DOBBS V. JACKSON WOMEN'S HEALTH AND THE RIPPLE EFFECT FELT THROUGHOUT NORTH DAKOTA LEGISLATION AND LAW*

ABSTRACT

In *Dobbs v. Jackson Women's Health Organization*, the United States Supreme Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. With the overruling of *Roe* and *Casey*, the Supreme Court held that the Constitution does not include a right to an abortion and returned the authority of abortion regulation to the States. Moreover, the Court implemented rational basis review as the standard for constitutional violations. After *Dobbs* passed, two trigger laws were activated within North Dakota statutory law. Attorney General Drew Wrigley wrote to the Legislature about the preconditions for the trigger laws enforcement being satisfied and establishing the date of enforcement. The resulting impact was a series of litigation in which the district court granted a temporary restraining order and preliminary injunction prohibiting enforcement of North Dakota Century Code section 12.1-31-12. The North Dakota Supreme Court left the preliminary injunction in effect. The 68th Legislative Session has set forth Senate Bill 2150, proposing amendments to section 12.1-31-12, including modifications to the definition of abortion, revisions to the affirmative defenses section, and repealing section 14-02.1-04.2. The bill also includes a provision declaring it to be an emergency measure. If Senate Bill 2150 is passed, it will immediately go into effect, changing the current North Dakota abortion laws.

* This article is meant to be an unbiased analysis of the changes to abortion law. It does not reflect the views of the authors or the NORTH DAKOTA LAW REVIEW.

I. INTRODUCTION

The United States Supreme Court's recent decision, *Dobbs v. Jackson Women's Health Organization*,[1] sparked controversy across the country and created division among varying political, moral, and legal ideologies.[2] As Justice Alito stated, writing on behalf of the Court's majority:

> Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.[3]

However, the scope of personal beliefs and opinions about abortion is so vast and widespread that even this statement could be considered controversial,

1. 142 S. Ct. 2228 (2022).
2. *See Dobbs*, 142 S. Ct. at 2240 (discussing the various deeply held viewpoints on abortion).
3. *Id.*

as many people's thoughts and beliefs about abortion adhere more closely to the opinions written by the Court in prior holdings where it previously found that the issue of abortion was one of privacy or liberty rather than one of morals.[4]

Many of the issues that impacted public opinion about abortion remain as prevalent today as they were at the time of the Supreme Court's 1973 decision, *Roe v. Wade*.[5] These considerations include an awareness of the "sensitive and emotional nature of the abortion controversy [and] of the vigorous opposing views," and a recognition of each individual's philosophy, experiences, exposure, religious beliefs, attitudes towards life, family values, and moral standards.[6] These factors are all "likely to influence and to color one's thinking and conclusions about abortion."[7] Personal experiences with other societal issues including "population growth, pollution, poverty, and racial overtones" can also impact perspectives and further complicate our understandings and evaluations of this issue.[8]

This article seeks to provide an objective analysis of the Court's holding in *Dobbs* as well as provide an understanding of how the decision will impact practitioners in North Dakota. This article will address the reasonings and rationale found within the *Dobbs* opinion as well as some considerations found in prior abortion cases, including *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Although the full extent of how *Dobbs* will impact North Dakota's practitioners is unclear, through an examination of current legislation, laws, and amendments, this article seeks to address the possible outcomes that could potentially impact North Dakota's practitioners.

II. HISTORY OF ABORTION CASE LAW

Prior to the Court's decision in *Dobbs*, the controlling cases on abortion law in the United States were the 1973 Supreme Court decision, *Roe v. Wade*, and the Court's 1992 opinion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[9] These two opinions established not only the foundation for abortion laws in the United States, but also the framework for subsequent legal disputes concerning abortion and provided the applicable

4. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("The controlling word in the cases before us is 'liberty.'").

5. *See Roe*, 410 U.S. at 116.

6. *Id.*

7. *Id.*

8. *Id.*

9. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240-42 (2022) (articulating that *Roe* and *Casey* served as the leading cases on the issue of abortion and contained the primary tests and standards that had previously been applied).

standards by which abortion issues were analyzed.[10] Therefore, for the purposes of this article, and specifically for analyzing the history of abortion case law in the United States, our focus will be primarily on these two opinions, the Court's reasoning and rationale, and the application and impact of these cases on abortion law.

A. *ROE V. WADE*

The 1973 United States Supreme Court decision, *Roe v. Wade*, is perceived by many to be the origin of federal law regarding the topic of abortion within the United States legal system.[11] While this is perhaps an oversimplification of the history of abortion within the United States—considering the references to a vast number of state statutes, regulations, state court decisions, and common law all found within *Roe*'s majority opinion[12]—the decision has nevertheless been at the center of many controversies and remains, for better or worse, a symbol of the ongoing political, societal, moral, and philosophical disputes that surround the issue of abortion.[13] At its time, *Roe* represented an expansion of the Court's prior holdings about the right to privacy.[14] *Roe* represented a widespread change with the Court finding that abortion was a fundamental right, and thus created a new understanding in the existing legal landscape.[15]

The particular statutes challenged in *Roe* came from the Texas criminal code, which made it a crime for any person to procure an abortion for or on a pregnant woman.[16] The statutes defined abortion to mean "that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."[17] The remaining articles provided various punishments for anyone acting as "an accomplice,"[18] for any attempted abortions[19] and provided that if a pregnant woman died as a result of an

10. *Roe*, 410 U.S. at 164-65; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

11. *Dobbs*, 142 S. Ct. at 2240 (when discussing the origin of abortion laws in the United States, the Court first addresses its prior holding from *Roe v. Wade* as marking the transition from state regulated abortion laws to federally regulated laws).

12. *Roe*, 410 U.S. at 118 n.2.

13. *See* Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework*, 51 AM. J. OF LEGAL HIST. 505, 506 (2011); *see also Dobbs*, 142 S. Ct. at 2240.

14. Lauren Talarico, *Why Overturning* Roe v. Wade *Could Impact Other Privacy Rights*, KHOU 11 (10:08 PM CDT, May 3, 2022), https://www.khou.com/article/news/nation-world/roe-v-wade-impact-privacy-rights/285-f66f2879-9079-4f97-9071-9860391c9b74 (interviewing a law professor at the University of Houston to discuss *Roe*'s impact on the Court's reasoning in other cases involving privacy interests under the liberty clause of the 14th Amendment).

15. *Roe*, 410 U.S. at 153-54.

16. *Id*. at 117 n.1.

17. *Id*. (quoting Art. 1191 of the then existing Texas Penal Code).

18. *Id*. (quoting Art. 1192 of the then existing Texas Penal Code).

19. *Id*. (quoting Art. 1193 of the then existing Texas Penal Code).

abortion, this would be punishable as murder under Texas law.[20] The statute did, however, provide an exception to these restrictions if an abortion was, based on a medical opinion, in the interests of saving the pregnant woman's life.[21]

Jane Roe, a pseudonym used by the Appellant,[22] alleged she had been "unable to get a 'legal' abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions."[23] Roe, who purported in her complaint to bring this class action suit "on behalf of herself and all other women' similarly situated," argued that the Texas statute was facially unconstitutional, unconstitutionally vague, and violated her right to "personal privacy" under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[24]

The Texas statutes in *Roe* were not alone at that time in restricting abortions on individual state levels;[25] instead, these statutes, and the limitations they implemented, reflected a legal outlook on abortion that was generally shared by a majority of the states.[26] Writing on behalf of the majority, Justice Blackmun referenced no less than thirty other states with statutes similar to the Texas law.[27] These criminal abortion laws can be traced back, in most cases, to the late nineteenth century.[28] Although the statutes themselves were of relatively recent origin, the Court found some of the principles and beliefs at their foundation came from a wide variety of sources and time periods.[29] Ancient attitudes, the Hippocratic Oath, common law, English statutory law, early American law, the American Medical Association, the American Public Health Association, and the American Bar Association all, to varying degrees, impacted state's statutory restriction on abortion.[30]

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20. *Id*. (quoting Art. 1194 of the then existing Texas Penal Code).

21. *Id*. (quoting Art. 1196 of the then existing Texas Penal Code) ("Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.").

22. *Id*. at 124.

23. *Id*. at 120.

24. *Id*. at 113, 120.

25. *Id*. at 118 n.2.

26. *Id*.

27. *Id*. (citing restrictive criminal abortion statutes from Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming).

28. *Id*. at 129.

29. *Id*. at 130-31.

30. *Id*. at 130-46.

The Court looked to the history of abortion in the United States and found that under common law and early American legal principles, women had historically enjoyed more freedom to obtain an abortion.[31] Abortions from this period in history were most likely to occur during a pregnancy before the "first recognizable movement of the fetus in utero," otherwise commonly referred to as before "quickening."[32] Converse to the relative leniency of common law, the Court found that more recent attitudes associated with the positions of the American Medical Association and the American Public Health Association provided a more restrictive attitude and outlook.[33] This "anti-abortion mood" prevalent among the American Medical Association and the series of standards imposed by the American Public Health Association were primarily concerned with mitigating risks towards the life and health of women.[34]

In addition to the aforementioned historical considerations and medical analysis that impacted the perceptions of abortion, the basis for much of the widespread acceptance of criminal abortion laws at the time of *Roe* could also be traced to three considerations: a "Victorian social concern" that sought to prohibit abortions to "discourage illicit sexual conduct," protection for women obtaining abortions due to the hazardous nature of the procedure, and the state's interest in protecting prenatal life.[35]

Bearing in mind the impact and implications of these societal, political, and moral implications, the Court in *Roe* sought to "resolve the issue by constitutional measurement, free of emotion and of predilection."[36] The promise of impartiality results in an analysis based on the "medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries," and one which is rooted in the principles of objectivity that had been previously proffered by Justice Holmes in his dissent from *Lochner v. New York*.[37]

Justice Holmes dissented in the 1905 Supreme Court case *Lochner v. New York*, opposing the Court's holding that limited the scope of the state's police power and expanded the "right of the individual to liberty of person and freedom of contract."[38] The majority opinion justified its reasoning for its decision after finding that a health law passed to safeguard public health lacked sufficient foundation and instead violated the rights of both employers

31. *Id.* at 140.
32. *Id.* at 132.
33. *Id.* at 141-46.
34. *Id.*
35. *Id.* at 148–50.
36. *Id.* at 116.
37. *Id.* at 117; *see* Lochner v. New York, 198 U.S. 45, 75 (1905).
38. *Lochner*, 198 U.S. at 57.

and employees to contract as they saw fit under the protection of the United States Constitution.[39] At its time, *Lochner* represented a marked difference in opinion between the various justices and between social and political parties,[40] prompting Justice Holmes to write that "[the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[41] Faced once more with a controversial and divisive topic, the Court in *Roe* reiterated this passage and resolved to achieve a holding based on its understanding and application of the Constitution.[42]

The analysis in *Roe* began by addressing the three major principles on which criminal abortion laws had previously been enacted.[43] The Court quickly dismissed the "Victorian social concern," because Texas did not advance this argument to justify its statute.[44] Additionally, this argument lacked a general application among other states.[45] Similarly, the Court dismissed the second basis of concern about the hazardous nature of abortions towards women because, although medical risks and high mortality rates had been prevalent in the past, modern medical treatments had significantly lowered the health risks.[46] The Court stated the current mortality rates among women receiving an abortion were generally on par with those rates associated with a normal childbirth.[47] Thus, the analysis addressed the final issue, whether the State has an interest in protecting prenatal and potential prenatal life.[48]

The justification for a state's interest in protecting prenatal life is based on the belief that "a new human life is present from the moment of conception;" thus, protection of a prenatal life would prevail with a sole exception for instances where the life of the pregnant woman was at stake.[49] Furthermore, the Court stated that, logically, the support for such an interest could be based on the possibility of potential life.[50]

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39. *Id*. at 57-58.
40. *Id*. at 65–76; *see also* JOSEPH G. COOK, 1 CONSTITUTIONAL RIGHTS OF THE ACCUSED § 1:9 (3d ed. 2021).
41. *Lochner*, 198 U.S. at 76.
42. *Roe*, 410 U.S. at 117 (quoting *Lochner*, 198 U.S. at 76).
43. *Id*. at 147–50.
44. *Id*. at 148.
45. *Id*.
46. *Id*. 148-49.
47. *Id*. at 149.
48. *Id*. at 150.
49. *Id*.
50. *Id*.

> [A] legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to life birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.[51]

However, the analysis in *Roe* is not limited to just the state's interest or the basis of potential prenatal life, but also considers the issue of privacy and addresses the question of whether privacy is sufficient to find that the ability to procure abortions should be considered a constitutional right.[52]

"The Constitution does not explicitly mention any right of privacy."[53] However, based on longstanding precedent, the Court found that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[54] The origins of a recognized right to privacy date back to the late 1800's with the Court's holding in *Union Pacific Railway Co. v. Botsford*.[55] Since then, a right to privacy has been derived from the Bill of Rights and Constitution's subsequent Amendments.[56] The right to privacy has been extended to "marriage, procreation, contraception, family relationships, and child rearing and education."[57] However, based on precedent, "[t]hese decisions make it clear that only personal rights can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' [thus warranting them be] included in this guarantee of personal privacy."[58]

When fundamental rights are involved, states are only allowed to regulate based on a "compelling state interest" and "narrowly drawn" legislative enactments that "express only the legitimate state interest at

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51. *Id.*

52. *Id.* at 152.

53. *Id.*

54. *Id.*

55. *Id.*; *see* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251, (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

56. *Roe*, 410 U.S. at 152; *see* Stanley v. Georgia, 394 U.S. 557, 563-64 (1969) (First Amendment); Terry v. Ohio, 392 U.S. 1, 8-9 (1968) (discussing Fourth Amendment jurisprudence on a person's "reasonable expectation of privacy"); Katz v. United States, 389 U.S. 347, 350 (1967) (Fourth Amendment); Griswold v. Connecticut, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring) (Ninth Amendment); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (Fourteenth Amendment).

57. *Roe*, 410 U.S. at 152–53 (citations omitted); *see* Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (contraception); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); *Meyer*, 262 U.S. at 399 (child rearing and education).

58. *Roe*, 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

stake."[59] In *Roe*, the Court found that "the right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[60] It reasoned that by preventing abortions, the State's imposition of maternity could result in a distressed life or future for the woman, psychological harm, taxation on both her mental and physical health, concerns for the unwanted child, and the potential dangers which the child might face in a family that is unable to care for them.[61] Despite these findings, the Court rejected the argument that this alone was enough to justify an argument that abortions were an "absolute right" and women should be free to terminate their pregnancies at any point or in any way they might choose.[62]

Although a decision to procure an abortion would fall under the scope of the right of privacy, the Court noted that states do have important interests in safeguarding health, maintaining medical standards, and protecting potential life, which would allow a state to restrict abortions.[63] "At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute."[64] In addition to these potential interests, the Court refused to adopt the assertion that "one has an unlimited right to do with one's body as one pleases" under the right of privacy based on prior holdings which "refused to recognize an unlimited right of this kind in the past."[65] Therefore, although the decision to abort fell within the scope of the right of privacy, it was "not unqualified and must be considered against important state interests in regulation."[66]

Based on this finding, the last portion of the substantive due process analysis in *Roe* consisted of reaching a balance between the state's interest and a woman's right to privacy.[67] This balance adopted what the Court believed to be a generally accepted principle among the state and district courts, which was "that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become

59. *Id*. at 155 (citation omitted).
60. *Id*. at 153.
61. *Id*.
62. *Id*.
63. *Id*. at 154.
64. *Id*.
65. *Id*.; *see* Jacobson v. Massachusetts, 197 U.S. 11, 35 (1905) (upholding the police power of the state to enact health laws concerning quarantine and vaccinations); *see also* Buck v. Bell, 274 U.S. 200, 207 (1927) (refusing to recognize an absolute right concerning sterilization).
66. *Roe*, 410 U.S. at 154.
67. *See id*. at 155-56.

dominant."[68] Therefore, the Court found that it could not fully accept Appellant's argument that access to an abortion is an absolute right from which the states would be barred from enacting any restrictions or limitations.[69] Similarly, the Court was equally unwilling to fully accept Appellee's position, that the State had a compelling and overarching interest in protecting prenatal life.[70] Thus, unable to adopt either position, the decision in *Roe* became predicated on whether a fetus, under the law, is considered a person.[71]

"If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[72] The Appellant conceded this proposition.[73] Appellee argued that under the language and meaning of the Fourteenth Amendment of the United States Constitution, a "fetus" is considered a "person," which they assert is consistent with "well-known facts of fetal development."[74] However, the Appellant was not the only party forced to make concessions, the Appellee admitted there was no case law at the time that supported their assertion that "a fetus is a person within the meaning of the Fourteenth Amendment."[75]

In much the same way that the Constitution makes no express provisions for a right to privacy,[76] it similarly does not define "person."[77] Instead, "person" is used when speaking about citizens of the United States, listing the qualifications of political representatives and offices, and addressing various provisions of the Constitution and its amendments.[78] "But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that [a person] has any possible prenatal application."[79] Based on this interpretation of Constitutional language, historical considerations, and various state court opinions, the Court held that a "person," as it is used within the Fourteenth Amendment, does not include the unborn.[80]

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68. *Id*. at 155.
69. *Id*. at 153-54.
70. *Id*.
71. *Id*. at 156.
72. *Id*.
73. *Id*. at 157.
74. *Id*. at 156.
75. *Id*. at 157.
76. *Id*. at 152.
77. *Id*. at 157.
78. *Id*.
79. *Id*.
80. *Id*. at 158.

Nevertheless, the Court hesitated to outright dismiss the Appellee's position despite this analysis.[81] This decision was seemingly due, in large part, to the uncertainty of when life begins.[82]

> 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.[83]

The opinions and beliefs about when life begins vary among different religious communities and within the scientific and medical community.[84] However, what further compounds this issue in a legal analysis is the generally accepted recognition of a prenatal life within other areas of law, which, when considered along with the many beliefs, contributes to a "wide divergence of thinking on this most sensitive and difficult question."[85]

As a solution, the holding in *Roe* included the adoption and implementation of two separate timelines for analyzing abortion.[86] The first timeline used a trimester framework which separated different periods, or trimesters, to determine when a state's compelling interest could be considered.[87] Specifically, the trimester framework was used to show that during the duration of a pregnancy, a state's interest in protecting the health and wellness of a pregnant woman is most applicable after the first trimester of pregnancy when "now-established medical facts" indicate that mortality rates would be more prevalent than abortions in the first trimester.[88] "It follows that, [after the first trimester], a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[89]

The second timeline or framework implemented by *Roe* considered the question of viability.[90] Viability, according to the Court, is achieved when "the fetus then presumably has the capability of meaningful life outside the mother's womb."[91] The viability timeline allowed states to regulate abortion after the point of viability but precluded regulations prior to viability.[92] Thus

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81. *Id.* at 159.
82. *Id.*
83. *Id.*
84. *Id.* at 160-62.
85. *Id.*
86. *Id.* at 162-63.
87. *Id.*
88. *Id.* at 163.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 163-64.

this framework recognized a "State's important and legitimate interest in potential life," but balanced this interest by permitting restrictions until a point in which the State's compelling interest may be realized.[93]

The Court in *Roe* held that the Texas statute violated the Due Process Clause of the Fourteenth Amendment because it criminalized abortion "without regard to pregnancy stage and without recognition of the other interests involved."[94] The holding considered the "relative weights of the respective interests," the legal and medical histories of abortion, and the "profound problems of the present day."[95] In doing so, it achieved, according to the Court, a balance between the interest in privacy while still allowing the State to "place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests."[96] Applying the trimester framework, *Roe* provided that decisions about abortion before the first trimester of pregnancy would be left to the "medical judgment of the pregnant woman's attending physician," while in subsequent trimesters, states are permitted to, "regulate the abortion procedure in ways that are reasonably related to maternal health," and may, "subsequent to viability . . . promot[e] its interest in the potentiality of human life [and] 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."[97]

Considering the present state of abortion law in the United States following *Dobbs*, it is worthwhile to consider Justice Rehnquist's dissent in *Roe*.[98] The dissent argued the right to privacy should not attach in this case.[99]

> Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word. Nor is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.[100]

The dissent argued that the "privacy" at stake in *Roe* is merely a wish to be free from "unwanted state regulation of consensual transactions."[101] Justice

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93. *Id*.
94. *Id*. at 164.
95. *Id*. at 165.
96. *Id*.
97. *Id*. at 164–65.
98. *Id*. at 171 (Rehnquist, J., dissenting).
99. *Id*. at 172.
100. *Id*. (citing Katz v. United States, 389 U.S. 347 (1967)).
101. *Id*.

Rehnquist stated this desire could be considered a "liberty" under the Fourteenth Amendment, but it would not be absolutely protected against deprivation under the Constitution and its Amendments.[102] As a further complication, he argued the majority seemingly, and improperly, substituted "legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment." [103]

B. *PLANNED PARENTHOOD OF SOUTHEASTERN PENNYSLVANIA V. CASEY*

Long before the *Dobbs* decision overturned existing abortion laws, many of the standards established by *Roe* were overturned, amended, or otherwise replaced by the Court's subsequent holding in *Planned Parenthood v. Casey*.[104] While *Casey* reaffirmed the "essential holding" in *Roe*, the opinion implemented substantial substantive changes to the standards, framework, and precedent of abortion laws in the United States.[105]

The Court in *Casey* addressed five provisions from the Pennsylvania Abortion Control Act of 1982 and its subsequent amendments in 1988 and 1989.[106] The challenged provisions included requirements for the woman seeking an abortion to give her informed consent, be provided with "certain information" prior to the procedure, minors seeking to obtain an abortion must have informed parental consent unless otherwise addressed through judicial bypass, and a married woman must provide a signed statement that she notified her husband of her intent to have an abortion.[107] The Act provided an exception to these requirements for "medical emergencies."[108] Additionally, the Act imposed regulations on abortion facilities, creating certain reporting requirements.[109]

Although *Casey* focused on the constitutionality of the Pennsylvania statutes, the case nevertheless provided the Court with an opportunity to review and reassess the holding in *Roe*.[110] Nineteen years after *Roe*, the Court held that "[a]fter considering the fundamental constitutional questions resolved by *Roe,* principles of institutional integrity, and the rule of *stare decisis,* we are led to conclude this: the essential holding of *Roe v.*

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102. *Id*. at 172-73.
103. *Id*. at 173.
104. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
105. *Id*. at 870-71.
106. *Id*. at 844; 18 PA. CONS. STAT. §§ 3203-20 (1989).
107. *Casey*, 505 U.S. at 844; 18 PA. CONST. STAT. §§ 3205-06, 3209 (1989).
108. *Casey*, 505 U.S. at 844; 18 PA. CONST. STAT. §§ 3203, 3205(a), 3206(a), 3209(c) (1989).
109. *Casey*, 505 U.S. at 844; 18 PA. CONST. STAT. §§ 3207(b), 3214(a), 3214(f) (1990).
110. *Casey*, 505 U.S. at 845-46.

Wade should be retained and once again reaffirmed."[111] The reaffirmation was extended to all three parts of "*Roe*'s essential holding" which included:

> a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State . . . . [A] confirmation of the State's power to restrict abortions after fetal viability, . . . [and] the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[112]

Despite this reaffirmation, *Casey* was quick to distinguish itself from *Roe*. Unlike *Roe,* which had been based on the principles and understandings of "privacy,"[113] *Casey* found that the issue of abortion was one of "liberty" under the Due Process Clause of the Fourteenth Amendment.[114] A strict and literal reading of this Clause, which provides that "no State shall 'deprive any person of life, liberty, or property, without due process of law,'"[115] might be interpreted to mean that the Due Process Clause would only apply to prohibiting individual states from depriving persons of their physical liberty.[116] However, the Court rejected this argument, citing to precedent in which the Due Process Clause was applied by means of a "substantive component" to prevent government actions.[117]

> As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."[118]

The Due Process Clause is rooted in the Magna Carta and is considered a safeguard to protect against not only tyranny but to guard against "arbitrary legislation."[119] Thus, *Casey* found that based on its intent, the Due Process Clause does protect the private "realm of personal liberty which the

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111. *Id*.
112. *Id*. at 846.
113. *Roe*, 410 U.S. at 154.
114. *Casey*, 505 U.S. at 846 ("The controlling word in the cases before us is 'liberty.'").
115. *Id*. at 846 (quoting U.S. CONST. amend. XIV, § 1).
116. *Id*.
117. *Id*. (citing Daniels v. Williams, 474 U.S. 327, 331 (1986) and Mugler v. Kansas, 123 U.S. 623, 660–61 (1887)).
118. *Id*. at 846-47 (Brandeis, J., concurring) (quoting Whitney v. California, 274 U.S. 357, 373).
119. *Id*. at 847 (Harlan, J., dissenting) (quoting Poe v. Ullman, 367 U.S. 497, 541 (1961)).

government may not enter," even when the particular issues at hand are not specifically addressed by the Constitution or Bill of Rights.[120]

In much the same way that the issue of abortion remains divisive today, the passing of time between *Roe* and *Casey* did little to diminish the controversy surrounding this issue.[121] Armed with the knowledge that people undoubtably would continue to disagree about the issue of abortion, the Court nevertheless undertook once more the task of addressing the "underlying constitutional issue."[122]

The Court previously held the Constitution provides protection for "matters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[123] In *Casey*, these same protections were held to afford individuals the right to make fundamental decisions about having children without intrusion by the government,[124] and ensures that states are kept from intruding on "the private realm of family life."[125]

In spite of the Court's affirmation of the foundational principles of *Roe*,[126] *Casey* provided a new substantive standard to analyze Constitutional issues related to abortion.[127] The Court upheld, pursuant to the doctrine of *stare decisis*, the concept of viability established by *Roe*.[128] However, the Court noted that the considerations *Roe* gave to the State's interests in protecting prenatal life had impacted legal decisions in a way that could not be reconciled to its prior opinion.[129]

Despite these apparent issues, the Court found that the holding from *Roe* was by no means "unworkable,"[130] and it was neither obsolete nor in jeopardy of being overruled, despite the factual considerations which made the opinion somewhat dated.[131] These issues were considered insufficient to justify overturning *Roe*, in part because overruling might risk jeopardizing the legitimacy of the Court.[132]

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120. *Id*. at 847-49; *see* Loving v. Virginia, 388 U.S. 1, 12 (1967).
121. *See Casey*, 505 U.S. at 845-46.
122. *Id*. at 850.
123. *Id*. at 851.
124. *Id*. (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
125. *Id*. (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
126. *Id*. at 845-46.
127. *Id*. at 878-79.
128. *Id*. at 870-71 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.").
129. *Id*. at 871.
130. *Id*. at 855.
131. *Id*. at 860-61.
132. *Id*. at 865-66.

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.[133]

The Court did, however, reject the trimester framework that had been implemented by *Roe* because it was not part of the "essential holding" and that "it misconceiv[ed] the nature of the pregnant woman's interest . . . [and] undervalu[ed] the State's interest in potential life, as recognized in *Roe*."[134] Further, *Casey* found that a state's restrictions on abortion should be analyzed based on an "undue burden" standard.[135]

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard.[136]

If a statute or regulation constitutes an undue burden under this test, the regulation is unconstitutional.[137] Thus, a state law that was designed for the purpose of advancing the State's interest in protecting prenatal life, but in the process, imposed an undue burden on a woman's right to obtain an abortion pre-viability, would be unconstitutional.[138]

Applying this new standard, the Court considered the Pennsylvania Abortion Control Act.[139] The Court held that the regulation requiring women be provided with information was not a substantial obstacle to obtaining an abortion and, therefore, was not an undue burden, and neither was the

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133. *Id*. at 869.

134. *Id*. at 873; *see* Webster v. Reprod. Health Servs., 492 U.S. 490, 529 (1989) (O'Connor, J., concurring in part and concurring in judgment) (describing trimesters as "problematic").

135. *Casey*, 505 U.S. at 877.

136. *Id*.

137. *Id*.; *see also* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 519-20 (1990).

138. *Casey*, 505 U.S. at 877.

139. *Id*. at 879.

adjoining requirement of a twenty-four-hour mandatory waiting period.[140] However, the "spousal notification requirement" would likely obstruct women from obtaining an abortion, making the requirement unconstitutional.[141] Likewise, *Casey* found that collecting and reporting patient information presented an undue burden on women seeking to maintain their privacy and did not serve a "purpose other than to make abortions more difficult."[142] The Court did uphold the requirement for a minor seeking an abortion to have obtained consent from a parent or through judicial bypass.[143] Further, the requirements for record keeping did not constitute an undue burden since they were reasonable measures within the medical field and intended to facilitate the preservation of the woman's health while still maintaining respect for the patient's privacy.[144]

Although *Casey* affirmed the "essential holding" from *Roe*,[145] the case was a marked departure in several substantive regards.[146] The focus of the majority opinion was directed towards "the woman's right to make the ultimate decision."[147] *Casey* still permitted states to regulate abortions, and it allowed restrictions implemented for the purpose of "persuad[ing] [the woman] to choose childbirth over abortion," except for those that affect a woman's right to choose.[148] Lastly, any provision constituting an undue burden would be invalid, despite the intention of the legislature.[149]

C. ADDITIONAL CASE LAW

Despite the prominence of both *Roe* and *Casey,* these were hardly the only abortion related cases heard by the Supreme Court. Subsequent decisions largely affirmed the Court's prior opinions and served primarily to build upon its doctrines.[150] However, if read in the context of the Supreme Court's most recent decision on abortion, these opinions can help illustrate the vast deviation from precedent that *Dobbs* represents.

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140. *Id*. at 883-87.
141. *Id*. at 893-94, 898.
142. *Id*. at 901.
143. *Id*. at 899.
144. *Id*. at 900-1001.
145. *Id*. at 869.
146. *Id*. at 873, 877.
147. *Id*. at 877.
148. *Id*. at 878.
149. *See id*. ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.").
150. Doe v. Bolton, 410 U.S. 179, 189 (1973) ("*Roe v. Wade* . . . sets forth our conclusion . . . . What is said there is applicable here and need not be repeated."); *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) (stating the standard established in *Casey* is not only the starting place for its analysis but that this standard serves as the test by which abortion-related challenges are considered).

Doe v. Bolton,[151] a case heard and decided almost simultaneously with *Roe*, found that restrictions on abortion, including the requirement for a second physician to be present during the abortion, created undue infringement if the same requirements were not mandated for other types of medical or surgical procedures.[152] Despite the similarity in wording, this holding was not a direct precursor to the subsequent undue burden standard in *Casey*.[153] Instead, this understanding was based on the belief that the presence of a second physician would cause an undue infringement on performing physicians and their "right to practice."[154] Because other means of holding physicians responsible were available if issues were to arise, and because of the requirements imposed on physicians in the form of training and licensing, the Court concluded that the two physician requirements could not be upheld.[155]

Doe reaffirmed the holding in *Roe*.[156] This included a reaffirmation that a woman had standing to challenge abortion regulations, provided she was pregnant on the date in question;[157] that although women do have the right to an abortion, as established under *Roe*, this is not an absolute constitutional right;[158] and that medical judgment by a physician should consider all available factors that relate towards protecting the health and well-being of the patient to make a decision for the benefit of the pregnant woman.[159]

Prior to *Dobbs*, the Court had previously upheld limitations on the manner in which abortions were performed, provided the State could show a legitimate interest and the restrictions did not constitute an undue burden on pregnant women.[160] In *Gonzales v. Carhart*,[161] the Court upheld a federally enacted ban on partial birth abortions, finding Congress could ban specific types of abortions provided the restrictions do not, among other requirements, impose an undue burden on the pregnant woman and the restrictions provide an exception where the life and health of the pregnant woman is at stake.[162] Congress sought to ban this form of abortion on the basis of moral, medical, and ethical considerations which determined partial-birth abortions were

151. 410 U.S. 179 (1973).
152. *Doe*, 410 U.S. at 199.
153. *See Casey*, 505 U.S. at 877.
154. *Doe*, 410 U.S. at 199.
155. *Id.* at 199-200.
156. *Id.* at 187-89.
157. *Id.* at 187.
158. *Id.* at 189.
159. *Id.* at 192.
160. Gonzales v. Carhart, 550 U.S. 124, 141-47 (2007).
161. 550 U.S. 124 (2007).
162. *Gonzales*, 550 U.S. at 164.

"gruesome and inhumane . . . [and] never medically necessary."[163] Although the Court declined to directly hold whether morals and ethics could be the basis of banning abortions, a topic which would reemerge in *Dobbs*, the Court conceded that a decision to abort did raise a difficult moral question and a physician's ethical duties could become complicated where partial-birth abortions were concerned.[164] Partial-birth abortions were not the primary manner in which the majority of abortions were carried out, and the Court continued to apply the undue burden standard, finding that where alternative options are available, Congress was permitted to regulate and ban certain types of abortion procedures.[165]

Prior to *Dobbs*, only a narrow and limited number of restrictions on abortions were upheld as constitutional.[166] Even restrictions that addressed the health and safety of an abortion procedure were required to have a necessary health purpose, and those restrictions which the Court deemed to be unnecessary or simply those which "have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion," were found to be unconstitutional under the undue burden standard.[167] This standard "asks courts to consider whether any burden imposed on abortion access is 'undue,'"[168] thereby establishing a high standard with which to judge the constitutionality of abortion restrictions.

III. *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

In 2018, Mississippi enacted House Bill No. 1510.[169] Known as the Gestational Age Act, this law restricts abortions after fifteen weeks'

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163. *Id.* at 141.

164. *Id.* at 157-59 (holding "[w]hether to have an abortion requires a difficult and painful moral decision" and the government's interests in and authority to "show its profound respect for the life within the woman" as well as protect the ethics, integrity, and high standards of the medical field, which could be complicated by the practice of a partial-birth abortion, were sufficient and legitimate interests); *see* Washington v. Glucksberg, 521 U.S. 702, 731 (1997); *see also* Barsky v. Bd. of Regents of Univ. of N.Y., 347 U.S. 442, 451 (1954) (concerning the interest of upholding medical standards); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852-53 (2018). *Contra Gonzales*, 550 U.S. at 182-83 (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 850) ("[T]he power of the State may not be used 'to enforce [ethical and moral principles] on the whole society through operation of the criminal law.'"); Lawrence v. Texas, 539 U.S. 558, 571 (2003).

165. *Gonzales*, 550 U.S. at 134-35, 164.

166. *See id.*; Whole Woman's Health v. Hellerstadt, 136 S. Ct. 2292, 2309 (2016) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877-78 (1992)).

167. *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877-78) ("'[A] statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.' Moreover, '[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.'").

168. *Id.* at 2310.

169. H.B. 1510, Legis. Assemb., 133d Sess. (Miss. 2018).

gestation,[170] subject to exceptions for medical emergencies and severe fetal abnormalities.[171] The Mississippi Legislature defined medical emergency as:

> a condition in which, on the basis of the physician's good faith clinical judgment, an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.[172]

The Mississippi Legislature went on to define "severe fetal abnormality" as "a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb."[173] Under the Act, if medical professionals perform an abortion after the fifteen week gestation period without a medical emergency or severe fetal abnormality, their Mississippi medical license can be revoked or suspended, and they can be subject to penalties or fines.[174]

A. HISTORY OF *DOBBS*

Jackson Women's Health Organization ("Clinic"), a facility in Mississippi providing abortion services, and one of the facility's doctors challenged the constitutionality of the Gestational Age Act legislation in *Jackson Women's Health Organization v. Currier*.[175] "The State argue[d] that because the Act is only a 'regulation,' which includes exceptions and was passed in furtherance of the State's legitimate interest in protecting the health of women, the Act does not place an undue burden on a woman's right to choose."[176] The court found there was not a legitimate state interest strong enough to justify abortion bans before viability, and fifteen weeks is prior to viability.[177] The title of the bill was considered, "An Act to be Known As the Gestational Age Act; To Prohibit Abortions After 15 Weeks' Gestation," and the court concluded that "prohibit" and "ban" were synonymous with one another.[178] Therefore, the Act was determined to be a ban rather than a

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170. MISS. CODE. ANN. § 41-41-191(1), (3)(e), (4) (2018) (defining gestation as "the time that has elapsed since the first day of the woman's last menstrual period").

171. *Id*. § 41-41-191(4).

172. *Id*. § 41-41-191(3)(j).

173. *Id*. § 41-41-191(3)(h).

174. *Id*. § 41-41-191(6)(a)-(b).

175. 349 F. Supp. 3d 536 (S.D. Miss. 2018).

176. *Id*. at 540-41.

177. *Id*.

178. *Id*.

regulation.[179] House Bill 1510 infringed upon the Fourteenth Amendment's guarantee of autonomy by disregarding women's ability to control their reproductive health decisions, and the court permanently enjoined the bill as a facially unconstitutional ban on pre-viability abortions.[180]

On appeal, in *Jackson Women's Health Organization v. Dobbs*,[181] the State raised five issues, which the Fifth Circuit condensed into three: "whether the summary-judgment order properly applies the Supreme Court's abortion jurisprudence, whether limiting discovery to viability was an abuse of discretion, and whether the scope of injunctive relief was proper."[182] The State primarily argued that the district court should not have only considered viability when looking at the Act's lawfulness.[183] Further, the parties disputed whether the Act was a regulation or ban on abortions.[184] The State presented that the Act regulated when an abortion could be performed, arguing "the Act is not a ban because it allows abortions before 15 weeks LMP [last menstrual period], it contains exceptions, and, practically speaking, it only limits the relevant time frame by one week, since the Clinic (the only abortion provider in Mississippi) does not perform abortions after 16 weeks LMP."[185] It further compared the Act to the federal Partial-Birth Abortion Ban Act of 2003 in *Gonzales*, asserting the district court should have considered "whether the Act 'place[s] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"[186] The Fifth Circuit distinguished *Gonzales*, finding "laws that limit certain methods of abortion or impose certain requirements on those seeking abortions are distinct under *Casey* from those that prevent women from choosing to have abortions before viability."[187] While the Act does not ban every abortion, it is a ban on certain pre-viability abortions, those after fifteen weeks, which *Casey* does not accept.[188]

> With respect to bans like this one, the Supreme Court's viability framework has already balanced the State's asserted interests and found them wanting: Until viability, it is for the woman, not the state, to weigh any risks to maternal health and to consider personal values and beliefs in deciding whether to have an abortion.[189]

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179. *Id.*
180. *Id.* at 544-45.
181. 945 F.3d 265 (5th Cir. 2019).
182. *Id.* at 271.
183. *Id.* at 272.
184. *Id.* at 272-73.
185. *Id.* at 273.
186. *Id.* (quoting Gonzales v. Carhart, 550 U.S. 124, 156 (2007)).
187. *Id.* at 274.
188. *Id.*
189. *Id.*

The State also argued the district court abused its discretion in limiting discovery to only the issue of "whether 15 weeks LMP is before or after viability."[190] In arguing for a remand to the district court in order to complete the record, the State contended that courts would remain "'willfully blind' to scientific developments and the Supreme Court can never see a full record in an abortion case" without the district court considering new evidence.[191] The State's discovery challenge came from the holding that pre-viability abortions were unconstitutionally banned within the Act, because no state interest is adequate to "ban abortions before viability."[192] The court held it was within the discretion of the district court to exclude the other evidence as it was bound by the viability framework precedent.[193]

Further, the State argued the permanent injunctive relief granted to the Clinic was an overreach because the Clinic did not have standing to bring the facial challenge, nor was the relief narrowly tailored to the injury.[194] The Fifth Circuit found the State conflated standing with relief.[195] "A plaintiff must show standing 'for each claim he seeks to press' and 'each form of relief sought.'"[196] The Clinic made a showing by pursuing the claim on behalf of the patients and the relief sought, a permanent injunction of the Act, redressed the abortion's pre-viability ban.[197] The State argued the facial invalidation of the Act without considering the constitutionality of the Act as applied to the Clinic and the patients was in error, and the court should vacate the relief and craft a remedy narrowly tailored to the actual dispute.[198] "[T]he Act is invalid as applied to every Mississippi woman seeking an abortion for whom the Act is an actual restriction . . . ."[199] The law here was "facially unconstitutional because it directly conflicts with *Casey*."[200] The Fifth Circuit held "the district court did not abuse its discretion in declining to fashion relief narrowly just because the result of the Clinic's internal policies is that no

190. *Id*. at 275.

191. *Id*.

192. *Id*. ("No state interest is constitutionally adequate to ban abortions before viability, so the interests advanced here are legally irrelevant to the sole issue necessary to decide the Clinic's constitutional challenge.").

193. *Id*.; *see* MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 773 n.4 (8th Cir. 2015) ("The State also appeals the district court's affirmance of a magistrate judge's order limiting discovery to the issue of viability. Because viability presents the central issue in this case, the district court did not err in affirming the magistrate judge's order.").

194. *Jackson Women's Health Org*., 945 F.3d at 275.

195. *Id*.

196. *Id*. (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006)).

197. *Id*.

198. *Id*. (The State asserted the actual dispute was "whether the Act [was] unconstitutional as applied to abortions performed at or before 16 weeks LMP").

199. *Id*. at 276 ("The only women to whom the Act is an actual restriction, then, are those who seek abortions before 20 weeks . . . .").

200. *Id*. at 277.

facility in Mississippi provides abortions after 16 weeks LMP."[201] The district court's judgement was affirmed.[202] The district court and Fifth Circuit emphasized that this ban was in clear conflict with Supreme Court precedent;[203] the State likely expected this outcome and pursued the case in hopes the Supreme Court would eventually hear their argument and overturn *Roe* and *Casey*.[204]

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court considered the constitutionality of Mississippi's law which prohibits abortion prior to the viability of the fetus.[205] In defense of the law, the State argued the Supreme Court should "reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish."[206] The respondents and Solicitor General argued for *Roe* and *Casey* to be reaffirmed, asserting Mississippi's abortion law would be invalid if the Court took this step.[207] The Court held that both *Roe* and *Casey* must be overruled.[208]

> The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[209]

The Supreme Court held that the right to abortion does not fall under the Due Process Clause of the Fourteenth Amendment.[210] Abortion is fundamentally different than previously recognized rights involving sexual relations, contraception, and marriage, as abortion destroys what the Mississippi law

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201. *Id.*

202. *Id.*

203. Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 545 (S.D. Miss. 2018) ("H.B. 1510 is permanently enjoined because it is a facially unconstitutional ban on abortions prior to viability."); *Jackson Women's Health Org.*, 945 F.3d at 269, 277 ("In an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability. States may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions. The law at issue is a ban.").

204. *See Currier*, 349 F. Supp. 3d at 542 ("No, the real reason we are here is simple. The State chose to pass a law it knew was unconstitutional to endorse a decades-long campaign, fueled by national interest groups, to ask the Supreme Court to overturn *Roe v. Wade*.").

205. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

210. *Id.*

calls an "unborn human being" and *Roe* and *Casey* deemed "fetal life."[211] "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. 'The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.'"[212]

Casey did not answer the question of whether the Constitution conferred the right to obtain an abortion, rather, it "reaffirmed *Roe's* 'central holding' based solely on the doctrine of *stare decisis*."[213] When the Court addressed the question, it considered whether the Constitution confers a right to abortion in three steps:

> First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.[214]

Casey argued the right to abortion was protected under the "liberty" aspect of the Due Process Clause of the Fourteenth Amendment.[215] Due Process protects two substantive rights, with the second category protecting select fundamental rights not included within the Constitution.[216] To determine whether a right falls into this category, the Court asks "whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[217]

> [G]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, [the Court] must ask what the *Fourteenth Amendment* means by the term "liberty." When [the Court] engage[s] in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.[218]

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211. *Id*. at 2243; *see* MISS. CODE ANN. § 41-41-191 (2018).

212. *Dobbs*, 142 S. Ct. at 2243 (Scalia, J., concurring in judgment in part and dissenting in part) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992)).

213. *Id*. at 2244.

214. *Id*.

215. *Id*. at 2246.

216. *Id*.

217. *Id*. (quoting Timbs v. Indiana, 139 S. Ct. 682, 687 (2019)).

218. *Id*. at 2248.

Under common law, it was considered a crime to receive an abortion after "quickening."[219] Most states criminalized abortion throughout all stages of pregnancy during the 19th century.[220] This trend persisted until *Roe*, and by that time, most states still banned abortions unless it was to save the mother's life.[221] "The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[222]

The Supreme Court found the respondents presented no persuasive answer to the historical evidence.[223] There was no dispute that most states criminalized abortion by 1868, and the respondents were unable to show the right to an abortion existed prior to end of the 20th century.[224] Further, the respondents' *amici* presented weak historical arguments.[225] The Supreme Court disfavored arguments based on legislative motive, asserting that even the legislative motive argument was made by supporters of abortion law rather than by legislators.[226] The Court found "[t]here is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being."[227]

Those in support of *Roe* and *Casey* did not seriously suggest that abortion had deep roots.[228] Rather, they argued the right to an abortion was located within a broader right.[229] The Supreme Court discussed the concept of ordered liberty, which "sets limits and defines the boundary between competing interests."[230] In doing so, it put forth the idea that people may evaluate abortion interests differently.[231] In one state, voters may want more extensive abortion rights, while in another, voters may want tighter abortion restrictions.[232] The historical perspective of ordered liberty does not prevent elected representatives from determining how to regulate abortion accordingly.[233]

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219. *Dobbs*, 142 S. Ct. at 2249 (defining "quickening" as "the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.").
220. *Id*. at 2252.
221. *Id*. at 2253.
222. *Id*. at 2253-54.
223. *Id*. at 2254.
224. *Id*.
225. *Id*.
226. *Id*. at 2255-56.
227. *Id*. at 2256.
228. *Id*. at 2257.
229. *Id*.
230. *Id*.
231. *Id*.
232. *Id*.
233. *Id*.

The Court found that an abortion right is not based on a sound precedent.[234] While *Roe* and *Casey* attempted to justify abortion through a broad right to autonomy, those rights did not have deep roots in history.[235] *Dobbs* "distinguishe[d] the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn being.'"[236] The Court considered that "[n]one of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion."[237] Because of this, the Court concluded that, "[t]hey do not support the right to obtain an abortion . . . [so] our conclusion that the Constitution does not confer such a right does not undermine them in any way."[238]

The doctrine of *stare decisis* serves many valuable functions.[239] However, the Court recognized that *stare decisis* is "not an inexorable command,"[240] and "is at its weakest when [the Court] interpret[s] the Constitution."[241] In interpreting the Constitution, great emphasis is placed on ensuring the matter is "settled right."[242] Here, the Supreme Court found five factors weighed in favor of overruling *Roe* and *Casey*: "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[243]

The Nature of the Court's Error: "An erroneous interpretation of the Constitution is always important, but some are more damaging than others."[244] The Supreme Court found that "*Roe* was . . . egregiously wrong and deeply damaging," with its analysis outside the scope of reasonable interpretation.[245] "[W]ielding nothing but 'raw judicial power,' the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."[246]

The Quality of the Reasoning: "Under [the Court's] precedents, the quality of the reasoning in a prior case has an important bearing on whether

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234. *Id*.
235. *Id*. at 2258.
236. *Id*. (citing Roe v. Wade, 410 U.S. 113, 159 (1973) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992)).
237. *Id*.
238. *Id*.
239. *Id*. at 2261.
240. *Id*. at 2262 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).
241. *Id*. (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).
242. *Id*.
243. *Id*. at 2265.
244. *Id*.
245. *Id*.
246. *Id*. (quoting Roe v. Wade, 93 S. Ct. 762, 763 (1973)) (White, J., dissenting).

it should be reconsidered."[247] *Roe* "stood on exceptionally weak grounds," failing to base the Constitutional right to obtain an abortion in precedent, text, or history.[248] In considering *Roe*, *Casey* affirmed *Roe's* central holding while creating the "undue burden" test and abandoning *Roe's* historical narrative.[249]

The Supreme Court analyzed the rules *Roe* imposed on the country, considering them similar to those found in a statute.[250] Neither party in *Roe* argued that viability was the point of an abortion right, nor did either party assert there should be a trimester framework.[251] Further, much of *Roe's* discussion on history was irrelevant, and it failed to discuss "how the States regulated abortion when the Fourteenth Amendment was adopted."[252] *Roe* engaged in incorrect discussion about common law and failed to note consensus of the state laws that were in effect in 1868.[253] "After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee."[254] The *Roe* opinion then looked to precedent, where it discussed the "right of personal privacy."[255] The Court "conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference."[256] The Supreme Court found that only the second meaning could have had any relevance to abortion, and even so, some of the cases falling in the second category were far astray.[257] None of the remaining decisions focused on an abortion's effect on "potential life."[258] *Roe* also failed to provide justifications for the assertions it made, further failing to justify its pre- and post-viability abortion distinction.[259] "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb."[260] Viability depends on factors that do not involve a fetus's characteristics, it is impacted by the

247. *Id*.
248. *Id*. at 2266.
249. *Id*.
250. *Id*.
251. *Id*.
252. *Id*. at 2267; *see* Roe v. Wade, 410 U.S. 113, 130-39 (1973).
253. *Dobbs*, 142 S. Ct. at 2267.
254. *Id*.
255. *Id*.; *see Roe*, 410 U.S. at 152.
256. *Dobbs*, 142 S. Ct. at 2267.
257. *Id*. at 2267-68.
258. *Id*. at 2268.
259. *Id*.
260. *Id*. (quoting *Roe*, 410 U.S. at 163).

quality of medical facilities, and it is not considered a "hard-and-fast line."[261] The Supreme Court found that the viability line "makes no sense."[262]

Casey relied on the Due Process Clause of the Fourteenth Amendment rather than the privacy right when it revisited *Roe*, further adopting the "central holding" of *Roe* without remedying the criticisms of the viability line.[263] While *Casey* rejected the trimester scheme, it adopted the "undue burden" test, which was found difficult to apply and ambiguous.[264] The Court also argued *Casey* applied a "novel version" of *stare decisis* because it failed to account "for the profound wrongness of the decision in *Roe*, and placed great weight on an intangible form of reliance with little if any basis in prior case law."[265]

Workability: "[The Court's] precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner."[266] The Supreme Court found the "undue burden" test under *Casey* rated "poorly on the workability scale," because it is "inherently standardless" to determine whether a burden is "due" or "undue."[267] The three subsidiary rules of the "undue burden" test also created problems.[268] The first rule, that "a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability," creates debate as to what qualifies as a "substantial" obstacle.[269] The second rule, "stat[ing] that measures designed 'to ensure that the woman's choice is informed' are constitutional so long as they do not impose 'an undue burden on the right' . . . overlaps with the first rule and appears to impose a different standard" when it comes to applying the rule to pre-viability abortions.[270] The third rule states, "*[u]nnecessary health* regulations that have the purpose or effect of presenting a *substantial obstacle* to a woman seeking an abortion impose an *undue burden* on the right."[271] The Supreme Court noted this rule contained three vague terms.[272] All of the rules requested courts to examine the effect a

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261. *Id*. at 2269-70.
262. *Id*. at 2270.
263. *Id*. at 2271.
264. *Id*.
265. *Id*. at 2272.
266. *Id*. (citing Montejo v. Louisiana, 556 U.S. 778, 792 (2009)).
267. *Id*. (Scalia, J., concurring in judgment in part and dissenting in part) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 992 (1992)).
268. *Id*.
269. *Id*. (quoting *Casey*, 505 U.S. at 878).
270. *Id*. (quoting *Casey*, 505 U.S. at 878).
271. *Id*. at 2273 (quoting *Casey*, 505 U.S. at 878).
272. *Id*. (finding the vague terms to include "undue burden," "substantial obstacle," and "*unnecessary* health regulations").

law had on women without defining the set of women the court should have in mind when determining whether the regulation presented a substantial obstacle to women.[273] The Court held the "undue burden" test under *Casey* was unworkable.[274]

Effect on Other Areas of Law: "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those doctrines."[275]

Reliance Interests: "[The Court] last consider[ed] whether overruling *Roe* and *Casey* [would] upend substantial reliance interests."[276] The Supreme Court agreed with *Casey* that conventional reliance interests were not present as abortion is normally an "unplanned activity" and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."[277] *Casey* perceived an intangible form of reliance, with the Supreme Court finding it was "ill-equipped to assess 'generalized assertions about the national psyche.'"[278] The Supreme Court relies on concrete reliance interests rather than on the intangible form of reliance endorsed in *Casey*.[279] The intangible reliance makes it difficult to assess the impact of abortion rights on the lives of women and society.[280] Both sides made arguments about the effect of abortion rights on the lives of women, and about the state of the fetus.[281]

> [The Supreme] Court has neither the authority nor the expertise to adjudicate those disputes, and the Casey plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies."
>
> Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power.[282]

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273. *Id*.
274. *Id*. at 2275.
275. *Id*.
276. *Id*. at 2276.
277. *Id*. (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)).
278. *Id*. (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (quoting *Casey*, 505 U.S. at 957).
279. *Id*.
280. *Id*. at 2277.
281. *Id*.
282. *Id*. (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

The decision on the issue of abortion only concerned the constitutional right to abortion; it does not cast doubt on Due Process Clause precedents not involving abortion.[283]

The Court acknowledged it did not know how the political system or society would respond to *Roe* and *Casey* being overruled, and even so, that knowledge could not influence its decision.[284] Accordingly, the Supreme Court held there is no right to an abortion under the Constitution, overruled *Roe* and *Casey*, and held "the authority to regulate abortions must be returned to the people and their elected representatives."[285]

B. *DOBBS'* EFFECT ON PRIOR CASE LAW

Dobbs overruled *Roe* and *Casey* and identified the standard to govern constitutional challenges to state abortion regulations.[286] In doing so, the Court determined rational-basis review is the correct standard for such a constitutional challenge.[287] Since obtaining an abortion has no basis in the text of the Constitution or in the history of the nation, it is not a fundamental constitutional right.[288] "A law regulating abortion . . . must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[289]

> These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.[290]

IV. *DOBBS* AND ITS IMPACT ON NORTH DAKOTA

The *Dobbs* decision impacts North Dakota by activating trigger mechanisms within the State's statutory law.

283. *Id.* at 2277-78.
284. *Id.* at 2279.
285. *Id.*
286. *Id.* at 2283-84.
287. *Id.* at 2283.
288. *Id.*
289. *Id.* at 2284.
290. *Id.* (citations omitted).

A. HISTORY OF THE NORTH DAKOTA ABORTION TRIGGER LAW

In 2007, North Dakota enacted House Bill 1466, putting into effect an abortion trigger law.[291] This law bans abortions with limited exceptions.[292] Under the law, there is an exception if the abortion "terminate[d] a pregnancy that resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest."[293] It is also an affirmative defense when the abortion was necessary to "prevent the death of the pregnant female," or when an individual acted under the direction of a physician or within the scope of their profession.[294] The 2007 bill included an effective date which was later amended by House Bill 1546 in 2019.[295]

In House Bill 1546, the Legislature amended the trigger language to make the Act effective on the thirtieth day after:

1. The adoption of an amendment to the United States Constitution which, in whole or in part, restores to the states the authority to prohibit abortion; or
2. The attorney general certifies to the legislative council issuance of the judgment in any decision of the United States Supreme Court which, in whole or in part, restores to the states authority to prohibit abortion.[296]

With the *Dobbs* decision, the United States Supreme Court restored to the states the authority to regulate and prohibit abortions, which was previously arrogated under *Roe* and *Casey*.[297] With this restoration of authority to the states, two trigger mechanisms within North Dakota statutory law became effective.[298]

On June 28, 2022, Attorney General Drew Wrigley ("Wrigley") wrote a letter to Director John Bjornson of the North Dakota Legislative Council, addressing the activation of two North Dakota trigger laws with the holding

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291. H.B. 1466, 60th Legis. Assemb. (N.D. 2007).

292. *Id*.

293. N.D. CENT. CODE § 12.1-31-12(3)(b) (2023).

294. *Id*. § 12.1-31-12(3)(a), (c).

295. H.B. 1466, 60th Legis. Assemb. (N.D. 2007) ("This Act becomes effective on the date the legislative council approves by motion of recommendation of the attorney general to the legislative council that it is reasonably probable that this Act would be upheld as constitutional."); H.B. 1546, 66th Legis. Assemb. (N.D. 2019).

296. H.B. 1546, 66th Legis. Assemb. (N.D. 2019).

297. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

298. Letter from Drew Wrigley, Att'y Gen., N.D., to John Bjornson, Dir., N.D. Legis. Council (June 28, 2022), https://attorneygeneral.nd.gov/sites/ag/files/documents/MediaAttachments/John%20Bjornson-LegislativeCouncil.pdf.

in *Dobbs*.[299] One of the trigger provisions is included within House Bill 1466, codified at section 12.1-31-12 of the North Dakota Century Code.[300] As legal barriers to enforcement were eliminated after *Dobbs,* Wrigley wrote, "[t]herefore, in my capacity as Attorney General of North Dakota, I hereby certify that the preconditions for enforcement of N.D.C.C. § 12.1-31-12 have been satisfied, and this provision shall be given its full effect on July 28, 2022, the thirtieth day after the date of this certification letter."[301] Wrigley also certified that the triggering mechanism for House Bill 1546, codified at section 14-02.1-04.2, which bans human dismemberment abortion unless in case of medical emergency, was satisfied.[302]

In *Access Independent Health Services, Inc. v. Wrigley*,[303] Access Independent Health Services, Inc., d/b/a Red River Women's Clinic ("RRWC"), filed for a temporary injunction to stop the enforcement of section 12.1-31-12.[304] At issue was the second provision of the trigger language that stated the statute goes into effect if the Supreme Court returns abortion regulation to the states and whether it was initiated and implemented correctly.[305] The court was unable to determine a final decision on the appropriateness of issuing a preliminary injunction before section 12.1-31-12 was set to take effect on July 28, 2022, so it considered whether a temporary restraining order was appropriate under the North Dakota Rules of Civil Procedure 65(a) until it could determine a ruling on a preliminary injunction.[306] RRWC argued Wrigley failed to follow the correct procedures laid out under the trigger language, such as that he issued the certification prematurely to the North Dakota Legislature before the United States Supreme Court issued the certified judgment of *Dobbs*.[307] Wrigley argued he followed procedure, and even if he did not, he could not be retroactively restrained from issuing the certification to the Legislature.[308] The court found that Wrigley issued the certification prematurely.[309] The court noted that after the Supreme Court publishes an opinion, parties have twenty-five days to seek a rehearing, during which time the court could alter or amend its original opinion.[310] As such, the trigger language under section 12.1-31-12 of the

299. *Id*.
300. *Id*.
301. *Id*.
302. *Id*.
303. No. 08-2022-CV-1608, 2022 WL 3009722 (N.D. Dist. July 27, 2022).
304. *Access Indep. Health Servs*., No. 08-2022-CV-1608, ¶ 1, 2022 WL 3009722, at * 1.
305. *Id*. at ¶ 3.
306. *Id*. at ¶ 4.
307. *Id*. at ¶ 5.
308. *Id*.
309. *Id*. at ¶ 9.
310. *Id*. at ¶ 7.

North Dakota Century Code requires formal issuance of the Supreme Court's judgment.[311] The court also looked at the amendment of the trigger language from the original 2007 language to the amended 2019 language, finding the Legislature saw fit to make the trigger process more restrictive.[312] While Wrigley's certification may have been proper under the original 2007 trigger language, it was not proper under the heightened 2019 standard.[313] The court granted the temporary restraining order, "prohibiting North Dakota Century Code § 12.1-31-12 from taking effect until [the] attorney general follows the provisions outline[d] in the triggering language or until future order of the Court."[314]

RRWC filed a motion for preliminary injunction on August 16, 2022, with Judge Romanick issuing an Order on Plaintiff's Motion for Preliminary Injunction on August 25, 2022.[315] Judge Romanick ruled in favor of RRWC, granting the preliminary injunction.[316] In making the ruling, Judge Romanick indicated the decision was based on requiring more time for a proper judgment, and while the clinic has moved to Minnesota, the statute can impact doctors and hospitals within the State.[317]

Wrigley petitioned to the North Dakota Supreme Court to vacate the preliminary injunction of North Dakota Century Code section 12.1-31-12 in *Wrigley v. Romanick*.[318] Wrigley, on behalf of the State of North Dakota, argued the district court enjoined the statute without evaluating the merits when considering motions for a preliminary injunction.[319] RRWC argued the district court gave proper consideration to each of the preliminary injunction factors: that patients would suffer irreparable harm without injunctive relief, it was in the public's interest to maintain the preliminary injunction, and there was no evidence that the preliminary injunction would harm the State or the public.[320] The North Dakota Supreme Court heard oral arguments on November 29, 2022.[321]

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311. *Id.*

312. *Id.* at ¶ 8.

313. *Id.*

314. *Id.* at ¶ 10.

315. *North Dakota Court Records Inquiry*, N.D. CTS., https://publicsearch.ndcourts.gov (last visited March 27, 2023) (select Burleigh county, click on "Civil, Family & Probate Case Records," choose "Search By: Case," and search "08-2022-CV-1608").

316. *North Dakota Abortion Ban Temporarily Blocked by Judge*, CBS NEWS (Aug. 25, 2022), https://www.cbsnews.com/news/north-dakota-abortion-ban-blocked-by-judge/.

317. *Id.*

318. 2023 ND 50.

319. Petitioner Drew H. Wrigley's Brief in Support of Petition for Supervisory Writ at 11, *Wrigley*, 2023 ND 50 (No. 20220260).

320. Brief of Respondents Access Independent Health Services, Inc. d/b/a Red River Women's Clinic and Kathryn L. Eggleston, M.D. at 14-15, 32-33, *Wrigley*, 2023 ND 50 (No. 20220260).

321. *Wrigley v. Romanick, et al.*, N.D. CTS., https://www.ndcourts.gov/supreme-court/dockets/20220260 (last visited Apr. 13, 2023).

The North Dakota Supreme Court issued its opinion in *Wrigley v. Romanick,* on March 16, 2023.[322] RRWC argued the North Dakota Supreme "Court should decline to exercise its supervisory jurisdiction because this issue is not the sort of 'extraordinary case' where the Court's intervention is necessary."[323] The court exercised its "discretion to review whether the district court abused its discretion [in] issuing a preliminary injunction," finding the issue was one of important public interest.[324] The State challenged each element required for granting the preliminary injunction.[325] "'A trial court's discretion to grant or deny a preliminary injunction is based on the following factors: (1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest.'"[326] RRWC argued it had "a substantial likelihood of succeeding on the merits" because the North Dakota Constitution provides a fundamental right to abortion care, and the statute was unconstitutional.[327] If there is a fundamental right to an abortion under the State Constitution, strict scrutiny applies to the statute.[328] If there is not a fundamental right to abortion, the court reviews the statute under the rational basis standard.[329] RRWC argued the North Dakota Constitution provides a fundamental right to an abortion under Sections 1 and 12 of Article I.[330] Section 1 and Section 12 provide:

> Section 1. All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.
>
> ….
>
> Section 12. In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No

322. *Wrigley*, 2023 ND 50.
323. *Id.* at ¶ 5.
324. *Id.* at ¶ 11.
325. *Id.* at ¶ 12.
326. *Id.* (quoting Eberts v. Billings Cnty Bd. of Comm'rs, 2005 ND 85, ¶ 8, 695 N.W.2d 691).
327. *Id.* at ¶ 13.
328. *Id.* at ¶ 14 (citing Hoff v. Berg, 1999 ND 115, ¶ 13, 595 N.W.2d 285).
329. *Id.* (citing *Hoff*, 1999 ND 115, ¶ 13, 595 N.W.2d 285).
330. *Id.* at ¶ 15.

> person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.[331]

The State argued Article I provided no constitutional right to an abortion, because abortion "does not have longstanding roots in American culture."[332]

Constitutional provisions are interpreted by the court through principles of statutory construction, with its intent and purpose determined from the language of the provisions.[333] The court also considers the words and meanings that the framers construed the provision to mean, as well as the laws and legal practices in effect when the constitutional provisions were adopted.[334] The North Dakota Supreme Court found RRWC "has a substantial likelihood in establishing there is a fundamental right for a woman to obtain an abortion in instances where it is necessary to preserve her life or health."[335] In giving effect to the intent and purpose of the people adopting the constitutional statement, the court construes the North Dakota Constitution with the history existing at the time the constitutional provision was adopted.[336] Article I, Section 1 of the "North Dakota Constitution explicitly provides all citizens of North Dakota the right of enjoying and defending life and pursuing and obtaining safety. These rights implicitly include the right to obtain an abortion to preserve the woman's life or health."[337]

The court found that the history and traditions of North Dakota supported these conclusions because women have been able to obtain abortions in order to preserve their life or health throughout the State's past.[338] Both prior to statehood and after, North Dakota criminalized obtaining an abortion, but it explicitly provided for abortions when done to preserve the life of a woman.[339] The State Legislature provided for exceptions to criminal prohibitions to abortions to preserve the life of a woman until the enactment of North Dakota Century Code section 12.1-31-12 in 2007.[340] Medical

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331. N.D. CONST. art. I, §§ 1, 12.

332. *Wrigley*, 2023 ND 50, ¶ 16.

333. *Id*. at ¶ 17 (citing MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶ 25, 855 N.W.2d 31).

334. *Id*. (citing *MKB Mgmt Corp*., 2014 ND 197, ¶ 25, 855 N.W.2d 31).

335. *Id*. at ¶ 20.

336. *Id*. at ¶ 21 (citing State v. Hagerty, 1998 ND 122, ¶ 13, 570 N.W.2d 139 and City of West Fargo v. McAllister, 2022 ND 94, ¶ 6, 974 N.W.2d 393).

337. *Id*. at ¶ 22.

338. *Id*. at ¶ 23.

339. *Id*. at ¶¶ 23-24; *see* COMP. LAWS OF DAKOTA, PENAL CODE § 6538 (1887); N.D. REV. CODE § 7177 (1895).

340. *Wrigley*, 2023 ND 50, ¶ 24.

journals further showed the life or health of a woman could be preserved through an abortion.[341]

The State argued abortion was not a fundamental right, as those rights reserved to the people under Sections 1 and 12 of Article I of the North Dakota Constitution could be distinguished from that of abortion because abortion did not have longstanding roots in American culture.[342] The court indicated that the State's argument was incorrect because the right to receive an abortion to preserve the life or health of a woman "is deeply rooted in North Dakota's history and culture."[343]

Fundamental rights include those rights that are "deeply rooted in history and tradition and are implicit in the concept of ordered liberty."[344]

> After review of North Dakota's history and traditions, and the plain language of article I, section 1 of the North Dakota Constitution, it is clear the citizens of North Dakota have a right to enjoy and defend life and a right to pursue and obtain safety, which necessarily includes a pregnant woman has a fundamental right to obtain an abortion to preserve her life or her health.[345]

Therefore, strict scrutiny applies to an analysis of section 12.1-31-12.[346] For the statute to be justified in restricting a fundamental right under the strict scrutiny standard, it must further a compelling government interest and be narrowly tailored to serve the government interest.[347]

"The State argue[d] it [had] a compelling interest in protecting women's health and protecting unborn human life."[348] The court found the State has a compelling interest, but needed to show section 12.1.-31-12 was necessary to achieve the compelling state interests.[349] "While [the court] note[s] the legislature can regulate abortion, it must do so in a manner that is narrowly tailored to achieve the compelling interest."[350] Section 12.1-31-12 provides restrictions on a women's ability to have an abortion to preserve her life or health because it criminalizes an abortion performed to preserve the life or health of a woman, and requires physicians to face criminal prosecution for performing life-preserving abortions.[351] "This is not narrowly tailored to

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341. *Id*. at ¶ 25 (citing *Criminal Abortions*, 24 JOURNAL-LANCET 81, 82 (1914)).
342. *Id*. at ¶ 26.
343. *Id*.
344. *Id*. at ¶ 27 (citing State v. Baxter, 2015 ND 107, ¶ 15, 863 N.W.2d 208).
345. *Id*.
346. *Id*. at ¶ 28.
347. *Id*. (citing Hoff v. Berg, 1999 ND 115, ¶ 14, 595 N.W.2d 285).
348. *Id*. at ¶ 29.
349. *Id*. at ¶¶ 29-30.
350. *Id*. at ¶ 30 (citing *Hoff*, 1999 ND 115, ¶ 13, 595 N.W.2d 285).
351. *Id*.

achieve the State's interests in women's health and protecting unborn human life."[352]

The affirmative defense in section 12.1-31-12 is allowed only when a physician determines an abortion is required to prevent a female's death.[353] The statute fails to allow abortions to preserve the health of a woman, despite the potential consequences to the woman's health.[354] "Preserving the life or health of the woman necessarily includes providing an abortion when necessary to prevent severe, life altering damage."[355] The court determined that "[a] law that on its face criminalizes a life-preserving abortion, infringes unnecessarily on a woman's fundamental right to seek an abortion to preserve her life or health, at least in part, cannot withstand strict scrutiny."[356]

The State also argued the statute was narrowly tailored to the government interest, asserting section 12.1-31-12 included a "narrow" definition of abortion.[357] Abortion is defined as:

> "Abortion" means the use or prescription of any substance, device, instrument, medicine, or drug to intentionally terminate the pregnancy of an individual known to be pregnant. The term does not include an act made with the intent to increase the probability of a live birth; preserve the life or health of a child after live birth; or remove a dead, unborn child who died as a result of a spontaneous miscarriage, an accidental trauma, or a criminal assault upon the pregnant female or her unborn child.[358]

The court found that the definition of abortion is not narrowly tailored to women's health.[359]

Under the strict scrutiny analysis, as the statute is not narrowly tailored to promote the women's health and to protect unborn human life, section 12.1-31-12 is unconstitutional.[360] As such, RRWC "has a substantial likelihood of succeeding on the merits at least with respect to life or health preserving abortions."[361]

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352. *Id.*
353. *Id.* at ¶ 31.
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at ¶ 32.
358. *Id.* (quoting N.D. CENT. CODE § 12.1-31-12(1)(a) (2023)).
359. *Id.* at ¶ 32 ("[T]he definition does not include abortions for ectopic pregnancies, which is a pregnancy where the fertilized egg 'does not implant appropriately within the uterus' and is potentially lethal to the mother. Therefore, under the statutory construction of N.D.C.C. § 12.1-31-12, an abortion to treat an ectopic pregnancy would be a criminal act.") (citation omitted).
360. *Id.* at ¶ 33.
361. *Id.*

When granting a preliminary injunction, the second factor a court considers is "the irreparable injury a party will suffer in the absence of a preliminary injunction."[362] RRWC argued the irreparable damage would be the loss of performance of life-saving or injury avoiding abortions if the statute were enforced.[363] The State asserted the irreparable injury would be "the irreversible loss of unborn human life."[364] While the court indicated it may have made a neutral finding for the second factor, it found that the lower court did not abuse its discretion when finding RRWC would suffer the greater irreparable injury.[365]

The third factor to consider when granting a preliminary injunction is harm to other interested parties.[366] RRWC argued that women in North Dakota would face harm if the statute were not enjoined.[367] The State argued citizens would face harm if the statute was enjoined because citizens have an interest in the enforcement of state legislation.[368] The lower court did not abuse its discretion when it found RRWC persuasive, because the statute was inactive for almost fifteen years and the State was unable to show how a longer delay would impact the other interested parties.[369]

Lastly, the court must consider the effect on public interest when considering whether to grant a preliminary injunction.[370] RRWC argued "it is always in the public interest to protect constitutional rights and abortion has been legal in North Dakota for 50 years."[371] The State argued that North Dakota has a history of prohibiting abortions prior to *Roe* and *Casey*.[372] "The district court noted . . . the purpose of preliminary injunctions is to maintain the status quo during the pendency of litigation and at this time the status quo in North Dakota is not to restrict or limit abortions in the manner provided

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362. *Id*. at ¶ 34 ("An injury is irreparable when it cannot be adequately compensated in damages, and it is not necessary that the pecuniary damage be shown to be great. Acts which result in a serious change of, or are destructive to, the property affected either physically or in the character in which it has been held or enjoyed, do an irreparable injury." (quoting Vorachek v. Citizens State Bank, 461 N.W.2d 580, 585 (N.D. 1990))).

363. *Id*. at ¶ 35.

364. *Id*.

365. *Id*. ("The death of unborn children and the potential death or injury of a pregnant woman are both tragic. While we may have found this factor neutral, under an abuse of discretion standard we 'will not reverse a district court's decision merely because it is not the one [we] would have made had it been [this Court] deciding the motion.' The district court did not abuse its discretion in determining RRWC [Access Independent Health Services] would suffer a greater irreparable injury than the State." (first two alterations in orginal) (quoting Anderson v. Baker, 2015 ND 269, ¶ 7, 871 N.W.2d 830)).

366. *Id*. at ¶ 36.

367. *Id*.

368. *Id*.

369. *Id*.

370. *Id*. at ¶ 37.

371. *Id*.

372. *Id*.

for in N.D.C.C. § 12.1-31-12."[373] *Roe v. Wade* granted a constitutional right to an abortion in 1973, and from 1973 to June 2022, the right to an abortion, with restrictions, was present within North Dakota.[374] The trigger within section 12.1-31-12 was not activated prior to the district court's injunction, meaning the status quo of the State is to provide abortion care.[375] "The district court properly determined the status quo at this time is to generally allow abortion care and thus to maintain that status quo until a trial on the merits is held, N.D.C.C. § 12.1-31-12 should be temporarily enjoined from enforcement."[376]

The North Dakota Supreme Court held the district court did not abuse its discretion in granting preliminary injunction and left the preliminary injunction in place.[377]

V. CURRENT SITUATION IN NORTH DAKOTA

Although the *Dobbs* decision certainly altered the legal field, its impact on North Dakota practitioners is far less apparent as it is yet to be fully developed at the state level. Following the Supreme Court's decision, the Due Process Clause of the Fourteenth Amendment and the United States Constitution "do not confer a right to abortion" and the decision to allow, to regulate, or to prohibit abortions has been returned to the discretion of the people of each state and to their elected representatives.[378] As Judge Romanick noted when granting an injunction on behalf of RRWC, "[t]he United States Supreme Court made it clear that the United States Constitution does not include a right to abortion" and a right to abortion within each individual state cannot be inferred based on the decisions of other states.[379] Thus, all decisions relating to the permission or restriction of abortions within each state have been placed in the hands of its people and their elected representatives.[380]

Under *Wrigley v. Romanick*, the North Dakota Supreme Court held that the North Dakota Constitution provides a fundamental right for women to receive an abortion in order to preserve their life or health.[381] The Legislature has taken steps to determine the State's position on abortion. The North Dakota trigger law, which has already been described in detail, would have

373. *Id.*
374. *Id.* at ¶ 38.
375. *Id.*
376. *Id.*
377. *Id.* at ¶¶ 39-40.
378. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242-43 (2022).
379. Order on Plaintiff's Motion for Preliminary Injunction at ¶ 10, Access Indep. Health Servs., Inc. v. Wrigley, No. 08-2022-CV-1608 (N.D. Dist. Aug. 25, 2022).
380. *Dobbs*, 142 S. Ct. at 2279.
381. Wrigley v. Romanick, 2023 ND 50, ¶¶ 27-28.

been enacted after the *Dobbs* decision when it would have been "reasonably probable that this Act would be upheld as constitutional."[382] However, after the South Central Judicial District Court of North Dakota granted a preliminary injunction staying the enactment and enforcement of the law,[383] the North Dakota Legislature heard a new bill concerning abortion laws and regulations.[384]

During the current North Dakota Legislative Session, legislators introduced Senate Bill 2150, which includes proposed changes to North Dakota Century Code section 12.1-31-12.[385] These changes include modifications to the definition of abortion, and revisions to the affirmative defenses included in the statute.[386] "Abortion" under Senate Bill 2150 is defined as:

> [T]he act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, including the elimination of one or more unborn children in a multifetal pregnancy, with knowledge the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to:
>
> (1) Remove a dead unborn child caused by spontaneous abortion; or
>
> (2) Treat a woman for an ectopic pregnancy.[387]

Although the definition will have bearing on North Dakota practitioners, it is the proposal to reclassify the affirmative defenses that will likely have the most impact on North Dakota practitioners. Under Senate Bill 2150, section 12.1-31-12 would provide that criminal penalties are not applied under the following circumstances:

> a. An abortion deemed necessary based on reasonable medical judgment which was intended to prevent the death of the pregnant female.
>
> b. An abortion to terminate a pregnancy that based on reasonable medical judgment resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest, as those offenses are

382. H.B. 1466, 60th Legis. Assemb. (N.D. 2007).
383. Order on Plaintiff's Motion for Preliminary Injunction, *supra* note 379, at ¶ 20.
384. S.B. 2150, 68th Legis. Assemb. (N.D. 2023).
385. *Id.*
386. *Id.*
387. *Id.*

> defined in chapter 12.1-20, if the probable gestational age of the unborn child is six weeks or less.
>
> c. An individual assisting in performing an abortion if the individual was acting within the scope of that individual's regulated profession, was under the direction of or at the direction of a physician, and did not know the physician was performing an abortion in violation of this section.
>
> d. An abortion necessary due to a medical emergency.[388]

Pursuant to the original section 12.1-31-12 statutory language, the criteria above were affirmative defenses and a person charged under this section who sought to succeed on an affirmative defense to avoid the penalties of a Class C felony would be required to prove their position in accordance with these defenses.[389] Senate Bill 2150 proposing to reclassify these affirmative defenses to be exceptions where the criminal penalties would not apply[390] is an important distinction for North Dakota practitioners, physicians, and members of the medical community.

Many of the initial statements heard by the North Dakota Legislature, both by those supporting and those opposing the bill, have been persons, parties, and practitioners voicing, in part, their approval of the proposed reclassifications as a means of protecting physicians.[391] According to one North Dakota practitioner writing in support of the bill, the purpose and focus of Senate Bill 2150 is to condense multiple previously enacted statutes, remove obsolete language, make the statutory language consistent, and clarify previously ambiguous language all while still maintaining the legislative intent for which the statute was enacted.[392] Thus, while reclassification of the amendments captured the attention of most parties,

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388. *Id.*

389. *See* N.D. CENT. CODE § 12.1-31-12(3) (2023).

390. S.B. 2150, 68th Legis. Assemb. (N.D. 2023).

391. *Hearing on S B. 2150 Before the S. Judiciary Comm.*, 68th Legis. Assemb. 2 (Jan. 16, 2023) (statement of Dr. Ana Tobiasz M.D.) ("SB 2150 eliminates the affirmative defenses in the trigger law and this is a respectable change to minimize the impact these laws will have on practicing physicians who care for pregnant women experiencing medical complications in North Dakota."); *Hearing on S B. 2150 Before the S. Judiciary Comm.*, 68th Legis. Assemb. 2 (Jan. 16, 2023) (statement of Melissa Hauer, General Counsel/Vice President, North Dakota Hospital Association) ("Physicians need to manage pregnancy complications where the mother's life or health are at risk, and they should not fear criminal consequences for doing so. With such uncertainty, physicians may delay care or decide not to practice in a state that puts them at risk of jail time for providing medically necessary care."); *Hearing on S B. 2150 Before the S. Judiciary Comm.*, 68th Legis. Assemb. 1 (Jan. 16, 2023) (statement of Courtney Koebele, North Dakota Medical Association) ("This bill fixes our main objection to the trigger law – the affirmative defenses. Which if left in place, make many common procedures that physicians do chargeable as a felony."). *See generally Hearing on S B. 2150 Before the S. Judiciary Comm.*, 68th Legis. Assemb. 1 (Jan. 16, 2023) (statement of Kayla Schmidt, Interim Executive Director, North Dakota Women's Network).

392. *Hearing on S B. 2150 Before the S. Judiciary Comm.*, 68th Legis. Assemb. 3 (Jan. 16, 2023) (statement of Christopher Dodson, Executive Director, North Dakota Catholic Conference).

"[u]ltimately the question presented by SB 2150 is not about whether a person supports or opposes the abortion bans. It is about whether we want a clearer, better statute."[393] This perspective is similarly reflected in other opinion pieces which voiced their support of the bill while still maintaining reservations about the contents of the law.[394] Despite the potential passage of Senate Bill 2150 and the immediate impact of the reclassified affirmative defenses, the question of abortion in North Dakota and the impact that the *Dobbs* decision will have on North Dakota practitioners has yet to be fully developed and will undoubtably continue to be a topic of discussion for the foreseeable future.

In addition to the proposed amendments to section 12.1-31-12, the bill also addressed section 14-02.1-04.2 and its prohibition on human dismemberment abortion and proposed that various sections prohibiting statutory-specific abortion related actions be repealed.[395] Under Section 11 of Senate Bill 2150, section 14-02.1-04.2 will be repealed if the bill is passed.[396]

Senate Bill 2150 passed in the Senate on January 31, 2023, and is appearing before the House of Representatives where it may receive more amendments before being voted on.[397] Currently included in the Act is Section 12, an emergency section under which the Act is declared to be an emergency measure.[398] If the bill passes in the House and is signed by the Governor, it will automatically go into effect.[399]

VII. CONCLUSION

With the Supreme Court's decision in *Dobbs*, *Roe* and *Casey* were overturned and the Court returned the ability to regulate abortions to the states.[400] With this authority, North Dakota's trigger laws were enacted, resulting in a series of litigation. Further, the 68th Legislative Assembly has put forth legislation aimed at amending section 12.1-31-12 of the North Dakota Century Code. The return of authority to the people and legislative bodies to regulate abortion is an ongoing issue in North Dakota, and one that

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393. *Id*. at 6.

394. *Hearing on S B. 2150 Before the S. Judiciary Comm*., 68th Legis. Assemb. 2 (Jan. 16, 2023) (statement of Dr. Ana Tobiasz, M.D.); *Hearing on S B. 2150 Before the S. Judiciary Comm*., 68th Legis. Assemb. 1-2 (Jan. 16, 2023) (statement of Dr. Erica Hofland, M.D.); *Hearing on S B. 2150 Before the S. Judiciary Comm*., 68th Legis. Assemb. 1-2 (Jan. 16, 2023) (statement of Dr. Brendan Boe, M.D.).

395. S.B. 2150, 68th Legis. Assemb. (N.D. 2023).

396. *Id*. (repealing "Sections 14-02.1-04.1, 14-02.1-04.2, 14-02.1-5.1, 14-02.1-05.2, and 14-02.1-05.3 of the North Dakota Century Code . . . .").

397. H.J., 68th Legis. Assemb. 472 (N.D. 2023).

398. S.B. 2150, 68th Legis. Assemb. (N.D. 2023).

399. N.D. LEGIS. DRAFTING MANUAL, LEGIS. COUNCIL at 7 (2023).

400. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

will continue to impact physicians, legal practitioners, and the people within the state as lawmakers and legislators continue to enact legislation and litigate the issue of abortion.[401]

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401. This article was written while the 68th Legislative Assembly was in session. As such, legislators in North Dakota continued to introduce and amend legislation during the pendency of this article. This article is up-to-date to the point of when it was submitted for publication. The NORTH DAKOTA LAW REVIEW will be publishing a second part to this article to keep readers updated with the state of abortion laws in North Dakota.

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