The Dobbs Effect on West Virginia

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THE DOBBS EFFECT ON WEST VIRGINIA

Anne Marie Lofaso* and Cameron Kiner**

Contraception and abortion have “freed women from lifelong careers of bearing and rearing children.”

ABSTRACT

Humans have practiced birth control, including abortion, for thousands of years. Pregnant individuals have sought abortions for many reasons even though the abortion procedure itself has often been dangerous to the pregnant person’s life. Moreover, a stable consensus concerning the debate about when life begins and other questions surrounding abortion has rarely if ever been attained. Notwithstanding the numerous questions raised by this indisputably controversial subject, this article is quite limited in scope. In Section I, we review the development and retrenchment of an individual’s right to terminate their pregnancy starting on January 22, 1973, the day that the United States Supreme Court held in Roe v. Wade that women have a legal right to terminate their pregnancies—a right that individual states could not override in some circumstances. In Section II, we trace the development and retrenchment of that right in West Virginia. We conclude by observing that the post-Dobbs world is fraught with political subterfuge, making legislative consensus difficult even where there is actual agreement.

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* Arthur B. Hodges Professor of Law, West Virginia University College of Law. Professor Lofaso wishes to thank the Hodges Research Fund for its support of this project and the law review editors, especially Hallie Arena, Brianna Frontuto, Blake Jacobs, and Anna Williams, for their excellent work on this article. The authors note that we have often used gender-neutral language to describe pregnant persons. However, we sometimes use the term women or other gendered words where those words make more sense in their historical context.

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INTRODUCTION

Humans have practiced abortion and other forms of birth control for thousands of years. The earliest written sources to record any human history date back only 5,000 years and are found in Egypt and the Middle East. The language on some of those records have been lost to modern humans and therefore our understanding of abortion and other birth control practices during this time are limited. We have a greater understanding of ancient abortion practices from later texts. For example, in Ancient Greece, “[t]he ideal was to have one son to maintain the family name and one daughter to cement a marriage alliance with another family. The goal was clear; the means employed to reach it—divorce, remarriage, adoption, contraception, abortion, exposure—depended on the circumstance.”

To maintain the ideal family size, the ancient Greek philosopher Plato discussed the “many contrivances possible: where the fertility is great, there are methods of inhibition, and contrariwise there are methods of encouraging and stimulating the birth-rate, by means of honors and dishonors, and by admonitions addressed by the old to the young, which are capable in all ways of producing the required effect.”

Along these lines, the ancient Greek philosopher Aristotle wrote:

As to exposing or rearing the children born, let there be a law that no deformed child shall be reared; but on the ground of number of children, if the regular customs hinder any of those born being exposed, there must be a limit fixed to the procreation of offspring, and if any people have a child as a result of intercourse in contravention of these regulations, abortion must be practised on it before it has developed sensation and life; for the line between lawful and unlawful

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2 Id. at 17.
abortion will be marked by the fact of having sensation and being alive.  

There is also evidence that the ancient Greeks used herbal potions either to prevent or eradicate pregnancy. For example, Aristotle explained that some herbs can be used to make the womb inhospitable to sperm—a description that is remarkably similar to the way the abortifacient mifepristone works. Simply put, Aristotle not only condones but recommends abortion as a form of birth control—so long as abortion is practiced before the mother can sense fetal movement, a turning point that came to be known as quickening.

The ancient Greeks understood that abortions were dangerous. One author describes this ancient technique for abortion as using a graduated set of wood, tin, or lead dilators:

The patient . . . is to have fumigations for five or six days till the cervix is softened. After these fumigations, dilators . . . made of pieces of very smooth slipping pinewood are to be introduced into the cervix. There were six of these. Each was six finger breadths . . . in length. They ended in a point, and each succeeding rod was larger than the preceding one; the largest being of the diameter and shape of the index finger, being smaller at one extremity than the other. They should be as round as possible and with no splinters. Before being introduced they were smeared with oil. First the point was gradually introduced by rotating the dilator and pushing it simultaneously till it entered for a distance of four finger breadths . . . . After the first rod was introduced it was withdrawn and replaced by a larger one. During the after treatment a leaden tube filled with mutton fat was left in the uterus at night, while through the day one of the pine dilators was used.

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4 ARISTOTLE, POLITICS, Book VII, 1335b, https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0058%3Abook%3D7%3Asection%3D1335b. This passage is excised from some translations but is available in the following version: ARISTOTLE, 21 ARISTOTLE IN 23 VOLUMES (H. Rackham trans., Harvard Univ. Press 1944). See also McLAREN, supra note 1, at 18.

5 ARISTOTLE, HISTORIA ANIMALIUM, 7.3.583a, 15–27 (A.L. Peck trans., Harvard Univ. Press, 1944); cited in McLAREN, supra note 1 at 27 & n. 66.


7 JOHN STEWART MILNE, SURGICAL INSTRUMENTS IN GREEK AND ROMAN TIMES 81–82 (1907) (citing to Hippocrates). McLAREN, supra note 1, at 29 (explaining that the abortion procedure "entailed perforation of the sac in order to precipitate expulsion. Fumigations were first employed to soften the cervix and then dilators of wood, tin or lead inserted. Wool and cotton tampons and suppositories were directed at dilating the cervix. Pessaries, consisting of a mixture of irritating drugs in an oil or grease base, were turned to the same purposes. Cataplasms or poultices—such
The ancient Greeks and Romans also “frequently procured” the “death of the foetus” using both instruments, as above, and medical abortifacients. “Frequent references to the use of drugs for this purpose may be found in the lay writers such as Juvenal and Suetonius (Domitian).”

The history of abortion from ancient times to the modern period is fairly well-documented, and this article is not intended to retrace that history. Suffice it to know that humans have undertaken abortions for thousands of years, that for most of that time abortions endangered the life of the pregnant woman, that the debate about when life begins has been around for centuries, and that a stable consensus surrounding that debate and about other questions concerning abortion has rarely if ever been attained. Notwithstanding the numerous questions raised by the subject, this article is quite limited in time and scope. In Section I, we jump in medias res to the year 1973, the day that the U.S. Supreme Court held that women had a right to terminate their pregnancies that individual states could not override. There, we review the development and retrenchment of that right. In Section II, we trace the development and retrenchment of that right in West Virginia. We make concluding observations in Section III.

I. THE POST-ROE, PRE-DOBBS WORLD AT THE FEDERAL LEVEL

A. From Roe to Casey: A Late Twentieth-Century Equilibrium

On January 22, 1973, in a 7–2 decision, the United States Supreme Court held that (1) women have a qualified right to terminate their pregnancy; (2) states cannot override that right; and (3) state laws criminalizing abortion are
unconstitutional because such laws infringe on a woman’s Fourteenth Amendment Due Process right to privacy.\textsuperscript{12} The Court explained that the right to abortion is fundamental, thereby triggering strict scrutiny.\textsuperscript{13} The Court added that the state had legitimate interests in protecting the pregnant individual’s health, protecting prenatal life (aka “the potentiality of human life”), and maintaining medical standards.\textsuperscript{14} Announcing a trimester standard, the Court explained that these interests grew throughout the pregnancy and reached a compelling point at distinct stages of the pregnancy.\textsuperscript{15}

For the next two decades, pro-choice advocates fought to solidify the right to reproductive choice as fundamental\textsuperscript{16} while pro-life advocates fought to narrow that right or to eliminate it altogether, focusing instead on the fetus’s right to life.\textsuperscript{17} The results were mixed. Cases decided between 1973 and 1992 established and solidified a women’s right to abortion but allowed some limitations on that right. On the one hand, for example, government health and welfare programs could refuse to pay for nontherapeutic abortions.\textsuperscript{18} But on the other hand, the government could not require a married woman to obtain spousal consent or an unmarried adult woman to obtain her parents’ consent before obtaining an otherwise lawful abortion.\textsuperscript{19}

\textsuperscript{12} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{13} Id. at 152–55.
\textsuperscript{14} Id. at 155, 162.
\textsuperscript{15} Id. at 163.
\textsuperscript{18} See, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (regulations prohibiting use of Title X funds in programs in which abortion is a method of family planning are constitutional because Congress can make a value choice between childbirth and abortion); Harris v. McRae, 448 U.S. 297 (1980) (holding not unconstitutional the Hyde amendment to the annual appropriations to Medicaid, which prohibits public funding for abortions except in the case of the mother’s life, rape, or incest (where rape/incest were promptly reported)); Maher v. Roe, 432 U.S. 464 (1977) (holding that the Constitution does not require states to pay for (using welfare benefits) nontherapeutic abortions even if that state subsidizes medical expenses for childbirth and analyzing under the rational basis test); Beal v. Doe, 432 U.S. 438 (1977) (federal Medicaid statute does not require states to fund nontherapeutic first-trimester abortions as a condition of participating in this federal-state program); Poelker v. Doe, 432 U.S. 519 (1977) (holding that a city may constitutionally refuse to pay for nontherapeutic first-trimester abortions in a public hospital).
\textsuperscript{19} See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (holding unconstitutional a Missouri law, requiring spousal consent during the first trimester unless the abortion is certified by a licensed physician to be necessary to preserve the mother’s life); Bellotti v. Baird, 443 U.S. 622 (1979) (finding unconstitutional a Massachusetts statute that (1) required parental consent for an unmarried woman under the age of 18 to obtain an abortion, but allowed the child to obtain an
The Court’s abortion jurisprudence took a turn toward stability in Planned Parenthood v. Casey, where the Court modified Roe but upheld Roe’s core holding. There, Petitioners, who were primarily abortion providers, challenged the constitutionality of the Pennsylvania Abortion Control Act (PACA), which created five restrictions on abortion. First, under the informed consent mandate, doctors were required to provide a woman seeking an abortion with information to dissuade her from having the abortion and imposed a waiting period of at least 24 hours after receiving the information. Second, the parental consent mandate required a minor to obtain the consent of one parent or a judge’s order before obtaining an abortion. Third, the spousal consent mandate required a married woman to sign a statement averring that either her husband has been notified, her husband was not the father, her husband forcibly impregnated her, or that she would be physically harmed if she notified her husband. Fourth, PACA required a public report on every abortion with details about the facility, doctor, patient, and steps taken to comply with the Act. Fifth and finally, the law allowed an exception for medical emergencies, stating that PACA’s first three parts were not required in an emergency—immediate abortion was necessary to avert death or irreversible impairment of major bodily function.

To analyze this case, the Court modified Roe in two significant ways. First, it abandoned its trimester framework for a viability standard. Under Roe’s trimester structure, a state (1) could not regulate abortion in the first trimester; (2) could regulate but not ban abortion in the second trimester, and (3) could ban abortion—except in cases of the life or health of the mother—in the third trimester. The Court would review any regulation under a strict scrutiny analysis in line with the Court’s view that the right to choose reproductive medical care constituted a fundamental right. Casey changed this framework to abortion under court order “for good cause shown” if one parent refused to consent and (2) held doctors performing abortions in absence of consent or court order criminally liable.

21 Id. at 846.
22 Id. at 879–80.
24 See 18 PA. CONST. STAT. ANN. § 3206; see also Brief of Petitioners, Casey, 1992 WL 12006398, at *11.
25 See 18 PA. CONST. STAT. ANN. § 3209; see also Brief of Petitioners, Casey, 1992 WL 12006398, at *46.
26 See 18 PA. CONST. STAT. ANN. §§ 3207, 3214; see also Brief of Petitioners, Casey, 1992 WL 12006398, at *13–14.
27 See 18 PA. CONST. STAT. ANN. § 3203; see also Brief of Petitioners, Casey, 1992 WL 12006398, at *12.
28 505 U.S. at 846.
a viability standard. This change opened the door to the Court’s second significant modification, which substituted strict scrutiny review with the undue burden test, under which a state regulation could not place an undue burden on a woman’s right to terminate her pregnancy prior to viability. The Court defined undue burden as placing a substantial obstacle in the path of the woman seeking to exercise the abortion right. Applying these newly minted standards, the Casey Court struck down part three of the PACA—spousal consent—as unconstitutional and upheld parts one (informed consent), two (parental consent), four (reporting requirements), and five (medical emergency exceptions) as constitutional.

**B. The Breakdown of Legal Consensus: The Push Towards Dobbs**

For nearly a quarter of a century after Casey was decided, only three abortion cases reached the Supreme Court. One case considered the remedy in a parental notification law. The other two cases examined the constitutionality of partial-birth abortions.

The parental notification case, *Ayotte v. Planned Parenthood of Northern New England*, presented the Court with a question dealing with the appropriate remedy when only part of a law is unconstitutional. There, New Hampshire’s parental notification law prohibited abortions to pregnant, unemancipated minors unless written notice had been delivered personally or by certified mail to the minor’s parent or guardian 48 hours before the abortion procedure. The law allowed for three exceptions to parental notification. First, a physician was legally permitted to perform an abortion on a minor without notifying the minor’s parent if “[t]he attending abortion provider certifie[d] in the pregnant minor’s record that the abortion [wa]s necessary to prevent the

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29 Id. at 870.
30 Id. at 876.
31 Id. at 877.
32 Id. at 879–902.
34 *See* Gonzales v. Carhart, 550 U.S. 124 (2007) (holding that the Partial Birth Abortion Ban Law of 2003, federal law criminalizing doctors’ performance of partial-birth abortions, does not place an undue burden on late-term, pre-viability abortions); Stenberg v. Carhart, 530 U.S. 914 (2000) (holding that a Nebraska statute banning partial birth abortions was unconstitutional because (1) it lacked any exception for preservation of health of the mother, and (2) it imposed an undue burden on woman’s right to choose a certain type of abortion procedure, thereby unduly burdening the right to choose abortion itself).
35 546 U.S. at 332 (remanding case to lower court to find a narrower remedy than a permanent injunction against enforcing the law in its entirety).
minor’s death and there was insufficient time to provide the required notice.\textsuperscript{38} Second, notification was unnecessary where the person entitled to notice certified that he or she had already been notified.\textsuperscript{39} Third, an abortion was permissible where a judge, petitioned by the minor in confidential proceedings, had authorized a physician to perform the abortion without parental notification because that judge had found that the minor was mature and capable of giving informed consent or that an abortion without notification was in the minor’s best interests.\textsuperscript{40} The statute imposed civil and criminal penalties on persons who performed an abortion in violation of the statute, unless the elements of the safe harbor provision were met.\textsuperscript{41}

Abortion providers, including three medical clinics and a physician, challenged the law, claiming that it was unconstitutional because it did not “‘allow a physician to provide a prompt abortion to a minor whose health would be endangered’ by delays inherent in the [state statute].”\textsuperscript{42} The abortion providers also challenged the state law for failing to provide an adequate exception for the minor’s life and adequate confidentiality safeguards for the judicial bypass procedure.\textsuperscript{43}

The Court reviewed the following remedial question: What is the “appropriate judicial response” in cases where “enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies”?\textsuperscript{44} The Court held, in line with principles of severability that “invalidating the statute entirely is not always necessary or justified,” because “lower courts may be able to render narrower declaratory and injunctive relief.\textsuperscript{45}

The Court expressly refused to reconsider any of its prior abortion precedent.\textsuperscript{46} Rather, it turned to three interrelated principles that informed its approach to remedies.\textsuperscript{47} First, the Court expressed a preference for invalidating only those portions of a law that were unconstitutional.\textsuperscript{48} Second, the Court articulated its limited “constitutional mandate and institutional competence” and its need to “restrain” itself from “rewrit[ing] state law to conform it to

\textsuperscript{39} Id. at 324 (citing N.H. Rev. Stat. Ann. § 132:26(I)(b)).
\textsuperscript{40} Id. at 324 (citing N.H. Rev. Stat. Ann. § 132:26(II)).
\textsuperscript{42} Ayotte, 546 U.S. at 325 (quoting Complaint, ¶ 24).
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 323.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 329.
\textsuperscript{48} Id.
constitutional requirements’ even as [an effort] to salvage it.”\textsuperscript{49} Third, it conveyed the basic principle that a court must not “ ‘use its remedial powers to circumvent the intent of the legislature.’ ”\textsuperscript{50}

Tooled with those principles, the Court criticized the lower courts for “cho[osing] the most blunt remedy—permanently enjoining the enforcement of New Hampshire’s parental notification law and thereby invalidating it entirely.”\textsuperscript{51} And while the Court exhibited sympathy for that approach given that it had just a few years earlier, in \textit{Stenberg v. Carhart},\textsuperscript{52} “invalidated an abortion statute in its entirety because of the same constitutional flaw,”\textsuperscript{53} the Court distinguished \textit{Stenberg} on the grounds that the parties there did not request, and therefore the Court “did not contemplate[] relief more finely drawn.”\textsuperscript{54} Agreeing that the lower courts did not have to invalidate the law wholes, as the abortion provides requested any “ ‘just and proper’ ” relief, the Court remanded the case to craft relief tailored to remove the constitutional infirmity by prohibiting unconstitutional application of the state statute.\textsuperscript{55}

Simply put, \textit{Ayotte} is more of a case about judicial restraint than a case about abortion principles. However, it is significant that the Court composed of seven Republican appointees and two Democratic appoints chose not to revisit abortion principles as late as 2006.\textsuperscript{56} And indeed, Justice O’Connor, the author of \textit{Ayotte}, stepped down from the Court on January 30, 2006, just weeks after this case was announced. Justice Alito, an ardent anti-abortion thinker, took Justice O’Connor’s position.\textsuperscript{57}

The two cases dealing with partial-birth abortions that reached the Court in the first decade of the twenty-first century were controversial and politically polarizing. As a threshold matter, it is significant to note that partial-birth abortion is not a medical term, but rather a political term used by those who

\textsuperscript{49} \textit{Id.} at 329 (quoting Virginia v. American Booksellers Assn., Inc., 484 U.S. 383, 397 (1988)).

\textsuperscript{50} \textit{Id.} at 329 (quoting \textit{Califano v. Westcott}, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part) (other citations omitted).

\textsuperscript{51} \textit{Id.} at 330.

\textsuperscript{52} 530 U.S. 914, 930 (2000) (holding unconstitutional a Nebraska law banning “partial birth abortion” unless the procedure was necessary to save the pregnant woman’s life because it lacked a health exception). This case is discussed below, \textit{infra} at notes 61 to 72 and accompanying text.

\textsuperscript{53} \textit{Ayotte}, 546 U.S. at 331.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.} (quoting Complaint ¶ 13).

\textsuperscript{56} In 2006, the seven Republican-appointed Supreme Court justices were Chief Justice John G. Roberts, Jr. and Associate Justices John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, Anthony M. Kennedy, David H. Souter, and Clarence Thomas; the two Democratic justices were Associate Justices Ruth Bader Ginsberg and Stephen G. Breyer. See \textit{Justices 1789 to Present}, \textit{supra} note 10.

disfavor certain types of procedures. This term had far-reaching effects on the political landscape by allowing those wanting to deny all or nearly all reproductive rights to frame the debate in terms making it difficult to disagree with their position. For example, it is more difficult to argue against the idea that a child should not be hacked into pieces to remove it from the body of a woman who wishes to terminate her pregnancy than it is to argue against the idea that a medical procedure, known as dilation and evaluation (D&E), is necessary to empty the uterus to prevent infection after a miscarriage and thus often to save the life of the formerly pregnant person. Yet, these so-called partial-birth abortion bans were typically broad enough in scope to encompass the latter.

For example, in Stenberg v. Carhart (2000), the Court held that a Nebraska statute banning partial-birth abortions was unconstitutional on two grounds. One, the state law lacked any exception for preserving the health of the mother. Two, the law applied to dilation and evacuation (D&E) procedures as well as to dilation and extraction (D&E) procedures; the law thus imposed an undue burden on a woman’s ability to elect a D&E abortion, thereby unduly burdening the right to choose abortion itself. As the American Civil Liberties Union observed in its analysis of this case:

Although supporters of “partial-birth abortion” bans claim that they prohibit only a single procedure known to the medical community as dilation and extraction or D&E, the Nebraska law, like the laws of more than two dozen other states, does not mention the D&X procedure. Rather, the law sweeps much more broadly, prohibiting the performance of an array of abortion methods used throughout pregnancy. And, like similar laws throughout the country, the Nebraska law provides no health exception and only a narrow life exception.

In Gonzales v. Carhart (2007), the second case to come before the Court on the subject of partial-birth abortions, four medical doctors challenged the constitutionality of the Partial Birth Abortion Ban Law of 2003, a federal law criminalizing doctors’ performance of partial-birth abortions, which Congress

60 D&E, a technique developed in the 1960s, has been the most common medical procedure for second-trimester abortions in the United States precisely because it is safe. See Patricia A. Lohr, Surgical Abortion in the Second Trimester, 16 REPRODUCTIVE HEALTH MATTERS 151 (2008). For a description of the procedure, see Richard E. Jones and Kristin H. Lopez, Induced Abortion, in HUMAN REPRODUCTIVE BIOLOGY (4th ed. 2014).
passed in the aftermath of *Stenberg v. Carhart*. This time, the Court found the federal ban to be constitutional. In so concluding, the Court assumed the three basic holdings of *Roe* and *Casey*: (1) A woman has a right to choose to obtain an abortion without undue state interference prior to fetal viability; (2) the state has the power to restrict abortions after viability; and (3) the state has legitimate interests in protecting women’s health and fetal life. The Court then explained that “*Casey . . . struck a balance*” among those principles: On the one hand, “[b]efore viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy.’” A State also “may not impose upon this right an undue burden, which exists if a regulation’s ‘purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’” On the other hand, “[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.” Given these principles, the Court upheld the federal law as well within this judicially created balance. The Court also left open the possibility of challenging the law as applied in specific instances.

The situation changed rapidly in 2016. On February 12, 2016, the United States Supreme Court consisted of the following nine members: Chief Justice John Roberts (Republican), Justices Antonin Scalia (Republican), Anthony Kennedy (Republican), Clarence Thomas (Republican), Ruth Bader Ginsburg (Democrat), Stephen Breyer (Democrat), Samuel Alito (Republican), Sonia Sotomayor (Democrat), Elena Kagan (Democrat). This gave the Republicans a 5–4 majority, insufficient to overturn *Roe v. Wade* or *Casey v. Planned Parenthood* because, at that time, only Justices Scalia and Thomas were on record as supporting such a move. Moreover, at that moment in time, few people suspected that *Roe* or *Casey* would ever be overturned, viewing it as important precedent in the expansion of basic civil

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65 550 U.S. at 145 (quoting *Casey* summarizing *Roe*).
66 550 U.S. at 146.
67 *Id.* (quoting *Casey*, 505 U.S. at 879 (plurality opinion)).
68 *Id.* (quoting *Casey*, 505 U.S. at 878 (plurality opinion)).
69 *Id.* (quoting *Casey*, 505 U.S. at 877 (plurality opinion)).
70 *Id.* at 147–67.
71 *Id.* at 167–68.
72 See Planned Parenthood v. Casey, 505 U.S. 833, 953 (1992) (Rehnquist, J., concurring) (joined by Justices White, Scalia, and Thomas) (“The Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce, Meyer, Loving,* and *Griswold*, and thereby deemed the right to abortion fundamental”).
rights to women. There was, however, a vocal minority of the U.S. populace, who supported overturning Roe.

Within twenty-four hours, the delicate balance of power was about to shift with several unexpected twists. On February 13, 2016, Justice Antonin Scalia peacefully passed away in his sleep at the Cibolo Creek Ranch in Shafter, Texas, while on a hunting trip. Two weeks later, the first abortion case to reach the Court in over a decade, Whole Woman’s Health v. Hellerstedt, was argued before a Supreme Court with four Democrats (Justices Ginsburg, Breyer, Sotomayor, Kagan), one pro-choice Republican (Justice Kennedy), and three pro-life Republicans (Chief Justice Roberts, and Justices Thomas & Alito). Accordingly, Justice Scalia’s death was unlikely to change Hellerstedt’s outcome, but it could change it’s reasoning because for the first time in a long time the Court would have five solid pro-choice Justices and would not have to appease the more moderate Justice Kennedy, who helped to pen Casey’s compromise.

On March 16, 2016, after an appropriate mourning period, Democratic President Barack Obama nominated Merrick Garland for Associate Justice of the United States Supreme Court to succeed Justice Scalia. At that time, Garland was Chief Judge of the United States Court of Appeals for the D.C. Circuit. Judge Garland—a former Justice Department attorney—had a reputation for fairness and toughness. He was also a moderate Democrat, a choice that President Obama hoped would persuade sufficient Republican Senators to vote in favor of Garland’s confirmation.

At the time of Scalia’s death, Republicans controlled the Senate by a small margin of 54–46 (the two Independent Senators caucused with the Democrats). This meant that the Democrats had to persuade five Republicans to vote for Garland, a very feasible feat were it not for Senate Majority Leader Mitch McConnell, who could prevent the question from even coming to the floor

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76 Id.
77 Id.
78 Id.
for a vote, which is precisely what he did. McConnell contended that the Senate Majority leader was not obligated to put a presidential nominee to the Supreme Court up for a vote during an election year. McConnell gambled on the possibility that a Republican would win the presidency and would be able to replace Justice Scalia with another like-minded justice. Some scholars have argued that there is “law” against proceeding in this manner. Others have argued that there is no law prohibiting McConnell’s action. The pertinent part of the U.S. Constitution is as follows:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In any event, at the very least, McConnell’s plan broke protocol, whereby the Senate Majority leader puts a Supreme Court nominee up for a vote.

In the meantime, in June 2016, the Supreme Court issued its decision in Hellerstedt, where the Court predictably held (5–3) that a Texas law regulating abortion was unconstitutional. In particular, the Court held that the Texas law—requiring a doctor performing an abortion to have admitting privileges at a hospital no more than 30 miles from the abortion facility and requiring that abortion facility to meet minimum state standards for ambulatory surgical centers—was unduly burdensome within the meaning of Casey.

McConnell’s gamble paid off big time. The Republican nominee for President, Donald Trump, won the 2016 presidential election and carried the Senate by a slim majority. At the beginning of Trump’s term, the Republicans

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81 See id.
82 U.S. CONST., art. II, § 2, ¶ 2 (emphasis added).
83 See Whole Woman’s Health v. Hellerstedt, 579 U.S. 582 (2016).
84 Id. at 615–24.
controlled the Senate 52–48.\textsuperscript{86} On January 31, 2017, now President Trump nominated Tenth Circuit Judge Neil Gorsuch to the Supreme Court.\textsuperscript{87} The following week, on February 8, the Senate confirmed one of its own, Republican Senator Jeff Sessions, to the office of Attorney General, leaving the Republicans with a 51 to 48 majority, sufficient to confirm Neil Gorsuch on April 7 by a vote of 54–45.\textsuperscript{88} All fifty-one Republican Senators and three democratic Senators—Joe Manchin (WV), Joe Donnelly (Ind), and Heidi Heitkamp (ND), all of whom were up for reelection in red states—voted to confirm Gorsuch.\textsuperscript{89} Although the public did not know Gorsuch’s views on abortion for certain, this vote likely meant that, at least on abortion cases, the Court maintained the 5–4 pro-choice margin that it held when Justice Scalia was on the Court.

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The following year, on June 27, 2018, Justice Kennedy retired, paving the way for Trump to nominate pro-life Republican Brett Kavanaugh to the Supreme Court.\textsuperscript{90} On October 6, Congress confirmed Kavanaugh by a vote of 50–48.\textsuperscript{91} Most people believe that Kennedy would not have retired had Democrat Hillary Clinton was President. Either way, this retirement was significant because it provided an opportunity to change the Court balance on the abortion issue from a slim 5–4 pro-choice margin to a slim 5–4 pro-life margin.

On June 29, 2020, this theory was tested in \textit{June Medical Services, LLC v. Russo},\textsuperscript{92} a case with nearly identical facts to \textit{Hellerstedt}. Unexpectedly for many, the Court held 5–4 that a Louisiana law, which mirrored the Texas law in \textit{Hellerstedt}, was unconstitutional.\textsuperscript{93} As expected, the four Democratic-appointed Justices, Breyer (writing), Ginsberg, Sotomayor, and Kagan, wrote the main

\begin{footnotesize}
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\item \textsuperscript{86} United States Senate Elections, 2016, \textsc{Ballotpedia}, https://ballotpedia.org/United_States_Senate_elections_2016 (last visited Mar. 12, 2023).
\item \textsuperscript{89} \textit{Id}.
\item \textsuperscript{90} Amy Howe, \textit{Anthony Kennedy, Swing Justice, Announces Retirement}, SCOTUSBLOG (June 27, 2018), https://www.scotusblog.com/2018/06/anthony-kennedy-swing-justice-announces-retirement/.
\item \textsuperscript{91} \textit{Nomination of Brett Kavanaugh to the U.S. Supreme Court}, \textsc{Ballotpedia} https://ballotpedia.org/Nomination_of_Brett_Kavanaugh_to_the_U.S._Supreme_Court (last visited Mar. 12, 2023).
\item \textsuperscript{92} 591 U.S. 1101, 140 S. Ct. 2103 (2020).
\item \textsuperscript{93} \textit{Id}.
\end{itemize}
\end{footnotesize}
opinion, and four of the Republican-appointed Justices, Thomas, Alito, Gorsuch, and Kavanaugh, drafted the dissent. The swing vote was Republican-appointed Chief Justice Roberts, who struck down the Louisiana law on stare decisis grounds even though he had dissented in \textit{Hellerstedt}.

Later that year, on August 18, the Democrats formally nominated Joe Biden for President to run against Republican incumbent Donald Trump. One month later, on September 18, Justice Ginsburg passed away. Eight days later, on September 26, Trump nominated Amy Coney Barrett to replace Justice Ginsburg. One month later, on October 26, the Senate confirmed Barrett as the next Associate Justice to the Supreme Court. Eight days later, on November 3, the people elected Democrat Joe Biden to be their next President.

With a clear pro-life majority on the Court, conservative-Republican-led states began to push through abortion laws that were clearly unconstitutional under the doctrine of stare decisis with the hope that the newly constituted majority would finally overturn \textit{Roe} and \textit{Casey}. The chance came with \textit{Dobbs v. Jackson Women’s Health Organization}. In that case, Mississippi passed the Gestational Age Act, which banned surgical abortions after the first 15 weeks of pregnancy, except for cases of a medical emergency or severe fetal abnormality. There were no exceptions for rape or incest. Under the medical emergency exception, abortions were permissible to save the life of a pregnant woman and in cases where “the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.”

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94 140 S. Ct. at 2112–33.
95 140 S. Ct. at 2142–82 (dissenting opinions).
96 140 S. Ct. 2133, 2141–42 (Roberts, C.J., concurring).
102 142 S. Ct. 2888 (2022).
103 Id. at 2234.
function. The severe fetal abnormality exception permits abortions of fetuses whose defects make them incapable of living outside the womb. The Court, in a split 6–3 decision, reversed the Fifth Circuit’s decision, holding the Mississippi law unconstitutional, and remanded the case to the lower court. Five Justices, Alito, Thomas, Gorsuch, Kavanaugh, and Barrett overturned Roe and Casey. Justice Alito, writing for the majority, held that the right to abortion cannot be found in the Constitution.

II. A BRIEF LEGAL HISTORY OF ABORTION IN THE UNITED STATES AND WEST VIRGINIA

A. Overview of Pre-Roe Abortion Law in the United States

Professor John Burns, in his famous early nineteenth-century book, Observations on Abortion, defined abortion as “the expulsion of the contents of the gravid uterus, at a period of gestation so early as to render it impossible for the fetus to live.” Although Dr. Burns is primarily concerned with miscarriages (“accidental” and “habitual abortions”), he does tell his reader how to perform an intentional abortion: “the pulling of a painsed tooth sometimes speedily produces the return of the menses in cases of obstruction.” Although we now know that pulling teeth does not generally result in abortion, nineteenth century doctors believed that it did.

104 Id. at 2243
105 Id.
106 Id. at 2228.
107 Id.
108 Id.
109 Before 1803, the common law prohibited abortion only after quickening. See Shelley Gavigan, The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion, 5 J. LEGAL HIST. 20, 21–29 (1984); Lord Ellenborough’s Act 1803, 43 Geo. 3, c. 48 (U.K.) (this is the first statutory prohibition of abortion in the United Kingdom and United States and provides a distinction in the penalty for abortions conducted on women “quick with child” and on women who are not “quick with child.”). A review of the common law throughout the American colonies and early U.S. history is beyond the scope of this article.
111 Burns, supra note 110 (1806).
112 See, e.g., THOMAS EVELL, LETTER TO LADIES, DETAILING IMPORTANT INFORMATION CONCERNING THEMSELVES AND INFANTS 51 (1817) (recommending that decaying teeth should be extracted “excepting with pregnant women”); id. at 53 (stating that “In all cases, except pregnancy, where the tooth is hollow, it is best to extract it”). This book is available on the Internet Archive, https://archive.org/details/2553035R.nlm.nih.gov/page/n61/mode/2up.
Before the 1820s, abortion was not illegal in the United States, but it was an exceedingly unsafe procedure. Starting in the 1820s, states began to regulate abortion, sometimes prohibiting it after the fourth month. By 1900, most abortions were illegal. This was also part of the movement where doctors (who were male) were displacing midwives (female) and consolidating power in the medical field. Throughout the twentieth century, illegal abortions were performed although they were less frequent during the height of the Comstock laws, which banned contraceptives and information about abortions. In 1965, most states banned abortion, possible with up to three exceptions: life of the mother, health of mother or fetus, rape. But that began to change.

B. The Law of Abortion When West Virginia Became a State

In achieving statehood by splitting from Virginia during the Civil War, West Virginia chose to retain almost the entirety of Virginia’s common and statutory law. Article XI, Section 8 of the 1863 Constitution of West Virginia states that “Such parts . . . of the laws of the State of Virginia as are in force . . . when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the Legislature.” As a result, West Virginia imported all the civil and criminal laws of Virginia in becoming a new state, including Virginia’s criminal prohibition on abortion. As a result, to understand West Virginia’s abortion laws, we must first turn to an analysis of Virginia’s law prior to the Civil War.

Virginia’s first abortion law was adopted on March 14, 1848, and stated as follows:

Any free person who shall administer to any pregnant woman, any medicine, drug or substance whatever, or use or employ any instrument or other means with intent thereby to destroy the child with which such woman may be pregnant, or to produce

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113 JAMES C. MOHR, supra note 110, at 16–19 (1979)
115 MOHR, supra note 110, at 160; PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 79–144 (describing how physicians began to consolidate power over medical case in the United States in the late nineteenth and early twentieth centuries).
116 See Comstock Act, ch. 258, sec. 2, § 148, 17 Stat. 598, 599 (1873) (outlawing, among other things, “any article or thing designed or intended for the prevention of conception or procuring an abortion” from being carried by the mail); Kathryn N. Peachman, The Need to Codify Roe v. Wade: A Case for National Abortion Legislation, 45 J. LEGIS. 272, 276–77 (2019) (“the illegalization of abortion did not make the procedure disappear. In fact, illegalization arguably did not succeed in significantly decreasing the number of women who sought to obtain abortions. Practitioners continued to offer abortion procedures, just behind closed doors”).
117 W. VA. CONST. OF 1863, art. XI, § 8.
abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, unless the same shall have been done to preserve the life of such woman, shall be punished, if the death of a quick child be thereby produced, by confinement in the penitentiary, for not less than one nor more than five years, or if the death of a child, not quick, be thereby produced, by confinement in the jail for not less than one nor more than twelve months.\footnote{118}{Act of Mar. 14, 1848, tit. 2, ch. 3, § 9, 1847–48 Va. Acts 96 (emphasis added).}

Noticeably present in this legislation are the provisions stating that the punishment imposed on an individual shall be significantly less if the child is “not quick”, a decrease from one to five years to one to twelve months.\footnote{119}{Id.} However, this language did not make it to the final, codified version of the Virginia Code that was published a mere two years later in 1849, which imposed the higher penalty for all criminal abortion convictions.\footnote{120}{Compare \textit{id.} with VA. CODE ch. 191 § 8 (1849) (providing a blanket one-to-five-year sentence for all abortions not done with intent to save “the life of such woman or child”).} This was done at the behest of the Revisors of the Code of Virginia.\footnote{121}{See \textit{JOHN M. PATTON & CONWAY ROBINSON, REPORT OF THE REVISORS OF THE CODE OF VIRGINIA} 940–41 (1849) (providing the exact language used in the 1849 Virginia Code).} In recommending such a change, the Revisors suggested that, upon discussion with a medical professional, the distinction between a “quick” and “not quick” child was “vulgar and antiquated” and merely based on “the perception by the female of a certain sensation.”\footnote{122}{Id. at 941.}

This version of the law remained in effect, unchanged, from 1849 through West Virginia’s independence in 1863, when it was adopted by West Virginia.\footnote{123}{See, \textit{e.g.}, W. VA. CODE ch. 144, § 8 (1868) (later re-codified at W. VA. CODE § 61-2-8 (1931)).} The only real change in the language of the prohibition came in 1882. This amendment increased the penalty from one to five years to a range of three to ten years.\footnote{124}{Act of Mar. 22, 1882, ch. 118, sec. 1, § 8, 1882 W. Va. Acts 335.} As a result, in West Virginia, an individual could be sentenced for three to ten years for criminal abortion if they (1) used any means to produce a miscarriage or abortion (2) with the intent to produce such a miscarriage or abortion and (3) were not acting in a good faith attempt to save the life of the woman or the child.

However, there were additional criminal provisions that could come into play in abortion cases. First, while performing a criminal abortion could not, by itself, support a murder conviction, the death of the woman on whom the abortion was performed was considered second-degree murder.\footnote{125}{State v. Lewis, 57 S.E.2d 513, 521 (W. Va. 1949).} In such cases, the
criminal abortion would satisfy the intent element required to uphold the conviction.\textsuperscript{126} Similarly, under § 61-11-6 (defining criminal accessory), any individual who assisted with the criminal abortion before it took place could be held equally as liable as the principal individual who violated the criminal abortion statute.\textsuperscript{127} Additionally, when the criminal accessory provision is read in conjunction with the criminal abortion law, there was nothing barring prosecutors from seeking accessory charges against women seeking abortions, as their acts in seeking out an abortion and authorizing such would be tantamount to aiding and abetting, if not a direct violation of the abortion law itself.\textsuperscript{128}

C. The Effect of Roe on Abortion in West Virginia

\textit{Roe’s} holding in 1973—that women have the right to obtain abortions under the Fourteenth Amendment—directly affected West Virginia’s criminal abortion law. Two years later, in \textit{Doe v. Charleston Area Medical Center},\textsuperscript{129} the Fourth Circuit Court of Appeals held that the criminal provision, § 61-2-8, was “unconstitutional beyond question.”\textsuperscript{130} In doing so, the court stated that it was so clear that the West Virginia law was unconstitutional that a “three-judge panel has dissolved itself on the ground that an attack upon it presented no substantial federal question.”\textsuperscript{131} The Fourth Circuit then remanded the case down to the district court with instructions to “issue [an] injunction to require the hospital to ignore the unconstitutional state statute and abandon its policy” refusing to preform abortions except in cases where the life of the mother appears to be in danger.\textsuperscript{132} However, the injunction granted on remand was not permanent and dissolved once the case was dismissed in 1982.\textsuperscript{133}

The West Virginia Legislature did, however, pass several other acts in the intervening years between \textit{Roe} and \textit{Dobbs}, which affected access to abortion.

\textsuperscript{126} Id. at 522.
\textsuperscript{129} 529 F.2d 638 (4th Cir. 1975).
\textsuperscript{130} 529 F.2d at 644.
\textsuperscript{131} Id. (citing Smith v. Winter & Browning, No. 74-571-CH (S.D. W. Va. April 17, 1975)).
\textsuperscript{132} Id. at 645.
\textsuperscript{133} See Attorney General of West Virginia, supra note 128, at 4.
Most notably was the Woman’s Access to Health Care Act, passed in 1998.\footnote{W. Va. Code §§33-42-1 to -8; Women’s Access to Health Care Act, ch. 173, 1998 W. Va. Acts 1005–09; Act of March 14, 1998, ch. 187, art. 42, 1998 W. Va. Acts 1133–35.} In addition to establishing disclosure requirements and standards for insurance coverage, the act also makes it a felony for an individual to “knowingly perform[] a partial-birth abortion” unless “necessary to save the life of a mother when her life is endangered by a physical disorder, illness or injury.”\footnote{W. Va. Code § 33-42-8(a).} The act further defines a “partial-birth abortion” as “an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.”\footnote{§ 33-42-3(3).} However, unlike the criminal abortion statute, this section provides that “no woman may be prosecuted . . . for having a partial-birth abortion” or for conspiracy to have one.\footnote{§ 33-42-8(c).}

The criminal provision of the act was enjoined by the Southern District of West Virginia in 2000 in Daniel v. Underwood.\footnote{102 F. Supp. 2d 680, 686 (S.D. W. Va. 2000).} There, the plaintiffs sued to enjoin the criminal provisions, alleging that these restrictions violated their rights under the Due Process Clause, the Equal Protection Clause, and the First Amendment.\footnote{Id. at 681.} The court had previously granted a motion for a temporary restraining order against enforcement after finding that (1) the act facially threatened the plaintiffs’ right to privacy under Roe and Casey, (2) the act may cause physicians to refuse to treat plaintiffs or suggest riskier procedures, and (3) the act contained “no exception for the protection of the mother’s health” in non-life-threatening situations.\footnote{Id. at 681–82.}

While the suit was pending, however, the Supreme Court heard the case of Stenberg v. Carhart, involving a Nebraska law with substantially the same language, and the court stayed proceedings until the Supreme Court issued a decision.\footnote{Id. at 682.} Upon the issuance of the Supreme Court’s ruling that the Nebraska law was unconstitutional due to both the lack of exception for health of the mother and the prohibition on dilation and evacuation abortions, the most common form of abortion after 13–14 weeks, the district court lifted its stay.\footnote{Id. at 682–83 (citing Stenberg v. Carhart, 530 U.S. 914, 930 (2000)).} Finding that Stenberg controlled, as the statutory language was nearly identical, the court held that these criminal provisions were unconstitutional and issued a permanent injunction against the enforcement of its partial-abortion ban.\footnote{Id. at 683–84, 686.}
However, West Virginia did not just limit itself to providing criminal penalties for abortion during this period. In 1984, the Legislature passed the Parental Notification of Abortions Performed on Unemancipated Minors Law. This law prohibits physicians from preforming “an abortion upon an unemancipated minor until notice of the pending abortion as required [under this law] is complete.” Prior to 2017, parental notification could be waived by a physician, separate from the one to perform the abortion, if they found that the “minor is mature enough to make the abortion decision independently or that notification would not be in the minor’s best interests.” Under this law, notice is only waived upon written confirmation that the person entitled to notice has been notified. However, the notification requirements prior to the abortion do not apply where a physician certifies that a “medical emergency” exists. A “medical emergency” was defined as a condition that, on the basis of a reasonably prudent physician’s reasonable medical judgment, so complicates the medical condition of a pregnant female that it necessitates the immediate abortion of her pregnancy without first determining gestational age to avert her death or for which the delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. Significantly, a medical emergency does not include the potential risk of self-harm that may result from a lack of access to care. West Virginia has also passed several other laws regulating the types of abortions performed in the state. The Pain-Capable Unborn Child Protection Act of 2015 prohibits abortions from being performed 22 weeks after “the first day of the woman’s last menstrual period.” Two exceptions exists for “nonmedically viable fetus[es]” or where the patient has a “medical emergency,” as defined above. In either case, the physician must act in a manner that “provides the best opportunity for the fetus to survive,” unless that would create

146 Compare Act of Feb. 23, 1984, § 16-2F-3(c).
147 Act of April 8, 2017, ch. 186, § 16-2F-3(d), 2017 W. Va. Acts 1739, 1742 (“Notice may be waived if the person entitled to notice certifies in writing that he or she has been notified”).
148 W. Va. Code § 16-2F-5(a)
149 § 16-2M-2(5); see also § 16-2F-2(2) (citing § 16-2M-2).
150 § 16-2M-2(5).
152 § 16-2M-4(a).
a greater risk of death or serious risk of substantial and irreversible physical impairment.\textsuperscript{153} Similarly, the Unborn Child Protection from Dismemberment Abortion Act contains the same medical emergency exception,\textsuperscript{154} but applies it to abortions that “purposely [] dismember” the fetus and extract them.\textsuperscript{155} However, it also purports to only ban “dismemberment abortions,” stating that it “does not prevent an abortion by any other method for any reason.”\textsuperscript{156}

By contrast, the Born-Alive Abortion Survivors Protection Act of 2020 establishes standards for how the physician is to treat fetuses that survive the abortion.\textsuperscript{157} The act states that, in such circumstances, the physician shall “exercise the same degree of reasonable medical judgment to preserve the life and health of the child” as they would “to any other child born alive at the same gestational age”\textsuperscript{158} and “ensure the child . . . is immediately transported and admitted to a hospital.”\textsuperscript{159}

The most recent pre-Dobbs legislation passed in West Virginia is the Unborn Child with a Disability Protection and Education Act of 2022.\textsuperscript{160} This act requires that, before performing an abortion, medical professionals must obtain a statement from their patients that “the reason for the abortion was not because of a disability,”\textsuperscript{161} meaning “the presence or presumed presence of a disability or diagnosis in a fetus including, but not limited to, chromosomal disorders or morphological malformations occurring as the result of atypical gene expressions.”\textsuperscript{162} However, in the case of medical emergencies or medically nonviable fetuses, such a statement is not needed.\textsuperscript{163}

Looking through these non-criminal abortion statutes, some general trends appear. First, in each of the acts regulating abortion procedures, the law imposes an affirmative duty on the physician to act in a particular manner.\textsuperscript{164} Second, each section expressly protects the patient seeking an abortion from any

\begin{enumerate}
\item § 16-2M-4(b).
\item § 16-2O-1(b).
\item § 16-2O-1(a)(3).
\item § 16-2O-1(d)(1).
\item § 16-2P-1(b)(1)(A).
\item § 16-2P-1(b)(1)(B).
\item § 16-2Q-1(d)(1)(A).
\item § 16-2Q-1(a).
\item § 16-2Q-1(b), (c)
\end{enumerate}

\textit{See W. VA. CODE §§ 16-2F-3, -2M-4, -2O-1(b), -2P-1(b), -2Q-1(b)-(g) (establishing the standards for physicians performing abortions).}
penalty.165 Finally, most establish reporting requirements on the part of the physician to the state.166

Finally, it must be noted that, in the years following Roe, West Virginia passed an amendment to the state constitution via a voter referendum.167 This amendment states that “Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.”168 In doing so, the legislature preempted challenges to abortion law under the state constitution’s guarantees in the even that Roe was overturned. As shown by the following section, this appears to have paid off.

D. The Effect of Dobbs on Abortion in West Virginia

The Dobbs decision had an almost immediate impact in West Virginia. Within three days of the decision’s release, Women’s Health Center of West Virginia, “the only outpatient health center offering abortion care in West Virginia,” filed suit in the Circuit Court of Kanawha County, seeking declaratory and injunctive relief against the enforcement of West Virginia’s criminal abortion law.169 Relying on the doctrine of “implied repeal” and finding that the criminal abortion law was “irreconcilable with the modern statutory regime,” the court found that the plaintiffs were likely to succeed on the merits of their action on their motion for a preliminary injunction.170 Further, the court found that, even absent implied repeal, the statute was void under the desuetude doctrine because of its long period of disuse.171 With these merits, combined with the risk of prosecution to the plaintiffs, the risk of harm to pregnant individuals in West Virginia, the court found more than enough reasoning to enjoin the application of the criminal abortion law.172

However, this would not be the end of the criminal abortion law, as less than two months later, the legislature adopted a new abortion ban. On July 20, 2022, the day the Kanawha County Circuit Court issued its injunction, Governor Jim Justice issued a proclamation calling on the legislature “to convene in Extraordinary Session” starting on July 25.173 On July 25, the Governor amended

165 W. VA. CODE §§ 16-2F-8(d), -2M-6(d), -2O-1(c)(4), -2P-1(c)(4), -2Q-1(l).
166 §§ 16-2F-6, -2M-5,-2Q-1(l).
168 W. VA. CONST. art. VI, § 57.
170 Id. at *7–9.
171 Id. at *10–12.
172 Id. at *12–15.
his proclamation to add abortion to the legislative agenda, requesting that the legislature “clarify and modernize the abortion-related laws.” 174 Within two months, a final bill would pass the legislature. 175

West Virginia’s post-Dobbs abortion bill has several key features. First, the bill states that many of the pre-existing abortion laws shall have “no force or effect unless any provision of [the new abortion law] is judicially determined to be unconstitutional.” 176 In doing so, the legislature interestingly provided that “if any provision of § 16-2R-1 et seq. of this code is judicially determined to be unconstitutional, this entire article shall be of no force and effect.” 177 Thus, it seems apparent that the legislature sought to avoid any issues of implied repeal that were addressed in the Miller case.

Second, the act establishes Article 2R of Chapter Sixteen of the Code, titled the “Unborn Child Protection Act.” 178 The act includes a definition of abortion that means “the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a patient known to be pregnant and with intent to cause the death and expulsion or removal of an embryo or a fetus.” 179 However, it does not include “the unintended or spontaneous loss of an embryo or a fetus”—or what is commonly called a miscarriage. The act then establishes the contexts in which an abortion is permitted, including a nonviable fetus, 180 an ectopic pregnancy, 182 a medical emergency, 183 or where the pregnancy is the result of sexual assault or incest (subject to certain limitations). 184 Such abortions must be performed in a hospital

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176 Id. at §§ 16-2F-9, -2I-9, -2M-7, -2O-1(c), -2P-1(d), -2Q-1(m), 33-42-8(d), 61-2-8(d).
177 Id. at § 16-2R-9.
178 Id. at §§ 16-2R-1 to -9.
179 W. VA. CODE § 16-2R-2.
180 Id.
181 § 16-2R-3(a)(1).
182 § 16-2R-3(a)(2).
183 § 16-2R-3(a)(3). A “medical emergency” is “a condition or circumstance that so complicated the medical condition of the patient as to necessitate an abortion to avert serious risk of the patient’s death or serious risk of substantial life-threatening physical impairment of a major bodily function.” § 16-2R-2. While it includes circumstances where it is necessary to terminate one fetus to save another, it does not include “psychological or emotional conditions” or the risk of self-harm. Id.
184 § 16-2R-3(b) (allowing abortions for adults within the first eight weeks of pregnancy resulting from sexual assault or incest and the patient has reported the sexual assault or incest at least 48 hours prior); § 16-2R-3(c) (allowing abortions for minors and incapacitated adults within the first fourteen weeks of pregnancy resulting from sexual assault or incest and at least 48 hours prior a report was made, or the patient has received medical treatment for the assault).
by a professional with hospital privileges. The act also explicitly excludes from the definition of “abortion”: the accidental or unintentional loss of a fetus or child, in vitro fertilization, fetal tissue research authorized under federal law, and contraceptives.

The act also provides for many of the same substantive requirements imposed upon medical professionals under the prior laws. For example, § 16-2R-5 imposes the same requirements for notice that existed under the most recent version of parental notification law. Similarly, § 16-2R-8 establishes the same standards of conduct for doctors handling born-alive aborted fetuses as in the Born-Alive Abortion Survivors Protection Act.

Finally, the act amended and reenacted West Virginia’s criminal abortion statute, although the language is a bit more confusing. Subsection (a) establishes a felony punishable with three to ten years prison sentence for persons “other than a licensed medical professional, as defined in [the act], who knowingly and willfully performs, induces, or attempts to perform an abortion.” Subsection (b) creates a parallel felony for individuals who were “formerly licensed medical professional[s]” under the act. Finally, the act establishes that pregnant individuals seeking abortions are not subject to criminal liability under these laws.

When viewing all these factors in light of the law before and during the Roe era, it seems apparent that the law has made a step forward from that of 1849 but has taken a clear step back from the broad understanding of reproductive rights as fundamental rights under the Constitution. The practical results of the new law have also started to show. Although the Women’s Health Center of West Virginia challenged the new criminal abortion law in the Southern District of West Virginia in February 2023, the Health Center voluntarily dismissed its claims on April 17, 2023. By requiring that all abortions be performed by

185 § 16-2R-3(f)-(g).
186 § 16-2R-4(a).
187 Compare W. VA. CODE § 16-2R-5 (requiring notice be given to the “parent, guardian, or custodian” within 48 hours after an abortion, in the case of a medical emergency, or more than 48 hours prior to the abortion), with W. VA. CODE § 16-2F-3.
188 Compare § 16-2R-8, with § 16-2P-1.
189 § 61-2-8(a).
190 § 61-2-8(b). However, it is unclear whether the offender described can be a medical professional who causes or attempts to cause the abortion while they have their license or whether it is limited to those who were once licensed medical professionals under the act, but who had their license revoked prior to the abortion or attempted abortion described by the law.
191 § 61-2-8(c).
physicians in hospitals, the act all but forced the Center to cease providing abortion services for the first time since 1976, which at least two lawmakers indicated was the purpose of the hospital provision. As a result, for the average West Virginian, the clock on abortion rights and access has effectively been set back to the 1800s.

CONCLUSION

The abortion debate is fraught with political subterfuge. Although there is great consensus among Americans that abortion should be permitted in cases of rape, incest, and where the life of the mother is at risk, for example, these easy areas of agreement have vanished into political chaos. Just this term, the West Virginia legislature attempted to jettison abortion access to minors, who by definition would often be pregnant as a result of rape and whose health outcomes are comparatively worse when forced to carry a fetus to term. Some states did not have, and may not have in the future, an express exception for ectopic pregnancies (where the fertilized egg implants outside the uterus, usually the fallopian tube) even though such pregnancies are never viable and if left untreated can destroy the woman’s fallopian tube and likely result in the woman’s death. In cases where the line between clarity and confusion is often coterminous with the line between life and death, it is insufficient to believe that treating an ectopic pregnancy is not an abortion in a state that forbids abortion without an express exception for the termination of an ectopic pregnancy. And for those who simply claim that the treatment of an ectopic pregnancy is not an abortion even though it is termination of that pregnancy, then it should be simple to make ectopic pregnancy an express exception, considering that an indisputably human life is at stake.

But these political questions are no longer simple in a post-Dobbs world. And they will continue to become more complicated as technologies emerge claiming to save the pregnant person’s life. Considering that legal terminology and medical termination are rarely precisely coterminous, are pregnant persons now at the mercy of medical-legal consensus that such technologies are not lifesaving or is a good chance of survival good enough for those of our legislative

198 See id.
onlookers who seem to value the potential for human life more than actual human life? No one should fear such outcomes in a free society.