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Abortion: Taking the Choice (or lack thereof) Away From the States

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Abortion: Taking the Choice (or lack thereof) Away From the States

Carlye Goldstein
Gender and the Law AWR
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I. Introduction

Throughout history abortion has been a divisive and controversial issue. Since the Supreme Court seized abortion jurisprudence in *Roe v. Wade*, the case that held that a woman's right to an abortion fell within the Fourteenth Amendment's right to privacy, pro-choice and pro-life proponents have fought vigorously for what they believe to be right.¹ As a result, states have struggled to take back some of that regulatory power. The Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which reaffirmed *Roe* but created a new standard allowing further regulation of abortions, opened the floodgates to state over-regulation, ranging from regulating the doctor, the facility, the procedure, and the woman herself.²

In 1989 members of Congress determined that enough was enough, and responded by creating the Freedom of Choice Act in order to protect the reproductive rights of women.³ Their intent was to codify *Roe* and reduce government interference with a woman's right to choose. The Freedom of Choice Act would have had the effect of eradicating decades of state and federal legislation and Court precedent. Unfortunately, the bill never got off the ground.

Without the Freedom of Choice Act there is a gaping hole in our federal legislation that needs to be occupied by a bipartisan bill that would protect women's reproductive rights. For too long states have had a stranglehold on abortion law, it is time that women take back their rights from the state by asking Congress to enact legislation that will protect their interests in liberty, privacy, and equality.

¹ *Roe v. Wade*, 410 U.S. 113, 142, 93 S. Ct. 705, 721, 35 L. Ed. 2d 147 (1973).

² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

³ *See* The Freedom of Choice Act, H.R. 3700, 101st Cong. (1989); S. 1912, 101st Cong. (1989).

Part II of this paper will discuss the historical background of abortion jurisprudence and its evolution beginning with *Roe v. Wade* and ending with *Gonzalez v. Carhart*. It will discuss the strong protections the *Roe* Court provided to women and the process through which the Court slowly chipped away at those protections over the last four decades. Part II will conclude that, with the Court's holding in *Gonzalez* the floodgates had been opened, and legislators nationwide have debated, and largely enacted regulatory measures that have strongly curtailed a woman's ability to procure an abortion in many jurisdictions.

Part III will present examples of the overbreadth of legislation that has resulted from the Court's decision to move away from the vigorous protections of strict scrutiny and into the realm of the undue burden test. Specifically, it will address the most common forms of abortion regulation and the dangerous effects they can have on women seeking abortions. Part III will focus on the restrictive and coercive measures used in some states to drastically reduce the number of abortions provided while not completely eliminating them, under a strategy commonly referred to as the "incrementalist approach." This section will contend that these laws do not exist for the purpose of protecting the pregnant woman and the fetus, as many of their proponents assert, but to propagate political and religious ideology to the detriment of a woman's right to privacy.

Part IV will discuss the Freedom of Choice Act, a piece of federal legislation that could have ended the abortion debate once and for all. However, since the Freedom of Choice Act was never enacted, this paper proposes an alternative solution that might bring both sides together, in order to end the continual onslaught of abortion legislation proliferated by the states. This section argues that this country, politically, religiously, and mentally, is ready to make concessions on

both sides of argument and proposes a model federal statute that would take abortion legislation out of the hands of the state.

Ultimately, this paper concludes that the states have abused their autonomy and drastically reduced women's constitutional right to privacy, resulting in the need for a federal law outlining a woman's right to obtain an abortion without state interference.

II. Historical Background

This part describes the evolution of abortion jurisprudence and how it has shaped the legal landscape of abortion law as we know it today. While the United States initially derived its abortion law from English common law, the states quickly began developing their own laws and by the early 1970's the Supreme Court, in *Roe v. Wade*, was ready to weigh in on the subject. Abortion jurisprudence has changed drastically since the decision *Roe* and this section tracks those changes and the effects they have had.

Historically, the legal status of abortion took shape under English common law, whereby abortions performed prior to "quickening"⁴ were legal.⁵ This principle continued to prevail until the mid-1800s when Connecticut created a law targeting apothecaries who sold poison as a method of abortion.⁶ New York followed, becoming the first state to enact legislation making abortion itself a criminal offense, barring destruction of unquickened and quick fetuses, when performed at any point during the pregnancy, unless necessary to preserve the life of the mother.⁷

The American Medical Association further contributed to the states criminalization of abortion when it adopted resolutions protesting "against such unwarrantable destruction of

⁴ Quickening is defined as the first fetal movements perceptible to the mother. Mark S. Scott, *Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use*, 1 MICH.L. & POL'Y REV. 199 (1996).

⁵ *Dorland's Illustrated Medical Dictionary* 1261 (24th ed. 1965).

⁶ Conn. Stat. tit. 20, § 14 (1821).

⁷ N.Y. Rev. Stat., pt. 4, c. 1 tit. 2, Art. 1, § 9, p. 661, and tit. 6, § 21, p. 694 (1829).

human life” in 1857.⁸ This created a domino effect and by the turn of the century almost every state had a similar or more restrictive law in place.⁹ State abortion laws continued to be enacted and by the early 1960’s all states prohibited abortions to some degree, however only Pennsylvania prohibited abortions under any circumstance. Forty-four states permitted abortions only when then woman’s life would be jeopardized if the pregnancy were carried to term.¹⁰ Four states and the District of Columbia permitted abortions if the woman’s life or physical health were in jeopardy, and Mississippi was the only state that permitted abortions in the case of rape.¹¹

Despite these laws prohibiting abortions, absent exceptional circumstances, women continued to obtain abortions.¹² Women attempted to perform abortions on themselves or sought out the assistance of unlicensed practitioners or skilled physicians if they had the means.¹³ As a result of the laws enacted by many states, and recognition that illegal abortions were continuing to take place and were often dangerous¹⁴, the American Law Institute (ALI) called for national change in its Model Penal Code (MPC) of 1962. While the ALI proposed that an abortion should be considered a felony when “unjustified,” it added that “[a] licensed physician is justified in terminating a pregnancy if he believes there is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child

⁸ Roe v. Wade, 410 U.S. 113, 142, 93 S. Ct. 705, 721, 35 L. Ed. 2d 147 (1973).

⁹ See Quay, Justifiable Abortion-Medical and Legal Foundations, (pt. 2), 49 GEO.L.J. 395, 406-422 (1961), a compilation of abortion statutes prior to 1960.

¹⁰ See Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?*, THE GUTTMACHER REPORT ON PUB. POL’Y, Mar. 2003, available at <http://www.guttmacher.org/pubs/tgr/06/1/gr060108.pdf>.

¹¹ See Benson Gold, *supra* note 10, at 9.

¹² Between 1950 and 1960 it is estimated that 200,000 to 1.2 million illegal abortions were performed. See Lynn M. Paltrow, Executive Director, National Advocates for Pregnant Women, Testimony Before the Task Force: Sept. 22, 2005, http://www.advocatesforpregnantwomen.org/articles/so_dak_tf.htm.

¹³ See Leslie Reagan, *Victim or Accomplice? :Crime, Medical Malpractice, and the Construction of the Aborting Women in American Case Law, 1860s-1970*, 10 COLUM. J. GENDER & L. 311, 318 (2001).

¹⁴ Prior to the legalization of abortion, illegal abortions were the cause of approximately 5,000 deaths per year. See Richard Schwarz, SEPTIC ABORTION (1968) (citing to Frederick J. Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* (1936) which discusses the mathematical formula used to determine that between 8,000 – 10,000 women died each year as a result of illegal abortions).

would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse."¹⁵ Since nearly all states prohibited abortions, aside from when the woman's health was at risk, the MPC attempted to broaden what was considered justified by making exceptions not only for physical and mental health of the mother, but also for birth defects, and pregnancy resulting from rape and incest.

States began to model their abortion laws after the MPC, beginning with Colorado's liberalizing law in 1967.¹⁶ Other states followed Colorado's lead and by 1972, thirteen states had statutes that mirrored the MPC. The ALI also influenced New York, Washington, Hawaii, and Alaska, which repealed their anti-abortion laws entirely. By the time the Supreme Court decided *Roe* in 1973, all but five states had introduced abortion reform legislation.¹⁷

A. Roe v. Wade

Over the past forty-two years the Supreme Court has been the leading force in shaping abortion policy by handing down decision after decision beginning with *Roe v. Wade*¹⁸, while effectively usurping the issue from the states.

Roe v. Wade was the first case to address a woman's right to choose an abortion prior to fetal viability under the Due Process Clause of the Fourteenth Amendment.¹⁹ In 1973, in *Roe* the Court addressed the constitutionality of a Texas statute that criminalized abortions except with respect to abortions procured for the purpose of saving the life of the mother.²⁰ The Court

¹⁵ MODEL PENAL CODE: Offenses Against the Family § 230.3 (Proposed Official Draft 1962).

¹⁶ See Claire Martin, *Colorado Abortion Rights Got Start 40 Years Ago Today*, THE DENVER POST, available at http://www.denverpost.com/ci_5743173.

¹⁷ Benson Gold, *supra* note 10, at 9.

¹⁸ See 410 U.S. 113 (1973).

¹⁹ *Roe v. Wade*, 410 U.S. 113, 170, 93 S. Ct. 705, 735, 35 L. Ed. 2d 147 (1973)

²⁰ *Id.* at 118.

simultaneously addressed the constitutionality of a Georgia statute that also criminalized abortion in *Roe's* companion case, *Doe v. Bolton*.²¹

The pregnant plaintiff Jane Roe sought an order declaring that the Texas statute prohibiting her from procuring an abortion unless her life was in danger violated the Due Process Clause.²² She further sought an injunction restraining Texas from enforcing the statute.²³ The trial court found that the statute violated the Ninth through the Fourteenth Amendments²⁴ and concluded all individuals have a fundamental right to choose where to have children. While the District Court found that the Texas statute was unconstitutionally vague and thus facially void, it declined to issue an injunction, as the court felt abstention²⁵ was warranted. The plaintiffs Roe and Doe appealed to the Supreme Court.

The Court reviewed the meaning of the word “person” as it is construed in the Constitution, as the appellees argued that a states desire to recognize prenatal life constituted a compelling state interest.²⁶ The Court ruled that “person” only applies to individuals postnatally and has no application prenatally, as the word as contained in the Fourteenth Amendment does not encompass the unborn.²⁷ The Court acknowledged that if personhood were established prenatally, the case for legalized abortion collapses.²⁸ However, since the Court ruled that the

²¹ *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 742, 35 L. Ed. 2d 201 (1973).

²² *Roe*, 410 U.S. at 120.

²³ *Id.*

²⁴ The Ninth Amendment states that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const. amend. IX. The Fourteenth Amendment states in relevant part that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.

²⁵ The doctrine of abstention is a judge-made doctrine first contrived in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941), whereby federal courts can avoid needless conflict with state courts by choosing not to hear a case or a portion thereof where there exists unresolved questions of both state law and the constitution.

²⁶ *Roe*, 410 U.S. at 156.

²⁷ *Id.* at 158.

²⁸ *Id.* at 157.

unborn child does not qualify as a person under the Fourteenth Amendment, he therefore has no rights.²⁹ Therefore, the only right that remains would be the mother's right to privacy.³⁰

The Supreme Court determined that while there exists a definitive right of privacy under the Fourteenth Amendment, that right is not absolute.³¹ At some point during the pregnancy a state's interests may become sufficiently compelling to sustain regulation, specifically, when necessary to safeguard health, maintain medical standards, and protect potential life.³²

Although the Court has generally analyzed fundamental rights through the lens of strict scrutiny³³, in *Roe*, the Court created a three-tiered framework, whereby as the pregnancy progressed state interest grew and increased regulation was permitted. The Court established that after viability, approximately the end of the first trimester, the state might then regulate the abortion to the extent that the regulation "reasonably relates" to the preservation of the life and health of the mother.³⁴ The health of the mother encompasses her physical well being, as well as her psychological well-being.³⁵ Accordingly in *Doe v. Bolton*, the Court concluded that the 'medical judgment may be exercised in the light of all factors - physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient.'³⁶ These factors, consequently, became the criteria with which abortions became permissibly sanctioned.

In sum, the Court in *Roe* held that the right to privacy includes a woman's right to terminate a pregnancy prior to fetal viability. The Court did not follow the approach generally applied when a fundamental right is at issue and instead created a three-tiered legal framework,

²⁹ *Id.* at 158.

³⁰ *Id.* at 159.

³¹ *Id.* at 154.

³² *Id.* at 154.

³³ Strict scrutiny is a mode of judicial review first articulated in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), whereby there exists a compelling state interest behind the challenged policy, and that law is narrowly tailored to achieve its result.

³⁴ *Id.* at 164.

³⁵ *Id.* at 153.

³⁶ 410 U.S. at 192.

based on the nine months of pregnancy, which gave the state greater interest and regulatory freedom in each successive tier.

B. Planned Parenthood of Southeastern Pennsylvania v. Casey

It was not until many years later that the Court once again argued the veracity of *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³⁷ Another divided court, comprised of plurality Justices Kennedy, O'Connor, and Souter, authored an opinion reaffirming the essential holding in *Roe v. Wade*, with Justices Blackmun and Stevens concurring. However, the three pluralists were joined by the Court's conservative wing of Justices – Rehnquist, Scalia, White and Thomas – in upholding all of the Pennsylvania's statutes requirements, aside from the spousal notification provision.

At issue in *Casey* were five provisions of a wide-ranging Pennsylvania abortion law that included an informed consent requirement, a twenty-four hour waiting period for women who sought abortions, as well as a provision that married women must notify their husbands prior to undergoing an abortion.³⁸ Plaintiffs, five abortion clinics and a physician representing himself as well as a class of physicians who performed abortions, brought suit challenging the statutes constitutionality and seeking declaratory and injunctive relief.³⁹

The trial court found every provision of the statute at issue unconstitutional and granted the injunction.⁴⁰ However, the Court of Appeals affirmed in part and reversed in part, holding that all provisions, aside from the spousal notification provision, were constitutional.⁴¹ The plaintiffs petitioned the Court for review and the Supreme Court granted certiorari.⁴²

³⁷ See 505 U.S. 833 (1992).

³⁸ *Id.*

³⁹ *Id.* at 845.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² A losing party has the ability to petition the Supreme Court to review the decision of a lower court by way of a petition for Writ of Certiorari. U.S. Sup. Ct. Rule 10, 28 U.S.C.A. (West 2015).

The plurality, Justices Kennedy, O'Connor, and Souter, found that *Roe's* essential holding, the right of a woman to have an abortion prior to viability and the state's ability to regulate after the point of viability, should remain in place.⁴³ While the plurality admitted that *Roe's* ruling has "engendered opposition," they found that it is by no means unworkable.⁴⁴ However, the plurality went on to reject *Roe's* rigid trimester framework in favor of giving states more discretion to restrict access to abortions as well as extending protections for fetal life, as long as those regulations did not create an "undue burden" on abortion rights pre-viability.⁴⁵ The Justices defined an "undue burden" as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁴⁶ Therefore, it is constitutional for a state to take measures to ensure that a woman's free choice to obtain an abortion is informed, as long it does not hinder that right.⁴⁷

The majority further expounded, that after viability the state could "proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."⁴⁸ Based on this consideration, the plurality upheld the majority of Pennsylvania's statute, including the requirements for informed consent,⁴⁹ a twenty-four hour waiting period,⁵⁰ parental consent for a minor,⁵¹ and record keeping and reporting to the state.⁵² The only provision of the Pennsylvania law that the plurality found troublesome, and deemed

⁴³ *Id.* at 846.

⁴⁴ *Id.* at 855.

⁴⁵ *Id.* at 872-76.

⁴⁶ *Id.* at 877.

⁴⁷ *Id.* at 877-79.

⁴⁸ *Id.* at 879.

⁴⁹ *Id.* at 873.

⁵⁰ *Id.* at 885-87.

⁵¹ *Id.* at 899.

⁵² *Id.* at 900-01.

unconstitutional for causing an undue burden on the right to abortion prior to viability, was the spousal notification provision.⁵³

Generally speaking, the plurality acted as peacemaker in many ways by accommodating both sides of the *Roe* debate. Their opinion allowed pro-life activists more room to regulate abortion while still maintaining and some ways further defining a woman's freedom to choose. However, the opinion also succeeded in creating more questions by stepping away from strict scrutiny and into the realm of the "undue burden" test.

While many abortion opponents believed that *Casey* would finally be the case to overturn *Roe*, its reaffirmation only served to solidify its legal precedence. As a result, state politicians who opposed abortions began to escalate their assault against *Roe* and *Casey* by enacting laws that dealt with how abortions were performed instead of the general legality of abortions themselves.⁵⁴ By creating bans against partial birth abortions, politicians could legally side step *Casey*, as no undue burden was placed on the right to abortion.⁵⁵

C. Gonzalez v. Carhart

Following *Stenberg v. Carhart*⁵⁶, in which the Supreme Court held that a Nebraska statute banning partial birth abortions lacked the requisite exception for "preservation of the ... health of the mother,"⁵⁷ Congress passed the Partial-Birth Abortion Ban Act (2003) ("The Act")

⁵³ *Id.* at 898.

⁵⁴ Jeffrey A. Van Detta, *Constitutionalizing Roe, Casey and Carhart: A Legislative Due-Process Anti-Discrimination Principle That Gives Constitutional Content to the "Undue Burden" Standard of Review Applied to Abortion Control Legislation*, 10 S. CAL. REV. L. & WOMEN'S STUD. 211, 264 (2001).

⁵⁵ James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES IN L. & MED. 3 (1998)

⁵⁶ *See* 530 U.S. 914 (2000).

⁵⁷ *Id.* at 930-31. While the majority in *Stenberg* seemed to continue to toe the line between those in favor and those against abortion, they appeared hesitant to commit to the idea of fetal "life." (In notes the majority describes the abortion procedures in ways that could appear "clinically cold or callous" to some readers, not necessarily embracing the fetus as a life but being sympathetic to those that do). However, Justice Kennedy, dissenting, believed that "the life that the fetus embodies possesses a "sanctity" and "although there are those who will be "insensitive, even disdainful," to it, the fetus is nevertheless entitled to "dignity and respect."'" *See* Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1306 (2013). Justice Kennedy

to “proscribe a particular method of ending fetal life in the later stages of pregnancy.”⁵⁸ The Act chose not to accept the District Court’s factual findings and instead focused on the “moral, medical, and ethical consensus” that partial birth abortions were inhumane and never medically necessary, thereby prohibiting the procedure.⁵⁹

The plaintiffs, four physicians who performed second-trimester abortions, challenged the Act’s constitutionality as being void for vagueness and an undue burden on the rights of pregnant women seeking abortions.⁶⁰ The trial court granted a permanent injunction, which prohibited the Attorney General from enforcing the Act except under circumstance where there was no debate that the fetus was viable.⁶¹ The Court of Appeals affirmed the trial court and the Supreme Court granted certiorari.⁶²

Justice Kennedy, writing for the majority, upheld the federal ban finding that the respondents had not been able to demonstrate that the act was void for vagueness, or “that it imposed an undue burden on a woman’s right to abortion based on its overbreadth or lack of a health exception.”⁶³

The majority applied the standards found within *Casey*, even going as far as applying the dicta on viability⁶⁴, even though agreement had not been reached on that point.⁶⁵ Justice

would go on to convince four other Justices to take this point of view of “life” in *Gonzalez v. Carhart* (also known as *Carhart II*). See 550 U.S. 124 (2007).

⁵⁸ *Gonzales v. Carhart*, 550 U.S. 124, 124, 127 S. Ct. 1610, 1614, 167 L. Ed. 2d 480 (2007).

⁵⁹ *Id.* at 124.

⁶⁰ *Id.* at 133.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 168.

⁶⁴ The *Casey* opinion contained this summary: “It must be stated at the outset and with clarity that *Roe’s* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and

Kennedy, true to his *Stenberg* dissent⁶⁶, noted that the Act applied both previability and postviability because “by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.”⁶⁷ Despite the obvious conflict with *Roe* previability, the majority held that the statute was constitutional based on the notion that it did not place any undue burden on those abortions.⁶⁸

The majority spent a good portion of their opinion differentiating Nebraska’s unconstitutional statute from the federal ban.⁶⁹ Even though Justice Kennedy dissented in *Stenberg*, the majority did not overturn the court’s opinion, they managed to fit the federal ban within its parameters.⁷⁰ More importantly, the Court announced the death of the “physician veto,⁷¹” shifting the focus from woman’s physical health to their mental health, while entirely eliminating physician autonomy. Justice Kennedy focused his opinion on the state’s interest, specifically regarding the “grave decision” that woman faced when considering an abortion.⁷² The majority noted that “[it] is self-evident that a mother who comes to regret her choice to abort

we adhere to each.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992).

⁶⁵ *Id.* at 145.

⁶⁶ *See* footnote 57.

⁶⁷ *Id.* at 147.

⁶⁸ *Id.*

⁶⁹ *Id.* at 141-147, 149-156.

⁷⁰ The majority provided several examples throughout the opinion. (1) The majority noted that the federal ban used language that alleviated the issues found within the Nebraska statute, specifically when it came to vagueness. (2) They further noted that the ban’s scienter requirement all but alleviated any vagueness as it narrowly tailored the prohibition. (3) Furthermore, the majority found that the ban assiduously worked to depart from the issues present in the Nebraska statute by adopting the phrase “delivers a living fetus,” as opposed to “delivering...an unborn child, or a substantial portion thereof. Thereby alleviating any confusion as to what procedure was specifically banned. (4) The identification of specific landmarks also differed from the Nebraska statute, as there could no longer be any confusion when it came to what was considered a “substantial portion” of the fetus. (5) Additionally, Congress also differentiated itself from the statute by including an “overt act” requirement.

⁷¹ “This veto can be globally defined as the placing of dispositive weight in our nation’s abortion jurisprudence on the autonomy and judgment of physicians who favor abortion rights, at the expense of undergoing the more difficult and deeper process of engaging issues of women’s liberty and equality vis-à-vis the nature of the unborn fetus and of abortion itself.” Peter M. Ladwein, *Discerning the Meaning of Gonzales v. Carhart: The End of the Physician Veto and the Resulting Change in Abortion Jurisprudence*, 83 NOTRE DAME L. REV. 1847 (2008).

⁷² *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

must struggle with grief more anguished and sorrow more profound when she learns, only after the event,” exactly how the procedure took place.⁷³

The Court abolished the one true exception safeguarding women’s health, the physician veto, in favor of the states interest in promoting fetal life.⁷⁴ Justice Ginsburg, dissenting, had some very harsh words for the majority. She noted from the outset that the *Casey* Court “stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect “the health of the woman.””⁷⁵ She further reiterated that the *Stenberg* Court continued with this line of thinking when holding the Nebraska partial-birth abortion statute unconstitutional.⁷⁶

Justice Ginsburg lambasted the *Gonzalez* Court for finding the ban constitutional in the wake of the American College of Obstetrics finding the procedure necessary and proper under certain circumstances.⁷⁷ Additionally, she derided the Court for relying on the congressional findings, which the District Court found fault with, for not carefully considering the evidence prior to reaching their conclusions.⁷⁸ She noted that several of the physicians who testified before Congress did not perform abortions at all and Congress put too much weight in their opinions, and not enough in the opinions of physicians with actual abortion experience.⁷⁹

Furthermore, the dissent averred that the federal ban “scarcely further[ed]” the state’s interest in “preserving and protecting fetal life” because the law focused on a method of abortion, thus not saving a “single fetus from destruction.”⁸⁰ The dissent continued its criticism of the majority for allowing “moral concerns” to override fundamental rights and “dishonor [the

⁷³ *Id.* at 160.

⁷⁴ *Id.* at 170-71 (Ginsburg, J., dissenting).

⁷⁵ *Id.* at 170 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992)).

⁷⁶ *Id.* at 170.

⁷⁷ *Id.*

⁷⁸ *Id.* at 175.

⁷⁹ *Id.*

⁸⁰ *Id.* at 181.

Court's] precedent.”⁸¹ Thus, concluding that the majority's own personal beliefs took priority over the health and autonomous choice women previously held, while reiterating long displaced notions about women's place in society.⁸²

In summation the Supreme Court, beginning with *Roe* took a very strong position with regards to a woman's right to an abortion, however, with each successive case the Court chipped away at those rights. The Court's decision in *Gonzalez* was viewed as a major triumph for defenders of fetal life and created ripples throughout the states, as one after another began restricting the rights of pregnant woman.

III. The Abortion Fallout

The anti-abortion rights movement, since the decision in *Roe v. Wade*, has taken an incrementalist approach to chipping away at the right to abortion. The incremental approach relies on “the cumulative effect of restrictions short of bans and extralegal pressures to restrict the provision of abortion services and create ‘abortion-free’ states without criminalization.”⁸³ The result of this strategy has been a literal explosion of state and federal restrictions on abortions, especially following the decision in *Gonzalez v. Carhart*.⁸⁴

This section will examine the different means utilized by the anti-abortion movement in an attempt to undermine *Roe* and its progeny in an effort to make obtaining an abortion as burdensome as possible for those who need them the most.

A. Personhood Statutes

⁸¹ *Id.* at 182.

⁸² *Id.* at 185.

⁸³ Linda J. Wharton & Kathryn Kolbert, *Preserving Roe v. Wade . . . When You Win Only Half the Loaf*, 24 STAN. L. & POL'Y REV. 143, 156 (2013) (quoting Dawn Johnsen, “TRAP” ing *Roe* in Indiana and a Common-Ground Alternative, 118 YALE L.J. 1356, 1360 (2009) (citing Memorandum from James Bopp, Jr. & Richard E. Coleson, on Pro-Life Strategy Issues (Aug. 7, 2007)).

⁸⁴ Wharton & Kolbert, *supra* note 83, at 156.

Personhood statutes aim to make all abortions illegal by establishing fertilized eggs as persons.⁸⁵ Given the rise in support for severe abortion measures⁸⁶, surprisingly recent ballot initiatives have failed at the state level, and thus far no personhood legislation has passed.⁸⁷

The idea of personhood statutes, while currently garnering attention, has been around since the time of *Roe*.⁸⁸ Following *Roe*, opponents of abortion tried tirelessly to amend the Constitution to include the Human Rights Amendment, without success.⁸⁹ Through the incremental approach, the movement for fetal personhood was revived, and since 2008 ballot initiatives have popped up across the country. This movement has been largely led by Keith Mason, president and founder of Personhood USA, a religious pro-life group.⁹⁰ Keith Mason and Personhood USA have assisted with personhood measures in many states, and several other states have taken it upon themselves to introduce legislation.⁹¹ In 2015 alone, personhood bills

⁸⁵ Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 76 (2013).

⁸⁶ Recently states including, Alabama, Arizona, Kansas, and Texas have imposed severe restrictions on a woman's ability to undergo an abortion. The governor of Arizona signed a bill on March 30, 2015, that requires physicians to inform women undergoing a drug-induced abortion that the abortion can be "reversed" mid-procedure, even though that statement is unsupported by medical evidence. 2015 Ariz. Legis. Serv. Ch. 87 (S.B. 1318). Last year Alabama enacted a law that requires minors who wish to have an abortion but do not have parental consent to undergo a trial and gives judges the discretion to appoint a guardian ad litem for the interests of the unborn child. Ala.Code § 26-21-4(j) (Westlaw). Kansas has become the first state to ban "dilation and evacuation" procedures, a common second-trimester method of performing abortions and considered one of the safest abortion procedures. Unborn Child Protection from Dismemberment Abortion Act of 2015, S.B. 95, Kan. Eighty-Sixth Legis. (2015). In 2013 Texas enacted sweeping abortion legislation, including banning abortions after 20 weeks, restrictions on medicinal abortions, and severe TRAP laws, which have had the effect of shuttering half of Texas' abortion clinics during that same year. Tex. Health & Safety Code § 171.044, § 171.063, and § 171.0031.

⁸⁷ See Laura Basset, *Colorado And North Dakota Voters Reject Fetal Personhood Measures*, THE HUFFINGTON POST, (Nov. 4, 2014) http://www.huffingtonpost.com/2014/11/04/personhood-colorado_n_6104120.html.

⁸⁸ Maya Manian, *supra* note 85, at 78.

⁸⁹ Glen A. Halva-Neubauer & Sara L. Zeigler, *Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement After Planned Parenthood v. Casey*, 22 FEMINIST FORMATIONS 101, 102-03 (2010).

⁹⁰ PERSONHOOD USA, <http://www.personhoodusa.com/about-us/leadership/> (last visited Mar. 18, 2015).

⁹¹ Alabama, Arkansas, California, Colorado, Florida, Georgia, Iowa, Kansas, Missouri, Mississippi, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Rhode Island, Virginia, Washington and Wisconsin. See Personhood' Legislation Dealt Another Blow, This Time in Iowa, RH Reality Check, <http://rhrealitycheck.org/article/2015/03/10/personhood-legislation-dealt-another-blow-time-iowa/> (last visited Mar. 18, 2015) (listing states and the status of their legislative initiatives). See also: Parents Against Personhood, Legislation, <http://parentsagainstpnh.com/legislation/> (last visited Mar. 18, 2015) (listing states who have initiated personhood bill/initiatives and the outcomes).

have been introduced in six states: Montana, Mississippi, New Hampshire, South Carolina, Virginia, and Washington.⁹²

Overwhelmingly, voters have rejected personhood legislation in every state in which it made the ballot. One commentator has argued that “the uniform failure in the push for zygote personhood appears rooted, at least in part, in reproductive rights advocates’ success in linking personhood proposals to health issues other than abortion for which the public has much more sympathy.”⁹³ In reality, it was not support for abortion, but the slew of unintended consequences to women’s health involving contraception, intro vitro fertilization, and general pregnancy care, that flow from personhood legislation that have seemed to spell its demise.⁹⁴ However, states continue to introduce personhood legislation in hopes of swaying their constituencies.

B. TRAP laws

Targeted Regulation of Abortion Providers, also known as “TRAP” laws, regulate clinics in order to restrict access to abortion.⁹⁵ Unlike personhood laws, anti-abortion proponents have had a lot of success implementing these statutes across the county.⁹⁶ While the laws differ from state to state, most requirements apply the states’ standards for an ambulatory surgical center to

⁹² See Personhood Bills and Ballot Initiatives, Resolve: The Nat’l Infertility Ass’n, <http://www.resolve.org/get-involved/personhood-bills-and-ballot-initiatives.html> (last visited Mar. 18, 2015) (listing states and the status of their legislative initiatives). See H.R. 1309, 2015 Leg., 130th Sess. (Miss. 2015); H.R. 425, 2015 Leg., 64th Sess. (Mont. 2015); H.R. 194, 164th Gen. Ct. Reg. Sess. (N.H. 2015); S. 129, 121st Gen. Assemb., Reg. Sess. (S.C. 2015); H.R. 1687, 2015 Leg., 64th Sess. (Wash. 2015).

⁹³ Maya Manian, *supra* note 85, at 86.

⁹⁴ Maya Manian, *supra* note 85, at 87-100.

⁹⁵ *State Policies in Brief: Targeted Regulation of Abortion Providers*, THE GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf (last visited Mar. 18, 2015). (24 states have laws or policies that regulate abortion providers and go beyond what is necessary to ensure patients’ safety; all apply to clinics that perform surgical abortion).

⁹⁶ See Ala. Admin. Code r. 420-5-1-.04 (2013); Ariz. Rev. Stat. § 36-449.03 (2012); Conn. Agencies Regs. § 19-13-D54 (2005); Fla. Stat. Ann. §§ 390.014(1) (2008); 210 Ill. Comp. Stat. Ann. § 5/2-5/6.6 (2012); Ind. Code Ann. § 16-34-2-4.5 (2014); Kan. Admin. Regs. §§ 28-34-127 (c)(1), 28-34-132(2011); 902 Ky. Admin. Regs. 20:360 (2015); La. Rev. Stat. Ann. §§ 40:2175.2-4 (2001); Mich. Comp. Laws Ann. § 333.20115(2013); Miss. Code Ann. § 41-75-1(f)(2012); Mo. Ann. Stat. § 188.080 (West 2005); N.C. Gen. Stat. Ann. § 14-45.1(a) (West 2013); Ohio Admin. Code § 3701-83-19(E) (2011); Okl. St. Ann. tit. 63 § 1-737 (West 1978); 35 Pa. Cons. Stat. Ann. § 448.806 (West 2014); R.I. Admin. Code 31-1-2.3.0 (West 2015); S.C. Code Ann. § 44-41-75 (1995); S.D. Codified Laws § 34-23A-51 (2015); Utah Code Ann. § 26-21-6.5 (West 2011); 12 Va. Admin. Code § 5-412-370 (2014).

abortion clinics, even though the procedures performed at a surgical center tend to be far more invasive and risky.⁹⁷ These laws also typically require clinics to maintain a relationship with a hospital, which doesn't concern the health and safety of the patients, but gives hospitals veto power over the very existence of the clinic.⁹⁸ Lastly, and most critical, some laws require abortion clinicians to have privileges at a local hospital, which has proven extremely difficult even impossible in some states, like Mississippi.⁹⁹

The public rationale in many states for having TRAP laws are the health and safety of the women visiting these clinics, however some states have been more candid, admitting the purpose of the law is to "protect the unborn."¹⁰⁰ These laws are having the effect anti-abortion proponents hoped they would, restricting access to abortions by setting an inordinately high standard for abortion clinics, thereby causing many to shutter their doors, leaving pregnant women with little in the way of alternatives.¹⁰¹

C. Compulsory Ultrasounds

While *Gonzalez v. Carhart* considered the way abortion procedures were performed, the Court still managed to address the issue of informed consent, though it wasn't necessarily the issue that it was in prior abortion cases.¹⁰² The majority in *Gonzalez* not only spoke to the issue

⁹⁷ The Guttmacher Institute, *supra* note 95. (22 states require facilities where abortion services are provided to meet standards intended for ambulatory surgical centers).

⁹⁸ *Id.* (7 states require each abortion facility to have an agreement with a local hospital in order to transfer patients in the event complications arise. (Including requirements on clinicians a total of 21 states require a provider to have a relationship with a hospital).

⁹⁹ *Id.* (14 states require abortion providers to have some affiliation with a local hospital. 5 states require that providers have admitting privileges. 9 states require providers to have either admitting privileges or an alternative arrangement, such as an agreement with another physician who has admitting privileges).

¹⁰⁰ Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics – And the Women They Serve – Pay the Price*, GUTTMACHER POLICY REVIEW (Spring 2013), <http://www.guttmacher.org/pubs/gpr/16/2/gpr160207.pdf> (citing Sutton J and Watkins T, *Mississippi legislature tightens restrictions on abortion providers*, CNN (Apr. 5, 2012), <http://www.cnn.com/2012/04/04/politics/mississippi-abortion/>).

¹⁰¹ Benson Gold & Nash, *supra* note 100, at 10.

¹⁰² See *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("The State has an interest in ensuring so grave a choice is well informed.").

of informed consent, but also expanded *Casey's* reading of informed consent.¹⁰³ The majority noted a District Court decision in which most of the doctors stated that they do not tell their patients the specifics of the abortion procedure, which they found to be problematic, and a legitimate concern to the state.¹⁰⁴ In dissent, Justice Ginsburg argued that banning the procedure was not the answer, providing the women with complete and accurate information was. She further noted that there was no logical connection between a woman's mental health and banning the D & X.¹⁰⁵

As a result of the Court's expansion in *Gonzalez*, states took it upon themselves to expand their informed consent laws, adding a compulsory ultrasound component. A survey of state ultrasound measures reveals that they can be divided into two groups based on their requirements. The first and more prevalent group requires that a pregnant woman contemplating an abortion be given the option to see an ultrasound prior to giving her consent to the procedure.¹⁰⁶ Furthermore, the woman has the option of refusing the ultrasound and still having the procedure done. Group two is slightly more restrictive, requiring doctors to perform an ultrasound and offering to show the patient that ultrasound prior to an abortion.¹⁰⁷ While there is some variation regarding the timing of the ultrasound in these states, the ultrasound is no longer an option that can be bypassed.

Although the first group only requires an offer, and is not burdensome, the second group requires that the physician perform an invasive procedure prior to obtaining consent. While laws

¹⁰³ See above, Justice Kennedy's comments regarding the "grave decision" women face and the regret they may come to feel, therefore informed consent is necessary from the outset.

¹⁰⁴ *Gonzalez*, 550 U.S. 124,159 (citing Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 466 (S.D.N.Y., 2004)).

¹⁰⁵ *Id.* at 182.

¹⁰⁶ Ark. Code Ann. § 20-16-602(a) (LexisNexis 2004); Ga. Code Ann. § 31-9A-3(4) (2006 & Supp. 2008); Idaho Code Ann. § 18-609(3) (2004 & Supp. 2008); Ind. Code Ann. § 16-34-2-1.1(b) (West 2006); Mich. Comp. Laws § 333.17015(8) (West 2006); S.C. Code Ann. § 44-41-330(A)(1) (2002 & Supp. 2007).

¹⁰⁷ Ala. Code § 26-23A-4(b)(4) (LexisNexis 2006); Fla. Stat. Ann. § 390.012(3)(d)(4) (West 2008); La. Rev. Stat. Ann. § 40:1299.35.2(C) (2008); Miss. Code Ann. § 41-41-34(1) (West Supp. 2007).

such as these are unlikely to dissuade someone seeking an abortion from following through, it is just one of many barriers in these states placed in the way of pregnant women.

D. Fetal Pain Laws

Commonly titled “Woman’s Right to Know Acts,” fetal pain laws abandon informed consent – whereby physicians provide crucial information to patients based on their medical discretion – in favor of statutory instructions disseminating particular facts to patients that may or may not be medically accurate.¹⁰⁸ The science involving fetal pain is highly complex and exceedingly contested¹⁰⁹, however, that has not stopped twelve states from enacting fetal pain laws.¹¹⁰ These states – Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma and Texas – have prohibited abortions at twenty weeks, sometimes even earlier, based on the theory that a fetus can experience pain from that point on.¹¹¹ Additionally, many of these statutes, if not all of them, contain requirements that the pregnant woman be provided information which includes the following statement:

By 20 weeks' gestation, the unborn child has the physical structures necessary to experience pain. There is evidence that by 20 weeks' gestation unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted to be a response to pain. Anesthesia is routinely administered to unborn children who are 20 weeks' gestational age or older who undergo prenatal surgery.¹¹²

¹⁰⁸ See Ga. Code Ann. § 31-9A-4(a)(3) (2006); La. Rev. Stat. Ann. § 40:1299.35.6(C)(1)(a)(ii) (2001); Kan. Stat. Ann. § 65-6709 (2013); see also Ark. Code Ann. § 20-16-1105(a)(1)(A) (2005); 63 Okla. Stat. Ann. § 1-738.10(A) (2006).

¹⁰⁹ Pam Belluck, *Complex Science at Issue in Politics of Fetal Pain*, N.Y. TIMES, (Sept. 16, 2013), available at http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?_r=0

¹¹⁰ The Guttmacher Institute, *State Policies in Brief: State Policies on Later Abortions*, GUTTMACHER.ORG, http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf

¹¹¹ Pam Belluck, *supra* note 109.

¹¹² Ark. Code § 20-16-1105(a)(1)(A) (2005); Ga. Code § 31-9A-4(a)(3) (2006); Kan. Stat. Ann. § 65-6710(a)(2)(2009). Okla. Stat. Ann. tit. 63 § 1-738.10(A) (Supp. 2008); La. Rev. Stat. Ann. § 40:1299.35.6(C)(1)(a)(ii) (2001).

Supporters of the fetal pain laws have strongly relied on the findings of Dr. Kanwaljeet Anand, a professor of pediatrics, anesthesiology and neurobiology at the University of Tennessee's Health Science Center. Dr. Anand has stated that he believes fetal pain is likely between eighteen and twenty-four weeks, however, he noted that fetal pain is unlikely to be applicable to abortion, as most abortions are done before the fetus is capable of experiencing pain.¹¹³ Dr. Anand's work has been cited as least four times on the House floor during Congressional debate over a potential national twenty-week ban on abortion.¹¹⁴ However, Dr. Anand does not wish to be associated with the anti-abortion movement, which he believes has gotten out of control, and now declines to participate in legislative debate.¹¹⁵

Conversely, The UK College of Obstetricians and Gynaecologists has found in a study released in 2010, that most neuroscientists believed that in order to perceive pain the cortex must be developed, which does not occur prior to twenty-four weeks. Therefore, many of the laws promulgated by the states are entirely unnecessary and misplaced, as the report concludes that fetuses are unable to feel pain at the time of abortions.¹¹⁶

In 2013, the American Congress of Obstetricians and Gynecologists, wrote an open letter to Texas legislators titled *Get Out of Our Exam Rooms*, in which they firmly stated that: "Recent and rigorous scientific reviews have concluded that there is no evidence of fetal perception of pain until 29 weeks at the earliest (third trimester is 28–40 weeks)."¹¹⁷ They argue that the

¹¹³ Pam Belluck, *supra* note 109.

¹¹⁴ Kate Sheppard, *Fetuses Feel Pain at 20 Weeks, and 4 Other Abortion Myths*, MOTHER JONES (Jun. 20, 2013, at 6:50 AM), <http://www.motherjones.com/politics/2013/06/science-house-abortion-ban-fetal-pain>.

¹¹⁵ Tara Culp-Ressler, *Scientists Studying 'Fetal Pain' Don't Actually Want Their Research to Justify Abortion Bans*, THINK PROGRESS, (Sept. 17, 2013, at 11:46 AM), <http://thinkprogress.org/health/2013/09/17/2633271/scientists-fetal-pain/>.

¹¹⁶ Andy Coghlan, *24-week Fetuses Cannot Feel Pain*, NEW SCIENTIST (June 25, 2010 at 1:04 PM), <http://www.newscientist.com/article/dn19089-24week-fetuses-cannot-feel-pain.html#.VQrR0Kp3dI>.

¹¹⁷ American Congress of Obstetricians and Gynecologists, *Open Letter to Texas Legislators: Get Out of Our Exam Rooms* (July 9, 2013), <http://www.acog.org/About-ACOG/News-Room/News-Releases/2013/Open-Letter-to-Texas-Legislators>

requirements that Texas wishes to impose on women, physicians, and abortion facilities runs counter to science and in contravention to the health and safety of patients.¹¹⁸

Fetal pain laws are just another impediment to obtaining an abortion, and do not exist to further the health of the mother but to force political and religious ideology on the women seeking them.

E. Other Laws

While listed above are some of the most pervasive and restrictive regulations states have imposed, that list is far from exhaustive. State and federal legislation has reduced access to abortion in a variety of ways, including reducing or eliminating funding for abortion services¹¹⁹, banning later abortions¹²⁰, imposing parental consent laws¹²¹, controlling information surrounding abortion care¹²², and imposing waiting periods.¹²³ For a survey of some of the country's harshest regulations see note 86.

F. Why These Laws Exist

The majority of the laws restricting abortion, if not all of them, exist purely based on the religious and political leanings of the politicians who propagate them.¹²⁴ These laws rarely have

¹¹⁸ American Congress of Obstetricians and Gynecologist

s, *supra* note 117.

¹¹⁹ One example of this type of regulation, is found in West Virginia, whereby Medicaid funds are prohibited from being used to fund abortions unless required by a medical emergency. W. Va. Code Ann. § 9-2-11 (West 1993).

¹²⁰ See Tex. Bus. & Com. Code Ann. § 171.044 (2013), which provides that a person may not perform an abortion once it is determined that the "unborn child" is 20 or more weeks old.

¹²¹ One example is Indiana's requirement that a minor obtain written consent from a parent prior to undergoing the abortion. Ind. Code Ann. § 16-34-2-4.

¹²² South Dakota requires that a woman be informed of the possible side effects of having an abortion, including: depression and psychological distress, increased risk of suicidal ideations, the rate of death as a result of having an abortion, and other health risks such as hemorrhage, infection, and infertility. S.D. Codified Laws § 34-23A-10.1 (2014).

¹²³ See Tenn. Code Ann. § 39-15-202 (2012), which provides that after being informed of the required information, a woman must wait two days prior to undergoing the procedure.

¹²⁴ Tara Culp-Ressler, *Abortion Laws are Expected to get Even Worse in the New Year*, THINK PROGRESS, (Dec. 10, 2014, at 4:05 PM), <http://thinkprogress.org/health/2014/12/10/3601930/abortion-laws-tighten-2015/>.

any scientific backing and are mainly part of the incrementalist plan to slowly restrict abortions to the point where they are no longer available at all.¹²⁵

IV. Privacy and Autonomy for Women, Not States

A woman's right to privacy should come before and supersede a states right to be autonomous. As promulgated in *Roe*, women should have a fundamental right to privacy that encompasses the right to have an abortion without state interference. That dream almost came to fruition with the Freedom of Choice Act, however, the bill was never passed and states have continued to enact restrictive abortion legislation. This section proposes a solution similar to the Freedom of Choice Act but which contains concessions to both sides of the abortion debate. The religious, political, and general population of Americans seems ripe for this type of legislation. It is possible to end the debate once and for all and return the right of privacy to women, with whom it belongs.

A. *The Dream*

In 1989 the Freedom of Choice Act (FOCA or the Act) was introduced and then most recently re-introduced again in 2007 with very few changes. However, since that time the politics have not aligned, and the Act has been shelved.¹²⁶ The legislation would have codified *Roe*, thereby legalizing abortion and preventing the government, at any level, from interfering with a woman's ability to procure an abortion.¹²⁷

The original 1989 version of FOCA, permitted the states to regulate a woman's right to abortion postviability as long as her health was not at risk, but protected that right by prohibiting

¹²⁵ See Fetal Pain Laws; Arizona's new law requiring doctors to inform patients of reversing medicinal abortions in note 86; TRAP laws which perpetuate the lie that abortions are unsafe and require and massive regulation; laws requiring women be informed of the mental health consequences of having an abortion, even though there is no medical backing for this assertion.

¹²⁶ See The Freedom of Choice Act, H.R. 3700, 101st Cong. (1989); S. 1912, 101st Cong. (1989).

¹²⁷ *Congress Introduces Bill Aimed at Legalizing Women's Right to Choose*, 13 ANDREWSHEALTH L. LITIG. REP. 2 (2006).

state interference prior to viability, as established in *Roe*.¹²⁸ Additionally, the bill contained a provision that allowed states to implement measures that were necessary to protect a woman's life and health, however, this "medical necessity" provision was absent in later iterations of the Act.¹²⁹

The next iteration of the Act in 1993, while following the same platform of protecting the reproductive rights of women, provided some insight into the motivations for creating the Act.¹³⁰ Following the Supreme Court's decision to modify the strict scrutiny standard utilized in *Roe* to *Casey*'s undue burden standard, the sponsor's felt FOCA was now more necessary than ever.¹³¹ The sponsors found that as a result of the deviation in standard, some states had begun to restrict the right of women to procure abortions. The sponsors enumerated several consequences as a result, including: a higher percentage of illegal abortions, a burden to interstate commerce, discrimination, and interference with the ability of medical professionals to provide health services.¹³²

Furthermore, the Act reiterated its sponsor's desire to reinstate the strict scrutiny standard utilized in *Roe*.¹³³ However, FOCA included a so-called "safe harbor" provision which, specifically stated:

Nothing in this Act shall be construed to (1) prevent a State from protecting unwilling individuals or private health care institutions from having to participate in the performance of abortions to which they are conscientiously opposed; (2) prevent a State from declining to pay for the performance of abortions; or (3) prevent a State from requiring a minor to involve a parent,

¹²⁸ Kristen L. Burge, *When It Rains, It Pours: A Comprehensive Analysis of the Freedom of Choice Act and Its Potential Fallout on Abortion Jurisprudence and Legislation*, 40 CUMB. L. REV. 181, 184 (2010).

¹²⁹ *Id.*; see H.R. 1964, 110th Cong. (2007); S. 1173, 110th Cong. (2007).

¹³⁰ H.R. 1068, 103d Cong. (1993); S. 25, 103d Cong. (1993).

¹³¹ *Id.*

¹³² *Id.* § 2(a)(2).

¹³³ *Id.* § 2(b).

guardian, or other responsible adult before terminating a pregnancy.¹³⁴

These provisions allowed legislation that states had enacted post-*Roe*, under the authority of *Roe*, to stand. FOCA's supporters stressed that these provisions assured that “protecting the interest of a woman's right to choose would not be at the expense of a state's interest in protecting potential life.”¹³⁵

Notably, this safe harbor provision was absent in the 2007 iteration of the Act.¹³⁶ The 2007 version of FOCA made a few other notable changes. First, the Act altered some of the language pertaining to how states may or may not regulate. In the prior versions the act dictated that a state “may not *restrict* the freedom of a woman to choose,”¹³⁷ however, the most recent amalgamation stated that a state shall not “*deny or interfere* with a woman's right to choose.”¹³⁸ Moreover, the authors added a “statement of policy” of the United States, which specified “that every woman has the fundamental right to choose to bear a child, to terminate a pregnancy prior to fetal viability, or to terminate a pregnancy after fetal viability when necessary to protect the life or health of the woman.”¹³⁹ Lastly, the bill now contained a private civil cause of action for violations of the Act ¹⁴⁰ , and was retroactive to “every Federal, State and local

¹³⁴ *Id.* § 3(b)(1-3).

¹³⁵ Kristen L. Burge, *supra* note 128 (citing 136 Cong. Rec. S7836 (daily ed. June 12, 1990) (statement of Sen. Max Baucus). Senator Baucus asserted that the Freedom of Choice Act would continue to permit such laws[,] [e.g. parental consent]. It is likely ... that the courts would interpret the otherwise unexplicated language of the [Act], if enacted, in a way as to make it compatible with the surrounding body of law into which it must be integrated. That body of law includes, under the regime of *Roe* versus *Wade*, the permissibility of State laws mandating parental notification or consent, subject to an alternative bypass.).

¹³⁶ See H.R. 1964, 110th Cong. (2007); S. 1173, 110th Cong. (2007).

¹³⁷ H.R. 1068, 103d Cong. (1993); S. 25, 103d Cong. (1993)

¹³⁸ H.R. 1964; S. 1173; see *supra* note 136, § 4(b)(1).

¹³⁹ *Id.* § 4(a).

¹⁴⁰ *Id.* § 4(c).

statute...regulation,...decision...or other action enacted, adopted, or implemented before, on, or after the date of enactment....” of the Act.¹⁴¹

Before the 108th Congress, Senator Barbara Boxer proclaimed that “[w]omen's reproductive rights [were] rapidly eroding as a result of the unrelenting efforts of the Bush Administration, the Republican Caucus, and powerful anti-choice organizations.”¹⁴² Unfortunately, even though President Barack Obama vowed to sign the Freedom of Choice Act the minute he became president, that never came to fruition, as it was no longer his “highest legislative priority.”¹⁴³ The bill was last introduced in 2007 and has been scarcely mentioned since dying in the 109th Congress.¹⁴⁴

What was once a very promising bill for many women no longer has the opportunity or support to make its way through Congress given the political make-up of the House of Representatives.

B. The Reality

After the Freedom of Choice Act failed to gain traction, little hope remained for a similar bill to be passed. However, this paper proposes that instead of a law that would completely satisfy pro-choice or pro-life proponents, a bipartisan bill that would remove the power from the states and eliminate the questions that surround abortion law and jurisprudence.

i. The General Public

¹⁴¹ *Id.* § 6.

¹⁴² Barbara Boxer, Press Release, (Jan. 22, 2004), <https://www.boxer.senate.gov/press/release/boxer-introduces-legislation-to-codify-roe-v-wade-on-the-31st-anniversary-of-the-decision/>.

¹⁴³ Molly Moorehead, *Nothing to Sign; Bill has Fizzled*, POLITIFACT (June 1, 2012, 7:01 AM), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/501/sign-the-freedom-of-choice-act/>.

¹⁴⁴ Govtrack.us, <https://www.govtrack.us/congress/bills/110/s1173> (last visited Mar. 19, 2015).

A recent study revealed that while abortion still remains a divisive issue in the United States, the public generally supports a “middle-ground” approach.¹⁴⁵ It comes as no surprise that liberals are most likely to favor no restrictions on abortion, with 88% believing there should only be restrictions in certain situations, and 43% believing there should be no restrictions at all. It also comes as no surprise that 21% of consistently conservative individuals believe that abortions should be entirely illegal, however, 73% of consistently conservative individuals believe abortions should be allowed under some circumstances.¹⁴⁶ Interestingly, these numbers “reflect the fact that conservatives are less likely to oppose legal abortions than liberals are to support it.”

ii. The Religious Sector

While it is exceedingly common for opinions regarding abortions to be correlated with ideology, over the past several years there has been a noticeable shift in the role it plays politically.

Following *Roe v. Wade*, the Roman Catholic Church and the majority of evangelicals consistently came to oppose abortion.¹⁴⁷ In principle both the Catholic Church and evangelicals believe that all life is sacred from conception until death, thereby condemning the practice of abortion.¹⁴⁸ Conversely, mainline Protestants were found to be the least likely to find abortion to be morally wrong, even though the clergy themselves are practically evenly split on the issue.¹⁴⁹

¹⁴⁵ Pew Research Center, *Political Polarization in the American Public*, people-press.org, <http://www.people-press.org/2014/06/12/section-4-political-compromise-and-divisive-policy-debates/>, (last visited Mar. 19, 2015).

¹⁴⁶ Pew Research Center, *supra* note 145, at 5.

¹⁴⁷ Jacob Lubfor, *The Religious Politics of Abortion are More Nuanced than We Think*, THE WASHINGTON POST (Jan. 22), http://www.washingtonpost.com/national/religion/the-religious-politics-of-abortion-are-more-nuanced-than-we-think-analysis/2015/01/22/b6891a4c-a24e-11e4-91fc-7dff95a14458_story.html.

¹⁴⁸ Jamelle Bouie, “*God Does Not Regard the Fetus as a Soul*,” SLATE (Mar. 25, 2014, 2:34 PM), http://www.slate.com/articles/news_and_politics/politics/2014/03/hobby_lobby_and_contraception_how_conservative_evangelicals_went_from_not.html.

¹⁴⁹ Pew Research Center, *Public Sees Religious Influence Waning*, pewforum.org, <http://www.pewforum.org/2014/09/22/public-sees-religions-influence-waning-2/>, (last visited Mar. 19, 2015).

Statistically, two-thirds of white evangelical Protestants (66%) currently express support for having churches speak out on political and social issues.¹⁵⁰ With nearly six-in-ten black Protestants (58%) also agreeing; as do approximately half of white mainline Protestants (49%) and Catholics (48%).¹⁵¹ Unsurprisingly, most individuals who have no religious affiliation say churches and other houses of worship should stay out of politics (65%), with just 32% saying churches should speak out on political matters.¹⁵²

While interest groups both for and against abortions firmly control political candidates and presidential hopefuls, the American people, whether religious or secular, still grapple with the issue of separation of church and state,¹⁵³ which has resulted in a better opportunity for bipartisan abortion legislation. A recent survey found that Americans are now equally divided on the question of “whether churches and other houses of worship should express their views on day-to-day social and political questions.”¹⁵⁴ Approximately three quarters (72%) of Americans think that religion is losing influence on American life, though the majority of these individuals believe this is a bad thing. However, when it comes to the issue of abortion and religion, 55% of Americans believe it should be legal, with four in ten believing it should be illegal.¹⁵⁵

Predictably, among those in the Republican Party, nearly six in ten (59%) believe that churches should have a voice concerning both political and social issues.¹⁵⁶ Juxtapose that with the Democratic Party who is more evenly split on the issue, with 42% believing churches should express their political views, with 55% believing churches should stay out of politics.¹⁵⁷ When it

¹⁵⁰ Pew Research Center, *supra* note 145, at 2.

¹⁵¹ Pew Research Center, *supra* note 145, at 2.

¹⁵² *Id.*

¹⁵³ Jacob Lubfor, *supra* note 140.

¹⁵⁴ Pew Research Center, *supra* note 145 (finding that 48% of Americans believe there should be a separation of church and state, and 49% believing religious houses should have a say in political matters.)

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

comes to endorsing candidates, the majority of Democrats and Republicans agree that it should not be allowed, and the majority of major religious groups all subscribe to this line of thinking.¹⁵⁸

It appears that, religion aside, Americans are more open to abortion legislation that would take into consideration to both sides of the argument. While many Christians firmly believe that abortion is abhorrent, Christians are ready to concede there should be criminal sanctions for the procedure, which could result in a hazardous black market for abortions, putting both the fetus and mother at risk. It is not impossible for other parties to follow suit and replace the inflexible structure that confines the abortion argument. So while the majority of American's believe that abortion should be legal in all situations, there is no reason to believe that they would oppose legislation that provided some concessions to those on the opposite side of the argument and vice versa.

iii. The Political Sphere

Abortion plays an important role in politics, as it has the power to win seats in the House, the Senate, and the oval office. Specifically, in 2008, President Obama ran on the platform that he would sign the Freedom of Choice Act the minute he got into office, which unfortunately never came to fruition. Additionally, in 2012 there were more than forty Republicans running for the House and Senate who wanted to ban abortion access to women, even those who had been victims of rape and incest.¹⁵⁹ Voters opposed to abortion view it as a much more important issue than those who support it.¹⁶⁰

¹⁵⁸ *Id.*

¹⁵⁹ Amanda Terkel, *Todd Akin's Party: More Than 40 Republican Candidates Oppose Abortion in Cases of Rape, Incest*, THE HUFFINGTON POST (Aug. 22, 2012, 12:44 PM), http://www.huffingtonpost.com/2012/08/22/todd-akin-abortion-rape-incest_n_1819201.html.

¹⁶⁰ Pew Research Center, *The Complicated Politics of Abortion*, [people-press.org](http://www.people-press.org/2012/08/22/the-complicated-politics-of-abortion/), <http://www.people-press.org/2012/08/22/the-complicated-politics-of-abortion/> (last visited Mar. 19, 2015).

While we already know that most Democrats (65%) believe abortion should be legal in all or most cases and Republicans (57%) believe it should be illegal in all or most cases, there do exist some nuances.¹⁶¹ Neither party can agree when it comes to the degree of legality or illegality.¹⁶² Statistically, while there will always be far right and far left leaning individuals, currently there exist enough Democrats and Republicans to possibly compromise on an abortion solution.

iv. A Possible Solution

Proponents of the ultra-restrictive laws found in the conservative, pro-life jurisdictions ignore the woman's body in abortion and focus instead on the "rights and interests" of the fetus. Legislation and jurisprudence need to return to focusing on the physical health of the pregnant woman: not her mental, health nor the health of the fetus, but the woman herself. She is not merely a vessel from which life is brought; she is an individual with fundamental rights that have been abrogated by religion and politics. One solution is to craft a piece of legislation that brings the focus back on women's health and makes concessions on both sides of the argument. While the Freedom of Choice Act was the preeminent piece of abortion legislation for pro-choice proponents, it is just not feasible in the current political climate.

An alternative to FOCA is sustainable, however, given the overall tenor of popular opinion regarding female reproductive choice in this country. That is, while religious conservatism actively combats the principle rule in *Roe*, most Americans agree with women's choice, albeit to varying degrees. This paper urges both sides to set aside their respective

¹⁶¹ Pew Research Center, *supra* note 160.

¹⁶² *Id.* (research shows that both Republicans and Democrats are divided when it comes to the extent to which abortion should be regulated. Republicans are divided over the extent to which abortion's illegality (22% believing it should be illegal in all cases; 35% believing it should be illegal in most cases). Democrats on the other hand are divided on the extent to which it should be legal (26% believing abortion should be legal in all cases, and 39% believing it should be legal in most cases).

ideological agendas and establish a compromise. Elected officials give voice to American values, and the majority of Americans have decided abortion should be legal but regulated. Congress should enact a federal bill that codifies *Roe* to the extent that the law balances women's right to pre-viability abortion with the states' interest in potential life. The law should take a step back from strict scrutiny, as it did in *Casey*, and continue but refine its undue burden test while accounting for the diversity in existing state laws and looking at the actual impact of those laws on the women they are targeting. It would not be difficult to gage the burden that some of these women are facing, especially in states like Mississippi and South Dakota where access to abortions has been virtually eradicated. Furthermore, the law would protect the privacy, liberty, and equality of the women seeking abortions, by returning the right to make intimate decisions without state interference.

The bill should also contain provisions for regulating abortions. One such provision would establish the number of per capita, per jurisdiction abortion clinics, and require states to have a reasonable minimum number of facilities available to adequately serve its distinct communities. Another balancing feature of the bill would retain waiting periods as long as they do not exceed forty-eight hours, enough time for a woman to consider her decision, but not excessively "burdensome." Additionally, states could retain the right to have physicians obtain privileges or have the hospital be associated with the clinic, so long as those privileges and associations are reasonably obtainable and not impossible, as is now the case in some outwardly pro-life states.

There are a number of ways that the legislation could be written to bring both sides together if they are so willing. This paper proposes that Congress should enact the following or similar legislation:

Section 1. Interference with Reproductive Health Prohibited

A state may not restrict the right of a woman to choose to terminate a pregnancy: (1) before fetal viability; or (2) at any time, if such termination is necessary to protect the life or health of the woman.

Section 2. State Regulation

A state may:

- (A) regulate a hospital, clinic, or other health facility, where abortions take place to the degree that other outpatient facilities are regulated;
- (B) require a physician performing abortions to obtain privileges or require the facility to be associated with a hospital in the case of emergency;
 - 1. a hospital may not refuse association or privileges based on reasons other than religious affiliation.
- (C) require waiting periods, as long as those waiting periods do not exceed forty-eight hours.

Section 3. Placement

There shall exist abortions clinic in every state based on population and area. There shall be no less than two clinics per state.

While this statute is in no way complete, it provides a genesis from which to begin. The legislation would eliminate the nonsensical nature of current abortion law in favor of clear and concise boundaries. States would retain some autonomy, by being allowed to determine the degree to which they regulate abortion, but their autonomy would exist within the confines of the statute. There has to be an end in sight, we cannot continue to allow states to abrogate women's reproductive rights until there is nothing left.

While it could be argued that states are autonomous for a reason – in order to limit the power of the federal government¹⁶³ – state autonomy should not supersede the constitutional rights of its constituents. Historically, states have used their autonomy to “protect and press their

¹⁶³ Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117 (2008).

interests and to influence the content of policy at the national level” through the usage of political parties.¹⁶⁴ But at what point have states gone too far? By over-regulating abortion - to the point of nearly eliminating the possibility of having an abortion in some states – states have exceeded the limits of their autonomy and offended the constitutional rights of their female constituents.

State autonomy does not justify the violation of constitutional rights. Women have a fundamental right to privacy and this should never be supplanted by the political or ideological orientation. Furthermore, states have continuously abused their powers when it comes to abortion rights, which is precisely why a bipartisan bill seizing this power from them is imperative.

A woman’s right to terminate pregnancy is rooted in her constitutional rights to due process and privacy, and this right should not be affected by the personal tastes of her state’s lawmakers. A bill ensuring the fundamental right to have an abortion is both necessary and possible at this time in our country.

V. Conclusion

As the abortion issue continues to divide constituencies along social, religious, and political lines, there remains room for cooperation and consideration for a federal law that would end the debate once and for all. While partisanship has stalled FOCA, this paper offers a compromise that both preserves female reproductive choice and maintains baseline autonomy for states.

¹⁶⁴ James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 2 (2013).