

Roe v. Wade: Its Logic and Its Legacy

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“The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.”

(Thomas Jefferson)

*“Anyone in America who writes these days about abortion must take account of the landmark decision of the Supreme Court in *Roe v. Wade*; and in estimating the ‘quality of mind’ manifested by the Court, he would have to regard that profundity which stands near the beginning of Justice Blackmun’s opinion for the majority: ‘Pregnancy often comes more than once to the same woman, and ... if man is to survive, [pregnancy] will always be with us.’ One becomes aware instantly that one is in the presence of no ordinary mind.”*

(Hadley Arkes, 1986)

It is no exaggeration to say that no U. S. Supreme Court opinion has been more misunderstood and its arguments more misrepresented in the public square than *Roe v. Wade* (1973).¹ 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 understand fully 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.*”²

This is not merely a theoretical issue. It has practical implications that bear on the

case pro-lifers may make in the public square in attempting to sway their fellow citizens. For example, in the 1990 pro-life campaign in Nevada to defeat an abortion-choice referendum, KLAS-TV (channel 8), a CBS affiliate, refused to air a commercial that featured former University of Nevada, Las Vegas basketball star (and son of its former coach, Jerry Tarkanian), Danny Tarkanian. In the commercial, Danny, a licensed attorney, claimed that current Nevada law permitted abortions for all nine months of pregnancy for reasons as trivial as sex-selection (i.e., a woman has an abortion because the child is the “wrong” gender).³ KLAS management claimed that Tarkanian’s comments were “inflammatory” and “untrue,” despite the fact that his claims are well-documented and supported by the scholarly literature⁴ (see, for example, the pre-1990 works cited in note 3). The station did air, however, an abortion-choice commercial in which a “typical” housewife says she supports abortion-rights so that the abortion decision is kept between “the woman, her physician, and her family.” It never occurred to KLAS that *this* commercial may be inflammatory and untrue, especially in light of two well-known legal facts about which anyone involved in the abortion debate is more than remotely familiar: a woman may have an abortion performed on her by a physician she has known for fewer than thirty seconds, and her family has no legal right to forbid, permit, or be informed about her abortion.⁵

In order to grasp fully the reasoning of

Roe, its paucity as a piece of constitutional jurisprudence, and the current state of abortion law, we will look 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* (1992), have shaped the jurisprudence of abortion law.

What the Court Actually Concluded in *Roe*

The case of *Roe v. Wade* (1973) concerned Jane Roe (a.k.a. Norma 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).⁶ According to the Texas law at the time (essentially unchanged since 1856), a woman can have an abortion only if it is 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.

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 every state except Missouri and Pennsylvania (where very modest restrictions were allowed due to the Court's rulings in *Webster v. Reproductive*

Health Services [1989]⁷ and *Casey v. Planned Parenthood* [1992]⁸) does not restrict a woman from procuring an abortion for practically any reason she deems fit during the entire nine months of pregnancy. 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. Writes Blackmun:

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, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.⁹

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. *Roe*, therefore, does not prevent a state from having unrestricted abortion for the entire nine months of pregnancy if it so chooses.

Nevertheless, the Court explains that it would be a mistake to think of the right to abortion as absolute.¹⁰ For 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) and/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 have not resulted in the sensible balance of interests he claimed his opinion had reached. Rather, it has, in practice, resulted in abortion on demand.

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 24 and 28 weeks of gestation), and because the viability line is being pushed back in pregnancy (now it is between 20 and 24 weeks) as a result of the increased technological sophistication of incubators and other devices and techniques, Justice Sandra Day O'Connor made the comment in her dissent in *Akron v. Akron Center for Reproductive Health, Inc.* (1983) that *Roe* is on a "collision course with itself."¹¹ In other words, if viability is pushed back far enough, the right to abortion will vanish for all practical purposes. That is, 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, which I will assess below in my presentation and critique of *Planned Parenthood v. Casey*.

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 such after the 24th 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."¹² But this restriction is a restriction 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. All these factors relate to health.”¹³ 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.”¹⁴

Even former Chief Justice Warren Burger, who 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, concluded in his dissent in *Thornburg v. American College of Obstetricians and Gynecologists* (1986) that *Roe* did, contrary to his own earlier interpretation of the decision, support abortion on demand: “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 State’s mere shallow rhetoric.”¹⁵ Others had come to the same conclusion much earlier than Justice Burger.¹⁶

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,”¹⁷ a determination that is exclusively in the hands of the pregnant woman. Although in *Roe* “meaningful life” seemed to mean a life that is physically independent of its mother (for more on this, see my analysis of *Casey* below), the Court made the point in a later opinion, “[T]here must be a potentiality of ‘meaningful life,’ ... not merely momentary survival.”¹⁸

The Court’s Reasoning in *Roe*: How It Found a Right to Abortion

Because the Court had already established a right to contraceptive use by married couples¹⁹ and then by single people²⁰ based on the right of privacy,²¹ it would seem that abortion, because it is a means of birth control, would be protectable under this right of privacy. However, in order to make this move, there were at least two legal impediments that Justice Blackmun had to eliminate: (1) *Starting in the 19th-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,”²² then the Court must account for the proliferation of anti-abortion laws, whose constitutionality was 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.” (2) *The unborn is constitutionally a person protectable under the Fourteenth Amendment.* After all, unlike contraception, in which all the adult par-

ticipants in the sexual act consent to its use, a successful abortion entails the killing of a third party, a living organism, the unborn, who has already come into being.²³ So, in order to justify abortion the Court had to 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 19th-century, was not to protect prenatal life, but rather, to protect the pregnant woman from a dangerous medical procedure.²⁴ Blackmun also argues that prior to the passage of these statutes, under the common law, abortion was permissible prior to quickening and was at most a misdemeanor after quickening.²⁵ (Quickening refers to the “first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy.”²⁶). So, because abortion is now a relatively safe procedure, then there is no longer a reason for prohibiting abortion.²⁷ Consequently, given the right of privacy, and given the abortion liberty at common law, there is a constitutional right to abortion.

The history of abortion figures prominently in the Court’s opinion in *Roe*.²⁸ Justice Blackmun, in 23 pages, takes the reader on a historical excursion through ancient attitudes (including 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 if it affirms a right to abortion. However, only the history of 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,”²⁹ even though, as Joseph W. Dellapenna points out, Justice Blackmun’s historical chronology is “simply wrong,” for twenty-six of thirty-six states had already banned abortion by the time the Civil War had ended.³⁰ 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 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, over the last quarter of the 20th-century, that are nearly unanimous in concluding that Justice Blackmun’s “history” is untrustworthy and essentially worthless.³¹ However, for our modest purposes here, we will assess the two aspects of the Court’s history that are the most central, and to which I alluded above: (1) the purpose of 19th-century anti-abortion statutes, and (2) the unborn’s status as a Fourteenth

Amendment person.

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 though secondary purpose of these statutes,³² there is no doubt that their primary purpose was to protect the unborn from harm. In what is perhaps the most definitive scholarly article on this subject, law professor James S. Witherspoon conclusively shows that this was in fact the case.³³ After an extensive analysis of the 19th-century statutes, their legislative histories, and the political climate in which they were passed, Witherspoon concludes:

That the primary purpose of the nineteenth-century anti-abortion 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 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 anti-abortion 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.³⁴

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).³⁵ Since 1973, however, Means’s work has come under devastating criticism, and for that reason is no longer considered an authoritative rendering of abortion law,³⁶ though once in a while it is cited positively by authors who ought to know better.³⁷

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,”³⁸ for it was thought that prior to quickening the unborn was not

animated or infused with a soul.³⁹ But this is an erroneous belief based on 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 seems to be an acceptable belief today even though each is of more ancient origin than its widely-accepted counterparts of heliocentricity, constitutional democracy, and human equality.⁴⁰ As biology acquired more facts about human development, quickening began to be dismissed as an arbitrary, and irrelevant, criterion by which to distinguish between protectable and unprotectable human life. “When better knowledge was acquired in the nineteenth century,” writes Stephen Krason, “laws began to be enacted prohibiting abortion at every stage of pregnancy.”⁴¹ Legal scholar Victor Rosenblum explains:

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.⁴²

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.”⁴³ 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.⁴⁴

One could say, therefore, that the quickening criterion, prior to the discoveries of modern biology, was employed as an evidential criterion so that the law may *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 alive to begin with.

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 our study 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.

There are two concerns for which Justice Blackmun conscripts the Fourteenth Amendment to make his argument. 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 right of privacy.⁴⁵ Second, he argues that the unborn is not a person under the Fourteenth Amendment. Because the first depends on the second, and Blackmun admits as much,⁴⁶ my critique will focus exclusively on the latter use of the Fourteenth Amendment in Blackmun's analysis.

Justice Blackmun offers three reasons in combination for his conclusion that the unborn are not Fourteenth Amendment persons. (1) 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 including 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 superseded cl. 3, ... the provision outlining qualifications for President, ... the Extradition provisions, ... the superseded Fugitive Slave Clause 3[,] ... and ... the Fifth, Twelfth, and Twenty-second Amendments."⁴⁷ According to Blackmun, "in nearly all these

instances, the use of the word is such that it has application postnatally" with no "possible prenatal application."⁴⁸ (2) Texas could not cite one case in which a court held that an unborn human being is a person under the Fourteenth Amendment.⁴⁹ (3) Throughout most of the 19th-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."⁵⁰ Each reason is seriously flawed.

(1) In citing the constitutional provisions that apply to postnatal human beings, Justice Blackmun begs the question. For none of the provisions define the meaning of "person," and thus do not exclude the unborn. Rather, with the exceptions of the Fugitive Slave Clause (Art. IV, Sec. 2, Cl. 3) and the Migration and Importation provision (Art. I, Sec. 9, Cl. 1), both of which were eliminated by the Thirteenth and Fourteenth Amendments, the constitutional provisions Justice Blackmun cites concern matters that apply to *already existing persons*. 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* (though it seems to be saying that birth is a state that persons undergo rather than an event that makes them persons, and thus the unborn are persons who shift from prenatal to postnatal when they undergo birth).⁵¹ The reference to the qualifications of Congressmen (Art. I, Sec. 2, Cl. 2; Art. I, Sec. 3, Cl. 3) 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). To cite one more example, the Apportionment Clause (Art. I, Sec. 2, Cl. 3) instructs the government on who to count in the census to determine every ten years the reapportionment to states of seats in the House of Representatives. Although the clause excludes the unborn from the census, it also excludes non-taxed Indians and declares black slaves as three-fifths 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, as Krason notes, at the time of the American Founding, "because of the high mortality rate then, 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."⁵²

(2) Although it is true that Texas did not cite a case that held that the unborn is a Fourteenth Amendment person, there was at least one federal court case that did issue such a holding. That case, *Steinberg v. Brown* (1970),⁵³ ironically, was cited by the Court in *Roe*,⁵⁴ but 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 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.⁵⁵

What the Court in *Steinberg* is suggesting should be uncontroversial: a legal principle has universal application. So, 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, 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: a Baha'i is protected by the First Amendment even though the Baha'i Faith did not exist in 1789.⁵⁶ 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.⁵⁷ 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 tak-

ing “no position” on the status of the unborn.

(3) Blackmun’s third reason is misleading. For, as we saw in our analysis of the 19th-century anti-abortion laws, state governments grasped the inadequacy of the common law’s quickening criterion when they became aware of the knowledge that science had acquired about the nature of prenatal human life. Consequently, by the end of the 19th-century abortion was prohibited throughout pregnancy. And, 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 (1789) and the Fourteenth Amendment (1868) common understanding held that the unborn is a person (at least after quickening), and/or at least 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.⁵⁸

The state of Texas suggested, as the *Steinberg* court held, 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.

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 position to speculate”⁵⁹ 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 writes 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.”⁶⁰ 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 what it promises. For to claim, as Justice 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 that hardly has a clear consensus. For it has all the earmarks of a theory of life that morally segregates the unborn from full-fledged membership in the human community, for it in practice excludes the unborn from constitutional protection. Although verbally the Court denied taking sides on the issue of when life begins, part of the theoretical grounding of its legal opinion, whether it

admits to it or not, is that the unborn in this society is not a human person worthy of protection. Thus, the Court actually did take sides on the question of when life begins. It concluded that the unborn is not a human person, because the procedure permitted in *Roe*, abortion, is something that the Court itself admits it would not have ruled a fundamental right if it were conclusively proven that the unborn is a human person: “If 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].”⁶¹

But 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. For a conclusion’s support—in this case, “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.” So, 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 it 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.

Justice Blackmun’s argument is flawed in another peculiar way, a way that actually provides a compelling reason to *prohibit* abortion, for, 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 be implying that

the different positions on life’s beginning all have able defenders, persuasive arguments, and passionate advocates, but 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. 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 obviously has the same DNA. 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.

After Roe

From 1973 to 1989 the Supreme Court struck down every state attempt to restrict an adult woman's access to abortion.⁶² The U. S. Congress tried, and failed, to pass a Human Life Bill (1981) in order to protect the unborn by means of ordinary legislation, and later it failed to pass a Human Life Amendment (1983) to the U. S. Constitution. Although the Court upheld Congress' ban on federal funding of abortion except to save the life of the mother,⁶³ it never wavered on *Roe*. Given these political and legal realities, proliferers put their hopes in the Supreme Court appointees of two prolife presidents, Ronald Reagan (1981-1989) and George H. W. Bush (1989-1993), 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, and David Souter) who, proliferers 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 author the Court's opinion in *Casey v. Planned Parenthood* (1992) and uphold *Roe*. And two of them—O'Connor and Souter—would go even further, joining three of their brethren in *Stenberg v. Carhart* (2000) in imparting the blessings of our Constitution on that gruesome procedure, partial-birth abortion.

Nevertheless, three years before *Casey*, the Court seemed to be moving toward a rejection of *Roe*. Many proliferers read *Webster v. Reproductive Health Services* (1989)⁶⁴ as a sign that the Court was preparing to dismantle the regime of *Roe*. In *Webster* the Court reversed a lower-court decision and upheld several provisions of a Missouri statute that would not have sur-

vived constitutional muster in earlier days. 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."⁶⁵ Furthermore, it requires that under Missouri's laws the unborn should be treated as full persons who possess "all rights, privileges, immunities available to other persons, citizens, and residents of the state,"⁶⁶ contingent upon the U. S. Constitution and prior Supreme Court opinions. 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.

Third, the Court upheld the statute's provision that 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.⁶⁷

In order to assess properly the unborn's viability, the statute requires that the physician employ procedures as are necessary and enter the findings of these procedures in the mother's medical record.⁶⁸ 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.”⁶⁹

Webster, however, modified *Roe* in at least two significant ways: it rejected both *Roe*’s trimester breakdown and as well as its claim that the state’s interest in prenatal life becomes compelling only at viability: “[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.”⁷⁰ 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.”⁷¹ Although *Webster* chipped away at *Roe*, it did not overturn it.

In *Planned Parenthood v. Casey* (1992) the Court was asked to consider the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982, which the state amended in 1988 and 1989.⁷² 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 calls the *undue burden* standard, which the Court defined in the following way: “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking

an abortion of a nonviable fetus.”⁷³ The undue burden standard is, according to most observers, a departure from *Roe* and its progeny, which required that any state restrictions on abortion be subject to strict scrutiny. 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. 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.⁷⁴ But the *Casey* Court, by subscribing to the undue burden standard, held that a state may restrict abortion by passing laws that may not withstand strict scrutiny but 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 woman must be provided the 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.⁷⁵

Although the *Casey* Court upheld *Roe* as a precedent, the plurality opinion, authored by three Reagan-Bush appointees, O’Connor, Kennedy, and Souter, rejected two aspects of *Roe*: (1) its requirement that restrictions be subject to strict scrutiny; and (2) its trimester framework (which *Webster* had already discarded). The trimester framework, according to the Court, was too rigid as well as unnecessary to protect a woman’s right to abor-

tion.⁷⁶ However, the *Casey* Court reaffirmed viability as the time at which the state has a compelling interest in protecting prenatal life, though it seemed to provide a more objective definition than did the *Roe* Court (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.”⁷⁷

At this point I want to 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.”⁷⁸

Assuming that Justice Blackmun is using “meaningful life” to mean “independent life,”⁷⁹ he commits either one of two fallacies, depending on how he defines independent life. If he means by independent life a being that does not require the physical resources of another particular being in order for it to survive, e.g., a viable fetus, then Blackmun’s argument amounts to a vicious circle, for in that case he is 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. However, if Blackmun means by independent life 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, then 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 Reeves did not become less of a being, or cease to be Christopher Reeves, merely because a tragic accident left him dependent on others for his very survival. 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 claims that the unborn undergoes change—goes from non-viable to viable—he is implying that the unborn is in fact a being distinct from, though changing its dependence in relation to, its mother. Blackmun 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.”⁸⁰ “The Court discovered,” writes Hadley Arkes, “that novel doctrines could be wrought by reinventing old fallacies.”⁸¹

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, *stare decisis*, 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 (which I have already quoted above) as the argument’s premise: “[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.”⁸² 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 (“that’s not an argument; it’s mere contradiction”) or a bad freshman paper in Critical Thinking or even Susan Sarandon. But, it is, sadly, a product of judicial “reasoning,” though it is neither judicious nor reasoned. The premise—the biological fact of fetal nonviability through roughly the first six months pregnancy—can not possibly provide sufficient warrant for the conclusion that the Court is trying to draw: 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 the normative premise: 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. But if it were to add that premise, the 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. To review some of what we covered above: (1) The key premises of Justice Blackmun’s case—e.g., abortion was a common law liberty, the primary purpose of 19th-century abortion law was to protect women from dangerous operations—have been soundly refuted in the scholarly literature; (2) His case against the unborn’s status as a Fourteenth Amendment person is questionable; and (3) His argument from expert disagreement over the unborn’s full humanity—that the unborn is not a Fourteenth Amendment person because experts disagree on its status—undermines the right to abortion as well as provides 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* for which the Court provided two reasons: the reliance interest, and the Court’s legitimacy and the public’s respect for it. Concerning the first, the Court argued that because women and men have planned and arranged their lives with the abortion right in mind, that is, because they have relied on this right, it would be wrong for the Court to jettison

it.⁸³ 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 *Roe* would in fact correct an error in constitutional jurisprudence.⁸⁴ The Court, nevertheless, in its opening comments in *Casey* speaks of abortion as a liberty grounded in the due process clause of the Fourteenth Amendment, an extension of the right of privacy cases we covered earlier.⁸⁵ Yet, even the *Roe* Court understood that abortion had been banned nearly everywhere in the U.S. for quite some time, and thus it could not easily be construed as a fundamental liberty found in our Nation's Traditions and History unless the reason for banning abortion was now obsolete and the fetus was not protected under the Fourteenth Amendment. The *Roe* Court, as we saw, made the argument, one that we now know was largely based on a distortion of history that virtually all scholars concede was false and misleading. So, nothing of any substance was left for the *Casey* Court to hang its hat except for an appeal to *stare decisis* based on the reliance interest and the public's perception of the Court's legitimacy.⁸⁶ 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 tradition and history, it would have made that argument rather than relying on these counterfeit reasons. But the implications of this deal with the devil are daunting. By putting in place the premises of jurisprudence that it did, the Court gave cover to future courts to "justify" 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 citi-

zens 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.

It seems to me that 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."⁸⁷

Beginning in 1996 then-President Bill Clinton vetoed several bills passed by the U.S. Congress to prohibit what prolife activists call "partial-birth abortion."⁸⁸ 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 a dead fetus.

Although none of the congressional bills became law, 30 states, including Nebraska,

passed similar laws that prohibited D & X abortions. However, in *Stenberg v. Carhart* (2000),⁸⁹ the Supreme Court, in a 5-4 decision, struck down Nebraska's ban on partial-birth abortions, on two grounds: (1) The law lacked an exception for the preservation of the mother's health, which *Casey* required of any restrictions on abortion, (2) Nebraska's ban imposed an undue burden on a woman's fundamental right to have an abortion.

Although Nebraska's statute had a "life of the mother" exception, 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.⁹⁰ But Nebraska did not limit its ban to only D & X abortions performed after viability. Its ban applied throughout pregnancy. So, according to the Court, unless Nebraska can show that its ban does not increase a woman's health risk, it is unconstitutional: "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."⁹¹ But, as Justice Kennedy points out in his dissent, "The 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."⁹² But the relative risk between procedures, if in fact D & X is in some cases relatively safer,⁹³ cannot justify overturning the law if the increased risk is statistically negligible and if the State, as the Court asserted in *Casey*⁹⁴ and *Webster*,⁹⁵ has an interest in prenatal life throughout pregnancy which becomes compelling enough after viability to prohibit abortion except

in cases when the life or the health of the mother are in danger. After all, if "the relative physical safety of these procedures, with the slight possible difference"⁹⁶ requires that the Court invalidate Nebraska's ban on partial-birth abortion, then the Court proves too much. 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.

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% of the cases between the 12th and 20th weeks of pregnancy, D & E abortion (dilation and evacuation), is similar to D & X abortion.⁹⁷ So, the Court reasoned, if a ban on D & X abortions is legally permissible, then so is a ban on D & E abortions. But 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*. But, as both Justice Thomas and Justice Kennedy point out in their separate dissents,⁹⁸ by reading Nebraska's law in this way, the Court abandoned its long standing doc-

trine of statutory construction, that statutes should be read in a way that is consistent with the Constitution if such a reading is plausible. What the Court did in *Stenberg* is to 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,⁹⁹ 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."¹⁰⁰

It remains to be seen whether Congress and/or state legislatures will try to enact new laws that include both a health exception as well as a more narrow definition of D & X abortion. However, it is unclear that if such laws were enacted they would pass constitutional muster, for it seemed to many (including Justice Kennedy who co-authored the plurality opinion in *Casey* and authored a dissent in *Stenberg*) that Nebraska's law did not violate the requirements of *Casey*.

In 2002, the U. S. Congress with the signature of President George W. Bush, passed the "Born-Alive Infants Protection Act," the brainchild of the inestimable Hadley Arkes.¹⁰¹ 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 it is, in the words of Arkes, a "modest first step,"¹⁰² it is not an insignificant first step. For it affirms that an abortion entails the 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 post-

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 virtually unrestricted prior to fetal viability, allowing states to only 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.

ENDNOTES

¹*Roe v. Wade*, 410 U.S. 113 (1973).

²Mortimer J. Adler, *Haves Without Have-Nots: Essays on the 21st Century on Democracy and Socialism* (New York: Macmillan, 1991) 210 (emphasis added).

³See Dorothy C. Wertz and John C. Fletcher, "Fatal Knowledge?: Prenatal Diagnosis and Sex Selection," *Hastings Center Report*, May/June 1989; Joyce Price, "Prenatal Test of Sex Sometimes Triggers Abortion Decisions," *Washington Times*, 13 February 1987; Christopher Farley, "The Debate Over Uses of Prenatal Testing," *USA Today*, 2 February 1989; Gina Kolata, "Fetal Sex Test Used as Step to Abortion," *The New York Times*, 25 December 1988; Jo McGowan, "In India, They Abort Females," *Newsweek*, 30 January 1989; Anne Koeing, "Abortion for Gender is Debated," *Lancaster Pennsylvania News*, 22 January 1989; Naryung Kim,

“Breaking Free From Patriarchy: A Comparative Study of Sex Selection Abortions in Korea and the United States,” *UCLA Pacific Basin Law Journal* 17 (Fall 1999/Spring 2000) 301-325; David Stoller, “Prenatal Genetic Screening: The Enigma of Selective Abortion,” *Journal of Law and Health* 12 (1998) 121-140; Susan M. Faust, “Baby Girl or Baby Boy? Now You Can Choose: A Look at New Biology and No Law,” *Albany Law Journal of Science and Technology* 10 (2000) 281-303; Lynne Marie Kohm, “Sex Selection Abortion and the Boomerang Effect Of a Woman’s Right to Choose: A Paradox of the Skeptics,” *William & Mary Journal of Women and the Law* 4 (Winter 1997) 91-128; and April L. Cherry, “A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice,” *Wisconsin Women’s Law Journal* 10 (1995) 161-223.

⁴See, for example, the pre-1990 works cited in note 3.

⁵The Supreme Court has consistently struck down state statutes that have required involvement by other family members in the abortion decision of an adult female. See, for example, *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

⁶Abortion-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* [New York: W. W.

Norton, 1990] 10).

⁷*Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

⁸*Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁹*Roe*, 410 U.S. 164-165.

¹⁰ “[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” (ibid.). 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. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization)” (ibid., 154).

¹¹*Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (O’Connor, J., dissenting) at 459.

¹²Nevada Revised Statute, 442.250, subsection 3.

¹³*Doe v. Bolton*, 410 U.S. 179 (1973) at 192.

¹⁴Report, Committee on the Judiciary, U.S. Senate, on Senate Resolution 3, 98th Congress, 98-149, 7 June 1983, 6. In another report, the Judiciary Committee concludes: “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, United States Senate, December 1981, p. 5).

¹⁵*Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (Burger, J., dissenting).

¹⁶See, for example, Victor G. Rosenblum and Thomas J. Marzen, “Strategies for Reversing *Roe v. Wade* through the Courts,” in *Abortion and the Constitution*, eds. Dennis Horan, Edward R. Grant, and Paige C. Cunningham (Washington, D.C.: Georgetown University Press, 1987) 199-200; Thomas O’Meara, “Abortion: The Court Decides a Non-Case,” *The Supreme Court Review* (1974) 344; Stanely M. Harrison, “The Supreme Court and Abortional Reform: Means to an End,” *New York Law Forum* 19 (1974) 690; Robert A. Destro, “Abortion and the Constitution: The Need for a Life-Protective Amendment,” *California Law Review* 63 (1975) 1250; Jacqueline Nolan Haley, “Haunting Shadows from the

Rubble of *Roe's* Right to Privacy," *Suffolk University Law Review* 9 (1974) 152-153; John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal* 82 (1973) 921; John T. Noonan, Jr., "Raw Judicial Power," in *The Zero People*, ed. Jeff Lane Hensley (Ann Arbor, MI: Servant, 1983) 18; Charles E. Rice, "Overruling *Roe v. Wade*: An Analysis of the Proposed Constitutional Amendments," *Boston College Industrial and Commercial Law Review* 15 (December 1973) 309; Lynn D. Wardle and Mary Anne Q. Wood, *A Lawyer Looks at Abortion* (Provo, UT: Brigham Young University Press, 1982) 12; William R. Hopkin, Jr., "*Roe v. Wade* and the Traditional Legal Standards Concerning Pregnancy," *Temple Law Quarterly* 47 (1974) 729-730; John Warwick Montgomery, "The Rights of Unborn Children," *Simon Greenleaf Law Review* 5 (1985-86) 40; Stephen M. Krason, *Abortion: Politics, Morality, and the Constitution* (Lanham, MD: University Press of America, 1984) 103-104; and Roger Wertheimer, "Understanding Blackmun's Argument: The Reasoning of *Roe v. Wade*," in *Abortion: Moral and Legal Perspectives* (Amherst: University of Massachusetts Press, 1984) 120-121.

¹⁷*Roe*, 410 U.S. 163.

¹⁸*Colautti v. Franklin*, 439 U.S. 379 (1979) at 387, quoting from *ibid.* However, given the Court's analysis in *Casey* (see below) 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).

²⁰*Eisenstadt v. Baird*, 405 U.S. 438 (1972).

In the words of Justice Brennan, author of the majority opinion: "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."

²¹This 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. 484 [Douglas, J.]). 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" (*ibid.*, 486).

²²*Ibid.*

²³As 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 is no longer sole and any right of privacy she possesses must be measured accordingly" (*Roe*, 410 U.S. 159) (citations omitted).

²⁴Justice 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 places her life in serious jeopardy" (*ibid.*, 149).

²⁵*Ibid.*, 132-136. Justice Blackmun writes: "It is thus apparent that at common law, at the time of the

adoption of the 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" (ibid., 140-141).

²⁶Ibid., 132.

²⁷"Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or 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" (*Roe*, 410 U.S. 149).

²⁸*Roe*, 410 U.S. 129-151.

²⁹Ibid., 139 (emphasis added).

³⁰Joseph W. Dellapenna, "The History of Abortion: Technology, Morality and Law," *University of Pittsburgh Law Review* 40 (1979) 389.

³¹Among these many works are the following: James S. Witherspoon, "Re-examing *Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," *St. Mary's Law Journal* 17 (1985) 29-77; Krason, 134-157; Dennis J. Horan and Thomas J. Balch, "*Roe v. Wade*: No Justification in History, Law, or Logic," *The Abortion Controversy 25 Years After Roe v. Wade: A Reader*, 2nd ed., ed. Louis P.

Pojman and Francis J. Beckwith (Belmont, CA: Wadsworth) 73-94; Joseph W. Dellapenna, "Abortion and the Law: Blackman's Distortion of the Historical Record," in *Abortion and the Constitution*, 137-158; and Joseph W. Dellapenna, "The History of Abortion, 359-428; Martin Arbagi, "*Roe* and the Hippocratic Oath," in *Abortion and the Constitution*, 159-181; Harold O. J. Brown, "What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion," *Human Life Review* 1.2 (Spring 1975) 5-21; Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review* 41 (1973) 807-862; John R. Connery, S. J., "The Ancients and the Medievels on Abortion: The Consensus the Court Ignored," in *Abortion and the Constitution*, 123-136; John Keown, *Abortion, Doctors, and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (New York: Cambridge University Press, 1988) 3-25; Janet LaRue, "Abortion: Justice Harry A. Blackmun and the *Roe v. Wade* Decision," *Simon Greenleaf Law Review: A Scholarly Forum of Opinion Interrelating Law, Theology & Human Rights* 2 (1982-83) 122-145; Marvin Olasky, *Abortion Rites: A Social History of Abortion in America* (Wheaton, IL: Crossway, 1992); and Robert Sauer, "Attitudes to Abortion in America, 1800-1973," *Population Studies* 28 (1974) 53-67.

³²See, generally, Witherspoon, "Re-examing *Roe*."

³³Ibid.

³⁴Ibid., 70.

³⁵Cyril Means, "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?" *New York Law Forum* 17 (1971) 335-410; and "The Law of New York concerning Abortion and the Status of the Foetus: 1664-1968," *New York Law Forum* 14 (1968) 411-515.

³⁶In addition to Witherspoon's article, see Byrn, "An American Tragedy"; Krason, 134-157; Horan and Balch, "*Roe v. Wade*: No Justification in History, Law, or Logic"; Dellapenna, "Abortion and the Law"; and idem, "The History of Abortion."

³⁷See, for example, Tribe, 27-41, 119-220; and Susan Estrich, "Abortion Politics: Writing for an Audience of One," *University of Pennsylvania Law Review* 138 (1989) 152-154.

³⁸*Roe*, 410 U.S. 132.

³⁹Ibid., 133.

⁴⁰Obviously, 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.

⁴¹Krason, 148.

⁴²The Human Life Bill: Hearings on S. 158 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Congress, 1st Session (statement of Victor Rosenblum, Professor of Law, Northwestern University) 474.

⁴³John Warwick Montgomery, *Slaughter of the Innocents* (Westchester, IL: Crossway, 1981) 37.

⁴⁴Witherspoon, 32.

⁴⁵"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 terminate her pregnancy" (*Roe*, 410 U.S., 153).

⁴⁶"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" (*ibid.*, 157-158).

⁴⁷*Ibid.*, 157.

⁴⁸*Ibid.* In a note that followed this quote, 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 Texas's exception appear to be out of line with the Amendment's command?" (*ibid.*, 157-58 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. In addition, the Court presents another argument: "There are other inconsistencies between Fourteenth Amendment status and the 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?" (*ibid.*, 158 n. 54). Since I address this and a similar argument in greater detail in *Politically Correct Death*:

Answering the Arguments for Abortion Rights (Grand Rapids: Baker, 1993) 72-74, a few brief comments will suffice here. First, if Blackmun is correct that Texas's laws are inconsistent with its claim that the unborn is a Fourteenth Amendment personhood, 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's inconsistency, if there really is one, proves nothing, for if the unborn is a Fourteenth Amendment person, then Texas's laws violate the unborn's equal protection; but if the unborn is not a Fourteenth Amendment person, then Texas's 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, as I point out in *Politically Correct Death*, the *Roe* Court did not take into consideration the possible reasons why Texas's 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, I will argue, were thought by legislators to justify penalties they believed had the best chance of limiting the most abortion-homicides as possible. Thus, Texas's penalties as well as those of other states were consistent with affirming the unborn as a Fourteenth Amend-

ment person.

⁴⁹Ibid., 157.

⁵⁰Ibid.

⁵¹My 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.

⁵²Krason, 168.

⁵³*Steinberg v. Brown*, 321 F. Supp. 741 (ND Ohio 1970).

⁵⁴*Roe*, 410 U.S. 155 (citing *Steinberg*, 321 F. Supp. as well as other cases in which courts have sustained anti-abortion statutes).

⁵⁵*Steinberg*, 321 F. Supp., 746-747.

⁵⁶See Francis J. Beckwith, "Baha'ism," in *Dictionary of Contemporary Religion in the Western World*, ed. Christopher Partridge, et. al. (Downers Grove: InterVarsity Press, 2002) 168-171.

⁵⁷This 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 and Robert H. Bork, "Constitutional Persons: An Exchange on Abortion," *First Things* 129 (January 2003). Thank you to Jim Stoner for bringing this essay to my attention.

⁵⁸See Krason's historical analysis and citations of the relevant literature in Krason, 164-173.

⁵⁹*Roe*, 410 U.S. 160.

⁶⁰Ibid., 163.

⁶¹Ibid., 157-158.

⁶²See, for example, *Danforth*, 428 U.S. 52 (held as unconstitutional parental and spousal consent requirements as well as state ban on saline [or salt poisoning] abortions, a procedure

that literally burns the skin of the unborn); *Colautti*, 439 U.S. 379 (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); *Akron*, 462 U.S. 416 (held as unconstitutional: informed consent requirement, 24-hour waiting period, parental consent requirement, compulsory hospitalization for second trimester abortions, and humane and sanitary disposal of fetal remains); *Thornburg*, 476 U.S. 747 (struck down as unconstitutional Pennsylvania statute that required informed consent of abortion's possible risks to a woman, that required that the pregnant woman be informed of agencies that would help her if she brought a child to term, that the abortion provider report certain statistics about their patients to the state, and that a second physician be present at abortion when fetal viability is possible).

⁶³See *Harris v. McRae*, 448 U.S. 297 (1980).

⁶⁴*Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

⁶⁵Ibid., 504, quoting from Mo. Rev. Stat. § 1.205.1(1), (2) (1986) (parenthetical insertions are the Court's).

⁶⁶Ibid., 504, quoting from Mo. Rev. Stat. § 1.205.2 (1986).

⁶⁷Ibid., 513, quoting from Mo. Rev. Stat. § 188.029 (1986).

⁶⁸Mo. Rev. Stat. § 188.029 (1986), as found in *ibid.*

⁶⁹*Webster*, 492 U.S. 520. "No abortion of a viable unborn child shall be per-

formed unless necessary to preserve the life or health of the woman" (Mo. Rev. Stat. § 188.030 [1986]).

⁷⁰*Webster*, 492 U.S. 519.

⁷¹Ibid.

⁷²*Casey*, 505 U.S. 844.

⁷³Ibid., 877.

⁷⁴"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 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" (*ibid.*, 871).

⁷⁵The Court in fact explicitly overrules *Akron*, 462 U.S. and *Thornburgh*, 476 U.S.: "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" (*Casey*, 505 U.S. 882).

⁷⁶*Ibid.*, 872.

⁷⁷*Ibid.*, 870.

⁷⁸*Roe*, 410 U.S. 163.

⁷⁹Justice Blackmun's dissenting opinion in *Webster* (492 U.S. 553) 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."

⁸⁰Blackmun reveals this confusion in his dissent in *Webster* (492 U.S. 553): "[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 gen-

eral, becomes compelling.

⁸¹Hadley Arkes, *First Things: An Inquiry into the Principles of Morals and Justice* (Princeton: Princeton University Press, 1986) 379.

⁸²*Ibid.*, 870.

⁸³"[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" (*Casey*, 505 U.S. 869).

⁸⁴"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" (*Casey*, 505 U.S. 869).

⁸⁵*Casey*, 505 U.S. 844-853.

⁸⁶Oddly 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)" (*ibid.*, 864). This is a curious argument, for it is unlikely that the 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.

⁸⁷*Ibid.*, 966 (Rehnquist J., dissenting).

⁸⁸See "Partial Birth Abortion," Center for Reproductive Rights Home Page, available at http://www.crlp.org/hill_pba.html (January 22, 2003).

⁸⁹*Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

⁹⁰*Ibid.*, citing *Casey* 505 U.S. 879.

⁹¹*Ibid.*, 2610.

⁹²*Ibid.*, 2628 (Kennedy, J., dissenting).

⁹³As 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 *ibid.*, 2626-2631 (Kennedy, J., dissenting).

⁹⁴*Casey*, 505 U.S. 871. The Court writes: "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" (*ibid.*, 872) (insertion mine).

⁹⁵*Webster*, 492 U.S. 519.

⁹⁶*Stenberg*, 120 S. Ct. 2628 (Kennedy, J., dissenting).

⁹⁷*Ibid.*, 2606.

⁹⁸"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" (*ibid.*, 2644, cit-

ing *Erznoznick v. Jacksonville*, 422 U.S. 205 [1975] at 216 and *Frisby v. Schultz*, 487 U.S. 474 [1988] at 482 [Thomas, J., dissenting]). See also *ibid.*, 2631 (Kennedy, J., dissenting).

⁹⁹*Ibid.*, 2640-2643 (Thomas, J., dissenting).

¹⁰⁰*Ibid.*, 2640.

¹⁰¹Although published before the Act became law, one should read Arkes's 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* (New York: Cambridge University Press, 2002) 234-294.

¹⁰² *Ibid.*, 89.