

# THE SUPREME COURT, *ROE V. WADE*, AND ABORTION LAW\*

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It is no exaggeration to say that no U.S. Supreme Court opinion has been more misunderstood and has had its arguments more misrepresented in the public square than *Roe v. Wade* (1973).<sup>1</sup> There seems to be a widespread perception that *Roe* was a moderate opinion that does not support abortion on demand, i.e., unrestricted abortion for all nine months for virtually any reason. Even a philosopher of such erudition as Mortimer Adler did not seem to fully understand the legal implications of *Roe*: “Mr. Justice Blackmun’s decision in the case of *Roe v. Wade* invokes the right of privacy, which is *nothing but the freedom of an adult woman to do as she pleases with her own body in the first trimester of pregnancy*.”<sup>2</sup>

In order to fully grasp the reasoning of *Roe*, its paucity as a piece of constitutional jurisprudence, and the current state of abortion law, this article looks at three different but interrelated topics: (1) what the Court actually concluded in *Roe*; (2) the Court’s reasoning in *Roe*; and (3) how subsequent Court opinions, including *Casey v. Planned Parenthood*, have shaped the jurisprudence of abortion law.<sup>3</sup>

## I. WHAT THE COURT ACTUALLY CONCLUDED IN *ROE*

The case of *Roe v. Wade* concerned Jane Roe (a.k.a. Norman McCorvey), a resident of Texas, who claimed to have become pregnant as a result of a gang rape (which was found later to be a false charge years after the Court had issued its opinion).<sup>4</sup> According to Texas law at the time (essentially unchanged since

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1. *Roe v. Wade*, 410 U.S. 113 (1973).

2. MORTIMER J. ADLER, *HAVES WITHOUT HAVE-NOTS: ESSAYS FOR THE 21ST CENTURY ON DEMOCRACY AND SOCIALISM* 210 (1991) (emphasis added).

3. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

4. Abortion-choice advocate and Harvard law professor Laurence Tribe writes: “A decade and a half after the Court handed down its decision in *Roe v. Wade* McCorvey explained, with embarrassment, that she had not been raped after all; she made up the story to hide the fact she had gotten ‘in trouble’ in the more usual way.” LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 10 (1990).

1856), a woman could have an abortion only if it was necessary to save her life. Because Roe's pregnancy was not life-threatening, she sued the state of Texas. In 1970, the unmarried Roe filed a class action suit in federal district court in Dallas. The federal court ruled that the Texas law was unconstitutionally vague and overbroad and infringed on a woman's right to reproductive freedom. The state of Texas appealed to the U.S. Supreme Court. After the case was argued twice before the Court, it issued *Roe v. Wade* on January 22, 1973, holding that the Texas law was unconstitutional, and that not only must all states including Texas permit abortions in cases of rape but in all other cases as well.<sup>5</sup>

The public does not fully understand the scope of what the Court declared as a constitutional right on that fateful day in 1973. The current law in the United States, except for in a few states, does not restrict a woman from procuring an abortion for practically any reason she deems fit during the entire nine months of pregnancy.<sup>6</sup> That may come as quite a shock to many readers, but that is in fact the state of the current law.

In *Roe*, Justice Harry Blackmun, who authored the Court's opinion, divided pregnancy into trimesters. He ruled that aside from procedural guidelines to ensure maternal health, a state has no right to restrict abortion in the first six months of pregnancy. Blackmun wrote:

A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses,

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5. *Roe*, 410 U.S. at 710–11 (setting forth the facts of the case).

6. For example, in Missouri and Pennsylvania modest restrictions were allowed due to the Court's rulings in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and *Casey*, 505 U.S. 833.

regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.<sup>7</sup>

Thus, a woman could have an abortion during the first six months of pregnancy for *any* reason she deems fit; e.g., unplanned pregnancy, gender-selection, convenience, or rape. Restrictions in the second trimester should be merely regulatory in order to protect the pregnant woman's health. In the last trimester after fetal viability (the time at which the unborn can live outside the womb) the state has a right, although not an obligation, to restrict abortions to only those cases in which the mother's life or health is jeopardized, because after viability, according to Blackmun, the state's interest in prenatal life becomes compelling. Therefore, *Roe* does nothing to prevent a state from allowing unrestricted abortions for the entire nine months of pregnancy.

Nevertheless, the Court explained that it would be a mistake to think of the right to abortion as absolute.<sup>8</sup> The Court maintained that it took into consideration the legitimate state interests of both the health of the pregnant woman and the prenatal life she carries. Thus, reproductive liberty, according to this reading of *Roe*, should be seen as a limited freedom established within the nexus of three parties: the pregnant woman, the unborn, and the state. The woman's liberty trumps both the value of the unborn and the interests of the state except when the unborn reaches viability (and an abortion is unnecessary to preserve the life or health of the pregnant woman) or when the state has a compelling state interest in regulating abortion before and after viability in order to make sure that the procedure is performed in accordance with accepted medical standards. Even though this is a fair reading of *Roe*'s reasoning, it seems to me that the premise put in place by Justice Blackmun has not resulted in the sensible balance of interests he claimed his opinion had established. In practice, his framework has resulted in abortion on demand.

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7. *Roe*, 410 U.S. at 732.

8. "[A]ppellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time she alone chooses. With this we do not agree." *Id.* at 153. The Court writes elsewhere in *Roe*:

The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.

*Id.* at 154 (citations omitted).

Because Justice Blackmun claimed that a state only has a compelling interest in protecting prenatal life after that life is viable (which in 1973 was between twenty-four and twenty-eight weeks gestation), and because the viability line is being pushed back in pregnancy (now it is between twenty and twenty-four weeks) as a result of the increased technological sophistication of incubators and other devices and techniques, Justice Sandra Day O'Connor commented in her dissent in *Akron v. Akron Center for Reproductive Health, Inc.* (1983) that *Roe* is on a "collision course with itself."<sup>9</sup> In other words, if viability is pushed back far enough, the right to abortion will vanish for all practical purposes. Thus, in principle, a state's interest in a viable fetus can extend back to conception. Furthermore, Blackmun's choice of viability as the point at which the state has a compelling interest in protecting prenatal life is based on a fallacious argument.<sup>10</sup>

But there is a loophole to which abortion-choice supporters may appeal in order to avoid O'Connor's "collision course." Consider one state law written within the framework of *Roe*. Nevada restricts abortions after viability by permitting abortion after the twenty-fourth week of pregnancy only if "there is a substantial risk that the continuance of the pregnancy would endanger the life of the patient or would gravely impair the physical or mental health of the patient."<sup>11</sup> This restriction is one in name only. For the Supreme Court so broadly defined health in *Roe*'s companion decision, *Doe v. Bolton* (1973), that for all intents and purposes, *Roe* allows for abortion on demand. In *Bolton*, the Court ruled that health must be taken in its broadest possible medical context and must be defined "in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well being of the patient" because "[a]ll these factors relate to health."<sup>12</sup> Because all pregnancies have consequences for a woman's emotional and family situation, the Court's health provision has the practical effect of legalizing abortion up until the time of birth if a woman can convince a physician that she needs the abortion to preserve her "emotional health." This is why in 1983 the U.S. Senate Judiciary Committee, after much critical evaluation of the current law in light of the Court's opinions, confirmed this interpretation when it concluded that "no significant legal barriers of any kind whatsoever exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy."<sup>13</sup>

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9. *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting).

10. See discussion *infra* Part II.

11. NEV. REV. STAT. § 442.250(3) (2006).

12. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

13. S. Rep. No. 98-149, at 6 (1983). In another report, the Judiciary Committee concludes:

Former-Chief Justice Warren Burger originally sided with the majority in *Roe* because he was under the impression that abortion after viability would only occur if the mother's physical life and health were in imminent peril. However, he later concluded that *Roe* did, in fact, support abortion on demand. In his dissenting opinion to *Thornburg v. American College of Obstetricians and Gynecologists* he stated:

We have apparently already passed the point at which abortion is available merely on demand. . . . The point at which these [State] interests become "compelling" under *Roe* is at viability of the fetus. Today, however, the Court abandons that standard and renders the solemnly stated concerns of the 1973 *Roe* opinion for the interests of the States mere shallow rhetoric.<sup>14</sup>

Others came to the same conclusion much earlier than Chief Justice Burger.<sup>15</sup>

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The apparently restrictive standard for the third trimester has in fact proved no different from the standard of abortion on demand expressly allowed during the first six months of the unborn child's life. The exception for maternal health has been so broad in practice as to swallow the rule. The Supreme Court has defined 'health' in this context to include 'all factors—physical, emotional, familial, and the woman's age—relevant to the well-being of the patient.' *Doe v. Bolton*, 410 U.S. 179, 192 (1973). Since there is nothing to stop an abortionist from certifying that a third-trimester abortion is beneficial to the health of the mother—in this broad sense—the Supreme Court's decision has in fact made abortion available on demand throughout the pre-natal life of the child, from conception to birth.

*Report on the Human Life Bill*, S. 158; *Committee on the Judiciary*, 97th Cong. 5 (1981).

14. *Thornburg v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 783–84 (1986) (citations omitted).

15. See STEPHEN M. KRASON, *ABORTION: POLITICS, MORALITY, AND THE CONSTITUTION* 103–04 (1984); John T. Noonan, Jr., *Raw Judicial Power*, in *THE ZERO PEOPLE* 18 (Jeff Lane Hensley ed., 1983); Victor G. Rosenblum & Thomas J. Marzen, *Strategies for Reversing Roe v. Wade through the Courts*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 195, 199–200 (Dennis Horan et al. eds., 1987); LYNN D. WARDLE & MARY ANNE Q. WOOD, *A LAWYER LOOKS AT ABORTION* 12 (1982); Roger Wertheimer, *Understanding Blackmun's Argument: The Reasoning of Roe v. Wade*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 120–21 (1984); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250 (1975); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 921 (1973); Jacqueline Nolan Haley, *Haunting Shadows from the Rubble of Roe's Right to Privacy*, 9 SUFFOLK U. L. REV. 152–53 (1974); Stanely M. Harrison, *The Supreme Court and Abortional Reform: Means to an End*, 19

Moreover, it is not clear that when the Court refers to viability as the time when the state has a compelling interest in prenatal life that it is referring only to the physical survival of the unborn apart from her mother. Rather, it may be suggesting a largely philosophical notion of “meaningful life”—a determination that is exclusively in the hands of the pregnant woman.<sup>16</sup> Although in *Roe* “meaningful life” seemed to mean a life that is physically independent of its mother,<sup>17</sup> the Court made the point in a later opinion: “[T]here must be a potentiality of ‘meaningful life’ . . . not merely momentary survival.”<sup>18</sup>

## II. THE COURT’S REASONING IN *ROE*: HOW IT FOUND A RIGHT TO ABORTION

By the time *Roe* reached the Supreme Court, the Court had already established a right to contraceptive use both by married couples and single people based on the right of privacy.<sup>19</sup> Therefore, it would seem that abortion, as a method of birth control, would be protected under the same interpretation

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N.Y. L. F. 690 (1974); William R. Hopkin, Jr., *Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy*, 47 TEMPLE L. Q. 729–30 (1974); John Warwick Montgomery, *The Rights of Unborn Children*, 5 SIMON GREENLEAF L. REV. 40 (1985–86); Thomas O’Meara, *Abortion: The Court Decides a Non-Case*, SUP. CT. REV. 344 (1974); Charles E. Rice, *Overruling Roe v. Wade: An Analysis of the Proposed Constitutional Amendments*, 15 B.C. INDUS. & COM. L. REV. 309 (1973).

16. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

17. See discussion *infra* Part III (analysis of *Casey*).

18. *Colautti v. Franklin*, 439 U.S. 379, 387 (1979) (citing *Roe*, 410 U.S. at 163). However, given the Court’s analysis in *Casey* and that opinion’s understanding of *Roe*, it may reject *Colautti*’s definition of “meaningful life,” though one may never really know for sure.

19. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing a right to contraceptive use by married couples); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (establishing a right to the use of contraceptives by unmarried couples). In the words of Justice Brennan, author of the majority opinion in *Eisenstadt*:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear and beget a child.

*Id.* at 453.

of the right of privacy.<sup>20</sup> However, in order to make this move, there were at least two legal impediments that Justice Blackmun had to eliminate.

First, starting in the nineteenth century, anti-abortion laws had been on the books in virtually every U.S. state and territory for the primary reason of protecting the unborn from unjust killing. If, as Justice Douglas asserts in *Griswold*, the “right of privacy [is] older than the Bill of Rights—older than our political parties, older than our school system,” then the Court must account for the proliferation of anti-abortion laws, whose constitutionality were not seriously challenged until the late 1960s, in a legal regime whose legislators and citizens passed these laws with apparently no inclination to believe that they were inconsistent with a right of privacy “older than the Bill of Rights.”<sup>21</sup>

Second, constitutionally, the unborn is a person protected under the Fourteenth Amendment. After all, unlike contraception, in which the adult participants in the sexual act consent to the use of the contraceptive device, and where a third party, the unborn, is not yet in existence, a successful abortion entails the killing of a third party, a living organism, the unborn, who has already come into being.<sup>22</sup> So, in order to justify abortion the Court had to

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20. This is not to say that one may not raise objections to the “right of privacy.” For its proponents admit that this right has no connection to the actual language of the Constitution’s text. According to Justice William O. Douglas, who penned the plurality opinion in *Griswold*, this right of privacy can be gleaned, not from a literal reading of the words found in the Bill of Rights, but from “penumbras” that stand behind these words, and these penumbras are “formed by emanations from those guarantees that help give them life and substance.” *Griswold*, 381 U.S. at 484. Douglas goes on to say:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for a noble purpose as any involved in our prior decisions.

*Id.* at 486.

21. *Griswold*, 381 U.S. at 486.

22. As Justice Blackmun writes in *Roe*:

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the uterus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . . As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, become significantly involved. The woman’s privacy

show that the unborn is not a person under the Fourteenth Amendment. If the Court had good reasons to reject these two jurisprudential challenges, then it could establish a right to abortion as a species of the right of privacy.

Justice Blackmun agreed with opponents of abortion rights that anti-abortion laws have been on the books in the U.S. for quite some time. However, according to Blackmun, the purpose of these laws, almost all of which were passed in the nineteenth century, was not to protect prenatal life, but rather, to protect the pregnant woman from a dangerous medical procedure.<sup>23</sup> At common law, abortion was regulated in relation to the “quickening” of the unborn, the “first recognizable movement of the fetus in utero, appearing usually from the sixteenth to the eighteenth week of pregnancy.”<sup>24</sup> Blackmun argues that under the common law’s framework, prior to the enactment of statutory abortion regulations, abortion was permissible prior to quickening and was at most a misdemeanor after quickening.<sup>25</sup> Therefore, Justice Blackmun claims that because abortion is now a relatively safe procedure, there is no longer a reason for its prohibition.<sup>26</sup> Consequently, Justice Blackmun asserts that given the right of privacy, and given the abortion liberty at common law, the Constitution must protect a right to abortion.

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is no longer sole and any right of privacy she possesses must be measured accordingly.

Roe v. Wade, 410 U.S. 113, 159 (1973) (citations omitted).

23. Justice Blackmun writes: “[I]t has been argued that a State’s real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.” *Id.* at 149.

24. *Id.* at 132 (footnote omitted).

25. *Id.* at 132–36. Justice Blackmun writes:

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.

*Id.* at 140–41.

26. *Id.* at 149 (“Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or as lower than the rates of normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently dangerous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared.”).



The history of abortion figures prominently in the Court's opinion in *Roe*.<sup>27</sup> Justice Blackmun, in twenty-three pages, takes the reader on an historical excursion through ancient attitudes (including those held by the Greeks and Romans), the Hippocratic Oath, the common law, the English statutory law, the American law, and the positions of the American Medical Association (AMA), the American Public Health Association (APHA), and the American Bar Association (ABA). The purpose for this history is clear: if abortion's prohibition is only recent, and primarily for the purpose of protecting the pregnant woman from dangerous surgery, then the Court would not be creating a new right out of whole cloth by affirming a right to abortion. However, only the history of the common law is relevant to assessing the Constitutionality of this right, because, as Blackmun himself admits, "it was not until after the War Between the States that legislation began generally to *replace* the common law."<sup>28</sup> However, Justice Blackmun's historical chronology is "simply wrong," because twenty-six of thirty-six states had already banned abortion by the time the Civil War had ended.<sup>29</sup> Nevertheless, when statutes did not address a criminal wrong, common law was the authoritative resource from which juries, judges, and justices, found the principles from which, and by which, they issued judgments.

However, since 1973 the overwhelming consensus of scholarship has shown that the Court's history, especially its interpretation of the common law, is almost entirely mistaken. Justice Blackmun's history (excluding his discussion of contemporary professional groups: AMA, APHA, and ABA) is so flawed that it has inspired the production of scores of scholarly works, which are nearly unanimous in concluding that Justice Blackmun's "history" is untrustworthy and essentially worthless.<sup>30</sup> However, for its modest purposes, this Article will

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27. *Id.* at 129–51.

28. *Id.* at 139 (emphasis added).

29. Joseph W. Dellapenna, *The History of Abortion: Technology, Morality and Law*, 40 U. PITT. L. REV. 359, 389 (1979).

30. See, e.g., Martin Arbaji, *Roe and the Hypocratic Oath*, in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS 159 (Dennis Horan et al. eds., 1987); John R. Connery, *The Ancients and the Medievels on Abortion: The Consensus the Court Ignored*, in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS 123 (Dennis Horan et al. eds., 1987); Joseph W. Dellapenna, *Abortion and the Law: Blackman's Distortion of the Historical Record*, in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS 137 (Dennis Horan et al. eds., 1987); Dennis J. Horan & Thomas J. Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in THE ABORTION CONTROVERSY 25 YEARS AFTER ROE V. WADE: A READER (Louis P. Pojman & Francis J. Beckwith eds., 2d ed. 1998); JOHN KEOWN, ABORTION, DOCTORS, AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982 3–25 (1988); KRASON, *supra* note 15, at 134–57; STEPHEN KRASON & W. HOLLBERG, THE LAW AND

assess the two aspects of the Court's history that are the most central, as mentioned above: (1) the purpose of nineteenth century anti-abortion statutes, and (2) the unborn's status as a Fourteenth Amendment person.

*A. Were Anti-Abortion Laws Meant to Protect the Unborn?*

Blackmun was wrong about the primary purpose of the anti-abortion laws. Although protecting the pregnant woman was an important purpose of these statutes, there is no doubt that their primary purpose was to protect the unborn from harm.<sup>31</sup> Analysis of the nineteenth century statutes, their legislative histories, and the political climate in which they were passed, confirms this point,<sup>32</sup> as James S. Witherspoon summarizes:

[T]he primary purpose of the nineteenth-century antiabortion statutes was to protect the lives of unborn children is clearly shown by the terms of the statutes themselves. This primary purpose, or legislative recognition of the personhood of the unborn child, or both, are manifested, in the following elements of these statutes, taken individually and collectively: (1) the provision of an increased range of punishment for abortion if it were proven that the attempt caused the death of the child; (2) the provision of the same range of punishment for attempted abortions killing the unborn child as for attempted abortions killing the mother; (3) the designation of attempted abortion and other acts killing the unborn child as "manslaughter"; (4) the prohibition of all abortions except those necessary to save the life of the mother; (5) the reference to the fetus as a "child"; (6) the use of the term "person" in reference to the unborn child; (7) the categorization of abortion with homicide and related offenses and offenses against born children; (8) the severity of punishments assessed for abortions; (9) the provision that attempted abortion killing the mother is only manslaughter or a

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HISTORY OF ABORTION: THE SUPREME COURT REFUTED (1984); MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA (1992); Harold O.J. Brown, *What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion*, 1 HUMAN LIFE REV. 5 (1975); Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); Dellapenna, *supra* note 29; John Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood" and the Supreme Court's Birth Requirement*, 1979 S. ILL. U. L.J. 1; Robert Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 POPULATION STUD. 53 (1974); James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985).

31. See generally Witherspoon, *supra* note 30.

32. *Id.*

felony rather than murder as at common law; (10) the requirement that the woman on whom the abortion is attempted be pregnant; (11) the requirement that abortion be attempted with intent to produce abortion or to “destroy the child”; and (12) the incrimination of the woman’s participation in her own abortion. Legislative recognition of the personhood of the unborn child is also shown by the legislative history of these statutes.

In short, the Supreme Court’s analysis in *Roe v. Wade* of the development, purposes, and the understandings underlying the nineteenth-century antiabortion statutes, was fundamentally erroneous. That analysis can provide no support whatsoever for the Court’s conclusions that the unborn children are not “persons” within the meaning of the fourteenth amendment, and that states do not otherwise have a “compelling interest” in protecting their lives by prohibiting abortion.<sup>33</sup>

The primary reason for Justice Blackmun’s historical mistake, according to many scholars, is his almost total reliance on two articles by Professor Cyril Means, who was an attorney for the National Association for the Repeal of Abortion Laws (NARAL).<sup>34</sup> Professor Means’s work has been occasionally cited favorably; however, since 1973, his work has come under devastating criticism.<sup>35</sup> For that reason his work is no longer considered an authoritative rendering of abortion law.

It is interesting to note that as biological knowledge of both human development and the unborn’s nature began to increase, the laws prohibiting abortion became more restrictive. Justice Blackmun was correct when he pointed out that at common law pre-quickening abortion “was not an indictable offense.”<sup>36</sup> Indeed, it was thought that prior to quickening the unborn was not animated or infused with a soul.<sup>37</sup> But that was an erroneous belief based on

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33. *Id.* at 70.

34. Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth Amendment Right About to Rise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Amendment Common Law Liberty*, 17 N.Y. L. F. 335 (1971); Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Fetus: 1664-1968*, 14 N.Y. L. F. 441 (1968).

35. See TRIBE, *supra* note 4, at 27–41, 119–20; Susan Estrich, *Abortion Politics: Writing for an Audience of One*, U. PENN. L. REV. 138, 152–54 (1989). See also Byrn, *supra* note 30; KRASON, *supra* note 15, at 134–57; Dellapenna, *supra* note 30.

36. *Roe v. Wade*, 410 U.S. 113, 132 (1973).

37. *Id.* at 133.

primitive embryology and outdated biology. People indeed believed that prior to quickening there was no life and thus no soul, but they were mistaken, just as they were mistaken about Ptolemaic astronomy, the divine right of kings, and white supremacy, none of which seem to be an acceptable belief today even though each is of more ancient origin than their widely-accepted counterparts of heliocentricity, constitutional democracy, and human equality.<sup>38</sup> As biology acquired more facts about human development, quickening began to be dismissed as an arbitrary and irrelevant criterion by which to distinguish between protected and unprotected human life. “When better knowledge was acquired in the nineteenth century, laws began to be enacted prohibiting abortion at every stage of pregnancy.”<sup>39</sup>

Only in the second quarter of the nineteenth century did biological research advance to the extent of understanding the actual mechanism of development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research finding which persuaded doctors that the old “quickening” distinction embodied in the common and some statutory law was unscientific and indefensible.<sup>40</sup>

Legal scholar and theologian John Warwick Montgomery points out that when the common law and American statutory law employed the quickening criterion “they were just identifying the first evidence of life they could conclusively detect. . . . They were saying that as soon as you had life, there must be protection. Now we know that life starts at the moment of conception with nothing superadded.”<sup>41</sup>

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38. Obviously, false beliefs may be widely held. The point here is that an ancient belief may be abandoned because it is *false*. That is, a belief’s age has no bearing on its truthfulness.

39. KRASON, *supra* note 15, at 148.

40. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong. 474 (1981) (statement of Victor Rosenblum, Professor of Law, Northwestern University).

41. JOHN WARWICK MONTGOMERY, *SLAUGHTER OF THE INNOCENTS* 37 (1981).

Witherspoon writes:

Clearly, the quickening doctrine was not based on an absurd belief that a living fetus is worthy of protection by virtue of its capacity for movement or its mother's perception of such movement. The occurrence of quickening was deemed significant *only* because it showed that the fetus was alive, and because it was *alive* and *human*, it was protected by the criminal law. This solution was deemed acceptable as long as the belief persisted that the fetus was not alive until it began to move, a belief that would be refuted in the early nineteenth century.<sup>42</sup>

Therefore, one could say that the quickening criterion, prior to the discoveries of modern biology, was employed as an evidentiary criterion so that the law could *know* that a human life existed, for one could not be prosecuted for performing an abortion if the being violently removed from the womb was not considered alive.

*B. Is the Unborn a Person under the Fourteenth Amendment?*

The Fourteenth Amendment became part of the U.S. Constitution in 1868. It was passed for the purpose of protecting U.S. citizens, including recently freed slaves, from having their rights violated by local and state governments. The portion of the amendment germane to this Article reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.<sup>43</sup>

In making his arguments, Justice Blackmun conscripts the Fourteenth Amendment for two reasons. First, he argues that the right of privacy is a fundamental liberty protected by the Amendment, and that the right to abortion is a species of the general right of privacy.<sup>44</sup> Second, he argues that the unborn

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42. Witherspoon, *supra* note 30, at 32.

43. U.S. CONST. amend. XIV, § 1.

44. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("The right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to

is not a person under the Fourteenth Amendment. Because the first depends on the second, and Blackmun admits as much, this Article will focus exclusively on the latter use of the Fourteenth Amendment in Blackmun's analysis.<sup>45</sup>

Justice Blackmun offers a combination of three reasons for his conclusion that the unborn are not Fourteenth Amendment persons. First, he maintains that "the Constitution does not define 'person' in so many words," and goes on to list all the places in the Constitution in which the word "person" is mentioned.<sup>46</sup>

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terminate her pregnancy.").

45. *Id.* at 157–58 ("The appellee and certain *amici* argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. 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. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.").

46. *Id.* As examples, Justice Blackmun lists the Fourteenth Amendment (sections 1, 2, and 3); the listing of qualifications for Representatives and Senators; the Apportionment Clause; the Migration and Importation provision; the Emolument Clause; the Electors provision; the provision outlining qualifications for the office of President; the Extradition provisions; the superseded Fugitive Slave Clause 3; and the Fifth, Twelfth, and Twenty-second Amendments. *Id.* According to Blackmun, "in nearly all these instances, the use of the word [person] is such that it has application postnatally" with no "possible prenatal application." *Id.* In a note following this statement by Justice Blackmun, the Court writes:

When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

*Id.* at 158 n.54. Given the *sui generis* nature of pregnancy, the life of the mother exception is perfectly consistent with, and incorporates the principle that grounds, the common law notion of justified homicide for self-defense. Because a continued pregnancy that imperils a woman's life will likely result in the death of both mother and child, the law, by permitting this exception, allowed physicians and patients the freedom to make a medical judgment that would result in at least one life being saved. Thus, if Justice Blackmun had chosen to exercise his imagination, the apparent inconsistency he thought he had found in the Texas law would have disappeared. The Court also presents another argument:

There are other inconsistencies between Fourteenth Amendment status and the

Second, he claims that Texas could not cite any cases in which a court held that an unborn human being is a person under the Fourteenth Amendment.<sup>47</sup> Third, he stated that throughout most of the nineteenth century, abortion was practiced with fewer legal restrictions than in 1972. Based on these three reasons, the Court was persuaded that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>48</sup> Each reason is seriously flawed.

In citing the constitutional provisions that apply to postnatal human beings as evidence that the Constitution’s drafters did not intend to recognize the personhood of the unborn, Justice Blackmun begs the question. None of the provisions define the meaning of “person,” and therefore, none of them exclude the unborn. Rather, with the exceptions of the Fugitive Slave Clause and the Migration and Importation provision, both of which were eliminated by the Thirteenth and Fourteenth Amendments, the constitutional provisions Justice

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typical abortion statute. It has already been pointed out . . . that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

*Id.* at 158 n.54. Although I address this and a similar argument in greater detail in Chapter Five of my book *DEFENDING LIFE: A MORAL AND LEGAL AGAINST ABORTION CHOICE* (2007), I will make a few brief comments here in this note. First, if Blackmun is correct that Texas’ laws are inconsistent with its claim that the unborn is a Fourteenth Amendment person, it does not prove that the unborn are not human persons or that abortion is not a great moral evil. It simply proves that Texas was unwilling to “bite the bullet” and consistently apply its position. The unborn may still be a Fourteenth Amendment person, even if the laws of Texas do not adequately reflect that. Texas’ inconsistency, if there really is one, proves nothing, for if the unborn is a Fourteenth Amendment person, then Texas’ laws violate the unborn’s equal protection; but if the unborn is not a Fourteenth Amendment person, then Texas’ laws violate the pregnant woman’s fundamental liberty. How a statute treats the unborn’s assailants has no bearing on what the unborn in fact is. Second, the *Roe* Court did not take into consideration the possible *reasons why* Texas’ statutes and those of other states granted women immunity or light sentences and specified penalties for abortionists not as severe in comparison to penalties for non-abortion homicides. These reasons were thought by legislators to justify penalties they believed had the best chance of limiting the most abortion-homicides as possible. Thus, Texas’ penalties as well as those of other states were consistent with affirming the unborn as a Fourteenth Amendment person. See FRANCIS J. BECKWITH, *DEFENDING LIFE: A MORAL AND LEGAL CASE AGAINST ABORTION CHOICE* (2007).

47. *Roe*, 410 U.S. at 157.

48. *Id.* at 158.

Blackmun cites concern matters that apply *to already existing persons*.<sup>49</sup> For example, the Fourteenth Amendment defines *citizens* as “all persons born or naturalized in the United States, and subject to the jurisdiction thereof,” but it does not define *persons*.<sup>50</sup> The reference to the qualifications of Congressmen tells us that a senator must be at least thirty years old and a representative at least twenty-five, but clearly the court cannot be saying that because the fetus cannot hold these offices that he or she is not a person (for this would mean that twenty-year olds are not persons either).<sup>51</sup> To cite one more example, the Apportionment Clause instructs the government whom to count in the national census.<sup>52</sup> Although the clause excludes the unborn from the census, it also excludes non-taxed Indians and declares black slaves as three-fifths of a person, even though Indians and black slaves are in fact persons. There were, of course, important practical reasons why a government may exclude the unborn from the census. It is extremely difficult and highly inefficient to count unborn persons because we cannot see them and some of them die before birth without the mother ever being aware that she was pregnant. Also, at the time of the American Founding, “because of the high mortality rate . . . it was very uncertain if a child would even be born alive.” Moreover, “it was not yet known that the child from conception is a separate, distinct human organism.”<sup>53</sup>

Although it is true that Texas did not cite any cases holding that the unborn is a Fourteenth Amendment person, there was at least one federal court case that did issue such a holding. Ironically that case, *Steinberg v. Brown*, was cited by the Court in *Roe*.<sup>54</sup> However, for some reason Justice Blackmun failed to mention that the federal court in *Steinberg* provided the following analysis:

[C]ontraception, which is dealt with in *Griswold*, is concerned with preventing the creation of a new and independent life. The right and power of a man or a woman to determine whether or not to

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49. U.S. CONST. art. IV, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. amend. XIII; U.S. CONST. amend. XIV.

50. The Amendment seems to be saying that birth is a state that persons undergo rather than an event that makes them persons, and that therefore, the unborn are persons who shift from prenatal to postnatal when they undergo birth. My then-12-year old nephew, Dean James Beckwith, made this same point when I read the relevant portion of the Fourteenth Amendment to him and his father, my brother, Dr. James A. Beckwith.

51. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.

52. U.S. CONST. art. I, § 2, cl. 3.

53. KRASON, *supra* note 15, at 168.

54. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citing *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970)).



participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere.

It seems clear, however, that the legal conclusion in *Griswold* as to the rights of individuals to determine without governmental interference whether or not to enter into the process of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.<sup>55</sup>

What the Court suggests in *Steinberg* should be uncontroversial: a legal principle has universal application. For example, if a statute that forbids burglary became law at a time when no computers existed, it would not follow that the prohibition against burglary does not apply to computers, or that one is free to burgle computers from the homes of one's neighbors since the "original intent" of the statute's framers did not include computers. What matters is whether the entity stolen is *property*, that it is a thing that can be owned, not whether it is a particular thing (in this case, a computer) that the authors of the anti-burglary statute knew or did not know to be property at the time of its passage.

To employ another analogy, the religion clauses of the First Amendment apply to religious believers whose faiths came to be after the Constitution was ratified. For example a Baha'i is protected by the First Amendment even though The Baha'i Faith did not exist in 1789.<sup>56</sup> Therefore, if the unborn *is* a person, the Fourteenth Amendment is meant to protect him or her even if the authors of the Fourteenth Amendment did not have the unborn in mind.<sup>57</sup> As we shall see below, Texas presented this premise as part of its case for the unborn's humanity. The Court, ironically, accepted this premise, but refused to fairly assess the argument offered by Texas, settling instead for taking "no position" on the status of the unborn.

Blackmun's third reason is misleading. As we saw in our analysis of the nineteenth century anti-abortion laws, state governments grasped the

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55. *Steinberg*, 321 F. Supp. at 746–47.

56. See Francis J. Beckwith, *Baha'ism*, in *DICTIONARY OF CONTEMPORARY RELIGION IN THE WESTERN WORLD* 168–71 (Christopher Partridge et al. eds., 2002).

57. This is why some conservative legal scholars, such as Robert Bork, are mistaken when they say that the Fourteenth Amendment cannot in principle be applied to the unborn. See Nathan Schlueter & Robert H. Bork, *Constitutional Persons: An Exchange on Abortion*, *First Things* 129 (Jan. 2003). Thank you to Jim Stoner for bringing this essay to my attention.

inadequacy of the common law's quickening criterion when they became aware of the nature of prenatal human life. Consequently, by the end of the 19th-century abortion was prohibited throughout pregnancy. As we saw, the primary purpose of these statutes was to protect prenatal human life. Moreover, some scholars have offered compelling reasons to think that at the times of the passage of the Constitution in 1789 and the Fourteenth Amendment in 1868, common understanding held that the unborn is a person (at least after quickening), and that a state or the federal government may legislate in such a way so as to place the unborn (even before quickening) under the protections of the law without violating the Constitution.<sup>58</sup>

The state of Texas suggested, as the Court held in *Steinberg*, that the unborn is protected by the Fourteenth Amendment because it is *in fact* a person. That is, even if Justice Blackmun was correct that the unborn has never been considered a full person under the law, Texas argued that the evidence for the unborn's humanity requires that the Court in the present treat the unborn as a Fourteenth Amendment person. For example, if the Earth were visited by members of an alien race, such as the Vulcans of Star Trek lore, it would seem correct to say that these aliens would have Fourteenth Amendment rights, even though they are not homo sapiens. They would have these rights because they would be beings whose natures have properties (e.g., the capacity for moral choice) identically possessed by the sorts of beings the Fourteenth Amendment was intended to protect.<sup>59</sup>

Confronting, though not disputing, Texas's evidence for the unborn's humanity, Justice Blackmun replied: "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

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58. For historical analysis and citations of the relevant literature, see KRASON, *supra* note 15, at 164–73.

59. One of our Ph.D. students at Baylor, T. Hunter Baker (who also happens to be my graduate assistant) made the observation to me that this is tricky because children and non-citizens do not have the full panoply of constitutional rights as adult citizens. There is no doubt that Hunter is correct: there are rights and privileges that are specific to one's age or citizenship. The question, then, is whether the right to life should depend on those contingencies. After all, those rights that are contingent on maturity or nationality presuppose that the being in question is the sort of being who can in principle have the full panoply of legal rights. For example, a seventeen year-old citizen will acquire the right to vote when she turns eighteen, but a baboon, at whatever age, will never have the right to vote. A certain level of maturity on the part of a citizen is required in order for the state to grant her the right to vote. However, all that is necessary for a right to life is to be alive. This is why we cannot murder illegal aliens or five-year olds, even though neither group can vote or be elected to Congress.

position to speculate.”<sup>60</sup> Hence, the state should not take one theory of life and force those who do not agree with that theory to subscribe to it, which is the reason why Blackmun wrote in *Roe*: “In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”<sup>61</sup> Thus for the pro-life advocate to propose that non-pro-life women should be forbidden from having abortions, on the basis that individual humanity begins at conception or at least sometime before birth, is clearly a violation of the right of privacy of non-pro-life women.

But the problem with this reasoning is that it simply cannot deliver on it what it promises. For to claim, as Justices Blackmun does, that the Court should not propose one theory of life over another, and that the decision to abort should be left exclusively to the discretion of each pregnant woman, *is* to propose a theory of life, which hardly has a clear consensus. For the Court’s theory segregates the unborn from full-fledged membership in the human community, for it in practice excludes the unborn from constitutional protection. Although the Court denied taking sides on the issue of when life begins, part of the theoretical grounding of its legal opinion is that the unborn in this society is not a human person worthy of protection. Thus, the Court actually did take a side on the question of when life begins. It concluded that the unborn is not a human person, because the abortion procedure permitted in *Roe* is something that the Court itself admits could not be a fundamental right if it were conclusively proven that the unborn is a human person. The Court stated that “[i]f the suggestion of personhood [of the unborn] is established, the appellant’s case, of course, collapses, for the fetus’ right to life is then guaranteed specifically by the [Fourteenth Amendment].”<sup>62</sup>

If we are to accept the Supreme Court’s holding in *Roe*, and agree with Justice Blackmun that the right to abortion is contingent upon the status of the unborn, then the allegedly disputed fact about life’s beginning means that the right to abortion is disputed as well. The support for a conclusion, such as the one in *Roe* that “abortion is a fundamental right,” is only as good as the veracity of its most important premise—in this case, “the unborn is not fully human.” Thus, the Court’s admission that abortion-choice is based on a widely-disputed fact, far from establishing a right to abortion, entails that it not only does not know when life begins but does not know when, if ever, the right to abortion begins. Consequently, the Court’s admitted ignorance of when life begins *undermines* the right to abortion.

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

61. *Id.* at 163.

62. *Id.* at 157–58.

Justice Blackmun's argument is flawed in another peculiar way, a way that actually provides a compelling reason to *prohibit* abortion. According to the logic of Blackmun's argument, an abortion *may* result in the death of a human entity who has a full right to life. When claiming that experts disagree on when life begins, Justice Blackmun seems to imply that the different theories on the beginning of personhood all have able defenders, persuasive arguments, and passionate advocates. However, none really wins the day. To put it another way, the issue of the unborn's full humanity is up for grabs. All positions are in some sense equal, none is better than any other. But if this is the case, then it is safe to say that the odds of the unborn being fully human are 50/50 (if we wanted to put a number on a reasonable, though disputed, position held by a sizeable number of well-informed and educated adults in the world). Given these odds, it would seem that society has a moral obligation to err on the side of life, and therefore to legally prohibit virtually all abortions. After all, if one kills another being without knowing whether that being is a human being with a full right to life, and if one has reasonable, though disputed, grounds (as Blackmun admits) to believe that the being in question is fully human, such an action would constitute a willful and reckless disregard for others, even if one later discovered that the being was not fully human.

Consider this illustration. Imagine the police are able to identify someone as a murderer with only one piece of evidence: his DNA matches the DNA of the genetic material found on the victim. The police subsequently arrest him, and he is convicted and sentenced to death. Suppose, however, that it is discovered several months later that the murderer has an identical twin brother who was also at the scene of the crime and obviously has the same DNA as his brother on death row. This means that there is a 50/50 chance that the man on death row is the murderer. Would the state be justified in executing this man? Surely not, for there is a 50/50 chance of executing an innocent person. Consequently, if it is wrong to kill the man on death row, it is then wrong to kill the unborn when the arguments for its full humanity are just as reasonable as the arguments against it.

### III. AFTER *ROE*

From 1973 to 1989 the Supreme Court struck down every state attempt to restrict an adult woman's access to abortion.<sup>63</sup> The U.S. Congress tried, and

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63. See *Thornburg v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (striking a Pennsylvania statute that required informed consent of abortion's possible risks to woman, that required that the pregnant woman be informed of agencies that would help her if she brought child to term, that the abortion provider report certain statistics about their patients

failed, to pass a Human Life Bill in order to protect the unborn by means of ordinary legislation, and later it failed to pass a Human Life Amendment to the U.S. Constitution. Although the Court upheld Congress's ban on federal funding of abortions that are not required to save the life of the mother, it never wavered on *Roe*.<sup>64</sup> Given these political and legal realities, prolife advocates put their hopes in the Supreme Court appointees of two prolife presidents, Ronald Reagan and George H.W. Bush, to help overturn *Roe*. Between Reagan and Bush, they would appoint five justices to the Court (Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, David Souter) who, prolife advocates mistakenly thought, all shared the judicial philosophies of the presidents who appointed them. Ironically, it would be three of those justices, O'Connor, Kennedy, and Souter, who would join the Court's opinion in *Casey v. Planned Parenthood* and uphold *Roe*. And two of them, O'Connor and Souter, would go even further, joining three of their brethren in *Stenberg v. Carhart* in finding partial-birth abortion to be constitutional.<sup>65</sup>

Nevertheless, three years before *Casey*, the Court seemed to be moving toward a rejection of *Roe*. Many prolife advocates interpreted *Webster v. Reproductive Health Services* to be a sign that the Court was preparing to dismantle the regime of *Roe*.<sup>66</sup> In *Webster*, the Court reversed a lower-court decision and upheld several provisions of a Missouri statute designed to regulate abortion.<sup>67</sup> The statute probably would not have survived constitutional muster in the years soon after *Roe*, and the Court's decision marked a willingness to restrict some aspects of abortion. First, the Court upheld the statute's preamble, which states that "[t]he life of each human being begins at conception," and that "[u]nborn children have protectable interest in life, health, and well-being."<sup>68</sup> The Court also upheld a provision which

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to the state, and that a second physician be present at abortion when fetal viability is possible); *City of Akron v. Akron Reproductive Health, Inc.*, 462 U.S. 416 (1983) (holding various provisions unconstitutional, including an informed consent requirement, twenty-four-hour waiting period, parental consent requirement, compulsory hospitalization for second trimester abortions, and humane and sanitary disposal of fetal remains); *Colautti v. Franklin*, 439 U.S. 379 (1979) (state may not define viability or enjoin physicians to prove the fetus is viable in order to require that they have a duty to preserve the life of the fetus if a pregnancy termination is performed; "viability" is whatever the physician judges it is in a particular pregnancy); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding unconstitutional parental and spousal consent requirements as well as a state ban on saline [or salt poisoning] abortions, a procedure that literally burns the skin of the unborn).

64. See *Harris v. McRae*, 448 U.S. 297 (1980).

65. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

66. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

67. *Id.*

68. *Id.* at 504 (quoting MO. REV. STAT. § 1.205.1(1), (2) (1986)).

stipulated that the unborn should be treated as full persons who possess “all rights, privileges, immunities available to other persons, citizens, and residents of the state,” contingent upon the U.S. Constitution and prior Supreme Court opinions.<sup>69</sup> Because these precedents would include *Roe*, the statute poses no threat to the abortion liberty.

Second, the *Webster* Court upheld the portion of the Missouri statute that forbade the use of government facilities, funds, and employees in performing and counseling for abortions except if the procedure is necessary to save the life of the mother.<sup>70</sup>

Third, the Court upheld another of the statute’s provisions, which mandates that:

[b]efore a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions.<sup>71</sup>

Thus, the statute requires that the physician employ procedures to properly assess the unborn’s viability and enter the findings of these procedures in the mother’s medical record.<sup>72</sup> In passing this statute, Missouri’s legislature took seriously *Roe*’s viability marker—that at the time of viability the state has a compelling interest in protecting unborn life. This is why the Court, in *Webster*, correctly concluded that “[t]he Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable—an end which all concede is legitimate—and that is sufficient to sustain its constitutionality.”<sup>73</sup>

However, *Webster* modified *Roe* in at least two significant ways. First, it rejected *Roe*’s trimester breakdown. Second, it rejected *Roe*’s claim that the state’s interest in prenatal life becomes compelling only at viability. In *Webster*, the Court stated:

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69. *Id.* at 504 (quoting MO. REV. STAT. § 1.205.2 (1986)) (footnote omitted).

70. *Webster*, 492 U.S. at 490.

71. *Id.* at 513 (quoting MO. REV. STAT. § 188.029 (1986)).

72. MO. REV. STAT. § 188.029 (1986).

73. *Webster*, 492 U.S. at 520. *See also* MO. REV. STAT. § 188.030 (1986) (“No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman”).

[T]he rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle.<sup>74</sup>

According to the Court, “we do not see why the State’s interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.”<sup>75</sup> Therefore, although *Webster* chipped away at *Roe*’s foundation, it did not overturn the decision.

In *Planned Parenthood v. Casey* the Court considered the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989.<sup>76</sup> The Court upheld as constitutional four of the five provisions, rejecting the third one (which required spousal notification for an abortion) based on what it called the *undue burden* standard, which the Court defined as “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.”<sup>77</sup> The undue burden standard is, according to most observers, a departure from *Roe* and its progeny, which require that any state restrictions on abortion be subject to strict scrutiny.<sup>78</sup> The *Casey* Court, nevertheless, claimed to be more consistent with the spirit and letter of *Roe* than the interpretations and applications of *Roe*’s principles in subsequent Court opinions.<sup>79</sup> By subscribing to the undue burden standard, the

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74. *Id.* at 519.

75. *Id.*

76. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

77. *Id.* at 877.

78. That is, in order to be valid, any restrictions on access to abortion must be essential to meeting a compelling state interest. For example, laws that forbid yelling “fire” in a crowded theater pass strict scrutiny and thus do not violate the First Amendment right to freedom of expression.

79. As the Court stated:

Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman’s liberty but also the States “important and legitimate interest in potential life.” That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling

*Casey* Court held that a state may restrict abortion by passing laws which may not withstand strict scrutiny, but which nevertheless do not result in an undue burden for the pregnant woman. For example, the Court upheld as constitutional two provisions in the Pennsylvania statute, a 24-hour waiting-period requirement and an informed-consent requirement (i.e., the abortion-provider must present the woman with facts of fetal development, risks of abortion and childbirth, and information about abortion alternatives), that would have most likely not survived constitutional muster with the Court's pre-*Webster* composition.<sup>80</sup>

Although the *Casey* Court upheld *Roe* as a precedent, the plurality opinion, joined by three Reagan-Bush appointees, O'Connor, Kennedy, and Souter, rejected both *Roe*'s requirement that restrictions be subject to strict scrutiny and its trimester framework (which *Webster* had already discarded).<sup>81</sup> According to the Court, the trimester framework was too rigid and was unnecessary to protect a woman's right to abortion.<sup>82</sup> Although the Court reaffirmed viability as the time at which the state has a compelling interest in protecting prenatal life, it seems to provide a more objective definition than it did in *Roe* (which, as we saw above, included the nebulous notion of "meaningful life"), despite the fact that it claimed to derive its definition from *Roe*: "[V]iability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb . . . ."<sup>83</sup>

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state interest. Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases.

*Casey*, 505 U.S. at 871 (citations omitted).

80. In fact, the Court explicitly overrules *Akron* and *Thornburgh*:

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled.

*Id.* at 882.

81. *Id.* at 872.

82. *Id.*

83. *Id.* at 870. Despite the fact that the Court claims to derive its definition from *Roe*, *Roe*'s nebulous notion of "meaningful life" seems inconsistent with the Court's rationale in *Casey*. *Id.*



One must look critically at the Court's viability criterion and the arguments it has presented for it in both *Roe* and *Casey*. In *Roe*, Justice Blackmun wrote:

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 presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justification.<sup>84</sup>

Assuming that Justice Blackmun is using "meaningful life" to mean "independent life," he commits either one of two fallacies, depending on how he defines independent life.<sup>85</sup> If by "independent life" he means a being that does not require the physical resources of another being in order for it to survive, e.g., a viable fetus, then Blackmun's argument is circular. He would be arguing that viability is justified as the time at which the state's interest in prenatal life becomes compelling because at that time the fetus is an independent life, i.e., viable.

Stuart Rosenbaum responds to the charge that Blackmun's argument is circular by denying that Blackmun is presenting an argument at all. He claims that "[s]ince Blackmun does not present an argument, he quite obviously does not present a circular argument. Blackmun *observes* that the state has an interest in protecting fetal life. Period."<sup>86</sup> It is not clear how Blackmun's opinion could become better because he offers no argument, rather than a

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84. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

85. Justice Blackmun's dissenting opinion in *Webster* seems to bear this out:

For my part, I remain convinced, as six other Members of this court 16 years ago were convinced, that the *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life. The viability line reflects the biological facts and truths of fetal development; it marks the threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling.

*Webster v. Reprod. Health Servs.*, 492 U.S. 490, 553 (1989).

86. Stuart Rosenbaum, *Abortion, the Constitution, and Metaphysics*, 43 J. CHURCH & STATE 715 (2001).

fallacious one, for his viability standard. Ironically, Mr. Rosenbaum attacks such an assessment of Blackmun as a “strawman” argument.<sup>87</sup> I suppose I could respond to this charge by claiming that I was not actually offering an argument, but, like Rosenbaum’s Justice Blackmun, I was merely stipulating the correctness of my point of view without offering any reasons, good or bad, whatsoever. But that type of response would lack intellectual integrity. A better response would be to show that Rosenbaum is simply mistaken, that he has not read Blackmun carefully. Let me again quote Justice Blackmun’s argument, putting in italics the words logicians call inference indicators, words that show that the author is offering a reason or reasons for a conclusion and/or a conclusion inferred from a reason or reasons:

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 presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability *thus* has both logical and biological justification.<sup>88</sup>

In the second sentence, “this” is shorthand for the first sentence. Therefore, Blackmun is saying that the first sentence is a conclusion for what follows “because,” just as one would say: “Fred is guilty. This is so because the police found the murder weapon in his apartment.” In the third and last sentence Blackmun summarizes his argument by concluding that “state regulation protective of fetal life after viability . . . has both logical and biological justification,” that is, the Court is justified in its holding because there is logical and biological support for it. Although a fallacious argument, it is an argument: it offers a conclusion and appeals to reason.

However, what if by “independent life” Blackmun meant a being that is a separate and distinct being even if it does require the physical resources of another particular being in order for it to survive, e.g., one of two conjoined twins who share vital organs. In that case, the unborn has independent life from the moment of conception and viability is merely the time at which it need not physically depend on its mother in order for it to survive. That is, undergoing an accidental change from dependent to independent does not change the identity of the being undergoing the change. Christopher Reeve did not cease to be Christopher Reeve, nor did he become less of a being, merely because a tragic accident left him dependent on others for his very survival.<sup>89</sup>

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87. “Beckwith’s charge of circularity is a ‘strawman’ reading of Blackmun . . . .” *Id.* at 716.

88. *Roe*, 410 U.S. at 163 (emphasis added).

89. In response to this sort of analogy, David Boonin writes:

The “he” that underwent that change remained the same “he.” Consequently, changing from non-viable to viable or vice versa does not impart to, or remove from a being any property or properties that would change that being’s identity. In fact, when Blackmun claimed that the unborn undergoes change, or goes from non-viable to viable, he was implying that the unborn is in fact a being distinct from, though changing its dependence in relation to, its mother. Because viability is a measure of the sophistication and/or accessibility of our neonatal life-support systems (including both technological and human, e.g., parents, caregivers), the fetus remains the same while viability changes. For

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One common objection to the viability criterion is that it excludes from the class of individuals with a right to life people who clearly have such a right, such as, according to one such critic people with pacemakers or on heart-lung machines . . . . But this is a puzzling objection. A fetus that could survive on a heart-lung machine is a paradigmatic example of a fetus that *is* viable, not one that is unviable.

DAVID BOONIN, A DEFENSE OF ABORTION 130 (2003), citing Richard Werner, *Hare on Abortion*, 36.4 *Analysis* 204 (June 1976).

This is a puzzling response, for it seems to make the very point the objection is making: if physical dependence is morally relevant in determining the ontological status of any being, then why should it matter if the being is dependent on another being (e.g., its mother or its conjoined twin) or a machine (e.g., an incubator or a heart-lung machine)? But, as the objection points out, if it is morally irrelevant in the latter case, then it is morally irrelevant in the former as well. Consequently, physical dependence on another (whether a person or a machine) is not a morally relevant property in assessing one’s ontological status. Boonin, nevertheless, replies that because “viability means merely the ability to survive outside the womb of the woman in whom the fetus is conceived,” and because “we can distinguish between being dependent on a particular person and being dependent on some person or other,” and because “the viability criterion maintains that the former property is morally relevant, while the purported counterexamples [e.g., heart-lung machine] establish only that the latter is morally irrelevant,” and because “the moral relevance of the former is not entailed by the latter,” these counterexamples “are ultimately ineffective.” *Id.* at 130. This reply begs the question, for all that Boonin is doing is restating the viability criterion and that its proponents maintain that an unborn human being’s unique physical dependence on its mother is morally relevant while a postnatal human being’s dependence on some person or other is not. But that is *precisely* the distinction the proponent of the viability criterion has to demonstrate, and Boonin fails to do so. The power of the counterexamples is that they extract from the viability criterion the property that is doing all the moral work—dependence. The key for Boonin is to show that the inability to survive outside the womb in which one was conceived is a type of dependence that when ended results in one’s ontological status changing from a being that does not have a right to life to one that does.

Although Boonin evaluates the viability criterion as a criterion of personhood rather than the point at which the state has a compelling interest in the unborn (as the Court does), his assessment of the viability criterion is applicable to the latter as well.

this reason, the viability standard seems to be arbitrary and inapplicable to the philosophical question of whether the unborn is a full-fledged member of the human community. Thus, according to the Court, a viable child born at twenty-two-weeks gestation in 2003 is fully human while a non-viable prenatal child at thirty-weeks gestation in 1900 is not fully human. This is absurd, because our technological advances do not change the nature of the dependent being.<sup>90</sup> Blackmun, therefore, seems to be confusing *physical* independence with *ontological* independence; he mistakenly argues from the fact of the pre-viable unborn's lack of independence from its mother that it is not an independent being, a "meaningful life."<sup>91</sup> According to noted prolife advocate and professor of political science Hadley Arkes:

Once again, the Court fell into the fallacy of drawing a moral conclusion (the right to take a life) from a fact utterly without moral significance (the weakness or dependence of the child). The Court

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90. Boonin replies to this type of argument by offering a counterexample:

Consider . . . an adult human being with a particular form of brain injury that has caused him to lapse into an irreversible coma. Most people would agree that he does not have the same right to life as you and I. But it is of course possible that technological advances might some day make it possible to bring people with precisely the same form of brain injury out of their comas. Were that to happen, we would surely say that the individual did have the same right to life as you or I, since this is what we say of people who are only temporarily unconscious. This would be to make his moral standing relative to the existing state of technology, and in a way that seems perfectly appropriate.

BOONIN, *supra* note 89, at 131.

Setting aside the question of whether the irreversibly comatose have the same right to life as you or I, Boonin misses the point of this objection by finding in it a principle its more sophisticated advocates are not employing: moral standing is *never* relative to technological advances. After all, a prolife would argue that an abortion morally permissible in times past to save the life of the mother may not be permissible today due to advances in medical technology. Rather, the objection is making the point that there is no moral difference between two human beings that are identical in every way *except* that one is dependent on technology and the other on its mother. So, to conscript Boonin's counterexample: if the comatose person could be brought back by either new technology or a newly discovered herb, his moral standing would not hinge on whether his recovery depended on artificial or natural means.

91. Blackmun reveals this confusion in his dissent in *Webster*: "[T]he viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 553 (1989).

discovered, in other words, that novel doctrines could be wrought by reinventing old fallacies.<sup>92</sup>

One may make two other observations about the viability criterion. First, one could argue that the non-viability of the unborn, and the dependence and vulnerability that goes with that status, should lead one to have more rather than less concern for the unborn. That is, a human being's dependence and vulnerability is a call for her parents, family, and the wider human community to care and nurture her, rather than a justification to kill her. Second, each of us, including the unborn, is non-viable in relation to his environment. If any one of us were to be placed naked on the moon or the earth's North Pole, one would quickly become aware of one's non-viability. Therefore, the unborn prior to the time she can live outside her mother's womb is as non-viable in relation to her environment as we are non-viable in relation to ours.<sup>93</sup>

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92. HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE PRINCIPLES OF MORALS AND JUSTICE* 378–79 (1986).

93. For a revealing response to my arguments against Blackmun's use of the viability criterion, see Rosenbaum, *supra* note 86, 716–19 (responding to arguments that appeared in Francis J. Beckwith, *Law, Religion, and Metaphysics: A Reply to Simmons*, 43 J. CHURCH & STATE 715 (Winter, 2001)). His response, however, is disappointing, for Rosenbaum does not actually engage my arguments, but rather, dismisses them as not relevant because, according to Rosenbaum, Blackmun was discussing the Constitutional permissibility of abortion and did not intend for the viability criterion to be an answer to any philosophical question on the nature of human beings and/or persons. *Id.* at 716. But this response is a red herring—for, as we have seen, the viability criterion was advanced by Blackmun as a standard by which the law marks off one set of human beings (prenatal ones) as objects that may be killed without justification and marks off another set of human beings as subjects that may do the killing with the law's permission. To employ an illustration: Imagine that the law were to allow whites to own blacks, as it did prior to President Lincoln's Emancipation Proclamation. Suppose that the Supreme Court upheld this law and based its opinion on the "pigment standard," a criterion that asserts that when one's flesh reaches a certain dark hue then one could be a slave to the first white man to come along. It would seem perfectly sensible, and entirely legitimate, on the part of the Court's critics to say that this criterion is arbitrary, flimsy, and without warrant because skin color carries no moral weight to justify such a judicial opinion. And the critics could offer arguments to support the conclusion on which this criticism is based: there is no *ontological* difference between whites and blacks that warrants treating blacks as property. A Rosenbaum-like comeback to such arguments—"issues of ontology are issues for metaphysicians, philosophers, and theologians" or "Supreme Court justices, and ontologically modest others, pursue issues in the historical world of human society and human practice," *id.* at 717,—is no response to these arguments. It is a red herring, a rhetorical distraction, that does not engage the arguments for the case for which they have been offered.

However, what is more troubling is that Rosenbaum labels me as exhibiting a lack of wisdom, "metaphysical imperialism" and "paternalism," as well as claiming that I lack modesty, do not live "in the real world" and that I raise "arcane issues." *Id.* at 717 (He also calls me a

The *Casey* Court's defense of the viability criterion offers two reasons. First, the Court appeals to *stare decisis*, the judicial practice of giving great deference to precedents. But because the precedent to which the Court appealed, *Roe*, relies on fallacious reasoning to ground the viability criterion and is thus a precedent that is not justified, this first reason has no merit. But that does not stop the Court from offering as a second reason the *reasoning* employed by Justice Blackmun in *Roe* to defend the viability criterion. This is a peculiar strategy of argument, for if precedent is sufficient, why also appeal to the *reasoning* for that precedent? Could the reasoning for the precedent be flawed and the precedent itself still be employed to "justify" a subsequent legal opinion? Or could a precedent be justifiably rejected in an applicable case even though the precedent is grounded in impeccable reasoning? In any event, the Court's second reason is an argument that contains, along with a conclusion, its *definition* of viability as the argument's premise. In its *Casey* opinion, the Court stated:

[V]iability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and fairness be the object of state protection that now overrides the rights of the woman.<sup>94</sup>

This argument is as fallacious in *Casey* as it was in *Roe*. The Court first defines viability and then from that premise of biological fact draws the normative conclusion that it is only fair and reasonable that after viability the State has a right to protect the unborn. If you did not know that this was from a Supreme Court opinion, you might have attributed it to a Monty Python skit or a bad freshman paper in Critical Thinking, or even Susan Sarandon. Instead, the statement is a product of judicial "reasoning," though sadly, it is neither

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"philosophical fundamentalist." *Id.* at 723.). Although Rosenbaum claims that "genuinely reasonable people will surely detect the inadequacy of the alleged reasons Beckwith suggests might deter them from accepting the viability standard of Blackmun and Simmons," *id.* at 718, he does not present the actual grounds by which these reasonable people would reject my reasons qua reasons. He merely points out that they are irrelevant to an opinion of the Supreme Court on a question of Constitutional law. At some point Rosenbaum has to actually get his hands dirty and engage the arguments rather than resort to name-calling. As I tell my students, when your opponent tries to exclude your view by some technicality and/or some pejorative assessment of your character or belief that have nothing to do with the quality of the arguments you offer, consider it a victory, for if your opponent actually had a response, he or she would have used it.

94. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

judicious nor reasoned. The Court's premise, the biological fact of fetal nonviability through roughly the first six months of pregnancy, cannot possibly provide sufficient warrant for the conclusion that it is fair and just, and required by our Constitution, for the government to permit, with virtually no restrictions, the unborn's mother to kill it before it is viable. In order for the Court to make its argument valid, it would have to add to its factual premise a normative premise stating that whenever a human being cannot live on its own because it uniquely depends on another human being for its physical existence, it is permissible for the second human being to kill the first in order to rid the second of this burden. If the Court were to add this second premise, its argument, though now valid, would contain a premise even more controversial than the abortion right it is attempting to justify, and for that reason would require a premise or premises to justify it.

The *Casey* Court also ignored the scholarly criticisms of *Roe*'s justification of the abortion right. First, the key premises of Justice Blackmun's case, e.g., that abortion was a common law liberty and that the primary purpose of nineteenth century abortion law was to protect women from dangerous operations, have been soundly refuted in the scholarly literature. Second, Justice Blackmun's case against the unborn's status as a Fourteenth Amendment person is questionable. Third, his argument that the unborn is not a Fourteenth Amendment person because experts disagree on this point, undermines the right to abortion as well as providing a reason to prohibit abortion.

Instead of restating these bad arguments, the *Casey* Court invented new ones. It upheld *Roe* on the basis of *stare decisis* based on two justifications. First, the Court claimed that the public had a reliance interest in *Roe*'s permission of abortion.<sup>95</sup> Second, the Court stated that its own legitimacy and the public's respect for the rule of law depended on judicial consistency.<sup>96</sup> Concerning the first, the Court argued that it would be unjust to overturn the right to abortion because women and men have relied on the ability to abort by planning and arranging their lives with the abortion right in mind.<sup>97</sup> And secondly, if the Court were to overturn *Roe*, it would suffer a loss of respect in the public's eye and perhaps chip away at its own legitimacy, even if rejecting

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95. *Casey*, 505 U.S. at 856.

96. *Id.* at 854.

97. "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." *Id.* at 869.

*Roe* would in fact correct an error in constitutional jurisprudence.<sup>98</sup> Nevertheless, in the opening comments of *Casey*, the Court speaks of abortion as a liberty interest grounded in the due process clause of the Fourteenth Amendment.<sup>99</sup> Yet, even the *Roe* Court understood that abortion had been banned nearly everywhere in the U.S. for quite some time. Thus abortion could not easily be construed as a fundamental liberty found in our Nation's traditions and history unless the reason for banning abortion was rendered obsolete and unless the fetus was not protected under the Fourteenth Amendment. The *Roe* Court made this argument, one that we now know was largely based on a distortion of history that virtually all scholars concede was false and misleading.<sup>100</sup> Therefore, nothing of any substance was left for the *Casey* Court to support its rationale except an appeal to *stare decisis* based on the reliance interest and the public's perception of the Court's legitimacy.<sup>101</sup> After all, if the *Casey* Court really believed that *Roe*'s reasoning was sound, that abortion was really a fundamental liberty found in our Nation's traditions and history, it would have made that argument rather than relying on *stare decisis*. But the implications of this rationale are daunting. By putting in place the premises of jurisprudence that it did, the Court gave cover to future courts to "justify" about any perversity it wants to uphold or "discover." For example, given the premises of *Casey*, the Court could knowingly, and "justifiably," deprive a citizen of his or her fundamental rights if the Court believes that a vast majority of other citizens have relied on that deprivation, and to declare it unjust would make the Court look bad in the eyes of the beneficiaries of this injustice. Here's the lesson: if a bad decision cannot be overturned because it is bad, then we cannot rely on the Court to protect a good opinion when it is good, if what is doing all the work is *narcissus stare decisis*—upholding precedent if it helps your image.

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98. "A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if there was error, 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." *Id.*

99. *Id.* at 844–53.

100. See *supra* note 30 and accompanying text.

101. Oddly enough, the Court does claim it will not reexamine *Roe* "because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown)." *Casey*, 505 U.S. at 864. This is a curious argument, for it is unlikely that Court and its clerks did not know that there exists a massive volume of scholarly literature that shows that the *Roe* opinion is significantly flawed in its history and its logic. Unless the Court means something else by the term "factual underpinnings," nothing but willful ignorance can account for the Court not taking this scholarship into serious consideration when assessing the merits of this case and crafting an opinion for it.



Apparently Chief Justice Rehnquist, the author of the Court's *Webster* opinion, got it right when he made the comment in his dissenting opinion in *Casey*:

*Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor 'legitimacy' are truly served by such an effort.<sup>102</sup>

Beginning in 1996, then-President Bill Clinton vetoed several bills passed by the U.S. Congress to prohibit what pro-life activists call "partial-birth abortion."<sup>103</sup> Also known as D & X (for dilation and extraction) abortion, this procedure is performed in some late-term abortions. Using ultrasound, the doctor grips the fetus's legs with forceps. The fetus is then pulled out through the birth canal and delivered with the exception of its head. While the head is in the womb the doctor penetrates the live fetus's skull with scissors, opens the scissors to enlarge the hole, and then inserts a catheter. The fetus's brain is vacuumed out, resulting in the skull's collapse. The doctor then completes the womb's evacuation by removing the dead fetus.

Although none of the congressional bills became law, thirty states, including Nebraska, passed similar laws that prohibited D & X abortions. However, in *Stenberg v. Carhart*, the Supreme Court, in a 5-4 decision, struck down Nebraska's ban on partial-birth abortions. The Court cited two grounds for its decision. First, the Court stated the law lacked an exception for the preservation of the mother's health, which *Casey* required of any restrictions on abortion. Second, the Court claimed that Nebraska's ban imposed an undue burden on a woman's fundamental right to have an abortion.<sup>104</sup>

Although Nebraska's statute had an exception for situations where the mother's life is in danger, the Court pointed out that *Casey* requires an exception for *both* the life *and health* of the mother if a state wants to prohibit post-viability abortions.<sup>105</sup> But Nebraska did not limit its ban to D & X abortions performed only after viability. Its ban applied throughout pregnancy.

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102. *Id.* at 966 (Rehnquist J., dissenting).

103. See Center for Reproductive Rights, [http://www.crlp.org/hill\\_pri\\_pba.html](http://www.crlp.org/hill_pri_pba.html) (last visited Dec. 2, 2006).

104. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

105. *Id.* at 930 (citing *Casey*, 505 U.S. at 879).

Therefore, according to the Court, unless Nebraska can show that its ban does not increase a woman's health risk, it is unconstitutional. The Court stated:

The State fails to demonstrate that banning D & X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D & X, would be, the safest procedure.<sup>106</sup>

As Justice Kennedy points out in his dissent, "[t]he most to be said for the D & X is it may present an unquantified lower risk of complication for a particular patient but that other proven safe procedures remain available even for this patient."<sup>107</sup> However, even if in some cases D & X is in fact safer than other types of abortion, the relative risk between procedures<sup>108</sup> cannot justify overturning the law if the increased risk is statistically negligible and if the State has an interest in prenatal life throughout pregnancy which becomes compelling enough after viability to prohibit abortion.<sup>109</sup> After all, if "the relative physical safety of these procedures, with the slight possible difference" requires that the Court to invalidate Nebraska's ban on partial-birth abortion, then the Court proves too much.<sup>110</sup> For with such premises in hand one may conclude that a ban on infanticide is unconstitutional as well, for a parent who kills her handicapped newborn eliminates the possibility that this child from infancy to adulthood will drain her resources, tax her emotions, and require physical activity not demanded by non-handicapped children. Consequently, to conscript Justice Stephen Breyer's language, the State that bans infanticide fails to demonstrate that this prohibition without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, infanticide, would best advance the mother's health.

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106. *Id.* at 932.

107. *Id.* at 967 (Kennedy, J., dissenting).

108. As Justice Kennedy points out in his dissent, there is impressive medical opinion that D & X abortion is not any less risky and may in some cases increase the risk to a woman's health. *See id.* at 966 (Kennedy, J., dissenting).

109. *Casey*, 505 U.S. at 871; *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (1989); *Casey*, 505 U.S. at 872 ("Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.").

110. *Stenberg*, 530 U.S. at 967 (Kennedy, J., dissenting).

The Court's second reason for rejecting Nebraska's law is that the ban on D & X imposed an undue burden on a woman's fundamental right to have an abortion. For the type of abortion performed in 95 percent of the cases between the twelfth and twentieth weeks of pregnancy, D & E abortion (dilation and evacuation), is similar to D & X abortion.<sup>111</sup> Therefore, the Court reasoned that if a ban on D & X abortions is legally permissible, then so is a ban on D & E abortions. However, that would imperil the right to abortion. Hence Nebraska's ban imposes an undue burden on the pregnant woman, and thus violates the standard laid down in *Casey*. As both Justice Thomas and Justice Kennedy point out in their separate dissents, by reading Nebraska's law in this way, the Court abandoned its long-standing doctrine of statutory construction, that statutes should be read in a way that is consistent with the Constitution if such a reading is plausible.<sup>112</sup> Therefore, in *Stenberg* the Court read Nebraska's statute in the least charitable way one could read it. Moreover, Justice Thomas, in a blistering dissent, shows, in meticulous and graphic detail, that D & X and D & E procedures are dissimilar enough that it is "highly doubtful that" Nebraska's D & X ban "could be applied to ordinary D & E."<sup>113</sup>

In 2003, President George W. Bush signed into law a federal partial-birth abortion ban, which contains both a life of the mother exception as well as a more circumspect definition of D & X abortion.<sup>114</sup> It was immediately challenged in federal court by abortion-choice groups.<sup>115</sup> It is unclear if this law, more carefully crafted than Nebraska's, will pass constitutional muster, especially since the law does not include the kind of expansive maternal health exception that the *Stenberg* opinion suggests such a restriction must include.<sup>116</sup>

In 2002, the U.S. Congress, with the signature of President Bush, passed the "Born-Alive Infants Protection Act," the brainchild of the inestimable Hadley

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111. *Id.* at 924.

112. "Were there any doubt remaining the statute could apply to a D & E procedure, that doubt is no ground for invalidating the statute. Rather, we are bound to first consider whether a construction of that statute is fairly possible that would avoid the constitutional question." *Id.* at 996 (citing *Erznoznick v. Jacksonville*, 422 U.S. 205, 216 (1975) and *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (Thomas, J., dissenting)). See also *id.* at 973 (Kennedy, J., dissenting).

113. *Id.* at 990–92 (Thomas, J., dissenting).

114. 18 U.S.C. § 1531 (2003).

115. Robert B. Bluey, *Lawsuits Challenge Partial-Birth Abortion Ban*, CNSNews.com, 31 Oct. 2003, available at <http://www.cnsnews.com/Culture/archive/200310/CUL20031031c.html> (last visited on Dec. 2, 2006).

116. This is what the 2003 federal law asserts: "This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." 18 U.S.C.A. § 1531(a) (2003).

Arkes.<sup>117</sup> The Act requires that any child who survives an abortion be immediately accorded all the protections of the law that are accorded all other postnatal human beings. Although, in the words of Arkes, the act is a “modest first step,” it is not an insignificant step.<sup>118</sup> It affirms that an abortion entails the termination-expulsion of a being who, if she survives, should receive all the protections of our laws. But this, of course, raises an awkward question for abortion-choice supporters. What is it, then, about that vaginal passageway that changes the child’s nature in such a significant fashion that it may be killed without justification before exit but only with justification after exit? The Act put in place a premise that elicits questions that lead one back to the most important question in this debate: Who and what are we?

#### CONCLUSION

The Supreme Court currently affirms a woman’s right to abortion with virtually no restrictions prior to fetal viability. After viability, it only allows states to make restrictions prior to viability that do not entail an undue burden. However, given the wideness of the Supreme Court’s “health exception,” a state’s ability to restrict post-viability abortions is questionable, especially given the Court’s *Stenberg* opinion and *Roe*’s pre-*Casey* progeny. Thus, according to the current legal regime in the United States, the unborn is not protected by the U.S. Constitution from death-by-abortion at any stage in her nine-month gestation.

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117. Although published before the Act became law, one should read Arkes’ elegant account of the Act’s history as well as his public encounters with certain members of Congress. HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* 234–94 (2002).

118. *Id.* at 89.