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EFFECTIVENESS OF INCORPORATING
RELIGION-BASED ARGUMENTS INTO THE
PRO-CHOICE PERSPECTIVE ON
ABORTION**

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LIFE, DEATH & THE GOD COMPLEX: THE EFFECTIVENESS OF INCORPORATING RELIGION-BASED ARGUMENTS INTO THE PRO-CHOICE PERSPECTIVE ON ABORTION

Stacy A. Scaldo *

I. Introduction

While speaking on the issue of healthcare in August of 2009, President Barack Obama told a meeting of Jewish rabbis, “We are God’s partners in matters of life and death.”¹ While the President’s message was expressly targeting choices in healthcare and end of life decisions,² the statement is representative of a shift in the public rhetoric reflective of all matters concerning life - including abortion. This, indeed, would be a remarkable change in both express policy and argument identification – one that appears to be a new weapon in the arsenal of those who identify themselves with the pro-choice movement. Historically, public arena based abortion arguments grounded in religious beliefs have been owned and used by traditional conservatives to support the pro-life agenda. However, for what appears to be the first time, the pro-choice movement, led by President Obama’s statements in August 2009, appears to be incorporating, embracing, and relying on God and religion as part of the “choice process.” Due in large part to the changing face of the traditionally pro-life religious communities, a growing population of people who claim to be both religious and pro-choice and the rise of independent, self-service religious practices, the use of God in the abortion debate no longer belongs solely to those that identify themselves as pro-life. These factors, however, are merely a consequence of a pro-choice religious framework initiated by the Supreme Court in *Roe v. Wade*³ and continued through present day abortion jurisprudence. The Court’s religion-based abortion justification have redefined the historical positions, and flipped the use of religious arguments

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¹ Ben Smith, *Rabbis mull ‘God’s Partners’ line*, POLITICO (Aug. 24, 2009, 5:08 PM), http://www.politico.com/blogs/bensmith/0809/Rabbis_mull_Gods_Partners_line.html.

² *Id.* The article notes that President Obama had previously in the conference call quoted from a Jewish prayer, stating “who shall live and who shall die.” *Id.* Present on the call, Rabbi Irwin Kula later noted “[i]f we actually find a way to ensure that there’s universal access to medical care, then we will be God’s partners in matters of life and death.” *Id.*

³ *Roe v. Wade*, 410 U.S. 113 (1973).

both in the law and in popular culture. As such, the pro-life community no longer owns popular religion-based abortion reasoning. Based upon the deepness of this impact, it may never get it back.

The goal of this article is to: (1) examine the causes of this rhetorical shift aimed at incorporating God or religion as a valid part of the “choice process”; (2) assess the current effectiveness of such an inclusion; and (3) discuss the potentially permanent impact this shift will have going forward. The decision by the President was a bold one. But, based upon the last forty years of case law, legal discourse, and societal acquiescence, it may be the argument that solidifies the pro-choice position once and for all.

II. The Use and Effectiveness of Religion-Based Reasoning and Arguments in *Roe*, *Casey*, *Stenberg*, and *Gonzales*.

While it is clear that popular culture will almost universally exploit the religious nature of arguments, and religion-based reasoning as a way to heat up any religiously affiliated debate, it is equally plain that the Court will employ any reasonable, and sometimes unreasonable, means to avoid a decision based on religious grounds or principles. The abortion cases are no exception. In fact, the Court in *Roe v. Wade* took careful measure to ensure the public that the right to abortion would not be determined by religious positions on abortion. In so doing, the Court not only addressed the specific question presented, but also set the standard to which all future abortion cases would adhere. This framework is evident in almost every post-*Roe* Supreme Court abortion case and is expressly so in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴ *Stenberg v. Carhart*⁵ and *Gonzales v. Carhart*⁶. True, the Court does not identify religion as the backbone of its stated reasoning. However, when viewed in a responsorial context, the language of the opinions demonstrates that religion, and religious beliefs about abortion, are at the heart of these decisions.

In order to examine how the Court sets up and tracks the “God’s partners” paradigm, it is important to also explore the relevant amicus curiae briefs filed on behalf of the parties in these four cases. The briefs filed by the religious or religiously affiliated organizations are vital, as they demonstrate telling aspects of the socio-religious status at each phase of the debate and during each time period.⁷ How these religious groups have

⁴ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

⁵ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

⁶ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁷ *Planned Parenthood*, *NARAL*, etc. generally always file Amicus briefs in abortion cases because their very livelihood depends upon it. However, what religious organization files a brief, which side they align themselves with, and what arguments they make, are

influenced Supreme Court decision-making when it comes to issues of abortion is representative of the entire changing abortion debate.

A. Roe v. Wade: Setting the Stage for Pro-Choice Religion-Based Holdings

In *Roe*, the Court was tasked with deciding whether the Constitution supported a woman's right to choose to terminate her pregnancy through abortion.⁸ The Texas law prohibiting abortion except when necessary to save the life of the pregnant woman was challenged by *Roe*, whose desire to abort was not connected to any life threatening condition.⁹ The Court held 7-2, that the Constitution's right to privacy, as recognized in *Griswold v. Connecticut*,¹⁰ included the right to terminate a pregnancy by abortion.¹¹ The Court set up a three stage analysis, and determined that the state's levels of interest in a pregnancy vary depending upon the trimester:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.¹²

In purpose and effect, the court created a sliding scale of autonomy, based upon this trimester framework, acknowledging a women's complete autonomy over the pregnancy during the first trimester and providing varying levels of acceptable state interference as the pregnancy continued

essential components to analyzing the changing abortion rhetoric and its effect on the "God's partners" paradigm.

⁸ *Roe*, 410 U.S. at 116.

⁹ *Id.* at 120. The companion case to *Roe*, *Doe v. Bolton* was filed by a married couple. *Id.* at 121; *Doe v. Bolton*, 410 U.S. 179 (1973). They claimed that the wife was suffering from a disorder that caused her physician to recommend that she not become pregnant. *Roe*, 410 U.S. at 121. The Does claimed that if she should become pregnant, they would wish to terminate the pregnancy. *Id.*

¹⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹¹ *Roe*, 410 U.S. at 153.

¹² *Id.* 164-65.

into the second and third trimesters.

1. The Briefs

Only two amicus curiae briefs on behalf of religiously affiliated groups were filed in the *Roe* case – one in favor of the pro-choice argument and the other in favor of the pro-life argument. The brief in favor of the pro-choice argument was filed on behalf of the following churches or organizations: the American Ethical Union, the American Friends Service Committee, the American Humanist Association, the American Jewish Congress, the Episcopal Diocese of New York, the New York State Council of Churches, the Union of American Hebrew Congregations, the Unitarian Universalist Association, the United Church of Christ and the Board of Christian Social Concerns of the United Methodist Church.¹³ The brief presented two main arguments in favor of finding the statutes at issue unconstitutional: 1) that the abortion laws at issue invaded the right to privacy¹⁴; and 2) that they were an invalid exercise of police power.¹⁵

The facially religious argument is contained within the broader argument as to the improper use of police power.¹⁶ The section's title presumes that the belief that "the product of every conception is sacred" is a religious view. Based upon this viewpoint, the pro-choice amici argued mainly that protecting fetal life based upon the premise that the product of every conception is sacred (a religious view) is violative of the Establishment Clause of the First Amendment. Amici noted that the interest in the fetus stems, in its essence, from a misplaced "'moral' concern for the '*potential* of independent human existence.'"¹⁷ They argued that this moral concern is misplaced if it outweighs a "greater moral outrage: the deep human suffering of adults and children alike, that results from compelling one to continue an unwanted pregnancy, to give birth to an unwanted child, and to assume the burdens of unwanted parenthood."¹⁸ Therefore, because not all people, and not all religions, regard the product

¹³ Motion of American Ethical Union et al. as Amici Curiae in Support of Appellants' Position, with the Proposed Brief Attached, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128051.

¹⁴ *Id.* at 14-20.

¹⁵ *Id.* at 20-34.

¹⁶ *Id.* at 31. Subsection B.3.c. of the brief is titled "The religious view that the product of every conception is sacred may not validly be urged by the States as a justification for limiting the exercise of constitutional liberties, for that would be an establishment of religion." *Id.*

¹⁷ *Id.* (quoting *Doe v. Bolton*, 319 F. Supp. 1048, 1055 (1970)).

¹⁸ Motion of American Ethical Union, et al., *supra* note 13, at 31-32.

of every conception as sacred, a law that prohibits abortion based on the sacredness of the potential life, necessarily chooses and imposes upon its citizens one religion or one set of religious beliefs over another in violation of the Establishment Clause.

The brief in favor of the pro-life argument was filed on behalf of the Association of Texas Diocesan Attorneys.¹⁹ The arguments made in this brief focused on the concept of personhood and the status of a fetus as a person.²⁰ In conformity with that argument, amici claimed:

[N]o federal court can rationally dispose of the issues in this case without confronting and resolving the issue of whether an unborn child is a person under the constitutional concept of the person. It also tells that if the unborn child is a person within the meaning of the Constitution then a state has the right to enact a statute seeking to protect the constitutional right to life of the unborn child providing it has done so in a reasonable way.²¹

The concept of personhood would be the center of the debate in *Roe*. The Court's decision on the issue would set the stage for all future abortion regulation cases.

2. The Decision

As is evident from the opening paragraphs of the opinion, the Court in *Roe* did not expressly look to religion as the basis of the decision. However, the introduction makes clear in both structure and content that religion and religious ideology were key components of the Court's reasoning. Broken into three distinct but overlapping parts, the introduction sets the stage for the holding in *Roe* and its progeny. First, the Court introduced the historical importance of the challenged legislation:

The Texas Statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new

¹⁹ Brief Amicus on Behalf of Association of Texas Diocesan Attorneys, in Support of Appellee, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134282.

²⁰ *See generally id.*

²¹ *Id.* at 48-49.

thinking about an old issue.²²

Next, the Court acknowledged the daunting task that lay ahead:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.²³

Finally, in an effort to demonstrate a principled detachment with regard to a deeply morality-driven issue, the Court noted that its task was "to resolve the issue by constitutional measurement, free from emotion and of predilection."²⁴

The Court did not cite in pertinent part to either of the two amicus briefs cited by the religiously affiliated groups.²⁵ It also facially avoided any reliance on religion in setting forth the framework of the opinion in the introduction. However, it is clear, even from these initial paragraphs, that the pro-choice religious brief had a deep impact on the Court's ruling. In noting the "vigorous opposing views," and the differing philosophies, experiences, religious training, attitudes toward life and moral standards, the Court was foreshadowing a buy-in of the argument made by the pro-choice religious amici – that the sacredness of human life is a distinct,

²² *Roe*, 410 U.S. at 116.

²³ *Id.*

²⁴ *Id.* In so doing, the Court quoted Justice Holmes:

(The Constitution) is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Id. (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905)).

²⁵ It did cite to the Brief of the American Ethical Union, et al., in support of its statement that "organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family." *See id.* at 159 and n.58.

religious concern rather than a universal one.²⁶

Any ruling affording a woman the right to choose abortion, based upon a liberty or privacy interest, must at least in theory demonstrate that one life is entitled to more value than the other. The *Roe* Court was aware of this, and took great measure to mount a preemptive attack on its ruling that would be based on those grounds. Before addressing *Roe*'s specific claim that the Texas statutes violated her liberty and privacy interests, the Court spent approximately twenty-four pages of the fifty-four page opinion in damage control.²⁷ This analysis was two-fold: first, the Court surveyed the history of abortion from a legal, medical and religious perspective; second, the Court examined the purposes and interests of the state in enacting and maintaining criminal abortion laws.²⁸

The purpose of the Court's foray into the historical practices and legal ramifications of abortion was to demonstrate that the laws at issue in the case were "of relatively recent vintage."²⁹ Instead, as the Court noted, these criminal abortion laws did not really begin to surface in mass until the late 19th century.³⁰ This is an important point to have been made from a religious perspective as it responded to a general societal belief that a pro-life stance had always been rooted in and connected to religious doctrine. It also placed the pro-life stance in the context of belonging to the new fundamentalist-based Christian upstarts that had gained momentum in the previous half-century. On several occasions throughout this analysis, the Court made a point of historical religious trends in support of and opposition to abortion. It noted that "[a]ncient religion did not bar abortion,"³¹ and that early Christian theology was inconsistent on the issue.³²

²⁶ See *id.* at 116; see Motion of the American Ethical Union, et al., *supra* note 3 at 31-32. The pro-choice religious amici also cited to Justice Holmes' admonition in *The Common Law* that "moral predilections must not be allowed to influence our minds in settling legal distinctions." Motion of the American Ethical Union, et al., *supra* note 3 at 32.

²⁷ *Roe*, 410 U.S. at 129-53.

²⁸ *Id.*

²⁹ *Id.* at 129.

³⁰ *Id.*

³¹ *Id.* at 130.

³² *Id.* at 134. Up until the 19th Century, Christian theology had come to accept the idea that the point of "mediate animation" occurred by the age of 40 days for males and 80 days for females. *Id.* According to the *Roe* Court, there was agreement that "prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide." *Id.* Due in large part to the lack of evidence to support the "40-80 view,"

After explaining why criminal abortion laws, in large part, did not exist until relatively recently, the Court examined three interests historically proffered by the state to justify its enactment and continued existence: 1) the discouragement of illicit sexual conduct; 2) the protection of the pregnant woman against an unsafe medical procedure; and 3) the protection of prenatal life.³³ The second state interest, that of protecting the pregnant woman against unsafe abortion procedures, was purely a medical interest and the Court's determination as to the value of that interest was medical as well.³⁴ However, the first and third interests – discouraging illicit sexual conduct and protection of fetal life – were flush with religious implications, both in interest of the state and analysis by the Court.

It was acknowledged by the Court that the discouragement of illicit sexual conduct was neither an interest advanced by the state in the case nor was it suggested by amici.³⁵ The Court, however, determined it would be best to address as a first concern the occasional argument “that these laws were the byproduct of a Victorian social concern.”³⁶ If not advanced by the state, and not argued by amici, the reasonable assumption is that the Court was speaking to the public in anticipation of or in reaction to an ongoing argument based upon a particular set of religious and moral principles. This tends to fall in line with the Court's assessment of late 19th century and then current religious attitudes toward abortion. The Court, in essence, was speaking directly to the pro-life religious sector of society and discounting any morally-based anti-abortion stance. The Court concluded, in line with the concessions of the pro-life argument, that the statutes at issue were overbroad in protecting the interest of discouraging illicit sexual conduct as “the law fail[ed] to distinguish between married and unwed mothers.”³⁷

The third interest of protecting prenatal life presented the Court with a different dilemma altogether. The parties to the case, amici, and in some way, the rest of society was asking the Court to make a determination as to when life begins. The Court refused.³⁸ Although acknowledging that

quickenings became the critical point. *Id.*

³³ *Id.* at 147-52.

³⁴ *Id.* at 148-50 (noting that abortion prior to the end of the first trimester is relatively safe, mortality rates for abortion in the first trimester when performed in a legal environment are equivalent to the rates for normal childbirth, the risks to a woman increase as her pregnancy continues, and high mortality rates at illegal “abortion mills” strengthen the state's interest in protecting the woman's health later in the pregnancy).

³⁵ *Id.* at 148.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 150-52.

historical abortion statutes and cases “impliedly repudiate[d] the theory that life begins at conception,”³⁹ the Court carefully searched for middle ground. Instead of a finding on either side, it determined:

A legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point to life [sic] birth. In assessing the State’s interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.⁴⁰

With this one statement, the Court handed both the pro-life and pro-choice communities victory and defeat. For purposes of the opinion and resulting legal framework, this evasion was not only intentional but necessary. To find that life begins at conception would to some extent require an elevation of fetal rights not previously provided. In so doing, the rights of the mother – and by extension, the second interest discussed by the Court in protecting the pregnant woman from submitting to a procedure which could place her life in jeopardy – would become subservient to that of the baby she carries. In weighing the equally competing rights and interests, certain death would trump potentially fatal danger.⁴¹ As a consequence, the equation would be turned on its head. Instead of determining when the interest in potential life is great enough to require a regulation on abortion, the question would ask under what circumstances the interest in the pregnant woman’s life and health require interference with natural fetal development. Even within the terms of maternal life and health, because the mother and child would have equal standing, abortion as it has been defined would not exist.⁴² Death of the fetus would be a consequence of the attempt to save both.

³⁹ *Id.* at 150.

⁴⁰ *Id.* at 150.

⁴¹ *Id.* at 156-57 (noting that if the fetus is considered a “person” within the language and meaning of the Fourteenth Amendment, the fetus’ right to life would be guaranteed and the pro-choice argument would collapse).

⁴² Article 1191 of the Texas Penal Code, the statute at issue in *Roe*, stated:

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By ‘abortion’ is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused.

The Court's finding, however, that the issue could be resolved without determining the status of a fetus beyond that of potential life would have equally far reaching implications. Facially, the Court took religion out of its reasoning. But, in implicitly adopting the argument of the pro-choice religious amici, the Court: 1) determined that the right to privacy included a woman's right to choose to have an abortion; 2) demonstrated that religion and how religious views affect the abortion debate was a noteworthy consideration of its decision; and 3) set the parameters for future religion-based arguments in Supreme Court abortion cases.

First, the 'potential life' determination was essential to the Court's finding that the right to personal privacy includes the abortion decision. As stated above, if life begins at conception, the privacy right cannot extend to abortion as the life of the fetus is of equal status.⁴³ However, by calling the fetus 'potential life,' the Court was able to circumvent the issue of when life begins and expressly avoid the religious 'sanctity of life' argument. As the potential life status impinges on the right to privacy an unqualified attribute, it "must be considered against important state interests in regulation."⁴⁴

Second, in refusing to rule on the exact life status of the fetus, the Court acknowledged how deeply religion and religious beliefs are tied to this debate. In fact, the decision to avoid rendering life status to a fetus was based, in part on the inconsistent religious theories:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.⁴⁵

Further discussion of the differing views of religious groups continued with the Court noting that the predominant Jewish and Protestant positions held to the theory that life does not begin until live birth, that organized religious groups taking a position have regarded it as a matter for the conscience of the pregnant woman and her family, and that the Catholic

⁴³ *Id.* at 157.

⁴⁴ *Id.* at 154 (noting that the right is "subject to some limitations; and that at some point the state interests as to the protection of health, medical standards, and prenatal life become dominant").

⁴⁵ *Id.* at 159.

pro-life stance was a relatively recent one.⁴⁶ As a consequence of these competing theories, the Court summed up its reasons for rejecting the sanctity of life argument by stating that it did “not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”⁴⁷ In making that determination, however, the Court did that very thing. By adopting one theory of life – that a fetus is only a potential life – the Court did not just override the rights of the fetus, it foreclosed the ability for the fetus to have any rights of equal measure that could validly compete with that of the pregnant woman at an early stage of pregnancy.⁴⁸ Instead, the fetus only becomes important if the state can show an interest sufficiently compelling to vie for legitimate state regulation – a situation never present at the beginning stages of a pregnancy. As future cases have noted, this state interest in fetal life is rarely sufficient to override the interests of the woman even at the latest stage of a pregnancy.⁴⁹

The problem, of course, is that choosing the term “potential life” over “life” brings with it some far reaching, possibly unintended consequences. True, the State, on behalf of the potential life, is afforded the opportunity to demonstrate that some level of protection is warranted post-viability. But that the fetus was classified in *Roe* as only a “potential life” coupled with the decision that the interests of the fetus do not potentially become compelling until viability resulted in the Court’s at least implicit finding that the sanctity of human life is not strong enough to compete with the privacy interests of the pregnant woman. Furthermore, even post-viability, fetal rights would still be subject to the will of the pregnant woman as the term “potential” prohibits full protection and acknowledgement of personhood even at the very latest stage of pregnancy. It is this potentiality of life, as opposed to the existence of it, which validates applying the right to privacy to the abortion decision. In essence, by refusing to determine when life begins and by referring to the fetus as “potential life” the Court did in fact answer the question of when life begins. According to the *Roe* Court, life begins at live birth.

With this framework in place, the Court set the parameters of the arguments by religious amici in future abortion cases. In order to obtain

⁴⁶ *Id.* at 160 (citing generally to the Motion of the American Ethical Union, et al.).

⁴⁷ *Id.* at 162.

⁴⁸ *Id.* at 163. According to the Court, the compelling point for triggering the State’s important and legitimate interest in protecting potential life was viability. *Id.* The court drew this line because “the fetus then presumably has the capability of meaningful life outside the mother’s womb.” *Id.*

⁴⁹ See generally *Stenberg*, 530 U.S. 914; *Gonzales*, 550 U.S. 124.

any measure of success, the pro-life proponents would have to convince the Court to reexamine and ultimately change its “potential life” status or enact sufficient lawful regulation to significantly reduce the number of women choosing the exercise of this right.⁵⁰ As demonstrated in *Casey*, any success by the pro-life movement with regard to either of these fronts has worked more to strengthen abortion rights than weaken them.

B. Planned Parenthood of Southeastern Pa. v. Casey: A Wolf in Sheep’s Clothing

In *Planned Parenthood of Southeastern Pa. v. Casey*, the Court was asked to determine the constitutionality of five different sections of a Pennsylvania statute regulating abortion.⁵¹ The Court, for the fifth time in a decade, was also asked to overturn *Roe v. Wade*.⁵² Although split on its

⁵⁰ The success of these endeavors can be viewed as nothing short of relative. The Court has continued to resist regulations based upon a finding that life begins from the moment of conception. However, it has allowed for states to hold an interest in whether pregnancies end in abortion or live birth. For example, in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the Court held unconstitutional an “informed consent” clause in a state regulation in large part because it was “designed not to inform the woman’s consent but rather to persuade her to withhold it altogether.” *Id.* at 444. Acknowledging that “[a] State is not always foreclosed from asserting an interest in whether pregnancies end in abortion or childbirth[.]” *id.* n.3 (citing *Maier v. Roe*, 432 U.S. 464, 474 (1977)), the *Akron* Court found that “the State’s interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman’s informed choice between abortion or childbirth.” *Id.* at 443-44. Distinguishing *Akron*, the Court in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), found legislative findings that “[t]he life of each human being begins at conception,” “[u]nborn children have protectable interests in life, health and well-being,” and that the laws should be interpreted to provide unborn children “all the rights, privileges, and immunities available to other persons, citizens, and residents” of the state acceptable. *Id.* at 504-05. The Court clarified *Akron*, holding that “a State could not ‘justify’ an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State’s view about when life begins. [. . .] The Court has emphasized that *Roe v. Wade* ‘implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.’” *Id.* at 506.

⁵¹ *Casey*, 505 U.S. at 844. The five provisions of the Pennsylvania Abortion Control Act were: §3205, requiring that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; §3206, mandating the informed consent of one parent for a minor to obtain an abortion, but providing a judicial bypass procedure; §3209, requiring that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; §3203, defining a ‘medical emergency’ to excuse compliance with those requirements; and §3207(b), §3214(a), and §3214(f), imposing certain reporting requirements on facilities providing abortion services.

⁵² *Id.*

decision regarding the specific statutory regulations at issue⁵³, a plurality of the Court reaffirmed what it considered to be the central tenets of *Roe*: (1) “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the state”; (2) “the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health”; and (3) the State’s “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”⁵⁴ It departed from the trimester test, determined that it was not part of the essential holding in *Roe*, and found that this trimester framework was not workable as it suffered from two 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.”⁵⁵ In place of the trimester test, the plurality held in favor of an “undue burden” analysis. The Court held that “a law designed to further the State’s interest in fetal life which imposes an undue burden on the woman’s decision before fetal viability” is unconstitutional.⁵⁶ The Court described an “undue burden” as a state regulation that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁵⁷

1. The Briefs

Five amicus curiae briefs by religious or religiously-affiliated groups were filed in the *Casey* case. All five of them were filed by organizations traditionally considered on the pro-life side of the abortion argument. All five argued in favor of either upholding the regulations, overturning *Roe*, or both.

Of the five briefs filed on behalf of the pro-life religious amici, two in particular address the lingering issues of privacy and personhood. The first of these briefs joined together sixteen organizations: Catholics United for Life, Orthodox Christians for Life, National Organization of Episcopalians for Life, Presbyterians Pro-Life, American Baptist Friends of Life, Baptists for Life, Lutherans for Life, WELS Lutherans for Life, United Church of Christ Friends for Life, Disciples for Life, Nazarenes for Life, Task Force of United Methodists on Abortion and Sexuality, Concerned Women for America, the American Center for Law and Justice, the Catholic

⁵³ *Id.* at 879-901

⁵⁴ *Id.* at 846.

⁵⁵ *Id.* at 873.

⁵⁶ *Id.* at 877.

⁵⁷ *Id.* at 877.

League for Religious and Civil Rights, and the Christian Action Council.⁵⁸ The Catholics United for Life (CUFL) brief directed its criticism of *Roe* at the Court's determination that unborn children were not to be considered "persons." CUFL made two main arguments in support of its request to redefine "person" to include those not yet born: 1) the term "person" under the Fifth and Fourteenth Amendments includes all human beings and does not exclude the unborn; and 2) the Court in *Roe* rendered no valid justification for excluding human beings conceived but not yet born from protection as "persons."⁵⁹ According to the CUFL, the erroneous nature of the *Roe* decision hinged on the premise that unborn children were and were to be considered only potential life.⁶⁰ It argued that the Court's decision was inconsistent and arbitrary in its conclusion that personhood requires birth.⁶¹ It also claimed that science, logic, legal consistency and justice called for no distinction between the born and unborn.⁶²

The second pertinent pro-life religion-based amicus curiae brief filed in *Casey* focused on the right to abortion as a faulty extension of the right to privacy. Those signing on to this brief included the United States Catholic Conference, the Christian Life Commission, Southern Baptist Convention, and the National Association of Evangelicals.⁶³ The United States Catholic Conference brief (USCC) argued that the privacy right, as it had been established prior to *Roe*, "consisted of a number of discrete cases protecting either certain private placed, private relationships, or private spheres of life from unwarranted government intrusion."⁶⁴ The USCC distinguished this

⁵⁸ Brief of Catholics United for Life et al. as Amici Curiae in Support of Respondents and Cross-Petitioners, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006411.

⁵⁹ *Id.* at 4-26.

⁶⁰ CUFL made of the Court's acknowledgement in *Roe* that "[i]f this suggestion of personhood is established, the [challengers'] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." *Id.* at 26 (quoting *Roe*, 410 U.S. at 156-57).

⁶¹ *Id.* at 6-11.

⁶² *Id.* at 11-26. Relying on an appeal to logic, CUFL argued:

The total meaningless of birth as a criterion for personhood is more apparent today than ever, when induced, "scheduled" deliveries are commonplace, when babies are removed from the womb for surgery and then replaced within their mothers, and when irremediably harmed mothers are sustained on life support systems solely to await the delivery of the uninjured child within the womb. Birth changes where the person is, not what the person is.

Id. at 18.

⁶³ Brief Amicus Curiae of the United States Catholic Conference, et al. in Support of Respondents and Cross-Petitioners, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006411.

⁶⁴ *Id.* at 11.

general application of privacy from the privacy right *Roe* contemplated:

In considering abortion . . . the calculation is never simply one of individual interests competing with interests of the state. The abortion decision is complex and certainly affects the life interests of others: the unborn child, the father, other members of the family, and society itself. The decision implicates the procreative interests of both partners, affects the integrity of the marriage relationship, and *ends a life* . . . A constitutional right to abortion subjugates liberties that in other contexts are found to be fundamental, but in this context are considered less worthy of protection.⁶⁵

The two noted amicus briefs attempted to overcome the designation of the fetus as merely a potential life. The first group of amici did so by contesting the lack of status afforded to the fetus. The second group attacked the privacy interest afforded to the pregnant woman. These two arguments appear to be separate and distinct. However, they are fully intertwined, each relying on the other for support and validity. Therefore, in order for the Court in *Casey* to address either of these arguments, it would have to address both.

2. The Decision

The first sentence of the opinion states: “Liberty finds no refuge in a jurisprudence of doubt.”⁶⁶ The last sentence concludes: “We invoke [our responsibility] once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.”⁶⁷ It is no coincidence that the *Casey* opinion starts and ends with the word “liberty.” Liberty is the theme of the case. As of 1992, liberty is the theme of the abortion debate.

After introducing the issues in the case, explaining the procedural posture and reaffirming the “essential holding of *Roe*,”⁶⁸ the Court made clear, how important the interest of liberty would be to the outcome of the case:

Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no

⁶⁵ *Id.* at 14 (emphasis in original).

⁶⁶ *Casey*, 505 U.S. at 844.

⁶⁷ *Id.* at 901.

⁶⁸ *Id.* at 844-46.

State shall “deprive any person of life, liberty, or property, without due process of law.” The controlling word in the case before us is “liberty.”⁶⁹

It further explained that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁷⁰ The Court then used this liberty interest framework to combat the arguments in favor of redefining personhood and against privacy as a claimed abortion right.

As set forth in *Roe*, the use of privacy as the anchor of the right to abortion is dependent upon the fetus being considered only a potential life. Liberty, however, is broader and could have the mark of validity even if full personhood status is afforded to the unborn. The idea of liberty in the abortion decision was not a new phenomenon orchestrated by the *Casey* Court. The Court in *Roe* acknowledged the liberty interest present and even contemplated that the pregnant woman cannot be isolated in her privacy.⁷¹ However, although not a new term, the Court’s use of liberty as the main interest to protect is not without importance. In order to fully appreciate the distinction, it is important to be clear about the difference in the meanings of each word – both plain and legal. The words privacy and liberty are more closely related in terms of legal definition than they are in their everyday usage. Liberty and privacy as rights or interests are both autonomous in nature. Privacy is sometimes spoken of as a right contained within the liberty interest.⁷² Despite this, there are some critical distinctions to be made. Black’s Law Dictionary defines “privacy” as “[t]he condition or state of being free from public attention or intrusion into or interference with one’s acts or decisions.”⁷³ “Autonomy privacy” is further defined as “[a]n individual’s right to control his or her personal activities or intimate personal decisions without outside interference, observation, or intrusion.”⁷⁴ Webster’s New World Dictionary defines “privacy” as the quality or state of being apart from the company or observation of others: seclusion.⁷⁵ In comparison, “liberty,” according to Black’s, is “[f]reedom from arbitrary or

⁶⁹ *Id.* at 846.

⁷⁰ *Id.* at 851.

⁷¹ *Roe*, 410 U.S. at 159.

⁷² See AM. JUR. 2D *Constitutional Law* § 614 (2010) (“The right of privacy is implicit in the concept of liberty guaranteed by the U.S. CONST. AMEND. XIV, § 1.”).

⁷³ BLACK’S LAW DICTIONARY 1315 (9th ed. 2009).

⁷⁴ *Id.* The “right to privacy” is defined as “[t]he right to personal autonomy.” *Id.*

⁷⁵ WEBSTER’S NEW WORLD COLLEGE DICTIONARY 1071 (Victoria Neufeldt ed., MacMillan USA 3d ed. 1997) (1951).

undue external restraint, esp[ecially] by a government.”⁷⁶ Webster’s defines “liberty” as “the quality or state of being free.”⁷⁷ While both terms denote a certain level of freedom, although varying, in their simplest terms privacy appears to be mostly used in a *freedom from* context – liberty, a *freedom to*.

Just as the Court in *Roe* included liberty as an interest worthy of protection, the Court in *Casey* did not officially move away from privacy. It did, however, reclaim the right to abortion in a broader context by focusing on the liberty interest present in a woman’s decision as to whether to terminate a pregnancy. Noting that “[w]hat 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[.]” the court acknowledged the inherent flaws in describing an act that necessarily will destroy the being of another as one protected by a right to act in seclusion.⁷⁸ This shift to liberty, even if only rhetorical, set up the undue burden analysis based upon viability, balancing the pregnant woman’s liberty interest in terminating a pregnancy with the State’s important and legitimate interest in potential life.⁷⁹ The effects of applying an undue burden analysis instead of the trimester test are twofold. First, it opened the door for greater regulation previability.⁸⁰ Second, it appears to have reduced the right to choose abortion from a fundamental to

⁷⁶ BLACK’S LAW DICTIONARY 1001 (9th ed. 2009).

⁷⁷ WEBSTER’S NEW WORLD COLLEGE DICTIONARY 778-79 (Victoria Neufeldt ed., MacMillan USA 3d ed. 1997) (1951).

⁷⁸ *Casey*, 505 U.S. at 877. The idea that privacy may not be the most workable standard is a theme illustrated throughout the decision. *See, eg., id.* at 869 (“The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.”).

⁷⁹ *Id.* at 871.

⁸⁰ *Id.* at 872. One of the reasons for moving away from the trimester test was its rigid application with regard to early pregnancy abortion regulation. The Court, in adopting the undue burden analysis, noted the misapplication of *Roe* and also explained why the right to abortion is not one that is unqualified:

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.

Id.

a quasi-fundamental right.⁸¹ These two effects, in turn, work to increase the State's rights in regulating abortion both pre and post viability. Immediate analysis of this shift would favor the pro-life argument. As the *Roe* decision had been interpreted as foreclosing regulation in the first trimester, *Casey* was a win for those pushing for greater protection of the fetus at an early stage of pregnancy.

The undue burden analysis allowed for slightly less flexibility with regard to making the abortion decision throughout all stages of pregnancy. But, basing that analysis on a liberty interest guaranteed that the overall right to abortion would remain. The difference between privacy and liberty, and their respective effects on the personhood of the fetus analysis, is most aptly conveyed in the Court's lead up to the explanation of why the central tenets of *Roe* would be affirmed:

[T]hough the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with the consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That the sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist that she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision

⁸¹ *Id.* at 833. See also Roy G. Spece, Jr., *A Fundamental Constitutional Right of the Monied to "Buy Out Of" Universal Health Care Program Restrictions Versus the Moral Claim of Everyone Else to Decent Health Care: An Unremitting Paradox of Health Care Reform?*, 3 J. Health & Biomedical L. 1, 33 (2007).

has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.⁸²

Couched as a liberty interest, the personhood status of the fetus becomes far less important. While a privacy right could not stand as paramount to the life – not “potential” life – of a fetus, a liberty interest as applied to the abortion decision focuses far more on the freedom that a woman possesses in choosing her own destiny. The Court was not interested in disturbing nineteen years of reliance on that choice:

[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. The 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.⁸³

Therefore, with *Casey*, the question moved from one of existence to one of importance. The *Roe* court could not answer the question of when life begins. The *Casey* court did not seem to be concerned with the question at all.⁸⁴

C. *Stenberg v. Carhart: A Matter of Geography*

When *Stenberg v. Carhart*⁸⁵ came before the Court in 2000, the focus was on the ability of a state to ban the late term intact D&E abortion procedure.⁸⁶ The Court framed the issue as “whether Nebraska’s statute,⁸⁷ making criminal the performance of a ‘partial birth abortion,’ violates the

⁸² *Casey*, 505 U.S. at 852.

⁸³ *Id.* at 856.

⁸⁴ This is not to say that *Casey* disregarded the possibility that the rights of the fetus could ever override those of the pregnant woman. In stressing that viability was the fairest and most consistent line to draw in determining appropriateness of regulations, the Court acknowledged that “[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.” *Id.* at 870.

⁸⁵ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

⁸⁶ *Id.* at 921-22.

⁸⁷ See Neb. Rev. Stat. Ann. § 28-328(1) (Supp. 2000).

Federal Constitution” as interpreted in *Roe* and *Casey*.⁸⁸ The Court ruled that the statute was unconstitutional for “two independent reasons.”⁸⁹ The first reason was that the “law lack[ed] any exception ‘for the preservation of the . . . health of the mother.’”⁹⁰ The second reason was that the statute “‘impose[d] an undue burden on a woman's ability’ to choose a D&E abortion,⁹¹ thereby unduly burdening the right to choose abortion itself.”⁹²

The Court discussed the health exception prong first, intentionally emphasizing that the earlier undue burden test would no longer be the sole arbiter of statutory validity.⁹³ As the Court discussed, this health exception prong applies to more than the ability to choose abortion:

[A] State cannot subject a woman's health to significant risks both in [the context where the pregnancy itself creates a threat to health], and also where state regulations force women to use riskier methods of abortion. Our cases have repeatedly invalidated statutes that in the process of regulating the methods of abortion, imposed significant health risks. They make clear that a risk to a woman's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely.⁹⁴

This decision made clear what was unresolved in *Casey* - the health of the mother stands on its own and is not to be balanced against the interest of the state.⁹⁵

⁸⁸ *Stenberg*, 530 U.S. at 929-30.

⁸⁹ *Id.* at 930.

⁹⁰ *Id.* (quoting *Casey*, 505 U.S. at 880).

⁹¹ In a standard dilation and evacuation (D&E) procedure, the physician reaches into the uterus of the patient and pulls parts of the fetus out, dismembering these parts to be able to remove the fetus. See *Dilation and Extraction for Late Second Trimester Abortion, Presented at the National Abortion Federation Risk Management Seminar*, September 13, 1992, by Martin Haskill, M.D. Numerous passes are made until all of the fetal parts, the placenta and any remaining tissue are completely removed from the uterus. *Id.* In comparison, the dilation and extraction (intact D&E or D&X) procedure is accomplished when “the surgeon grasps and removes a nearly intact fetus through an adequately dilated cervix.” *Id.* Once all but the fetus’ head is delivered, the physician forces tip of a pair of scissors into the base of the skull, separates the scissors to enlarge the opening, and sucks the contents of the skull out with a catheter. *Id.* Once the skull is emptied, the physician delivers the now dead fetus intact. *Id.*

⁹² *Stenberg*, 530 U.S. at 930.

⁹³ *Id.* at 930-39. The Court extended the health exception prong to a previable fetus as well. Justice Breyer noted that because the “law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.” *Id.* at 930.

⁹⁴ *Id.* at 931.

⁹⁵ See *The Supreme Court, 1999 Term Leading Cases-Constitutional Law*, 114 Harv.

Although this case could have been decided by applying only the undue burden test, the Court split the previous test, which incorporated the concerns for the health of the mother in determining whether the state had imposed an undue burden on her choice, into a separate and distinct two-part test.⁹⁶ In deciding that the statute posed an undue burden, the Court held that the statute had the “effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁹⁷ The language of the statute, the Court reasoned, could have been interpreted to apply to the more commonly used D&E procedure as well as intact D&E because the procedures are similar in form.⁹⁸ If this were the case, Nebraska and any other state would have had the opportunity to revise the statutory language and clarify that the ban only covered intact D&E abortions. The Court did not afford the State the opportunity to do this but instead promoted the health exception prong, a test that, based in large part upon the medical authority available at the time, would virtually block any state from creating legislation to stop this procedure.

1. The Briefs

With the constitutionality of the Nebraska partial-birth abortion statute in question and the constitutionality of partial-birth abortion bans hanging in the balance, the pro-choice religious amici retooled their arguments and once again had a measurable effect on Supreme Court abortion litigation. Six amicus curiae briefs were filed on behalf of religious or religiously affiliated institutions in the *Stenberg* case. Only one was filed by those ideologically aligned with the pro-choice movement. However, the single brief joined together fifty-four religious and religiously affiliated organizations as well as fourteen clergy and laypersons (hereinafter “Religious Coalition” brief).⁹⁹ Three main arguments were posited: 1) that the Nebraska partial-birth abortion statute “impermissibly intrudes upon individual decisions about family” which is protected by the Constitution’s right to privacy and religious liberty;¹⁰⁰ 2) that “the variety of religious views about abortion prohibits” the State from legislating in ways that interfere with a woman’s right to choose abortion;¹⁰¹ and 3) that the statute imposes upon both religious and non-religious women an undue

L. Rev. 219, 220 (2000).

⁹⁶ *Id.* at 226-27.

⁹⁷ *Stenberg*, 530 U.S. at 921 (quoting *Casey*, 505 U.S. at 877).

⁹⁸ *Id.* at 939.

⁹⁹ Brief of Amici Curiae Religious Coalition for Reproductive Choice, et al. In Support of Respondent, *Stenberg v. Carhart*, 530 U.S. 914 (No. 99-830), 2000.

¹⁰⁰ *Id.* at 4-9.

¹⁰¹ *Id.* at 9-20.

burden on the right to terminate a pregnancy.¹⁰²

The first argument put forth by the Religious Coalition appears to be an updated version of that made by the pro-choice religious amici in *Roe* – namely that the choice to terminate a pregnancy is an issue of religious freedom, guaranteed by the Establishment and Free Exercise clauses of the Constitution.¹⁰³ Therefore, choosing one view of conscience (or religion, or definition of life) over another impermissibly impedes the exercise of individual conscience.¹⁰⁴ With the *Roe* and *Casey* decisions as arsenal, the Religious Coalition could validly, and constitutionally, mount a pro-choice religious argument. Quoting language from *Roe* and *Casey* that affirmed the individual and unique nature of the abortion decision and its deep connection to religion, spirituality and morality, the Religious Coalition argued that “the Constitution prohibits governmental interference into crucial family decisions for which individuals look to the guidance of religious teachings and individual conscience.”¹⁰⁵ Because of this, and because “reasonable persons of good conscience disagree” as to the appropriateness of abortion, they argued the government must “refrain from imposing one view over all others.”¹⁰⁶

The Religious Coalition’s second argument furthered the overarching concern that Nebraska was choosing and legislating one religious belief over another. They detailed the general, and sometimes specific, doctrines of more than eleven religious faiths and called attention to the diverse teachings and theories among and within these groups.¹⁰⁷

¹⁰² *Id.* at 20-23.

¹⁰³ *Id.* at 6.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 7-8.

¹⁰⁶ *Id.* at 9. Interestingly, the Religious Coalition chose to use the term “sanctity” in concluding that the abortion decision was deemed by the Court, and should remain, a matter of conscience:

This Court has properly respected the need for a woman’s autonomy in making such decisions, which must be made on an individual woman’s circumstances, her own personal or religious conscience, and the best available medical advice. Thus, the Court’s position says that every woman must be free to make decisions about when to have children, according to her own conscience and religious beliefs. Nebraska’s Act, therefore, violates the sanctity of individual decisions about family life protected by both the right of individual privacy and freedom of conscience.

Id. Whether intended or not, the use of the word sanctity within this quote adds a different dimension to debate, one opposite of the often invoked “sanctity of human life” argument by the pro-life proponents.

¹⁰⁷ *Id.* at 9-20.

Arguing that the state had “unconstitutionally imbedded into law certain religious beliefs over others” by choosing to ban a particular form of abortion, the group used *Casey* and *Roe* as setting forth an acknowledgment that liberty includes religious liberty in family planning.¹⁰⁸ In addition to noting that mandates of the statute clashed with many strongly held religious beliefs, the Religious Coalition highlighted the belief that it also interfered with the way in which adherents to particular religious faiths practiced their beliefs.¹⁰⁹ They claimed: “For those for whom abortion may be required by their religion in the case of a threat to their life or health, the Act interferes with their choice. For those whose religion dictates that authentic choice is an ethical necessity, the Act negates the freedom of that choice.”¹¹⁰

The Religious Coalition’s third and final argument addressed the undue burden analysis established in *Casey*.¹¹¹ The group proposed that the statute banning partial-birth abortion would pose an undue burden on a woman’s right to choose abortion in that it would “ban a woman from acting consistently with her religious conscience in making the most personal decision whether to terminate her pregnancy long before viability.”¹¹² In essence, the group argued that the ban interfered with the rights of women to make decisions “in light of their own religious convictions and conscience.”¹¹³

In comparison to the one brief filed by the pro-choice religious amici, five briefs were filed on behalf of various pro-life religious or religiously affiliated institutions.¹¹⁴ Contrary to the arguments of the pro-choice religious amici, the pro-life religious amici briefs avoided patently

¹⁰⁸ *Id.* at 20

¹⁰⁹ *Id.* at 19-20

¹¹⁰ *Id.* at 20

¹¹¹ *Id.* at 20-24.

¹¹² *Id.* at 21.

¹¹³ *Id.* at 22.

¹¹⁴ Brief Amicus Curiae of the Knights of Columbus in Support of Petitioners, *Stenberg v. Carhart*, 530 U.S. 914 (No. 99-830), 2000; Brief of Amici Curiae National Right to Life Committee, et al., in Support of Petitioners, *Stenberg v. Carhart*, 530 U.S. 914 (No. 99-830), 2000; Brief of Agudath Israel of America as Amicus Curiae in Support of the Petitioners, *Stenberg v. Carhart*, 530 U.S. 914 (No. 99-830), 2000; Brief of the American Center for Law & Justice and the Thomas More Center for Law & Justice as Amici Supporting Petitioners, *Stenberg v. Carhart*, 530 U.S. 914 (No. 99-830), 2000; On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (Brief Amicus Curiae of The Family Research Council), *Stenberg v. Carhart*, 530 U.S. 914 (No. 99-830), 2000. The five briefs filed by religious or religiously affiliated institutions make many of the same arguments. For purposes of this analysis, the briefs will be discussed in total and the focus will be on the arguments made among them.

religious arguments. The themes throughout all of these briefs, however, make it clear that the arguments that were posited by the pro-life religious amici have their foundation in the religious doctrines and ideologies of these organizations. Among the five briefs, the recurring arguments could be placed into three main, but interrelated, categories: 1) the right to a partial birth abortion would be the creation of a new right neither provided by nor contemplated in the *Roe* and *Casey* decisions; 2) the statute at issue, which only bans one form of abortion, did not place an undue burden on a woman's right to choose abortion; and 3) the practice of partial birth abortion blurs the line between abortion and infanticide.¹¹⁵

The first main argument surfacing from this group of amicus briefs was that finding a constitutional right to a partial birth abortion would be creating a new right. Amici argued that *Roe* and *Casey* held that a woman has a constitutional right to terminate a pregnancy – not a right to kill a child during birth.¹¹⁶ In other words, “once birth begins, pregnancy is over.”¹¹⁷ They noted a distinction between the right to abortion and the result of an abortion in that the right to terminate a pregnancy, in essence, the right to empty the womb of a fetus, does not include the right to a dead fetus.¹¹⁸ In accordance with this principle, the right to choose does not include the right to choose how.¹¹⁹

The second main argument focused on the undue burden test established in *Casey*. Amici argued that *Casey* guaranteed that there would be a point when the interest of the woman would not override the interest of the state in protecting fetal life.¹²⁰ Relying on the language in *Casey* that a basic flaw of *Roe* was the “undervalue[d] State’s interest in the potential life within the woman,”¹²¹ they continued that banning the practice of partial birth abortion was one such example:

¹¹⁵ See generally *id.*

¹¹⁶ See *id.*

¹¹⁷ Brief Amicus Curiae of the Knights of Columbus, *supra* note 114, at 6-8. The Knights of Columbus brief noted the distinction between pregnancy and partial birth abortion. Pregnancy was defined as “the condition resulting from the fertilized ovum. The existing of the condition beginning at the moment of conception and terminating with the delivery of the child.” *Id.* at 7 (quoting BLACK’S LAW DICTIONARY, 1179 (6th ed. 1990)). Partial birth abortion, argued the Knights of Columbus, “involves inducing childbirth and then killing the living child during the birth process, in the birth canal.” *Id.*

¹¹⁸ Brief of Amici Curiae National Right to Life Committee, et al., *supra* note 114, at 11.

¹¹⁹ *Id.* at 5-7.

¹²⁰ *Id.* at 26-27.

¹²¹ *Id.* (quoting *Casey*, 505 U.S. at 875).

The Nebraska statute does not prohibit termination of any pregnancy that threatens maternal health. It forbids only the killing of a child in the birth canal with specific intent to do so. Moreover, it allows for the use of alternative pregnancy termination techniques, thereby assuring that abortions will always be available for pregnancies that endanger health.¹²²

As such, because the partial birth abortion ban did not prohibit a woman from terminating a pregnancy, it could not be said to pose an undue burden on a woman's ability to have an abortion.

For their third main argument, the pro-life religious amici claimed that the partial birth abortion ban was constitutional as it helped to distinguish abortion from infanticide.¹²³ They distinguished this particular type of abortion from all others and explained that it comes closest to the killing of a born child:

The difference between partial birth abortion and conventional abortion techniques is the evident similarity between the partial birth abortion method and infanticide. Partial birth abortion destroys the human child in a visible, open and explicit way, moments before birth, while conventional abortion methods do not. This explains the different public reaction to it, and why even legislators supportive of legal abortion have voted in large numbers to ban it: All recognize that this abortion method, unlike others, involved killing a child who is in the birth canal, in the process of being born. This renders the procedure indistinguishable from infanticide.¹²⁴

According to these groups, the blurring of the lines between abortion and infanticide are evident when location no longer logically affects the status of fetal rights.¹²⁵ "If the child may be killed either in the womb during pregnancy or in the birth canal during birth, [nothing] prevents the same child from being killed once it is outside the birth canal[.]"¹²⁶ While

¹²² *Id.* at 26.

¹²³ Brief of the Family Research Council, *supra* note 114, at 2-23.

¹²⁴ *Id.* at 8.

¹²⁵ Brief of Amicus Curiae of the Knights of Columbus, *supra* note 114, at 19.

¹²⁶ *Id.* at 19. *But see* Hope Clinic v. Ryan, 195 F.3d 857, 882 (7th Cir. 1999) ("Line drawing is inescapable but the line between feticide and infanticide is birth. Once the baby emerges from the mother's body, no possible concern for the mother's life or health

clinical in presentation, these three arguments contradict the Religious Coalition's contention that religion and religious freedom requires that abortion remain a matter of conscience regardless of the stage of pregnancy or manner of procedure. The pro-life religious amici were intentionally attacking, once again, the determination as to when life begins. By the time *Stenberg* found its way to the Court, however, the questions surrounding privacy, liberty and personhood had turned from the theoretical to the geographical.

2. The Decision

As previously noted, the *Stenberg* Court determined the Nebraska statute was unconstitutional as it 1) lacked an exception for the health of the mother, and 2) posed an undue burden on a woman's right to terminate a pregnancy.¹²⁷ While the interest in the woman's health had always been a concern, *Stenberg* officially elevated this interest beyond a mere factor in weighing the burden to a position that would hold equal value with the undue burden analysis. Finding that a woman's health was not just one factor to be balanced against state interests, the Court explained that the reach of the health exception requirement was applicable to both a woman's ability to carry the pregnancy to term and also the determination as to the safety of particular abortion procedures.¹²⁸ Despite this, it made clear that doctors would not have "'unfettered discretion' in their selection of abortion methods."¹²⁹ A health exception would be required "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health."¹³⁰ Although the Court specifically addressed the lack of a health exception, and requirement in certain circumstances of including one, it concluded "[r]equiring such an exception in this case is no departure from *Casey*, but simply a straightforward application of its holding."¹³¹

The *Stenberg* decision did not address religion. It did not explicitly address the arguments made by the religious or religiously affiliated institutions for either side of the issue. It did, however, frame the issue in the case so as to foreclose contemplation of the arguments posed by the pro-life religious amici. The issue as the Court framed it was whether the

justifies killing the baby.") (Posner, J., dissenting).

¹²⁷ *Stenberg*, 530 U.S. at 930.

¹²⁸ *Id.* at 931.

¹²⁹ *Id.* at 938.

¹³⁰ *Id.* at 938.

¹³¹ *Id.* at 938.

particular statute banning partial-birth abortion was constitutional.¹³² The pro-life religious amici asked the Court to determine whether the right to an abortion included the right to a dead fetus.¹³³ A cursory review of these two questions may lead one to believe that the distinction between the two, if any, is subtle and of no import. A closer look reveals the true effect of the *Casey* decision.

Regardless of how the issue was framed, the resolution of the case would require an analysis of just how far the liberty interest in procuring an abortion could stretch. If the sole interest of the Court was to answer the issue of whether the statute was constitutional, it could have done so simply by applying the undue burden analysis. In fact, it acknowledged that the decision could stand on the undue burden analysis alone.¹³⁴ However, the Court went beyond the express confines of *Casey* and officially raised the consideration of a health exception as a standalone requirement. Whether this was necessary is debatable. *Roe* and *Casey* already included the requirement that a health exception be contained in any such abortion ban post viability.¹³⁵ As the “State’s interest in regulating abortion pre viability is considerably weaker than post viability[,]” extending the health exception requirement to an abortion of a fetus pre viability did not require creating a separate and independent test.¹³⁶ Furthermore, the Court acknowledged that it was engaging in a “straightforward application” of *Casey*.¹³⁷

The liberty interest becomes more important when a valid abortion

¹³² *Id.* at 929-930.

¹³³ Brief of Amici Curiae National Right to Life Committee, et al., *supra* note 114, at 11.

¹³⁴ *Id.* at 930. The Court held that the Nebraska statute was unconstitutional for “at least two independent reasons[,]” one of which was the imposition of an undue burden on the woman’s ability to choose a D&E abortion. *Id.*

¹³⁵ See *Roe*, 410 U.S. at 164-65; *Casey*, 505 U.S. at 878-79. The trimester test in *Roe* allowed for no regulation prior to the end of the first trimester, regulations in the second trimester aimed at “promoting its interest in the health of the mother” and “reasonably related to maternal health[,]” and regulations and even proscription of abortion in the third trimester “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Roe*, 410 U.S. at 164-65. Although *Casey* rejected the rigidity of the trimester approach, it reaffirmed that “subsequent to viability, the State in promoting its interest in the potentiality of human life, may if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Casey*, 505 U.S. at 878-79.

¹³⁶ See *Stenberg*, 530 U.S. at 2609 (“Since the law requires a health exception in order to validate even a post viability abortion regulation, it at a minimum requires the same in respect to pre viability regulation.”).

¹³⁷ *Id.* at 938.

regulation must pass not only the undue burden test but also contain a health exception. If the only hurdle is the undue burden test, a simple redrafting of the statute, where the banned procedure is explicitly described, would cure any overbreadth problem and avoid confusion as to what procedure was actually prohibited. But, at the stage of pregnancy when partial birth abortion is most frequently performed, the undue burden analysis only may not fully support the woman's rights over that state's interest in fetal life. If, however, the test also includes a ban on any prohibition that places the woman's health at risk, the right to an abortion, could, in fact, include the right to a dead fetus. The health exception, as set forth in *Doe v. Bolton*¹³⁸, is quite broad. In determining what may relate to health, the Court in *Doe* found "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient."¹³⁹ Because of the possibility that another abortion method could put a woman's emotional, psychological, familial or other "health" at risk, especially if another method resulted in a live baby, a health of the woman requirement could be the catch-all barricade to prohibition-based abortion regulations. Therefore, despite all of *Casey*'s regulation-friendly language, speaking of a woman's right to choose abortion in terms of a liberty interest essentially foreclosed the state from reasonably prohibiting any of these late term abortions – even one that would require the killing of the fetus as a separate and independent step in the abortion procedure absent "substantial medical authority" to the contrary.¹⁴⁰

D. Gonzales v. Carhart: The Breakdown of Pro-Life Religious Reasoning

Three years after the Court decided *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act of 2003.¹⁴¹ The Act prohibits any physician from "knowingly perform[ing] a partial-birth abortion[.]"¹⁴² Congress included an exception in order to save the life of the pregnant woman.¹⁴³ It did not include an exception for the woman's health. However, responding

¹³⁸ *Doe v. Bolton*, 410 U.S. 179 (1973).

¹³⁹ *Id.* at 192.

¹⁴⁰ In *Casey*, the Court acknowledged the potential that the State's rights could, under certain circumstances be strong enough to preclude a woman from choosing abortion late in the pregnancy. *Casey*, 505 U.S. at _____. It noted: "In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.* The *Stenberg* decision seems to contradict this statement.

¹⁴¹ 18 U.S.C. § 1531 (2003).

¹⁴² *Id.*

¹⁴³ *Id.* § 1531(a).

to the decidedly flawed language and mandates of the Nebraska statute at issue in *Stenberg*, Congress described the method of the banned procedure in greater detail, requiring a specific anatomical landmark stage of delivery and an overt act by the physician in addition to the delivery that kills the fetus.¹⁴⁴

The Court, in *Gonzales v. Carhart*, upheld the Act, distinguished it from the Nebraska statute struck down in *Stenberg*, and determined that it neither imposed an undue burden on a woman's right to choose to have an abortion nor required a health exception.¹⁴⁵ It found that the Act clearly only prohibited one type of abortion, intact D&E, and did not prohibit the D&E procedure where the fetus is removed in parts.¹⁴⁶ The Court distinguished the language of the Act, which explicitly required the fetus to be delivered to an anatomical landmark from the language in the Nebraska statute that required the delivery of a substantial portion of the fetus.¹⁴⁷ While use of "substantial portion" of a fetus could prohibit both the intact D&E and the other D&E procedure, the anatomical landmark requirements limit the procedure to only intact D&E.¹⁴⁸ Also, the Court found the mandate that the physician engage in an additional fatal overt act other than delivery further distinguished the banned procedure from other D&E procedures.¹⁴⁹ Because the Act clearly identified which procedure would be banned, it was not overbroad. Therefore, it did not impose an undue burden on a woman's ability to obtain an abortion at that stage of pregnancy.¹⁵⁰

With regard to the health exception, language that the *Stenberg* court

¹⁴⁴ *Id.* § 1531(b)(1)(A) & (B). The Act states in pertinent part:

(b) As used in this section--

(1) the term "partial-birth abortion" means an abortion in which the person performing the abortion--

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

Id.

¹⁴⁵ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

¹⁴⁶ *Id.* at 152-53.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

all but made a requisite for the constitutionality of any abortion regulation, the Court determined that the lack of a health exception in the Act did not pose an undue burden on the abortion right.¹⁵¹ Based in large part on the reality that medical uncertainty exists as to whether intact D&E is ever the safest abortion method, the Court stated this “medical uncertainty does not foreclose the exercise of legislative power.”¹⁵² It noted the language in *Stenberg* that an abortion regulation must contain an exception for the health of the woman if “substantial medical authority supports the proposition that banning a particular type of procedure could endanger women’s health[,]” but noted that such a “zero tolerance policy would strike down legitimate abortion regulations . . . if some part of the medical community were disinclined to follow the proscription.”¹⁵³ Such a narrow interpretation, the Court claimed, “would leave no margin of error for legislatures to act in the face of medical uncertainty.”¹⁵⁴ As such, because there was medical uncertainty as to whether intact D&E was ever the safest abortion procedure, the Court held that Congress was free to enact legislation banning the procedure without the inclusion of a health exception.¹⁵⁵

1. The Briefs

Once again, only one amicus brief was filed by pro-choice leaning religious or religiously affiliated institutions. The number of groups signing on to the brief dropped, however, to thirty-five.¹⁵⁶ The group did not make

¹⁵¹ *Id.* at 160-65.

¹⁵² *Id.* at 164.

¹⁵³ *Id.* at 166.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 166-67. According the *Gonzales* Court:

Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.

Id.

¹⁵⁶ Motion for Leave to File Brief Amici Curiae in Support of Respondents in Related Case and Brief of Amici Curiae Religious Coalition for Reproductive Choice and Thirty-Four Other Religious and Religiously Affiliated Organizations and Individual Clergy and Theologians in Support of Respondents, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-1382). Amici included: American Jewish Committee, Americans for Religious Liberty, Anti-

any arguments that specifically addressed whether its members were of the opinion that the Act was constitutional. It focused instead on varying positions on abortion among the religious community. It first argued that there had never, in the history of the country, been a “single moral consensus on the issue of reproductive decision-making.”¹⁵⁷ While this appears to suggest that the abortion decision could be viewed as separate from any one particular religious ideology, the group highlighted that the two main principles upon which arguments by religious groups in favor of reproductive freedom rested were, by their very nature, religious.¹⁵⁸ The reproductive freedom arguments, so the group argued, have found their roots in “the sanctity of the life and health of the woman in the face of dangerous and illegal abortion procedures; and this nation’s founding principle of religious freedom and the right to act according to one’s own moral judgment.”¹⁵⁹ The group’s second point was also a consensus argument. It claimed that the varying religious communities were not in agreement as to whether abortion regulations should protect the health of the woman.¹⁶⁰ It noted that “[t]his plurality of religious opinion is a testament to the intensely personal nature of the decision to terminate a pregnancy[.]” and “is an undue government intrusion into a woman’s personal, religious, or moral sphere.”¹⁶¹ Specifically, the group identified the distinct categories of viewpoints among the religious institutions and religious groups. Despite the number of religions and religiously affiliated groups that are opposed to abortion, they acknowledged that many religions support a woman’s right to make reproductive decisions absent interference from the government¹⁶² and that still others support the right to choose abortion where necessary to protect the life or health of the pregnant woman.¹⁶³ With these varying sets of religious principles laid before the

Defamation League, Disciples for Choice, Disciples Justice Action Network, Episcopal Women’s Caucus, Hadassah – the Women’s Zionist Organization of America, Jewish Reconstructionist Federation, Justice and Witness Ministries of the United Church of Christ, Methodist Federation for Social Action, National Council of Jewish Women, The Rabbinical Assembly, Union for Reform Judaism, United Synagogue of Conservative Judaism, and Women of Reform Judaism. *Id.*, App. B. Nineteen additional individual interested parties joined the brief as amici. *Id.*, App. B. The individuals consisted of mainly professors and religious clergy, both active and retired. *Id.*, App. B.

¹⁵⁷ *Id.* at 3.

¹⁵⁸ *Id.* at 4-5.

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.* at 8-22.

¹⁶¹ *Id.* at 8.

¹⁶² *Id.* at 9-12.

¹⁶³ *Id.* at 12-14. In addition to the two arguments noted, amici highlighted examples of religious organizations and individuals who have fought against abortion regulations that risk the health of the woman. *Id.* at 14-20. It also made note of religious democracies in

court, the group identified what appeared to be their main concern with the Act – a lack of religious freedom:

For women of faiths that encourage prayerful consideration of woman's health, or in fact mandate that a woman's health be preserved, the Act's lack of a health exception is religiously intolerable. The Act leaves no room for such women to make highly personal decisions about their health in consultation with their faith and in accordance with their religious values. Rather, the Act legislates *one* moral path as *the* path for all women.¹⁶⁴

The pro-choice religious amici's argument in *Gonzales* reaffirmed the positions taken by pro-choice religious and religiously affiliated institutions in *Roe* and *Stenberg* – that the decision regarding whether to have an abortion is personal, private, and in many ways, religious. It is because of the religious nature of the abortion decision – not despite it – that women should not be regulated out of the opportunity to make that choice.

As had come to be the norm by the time *Gonzales* made its way to the Supreme Court, the number of pro-life religious amici brief filings far exceeded the one brief filed by the pro-choice religious amici. The eight briefs filed included a total of approximately twenty-eight religious or religiously affiliated organizations.¹⁶⁵ However, as was the case with many

different parts of the world that safeguard the health of the woman. *Id.* at 20-22.

¹⁶⁴ *Id.* at 14.

¹⁶⁵ Brief Amicus Curiae of the Family Research Council and Focus on the Family in Support of the Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-1382); Brief of Amici Curiae Pro-Life Legal Defense Fund, Alliance Defense Fund, Christian Legal Society, Christian Medical Association, Concerned Women for America, and National Association of Evangelicals, in Support of Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-1382); Brief of Amici Curiae of the United States Conference of Catholic Bishops and Other Religious Organizations in Support of the Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-1382); Brief of the Thomas More Law Center, the National Pro-Life Alliance, and the Catholic League for Religious and Civil Rights, Amici Curiae, in Support of Petitioner and Urging Reversal of Judgment, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-1382); Brief Amici Curiae of Christian Legal Society, National Association of Evangelicals, Pro-Life Legal Defense Fund, Alliance Defense Fund and Concerned Women for America in Support of Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-1382); Brief of the Thomas More Society, Inc. as Amicus Curiae in Support of Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-1382); Brief of Faith in Action, Institute in Basic Life Principles, international Reapers Foundation, The National Clergy Council and Illinois State Senator David Syverson as Amici Curiae in Support of Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-1382); Motion for Leave to File Brief Amici Curiae Out of Time and Brief of the Christian Medical and Dental Associations and the Catholic Medical Association as

of the pro-life religious amici briefs filed in *Roe*, *Casey* and *Stenberg*, the arguments set forth by these groups were, on the whole, not based on or connected to religious principles.

The main arguments proffered by the pro-life religious amici were that the Partial Birth Abortion Act of 2003, a federal statute, was distinguishable from the Nebraska Act that was the subject of the *Stenberg* case.¹⁶⁶ Some of the briefs focused on the importance of adhering to Congressional fact finding.¹⁶⁷ They made note of the steep Congressional record and delineated intent of the legislature in drafting the statute.¹⁶⁸ They argued based on thorough investigation and comprehensive testimony, Congress' determination that the intact D&E procedure is never medically necessary, is similar to infanticide and that a health exception to the procedure would work to endanger the lives of infants.¹⁶⁹ The groups argued that the congressional and trial court records demonstrated that no health exception was necessary for intact D&E abortions.¹⁷⁰ Along those lines, some briefs further highlighted the distinguishing factors between the two cases, claiming that the federal act should be upheld as a permissible regulation under *Casey*, the federal act explicitly applied only to intact D&E procedures and as such did pose an undue burden, and *Stenberg's* factual findings should not be conflated with its constitutional holdings.¹⁷¹

Most of the pro-life religious amici's arguments were based upon the particular constitutionality of the statute at issue; however, there were some broader arguments. These included requests to reexamine abortion jurisprudence on the whole¹⁷² and that the founding, and relevant document, to examine in determining the legality of abortion is the Declaration of Independence, which is based upon principles of a society formed under the watchful guidance of a Creator.¹⁷³ Along the lines of the infanticide

Amici Curiae in Support of Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-1382).

¹⁶⁶ Family Research Council, *supra* note 165; Pro-Life Legal Defense Fund, *supra* note 165; United States Council of Catholic Bishops, *supra* note 165.

¹⁶⁷ Family Research Council, *supra* note 165; Pro-Life Legal Defense Fund, *supra* note 165.

¹⁶⁸ Family Research Council, *supra* note 165; Pro-Life Legal Defense Fund, *supra* note 165.

¹⁶⁹ Family Research Council, *supra* note 165.

¹⁷⁰ Pro-Life Legal Defense Fund, *supra* note 165; Christian Legal Society, *supra* note 165.

¹⁷¹ Pro-Life Legal Defense Fund, *supra* note 165; United States Conference of Catholic Bishops, *supra* note 165; The Thomas More Society, *supra* note 165; Christian Medical and Dental Association, *supra* note 165.

¹⁷² United States Conference of Catholic Bishops, *supra* note 165.

¹⁷³ Faith and Action, *supra* note 165.

argument previously noted, one brief discussed findings that fetal pain is experienced by infants in the womb, and argued that a ruling that the Act is unconstitutional would cement the availability of abortion on demand.¹⁷⁴

While the pro-choice religious amici, backed by the notion that abortion choice is a matter of religious freedom, requested that the Court maintain the status quo as set forth in *Stenberg*, the pro-life religious amici were seeking an opportunity to distinguish the *Gonzales* case and influence what appeared to be a new, regulation-friendly majority.¹⁷⁵ In line with the briefs filed in the three previously mentioned cases, the religious arguments continued to be proffered to a much greater extent by the groups who align themselves with the pro-choice argument. The groups aligning with the pro-life perspective in large part maintained a clinical, non-religious tone to their arguments.

2. The Decision

Responding to *Stenberg*'s focus on the requirement that an abortion regulation or prohibition include an exception if "substantial medical authority supports the proposition that banning a particular procedure could endanger women's health[,]"¹⁷⁶ and its determination that the Nebraska statute was overbroad,¹⁷⁷ the Court in *Gonzales* went to great pains to demonstrate how Congress appropriately responded to the mandates of the newly delineated partial birth abortion jurisprudence. It plainly demonstrated the differences between the Nebraska statute and the federal Act, acknowledging the federal government's superior record-making capabilities, the benefit to Congress of the *Stenberg* decision in making its findings, and that time had afforded the opportunity for greater examination of the issues.¹⁷⁸ Taking this into consideration, the Court, without trepidation, determined the Act: 1) was not void for vagueness; 2) did not impose an undue burden on a woman's right to choose abortion as the restriction only prohibits the intact D&E procedure, and not the more

¹⁷⁴ Tomas More Law Center, *supra* note 165.

¹⁷⁵ Geoffrey R. Stone, *Our Faith-Based Justices*, the Chicago Tribune (Apr. 30, 2007) (noting how the five justices joining to hold the statute in *Gonzales* constitutional may have been adhering more to their Catholic faith than to the tenets of the law) *see also* Gila Stopler, "A Rank Usurpation of Power" – *The Role of Patriarchal Religion and Culture in the Subordination of Women*, 15 Duke J. Gender L. & Pol'y 365, 392 (2008); Frederick Liu, *The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives*, 117 Yale L.J. 1947, n.56 (2008); Harold P. Southerland, "Love For Sale" – *Sex and the Second American Revolution*, 15 Duke J. Gender L. & Pol'y 49, n.9 (2008).

¹⁷⁶ *Stenberg*, 530 U.S. at 938.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

common second trimester abortion methods; 3) did not require a health exception because substantial medical authority did not suggest the banned procedure was ever medically necessary, given the available abortion procedures considered to be safe alternatives; and 4) could be subject to as-applied challenges but not facial attacks.

The debate as to whether these findings are consistent with the constraints of *Roe*, *Casey* and *Stenberg* has begun and will continue.¹⁷⁹ Regardless, the *Gonzales* decision demonstrates the influence of the latent religion-based reasoning of the previous cases, whose analyses were a result of the arguments proffered in the religious and religiously affiliated amicus curiae briefs. As the Court in *Gonzales* made plain, any decision as to the validity of the Act would have to comport with the third general principle of *Roe*'s essential holding, as reaffirmed in *Casey*: “that the State has legitimate interests from the outset [of a pregnancy] in protecting the health of the woman and the life of the fetus that may become a child.”¹⁸⁰ Although a regulation that places a woman's health in peril would not be upheld, not every regulation, according to *Casey*, must be designed with the woman's health in mind. As such, the Court in *Gonzales* interpreted the third principle of *Roe*'s essential holding as it applied to the Act in terms of the Government's interest in fetal life.¹⁸¹ It stated that the proper question was “whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.”¹⁸² Observing that the central premise of the Court's holding in *Casey* “was that [its] precedents after *Roe* had ‘undervalue[d] the State's interest in potential life[,]’” it reasoned that an act that bans abortions involving partial delivery of a living fetus furthers that State interest.¹⁸³ The Court stated:

Congress could [] conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify

¹⁷⁹ See generally Samuel W. Calhoun, “*Partial-Birth Abortion*” Is Not Abortion: *Carhart II*'s Fundamental Misapplication of *Roe*, 79 Miss. L.J. (2010); Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 Wash. & Lee L. Rev. 915 (2010); Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 Colum. L. Rev. 1193 (2010); Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 Minn. L. Rev. 1997 (2010); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 Duke J. Gender L. & Pol'y 223 (2009); Ronald Turner, *Gonzales v. Carhart and the Court's “Women's Regret” Rationale*, 43 Wake Forest L. Rev. 1 (2008).

¹⁸⁰ *Gonzales*, 550 U.S. at 145 (quoting *Casey*, 505 U.S. at 846).

¹⁸¹ *Gonzales*, 550 U.S. at 146.

¹⁸² *Id.* at 146.

¹⁸³ *Id.* at 157.

a special prohibition. Congress determined that the abortion methods it proscribed had a “disturbing similarity to the killing of a newborn infant” . . . and thus it was concerned with ‘draw[ing] a bright line that clearly distinguishes abortion and infanticide.’¹⁸⁴

While it is clear that Congress had an interest in preventing a procedure that blurs the lines between abortion and infanticide, it is unclear whose interest Congress was attempting to protect. For example, it also took interest in the effects the procedure had on the medical community:

Partial-birth abortion . . . confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts 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 the that life.¹⁸⁵

It is difficult to see how an interest in fetal life was a concern of Congress or the Court when the regulation stops not one abortion.¹⁸⁶ It only prohibits a certain abortion procedure in particular circumstances. Moreover, the difference in geography that the fetus finds himself or herself in at the time of the killing is really of no consequence to the furtherance of fetal interests. Consequently, the paramount interest in banning the partial-birth abortion procedure appears to be the protection of everyone but the fetus: the medical community who would be permitted to perform the procedure, the woman who would have to reconcile the way in which her abortion is performed, and the members of society at large who are uncomfortable with sanctioning this type of procedure.

The ability to call an anatomical landmark analysis the furtherance of the Government’s interest in fetal life is the direct result of *Roe*’s inability to grant personhood status to a fetus, regardless of the stage of pregnancy, coupled with *Casey*’s rhetorical switch to liberty as the foundational interest for the abortion right. A fetus does not have the right

¹⁸⁴ *Id.* at 158 (quoting Congressional Findings 14(L) & (G)).

¹⁸⁵ *Gonzales*, 550 U.S. at 157 (quoting Congressional Finding 14(J)).

¹⁸⁶ *See id.* at 181 (Ginsburg, J., dissenting) (claiming that the Act scarcely furthers the legitimate interest of the Government in protecting fetal life as it “saves not a single fetus from destruction, for it targets only a method of performing abortion”); *see also Stenberg*, 530 U.S. at 930 (Ginsburg, J., concurring) (the Nebraska law “does not directly further an interest in the potentiality of human life by saving the fetus in question from destruction, as it regulates only a method of performing abortion”).

not to be killed until it is sufficiently outside of the woman's body such that it could be labeled a person under the law. The fetus' ultimate fate is not different whether the abortion is performed through the intact D&E partial-birth or the standard D&E method. If the purpose of an abortion is not an empty womb but a dead baby, that Government's interest in protecting fetal life is not served through the Act.¹⁸⁷

For evidence of how the pro-choice religion-based reasoning has neutered the Court's ability to provide any valid protection for the Government's interests in fetal life, even during the later stages of pregnancy, one need only look to its discussion of anatomical landmarks and scienter required to violate the Act. With regard to the position of the fetus at the time of the killing, in order to violate the Act, the physician must:

deliberately and intentionally vaginally deliver[] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.¹⁸⁸

After the partial delivery, the physician must "perform[] the overt act, other than completion of delivery, that kills the partially delivered living fetus."¹⁸⁹ The physician must pull the fetus out past the anatomical landmark with the intention of killing the fetus with a separate overt act and then actually do so in order for the procedure to be subject to the Act.¹⁹⁰ Therefore, if the fetus is dismembered before it is removed from the womb, if the physician collapses its skull and evacuates the contents of its head prior to the fetus reaching an anatomical landmark, or if a full partial birth abortion is performed by mistake, the Act is not violated. In the case of any of these three examples, the fetus ultimately is subject to no better fate than if a traditional Act-violating partial-birth abortion is performed. The only difference is that in a traditional Act-violating partial-birth abortion, the fetus could, by the process of birth, come dangerously close to legal personhood.¹⁹¹

¹⁸⁷

¹⁸⁸ § 1531(b)(1)(A).

¹⁸⁹ § 1531(b)(1)(B).

¹⁹⁰ *See id.*

¹⁹¹ *See* Family Research Council Brief, *supra* note 165 at 18 n.29. The Family

Further evidence of the Court's ill-fated attempt to reconcile interests of liberty and fetal life can be found in its reliance on the infanticide argument as the basis for preventing the intact D&E procedure. The Court's reasoning switches from the Government's interest in prohibiting the procedure to a more general interest in abortion regulation. It states first that "[n]o one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life."¹⁹² Then, after including D&E along with intact D&E as an infanticide-esque procedure, the Court moves to its now infamous "women's regret rationale" and claims:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.¹⁹³

This paragraph on women's regret demonstrates both the desire of the Court to distance itself from previous abortion jurisprudence and the inability to do so. Knowing that its decision was limited to whether the Partial-Birth Abortion Act was constitutional, it then had to find a way to sufficiently distinguish the procedure from the D&E procedure that it had just described as a devaluation of human life. It acknowledged that the D&E procedure could be considered as brutal, if not more brutal than the intact D&E procedure.¹⁹⁴ It distinguished the two procedures by highlighting the geographic parameters of each procedure – a D&E procedure occurs while the fetus is still inside the mother; a intact D&E procedure occurs when the fetus is partially outside the mother.¹⁹⁵ It then concluded that "[i]t was reasonable for Congress to think that partial-birth

Research Council argued that the issue of when life begins is actually irrelevant in light of the fact that Congress and Courts have determined in numerous other situations that life begins at conception. *Id.* The group highlighted the Unborn Victims of Violence Act, which it claimed "effectively holds that as to the whole work save for the pregnant woman and those cooperating with her in her voluntary abortion, persons deserving the equal protection of laws against killing begin at conception." *Id.*

¹⁹² *Gonzales*, 550 U.S. at 158.

¹⁹³ *Id.* at 159.

¹⁹⁴ *Id.* at 160.

¹⁹⁵ *Id.* at 160.

abortion, more than standard D&E, ‘undermines the public’s perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.’¹⁹⁶ Again, the Government’s interest seems to be focused more on protecting those that are aware of the procedure – not those that are the subject of the procedure.

Of importance is the fact that the Court only refers to the fetus as “potential life” when either quoting from a previous case or describing the confines of a previous holding.¹⁹⁷ Otherwise, the fetus is described in a variety of ways including “human life,” “infant life,” and “life.”¹⁹⁸ But this is the ultimate evidence of the *Casey* effect. Even an infant in the process of being born is still subordinate to the liberty interests of the woman in her choice to abort. It is true that the Court in *Gonzales* maintains, at least by way of not directly changing its status, that the fetus is potential life. But it cannot ignore the fact that the partial-birth abortion process is the closest that potential life can come to becoming a person entitled to Fourteenth Amendment protection. With the liberty interest of the woman maintaining a paramount position, the Partial-Birth Abortion Act, even though held constitutional, guarantees that the right to an abortion includes the right to a dead fetus. Therefore, abortion jurisprudence, as a result of its initial reliance upon the pro-choice religious and religiously affiliated amici has rendered even partial-birth abortion prohibitions without any bite.¹⁹⁹

¹⁹⁶ *Id.* at 160.

¹⁹⁷ *Id.* at 146, 158.

¹⁹⁸ *Id.* at 145, 157, 158, 159, 160, 164.

¹⁹⁹ It is important to note that although the *Roe* Court could not decide when life begins, it clearly did not intend to extend lack of personhood to a fetus in the process of being born. *Roe*, 410 U.S. at 118 n.1. The distinction was acknowledged in *Roe* when the court stated that the Texas parturition statute which disallowed the killing of a child “in a state of being born and before actual birth” was not under attack. *Id.* It seems, however, that the subsequent abortion cases have done just that. If a fetus in the process of being born is entitled to Fourteenth Amendment protection, the not the health or even the life of the woman could override the fetus’ right to exist. This, of course, is clearly not what the partial-birth abortion statutes contemplate or protect. Furthermore, it could be argued that *Gonzales*, even though it appears to have restricted abortion procedures, has affirmed the idea of abortion on demand. The intact D&E procedure prohibited by the Act is still allowed if the woman’s life is in danger. As the pregnancy continues, the standard D&E procedure becomes more dangerous due to the number of passes a physician has to make, the size and durability of fetal parts, and the sheer volume of fetal material that would need to be evacuated. Protecting or saving the life of the pregnant woman is a common reason for late term abortions. If the later the abortion, the greater the threat, all late term abortions could fall under the category of the life-threatening and thus be entitled to protection.

E. The Varying Faces of Religion-Based Abortion Beliefs

The Amicus Briefs of the religious and religiously affiliated organizations demonstrate that positions on abortion do not necessarily fall along traditional religious lines. Institutional positions, however, do not fully explain the development of the “God’s partners in matters of life and death” philosophy. It is instead both a combination and a comparison of the institutional religious positions on abortion and the independent positions of those that are members of each respective religion, whose beliefs about abortion may or may not be connected to religious ideology at all.

1. Where the Churches Stand

As part of its U.S. Religious Landscape Survey, The Pew Forum on Religion & Public Life recently provided a breakdown of religious groups’ official positions on abortion.²⁰⁰ The beliefs of these organizations can be separated into five main categories: those that fully oppose abortion; those that generally oppose abortion except under certain circumstances; those that generally support abortion rights except under certain circumstances; those that fully support abortion rights; and those that have no official position on the matter.

The Catholic Church is the only religious institution that fully opposes abortion. As part of its position, the United States Conference on Catholic Bishops has stated that “the only moral norm needed to understand the Church’s opposition to abortion is the principle that *each and every human life has inherent dignity, and thus must be treated with the respect due to a human person.*”²⁰¹

There are nine religious institutions that generally oppose abortion except under certain circumstances. These include the Church of Jesus Christ of Latter-day Saints (Mormon Church), the Episcopal Church, the Evangelical Lutheran Church in America, Hinduism, Islam, Judaism, the Lutheran Church-Missouri Synod, the National Association of Evangelicals,

²⁰⁰ *Religious Groups’ Official Positions on Abortion*, The Pew Forum on Religion & Public Life (Sept. 30, 2008), <http://pewforum.org/Abortion/Religious-Groups-Official-Positions-on-Abortion.aspx>.

²⁰¹ United States Conference of Catholic Bishops, Secretariat for Pro-Life Activities, *Respect for Unborn Human Life: The Church’s Constant Teaching*, available at <http://www.usccb.org/prolife/issues/abortion/index.shtml> (August 29, 2008); see also United States Conference of Catholic Bishops, *Catholic Church is a Pro-Life Church*, <http://www.usccb.org/prolife/issues/abortion/teaching.shtml>.

and the Southern Baptist Convention.²⁰² The Church of Jesus Christ of Latter-day Saints considers exceptional circumstances surrounding abortion, including rape, incest, if the health or life of the mother is at stake, and cases of fetal abnormalities incompatible with life.²⁰³ Even in these cases, however, the Church does not justify abortion outright.²⁰⁴ The Episcopal Church condones abortion in cases of rape, incest, a risk to the mother's physical or mental health, or in cases of fetal abnormalities but forbids abortion as a means of birth control, sex selection, family planning or convenience.²⁰⁵ Despite its belief in the sanctity of human life, the Church is opposed to any legislative, executive or judicial action "that abridges the right of a woman to reach an informed decision about the termination of pregnancy or that would limit the access of a woman to safe means of acting on her decision."²⁰⁶ The Evangelical Lutheran Church in America takes the position that prior to viability, abortion should not be prohibited by law or lack of public funding if the mother's life is threatened, if the pregnancy is the result of rape or incest, and where the fetus has abnormalities incompatible with life.²⁰⁷ The Church supports prohibitive regulations on abortion after viability unless the mother's life is threatened or if the fetus has abnormalities incompatible with life.²⁰⁸ In the Hindu religion, the correct path is the one that will do the least harm.²⁰⁹ As such, Hinduism opposed abortion except in circumstances where the mother's health is at risk.²¹⁰ In Islam, abortion is permissible up to four months gestation in cases of rape or if a mother's life is in danger.²¹¹ Although there is some debate as to the actual time marker, after four months, abortion is generally not permissible as the fetus is at that point thought to

²⁰² *Religious Groups' Official Positions on Abortion*, *supra* note 200.

²⁰³ The Church of Jesus Christ of Latter-day Saints, Gospel Library, Gospel Topics, Abortion, http://lds.org/ldsorg/v/index.jsp?locale=0&sourceId=63c139b439c98010VgnVCM1000004d82620a___&vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD.

²⁰⁴ *Id.*

²⁰⁵ General Convention, *Journal of the General Convention of...The Episcopal Church, Indianapolis, 1994* (New York: General Convention, 1995), pp. 323-25.

²⁰⁶ *Id.*

²⁰⁷ Evangelical Lutheran Church in America, A Social Statement on: Abortion (August 28-September 4, 1991) *available at* <http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/Abortion.aspx#top3>.

²⁰⁸ *Id.*

²⁰⁹ Hinduism and Abortion, BBC – Religions – Hinduism: Abortion, (last updated August 25, 2009), *available at* http://www.bbc.co.uk/religion/religions/hinduism/hinduethics/abortion_1.shtml.

²¹⁰ *Id.*

²¹¹ Sanctity of Human Life, Islamic Teaching on Abortion, (last updated Sept. 7, 2009) *available at* http://www.bbc.co.uk/religion/religions/islam/islamethics/abortion_1.shtml

be a living soul.²¹² Islam allows an abortion to save the mother's life because, even though there is a very high priority given to the sanctity of life, abortion in those cases would be the lesser of two evils.²¹³ In the Jewish religion, the abortion position is in large part dependent upon the denomination.²¹⁴ But, according to some scholars, "[j]ewish law not only permits, but in some circumstances *requires* abortion. Where the mother's life is in jeopardy because of the unborn child, abortion is mandatory."²¹⁵ The Lutheran Church-Missouri Synod takes the position that because "abortion takes a human life, it is not a moral option except to prevent the death of another person, the mother."²¹⁶ The National Association of Evangelicals, which is comprised of approximately thirty-nine different Christian-based denominations, opposed abortion except in the circumstances of risk to the life or health of the mother, rape or incest.²¹⁷ The Southern Baptist Convention, which is the largest Protestant organization in America, permits abortion in cases where the life of the mother is in danger.²¹⁸

There are three religious organizations that generally support abortion rights but condemn abortion in certain excepted circumstances. The American Baptist Churches in the U.S.A., not to be confused with the Southern Baptist Convention whose position is stated in the previous category, supports abortion except when used as a primary means of birth control.²¹⁹ The Presbyterian Church (U.S.A) does not condemn abortion

²¹² *Id.*

²¹³ *Id.* Reasons for abortion being the lesser of two evils include: that "the mother is the originator of the foetus"; that "the mother's life is well-established"; that "the mother has with duties and responsibilities"; that "the mother is part of a family"; and that "allowing the mother to die would also kill the foetus in most cases." *Id.*

²¹⁴ Daniel Eisenberg, *Abortion in Jewish Law*, available at <http://www.aish.com/print/?contentID=48954946§ion=/ci/sam>. "While there is debate among Rabbis whether abortion is a Biblical or Rabbinical prohibition, all agree on the fundamental concept that . . . abortion is only permitted to protect the life of the mother or in other extraordinary situations. Jewish law does not sanction abortion on demand without a pressing reason." *Id.*

²¹⁵ Tracey R. Rich, *Kosher Sex, Jewish Attitudes Toward Sexuality*, Judaism 101, available at <http://www.jewfaq.org/sex.htm>.

²¹⁶ The Lutheran Church – Missouri Synod, Belief and Practice, *What About Abortion*, available at http://www.lcms.org/graphics/assets/media/LCMS/wa_abortion.pdf.

²¹⁷ Abortion 1973, www.nea.net (last visited Feb. 27, 2011).

²¹⁸ Southern Baptist Convention Resolutions on Abortion, available at <http://www.johnstonarchive.net/baptist/sbcabres.html> (last updated Nov. 7, 2010).

²¹⁹ American Baptist Resolution Concerning Abortion and Ministry in the Local Church, 8006.5:12/87, available at www.abc-usa.org. The Resolution states "As American Baptists we oppose abortion as a means of avoiding responsibility for conception, as a primary means of birth control, without regard for the far-reaching consequences of the act."

outright, believing it is a personal decision.²²⁰ However, the Church disapproves of abortion as a method of birth control or convenience.²²¹ The United Methodist Church opposed abortion as a means of gender selection or birth control.²²² The Church also opposes the intact D&E procedure, except in circumstances where the life of the mother is at risk, no alternative procedures exists, or in the case of fetal abnormalities compatible with life.²²³

The final two categories of religious institutions are those that fully support the right to have an abortion and those that have no official position on the matter. The Unitarian Universalist Association of Congregations²²⁴ and the United Church of Christ²²⁵ fully support abortion rights. Buddhism has taken no official position.²²⁶

The official positions of the institutions noted above have for the most part remained from *Roe* to *Gonzales*. The statements of the different

Id.

²²⁰ Presbyterian Church (U.S.A.), *Presbyterian 101: Abortion Issues*, available at <http://gamc.pcusa.org/ministries/101/abortion-issues/>.

²²¹ *Id.*

²²² United Methodist Church, *Abortion*, available at <http://archives.umc.org/interior.asp?mid=1732>.

²²³ *Id.*

²²⁴ Right to Choose, 1987 General Resolution (June 3, 2010), <http://www.uua.org/php/template/printer.php>. The Unitarian Universalist Association's statement provides "the inherent worth and dignity of every person, the right of individual conscience, and respect for human life are inalienable rights due every person; and that the personal right to choose in regard to contraception and abortion is an important aspect of these rights," and supports the right to abortion as legitimate aspects of the right to privacy.

Id.

²²⁵ *Reproductive Health and Justice, Why the UCC is a Leader in this Area*, http://www.ucc.org/justice/advocacy_resources/pdfs/reproductive-health-and-justice/reproductive-health-and-justice.pdf. In affirming the position of the United Church of Christ that "access to safe and legal abortion is consistent with a woman's right to follow her own faiths and beliefs in determining when and if she should have children," the Church stated:

God has given us life, and life is sacred and good. God has also given us the responsibility to make decisions which reflect a reverence for life in circumstances when conflicting realities are present. Jesus affirmed women as full partners in the faith, capable of making decisions that affect their lives.

Id.

²²⁶ Buddhism and Abortion, BBC (November 23, 2009), <http://www.bbc.co.uk/religion/religions/buddhism/buddhistethics/abortion.shtml>. While traditional Buddhism rejects abortion because it involves the deliberate destruction of a life, most Western and Japanese Buddhists believe in the permissibility of abortion. *Id.* However, the religion has taken no official stance on the issue.

churches also tend to focus on the respective group's belief as to the performance of the procedure, at what stages and under what circumstances the church finds abortion acceptable.²²⁷ While they imply certain legal and political alignment on the issue, the churches' focal points tend to be based upon the religious, social and emotional.²²⁸ These ideological stances, even if not coupled with an explicit statement about the appropriateness of state regulation, paved the way for the rash of religiously affiliated groups to lobby the Supreme Court on these issues.

As has been previously noted, most of the religious amicus curiae briefs filed in these four cases were joined by religiously affiliated organizations – not the official churches. In many of those filings, the religiously affiliated groups presented abortion positions at least slightly distinguishable from their host religions. In some cases, separate groups descending from the same host religion filed or joined briefs on opposing sides of each other. These deviations signify a splintering within the churches regarding both ideological beliefs and the importance of adhering to church doctrine which can be best explained by examining the views not of the churches but their parishioners.

2. Where the Parish Stands

A corollary component of the religious institutions' abortion positions examined by the Pew Forum on Religion & Public Life focused on abortion views categorized by religious affiliation.²²⁹ Generally, the study found, "individuals exhibiting high levels of religious commitment are much more likely to oppose legalized abortion in all or most cases than those who are less-observant."²³⁰ When calculated based solely on religious affiliation, without regard to the level of commitment to the chosen faith, the percentages often deviate from religious teaching.²³¹ For example, the Catholic Church takes the most hard line stance against abortion, arguing that there are no exceptions to the sanctity of life.²³² However, 48% of

²²⁷ *Religious Groups' Official Positions on Abortion*, *supra* note 200

²²⁸ *Id.*

²²⁹ *Abortion Views by Religious Affiliation*, The Pew Forum on Religion & Public Life (Jan. 15 2009), <http://pewforum.org/Abortion/Abortion-Views-by-Religious-Affiliation.aspx?print=true>.

²³⁰ *Id.* Among Americans who feel abortion should be illegal or all or most cases, 61% attend church weekly or more, 56% say religion is very important, 53% pray at least daily and 54% have an absolutely certain belief in a personal God. *Id.*

²³¹ See *Abortion Views by Religious Affiliation*, *supra* note 229; *Religious Groups' Official Positions on Abortion*, *supra* note 200.

²³² *Religious Groups' Official Positions on Abortion*, *supra* note 200.

Catholics believe abortion should be legal in all or most cases.²³³ Islam accepts abortion up to four months but only if the mother's life is at risk or in cases of rape.²³⁴ However, 48% of Muslims believe abortion should be legal in all or most cases.²³⁵ While the Evangelical churches oppose abortion except in cases of life or health risks to the mother, incest or rape,²³⁶ 33% of Evangelical parishioners are in favor of abortion in all or most cases.²³⁷ Finally, the Hindu religion accepts abortion only if the mother's health is at risk.²³⁸ But, 69% of Hindus support the right to abortion in all or most circumstances.²³⁹

There are two apparent exceptions to these variances. First, those religions that either impose or promote a higher level of commitment among parishioners tend to have parishioners who, on an individual level, adhere to the teachings of those religions.²⁴⁰ Jehovah's Witnesses, for example, support abortion rights in all or most circumstances at a rate of only 16%.²⁴¹ Also, Mormons, whose religion teaches that there is no outright justification for abortion although there may be exceptions for the life or health of the mother, rape, incest or fetal abnormalities,²⁴² believe at a rate of only 23% that abortion should be legal in all or most cases.²⁴³ Second, the religions whose stances on abortion can be considered mainstream to more liberal tend to have little deviation among parishioners.²⁴⁴ The Jewish religion is divided among denominations on the issue of abortion.²⁴⁵ However, Jewish teaching allows for, and in some circumstances requires a woman to get an abortion.²⁴⁶ Along those lines, 84% of Jews believe in the right to abortion in all or most cases.²⁴⁷ Also, Unitarians and other liberal faiths have fully supportive positions on abortion.²⁴⁸ Their followers support abortion in all or most cases by

²³³ *Abortion Views by Religious Affiliation*, supra note 229.

²³⁴ *Religious Groups' Official Positions on Abortion*, supra note 200.

²³⁵ *Abortion Views by Religious Affiliation*, supra note 229.

²³⁶ *Religious Groups' Official Positions on Abortion*, supra note 200.

²³⁷ *Abortion Views by Religious Affiliation*, supra note 229.

²³⁸ *Religious Groups' Official Positions on Abortion*, supra note 200.

²³⁹ *Abortion Views by Religious Affiliation*, supra note 229.

²⁴⁰ *Id.*

²⁴¹ *Abortion Views by Religious Affiliation*, supra note 229.

²⁴² *Religious Groups' Official Positions on Abortion*, supra note 200.

²⁴³ *Abortion Views by Religious Affiliation*, supra note 229.

²⁴⁴ *Id.*

²⁴⁵ *Religious Groups' Official Positions on Abortion*, supra note 200.

²⁴⁶ Tracey R. Rich, *Kosher Sex, Jewish Attitudes Toward Sexuality*, Judaism 101, available at <http://www.jewfaq.org/sex.htm>.

²⁴⁷ *Abortion Views by Religious Affiliation*, supra note 229.

²⁴⁸ *Religious Groups' Official Positions on Abortion*, supra note 200.

77%.²⁴⁹ As one final example, the mainline Protestant churches generally support abortion except in cases of convenience, birth control, family planning, etc.²⁵⁰ In line with those principles, 62% of the parishioners at those churches support abortion rights in all or most circumstances.²⁵¹

The importance of these deviations from strict religious abortion doctrine is telling in light of the following statistics regarding the overall population. According to the Pew Forum, while as many as 74% of people believe there is a Heaven, only 59% of people believe there is a Hell.²⁵² Further, 71% of people are absolutely certain that God exists, compared to only 56% of people that say religion is very important to their lives.²⁵³ In terms of interpretation of scripture and religious teachings, only 33% of people believe the Word of God is literally true, word for word and only 27% of people believe there is only one true way to interpret the teachings of their religion.²⁵⁴ Finally, only 24% of people believe their religion is the one true faith leading to eternal life.²⁵⁵ One thing is clear from these statistics, at least with regard to abortion views. Except for religious communities that tend to be more culturally cloistered, Americans are far more inclined to follow church doctrine if it comports with their personal sense of liberty – an interest that has been constitutionally provided and reaffirmed by the Court.

F. “God’s Partners”: The Fusion of Law and Religion Regarding Individual Positions on Abortion and its Current and Future Effects on the Pro-Life and Pro-Choice Movements

With the Supreme Court decisions holding to liberty as the hallmark of abortion rights, and the religious population in America adhering more to the Court’s view of life than the position of their own religions, the “partners with God” paradigm is set in place. The public has moved from aligning with a particular religion and following the mandates of that religion, to marginalizing the religious institution in order to “focus on the individual search for private meaning and self-realization through religion.”²⁵⁶ Rebecca French has described what she calls “grocery cart religion.”²⁵⁷

²⁴⁹ *Abortion Views by Religious Affiliation*, supra note 229.

²⁵⁰ *Religious Groups’ Official Positions on Abortion*, supra note 200.

²⁵¹ *Abortion Views by Religious Affiliation*, supra note 229.

²⁵² The Pew Forum on Religion & Public Life, Maps, Religious Beliefs and Practices, <http://religions.pewforum.org/maps>.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Rebecca French, *Shopping for Religion: The Change in Everyday Religious*

This consists of “a personal brand of religion not based in the self . . . but in personal choice. An individual assembles her own bricolage religion after filling a grocery cart with pieces from several different types of religious practice.”²⁵⁸ This type of practice “has only the rituals and ethical boundaries that the practitioner explicitly agrees to take on. Instead of following a revealed canon, the individual fits the interesting parts of different religions together into a structured personal spiritual practice.”²⁵⁹

While the Pew Forum study does not address the specific effect of those who have created their own religion, the disparity between religious doctrine and the individual beliefs of the churches’ parishioners demonstrates a “grocery cart” attitude toward institutional religious principles. The parishioners have, to an extent, decided to pick and choose what they like about their chosen religion and ascribe only to those accepted principles. It is a subtle but important shift. For many, the center of one’s spirituality is not the religion, but the individual. If a certain religious principle infringes upon a right they have been told they are entitled to, the simple response is to just choose to disregard what consequently appears to be an oppressive position. Therefore, a position viewed by a parishioner as oppressive - for example, one that opposes abortion in all or most circumstances - is simply disregarded as outside the actual tenets of the faith and therefore not required for membership.

An explanation for this disconnect may be based upon how the public feels about the church-banned practices. A 2000 study in the Archives of General Psychiatry found that most women do not regret having had an abortion.²⁶⁰ According to the study, “most women were satisfied with their decision, believed they had benefited more than had been harmed by their abortion, and would have the abortion again.”²⁶¹ A recent Guttmacher Institute study on why women have abortions demonstrates the individualized nature of women’s moral and religious reasoning:

In light of the public debate over the morality of abortion, it is notable that the women in our survey emphasized their conscious examination of the moral aspects

Practice and Its Importance to the Law, 51 Buff. L. Rev. 127, 163 (2003).

²⁵⁷ *Id.* at 165.

²⁵⁸ *Id.* at 165-66.

²⁵⁹ *Id.* at 166.

²⁶⁰ Abortion and the Null Hypothesis, Nancy Adler, *Arch Gen Psychiatry*.2000; 57: 785-86.

²⁶¹ *Id.*

of their decisions. Although some described abortion as sinful and wrong, many of those same women, and others, described the indiscriminate bearing of a child as a sin, and their abortion as “the right thing” and “a responsible choice.”²⁶²

A percentage of young religious people appears to have accepted this individualized idea of faith and ambivalence to uncomfortable and unpopular religious teachings as well. One study found that “a majority of students at Catholic colleges and universities disagree with the position of the church hierarchy on sexual and reproductive health.”²⁶³ The study discovered that the opinions of students at these schools were for the most part in accordance with those who attended secular schools.²⁶⁴ The researcher was most surprised to find that “Catholic colleges were virtually indistinguishable from the private secular and public schools in terms of prominence of sexual behavior, hook-up culture and attitudes about sex. Chastity and purity and saving sex for marriage was virtually nonexistent at Catholic colleges.”²⁶⁵

With a religious population that is more secularized than it has been in the last forty years, the idea of maintaining a partnership with God in any variety of matters, especially those involving life and death, is more appealing than ever.

G. Conclusion

The Court, through its use of the idea of liberty, has done for abortion rights what secular pro-choice arguments never could. The pro-choice religious amici successfully convinced the Court of the difficulty in squaring abortion and religion – so the Court has avoided it in theory but embraced it in practice. As a prominent pro-choice religious advocate has stated,

The space between what is legal and what is right needs

²⁶² Lawrence B. Finer, Lori F. Frohworth, et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, Perspectives on Sexual and Reproductive Health (Sept. 2005).

²⁶³ *Study Finds Majority of Catholic Students Support Abortion, Contraceptives, Conscience*, Winter 2008, available at http://findarticles.com/p/articles/mi_hb064/is_3_29/ai_n31487508/?tag=erl.res2.

²⁶⁴ *Id.* The study showed that of the students surveyed, 60% agreed abortion should be legal, 60% disagreed premarital sex was a sin, 78% disagreed condom use was a sin, and 57% agreed same-sex marriage should be legal. *Id.*

²⁶⁵ *Id.*

to be filled We must lead a more meaningful public conversation about the morality of abortion. To believe that there is a fundamental right to choose abortion is not the same as believing that there are no moral dilemmas worthy of debate.²⁶⁶

The holding in *Roe* was based upon the Court's inability to determine the deeply moral and religious question of when life begins. This finding created a rift in pro-life religious reasoning – one neither the pro-life religious amici in abortion litigation nor the religious teachings of our time have been able to overcome. The idea, after all, of liberty to do with one's body what one wants is far more appealing than martyrdom. Until both the secular and non-secular pro-life movements can determine how to advance anti-abortion arguments reasoned in secular logic, we will remain God's partners in matters of life and death.

²⁶⁶ Peggy Hau, *The Politics of Law, Language, & Morality: Thucydides & the Abortion Debate*, 8 S. Cal. Interdisc. L.J. 711, 739 (1999) (quoting Pamela Schaeffer, Strange Reversal: Opponents Seen Trading Issues as Bitter 25-Year Battle Matures, National Catholic Reporter, Jan. 16, 1998, available in 1998 WL 10326332 (quoting Frances Kissling, President of Catholics for a Free Choice)); see also Naomi Wolf, *Our Bodies, Our Souls*, The New Republic, Oct. 16, 1995, at 27, 33 (“But how, one might ask, can I square a recognition of the humanity of the fetus, and the moral gravity of destroying it, with a pro-choice position? The answer can only be found in the context of a paradigm abandoned by the left and misused by the right: the paradigm of sin and redemption.”)