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Twenty-Week Bans, New Medical Evidence, and the Effect on Current United States Supreme Court Abortion Law Precedent

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TWENTY-WEEK BANS, NEW MEDICAL EVIDENCE, AND THE EFFECT ON CURRENT UNITED STATES SUPREME COURT ABORTION LAW PRECEDENT

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PART I: INTRODUCTION

"Viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortion."[1] This was the United States Supreme Court's essential holding in the 1973 landmark case of *Roe v. Wade*.[2] In 1992 and again in 2007 the Supreme Court reaffirmed that essential holding in *Planned Parenthood v. Casey* and *Gonzales v. Carhart*.[3] However, to date, thirteen states have enacted statutes that appear to challenge this decade-old ruling on its face.[4] Starting in 2010 with Nebraska,[5] states began enacting laws banning abortions beginning at twenty weeks gestational age, a point in time that precedes fetal viability.[6] States have

1. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835–36 (1992).

2. Roe v. Wade, 410 U.S. 113, 164–65 (1973) (setting out the trimester framework under which the State can only prohibit nontherapeutic abortions after a fetus is viable), *holding modified* by Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

3. *Casey*, 505 U.S. at 835–36; Gonzales v. Carhart, 550 U.S. 124, 146 (2007).

4. *See* ALA. CODE § 26-23B-5 (West, Westlaw through Act 2014-191 of the 2014 Regular Session); ARIZ. REV. STAT. ANN. § 36-2159 (West, Westlaw through the First Regular and First Special Session of the Fifty-first Legislature (2013)) (held unconstitutional by Isaacson v. Horne, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (U.S. 2014)); ARK. CODE ANN. § 20-16-1405 (West, Westlaw through end of 2013 Regular and First Ex. Session, including changes made by Ark. Code Rev. Comm. received through 1/1/2014, and emerg. eff. acts from 2014 Fiscal Sess.: 210); GA. CODE ANN. § 16-12-141 (West, Westlaw through Act 351 of the 2014 Regular Session); IDAHO CODE ANN. §18-505 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature enacted as of March 26, 2014) (held unconstitutional by McCormack v. Hiedeman, 900 F. Supp. 2d 1128 (D. Idaho 2013)); IND. CODE ANN. § 16-34-2-1 (West, Westlaw through P.L.29 of the Second Regular Session of the 118th General Assembly (2014) with effective dates through March 13, 2013); KAN. STAT. ANN. § 65-6724 (West, Westlaw through 2013 regular and special session) (banning abortions beginning at twenty-two weeks gestational age); LA. REV. STAT. ANN. § 40:1299.30.1 (West, Westlaw through the 2013 Regular Session); NEB. REV. STAT. ANN. § 28-3,106 (West, Westlaw through End of 2013 Regular Session); N.C. GEN. STAT. ANN. § 14-45.1 (West, Westlaw through the end of the 2013 Regular Session of the General Assembly); N.D. CENT. CODE ANN. § 14-02.1-05.3 (West, Westlaw through the 2013 Regular Session of the 63rd Legislative Assembly); OKLA. STAT. ANN. tit. 63, § 1-745.5 (West, Westlaw through Chapter 23 (End) of the First Extraordinary Session of the 54th Legislature (2013)); TEX. HEALTH & SAFETY CODE ANN. § 171.044 (West, Westlaw through end of the 2013 Third Called Session of the 83rd Legislature).

5. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J.L. MED. & ETHICS 235, 235 (2011).

6. ALA. CODE § 26-23B-5 (West, Westlaw through Act 2014-191 of the 2014 Regular Session); ARIZ. REV. STAT. ANN. § 36-2159 (West, Westlaw through the First Regular and First Special Session of the Fifty-first Legislature (2013) (held unconstitutional by *Isaacson*,

begun enacting these *twenty-week bans* based on "substantial medical evidence indicat[ing] that [an unborn child is] capable of [experiencing] pain" by twenty weeks after fertilization.[7]

Although the purpose of these twenty-week bans may be compelling, under current Supreme Court precedent the statutes are likely per se unconstitutional. Viability, as defined by the Court, is "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb."[8] This critical point is flexible and differs from pregnancy to pregnancy,[9] but many professionals today believe viability occurs at roughly twenty-three or twenty-four weeks of pregnancy.[10] It is currently undisputed that no fetus is viable at twenty weeks gestational

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716 F.3d 1213); ARK. CODE ANN. § 20-16-1405 (West, Westlaw through end of 2013 Regular and First Ex. Session, including changes made by Ark. Code Rev. Comm. received through 1/1/2014, and emerg. eff. acts from 2014 Fiscal Sess.: 210); GA. CODE ANN. § 16-12-141 (West, Westlaw through Act 351 of the 2014 Regular Session); IDAHO CODE ANN. §18-505 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature enacted as of March 26, 2014) (held unconstitutional by *McCormack*, 900 F. Supp. 2d 1128); IND. CODE ANN. § 16-34-2-1 (West, Westlaw through P.L.29 of the Second Regular Session of the 118th General Assembly (2014) with effective dates through March 13, 2013); LA. REV. STAT. ANN. § 40:1299.30.1 (West, Westlaw through the 2013 Regular Session); NEB. REV. STAT. ANN. § 28-3,106 (West, Westlaw through End of 2013 Regular Session); N.C. GEN. STAT. ANN. § 14-45.1 (West, Westlaw through the end of the 2013 Regular Session of the General Assembly); N.D. CENT. CODE ANN. § 14-02.1-05.3 (West, Westlaw through the 2013 Regular Session of the 63rd Legislative Assembly); OKLA. STAT. ANN. tit. 63, § 1-745.5 (West, Westlaw through Chapter 23 (End) of the First Extraordinary Session of the 54th Legislature (2013)); TEX. HEALTH & SAFETY CODE ANN. § 171.044 (West, Westlaw through end of the 2013 Third Called Session of the 83rd Legislature); *see also Isaacson*, 716 F.3d at 1225 ("[V]iability usually occurs between twenty-three and twenty-four weeks gestation.").

7. ALA. CODE § 26-23B-2 (West, Westlaw through Act 2014-191 of the 2014 Regular Session); ARK. CODE ANN. § 20-16-1403 (West, Westlaw through end of 2013 Regular and First Ex. Sessions, including changes made by Ark. Code Rev. Comm. received through 1/1/2014, and emerg. eff. acts from 2014 Fiscal Sess.: 210); IDAHO CODE ANN. § 18-503 (West, Westlaw through emergency effective legislation of the 2014 Second Regular Session of the 62nd Idaho Legislature enacted as of March 26, 2014); KAN. STAT. ANN. § 65-6722 (West, Westlaw through 2013 regular and special session); LA. REV. STAT. ANN. § 40:1299.30.1 (West, Westlaw through the 2013 Regular Session); NEB. REV. STAT. ANN. § 28-3,104(West, Westlaw through End of 2013 Regular Session); OKLA. STAT. ANN. tit. 63, § 1-745.3 (West Westlaw through Chapter 23 (End) of the First Extraordinary Session of the 54th Legislature (2013)).

8. *Casey*, 505 U.S. at 870; *see also* Roe v. Wade, 410 U.S. 113, 163 (1973) (explaining that viability is the critical point in time at which the state's interest in fetal life becomes compelling because "the fetus then presumably has the capability of meaningful life outside the mother's womb."), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

9. *Isaacson*, 716 F.3d at 1225.

10. *Id.*; *see also* David F. Forte, *Life, Heartbeat, Birth: A Medical Basis for Reform,* 74 Ohio St. L.J. 121, 138 (2013) (explaining that there is no "consensus among physicians as to when viability actually occurs" as some place threshold viability at twenty-two weeks gestational age while others place it at twenty-six weeks gestational age).

age.[11] Because the twenty-week bans enacted by the states prohibit abortions beginning at a point in time prior to viability,[12] it is likely the United States Supreme Court would hold the laws unconstitutional under current precedent. To date, two courts have reached that same conclusion.[13] In 2013, both Idaho and Arizona's twenty-week bans were struck down as unconstitutional.[14]

Although it appears the twenty-week bans cannot stand under current Supreme Court precedent, the medical evidence presented in support of these new laws and the purpose behind their enactment may warrant the Supreme Court revisiting its prior holding in *Roe* marking viability as the critical point. The Court's holdings in major cases since *Roe* suggest that at some point in the future the Court will indeed revisit *Roe*'s central rule. In *Roe*, the Court announced a woman's constitutional right to obtain an abortion prior to viability and the woman's absolute right to obtain a first-trimester abortion without state interference.[15] However, since that time, the Supreme Court has slowly been chipping away at a woman's constitutional right to obtain an abortion. In *Casey*, the Court "obliterated [a woman's] absolute right to [obtain] a first-trimester abortion" by announcing the undue burden standard.[16] The undue burden standard allows the State to regulate previability abortions so long as they do not unduly burden a woman's right to choose abortion.[17] The Court continued to whittle away at *Roe* in 2007, when in *Carhart* it upheld Congress's Partial-Birth Abortion Ban Act of 2003 as a permissible burden on a woman's right to obtain a previability abortion.[18] In the Court's opinion, the majority shifted its focus from a woman's right to choose and instead emphasized the importance of the State's interest in protecting the unborn child and maintaining respect for the dignity of human life.[19]

Given the developments in the Court's abortion law precedent, the question remains: should the Court revisit *Roe*'s central rule and change the point in time at which the State's interest in fetal life becomes compelling from fetal viability to fetal pain as suggested by the states' twenty-week bans? Because the Court, over the last four decades, has ex-

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11. *See Isaacson*, 716 F.3d at 1225.

12. *See id.* ("[N]o fetus is viable at twenty weeks gestational age . . . . [V]iability usually occurs between twenty-three and twenty-four weeks gestation. Accordingly, Arizona's ban on abortion from twenty weeks necessarily prohibits previability abortions.").

13. *See id.*; *see also* McCormack v. Hiedeman, 900 F. Supp. 2d 1128, 1151 (D. Idaho 2013) (invalidating Idaho's twenty-week ban).

14. *Isaacson*, 716 F.3d at 1226 (invalidating Arizona's twenty-week ban); *McCormack*, 900 F. Supp. 2d at 1151 (invalidating Idaho's twenty-week ban).

15. Roe v. Wade, 410 U.S. 113, 164–65 (1973), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

16. Tracy Bach, *High Noon in the Abortion Battle? Roe "Reality" Post Gonzales v. Carhart*, 32 VT. L. REV. 663, 664 (2008); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992).

17. *Casey*, 505 U.S. at 874.

18. Gonzales v. Carhart, 550 U.S. 124, 133 (2007).

19. *Id.* at 157.

panded the State's interest in potential life both in scope and time by allowing the State to place regulations on abortions from the outset of pregnancy to protect fetal life and to maintain dignity and respect for human life,[20] medical evidence indicating that unborn children are capable of feeling pain beginning at twenty weeks gestational age may have a significant impact on abortion law.[21]

Part II of this article will begin with an examination of abortion law over the last forty years by looking at three major Supreme Court cases. Next, part III will discuss, in depth, the impact of existing abortion law precedent on the states' twenty-week bans. Finally, part IV of this article will discuss the Court revisiting its central holding in *Roe*, marking viability as the critical point in time where a State's interest in potential life becomes compelling, and replacing it with fetal pain.

PART II: ABORTION LAW PRECEDENT THROUGHOUT THE PAST FORTY YEARS: *ROE V. WADE*, *PLANNED PARENTHOOD V. CASEY*, & *GONZALES V. CARHART*

In the landmark case of *Roe v. Wade*, the Supreme Court announced a woman's absolute right to obtain an abortion during the first trimester of pregnancy as well as the right of the State to ban nontherapeutic abortions[22] post viability.[23] However, in the years since that groundbreaking opinion, the Court has greatly expanded the State's interest in protecting fetal life both in time and scope.[24] In 1992, the Court in *Casey* rejected *Roe's* trimester framework and with it a woman's absolute right to obtain a first-trimester abortion.[25] In place of the tri-

20. *See Casey*, 505 U.S. at 837 (expanding the State's interest in fetal life in time by adopting the undue burden standard allowing for state regulation of abortion procedures from the outset of pregnancy); *see also Carhart*, 550 U.S. at 157 (expanding the State's interest in fetal life in scope by upholding the Partial-Birth Abortion Ban Act of 2003 as a permissible regulation on previability abortions because it showed "respect for the dignity of human life").

21. *See supra* note 7 (listing the various state statutes that include legislative findings regarding the capacity of a fetus to feel pain at twenty weeks gestational age).

22. *See generally Therapeutic Abortion*, MERRIAM-WEBSTER, *available at* http://www.merriam-webster.com/medical/therapeutic%20abortion (last visited June 29, 2014) (defining therapeutic abortion as an "abortion induced when pregnancy constitutes a threat to the physical or mental health of the mother.").

23. Roe v. Wade, 410 U.S. 113, 164–65 (1973), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, (1992) (setting out the trimester framework).

24. *See Casey*, 505 U.S. at 837 (expanding the State's interest in fetal life in time by adopting the undue burden standard allowing for state regulation of abortion procedures from the outset of pregnancy); *see also Carhart*, 550 U.S. at 157 (expanding the State's interest in fetal life in scope by upholding the Partial-Birth Abortion Ban Act of 2003 as a permissible regulation on previability abortions because it showed "respect for the dignity of human life.").

25. *Casey*, 505 U.S. at 837.

mester framework the Court adopted the undue burden standard allowing the State to regulate previability abortions in order to further its interest not only in maternal health, but also in the life of the fetus, expanding the State's interest in protecting fetal life in time.[26] Although the Court in *Casey* explicitly upheld *Roe's* central rule, that a woman has a constitutional right to obtain an abortion prior to fetal viability,[27] the ruling "left no doubt that the Court had struck a new balance between the state's interest in protecting life and a woman's right to choose."[28]

The Court continued to cut back on *Roe* and expand the State's interest in potential life in its 2007 holding in *Carhart*.[29] There, the Court upheld Congress's Partial-Birth Abortion Ban Act of 2003 as a permissible regulation on previability abortions under the undue burden standard.[30] The majority in *Carhart* stressed the importance of the State's interest in the life of the fetus and expanded that interest to include respect and dignity for human life.[31] The following portion of this article will look in depth at these three major Supreme Court rulings that have shaped abortion law over the last forty years.

A. *Roe v. Wade*

In 1973 the Supreme Court addressed for the first time the issue of a woman's right to obtain an abortion.[32] In *Roe*, the Court held that a woman has a constitutional right, encompassed within the right to privacy and the right to liberty under the substantive component of the Due Process Clause of the Fourteenth Amendment, to choose to terminate her pregnancy before fetal viability.[33] Although the Court recog-

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26. *Id.*

27. *Id.*

28. Bach, *supra* note 16, at 663.

29. *See Carhart*, 550 U.S. at 156–57 (upholding Congress's Partial-Birth Abortion Ban Act of 2003 under the undue burden standard after finding "[t]he Act expresse[d] respect for the dignity of human life."). This decision expanded the State's interest in fetal life in scope since the State's interest in fetal life now encompasses not only protection of fetal life, but also maintaining dignity and respect for human life. *Id.*

30. *Id.* at 156 ("The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.").

31. *Id.* at 157–158 (holding that the State's interest in potential life from the outset of pregnancy cannot be treated as unimportant, and thus finding that the State can use its regulatory power to express respect for the dignity of human life).

32. *The Supreme Court and Abortion Access*, NAT'L P'SHIP FOR WOMEN & FAMILIES 1 (Aug. 2008), http://www.nationalpartnership.org/research-library/repro/abortion/the-supreme-court-and-abortion.pdf (discussing that prior to 1850 abortion was legal in the United States, but beginning in 1850 states began enacting strict bans on abortions leading to the Supreme Court's decision in *Roe* holding "that access to abortion is a fundamental constitutional right that government may not restrict without a very strong reason–a state interest that must be 'compelling'").

33. Roe v. Wade, 410 U.S. 113, 154 (1973) ("[T]he right of personal privacy includes the abortion decision."), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). The *Roe* court also held that "[a] state criminal abortion statute . . . that excepts from criminality only a life-saving procedure on behalf of the mother, without regard

nized a woman's fundamental right to obtain an abortion, it made clear that such a right was not absolute.[34] In determining when the State could interfere with a woman's fundamental right to choose abortion, the Court used strict scrutiny review and set out the trimester framework.[35]

Under the trimester framework, the Court determined that during the first trimester of pregnancy, the time prior to twelve weeks gestational age, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[36] Thus, during that time, the State could not place regulations on abortion procedures for any reason.[37] However, the Court held that during the second trimester of pregnancy the State's interest in the health of the pregnant woman became compelling; therefore, State regulations of abortion procedures to maintain maternal health during that time were permitted.[38] Further, the Court found that at twenty-eight weeks gestational age a fetus was viable.[39] At that time, the Court deemed the State's interest in potential life sufficiently compelling to warrant prohibitions on abortion except where necessary to preserve the life or health of the mother.[40] Thus, under *Roe* and the trimester framework: a woman had the absolute right to obtain a first-trimester abortion without State interference, viability was deemed the critical point in time at which the State could prohibit abortions to further its interest in potential life, and, between those two points in time, the State could regulate abortion procedures only to further its interest in maternal health.[41]

In parsing out the State's dual interests in maternal health and fetal life under the trimester framework, the Court declared that the State has "an important and legitimate interest in preserving and protecting the health of the pregnant woman [and] . . . another important and legitimate interest in protecting the potentiality of human life."[42] The Court went on to explain that:

> These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes compelling. With respect to the State's

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to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment."). *Id.* at 164.

34. *Id.* at 154.
35. *See id.* at 155, 164–66.
36. *Id.* at 164.
37. *See id.*
38. *Id.* at 163–64.
39. *Roe*, 410 U.S. at 160.
40. *Id.* at 164–65.
41. *Id.*
42. *Id.* at 162.

> important and legitimate interest in the health of the mother, the 'compelling' point, in light of present medical knowledge, is at approximately the end of the first trimester. . . . With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.[43]

In establishing this trimester framework, the Court undertook the challenge of balancing the State's interests in maternal health and fetal life against the pregnant woman's constitutional right to choose abortion.[44] To achieve this task, the Court, and specifically Justice Blackmun, the author of the *Roe* opinion, relied heavily on medical evidence and approached the issue of abortion as a medical problem and not as a legal or moral issue.[45] Under this approach, Justice Blackmun focused on the medical consequences of an abortion at each stage of pregnancy.[46]

During the first trimester of pregnancy, Justice Blackmun found that the "[m]ortality rate[] for women undergoing early abortions . . . appear[ed] to be as low as or lower" than that associated with natural childbirth.[47] Based on this medical evidence, Justice Blackmun declared the right of a woman's physician to determine, based on his or her medical judgment, if the woman's pregnancy should be terminated and to do so without interference from the State.[48] Although Justice Blackmun focused on the right of the woman's physician to determine abortion for her rather than the woman's right to choose abortion for herself, this is not surprising as the statute at issue in *Roe* criminalized physicians for performing abortions and not women for obtaining them.[49] Thus, *Roe* gave the woman the absolute right to choose to obtain a first-trimester abortion and allowed her physician, based on his medical judgment, to perform such an abortion without criminal penalties because of the low mortality rate for abortions during this time period.[50]

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43. *Id.* at 162–64.

44. *See id.* at 162–65 (explaining the State's dual interests in maternal health and potential life and setting out the trimester framework so as to allow the State to assert its interests while not trampling over the woman's constitutional right to obtain an abortion).

45. *See id.* at 149, 160–61, 163; Forte, *supra* note 10, at 123.

46. *See infra* notes 47, 51, 54 and accompanying text.

47. *Roe*, 410 U.S. at 149. Thus, the "State's . . . concern in enacting a criminal abortion law . . . to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy" is not a valid concern during the first trimester of pregnancy. *Id.*

48. *Id.* at 164.

49. Bach, *supra* note 16, at 665.

50. *Roe*, 410 U.S. at 149, 164.

During the second trimester of pregnancy, medical evidence showed that the risks associated with abortion increased; therefore, abortions during the second trimester posed a greater danger to the life and health of the pregnant woman.[51] Because of these increased risks and the possible consequences of an abortion, Justice Blackmun asserted that the State's interest in maternal health and life became compelling.[52] Thus, during the second trimester, the State could regulate abortion procedures to maintain maternal health.[53]

At twenty-eight weeks of pregnancy, or the beginning of the third trimester, Justice Blackmun found that the consequences of an abortion began to impact the unborn child in a more definite way because at that point in time a fetus was deemed viable and had the potential to survive outside the womb.[54] In making this determination, Justice Blackmun relied on medical evidence. He pointed out that physicians and those in the scientific arena determined that life began either "upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb . . . with artificial aid."[55] Based on "embryological data that . . . indicate[d] that conception [was] a 'process' over time, rather than an event, and . . . medical techniques such as menstrual extraction, the 'morning-after' pill, implantation of embryos, artificial insemination, and . . . artificial wombs,"[56] Justice Blackmun rejected the notion that life began upon conception. He ultimately settled on fetal viability, which occurred at roughly twenty-eight weeks of pregnancy in 1973,[57] as the point in time at which the State's interest in protecting potential life became sufficiently compelling so as to justify prohibitions on abortions.[58] This was the case because Justice Blackmun felt that, at that point in time, "the fetus . . . ha[d] the capability of meaningful life outside the mother's womb."[59] Moreover, he found "State regulation protective of fetal life after viability . . . ha[d] both logical and biological justifications."[60] Thus,

51. *Id.* at 150 ("[T]he risk [associated with abortion] to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.").

52. *See id.* at 163–64 (holding that the State could infringe on the woman's fundamental right to obtain an abortion by regulating abortion procedures "in ways . . . reasonably related to maternal health.").

53. *Id.*

54. *Id.* at 160, 163 (discussing that viability occurred at roughly the twenty-eighth week of pregnancy, and at the point of viability medical evidence indicated that an unborn child "ha[d] the capability of meaningful life outside the mother's womb.").

55. *Id.* at 160.

56. *Roe*, 410 U.S. at 161.

57. *Id.* at 160.

58. *Id.* at 164–65.

59. *Id.* at 163.

60. *Id.*

because an abortion after viability terminated a fetus potentially capable of survival outside the womb, the Court set viability as the critical point in time at which the State's interest in fetal life was compelling enough to warrant prohibitions on abortion.

As evident from the above discussion of *Roe*, medical evidence played an important role in Justice Blackmun's formation of the trimester framework and in the Court's determination that viability should be the critical point in time when the State's interest in potential life becomes compelling. Medical evidence has continued to play a role in the Court's abortion law jurisprudence over the past several decades. As indicated in the following discussion of *Casey* and *Carhart*, developments in medical evidence have allowed the Court to expand the State's "important and legitimate interest in [protecting] potential [human] life" in both time and scope.[61]

B. *Planned Parenthood v. Casey*

Although *Roe's* central rule is still at the heart of abortion law today, in 1992 the Court, in *Planned Parenthood v. Casey*, dramatically altered the test for analyzing restrictions on a woman's fundamental right to obtain an abortion by adopting the undue burden standard.[62] With the adoption of the undue burden standard, the Court, in a fractured opinion,[63] expanded the State's interest in potential life in time by allowing for state regulation of abortion procedures from the outset of pregnancy.[64] Although the Court adopted a new test for analyzing restrictions on abortions, the Court applied the doctrine of stare decisis and declined to completely overturn *Roe*.[65] In declining to overturn the landmark case, the Court reaffirmed *Roe's* three central principles.[66]

The first principle the Court reaffirmed was "the right of [a] woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[67] The Court explained that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect [to have an abortion]."[68] The second principle the Court confirmed from *Roe* was the State's power to proscribe abortions after fetal viability.[69] With regard to the second principle, the

61. *Id.* at 162.
62. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992).
63. *Id.* at 833–43 (three Justices delivered the opinion of the Court with others concurring and dissenting throughout different portions of the opinion).
64. *See id.* at 876 (rejecting the trimester framework and adopting the undue burden standard to allow the State to promote its interest in potential life throughout pregnancy).
65. *Id.* at 845–46.
66. *Id.* at 846.
67. *Id.*
68. *Casey*, 505 U.S. at 846.
69. *Id.*

Court again emphasized that "[v]iability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[70] The third principle reaffirmed by the Court was a recognition of "the State['s] legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[71] Although the Court declined to overrule *Roe* and reaffirmed *Roe's* central principles, the Court stated that *Roe's* central holding erred when it came to the strength of the State's interest in fetal protection.[72]

In addressing the State's interest in protecting the life of the fetus, the Court expressed the opinion that the trimester framework set out in *Roe* did not allow the State to assert its interest in protecting fetal life because the State was not allowed to regulate abortions during the first trimester and could only regulate abortions during the second trimester to promote its interest in protecting maternal health.[73] On this point, the Court stated the following in its opinion:

> *Roe v. Wade* was express in its recognition of the State's "*important and legitimate* interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life." The trimester framework, however, does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a *substantial* state interest in potential life throughout pregnancy.[74]

Expanding on the State's "substantial interest" in the unborn fetus the Court continued on to say, "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right

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70. *Id.* at 835–36.

71. *Id.* at 846.

72. *Id.* at 858 (stating that the "central holding of *Roe* was in error [in undervaluing] the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty."); *see also id.* at 837 ("To protect the central right recognized by *Roe* while at the same time accommodating the State's profound interest in potential life, the undue burden standard should be employed" in place of the trimester framework).

73. *Casey,* 505 U.S. at 872.

74. *Id.* at 875–76 (alteration in original) (emphasis added) (citations omitted).

to decide whether to terminate a pregnancy will be undue."[75] This view laid the foundation for the adoption of the undue burden standard in place of the trimester framework.[76]

In rejecting the trimester framework, the Court pointed to both flaws in the framework itself and advances in medical technology. In regards to the flaws in the framework, the Court held: "The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*."[77] Moreover, the Court found that advances in medical technology in the ensuing years since *Roe* had rendered the trimester framework "problematic."[78] The Court appeared to pick up on the position held by Justice O'Connor in her dissenting opinion in the 1983 case of *City of Akron v. Akron Center for Reproductive Health*, where she explained:

> [a]s the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.[79]

Thus, because of the inherent flaws in the trimester framework and because of medical advances rendering the framework increasingly unworkable, the Court opted to reject the trimester framework.[80]

With the rejection of the trimester framework, the Court stated: "To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life," the undue burden standard should be employed.[81] The undue burden standard announced by the Court proclaimed that the State could regulate previability abortion procedures so long as the regulations did not have the purpose or effect of placing a substantial obstacle in the path of women seeking to abort a nonviable fetus.[82] Therefore, under *Casey's* undue burden standard, the State may regulate previability

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75. *Id.* at 876.
76. *See id.* at 875–76.
77. *Id.* at 873.
78. *Id.* at 873 (citing to Justice O'Connor's concurring opinion in Webster v. Reprod. Health Servs., 492 U.S. 490, 529 (1989) in which she described the trimester framework as "problematic"); *see also* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (arguing that the trimester framework was on a "collision course with itself"), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
79. *City of Akron*, 462 U.S. at 458; *see also Casey*, 505 U.S. at 873 (citing to Justice O'Connor's concurring opinion in *Webster*, 492 U.S. at 529, in which Justice O'Connor stated that "I dissented from the Court's opinion in *Akron* because it was my view [and continues to be my view] that, *Roe*'s trimester framework [is] . . . problematic.").
80. *Casey*, 505 U.S. at 873.
81. *Id.* at 878.
82. *Id.*at 877.

abortions so long as such regulations do not unduly burden a woman's right to choose abortion, and the State can continue to prohibit post viability abortions.[83] Thus, the adoption of the undue burden standard expanded the State's interest in potential life in time by allowing for State regulation of abortion procedures from the outset of pregnancy to promote the State's interest in potential life.[84]

However, despite the rejection of the trimester framework, under the undue burden standard the Court continued to uphold *Roe's* central rule marking viability as the critical point in time where the State's interest in potential life becomes compelling.[85] Although medical developments had moved the point of viability from roughly twenty-eight weeks of pregnancy to twenty-four weeks of pregnancy,[86] the Court stated that the imprecision on the precise point of viability, which would continue to be affected by medical advances, was within tolerable limits.[87] Further, the Court stated that fetal viability was a fair point in time to begin allowing the State to ban abortions because "a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[88]

Although the Court's opinion in *Casey* expressly reaffirmed *Roe*'s central rule, the "shift from *Roe*'s trimester [framework] to [the] undue burden [standard] left no doubt that the Court had struck a new balance between the State's interest in protecting life and a woman's right to choose."[89] The Court's adoption of the undue burden standard greatly expanded the State's interest in potential life in time by allowing for regulation of abortion procedures from the outset of pregnancy in order to promote the State's interest in potential life.[90] Thus, the undue burden standard gave the State more power to regulate abortions while at the same time taking away the woman's absolute right to obtain a first-trimester abortion.[91] After *Casey*, abortion law was dramatically changed and as Chief Justice Rehnquist stated in his dissent in *Casey*,

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83. *Id.* at 878.

84. *See id.* at 876–77. Adoption of the undue burden standard expanded the State's interest in potential life in time because under the trimester framework the State was not allowed to regulate abortion procedures during the first trimester of pregnancy, and could only do so during the second trimester of pregnancy to promote its interest in maternal health; however, under the undue burden stranded, the State can now regulate abortion procedures from the outset of pregnancy to promote its interest in potential life. *Id.*

85. *Id.* at 879.

86. *Casey*, 505 U.S. at 860.

87. *Id.* at 870.

88. *Id.*

89. Bach, *supra* note 16, at 663.

90. *See supra* note 84 and accompanying text.

91. Bach, *supra* note 16, at 664.

"*Roe* continues to exist [today], but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."[92]

Between 1992 and 2000 the Court applied the undue burden standard to six different types of abortion regulations and found only two unconstitutional.[93] In 2007, the Court again took up the issue of a previability abortion regulation in *Gonzales v. Carhart*.[94] This time, the regulation at issue was one promulgated by the federal government.[95]

C. *Gonzales v. Carhart*

In the most recent Supreme Court decision regarding abortion, the Court addressed the issue of whether Congress's Partial-Birth Abortion Ban Act of 2003 was a permissible regulation on previability abortions.[96] The statute at issue in *Carhart* prohibited all intact dilation and extraction ("D&E") procedures.[97] The intact D&E procedure was a method used by some physicians to terminate pregnancy in late term abortions.[98] The Court ultimately upheld the Act as a constitutional regulation on previability abortions after evaluating it under the undue burden standard.[99] In its opinion, the Court reviewed medical evidence presented to Congress regarding the procedure, evaluated the congressional findings, and looked to Congress's purpose for banning the procedure.
The medical evidence reviewed by the Court included two detailed descriptions of the intact D&E procedure, the first given by a doctor and the second by a nurse.[100] The testimonies appear to have played a key role in not only Congress's decision to ban the procedure, but also in the Court's decision to uphold the Act.[101] The doctor gave the following testimony describing the procedure before Congress:

> The fetus is delivered intact until the head lodges in the cervix of the woman. At that point the doctor performing the abortion inserts scissors into the cervix and places them by the skull of the fetus. The doctor then "forces the scissors into the base of the

92. *Casey*, 505 U.S. at 954 (Rehnquist, J., dissenting).
93. Bach, *supra* note 16, at 663–64.
94. Gonzales v. Carhart, 550 U.S. 124, (2007).
95. *Id.* at 132.
96. *Id.* at 132 ("These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003, a federal statute regulating abortion procedures."); *see also id.* at 156 ("The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions.").
97. *Id.* at 136.
98. *Id.* at 135.
99. *Id.* at 156 ("The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.").
100. *Carhart*, 550 U.S. at 138–39.
101. *See id.* at 157. In finding Congress had a rational reason for the enactment of the Partial-Birth Abortion Ban Act of 2003, the Court stated, after reviewing the medical testimony and evidence, that: "The Act expresses respect for the dignity of human life." *Id.*

> skull or into the foramen magnum. Having safely entered the skull, [the doctor] spreads the scissors to enlarge the opening."[102]

The nurse's testimony, in contrast to the doctor's testimony, referred to the fetus as a baby and gave a much more graphic depiction of the procedure.[103] The nurse described the procedure as follows:

> [The doctor] went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right inside the uterus . . . . The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp . . . . He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.[104]

Next, the Court turned to Congress's findings regarding the procedure and the purpose behind the enactment of the Partial-Birth Abortion Ban. The Court cited to Congress's concerns about the overall negative impact of the procedure on society[105] as well as the negative effects performing the intact D&E procedure had on the medical community and its reputation.[106] Concerning the negative impact on society, Congress found that "implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it w[ould] further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life."[107] Further, in regards to the negative impact on the medical community, Congress cited "a moral, medical, and ethical consensus . . . that the practice of performing a partial-birth abortion . . . [was] a gruesome and inhumane procedure that [was] never medically necessary and should be prohibited."[108] Moreover, Congress found that "[p]artial-birth abortion . . . confuse[d] the medical, legal, and ethical duties of physicians to pre-

102. *Id.* at 138.
103. *Id.* at 138–39.
104. *Id.* (quoting with omissions the nurse's testimony before the Senate Judiciary Committee).
105. *Id.* at 157.
106. *Carhart*, 550 U.S. at 157.
107. *Id.*
108. *Id.* at 141.

serve and promote life, [because] the physician act[ed] directly against the physical life of a child whom he or she had just delivered, all but the head, out of the womb, in order to end that life."[109] Thus, Congress's purpose for enacting the Partial-Birth Abortion Ban Act was to protect humanity and the medical profession from the horrors of such a procedure.[110]

After reviewing the medical testimony regarding the procedure, the legislative findings, and the purpose behind the enactment of the statue, the Court evaluated the Act under the undue burden standard and yet again expanded the State's interest in potential life, this time in scope.[111] To begin its analysis, the Court emphasized the State's interest in protecting the life of the fetus that may become a child from the outset of pregnancy.[112] The Court pointed out that "*Casey* rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted."[113] Moreover, the Court stated that *Casey* overruled two prior holdings because they "undervalued the State's interest in potential life."[114] Thus, based on the expansion of the State's interest in potential life in *Casey*, the Court stated, "regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[115]

Based on this expanded undue burden standard, the Court found that the Partial-Birth Abortion Ban Act was a permissible regulation of previability abortions.[116] The Court stated that the State's interest in protecting the unborn child couldn't be treated as unimportant and further held that the State could "use its voice and its regulatory authority to show its profound respect for the life within the woman."[117] On this point, the Court held that the Act at issue merely "expresse[d] respect for the dignity of human life" because the ban procedure allowed a fetus to be killed just inches before completion of the birth process.[118] In addition, the Court found that the State had "an interest in protecting the integrity and ethics of the medical profession."[119] Thus, the Court ex-

109. *Id.* at 157.
110. *See id.* at 156–57.
111. *See id.* at 156 (holding the Act constitutional under the undue burden standard); *see also id.* at 157 (stating the Act merely prohibited a form of abortion that killed a fetus "just inches before completion of the birth process" and thus finding: "The Act express[ed] respect for human life."). Thus, the Court expanded the State's interest in potential life in scope by allowing for regulations on abortion procedures to promote not only fetal life but respect for human life.
112. *Carhart*, 550 U.S. at 158.
113. *Id.* at 146.
114. *Id.* at 157.
115. *Id.* at 146.
116. *Id.* at 156.
117. *Id.* at 157–58.
118. *Carhart*, 550 U.S. at 156–57.
119. *Id.* at 157.

panded the State's interest in potential life in scope to encompass dignity and respect for human life and held the Partial-Birth Abortion Ban Act did not impose an undue burden on a woman's right to choose a previability abortion despite the fact the Act had the incidental effect of making it more difficult to obtain such an abortion.[120]

As illustrated by *Casey* and *Carhart*, since *Roe* the Court has slowly been chipping away at a woman's right to obtain a previability abortion without interference from the State while at the same time expanding the State's interest in potential life in time and scope. Although *Roe's* central rule, holding women have a constitutional right to obtain a previability abortion, is still intact, the Court in *Casey* and again in *Carhart* showed a willingness to uphold laws protecting the life of the unborn fetus. The question remains: How far does the State's ability to protect the fetus go and are laws banning abortions beginning at twenty weeks gestational age beyond the scope of this protection?

PART III: THE IMPACT OF CURRENT SUPREME COURT ABORTION LAW PRECEDENT ON THE STATES TWENTY-WEEK BANS

As discussed in Part II of this article, under current Supreme Court precedent the State can prohibit post-viability abortions and regulate previability abortions so long as such regulations do not unduly burden a woman's right to make the ultimate choice to have an abortion.[121] As abortion law stands in its present state, the statutes being enacted by states banning abortions beginning at twenty weeks post-fertilization are unconstitutional.[122] To date, two courts have come to the same conclusion.[123] In *McCormack v. Hiedeman*, the United States District Court for the District of Idaho held Idaho's Pain-Capable Unborn Child Protection Act, which bans all abortions beginning at twenty weeks gestational age, unconstitutional under *Casey's* undue burden standard.[124] Two months later, in May 2013, the Ninth Circuit Court held an almost identical Arizona law per se unconstitutional in *Isaacson v. Horne*.[125] The court stated in its decision that the law at issue was a complete ban on some previability abortions.[126] Thus, the court held the law unconstitu-

120. *See id.* at 156–58.

121. *See supra* Part II.B (discussing *Casey's* undue burden standard).

122. *See infra* Parts III.A, III.B, III.C, and III.D.

123. McCormack v. Hiedeman, 900 F. Supp. 2d 1128, (D. Idaho 2013) (invalidating Idaho's twenty-week ban); Isaacson v. Horne, 716 F.3d 1213, (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014) (invalidating Arizona's twenty-week ban).

124. *McCormack*, 900 F. Supp. 2d at 1149–51.

125. *Isaacson*, 716 F.3d at 1217.

126. *Id.*

tional on its face without even employing the undue burden standard.[127] The following section of this article, Part III, will look at the two above-mentioned cases and will evaluate their holdings under current precedent.

A. *McCormack v. Hiedeman*

In *McCormack v. Hiedeman*, decided in March 2013 by the United States District Court for the District of Idaho, the district court took up the constitutionality of Idaho's Pain-Capable Unborn Child Protection Act.[128] Like many similar laws enacted by various states,[129] the Idaho law mimics proposed federal legislation[130] and asserts a new compelling state interest in preventing fetal pain.[131] The Idaho legislation reads as follows:

> No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing the abortion or by another physician upon whose determination that physician relies, that the probable postfertilization age of the woman's unborn child is twenty (20) or more weeks unless, in reasonable medical judgment: (1) she has a condition that so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions; or (2) it is necessary to preserve the life of an unborn child. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.[132]

Idaho's Pain-Capable Unborn Child Protection Act, like legislation enacted in other states, is based on the State's assessment of medical evidence indicating that an unborn child can feel pain as early as twenty weeks gestational age.[133] Federal congressional findings regarding the

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127. *Id.* at 1225.

128. *McCormack*, 900 F. Supp. 2d at 1149–51.

129. *See supra* note 4.

130. *See* Forte, *supra* note 10, at 134 ("Ten states have passed a version of the Pain-Capable Unborn Child Protection Act. The Act prohibits abortion after twenty weeks of pregnancy based on the State's assessment of medical evidence that the unborn child could experience pain as early as twenty weeks. Nebraska was the first state to pass a version of the Act in 2010, which borrows its language from proposed federal bills.").

131. IDAHO CODE ANN. § 18-503 (West 2013).

132. *Id.* at § 18-505.

133. *Id.* at § 18-503; *see also supra* note 7 (listing the various state statutes that include legislative findings regarding the capacity of a fetus to feel pain at twenty weeks gestational age); *see also* Forte, *supra* note 10, at 134 ("The [Pain-Capable Unborn Child Protec-

capability of fetuses to experience pain, which have greatly influenced the enactment of these various state statutes, assert the following:

> Pain receptors . . . are present throughout the unborn child's entire body and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks after fertilization.[134] […] After 20 weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling.[135] […] For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without such anesthesia. In the United States, surgery of this type is being performed by 20 weeks after fertilization and earlier in specialized units affiliated with children's hospitals.[136]

> The position, asserted by some physicians, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.[137]

> Substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydronencephaly, nevertheless experience pain.[138] […] In adult humans and in animals, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does.[139] […] The position, asserted by some commentators, that the unborn child remains in a coma-like sleep state that precludes the unborn child experiencing pain is inconsistent with the documented reaction of the unborn children to painful stimuli and with the experience of fetal surgeons who have found it

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tion] Act prohibits abortion after twenty weeks of pregnancy based on the State's assessment of medical evidence that the unborn child could experience pain as early as twenty weeks.").

134. 159 CONG. REC. H3730-01 (daily ed. June 18, 2013).
135. *Id.*
136. *Id.* at 3731.
137. *Id.*
138. *Id.*
139. *Id.*

> necessary to sedate the unborn child with anesthesia to prevent the unborn child from engaging in vigorous movement in reaction to invasive surgery.[140] […] [T]here is substantial medical evidence that an unborn child is capable of experiencing pain at least by 20 weeks after fertilization, if not earlier.[141]
>
> It is the purpose of the Congress to assert a compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.[142] […] The compelling government interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is intended to be separate from and independent of the compelling governmental interest in protecting the lives of unborn children from the stage of viability, and neither governmental interest is intended to replace the other.[143]

Although the evidence presented by Idaho, and other states, regarding the purpose behind the enactment of the Pain-Capable Unborn Child Protection Act is compelling and the argument that the State has an interest in protecting unborn children beginning at the time in which they are capable of feeling pain a logical one, the Idaho District Court in *McCormack* struck down the Act as unconstitutional.[144] In reaching its decision to strike down the law as unconstitutional, the district court was bound by prior Supreme Court precedent.[145] Thus, the district court used the undue burden standard set out in *Casey* in evaluating the constitutionality of Idaho's twenty-week ban.[146]

The district court in *McCormack* reasoned that, under the undue burden standard, Idaho's twenty-week ban was unconstitutional for two major reasons. First, the district court found that the Act did not fall into either of the two "permissible" categories of regulations on previability abortions upheld by the Supreme Court as constitutional.[147] Second, the district court held that the purpose of the law was to place an

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140. 159 CONG. REC. H3730-01 (daily ed. June 18, 2013).
141. *Id.*
142. *Id.*
143. *Id.*
144. McCormack v. Hiedeman, 900 F. Supp. 2d 1128, 1151 (D. Idaho 2013).
145. *Id.* at 1149 (discussing how "[t]he Idaho legislature enacted the PUCPA in the face of the Idaho Attorney General's declaration that it is likely unconstitutional because it prohibits some non-therapeutic abortions before a fetus has reached viability," and then continuing on to quote *Casey* and the undue burden standard).
146. *Id.* at 1149–51.
147. *Id.* at 1149–50 (asserting that "in *Casey*, the Supreme Court held that the state's dual interests in fetal life and maternal health permit only two broad categories of regulations before fetal viability[:]" those to insure informed consent and those to protect the health and safety of the mother. Based on this, the court found that Idaho's PUCPA did not fall into either category).

insuperable obstacle in the way of women seeking previability abortions and the effect of the law did just that, both of which are prohibited under the undue burden standard.[148] Thus, the district court struck down the Idaho Act as unconstitutional.[149]

Under its first line of reasoning, the court explained that the State's dual interests in fetal life and maternal health permit only two broad categories of previability regulations: measures to ensure that a women's choice is informed and regulations to protect the health and safety of the mother.[150] Because the Supreme Court itself has never made such an assertion, a discussion of how the district court appeared to reach this conclusion is necessary before examining the district court's analysis of why the twenty-week ban did not fit into either permissible category.

Although unclear from the court's opinion, it seems the district court in *McCormack* came to the conclusion that only two permissible categories of previability regulations exist under the undue burden standard by examining prior Supreme Court holdings.[151] Post *Casey*, under the undue burden standard, the Supreme Court has upheld five types of regulations on previability abortions: 1) regulations requiring parental consent, or, alternatively, a judicial decree, before a physician performs an abortion on a minor;[152] 2) regulations requiring abortion facilities to file a report on each abortion performed;[153] 3) regulations requiring physicians to provide information on abortions and other options to a woman prior to performing an abortion;[154] 4) regulations requiring physicians to wait twenty-four hours after a woman first tries to procure an abortion before performing such abortion;[155] and 5) the Partial-Birth Abortion Ban Act of 2003 at issue in *Carhart* that banned the intact D&E procedure.[156]

The first two types of regulations discussed above fall into the district court's "permissible" category of "regulations protecting the health and safety of the mother,"[157] while the third and fourth type of regula-

148. *Id.* at 1151.
149. *Id.*
150. *McCormack*, 900 F. Supp. 2d at 1149–50.
151. *See id.*
152. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 899 (1992).
153. *Id.* at 900–01.
154. *Id.* at 881–87.
155. *Id.*
156. Gonzales v. Carhart, 550 U.S. 124, 133 (2007).
157. Four Justices in *Casey* concluded that a regulation requiring parental consent ensured the welfare of minor mothers, while a regulation requiring abortion clinics to report on abortion procedures furthered the State's interest in maternal health. *See Casey*, 505 U.S. at 841. However, three other Justices in *Casey* concluded that the parental consent provision was designed to ensure informed consent. *See id.* at 899–900.

tions fall into the court's second category of "permissible" regulations "ensuring that a woman's choice is informed."[158] However, understanding which of the two "permissible" categories of previability regulations the district court placed the Partial-Birth Abortion Ban Act in is more difficult. The only way the Act seems to fall into either category is to place it in the category of regulations ensuring a woman's informed choice. Placing it in such a category is logical because, the argument goes, a woman fully informed of what the intact D&E procedure entailed would never elect to have it done.[159] Thus, by enacting the Partial-Birth Abortion Ban Act, Congress was merely imposing a regulation ensuring a woman's informed consent by requiring the result that any informed woman would reach.[160]

In the district court's analysis of Idaho's twenty-week ban in *McCormack*, the court held that the Pain-Capable Unborn Child Protection Act did not fall into either of the two "permissible" categories of previability regulations.[161] The district court found that the Act did not protect maternal health or safety because "[w]hen the Idaho legislature enacted the PUCPA, no mention was made of the health and safety of the mother."[162] Rather, the court found, the primary purpose of the Act was to protect the fetus—not the pregnant woman.[163] Further, the court found that the Act did not ensure a woman's informed choice because the Act was "not designed to make women more informed"; rather, its clear purpose was to narrow the universe of previously allowable previability abortions since it categorically banned non-therapeutic abortions at and after twenty weeks.[164] Thus, because the Act did not protect maternal health or safety nor did it ensure an informed choice, the court found that it did not fall into either "permissible" category of previability abortion regulations.[165]

The district court's second reason for holding Idaho's twenty-week ban unconstitutional centered on the purpose and the effect of the

158. *See id.* at 887 (discussing how the regulations at issue requiring a physician to provide a woman with information on abortion and other options twenty-four hours prior to performing an abortion ensured the woman's informed consent).

159. Bach, *supra* note 16, at 668–69; *see also Carhart*, 550 U.S. at 160 ("It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.").

160. *See* Bach, *supra* note 16, at 668–69.

161. McCormack v. Hiedeman, 900 F. Supp. 2d 1128, 1150 (D. Idaho 2013).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

law.[166] The court stated that "an undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[167] The court found that the purpose behind the enactment of Idaho's twenty-week ban was not to inform or protect a woman's health.[168] Instead, the court found it was enacted with "the specific purpose of placing an insurmountable obstacle in the path of women seeking an abortion after twenty weeks, but before the fetus ha[d] attained viability."[169] Based on these findings the court concluded that the sole purpose behind the enactment of the law was to "narrow the scope of allowable previability abortions in the name of fetal pain."[170] Thus, the court held the purpose behind the law's enactment made the law unconstitutional under the undue burden standard.[171]

Moreover, the court also found the law unconstitutional because the effect of the law was to place a substantial obstacle in the path of women seeking an abortion before fetal viability.[172] The court held that "an outright ban on abortions at or after twenty weeks' gestation . . . place[d] not just a substantial obstacle, but an absolute obstacle, in the path of women seeking such abortions."[173] Thus, the court held the effect of Idaho's twenty-week ban made the law unconstitutional under the undue burden standard.[174]

B. Analysis of the District Court's Holding in *McCormack*

Although the district court's holding striking down the Pain-Capable Unborn Child Protection Act as unconstitutional appears correct under current abortion law precedent, the reasoning used by the court to reach that conclusion appears flawed for two reasons. First, the assertion by the court that there are only two permissible categories of abortion regulations before fetal viability[175] is problematic. Second, the employment of the undue burden standard by the court to evaluate the twenty-week ban is wrong because the statute places an outright ban on some previability abortions.

In regard to the first reason, the court's assertion that only two permissible categories of previability regulations exist is unsound on

166. *Id.* at 1151.
167. *McCormack*, 900 F. Supp. at 1149.
168. *Id.* at 1150.
169. *Id.* at 1151.
170. *Id.* at 1150.
171. *Id.* at 1151.
172. *Id.*
173. *McCormack*, 900 F. Supp. at 1151.
174. *Id.*
175. *Id.* at 1149.

two grounds. First, the Supreme Court itself has never stated that only two permissible categories of previability abortion regulations exist.[176] The Court has only stated that a state regulation on abortion cannot have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[177] Thus, the assertion by the district court that there are only two permissible categories of previability regulations requires an inference to be drawn that since the Supreme Court has never upheld any other category of previability abortion regulation in the past it will never do so in the future. This conclusion is unsound given the fact that the Court has never put such a restriction on itself and has, in fact, been expanding the State's interest in protecting fetal life so as to conceivably uphold more regulations on abortions furthering this interest in the future.

Further, the court's assertion that only two permissible categories of previability abortion regulations exist is flawed on the grounds that Idaho's twenty-week ban and the Partial-Birth Abortion Ban Act are indistinguishable under the court's apparent reasoning for placing the latter Act in the category of permissible regulations ensuring informed consent. A strong argument can be made that the two Acts should be treated in the same manner under the court's categorization system. Similar to the argument described above for the Partial-Birth Abortion Ban Act, one can argue that Idaho's twenty-week ban ensures informed consent because no woman fully informed of a fetus's capability to feel pain at twenty weeks gestational age would elect to have an abortion after that time. Therefore, as Congress did when it enacted the Partial-Birth Abortion Ban, Idaho was merely imposing a regulation to ensure the result that any well-informed woman would reach. Thus, the court's reasoning for holding the Pain Capable Unborn Child Protection Act unconstitutional is flawed because the district court's use of the categorization system is unsound.

In addition, the court's reasoning for holding Idaho's twenty-week ban unconstitutional is flawed because the court used the undue burden standard to evaluate the constitutionality of the law. In *Casey*, the Su-

176. In discussing the undue burden standard, the Court in *Casey* set forth some guiding principles for courts to follow in applying the standard. The Court stated, "Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877–78 (1992). Thus, the Court never laid down a hard and fast rule that only two permissible categories of previability regulations exist.

177. *Id.* at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.").

preme Court held that "viability marks the earliest point [in time] at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[178] Further, the Court held that the State can regulate previability abortions so long as such regulations do not impose an undue burden on the woman's right to choose.[179] However, the undue burden standard is not applicable to Idaho's twenty-week ban. This is the case because the Pain-Capable Unborn Child Protection Act bans all abortions beginning at twenty weeks[180] and viability does not occur until roughly twenty-three or twenty-four weeks of pregnancy.[181] Thus, the Act is a legislative ban on nontherapeutic abortions before viability and is simply unconstitutional on its face, rendering the undue burden standard inapplicable and the court's reasoning for holding the twenty-week ban unconstitutional flawed.[182] The Ninth Circuit Court used the same reasoning in *Isaacson v. Horne*, a ruling that came down ten weeks after *McCormack*, to hold Arizona's twenty-week ban per se unconstitutional.[183]

C. *Isaacson v. Horne*

In *Isaacson v. Horne* the Ninth Circuit Court took up the constitutionality of an Arizona statute banning abortions beginning at twenty weeks of pregnancy.[184] The Arizona statute at issue in *Isaacson* was almost identical to the Idaho statute at issue in *McCormack*.[185] The stated purpose of the law was to curtail the risks to a woman's health associated with a late-term abortion and ban abortions starting at twenty weeks of pregnancy where strong medical evidence indicates that an unborn child feels pain during an abortion at that age of gestation.[186] The Arizona law reads in pertinent part:

> Except in a medical emergency, a person shall not perform, induce or attempt to perform or induce an abortion unless the physician or the referring physician has first made a determination of the probable gestational age of the unborn child. In making that determination, the physician or referring physician shall make any inquiries of the pregnant woman and perform or

178. *Id.* at 860.
179. *Id.* at 876.
180. *McCormack*, 900 F. Supp. 2d, at 1151.
181. Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).
182. *See id.* at 1225–26.
183. *Id.*
184. *Id.*
185. *See Isaacson*, 716 F.3d at 1217–18; *McCormack*, 900 F. Supp. 2d at 1149.
186. *Isaacson*, 716 F.3d at 1218.

> cause to be performed all medical examinations, imaging studies and tests as a reasonably prudent physician in the community, knowledgeable about the medical facts and conditions of both the woman and the unborn child involved, would consider necessary to perform and consider in making an accurate diagnosis with respect to gestational age.
>
> Except in a medical emergency, a person shall not knowingly perform, induce or attempt to perform or induce an abortion on a pregnant woman if the probable gestational age of her unborn child has been determined to be at least twenty weeks.[187]

In its opinion, the Ninth Circuit Court reversed a district court's ruling holding the above cited law constitutional and instead held the law per se unconstitutional.[188] The district court had found the law constitutional under the undue burden standard as a permissible regulation on previability abortions.[189] However, the Ninth Circuit found the use of the undue burden standard faulty because the law placed a ban on some previability abortions.[190] In reaching its holding, the court set out three main points regarding viability and the law. First, the court pointed out that the parties in the case agreed that no fetus was viable at twenty weeks gestational age.[191] Second, the court found that as of now, based on medical evidence, viability usually does not occur until twenty-three or twenty-four weeks of pregnancy.[192] Lastly, the court stated that Arizona's law banned all abortions starting at twenty weeks of pregnancy unless a medical emergency existed that threatened the mother's life or health.[193] Thus, based on these findings, the court found Arizona's twenty-week ban per se unconstitutional under Supreme Court precedent as it banned some previability abortions. In its opinion, the court reiterated the Supreme Court's holding that the State's interest in potential life does not become compelling until viability,[194] and stated the medical emergency exception in Arizona's statute did not transform it into a permissible regulation on previability abortions.[195]

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187. ARIZ. REV. STAT. ANN. § 36-2159 (West, Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)).

188. *Isaacson*, 716 F.3d at 1217, 1225–26.

189. *Id.* at 1225.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 1226.

194. *Isaacson*, 716 F.3d at 1217. ("[A] woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable. A prohibition on the exercise of that right is *per se* unconstitutional."). Thus, the Court held Arizona's law invalid on its face. *Id.* at 1225.

195. *Id.* at 1227.

D. Analysis of the Ninth Circuit's Holding in *Isaacson*

The Ninth Circuit's reasoning for holding Arizona's twenty-week ban unconstitutional appears spot-on under current abortion law precedent. As abortion law stands right now, bans on previability abortions are per se unconstitutional.[196] The Court has stated repeatedly that the State's interest in potential life does not become compelling enough to justify a ban on abortions until the point of viability.[197] Although the district courts in Idaho and Arizona used *Casey*'s undue burden standard to evaluate the constitutionality of the twenty-week bans at issue in *McCormack* and *Isaacson*,[198] it seems clear that the Ninth Circuit Court was correct in holding Arizona's twenty-week ban unconstitutional on its face. Although it seems clear that the twenty-week bans being enacted by the states are per se unconstitutional under current Supreme Court precedent, the question remains: in light of new medical evidence regarding fetal pain, should the Supreme Court revisit *Roe's* central rule marking viability as the critical point in time at which the State's interest in potential life becomes compelling enough to warrant a ban on abortions, and replace it with fetal pain?

PART IV: SHOULD THE SUPREME COURT REVISIT *ROE V. WADE*'S CENTRAL HOLDING MARKING VIABILITY AS THE CRITICAL POINT IN TIME AT WHICH THE STATE'S INTEREST IN POTENTIAL LIFE BECOMES COMPELLING ENOUGH TO WARRANT PROSCRIPTION OF ABORTION AND REPLACE IT WITH FETAL PAIN?

A strong argument can be made that fetal pain, not fetal viability, should be the critical point in time at which the State's interest in potential life becomes compelling enough to warrant prohibitions on abortion procedures. This is the case for four main reasons. First, fetal pain is a more workable point in time at which to deem the State's interest in fetal life compelling because it is a more conclusive point.[199] Second, replacing *Roe's* central rule marking viability as the critical point with

196. "First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

197. *See id.*; *see also* Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Roe v. Wade, 410 U.S. 113, 163–64 (1973), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

198. *Isaacson*, 716 F.3d at 1225; McCormack v. Hiedeman, 900 F. Supp. 2d 1128, 1149–51 (D. Idaho 2013).

199. *See infra* Part IV.C.i.

fetal pain would not cause "serious inequity" to those who rely on abortion.[200] Third, over the last four decades, the Court has expanded the State's interest in fetal life both in time and scope allowing state regulation of previability abortions from the outset of pregnancy to preserve fetal life and ensure dignity and respect for human life.[201] Allowing the State to ban abortions beginning at the time unborn children are capable of feeling pain is, thus, logical under this expansion of the State's interest in fetal life.[202] Finally, allowing the State to prohibit abortions beginning at the time unborn children have the capacity to feel pain is both relevant and justifiable.[203] Thus, the Supreme Court should revisit its prior holding in *Roe* because a strong argument can be made that *Roe's* central rule marking viability as the critical point should be replaced with fetal pain.

Part A of this section of the article will examine the doctrine of stare decisis and the framework set out by the Court in *Casey* for evaluating and overturning precedent. Part B will then address how the Court in *Casey* applied the framework to conclude that *Roe* should not be overturned. In Part C, the framework from *Casey* will be applied to *Roe* today, post *Casey* and *Carhart*, and the four factors discussed above will be evaluated in greater detail in addressing whether the Court should change the critical point from fetal viability to fetal pain. Part D will briefly conclude this section.

A. Stare Decisis and the Framework for Re-Examining and Overturning Abortion Law Precedent

Under the doctrine of stare decisis, the Supreme Court will not lightly overrule its prior holdings marking viability as the critical point in time where the State's interest in fetal life becomes compelling enough to justify a prohibition on abortion.[204] "The [Supreme] Court operates as an institution, and the . . . Justices . . . operate within its institutional framework."[205] Within that institutional framework is the doctrine of stare decisis that the Court, to some degree, is bound by.[206] The doctrine of stare decisis stands for the premise that judges should follow the same reasoning used in prior cases when deciding similar cases in the future.[207] This means that "what [the Court] has done in the past, it will continue to do in the future."[208]

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200. *See infra* Part IV.C.ii.
201. *See infra* Part IV.C.iii.
202. *See infra* Part IV.C.iii.
203. *See infra* Part IV.C.iv.
204. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).
205. Robert A. Sedler, *The Supreme Court Will Not Overrule Roe v. Wade*, 34 HOFSTRA L. REV. 1207, 1207–08 (2006).
206. *See Casey*, 505 U.S. at 854.
207. *Stare Decisis*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/stare%20decisis (last visited June 29, 2014) (defining stare decisis as

In *Casey*, the Court explained that necessity requires the Court, to some extent, to follow the doctrine of stare decisis[209] and specifically rejected the argument that it should overrule its prior holding in *Roe* announcing a woman's constitutional right to obtain a previability abortion.[210] The Court stated:

> [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.[211]

With this in mind, the Court laid out a series of questions that it would evaluate in determining whether or not to overturn *Roe*. [212] The Court stated:

> [W]e may enquire whether *Roe's* central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe's* central rule a doctrinal anachronism discounted by society; and whether *Roe's* premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.[213]

Based on these inquiries, the Court declined to overrule the landmark case.[214]

B. The Court's Application of the Framework in *Casey* in Deciding Not to Overturn *Roe*

In declining to overturn *Roe*, the Court used the framework discussed above.[215] Under the framework the Court found that *Roe's* central premise had not been weakened by subsequent decisions and that

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"a doctrine or policy of following rules or principles laid down in previous judicial decisions unless they contravene the ordinary principles of justices").

208. Sedler, *supra* note 205, at 1208.
209. *Casey*, 505 U.S. at 854.
210. *Id.* at 853.
211. *Id.* at 854.
212. *Id.* at 855.
213. *Id.*
214. *Id.* at 855–61; *see also* Sedler, *supra* note 205, at 1209–10.
215. *Casey*, 505 U.S. at 855–61.

the ruling in *Roe* was still supported by the doctrine and premises on which it was based.[216] To reach this conclusion, the Court took up, in turn, each of the four questions set out in the framework.[217]

First, the Court in *Casey* evaluated whether *Roe's* central rule, that the State cannot proscribe previability abortions, was unworkable.[218] The Court answered this in the negative.[219] In reaching that conclusion, the Court held that *Roe's* central rule represented "a simple limitation beyond which a state law is unenforceable."[220] Based on that, the Court found that the required determination, that is, whether a law violates "the exercise of the choice guaranteed against government infringement" was "within judicial competence."[221] Thus, the Court in *Casey* found *Roe's* central rule, which marked viability as the critical point, workable.[222]

The second question the Court in *Casey* evaluated in deciding whether or not to overturn *Roe's* central rule was "whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it."[223] The Court also answered this question in the negative finding that overruling *Roe* and its central rule, marking viability as the critical point, would negatively affect individuals and society as a whole.[224] In making that finding, the Court stated:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. [Further,] [t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[225]

Thus, the Court found that *Roe's* central rule should not be overruled because both individuals and society as a whole relied on a woman's right to obtain an abortion.[226]

The third question the Court looked at in *Casey* in determining if *Roe* should be overruled was "whether the law's growth in the intervening years ha[d] left *Roe's* central rule a doctrinal anachronism discounted by society . . . ."[227] The Court broadly answered this question in the

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216. *Id.* at 860–61; Sedler, *supra* note 205, at 1209–10.
217. *Casey*, 505 U.S. at 855–61.
218. *Id.* at 855.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Casey*, 505 U.S. at 855–56.
224. *Id.*
225. *Id.* at 856.
226. *Id.*
227. *Id.* at 857–59.

negative, but found that *Roe's* central rule undervalued the State's interest in potential life.[228] The Court analyzed a woman's right to obtain an abortion under the liberty prong of the 14th Amendment of the Constitution and also under the theory of sui generis.[229] The Court found that regardless of the theory used to protect a woman's constitutional right to obtain an abortion, the right had been upheld by a majority of justices in the years between *Roe* and *Casey*.[230] However, the Court also stated that if "the central holding in *Roe* was in error, that error would go . . . to the strength of the state interest in fetal protection, not the recognition afforded by the Constitution to the woman's liberty."[231] Thus, the Court found *Roe's* central rule had not been discounted by the law's growth in the years since *Roe*, but recognized that *Roe's* central rule did not afford the State a great enough interest in protecting the life of the unborn child.[232] In remedying this issue, the Court declined to outright overrule *Roe*, but tweaked its central rule by abandoning the trimester framework and adopting the undue burden standard affording the State a greater interest in potential life while continuing to uphold the woman's constitutional right to obtain an abortion.[233]

The final question the Court in *Casey* evaluated in determining if it should overrule *Roe* was "whether *Roe's* premises of fact ha[d] so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed."[234] Again, the Court answered the question in the negative.[235] In evaluating this question, the Court looked at developments in medical technology since *Roe*.[236] From 1973 to 1992, advances in medical technology had changed the point of viability from twenty-eight weeks of pregnancy to roughly twenty-three or twenty-four weeks of pregnancy.[237] Although the point of viability had changed, the Court concluded that such a change only went to "the scheme of time limits on the realization of competing interests . . . ."[238] Thus, the Court concluded that "the divergences from the factual premises of 1973 ha[d] no bearing on the validity of *Roe*'s central holding, that viability marks the earliest

228. *Id.*
229. *Casey*, 505 U.S. at 857–59.
230. *Id.* at 858.
231. *Id.*
232. *Id.* at 857–59.
233. *Id.* at 876.
234. *Id.* at 860.
235. *Casey*, 505 U.S. at 860.
236. *Id.* (looking at advances in maternal care and advances in neonatal care since 1973).
237. *Id.*
238. *Id.*

point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[239]

Although the Court in *Casey* declined to overrule *Roe* and recognized the importance of stare decisis in judicial jurisprudence, the Court did tweak *Roe* in a major way by rejecting the trimester framework and adopting the undue burden standard.[240] In addition, the Court stated that "the rule of stare decisis is not an '[irrevocable] command' and certainly it is not such in every constitutional case"[241] and emphasized *Roe*'s under-appreciation for the State's interest in potential life.[242] Thus, the Court left open the possibility of reevaluating *Roe*'s central rule at a future time and, if circumstances called for such action, once again tweaking the rule, or altogether overruling it if the four questions set out in the framework for overturning precedent were answered in the affirmative.

C. Applying the Framework from *Casey* to *Roe* Today in Determining if the Court Should Change the Critical Point from Fetal Viability to Fetal Pain

In light of new medical evidence indicating that unborn children are capable of feeling pain at twenty weeks, the circumstances may be right now for the Court to reevaluate *Roe*'s central rule marking viability as the critical point. Twenty years have passed since the Court declined to overturn *Roe* in *Casey*.[243] Since that time, compelling new medical evidence regarding fetal pain has emerged[244] and the Court has greatly expanded the State's interest in fetal life both in scope and time.[245] In addition, numerous states like Idaho and Arizona have enacted "twenty-week bans," statutes banning previability abortions[246] and courts are split on how to evaluate and rule on such laws.[247] Thus, reevaluation of *Roe*'s central rule under the framework set out in *Casey*

239. *Id.*

240. *See supra* Parts IV.A, IV.B.

241. *Casey*, 505 U.S. at 854 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932)).

242. *Id.* at 875–76.

243. *Id.* at 883 (showing that *Casey* was decided 22 years ago in 1992).

244. *See supra* Part III.A (discussing congressional findings regarding fetal pain).

245. *See Casey*, 505 U.S. at 837 (expanding the State's interest in fetal life in time by adopting the undue burden standard allowing for state regulation of abortion procedures from the outset of pregnancy); Gonzales v. Carhart, 550 U.S. 124, 157 (2007) (expanding the State's interest in fetal life in scope by upholding the Partial-Birth Abortion Ban Act of 2003 as a permissible regulation on previability abortions because it showed "respect for the dignity of human life").

246. *See supra* note 4 (listing all the states that have enacted twenty-week ban statutes).

247. *See supra* Part III (discussing how the Idaho District Court for the District of Idaho used the undue burden standard in striking down Idaho's "twenty week ban," how an Arizona District Court used the undue burden in ruling Arizona's "twenty week ban" constitutional, and how the Ninth Circuit Court struck down Arizona's "twenty week ban" as per se unconstitutional).

is warranted and fetal pain instead of fetal viability should be deemed the critical point in time at which the State's interest in potential life becomes compelling.

In evaluating this argument under the framework laid out in *Casey* for overruling precedent, it is important to note that by changing the critical point from fetal viability to fetal pain, or by recognizing a second compelling State interest in fetal pain, the Court would not be required to completely overrule *Roe*. Rather, like in *Casey*, the Court could continue to uphold *Roe*'s central premise, that a woman has a constitutional right to choose abortion, while slightly tweaking the point in time at which the State can intervene on behalf of the unborn child by proscribing nontherapeutic abortions.

i. Is *Roe*'s Central Rule Unworkable Today?

Roe's central rule may no longer be workable in light of differing court opinions regarding the constitutionality of the twenty-week bans being enacted by the states.[248] Under the framework set out in *Casey*, the first question that must be evaluated in determining if *Roe* should be overruled is whether or not its central rule is unworkable.[249] *Roe*'s central rule states that the State can prohibit post-viability abortions but can only regulate previability abortions.[250] In *Casey*, the Court answered the question of unworkability in the negative and held that viability is "a simple limitation . . . within judicial competence."[251] However, because at least three different courts have decided the constitutionality of the twenty-week bans differently under current Supreme Court precedent, viability may no longer be "a simple limitation . . . within judicial competence."[252] Thus, *Roe*'s central rule may no longer be workable.

Roe's central rule marking viability as the critical point is unworkable and beyond judicial competence for four main reasons: 1) viability

248. *See* McCormack v. Hiedeman, 900 F. Supp. 2d 1128, 1151 (D. Idaho 2013) (holding Idaho's "twenty week ban" unconstitutional); Isaacson v. Horne, 884 F. Supp. 2d 961 (D. Ariz. 2012), *rev'd*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014) (holding Arizona's "twenty week ban" constitutional); Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014) (holding Arizona's "twenty week ban" unconstitutional).

249. *Casey*, 505 U.S. at 855.

250. Roe v. Wade, 410 U.S. 113, 164–65 (1973), *holding modified by* Planned Parenthood of Se. Pa.v. Casey, 505 U.S. 833 (1992).

251. *Casey*, 505 U.S. at 855.

252. *McCormack*, 900 F. Supp. 2d at 1149–51 (holding Idaho's "twenty week ban" unconstitutional under the undue burden standard); *Isaacson*, 884 F. Supp. 2d at 968 (holding Arizona's "twenty week ban" constitutional under the undue burden standard); *Isaacson*, 716 F.3d at 1225 (holding Arizona's "twenty week ban" per se unconstitutional).

is a variable point,[253] 2) courts have trouble distinguishing abortion bans from abortion regulations under current precedent,[254] 3) the undue burden standard is amorphous,[255] and 4) it is unclear whether regulations can only permissibly be justified by preserving maternal health or ensuring informed consent.[256]

First, viability is a variable point and changes from pregnancy to pregnancy.[257] Because of this, there is no conclusive point in time at which viability occurs.[258] Although a majority of specialists estimate that viability occurs somewhere between twenty-three and twenty-four weeks of pregnancy,[259] disagreement among specialists continues.[260] Some specialists estimate viability occurs as early as twenty-two weeks of pregnancy while others estimate it to occur as late as twenty-six weeks of pregnancy.[261] Thus, because there is no conclusive point in time at which viability occurs, the State "may not fix viability at a specific point in pregnancy" by enacting blanket laws banning abortions based on weeks of gestation.[262] For that reason, it may be difficult for courts to evaluate if a law prohibits a previability abortion, which is unconstitutional, or a post-viability abortion, which is constitutional. This makes *Roe*'s central rule, marking viability as the critical point, unworkable.

Second, under Supreme Court precedent, it is difficult for courts to distinguish between laws that ban previability abortions and laws that place regulations on such abortions.[263] This is evidenced by the fact that

253. *Isaacson*, 716 F.3d at 1225.

254. *Id.* (discussing why the Arizona District Court's use of the undue burden standard was flawed and stating the "'undue burden'/'substantial obstacle' mode of analysis has no place where, as here, the state is *forbidding* certain women from choosing previability abortions rather than specifying the conditions under which such abortions are to be allowed" and holding the law per se unconstitutional as a ban on previability abortions); *Isaacson*, 884 F. Supp. 2d at 971 (holding Arizona's "regulation on abortions after 20 weeks gestational age" constitutional); *McCormack*, 900 F. Supp. 2d at 1150 (analyzing Idaho's twenty week ban under the undue burden standard as a regulation on previability abortions).

255. Courts disagree on what constitutes an "undue burden." *See McCormack*, 900 F. Supp. 2d at 1149–51 (holding Idaho's twenty week ban unconstitutional under the undue burden standard); *Isaacson*, 884 F. Supp. 2d at 968 (holding Arizona's twenty week ban constitutional under the undue burden standard).

256. *See McCormack*, 900 F. Supp. 2d at 1149 (holding that "in *Casey*, the Supreme Court held that the state's dual interests in fetal life and maternal health permit only two broad categories of regulations before fetal viability").

257. *Isaacson*, 716 F.3d at 1225.

258. *Id.*

259. *Id.*; *see also* Forte, *supra* note 10, at 138.

260. *See* Forte, *supra* note 10, at 138.

261. *Id.*

262. *Isaacson*, 716 F.3d at 1225.

263. *See id.* (holding Arizona's twenty week ban per se unconstitutional because it *banned* some previability abortions); Isaacson v. Horne, 884 F. Supp. 2d 961, 971 (D. Ariz. 2012), *rev'd*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014) (emphasis added) (holding Arizona's "*regulation* on abortions after 20 weeks gestational age" constitutional); McCormack v. Hiedeman, 900 F. Supp. 2d 1128, 1150 (D. Idaho 2013) (analyzing

in *McCormack* the District Court held Idaho's twenty-week ban unconstitutional as an *impermissible regulation* on previability abortions.[264] However, the United States District Court for the District of Arizona held Arizona's twenty-week ban, an almost identical statute, constitutional as a *permissible regulation* on previability abortions.[265] Moreover, in *Isaacson*, the Ninth Circuit Court overturned the Arizona District Court's ruling and held the same statute per se unconstitutional as an *impermissible ban* on previability abortions.[266] Thus, because courts have trouble distinguishing between bans on previability abortions and regulations on such abortions, *Roe*'s central rule is unworkable.

Third, the undue burden standard is an indeterminate standard rendering viability an unworkable rule. The undue burden standard announced in *Casey* allows State regulation of previability abortions so long as such regulations do not unduly burden a woman's right to choose.[267] However, courts disagree about what constitutes an undue burden.[268] In *McCormack* the District Court in Idaho used the undue burden standard in striking down Idaho's twenty-week ban.[269] The Court held that the law's purpose and effect was to place an absolute obstacle in the path of women seeking abortions after twenty weeks of pregnancy, but prior to viability, and thus posed an undue burden.[270] However, the District Court in Arizona upheld Arizona's twenty-week ban as constitutional under the undue burden standard.[271] There, the court held that the medical exceptions to the law made it a permissible regulation on previability abortions.[272] Further, the Ninth Circuit Court declined to even apply the undue burden standard to Arizona's twenty-week ban because the law was not a regulation subject to the undue burden standard.[273] These cases show that the undue burden standard is not clearly defined and courts disagree on how to apply it to laws. Thus, viability under the undue burden standard is unworkable.

Idaho's twenty week ban under the undue burden standard as a *regulation* on previability abortions).

264. *McCormack*, 900 F. Supp. 2d at 1149–51.

265. *Isaacson*, 884 F. Supp. 2d at 971.

266. *Isaacson*, 716 F.3d at 1225.

267. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

268. *See McCormack*, 900 F. Supp. 2d at 1149–51 (holding Idaho's twenty-week ban unconstitutional under the undue burden standard); *Isaacson*, 884 F. Supp. 2d at 968 (holding Arizona's twenty-week ban constitutional under the undue burden standard); *Isaacson*, 716 F.3d at 1225 (holding the undue burden standard did not even apply in the case of Arizona's twenty-week ban).

269. *McCormack*, 900 F. Supp. 2d at 1149–51.

270. *Id.* at 1151.

271. *Isaacson*, 884 F. Supp. 2d at 968.

272. *Id.* at 967–68.

273. *Isaacson*, 716 F.3d at 1225.

Lastly, *Roe's* central rule is unworkable because Supreme Court precedent leaves unclear whether previability regulations can only permissibly be justified by preserving maternal health and ensuring informed consent.[274] In *McCormack* the District Court made the assertion that only two permissible categories of previability regulations exist: those to ensure a woman's informed consent and those to protect maternal health.[275] Although the Supreme Court has never held that there are only two permissible categories of regulations,[276] an examination of prior Supreme Court holdings suggests this could be the case—with the possible exception of *Carhart*—as the Court has yet to uphold any other type of previability regulation as constitutional.[277] Thus, *Roe's* central rule is unworkable because it is unclear if there are only two permissible categories of previability regulations.

Because *Roe's* central rule is unworkable, the Court could reevaluate and replace it with a more workable standard such as fetal pain. If fetal pain became the new critical point, the central rule would be: the State may regulate abortions prior to twenty weeks of pregnancy and after that point may prohibit abortions. Fetal pain is a more workable point than fetal viability because it is a more conclusive point in time. Medical evidence shows that all unborn children are capable of feeling pain at twenty weeks gestational age,[278] whereas, there is no conclusive point in time at which all unborn children become viable.[279] Although a majority of specialists place viability somewhere between twenty-three and twenty-four weeks of pregnancy,[280] a non-conclusive point in and of itself, continued disagreement among specialists shows that viability may occur anywhere from twenty-two weeks to twenty-six weeks of pregnancy.[281] Thus, if fetal pain were the critical point, the State could enact blanket laws banning abortions at twenty weeks gestation making it easier for courts to assess the constitutionality of such laws because all laws banning abortions before twenty weeks would be unconstitutional. Therefore, fetal pain is a more workable rule than fetal viability in determining when the State's interest in fetal life is compelling enough to warrant a prohibition on abortion.

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274. *See McCormack*, 900 F. Supp. 2d at 1149; *supra* notes 176–177 and accompanying text (discussing why it is unclear if the Idaho District Court's assertion that there are only two permissible categories of previability regulations is accurate).

275. *McCormack*, 900 F. Supp. 2d at 1149–50.

276. *See supra* notes 176–77 and accompanying text (discussing how the Supreme Court has only ever set out the undue burden standard holding that state regulations on previability abortions cannot have the purpose or effect of placing a substantial obstacle in the path of a woman seeking a previability abortion).

277. *See supra* Part III.A (discussing the types of regulations upheld by the Supreme Court post *Casey* and how *Carhart* may fit into the categorization scheme asserted by the District Court in *McCormack).*

278. 159 CONG. REC. H3730-01 (daily ed. June 18, 2013).

279. *Isaacson*, 716 F.3d at 1225; *see also* Forte, *supra* note 10, at 138.

280. *Isaacson*, 716 F.3d at 1225; *see also* Forte, *supra* note 10, at 138.

281. Forte, *supra* note 10, at 138.

ii: Can *Roe*'s Central Rule Limiting State Power Be Removed without Serious Inequity to Those Who Have Relied Upon It or Significant Damage to the Stability of the Society Governed by It?

The critical point could be changed from viability to fetal pain without serious inequity to those who rely upon the right to obtain an abortion because the Court in *Casey* already undermined reliance on the absolute right to obtain a first-trimester abortion. Further, reliance on the right to obtain a previability abortion would not be seriously disturbed by slightly tweaking the critical point in time at which the State's interest in fetal life becomes compelling. Under the framework set out in *Casey* for evaluating abortion law precedent, the second question that must be addressed is whether or not *Roe*'s central rule limiting state power can be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it.[282] In *Casey*, the Court found that *Roe*'s central rule could not be removed without serious inequity because for two decades individuals and society had relied on a woman's right to obtain an abortion "in the event that contraception should fail."[283] However, although the Court declined to overrule *Roe* for fear of causing inequity to those who relied on abortion, the Court's opinion itself greatly undermined reliance on the right of women to obtain a first-trimester abortion.[284] Further, reliance on abortion "in the event that contraception should fail"[285] would not seriously be disturbed by changing the critical point from fetal viability to fetal pain.[286] Thus, *Roe*'s central rule could be tweaked without serious inequity to those who rely on abortion or significant damage to the stability of society.

After the Court's opinion in *Casey*, abortion law precedent was dramatically changed and reliance on *Roe* was dramatically undermined.[287] As discussed in Part II.B of this article, the adoption of the undue burden standard in *Casey* greatly expanded the State's interest in potential life.[288] With that expansion, the State gained greater power

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

283. *Id.* at 855–56.

284. *Id.* at 837, 876–77 (adopting the undue burden standard and with it eliminating the absolute right of a woman to obtain a previability abortion); *see also* Bach, *supra* note 16, at 664.

285. *Id.* at 856.

286. *See Isaacson*, 716 F.3d at 1218 (discussing that women seek late term abortions, including those after twenty weeks gestational age, for medical reasons, not because contraception failed).

287. *Casey*, 505 U.S. at 837, 876–77.

288. *See supra* Part II.B (discussing how the adoption of the undue burden standard expanded the State's interest in fetal life in time by allowing regulations on previability abortions).

to regulate abortions and women lost the absolute right to obtain a first-trimester abortion.[289] As Chief Justice Rehnquist stated in his dissent in *Casey*, "*Roe* continues to exist [today], but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."[290] Thus, *Casey* greatly undermined reliance on the absolute right to obtain an abortion during the first trimester of pregnancy.[291]

Because *Casey* undermined reliance on a woman's absolute right to obtain a first-trimester previability abortion, apparently without triggering the serious inequities warned of in the same case, it follows that changing the critical point from fetal viability to fetal pain would not dramatically disrupt reliance on the ability to obtain a previability abortion. Today, as medical evidence indicates, viability occurs at roughly twenty-three or twenty-four weeks of pregnancy.[292] Further, medical evidence indicates that unborn children are capable of feeling pain beginning at twenty weeks gestational age.[293] Thus, if the critical point was changed from viability to fetal pain, a woman would only lose three or four weeks in the second trimester of pregnancy in which she could have relied on abortion under *Roe*'s central rule that she could no longer rely on under the new rule. As the Court said in *Casey*, "a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child" and after that point cannot rely on abortion.[294] The same can be said if the critical point were changed to fetal pain. A woman who fails to act before the twentieth week of pregnancy has consented to the State's intervention on behalf of the developing child and can no longer rely on the right to obtain an abortion. Thus, changing the critical point to fetal pain would not cause serious inequity to those who rely on abortion since *Casey* already undermined the absolute right to obtain a first-trimester abortion, and changing the critical point would only take away three or four weeks of reliance late in the second trimester.

Further, reliance on abortion in the event contraception failed would not seriously be disturbed by changing the critical point from fetal viability to fetal pain because such reliance does not apply in the late-term abortion setting. In *Isaacson*, the physician plaintiffs asserted that patients "seek previability [late-term] abortions for . . . reasons [such as the] continuation of the pregnancy pos[ing] a threat to their health, . . . the fetus has been diagnosed with a medical condition or anomaly, or that they are losing their pregnancy."[295] This indicates that although women rely on abortions for a variety of reasons early on in

289. *Casey*, 505 U.S. at 837, 876–77; *see also* Bach, *supra* note 16, at 664.
290. *Id.* at 954.
291. *Id.* at 837, 876–77; *see also* Bach, *supra* note 16, at 664.
292. Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014); *see also* Forte, *supra* note 10, at 138.
293. 159 CONG. REC. H3730-01 (daily ed. June 18, 2013).
294. *Casey*, 505 U.S. at 870.
295. *Isaacson*, 716 F.3d at 1218.

pregnancies, such as failed contraception, as pregnancies progress into the second and third trimester, the reasons for seeking late-term abortions narrow. At that point in pregnancy, there is usually a medical reason—rather than a failure of contraception—behind a woman wanting to obtain an abortion.[296] Thus, the reliance on abortion spoke of in *Casey*, that is, individuals' reliance "on the availability of abortion in the event that contraception should fail," does not apply in the late-term abortion setting.[297]

Further, for a woman who relies on a late-term previability abortion in the event that an unforeseen medical issue arises with her or her fetus, reliance on obtaining such an abortion would not be disturbed by changing the critical point to fetal pain if exceptions were put into the twenty-week bans accommodating such medical reasons. Although the current twenty-week bans have only narrow medical exceptions that do not cover all the medical reasons for seeking a late-term previability abortion, like fetal anomaly, the Supreme Court could require such exceptions be written into the laws. This would allow the State to assert its interest in protecting potential life from the time at which unborn children are capable of feeling pain, while at the same time avoiding inequity to those who do rely on late term abortions.

Thus, because *Casey* already substantially undermined the ability of women to obtain a previability first-trimester abortion[298] and because most women seeking abortion after twenty weeks gestational age do so for a medical reason and not because contraception failed,[299] changing the critical point from viability to fetal pain would not greatly affect reliance on abortion. Further, broadening the existing medical exceptions to the twenty-week bans would ensure that reliance on late term abortions for medical reasons would not be affected. Thus, changing the critical point in time in which the State's interest in fetal life becomes compelling to fetal pain would not cause inequity to those who rely on abortion.

iii. Has the Law's Growth in the Intervening Years since *Roe* Left *Roe's* Central Rule a Doctrinal Anachronism Discounted by Society?

In the forty years since *Roe* was decided, the Court's opinions in *Casey* and *Carhart* have left *Roe*'s central rule a hollow principle by expanding the State's interest in fetal life both in scope and time.[300] Under

296. *Id.*

297. *Casey*, 505 U.S. at 856; *see also Isaacson*, 760 F.3d at 1218.

298. *Casey*, 505 U.S. at 837, 876–77; *see also* Bach, *supra* note 16, at 664.

299. *Isaacson*, 716 F.3d at 1218.

300. *See Casey*, 505 U.S. at 837 (expanding the State's interest in fetal life in time by adopting the undue burden standard allowing for state regulation of abortion procedures

the framework set out in *Casey* for reevaluating prior precedent, the third question that must be looked at is "whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society."[301] In *Casey*, the Court broadly answered this question in the negative stating that, over the years, a majority of justices had upheld the right of women to choose abortion.[302] However, the Court also stated that *Roe*'s central holding erred in not affording the State a greater interest in fetal protection.[303]

To remedy the error, the Court expanded the State's interest in fetal life in time by adopting the undue burden standard.[304] The undue burden standard announced by the Court "left no doubt that the Court had struck a new balance between the state's interest in protecting life and the woman's right to choose."[305] The new standard "obliterated the absolute right to a first-trimester abortion established in *Roe* and replaced it with an 'inherently nebulous standard' that provides states with a high degree of regulatory flexibility."[306] Thus, after *Casey*, the State is permitted to regulate abortion procedures to promote its interest in potential life throughout pregnancy[307] whereas, under *Roe*, the only regulations permitted were during the second trimester to protect maternal health.[308] *Casey* thus changed abortion law by expanding the State's interest in protecting fetal life in time.[309]

Fifteen years after *Casey*, the Court once again expanded the State's interest in potential life, this time in scope.[310] In *Carhart*, the Court expanded the State's interest in potential life to encompass not just preservation of life but also to encompass dignity and respect for human life.[311] The opinion:

> [marked] a sharp turn away from framing the abortion debate in terms of women's rights and empowerment. In holding that the Partial-Birth Abortion Ban Act of 2003 d[id] not pose an undue

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from the outset of pregnancy); Gonzales v. Carhart, 550 U.S. 124, 157 (2007) (expanding the State's interest in fetal life in scope by upholding the Partial-Birth Abortion Ban Act of 2003 as a permissible regulation on previability abortions because it showed "respect for the dignity of human life").

301. *Casey*, 505 U.S. at 855.

302. *Id.* at 857–59.

303. *Id.* at 858–59.

304. *Id.* at 837, 876–77.

305. Bach, *supra* note 16, at 663.

306. *Id.* at 664.

307. *Casey*, 505 U.S. at 837.

308. Roe v. Wade, 410 U.S. 113, 164 (1973), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

309. *Casey*, 505 U.S. at 837, 876–77.

310. *See* Gonzales v. Carhart, 550 U.S. 124, 157 (2007) (expanding the State's interest in fetal life in scope by upholding the Partial-Birth Abortion Ban Act of 2003 as a permissible regulation on previability abortions because it showed "respect for the dignity of human life").

311. *Id.*

> burden on a woman's constitutional right to an abortion, the court explicitly value[d] protecting fetal rights over women's rights.[312]

Thus, *Carhart* expanded the State's interest in potential life in scope by allowing regulations that protect and promote dignity and respect for human life.[313]

Thus, because the Court has greatly expanded the State's interest in protecting fetal life in both scope and time, *Roe*'s central rule, marking viability as the critical point in time at which the State's interest in potential life becomes compelling, has become a hollow principle. This is so because the State cannot adequately protect potential life prior to viability through regulation alone.[314] At twenty weeks gestational age, a point in time prior to viability, unborn children are capable of feeling pain.[315] Although substantial medical evidence supports this assertion, state regulations banning abortions at that time are likely per se unconstitutional under *Roe*'s central rule.[316] This seems at odds with what the Court said in both *Casey* and *Carhart* when it expanded the State's interest in potential life in scope and time because such regulations protect and promote dignity and respect for human life. Thus, *Roe*'s central rule, marking viability as the critical point, has become a doctrinal anachronism and should be replaced with fetal pain.

iv. Has *Roe*'s Premises of Fact so Far Changed in the Ensuing Four Decades as to Render Its Central Holding Somehow Irrelevant or Unjustifiable in Dealing with the Issue It Addressed?

Roe's central holding is irrelevant because a fetus that is deemed viable does not necessarily have a realistic chance of survival outside the womb.[317] Further, new medical evidence indicating that unborn children are capable of feeling pain at twenty weeks of pregnancy has surfaced rendering *Roe*'s central rule unjustifiable.[318] The final question that must be evaluated in determining whether or not to overrule *Roe* is

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312. Bach, *supra* note 16, at 666.

313. *Carhart*, 550 U.S. at 157–60.

314. *See supra* note 4 and accompanying text. This footnote lists all the states that have enacted statutes banning abortions beginning at twenty or twenty-two weeks gestational age in order to assert their interest in protecting fetal life. *Id.* However, the statutes are likely per se unconstitutional because they ban abortions before the accepted point of viability. *See* Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).

315. 159 CONG. REC. H3730-01 (daily ed. June 18, 2013).

316. *See Isaacson*, 716 F.3d at 1225.

317. *See* Forte, *supra* note 10, at 138.

318. 159 CONG. REC. H3730–01 (daily ed. June 18, 2013).

"whether *Roe*'s premises of fact have so far changed in the ensuing [four] decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed."[319] In *Casey*, the Court answered this question in the negative because, although the point of viability had changed in the two decades between *Roe* and *Casey*, such a change only went to "the scheme of time limits on the realization of competing interests."[320] However, when a fetus is deemed viable medical evidence indicates that the chances of survival outside the womb are slim,[321] leaving *Roe*'s central rule, marking viability as the critical point, irrelevant. Further, new medical evidence has come to light since the Court's holdings in *Roe* and *Casey* showing unborn children can feel pain beginning at twenty weeks gestational age.[322] This new evidence renders *Roe*'s central rule unjustifiable.[323] Thus, the critical point should be changed from viability to fetal pain as *Roe*'s central rule is no longer relevant or justifiable in light of new medical evidence.

Viability is an irrelevant point in time at which to deem the State's interest in potential life compelling because the "realistic possibility" of survival for children born at twenty-three and twenty-four weeks of pregnancy, the generally accepted range at which viability occurs, in fact reflects a fairly slim chance of survival.[324] Because survival outside the womb is unlikely at the point of viability, bans on abortions beginning at viability lack both "logical and biological justifications" as viability is less meaningful than many people believe.[325] Although Justice Blackmun held in *Roe* that the point of viability is the critical point at which a State's interest in potential life becomes compelling because at that point there is a realistic possibility of maintaining and nourishing a life outside the womb, and thus state regulation after viability has both "logical and biological justifications,"[326] there is medical evidence suggesting that the chances of survival at twenty-three or twenty-four weeks gestational age is slim.[327] Physicians estimate less than a 10% chance of survival for children born at twenty-two weeks, a 10%–35% chance of survival for children born at twenty-three weeks, and a 40%–70% chance of survival for children born at twenty-four weeks gestational age.[328] This evidence substantially undermines Justice Blackmun's reasoning for marking viability as the critical point. This is so because there is not necessarily a realistic possibility of maintaining and nourishing a life outside the womb for children born at the point of

319. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).
320. *Id.* at 860.
321. Forte, *supra* note 10, at 138.
322. 159 CONG. REC. H3730–01 (daily ed. June 18, 2013).
323. *See id.*
324. *See* Forte, *supra* note 10, at 138.
325. *See id.* at 138–39.
326. Roe v. Wade, 410 U.S. 113, 163 (1973), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
327. *See* Forte, *supra* note 10, at 138.
328. *Id.*

viability as evidenced by the statistics. Thus, there is no logical or biological justification for marking viability as the critical point because viability is not a watershed point in time at which existence outside the womb becomes probable rendering *Roe*'s central rule irrelevant.

Moreover, *Roe*'s central rule is unjustifiable in light of new medical evidence showing unborn children are capable of feeling pain at twenty weeks of pregnancy,[329] a point in time prior to viability.[330] When *Roe* was decided in 1973, no medical evidence was available showing that unborn children can feel pain beginning at twenty weeks gestational age.[331] Although such evidence had not come to light until recently, several Justices over the years have stated that the State would in fact have an interest in intervening on behalf of the unborn child at the time the child developed the capacity to feel pain if such medical evidence ever came to light.[332] In 1986, Justice Stevens, in his concurring opinion in *Thornburgh v. American College of Obstetricians & Gynecologists*, argued that "the reason the Constitution forbids the state from restricting abortion is that the unborn child cannot feel pain."[333] He stated:

> I should think it obvious that the State's interest in the protection of an embryo – even if that interest is defined as "protecting those who will be citizens," - increases progressively and dramatically as the organism's capacity to *feel pain*, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus, and pregnancy itself, are not static conditions, and the assertion that the government's interest is static simply ignores this reality.[334]

Although in 1986 "Justice Stevens assumed that the unborn would not feel pain until late in pregnancy, [he] nonetheless . . . argued that

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329. 159 CONG. REC. H3730–01 (daily ed. June 18, 2013).

330. Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).

331. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J., concurring), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (discussing that if and when a fetus became capable of feeling pain the State's interest in protecting fetal life would be compelling); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 552 (1989) (Blackmun, J., concurring in part and dissenting in part with the judgment of the Court, joined by Justice Brennan and Justice Marshall) (concurring with Justice Stevens's opinion in *Thornburgh*). Thus, if there was conclusive evidence showing that at a point in pregnancy a fetus became capable of feeling pain, Justice Stevens and Justice Blackmun would have deemed the State's interest compelling at that time.

332. *See Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring); *Webster*, 492 U.S. at 552 (Blackmun, J., concurring in part and dissenting in part with the judgment of the Court, joined by Justice Brennan and Justice Marshall).

333. Forte, *supra* note 10, at 134 n.93.

334. *Thornburgh*, 476 U.S. at 778 (emphasis added).

the State has the progressive right to intervene as the unborn developed the capacity to feel pain."[335] Further, in 1989, other Justices who supported a woman's constitutional right to obtain an abortion including Justice Brennan, Justice Marshall, and Justice Blackmun, the Justice who authored *Roe*, all concurred with Justice Stevens' 1986 assessment that if and when a fetus developed the capacity to feel pain, the State would have the right to intervene if it so chose.[336]

Thus, now that medical evidence is available indicating that in fact a fetus is capable of feeling pain beginning at twenty weeks gestational age,[337] *Roe*'s central rule, marking viability as the critical point at which the State's interest in potential life is compelling enough to ban abortions, is unjustifiable. This is the case because abortion procedures taking place between twenty weeks gestational age, the time at which a fetus has the capacity to feel pain, and viability subject the unborn to a painful demise.[338] In light of this new medical evidence it seems several Justices would concur that *Roe*'s central rule has become unjustifiable.

Thus, because *Roe*'s central holding has been rendered irrelevant and unjustifiable in light of new medical evidence indicating that at viability there is not a realistic chance of survival outside the womb[339] and that unborn child have the capacity to feel pain at twenty weeks of pregnancy,[340] the critical point should be changed to fetal pain. Replacing viability with fetal pain has both logical and biological justifications because it would prevent unborn children from being subjected to painful abortion procedures; therefore, fetal pain is a relevant point in time at which to deem the State's interest in potential life compelling. Similarly, fetal pain is a justifiable point in time at which to hold the State's interest in fetal life compelling because intervention on behalf of the unborn child at that point protects him or her from a painful end. Thus, because *Roe*'s central rule is no longer relevant or justifiable and because a central rule holding fetal pain as the critical point would be both relevant and justifiable, viability should be replaced with fetal pain as the compelling point.

D. Conclusion

Fetal pain, not fetal viability, should be the critical point in time at which the State's interest in potential life is deemed compelling so as to warrant prohibitions on abortions and thus the Supreme Court should revisit *Roe*'s central rule. Under the test set out in *Casey* for revisiting prior precedent,[341] *Roe*'s central rule should be tweaked for four reasons.

335. Forte, *supra* note 10, at 134 n.93.
336. *Webster*, 492 U.S. at 552.
337. 159 CONG. REC. H3730–01 (daily ed. June 18, 2013).
338. *See id.*
339. Forte, *supra* note 10, at 138.
340. 159 CONG. REC. H3730–01 (daily ed. June 18, 2013).
341. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

First, viability is no longer a workable point in time at which to deem the State's interest compelling.[342] Second, the central rule marking viability as the critical point could be tweaked without serious inequity to those who rely on the right to abortion.[343] Third, under the Court's expanded view of the State's interest in fetal life, prohibiting State bans on abortion beginning at twenty weeks gestational age, the time unborn children become capable of feeling pain, is not logical.[344] Finally, in light of new medical evidence, viability is an irrelevant and unjustifiable point in time at which to deem the State's interest compelling.[345] Thus, the Supreme Court should revisit *Roe*'s central rule and replace it with fetal pain, a more workable, logical, relevant, and justifiable point in time at which to deem the State's interest in potential life compelling.

PART V: CONCLUSION

"[V]iability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortion."[346] This central rule announced in *Roe* is in jeopardy in light of new medical evidence indicating that an unborn child can feel pain at a point in time prior to viability.[347] *Roe* has always contained the seeds of its demise by relying on a state of medical knowledge—rather than law, morality, or philosophy—that was bound to change.[348] The latest assault on *Roe* that is represented by these twenty-week bans, which rely heavily on new medical knowledge,[349] may very well succeed in diminishing *Roe* even further.

Shea Leigh Line

342. *See supra* Part IV.C.i (discussing why Roe's central rule is no longer workable and why fetal pain is a more workable point in time at which to deem the State's interest compelling).

343. *See supra* Part IV.C.ii (discussing why changing the critical point to fetal pain would not substantially disrupt reliance on a woman's right to obtain a previability abortion).

344. *See supra* Part IV.C.iii (discussing how the Court has expanded the State's interest in fetal life in both time and scope).

345. *See supra* Part IV.C.iv (discussing why Roe's rule is no longer relevant or justifiable).

346. *Casey*, 505 U.S. at 835–36.

347. *See* 159 CONG. REC. H3730–01 (daily ed. June 18, 2013) (finding that unborn children can feel pain at twenty weeks gestational age); Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014) (finding that viability usually occurs between twenty-three and twenty-four weeks of pregnancy).

348. Roe v. Wade, 410 U.S. 113, 149, 160–61 (1973), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Forte, *supra* note 10, at 123.

349. *See supra* note 7 and accompanying text (listing the states that have enacted twenty-week bans based on substantial medical evidence that unborn child can feel pain beginning at twenty weeks gestational age).