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HOW VIABLE IS VIABILITY? ARTIFICIAL WOMB TECHNOLOGY AND THE THREAT TO ABORTION ACCESS

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ABSTRACT

The viability standard plays an important role in abortion access around much of the United States. In fact, before the Dobbs *decision, the viability standard was the constitutional gatekeeper to abortion access and was uniform across the entire nation. Unfortunately, the Supreme Court has removed the constitutional right to abortion altogether. Nevertheless, I will provide an argument as to why* Dobbs *does not signal the end of viability-based abortion around the U.S. I will prove the importance of the viability standard even in a post-*Dobbs *society, highlighting its operation within various state laws, such as Michigan's Prop. 3, as well as its presence in federal bills aimed at codifying* Roe. *As an important factor in abortion regulation, it is important to note that viability is fluid and is subject to change depending on the context of medical technology. The artificial womb is a threat to the current understanding of viability, and its arrival is by no means far-fetched. The question this paper will address is how society should deal with viability after artificial womb technology becomes mainstream. The paper will explore potential alternatives to the viability standard, but ultimately conclude that viability ought to be retained where it is already used, and implemented where it is not, due to its inherent ability to fairly balance relevant interests in the abortion decision. This paper will advocate for reform envisaging legislative change to ground artificial wombs firmly within the private surrogacy sector, to distance them as being considered 'medical apparatus' capable of expediting viability.*

* J.D. Student at the University of Michigan Law School. Thanks to my friend René Figueredo for giving me the advice and encouragement to work hard on this while the political landscape around abortion changed so much. Thank you also to my family and friends back home for countless hours listening to me talk about US politics and hearing the same ideas time and time again.

INTRODUCTION

Artificial Womb Technology ("AWT"), which will allow for fetuses to be gestated in technology emulating a womb,[1] threatens abortion access wherever it is hinged on the viability standard due to expediting the point at which fetal viability is met. The writing of this article witnessed abortion law in the U.S. through a tumultuous time. On June 24, 2022, the Supreme Court decided 6-3 to uphold a Mississippi law prohibiting abortion after fifteen weeks and 5-4 to overrule *Roe v. Wade* and *Planned Parenthood v. Casey*.[2] While to many, this was expected in accordance with the political landscape of the U.S., the decision still carried with it widespread shock.[3] However, many states continue to permit abortion and elect viability as the dividing line for abortion access.[4] For example, Michigan has enshrined this within its state constitution.[5] Therefore, even despite *Dobbs*, it is important to discuss the effect AWT will have on viability and the autonomy of pregnant individuals faced with the abortion decision. Furthermore, viability appears to be the preferred approach to abortion access in potential federal legislation, such as the Women's Health Protection Act ("WHPA"),[6] a bill which attempts to codify *Roe* and may well serve as a model for future bills aimed at protecting and codifying the right to abortion.[7] Having established the continued importance of viability, the threat of AWT still looms large. I propose a solution in which federal legislation designates AWT as surrogacy technology.

1. Natasha Preskey, *In The Future, You Could be Pregnant Outside Your Body*, VICE (June 14, 2018), [https://perma.cc/JUS7-N5GW].
2. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 5 (2022); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
3. The Editorial Board, *The Ruling Overturning Roe is an Insult to Women and the Judicial System*, N.Y. TIMES (June 24, 2022), [https://perma.cc/7VDC-AS44].
4. *See infra* Section I.E of this paper.
5. MICH. CONST. art. 1, § 28.
6. Women's Health Protection Act of 2023, H.R. 12, 118th Cong. (2023).
7. Nadine El-Bawab, *Women's Health Protection Act explained as Roe v. Wade comes under likely threat*, ABC NEWS (May 7, 2022), [https://perma.cc/YW6T-KX3G].

A. *Artificial Womb Technology*

Artificial Womb Technology is, as described in the previous section, a Huxley-esque depiction of the unborn being brought to term within futuristic apparatus. But are these dystopian visions portrayed in Brave New World a far-off reality?[8] The current scientific consensus says no.[9]

AWT will facilitate the process of ectogenesis, the development of the fetus *ex utero*–outside of the womb.[10] An artificial womb will generally consist of a sealed bag–the biobag–which is full of amniotic fluid containing all the required nutrients.[11] The biobag will have cannulated umbilical cord access and its own oxygenator system to carry nutrients to the fetus.[12] This technology is showing almost certain prospects of being fruitful; it has already been successfully tested on animals.[13] In 2017, researchers at the Children's Hospital of Philadelphia managed to successfully use the biobag model of artificial womb to maintain a lamb fetus until it was "successfully weaned to spontaneous respiration" and capable of "long-term survival."[14] The dystopian visions that Aldous Huxley once dreamt of are on the horizon of becoming a scientific reality, perhaps even within the next decade with appropriate funding, according to Yale Department of Obstetrics, Gynecology and Reproductive Science Professor, Carlo Bulletti in 2018.[15]

B. *The Viability Doctrine*

I will illustrate why the viability doctrine still plays an important, if not wholly operative role in many U.S. states and many other legal

8. ALDOUS HUXLEY, BRAVE NEW WORLD, CHAPTER X (1932).
9. Preskey, *supra* note 1.
10. Olalekan Okesanya, Angelica J. Gacutno-Evardoneg, Abideen A. Olaniyic, Hakeem K. Hassand, Kristine J. A. Gacutnof, Noah O. Olalekee, Ridwan O. Adesolab, Jose J. Lasalah, Emery Manirambonai, Don E. Lucero-Prisno III, *Ectogenesis: Understanding and Opportunities, Implications, Concerns, and Ways Forward*, 7 INT'L J. SURGERY: GLOBAL HEALTH 1, 2 (2024) [hereinafter Okesanya, et al].
11. *Id.*
12. *Id.*
13. Emily A. Partridge, Marcus G. Davey, Matthew A. Hornick, Patrick E. McGovern, Ali Y. Mejaddam, Jesse D. Vrecenak, Carmen Mesas-Burgos, Aliza Olive, Robert C. Caskey, Theodore R. Weiland, Jiancheng Han, Alexander J. Schupper, James T. Connelly, Kevin C. Dysart, Jack Rychik, Holly L. Hedrick, William H. Peranteau, Alan W. Flake, *An extra-uterine system to physiologically support the extreme premature lamb*, 8 NAT. COMMC'N'S. 1, 2 (2017) [hereinafter Partridge et. al].
14. *Id.*
15. Preskey, *supra* note 1.

spheres and bodies of abortion jurisprudence. Viability is the gestational age at which a fetus has a good probability of survival if born.[16] In the legal world, many cases have taken a stab at defining viability. The most salient example is from *Roe v. Wade*, defining viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[17] In Black's Legal Dictionary, viability is defined as a stage of fetal development which allows it to live "indefinitely outside the womb by natural or artificial life-supportive systems."[18] In *Colautti v. Franklin*, the Supreme Court refused to provide a temporal threshold of viability, stating that they "left the point flexible for anticipated advancements in medical skill."[19]

Post-*Dobbs* iterations of viability continue to make reference to use of artificial aid.[20] Such references do not require the fetus to survive naturally to be viable and hint at the ability of technology such as AWT to influence when a fetus is viable. For example, the proposed Federal bill, the Women's Health Protection Act of 2023 ("WHPA"), defines viability as "the point in a pregnancy at which […] there is a reasonable likelihood of sustained fetal survival outside the uterus with or without artificial support."[21] Furthermore, many state laws that permit abortion under a viability threshold remain untouched by *Dobbs*.[22] These laws also allude to viability as including the use of artificial aid; for example, Rhode Island's statute uses almost the very same definition of viability as the WHPA.[23]

C. *The Relationship Between AWT and Viability*

The definitions of viability both pre- and post-*Dobbs* affirm the ability of artificial technology to influence fetal viability. For example, the Supreme Court of Alaska in *Cleveland v. Anchorage* pondered the impacts AWT may have on the concept of viability, saying, "[V]iability is a very inexact criterion because it is intimately connected with medical and scientific advances. In the future it might very well be possible for the fetus to

16. *Viability*, BLACK'S LAW DICTIONARY (6th ed. 1990).
17. *Roe*, 410 U.S. at 160.
18. *Viability, supra* note 16.
19. Colautti v. Franklin, 439 U.S. 379, 387 (1979).
20. *See, e.g.*, H.R. 12, 118th Cong.; MICH. CONST. art. 1, § 28.
21. *Id.*
22. *See* Lindsay Paulsen, *The Dobbs Decision: Looking Back and Moving Forward*, STANFORD MED. NEWS (July 14. 2023), [https://perma.cc/5X8A-CK75].
23. R.I. S.T. § 23-4.13-2 (b) (2019) ("that stage of gestation where […] there is a reasonable likelihood of the fetus' sustained survival outside of the womb with or without artificial support").

live in an artificial womb or even with an artificial placenta from a very early stage in fetal development."[24] There is a clear vulnerability in the current understanding of viability with respect to AWT. Simply put, technology designed to nurture previable fetuses will expedite the point of viability.[25] According to Romanis, a Professor of biolaw at Durham University, "AW[T] could impact on perceptions of viability […] [F]oetuses are considered 'viable by virtue of technology' earlier in a pregnancy."[26]

Harnessing the potential of AWT to expedite viability, while concerning to activists and scholars vindicating abortion rights, is a welcome advancement to medical professionals in neonatal care.[27] For example, Professor Bulletti regards AWT as revolutionary due to its ability to help those suffering with uterine abnormalities, or even those with no uterus at all, have biological children.[28] Undeniably, AWT has legitimate and beneficial applications, and so it would be wrong to suggest it was to be prohibited due to the legal consequences it may entail. Instead, it should be the duty of the law to harmonize the benefits of AWT with the countervailing and potentially detrimental consequences to viability and access to abortion.

D. *The Roadmap of this Paper*

This article is split into three parts. Section I focuses on the fundamental importance of the viability standard. I will explore the jurisprudence of abortion throughout U.S. history and the weight placed onto the viability standard. I will then analyze the legal impact of the *Dobbs* decision and illustrate why, even post-*Dobbs*, the viability standard remains a big part of the abortion decision in various states. Accordingly, many pregnant persons are still vulnerable because AWT threatens

24. *Cleveland*, 631 P.2d at 1085 (quoting CHARLES E. CURRAN, TRANSITION AND TRADITION IN MORAL THEOLOGY 209 (1979)).
25. *See generally* Hyun Jee Son, *Artificial Wombs, Frozen Embryos, and Abortion: Reconciling Viability's Doctrinal Ambiguity*, 14 UCLA WOMEN'S L.J. 213 (2005); Jessica H. Schultz, *Development of Ectogenesis: How Will Artificial Wombs Affect the Legal Status of a Fetus or Embryo?*, 84 CHICAGO-KENT L. REV. 877 (2010).; Elizabeth Chloe Romanis, *Artificial Womb Technology and the Choice to Gestate Ex Utero: Is Partial Ectogenesis the Business of the Criminal Law?*, 28 MED. LAW REV. 342 (2020).
26. Romanis, *supra* note 25 at 352.
27. *See generally* Johanna Eichinger & Tobias Eichinger, *Procreation machines: Ectogenesis as reproductive enhancement, proper medicine or a step towards posthumanism?*, 34 BIOETHICS 385 (2020).
28. Preskey, *supra* note 1.

viability's current conventional understanding, setting the scene for an inquiry into the legal implications of AWT on viability.

Section II delves into the legal consequences of AWT using an unmodified viability standard. I cover this in order to illustrate that although viability is important and should not be replaced, it needs to be modified in order to avoid the legal consequences I have identified. I will also explore different legal pathways and principles that may be used to uphold the right to abortion in order to analyze their utility in my proposal. This consists of the principle of decision-making privacy (autonomy) and the right not to be a genetic parent.

In Section III, I call for federal legislation to designate AWT within the surrogacy sector. The section itself will first introduce the concept and background of surrogacy before conducting a literature review of proposals that have been made by other academics and illustrating why they are not satisfactory. I will then discuss the solution, including a rebuttal of the criticisms I deem most likely to be levelled at it.

I. VIABILITY IN U.S. LAW

A. *Jurisprudence: Legal Personhood*

Legal personhood is the conferral of rights as a human.[29] It is important to the abortion context as the fetus's lack of legal personhood allows the mother a choice of termination without committing murder.[30] Under common law, legal personhood is crystallized at the point of being "born alive".[31] After being born alive, a child is granted all the rights and protections of a human being.[32] The federal government codified this principle most recently under the Born Alive Infants Protection Act.[33] In particular, subsection (a) of the Act says that wherever the legal term of "person," "human being," "child," or "individual" is used, it shall include anybody that has been "born alive."[34] This is, according to section (b), the "complete expulsion or extraction from his or her mother" after

29. *See* John Salmond, SALMOND ON JURISPRUDENCE 299 (1966).
30. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769 129-30 (1979).
31. *See generally* Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563 (1986).
32. *See* United States v. Spencer, 839 F.2d 1341, 1343 (9th Cir. 1998) (stating that after being born alive, one is considered a person capable of being murdered).
33. 1 U.S.C. § 8.
34. 1 U.S.C. § 8(a).

which the infant exhibits further signs of life such as contracting muscles, breathing and heart beats.[35] Subsection (c) says that legal rights will not be conferred under this provision to any "homo sapiens at any point prior to being 'born alive' as defined in this section."[36]

The "born alive" threshold is, therefore, the operative point at which a fetus becomes a newborn and is deemed an equal legal entity to any other person.[37] The applicability of 1 U.S.C. § 8 to other federal statutes has been confirmed in *United States v. Flute*.[38] Some states, namely Massachusetts and South Carolina, have opted not to follow the federal approach under their criminal codes.[39] Instead, they qualify the fetus as a possible victim of homicide.[40] This may be the only instance in which we see an unborn fetus as being capable of having any interests or rights associated with personhood.[41]

B. *Abortion before* Roe

Historically, abortion was illegal under the common law after the 'quickening' of the fetus.[42] In 1765, English jurist William Blackstone said that quickening occurred "as soon as an infant is able to stir in the mother's womb."[43] He then stated that a criminal penalty of manslaughter would apply when "a woman quick with a child […] killeth it in her womb."[44] Therefore, the quickening model serves as a fairly rudimentary form of the viability standard that can be traced back to the times of Blackstone.

The English common law 'quickening' rule was largely observed in the United States from its conception until the 1820s, when a number of states began to enact laws that provided penalties for pre-quickening abortions.[45] The main impetus for these laws was the belief that it would

35. 1 U.S.C. § 8(b).
36. 1 U.S.C. § 8(c).
37. 1 U.S.C. § 8.
38. United States v. Flute, 929 F.3d 584, 588 (8th Cir. 2019).
39. *See* Commonwealth v. Cass, 392 Mass. 799 (Mass. 1984); State v. Horne, 282 S.C. 444 (S.C. 1984).
40. *Cass*, 392 Mass. at 799; *Horne*, 282 S.C. at 444.
41. *See generally* Alison M. Leonard, *Fetal Personhood, Legal Substance Abuse, and Maternal Prosecutions: Child Protection or "Gestational Gestapo"?*, 32 NEW ENG. L. REV. 615 (1998).
42. BLACKSTONE, *supra* note 30.
43. *Id.*
44. *Id.*
45. Elizabeth Georgian, *The End of Roe in Historical Perspective*, CLIO & THE CONTEMPORARY (July 1, 2022), [https://perma.cc/85LH-W3SU].

protect women from dangerous terminations.[46] In fact, these laws were known as "poison control measures," as they sought to protect women from the potentially deadly abortifacients of the time.[47]

In the 1860s, fears that white Protestant women were not having enough babies arose from anti-immigrant and anti-Roman Catholic sentiment.[48] As a result, abortion bans prior to quickening became more widespread.[49] The poison control laws–which aimed to protect women from unsafely manufactured drugs–were slowly weaponized due to developing racial, gender, and class anxieties caused by increased immigration and the development of the feminist movement.[50] The continuance of poison control bans on pre-viability abortions once the drugs were safe exposed motives that were "antifeminist at [their] core."[51] Despite this, around half of the states by 1868 continued to permit some abortions or at least impose lesser penalties for abortion pre-quickening, penalising only the provider and not the patient.[52] Up until *Roe*, when previability abortion access was recognized as a constitutional right, abortion remained a question for state law.[53]

C. *The Trimester Framework and Viability*

Roe and *Casey* are the most notable pre-*Dobbs* cases in the U.S. on abortion, both for the establishment of abortion protection under the constitutional right to privacy and also for the balance they strike between maternal and state interests which influence the operation of the right.[54] These decisions identified viability as the dividing line at which the maternal interest in terminating the pregnancy would succumb to the state interest in protecting potential life.[55] Even after the recent *Dobbs* decision, these cases remain central to this paper as they provide

46. *Id.*
47. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 10 (1997).
48. *Id.*
49. *Id.* at 11.
50. *Id.*
51. *Id.*
52. Georgian, *supra* note 45.
53. Georgian, *supra* note 45
54. Joan Biskupic, *Roe and Casey: The two abortion precedents the Supreme Court may overturn*, ABC 12 NEWS (Dec. 1, 2021), l[https://perma.cc/VK7E-QV5C].
55. *Id.*

important jurisprudence on the operation of the viability standard, which many current state laws and federal bills still rely on.[56]

In 1973, abortion was recognized as a constitutional right in *Roe v. Wade*.[57] While *Roe* is celebrated by many as the gateway to the new era of reproductive rights, it is less celebrated for the weight it gave to the state interest to protect potential life, and the rigid, perhaps even restrictive, trimester framework that it laid down.[58] That "this right is not unqualified and must be considered against important state interests in regulation" was not a complete win for the pro-choice movement and thus not a complete loss for the pro-life movement.[59] The state interests in protecting potential life and the pregnant person's life (in the historic sense that abortions are dangerous), were, in the Court's opinion, weighty enough to place concrete limits on abortion and give rise to a balancing exercise to determine whether the maternal or state interests would prevail.[60]

The *Roe* Court tried to resolve this balancing act with the trimester framework. Part XI of the opinion lays down the framework that within the first three-month trimester, the woman's right to terminate her pregnancy prevails absolutely subject to private medical consultation and the state may not interfere.[61] In the second trimester, the state may interfere with abortion for reasons reasonably related to protecting the mother's health.[62] Finally, once viability is reached (third trimester), the state interest in potential life can completely prevail.[63] At this point, the state can regulate and even prohibit abortion on these grounds, unless continuance of the pregnancy threatens the life or health of the pregnant person.[64] *Roe*, however, makes the presumption that viability is a characteristic of entering the third trimester.[65] Thus, it is the six months of gestational maturity upon which *Roe* really situated the temporal shift from the maternal to the state interest.

56. *See infra* Section I.E of this paper for a general discussion of states continuing to use the viability standard.
57. Roe v. Wade, 410 U.S. 113, 160 (1973).
58. Biskupic, *supra* note 54.
59. *Id.*
60. *Roe*, 410 U.S. at 149 ("[I]mportant state interests in the areas of health and medical standards do remain") and at 164.
61. *Roe*, 410 U.S. at 164-65.
62. *Roe*, 410 U.S. at 164-65.
63. *Roe*, 410 U.S. at 164-65.
64. *Roe*, 410 U.S. at 164-65.
65. MARK TUSHNET, ABORTION, MEDICINE, AND THE LAW 162 (1986).

Yet, in 1992, the trimester framework was abandoned when a legal challenge to abortion occurred in *Planned Parenthood v. Casey*.[66] The Supreme Court upheld abortion as a constitutionally protected right by a narrow 5-4 majority.[67] Under a *stare decisis* review, *Casey* stepped away from the trimester framework constructed within *Roe* as the Court found it unreceptive to advances in both maternal healthcare (allowing for safe abortions later in the pregnancy) and neonatal care (allowing for viability to be reached earlier).[68] The issue was not that viability was the incorrect balancing tool for the competing interests, but that the trimester framework was no longer a factual reflection of it; imposing an artificial 'itinerary' of a woman's pregnancy no longer reflected the real nuances of pregnancy.[69] Thus, *Casey* expanded on *Roe* to expressly affirm 'viability' as the principal consideration used in the balancing of maternal and state interests.[70] In other words, the state interest in protecting potential life becomes compelling after viability.[71] Therefore, the Court recognized that if viability could be reached earlier in pregnancy due to medical advances, so too would the point before which a woman could seek a nontherapeutic abortion.

The *Casey* Court even allowed for certain regulations on the right to abortion at any point pre-viability,[72] whereas in *Roe* this was only possible upon entering the second trimester.[73] One of the reasons the *Casey* Court took this approach was that they believed that since *Roe*, "too little acknowledgement and implementation"[74] had been placed on the state's "legitimate interest in protecting the potentiality of human life."[75] For example, it noted that that strict scrutiny had been applied to state regulations on abortion in the second trimester.[76] To 'remedy' this, the court replaced strict scrutiny in relation to previability state regulations with the "undue burden" test.[77] An undue burden occurs when "a state regulation

66. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
67. *Casey*, 505 U.S. 833.
68. *Casey*, 505 U.S. at 860.
69. *Casey*, 505 U.S. at 872 ("A framework of this rigidity was unnecessary").
70. *Casey*, 505 U.S. at 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy").
71. *Casey*, 505 U.S. at 870.
72. *Casey*, 505 U.S. at 871.
73. Roe v. Wade, 410 U.S. 113, 164-65 (1973).
74. *Casey*, 505 U.S. at 871.
75. *Roe*, 410 U.S. at 162.
76. *See* Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 461 (1983); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (both of which were overruled for being overly scrutinous on state regulations and not respecting their legitimate interest in protecting potential life).
77. *Casey*, 505 U.S. 833 at 877.

has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[78] The presence of an undue burden had the effect of invalidating the restrictive regulation.[79]

In summary, *Roe* and *Casey* promoted both the importance of viability within abortion jurisprudence and the legitimacy of the state interest in protecting potential life. These cases placed viability as the legal gatekeeper to abortion: the point at which the choice to terminate a pregnancy is displaced by the state's ability to regulate and even prohibit abortion.

D. *Dobbs v. Jackson Women's Health Organization*

In June 2022, the Supreme Court in *Dobbs v. Jackson Women's Health Organization* decided 6-3 to uphold a Mississippi law prohibiting abortion after fifteen weeks and 5-4 to overrule *Roe v. Wade* and *Planned Parenthood v. Casey* and the constitutional protection of abortion.[80] Alito's majority opinion illustrated contempt for the millions of women in the United States, their health, and the jurisprudence of the Supreme Court. Nevertheless, *Dobbs* now interprets the Constitution to provide no protection of abortion within the United States. With this in mind, viability is no longer the gatekeeper to abortion access under the Constitution. However, this does not mean that it is not still important in the U.S. As I will discuss later, viability remains the gatekeeper to abortion in a number of states.[81]

My discussion of *Dobbs* will discredit the Court's reasoning, including its cursory treatment of *stare decisis* when reviewing its previous decisions in *Roe* and *Casey*. Ultimately, the remainder of this paper will focus on viability and offer a solution to the AWT crisis in states which permit abortion using a viability threshold.[82] Furthermore, if Congress passes legislation codifying *Roe* (as will be discussed) then viability will once again become the gatekeeper to abortion throughout the entire U.S.[83]

Due to the unenumerated nature of the right to abortion in the Constitution, its very protection relies upon the incorporation doctrine under the Fourteenth Amendment's Due Process Clause, which is used to determine whether a right is incorporated under the "liberty" language

78. *Casey*, 505 U.S. at 877.
79. *Casey*, 505 U.S. at 877.
80. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
81. *See infra*, Section I.E.
82. *Infra*, Section III.
83. *See* Women's Health Protection Act of 2023, H.R. 12, 118th Cong., § 3(7) (2023).

within the Amendment's text.[84] To determine the question of the incorporation, or rather "disincorporation," of a right of abortion, the majority endorsed an originalist approach looking as to whether abortion was "deeply rooted in this Nation's history and tradition."[85] Alito relies heavily on the early common law jurists, such as Bracton, Coke, Hale, and Blackstone, all of whom condemned abortion as a crime.[86] He goes as far back as the thirteenth century to make this point.[87] Nevertheless, the examples that he uses actually appear to support abortion law under *Roe* and *Casey* using viability as a dividing line, rather than an outright prohibition. For instance, Bracton had stated that killing a fetus is only homicide if it be "already formed and [particularly if it is] animated."[88] Coke said that the abortion of a "quick" child was a "great misprision [but] no murder,"[89] and similarly, Blackstone said the killing of a "quick" child was "though not murder […] a very heinous misdemeanour."[90]

The reference to a child being "animated" or "quick" indicates that the concept of viability was given weight even as far back as the thirteenth century. *Roe* and *Casey* allowed states to prohibit postviability abortions,[91] so it is unclear as to how these originalist sources are supporting the majority's argument. As an added point regarding "this Nation's history,"[92] none of these English jurists have any direct link to the history of the United States itself.[93] Benjamin Franklin, however, a Founding Father of the United States, published a medical handbook written by John Tennent, a Virginian doctor, which included a 'recipe' on how to terminate a pregnancy early on.[94] When Molly Farrell, Associate Professor of English at Ohio State University, reviewed the history of this book, she found that the book had been immensely popular at the time and had not found

84. *See Incorporation Doctrine*, LEGAL INFORMATION INSTITUTE, [https://perma.cc/UFR3-B7W3].
85. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).
86. *Dobbs*, 597 U.S. at 217.
87. *Henry Bracton*, BRITANNICA, [https://perma.cc/PKP5-63QQ][hereinafter Bracton] (Bracton was a jurist who died in 1268).
88. *Dobbs,* 597 U.S. at 242.
89. EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND, PART 3, at 50 (1648).
90. BLACKSTONE, *supra* note 30.
91. Roe v. Wade, 410 U.S. 113, 163 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835-36 (1992).
92. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).
93. See Bracton, s*upra* note 87; *Sir Edward Coke*, BRITANNICA, Jan. 28, 2024, [https://perma.cc/CBF6-6MNJ]; *Sir William Blackstone*, BRITANNICA, Feb. 16, 2024, [https://perma.cc/GTP3-VYF7].
94. *Suppression of the Courses* in JOHN TENNENT, EVERY MAN HIS OWN DOCTOR: OR, POOR PLANTER'S PHYSICIAN at 40-41 (4th ed. 1736).

any evidence of any objection to the inclusion of this section, remarking "it was just part of everyday life."[95]

When unpacking more closely Alito's analysis of the nation's historical practices in *Dobbs*, it appears to support the adoption of viability as the dividing line in abortion access. Viability is essentially a developed version of the common law principle of quickening that was referenced by Coke, Bracton, and Blackstone.[96] Even the first laws in the U.S. prohibiting pre-quickening abortion were, as we have discussed, aimed at protecting women from mass-manufactured and dangerous abortifacients.[97] These laws never punished women for inducing abortions or said anything about homemade abortion remedies.[98] Indeed, it was quite normal for colonial and early nineteenth century women to take abortion inducing drugs to restore the "menses" (restore menstruation) which had been lost due to pregnancy.[99] All of this indicates that the Supreme Court's disposal of abortion hinged on viability does not reflect the nation's history and traditions and expose a potentially more political motive at play.

Furthermore, the majority paid little attention to the reliance interest limb of the doctrine of *stare decisis*. Alito dismissed the existence of "concrete reliance interests" on *Roe* based upon the fact that "an abortion is generally '[an] unplanned activity[.]'"[100] He deemed this to be inconsistent with his statement that traditional reliance interests arise where "advance planning of great precision" takes place around the legal right imparted by the legal decision.[101] In the two-paragraph dismissal of reliance interest, the majority failed in any way to account for the importance that the availability of safe abortion plays within the planning of a woman's life. The ability to control when to have a child is an integral component of career, financial, and life planning.[102] The availability of abortion provides the peace of mind to allow this important life planning to occur, as the dissenters Kagan, Sotomayor, and Breyer state: "Women

95. Emily Feng & Manuela López Restrepo, *Benjamin Franklin gave instructions on at-home abortions in a book in the 1700s*, NPR, May 18, 2022, [https://perma.cc/3L8U-NRGD].
96. *See generally* Bracton, *supra* note 87; Edward Coke, THE THIRD PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 50 (1648); Blackstone, *supra* note 30.
97. Reagan, *supra* note 47, at 10.
98. *Id.*
99. *Id.* at 9.
100. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 288 (2022).
101. *Dobbs*, 597 U.S. at 287.
102. *See, e.g.*, Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 Harv. L. REV. 1845, 1868 (2023).

have relied on the availability of abortion both in restructuring their relationships and in planning their lives."[103] The *Dobbs* decision has accordingly glossed over one of the most integral components of *stare decisis*, reliance interest. Even Scalia once mentioned that "The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law[.]"[104] Yet, the Court is pursuing a policy of cherry-picking legal arguments which support its political agenda and dismissing any arguments which oppose it. This, the dissent argued, exposes that it is indeed the "proclivities of individuals [that] rule" in *Dobbs*,[105] rather than adherence to the law. [106]

Regarding the unworkability limb of *stare decisis*, the majority regarded the undue burden standard from *Casey* as unworkable,[107] citing both *Brown v. Board of Education*[108] and *West Coast Hotel Co. v. Parrish*[109] as precedent for overruling prior cases. However, the dissent remarked that general standards like this "are ubiquitous in the law," and substantial burden tests are also used in the constitutional spheres of speech, voting, and interstate commerce.[110] Interestingly, the dissent criticized the new test formulated by the majority as being unworkable.[111] The test is that if a rational basis exists for sustaining an abortion ban (including to protect prenatal life), a state may do so.[112] How, the dissent questioned, does this test work when an abortion may be "necessary to protect a woman's life and health?"[113] A threat to life would clearly activate the protections of the Fourteenth Amendment, and how could a rational basis test overcome this?[114] This is not the only constitutionally protected right that *Dobbs* will affect. For example, what about interstate commerce including the mailing of abortion medication or travelling interstate to receive such care?[115] It is simply unworkable. This is just one major failure of many from the *Dobbs* majority, who have departed from the 'unworkability' of *Roe* and *Casey* in order to implement a new, unworkable test.

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103. *Dobbs*, 597 U.S. at 364 (Breyer, J., dissenting).
104. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part).
105. *Dobbs*, 597 U.S. at 364 (Breyer, J., dissenting).
106. Vasquez v. Hillery, 474 U.S. 254, 265 (1986) ("[*Stare decisis* ensures that decisions are] founded in the law rather than in the proclivities of individuals[.]").
107. *Dobbs*, 597 U.S. at 286.
108. *Dobbs*, 597 U.S. at 264-65; *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).
109. *Dobbs*, 597 U.S. at 265; *See* West Coast Hotel Company v. Parrish, 300 U.S. 379 (1937).
110. *Dobbs*, 597 U.S. at 391 (Breyer, J., dissenting).
111. *Dobbs*, 597 U.S. at 393 (Breyer, J., dissenting) ("Anyone concerned about workability should consider the majority's substitute standard.").
112. *Dobbs,* 597 U.S. at 301.
113. *Dobbs*, 597 U.S. at 393 (Breyer, J., dissenting).
114. *Dobbs*, 597 U.S. at 393 (Breyer, J., dissenting).
115. *Dobbs*, 597 U.S. at 394 (Breyer, J., dissenting).

Chief Justice Roberts filed a concurring opinion in *Dobbs*, under which he would have upheld the Mississippi post fifteen-week abortion ban but not overruled *Roe* or *Casey*.[116] In his concurrence, Roberts was clear in his belief that the Court was making the wrong move in taking "the dramatic step of altogether eliminating the abortion right first recognized in *Roe*."[117] He urged for judicial restraint, saying that "the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*" and that the decision was "unnecessary."[118] He recounted that before certiorari had been granted, Mississippi was clear that it sought clarification only as to whether "abortion prohibitions before viability are always unconstitutional" and that "[t]he questions presented in this petition do not require the Court to overturn *Roe* or *Casey*."[119] Nevertheless, after certiorari was granted, Mississippi changed its course, and Roberts criticized the Court for "reward[ing] that gambit[.]"[120]

Roberts's plea for judicial restraint highlights his worry that the Court could lose its legitimacy in appearing too politicized – he has himself "in recent years attempt[ed] to avoid sweeping rulings that could make the justices appear politicized."[121] The legitimacy of the Court is something that is very much at risk.[122] When the founding fathers were advocating for the current form of government, Hamilton always maintained that the judiciary was to be the least dangerous branch of government.[123] Yet, recently, the Court is proving to be the opposite. With the decision in *Dobbs*, the Court has flouted half a century of precedent.[124] Roberts's worry is legitimate, as the Supreme Court has always maintained that *stare decisis* "contributes to the actual and perceived integrity of the judicial process."[125] As the dissenters point out, binding precedent in the judicial system was deemed by Hamilton to be "indispensable" to

116. *Dobbs*, 597 U.S. at 348-49 (Roberts, C. J., concurring).
117. *Dobbs,* 597 U.S. at 352 (Roberts, C. J., concurring).
118. *Dobbs,* 597 U.S. at 348-49 (Roberts, C. J., concurring).
119. *Dobbs,* 597 U.S. at 352 (Roberts, C. J., concurring).
120. *Dobbs,* 597 U.S. at 352 (Roberts, C. J., concurring).
121. Tal Kopan, *Flouting public opinion by overturning Roe, the Supreme Court could be risking its legitimacy*, BOSTON GLOBE, (July 14, 2022), [https://perma.cc/K96L-ARLZ].
122. *See, e.g.*, James L. Gibson, *After Dobbs: A Note of Warning to the U.S. Supreme Court* (Apr. 21, 2023), [https://perma.cc/3WCP-42VQ].
123. The FEDERALIST NO. 78 (Alexander Hamilton) 570 (THE FLOATING PRESS 2011) (stating that the judiciary can "truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").
124. *Roe* was decided in 1973.
125. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

"avoid an arbitrary discretion in the courts."[126] Therefore, in departing from *Roe*, a case that, in the words of Justice Kavanaugh himself "is important precedent of the Supreme Court that has been reaffirmed many times,"[127] the Court is playing a risky game with its own legitimacy.

The dissent is also effective in its review of the substantive aspects of *Roe*, namely, how the right to abortion is embedded in the Constitution, and thus "off limits to majority rule."[128] In particular, the dissent approved of the viability line as it was demarcated in *Casey*.[129] In fact, it used viability as a counterargument to the majority's insistence that defending *Roe* and *Casey* is dismissive of the state's interest in protecting prenatal life, by pointing out that these cases "invoked powerful state interests in that protection […] overriding the woman's liberty after viability."[130] The dissent even noted *Casey's* observation that *Roe* had not provided states with "sufficient ability to regulate abortion prior to viability."[131] The *Casey* Court thus actively "promot[ed] prenatal life" by introducing the previability undue burden standard.[132] For this reason, it is difficult to agree with Alito's majority that *Roe* and *Casey*'s viability standard was dismissive of protecting fetal life.

The rational basis standard introduced by the *Dobbs* majority suffers from issues of unworkability and incompatibility with the equal protection clause of the Constitution. I argue that state laws enacted to prohibit abortion could be challenged on this ground. Statistically, Black women are likely to face up to a 33 percent increase in maternal mortality compared to the 13 percent increase white women face.[133] It is accordingly likely that a ban on abortions may lead to breaches of the equal protection requirement of the Fourteenth Amendment in regard to life.

126. Hamilton, *supra* note 123 at 576; Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 288, 388 (2022) (Breyer, J., dissenting).

127. Jane C. Timm, *What Supreme Court justices said about Roe and abortion in their confirmations*, NBC NEWS (June 24, 2022), [https://perma.cc/A65Q-V9KP].

128. *Dobbs*, 597 U.S. at 414 and at 365, (Breyer, J., dissenting).

129. *Dobbs*, 597 U.S. at 369 (Breyer, J., dissenting) (*Casey* clarified States' ability to regulate to promote prenatal life by ensuring informed choice and promoting childbirth so long as the State did not place an "undue burden" or "substantial obstacle" to obtaining an abortion).

130. *Dobbs*, 597 U.S. at 368-69 and at 369 (Breyer, J., dissenting).

131. *Dobbs*, 597 U.S. at 369 (Breyer, J., dissenting).

132. *Dobbs*, 597 U.S. at 369 (Breyer, J., dissenting) (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 873 (1992)).

133. Lisa H. Harris, *Navigating Loss of Abortion Services – A Large Academic Medical Center Prepares for the Overturn of* Roe v. Wade*,* 386 NEW ENG. J. MED. 2061, 2063 (2022); *See also Dobbs*, 597 U.S. at 396 ("Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase.").

Dobbs has introduced a real risk of Black women being particularly susceptible to seeking unsafe and unregulated abortion procedures.[134] The same risk exists for individuals of a lower socioeconomic class, with up to a 120 percent higher risk of maternal mortality rate in the most-deprived areas compared to those in the most-affluent areas.[135] There will, of course, also be intersectionality between race and economic deprivation.[136] Accordingly, state laws prohibiting abortion will have a disparate impact on Black women, particularly those of a lower socioeconomic class and should be subject to heightened scrutiny under the Equal Protection Clause.[137] A successful challenge may force federal courts to revisit the abortion issue and could potentially reinstate further constitutional guarantees to pregnant individuals.

In summary, it appears that the majority opinion in *Dobbs* adopts a political stance. Furthermore, the Court has departed from the cardinal legal doctrine of *stare decisis*, which is designed to provide it with legitimacy and ensure the propriety of decisions based on law, rather than the interests of individual justices. Furthermore, the majority does not deal with the concept of viability with much detail, but many of the historical sources they cite seem to provide support to the viability standard as reference to "quickening."[138] However, *Dobbs* is now the law, and because it has abandoned abortion, it has also abandoned the viability standard as its constitutionally appointed gatekeeper.[139] Therefore, we must look at why viability remains an important part of abortion access in the U.S.

134. Harris, *supra* note 133 at 51.

135. Gopal K. Singh, *Trends and Social Inequalities in Maternal Mortality in the United States, 1969-2018*, 10 INT'L J. MAT. & CHILD HEALTH & AIDS 29, 29, 37-38 (2021).

136. *See generally* Reeve D. Vanneman & Thomas F. Pettigrew*, Race and Relative Deprivation in the Urban United States*, 13 RACE 461 (1972).

137. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that strict scrutiny should apply to laws with racial classifications); however, *see, c.f.* Washington v. Davis, 426 U.S. 229, 240 (1976) (complicating this because facially neutral laws would now require plaintiffs to prove both discriminatory intent and impact in the abortion law); *See also* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (highlighting that an effect so disproportionate can demonstrate a desire to discriminate).

138. See earlier discussion of comparing the quickening model put forth by common law jurists to the viability model adopted in *Roe* and *Casey*.

139. *See* Janice Hopkins Tanne, *Supreme Court Ends Constitutional Right to Abortion*, 377 BMJ 1 (2022), [https://perma.cc/NA7S-3A4Y].

E. *The Viability Standard after* Dobbs*–The Women's Health Protection Act and State Law*

Even post-*Dobbs*, a public and legislative consensus that viability is an important factor in abortion access can be observed within the United States. Many members of Congress have indicated their support of viability, a salient example being the Women's Health Protection Act Bill ("WHPA").[140] This bill was successful in the House of Representatives, but unfortunately failed in the Senate by a close vote of 46-48.[141] The bill was brought to the Senate a second time in early May after the *Dobbs* decision was leaked.[142] The bill could not reach the 60 votes needed to overcome the Senate filibuster and failed 49-51.[143] The narrow margin demonstrates the broad public and legislative support to pass a bill enshrining the viability standard, and it is well within the realms of possibility that a bill like this could pass in the future.[144] President Biden has supported changing the rules of the Senate to exempt an abortion rights bill from the filibuster, yet it would ultimately be up to the Senate.[145] The November 2022 midterm elections placed the Democrats in a stronger position to pass reproductive rights legislation upon gaining control of the Senate with 51 seats.[146] With the Democrat majority and with the added security of Vice President Harris' tie-breaker vote, the prospects of passing the WHPA have increased, especially if the filibuster is discontinued. The WHPA was reintroduced at the time of writing in the 2023 session of Congress, and it will be interesting to see how it will do in a Democrat-controlled Senate.[147] It is likely that the WHPA will still face a filibuster in the Senate and will need 60 votes to pass.[148]

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140. Women's Health Protection Act of 2023, H.R. 12, 118th Cong. § 4 (2023).
141. Abigail Abrams, *The Senate Just Failed to Pass an Abortion Rights Bill. Here's Why That's Not All Bad For Democrats*, TIME (Feb. 28, 2022), [https://perma.cc/4ESA-Z49D].
142. Amanda Becker, *Democrats' Abortion Bill Fails – Again – and They Turn to November Elections*, THE 19TH (May 11, 2022), [https://perma.cc/B6SV-JHWH].
143. *Id.*
144. Hart Research Associates, *New Poll: A Solid Majority of Voters Support the Women's Health Protection Act (WHPA*) (2021), [https://perma.cc/4KTX-DJ2Z] (concluding that sixty-one percent of voters support passage of a national law like the WHPA).
145. Martin Pengelly, *Biden Backs Exception to Senate Filibuster to Protect Abortion Access*, GUARDIAN (Jun. 30, 2022), [https://perma.cc/WA36-MQJL].
146. Maeve Reston & Stephen Collinson, *Democratic Pick Up in Pennsylvania Boosts Their Hopes of Holding Senate*, CNN (Nov. 9, 2022), [https://perma.cc/5HFE-U7AU].
147. *Women's Health Protection Act (WHPA)*, CTR. FOR REPROD. RTS. (Jun. 23, 2023), [https://perma.cc/BK8Y-V5C6].
148. Amanda Becker, *Biden Says He Supports Changing Senate Filibuster Rules to Protect Abortion Rights*, TEX. TRIB., (Jun. 30, 2022), [https://perma.cc/88T6-X5J3].

The WHPA affirms the viability doctrine as the dividing line for abortion access.[149] The broad support of the WHPA by the public and legislature in general suggests the pertinence and favorability of viability in the abortion decision.[150] The WHPA may well act as a model and form the basis for future bills. Section 5 of the 2023 bill distinguishes between previability and postviability abortion rights, providing that:

> "Pre-viability–A health care provider has a right under this Act to provide abortion services, and a patient has a corresponding right under this Act to terminate a pregnancy prior to viability without being subject to […]: (A) A prohibition on abortion prior to viability" and a number of other burdens on obtaining abortion.
>
> And that;
>
> "Post-viability–[…] a right under this Act to terminate a pregnancy after viability when […] it is necessary to protect the life or health of the patient. This subparagraph shall not otherwise apply after viability."[151]

Further, many states that continue to permit abortion post-*Dobbs* use viability as the gatekeeper to abortion. For example, New York's Reproductive Health Act provides for unrestricted abortion before the fetus reaches the gestational age of twenty-four weeks, or after twenty-four weeks where there is "an absence of fetal viability," or to protect the pregnant individual's health.[152] Therefore, even while the statute references the gestational limit of twenty-four weeks, abortions are still legal if there is "an absence of fetal viability," for example, if the fetus is still deemed previable after twenty-four weeks, or if a fetus may never be viable due to abnormalities.[153] In Nevada, the Freedom of Choice Act upholds the same right and the same health and fetal abnormality exceptions after the viability threshold of twenty-four weeks.[154] In California, the Reproductive Privacy Act provides that abortion is a legal procedure at any time

149. *See infra* note 151 (the use of viability in the WHPA).
150. Becker, *supra* note 142; Hart Research Associates, *supra* note 144.
151. Women's Health Protection Act of 2023, H.R. 12, 118th Cong. § 4(a) (2023).
152. N.Y. PUB. HEALTH LAW § 2599-bb (McKinney 2019).
153. *Id.*
154. NEV. REV. STAT. ANN. § 442.250 (West 1985).

previability, or postviability if the fetus is not likely to survive or continuance of pregnancy poses a health risk to the pregnant individual.[155] Rhode Island's Reproductive Privacy Act of 2019 provides that nobody can restrict abortion before fetal viability.[156] The Rhode Island statute is even more vulnerable to AWT as it gives the attending physician discretion to determine viability, "with or without artificial support."[157]

In the aftermath of the *Dobbs* decision, reproductive freedom was put on the ballot in the State of Michigan in November 2022 as an amendment to the State Constitution.[158] Proposal 3, now enshrined under the State Constitution, reaffirms not only the right to abortion in Michigan, but also the pertinence of the viability standard in such a right. It provides that an "individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon" but "the state may regulate the provision of abortion care after fetal viability" unless required as a health exception.[159] As of November 2023, Ohio also voted to amend their constitution under "Issue 1" to include a constitutional right to abortion, and allowing state restrictions only after "fetal viability."[160]

Viability, at the time of this writing, is already codified as the gatekeeper to abortion in 14 states[161] and is currently used in 25 states out of the 40 in which abortion is legal in some capacity.[162] Before *Dobbs* was decided, some states had 'trigger laws' enacted that included provisions to ban or restrict abortion.[163] These laws were set to trigger in the event that *Roe* was overturned. However, since *Dobbs*, a number of states' 'trigger laws' set to impose harsher gestational thresholds on abortion access have

155. CAL. HEALTH & SAFETY § 123468 (West 2023).
156. 23 R.I. GEN. LAWS ANN. § 4.13-2(a)(1) (West 2019).
157. *Id.* at § 4.13-2(b).
158. *Michigan Proposal 3: Abortion on the Ballot*, FOX 2 DETROIT (Oct. 25, 2022), [https://perma.cc/DXN9-WNGC].
159. MICH. CONST. art. I, § 28.
160. OHIO CONST. art. I, § 22; Susan Tebben & Nick Evans, *Ohio Voters Pass Issue 1 Constitutional Amendment to Protect Abortion and Reproductive Rights*, OHIO CAPITAL J. (Nov. 7, 2023), [https://perma.cc/8KX5-NDX9].
161. *See State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Aug. 29, 2023), [https://perma.cc/W7JU-T9EK] [hereinafter GUTTMACHER, *State Bans*] (listing CA, CT, DL, HI, ME, MD, MI, MN, MT, NY, OH, RI, WA).
162. *See id.* (The extra eleven states using viability have had their abortion 'trigger laws' either permanently or temporarily enjoined by the state courts, meaning they for now, have retained their abortion procedures from the *Roe/Casey* era. They are: WY, KY, LA, ND, OK, MO, AR, MS, AZ, ID; VA uses the third trimester).
163. *13 States Have Abortion Trigger Bans – Here's What Happens When Roe is Overturned*, GUTTMACHER INST. (June 6, 2022), [https://perma.cc/BUQ3-WN53] [hereinafter GUTTMACHER, *Abortion Trigger Bans*].

been enjoined by Courts.[164] This means that abortion is temporarily or indefinitely continuing under the pre-*Dobbs* viability framework.[165] In these states, abortion and the possible inclusion of viability will likely be the topic of legislative or constitutional reforms.[166] According to current statistics, 34.58 percent of the entire U.S. population is represented by the fourteen states expressly electing viability.[167] This number rises to 47.91 percent if one counts all the states where viability is currently used but not codified.[168] The number of people affected by viability may be even larger considering some states will protect the passage of out-of-state residents for safe abortion.[169] These numbers demonstrate the scale of people subject to viability-predicated abortion access. This paired with viability's attempted, possible, and likely use in federal legislation proves that it is necessary to inquire into the effect that AWT will have on viability even in a post-*Dobbs* America.

F. *A Defense of the Viability Standard*

Despite the decision in *Dobbs*, the viability standard in the United States remains important. It continues to operate within and be relied upon by a multitude of state laws.[170] Viability is also deemed important by the federal government by including it in the WHPA, which, if passed, would constitute the uniform law in all states.[171]

Viability also acts as an important gatekeeper to abortion access outside of the United States. In the United Kingdom, the Abortion Act 1967 as well as the Infant Life (Preservation) Act 1929 constitute the governing

164. *Id.*; *see* GUTTMACHER, *State Bans*, *supra* note 161.
165. *See* GUTTMACHER, *Abortion Trigger Bans*, *supra* note 163; *see* GUTTMACHER, *State Bans*, *supra* note 161.
166. Geoff Mulvihill, *Here Are the States Where Abortion Access May Be on the Ballot in 2024*, PBS (Nov. 8, 2023), [https://perma.cc/8HF9-2KXV].
167. *See U.S. State Population by Rank (Update for 2023!)*, INFOPLEASE (Jul. 21, 2023), [https://perma.cc/UYC2-SS69]; GUTTMACHER, *State Bans*, *supra* note 161.
168. *See id.* (CA, CT, DL, HI, ME, MD, MI, MN, MT, NY, RI, WA, WY, KY, LA, ND, OK, MO, AR, MS, AZ, ID, VA); GUTTMACHER, *State Bans*, *supra* note 161.
169. *See*, *e.g.*, Jennifer McDermott, Geoff Mulvihill & Hannah Schoenbaum, *States Move to Protect Abortion from Prosecutions Elsewhere*, ASSOCIATED PRESS (July 6, 2022), [https://perma.cc/9JEF-LY5P]; Dani Anguiano, *California Abortion Clinics Braced for Out-Of-State Surge as Bans Kick In*, THE GUARDIAN (Jun. 27, 2022), [https://perma.cc/46KT-RGW4].
170. GUTTMACHER, *State Bans*, *supra* note 161.
171. U.S. CONST. art. VI ("Laws of the United States […] shall be the supreme Law of the Land").

law on abortion.[172] Section 1(1)(a) of the former formulates a twenty-four-week threshold of viability.[173] The Act makes abortion, in practice, almost unrestricted before this threshold.[174] After the threshold, the Act only allows abortions in certain situations: to prevent grave or life-threatening harm to the mother, or if the fetus exhibits severe abnormalities.[175] These provisions provide a defense to the criminal liability (which is potentially "penal servitude for life") imposed by the Infant Life (Preservation) Act 1929 when one causes the death of a child "capable of being born alive."[176] As much of the U.S. law on abortion came from the English common law, comparing the development of the law in the U.K. with the U.S. is a valuable exercise in providing meaning to the viability standard.[177]

It is worth noting that the U.K. and a number of states, such as New York, legislate a gestational age threshold to abortion (such as twenty-four weeks).[178] However, New York, and numerous other states (which specify that abortion is illegal after a certain gestational age) follow the federal standard of viability.[179] This means that not all abortions will be prohibited in these states once the specified gestational age is reached if a fetus is still not viable. Moreover, laws of this nature are also often amended to reflect changes in viability. For example, the U.K. law which provides a gestational age threshold was amended in 1990 by the Human Fertilisation and Embryology Act from twenty-eight weeks to twenty-four due to medical advances and an increased survival rate of neonates born before twenty-eight weeks.[180] As a result, it appears that gestational age limits are not arbitrary and are instead designed to personify viability. It may even be that they are articulated as a gestational threshold to

172. Abortion Act 1967, (U.K.); Infant Life (Preservation) Act 1929, (U.K.).

173. Abortion Act 1967, § 1(1)(a), (U.K.).

174. *See, e.g.*, *Abortion Law in Great Britain,* BRITISH PREGNANCY ADVISORY SERVICE, [https://perma.cc/EJC9-J3RX] (explaining that a pregnant person can receive an abortion if two physicians agree that continuing pregnancy may harm her physical or mental health, or that of her existing children. Abortion Practitioners often work off the presumption that the person seeking an abortion will suffer mental harm if they cannot receive one).

175. Abortion Act 1967, §§ 1(1)(b)-(d), (U.K.).

176. Infant Life (Preservation) Act 1929, § 1(1), (U.K.).

177. *See supra*, Section I.B.

178. N.Y. PUB. HEALTH LAW § 2599-bb (McKinney 2019).

179. *Abortion Gestational Limits and Exceptions*, KAISER FAM. FOUND. n.1 (Jan. 31, 2023), [https://perma.cc/5BQE-LF77].

180. HOUSE OF COMMONS SCI. & TECH. COMM., SCIENTIFIC DEVELOPMENTS RELATING TO THE ABORTION ACT 1967, REPORT, 2006-7, HC 1045-I, at 13-15, 22, [https://perma.cc/D4E7-E3F6].

protect from the potential biases of a doctor who may otherwise have the sole discretion to determine viability.[181]

Yet, even in the U.S., some state laws do enforce a gestational age threshold.[182] According to the Guttmacher Institute, a U.S. based reproductive health and rights policy NGO, fourteen states have laws in effect which dictate a gestational age threshold, ranging from six to twenty-four weeks.[183] However, the Guttmacher Institute points out that many states use justifications not grounded in science to ban abortions. For example, four states have banned abortion from twenty-two weeks on the basis that a fetus "can feel pain at that point," despite no scientific evidence to support that proposition.[184] Presumably, states with laws like these are pursuing an interest in protecting potential life.[185] Such an interest is deemed an important and legitimate factor in abortion regulation and was even recognized by *Roe* and *Casey*.[186] However, in the context of AWT, an arbitrary gestational age threshold may instead dismiss the state interest in protecting the potentiality of life. For example, as an existing threshold would not account for viability moving closer to conception, it would allow for abortions to take place after the real point of medical viability until the threshold age.

Furthermore, as we have inferred, these thresholds are often intended to be tantamount to viability. Bearing in mind the state's interest in protecting potential life, it does not follow that a state legislature would be overtly willing to allow abortions until twenty-four weeks if AWT has brought viability forward closer to conception. It is a normative misconception that if somebody 'supports *Roe*,' they support unrestricted late-term abortion.[187] Many people who support abortion still postulate

181. *See, e.g.*, HC Deb (11 Feb. 1985) (73), 5-6 [https://perma.cc/7L7T-8JMJ] (Mr. Leigh discussing that sometimes healthcare professionals have elected to not be involved in abortion due to their conscientious objections).

182. GUTTMACHER, *State Bans*, *supra* note 161.

183. *Id.* (GA, AZ, FL, UT, NC, IA, KS, NE, SC, WI, NV, MA, NH, PA).

184. *Id.*

185. *See, e.g.*, Kavita Shah Arora, *Fetal Pain Legislation*, 16 AM. MED. ASS'N J. ETHICS 818, 819 (2014) (explaining that there is a balance between "the states interest in the ongoing gestation and ultimate delivery of the fetus" and the woman's autonomy and that this balancing act "has opened the door to a variety of state-based initiatives" to "impose restrictions" on abortion and include "fetal pain bills").

186. Roe v. Wade, 410 U.S. 113, 162 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992).

187. *See Abortion*, GALLUP [https://perma.cc/V223-47LR] (in 2018, 77% answered that abortion should be illegal in the third trimester if it is because the pregnant person does not want the child for any reason); Valerie Richardson, *Most Pro-Choice Adults Oppose Late-Term Abortion, Denying Newborns Care: Poll*, WASH. TIMES (Feb. 12, 2019), [https://perma.cc/4NL5-S5SZ].

instances in which it may seem cruel or unfair.[188] Accordingly, the interest in protecting potential life is going to be operative in any new abortion legislation, and in the era of AWT, gestational age limits do not value this interest enough. For this reason, although ostensibly a useful way to sidestep the issues that AWT poses to the viability standard, a prescribed threshold is unlikely to gain support as a reform to deal with AWT. An effective reform will work best to protect abortion more covertly, under a viability framework. I will deal with what such a reform will look like in Section III.

G. *The Balance of Maternal and State Interests*

As discussed above, many supporters of abortion still have reservations as to late-term abortion.[189] Accordingly, there is a normative basis for balancing both the maternal interest to terminate the pregnancy and the state interest in protecting life when considering a potential abortion. The viability standard feels like the most natural way to determine the dividing line between which interest prevails.[190] The general unease attached to later-term abortion by even pro-choice adults would indicate that many people, like those participating in the Gallup poll, naturally align with the viability threshold as the point at which an interest in protecting life will take precedence.[191]

Because a fetus is incapable of asserting its own legal rights and interests, its protection is framed under the pretence of a "state interest."[192] *Roe* and *Casey*, although no longer the law of the land, are influential where abortion remains legal because they identified that a legal examination of abortion seeks to reconcile the state interest against the pregnant person's interest.[193] Under the viability framework, the law seeks to balance these interests during the pregnancy and the fulfilment of certain conditions within a pregnancy will shift the balance one way or another.[194] For example, the interest of the pregnant person will outweigh the state's in the

188. *See Abortion*, GALLUP, *supra* note 187.
189. *Id.*
190. *See, e.g.*, *Casey*, 505 U.S. at 870 (stating in dicta that there is "no line other than viability which is more workable").
191. *See Abortion*, GALLUP, *supra* note 187.
192. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 301 (2022) ("A law regulating abortion [may] serve legitimate state interests . . . These legitimate interests include respect for and preservation of prenatal life at all stages of development . . .").
193. *See*, *e.g.*, *Casey*, 505 U.S. at 861 ("viability . . . as the point at which the balance of interests tips").
194. *See Casey*, 505 U.S. at 861.

life of a viable fetus upon the existence of potential life-threatening injury to the person in continuing their pregnancy.[195] A common shift in interests occurs in the state's favor after the fetus attains viability.[196]

The pre-*Dobbs* cases, in particular, maintained that the state interest in the potentiality of life is important and even significant, which provided a rationale for allowing previability regulations which are not unduly burdensome.[197] The *Casey* Court took a step further to legitimize the state interest in previability.[198] It argued that the legitimate state interest had been overlooked since *Roe*.[199] The *Casey* Court therefore saw fit to overrule the cases of *Thornburgh* and *City of Akron* in which the Court struck down state-imposed measures that required, respectively, a pregnant person to give informed consent upon reading information on the risks of abortion and a 24-hour waiting period with parental consent before an abortion.[200] These measures, in the *Casey* Court's opinion, were a valid exercise of the state interest and therefore, striking them down had "undervalued the State's interest in potential life."[201] In attempting to explain how the state interest could be respected and most fairly balanced in abortion policy, the Court exclaimed that it could not adopt an arbitrary line and had a duty to "justify the lines [it] draw[s]," concluding that there was "no line other than viability which is more workable."[202]

Since *Dobbs,* the efforts to enact abortion protection have maintained the *Roe* and *Casey* framework by electing viability as the point at which the prevailing interest shifts from the pregnant person to the state. For example, the WHPA states that in postviability situations, the abortion is only permissible if "necessary to protect the life or health of the patient."[203] Michigan's Proposal 3 does the same, allowing the state to regulate or prohibit a postviability abortion so long as it would not put the patient's life or health at risk.[204]

Accordingly, post-*Dobbs* efforts to protect abortion access continue to appreciate the importance of the state interests that were given weight

195. Roe v. Wade, 410 U.S. 113, 164-65 (1973).
196. *Casey*, 505 U.S. at 860.
197. *Casey*, 505 U.S. at 877.
198. *Casey*, 505 U.S. at 871.
199. *Casey*, 505 U.S. at 871.
200. *Casey*, 505 U.S. at 870; Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 760-61 (1986); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 422 (1983).
201. Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (Kennedy, J., commenting in dicta as to why *Casey* overruled these cases).
202. *Casey*, 505 U.S. at 870.
203. Women's Health Protection Act of 2023, H.R. 12, 118th Cong. §4(a)(2) (2023).
204. MICH. CONST. art. I, § 28.

by *Roe* and *Casey*. They further highlight that viability is the most suitable and workable way to regulate the balance of these interests.

II. LEGAL IMPLICATIONS OF AWT ON ABORTION

A. *Limited Access to Abortion*

Through the discourse already covered in this paper, we have established the strong relationship between AWT and viability.[205] But what does this mean in practice? In a jurisdiction where abortion access is contingent on viability, AWT poses a serious threat to abortion access. As discussed, the generally accepted definitions of viability openly accept that it can be subject to the influence of external artificial aids.[206] For example, in the WHPA, the federal bill defines viability as requiring consideration that there is a "reasonable likelihood of sustained fetal survival outside the uterus *with or without artificial support*."[207]

Following this approach to interpreting viability, AWT could mean that viability is reached at a very early stage of pregnancy, in the sense that "if removed, [a fetus] could fully gestate" in an artificial womb.[208] This technology will only become more and more advanced until it may even be possible to gestate an embryo.[209] In *Casey*, Justice O'Connor remarked in the majority opinion that viability is ultimately a medical concept to be determined by doctors but that "there may be some medical developments that affect [its] precise point."[210] Accordingly, without statutory or judicial intervention, an expedited standard of viability could lead to a truncated period in which a pregnant person may seek abortion free from unduly imposed burdens. This period could be expected to shrink even further as AWT becomes more effective. The danger of this is clear because of the range of gestational ages at which abortions take place. The CDC concluded that only 1% of abortions take place on or after twenty-one weeks of gestation.[211] Even twenty-one weeks is arguably below the scientific

205. *See* discussion *supra* Introduction & Section I.
206. *See supra* text accompanying notes 20-23.
207. Women's Health Protection Act of 2023, H.R. 12, 118th Cong. § 4(7) (2023) (emphasis added).
208. Schultz, *supra* note 25, at 886.
209. Michelle Petersen, *The Artificial Womb – A Fast-Approaching Frontier for Humanity?*, ZME SCIENCE (May 31, 2023), [https://perma.cc/7ZRY-JF6M].
210. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).
211. Katherine Kortsmit, Tara C. Jatlaoui, Michele G. Mandel, Jennifer A. Reeves, Titilope Oduyebo, Emily Petersen & Maura K. Whiteman, *Abortion Surveillance – United States, 2018*, 69 SURVEILLANCE SUMMARIES 1, 6 (2020) [hereinafter Kortsmit et al.].

threshold of viability, which places the periviable birth period (earliest stage of fetal maturity where there may be a reasonable chance of survival) between 20-25 weeks.[212] More specifically, in 2018, the CDC placed 92.2% of all abortions at or before thirteen weeks.[213] These statistics indicate that, if due to AWT, viability was made possible before thirteen weeks, many abortions in this period could be enjoined by an expedited standard of viability. The number of potential enjoinments would only increase as the technology develops, expediting viability even further.

There are a number of potential equitable access implications that will likely arise with use of AWT.[214] It is almost certain that the availability of AWT for every unplanned pregnancy is unattainable.[215] Therefore, it is likely that we will see issues regarding access to this technology. Bhatia, a Professor of Law, and Kendal, a lecturer in Bioethics and Health Humanities at Deakin University, believe that the limited availability of AWT will favor certain racial and socioeconomic backgrounds.[216] Women from disadvantaged racial and socioeconomic backgrounds are less likely to possess the capital which would provide them access to AWT.[217] Furthermore, financial capacity is one of the main triggers of abortion.[218] A Guttmacher Institute study revealed that pregnant people with low financial resources often felt they could not support a child and that an abortion would be the "most responsible action."[219] Therefore, it seems unjust to hold these women hostage to a standard of viability which is, in their case, unachievable–as they would not be able to access AWT even if they wanted it. Furthermore, it is worth considering the

212. AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, PERIVIABLE BIRTH 188 (2017), [https://perma.cc/4BG4-F4QA].

213. Kortsmit et al., *supra* note 211, at 6.

214. *See*, *e.g.*, Neera Bhatia & Evie Kendal, *We May One Day Grow Babies Outside the Womb, But There Are Many Things to Consider First*, THE CONVERSATION (Nov. 10, 2019), [https://perma.cc/6L4E-TFPA] [hereinafter Bhatia et. al].

215. *See* Felix R. De Bie, Sarah D. Kim, Sourav K. Bose, Pamela Nathanson, Emily A. Partridge, Alan W. Flake & Chris Feudtner, *Ethics Considerations Regarding Artificial Womb Technology for the Fetonate*, 23 AM. J. BIOETHICS 67, 74-75 (2023) (discussing the likely "low availability" of ectogenesis and AWT).

216. Bhatia et. al, *supra* note 214.

217. *Id.*

218. M. Antonia Biggs, Heather Gould & Diana Greene Foster, *Understanding Why Women Seek Abortions in the U.S.*, 13 BMC WOMEN'S HEALTH 1, 5 (2013) (discussing that forty percent of abortions are sought for financial reasons in the U.S. being the largest single reason).

219. Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 117 (2005).

equal protection challenges that could be mounted if this gap in AWT were to materialize.

Yet the mere existence of the technology alone may still dictate substantial limits to abortion access for women. While AWT dictates the fulfilment of viability by acting as an artificial aid in which the fetus/embryo could be brought to term, it seems that for most unplanned pregnancies, this is an objectively unachievable standard of viability, as the technology would not be available in many cases.[220]

B. *The Lack of Engagement of Natural Law Considerations: Bodily Integrity*

A number of jurisdictions which continue to legalize abortion post-*Dobbs* often imply the right within state constitutional protections of autonomy and bodily integrity, or individual privacy.[221] This integrity is often recognized as a natural right.[222] Natural rights are the fundamental enterprise of liberty and have been deeply rooted in democratic society since its earliest days.[223] John Locke, whose philosophy inspired many of the principles sought in the new republic of the United States, asserted that "every man has a property in his own person."[224] Under natural law, a person has the right to do with their body what they choose, and undergoing the bodily strain of a pregnancy may well be something one does not desire.[225] In Kansas, the State Supreme Court recognized a natural right to abortion under the State Constitution in 2019.[226] In interpreting the State Constitution's language, the court in *Hodes & Nauser, MDs, P.A. v. Schmidt* upheld an injunction against a statute, SB 95, which prohibited 'partial-birth' abortion, like the federal statute in *Gonzales v. Carhart*.[227] The *Schmidt* Court decided that Section 1 of the State Constitution, which reads: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," contains, at

220. *See* Bhatia et. al, *supra* note 214.
221. *See* CTR. FOR REPROD. RTS., *supra* note 147, at 6-11.
222. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (1689); Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 480-81 (Kan. 2019) (citing Locke, Coke, and Blackstone).
223. *See, e.g.*, LIBRE TEXTS, *2.1: Natural Rights and the Declaration of Independence*, *in* A.P. U.S. GOVERNMENT AND POLITICS (ebook), [https://perma.cc/Q76A-3L22].
224. LOCKE, *supra* note 222.
225. *See infra* text accompanying notes 226-39 (discussing the natural law concept of bodily integrity); *Schmidt*, 440 P.3d at 491-92.
226. *Schmidt*, 440 P.3d at 491-92.
227. *Schmidt*, 440 P.3d at 466.

the heart of it, a right of bodily integrity.[228] The opinion supported its interpretation of the state constitution's "natural rights" language by giving weight to the philosophies of John Locke, Sir Edward Coke, and Blackstone.[229]

Bodily integrity has been grounded as a fundamental right under the U.S. Constitution by the Supreme Court, as well as numerous state constitutions,[230] and is one of the protections, amongst others, upon which abortion can be based.[231] For instance, in *Union Pacific Railway Co. v. Botsford*, the Supreme Court reasoned that a person could not be compelled to expose injuries to the court and jury in a civil action if they do not want to.[232] The Supreme Court recognized that this was a right at common law and a court had no power to subject a person to an examination against the common law.[233] It is argued by many that bodily integrity is enshrined under the Fourth Amendment, which provides protection against unreasonable searches and seizures of persons and their property.[234] Nevertheless, the Supreme Court has not abstained from permitting limitations to this protection.[235] For instance, in the prison context, the Court has deferred extensive institutional discretion to perform highly invasive strip-searches.[236] In *Bell v. Wolfish*,[237] it was decided that prisoners can be subjected to cavity searches after visitation without probable cause as the searches are automatically deemed as "reasonable."[238] In 2012, the Court went even further in *Florence v. Board of Chosen Freeholders*.[239] Here, it refused to prohibit correctional facilities from performing blanket

228. *Schmidt*, 440 P.3d at 466.
229. *Schmidt*, 440 P.3d at 480-81.
230. *See* Jacob Sullum, *Without* Roe v. Wade*, Litigants Look to State Constitutions for Protection of Abortion Rights*, REASON (June 30, 2022), [https://perma.cc/7JZ6-56RD] (including Kansas, Montana, Michigan, Utah, Ohio).
231. *See, e.g.*, Working Group on the Issue of Discrimination Against Women in Law and in Practice on Women's Autonomy, Equality and Reproductive Health in International Human Rights, U.N. Doc., at 1 (Oct. 2017).
232. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 255 (1891).
233. *Botsford*, 141 U.S. at 257.
234. Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 4 UNIV. ILL. L. REV. 1059, 1070 (2014); Jay A. Gitles, *Reasonableness of Surgical Intrusions–Fourth Amendment:* Winston v. Lee*, 105 S. Ct. 1611 (1985)*, 76 J. CRIM. L. & CRIMINOLOGY 972, 984 (1985).
235. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979); Florence v. Bd. of Chosen Freeholders, 566 U.S. 318 (2012).
236. *See generally* Nina Gleiberman, Florence v. Board of Chosen Freeholders*: Maintaining Jail Security While Stripping Detainees of Their Constitutional Rights*, 72 MD. L. REV. 81 (2012-2013).
237. *Bell*, *supra* not 235.
238. *Bell*, 411 U.S. at 558.
239. *Florence*, *supra* note 235.

and arbitrary strip searches which were carried out without any suspicion that the prisoner was even carrying contraband.[240] These decisions indicate that bodily integrity may not be as strongly applied under the Constitution as it was under the common law.

Clearly, AWT poses another damaging blow to abortion by potentially changing the role and even the certainty of 'bodily integrity' within pregnancy. Bodily integrity may still be a consideration in viability in cases where AWT is not available to the pregnant individual. On the other hand, imagine an application of AWT that bypasses the uterus completely, for example, if an IVF procedure was used to procure an embryo that was then implanted into the artificial womb. Cases like this will bypass any bodily integrity considerations entirely. It is thus important to determine alternative rights and freedoms which may justify abortion even after AWT comes into play.

C. *The Right to Not be a Biological Parent and the Freedom to Make Intimate and Personal Choices*

1. The Right to not be a Biological Parent

As bodily integrity in pregnancy may lose relevance in an era of AWT, we should assess whether a right to abortion is justified by any other rights or freedoms. Many pro-choice advocates believe in a more profound right: the right not to become a genetic parent.[241] I.G. Cohen, Faculty Director of the Petrie-Flom Center for Bioethics at Harvard Law, speaks of this in depth in his article in the Southern California Law Review and attempts to discover the correct normative bases to legitimize this right. He suggests that "[t]here is a plausible argument that a rule preventing compelled genetic parenthood in the absence of any prior consent is the welfare-maximizing rule."[242] Under a welfare-maximizing rule, Cohen takes account of various philosophical constructions of consequentialist theory and concludes that a right should exist under this basis.[243] The welfare-maximizing rule simply states that in a world without rules, we would protect a choice to not have unwanted genetic children as this maximizes the greatest happiness for the greatest number.[244]

240. *Florence*, 566 U.S. at 330.
241. Schultz, *supra* note 25, at 887.
242. I. Glenn Cohen, *The Right Not to be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1153 (2008).
243. *Id.* at 1152.
244. *Id.* at 1152 n.144, 1153.

Cohen states that in a hypothetical world which has no respect for a right to not be a genetic parent, "genetic ties would now no longer be a sufficient condition for establishing expectations of family love and bonding."[245] He believes that while this idea is not conclusive and is circumvented in cases of adoption, it is simply "unlikely that," even if permitted, "the imposition of unconsented-to and unwanted genetic children would become common" because this would minimize total welfare,[246] which is based on pleasure, and any state that makes the world "good."[247]

In essence, the law, at least theoretically, should have no justification to compel the imposition of genetic parenthood when there is no prior consent. Thus, without the consent of the pregnant person, the state should not be able to compel them to donate a fetus to ectogenesis should they want to abort. Under this argument, AWT should not be considered a factor of viability as doing so interferes with the pregnant person's right to not be a genetic parent, as it is not a reasonable factor of viability if the pregnant person would not consent to its use in any case.

This right has been given some weight by the judiciary.[248] In the Tennessee case of *Davis v. Davis*,[249] a divorced couple had created a number of frozen embryos pre-divorce, taken from numerous IVF procedures they had undergone throughout the marriage.[250] Post-divorce, the wife, Mary Sue, had asked for control, or custody, of the frozen embryos.[251] She intended to use the frozen embryos in a post-divorce effort to become pregnant.[252] The trial court ruled in favor of Mary Sue, holding that the embryos were "human beings" and accordingly she should have the opportunity to bring them to term.[253] The Court of Appeals reversed this decision on the basis that the ex-husband, Junior Lewis, had a "constitutional right not to beget a child where no pregnancy had taken place."[254] Mary Sue then challenged the validity of this constitutional analysis to the Supreme Court of Tennessee.[255] In the time it took for the case

245. *Id.* at 1153.
246. *Id.*
247. *Id.* at 1152.
248. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
249. *Davis*, 842 S.W.2d at 588.
250. *Davis*, 842 S.W.2d at 591-92.
251. *Davis*, 842 S.W.2d at 589.
252. *Davis*, 842 S.W.2d at 589.
253. *Davis*, 842 S.W.2d at 589.
254. *Davis*, 842 S.W.2d at 589.
255. *Davis*, 842 S.W.2d at 590.

to reach the top court, she had decided that she would prefer to donate the embryos to a childless couple rather than use them herself.[256]

In assessing this constitutional claim, the Tennessee court took a deep dive into the U.S. Supreme Court jurisprudence on the constitutional right to privacy.[257] It concluded that the right to not beget a child is implicit within the right of individual autonomy, and furthermore, that "an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood."[258] By "all other aspects of parenthood" the court is referring to the fundamental rights inferred by the U.S. Supreme Court on the decision on whether to conceive during the contraception cases: *Eisenstadt v. Baird*[259] and *Carey v. Population Services International*,[260] which the Tennessee Supreme Court cites as authority.[261]

In essence, throughout a number of important decisions, the U.S. Supreme Court has indicated that the right not to beget a child is beyond a mere right to bodily integrity, *but* in fact, a fundamental decision-making authority, under the right to privacy.[262] In *Carey*, the Supreme Court put this nicely as:

> "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy."[263]

I now consider how to link the holding of these decisions back to AWT. Of course, there are some differences in fact between the decisions above, which pertained to decisions with one's body, and AWT, but I contend that the reasoning applies equally. Firstly, the *Davis* case pertains to the right of a male to avoid parenthood.[264] However, the case has a more central and important holding: the right not to be a genetic parent even when the issue is beyond one's bodily autonomy.[265] In arriving at

256. *Davis*, 842 S.W.2d at 590.
257. *Davis,* 842 S.W.2d at 599-601.
258. *Davis*, 842 S.W.2d at 603.
259. Eisenstadt v. Baird, 405 U.S. 438 (1972).
260. Carey v. Population Servs. Int'l., 431 U.S. 678 (1977).
261. *Davis*, 842 S.W.2d at 600-01.
262. *Davis*, 842 S.W.2d at 600.
263. *Carey*, 431 U.S at 685.
264. *Davis*, 842 S.W.2d at 604-05 (deciding that the male appellee, Junior Lewis, won the case).
265. *Davis*, 842 S.W.2d at 603 (Discussing that by winning the case, the ex-husband's interests to avoid genetic parenthood were upheld by the court, giving rise to a positivistic right that was protected by the law).

this holding, the Tennessee court's inquiry into the right to privacy is extremely helpful, in seeing how the right to avoid genetic parenthood may attach to the fundamental right of privacy in terms of decision-making, without being reliant on bodily integrity. Sure, the *Eisenstadt* and *Carey* cases were based on the choice of whether to accomplish or prevent conception, instead of aborting the fetus in the sense of killing it (not even allowing it to be brought to term in an artificial womb with a complete cut of ties between it and its genetic mother).[266] Yet, their elucidation of what constitutes a constitutionally protected decision is what applies to the AWT decision. The *Carey* Court said that in "a field that by definition concerns the most intimate of human activities and relationships, decisions […] are among the most private and sensitive" and thus merit constitutional protection. [267] Simply put, the decision on whether to be a genetic parent is surely among the most private and sensitive and within the most intimate of human relationships–parenthood.

2. The Freedom to Make Intimate and Personal Choices

The case law invoked by the Tennessee court in *Davis* illustrates the right to agency–that one can make decisions on the most intimate and personal aspects of their life under the constitutional right to privacy.[268] This unenumerated right has its roots in Supreme Court jurisprudence as far back as 1923 in *Meyer v. Nebraska*.[269] The Court held that "liberty" under the Fourteenth Amendment means more than freedom from bodily restraint.[270] In 1925, *Pierce v. Society of Sisters* confirmed that there are unenumerated *fundamental* rights. [271] The Court built upon this doctrine in respect of the personal sphere of marriage, family, and intimacy beginning with *Griswold v. Connecticut*.[272] In this case, a Connecticut statute criminalized the use of contraception, and a physician had been convicted under this statute for prescribing contraceptives to a married couple.[273] The

266. Eisenstadt v. Baird, 405 U.S. 438, 438 (1972); Carey v. Population Servs. Int'l., 431 U.S. 678, 678 (1977).
267. *Carey*, 431 U.S. at 685.
268. *Eisenstadt*, 405 U.S. at 438; *Carey,* 431 U.S. at 678.
269. Meyer v. Nebraska, 262 U.S. 390 (1923).
270. *Meyer*, 262 U.S. at 399.
271. Pierce v. Society of the Sisters, 268 U.S. 510, 520 (1925) ("The Fourteenth Amendment had for its primary object the prevention of state legislation calculated to keep one class in subjection to another in respect of opportunities for economic and social advancement, the pursuit of happiness, and the exercise of fundamental rights comprehended in an essential individual liberty.").
272. Griswold v. Connecticut, 381 U.S. 479 (1965).
273. *Griswold*, 381 U.S. at 480.

Supreme Court held that the Constitution contained a right to privacy which could be deducted from a penumbra of constitutional guarantees found in the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.[274] This decision concluded that the "very idea" of searching "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" is "repulsive to the notions of privacy surrounding the marriage relationship."[275] Therefore, the Court held, marriage is a fundamental right, although not enumerated in the Constitution.[276]

In *Loving v. Virginia*, prohibiting interracial marriage was not deemed a compelling enough justification to deny people the fundamental right of marriage.[277] The decision in *Griswold* related only to married couples.[278] Nevertheless, in 1972, the Supreme Court extended the right to make personal decisions regarding contraception to non-married persons in *Eisenstadt v. Baird*.[279] This case accepted *Griswold's* finding that the right to personal decision-making is included under the Constitution and held that only providing this right to married persons violates the equal protection clause of the Fourteenth Amendment.[280]

Since *Roe* and *Casey*, the Supreme Court has affirmed the right to intimate decision-making agency multiple times. The best examples are found under *Lawrence v. Texas*[281] and *Obergefell v. Hodges*.[282] In *Lawrence*, the Court invalidated a Texas statute criminalizing intimate and consensual same-sex relationships on the grounds that it violated the protection offered under the due process clause of the Fourteenth Amendment.[283] Justice Kennedy stated that "[l]iberty presumes an autonomy of self that includes . . . certain intimate conduct."[284] Justice O'Connor, in her concurrence, also stated that enforcing views on morality was never a sufficient reason to uphold a law, as there is no legitimate interest in doing

274. *Griswold*, 381 U.S. at 481-86.
275. *Griswold*, 381 U.S. at 485-86.
276. *Griswold*, 381 U.S. at 485 (describing marriage as "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees").
277. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.").
278. *See Griswold*, 381 U.S. at 480.
279. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").
280. *Eisenstadt*, 405 U.S. at 446, 454-55.
281. *See* Lawrence v. Texas, 539 U.S. 558 (2003).
282. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).
283. *See Lawrence,* 539 U.S. at 578.
284. *Lawrence,* 539 U.S. at 562.

so,[285] an important reminder for the current debate on abortion. In *Obergefell*, the Court ruled that same-sex marriage is protected by the due process clause.[286] More specifically, that the right to marry is a fundamental liberty as it "is inherent in the concept of individual autonomy" irrespective of gender.[287] Even more broadly than marriage, the Court stated that the due process clause's protection of liberties includes "personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs."[288] While the jurisprudence on individual autonomy discussed in this section does not relate directly to abortion, it was relied upon heavily by the Court in *Roe* and *Casey*.[289] Many of the general statements relating to the importance of protecting personal and intimate choices are very much applicable to the question of abortion as the pregnant person will be making life-changing decisions; firstly whether they can go through a pregnancy, and secondly whether they can be a biological parent.

To conclude, linking the right of abortion to something beyond bodily integrity will be important in the era of AWT because bodily integrity may cease to be implicated in a pregnancy. It is especially important in states that imply abortion under the right to bodily integrity,[290] as AWT may leave these states without protection for abortions in an AWT context that do not implicate the body. Other approaches to abortion protection that are not hinged on bodily integrity are therefore paramount to repel any challenge to abortion itself as we enter an era of AWT.

III. THE PROPOSAL

If AWT was to be factored into a viability determination, the consequences would be pernicious to abortion access for the reasons I have explored. Accordingly, my proposal seeks to ensure that AWT's very

285. *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

286. *See Obergefell*, 576 U.S. at 645-46.

287. *Obergefell*, 576 U.S. at 646.

288. *Obergefell*, 576 U.S. at 644-45.

289. *See* Roe v. Wade, 410 U.S. 113, 152 (1973) ("In a line of decisions . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 853 (1992) (explaining that opposing views on abortion feature the same "deep, personal character" underlying the Court's decisions in "Griswold, Eisenstadt, and Carey" and "[t]he same concerns are present when the woman confronts the reality that . . . she has become pregnant.").

290. *See, e.g.,* Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 466 (Kan. 2019) (holding that the right to abortion in Kansas is based on personal autonomy, including bodily integrity).

existence does not influence viability determinations by exploring the potential use of AWT in surrogacy agreements.

A. *Surrogacy and AWT*

It is definitely true that AWT resembles and could be interpreted as technology capable of fulfilling a role of surrogacy. In this vein, some academics contend that ectogenesis is most fitting as an advancement in surrogacy and this should be its primary purpose.[291] It is certainly worth advocating for this approach as it would mean that AWT may bypass consideration as a factor of viability if it is reserved for times when it is opted for by women for surrogacy purposes. The status of surrogacy across the states currently remains largely legal with differing levels of regulation. Michigan, Louisiana, and Nebraska are the only states which prohibit any form of compensated surrogacy.[292] Many other states remain legislatively reticent and silent on the topic and generally do not interfere with surrogacy agreements.[293] California, New York, and Washington permit comprehensive compensated surrogacy agreements (commercial surrogacy).[294] When available, AWT could be a useful revolution for compensated surrogacy agreements and would be best served by health insurance policies as the service would likely be offered by medical providers–cutting out the risks taken on by surrogate mothers.

In the states prohibiting surrogacy, the rationale is partially grounded in concerns for the surrogate mother,[295] which would not be an issue with AWT. In Michigan, the Court of Appeals' decision in *Doe v. Attorney General*, addressed these concerns and held that the state could interfere with and even criminalize compensated surrogacy contracts.[296] Justice Holbrook stated that "unbridled surrogacy for profit could encourage the treatment of babies as commodities"[297] and that these agreements "have the potential for demeaning women by reducing them to the status of

291. *See* Eric Steiger, *Not of Woman Born: How Ectogenesis Will Change the Way We View Viability, Birth, and the Status of the Unborn*, 23 J.L. & HEALTH 143, 151 (2010) ("Ectogenesis is most appealing as an alternative to surrogacy, without many of the potential problems involved in a surrogate pregnancy.").

292. *See Surrogacy Laws*, THE SURROGACY EXPERIENCE, [https://perma.cc/84KC-LH85].

293. *See id.* (for example: Hawaii, Oklahoma, North and South Carolina, Montana, Minnesota, Mississippi, Massachusetts, Maryland, Vermont, South Dakota, Iowa, and others).

294. *See* CAL. FAM. CODE. § 7962 (West 2020), N.Y. FAM. CT. ACT § 581 (McKinney 2021), WASH. REV. CODE ANN. § 26.26A.715(f) (West 2019).

295. *See* Doe v. Attorney General, 487 N.W.2d 484, 486-87 (Mich. Ct. App. 1992).

296. *See Doe,* 487 N.W.2d at 484.

297. *Doe,* 487 N.W.2d at 486.

'breeding machines.'"[298] These concerns identify a number of ethical uncertainties within surrogacy. Firstly, that of pregnant people devaluing their bodies by 'renting their womb.'[299] Whether this conduct is right or wrong, it inevitably gives rise to an ethical debate which, much like abortion, can never seem to reach a consensus. The second concern identified by Justice Holbrook is that of using the human child and monetizing the birth process.[300] Of course, purely profit-making motivations behind surrogacy and human life will always be wrong, whether using a surrogate mother or artificial womb. However, it can be presumed that medical facilities providing AWT surrogacy can be much more easily regulated than individual surrogates entering into private contractual agreements regarding the use of their own womb and body. Many other issues in traditional surrogacy may arise out of potential conflicts between the surrogate's autonomy and bodily integrity, and the decision-making autonomy of the biological mother over the child.[301] AWT surrogacy would provide a medium where the biological mother may retain autonomy over the child, removing the need to protect and respect the bodily autonomy of a third-party human surrogate.

Therefore, let us assume AWT was to be reserved as an instrument of surrogacy, including therapeutic cases where the mother cannot physically carry the child. Not only would AWT no longer pose a risk to the right to abortion as it is not constituting a 'factor' of viability – but it would also shore-up the surrogacy process and remove ethical concerns relating to the surrogate mother. Distancing AWT from the neonatal care world and placing it firmly into surrogacy would remove the technology from the viability determination as it would not be available in the case of an unwanted pregnancy. To achieve this, it is necessary to develop a nexus between AWT and surrogacy rather than AWT as a medical intervention for unwanted and premature fetuses. These ideas will be explored in Part C below.[302]

298. *Doe,* 487 N.W.2d at 487.

299. *See Doe*, 487 N.W.2d at 486 ("Whatever sense of idealism that may motivate a fertile woman into hosting a pregnancy for an infertile couple is rent asunder by the introduction of the profit motive.").

300. *See Doe,* 487 N.W.2d at 486-87 ("It could be only a matter of time before desirable, healthy babies would come to be viewed quantitatively, as merchandise that can be acquired, at market or discount rates.") (internal quotations omitted).

301. *See* Herjeet Marway, *The Ethics of Surrogacy*, UNIV. OF BIRMINGHAM (Sept. 27, 2018), [https://perma.cc/DW4K-EBSV]; *See generally* Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 LAW & SOC'Y REV. 143 (2015) (discussing the range of conflicting emotions experienced between the biological and surrogate mother during surrogacy arrangements).

302. See *infra* Section III.C.

B. *Critique of Solutions Proposed by Other Academics*

Before introducing my proposal, I would like to review existing academic reform proposals on this topic and explain why they will not be satisfactory in dealing with AWT's implications on abortion access.

To begin, academics such as Schultz, who was, at the time of publishing her law review article on the subject, a JD candidate at the Chicago-Kent College of Law, have conceded that there is no sufficient replacement to viability and that any proposed "alternatives to the viability standards are flawed."[303] For example, Schultz proposed that the imposition of a gestational age threshold is a potential alternative.[304] In short, an abortion is lawful until a certain gestational age, regardless of any other circumstances which may be relevant, and once that age is met, abortion becomes unlawful.[305] A viability framework carefully balances competing state interests against the pregnant person's interest in terminating the pregnancy.[306] As discussed in Section I, the imposition of an arbitrary gestational threshold in an AWT era would no longer reflect viability and therefore dismiss the state interest in protecting potential life.[307] The limits to abortion would now have no carefully balanced basis, and in a society that holds pluralistic views on abortion,[308] it would be very difficult to get a state legislature to create a law which may dismiss legitimate state interests by imposing an arbitrary threshold. On the other hand, if a threshold was placed too early in a pregnancy, it would be dismissive of the pregnant person's interests in terminating the pregnancy which would be protected by relevant state law or a potential future federal law, such as the WHPA. It is also not feasible to suggest a state legislates a gestational threshold and continuously amends the statutory threshold as the real point of viability remains fluid and affected by medical developments. This is because viability is ultimately a medical question and is never uniformly a specific gestational age.[309] There are many more nuances of viability that can only be determined accurately to

303. Schultz, *supra* note 25, at 902.
304. *See id.* at 903.
305. *See id.*
306. *See supra* Section I.G.
307. *See id.*
308. *See Abortion*, GALLUP, *supra* note 187.
309. *See supra* Introduction, Part B.

each pregnancy by a medical professional and not a legislature.[310] Moreover, constant reamendment of the gestational age threshold is never guaranteed due to the democratic obstacles involved in legislating.[311]

Hyun Jee Son, who was a JD candidate at UCLA when writing her article, called for the redefinition of viability by the courts to a point "sufficiently late into a woman's pregnancy."[312] Son thinks that viability should be redefined to "clarify the first principle of viability theory to mean advanced fetal development, not fetal independence."[313] However, this imputed threshold of advanced fetal development cannot be "viability." Instead, it would merely be the imposition of an arbitrary gestational age threshold – a wolf in sheep's clothing. Son's approach would thus render the concept of viability meaningless, as, under her approach, it would not reflect the fetus's potential of survival – which is surely the plainest and most uncontested meaning of the word viability.[314] As the viability standard is still used in many abortion-permitting states,[315] a standardized gestational threshold would likely face challenge because viability would no longer be present to discharge sufficient due process to abridge the person of their right to terminate the pregnancy, or right to privacy that may be implied in various state constitutions.[316]

Other proposals rely too much on a normative shift in attitudes towards abortion. For instance, Dalzell, a JD candidate at the University of San Diego Law School, suggested that "[c]ourts should abandon the viability standard and require states to redefine their interests."[317] In many ways, this is what has happened under *Dobbs*, but instead of having to redefine their interests, some states have statutorily disposed (whether enjoined by courts or not) of abortion access altogether due to it no

310. *See generally* Leo Han, Maria Rodriguez & Aaron Caughey, *Blurred Lines: Disentangling the Concept of Fetal Viability from Abortion Law*, 28 WOMEN'S HEALTH ISSUES 287 (2018) (discussing the law's failure to account for the real complexities of fetal viability from a medical standpoint).

311. The democratic obstacles I imagine include the lack of a guarantee that the legislature is always favorable to re-amendment, as successive legislatures may favor maternal interests (and not follow the point of AWT-influenced medical viability) and others may favor state interests in protecting prenatal life.

312. Son, *supra* note 25, at 232.

313. *Id.* at 233.

314. *See Viability*, BLACK'S LAW DICTIONARY, *supra* note 16.

315. *See supra* Section I.E.

316. *See* CTR. FOR REPROD. RTS., *supra* note 147,, at 5-21 (KS, MT, AL, FL, MN); KAN. CONST. BILL OF RIGHTS § 1; MONT. CONST. art. II, § 10; ALASKA CONST. art. I, § 22; FLA. CONST. art. I, § 23; MINN. CONST. art. I, §§ 2, 7, 10 (recognized to ensure a broad right both to abortion and its funding in *Doe v. Gomez*, 542 N.W.2d 17, 18 (Minn. 1995)).

317. Julia Dalzell, *The Impact of Artificial Womb Technology on Abortion Jurisprudence*, 25 WM. & MARY J. RACE, GENDER, & SOC. JUST. 327, 350 (2019).

longer being constitutionally protected.[318] However, even though Dalzell's paper was written in 2019, before *Dobbs*, her proposal that courts "abandon" viability and "redefine their interests" can apply where abortion remains legal, or in the event that the WHPA is passed and protects nationwide abortion access. Abortion scholars are concerned that AWT will not be seen as a specialized issue outside of the abortion debate but instead directly affect abortion access,[319] especially as those that oppose abortion are likely to welcome AWT due to the implications it will have on abortion access.[320] Accordingly, normative shifts in attitude in favor of the maternal interest like this would have to be so substantial as to displace a long-established state interest placed to protect potential life that it is simply unrealistic. Particularly because, as discussed in Section I, Part F, many people in favor of abortion indicated on a Gallup poll that they do not necessarily support late-term postviability abortion.[321] Son is more specific in the normative shift envisioned; namely, that the courts pay more attention to recognize the "right" not to be a biological parent (as seen in *Davis*) in order to strengthen a woman's right to abortion regardless of viability.[322] Post-*Dobbs*, this judicial attention would be indispensable when interpreting state constitutions permitting abortion. I endorse this approach as a part of my own proposal. Unfortunately, however, I believe that as a free-standing proposal it relies too heavily on a judicial interpretation which we may never see. That is why my solution pairs this right to autonomy in decision-making with a need for regulation which places AWT firmly as a vessel of surrogacy which should be generally understood to not interfere with the inquiry of locating viability.[323]

Another proposed standard, as exemplified in an article by Marion Abecassis, an LLM at Georgetown University Law School, is a standard of viability known as naturalistic viability.[324] This approach classifies the artificial womb as merely an extension of the pregnant person's womb.[325]

318. *See* Emma Batha, Roe v. Wade: *Which US States are Banning Abortion?*, CONTEXT (Nov. 8, 2023), [https://perma.cc/LC7Q-T74Y] (AL, AR, TX, ID, KY, LA, MS, MO, OK, ND, SD, TN, WV).

319. *See, e.g.*, Marion Abecassis, *Artificial Wombs: "The Third Era of Human Reproduction" and the Likely Impact on French and U.S. Law*, 27 HASTINGS WOMEN'S L.J. 3, 3-27 (2016); Dalzell, *supra* note 317; Romanis, *supra* note 25; Schultz, *supra* note 25; Son, *supra* note 25.

320. *See, e.g.*, *Artificial Wombs Raise Challenging Question for Abortion Supporters*, RIGHTTOLIFENEWS (Feb. 15, 2022), [https://perma.cc/WU58-6L4Q] ("Affirming that many pro-lifers may welcome the introduction of artificial wombs.").

321. *See supra* note 187.

322. *See* Son, *supra* note 25, at 232.

323. *See infra* Section III.C.

324. *See generally* Abecassis, *supra* note 319.

325. *See id.* at 20.

However, 'full' naturalistic viability does not factor into account any medical technology at all, pushing viability closer to the natural birth period.[326] My approach endorses a naturalistic approach insofar as it applies only to AWT, and no other medical technology. Abecassis, however, also concedes the weaknesses of the naturalistic approach, labelling it as "legal fiction" due to the lack of a physical connection between the real uterus and the artificial one.[327] She presumably infers that naturalistic viability cannot purport to be an extension of the womb simply because the same bodily integrity concerns that apply to a regular right to abortion are not present with AWT.[328] Abecassis fails to explore this point further, whereas I argue that this lack of physical connection is not an issue. In the instance of a fetus contained within an artificial womb, the parent still retains a connection due to the fact that it is carrying their biological child. Therefore, the right not to be a genetic parent (whose biological child exists in the world) and the right to make fundamental decisions are implicated.[329] Hence, a proposal which sets forth a form of naturalistic viability can very much be made legitimately, and independently of a constructed "legal fiction."

C. *My Proposal*

There is no sufficient replacement for the viability standard, even despite *Dobbs*. In the states where abortion remains available, viability is important,[330] and it is very much possible that incoming federal legislation will codify the viability standard across the United States.[331] Viability will face a challenge upon the advent of AWT, which will expedite when fetal viability is reached. Yet, even if viability and AWT seem irreconcilable, my solution moves to retain viability, and instead suppress the potential application of AWT as a 'factor' or 'catalyst' of viability.

The real challenge is finding a way to maximize abortion access in an AWT era without relying on a complete expansion to unrestricted abortion. While it is true that some lawmakers have shifted to expressly approve the

326. *See* Son, *supra* note 25, at 223 (describing the author's concerns about a full naturalistic approach).
327. Abecassis, *supra* note 319, at 20.
328. *See id.*
329. *See* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972).
330. *See supra* Section I.E.
331. *See supra* Section I.E (discussing the WHPA).

right to abortion post-*Dobbs*,[332] it does not follow that relying on progressive state lawmakers is the solution to the AWT dilemma due to a lack of uniformity among states and differing views and political will. For example, Montana lawmakers have not been progressive in permitting abortion under a viability threshold and are actively trying to pass bills restricting abortion.[333] Instead, it is state courts that imply the right to abortion under the state constitutions and enjoining laws undermining abortion access.[334] To surmount the unrealistic expectation that each state adopts abortion-specific laws and constitutional amendments, I rely on the enactment of federal legislation which limits AWT's primary application to surrogacy agreements. Legislation of this nature is suitable because the mere existence of AWT does not mean it should factor into viability, especially considering it may not be available in many instances.[335] This is tantamount to arguing that because surrogate mothers exist, their mere existence should factor into a viability assessment. My hope is that artificial wombs will be seen as irrelevant to medical viability as they become the predominant mode of surrogacy. If artificial wombs were deemed as surrogates, then the AWT would be deemed an extension of the mother's womb, instead of therapeutic technology applied solely as neonatal care. This means that AWT would follow the "naturalistic approach" as suggested by Abecassis.[336] I believe that the surrogacy sector holds the key to this realization as it would place the common use of AWT decisively outside of the neonatal care field which is so closely linked to the perception of viability.[337] Giving AWT primary influence as a vessel of surrogacy also removes the ethical concerns and conflicts of consent inherent in a traditional female surrogacy agreement[338] and would strengthen decision making autonomy of the biological mother to be able to make choices about things such as abortion – which can exist outside of bodily integrity in cases such as *Carey* and *Griswold*.[339]

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332. *See supra* Section I.E (discussing Michigan's Prop 3 and Ohio's Issue 1).
333. *See* Kaanita Iyer, *Montana Governor Signs Slate of Bills Restricting Abortion Rights*, CNN (May 5, 2023, 5:40 AM), [https://perma.cc/VN46-8CNT]; CTR. FOR REPROD. RTS., *supra* note 147.
334. *See, e.g.*, Planned Parenthood of Mont. v. Montana, No. DV 21-00999 (Mont. Thirteenth Jud. Dist. Ct. Oct. 7, 2021) (enjoining a bill which bans abortions previability at 20 weeks); Armstrong v. State, 989 P.2d 364, 391 (Mont. 1999) (protecting abortion as a right under the State Constitution).
335. Bhatia et. al, *supra* note 214.
336. Abecassis, *supra* note 319, at 20.
337. *See* Lilijana Kornhauser Cerar & Miha Lucovnik, *Ethical Dilemmas in Neonatal Care at the Limit of Viability*, 10 CHILDREN 784, 784-85 (2023).
338. *See supra* text accompanying notes 295-300.
339. *See supra* Section II.C.

To give AWT primacy as the predominant form of surrogacy, Congress should legislate using their commerce clause power under Article I, Section 8 of the United States Constitution to harmonize the law to limit surrogacy agreements to AWT providers.[340] A statute of this nature might also sneak past political bias, as making surrogacy agreements exclusive to AWT clinics would not necessarily strike pro-life politicians as overtly protective of the right to abortion, so they might not consider the potential protections AWT surrogacy laws would offer to abortion access when passing them. The legislation would provide that surrogacy agreements could only be binding when made with a medical provider of AWT surrogacy. Because this would be the regulation of potential surrogacy contracts, it would be safely within Congress's authority to regulate economic activity with a substantial effect on commerce–within their commerce clause powers.[341] Surrogacy agreements will easily qualify as, in the language of *Lopez* and *Morrison*, as an activity substantially connected to interstate commerce, as not only will it be likely to see people travel interstate to access AWT facilities, but it also qualifies as an "economic activity" arising out of a commercial agreement to carry a fetus to term.[342] It is likely that even without such legislation, AWT surrogacy would become the predominant mode of surrogacy as many intended parents are uncomfortable with allowing another person to carry their child, and frequently experience emotions such as jealousy, vulnerability, and anxiety.[343] In addition, parents who may never have considered surrogacy may opt-in to AWT surrogacy as a means to avoid the physical perils of pregnancy and childbirth.[344] In this way, we would not rely on AWT as a catalyst of viability but rather view it as tantamount to a human surrogate, in that it would not even be a consideration in the fulfilment of viability.

There are currently no federal laws relating to surrogacy.[345] While the exact reason is not known, it may be due to the ethical concerns such as renting the womb and babies becoming commodities.[346] However, the

340. *See* U.S. CONST. art. I, § 8; *see also* U.S. CONST. art. VI (stating that federal law will preempt state law).

341. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

342. *Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 98; *see also* David Driesen, *The Economic/Noneconomic Activity Distinction Under the Commerce Clause*, 67 CASE W. RSRV. L. REV. 337 (2016).

343. Berk, *supra* note 301 at 156.

344. *See, e.g.*, Alison Brodrick, *Too Afraid to Push: Dealing with Fear of Childbirth*, THE PRACTISING MIDWIFE, Mar. 2014, at 15.

345. *See What You Need to Know About Surrogacy Laws In The U.S.*, AM. SURROGACY (last visited Feb. 17, 2024), [https://perma.cc/LS54-RWF3].

346. *See supra* text accompanying notes 299-300; Doe v. Attorney General, 487 N.W.2d 484 (Mich. Ct. App. 1992).

use of AWT in surrogacy removes these concerns by eliminating the need for consideration of a third-party surrogate's autonomy. Restricting commercialized surrogacy to AWT could therefore fit into a federal legislative framework exercising Congress's Commerce Clause powers.[347] Legislation of this type should be very specific in that the only permitted form of compensated surrogacy in the U.S. will be AWT surrogacy. The statute must also provide consistent standards on how an AWT surrogacy pregnancy should look, and how it should be administered by healthcare providers. It should establish statutory requirements for all parties to the agreement, including confirming the legal status of the fetus and its parents and the minimum conditions that must be met by AWT surrogacy facilities. These laws would fix what scholars have described as "extensive legal confusion" due to the state-to-state discrepancies in surrogacy law,[348] while equally and inconspicuously strengthening the position of abortion rights where they are hinged on viability.

Nevertheless, it is paramount that AWT is still available therapeutically for those that opt for it to nurture a fetus they intend to keep that has been born prematurely or for those with infertility issues.[349] Accordingly, medical insurance would be able to provide access to AWT surrogacy where required. Furthermore, Congress should regulate accordingly to ensure that emergency AWT usage is within the realm of medical insurance and is subject to a number of criteria being met, such as the individual's desire to keep the child and a real risk that the fetus would otherwise die. This would allow emergency AWT to remain, in a way, commercialized. Accordingly, its occasional use in emergency scenarios by parents wanting to keep the child should not be factored into an assessment of viability for women who do seek an abortion early on into a pregnancy.

Under this approach, the viability standard would be retained without factoring in the influence of AWT. For a fetus in ectogenesis for surrogacy purposes, viability would be drawn at the point that the fetus

347. *See* Emily Gelmann, "*I'm Just the Oven, It's Totally Their Bun": The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS L. REP. 159, 169 (2011) and Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507 (2010) (discussing a broader federal legislative framework that commercial surrogacy would fit into).

348. Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 286 (2009); *see also* Katherine Drabiak, Carole Wegner, Valita Fredland & Paul R. Helft, *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 302 (2007) (describing the current state of surrogacy law as "jurisdictional chaos").

349. *See Artificial Wombs: A Revolutionary Invention That Can Be a Beacon of Hope for Infertile Women*, ECON. TIMES (Dec. 4, 2023, 6:33 PM), [https://perma.cc/VF5J-9P68].

would be able to live if it were to be removed from the artificial womb. If a federal statute elected AWT as the predominant and exclusive vessel for surrogacy, we would begin to make a general association between the two. This association alone would hopefully be sufficient to make any consideration of this technology within an assessment of viability completely unorthodox. To illustrate why reliance upon this is reasonable, I compare this to a human surrogate and the IVF-created embryo. Imagine a couple decided that they no longer wanted the child. The embryo is held outside of the womb yet remains unviable and is not deemed viable just because of the existence of a surrogate mother's womb. The couple should not be compelled to bring the embryo to term in a surrogate mother, so, why should they within an artificial one? In essence, associating AWT primarily with surrogacy will distance AWT from the viability assessment.

D. *Rebuttals to the Possible Criticisms of my Proposal*

1. Destabilizing the Balance of Maternal and State Interests

Son directly attacked the possibility of following a naturalist approach in regard to AWT, saying that:

> "For the reasons given, the naturalist approach of viability is in direct contradiction with *Casey's* original intent to preserve the state interest in protecting potential life and should not be adopted to reconcile the ambiguity."[350]

Son fears that a naturalist approach will be applied broadly and blanketly and will interfere with existing medical technology such as incubation and respiratory aids.[351] She argues that this will effectively override the state interest in protecting potential life because without any of these aids, a fetus would not often survive independently until "near completion" of the natural gestation period.[352] The *Roe* and *Casey* Courts most likely could not envisage a completely artificial womb, consequently deeply entrenching themselves into the viability standard. Thus, Son's concern is that the naturalist approach would completely reverse the issue we have with AWT and viability by moving it from conception

350. Son, *supra* note 25, at 223.
351. *See id.*
352. *Id.*

(with AWT) to practically nine-months gestation (under the pure naturalist approach).[353] Yet, it is also important to remember that a failure to apply a naturalist approach (to protect the state's interest and allow for intervention before viability is met close to the end of pregnancy) would cause equal damage to abortion access. My proposal, on the other hand, retains a balance between both the pregnant person's interest and state interest by requesting that a naturalist interpretation of viability be made only in relation to fetuses in ectogenesis. Fetal viability should be determined by a fetus's ability to survive outside ectogenesis. This will be achieved by analogizing AWT to a surrogacy scenario. Son's proposal is absolutist as it implies that you must either apply every existing piece of medical aid that exists (including AWT) to determine viability, or that you apply none at all (including any medical assistance whatsoever).[354] However, I will once again use the example of the surrogate mother. Surrogates willing to bear the children of others exist, but it does not mean they are automatically factored into any assessment of viability: an embryo is not viable solely because it could be implanted into another womb. This is simply not the case, and therefore we need not be absolutist. An assessment on viability should be made considering the options that are practically available to the fetus at the time. My proposal attempts to ensure that the AWT is not practically available to the fetus at any time, and thus would not be factored into a viability assessment.

2. Viability Post-*Dobbs*

Secondly, it may be argued that my proposal is not necessarily solving the issue that viability is no longer workable but sidestepping it by finding a way to retain it. Yet, without viability, a pregnant person's right to the termination of their pregnancy is in grave danger from arbitrary state-imposed standards intended to replace viability.[355] I also concluded, in agreement with Schultz's statement, that there seem to be no workable and effective alternatives to viability in the abortion decision.[356] Moreover, despite the majority's decision in *Dobbs*, there is an abundance of reliance on the viability standard that exists and to depart from it would be incomprehensible. As we have discussed in Section I, even now that the Supreme Court does not recognize the standard, there

353. *See id.*

354. *See id.*

355. *See, e.g.*, Batha, *supra* note 318; GUTTMACHER, *State Bans*, *supra* note 161 (specifically fetal heartbeat and fetal pain laws, such as in Georgia and South Carolina).

356. *See* Schultz, *supra* note 25, at 902.

are numerous state statutes and constitutions which use viability as the dividing line of the maternal and state interests.[357] Even Congress is pushing through the WHPA which pertains to viability in order to protect abortion access across the United States.[358] Therefore, wherever abortion is legal post-*Dobbs*, there is reliance on the viability standard. For these reasons, I cannot defend the position that viability must be replaced just because AWT seems, at first glance, to be incompatible with it.

3. Not Capitalizing on A Complete Pro-Choice Reform

My proposal may be read to the frustration of many pro-choice and feminist activists for missing an opportunity to further vindicate and strengthen women's autonomy and abortion rights. While I am personally sympathetic with this view and agree that AWT does provide a schism and uncertainty in the law which *could* facilitate a complete shift to maternal autonomy – there are reasons why it is not necessary, or even desirable. As the statistics ascertain: 92.2 percent of abortions take place at or before thirteen weeks.[359] With this in mind, a complete reconceptualization of the law to permit unrestricted late-term abortion would make an incredibly marginal difference to abortion access compared to upholding viability. In practice, the likelihood of late-term abortion based upon choice, and not necessity, is hypothetical, and thus retaining a standard of viability which is blind to AWT would not have a significantly detrimental effect on abortion access. Yet, if such a complete shift to unrestricted abortion access did occur, it would be much more prone to being overturned in a legal challenge for undermining legitimate state interests in protecting potential life. If we try to weigh this in a risk/benefit analysis, it simply is not rational to take such a risk to make such a minimal difference in practice. Furthermore, since the *Dobbs* decision, viability is now an aspirational standard for many states who will now be able to and likely will restrict abortion access.[360] Unfortunately, since I first began writing this paper, when *Roe* and *Casey* was the controlling law on abortion, a full reconceptualization of the law to place no limits on abortion whatsoever has gone from unlikely to almost impossible, and therefore the immediate fight is to retain viability and abortion access.[361]

357. *See, e.g.*, *supra* text accompanying notes 160-176.
358. *See, e.g.*, *supra* text accompanying notes 147-160.
359. Kortsmit et al., *supra* note 211, at 6.
360. *See, e.g.*, Batha, *supra* note 318.
361. Since *Dobbs*, the challenge is to reintroduce previability abortion protections, rather than eliminate potential postviability restrictions.

4. Born Alive?

This paper began with a discussion of legal personhood and the born alive test. The born alive test in US law requires that after extraction from the uterus, the fetus "breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles."[362] It may well be the case that some argue in an era of AWT, the fetus is essentially 'born alive' in the situation it is taken from the uterus and placed into the artificial womb. Accordingly, to abort a fetus in an artificial womb would amount to murder as it was born alive when placed into ectogenesis.[363]

However, I do not believe that this situation constitutes the fetus being born alive. The requirement that the fetus "breathes," has a "beating heart," or "voluntary muscle movement" are indicative of the 'quickening' of the fetus, or attainment of viability.[364] A fetus very early into gestation would not exhibit any of these requirements, which start between 16-25 weeks of gestation, and thus would not be born alive.[365] Therefore, under my proposal, a previable fetus being placed into AWT cannot have been born alive as it will have been unable to exhibit these characteristics.

CONCLUSION

This paper has taken a deep dive into the operation of the viability standard within the U.S. legal system and beyond. Despite the recent Court decision in *Dobbs*, I demonstrated the unquestionable importance and reliance that is placed upon this standard, rooting from the Court's seminal decisions such as *Roe* and *Casey*, state legislation and federal bills. I then explored the impact of AWT and found that it instigates a great threat to the right to abortion. This impact is characterized by the likely limits that will be placed on abortion access in abortion-permitting states as the pre-viability window narrows with the availability of AWT, as viability can be interpreted to move closer to conception. To respond to this, I highlighted alternative sources of law to identify rights alternative to bodily integrity which may be resistant to the expedited standard of viability

362. 1 U.S.C. § 8 (2002).

363. *See id.* (imparting legal personhood upon a born-alive fetus means it is legally a human being and capable of being the subject of homicide).

364. *See Quickening in Pregnancy*, CLEVELAND CLINIC (Apr. 22, 2022), [https://perma.cc/X2SX-6XJQ].

365. *See* Stephanie Watson, *Feeling Your Baby Kick*, WEBMD (Mar. 3, 2023), [https://perma.cc/JG78-ZRL2].

inherent in AWT, namely, the right of agency–or decision-making autonomy and the right not to be a genetic parent. At this juncture, the paper first explored the relation between AWT and its potential use in surrogacy, which becomes a central component of the proposal.

Next, I analyzed the proposals made by a number of academics on the subject. The analysis revealed, in further support to the proposition I put forth, that it is incredibly difficult to find any alternative to viability wherever abortion is permitted, and it does not follow that the protections it offers to the mother and viable fetus on the balance of interests can be fairly retained in any other manner. Furthermore, I critiqued those relying on normative changes without any change in legal framework. Such changes are aspirational at best and are unlikely to materialize and lead to meaningful reform in the polarized U.S. for a very long time, if ever. Having identified these essential qualities which must attend a meaningful reform, I proposed that AWT be given legislative primacy within surrogacy, with a view towards creating a perception that AWT is a choice, rather than a medical tool. Following this approach supports an 'AWT-blind' or 'naturalistic' standard of viability, upon which viability is drawn from the fetus' ability to survive if removed from ectogenesis. Additionally, this approach would not only solve the viability issue, but also correct some of the ethical concerns regarding female surrogacy, such as conflicts between the surrogate and biological parents and the monetization of a woman's body.

In summary, while AWT poses a great threat to the right of abortion around the world, it certainly is not irresolvable. The challenge is retaining viability, but while this may seem increasingly burdensome, it is the only standard that can fairly balance the maternal and state interests. Any other way would be to completely change direction from a well-established jurisprudence and would be at the expense of either the pregnant person or the fetus, as seen in such states banning abortion in a post-*Dobbs* America.[366]

366. *See* Batha, *supra* note 318, *see also* text accompanying note 318.