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HOW THE FIRST AMENDMENT’S  
COMMITMENT TO RELIGIOUS  
FREEDOM COULD IRONICALLY SAVE  
*ROE V. WADE* . . . IF WE LET IT

ABIGAIL SELLERS\*

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## INTRODUCTION

On May 15, 2019, Alabama Governor Kay Ivey signed the Alabama Human Life Protection Act into law.<sup>1</sup> The Act imposes serious punishments on doctors who perform an abortion unless it “is necessary in order to prevent a serious health risk to the unborn child’s mother,” there is an ectopic pregnancy, or the fetus has a “lethal anomaly.”<sup>2</sup> Notably, the Act does not provide an exception for pregnancies resulting from rape or incest.<sup>3</sup> Of particular interest to this Note are statements made by Alabama lawmakers indicating this law was passed to comport with their and Alabama citizens’ religious belief that “every life is a sacred gift from God.”<sup>4</sup> Furthermore, Alabama lawmakers are keenly aware the law is in violation of a woman’s right to terminate a pregnancy as protected under the Fourteenth Amendment Due Process right to privacy.<sup>5</sup> In fact, the Act was designed to challenge the cases establishing and upholding this right—*Roe v. Wade* and *Planned Parenthood v. Casey*—in the hopes that the Supreme Court will overrule these precedents.<sup>6</sup>

Even more disconcerting to reproductive health advocates, Alabama was only one of seven states that passed laws in 2019 severely restricting access to abortions.<sup>7</sup> The six other states—Georgia, Kentucky, Louisiana,

1. Caroline Kelly, *Alabama Governor Signs Nation’s Most Restrictive Anti-Abortion Bill into Law*, CNN POL. (May 16, 2019, 6:11 AM), <https://www.cnn.com/2019/05/15/politics/alabama-governor-signs-bill/index.html> [<https://perma.cc/Q2TL-XEG8>].

2. H.B. 314, 2019 Leg., Reg. Sess. (Ala. 2019); Kelly, *supra* note 1.

3. Kelly, *supra* note 1; *see* H.B. 314, 2019 Leg., Reg. Sess. (Ala. 2019).

4. Kelly, *supra* note 1 (quoting Alabama Governor Kay Ivey).

5. *Id.*; *see* *Roe v. Wade*, 410 U.S. 113 (1973).

6. Kelly, *supra* note 1; *see also* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113.

7. K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html> [<https://perma.cc/6K4W-C5C5>]. While this Note focuses on laws passed in 2019, states have also passed laws in 2020 and 2021 further restricting access to abortion care. For example, in March 2021,

Missouri, Mississippi, and Ohio—criminalized abortion after six to eight weeks of pregnancy when a fetal heartbeat can be detected.<sup>8</sup> These are aptly referred to as “heartbeat laws.” The passage of these laws was marked by religious statements from state lawmakers, and some of these laws have been expressly designed to challenge *Roe*.<sup>9</sup>

With a challenge to each of these laws making its way through various federal courts,<sup>10</sup> it is possible that the Supreme Court will hear a case involving one or more of these laws and will once again get a chance to reconsider its holdings from *Roe* and *Casey*.<sup>11</sup> This Note will argue that the Court should never reach the privacy issue at the heart of *Roe* and *Casey*. Instead, exercising judicial restraint, the Court should decide only as much as is necessary to resolve the case in front of it<sup>12</sup> and should deem the Alabama Human Life Protection Act and the six heartbeat laws unconstitutional under the First Amendment’s Establishment Clause. Under current Supreme Court precedent, when a law lacks a sincere secular purpose, it violates the Establishment Clause,<sup>13</sup> and as the previously mentioned religious statements by lawmakers indicate, the purpose behind

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Arkansas Governor Asa Hutchinson signed a bill that prohibited all abortions in the state other than to “save the life or preserve the health of the fetus or mother.” The governor acknowledged in a statement that the law “is in contradiction of binding precedents of the U.S. Supreme Court, but it is the intent of the legislation to set the stage for the Supreme Court overturning current case law.” Thus, even if the laws discussed in this Note are invalidated and certiorari is not granted by the Supreme Court, the litigation strategy proposed in this Note is still relevant to future cases. Jaelyn Diaz, *Arkansas Passes Near-Total Abortion Ban — and a Possible ‘Roe V. Wade’ Test*, NPR (Mar. 10, 2021, 5:06 AM), <https://www.npr.org/2021/03/10/975546070/arkansas-passes-near-total-abortion-ban-as-lawmakers-push-for-supreme-court-case> [<https://perma.cc/XH7X-U7WE>].

8. Lai, *supra* note 7.

9. See, e.g., Laura Hancock, *Ohio House, Senate Pass ‘Heartbeat’ Abortion Ban*, CLEVELAND.COM (Apr. 11, 2019), <https://www.cleveland.com/open/2019/04/ohio-house-passes-heartbeat-abortion-ban.html> [<https://perma.cc/UU6U-VDMG>] (describing how Representative Tim Ginter from the Ohio House of Representatives has “quoted several Bible verses to argue that [a] fetus has a soul” and has said “that abortion supporters who rely on their faith to inform their beliefs are mistaken”); Gabe Rosenberg, *A Bill Banning Most Abortions Becomes Law in Ohio*, NPR (Apr. 11, 2019, 6:37 PM), <https://www.npr.org/2019/04/11/712455980/a-bill-banning-most-abortions-becomes-law-in-ohio> [<https://perma.cc/ZK7E-P4CK>].

10. Complaint, *Robinson v. Marshall*, No. 19-365 (M.D. Ala. May 24, 2019); Complaint, *SisterSong Women of Color Reproductive Justice Collective v. Kemp*, No. 19-2973 (N.D. Ga. June 28, 2019); Complaint, *Reproductive Health Services of Planned Parenthood of the St. Louis Region v. Parson*, No. 19-4155 (W.D. Mo. July 30, 2019); Complaint, *Preterm-Cleveland v. Yost*, No. 19-360 (S.D. Ohio May 15, 2019); Amended Complaint, *Jackson Women’s Health Organization v. Currier*, No. 18-171 (S.D. Miss. Mar. 19, 2018). Louisiana’s law is dependent on Mississippi’s law surviving its legal challenge. S.B. 184, 2019 Leg., Reg. Sess. (La. 2019).

11. See *Casey*, 505 U.S. at 854–69 (rejecting the opportunity to overturn *Roe v. Wade* and reasoning that the principle of stare decisis restrains the Court from easily overturning precedent).

12. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”).

13. *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987).

these laws is not secular. Thus, the Court should never reach the privacy issue.

This Note will (1) examine the history of the debate surrounding abortion in American politics to show how *Roe* and *Casey* are once again ripe to be challenged, (2) explain the need for a new approach to challenge the abortion laws in question based on the current composition of the Supreme Court, (3) argue that the laws violate the Establishment Clause, and (4) explain why an Establishment Clause claim is worth pursuing.

## I. THE HISTORY OF THE ABORTION DEBATE IN THE UNITED STATES

### A. THE ROAD TO *ROE V. WADE*

Prior to the Supreme Court's decision in *Roe v. Wade* in 1973,<sup>14</sup> abortion rights had primarily been a state issue and received little federal government attention.<sup>15</sup> In the years preceding *Roe*, states had begun to repeal or liberalize previous anti-abortion laws,<sup>16</sup> while both Congress and the executive branch were largely uninvolved with the issue.<sup>17</sup> The few actions taken by Congress were "designed to preserve the anti-abortion status quo ante," while the executive branch largely reaffirmed the power of state authorities to decide abortion rights.<sup>18</sup>

When *Roe* reached the Supreme Court, Justice Blackmun designed his opinion in *Roe* to "put an end to the abortion dispute."<sup>19</sup> The Court held that the right to privacy under the Fourteenth Amendment's Due Process Clause protects a woman's right to choose to end a pregnancy.<sup>20</sup> The Court's reasoning balanced the rights of the pregnant woman and the interest of the state in preserving and protecting the health of pregnant women.<sup>21</sup> Because both interests are "separate and distinct" and evolve throughout the pregnancy, the Court held that each is "compelling" at certain points of a pregnancy.<sup>22</sup> It found that the mother's compelling point is during the first

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14. See *Roe v. Wade*, 410 U.S. 113, 162-64 (1973).

15. Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 294 (1994) (reviewing BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* (1993)).

16. *Id.* Four states had repealed previous anti-abortion laws while nineteen states had liberalized their laws. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 293.

20. *Roe v. Wade*, 410 U.S. 113, 153, 163 (1973).

21. *Id.* at 162.

22. *Id.* at 162-64.

trimester.<sup>23</sup> This is because at the time the case was decided, the mortality rate of abortions performed during the first trimester may have been less than the mortality rate from childbirth.<sup>24</sup> Therefore, the state's interest in protecting the life of the mother did not control yet.<sup>25</sup> After the first trimester, the Court stated that until the point of fetus viability, the state could "regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."<sup>26</sup> The Court found that the state's compelling interest was at the point of fetus viability.<sup>27</sup> Thus, after fetus viability, it held that state regulation has "both logical and biological justifications" that could justify prohibiting abortions except when it is "necessary to preserve the life or health of the mother."<sup>28</sup>

#### B. THE INITIAL REACTION TO ROE

Justice Blackmun's belief that the decision in *Roe* would put the abortion debate to rest was misguided.<sup>29</sup> The decision went past striking down the law at issue in the case.<sup>30</sup> Instead, it set forth a scheme arguably resembling a legislative act rather than a judicial decision<sup>31</sup> that ultimately resulted in the invalidation of nearly every state law regulating abortion.<sup>32</sup>

The reaction to *Roe* was widespread. Congress, the executive branch, and the states made efforts to limit its effects or overturn it.<sup>33</sup> Members of Congress took many steps to overturn or limit *Roe*, most of which proved to be unsuccessful.<sup>34</sup> However, not all congressional efforts to limit *Roe* failed. In 1976, Congress passed the Hyde Amendment, which prohibited the use of

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23. *Id.* at 163.

24. *Id.*

25. *See id.* During the first trimester, the Court held that it was a physician's role in conjunction with their patient to determine whether to terminate the pregnancy. *Id.*

26. *Id.* The Court stated that reasonable regulations under its holding may include the qualifications necessary to perform an abortion, the licensing of the person performing abortions, and requirements for facilities where abortions may be performed. *Id.*

27. *Id.*

28. *Id.* at 163–64.

29. Devins, *supra* note 15, at 293.

30. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992); *see Roe*, 410 U.S. at 162–64.

31. Devins, *supra* note 15, at 293.

32. Ginsburg, *supra* note 30, at 1199. Justice Ginsburg even suggested that Blackmun's decision prolonged the abortion debate. *Id.*

33. Devins, *supra* note 15, at 294–95.

34. Congress considered but failed to pass a constitutional amendment overturning *Roe*, which defined life as beginning at conception, a more modest constitutional amendment that allowed states to regulate abortion as they saw fit, and a proposal that stripped federal courts of their ability to hear abortion cases. Of the list above, the only proposition to make it out of committee was the more modest constitutional amendment. *Id.* at 299–300.

Medicaid funds for most abortions.<sup>35</sup> In *Harris v. McRae*, the Supreme Court held that the Hyde Amendment did not violate the Due Process Clause or the Religion Clauses of the First Amendment.<sup>36</sup> Congress also used its appropriations power to enact abortion-related restrictions on “programs involving family planning, foreign aid, legal services, military hospitals, the Bureau of Prisons, and the Peace Corps.”<sup>37</sup>

The largest federal response to *Roe* arose in the executive branch. Because *Roe* was decided in the middle of the Watergate scandal, it did not get much attention from President Nixon, and it was not the focus of his successors, Gerald Ford and Jimmy Carter.<sup>38</sup> In fact, all three presidents largely tried to distance themselves from the issue, simply stating it was an issue to be left up to the states.<sup>39</sup> The status quo quickly changed when Ronald Reagan entered the 1980 presidential race. He did not equivocate on his position; instead, he adopted a strong pro-life stance and criticized the Supreme Court’s abortion jurisprudence.<sup>40</sup> During his campaign, he promised to appoint anti-abortion judges and endorsed a Constitutional amendment to overturn *Roe* and “prohibit the use of federal funds for abortion.”<sup>41</sup> Reagan delivered on many of his promises. He appointed over three hundred judges to the federal bench during his two terms in office, and the selection process was designed to find judges supportive of Reagan’s desire to overturn *Roe*.<sup>42</sup> In total, Reagan was able to appoint Justice O’Connor, Justice Scalia, and Justice Kennedy to the Supreme Court and elevate then Justice Rehnquist to Chief Justice.<sup>43</sup> Reagan’s appointment of Chief Justice Rehnquist ensured that the Chief Justice was sympathetic to Reagan’s ideological goals.<sup>44</sup> Thus, by 1992, after President George H.W. Bush’s appointment of Justice Thomas and Justice Souter,<sup>45</sup> the conservative majority on the Court was solidified, and the Court seemed situated to fulfill Reagan’s goal of overturning *Roe*.<sup>46</sup>

35. *Id.* at 300.

36. *Harris v. McRae*, 448 U.S. 297, 318, 320–21 (1980). A full discussion of implications of *Harris v. McRae* can be found *infra* Section III.A.3.

37. Devins, *supra* note 15, at 300.

38. See BARBARA HINKSON CRAIG & DAVID M. O’BRIEN, ABORTION AND AMERICAN POLITICS 157–161, 164–65 (1993).

39. *Id.*

40. *Id.* at 169.

41. *Id.*

42. *Id.* at 173–75.

43. *Id.* at 179–81, 185.

44. *Id.* at 179–80.

45. *Id.* at 316–21.

46. *Id.* at 321; Marie Solis, *27 Years Ago, Roe v. Wade Almost Fell. This Is How Protests Saved It.*, VICE (June 28, 2019, 4:00 AM), <https://www.vice.com/en/article/xwnpeq/the-history-of-planned-parenthood-v-casey-and-pro-choice-activism-roe-v-wade> [<https://perma.cc/62CT-LMKS>].

C. THE EMERGENCE OF A NEW STANDARD—*PLANNED PARENTHOOD V. CASEY*

Arguably the most influential abortion rights case that the Court heard after *Roe* was *Planned Parenthood v. Casey*.<sup>47</sup> When *Casey* arrived at the Supreme Court in 1992, pro-choice and pro-life advocates both believed that the Court was destined to overturn *Roe*.<sup>48</sup> There were only two Justices on the Court who openly supported *Roe*, and one of the two original dissenters still remained on the Court.<sup>49</sup> Even the lawyer who was arguing on behalf of the American Civil Liberties Union to uphold *Roe* believed it would be overturned.<sup>50</sup>

The Court's original vote was 5-4 to overturn *Roe*; however, after the initial deliberation, one Justice changed their vote, deciding to uphold *Roe*—Justice Kennedy.<sup>51</sup> It has been reported that Kennedy chose to change his mind at the last minute due to his belief that the Justices are not politicians and his belief in the integrity of the Court.<sup>52</sup> These beliefs are on full display in the majority opinion in *Casey*. Justices O'Connor, Kennedy, and Souter, who announced the opinion of the Court in a joint opinion, explained the institutional importance of precedent<sup>53</sup> and described the limited circumstances under which it should be overturned.<sup>54</sup> They announced:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask [1] whether the rule has proven to be intolerable simply in defying practical workability; [2] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; [3] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or

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47. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The purpose of this Note is not to summarize all Supreme Court cases regarding abortion that followed *Roe*. Instead, this Note focuses on the most influential and relevant cases. For a more complete history of Supreme Court abortion jurisprudence, see Melanie Kalmanson & Riley Erin Fredrick, *The Viability of Change: Finding Abortion in Equality After Obergefell*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 647, 655–69 (2019).

48. Solis, *supra* note 46.

49. *Id.*

50. *Id.* At the time, the lawyer for the ACLU stated that, “We did not see the fifth vote.” *Id.*

51. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 53 (2007).

52. *Id.*; Solis, *supra* note 46.

53. “With Cardozo, we recognize that no judicial system could do society’s work if it eyed each issue afresh in every case that raised it.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992).

54. *Id.* at 854–55.

[4] whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.<sup>55</sup>

The Court found that *Roe* did not meet these limited criteria, and, thus, should not be overturned.<sup>56</sup> However, this did not stop the Court from altering the scope of *Roe*'s holding. The Court announced that the trimester test from *Roe* was too rigid. While it was designed to protect women's rights, it undervalued states' rights.<sup>57</sup> The new critical point was the point of viability.<sup>58</sup> Under *Casey*, even before viability, a state is not prohibited from "taking steps to ensure that this choice is thoughtful and informed,"<sup>59</sup> as long as it does not place an "undue burden" on the woman considering an abortion.<sup>60</sup> While the Court abandoned the trimester test and announced the new undue burden test, Kennedy, O'Connor, and Souter still viewed their decision as affirming the core of *Roe*.<sup>61</sup> Thus, they succeeded in following the principle of stare decisis.

#### D. ABORTION JURISPRUDENCE AFTER *CASEY*

The Court has heard many cases regarding abortion rights since *Casey*, but it has only identified a handful of "undue burdens."<sup>62</sup> The Court identified an undue burden in *Whole Woman's Health v. Hellerstedt*.<sup>63</sup> The Court, relying on *Casey*, held in a 5-3 decision that a Texas law requiring hospital admitting privileges for all doctors performing abortions and requiring abortion clinics to comply with surgical center requirements was unconstitutional as it was an undue burden.<sup>64</sup> The requirement of hospital admitting privileges and surgical center standards would have cut the number of centers providing abortions in the state by more than half.<sup>65</sup> Furthermore, the requirements would have increased the number of women living over two hundred miles away from an abortion clinic by 2,800% and

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55. *Id.* (citations omitted).

56. *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.")

57. *Id.* at 873.

58. *Id.* at 870.

59. *Id.* at 872.

60. *Id.* at 874.

61. *See id.* at 873-75.

62. A thorough analysis of those cases is beyond the scope of this Note. However, for an example, see *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding partial birth statute unconstitutional because, among other reasons, it did not include an exception for the health of the mother).

63. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). This case was decided after the death of Justice Scalia but before his vacancy on the Court was filled. The case is discussed in more detail *infra* Section II.A.2.

64. *Id.* at 2299, 2313, 2318.

65. *See id.* at 2301.

would have required each remaining facility to “serv[e] between 7,500 and 10,000 patients per year.”<sup>66</sup> In 2020, the Court struck down a nearly identical Louisiana law in *June Medical Services v. Russo*.<sup>67</sup>

#### E. FROM REAGANISM TO TRUMPISM

While the abortion debate has lingered in the background of American politics since *Casey* and has been at issue in a multitude of states, the abortion debate was once again brought to the national forefront during the 2016 presidential election and during Donald Trump’s term in office.<sup>68</sup> President Donald Trump shone a fresh spotlight on the issue that had, in comparison, largely been ignored in recent presidential elections.<sup>69</sup> Similar to Ronald Reagan, then-candidate Donald Trump promised to appoint pro-life judges who would overturn *Roe*.<sup>70</sup> During the election, he used highly charged rhetoric surrounding the issue. At the final presidential debate, Donald Trump exclaimed, “With what Hillary [Clinton] is saying, in the ninth month, you can take the baby and rip the baby out of the womb of the mother just prior to the birth . . . .”<sup>71</sup> This statement was misleading as Hillary Clinton did not support late-term abortions unless there was a danger to a mother’s life.<sup>72</sup>

President Trump’s comments on abortion did not cease after entering office. During his time in office, Trump even compared his stance on abortion to Reagan. Shortly after Alabama passed the Alabama Human Life Protection Act, President Trump posted on Twitter stating, “I am strongly Pro-Life, with the three exceptions – [r]ape, [i]ncest and protecting the [l]ife of the mother – the same position taken by Ronald Reagan.”<sup>73</sup> The similarities between Trump and Reagan do not stop there. Trump was able

66. *Id.* at 2301–02.

67. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

68. *What’s Going on in the Fight Over US Abortion Rights?*, BBC NEWS (June 14, 2019), <https://www.bbc.com/news/world-us-canada-47940659> [<https://perma.cc/JZD8-SLHT>].

69. See Laura Bassett, *Donald Trump Promises to Appoint Anti-Abortion Justices to Supreme Court*, HUFFINGTON POST (May 11, 2016, 12:44 PM), [https://www.huffpost.com/entry/donald-trump-abortion-supreme-court\\_n\\_5733400be4b0bc9cb048aef2](https://www.huffpost.com/entry/donald-trump-abortion-supreme-court_n_5733400be4b0bc9cb048aef2) [<https://perma.cc/5KDR-CDE2>]; Irin Carmon, *2016 Debate: On Abortion, Trump and Clinton Give Passionate Answers*, NBC NEWS (Oct. 29, 2016, 1:26 AM), <https://www.nbcnews.com/storyline/2016-presidential-debates/abortion-trump-clinton-let-it-all-hang-out-n669586> [<https://perma.cc/2RX3-SF6X>].

70. See Carmon, *supra* note 69.

71. *Id.*

72. Ben Tinker, *Reality Check: Trump on Clinton Allowing Abortions ‘In the 9th Month, on the Final Day.’* CNN (Oct. 20, 2016, 9:06 AM), <https://www.cnn.com/2016/10/20/politics/donald-trump-hillary-clinton-abortion-fact-check/index.html> [<https://perma.cc/NK79-6G25>].

73. Donald J. Trump (@realDonaldTrump), TWITTER (May 18, 2019, 8:37 PM), <https://twitter.com/realdonaldtrump/status/1129954110747422720?lang=en>.

to appoint a staggering number of judges to the federal bench.<sup>74</sup> During his single term as president, Trump appointed 234 Article III judges including three Justices to the Supreme Court: Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.<sup>75</sup>

## II. THE NEW ROBERTS COURT

### A. THE CONSERVATIVE MAJORITY AND ABORTION

The composition of the Roberts Court has changed greatly since President Trump took office in early 2017. Due to the large change in the composition of the Court, it will be referred to as the “New Roberts Court” for the duration of this Note. Following the retirement of Justice Kennedy and the appointment of Justice Kavanaugh, the New Roberts Court solidified a clear conservative majority.<sup>76</sup> Justice Kennedy was long known as the “moderate” of the Court.<sup>77</sup> Despite being appointed by Republican president Ronald Reagan, Justice Kennedy was known for breaking with the rest of his Republican appointed colleagues and being the swing vote, especially in cases involving individual liberties.<sup>78</sup> After the death of the late Justice Ruth Bader Ginsburg, the conservative majority on the court became stronger when Justice Amy Coney Barrett was confirmed to fill Ginsburg’s vacant seat in October 2020. This left the Court with a 6-3 conservative majority. This Note will focus on the conservative justices currently on the Supreme Court as it is presumed the three liberal justices (Breyer, Sotomayor, and Kagan) would not break with their traditional voting pattern<sup>79</sup> and would vote to uphold *Casey* and protect a woman’s right to terminate a pregnancy.

For a few members of the conservative majority, their views on abortion

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74. *President Donald J. Trump Is Appointing a Historic Number of Federal Judges to Uphold Our Constitution as Written*, TRUMP WHITE HOUSE (Nov. 6, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-appointing-historic-number-federal-judges-uphold-constitution-written> [<https://perma.cc/QK7M-UJUU>].

75. *Federal Judges Nominated by Donald Trump*, BALLOTPEdia, [https://ballotpedia.org/Federal\\_judges\\_nominated\\_by\\_Donald\\_Trump](https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump) [<https://perma.cc/N8MV-Q9CQ>].

76. Adam Liptak, *Confirming Kavanaugh: A Triumph for Conservatives, but a Blow to the Court’s Image*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/conservative-supreme-court-kavanaugh.html> [<https://perma.cc/BTL4-EUDD>].

77. Veronika Bondarenko & Grace Panetta, *‘Kennedy’s Court’: Meet 81-Year-Old Supreme Court Justice Anthony Kennedy, Who Just Announced His Retirement*, BUS. INSIDER (June 27, 2018, 6:21 PM), <https://www.businessinsider.com/justice-kennedy-retire-bio-facts-supreme-court-2017-6> [<https://perma.cc/6J5K-AELE>].

78. *Id.* For example, Justice Kennedy was the swing vote in *Casey*, which was protecting an individual’s right to an abortion. Solis, *supra* note 46.

79. ALL. FOR JUSTICE, IN THEIR WORDS: THE SUPREME COURT JUSTICES ON ABORTION 7 (2014) (detailing Justice Breyer’s history of voting in favor of abortion rights advocates); *see generally* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (Justices Kagan, Breyer, and Sotomayor voting in favor of abortion rights activists); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (same).

are well-known and can be demonstrated through the decisions they have made while on the Supreme Court and lower courts. Thus, how they will vote when faced with a challenge to *Roe* and *Casey* is more predictable. The remaining conservative justices are what this Note will refer to as “wild cards.” Before discussing the wild cards in more details, a short summary of the views of the more predictable justices is in order.

### 1. The More Predictable Justices

Justice Thomas, currently the longest serving member on the Court,<sup>80</sup> has voted against nearly all parties advocating for abortion rights<sup>81</sup> and was one of the original dissenters in *Casey*.<sup>82</sup> Thomas has called *Roe* “grievously wrong”<sup>83</sup> and called the undue burden test from *Casey* “as illegitimate as the standard it purported to replace.”<sup>84</sup> Furthermore, in *Gonzalez v. Carhart*, which upheld a federal partial-birth abortion ban,<sup>85</sup> Justice Thomas wrote his own concurring opinion to “reiterate [his] view that the Court’s abortion jurisprudence . . . has no basis in the Constitution.”<sup>86</sup> Thus, Thomas would be expected to vote to overturn *Roe* and *Casey*.

Justice Alito’s views on abortion jurisprudence are similar to those of Justice Thomas. He has voted with Thomas on most major abortion cases since joining the Court,<sup>87</sup> and before his time on the Court, he stated in a job application that “[t]he Constitution does not protect a right to an abortion.”<sup>88</sup> However, unlike Thomas, Alito heard influential abortion cases before joining the Supreme Court.<sup>89</sup> Justice Alito sat on the three-judge panel that

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80. Nina Totenberg, *Clarence Thomas: From ‘Black Panther Type’ to Supreme Court’s Conservative Beacon*, NPR (July 14, 2019, 7:00 AM), <https://www.npr.org/2019/07/14/740027295/clarence-thomas-from-black-panther-type-to-supreme-court-s-most-conservative-mem> [https://perma.cc/7VE5-6G8X].

81. ALL. FOR JUSTICE, *supra* note 79, at 7. An example of this rare exception is *Avotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006). *Id.* In *Avotte*, the Court “unanimously remanded back to [the] lower court with [the] recommendation to strike down” a parental notification law that “lacked a medical emergency exception to protect [a] minor wom[a]n’s health.” *Id.* at 7 n.7.

82. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J. dissenting).

83. *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting); ALL. FOR JUSTICE, *supra* note 79, at 24.

84. *Stenberg*, 530 U.S. at 982 (Thomas, J., dissenting); see also ALL. FOR JUSTICE, *supra* note 79, at 24.

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

86. *Id.* at 169 (Thomas, J., concurring); ALL. FOR JUSTICE, *supra* note 79, at 25; see also *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

87. ALL. FOR JUSTICE, *supra* note 79, at 41; see also *Hellerstedt*, 136 S. Ct. at 2292; *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2153 (2020) (Alito, J., dissenting).

88. Jo Becker & Charles Babington, *No Right to Abortion, Alito Argued in 1985*, WASH. POST (Nov. 15, 2005), <https://www.washingtonpost.com/archive/politics/2005/11/15/no-right-to-abortion-alit-o-argued-in-1985/bcbd4e02-0c2e-4dac-8caf-0d252c5630a0> [https://perma.cc/T4DP-ZG4W].

89. ALL. FOR JUSTICE, *supra* note 79, at 38.

heard *Casey* on the Third Circuit.<sup>90</sup> The Third Circuit deemed all of the provisions challenged in *Casey* constitutional, with the exception of the spousal notification provision, which the Supreme Court also found unconstitutional. Justice Alito dissented in part from the circuit court decision, arguing that the spousal notification clause was also constitutional under *Roe*.<sup>91</sup>

## 2. The Wild Cards

The majority of the wild cards are characterized as such due to their infancy on the Court, making it impossible to predict with any meaningful certainty their future behavior based upon past decisions made while on the Court. However, Chief Justice Roberts is placed here not due to his lack of tenure, but rather due to his recent opinions. Chief Justice Roberts's view on *Roe* and *Casey* have not been as staunch as Justice Alito's or Justice Thomas's. While up until 2020, like Thomas and Alito, Roberts had mostly voted against parties advocating for abortion rights, in 2020, Roberts diverged in *June Medical Services v. Russo* when he joined the four liberal justices—Ginsburg, Breyer, Sotomayor, and Kagan—to strike down a Louisiana law that was nearly identical to that in *Whole Woman's Health*.<sup>92</sup> While Roberts voted in *Whole Woman's Health* to uphold a similar law finding it was not an undue burden, in *June Medical*, he voted to strike down the Louisiana law. In Roberts's *June Medical* opinion, he states that he believes *Whole Woman's Health* was wrongly decided, but based on the principle of stare decisis, he must follow that precedent and *Casey*, which led him to vote with his liberal colleagues.<sup>93</sup> Roberts's emphasis on the principles of stare decisis echoed the joint opinion of Souter, Kennedy, and O'Connor from *Casey*. Thus, because of this, unlike Thomas and Alito, who both firmly believe *Roe* and *Casey* were wrongly decided and show no hesitation to overturn them, Roberts is a wild card who has positioned himself to potentially step into Kennedy's shoes to provide a swing vote in the interest of institutional integrity.

Unlike the Chief Justice, Justices Kavanaugh, Gorsuch, and Barrett have spent very little time on the Court; thus, they have not had the opportunity to develop significant voting history on abortion rights while on

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90. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 719 (3d Cir. 1991) (Alito, J., dissenting in part, concurring in part).

91. *Id.*; ALL FOR JUSTICE, *supra* note 79, at 38.

92. See, e.g., ALL FOR JUSTICE, *supra* note 79, at 12; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2293 (2016); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C. J., concurring).

93. See *June Med. Servs. L.L.C.*, 140 S. Ct. at 2133–35.

the Court.<sup>94</sup> However, all of the justices have either decided a case related to abortion rights since joining the Court, developed history while on lower courts, or authored scholarship that is of use in determining their potential stance on a challenge to *Casey*.

The newest Justice, Amy Coney Barrett, has arguably the largest record detailing her stance on abortion rights. She heard more cases regarding abortion than both Kavanaugh and Gorsuch before joining the Court. During her three years on the Seventh Circuit, Barrett heard three cases that focused on laws related to abortion. The three cases involved laws that: (1) created stricter parental notification laws for minors, (2) banned abortions sought solely because of a disability or the sex of the fetus, and (3) required abortion providers to cremate or bury fetal remains.<sup>95</sup> In each case, Barrett dissented from the court's opinion that the laws were unconstitutional and believed the laws that were constitutional.<sup>96</sup> Additionally, before becoming a court of appeals judge, while Barrett was a law professor, she published scholarship that commented on *Roe*. One piece of interest discusses the role of stare decisis. In it, Barrett writes, "[T]he public response to controversial cases like *Roe* reflects public rejection of the proposition that stare decisis can declare a permanent victor in a divisive constitutional struggle rather than desire that precedent remain forever unchanging."<sup>97</sup> Due to her scholarship and judicial record, the Center for Reproductive Rights opposed the confirmation of Barrett, claiming that she had the most antireproductive rights record since the failed nomination of Robert Bork.<sup>98</sup> This was only the second time the Center had opposed the confirmation of a nominee.

Additionally, while not part of Barrett's scholarship or judicial record, Barrett's relationship with late-Justice Antonin Scalia and her constitutional interpretation philosophy may indicate how Barrett would decide a challenge to *Roe* and *Casey*. Barrett has widely publicized that she is an originalist, the judicial philosophy that her mentor Justice Scalia championed.<sup>99</sup> Applying

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94. In fact, at the time this Note was published, Justice Barrett had not decided a case related to abortion while on the Supreme Court.

95. Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/article/amy-barrett-views-issues.html> [<https://perma.cc/9YKC-EYML>].

96. *Id.*

97. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1727 (2013).

98. Press Release, Nancy Northup, President & CEO, Ctr. for Reprod. Rights, Center for Reproductive Rights Opposes Confirmation of Judge Amy Coney Barrett (Oct. 7, 2020), <https://www.reproductiverights.org/press-room/center-reproductive-rights-opposes-confirmation-judge-amy-coney-barrett> [<https://perma.cc/S7VY-ZXA9>].

99. *AP Explains: Originalism, Barrett's Judicial Philosophy*, ASSOCIATED PRESS (Oct. 13, 2020), <https://apnews.com/article/donald-trump-amy-coney-barrett-us-supreme-court-courts-antonin-scalia-038ec1d4de30d1bd97a0ce3823903f0c>.

his originalist framework, Scalia believed the Constitution did not protect a woman's right to terminate a pregnancy.<sup>100</sup> While Scalia's views cannot be automatically assigned to his mentee, it is important to consider his views given her own statements on his influence over her judicial philosophy and thinking.<sup>101</sup> Given Barrett's past scholarship, judicial record, and judicial philosophy, it seems likely that Barrett could vote to overturn *Roe* and *Casey*. However, while it is one thing to muse about the errors of *Roe* and overturning it in academic scholarship, it is another to do it in practice. Therefore, given that Barrett has not had the opportunity to hear a case regarding abortion while on the Supreme Court, she remains in the wild card category.

After Justice Barrett, Justice Kavanaugh has the largest record on abortion amongst the Trump appointees. Despite being on the D.C. Circuit for over ten years,<sup>102</sup> Justice Kavanaugh heard only one case involving abortion while there.<sup>103</sup> In 2017, the D.C. Circuit went en banc to hear *Garza v. Hargan*, holding that it was unconstitutional to require a seventeen-year-old undocumented immigrant in federal custody to wait eleven days to receive an abortion, after already waiting six weeks.<sup>104</sup> The government had attempted to find her a sponsor so she could be released from custody before obtaining the abortion but had yet to find a sponsor.<sup>105</sup> Kavanaugh authored a dissent stating that the eleven-day waiting period was not an "undue burden" under *Casey*.<sup>106</sup> Notably, he did not mention the Supreme Court's

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100. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting) ("The issue is whether [an abortion] is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life.' Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed." (citations omitted)).

101. See Liptak, *supra* note 95 (quoting then-Judge Barrett, "I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. His judicial philosophy is mine, too").

102. Tessa Berenson, *Inside Brett Kavanaugh's First Term on the Supreme Court*, TIME (June 28, 2019, 11:46 AM), <https://time.com/longform/brett-kavanaugh-supreme-court-first-term> [<https://perma.cc/2U43-UXAH>].

103. CTR. FOR REPROD. RIGHTS, JUDGE KAVANAUGH'S JUDICIAL RECORD ON THE RIGHT TO ABORTION 1, <https://reproductiverights.org/sites/default/files/documents/factsheets/Judge-Kavanaugh-Judicial-Record-on-the-Right-to-Abortion2.pdf> [<https://perma.cc/E27J-DX4S>].

104. *Garza v. Hargan*, 874 F.3d 735, 738 (D.C. Cir. 2017) (en banc). Justice Kavanaugh was part of the original three-judge panel that held that the government could have eleven more days to find a sponsor for the plaintiff, Jane Doe, without the delay being an undue burden. CTR. FOR REPROD. RIGHTS, REPORT OF THE CENTER FOR REPRODUCTIVE RIGHTS ON THE NOMINATION OF JUDGE BRETT KAVANAUGH TO BE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 6 (2018), <https://reproductiverights.org/sites/default/files/documents/PublicReportonJudgeBrettKavanaugh.pdf> [<https://perma.cc/DHR7-TW9E>].

105. *Garza*, 874 F.3d at 736–38.

106. *Id.* at 755–56 (Kavanaugh, J., dissenting).

most recent precedent at that time addressing the undue burden requirement—*Whole Woman’s Health*.<sup>107</sup> Despite Justice Kavanaugh’s limited judicial precedent on the matter, his past writings and speeches led the Center for Reproductive Rights to recommend that the Senate not confirm Kavanaugh.<sup>108</sup> This was the first time since the Center’s founding in 1992 that it has recommended that a nominee not be confirmed.<sup>109</sup> Since joining the Court, Kavanaugh has decided one abortion rights case—*June Medical*. Kavanaugh dissented from the majority that held the law created an undue burden on women seeking abortion care.<sup>110</sup> Despite the law’s similarity to the law struck down in *Whole Woman’s Health* and the trial court’s finding that if the law went into effect, at most two doctors would be qualified to perform abortions in the state,<sup>111</sup> Kavanaugh believed that there were not enough facts to decide the case because *June Medical* was a pre-enforcement challenge.<sup>112</sup> Therefore, he wished to remand the case for additional fact finding.<sup>113</sup> Kavanaugh’s record indicates that he may vote to overturn *Roe* and *Casey*, but unlike Alito and Thomas, he has not had significant voting history on the Court; thus, he is a wild card.

Finally, in comparison to the other Justices appointed by President Trump, little was known about Justice Gorsuch’s views on abortion prior to his nomination to the Court. The only indication of his views was that he was the first Supreme Court nominee of Donald Trump’s presidency, and Donald Trump promised to nominate anti-abortion justices who would overturn *Roe*.<sup>114</sup> During Gorsuch’s time on the Tenth Circuit, he never heard a case directly dealing with abortion,<sup>115</sup> and unlike other members of the Court,<sup>116</sup> he never authored any scholarship outside of the judiciary that directly dealt with abortion.<sup>117</sup> However, like Justice Kavanaugh, since joining the Court, he dissented in *June Medical*, despite its extreme similarity to *Whole Woman’s Health*.<sup>118</sup> Gorsuch authored his own dissent, arguing that the Court ignored the findings of the state legislature that led it to enact the law

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107. CTR. FOR REPROD. RIGHTS, *supra* note 104, at 9–10.

108. *Id.* at 19.

109. *Id.* at 1.

110. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting).

111. *Id.* at 2115–16 (plurality opinion).

112. *Id.* at 2182 (Kavanaugh, J., dissenting).

113. *Id.*

114. Larry Neumeister, Garance Burke & Mitch Weiss, *Gorsuch Case Review Shows He’s No Crusader on Abortion*, PBS (Feb. 2, 2017, 10:03 AM), <https://www.pbs.org/newshour/politics/gorsuch-case-review-shows-hes-no-crusader-abortion> [<https://perma.cc/QK99-ZDUQ>].

115. *Id.*

116. *See* ALL. FOR JUSTICE, *supra* note 79, at 8–10, 36–38 (describing work done by Chief Justice Roberts and Justice Alito relating to abortion rights outside of their time in the judiciary).

117. Neumeister et al., *supra* note 114.

118. *June Med. Servs. L.L.C.*, 140 S. Ct. at 2171 (Gorsuch, J., dissenting).

and disregarded many procedural rules in hearing the case, such as the standing requirement.<sup>119</sup> However, he explicitly stated in his opinion that the validity of *Roe* was not at issue in this case.<sup>120</sup> Thus, his position on possibly overturning *Roe* and *Casey* is unclear, but given his nomination by President Trump, it is a possibility, so he remains in the wild card category.

Understanding the slate of Justices on the Court is crucial, because like the lead up to *Casey* in 1992, the Court has a majority of conservative-leaning Justices, three of whom were appointed by a president who promised to appoint anti-abortion Justices in an effort to overturn *Roe*,<sup>121</sup> and which Justices would join the three liberal Justices to be the fourth or even the fifth vote to uphold is unclear. With numerous abortion cases making their way through the federal court system,<sup>122</sup> the question on every women's rights advocate's mind is, "Will *Roe* stand?" Based on the stare decisis reasoning from *Casey*, it would seem so, but considering the conservative majority's record on abortion and after reviewing the New Roberts Court's lack of adherence to precedent below, that fate is less than certain.

#### B. NON-ADHERENCE TO PRECEDENT

It is not unusual for the Supreme Court to overturn its own precedent; in fact, the Court has overruled more than two hundred cases in its history.<sup>123</sup> However, as stated in *Casey*, the adherence to stare decisis is critical to the integrity of the Court.<sup>124</sup> Since its founding, the Supreme Court has overturned on average one precedent per year.<sup>125</sup> Over fifty percent of the cases that are overturned are done within twenty years of the decision, and

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119. *Id.* at 2171–82.

120. *Id.* at 2171.

121. It is worth clarifying that this Note is not arguing that just because these Justices were appointed by a president who promised to appoint Justices to overturn *Roe* they will do so. President Reagan, who also promised to appoint Justices to overturn *Roe*, appointed O'Connor, Scalia, and Kennedy. *See supra* note 43 and accompanying text. However, only Justice Scalia voted to overturn *Roe* when *Casey* was decided. *See supra* note 100. Justices O'Connor and Kennedy voted to uphold *Roe*. *See supra* notes 51–61 and accompanying text. Instead, this Note is arguing that this fact strengthens the possibility that they will vote to overturn *Roe* and *Casey*.

122. *See supra* note 10; Alice Ollstein & Beatrice Jin, *After Alabama: How 12 Court Cases Could Challenge Abortion Access Under Roe v. Wade*, POLITICO (May 15, 2019, 11:06 AM), <https://www.politico.com/interactives/2019/abortion-cases-up-for-supreme-court-review> [<https://perma.cc/BQQ3-Q7G>].

123. AJ Willingham, *The Supreme Court Has Overturned More Than 200 of Its Own Decisions. Here's What It Could Mean for Roe v. Wade*, CNN (May 29, 2019, 7:31 AM) <https://www.cnn.com/2019/05/29/politics/supreme-court-cases-overturned-history-constitution-trnd/index.html> [<https://perma.cc/89BE-BYUZ>]. As of May 2019, the Court had overruled 236 precedents. *Id.*

124. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992).

125. *See The Establishment of the Supreme Court*, HIST., ART & ARCHIVES U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1700s/The-establishment-of-the-Supreme-Court> [<https://perma.cc/SEV2-3MUM>]; Willingham, *supra* note 123.

nearly eighty percent are overturned within forty years of the decision.<sup>126</sup> However, in just a little over a month, between May and June of 2019, the New Roberts Court overturned a forty-year-old precedent<sup>127</sup> and a thirty-five year-old precedent<sup>128</sup> that relied on a legal principle that was more than one hundred years old.<sup>129</sup>

The first case, *Franchise Tax Board v. Hyatt*, overturned a forty-year-old precedent allowing states to be sued in other state courts.<sup>130</sup> Justice Breyer, writing for the dissent in the 5-4 decision that split down ideological lines, argued that the overturned case was not subject to any of the factors described in *Casey*.<sup>131</sup> Instead, Justice Breyer stated, “an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent,”<sup>132</sup> and “[i]t is far more dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question.”<sup>133</sup> Justice Breyer ended his dissent with a warning that “[t]oday’s decision can only cause one to wonder which cases the Court will overrule next.”<sup>134</sup>

Justice Kagan answered that question a month later stating, “[w]ell, that didn’t take long”<sup>135</sup> in her dissent in *Knick v. Township of Scott*, another 5-4 decision that split down ideological lines.<sup>136</sup> Justice Kagan reiterated Justice Breyer’s stare decisis concerns from *Hyatt* because, in her opinion, over one hundred years of case law had been overturned by the majority’s decision.<sup>137</sup>

However, in 2020, there was a glimmer of hope for reproductive health advocates that the Court would follow the principle of stare decisis if it ever heard a challenge to *Roe* and *Casey*—*June Medical*. In *June Medical*, Justice Roberts broke with the four other conservative justices to strike down a law that was nearly identical to that at issue in *Whole Woman’s Health*. This indicated that the Court, with Roberts as the swing vote, would potentially prioritize institutional stability and stare decisis if ever presented with a

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126. Willingham, *supra* note 123.

127. *Nevada v. Hall*, 440 U.S. 410 (1979), *overruled by* *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019).

128. *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985), *overruled in part by* *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019).

129. *Knick*, 139 S. Ct. at 2183 (Kagan, J., dissenting) (“[T]oday’s opinion smashes a hundred-plus years of legal rulings to smithereens.”).

130. *Hyatt*, 139 S. Ct. at 1499.

131. *Id.* at 1504–05 (Breyer, J., dissenting).

132. *Id.* at 1505 (quoting *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 455 (2015)).

133. *Id.* at 1506.

134. *Id.*

135. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting).

136. *Id.* at 2162.

137. *See id.* at 2189–90 (Kagan, J., dissenting).

challenge to *Roe* and *Casey*.

This hope was likely dashed with the shift to the 6-3 conservative majority after the death of Justice Ginsburg and the appointment of Justice Barrett. This shift and its effect on precedent is best illustrated through the multitude of cases the Supreme Court heard in 2020 and 2021 regarding capacity restrictions on places of worship due to the COVID-19 pandemic. As an illustrative example, while Justice Ginsburg was on the Court, the Court voted 5-4 with the Chief Justice joining the four liberal Justices to deny an application for injunctive relief against capacity restrictions on places of worship in California.<sup>138</sup> The state put a 25% capacity or 100-person cap on places of worship to help stop the spread of COVID-19; however, that cap was not placed on some secular businesses.<sup>139</sup>

Once Justice Barrett joined the Court, the balanced flipped, and the Justices voted 5-4 to grant an injunction against an occupancy restriction on in-home religious gatherings in California due to the COVID-19 pandemic.<sup>140</sup> Chief Justice Roberts joined the three liberal Justices and voted to deny the application for injunctive relief, while the five remaining conservative Justices voted to grant it.<sup>141</sup> The restriction limited in-home religious and secular gatherings to members or no more than three households.<sup>142</sup> The majority granted the injunction emphasizing that the plaintiffs would likely succeed on the merits of their Free Exercise claim because, in their view, the restriction treated comparable secular conduct, such as the occupancy restrictions on hair salons, retail stores, and movie theatres, more favorably than the religious conduct in question.<sup>143</sup> Justice Kagan dissented from the decision arguing that hair salons, retail stores, and the like are not comparable secular conduct, and that in this case, it was not difficult to find a comparable, secular analog—in-home, secular gatherings—which were subject to the exact same restrictions as in-home, religious gatherings.<sup>144</sup> This case and other COVID-19 restriction cases heard by the Supreme Court since the appointment of Justice Barrett has led scholars and Supreme Court commentators to believe the Court is currently in the midst of narrowing or overturning its long-standing precedent setting the standard for Free Exercise claims such as these, *Employment Division v. Smith*.<sup>145</sup>

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138. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

139. *Id.* at 1614 (Kavanaugh, J., dissenting).

140. *See generally* *Tandon v. Newsom*, No. 20A151, 2021 U.S. LEXIS 1866 (Apr. 9, 2021).

141. *See generally id.*

142. *Id.* at \*5–6 (Kagan, J., dissenting).

143. *Id.* at \*3–5 (majority opinion).

144. *Id.* at \*5–6 (Kagan, J., dissenting).

145. *Emp't Div. v. Smith*, 494 U.S. 872 (1990); *see, e.g., A Legal Winning Streak for Religion*, N.Y.

Given the New Roberts Court's solid 6-3 conservative majority, the inability to assume that five Justices support upholding *Roe* and *Casey*, the fact that the Court's adherence to stare decisis is questionable, and the reality that many abortion cases are working their way through the federal court system, it may be necessary for reproductive health advocates to consider an alternative legal strategy to challenge new abortion restrictions, such as the wave of heartbeat laws and the nearly complete abortion ban passed in Alabama in 2019. The theory must be one that does not depend on *Roe* or *Casey*, but instead, one that provides an alternative basis for finding the laws unconstitutional and allows the Court to never reach the privacy issue at the heart of *Roe*. One viable strategy depends on the First Amendment's Establishment Clause.

### III. A NEW PATH FORWARD

#### A. THE FIRST AMENDMENT, RELIGION, AND ABORTION

Many religions have different views on the permissibility of abortion.<sup>146</sup> Generally, these groups can be classified into three categories: those who oppose abortion with few exceptions,<sup>147</sup> those who support abortion with

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TIMES: THE DAILY (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/podcasts/the-daily/supreme-court-religious-cases.html> [<https://perma.cc/R3DL-4N5K>].

146. David Masci, *Where Major Religious Groups Stand on Abortion*, PEW RES. CTR. (June 21, 2016), <https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion> [<https://perma.cc/T7GJ-FHGL>].

147. The Roman Catholic Church, Church of Jesus Christ of Latter-day Saints, Southern Baptist Convention, African Methodist Episcopal Church, Assemblies of God, Hinduism, and Lutheran Church-Missouri Synod all oppose abortion with few or no exceptions. *Id.* For example, the Roman Catholic Church opposes abortion in all circumstances and threatens ex-communication for any woman who has a completed abortion. CATECHISM OF THE CATHOLIC CHURCH 547-49 (2d ed. 2000). In comparison, the Church of Jesus Christ of Latter-day Saints permits abortion after prayer and consulting with local church leaders in cases of rape and incest, danger to the life of the mother, or severe medical conditions that will not allow the fetus to survive past birth. *Abortion*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/gospel-topics/abortion?lang=eng> [<https://perma.cc/TP4Z-WAM3>].

limits,<sup>148</sup> and those who support abortion with few limits.<sup>149</sup> While no religion practices abortion as part of a religious ceremony or tradition, certain religions do permit abortions amongst their members and have even advocated for a woman's right to choose through amicus briefs.<sup>150</sup> With these differences in religious beliefs come potential First Amendment implications.

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." <sup>151</sup> The First Amendment is incorporated against the states through the Fourteenth Amendment's Due Process Clause.<sup>152</sup> The Amendment has two clauses protecting religious freedom: the Free Exercise Clause and the Establishment Clause.<sup>153</sup> This Note focuses solely on the Establishment Clause, which, by at least one interpretation, stands for the principle of government neutrality towards religion.<sup>154</sup>

### 1. The Drafting of the Establishment Clause

In order to understand the Establishment Clause, it is important to first briefly discuss the historical context from which it arose.<sup>155</sup> Before the

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148. The Episcopal Church, Evangelical Lutheran Church in America, and the United Methodist Church support abortions rights with limits. Masci, *supra* note 146. Generally, these organizations emphasize the value of all human life but also recognize the rights of women, and that this is a difficult choice to be made, so they counsel against abortion, but also accept it amongst their members. See Joe Iovino, *The United Methodist Church and the Complex Topic of Abortion*, UNITED METHODIST CHURCH (Nov. 3, 2015), <http://ee.umc.org/what-we-believe/the-united-methodist-church-and-the-complex-topic-of-abortion> [<https://perma.cc/DTH8-TG66>]; *Summary of General Convention Resolution on Abortion and Women's Reproductive Health*, EPISCOPAL CHURCH (May 17, 2019), <https://episcopalchurch.org/posts/ogr/summary-general-convention-resolutions-abortion-and-womens-reproductive-health> [<https://perma.cc/4BZN-YMLK>]; EVANGELICAL LUTHERAN CHURCH IN AM., A SOCIAL STATEMENT ON: ABORTION 3–7 (1991), [https://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf?\\_ga=2.222361115.1857940963.1610575546-2109018058.1610575546](https://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf?_ga=2.222361115.1857940963.1610575546-2109018058.1610575546) [<https://perma.cc/79M4-MQLP>].

149. Masci, *supra* note 146. The United Church of Christ, Unitarian Universalist, Reform Judaism, Presbyterian Church, and Conservative Judaism support abortion rights and the least number of limitations. *Id.* Additionally, there are other major religions within the United States that do not have a uniform stance on abortion, such as Islam, Buddhism, National Baptist Convention, and Orthodox Judaism. *Id.*

150. See, e.g., MLJ, *Abortion and Judaism*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/abortion-in-jewish-thought> [<https://perma.cc/QX9K-RYKT>].

151. U.S. CONST. amend. I.

152. U.S. CONST. amend XIV; *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (holding that the Establishment Clause of the First Amendment applies to states through the Due Process clause of the Fourteenth Amendment); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the Free Exercise and Establishment Clauses of the First Amendment apply to states through the Due Process clause of the Fourteenth Amendment).

153. *Harris v. McRae*, 448 U.S. 297, 318–21 (1980).

154. *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005).

155. This overview is not meant to be a detailed analysis or extensive overview of the historical context surrounding the drafting of the Establishment Clause. This has already been detailed in many

Establishment Clause was drafted by James Madison and proposed to the House of Representatives, the states had contradicting views on what type of relationship there should be, if any, between state government and religion.<sup>156</sup> For example, Massachusetts had authorized the use of taxpayer funds to support religion, while in Virginia, no person was forced to support any religion.<sup>157</sup>

In the Virginia legislature, James Madison proposed “A Bill for Establishing Religious Freedom,” which was drafted by Thomas Jefferson.<sup>158</sup> In relevant part, the Bill stated “that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . [and] that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion.”<sup>159</sup> Madison himself was a firm believer that religion does not need support from government. Explaining his beliefs, Madison drafted the *Memorial and Remonstrance Against Religious Assessments*, which he presented to the Virginia General Assembly in 1785.<sup>160</sup> Justice Black aptly summarized Madison’s paper stating “that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.”<sup>161</sup> Thus, Madison established himself as a strong advocate for separation between government and religion while in the Virginia legislature.

While the states were establishing their own policies regarding religion, the federal government was just beginning to grapple with the issue. Because the Constitution did not establish affirmative individual rights, antifederalists in particular were concerned that the federal government had the power to interfere with individual liberties in ways that were not enumerated in the Constitution.<sup>162</sup> Thus, in 1789, four years after presenting his *Memorial and*

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academic pieces. Instead, it is meant to be a brief summary. For a more extensive analysis of the drafting of the Establishment Clause, see, for example, Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 604–631 (2006).

156. *Id.* at 605–06 (2006).

157. *Id.* at 606–10.

158. *Id.* at 609.

159. *Id.* (quoting THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (drafted in 1777, adopted in 1786), reprinted in THE PORTABLE THOMAS JEFFERSON 251, 253 (Merrill D. Peterson ed., 1977)).

160. James Madison, *Memorial and Remonstrance Against Religious Assessments*, [ca. 20 June] 1785, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-08-02-0163> [https://perma.cc/QU3V-DLQS].

161. *Everson v. Bd. of Educ.*, 330 U.S. 1, 12 (1947).

162. *Wallace v. Jaffree*, 472 U.S. 38, 92–94 (1985) (Rehnquist, J., dissenting).

*Remonstrance* to the Virginia state legislature, to quell antifederalist fears, James Madison proposed to the House of Representatives amendments to the Constitution, which would later be known as the Bill of Rights.<sup>163</sup> Within this proposed Bill of Rights was the first draft of the First Amendment.

Madison's first draft of the First Amendment read in relevant part, "the civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>164</sup> The proposed amendment went through many changes in the House and Senate. First, a House committee changed the amendment to read "no religion shall be established by law, nor shall the equal rights of conscience be infringed."<sup>165</sup> However, the House later rewrote the amendment during an unrecorded debate to read "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."<sup>166</sup> Of particular interest here is the change from "no religion shall be established by law" to "Congress shall make no law establishing Religion." Some have interpreted this change as evidence that the House wanted broader protection against the establishment of religion.<sup>167</sup> Afterwards, the amendment was sent to the Senate where it went through a few proposals before being sent back to the House as "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion," which some would argue was the narrowest version of the amendment ever considered by the Senate.<sup>168</sup> The House did not accept the Senate's version of the First Amendment and in a joint conference committee the House persuaded the Senate to adopt the First Amendment as it stands today: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>169</sup>

The broadening of the language that occurred between drafts in the House, the Senate's final proposal, and the ultimate language of the Amendment has led some scholars to argue that the protection guaranteed by the Establishment Clause was meant to be broad and protect against both

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163. *Id.* at 93–94. James Madison stated, "As I considered myself bound in honor and in duty to do what I have done on this subject, I shall proceed to bring the amendments before you as soon as possible, and advocate them until they shall be finally adopted or rejected . . ." 1 ANNALS OF CONG. 424 (1789) (Joseph Gales ed., 1834).

164. *Lee v. Weisman*, 505 U.S. 577, 612 (1992) (Souter, J., concurring); 1 ANNALS OF CONG. 424 (1789) (Joseph Gales ed., 1834).

165. *Lee*, 505 U.S. at 612.

166. *Id.* at 613.

167. *Id.* at 612–13.

168. *Id.* at 614.

169. *Id.*

preferential and nonpreferential aid by the government.<sup>170</sup> In other words, the Establishment Clause protects against support for one religion over another and for religion over nonreligion.<sup>171</sup> However, others interpret this sequence of changes and Madison's actions to mean that the Establishment Clause only protects against the establishment of a national religion and preferential aid or, in other words, preference between religious sects.<sup>172</sup> These remain two predominant schools of thought on the interpretation of the Establishment Clause.

## 2. Supreme Court Establishment Clause Jurisprudence

The Supreme Court's first comprehensive interpretation of the Establishment Clause did not occur until 1947 in *Everson v. Board of Education*.<sup>173</sup> In *Everson*, the Court considered whether a state's use of taxpayer dollars to refund parents who paid for their child to be transported to a parochial school on public school buses violated the Establishment Clause.<sup>174</sup> Justice Black began his Establishment Clause analysis in the majority opinion by detailing the motivation for and the history surrounding the Establishment Clause.<sup>175</sup> Specifically, the opinion detailed how James Madison's *Memorial and Remonstrance* and the "Virginia Bill for Religious Liberty" drafted by Thomas Jefferson were crucial to understanding the purpose of the Establishment Clause.<sup>176</sup> Because Jefferson and particularly Madison had such leading roles in the adoption of the First Amendment, the Court found that the Establishment Clause was meant to provide the same protection of religious liberties as the Virginia statute that Jefferson drafted and Madison argued for had.<sup>177</sup> Justice Black concluded that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>178</sup> The Court ultimately concluded that the wall between church and state must "be kept high and impregnable," but that the law had not breached the wall in this case.<sup>179</sup>

The *Everson* decision was met with confusion as the ultimate result

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170. *See id.* at 612–18.

171. *Id.* at 616.

172. *Wallace v. Jaffree*, 472 U.S. 38, 98–99 (1985) (Rehnquist, J., dissenting).

173. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

174. *Id.* at 3. John Morton Cummings Jr., *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191, 1196 (1990).

175. *Everson*, 330 U.S. at 8.

176. *Id.* at 12.

177. *Id.* at 13.

178. *Id.* at 15.

179. *Id.* at 18.

seemed to be at odds with the interpretation of the Establishment Clause announced in the opinion.<sup>180</sup> Thus, the interpretation in *Everson* was challenged within a year in *Illinois ex rel. McCollum v. Board of Education*.<sup>181</sup> In another opinion by Justice Black, the Court upheld the interpretation from *Everson*,<sup>182</sup> but in *McCollum* the Court found that an Illinois law, which allowed parochial teachers to come to secular schools and teach religion for a short period of time each week, violated the Establishment Clause.<sup>183</sup> In the years following *Everson* and *McCollum*, the Court struggled to find a coherent test for the Establishment Clause.<sup>184</sup> The Court did not announce the current test for Establishment Clause violations until the early 1970s in *Lemon v. Kurtzman*.<sup>185</sup>

Two state laws were at issue in *Lemon*.<sup>186</sup> The first was a Pennsylvania law that provided financial support to nonpublic schools, including reimbursement for teachers' salaries and other classroom materials.<sup>187</sup> The second law was a Rhode Island law that provided nonpublic school teachers with an additional 15% of their salary.<sup>188</sup> Under both laws, public funds were given to parochial institutions.<sup>189</sup> In the course of its analysis, the Court announced what has since been referred to as the *Lemon* test: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" <sup>190</sup> In *Lemon*, the Court held that both state laws led to excessive government entanglement with religion, and thus violated the Establishment Clause.<sup>191</sup>

Since announcing the *Lemon* test in 1971, the Court has repeatedly upheld it<sup>192</sup> and further explained the different factors. However, the Court's choice of when to apply the test to a given case has been inconsistent. In

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180. Morton Cummings Jr., *supra* note 174, at 1197.

181. *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

182. *Id.* at 211–12.

183. *Id.* at 207–10.

184. Morton Cummings Jr., *supra* note 174, at 1196. An extensive review of Establishment Clause jurisprudence from *McCollum* through *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is beyond the scope of this Note. See Morton Cummings Jr., *supra* note 174, 1198–1207.

185. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

186. *Id.* at 606.

187. *Id.* at 609–10.

188. *Id.* at 607–09.

189. *Id.* at 607.

190. *Id.* at 612–13 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

191. *Id.* at 613–14.

192. See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 861–64 (2005); *Edwards v. Aguillard*, 482 U.S. 578, 582–83 (1987).

some Establishment Clause cases, the Court chooses to apply the test, while in others it adopts alternative reasoning.<sup>193</sup> Thus, in some ways, an Establishment Clause claim that the 2019 restrictive abortion laws violate the *Lemon* test suffers from the same flaw as a claim that the laws present undue burdens under the Fourteenth Amendment. For both claims, the Court has struggled to find a test it has applied consistently.<sup>194</sup> Nevertheless, an Establishment Clause challenge still has a major advantage: the potential to avoid reaching the privacy issue at the heart of *Roe* and *Casey*. Therefore, it is a claim worth pursuing despite the uncertainty. Specifically, this Note will argue that the laws should be found unconstitutional because they fail the first requirement of the *Lemon* test: a law must have a secular legislative purpose.

i. Defining a Secular Purpose

The Supreme Court has struck down only a few state statutes for lacking a secular purpose since *Lemon*. However, in these cases the Court has further explained what is required to find that a law lacks a secular purpose. The Court found a law lacked a secular purpose in *Stone v. Graham*.<sup>195</sup> In *Stone*, the Court held per curiam that a Kentucky law, which required public schools to post a copy of the Ten Commandments in public classrooms, lacked a secular purpose.<sup>196</sup> The text of the law stated the Ten Commandments were posted because they are the “fundamental legal code of Western Civilization and the Common Law of the United States.”<sup>197</sup> However, the Court did not accept this purpose and held that posting the Ten Commandments violated the Establishment Clause because the Ten Commandments are “plainly religious in nature” and they were not being used as part of the educational curriculum for the study of history, ethics, etc.<sup>198</sup>

After *Stone*, the Court once again addressed the secular purpose requirement in *Wallace v. Jaffree*<sup>199</sup> and built off of the doctrine established in *Stone*. In *Wallace*, a public school parent challenged an Alabama statute allowing a one-minute moment of silence in public schools for voluntary

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193. See, e.g., Karthik Ravishankar, *The Establishment Clause's Hydra: The Lemon Test in the Circuit Courts*, 41 U. DAYTON L. REV. 261, 262–63 (2016); Marcia S. Alembik, Note, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1173 (explaining how in two Establishment Clause cases decided on the same day, the Court applied the *Lemon* test in one and used different reasoning in the other).

194. Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After Casey/Hellerstedt*, 52 HARV. C.R.-C.L. L. REV. 421 (2017).

195. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

196. *Id.* at 39–40.

197. *Id.* at 41 (quoting KY. REV. STAT. ANN. § 158.178 (West 1980)).

198. *Id.* at 41–42.

199. *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985).

prayer or meditation.<sup>200</sup> The Court began by announcing that if a law has no secular purpose, the second and third criteria of the *Lemon* test do not need to be considered.<sup>201</sup> In considering the first factor, the Court stated that “it is appropriate to ask ‘whether government’s actual purpose is to endorse or disapprove of religion.’”<sup>202</sup> In *Wallace*, this question was dispositive as the statute clearly had no secular purpose.<sup>203</sup> The sponsor of bill that became the law stated in the legislative record that the bill was an “effort to return voluntary prayer” and there was no recorded dissent to this statement.<sup>204</sup> Furthermore, in the district court, when the bill’s sponsor was asked whether the bill had any purpose other than a return to prayer, he stated that it did not, and the State did not offer any evidence of a secular purpose.<sup>205</sup>

After *Wallace*, the Court heard *Edwards v. Aguillard*, which challenged a Louisiana law requiring “creation science” to be taught in public schools whenever evolution was taught.<sup>206</sup> The State asserted the legislative purpose of the act was to protect academic freedom and not to promote religion.<sup>207</sup> The Court announced that “[w]hile the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham,”<sup>208</sup> and in this case, the statute did not protect academic freedom, but instead may have harmed it.<sup>209</sup> By requiring schools and teachers to teach creationism whenever evolution was taught, the academic freedom of schools was actually hindered.<sup>210</sup> The Court cited a statement of the bill’s sponsor wherein he said, “[m]y preference would be that neither [creationism nor evolution] be taught,” as further evidence that purpose of the law was to hinder academic freedom rather than advance it.<sup>211</sup> Thus, *Edwards* expanded upon previous secular purpose jurisprudence and made it clear that the stated government purpose “be sincere and not a sham.”<sup>212</sup>

The Court revisited the Ten Commandments issue in 2005 in *McCreary County v. ACLU*, where, again, the Court was faced with the question of whether a public display of the Ten Commandments on government property

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200. *Id.* at 40–42.

201. *Id.* at 56.

202. *Id.* at 56 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)).

203. *Id.*

204. *Id.* at 56–57 (quotation omitted).

205. *Id.* at 57.

206. *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987).

207. *Id.* at 586.

208. *Id.* at 586–87.

209. *Id.* at 586.

210. *Id.*

211. *Id.* at 587 (citation omitted).

212. *Id.* at 586–87.

violated the Establishment Clause for lacking a secular purpose.<sup>213</sup> In *McCreary County*, two Kentucky courthouses had displays of the Ten Commandments, but the State insisted they were secular in nature as they are “precedent legal code.”<sup>214</sup> The Court reaffirmed its holding from *Stone* that the Ten Commandments are clearly religious in nature and held that posting the Ten Commandments was an Establishment Clause violation.<sup>215</sup> Oddly, on the same day that the Court released its opinion in *McCreary County*, it released its opinion in *Van Orden v. Perry*. In *Van Orden*, the Court was asked to decide whether a monument containing the Ten Commandments on Texas Capitol Grounds violated the Establishment Clause.<sup>216</sup> The Court declined the opportunity to apply the *Lemon* test, instead employed alternate reasoning, and held that the monument displaying the Ten Commandments was not a violation of the Establishment Clause.<sup>217</sup>

### 3. Previous Application of the Establishment Clause to Abortion Laws

Before applying prior Supreme Court Establishment Clause precedent to the abortion laws at issue in this Note, it is necessary to analyze the limited Supreme Court precedent in which laws restricting abortion care were challenged under the First Amendment.<sup>218</sup> These limited number of cases concerned laws restricting the use of public funds for abortions.<sup>219</sup> The most prominent case regarding the Establishment Clause and a law restricting abortion care is *Harris v. McRae*.<sup>220</sup> Reproductive health advocates in that case argued that the Hyde Amendment, which prohibited the use of Medicaid funding for all but medical necessary abortions,<sup>221</sup> violated the Establishment Clause as it reflected traditional Roman Catholic views on abortion.<sup>222</sup> After very limited analysis, the Court held that “the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the

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213. *McCreary County v. ACLU*, 545 U.S. 844, 850–51 (2005).

214. *Id.* at 850.

215. *Id.* at 858.

216. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

217. *Id.* at 685–86, 691–92.

218. See Jessica L. Knopp, Comment, *The Unconstitutionality of Ohio’s House Bill 125: The Heartbeat Bill*, 46 AKRON L. REV. 253, 276–80 (2013).

219. See, e.g., *Maier v. Roe*, 432 U.S. 464, 466, 480 (1977) (holding that it was constitutional for a state’s welfare department to provide only “medically necessary abortions” when it pays for childbirth); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (per curiam) (holding that it was constitutional for publicly funded hospitals to not provide non-therapeutic abortion but to provide childbirth services).

220. *Harris v. McRae*, 448 U.S. 297 (1980).

221. Medicaid funding was available for abortions that were performed because of the safety of the life of the mother and for victims of rape or incest as long as it was reported to law enforcement. *Id.* at 302.

222. *Id.* at 319.

Establishment Clause” for lacking a secular purpose.<sup>223</sup> However, the Court did not specify what “more” would be necessary to result in an Establishment Clause violation.

The Court has also addressed religion in the abortion context when discussing the unknowable question of when life begins. The Court has effectively avoided taking a stance on when life begins. Dating back to *Roe*, the Court deferred answering the question stating:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.<sup>224</sup>

In fact, the Court went on to say that “we do not agree that, by adopting one theory of life, [the State] may override the rights of the pregnant woman that are at stake.”<sup>225</sup> Thus, at least in *Roe*, the Court expressed hesitance as to whether a state can justify a law restricting access to abortion care based on its definition of life beginning at conception or at another point prior to viability in a pregnancy.

Outside of the public-funds context and the limited Establishment Clause analysis in *Harris*, there is uncertainty as to how the Supreme Court would view an Establishment Clause challenge to state restrictions on abortion care that rely on a religious belief that life begins at conception or at another point prior to viability and that life must be protected. This creates the opportunity to challenge new laws restricting abortion, such as the aforementioned heartbeat laws and Alabama’s near-total abortion ban, under the Establishment Clause.

## B. A NEW APPROACH

Despite the unsuccessful Establishment Clause challenge in *Harris*, the circumstances surrounding the abortion laws at issue in this Note are drastically different, and the time has come for a potentially successful Establishment Clause challenge to a restrictive abortion law. The seven states that passed heartbeat laws or made nearly all abortions illegal in 2019 have set the stage for such a challenge. The remainder of this Note will detail why the circumstances are ripe in these cases to make a challenge under the Establishment Clause and how this approach could be advantageous for abortion rights advocates and judges. The remainder of this Note primarily

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223. *Id.* at 319–20.

224. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

225. *Id.* at 162.

focuses on the Alabama Human Life Protection Act as a representative example of the seven state laws discussed in this Note in order to show how a challenge could be mounted against these laws. Evidence that could be used to challenge the remaining state laws is included in footnotes where applicable.

### 1. Is the Purpose Truly Secular?

First, it is necessary to determine what each state proffers as the law's secular purpose. For the laws in question, the secular purpose of each law can be gleaned from the law's text. While the language of the laws differ, the overarching purpose that ties all of the laws together is the protection of human life. However, as announced in *Edwards v. Aguillard*, the stated government purpose must "be sincere and not a sham."<sup>226</sup> Thus, like in *Edwards* and *Wallace*, for the laws in question here, the statements of lawmakers can be used as evidence to show that the stated secular purpose is not sincere. Additionally, here, the evidence that the stated purpose is not sincere surpasses just the statements of lawmakers. The proffered secular purpose leads to logical inconsistencies with other state laws in each of the seven states.<sup>227</sup> Furthermore, when examining the advocacy efforts behind the legislation that became the laws in question, it is clear that a significant portion of the money spent to pass these laws came from religiously affiliated organizations, casting further doubt on the stated secular purpose.

Using the Alabama Human Life Protection Act ("AHLPA") as an example, the AHLPA imposes serious punishments for doctors who perform an abortion unless it "is necessary in order to prevent a serious health risk to the unborn child's mother," there is an ectopic pregnancy, or the fetus has a "lethal anomaly."<sup>228</sup> House Bill 314, which became the AHLPA, stated:

[E]lectors in this state approved by a majority vote a constitutional amendment to the Constitution of Alabama of 1901 declaring and affirming the public policy of the state to recognize and support the sanctity of unborn life and the rights of unborn children. The amendment made it clear that the Constitution of Alabama of 1901 does not include a right to an abortion . . . .<sup>229</sup>

Taken together, the fact that the law (1) does not allow an abortion at any

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226. *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987).

227. All seven states permit the death penalty, thus undermining the stated purpose that the law was not religiously affiliated but was for the protection of human life. *See, e.g.*, ALA. CODE § 13A-5-45 (LexisNexis 2021); GA. CODE ANN. § 17-10-30 (2020); KY. REV. STAT. ANN. § 532.025 (LexisNexis 2021); LA. STAT. ANN. § 14:30(C)(1) (2020); MO. ANN. STAT. § 565.020(2) (West 2020); MISS. CODE ANN. § 97-3-21 (2021); OHIO REV. CODE ANN. § 2929.02 (LexisNexis 2021).

228. H.B. 314, 2019 Leg., Reg. Sess. (Ala. 2019); Kelly, *supra* note 1.

229. H.B. 314, 2019 Leg., Reg. Sess. (Ala. 2019) (emphasis added).

stage of pregnancy unless it falls under the three exceptions stated above, (2) that it recognizes the “sanctity of unborn life,” and (3) that the law is named “the Human Life Protection Act,” imply that life begins at conception,<sup>230</sup> which is a traditional Roman Catholic view, as well as a view held by other religious sects.<sup>231</sup>

The argument that the belief that life begins at conception is religious in nature is bolstered by the fact that there is no medical consensus on when life begins or what is considered conception.<sup>232</sup> However, not every religion believes that life begins at conception.<sup>233</sup> Certain denominations of Christianity are unsure of when human life begins. For example,

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230. The other six state laws imply that life begins at conception as well.

- Georgia:
  - Georgia’s bill is known as the Living Infants Fairness and Equality (LIFE) Act, indicating it is meant to protect the potentiality of life. H.B. 481, 2019–2020 Gen. Assemb., Reg. Sess. (Ga. 2019). Furthermore, the Act recognizes that “[i]t shall be the policy of the State of Georgia to recognize unborn children as natural persons.” H.B. 481, 2019–2020 Gen. Assemb., Reg. Sess. (Ga. 2019).
- Kentucky:
  - In Kentucky’s bill, there is no clear language indicating its purpose, but in the bill, it states, “Kentucky has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of an unborn human individual who may be born.” S.B. 9, 2019 Leg., Reg. Sess. (Ky. 2019).
- Ohio:
  - Ohio’s bill also has this same language. H.B. 493, 133rd Gen Assemb., Reg. Sess. (Ohio 2019). Thus, it can be assumed both states’ stated purpose would be one of the two interests above.
- Louisiana:
  - In Louisiana, the law specifies that “it shall be unlawful for any person to knowingly perform an abortion with the specific intent of causing or abetting the termination of the life of an *unborn human being* when a fetal heartbeat has been detected.” S.B. 184, 2019 Leg., Reg. Sess. (La. 2019) (emphasis added).
- Mississippi:
  - Similarly, the Mississippi Law states, “no person shall knowingly perform an abortion . . . with the specific intent of causing or abetting the termination of the life of the *unborn human individual* that the pregnant woman is carrying and whose fetal heartbeat has been detected.” S.B. 2116, 2019 Leg., Reg. Sess. (Miss. 2019) (emphasis added). Therefore, from the use of the phrase “unborn human” in Louisiana and Mississippi’s laws, it is clear their stated purpose is to protect the potentiality of human life.
- Missouri:
  - Missouri’s legislative purpose can be assumed to be protection of potential human life as the law is known as the “Right to Life of the Unborn Child Act.” H.B. 126, 100th Gen. Assemb., Reg. Sess. (Mo. 2019).

231. *When Does Life Begin . . . and End with EPC’s*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/when-does-life-begin-and-end-with-epcs.cfm> [https://perma.cc/NSK4-FC7B].

232. Kerry Grens, *When Does Pregnancy Begin? Doctors Disagree*, REUTERS (Nov. 17, 2011, 11:21 AM), <https://www.reuters.com/article/us-when-does-pregnancy-begin/when-does-pregnancy-begins-doctors-disagree-idUSTRE7AG24B20111117> [https://perma.cc/59HV-GPVZ].

233. Elissa Strauss, *When Does Life Begin? It’s Not So Simple.*, SLATE (Apr. 4, 2017, 5:55 AM), <https://slate.com/human-interest/2017/04/when-does-life-begin-outside-the-christian-right-the-answer-is-over-time.html> [https://perma.cc/S9AW-NJFQ].

“[p]resbyterians concede that they ‘may not know exactly when human life begins.’”<sup>234</sup> Thus, by expressing the view that life begins at conception or shortly thereafter, the laws are not just expressing the views of nonreligion over religion but are also expressing the views of one religion over another. Therefore, if these laws are found not to have a sincere secular purpose, they would violate both schools of thought on the Establishment Clause discussed above.<sup>235</sup> Because there is no consensus amongst religions on when life begins, a law defining life at conception for religious motives violates the theory that the Establishment Clause only protects against preferential treatment (that is, preference between religions). It also violates the theory that the Establishment Clause protects against preferential and nonpreferential treatment (that is, preference between religion over nonreligion) as there is also not a unitary, secular view that life begins at conception.

Nevertheless, as stated in *Harris*, just because a law may coincide with the tenets of a religion does not “without more” mean that a law lacks a secular purpose and violates the Establishment Clause.<sup>236</sup> However, here, the law does not merely “coincide” with a religious tenet. When the curtain is pulled back and the actions surrounding the passage of the AHLPA are revealed, the façade that there is a secular purpose begins to chip away.

First, just as in *Wallace v. Jaffree* and *Edwards v. Aguillard*, the statements of lawmakers involved in passing the AHLPA show that the law was truly motivated by the lawmakers’ religious beliefs. When signing the AHLPA into law, Alabama Governor Kay Ivey stated, “[T]his legislation stands as a powerful testament to Alabamians’ deeply held belief that every life is precious and that every life is a sacred gift from God.”<sup>237</sup> Furthermore, just as in *Wallace* and *Edwards*, in which the sponsors of the bills that eventually became the laws at issue explicitly stated the laws were religiously motivated, here, Senator Clyde Chambliss, who was the sponsor of the AHLPA in state senate stated, “When God creates the miracle of life inside a woman’s womb . . . it is not our place as human beings to extinguish that life.”<sup>238</sup> These are just a few examples of statements made by lawmakers that show the purpose behind the law did not merely coincide with religious tenets, but instead, the law was drafted to further the religious belief that life

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234. *Id.*

235. *See infra* Section III.A.1.

236. *Harris v. McRae*, 448 U.S. 297, 319–20 (1980).

237. Kelly, *supra* note 1.

238. Timothy Williams & Alan Blinder, *Lawmakers Vote to Effectively Ban Abortion in Alabama*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/us/abortion-law-alabama.html> [<https://perma.cc/D6MN-265D>].

begins at conception and must be protected.<sup>239</sup>

Furthermore, the evidence of a nonsecular purpose extends past the religious statements of lawmakers. When the logical inconsistencies within Alabama's penal code are analyzed, Alabama's stated purpose—the protection and sacredness of human life—is undermined. Like every state that passed restrictive abortion laws in 2019, Alabama permits the death penalty for capital offenses.<sup>240</sup> To preface, there are substantial differences between the death penalty and abortions. While both result in the loss of human life, according to Alabama's belief that life begins at conception, the death penalty is enforced against those who society has deemed highly culpable. Nevertheless, following Alabama lawmakers' beliefs that "every life is precious and that every life is a sacred gift from God"<sup>241</sup> and "it is not

239. Examples from other states include:

- Louisiana:
  - "God values human life, and so do the people of Louisiana," said Louisiana Senator John Milkovich. Alan Blinder, *Louisiana Moves to Ban Abortions After a Heartbeat Is Detected*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/us/louisiana-abortion-heartbeat-bill.html> [<https://perma.cc/CMB7-EDAJ>].
  - "In Louisiana, we have a culture of love of life, love of family, and love of God," said Representative Valarie Hodges during a floor debate. *Id.*
- Georgia:
  - When signing the heartbeat bill in Georgia, Governor Brian Kemp stated, "We must protect life at all stages. We must remember our higher calling." Bill Chappell, *Georgia Abortion Providers File Federal Suit Against State's 'Fetal Heartbeat' Law*, NPR (June 28, 2019, 12:15 PM), <https://www.npr.org/2019/06/28/736946045/georgia-abortion-providers-file-federal-suit-against-states-fetal-heartbeat-law> [<https://perma.cc/D3EM-XK2P>].
- Mississippi:
  - Governor Phil Bryant wrote on Twitter before he signed the bill, "We will all answer to the good Lord one day," and that "I will say in this instance, 'I fought for the lives of innocent babies, even under threat of legal action.'" Alan Blinder, *Federal Judge Blocks Mississippi Abortion Law*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/us/mississippi-abortion-law.html> [<https://perma.cc/NSW8-33CD>].
- Missouri:
  - Before signing the heartbeat bill, the Missouri governor said at rally, "It's a God-given right to live . . . and that's why it's important for this legislation to get done." Summer Ballentine, *Missouri 8-Week Abortion Ban One Step from Going to Governor*, ASSOCIATED PRESS (May 16, 2019), <https://apnews.com/8977f3cee25d400f9ec46fae0cef72c7> [<https://perma.cc/6ST6-MCH5>].
- Kentucky:
  - Representative Robert Goforth stated, "When that baby's heart's beating, you have to recognize that is a life there. The only person that should be the author of life is God and not man." Ryland Barton, *Kentucky Lawmaker Proposes Heartbeat Abortion Bill*, CINCINNATI PUB. RADIO NEWS (Jan. 8, 2019), <https://www.wvxu.org/post/kentucky-lawmaker-proposes-heartbeat-abortion-bill#stream/0> [<https://perma.cc/6VBU-LCCD>].

240. ALA. CODE § 13A-5-45 (LexisNexis 2021); GA. CODE ANN. § 17-10-30 (2020); KY. REV. STAT. ANN. § 532.025 (LexisNexis 2021); LA. STAT. ANN. § 14:30(C)(1) (2020); MO. ANN. STAT. § 565.020(2) (West 2020); MISS. CODE ANN. § 97-3-21 (2021); OHIO REV. CODE ANN. § 2929.02 (LexisNexis 2021).

241. Kelly, *supra* note 1.

our place as human beings to extinguish that life,”<sup>242</sup> the end result is the same in both cases: the loss of human life.

If these statements truly reflected a belief that humans should not take the lives of others, rather than a belief that abortion violates their religious belief that life begins at conception, how can the State still support the death penalty? Further, Alabama does not merely support the death penalty—it has gained notoriety for its application. In past years, Alabama had the highest per capita death penalty rate in the country.<sup>243</sup> In 2014, there were more death sentences in Alabama than Texas, which has a population five times the size.<sup>244</sup> Furthermore, Alabama is one of only two states where a defendant can be sentenced to death by a nonunanimous jury.<sup>245</sup> The state gained national attention in March 2020 when it executed Nathaniel Woods.<sup>246</sup> Woods was sentenced to death for his involvement in the murder of three police officers.<sup>247</sup> While there was no question that Woods did not kill the police officers and was only an accomplice, Woods was sentenced to death by the judge after a jury failed to unanimously decide on the death penalty and sentenced him to life in prison.<sup>248</sup> In a case like Woods’s, wherein the defendant’s culpability is questioned by a jury of his peers, the justification for distinguishing between the death penalty and abortion on the basis of culpability is weakened. Thus, given Alabama’s capital punishment practice, how can the state sincerely argue that the AHLPA’s purpose to protect human life is truly secular and not a veiled attempt at writing their religious beliefs into law?

Lastly, a review of the organizations that were directly involved in passing the AHLPA, either through lobbying, bill writing, advocacy, or

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242. Williams & Blinder, *supra* note 238.

243. See, e.g., Rebecca Buckwalter-Poza, *With Judges Overriding Death Penalty Cases, Alabama Is an Outlier*, NPR (July 27, 2014, 3:08 PM), <https://www.npr.org/2014/07/25/335418230/with-judges-overriding-death-penalty-cases-alabama-is-an-outlier> [<https://perma.cc/VA6K-3N3D>].

244. *Id.*

245. Florida is the only other state that allows a defendant to be sentenced to the death penalty by a nonunanimous jury. See *State and Federal Info: Alabama*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/alabama> [<https://perma.cc/JZU7-CZJA>]; *Florida Supreme Court Retracts Jury Unanimity Requirement, Reinstates Non-Unanimous Death Sentence*, DEATH PENALTY INFO. CTR. (Jan. 24, 2020), <https://deathpenaltyinfo.org/news/florida-supreme-court-retracts-jury-unanimity-requirement-reinstates-non-unanimous-death-sentence#:~:text=The%20court's%20January%202023%2C%202020,to%20recommend%20the%20death%20penalty> [<https://perma.cc/SDF5-Z3XV>]. See generally *State v. Poole*, 292 So. 3d 694 (Fla. 2020) (reversing prior Florida Supreme Court decision and holding it is not unconstitutional to sentence a defendant to death by a nonunanimous jury).

246. Rick Rojas, *2 Jurors Voted to Spare Nathaniel Wood’s Life. Alabama Executed Him.*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/us/nathaniel-woods-alabama.html> [<https://perma.cc/S2JN-F6B9>].

247. *Id.*

248. *Id.*

legislative testimony, casts further doubt on the law's "secular" purpose.<sup>249</sup> In 2019, Sludge, an investigative news agency focused on the relationship between money and politics, released a report that detailed the groups that advocated for the restrictive abortion laws discussed in this Note and the organizations that donated to those groups between 2013 and 2017.<sup>250</sup> In Alabama, the Alabama Policy Institute ("API") was involved in advocacy efforts to pass the AHLPA.<sup>251</sup> API's official position on abortion is that "Alabama legislators should consider introducing stricter abortion legislation in order to decrease the high number of abortions within the state."<sup>252</sup> A member of API advocated in favor of the AHLPA in front of a House Committee that was conducting a hearing on the Bill.<sup>253</sup> Furthermore, API applauded the Senate for passing the Bill.<sup>254</sup> However, the fact that API advocates for abortion restrictions in and of itself is not the concern. The concern is that 13% of all donations to API between 2013 and 2017 came from the National Christian Foundation ("NCF").<sup>255</sup> While the name of the organization by itself suggests a religious affiliation, numerous statements on NCF's website confirm this affiliation. For example, the website states, "We believe God is moving hearts to give like never before," and "[w]ith every gift you release from your hands, you're writing a new story for the people and causes you truly love . . . . Join us, and discover the bigger story God is writing through us all."<sup>256</sup> Thus, the advocacy efforts to pass the AHLPA are affiliated with religious organizations advancing a nonsecular purpose.<sup>257</sup>

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249. See Alex Kotch, *These Corporations and Public Charities Funded the State Abortion Bans*, SLUDGE (June 13, 2019, 11:37 AM), <https://readsludge.com/2019/06/13/these-corporations-and-public-charities-funded-the-state-abortion-bans> [<https://perma.cc/Y8M6-9LTJ>].

250. *Id.*

251. *Id.*

252. ALA. POLICY INST., *GUIDE TO THE ISSUES: ABORTION IN ALABAMA 1* (2017), <https://alabama.policy.org/wp-content/uploads/2020/10/Abortion-GTI-for-Website.pdf> [<https://perma.cc/Y9TF-EAMP>].

253. Brian Lyman, *Alabama House Committee Approves Near-Total Ban on Abortion*, MONTGOMERY ADVISER (Apr. 17, 2019, 1:55 PM), <https://www.montgomeryadvertiser.com/story/news/2019/04/17/house-committee-approves-near-total-ban-abortion/3496055002> [<https://perma.cc/B9UU-LE42>].

254. Kotch, *supra* note 249.

255. *Id.* The National Christian Charitable Foundation donated over \$600,000 dollars to API between 2013 and 2017. *Id.*

256. NAT'L CHRISTIAN FOUND., <https://www.ncfgiving.com> [<https://perma.cc/9ZVT-FQWW>].

257. Some of the advocacy efforts to pass the other six bills at issue in this Note have been linked with religious organizations as well. Kotch, *supra* note 249. For example, in Missouri, a lobbyist disclosed that she advocated for Missouri's heartbeat law on behalf of Concerned Women of Missouri. *Id.* Concerned Women of Missouri is a state chapter of the national group Concerned Women for America ("CWA"). *Get Involved with CWA of Missouri!*, CONCERNED WOMEN FOR AM., <https://concernedwomen.org/state/Missouri> [<https://perma.cc/RP8S-BCUV>]. The National Christian Foundation donated \$347,150 to CWA between 2013 and 2017. Kotch, *supra* note 249. However, CWA does not just accept donations from religious charities. It has a religious mission itself. CWA's website states:

The association between AHLPA advocacy groups and religious organizations, the religious statements of lawmakers, and the inconsistencies within Alabama's penal code together provide a strong argument that the AHLPA's stated secular purpose is not truly secular but instead a sham. Thus, these facts provide a basis for a challenge to the AHLPA under the Establishment Clause.

## 2. The Benefits of an Establishment Clause Challenge for Judges and Women's Rights Advocates

Before discussing why an Establishment Clause challenge may be beneficial to judges and abortion rights advocates, it is first necessary to understand the potential effects if the abortion laws at issue in this Note were allowed to go into effect.

### i. The Impact on Constitutional Law

At the outset, it is important to note that these laws interfere not only with the fundamental right to an abortion but also with the broader constitutional right to bodily autonomy and privacy.<sup>258</sup> If laws lacking a secular purpose are permitted to interfere with a subject as personal as bodily autonomy, it is difficult to imagine in what sphere religiously motivated laws would not be unconstitutional. Furthermore, while in this case, the laws can potentially be held unconstitutional under the Due Process Clause because they infringe on a fundamental right, it is highly unlikely that a religiously motivated law that infringes on a nonfundamental right will be found unconstitutional under the Due Process Clause because laws affecting nonfundamental rights are subject only to rational basis review.<sup>259</sup> Thus, in the future, religiously motivated laws lacking a sincere secular purpose, especially those undermining nonfundamental rights, could be deemed constitutional under the Due Process Clause and allowed to go into effect.

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This Judeo-Christian worldview once served as the bedrock of Western Civilization. In recent times, Western Civilization has willingly chosen to exchange the faith and logic of a Biblical worldview for an irrational secularism based on an unthinking and cruel relativism. This foolish exchange is at the root of the glaring injustices of modern American public policy.

*CWA Core Issues*, CONCERNED WOMEN FOR AM., <https://concernedwomen.org/core-issues> [<https://perma.cc/5P5C-2R3P>]. Furthermore, the first topic listed under "Issues" on CWA's website is "Sanctity of Life." *Id.* The website states, "CWA supports the protection of all innocent human life from conception until natural death." *Id.* Thus, like in Alabama, in Missouri, a religiously motivated group that accepts donations from charities associated with religion, fought to pass the heartbeat law.

258. See generally, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a constitutional right to privacy); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that under the right to privacy laws prohibiting sodomy are unconstitutional).

259. While nonfundamental rights can be protected under the Due Process Clause, they are only subject to rational basis review. See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (applying rational basis review to a law prohibiting physician-assisted suicide as there is not a fundamental right to physician-assisted suicide).

Additionally, if a high burden of proof is required to prove a nonfacial religious purpose, it is possible that this area of the law will fall subject to the same problems as challenging a facially neutral law with a disparate impact under the Equal Protection Clause. For the laws at issue in this Note, just as in *Everson* and *Wallace*, key lawmakers involved in passing them made statements suggesting the laws are religiously motivated.<sup>260</sup> If religious statements made by lawmakers when passing a law are not sufficient proof of a nonsecular purpose, what evidence would be needed? A clear statement of religious motive in the law's text? The secular purpose test would then be subject to the same problems faced by a challenge to a facially neutral law with a disparate impact under the Equal Protection Clause. Under the Equal Protection Clause, a facially neutral law can only get heightened scrutiny if it has a discriminatory impact and was enacted with a discriminatory purpose.<sup>261</sup> However, the standard for proving discriminatory impact is rarely met, as the challenger must demonstrate that the law was enacted because of, not merely in spite of, its adverse effect.<sup>262</sup> Therefore, the majority of nonfacial classifications fail to get heightened scrutiny, and the laws are usually upheld. This has led to criticism that the Equal Protection Clause is ineffective because it fails to protect against certain forms of discrimination, such as unconscious racism.<sup>263</sup> Here, the Establishment Clause could fall victim to the same fate if laws designed to further lawmakers' own religious beliefs could stand so long as these beliefs were not directly acknowledged in the law and a plausible secular purpose exists.

#### ii. The Impact on Women

Despite the possibility that these laws could be declared unconstitutional under the Fourteenth Amendment because they are an undue burden under *Casey*, it is still important to consider the potential effects these laws could have on the health and wellbeing of women if allowed to go into effect. Because Alabama's law prohibits nearly all abortions, and the six other laws prohibit them after a fetal heartbeat is detected, which is often before women know they are pregnant, it is possible that women would resort to having illegal abortions.

Abortion became legal nationally in 1973 after *Roe*. Before 1969, the number of abortions performed annually and the number of abortion-related

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260. See *supra* notes 226–29 and accompanying text.

261. *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that discriminatory impact and purpose are needed to find a violation of the Equal Protection Clause).

262. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the law had to be enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

263. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987).

deaths in the United States were not monitored, so the only source of information on the number of deaths from abortions were death certificates.<sup>264</sup> In 1965 and 1971, there were 201 and 90 reported deaths, respectively, that resulted from abortions, and these numbers are thought to be conservative, as many doctors may not have recorded the true cause of death due to a lack of information about the actual cause or the stigma surrounding abortion.<sup>265</sup> In 1973, the year that *Roe* was decided, the number of deaths from legal abortions was 44.<sup>266</sup> It is believed that the number of abortion-related deaths declined each year in the years leading up to 1973 for a multitude of reasonings, including but not limited to, a larger use of contraceptives decreasing the number of women seeking abortions and an increase in the number of physicians providing illegal abortions, leading to safer abortion practices.<sup>267</sup> The number of abortion-related deaths have continued decreasing since *Roe*.<sup>268</sup> For example, when the Centers for Disease Control and Prevention last collected data on abortion-related deaths in 2015, there were only two deaths related to abortion.<sup>269</sup> Because legalizing abortion increased access to safe abortions and reduced the number of deaths related to the procedure,<sup>270</sup> if access to safe abortions are restricted again, it is possible that the number of unsafe abortions and thus deaths resulting from those abortions would once again increase and put women's lives in danger.<sup>271</sup>

Additionally, it is important to consider the psychological effects of forcing women to carry a pregnancy to term. The American Psychological Association found that women who are denied an abortion are “more likely to initially experience higher levels of anxiety, lower life satisfaction and lower self-esteem compared with women who received an abortion.”<sup>272</sup> Further, this does not account for the potentially heightened effects that could

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264. Yank D. Coble Jr., E. Harvey Estes Jr., C. Alvin Head, Mitchell S. Karlan, William R. Kennedy, Patricia Joy Numann, William C. Scott, W. Douglas Skelton, Richard M. Steinhilber, Jack P. Strong, Christine C. Toevs, Henry N. Wagner Jr, Jerod M. Loeb, Robert C. Rinaldi & Janet E. Gans, *Induced Termination of Pregnancy Before and After Roe v. Wade*, 268 JAMA 3231, 3234 (1992).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*; Tara C. Jatlaoui, Lindsay Eckhaus, Michele G. Mandel, Antoinette Nguyen, Titilope Oduyebo, Emily Petersen & Maura K. Whiteman, *Abortion Surveillance—United States, 2016*, CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY & MORTALITY WKLY. REP., SURVEILLANCE SUMMARIES, Nov. 29, 2019, at 1, 43, <https://www.cdc.gov/mmwr/volumes/68/ss/pdfs/ss6811a1-H.pdf> [<https://perma.cc/YEM9-CNNM>].

269. Jatlaoui et al., *supra* note 268, at 43.

270. See Willard Cates, Jr., David A. Grimes & Kenneth F. Schulz, *The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 25, 27 (2003).

271. *Abortion and Mental Health*, AM. PSYCHOL. ASS'N, <https://www.apa.org/pi/women/programs/abortion> [<https://perma.cc/KRG8-6WAW>].

272. *Id.*

occur when the pregnancy is due to rape or incest.<sup>273</sup> Georgia's law is the only law of the seven laws at issue in this Note to have an exception for rape and incest.<sup>274</sup> However, even under Georgia's law, a police report must be filed alleging rape or incest in order to obtain a legal abortion,<sup>275</sup> and while the statistics vary, it has been estimated that less than one-third of rapes are reported to the police.<sup>276</sup> Thus, even this law could make it illegal for more than half of all rape victims to receive a legal abortion once a fetal heartbeat is detected. Finally, there is a relationship between interpersonal violence and unwanted pregnancy because "the inability to obtain an abortion may force women to stay in contact with violent partners."<sup>277</sup> Therefore, these laws could place women's lives and children's lives at risk if allowed to go into effect because it could increase their chances of staying with a violent partner. For these reasons, if these laws are found to have a secular purpose, a dangerous situation could be created for women.

### iii. Advantages of a Challenge Under the Establishment Clause

There are advantages of an Establishment Clause challenge for women's rights advocates and judges. Pursuing an Establishment Clause challenge has three benefits over a Due Process Clause challenge<sup>278</sup>: (1) it is based in an area of constitutional law with a clearer rule even though the Court does not chose to apply the rule in all Establishment Clause cases, (2) it provides a basis in future litigation to argue that the only secular way to define the period at which a state's interest outweighs a woman's rights is at the point of viability, and (3) it allows judges to potentially strike down the abortion laws in question without ever reaching the question of whether the fundamental right to privacy protects the right to an abortion as held in

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273. See, e.g., *Effects of Sexual Violence*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/effects-sexual-violence> [<https://perma.cc/SLR8-KQ3P>] (noting sexual violence can result in self-harm, panic attacks, eating disorders, and suicidal thoughts, among other symptoms); Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences*, WASH. POST (Oct. 6, 2018, 4:00 AM), <https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences> [<https://perma.cc/5TCD-S4AH>] (noting "at least 89 percent of victims report some level of distress, including high rates of physical injury, post-traumatic stress disorder, depression, anxiety and substance abuse").

274. H.B. 481, 2019–2020 Gen. Assemb., Reg. Sess. (Ga. 2019) (prohibiting abortion after heartbeat detected unless "[t]he probable gestation age of the unborn child is 20 weeks or less and the pregnancy is the result of rape or incest in which an official police report has been filed alleging the offense of rape or incest").

275. *Id.*

276. See, e.g., Cameron Kimble, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST. (Oct. 4, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported> [<https://perma.cc/VCU8-55N8>]; Van Dam, *supra* note 273.

277. *Abortion and Mental Health*, *supra* note 272.

278. Note however that the approach being advocated for in this Note is a simultaneous challenge to restrictive abortion laws under both the Establishment Clause and the Due Process Clause.

*Roe* and *Casey*.

First, while Establishment Clause jurisprudence is in no way straightforward, in some ways, it can be subject to less criticism than substantive Due Process Clause analysis under the Fourteenth Amendment.<sup>279</sup> Under the Due Process Clause, judges are forced to decide what is a fundamental right, and therefore, what level of scrutiny laws that limit each right should be subject to.<sup>280</sup> This has been criticized for being a highly variable process with uncertain outcomes that are not rooted in the text of the Fourteenth Amendment.<sup>281</sup> Because this is such an unpredictable area of law, it could be beneficial for advocates to bring a challenge under the Establishment Clause. While there is inconsistency in when the Court chooses to apply the *Lemon* test, it has repeatedly been upheld by the Court for almost fifty years,<sup>282</sup> providing a foundation to build a legal challenge. Furthermore, because there are multiple Establishment Clause precedents that support the argument that the laws in question lack a secular purpose,<sup>283</sup> there is an even stronger foundation. Nevertheless, advocates should be cautious of the New Roberts Court's recent history with overturning long-standing precedents when they craft their arguments.

Second, if reproductive health advocates are able to successfully argue that these laws have a nonsecular purpose, and thus violate the Establishment Clause, it creates a precedent to challenge laws in the future that prohibit abortions before viability. While the major strength of the cases in question here is the religious statements made by lawmakers, it is possible that future Establishment Clause challenges against restrictive abortion laws like these could succeed without such statements from lawmakers. As previously stated, because lawmakers insist that these laws are meant to protect human life, these laws essentially define when the state believes life begins: at conception or at the detection of a fetal heartbeat. Because of this, in the future, it may be more difficult for other states to argue that laws defining when human life begins have a secular purpose.<sup>284</sup> Therefore, winning an

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279. See, e.g., Branson D. Dunlop, *Fundamental or Fundamentally Flawed? A Critique of the Supreme Court's Approach to the Substantive Due Process Doctrine under the Fourteenth Amendment*, 39 U. DAYTON L. REV. 261 (2014); Morton Cummings Jr., *supra* note 174, at 1234–35.

280. See *Washington v. Glucksberg*, 521 U.S. 702, 719–22 (1997) (noting the various decisions enumerating the fundamental rights protected by the Due Process Clause).

281. See, e.g., Richard S. Myers, *The End of Substantive Due Process?*, 445 WASH. & LEE L. REV. 557, 557 (1988); John C. Toro, Note, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172 (2009); Evan D. Bernick, *Substantive Due Process for Justice Thomas*, 26 GEO. MASON L. REV. 1087, 1087 (2019).

282. See *supra* notes 192–93 and accompanying text.

283. See *supra* Section III.A.2.i.

284. To be clear, if the laws at question in this Note are found to lack a true, secular purpose, it is not to say that all laws in the future that define life as beginning at conception or the detection of a fetal heartbeat will violate the Establishment Clause. Instead, it would provide an additional hurdle for a state

Establishment Clause case may even help reproductive health advocates in the future defend the key holdings of *Roe* and *Casey*: that the critical point in the balance between a state's interests and a woman's rights is at viability.

Third, an Establishment Clause challenge would enable the Court to strike down the laws in question without ever reaching the holdings in *Roe* and *Casey*. Given the conservative majority on the Court, the parallels between the Reagan and the Trump Administration's efforts to overturn *Roe*, and the Court's recent tendency to overturn long-standing precedent, reproductive health advocates should be open to putting all arguments in front of the Court that would allow it to sidestep the privacy issue in *Roe* and *Casey*. The pressure to pursue all options is intensified when considering the consequences to women's health detailed above if the laws were to go into effect. However, this strategy may be beneficial not only for reproductive health advocates, but also for judges.

In recent years, the Supreme Court has been under increased scrutiny for its apparent polarization.<sup>285</sup> Specifically, critics point to the number of cases with political undertones being split down ideological lines.<sup>286</sup> In 2018, half of all voters believed that the Court was polarized,<sup>287</sup> and Chief Justice Roberts is still fighting to overcome that perception.<sup>288</sup> Since the retirement of Justice Kennedy and death of Justice Ginsburg, Roberts has increasingly found himself as the swing vote, forcing him to decide whether to vote with his fellow conservative-leaning colleagues or his liberal-leaning colleagues.<sup>289</sup> As previously mentioned, he has even shown that he will vote with his liberal-leaning colleagues on abortion rights cases when he voted with them to strike down the law in *June Medical*.<sup>290</sup> Because of Robert's current balancing act on the court, an Establishment Clause challenge may be appealing to him.

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advocating for a new law because the State would have to distinguish its new law from the laws at issue in this Note and explain how the new law, which defines life as beginning at either conception or the detection of a fetal heartbeat, has a true, secular purpose.

285. See Robert Barnes, *One of the Most Politically Volatile Terms in Years Tests John Roberts and the Supreme Court*, WASH. POST (Oct. 6, 2019, 10:48 AM), [https://www.washingtonpost.com/politics/courts\\_law/one-of-the-most-politically-volatile-terms-in-years-tests-john-roberts-and-the-supreme-court/2019/10/06/ffe72528-e608-11e9-a6e8-8759c5c7f608\\_story.html](https://www.washingtonpost.com/politics/courts_law/one-of-the-most-politically-volatile-terms-in-years-tests-john-roberts-and-the-supreme-court/2019/10/06/ffe72528-e608-11e9-a6e8-8759c5c7f608_story.html) [<https://perma.cc/HYJ8-6AU2>]; Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html> [<https://perma.cc/42DQ-KVNL>].

286. See, e.g., Hulse, *supra* note 286.

287. See *id.*

288. Ariane de Vogue, *John Roberts Says Supreme Court Doesn't Work in a 'Political Manner,'* CNN (Sept. 24, 2019, 10:51 PM), <https://www.cnn.com/2019/09/24/politics/john-roberts-new-york/index.html> [<https://perma.cc/8GNV-HHJZ>]; Hulse, *supra* note 286.

289. Barnes, *supra* note 286.

290. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C. J., concurring).

Abortion is one of the most controversial issues in American politics, and the political parties have polarized views on the topic.<sup>291</sup> Overturning *Roe* in a decision split down ideological lines could further the public's belief that the Court is polarized. Therefore, if Roberts or any of his fellow justices are looking for a way to combat this perceived polarization and prevent *Roe* from being overturned without having to reaffirm that there is a fundamental right to terminate a pregnancy when they may not personally believe that there is, an Establishment Clause challenge would provide the perfect cover. If a Justice or judge practices judicial restraint and could hold that the law is unconstitutional under the Establishment Clause, the privacy issue in *Roe* would never have to be considered.

Finally, an Establishment Clause challenge could be beneficial to lower court judges as it allows them to avoid applying *Casey*'s undue burden test. Like Substantive Due Process analysis in general, the undue burden standard comes with many questions. Mainly, when does a burden become undue? The confusion over the undue burden test has persisted since its emergence in *Casey*.<sup>292</sup> Additionally, with the retirement of Justice Kennedy, who authored the undue burden test in *Casey*,<sup>293</sup> and five members of the Court in *June Medical* rejecting the benefits versus burden standard introduced by the majority in *Whole Woman's Health*,<sup>294</sup> lower courts are left with many questions, including what is the test and how is it applied?<sup>295</sup> Therefore, it could be beneficial for judges to apply the *Lemon* test, which has been used by the Court for almost fifty years.<sup>296</sup>

With the clear benefits to both reproductive health advocates and the judiciary, those filing lawsuits to strike down restrictive abortion laws with religious undertones should seriously consider adding an Establishment Clause claim to their pending or future legal challenges.

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291. *Public Opinion on Abortion*, PEW RES. CTR. (Aug. 29, 2019), <https://www.pewforum.org/fact-sheet/public-opinion-on-abortion> [<https://perma.cc/6NW4-EQMK>] (noting 62% of Republicans and Republican-leaning voters say abortion should be illegal in all or most cases, while 82% of Democrats and Democrat-leaning voters say it should be legal in all or most cases).

292. *See generally* Thomas J. Molony, *Liberty Finds No Refuge: The Doubt-Filled Future of Casey's Undue Burden Standard*, 2019 MICH. ST. L. REV. 23 (discussing how the test for what is an undue burden was further complicated by *Whole Woman's Health* and the retirement of Justice Kennedy).

293. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873–75 (1992).

294. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016) (noting the Court is required to “consider the burdens a law imposes on abortion access together with the benefits those laws confer”).

295. Molony, *supra* note 293, at 24–25; *June Med. Servs. L.L.C.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) (“Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard.”).

296. *See supra* notes 192–93 and accompanying text.

## CONCLUSION

As shown above, there is a need for a new strategy to invalidate the recent wave of highly restrictive abortion laws that were designed to challenge *Roe* and *Casey*. With the New Roberts Court's clear conservative majority, its willingness to overturn long-standing precedent, and its judicial record on abortion cases, a litigation strategy is needed that will allow the Court to find highly restrictive abortion statutes unconstitutional without having to consider whether the right to terminate a pregnancy is protected under the Fourteenth Amendment. Because of the religious statements made by state lawmakers during the passage of the restrictive laws discussed in this Note, it is clear that such laws were motivated by the state lawmakers' religious beliefs. Thus, these laws should be challenged under the First Amendment's Establishment Clause for lacking a sincere secular purpose. While there is no guarantee that a challenge under the Establishment Clause will stop the Court from reconsidering its holdings in *Roe* and *Casey*, all plausible arguments should be made to protect them. The First Amendment's commitment to religious freedom may ironically be the way to save *Roe* and *Casey* . . . if we let it.