

Abortion Legislation: Insight into the Reality of Constitutional Infringement by the Federal Government

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The controversy surrounding abortion in the United States has been an ongoing political, moral, and religious debate. Throughout history to modern times, the legality of abortion has been and continues to be unceasingly contested by both supporters and opponents of the law. While the focus of these debates is generally on the biological development of the unborn fetus and the physical well-being of the mother, there is another significant concern raised by the abortion controversy relating to the United States federal government. The abortion controversy arouses concern about whether the current Supreme Court ruling on abortion is a constructive legalistic effort to remedy pre-existing abortion laws or if it, fundamentally, violates the United States Constitution by infringing upon a woman's civil liberty to choose. Through analyzing the current legal standard on abortion in the United States, it becomes clear that there is a potential element of gestation that should allow a woman to exercise her right to choose but prevents her from doing so because of the narrow standard issued by the Supreme Court. In understanding the legality of abortion laws, this essay will first discuss the foundational element of the United States Constitution upon which the controversy of abortion rests: the Fourteenth Amendment. Following, this essay will examine *Roe v. Wade* and *Planned Parenthood v. Casey*, two Supreme Court rulings that have together constructed the current legislation of abortion in the United States and the legal ramifications of this legislation. Based on this examination, a lethal fetal neurological anomaly known as anencephaly is discussed, suggesting that the current legal standard of abortion prevents a woman carrying a child with anencephaly from exercising her constitutional right to choose. Ultimately, through an examination of present abortion legislation and a lethal neurological condition in an unborn fetus, this essay will conclude that as a result of the legal standard on abortion issued by the Supreme Court, the United States federal

government is infringing upon the United States Constitution by violating a woman's civil liberty to choose. This conclusion raises concern about whether there are other circumstances in which the federal government infringes upon the Constitution. To illustrate, in the effort to contain the ongoing COVID-19 pandemic by the federal government, there was an incident that took place in the recent 2020 presidential election that displayed a violation of the United States Constitution by the executive branch of the federal government. In a nation governed by principles of freedom and equality, the potentiality of government infringement on the Constitution raises concerns regarding the power and function of the United States federal government and the future of politics in America. However, there may be possible remedies that can mitigate these concerns and ensure the prosperity of American politics.

Presently, the legislation of abortion is a direct outcome of two historical Supreme Court decisions: *Roe v. Wade* and *Planned Parenthood v. Casey*. These decisions emanated from concerns that abortion laws, at the respective times of these cases, were unconstitutional, as they violated the Fourteenth Amendment. Thus, before delving into these specific Supreme Court decisions, it is crucial to analyze the Fourteenth Amendment and what it legally entails.

The Fourteenth Amendment to the United States Constitution expands on the Due Process Clause first mentioned in the Fifth Amendment ("14th Amendment"). The first ten amendments to the United States Constitution are collectively termed the Bill of Rights and represent individual civil liberties, also termed natural rights, of the American people concerning the federal government. The Bill of Rights applies to all three branches of the federal government: Legislative (Congress), Executive (President), and Judicial (Supreme Court) ("The Legislative Branch"). These civil liberties are considered inherent to every individual and,

through the Bill of Rights, are constitutionally protected from federal government intrusion (“The Bill of Rights: What Does it Say?”; “The Bill of Rights: A Brief History”). The Fifth Amendment introduces a notion known as the Due Process Clause, which is the obligation that legal affairs are to be managed with due process of law—per just rules and regulations. Essentially, it is the obligation that federal government action complies with the law itself, ensuring that civil liberties will not be infringed upon by the federal government (Strauss). The Fifth Amendment states that no individual will be “deprived of life, liberty or property without due process of law” (Strauss)—meaning, without just and civil practices. Similarly, the Fourteenth Amendment highlights a state government’s constitutional responsibility of the Due Process Clause, as it states, “Nor shall any state deprive any person of life, liberty or property, without due process of law” (“14th Amendment.”). Essentially,

The Due Process Clause of the Fourteenth Amendment echoes that of the Fifth Amendment. The Fifth Amendment, however, applies only against the federal government. After the Civil War, Congress adopted a number of measures to protect individual rights from interference by the states. Among them was the Fourteenth Amendment, which prohibits states from depriving ‘any person of life, liberty, or property, without due process of law.’ (Chapman and Yoshino)

As a result of parallel constitutional responsibility, the legal requirements of both the federal government and the state governments in the context of the Due Process Clause are the same (Strauss).

In the United States, there are two interpretations of the Due Process Clause: procedural due process and substantive due process. The first interpretation refers to the constitutional

requirement of both the federal government and state governments to give “notice, the opportunity to be heard, and a decision by a neutral decision-maker” to any individual whose life, liberty, or property may be denied due to the federal government’s actions (Kenton).

Procedural due process essentially requires that the government abide by fair procedures before stripping an individual’s right to life, liberty, or property. The latter interpretation, substantive due process, safeguards fundamental liberties from government intrusion regardless of whether those liberties are explicit in the United States Constitution. This interpretation of substantive due process is specifically relevant to cases regarding abortion as, generally, the protest in an abortion case includes the claim that anti-abortion laws are an infringement upon privacy, a civil liberty that is not explicit in the Constitution (Kenton). With the understanding of substantive due process, consider the case of Norma McCorvey and the resulting hallmark Supreme Court decision termed *Roe v. Wade*.

In January of 1973, the United States Supreme Court overturned a Texas law that banned abortion, ultimately causing the legalization of abortion on a national level. In 1969, a woman named Norma McCorvey (“Jane Roe”), who lived in Dallas, wanted to terminate her pregnancy. At that time, since 1880, every American state had instituted anti-abortion laws—the only exception being to save a mother’s life (“A Brief History of US Abortion Law”). Therefore, in 1969, abortion was only legal in Texas to save a woman’s life. In determination to protest the Texas abortion law, McCorvey paired with Texas attorneys—Linda Coffee and Sarah Weddington—who were also interested in challenging the law. In 1970, on behalf of McCorvey, Coffee and Weddington filed a lawsuit against Henry Wade, the district attorney of Dallas County. They claimed that the Texas law banning abortion violated McCorvey’s constitutional

right to privacy, according to the substantive due process interpretation of the Due Process Clause. According to McCorvey, her civil right to privacy included making personal medical decisions on behalf of her own body, which constituted the decision to have an abortion. In the same year, the Texas district court ruled that the Texas law prohibiting abortion was, in fact, illegal due to its violation of the Fourteenth Amendment's Due Process Clause, specifically substantive due process. Also, Wade proclaimed that he would forcefully prosecute those doctors who continued to perform abortions. By that time, however, McCorvey had given birth to her child and had put the child up for adoption ("*Roe v. Wade* Is Decided").

Ultimately, McCorvey's case was appealed to the Supreme Court, which resulted in the historical court decision termed *Roe v. Wade*. In a 7-2 decision, the Supreme Court overruled the Texas law that banned abortion. The Court stated that inherent in the Fourteenth Amendment's Due Process Clause is a woman's right to choose a pre-viability abortion—a right that the state governments could not infringe upon. Ultimately, according to *Roe v. Wade*, the Supreme Court ruled,

State criminal abortion laws, like those involved here [in the case of *Roe v. Wade*], that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. ("*Roe v. Wade*, 410 U.S. 113 (1973)")

Essentially, the Court acknowledged that a woman's right to choose a pre-viability abortion was guaranteed in the United States Constitution by the Due Process Clause, which protects a

woman's right to privacy. In making this decision, the Supreme Court specified two interests of the state government in regards to abortion, stating, "Though the State cannot override [a woman's right to terminate her pregnancy], it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a 'compelling' point at various stages of the woman's approach to term" ("*Roe v. Wade*, 410 U.S. 113 (1973)"). Thus, the state governments had two interests: preserving and safeguarding the life of the pregnant woman and preserving and safeguarding the potential life of the unborn fetus (Paulk). These interests, as declared by the Court, pertained to specific periods of pregnancy. Thus, the Court instituted a trimester approach, dividing pregnancy into three trimesters that corresponded to these interests to regulate abortion laws. As the trimester approach was issued by the federal government, it became the standard for all state governments. Once the Supreme Court clarifies the understanding of an amendment to the Constitution, every state must fall in line with that understanding. Thus, state governments cannot go against the Supreme Court's constitutional interpretations. The Supreme Court stated that in the first trimester, a woman was able to choose to have a pre-viability abortion without government interference, as the interests regarding the life of the mother and the unborn fetus were not government concerns. However, in the second trimester, protecting the health of the mother became a government interest, resulting in the ability of the government to regulate but not prohibit abortion to protect the life of the mother. In the third trimester, protecting the fetus became a government interest, resulting in a state government's ability to prohibit abortion. According to *Roe v. Wade*, the last trimester occurred after fetal viability, and it was in this

trimester that state governments could completely prohibit abortion procedures (“*Roe v. Wade* Is Decided”; Paulk; “*Roe v. Wade*”; Tushnet).

By cause of *Roe v. Wade*, the national standard of abortion laws was set based on the ruling that a woman’s right to a pre-viability abortion, a woman’s right to choose, was protected by the Fourteenth Amendment—specifically, in the Due Process Clause (Paulk). However, the ruling of *Roe v. Wade* did not include an objective definition of viability. The Court merely stated that by the time of the third trimester, the fetus was considered to be viable, stating that a “fetus becomes ‘viable’... [when]...able to live outside the mother’s womb, albeit with artificial aid” (“Supreme Court’s Response to the Question”). The Court explained that the point of viability was to be determined by a medical professional, not the Court itself. Harry A. Blackmun, a prior Associate Justice of the Supreme Court who voted in *Roe v. Wade*, stated, “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer” (“Abortions Later in Pregnancy”). Thus, despite the trimester framework that the Court issued, the definition of viability was extremely vague and dependent on the opinions of medical professionals (“Abortions Later in Pregnancy”). Ultimately, the Court’s ruling of fetal viability evolved into a more ambiguous definition in the Supreme Court decision *Planned Parenthood v. Casey* in 1992.

In response to the Pennsylvania Abortion Control Act of 1982, the Supreme Court instituted a second ruling regarding abortion that reinforced the verdict of *Roe v. Wade* in terms of a woman’s freedom to choose a pre-viability abortion. The Pennsylvania Abortion Control Act

set five strict requirements for any woman seeking an abortion. First, a doctor must inform a woman of the negative consequences of receiving an abortion. Second, a woman must inform her husband of her desire to have an abortion. Third, minors must obtain parental consent before undergoing an abortion procedure. Fourth, a waiting period of twenty-four hours must take place between requesting an abortion and the actual procedure. Last, facilities offering abortions must report and record abortion procedures. In response, several physicians and abortion facilities filed a lawsuit against the federal district court. They claimed that these qualifications were unconstitutional because they infringed upon the Fourteenth Amendment, specifically the Due Process Clause, by placing what is known as an “undue burden”- “a significant difficulty or expense” (Skelton)—for a pregnant woman seeking an abortion. Placing an undue burden before a pregnant woman seeking an abortion, they claimed, was not in keeping with fair legal procedures implicit in the Due Process Clause and that the five requirements invaded a woman’s right to privacy (Skelton; “Lesson 2 Factors of Undue Burden”). This lawsuit ultimately led to the famous Supreme Court decision termed *Planned Parenthood v. Casey*.

In 1992, approximately two decades after *Roe v. Wade*, the Supreme Court issued another ruling termed *Planned Parenthood v. Casey* regarding a woman’s right to an abortion. The Court acknowledged that the restrictions presenting an “undue burden” to women seeking an abortion were unconstitutional—a violation of the Fourteenth Amendment’s Due Process Clause (“Fourteenth Amendment — Due Process Clause”). The Court held that any undue burden that sets a restriction on a woman’s right to choose is a violation of liberty mentioned in the Fourteenth Amendment’s Due Process Clause, liberty defined as the “freedom from arbitrary and unreasonable restraint upon an individual” (Wex Definitions Team; Wharton et al). In the context

of abortion, the Court defined an undue burden as “purposefully placing a substantial obstacle in the path of a woman seeking an abortion of a fetus that is not yet viable” (Skelton). Ultimately, the Supreme Court ruled,

A person retains the right to have an abortion, established by *Roe v. Wade*, but the state’s compelling interest in protecting the life of an unborn child means that it can ban an abortion of a viable fetus under any circumstances except when the health of the mother is at risk. Also, laws restricting abortion should be evaluated under an undue burden standard rather than a strict scrutiny analysis. (Skelton)

In this ruling, the Court also stated that *Planned Parenthood v. Casey* declared that a woman’s right to a pre-viability abortion included three components. First, a woman has the right to an abortion before fetal viability without any interference from the state government. Second, state governments have the authority to restrict abortions post fetal viability unless a woman’s life is in danger. Last, the Court proclaimed the fundamental principle that the state governments have a concern to protect the health of both the unborn fetus and the mother from the beginning of a woman’s pregnancy (Fundamental Rights (“Noneconomic Substantive Due Process”)).

While this decision strengthened the ruling of *Roe v. Wade* in that a woman’s right to a pre-viability abortion was protected by the Fourteenth Amendment, it altered the legal approach to abortion from a division of trimesters to an undue burden standard and a fetal viability analysis (“Fourteenth Amendment — Due Process Clause”). However, since the Court eradicated the trimester framework but maintained the viability standard, the definition of viability became significantly vaguer than it had been in the ruling of *Roe v. Wade*. This ambiguity allowed “states to curb the availability of abortion in favor of a more flexible medical

definition of viability” (The Editors of Encyclopaedia Britannica), prohibiting abortions in the early stages of pregnancy. Thus, while *Planned Parenthood v. Casey* seemingly displayed a beneficial advancement in the legality of abortion laws, the Court’s ruling posed a controversy: fetal viability. This controversy arouses concerns surrounding the legality of abortion laws in modern society.

_____ Presently, in keeping with *Roe v. Wade* and *Planned Parenthood v. Casey*, a woman has a right to a pre-viability abortion. The undue burden standard and fetal viability analysis instituted in *Planned Parenthood v. Casey* remains the modern-day legal standard on abortion. According to the Supreme Court, a woman’s constitutional right to choose ends at the time of fetal viability. However, because of the Court’s ambiguous definition of viability, state governments can set individual limitations on a woman’s right to choose based on a state’s interpretation of viability. These state limitations, however, are based on a biological understanding of a typical, healthy gestational course. Thus, the possibility of a nonviable fetus after a state’s gestational limit for abortion may be neglected. Currently, forty-three states ban abortion at specific points in gestation, calculated from the first day of a woman’s last menstrual cycle: one state at twenty weeks, seventeen states at twenty-two weeks, four states at twenty-four weeks, one state at twenty-five weeks, and twenty states within the range of twenty-four to twenty-eight weeks gestation. Abortion procedures after these gestational limits are, generally, banned as long as the mother’s life is not compromised. Shockingly, only five states permit abortions after these gestational limits if a lethal fetal anomaly is present (“An Overview of Abortion Laws”). What about the remaining states? What happens if a lethal fetal anomaly is diagnosed at the gestational limit of abortion or after the gestational limit? State gestational limitations for abortion reflect

definitions of fetal viability, meaning the point at which a fetus can survive outside the mother's womb with or without medical intervention. However, if a fetus presents a lethal anomaly that will result in either a stillborn delivery or a neonatal death, it would seem as though the fetus is not viable, which should permit a woman carrying a fetus with a lethal anomaly to receive an abortion after a state's gestational limit for abortion is reached. However, with the exception of five states, a woman is prohibited from receiving an abortion after the gestational limit for abortion in a respective state even though she may be carrying a fetus with a lethal anomaly. To highlight a specific example of such a case consider a type of lethal fetal anomaly: anencephaly—a severe neural tube defect. To delve into the political implications of abortion in regards to anencephaly, it is crucial to first examine both the normal and abnormal fetal neurological development throughout the first several weeks of gestation. After examining the normal and abnormal developmental processes, it becomes clear why the current abortion legislation does not guarantee a woman's freedom to choose a pre-viability abortion.

Biologically, the process of gestation begins on the first day of a woman's previous menstrual cycle, two weeks before physical fertilization. Fundamentally, the process of fertilization consists of the fusion of two cells: a secondary oocyte (egg) from a female and a single spermatozoon from a male, both containing twenty-three chromosomes in their nuclei. Two weeks following the first day of a female's menstrual cycle, a process known as ovulation occurs—the release of a secondary oocyte from a woman's ovary into the fallopian tube. When the oocyte is released, it is surrounded by a protective protein coat termed the zona pellucida. At fertilization, the spermatozoon binds to specific receptors found on the zona pellucida, which enables the head of the spermatozoon to penetrate the secondary oocyte. Surrounding the nucleus

of the spermatozoon is a cap-like organelle termed the acrosome, which releases enzymes that allow the head of the spermatozoon to penetrate through the secondary oocyte once the spermatozoon has bound to the receptors on the zona pellucida. The spermatozoon then dispenses its genetic material into the cytoplasm of the secondary oocyte, resulting in the formation of a zygote with forty-six chromosomes in its nucleus. In the following twenty-four hours, the zygote undergoes basic mitotic divisions, resulting in multiple cells termed blastomeres, each one still enclosed within the original zona pellucida. After the first of these mitotic divisions, the zygote is considered an embryo. By day three post-fertilization, an event termed compaction, the concentration or condensing of cells into two distinct groups of cells, takes place within the original zona pellucida. One group of cells develops into the inner cell mass—the embryoblast—and the other group of cells develops into the outer cell mass—the trophoblast. Together, these groups of cells enter the female uterus, providing the foundation for fetal development (Moore et al.; “Blastocyst Culture: Factsheet”).

On day five post-fertilization, the embryo enters a stage of development known as the blastocyst. In this stage, the embryo, still protected by the zona pellucida, enlarges as it absorbs fluid emanating from the uterine lining. As a result of this absorption, the embryoblast shifts towards one pole of the embryo. After the enlargement of the embryo, a process known as hatching occurs: the embryo enzymatically “hatches” from the zona pellucida. On day six post-fertilization, the embryo undergoes the process of implantation: the attachment of the embryo to the endometrium, the inner lining of the uterus. The process of implantation lasts until the middle of the second week post-fertilization, ending with the embryo completely embedded in the endometrium. When the embryo implants into the endometrium, the trophoblast remains

the outermost layer of cells, while the embryoblast remains to the inner cell mass. The trophoblast is responsible for stimulating the cells of the outer mass to proliferate and differentiate into two sub-groups of cells: the syncytiotrophoblast and the cytotrophoblast. The syncytiotrophoblast is an invasive tissue that is in direct contact with the endometrium, driving the process of implantation. Beneath the syncytiotrophoblast is the cytotrophoblast, which serves to replenish the syncytiotrophoblast. Ultimately, it is the trophoblast that will give rise to the placenta, which will serve to nourish the growing embryo (Moore et al.).

In week three, after the completion of implantation, a process known as gastrulation takes place, consisting mainly of the differentiated embryoblast. The embryoblast differentiates into two structures known as the epiblast and hypoblast. The epiblast ultimately develops into the formal embryo and amniotic cavity, while the hypoblast ultimately develops into structures known as yolk sacs. Together, the epiblast and hypoblast form the bilaminar disc, a two-layered flat structure. As a result of gastrulation, this disc transforms into a trilaminar embryonic disc, a three-layered cell structure consisting of the endoderm, mesoderm, and ectoderm. In the formation of the trilaminar embryonic disc, the cells surrounding the initial epiblast first proliferate and migrate towards the caudal region of the epiblast's midline. The result is an elevated structure known as the primitive streak. In the middle of the primitive streak, an indentation forms, known as the primitive groove. At the cranial portion of the primitive streak, cells proliferate and migrate to elongate the primitive streak. The resulting elongated structure is termed the primitive node. Then, to form the first layer (endoderm), cells from the primitive streak detach and migrate downwards through the primitive groove, ultimately encountering the original epiblast and hypoblast. The hypoblast is then completely displaced by these migrating

cells, forming a new layer of cells called the endoderm. Following the formation of the endoderm, cells from the epiblast migrate downwards through the primitive groove, creating another layer of cells known as the mesoderm, which rests on top of the endoderm. Unlike the endoderm and mesoderm, the final layer of cells, termed the ectoderm, is not a result of a migration of cells through the primitive groove. Rather, cells surrounding the epiblast proliferate and remain on top of the mesoderm. These three layers of cells become known as the germ layers from which all body organs originate (Moore et al.).

Towards the end of the third week post-fertilization, following gastrulation, the process of neurulation—the formation of the neural tube—begins. The neural tube is the foundational structure from which the central nervous system—the brain and spinal cord— develops. At this point, the epiblast has differentiated into the trilaminar disc consisting of the three main germ layers. Emanating from the mesoderm, a collection of cells begin to proliferate and migrate upwards in the cranial direction, forming a structure known as the notochord. The notochord's primary function is to induce the portion of the ectoderm that rests directly above it to develop into the neuroectoderm—a specialized form of ectoderm tissue that ultimately forms the neural tube. The neuroectoderm transforms into a flat structure termed the neural plate, which widens and expands upon development. Following the formation of the neural plate, an indentation—termed the neural groove—forms in the center of the neural plate. The remaining side portions of the plate evolve into neural folds, such that there are two folded portions on either side of the neural groove. The neural folds continue to expand and grow towards each other, ultimately fusing. The cranial and caudal ends of the neural groove remain opened and are referred to as neuropores. This semi-closed structure is considered to be the neural tube.

Ultimately, the cranial neuropore develops into the brain and the caudal neuropore develops into the spinal cord. By the end of the fourth-week post-fertilization, the basic structure of the central nervous system is present, the neural tube is closed, and the beginning process of neurulation is complete (Moore et al.; “Central Nervous System Birth Defects”).

In a typical gestational course, the neural tube properly closes and forms the brain and spinal cord, allowing the fetus to undergo normal development. However, there is the potentiality of a fetus presenting a neural tube defect if there is insufficient closure at some point along the neural tube. If there is a failure of full closure occurring in the caudal portion of the neural tube, the spinal cord will be impacted, the severity dependent on the degree of insufficient closure. If there is a failure of full closure occurring in the cranial portion of the neural tube, the brain will be impacted, the severity dependent on the degree of insufficient closure. The most severe neural tube defect is a lethal condition known as anencephaly. Anencephaly results from a lack of full cranial closure during the first few weeks of gestation, causing a partial or complete absence of the forebrain and cerebrum. Typically, in cases of anencephaly, the remaining portion of the brain is neither covered by skin nor bone. The Cleveland Clinic explains that anencephaly occurs “when the skull, scalp and brain do not develop properly in the womb. Portions of the baby’s brain and skull are missing. The brain tissue that does form is usually exposed because there isn’t enough skin and bone to cover it” (“Anencephaly: Neural Tube Defect, Birth Defect, Causes, Prevention”). According to the Centers for Disease Control (CDC), anencephaly affects approximately one in every forty-six hundred pregnancies annually. Many of these births result in miscarriages, as the deformed nervous tissue interferes with ongoing fetal development. Thus, the pervasiveness of anencephaly in newborns is lowered to one in every ten thousand births.

Unfortunately, if anencephaly is diagnosed in a growing fetus, there is no treatment. According to Stanford's Children's Health, a component of the Lucile Packard Children's Hospital of Stanford University, "There is no cure or standard treatment for anencephaly. Treatment is supportive. This means efforts are made to keep the baby as comfortable as possible... counseling services are available to help parents cope with the loss of their child" ("Stanford Children's Health"). Sadly, babies born with anencephaly die shortly after birth if not before. Boston Children's Hospital notes that "Due to the lack of development of babies' brains, about 75 percent of infants are stillborn and the remaining 25 percent of babies die within a few hours, days, or weeks after delivery" ("Anencephaly: Diagnosis & Treatment"), experiencing what is considered a neonatal death ("What is a Neonatal Death?"; "Central Nervous System Birth Defects"; "Anencephaly: MedlinePlus Genetics"; "Facts About Anencephaly"; Falchek).

Given that anencephaly is a lethal fetal disease and inevitably results in the death of the growing fetus, the concept of fetal viability in regards to abortion legislation is critical. Recall that the present legality of abortion in the United States remains at an undue burden standard and a fetal viability analysis. Fetal viability, in the context of abortion legislation, is defined as the ability of the fetus to survive outside of the mother's womb with or without medical intervention. According to the current abortion legislation, a woman has the right to choose a pre-viability abortion, and state governments cannot prohibit abortion procedures before the point of fetal viability. In the case of anencephaly, however, there is no point throughout the gestational course in which the fetus would be able to survive outside of the mother's womb with or without medical intervention. Essentially, there is no point throughout gestation in which a fetus diagnosed with anencephaly is considered viable according to the Supreme Court's definition of

fetal viability. Thus, a mother carrying a fetus with anencephaly should be permitted to exercise her right to choose at any point throughout her pregnancy. However, based on present-day abortion legislation, a woman, in this case, is denied her right to choose in thirty-eight states, leaving a mother to carry out a pregnancy that will result in the inevitable death of her child. This reality is constitutionally unjustified, as it infringes upon a woman's right to choose a pre-viability abortion. However, these state rulings are simply a consequence of the original federal government regulation issued by the Supreme Court in *Roe v. Wade* and *Planned Parenthood v. Casey* ("Supreme Court's Response to the Question").

_____ Fundamentally, the Supreme Court's ruling regarding abortion corresponds with a typical, healthy gestational course, excluding the reality of lethal fetal diseases. Rather than providing a concrete definition of fetal viability that encompasses the potentiality of fetal fatality, the Court provided a very vague interpretation of viability, allowing states to set individual limitations regarding lethal fetal anomalies and abortion. The ruling instituted by the Supreme Court does not ensure that a woman's civil liberty to choose is protected in the case of anencephaly. Instead, it allows for the potential infringement on this liberty. The current ruling must be altered in such a way to include gestational circumstances in which there is no potential for fetal viability. Simply regulating that a woman has the right to choose a pre-viability abortion, allowing states to individually define viability and subsequently set respective limitations on abortions, does not safeguard a woman's civil liberty to choose. Rather, it violates that civil liberty, leaving a woman expecting a child with anencephaly confined to an unconstitutional regulation.

_____ This violation of a woman's civil liberty to choose arouses concern about the general power of the federal government. The federal government serves to enact justice and safeguard

civil liberties, and the American people believe that these responsibilities will be fulfilled with their interests prioritized. American civilians expect that federal government actions comply with the foundational elements of the United States Constitution, preserving the freedoms and liberty afforded to the American people. How are the American people meant to rely on a political system whose actions seem to contradict these clear and necessary responsibilities? At what point should the American people question whether the federal government is acting in accordance with these constitutional responsibilities and obligations or whether its actions completely overstep fundamental American freedoms? These questions not only spark suspicion regarding the authority of the federal government, but they also provoke a serious concern that there may be other matters in which the federal government wrongfully imposes its authority over the American people.

Seemingly, the legality of abortion may not be the only case in which the Constitution might be currently infringed upon by the federal government. To illustrate, consider the 2020 presidential campaign and then-candidate Joe Biden's plan to manage the ongoing COVID-19 pandemic. Before being elected as President of the United States, presidential nominee Joe Biden outlined his administration's plan to prevent the spread of COVID-19 in America. Throughout his campaign, President Biden made several references to a nationwide mask mandate. In his presidential campaign, President Biden stated, "It's a simple measure, everyone needs to wear a mask in public" (Subramaniam), with the implication that a nationwide mask mandate would be enforced if he were elected president. Even more so, President Biden stated, "I'll go to every governor and urge them to mandate mask-wearing in their states, and, if they refuse, I'll go to the

mayors and county executives and get local mask requirements in place nationwide” (Subramaniam).

Interestingly, however, due to the Tenth Amendment to the United States Constitution and the Public Service Act—a piece of United States federal legislation enacted in 1944—the President of the United States does not have the legal authority to institute such a nationwide health regulation. The President has the authority to mandate mask-wearing on federal property and within federal facilities, but not beyond federal government estates. According to the Tenth Amendment to the United States Constitution, states have what is known as “police power”, an authoritative ability that provides state governments additional powers—powers that are not specifically delegated to the federal government. As a result of “police power”, states can implement and enforce far-reaching regulations that protect the health, safety, and welfare of the public. Thus, states, unlike the federal government, do have the power to enforce mask mandates on a statewide level (“Police Powers”). Furthermore, outside the limits of federal property, the Public Health Service Act, Section 319, grants authority to the Secretary of Health and Human Services to enforce national health mandates in the United States:

The Public Health Service Act (PHSA) provides the legal authority for the Department of Health and Human Services (HHS), among other things, to respond to public health emergencies. The act authorizes the HHS secretary to lead federal public health and medical response to public health emergencies, determine that a public health emergency exists, and assist in their response activities. (Emergency Authority and Immunity Toolkit)

Section 319 of the Public Health Service Act “grants the Secretary of Health and Human Services [“delegated in part to the CDC”] the authority to issue regulations if necessary ‘to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the [American] States or possessions, or from one State or possession into any other State or possession’” (Shen). President Biden sought to utilize this legislation as the foundation of his push for a nationwide mask mandate. However, Biden interpreted this section of the Public Service Act too widely, suggesting that his executive power would allow him to mandate masks not only on an interstate level but also on an intrastate level. According to critics, Biden’s view was overly broad and would have a tough time withstanding legal scrutiny because it essentially “[intrudes] on what the [states are] responsible for” (Subramaniam). Josh Blackman, a constitutional law professor at South Texas College, explains that “The statute would have to be read very broadly to give the President the authority to require, for example, people to wear a mask while walking outside or traveling on an interstate highway within the confines of their state...Once you go beyond people in federal facilities, you’re really intruding on what the state’s responsible for” (Subramaniam). The power to regulate masks on federal land, which includes interstate federal property, such as airports or train stations, is delegated to the executive branch; but the power to mandate masks on an intrastate level is delegated to the authority of the states. With this understanding of the Tenth Amendment and the Public Health Service Act, the Biden-Harris administration’s plan to manage the COVID-19 pandemic appeared to be beyond its constitutional authorization. As a result, President Biden’s presidential campaign and his impending presidency posed several concerns regarding his efforts to manage the COVID-19 pandemic (Subramaniam).

In response to the Biden-Harris Administration's looming nationwide mask mandate, critics claimed that such an order was not only unjust because it exceeded the boundaries of the federal government's authority but also because it violated the civil liberties of the American people. These critics believed that a nationwide mask mandate infringed upon the civil liberties guaranteed by both the First and Fourteenth Amendments to the United States Constitution. In regards to the First Amendment, critics claimed that mask-wearing prevents them from exercising their freedom of religion. According to the Religious Freedom Restoration Act of 1993, governments are obligated to exempt religious activities from general mandates that impose a substantial burden on an individual's ability to freely practice their religion (Shen). In regards to the Fourteenth Amendment, critics claimed that wearing a mask violated their right to privacy inherent in the Due Process Clause, which allows them to make decisions on an individual basis regarding their health (Caldera). Professor Bill Dunlap from Quinnipiac University stated that Biden's order will undoubtedly be taken to court and examined against foundational congressional standards if enforced. Further, CNN Politics explained that the federal government can execute orders on federal property but not on a nationwide scale: "There appears to be no legal authority that would allow a US president to enact a nationwide mask mandate. There are exceptions where the executive authority allows the President to enforce such a mandate, such as on federal property, though a nationwide rule would almost certainly be challenged in court"(Subramaniam). Other professors and legal scholars believed that such a mandate would be appealed to the Supreme Court, resulting in a ruling against President Biden (Storace).

_____ While President Biden did push for a nationwide mask mandate in his presidential campaign, it appears that his administration instituted a narrower mask mandate, acting within its rightful authoritative limitations and only mandating masks on federal property. President Biden stated, “As President, I’ll mandate mask wearing in all federal buildings and all interstate transportation because masks save lives. Period” (Subramaniam). On January 20, 2021, President Biden instituted an executive order regarding practicing the CDC guidelines to prevent the spread of the COVID-19 virus. The order is titled “Protecting the Federal Workforce,” and it mandates that all persons working in or entering federal buildings or federal property wear masks, practice social distancing, and comply with the guidelines of the CDC (“Protecting the federal Workforce and Requiring Mask-Wearing”). In his order, President Biden states that the purpose of mandating masks is to prevent the spread of the COVID-19 virus:

It is the policy of my Administration to halt the spread of coronavirus disease 2019 (COVID-19) by relying on the best available data and science-based public health measures. Such measures include wearing masks when around others, physical distancing, and other related precautions recommended by the Centers for Disease Control and Prevention (CDC). (Laris)

The federal government does have the authority to mandate masks on federal property or within federal facilities, thereby validating President Biden's executive order. In addition to this executive order, the Biden-Harris Administration is working to encourage state governments to enact mask mandates. Instead of implementing a nationwide mask mandate, the Biden-Harris administration plans to “work with governors and mayors...by asking the American people to do what they do best: step up in a time of crisis” (Hauck). While the Biden-Harris administration

worked towards enforcing a nationwide mask mandate, the power to mandate and enforce such an order proved to be beyond the administration's authoritative reach. Despite the reality of the Biden-Harris administration being unable to issue a nationwide mask mandate, it remains concerning that there was a presidential candidate, now a current president, who attempted to act beyond his constitutional, authoritative abilities. While the Biden-Harris administration was unsuccessful in its attempt to mandate masks nationwide, the fact remains that a major-party candidate running to lead the executive branch of the federal government actively prepared and supported the institution of an unconstitutional regulation.

Undoubtedly, this reality of constitutional infringement, both in the context of abortion legislation and COVID-19 regulations, sparks significant concern regarding the federal government's authority and position as the protector and enforcer of the United States Constitution. The United States Constitution is a physical manifestation of American society's ethical concerns—the federal government serving as guardians, interpreters, and supporters of those concerns. As a representative democracy, American civilians trust that those individuals being elected into office will protect and defend the Constitution with the interest of the nation being prioritized. However, how are the American people meant to perceive the federal government as safeguarders of the Constitution when it appears that its actions are in direct conflict with its moral obligations? While the Constitution grants a woman the freedom to choose a pre-viability abortion, the Supreme Court's ruling seems to limit this exact right in the case of a lethal fetal anomaly. Further, while the Constitution ensures that state governments have authority over matters that are not delegated to the federal government, President Joe Biden attempted to overpower constitutional provisions and exceed his capabilities as determined by

federal law. How is society meant to reconcile these apparent or attempted violations of the Constitution? Is the American public meant to passively observe and act indifferent towards such incidents? Is America meant to actively rebel to the point of violent protesting and social unrest? How is American society meant to perpetuate the foundational American ideals of equality, justice, and liberty when it appears that its leaders do not demonstrate those same moral standards? Perhaps the most pressing question remains: if incidents of constitutional infringement have occurred in the past—whether it be decades past or in the previous year—will American politics echo these actions in the future?

While there may not be simple answers to these questions, there are ways for the American people to obtain clarity moving forward. Broadly speaking, the American people are woefully uneducated about the American Constitution and government system. According to a study conducted in 2017 by the Annenberg Public Policy Center at the University of Pennsylvania, “Many Americans are poorly informed about basic constitutional provisions” (“Americans Are Poorly Informed About Basic Constitutional Provisions”). The study states, “More than a third of those surveyed (37 percent) can’t name any of the rights guaranteed under the First Amendment; Only a quarter of Americans (26 percent) can name all three branches of government” (“Americans Are Poorly Informed About Basic Constitutional Provisions”). In response to these statistics, Kathleen Hall Hamieson—the director of the center—explains that “protecting the rights guaranteed by the Constitution presupposes that we [Americans] know what they are. The fact that many don’t is worrisome” (“Americans Are Poorly Informed About Basic Constitutional Provisions”). These statistics are only several examples taken from the study that proves that a large portion of the American population is uneducated about the

American Constitution and government system. Consequently, this portion of the American people does not adequately understand their civil liberties that are guaranteed by the Constitution. Without this understanding, these people cannot defend themselves from potential government intrusion on these civil liberties. Therefore, the general American population must become more educated regarding basic constitutional rights and the authoritative limitations of the United States government. Perhaps one solution to this issue is to institute a progressive civic curriculum in all high schools nationwide, where students are required to take four consecutive years of civic education to graduate. In this way, more Americans can become educated about basic constitutional rights and liberties.

Additionally, perhaps the American nation should strive for a de-emphasis of political party identification and focus on the case-by-case policy ideas of candidates. While political party identification is important, it should not be the only factor under consideration when electing officials into the government. The American people seem to depend on party affiliation when voting for government officials— “49% of all registered voters either identify as Democrats or lean to the party, while 44% identify as Republicans or lean to the GOP” (“Trends in Party Affiliation Among Demographic Groups”). When relying solely on party affiliation, voters may believe that their respective party’s candidate is an appropriate representation of that party and thus a suitable choice when it comes to their vote. However, perhaps relying only on the party’s choice should not be the only element taken into consideration when voting. If the American people put their faith in only these parties and refrain from contemplating the actual implications of a candidate on a case-by-case basis, the American people may continue to have their constitutional rights infringed upon as a result of mere political affiliation. Perhaps the

American people should focus on individual candidates—their beliefs and policies—rather than relying only on a political party and its respective beliefs.

Considering the issues of abortion and government intrusion on constitutionally mandated rights is complex and is not always clear. This paper has addressed insufficient abortion rulings by the Supreme Court enacting a rule that does not take into account certain mitigating factors, such as anencephaly. In addition, by addressing the Biden-Harris Administration's attempt at further government overstepping in the realm of public health and COVID-19, this paper attempts to clarify that the government may continue to run roughshod over civil liberties. To respond to these issues, education and evaluations of candidates on the part of the American people are crucial. John Adams, one of the Founding Fathers of the United States, stated that “[liberty] must at all hazards be supported. We have a right to it, derived from our Maker. But if we had not, our fathers have earned, and bought it for us, at the expense of their ease, their estates, their pleasure, and their blood” (Adams). To fulfill the desires and vision of the Founding Fathers, it's incumbent upon the American people to pursue liberty and seek out meaningful methods of transformation for the unstable system that currently exists.

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