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FORUM

The First Amendment and the Abortion Rights Debate

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Following *Dobbs v. Jackson*'s (2022) reversal of *Roe v. Wade* (1973) — and the subsequent revocation of federal abortion protection — activists and scholars have begun to reconsider how to best ground abortion rights in the Constitution. In the past year, numerous Jewish rights groups have attempted to overturn state abortion bans by arguing that abortion rights are protected by various state constitutions' free exercise clauses — and, by extension, the First Amendment of the U.S. Constitution. While reframing the abortion rights debate as a question of religious freedom is undoubtedly strategic, the Free Exercise Clause is not the only place to locate abortion rights: the Establishment Clause also warrants further investigation.

Roe anchored abortion rights in the right to privacy — an unenumerated right with a long history of legal recognition. In various cases spanning the past two centuries, the Supreme Court located the right to privacy in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Roe* classified abortion as a fundamental right protected by strict scrutiny, meaning that states could only regulate abortion in the face of a "compelling government interest" and must narrowly tailor legislation to that end. As such, *Roe*'s trimester framework prevented states from placing burdens on abortion access in the first few months of pregnancy. After the fetus crosses the viability line — the point at which the fetus can survive outside the womb — states could pass laws regulating abortion, as the Court found that "the potentiality of human life" constitutes a "compelling" interest. *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) later replaced strict scrutiny with the weaker "undue burden" standard, giving states greater leeway to restrict abortion access. *Dobbs v.*

Jackson overturned both *Roe* and *Casey*, leaving abortion regulations up to individual states.

While *Roe* constituted an essential step forward in terms of abortion rights, weaknesses in its argumentation made it more susceptible to attacks by skeptics of substantive due process. *Roe* argues that the unenumerated right to abortion is implied by the unenumerated right to privacy — a chain of logic which twice removes abortion rights from the Constitution's language. Moreover, Roe's trimester framework was unclear and flawed from the beginning, lacking substantial scientific rationale. As medicine becomes more and more advanced, the arbitrariness of the viability line has grown increasingly apparent.

As abortion rights supporters have looked for alternative constitutional justifications for abortion rights, the First Amendment has become increasingly more visible. Certain religious groups — particularly Jewish groups — have argued that they have a right to abortion care. In *Generation to Generation Inc v. Florida*, a religious rights group argued that Florida's abortion ban (HB 5) constituted a violation of the Florida State Constitution: "In Jewish law, abortion is required if necessary to protect the health, mental or physical well-being of the woman, or for many other reasons not permitted under the Act. As such, the Act prohibits Jewish women from practicing their faith free of government intrusion and thus violates their privacy rights and religious freedom." Similar cases have arisen in Indiana and Texas. Absent constitutional protection of abortion rights, the Christian religious majorities in many states may unjustly impose their moral and ethical code on other groups, implying an unconstitutional religious hierarchy.

Cases like *Generation to Generation Inc v. Florida* may also trigger heightened scrutiny status in higher courts; The Religious Freedom Restoration Act (1993) places strict scrutiny on cases which "burden any aspect of religious observance or practice."

But framing the issue as one of Free Exercise does not interact with major objections to abortion rights. Anti-abortion advocates contend that abortion is tantamount to murder. An anti-abortion advocate may argue that just as religious rituals involving human sacrifice are illegal, so abortion ought to be illegal. Anti-abortion advocates may be able to argue that abortion bans hold up against strict scrutiny since "preserving potential life" constitutes a "compelling interest."

The question of when life begins—which is fundamentally a moral and religious question—is both essential to the abortion debate and often ignored by left-leaning activists. For select Christian advocacy groups (as well as other anti-abortion groups) who believe that life begins at conception, abortion bans are a deeply moral issue. Abortion bans which operate under the logic that abortion is murder

essentially legislate a definition of when life begins, which is problematic from a First Amendment perspective; the Establishment Clause of the First Amendment prevents the government from intervening in religious debates. While numerous legal thinkers have associated the abortion debate with the First Amendment, this argument has not been fully litigated. As an amicus brief filed in *Dobbs* by the Freedom From Religion Foundation, Center for Inquiry, and American Atheists points out, anti-abortion rhetoric is explicitly religious: "There is hardly a secular veil to the religious intent and positions of individuals, churches, and state actors in their attempts to limit access to abortion." Justice Stevens located a similar issue with anti-abortion rhetoric in his concurring opinion in *Webster v. Reproductive Health Services* (1989), stating: "I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution." Judges who justify their judicial decisions on abortion using similar rhetoric blur the line between church and state.

Framing the abortion debate around religious freedom would thus address the two main categories of arguments made by anti-abortion activists: arguments centered around issues with substantive due process and moral objections to abortion.

Conservatives may maintain, however, that legalizing abortion on the federal level is an Establishment Clause violation to begin with, since the government would essentially be imposing a federal position on abortion. Many anti-abortion advocates favor leaving abortion rights up to individual states. However, in the absence of recognized federal, constitutional protection of abortion rights, states will ban abortion. Protecting religious freedom of the individual is of the utmost importance — the United States government must actively intervene in order to uphold the line between church and state. Protecting abortion rights would allow everyone in the United States to act in accordance with their own moral and religious perspectives on abortion.

Reframing the abortion rights debate as a question of religious freedom is the most viable path forward. Anchoring abortion rights in the Establishment Clause would ensure Americans have the right to maintain their own personal and religious beliefs regarding the question of when life begins. In the short term, however, litigants could take advantage of Establishment Clauses in state constitutions. Yet, given the swing of the Court towards expanding religious freedom protections at the time of writing, Free Exercise arguments may prove better at securing citizens a right to an abortion.