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Raising Our Standards: Rethinking the Supreme Court's Abortion Jurisprudence

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NOTE

Raising Our Standards: Rethinking the Supreme Court's Abortion Jurisprudence

MKB Management Corp. v. Stenehjem, 795 F.3d 768 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016).

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I. INTRODUCTION

The controversy regarding abortion rights in the United States is perhaps the single most polarizing and heated domestic issue facing our nation today. According to the most recent Gallup poll recording American's views on abortion, twenty-nine percent of Americans believe abortion should be legal in all circumstances, fifty-one percent believe abortion should be legal in limited circumstances, and nineteen percent believe abortion should be illegal in all circumstances.[1]

Abortion is an incredibly sensitive subject to countless Americans with personal beliefs often stemming out of closely-held ideologies rooted in religion and personal liberty, and any decision on the subject should be made with extraordinary care. As such, when the Supreme Court of the United States is determining issues on this matter, it should do so with the utmost consideration, analyzing all implications of the potential reach of its decisions. Recently, Professor Randy Beck summarized the problem with the Supreme Court's current abortion standard well:

> If the Court asks citizens to lay aside deeply held political and social views in light of "a common mandate rooted in the Constitution," it is crucial to demonstrate that constitutional mandate to the contending parties. Drawing a line as far-reaching and consequential as the viability rule without a convincing constitutional rationale is more likely to aggravate the national division over abortion than to quell it.[2]

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1. *Abortion*, GALLUP, http://www.gallup.com/poll/1576/abortion.aspx (last visited Feb. 23, 2016).

2. Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 NW. U. L. REV. 249, 256–57 (2009) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 866–67 (1992) (plurality opinion)).

While the morally "right" or "wrong" issue surrounding abortion could be argued at length, this Note discusses taking a more reasonable approach in the analysis of abortion rights. In implementing standards for abortion rights, the Supreme Court should either apply consistent measures of a fetus's life that will maintain its practical implications over time or allow states to use the resources they possess to do so if the Court will not.

Part II of this Note explores the Supreme Court's abortion jurisprudence by discussing *MKB Management Corp. v. Stenehjem*, which declared a North Dakota statute barring abortions after a fetus has a detectable heartbeat to be unconstitutional. Next, Part III analyzes the relevant history surrounding abortion rights and the rationale behind the precedent relied on in *Stenehjem*. Part IV examines the U.S. Court of Appeals for the Eighth Circuit's decision to void the statute, along with the Eighth Circuit's vehement plea for a new abortion standard. Finally, Part V of this Note reveals flaws in the Supreme Court's current abortion jurisprudence and concludes with an outlook on future challenges to the abortion standard.

II. FACTS AND HOLDING

In 2013, North Dakota passed House Bill 1456 ("H.B. 1456"), later codified in North Dakota Century Code § 14-02.1, which expanded the state's prohibition on abortion to the point in a mother's pregnancy where the fetus has a detectable heartbeat.[3] Prior to this bill's enactment, North Dakota prohibited abortion "[a]fter the point in pregnancy when the unborn child may reasonably be expected to have reached viability," except when necessary to preserve the life or health of the mother.[4]

In restricting the availability of abortions, North Dakota's H.B. 1456 contained two operative provisions. The first provision required a physician performing an abortion to "determin[e], in accordance with standard medical practice, if the unborn child the pregnant woman is carrying has a detectable heartbeat."[5] However, this requirement was not applicable "when a medical emergency exists that prevents compliance."[6] Violation of the heartbeat-testing requirement subjected the performing physician to disciplinary action before the state board of medical examiners.[7] The bill provided, "Failure to

3. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 770 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016).

4. N.D. CENT. CODE ANN. § 14-02.1-04(3) (West 2016). Further, the statute defined "viable" as: "[T]he ability of an unborn child to live outside the mother's womb, albeit with artificial aid." *Id.*

5. *Stenehjem*, 795 F.3d at 770 (alteration in original) (quoting H.R. 1456 § 1.1, 63d Leg. Assemb., Reg. Sess. (N.D. 2013)).

6. *Id.* (quoting N.D. H.R. 1456 § 1.1).

7. N.D. H.R. 1456 § 1.2 ("If a physician performs an abortion on a pregnant woman before determining if the unborn child the pregnant woman is carrying has a detectable heartbeat, that physician is subject to disciplinary action under section 43-17-31.") (codified at § 14-02.1-05.1.2).

determine whether a heartbeat is detectible is punishable through a disciplinary action against a physician by the North Dakota Board of Medical Examiners, which can include suspension or revocation of the physician's license."[8]

H.B. 1456's second operative provision prohibited a physician from performing an abortion on a pregnant woman if the fetus had a "heartbeat [that] ha[d] been detected according to the requirements of section 1."[9] Exceptions were given if there was a medical emergency jepordizing the life or health of the pregnant woman or the life of another unborn child.[10] A physician found in violation of this provision committed a felony, while the pregnant woman faced no liability.[11]

MKB Management Corporation ("MKB") and Dr. Kathryn Eggleston (together, "Plaintiffs") brought suit challenging the statute's constitutionality and sought a preliminary injunction.[12] MKB is the sole abortion provider in the state of North Dakota and does business as "Red River Women's Clinic."[13] Dr. Eggleston is the clinic's medical director and provides abortions to the clinic's patients.[14]

Plaintiffs requested preliminary injunctive relief to prevent Defendants from enforcing H.B. 1456.[15] Plaintiffs argued that the "statute [was] an unconstitutional abridgment of the right to abortion protected under the Four-

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8. MKB Mgmt. Corp. v. Burdick, 954 F. Supp. 2d 900, 904 (D.N.D. 2013) (citing N.D. H.R. 1456 §§ 1.2, 3), *aff'd sub nom. Stenehjem*, 795 F.3d 768, *cert. denied*, 136 S. Ct. 981 (2016).

9. *Stenehjem*, 795 F.3d at 770 (quoting N.D. H.R. 1456 § 2.1). Section 1 states:

> Except when a medical emergency exists that prevents compliance with this subsection, an individual may not perform an abortion on a pregnant woman before determining, in accordance with standard medical practice, if the unborn child the pregnant woman is carrying has a detectable heartbeat. Any individual who performs an abortion on a pregnant woman based on the exception in this subsection shall note in the pregnant woman's medical records that a medical emergency necessitating the abortion existed.

N.D. H.R. 1456 § 1.1 (codified at § 14-02.1-05.1.1). *See also id.* at § 1.2 (codified at § 14-02.1-05.1.1).

10. N.D. H.R. 1456 § 2.2.a (codified at § 14-02.1-05.2.2a).

11. *Id.* § 2.4 ("It is a class C felony for an individual to willingly perform an abortion in violation of subsection 1. The pregnant woman upon whom the abortion is performed in violation of subsection 1 may not be prosecuted for a violation of subsection 1 or for conspiracy to violate subsection 1.") (codified at § 14-02.1-05.2.4).

12. *Stenehjem*,795 F.3d at 770.

13. *Id.*

14. *Id.* Dr. Kathryn Eggleston is a board-certified medical physician who is licensed to practice in North Dakota. *Id.*

15. MKB Mgmt. Corp. v. Burdick, 16 F. Supp. 3d 1059, 1061 (D.N.D. 2014), *aff'd sub nom. Stenehjem*, 795 F.3d 768, *cert. denied*, 136 S. Ct. 981 (2016).

teenth Amendment of the United States Constitution."[16] Plaintiffs' primary contention was that the statute banned virtually all abortions in North Dakota, unconstitutionally banning abortions prior to viability of the fetus.[17]

The North Dakota Attorney General and members of the North Dakota Board of Medical Examiners (collectively, "Defendants") argued for the enforcement of H.B. 1456.[18] In their response, Defendants argued that a fetus was viable upon conception[19] and that H.B. 1456 was constitutional, as abortions could still be performed until the point a fetal heartbeat was detected.[20] Further, Defendants contended that "a woman's right to [an] abortion before viability was not absolute and must be weighed against the state's interest in protecting the fetus and mother."[21] Thus, it was Defendants' position that the implementation of H.B. 1456 provided a valuable state interest in protecting the life of an unborn child and protecting the physical and mental health of the mother seeking an abortion.[22] In doing so, Defendants believed they were "preserving the integrity of the medical profession, preventing the coarsening of society's moral sense and promoting respect for human life."[23]

The U.S. District Court for the District of North Dakota granted Plaintiffs a preliminary injunction, whereupon Plaintiffs moved for summary judgment.[24] In support of their motion for summary judgment, Plaintiffs relied on the opinions of both Dr. Eggleston and Dr. Christie Iverson, a board-certified obstetrician and gynecologist, as set forth in their affidavits.[25] Through their affidavits, both argued that fetal cardiac activity was not detectable until about six weeks, and that the fetus was not viable until around twenty-four weeks.[26] More so, they stated that since most women do not know they are pregnant until about six weeks, and with the clinic being open for abortions just one day per week, women would be limited in their ability to obtain an abortion to a single day during the pregnancy's fifth week.[27]

Defendants responded with their own expert, Dr. Jerry Obritsch, a board-certified obstetrician and gynecologist licensed in North Dakota.[28] In his affidavit, Dr. Obritsch stated that fetal cardiac activity was detectable by about six to eight weeks, and that a fetus is viable from conception with the

16. *Id.*
17. *Id.* at 1062.
18. *Id.* at 1060.
19. Dr. Jerry Obritsch argued for Defendants that an unborn child was viable from conception because in vitro fertilization allows an embryonic unborn child to live outside the womb for two to six days after conception. *Id.* at 1066.
20. *Id.* at 1062.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1061.
25. *Id.* at 1066.
26. *Id.*
27. *Id.* at 1063.
28. *Id.* at 1066.

use of in vitro fertilization ("IVF"), which allows the fetus to live outside the womb for two to six days after conception.[29]

In granting Plaintiffs' motion for summary judgment, the district court stated that "[a] woman's constitutional right to terminate a pregnancy before viability has consistently been upheld by the United States Supreme Court for more than forty years since *Roe v. Wade*."[30] The court believed there to be no genuine issue of material fact, even though Dr. Obritsch provided a definition of viability that would satisfy constitutional precedent, his definition was not consistent with that of the Supreme Court or the medical community in general.[31] The district court held that "H.B. 1456 clearly prohibits pre-viability abortions in a very significant percentage of cases in North Dakota, thereby imposing an undue burden on women seeking to obtain an abortion."[32]

Defendants appealed this decision, contending that the trial court erred in granting Plaintiffs' motion for summary judgment and that doing so was an abuse of the court's discretion.[33] On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision and held that the North Dakota abortion law impermissibly infringed on the right to terminate pregnancy before viability, as set forth by Supreme Court's precedent that states may not prohibit pre-viability abortions.[34]

III. LEGAL BACKGROUND

Abortion rights are by no means an unfamiliar topic for the Supreme Court. First, Part III will provide the relevant legal history surrounding the Supreme Court's abortion jurisprudence, providing a foundation for examining the law as it stands today. Then, Part III will delve into the meaning of the illusory term "viability" and how this term interplays with the Supreme Court's abortion standards.

A. The Supreme Court's Abortion Jurisprudence

Prior to the Supreme Court's landmark decision in *Roe v. Wade*, and throughout a large portion of America's history, states have vastly encumbered women's right to an abortion.[35] However, in 1973, the Supreme Court

29. *Id.*

30. *Id.* at 1070.

31. *Id.* at 1073.

32. *Id.* at 1074.

33. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 771 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016).

34. *Id.* at 773.

35. David Masci & Ira C. Lupu, *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RES. CTR. (Jan. 16, 2013), http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/. Many state abortion laws enacted in the nineteenth and early twentieth centuries attempted to protect pregnant women and their fetuses by prosecuting those who performed abortions. *Id.*

heard two cases, *Roe v. Wade* and *Doe v. Bolton*, which declared state statutes barring abortion to be a violation of basic protections granted by the Constitution.

In *Roe*, a pregnant single woman under the pseudonym "Roe" brought a class action lawsuit challenging the constitutionality of Texas's criminal abortion laws.[36] These laws criminalized all attempts to procure an abortion – except for those performed with the purpose of saving the mother's life.[37] In determining this state statute to be unconstitutional and in violation of the Due Process Clause of the Fourteenth Amendment, the Court developed the following guidelines:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[38]

In its decision, the *Roe* Court left "the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the *recognized state interests*."[39] The Court stated that the physician maintained the right "to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention."[40] The Court held that "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."[41] While recognizing states' interests in regulating abortions, *Roe* prevented states from creating laws that barred abortions during the first two trimesters of pregnancy.[42]

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36. Roe v. Wade, 410 U.S. 113, 120 (1973).
37. *Id.*
38. *Id.* at 164–65.
39. *Id.* at 165 (emphasis added).
40. *Id.*
41. *Id.* (noting there were still exceptions making some restrictions permissible during the second trimester under *Roe*).
42. *Id.* at 154, 164.

In the Court's simultaneous decision, *Doe v. Bolton*, Mary Doe, twenty-three other individuals, and two nonprofit Georgian corporations promoting abortion reform, challenged Georgia's abortion statutes and claimed they were unconstitutional.[43] The applicable Georgia statute barred abortions – except in cases where continued pregnancy would endanger the pregnant woman's life or injure her health, the pregnancy resulted from rape, or the fetus was likely be born with a serious defect.[44] In each of these scenarios, this determination was to be made by a licensed Georgia physician in "his best clinical judgment."[45] In addition to requiring those seeking an abortion to be a Georgian citizen, the statute contained three further hurdles for women to cross: the abortion had to be performed in an accredited hospital, the procedure had to be approved by the hospital staff abortion committee, and the performing physician had to have approval by the independent examinations of two other licensed physicians.[46]

In its decision, the Supreme Court invalidated most of these procedural requirements to receiving an abortion, in line with its logic in *Roe*.[47] Further, the Court stated that a woman could receive an abortion after a fetus was viable if necessary to protect her health.[48] Ultimately, however, the Court followed suit with its *Roe* decision in saying, "[w]hether, in the words of the Georgia statute, 'an abortion is necessary' is a professional judgment that the Georgia physician will be called upon to make routinely."[49]

Webster v. Reproductive Health Services, a 1989 Supreme Court decision that came out of Missouri, was among one of the first major cases challenging the *Roe* and *Doe* holdings.[50] This case involved state-employed health care professionals and facilities offering abortion services who brought a class action claim against the constitutional validity of a state statue regulating abortions.[51] Here, the Missouri statute required physicians to conduct viability tests on pregnant women at or past the twentieth week of pregnancy.[52] Further, the statute did not allow abortions to be performed at public facilities unless an abortion was necessary to save the life of the mother.[53]

In a 5-4 decision, the Supreme Court upheld the constitutionality of the statute while managing to avoid confronting *Roe*.[54] The Court upheld the statute's viability testing requirement by arguing that the State could have an

43. Doe v. Bolton, 410 U.S. 179, 185 (1973).
44. *Id.* at 183.
45. *Id.*
46. *See id.* at 183–84.
47. *Id.* at 180.
48. *Id.* at 179.
49. *Id.* at 192.
50. 492 U.S. 490 (1989).
51. *Id.* at 501.
52. *Id.*
53. *Id.*
54. *Id.* at 499.

interest in protecting the life of a fetus before the point of viability.[55] The Court also upheld the prohibitions against the use of public facilities and employees for conducting abortions, justifying its decision by saying that the issue does not contravene the Court's past abortion decisions.[56]

The scope of abortion limitations was defined once again in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[57] In *Casey*, the Supreme Court implemented the undue burden test, as opposed to *Roe*'s trimester framework, for evaluating abortion restrictions before viability.[58] Under this new test, a state may promote its interest in potential life by restricting the availability of abortions before viability so long as the law's "purpose or effect is [not] to place substantial obstacles in the path of a woman seeking an abortion."[59] In analyzing whether a state abortion law met constitutional standards, *Casey* created a less rigorous standard than that set forth in *Roe*. While *Roe* required abortion laws to undergo "strict scrutiny" analysis,[60] *Casey* required a lesser "undue burden" standard.[61]

However, *Casey* did reaffirm *Roe*'s essential holding that women have the right to the choice of an abortion before a fetus becomes viable.[62] The Court stated, "[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."[63]

In 2003, Congress passed the Partial-Birth Abortion Ban Act, prohibiting a physician from knowingly performing a partial-birth abortion, a form of late-term abortion.[64] This federal law immediately underwent judicial attack, and by 2007, the law was tested by the Supreme Court in the case of *Gonzales v. Carhart*.[65] Although the Court had previously struck down a state ban on partial-birth abortion in *Stenberg v. Carhart*,[66] here, the Court held that the Partial-Birth Abortion Act defined the banned procedure in clearer terms and upheld the statute.[67] The Court further justified its holding by explaining that the Act only banned a procedure used in obtaining an abortion and did not prevent a woman from obtaining an abortion altogether.[68] Perhaps most important, however, was *Gonzales*'s questioning of the continued validity of the

55. *Id.* at 519.
56. *Id.* at 511.
57. 505 U.S. 833 (1992) (plurality opinion).
58. *Id.* at 837.
59. *Id.*
60. Roe v. Wade, 410 U.S. 113, 155 (1973).
61. *Casey*, 550 U.S. at 839.
62. *Id.* at 846.
63. *Id.* at 853.
64. 18 U.S.C. § 1531 (2012).
65. 550 U.S. 124 (2007).
66. 530 U.S. 914, 929–30 (2000).
67. *Gonzales*, 550 U.S. at 149.
68. *Id.* at 156.

Court's abortion jurisprudence.[69] This questioning of the Supreme Court's abortion jurisprudence was prominent in the decision of *MKB Management Corp. v. Stenehjem.*

B. The Meaning of "Viability"

As stated by the Supreme Court in *Roe v. Wade*, viability is the point at which a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[70] In the instant case, the court determined this to be around seven months, but said it may occur as early as twenty-four weeks. The Supreme Court's decisions have consistently held that the point of viability was a matter of judgment for a physician. As set out in *Colautti v. Franklin*,

> [A] physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors.[71]

Most state statutes also follow language similar to the Court's definition of viability. For example, Missouri defines viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."[72] While the legal wording of what constitutes viability is consistent today, the understanding and the actual point of viability evolved over time.

The roots of the term "viability" can be traced to the beginning of the nineteenth century, where abortion was discouraged after the onset of quickening, which is the moment in pregnancy where the woman can feel fetal movements.[73] In 1935, the American Academy of Pediatrics defined an infant as being premature if she weighed less than 2500 grams at birth.[74] While the Academy did not define a weight for viability, 1250 grams was often used, which correlated to approximately the twenty-eighth week in pregnancy.[75] By the 1950s, respiratory issues in infants younger than thirty-seven weeks were identified as the principal cause of death, leading to a distinction

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69. *Id.* at 187 (Thomas, J., concurring).

70. Roe v. Wade, 410 U.S. 113, 160 (1973).

71. 439 U.S. 379, 395–96 (1979).

72. MO. REV. STAT. § 188.015 (Cum. Supp. 2013).

73. Bonnie Hope Arzuga & Ben Hokew Lee, *Limits of Human Viability in the United States: A Medicolegal Review*, 128 PEDIATRICS PERSP. 1047, 1047 (2011), http://pediatrics.aappublications.org/content/pediatrics/128/6/1047.full.pdf.

74. *Id.*

75. *Id.*

between "premature" and "growth-restricted" infants.[76] Over the next two decades, there was an emphasis on neonatal technology.[77]

In the 1970s, mortality rates of infants born under 1800 grams were "markedly improved" by neonatal technology.[78] In addition, the medical viability standard changed.[79] By the 1980s, smaller infants were successfully treated with more frequency, and the survival of infants born between twenty-four and twenty-eight weeks had become an "expected possibility," setting the contemporary range of viability.[80]

Continued evolution of neonatal biological medical advances led to increased survival rates for infants born at twenty-three and twenty-four weeks by the 1990s.[81] Among a recent study looking at infants weighing less than 400 grams at birth, about six percent of twenty-two-week-old infants survived, at least until discharged from the hospital, while about twenty-six percent of twenty-three-week-old infants survived.[82] These numbers illustrate the current contemporary limits of human viability.[83]

Of course, simply surviving until being discharged from the hospital should not be the only factor considered when determining viability. Factors such as the fetus's expected growth potential and risk of developing later health complications should also be relevant in determining overall health compared to a fetus born later in pregnancy. Premature births, defined as births before thirty-seven weeks, are notable for having a higher risk of health problems, compared to later births.[84] These risks include complications such as long-term intellectual and developmental disabilities, lung and breathing problems, and vision problems.[85]

IV. INSTANT DECISION

"Accordingly," the Eighth Circuit noted, "we have no choice but to follow the majority of the Court in assuming the following principles for the purposes of this opinion."[86] In its decision, the Eighth Circuit relied on the precedent laid down by the Supreme Court in *Roe*, *Casey*, and *Gonzales* in holding that "[b]efore viability, a State 'may not prohibit any woman from

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1051.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Long-term Health Effects of Premature Birth*, MARCH DIMES (Oct. 2013), http://www.marchofdimes.org/complications/long-term-health-effects-of-premature-birth.aspx.
85. *Id.*
86. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 772 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016).

making the ultimate decision to terminate her pregnancy.'"[87] More so, the court explained that a state may not alter this right by creating an undue burden on a woman seeking to receive an abortion.[88] This undue burden is said to exist 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."[89] However, simply placing a hindrance in the path to an abortion may not be enough to create an undue burden:

> 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."[90]

In applying this standard, the Eighth Circuit determined that H.B. 1456 prohibited abortions before viability and did not conform to the requirements set forth above.[91] The court first noted that there was no dispute between the parties concerning when a heartbeat was detectable in a fetus.[92] This was determined to take place at approximately six weeks.[93] As this was not in dispute, the court simply had to determine when viability occurs to conclude whether the statute could be upheld.[94]

Defendants argued that viability occurs at conception because IVF "allow[s] an embryonic unborn child to live outside the human uterus (womb) for two-six days after conception."[95] In contrast, Plaintiffs contended that viability occurs at approximately twenty-four weeks, as they understood viability to mean "the time when a fetus has a reasonable chance for sustained life outside the womb, albeit with lifesaving medical intervention."[96] The court determined it was bound by the Supreme Court's definition of viability and characterized it as the time "when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus sustained survival outside the womb, with or without artificial support."[97] Because the court felt Plaintiffs' definition of viability was in line with that of the Supreme Court, the court determined viability to be at or about twenty-four weeks.[98] Thus, as H.B. 1456 barred abortions at ap-

87. *Id.* (quoting Gonzales v. Carhart, 550 U.S. 124, 146 (2007)).
88. *Id.* (quoting *Gonzales*, 550 U.S. at 146).
89. *Id.* (quoting *Gonzales*, 550 U.S. at 146).
90. *Id.* (quoting *Gonzales*, 550 U.S. at 146).
91. *Id.* at 773.
92. *Id.* at 772.
93. *Id.*
94. *Id.*
95. *Id.* at 773 (quoting Dr. Obritsch's testimony at trial).
96. *Id.* (quoting Dr. Iverson's testimony at trial).
97. *Id.* at 772–73 (quoting Colautti v. Franklin, 439 U.S. 379, 388 (1979)).
98. *Id.* at 773.

proximately six weeks, it impermissibly prohibited women from choosing to have an abortion before the point of viability.[99]

In the instant case, the court also made a strong argument for the Supreme Court to reevaluate its abortion jurisprudence.[100] The court believed that the Supreme Court's current viability standard has shown itself to be unsatisfactory, as it gives too little consideration to the "substantial state interest in potential life throughout pregnancy."[101] The court continued, stating, "By deeming viability 'the point at which the balance of interests tips,' the Court has tied a state's interest in unborn children to developments in obstetrics, not to developments in the unborn."[102] Because North Dakota developed a reasonable point at which to measure its state's interest in potential life, the court believed the Supreme Court improperly "substitute[d] its own preference to that of the legislature."[103]

Further, the Eighth Circuit argued that the Supreme Court should reevaluate its jurisprudence, as the facts underlying *Roe* and *Casey* have changed.[104] The court believed the State's evidence exemplified the balance found in *Roe* between the choice of a mother and the life of the fetus.[105] Here, the Eighth Circuit reasoned that many women do not have proper consultation before receiving abortions and many do not receive adequate information about the process.[106] The court also stated that women who have had abortions may have adverse health consequences and many women regret having proceeded with an abortion.[107] The court then concluded by discussing how the Supreme Court's continued use of the viability standard discounts the legislative branch's recognized interest in protecting the lives of unborn children within the state.[108]

V. COMMENT

There is little question that the Eighth Circuit correctly decided that H.B. 1456 impermissibly prohibited women from choosing to have an abortion before the point of viability according to precedent set out by the Supreme Court of the United States. As an intermediate court of appeals, the Eighth Circuit virtually had no choice but to uphold the principles the Court

99. *Id.*

100. *Id.*

101. *Id.* at 774 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (plurality opinion)).

102. *Id.* (quoting *Casey*, 505 U.S. at 861).

103. *Id.* (quoting Edwards v. Beck, 786 F.3d 1113, 1119 (8th Cir. 2015)).

104. *Id.* at 774–75.

105. *Id.* at 775 (quoting McCorvey v. Hill, 385 F.3d 846, 850 (5th Cir. 2004) (Jones, J., concurring)).

106. *Id.* at 775.

107. *Id.*

108. *Id.* at 776.

previously established.[109] Although the Eighth Circuit ultimately affirmed the district court's decision to overturn the statute, the Eighth Circuit did make some very compelling arguments on why the Supreme Court may wish to reevaluate its jurisprudence in this area.

A. The Substantive Due Process Right to an Abortion

While the underlying holding of *Roe* has yet to be overruled, it has become clear that the original reasoning behind the holding, providing a substantive due process right to an abortion before the point of viability, has been weakened by a series of Supreme Court abortion cases.[110]

For instance, in *Roe*, the Supreme Court found a fundamental right at stake – the right of a woman to decide whether to terminate her pregnancy.[111] As such, and this being a substantive due process challenge, the Court applied strict scrutiny analysis in finding statutes barring abortions before viability to be unconstitutional.[112] By its decision in *Casey*, however, the Court already appeared apprehensive to label the right to an abortion a fundamental right, as shown through a vehement dissent and the Court's newly created undue burden test.[113] While this undue burden test was applied yet again in *Gonzales*, the Court characterized it as more of a rational basis test in saying that Congress had a "rational basis to act" in refusing to allow partial-birth abortions due to the "uncertainty" of the medical necessity.[114] In their dissenting opinion, Justices Ginsburg, Stevens, Souter, and Breyer stated, "[i]nstead of the heightened scrutiny we have previously applied, the Court determines that a 'rational' ground is enough to uphold the Act."[115]

As rational basis analysis merely requires the government to have a legitimate purpose in implementing a law, the government must simply act in a manner reasonably related to achieving that goal.[116] Put differently, "[R]ational basis review, the most forgiving standard of constitutional scrutiny, nominally requires courts to establish as adequate the connection, or 'nexus,' between the state's legislative ends and its legislative means."[117] If

109. *Id.* at 772.

110. *See* discussion *supra* Part III.

111. *See* discussion *supra* Part III.

112. *Supra* notes 59–61 and accompanying text.

113. *Supra* notes 60–63 and accompanying text.

114. *Supra* notes 65–69 and accompanying text.

115. Gonzales v. Carhart, 550 U.S. 124, 187 (2007) (Ginsburg, J., dissenting).

116. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("[F]or regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

117. Emma Freeman, Note, *Giving* Casey *Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 279 (2013).

rational basis scrutiny of state abortion laws was to be accepted, states could vastly expand laws that restrict a woman's right to an abortion. Theoretically, this would give states great latitude in creating abortion laws as they see fit for their populace.

Cases such as *MKB Management Corp. v. Stenehjem* demonstrate that true rational basis scrutiny has yet to be routinely applied. In *Stenehjem*, North Dakota's legislature determined that the detectable heartbeat of a fetus was an appropriate measuring point for restricting abortions.[118] As North Dakota determined this to be the critical point at which to protect its interest in human life, this could arguably meet the low or "nominal" standard of the rational basis test. North Dakota could argue that it has developed an objective test that provides more consistent results than that of the ever-varying viability standard. Further, North Dakota could argue that a heartbeat test provides emotional significance to its citizens, given the way the term "heart" is used metaphorically in society.[119] While perhaps not reasons capable of surviving strict scrutiny, states could contend that these reasons meet the rational basis test's nominal benchmark.

B. The States' Interest in Regulating Abortions

Even after the Supreme Court's landmark decision in *Roe*, states were recognized as having some legitimate interest in protecting the lives of unborn children. As previously discussed, *Roe* left "the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the *recognized state interests*."[120]

Like the Eighth Circuit recognized in *Stenehjem*, a state may be better suited to determine the interests of its people than the Supreme Court. States generally have the ability through their legislative branches to have thorough debates and investigations into recent medical and scientific advances and to develop laws suited to these discoveries and the wishes of their constituents.[121] Further, as abortion is such a sensitive topic for so many Americans with no clear-cut "right answer," perhaps the will of the people, and not the will of the courts, should decide what abortion policies govern their states. In

118. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 774 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016).

119. Danny Groner, *Why's a Heart Represent Love, Anyway?*, HUFFINGTON POST (Feb. 7, 2013, 8:13 AM), http://www.huffingtonpost.com/danny-groner/whys-a-heart-represent-lo_b_2635820.html ("It was around the Middle Ages that the heart symbol took on its current meaning. At that time, according to Christian theology, it was meant to represent Jesus Christ and his love.").

120. Roe v. Wade, 410 U.S. 113, 165 (1973) (emphasis added); *see supra* note 39 and accompanying text.

121. *Stenehjem*, 795 F.3d at 774 (quoting Hamilton v. Scott, 97 So.3d 728, 742 (Ala. 2012) (Parker, J. concurring)) ("By taking this decision away from the states, the Court has also removed the states' ability to account for 'advances in medical and scientific technology [that] have greatly expanded our knowledge of prenatal life . . . .'").

line with this reasoning, it has been widely held that a court should not substitute its own judgment or preference for that of the legislature.[122] Although often criticized for being no more than a fallback answer as to why a court strikes down a heavily debated law, the argument maintains credence when the court gives no reasoned analysis for doing so. Why should an arbitrary line pulled from the sky and decided by a split court govern a line representing the wishes of a state's constituents and supported by a reasoned argument?

As the court in *Stenehjem* articulated and as demonstrated in the forthcoming Part, "[b]y deeming viability 'the point at which the balance of interests tips,' the Court has tied a state's interest in unborn children to developments in obstetrics, not to developments in the unborn. This leads to troubling consequences for states seeking to protect unborn children."[123]

C. "Viability" – An Arbitrary Standard

As articulated by constitutional law scholar Professor Randy Beck, "[S]election of a rule near the extreme end of available options creates the appearance that the Court made a social or political decision, an impression that can be dispelled only by providing a convincing rationale for the viability rule grounded in neutral constitutional principles."[124]

Currently, according to *Gonzlaes*, "*Before viability*, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'"[125] The United States' viability standard falls approximately twice as far into pregnancy as that of the most common international standard of twelve weeks.[126] Foreign standards, although by no means commanding authority, were relied on in past constitutional analyses and often contained principles that the Court could embrace by citing traditional authority.[127] While a line must be drawn for the enforcement of almost any law, the current viability standard for restricting abortions appears to create wide-ranging and arbitrary results. While the same viability standard has existed since the 1970s, the timeframe in which a state may restrict abortions has increased.[128] A twenty-four week old fetus in the 1970s would not have been considered viable, and thus would not garner protection from abortion, while today it

122. Edwards v. Beck, 786 F.3d 1113, 1119 (8th Cir. 2015) ("To substitute its own preference to that of the legislature in this area is *not* the proper role of a court.").

123. *Stenehjem*, 795 F.3d at 774 (quoting Planned Parenthood of Se. Pa. v. Casey 505 U.S. 833, 876 (1992) (plurality opinion)).

124. Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 NW. U. L. REV. 249, 252–53 (2009).

125. Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (emphasis added) (quoting *Casey*, 505 U.S. at 879).

126. Beck, *supra* note 124, at 267 (2009). Data from the Center of Reproductive Rights shows that forty-one of fifty-six countries limit the availability of an abortion right within twelve weeks or sooner. *Id.* at 264.

127. *Id.* at 262–63.

128. Edwards v. Beck, 786 F.3d 1113, 1118 (8th Cir. 2015).

likely would.[129] This standard has allowed an entire class of fetuses to garner legal protection today while the same class would not have had the benefit of such protection before.[130]

Thus, the standard provides differential treatment, as determined by the year of a fetus's conception, linking a constitutional standard to an irrelevant factor.[131] The Supreme Court went as far as to recognize this in its *Casey* decision, discussing how the viability threshold has moved several weeks closer to the point of conception than the time of the *Roe* decision.[132] As stated in *Stenehjem*, "How it is consistent with a state's interest in protecting unborn children that the same fetus would be deserving of state protection in one year but undeserving of state protection in another is not clear."[133] Whether it is for or against abortion, a standard as fluid and arbitrary as the current viability standard is not a palatable solution.

With the constant evolution of medical technology and advances in healthcare, it is only logical that the point of viability from a medical perspective would continue to expand. Should we continue, then, to allow states to restrict abortions after the point of viability if the point of viability becomes almost immediate in the fetus following conception? More so, the viability standard currently in place could provide mixed results simply due to the region a person lives in or the socioeconomic characteristics they possess.[134] Is the viability standard for the person with access to elite hospitals and advanced medical technology equal to the viability standard of the person whose only health access is a rural clinic? Again, regardless of personal opinion on the subject, the reasoning behind such a standard must be questioned with such varying results. While there are other legal standards currently in place that have different implications depending on locale,[135] abortion simply involves too high of stakes and is too controversial to be among those standards.

D. The Future of the Supreme Court's Abortion Jurisprudence

As long as abortion remains a hot-button topic in this country, it is sure to remain relevant in forthcoming litigation. One such case appearing in the next session of the Supreme Court's docket involves a Texas law requiring doctors performing abortions in the state to possess "admitting privilege"[136]

129. *Id.*

130. Beck, *supra* note 124, at 258.

131. *Id.* at 259.

132. *Id.* at 258.

133. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 774 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016).

134. Beck, *supra* note 124, at 258.

135. *See* Miller v. California, 413 U.S. 15, 24 (1973) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)) (applying "contemporary community standards" in analyzing obscenity).

136. "Admitting privilege is the right of a doctor, by virtue of membership as a hospital's medical staff, to admit patients to a particular hospital or medical center for

at a nearby hospital.[137] Further, the Texas law requires abortion clinics to meet expensive operating standards and bans abortions after twenty weeks of pregnancy.[138] After arguments were presented on how the statute was designed to protect women's health, the U.S. Court of Appeals for the Fifth Circuit upheld the statute in a reversal of a substantial portion of the district court's decision.[139] While the Supreme Court implemented temporary injunctions on some of the statute's requirements for clinics, pending litigation, the statute has already had a dramatic impact on abortion rights within the state. The number of abortion clinics in Texas has shrunk from over forty to just ten, and it is argued this number will be cut in half again if the statute is upheld.[140]

While not a direct attack on *Roe*'s viability standard, statutes like the Texas law appear to be attempting to circumvent the Supreme Court's decision and test the limits of *Casey*'s undue burden test. Although these statutes do not strictly prohibit abortion against the Court's viability standard, they make abortions unavailable or highly inconvenient for women to receive. The Court's handling of this case, and cases similar to it, could influence the next wave of abortion-restricting legislation. If upheld, statutes like this would surely arise in conservative states across the nation.[141] If denied, it will be crucial to look toward the language of the Court's decision to determine how broadly its opinion applies. If narrowly tailored, it would be safe to expect pro-life jurisdictions to continue thinking of any available means to restrict women's access to an abortion.

In the Eighth Circuit, and Missouri in particular, similar measures have already been undertaken to make abortions more difficult to obtain. The Eighth Circuit upheld a Missouri statute requiring that abortion providers have admitting privileges at nearby hospitals, holding that the requirement "furthers important state health objectives."[142] Currently, Missouri allows abortion up until twenty-one weeks and six days after a woman's last men-

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providing specific diagnostic or therapeutic services to such patient in that hospital." *Admitting Privileges (Health Care) Law & Legal Definition,* USLEGAL, http://definitions.uslegal.com/a/admitting-privileges-health-care/ (last visited Mar. 5, 2016).

137. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 587 (5th Cir. 2014).

138. Brittney Martin, *Texas AG Asks Supreme Court to Uphold State's Abortion Restrictions*, DALLAS MORNING NEWS (Oct. 5, 2015, 4:48 PM), http://trailblazersblog.dallasnews.com/2015/10/texas-ag-asks-supreme-court-to-uphold-states-abortion-restrictions.html/.

139. *Abbott*, 748 F.3d at 605.

140. Taylor Wofford, *Abortion, Affirmative Action and Other Supreme Court Cases to Watch This Session*, NEWSWEEK (Oct. 6, 2015, 6:39 AM), http://www.newsweek.com/supreme-court-cases-watch-session-380119.

141. *See id.*

142. Women's Health Ctr. of W. Cty., Inc. v. Webster, 871 F.2d 1377, 1381 (8th Cir. 1989).

strual cycle, at which point it is banned unless the woman's life or health is in jeopardy.[143] Additionally, Missouri currently requires a woman seeking an abortion to receive state-directed counseling seventy-two hours before receiving an abortion, as well as parental consent for minors seeking to receive an abortion.[144]

In light of the recent controversy surrounding Planned Parenthood,[145] abortion policy is again a highly-debated issue in the Missouri Capitol.[146] Predicted Republican proposals for the 2016 legislative schedule on the issue range from requiring memorials for aborted fetuses to ramping up oversight of already established state abortion laws.[147]

VI. CONCLUSION

While the Eighth Circuit's decision in *MKB Management Corp. v. Stenehjem* to overturn a North Dakota statute restricting abortions past the point of a detectable heartbeat in a fetus was legally sound, perhaps the greatest takeaway from the decision was the court's critique of the Supreme Court's jurisprudence on the issue of abortion. Public sentiment on either end of the abortion spectrum has become white noise to the Supreme Court in its abortion analysis, but who knows the impact that direct opposition from an intermediate appellate court could have? The Eighth Circuit has clearly taken the position that the current standard for measuring when a state government can restrict a woman's right to an abortion is unworkable, arbitrary, and in need of change. Further, strong arguments can be made that the judicial branch should not make this decision at all, but rather, the legislature could handle the issue more effectively and thoughtfully. Why allow states to continuously backdoor the Supreme Court's constitutional decisions on abortion rather than setting clear legal standards on the issue? The future argument over abortion rights in the United States should not be decided in arguments of just or unjust, moral or immoral, but rather grounded in reason and backed by sufficient rationale.

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143. *Reproductive Health Services*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/planned-parenthood-st-louis-region-southwest-missouri/who-we-are/our-services/reproductive-health-services (last visited Mar. 5, 2016).

144. *State Facts About Abortion: Missouri*, GUTTMACHER INST., https://www.guttmacher.org/pubs/sfaa/missouri.html (last visited Mar. 5, 2016). In line with the national abortion rate trend, Missouri's abortion rate has dropped from 13.4/1,0000 to 5/1000 in women aged 15 to 44 from 1991–2011. *Id.*

145. *Missouri GOP Lawmakers Brainstorm New Abortion Legislation*, SPRINGFIELD NEWS-LEADER (Oct. 15, 2015, 6:32 AM), http://www.news-leader.com/story/news/politics/2015/10/15/missouri-gop-lawmakers-brainstorm-new-abortion-legislation/73974786/.

146. *See id.*

147. *Id.*