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Dobbs v. Jackson Women's Health Organization: The Court's Opportunity to Overrule Roe, or, at Least, Correct the Evidentiary Catch-22 Created by Roe and Casey

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ABSTRACT

The 1954 Dr. Seuss classic, *Horton Hears a Who*, rests on the foundational truth that "a person's a person no matter how small."[1] Since *Roe*, however, more than 60 million of the smallest persons in the United States have been destroyed in the womb. Because the Court has refused to answer when life begins but nevertheless established viability as the point at which a state's interest becomes sufficient to prohibit abortion (subject to the life and health of the mother), states have struggled to pass legislation in defense of the unborn that withstands judicial scrutiny. In particular, lower courts have interpreted the viability standard to mean that any law prohibiting abortion (with health and life exceptions) before viability is per se unconstitutional. As a result, courts have not permitted states to introduce evidence of fetal heartbeat or fetal pain, which would undermine *Roe*'s conclusion that it could not decide when life begins.

This Article will review existing abortion precedent, explain the catch-22 states face in their efforts to reverse *Roe*, and discuss how the Court should decide in *Dobbs* to reverse *Roe* or, at a minimum, abandon viability as the first point in which the state has a compelling interest in protecting the unborn baby.

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[1] DR. SUESS, HORTON HEARS A WHO! 6 (1954). Scripture tells us that God is the author of all life, that He knew us before we were even born, and that He knit us together in our mother's womb. *See Genesis* 1:27; *Psalm* 139:13.

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Professor of Law, Liberty University School of Law. J.D., magna cum laude, Brooklyn Law School. The author wishes to thank the Liberty University Law Review for hosting a symposium on issues related to sanctity of human life. I am grateful to be among a student body and colleagues who understand that God is the author of all life and every human being from the moment of conception to the moment of death has innate worth as an individual created in the image of God.

ARTICLE

DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION: THE COURT'S OPPORTUNITY TO OVERRULE *ROE* OR, AT LEAST, CORRECT THE EVIDENTIARY CATCH-22 CREATED BY *ROE* AND *CASEY*

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I. INTRODUCTION

In its decision in *Roe v. Wade*, the Supreme Court ushered in "legalized" abortion, resulting in more than 60 million abortions during the past forty-nine years.[2] What compounds this tragic loss of human life is the Court's characterization of the fetus as only "potential life"[3] rather than human life. After the Court explained that the question of when life begins is a "difficult question" that lacks "any consensus" as to an answer by "those trained in the respective disciplines of medicine, philosophy, and theology,"[4] the Court concluded it did not need to answer the question of when life begins to declare a woman's right to an abortion.[5] That decision ignored the obvious—if the fetus is an unborn human life, then an abortion results in the destruction of a human life.

Even though the Court stated it could not answer the question of when life begins "at this point in development of man's knowledge"—suggesting that it could do so at a later time—*Casey*'s viability standard has caused lower courts to refuse to allow discovery of facts that would undermine the factual assumptions in *Roe*.[6] If courts were to allow evidence of fetal heartbeat, fetal

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[2] Sam Dorman, *An Estimated 62 Million Abortions Have Occurred Since* Roe v. Wade *Decision in 1973*, FOX NEWS (Jan. 22, 2021, 6:33 PM), https://www.foxnews.com/politics/abortions-since-roe-v-wade.

[3] Roe v. Wade, 410 U.S. 113, 150 (1973); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

[4] *Roe*, 410 U.S. at 159.

[5] *Id.*

[6] *See, e.g.*, Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 270, 275 (5th Cir. 2019) (the trial court refused to permit discovery on fetal pain because it did not relate to viability);

pain, and whether abortions are safer than childbirth, the Court could move the judicially recognized line of when life begins back from viability to a point in time much closer to conception.[7]

As the Supreme Court considers in *Dobbs v. Jackson Women's Health Organization*[8] whether to reverse *Roe*, it would be wise to consider the dilemma posed by "Pascal's wager." Pascal begins by presenting a decision that each person must make: Either a person will choose to believe in God or she will not.[9] Because Pascal believed that reason alone could not lead a person to reach a *conclusive* decision on the question, Pascal posed the question of "how will you wager" rather than what will you choose.[10] He explained that each person must choose—indeed, each person has already made a choice, whether the person realizes it or not.[11] Even when a person says she has not made a choice, that is itself a choice. Here are the possible wagers a person can choose with respect to whether God exists.

- If God really exists, and we wager that God exists, we have an infinite gain (eternity in heaven).
- If God really exists, and we do not wager that He exists, then we have the potential of an infinite loss (hell for eternity, or at least eternal separation from God).
- If God really does not exist, and we wager that God exists, we essentially lose nothing.
- If God really does not exist, and we wager that God does not exist, we essentially gain nothing.[12]

MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 773 n.4 (8th Cir. 2015) (limiting discovery to the issue of viability).

[7] For example, in *Dobbs*, the state offered expert testimony that "it was 'universally accepted' that a fetus has a neural network 'capable of pain perception' at some point 'between [14–20] weeks'" gestation. *Dobbs,* 945 F.3d at 279–80 (Ho, J., concurring). Fetal heartbeat is detectable around six weeks gestation. *See MKB*, 795 F.3d at 772 ("[T]he parties do not dispute that fetal heartbeats are detectable at about 6 weeks[.]").

[8] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021).

[9] BLAISE PASCAL, PENSÉES, § III, para. 233 (2016); s*ee also Pascal's Wager*, ST. MARY'S, http://sites.saintmarys.edu/~incandel/pasc

alswager.html (last visited Mar. 1, 2022).

[10] PASCAL, *supra* note 9, § III, para. 233.

[11] *Id.*

[12] *Pascal's Wager*, *supra* note 9. Another example is "Schrodinger's Cat." *See* Christopher S. Baird, *What Did Schrodinger's Cat Experiment Prove?*, SCI. QUESTIONS WITH SURPRISING ANSWERS (July 30, 2013), https://www.wtamu.edu/~cbaird/sq/2013/07/30/what-did-

The same logic applies to the Supreme Court's assertion that it cannot decide when life begins while also legalizing abortion. By supposedly not deciding when life begins, the Court already has made a choice—that the fetus is not a human life because if it were a human life, abortion would be the killing of innocent human life. Hopefully, the Court would reverse *Roe* if it knew abortion killed an innocent human life.

Here are the first two options of Pascal's wager, restated in the abortion context.

- If the fetus is a human life, and we wager it is (and, therefore, do not allow abortions), we have infinite gain (preserving innocent life).
- If the fetus is a human life, and we wager that it is not (and therefore allow abortions), we have infinite loss (destroying innocent human life).

The last two options cannot logically be articulated because if a woman does not abort and gives birth, she will deliver a human life.[13] Unlike Pascal's wager, where it is not presently possible to conclusively prove God's existence to those who do not believe God exists, it is possible to conclusively prove that what is growing in the womb is a human life because after nine months gestation the woman gives birth to a human life; she does not give birth to an inanimate object or any other living species. Thus, the Supreme Court's decisions in *Roe* and *Casey*, where it said it was not deciding when life begins, is indeed a decision—a decision to allow the killing of innocent human life.[14]

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schrodingers-cat-experiment-prove/. Although Schrodinger's Cat was not a real experiment, it was used as a teaching tool "to illustrate how some people were misinterpreting quantum theory. Schrodinger constructed his imaginary experiment with the cat to demonstrate that simple misinterpretations of quantum theory can lead to absurd results which do not match the real world." *Id.* In the case of Schrodinger's imaginary experiment, you end up with a cat in the box that you believe is both alive and dead at the same time because of your faulty understanding of quantum theory. *Id.* That aptly describes the faulty conclusion reached in the Court's abortion jurisprudence: the fetus is both a life and not a life depending on a faulty belief about the nature of the life growing in the womb.

[13] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 982 (1992) (Scalia, J., concurring and dissenting) ("'[R]easoned judgment' does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the state is protecting is the mere 'potentiality of human life.'").

[14] *Cf. Casey*, 505 U.S. at 982 (Scalia, J., concurring and dissenting) ("The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after concluding its 'balancing' is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human.").

More than a decade after *Roe*, Justice White acknowledged that a fetus is of the same "character" before viability as it is after viability, and that the State's interest is equally compelling throughout a pregnancy.[15] In Justice White's dissent in *Thornburgh v. American College of Obstetricians & Gynecologists*, he stated that "[t]he State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability."[16] Yet, the Supreme Court's current abortion jurisprudence minimizes the State's interest in pre-viability, only permitting the State to implement health and safety regulations before viability.

This Article briefly explains the Supreme Court's abortion precedent, as developed through *Roe*, *Casey*, and subsequent case law. It then discusses the United States Court of Appeals for the Fifth Circuit's decision in *Jackson Women's Health Organization v. Dobbs*,[17] highlighting the refusal by lower courts to permit discovery on the issue of pre-viability fetal pain because of the Supreme Court's viability standard. The Article concludes by explaining why the Supreme Court should seize *Dobbs* as an opportunity to put an end to legalized, elective abortion. To the extent the Court does not use *Dobbs* to reverse *Roe*'s conclusion that there is a right to abortion, the Court must at least abandon the viability line as the point when the State's interest in the life of the unborn can justify prohibiting abortion. If the Court abandoned the viability line, states could take discovery and admit evidence demonstrating that the fetus is a human life long before viability, that abortions are not as safe as *Roe* assumed, or that women do not need abortion to have equal life opportunities.

II. THE SUPREME COURT'S ABORTION PRECEDENT

It has been nearly fifty years since *Roe* was decided. Even though the Court has continued to affirm a right to abortion, it has never answered the foundational question—whether abortion is the destruction of a human life. In *Roe*, the Court concluded that the fetus is not a "person" for purposes of the Fourteenth Amendment Due Process guarantees, but said it could not—indeed, did not need to—answer the question of when life begins.[18] Nearly twenty years after *Roe*, the Court had the opportunity in *Casey* to reverse *Roe*

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[15] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting).

[16] *Id.*

[17] *See* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021).

[18] Roe v. Wade, 410 U.S. 113, 158 (1973).

based on the fact that abortion kills an unborn human life. Instead, the Court dug its heels in, affirming a woman's right to abortion.[19] Rather than answer the question of when life begins, the Court said that even if its decision in *Roe* were in error, *stare decisis* required the Court to affirm *Roe*.[20] Significantly, the Court was concerned that if it reversed *Roe*, the Court would lose credibility in the eyes of the American people. Since *Casey*, states have passed laws that seek to protect the human life growing in the womb, often with the Court striking down those laws as an undue burden on the woman's right to choose abortion.[21] Those efforts laid the groundwork for the statute at issue in *Dobbs*. The Mississippi statute seeks to force the Court to answer the question of when life begins. The statute prohibits most abortions after fifteen weeks gestation because that is when medical professionals assert that an unborn baby can feel pain.[22]

A. Roe v. Wade[23]

In 1973, the United States Supreme Court declared a right to abortion.[24] In reaching that decision, the Court admitted that the Constitution does not explicitly mention a right to privacy but found a privacy right to abortion arising out of the penumbras of the Bill of Rights.[25] After identifying prior decisions where the Court had declared a right to marriage, procreation,

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[19] *Casey*, 505 U.S. at 869.

[20] *Id.* at 858 ("Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty."); *id.* at 869 ("A decision to overrule *Roe*'s essential holding the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.").

[21] *See, e.g.*, June Med. Servs. v. Russo, 140 S. Ct. 2103, 2133 (2020) (striking down statute that required abortion providers to have admitting privileges at a hospital within thirty miles of the abortion clinic); *Casey*, 505 U.S. at 898 (striking down as an undue burden the spousal notification requirement); Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 541–43 (S.D. Miss. 2018) (striking down statute that prohibited abortions after fifteen weeks).

[22] *See Dobbs*, 945 F.3d at 279–80 (Ho, J., concurring); *see also* MISS. CODE ANN. § 41-41-191 (2022).

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

[24] *Roe*, 410 U.S. at 154 (noting the right of personal privacy includes the right of a woman to decide to have an abortion).

[25] *Id.* at 152 ("The Constitution does not explicitly mention any right of privacy."). *See* Rena M. Lindevaldsen, *When the Pursuit of Liberty Collides with the Rule of Law*, 11 LIBERTY U. L. REV. 667, 670 (2017) (discussing the meaning of "penumbra" and explaining that, by definition, any right that exists as the penumbra is of a lesser degree than the express rights in the Constitution).

contraception, and child rearing, the Court concluded that the privacy right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[26] Before reaching that decision, the *Roe* Court conceded that a woman's asserted right to abortion would fail if the unborn fetus were established to be a person within the meaning of the Fourteenth Amendment;[27] but the Court, nevertheless, stated that it "need not resolve the difficult question of when life begins."[28]

Admittedly, the questions of whether someone qualifies as a "person" entitled to due process protections under the Fourteenth Amendment to the United States Constitution (which the Court answered in the negative)[29] and when a human life begins (which the Court did not answer)[30] are different. But the Court's decision that an unborn fetus is not entitled to the due process protections afforded to a "person" under the Fourteenth Amendment[31] does not absolve the Court of the logical results of its purported refusal to decline to answer whether the unborn fetus is a human life. Namely, to the extent the unborn fetus is a growing human life, an abortion ends that life.

As the Court fleshed out the scope of the abortion right, it rejected the argument that the right is absolute, acknowledging the State's interests in health, medical standards, and protecting potential life.[32] Nevertheless, the Court held that the decision whether to abort rests entirely with the mother during the first trimester.[33] It was not until the point of viability—when the "[fetus] has the capability of meaningful life outside the mother's womb"[34]—that the State's interests become strong enough to override the woman's right to abortion. Subsequent case law, however, demonstrates that the Court has required states to permit a woman to have an abortion up to the point of birth based on very liberally construed exceptions for the health and life of the mother.[35]

In addition to the life-or-death consequences resulting from the Court's refusal to protect unborn life prior to viability by ostensibly declining to

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[26] *Roe*, 410 U.S. at 153.

[27] *Id.* at 156–57.

[28] *Id.* at 159.

[29] *Id.* at 158.

[30] *Id.* at 159.

[31] *Id.* at 158.

[32] *Roe*, 410 U.S. at 153–54.

[33] *Id.* at 163.

[34] *Id.*

[35] Doe v. Bolton, 410 U.S. 179, 192 (1973) (explaining that all of the following factors relate to the health exception: "physical, emotional, psychological, familial, and the woman's age").

answer whether the fetus is a human life, another significant concern over the years has been the arbitrariness of *Roe*'s choosing viability as the point at which a state can prohibit abortion, albeit with broadly construed exceptions for the health and life of the mother. Professor Randy Beck stated that the viability standard was created practically out of whole cloth given that there was no "evidentiary record" on the issue, and it "was not discussed in the briefs or arguments."[36] During the oral arguments in *Dobbs*, Chief Justice Roberts asked Mississippi's Solicitor General whether viability was even an issue in *Roe*.[37] Chief Justice Roberts also explained that the publicly-released notes of Justice Blackmun, who authored *Roe*, state that the viability standard was merely dicta in the case.[38] Ten years after *Roe*, Justice O'Connor explained in her dissent in *City of Akron v. Akron Center for Reproductive Health, Inc.* that:

> [t]he fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.
>
> The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is

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[36] *See* Hamilton v. Scott, 97 So. 3d 728, 744 (Ala. 2012) (Parker, J., concurring) (quoting Randy Beck, *Self-Conscious Dicta: The Origins of* Roe v. Wade*'s Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 511–12 (2011)). Justice Parker in *Hamilton* further explained that although *Roe* cited Blackstone, it

> failed to note that Blackstone addressed the legal protection of the unborn child within a section entitled 'The Law of Persons.' It also ignored the opening line of his paragraph describing the law's treatment of the unborn child: 'Life is an immediate gift of God, a right inherent by nature in every individual.'

Hamilton, 97 So. 3d at 743.

[37] *See* Transcript of Oral Argument at 18–19, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (No. 19-1392).

[38] *Id.* at 19.

> the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," the Court chose the point of viability—when the fetus is *capable* of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.[39]

B. Planned Parenthood of Southeastern Pennsylvania v. Casey[40]

Nineteen years after *Roe*, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[41] affirmed its prior declaration of the right to abortion.[42] The *Casey* Court, like the *Roe* Court, refused to directly answer the question of whether the fetus is a human life.[43] In fact, based on concern over the Court's legitimacy if it reversed *Roe*, the Court refused to even state whether *Roe* was properly decided.[44] Specifically, the Court stated that a decision overruling *Roe* "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law."[45] Instead of overruling *Roe*, the Court stated:

> We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.[46]

Earlier in the opinion, the Court expressly stated that it should affirm *Roe*

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[39] City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 460–61 (1983) (emphasis in original); *see also* Hamilton v. Scott, 97 So. 3d 728, 744–45 (Ala. 2012) (Parker, J., concurring) (discussing the lack of evidentiary support for the court's viability standard).

[40] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[41] *Id.* at 833.

[42] *Id.* at 846.

[43] *See generally id.* at 833 (nowhere in the decision does the Court answer the question of when life begins).

[44] *Id.* at 858, 869.

[45] *Id.* at 865.

[46] *Casey*, 505 U.S. at 871.

even if "in error."[47] Thus, rather than addressing whether *Roe* correctly weighed the State's interest in life as against the declared right to abortion, the *Casey* Court assumed the Constitution afforded a right to abortion, then it built on *Roe* as if it were legitimate precedent. The Court concluded that none of the factual changes since 1973 have any "bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[48]

Several years later, Justice O'Connor spoke to the notion that *stare decisis* is an inexorable command. The doctrine of *stare decisis*

> "demands respect in a society governed by the rule of law." Although respect for *stare decisis* cannot be challenged, "this Court's considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases." Although we must be mindful of the "desirability of continuity of decision in constitutional questions . . . when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, when correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."[49]

A significant portion of the oral argument before the Supreme Court in *Dobbs* focused on *stare decisis*, and whether error alone is a sufficient basis for reversing prior precedent.[50] Justice Kavanaugh listed several prior Supreme Court cases to support his point that where the prior precedent is seriously wrong, the Court must refuse to follow it.[51] Justice Alito asked the U.S. Solicitor General whether it was her argument that "a case can never be

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[47] *Id.* at 858 ("Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty."); *id.* at 869 ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.").

[48] *Id.* at 860.

[49] *Akron*, 462 U.S. at 458–59 (O'Connor, J., dissenting) (citations omitted).

[50] Transcript of Oral Argument, *supra* note 37, at 123 (identifying in the word index every instance of "stare").

[51] *Id.* at 79–80.

overruled simply because it was egregiously wrong."[52] The Solicitor General said that error plus changed facts would be necessary.[53] The Solicitor General maintained that position even when faced with the question of whether the Court could have overruled *Plessy v. Ferguson* the year after it was decided based solely on the fact it was an "egregiously wrong" decision.[54] She persisted in her contention that there must be changed factual circumstances:

> It certainly was egregiously wrong on the day that it was handed down, *Plessy*, but what the Court said in analyzing *Plessy* to *Brown* and *Casey* was that what had become clear is that the factual premise that underlay the decision, this idea that segregation did[] [not] create a badge of inferiority, had been entirely mistaken.[55]

Although several Justices during the oral argument in *Dobbs* seemed to agree that an egregious error alone was sufficient to overrule prior precedent, several other Justices took the position that error alone is insufficient.[56] They emphasized the *stare decisis* factors, focusing on "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification[.]"[57] Justice Kagan shared her belief that "not much has changed [factually] since *Roe* and *Casey*[.]"[58]

The *Dobbs* oral argument concerning *stare decisis* highlights the need to permit discovery on issues that would challenge the factual underpinnings in *Roe* to demonstrate the Court's error. Yet, lower courts refuse discovery concerning issues that would challenge the validity of the viability line.[59] As a result, litigants have not been able to develop a record showing fetal pain, fetal heartbeat, whether abortion is safer than childbirth, or whether women need abortion to be successful in the workplace.

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[52] *Id.* at 92.

[53] *Id.*

[54] *Id.* at 92–93.

[55] *Id.* (emphasis added).

[56] Transcript of Oral Argument, *supra* note 37, at 8–13 (questions by Justice Breyer); *id.* at 20–21 (question by Justice Sotomayor).

[57] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

[58] Transcript of Oral Argument, *supra* note 37, at 32–33.

[59] *See supra* note 6.

C. *Supreme Court Abortion Precedent After* Roe *and* Casey

Supreme Court precedent after *Roe* and *Casey* highlight the catch-22 that states face in attempting to overturn or limit *Roe*.[60] To convince the Court to reverse *Roe*, advocates need to demonstrate that the fetus is a human life—not just "potential life"—prior to viability. However, the current viability standard not only prevents a state from prohibiting abortion prior to viability but it also has led courts to prohibit discovery on issues that are aimed at undermining the right to abortion prior to viability.[61] Thus, the catch-22 is that, on the one hand, states need to produce evidence undermining the factual underpinnings of the viability standard to reverse *Roe*;[62] but, on the other hand, courts will not allow states to gather such evidence and use it in litigation to undermine the factual underpinnings of *Roe*.[63]

In addition to the question of life prior to viability, decisions following *Roe* and *Casey* highlight two additional areas for factual findings that could undermine *Roe*: facts addressing the question of whether abortion is a safer alternative to childbirth,[64] and facts addressing whether women need the right to abortion to realize their full potential in and out of the workplace.[65] In a recent article discussing the workability of *Roe*, scholars, Clarke D. Forsythe and Rachel N. Morrison, explain that the premise that abortions are safer than childbirth was unsupported in *Roe*.[66] Specifically, the Court based its decision that abortion was a safe alternative to childbirth despite having

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[60] *See* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 281 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021) (explaining that courts should permit discovery of issues that would challenge viability as the point at which a state's interest becomes compelling but citing cases where courts, including the *Dobbs* court, refused discovery because the plaintiffs sought to challenge the viability standard).

[61] *Id.*

[62] The *Roe* Court admitted that if the state could establish that the unborn fetus was a person, then plaintiff's case would fail. It naturally flows from that statement that if a litigant could establish that the unborn fetus is a human being, a plaintiff's challenge to an abortion regulation would fail. *Cf.* Roe v. Wade, 410 U.S. 113, 156–57 (1973).

[63] *See supra* note 6.

[64] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016) (Ginsburg, J., concurring) (stating that abortion is "one of the safest medical procedures" in the United States).

[65] *See* Gonzales v. Carhart, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting) (explaining why women need and rely on abortion).

[66] Clarke D. Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and* Roe v. Wade*: An Introduction*, 18 AVE MARIA L. REV. 48, 77–81, 86–87 (2020).

"no reliable national system of data collection and analysis."[67] If evidence were produced demonstrating the factual misgivings of the assertion that abortion is safer than childbirth, then it would provide a basis for satisfying the fourth factor of *stare decisis*.

Similarly, at least one amicus brief submitted to the Supreme Court in *Dobbs* directly challenged the factual premise in *Roe*, *Casey*, and subsequent cases, that women need abortion to have equal opportunities in the United States.[68] The brief filed on behalf of 240 women scholars and professionals as well as prolife feminist organizations asserts "[t]here is no adequate credible evidence that women, as a group, have enjoyed greater economic and social opportunities because of the availability of abortion."[69] It provides significant data challenging the previously unsupported notion that women need abortion to be successful. Justice Barrett asked questions along these same lines during the *Dobbs* oral argument. For example, she asked,

> [Given] both *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the ways in which forced parenting, forced motherhood, would hinder women's access to the workplace and to equal opportunities, it's also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy. Why don't the safe-haven laws take care of that problem?[70]

As reflected in *Dobbs*, both *Roe* and *Casey* established viability as the first instance that states have a strong enough interest in the life of the unborn to

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[67] *Id.* at 89 (identifying the unverified and noncollaborative data collection that takes place at the federal and state levels as well as by private organizations); *id.* at 90 ("*Roe* is unworkable because it was based on an unfulfilled assumption.").

[68] *See, e.g.*, *Gonzales*, 550 U.S. at 171 (Ginsburg, J., dissenting) ("[Women's] ability to realize their full potential . . . is intimately connected to 'their ability to control their reproductive lives.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 897 (1992))); *id.* at 172 ("[Abortion] center[s] on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.").

[69] Brief for 240 Women Scholars and Professionals, and Prolife Feminist Organizations in Support of Petitioners at 17, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (No. 19-1392), https://www.supremecourt.gov/DocketPDF/19/19-1392/185366/20210804180314919_19-1392%20Brief%20of%20240%20Women%20Scholars%20et%20al%20In%20Support%20of%20Petitioners.pdf.

[70] Transcript of Oral Argument, *supra* note 37, at 56.

prohibit abortion.[71] To the extent *Roe* and *Casey* rested on facts tending to show that abortion is safe, women need abortion to be equal participants in society, or that the fetus is not human life, the doctrine of *stare decisis* dictates that states must have the opportunity to produce new evidence that undermines the factual underpinnings of *Roe* and *Casey*. Banning states from ever gathering and submitting such information is contrary to the language in *Roe* and inconsistent with prior precedent where the Supreme Court has recognized and provided correction for its errors.[72]

III. *JACKSON WOMEN'S HEALTH ORGANIZATION V. DOBBS*[73]

In early 2018, Mississippi enacted the Gestational Age Act, which provides that, in most cases, a person cannot perform an abortion until a physician first determines and documents a fetus's probable gestational age.[74] Except in the case of

> a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.[75]

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[71] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) ("[D]uring the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake."); *Roe*, 410 U.S. at 163–65 (the state's interest is "compelling" at viability and, at that point, the state could "proscribe abortion").

[72] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (reversing *Plessy v. Ferguson*, 163 U.S. 537 (1896), concluding that separate educational facilities are inherently unequal).

[73] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021).

[74] MISS. CODE ANN. § 41-41-191 (1972).

[75] *Id.* The statute defines "severe fetal abnormality" as "a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb." *Id.* A "medical emergency" is defined as

> > a condition in which . . . an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.
>
> *Id.*

The statute provides that the medical licenses of doctors who violate the Act shall be suspended or revoked.[76]

The legislature set the mark at fifteen weeks because it found that "most abortions performed after fifteen weeks' gestation are dilation and evacuation procedures," which the legislature described as "a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession."[77] The legislature also made findings concerning medical knowledge of prenatal development, including that unborn babies have the ability to open and close fingers and sense outside stimulations starting at twelve weeks' gestation.[78] Finally, the legislature "found that abortion carries risks to maternal health that increase with gestational age."[79]

"On the day the Act was signed into law, Jackson Women's Health Organization" filed suit challenging the constitutionality of the Act and requesting emergency relief to enjoin implementation of the Act.[80] Concluding that the Act is "effectively a ban on all elective abortions after 15 weeks," the court granted the temporary restraining order and limited discovery to the issue of when viability occurs.[81] The district court explained that the "single question" in the case was whether the fifteen-week mark was before viability.[82] Thus, the court concluded that the State's discovery requests concerning fetal pain and the detection of a heartbeat were irrelevant because "discovery was aimed at rejecting the Supreme Court's viability framework, not at defending the Act within that framework."[83]

At the close of discovery, the Clinic moved for summary judgment.[84] It "submitted evidence that viability is medically impossible at 15 weeks", and that the State conceded that it had not identified any "medical evidence that a fetus would be viable at 15 weeks."[85] "The district court granted summary judgment to the [C]linic" and permanently enjoined the Act "because 'viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic

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[76] MISS. CODE ANN. § 41-41-191(6).

[77] *Dobbs*, 945 F.3d at 269.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 269–70.

[82] *Id.*

[83] *Dobbs*, 945 F.3d at 270.

[84] *Id.*

[85] *Id.*

abortions.'"[86] On appeal, the State raised five arguments,[87] which the circuit court "collapse[d] to three: whether the summary-judgment order properly applies the Supreme Court's abortion jurisprudence, whether limiting discovery to viability was an abuse of discretion, and whether the scope of injunctive relief was proper."[88]

In affirming the district court's decision, the circuit court held that under *Casey* there is no state interest that "can justify a pre-viability abortion ban."[89] The court explained that pre-viability abortion bans are "unconstitutional regardless of the State's interests because 'a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.'"[90] As a result, the circuit court held that the district court did not abuse its discretion in denying discovery on the issues of fetal pain and heartbeat because those issues did not relate to the question of when viability occurs.[91] The State argued that the district court abused its discretion because the denial of discovery means that the court cannot consider new evidence related to the State's interests in prohibiting or limiting abortion pre-viability.[92] Rather, courts "will remain 'willfully blind' to scientific developments" and will "never see a full record in an abortion case."[93] Judge James C. Ho, who wrote a concurring opinion, reasoned:

> Because *Casey* establishes viability as the governing constitutional standard, I am duty bound to conclude that

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[86] *Id.* (quoting Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 539 (S.D. Miss. 2018)).

[87] The five arguments made by the State were that

> (1) the Supreme Court's decision in *Gonzales v. Carhart* preserves the possibility that a "state's interest in protecting unborn life can justify a pre-viability restriction on abortion;" (2) the district court abused its discretion by restricting discovery, thus stymying the State's effort to develop the record; (3) the district court failed to defer to the legislature's findings; (4) the Act imposes no undue burden, as it only shrinks by one week the window in which women can elect to have abortions [given that the only abortion provider in Mississippi only provides abortions through sixteen weeks]; and (5) the Clinic lacked standing to challenge the Act's application after 16 weeks . . . .

Id. at 271.

[88] *Id.*

[89] *Dobbs*, 945 F.3d at 271.

[90] *Id.* at 273 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)).

[91] *Id.* at 275.

[92] *See id.*

[93] *Id.*

> the district court did not abuse its discretion in forbidding discovery and fact development on the issue of pain. But neither would it have been an abuse of discretion if the district court had *permitted* discovery fact development on the issue of pain.[94]

Judge Ho began his explanation by turning to Federal Rule of Civil Procedure 26(b)(1), which permits discovery for "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering [*inter alia*] the importance of the issues at stake in the action."[95] He explained that relevance, as used in Rule 26, "encompass[es] any matter that bears on, or that could reasonably lead to other matter that could bear on, any issue that is or may be in the case."[96] Judge Ho believed Rule 26 was broad enough to encompass discovery on factual matters directed at overturning *Roe* because Federal Rule of Civil Procedure 26(g), which sets forth the signature requirement for discovery requests and disclosures, specifically states that the parties can take discovery on matters related to those "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[97]

Under Rule 26, a court cannot prevent discovery solely on the ground that the information sought in discovery is intended to be used to overrule or undermine existing precedent.[98] Rule 26(g) specifically states that by signing the request or response, the party or attorney represents that the discovery is "consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law."[99] As applied in the abortion context, Rule 26 reaffirms that parties are allowed to pursue nonfrivolous claims seeking to reverse existing law.[100] Thus, states should be permitted to take discovery on issues such as fetal heartbeat and fetal pain to seek a reversal of existing precedent that triggers the State's compelling interest in the unborn baby only at the point of viability. States should also be permitted to take discovery on the safety of the abortion procedure as compared to childbirth, because the Court in *Roe* relied on the purported safety of abortion in reaching its

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[94] *Id.* at 281 (Ho, J., concurring).

[95] *Dobbs*, 945 F.3d at 281 (quoting FED. R. CIV. P. 26(b)(1)).

[96] *Id.* (alteration in original) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)).

[97] *Id.* (quoting FED. R. CIV. P. 11(b)(2)).

[98] *Id.* (quoting FED. R. CIV. P. 11(b)(2)).

[99] FED. R. CIV. P. 26(g)(1)(B)(i).

[100] *Id.*

decision that there was a right to abortion.[101] A repeatedly asserted basis when arguing the reliance factor in the *stare decisis* doctrine is the conclusion that women need abortion.[102] Thus, states should be allowed to take discovery on the question of whether women actually need, and rely on, the right to abortion in order to have an equal opportunity to participate in society.

IV. AT A MINIMUM, THE SUPREME COURT MUST SEIZE THE OPPORTUNITY IN *DOBBS* TO ALLOW STATES TO PROVE WHEN LIFE BEGINS

A. *The Supreme Court Should Overrule* Roe *and* Casey

More than 60 million unborn babies have been aborted because the Supreme Court has refused for nearly fifty years to reverse *Roe*.[103] In some respects, the abortion precedent has felt a bit like a shell game–with the Court pushing around various words to describe the unborn baby, all the while refusing to answer the one question that should put an end to abortion—whether what is growing in the mother's womb is a human life. Instead of answering that important question, the Court refers to the unborn baby as a "*potential* life"[104] or a "living organism."[105] According to a dictionary definition, "potential" means "[h]aving or showing the capacity to become or develop into something in the future."[106] This definition begs the following questions. When discussing an unborn human, at what point in the future does the potential life develop into life? Is it a life at conception, viability, birth, or some other point in the fetus's development? If only at birth, why has the Court used the viability line as the point in time the State's interest in that potential life becomes compelling? And if a fetus is only "potential life" for the first twenty-plus weeks, what exactly is it prior to viability?

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[101] *See* Roe v. Wade, 410 U.S. 113, 145–46, 149 (1973).

[102] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) (an entire generation of women have come to rely on the ability to make reproductive decisions); *id.* at 927–28 (Blackmun, J., concurring) (discussing the burdens women face when "force[d]" to give birth); Transcript of Oral Argument, *supra* note 37, at 48 ("[E]liminating or reducing the right to abortion will propel women backwards."); *id.* at 52 ("[A]bortion has been critical to women's equal participation in society.").

[103] *See* Dorman, *supra* note 2.

[104] *Roe*, 410 U.S. at 150; *see also Casey*, 505 U.S. at 852 ("Abortion is a unique act. It is an act fraught with consequences for others: for the woman . . . and, depending on one's beliefs, for the life or potential life that is aborted.").

[105] Gonzales v. Carhart, 550 U.S. 124, 147 (2007) ("The Act does apply both pre[-]viability and post[-]viability 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.").

[106] *Potential*, LEXICO.COM, https://www.lexico.com/en/definition/potential (last visited Mar. 6, 2022).

Supreme Court precedent seems to rest on the notion that prior to viability, the fetus is not a human life; it is some "living organism" constituting "potential [human] life" that later develops into human life.[107] The Court has not added any clarity to its reasoning by referring to the fetus as a "living organism" while refusing to identify what species of living organism the Court believes the fetus to be.

To confuse things even further, without answering the question of when life begins or explaining what a potential life means, the *Roe* Court concluded that the unborn baby is not a person for purposes of the Fourteenth Amendment's protection—including the right to life.[108] The Justices who continue to affirm *Roe* and *Casey* apparently do not realize the contradictory positions they take in asserting that the fetus *is* a living being and, yet, a woman can abort that living being as long as we do not call it a living human being.[109] In reality, all human life, regardless of its stage of development, is endowed with the right to life because humans are created in the image of God, not because a human magically transforms into a "person" at birth. Scripture repeatedly describes God making, forming, and knitting together babies in the womb.[110]

The Supreme Court has continued to affirm *Roe* even while suggesting that the decision in *Roe* might have been in error.[111] The possible error that the Court referred to in *Casey* is the fact that *Roe* did "not resolve the difficult question of when life begins," yet the Court still went on to conclude that women have a right to destroy what may or may not be a life.[112] If the Court was not competent to decide when life begins, and thus whether the fetus is a human life prior to birth, then it should have erred on the side of protecting the fetus. Instead, the Court refused to decide when life begins but still found a right to destroy what may or may not constitute human life.[113] Looking back to Pascal's Wager, the Court chose the wager that has the potential of infinite

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[107] *See Roe*, 410 U.S. at 163 (explaining that the state has an interest in the "potential life," before viability but that after viability the "fetus then presumably has the capability of meaningful life outside the mother's womb").

[108] *Casey*, 505 U.S. at 913 (Stevens, J., concurring) ("After analyzing the usage of 'person' in the Constitution, the Court concluded that the word 'has application only postnatally.' . . . Thus, as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.'").

[109] *Id.* at 846 ("These principles do not contradict one another . . . .").

[110] *See, e.g.*, *Job* 31:15; *Psalm* 139:13; *Isaiah* 44:2, 24; *Isaiah* 49:5; *Jeremiah* 1:4–5.

[111] *Casey*, 505 U.S. at 857–59, 869.

[112] *Roe*, 410 U.S. at 159.

[113] *Id.*

loss.[114]

A 2012 Alabama Supreme Court opinion highlights the Court's error. The Alabama decision held that the State's "wrongful-death statute allows an action to be brought for the wrongful death of any unborn child, even when the child dies before reaching the point of viability."[115] In that case, the trial court concluded that the plaintiffs could not bring suit for wrongful death of a non-viable fetus.[116] The Supreme Court of Alabama reversed.[117] Justice Parker explained in his concurring opinion that some states had incorrectly "applied *Roe*'s viability standard to wrongful-death law, citing *Roe* as prohibiting the recovery of damages for the wrongful death of a child who dies without reaching viability."[118] "*Roe*'s statement that unborn children are not 'persons' within the meaning of the Fourteenth Amendment is irrelevant to the question whether unborn children are 'persons' under state law."[119] Thus, unless a woman's right to abortion is implicated, states can treat an unborn child as a protectable human life.

Justice Parker identified four reasons that "*Roe*'s viability standard is not persuasive."[120] First, he explained how "*Roe* misstated the protection of the unborn child under the common law."[121] He specifically challenged the *Roe* Court's conclusion that "the unborn have never been recognized in the law as persons in the whole sense."[122] For example, even though Sir William Blackstone "recognized that unborn children were persons," and the *Roe* Court cited Blackstone in its decision, the Court "failed to note that Blackstone addressed the legal protection of the unborn child within a section entitled 'The Law of Persons.'"[123] Further, the Court "ignored the opening line of [Blackstone's] paragraph describing the law's treatment of the unborn child: 'Life is an immediate gift of God, a right inherent by nature in every individual.'"[124] Professor David Kader's research revealed that "[r]ights and protections legally afforded the unborn child are of ancient vintage. In equity, property, crime, and tort, the unborn has received and continues to receive a

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[114] *See Pascal's Wager*, *supra* note 9 and accompanying text.

[115] Hamilton v. Scott, 97 So. 3d 728, 735 (Ala. 2012).

[116] *Id.* at 732.

[117] *Id.* at 737.

[118] *Id.* at 740 (Parker, J., concurring).

[119] *Id.* at 741.

[120] *Id.* at 742.

[121] *Hamilton*, 97 So. 3d at 742.

[122] *Id.* (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)).

[123] *Id.* at 743.

[124] *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *129).

legal personality."[125]

Justice Parker then explained how *Roe* "misstated the protection of the unborn child under tort law and criminal law."[126] Citing various scholars, Justice Parker pointed out that *Roe*'s discussion on the legal status of the unborn in tort law was "perfunctory, and unfortunately largely inaccurate."[127] In particular, "[v]iability played no role in the common law of property, homicide, or abortion."[128] Nor was there any viability standard connected to "wrongful-death law because the common law did not recognize a[ny] cause of action for the wrongful death[.]"[129] Rather, the viability standard was not introduced into American law until 1946 when a federal district court implied that a cause of action for prenatal injuries would only be recognized if the unborn child had reached the point of viability.[130] Over the next couple of decades, however, the viability standard lost influence.[131] In a thorough legal survey of prenatal-injury law that took place a decade before *Roe* was decided, the researcher concluded that the viability standard in prenatal injury cases is headed for "oblivion" because courts recognized it was "illogical and unjust" to the children who suffered prenatal injuries since viability was "not readily amenable to scientific proof."[132]

Justice Parker's third point was that "*Roe*'s viability standard was dictum."[133] He relied on three lines of reasoning to support his conclusion. First, viability was not a part of the Texas statute at issue in *Roe* or the Georgia statute addressed in *Roe*'s companion case, *Doe v. Bolton*.[134] Because neither of those cases rested on a viability determination, the Court created a viability standard without any evidentiary record.[135] Second, Justice Parker explained that the viability standard was dictum in *Casey* because the Pennsylvania

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[125] *Id.* (quoting David Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639, 639 (1980)).

[126] *Id.*

[127] *Hamilton*, 97 So. 3d at 743 (quoting Kader, *supra* note 125, at 652).

[128] *Id.* (citing Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 569 n.33 (1987)).

[129] *Id.* (citing Farley v. Sartin, 466 S.E.2d 522, 525 (W. Va. 1995); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984)).

[130] *Id.* (citing Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946)).

[131] *Id.* at 744.

[132] *Id.* at 744 (alteration in original) (quoting Charles A. Lintgen, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 600 (1962)).

[133] *Hamilton*, 97 So. 3d at 744 (emphasis added).

[134] *Id.*

[135] *Id.* (citing Randy Beck, *Self-Conscious Dicta: The Origins of* Roe v. Wade*'s Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 511–12, 516–26 (2011)).

statute "applied throughout a woman's pregnancy."[136] Finally, Justice Parker explained that "the *Roe* Court's internal correspondence" identifies the viability line as "arbitrary."[137] Justice Parker cited an internal memorandum of Justice Blackmun's, where he said "that the end of the first trimester [wa]s [a] critical" time on which to rest the woman's nearly unfettered right to abortion, but acknowledged that it was as "arbitrary" a point "as quickening or viability."[138]

Justice Parker's final reason in support of his conclusion that *Roe*'s reasoning is not persuasive was that "the viability standard was incoherent."[139] *Roe*'s reasoning was incoherent because (1) the viability standard lacked foundation and was arbitrary, (2) the Court offered no understandable explanation why it chose viability as compared to quickening (when fetal movement is detectable), (3) viability is irrelevant in other areas of law, and (4) genetics and related medical fields demonstrate that from the point of conception a separate human life is formed.[140] The viability standard lacks foundation and is "arbitrary"[141] because the government's interest in regulating or prohibiting abortion is in protecting those who will be citizens if their lives are not ended in the womb.[142] "The State's interest is in the fetus as an entity itself, and *the character of this entity does not change at the point of viability under conventional medical wisdom*."[143]

Roe's viability standard is incoherent because the Court chose viability as the time when a State's interest becomes compelling even though it could have chosen quickening, which occurs six to twelve weeks earlier.[144] The incoherence of that choice is made clear by looking at the definition of quickening. "Quickening is the point at which the fetus begins discernibly to move independently of the mother and the point that has historically been deemed crucial[—]to the extent *any* point between conception and birth has

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[136] *Id.* (citing Randy Beck, Gonzales*,* Casey*, and the Viability Rule*, 103 NW. U. L. REV. 249, 271–76 (2009)).

[137] *Id.* (quoting Beck, *supra* note 135, at 520–21, 526).

[138] *Id.* (quoting Internal Supreme Court Memorandum from Justice Blackmun, *as quoted in* DAVID J. GARROW, LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 580 (1994)).

[139] *Hamilton*, 97 So. 3d at 744.

[140] *Id.* at 745–47.

[141] *Id.* (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 794–95 (1986) (White, J., dissenting) (citations omitted)).

[142] *Id.* at 745.

[143] *Id.* (quoting *Thornburgh*, 476 U.S. at 795 (White, J., dissenting) (emphasis added)).

[144] *Id.* (quoting John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924–25 (1973)).

been focused on."[145] The Court justified its viability choice by stating that viability is the point at which the fetus has the capability of surviving outside the womb.[146] Keeping in mind that the Court said it would not, or could not, decide in 1973 when human life begins, the Court's choice of viability as compared to quickening makes no sense.[147] Once independent movement of the unborn baby is detectable, it is unquestionably human life. None of the abortion cases suggest anything to the contrary.[148] But instead of choosing quickening as the point when a State's interest in protecting that growing life becomes compelling, the Court chose viability because—to paraphrase—before that time, the growing human life is too weak and not developed enough to have a chance of survival outside the womb.[149]

Justice Parker also explained that, in other areas of law, viability is irrelevant to determining the existence of liability for harm to the unborn child.

> Viability is irrelevant to determining the existence of prenatal injuries, the extent of prenatal injuries, or the cause of prenatal death. Viability is irrelevant to proving causation because the unborn child's anatomic condition can be observed regardless of viability and, if the unborn child dies, the cause of its death can be determined by autopsy regardless of the child's gestational age. Viability does not affect the child's loss of life or the damages suffered by the surviving family.[150]

For example, at least thirty-eight states have fetal homicide laws that criminalize harm caused to a fetus.[151] At least twenty-eight of those states

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[145] *Hamilton*, 97 So. 3d at 745 (quoting Ely, *supra* note 144, at 924–25).

[146] Roe v. Wade, 410 U.S. 113, 163 (1973).

[147] *Id.* at 159 (need not and cannot decide when life begins); *id.* at 163 (state's interest in regulating abortion is at viability).

[148] *See, e.g.*, *id.* at 133 (quickening was "the point at which the embryo or fetus became 'formed' or recognizably human, or in terms of when a 'person' came into being").

[149] *Id.* at 163 (the fetus is capable of meaningful life outside the womb at the point of viability).

[150] *Hamilton*, 97 So. 3d at 746.

[151] *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women*, NAT'L CONF. OF STATE LEGISLATORS (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx#State%20Laws. *Cf. Hamilton*, 97 So. 3d at 738 (Parker, J., concurring) (noting that as of 2010, "[a]t least 38 states have enacted fetal-homicide statutes, and 28 of those states protect life from conception"); *see* State v. Courchesne, 298 A.2d 1, 15–18 (Conn. 2010) (affirming conviction under fetal-

impose criminal penalties at any point post-conception.[152] Many of the states with fetal homicide laws expressly define the fetus as an "unborn child" or "person."[153] Some courts have also held a fetus to be an unborn child in the context of proceedings in juvenile court to protect the unborn child from the mother's neglect.[154] One New York Family Court explained that "[m]aking a child endure an unsafe environment in the womb is ludicrous when this same child is afforded protection from illegal drugs and an unsafe environment the moment it takes its first breath outside the womb."[155] The West Virginia Supreme Court similarly explained that justice is denied when a tortfeasor's civil liability for harming an unborn baby turns on the happenstance that the unborn child died pre-viability.[156]

Justice Parker further explained that the continued use of viability as the time in which the State's interest becomes compelling is incoherent because of medical advancements.[157] Genetic and medical advancements demonstrate that a unique human being is formed at the moment of conception.[158] The fact that the individual human being may not be able to survive independently should not be relevant—it is still a human life.[159] Indeed, human life is most innocent prior to birth.[160]

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homicide statute); State v. Bauer, 471 N.W.2d 363, 364 (Minn. Ct. App. 1991) (upholding constitutionality of fetal-homicide statute). *See also* Steven Andrew Jacobs, *The Future of* Roe v. Wade*: Do Abortion Rights End When a Human's Life Begins?*, 87 TENN. L. REV. 769, 847 (2020) ("However, in the four decades since *Roe*, federal and state lawmakers have been progressive in their recognition of fetuses as persons under the law. On the federal level, the U.S. Congress passed the 'Unborn Victims of Violence Act' to ensure that 'protection of unborn children,' which includes any 'member of the species homo sapiens, at any stage of development, who is carried in the womb.'").

[152] *Hamilton*, 97 So. 3d at 738.

[153] *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women*, *supra* note 151.

[154] *Ex parte* Ankrom, 152 So. 3d 397, 400–01 (Ala. 2013); *In re* Unborn Child, 179 Misc. 2d 1, 7–8 (N.Y. Fam. Ct. 1998). *But see* State v. Stegall, 828 N.W.2d 526, 528 (N.D. 2013) (holding that an unborn child is not protected by child endangerment statutes); State v. Wade, 232 S.W.3d 663, 666 (Mo. Ct. App. 2007) (refusing to treat unborn child as a person for child endangerment statutes).

[155] *In re Unborn Child*, 179 Misc. 2d at 8.

[156] *Hamilton*, 97 So. 3d at 746 (Parker, J., concurring) (quoting Farley v. Sartin, 466 S.E.2d 522, 533 (W. Va. 1995)).

[157] *Id.*

[158] *Id.*

[159] *Id.* at 746–47.

[160] *Id.* at 747. The decisions and laws recognizing that a fetus is an unborn child are consistent with biblical references indicating that babies in the womb are human lives. For

As *Roe*, *Casey*, and other cases challenging laws imposing limits on abortion pre-viability demonstrate, the viability standard is incoherent, arbitrary, and not based on medical science. The Court should use *Dobbs* to correct its egregious error in *Roe* and *Casey*. The oral argument in *Dobbs* seems to reflect that some of the Justices believe egregious error alone is sufficient to overrule a prior case, while Justices Breyer, Kagan, and Sotomayor believe that egregious error alone is insufficient.[161] For example, after two short questions by Justice Thomas to clarify the petitioner's argument about the nature of the privacy right of abortion, Justice Breyer asked a question about *stare decisis*.[162] His question turned into two and half pages of how the Court should overrule a prior case only when there is "the most convincing justification[s]" lest the Court "'surrender to political pressures or new members' [on the bench]."[163] Referencing Justice Breyer's questions about *stare decisis*, Justice Kagan later articulated her belief that "there has to be a justification, a strong justification in a case like this beyond the fact that you think the case is wrong" to "prevent people from thinking that this Court is a political institution that will go back and forth depending on what part of the public yells loudest."[164] Justice Sotomayor spoke more bluntly on the question of whether the Court could reverse *Casey* when she

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example, the Bible refers to people who expressed their desire that God had killed them within the womb, *Job* 10:18–9; *Jeremiah* 20:17, a baby grabbing his brother by the heel in the womb, *Hosea* 12:3, and a baby leaping for joy while still in the womb, *Luke* 1:41–5. A right to abortion, which destroys a growing human life, stands in conflict with the biblical admonitions not to murder or shed innocent blood. *Exodus* 20:13; *Psalm* 106:35, 37–38 ("But mingled themselves with the nations, and learned their [practices], . . . they [even] sacrificed their sons and their daughters []to demons, and shed innocent blood, . . . the blood of their sons and of their daughters, whom they sacrificed []to the idols of Canaan; And the land was polluted with blood."). Human life is, at its most innocent, pre-birth.

[161] Transcript of Oral Argument, *supra* note 37, at 10 (Breyer stating only the "most convincing justification" would be sufficient to overrule and suggesting throughout oral argument that the belief of some the case was in error is not enough); *id*. at 15–16 (Sotomayor pointing out that at the time of *Roe* and now, some people think abortion is right and others think it is wrong; suggesting that was not enough to overrule *Roe* without making it look like a political decision); *id*. at 32–33 (Kagan also pointing out the continued conflicting views on abortion); *id*. at 79–80 (Kavanaugh listing the Court's prior precedent where it overruled itself because the prior case was wrong); *id*. at 92–95 (Alito asking, "[w]ould it not be sufficient to say that was an egregiously wrong decision on the day it was handed down and now it should be overruled[;] . . . [c]an a decision be overruled simply because it was erroneously wrong, even if nothing has changed between the time of that decision and the time when the Court is called upon to consider whether it should be overruled").

[162] *Id.* at 11.

[163] Transcript of Oral Argument, *supra* note 37, at 9–11.

[164] *Id.* at 33.

asked, "[w]ill this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?"[165]

When, as here, the prior decisions are based on egregious error and rest on factual assumptions that are now known to be incorrect,[166] the Court should reverse. If the Court does not seize the opportunity in *Dobbs* to reverse *Roe* and *Casey*, the Court must at least abandon the viability standard.

B. *If the Court Does Not Reverse* Roe*, It Should Abandon the Viability Standard*

Although one cannot necessarily predict how the Justices will rule based on the questions asked during oral argument, Chief Justice Roberts asked questions during the *Dobbs* argument that suggest he appreciates the arbitrariness of the viability line.[167] For example, after pointing out that the Mississippi statute prohibited abortions after fifteen weeks, the Chief Justice asked whether all the burdens on women asserted by the Clinic's counsel apply with full force to the statute given the difference is only between fifteen weeks and viability.[168] He then asked,

> if you think that the issue is one of choice that women should have a choice to terminate their pregnancy, that supposes that there is a point at which they've had the fair choice, opportunity choice, and why would 15 weeks be an inappropriate line? Because viability, it seems to me, doesn't have anything to do with choice. But, if it really is an issue about choice, why is 15 weeks not enough time?[169]

After the Clinic's counsel attempted to turn the focus back to the fact that Mississippi's law prohibited abortions before viability and that any line other than viability would be unworkable, the Chief Justice stated he wanted "to focus on the 15-week ban because that's not a dramatic departure from

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[165] *Id.* at 15.

[166] The pre-viability fetus cannot be merely potential life given that the fetus has a detectable heartbeat as early as six weeks and can feel pain as early as twenty weeks. *See supra* note 6. Advancements in ultrasound technology since 1973, including 3D and 4D photos and videos of the unborn, reveal that the fetus is undeniably a human life well before birth or viability. *See* Dr. Liji Thomas, *Ultrasound Scans – Is There a Difference Between 3D and 4D Scans?*, NEWS MED. LIFE SCIS., https://www.news-medical.net/health/Ultrasound-scans-is-there-a-difference-between-3D-and-4D-scans.aspx#:~:text=Comparatively%2C%204D%20ultrasounds%20allow%20for,3D%20ultrasound%20in%20live%20motion (last visited Mar. 6, 2022).

[167] Transcript of Oral Argument, *supra* note 37, at 51–54.

[168] *Id.* at 52.

[169] *Id.* at 53.

viability."[170] He explained that "the vast majority" of other countries prohibit abortions at the fifteen-week mark and other than the United States, China and North Korea use the viability standard.[171]

Even Justice Blackmun, who authored *Roe*, later explained that he would "have thought 'it obvious that the State's interest in the protection of an embryo . . . increased progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day.'"[172] Yet, courts use *Roe* to justify their refusal to permit evidence to be submitted that demonstrates fetal pain or fetal heartbeats.[173]

The refusal of courts to permit discovery on these issues is inconsistent with the fourth *stare decisis* factor. Under that factor, the Court considers "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[174] The rule's underlying assumptions are that the Court can make mistakes and parties can continue to gather facts to prove to the Court that it was a mistake. If a Supreme Court decision is subsequently interpreted to foreclose discovery of new facts that might one day prove the Court's mistake, then the fourth factor can never be satisfied and is rendered meaningless. Yet, as discussed earlier, some courts are using the viability standard as a justification to deny discovery of facts that could demonstrate that the old rule is no longer significant.

A brief look at three cases highlights that lower courts are treating the viability rule as a rule that can never change and which precludes discovery of facts that could lead to *Roe*'s reversal. As discussed earlier in *Dobbs*, the trial court denied discovery on fetal pain.[175] On appeal, even the concurring justice who explained why the trial court could have permitted discovery, believed "the district court did not abuse its discretion in forbidding discovery and fact development on the issue of [fetal] pain."[176] He reached that decision "[b]ecause *Casey* establishes viability as the governing constitutional standard[.]"[177] However, because the parties are entitled to

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[170] *Id.* at 54.

[171] *Id.*

[172] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 280 (5th Cir. 2019) (Ho, J., concurring), *cert. granted*, 141 S. Ct. 2619 (2021) (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 552 (1989)).

[173] See *supra* note 6.

[174] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

[175] *Dobbs*, 945 F.3d at 269.

[176] *Id.* at 281 (Ho, J., concurring).

[177] *Id.*

assert nonfrivolous arguments that extend, modify, or even reverse existing law, it was an abuse of discretion to deny discovery on matters that could lead to reversal of *Roe* and *Casey* as the governing constitutional standards.[178]

In *Bryant v. Woodall*, decided by the Middle District of North Carolina, the trial court permitted discovery on three questions that directly challenged the point of viability: the issue of whether a fetus is viable between twenty and twenty-six weeks, whether a fetus feels pain between twenty and twenty-six weeks, and "whether abortions of fetuses between [twenty] to [twenty-six] weeks pose any greater health risks to pregnant women."[179] It permitted the discovery on those issues because the Supreme Court's abortion jurisprudence acknowledges that as technology advances, the point at which a fetus becomes viable will change.[180] Thus, discovery on issues related to determining viability are consistent with *Roe* and *Casey*.

In reaching that conclusion, the court distinguished a decision by the Ninth Circuit Court of Appeals that issued an injunction against an Arizona law that prohibited abortions pre-viability.[181] The Middle District of North Carolina explained that in the Ninth Circuit case, all parties conceded that a ban on abortions prior to twenty weeks was a ban on an abortion prior to viability.[182] Thus, as the Middle District of North Carolina explained, the twenty-week ban was in direct conflict with *Casey* and, therefore, unconstitutional.[183] In the North Carolina case, however, the parties were litigating whether viability was possible once a fetus reached twenty weeks and, thus, discovery could be taken on whether the fetus was viable between twenty weeks (the Arizona statute) and twenty-six weeks (the then prevailing understanding of viability).[184] The court then permitted discovery on fetal pain and the safety of abortion during that same time period.[185]

Even though the North Carolina case permitted discovery, its discussion of the entrenched viability standard from *Casey* demonstrates that courts treat the viability rule as a permanent standard that cannot be overruled. As a result, courts refuse discovery on matters that would undermine that viability standard rather than move the point of viability. The Supreme Court can use *Dobbs* to correct this assumption by eliminating viability as the

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[178] *See* FED. R. CIV. P. 26(g)(1)(B)(i).

[179] Bryant v. Woodall, No. 1:16CV1368, 2017 U.S. Dist. LEXIS 53570, at *21 (M.D.N.C. Apr. 7, 2017).

[180] *See Casey*, 505 U.S. at 860.

[181] *Bryant*, 2017 U.S. Dist. LEXIS 53570, at *12–14.

[182] *Id.*

[183] *Id.* at *4–5.

[184] *Id.* at *13–14.

[185] *Id.* at *21–22.

arbitrary cut-off point and permitting states to demonstrate that protectable human life occurs well before the point of viability. A decision from the United States Court of Appeals for the Eighth Circuit highlights the need for the Court to change its precedent.[186]

North Dakota passed a law prohibiting abortions once there was a detectable heartbeat in the unborn child.[187] The trial court granted summary judgment in favor of the Clinic, and the Eighth Circuit affirmed.[188] The North Dakota law required a physician to determine if the unborn child had a detectable heartbeat and, if there was a heartbeat, a medical professional could not perform an abortion.[189] The statute had life and health exceptions.[190] The statute subjected physicians to liability for violating the statute but did not subject women to liability.[191] After the Eighth Circuit quickly explained that the Supreme Court had not yet overruled *Roe* and *Casey*, the court held that it had no choice but to apply the governing legal standard that "a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'"[192] Applying that standard, a statute that generally prohibits abortions after a fetal heartbeat is detectable at about six weeks is unconstitutional.[193]

After that brief discussion as to why it was bound by Supreme Court precedent to declare the statute unconstitutional, the Eighth Circuit explained that, in a previous case involving a similar Arkansas statute, it had noted "the importance of the parties, particularly the state, developing the record in a meaningful way so as to present a real opportunity for the court to examine viability."[194] In *MKB*, the state's declaration by Dr. Obritsch took the position that viability occurs at conception, relying on the fact that in vitro fertilization[195] allows an embryo to live outside the human womb for two to six days after conception.[196] Even though the State provided some support for its argument, the Eighth Circuit held that those facts did "not

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[186] *See* MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768 (8th Cir. 2015).

[187] *Id.* at 770.

[188] *Id.* at 776.

[189] N.D. CENT. CODE § 14-02.1-04 (2021).

[190] N.D. CENT. CODE § 14-02.1-02(12) (2021).

[191] *MKB*, 795 F.3d at 770.

[192] *Id.* at 772 (quoting Gonzales v. Carhart, 550 U.S. 124, 146 (2007)).

[193] *Id.*

[194] *Id.* at 773 (quoting Edwards v. Beck, 786 F.3d 1113, 1119 (8th Cir. 2015) (per curiam)).

[195] For a brief overview of the in vitro fertilization process, see *In Vitro Fertilization*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 (last visited Mar. 6, 2022).

[196] *MKB*, 795 F.3d at 773.

create a genuine dispute as to when viability occurs" because its definition of viability differed from the Supreme Court's definition of viability.[197] Because courts are interpreting the viability line as an absolute legal standard rather than one subject to later review and possible reversal, it seems no amount of evidence provided by a state would create a genuine issue of material fact. Thus, only the Supreme Court can change the viability standard, but it would need evidence to reach that conclusion—evidence that most courts are prohibiting states from taking discovery to obtain.

After explaining that it was bound to affirm the injunctive relief, the Eighth Circuit explained that "good reasons exist for the [Supreme] Court to reevaluate its jurisprudence."[198] It identified two primary reasons. First, the Court's viability standard "gives too little consideration to the 'substantial state interest in potential life throughout pregnancy.'"[199] The Eighth Circuit stated that the Court has "tied a state's interest in the unborn children to developments in obstetrics, not to developments in the unborn."[200] As a result, one year an unborn baby could be aborted because the point of viability was twenty-four weeks but a few years later the unborn baby would be protected at twenty-three weeks if medical advances moved the time for viability.[201] "How it is consistent with a state's interest in protecting unborn children that the same fetus would be deserving of state protection in one year but undeserving of state protection in another is not clear."[202] Similarly, depending on the medical standards in a particular community, the same fetus might be considered viable in one community but not another.[203] The choice of what that critical point is when a State's interest becomes compelling "is better left to the states, which find their interest in protecting unborn children better served by a more consistent and certain marker than viability."[204] In *MKB*, the North Dakota legislature had determined the critical point for asserting the state interest in protecting unborn life was a detectable heartbeat.[205]

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[197] *Id.*

[198] *Id.*

[199] *Id.* at 774 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (plurality opinion)).

[200] *Id.*

[201] *Id.*

[202] *MKB*, 795 F.3d at 774.

[203] *Id.*

[204] *Id.*

[205] *Id.*

The *Beck* court explained that the judiciary should not substitute its judgment for the legislature.[206] By taking the issue from the states, the Court has removed the states' ability to account for medical and scientific advancements that have significantly expanded our knowledge of prenatal development.[207] There is medical evidence that "a baby develops sensitivity to external stimuli and to pain much earlier than was [previously] believed [when *Roe* was decided]."[208] As Judge Jones from the Fifth Circuit explained:

> "[B]ecause the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate" medical and scientific advances. Thus, the Court's viability standard fails to fulfill *Roe*'s "promise that the State has an interest in protecting fetal life or potential life."[209]

The second reason the Eighth Circuit identified for the Court to reevaluate *Casey* is that the facts underlying *Roe* and *Casey* may have changed.[210] One of those assumptions is that the a woman will be in close consultation with her physician when making the decision whether to abort.[211] Declarations submitted in the case revealed that many women had abortions without consulting a physician before or after the procedure; women received no information about possible complications from the abortion procedure; and many abortion clinics function "like a mill."[212] One doctor submitted a declaration stating that women often face coercion or pressure prior to making the decision to terminate her pregnancy.[213] The declarations from women revealed that abortions may cause adverse physical and mental health consequences for the women.[214] Sandra Cano, who was the "Mary Doe" in *Doe v. Bolton—Roe*'s companion case—filed an amicus brief in the Eighth

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[206] Edwards v. Beck, 786 F.3d 1113, 1119 (8th Cir. 2015) (per curiam).

[207] *Id.* at 1118 (quoting Hamilton v. Scott, 97 So. 3d 728, 746 (Ala. 2012) (Parker, J., concurring)).

[208] *MKB*, 795 F.3d at 774 (quoting McCorvey v. Hill, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring)).

[209] *Id.* (quoting *McCorvey*, 385 F.3d at 852; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992)).

[210] *Id.* at 775.

[211] *Id.* (citing *McCorvey*, 385 F.3d at 851).

[212] *Id.*

[213] *Id.*

[214] *MKB*, 795 F.3d at 775.

Circuit case arguing "that abortion is psychologically damaging to the mental and social health of significant numbers of women."[215]

These cases highlight that, unless the Court eliminates the viability standard, courts will continue to deny discovery on issues that would support reversal of *Roe*. Or, if a court were to permit discovery, they would then have to ignore the fact of the destruction of human life and rule unconstitutional any state laws that prohibit abortions prior to viability.[216]

V. CONCLUSION

In *Dobbs*, the Supreme Court has the opportunity to reverse *Roe* and prohibit elective abortions. As counsel for Mississippi argued, the right to abortion is the only constitutional right that "involve[s] the purposeful termination of a human life."[217] It "is an egregiously wrong decision that has inflicted tremendous damage on our country and will continue to do so and take innumerable human lives unless and until this Court overrules it."[218] The right to abortion rests on the Court's assertion that it cannot, and need not, answer the question of when human life begins. But as Pascal's Wager makes clear, the Court's purported indecision on the question of when human life is itself a decision—the Court has wagered that the fetus is not a human life even though it is undisputed that a fetus growing in the womb leaves the womb as a human being. At no point does a fetus transform from non-human to human. Rather, the Court has hung its hat on the arbitrary point of viability before a state can prohibit abortion—rejecting the point at which the fetus independently moves (quickening) or any earlier point, including fetal heartbeat (at six weeks) or fetal pain (at twenty weeks).

To the extent the Court does not seize this moment to reverse *Roe*, it must abandon the viability line and permit states to demonstrate that protectable

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[215] *Id.* at 775–76.

[216] One scholar has echoed these sentiments:

> Today, states recognize fetuses' independent rights, and there are several contexts in which fetuses are legally recognized as persons: (1) abortion restrictions; (2) fetal homicide laws; (3) restrictions on the capital punishment of pregnant women; (4) wrongful death statutes; (5) inheritance rights under property law; (6) legal guardianship; (7) Social Security and Disability benefits; and (8) prenatal child support laws. Because the law has developed to recognize fetuses as legal persons throughout pregnancy, the Court can take notice of these legal developments and reexamine *Roe*'s rejection of fetuses' constitutional rights.

Jacobs, *supra* note 151, at 847 (footnotes omitted).

[217] Transcript of Oral Argument, *supra* note 37, at 25.

[218] *Id.* at 113.

human life exists prior to viability. If the Court does not abandon viability, the lower courts will continue to treat viability as a standard that is beyond the reach of the *stare decisis* doctrine, thereby denying discovery on facts that could one day lead to reversal of *Roe*. Although abortion "is unique for the woman[,] [i]t [is] unique for the unborn child too whose life is at stake in all of these decisions."[219] The Supreme Court's abortion jurisprudence turns a blind eye to the realities of the unborn human life that is destroyed through abortion. That reality in the United States results in the death of 1,700 unborn babies each day.[220]

[219] *Id.* at 112–13.

[220] *Abortion Surveillance —Findings and Reports*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://cdc.gov/reproductivehealth/datastats/abortion.html (last visited Nov. 22, 2021).