informed consent found unconstitutional was a requirement for, "the physician to inform his patient that 'the unborn child is a human life from the moment of conception'"[112] The Court held that the requirement was "inconsistent with the Court's holding in Roe v. Wade that a State may not adopt one theory of when life begins to justify its regulation of abortions." [113] This reasoning explicitly upheld *Roe* and reiterated the Court's view in *Roe* that the state may not consider a fetus a person for the purpose of restricting or limiting abortions.

Webster v. Reproductive Health Services

The case of Webster v. Reproductive Health Services allowed states to limit abortions in ways previously considered unconstitutional under the Roe holding, thus limiting Roe while upholding its basic structure. [114]

In this case, several public and private abortion providers in the state of Missouri, including Reproductive Health Services and Planned Parenthood, challenged five out of twenty

[111] C*ity of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).
[112] C*ity of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, at p. 444 (1983).
[113] *Ibid.*
[114] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

provisions of Missouri Senate Committee Substitute for House Bill No. 1596.[115] The preamble, one of the statutes in question, defines human life as beginning at conception.[116] The law goes on to require laws and statutes to be interpreted to give fetuses the same rights as all people, and requires a physician to perform viability tests any fetus twenty weeks gestation or later before performing an abortion. It also prohibits the use of public funds, facilities, or employees to assist in abortions unless necessary to save the life of the mother or counsel any women to have an abortion not necessary to save her life.[117]

The legal question in this case was whether the statute in question violates the privacy and Equal Protection rights of pregnant women and physicians by unconstitutionally restricting access to and performance of abortions. The District court struck down each of the provisions of the statute in question, citing that they each violated the Court's holding in *Roe*. The Appellate Court affirmed this decision. The Court granted cert and both heard the case and released their decision in 1989. In a complicated and fractured decision, the Court reversed the holding. The decision was unanimous in part, with several justices concurring in part and dissenting in part from the Court's opinion. Chief Justice Rehnquist delivered the opinion of the Court.

The first provision in question was the preamble to the act, which defined that, "'[t]he life of each human being begins at conception,' and that 'unborn children have protectable interests in life, health, and wellbeing.'" [118] It goes on to mandate "state laws be interpreted to provide unborn children with 'all the rights, privileges, and immunities available to other persons, citizens, and residents of this state,' subject to the Constitution and this Court's precedents." [119]

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[115] *Ibid*., at pp. 501-2.
[116] *Ibid*., at p. 502.
[117] *Ibid*., at p. 491.
[118] *Ibid*., at p. 505.
[119] *Ibid*.

Missouri claimed that this preamble was abortion-neutral and merely determined when life began outside of the abortion context, which they saw as a state's prerogative.

The Court of Appeals invalidated the preamble under dictum found in *Akron v Akron Center for Reproductive Rights*, which "a State may not adopt one theory of when life begins to justify its regulation of abortions." [120] They further rejected Missouri's claims that the preamble was abortion neutral, inferring that, "'every remaining section of the bill save one regulates the performance of abortions' was that 'the state intended its abortion regulations to be understood against the backdrop of its theory of life.'" [121] They further maintained that the preamble's definition of life as stated might impact how freely doctors in public hospitals may practice medicine; for example, they posture that it may prevent them from distributing intrauterine contraception devices. [122]

The Supreme Court overturned this ruling by the Court of Appeals, stating:

> "*Court of Appeals misconceived the meaning of the Akron dictum, which was only that a State could not 'justify' an abortion regulation otherwise invalid under Roe v. Wade on the ground that it embodied the State's view about when life begins. Certainly the preamble does not, by its terms, regulate abortion or any other aspect of appellees' medical practice. The Court has emphasized that Roe v. Wade "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." Maher v. Roe, 432 U.S. at 474. The preamble can be read simply to express that sort of value judgment.*" [123]

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[120] C*ity of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, at p. 444 (1983).
[121] *Webster v. Reproductive Health Services*, 492 U.S. 490, at p. 506 (1989).
[122] *Ibid*., at p. 507.
[123] *Ibid*.

The Court identifies the preamble as merely clarifying the state's preference to favor maintenance of potential human life over abortion, without doing anything to actually regulate abortion and without using the specific definition to justify any restrictions. As such, the Court further ruled that as the statute did nothing to regulate practice of medicine or perform abortions, it did not apply to the petitioners, or any other possible petitioners, in any manner. Thus, the petitioners and any other potential petitioners lack standing and the constitutional challenge is invalid.

However, the court left the door open for a future constitutional challenge on this or other similar statutes, stating, "It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way. Until then, this Court 'is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result a to the thing in issue in the case before it'… We therefore need not pass on the constitutionality of the Act's preamble." [124] Although the Court does not pass judgment on the present preamble because it does not present a ripe constitutional question, it leaves open the possibility of a future challenge if a state promotes a definition of the start of human life as a means to restrict access to abortion or other rights.

The Court goes on uphold the requirement banning the use of public facilities for abortion purposes and prohibiting state employees from performing abortions not necessary to save the life of the mother.[125] As the Court has already specified that the state may enact policies to favor potential life over abortion and upheld withholding state funds to reimburse for abortion

[124] *Ibid*., at pp. 507-8.
[125] *Ibid*., at p. 508.

in *Harris v. McRae,*[126] they held that this requirement followed logically.[127] Although the Court of Appeals held that restricting public facilities and employees from assisting in abortions might narrow or even close some women's opportunities for abortion,[128] the Supreme Court held that while the state could not unconstitutionally ban or restrict abortion they had no requirement to help provide them.[129]

The Court similarly upheld the act's ban on using public fund to counsel women to have abortions for any reason other than preservation of the life of the woman. Although the original provision struck down by the Court of Appeals banned the use of public funds, employees, and facilities for said purposes, Missouri chose only to appeal the ban on using public funds in such a manner. The appellees agreed that they are not unduly affected by this particular ban, so the Court judged that there was no longer a constitutional question and thus reversed the decision of the lower courts. [130]

While this case seems to limit the *Roe* decision, the Court specifically upheld *Roe* as a principle of stare decisis and reaffirmed its basic framework.

VI. Current Supreme Court Abortion Standards: *Planned Parenthood v Casey*

Planned Parenthood v. Casey

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126 *Harris v. McRae,* 448 U.S. 297 (1980).
127 *Webster v. Reproductive Health Services*, 492 U.S. 490, at p. 509 (1989).
128 *Ibid*., at p. 510.
129 *Ibid*., at p. 511.
130 *Ibid*., at p. 513.

Planned Parenthood v Casey[131] was the most recent major abortion Supreme Court decision. Overall, this case upheld the constitutional right to have an abortion as found in *Roe v. Wade*, but amended the framework to allow for more restrictions. The Court replaced the *Roe* trimester-framework with purely a viability-based framework, in addition to proffering an "undue burden" standard as the test for restrictions prior to viability.

In this case concerns a Pennsylvania law which required, among other things, parental consent for a minor to obtain an abortion, spousal notification for a married women, and 24 hour waiting period between obtaining abortion information and giving informed consent and procuring an abortion.[132] This law was challenged by five abortion clinics, including Planned Parenthood of Southeastern Pennsylvania, one physician representing himself, and a class of physicians who provide abortions. The petitioners were seeking declaratory and injunctive relief, arguing that the statute was unconstitutional under *Roe v. Wade* reasoning. While the District Court found all of the provisions unconstitutional, the Circuit Court partially reversed and partially upheld the District Court decision, holding all of the statutes constitutional except for the spousal notification statute. The Supreme Court granted cert and decided the case in 1992.[133]

The Court agreed with the Circuit Court in upholding all of the restrictions besides the spousal notification requirement. The 5-4 decision was uniquely authored by three justices, Justices Kennedy, O'Conner, and Souter, and joined in part by Justices Stevens and Blackmun. Justice Blackmon similarly filed an opinion concurring in part and in the decision, but dissenting in part. Justices Rehnquist and Scalia each filed an opinion concurring with the judgment in part and dissenting in part, joining each other's decisions along with Justices White and Thomas.

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[131] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[132] *Ibid*., at pp. 843-6.
[133] *Ibid*.

While the Court disagreed with the parties' argument that the statutes could not be upheld without overruling *Roe*, they did take a look at whether the *Roe* structure and reasoning should be upheld. As a matter of constitutional issue and with the rule of stare decisis, the court upheld the essential holding of *Roe*, stating, "After considering the fundamental constitutional questions resolved by Roe, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of Roe v. Wade should be retained and once again reaffirmed." [134] They also affirmed that, "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment," with an emphasis on "liberty" as the important and controlling concept.[135] This case marks the most recent of many times in which the court has upheld the right to have an abortion as protected by the Constitution.

The Court also touched upon the issue of morality. The Court noted that many justices were opposed to abortion as a moral or political concept, but noted that their personal moral views could not cloud or control their legal obligation to interpret the Constitution. Specifically, they noted, "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not mandate our own moral code." [136] Essentially, the Court notes that personal morality has no place in law or legal decisions. Whether or not someone, including a Justice, is opposed to abortion personally, the constitutionality of it does not change.

Similarly, the Court specifies that abortion is a process unique to liberty in the way that it affects others, noting that some people believe it to be an act of violence, "against innocent

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[134] *Ibid*., at pp. 845-6.
[135] *Ibid*., at p. 846.
[136] *Ibid*., at p. 850.

human life; and, depending on one's beliefs, for the life or potential life that is aborted." [137] In this, they noted that some people might believe a fetus is a human life, while also noting that that is merely some people's belief. However, they note that these beliefs do not have a place in the law, nor do they overrule a woman's right to have an abortion as a unique aspect of liberty. The Court focused on the unique liberty restrictions the woman may experience in pregnancy, noting:

> *Abortion is a unique act... Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law... Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role... The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society*. [138]

With this, the Court reaffirmed the importance of abortion as a unique and uniquely protected liberty right under Due Process, noting that the process of pregnancy is unique and personal.

However, the Court did note that this liberty was not without limit. Specifically, they threw out the trimester-based framework outlined in *Roe* and replaced it with a viability-based framework. Although the point of viability was discussed in Roe, it was implied that the third trimester, at around 28 weeks, was the point at which viability occurred, and thus based their analysis on this framework.[139] The Casey Court decided instead to draw the line clearly as viability for two main reasons:

> *We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons.*

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[137] *Ibid*., at p. 852.
[138] *Ibid*.
[139] *Roe v. Wade*, 410 U.S. 113, at p. 187 (1973).

> *First, as we have said, is the doctrine of stare decisis… The second reason is that the concept of viability, as we noted in Roe, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman*. [140]

The Court reaffirmed the concept that the state has an interest in protecting the potential for human life represented by the fetus, but this interest does not become compelling or override the woman's liberty interest until the fetus is viable.

In an even bigger drift from *Roe*, the *Casey* decision allows for restrictions on abortion throughout pregnancy, including pre-viability and in the first trimester. While *Roe* prohibited restrictions in the first trimester and only allowed for second semester restrictions reasonably related to a woman's health, the Webster decision replaced the *Roe* standards with an "undue burden" standard. The majority decision determined, "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." [141] As the decision notes, most protected liberty interests allow for restrictions from the state, as long as the restrictions do not unduly burden the person whose liberty is at stake. The Court reasoned that the state may restrict abortion for a legitimate reason, and some restrictions may increase the cost or hassle for the woman, but these burdens are not enough to invalidate a restriction. Only an undue burden, or a burden which may reasonably prevent a woman from seeking or obtaining an abortion, would be restrictive enough to conflict with the constitutional liberty at stake.

In their reasoning the court notes that the state may impose restrictions throughout

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[140] *Planned Parenthood v. Casey*, 505 U.S. 833, at p. 870 (1992).
[141] *Ibid*., at pp. 874.

abortion, contrary to previous decisions. In explanation, the Court notes that, "Roe did not declare an unqualified 'constitutional right to an abortion, ' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." [142] With this reasoning, the Court notes that the right to an abortion is not absolute, although women do have the constitutional liberty right to not experience interferences that might "unduly burden" her freedom to choose an abortion.

Under this new framework, the Court ruled that the only part of the Pennsylvania statute that was an undue burden to pregnant women was the spousal notification statute, noting that most married women consult their husbands prior to terminating pregnancy and those who choose not to may risk experiencing domestic violence and injury if they do.[143] As in *Planned Parenthood of Missouri v. Danforth*, the Court once again upheld the constitutionality of an informed consent requirement.[144] They also upheld the definition of a medical emergency in which a woman may access an abortion post-viability did not unduly burden the woman, as it adequately allowed carved out exceptions to protect the women from death or serious risk.[145] As determined in previous cases, the Court reaffirmed that the parental consent requirement was constitutional as long as there was a judicial bypass option if the parents do not consent but a court or judge determines that the minor is capable of mature consent or that the abortion is in her best interest.[146] The Court also determines that recordkeeping requirements do not pose an undue burden, as they previously determined in *Danforth* that similar requirements are

[142] *Ibid*.
[143] *Ibid*., at p. 888.
[144] *Ibid*., at p. 881.
[145] *Ibid*., at p. 880.
[146] *Ibid*., at p. 899.

reasonably related to maternal health.[147] The upheld requirements are, for the most part, similar to decisions in previous abortion cases. However, the Court did clarify their reasoning under the new undue burden framework.

Altogether, although this decision limited the framework of Roe, it upheld the central principles of *Roe*, stating "The woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce." [148] This decision created a new era of abortion jurisprudence, while maintaining the central principles

VII. Moving into the 21st Century: Cases and Laws of Today

Partial Birth Abortions

In recent years, one of the largest legal controversies surrounding abortion has concerned a method popularly referred to as "partial-birth abortions." These procedures are referred to by doctors as dilation and extraction, or "D&X," and involve partially delivering the fetus before performing an abortion.[149] This procedure is often used in later-term abortions, as some physicians see it as safer to the mother.[150]

In the 2000 case *Stenberg v Carhart* the court invalidated a Nebraska statute that banned partial birth abortions in all cases except to save the life of the mother. The statute was challenged by Dr. Carhart, an abortion practitioner in Nebraska who argued that the D&X

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[147] *Ibid*., at p. 900.
[148] *Ibid*., at p. 871.
[149] *Stenberg* v. Carhart, 530 U.S. 914, at p. 915 (2000)
[150] *Ibid.*

procedure was often the safest procedure for protecting the health of the woman.[151]

The legal question at issue in this case was whether a statute that banned D&X abortions pre-viability without an exception for maternal health conflicted with the "undue burden" prohibition outlined in Planned Parenthood v. Casey.[152] In a 5-4 decision the court concluded that, while the public may be put off by the concept of a fetus potentially being delivered before being aborted,[153] the statute was unduly burdensome to women since it did not provide an exception for the health of the pregnant woman,[154] as required by the Casey decision.[155] The Court also deemed the definition of "partial-birth abortion" too vague. [156]

In reaction to this, Congress passed the Partial-Birth Abortion Act of 2003, which prohibited any physician from using performing partial-birth methods of abortion, including the D&X procedure in addition to the dilation and evacuation, or D&E, procedure. The law held that "Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both." [157] It defines abortion as an abortion procedure in which, "the entire fetal head … or ... any part of the fetal trunk past the navel is outside the body of the mother." [158] The act cited common morality as its inspiration, noting, "A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion... is a gruesome

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[151] *Ibid.*
[152] *Ibid.,* at p. 921.
[153] *Ibid.,* at p. 920.
[154] *Ibid.,* at p. 921.
[155] *Planned Parenthood v. Casey*, 505 U.S. 833, at p. 879 (1992).
[156] *Stenberg* v. Carhart, 530 U.S. 914, at p. 914 (2000).
[157] "The *Partial-Birth Abortion* Ban *Act of 2003"* (Pub.L. 108–105, November 5, 2003), 117 *United States Statutes at Large*, p. 1201, 18 U.S.C. § 1531.
[158] *Ibid.*

and inhumane procedure that is never medically necessary and should be prohibited." [159] The statute makes an exception in cases where the procedure may be used to save the life of the mother, but does not have an exception to preserve health.

This statute was challenged in the 2007 case *Gonzales v. Carhart*[160] after three District courts and three Circuit courts deemed the law unconstitutional, most noting little evidence to distinguish this case from the controlling decision in *Stenberg*. The legal question at issue in this case was whether the statute was distinct enough from the one at issue in *Stenberg* as to not place an undue burden on the woman.

In a close 5-4 decision, the Court ruled that the statute was constitutional. The majority held that the Act was distinct from *Stenberg* since "partial-birth abortion" was clearly defined, and noted that this decision did not necessarily reverse *Stenberg*. They also noted Congressional findings that the procedures restricted may not be medically necessary.[161] The Court also held that the Act was in line with *Casey* reasoning, as it upheld the state interest of protecting fetal life while not placing an undue burden on the pregnant woman.[162]

Justice Ginsberg's dissent, joined by Justices Breyer, Souter, and Stevens, noted alarm at the disregard she deemed the majority was showing towards *Casey* and *Stenberg*, particularly in light of the lack of health exception in the Act.[163]

This decision shows a shift from recent abortion reasoning. Notably, between the *Stenberg* and *Gonzalez* decisions Justice O'Conner left the court and was replaced by Justice Alito, who

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[159] *Ibid.*
[160] *Gonzales v. Carhart*, 550 U.S. 124 (2007).
[161] *Ibid*.
[162] *Ibid*.
[163] *Ibid*.

then became the swing vote in *Gonzalez*.[164] While Congress passed the Partial-Birth Abortion Act after testimony that the procedure may not be necessary to save the life or health of the mother, the Act itself cited morality and medical advances as its main motivation. However, as determined by Casey, it is not the place of the court to judge morality, but rather to interpret law in light of the Constitution.[165] While this case did not overturn abortion cases of the past it did imply a shift towards more morality-focused decisions by the Court.

Unborn Victims of Violence Act of 2004

Another recent shift in abortion law has been a shift towards recognizing fetuses as legal victims of crimes. Prior to 2004, under federal law fetuses were not treated like separate victims when hurt during commission of a crime, and if a fetus was killed through commission of a crime it was not recognized as a homicide.[166] The Unborn Victims of Violence Act of 2004 recognized a child in utero, defined as "'a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb," as a unique legal victim.[167] It is important to note that this Act carves out an exception for abortion and does not technically grant fetuses legal personhood, it was hailed as a major win for the personhood and pro-life movements, and perhaps even a step towards a federal definition of fetal personhood.[168]

Critics of this law noted that the fetus could not be protected in such a way because *Roe v.*

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[164] Biskupic, Joan. "The Alito/O'Connor Switch." *Pepperdine Law Review* 35.5 (2008): 495.
[165] *Planned Parenthood v. Casey*, 505 U.S. 833, at p. 850 (1992).
[166] "Unborn Victims of Violence Act" (Public Law 108-212, 1 April 2004), 118 *United States Statutes at Large*, pp. 568-570.
[167] *Ibid.*
[168] "Constitutional Challenges to State Unborn Victims Laws." *Constitutional Challenges to State Unborn Victims Laws*. National Right to Life, n.d. Web.

Wade specifically noted that the fetus is not a person as defined in the Fourteenth Amendment.[169] Of course, *Webster* examined a similar definition of fetal personhood and consequently determined that such as law was not unconstitutional as long as it did not conflict with a woman's right to access an abortion.[170]

While this law does not on its face create fetal personhood, it does raise questions as to how we can treat a fetus as a person under certain aspects of the law, such as when it is the victim of a violent crime, but not under other aspects, notably abortion.

VIII. Legal Question Discussion

Upon investigation of relevant Supreme Court jurisprudence and history, it is clear that the Sanctity of Human Life Act would conflict with Supreme Court precedent, which has determined that there is no constitutional basis for defining a fetus as a person. As discussed in *Roe v. Wade*, if a fetus is determined to be a person the right to an abortion cannot exist, as the Due Process Clause that protects a woman's liberty to have an abortion would then also protect a fetus's right to life.[171] Under the Equal Protection Clause of the Fourteenth Amendment, the rights of the fetus would need to be protected equally to the rights of the pregnant women. However, time after time the Court has determined that a woman has a constitutionally protected right to access and obtain an abortion pre-viability as both a right of Due Process and reproductive privacy as found in the Bill of Rights' zones of privacy. If personhood were defined

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[169] *Roe v. Wade*, 410 U.S. 113 (1973).
[170] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
[171] *Roe v. Wade*, 410 U.S. 113 (1973).

to include a fetus that definition would conflict with a woman's constitutional right to terminate a pregnancy pre-viability. Thus, the Sanctity of Human Life act must be ruled unconstitutional.

A statute cannot overturn a Supreme Court decision, as the Constitution is set up to allow for checks and balances between branches of government so that Congress can not simply create a new law to overrule a Supreme Court case that it does not like. While it may seem like the Partial-Birth Abortion Act did just that, the Supreme Court was given a chance to rule on this Act and determined that it was distinct from previous abortion cases and did not cause an undue burden on the pregnant woman. Clearly, a prohibition of all abortions would conflict with decades of Supreme Court cases detailing where abortion rights are found in the Constitution.

Furthermore, it should be noted that state laws cannot conflict with federal laws under the Supremacy Clause of the US Constitution. This means that not only can the federal government and states not pass unconstitutional laws, but also a state may not pass a law that directly conflicts with federal law. In these cases, federal law must win out.[172]

Of course, laws do change over time, and the Court does occasionally overturn or reinterpret Constitutional rights. For this law to overturn *Roe* and other abortion cases, it would need to be enacted and withstand challenge in the Supreme Court. If it withstood challenge, meaning the Supreme court found it Constitutional, they would effectively be overturning all previous abortion cases and jurisprudence, essentially saying that there is no right to reproductive privacy in the Constitution, nor does the Due Process Clause guarantee women a right to choose to terminate their pregnancies pre-viability. On a larger scale, this decision would redefine what privacy meant as a Constitutional right, and what liberty rights Due Process protected. It would also raise even more questions about Due Process and Equal Protection in enforcement.

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[172] U.S. Const., Art. VI, § 2.

However, the Supreme Court rarely ever overturns its own previous decisions and is much more likely to limit them while also upholding them.[173] This is partly because of the principle of stare decisis, but for the most part the reason for this is that the Supreme Court's purpose is to interpret the Constitution which, save for Amendments, is unchanging and thus continues to guarantee any rights it once did. Based on the continually upheld ideas that there is no constitutional bases for defining a fetus as a person but there is a constitutional basis for protecting the right of a woman to have an abortion, it is extremely unlikely the Supreme Court would suddenly reverse this interpretation of the Constitution to find that a fetus is a person and abortion is not a right found in the Constitution.

VIII. Issues and Effects of Potential Passage of H.R. 212

As previously stated, it is very unlikely that this Act would withstand a test of constitutionality in the Supreme Court. However, if the Supreme Court did decide that the Constitution allows for fetuses and embryos to be defined as people and granted full rights granted to those who have been born, many issues are likely to arise as a result.

First of all, recall that *Roe v. Wade* examined the issue of fetal personhood. Although the Court rejected claims that the fetus was a person under the Constitution, they noted that if it ever were to be defined as such the right to an abortion would clearly not exist, as the fetus's right to life would specifically be protected by the Fourteenth Amendment Due Process Clause which states "[N]or shall any State deprive any person of life, liberty, or property, without due process

[173] Greenhouse, Linda. "Supreme Court Memo; Precedents Begin Falling for Roberts Court." *The New York Times*. The New York Times, 21 June 2007. Web.

of law." [174] [175] In its discussion of fetal personhood, the majority decision in *Roe* reasoned, "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument." [176]

The first issue that would arise is the issue of Equal Protection as applied to both the pregnant woman and her unborn fetus. The Equal Protection Clause prevents states and the federal government from "deny(ing) to any person within its jurisdiction the equal protection of the laws." [177] If the fetus is defined as a person, then the lives of the fetus and mother are clearly intertwined and the government will have the responsibility to protect them both equally. So, how does one balance the rights of the mother and child if the mother's health or life is in jeopardy? If there is a medical procedure that must be performed to save the mother but might terminate a pregnancy, how can one protect both the mother and child equally, as this would define them both as persons protected under the Constitution? Similarly, there is no exception in cases of rape or incest. The burden of an unwanted pregnancy, as noted in Casey,[178] is undoubtedly greater when the pregnancy is the result of rape or incest. What protections can the state offer the mother who has been impregnated through the commission of a violent crime and does not wish to carry the fetus to term, but is not allowed to terminate her pregnancy? Furthermore, there is no exception for if the fetus has profound birth defects, which may cause health complications or even death for the fetus or the mother and, if not, lead to a very low

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[174] U.S. Const., amend. XIV, § 1.
[175] The 5th Amendment, U.S. Const., amend. XV, also contains a Due Process Clause which reads, "[N]or shall any person…be deprived of life, liberty, or property, without due process of law…"
[176] *Roe v. Wade*, 410 U.S. 113, at pp. 156-7 (1973).
[177] U.S. Const., amend. XIV, § 1.
[178] *Planned Parenthood v. Casey*, 505 U.S. 833, at p. 582 (1992).

quality of life for the fetus and mother or premature death for the fetus after birth? [179] How can the state protect both the lives of the fetus and mother while ensuring both are not deprived of liberty and equal protection?

The Sanctity of Human Life Act defines life as beginning at fertilization.[180] As such, personhood is not only defined as an implanted embryo or fetus, but as a fertilized embryo in any form. This gives rise to a host of other concerns about the rights of embryos and how the government may protect them. Some forms of birth control act by preventing the implantation of the embryo on the uterine wall, and thus preventing pregnancy.[181] However, if the embryo is defined as a person then these types of birth control may be seen as preventing a person from reaching development, and effectively ending the life of the embryo. Would the Sanctity of Human Life Act ban forms of birth control that prevent implantation of a fertilized embryo on the uterine wall? Other types of birth control may interfere with the act of fertilization and process of implementation even if they are not designed to prevent implantation.[182] Could these types of birth control also be banned? Recall that the right to contraceptive use is also considered a constitutional privacy right under cases such as *Griswold* and *Eisenstadt*. This right would undoubtedly conflict with the embryo's right to life if it were defined as a person.

The process of in vitro fertilization, or IVF, may also conflict with an embryonic right to life. This process involved the fertilization of an embryo outside of the womb, which is later

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[179] "National Center on Birth Defects and Developmental Disabilities." Centers for Disease Control and Prevention, 22 Apr. 2013. Web.
[180] Broun, Paul (GA). "Sanctity of Human Life Act of 2013." Congressional Record 159:1 (January 3, 2013) p. H33. Available from: LexisNexis® Congressional
[181] "IUDs Work as Emergency Contraceptive: Review." *Your Source for Reliable Health Information*. U.S. Department of Health and Human Services, n.d. Web.
[182] "Birth Control Methods Fact Sheet." *Womenshealth.gov*. U.S. Department of Health and Human Services, 21 Nov. 2011. Web.

implanted in the womb in the hope of achieving implantation and pregnancy.[183] However, these procedures have very high failure rated, and many embryos do not attach and thus do not develop.[184] Even more embryos are never implanted after fertilization and may be stored or destroyed.[185] Meaning, during the IVF process many embryos that are fertilized do not develop into fetuses. If embryos are defined as people, if is clear that they could not be needlessly destroyed as their right to life would be guaranteed. Could IVF procedures be banned or limited due to high failure rates, which under this definition of personhood would mean the death of many embryos? Likely, performing a procedure which is more likely to destroy an embryo than allow it to form into a human being will be considered failing to protect the embryo's Due Process rights to life and liberty, and may be banned in order to protect these rights.

Furthermore, this definition of personhood would invite questions of who has the rights to non-implanted embryos and who has the responsibility to protect them. As discussed, many fertilized embryos in procedures such as IVF are never implanted and thus never develop. Would the parents, or sperm and egg donors, have any right to guardianship of a non-implanted embryo? Would non-implanted embryos become wards of the state? Who could act to make legal decisions for the embryos as people protected under the Constitution who clearly cannot speak for themselves? Would destroying or damaging embryos be considered murder or manslaughter?

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[183] Storck, Susan. "In Vitro Fertilization (IVF): MedlinePlus Medical Encyclopedia." *U.S National Library of Medicine*. U.S. Department of Health and Human Services, National Institutes of Health, 22 Mar. 2013. Web.

[184]Deonandan,, Raywat, M. Karen Campbell, Truls Østbye,, and Ian Tummon. "Toward a More Meaningful In Vitro Fertilization Success Rate." J Assist Reprod Genet. 2000 October; 17(9): 498–503

[185] Storck, Susan. "In Vitro Fertilization (IVF): MedlinePlus Medical Encyclopedia." *U.S National Library of Medicine*. U.S. Department of Health and Human Services, National Institutes of Health, 22 Mar. 2013. Web.

Just as destroying embryos may be considered murder or manslaughter if the embryos are defined as people with protected constitutional rights, damaging or killing a fetus or embryo at any stage of development would have to be considered a unique crime. Although the Unborn Victims of Violence Act allows for fetuses to be seen as unique victims under law, if they are officially defined as people then they must receive equal protection under the laws, including equal protection as victims of a crime. Under this analysis, destroying embryos must be considered murder. Furthermore, miscarriages deemed by the court to be caused by actions of the mother may be classified as murder or manslaughter. Abortions would likely be deemed murder, as it is purposefully ending what would be defined as a human life. What rights would a pregnant woman have over her body if the fetus she is carrying is considered a person and she is liable if she harms or kills it?

Another issue the Sanctity of Human Life Act may open is the issue of when citizenship begins. The Fourteenth Amendment defines citizens, stating, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[186] The Amendment distinguishes between persons and citizens, and affords each unique rights. [187] If the fetus is seen as a person under the Constitution, including the Fourteenth Amendment, would this make a fetus conceived in the United States of conceived by U.S. citizens to be itself a citizen, or would birth or naturalization be a requirement for citizenship?

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[186] U.S. Const., amend. XIV, § 1.
[187] Berg, Jessica. "Selected Works of Jessica Berg." *"Of Elephants and Embryos: A Proposed Framework for Legal Personhood" by Jessica Berg*. N.p., 17 Dec. 2007 at p. 373.

Although most other Constitutional Amendments and provisions do not have pre-natal applicability,[188] if this law is passed the state must protect all constitutional rights of embryos and fetuses before birth. This includes all of the guarantees of the Bill of Rights. This law opens the question of what constitutional rights would apply to fetuses and how the government can enforce these rights in order to protect persons before birth.

One final consideration may involve for the state can protect a person that they do not know exists. If a pregnancy is terminated in its earliest stages, whether by accident or intentionally, the state will likely not know and thus has not means to protect the fetus or embryo and prosecute those who harm it. At the earliest stages of pregnancy the mother herself does not know that she is pregnant. Can the woman be liable for fetal damages at this stage? How can the state protect a fetus before anyone knows it exists?

Undoubtedly, if the Sanctity of Human Life Act is passed it will not only conflict with constitutional law but also give rise to a host of other difficult issues involved with granting constitutional rights and protections to embryos. If passed, this legislation would need to be clarified and specified, and new procedures would need to be put in place to enforce it.

X. Conclusion

The Sanctity of Human Life Act is inconsistent with Constitutional interpretations of privacy, Due Process, and personhood. If upheld, this law would conflict with decades of Supreme Court precedent and necessitate the reinterpretation of Constitutional frameworks including privacy, Equal Protection, and Due process.

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[188] *Roe v. Wade*, 410 U.S. 113 (1973)

As Supreme Court interpretation is constantly changing and evolving, it is not impossible that they may one day they may uphold a law that conflicts with all previous thinking and reasoning and has dramatic effects on enforcement and interpretation of constitutional rights. However, it is a dangerous path for the Supreme Court to begin to base its legal decisions on morality or a general ethical consensus. Time and time again, the Court has confirmed that it is not its place to make moral decisions or legislate the general morality, but rather to interpret the law in light of the Constitution. Save for Amendments, the Constitution does not change, only interpretation of it may. However, interpreting the Constitution based on a personal or general definition of morality or social goal is not in line with the principles of the Constitution. Regardless of when someone thinks life begins as a moral, religious, ethical, or even medical question, the Supreme Court has determined that the Constitution does not protect the fetus as a person, but does protect the right to terminate a pregnancy. Congress cannot change the Constitution with a law, no matter how morality, religiously, or ethically problematic they may believe a right to be.