

THE UNIVERSITY OF CHICAGO

BALANCING ABORTION RIGHTS AND FETAL RIGHTS:
A MIXED METHODS MEDIATION OF THE U.S. ABORTION DEBATE

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Dedicated to my mother.

In every meaning of the phrase, this would not have been possible without her.

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ABSTRACT

The U.S. Supreme Court viewed *Roe v. Wade* as the Court's attempt to end the national abortion controversy. In 2019, pro-choice and pro-life state legislators are passing laws that undermine the Court's resolution in *Roe* and move the debate toward an inflection point. This thesis reports a mixed-methods mediation of the U.S. abortion debate that assesses the conflict and how it could be reduced or resolved. A historical analysis of U.S. abortion laws shed light on how the debate has developed, analyses of online abortion discourse and polls on abortion attitudes outlined Americans' common ground and irreconcilable differences, and studies were performed to contextualize the role that error and confusion have played in the debate.

Americans might see the national abortion controversy as an insurmountable issue because they believe pro-choice and pro-life Americans are diametrically opposed in their stances on abortion, but most Americans support certain abortion restrictions and legal abortion access in certain circumstances. Thus, discussions on whether fetuses are humans and whether they deserve rights distract from the core issue of when a pregnant person's right to terminate a pregnancy outweighs a fetus' right to life. While there is genuine disagreement on the permissibility of legal access to elective abortion in the first trimester, this thesis argues that Americans' common ground can be used to reach a resolution. The question is if Americans, activists, and politicians want to compromise.

CHAPTER 1: INTRODUCTION

“The fierce, unabating abortion controversy in this country is not over the moment one biological life commences. It’s over the tragic moment when two rights conflict. It’s not about whether a fetus has a claim to protection. It’s about whether the fetus’ claim is greater than the women’s”.

The Washington Post¹

In 1973, the United States Supreme Court sought to resolve the abortion debate² by striking a balance³ between a state’s right to protect fetal life and a woman’s right to legal abortion access. In *Roe v. Wade* (“*Roe*”)⁴. The Court held that women have a Fourteenth Amendment right to abort

¹ <https://www.washingtonpost.com/archive/politics/1981/04/29/the-facts-of-life-scram/051ec109-fb96-4c2f-99ef-aad4b33707e4/> [archived link: <https://perma.cc/M6DQ-YY4S>]; this quote encapsulates the essential controversy about abortion and, as reported in chapter 4 on p. 199, a majority (68%) of American participants agreed with this quote; as will be made clear in this thesis, error and confusion have distracted Americans away from this essential question, which might have contributed to differences in how both sides view each other, fetuses, and fetal rights.

² ‘Abortion debate’ is used to refer to the national controversy about the legality and morality of abortion; this use of ‘debate’ is consistent with Google’s definition: “a formal discussion on a particular topic in a public meeting or legislative assembly, in which opposing arguments are put forward”; this use is consistent with the depiction of the “same-sex marriage debate” (<https://www.washingtonpost.com/blogs/right-turn/wp/2017/06/27/the-gay-marriage-debate-has-been-won/> [https://perma.cc/M84T-JWEX]) and has been used to describe the national controversy surrounding abortion laws (<https://www.nytimes.com/2019/01/15/opinion/letters/abortion-language.html> [https://perma.cc/KV2W-HE9C]).

³ ‘Balance’ is used in the spirit of judicial balancing tests that are performed to decide which interest supersedes the other in certain circumstances, see, e.g., https://www.law.cornell.edu/wex/balancing_test [https://perma.cc/TAT5-KQ4R]; for instance, consider the balancing test performed by *Roe* with regards to a state’s right to protect life and a pregnant person’s liberty right to abort, in which the Court protected a pregnant person’s constitutional right to abort before viability, and a state’s right to protect life prevails after viability; however, the Court could have recognized a pregnant person’s right to abort and a fetus’ right to life, which would have required a balancing test that assessed the former as prevailing in certain circumstances and the latter in other circumstances (see, e.g., “the Supreme Court in *Roe* broke new legal ground and provided an opportunity for abortion opponents to argue that the woman’s rights must be *balanced* against those of the fetus”, Schroedel, J.R. & Waller, S. Fetus, Legal Status of The, The Child: An Encyclopedic Companion, University of Chicago Press, p. 359, *italics added*).

⁴ *Roe v. Wade*. 410 U.S. 113 (1973).

a pregnancy before a fetus is viable⁵ and states have the right to protect viable fetuses through abortion restrictions⁶. Although the Court reaffirmed this holding in 1992's *Planned Parenthood v. Casey* ("Casey")⁷, polls have suggested that few Americans agree with *Roe*'s central holding; a majority of Americans opposes elective abortion access up until fetal viability, and they prefer laws that restrict elective abortions⁸ after the first trimester of pregnancy.⁹

In 2019, politicians on both sides of the aisle are pushing abortion laws to the extremes, weakening *Roe* as the compromise that the U.S. Supreme Court issued to resolve¹⁰ the national abortion controversy. While pro-life state legislators are expressly challenging¹¹ the Court with

⁵ Fetal viability describes the point at which a fetus' lungs are sufficiently developed such that the fetus can survive on a ventilator until it can breathe on its own; while zygotes and embryos can survive outside of the womb, for example in IVF treatments, they are not deemed viable because they cannot continue to develop outside of the womb as viable fetuses can.

⁶ Restrictions can take many forms, as they can be written to restrict the seeking, the purchasing, the receiving, the performing, the providing, or the advertising of an abortion.

⁷ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁸ There are two categories of abortions: "[1] Elective Abortion: The voluntary termination of pregnancy. [2] Therapeutic Abortion: Termination of pregnancy, performed when the pregnancy endangers the mother's health or when the fetus has a condition incompatible with normal life.", https://www.oxhp.com/secure/policy/abortions_therapeutic_and_elective.pdf [<https://perma.cc/96RX-LQB8>]; in this thesis, 'therapeutic abortion' also refers to abortions of pregnancies that result from nonconsensual sex since many believe that such abortions would be pursued because of the significant risk such pregnancies could pose to pregnant people.

⁹ <https://news.gallup.com/poll/235469/trimesters-key-abortion-views.aspx> [<https://perma.cc/BE3S-GR8Z>]; <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>].

¹⁰ The Court claimed it had only been asked to resolve a national controversy in the racial segregation and abortion debates, *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992).

¹¹ State legislators from Alabama, Arkansas, Delaware, Florida, Georgia, Iowa, Kentucky, Kansas, Mississippi, Missouri, Montana, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Utah have worked to pass legislation that contradicts *Roe* in 2019, see, e.g., <https://www.tampabay.com/florida-politics/2019/03/22/floridas-not-alone-abortion-limits-proposed-in-other-states-too/> [<https://perma.cc/5ACE-ZF4B>], <https://www.nytimes.com/2019/03/30/us/georgia-fetal-heartbeat-abortion-law.html> [<https://perma.cc/RLJ3-LLZM>], <https://www.cnn.com/2019/05/15/politics/alabama-governor-signs-bill/index.html> [<https://perma.cc/99PZ-M9MB>].

laws that violate the constitutional rights *Roe* recognized¹², pro-choice state legislators are removing abortion from criminal codes¹³; while pro-life state legislators seek to protect fetuses' human rights¹⁴, pro-choice legislators pass bills that declare human zygotes, embryos, and fetuses do not have independent rights¹⁵.

Despite *Roe*'s role as the law of the land for nearly half of a century, the Court's compromise has not worked: the debate still rages on, states are challenging the Court's holding in *Roe*, and polls suggest a majority of Americans believe the country's abortion laws are too permissive¹⁶. Some strengthen this claim by noting that U.S. abortion laws are some of the most permissive in

¹² Attorneys general for Michigan and New Mexico have suggested they would not enforce abortion restrictions if *Roe* is overturned, <https://thinkprogress.org/michigan-new-mexico-attorneys-general-pledge-not-to-prosecute-abortions-if-roe-is-overturned-cb080079f929/> [<https://perma.cc/P56J-JDT9>].

¹³ In 2019, New York removed abortion from its criminal code; it joins Alaska, Colorado, the District of Columbia, New Hampshire, New Jersey, New Mexico, Oregon, and Vermont as states that do not prohibit abortion at a certain point in pregnancy, <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/UM2Z-QJ26>]; New York state residents were polled, and only 20% supported legal abortion access up until birth, <http://www.kofc.org/un/en/resources/communications/new-yorkers-reject-late-term-abortion.pdf> [<https://perma.cc/XF9D-5WE2>]; Marist's polls are heavily relied upon in this thesis due to the specificity of their questions, which helps to get at nuanced aspects of abortion attitudes that go unexplored in the other major polls (e.g., questions on when life begins, dynamic questions that assess Americans' opinions on both the timing and circumstances of abortions); they are recognized as a leading traditional live-caller poster, and their polls were given an "A" grade, <https://projects.fivethirtyeight.com/pollster-ratings/> [<https://perma.cc/YLC6-XJS2>]; <https://fivethirtyeight.com/features/which-pollsters-to-trust-in-2018/> [<https://perma.cc/PEM4-CV2J>].

¹⁴ https://www.cdapress.com/local_news/20190123/north_idaho_lawmakers_propose_end_to_legal_abortion [<https://perma.cc/U8RG-ZPUY>].

¹⁵ See: <https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0057/H-0057%20As%20Introduced.pdf> [<https://perma.cc/T435-LQTP>]; in the context of the abortion debate, 'fetal rights' and 'rights of fetuses' refer to a view that fetuses have a right to life, the protection of which requires abortion restrictions.

¹⁶ In a 2019 poll, 80% of Americans believed that abortion should be restricted after the first trimester, <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>]; as reported in chapter 4 on p. 187, 65% of participants support such restrictions.

the world.¹⁷ Indeed, America is one of only seven countries¹⁸ that allow elective abortions after 20 weeks. With such liberal abortion laws and such an intense and persistent pro-life movement in America, it is no surprise that the debate has raged on for decades.¹⁹ The division is even more salient in the face of the recent defeat of a U.S. Senate bill to protect newborn children after unsuccessful abortion procedures²⁰; the debate has become so polarized that U.S. Senators on both sides of the aisle cannot unite to pass legislation that restricts medical practitioners from denying appropriate medical care to infants.²¹

¹⁷ <https://lozierinstitute.org/america-global-outlier-ultra-permissive-abortion-policy/> [https://perma.cc/8HCB-ML9S].

¹⁸ Canada, China, Netherlands, North Korea, Singapore, the United States, and Vietnam, <https://www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-pregnancy/> [https://perma.cc/B7RF-HECT].

¹⁹ As reported in chapter 4 on p. 199, 63% of participants suggested that the debate is so contentious because America's abortion laws are uniquely liberal compared to other countries.

²⁰ The procedures succeed in aborting the pregnancy but fail in ending the fetus' life.

²¹ "A bill to amend title 18, United States Code, to prohibit a health care practitioner from failing to exercise the proper degree of care in the case of a child who survives an abortion or attempted abortion" – 50 Republican and 3 Democratic Senators voted on a motion to proceed with a vote on the bill, and 42 Democratic and 2 Independent Senators voted against it, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=1&vote=00027 [https://perma.cc/CHX3-EF3L]; 2020 Presidential Candidate and U.S. Senator Elizabeth Warren described the situation in a February 25th Twitter post: "Republican politicians just tried (and failed) again to score political points at the expense of women. Enough. Women and their doctors should decide what's best for their health – not the @SenateGOP", https://twitter.com/SenWarren?ref_src=twsrc [https://perma.cc/9U7B-39GU]; while it is not obvious how the medical treatment of an infant would affect a pregnant person's health, the Senator's post could have been referring to the effect of the infant's survival on the pregnant person's mental health, as they might experience distress from the infant's survival if they had sought to end the life through abortion; for further discussion on the bill, see, e.g., <https://www.factcheck.org/2019/03/the-facts-on-the-born-alive-debate/> [https://perma.cc/CY9F-MYD3], <https://www.heritage.org/life/report/the-necessity-the-born-alive-abortion-survivors-protection-act> [https://perma.cc/ZGM7-Q52S].

Fundamentally, the U.S. abortion debate focuses on the permissibility of abortion: a procedure pregnant people²² undergo after they choose to terminate their pregnancy, which has the effect of ending a fetus' life²³ before it is completely removed from the womb. As such, the question is whether that action should be subject to government interference. 88% of Americans believe that it should be.²⁴ Thus, for most Americans, the question is not *if* the government should interfere with a pregnant person's right to choose but *when* it should interfere; the question is not *if* fetuses deserve rights under the constitution but a matter of *when* fetuses should have such protections²⁵;

²² It is important to note that it is not inclusive to talk about reproductive rights as women's rights in 2019; such limited language others people who are not cisgendered women, see, e.g., <http://www.telegraph.co.uk/news/2017/01/29/dont-call-pregnant-women-expectant-mothers-might-offend-transgender/> [<https://perma.cc/AP68-VPSS>], <https://www.nbcnews.com/feature/nbc-out/gender-x-new-york-city-add-third-gender-option-birth-n909021> [<https://perma.cc/AVG5-FCF8>]; as will be further discussed in this chapter's Key Terminology section on p. 27, this dissertation utilizes 'pregnant people' except when references are made to rights in the past that were couched as 'women's rights' since that gendered aspect was both active and expressed – modern lawmakers might pass laws to protect pregnant people's abortion rights, but lawmakers in the past were solely passing laws to protect women's abortion rights.

²³ Chapter 5 presents data from biologists that suggest a human fetus is a biological human once the human sperm fertilizes the human egg; the biological dimension of life is important here since many Americans believe that it is – as reported in chapter 4 on p. 207-208, 80% of American participants selected biologists as the most qualified group to determine when a human's life begins; biology, 'the study of life', is one of humanity's oldest interpretive frames for the physical world and a science that is the basis for modern medicine, so it dictates Americans' understanding of the objective, physical aspects of life; while normative terms like "person" could be defined to exclude certain kinds of humans (e.g., in modern times, humans in vegetative state – in the past, slaves), the descriptive term "biological human" includes any organism that belongs to the *Homo sapiens sapiens* species and is developing in one of the stages of the human life cycle.

²⁴ <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>]; while this broad support of government interference does not mean that abortion *should* be subject to it, the broad support suggests that the Court would likely need to recognize and protect fetuses with some abortion restrictions in order to issue a mandate that represents Americans' values and can resolve or reduce the national abortion controversy.

²⁵ While the Court in *Roe* contemplated the argument that abortion restrictions were not historically passed to protect fetuses ("Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.", *Roe v. Wade*. 410 U.S. 113, 151 (1973)), modern legislators signal that protecting fetuses is a principal purpose of abortion restrictions; this is clear when one considers the structure

the question is not *if* abortion should be restricted but *when* it should be restricted.

The Debate's Controversy

The U.S. abortion debate has been an important national political issue for decades.²⁶ In the 21st century, abortion stances impact the way people vote²⁷ and the debate has taken center stage in Americans' relationship with the U.S. Supreme Court.²⁸ With each appointment of a nominee to the Court, some worry it will tip the Court and lead to greater protections of abortion rights, while others worry that it will spell the end of abortion rights.²⁹

of restrictions, as they typically focus on landmarks in a fetus' development – such as those based on a fetus' first heartbeat (~6 weeks) and when a fetus is capable of feeling pain (see, e.g., “a number of states have enacted bills that ban abortion at 22 weeks, based on the theory that a fetus can feel pain at that point”, <https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/18/us/politics/abortion-restrictions.html> [<https://perma.cc/NJP5-RQHJ>]).

²⁶ 46% of Americans suggest that abortion is a critical issue or one of many critical issues facing the country, <http://www.pewforum.org/2013/01/16/roe-v-wade-at-40/> [<https://perma.cc/Q4EU-7SHU>].

²⁷ 45% of Americans suggest it is one of many important factors and 17% view it as a threshold issue, as they would only vote for a candidate that shares their views, <https://news.gallup.com/poll/157886/abortion-threshold-issue-one-six-voters.aspx> [<https://perma.cc/NYT4-YU66>].

²⁸ Many Americans vote for presidential candidates based on the Supreme Court nominees they would likely appoint, as 86% said Supreme Court appointments were a factor and 56% of Trump voters said it was the most important factor, <https://www.vox.com/2018/6/29/17511088/scotus-2016-election-poll-trump-republicans-kennedy-retire> [<https://perma.cc/K46D-MBX6>]; see also: <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/NMV4-U2G4>].

²⁹ 35% believe the next Supreme Court is likely to overturn *Roe v. Wade*, and a higher percentage of Democrats believe it is likely to be overturned (43%) than Republicans (32%), <https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%202018%20Supreme%20Court%20Survey%20Agenda%20of%20Key%20Findings%20FINAL%2008%2028%2018.pdf> [<https://perma.cc/CVE8-NYGA>]; see also: <http://nymag.com/intelligencer/2018/06/supreme-court-steps-restrict-abortion.html> [<https://perma.cc/9WJZ-4WHR>].

The debate seems particularly difficult and intractable because it is an important area of law where two opposing sides are trying to express American norms.³⁰ The conflict can be seen as a collective action problem that can be resolved if both sides worked together to coordinate Americans and engender cooperation, either in developing consensus support for abortion rights or fetal rights. However, the absolutists³¹, who are outside of the ideological majority³², view abortion as a deeper battle for the heart of a nation³³.

Polls suggest between 38-48% of Americans identify as “pro-life”.³⁴ This ideology supports the restriction of elective abortions throughout pregnancy and the permissibility of therapeutic abortions in exceptional cases, such as pregnancies emanating from rape or incest, pregnancies

³⁰ While many see the abortion debate as a matter of legal deterrence (e.g., those who seek to contextualize the debate about late-term abortions with data on how infrequently they occur, https://www.washingtonpost.com/us-policy/2019/02/06/tough-questions-answers-late-term-abortions-law-women-who-get-them/?utm_term=.fb77f1b9294d [<https://perma.cc/97LZ-FJ8U>]), some recognize the expressive function of law (e.g., https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3526&context=penn_law_review [<https://perma.cc/FT96-S5F9>]); under the latter view, laws could be justified if they are not successful in effectuating the desired deterrence ends and even if the laws do not seek to punitively deter conduct.

³¹ While the absolutists might be the furthest apart in their positions, they might be the closest in their empathy responses to abortion: “People imagine that empathy can help resolve tensions in cases of conflict, but very often empathy is exactly that thing that leads to the extremes, that polarizes people even more.”, <https://www.npr.org/sections/health-shots/2019/04/12/712682406/does-empathy-have-a-dark-side> [<https://perma.cc/XGC6-VRPT>].

³² Katha Pollitt describes these people as the “muddled middle” (<https://rewire.news/article/2014/10/14/katha-pollitts-pro-hopes-sway-muddled-middle-abortion-ethics/> [<https://perma.cc/N2QZ-JNUL>]) while others have described them as the “exhausted majority” (<https://www.theatlantic.com/ideas/archive/2018/10/large-majorities-dislike-political-correctness/572581/> [<https://perma.cc/W9FY-H92L>]).

³³ The battle is so important to some that one abortion rights advocate delayed reporting the sexual misconduct she suffered from another abortion rights advocate, believing that while “he was a predator, calling him out wasn’t the answer. Doing so would only lead to us losing the very battle I’d given my entire life up to fight in” and she detailed that she lost friends who feared her report “would hurt our fight, and in the end cost us the war”, see: https://medium.com/@contact_19042/to-all-the-women-whose-names-i-dont-know-about-the-pain-we-share-the-secrets-we-keep-and-the-6e7d4a79905e [<https://perma.cc/3H48-NECH>].

³⁴ <https://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-kni>

of fetuses with life-threatening illnesses, and pregnancies that threaten the life of the pregnant person. However, many pro-life Americans are skeptical of the necessity of therapeutic abortions, and many believe that abortion is never required to save the life of a pregnant person.³⁵

Abortion is a common practice. It is estimated that 24% of American women will have an abortion in their lives³⁶ and an estimated 28% of all pregnancies around the world are aborted each year³⁷. To understand why Americans oppose the legal right to engage in this fairly ubiquitous practice, mission statements of major pro-life organizations³⁸ were reviewed. The statements contain one clear narrative: since they believe that all humans deserve a protectable right³⁹ to life⁴⁰,

ghts-of-columbus-marist-poll-slides.pdf [https://perma.cc/8G2W-D6FL]; https://news.gallup.com/poll/1576/abortion.aspx [https://perma.cc/3WJ4-YXTH].

³⁵ https://rewire.news/article/2012/10/23/no-life-saving-abortions-lie-and-why-it-persists/ [https://perma.cc/VN4T-ADMP]; see also: the Dublin Declaration (http://www.dublindeclaration.com [https://perma.cc/X5VE-6DD4]), which is signed by medical professionals who attest that it is never medically necessary to end the life of a fetus to save the life of a pregnant person late in pregnancy, Morgan L.M. (2017). The Dublin Declaration on Maternal Health Care and Anti-Abortion Activism: Examples from Latin America. *Health and human rights*, 19(1), p. 41-53.

³⁶ https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates [https://perma.cc/7VP7-9ACM].

³⁷ The Guttmacher Institute estimates that 56 million abortions take place each year, see: https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide [https://perma.cc/3K9M-7TTN]; compare this to the United Nation's reporting of 141 million births each year for a global 28% abortion rate, see: https://ourworldindata.org/fertility-rate [https://perma.cc/F3EQ-TCK2].

³⁸ See, e.g., https://www.nrlc.org/about/mission/ [https://perma.cc/Z6MB-NB9G]; https://aul.org/about/ [https://perma.cc/GD5Y-DTDR].

³⁹ 'Rights' can be thought of as natural, inherently-deserved rights or as legal, externally-granted or socially constructed rights; as reported in chapter 4 on p. 181, most Americans view rights as socially constructed (60%); it is important to note that rights recognized by universal human rights charters and the U.S. Constitution can be said to be both natural and socially constructed since those 'universal', 'inalienable' rights are legally recognized under international and U.S. law; this blurs the line and helps to explain why many discuss abortion rights without clearly signaling whether rights are intrinsic natural rights or extrinsic legal rights.

⁴⁰ Throughout the debate, there is ambiguity related to fetuses, as to whether fetuses themselves have rights or are legally protectable based on a governmental interest in protecting life; "fetal rights" in the abstract is simply understood as 'fetuses should be legally protected', and "fetal rights" in the context of human rights, the U.S. Constitution, or any other rights context,

from the beginning of their lives until the end, they argue that elective abortion is impermissible and should be legally restricted because the practice unjustifiably ends the life of a human. While some have pointed out the role of Catholicism in the debate⁴¹, and researchers have sought to link pro-life beliefs to religiosity⁴², noticeably missing in these mission statements is any mention of “God”, “Christian”, “Catholic”, or “sin”. Instead, they make explicit reference to defending the lives of all humans and protecting the rights of fetuses.⁴³

On the other end of the abortion debate, 47-55% of Americans identify as “pro-choice” and support legal access to elective abortions.⁴⁴ While most believe elective abortions should be restricted after the first trimester⁴⁵, some support an absolute right to abortion at any time for any reason⁴⁶. A review of the mission statements of major pro-choice organizations⁴⁷ reveals a distinct

could be strictly understood as fetuses being worthy of natural or positive rights irrespective of others’ interests in the fetuses.

⁴¹ Kissling, F. Religion and abortion: Roman catholicism lost in the pelvic zone, *Women's Health Issues*, Volume 3, Issue 3, 1993, p. 132-137.

⁴² See, e.g., Barkan, S. Gender and Abortion Attitudes: Religiosity as a Suppressor Variable, *Public Opinion Quarterly*, Vol. 78, No. 4, Winter 2014, p. 940-950.

⁴³ Fetal rights are often discussed as human or constitutional rights, both of which are conceived of as natural and inalienable rights that date back to the rights treatises of the 17th and 18th centuries, see, e.g., Locke, J. (1948). *The second treatise of civil government and A letter concerning toleration*. <https://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf> [<https://perma.cc/WEG3-FS9J>].

⁴⁴ See, e.g., <https://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> [<https://perma.cc/C7LQ-ZEW7>], <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>], and <https://news.gallup.com/poll/1576/abortion.aspx> [<https://perma.cc/8GUK-CKKV>].

⁴⁵ 65% of pro-choice Americans suggested that elective abortions should at least be restricted after the first trimester, <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>].

⁴⁶ The argument that the right to abortion is absolute was advanced by attorneys for Roe, and they were echoed by *amici curiae* briefs, *Roe v. Wade*. 410 U.S. 113, 153 (1973).

⁴⁷ <https://www.prochoiceamerica.org/about/> [<https://perma.cc/VP9F-MWKB>]; <https://www.myphilanthropedia.org/top-nonprofits/national/reproductive-health-rights-justice/2010/planned>

narrative: since they believe that pregnant people have a liberty right to choose to terminate their pregnancies⁴⁸, they believe that abortion should be legally permitted. Just as the review of pro-life organizations revealed no more than a passing mention of the rights of pregnant people, the review of pro-choice organizations revealed no mention of fetuses or fetal rights.

This analysis of abortion advocacy groups' stated purposes is consistent with the colloquial view of the debate: some people oppose legal abortion access because they believe it is an impermissible killing of a fetus⁴⁹ and others support legal abortion access because they believe it is a permissible expression of a pregnant person's liberty rights.⁵⁰ Both sides use the language of rights,

-parenthood-federation-of-america-ppfa [<https://perma.cc/77GH-27GF>]; <https://www.reproductiverights.org/about-us> [<https://perma.cc/TAV8-Y79V>].

⁴⁸ Abortion rights are typically deemed “reproductive rights”, which puts forth abortion as the expression of numerous underlying rights: life, autonomy, bodily autonomy, liberty, economic liberty, equality, freedom from forced labor, privacy, health, healthcare, information, safety, security of person, freedom of conscience and religion, non-discrimination, reproductive self-determination, freedom from inhumane treatment, enjoyment of the benefits of scientific progress, to decide the number and spacing of children, and to make medical decisions; see, e.g., <https://www.ohchr.org/Documents/Issues/Women/WG/TestimonyMU.pdf> [<https://perma.cc/P3YT-BJWG>]; <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Safe%20and%20Legal%20Abortion%20is%20a%20Womans%20Human%20Right.pdf> [<https://perma.cc/XB9N-YMMT>]; <https://www.hrw.org/news/2017/07/24/qa-human-rights-law-and-access-abortion> [<https://perma.cc/89F9-4ZR5>].

⁴⁹ While some have pushed back on this characterization (see, e.g., “[w]hile opponents of abortion typically characterize the procedure as a ‘killing,’ it also can be viewed as a withdrawal of assistance”, <http://blog.petrieflom.law.harvard.edu/2015/08/11/abortion-and-the-fetal-personhood-fallacy/> [<https://perma.cc/PAJ4-PD84>]), abortion procedures do not withdraw assistance by disconnecting a fetus from the umbilical womb or deliver a fetus unscathed so it can die a natural death from the withdrawal of assistance, so it is important to be accurate in describing the medical procedure as the killing of a fetus since it deliberately and specifically physically manipulates a fetus' body with the goal and result of the fetus' death; this is especially true in late-term abortions, as doctors do not terminate post-viable pregnancies by simply inducing labor, which would give the fetus a chance to survive, but instead choose to end the life of the fetus before inducing labor.

⁵⁰ The liberty right is so fundamental to some pro-choice Americans' conception of rights that, 65% of pro-choice participants in chapter 4's study had suggested that pregnant people have no rights if they do not have the right to elective abortion, as they agreed with the statement that: “Legal elective abortion access is justified because pregnant people have no rights if they do not have the right to abortion”.

but one prioritizes the rights of fetuses, and the other prioritizes the rights of pregnant people. However, the prioritization of one party's rights does not entail the rejection of the other party's rights.

A 2019 poll found that most pro-life Americans at least recognize the right to abort life-threatening pregnancies (75%) and only a minority believe abortion should never be permitted (26%)⁵¹. The broad support for life-saving abortions indicates that pro-life Americans have a stance on abortion that recognizes both the rights of pregnant people and the rights of fetuses. This is also true for pro-choice Americans since most support a fetus' right to life in the third trimester (78%)⁵² and only a minority believe abortion is an absolute right (21%).⁵³ Thus, the broad support for third-trimester abortion restrictions indicates that most pro-choice Americans recognize both the rights of fetuses and the rights of pregnant people.⁵⁴

⁵¹ <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>]; results reported in chapter 4 on p. 187 similarly suggest most pro-life participants (86%) preferred abortion laws that permitted abortions when the mother's life is threatened.

⁵² While polls capture differences between early and late-term abortions, some politicians see all abortions as equivalent under reproductive rights concepts since they choose not to recognize possible rights of fetuses but instead trust pregnant people to use their judgment; for example, in response to the question "Are you for or against third-trimester abortion?", Democratic Presidential Candidate Robert "Beto" O'Rourke replied: "[M]y answer to you is that should be a decision that the woman makes. I trust her", see video at: <https://twitter.com/i/web/status/1107761238656741376> [<https://perma.cc/NQ3B-4BJX>].

⁵³ <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>]; another 2019 YouGov poll found that 79% of Americans oppose third-trimester abortions, including 66% of pro-choice Americans, <https://aol.org/2019/02/12/pro-choice-americans-overwhelmingly-oppose-late-term-abortion-now-permitted-in-new-york/> [<https://perma.cc/36G8-5UQ9>].

⁵⁴ Again, in *Roe*, it was argued that late-term abortions were not restricted to protect developed fetuses but because the procedures were dangerous to the pregnant person's health; this is no longer a common argument; opposition to late-term abortions is often rooted in a desire to protect developed fetuses that are viable and can experience pain: "a number of states have enacted bills that ban abortion at 22 weeks, based on the theory that a fetus can feel pain at that point", <https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/18/us/politics/abortion-restrictions.ht>

Despite agreement in some circumstances, both sides hold qualitatively different views of how to balance fetal rights and abortion rights in the first trimester: one side believes that only therapeutic abortions should be permitted and the other side believes that elective abortions should also be permitted. Since the former prioritizes fetal rights over elective abortion rights, and the latter does not recognize fetal rights before viability⁵⁵, differences in opinions on abortion restrictions might be related to how both sides perceive fetuses and fetal rights.⁵⁶

Americans have strong positions on the humanity and legal status of fetuses. Pro-choice and pro-life Americans use science⁵⁷ and thought experiments⁵⁸ to argue for their particular views on when life begins⁵⁹. However, since this issue is embedded within the debate, it is not clear

ml [<https://perma.cc/NJP5-RQHJ>].

⁵⁵ As reported in chapter 4 on p. 206, 55% of pro-choice participants suggested that fetuses do not have protectable rights before they reach viability.

⁵⁶ There is a sense that pro-life and pro-choice Americans fundamentally disagree about the legal status of abortion, which is nested within concepts of liberty and the government's role in interfering in personal medical decisions related to family planning, but polling data has consistently shown that a majority of pro-choice Americans believe the government should legally interfere in those decisions (see, e.g., <https://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> [<https://perma.cc/C7LQ-ZEW7>]); thus, both sides are in fundamental agreement that the state should interfere in certain abortive contexts, and the disagreement likely focuses on the timing of abortion with respect to a fetus' age.

⁵⁷ Pro-Choice: <https://blogs.plos.org/dnascience/2013/10/03/when-does-a-human-life-begins-17-timepoints/> [<https://perma.cc/2MTW-AZ5F>]; Pro-Life: <https://lozierinstitute.org/a-scientific-view-of-when-life-begins/> [<https://perma.cc/RA8Y-R5QZ>].

⁵⁸ Pro-Choice: <https://www.independent.co.uk/life-style/man-pro-choice-question-anti-abortion-argument-human-embryos-five-year-old-a8016671.html> [<https://perma.cc/F7YA-FVT2>]; Pro-Life: <http://www.sledtest.org> [<https://perma.cc/MA5M-SLRN>].

⁵⁹ This phrase is discussed at greater length under the Key Terminology section of this chapter, but the phrase 'when life begins' is used as an all-encompassing term for the relevant constitutive concepts (e.g., when is a fetus classified as a human, when does a fetus deserve legal protection, when does a fetus deserves rights); this thesis grapples with a seemingly simple question that has various meanings and consequences; 'when life begins' is used to generally describe the start of a single organism's existence as an organism (i.e., when is the organism first an organism), and specifically describe the starting point of a single human's existence as a human (i.e., when is a human first a human).

whether the two sides have a general disagreement about fetuses – based on descriptive or normative differences – or if the disagreement is specific to the abortion debate and thus motivated by strategic reasons⁶⁰. This discrepancy in perceptions of fetuses is suggested by the rejection of fetuses’ personhood status, or constitutional rights⁶¹, despite states’ increasing willingness to recognize fetuses as human persons that can be victims of homicide⁶².

Even with these differences in perceptions of fetuses, the debate seems simple: (1) Americans on both sides of the debate agree that rights conceptions should serve as the basis for abortion laws; (2) some seek to maximize the protection of the right to life of fetuses because, in part, they recognize fetuses as human persons throughout pregnancy; (3) others seek to maximize the protection of pregnant people’s right to electively abort their early-term pregnancies because, in part, they do not recognize fetuses as humans or persons until some later point in pregnancy. Thus, in the most basic sense of the debate, the two sides would simply need to find a point at which pro-life Americans feel fetuses are acceptably protected and pro-choice Americans feel pregnant people are acceptably protected. Since the debate could be reduced to a simple dispute, on which compromise could theoretically be found, mediation is an appropriate method of analyzing the debate.

Overview of the Mediation

⁶⁰ As reported in chapter 6 on p. 273, one participant suggested that recognizing fetuses as humans could lead to a slippery slope to fetuses gaining rights and abortion rights being restricted; indeed, chapter 4 reports data on p. 224 that suggests 51% of Americans believe that fetuses are not recognized as biological humans for strategic purposes, either because it is uncomfortable to consider abortion as the killing of a human or to protect the legal status of abortion.

⁶¹ See, e.g., <https://www.aclu.org/other/whats-wrong-fetal-rights> [<https://perma.cc/WK9F-EY49>].

⁶² See, e.g., <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [<https://perma.cc/K8UE-WAWY>].

In a mediation, there are two main goals: (1) Information Gathering – addressing error and confusion in creating a shared understanding of the facts of the dispute and parties’ positions, underlying interests, and motivating values; (2) Identifying Possible Resolutions – setting the areas of agreement and disagreement, generating creative solutions, and negotiating compromise. Therefore, the overarching goal of this thesis’ mediation of the debate is to diagnose the debate to determine whether the U.S. abortion debate can be resolved through compromise, which is also the primary goal of mediation in general:

“In mediation, the disputing parties work with a neutral third party, the mediator, to resolve their disputes. The mediator facilitates the resolution of the parties' disputes by supervising the exchange of information and the bargaining process. The mediator helps the parties find common ground and deal with unrealistic expectations. He or she may also offer creative solutions and assist in drafting a final settlement. The role of the mediator is to interpret concerns, relay information between the parties, frame issues, and define the problems.”⁶³

This dissertation represents a mediation of the U.S. abortion debate for the American public. While there was no formal commissioning, two of America’s finest educational institutions⁶⁴ provided this author with the training and opportunity to conduct this mediation as a neutral⁶⁵ certified mediator, lawyer, and researcher. Since mediation is “a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction.”⁶⁶, this thesis aims to help Americans reduce or resolve the national abortion controversy.

⁶³ See, e.g., <https://adr.findlaw.com/mediation/what-is-mediation-.html> [<https://perma.cc/GS4N-EGYL>].

⁶⁴ The University of Chicago and Northwestern University School of Law.

⁶⁵ The author has never attended an abortion-related protest or engaged in public advocacy for either side.

⁶⁶ Riskin, L.L. "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" (1996) 1:7 Harv. Neg. L.R. 7 at 8.

This mediation is performed with an interdisciplinary approach that also explores the divisiveness of the U.S. abortion debate. Since the debate is so grounded in the law, any comprehensive discussion requires a sophisticated understanding of the legal dimension of the debate. This thesis began with a grounded theory approach⁶⁷ that can mitigate problems related to the ideological biases that might have guided previous abortion research⁶⁸. Overall, the structure of this work is most aligned with a proposed model of interdisciplinary inquiry within the social sciences.

The University of Chicago's Comparative Human Development department has cultivated an academic community that integrates qualitative and quantitative research.⁶⁹ Coming out of this tradition, students and recent graduates of the department formalized this approach in their proposal of the SAGE model:

“[A] proposal to have a *synthetic* approach to social psychological research, in which qualitative methods are *augmentative* to quantitative ones, qualitative methods can be *generative* of new experimental hypotheses, and qualitative methods can capture *experiences* that evade experimental reductionism”.⁷⁰

⁶⁷ The approach is grounded theory insofar as it was primarily inductive since the goal was to develop a theory or explanation of the divisiveness of the U.S. abortion debate that emerged from the data, see, e.g., Charmaz, K. "Grounded Theory." The SAGE Encyclopedia of Social Science Research Methods. 2003. SAGE Publications. 24 May. 2009.

⁶⁸ For further discussion, see: <https://www.spssi.org/index.cfm?fuseaction=page.viewPage&pageID=2406&nodeID=1> [<https://perma.cc/JQ26-KSKK>].

⁶⁹ Drs. Bertram J. Cohler, Richard A. Shweder, and Richard P. Taub – graduates of the former Harvard Department of Social Relations for Interdisciplinary Social Science Studies and faculty of the University of Chicago's Department of Comparative Human Development – developed and taught the spirit of interdisciplinarity embodied in the model, as they dedicated their careers to promoting interdisciplinary research in the social sciences.

⁷⁰ Power, S., Velez, G., Qadafi, A., & Tennant, J. (2018). The SAGE Model of Social Psychological Research. *Perspectives on Psychological Science*, 13(3), 359–372. <https://doi.org/10.1177/1745691617734863> [<https://perma.cc/2EU9-2C7K>].

The methodology of this thesis can be characterized by this generative and bidirectional relationship between qualitative and quantitative research.⁷¹

In the first step of the research, which utilized a qualitative method, informal mediations⁷² were conducted to develop an initial theory of why Americans disagree about abortion. While the discussions suggested that the two sides are close in their values (e.g., human rights), interests (e.g., balancing abortion rights against fetal rights), and positions (e.g., stances on when to restrict elective abortions), ‘when life begins’ was a major issue that prevented participants from having productive discussions about resolution. This comported with preliminary analyses of the legal history of the debate, but, since the group discussions only represented the views of a handful of people, the next step was to use the quantitative method to survey a large sample of Americans to learn if ‘when life begins’ had broad significance in the debate.

In the survey reported in chapter 4 on p. 206, most participants (76%) suggested that Americans deserve to know when life begins in order to be informed in their abortion decisions and positions, and a majority believed biologists were the most qualified to determine when a human’s life begins (80%) because they view it as a scientific question with an objective answer. Biologists were then surveyed; their responses suggested that a majority of biologists hold the biological view that a human’s life begins at fertilization.⁷³ Finally, this thesis concludes with a study that utilized

⁷¹ This is a description of its underlying structure; in its purpose, this approach is similar to other attempts to resolve contentious debates, see, e.g., Braman, D. & Kahan, D.M. (2006) Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate, 55 Emory Law Journal 569-607.

⁷² These were done as a class project, so it would be inappropriate to discuss them in any substantive way; however, they were an early sign, in concert with a review of the legal history and online abortion discourse, that people’s perceptions of fetuses might be predictive of, and possibly affected by, Americans’ abortion attitudes.

⁷³ It is important to note that this finding does not necessitate a certain stance on abortion and one can recognize a fetus as a biological human throughout pregnancy while supporting elective abortion access by arguing that: (1) not all biological humans deserve rights (see, e.g., Singer,

the qualitative method, as Americans were recruited to participate in mediated discussions on abortion to further investigate the role of people's perceptions of fetuses and whether there is room for agreement in the abortion debate.

Using an approach with elements of both grounded theory and the SAGE model, this thesis was able to comprehensively investigate the disagreement by mitigating the kind of ideological homogeneity and pressures some social scientists have faced when researching abortion attitudes. Indeed, this approach has produced unique findings and novel perspectives to explain most of the variance of Americans' abortion stances.⁷⁴

Thus, this thesis works to describe the historical and contemporary functions of the debate, focusing on how its form has fluctuated based on the shifting needs and values of both America and its citizens. As will be explained in greater detail in chapter 2: in the 19th century, doctors recognized abortion as the killing of a human, so states passed laws to deny legal access to abortion; in the early 20th century, women suffered economic and social consequences from not having legal access to abortion, so the U.S. Supreme Court ensured broad legal access to abortion by recognizing a constitutional right to abort. However, it is unknown what kind of needs and values will dictate U.S. abortion laws throughout the 21st century.

The broad nature of the problem required research that crossed multiple domains and disciplines. Altogether, the research in this dissertation utilized concepts and methods from biology, philosophy, psychology, political science, sociology, mediation, human rights, and jurisprudence.

P. "Practical Ethics". Cambridge: *Cambridge University Press*, 1993, 2008, 2nd ed., p. 85-86.) or (2) while fetuses deserve rights, a pregnant person's rights are prevailing (see, e.g., Thomson, J.J. *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971); Davis, N. (1984). *Abortion and Self-Defense. Philosophy & Public Affairs*, 13(3), 175-207. Retrieved from <http://www.jstor.org/stable/2265411> [<https://perma.cc/YEF5-NGXQ>]).

⁷⁴ As reported in chapter 4 on p. 217, this method produced models that explain a majority of the variance (67%) between Americans' pro-choice and pro-life identities.

Thus, this dissertation represents an interdisciplinary, mixed-methods approach to comprehensively studying the U.S. abortion debate in hopes of developing a holistic narrative that attends to the relevant dimensions of the debate.

In terms of general contributions, the goals were to: (1) emphasize the importance of utilizing empirical methods in legislative and judicial arenas; (2) provide an additional example of interdisciplinary research that employs various methods that fit the work; (3) further pave the way for scholarship that seriously tackles important political and social problems from a mediator's perspective. Further, this particular implementation of an approach that draws on concepts from the SAGE model of social psychological research⁷⁵ is further evidence of the model's feasibility and importance. Addressing research questions with a single methodology would have resulted in work akin to social psychological research on abortion attitudes.⁷⁶ Through the use of a mixed-methods approach, this research was able to go beyond mere psychological inquiry by drawing on multiple disciplines, conducting studies both rooted in theory and motivated by empirical results, and synthesizing disparate lines of inquiry into a single cohesive narrative on the U.S. abortion debate.

Research Questions

This dissertation seeks to explain why the abortion debate persists and whether it can be resolved. While the U.S. Supreme Court was able to end the national segregation controversy with

⁷⁵ Power, S., Velez, G., Qadafi, A., & Tennant, J. (2018). The SAGE Model of Social Psychological Research. *Perspectives on Psychological Science*, 13(3), 359–372. <https://doi.org/10.1177/1745691617734863> [<https://perma.cc/2EU9-2C7K>].

⁷⁶ See, e.g., Huang, Y., Osborne, D., Sibley, C.G., & Davies, P.G. (2014). The Precious Vessel?: Ambivalent Sexism and Opposition to Elective and Traumatic Abortion. *Sex Roles*, 71, 436–449.

its holding in *Brown v. Board* (“*Brown*”)⁷⁷, the Court has twice failed⁷⁸ to end the national abortion controversy in *Roe* and *Casey*. The controversy has been resilient for decades, and it grows as some states pass laws to ban abortions throughout pregnancy⁷⁹ and other states legalize abortion throughout pregnancy.⁸⁰ Thus, this dissertation aims to understand whether the national controversy surrounding abortion is trivial or insurmountable.⁸¹

It is trivial if it results from error, ignorance, or confusion and can be resolved by remedying such issues. It is insurmountable if remedying such issues does not affect the disagreement, as it would suggest that the conflict could only be resolved through power. The segregation and same-sex marriage debates can be said to be examples of the former, since clearing up constitutional issues resolved the debates⁸², and the debate over slavery is an example of the latter, as it was only resolved through the power of the Union in its defeat of the Confederacy in the U.S. Civil War.

⁷⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁷⁸ Pre-*Brown* polls suggested that most Americans wanted school segregation, but as of the 1990s, a small percent believe in segregation (<https://prospect.org/article/polling-prejudice>); after 46 years of *Roe* as the law of the land – as it was issued in 1973, upheld in 1992, and continues to be good law in 2019 – polls suggest between 24-41% of Americans support *Roe*’s protection of legal abortion access after the first trimester (<https://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> [<https://perma.cc/C7LQ-ZEW7>]; <https://news.gallup.com/poll/235469/trimesters-key-abortion-views.aspx> [<https://perma.cc/BE3S-GR8Z>]).

⁷⁹ See, e.g., https://www.cdapress.com/local_news/20190123/north_idaho_lawmakers_propose_end_to_legal_abortion [<https://perma.cc/W479-UZFC>].

⁸⁰ See, e.g., <https://buffalonews.com/2019/01/22/long-stalled-abortion-bill-passes-new-york-legislature/> [<https://perma.cc/ZCX5-GSCP>].

⁸¹ “We need not dispute, we need not prove—we need but define... When men understand what each other mean, they see, for the most part, that controversy is either superfluous or hopeless.”, Cardinal Newman, *The Contemporary Review* (1878), Strahan and Company Limited, p. 872.

⁸² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) and *Obergefell v. Hodges*, 576 U.S. ____ (2015).

This understanding of contentious disputes is consistent with the mediation model and – is related to the psychological concept naïve realism⁸³ – since it seeks to identify the areas for agreement or disagreement so parties can understand whether they can reach a mutually agreeable resolution. Much like how the trivial-insurmountable dichotomy suggests the resolution of error, ignorance, and confusion⁸⁴ can signal whether a dispute is hopeless, mediators seek to help parties understand each other’s interests and resolve factual disputes, which can engender productive discussions that can expose areas of agreement and disagreement. Such an approach can help to prevent parties from responding to a “different object of judgment”⁸⁵ and protect them from seeing each other as “stubborn, illogical, or distorted by some combination of ideological bias and self-interest”.⁸⁶ For instance, consider the following example of a mediation:

An ex-boyfriend and an ex-girlfriend argue about who should keep the dog they shared as a couple; the ex-boyfriend says he should keep it because he bought it and the ex-girlfriend says that not only was she the one who bought the dog, but it does not matter because

⁸³ Seen as one of a few foundational aspects of social psychology, it is here used to describe humans’ tendency to believe their stance is informed by an objective view of the world and that those who disagree do so out of their irrationality, bias, or lack of information, see, e.g., Ross, L., Lepper, M., & Ward, A. (2010) *History of Social Psychology: Insights, Challenges, and Contributions to Theory and Application*, <https://onlinelibrary.wiley.com/doi/full/10.1002/9780470561119.socpsy001001> [<https://perma.cc/YJ7R-NSBK>].

⁸⁴ This is also consistent with the information deficit model that is used to explain why there is public disagreement on science issues, see, e.g., <https://www.scidev.net/global/communication/editorials/the-case-for-a-deficit-model-of-science-communic.html> [<https://perma.cc/WG78-XQBG>] and McDivitt, P., "The Information Deficit Model is Dead. Now What? Evaluating New Strategies for Communicating Anthropogenic Climate Change in the Context of Contemporary American Politics, Economy, and Culture" (2016). *Journalism & Mass Communication Graduate Theses & Dissertations*. 31.

⁸⁵ Asch, S.E. (1940). Studies in the principles of judgments and attitudes: II. Determination of judgments by group and by ego standards. *Journal of Social Psychology*. 12, 433-465.

⁸⁶ Robinson, R.J., Keltner, D., Ward, A., & Ross, L. (1995). Actual versus assumed differences in construal: “Naïve realism” in intergroup perception and conflict. *Journal of Personality and Social Psychology*, 68, 404–417; Fisher, R., Ury, W. & Patton, B. “Getting to Yes: Negotiating Agreement Without Giving In, Penguin Books”, 1991.

she is the one who fed it, walked it, and the dog prefers to be with her. Now, none of those arguments are necessarily important, as proving that the man bought it would not mean he necessarily deserves to keep it, but the arguments are important to the discussion because those are the issues over which both parties choose to argue. If the parties cannot have a productive discussion because they call each other liars over who bought the dog, then a mediator would work to resolve the factual dispute of who bought it so they can move onto a meaningful discussion who should keep the dog.

Through preliminary mediations, reviews of the legal history of the debate, reviews of polls, online abortion discourse, and surveys, the debate seems to be subject to a similar issue:

U.S. abortion laws are strongly permissive, and pro-life Americans want more restrictive abortion laws, while pro-choice Americans want them to remain permissive. Pro-life Americans claim that scientists agree that life begins at fertilization, so zygotes are humans deserving of rights and pro-choice Americans say that scientists do not agree on that and, even if they did, a zygote is not a human deserving of rights. Now, none of those arguments are necessarily important, as proving that zygotes are biological humans would not necessarily mean abortion laws should be more restrictive, but the arguments are important to the discussion because those are the issues over which both parties choose to argue. If the parties cannot have a productive discussion because they say each other as wrong about when life begins, then a mediator would work to resolve the factual dispute of when life begins so they can move onto a meaningful discussion of whether abortion laws should remain permissive or become more restrictive.

Thus, while resolving the factual dispute over when life begins may resolve some error, ignorance, or confusion that exists on one or both sides, the parties might still disagree on how to balance a fetus' right to life – or a state's right to protect life – against a pregnant person's liberty right to abortion. Since most on both sides of the debate hold abortion positions that suggest they do value and balance those two rights, there is no *a priori* reason that they cannot balance those

rights in the same manner if they have a similar understanding of when life begins and share the same beliefs about rights.

Just as it is important for a discussion to be free from error, it is important to know whether both sides' beliefs are rooted in the same principles. According to the results in chapter 4's survey of Americans, people on both sides overwhelmingly support human rights principles from the United Nation's Declaration of Human Rights ("UDHR").⁸⁷ Since both sides use language and take positions that suggest they employ rights principles in their abortion stances, and they agree on principles within the UDHR, both sides of the abortion debate likely operate from the same standards. Thus, both sides could find common ground in how they approach and discuss the issue, which could lead to them finding common ground in resolving the conflict.

Key Terminology

Since the abortion debate is a highly contentious social, political, and legal issue, it is important to be sensitive to semantics.⁸⁸ While most people might not be concerned with the difference between "human" and "person"⁸⁹, these two phrases can have very different meanings in the context of the abortion debate.⁹⁰ Similarly, while pundits might use the terms "pro-life" and "pro-choice" since they are popular identifiers, these terms can invoke strong feelings by both sides.⁹¹

⁸⁷ As reported in chapter 6 on p. 181, 96% of Americans support the views that all humans deserve human rights and are equally deserving of such rights.

⁸⁸ See, e.g., <https://www.nytimes.com/2019/01/09/opinion/abortion-pro-life.html> [<https://perma.cc/TT3Q-6G2J>].

⁸⁹ As will be further discussed in chapter 2, Supreme Court Justices treat these two terms as fungible, see, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 US 747, 779 (1986).

⁹⁰ <https://www.psychologytoday.com/us/blog/theory-knowledge/201508/when-does-it-be-come-person> [<https://perma.cc/SP8F-UKX5>].

⁹¹ See, e.g., <https://www.cincinnati.com/story/opinion/contributors/2018/01/17/pro-life-m>

These semantic issues are particularly salient in emotional debates, and the choice of any given frame is fraught with peril. Chapter 5’s survey utilized “fertilization” instead of “conception” since some see the latter as a religiously-loaded term, while the former is a scientific term used by embryologists and biologists. However, avoiding that issue led to running afoul of a feminist critique, as pointed out by one participant:

“Please remove the sexism inherent in your questions. Fertilization is male active female passive. The word conception is more appropriate and gender neutral. In addition, the use of 'egg' to refer either to an ovum or a zygote hides the female contribution to the process. I found this questionnaire [sic] to illustrate your ignorance of the historical bias in reproductive biology.”

This dissertation uses ‘when life begins’ as an all-encompassing phrase to describe the starting point in the life of a human fetus. However, this starting point has different implications depending on the context, so there are numerous dimensions: when is a fetus a life, a unique life, an independent life, a human life, a human, a biological human, a viable human, or a person.

As will be discussed at greater length in chapter 3, ‘When does life begin?’ is subject to David Hume’s classic *is-ought* problem⁹² since the question has two primary interpretations⁹³: the descriptive view (i.e., when *is* a fetus classified as a human) and the normative view (i.e., when

ust-mean-more-than-pro-birth/1037216001/ [https://perma.cc/M4ZP-3EY3].

⁹² Hume, D. “A Treatise of Human Nature”. 1759. Available at: <http://www.davidhume.org/texts/thn.html> [https://perma.cc/EU24-SJ47]; Garrett, D. “Hume”. *Routledge*, p. 146-171, 2015; Pigden, C. “Hume On Is and Ought: Logic, Promises and the Duke of Wellington”. In Paul Russell (ed.), *The Oxford Handbook on David Hume*. Oxford University Press, 2016.

⁹³ This dichotomy can also be seen as the difference between interpreting reality through science and biological classifications or philosophy and social constructions, which is also at the heart of current debates about gender classifications (see, e.g., <https://www.kialo.com/is-gender-a-social-construct-1570>); further, there is an interesting parallel between those who suggest a fetus is a human at the point that the pregnant person recognizes a fetus as a human and those who suggest a person is the gender with which they identify – both reflect the primacy of one’s preferred constructions over objective constructions.

ought a fetus be recognized as a person worthy of ethical and legal consideration).⁹⁴ However, the question explicitly refers to the descriptive dimension, as it does not explicitly call for a value judgment, and chapter 4's finding that most Americans see it as a biological question suggests that most understand it as a descriptive question.

When referring to a particular interpretation of when life begins, and not just its general relevance as a dimension of the debate, it will be explicated whether it is being used to describe the biological view of when a human's life begins, the legal view of when a human is protectable, or the philosophical view of when a human is a person.

In terms of describing human fetuses, embryos, and zygotes, all in utero human organisms are plainly labeled with the catch-all 'fetuses', except when there is a specific reference to zygotes or embryos. Further, 'fetus' should be understood as a human fetus, as there will be clarification when there is a discussion of a non-human fetus (e.g., a cat fetus). This phrase is the most clinical, and it best avoids potential issues. For example, in the news, there seems to be some variation in how they refer to fetuses based on the context of the story. While "fetus" and "unborn child" can be used interchangeably, some have suggested that there is a tendency for journalists to describe it in clinical terms when discussing abortion rights and to recognize it as a person when "a death is unexpected or criminal in nature".⁹⁵ Other than when it is presented within a quote, this dissertation does not make use of the more loaded term 'unborn child'.

⁹⁴ As reported in chapter 4 on p. 222, there was a strong correlation ($r = .695$) between items that phrased the question in descriptive and normative terms, so it is clear that the two questions are related but is a difference between when life begins and when life is deemed worthy of protection.

⁹⁵ See, e.g., <https://consciousstyleguide.com/tag/abortion/> [<https://perma.cc/X65N-3WVR>].

The most important decision is how to refer to both sides of the debate honestly and fairly. The two early slogans used to represent both positions were ‘right to life’ and ‘right to choose’, and the latter was developed as a short, catchy label to counter the former.⁹⁶ Some have suggested that the pro-life label was developed to focus on the positive aspect of their position (i.e., the defense of life) rather than the negative aspect (i.e., the opposition to abortion).⁹⁷ While both labels can be said to be inaccurate and inappropriate, as they suggest that some Americans are against life and other Americans are against choice, they are the preferred identifiers of the two movements. Pro-life Americans might prefer to call people in the pro-choice movement ‘pro-abortion’⁹⁸ and pro-choice Americans might prefer to call people in the pro-life movement ‘anti-choice’⁹⁹, but it would be more appropriate to allow both sides to each choose their identifier rather than to allow them to determine each other’s identifiers. This is especially true in the absence of a standard dichotomy with which to describe both sides.

The Wall Street Journal style guide¹⁰⁰ makes recommendations that can add ambiguity and confusion. They recommend referring to pro-life Americans as “antiabortion” since they consider it a neutral term for an unstated reason, but they fail to provide a term for those who identify as pro-choice. The Diversity Style guide and AP Stylebook similarly recommend “anti-abortion” for

⁹⁶ Greenhouse, L., & Siegel, R.B. (2012). Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court’s ruling, p. 33, https://documents.law.yale.edu/sites/default/files/beforeroe2nded_1.pdf [<https://perma.cc/AR5L-WT2J>].

⁹⁷ Schultz, J.D. & Van Assendelft, L.A. (1999). *Encyclopedia of women in American politics*. The American political landscape (1 ed.). Greenwood Publishing Group. p. 195. ISBN 1-57356-131-2.

⁹⁸ <https://www1.cbn.com/cbnnews/2019/january/sen-kamala-harris-pro-abortion-record-in-spotlight-as-she-announces-presidential-bid> [<https://perma.cc/6XMM-Q6YA>].

⁹⁹ <https://www.prochoiceamerica.org/laws-policy/trumps-anti-choice-judicial-nominees/> [<https://perma.cc/6TQL-ECPC>].

¹⁰⁰ <https://blogs.wsj.com/styleandsubstance/2010/01/31/vol-23-no-1/> [<https://perma.cc/N3KZ-DLZT>].

those who hold pro-life beliefs and “abortion rights” instead of “pro-abortion” or “pro-choice”, again failing to provide a label for Americans who hold pro-choice beliefs since “abortion rights” cannot be used as a standalone adjective that describes a particular stance or identity.¹⁰¹ The senior copy editor for National Public Radio’s (“NPR”) website also failed to provide a descriptor for those who identify as pro-choice.¹⁰²

It seems curious that they would give an identifier for Americans who hold pro-life beliefs, whereby a person could be described in terms of their abortion beliefs as “antiabortion” or “anti-abortion”, and yet not recommend an equivalent term for those who identify as pro-choice. Similar to chapter 3’s analysis of abortion attitudes research, there seems to be a trend of framing pro-choice Americans as the default or the norm, such that there is no need to be label those who are “pro-choice”, and yet there is an important need to label pro-life Americans and to label them with a negative term (i.e., “anti-abortion”).

Not only is there a lack of an acceptable alternative for pro-choice, the framing around ‘abortion rights’ rather than ‘fetal rights’¹⁰³ is interesting. One could similarly argue that the side for fetal rights is “pro-fetal rights” and that the other side would be against fetal rights “anti-fetal rights”. Given these issues, it seems reasonable to respect the history of both sides’ chosen labels for themselves, especially because participants’ responses to questions about abortion laws were consistent with their self-identification as pro-choice or pro-life, as shown in Table 2.1:

¹⁰¹ <http://www.diversitystyleguide.com/glossary/abortion/> [<https://perma.cc/BWV5-4MVG>].

¹⁰² NPR also suggests that “late-term abortion” is more neutral than “partial-birth abortion”, even though the former describes a range of abortion procedures and the second refers to a specific procedure, <https://www.npr.org/sections/publiceditor/2010/03/18/114576700/in-the-abortion-debate-words-matter> [<https://perma.cc/MYN7-UU4W>].

¹⁰³ See, e.g., <https://www.bostonglobe.com/ideas/2014/02/16/for-pregnant-women-two-sets-rights-one-body/5Pd6zntIViRBZ9QxhiQgFJ/story.html> [<https://perma.cc/S2JW-2ZCG>].

Table 2.1 Pro-Choice and Pro-Life Support for Abortion Permissions and Restrictions.¹⁰⁴

| | Pro-Choice | Pro-Life |
|--|------------|----------|
| Laws should permit life-saving abortions | 92% | 76% |
| Laws should permit abortion in the first 24 weeks | 84% | 37% |
| Laws should permit abortion for preteen pregnancies | 77% | 41% |
| Laws should permit abortions of fetuses with Down Syndrome | 57% | 31% |
| Laws should permit abortion in all 40 weeks | 33% | 20% |
| Laws should restrict abortion throughout pregnancy | 11% | 73% |
| Laws should restrict abortifacients | 20% | 71% |
| Laws should restrict abortions after 6 weeks (first heartbeat) | 18% | 83% |
| Laws should restrict race-selective abortions | 37% | 78% |
| Laws should restrict sex-selective abortions | 42% | 83% |

Finally, this dissertation carefully and sensitively refers to abortion rights as the rights of pregnant people, not the rights of women. In 2019, Americans have become more cognizant of the social aspects of gender. People who were born with an XY chromosome are embraced as women¹⁰⁵ and men, who were born with an XX chromosome, become pregnant and give birth¹⁰⁶. Referring to abortion rights as women's rights excludes, invalidates, and dismisses the experiences of some pregnant people. While this dissertation uses 'pregnant people' instead of 'pregnant women' – when making references in the abstract, the present, and the future – it utilizes gendered terms when making historical references since it would be inaccurate to describe the early pro-choice movement as advocates for pregnant people's rights. In this instance, this thesis can be said to be more focused on being factually correct than being morally right.

¹⁰⁴ These data are reported in chapter 4 on p. 190-191.

¹⁰⁵ <https://www.self.com/story/being-a-woman-uterus> [<https://perma.cc/D9PY-V78X>].

¹⁰⁶ <https://people.com/human-interest/wiley-simpson-pregnant-man-baby-boy-texas/> [<https://perma.cc/KJH6-8VLP>].

Overview of the Chapters

The primary goal of this dissertation is to exhaustively explore the history of the debate, and where it currently sits, in order to understand the discord of the modern debate, the factors that might drive the debate in the future, and how the controversy might be reduced or resolved. Thus first, in chapter 2, there is a discussion of the legal history of the U.S. abortion debate.

Chapter 2 explores the legal history of abortion laws to trace their path and determine whether patterns suggest why people differ in their abortion stances. U.S. abortion laws have their roots in the English common law system, which restricted abortion after the fetus first moved and was said to “quicken”.¹⁰⁷ Quickening represented the point at which most authorities believed life began, at that time, since the experience of the fetus was the first convincing evidence of pregnancy.

This tradition was adopted during the founding of America and persisted until the middle of the 19th century when, after the American Medical Association took the stance that life began at fertilization, a nationwide movement led to the ban of nontherapeutic abortions throughout pregnancy in each state. After a century of the criminalized abortion era, a 20th-century reformation movement spurred the U.S. Supreme Court to recognize women’s hardships from not having legal abortion access. The Court recognized a constitutional right to abort a pregnancy before viability, which they effectively deemed to be the moment life begins. The chapter concludes by discussing the pro-life pushback with the fetal personhood movement and the passage of Targeted Restrictions of Abortion Prover (“TRAP”) laws, as well as recent legal developments from pro-choice

¹⁰⁷ <https://www.webmd.com/baby/features/when-feel-baby-move> [<https://perma.cc/5KXG-X8WF>].

legislators who are seeking to expand abortion access and pro-life legislators who are seeking to restrict it.

While chapter 2 suggested that ‘when life begins’ was an important historical issue in the legal debate, it is unclear if it is an important issue in the modern debate. In chapter 3, polls on abortion beliefs, online abortion discourse, and abortion attitudes research were reviewed. While polls showed Americans are split on whether ‘life begins at conception’ is a scientific fact or a philosophical view¹⁰⁸ and ‘when life begins’ was a pervasive question in online discussions, there was a dearth of research on its role in abortion attitudes. However, there was much research on predictors such as sexism, right-wing authoritarianism, and attitudes toward gender roles. The chapter goes on to critique the literature’s focus on explaining pro-life beliefs rather than the full gamut of abortion beliefs. Given the results of the early mediations, the historical analysis of the legal debate, the review of Americans’ responses to polls, and the analysis of online abortion discourse, this absence of research on ‘when life begins’ as a predictor of abortion attitudes was glaring.

Chapter 4 reports surveys designed to locate and address error, ignorance, or confusion in the debate. The first results section reports data on Americans’ beliefs and values, the second results section reports data on predictors of Americans’ abortion attitudes, and the third results section reports data on Americans’ opinions on when life begins. Overall, these studies suggested that Americans believe that when life begins is an important issue in the abortion debate, on which biologists are most qualified to weigh in, and that both sides support human rights principles.

¹⁰⁸ <http://www.kofc.org/en/resources/communications/abortion-limits-favored.pdf> [<https://perma.cc/F6AC-H94V>].

However, there were some interesting results related to perceptions of fetuses. Some data suggested support for abortion might interfere with people's perceptions of fetuses – through some mechanisms related to theories of cultural cognition¹⁰⁹, identity-protective cognition¹¹⁰, or dissonance reduction¹¹¹. However, Americans' selection of biologists as the authority on when life begins suggested that biologists' opinions could further clear up and locate error, ignorance, or confusion since Americans agreed on how the factual dispute should be resolved, despite their disagreement on whether the view that life begins at fertilization is a biological and scientific fact or a religious or philosophical view.

In chapter 5, data from biologists is reported. It includes discussion of biologists' view on when life begins and their assessment of the biological view that life begins at fertilization. A large majority of biologists stated that a human's life begins at fertilization, after being posed an open-ended question, and affirmed statements representing the view that a human's life begins at fertilization. Combined with the better grasp of the abortion debate and Americans' abortion attitudes, the chapter discusses how these data could help prevent abortion discussions from being bogged down in debates about the biology of when life begins.

¹⁰⁹ “[A] growing body of work has suggested that ordinary citizens react to scientific evidence on societal risks in much the same way. People endorse whichever position reinforces their connection to others with whom they share important commitments.”, Kahan, D. Fixing the Communications Failure. *Nature* 463, 296-297 (2010).

¹¹⁰ “Because espousing beliefs that are not congruent with the dominant sentiment in one's group could threaten one's position or status within the group, people may be motivated to “protect” their cultural identities. In fact, the cultural cognition thesis predicts that identity-protective reasoning is a mechanism that people unconsciously employ to assimilate (risk) information. In other words, people are expected to process information in a motivated way, that is, consistent with their cultural worldviews”, Van der Linden, S. (2016). A conceptual critique of the cultural cognition thesis. *Science Communication*, 38, 128–138. doi:10.1177/1075547015614970.

¹¹¹ “[T]he tendency of people to react dismissively to information the acceptance of which would experience dissonance or anxiety”, <http://www.scienceandreligiontoday.com/2011/05/04/what-is-motivated-reasoning-and-how-does-it-work/> [<https://perma.cc/UHF7-7NCP>].

Chapter 6 reports results from the group mediations on the U.S. abortion debate. Results from the surveys of mediation participants are analyzed, as are general impressions of the discussions and the transcendent solutions participants proposed. While the discussions were respectful and many participants felt that the conversations were productive, the survey results suggested that pro-choice participants were similarly likely to become more willing to compromise as they were to double down on their beliefs¹¹². However, discussions further clarified pro-choice and pro-life positions and contributed to a deeper and more nuanced understanding of the debate.

The final chapter addresses recent legislative efforts to recognize fetal rights and expand abortion rights that suggest the U.S. Supreme Court might once again weigh in on the national controversy surrounding abortion. Given the present state of flux, it is important to understand the divisiveness of the abortion debate since it has been mired in arguments over when life begins. This has prevented people from moving on to a sophisticated discussion on how to balance fetal rights and abortion rights. Similarly, the debate has been stunted and made more contentious by both sides' misperceptions about each other since both sides view each other as more orthodox than they are.¹¹³

Much like in typical mediations, which are themselves non-binding¹¹⁴, this thesis merely aims to enhance the parties' understanding of the dispute and help both sides identify how the

¹¹² Nyhan, B. & Reifler, J. (2010). When Corrections Fail: The Persistence of Political Misperceptions. *Political Behavior* 32(2):303–330.

¹¹³ Robinson, R. J., Keltner, D., Ward, A., & Ross, L. (1995). Actual versus assumed differences in construal: “Naïve realism” in intergroup perception and conflict. *Journal of Personality and Social Psychology*, 68, 404–417; chapter 4 also reports data that suggests both sides are likely to view each other as holding absolutist positions, despite most holding moderate positions.

¹¹⁴ Mediation is inherently non-binding, as mediators perform in an advisory capacity since parties are not required to accept the resolution recommended by the mediator, <https://adr.findlaw.com/mediation/mediation-vs-arbitration-vs-litigation-whats-the-difference.html> [<https://perma.cc/XK8A-3E7P>].

debate can be reduced or resolved. The author recognizes a resolution that reflects a compromise between moderates might not be appropriate or preferable, as it certainly would not have been in the 19th-century controversy surrounding slavery¹¹⁵, but the identification of such resolution can be used by Americans, activists, and politicians in making that determination for themselves.

¹¹⁵ A researcher in the 19th century could have written a thesis on mediating the slavery debate, in which they concluded that the controversy could end if both sides agreed to a resolution permitting slavery in some circumstances or jurisdictions and restricted it in others; however, most would say that history has shown that such a compromise would not have been preferable; for further discussion, see, e.g., <https://catholicherald.co.uk/issues/july-6th-2018/overturn-roe-v-wade-2/> [<https://perma.cc/5YMN-WKMS>].

CHAPTER 2: THE HISTORY OF U.S. ABORTION LAWS

“The history of the [Fourteenth A]mendment proves that the people were told that its purpose was to protect weak and helpless human beings”.

Supreme Court Justice Hugo Black¹

“[T]here is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures.”

Supreme Court Justice John Paul Stevens²

This chapter analyzes the history of U.S. abortion laws, from its roots in the English common law system through 2019, to uncover patterns that shed light on why the national abortion controversy has persisted for decades. It also forecasts the impact recent abortion legislation could have in a future challenge to *Roe v. Wade*, the 1973 case that first recognized a constitutional right to abort, and *Planned Parenthood v. Casey*, the 1992 case that upheld *Roe*. After providing a detailed roadmap of the history of the debate from social and legal perspectives, it concludes with suggesting that both sides of the debate have ramped up the debate in 2019: some states are seeking to ban abortion³ and others are seeking to permit abortion throughout pregnancy⁴. There is some

¹ *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938).

² *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 US 747, 779 (1986).

³ See, e.g., Alabama and Georgia, (<https://www.washingtonpost.com/health/2019/05/11/could-miscarriages-land-women-jail-lets-clarify-these-georgia-alabama-abortion-bills/>, [<https://perma.cc/PH6G-X4WT>]), Idaho (https://www.cdapress.com/local_news/20190123/north_idaho_law_makers_propose_end_to_legal_abortion [<https://perma.cc/W479-UZFC>]), Ohio (<https://www.cincinnati.com/story/news/politics/2019/01/29/heartbeat-abortion-ban-return-ohio-right-lifes-support/2667770002/> [<https://perma.cc/4MH4-R2LC>]), Iowa (<https://www.desmoinesregister.com/story/news/politics/2018/05/04/abortion-ban-law-iowa-fetal-heartbeat/577443002/> [<https://perma.cc/X96Y-RWHL>]), and Mississippi (<https://www.clarionledger.com/story/news/politics/2019/02/13/restrictive-abortion-ban-bill-passed-by-mississippi-senate-ms-leg/2858914002/> [<https://perma.cc/MK4-R8A3>]).

⁴ See, e.g., New York (<https://buffalonews.com/2019/01/22/long-stalled-abortion-bill-pas>

evidence that this polarization is further destabilizing the debate and could be causing a significant shift in Americans' abortion attitudes.⁵

This chapter's historical review suggests America is currently in the midst of its third era of abortion laws: (1) from the nation's founding until the early 1800s, abortion laws were in a passive state that continued the English tradition of restricting abortion after the fetus first moved in the womb, which coincided with the point at which people had believed that life begins⁶; (2) from the early 1800s until 1973, abortion laws transitioned to a restrictive state after the AMA propagated the medical view that life began at fertilization, which culminated in a nationwide movement to pass state restrictions of nontherapeutic abortions throughout pregnancy⁷; (3) since 1973, abortion laws have reflected a permissive state that protects a pregnant person's right to abort before fetal viability, which was the perfunctory view on when life begins recognized by United States Supreme Court⁸.

ses-new-york-legislature/ [https://perma.cc/Q83B-67PY]), Virginia (https://www.cbsnews.com/news/virginia-abortion-bill-proposed-by-kathy-tran-third-trimester-today-2019-01-30/ [https://perma.cc/SYV6-43JH]), and Vermont (https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0057/H-0057%20As%20Introduced.pdf [https://perma.cc/T435-LQTP]).

⁵ Marist conducted its annual poll on abortion in January 2019 (http://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf [https://perma.cc/C7LQ-ZEW7]) but, since New York and Virginia's abortion legislation dominated news cycles at the beginning of 2019, Marist conducted another poll in the middle of February in 2019 (http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf [https://perma.cc/C34M-2BDT]) and found the 17-point gap between Americans who identified as pro-choice (55%) and those who identified as pro-life (38%), as 47% of Americans identified as pro-choice and 47% identified as pro-life; there was also an increase of 5% of those who preferred that legal abortion access be limited to the first three months of pregnancy (from 75% to 80%), https://www.axios.com/abortion-rights-marist-poll-pro-life-pro-choice-7170b431-eb2f-4292-b801-8ed56cf2d056.html [https://perma.cc/8XHJ-WXV8].

⁶ Reagan, L.J. "When Abortion Was a Crime, *Women, Medicine, and Law in the United States, 1867-1973*", p. 9, University of California Press, 1997.

⁷ *Id.* at 7-13.

⁸ *Roe v. Wade*, 410 U.S. 113, 163-165 (1973).

In 1973, the opinion in *Roe* was premised on two important realities: (1) the social and economic supports of pregnant people were so limited that they were discriminated against and unwanted pregnancies thrust upon them a series of other hardships; (2) the law was reluctant to recognize fetuses as persons or victims of crime. However, since the Court first called out these issues, lawmakers have responded. Modern laws and social programs have reduced many of the hardships pregnant people face⁹, and many states recognize fetuses as humans¹⁰, human victims¹¹, and human persons¹².

This change in the legal status of fetuses, whereby they are no longer seen as attaining legal status once they are born alive, serves as a threat to *Roe* since it gives the Court motive to reexamine its abortion jurisprudence. That motive, combined with the opportunity they are increasingly provided¹³, could lead the Court to once again attempt to end the national abortion controversy. While the Court has failed to do so in both *Roe* and *Casey*, perhaps it could be more successful in its third attempt. First, it is important to take a step back and trace the trajectory of abortion laws throughout the history of the United States.

⁹ See, e.g., <https://www.fns.usda.gov/wic/about-wic-wic-glance> [<https://perma.cc/8BFE-G888>]; <https://www.dol.gov/oasam/programs/crc/2011-pregnancy-discrimination.htm> [<https://perma.cc/KQ8T-TYT4>]; <https://www.dol.gov/whd/fmla/> [<https://perma.cc/P5ZN-5RD7>].

¹⁰ <https://www.ksl.com/article/46480459/idaho-legislators-seek-to-make-abortion-murder> [<https://perma.cc/Y6JE-GXCW>].

¹¹ <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [<https://perma.cc/U7S-GATR>].

¹² See, e.g., <https://www.apnews.com/09c731313cd56018857f0f0a10c8add5> [<https://perma.cc/CW9B-2CR2>].

¹³ See, e.g., <https://www.washingtonpost.com/health/2019/02/15/least-abortion-cases-are-steps-us-supreme-court-any-one-could-gut-roe-v-wade/> [<https://perma.cc/3QEG-ULUQ>].

Abortion under Common Law

Under common law, from the 13th century until the start of the 19th century, abortion was permitted for the first ~20 weeks of pregnancy. While one could assume that abortion was then a common law liberty, as it provided broader access than most countries in Europe¹⁴, the common law's treatment of abortion should be understood against the backdrop of that time period's prevailing belief that life began once the fetus first moved in the womb, which was also around the 20th week of pregnancy, and the fact that the subsequent change to this belief coincided with a corresponding shift in abortion law. Thus, understanding shifts in views on when life begins helps shed light on the logical basis for abortion laws.

Early Views on When Life Begins

As long as there have been legal debates about abortions in the West, there have been debates about when a human's life begins.¹⁵ One of the earliest documented disputes took place between early Christian scholars in the 4th century. St Basil, Bishop of Caesarea, recognized that a fetus' life begins at the start of pregnancy by holding that an abortion at any stage is a "destruction of [a] child".¹⁶ He believed laws should restrict abortion on that basis, arguing that a "woman who

¹⁴ "Of the 36 countries in Europe that allow abortion on request, the vast majority impose time limits of around 12 weeks.", <https://www.csmonitor.com/World/Europe/2018/0524/In-Europe-it-is-both-easier-and-harder-to-get-an-abortion-than-in-US> [<https://perma.cc/W7RX-P33Y>].

¹⁵ Means, C.C. The Law of New York Concerning Abortion and the Status of the Foetus, 1664- 1968: A Case of CessationofConstitutionality, 14 N.Y.L.F. 411, p. 411 (1968);see also: "The [moral] tradition attempted to grade the protection accorded to the nascent human being according to the stages of its development." in R. Dunstan., The Moral Status of the Human Embryo: A Tradition Recalled, Journal of Medical Ethics, Vol. 10, No. 1 (Mar., 1984), p. 43.

¹⁶ *Letter 188:2*, <http://catholicism.org/fathers-abortion.html> [<https://perma.cc/NE2M-KNEE>].

deliberately destroys a fetus is answerable for murder. And any fine distinction as to its being completely formed or unformed is not admissible among us".¹⁷

St Gregory of Nyssa, the younger brother of St Basil, opposed this view by using that fine distinction to argue that "it would not be possible to style the unformed embryo a human being, but only a potential one".¹⁸ However, he was not immune from grappling with this question, himself. He had also written that "there is no question about that which is bred in the uterus both growing and moving from place to place... that the point of commencement of existence is one and the same for body and soul."¹⁹ This belief that a body comes into existence at the same time as the soul belied his view that there was a difference between a formed and unformed embryo; 'forming' was a characterization of ensoulment, which is the moment people believed a human receives its soul.

This distinction of formed vs. unformed fetuses, contemplated by both early Christian scholars, was first documented by Aristotle, who wrote about early human development and advanced his belief that the fetus was formed at forty days after conception for human males and ninety days for human females.²⁰ This was based on his belief that every human has a vegetative state that moves to an animated state once the soul enters the body ('ensoulment'). The human

¹⁷ St Basil. Ep. clxxxviii. Ad Amphilochium II. in Dunstan, G.R. The Moral Status of the Human Embryo: A Tradition Recalled, *Journal of Medical Ethics*, Vol. 10, No. 1 (Mar., 1984), p. 38-44.

¹⁸ Gregory of Nyssa, *Adversus Macedonianos*, Wake H, Schaff, P., eds. Oxford and New York: Library of Nicene and Post-Nicene Fathers, series 2, vol v, 1893: 320.

¹⁹ Gregory of Nyssa, *The Sacred Writings of Gregory of Nyssa*, Translated by Henry Austin Wilson (1854-1927), p. 420.

²⁰ Aristotle. *History of animals books vii-x*. In: Balm, D.M., ed. *Aristotle vol xi*. London: Loeb Classical Library, 1991, 7. 3, 583b, 3-23.

soul has yet to be detected by modern science, so millennia of scientific research has not, as of yet, lent credibility to this gendered view of when a human's life begins.

Aristotle's distinction was also recognized by St Augustine, whose beliefs are largely credited as being the inspiration behind quickening-based abortion laws. He believed that the law of homicide could only apply after a fetus was formed and ensouled. This notion was further supported by St Thomas Aquinas, who had a similar view of human development: "The formation of the body is caused by the generative power, not of that which is generated [the embryo], but of the father generating from seed."²¹ The Court recognized this history when it discussed "[t]he Aristotelian theory of 'mediate animation,' that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century."²²

This view guided the canon law of the Catholic Church on abortion for centuries.²³ It eventually gave way to English common law, as the authoritative source of law, but the law's use of ensoulment as the starting point of a human's life remained. In his tome on the history of abortion laws, law professor Joseph Dellapenna documents prosecutions and executions for abortions that transpired over the course of several centuries in England.²⁴ There is debate over whether ensoulment was naturally replaced by quickening, which marks the point at which a pregnant person

²¹ For more discussion on early Christian attitudes toward abortion, see, e.g., Jones, D.A., The human embryo in the Christian tradition: a reconsideration *Journal of Medical Ethics* 2005; 3 1: p. 710-714.

²² *Roe v. Wade*, 410 U.S. 113, 160 (1973);

²³ For a discussion of canon law in the Catholic Church, see, e.g., R. Dunstan., The Moral Status of the Human Embryo: A Tradition Recalled, *Journal of Medical Ethics*, Vol. 10, No. 1 (Mar. 1984), p. 40.

²⁴ There is a debate over the motivations behind the prosecutions and executions: <https://www.theatlantic.com/health/archive/2016/03/bringing-down-the-flowers-the-controversial-history-of-abortion/471762/> [<https://perma.cc/4M87-672P>]; Dellapenna, J. *Dispelling the Myths of Abortion History* (2006), Carolina Academic Press.

experiences a fetus stirring in the womb, or if the two were originally seen as fungible by early Anglo-Saxons.²⁵ In either case, inspired by the legal commentator Coke, Blackstone explicitly defended this English common law view: "life... begins in contemplation of law as soon as the infant is able to stir in the mother's womb".²⁶ At this time in English common law, pre-quickening abortions were legally permissible, and post-quickening abortions were punishable by death, albeit rarely punished since it was difficult to prove that a lost pregnancy was due to an abortion procedure.²⁷

Thus, the permissibility of pre-quickening fetuses under common law might be properly understood as equivalent to the modern legal status of birth control. Abortion was legal before quickening because an unquickened fetus was not seen as animated or alive, which is akin to how people view sperm and eggs. Thus, abortion was not legal because it was the permissible destruction of a fetus – pre-quickening abortion was legal because it was understood as preventing an unformed fetus from forming. Since post-quickening abortions were illegal, given their view on when life began, the underlying principle was that abortion could be restricted and punished when it ends a life. This principle can be said to have prevailed throughout the Western legal tradition from the 13th century to this day. This also becomes clear after considering a phenomenological view of abortion from the 13th century through the 19th century.

²⁵ See Spivack's comment: "The baby moves, and it displays an ability to be animated... [t]hey thought that was what having a soul meant." <https://www.theatlantic.com/health/archive/2016/03/bringing-down-the-flowers-the-controversial-history-of-abortion/471762/> [<https://perma.cc/ZZF3-VEMT>].

²⁶ Blackstone. Commentaries. 4th edition, 1770. 1; 129; iv: 388.

²⁷ See, e.g., <http://www.fclr.org/fclr/articles/html/2010/ostler.pdf> [<https://perma.cc/VQT6-P8K3>] discussing Riddle, J.M., *Eve's Herbs: A History of Contraception and Abortion in the West*, p. 96 (1997).

Early Abortions

While it is reasonable to believe that people have always wanted to have abortions, it is more difficult to argue that over one-quarter of those early people's pregnancies were aborted, which is the modern abortion rate²⁸. Early Americans were predominantly religious people who married and had children at much higher rates²⁹. It is possible that there was not as much of a call for abortion, so there was not as much of a need for well-developed abortion laws. Since women would restore their menstrual flow before they became pregnant, there might not have been a lot of late-term pregnancies that were unwanted, even fewer people who wanted to abort the unwanted pregnancies, and a small subset of those situations were discovered by legal authorities. Historians' inability to find many 15th-century abortion prosecutions does not compel the view that fetuses were not protected by the law. Mechanical or physical abortions³⁰ were exceedingly rare, and it is not clear at all that abortifacients³¹ were specifically taken to terminate pregnancies.

In her seminal work on the history of abortion in the United States, Leslie Reagan argues that most pre-quickening induced miscarriages were not intentional. At the time, any break in a

²⁸ The Guttmacher Institute estimates that 56 million abortions take place each year, see: <https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide> [<https://perma.cc/3K9M-7T-TN>]; compare this to the United Nation's reporting of 141 million births each year for a global 28% abortion rate, see: <https://ourworldindata.org/fertility-rate> [<https://perma.cc/3Y53-KERC>].

²⁹ See, e.g., <http://www.hampton.lib.nh.us/hampton/history/FertilityTransition.htm#table1> [<https://perma.cc/KBM9-47DF>]; just in the last several decades, since 1950, the total fertility rate has been cut in half (from 5 to 2.5 children per woman), <https://ourworldindata.org/fertility-rate> [<https://perma.cc/3Y53-KERC>].

³⁰ There are fundamentally two types of actions that medical practitioners use to terminate pregnancies: (1) mechanical or physical abortions – procedures in which the fetus is targeted with a physical action, such as an injection into the fetus, dismemberment of the fetus, or any other physical manipulation of the fetus; (2) chemical or medical abortions – procedures in which the pregnant person ingests a substance that acts upon the pregnant person and/or the fetus.

³¹ These are the substances used in chemical or medical abortions; see, e.g., https://www.academia.edu/10915569/A_Short_History_of_Abortifacients [<https://perma.cc/QFE8-3Y9B>].

woman's menstrual cycle was perceived as a "worrisome imbalance in the body" that signaled a "need to bring the body back into balance by restoring the flow".³² Therefore, taking abortifacients – substances that can cause early pregnancy miscarriages – was not seen as taking action against a fetus or a pregnancy, but merely as a woman's attempt to improve her health. However, once the pregnancy quickened, a woman could be confident they were pregnant. This would remove the perceived health benefit of bringing menses back, as this disruption in the cycle could finally be attributed to pregnancy. Thus, quickening "was a moment recognized by women and by law as a defining moment in human development" and the moment when women "recognized a moral obligation to carry the fetus to term".³³ While the common law's treatment of abortion availed for centuries, it later gave way to statutory constructions and the first English statute on abortion.

Early Abortion Statutes

In 1803, Lord Ellenborough's Act³⁴ criminalized abortion at all stages in a woman's pregnancy.³⁵ While it originally ordered different penalties for pre-quickening abortions, a felony, and post-quickening abortions, capital punishment, the Ellenborough Act was later amended to remove the quickening distinction.³⁶ In the ensuing years, American's common law treatment of abortion also gave way to statutes when Connecticut passed America's first statutory abortion regulation.³⁷

³² *Id.*

³³ Reagan, L.J. "When Abortion Was a Crime, *Women, Medicine, and Law in the United States, 1867-1973*", p. 9, University of California Press, 1997.

³⁴ 43 Geo 3 c. 58.

³⁵ See: Ellenborough Act in Greaves, C.S. (editor). *A Treatise on Crimes and Misdemeanors*. Eighth American Edition. T & JW Johnson. Philadelphia, 1857. Volume 1. p. 720, and discussion in Keown, J. *Abortion, Doctors and the Law*, Cambridge University Press, p. 25, (1988).

³⁶ Keown, J. *Abortion, Doctors and the Law*, Cambridge University Press, p. 39, 1988.

³⁷ Conn. Stat., Tit. 20, §14 (1821).

New York passed its first abortion statute in 1828, which later served as a model for other states' anti-abortion statutes³⁸. The statute made a pre-quickening abortion a misdemeanor and a post-quickening abortion second-degree manslaughter with exceptions related to therapeutic abortions. Since the precedential weight of common law was being undercut by statutes, it opened the door for legislators to remake abortion laws in America and to start a “pro-life” movement.

The 19th-Century Pro-Life Movement

After centuries of passive and permissive attitudes toward abortion, the American Medical Association's (“AMA”) crusade to reform the permissive abortion laws of the early 1800s caused a paradigmatic shift in U.S. abortion law. Amidst the passage of the Fourteenth Amendment³⁹, legislators sought to restrict nontherapeutic abortions throughout pregnancy, and nationwide state restrictions soon followed.

In the 19th century, feminists who opposed abortion as the remedy to uncontrolled birth rates, but instead preferred birth control, found common cause with physicians. Starting in the 1820s, both groups advocated for anti-abortion statutes and acted as legal code revisers, members

³⁸ Mohr, J. *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, Oxford University Press, p. 25-26, 1978.

³⁹ “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”, <https://www.law.cornell.edu/constitution/amendmentxiv> [<https://perma.cc/U3K4-DEX7>].

of legislative committees, and anti-abortion protestors.⁴⁰ With the founding of the American Medical Association in 1847, doctors developed an organizational framework they could use to create a large scale anti-abortion campaign.

Dr. Horatio Storer, a young AMA member who specialized in obstetrics and gynecology, started physicians' crusade against abortion access by founding and leading the AMA's Committee on Criminal Abortion, which comprised a prestigious medical professor, a dean, and a former president of the AMA. The AMA accepted that Committee's Report in 1859 with a unanimous vote and endorsed the view that they "have proved the existence of fetal life before quickening has taken place or can take place, and by all analogy and a close and conclusive process of induction, its commencement at the very beginning, at conception itself, we are compelled to believe unjustifiable abortion always a crime".⁴¹

Motivations for State Restrictions

The Committee's strategy to criminalize abortion focused on the lobbying of state medical associations.⁴² Some have written that the effort to criminalize abortion was not about protecting fetuses, but instead, the lobbying efforts served as evidence that physicians wanted to aggregate the power of physicians by driving midwives and homeopaths out of the medical profession, who

⁴⁰ Mohr, J. *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, Oxford University Press, p. 147, 1978.

⁴¹ Storer, H.R. "On Criminal Abortion in America", J.B. Lippincott & Co., 1860, available at: <https://books.google.com/books?id=4kprAAAAMAAJ> [<https://perma.cc/A8W7-FQGF>]; the logic suggests that they viewed the elective killing of a fetal human to be a crime under homicide statutes that criminalized the killing of other humans.

⁴² Mohr, J. *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, Oxford University Press, p. 155-156, 1978.

performed and provided many abortions. Historians James Mohr and Leslie Reagan have suggested that such legislative efforts were indeed a smokescreen. In their historical accounts of abortion laws in the 19th century, they argued that the anti-abortion efforts were more about the desire to marginalize midwives, in pursuit of their goal to professionalize medicine, and less about abortion or the protection of fetuses. At this point, it is important to consider the express legislative intent of 19th-century abortion laws like Ohio's⁴³ and recognize that 19th-century developments in embryology and biology coincided with the restriction of abortion. However, the physicians' attempt to marginalize these paraprofessionals could have been rooted in their desire to restrict the supply of abortionists⁴⁴. This is a more parsimonious and reasonable explanation than the theory that portrays a conspiracy among university-trained medical physicians that spanned several decades.

In either case, those physicians were driving abortionists out of business. If their sole focus was on their profession, and they were unconcerned with protecting the rights of preborn humans, then it is curious why they did not advocate for the standardization and medicalization of abortion since that would grow their business and expand their share of pregnancy-related services. The fact that they did not seize that opportunity – and ceded their share by making abortion illegal –

⁴³ In their report that recommended the passage of Ohio's statute to restrict abortion, which was passed in the same legislative session in which they ratified the Fourteenth Amendment, the senate committee stated abortion was "child-murder" since a human's life begins at conception and "willful killing of a human being, at any stage of its existence, is murder.", General and Local Laws and Joint Resolutions of the State of Ohio, Volume 64, 202-3 (Columbus, OH: L.D. Meyers & Bro., 1867); The Journal of the Senate of the State of Ohio, Fifty-Seventh General Assembly (Columbus, Ohio, L.D. Myers & Bro. 1867).; Dyer, J.B. (2017). The Constitution, Congress and Abortion. *New York University Journal of Law & Liberty*, 11, 394.

⁴⁴ While some take exception with this phrase, it is typically used and it is more accurate than "abortion doctor" or "physician" since nurse practitioners and physician assistants also perform abortions (<https://www.elitedaily.com/p/can-only-physicians-provide-abortions-in-certain-states-laws-restrict-care-9687059> [<https://perma.cc/2FJ6-CG79>]) and "abortion provider" typically refers to a clinic that provides abortion services, not an individual who performs abortions.

flies in the face of the inference that physicians solely, or even primarily, advocated for the restriction of abortion for business, financial, and professional reasons.

The more reasonable inference is that physicians in the late 19th century sought to restrict abortion because they saw it as an impermissible form of homicide, especially since that was the stated reason in their AMA reports, medical articles, legal articles, and tracts. James Mohr is a strong proponent of the view that physicians' anti-abortion movement was rooted in professional concerns, but he admitted, "personal factors certainly added to the substantial professional motives for an anti-abortion crusade on the part of America's regular physicians. The first was a no doubt sincere belief on the part of most regular physicians that abortion was morally wrong."⁴⁵

It is important to note that historian Leslie Reagan compellingly makes the case that there were anti-immigrant, nationalist, and natalist currents driving the anti-abortion movement.⁴⁶ As immigrant populations were coming into the U.S. in the 1800s, many American-born citizens and protestants worried that foreign Catholics would erode America's national character. The nationalists lobbied Americans to have more children, as they worried their birth rate was exceeded by the immigrants'. This is not unlike the modern immigration debate and the 21st-century discussion on declining birth rates.⁴⁷ In either case, states were moving away from the common law and toward new state abortion restrictions, due to the AMA's lobbying. The shift can also be understood in the context of the shift in constitutional law regarding the equal protection of all humans.

⁴⁵ Mohr, J. *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, Oxford University Press, p. 163-164, 1978.

⁴⁶ Reagan, L.J. "When Abortion Was a Crime, *Women, Medicine, and Law in the United States, 1867-1973*", p. 10-11, University of California Press, 1997.

⁴⁷ See, e.g., https://www.washingtonpost.com/opinions/can-immigration-save-the-us-from-its-birthrate-crisis/2019/01/15/2c546262-1907-11e9-8813-cb9dec761e73_story.html [<https://perma.cc/YV2W-BAZN>].

State Restrictions and the Fourteenth Amendment

“In 1867, the same time it ratified the Fourteenth Amendment, Ohio made abortion at any stage of pregnancy illegal. The same year, Illinois also ratified the Fourteenth Amendment and passed laws stiffening penalties for committing abortion. In 1869, in the same session that Florida ratified the Fourteenth Amendment, Florida also passed laws prohibiting abortion at any stage of gestation. Vermont and New York each passed laws that increased protection of unborn human beings after these states ratified the Fourteenth Amendment. By 1875, 16 of the 28 ratifying states had in place tough laws against abortion at any stage of gestation, allowing for abortion only when the life of the mother was in real danger. Congress complemented the action of the various states by enacting the Comstock Laws in 1873 to prevent the dissemination of literature that promoted abortion. The legal protection of unborn human beings at the time the Fourteenth Amendment was ratified was consistent with the guarantee of equal protection and the right to life, to every “person,” whether born or unborn.”⁴⁸

Some have argued that restrictive abortion statutes were passed as a way to effectuate the protection of fetuses, given the evidence of legislative intent to achieve that purpose and the Fourteenth Amendment’s context of expanding rights to all persons. In 1868, during the Thirty-Ninth Congress, Republican Senator Lyman Trumbull from Illinois advocated for the Thirteenth and Fourteenth Amendments on behalf of President Abraham Lincoln, and he voted for the amendment in 1868⁴⁹. Specifically referring to the spirit of the Fourteenth Amendment, he was quoted as saying that he hoped to move forward with fellow senators “hand in hand together to the consummation of this great object of securing to every human being within the jurisdiction of the republic

⁴⁸ Lugosi, C.I., *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 186 (2006).

⁴⁹ "A Handbook of Politics for 1868", Part I Political Manual for 1866, VI - Votes on Proposed Constitutional Amendments. Washington City: Philp & Solomons. 1868, p. 102, available at: https://commons.wikimedia.org/wiki/File:14th_Amendment_Senate_%26_House_votes_June,_1866.jpg [<https://perma.cc/J2QG-EW7Y>].

equal rights before the law”.⁵⁰ In 1875, United States Senator Allen Thurman similarly stated that:

*“[The Fourteenth Amendment] covers every human being within the jurisdiction of a state. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State from any deprivation of an equal protection of the laws”*⁵¹

In 1868, at least 28 of the 37 states in the union – and eight territories – had statutes banning or limiting abortion.⁵² Further, the statutes of 23 states and six territories referred to the fetus as a “child”.⁵³ Many states also classified the crimes in their abortion statutes as “offenses against the person” and “offenses against the lives and persons of individuals”.⁵⁴

It is interesting to note that the Fourteenth Amendment is currently used as the basis for the liberty right to abort, while pregnant people did not then have the liberty right to terminate their pregnancies, or at least that right was not recognized at that point. In the decades leading up to the amendment’s passage, and for a century after, abortion was restricted. It then seems curious how the Court was able to use the context of these 19th abortion laws to show that fetuses were not protected. Perhaps it was because the Court was still unclear on when life begins.

⁵⁰ History of the Thirty-ninth Congress of the United States, William Horatio Barnes, January 1, 1868, Harper & Brothers, p. 132, available at: <https://www.gutenberg.org/files/24596/24596.txt> [<https://perma.cc/PKL7-GTTZ>].

⁵¹ Congressional Record containing the Proceedings and Debates of the Forty-Third Congress, Second Session, p. 1794, Washington, Government Printing Office, 1875, accessible at: <https://books.google.com/books?id=NU9hwULq9BUC&pg=PA1794> [<https://perma.cc/LH2T-9GMD>]

⁵² Mohr, J. Abortion in America: The Origins and Evolution of National Policy, 1800-1900, Oxford University Press, p. 200, 1978; *Planned Parenthood v. Casey*, 505 U.S. 833, 952 (1992).

⁵³ Witherspoon, J.S. *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L.J. 29, 48 (1985).

⁵⁴ In the latter, “persons” is likely a reference to bodies; *Id.*

Given recent findings on when life begins⁵⁵ and Senator Trumbull's comments, it is unsurprising that some believe that it seems obvious that the Fourteenth Amendment entails the protection of fetuses since they are humans and the amendment's purpose was to give "every human being within the jurisdiction of the republic equal rights before the law"⁵⁶. Whatever the motivation or grounding of 19th-century abortion laws, the law restricted abortion and did not recognize broad abortion rights. However, policy does not always dictate practice.

The Enforcement of Abortion Laws

It is difficult to improve upon Clark Forsythe's review of this issue in his article "Why the States Did Not Prosecute Women for Abortion Before *Roe v. Wade*".⁵⁷ To provide a quick summary: legislators and prosecutors have been reluctant to prosecute pregnant people for illegal abortions⁵⁸, at most treating them as accomplices in the crime committed by the principals (the abortionists): "A reading of the statute indicates that the acts prohibited are those which are performed upon the mother rather than any action taken by her. She is the object of the acts prohibited rather than the actor."⁵⁹ This includes self-abortions, as law professor Joseph Dellapenna reports that only one woman has been charged with a crime in a self-abortion.⁶⁰ This is consistent with Leslie

⁵⁵ See Chapter 5 on p. 251.

⁵⁶ History of the Thirty-ninth Congress of the United States, William Horatio Barnes, January 1, 1868, Harper & Brothers, p. 132, available at: <https://www.gutenberg.org/files/24596/24596.txt> [<https://perma.cc/Y9EK-8ECH>].

⁵⁷ <https://aul.org/2010/04/23/why-the-states-did-not-prosecute-women-for-abortion-before-roe-v-wade/> [<https://perma.cc/8BBU-THZ5>].

⁵⁸ *Id.*, Forsythe claims that there have been only two documented cases in which a pregnant person was charged with a crime related to an illegal abortion: *Commonwealth v. Weible*, 45 Pa. Super. 207 (1911) and *Crissman v. State*, 93 Tex. Crim. 15, 245 S.W. 438 (Tex. Crim. App. 1922).

⁵⁹ *Id.*, citing: *State v. Barnett*, 249 Or. 226, 228, 437 P.2d 821, 822 (1968).

⁶⁰ *Id.*, citing: *Petition of Vickers*, 371 Mich. 114, 115, 123 N.W.2d 253, 254 (1963).

Reagan's discussion of the reluctance to prosecute women in illegal abortions, shown by both officers of the law and those in the pro-life movement. While pregnant people are under the kind of duress that would undercut them having the requisite *mens rea*⁶¹, it is easy to prosecute and punish abortionists who perform illegal abortions for money.⁶²

This might seem like a surprising finding given the history of U.S. abortion laws. However, the reluctance to prosecute pregnant people for illegally aborting their pregnancies or illegally hiring a doctor to perform an abortion – compared to the willingness to prosecute the unlawful killing of another human or the unlawful hire of a contract killer to kill another human – could be explained by various pragmatic and social factors: (1) the pregnant person and the abortionist might be the only people who know about the pregnancy and its termination; (2) the people who know about the abortion are likely close to the pregnant person and abortionist, so they are less likely to report an unlawful abortion; (3) pregnant people have historically been women, and there is a significant reluctance to prosecute women or to punish them for crimes in America⁶³.

However, the biggest takeaway might be what this says about abortion laws. Perhaps abortion opponents, at least in the past, do not see laws as a method of deterring through the severity of the punishment, like with capital punishment, but prefer to use laws to frustrate and deter those

⁶¹ Typically, a person needs to have criminal intent in order to be convicted of a crime, see, e.g., https://www.law.cornell.edu/wex/mens_rea [<https://perma.cc/GR5L-4BJT>].

⁶² Reagan, L.J. “When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973”. *University of California Press*, 1997, p. 103-106.

⁶³ These differences can be explained by prosecutors' discretion: “the key control variable is itself the result of a host of discretionary decisions made earlier in the justice process”, but regardless of the mechanism “men receive 63% longer sentences on average than women do” and “[w]omen are...twice as likely to avoid incarceration if convicted”, Starr, Sonja B., *Estimating Gender Disparities in Federal Criminal Cases* (August 29, 2012). University of Michigan Law and Economics Research Paper, No. 12-018. Available at SSRN: <https://ssrn.com/abstract=2144002> [<https://perma.cc/57WU-EUQG>]; https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.2011/tables/table_66_arrests_suburban_areas_by_sex_2011.xls [<https://perma.cc/U4V3-MGJ6>].

who are reluctant to break the law. This researcher has encountered people who have explicitly stated that they would have gotten an abortion in the 1960s if it had been legal at the time but, because it was illegal and they were unwilling to break the law, they went through with their pregnancies. That might be the very intended purpose of abortion laws for some, especially if they view abortion laws as serving the expressive function of law for society to stand firmly against legal abortion access.

While this might undercut the thrust of expanding abortion restrictions for some, this past reluctance to strictly enforce abortion laws might signal how future abortion laws would be enforced. However, it is also possible that people in the future would be more apt to strictly enforce abortion laws and harshly punish violators. In either case, the lack of enforcement before *Roe* likely played a role in the creation of a two-tiered system, as some found ways to have legal abortions, while the less fortunate resorted to obtaining illegal abortions.

Unintended Consequences of State Restrictions

While the early anti-abortion movement made significant progress in state legislatures, there was a major unintended consequence upon which the subsequent pro-choice movement seized: the growth of therapeutic abortions. While these were envisioned as rare exceptions where a woman's life or health was seriously at risk, people gamed the system. Those who had enough money to pay a doctor to legitimate their claim were able to have safe and legal abortion access. It created a two-tiered system where predominantly rich, white women had legal abortion access, and predominantly poor minorities had to have illegal abortions, which carried with them some increased risk of injury or death.

While there is no limit of anecdotes about coat hanger abortions and brutal home procedures, most illegal abortions were ‘back-alley abortions’. That language likely evokes some sense that the abortions took place in back alleys⁶⁴, but it was a reference to the fact that patients would have to enter medical clinics through the back-alley entrances, outside of regular office hours, to avoid law enforcement agencies. That is to say many illegal abortions, in addition to the legal therapeutic abortions, were performed by medical practitioners. In the early 20th century, there were many deaths from illegal and legal abortions because surgery was dangerous, as antiseptics had yet to be developed. With the discovery of penicillin, death rates from abortion plummeted⁶⁵, as did death rates from general surgeries. While those in the early 20th-century pro-choice movement legitimately cited thousands of deaths from illegal abortion⁶⁶, many in the movement leading up to *Roe* knowingly omitted the impact of penicillin and made it seem as if thousands were dying from illegal abortion each year, while the actual death rate was measured in the hundreds.⁶⁷

While many used this claim to bolster their defense of legal abortion, it did not avail for those who opposed abortion. Mary Anne Warren explained this, in her defense of abortion, and suggested that the mortality rate associated with illegal abortions is irrelevant to the debate about abortion since “the fact that restricting access to abortion has tragic side effects does not, in itself,

⁶⁴ This subject often came up in chapter 6’s mediations; it usually caused laughter when participants realized that ‘back alley’ was not a suggestion that most illegal abortions had taken place in back alleys, but that pregnant people had to access clinics and hospitals through ‘back-alley’ entrances.

⁶⁵ One 20th-century abortionist claims she performed 40,000 illegal abortions without a single death of a pregnant person, Sollinger, R. *The Abortionist: A Woman Against the Law*, University of California Press, p. 5, 1996.

⁶⁶ <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue> [<https://perma.cc/7SF7-ZR94>].

⁶⁷ <https://www.factcheck.org/2005/07/abortion-distortions/> [<https://perma.cc/5CS9-AMZ9>].

show that the restrictions are unjustified, since murder is wrong regardless of the consequences of prohibiting it”.⁶⁸

The 20th-Century Pro-Choice Movement

The early 20th century saw a confluence of environmental, birth control, and gender equality advocates work to reform and repeal abortion laws. Doctors, lawyers, and activists were the drivers of the movement; they faced little opposition, other than religious moralists and civil libertarians who sought to protect abortion laws. This battle set the stage for the U.S. Supreme Court’s intercession in *Roe*.

Margaret Sanger, an early hero of the pro-choice Movement and founder of Planned Parenthood, opened her first birth control clinic in Brooklyn in 1916.⁶⁹ Despite widespread abortion laws, it was estimated that hundreds of thousands of illegal abortions still occurred each year in the early 20th century.⁷⁰ As discussed above, while illegal abortions were dangerous in the early years, abortion-related maternal deaths plummeted once practitioners started using penicillin in the procedure. Interestingly, illegal abortions became so safe that “in 1957 there were only 260 deaths in the whole country attributed to abortions of any kind. In New York City in 1921 there were 144 abortion deaths, in 1951 there were only 15”.⁷¹

⁶⁸ Warren, M. (1973). ON THE MORAL AND LEGAL STATUS OF ABORTION. *The Monist*, 57(1), 43-61, p. 44, <http://www.jstor.org/stable/27902294> [<https://perma.cc/5E5S-4S2V>].

⁶⁹ https://www.plannedparenthood.org/files/7513/9611/6635/Margaret_Sanger_Hero_1009.pdf [<https://perma.cc/LM4S-9AJV>].

⁷⁰ Abernathy, J.R., Greenberg, B.G., and Horvitz, D.G., Estimates of induced abortion in urban North Carolina, *Demography*, 1970, 7(1):19-29.

⁷¹ Calderone, M. “Illegal Abortions,” *American Journal of Public Health*, July 1960, 949.

Dr. Bernard Nathanson, one of the founders of the National Association for the Reform of Abortion Laws (“NARAL”), later opened up about the statistics used by the pro-choice movement:

“How many deaths were we talking about when abortion was illegal? In NARAL (National Association for Repeal of Abortion Laws) we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always 5,000 to 10,000 a year. I confess that I knew the figures were totally false, but in the "morality" of our revolution, it was a useful figure, widely accepted, so why go out of our way to correct it with honest statistics?.”⁷²

However, this quote should be understood in the context of his later conversion to a pro-life voice in the debate. He railed against the pro-choice movement with more accusations:

“We fed the public a line of deceit, dishonesty, a fabrication of statistics and figures. We succeeded [in breaking down the laws limiting abortions] because the time was right and the news media cooperated. We sensationalized the effects of illegal abortions, and fabricated polls which indicated that 85% of the public favoured unrestricted abortion, when we knew it was only 5%. We unashamedly lied, and yet our statements were quoted [by the media] as though they had been written in law.”⁷³

Justice Ruth Bader Ginsburg once remarked that she thought *Roe* was about population growth⁷⁴; there was a significant move to protect the environment and limit uncontrolled growth.

⁷² Nathanson, B. & Ostling, R. *Aborting America*. Pinnacle Books. New York 1979, available at: <https://www.bmj.com/rapid-response/2011/11/03/how-abortion-movement-started-deceit-and-lies-dr-nathanson> [<https://perma.cc/BKV4-B8KL>].

⁷³ *Id.*, citing: Powell, J. *Abortion: the silent Holocaust*. Tabor, Allen, Texas. 1981.

⁷⁴ <https://slate.com/news-and-politics/2012/10/ruth-bader-ginsburg-clears-up-her-views-on-abortion-population-control-and-roe-v-wade.html> [<https://perma.cc/4EAW-SF69>].

Indeed, a best-selling book had raised fears about overpopulation⁷⁵, as there was a baby boom in America, and abortion was seen as an important part of limiting potentially catastrophic overpopulation. The world was not yet in a technological place to efficiently feed billions, so people sought to grow a population control tool such as abortion.

In 1955, Planned Parenthood organized a national conference to bring together physicians and professionals who supported the reform of abortion laws.⁷⁶ Amidst the growing effort to repeal abortion laws, the American Law Institute ("ALI") issued an affirmative policy recommendation that laws except for abortions that: (1) prevent the grave impairment of a pregnant person's physical or mental health, (2) terminate a pregnancy of a fetus with grave physical or mental defects, (3) terminate a pregnancy that resulted from rape, incest, or felonious intercourse.⁷⁷ While most laws already permitted abortions in the first case, this was seen as an expansion of abortion rights and states did adopt ALI's recommendations in reforming their abortion laws.

By 1969, the California State Supreme Court and a D.C. federal district court both found their abortion laws unconstitutional.⁷⁸ By 1973, seventeen states had repealed or reformed their abortion laws.⁷⁹ That year, Lawrence Lader, Betty Friedan, and the aforementioned Dr. Nathanson

⁷⁵ Ehrlich, P.R. *The Population Bomb*, 1968; see also: <https://www.smithsonianmag.com/innovation/book-incited-worldwide-fear-overpopulation-180967499/> [<https://perma.cc/9KE2-AA2N>] (for a discussion of the impact of the book) and <https://www.lifenews.com/2013/09/25/the-ugly-unknown-story-behind-roe-v-wade/> [<https://perma.cc/FMD5-C5TL>] (for a suggestion that it played a role in *Roe*).

⁷⁶ Sanger, M. "Birth Control, 1955," 1956.

⁷⁷ MODEL PENAL CODE § 230.3 (2) (Proposed Official Draft, 1962).

⁷⁸ *People v. Belous* - 71 Cal.2d 954; *United States v. Vuitch*, (D.D.C. 1969), 305 F. Supp. 1032.

⁷⁹ Kliff, S. (January 22, 2013). "CHARTS: How Roe v. Wade changed abortion rights". *The Washington Post*, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/22/charts-how-roe-v-wade-changed-abortion-rights/> [<https://perma.cc/SY7Q-BMAR>].

founded the National Association for the Repeal of Abortion Laws (NARAL).⁸⁰

A lesser discussed aspect of the pro-choice movement is the reactionary pro-life movement, at that time. While many think about the pro-life movement as having religious and Catholic roots, Daniel K. Williams' recent book, "Defenders of the Unborn", argues that many prominent figures were human rights activists and civil libertarians⁸¹. He cites some interesting anecdotes that are hard to ignore. For instance:

"The media portrayed the pro-life movement as a Catholic cause, but by 1972, that stereotype was already outdated. In Michigan, for instance, the fight against a referendum to legalize abortion was spearheaded by three Protestants—a gynecologist, a white Presbyterian mother, and an African American woman who was a liberal Democratic state legislator. In Minnesota, the leader of the state's pro-life campaign was a liberal Methodist whose physician husband was a member of Planned Parenthood. In Massachusetts, one of the leading pro-life activists was an African American Methodist physician who had been the first black woman to graduate from Harvard Medical School."⁸²

The public debates and legal battles between pro-choice and pro-life movements served as the impetus for the U.S. Supreme Court to finally tackle the issue for the first time in the 1970s.

Federal Abortion Protections

In a series of cases⁸³, the U.S. Supreme Court recognized the Constitution's protection of a Fourteenth Amendment liberty right to be free from hardships related to unwanted pregnancies.

⁸⁰ <http://articles.latimes.com/2011/feb/23/local/la-me-bernard-nathanson-20110223> [<https://perma.cc/5SMW-JFU5>].

⁸¹ Williams, D.K. *Defenders of the Unborn: The Pro-Life Movement before Roe v. Wade*, Oxford University Press, 2015.

⁸² *Id.* at 1.

⁸³ *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

However, they deemed this was not an absolute right, and the Court balanced it against the legitimate state interest of protecting fetuses. Since they could not find agreement on when life begins, they found that fetuses are protectable when they have the capacity for meaningful life. The Court determined that fetal viability is the point at which a fetus has the capacity for meaningful life, which is when a fetus' lungs have sufficiently developed to survive outside the womb with the aid of medical life support technologies. Thus, pregnant people were said to have a Constitutional right to have an abortion until fetal viability, at which point the state's compelling interest takes precedence under the strict scrutiny judicial balancing test. However, this Fourteenth Amendment right was not expressly stated in the Constitution and could not have been recognized without the development of the substantive due process doctrine.

Substantive Due Process

From the United States Supreme Court decision in *Lochner v. New York*,⁸⁴ until their decision in *West Coast Hotel Co. v. Parrish*,⁸⁵ the Substantive Due Process doctrine was primarily used to strike down state economic regulations. While “due process” was a legal concept that set out citizens' rights for fair treatment in the legal process, it was later separated into two doctrines: (1) Procedural due process, which set forth citizens' right to be notified of any legal action against them and other associated rights; (2) Substantive due process, which set forth certain fundamental rights to which citizens are entitled.

In this *Lochner* era, named after the landmark case *Lochner*, the U.S. Supreme Court overturned minimum wage laws and other economic laws to protect citizens' economic liberty and

⁸⁴ *Lochner v. New York*, 198 US 45 (1905).

⁸⁵ *West Coast Hotel Co. v. Parrish*, 300 US 379 (1937).

private contract rights. However, the Court soon used the doctrine to protect civil liberties. This began with 1923's *Meyer v. Nebraska*, where the Court found that parents have a substantive due process right to educate their children in a foreign language.⁸⁶ The doctrine was then significantly expanded in 1925's *Pierce v. Society of Sisters* after it struck down an Oregon statute that required children to attend public school up to a certain age.⁸⁷ These cases ushered in a new era of substantive due process.

While developing the doctrine that protected unenumerated civil liberties, the Court created a judicial standard to be used in cases that involve those rights. In 1944's *Korematsu v. United States*, the Court first employed the "strict scrutiny" standard for laws that impact citizens' fundamental rights.⁸⁸ This standard of judicial review requires that a state's law be narrowly tailored to address a compelling government interest. Contrasted with the default "rational basis" standard, which only requires that a state law have some rational basis for addressing any legitimate government purpose, this bar was made to be much more difficult for a law to overcome, which suggests great deference to fundamental rights. Indeed, it is the strictest standard of judicial review.⁸⁹

This use of the substantive due process doctrine was gaining steam, but it was not without its detractors. In one of his final dissents, Justice Oliver Wendell Holmes, an originalist and an opponent of the living constitution interpretation⁹⁰, finally spoke brazenly about his thoughts on the development of the substantive due process doctrine:

⁸⁶ *Meyer v. Nebraska*, 262 US 390 (1923).

⁸⁷ *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).

⁸⁸ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁸⁹ https://www.law.cornell.edu/wex/strict_scrutiny [<https://perma.cc/DT87-ZQUF>].

⁹⁰ There are two fundamental views of the constitution that are in constant tension and some are comfortable anchoring their judicial philosophy in one of the views: originalists, those who believe that the constitution should be interpreted as strictly and textually as possibly, and

“I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.”⁹¹

While proponents of the doctrine argue that they are attempting to protect fundamental rights, opponents like Justice Holmes argue that using the Fourteenth Amendment to achieve such ends subverts States’ unenumerated rights reserved to them by the Tenth Amendment. In the following years, the Court did not heed share Justice Holmes’ anxiety or reluctance.

Griswold v. Connecticut

In 1965, the U.S. Supreme Court heard *Griswold v. Connecticut* (“*Griswold*”).⁹² Estelle Griswold, executive director of Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, doctor and professor at Yale Medical School, opened a birth control clinic in Connecticut to challenge the state’s 1879 Comstock law, which prohibited the use of contraception. Indeed, the two were arrested and charged as accessories for providing illegal contraception. Both were found guilty and appealed their convictions to the Supreme Court of Errors of Connecticut, based upon their claim that the Comstock law violated the U.S. Constitution. While the court of appeals upheld the conviction, the parties appealed to the U.S. Supreme Court, which agreed to review the case.⁹³

those who view it as a living constitution that is a guideline meant to represent and serve the interests of a populace, such that the constitution takes on different meaning at different points, see, e.g., Justice Sonia Sotomayor’s discussion: <https://www.c-span.org/video/?c4631147/originalism-vs-living-constitution> [<https://perma.cc/F8DS-785Y>].

⁹¹ *Baldwin v. Missouri*, 281 U.S. 586 (1930).

⁹² *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹³ *Id.*

The Connecticut law had been passed due to the 1873 federal act, which targeted the distribution of pornography, contraception, and other so-called obscene materials.⁹⁴ The Court found the Comstock law unconstitutional in a 7-2 majority opinion. In *Griswold*'s majority opinion, Justice William O. Douglas argued that there is no explicit right to privacy in the Bill of Rights. However, the majority recognized one, using the "penumbras" and "emanations" from other constitutional protections.⁹⁵

In this catch-all approach, Justice Douglas cited the First Amendment (the right to free speech), the Third Amendment (the right to be free from being forced to quarter soldiers), the Fourth Amendment (the right to be free from unlawful searches and seizures), the Fifth Amendment (the right to be free from self-incrimination), and the Ninth Amendment (which preserves other fundamental rights of citizens that are not enumerated). His argument went: 'there is a general "right to privacy" in the Bill of Rights that guarantees citizens' right to life and opinion, which is part of their right to privacy'.⁹⁶

This newly-recognized right to privacy allowed Justices to construe the right to contraception access as a fundamental right, which triggered the strict scrutiny standard of judicial review. Again, this is the most difficult constitutional bar to overcome since it requires that a state's law be narrowly tailored to a compelling governmental interest. Justices Hugo Black and Potter Stewart dissented, arguing that the right to privacy is not in the Constitution and that it is not the Court's

⁹⁴ The Comstock Act, 17 Stat. 598.

⁹⁵ "Justice Holmes developed the penumbra doctrine as representing the 'outer bounds of authority emanating from a law'", <https://legal-dictionary.thefreedictionary.com/penumbras> [<http://perma.cc/4HSZ-BAV8>]; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁶ See, e.g., http://www.pbs.org/wnet/supremecourt/rights/landmark_griswold.html [<https://perma.cc/9G7M-FD66>].

job to overturn “silly” laws but to determine whether laws are constitutional.⁹⁷

Griswold's holding was extended to unmarried couples in the 1972 United States Supreme Court Case *Eisenstadt v. Baird*.⁹⁸ The Court argued that restricting birth control access for unmarried couples was a violation under the Fourteenth Amendment's Equal Protection Clause. Since married couples had the right to contraception access, the Clause required that unmarried couples be extended the same protection. While *Griswold*'s majority opinion grounded the right to privacy in the “penumbras” and “emanations” of the Bill of Rights, the concurring opinions' use of the Substantive Due Process doctrine, which was grounded in the Fourteenth Amendment, proved to stand the test of time when the Court used it as the basis for its decision in *Roe v. Wade*.

Roe v. Wade

In 1969, Norma L. McCorvey was pregnant with her third child and sought an abortion. Despite having later given birth to that child in 1970, McCorvey was referred to attorneys Linda Coffee and Sarah Weddington, who filed suit on her behalf. Under the alias ‘Jane Roe’, a pseudonym in the vein of ‘Jane Doe’, her lawyers filed suit against Dallas County District Attorney Henry Wade as the state representative of Texas. Later that year, a three-judge panel of the United States District Court for the Northern District of Texas unanimously declared the Texas law was an unconstitutional violation of the right to privacy under the Ninth Amendment.⁹⁹ The decision made its way up to the U.S. Supreme Court.

⁹⁷ *Griswold v. Connecticut*, 381 U.S. 479, p. 380 (1965).

⁹⁸ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁹⁹ *Roe v. Wade*, 410 U.S. 113, 122 (1973).

In January 1973, a 7-2 majority of Justices overturned the Texas law, opting to use the Fourteenth Amendment to justify its reading of a pregnant woman's right to privacy.¹⁰⁰ Justice Blackmun wrote the majority opinion and construed the right to abortion as a fundamental right to personal privacy, which triggered the high judicial review bar of strict scrutiny. First, Justice Blackmun recognized that *Roe's* case would collapse if fetuses were recognized as persons under the Fourteenth Amendment; thus, he dismissed such fetal rights because other references to "person" in the Constitution could not apply to fetuses. However, he failed to note that most of those references similarly did not apply to infants.¹⁰¹ By discounting fetal rights, Justice Blackmun was able to then balance pregnant women's fundamental right to have an abortion against Texas' interests in regulating abortion.

First, Justice Blackmun sought to define Texas' interests in regulating abortion. Justice Blackmun set forth two legitimate interests on behalf of the state: (1) to protect pregnant women's health; (2) to protect the "potentiality" of human life. In an interesting move, the Justice simultaneously argued that the Court "need not resolve the difficult question of when life begins", while assuming that fetuses are "potential" lives and that states only have a "compelling" interest in protecting them at the moment of viability.¹⁰²

This might seem like a simple move, but let us consider the logic of Justice Blackmun's argument for a moment, as it has proved to produce an immensely important impact on America and its political landscape over the last four decades:

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., Craddock, J., Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion? (May 15, 2017). Harvard Journal of Law and Public Policy, Vol. 40, No. 2, 2017. Available at SSRN: <https://ssrn.com/abstract=2970761> [<https://perma.cc/9K9E-U4UF>].

¹⁰² *Roe v. Wade*, 410 U.S. 113, 162-163 (1973).

“With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.”¹⁰³

While Justice Blackmun stated that the Court need not resolve the difficult question of when life begins, he introduced the “viability” concept as a proxy for: (1) when life begins; (2) when the government can assert a compelling interest in a fetus’ life; (3) the compelling point in fetal development. He argued that this biological justification permitted infringement on a pregnant woman’s fundamental rights because this was the compelling point when the state was permitted to assert its interest in protecting human life.

It is important to note that a full reading of *Roe* makes it clear that the Court had one main object in recognizing a constitutional right to abort:

“The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.”¹⁰⁴

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 153.

The Court's description of the hardships women faced was highly responsive to Sarah Weddington's remarks at the oral arguments and rearguments.¹⁰⁵ It was of great importance for the Court to remediate the gender issues in 1970s America. The Court had a similar holding in *Doe v. Bolton* ("Doe"), the 1973 companion case to *Roe*, that it released on the same day as *Roe*.¹⁰⁶

In *Doe*, the same 7-2 majority invalidated the medical approval requirement of a Georgia abortion law. The Court grounded its decision in the holding that a woman's right to privacy is "broad enough to encompass a woman's decision" to have an abortion.¹⁰⁷ *Doe* went further than *Roe*, creating a legal exception for post-viability abortions in the case of the mother's health. Not only did the Court create an exception, it construed a pregnant woman's health as broadly as possible: "The medical judgment [to determine whether abortion is necessary] 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. All these factors may relate to health."¹⁰⁸ Effectively, the holding gave license to states to permit abortion in most conceivable cases.

Means' Role in Roe

In discussing *Roe*, there is a need to briefly consider the curious case of Professor Cyril Means' scholarship's prominence in the decision. The Court frequently cited Professor Means' two articles as authoritative on the legal history of abortion.¹⁰⁹ There has been much debate about

¹⁰⁵ Weddington, S. Oral Argument of *Roe v. Wade*, 1971; Weddington, S. Oral Reargument of *Roe v. Wade*, 1972.

¹⁰⁶ *Doe v. Bolton*, 410 U.S. 179 (1973).

¹⁰⁷ *Id.* at 186.

¹⁰⁸ *Id.* at 192.

¹⁰⁹ The Court cited Professor Means in notes 21, 22, 26, 33, 42, and 47 in *Roe v. Wade*, 410 U.S. 113 (1973).

these articles and the credibility of their author since the Court relied on them forty-five years ago. Some opponents start by pointing out that Professor Means identified his position on abortion as a common law liberty as unique, as he claimed he was the only researcher who had uncovered these surprising realities of past U.S. abortion law¹¹⁰. Some have argued that the uniqueness of the claim suggests it is unlikely to be true, while others have sought to undermine the position by calling into question the credibility of Means.

They advance this move by noting that Means did not disclose he was counsel for the National Association for the Repeal of Abortion Laws (“NARAL”), and thus failed to cite his conflict of interest in both of the law review articles cited by *Roe*. They further attack Means’ credibility by citing a memo, which circulated amongst Jane Roe’s legal team, that suggested Means’ articles were not genuinely dispassionate and unbiased academic scholarship.¹¹¹ Indeed, Means was not merely providing a legal history; he was providing a legal history in advance of his advocacy for the legalization of abortion through constitutional protection of abortion rights.¹¹²

¹¹⁰ Means, C.C. *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N. Y. L. F. 335, 336 (1971).

¹¹¹ “The problem (as Weddington almost certainly knew) is that Means’s central claims were not true. In a memo circulated among Roe’s legal team in the summer of 1971, a Yale law student named David Tundermann warned that Means’s ‘conclusions sometimes strain credibility.’ Even so, Tundermann tellingly concluded: ‘Where the important thing to do is to win the case no matter how, however, I suppose I agree with Means’s technique: begin with a scholarly attempt at historical research; if it doesn’t work out, fudge it as necessary; write a piece so long that others will read only your introduction and conclusion; then keep citing it until the courts begin picking it up. This preserves the guise of impartial scholarship while advancing the proper ideological goals.’”, <https://www.nationalreview.com/2012/12/fictional-abortion-history-justin-dyer/> [<https://perma.cc/PQT3-KXAX>].

¹¹² “This is not only of historic interest; it is of constitutional significance... It is a nonenumerated right among the ‘others retained by the people’ which the ninth amendment protects.” Means, C.C. *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N. Y. L. F. 335, 376 (1971).

However, it is important to note that hundreds of historians signed amicus briefs that supported Means' claims in subsequent Supreme Court cases.¹¹³ In Means' words:

“The original contribution... was the revelation of a truth that had been long forgotten: that the sole historically demonstrable legislative purpose behind these statutes was the protection of pregnant women from the danger to their lives imposed by surgical or potential abortion, under medical conditions then obtaining, that was several times as great as the risk to their lives posed by childbirth at term, and that concern for the life of the conceptus was foreign to the secular thinking of the Protestant legislators who passed these laws. Novel as this thesis was at the time, it has since received approbation by distinguished judges, and is no longer seriously challenged.”¹¹⁴

The main premises seem to be: (1) abortion was solely restricted to protect women from unsafe abortion, (2) people mistakenly believed that abortion was restricted to protect fetuses since legislators were unconcerned with fetal lives. He implies that these positions are so well-founded and have become so accepted that no one seriously challenges them.

Central to Means' premises is that abortion was never criminal before quickening. This is so because he seeks to explain that abortion had long been permitted for much of a pregnancy's duration. As has been previously discussed, this merely focuses on the form of abortion laws and not the function, as abortion laws were functionally written to prevent the deaths of fetuses and pre-quickening abortions were permitted since lawmakers did not recognize fetuses as alive before

¹¹³ “For the sake of legal advocacy, many historians have continued to take this tack in writing abortion history. Amicus briefs signed by several hundred professional historians and submitted to the Court for *Webster v. Reproductive Health Services* (1989) and *Planned Parenthood v. Casey* (1992) doubled down on Means' new abortion history”, <https://www.nationalreview.com/2012/12/fictional-abortion-history-justin-dyer/> [<https://perma.cc/PQT3-KXAX>].

¹¹⁴ Means, C.C. *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N. Y. L. F. 335, 336 (1971).

quickenings. In addition to these critiques of Means, some have seized upon *Roe*'s unexplained omission of a federal case that had recognized fetal rights under the U.S. Constitution.

The Omission of the Analysis in Steinberg v. Brown

It is important to first note that the proponent of the abortion in *Roe v. Wade* was not part of an organization asserting the rights of fetuses. The rights of fetuses were merely mentioned by a state's assistant attorney general who was in Court defending their state's law. There was no representative for fetuses, so no full-throated argument was made on their behalf. When asked at the oral reargument for *Roe* whether "any case anywhere that's held that an unborn fetus is a person within the meaning of the Fourteenth Amendment", the attorney for the state said, "No, Sir".

The state thus failed to cite the federal case *Steinberg v. Brown* ("Steinberg"), which itself cited "authority for the proposition that human life commences at the moment of conception" and held that "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it."¹¹⁵ While the *Roe* Court was aware of this case, as it was listed amongst cases that had sustained state statutes¹¹⁶, they failed to consider the arguments in the case. While the lack of zealous representation for fetuses would have permitted the Court to perfunctorily dismiss the claim, the Court did analyze whether fetuses could be interpreted as persons under the Fourteenth Amendment. However, since it did not consider the arguments in *Steinberg*, it could find no precedent for so recognizing

¹¹⁵ *Steinberg v. Brown*, 321 F. Supp. 741, 746, (ND Ohio 1970).

¹¹⁶ *Roe v. Wade*, 410 U.S. 113, 155 (1973).

fetuses (“no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment”¹¹⁷) and argued that fetuses were not persons under the Constitution.¹¹⁸

Justice Stevens ignored arguments related to fetal rights when he summarized the holding in *Roe* as follows:

“In the final analysis, the holding in *Roe v. Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny”¹¹⁹

By framing abortion as an “incorrect decision” and not the possible infringement of a fetus’ right to life, Justice Stevens represented his view that abortion opponents merely wanted to restrict abortion based on their aversion to abortion and not based on their belief that abortion is unconstitutional or necessarily illegal¹²⁰. However, for decades, the pro-life movement has focused on getting *Roe* overturned to protect fetal rights.

The Right’s Reaction to *Roe*

Some famous figures stood in opposition to *Roe*. The band Seals and Crofts released the song and album “Unborn Child” and faced instant backlash¹²¹. Phillip K. Dick wrote a short story,

¹¹⁷ *Id.*

¹¹⁸ The *Roe* Court could have read *Steinberg v. Brown* as suggesting, but not holding, that a fetus deserves protection under the Fourteenth Amendment; the Court could have also read it as suggesting that it deserves rights protections without explicitly arguing that fetuses were “persons”; in any case, *Roe*’s failure to substantively discuss the case is part of a broader discussion about *Roe*’s missteps in its failure to resolve the national abortion controversy.

¹¹⁹ *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 US 747, 781 (1986).

¹²⁰ “The majority remains free to preach the evils of birth control and abortion and to persuade others to make correct decisions”, at *Id.*

¹²¹ <http://www.humanlifereview.com/unborn-child-forty/> [<https://perma.cc/3U7U-PUHL>].

“The Pre-Persons”, about a dystopian future with a government that permits abortion up until the soul entered the body, which was believed to occur when a child was 12 years old.¹²² As the public pushed back on *Roe*, the Republican party seized upon the opportunity to gain votes.

This pro-life movement did not start in the Republican party, as there was greater support of legal abortion amongst Republicans than Democrats in the years surrounding *Roe*; it was not until Richard Nixon’s campaign, in 1972, that abortion became a Republican policy goal.¹²³ Conservatives likely latched onto abortion due to converging interests in protecting fetuses, restricting abortion, restricting judicial overreach, and to gain political power¹²⁴.

Many opposed *Roe* on principles of federalism, as they believed the decision represented the U.S. Supreme Court overstepping its bounds and infringing on states’ rights. Some chose to focus on related legal issues, as they saw *Roe* as a prime example of legal positivism¹²⁵, and they

¹²² https://www.americanthinker.com/articles/2015/08/the_agony_of_the_prepersons_phillip_k_dicks_attack_on_abortion.html [<https://perma.cc/Z3GK-M2XY>]; <http://prolife.org.nz/the-pr-e-persons-phillip-k-dick/> [<https://perma.cc/J2KM-SSW5>].

¹²³ Greenhouse, L. & Siegel, R.B., Before (and After) *Roe v. Wade*: New Questions About Backlash (March 23, 2011). Yale Law Journal, Vol. 120, p. 2028, 2011; Yale Law School, Public Law Working Paper No. 228. Available at SSRN: <https://ssrn.com/abstract=1798222> [<https://perma.cc/K5AR-77M2>].

¹²⁴ *Id.*, “Over the course of the 1972 presidential campaign, the strategy widened to target social conservatives as well as Catholic voters, and the attack on abortion was refrained to express not only religious convictions about respect for life but also social convictions about respect for traditional forms of authority. Supporters of President Nixon tarred his Democratic opponent, Senator George McGovern, as the ‘triple-A’ candidate associated with amnesty (the antiwar movement), abortion, and acid (drugs). Attacking ‘abortion on demand’ became a new way to signal distance from feminism and a ‘permissive’ youth culture run amok.”

¹²⁵ See, e.g., “Legal decisions such as *Roe v. Wade* (1973)... are consistent with a positivist philosophy... [and] take the position that abortion should be tolerated and emphasize the idea of ‘freedom of choice’ of the woman. Their focus is on ‘who decides,’ not on whether or not human life is destroyed or whether or not there may be any moral duty to protect that life. The framework of discussion is limited to the autonomous, independent woman versus governmental authority”, Strahan, T.W. The Natural Law Philosophy of *Roe v. Wade* and Its Progeny, Life and Learning XI, <http://uffl.org/vol11/strahan11.pdf> [<https://perma.cc/S7M3-DPAX>].

use it as an example of why the natural law approach should never have fallen out of favor¹²⁶. This represents a major battle between legal thinkers: there are those who have a *legal positivism* approach, which treats the law as nothing more than a set of rules people operate from and adhere to, and a *natural law* approach, which recognizes the law as an expression of moral principles.¹²⁷ There is some sense that the latter approach is more conducive to stricter abortion laws, but that is not necessarily the case. Others choose to focus on getting fetuses constitutional protections. Instead of challenging *Roe* it in the courts, pro-life politicians turned to the legislative process and began proposing “Human Life Amendments” to the U.S. Constitution with the goal of legislatively overturning the judiciary’s recognition of women’s abortion rights.¹²⁸

Human Life Amendments

In the early days of the movement, politicians worked to pass Human Life Amendments.¹²⁹ Indeed, between 1973 and 2003, 330 “Human Life Amendments” had been proposed by the National Committee for a Human Life Amendment. Few had been introduced, and only one reached a formal vote, but one such proposed bill started a conversation on when life begins. In 1981, there was a Senate Judiciary Subcommittee meeting on Senate Bill 158 the “Human Life Bill”.¹³⁰ After

¹²⁶ See, e.g., Kalpakgian, M. The Right to Life and the Natural Law, Life and Learning IX, <http://www.uffl.org/vol%209/kalpakgian9.pdf> [<https://perma.cc/2TND-URJY>].

¹²⁷ Reynolds, B. Natural Law versus Positivism: The Fundamental Conflict, *Oxford Journal of Legal Studies*, Volume 13, Issue 4, 1 December 1993, p. 441–456, <https://doi.org/10.1093/ojls/13.4.441> [<https://perma.cc/QS2H-PX3Q>].

¹²⁸ <http://www.nchla.org/datasource/idocuments/HLAhghlts.pdf> [<https://perma.cc/M5C5-4MJ8>].

¹²⁹ Manninen, B. A. (2012). Beyond abortion: The implications of human life amendments. *Journal of Social Philosophy*, 43(2), 140-160.

¹³⁰ Emerson, T.I., "The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill" (1982). Faculty Scholarship Series. Paper 2769.

hours of testimony by scientists and doctors, the Official Senate report reached the following conclusion:

*“Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being - a being that is alive and is a member of the human species. There is overwhelming agreement on this point in countless medical, biological, and scientific writings.”*¹³¹

However, the Senate report recognized that taking this stance, that human life begins at fertilization, does not require the nation to value all humans equally, as that is a matter for philosophical judgment, not science.¹³² Also, not all experts supported such a view of when life begins.¹³³ While these attempts proved unsuccessful, the movement continued to use federal legislation to undermine abortion rights.

In 1976, pro-life politicians succeeded in passing the Hyde Amendment, which prevented federal funds from being used to pay for abortion with limited exceptions.¹³⁴ In the 1980s, there was a battle between those who sought to moralize the issue of abortion and those who sought to fight for the rights of the unborn. The pro-life movement at that time was one of the most significant social movements in U.S. history¹³⁵, but it ended in defeat after a surprise Supreme Court ruling.

¹³¹ Report, Subcommittee on Separation of Powers to Senate Judiciary Committee S-158, 97th Congress, 1st Session 1981, 7.

¹³² *Id.* at 13.

¹³³ <http://www.nytimes.com/1981/05/21/us/8-doctors-at-senate-hearing-criticize-anti-abortion-bill.html> [<https://perma.cc/3BP9-LTCV>].

¹³⁴ <https://www.aclu.org/other/public-funding-abortion?redirect=reproductive-freedom/public-funding-abortion> [<https://perma.cc/4KJY-JQRT>].

¹³⁵ <http://americanarchive.org/exhibits/first-amendment/protests-80s-andbeyond> [<https://perma.cc/JWH3-2XXD>].

Casey's "Reaffirming" of Roe

"It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*."¹³⁶

In 1992, the United States Supreme Court agreed to hear *Planned Parenthood v. Casey*.¹³⁷

At issue was Pennsylvania's Abortion Control Act of 1982. Planned Parenthood of Southeastern Pennsylvania filed suit against Robert P. Casey, the Pennsylvania Governor at the time. There were five provisions that were being challenged:

- (1) a 24-hour waiting period, where a woman seeking an abortion had to give her informed consent prior to the procedure and the doctor had to provide her with certain medical information on the risks of abortion 24 hours before the procedure;
- (2) Spousal notice, which required married pregnant women to provide signed statements confirming that they had notified their husband before undergoing the procedure;
- (3) Parental Consent, which held minors had to get the informed consent of at least one parent or guardian;
- (4) Definition of Medical Emergency, which limited acceptable medical emergencies to ones where an immediate abortion would be necessary to prevent the pregnant woman's death;
- (5) Reporting requirements incumbent upon abortion providers, related to clinics' duty to report and keep records.¹³⁸

¹³⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992).

¹³⁷ *Id.*

¹³⁸ *Id.* at 844.

The Justices upheld the essential holding of *Roe*, which it deemed to consist of three parts: (1) women have the right to choose to have an abortion before viability; (2) the State can restrict post-viability abortions, as long as there is an exception for pregnancies that threaten a woman's life or health; (3) the State has legitimate interests in protecting the health of pregnant women and their fetuses from the moment a pregnancy begins.¹³⁹ Interestingly, while the Court argued that this was the essential holding of *Roe*, the third element went far beyond *Roe* since it held that states could only have a legitimate interest in protecting fetal life after viability.

The plurality abandoned *Roe*'s trimester framework and solely focused on fetal viability. The plurality also held that laws that prohibit abortions before viability are unconstitutional since they pose an undue burden on a woman's fundamental right to abortion, which was another change to the United States Supreme Court's abortion jurisprudence. Previously, the Court held that the strict scrutiny judicial standard should be applied to abortion laws. However, the new standard did not require that states narrowly tailor abortion laws or assert a compelling government interest, needing only to pass laws that do not pose an undue burden on a woman's exercise of her right to have an abortion. Using this new standard of review, the Court upheld four of the restrictions and only struck down the spousal notification requirement of the Pennsylvania statute. The Court held that requiring a pregnant woman to notify her spouse was an undue burden on the exercise of her abortion rights and, thus, unconstitutional.

While *Casey* might seem like the Court was maintaining the status quo, it further solidified the abortion right due to the *stare decisis* doctrine.¹⁴⁰ *Stare decisis* is a Latin phrase that means "let the decision stand". It is a legal doctrine that underlies and supports the use of precedent, and it is

¹³⁹ *Id.* at 846.

¹⁴⁰ Mitchell, J.F. *Stare Decisis and Constitutional Text*, 110 Mich. L. Rev. 1 (2011).

grounded in goals of predictability in the legal system. Since abortion rights have significant precedents and the fundamental right to abortion has been recognized in *Roe* and then supported once again after it was reexamined in *Casey*, the *stare decisis* doctrine serves as a high bar for future challenges to women's fundamental right to have pre-viability abortions.

The *Casey* decision came as a surprise to many since conservative justices outnumbered liberal justices. Some say there were secret meetings from justices who sought to uphold *Roe*, blindsiding the other justices.¹⁴¹ However, the opinion of the Court did not consider the argument that a fetus deserves Fourteenth Amendment rights protections, as only Justice Stevens' concurring opinion made mention of it.¹⁴² Since no member of the Court has ever earnestly considered fetuses' rights under the Fourteenth Amendment, the pro-life movement was encouraged to lay a better foundation for overturning *Roe*. While there had been attempts to restrict abortion due to its immorality or abortion as a maternal health issue¹⁴³, the movement eventually focused on fetal rights. But first, before moving away from *Casey*, it is important to consider its *stare decisis* factors for overturning *Roe*, as it is an indicator of the jurisprudence's stability.

¹⁴¹ Some have argued that Justice Kennedy met with liberal justices in secret and that the other justices were surprised when the majority upheld *Roe*, believing that he had been manipulated by Laurence Tribe: https://www.washingtonpost.com/archive/opinions/1992/09/04/justice-kennedys-flip/17eb4e0b-72f6-4678-b5bb-7a3e8f79b395/?utm_term=.f0e9b6033cd8 [<https://perma.cc/YQG8-MZF3>].

¹⁴² Justice Stevens wrote, "as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life.", *Planned Parenthood v. Casey*, 505 U.S. 833, 913 (1992).

¹⁴³ See, e.g., Jasen, P. Breast cancer and the politics of abortion in the United States. *Med Hist.* 2005; 49(4): 423-44; https://www.plannedparenthood.org/files/9613/9611/5578/Myths_About_Abortion_and_Breast_Cancer.pdf [<https://perma.cc/F2CY-LHUA>]; <https://rewire.news/article/2014/11/13/anti-choice-science-big-tobacco-time/> [<https://perma.cc/PK4A-V5EE>].

Stare Decisis *Factors for Reexamining Roe*

The *Casey* Court started its analysis of the standard of review by citing the significant justification of *stare decisis*: the judicial system simply cannot function without it. However, while the rule of law requires respect for precedent, *stare decisis* is not an “inexorable command” so the Court can reexamine a prior ruling by considering a series of “prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case”.¹⁴⁴

The *stare decisis* factors laid out by the Court focused on the four factors: (1) “whether the rule has proven to be intolerable simply in defying practical workability”¹⁴⁵; (2) “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”;¹⁴⁶ (3) “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine”¹⁴⁷; (4) “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”.¹⁴⁸ Thus, the Court looked at whether *Roe*’s central rule had been found unworkable, whether overturning the rule would pose a significant problem to all who relied on it, whether the development of law has left the rule as irrelevant, and whether the rule’s premises of facts had so changed that the ruling was irrelevant or unjustifiable.

First, the *Casey* Court found no grounds for it to be unworkable. Second, in assessing peo-

¹⁴⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 954 (1992).

¹⁴⁵ *Swift & Co. v. Wickham*, 382 U. S. 111, 116 (1965).

¹⁴⁶ *United States v. Title Ins. & Trust Co.*, 265 U. S. 472, 486 (1924).

¹⁴⁷ *Patterson v. McLean Credit Union*, 491 U. S. 164, 173-174 (1989).

¹⁴⁸ *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932).

ple’s reliance on *Roe*, the Court recognized that significant reliance is usually understood in commercial contexts where people incurred expenses and liabilities. However, the Court found that “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”. Even though the extent of this reliance was not quantified¹⁴⁹, the Court justified its finding of some reliance on the notion that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives”.¹⁵⁰

Third, the Court found no legal principle had evolved to weaken *Roe*’s doctrinal footings, and no development of constitutional law had left *Roe* as an abandoned ruling. The Court recognized that *Griswold* and its progeny have not put *Roe* in jeopardy and that *Roe* had been upheld as a liberty right in subsequent cases.¹⁵¹ The Court also defended *Roe*’s doctrine by arguing that it was rooted in personal autonomy and bodily integrity principles that limit governmental power in medical decisions. In this line of cases, cases since *Roe* had upheld the notion that a State’s interest in life falls short of an absolute right to protect life.¹⁵² The Court further supported the doctrine, with regards to the liberty right to abort,¹⁵³ and argued that “even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal

¹⁴⁹ “The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed”, *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

¹⁵⁰ *Id.*

¹⁵¹ *Carey v. Population Services International*, 431 U.S. 678 (1977); *Moore v. East Cleveland*, 431 U. S. 494 (1977).

¹⁵² *Cruzan v. Director, Mo. Dept. of Health*, 497 U. S. 261, 278 (1990).

¹⁵³ *Planned Parenthood v. Casey*, 505 U.S. 833, 857-858 (1992).

protection, not to the recognition afforded by the Constitution to the woman's liberty".¹⁵⁴

Finally, the Court considered whether any of *Roe*'s factual assumptions had been overtaken by time¹⁵⁵. The Court held that advances had made late-term abortions safer than they were before and had made fetuses viable earlier in pregnancy. However, those advances had no bearing on the validity of *Roe*'s central holding. The Court held that viability still served as the critical fact – as it did at the time of *Roe* – so no change in *Roe*'s factual underpinning¹⁵⁶ had made its central holding obsolete and no change supported an argument for overruling the central holding. This was so because: (1) people had come to assume *Roe*'s conception of liberty, (2) the principle of liberty and autonomy had not eroded so as to leave *Roe*'s central holding a remnant of old doctrine, (3) there were no developments that conflicted with other precedents, and (4) “no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips”¹⁵⁷.

Thus, under the principles of traditional *stare decisis*, the stronger argument was to affirm *Roe*'s central holding. The Court then stated that, due to the sustained and widespread debate about abortion, there was reason to consider *Roe* in the context of other major cases that arose out of, and responded to, national controversies: the line of cases related to *Lochner v. New York* and *Plessy v. Ferguson*.

In the case of *Lochner*, the Court imposed limitations on legislation that limited economic

¹⁵⁴ *Id.* at 858.

¹⁵⁵ *Id.* at 860.

¹⁵⁶ It is interesting that *Casey* did not consider the S-158 report that concluded a human's life begins at fertilization, as this could be seen as a change to *Roe*'s factual underpinning that suggested there was no consensus on when life begins; however, perhaps the Court considered it and deemed testimony for a number of witnesses from both sides as insufficient to establish consensus.

¹⁵⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992).

autonomy in favor of promoting health and welfare interests. *Lochner* and its progeny were notably upheld in *Adkins v. Children's Hospital of District of Columbia*, in which the Court held that requiring employers to pay a minimum wage to adult women infringed on the constitutionally protected liberty of contract. Thirty-two years after the Court ruled in *Lochner*, it overruled the doctrine in *West Coast Hotel Co. v. Parrish*. The Court overruled its previous holding because the Great Depression revealed that the Court's interpretation of contractual freedom relied on fundamentally false factual assumptions related to an unregulated market's ability to achieve minimum standards of human welfare.¹⁵⁸ Since the premises of fact in *Adkins* and *Lochner* had been proven false, their overruling was not only justified but required: "the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law".¹⁵⁹

In the case of *Plessy*, the Court held that legislatively mandated racial segregation did not deny equal protection under the Fourteenth Amendment. The decision was justified based on the implication that laws that mandate segregation did not stamp African-Americans with "a badge of inferiority".¹⁶⁰ The understanding of the facts of segregation, and the ruling and its justification were then repudiated by *Brown v. Board of Education*. The *Brown* Court held that segregation did indeed mark African-Americans with "a badge of inferiority" since legally-sanctioned segregation has such an effect and separate accommodations were inherently unequal.¹⁶¹ Again, as was in the case of *West Coast Hotel*, "[s]ociety's understanding of the facts upon which a constitutional ruling

¹⁵⁸ *West Coast Hotel Co. v. Parrish*, 300 US 399 (1937).

¹⁵⁹ *Planned Parenthood v. Casey*, 505 U.S. 833, 862 (1992).

¹⁶⁰ *Id.* at 862

¹⁶¹ *Brown v. Board of Education of Topeka*, 347 U.S. 483, 494-495 (1954).

was sought was thus fundamentally different from the basis claimed for the decision in 1896”.¹⁶² The Court also recognized that “the *Plessy* Court’s explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required”.¹⁶³

Together, the two cases *Casey* compared to *Roe* both “rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions”.¹⁶⁴ Both cases were overturned because the Court, in the later cases, was able to respond to facts the country had come to learn and understand after the previous decisions, such that the overruling cases were comprehensible and defensible as “applications of constitutional principle to facts as they had not been seen by the Court before”.¹⁶⁵ While the *Casey* Court used this analysis to distinguish *Roe* from *West Coast* and *Brown*, the Court set the standard that by holding “[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court’s constitutional duty”.¹⁶⁶

Thus, the *Casey* Court outlined the *stare decisis* factors and explained how the factors were satisfied in two landmark overrulings of prior holdings. If the Court finds that present circumstances have so changed that *Casey*’s *stare decisis* factors have been met, such that there is reason to reexamine *Roe* like there was in *West Coast Hotel* and *Brown*, there would be reason to consider overruling *Roe* irrespective of the analysis the *Casey* Court provided in deciding not to overrule

¹⁶² *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992).

¹⁶³ *Id.* at 863.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 864.

¹⁶⁶ *Id.*

Roe since the *Casey* Court was not presented with any cause. Thus, the *Casey* Court's analysis would not hold weight in the future because the Court did not have access to the changed circumstances that the Court would have in the future. Thus, the Court would likely consider whether the premises of fact, law, and society have changed since *Roe* and whether there are grounds to reexamine *Roe* and consider whether it should be upheld, reframed, or overruled.

How Far America Has Come Since *Roe*

It might be uncomfortable for some to admit, but abortion is no longer a woman's issue. In 2018, men became pregnant and give birth.¹⁶⁷ In some states, upwards of 27% of adolescents are gender-nonconforming¹⁶⁸, and over 1.5 million Americans identify as transgender.¹⁶⁹ States are starting to allow nonbinary gender designations on birth certificates.¹⁷⁰ Thus, while abortion has been traditionally a woman's issue, modern values of tolerance and inclusivity¹⁷¹ call for changing such divisive language and concepts to avoid the marginalization of certain voices. What must a

¹⁶⁷ <https://people.com/bodies/transgender-man-gives-birth-five-years-after-having-child-as-woman> [<https://perma.cc/W673-5FMB>]; <https://www.mirror.co.uk/news/real-life-stories/pregnant-man-gives-birth-daughter-10081406> [<https://perma.cc/XRV4-KXW7>]; <https://www.cnn.com/2017/07/31/health/trans-man-pregnancy-dad-trnd/index.html> [<https://perma.cc/VB5P-ESHQ>].

¹⁶⁸ <https://williamsinstitute.law.ucla.edu/press/youth-gender-expression-ca-release/> [<https://perma.cc/PV9U-3E9E>].

¹⁶⁹ <https://williamsinstitute.law.ucla.edu/research/transgender-issues/new-estimates-show-that-150000-youth-ages-13-to-17-identify-as-transgender-in-the-us/> [<https://perma.cc/R46W-R2KE>].

¹⁷⁰ <https://www.nbcnews.com/feature/nbc-out/gender-x-new-york-city-add-third-gender-option-birth-n909021> [<https://perma.cc/2KNQ-LR5Z>]; since children will be born with an "X" gender, males, females, and X-gendered people will all become pregnant in the future, so laws, activists, and politicians should be sensitive to this.

¹⁷¹ <https://health.usnews.com/wellness/for-parents/articles/2018-04-13/how-to-raise-tolerant-inclusive-kids> [archived link unavailable].

pregnant person who does not identify as a woman think when they are told that abortion is a woman's right? Abortion no longer impacts women – it impacts pregnant people.

To make a rare prescription in this dissertation, in the event that the U.S. Supreme Court reexamines *Roe*, the Court should respect diversity and recognize pregnancy and abortion as a human issue directly relevant to the experiences of people, not just women. While not sufficient on its own, this reframing of the Court could go a long way to respecting and recognizing the experiences of millions of Americans, as members of the LGBTQ community and their allies deserve validation of their experiences. This would be consistent with other developments in areas related to the abortion debate.

Anyone with even a passing understanding of America over the past half-century is likely to recognize that the nation has made considerable strides in gender relations and how gender is understood. Efforts are often made to ensure equal protection for people who can become pregnant, which has increased their engagement in the economy and society. The work of the women's rights movement, throughout the 20th and 21st centuries, has led to this day.

While more men (16%) had graduated from college than women (10%) as of 1973, more women (35%) than men (34%) have graduated from college as of 2017.¹⁷² In 2016, for the first time, women outnumbered men in law school¹⁷³. Women earn the majority of doctoral degrees and outnumber men 135 to 100 in graduate school.¹⁷⁴ Where over 75% of men participated in the workforce in 1973 and less than 45% of women did, in 2016 the gap between men (69%) and

¹⁷² <https://www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by-gender/> [<https://perma.cc/JA9E-5KAQ>].

¹⁷³ <https://abovethelaw.com/2018/03/there-are-now-more-women-in-law-school-than-ever-before/> [<https://perma.cc/M5EC-V2HB>].

¹⁷⁴ <https://www.aei.org/publication/women-earned-majority-of-doctoral-degrees-in-2016-for-8th-straight-year-and-outnumber-men-in-grad-school-135-to-100/> [archived link unavailable].

women (57%) has largely shrunk.¹⁷⁵ While some have attributed women's economic strides to legal access to abortion¹⁷⁶, there are laws and protections that are disconnected from *Roe* and its progeny.

Social changes have been memorialized in law to protect the educational and economic opportunities of pregnant people. Under Title IX of the Education Amendments of 1972 ("Title IX")¹⁷⁷, a federal civil rights law that prohibits discrimination, pregnant people and new parents are fully able to participate in educational programs and activities. Title IX also permits pregnant people to take medically necessary leaves of absence and provides protections from harassment, intimidation, or any other form of discrimination related to their pregnancy.

Shortly after *Roe*, in 1978, Congress passed The Pregnancy Discrimination Act, which protects pregnant people from being treated differently from non-pregnant workers.¹⁷⁸ The Family and Medical Leave Act ("FMLA"), which is effective for most employers, was also passed to protect employees who need to take a leave of absence for family or medical reasons.¹⁷⁹ Pregnant people's jobs are protected for up to 12 weeks in each 12-month period for specified family and medical reasons, which include pregnancy. The U.S. Congress is currently working to improve upon the FMLA by providing pregnant persons with paid leave for those 12 weeks.¹⁸⁰ Apart from rights protections, the government has increased subsidies to pregnant people.

¹⁷⁵ <https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm>; <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jel.20160995> [<https://perma.cc/42KN-T8F9>].

¹⁷⁶ <https://www.bostonglobe.com/opinion/2018/08/22/chelsea-clinton-twisted-argument-about-abortion-and-economic-growth/6ajP713rANYAOizO30hLeN/story.html> [<https://perma.cc/EE8G-YFTF>].

¹⁷⁷ 20 U.S.C. §1681 et seq.

¹⁷⁸ <https://www.eeoc.gov/laws/statutes/pregnancy.cfm> [<https://perma.cc/3D5S-A2WB>].

¹⁷⁹ <https://www.dol.gov/whd/fmla/> [<https://perma.cc/5UTA-93K9>].

¹⁸⁰ <http://fortune.com/2017/02/07/trump-paid-family-leave-gillibrand/> [<https://perma.cc/4>

The United States Department of Agriculture's Food and Nutrition Service is a federal program that provides grants to states. Under Women, Infants, and Children ("WIC"), low-income pregnant persons and infants up to age five can receive subsidized supplemental foods, health care referrals, and nutrition education.¹⁸¹ Congress also established the Pregnancy Assistance Fund ("PAF") grant program as part of the 2010 Affordable Care Act that was passed by Congress.¹⁸² This program was founded as part of a federal strategy to support "expectant and parenting teens, women, fathers, and their families".¹⁸³ Support of pregnant people has become such a public policy concern that there are programs to support pregnant wards of states.¹⁸⁴ Babies can also be insured for free through the "CHIP" program.¹⁸⁵ Not only is there support for pregnant people, they are also no longer legally liable for raising their newborns.

With safe haven laws, young parents can leave their newborns with any fire department, police department, or state agency to legally relinquish the custody of their children.¹⁸⁶ This first developed in Alabama after a string of infanticides¹⁸⁷ and was first passed as a state law by Texas

RY4-36QT].

¹⁸¹ <https://www.fns.usda.gov/wic/women-infants-and-children-wic> [<https://perma.cc/4F6B-MT75>].

¹⁸² Public Law 111-148.

¹⁸³ The statute establishing PAF may be accessed through the U.S. Government Printing Office at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf> [<https://perma.cc/L4AJ-NL5Z>]; https://www.hhs.gov/ash/oah/sites/default/files/paf_crossreport_feb18.pdf [<https://perma.cc/68DN-RX2J>].

¹⁸⁴ <http://www.cebc4cw.org/program/teen-parenting-service-network/detailed> [<https://perma.cc/XC4X-C7EJ>].

¹⁸⁵ <https://www.healthcare.gov/medicaid-chip/childrens-health-insurance-program/> [<https://perma.cc/RU3M-8XBP>].

¹⁸⁶ <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safehaven/> [<https://perma.cc/AK26-EC8X>].

¹⁸⁷ https://en.wikipedia.org/wiki/Safe-haven_law#cite_note-11 [<https://perma.cc/U46L-JKCJ>].

in 1999 and soon became law in all 50 states.¹⁸⁸ Further, there are laws under the Adoption and Safe Families Act¹⁸⁹ that permit parents to terminate their parental rights of older children for various reasons.

Compared to the past, when some would leave their newborns in dumpsters or would have to find someone to take responsibility for their children, any parent can protect themselves from the costs and detriments of child-rearing at a moment's notice. This might seem unremarkable, but consider that people in the 1970s were obligated to provide for children they bore, while Americans currently have no such obligation. Not only can they give children up for adoption in a time where many have to go overseas for healthy infants, but they can also relinquish custody of their children at a moment's notice anywhere in the country. This has dramatically reduced the cost or detriment to being denied abortion rights.

As discussed by the attorney for *Roe*¹⁹⁰, women in the 1970s felt like they had to drop out of school when they got pregnant. While it might seem foreign to most, the attorney for *Roe* argued that pregnant persons were often forced to quit their jobs early in pregnancy.¹⁹¹ Up to the early 1970s, pregnant people were seen as having an obligation to focus on their pregnancy. People in Texas were forced to quit high school and college if they became pregnant and did not enjoy the

¹⁸⁸ <http://www.childwelfare.gov/pubPDFs/safehaven.pdf> [<https://perma.cc/59PR-UA7H>].

¹⁸⁹ <https://codes.findlaw.com/us/title-42-the-public-health-and-welfare/> [<https://perma.cc/KR58-SDVU>].

¹⁹⁰ “Here, a woman, because of her pregnancy, is often not a productive member of society. She cannot work. She cannot hold a job. She’s not eligible for welfare. She cannot get unemployment compensation, and furthermore, in fact, the pregnancy may produce a child who will become a ward of the state.” Weddington, S. Oral Reargument of *Roe v. Wade*, 1972, p. 48.

¹⁹¹ Weddington, S. Oral Argument of *Roe v. Wade*, 1971, p. 10.

maternity leave to which they currently have access.¹⁹² Pregnant people did not receive unemployment during their pregnancies, so they often faced financial hardships on top of their inability to get welfare or a job to provide for herself.

Pregnancy was difficult in the 1970s, and it further put people at risk of abuse; since there was so little support, people had less autonomy and freedom to be self-sufficient. Currently, there is such availability and support for daycare¹⁹³, on top of the option to give the child up for adoption, that pregnant people are no longer put in a position to choose between having a child and living a full life. In 2019, a pregnant can still be a productive member of society; they can work, they can hold a job, they can receive welfare¹⁹⁴, and they can get unemployment compensation.

Many of pregnant people's concerns in 1973 persist no longer, especially since they no longer have any legal obligation to raise their children. Back then, child abandonment laws required parents to care for their children until the age of eighteen, under criminal penalty. It was thus reasonable for *Roe* to envision child-rearing as a great detriment for people, and it could greatly hurt an infant if the parents are unable to care for the child.¹⁹⁵

Abortion was seen as an important tool in an early 20th-century climate that discouraged birth control¹⁹⁶ and failed to educate women on their right to control their reproduction, as well as

¹⁹² https://www.oecd.org/els/family/PF2_5_Trends_in_leave_entitlements_around_child-birth_annex.pdf [<https://perma.cc/9AAS-3C8B>], p. 48.

¹⁹³ See, e.g., <https://earlychildhood.marylandpublicschools.org/child-care-subsidy-program> [<https://perma.cc/35FU-F2CV>].

¹⁹⁴ See, e.g., <https://www.dshs.wa.gov/esa/community-services-offices/pregnant-women-assistance-program> [<https://perma.cc/4GRU-GZVW>]; <https://www.fns.usda.gov/wic/women-infants-and-children-wic> [<https://perma.cc/LDX3-B7JE>].

¹⁹⁵ “[T]he inability to pro-vide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent”, *Planned Parenthood v. Casey*, 505 U.S. 833, 853 (1992).

¹⁹⁶ See Leslie Reagan's discussion of early feminists' blaming men for abortion since they were unwilling to be a partner in controlling reproduction. Reagan, L.J. “When Abortion Was a

how to effectuate it. However, currently, men and women have access to a bevy of options that has greatly reduced the need for abortion as a form of birth control.

Adoption

Each year in America, there are around 6 million pregnancies, and about 2.8 million pregnancies are considered “unintended”¹⁹⁷ since those pregnant people did not have sex with the intention of becoming pregnant. Since there are around 1 million estimated abortions each year¹⁹⁸, most people with unintended pregnancies choose to have and raise their children since only around 18,000 infants are adopted each year¹⁹⁹.

In 2019, an estimated 2 million American couples are seeking to adopt²⁰⁰, but only 135,000 children are adopted each year²⁰¹. Many talk about foster care in the context of adoption being a viable alternative to abortion. It is important to note that most children in foster care are there temporarily because their parents or guardians are in custody; 88% of children who go into foster care spend less than three years in the system. While over 430,000 children were in foster care in

Crime, *Women, Medicine, and Law in the United States, 1867-1973*”, ch. 3, University of California Press, 1997.

¹⁹⁷ Finer, L.B. & Zolna, M.R., Declines in unintended pregnancy in the United States, 2008–2011, *New England Journal of Medicine*, 2016, 374(9):843–852, doi:10.1056/NEJMsa1506575.

¹⁹⁸ Jones, R.K. & Jerman, J., Abortion incidence and service availability in the United States, 2014, *Perspectives on Sexual and Reproductive Health*, 2017, 49(1):17–27, doi:10.1363/psrh.12015.

¹⁹⁹ <https://www.adoptioncouncil.org/publications/2017/02/adoption-by-the-numbers> [<https://perma.cc/VHC2-ULE9>].

²⁰⁰ https://www.americanadoptions.com/pregnant/waiting_adoptive_families [<https://perma.cc/LU7X-5TM8>].

²⁰¹ <https://adoptionnetwork.com/adoption-statistics> [<https://perma.cc/S44W-SCFR>].

2016, only 26% had the goal of adoption.²⁰² The majority of those children are adopted each year and less than one-quarter age out of the system.²⁰³

While the attorney for *Roe* represented an unwanted pregnancy as the choice to abort or make one's child a ward of the state²⁰⁴, the current viable third option of adoption further alleviates the hardships *Roe* deemed the state would impose on a pregnant person by denying them legal abortion access. Despite this option, some estimate that only 4% of pregnant people choose adoption over abortion.²⁰⁵ Indeed, while over a million abortions take place in the United States each year, the National Council for Adoption reports that fewer than 20,000 infants are adopted each year.²⁰⁶ Since a little over 31,000 children in foster care are under the age of 1²⁰⁷, even the most liberal interpretations of these data would put the percent who choose adoption over abortion at well under 10%.²⁰⁸ Not only does the adoption option provide a viable alternative to abortion, the development of reproductive technologies further reduces the need for abortion in the 21st century.

²⁰² <https://www.childwelfare.gov/pubPDFs/foster.pdf> [<https://perma.cc/QU5E-F427>].

²⁰³ <https://www.adoptioncouncil.org/blog/2018/01/stats-show-our-nations-foster-care-system-is-in-trouble> [<https://perma.cc/6DZ3-ZKKC>].

²⁰⁴ Weddington, S. Oral Reargument of *Roe v. Wade*, 1972, p. 48.

²⁰⁵ <https://adoptionnetwork.com/adoption-statistics> [<https://perma.cc/S44W-SCFR>].

²⁰⁶ <https://www.adoptioncouncil.org/publications/2017/02/adoption-by-the-numbers> [<https://perma.cc/VHC2-ULE9>].

²⁰⁷ <https://datacenter.kidscount.org/data/tables/6244-children-in-foster-care-by-age-group#detailed/1/any/false/870,573,869,36,868,867,133,38,35,18/1889,2616,2617,2618,2619,122/12988,12989> [<https://perma.cc/W95K-LYFH>].

²⁰⁸ It is important to note that these data cannot be construed to suggest that ~18,000 infants are adopted while ~31,000 infants put up for adoption go into foster care; it is unlikely that most of the ~31,000 infants in foster care are available for adoption, and it is more likely that <10,000 are up for adoption since only one-quarter of all children in foster care are available for adoption.

The Development of Reproductive Technologies

Given advances to contraceptive technology, education, and access, abortion is no longer needed birth control like it was in 1973. The possible detriment to a pregnant person focuses on them having to carry the pregnancy to term, should they want to be a law-abiding citizen, as the natural consequence of heterosexual sexual intercourse and a necessary function for society and the continuation of the human race. Thus, 45 years have dramatically changed women's relationship with abortion, such that abortion cannot be argued to be necessary or necessary to effectuate women's privacy right to make family planning decisions like it once was.

99% of sexually active people use contraceptives.²⁰⁹ Contraceptives, phone apps for the rhythm method, birth control pills, emergency contraception, and long-acting contraception methods have all developed to equip men and women with an astounding level of control that would've likely satisfied early abortion advocates²¹⁰. Of sexually active women who are at risk of unwanted pregnancy, only 11% of women are not using at least one form of contraception.²¹¹ People who become pregnant after consensual sex currently get pregnant when they want to, when they are extremely careless in controlling their reproduction, or when contraception fails. 99% of women have tried at least one form of contraception, and contraception is on the rise. With contraception, abortion is simply no longer required for women to be fully engaged in American society like it was in the 1970s, and women have a far different role in society since they are more likely to

²⁰⁹ <https://www.gutmacher.org/fact-sheet/contraceptive-use-united-states> [<https://perma.cc/RJ97-ZZR6>].

²¹⁰ It is wrong to assume that all early advocates preferred mechanical abortions to birth control: "While there are cases where even the law recognizes an abortion as justifiable if recommended by a physician, I assert that the hundreds of thousands of abortions performed in America each year are a disgrace to civilization.", *Birth Control Review*, Dec. 1918, 3-4, *Margaret Sanger Microfilm*, S70:809, available at: <https://www.nyu.edu/projects/sanger/webedition/app/document/s/show.php?sangerDoc=232534.xml> [<https://perma.cc/U3D7-B9BF>].

²¹¹ <https://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf> [<https://perma.cc/7QN6-77LP>].

graduate college²¹², are becoming increasingly more likely to hold professional careers²¹³, and some have suggested that young career women make more than their male counterparts²¹⁴.

Artificial Wombs

While Laurence Tribe had previously only considered it as a theoretical possibility²¹⁵, it is increasingly becoming more of a legitimate possibility. *Roe v. Wade* protected the right to abortion before the fetus can survive outside of the pregnant person's womb, and *Planned Parenthood v. Casey* shifted that point based on modern medicine's ability to help fetuses survive outside of the womb earlier²¹⁶. Thus, the Court has shown that *Roe*'s holding is subject to the current state of medical technology. The development of an artificial womb for humans would then permit states to restrict abortion throughout pregnancy, as fetuses would then be viable at fertilization.

Researchers have developed an artificial womb used to help fetal lambs develop outside of the womb.²¹⁷ The main challenge is creating an environment that allows fetuses to get enough oxygen even though their lungs are not yet sufficiently developed for assisted ventilation. Thus, researchers used a plastic bag containing essential artificial amniotic fluids to mimic the uterine

²¹² <https://www.theatlantic.com/business/archive/2017/11/gender-education-gap/546677/> [<https://perma.cc/ALH3-ASYG>].

²¹³ <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html> [<https://perma.cc/XG6Z-J76T>]; <http://www.aei.org/publication/women-earned-majority-of-doctoral-degrees-in-2017-for-9th-straight-year-and-outnumber-men-in-grad-school-137-to-100-2/> [archived link unavailable].

²¹⁴ <https://www.politifact.com/punditfact/statements/2014/apr/09/genevieve-wood/what-pay-gap-young-women-out-earn-men-cities-gop-p/> [<https://perma.cc/8A2N-UACN>].

²¹⁵ Tribe, L.H., *Abortion: The Clash of Absolutes* (1992), W. W. Norton & Company.

²¹⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992).

²¹⁷ Romanis, E.C. Artificial womb technology and the frontiers of human reproduction: conceptual differences and potential implications *Journal of Medical Ethics* 2018; 44: 751-755.

environment. Some are hailing this as a potential savior for premature infants²¹⁸, but it could also be *Roe*'s undoing. In concert with current issues with population decline²¹⁹ and other issues that have been raised, the development of an artificial womb could be another dimension that one day gives the Court cause to reexamine *Roe*.²²⁰

Population Decline

This dissertation raises many issues, but the correlation between a native population's fear of being replaced and opposition to abortion is one of the most striking. The 19th-century anti-abortion movement cannot be said to be solely driven by anti-immigrant sentiments, but it might have been a convergence of interests that makes for strange bedfellows.

Continuing with this trend of looking to the future, it is interesting to think about whether changing landscapes could undermine or cause people to abandon certain reproductive rights principles. As previously discussed, some believe the first major anti-abortion movement was born out of nationalist fears of losing their country. Breitbart has published articles that report deaths of

²¹⁸ https://www.washingtonpost.com/news/morning-mix/wp/2017/04/26/this-plastic-bag-an-artificial-womb-could-some-day-save-extreme-preemies/?utm_term=.8345e4e67ae4 [<https://perma.cc/2TQQ-FC65>].

²¹⁹ See, e.g., Bricker, D. & Ibbitson, J. Empty Planet, The Shock of Global Population Decline.

²²⁰ While Alan Flake, the fetal surgeon who led the study, has said that the thought of developing a human zygote until it is viable is currently a "pipe dream", his estimation should be understood in light of his lack of intention of extending the limits of viability because he is worried it would "open a whole new can of worms", <https://www.npr.org/sections/health-shots/2017/04/25/525044286/scientists-create-artificial-womb-that-could-help-prematurely-born-babies> [<https://perma.cc/H4W2-9LRL>]; Romanis, E.C. Artificial womb technology and the frontiers of human reproduction: conceptual differences and potential implications *Journal of Medical Ethics* 2018; 44: 751-755.

white Americans exceed new births²²¹, citing data that suggests white American births are below replacement in every state²²². This notion of replacement keeps popping up, and the CDC talks about the birth rate in this vein.²²³ If this issue persists, it could give rise to another successful anti-abortion movement.

Abortion Rights Under Siege

In recent years, pro-life lawmakers have focused on state abortion regulations, passing nearly as many abortion restrictions in the past five years as the preceding fifteen.²²⁴ In 2015 alone, almost 400 abortion-restricting bills were introduced. Described as Targeted Regulations of Abortion Providers (TRAP laws) by the pro-choice movement,²²⁵ they reflect the movement's resilience in the abortion debate and dedication to continuing their fight for fetal rights²²⁶.

²²¹ <https://www.breitbart.com/politics/2018/06/25/data-death-of-white-americans-exceed-white-births-for-first-time/> [<https://perma.cc/3KCP-RWNS>].

²²² <https://www.breitbart.com/politics/2019/01/13/states-birth-rate-2017/> [<https://perma.cc/HX22-GDFL>].

²²³ https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_01-508.pdf [<https://perma.cc/WYJ5-P59L>].

²²⁴ <https://www.guttmacher.org/laws-affecting-reproductive-health-and-rights-2015-state-policy-review> [<https://perma.cc/RCR7-RRT4>].

²²⁵ <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers> [<https://perma.cc/YV3V-A93Z>].

²²⁶ The fight to protect fetal rights takes place outside of the abortion debate as well, see, e.g., The Unborn Victims of Violence Act, <https://www.congress.gov/108/plaws/publ212/PLAW-108publ212.pdf> [<https://perma.cc/5B6N-24JH>], which recognized all fetuses as humans: "As used in this section, the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb."

Unfortunately, emotions have run high in the debate, and hundreds of violent acts have been committed in its name.²²⁷ Protests and counter-protests by both sides have raged on for decades, even causing the United States Supreme Court to step in and weigh in on how these protests should be refereed by police.²²⁸ Such emotional attempts have come to the forefront in recent pro-life efforts to cast aspersions on Planned Parenthood, America's leading abortion provider.²²⁹

In 2015, a pro-life investigation led to national awareness about abortion's role in the sale of fetal tissue. Specifically, representatives for Planned Parenthood were shown in undercover videos discussing transferring fetal tissue to various organization.²³⁰ This brought more attention to the abortion debate, as it concretized the issue and made people suspicious of the role financial motives play in abortion. However, it did not have a devastating impact on Planned Parenthood.

In 2017, Planned Parenthood performed 332,000 abortions²³¹ and took in \$564m in tax dollars, which was a 1-year increase of \$20m.²³² In 2017, they took in \$244.8m in a 'revenue over

²²⁷ <http://users.nber.org/~jacobson/JacobsonRoyer6.2.10.pdf> [<https://perma.cc/UDJ3-F6JW>].

²²⁸ http://www.nytimes.com/2014/06/27/us/supreme-court-abortion-clinic-protests.html?_r=0 [<https://perma.cc/8YX6-D2T2>].

²²⁹ See, e.g., <https://www.cnn.com/2015/08/04/health/planned-parenthood-by-the-number-s/index.html> [<https://perma.cc/9XG3-87VS>]; Planned Parenthood is also the 27th largest charity in America with over \$1.5 billion in annual revenue, <https://www.forbes.com/companies/planned-parenthood-federation-of-america/#4b42fadd18a1> [<https://perma.cc/4NHG-85ER>].

²³⁰ https://www.washingtonpost.com/nation/2019/01/18/court-rules-against-planned-parenthood-texas-sting-videos-case-bringing-it-step-closer-getting-defunded/?noredirect=on&utm_term=.e502ed0fd396 [<https://perma.cc/6KKN-FQTC>].

²³¹ In 1973, Planned Parenthood performed less than 1% of all abortions, the organization performed less than 10% of abortions each year in the early '90s, and they currently perform over 30% of all abortions, see, e.g., Aden, S.H. Driving out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion, 8 U. St. Thomas J.L. & Pub. Pol'y 14 (2013).

²³² <https://townhall.com/tipsheet/laurettabrown/2019/01/21/planned-parenhoods-new-annual-reports-shows-increase-in-abortions-decrease-in-other-services-n2539352> [<https://perma.cc/487H-D3WH>].

expenses profit' measure, which was more than twice 2016's \$98.5m profit. This suggests that support for Planned Parenthood is growing as the threat of abortion restrictions rises under President Donald Trump's presidency. As one reporter observed, while "the number of abortions and the amount of taxpayer dollars the abortion group received both increased, almost every other category of the group's services went down."²³³ While some have impugned abortion providers, others seek to reform the debate through education.

In 2018, Oklahoma legislators passed a fetal education bill to teach young people that life begins at fertilization.²³⁴ In the bill, the state legislature allocated funds for Oklahoma high schools to provide fetal education to its students. Ultrasound restrictions and the rise of 4D ultrasounds²³⁵ are examples of using information to inform opinions and influence people's decisions. Such technology has even enabled a blind pregnant woman to 'see' her fetus in utero after a 3D-printed sculpture was made from her ultrasound.²³⁶ However, others have tried to reduce the moralization of the debate by focusing on fetuses' rights.

Federal lawmakers have also worked to restrict abortion access with a bill that would protect sentient fetuses capable of experiencing pain.²³⁷ Similar attempts have taken place on the state level, as state legislators have had recent success in passing laws that protect viable fetuses.²³⁸

²³³ *Id.*

²³⁴ Oklahoma Humanity of the Unborn Child Act (HB 2797).

²³⁵ <https://www.verywellfamily.com/whats-the-difference-between-a-3d-and-4d-ultrasound-2760110> [<https://perma.cc/LLN2-XAF9>].

²³⁶ <https://www.cbsnews.com/news/3d-printed-ultrasound-lets-blind-mom-see-unborn-baby/> [<https://perma.cc/2NAL-424U>].

²³⁷ O'Keefe, E. *Abortion ban bill fails to advance in the Senate*. 2018. Available at: http://www.washingtonpost.com/politics/abortion-ban-bill-fails-to-advance-in-the-senate/2018/01/29/98ad2c0e-0518-11e8-94e8-e8b8600ade23_story.html [<https://perma.cc/HDK5-HQZ9>].

²³⁸ <https://www.nytimes.com/2019/03/30/us/georgia-fetal-heartbeat-abortion-law.html> [<https://perma.cc/K7MA-RT66>].

Georgia, Iowa, Mississippi, Missouri, and Tennessee state legislators have passed ‘heartbeat bills’ to protect a fetus once its heartbeat has been detected; they argue that abortion should be restricted after a fetus’ heartbeat is first detected since it signals the beginning of a human’s life.²³⁹ Some have predicted such laws will trigger the next challenge to *Roe*²⁴⁰ and Iowa legislators have suggested that this was the very purpose of the bill and the law.²⁴¹

Types of Challenges

In the four decades since *Roe*, federal and state lawmakers have shown a willingness to recognize fetuses as persons under the law. There are at least eight different categories of laws that were passed to protect fetuses: (1) laws that protect fetuses from violent acts²⁴², (2) laws banning

²³⁹ *Id.*; after signing the bill into law, Iowa Governor Reynolds argued “...if death is determined when a heart stops beating, then doesn’t a beating heart indicate life?” Pfannenstiel, B. & Petroski, W. *The nation's strictest abortion ban is now law. Iowa Gov. Kim Reynolds signs 'fetal heartbeat' bill.* Des Moines Register, 2018. Available at: <https://www.desmoinesregister.com/story/news/politics/2018/05/04/abortion-ban-law-iowa-fetal-heartbeat/577443002/> [<https://perma.cc/X96Y-RWHL>]; <https://www.clarionledger.com/story/news/politics/2019/02/13/restrictive-abortion-ban-bill-passed-by-mississippi-senate-ms-leg/2858914002/> [<https://perma.cc/MLK4-R8A3>]; <https://thehill.com/homenews/state-watch/431709-tennessee-lawmakers-advance-fetal-heartbeat-bill> [<https://perma.cc/5C64-QHXZ>]; <https://www.vox.com/2019/5/17/18628265/alabama-abortion-law-missouri-georgia-roe-v-wade> [<https://perma.cc/3YRC-265Z>].

²⁴⁰ *Id.*, see also: Ingber, S. “Iowa Bans Most Abortions As Governor Signs ‘Heartbeat’ Bill”. NPR, 2018. Available at: <http://www.npr.org/sections/thetwo-way/2018/05/05/608738116/iowa-bans-most-abortions-as-governor-signs-heartbeat-bill> [<https://perma.cc/BF4U-V334>].

²⁴¹ For example, Iowa State Senator Rick Bertrand signaled this view: "I believe this bill will be the vehicle that will ultimately provide change and provide the opportunity to overturn *Roe v. Wade*." Shaw, M. *Iowa's new six-week 'heartbeat' abortion bill is a blatant attempt to reverse *Roe v. Wade*.* NBC News, 2018. Available at: <https://www.nbcnews.com/think/opinion/iowa-s-new-six-week-heartbeat-abortion-bill-blatant-attempt-ncna871561> [<https://perma.cc/V84N-ZHNX>].

²⁴² “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought”, “Cal Pen Code § 187; “to protect unborn children from assault and murder, and for other purposes”, Unborn Victims of Violence Act of 2004., 118 Stat. 568.

post-viability abortions²⁴³, (3) laws banning abortion after the first fetal heartbeat²⁴⁴, (4) laws banning abortion after the fetus feels pain²⁴⁵, (5) constitutional amendments to define previable fetuses as humans²⁴⁶, (6) constitutional amendments to define unborn humans as persons²⁴⁷, (7) laws to protect born-alive fetuses²⁴⁸, (8) laws banning abortions based on sex, race, and disability²⁴⁹. There have also been “trigger laws” that state a legislative intent to protect fetuses throughout pregnancy, which would go in effect if *Roe* is overturned. These laws suggest a state interest in recognizing

²⁴³ California defines its abortion restrictions in terms of the development of the fetus, and not the stage of pregnancy: “The abortion is performed on a viable fetus”, presumably to maximally protect fetuses as allowed by the Supreme Court, § 123468(b).

²⁴⁴ In regards to Iowa’s Fetal Heartbeat Bill, Iowa Code § 146C.1, Governor Reynolds said “I would do everything that I could to protect the life of the unborn... we need to do everything that we can to protect life and that is what I did when I signed the bill.” <https://www.usatoday.com/story/news/politics/onpolitics/2018/05/08/abortion-iowas-fetal-heartbeat-law/592362002/> [<https://perma.cc/SA26-NLPX>].

²⁴⁵ “It is the purpose of this state to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain”, Alabama Pain-Capable Unborn Child Protection Act, 2011 Al. HB 18

²⁴⁶ <https://www.humanlifeaction.org/issues/human-life-amendment> [<https://perma.cc/5G3A-PSUX>].

²⁴⁷ <https://www.propublica.org/article/the-personhood-movement-timeline> [<https://perma.cc/92LS-NACN>].

²⁴⁸ The phenomenon is known as “backing away” as a doctor will deliver a live infant after an abortion, whom they believe to be dead, and then back away from the infant to leave it to die on its own; *Testimony of Gianna Jessen, Hearing on H.R. 4292, the “Born-Alive Infants Protection Act of 2000, House Judiciary Subcommittee on the Constitution, 106th Cong. 2nd Sess. (July 20, 2000)* at http://commdocs.house.gov/committees/judiciary/hju67226.000/hju67226_of.htm [<https://perma.cc/Y5LL-AGD5>]; Massachusetts passed a law with the sole purpose of protecting the lives of fetuses that had been aborted “the physician performing the abortion shall take all reasonable steps, both during and subsequent to the abortion, in keeping with good medical practice, consistent with the procedure being used, to preserve the life and health of the aborted child” ALM GL ch. 112, § 12P; the U.S. Senate in 2019 sought to pass legislation to confer a criminal penalty on doctors who fail to provide life-saving medical care of newborns, but Democratic presidential candidate hopefuls voted against it, https://www.washingtonpost.com/politics/senate-blocks-bill-on-medical-care-for-children-born-alive-after-attempted-abortion/2019/02/25/e5d3d4d8-3924-11e9-a06c-3ec8ed509d15_story.html?utm_term=.403868d97bb9 [<https://perma.cc/PB95-QG3H>].

²⁴⁹ <https://www.gutmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly> [<https://perma.cc/Z56C-PZCH>].

fetuses as protectable presumably because they are persons.²⁵⁰

Justice Douglas' concurrence in *Doe v. Bolton*²⁵¹ cites Justice Clark's reasoning that fetuses are not persons because "[n]o prosecutor has ever returned a murder indictment charging the taking of the life of a fetus"²⁵². This is no longer the case. In 2004, Scott Peterson was convicted for the second-degree murder of his unborn son, Conner, under a California statute that treats the killing of a fetus as murder under the title "Crimes against the Person".²⁵³

While its categorization could be merely construed as superfluous and not meaningful to California's stance on fetal personhood, it is hard to imagine that the state would punish someone for murder if it did not involve the killing of a person. The statute, PC 597²⁵⁴, has a maximum penalty of a one-year sentence for killing a protected animal, while second-degree murder of a fetus has a penalty of 15 years to life. Conner's murder was punished as such because he was recognized as a human person. It is important to note that Conner's death served as the impetus for the Unborn Victims of Violence act that was passed in 2004. This particular case, in concert with other demonstrations of states' recognition of fetuses as humans and persons under the law, might be behind recent legislation passed by both sides of the political aisle; while such laws embolden pro-life legislators, they similarly threaten pro-choice legislators who could be expanding

²⁵⁰ See, e.g., 720 ILL. COMP. STAT. 510/1 (2016): "[T]he unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State"; while this language was removed by the legislature, it had remained the state's position for over 40 years.

²⁵¹ *Doe v. Bolton*, 410 U.S. 179, 218 (1973).

²⁵² Clark, T. *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1, 9-10 (1969)

²⁵³ <https://www.cnn.com/2013/10/15/us/scott-peterson-trial-fast-facts/index.html> [<https://perma.cc/3CV5-DFQV>].

²⁵⁴ https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN§ionNum=597 [<https://perma.cc/8GDJ-JGEJ>].

abortion rights as much as they can before the U.S. Supreme Court once again seeks to end the national abortion controversy.

Recent Escalations

While a 2019 poll of Americans' abortion beliefs suggests that only 15% support legal abortion access throughout pregnancy – and only 27% support abortion access in the first trimester²⁵⁵ – pro-choice lawmakers are seeking to permit abortion throughout pregnancy, and pro-life lawmakers are seeking to restrict abortion throughout pregnancy. Despite only 15% of American support for the former and only 48% support for the latter, lawmakers are pushing these extreme positions.

In 2018 and 2019, pro-life legislators have worked to pass laws in hopes of the U.S. Supreme Court reviewing *Roe v. Wade*. In 2018, Iowa signed a bill into law restricting abortion after a fetus' first heart beat (6 weeks into pregnancy)²⁵⁶. Later that year, Ohio Governor John Kasich vetoed a similar fetal heartbeat bill, but in 2019 the newly-elected Ohio Governor Mike DeWine has pledged to sign the bill into law if the bill crosses his desk, so legislators are working on bills again.²⁵⁷ Similar efforts are taking place in Kentucky.²⁵⁸ Idaho legislators went even further with “Idaho Abortion Human Rights Act”, which would repeal the current prohibition on prosecuting

²⁵⁵ <https://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> [<https://perma.cc/C7LQ-ZEW7>].

²⁵⁶ <https://www.cnn.com/2019/01/23/us/iowa-fetal-heartbeat-abortion-unconstitutional/index.html> [<https://perma.cc/FTH7-4LQR>].

²⁵⁷ <https://www.10tv.com/article/abortion-heartbeat-bill-proposed-both-ohio-house-senate> [<https://perma.cc/Y74J-62FA>].

²⁵⁸ <https://www.wcpo.com/news/government/state-government/kentucky-state-government-nt-news/kentucky-lawmakers-advance-fetal-heartbeat-abortion-bill> [<https://perma.cc/S3HJ-GWSQ>].

abortion by defining abortion as murder under the Idaho Code.²⁵⁹ While pro-life lawmakers are seeking to overturn *Roe* more than ever before, some pro-choice lawmakers are seeking to protect state laws, by ending abortion trigger laws, in case it is overturned.²⁶⁰ While such efforts can be said to be a response to the pro-life threat, other states' efforts to expand abortion rights suggest that both sides are moving away from common ground and toward the extremes.

In 2019, New York's Reproductive Health Act was signed into law by Governor Andrew Cuomo on the 46th anniversary of *Roe v. Wade*, despite most New York State residents' opposition to such liberal abortion laws.²⁶¹ This act permits greater access to late-term abortions, removes illegal abortions from its criminal code, and removes prosecutors' ability to charge a person with murder for an attack a pregnant person that causes the death of the fetus.²⁶² To celebrate the signing of the bill into law, Governor Cuomo directed both the One World Trade Center and the Governor Mario M. Cuomo Bridge to be lit pink.²⁶³ However, Virginian Democrats' efforts to pass similar legislation were not as successful.

²⁵⁹ The authors of the bill said in order to restore "human rights for the unborn in Idaho, the act simply repeals the prohibition of prosecution for abortion, found in Idaho Code 18-4016 and puts the matter within existing statute for the prosecution of murder, where it clearly belongs", as murder is currently defined as "the unlawful killing of a human being including, but not limited to, a human embryo or fetus, with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being.", https://www.cdapress.com/local_news/20190123/north_idaho_lawmakers_propose_end_to_legal_abortion [<https://perma.cc/U8RG-ZPUY>].

²⁶⁰ See, e.g., Illinois, <https://chicago.suntimes.com/news/rauner-to-announce-decision-thursday-on-abortion-trigger-bill/> [<https://perma.cc/B47T-WFTG>]; New Mexico, <https://www.usnews.com/news/best-states/new-mexico/articles/2018-11-19/new-mexico-democrats-seek-repeal-of-state-abortion-ban> [archived link unavailable].

²⁶¹ Only 21% of New York State residents suggested they support legal abortion access throughout pregnancy, <http://www.kofc.org/un/en/resources/communications/new-yorkers-reject-late-term-abortion.pdf> [<https://perma.cc/XF9D-5WE2>].

²⁶² <https://buffalonews.com/2019/01/22/long-stalled-abortion-bill-passes-new-york-legislature/> [<https://perma.cc/754M-K93B>].

²⁶³ <https://dailycaller.com/2019/01/23/world-trade-center-lit-pink-abortion/> [<https://perma.>

Democratic Delegate Kathy Tran of the Commonwealth of Virginia proposed a bill to permit abortion throughout pregnancy when sought to protect the health of the pregnant person.²⁶⁴ Conservative pundits²⁶⁵ and pro-life activists²⁶⁶ railed against the proposal, as President Trump claimed Virginia's efforts would energize the pro-life movement²⁶⁷.

After the bill was proposed, Virginia Governor Ralph Northam raised comments that many construed as supportive of infanticide.²⁶⁸ However, this would not be the first time that a high-profile Democrat has faced accusations of supporting infanticide.²⁶⁹ Both Virginian politicians defended themselves from significant public backlash, particularly Senator Ben Sasse who was so incensed by Governor Northam's comments that he suggested the Governor should "get the hell out of public office".²⁷⁰ However, a conservative media research center reported that there was a

cc/AC5R-9SZA].

²⁶⁴ The bill was later defeated, but it became the source of much controversy: <https://www.cbsnews.com/news/virginia-abortion-bill-proposed-by-kathy-tran-third-trimester-today-2019-01-30/> [<https://perma.cc/UBQ7-PDVV>], <https://thehill.com/homenews/state-watch/427689-dem-bill-in-virginia-would-loosen-restrictions-on-late-term-abortions> [<https://perma.cc/H79M-J2GR>], https://www.richmond.com/news/virginia/government-politics/general-assembly/virginia-lawmaker-says-she-wouldn-t-have-co-sponsored-controversial/article_66ec687d-e8f4-5997-aca2-efc7d246c192.html [<https://perma.cc/7WSW-626H>].

²⁶⁵ <https://www.foxnews.com/politics/tucker-and-pro-choice-advocate-have-heated-debate-on-virginia-abortion-bill> [<https://perma.cc/E6MH-ZSPD>].

²⁶⁶ <https://www.lifesitenews.com/news/pro-lifers-to-picket-virginia-democrat-who-defended-bill-allowing-abortion> [<https://perma.cc/BPZ3-R5BP>].

²⁶⁷ <https://observer.com/2019/01/trump-claims-virginia-abortion-bill-will-lift-up-the-pro-life-movement/> [<https://perma.cc/YPL5-M6RR>].

²⁶⁸ <https://dailycaller.com/2019/01/30/rubio-sasse-rip-northam-abortion-infanticide-advocacy/> [<https://perma.cc/6HPL-AE4H>].

²⁶⁹ In 2008, then-Presidential candidate Barack Obama was accused of lying about his voting record against born-alive protections, and it became a source of controversy between both sides of the political aisle: <https://townhall.com/columnists/amandacarpenter/2008/10/14/obamas-infanticide-lie-n959756> [<https://perma.cc/P9XV-N7QV>]; http://voices.washingtonpost.com/fact-checker/2008/10/is_obama_guilty_of_infanticide.html [<https://perma.cc/YBB5-35XH>].

²⁷⁰ <https://www.nationalreview.com/corner/virginia-governor-defends-letting-infants-die/> [<https://perma.cc/EM4Q-G6X2>].

surprising dearth of media coverage of the Governor's remarks, claiming that the news arms of the broadcast networks ABC, CBS, and NBC and the cable networks CNN and MSNBC made no mention of his radio interview during the primetime slot on the evening of the interview; in the same time span that those networks did not cover the remarks, the cable network Fox News Channel spent over 67 minutes discussing the remarks and surrounding issues.²⁷¹ This led to a U.S. Senate vote on a born-alive act, which only received three votes from Democrat Senators and was a subject of series of President Trump's Tweets:

“Senate Democrats just voted against legislation to prevent the killing of newborn infant children. The Democrat position on abortion is now so extreme that they don't mind executing babies AFTER birth... This will be remembered as one of the most shocking votes in the history of Congress. If there is one thing we should all agree on, it's protecting the lives of innocent babies.”²⁷²

Within days of the comments, a medical school yearbook picture of Governor Northam caught national attention, which led to many pro-choice politicians and groups to call for him to resign as Governor²⁷³ and others to speculate that the Democrats themselves had leaked the year-

²⁷¹ See, e.g., <https://www.washingtonexaminer.com/opinion/virginias-governor-just-endorsed-late-late-term-abortion-and-journalists-are-not-on-it> [<https://perma.cc/8P8U-4M9E>]; <https://www.newsbusters.org/blogs/nb/nicholas-fondacaro/2019/01/30/nets-ignore-dem-governor-supporting-abortion-delivered-babies> [<https://perma.cc/L54D-KSX4>]; <https://www.newsbusters.org/blogs/nb/curtis-houck/2019/01/31/primetime-cnn-msnbc-ignore-virginia-dems-supporting-late-post-term> [<https://perma.cc/RXC5-QGNC>].

²⁷² February 25, 2019, https://twitter.com/realDonaldTrump?ref_src=twsrc [<https://perma.cc/CW2X-UN9C>].

²⁷³ Amidst U.S. Senators and politicians who had announced their run for President, Planned Parenthood and a local chapter of NARAL called for the Governor to resign, https://www.washingtonpost.com/local/virginia-politics/shocked-saddened-and-offended-swift-reaction-to-va-gov-ralph-northams-racist-photo/2019/02/01/ee319196-269c-11e9-ad53-824486280311_story.html [<https://perma.cc/2FDB-3CK3>].

book picture to take the focus off late-term abortion.²⁷⁴

Interestingly, when Democratic leaders were asked about Governor Northam's comments that week, many stated that they had not heard his comments.²⁷⁵ While high-ranking national politicians might be reluctant to support an absolute right to abortion, other states are proposing similar laws²⁷⁶ and Vermont passed a bill permitting abortion under all circumstances²⁷⁷, further suggesting there is a recent resurgence of the pro-choice movement as a result of other states' efforts to ban abortion and the threat of *Roe* being overturned in the wake of Justice Brett Kavanaugh's appointment to the U.S. Supreme Court.²⁷⁸ Indeed, this argument became a talking point in the debate after one young man spoke to this during a legislative hearing in Rhode Island, where they were considering the Reproductive Health Care Act.²⁷⁹

²⁷⁴ A former Secret Service agent and current conservative pundit claimed that he had seen the yearbook photo months prior but did not release it because he could not verify it; he speculated that the Democratic party might have released it because Governor Northam had been too revealing in his comments and they wanted to shift the narrative, Fox & Friends, Dan Bongino Interview on 2/2/19.

²⁷⁵ <https://townhall.com/tipsheet/reaganmccarthy/2019/01/31/speaker-pelosi-skirts-questions-on-gov-northams-abortion-comments-n2540626> [<https://perma.cc/9REH-V59F>]; <https://dailycaller.com/2019/02/01/cassidy-late-abortion-dems/> [<https://perma.cc/5L6Y-78XX>].

²⁷⁶ <https://www.wpri.com/politics/two-abortion-rights-bills-introduced-in-rhode-island/1706784477> [<https://perma.cc/7E8M-T9FB>]; <http://webserver.rilin.state.ri.us/BillText/BillText18/HouseText18/H7340.pdf> [<https://perma.cc/7Z93-542E>].

²⁷⁷ <https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0057/H-0057%20as%20Introduced.pdf> [<https://perma.cc/T435-LQTP>].

²⁷⁸ <https://www.vox.com/policy-and-politics/2018/7/10/17551644/brett-kavanaugh-roe-wade-abortion-trump> [<https://perma.cc/E9SC-L4EG>].

²⁷⁹ Setting aside issues with the title of the video, this was an impassioned pro-life speech that went viral in 2019, https://www.youtube.com/watch?v=OqS4qFc_I6A, [<https://perma.cc/QF8C-A2DC>].

The Effect of Recent Developments on the U.S. Supreme Court

In the summer of 2018, President Trump announced his nomination of then-Judge Brett Kavanaugh to the United States Supreme Court. Among other opponents of his nomination, pro-choice activists were ready to protest the nomination before he was named.²⁸⁰ Some argued the opposition was a result of the Republicans' refusal to consider the nomination Judge Merrick Garland²⁸¹, while others believed pro-choice Americans feared that then-Judge Kavanaugh's appointment would trigger the end of *Roe v. Wade*.²⁸²

The nomination process was contentious, to say the least.²⁸³ As protestors screamed about abortion and held signs like "ROE – YES, KAVA – NOPE" high above their heads²⁸⁴, the public hearings made it clear that the nation is at a boiling point when it comes to *Roe v. Wade*. For the sake of the U.S. Supreme Court, and the integrity of the Court's nomination process, which is responsible for appointing the nine heads of the United States' judicial branch – a branch that is co-equal to the executive and legislative branches, the President and the Congress – there is good reason for the Court to revisit the national abortion controversy. However, this would not necessarily be bad news for abortion rights, as such a review could lead to the enhancing or solidifying of abortion rights.

²⁸⁰ <https://abcstlouis.com/news/nation-world/four-examples-showing-that-trump-opponents-planned-to-attack-any-supreme-court-nominee> [<https://perma.cc/UNT4-CQMR>].

²⁸¹ <https://www.cnn.com/2018/09/24/politics/brett-kavanaugh-grassley-scotus-letter-trump/index.html> [<https://perma.cc/3AU9-U5UF>].

²⁸² <https://www.gq.com/story/kavanaugh-abortion-roe-v-wade-explained> [<https://perma.cc/RB46-84BT>].

²⁸³ <https://www.npr.org/2018/09/28/652239571/brett-kavanaugh-offers-fiery-defense-in-hearing-that-was-a-national-cultural-mom> [<https://perma.cc/XR8L-LF2L>].

²⁸⁴ <https://www.businessinsider.com/brett-kavanaugh-confirmation-hearing-photos-protesters-2018-9#protesters-shouted-senators-we-demand-you-vote-no-during-the-hearing-4> [<https://perma.cc/2PSP-D9VL>].

Abortion as Self-Defense

As suggested by Nancy Davis²⁸⁵, it is important to note that protecting fetal rights, by recognizing fetuses as persons under the Fourteenth Amendment, would not require an all-out ban on abortions since it is sometimes legal to end the life of a human (i.e., “justifiable homicide”²⁸⁶). There are legitimate interests that compete with the right to life and justify a homicide (e.g., self-defense, necessary use of police force). In this specific instance, fetal rights would not be absolute because they would need to be balanced against the rights of pregnant people. While some would generally balance a fetus’ right to life against abortion rights (e.g., liberty, self-determination, and bodily autonomy), it helps to assess the specific motivations behind abortions in order to understand the specific rights involved.

Many abortion restrictions have exceptions for life-saving abortions, where the pregnancy significantly endangers the pregnant person’s life, through possible medical complications or a higher risk of suicide in pregnancies resulting from rape or incest. These specific motivations exempt life-saving abortions because those abortions represent a conflict between a pregnant person’s right to life and a fetus’ right to life. In such a conflict, a life-saving abortion could be protected using the same logic that exempts justifiable homicides.

The first court to propose that the right to abortion is the right to self-defense issued an opinion in 1970 defending the position.²⁸⁷ However, the court construed this right narrowly as the

²⁸⁵ Davis, N. (1984). Abortion and Self-Defense. *Philosophy & Public Affairs*, 13(3), 175-207. Retrieved from <http://www.jstor.org/stable/2265411> [<https://perma.cc/YEF5-NGXQ>].

²⁸⁶ See, e.g., http://www.law.cornell.edu/wex/justifiable_homicide [<https://perma.cc/UAU3-67HM>].

²⁸⁷ “Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it. Obviously, of course, there are limits to the protection which the state can and must extend to human life, but these are clear and well-marked in the law, and have been for centuries, essentially on the basis that ‘self-preservation is the first law of nature’; thus throughout the development of laws, self-defense has

right to defend one's life in the instance that a fetus represents a threat to the life of the pregnant person. This is not a necessity in the self-defense doctrine, so it is not necessarily the case that this right could only be asserted in the case of a life-threatening pregnancy like an ectopic pregnancy. The doctrine could be used in those situations where the fetus represents a potential threat to life, much like is the case in the self-defense right found in the second amendment. Thus, the Court recognizing that the Constitution ensures the protection of fetal rights would not necessarily sound the death knell for legal abortion like some pro-choice Americans might fear.

U.S. Abortion Laws in a Global Context

Recently, pro-life Americans have used other countries' abortion laws to influence the U.S. abortion debate. Indeed, it can be illuminating to compare U.S. abortion laws to abortion laws throughout the world.²⁸⁸ For instance, while the average European country bans abortion after the 12th week of pregnancy²⁸⁹, America's abortion laws are among the seven countries that allow elective abortions after 20 weeks: Canada, China, Netherlands, North Korea, Singapore, the United States, and Vietnam.²⁹⁰

This comparison triggers a kind of self-evident practical argument that has been suggested

been recognized as a justification for homicide. Hence the provision in the statute here in question that abortion is noncriminal when it is necessary, or declared by two physicians to be necessary, to preserve the life of the mother. One human life may legally be terminated when doing so is necessary to preserve or protect another or others." *Steinberg v. Brown*, 321 F. Supp. 741, 746-747.

²⁸⁸ Kleinfeld, J. Two Cultures of Punishment. (2016). *Stanford Law Review*, Volume 68.

²⁸⁹ <https://www.euronews.com/2018/01/30/which-european-countries-have-the-strictest-abortion-rules> [<https://perma.cc/W67K-TMU9>].

²⁹⁰ <https://lozierinstitute.org/internationalabortionnorms/> [<https://perma.cc/CQM4-WBL5>]; <https://lozierinstitute.org/america-global-outlier-ultra-permissive-abortion-policy/> [<https://perma.cc/K3U7-6NFM>].

by pro-life Americans: ‘no wonder the U.S. has such a contentious abortion debate; despite half of the country being pro-life, we have abortion laws so extreme that we are mentioned in the same breath as China, North Korea, and Vietnam among the countries with the most permissive abortion laws on Earth’.²⁹¹ This was certainly the impetus for the Lozier Institute’s publication of this comparison, which was founded as the pro-life equivalent of the pro-choice Guttmacher Institute²⁹², and was provocative enough to garner a fact-check from the Washington Post, which did confirm it as accurate.²⁹³

While America is a sovereign nation that is not required to pass legislation that represents the will of other countries’ citizens, or the will of the human race, one who is interested in resolving the debate can look at U.S. abortion laws in the context of abortion laws around the world and consider the possibility that America’s abortion laws are too permissive for there not to be a controversy. Given the number of Americans who are pro-life – and the intensity of the movement, its protests, and its legislators’ efforts to change abortion laws – and the number of pro-choice Americans who believe abortion should be illegal after the first trimester, there is currently more support for restricting abortion after the first trimester (76%)²⁹⁴ than there was support for gay

²⁹¹ As reported in chapter 4 on p. 199, 50% of pro-choice participants believed that the debate is so contentious because its laws are so uniquely liberal, while 78% of pro-life participants agreed.

²⁹² “Donovan founded the Charlotte Lozier Institute nearly four years ago as an anti-abortion counter to Guttmacher, as he is convinced the movement needs its own serious research group.”, <https://www.washingtonexaminer.com/both-sides-of-abortion-debate-get-data-from-same-source> [<https://perma.cc/88WW-B2ZT>].

²⁹³ <https://www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-pregnancy/> [<https://perma.cc/E3RS-F82F>].

²⁹⁴ <https://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> [<https://perma.cc/C7LQ-ZEW7>].

marriage in 2013 (53%)²⁹⁵.

While there was more support for bringing America's abortion laws in line with other more moderate countries, state legislators showed a much bigger appetite for permitting gay marriage²⁹⁶ than they have for more restrictive abortion laws. However, that change came after the U.S. Supreme Court had weakened the federal Defense of Marriage Act, which led to states legalizing gay marriage and the U.S. Supreme Court's recognition of a constitutional right to marry in *Obergefell v. Hodges*. Thus, it is a more complicated issue than mere public will.

Conclusion

The main takeaway from this chapter is that the U.S. abortion debate is in a unique state of flux. Some legislators are pushing to restrict abortion throughout pregnancy, and others are pushing to permit abortion throughout pregnancy, so both sides are weakening *Roe* as a resolution to the debate. Forty-six years under the United States Supreme Court's abortion jurisprudence that used viability²⁹⁷ as the dividing line has failed to end the national abortion controversy. It might have failed because pro-life Americans have been unreasonable in their refusal to accept the Court's mandate; it might have failed because it is an extreme view, as only a handful of countries use it as a dividing line; it might have failed because it was not coupled with constitutional protections of fetuses at that point. Whatever the reason, the U.S. Supreme Court has tried to end a national controversy twice before; while *Brown* was a success, *Roe* was not.

²⁹⁵ “[A] majority (53%) of Americans favor allowing gay and lesbian couples to legally marry, compared to 41% who oppose.” <https://www.prii.org/research/2014-lgbt-survey/> [<https://perma.cc/NQ5H-WTTJ>].

²⁹⁶ <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/> [<https://perma.cc/SJE5-54ZY>].

²⁹⁷ This was used as the point at which abortion could be restricted based on the Court's belief that it fetal viability is the significant point in fetal development.

Moving forward, the Court has three options: (1) remain silent and hope the controversy reduces or resolves on its own; (2) overrule *Roe* and allow states to freely craft state abortion laws; (3) reexamine *Roe* and offer a new mandate. Since this dissertation centers on mediating the abortion debates, the following chapter explores why Americans disagree in hopes of finding common ground and opportunities to reduce or resolve the controversy.

The historical analyses in this chapter suggest that perceptions of fetuses play a role in the abortion debate. The Court did not determine that pregnant people have a right to get an abortion 24 weeks into pregnancy because that gives them ample time to make a decision or to save enough money for the procedure; the Court used viability because that was the point it decided a fetus is worthy of protection, after the Court stated it was unable to determine when a human's life begins. Historically, perceptions of fetuses have dictated abortion laws, as they currently do, so questions about when a human's life begins and when a fetus is worthy of legal protection seem important. Since a review of history alone cannot determine those questions' importance in the 21st century, the next chapter uses reviews of abortion polls, online abortion discourse, and research on abortion attitudes to motivate studies to further explore why Americans are still divided by the national abortion controversy.

CHAPTER 3: A REVIEW OF THE MODERN DEBATE

*“[T]he prevailing sentiment among abortion rights activists is that the anti-abortion movement is just applied misogyny — a derivative position from a general attitude of patriarchal contempt toward or fear of women’s sexuality and autonomy”.*¹

Since abortion has been a contentious issue for decades, polling companies have surveyed Americans’ opinions dating back before the 1973 landmark U.S. Supreme Court case *Roe v. Wade*. The polls typically focus on the legal and moral dimensions of the debate and provide useful data for understanding Americans’ opinions on abortion. While analyses of the polls reveal that Americans are split between the pro-choice and pro-life camps, some surprising findings reveal a significant amount of agreement² on important aspects of contemporary issues in the abortion debate.

Most of the early research diagnosing the abortion debate was done through encountering as many conversations about abortion as possible: classroom discussions, in-person discussions, battling op-eds, cable television debates, and online discussions. Online abortion discussions were the most plentiful, but they were also difficult to analyze since they have a lot of noise and not much structure. A chance encounter between one of this dissertation’s committee members and the owner of Kialo.com (“Kialo”), an online discussion forum, proved to be quite fortuitous for this research. While various online resources provided some sense of online abortion discourse, Kialo’s organized system greatly facilitated a discursive analysis of the debate. Reviewing thousands of arguments enabled pattern recognition and the creation of an internal heat map of how

¹ <http://nymag.com/intelligencer/2018/09/is-the-anti-abortion-movement-just-about-suppressing-women.html> [<https://perma.cc/83XX-4FXW>].

² 81% of Americans surveyed in a Gallup poll said that abortion should be illegal in the third trimester, <https://news.gallup.com/poll/235469/trimesters-key-abortion-views.aspx> [<https://perma.cc/BE3S-GR8Z>].

people talk about abortion in online discussions. Finally, there is a review of previous research on abortion attitudes.

Altogether, this chapter functions as an observation of the U.S. abortion debate. This was a crucial step before designing and conducting studies that aim to identify the areas of agreement and disagreement between Americans. The development of the kind of embedded perspective, which starts with an observation, could provide unique insights that lead to studies that can offer relevant and novel contributions to the literature.

Polls on Americans' Abortion Attitudes

Justice Blackmun's case files on *Roe v. Wade* included a snippet of a 1972 Gallup poll that suggested 64% of Americans agreed with the full liberalization of abortion laws, as they agreed with a statement representing the view that the government should not interfere with the relationship between a woman and her doctor.³ However, the validity of some of *Roe*-era polling has been

³ Greenhouse, L., & Siegel, R.B. (2012). Before *Roe v. Wade*: Voices that shaped the abortion debate before the Supreme Court's ruling, p. 207, https://documents.law.yale.edu/sites/default/files/beforeroe2nded_1.pdf [<https://perma.cc/AR5L-WT2J>]; the relationship between a pregnant person and their abortionist is typically different compared to the relationship between a pregnant person and their primary care physician (see, e.g., Abby Johnson's Kentucky State Testimony, <https://www.youtube.com/watch?v=zj7S75Dp3GQ> [<https://perma.cc/AL89-FS7Y>] at 1:50) – some have argued this difference can be grounds for reviewing *Roe*, see, e.g., “American medicine has largely abandoned abortion”, Forsythe, C.A. Draft Opinion Overruling *Roe v. Wade* (July 1, 2018). *Georgetown Journal of Law & Public Policy*, Vol. 16, p. 445, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252545 [<https://perma.cc/2XCV-XQW4>].

called into question⁴, and there were numerous contemporaneous polls which suggested Americans might have generally supported abortion rights, but they opposed access to elective abortions⁵.

Abortion could be understood as a question of morality, a public policy question, a legal question, or a political matter. Indeed, a 2018 poll showed it is a major factor for Americans' votes for president (42%), congress (45%), and even local politicians (38%). Overall, only 24-28% say it is not a factor when casting those votes⁶. In 11 years of polling on abortion, more Americans have identified as pro-choice (48-60%) than as pro-life (38-49%), and the most recent poll had more pro-choice Americans (47% to 47%).⁷ In terms of political breakdowns, Independents lean pro-choice (55%), Democrats are mostly pro-choice (70%), and Republicans are mostly pro-life (75%).⁸

⁴ “Knowing that if a true poll were taken, we would be soundly defeated, we simply fabricated the results of fictional polls. We announced to the media that we had taken polls and that 60% of Americans were in favour of permissive abortion. This is the tactic of the self-fulfilling lie. Few people care to be in the minority.”, Nathanson, B. "Confessions of an Ex-Abortinist" In *The Hand of God: A Journey from Death to Life by the Abortion Doctor Who Changed His Mind* (Washington, D.C.: Regener Publishing, 2013).

⁵ In 1965, a Gallup poll suggested that 72% of Americans believed abortion should not be legal “where the family does not have enough money to support another child” (Gallup Poll, December 1965 [Dataset: USAIPO1965-0721], Data provided by The Roper Center for Public Opinion Research); In 1972, the results from the General Social Survey suggested that 57% of Americans opposed legal access if a woman is “married and does not want any more children” (General Social Survey, February 1972 [Dataset: USNORCGSS1972-2012, Variable: ABNOMORE], Data provided by The Roper Center for Public Opinion Research).

⁶ <https://www.kofc.org/un/en/resources/communications/abortion-limits-favored.pdf> [https://perma.cc/F6AC-H94V].

⁷ <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [https://perma.cc/C34M-2BDT]

⁸ <http://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> [https://perma.cc/C7LQ-ZEW7].

The Morality of Abortion

Since 2001, Gallup has polled Americans on their beliefs about whether abortion is morally acceptable or morally wrong. No Gallup poll has shown that a higher percentage of Americans felt abortion was morally acceptable (range: 36-45%) than morally wrong (range: 45-53%). Most recently, in a poll conducted in May 2018, 48% stated that it was morally wrong, 43% stated that it was morally acceptable, and 7% stated that it depends on the situation.⁹

Pew conducted a similar poll but included an option for those who saw abortion as not relevant to morality. Before the 2016 election¹⁰, participants were asked if having an abortion was morally wrong (44%), morally acceptable (19%), or if it was not a moral issue (34%). In virtually all categories, including those who are Democrats, a higher percentage of participants rated abortion as wrong rather than acceptable. This pattern was found in men (45% vs. 20%), women (43% vs. 18%), Republicans (62% vs. 11%), and Democrats (29% vs. 27%). The largest difference was between those who were Protestant (54% vs. 14%) and Catholic (51% vs. 16%), but the reverse was true for those who were unaffiliated with a religion (23% vs. 30%).¹¹

These polls suggest that a slight majority of Americans feel that abortion is morally wrong. However, many of those in the Gallup poll who said it was morally acceptable might have chosen the “not a moral issue” option if it had been presented. It is interesting that one-third of Americans recognized abortion as an amoral issue since abortion is commonly framed as a moral issue.

Some people advance the argument that it is an amoral issue, but they typically do so to

⁹ <https://news.gallup.com/poll/235445/abortion-attitudes-remain-closely-divided.aspx> [https://perma.cc/D3FV-75WP].

¹⁰ <http://www.pewforum.org/2016/09/28/4-very-few-americans-see-contraception-as-morally-wrong/> [https://perma.cc/6MNB-E4YD].

¹¹ These percentages do not add up to 100% since participants were also given a choice to state that abortion was not a moral issue or to not answer.

shift the legal debate from punishing immoral conduct to managing a public health issue¹²; they make this case but still recognize that “deeply divisive moral issues are involved... [a]bortion does end a human life”.¹³ As to how those who abstained from answering would assess abortion, if pressed, a comparison of the Gallup and Pew polls suggests that most would have selected morally acceptable since Gallup’s morally wrong category (48%) was only slightly higher than Pew’s morally wrong category (44%), while Gallup’s morally acceptable (43%) was much higher than Pew’s morally acceptable (19%). Thus, looking only at the question of whether abortion moral, it seems a slight majority of Americans feel that abortion is morally wrong. However, the question is whether these moral beliefs on abortion map onto their positions on the legality of abortion.

The Legality of Abortion

In regards to the question of the legality of abortion, many pollsters have focused on the question of whether abortion should be legal/illegal in all, most, or certain circumstances. However, this is a rather vague question since it fails to ask about the specific circumstances. One abortion pollster took issue with it, calling it a “bad polling measurement” and stating: “I don’t even want to ask this dumb question anymore, because it doesn’t work”.¹⁴ There is also a difference in results when it is framed slightly differently.

Pew frames it as “legal in all cases” (25%), “legal in most cases” (24%), “illegal in most

¹² <https://www.nytimes.com/2018/03/19/opinion/abortion-arguments-morality-policy.html> [<https://perma.cc/9QWP-QE4V>].

¹³ <https://www.scientificamerican.com/article/abortion-is-a-problem-to-be-solved-not-a-moral-issue/> [<https://perma.cc/8D82-CFZK>].

¹⁴ <http://www.msnbc.com/msnbc/why-its-so-hard-measure-public-opinion-abortion> [<https://perma.cc/859T-C79R>].

cases” (22%), and illegal in all cases (15%).¹⁵ Given other polls, this seems to be a fairly standard sample. Gallup had similar results for “legal under any circumstances” (29%) and “illegal in all circumstances” (18%). However, 50% selected “legal only under certain circumstances”¹⁶, which is much higher than the 22% that selected Pew’s “illegal in most cases”. However, this could be explained by Gallup only presenting one moderate option, as there were about the same percent of participants who chose the moderate option in the Pew (46%) and Gallup (50%) polls.

In 2018, Gallup provided poll results¹⁷ that further explained the middle option “legal only under certain circumstances”. While 14% of Americans said that abortion should be “legal in most” circumstances, 35% said it should be “legal in only a few” circumstances. Gallup broke down respondents into 38 different groups based on demographics (e.g., education, political beliefs, income) and a higher percentage of respondents preferred abortion to be legal in a few circumstances rather than most circumstances (36 out of the 38 groups). Postgraduates were just as likely to select each category, and liberals were the only group to show a preference for most circumstances (20%) than few circumstances (17%).

While Americans showed a preference for abortion being legal in only a few circumstances or illegal in all (53%) over legal in most or all circumstances (43%), there were some groups that preferred more permissive abortion laws. Majorities of Americans between the ages 18-29 (50%), postgraduates (64%), college graduates (58%), people making over \$75,000 (53%), liberals (71%), Democrats and those who lean that way (62%), non-Christians (68%), those who seldom attend

¹⁵ <http://www.people-press.org/wp-content/uploads/sites/4/2018/10/Values-for-release.pdf> [<https://perma.cc/CMK4-EKVY>].

¹⁶ <https://news.gallup.com/poll/235445/abortion-attitudes-remain-closely-divided.aspx> [<https://perma.cc/P7LZ-TQTZ>].

¹⁷ https://news.gallup.com/poll/244097/legality-abortion-2018-demographic-tables.aspx?g_source=link_news9&g_campaign=item_246257&g_medium=copy [<https://perma.cc/JCC8-PEBK>].

church (56%), and Americans from the Eastern (54%) and Western coasts (57%). Overall, 26 out of the 38 groups showed a preference for legal abortion access in few circumstances or none.¹⁸

Laws Based on the Timing of Abortions

In a 2018 Gallup poll, 34% thought abortion should be generally illegal in the first trimester of pregnancy, 65% thought abortion should be generally illegal in the second trimester, and 81% thought abortion should be generally illegal in the third trimester.¹⁹ Further, in terms of the legality of first-trimester abortions, this poll reported that fewer Americans thought it should then be legal for any reason (45%) than Americans who thought abortion should be generally legal (60%). This suggests that the support of first-trimester abortions might depend on an abortion being seen as justified for some reason. Framing the legality of abortion with the timing of the pregnancy, which is inextricably linked with the age of the fetus, is a significant feature of polls on abortion beliefs.

The Harvard T.H. Chan School of public health performed a similar poll in 2016 and found that only 23% of Americans believe abortion should be legal after 24 weeks.²⁰ The National Right to Life Committee's 2013 poll found that 64% of Americans would support a law restricting abortion to the first 20 weeks of pregnancy²¹, and Marist's 2019 poll found 66% support a similar 20-week ban.²² In that poll, a majority of Americans said abortion should be limited to the first three

¹⁸ *Id.*

¹⁹ Gallup has performed similar polls on five other occasions since 1996 and has found similar results, as support for illegalization has remained fairly stable for abortions in the first trimester (29-34%), second trimester (64-71%), and third trimester (80-86%); <https://news.gallup.com/poll/235469/trimesters-key-abortion-views.aspx> [<https://perma.cc/445Z-BTKR>].

²⁰ <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2016/08/STAT-Harvard-Poll-August-2016-Zika.pdf> [<https://perma.cc/A4M9-TVT7>].

²¹ <https://www.nrlc.org/communications/releases/2013/release042213/> [<https://perma.cc/WU6F-EJDV>].

²² <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion>.

months of pregnancy (80%); in another 2019 poll, 65% supported a Supreme Court challenge to *Roe v. Wade*²³; most said a challenge should lead to returning abortion laws back to the states (49%), and fewer said a challenge should outlaw abortion nationwide (16%). The majority of the sample was pro-choice (55%), so these findings are surprising.

In their 2011 survey, Gallup provided a breakdown of beliefs based on people's stated abortion stances.²⁴ While most pro-choice Americans thought abortion should be legal in the first trimester (89%), a slight majority thought it should be illegal in the second trimester (52%), and a consensus thought it should be illegal in the third (79%). Pro-life Americans believe it should be illegal throughout pregnancy, as only 35% supported legal abortion in the first trimester and large majorities thought abortion should be illegal in the second (90%) and third (94%) trimesters. Overall, this poll suggested that agreement between pro-choice and pro-life Americans on many of the issues related to the timing of pregnancy extends to the reasons for seeking abortions.

Gallup presented Americans with different scenarios and asked if those pregnancies should be legal at any stage of pregnancy. A majority of pro-choice Americans believed each circumstance should be legal, while pro-life Americans varied. Majorities of pro-choice and pro-life Americans thought that abortion should be legal when the woman's life is endangered (97% and 69%), the woman's physical health is endangered (96% and 68%), and the pregnancy was caused by rape or incest (91% and 59%). There was also agreement, in terms of majority support, on issues related to informed consent for abortion patients (86% and 87%), parental consent for mi-

pdf [<https://perma.cc/C34M-2BDT>].

²³ <http://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> [<https://perma.cc/C7LQ-ZEW7>].

²⁴ <https://news.gallup.com/poll/148880/plenty-common-ground-found-abortion-debate.aspx> [<https://perma.cc/HW63-3PHJ>].

nors (60% and 81%), 24-hour waiting periods for women seeking abortion (60% and 79%), abortion restrictions in the second trimester (52% and 90%), abortion restrictions in the third trimester (79% and 94%), and bans on partial-birth abortions (63% and 68%).²⁵

Since only 24% of the country supports abortion after the first trimester, one might think that *Roe* is not consistent with Americans' preferences so the public might not support it. However, Americans have interesting ideas about *Roe*. While Americans are more aware of it than any other Supreme Court case by a significant margin²⁶, a 2012 Pew poll suggests that only 44% of young adults know that the case was related to abortion, and only 62% of all adults knew that it was.²⁷ One pollster said that “[m]illennials think that *Roe v. Wade* happened right after the American Revolution [and] have no idea that there was ever a time when abortions were illegal”.²⁸ Apart from the possibility that people might fear that overturning *Roe* would criminalize abortion across the country, Americans' lack of specific knowledge about *Roe* might explain the inconsistency between the majority view that abortion should be illegal after the first trimester and the numerous

²⁵ *Id.*

²⁶ In an open-ended question, respondents were asked to name Supreme Court cases; 36% mentioned *Roe v. Wade*, which was a much higher percentage than the second-most commonly cited case, *Brown v. Board* (5%), <https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%202018%20Supreme%20Court%20Survey%20Agenda%20of%20Key%20Findings%20FINAL%2008%2028%2018.pdf> [<https://perma.cc/CVE8-NYGA>].

²⁷ 17% of adults thought it dealt with the death penalty, school desegregation, and environmental protection, and 20% said they did not know, <http://www.pewforum.org/2013/01/16/roe-v-wade-at-40/> [<https://perma.cc/KXN7-SZSH>].

²⁸ <https://thehill.com/hilltv/what-americas-thinking/395824-dem-pollster-millennials-think-roe-v-wade-happened-after-the> [<https://perma.cc/2TZS-6TJ3>]; since this was an interesting quote that was not backed with data, there was a question of whether this was a pro-life sentiment, but it came from a pollster who describes herself as “one of the Democratic Party's leading political strategists” on her company website and says that her company has done work for NARAL and Planned Parenthood, so that fear seems unfounded, https://www.lakeresearch.com/index.php?option=com_content&view=article&id=2&Itemid=150 [<https://perma.cc/ZM68-FB24>].

findings that most Americans oppose overturning *Roe*²⁹, even though it does not represent their preferences since it protects legal abortion throughout most of the second trimester and permits abortion in the third trimester.

Regardless of the timing or the circumstances, most believe that abortion access should sometimes be restricted because they recognize the rights of both sides. Americans agree that laws can protect both women and “the unborn”. Participants were asked if laws had to choose between the two rights³⁰ and 78% said that “laws can protect both woman and unborn”, while only 15% said that “laws must choose to protect one”.³¹ Not only does the large majority of Americans prefer laws that balance the rights of fetuses against the rights of pregnant people, they believe it is possible to pass such laws in America.

When Life Begins

In a 2018 Marist poll³², 72% of Republicans, 32% of Democrats, and 44% of Independents selected conception as the moment a human’s life begins. For each group, conception was the most popular selection. In terms of alternative views on when life begins, 21% of Democrats selected “viability outside the womb” and 17% selected “when a baby is born”. 62% of Americans believed

²⁹ Polls have found between 52-71% of Americans oppose overturning *Roe*, <https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%202018%20Supreme%20Court%20Survey%20Agenda%20of%20Key%20Findings%20FINAL%2008%2028%2018.pdf> [<https://perma.cc/CVE8-NYGA>], <https://www.nbcnews.com/politics/first-read/nbc-wsj-poll-support-roe-v-wade-hits-new-high-n893806> [<https://perma.cc/RHQ4-YVWU>].

³⁰ “Which statement comes closer to your view: One, it is possible to have laws which protect both the health and well-being of a woman and the life of the unborn; or two, it is necessary for laws to choose to protect one and not the other?”, <https://www.kofc.org/en/resources/communications/american-support-abortion-restriction.pdf> [<https://perma.cc/QE4Q-HXKS>].

³¹ *Id.*

³² <http://www.kofc.org/en/resources/communications/abortion-limits-favored.pdf> [<https://perma.cc/F6AC-H94V>].

that life begins within the first three months of pregnancy, and 88% of Republicans, 56% of Democrats, and 69% of Independents believed that life begins before viability. However, it is also important to know how they perceive the question.

In the 2018 Marist poll, 46% of Americans referred to the view ‘human life begins at conception’ as a biological and scientific fact, compared to 45% that viewed it as a philosophical or religious belief. The pollsters broke this result down by participants’ abortion and political stances: most pro-life supporters (59%) viewed it as a biological and scientific fact and not as a philosophical or religious belief (30%), and the reverse was true for pro-choice supporters (35% vs. 58%). Republicans (52% vs. 39%) and Independents (49% vs. 41%) showed a smaller preference, and Democrats (35% vs. 55%) followed the pattern of pro-choice supporters. In Marist’s 2019 poll, the Marist poll rephrased the question and found 56% believe that the scientific view of a human fetus is that “it is a unique life” (56%), while only about a third (35%) believed “it is part of a woman’s body.”³³

Why They Disagree

These polls suggest that there is greater opposition toward legal abortion among pro-life Americans and Republicans. As for the mechanism behind this, chapter 5 explores whether these identities drive the opposition or whether these identities are acting as intervening variables for other factors.

The same percent of men (19%) and women (19%) prefer that abortion be illegal under all circumstances, and a similar percent of men (53%) and women (49%) favor legal abortion under

³³ <https://www.kofc.org/en/news/media/substantial-abortion-restrictions.html> [<https://perma.cc/AGQ8-JHNG>].

some circumstances.³⁴ This runs counter to the narrative that opposition to abortion is solely a male effort to control women’s reproduction³⁵ and could be supported by implying that women have fallen victim to false consciousness³⁶, whereby women have been led to believe in policies that run counter to their interests. Some have claimed that those in the pro-choice movement have sought to suppress pro-life female voices in the 2017 Women’s March³⁷ and in a recent Netflix abortion documentary “Reversing Roe”.³⁸ Disregarding pro-life women’s’ voices was also suggested by Governor Northam’s defense of a 2019 Virginia abortion bill, as he argued that “legislators, most of whom are men, by the way, shouldn’t be telling a woman what she should and shouldn’t be doing with her body.”³⁹

When one considers the issues on which people on both sides of the aisle disagree, there are large differences in how both sides view abortion and fetuses. An analysis of recent polls suggests pro-choice and pro-life Americans are divided on when life begins and whether abortion is

³⁴ <https://news.gallup.com/poll/235646/men-women-generally-hold-similar-abortion-attitudes.aspx> [<https://perma.cc/CB3X-R6U2>].

³⁵ “[T]he prevailing sentiment among abortion rights activists is that the anti-abortion movement is just applied misogyny — a derivative position from a general attitude of patriarchal contempt toward or fear of women’s sexuality and autonomy”, <http://nymag.com/intelligencer/2018/09/is-the-anti-abortion-movement-just-about-suppressing-women.html> [<https://perma.cc/83XX-4FXW>]; as a preview of data presented in chapter 4 on p. 192, only 18% of pro-life participants believe abortion should be restricted to control women and discourage sexual freedom – compared to 10% of pro-choice participants – while 53% of pro-choice and 30% of pro-life participants reported that they believe Americans support abortion restrictions on that basis; thus, both pro-choice and pro-life Americans overrate the degree to which there is support for abortion restrictions because of an underlying desire control women and discourage sexual freedom.

³⁶ <https://www.britannica.com/topic/false-consciousness> [<https://perma.cc/HAW7-TR68>].

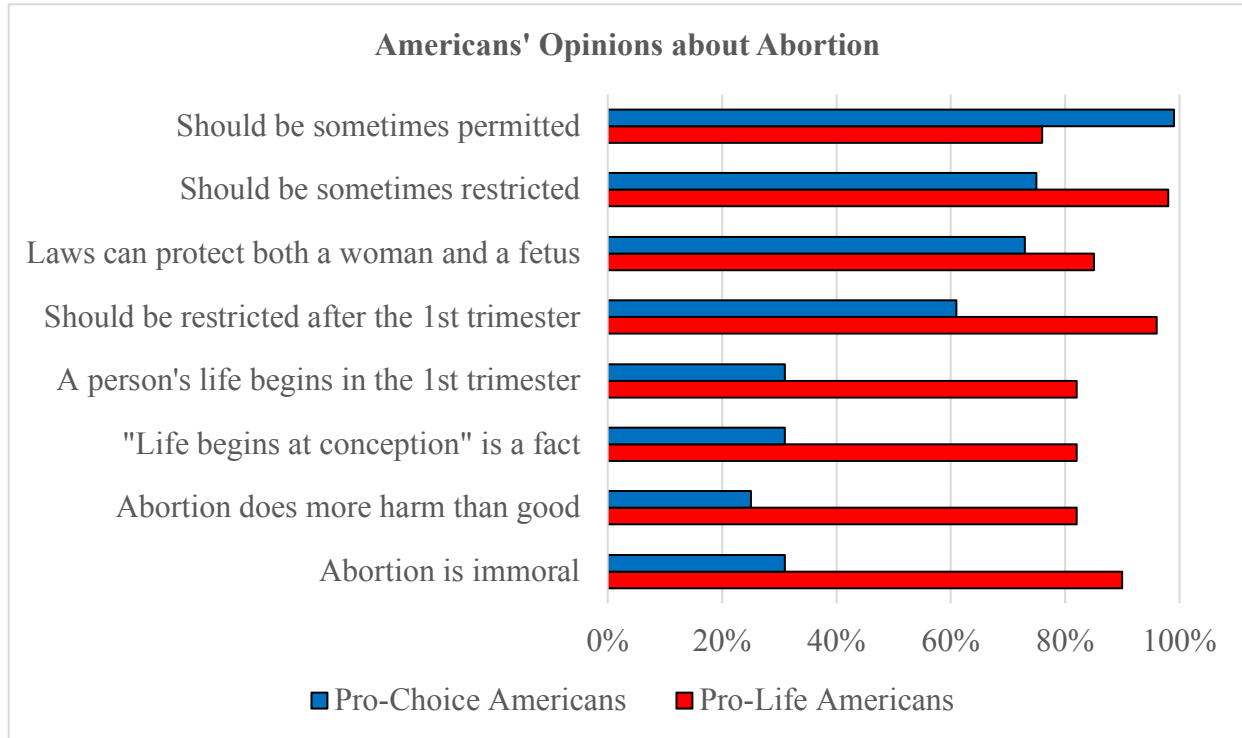
³⁷ <https://www.usnews.com/opinion/op-ed/articles/2017-01-19/the-womens-march-on-washington-errs-in-excluding-pro-life-feminists> [archived link unavailable].

³⁸ <https://www.washingtonexaminer.com/opinion/op-eds/i-was-in-a-netflix-abortion-documentary-heres-what-you-didnt-hear> [<https://perma.cc/TL84-4A84>].

³⁹ <https://www.wmdt.com/2019/01/accomack-residents-react-to-comments-made-by-governor-northam/> [<https://perma.cc/KX3L-7EYS>].

immoral, but they agree that abortion laws can protect both pregnant people and fetuses by permitting abortion in some circumstances and restricting it in others:

Figure 3.1 Pro-Choice and Pro-Life on Abortion-Related Issues.⁴⁰



When Life Begins and Abortion Restrictions

Table 3.1 is a comparison of the 2018 and 2019 Marist polls that asked respondents their views on when they believe life begins and when elective abortion should be restricted. The 2019 poll specified about what type of life, focusing in on when a “person’s” life begins.

⁴⁰ This poll states that 15% want abortion legal throughout pregnancy, which is consistent with Gallup’s finding on the same question (13%), <https://news.gallup.com/poll/235469/trimester-s-key-abortion-views.aspx> [<https://perma.cc/BE3S-GR8Z>]; the 2017 Marist poll found more people felt it is morally wrong (59%), and fewer felt it is morally acceptable (39%) than a 2018 Gallup poll (48% vs. 43%), and the 2019 Marist poll had a slightly higher percentage of participants who thought abortion should be legal in the first trimester (66%) than the 2018 Gallup poll (60%), but the latter had a higher percentage of participants who stated they were unsure.

Table 3.1 Comparing Perceptions of Fetuses and Abortion Restrictions.

| | "Life Begins" ⁴¹ | "Person's Life Begins" ⁴² | Abortion Restrictions ⁴³ |
|----------------|-----------------------------|--------------------------------------|-------------------------------------|
| Fertilization | 47% | 42% | 48% |
| First 3 Months | 15% | 10% | 27% |
| 3-6 Months | 10% | 9% | |
| Viability | 14% | 19% | 9% |
| Birth | 10% | 13% | 15% |

In numerous polls since 2009, the large majority of Americans has suggested it is “possible to have laws which protect both the health and well-being of a woman and the life of the unborn” (77-84%).⁴⁴ This is true for both pro-life (84%) and pro-choice participants (73%).⁴⁵ Overall, a majority of Americans agree that abortion laws should balance both rights.

⁴¹ 51% identified as pro-choice and 44% identified as pro-life in the 2018 Marist poll, <https://www.kofc.org/un/en/resources/communications/abortion-limits-favored.pdf> [<https://perma.cc/F6AC-H94V>]; participants were asked: “Do you believe life begins: At conception, within the first three months, between three and six months, when a fetus is viable and can live outside the womb, or when a baby is born.”

⁴² 55% identified as pro-choice and 38% identified as pro-life in the 2019 Marist poll, <https://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> [<https://perma.cc/C7LQ-ZEW7>]; participants were asked: “Do you believe a person's life begins: At conception, Within the first three months, Between three and six months, When a fetus is viable and can live outside the womb, When a baby is born, or Unsure”; those who said they were ‘unsure’ are not reported in this chart.

⁴³ 55% identified as pro-choice and 38% identified as pro-life in the 2019 Marist poll, *Id.*; participants were asked: “Which comes closest to your opinion on abortion: Available to a woman at any time during pregnancy, Only during the first six months of pregnancy, Only during the first three months of pregnancy, Only in cases of rape, incest, or to save the life of the mother, Only to save the life of the mother, or Should never be permitted under any circumstances”.

⁴⁴ <https://www.kofc.org/un/en/resources/communications/abortion-limits-favored.pdf> [<https://perma.cc/F6AC-H94V>].

⁴⁵ *Id.*

Only 13% want abortion “[a]vailable to a woman any time during her pregnancy”, and 80% want elective abortion illegal at least after three months.⁴⁶ Since 2008, between 74-86% of Americans have wanted abortion illegal after the first trimester. It is the majority view of pro-life (92%) and pro-choice Americans (65%), as well as Democrats (64%), Republicans (92%), and Independents (83%). Similarly, most Americans oppose tax dollars being used for abortion (60%), however here Independents’ level of support (39%) looked more similar to Democrats (51%) than Republicans (10%).⁴⁷ As for bringing abortion laws in lockstep with these preferences, 59% of Americans said it was a priority to limit elective abortion to the first three months of pregnancy.⁴⁸ This includes 80% of pro-life participants and 44% of pro-choice participants.

As for *Roe v. Wade*, 30% claim they want abortion legal without restriction, 49% want to allow states to make restrictions, and 16% suggest they would make abortion illegal.⁴⁹ However, it is curious that there were such different results on similar questions within the same poll, as only 15% wanted abortion available at any time, 74% wanted some of the proposed restrictions, and 10% wanted abortion restricted under all circumstances. Perhaps concretizing questions on the legality of abortion within the context of what the U.S. Supreme Court should do polarized people, as higher numbers supported absolute permission and absolute restriction when the question was

⁴⁶ <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>].

⁴⁷ *Id.*

⁴⁸ <https://www.kofc.org/en/resources/communications/american-support-abortion-restricti-on.pdf> [<https://perma.cc/QE4Q-HXKS>].

⁴⁹ <http://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knigh-hts-of-columbus-marist-poll-slides.pdf> [<https://perma.cc/C7LQ-ZEW7>].

so contextualized. Also, since many do not know that *Roe* is about abortion and might not understand the specifics of the ruling, *Roe* might function as a symbol that outweighs Americans' abortion restriction preferences.

Americans not only agree on the need for abortion restrictions, but most also oppose using taxes to fund abortions. Indeed, in the run-up to the 2016 presidential election, 87% opposed taxpayer-funded abortions, and 57% of Clinton supporters supported those abortions.⁵⁰ Both sides opposed funding abortions in other countries, as well as all other sub-categories polled.⁵¹ Similarly, 59% of Americans felt that government regulations should not require businesses and their insurers to pay for procedures with which they have religious or moral objections.⁵²

These polls suggest that pro-choice and pro-life Americans are most divided in their perceptions of fetuses, and these perceptions could be driving the differences in abortion attitudes. However, these polls might have been subject to certain biases from pollsters⁵³, so it is important to step out of these constraints and step into open online discussions that can give a broader sense of what is important to Americans interested in discussing the abortion debate on the internet.

⁵⁰ <https://www.kofc.org/en/resources/communications/american-support-abortion-restriction.pdf> [<https://perma.cc/QE4Q-HXKS>].

⁵¹ Despite significant support, including 73% of pro-choice Americans and 95% support of pro-life Americans, the Trump administration received pushback when he reimposed a Reagan-era policy that effectively ended America's funding of foreign abortions, <https://www.usnews.com/news/best-countries/articles/2018-06-05/report-trumps-foreign-abortion-gag-rule-harms-developing-countries-other-foreign-aid> [archived link unavailable].

⁵² <https://www.kofc.org/en/resources/communications/american-support-abortion-restriction.pdf> [<https://perma.cc/QE4Q-HXKS>].

⁵³ It is possible that pollsters focused on issues that have been important in legal debates about abortion, whereas these traditional concepts are no longer important to Americans.

Online Abortion Discourse

zygote embryo fetus unborn **child** baby babies woman mother
pregnant pregnancy conception fertilization viable viability birth
right rights autonomy bodily autonomy moral immoral law legal illegal
abort **abortion** kill killing murder rape⁵⁴

To better understand how abortion is typically discussed, the abortion discussion on the website Kialo.com was analyzed (“Kialo”). Kialo enables users around the world to engage in organized, focused discussions on various topics.⁵⁵ Some of the site’s most popular discussions include: “Has Religion Been a Good Thing for Humanity?”, “Should the US adopt stricter gun controls?”, and, unsurprisingly, “Pro-Life vs Pro-Choice: Should Abortion be Legal?”.⁵⁶

Reading and analyzing over 3,200 arguments and counter-arguments about abortion, it was easy to be reminded of moral psychologist Jonathan Haidt’s emotional dog and its rational tail. In his social intuitionist approach to moral reasoning, Haidt claims that humans are more like lawyers trying to build a case for their predetermined outcome rather than objective judges searching for the truth.⁵⁷ This theory never felt so compelling as it did while transcribing and coding this online

⁵⁴ This is a tag cloud for the frequency of relevant terms out of the 85,195 words used in the abortion debate thread on Kialo: Abortion (1188), child (837), mother (371), fetus (324), right (311), and woman (292) were among the most frequently used terms.

⁵⁵ <https://www.chronicle.com/article/How-to-Promote-Enlightened/242905> [<https://perma.cc/328F-BBGQ>].

⁵⁶ <https://www.kialo.com/pro-life-vs-pro-choice-should-abortion-be-legal-5637/5637.0=5637.1> [<https://perma.cc/D7EF-BUNR>]; while participants in the online discussion did not always identify themselves as pro-choice or pro-life, such labels are discussed in this chapter in terms of opinions and perspectives that would be generally recognized as pro-choice or pro-life; further, there was no sense of how many participants were Americans and requests for such data were denied by the site’s support staff.

⁵⁷ Haidt, J., *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to*

abortion discussion. There was a strong sense that pro-choice Americans support legal abortion access because of their intuition that pregnant people should have control of their bodies and pro-life Americans oppose legal abortion access because of their intuition that abortion is murder.

That is it. Both sides have many varied and nuanced ways of arguing for, defending, and justifying their intuitions, but a perceiving mind can become convinced that this is the prism through which the debate is seen and the hinge on which it swings. Perhaps people in the past solely used fetal rights as a pretense for denying women rights, but this analysis is further evidence for the importance of fetal rights in pro-life beliefs.

Both sides are willing to make some concessions consistent with what has been found in polls (e.g., pro-choice Americans allow for some instances where abortion should be illegal and pro-life Americans allow for some instances where it should be legal), but they are two sides of the same coin and are wont to make the same kinds of arguments. For example, a pro-choice person argued that abortion should be legal because there are instances where a pregnant person's life is endangered by her pregnancy; a pro-life person then argued that life-threatening abortions are exceedingly rare (less than 1% of pregnancies), so – while exceptions should be made – that argument has no relevance to the overall question of the legality of elective abortions. There was a similar back and forth where the roles were reversed, as a pro-life person argued that abortion should be illegal because 38-week fetuses are almost fully developed; a pro-choice person then argued that 99% of abortions take place much earlier in pregnancy, so – while those abortions might be impermissible – that argument has no relevance to the overall abortion debate. Thus, the same types of arguments are advanced and countered in the same manner.

Moral Judgment, *Psychological Review*, 2001. Vol. 108. No. 4, 814-834.

Popular Topics in the Abortion Debate

Before diving into both sides' abortion arguments, it is helpful to have a robust frame for understanding the discussion. People can have various motivations for, or interests in, discussing abortion, but certain concepts typically come up in abortion's various culturally-constructed dimensions.⁵⁸ In this review of the online discussion, seven frames encapsulate much of the online discourse on abortion in the Kialo community. Some are related and invoked at times by other questions, but altogether these questions cover the debate.

1. The moral status of abortion

Morality often comes up in abortion discussions since pro-life Americans see most abortions as immoral acts, and some pro-choice Americans defend the practice by describing the utilitarian benefits of the practice. There is a broad range of ways in which morality is invoked, from 'abortion is immoral because it ends a human's life' and 'abortion is immoral because it represents the mother ending the chance of the father having relationship with his child' to 'abortion is moral because it curbs overpopulation' to 'abortion is moral because it helps to ensure society achieves gender equality'.

2. The legal status of abortion

The legal status of abortion is central to most discussions about abortion, possibly due to the moralizing of the practice. Here, pro-choice Americans typically argue that abortion should be legal from fertilization to some compelling moment in pregnancy when the fetus becomes legally protectable or reaches some point that makes the practice deserving of restriction or punishment.

⁵⁸ For instance, a society that has well-settled abortion laws might not discuss the legality of abortion as much as one where it is a significant political issue.

Pro-life Americans typically reject this, arguing that the compelling point is at fertilization so abortion should be illegal throughout pregnancy.

3. The rights of parties involved in abortion

Discussions tend to focus on the rights of the parties directly involved in abortion. Both sides agree that the two parties most directly involved are the pregnant person and the fetus, but not all support the rights of both parties. Those who identify as pro-choice typically argue there is a point in pregnancy when a fetus deserves rights, while pro-life Americans typically argue that fetuses deserve rights from the moment of fertilization because that is when they believe life begins. While some who identify as pro-life agree that pregnant people have the right to bodily autonomy in this context and that those rights are secondary to a fetus' rights, most see a pregnant person having no right to end the life of another. Pro-life Americans also focus the discussion on the rights of the man who had impregnated the pregnant person seeking an abortion, while pro-choice Americans typically do not think much of the man's rights since the fetus is only inside the pregnant person's body and they believe the pregnancy does not directly bear on his health and well-being in the same way as it does on the pregnant person's.

4. The rights frameworks involved in abortion

Abortion rights are typically thought of as reproductive rights in a human rights framework. However, when it comes to the rights of fetuses, pro-choice Americans typically shift the discussion to personhood rights, arguing that a fetus must have personhood in order to have rights. Pro-life Americans typically stick to inalienable human rights, arguing that fetuses deserve rights because they are humans no less deserving of rights than infant, teenage, or adult humans.

5. The motivations for obtaining abortions

People typically discuss the motivating reasons behind a pregnant person's decision for an abortion, arguing that some motivations justify abortions while others make them illegitimate. This is true for both sides of the debate. Pro-life and pro-choice Americans argue about abortions performed for any reason, but they typically agree on giving special considerations for pregnancies that threaten the life of the pregnant person and pregnancies that result from rape or incest. There are also motivations that are typically seen as illegitimate or discriminatory (e.g., sex-selective abortions⁵⁹ or abortions that target fetuses with Down syndrome⁶⁰).

6. The impact of abortion on the parties involved

Discussions tend to focus on the practical aspects of actual abortion procedures. Pro-life Americans typically contend that abortion ends a human's life, deprives fathers of their children, and harms women. Pro-choice Americans typically argue that abortion frees women from the burden of carrying, delivering, and raising children when they do not choose to, and that abortion protects women's lives since abortion is statistically safer for women and childbirth represents some nontrivial increased risk of mortality.

7. The impact of abortion on society

Discussions often broaden to the effect of abortion on society as a whole. Pro-choice Americans typically see it as a social good that benefits society in various ways: reduces crime, helps create gender equality, and curbs the overpopulation that threatens the Earth and its species. Pro-

⁵⁹ See, e.g., <https://www.theatlantic.com/international/archive/2011/06/west-blame-sex-selective-abortion-asia/352257/> [<https://perma.cc/WJ8H-ZD2Z>].

⁶⁰ See, e.g., <https://www.washingtontimes.com/news/2019/jan/31/ashton-kutcher-posts-video-special-olympian-frank/> [<https://perma.cc/265R-P2PN>].

life Americans typically see it as harmful for society, arguing it causes women to engage in dangerous behavior, it erodes the morality of a society, and it prevents women from otherwise giving up their children for adoption, so it deprives others of raising children they want.

The Philosophical Aspects of the Debate

The common philosophical arguments ascribed to the abortion debate⁶¹ were represented on Kialo's discussion board. The main pro-life arguments related to the fetal personhood argument and respect for human life, and fewer advanced arguments about fetuses' value from having potentiality as part of "the natural capacities view" or fetuses' loss of future value as related to the deprivation argument. The latter arguments are structurally weaker arguments since they ascribe extrinsic value to a fetus based on its possible future, while the fetal personhood and respect for human life arguments focus on a fetus' intrinsic value a human and a person. As for the bodily rights argument, this is the primary pro-choice argument. At a broader level, both sides employed rights-based and utilitarian arguments to justify their positions on abortion.

Pro-Choice Justifications

Pro-choice Americans justify their moral intuition ('women should not be forced to have children') with rights-based and utilitarian arguments. They use the arguments to defend their intuition and explain why their moral intuition justifies their position that most abortions should be legal. Three popular rights-based arguments focus on the pregnant woman:

⁶¹ https://en.wikipedia.org/wiki/Philosophical_aspects_of_the_abortion_debate [<https://perma.cc/WCH7-WRML>].

1. A woman should not have to give birth to a child if she does not want to.
2. A woman should not have to raise a child if she does not want to.
3. Abortion affects women's bodies, so they have the right to make medical decisions.

These arguments likely represent their interests in improving the quality of women's lives through the recognition of their rights, which would permit them to have greater control over their bodies. Each argument solely focuses on the rights of women and does not consider the possible rights of fetuses, nor do they pay mind to a balance of the two. Four popular utilitarian arguments focus on abortion's impact on society:

1. Abortion helps to limit people in an already overpopulated world.
2. The woman is not always equipped to raise child so abortion can be the best option for the woman, the child, and society.
3. Abortion is necessary for society to achieve gender equality.
4. Women will still have back-alley abortions, so keeping it legal will save lives.

These arguments likely represent their interests in improving society through legal abortion access. Each argument solely focuses on potential benefits and discounts possible societal costs, and each also fails to do a cost-benefit analysis. The implied interests relate to population control, crime or sexual abuse prevention, gender equality, and harm reduction. Much work would have to be done to suggest a causal link between legal abortion and these anticipated benefits, and more work would need to be done to assess whether these benefits would be worth the anticipated and actual costs. However, this chapter does not aim to litigate and critique arguments about abortion; the sole aim is to understand the arguments' underlying motivations and determine a framework for understanding how both sides discuss abortion.

Pro-Life Justifications

Pro-life Americans also justify their moral intuition ('abortion is a form of unjustifiable homicide') with rights-based and utilitarian arguments. They similarly use the arguments to defend their intuition and explain why they believe their moral intuition justifies their position that most abortions should be illegal. Three popular rights-based arguments focus on the rights of different groups affected by abortion:

1. Life begins at conception, so abortion violates the right to life of the fetus.
2. It allows for genetic or sex-selection abortions, which are discriminatory.
3. Fathers have a right to have their children born.

These arguments likely represent their interests in protecting groups from the harm they experience, whether intended or unintended, as a result of abortion. These aim to legally recognize fetuses, legally recognize fetuses in traditionally discriminated classes (e.g., women, the differently abled) to fight sexism or ableism, and to improve the quality of the lives of fathers who wish to have their genetic children brought to term. Much like with the pro-choice rights-based arguments, these ignore the rights of women and fail to balance those rights against the proposed rights of fetuses and their fathers. Four popular utilitarian arguments focus on abortion's impact on society:

1. Abortions are immoral and unethical.
2. There are mental and physical consequences of abortions.
3. Access causes women to engage in irresponsible behavior.
4. Women have the choice to give their children up for adoption.

These arguments likely represent their interests in improving society through the illegalization of abortion. Each argument solely focuses on potential benefits and discounts possible societal costs, and each also fails to do a cost-benefit analysis. The implied interests relate to the legal enforcement of morality and ethics, protection of women, and the promotion of adoption as an alternative to abortion. In these instances, work would need to be done to show that these interests would benefit society, but their goals are clear.

In comparing the arguments, implied interests, and goals of both sides, it is clear that there is a way for the debate to progress. Both sides believe in rights, and both recognize a need to make decisions that benefit society. While they can, and have, debated which arguments or positions best achieve these goals, both sides are nevertheless working toward a common purpose.

The interesting differences between the two sides lie in their rights-based arguments, as pro-choice Americans focus on the rights of pregnant persons and those who are pro-life focus on the rights of humans, suspect classes' rights, and men's rights. In terms of their utilitarian arguments, pro-choice Americans seek to control population levels, reduce crime and sexual abuse, promote gender equality, and reduce maternal deaths; while pro-life Americans seek to deter unethical behavior through legal means, protect women, and promote adoption as an alternative to abortion.

While they are obviously not focusing on the same goals with the way they discuss abortion, there is no reason to believe they do not share certain goals. It is hard to imagine that either side would argue against women's rights, human rights, the rights of suspect classes, or men's rights. It is also hard to imagine that either would disagree with improving society by reducing crime and sexual abuse, promoting gender equality, reducing maternal deaths, protecting women, or increasing adoptions. Thus, a careful analysis of both sides' main arguments about abortion

reveals there are far more common or consistent goals than there are conflicting goals. As such, it would lead to the prediction that the difference between pro-choice and pro-life Americans might not lie in their understanding of rights or their interests and values, but rather their abortion positions and specific analyses of abortion. However, this is not a view shared by abortion attitudes researchers who have suggested that differences in abortion attitudes are rooted in values and other traits (e.g., sexism, religiosity). Thus, it is important to consider whether pro-choice and pro-life Americans abortion stances are driven by such differences, as it is possible that the disagreement in the abortion debate is a proxy for deeper divisions between pro-choice and pro-life Americans.

Review of Previous Studies

For half of a century, researchers have sought to understand why some people support legal abortion, and others oppose it. Perhaps the most significant finding is not the results from their participants, but the one that emanated from a natural observation of the researchers' hypotheses and scales. Psychologists have conducted studies with measures of participants' sexist attitudes, perceptions of the humanness of fetuses, perceptions of gender roles, attitudes toward motherhood, beliefs on the sanctity of life, beliefs on morality in general and specifically sexual morality, political orientation, and religiosity. Some have found promising results, but the interactions complicate the story since so many have only used one or two dimensions and reported results that implied some factors as driving attitudes, while those factors were found to be weak predictors in more comprehensive studies of attitudes.⁶²

⁶² Rodriguez, C. G., & Ditto, P. H. (2017). What's sex got to do with it? Sexual morality predicts abortion attitudes better than respect for life or women. San Diego, CA., https://www.researchgate.net/publication/322666194_What's_sex_got_to_do_with_it_Sexual_morality_predicts_Abortion_Attitudes_better_than_politics_respect_for_life_or_for_women/related [archived link unavailable].

The glut of abortion attitudes research has been done with the survey method. Researchers use measures of particular beliefs or attitudes that are not necessarily related to abortion attitudes as predictors for participants' responses to questions that directly ask about abortion attitudes. Abortion attitudes questions typically relate to the morality and legality of abortion, both in terms of the timing of abortion with respect to the pregnancy and the reasons for which abortions are performed. While studies have combined different predictors, this section separates the predictors into different sections so they can be analyzed on their own and in the context of other predictors.

Religiosity

Hypothesis: People who are more religious are more likely to oppose abortion because pro-life beliefs are rooted in religious beliefs (e.g., the sanctity of life, the importance of procreation).

One study found that personal religious involvement has a greater effect on abortion attitudes in the United States, which has a strong self-expressive cultural orientation, than in Sub-Saharan African nations. Industrialization and modernization shift attitudes and values from concerns with physical and economic security (survival) to an orientation that is more rational, tolerant, and trusting (self-expression). 19% of the variance in abortion attitudes between cultures was due to differences found between nations. Living in a country with a survival orientation better predicts opposition to abortion than one's religious attendance. However, in countries with a self-expression orientation, high religious attendance is associated with greater opposition to abortion.⁶³

⁶³ Adamczyk, A. (2013). The effect of personal religiosity on attitudes toward abortion, divorce, and gender equality--does cultural context make a difference? *Euramerica*, 43(1), 213.

Another study suggested that women's higher level of religiosity could be suppressing the expected disparity in abortion opposition between men and women.⁶⁴ Indeed, when controlling for religiosity, women became slightly more likely to support legal abortion than men.⁶⁵ Thus, women do not only oppose abortion because they are more religious than men. Religiosity did impact this measure of support for legal abortion, as it explained a higher amount of variance (.369) than education (.176), age (.151), and political conservatism (.136).⁶⁶ However, other studies have shown that religion explained less variance than one's worldview, as defined by attitudes toward gender roles, sexual expression, the centrality of children, and morality.⁶⁷ Similarly, another study found that religiosity, as measured by religious attendance, was the fourth-best predictor of abortion attitudes.⁶⁸ In Australia, religion was similarly a lower-ranked predictor of abortion attitudes.⁶⁹

While the effect of religion might be attenuated by other variables, it is important to know how religion might be impacting Americans' abortion attitudes. One study showed that opposition

⁶⁴ Barkan, S. Gender and Abortion Attitudes: Religiosity as a Suppressor Variable, *Public Opinion Quarterly*, Vol. 78, No. 4, Winter 2014, p. 946.

⁶⁵ The standardized coefficient only went up from .035 to .079 after controlling for religiosity, so being female only explained little of the variance in support for legal abortion.

⁶⁶ Barkan, S. Gender and Abortion Attitudes: Religiosity as a Suppressor Variable, *Public Opinion Quarterly*, Vol. 78, No. 4, Winter 2014, p. 946.

⁶⁷ Emerson, M.O. Through Tinted Glasses: Religion, Worldviews, and Abortion Attitudes, *Journal for the Scientific Study of Religion*, 1996, 35 (1): p. 53.

⁶⁸ Koleva, S. P., et al. Tracing the threads: How five moral concerns (especially Purity) help explain culture war attitudes. *Journal of Research in Personality* (2012), p. 8, doi:10.1016/j.jrp.2012.01.006.

⁶⁹ Huang, Y., Davies, P.G., Sibley, C.G., & Osborne, D. (2016). Benevolent sexism, attitudes toward motherhood, and reproductive rights: A multi-study longitudinal examination of abortion attitudes. *Personality and Social Psychology Bulletin*, 42(7), p. 974. doi:10.1177/0146167216649607.

to abortion across religions might be driven by one's beliefs on euthanasia and sexual morality.⁷⁰

Thus, religiosity plays some role, even when controlling for related issues.

Ambivalent Sexism

Hypothesis: People who are sexist are less likely to be compassionate or understanding of women's needs and more likely to punish them.

Researchers used previous findings linking the endorsement of traditional gender roles to anti-abortion attitudes to predict that sexism is similarly correlated:

“For the benevolent sexist, motherhood is an idealized gender role [and] women who resist this role should be met with opposition from the benevolent sexist. For the hostile sexist, however, elective abortions are situations in which a woman has exercised her sexuality and must accept the consequences of her behavior (i.e., carry the pregnancy to term).”⁷¹

The researchers used the ambivalent sexism inventory⁷², which measures both hostile sexism (“HS”) and benevolent sexism (“BS”). Before jumping into the results, it is important to analyze the inventory itself. Since rejecting the statement “Feminists are making reasonable demands” is counted as hostile sexism in the ambivalent sexism inventory, one can wonder if rejecting the

⁷⁰ Jelen, T.G. The Subjective Bases of Abortion Attitudes: A Cross National Comparison of Religious Traditions, Politics and Religion, 7 (2014), p. 558-559.

⁷¹ Osborne, D., & Davies, P.G. (2012). When Benevolence Backfires: Benevolent Sexists' Opposition to Elective and Traumatic Abortion. *Journal of Applied Social Psychology*, 42(2), 291–307. <http://doi.org/10.1111/j.1559-1816.2011.00890.x> [<https://perma.cc/529V-46EZ>].

⁷² Glick, P., & Fiske, S. T. (1996). The ambivalent sexism inventory: Differentiating hostile and benevolent sexism. *Journal of Personality and Social Psychology*, 70, 491–512. <http://dx.doi.org/10.1037/0022-3514.70.3.491> [<https://perma.cc/8FZ8-88NK>].

statement “Men’s rights activists⁷³ are making reasonable demands” would also be counted as hostile sexism. Also, since affirming the statement that “Women are too easily offended” is counted as hostile sexism, one can wonder if affirming the statement that “Men are too likely to offend” or even “Men are too easily offended” would be similarly counted as hostile sexism, especially in 2019.⁷⁴

It is difficult to see how any of the statements amount to Glick’s definition of hostile sexism, which is based on Allport’s definition of prejudice (“an antipathy based upon a faulty and inflexible generalization”).⁷⁵ Perhaps if they were phrased as “I hate feminists because they make unreasonable demands” or “I do not like women because they are too easily offended”, they would fit the definition, but these items deal with possibly faulty and inflexible generalizations without any clear indications of antipathy. This makes for a very loose measure of the sexism the scale purports to measure; that is not to say that it is not useful, but these limitations are worth noting. These concerns aside, these measures are promising predictors.

The original 2009 study found that both forms of sexism (HS and BS) predicted higher opposition to elective abortion, but only BS served as a predictor of attitudes toward therapeutic abortions. This study also found that those who have previous experience with abortion are less

⁷³ While there is no shortage of bad examples of men’s rights activists that would make anyone loathe to represent the movement as anything but deplorable, the documentary “The Red Pill” (see, e.g., Cassie Jaye’s TEDx talk, <https://www.youtube.com/watch?v=3WMuzhQXJoY> [<https://perma.cc/V3H2-XT CZ>]) makes too compelling a case for one to ignore the fact that some in the movement fight for gender equality alongside feminists, so they serve as an appropriate counter-example.

⁷⁴ See, e.g., <http://time.com/5543441/stop-getting-offended/> [<https://perma.cc/48KL-UEQ F>].

⁷⁵ Glick, P., & Fiske, S. T. (1996). The ambivalent sexism inventory: Differentiating hostile and benevolent sexism. *Journal of Personality and Social Psychology*, 70, 491–512. <http://dx.doi.org/10.1037/0022-3514.70.3.491> [<https://perma.cc/8FZ8-88NK>].

likely to oppose abortion.⁷⁶ This finding was later replicated by researchers who found that BS was related to both elective and therapeutic abortions, and also found that the relationship between BS and abortion attitudes was mediated by attitudes toward motherhood.⁷⁷ However, in a recent study of New Zealand adults, BS was associated with greater opposition to both elective and therapeutic abortions, while hostile sexism was only negatively associated with support for the latter.⁷⁸ This difference could be due to cultural differences, or it could say something about sexism as a measure.⁷⁹

In another study, scores on the full-scale ambivalent sexism inventory significantly predicted antichoice attitudes (.19), but its strength was less than one-half of religiosity (.46). When broken down into models that used hostile sexism (.15) and benevolent sexism (.14) both significantly predicted opposition to abortion in general, but each explained less than one-third of the

⁷⁶ Osborne, D., & Davies, P.G. (2012). When Benevolence Backfires: Benevolent Sexists' Opposition to Elective and Traumatic Abortion. *Journal of Applied Social Psychology*, 42(2), 291–307. <http://doi.org/10.1111/j.1559-1816.2011.00890.x> [<https://perma.cc/529V-46EZ>].

⁷⁷ Huang, Y., Davies, P.G., Sibley, C.G., & Osborne, D. (2016). Benevolent Sexism, Attitudes Toward Motherhood, and Reproductive Rights: A Multi-Study Longitudinal Examination of Abortion Attitudes. *Personality and Social Psychology Bulletin*. <http://doi.org/10.1177/0146167216649607> [<https://perma.cc/M44U-HDA8>].

⁷⁸ Huang, Y., Osborne, D., Sibley, C.G., & Davies, P.G. (2014). The Precious Vessel?: Ambivalent Sexism and Opposition to Elective and Traumatic Abortion. *Sex Roles*, 71, 436–449. <http://doi.org/10.1007/s11199-014-0423-3> [<https://perma.cc/MW5T-7L8P>].

⁷⁹ *Id.*, the abstract includes the following: “In contrast, hostile sexism—the punitive component of ambivalent sexism—was only negatively associated with support for traumatic abortion. These results demonstrate that ambivalent sexism—and particularly benevolent sexism—restricts women’s reproductive rights even in extreme cases where a woman’s life is in danger.” (emphasis added); setting aside the fact that correlation does not imply causation, and that the first claim purports to describe statements like “Women exaggerate problems at work” as related to punishment, the publication’s credibility becomes suspect when considering the most charitable interpretation of the second claim as the characterization of a correlational result that sexism causes opposition to reproductive rights - let alone the less charitable, and more literal, interpretation that it makes the unsubstantiated inferential leap of sexism causing the restriction of reproductive rights.

variance explained by religiosity (47% and 45%, respectively).⁸⁰ Some researchers have suggested that sexism can explain as much as 75% of conservatives' variance in abortion attitudes.⁸¹ However, a follow-up study with a much larger sample of Americans (4,271 vs. 529) found that the effect of sexism was much lower (7%) and that conservatism, partially explained by sexism, predicted lower support for abortion equally for women and men.⁸²

Much like with religiosity, studies have suggested that sexism, as measured by the ambivalent sexism inventory, is a significant predictor of opposition to abortion. However, given this analysis of the inventory, this measure of sexism seems far more about perceptions of gender differences than sexism. On its face, it does not seem reasonable to say that endorsing the statement “Women exaggerate problems at work” reflects hostile sexism and the kind of prejudice that Allport defined as “antipathy”.⁸³ Conceptualizing it as perceptions of gender differences, rather than whether people have an aversion to women, seems reasonable particularly because this line of work has consistently shown that men and women have similar scores on the ambivalent sexism inventory, and those scores for both men and women predict opposition to abortion. It is important to consider if a higher score suggests that “sexism” leads to greater opposition to abortion or if

⁸⁰ Begun, S., & Walls, N.E. (2015). Pedestal or Gutter: Exploring Ambivalent Sexism's Relationship With Abortion Attitudes. *Affilia - Journal of Women and Social Work*, 30(2), 200–215. <http://doi.org/10.1177/0886109914555216> [<https://perma.cc/TQS2-E9H4>].

⁸¹ Hodson, G., & MacInnis, C.C. (2017). Can left-right differences in abortion support be explained by sexism? *Personality and Individual Differences*, 104, 118–121. <http://doi.org/10.1016/j.paid.2016.07.044> [<https://perma.cc/2SZV-5VR6>].

⁸² Prusaczyk, E., & Hodson, G. (2018). Left-right differences in abortion policy support in America: Clarifying the role of sex and sexism in a nationally representative 2016 sample. *Personality and Individual Differences*, 127(November 2017), 22–25. <http://doi.org/10.1016/j.paid.2018.01.030> [<https://perma.cc/EL7F-FJWS>].

⁸³ Glick, P., & Fiske, S. T. (1996). The ambivalent sexism inventory: Differentiating hostile and benevolent sexism. *Journal of Personality and Social Psychology*, 70, 491–512. <http://dx.doi.org/10.1037/0022-3514.70.3.491> [<https://perma.cc/8FZ8-88NK>].

“lower recognition of possible gender differences” leads to more support for legal abortion. Regardless of how this attitude should be characterized, studies have suggested that it has good predictive value so it should be considered for use in any model that seeks to present a comprehensive picture of why people disagree about abortion.

Preborn Humanness

Hypothesis: Pro-life and pro-choice Americans might differ in the humanness they ascribe to preborn fetuses so the difference would be partially explained by pro-life Americans caring more about fetuses.

In one study, Polish people who used humanizing language in referring to fetuses were much more likely to oppose abortion than those who used dehumanizing language, as people who were asked to describe a 12-week ultrasound and called it a fetus were less likely to oppose abortion than those who called it a child. These differences on abortion were suggested to be mediated by the emotionality ascribed to the preborn.⁸⁴ This effect of humanizing language does not only impact a person who produces the language but also for those who are exposed to such language.

Researchers have shown that people who are exposed to humanizing language (“the child”) rather than dehumanizing language (“the fetus”) declare a lower level support for elective abortion.⁸⁵ The dehumanization model puts forth two dimensions: human nature and human unique-

⁸⁴ Bilewicz, M., Mikołajczak, G., & Babinska, M. (2017). Speaking about the preborn. how specific terms used in the abortion debate reflect attitudes and (de)mentalization. *Personality and Individual Differences*, 111, 256-262. doi:10.1016/j.paid.2017.02.018.

⁸⁵ Mikołajczak, M., & Bilewicz, M. (2015). Fetus or child? Abortion discourse and attributions of humanness. *British Journal of Social Psychology*, 54, 500–518. <http://dx.doi.org/10.1111/bjso.12096> [<https://perma.cc/VC6R-JGMC>].

eness.⁸⁶ Once people are denied human nature, they are seen as non-agentive machines.⁸⁷ When their uniqueness is challenged, they are seen as more akin to animals than humans.

Thus, there are two primary methods of dehumanization: failing to recognize a human's human attributes in representing them as animals, and failing to recognize their human nature in representing them as mechanical objects. Some have argued that dehumanization is a normal social phenomenon driven by everyday social-cognitive processes⁸⁸, so it is no surprise that it would impact people's abortion beliefs.

One study found that people believe a 7-week old fetus experiences the world akin to how a man in a persistent vegetative state experiences the world, and the man was rated as being slightly more agentive.⁸⁹ Due to the moral typecasting hypothesis, fetuses might be more likely to be perceived as moral patients since they are vulnerable to being recipients of good and evil, but are perceived as less capable of performing actions that are good or evil.⁹⁰

The bias against recognizing preborn humans' humanity might be explained by infrahumanization, which suggests a preference for recognizing members of in-groups as humans. Indeed, there is a "self-humanization" effect, as people have been shown to "perceive themselves to be

⁸⁶ Haslam, N. (2006). Dehumanization: An integrative review. *Personality and Social Psychology Review*, 10, 252–264. doi:10.1177/0146167204271182.

⁸⁷ Haslam, N., Bain, P., Douge, L., Lee, M., & Bastian, B. (2005). More human than you: Attributing humanness to self and others. *Journal of Personality and Social Psychology*, 89, 937–950. doi:10.1037/0022-3514.89.6.937.

⁸⁸ Haslam, N. (2006). Dehumanization: An integrative review. *Personality and Social Psychology Review*, 10, 252–264, doi:10.1177/0146167204271182.

⁸⁹ Gray, K. & Wegner, D.M. (2009). Moral Typecasting: Divergent Perceptions of Moral Agents and Moral Patients, *Journal of Personality and Social Psychology*, Vol. 96, No. 3.

⁹⁰ *Id.*

more essentially human than others.”⁹¹ This extends to social groups, as both types of humanness – human uniqueness and human nature – are often implicitly and explicitly denied to certain social groups, as Australian participants were more likely to attribute human nature to Australians than Indonesians, Singaporean, and British people.⁹² Thus, if humans have greater difficulty recognizing members of certain cultural groups as human as much as other groups, it would be no surprise that they might have difficulty recognizing the humanity of fetuses. Indeed, researchers have found that blatant preborn humanness measures predicted abortion opposition⁹³, but subtle preborn humanness measures did not – this was unsurprising since the measure included items on how “friendly” people perceived zygotes.

While this line of work is interesting, asking Americans to rate zygotes in terms of how friendly they are and how human they are on a scale does not capture the significance of perceptions of fetuses in the abortion debate. From this dissertation’s review of the debate, pro-life Americans do not argue for fetal rights because they perceive them as “curious” or “fun-loving” – as hypothesized by some researchers⁹⁴ – they defend fetuses because they recognize them as humans, so more relevant studies would seek to measure opinions on when life begins. This limitation of that work is especially troubling since that finding has been taken to be evidence that abortion attitudes are not driven by perceptions of fetuses and when life begins:

⁹¹ Haslam, N., Bain, P., Douge, L., Lee, M., & Bastian, B. (2005). More human than you: Attributing humanness to self and others. *Journal of Personality and Social Psychology*, 89, 937–950. doi:10.1037/0022-3514.89.6.937

⁹² Struch, N., & Schwartz, S.H. (1989). Intergroup aggression: Its predictors and distinctness from in-group bias. *Journal of Personality and Social Psychology*, 56, 364–373.

⁹³ MacInnis, C.C., MacLean, M. H., & Hodson, G. (2014). Does “humanization” of the preborn explain why conservatives (vs. liberals) oppose abortion? *Personality and Individual Differences*, 59, 77–82. doi:10.1016/j.paid.2013.11.009.

⁹⁴ *Id.*

“Conservatives frequently claim that ‘human life begins at conception,’ and this belief is widely assumed to be one of the core reasons for the right-left divide on abortion. However, MacInnis, MacLean, and Hodson (2014) found little evidence that the perceived humanness of preborns explained partisan differences, and association between perceived preborn humanness and abortion opposition was no stronger among conservatives than liberals”⁹⁵

One might colloquially describe a serial killer as subhuman, in terms of loaded human traits, but that does not mean they would fail to recognize the serial killer’s membership in the human species. While differences in the perceived “humanness” of fetuses might not explain differences in abortion attitudes⁹⁶, it seems reasonable to hypothesize that differences in beliefs on ‘when life begins’ could, as one who does not recognize a fetus as a human until viability might not have as much reason to restrict abortion before viability as one who recognizes a zygote as a human.

Analysis of Previous Research

“It is neither a novel insight nor a secret that ideology, politics, and religious beliefs sometimes influence science.”⁹⁷

Researchers Cristian Rodriguez and Peter Ditto published an article that reviewed studies

⁹⁵ Nadler, J.T. & Lowery, M.R. (ed.), *The War on Women in the United States: Beliefs, Tactics, and the Best Defenses*, 2018, ABC-CLIO, LLC.

⁹⁶ *Id.*

⁹⁷ von Hippel, W. & Buss, D.M. Do Ideologically Driven Scientific Agendas Impede the Understanding and Acceptance of Evolutionary Principles in Social Psychology? (2017), in *Politics of Social Psychology*, eds. Crawford, J.T. & Jussim, L. Psychology Press, New York. <https://doi.org/10.4324/9781315112619> [<https://perma.cc/A5LV-R4HF>].

on abortion attitudes.⁹⁸ They argued that liberal bias in the social sciences⁹⁹ and ideological homogeneity might have led researchers to miss important aspects of abortion attitudes. They deemed hypotheses based on sexism, religiosity, and political ideology are ‘liberal hypotheses’ and then proposed ‘conservative hypotheses’ based on the sanctity of life and sexual morality. When they ran models using measures of both types, they found that sexism is washed out by beliefs on sexual morality and sanctity of life. Indeed, their measures better explained abortion attitudes than ideology and religiosity in numerous types of samples.¹⁰⁰ Ultimately, they believe that their work “shows in a quantitative way how ideological one-sidedness can affect research”.¹⁰¹

While that is a strong claim, given recent developments in the social sciences, it might not be far off. However, might they be subject to that same one-sidedness. Consider the predicted directions of each hypothesis: sexism (pro-life > pro-choice), religiosity (pro-life > pro-choice), conservatism and authoritarianism (pro-life > pro-choice), sanctity of life (pro-life > pro-choice), and sexual morality (pro-life > pro-choice). In each, the hypothesized trait focuses on explaining why people hold pro-life beliefs. So, while they frame sanctity of life and sexual morality as conservative hypotheses, they seem to be biased in the same direction. Examples of conservative hypotheses without such bias would then be: (1) people hold pro-choice beliefs because they have a

⁹⁸ <https://www.spssi.org/index.cfm?fuseaction=page.viewPage&pageID=2406&nodeID=1> [<https://perma.cc/JQ26-KSKK>].

⁹⁹ See, e.g., <https://fivethirtyeight.com/features/psychologists-looked-in-the-mirror-and-saw-a-bunch-of-liberals/> [<https://perma.cc/WGS3-5Q7G>].

¹⁰⁰ Rodriguez, C.G., & Ditto, P.H. (2017). What’s sex got to do with it? Sexual morality predicts abortion attitudes better than respect for life or women, San Diego, CA., https://www.researchgate.net/publication/322666194_What's_sex_got_to_do_with_it_Sexual_morality_predicts_Abortion_Attitudes_better_than_politics_respect_for_life_or_for_women/related [archived link unavailable].

¹⁰¹ <https://www.spssi.org/index.cfm?fuseaction=page.viewPage&pageID=2406&nodeID=1> [<https://perma.cc/JQ26-KSKK>].

general opposition to laws¹⁰², (2) people hold pro-choice beliefs because they are higher in psychoticism and thus less altruistic, empathic, and conventional¹⁰³, (3) people hold pro-choice beliefs because they have antinatalist attitudes. However, their general question remains. Might ideological homogeneity in the social sciences hold researchers back from fully understanding important issues like abortion? Has this been exposed as an issue before? Consider Altemeyer's work on right-wing authoritarianism ("RWA").

This research has been well-accepted as evidence of RWA, and the scale had been employed in various studies, but results from the left-wing authoritarianism ("LWA") scale led him to argue that finding a left-wing authoritarian was like finding the Loch Ness Monster.¹⁰⁴ Unconvinced that authoritarianism was not a trait only exhibited by conservatives, and indeed one only need to consider infamous European leaders in the 20th century to so question that, Conway et al.¹⁰⁵ developed the authoritarianism symmetry hypothesis to test whether LWA exists. While Altemeyer's original LWA scale differed from the RWA scale, Conway created an LWA scale that was a close facsimile of the RWA scale. As it turned out, Loch Ness was filled to the brim with

¹⁰² On an item discussed in chapter 4 on p. 179-180, only 69% of pro-choice participants suggested that the right to life requires the punishment of all forms of unjustifiable homicide.

¹⁰³ Verhulst, B., Eaves, L.J., & Hatemi, P.K. (2012). Correlation not causation: the relationship between personality traits and political ideologies. *Am J Pol Sci.* 2012;56(1):34-51, see also: <https://onlinelibrary.wiley.com/doi/full/10.1111/ajps.12216> [<https://perma.cc/2LR5-A75G>].

¹⁰⁴ It is possible that LWA had not been previously found because "authoritarianism is not a stable personality trait. It is rather a *psychological predisposition* to become intolerant when the person perceives a certain kind of threat.", <https://www.the-american-interest.com/2016/07/10/when-and-why-nationalism-beats-globalism/> [<https://perma.cc/PX57-RCQ3>].

¹⁰⁵ Conway, L.G., III, Houck, S.C., Gornick, L.J., & Repke, M.R. (2017). Finding the Loch Ness Monster: Left-Wing Authoritarianism in the United States, *Political Psychology*, Advance online publication. DOI: 10.1111/pops.12470.

monsters since liberals' scores on the LWA scale were higher than conservatives' scores on the RWA scale.¹⁰⁶

While authoritarianism might be on both sides, that is not to say that authoritarianism is not driving opposition to abortion. However, that might not be the whole picture. As discussed in chapter 2, America had a century of nationwide abortion bans that coincided with rising anti-immigrant sentiments and natives' fears about retaining the nation's cultural identity. Could it be that such threat leads to greater opposition to abortion? Indeed, one researcher "showed a strong interaction between Economic Threat and Authoritarianism; authoritarians under conditions of economic threat were almost eight times as likely as those not so threatened to support measures that would eliminate abortion as a legal right."¹⁰⁷ Given this, why would people want to restrict others' abortion access in times of economic duress? Fewer people would mean more resources for them and their children, as their children would then have less competition.

A contingent of Americans that could be loosely identified as nationalists and authoritarians, as opposed to "status quo conservatives", might see themselves as having an 'us against them' mentality¹⁰⁸, whereby they strongly identify with members of their in-group. They might feel abortion's effect of reducing its in-group is an existential threat because they see life as a numbers game. While one would think a person would have the most compassion for one who gets an abortion in austere times, perhaps this is when the group feels it is most important to reproduce.

¹⁰⁶ To be fair, some have described authoritarianism as a psychological predisposition that is triggered when one becomes threatened so the rise of conservatism and nationalism in recent years could have triggered the heightened levels of LWA, <https://www.the-american-interest.com/2016/07/10/when-and-why-nationalism-beats-globalism/> [<https://perma.cc/9G6Y-FWKJ>].

¹⁰⁷ Rickert, E. (1998). Authoritarianism and Economic Threat: Implications for Political Behavior. *Political Psychology*, 19(4), 707-720. Available at: <http://www.jstor.org/stable/3791872> [<https://perma.cc/Z2XN-XV97>].

¹⁰⁸ <https://www.the-american-interest.com/2016/07/10/when-and-why-nationalism-beats-globalism/> [<https://perma.cc/9G6Y-FWKJ>].

Whether it is the fear of being out-reproduced by immigrants or economic threat, opposition to abortion could be driven in part by a threat to one's community and culture such that the anxiety of the threat is managed by supporting in-group reproduction and opposing those practices that quell it. This is an example of an analysis that seeks to explain pro-life beliefs rather than condemn them, which makes it unique. Another interesting hypothesis would be that beliefs about abortion are nested within broader beliefs about whether laws should restrict behavior to condemn it or deter it.

Conservatives are less likely to see hot topic issues as morally acceptable than liberals.¹⁰⁹ This is true for abortion, birth control, cloning animals, cloning humans, divorce, doctor-assisted suicide, drinking alcohol, gambling, having children outside of marriage, homosexual relations, marital affairs, polygamy, pornography, premarital sex, sex between teenagers, smoking marijuana, stem cell research using human embryos, and suicide. Conservatives only saw the following as morally acceptable at a higher rate: buying and wearing fur, capital punishment, and medical testing on animals. Liberals were more likely to see behaviors as morally acceptable than conservatives and, overall, liberals approved at a rate of 62%, while conservatives were at 43%. These differences in the morality of these behaviors translated to opinions on their legal status.

On the question of legal prostitution, more Democrats (50%) supported legalization than Republicans (34%).¹¹⁰ This pattern persists for the legalization of marijuana (72% vs. 51%)¹¹¹,

¹⁰⁹ https://news.gallup.com/poll/235640/above-issues-abortion-divides-liberals-conservatives.aspx?g_source=link_NEWSV9&g_medium=related_tile2&g_campaign=item_1606&g_content=Above%2520All%2520Issues%2c%2520Abortion%2520Divides%2520Liberals%2c%2520Conservatives [https://perma.cc/W2FH-RVRQ].

¹¹⁰ <https://today.yougov.com/topics/politics/articles-reports/2015/09/01/country-split-legalizing-prostitution> [https://perma.cc/NM5H-WBX2].

¹¹¹ <https://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx> [https://perma.cc/9SJT-YYZL].

legal abortion under any circumstance (44% vs. 15%)¹¹², and same-sex marriage (76% vs. 53%)¹¹³. Further, Democrats are less likely to support legal restrictions on stem cell research (12%) than Republicans (36%).¹¹⁴ Thus, a pattern emerges of Democrats being more likely to support the legalization of citizens' conduct. Gun laws seem to be a major reversal of this pattern, as 77% of Democrats support stricter gun laws compared to 34% of Republicans.¹¹⁵ Altogether, this suggests that a general opposition to laws could explain some of the variance in abortion attitudes, as conservatives might be more likely to support a law of any type and liberals might be less likely to support a law of any type.¹¹⁶

Thus, going beyond typical hypotheses could add to the literature's ability to explain differences in abortion attitudes. Indeed, while previous research has shed some light on abortion attitudes, much of the variance has gone unexplained. While chapter 2's review of legal history and this chapter's review of polls, online abortion discourse, and abortion attitudes research suggest that the question 'when life begins' might drive differences in abortion attitudes, it is important to first diagnose that question and its possible role in the debate.

¹¹² https://news.gallup.com/opinion/polling-matters/215210/partisan-differences-growing-number-issues.aspx?g_source=link_NEWSV9&g_medium=related_tile1&g_campaign=item_221030&g_content=Partisan%2520Differences%2520Growing%2520on%2520a%2520Number%2520of%2520Issues [https://perma.cc/VSL8-L65A].

¹¹³ *Id.*

¹¹⁴ https://news.gallup.com/poll/13927/Stem-Cells-Divide-Republicans-Democrats.aspx?g_source=link_NEWSV9&g_medium=related_tile1&g_campaign=item_12265&g_content=Stem%2520Cells%2520Divide%2520Republicans%2520and%2520Democrats [https://perma.cc/6T38-GSWH].

¹¹⁵ https://news.gallup.com/opinion/polling-matters/215210/partisan-differences-growing-number-issues.aspx?g_source=link_NEWSV9&g_medium=related_tile1&g_campaign=item_221030&g_content=Partisan%2520Differences%2520Growing%2520on%2520a%2520Number%2520of%2520Issues [https://perma.cc/VSL8-L65A].

¹¹⁶ Indeed, with 2003's *Lawrence v. Texas*, 539 U.S. 558 (2003), morality-based legislation has ended; currently, legislation typically needs to serve the public interest in some way, whereas laws since the 18th century, and dating back to the magna carta, criminalized immoral conduct.

When Does a Human's Life Begin?

While people agree that pregnant people have the right to make reproductive decisions involving their bodies, many debate if those decisions directly affect other humans' bodies. This dispute on when a human's life begins likely plays a role in Americans' ethical and legal positions on abortion. Since there is higher support of legal abortion access in the first trimester (60%) than the second (28%) and third (13%) trimesters of pregnancy¹¹⁷, the dispute is not a matter of *if* abortion directly impacts another human's body – it is a matter of *when*.¹¹⁸ However, many debate the question's importance¹¹⁹, if the question is answerable¹²⁰, and the meaning of people's answers to the question.¹²¹

'When does a human's life begin?' is subject to David Hume's classic *is-ought* problem¹²² since the question has two primary interpretations: the descriptive view (i.e., when *is* a fetus classified as a human) and the normative view (i.e., when *ought* a fetus be recognized as a person

¹¹⁷ <https://news.gallup.com/poll/235469/trimesters-key-abortion-views.aspx> [<https://perma.cc/BE3S-GR8Z>].

¹¹⁸ Moore, P. "Three quarters say Longmont attack is murder". 2015. Available at: <http://today.yougov.com/topics/politics/articles-reports/2015/04/07/three-quarters-say-longmont-attack-murder> [<https://perma.cc/Q8X2-CYG9>]; Elliott T. A., Friedman, J. A., Siegel, E. T., Kort, H. I., & Nagy, Z. P. "'When does life begin?' Results of an online survey". *Fertility and Sterility*, 2008. Available at: [http://www.fertstert.org/article/S0015-0282\(08\)01732-9/fulltext](http://www.fertstert.org/article/S0015-0282(08)01732-9/fulltext) [<https://perma.cc/VR3D-LS68>].

¹¹⁹ Johnson, A. "Planned Parenthood President: When Life Begins Not 'Really Relevant' in Abortion Debate". *National Review*, 2014. Available at: <https://www.nationalreview.com/corner/planned-parenthood-president-when-life-begins-not-really-relevant-abortion-debate/> (citing: <https://www.youtube.com/watch?v=ZdK--xwxwBA> [<https://perma.cc/YFH7-MWBC>]).

¹²⁰ Zhang, S. "Why Science Can't Say When a Baby's Life Begins". *Wired Magazine*, 2015. Available at: <https://www.wired.com/2015/10/science-cant-say-babys-life-begins/> [<https://perma.cc/4ZU8-Y3VX>].

¹²¹ Henriques, G. "When Does 'It' Become a Person?". *Psychology Today*, 2015. Available at: <https://www.psychologytoday.com/us/blog/theory-knowledge/201508/when-does-it-become-person> [<https://perma.cc/S4YG-FAXA>].

¹²² Hume, D. "A Treatise of Human Nature". 1759. Available at: <http://www.davidhume.org>

worthy of ethical and legal consideration¹²³). The *is-ought* fallacy is present in some pro-life stances that confuse the former for the latter such that a certain descriptive view necessitates a corresponding normative view (e.g., ‘since a human’s life begins at fertilization, fetuses are worthy of legal protection throughout pregnancy’). This fallacy is also present in some pro-choice stances that confuse the latter for the former such that a certain normative view necessitates a corresponding descriptive view (e.g., ‘since fetuses are not worthy of legal protection, a human’s life begins at birth’). Careful consideration of the specific language used in a stance on when life begins is required to understand which interpretation drove that stance.

The linguistic structure utilized in a person’s response to the question serves as evidence for the person’s interpretation of the question. Some responses give little indication of the person’s interpretation (e.g., ‘life begins at conception’, ‘life begins at birth’). Others more clearly signal a descriptive interpretation (e.g., ‘a human’s biological development begins at fertilization’) or a normative interpretation (e.g., ‘the woman gets to decide when the fetus is a person’). The phrasing of a nonresponsive answer can similarly indicate how the question was understood. If one argues ‘it is not known when a human’s life begins’, they likely have a descriptive interpretation since they represented it as a knowable question on when a human is first classified as such. If one argues ‘when a fetus is a person is a matter of opinion’, they likely have a normative interpretation since they represented it as a value judgment on when a fetus is a person worthy of ethical and legal consideration.

g/texts/thn.html [<https://perma.cc/KH4F-7EM7>]; Garrett, D. “Hume”. *Routledge*, p. 146-171, 2015; Pigden, C. “Hume On Is and Ought: Logic, Promises and the Duke of Wellington”. In Paul Russell (ed.), *The Oxford Handbook on David Hume*. Oxford University Press, 2016.

¹²³ Legal consideration was used because it is broader than legal protection; the former implies that a fetus might have rights that can be balanced against a woman’s rights; the latter implies that a woman’s rights are secondary to a fetus’ rights.

This *is-ought* analysis can explain why people disagree on when life begins. The disagreement might not emanate from different biological views on when to classify a fetus as a human or different beliefs on when a fetus is deserving of legal consideration. Different stances could merely represent that one person interprets ‘when life begins’ descriptively, while the other interprets it normatively. Thus, Americans could merely disagree because they understand the question differently. One indication could be to look at how the question is discussed by experts in the public sphere.

Cecile Richards, the former president of Planned Parenthood¹²⁴, has stated that experts believe there is no specific moment when a human’s life begins because it is a variable point that depends on each pregnancy.¹²⁵ Politicians have also suggested that the ontogenetic starting point of a human’s life is unknown. In defense of her support of *Roe v. Wade*, the landmark U.S. Supreme Court case that founded federal abortion protections, Congresswoman Nancy Pelosi argued, “I don’t think anyone can tell you when life begins.”¹²⁶ Both answers indicate a descriptive interpretation of the question. Cecile Richards’ statement suggests she believes ‘when life begins’ can be medically determined in each pregnancy, and Nancy Pelosi’s statement suggests she believes ‘when life begins’ is a knowable factual matter which is currently unknown.

¹²⁴ Planned Parenthood is a nonprofit that provides reproductive services around the world, and it is recognized as the leading abortion provider in the U.S., see, e.g., Umhouefer, D. “Glenn Grothman says Planned Parenthood is leading abortion provider”. *Politifact Wisconsin*, 2017. Available at: <http://www.politifact.com/wisconsin/statements/2017/may/15/glenn-grothman/glen-grothman-says-planned-parenthood-leading-abo/> [<https://perma.cc/DS6X-7SH7>].

¹²⁵ Hochman, D. “The Playboy Interview With Cecile Richards”. *Playboy*, 2018. Available at: <https://www.playboy.com/read/playboy-interview-cecile-richards> [<https://perma.cc/CXS6-RL3U>].

¹²⁶ Pelosi, N. “Meet the Press interview with Tom Brokaw”. 2008. Available at: <https://www.youtube.com/watch?v=G8FmLCm2CiI> [<https://perma.cc/8BF5-A6KS>].

Other politicians believe it is a settled issue. In defense of his abortion stance, 2016 Republican Party presidential candidate Senator Marco Rubio once said, “I believe that science is clear... when there is conception that that [*sic*] is a human life in the early stages of its total development that is worthy of the protection of our laws.”¹²⁷ Here, Senator Rubio responded to both perspectives of when life begins, seemingly arguing that a specific descriptive view (i.e., there is human life at conception) necessitates a specific normative view (i.e., a fetus is worthy of legal protection throughout pregnancy).

The Question’s Legal Implications

The current U.S. President echoes these views since he similarly argues that a fetus is a human worthy of legal protection. President Donald Trump advanced this stance in a letter to the National Right to Life Committee: “[a]s President I am dedicated to protecting the lives of every American including the unborn”.¹²⁸ This belief was memorialized on January 22, 2018, the National Sanctity of Human Life day, when President Trump announced that “[t]oday, we focus our attention on the love and protection each person, born and unborn, deserves regardless of disability, gender, appearance, or ethnicity... [and] no class of people should ever be discarded as ‘non-human.’”¹²⁹ Under his direction, the U.S. Department of Health and Human Services (HHS) updated

¹²⁷ Scott, E. “Marco Rubio defends abortion stance: Human life begins at conception”. *CNN*, 2015. Available at: <https://www.cnn.com/2015/08/07/politics/marco-rubio-abortion-republican-debate-gop/> [<https://perma.cc/AXQ3-PP8C>].

¹²⁸ Ertelt, S. “President Donald Trump: Unborn Babies Have a “Basic and Fundamental Human Right, the Right to Life”. *LifeNews.com*, 2018. Available at: <http://www.lifenews.com/2018/06/28/president-donald-trump-unborn-babies-have-a-basic-and-fundamental-human-right-the-right-to-life/> [<https://perma.cc/7P59-UPWE>].

¹²⁹ “President Donald J. Trump Proclaims January 22, 2018, as National Sanctity of Human Life Day”. *The White House*, 2018. Available at: <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-proclaims-january-22-2018-national-sanctity-human-life-day/> [<https://perma.cc/B6NW-PDF6>].

its strategic plan to recognize this view.¹³⁰ However, an HHS representative denied they were taking a political stance: “[n]o, the department is finally looking to and acknowledging science”.¹³¹ These political stances are not mere talking points; they can affect U.S. policy and potentially impact America’s abortion laws.

As discussed in chapter 2, ‘when life begins’ has played a central role in the United States’ centuries-long legislative debate on abortion. Until the 19th century, quickening was recognized as the moment life began because fetal movements in the uterus served as proof that a woman was pregnant. This descriptive view served as the basis of the normative view under U.S. common law because “[o]nce quickening occurred, women recognized a moral obligation to carry the fetus to term”.¹³² Quickening later gave way to the view espoused by Dr. Horatio Storer and the American Medical Association (AMA). In the 1857 report of the Committee on Criminal Abortion, the AMA took the stance that “the child is really alive from the very moment of its conception, and from that very moment is, and should be considered, a distinct being”.¹³³ That stance drove the nationwide passage of state laws that restricted abortion throughout all stages of pregnancy. This reflected Americans’ continued use of a descriptive view to establish the normative view in their abortion laws. After a century of abortion bans, both views were redefined in 1973 by the U.S. Supreme Court in *Roe v. Wade*.

¹³⁰ “Strategic Plan FY 2018 - 2022.” *U.S. Department of Health & Human Services*. Available at: <https://www.hhs.gov/about/strategic-plan/index.html> [<https://perma.cc/S9DE-DUZ9>].

¹³¹ Burger, J. “HHS draft plan recognizes that life begins at conception”. *Aleteia*, 2017. Available at: <https://aleteia.org/2017/10/14/health-and-human-services-draft-plan-recognizes-that-life-begins-at-conception/> [<https://perma.cc/78RS-ZWXD>].

¹³² Reagan, L.J. “When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973”. *University of California Press*, 1997, p. 8-9.

¹³³ “Suffolk District Medical Society Report [of the Committee on Criminal Abortion]”. Boston, 1857, p. 8. Available at: <https://collections.nlm.nih.gov/bookviewer?PID.nlm:nlmuid-101218760-bk> [<https://perma.cc/XLR6-9NVC>], p. 10.

Justice Harry Blackmun wrote the Court's opinion and considered multiple theories on when life begins. He suggested that "those trained in the respective disciplines of medicine, philosophy, and theology" were the experts whose consensus on when life begins would be relevant to the Court's opinion since "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer"¹³⁴.¹³⁵ However, the Court could not find a consensus view among experts and replaced the AMA's stance with the descriptive view that "the fetus, at most, represents only the potentiality of life". The Court ultimately argued that the "potentiality of human life... grows" during pregnancy and first reaches a compelling point at fetal viability (i.e., the point at which medical technology could facilitate a fetus' survival after a premature birth). This descriptive view was consistent with the Court's normative view, "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability" since the Court held that life could be protectable at viability.¹³⁶ Since *Roe* used viability as both the moment when a fetus' life begins, and as the legal dividing line in pregnancy¹³⁷, the Court continued the U.S. legal trend of deeming a fetus worthy of legal consideration at the point when a fetus has been classified as a human.

¹³⁴ As discussed in chapter 4 on p. 207-208, American participants were presented a survey question on who is most qualified to determine when life begins; out of 3,919 Americans, only 82 selected Supreme Court Justices and 3,127 selected biologists; despite the agreement that Justices should not make determinations on when life begins, the Court's decision that viability was the compelling point was an ostensible determination which states have been subject to for over 45 years.

¹³⁵ *Roe v. Wade*. 410 U.S. 113, 159 (1973).

¹³⁶ *Id.* at 163-165.

¹³⁷ *Id.* at 159. Justice Blackmun signaled that he understood the distinction between the descriptive and normative interpretations of when life begins: "Texas urges that... life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins"; additionally, he precluded the view that a fetus is classified as a human at fertilization by referring to previable fetuses as "potential human life".

The descriptive and normative views of *Roe* are currently used as the basis for U.S. abortion laws¹³⁸, but anti-abortion politicians continue to challenge these views. Federal lawmakers have made numerous attempts to pass human life amendments to the U.S. Constitution and redefine the beginning of life as conception to protect fetuses throughout pregnancy.¹³⁹ Federal lawmakers have also worked to restrict abortion access with a bill that would protect fetuses that are sentient (i.e., capable of experiencing pain).¹⁴⁰ Similar attempts have taken place on the state level. Recently, Iowa state legislators passed a ‘heartbeat bill’ to protect a fetus once its heartbeat has been detected, taking the position that a heartbeat signals the beginning of life.¹⁴¹ Some predict it will trigger the next challenge to *Roe*¹⁴², and politicians have suggested this was the very purpose of the bill and the law:

*“I would be proud if it’s Kentucky that takes it all the way up to the Supreme Court and we challenge Roe v. Wade... That would be absolutely the pinnacle of my career in the Legislature.”*¹⁴³

¹³⁸ The essential holding of *Roe*, in part that a fetus is a potential human life, was upheld in *Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992) and *Whole Woman’s Health v. Hellerstedt*, 579 U.S. ____ (2016).

¹³⁹ Lohr, K. “‘Human Life’ Amendments Latest Challenge to *Roe*”. *NPR*, 2008. Available at: <http://www.npr.org/templates/story/story.php?storyId=18292863> [<https://perma.cc/K44Q-MK2H>].

¹⁴⁰ O’Keefe, E. “Abortion ban bill fails to advance in the Senate”. *Washington Post*, 2018. Available at: http://www.washingtonpost.com/politics/abortion-ban-bill-fails-to-advance-in-the-senate/2018/01/29/98ad2c0e-0518-11e8-94e8-e8b8600ade23_story.html [<https://perma.cc/HDK5-HQZ9>].

¹⁴¹ After signing the bill into law, Iowa Governor Reynolds argued, “if death is determined when a heart stops beating, then doesn’t a beating heart indicate life?”. Pfannenstiel, B. & Petroski, W. “The nation’s strictest abortion ban is now law. Iowa Gov. Kim Reynolds signs ‘fetal heartbeat’ bill”. *Des Moines Register*, 2018. Available at: <https://www.desmoinesregister.com/story/news/politics/2018/05/04/abortion-ban-law-iowa-fetal-heartbeat/577443002/> [<https://perma.cc/X96Y-RWHL>].

¹⁴² Ingber, S. “Iowa Bans Most Abortions As Governor Signs ‘Heartbeat’ Bill”. *NPR*, 2018. Available at: <http://www.npr.org/sections/thetwo-way/2018/05/05/608738116/iowa-bans-most-abortions-as-governor-signs-heartbeat-bill> [<https://perma.cc/BF4U-V334>].

¹⁴³ <https://www.nytimes.com/2019/03/21/us/abortion-laws-states.html?module=inline> [htt

The logic of U.S. abortion laws has remained constant for centuries. The legal dividing line in pregnancy has merely moved according to the arbiters' determination on the *is* dimension of 'when life begins' (i.e., first society, then the AMA, and finally the U.S. Supreme Court). Thus, courts and lawmakers have a long and consistent history of using a fetus' developmental landmarks to form their view on when a fetus is classified as a human, which they then use as the bright line that separates legal abortions from illegal abortions. Americans have either believed that the descriptive and normative interpretations are fungible or that a certain descriptive view necessitates a corresponding normative view (i.e., a human's life is worthy of legal consideration when it begins).¹⁴⁴ However, it is not known whether this is still true for Americans. It is possible that traditional ethical and legal concepts have been impacted by contemporary modes of thinking that find the descriptive view irrelevant to the U.S. abortion debate (e.g., the view that a woman needs reproductive rights for the protection of her rights to autonomy, liberty, and equality).¹⁴⁵

<https://perma.cc/6VVV-3BLT>]; see also: Iowa State Senator Rick Bertrand's comments: "I believe this bill will be the vehicle that will ultimately provide change and provide the opportunity to overturn *Roe v. Wade*", Shaw, M. "Iowa's new six-week 'heartbeat' abortion bill is a blatant attempt to reverse *Roe v. Wade*". *NBC News*, 2018. Available at: <https://www.nbcnews.com/think/opinion/iowa-s-new-six-week-heartbeat-abortion-bill-blatant-attempt-ncna871561> [<https://perma.cc/LKN5-9764>]).

¹⁴⁴ It is unknown which principle would justify the argument that a certain descriptive view would necessitate a corresponding normative view, but this principle is consistent with rights concepts outlined in the Universal Declaration of Human Rights, which extend rights to all humans: "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". "Universal Declaration of Human Rights". *United Nations*. Available at: <http://www.un.org/en/universal-declaration-human-rights/> [<https://perma.cc/HZ5C-58KZ>].

¹⁴⁵ "Reproductive Rights are Human Rights". *Center for Reproductive Rights*, 2009. https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RRareHR_final.pdf [<https://perma.cc/TSN4-6K7L>].

Motivated Views on When Life Begins

“When societal risks become suffused with antagonistic social meanings, it is (often if not always, and with respect to many if not all issues) *individually rational* for ordinary members of the public to attend to information in a manner that reliably connects them to the positions that predominate in their identity-defining groups.”¹⁴⁶

“Identity protective cognition refers to the tendency of culturally diverse individuals to selectively credit and dismiss evidence in patterns that reflect the beliefs that predominate in their group... Individuals are also more likely to accept misinformation and resist the correction of it when that misinformation is identity-affirming rather than identity-threatening.”¹⁴⁷

Given the legal stakes of ‘when life begins’ throughout the history of U.S. abortion laws and the way in which it functions in the modern debate, it is unsurprising that debates on how to classify fetuses would be a major point of contention in the national abortion controversy. To some, it might seem like the ability to define how the law and the public perceive fetuses is the ability to determine the legal status of abortion. Since there are such stakes, it is clear why people would themselves have such different perceptions of fetuses, whereby even some biologists view fetuses

¹⁴⁶ See, e.g., Kahan, D.M. (2013). Ideology, motivated reasoning, and cognitive reflection, *Judgment and Decision Making*, Vol. 8, No. 4, July 2013, p. 407–424; Kahan, D.M. (2012). Cultural cognition as a conception of the cultural theory of risk. In S. Roeser, R. Hillerbrand, P. Sandin, & M. Peterson (Eds.), *Handbook of risk theory*, p. 725-759, Amsterdam, Netherlands: Springer.

¹⁴⁷ Kahan, D.M., *Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition* (May 24, 2017). Cultural Cognition Project Working Paper Series No. 164; Yale Law School, Public Law Research Paper No. 605; Yale Law & Economics Research Paper No. 575. Available at SSRN: <https://ssrn.com/abstract=2973067> [<https://perma.cc/95U2-NBDC>].

as parasites¹⁴⁸, even though fetuses cannot be strictly defined as parasites¹⁴⁹, and others see fetuses as humans no different from humans who have already been born. While these stakes might be present, there is a question of whether the abortion debate could be causing these differences or merely reflecting them.

Dan Kahan, a science of science communication researcher, has a Cultural Cognition lab that studies the decision-relevant science (“DRS”) that lies at the heart of the science of science communication. The lab studies why the public is reluctant to recognize consensus amongst scientists (e.g., anthropogenic climate change, acceptance of evolution). He juxtaposes his work with what he dubs the public-irrationality thesis (“PIT”), arguing that many academics believe that most members of the public “display only modest familiarity with fundamental scientific findings, and lack proficiency in the forms of critical reasoning essential to science comprehension... [a]s a result, they are easily misled by special interest groups, who flood public discourse with scientifically unfounded claims on global warming, genetically modified foods, and other issues”.¹⁵⁰ Kahan does not recognize the bias against certain findings as resulting from any deficits, but rather

¹⁴⁸ It was reported that in 2019, in a University of California San Diego course “Biology of Disease”, a biology professor used a PowerPoint slide describing a fetus as “a legitimate parasite”, <https://twitter.com/DylanPGriswold>, April 25th tweet; some academic biologists, who were participants in chapter 5, similarly shared this view: “[t]his survey is somewhat misleading. The zygote, while alive cannot survive on its own. It is parasitic on the mother until birth. I am still pro-choice.”, “[l]ike it or not a zygote is a parasite living in mom and mom should be the one to decide to keep it or not.”, and “[b]ecause both sperm and oocyte are also alive prior to recombining, any line drawn here is going to be purely arbitrary and will reflect the weight people put on the rights of the mother, who must carry the embryo as a parasite and with risk to herself and the weight they put on the potential human”.

¹⁴⁹ While some have argued for intraspecific parasitism (<https://www.annualreviews.org/doi/abs/10.1146/annurev.ento.53.103106.093515?journalCode=ento> [<https://perma.cc/CS6Z-K566>]), parasitism is typically fined as a relationship between members of different species (<https://www.merriam-webster.com/dictionary/parasitism> [<https://perma.cc/8X98-FE9G>]).

¹⁵⁰ Kahan, D.M., Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition (May 24, 2017). Cultural Cognition Project Working Paper Series No. 164; Yale Law

that they have secondary concerns¹⁵¹; in support, he reports data that suggests those who have the highest level of science comprehension are the most subject to the influence from these secondary concerns.¹⁵² Thus, making meaning of the results from studies in this field, Kahan concludes that:

“The problem, in short, is not a gullible, manipulated public; it is a polluted science communication environment. The pollution consists of antagonistic social meanings that put individuals in the position of having to choose between using their reason to discern what science knows or using it instead to express their group commitments.”¹⁵³

It is an interesting perspective. Since there can be social meaning behind certain scientific findings, such as one feeling that scientists’ consensus support of evolution entails the rejection of the Bible’s explanation of the creation of life on Earth, people are sometimes put in the position to maintain a consistent identity or accept a scientific finding.

In the abortion debate, both sides might be put in this position, as well. If scientists agree that having an abortion does not significantly increase the risk of breast cancer, then pro-life Americans could reject that view because it is easier for them to maintain their abortion identity if they

School, Public Law Research Paper No. 605; Yale Law & Economics Research Paper No. 575. Available at SSRN: <https://ssrn.com/abstract=2973067> [<https://perma.cc/95U2-NBDC>].

¹⁵¹ *Id.*, “PIT itself reflects a misconception of a particular form of *science*: namely, the *science of science communication*. One of the major tenets of this emerging body of work is that public controversy over DRS typically originates in *identity-protective cognition*—a tendency to selectively credit and discredit evidence in patterns that reflect people’s commitments to competing cultural groups... Far from evincing irrationality, this pattern of reasoning promotes the interests of individual members of the public, who have a bigger personal stake in fitting in with important affinity groups than in forming correct perceptions of scientific evidence”.

¹⁵² Kahan, D.M. Climate-Science Communication and the Measurement Problem. *Advances in Political Psychology* 36, 1-43 (2015).

¹⁵³ Kahan, D.M., Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition (May 24, 2017). Cultural Cognition Project Working Paper Series No. 164; Yale Law School, Public Law Research Paper No. 605; Yale Law & Economics Research Paper No. 575. Available at SSRN: <https://ssrn.com/abstract=2973067> [<https://perma.cc/95U2-NBDC>].

believe that abortion hurts women; if scientists agree that having an abortion kills a biological human, then pro-choice Americans could reject that view because it is easier for them to maintain their abortion identity if they disregard the practice's impact on fetuses and view abortion as the expression of a woman's rights.

Kahan has studied the effect of this need to protect one's identity and reduce one's dissonance when making judgments. For instance, he has found that those with an identity related to the pro-choice identity are more likely to see abortion clinic protestors as threatening and those with an identity related to the pro-life identity are more likely to see protestors of the "Don't Ask, Don't Tell" military policy as threatening.¹⁵⁴ Through a series of studies, he has found good evidence that people can be influenced by their identities in their judgments on issues that are strongly related to important issues relevant to their identities¹⁵⁵. Indeed, people who were simply asked to assess a math problem were less likely to solve it correctly when the answer supported a political argument with which they disagreed.¹⁵⁶ Similarly, research on myside bias suggests that people

¹⁵⁴ Kahan, D.M., Hoffman, D.A., Braman, D., Evans, D. & Rachlinski, J.J. "They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction." *Stanford Law Review* 64, 2012.

¹⁵⁵ "Shown the sterling credentials of a scientist who studies the climate, subjects of a particular identity readily agreed that he was an expert to whom ordinary citizens ought to defer—but *only* if that scientist espoused *their groups' position* on whether humans are the cause of global warming. If he didn't, then his opinions were dismissed on the ground that he was not a genuine expert on climate change. The same pattern characterized individuals' perception of a scientist's expertise on other culturally divisive issues such as nuclear waste disposal and gun control", Kahan, D.M., Jenkins-Smith, H. & Braman, D. Cultural Cognition of Scientific Consensus. *J. Risk Res.* 14, 147-174 (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1549444 [<https://perma.cc/6DH9-X5G4>].

¹⁵⁶ Kahan, D.M., Peters, E., Dawson, E.C. & Slovic, P. Motivated Numeracy and Enlightened Self-Government. *Behavioural Public Policy*, 1, 1, 54-86; Yale Law School, Public Law Working Paper No. 307. Available at SSRN: <https://ssrn.com/abstract=2319992> [<https://perma.cc/P9DN-A5U9>].

cannot follow syllogisms that relate to values with which they do not agree.¹⁵⁷ Whether it be identity-protective cognition¹⁵⁸, interference with syllogistic reasoning, or motivated numeracy, these mechanisms suggest that Americans might not be fundamentally divided in their views on when life begins but that such beliefs are motivated by their beliefs about abortion.

Since both sides of the abortion debate have identities and beliefs related to such an important issue, Americans could be biased when discussing objective aspects of the debate. Specifically, on the question of when life begins: pro-choice Americans' abortion stances could induce cognitive pressure to deny the humanity of fetuses to justify support of abortion, so they do not have to view the practice as the killing of a human, and pro-life Americans' abortion stances could provide cognitive pressure to emphasize the humanity of fetuses to justify their opposition of abortion, so they feel their stance supports fetal rights rather than attacks women's rights.

¹⁵⁷ <https://psychcentral.com/blog/only-my-opinion-counts-myside-bias/> [<https://perma.cc/8G5K-W5BV>]; <https://bigthink.com/mind-brain/my-side-bias-makes-it-difficult-for-us-to-see-the-logic-in-arguments-we-disagree-with-2618745120?rebelltitem=1#rebelltitem1> [<https://perma.cc/HWT8-P4B3>]; <https://www.tandfonline.com/doi/abs/10.1080/20445911.2018.1518961?tokenDomain=eprints&tokenAccess=mQIw3zxwkWJ4iVVDG6jC&forwardService=showFullText&doi=10.1080%2F20445911.2018.1518961&doi=10.1080%2F20445911.2018.1518961&journalCode=pepc21> [<https://perma.cc/WDC6-P7RF>].

¹⁵⁸ It is important to note that 'identity' can be seen as related to the 'self', and Geoffrey Cohen has done work on the role of self-affirmation being a major factor in the psychology of change, see, e.g., Cohen, G.L., Sherman, D.K., Bastardi, A., Hsu, L., McGoey, M., & Ross, L. Bridging the Partisan Divide: Self-Affirmation Reduces Ideological Closed-Mindedness and Inflexibility in Negotiation, *Journal of Personality and Social Psychology*, 2007, Vol. 93, No. 3, 415–430; Cohen, G.L. & Sherman, D.K., *The Psychology of Change: Self-Affirmation and Social Psychological Intervention*, *Annual Review of Psychology*, January 2014, available at: https://www.researchgate.net/profile/Geoffrey_Cohen/publication/259650286_The_Psychology_of_Change_Self-Affirmation_and_Social_Psychological_Intervention/links/02e7e52f3312ea8b3e000000/The-Psychology-of-Change-Self-Affirmation-and-Social-Psychological-Intervention.pdf [<https://perma.cc/4Y64-F5R5>].

Conclusion

Together, this review of poll results on Americans' beliefs about abortion, analysis of the way people debate abortion online, and review of the literature on abortion attitudes reinforce the notion that abortion is a complicated issue that operates in various dimensions. However, perhaps most revealing is the amount of agreement on both sides. Americans fundamentally see the issue as related to human rights, they make rights-based and utilitarian arguments, they agree that abortion should be illegal after the first trimester, and they agree on many exceptions to protect pregnant people. Their main disagreement seems to center on elective abortions performed in the first trimester, which maps onto their disagreement on whether nonviable fetuses are humans. After using qualitative methods to generate hypotheses, current research was used to assess trends in research on abortion and generate experimental hypotheses.

Thus, in the next chapter, Americans are surveyed to assess different predictors of abortion attitudes, to better understand Americans' abortion attitudes, and to explore the role 'when life begins' plays in the debate. Further, those data will provide a sense of Americans' optimism that the national abortion controversy can be reduced or resolved.

CHAPTER 4: AMERICANS' BELIEFS ABOUT ABORTION

“They go to magical thinking and they go, ‘A fertilized egg is a human being! A fertilized egg is a human being!... And they say it over and over, and they’ve got millions behind them.”

Michael Moore, Oscar-Winning Documentarian¹

“[A]dopting the “wrong” position in interactions with her peers could rupture bonds on which she depends heavily for emotional and material well-being. Under these pathological conditions, she will predictably use her reasoning not to discern the truth but to form and persist in beliefs characteristic of her group, a tendency known as “identity-protective cognition.”

Dan Kahan, Cultural Cognition Researcher²

“Social psychologists who have addressed the motivations behind support or opposition to abortion have introduced novel hypotheses linking anti-abortion attitudes with sexism and opposition to gender equality... it is clear that these hypotheses are based on a specific construal of what the abortion debate is ultimately about – namely, the liberal narrative of abortion as a gender issue. But aren’t we missing something?”

Abortion Researcher³

The review of the legal history of the debate and observations of the modern debate – through polls on abortion beliefs, online abortion discourse, and research on abortion attitudes – have suggested that Americans might be less divided than most believe since both sides assume that both sides’ are more orthodox than they are. Further, differences could be driven by the unique perceptions of fetuses and on when life begins. This chapter reports a series of online surveys of

¹ <https://deadline.com/2018/06/michael-moore-bill-maher-real-time-millions-should-surround-capital-supreme-court-vote-1202419654/> [<https://perma.cc/5WQN-5XD9>].

² <https://blogs.scientificamerican.com/observations/why-smart-people-are-vulnerable-to-pitting-tribe-before-truth/> [<https://perma.cc/8BKZ-SG5T>].

³ <https://www.spssi.org/index.cfm?fuseaction=page.viewPage&pageID=2406&nodeID=1> [<https://perma.cc/JQ26-KSKK>].

Americans⁴ that had three main goals: (1) to understand whether Americans hold the same underlying beliefs and values (e.g., sexual morality, feminism, human rights), (2) to learn whether Americans have similar interests in the debate (e.g., desire to end the debate), and (3) to report Americans' positions on abortion (e.g., the legal status of abortion).

The results are broken down into three results sections. Section 1 reports scales on Americans' underlying beliefs and values, Section 2 reports various questions that assess Americans' abortion attitudes, and Section 3 reports Americans' beliefs about when life begins and the role that question plays in the debate. The chapter concludes by reporting comprehensive models that assess various factors' (e.g., sexual morality, the centrality of children, perceptions of fetuses) predictive value in Americans' abortion attitudes.

Methodology

Participation was sought from American adults through Amazon's Mechanical Turk workforce site ("MTurk"), which is the service many academic researchers⁵ use to connect with large participant pools. Since previous work suggests samples drawn from MTurk are valid for research

⁴ Five versions of the survey were used to collect data from October of 2017 to April of 2019; the data were aggregated and, for each participant, there was a variable representing the version of the survey to investigate whether there was an effect of survey version (i.e., if a question was asked in all five versions, then overall responses were analyzed as well as the responses for each survey to determine whether there were significant differences between results from that question on survey version 1 and survey 2); there were no such differences, so all of the survey versions were treated as fungible.

⁵ Buhrmester, M., Kwang, T., & Gosling, S. D. "Amazon's Mechanical Turk: A new source of inexpensive, yet high-quality, data?". *Perspectives on Psychological Science*, 2011, 6, p. 3-5; Bates, J. A., & Lanza, B. A. "Conducting psychology student research via the Mechanical Turk crowdsourcing service". *North American Journal of Psychology*, 2013, 15(2), p. 385-394; Buhrmester, M. & Talaifar, S. & Gosling, S. "An Evaluation of Amazon's Mechanical Turk, Its Rapid Rise, and Its Effective Use". *Perspectives on Psychological Science*, 2018, 13, p. 149-154. Available at: <https://doi.org/10.1177/1745691617706516> [<https://perma.cc/5L78-MV7H>].

on political ideology⁶, it was a useful tool to collect data on issues related to the abortion debate. 4,724 American participants answered the advertisement on a survey about “a popular American debate”.⁷ Results from 4,107 participants, who provided data on operative questions, are analyzed in this chapter.⁸

Politically, the sample was predominantly pro-choice (62%), liberal (63%), socialist (54%), and Democratic (66%). The sample was well-educated (63% graduated from college) and had more females (57%) than males (43%). The demographics were consistent with previous findings on the demographics of MTurk samples.⁹ While MTurk surveys utilize non-probabilistic sampling, comparisons of probability and non-probability samples suggest that they have similar absolute error rates.¹⁰ There are different totals of participants for the questions since not all participants received identical surveys.

⁶ Clifford, S., Jewell, R.M., & Waggoner, P.D. (2015), Are samples drawn from Mechanical Turk valid for research on political ideology? *Research & Politics*, Volume: 2 issue: 4, <https://journals.sagepub.com/doi/full/10.1177/2053168015622072> [<https://perma.cc/5L8E-4CPZ>].

⁷ 587 participants were offered \$.26 for participating, 2,312 participants were offered \$.51 for participating, and 1,208 were offered \$1.01 for participating.

⁸ The surveys included various quality control checks (e.g., being presented a question twice in a row to assess whether they were answering randomly) to ensure participants were completing the questions; this was especially important in the final survey, which had over 150 questions, so participants were removed if they failed at least two of the three checks; comparisons of responses from those who failed checks and those who passed them revealed clear differences, so those who failed checks were removed.

⁹ Huff, C. & Tingley, D. “Who are these people?” Evaluating the demographic characteristics and political preferences of MTurk survey respondents”. *Research & Politics*, 2015, 2(3), p. 1-12. Available at: <https://scholar.harvard.edu/files/dtingley/files/whoarethesepeople.pdf> [<https://perma.cc/L6GF-K4UM>].

¹⁰ Probability sample telephone and Internet surveys had average absolute errors between 2.9% and 3.4%, while non-probability Internet surveys’ average absolute errors averaged 5.23%. <https://pdfs.semanticscholar.org/b705/eb8c7524b402493985e7e8452e514e51315e.pdf> [<https://perma.cc/2BWS-LB76>].

Surveys 1-3 contained questions on the roles that values and views of when life begins play in the abortion debate, survey 4 explored those topics as well as justifications for abortion positions, and survey 5 built on the previous surveys by asking more penetrative questions on Americans' beliefs and questions assessing whether Americans as polarized in their abortion attitudes as most believe.

Results Section 1: Americans' Beliefs and Values

The questions in this section were posed to Americans to determine whether pro-choice and pro-life Americans differ in their beliefs about sexual morality, children, feminism, and rights. This section can be conceptualized as the values parties hold, which could reflect deep divides between Americans. However, if Americans hold similar values, this could be seen as common ground and a basis for a potential agreement.

Sexual Morality Scale

This was employed as a possible 'conservative predictor', as some researchers have suggested it explains much of the variance between pro-choice and pro-life Americans' abortion attitudes.¹¹ This squares with beliefs that those in the pro-life camp oppose sex education¹² and only support abstinence¹³ because they see sexuality through a moral lens.

¹¹ <https://www.spssi.org/index.cfm?fuseaction=page.viewPage&pageID=2406&nodeID=1> [<https://perma.cc/JQ26-KSKK>].

¹² https://www.huffpost.com/entry/why-do-pro-life-activists_n_227001 [<https://perma.cc/TUW9-HRJQ>]; however, pro-life Americans suggest they oppose sex education when it is endorsed by Planned Parenthood and focuses more on sexual mores rather than the biology of reproduction (<https://www.liveaction.org/news/planned-parenthood-sex-ed-traumatizes/> [<https://perma.cc/VRA5-B38V>]).

¹³ <https://www.nytimes.com/2018/05/05/opinion/sunday/the-new-era-of-abstinence.html> [<https://perma.cc/V6FE-XN6J>].

On a 6-question ‘sexual morality scale’¹⁴, pro-choice participants (8%) were less likely¹⁵ to recognize sexual behaviors as morally wrong than pro-life participants (60%). There were significant differences ($p < .001$) for each of the items in the scale, which included questions on sex: before marriage¹⁶, involving three or more partners¹⁷, involving an exchange of money¹⁸, and between two people of the same sex¹⁹; pro-life participants were also more likely to recognize sexual promiscuity²⁰ and routinely consuming pornography²¹ as morally wrong. Overall, the scale had a Cronbach’s Alpha of .950, so the internal consistency was excellent.

¹⁴ This scale was motivated by Rodriguez, C.G., & Ditto, P.H. (2017). What’s sex got to do with it? Sexual morality predicts abortion attitudes better than respect for life or women. San Diego, CA., https://www.researchgate.net/publication/322666194_What's_sex_got_to_do_with_it_Sexual_morality_predicts_Abortion_Attitudes_better_than_politics_respect_for_life_or_for_women/related.adapted [archived link unavailable], which adapted the questions from the General Social Survey (<http://gss.norc.org> [<https://perma.cc/53AK-C9QV>]) and the World Values Survey (<http://www.worldvaluessurvey.org/wvs.jsp> [<https://perma.cc/4P8Z-9JEK>]).

¹⁵ $\chi^2(1, N = 839) = 258.983, p < .001$.

¹⁶ $\chi^2(1, N = 839) = 234.493, p < .001$; participants were asked to assess the following statement: “Sexual relationships before marriage are morally wrong.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

¹⁷ $\chi^2(1, N = 838) = 242.544, p < .001$; participants were asked to assess the following statement: “Sexual relationships involving three or more partners are morally wrong.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

¹⁸ $\chi^2(1, N = 838) = 184.522, p < .001$; participants were asked to assess the following statement: “Sexual relationships that involve an exchange of money are morally wrong.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

¹⁹ $\chi^2(1, N = 837) = 220.457, p < .001$; participants were asked to assess the following statement: “Sexual relationships between two people of the same sex are morally wrong.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

²⁰ $\chi^2(1, N = 838) = 214.814, p < .001$; participants were asked to assess the following statement: “It is morally wrong for an adult to be sexually promiscuous.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

²¹ $\chi^2(1, N = 838) = 192.784, p < .001$; participants were asked to assess the following statement: “It is morally wrong for an adult to routinely consume pornography.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

No more than a small minority of pro-choice participants recognized any of the sexual domains presented as immoral, while a majority of pro-life participants viewed all of the items as immoral, except for sex before marriage. It is not clear that this is related to abortion beliefs or that it is driving differences in abortion beliefs, but it seems possible that the willingness to moralize sexual behavior suggests a higher level of respect for the relationship-building and procreative dimensions of sexual intercourse.²² This view seems a more likely explanation than suggesting pro-life Americans view abortion restrictions as punishment for sexual immorality since very few Americans believe in restricting abortion to punish pregnant people.²³ The higher respect of the procreative dimension of sex could also be associated with greater affinity for children, as they could oppose abortion since they view the practice as the prevention of children being born.

Views on Children

These measures assess whether Americans differ in their beliefs on the importance of children and how central children are to life. Previous research on the impact of worldviews on abortion attitudes was promising²⁴, but measures on the role that children play in one's worldview was particularly striking. Since early surveys in this study found that those who had more children were more likely to oppose abortion, this dimension was worthy of further inquiry.

²² See, e.g., <https://www.lifesitenews.com/blogs/if-we-really-want-to-end-abortion-we-have-to-re-educate-the-world-on-sex> [<https://perma.cc/JS5Z-CAGY>].

²³ Among participants in chapter 4's study, only 4% suggested abortion should be restricted to punish pregnant people; participants were presented the following item "If you believe abortion should sometimes be restricted, what is the primary reason behind the restriction?" with the following options: "To protect the pregnant person", "To protect the fetus", "To punish the pregnant person", "To punish the person who performed the abortion", and "To express American values".

²⁴ Emerson, M.O. Through Tinted Glasses: Religion, Worldviews, and Abortion Attitudes, *Journal for the Scientific Study of Religion*, 1996, 35 (1).

The Centrality of Children Scale

On a 7-question ‘the centrality of children scale’²⁵, pro-choice participants (49%) were less likely²⁶ to view children as central to life than pro-life participants (76%). There were significant differences ($p < .001$) for each of the items on the scale, which included positive views of children (i.e., watching children grow up is life’s greatest joy²⁷, a marriage is not fully complete without children²⁸, it is desirable to have a family with four or more children²⁹) and negative views that were reverse-coded (i.e., children are more trouble than they are worth³⁰, children interfere with the freedom of parents³¹, it is better not to have children because they are a financial burden³², it

²⁵ These questions were adapted from Emerson, M.O. Through Tinted Glasses: Religion, Worldviews, and Abortion Attitudes, *Journal for the Scientific Study of Religion*, 1996, 35 (1).

²⁶ $X^2(1, N = 839) = 61.423, p < .001$.

²⁷ $X^2(1, N = 838) = 67.609, p < .001$; participants were asked to assess the following statement: “Watching children grow up is life's greatest joy.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

²⁸ $X^2(1, N = 835) = 79.027, p < .001$; participants were asked to assess the following statement: “A marriage without children is not fully complete.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

²⁹ $X^2(1, N = 838) = 60.598, p < .001$; participants were asked to assess the following statement: “Your desire is to have a family with four or more children.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

³⁰ $X^2(1, N = 836) = 18.565, p < .001$; participants were asked to assess the following statement: “Children are more trouble than they are worth.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

³¹ $X^2(1, N = 838) = 17.214, p < .001$; participants were asked to assess the following statement: “Having children interferes with the freedom of parents.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

³² $X^2(1, N = 838) = 22.997, p < .001$; participants were asked to assess the following statement: “It is better not to have children because they are such a heavy financial burden.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

is better not to have children because it is for the good of society and the environment³³). Overall, the scale had a Cronbach's Alpha of .806, so the internal consistency was good.

Importance of Children

Most pro-life participants (61%) felt it was important for them to have children, and they were significantly more likely to feel it is important³⁴ than pro-choice participants (30%). Participants were also asked how many children they would like to have, and pro-life participants wanted more children than pro-choice participants³⁵. When asked how many children they want³⁶, more pro-choice participants wanted zero children (38%) than pro-life participants (23%), and fewer wanted multiple children (47%) than those who identified as pro-life (58%)³⁷.

Life vs. Birth Scale

This scale was included to assess a popular talking point in the debate. While there is some sense that Americans who identify as pro-life value children more than those who identify as pro-choice, some have argued that pro-life Americans do not support life but instead they solely support forced birth.³⁸ Sister Joan Chittister is credited with first advancing this view:

³³ $X^2(1, N = 837) = 10.189, p < .001$; participants were asked to assess the following statement: "It is better not to have children for the good of society and the environment." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

³⁴ $X^2(1, N = 497) = 43.806, p < .001$; participants were asked to assess the following question: "If you do not have children, how important is it that you have children one day? Note: Please skip if you have children." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

³⁵ $X^2(1, N = 786) = 24.473, p < .001$.

³⁶ Participants were posed the following question: "How many children would you like to have?"

³⁷ $X^2(4, N = 784) = 45.579, p < .001$.

³⁸ https://www.huffpost.com/entry/pro-life-vs-pro-birth_b_3579527 [<https://perma.cc/YQ>]

“I do not believe that just because you’re opposed to abortion, that that makes you pro-life. In fact, I think in many cases, your morality is deeply lacking if all you want is a child born but not a **child fed**, not a **child educated**, not a **child housed**. And why would I think that you don’t? Because you don’t want any tax money to go there. That’s not pro-life. That’s pro-birth. We need a much broader conversation on what the morality of pro-life is.”³⁹

Participants were presented three questions that asked whether they would support their tax dollars being used for the three purposes in the quote.

On a 3-question ‘life vs. birth scale’, there was not a significant difference ($p > .05$) between pro-choice participants (93%) and pro-life participants (92%). The two groups also did not differ ($p > .05$) in whether they would support their tax dollars being used to ensure that children in need have access to proper nutrition⁴⁰ and proper education⁴¹. However, there was a small but significant difference on the use of tax dollars for proper housing⁴², as pro-choice participants (92%) were more likely to support it than pro-life participants (88%). Overall, the scale had a Cronbach’s Alpha of .962, so the internal consistency was excellent. It is important to note that the quote might have been more true of pro-life Americans in 2004, when it is uttered, than those in 2019.

7A-4EG9].

³⁹ Emphasis added; see a video of the quote at: <https://billmoyers.com/story/what-pro-life-means/> [<https://perma.cc/R99Q-VYHU>].

⁴⁰ Participants were asked to assess the following statement: “I support my tax dollars being used to ensure that children in need have access to proper nutrition.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

⁴¹ Participants were asked to assess the following statement: “I support my tax dollars being used to ensure that children in need have access to proper education.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

⁴² $\chi^2(1, N = 838) = 6.383, p < .05$; participants were asked to assess the following statement: “I support my tax dollars being used to ensure that children in need have access to proper housing.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

Altogether, these results suggest that children are more important to pro-life Americans. However, when considered amongst other factors, it could play a small role in Americans' abortion attitudes. While these measures implicitly assessed whether Americans differ in their beliefs about abortion because those who are pro-life care more about children, the next measures assess whether these differences can be explained by pro-choice Americans' greater respect for women and pregnant people.

Feminism

Instead of replicating studies that used the ambivalent sexism inventory, two feminism scales were used to provide a more robust sense of whether misogyny or strong views on gendered social roles are driving differences in abortion attitudes. These scales, which focused on principles of radical and liberal feminism, were adapted from previous work on the diversity of feminist attitudes.⁴³

On a 5-question 'radical feminism scale', pro-choice participants (42%) and pro-life participants (34%) were similarly unlikely to support such statements ($p > .05$). While the groups did not differ on most of the items ($p > .05$)⁴⁴, there was a significant difference⁴⁵ on an item that

⁴³ Henley, N.M., Meng, K., O'Brien, D., McCarthy, W.J., & Sockloskie, R.J., Developing a Scale to Measure the Diversity of Feminist Attitudes, *Psychology of Women Quarterly*, 22 (1998), 317-348, Cambridge University Press, available at: <http://www.bwgriffin.com/gsu/courses/edur9131/content/FeminismScale.pdf> [<https://perma.cc/QF58-PZRZ>].

⁴⁴ Pro-choice and pro-life participants had similar scores on a 1 ("Do Not Agree") to 10 ("Agree") scale after they were presented the following statements: "Using "man" to mean both men and women is one of many ways sexist language destroys women's existence.", "Men's control over women forces women to be the primary caretakers of children.", and "Marriage is a perfect example of men's physical, economic, and sexual oppression of women."

⁴⁵ $\chi^2(1, N = 183) = 6.307, p < .05$; participants were asked to assess the following statement: "Sex role stereotypes are only one symptom of the larger system of patriarchal power, which is the true source of women's subordination." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

described sex-role stereotypes as part of patriarchal power between pro-choice (64%) and pro-life Americans (44%) and another significant difference⁴⁶ on a question of whether men use abortion laws to control women, as pro-choice (58%) participants were more likely to agree than pro-life participants (31%). Overall, the scale had a Cronbach's Alpha of .847, so the internal consistency was good.

On a 5-question 'liberal feminism scale', pro-choice participants (90%) and pro-life participants (80%) were similarly likely to support such statements ($p > .05$).⁴⁷ There was a significant difference⁴⁸ in support of an item representing the view that family structures should be a matter of personal choice between pro-choice (95%) and pro-life Americans (68%); there was also a significant difference⁴⁹ on a question of whether social change for sexual equality is best done through the government, as pro-choice (64%) participants were more likely to agree than pro-life participants (48%). Lastly, there was a significant difference⁵⁰ on a question of whether people should

⁴⁶ $\chi^2(1, N = 180) = 11.603, p < .005$; participants were asked to assess the following statement: "Men use abortion laws and reproductive technology to control women's lives." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁴⁷ Pro-choice and pro-life participants had similar scores on a 1 ("Do Not Agree") to 10 ("Agree") scale after they were presented the following statements: "The government is responsible for making sure that all women receive an equal chance at education and employment." and "The availability of adequate child care is central to a woman's right to work outside the home."

⁴⁸ $\chi^2(1, N = 183) = 25.381, p < .001$; participants were asked to assess the following statement: "Whether one chooses a traditional or alternative family form should be a matter of personal choice." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁴⁹ $\chi^2(1, N = 182) = 4.629, p < .05$; participants were asked to assess the following statement: "Social change for sexual equality will best come about by acting through federal, state, and local government." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁵⁰ $\chi^2(1, N = 182) = 9.234, p < .005$; participants were asked to assess the following statement: "People should define their marriage and family roles in ways that make them feel most comfortable." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

define their family roles in ways that make them feel most comfortable, as pro-choice (90%) participants were more likely to agree than pro-life participants (73%). Overall, the scale had a Cronbach's Alpha of .720, so the items were acceptably related.

These data further cast doubt on the impact of sexism or gendered views on abortion attitudes. Both sides were not very supportive of principles of radical feminism, which also suggests that most pro-choice Americans do not have extreme views, but they both strongly supported principles of liberal feminism. However, while they might not differ in their views of feminism, it is important to know whether there are differences in both sides' support the rights of women.

Rights of Women and Fetuses in Non-Abortive Contexts

These two scales measured Americans' support of the rights of women and fetuses outside of the context of abortion to better understand their underlying values. If pro-life participants are not as supportive of the rights of women, then opposition to abortion rights could be embedded within a general opposition to women's rights. Further, if pro-choice participants do not recognize the rights of fetuses outside of the abortion context, then their support of abortion rights might be more rooted in their belief that fetuses cannot be human victims than the belief that a pregnant person's rights take precedence over the rights of the fetus.

Rights of Women Scale

On a 5-question 'rights of women scale'⁵¹, pro-choice participants (93%) and pro-life

⁵¹ These questions were adapted from: Smith, E.R., Marx Ferree, M., & Miller, F.D. A Short Scale of Attitudes Toward Feminism, *Representative research in social psychology*, 6(1):51-56, 1975, available at: https://www.researchgate.net/publication/232536476_A_scale_of_attitudes_toward_feminism [<https://perma.cc/GE4E-BGWR>].

participants (91%) were similarly likely to support such statements ($p > .05$).⁵² There was a significant difference⁵³ on an item that described the view that women have the right to compete with men in every area of life between pro-choice (93%) and pro-life Americans (83%); there was also a significant difference⁵⁴ on a question of whether a woman should expect to have the same freedom of action as men, as pro-choice (93%) participants were more likely to agree than pro-life participants (80%). Overall, the scale had a Cronbach's Alpha of .792, so the items acceptably related.

Since these data suggest pro-life Americans are no less likely than pro-choice Americans to support the rights of women – and no less likely to affirm scales on radical and liberal feminism – it seems unlikely that pro-life beliefs are rooted in misogyny or disrespect for women. This especially bears out in the fact that women in this study were not significantly less likely ($p > .05$) to identify as pro-life (58%) than as pro-choice (57%)⁵⁵. While it is possible that pro-life women have internalized misogyny⁵⁶ or, as assumed by some politicians, that they vote based on the pref-

⁵² Pro-choice and pro-life participants had similar scores on a 1 (“Do Not Agree”) to 10 (“Agree”) scale after they were presented the following statements: “It is desirable that women be appointed to police forces with the same duties as men.”, “Men and women should be paid the same for the same work regardless of whether or not they have a family to support.”, and “Women should not be permitted to hold political offices that involve great responsibility.”; the last item was reverse-coded.

⁵³ $X^2(1, N = 181) = 4.397, p < .05$; participants were asked to assess the following statement: “Women have the right to compete with men in every sphere of activity.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

⁵⁴ $X^2(1, N = 181) = 6.515, p < .05$; participants were asked to assess the following statement: “A woman should not expect to go to the same places or have the same freedom of action as a man.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”); this item was reverse-coded.

⁵⁵ Participants were presented with the following question “How would you rate your beliefs?” and were asked to rate their beliefs on a scale of 1 (“Pro-Choice”) to 10 (“Pro-Life”).

⁵⁶ <https://www.psychologytoday.com/us/blog/valley-girl-brain/201610/are-female-misogynists-the-rise> [<https://perma.cc/63U2-B74C>].

erences of the men in their lives⁵⁷, that hypothesis was not supported by the lack of differences between pro-choice and pro-life participants along these relevant dimensions. Thus, these surveys did not support a popular ‘liberal hypothesis’ amongst abortion attitudes researchers.

Rights of Fetuses Scale

On a 5-question ‘rights of fetuses scale’⁵⁸, pro-choice participants (87%) were less likely⁵⁹ than pro-life participants (97%) to support such statements. There were significant differences ($p < .001$) for each of the items on the scale, which included statements representing deaths of fetuses as homicides in the following scenarios: pregnant person being physically attacked⁶⁰, capital punishment of a pregnant person⁶¹, drugging a pregnant person⁶², negligent medical treatment of a

⁵⁷ <https://www.foxnews.com/politics/hillary-clinton-blames-pressure-from-men-for-why-white-women-voted-for-trump> [<https://perma.cc/JWL8-B927>].

⁵⁸ These were original questions adapted from various real-life scenarios: <https://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302/> [<https://perma.cc/4SLQ-5LNF>], <http://www.deathpenaltyworldwide.org/women.cfm> [<https://perma.cc/9SXJ-YUWG>], <https://www.washingtonpost.com/news/true-crime/wp/2018/05/19/a-doctor-laced-his-ex-girlfriends-tea-with-abortion-pills-and-got-three-years-in-prison/> [<https://perma.cc/RWW3-ENSL>], <https://law.justia.com/codes/colorado/2016/title-18/article-3.5/section-18-3.5-106/> [<https://perma.cc/2RK3-RQZ2>], and <https://www.nbcnews.com/news/us-news/murder-or-miscarriage-grieving-mom-crusades-unborn-s-on-n18891> [<https://perma.cc/DFS6-M3RU>].

⁵⁹ $\chi^2(1, N = 1022) = 29.770, p < .001$.

⁶⁰ $\chi^2(1, N = 1021) = 18.563, p < .001$; participants were asked to assess the following statement: “Physically attacking a pregnant person with the goal and result of causing the death of a fetus should be considered an unjustifiable homicide.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

⁶¹ $\chi^2(1, N = 1022) = 74.140, p < .001$; participants were asked to assess the following statement: “Using the death penalty on a pregnant person should be considered an unjustifiable homicide of a fetus for a crime they didn’t commit.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

⁶² $\chi^2(1, N = 1020) = 21.140, p < .001$; participants were asked to assess the following statement: “Drugging an unaware pregnant person with the goal and result of causing the death of a fetus should be considered an unjustifiable homicide.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

pregnant person⁶³, and a drunk driving accident⁶⁴. Overall, a majority on both sides recognized the death of a fetus, without distinction being made to its age, as an unjustifiable homicide. While pro-life participants did not vary much on these questions (range: 87-96%), pro-choice participants did (range: 64-86%), as they were particularly less likely to view the execution of a pregnant person as a homicide of the fetus (64%)⁶⁵. Overall, the scale had a Cronbach's Alpha of .849, so the internal consistency was good.

This was an interesting finding given polling data that suggests most pro-choice participants do not recognize fetuses as humans or persons deserving of rights until later in pregnancy. Here, they were presented with situations where fetuses were of an undefined age⁶⁶, and there was little reluctance to recognize fetuses as homicide victims in non-abortive contexts. However, this could be due to the fact that the situations were non-abortive, as the lack of competing rights or interests (e.g., abortion rights) could have failed to motivate nuanced views of fetuses.

⁶³ $X^2(1, N = 1016) = 30.667, p < .001$; participants were asked to assess the following statement: "Negligently or purposefully committing malpractice in the treatment of a pregnant person with the result of causing the death of a fetus should be considered a negligent or unjustifiable homicide." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁶⁴ $X^2(1, N = 1020) = 31.972, p < .001$; participants were asked to assess the following statement: "Causing a fetus to die and a pregnant person to lose their pregnancy as the result of a drunk driving accident should be considered an unjustifiable homicide or vehicular manslaughter." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁶⁵ One implication is that some pro-choice participants do not evaluate the fetus independently from the pregnant person, but instead see it as an extension of the pregnant person.

⁶⁶ This is a limitation of the scale; it would be interesting to know whether pro-choice participants would be less likely to affirm these situations as unjustifiable homicides if the fetuses were described as 6-week fetuses or if they would be more likely if the fetuses were described as 38-week fetuses; given how widespread fetal homicide laws have become, which recognize fetuses as human victims throughout pregnancy, such differences would not be expected but the following results section in this chapter on p. 198 suggest that Americans might be more likely to view a pregnancy-ending physical attack of a pregnant person to involve the death of a human when the fetus is forty-weeks old than when the fetus is six-weeks old.

Specific Rights Implied in the Debate

In discussions of abortion, the rights to autonomy and life are the rights most frequently cited.⁶⁷ These measures assess the relevant rights outside of the context of abortion to discern whether pro-choice and pro-life Americans differ in their general view of these rights. Researchers have found that autonomy is a central aspect of morality for many⁶⁸, but perhaps it is not prized as much by pro-life participants – this could help to explain why they do not respect the right to illegal abortion access since they do not believe there is an underlying right to self-govern. Similarly, if pro-choice participants have lower respect for the right to life, this could be the underlying reason why they are less likely to restrict abortion in order to protect fetal lives.

Right to Autonomy Scale

On a 5-question ‘the right to autonomy scale’, pro-choice participants (59%) were significantly more likely to agree⁶⁹ with the statements than pro-life participants (44%). Other than an item that focused on whether the right to autonomy protects against being legally forced to report a violent attack⁷⁰, on which both sides similarly opposed such a right ($p > .05$), pro-choice participants were significantly more likely to support the right to autonomy ($p < .001$) in the following

⁶⁷ See, e.g., <https://www.kialo.com/women-have-a-right-to-bodily-autonomy-and-should-ultimately-be-able-to-make-choices-about-what-happens-to-their-bodies-5637.3> [<https://perma.cc/5GRE-6H34>].

⁶⁸ Shweder, R.A., Much, N. C., Mahapatra, M., & Park, L. (1997). The "big three" of morality (autonomy, community, divinity) and the "big three" explanations of suffering. In A. M. Brandt & P. Rozin (Eds.), *Morality and health*, p. 119-169, Florence, KY, US: Taylor & Frances/Routledge.

⁶⁹ $X^2(1, N = 1022) = 22.389, p < .001$.

⁷⁰ Participants were asked to assess the following statement: “Humans have the right to bodily autonomy, so no one should be legally required to call the police even if they have a cell phone and are witnessing an extremely violent beating,” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

scenarios: one's child requires a life-saving blood transfusion⁷¹, one has a rare blood type that can save thousands of lives⁷², legally-required vaccinations⁷³, and forced reproduction if the human race neared extinction⁷⁴. Overall, the scale had a Cronbach's Alpha of .650, so the items were

⁷¹ $\chi^2(1, N = 1021) = 22.784, p < .001$; participants were asked to assess the following statement: "Humans have the right to bodily autonomy, so no one should be legally required to donate blood to their child even if the child will die without a blood transfusion from the parent." on a scale from 1 ("Do Not Agree") to 10 ("Agree"); this question emanated from a common debate tactic, whereby pro-choice Americans seek to explain that a pregnant person should not be obligated to let a child use her body in the same way that organ donation is not mandated (see, e.g., <http://www.prolifehumanists.org/unwanted-pregnancy-forced-organ-donation/> [<https://perma.cc/UU58-GEMA>]); these results suggest that pro-life Americans do not believe autonomy would prevent a legal obligation to donate blood, but those who are pro-choice do.

⁷² $\chi^2(1, N = 1018) = 13.253, p < .001$; participants were asked to assess the following statement: "Humans have the right to bodily autonomy, so no one should be legally required to donate blood even if a person has an extremely rare type of blood that can save thousands of lives." on a scale from 1 ("Do Not Agree") to 10 ("Agree"); while people are celebrated for such selflessness and service (see, e.g., <https://www.cnn.com/2018/05/11/health/james-harrison-blood-donor-retires-trnd/index.html> [<https://perma.cc/DKK7-ZZHV>]), people on both sides support the notion that being a 'good samaritan' should not be legally required.

⁷³ $\chi^2(1, N = 1019) = 29.285, p < .001$; participants were asked to assess the following statement: "Humans have the right to bodily autonomy, so no one should be legally required to get vaccinated even if it's to protect against an incurable, deadly, and highly contagious disease." on a scale from 1 ("Do Not Agree") to 10 ("Agree"); this came into the news in 2019, as a New York County banned unvaccinated minors from public spaces, see, e.g., <https://www.cbsnews.com/news/measles-outbreak-hundreds-of-vaccines-given-since-emergency-declared-in-rockland-county/> [<https://perma.cc/V6P9-4UTE>].

⁷⁴ $\chi^2(1, N = 1018) = 70.207, p < .001$; participants were asked to assess the following statement: "Humans have the right to bodily autonomy, so no one should be legally required to give birth to a child even if the global birth rate plummets and humans become an endangered species." on a scale from 1 ("Do Not Agree") to 10 ("Agree"); there is a sense here related to Durkheim's sacred-profane dichotomy; while he provided some commentary on abortion ("[W]e are inclined to forget that there are murders of which she has a monopoly, infanticides, abortions and poisonings. Whenever homicide is within her range she commits it as often or more often than man", <http://www.bahaistudies.net/asma/suicide-durkheim.pdf> [<https://perma.cc/K6E5-97MC>]), this result might be explained through a viewing of autonomy in the realm of the sacred for pro-choice Americans; since the respect for the sacredness of autonomy (e.g., not legally requiring a person to have a child) seems to make the continued existence of the human race profane when the two are in tension, it can be said that autonomy takes on a supernatural weight that makes human survival secondary in the way that God or the sacred can be primary over all things for those who are religious; this seems particularly useful given his concern with understanding religion: "If we have taken primitive religion as the subject of our research... it is because it has

questionably related.⁷⁵ While these are unique scenarios, they suggest that both sides do not see the right to autonomy as absolute and both recognize that there are situations in which the right to autonomy is outweighed by other concerns.

Right to Life Scale

On a 5-question ‘the right to life scale’, pro-choice participants (83%) were significantly less likely to agree⁷⁶ with the statements than pro-life participants (93%). There were significant differences ($p < .001$) on items suggesting that laws should: protect unconscious humans’ right to medical life support⁷⁷, protect the right to self-defense⁷⁸, and punish all forms of homicide to pro-

seemed to us better adapted than any other to lead to an understanding of the religious nature of man, that is to say, to show us an essential and permanent aspect of humanity", p. 13, <http://home.ku.edu.tr/~mbaker/cshs503/durkheimreligiouslife.pdf> [<https://perma.cc/4L72-28T9>].

⁷⁵ This scale was an exploration of the robustness of Americans’ conception of autonomy; for pro-choice Americans, bodily autonomy means a parent should not be legally obligated to donate blood to save the life of their dying child (55%) or thousands of strangers (75%) and a person should not be legally obligated to reproduce if humans faced extinction (79%), but only few agreed that the right to autonomy prevents one from being legally required to get vaccinated (26%) or that it prevents one from being legally required to report a violent attack (31%); pro-choice Americans then recognize that autonomy in non-abortive contexts can be secondary to public health (vaccinations) and another person’s right to physical health, safety, or life (violent attack); it is also interesting to note that fewer pro-life participants believed that autonomy protects a parent from having to donate blood (39%) than a person with a rare blood type from donating to save strangers’ lives (64%); this suggests that they see a familial obligation or believe rights diminish when the interaction involves a parent and a child.

⁷⁶ $X^2 (1, N = 1022) = 23.860, p < .001$.

⁷⁷ $X^2 (1, N = 1020) = 69.580, p < .001$; participants were asked to assess the following statement: “Humans have the right to life, so laws should protect unconscious humans’ right to medical life support.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

⁷⁸ $X^2 (1, N = 1022) = 16.597, p < .001$; participants were asked to assess the following statement: “Humans have the right to life, so laws should protect the right to self-defense to allow humans to protect against others infringing on their right to life.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

protect humans' right to life⁷⁹. There were no significant differences ($p > .05$) on questions of whether laws should prevent government-run medicine from denying life-saving treatment for financial reasons⁸⁰, as both sides agreed, and the two sides were similarly disinclined⁸¹ from suggesting that laws should restrict the death penalty⁸² since it infringes on a human's right to life. Overall, the scale had a Cronbach's Alpha of .521, so the items were poorly related.

These data suggest that both sides respect the right to life, but there is lower support among Americans who identify as pro-choice. It is unclear whether lower respect for life motivates lower opposition to protecting fetal lives or if the reverse is true and their support for abortion has impacted their general conceptions of the right to life. In either case, these measures focused on the specific rights implied in the debate. The next measures focused on applied rights and how Americans balance those rights.

Applied Rights Concepts

It seems important to know whether Americans support the application of rights concepts, how they conceptualize rights, and how they would balance rights. Balancing rights is particularly important since the abortion debate can be seen as a competition of rights: a pregnant person's

⁷⁹ $X^2(1, N = 1019) = 74.513, p < .001$; participants were asked to assess the following statement: "Humans have the right to life, so laws should punish all forms of unjustifiable homicide to protect humans' right to life." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁸⁰ Participants were asked to assess the following statement: "Humans have the right to life, so laws should prevent government-run medical facilities from denying life-saving medical treatments for financial reasons." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁸¹ Participants were asked to assess the following statement: "Humans have the right to life, so laws should restrict the death penalty since it infringes on humans' right to life." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁸² Capital punishment is often discussed in the context of abortion since many believe that pro-life Americans do not have a consistent life ethic, see, e.g., <https://www.nronline.org/news/Millennials-organize-advance-consistent-life-ethic> [<https://perma.cc/V34H-Y4BP>].

liberty right to bodily autonomy and a fetus' right to life.

Human Rights

Pro-choice participants (96%) and pro-life participants (96%) similarly agreed with the statement that “humans deserve the right to life, religion, liberty, freedom, and other rights recognized as ‘human rights’”⁸³ ($p > .05$). The same proportions supported the statement that “humans are equally deserving of these rights regardless of their age, race, religion, or any other distinction”.⁸⁴ Overall, 60% of American participants stated that rights are socially constructed by humans rather than “natural, God-given, or inherent to humans”.⁸⁵ While pro-life participants were split, as only 51% believed rights are socially constructed, pro-choice participants (68%) recognized them as such.⁸⁶ Finally, participants were asked if they agree with the argument that American laws should be consistent with human rights principles⁸⁷, and pro-choice (92%) and pro-life participants (92%) were just as likely ($p > .05$) to agree.

⁸³ Participants were asked to assess the following statement: “All humans deserve the right to life, religion, liberty, freedom, and other rights recognized as “human rights.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”); this question was adapted from the United Declaration of Human Rights, <https://www.un.org/en/universal-declaration-human-rights/> [https://perma.cc/HZ5C-58KZ].

⁸⁴ Participants were asked to assess the following statement: “All humans are equally deserving of these rights regardless of their age, race, religion, or any other distinction.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”); this question was also adapted from the United Declaration of Human Rights, <https://www.un.org/en/universal-declaration-human-rights/> [https://perma.cc/HZ5C-58KZ].

⁸⁵ This conflict can be understood as the classic debate between legal positivism and natural law that was discussed in chapter 2.

⁸⁶ $\chi^2(1, N = 837) = 30.325, p < .001$; participants were asked to assess the following statement: “Are rights (a) natural, God-given, or inherent to humans, or are rights (b) socially constructed by humans?” on a scale from 1 (“Natural”) to 10 (“Socially Constructed”);

⁸⁷ Participants were asked to assess the following question: “Do you agree that American laws should be consistent with human rights principles?” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

While Americans might disagree about the basis of rights, they agree that humans deserve rights and that they are equally deserving of rights regardless of any distinction. This suggests that balancing rights should focus on comparing the rights involved and not on comparing the parties asserting the rights. While this is the implication of participants' responses, they were posed this very question to determine whether they explicitly hold such a view.

Balancing Rights

85% of Americans agreed that there is a hierarchy of rights and pro-choice participants (86%) were slightly more likely⁸⁸ to recognize a hierarchy than pro-life participants (81%). Indeed, 83% of Americans suggested that rights should be balanced based on the nature of the rights, not the parties who are involved in a collision, but pro-choice participants (81%) were less likely⁸⁹ to support this concept than pro-life participants (88%). Similarly, when presented with the following prompt: "Ritualistic human sacrifice is a human rights violation because the right to life is more important or fundamental than the right to religion, since you can have life without religion but you cannot have religion without life.", 78% of pro-choice participants agreed at a significantly

⁸⁸ $X^2(1, N = 1132) = 4.899, p < .05$; participants were asked to assess the following item: "There is a hierarchy of rights, since some rights are inherently more important than other rights. For example, a human's right to freedom is more important than another human's right to own property, which is why slavery is a human rights violation." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁸⁹ $X^2(1, N = 1132) = 8.537, p < .005$; participants were asked to assess the following statement: "In a collision between one right of a human and a different right of another human, the characteristics of each human are irrelevant. All that matters is an analysis of the rights, and it is the more important or fundamental right that should be protected. For example, in considering the collision of an infant's right to life and an adult's right to practice their religion through a human sacrifice ritual, the age of the parties is irrelevant. The ritual would be a human rights violation because the right to life is more important or fundamental than the right to practice religion." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

lower rate⁹⁰ than pro-life participants (87%).

70% of Americans, and similar rates on both sides ($p > .05$) believed that the liberty right to self-govern is limited when it conflicts with another's rights⁹¹. However, both groups were similarly less inclined ($p > .05$) to suggest that the right to life is limited when it conflicts with another's rights (49%)⁹². Indeed, 67% affirmed that "the right to life is more important or fundamental than the right to liberty, since you can have life without liberty but you cannot have liberty without life."; however, a lower rate⁹³ of pro-choice participants (62%) affirmed the statement than pro-life participants (74%). In another variation of this question, where the right to life was pitted against the right to liberty, 77% of Americans suggested the right to life should be protected; again, a lower rate⁹⁴ of pro-choice participants (69%) affirmed the statement than pro-life participants (89%).

Further, on a question that set the right to life against the right to autonomy, both sides

⁹⁰ $X^2(1, N = 837) = 13.691, p < .001$; participants were asked to assess the following statement: "Ritualistic human sacrifice is a human rights violation because the right to life is more important or fundamental than the right to religion, since you can have life without religion but you cannot have religion without life." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁹¹ Participants were asked to assess the following statement: "Think about the liberty right to self-govern, which is the right to do what you want with your life. To what extent is that right limited when it conflicts with another's rights?" on a scale from 1 ("No Limitations") to 10 ("Many Limitations").

⁹² Participants were asked to assess the following statement: "Think about the right to life, which is the right to live without anyone ending your life. To what extent is that right limited when it conflicts with another's rights?" on a scale from 1 ("No Limitations") to 10 ("Many Limitations").

⁹³ $X^2(1, N = 836) = 13.633, p < .001$; participants were asked to assess the following statement: "The right to life is more important or fundamental than the right to liberty, since you can have life without liberty but you cannot have liberty without life." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁹⁴ $X^2(1, N = 836) = 48.410, p < .001$; participants were asked to assess the following statement: "Which right should take precedence in a collision of rights?" on a scale from 1 ("Right to Liberty") to 10 ("Right to Life").

affirmed that the right to life should take precedence (71%), but there was a lower rate of support⁹⁵ among pro-choice (60%) than pro-life (85%) participants. Finally, abortion rights were pitted against fetal rights. 85% of pro-choice participants suggested that abortion rights should take precedence, and 89% of pro-life participants suggested that fetal rights should take precedence.⁹⁶

Discussion

The results in this section suggest that Americans are not divided in their support of feminism, women's rights, or their recognition of fetuses as homicide victims in non-abortive contexts. Both sides support the rights to autonomy and life, they support human rights principles, they recognize that rights should be balanced when there is a rights collision, and they generally support the right to life over the rights to liberty and autonomy when those rights conflict. However, they differ in how they resolve the collision between abortion rights and fetal rights; possibly because pro-life Americans place greater value on children and sexual morality. While this section mostly focused on deeper values and issues related to abortion, outside of the abortion context, the next section concretizes these issues by examining Americans' abortion attitudes.

Results Section 2: Americans' Abortion Attitudes

This section reports measures on specific issues related to abortion. Americans are asked

⁹⁵ $\chi^2(1, N = 922) = 63.669, p < .001$; participants were asked to assess the following statement: "Which right should take precedence in a collision of rights?" on a scale from 1 ("Right to Autonomy") to 10 ("Right to Life").

⁹⁶ $\chi^2(1, N = 925) = 399.837, p < .001$; participants were asked to assess the following statement: "Which right should take precedence in a collision of rights?" on a scale from 1 ("Abortion Rights") to 10 ("Fetal Rights").

questions related to the impact of abortion laws, their positions on abortion as well as their justifications for those positions, and their perceptions of abortion rights and fetal rights. Their interests in the debate are also assessed, as they are asked about whether they believe the debate can be resolved and whether they support possible resolutions to the debate. Altogether, this section aims to describe the nature of the disagreement on abortion by defining parties' interests and positions; while they shared many values, as shown in the previous section, this is the area in which the differences arise.

Impact of Abortion Laws

Americans are split (56%) on whether restricting abortion would stop doctors and medical professionals from performing illegal abortions, forcing pregnant people to perform self-abortions. Participants who identified as pro-choice (65%) were more likely than pro-life participants (44%) to believe⁹⁷ restrictions would have such an impact. Americans agree that restricting abortion would prevent some abortions (72%), but pro-choice participants (61%) were less likely to believe this⁹⁸ than pro-life participants (87%). Similarly, fewer pro-choice (43%) than pro-life participants (75%) suggested they would be less likely⁹⁹ to abort a pregnancy or encourage someone to have an abortion if it became illegal.

⁹⁷ $X^2(1, N = 839) = 34.069, p < .001$; participants were asked to assess the following statement: "When abortions are illegal, doctors and medical professionals do not perform illegal abortions and pregnant people are forced to perform self-abortions." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁹⁸ $X^2(1, N = 837) = 72.074, p < .001$; participants were asked to assess the following statement: "Making abortions illegal would prevent some pregnant people from aborting their pregnancies." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

⁹⁹ $X^2(1, N = 837) = 85.935, p < .001$; participants were asked to assess the following statement: "If abortion was illegal, then I would be less likely to abort a pregnancy or to encourage someone to abort theirs." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

Americans have different beliefs on how abortion laws would impact people. Pro-choice participants could be less inclined to believe restrictions would reduce abortions because they would not be less likely to have an abortion or to encourage someone to have one. This is an interesting finding since over two-thirds suggested that legally restricting abortion would force people to perform self-abortions, which means most pro-choice participants might believe that they believe self-abortions are a viable option. This could help to explain why they are opposed to restrictions, as they could support abortion as part of a harm reduction approach.¹⁰⁰

Abortion Positions

The following measures were used to get a sense of how participants think about the debate and their particular positions on the relevant legal questions. While polls typically ask simple questions about Americans' general support for, or opposition to, legal abortion, these measures were used to depict the breadth Americans' positions with specificity.

Beliefs about the Debate

In terms of the importance of their abortion positions, a higher proportion of pro-life participants (80%) felt their position on abortion is important to their overall political and ideological worldviews¹⁰¹ than pro-choice participants (62%). Pro-life participants (56%) were also twice as

¹⁰⁰ Indeed, in an item representing a utilitarian justification of abortion that was presented to participants in chapter 4, 90% of pro-choice participants suggested that abortion is justified because people will always have abortions; participants were asked to assess the following item "Legal elective abortion access is justified because people will always have abortions." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹⁰¹ $\chi^2(1, N = 837) = 29.093, p < .001$; participants were asked to assess the following item: "How important is your position on abortion to your overall political, ideological, and world views?" on a scale from 1 ("Unimportant") to 10 ("Important").

likely to feel that their family and friends would be upset if they switched their stance on abortion¹⁰² as pro-choice participants (27%). This suggests that those who use abortion as a purity test on the left¹⁰³ might be in the minority, as many pro-choice participants suggested that they are not defined by their stance on abortion.

Legal Status of Abortion

Pro-choice participants (77%) suggested that abortion should be legal in a majority of circumstances, while only 23% of pro-life participants agreed¹⁰⁴. 35% of participants thought abortion should be legal after the first trimester, but pro-choice participants felt abortion should be legal later into pregnancy than pro-life participants¹⁰⁵. In terms of the absolutists, 34% of pro-choice participants said that abortion should be legal throughout pregnancy, while only 14% of pro-life participants said that abortion should be illegal in all circumstances – 86% of pro-life participants preferred abortion laws that permitted legal abortion access for pregnancies that threaten the life of the pregnant person.

Participants were also asked about their perceptions of Americans' opinion on abortion

¹⁰² $X^2(1, N = 926) = 79.009, p < .001$; participants were asked to assess the following statement: “Do you think your friends, family, and co-workers would be upset if you switched your stance on abortion?” on a scale from 1 (“No”) to 10 (“Yes”).

¹⁰³ See, e.g., <https://slate.com/news-and-politics/2018/11/joe-donnelly-pro-life-democrats-congress-midterms.html> [<https://perma.cc/T2HR-67D3>].

¹⁰⁴ $X^2(1, N = 836) = 238.068, p < .001$; participants were asked to assess the following statement: “In how many circumstances should abortion be legal?” on a scale from 1 (“No Circumstances”) to 10 (“All Circumstances”).

¹⁰⁵ $X^2(1, N = 838) = 388.583, p < .001$; participants were asked to assess the following statement: “Which comes closest to your opinion on abortion?” and were presented the following options: “Available to a woman at any time during pregnancy”, “Only during the first six months of pregnancy”, “Only during the first three months of pregnancy”, “Only in cases of rape, incest, or to save the life of the mother”, “Only to save the life of the mother”, and “Should never be permitted under any circumstances”.

laws¹⁰⁶, and both sides had similar views ($p > .05$) as 66% of participants felt that Americans believe abortion should be legal after the first trimester. As for their perceptions of pro-choice Americans' desired abortion laws, 70% believed pro-choice Americans want abortion legal after the first trimester and 50% believed they want abortion legal at all times throughout pregnancy; pro-life participants (54%) were more likely¹⁰⁷ than pro-choice participants (46%) to believe pro-choice Americans want abortion legal throughout pregnancy.

Participants similarly presumed that pro-life Americans are more extreme in their stance on abortion, as 45% believed that pro-life Americans want abortion to be illegal in all circumstances; pro-choice participants (54%) were more likely to believe that¹⁰⁸ than pro-life participants (32%). These findings confirm previous findings¹⁰⁹ that suggest both sides believe they are more

¹⁰⁶ Participants were asked to assess the following statement: "Which comes closest to most Americans' opinion on abortion:" and were presented the following options: "Available to a woman at any time during pregnancy", "Only during the first six months of pregnancy", "Only during the first three months of pregnancy", "Only in cases of rape, incest, or to save the life of the mother", "Only to save the life of the mother", and "Should never be permitted under any circumstances".

¹⁰⁷ $X^2(5, N = 834) = 42.894, p < .001$; participants were asked to assess the following statement: "Which comes closest to most pro-choice Americans' opinion on abortion:" and were presented the following options: "Available to a woman at any time during pregnancy", "Only during the first six months of pregnancy", "Only during the first three months of pregnancy", "Only in cases of rape, incest, or to save the life of the mother", "Only to save the life of the mother", and "Should never be permitted under any circumstances".

¹⁰⁸ $X^2(5, N = 832) = 41.429, p < .001$; participants were asked to assess the following statement: "Which comes closest to most pro-life Americans' opinion on abortion:" and were presented the following options: "Available to a woman at any time during pregnancy", "Only during the first six months of pregnancy", "Only during the first three months of pregnancy", "Only in cases of rape, incest, or to save the life of the mother", "Only to save the life of the mother", and "Should never be permitted under any circumstances".

¹⁰⁹ "[P]artisans and nonpartisans alike are prone to overestimate the gap between the two sides, the gap between their own personal views and those of the other side, and especially the gap between their ideological partners and those of their ideological adversaries", Robinson, R. J., Keltner, D., Ward, A., & Ross, L. (1995). Actual versus assumed differences in construal: "Naïve realism" in intergroup perception and conflict. *Journal of Personality and Social Psychology*, 68, 404-417.

orthodox in their views than they are, which can explain why both sides might believe the debate is more intractable than it is.

Current Laws

Participants were asked what they believe *Roe v. Wade* determined. They were presented accurate (i.e., permitted elective abortions up until viability, allowed states to restrict elective abortions after viability) and inaccurate options (i.e., permitted all abortions, restricted all abortions, *Roe v. Wade* was not about abortion).¹¹⁰ 53% of participants selected at least one inaccurate option, and there was a small but significant difference¹¹¹ between pro-choice (50%) and pro-life (57%) participants.

Participants were then told that recent legislation shows that *Roe v. Wade* permits states to legalize abortion for any reason up until birth, and they were asked if this shows the Court should reconsider its decision¹¹². Americans were split (50%), but pro-choice participants (28%) were significantly less likely¹¹³ to suggest that *Roe* should be reconsidered than pro-life participants (82%). This does not mean that most pro-choice participants support legal abortion throughout

¹¹⁰ Participants were asked to assess the following statement: “What do you think *Roe v. Wade* said about U.S. abortion law? (Select all that apply)” and were presented the following options: “Permitted all abortions”, “Restricted all abortions”, “Permitted elective abortions up until viability”, “Allowed states to restrict elective abortions after viability”, and “*Roe v. Wade* was not about abortion”.

¹¹¹ $X^2(1, N = 921) = 4.464, p < .05$.

¹¹² Participants were asked to assess the following statement: “Recent legislation in New York and Virginia shows that *Roe v. Wade* permits states to legalize abortion for any reason up until birth. Given this, do you support *Roe* as it is or do you believe the Supreme Court should reconsider its decision in *Roe* to modify it in some way?” on a scale from 1 (“Keep *Roe* as it is”) to 10 (“Reconsider *Roe*”).

¹¹³ $X^2(1, N = 833) = 243.206, p < .001$.

pregnancy, but that they might value *Roe* so much that they would not want to jeopardize its authority to ensure the protection of fetuses in the third trimester in every state.

Abortion Access Scales

On a 5-question ‘broad legal access to abortion scale’, pro-choice participants (84%) were significantly more likely to support the scale’s statements¹¹⁴ than pro-life participants (32%). While participants on both sides similarly disagreed with an item¹¹⁵ that suggested laws should permit abortion through all 40 weeks of pregnancy ($p > .05$)¹¹⁶, there were significant differences ($p < .005$) on the other items that stated laws should permit: abortions of pre-viable pregnancies¹¹⁷,¹¹⁸ abortions by pregnant people under the age of 13¹¹⁹, abortions deemed necessary to save

¹¹⁴ $X^2(1, N = 183) = 48.429, p < .001$.

¹¹⁵ Participants were asked to assess the following statement: “Laws should permit abortions at all times during a pregnancy (during all 40 weeks of pregnancy).” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

¹¹⁶ Participants’ belief on when life begins was significantly different for those who supported abortion throughout pregnancy (38% believed life began at birth) than those who did not (10% believed life began at birth); while the view on when life begins is not a sole determining factor of abortion laws, further suggested by dozen participants who believe that life begins at fertilization and support absolute abortion rights, this further suggests the relationship between when life begins and Americans’ stances on abortion.

¹¹⁷ $X^2(1, N = 182) = 39.999, p < .001$; participants were asked to assess the following statement: “Laws should permit abortions of pre-viable pregnancies (during the first 24 weeks of pregnancy).” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

¹¹⁸ A comparison of participants’ responses to this item and their belief on when life begins shows that those who believe abortion should be permitted for pre-viable pregnancies were more likely to state that life begins at viability (31%) than any other point; this comparison revealed a significant difference, as those who agreed with this item were less likely to select fertilization (12%) than those who disagreed with this item (54%).

¹¹⁹ $X^2(1, N = 183) = 23.906, p < .001$; participants were asked to assess the following statement: “Laws should permit abortion by pregnant people under the age of 13.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

the life of pregnant people¹²⁰, and abortions of fetuses with genetic conditions like Down syndrome¹²¹. Overall, the scale had a Cronbach's Alpha of .698, so the internal consistency was questionable.

On a 5-question 'broad abortion restrictions scale', pro-choice participants (22%) were significantly less likely to support the scale's statements¹²² than pro-life participants (81%). There were significant differences on each item ($p < .001$), which stated that laws should restrict: medications that cause abortions or miscarriages¹²³, abortion after a fetus' heartbeat is detected in the 6th week of pregnancy¹²⁴, sex-selective abortions¹²⁵, race-selective abortions¹²⁶, and abortion throughout pregnancy¹²⁷. Overall, the scale had a Cronbach's Alpha of .877, so the internal consistency was good.

¹²⁰ $X^2(1, N = 182) = 8.475, p < .005$; participants were asked to assess the following statement: "Laws should permit an abortion deemed medically necessary to save the life of the pregnant person." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹²¹ $X^2(1, N = 182) = 11.130, p < .005$; participants were asked to assess the following statement: "Laws should permit terminating any pregnancy of a fetus with a genetic condition like Down syndrome." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹²² $X^2(1, N = 183) = 60.530, p < .001$.

¹²³ $X^2(1, N = 183) = 44.850, p < .001$; participants were asked to assess the following statement: "Laws should restrict any medication that causes abortions or miscarriages." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹²⁴ $X^2(1, N = 183) = 71.811, p < .001$; participants were asked to assess the following statement: "Laws should restrict abortion after the fetus' heartbeat is first detected (around the 6th week of pregnancy)." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹²⁵ $X^2(1, N = 182) = 26.602, p < .001$; participants were asked to assess the following statement: "Laws should restrict abortions sought because the fetus isn't the pregnant person's preferred gender." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹²⁶ $X^2(1, N = 178) = 26.189, p < .001$; participants were asked to assess the following statement: "Laws should restrict abortions sought because the fetus isn't the pregnant person's preferred race." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹²⁷ $X^2(1, N = 182) = 72.680, p < .001$; participants were asked to assess the following statement: "Laws should restrict abortion throughout pregnancy." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

Justifications for Abortion Positions

Motivated by chapter 3's analysis of online abortion discourse, these measures explored Americans' reasons for restricting abortion and their justifications for their stances on abortion. This part concludes with a measure that seeks to discretize abortion positions with direct questions that amount to an abortion position typology.

Reasons for Restrictions

Generally, Americans were split on whether laws can be solely justified as expressions of American values and morals, and pro-choice participants (41%) were more likely to find them insufficient¹²⁸ than pro-life participants (56%). Participants were presented a list of possible reasons behind restrictions (i.e., condemn abortion, control women, protect women, protect fetuses, discourage sexual freedom) and were asked to select any reasons that apply¹²⁹. They were first asked about the reason they believe it should be restricted, and pro-choice participants (10%) were less slightly but significantly less likely¹³⁰ to suggest abortion should be restricted to control women or to discourage sexual freedom than pro-life participants (18%).

Participants on both sides felt Americans used such reasons to restrict abortion, as 43% felt

¹²⁸ $X^2(1, N = 835) = 18.430, p < .001$; participants were asked to assess the following statement: "Laws can be solely justified as expressions of American values and morals." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹²⁹ Participants were asked to answer the following question: "What is the reason you believe abortion should be restricted in some circumstances? (Select all that apply)" and were presented the following options: "Condemn abortion", "Control women", "Protect women", "Protect fetuses", and "Discourage sexual freedom".

¹³⁰ $X^2(2, N = 778) = 13.395, p < .005$.

Americans believe abortion should be restricted to control women or to discourage sexual freedom¹³¹ – however, pro-choice participants (53%) were more likely¹³² than pro-life participants (30%) to believe Americans have such motivations. This was also true for their perceptions of pro-life Americans’ reasons for restrictions, as 41% of participants felt pro-life Americans believe abortion should be restricted to control women or to discourage sexual freedom¹³³, but pro-choice participants (53%) were more likely¹³⁴ than pro-life participants (25%) to believe Americans have such motivations. Thus, people on both sides presume that Americans, and specifically pro-life Americans, restrict abortion for reasons with negative connotations; however, 86% of participants suggested they believe abortion should be restricted to protect women, protect fetuses, and to condemn abortion.

When asked why there should be a legal exception that permits abortions when pregnancies result from rape or incest, pro-choice participants (73%) were more likely¹³⁵ to suggest that the

¹³¹ Participants were asked to answer the following question: “Why do Americans believe abortion should be restricted in some circumstances? (Select all that apply)” and were presented the following options: “Condemn abortion”, “Control women”, “Protect women”, “Protect fetuses”, and “Discourage sexual freedom”.

¹³² $X^2(2, N = 834) = 44.839, p < .001$.

¹³³ Participants were asked to answer the following question: “Why do pro-life people believe abortion should be restricted in some circumstances? (Select all that apply)” and were presented the following options: “Condemn abortion”, “Control women”, “Protect women”, “Protect fetuses”, and “Discourage sexual freedom”.

¹³⁴ $X^2(2, N = 837) = 71.664, p < .001$.

¹³⁵ $X^2(2, N = 702) = 47.070, p < .001$; participants were asked to answer the following question: “If you believe abortion laws should have a legal exception that permits abortions of pregnancies that resulted from rape or incest, then what is that exception based on?” and were presented the following options: “Since they did not consent to sex, they deserve the right to abort a resulting pregnancy”, “An unwanted pregnancy that resulted from nonconsensual sex can put the pregnant person at a greater risk of mental illness, so they deserve the right to protect their mental health”, “An unwanted pregnancy that resulted from nonconsensual sex can put the pregnant person at a greater risk of suicide, so they deserve the right to reduce their risk of death”, and “Other”; those who responded “Other” were excluded from analyses as outliers.

exception is based on a right to abort a pregnancy that resulted from nonconsensual sex, while pro-life participants were split on whether there is such a right (50%) or if it is justified because that kind of pregnancy could put a pregnant person's mental health at risk or put them at a greater risk of suicide (50%).

Focusing on a pregnant person's mental health, participants were posed the following: "If a person is 38 weeks pregnant breaks up with the father of the child and becomes depressed at the thought of sharing custody with their ex, they should be able to get a legal abortion to protect their mental health."¹³⁶ While only 27% of Americans agreed with such an abortion, pro-choice participants (36%) were more likely to support it¹³⁷ than pro-life participants (15%).

Abortion Rights

Participants were asked about the rights they believe are represented in the abortion debate. In terms of pro-life beliefs¹³⁸, 90% of participants suggested that they represent fetal rights, 25% suggested they represent states' rights, and 25% suggested they represent women's rights. While there were no differences ($p > .05$) between pro-choice and pro-life participants on fetal rights and states' rights, pro-choice participants (18%) were less likely to suggest that pro-life beliefs represent women's rights¹³⁹ than pro-life participants (35%).

¹³⁶ Participants were asked to assess that item on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹³⁷ $X^2(1, N = 838) = 46.510, p < .001$.

¹³⁸ Participants were asked to answer the following question: "Which rights are represented by pro-life beliefs? (Select all that apply)" and were presented the following options: "States", "Fetuses", and "Women".

¹³⁹ $X^2(1, N = 835) = 32.356, p < .001$.

As for the rights represented by pro-choice beliefs¹⁴⁰, 18% suggested that they represent fetal rights, 26% suggested that they represent states' rights, and 93% suggested they represent women's rights. While there was no difference ($p > .05$) between pro-choice and pro-life participants on fetal rights, there were such differences with regards to states¹⁴¹ and women¹⁴²; while pro-choice participants (22%) were less likely to suggest pro-choice beliefs represent states' rights than pro-life participants (32%), pro-choice participants (96%) were more likely to suggest they represent women's rights than pro-life participants (88%).

Participants were asked about the general right that the specific right to abortion represents¹⁴³. Overall, 50% of participants suggested that abortion rights are grounded in the rights to liberty, privacy, and the right to self-govern. 25% suggested that the right to abortion is the right to freedom, and 25% suggested it is the right to life¹⁴⁴.

Perceptions of Fetuses

The previous results section showed that both sides agree that fetuses are homicide victims in non-abortive contexts, so these measures focused on participants' perceptions of fetuses and whether they recognize fetuses as humans at different points in development.

¹⁴⁰ Participants were asked to answer the following question: "Which rights are represented by pro-choice beliefs? (Select all that apply)" and were presented the following options: "States", "Fetuses", and "Women".

¹⁴¹ $X^2(1, N = 826) = 9.822, p < .005$.

¹⁴² $X^2(1, N = 826) = 17.993, p < .001$.

¹⁴³ Participants were asked to answer the following question: "When you think about the right to abortion, what is the general right in which the right to abortion is most strongly grounded?" and were presented the following options: "The right to freedom", "The right to liberty", "The right to life", "The right to privacy", and "The right to self-governance".

¹⁴⁴ However, this question might have been misinterpreted by some pro-life participants, as they were much more likely (42%) than pro-choice participants (14%) to recognize abortion rights as the right to life.

Classification of Fetuses

Most Americans (67%) suggested that the humanity of fetuses is important to their stance on abortion, but pro-choice participants (49%) were less likely¹⁴⁵ to suggest it is important than pro-life participants (92%). Participants were asked if the Equal Protection Clause suggests that a 40-week fetus deserves the constitutional recognition that a 23-week newborn enjoys since the former is more developed and better able to survive on its own. Again, most Americans (65%) suggested that 40-week fetuses deserve such recognition, but pro-choice participants (53%) were less likely to agree¹⁴⁶ to than pro-life participants (83%).

Legal Status of Fetuses

Participants were presented a definition of homicide¹⁴⁷ and asked if the causing of the death of a fetus is a homicide. Pro-choice participants (15%) were significantly less likely to agree¹⁴⁸

¹⁴⁵ $X^2(1, N = 838) = 169.514, p < .001$; participants were asked to assess the following statement: "How important is the humanity of fetuses to your position on abortion?" on a scale from 1 ("Unimportant") to 10 ("Important").

¹⁴⁶ $X^2(1, N = 827) = 82.008, p < .001$; participants were asked to assess the following statement: "Some have argued that it might be unconstitutional to legally recognize a 23-week newborn that weighs 17 ounces, which needs a respirator to survive, as a person under the constitution but not legally recognize a 40-week fetus that weighs 8 pounds as a person since it is viable and can survive outside of the womb. Does the Fourteenth Amendment's Equal Protection Clause, which says that all persons deserve equal protection under the law, require the legal recognition of a viable 40-week fetus under the U.S. Constitution?" on a scale from 1 ("No") to 10 ("Yes").

¹⁴⁷ Participants were asked to assess the following statement: "According to Cornell Law School's Legal Information Institute, "Homicide is when one human being causes the death of another. Not all homicide is murder, as some killings are manslaughter, and some are lawful, such as when justified by an affirmative defense, like insanity or self-defense." Do you agree with the argument that causing the death of any fetus, in any situation, is a homicide?" on a scale from 1 ("Do Not Agree") to 10 ("Agree"); citation available at: <https://www.law.cornell.edu/wex/homicide> [<https://perma.cc/XSB2-4PBA>].

¹⁴⁸ $X^2(1, N = 839) = 305.552, p < .001$.

than pro-life participants (75%).¹⁴⁹ Similarly, both sides disagreed on whether an abortion is a homicide¹⁵⁰, as pro-choice participants (12%) were less likely to recognize it as such than pro-life participants (79%). While few pro-life participants (42%) recognized an accidental trip of a pregnant person that causes the death of a fetus as a homicide, they were significantly more likely¹⁵¹ to recognize it as such than pro-choice participants (20%).

Participants were presented eight questions¹⁵² with four different situations (i.e., miscarriage, physical attack of a pregnant person, legal abortion, illegal abortion) and asked if a human has died in those situations. Each situation was presented twice, once entailing the death of a 6-week fetus and once entailing the death of a 40-week fetus. Pro-choice participants (range: 22-72%) were significantly less likely ($p < .001$) to agree that a human had died in those situations than pro-life participants (range: 78-95%).

¹⁴⁹ Since pro-choice participants recognized fetuses as the victims of an unjustifiable homicide in the rights of fetuses scale on p. 175-176, it is surprising that they were so disinclined from recognizing the causing of a death of a fetus as a homicide.

¹⁵⁰ $X^2(1, N = 836) = 381.902, p < .001$; participants were asked to assess the following statement: “Do you agree with the argument that, regardless of whether or not an abortion is lawful, an abortion is a homicide?” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

¹⁵¹ $X^2(1, N = 837) = 53.498, p < .001$; participants were asked to assess the following statement: “Even if it isn't charged as a crime, the accidentally trip of a pregnant person down a flight of stairs that results in the death of a fetus is an act that resulted in a homicide.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

¹⁵² Each statement was presented with a scale from 1 (“Do Not Agree”) to 10 (“Agree”): “A pregnant person has a miscarriage and their 40-week fetus dies. A human has died.”, “A pregnant person is attacked and their 40-week fetus dies. A human has died.”, “A pregnant person has a legal abortion and their 40-week fetus dies. A human has died.”, “A pregnant person has an illegal abortion and their 40-week fetus dies. A human has died.”, “A pregnant person has a miscarriage and their 6-week fetus dies. A human has died.”, “A pregnant person is attacked and their 6-week fetus dies. A human has died.”, “A pregnant person has a legal abortion and their 6-week fetus dies. A human has died.”, and “A pregnant person has an illegal abortion and their 6-week fetus dies. A human has died.”; since the questions were presented in that order, participants might have answered strategically so they would not be inconsistent in recognizing a fetus as a human in a non-abortive context but not in an abortive context.

While 72% of pro-choice participants suggested the physical attack of a pregnant person that ends the life of a 40-week fetus results in the death of a human, fewer recognized a legal abortion of a 40-week fetus as a human death (64%). Pro-choice participants were much less likely to recognize a 6-week fetus' death in an attack (29%) and a legal abortion (22%) as the death of a human.

Altogether, this section's measures suggest that both sides are divided in how they perceive fetuses, and there is some suggestion that their views do not differ between abortive and non-abortive contexts. However, it is important to note that these items were presented simultaneously and in succession, so the inconsistency between recognizing a 40-week fetus death in an attack and not in an abortion would have been more salient. When participants were presented items in the 'rights of fetuses scale' in the last section, the questions' placement was less conspicuously tied to such a comparison of perceptions of fetuses in abortive and non-abortive contexts. Thus, these data should be considered with these issues in mind.

Resolving the Debate

Given these differences, there might be fundamental areas of disagreement that would prevent both sides from developing similar positions on abortion. These measures were used to assess whether Americans have similar views of why they disagree on abortion, how likely it is that they could agree, and whether they support possible resolutions.

Reasons behind the debate

Participants were asked if they agree that the abortion debate centers on the question of

when a fetus' right to life outweighs a pregnant person's right to liberty¹⁵³. 68% of participants agreed, but pro-choice participants (64%) were less likely to agree¹⁵⁴ than pro-life participants (75%). Participants were asked if America's liberal abortion laws were part of the reason the debate is so divisive and most agreed (63%)¹⁵⁵. Pro-choice participants were split (50%), while most pro-life participants (78%) agreed.¹⁵⁶ Participants were also informed that most European countries limit abortion after 12 weeks, and they were asked if that is a reasonable compromise that respects abortion rights¹⁵⁷. Participants agreed (58%), and pro-life participants (62%) were more likely¹⁵⁸ than pro-choice participants (54%) to believe abortion laws that restrict access after 12 weeks strike a reasonable compromise.

¹⁵³ Participants were asked to assess the following statement: "An article in the Washington Post claims: 'The fierce, unabating abortion controversy in this country is not over the moment one biological life commences. It's over the tragic moment when two rights conflict. It's not about whether a fetus has a claim to protection. It's about whether the fetus' claim is greater than the women's' Do you agree that the abortion debate centers on the question of when a fetus' right to life outweighs a pregnant person's right to liberty?'" on a scale from 1 ("Do Not Agree") to 10 ("Agree"); however, it is important to note that the question entailed a reference to the article and source, so support might have been higher among those who lend credibility to the Washington Post and lower among those who do not see the publication as credible.

¹⁵⁴ $X^2(1, N = 838) = 13.143, p < .001$.

¹⁵⁵ Participants were asked to assess the following statement: "There are 59 countries that allow abortion 'without restriction as to reason,' or 'elective,' or 'abortion on demand.'... Only seven of the 59 countries allow elective abortions after 20 weeks, the group found: Canada, China, Netherlands, North Korea, Singapore, the United States and Vietnam.' The fact that America has some of the most liberal abortion laws in the world is part of the reason why there is such an intense national abortion controversy in America." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹⁵⁶ $X^2(1, N = 836) = 73.866, p < .001$.

¹⁵⁷ Participants were asked to assess the following statement: "Of the 36 countries in Europe that allow abortion on request, the vast majority impose time limits of around 12 weeks.' Do you feel those countries struck an unreasonable compromise that unjustifiably limits the rights of pregnant people or that it is a compromise that reasonably respects abortion rights?" on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹⁵⁸ $X^2(1, N = 838) = 5.050, p < .05$.

Likelihood of Resolution

As the debate is currently situated, few participants (14%) felt the national abortion controversy is likely to end¹⁵⁹; however, pro-choice participants (7%) are even less¹⁶⁰ optimistic than pro-life participants (23%). A greater proportion of participants believed the debate could be resolved if both sides work together on a mutually-beneficial compromise¹⁶¹, but they are still in the minority (29%). Again, pro-choice participants (24%) are less optimistic¹⁶² than pro-life participants (36%).

Participants were presented some data that suggests 70% of Americans believe abortion laws should balance the interests of the fetus against those of pregnant people, and they were asked if that suggests the national abortion controversy can be reduced or resolved¹⁶³. Again, participants were not optimistic (32%), and pro-choice participants (27%) were less optimistic¹⁶⁴ than pro-life participants (39%). Despite their pessimism, participants on both sides (71%) were similarly likely

¹⁵⁹ Participants were asked to assess the following statement: “As the debate is currently situated, how likely is it that the national abortion controversy can end?” on a scale from 1 (“Unlikely”) to 10 (“Likely”).

¹⁶⁰ $X^2(1, N = 838) = 46.080, p < .001$.

¹⁶¹ Participants were asked to assess the following statement: “If pro-choice and pro-life Americans agreed to work on a mutually-beneficial compromise, how likely is it that the national abortion controversy can end?” on a scale from 1 (“Unlikely”) to 10 (“Likely”).

¹⁶² $X^2(1, N = 837) = 14.060, p < .001$.

¹⁶³ Participants were asked to assess the following item: “Recent polls suggest 26% of pro-life Americans believe all abortions should be illegal and 21% of pro-choice Americans believe all abortions should be legal. 70% of Americans believe abortion laws should balance the interests of the fetus against those of pregnant people and craft laws that restrict some abortions and permit other ones. In fact, 80% of Americans believe abortion should be illegal after the first trimester. In light of this, how likely is it that the national controversy on abortion could end through compromise, so it just becomes a minor political issue?” on a scale from 1 (“Unlikely”) to 10 (“Likely”).

¹⁶⁴ $X^2(1, N = 837) = 12.899, p < .001$.

($p > .05$) to suggest that it would be preferable¹⁶⁵ if pro-choice and pro-life Americans found a mutually-beneficial compromise to end the national abortion controversy.

How it can be resolved

Both sides disagreed on how the debate can be resolved, in terms of whether abortion laws need to become more restrictive¹⁶⁶. Pro-choice participants (57%) believed laws need to become more permissive, while pro-life participants (80%) believed laws need to become more restrictive¹⁶⁷.¹⁶⁸ Both sides were even more split on whether resolution requires that abortion laws recognize fetuses as humans¹⁶⁹, as a lower proportion¹⁷⁰ of pro-choice participants (23%) agreed than pro-life participants (86%).

Possible Resolutions

Given Americans' pessimism, it seems unlikely that they could share similar abortion positions. However, participants were posed possible compromises to assess this directly. They were

¹⁶⁵ Participants were asked to assess the following statement: "It would be preferable if pro-choice and pro-life Americans found a mutually-beneficial compromise to end the national abortion controversy." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹⁶⁶ Participants were asked to assess the following statement: "In order to end the U.S. abortion debate, do abortion laws need to become more restrictive or more permissive?" on a scale from 1 ("More Restrictive") to 10 ("More Permissive").

¹⁶⁷ $X^2(1, N = 836) = 117.304, p < .001$.

¹⁶⁸ As will be reported in chapter 6 on p. 276, participants in mediated discussions were posed the same question and those who identified as pro-choice suggested that abortion access needs to be expanded to reduce or resolve the controversy.

¹⁶⁹ Participants were asked to assess the following statement: "In order to end the U.S. abortion debate, abortion laws need to recognize fetuses as humans deserving of rights or legal protections." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹⁷⁰ $X^2(1, N = 924) = 329.651, p < .001$.

presented simple compromises that focused on resetting the point at which abortion should be legal and comprehensive reforms that would also address tangential issues in the debate.

Simple compromise

Participants were presented four compromises that varied on the legality of elective abortion while holding constant the legality of therapeutic abortions. Pro-choice participants (21%) were less likely¹⁷¹ to support a compromise¹⁷² that restricted elective abortion throughout pregnancy than pro-life participants (48%). Pro-choice participants (36%) were similarly less likely¹⁷³ than pro-life participants (43%) to support a compromise that restricted elective abortion when a fetus' heart first beats in the 6th week of pregnancy¹⁷⁴. When a compromise permits elective abortion after the first trimester¹⁷⁵, support flips as pro-choice participants (47%) are more likely¹⁷⁶ to support it than pro-life participants (29%). Similarly, when a compromise permits elective abortion after the second trimester¹⁷⁷, pro-choice participants (53%) are more likely¹⁷⁸ to support it than

¹⁷¹ $X^2(1, N = 834) = 67.430, p < .001$.

¹⁷² Participants were asked to assess the following statement: "I would support a compromise that made all therapeutic abortions legal and elective abortion illegal throughout pregnancy." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹⁷³ $X^2(1, N = 829) = 4.062, p < .05$.

¹⁷⁴ Participants were asked to assess the following statement: "I would support a compromise that made all therapeutic abortions legal and elective abortion legal up until the fetal heartbeat (6th week)." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹⁷⁵ Participants were asked to assess the following statement: "I would support a compromise that made all therapeutic abortions legal and elective abortion legal in the first trimester (through the 13th week)." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹⁷⁶ $X^2(1, N = 834) = 25.493, p < .001$.

¹⁷⁷ Participants were asked to assess the following statement: "I would support a compromise that made all therapeutic abortions legal and elective abortion legal up until viability (through the 24th week)." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

¹⁷⁸ $X^2(1, N = 829) = 82.139, p < .001$.

pro-life participants (22%).

Comprehensive Abortion Reform

“Suppose that legislators agree to comprehensive abortion reform that (1) provides financial assistance and health insurance to pregnant people, (2) streamlines and subsidizes the adoption process, (3) mandates sex education, (4) maximizes the access and affordability of contraceptives, (5) permits abortions for special circumstances such as pregnancies caused by rape and incest, pregnancies of preteens, ectopic pregnancies, and life-threatening pregnancies, and (6) restricts elective abortions at all points during pregnancy. Would you support such comprehensive reproduction reform?”¹⁷⁹

Pro-choice participants (32%) were less likely¹⁸⁰ to support such reform than pro-life participants (64%). Participants were also presented a similar prompt that only varied in the sixth point, as this proposal restricted elective abortions after the first trimester¹⁸¹. This proposal was supported by a slight majority of participants (54%), and both sides supported it at a similar rate ($p > .05$).

Discussion

Americans have very different perceptions of fetuses, the formal rights involved in the

¹⁷⁹ Participants were asked to respond on a scale from 1 (“No”) to 10 (“Yes”).

¹⁸⁰ $\chi^2(1, N = 833) = 87.756, p < .001$.

¹⁸¹ Participants were asked to assess the following item: “Suppose that legislators agree to comprehensive abortion reform that (1) provides financial assistance and health insurance to pregnant people, (2) streamlines and subsidizes the adoption process, (3) mandates sex education, (4) maximizes the access and affordability of contraceptives, (5) permits abortions for special circumstances such as pregnancies caused by rape and incest, pregnancies of preteens, ectopic pregnancies, and life-threatening pregnancies, and (6) restricts elective abortions after the first trimester of pregnancy. Would you support such comprehensive reproduction reform?” on a scale from 1 (“No”) to 10 (“Yes”).

debate, and they do not show a willingness to compromise. Compared to their deeply-held values, both sides disagree with more concrete aspects of the debate like their interests and positions. If Americans could focus on their shared values and address confusion – with regards to their beliefs that the debate is more polarized than it is – then they might be able to find common ground in their positions. However, there is still the issue of perceptions of fetuses. The next section reports measures used to drill down on this issue in the abortion debate.

Results Section 3: Americans' Beliefs about When Life Begins

This section focuses on the role that ‘when life begins’ plays in the U.S. abortion debate. It presents participants’ responses to questions on how they perceive the question, whether Americans share a common understanding of the question, how Americans perceive specific stances on when life begins, and what kind of impact those stances could have if they were propagated. Altogether, this section explores ‘when life begins’ as a factual dispute and assesses whether it divides Americans and drives differences in their abortion attitudes.

Perceptions of When Life Begins

82% of participants believe that "When does a human's life begin?"¹⁸² is an important ques-

¹⁸² Participants were presented the following question: “There are two senses in which one can understand "When does a human's life begin?". One is descriptive because it describes when a zygote/embryo/fetus should first be classified as a human and the other is normative because it is an evaluation of when a human zygote/embryo/fetus deserves rights or legal protections. When you hear "When does a human's life begin?", in which sense do you understand the question?"; a slight majority of participants (53%) suggested they hold a descriptive view, and there were no differences ($p > .05$) based on abortion identity; this was a surprising result given participants’ selection of biologists as the group most qualified to determine when a human’s life begins, which suggests they hold a descriptive view even though they report being more split between descriptive and normative views.

tion in the U.S. abortion debate¹⁸³. However, a lower proportion¹⁸⁴ of pro-choice participants (75%) believe it is important than pro-life participants (94%). Similarly, 78% believe that "When is the life of a human zygote/embryo/fetus worthy of legal protection?" is an important question in the U.S. abortion debate¹⁸⁵, and pro-choice participants (70%) were also less likely¹⁸⁶ to recognize it as important than pro-life participants (90%). Further, 79% agree that "When does a fetus' right to life outweigh a woman's right to have an abortion?" is an important issue in the debate¹⁸⁷. Again, participants who are pro-choice (74%) were more likely to agree it is important¹⁸⁸ than pro-life participants (84%).

While this was not a formal scale, the three were compared to determine their relatedness. Overall, the three questions had a Cronbach's Alpha of .708, so the internal consistency was acceptable. It suggests that, for most, the abortion debate entails fetal rights, and those rights are recognized once a human's life begins. Indeed, in a direct measure, 93% of participants affirmed that once a human's life is worthy of legal protection once it begins¹⁸⁹; though, participants who identified as pro-choice (89%) were less likely¹⁹⁰ to affirm that view than pro-life participants

¹⁸³ Participants were asked to assess the following item: "How important is the question "When does a human's life begin?" in the U.S. Abortion Debate?" on a scale from 1 ("Unimportant") to 10 ("Important").

¹⁸⁴ $X^2(1, N = 3859) = 231.359, p < .001$.

¹⁸⁵ Participants were asked to assess the following item: "How important is the question "When is the life of a human zygote/embryo/fetus worthy of legal protection?" in the U.S. Abortion Debate?" on a scale from 1 ("Unimportant") to 10 ("Important").

¹⁸⁶ $X^2(1, N = 835) = 48.866, p < .001$.

¹⁸⁷ Participants were asked to assess the following item: "How important is the question "When does a fetus' right to life outweigh a woman's right to have an abortion?" in the U.S. Abortion Debate?" on a scale from 1 ("Unimportant") to 10 ("Important").

¹⁸⁸ $X^2(1, N = 838) = 11.604, p < .005$.

¹⁸⁹ Participants were asked to assess the following item: "Once a human's life begins, is it worthy of legal protection?" on a scale from 1 ("No") to 10 ("Yes").

¹⁹⁰ $X^2(1, N = 838) = 24.469, p < .001$.

(98%). Finally, the majority of participants (76%) suggested that Americans deserve to know when a human's life begins so they can be informed in their abortion positions and decisions¹⁹¹; but fewer¹⁹² pro-choice participants (69%) felt this was important than pro-life participants (89%).

Beliefs on When Life Begins

Participants were asked when a human's life begins¹⁹³, and pro-choice participants (51%) were more likely¹⁹⁴ to suggest a fetus is not a human until viability than pro-life participants (6%). Similarly, more pro-choice participants (55%) suggested a fetus is worthy of protection after viability¹⁹⁵ than pro-life participants (6%).¹⁹⁶

Participants were also presented a quote from a Supreme Court Justice (“The history of the [Fourteenth] amendment proves that the people were told that its purpose was to protect weak and helpless human beings”) and asked when a fetus would deserve constitutional protection, even if

¹⁹¹ Participants were asked to assess the following item: “Americans deserve to know when a human's life begins so they can be informed in their abortion positions and decisions.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

¹⁹² $X^2(1, N = 3878) = 216.440, p < .001$.

¹⁹³ Participants were asked to assess the following item: “When does a human's life begin?” and were presented the following options: “The moment of conception/fertilization”, “The moment a fetus' heart beats”, “The moment a fetus shows brain activity”, “The moment a fetus can feel pain”, “The moment a fetus can be viable outside the womb”, “The moment a fetus is born”, and “Other”; those who responded “Other” were excluded from analyses as outliers.

¹⁹⁴ $X^2(5, N = 2076) = 828.562, p < .001$.

¹⁹⁵ $X^2(5, N = 2072) = 875.063, p < .001$.

¹⁹⁶ Participants were asked to assess the following item: “When is the life of a human zygote/embryo/fetus worthy of legal protection?” and were presented the following options: “The moment of conception/fertilization”, “The moment a fetus' heart beats”, “The moment a fetus shows brain activity”, “The moment a fetus can feel pain”, “The moment a fetus can be viable outside the womb”, “The moment a fetus is born”, and “Other”; those who responded “Other” were excluded from analyses as outliers.

it would not necessitate abortion restriction¹⁹⁷. In this context, more pro-choice participants (57%) suggested fetuses were not humans deserving of constitutional rights until viability than pro-life participants (12%)¹⁹⁸, but 84% of Americans – 76% of pro-choice and 95% of pro-life participants – believed that fetuses deserve constitutional rights at some point in pregnancy. Thus, the notion of when life begins seems highly connected to the notion of when a fetus is worthy of legal protection and constitutional protections. It is then important to ascertain whether the two sides could find common ground in their perceptions of when life begins.

Resolving the Factual Dispute

Two questions were used to understand whom Americans believed was most qualified to determine when life begins and why they held their beliefs. Inspired by Justice Blackmun’s list in *Roe v. Wade*¹⁹⁹, the mock abortion mediations were used to develop a list of five possible author-

¹⁹⁷ Participants were asked to assess the following item: “In a Supreme Court case, a Justice described the Fourteenth Amendment’s purpose: “The history of the amendment proves that the people were told that its purpose was to protect weak and helpless human beings’. Based on this understanding of the Fourteenth Amendment, when do fetuses deserve protection under the Fourteenth Amendment? Note: this would not mean that abortions would be illegal at this point, just that fetuses would have protectable rights that need to be considered.” and were presented the following options: “The moment of conception/fertilization”, “The moment a fetus’ heart beats”, “The moment a fetus shows brain activity”, “The moment a fetus can feel pain”, “The moment a fetus can be viable outside the womb”, “The moment a fetus is born”, and “Other”; those who responded “Other” were excluded from analyses as outliers.

¹⁹⁸ $\chi^2(5, N = 828) = 244.520, p < .001$.

¹⁹⁹ Justice Harry Blackmun suggested that “those trained in the respective disciplines of medicine, philosophy, and theology” were the experts whose consensus on when life begins would be relevant to the Court’s opinion since “the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer”, *Roe v. Wade*, 410 U.S. 113, 159 (1973).

ities: biologists, philosophers, religious leaders, Supreme Court Justices, and voters. This question²⁰⁰ was important since it would provide a window into the way they perceive the question – if one selects biologists, then they likely see it as a biological question; if they select religious leaders, they likely see it as a theological question. However, such an inference could not be assumed without asking participants directly. Thus, in the second question, participants were asked a follow-up question aimed at understanding why they made their choice.

80% of participants selected biologists as the group most qualified to determine when a human's life begins²⁰¹, and pro-choice participants (86%) were more likely²⁰² to select them than pro-life participants (69%). Participants were asked a follow-up essay question, as to why the group is most qualified²⁰³, and those who selected biologists suggested that it was because biologists are objective experts in the study of life (91%); there was a small but significant difference²⁰⁴ between pro-choice (93%) and pro-life participants (88%). Overall, a majority of participants (64%) felt that a consensus of experts would agree on when life begins²⁰⁵, but pro-choice participants (61%) were less likely to agree²⁰⁶ than pro-life participants (71%). However, the two sides

²⁰⁰ Participants were asked to assess the following item: “Which group is most qualified to answer the question “When does a human's life begin?”” and were presented the following options: “Biologists”, “Philosophers”, “Religious Leaders”, “Supreme Court Justices”, and “Voters”.

²⁰¹ Participants were asked this question in all five versions of the survey and a majority of participants (range: 76-81%) selected biologists in each survey.

²⁰² $\chi^2(4, N = 3883) = 360.920, p < .001$.

²⁰³ Participants were presented the following essay prompt “Why do you think they are most qualified?” and the responses of those who had selected biologists as the group most qualified were coded.

²⁰⁴ $\chi^2(1, N = 1808) = 11.643, p < .005$.

²⁰⁵ Participants were asked to assess the following item: “If that group was surveyed, how many of them would agree on when a human's life begins?” on a scale from 1 (“Few Would Agree”) to 10 (“Most Would Agree”).

²⁰⁶ $\chi^2(1, N = 1149) = 12.337, p < .001$.

disagreed on whether such a consensus would strengthen the pro-choice or pro-life side of the debate²⁰⁷, as pro-choice participants (73%) believe it would support their side and pro-life participants (79%) believe it would support theirs.²⁰⁸

Participants were also asked to anticipate when most biologists would say that, from a biological perspective, when a human's life begins²⁰⁹. Pro-choice participants selected significantly later points²¹⁰ and were less likely (23%) to suggest that biologists believe a biological human's life begins at fertilization than pro-life participants (54%); overall, in terms of viability, 58% of pro-choice participants suggested biologists believe a human's life begins before viability, compared to 91% of pro-life participants.

Participants were then asked when a human's life begins from a biological perspective, based on their understanding of biology²¹¹. Pro-choice participants selected significantly later points²¹² and were less likely (23%) to suggest that a biological human's life begins at fertilization

²⁰⁷ Participants were asked to assess the following item: "If there was a consensus, do you think that finding would strengthen the pro-choice or pro-life side of the U.S. Abortion Debate?" on a scale from 1 ("Pro-Choice") to 10 ("Pro-Life").

²⁰⁸ $\chi^2 (1, N = 1979) = 489.524, p < .001$.

²⁰⁹ Participants were asked to assess the following item: "If biologists were asked, "From a biological perspective, when does a human's life begin?", what would most biologists select as the point at which a human's life begins?" and were presented the following options: "The moment of conception/fertilization", "The moment a fetus' heart beats", "The moment a fetus shows brain activity", "The moment a fetus can feel pain", "The moment a fetus can be viable outside the womb", "The moment a fetus is born", and "Other"; those who responded "Other" were excluded from analyses as outliers.

²¹⁰ $\chi^2 (5, N = 828) = 148.513, p < .001$.

²¹¹ Participants were asked to assess the following item: "Based on your understanding of biology, from a biological perspective, when does a human's life begin?" and were presented the following options: "The moment of conception/fertilization", "The moment a fetus' heart beats", "The moment a fetus shows brain activity", "The moment a fetus can feel pain", "The moment a fetus can be viable outside the womb", "The moment a fetus is born", and "Other"; those who responded "Other" were excluded from analyses as outliers.

²¹² $\chi^2 (5, N = 830) = 170.127, p < .001$.

than pro-life participants (59%); overall, in terms of viability, 57% of pro-choice participants suggested a human's life begins before viability, compared to 92% of pro-life participants.

Comparing these two findings, participants believe that their view on the ontogenetic starting point of a human's life is consistent with biologists' views. It is also important to note that these data suggest a minority of Americans believe that a fetus is a biological human at fertilization (38%), and participants who identify as pro-choice (23%) are even less likely than those who are pro-life (59%). This finding was consistent with the poll that reported 35% of pro-choice Americans believed the statement "human life begins at conception" is a biological and scientific fact compared to 59% of pro-life Americans.²¹³

While many are likely unaware of the developmental stages of the human life cycle, many likely use extrabiological concepts in biologically classifying fetuses. They might use viability or birth because they believe a fetus needs to be able to survive outside of the womb or needs to be outside of the womb, to be biologically classified as a human. It is possible that they would quickly change their opinions after they learn biologists' standards for classifying a fetus as a biological human, but they might disagree with biologists' methods and continue defending their views for fear of losing abortion rights.

Specific Views on When Life Begins

Participants were presented particular views on when a human's life begins and asked if they assumed a person would be more pro-choice or pro-life if they had made that claim. Participants were similarly likely ($p > .05$) to suggest that the view that fertilization is the starting point

²¹³ <http://www.kofc.org/en/resources/communications/abortion-limits-favored.pdf> [<https://perma.cc/F6AC-H94V>].

of a human's life is more associated with pro-life beliefs²¹⁴ (91%). Both sides suggested that viability is more associated with pro-choice beliefs²¹⁵ (73%), and participants who identified as pro-choice (76%) were more likely²¹⁶ to make this connection than those who are pro-life (68%). Lastly, both sides suggested that birth is associated with pro-choice beliefs²¹⁷ (88%) and pro-choice participants (93%) made that association at a higher rate²¹⁸ than pro-life participants (82%).

Participants were also presented with the view “human life begins at conception” and asked if it was more of a biological and scientific fact or a philosophical or religious belief²¹⁹. 60% suggested the view is a philosophical or religious belief, and a higher proportion²²⁰ of pro-choice participants (73%) believed this than pro-life participants (43%). The phrasing was slightly altered, and participants were asked to assess whether “a human's life begins at fertilization” with the same metric²²¹. Participants were split, as 51% suggested it is a philosophical or religious belief, but pro-

²¹⁴ Participants were asked to assess the following item: “If someone claims that a human's life begins at fertilization, would you assume they were more pro-choice or pro-life?” on a scale from 1 (“Pro-Choice”) to 10 (“Pro-Life”).

²¹⁵ Participants were asked to assess the following item: “If someone claims that a human's life begins at viability, would you assume they were more pro-choice or pro-life?” on a scale from 1 (“Pro-Choice”) to 10 (“Pro-Life”).

²¹⁶ $X^2(1, N = 835) = 5.362, p < .05$.

²¹⁷ Participants were asked to assess the following item: “If someone claims that a human's life begins at birth, would you assume they were more pro-choice or pro-life?” on a scale from 1 (“Pro-Choice”) to 10 (“Pro-Life”).

²¹⁸ $X^2(1, N = 838) = 24.781, p < .001$.

²¹⁹ Participants were asked to assess the following item: “Is the statement ‘human life begins at conception’:” on a scale from 1 (“Biological and Scientific Fact”) to 10 (“Philosophical or Religious Belief”).

²²⁰ $X^2(1, N = 838) = 78.160, p < .001$.

²²¹ Participants were asked to assess the following item: “Is the statement ‘a human's life begins at fertilization’:” on a scale from 1 (“Biological and Scientific Fact”) to 10 (“Philosophical or Religious Belief”).

choice participants (62%) were more likely²²² to so recognize it than pro-life participants (36%).

These data were similar to the results from the 2018 Marist poll question on which these survey questions were based.²²³ In the poll, 35% of pro-choice Americans and 59% of pro-life Americans said they viewed ‘human life begins at conception’ as a biological statement; in this study, the proportions were 27% of pro-choice participants and 58% of pro-life participants. Compare this also to the 23% of pro-choice and 59% of pro-life participants suggested that they believe a human’s life begins at fertilization from a biological perspective when they were asked when a human’s life begins based on their understanding of biology.²²⁴

A comparison of participants’ assessments of the two statements revealed there was a significant difference²²⁵, as only 40% of all participants suggested “human life begins at conception” was a biological and scientific fact and 49% of all participants so recognized “a human’s life begins at fertilization”. This finding confirmed early observations that ‘fertilization’ is perceived as a more scientific framing of the biological event than ‘conception’.²²⁶

Impact of Resolving the Factual Dispute

Participants were asked if the debate would be less contentious and more likely to be re-

²²² $X^2(1, N = 836) = 58.739, p < .001$.

²²³ <http://www.kofc.org/en/resources/communications/abortion-limits-favored.pdf> [<https://perma.cc/F6AC-H94V>].

²²⁴ See p. 209-210 in chapter 5.

²²⁵ $X^2(1, N = 836) = 355.717, p < .001$.

²²⁶ However, it is important to note that the use of ‘fertilization’ was interpreted as “sexism inherent in [the] questions” by an academic biologist in chapter 5’s study, as they suggested, “Fertilization is male active female passive. The word conception is more appropriate and gender neutral”.

solved if both sides agreed on when a human's life begins²²⁷. 66% of participants believed that it would, but fewer²²⁸ pro-choice participants agreed (60%) than pro-life (76%) participants. Participants were also asked whether there would be an impact if it became common knowledge that fetuses are biological humans at fertilization. In terms of whether abortion rates would decrease or increase²²⁹, 87% said it would decrease and more²³⁰ pro-choice participants (90%) agreed than pro-life participants (82%). There was a similar pattern for a question that asked about support for legal abortion²³¹, as pro-choice participants (83%) were more likely²³² than pro-life participants (75%) to believe the propagation of that view would reduce support for legal abortion access.

Since these measures contrasted the possibility of decrease against increase on a 1-10 scale, a quintile split was performed, and responses were recoded into five categories: strongly decrease (1-2), decrease (3-4), neither decrease nor increase (5-6), increase (7-8), and strongly increase (9-10). This analysis revealed that many participants felt it would have a neutral impact on abortion rates (38%) and abortion positions (26%), as 55% believed the propagation of the view that a fetus is a biological human would strongly reduce abortion rates and 60% thought the revelation would reduce support for legal abortion access.

²²⁷ Participants were asked to assess the following item: "If both sides agreed on when a human's life begins, the U.S. Abortion Debate would be less contentious and more likely to be resolved." on a scale from 1 ("Do Not Agree") to 10 ("Agree").

²²⁸ $\chi^2(1, N = 2159) = 61.160, p < .001$.

²²⁹ Participants were asked to assess the following item: "If it became common knowledge that fetuses are biological humans at fertilization, would support for legal abortion decrease or increase?" on a scale from 1 ("Decrease") to 10 ("Increase").

²³⁰ $\chi^2(1, N = 837) = 9.925, p < .005$.

²³¹ Participants were asked to assess the following item: "If it became common knowledge that fetuses are biological humans at fertilization, would abortion rates decrease or increase?" on a scale from 1 ("Decrease") to 10 ("Increase").

²³² $\chi^2(1, N = 839) = 8.596, p < .005$.

Altogether, these questions were asked to get a sense of whether participants believed it is already common knowledge that a biological human's life begins at fertilization. Since participants suggested that making it common knowledge would reduce abortions and support for legal abortion, Americans likely believe that most do not believe that a zygote is a biological human, which is consistent with direct measures of that question. These measures are good evidence of that and weaker evidence of the stated questions, as Americans' responses were merely speculation on the abortion decisions people would make and the beliefs they would hold if they held a particular descriptive view of when life begins.

While this section has mainly dealt with quantitative data, one of the surveys captured interesting comments by pro-choice participants who were asked to analyze abortion from a human rights perspective:

“Assuming that Biologists determine that life begins at fertilization, the fetus' right to life is important, and should be considered more important than the mother's right to choose to carry the fetus to term.”

“If life begins at fertilization, abortion is against human rights principles. If life begins at birth, abortion conforms with human rights principles.”

“Is [sic] human life is considered to begin at fertilization, the only acceptable grounds for abortion would be to protect the life of the mother. If life is considered to begin when the fetus is viable, then abortion would not be a human rights violation for the fetus until the point of viability.”

These quotes suggest a certain view of the relationship between perceptions of fetuses and abortion restrictions that seems to describe the relevance of ‘when life begins’ in the debate. This

perspective is consistent with the history of abortion laws²³³, and it is rooted in a rights-based view of abortion that has multiple premises that are subject to disagreement by both sides. As suggested by the data in Table 4.1, both sides largely agree on the premises that undergird a rights calculation of abortion, but they sharply disagree on whether fetuses are biological humans throughout pregnancy:

Table 4.1 Analysis of Abortion Restrictions' Underlying Concepts.²³⁴

| | Pro-Choice | Pro-Life |
|---|------------|----------|
| Fetuses are biological humans at fertilization | 23% | 59% |
| All humans have rights | 96% | 96% |
| All humans equally deserve rights | 96% | 96% |
| There is a hierarchy of rights | 86% | 81% |
| The right to life is more important than the right to liberty | 69% | 89% |

If one strictly applies these concepts, then it leads to the conclusion that elective abortion is violative of human rights principles. However, as suggested by their differing perceptions of fetuses, both sides disagree about whether abortion violates human rights principles.²³⁵ While most pro-life participants (81%) agreed that “Abortion is a human rights violation because the right to life is more important or fundamental than the right to liberty”, fewer pro-choice participants agreed with that view (21%).

²³³ As discussed in chapter 2, abortion was restricted after quickening when most believed that a human’s life began at quickening, it was restricted throughout pregnancy after the AMA spread the view that a human’s life begins at fertilization, and the country permitted previable abortions after *Roe* suggested that viability is the meaningful point in fetal development.

²³⁴ The data in the rows are reported, respectively, on p. 209-210, 181, 181, 182, and 183.

²³⁵ $\chi^2(1, N = 1393) = 476.005, p < .001$; participants were asked to assess the following item: “Abortion is a human rights violation because the right to life is more important or fundamental than the right to liberty, since you can have life without liberty but you cannot have liberty without life.” on a scale from 1 (“Do Not Agree”) to 10 (“Agree”).

This fundamentally different view of abortion, where one sees it as a human rights violation, and the other sees it as an important human right²³⁶, suggests that differing positions on abortion reflect different perceptions of the relevant facts. Both sides share similar views of rights in the abstract, but the differences in their perceptions of fetuses might prevent them from sharing similar views of rights in the concrete situation of abortion.

Predictive Models of Abortion Attitudes

These results sections further suggested that differences in perceptions of fetuses drive differences in Americans' abortion attitudes. However, since both sides agree that biologists are most qualified to determine when life begins, it is not an unresolvable factual dispute or difference of opinion. Further, Americans' responses suggest that the controversy could improve and the gap between both sides could close if biologists shared the same view on when life begins, and that view became well-known. However, before going deeper into that, it is important to assess how much differences in perceptions of fetuses drive differences in abortion attitudes.

These models were performed to assess the relative importance of different values and beliefs in Americans' abortion attitudes. The models use predictors like participants' views on when life begins and other possible predictors (e.g., sexual morality, the centrality of children scale) to explain variation in dependent variables like participants' stances on abortion and overall positions on legal abortion access. Together, these models assess the degree to which differing perceptions of fetuses drive differences in abortion attitudes.

²³⁶ <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Safe%20and%20Legal%20Abortion%20is%20a%20Womans%20Human%20Right.pdf> [<https://perma.cc/XB9N-YMMT>]

Model 1 – Abortion Identity

As shown in Table 4.2 below, a multiple regression analysis was used to test if the factors significantly predicted participants' abortion identities²³⁷. The results of the regression indicated the predictors explained 67% of the variance ($R = .784$, $R^2 = .667$, $F(14, 673) = 99.782$, $p < .001$). It was found that when life begins significantly predicted preferred abortion identities ($\beta = -.327$, $p < .001$), as did ideological stance ($\beta = .387$, $p < .001$), the sexual morality scale ($\beta = .190$, $p < .001$), the right to life scale ($\beta = .095$, $p < .001$), and the centrality of children scale ($\beta = .069$, $p < .05$).

Table 4.2 Predicting Abortion Identities.

| Predictor | Non-Significant β | Significant β | Strong β |
|------------------------------|----------------------------|------------------------|-------------------|
| Gender | -.007 | | |
| Ethnicity | -.012 | | |
| Income | -.021 | | |
| Education | .030 | | |
| Marital Status | -.040 | | |
| Number of Children | -.021 | | |
| Religious Identity | .021 | | |
| Equality of Fetuses Scale | -.031 | | |
| Right to Autonomy Scale | -.048 | | |
| Centrality of Children Scale | | .069* | |
| Right to Life Scale | | .095*** | |
| Sexual Morality Scale | | | -.190*** |
| Ideological Stance | | | -.387*** |
| When Life Begins | | | -.327*** |

*** $p < .001$

** $p < .005$

* $p < .05$

²³⁷ Participants were presented the following prompt: “How would you rate your beliefs?” and were given a scale from 1 (“Pro-Choice”) to 10 (“Pro-Life”).

Model 2 – Abortion Position

As shown in Table 4.3 below, a multiple regression analysis was used to test if the factors significantly predicted participants' responses to a question²³⁸ on their preferred abortion laws. The results of the regression indicated the predictors explained 62% of the variance ($R = .784$, $R^2 = .615$, $F(14, 673) = 75.255$, $p < .001$). It was found that when life begins significantly predicted preferred abortion laws ($\beta = -.337$, $p < .001$), as did ideological stance ($\beta = .196$, $p < .001$), the sexual morality scale ($\beta = .187$, $p < .001$), the centrality of children scale ($\beta = .174$, $p < .001$), the right to life scale ($\beta = .095$, $p < .001$), ethnicity ($\beta = -.071$, $p < .005$), and the equality of fetuses scale ($\beta = .078$, $p < .05$).

Table 4.3 Predicting Abortion Positions.

| Predictor | Non-Significant β | Significant β | Strong β |
|------------------------------|----------------------------|------------------------|-------------------|
| Gender | -.027 | | |
| Ethnicity | -.071 | | |
| Income | -.033 | | |
| Education | -.030 | | |
| Marital Status | -.018 | | |
| Number of Children | -.021 | | |
| Religious Identity | .050 | | |
| Right to Autonomy Scale | -.034 | | |
| Right to Life Scale | .021 | | |
| Equality of Fetuses Scale | | -.078* | |
| Centrality of Children Scale | | | .174*** |
| Sexual Morality Scale | | | -.187*** |
| Ideological Stance | | | -.196*** |
| When Life Begins | | | -.337*** |

*** $p < .001$

** $p < .005$

* $p < .05$

²³⁸ Participants were presented the following prompt: “Which comes closest to your opinion on abortion” and were given the following options: “Available to a woman at any time during pregnancy”, “Only during the first six months of pregnancy”, “Only during the first three months of pregnancy”, “Only in cases of rape, incest, or to save the life of the mother”, “Only to save the life of the mother”, and “Should never be permitted under any circumstances”.

Model 3 – Abortion Restrictions

As shown in Table 4.4 below, a multiple regression analysis was used to test if the factors significantly predicted participants' responses to a question²³⁹ on their preferred level of abortion restrictions. The results of the regression indicated the predictors explained 46% of the variance ($R = .677$, $R^2 = .458$, $F(14, 673) = 39.778$, $p < .001$). It was found that when life begins significantly predicted the preferred level of abortion restrictions ($\beta = .320$, $p < .001$), as did ideological stance ($\beta = -.137$, $p < .005$), the sexual morality scale ($\beta = .190$, $p < .001$), the right to life scale ($\beta = .095$, $p < .001$), and the centrality of children scale ($\beta = .069$, $p < .05$).

Table 4.4 Predicting Opinions on How Much Abortion Should Be Restricted.

| Predictor | Non-Significant β | Significant β | Strong β |
|------------------------------|----------------------------|------------------------|-------------------|
| Gender | .061 | | |
| Income | .058 | | |
| Education | .002 | | |
| Marital Status | .001 | | |
| Number of Children | .031 | | |
| Religious Identity | -.048 | | |
| Right to Autonomy Scale | .037 | | |
| Right to Life Scale | .010 | | |
| Equality of Fetuses Scale | | -.071* | |
| Ethnicity | | | .121*** |
| Centrality of Children Scale | | | .171*** |
| Sexual Morality Scale | | | -.140** |
| Ideological Stance | | | -.137** |
| When Life Begins | | | .320*** |

*** $p < .001$

** $p < .005$

* $p < .05$

²³⁹ Participants were presented the following prompt: “In how many circumstances should abortion be legal?” and were given a scale from 1 (“No Circumstances”) to 10 (“All Circumstances”).

Conclusion

This chapter reveals that there are resolvable error and confusion in the debate. Participants (50%) believed that pro-choice Americans want abortion legal throughout pregnancy at a higher rate than pro-choice participants did (33%) and participants believe pro-life Americans are over three times more likely to want all abortions illegal (45%) than pro-life participants do (14%).

While this chapter reported numerous findings that help to explain the extent to which Americans disagree about abortion, and why they do, it most compellingly makes the case that perceptions of fetuses is a powerful area of confusion in the debate. Most pro-life participants (59%) believe that, from a biological perspective, a human's life begins at fertilization, but few pro-choice participants (23%) support that view and many believe that a fetus is not a biological human until viability (43%). However, since both sides believe that biologists are most qualified to determine when a human's life begins, and pro-choice participants (86%) are more likely to select biologists than pro-life participants (69%), biologists' expertise could improve the debate.

In terms of the importance of one's biological view on when a human's life begins, 66% of Americans who recognized a fetus as a biological human at fertilization did not support legal access to elective abortion at any time during pregnancy; 85% did not support access after the second trimester, and 90% did not support access in the third trimester. Further, 60% of Americans believed that support for legal abortion would decrease if it became common knowledge that fetuses are biological humans throughout pregnancy.

Most pro-choice Americans' understanding of whether a fetus is a biological human seems to dictate the point at which abortion should be restricted. Pro-choice participants who believe a fetus is not a biological human until viability or birth prefer laws that permit elective abortion until birth (45%) and in the first six months of pregnancy (30%), while few solely support elective

abortion in the first trimester or only support therapeutic abortions (25%). Among pro-choice participants who believe a fetus is a biological human before viability, few prefer laws that permit elective abortion until birth (23%) or in the first six months of pregnancy (15%) but rather most support elective abortion in the first trimester or only support therapeutic abortions (62%). This suggests that the recognition of fetuses as biological humans would draw the two sides closer, as pro-life Americans are more amenable to legal abortion in the first trimester, these results show that the two sides would still be divided on whether elective abortion should ever be legal, as only 25% of pro-choice Americans who believe a biological human's life begins at fertilization believe elective abortion should be restricted throughout pregnancy. This suggests the question of whether elective abortion should be permitted in the first trimester might be immune to the reduction of confusion surrounding the biological view on when a human's life begins. Thus, it would appear that the brother and sister fighting over the orange cannot resolve the dispute by solely taking through their conflict.

While some believe that pro-choice Americans hold the view that fetuses do not have rights until birth, and this is the position of Peter Singer²⁴⁰, 76% of pro-choice participants suggested that – outside of the question of abortion – fetuses have the right to Fourteenth Amendment protections at some point in utero, as 44% recognized this right before viability and 32% recognized this right perfecting at viability. Thus, while one might think pro-choice participants' preference for abortion restrictions at some point during pregnancy might reflect an unquantifiable connection to fetuses²⁴¹, these data suggest the large majority of pro-choice Americans recognize fetal rights, so it

²⁴⁰ Singer, P. "Practical Ethics". Cambridge: *Cambridge University Press*, 1993, 2008, 2nd ed., p. 85-86.

²⁴¹ For instance, California has laws against the killing of pets, but it does not recognize pets' constitutional rights, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN§ionNum=597 [<https://perma.cc/8GDJ-JGEJ>].

is merely a question of when those rights come into play for most. However, there are some (25%) who do not recognize a fetal rights at any time in pregnancy.

There are strong correlations between when participants recognize a fetus as a biological human and when they deem a fetus deserving of legal protection²⁴² or constitutional rights²⁴³. This suggests that many Americans believe that all biological humans deserve legal protection and constitutional rights, which is consistent with the finding that 88% of pro-choice and 98% of pro-life Americans believe that a human's life is deserving of protection once it begins. Indeed, an analysis of the relatedness of participants' responses to various questions on when life begins²⁴⁴ showed that Americans' perceptions of fetuses undergird their thoughts on when a human's life begins, when a biological human's life begins, when a fetus deserves legal protection, when a fetus deserves legal protection outside of the abortion context, when a fetus deserves constitutional rights,

²⁴² $r = .695, p < .001$.

²⁴³ $r = .612, p < .001$.; further, an exploratory model ($R = .691, R^2 = .477, F(2, 823) = 374.761, p < .001$) using participants' view on when a biological human's life begins and their abortion identities to predict when they believed a fetus is deserving of constitutional rights revealed that their biological views better predicted their beliefs on rights ($\beta = .420$) than even their abortion stances ($\beta = -.371$), so the biological view plays more of a role in their view on when fetuses deserve rights than their abortion stances.

²⁴⁴ "When does a human's life begin?", "Based on your understanding of biology, from a biological perspective, when does a human's life begin?", "When is the life of a human zygote/embryo/fetus worthy of legal protection?", "In a Supreme Court case, a Justice described the Fourteenth Amendment's purpose: 'The history of the amendment proves that the people were told that its purpose was to protect weak and helpless human beings' Based on this understanding of the Fourteenth Amendment, when do fetuses deserve protection under the Fourteenth Amendment?", "Suppose there was an artificial womb that could sustain a zygote from fertilization until birth. Suppose there were also abortion procedures that either ended a fetus' life in the womb or safely removed the fetus from the womb and transplanted it into the artificial womb, at no expense to the pregnant person. At what point would you restrict the first abortion procedure so the pregnant person would need to have the second procedure to legally terminate their pregnancy?", and "Disregarding abortion and solely focusing on other situations (for example: when a pregnant person is attacked, drugged, or otherwise affected by others), when is a fetus worthy of legal protection? Note: this would not mean that abortions would be illegal at this point, just that fetuses would have protectable rights that need to be considered."

and when mechanical abortions should be illegal if an artificial womb were created.²⁴⁵ Thus, the question is when a fetus is a biological human.

Given this and numerous findings in this thesis that suggest views on when life begins play an important role in Americans' abortion attitudes, particularly the variable's predictive value in the models reported in this chapter, it is difficult to dismiss this element of the debate, which can be understood through three related but distinct mechanisms:

*Motivated reasoning*²⁴⁶: Americans experience dissonance when they consider when a biological human's life begins, as they might simultaneously recognize the simple biological fact that a fetus is a human because it is a human organism and reflect on their belief that abortion is a personal decision, so some reduce that dissonance by developing a stance on when life begins that is consistent with their beliefs about abortion; thus, some might hold the view that previable fetuses are not biological humans to experience the dissonance-infused view that abortion is a personal decision that ends the life of a biological human.

*Cultural cognition*²⁴⁷: Americans could perceive facts on when a biological human's life begins, in terms of the risk of whether abortion kills humans, in relation to their values related to abortion rights; thus, some might conclude there is no risk as they are afraid that

²⁴⁵ Overall, the scale had a Cronbach's Alpha of .919, so the internal consistency was excellent.

²⁴⁶ "Individuals engage in motivated reasoning as a way to avoid or lessen cognitive dissonance, the mental discomfort people experience when confronted by contradictory information, especially on matters that directly relate to their comfort, happiness, and mental health. Rather than re-examining a contradiction, it's much easier to dismiss it", <https://www.psychologytoday.com/us/basics/motivated-reasoning> [<https://perma.cc/2JDZ-HQX7>]; "Aronson [provided] a detailed example of the cognitive processes that a smoker might engage in to dispel the notion that smoking might be harmful", Kunda, Z. (1990). The case for motivated reasoning. *Psychological Bulletin*, 108(3), 480-498.

²⁴⁷ "[I]ndividuals can be expected to form beliefs about societal dangers that reflect and reinforce their commitments to one or another idealized form of social ordering.", Kahan, D. M. (2012). Cultural cognition as a conception of the cultural theory of risk. In S. Roeser, R. Hillerbrand, P. Sandin, & M. Peterson (Eds.), *Handbook of risk theory*, p. 725-759, Amsterdam, Netherlands: Springer, Available at SSRN: <https://ssrn.com/abstract=1123807> [<https://perma.cc/CJY6-VLCZ>].

abortions could be less justifiable or restricted more stringently if it were the case that abortions ended the lives of biological humans.

*Identity-Protective Cognition*²⁴⁸: Americans' identities as pro-choice liberals can be active when they consider when a biological human's life begins, so could they make a determination in the context of their identity related to abortion; thus, some might hold the view that a fetus is not a biological human until viability or birth to express their loyalty to the pro-choice liberal identity, which might hold *Roe* sacred, and to protect against forming an opinion that risks estrangement from other pro-choice liberals, whom they might rely on for social, emotional, and financial support.

To assess such motivations, participants were asked why so many Americans disagree with that view²⁴⁹; while 49% suggested that the finding is not common knowledge and that Americans do not understand the human life cycle, 51% suggested that those Americans are uncomfortable recognizing abortion as the killing of a human and they want to ignore fetuses' humanity in order to keep abortion legal. Thus, it is not just that analyses of relevant data suggest pro-choice Americans are discouraged from recognizing fetuses as biological humans, many pro-choice participants (44%) recognized that there are such motivations that can prevent Americans from recognizing fetuses as biological humans.

²⁴⁸ "Identity protective cognition refers to the tendency of culturally diverse individuals to selectively credit and dismiss evidence in patterns that reflect the beliefs that predominate in their group", Kahan, D.M., Peters, E., Dawson, E.C. & Slovic, P. *Motivated Numeracy and Enlightened Self-Government*. Behavioural Public Policy, 1, 1, 54-86; Yale Law School, Public Law Working Paper No. 307. Available at SSRN: <https://ssrn.com/abstract=2319992> [<https://perma.cc/P9DN-A5U9>].

²⁴⁹ Participants were asked to assess the following item: "In a recent poll, 46% of Americans said that 'life begins at conception' is a biological and scientific fact while 45% said that is a philosophical or religious belief. Given the finding that a large majority of biologists affirmed 'life begins at fertilization' as a biological view, why do you think 45% of Americans do not recognize it as a scientific and biological fact?" and were presented the following options: "That finding is not common knowledge", "Some Americans do not understand the human life cycle", "It is uncomfortable to consider abortion as the killing of a human", "Some might want to ignore fetus' humanity to keep abortion legal", and "Other"; those who responded "Other" were excluded from analyses as outliers.

In sum, pro-choice Americans might face significant costs associated with recognizing fetuses as biological humans: (1) they could not view abortion as a personal decision since abortion would then necessarily impact another human's life; (2) it would be more difficult to justify abortion since they would recognize it as a form of homicide; (3) it would jeopardize their identity as pro-choice liberals or supporters of 'women's rights'²⁵⁰, which would put at risk important bonds that might be relied upon for social, emotional, and financial support.²⁵¹

It would be no small thing for an ardent abortion-rights supporter to recognize fetuses as biological humans, and abortion as homicide, so it is no surprise that some do not. Such a realization could lead one to understand abortion as the leading cause of human death by a factor of 5²⁵² and discover that more humans die from abortion each year than all other causes of death combined²⁵³.

²⁵⁰ This might be a particularly important mechanism in 2019, as many people who identify as liberals have been labeled 'conservative' or 'far-right' for discussing topics that run counter to predominant liberal views (see, e.g., <https://www.theguardian.com/media/2018/sep/18/report-you-tubes-alternative-influence-network-breeds-rightwing-radicalisation> [<https://perma.cc/V8VE-MLB8>]); the equivalent on the right is labeling a republican a 'RINO' (Republican-in-name-only), <https://www.vox.com/2015/9/29/9416259/rino-word-history> [<https://perma.cc/9PV3-FQHA>].

²⁵¹ See, e.g., Canada's requirement that organizations support reproductive rights in order to receive government funding, <https://nationalpost.com/news/politics/hundreds-of-churches-camps-and-charities-protest-abortion-clause-in-canada-summer-jobs-grant-application> [<https://perma.cc/2HDU-FJ94>]; however, it is important to note that while most pro-choice participants in chapter 4's study confirmed that their abortion stance is important to their overall worldview, a minority thought their relationships would be negatively affected if they switched stances on abortion, see p. 186-187.

²⁵² Under 10 million die from ischaemic heart disease (<https://www.who.int/news-room/fact-sheets/detail/the-top-10-causes-of-death> [<https://perma.cc/9V9V-LBVQ>]) while an estimated 56 million abortions induced abortions occur each year worldwide (<https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide> [<https://perma.cc/3K9M-7TTN>]).

²⁵³ *Id.*, 57 million deaths occurred worldwide in 2016 and an estimated 56 million abortions occur each year, which do not include other abortive deaths like selective reduction after IVF and those resulting from the use of abortifacients.

This perspective could also lead one who places great value on human life to view abortion as a global health crisis that needs remediation through public health means; not in terms of making abortions safer, but in terms of preventing the procedure and preserving the lives of humans who die in abortions. For those who believe in law and order as a means to influence human behavior, it would provoke questions about whether abortion laws control women or save lives. This view of abortion as homicide would significantly complicate some abortion-rights supporters' views on abortion. Again, it is simply no surprise that some are reluctant to view fetuses as biological humans, given these potential risks to their mental state, identity, and relationships. Difficult as it might be, this thesis suggests recognizing fetuses as humans could be an important step in reducing or resolving the national abortion controversy.

While finding or developing common ground in weaker predictors like sexual morality and ideology could also improve the debate, those are more stable values and personality traits which cannot be said to be areas of confusion that can be resolved.²⁵⁴ The goal of this dissertation is to address possible error and confusion, not to force Americans to lose their ideological diversity. As such, the biological perspective on when life begins is an objective determination based on a set of scientific principles – resolving this question by asking biologists' opinions

²⁵⁴ It is possible that there would be no debate if both sides shared the same political orientation, moralized sexuality in the same way, and had similar views of the centrality of children, but – as pointed out in one of the Federalist papers – it is important to note use a remedy would be worse than the disease: “There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests. It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.” Madison, J. Federalist No. 10: "The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection." New York Daily Advertiser, November 22, 1787, available at: <https://www.ourdocuments.gov/doc.php?flash=false&doc=10#> [<https://perma.cc/8SS3-354Y>].

would address this confusion on a factual dispute in the U.S. abortion debate. It would also further reveal whether the debate is driven by error and confusion or if it is insurmountable because both sides are divided by irreconcilable differences.

CHAPTER 5: BIOLOGISTS' OPINIONS ON 'WHEN LIFE BEGINS'

"[T]he data seem like they will be used in the future in a legal campaign, and are themselves trying to change the survey reader's perspective."

Former Faculty IRB Chair

"I hope that your research project crashes and burns, based on its obvious religious agenda."; "Such an approach is also not deserving of a PhD degree."; "[R]eally crap 'survey'. You have such major political issues in your country, maybe you should focus on raising standards. I am ashamed for Uni of Chicago to see such rubbish disseminated."; "Is this a studied fund by Trump and ku klux klan?" "Sure hope YOU aren't a f^%\$#ing christian!!"

Academic Biologist Participants

"[I]ndividual differences in cognition related to science comprehension—of which science curiosity, if it exists, would presumably be one—do not mitigate politically biased information processing but instead aggravate it."

Dan Kahan, Cultural Cognition Researcher¹

As discussed in chapters 3 and 4, a 2018 Marist poll² showed that 46% of Americans referred to the notion that human life begins at conception as a biological and scientific fact, compared to 45% that viewed it as a philosophical or religious belief. The pollsters broke this result down by participants' abortion and political stances. A higher percentage of pro-life supporters (59%) viewed it as a biological and scientific fact than a philosophical or religious belief (30%). The reverse was true for pro-choice supporters, as a higher percentage recognized the view as a philosophical or religious belief (58%) than as a biological and scientific fact (35%). Republicans (59%) and Independents (49%) are more inclined to viewing it as a fact, while Democrats (55%)

¹ Kahan, D.M., Landrum, A., Carpenter, K., Helft, L., & Jamieson, K.H. Science Curiosity and Political Information Processing, *Advances in Political Psychology*, Vol. 38, Suppl. 1, 2017 [https://perma.cc/4T7T-QBYA].

² <http://www.kofc.org/en/resources/communications/abortion-limits-favored.pdf> [https://perma.cc/F6AC-H94V].

followed the pattern of pro-choice supporters. However, in 2019, the Marist poll rephrased the question and found 56% believe that “‘scientifically’ a fetus is ‘a unique life’ (56 percent), and only about a third (35 percent) believe it is ‘part of a woman’s body.’”³ These poll results are consistent with results reported in chapter 4, as 23% of Americans who identified as pro-choice and 59% of those who identified as pro-life suggested they believe fertilization marks the beginning of a biological human’s life.

Since Americans disagree about the biological view of when a human’s life begins, there is a factual dispute in the abortion debate. The dispute can be resolved if both sides can agree on a third party, which can then be consulted so it can be determined whether it is an open or settled question. Indeed, as the results in chapter 4 suggested, most Americans (80%) believe that biologists are most qualified to determine when a human’s life begins. However, before surveying biologists’ opinions, it is important to consider previous work on this topic⁴.

The Human Life Cycle

According to the Carnegie stages of human development⁵, a human’s life cycle begins at fertilization. Pro-life groups present citations from articles and biological textbooks written by

³ <https://www.kofc.org/en/news/media/substantial-abortion-restrictions.html> [<https://perma.cc/QE4Q-HXKS>].

⁴ Various studies suggest between 21-52% of Americans recognize zygotes as humans, see: Knutson, A.L., “When does a human life begin? Viewpoints of public health professionals”, Vol. 57, NO. 12, American Journal of Public Health, December 1967, <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.57.12.2163> [<https://perma.cc/2GUU-F4AK>]; Elliott, T.A. et al., ‘When does life begin?’ Results of an online survey, Fertility and Sterility , Volume 90 , S65 - S66, [https://www.fertstert.org/article/S0015-0282\(08\)01732-9/fulltext](https://www.fertstert.org/article/S0015-0282(08)01732-9/fulltext) [<https://perma.cc/VR3D-LS68>]; <https://today.yougov.com/topics/politics/articles-reports/2015/04/07/three-quarters-say-longmont-attack-murder> [<https://perma.cc/Q8X2-CYG9>]; <http://www.kofc.org/en/resources/communications/abortion-limits-favored.pdf> [<https://perma.cc/F6AC-H94V>].

⁵ “[T]he *Carnegie Stages of Early Human Embryonic Development* were instituted in 1942 by the National Museum of Health and Medicine's Developmental Anatomy Center... They are

biologists who explicate the view that a human's life begins at the beginning of the life cycle, which can be understood as the duration of a genetically unique organism. For instance, Students for Life of America's article "When Does Human Life Begin?" points out a quote from Scott Gilbert's textbook, *Developmental Biology*:

"When we consider a dog, for instance, we usually picture an adult. But the dog is a "dog" from the moment of fertilization of a dog egg by a dog sperm. It remains a dog even as a senescent dying hound. Therefore, the dog is actually the entire life cycle of the animal, from fertilization through death."⁶

This view that the ontogenetic life of a human begins at fertilization seems to be the only biological view advanced by scientists. It is difficult to prove a negative so one cannot state that an alternative biological claim has never been made; it is just that a review of biological views on when life begins revealed no view other than fertilization.⁷ This is not to say that there are no alternative views that used other biological dimensions or developmental landmarks to define when life begins, but those were not biological views.

based on internationally acclaimed research going back to the 1880s and have been consistently updated since then to the present by the international nomenclature committee consisting of 20-23 Ph.D.'s in human embryology from around the world.", http://www.lifeissues.net/writers/irv/irv_226new.url.html [<https://perma.cc/5B7B-K28S>]; https://embryology.med.unsw.edu.au/embryology/index.php/Carnegie_Stages [<https://perma.cc/DH2L-FF53>]; <https://www.washingtonexaminer.com/opinion/op-eds/roe-v-wade-has-spread-scientific-illiteracy-about-when-life-begins> [<https://perma.cc/3N3V-LGYN>].

⁶ <https://studentsforlife.org/med-law/when-does-human-life-begin> [<https://perma.cc/UVP-9TCU>].

⁷ Neither had a medical school professor who gave Senate testimony that advanced the same claim: "I have never ever seen in my own scientific reading, long before I became concerned with issues of life of this nature, that anyone has ever argued that life did not begin at the moment of conception and that it was a human conception if it resulted from the fertilization of the human egg by a human sperm. As far as I know, these have never been argued against.", S-158 Hearings, April 23 transcript, p. 52.

The view that ‘life begins at birth because that is when the fetus is independent of the mother’ uses the biological reality of the fetus’ separation from the umbilical cord, but it is not a biological view since there is no scientific principle that dictates a human cannot be connected to another. The view that ‘life begins at viability because that is when the fetus can survive outside of the womb’ uses the biological reality of sufficient lung development to survive on a respirator, but it is not a biological view since there is no scientific principle that dictates a life must have sufficient lung development to live outside of the womb. Both of these are philosophical views that are based on biological realities.

The view that life begins at fertilization – since the human life cycle begins at fertilization and zygotes have human DNA – is a biological view since it uses the scientific convention of the human life cycle and genetics-based biological classifications. This is not to say that there are no philosophical or metaphysical dimensions, as even the principle that all humans are humans requires the law of noncontradiction, but there is a difference between a scientific principle that is subject to epistemological, metaphysical, or philosophical concepts and a philosophical concept that utilizes biological and developmental landmarks (e.g., a human deserves legal rights when it can survive outside of a uterus, so a life begins at viability).

There are essentially two prevailing views of when life begins. One is that it is a scientific question that is easily answerable⁸ and the second is that it is a matter of opinion subject to philosophy, religion, and any other manner of thinking. The first represents the descriptive view of the

⁸ See, e.g., writings by medical school professor Maureen Condic: <https://lozierinstitute.org/a-scientific-view-of-when-life-begins/> [<https://perma.cc/S7WK-VRH8>]; Condic, M.L. When Does Human Life Begin? The Scientific Evidence and Terminology Revisited, 8 U. St. Thomas J.L. & Pub. Pol’y 44 (2013).) and embryologist C. Ward Kischer (<https://www.catholicculture.org/culture/library/view.cfm?recnum=4638> [<https://perma.cc/E9TH-THM8>]); Kischer, C. W. 2001. Why Hatch is wrong on human life. Human Events, July 16th.”

question, and the second represents the normative view. People are entitled to hold either view and come to any of a number of answers. However, the question of when a human's life begins from a biological perspective should be determined without the influence of religion, legal stances, or beliefs about abortion. While the descriptive view might have consequences for the normative view, the former should be answered in a vacuum. If it is not, then the overall question would be a tautology, as the normative view would act as a proxy for the descriptive view, which would amount to a pretense to justify a particular religious view, legal stance, or belief about abortion. Biologists recognized this in 1981 during the Senate Judiciary Subcommittee meeting on Senate Bill 158, the "Human Life Bill".⁹

One biologist testified that "(l)ife has a very, very long history, but each individual has a very neat beginning – the moment of its conception".¹⁰ A medical school professor testified that: "If we are talking, then, about the biological beginning of a human life or lives, as distinct from other human lives, the answer is most assuredly that it is at the time of conception – that is to say, the time at which a human ovum is fertilized by a human sperm"¹¹ and referred to it as a "straight-forward biological fact".¹² Another medical school professor testified: "I think we can now also say that the question of the beginning of life – when life begins – is no longer a question for theological or philosophical dispute. It is an established scientific fact. Theologians and philosophers may go on to debate the meaning of life or the purpose of life, but it is an established fact that all life, including human life, begins at the moment of conception."¹³

⁹ Emerson, T.I., "The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill" (1982). Faculty Scholarship Series. Paper 2769.

¹⁰ S-158 Hearings, April 23 transcript, p. 18.

¹¹ *Id.* at 61.

¹² *Id.* at 65.

¹³ *Id.* at 31-32.

That professor testified that it was the only possible biological view: “I have never ever seen in my own scientific reading, long before I became concerned with issues of life of this nature, that anyone has ever argued that life did not begin at the moment of conception and that it was a human conception if it resulted from the fertilization of the human egg by a human sperm. As far as I know, these have never been argued against.”¹⁴

Another medical school professor also reviewed “the scientific literature on the question of when the life of a human being begins, concluded her statement with these words: ‘So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life’”.¹⁵

Most recently, the legislature in South Dakota took up this issue after a bill was passed to evaluate abortion¹⁶ in a report from the Abortion Task Force. After hours of testimony by scientists and doctors, the Official Senate report reached the following conclusion: “Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being - a being that is alive and is a member of the human species. There is overwhelming agreement on this point in countless medical, biological, and scientific writings.”¹⁷ Along those lines, the report from South Dakota concluded that “abortion terminates the life of a unique, whole, living human being”.¹⁸

¹⁴ S-158 Hearings, April 23 transcript, p. 52.

¹⁵ *Id.* at 41-42.

¹⁶ <http://sdlegislature.gov/sessions/2005/bills/HB1233p.htm> [<https://perma.cc/U5GN-HTNF>].

¹⁷ Report, Subcommittee on Separation of Powers to Senate Judiciary Committee S-158, 97th Congress, 1st Session 1981, p. 7.

¹⁸ Report of The South Dakota Task Force to Study Abortion, Submitted to the Governor and Legislature of South Dakota, December 2005, p. 13.

However, there was much derision and divisive debate surrounding both committees.¹⁹ Since both were bipartisan and included those who supported abortion rights, as well as those who opposed abortion rights, there were debates about process, substance, and various issues on which politicians are wont to squabble over. Both committees relied on testimonial evidence from handfuls of scientific experts instead of doing representative, large-scale surveys. While the findings of these reports could have contributed to the anti-abortion movement and the opposition to *Roe*, most others did not find those reports availing; rather, they saw them as partisan conclusions from biased individuals. In order to have a real sense of the issue, one must open up the issue and pursue it objectively.

However, the first step is to determine who should define when life begins. Justice Potter Stewart identified the importance in resolving who should determine when life begins: “How should we-- how should that question be decided? Is it a legal question, a constitutional question, a medical question, a philosophical question, a religious question, what is it?”²⁰ Justice Blackmun similarly posed framed the question as possibly relevant to multiple domains: “When those trained in the respective disciplines of medicine, philosophy, and theol-ogy 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.”²¹

Since an overwhelming majority of participants selected biologists in the study reported in chapter 4, it important to survey biologists to learn how they think about the biological view that

¹⁹ Report, Subcommittee on Separation of Powers to Senate Judiciary Committee S-158, 97th Congress, 1st Session 1981; Report of The South Dakota Task Force to Study Abortion, Submitted to the Governor and Legislature of South Dakota, December 2005; http://thewelltimedperiod.blogspot.com/2005/12/south-dakota-task-force-to-study_17.html [<https://perma.cc/7DRM-NB-XJ>].

²⁰ Weddington, S. Oral Reargument of *Roe v. Wade*, 1972, p. 20.

²¹ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

a human's life begins at fertilization. By framing it as a biological view and asking them to assess it, the questions would be able to get a sense of whether the view is correct as a matter of biology and science. However, it is important to first consider potential issues with disambiguating the descriptive view from the normative view of when life begins.

Clarifying 'When Life Begins'

Some who argue that there is no consensus on when life begins sometimes conflate the descriptive and objective dimension (when life begins) with the normative and subjective dimension (when personhood begins).²² Some hold opinions about points other than fertilization due to a semantic shift from when life begins to when a sustainable human life begins²³. Indeed, the U.S. Supreme Court shifted the question of when life begins to the question of when a fetus has the capacity for meaningful life outside of the womb.²⁴ In the South Dakota Abortion Task Force hearing, the report stated that “[n]o credible evidence was presented that challenged these scientific facts. In fact, when witnesses supporting abortion were asked when life begins, not one would answer the question, stating that it would only be their personal opinion.”²⁵

One of the most common confluences, which rests on a biological concept, is the argument that “biological life does not begin” because “it is continuous”.²⁶ In the U.S. Senate Hearing report, a biology professor's quote in Psychology Today states that:

²² <https://www.wired.com/2015/10/science-cant-say-babys-life-begins/> [<https://perma.cc/8AL7-E93Q>].

²³ <https://blogs.plos.org/dnascience/2013/10/03/when-does-a-human-life-begins-17-timepoints/> [<https://perma.cc/T7PW-FAVN>].

²⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁵ South Dakota Abortion Task Force Report, p. 12.

²⁶ The Human Life Bill Appendix, S-158, a bill to provide that human life shall be deemed to exist from conception, Serial No. J-97-16, p. 10.

“[W]hen does life really begin? The true answer is simple: Never. Life ends, often, but it never begins. It is just passed on from one cell to another. All biologists... are in agreement on that answer.”²⁷

This opinion was reiterated by other biologists throughout the report. Here, they are answering an ontogenetic question with a phylogenetic answer. The question is when an individual human’s life begins, and they focus on the moment that all life began. The question is, what was the moment at which an individual human with a unique genetic code did not exist as an organism with that genetic code. An organism with a diploid genetic code is present at fertilization, and it did not exist at the moment before then – there was no human, only a sperm and an egg that had genetically distinct haploid genetic codes.

These approaches are perfectly suitable, and since “when life begins” is merely a phrase, it could be used to represent when all biological life began, when a biological life begins, when a biological life is viable outside the womb, when a biological life is outside a womb, or even when a biological life is no longer encumbered with raising their offspring. However, the question is typically associated with a specific interpretation: ‘what is the earliest point of a human’s life, when that unique ontogenetic life of a given species has begun’. Thus, notions of sustainability, viability, meaning, and value are non-scientific concepts that adulterate the discussion²⁸. Now, the fact that these concepts are integrated in such discussions might be telling since their inclusion could signal a desire to de-emphasize the core question and emphasize dimensions that would be supportive of a later point that would better justify abortion rights. However, the desire to focus on the core question, and not the other dimensions, could suggest a preference to define life early

²⁷ *Id.*

²⁸ A non-exhaustive list of such phrases is as follows: autonomous, conscious, independent, person, self-sustaining, sentient, and viable.

as possible, which would be more supportive of restrictive abortion access. Regardless, Americans suggested that they are only interested in an unbiased, objective opinion rooted in biology, the question should be formulated as a purely biological perspective.

An International Survey

Just as the earlier pro-life argument that abortion was detrimental to the health of the woman was empirically assessed, and later invalidated²⁹, so must this question be subject to the “force of scientific studies”.³⁰ While science is not typically done by consensus, such exercises have contributed to debates about evolution³¹ and anthropogenic climate change.³² This method is especially helpful in debates with political implications because such topics can motivate scientists to take stances based on their personal or political opinions, rather than stances resulting from their scientific training. Accordingly, personal or political bias is likely less impactful in a survey of thousands of scientists than in a collection of anecdotal evidence from a small group of experts.³³ A large sample can also allow for comparisons of groups with different ideological or political

²⁹ Jasen, P. Breast cancer and the politics of abortion in the United States. *Med Hist.* 2005; 49(4): 423-44; https://www.plannedparenthood.org/files/9613/9611/5578/Myths_About_Abortion_and_Breast_Cancer.pdf [<https://perma.cc/7SWQ-X7HH>].

³⁰ Stern, L.G. Abortion: Reform and the Law, 59 *J. Crim. L. Criminology & Police Sci.* 84 (1968), available at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5501&context=jclc> [<https://perma.cc/2A4G-M8D2>].

³¹ <http://www.pewresearch.org/fact-tank/2017/02/10/darwin-day/> [<https://perma.cc/M79P-FAK3>].

³² Vaidyanathan, G. “How to Determine the Scientific Consensus on Global Warming”. *ClimateWire*, 2014. Available at: <http://www.scientificamerican.com/article/how-to-determine-the-scientific-consensus-on-global-warming> [<https://perma.cc/AB44-PRS3>].

³³ In 1981, the U.S. Senate Judiciary Committee heard testimonial evidence from physicians and biologists that further reinforced disagreement on when life begins. “Report”. *Subcommittee on Separation of Powers to Senate Judiciary Committee S-158*, 97th Congress, 1st Session 1981.

stances and allow for analyses that measure these differences. For a robust view of biologists, a consensus of the groups would have to affirm the view. This nuanced analysis would suggest whether the finding is ubiquitous among all groups of biologists or if the finding was being driven by a certain religious belief (e.g., Atheism, Catholicism), a stance on abortion (e.g., pro-choice, pro-life), or a life circumstance (e.g., not having children, having four children).

Methodology

Participants were recruited from biology faculty associated with colleges, universities, and institutes around the world³⁴. A list of academic institutions was generated from rankings of biology programs.³⁵ Contact information of post-docs, lecturers, professors, and professors emeriti was collected from the institutions' biology and life science faculty webpages. Altogether, 62,469 academic biologists were recruited through e-mail³⁶ and 7,402 participated in the study (12% sur-

³⁴ Initially, participants were only recruited from American universities, but the study expanded to academic institutions throughout the world.

³⁵ “Best Graduate Biological Sciences Programs”. *U.S. News*, 2018. Available at: <https://www.usnews.com/best-graduate-schools/top-science-schools/biological-sciences-rankings> [permalink unavailable]; “QS World University Rankings by Subject 2015 - Biological Sciences”. 2015. Available at: <https://www.topuniversities.com/university-rankings/university-subject-rankings/2015/biological-sciences> [<https://perma.cc/R5MZ-H7H7>].

³⁶ From 7/2016 to 1/2018, e-mails were sent to academic biologists; the prolonged period allowed for refinements of the survey instruments, which shared many identical items throughout the total of nine survey versions – 75% of the participants were presented all of the same items, and five of the versions were presented to a combined 6% of participants.

vey response rate³⁷).³⁸ Of those participants, 5,557 biologists from 1,058 academic institutions provided analyzable data by assessing at least one of the five statements (Q1-Q5). The majority of the sample was male (63%) and, 95% held a PhD. The sample was predominantly non-religious (63%). As in previous studies, there were more liberals (89%) than conservatives (11%), Democrats (92%)³⁹ than Republicans (8%), and pro-choice supporters (85%) than pro-life supporters (15%).⁴⁰ The sample included biologists that were born in 86 countries around the world.

Survey Questions

The study focused on the biological view of when a human's life begins⁴¹, but surveys also

³⁷ This response rate is similar to what was found in a recent study of sociologists, see: Horowitz, M., Haynor, A., & Kickham, K. "Sociology's Sacred Victims and the Politics of Knowledge: Moral Foundations Theory and Disciplinary Controversies". *The American Sociologist*, 2018 1-37. Available at: <https://doi.org/10.1007/s12108-018-9381-5> [<https://perma.cc/3ZBL-ZVWT>].

³⁸ 7,383 participants started a survey, and 6,646 gave at least one substantive answer to a question (89%); substantive answers included responsive answers to preliminary questions on genetics that were posed to activate participants' biological reasoning (along with missing data and other nonresponsive answers, these were not included in the analyses in this paper); this response rate (89%) reflected the RR2, which includes completed and partial interviews, see: "Standard Definitions", American Association for Public Opinion Research, 2015. Available at: http://www.aapor.org/AAPOR_Main/media/publications/Standard-Definitions2015_8theditionwithchanges_April2015_logo.pdf [<https://perma.cc/WY3F-XP22>]; however, it is important to note that each survey collection was cut off within one week of the e-mails being distributed and no follow-up e-mails could be sent because of institutional and IRB issues; sending out tens of thousands of e-mails to professors caused some to worry that it was spam, and this was exacerbated by the participants who complained for ideological reasons.

³⁹ Since this is an international survey, it is possible that participants who work in schools outside of the U.S. might not know to what 'Democrat' and 'Republican' refer; however, participants were able to skip the question, and the same pattern was shown in samples of participants who work on other continents, as none had more than 10% identify as Republican.

⁴⁰ Participants rated themselves on three scales from 1-10 that had "pro-choice", "liberal", and "Democratic" (1 through 5) on one end and "pro-life", "conservative", and "Republican" on the other end (6 through 10).

⁴¹ This view represents when a fetus is properly described as a biological human (i.e., an organism with a human genome that is developing in one of the stages of the human life cycle);

included questions about a range of related scientific concepts (e.g., genetics and epigenetics) that are not analyzed in this chapter. Most questions called for participants' assessments of whether a statement was "Correct" or "Incorrect"⁴². The statements described the specific biological view that 'a human's life begins at fertilization'. As previously discussed, this view was used because polls, surveys, and testimony have suggested this is a popular view among scientific experts and laypeople.⁴³ Participants were also given an open-ended survey question on their biological view of 'when a human's life begins'. The main questions investigated in this study are as follows:

Question 1 - Implicit Statement: "The end product of mammalian fertilization is a fertilized egg ('zygote'), a new mammalian organism in the first stage of its species' life cycle with its species' genome."

Question 2 - Implicit Statement: "The development of a mammal begins with fertilization, a process by which the spermatozoon from the male and the oocyte from the female unite to give rise to a new organism, the zygote."⁴⁴

this represents the most objective descriptive view of a fetus as it is free from arbitrarily-selected criteria like independence, individuality, or viability – to say one is a biological human is to say that they are unique from non-human species and they are unique from other cells and tissue that have human DNA but are not developing in one of the stages of the life cycle; it is simply a definitional term based on when biologists classify a human fetus a biological human in the same way that they classify an infant or adult a biological human.

⁴² On Question 1, a small number of participants (394 out of 4993) were asked to assess it as "Accurate" or "Inaccurate" on earlier versions of the survey and these participants affirmed the statement as "Accurate" (89%) at a similar rate as those who affirmed the statement overall (91%); further, in the other unique assessment, one of the versions of the survey used an interval scale (e.g., a 1-10 rating from "Incorrect" to "Correct") and 97% affirmed the item since they selected a rating between 6-10.

⁴³ See, e.g., <http://www.kofc.org/en/resources/communications/abortion-limits-favored.pdf> [<https://perma.cc/F6AC-H94V>]; Elliott T.A., Friedman, J.A., Siegel, E.T., Kort, H.I., & Nagy, Z.P. "When does life begin? Results of an online survey". 2008. Available at: [http://www.fertstert.org/article/S0015-0282\(08\)01732-9/fulltext](http://www.fertstert.org/article/S0015-0282(08)01732-9/fulltext) [<https://perma.cc/VR3D-LS68>]; Moore, P. *Three quarters say Longmont attack is murder*. YouGov, 2015. Available at: <http://today.yougov.com/topics/politics/articles-reports/2015/04/07/three-quarters-say-longmont-attack-murder> [<https://perma.cc/Q8X2-CYG9>].

⁴⁴ Sadler, T.W., Langman's Medical Embryology. 7th edition. Baltimore: Williams & Wilkins 1995, p. 3.

Question 3 - Implicit Statement: “A mammal's life begins at fertilization, the process during which a male gamete unites with a female gamete to form a single cell called a zygote.”⁴⁵

Question 4 - Explicit Statement: “In developmental biology, fertilization marks the beginning of a human's life since that process produces an organism with a human genome that has begun to develop in the first stage of the human life cycle.”

Question 5 - Explicit Statement: “From a biological perspective, a zygote that has a human genome is a human because it is a human organism developing in the earliest stage of the human life cycle.”

Question 6 - Open-Ended Essay Question: “From a biological perspective, how would you answer the question ‘When does a human's life begin?’”

They each vary in how explicitly they frame the descriptive view on when life begins, so all were used to develop a robust understanding of participants' assessments of the biological view that ‘a human's life begins at fertilization’. However, all could be argued to be logically and biologically equivalent.⁴⁶ The implicit statements represent the ‘textbook view’ that fertilization produces an organism at the beginning of the ontogenetic developmental process of mammals (i.e., the mammalian life cycle)⁴⁷. The explicit statements focus on a specific species of mammals, ‘humans’ (i.e., *Homo sapiens sapiens*)⁴⁸, and concretely frame the implied ontogenetic life cycle as ‘a life’ – these elements are collectively represented by the phrase “a human's life”. While Q1-Q5 were assessments of a specific view on when life begins, the open-ended essay question (Q6) was

⁴⁵ Moore, K.L., *The Developing Human: Clinically Oriented Embryology*, 7th edition. Philadelphia, PA: Saunders, 2003. p. 16, 2.

⁴⁶ Indeed, many participants complained in the comments section about how these questions seemed repetitive, and many responded to the essay question by saying, ‘I've already answered this question multiple times’.

⁴⁷ Seisenberger, S. et al. “Reprogramming DNA methylation in the mammalian life cycle: building and breaking epigenetic barriers”. *Phil. Trans. R. Soc.*, 2012.

⁴⁸ Foley, N.M., Springer, M.S., & Teeling, E.C. “Mammal madness: is the mammal tree of life not yet resolved?”. *Phil. Trans. R. Soc. B.*, 2016. Available at: <https://doi.org/10.1098/rstb.2015.0140> [<https://perma.cc/X3JK-45ZW>].

incorporated to learn the view biologists would focus on when they were free to write about the biological view they believe to be most correct.

As mentioned in previous chapters, some participants took issue with the survey.⁴⁹ There were dozens of complaints and a few dozen who requested that their data be removed from analyses. If the principle of the customer complaint iceberg applies here, there were likely hundreds who were unhappy.⁵⁰ There were two primary complaints: (1) the advertising e-mail should have disclosed that the survey had questions with implications for the abortion debate and (2) the survey was inappropriate because when life begins goes beyond a biological perspective.

In regards to the first complaint, such disclosure was not necessary and carried with it the risk of skewing the participant pool; it could have resulted in a sample of participants who have strong feelings about abortion or at least those do not have a strong aversion to controversial issues. As for the second complaint, the clear demarcation of a biological perspective and fierce commitment to not conflating even the most nuanced distinctions (e.g., “human” vs. “human being”) all show that the fear is unfounded. A likely suppressed premise of their position is that the data could be exploited by legislators, and this was explicitly suggested by some⁵¹. However, research is often

⁴⁹ Given the emotional valence of many participants, especially those who personalized their complaints by talking about how they would not have become a professor if they or their partner did not have the access to legal abortion that they had enjoyed, it seems like the response could have been related to identity-protective cognition or cultural cognition for some and intense emotions for others; hence, pro-choice biologists would not be intentionally misapplying biological principles but that their minds protect them from having to encounter the dissonance from recognizing fetuses as humans.

⁵⁰ “TARP found, through their research, that for every 26 unhappy customers, only one will make the effort to make a formal complaint.”, <https://www.forbes.com/sites/adrianswinscoe/2013/10/23/improving-government-by-solving-complaints-is-good-solving-the-silent-complaints-too-is-better/#60fbc64f5a25> [<https://perma.cc/CF9W-7C3F>].

⁵¹ The faculty chair for the IRB of this author’s institution suggested that “the data [from the study of biologists] seem like they will be used in the future in a legal campaign”; however, within hours, the chair retracted their statement.

subject to being misused or misstated by others, and this cannot be deemed a legitimate basis for shutting down objective, rigorous research in a free academic environment.

It seems more likely that people deeply committed to abortion rights experienced dissonance, as they were presented questions that invariably caused them to think about the humanity of the fetuses that are killed in abortion. Not only that, but they were also asked to confirm, using their particular knowledge, expertise, and credibility as academic biologists, that fetuses are humans, an inconvenient fact that they might think would threaten the legality of abortion if it became common knowledge. While some thought it was already common knowledge, and some expressed frustration with being surveyed on such a paltry topic, the number of biologists who stated that a fetus is not a biological human until birth suggest that it is not common, or at least it is common knowledge that is not easily expressed.

Biologists' opinions on who is most qualified to determine when a human's life begins showed a similar pattern to the opinions of Americans in chapter 4. 64% selected biologists (2395 out of 3773), 23% selected philosophers (865 out of 3773), 1% selected religious leaders (53 out of 3773), 4% selected Supreme Court Justices (135 out of 3773), and 9% selected voters (325 out of 3773). Biologists were presented with the data from Americans, as they were asked if they agreed with the 80% of Americans who said biologists were most qualified. 68% agreed with Americans' selection (2365 out of 3457), and 32% disagreed (1092 out of 3457).

Results - Assessing the Fertilization View

Questions 1-3 are implicit statements of the biological view as they replaced concepts that could be perceived as normative (e.g., "human", "life") with descriptive terms (e.g., "mammalian", "development"). These statements retained the core argument for biologically classifying humans

(i.e., a zygote with a human genome is a new human organism developing in the first stage of the human life cycle), so it can be argued that affirming one of the implicit statements is logically equivalent to affirming the biological view that ‘a human’s life begins at fertilization’.

Questions 4-5 are explicit statements that focus on the views that fertilization marks the beginning of a human’s life, rather than abstract formulations on a mammal’s development or life. Asking when life begins and whether a zygote is a human are distinct but related questions. It is important to note that Q4 and Q5 go beyond statements and take the form of arguments, as they entail justifications for the claims (i.e., “since that process” in Q4, “because it is” in Q5).

Question 1: Implicit Statement “The end product of mammalian fertilization is a fertilized egg (‘zygote’), a new mammalian organism in the first stage of its species’ life cycle with its species’ genome.”

91% of participants affirmed the statement (4555 out of 4993) and 9% rejected the statement (438 out of 4993). There was a significant difference⁵² between biologists who identified as very pro-choice⁵³ (90%; 2536 out of 2821) affirmed the question at a lower rate than neutral (93.5%; 272 out of 291) and those who identified as pro-life (97%; 319 out of 329).

Question 2: Implicit Statement “The development of a mammal begins with fertilization, a process by which the spermatozoon from the male and the oocyte from the female unite to give rise to a new organism, the zygote.”

⁵² $\chi^2(4, N = 4281) = 21.178, p = .001$.

⁵³ Abortion identities in Q1-Q6 were based on their responses to the question, “How would you rate your opinion? Pro-Choice = 1, Pro-Life =10)”; like in Table 5.1, which broke identities down with a quintile split, those who rated their opinion as 1-2 were coded as “very pro-choice”, 3-4 as “pro-choice”, 5-6 as “neutral”, 7-8 as “pro-life”, and those who rated their opinion as 9-10 were coded as “very pro-life”

88% of participants affirmed the statement (3984 out of 4510) and 12% rejected the statement (526 out of 4510). There was not a significant difference⁵⁴ between biologists who identified as very pro-choice (88%; 2287 out of 2606) affirmed the question at a similar rate as neutral (88%; 242 out of 275) and those who identified as pro-life (92%; 285 out of 309).

Question 3: Implicit Statement “A mammal's life begins at fertilization, the process during which a male gamete unites with a female gamete to form a single cell called a zygote.”

77% of participants affirmed the statement (3153 out of 4078) and 23% rejected the statement (925 out of 4078). There was a significant difference⁵⁵ between biologists who identified as very pro-choice (72%; 1631 out of 2280) affirmed the question at a lower rate than neutral (88%; 226 out of 257) and those who identified as pro-life (92%; 270 out of 294).

Question 4: Explicit Statement “In developmental biology, fertilization marks the beginning of a human's life since that process produces an organism with a human genome that has begun to develop in the first stage of the human life cycle.”

75% of participants affirmed the statement (2500 out of 3334) and 25% rejected the statement (844 out of 3344). There was a significant difference⁵⁶ between biologists who identified as very pro-choice (69%; 1321 out of 1919) affirmed the question at a lower rate than neutral (86%; 177 out of 207) and those who identified as pro-life (92%; 236 out of 257).

Question 5: Explicit Statement “From a biological perspective, a zygote that has a human genome is a human because it is a human organism developing in the earliest stage of the human life cycle.”

⁵⁴ $X^2(4, N = 3954) = 7.013, p > .05$.

⁵⁵ $X^2(4, N = 3521) = 115.418, p = .001$.

⁵⁶ $X^2(4, N = 2988) = 121.112, p = .001$.

69% of participants affirmed the statement (2744 out of 3980) and 31% rejected the statement (1236 out of 3980). There was a significant difference⁵⁷ between biologists who identified as very pro-choice (64%; 1414 out of 2217) and those who identified as neutral (80%; 193 out of 242) or very pro-life (89%; 255 out of 286).

Table 5.1 reports biologists' responses to questions 1-5 and uses their responses to demographics questions to assess their responses to each question along various dimensions:

Table 5.1 Breakdown of Biologists based on Demographics.⁵⁸

| <u>Education</u> | <u>Q1</u> Implicit | <u>Q2</u> Implicit | <u>Q3</u> Implicit | <u>Q4</u> Explicit | <u>Q5</u> Explicit |
|-------------------------|-------------------------------|-------------------------------|-------------------------------|-------------------------------|-------------------------------|
| Master's | 94% (N = 139) | 82% (N = 136) | 79% (N = 127) | 80% (N = 118) | 73% (N = 114) |
| MD | 99% (N = 69) | 87% (N = 62) | 86% (N = 55) | 87% (N = 47) | 79% (N = 52) |
| MD/PhD | 91% (N = 330) | 89% (N = 313) | 80% (N = 296) | 78% (N = 264) | 65% (N = 280) |
| PhD | 91% (N = 4417) | 89% (N = 3975) | 77% (N = 3578) | 74% (N = 2896) | 69% (N = 3514) |

| <u>Specialty</u> | <u>Q1</u> Implicit* | <u>Q2</u> Implicit | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit* |
|-------------------------|--------------------------------|-------------------------------|--------------------------------|--------------------------------|--------------------------------|
| Anatomy | 93% (N = 135) | 92% (N = 107) | 84% (N = 106) | 90% (N = 89) | 86% (N = 99) |
| Biochemistry | 92% (N = 385) | 86% (N = 297) | 71% (N = 269) | 65% (N = 207) | 60% (N = 266) |
| Botany | 93% (N = 256) | 85% (N = 216) | 81% (N = 203) | 79% (N = 164) | 73% (N = 200) |
| Cellular Biology | 93% (N = 420) | 88% (N = 426) | 77% (N = 375) | 70% (N = 311) | 65% (N = 366) |

⁵⁷ $\chi^2(4, N = 3391) = 113.801, p = .001$.

⁵⁸ Asterisks denote that a chi-square for that question showed the groups within the category were significantly different at the $p = .05$ level; while there are differences based on various dimensions, the largest and most consistent differences centered on participants' identities related to abortion, ideology, politics, and religion.

Table 5.1 Breakdown of Biologists based on Demographics (continued).

| <u>Specialty (continued)</u> | <u>Q1</u> Implicit* | <u>Q2</u> Implicit | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit* |
|-------------------------------------|--------------------------------|-------------------------------|--------------------------------|--------------------------------|--------------------------------|
| Developmental Biology | 90% (N = 155) | 83% (N = 151) | 80% (N = 135) | 76% (N = 118) | 64% (N = 132) |
| Ecology | 88% (N = 894) | 87% (N = 848) | 77% (N = 770) | 73% (N = 617) | 74% (N = 767) |
| Genetics | 92% (N = 546) | 89% (N = 441) | 76% (N = 372) | 75% (N = 290) | 68% (N = 353) |
| Molecular Biology | 92% (N = 610) | 89% (N = 602) | 78% (N = 542) | 77% (N = 436) | 68% (N = 529) |
| Physiology | 95% (N = 353) | 90% (N = 352) | 79% (N = 318) | 72% (N = 246) | 67% (N = 311) |
| Zoology | 92% (N = 431) | 91% (N = 298) | 83% (N = 274) | 83% (N = 210) | 79% (N = 266) |
| Other | 91% (N = 794) | 90% (N = 765) | 74% (N = 706) | 75% (N = 651) | 64% (N = 683) |

| <u>Abortion Identity</u> | <u>Q1</u> Implicit* | <u>Q2</u> Implicit | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit* |
|---------------------------------|--------------------------------|-------------------------------|--------------------------------|--------------------------------|--------------------------------|
| Very Pro-Choice | 90% (N = 2821) | 88% (N = 2606) | 72% (N = 2280) | 69% (N = 1919) | 64% (N = 2217) |
| Pro-Choice | 92% (N = 616) | 88% (N = 561) | 81% (N = 492) | 80% (N = 437) | 71% (N = 466) |
| Neutral | 94% (N = 291) | 88% (N = 275) | 88% (N = 257) | 86% (N = 207) | 80% (N = 242) |
| Pro-Life | 92% (N = 224) | 91% (N = 203) | 90% (N = 198) | 92% (N = 168) | 83% (N = 180) |
| Very Pro-Life | 97% (N = 329) | 92% (N = 309) | 92% (N = 294) | 92% (N = 257) | 89% (N = 286) |

| <u>Ideological Identity</u> | <u>Q1</u> Implicit | <u>Q2</u> Implicit* | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit* |
|------------------------------------|-------------------------------|--------------------------------|--------------------------------|--------------------------------|--------------------------------|
| Very Liberal | 91% (N = 1399) | 89% (N = 1417) | 73% (N = 1248) | 70% (N = 1139) | 64% (N = 1202) |
| Liberal | 92% (N = 1065) | 88% (N = 1055) | 75% (N = 937) | 76% (N = 856) | 68% (N = 901) |
| Neutral | 91% (N = 425) | 86% (N = 435) | 79% (N = 389) | 77% (N = 376) | 72% (N = 371) |
| Conservative | 93% (N = 175) | 93% (N = 178) | 91% (N = 169) | 92% (N = 164) | 83% (N = 163) |
| Very Conservative | 94% (N = 67) | 99% (N = 70) | 96% (N = 69) | 96% (N = 69) | 91% (N = 68) |

Table 5.1 Breakdown of Biologists based on Demographics (continued).

| <u>Political Identity</u> | <u>Q1</u> Implicit | <u>Q2</u> Implicit | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit* |
|----------------------------------|-------------------------------|-------------------------------|--------------------------------|--------------------------------|--------------------------------|
| Strong Democrat | 91% (N = 1520) | 89% (N = 1536) | 75% (N = 1354) | 74% (N = 1240) | 65% (N = 1314) |
| Democrat | 91% (N = 783) | 87% (N = 778) | 71% (N = 676) | 72% (N = 623) | 67% (N = 642) |
| Neutral | 91% (N = 469) | 88% (N = 472) | 79% (N = 433) | 78% (N = 321) | 72% (N = 420) |
| Republican | 98% (N = 101) | 93% (N = 106) | 91% (N = 101) | 88% (N = 101) | 85% (N = 98) |
| Strong Republican | 89% (N = 35) | 97% (N = 37) | 94% (N = 36) | 94% (N = 35) | 85% (N = 34) |

| <u>Religious Identity</u> | <u>Q1</u> Implicit | <u>Q2</u> Implicit | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit* |
|----------------------------------|-------------------------------|-------------------------------|--------------------------------|--------------------------------|--------------------------------|
| Agnostic | 90% (N = 524) | 88% (N = 537) | 72% (N = 446) | 72% (N = 406) | 65% (N = 434) |
| Atheist | 90% (N = 854) | 90% (N = 857) | 72% (N = 749) | 70% (N = 697) | 63% (N = 721) |
| No Religion | 91% (N = 511) | 85% (N = 509) | 77% (N = 470) | 78% (N = 422) | 66% (N = 427) |
| Buddhist | 86% (N = 43) | 89% (N = 46) | 76% (N = 41) | 78% (N = 40) | 56% (N = 39) |
| Hindu | 96% (N = 27) | 93% (N = 27) | 85% (N = 27) | 81% (N = 26) | 87% (N = 23) |
| Muslim | 96% (N = 22) | 86% (N = 21) | 79% (N = 19) | 90% (N = 19) | 68% (N = 19) |
| Jewish | 93% (N = 110) | 90% (N = 112) | 70% (N = 95) | 68% (N = 90) | 62% (N = 93) |
| Catholic | 93% (N = 304) | 91% (N = 308) | 85% (N = 294) | 82% (N = 271) | 79% (N = 282) |
| Lutheran | 97% (N = 58) | 90% (N = 57) | 68% (N = 57) | 70% (N = 50) | 70% (N = 53) |
| Protestant | 94% (N = 429) | 90% (N = 435) | 84% (N = 390) | 81% (N = 375) | 74% (N = 392) |

| <u>Gender</u> | <u>Q1</u> Implicit | <u>Q2</u> Implicit | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit |
|----------------------|-------------------------------|-------------------------------|--------------------------------|--------------------------------|-------------------------------|
| Male | 91% (N = 2472) | 89% (N = 2233) | 79% (N = 2004) | 77% (N = 1654) | 69% (N = 1954) |
| Female | 91% (N = 1425) | 88% (N = 1349) | 74% (N = 1187) | 72% (N = 978) | 71% (N = 1132) |

Table 5.1 Breakdown of Biologists based on Demographics (continued).

| <u>Language</u> | <u>Q1</u> Implicit | <u>Q2</u> Implicit* | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit* |
|------------------------|-------------------------------|--------------------------------|--------------------------------|--------------------------------|--------------------------------|
| Native English | 92% (N = 2150) | 89% (N = 2166) | 74% (N = 1863) | 73% (N = 1743) | 70% (N = 1828) |
| Non-Native English | 90% (N = 964) | 87% (N = 974) | 80% (N = 933) | 81% (N = 843) | 63% (N = 864) |

| <u>School Continent</u> | <u>Q1</u> Implicit* | <u>Q2</u> Implicit | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit* |
|--------------------------------|--------------------------------|-------------------------------|--------------------------------|--------------------------------|--------------------------------|
| Asia | 91% (N = 154) | 91% (N = 150) | 85% (N = 149) | 86% (N = 132) | 60% (N = 139) |
| Africa | 96% (N = 45) | 95% (N = 43) | 86% (N = 42) | 97% (N = 38) | 79% (N = 38) |
| Australia | 95% (N = 220) | 92% (N = 210) | 86% (N = 200) | 82% (N = 186) | 74% (N = 189) |
| Europe | 90% (N = 1027) | 88% (N = 1019) | 83% (N = 987) | 83% (N = 904) | 67% (N = 925) |
| North America | 92% (N = 3373) | 88% (N = 2985) | 74% (N = 2608) | 69% (N = 2035) | 70% (N = 2595) |
| South America | 77% (N = 30) | 82% (N = 28) | 76% (N = 25) | 82% (N = 22) | 50% (N = 26) |

| <u># of Children</u> | <u>Q1</u> Implicit | <u>Q2</u> Implicit | <u>Q3</u> Implicit* | <u>Q4</u> Explicit* | <u>Q5</u> Explicit* |
|-----------------------------|-------------------------------|-------------------------------|--------------------------------|--------------------------------|--------------------------------|
| 0 | 91% (N = 1033) | 88% (N = 955) | 75% (N = 821) | 75% (N = 684) | 68% (N = 802) |
| 1 | 91% (N = 686) | 87% (N = 635) | 76% (N = 566) | 73% (N = 440) | 68% (N = 522) |
| 2 | 91% (N = 1516) | 90% (N = 1397) | 75% (N = 1254) | 73% (N = 1044) | 68% (N = 1219) |
| 3 | 91% (N = 461) | 89% (N = 422) | 87% (N = 388) | 84% (N = 323) | 76% (N = 381) |
| 4+ | 98% (N = 164) | 88% (N = 147) | 85% (N = 137) | 84% (N = 118) | 79% (N = 137) |

Thus, in the first five questions, of those who assessed multiple statements, only 4% rejected each statement (187 out of 4650), and 96% affirmed at least one (4463 out of 4650). 85% affirmed at least half of the statements they assessed (3936 out of 4650). Overall, on both sets of questions, there were 37,479 assessments of statements that represented the view that a human's

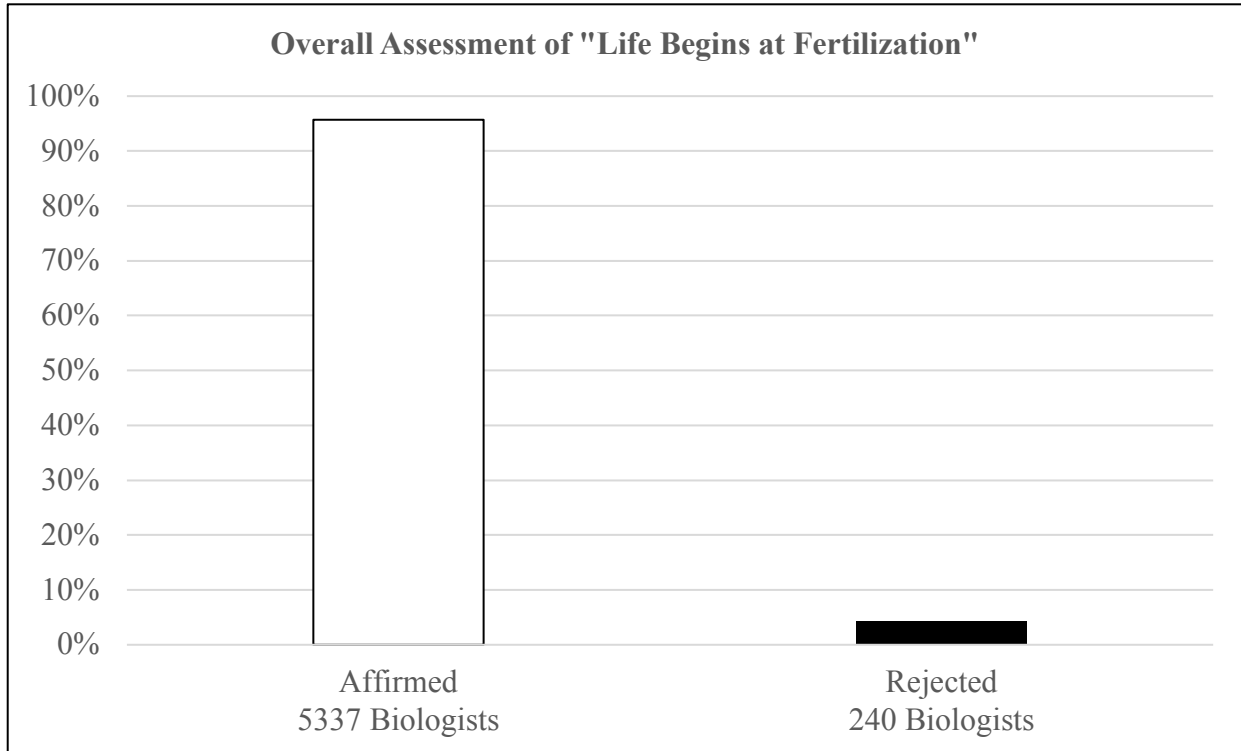
life begins at fertilization, and 80% were affirmed (30044 out of 37479). If one looks at all the instances in which an answer was provided, which includes non-assessments, 67% of responses affirmed the view (30044 out of 44707), 17% rejected the view (7435 out of 44707), and 16% of responses were non-assessments (7228 out of 44707).

Again, Q4 and Q5 went beyond statements and took the form of arguments, as they entailed justifications for the claims (i.e., “since that process” in Q4, “because it is” in Q5). Thus, the affirmation rates could be suppressed since the participants could agree with the initial statement and disagree with the justification, in each question. However, this seems unlikely since the affirmation rate for Q3 and Q4 are so similar, despite the fact that Q3 did not contain an argument. One could also argue that participants’ high affirmation rates of Q4 and Q5 suggest that the claims are not only supported, but the arguments are supported as well.

These data would then not only suggest that fetuses are biological humans but that fetuses are humans because they are developing in the human life cycle, which is what one would expect given that the human life cycle describes the entire ontogenetic chronology of a human’s life and the present question is when a human’s life begins. Thus, the beginning of the chronology is consonant with the beginning of life. Thus, it should be unsurprising that most biologists then use that to biologically classify a human fetus as a human.

Overall, as depicted in Figure 5.1 below, 5,577 participants assessed at least one of the five statements, and only 240 participants did not affirm at least one of the statements (4%). 86% affirmed at least half of the items they assessed, and 64% affirmed each item they assessed. Thus, regardless of the phrasing of the question, a majority of biologists affirm the underlying biological view that a human’s life begins at fertilization.

Figure 5.1 Biologists' Assessments of the View 'Life Begins at Fertilization'.



Results – When Do They Believe Life Begins

Since biologists assessed a stated biological view in the previous measures, it was important to learn the views they would write about in an open-ended essay question. Again, despite Q4's explicit descriptive frame (i.e., “[f]rom a biological perspective...”), the question’s use of certain language (e.g., “human”, “life begins”) could activate a normative interpretation. Most participants wrote about various points during pregnancy: when the sperm fertilizes the egg, when the zygote implants in the uterus, cell differentiation, neurogenesis, the first heartbeat, the first brain waves, the first pain response, fetal viability, and birth. Since a small percent of participants wrote about each of the various points after fertilization and before viability, they were grouped and given the code “pre-viability”.

Question 6: Open-Ended Essay Question “From a biological perspective, how would you answer the question ‘When does a human's life begin?’”

Altogether, responsive answers were given one of four codes: fertilization, pre-viability, fetal viability, and birth.⁵⁹ Consistent with biologists’ descriptive view in Q1-Q5, a consensus of biologists wrote about the biological view that ‘a human’s life begins at fertilization’ (68%; 1898 out of 2794). 10% were given the code pre-viability (268 out of 2794), 10% wrote about fetal viability (284 out of 2794), and 12% wrote about birth (343 out of 2794).

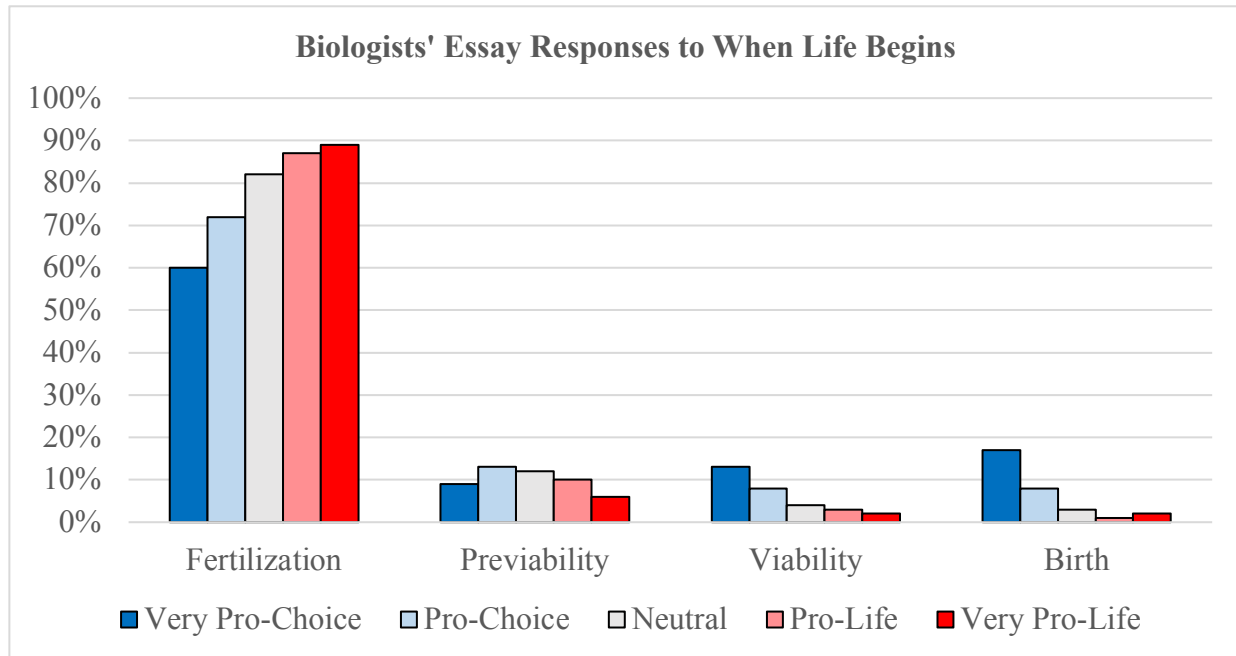
As with questions 1-5, participants who most strongly identified as pro-choice affirmed the statement at a lower rate (60%) than those who were neutral in their stance on abortion (82%) and those who identified most strongly as pro-life (89%). There was a similar pattern between those who identify as liberal and conservative, and those who identify as Democrat and Republican. Non-Christians were less likely to affirm the statement than Christians; those who speak English as their native language than those who do not; females than males; and those who have fewer kids than those who have more kids.

Results on viability and birth were interesting. Most of those who wrote about those two points were pro-choice, few neutral and pro-life participants wrote about viability or birth. While 30% of very pro-choice participants wrote that life begins at viability or some point after, it was a much lower rate among participants who identified as pro-choice (16%), neutral (7%), pro-life (4%), and very pro-life (5%). Despite this variability, Figure 5.2 shows that biologists across the

⁵⁹ Nonresponsive answers did not represent a fetus’ developmental point or state during pregnancy; many of the nonresponsive answers focused on the beginning of ‘human life’ rather than ‘a human life’ (i.e., they argued life never really begins or ends, as it has continued in an unbroken chain from the first humans to modern humans).

ideological spectrum wrote about fertilization when given an opportunity to write about their view of when a biological human’s life begins.

Figure 5.2 Biologists’ Coded Essay Responses to “When Does Life Begin?”⁶⁰.



There was a surprising finding in an analysis of responses to questions 4 and 6. Since question 4 represents the biological view that a human’s life begins at fertilization⁶¹ and question 6 centers on the biological perspective on when a human’s life begins⁶², the similarity suggests that participants might provide similar responses to the questions. Indeed, 93% of pro-life biologists who affirmed Q4 wrote about fertilization in Q6 (335 out of 360); 6% affirmed Q4 and wrote about

⁶⁰ Q6: “From a biological perspective, how would you answer the question ‘When does a human's life begin?’”.

⁶¹ Q4: “In developmental biology, fertilization marks the beginning of a human's life since that process produces an organism with a human genome that has begun to develop in the first stage of the human life cycle.”

⁶² Q6: “From a biological perspective, how would you answer the question ‘When does a human's life begin?’”.

pre-viability (20 out of 360), which is some point between fertilization and viability, and 1% affirmed Q4 and wrote about viability or birth (5 out of 360). Fewer pro-choice biologists who affirmed Q4 wrote about fertilization in Q6 (83%; 1057 out of 1280), as more pro-choice biologists wrote about some point later: 7% wrote about previability (85 out of 1280), 5% wrote about viability (60 out of 1280), and 6% wrote about birth (78 out of 1280).

This reflects incoherent responses to the essay question and the most similar multiple choice question, but there were even bigger discrepancies between Q1-4 and Q6.⁶³ However, focusing on the most direct comparison, it is unclear why 17% of pro-choice biologists would affirm the biological view that a human's life begins at fertilization and yet write about some point after fertilization. If it is correct to say that a human's life begins at fertilization, why would one suggest that a human's life begins at viability or birth? Perhaps it was more difficult for participants to reject what they believed to be a correct statement in the multiple choice question than to write about an incorrect statement in response to the essay prompt. This discrepancy works together with pro-choice biologists' overall willingness to write that a human's life begins at viability or birth to suggest that some pro-choice biologists were motivated to provide an essay response that was congenial to their abortion beliefs.

Replicability and Robustness

Due to the numerous and prolonged interruptions in data collection, multiple survey versions were utilized in this study. The above results aggregated the data from all of the surveys to

⁶³ For instance, 88% of pro-life biologists affirmed Q1 and wrote about fertilization (382 out of 432) compared to 4% that wrote about viability or birth (17 out of 432); fewer pro-choice biologists affirmed Q1 and wrote about fertilization (68%; 1285 out of 1904), while many affirmed Q1 and wrote about viability or birth (23%; 438 out of 1904).

represent all of the results. However, this situation permitted a comparison of the results between surveys to address potential replication issues.⁶⁴

Before comparing the results between surveys, it is important to compare the participants who participated in each survey. For instance, some surveys only had participants from American universities, while others were international. However, along the dimensions that have been shown to be predictors of one's responses to the operative questions reported above, each survey had a similar group of respondents. In terms of the distributions on abortion stances, each survey had a majority of participants who identified as pro-choice (range: 81-90%). Similarly, each survey had a majority of participants who identified as liberal (range: 86-97%) and Democratic (89-96%). Thus, the important consideration is the positioning of each question with respect to each other.

Question 1 was asked in nine non-identical surveys, so it was asked in nine different contexts. 91% of participants affirmed the statement in question 1 throughout the surveys, and each survey had a similar affirmation rate (range: 87-97%). Question 2 was asked in seven different surveys; overall, 88% affirmed the statement, and participants in each survey had a similar affirmation rate (range: 85-100%). Question 3 was asked in seven different surveys; overall, 77% affirmed the statement, and participants in each survey had a similar affirmation rate (range: 75-89%). Question 4 was asked in seven different surveys; overall, 75% affirmed the statement, and participants in each survey had a similar affirmation rate (range: 64-85%). Question 5 was asked in seven different surveys; overall, 88% affirmed the statement, and participants in each survey

⁶⁴ <https://www.theatlantic.com/science/archive/2016/03/psychologys-replication-crisis-cant-be-wished-away/472272/> [<https://perma.cc/SA7K-BZK7>].

had a similar affirmation rate (range: 49-89%).⁶⁵ Finally, in the essay question, fertilization was consistently the most popular selection across seven different surveys (range: 56-75%).

Finally, some surveys presented Q1-Q5 twice to participants, once before there was any mention of the abortion debate and once after participants were presented with several questions related to the abortion debate. However, there was not much difference between such responses. Question 1 had a similar affirmation rate before any mention of the abortion debate (91%) as after (88%), and the same could be said for question 2 (88% vs. 88%), question 3 (77% vs. 75%), question 4 (75% vs. 72%), and question 5 (69% vs. 69%). While these analyses suggest that some biologists would give a different answer to two identical items, after being made aware of the question's potential relevance to the abortion debate, such instances exceedingly rare. Thus, overall, affirmation rates on Q1-Q5 were unlikely to be predicated on participants' level of awareness of the questions' context within the abortion debate.

Conclusion

Since 75% of biologists affirmed the explicit view that a human's life begins at fertilization in Q4 and 68% of biologists wrote about fertilization when asked when a human's life begins in Q6, biologists do not only recognize the view as correct but they also believe it is correct to the exclusion of other views. One interesting finding is that 1,011 participants affirmed all five statements and wrote about fertilization in the essay question, while there were only 33 participants who rejected all five statements and wrote about some later point in the essay. Of those participants

⁶⁵ Question 5 had a wider range because there was a survey that was an outlier (49%), which was much lower than the survey with second-lowest affirmation rate (63%); this could have been due to the small sample size (n = 49) and the measure, as this survey was the only survey that utilized an interval measurement scale.

who consistently rejected the view that a biological human's life begins at fertilization, 29 were very pro-choice, three were pro-choice, one was neutral, and none were pro-life or very pro-life.

Between testimonies and state and federal committees' findings, a review of the scientific literature, and this robust finding, it is reasonable to state that the leading scientific view is that a human's life begins at fertilization. Not that it is viable or capable of rational thought, but that a zygote is a human developing in the human cycle just like an infant or an adult; a zygote's morphology as a single cell is no less disqualifying of being classified as a biological human than an infant's inability to walk, talk, or sexually reproduce.

Altogether, a great number of biologists affirmed the items that contain the following scientific propositions: (1) a human zygote is an organism, (2) a mammal's development begins at fertilization, (3) a mammal's life begins at fertilization, (4) fertilization marks the beginning of a human's life, (5) a human's life begins at fertilization because it is developing in the first stage of the human life cycle, (6) a human zygote is a human, and (7) a human zygote is a human because it is developing in the human life cycle,.

Thus, a large majority of biologists believes that 'a human's life begins at fertilization' is not only a correct biological statement, but it is the correct biological view on when a human's life begins. This suggests that there is an informational asymmetry between biologists and the American public, as only 38% of participants (347 out of 918) in chapter 4 believed that, from a biological perspective, a human's life begins at fertilization.

Science Communication

There have been suggestions that it is unethical to collect data that might suggest there is a scientific consensus on when life begins. Some believe that it can be misused by pro-life Americans to further intensify the abortion debate, while others suggest that it is not a contribution because it is common knowledge that a fetus is a biological human. Indeed, one peer questioned the data because they believed that all of their friends already recognized a fetus as such. Addressing these concerns in reverse-order, this thesis' surveys reported that 26% of pro-choice biologists and 43% of pro-choice Americans in chapter believe a fetus is not a biological human until viability⁶⁶; altogether, 62% of Americans surveyed in chapter 4 believed that a biological human's life begins at some point after fertilization.

As for the role of this data in the greater society, consider the following quote from Dan Kahan:

"[C]onflict over what is known by science arises from the very conditions of individual freedom and cultural pluralism that make liberal democratic societies distinctively congenial to science. This tension, however, is not an "inherent contradiction"; it is a problem to be solved — by the science of science communication understood

⁶⁶ Here, much like with Kohlberg's conventional level of reasoning – which describes that an "attitude is not only one of conformity to personal expectations and social order, but of loyalty to it, of actively maintaining, supporting, and justifying the order" (Kohlberg, L. (1973). "The Claim to Moral Adequacy of a Highest Stage of Moral Judgment". *Journal of Philosophy*. 70 (18): 630–646.) – the biologists and Americans might be led to adopt a strategy of not classifying pre-viable fetuses as biological humans to justify *Roe*'s view of when life begins, which currently serves as the point at which a fetus can be protected in America; "[M]isinformation is not something that happens to the mass public but rather something that its members are complicit in producing as a result of identity-protective cognition. Persons using this mode of reasoning are not trying to form an accurate understanding of the facts... they are using their reasoning to cultivate an affective stance that expresses their identity and their solidarity with others who share their commitments", Kahan, D.M., *Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition* (May 24, 2017). Cultural Cognition Project Working Paper Series No. 164; Yale Law School, Public Law Research Paper No. 605; Yale Law & Economics Research Paper No. 575. Available at SSRN: <https://ssrn.com/abstract=2973067> [<https://perma.cc/95U2-NBDC>].

as a 'new political science' for perfecting enlightened self-government."⁶⁷

In the context of this work, the conditions of individual freedom and cultural pluralism are people's beliefs about the legality of abortion. That is a major issue in people's self-identity, social identity, and broader cultural identity, and it could be the primary operating principle⁶⁸ when considering questions about when life begins. When the topic is constrained to non-abortive contexts, which reduces their need to protect their identity as a supporter of abortion rights⁶⁹, they are free to describe their unbiased understanding of fetuses as humans. Kahan would likely say that this shows that pro-choice and pro-life Americans do not fundamentally disagree on how to perceive fetuses, so the dispute is not superfluous, but it is a result of a misunderstanding. Kahan makes a strong proclamation that:

“[S]cience communication professionals **must** protect citizens from having to choose between *knowing what's known by science* and *being who they are* as members of diverse cultural communities.”⁷⁰

⁶⁷ Kahan, D.M. (2015). 'What is the "science of science communication"?' . *JCOM* 14 (03), Y04., https://jcom.sissa.it/sites/default/files/documents/JCOM_1403_2015_Y04.pdf [<https://perma.cc/84NT-78WG>].

⁶⁸ Much like how people with certain ideological orientations can interpret abortion clinic protestors' actions differently (Kahan, D.M., Hoffman, D.A., Braman, D., Evans, D., & Rachlinski, J.J. "They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction" (2012). *Cornell Law Faculty Publications*. 400. <https://scholarship.law.cornell.edu/facpub/400> [<https://perma.cc/763R-PUAM>]), one principally sees a question through a certain lens; while conservatives might think about evolution through the lens of their belief in God, some pro-choice Americans might think about when life begins through the lens of their support of abortion rights.

⁶⁹ This is set against the pressure they might have to be consistent; if they were concentrating on the question and asking themselves if it would be hypocritical to consider a fetus a human in a non-abortive context and a non-human in an abortive context.

⁷⁰ Kahan, D.M. (2015). 'What is the "science of science communication"?' . *JCOM* 14 (03), Y04., https://jcom.sissa.it/sites/default/files/documents/JCOM_1403_2015_Y04.pdf [<https://perma.cc/P7FS-JSTZ>].

This suggests that people who discuss when life begins should use the disentanglement principle to help pro-choice Americans understand that they can recognize fetuses as biological humans without feeling as if they are betraying their identities as abortion-rights supporters. A noble goal and one that undergirds this entire thesis: if people share a common understanding of fetuses, which would not inherently necessitate a particular view of abortion, then there would not be as much pressure to perceive fetuses through the prism of abortion rights. There would still be pressure to not recognize biologists' consensus, as pro-choice Americans might still think tactically and choose not to recognize it since it might be a huge moral victory for pro-life Americans that energizes the movement, but at least they would not feel an inherent tension between recognizing a fetus as a biological human and supporting abortion rights. Thus, if science communication professionals can help society better integrate the science of when life begins if they buttress this tension and disentangle 'when life begins' from 'when life is protectable' or 'when abortion should be restricted'.

At the very least, this data lends some support to the view that “[t]here is no credible scientific opposition to the fact that a genetically distinct human life begins at conception and that an induced abortion is a death”.⁷¹ A similar argument had been previously suggested by this author's adviser, as he had once suggested that statisticians should perhaps take into account the number of abortions when calculating the number of human deaths and the life expectancy in a given country. For example, if there were a country with a higher abortion rate, they would have a lower life expectancy than a similar country with a lower abortion rate. This chapter's data certainly supports such a view of fetuses and abortion.

⁷¹ Studnicki, J., MacKinnon, S.J., & Fisher, J.W. “Induced Abortion, Mortality, and the Conduct of Science”, *Open Journal of Preventive Medicine*, 2016, 6, 170-177, June 2016, available at: <http://dx.doi.org/10.4236/ojpm.2016.66016> [<https://perma.cc/CPY5-6MME>].

Moving forward, since confusion and error surrounding the biological view on when life begins has been addressed, the hope is that abortion discussions can be more focused on relevant policy concerns when they are not mired in discussions of how fetuses should be classified. While participants in discussions might not believe or accept biologists' opinions, especially when those opinions are in conflict with participants' support of abortion rights, addressing such error could help participants assess whether there is common ground in the debate on which both sides can agree.

CHAPTER 6: GROUP MEDIATIONS ON THE U.S. ABORTION DEBATE

“Members of pro-choice and pro-life factions, we believe, who took the trouble to candidly air the details of their views might find more in the way of shared interests than they anticipate... Yet, the discussion and negotiation necessary to become aware of such areas of potential agreement may be precluded by erroneous assumptions about the ideological orthodoxy of the other side.”

Abortion Researchers¹

Mediators try not to focus on the rhetorical dance of arguments, counter-arguments, and rebuttals since that dance is in the realm of competition and mediation is the realm of collaboration. After all, while most discussions on contentious topics have some utility in enhancing both sides’ understanding of each other’s positions and interests, people typically focus on defending their positions rather than transcending their positions to work toward identifying potential mutually-satisfying positions. Whereas that is the very purpose of mediation.

In their seminal work on conflict resolution, Fisher and Ury offered up the following story to explain how two parties can have diametrically-opposed positions, yet have common or compatible underlying interests:

Two siblings argued over the last orange in the refrigerator. They decided to cut the orange in half and split it. The brother ate his half of the orange and threw away the peel, while the sister used her peel to bake a cake and threw away her half of the orange. If the siblings had discussed their interests in the orange, they could’ve both had exactly what they wanted. Instead, each only got half.²

¹ Robinson, R. J., Keltner, D., Ward, A., & Ross, L. (1995). Actual versus assumed differences in construal: “Naïve realism” in intergroup perception and conflict. *Journal of Personality and Social Psychology*, 68, 404–417.

² Fisher, R., Ury, W. & Patton, B. “Getting to Yes: Negotiating Agreement Without Giving In, Penguin Books”, p. 31, 1991.

This metaphor represents the distinction between stated positions and actual positions, and it reveals how important it is for parties in conflicts to openly discuss what they want and why they want it. Here, the brother and sister's stated positions were that they each wanted the whole orange, but their actual positions were distinct (i.e., she wanted the peel, and he wanted the fruit).³ Surely, this example shows that there was merely a failure to communicate, but facilitating communication and enabling mutual understanding is the essence of mediation. As the story showed, when parties go deeper and communicate more freely – when they expose why they want something, instead of merely vying for what they want – they can discover areas of agreement and compromise.⁴

While this might seem like an insignificant dispute based on a misunderstanding fit for a situational comedy television show, it is a classic mediation example for that very reason. Most who seek or utilize mediation do not need it, but they become subject to it when they become so embroiled in greed or emotion that they cannot openly and honestly communicate with the other party, let alone deal work with them to achieve a common goal. Sometimes this is true of both parties, and other times it is only one party.

This understanding is the very reason that mediation is suitable for the abortion debate. Given the language employed by both parties, and the rarity of robust positions that take a holistic view of both sides' interests, the current debate is not on a trajectory to improve. It has not been an honest or error-free debate with aims of mutual understanding, compromise, or resolution

³ As in the orange example, pro-choice and pro-life Americans' actual positions are not as divided as their stated ones; while the stated positions are colloquially understood as “for legal abortion” and “against legal abortion”, respectively, most are in agreement on legally restricting post-viability abortions (see, e.g., http://www.slate.com/blogs/saletan/2014/01/23/second_trimester_abortion_polls_even_pro_choicers_support_a_20_week_ban.html [archived link unavailable]), so their actual positions are more appropriately described as “for legal pre-viability abortions” and “against legal pre-viability abortions”.

⁴ Fisher, R., Ury, W. & Patton, B. “Getting to Yes: Negotiating Agreement Without Giving In, Penguin Books”, p. 31, 1991.

through even-handed persuasion tactics, but rather a power struggle between two parties that have sought to influence through coercive emotional arguments.

This sense is readily apparent when a person debating abortion suggests that elective abortions are part of “women’s healthcare” or when one uses the imagery of an aborted fetus to provoke an emotional response. Both are technically accurate and not easily described as misleading, but they are heavy-handed attempts to put a thumb on the scale and box people in, rather than to aid in the development of sophisticated and carefully-considered positions. One cannot fault them for it. They are advocates, and that is their province. However, it is the province of a mediator and a researcher of the abortion debate to push past that which stifles the kind of honest discussion that promotes understanding, in order to set the table for resolution.

Mediation Theory

Positions are often simple statements that represent what a party wants as an outcome (e.g., I want the last orange), but they can also represent one’s opinion on an issue (e.g., being pro-choice on the issue of abortion). Since people in the U.S. abortion debate often define this dispute in terms of their positions, the debate seems intractable since the positions are represented as polar opposites. However, if people discussed the debate in terms of their underlying interests and values, rather than these overt positions, the parties might not be as divided, and they might see each other in less of an adversarial light. Seemingly “resolution-resistant conflicts” sometimes even become resolvable since interests are often common or compatible even when positions are not.⁵ As in the

⁵ Maiese, M. "Interests, Positions, Needs, and Values." Beyond Intractability. Eds. Burgess, G. and Burgess, H. Conflict Information Consortium, University of Colorado, Boulder, 2004.

orange example, even though their stated positions were zero-sum and totally irreconcilable, their interests in the orange were completely compatible.

While a position is often what someone wants, an interest is why they want it. In the Handbook of Conflict Management, interests are defined as “the needs, concerns, and desires of individuals or groups”.⁶ Going deeper, values are the motivating concepts that underlie parties' interests. These values are the principles that represent ethical codes and beliefs about the world.⁷ They are often non-negotiable since they reflect a stable and deeply-held worldview.

It helps to visualize positions, interests, and values in a hierarchy. Positions are at the top, since they are on the surface and represent concrete stances that are the expression of underlying interests, which are in the middle, and values, which are at the bottom since they are the deepest, most foundational abstract principles that interests represent.

To summarize, this hierarchy is based on the following concepts and definitions: (1) positions are parties' stances on issues, (2) interests represent why parties hold their positions, and (3) values are the principles and underlying beliefs about the world that motivate parties' interests. Consider how this hierarchy applies to the orange example: (1) both parties had diametrically opposed positions since they each wanted one orange even though only one was available; (2) they had compatible interests since the one child wanted the peel so they could make a cake and the other child wanted the fruit so they could eat it; (3) they likely had the same value that a person should exert their will to satisfy their needs.

⁶ Pammer, W. & Killian, J. “The Handbook of Conflict Management”. CRC Press, p. 106, 2003.

⁷ Akin Ojelabi, L. & Sourdin, T. “Using a Values-Based Approach in Mediation”. 22 ADRJ 258, 2011.

While the analysis of the orange example begins with divergent positions and ends with uncovering common or compatible interests and values, it can help to consider how this works in reverse. Consider the following example that begins with discussing abstract values, moves to interests, and ends with very concrete positions:

“Once I saw this guy on a bridge about to jump. I said, "Don't do it!" He said, "Nobody loves me." I said, "God loves you. Do you believe in God?" He said, "Yes." I said, "Are you a Christian or a Jew?" He said, "A Christian." I said, "Me, too! What [denomination]?" He said, "Baptist." I said, "Me, too! Northern Baptist or Southern Baptist?" He said, "Northern Baptist." I said, "Me, too! Northern Conservative Baptist or Northern Liberal Baptist?" He said, "Northern Conservative Baptist." I said, "Me, too! Northern Conservative Baptist Great Lakes Region, or Northern Conservative Baptist Eastern Region?" He said, "Northern Conservative Baptist Great Lakes Region." I said, "Me, too!" Northern Conservative Baptist Great Lakes Region Council of 1879, or Northern Conservative Baptist Great Lakes Region Council of 1912?" He said, "Northern Conservative Baptist Great Lakes Region Council of 1912." I said, "Die, heretic!" And I pushed him over.”⁸

Here, the two men shared the same values of monotheism, religion, and community, yet they greatly diverged in their positions, specifically the outcome of which council should be followed.

Both examples showed that two parties could have common or compatible interests and values, despite differing in their positions. However, there also exists the possibility that two parties can differ in their interests and values, and yet have identical positions. Consider the following: two countries agree to both wage war on a third country to remove its malevolent dictator. Both countries' positions are identical, yet one country is motivated by its interest to stop human rights abuses in the third country, and the other country is motivated by its interest to conquer the third

⁸ <https://www.theguardian.com/stage/2005/sep/29/comedy.religion> [<https://perma.cc/2LD-D-AEL2>].

country. Despite their convergence in positions, the two countries diverge in their interests and their respective values of humanitarianism - protecting all humans from abuse - and imperialism – expanding their power by conquering other countries.

While this final analysis shows that the two countries do not have conflicting positions, as there is such incoherence between each party's interests and values, it does reveal a potential conflict. To wit, using the hierarchy is not only helpful in analyzing conflicts, as there is also utility in diagnosing potential conflicts and understanding why people fixate on positions during conflicts. Since people's positions, interests, and values can be thought to range from the concrete to the abstract – with positions being the most concrete and values being the most abstract – discussing concrete positions can spare cognitive resources and discussing abstract values can tax cognition.⁹

Once a person has formed their position, it requires less mental effort to merely state, 'I want abortion to be legal', than explaining their underlying interest, 'I want them to be legal so women can have the right to make reproductive decisions', or reflecting on the values that motivate their interests, 'Women deserve equality, freedom, and the ability to self-govern'. Simply put, positions are often explicit components of one's identity, so it is far easier to recruit that information than having to think about their reasons for holding it or accessing the implicit values that drive those reasons. Thus, it is unsurprising why most would make positional arguments, rather than discussing their underlying interests and values when engaged in a debate on a complex issue like abortion.

⁹ For discussions that explain more effortful thinking can be more cognitively taxing, see, e.g., Lavine, H. (1999). "Types of evidence and routes to persuasion: The unimodal versus dual-process models". *Psychological Inquiry*, 10, p. 141-144, 1999.; Lewis, P. A., Birch, A., Hall, A., & Dunbar, R. I. M. "Higher order intentionality tasks are cognitively more demanding". *Social Cognitive and Affective Neuroscience*, 12(7), p. 1063–1071, 2017.

In a debate, there is also a tactical advantage to solely discussing positions. If one opens up about their interests (e.g., ‘I want abortion to be legal because I only want children to grow up wanted and in good homes.’), they leave themselves open to the other side using that information to explain that a different position better satisfies those interests (e.g., ‘I agree that kids should be raised in good homes by parents who want them, and we can ensure that by promoting adoption as the solution to unwanted pregnancies. So, your interest will be satisfied with my position that the adoption process should be streamlined and subsidized, and abortion should be illegal.’). Thus, if a person in a dispute opens up about the interests that underlie their position, they can lose bargaining power. While most might not have an explicit sense of this debate tactic, conflicts are a common enough part of the human experience that people might develop an implicit sense of this risk through experiential learning.¹⁰

Taken together, these motivations likely drive Americans to focus on positional aspects of the abortion debate (e.g., ‘Should abortion be legal?’, ‘Should Roe v. Wade be overturned?’) rather than interest-based aspects (e.g., ‘How does abortion affect our society?’) and value-based topics (e.g., ‘Is abortion immoral?’), since discussing positions can be less cognitively taxing and can protect a person’s bargaining position in a debate. Although it is clear that people might be motivated to avoid using an interest-based approach to conflict resolution, mediation theory suggests that focusing on interests can expose “win-win” solutions to seemingly intractable debates.

Interest-based approaches utilize problem-solving techniques aimed at understanding the needs and interests of both sides. If a mediator can fully understand both sides’ positions, their underlying interests, and the values that drive those interests, then they can identify the potential

¹⁰ See, e.g., Kolb, D. A. (1984). “Experiential learning: Experience as the source of learning and development (Vol. 1)”. Englewood Cliffs, NJ: Prentice-Hall.

areas for agreement and the sticking points on which neither side will cede. Thus, by focusing on interests, opposing parties can discover common or compatible interests and values that would have gone undiscovered had the parties focused on their positions.¹¹ Indeed, studies on dispute resolution suggest that conflicts are resolved at a higher rate and in a shorter amount of time, resulting in greater satisfaction of the parties, when both sides focus on their interests in mediation instead of focusing on their positions in arbitration.¹²

While this approach typically focuses on resolving conflicts, this interest-based approach can be used to learn about Americans' underlying interests and motivating values to help explain why the U.S. abortion debate is so contentious. Specifically, it would be interesting to know whether Americans are as divided in their underlying interests and motivating values, as they are in their abortion positions.

There exists the possibility that Americans are less divided on their interests and values than their abortion positions (e.g., both sides could have common interests in reducing unwanted pregnancies and abortions, yet be diametrically opposed on the question of legal abortion access). Further, the degree to which Americans have identified with these issues (i.e., self-identifying as a pro-life instead of merely stating they believe abortion should be illegal) could be driving this division. People are more likely to be negative toward opposing views when their position is

¹¹ Fisher, R., Ury, W. & Patton, B. "Getting to Yes: Negotiating Agreement Without Giving In, Penguin Books", p. 42, 1991.

¹² Goldberg, S. & Brett, J. "An experiment in the mediation of grievances", Monthly Labor Review, 23, 1983; Brett, J., Barsness, Z., & Goldberg, S. "The effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers", Negotiation Journal, 1996.

framed as an identity; people will also stick with positions, even in the face of compelling opposing points, due to a dogmatic need to stick to a long-held position.¹³

Group Mediations

Participants were recruited¹⁴ from the University of Chicago (“UChicago”) and Wheaton College (“Wheaton”)¹⁵. Both are competitive schools¹⁶ with very different ideological leanings. The former is a liberal bastion of open inquiry for those who want to pursue the life of the mind¹⁷, while the latter is considered a conservative oasis for high-performing students¹⁸. While these populations were not selected to make comparisons, they do permit such comparisons. The primary purpose for selecting both populations is that, together, they represent a broad range of strong

¹³ Patton, M.M. “Representing attitudes as identities: Consequences for attitude features and implications for political and legal processes”, 46, The University of Chicago, 2008.

¹⁴ UChicago participants’ participation was compensated with course credit and \$15 per participant, while Wheaton participants solely received the financial compensation.

¹⁵ Six discussions took place with members of the UChicago community on its campus (range: 4-7 participants), and three discussions took place with members of the Wheaton community on its campus (range: 3-4 participants); they ranged from 68 minutes to 89 minutes in duration.

¹⁶ The middle 50% of the University of Chicago’s 2022 incoming freshman class scored within a range of 33-35 on the ACT (<https://collegeadmissions.uchicago.edu/apply/class-2022-profile> [<https://perma.cc/4P48-3SSH>]), and the middle 50% of Wheaton’s 2021 incoming freshman class scored within a range of 27-32 on the ACT (<https://www.wheaton.edu/about-wheaton/why-wheaton/college-profile/admissions/> [<https://perma.cc/N85P-56KF>]); for reference, a 27 on the ACT puts a student at the 86th percentile, <http://www.act.org/content/dam/act/unsecured/documents/MultipleChoiceStemComposite.pdf> [<https://perma.cc/45CP-XTB6>].

¹⁷ See, e.g., Boyer, J. *Academic Freedom and The Modern University: The Experience of the University of Chicago*, https://news.uchicago.edu/sites/default/files/attachments/Academic_Freedom_V1.pdf [<https://perma.cc/5PQT-XZZF>].

¹⁸ Wheaton has a community covenant that encourages employees and students to affirm and live according to its provisions (<https://www.wheaton.edu/about-wheaton/community-covenant/> [<https://perma.cc/V28F-ME9E>]), and the school has been referred to as “the Harvard of the Christian schools” (<http://time.com/4233666/wheaton-college-gay-leader/> [<https://perma.cc/38C9-A57X>]).

students along ideological and religious spectra. Indeed, while 81% of UChicago participants identified as pro-choice, 82% of Wheaton participants identified as pro-life¹⁹; while 25% of UChicago participants identified as conservative, 50% of Wheaton participants did. Overall, 56% were female, 44% were male, all were college-aged (range: 18-31), and most were 18-24 years old (40 out of 43).

Participants were not selected based on any additional criteria, as gender and abortion stances were not controlled for, because the mediations were designed as group discussions between Americans; not as debates between pro-choice and pro-life Americans. They were mediated with the aim of helping participants understand the debate and both sides' positions so they could identify what resolution or compromise could look like after carefully considering both sides' interests, values, and positions – while they were not conducted with the aim of changing people's opinions or abortion positions, pretests and posttests were used to assess whether the mediations had that effect on participants.

Discussions often focused on developing the strongest and weakest positions for both sides of the debate. By juxtaposing strong and weak arguments, this prevented them from falling victim to the false polarization that is associated with naïve realism, as partisans often overestimate how much they disagree.²⁰

¹⁹ Overall, using a quintile split, 42% of participants were very pro-choice (18 out of 43), 19% were pro-choice (8 out of 43), 7% were neutral (3 out of 43), 14% were pro-life (6 out of 43), and 19% were very pro-life (8 out of 43).

²⁰ Sherman, D.K., Nelson, L.D., & Ross, L.D. (2003). Naïve Realism and Affirmative Action: Adversaries are More Similar Than They Think. *Basic and Applied Social Psychology*, 25(4), 275-289.

abortion autonomy life liberty right
pro-choice pro-life compromise
human baby fetus woman pregnant person mother²¹

The strongest impression from the nine discussions was that participants were very respectful of each other's opinions.²² Most UChicago discussions were mainly comprised of participants that identified as pro-choice²³, and there seemed to be less interest in discussing both sides' views than in the Wheaton discussions, which were mostly comprised of participants that identified as pro-life. While the mediator had little difficulty in helping Wheaton students work to understand both sides' views, the UChicago discussions required much more effort. This impression led to a

²¹ This is a tag cloud for the frequency of relevant terms out of the words that were most frequently used in the discussions: abortion (664), life (578), autonomy (61), liberty (41), right (701), pro-choice (158), pro-life (207), compromise (102), human (269), baby/babies (54), fetus (173), woman/women (139), pregnant person/people (108), and mother (66); this is a crude measurement, as this was generated from a transcription software and nuanced differentiations were not made (i.e., 'I think that is *right*' was not distinguished from 'a pregnant person has the *right*'; however, a cursory analysis suggested that such exceptions were rare).

²² There was only a single exception, as one pro-choice participant directed heated words at the sole pro-life participant in a discussion after he had suggested that birth control and adoption are viable alternatives to abortion; this pro-choice participant had previously shown a reluctance to participate in good faith: "Mediator: '[W]hat do you think pro-life people mean when they say 'It's a human at conception'?' Participant: "That doesn't mean anything to me... I don't think why you should... think you should be able to tell some complete stranger what to do with their body or why you think you have any say in that. So I personally just don't even consider that part of the debate, to be honest... and the fact that it's so important to them, it's just... it's not worthy of consideration.'"

²³ References to participants' stances on abortions are based on their self-reported stances on the pretest and posttest.

broader observation that pro-life participants' positions seemed to be responsive to pro-choice beliefs, while pro-choice participants' positions did not seem responsive to pro-life beliefs.²⁴

This lack of consideration of pro-life beliefs was particularly pronounced in UChicago discussions, which might be due to the fact that only two out of the six discussions had multiple pro-life participants and three of the discussions were solely comprised of pro-choice participants. Many seemed fixated on their views of when life begins, and many were pessimistic about creating a shared understanding of fetuses. In four of the discussions, the mediator felt it appropriate to discuss the data in chapter 5. While its mention sometimes helped progress the discussions from debates on when a fetus is descriptively a human to when a fetus deserves protection, it did not have much of an effect. Some did suggest that people do recognize fetuses as humans but are reluctant to recognize those humans' rights because it could threaten abortion rights.²⁵

One of the main differences between the discussions was that Wheaton participants viewed pro-life beliefs as legitimate policy interests rooted in fetal rights and UChicago participants viewed the beliefs as rooted in religion, which some used as a way to dismiss pro-life beliefs as a violation of the separation between church and state.²⁶ When participants were presented chapter

²⁴ There was this sense from participants that pro-choice beliefs do not factor in the rights of fetuses, while pro-life beliefs recognize the rights of pregnant people but deem those rights to be secondary to the rights of fetuses; this is a fine, and perhaps minor, point but it would suggest that pro-choice beliefs do not reflect a balance of rights, while pro-life beliefs reflect such a balance; this could help to explain why both sides hold different views on when life begins, as pro-choice beliefs might not be congenial to the recognition of fetuses as humans.

²⁵ For example, one participant stated: "I wonder if that becomes a slippery slope, where if you're recognizing the fetus, I wonder if there's, there's probably not a lot of debate that fetus is human in the sense that is, like, made out of human cells, and it's alive and growing. However, I wonder if people recognize it as a human with that deserves rights in the debate becomes whether those rights are less or more than that of the mother, it becomes a slippery slope where there are human lives with rights that are like that are less valuable than other humans with rights."

²⁶ For example, one participant stated: "I found at least, like in my life experience, people who turn themselves pro-life usually do have some religious background... And it's not just because they think that like, biologically the moment like an egg becomes fertilized it becomes life.

4's question of who is most qualified to determine when a human's life begins, pro-choice participants believed that most pro-life Americans would select religious leaders and they were surprised to learn that the majority selected biologists.

As a crude measure of this aspect of the mediations, in the five UChicago and Wheaton discussions that had multiple pro-life participants, participants made an average of 4.6 mentions of select religious concepts (i.e., "religion", "religious", "God", "Bible"), and most of these participants identified as belonging to a theistic religion (78%); among the other discussions, other than a discussion that similarly only had a handful of mentions, the remaining three discussions that were mostly comprised of pro-choice participants averaged 18.3 mentions per discussion (range: 14-22), and most of these participants did not identify themselves as belonging to a theistic religion (33%).

These data suggest that in discussions that had the most representation of pro-life beliefs, where participants were the most religious, there was little mention of religious concepts; in discussions that had the most representation of pro-choice beliefs, where participants were the least religious, there were far more mentions of religious concepts. While this suggests pro-choice

It's usually like at that moment, like God, like believes that that's life. And I am very worried about the separation of church and state and country. And I think that this is one of the major infringements on it currently."

Americans perceive pro-life beliefs as religious in nature²⁷, it also suggests that pro-life participants do not discuss their beliefs with religious concepts. Thus, these data do not support the argument that pro-life beliefs are solely rooted in religious beliefs.²⁸

Similarly, one impression from the UChicago mediations was that pro-choice participants were more likely to use less nuanced or sophisticated arguments when they were in discussions that did not have pro-life participants. While participants were not asked to state their beliefs at any point in the mediations, the ideological make-up of the discussions often became clear. For instance, one participant obfuscated the discussion of when a human's life begins by comparing humans to insects²⁹ and another participant, in response to a participant who suggested the murder of a 6-week pregnant person should be treated as a double homicide, suggested that their logic could be used to treat masturbation as a homicide. This observation dovetails with the observation that unbalanced discussions that were mostly comprised of pro-choice participants, as ideological homogeneity might hinder productive discussions.³⁰

²⁷ While many pro-life Americans are religious, and indeed 73% (851 out of 1228) of pro-life participants in chapter 4's study identified as Catholic or Protestant, this could be due to the overrepresentation of religious people in prominent pro-life organizations (see, e.g., <https://www.thomasmoresociety.org> [<https://perma.cc/TFM3-LZRS>]) and among pro-life politicians (see, e.g., <https://www.chicagotribune.com/news/local/politics/ct-mike-huckabee-ministers-tinley-park-met-0801-20150731-story.html> [<https://perma.cc/4CE9-F5ES>]), see also: <https://www.thegospelcoalition.org/blogs/evangelical-history/christian-right-discovered-abortion-rights-transformed-culture-wars/> [<https://perma.cc/57W2-JV6T>].

²⁸ A common sentiment was expressed by a pro-choice participant who suggested pro-life beliefs are a "religious thing... their thing is that there's like, a God-given plan... as soon as there is conception, it's like, you can't go against that plan... but I don't think that's justifiable. Because every not everyone's religious".

²⁹ For example, one participant stated: "Especially because life is a really broad definition itself, right? Yeah, we consider bugs alive. But we have no problem killing them. I don't think pro-life people do either."

³⁰ See, e.g., Janis, I. (1991). Groupthink. In E. Griffin (Ed.) A First Look at Communication Theory, p. 235-246, New York: McGrawHill, <https://williamwolff.org/wp-content/uploads/2016/01/griffin-groupthink-challenger.pdf> [<https://perma.cc/K39Y-DEY6>].

This was most clear in the UChicago discussions, as there were times where participants observed that everyone in the discussion was pro-choice. One participant suggested that they can discern a person's stance on abortion by the language they use.³¹ In another discussion, participants were asked if abortion laws needed to become more permissive or more restrictive for both sides to find some common ground; after most participants suggested abortion laws needed to become more permissive, one participant scoffed and said that America has some of the most permissive laws in the world and compromise could only be found if the other pro-choice participants were reasonable.

This is part of a bigger issue of a lack of information and understanding in the debate, which was suggested by a pro-choice participant that described it as one of the biggest problems in the debate is that so few have an understanding of the relevant issues:

“I think one of the things that might be important in – I guess – finding some common ground, making this issue less contentious, is just more, I guess, information about, like, both sides, and just really, I guess, humanizing the other side. Sure. We're, like, I remember reading a couple articles, and none of them really could... really agree on what goes on. And what happens in an abortion clinic where some women reported stories of like, like, being given all the choices and being like, talked through very kindly and of course, this vary from clinic to clinic, but also other women reported, like, a lot of like pressure to abort and feeling like they weren't given sort of all their options, all the information in so maybe humanizing both sides more information on both sides in like standardizing practices and abortion clinics were like more, I guess, openness about what goes on in abortion clinics.”

³¹ For example, there was a discussion on whether the view ‘life begins at conception’ is equivalent to the view ‘life begins at fertilization, and one participant suggested there was a difference: “in the sense that fertilization isn't a buzzword, it? Like, like the phrase like we can create this knee jerk, like, oh, great, I'm dealing with one of those [people], right? Whereas... if I were to hear the phrase, oh, life begins at fertilization, then I wouldn't have to disentangle my immediate past associations with that phrase”.

Another pro-choice participant agreed: “I personally don't feel informed. And I think and I know a lot of other people that also feel as if there's a sort of ignorance surrounding that. That by, by – by ignoring and so to speak, there is – there's like this being complicit in that ignorance, per se.” This was an interesting discussion given what goes on in the broader debate, as pro-life Americans try to inform people about abortion procedures and expose people to images of aborted fetuses to cause people to empathize with fetuses.³² While both sides might make different arguments about the need for information in the debate, this point supports this thesis' goal to reduce or resolve the controversy through better information that can combat confusion and error in the debate.

Participants in UChicago discussions spent a lot of time talking about viability as an important point in pregnancy. When the mediator would ask if the significance of viability centers on the fetus' ability to survive outside the womb or if participants felt that point is significant because that is when fetuses 'become human', participants would often affirm the latter. This analysis of viability is consistent with responses to artificial womb thought experiments, from both mediation participants' responses on the survey and the participants' responses in chapter 4, as pro-choice participants suggest that the advent of an artificial womb technology would not have an impact on abortion laws. One participant made it clear that, even if there were such technology, the decisions should “be left at the discretion of the parents, and the parents should not be required to have any responsibility towards the child”. However, another participant suggested that the rapid improvement of medical technology could one day have an impact on abortion laws.

³² See, e.g., <https://www.chicagotribune.com/suburbs/lake-zurich/news/ct-bcr-pro-life-rally-tl-0713-20170711-story.html> [<https://perma.cc/63JA-FZSN>].

One interesting contribution of the Wheaton mediations, which was likely due to the groups being more pro-life, was that there was an honest accounting of the pro-life movement. There were discussions related to how some might seek to control women or reinforce certain moral or societal values, but it was clear that everyone was solely focused on the protections of fetuses. Most had never even heard of pro-life arguments that were popular in years past, such as the protection of pregnant people's physical health, mental health, and breast cancer risk. Consistent with the review of online abortion discourse, it seems the pro-life movement has jettisoned most of its religious-based or less fruitful arguments in favor of a focus on defending fetuses.

At the end of the mediations, participants would sometimes reflect on their experience in the discussions. While participants would state their stances on abortion when introducing themselves in some of the early discussions, the mediator curbed such opportunities in later mediations, and some participants noted that it was a strength of the discussions.³³ Many suggested that it was an interesting and challenging exercise since they would typically stick to a habituated script when discussing abortion, but the mediation helped them step out of their frames. Some suggested that they were glad the discussion was about the broader debate and not about their personal opinions³⁴, but most comments from participants directly or indirectly referred to their personal beliefs about abortion. Participants suggested the discussions helped them become less fixed in their beliefs and more understanding of the other side. However, the survey results suggest that the group discussions were similarly likely to trigger the backfire effect, whereby participants became more rigid

³³ For example, one participant stated, "I also like that how we didn't explicitly state our own stances, because then it allowed for a conversation that people actually listened in and like contributed more to rather than just be like, oh, that person is this stance, like, whatever they're saying is just jibberish and has no merit, so I'm not going to listen".

³⁴ For example, one participant stated, "I'm happy with how it went. I wasn't really sure what to expect. I thought it would be more sharing of our own personal opinions. And I'm glad that it wasn't."

in their beliefs. Most often, participants expressed surprise at how productive and respectful the discussions were³⁵, and this was likely due to the maturity of the participants and the strengths of the facilitative mediation method.

Survey Results

Participants were given short surveys on their beliefs about abortion before and after the discussion.³⁶ However, the surveys were primarily conducted to open participants up by giving them the opportunity to think deeply and creatively about the debate before the discussions took place. Indeed, some participants made comments about the pretest survey during the discussion, noting that it revealed issues they had not previously considered. They mentioned that the experience caused them to be more open during the discussion, and this was the very purpose.

Since there were not many participants in this study, a full analysis of the results of the surveys would have limited value; especially since many of the questions in the surveys were posed to participants in the study in chapter 4, where those results are reported and analyzed. Thus, this section will instead focus on interesting findings that provide context for the reported impressions of the discussions.

³⁵ For example, one participant stated, “I enjoyed it, which is kind of strange. Like, it was a serious topic, but I felt like everyone was super respectful. And it's like, very different from other for discussions of abortions that I've had where I feel like, like, even if once we mean another person talking about it shared a lot of common ground at the end like I like I felt very distant from them. Where I don't get that same sense.”.

³⁶ The pretest had 25 substantive questions and eight demographics questions; the posttest repeated eight of the pretest's substantive questions and four of the demographics questions.

Abortion Stances

Of the 43 participants, 28 rated themselves as pro-choice and 15 identified as pro-life. Only one participant shifted their stance on the posttest, and it was a shift from pro-choice to pro-life. Most participants rated themselves identically on the pretest and posttest, but, while those who identify as pro-life were just as likely to rate themselves as more or less pro-life, a higher percentage of pro-choice participants (29%) rated themselves as more pro-choice than those who rated themselves as less pro-choice (14%). This suggests that pro-choice participants' abortion identities became more solidified than pro-life participants'.

Views on When Life Begins

Considering all three questions³⁷ related to this concept, only 9% of pro-life participants' posttest answers differed from the pretest, while 36% of pro-choice participants' responses reflected a shift after the discussion. In terms of when a human's life begins, pro-choice participants were just as likely to shift to some earlier point as they were to shift to some later point. As for when a human's life is worthy of legal consideration, 7 participants shifted to some earlier point, while 4 shifted to some later point; the pattern was reversed on the question of when abortion should be restricted, as 2 participants selected an earlier point on the posttest, while 7 shifted to same later point. These data suggest that pro-choice participants were less stable and more likely to shift their views after discussions, and they were more likely to expand abortion access than to restrict it.

³⁷ Question 1: "At what point does a human's life begin?", Question 2: "At what point is a human's life worthy of legal consideration?", and Question 3: "At what point in pregnancy should abortion be illegal with limited or no exceptions?"

Willingness to Compromise

While some participants reported being more willing to compromise in the discussions³⁸, the surveys suggested such a shift was exceedingly rare. As a more explicit measure of their willingness to compromise, participants were presented five positions and asked whether they support or oppose them: (1) Legal abortion access in the first trimester of pregnancy; (2) Legal abortion access in the second trimester of pregnancy; (3) Legal abortion access in the third trimester of pregnancy; (4) Legal abortion access for victims of rape and incest at all points in pregnancy; (5) The use of taxes to pay for abortions. For each position, they were also asked the degree to which they were unwilling to compromise or willing to compromise.

Pro-life and pro-choice participants followed a predictable pattern, as the former opposed the positions and the latter supported the positions. These questions were posed on the pretest and posttest so comparisons could be used to assess whether discussions led to participants becoming more or less likely to compromise. Pro-choice participants were less likely to compromise on the posttest with regards to legal abortion in the first and second trimesters, as well as the use of taxes to pay for abortions, while they were more likely to compromise on third-trimester abortions. Pro-life participants were more likely to compromise on first-trimester abortions and the use of taxes to pay for abortions, while they were less likely to compromise on second- and third-trimester abortions. Both sides showed similar neutral patterns on nonconsensual abortions. These data suggest that both sides moved somewhat closer to resolution, as possible resolutions entail permissibility of first-trimester abortions and the restriction of late-term abortions – pro-life participants

³⁸ For example, one participant stated: “[After this discussion] I feel like if they pass the laws that [restrict abortion] after the first trimester or just more stricter abortion laws, if those are put into place – but at the same time, a lot more money was poured into like foster care, and Planned Parenthood type, caring for families and pregnant people – I would be less pissed”.

softened their opposition to first-trimester abortions and pro-choice participants softened their opposition to second and third-trimester abortions. While worth noting, this was not a huge effect, and it is not suggested to be significant.

Overall, in terms of whether they supported or opposed the five items on the pretest and posttest, there were only eight instances where a participant's support or opposition shifted after the discussion (2%; 8 out of 375), and six reflected a shift from support to opposition. In terms of their willingness to compromise, pro-choice (26%) and pro-life participants (25%) were similarly likely to become more willing to compromise on the posttest; however, pro-choice participants (35%) were more likely to become less willing than pro-life participants (23%). This suggests the discussions might have led to pro-choice participants to become more fixed in their beliefs at a higher rate than pro-life participants.

The Matriarchy Thought Experiment

Participants were asked to suppose that a coalition of women decide to undo the patriarchal structure of the United States³⁹. Tens of millions of women agree to find out the gender early in pregnancy so they can abort any pregnancy of a male fetus, such that 95% of infants will be female at birth. Participants were asked if abortion, in that scenario, should remain a federally-protected right or if the U.S. government should rethink its abortion laws.

³⁹ Participants were asked to assess the following item: "Suppose that a coalition of women will form and decide to take concrete steps to undo the patriarchal structure of the United States. Tens of millions of women will agree to find out the gender early in pregnancy and abort any pregnancy of a male fetus. Each year, 95% of infants will be female at birth. If this were to happen, should sex-selective abortion remain a federally-protected right or should the U.S. government rethink its abortion laws?" on a scale from 1 ("Maintain Current Laws") to 10 ("Rethink Current Laws").

While most pro-life participants (87%; 13 out of 15) suggested that America should rethink its laws in that scenario, pro-choice participants were split on whether America should rethink its laws or if it should maintain its current laws (50%; 11 out of 22)⁴⁰. This result seems telling, as it shows the degree to which beliefs about abortion can exist as principles outside real life concerns; however, to be fair, it could also reflect pro-choice participants' support of undoing the patriarchy, so future inquiry could pose an alternative scenario in which 95% of infants will be male at birth to suss this issue out.

If it is the case that many pro-choice Americans would support permissive abortion laws even in the case that fetuses were targeted based on their immutable characteristics, then it would suggest that the right of abortion is seen as more sacred than concerns about discrimination. Since most pro-choice participants were willing to limit the right to bodily autonomy, in supporting the legal requirement that people be vaccinated – as reported in chapter 4 on p. 177-178, it suggests that pro-choice participants recognize that the right to bodily autonomy is not an absolute right and can be overcome by another's rights.

Conclusion

It is important to note that these discussions were mostly comprised of strangers, and they ran for about an hour in duration. They were extemporaneous conversations where participants did not have the ability to research issues or fact-check any of the points that came up in discussions. Further, most participants were high-achieving young adults who attend private academic institutions so it would be difficult to generalize from these data.

⁴⁰ This question was also posed to participants in chapter 4's study and 47% of pro-choice participants (251 out of 540) felt America should maintain its current laws in that scenario.

Even if one disregards these limitations and generalizes these findings, Americans' unwillingness to compromise on abortion does not mean that they would be unlikely to accept a resolution issued by the U.S. Supreme Court. Indeed, one participant argued that effective resolutions in the past were not necessarily supported by most people, but rather they later proved to be effective.⁴¹ If participants had shown a greater willingness to compromise after the discussions, it could have given greater weight to this thesis' implicit argument that the debate can be resolved, but this chapter's results were not discouraging.

Overall, this qualitative study provided meaningful nuances that were less apparent in polls, online abortion discourse, or quantitative studies on Americans' abortion attitudes. The mediator was able to draw on that quantitative research to make interesting connections, which make for a more robust discussion of the U.S. abortion debate. While the data suggested that perceptions of fetuses were an important part of the debate, it took discussions for the author to understand the reasons behind pro-choice participants' reluctance to recognize fetuses as humans.

Simply put, just as abortion rights advocates have pushed back on non-abortive fetal protections that recognize fetuses as human victims⁴², Americans might be reluctant to recognize fetuses as humans because their abortion positions do not respond to pro-life beliefs by arguing that

⁴¹ One participant suggested that "[T]he compromise is something that people come to... appreciate it retrospectively. And so you bring – you brought up the *Brown v. Board* [decision]. And so like it, I'm sure, those who, those who did support racial segregation, by the time the decision was reached, and the effects came and societal infrastructure was changed significantly."

⁴² For example, an ACLU representative opposed the 2004 Unborn Victims of Violence Act because they felt that the recognition of fetuses as human victims could undermine abortion rights: "Were this legislation to become law, it could become part of the larger effort to undermine a woman's right to direct the course of her own reproductive life.", <https://www.aclu.org/news/aclu-urges-lawmakers-oppose-unborn-victims-violence-actcalls-bill-deceptive-attempt-erode> [<https://perma.cc/R9L5-DTWD>]; see also: <https://newrepublic.com/article/113258/ariel-castro-pro-choice-answer-violence-against-pregnant-women> [<https://perma.cc/DK3W-TDZX>].

a pregnant person's right to abort supersedes a human's right to life; since some pro-choice positions might be brittle to the recognition of fetal rights, they are disinclined from recognizing fetuses as humans. This also leads them to take unique positions when pushed, whereby they suggest abortion is justified because unwanted fetuses are better off dying in the womb⁴³ than being raised in foster care where they might face abuse.⁴⁴

⁴³ One would imagine these are specific to the abortion context since there does not seem to be a whole lot of call for compassionately ending the lives of children in foster care.

⁴⁴ Participants in chapter 4's study were asked if they agreed with this sentiment ("Legal elective abortion access is justified because unwanted children are better off not having been born than facing possible abuse from the foster care system or unwilling parents."), 57% of pro-choice participants affirmed this utilitarian justification; in a discussion of adoption, one participant suggested that "if you just don't think the child would have a quality life at all, you should probably just be able to get a normal abortion"; these kinds of arguments concern those who believe in equal protection under the law since they could be extended to suggest that those who live in poverty, and some lives – those who might have lives that do not meet some people's subjective views of "a quality life" – are not as valuable as others and might not be deserving of the same legal protection; in 2019, Alabama State Representative John Rogers used this argument during a legislative session ("Some kids are unwanted, so you kill them now or you kill them later. You bring them in the world unwanted, unloved, you send them to the electric chair. So, you kill them now or you kill them later. But the bottom line is that I think we shouldn't be making this decision [to restrict abortion throughout pregnancy]", https://www.youtube.com/watch?v=oxoXH92I_64 [<https://perma.cc/3Q4W-LEVG>]).

CHAPTER 7: MOVING THE DEBATE FORWARD

“[The abortion debate] comes down to the question of whether we think personal autonomy is more important than the life of a human being”.

Academic Biologist

It is reasonable to assume that pro-life and pro-choice Americans are diametrically-opposed on abortion.¹ The difference is implied by their labels: pro-life Americans prioritize fetuses’ right to life, and pro-choice Americans prioritize pregnant people’s right to choose to terminate their pregnancies. It is then easy to assume that pro-life Americans only value fetuses and their right to life and that pro-choice Americans only value women and their right to bodily autonomy. However reasonable or easy these presumptions might be, they were not confirmed by this thesis’ empirical investigation.²

Some might see abortion as a fundamental disagreement between pro-choice Americans who believe the government should not interfere in personal medical decisions that are related to family planning and pro-life Americans who believe the government should interfere to save the

¹ This could be part of a larger problem of polarized views being more represented in the media (<https://www.forbes.com/sites/brettedkins/2017/06/27/u-s-media-among-most-polarized-in-the-world-study-finds/#35aba1b92546>, [<https://perma.cc/4L4Y-VL7B>]) and the overrepresentation of such views on social media websites (e.g., <https://www.nytimes.com/interactive/2019/04/08/upshot/democratic-electorate-twitter-real-life.html> [<https://perma.cc/Z9R5-2Q4Y>]), as it could lead Americans to assume that most hold absolute pro-choice or pro-life views.

² Differences in pro-choice and pro-life participants’ abortion attitudes did not seem to be driven by fundamental differences in their values since they had similar scores on scales related to liberal feminism, radical feminism, and the rights of women and fetuses in non-abortive contexts; on scales assessing the relevant rights, in non-abortive contexts, pro-life Americans scored higher on the right to life scale and pro-choice Americans scored higher on the right to autonomy scale – however, pro-choice Americans still supported the rights of fetuses and were less likely to support right to bodily autonomy in situations regarding legally-requiring vaccines and good Samaritan laws than pro-life Americans; in models presented in chapter 4, scales on the right to autonomy and the right to life did not explain much of the variance in American’s abortion identities or stances on abortion laws.

life of a fetus. Some do believe that the government should never interfere in one's family life to protect a fetus³, but they are the small minority – to understand why Americans support abortion restrictions, consider what the government should do when a Jehovah's Witness objects to their child being given a life-saving blood transfusion.⁴

In legally forcing children to receive transfusions against the will of their parents, courts have shown that they refuse to respect parents' right to act in accordance with their religion or to respect their fundamental rights related to child-rearing; instead, the government interferes in those Americans' intimate decisions about their personal lives for the sake of saving children's lives.⁵ Indeed, the U.S. government has interfered in Americans' family lives and have infringed on their child-rearing rights to protect children in situations of child abuse for centuries.⁶

While this situation is not a facsimile of abortion, as there are certainly disanalogous aspects between the two situations⁷, it helps to explain why Americans believe there are situations

³ As suggested by participants' responses in chapter 4, most on both sides believe that a fetus has constitutional rights at some point before birth and that there are some situations in which the government should interfere to protect fetuses, which is consistent with polls that suggest the large majority of Americans support some abortion restrictions.

⁴ "Jehovah's Witnesses, with at least 7.5 million active members worldwide... are the most well-known religious community who decline transfusion of specific blood components. Their decision is not related to perceived risks of transfusion but is a scriptural stand based on biblical texts, such as 'the life of all flesh is the blood thereof: whoever eat it shall be cut off' (Lev. 17:10–16) and 'abstain from the meats offered to idols and from blood' (Acts 15:28–29)", <https://www.transfusionguidelines.org/transfusion-handbook/12-management-of-patients-who-do-not-accept-transfusion/12-2-jehovah-s-witnesses-and-blood-transfusion> [<https://perma.cc/YVM3-GUCL>].

⁵ "With regard to religious based refusal of blood products by parents, courts in the western world are of the opinion that the child's welfare is paramount and blood can be given", Woolley, S. Children of Jehovah's Witnesses and adolescent Jehovah's Witnesses: what are their rights? Archives of Disease in Childhood 2005;90:715-719; see also: <https://www.latimes.com/archives/la-xpm-1989-05-10-me-2880-story.html> [<https://perma.cc/H47K-BUUG>].

⁶ See, e.g., https://en.wikipedia.org/wiki/Child_Protective_Services [<https://perma.cc/UN A5-TWW6>].

⁷ Carrying a pregnancy to term is far more involved than receiving a blood transfusion, but laws that pose an undue burden on a pregnant person's ability to have a legal abortion do not

in which liberty rights under the family rights umbrella are secondary to a human's right to life⁸ – to believe the government should interfere in a pregnant person's life to save a fetus' life from an abortion procedure is legitimate⁹ in the way that it is legitimate to believe the government should interfere in a Jehovah's Witness' family life to save their child's life with a blood transfusion.

Americans believe this focus on balancing the two rights – abortion rights and fetal rights – is possible¹⁰, preferable¹¹, and primary in the debate¹². Both sides believe that fetal rights can take precedence over abortion rights, as evinced by pro-choice Americans' preference of laws that restrict abortions in the third trimester and pro-life Americans' preference of laws that restrict elective abortions throughout pregnancy¹³. People on both sides of the debate can understand and respect motivations behind abortion restrictions since those laws are passed to protect fetuses not

directly infringe on one's rights to the same degree that forcibly injecting blood into a child does since a pregnant person can still abort a pregnancy by other means, while the transfusion is a government action forced on a person, who sees it as a deep violation of their rights as a parent.

⁸ One who holds pro-choice beliefs would likely draw a distinction between how the law should treat a post-birth child and a fetus, but most who hold pro-life beliefs believe the law deserve equal protection under the law.

⁹ Indeed, the Supreme Court has recognized that a state has an "important and legitimate interest in protecting the potentiality of human life", *Roe v. Wade*, 410 U.S. 113, 162 (1973).

¹⁰ In a 2018 poll, 78% of Americans stated that it is "possible to have laws which protect both the health and well-being of a woman and the life of the unborn", <http://www.kofc.org/en/resources/communications/abortion-limits-favored.pdf> [<https://perma.cc/F6AC-H94V>].

¹¹ As reported in chapter 4 on p. 207, 84% of Americans believe that a fetus has constitutional rights at some point during pregnancy; in a 2019 poll, 70% of Americans held the opinion that abortion laws should be permitted in some circumstances and restricted in others, <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>].

¹² As reported in chapter 4 on p. 198-199, 68% of Americans agreed that "the abortion debate centers on the question of when a fetus' right to life outweighs a pregnant person's right to liberty".

¹³ In a 2019 poll, 79% of pro-choice Americans opined that elective abortion should be restricted in the third trimester and 78% of pro-life Americans opined that all elective abortions should be restricted, <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>].

to control women or restrict sexual freedom. However, there remains the question of whether there can be an agreement.

Is the Debate Trivial or Insurmountable?

While the negligible effect of chapter 6's group discussions on participants' abortion stances did not suggest that the debate can be easily resolved, those were short discussions mainly comprised of college students who held absolute positions on abortion.¹⁴ If one solely focused on those who hold absolute positions on abortion¹⁵, then the debate would seem insurmountable. It is difficult to imagine how one could resolve the difference of opinion between one group that believes an abortion of a 40-week fetus should be viewed as the permissible expression of the right to freedom and another group that believes an abortion of a 5-week fetus should be punishable by death. Indeed, it seems the debate between the extremes would only end if one side built consensus, absent some major shift in American society¹⁶. However, this thesis' broader mediation suggests

¹⁴ While chapter 6's mediations were useful for a better understanding of the debate, most of the UChicago participants were absolutists, so the mediations did not represent discussions between the majority of Americans who hold moderate views on abortion.

¹⁵ The absolute pro-choice position is that all abortion restrictions impermissibly infringe on pregnant people's right to freedom (see, e.g., <https://www.dailywire.com/news/45044/dem-presidential-candidate-pete-buttiieg-embraces-frank-camp> [<https://perma.cc/Y9QD-CQNT>]) and the absolute pro-life position is that all elective and therapeutic abortions should be punished with the death penalty (see, e.g., <https://www.vox.com/policy-and-politics/2019/4/11/18304825/abortion-texas-ony-tinderholt-death-penalty-bill> [<https://perma.cc/DW6C-C4DK>]).

¹⁶ One can certainly imagine that opinions on abortion would shift if birth rates plummeted and the survival of the human species was threatened or if there was a convergence of record-high birth rates and mass food shortages, as the former could motivate Americans to oppose legal abortion access and the latter could motivate them to support it.

that focusing on the “exhausted majority”¹⁷ can lead to the reduction or resolution¹⁸ of the national abortion controversy since the majority of Americans support both legal abortion access and abortion restrictions.

83% of Americans believe that abortion should at least be permitted to save the life of the mother¹⁹, so it is clear that most Americans believe pregnant people have a protectable legal right to abort a pregnancy and that right can be protected even if it infringes on a fetus’ right to life. Thus, for the large majority of Americans, abortion rights can take precedence over fetal rights.

88% of Americans believe that abortion should be illegal at some point in pregnancy²⁰, and 84% of participants in study 4 stated that fetuses deserve constitutional rights at some point in pregnancy, so it is clear that most Americans believe fetuses’ rights can be protected even if that protection infringes on a pregnant person’s right to abort their pregnancy. Thus, for the large majority of Americans, fetal rights can take precedence over abortion rights.

Most Americans are not pro-choice or pro-life in the absolute sense of the phrases; most Americans are pro-choice *and* pro-life. The large majority of Americans support both rights, as

¹⁷ Katha Pollitt describes these people as the “muddled middle” (<https://rewire.news/article/2014/10/14/katha-pollitts-pro-hopes-sway-muddled-middle-abortion-ethics/> [<https://perma.cc/N2QZ-JNUL>]), while others have described them as the “exhausted majority” (<https://www.theatlantic.com/ideas/archive/2018/10/large-majorities-dislike-political-correctness/572581/> [<https://perma.cc/W9FY-H92L>]).

¹⁸ It is hard to imagine a resolution that would motivate pro-life Americans to end their protests outside of abortion clinics and pro-choice politicians to stop advocating for reproductive rights; however, the abortion debate could be seen as reduced if it were relegated to a minor political issue whose coverage in national politics is more akin to the debate over male circumcision, see, e.g., Freedman, A.L. The Circumcision Debate: Beyond Benefits and Risks, *Pediatrics*, May 2016, Volume 137, Issue 5.

¹⁹ <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>].

²⁰ *Id.*

they recognize a pregnant person's legally protectable right to abort a pregnancy and a fetus' legally protectable right to life. Thus, in principle, the national abortion controversy can be resolved if Americans can agree on the particular circumstances in which one right takes precedence over the other. However, they currently do not since polls suggest most pro-life Americans only support legal access to therapeutic abortions throughout pregnancy and they oppose elective abortion access throughout pregnancy, while most pro-choice Americans support access to therapeutic abortions throughout pregnancy and oppose elective abortion access after the first trimester.²¹

To better understand the debate in terms of Cardinal Newman's juxtaposition of confusion and true division²², the question is what possible error, ignorance, and confusion on both sides could be resolved – if the debate is resolved once those are addressed, then the debate is trivial, but if the debate persists, then the debate is insurmountable.

Once again, the review of the history of the abortion debate in chapter 2, the review of online abortion discourse in chapter 3, Americans' beliefs on abortion in chapter 4, biologists' stances on when life begins in chapter 5, and the group discussions reported in chapter 6 work together to suggest that Americans have certain misconceptions and make certain assumptions about the abortion debate that do not stand up to empirical investigation:

²¹ It seems that pro-choice Americans support abortion restrictions of third-trimester pregnancies because they view a viable fetus' right to life as primary over a pregnant person's abortion rights, but they oppose such restrictions in the first trimester because they do not recognize fetuses as biological humans in the first trimester and they do not believe those fetuses have rights; however, it is also possible that pro-choice Americans' preferences reflect interests and not principles, whereby they want laws that provide pregnant people with an opportunity to abort their pregnancy for any reason and they deem the first trimester a sufficient window of time.

²² "We need not dispute, we need not prove—we need but define... When men understand what each other mean, they see, for the most part, that controversy is either superfluous or hopeless.", *The Contemporary Review* (1878), Strahan and Company Limited, p. 872.

1. Many believe that pro-choice Americans prefer abortion laws that permit elective abortion access throughout pregnancy, but most pro-choice Americans prefer laws that restrict elective abortion access at some point during pregnancy.
2. Many believe that pro-life Americans prefer abortion laws that legally restrict all abortions, but most pro-life Americans prefer laws that permit therapeutic abortions throughout pregnancy.
3. Many believe that Americans want abortion restrictions to control women and discourage sexual freedom, but most Americans believe abortion should be restricted to protect fetuses.
4. Many believe that a fetus is not a biological human at fertilization, but most biologists agree that a biological human's life begins at fertilization.

Thus, the following could be presented to Americans to address such confusion and error:

Most Americans support legal access to therapeutic abortions throughout pregnancy and oppose legal access to elective abortions after the first trimester. They support such abortion restrictions to protect fetuses, and very few support the restrictions to punish pregnant people, punish abortion, or to express American values. Many believe in protecting fetuses because they recognize fetuses as biological humans, which is consistent with most biologists' view that fetuses are biological humans throughout pregnancy because they are organisms with human genomes that are developing in the human life cycle.

Thus, there are trivial disputes in the U.S. abortion debate and removing such confusion and error could help parties focus on the central impasse in the debate: whether a biological human in the first trimester of pregnancy has rights and whether those rights should take precedence over a pregnant person's abortion rights. Thus, while the U.S. abortion debate has trivial disputes that can be easily addressed, the dispute over whether elective abortions should ever be legal is a fundamental disagreement between pro-choice and pro-life Americans. However, while this central dispute might be insurmountable on its own, it is merely one sticking point in the context of the

broader debate. As such, both sides might be willing to compromise on that point if a comprehensive resolution satisfies their other interests.²³

Contributions to Literatures

While some might focus on this thesis' implications for the U.S. abortion debate, this dissertation reports multiple contributions for various literatures. First, it serves as another example of how the SAGE model²⁴ can use a data-driven approach to address big, interdisciplinary questions. Without such a comprehensive approach, this thesis could have only answered small questions that would have likely been subject to the kind of ideological limitations to which unidisciplinary studies on abortion attitudes were subject. Second, it revealed novel abortion attitudes predictors that support Rodriguez and Ditto's claims that the literature faces ideological homogeneity issues that have limited abortion attitudes researchers' ability to explain why Americans disagree about abortion.²⁵

Further, chapter 5's data on the biological perspective on when a human's life begins reveals a new area of inquiry for science of science communication researchers. Not only does it provide an additional consensus that can be used to better understand cultural and identity-protective cognition, it is a consensus that reveals the cultural cognition of Americans who identify as liberal, whereas most previous studies have utilized scientific consensus that trigger the cultural cognition of conservatives. As shown in Figure 7.1, this is a finding in which Republicans' views

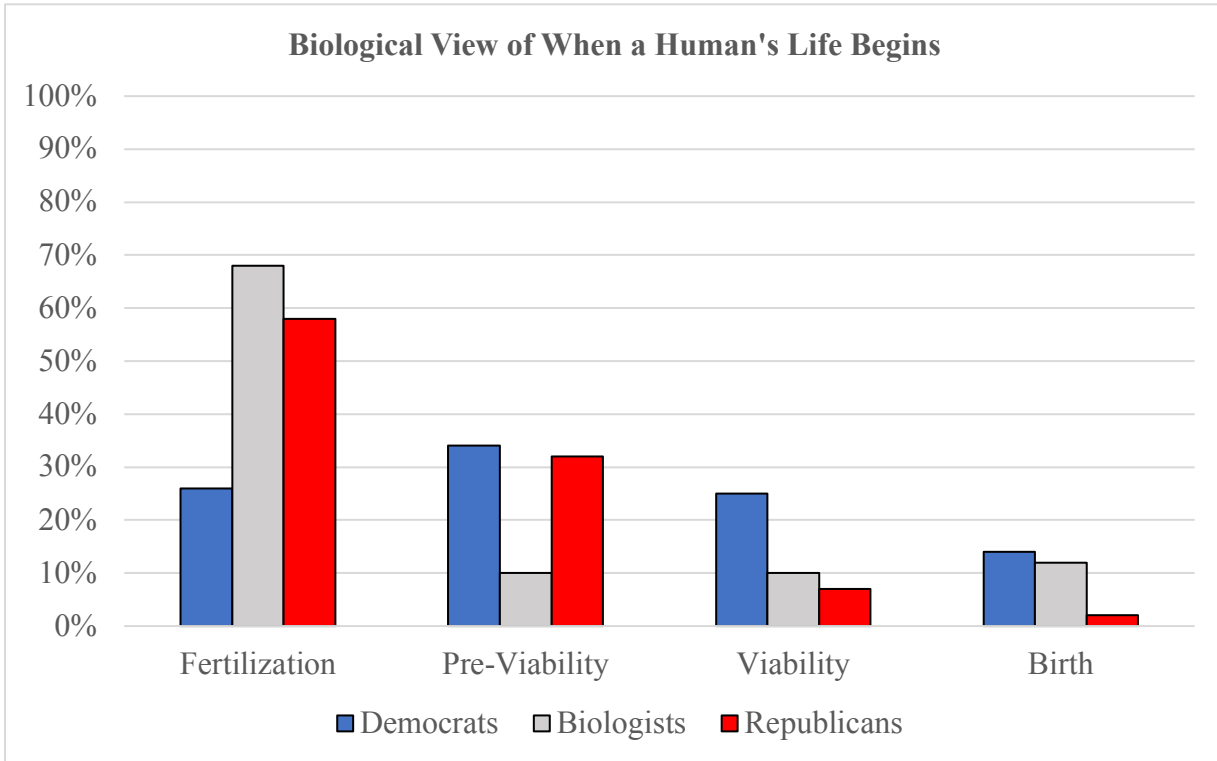
²³ The coda on p. 307, at the end of this chapter, discusses possible resolutions.

²⁴ Power, S., Velez, G., Qadafi, A., & Tennant, J. (2018). The SAGE Model of Social Psychological Research. *Perspectives on Psychological Science*, 13(3), 359–372. <https://doi.org/10.1177/1745691617734863> [<https://perma.cc/2EU9-2C7K>].

²⁵ <https://www.spssi.org/index.cfm?fuseaction=page.viewPage&pageID=2406&nodeID=1> [<https://perma.cc/JQ26-KSKK>].

were more closely aligned with scientists' views, which is notable since it is believed that Democrats are more likely than Republicans to hold views that are consistent with scientists' views.²⁶

Figure 7.1 Bar Graph of Biological Views on When Life Begins.²⁷



²⁶ Republicans are typically perceived as being more predisposed to denying scientific findings and holding views that do not cohere with consensus of scientists (e.g., evolution, climate change, see, e.g., <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2016/apr/28/can-the-republican-party-solve-its-science-denial-problem> [<https://perma.cc/5WGZ-PHPZ>]); the main example of an issue in which Republicans' opinions might otherwise more closely align with scientists than Democrats is on the safety of nuclear energy, Kahan, D.M., Jenkins-Smith, H. & Braman, D. Cultural Cognition of Scientific Consensus. *J. Risk Res.* 14, 147-174 (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1549444 [<https://perma.cc/6DH9-X5G4>].

²⁷ The data represent biologists' responses to the essay question in chapter 5 on p. 252 ("From a biological perspective, how would you answer the question 'When does a human's life begin?'") and American participants' responses to a similarly-worded multiple choice question in chapter 4 on p. 209 ("Based on your understanding of biology, from a biological perspective, when does a human's life begin?") – participants were separated based on their stated political stances.

Finally, given significant differences between pro-choice and pro-life biologists on certain questions on developmental biology, this dissertation presents unique evidence of cultural cognition possibly impacting scientific experts' opinions²⁸, as studies in that literature have primarily focused on how the bias affects the perception of a consensus, not how bias can affect the formation of a consensus.

Limitations and Future Directions

Some of the answers to chapter 4 and 5's survey questions should be narrowly interpreted. For instance, while "When is the life of a human zygote/embryo/fetus worthy of legal protection?" seems fairly straightforward, there are numerous related questions that could all produce unique answers that reflect slightly different attitudes. For instance, consider these reformulations: 'when does a person's life begin' and 'at what point can a fetus be a human victim'. While various questions about fetuses might be fungible for some²⁹, others might have more nuanced views of fetuses.

²⁸ This would cohere with previous findings that those who are the most competent are most predisposed to using identity-protective cognition when they are presented a situation that seems to conflict with their political views, see, e.g., Kahan, D.M., Peters, E., Dawson, E.C. & Slovic, P. Motivated Numeracy and Enlightened Self-Government. *Behavioural Public Policy*, 1, 1, 54-86; Yale Law School, Public Law Working Paper No. 307. Available at SSRN: <https://ssrn.com/abstract=2319992> [<https://perma.cc/P9DN-A5U9>].

²⁹ There were significant correlations between participants' views on when a fetus is a biological human and (a) when they deemed a fetus deserving of legal protection ($r = .695, p < .001$) and (b) when they deemed a fetus deserving of constitutional rights ($r = .612, p < .001$); further, an analysis of the relatedness of participants' responses to various questions on when life begins showed that Americans' perceptions of fetuses undergird their thoughts on (1) when a human's life begins, (2) when a biological human's life begins, (3) when a fetus deserves legal protection, (4) when a fetus deserves legal protection outside of the abortion context, (5) when a fetus deserves constitutional rights, and (6) when mechanical abortions should be illegal if an artificial womb were created – the scale had a Cronbach's Alpha of .919, so the internal consistency was excellent).

The main limitation of this thesis centers on chapter 6's group discussions. Few pro-life college students participated, and most of the participants were very resolute in their views on abortion. However, setting that challenge aside, the bigger issue seemed to be some participants' unwillingness to engage in ideas that conflicted with their beliefs.³⁰ Some participants suggested that they have no respect for pro-life Americans or their beliefs, and there was a common thread of dismissing pro-life views based on beliefs that those views were solely motivated by religious views. This might have been a result of the discussions being primarily comprised of pro-choice participants, as it is possible that they would have been less dismissive of pro-life views if there would have been more pro-life participants to represent those views. This limitation led to chapter 6's study functioning more as a qualitative assessment of Americans' abortion attitudes and less of an assessment of possible resolutions to the debate.

The overall mediation approach utilized in this dissertation can be applied to the gun control debate and other contentious political issues. The thrust is to take a step back from a debate and recognize that, despite division on particular issues, Americans are a single group who live under the law and are responsible for shaping it. Resolving a political debate is like resolving any other dispute. Through conversation or mediation, parties need to determine whether there is common ground and how to find a resolution that can satisfy both sides. Even in a debate like immigration, those with more absolutist views might want to build a wall on the Southern border, or they might want open borders, but the majority might be able to unite to find a compromise. This method might not appeal to those seeking drastic change, but it is useful when the two sides have

³⁰ It is important to note that there was not much impetus for them to do so; their compensation was not dependent on them reaching an agreement or being willing to consider both sides – while some did engage both views, as they might have been more open and agreeable, others made it clear that they were more focused on advocating for their beliefs than talking through the debate or how the controversy could be reduced or resolved.

battled long enough to show that neither side will win out, and resolution is preferable to unending conflict.

Conclusion

A 1972 Gallup poll suggested 64% of Americans agreed with the full liberalization of abortion laws³¹, and yet a 2018 Gallup poll suggested only 13% of Americans support legal abortion in the third trimester³². During those 46 years, the nation has been governed under *Roe*, and yet the holding failed to resolve the national controversy surrounding the abortion debate. While that might not have been the Court's actual goal, the discovery of a clipping of the 1972 Gallup poll in Justice Blackmun's *Roe* case file³³ suggests the Justice who wrote *Roe*'s majority opinion was at least under the impression that most Americans believed that abortion laws should be repealed. Further, the Court in *Casey* did recognize the *Roe* Court as having been put to such a task:

“[T]he Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*.”³⁴

³¹ However, some have suggested the poll did not accurately represent public opinion on abortion, see, e.g., [https://www.nytimes.com/1972/09/01/archives/poll-on-abortions-scored-by-pr-
elate.html](https://www.nytimes.com/1972/09/01/archives/poll-on-abortions-scored-by-pr-elate.html) [<https://perma.cc/N5HZ-YZXH>].

³² See, e.g., <https://news.gallup.com/poll/235469/trimesters-key-abortion-views.aspx> [<https://perma.cc/BE3S-GR8Z>].

³³ Greenhouse, L., & Siegel, R.B. (2012). Before *Roe v. Wade*: Voices that shaped the abortion debate before the Supreme Court's ruling, p. 208, https://documents.law.yale.edu/sites/default/files/beforeroe2nded_1.pdf [<https://perma.cc/AR5L-WT2J>].

³⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992).

Consider the disparate results of *Brown* and *Roe*. Pre-*Brown* polls suggested that most Americans wanted racially-segregated public schools³⁵ and only a small majority approved of the decision to end segregation months after it was issued³⁶. However, as of the 1990s, very few Americans supported racial segregation in schools³⁷; *Brown* was either successful in ending the controversy or its holding turned out to be consistent with the will of the people several decades later.

After 46 years with *Roe* as the law of the land, polls suggest a minority of Americans (20-41%) support legal access to elective abortions up until viability, as a majority of Americans (60-80%) believe elective abortion should be restricted after the first trimester.³⁸ The prospect that the Court's 1973 decision will end the national controversy surrounding abortion has thus far proved unlikely. While the Court is not required to submit to the will of the majority, and Justice Antonin Scalia railed against such an approach in his dissent of *Casey*³⁹, the Court has recognized abortion as a national controversy which the Court needs to resolve with a Constitutional mandate. If the Supreme Court steps in again, the Court would likely need to reform abortion jurisprudence to better represent the preferred laws of Americans; as shown in Figure 7.2, this would entail the protection of therapeutic abortions and the restriction of abortions after the first trimester.

³⁵ <https://prospect.org/article/polling-prejudice> [<https://perma.cc/5XZ8-AEA8>].

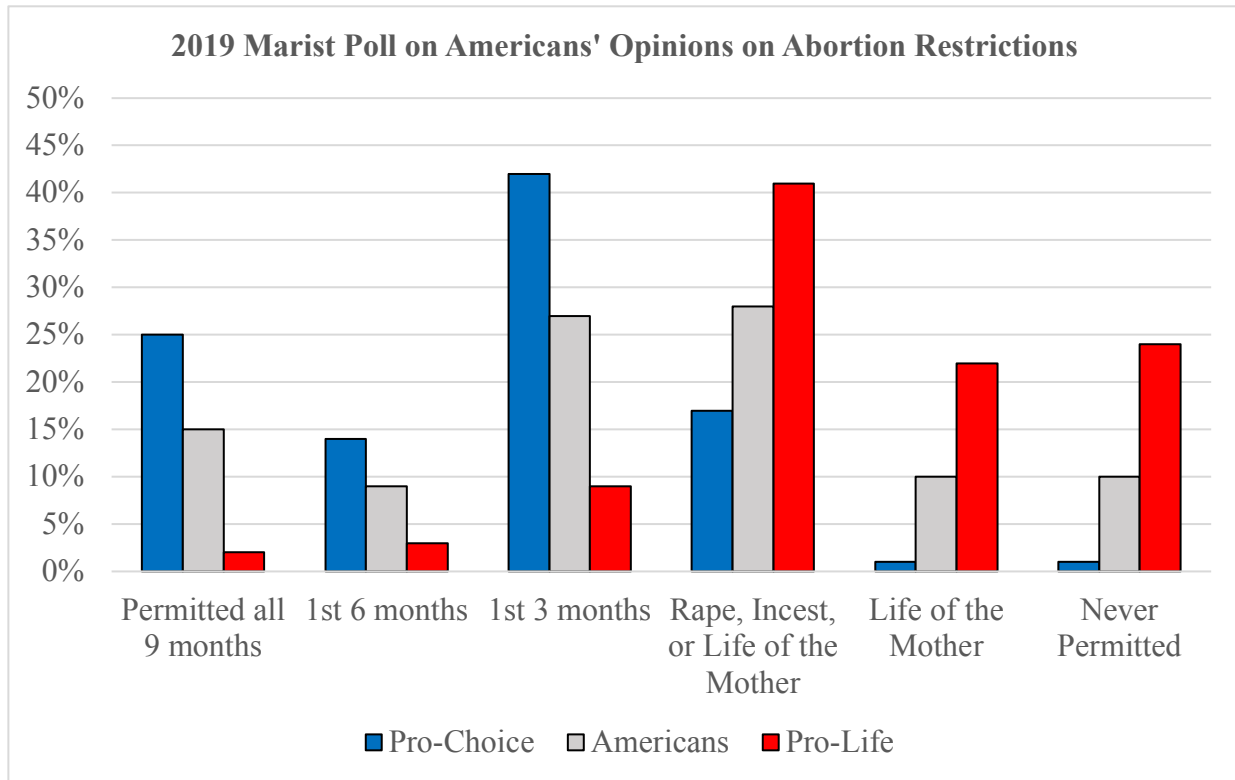
³⁶ http://www.norc.org/PDFs/publications/NORCRpt_119.pdf [<https://perma.cc/JL68-2QEP>], p. 39.

³⁷ <https://prospect.org/article/polling-prejudice> [<https://perma.cc/5XZ8-AEA8>].

³⁸ 21% of Americans support elective abortion after the first trimester, including 34% of pro-choice Americans, <http://www.kofc.org/un/en/resources/communications/americans-opinions-on-abortion.pdf> [<https://perma.cc/C34M-2BDT>]; 41% believe abortion should be legal in the second and third trimesters, <https://news.gallup.com/poll/235469/trimesters-key-abortion-views.aspx> [<https://perma.cc/BE3S-GR8Z>].

³⁹ *Planned Parenthood v. Casey*, 505 U.S. 833, 1000 (1992).

Figure 7.2 Bar Graph of Americans' Abortion Stances.⁴⁰



The Court might soon be motivated to reexamine *Roe* because states' recent passage of laws that undermine *Roe*'s viability as a legal doctrine can create a split between circuit courts, which would serve as a basis for the U.S. Supreme Court to step in⁴¹ and resolve the controversy surrounding abortion. To wit, pro-choice legislators have recently passed state laws permitting

⁴⁰ These data are reported in chapter 3 on p. 120; they are responses to a 2019 Marist poll question "Which comes closest to your opinion on abortion: Available to a woman at any time during pregnancy, only during the first six months of pregnancy, only during the first three months of pregnancy, only in cases of rape, incest, or to save the life of the mother, only to save the life of the mother, should never be permitted under any circumstances.," <https://www.kofc.org/un/en/resources/communications/american-attitudes-abortion-knights-of-columbus-marist-poll-slides.pdf> [<https://perma.cc/C7LQ-ZEW7>].

⁴¹ https://www.law.cornell.edu/wex/circuit_split [<https://perma.cc/SB28-BCDZ>].

abortion throughout pregnancy⁴² and pro-life legislators have recently passed state laws restricting abortion that conflict with *Roe* since they restrict abortion before viability⁴³. Thus, whether a law that restricts abortion before viability is upheld or overturned by its circuit court⁴⁴, each passage of a state law that conflicts with *Roe*'s central holding is an opportunity for the U.S. Supreme Court to review its abortion jurisprudence.

If the Court considers recent legal developments, whereby many state laws currently recognize fetuses as human victims and persons, then it could reform abortion jurisprudence to recognize a fetus as a person within the meaning of the Fourteenth Amendment. However, such recognition would not demand any particular legal position on abortion as such rights would be balanced against a woman's constitutional right to abort. Recognizing fetuses as persons would not require restrictions of abortion since the Court could ground the right to abort in self-defense principles or modern reproductive rights principles.

In either case, legislators on both sides are ratcheting up the debate and effectively calling for the U.S. Supreme Court to once again issue a mandate rooted in the constitution with the aim of settling the national controversy surrounding abortion. However, in order to succeed in its third attempt, the Court would likely need to reform abortion jurisprudence to reflect both sides' interests and strike a balance between the competing rights in order to finally resolve the U.S. abortion debate.

⁴² <https://buffalonews.com/2019/01/22/long-stalled-abortion-bill-passes-new-york-legislature/> [<https://perma.cc/ZCX5-GSCP>].

⁴³ See, e.g., <https://rewire.news/legislative-tracker/law-topic/heartbeat-bans/> [<https://perma.cc/7T9R-2BT9>].

⁴⁴ See, e.g., https://www.law.cornell.edu/wex/circuit_split [<https://perma.cc/SB28-BCDZ>].

Resolving Error

While some might believe that when life begins is not an important dimension of the abortion debate, this thesis presents data that suggests it is an important question on which both sides disagree⁴⁵; while some might believe that both sides merely disagree on the normative implications of the question (e.g., when a fetus is a ‘person’, when abortion should be illegal), this thesis presents data that suggests both sides hold different views on when a biological human’s life begins⁴⁶.

Table 7.1 Comparisons of Biological and Legal Views of Fetuses.⁴⁷

| | When a Fetus' Life Begins | When a Fetus' Life is Legally Protectable | When a Fetus Deserves Constitutional Rights |
|-----------------------------------|---------------------------|---|---|
| Biological Human Before Viability | 85% | 83% | 79% |
| Biological Human At Viability | 77% | 75% | 68% |
| Biological Human At Birth | 67% | 67% | 67% |

While pro-choice Americans’ biological views on when life begins might not seem relevant to their stances on abortion, as many focus on abortion rights, chapter 5’s data suggests that fewer

⁴⁵ As has been made clear throughout this thesis, research on when life begins was performed to clear up confusion between the two sides so they can have a shared understanding of the relevant facts and not get caught up in debating the issue; while there are biologists who might disagree, the weight of previous congressional and legislative hearings, a review of relevant literatures, and chapter 5’s survey results suggest that most biologists recognize a human zygote as a biological human since it has human DNA – which distinguishes it from non-humans – and it is developing in the human life cycle – which distinguishes it from human body cells.

⁴⁶ In chapter 4 on p. 209-210, 23% of pro-choice and 59% of pro-life participants selected fertilization as the point at which a biological human’s life begins; 43% of pro-choice participants suggested that a fetus is a biological human once it reaches viability or once it is born.

⁴⁷ These data were produced from a comparison of the data reported in chapter 4 on p. 206-207 and 209-210; this table should be read as follows: of those who believe a biological human’s life begins before viability, 85% believe that a fetus’ life begins before viability, 83% believe that a fetus’ life is legally protectable before viability, and 79% believe that a fetus deserves constitutional rights before viability; this is interesting in that their descriptive view of fetuses could undergird their normative view of fetuses.

pro-choice participants who believe a pre-viable fetus is a biological human preferred abortion access after the first trimester (39%) than pro-choice participants who believe a pre-viable fetus is not a biological human (79%).⁴⁸

As suggested by Table 7.2 below, which compares pro-choice participants' beliefs on when a fetus is a biological human and their preferences on abortion laws, those who support the greatest access to legal abortion believe that fetuses are biological humans later in pregnancy. Similarly, those who recognize pre-viable fetuses as biological humans are more inclined to support more restrictive abortion laws:

Table 7.2 Pro-Choice Americans' Perceptions of Fetuses and Preferred Laws.⁴⁹

| | Not legal at any time | In the first 3 months | In the first 6 months | Legal at any time |
|-----------------------------------|-----------------------|-----------------------|-----------------------|-------------------|
| Biological Human Before Viability | 20% | 42% | 15% | 24% |
| Biological Human At Viability | 5% | 20% | 39% | 37% |
| Biological Human At Birth | 1% | 23% | 14% | 61% |

Pro-choice Americans' beliefs that fetuses are not biological humans until viability or birth could reflect confusion that could be addressed with a simple clarification⁵⁰: 'Biologists classify

⁴⁸ It is an open question as to whether they would prefer more restrictive abortion laws if they came to recognize pre-viable fetuses as biological humans, but the totality of this dissertation's research leads the author to expect that pro-choice Americans' preferences would change; although, this finding is more useful for understanding why one might not recognize fetuses as biological humans, as those who want more permissive abortion laws are less likely to so recognize fetuses and this might be because that view is not congenial to their strong support for abortion.

⁴⁹ These data were produced from a comparison of the data reported in chapter 4 on p. 187 and 209-210.

⁵⁰ However, there was some evidence in chapter 4 on p. 213 that suggests Americans believe that the propagation of the biological view could reduce the country's abortion rate and support for legal abortion access so it might not be a trivial misunderstanding or an inconsequential area of error and confusion.

biological humans, or members of the *Homo sapiens sapiens* species, as organisms with human genomes that are in some developmental stage of the human life cycle; since the human life cycle begins at fertilization, fetuses are biological humans throughout pregnancy'. If that is the case, then Americans would be able to work from the same objective view of fetuses – which was the consensus view of the group both sides felt was most qualified to make the determination⁵¹ – and they could define their disagreement as one of normative differences: “While many pro-choice Americans believe that only biological humans that can survive outside of the womb deserve rights, many pro-life Americans believe that all biological humans deserve rights.”⁵² Thus, a typology could be broken down into the following stances:

Stance 1: Fetuses are not biological humans, and they do not deserve rights, so all abortions should be legal.

Stance 2: Fetuses are biological humans, but they do not deserve rights, so all abortions should be legal.⁵³

⁵¹ Most Americans felt biologists were most qualified to determine when a human’s life begins and most biologists agreed that a fetus is a biological human throughout pregnancy.

⁵² Pro-choice Americans and biologists who recognize fetuses as biological humans throughout pregnancy are not necessarily inconsistent in their beliefs about abortion since, on its own, the fact that abortion impacts biological humans does not require a particular stance on abortion without something more; further, even if one strictly supports universal human rights or equal protection under the constitution, they are not obliged to have a particular legal stance on abortion since one can recognize a fetus’ rights and hold that abortion rights are superseding; there would only be a question as to whether one is consistently applying their principles if they believe that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind” (<http://www.un.org/en/universal-declaration-human-rights/> [<https://perma.cc/HZ5C-58KZ>]) and yet reject the notion that fetuses have rights at some point in pregnancy since the former entails the latter: denying fetuses rights requires drawing a distinction between which humans deserve rights.

⁵³ This represents the principle behind Peter Singer’s view of abortion, see, e.g., Singer, P. “Practical Ethics”. Cambridge: *Cambridge University Press*, 1993, 2008, 2nd ed., p. 85-86.

Stance 3: Fetuses are biological humans, and they do deserve rights, but all abortions should be legal because the right to abortion is more important than the right to life.⁵⁴

Stance 4: Fetuses are biological humans, and they do deserve rights, so some abortions should be restricted because the right to life is more important than the right to abortion in some circumstances.

Stance 5: Fetuses are biological humans, and they do deserve rights, so all abortions should be restricted because the right to life is more important than the right to abortion in all circumstances.

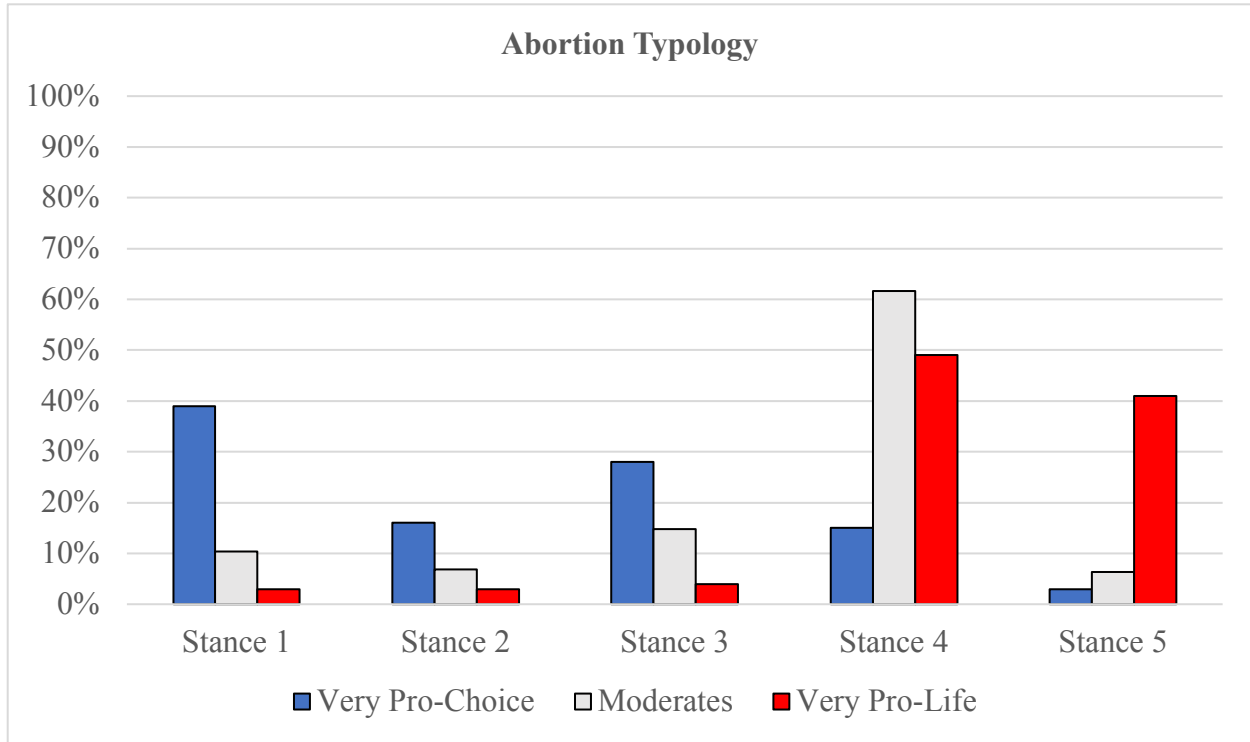
Participants in chapter 4's study provided responses to a similar abortion typology question, which allows for a comparison of the most pro-choice participants, the moderate Americans, and the most pro-life participants.

As shown in Figure 7.3⁵⁵ below, these results suggest that most moderate and very pro-life Americans believe that fetuses are biological humans deserving of rights and the right to life is more important than the right to abort in at least some circumstances.

⁵⁴ This represents the principle behind Judith Jarvis Thomson's view of abortion, e.g., Thomson, J.J. *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971); Davis, N. (1984). *Abortion and Self-Defense*. *Philosophy & Public Affairs*, 13(3), 175-207. Retrieved from <http://www.jstor.org/stable/2265411> [<https://perma.cc/YEF5-NGXQ>].

⁵⁵ These data relate to a result reported in chapter 4 on p. 187; on a scale from 1 ("Pro-Choice") to 10 ("Pro-Life"), very pro-choice participants were those who were in the first quintile, moderates were those who in the middle three quintiles, and very pro-life participants were those who were in the fifth quintile; Stance 1: "Human fetuses are not all biological humans, so they do not deserve legal protection and abortions should not be legally restricted", Stance 2: "All human fetuses are biological humans, but they do not deserve legal protection so abortions should not be legally restricted", Stance 3: "All human fetuses are biological humans, and they do deserve legal protection but abortions should not be legally restricted because the right to abortion is more important than the right to life", Stance 4: "All human fetuses are biological humans, and they do deserve legal protection but some abortions should be legally restricted because the right to life is more important than the right to abortion in some circumstances" or "All human fetuses are biological humans, and they do deserve legal protection but most abortions should be legally restricted because the right to life is more important than the right to abortion in most circumstances", and Stance 5: "All human fetuses are biological humans, and they do deserve legal protection but all abortions should be legally restricted because the right to life is more important than the right to abortion in all circumstances".

Figure 7.3 Bar Graph of an Abortion Typology.



While many very pro-choice participants might not recognize fetuses as biological humans or deem them worthy of legal protection in utero, they seem to be as alone in having those views as very pro-life participants who believe all abortions should be illegal.⁵⁶

⁵⁶ It is important to note that most Americans recognize the right to life as more important than the right to liberty (in chapter 4 on p. 183, 67% affirmed that “the right to life is more important or fundamental than the right to liberty, since you can have life without liberty but you cannot have liberty without life.”), which is consistent with rights calculations that suggest liberty is a lower right than life since: (1) it is derogable in times of emergency, while the right to life is not, (2) all laws necessarily infringe on liberty but few infringe on the right to life, (3) the right to life is more important a human than the right to liberty is since a human can still have other rights if their right to liberty is infringed upon in some way, while a human can have no other rights if they do not have the right to life; however, these analyses assume that abortion rights are rooted in liberty rights related to bodily autonomy, family rights, and the right to self-governance – some might root abortion rights in the right to life, in which case abortion could be dictated by the right to self-defense doctrine.

Pro-life participants have less variability in their principles, as most hold the view that fetuses are humans with the right to life and that right takes precedence over abortion rights. They vary more in their views of the circumstances in which abortion rights be prioritized: (1) abortion should never be legal; (2) abortion should only be legal to save the life of the pregnant person; (3) abortion should only be legal in life-threatening pregnancies and pregnancies resulting from non-consensual sex.⁵⁷

While this thesis does not assess whether the absolutist positions⁵⁸ are morally correct or preferable⁵⁹, it predicts that a successful resolution supported by most Americans would not be based on an absolutist position that ignores either abortion rights or fetal rights – rather, a successful resolution would embrace a nuanced balance of rights, and it would reflect Americans’ preferences. This might be mistaken as an *argumentum ad populum*⁶⁰, but the will of the people is not

⁵⁷ In chapter 4 on p. 187, when asked about their preferred abortion laws, 14% said abortion should be legal under no circumstances, 27% said abortion should only be legal when a pregnant person’s life is threatened, and 37% supported therapeutic abortions of life-threatening pregnancies and pregnancies that resulted from nonconsensual sex.

⁵⁸ For instance, while *Roe* recognized a constitutional right to abort, it rejected the absolutist argument for abortion rights: “[A]ppellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree”, *Roe v. Wade*. 410 U.S. 113, 153 (1973).

⁵⁹ This thesis does not argue that either absolutist position is necessarily wrong or that compromise is preferable in political debates, as slavery is a clear example of a debate where the absolute position against the practice is seen as correct and any compromise in which slavery is permitted in some circumstances is wrong.

⁶⁰ “[T]he argument *ad populum* (an appeal “to the people”), which, instead of offering logical reasons, appeals to such popular attitudes as the dislike of injustice”, <https://www.britannica.com/topic/fallacy#ref1102382>.

used to suggest that such preferences are true or correct but rather that the controversy is most likely to end if there is a resolution that represents the will of the people.⁶¹

Coda: Possible Resolution

Some might suggest that the debate is ultimately insurmountable because the two sides are in fundamental disagreement as to whether elective first-trimester abortions should be illegal. However, both sides have ample common ground that can be used to engender compromise. Indeed, the majority on both sides agreed with the following resolution proposed as a comprehensive abortion reform⁶²:

- (1) financial assistance and health insurance for pregnant people
- (2) streamlining and subsidization of the adoption process
- (3) mandated sex education
- (4) maximal access and affordability of contraceptives
- (5) legal abortion access for special circumstances such as: pregnancies caused by rape and incest, pregnancies of preteens, ectopic pregnancies, and life-threatening pregnancies
- (6) legal restriction of elective abortions after the first trimester of pregnancy

This resolution is not necessarily optimal and, aside from obvious practical challenges⁶³, pro-

⁶¹ This is based on assumptions that Americans honestly describe their preferences, their preferences are stable, and Americans will be more content with abortion laws that reflect their preferences than laws that do not.

⁶² As reported in chapter 4 on p. 203, using a median split, 53% of pro-choice and 54% of pro-life participants supported this resolution; using a quintile split, very pro-choice (46%) and very pro-life (48%) were less likely to support it than pro-choice (70%), neutral (56%), and pro-life (67%) participants.

⁶³ Such comprehensive reform would require action from the U.S. Congress since the first four points could only be achieved through federal legislation.

choice absolutists would not likely accept a reduction of abortion rights⁶⁴ and pro-life absolutists would not likely accept a compromise that permits legal access to elective abortions⁶⁵.

However, compromises rarely make all parties happy.⁶⁶ Pro-life Americans might be willing to compromise their principles on the permissibility of first-trimester abortions so second- and third-trimester abortions can be restricted, and pro-choice Americans might accept this narrowing of the legal window in order to get assistance for pregnant people, mandated sex education, and increased access to contraceptives. On top of these more tangible reasons, the pro-life side might be motivated to gain some ground in the debate by limiting access, and the pro-choice side might be motivated to solidify legal abortion access in the face of serious challenges to legal abortion access.⁶⁷

⁶⁴ Here, this would merely be a change in degree, as this resolution would require the pro-choice side to reduce the window in which pregnant people can get elective abortions.

⁶⁵ This would be a change in type since this resolution goes against the pro-life principle that a fetus' right to life cannot be secondary to the right to have an elective abortion; accepting this resolution would require the pro-life side to compromise its principles.

⁶⁶ In mediations, the question is whether the resolution is preferable to not reaching an agreement; thus, an undesirable compromise can be preferable to continuing a dispute if one is concerned they will lose the dispute; due to the flux surrounding *Roe* in 2019, both sides have much incentive to agree on a mutually-beneficial resolution since a more conservative Supreme Court could significantly restrict legal abortion access and a more liberal Supreme Court could significantly expand legal abortion access.

⁶⁷ Georgia's Governor Brian Kemp signed HB 481 into law (<http://www.legis.ga.gov/Legislation/en-US/display/20192020/HB/481>, [archived link unavailable]), and the state can charge pregnant people who get abortions with murder and pregnant people who seek an abortion out of state with conspiracy to commit murder, see, e.g., <https://slate.com/news-and-politics/2019/05/hb-481-georgia-law-criminalizes-abortion-subjects-women-to-life-in-prison.html>, [<https://perma.cc/L52Q-2KC6>]; in the face of this law, and similar laws that might soon follow, pro-choice Americans could soon be motivated to compromise to prevent state and federal restrictions of abortion after six weeks of pregnancy.

The U.S. abortion debate is not like the siblings' misunderstanding about an orange that was discussed in chapter 6, and it is an issue that has divided Americans for decades despite repeated mandates from the U.S. Supreme Court. Since pro-choice and pro-life Americans genuinely disagree about whether a pregnant person should be able to get a first-trimester abortion simply because they do not want to carry the pregnancy to term, it is hard to imagine a compromise that would please everyone.

Abortion is a polarizing issue. However, the public is less polarized than most Americans believe. Commentators usually assume that some Americans favor legal abortion access throughout pregnancy for any reason, while others oppose legal access to abortion throughout pregnancy for any reason. However, the majority prefers abortion laws that permit therapeutic abortion access throughout pregnancy, permit elective abortion access in the first trimester, and restricts elective abortion access after the first trimester. This common ground leaves open the possibility of compromise and invites the sort of mediation on which this thesis centers. Yet, because of the polarization of activists and politicians, a compromise that reflects the opinions of most Americans would leave the absolutists unhappy and believing that such a resolution is profoundly immoral.

Further, it is important to note that, because part of this project shows that biologists on balance believe that a biological human's life begins at fertilization, pro-life forces might see this project as 'proof' that elective abortion should be illegal throughout pregnancy⁶⁸. Yet this thesis

⁶⁸ To be clear, in the debate over whether a fetus is a human or mere human tissue akin to skin cells, biologists' opinions suggest that a single-celled zygote with human DNA is a biological human in the same way as a 33-year-old man; however, without something more (e.g., the view that all humans regardless of any distinction are equally deserving of the right to life), one does not need to treat them as equivalent in terms of their rights or moral value; further, even if one recognizes fetal rights, abortion restrictions are not necessary without something more (e.g., the view that a human's life is more deserving of protection than another human's liberty right to bodily autonomy, the view that a pregnant person's right to self-defense entails abortion rights); thus, recognizing a fetus as a biological human does not necessitate limited abortion access on its

concludes that a likely compromise on abortion would entail legal access to elective first-trimester abortions, so many pro-life Americans would be strongly opposed to such a resolution. On the other side, pro-choice activists would also strongly oppose limiting elective abortion access to the first trimester. Thus, it is unlikely that either side would be excited to agree to such a compromise without significant motivation to end the debate and settle on a mutually-beneficial resolution.

Though this thesis' data might be of some use to both sides in the public abortion debate, neither side would be likely to contextualize them within the proposed compromise that could reduce polarization since absolutists and partisans would not support such resolution. However, helping parties in a dispute to better understand the dispute and both sides' values, interests, and positions is the province of a mediator. Thus, this author supports the use of these data in good-faith efforts to enhance Americans' understanding of the abortion debate, as a shared and sophisticated understanding of the national abortion controversy can help to reduce or resolve it.

Despite these challenges, the recommended compromise seems to be of the type that would get majority support from Americans on both sides of the debate. Further, it would be more in keeping with abortion laws throughout Europe and other countries that permit elective abortions. While it is not a perfect solution and some would still fight for greater abortion rights or fetal rights, it is possible that a compromise more consistent with the will of the American people could have the kind of impact the U.S. Supreme Court has sought since 1973.

own – however, as discussed in chapter 2, the widespread recognition of a fetus as a biological human previously led to the passage of elective abortion bans throughout the country, so it would not be unprecedented if elective abortions were restricted throughout pregnancy based on the view that a biological human's right to life supersedes a pregnant person's liberty right to abort a pregnancy for any reason.

However, since comprehensive reform could only be reached if politicians pursued comprehensive reform⁶⁹ of abortion laws, such a resolution seems unlikely due to the political polarization of America in general⁷⁰ and on abortion specifically⁷¹. However, the common ground on the support for legal therapeutic abortions and opposition to legal access of elective abortions in the second and third trimesters remains as an opportunity for the Supreme Court to reform its legislation to reflect most Americans' abortion stances – such reform could help the Court finally succeed in its third attempt to use a mandate to reduce or resolve America's national abortion controversy⁷².

⁶⁹ Given the recent difficulty in passing a comprehensive reform of U.S. immigration laws, this seems even more unlikely, <https://www.theatlantic.com/politics/archive/2018/11/democrats-are-divided-immigration-reform/576457/> [<https://perma.cc/F6SV-RFP3>].

⁷⁰ See, e.g., <https://www.theatlantic.com/politics/archive/2017/10/trump-partisan-divide-republicans-democrats/541917/> [<https://perma.cc/LTN2-86RK>], <https://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values/> [<https://perma.cc/H4JQ-TWXR>].

⁷¹ While state legislators have worked to pass legislation that contradicts *Roe* in 2019 (<https://www.tampabay.com/florida-politics/2019/03/22/floridas-not-alone-abortion-limits-proposed-in-other-states-too/> [<https://perma.cc/5ACE-ZF4B>], <https://www.nytimes.com/2019/03/30/us/georgia-fetal-heartbeat-abortion-law.html> [<https://perma.cc/RLJ3-LLZM>]), other states have worked to expand abortion access (see, e.g., <https://www.gutmacher.org/gpr/2019/01/ensuring-access-abortion-state-level-selected-examples-and-lessons> [<https://perma.cc/9KMA-4A3U>]).

⁷² Again, the Court is not obliged to reform its abortion jurisprudence, and it might be that the debate would be more likely to improve through such reform rather than the Court punting the question back to the states; further, since abortion restrictions are typically in the jurisdiction of states, as they represent laws within criminal codes, it is not clear how a Supreme Court ruling would be enforced if state legislators refuse to enact similar legislation – however, the Court in *Brown* faced similar issues since it “did not direct a remedy for the constitutional injury suffered by students in segregated schools”, (Chen, J. With All Deliberate Speed: *Brown II* and Desegregation's Children, 24 *Law & Ineq.* 1 (2006), available at: <http://scholarship.law.umn.edu/lawineq/vol24/iss1/1>, [<https://perma.cc/KXC5-C4ZE>]); thus, if the Court reformed its abortion jurisprudence, a compromise might simply permit states to restrict abortion after the first trimester or the Court could direct states to pass such legislation and trust that the force of its mandate would eventually be adopted, as it did in *Brown*.