"... a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason."


INTRODUCTION

In Planned Parenthood of Southeastern Pennsylvania v. Casey, a bare majority of the Supreme Court reaffirmed Roe v. Wade. Although Roe was not directly implicated by any of the statutes challenged in Casey, all of which could have been upheld without overruling Roe, the Justices agreed to reexamine Roe because of the uncertainty regarding its continued viability and the need to provide guidance to state and federal courts and state legislatures. The result of this reexamination, however, was a badly divided Court that could not muster a majority in support of any standard of re-

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3. At issue in Casey were five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989—the definition of medical emergency, 18 PA. CONS. STAT. § 3203 (1990), and provisions requiring informed consent and a 24-hour waiting period, id., § 3205, spousal notice, id., § 3209, informed parental consent (subject to a judicial bypass), id., § 3206, and recordkeeping and reporting, id., §§ 3207(b), 3214(a), 3214(f).
4. Casey, 112 S. Ct. at 2803.
5. Id. at 2803-04 (Joint Opinion), 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
view and whose opinion is virtually certain to exacerbate the political and social tensions created by Roe and intensify the national debate over the Court's claimed authority to impose a regime of abortion upon the American people.

In a Joint Opinion co-authored by Justices O'Connor, Kennedy, and Souter, the Court reaffirmed what it variously described as the "central" or "essential" holding of Roe v. Wade—that viability marks the constitutional frontier between lawful and unlawful prohibitions of abortion. The Court concluded, "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." But while adhering to the viability distinction, the Joint Opinion discarded the remainder of the trimester framework constructed in Roe, opting instead for a variation of the "undue burden" standard previously espoused by Justice O'Connor. Under this standard, as modified by Casey, regulation of abortion before viability is permissible so long as the regulation in question does not have "the purpose or effect of placing a substantial obstacle

6. Id. at 2804, 2808, 2809, 2810, 2811, 2812, 2813, 2816, 2817, 2818, 2821.
7. Id. at 2821. The Joint Opinion also reaffirmed "Roe's holding that subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Id. at 2821 (quoting Roe, 410 U.S. at 164-65). But see note 45, infra.
8. Id. at 2817-20. Under that framework, "almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake." Id. at 2817-18 (citing Roe, 410 U.S. at 163-66). The Joint Opinion also rejected the strict scrutiny standard of review. Casey, 112 S. Ct. at 2817. Under that standard, "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." Id. (citing City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983) (Akron Center I). ("restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest") (citing Roe, 410 U.S. at 155)). In Roe, the Court held that "[w]here certain 'fundamental rights' are involved, . . . regulation limiting these rights may be justified only by a 'compelling state interest,' and "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155 (citations omitted).
in the path of a woman seeking an abortion of a nonviable fetus."10

Applying this standard to the statutes in question, the Joint Opinion upheld four of the five provisions, 11 and struck down one of them—spousal notice. 12 Both Justice Blackmun and Justice Stevens dissented from the Joint Opinion's abandonment of Roe's trimester framework and the strict scrutiny standard of review. 13 Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, dissented from the reaffirmation of Roe, arguing that the rational basis standard should be applied to all regulation of abortion. 14

In reaffirming the "essential holding" of Roe v. Wade, the Joint Opinion considered "the fundamental constitutional questions resolved by Roe, principles of institutional integrity and the rule of stare decisis."15 Whether any of these considerations, individually or collectively, supports the Court's decision to reaffirm Roe is the subject of this article.

I. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT CONFER A RIGHT TO ABORTION?

Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. Roe

10. Casey, 112 S. Ct. at 2820; see also id. at 2821.

11. Id. at 2822 (medical emergency definition); id. at 2823-26 (informed consent and 24-hour waiting period); id. at 2832 (parental consent); id. at 2832-33 (recordkeeping and reporting). The votes to uphold these provisions were 9-0, 7-2, 7-2 and 8-1, respectively. See 112 S. Ct. at 2843 (Stevens, J., concurring in part and dissenting in part); id. (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); id. at 2835 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

12. Id. at 2829-30.

13. Id. at 2843, 2846 ("our precedents and the joint opinion's principles require us to subject all non-de minimis abortion regulations to strict scrutiny"); id. at 2847 ("[t]he Court has held that limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest"); id. at 2847-50 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); id. at 2839-43 (Stevens, J., concurring in part and dissenting in part).

14. Id. at 2855 ("we would adopt the approach of the plurality in Webster v. Reproductive Health Services," 492 U.S. 490 (1989)); id. at 2867 ("a woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion in ways rationally related to a legitimate state interest") (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

15. Id. at 2804.
v. Wade implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling Roe v. Wade.


In barely eight columns of text taking up less than five pages out of an opinion of more than thirty pages, the authors of the Joint Opinion attempt to construct a defense of Roe v. Wade by appealing to the liberty language of the Due Process Clause of the Fourteenth Amendment. This effort ultimately fails for a variety of reasons, not the least of which is the Joint Opinion's own tentativeness regarding Roe and its refusal to endorse Roe as a proper interpretation of the Constitution.

A. The Misgivings of the Court

Concluding its analysis of the liberty interest a woman has in obtaining an abortion, the Joint Opinion states:

While we appreciate the weight of the arguments made on behalf of the State in the case before us, arguments which in their ultimate formulation conclude that Roe should be overruled, the reservations any of us may have in reaffirming the central holding of Roe are outweighed by the explication of individual liberty we have given combined with the force of stare decisis. What this implies, of course, is that the Joint Opinion's "explication of individual liberty" might not, standing alone, support a right to abortion before viability or require reaffirmation of Roe. This is confirmed by other passages in the Joint Opinion. In its discussion of stare decisis, the Court leaves open the question as to whether "the central holding of Roe was in error." More revealingly, four pages later the Court asserts that "a decision to overrule should rest on some special reason over and above the belief that a prior case was

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16. Id. at 2804-08 (Part II of the Joint Opinion).
17. Id. at 2808. A moral ambiguity about abortion pervades the Joint Opinion. "Some of us as individuals find abortion offensive to our most basic principles of morality." Id. at 2806. "[T]he stronger argument is for affirming Roe's central holding, with whatever degree of personal reluctance any of us may have, not for overruling it." Id. at 2812.
18. Id. at 2810.
wrongly decided." And concluding its discussion of institutional integrity, the Court opines that "[a] decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law." If the authors of the Joint Opinion in Casey were actually convinced that Roe had been correctly decided as a matter of original constitutional interpretation, it would have been an easy matter for them to have said so. But they did not, which leaves a reader of the opinion with the nagging sense that a majority of the Court reaffirmed Roe, even though a differently constituted majority (the four dissenters plus one or more of the authors of the Joint Opinion) believed Roe to have been wrongly decided. That sense does not promote respect for the judiciary, especially in a case where the stakes were so high. And that sense is only reenforced by the Court's statement that "the basic decision in Roe was based on a constitutional analysis which we cannot now repudiate." Finally, in evaluating the weight to be given to the "interest of the State in the protection of potential life," the authors of the Joint Opinion state:

We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the Roe Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in Roe's wake we are satisfied that the immediate question is not the soundness of Roe's resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of Roe should be reaffirmed.

In light of the Court's refusal to decide whether Roe was correctly decided as "an original matter," its "explication of individual liberty" strikes one as superfluous, perhaps even pretextual. Nevertheless, that explication warrants close scrutiny.

19. Id. at 2814.
20. Id. at 2816.
22. Id. at 2807 (emphasis added).
23. Id. at 2817.
24. Id.
B. The Court's Understanding of Liberty

Unlike the opinion in Roe, which derived a right to abortion from an implied right of privacy found nowhere in the text, structure or history of the Constitution, the Joint Opinion grounds the right to abortion in the express language of the Due Process Clause of the Fourteenth Amendment. That clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The Due Process Clause, as the Court observes, has been interpreted to apply "to matters of substantive law as well as to matters of procedure." Continuing to quote from Justice Brandeis' concurring opinion in Whitney v. California, the Joint Opinion states that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." Curiously, however, the Joint Opinion never characterizes the right to abortion as "fundamental." Although "the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States," the Court "has never accepted [the] view" that "liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution."

Tacitly conceding that a right to abortion cannot be derived from our history and traditions, the Court rejects the argument, attributed to Justice Scalia, that "the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified," and concludes that "[n]either the

25. 410 U.S. at 152-53.
26. Casey, 112 S. Ct. at 2804. In its exposition of the liberty interest in obtaining an abortion (Part II of the Joint Opinion), the Court does not once refer to the right of privacy. In fact, the word "privacy" appears only four times in the entire Joint Opinion, id. at 2823, 2324, 2830 and 2832, and three of those references are in quoted material.
27. U.S. CONST., amend. XIV, § 1.
28. Casey, 112 S. Ct. at 2804 (quoting Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).
29. Id. (quoting Whitney, 274 U.S. at 373 (Brandeis, J., concurring)).
30. The Joint Opinion's selection of the "undue burden" standard does not clarify the nature of the right at stake. "[T]he undue burden standard begs the question at issue (namely, whether there is a fundamental right to abortion) and does not provide a meaningful guide for assessing the weight of the competing interests." Brief of the United States as amicus curiae, in support of Respondents at 6 n.2, Casey, 112 S. Ct. 2791 (Nos. 91-744 and 91-902) (1992).
31. Casey, 112 S. Ct. at 2804.
32. Id. at 2805.
33. Id. (citing Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989)).
Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limit of the substantive sphere of liberty which the Fourteenth Amendment protects.34 “[A]djudication of substantive due process claims,” the Joint Opinion explains, requires the Court "to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."35 Quoting Justice Frankfurter, the Court denies that ""this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought, . . . .""36 The trouble with the Joint Opinion, however, is that it does not identify any "stage of time or thought" (prior to Roe) when abortion was regarded as a "right" or a protected "liberty interest," or even a socially tolerated practice.37 A proper understanding of the meaning of

34. Casey, 112 S. Ct. at 2805.
35. Id. at 2806.
36. Id. at 2806 (quoting Rochin v. California, 342 U.S. 165, 171-72 (1952) (opinion of Frankfurter, J.).
37. Conspicuous by its absence from the Joint Opinion is any attempt to root a right to abortion in American law and culture. This is all the more remarkable when it is considered that Justice Blackmun devoted more than twenty pages of his lengthy opinion in Roe to exploring ancient, medieval and modern philosophical, moral, religious, medical and legal attitudes toward abortion.' Roe, 410 U.S. at 129-47, 159-62. Based upon that review, Justice Blackmun concluded that "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect," and that "[a]t least with respect to the early stages of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century." Id. at 140-41. Although the limited, and in many respects inaccurate, historical survey sketched in Roe did not support Justice Blackmun's conclusions (see id. at 174-77 (Rehnquist, J., dissenting); see also infra note 44, and Appendix A), those conclusions were critical to his finding that for most of our legal history, "a woman enjoyed a substantially broader right
"liberty" must be firmly anchored in our history and traditions. Unless the Court intends to cut those lines and set itself adrift on a sea of philosophical abstractions, its failure to identify a practice of allowing abortion must be regarded as fatal to its conclusion that abortion is a "protected liberty."

In its exposition of substantive due process claims, the Court...
cites and quotes extensively from Justice Harlan's justly famous dissent in Poe v. Ullman, but overlooks his apparent endorsement of laws forbidding abortion and disregards his warning that the Court must exercise "judgment and restraint" in fashioning new substantive due process rights. Justice Harlan referred to "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Elaborating upon this balance, he said:

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

It was precisely the "tradition" of prohibiting abortion, first at common law and later under statutes enacted in all of the States, which the Court seriously misread in Roe and completely ignored in Casey. In recognizing a constitutional right to abortion for any reason before viability, and for virtually any reason after viability,
the Court in *Roe* "radically depart[ed]" from our legal and social traditions. That, it is submitted, explains why the decision remains controversial twenty years later and why, despite the efforts and desires of the authors of the Joint Opinion, legalized abortion remains and will continue to remain a highly visible and divisive public issue.

At the time *Roe* was decided, thirty States allowed abortion only to save the life of the mother;

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declared unconstitutional a statute that prohibited abortion after viability unless the procedure was "necessary to preserve the woman from an imminent peril that substantially endangers her life or health." In *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984), aff'd, 476 U.S. 747 (1986), the Third Circuit, noting that "no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus," stated in *dicta* that had Pennsylvania attempted to prohibit postviability abortions performed for psychological or emotional reasons, such a limitation would have been unconstitutional under *Doe v. Bolton* Id. at 298-99.

In *Thornburgh*, the Court struck down a requirement that a physician performing a post-viability abortion use the technique that "would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique, . . . ." 18 PA. CONS. STAT. ANN. § 3210(b) (1982). Justice White dissented, saying:

The Court's ruling in this respect is not even *consistent* with its decision in *Roe v. Wade*. In *Roe*, the Court conceded that the State's interest in preserving the life of a viable fetus is a compelling one, and the Court has never disavowed that concession. The Court now holds that this compelling interest cannot justify *any* regulation that imposes a quantifiable medical risk upon the pregnant woman who seeks to abort a viable fetus: if attempting to save the fetus imposes any additional risk of injury to the woman, she must be permitted to kill it. This holding hardly accords with the usual understanding of the term "compelling interest," which we have used to describe those governmental interests that are so weighty as to justify substantial and ordinarily impermissible impositions on the individual—impositions that, I had thought, could include the infliction of some degree of risk of physical harm.

*Thornburgh*, 476 U.S. at 808-09 (White, J., dissenting) (emphasis in original).

lumbia allowed abortion to save the life or preserve the health of the mother;\textsuperscript{47} one State allowed abortion to save the mother's life or to terminate a pregnancy resulting from rape;\textsuperscript{48} thirteen States had adopted Section 230.3 of the American Law Institute's Model Penal Code\textsuperscript{49} or some variant thereof,\textsuperscript{50} allowing abortion under specified

\begin{itemize}
  \item 47. ALA. CODE tit. 14, § 9 (1958) (the health exception was added by statute in 1951, 1951 Ala. Acts 1630; MASS. GEN. LAWS ANN. ch. 272, § 19 (West 1968) (the health exception was adopted by judicial decision, see Kudish v. Bd. of Registration in Medicine, 248 N.E.2d 264, 266 (Mass. 1969), and cases cited therein); D.C. CODE ANN. § 22-201 (1967) (the health exception has been part of the Code since it was adopted in 1901, 31 Stat. 1322 (1901)).
  \item 48. MISS. CODE ANN. § 2223 (Supp. 1966). The rape exception was added in 1966. 1966 Miss. Laws ch. 358 § 1.
  \item 49. Section 230.3 provides:
    \begin{enumerate}
      \item 1. Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.
      \item 2. Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes that there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]
      \item 3. Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be per-
    \end{enumerate}
\end{itemize}
formed and, in the case of abortion following felonious intercourse, to the
prosecuting attorney or the police. Failure to comply with any of the
requirements of this Subsection gives rise to a presumption that the abortion
was unjustified.

(4) Self-Abortion. A woman whose pregnancy has continued beyond
the twenty-sixth week commits a felony of the third degree if she purposely
terminates her own pregnancy otherwise than by a live birth, or if she uses
instruments, drugs or violence upon herself for that purpose. Except as
justified under Subsection (2), a person who induces or knowingly aids a
woman to use instruments, drugs or violence upon herself for the purpose of
terminating her pregnancy otherwise than by a live birth commits a felony of
the third degree whether or not the pregnancy has continued beyond the
twenty-sixth week.

(5) Pretended Abortion. A person commits a felony of the third de-
gree if, representing that it is his purpose to perform an abortion, he does an
act adapted to cause abortion in a pregnant woman although the woman is in
fact not pregnant, or the actor does not believe she is. A person charged with
unjustified abortion under Subsection (1) or an attempt to commit that
offense may be convicted thereof upon proof of conduct prohibited by this
Subsection.

(6) Distribution of Abortifacients. A person who sells, offers to sell,
possesses with intent to sell, advertises, or displays for sale anything spe-
cially designed to terminate a pregnancy, or held out by the actor as useful for
that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an
intermediary in a chain of distribution to physicians or druggists; or
(b) the sale is made upon prescription or order of a physician; or
(c) the possession is with intent to sell as authorized in paragraphs
(a) and (b); or
(d) the advertising is addressed to persons named in paragraph (a)
and confined to trade or professional channels not likely to reach the general
public.

(7) Section Inapplicable to Prevention of Pregnancy. Nothing in this
Section shall be deemed applicable to the prescription, administration or
distribution of drugs or other substances for avoiding pregnancy, whether by
preventing implantation of a fertilized ovum or by any other method that
operates before, at or immediately after fertilization.

Ann. tit. 11, §§ 222(22), 651-654, and id. tit. 24, §§ 1766(b), 1790-1793 (various
dates); Fla. Laws 608, ch. 72-196 (1972); Ga. Code Ann. § 26-1201 et seq. (1971);

Allowing for certain variations in language and scope, these statutes generally
permitted abortions to save the life or preserve the physical or mental health of the
mother, to end pregnancies resulting from rape or, except in Maryland, incest, and,
except in California, to end pregnancies where there was a substantial risk that the
unborn child would be born with a physical or mental disability. In those States that
adopted ALI-type statutes, most abortions were performed for
circumstances; and four States allowed abortion on demand, but set limits in terms of the age of the fetus. No State allowed unrestricted abortion throughout pregnancy, as Roe effectively does.

The authors of the Joint Opinion relied heavily on the writings of Justice Harlan in developing their theory of substantive due process. It cannot be known with certainty what weight Justice Harlan would have given to the widespread and longstanding prohibition of abortion had he been on the Court when Roe was decided. What is known, however, is that it was only the lack of a comparable tradition barring the marital use of contraceptives (as opposed to their sale or distribution) that ultimately persuaded him that such laws are unconstitutional. In a passage from his opinion in Poe v. Ullman, not cited by the Court in Casey, Justice Harlan said:

But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.

Justice Harlan did not question the authority of the States to legislate on moral matters— he freely and openly acknowledged that authority. What troubled him about the Connecticut contraception laws was the uniqueness of those laws, directed at the use, not merely the sale or distribution, of contraceptives, and their potentially devastating impact on the privacy of the marital relationship had they been enforced (which they had not). But unlike the contraception laws ultimately struck down in Griswold, the abortion laws reviewed in Roe v. Wade and Doe v. Bolton were typical of the laws on the books (and often enforced) in nearly all of the States at the time those cases were decided. And the Texas laws were representative of


51. ALASKA STAT. § 11.15.060 (1970) (prior to viability); HAW. REV. STAT. § 453-16 (Supp. 1971) (prior to viability); N.Y. PENAL LAW § 125.00 et seq. (McKinney Supp. 1971) (twenty-four weeks); WASH. REV. CODE ANN. § 9.02.010 et seq. (West Supp. 1971) (before quickening and not more than four lunar months after conception).

52. Poe v. Ullman, 367 U.S. at 554-55 (Harlan, J., dissenting from dismissal on jurisdictional grounds) (emphasis in original). See also Griswold, 381 U.S. at 499 (Harlan, J., concurring in the judgment).

laws that had been on the books for more than 150 years before Roe was decided. Entirely apart from the obvious difference between contraception and abortion (one prevents a life from beginning, the other ends a life that already has begun), this legal and societal consensus against abortion strongly suggests that the methodology employed by Justice Harlan in evaluating substantive due process claims would not have yielded the same results claimed for it by the authors of the Joint Opinion.54

54. Casey, 112 S. Ct. at 2804-08. The existence of longstanding traditions protecting specific interests in family decisionmaking and marital privacy, and the absence of any countervailing tradition denying protection to those interests, distinguishes all of the substantive due process cases relied upon in the Joint Opinion from the right to abortion first recognized in Roe.

In Meyer v. Nebraska, 262 U.S. 390 (1923), for example, the Court struck down a law forbidding the teaching of any subject in any language other than English, or the teaching of modern languages other than English below the eighth grade. The Court emphasized the importance of education in American society and held that the liberty guaranteed by the Due Process Clause "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Id. at 399. Two years later the Court, relying upon Meyer, held invalid a law mandating public education of children between the ages of eight and sixteen because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). Noting that "[a]ppellees are engaged in a kind of undertaking not inherently harmful [parochial education], but long regarded as useful and meritorious," the Court held that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id. at 535.

In invalidating, on equal protection grounds, a law requiring sterilization of certain recidivists, the Court, in Skinner v. Oklahoma, 316 U.S. 535 (1942), said, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Id. at 541. In Griswold, the Court struck down laws banning the use of contraceptives, even by married persons. In his opinion for the Court, Justice Douglas noted that "[w]e deal with a right of privacy [i.e., the marriage relationship] older than the Bill of Rights—older than our political parties, older than our school system." Id. at 486. Separately concurring, Justice Goldberg referred to "a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage," id. at 491 (Goldberg, J., concurring), and observed that "[t]he Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home." Id. at 493. But he also cautioned that "[i]n determining which rights are fundamental, judges are not left to decide cases in light of their personal and private notions," but "must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] ... as to be ranked as fundamental.'" Id. at 493 (quoting Snyder v.
Massachusetts, 291 U.S. 97, 105 (1934)). As Justice Harlan noted four years earlier in his dissent in Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds), "the intimacy of husband and wife is necessarily an essential and accepted feature of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected."

In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court declared unconstitutional a municipal ordinance forbidding first cousins from residing in the same household with their grandmother. Noting the ordinance's "unusual" definitional section that recognized as a "family" only a few categories of related individuals, id. at 496, a four-justice plurality said that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Id. at 503-04 (opinion of Powell, J.). Justice Powell's opinion continued:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing . . . long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Id. at 504-05 (opinion of Powell, J.). Dismissing Justice White's concern that "recourse to history and tradition will 'broaden enormously the horizons of the [Due Process] Clause,'" id. at 549-50 (White, J., dissenting), Justice Powell wrote that "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from Palko v. Connecticut, 302 U.S. 319 (1937), and apparently suggested as an alternative." Id. at 504 n.12.

In Loving v. Virginia, 388 U.S. 1 (1967), the Court struck down Virginia's anti-miscegenation statutes, primarily on equal protection grounds, and only secondarily on substantive due process grounds (right to marry). The Court said that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and is "one of the 'basic civil rights of man,' fundamental to our very existence and survival." Id. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). See also Turner v. Safley, 482 U.S. 78, 95 (1987) (same).

It is important to note that each of the foregoing cases relied upon a specific and long-standing tradition of protecting the very right asserted, whether it be the right to marry, to privacy in the marital bedroom, to procreate, to educate one's children, or to live together in a common household with other rela-
Without being able to identify a specific legal tradition of protecting abortion, or even a social practice of tolerating it, the Joint Opinion falls back on more general notions of personal autonomy and bodily integrity and analogizes Roe to the contraception cases. But neither attempt to justify Roe persuades. The comparison to contraception fails because, as the Court itself admits, "[a]bortion is a unique act." It is unique because abortion "involves the purposeful termination of potential life." The Court acknowledges that "Roe . . . was an extension of those cases [Griswold and Eisenstadt] and agrees that Roe could be classified as "sui generis." Indeed, the very fact that the States have been allowed to

tives. Unlike any of these rights, however, there was no tradition protecting a right to abortion prior to Roe. None of the other cases cited in the Joint Opinion supports a methodology of recognizing unenumerated rights without regard for (much less in defiance of) those traditions. In Eisenstadt, for example, the Court declared unconstitutional a ban on the distribution of contraceptives to unmarried individuals but implicitly acknowledged the State's authority to prohibit "extramarital and premarital sexual relations." 405 U.S. at 448. Eisenstadt was based on the Equal Protection Clause, not the Due Process Clause, id. at 443, 446-55, and was decided when Roe was under advisement by the Court. Carey, a post-Roe opinion, simply applied the earlier contraception decisions to minors. But, as in Eisenstadt, the Court did not purport to recognize a right to engage in premarital or extramarital sexual activity. 431 U.S. at 688 n.5, 694, & 694 n.17. See also id. at 702 (White, J., concurring in part and concurring in the judgment), id. at 713 (Stevens, J., concurring in part and concurring in the judgment).

Winston v. Lee, 470 U.S. 753 (1985) (under the Fourth Amendment, suspect could not be compelled to submit to dangerous surgical procedure to remove evidence of a shooting), and Rochin v. California, 342 U.S. 165 (1952) (Due Process Clause forbade stomach pumping to obtain proof of intoxication), were both search and seizure cases and to the extent they, along with Washington v. Harper, 494 U.S. 210 (1990) (forcible administration of anti-psychotic drugs implicates liberty interest of Due Process Clause), also cited by the Joint Opinion, 112 S. Ct. at 2806, stand for the proposition that there is a liberty interest in refusing unwanted medical treatment, that specific interest has long been protected by the law. See, e.g., Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891); Schloendorff v. Society of New York Hospital, 105 N.E. 92, 93 (N.Y. 1914); Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905).

In short, none of the cases cited by the Joint Opinion supports a "generalized constitutional right of privacy," Cruzan v. Director, Missouri Dept' of Health, 497 U.S. 261, 279 n.7 (1990), and none purports to recognize a substantive due process liberty interest apart from a tradition supporting that interest. For a thoughtful and incisive critique of the Court's treatment of privacy as autonomy, see Smolin, supra note 37.

55. Casey, 112 S. Ct. at 2807-08, 2810.
56. Id. at 2807. On the same page, the Court notes that "the liberty of the woman is at stake in a sense unique to the human condition and so unique in the law." Id. See also infra note 291.
58. Casey, 112 S. Ct. at 2808.
59. Id. at 2810. As Roe itself recognized:
regulate abortion before viability and (at least in theory) prohibit abortion after viability in a manner that would not be accepted if those same measures were directed at contraception suggests that the Court's comparison of Roe to Griswold, Eisenstadt, and Carey is deeply flawed.

Nor does the Court's appeal to personal autonomy and bodily integrity fare any better. The Court itself expresses doubt as to whether Roe may be regarded as a guarantor of either interest. To characterize some or all of the cases on which the Court relies in reaffirming Roe as standing for an abstract right to "personal autonomy" simply creates an artificial common denominator among a very disparate and largely unrelated group of cases while at the same time denying what makes abortion unique. Though the Court has decid-

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, .... The situation, therefore, is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley v. Georgia, 394 U.S. 557 (1969), Loving, Skinner, and Pierce and Meyer were respectively concerned. 410 U.S. at 159 (emphasis added). See also Thornburgh, 476 U.S. at 792 (White, J., dissenting) (the decision to abort "must be recognized as sui generis different in kind from the others that the Court has protected under the rubric of personal or family privacy or autonomy").

60. Like Roe, 410 U.S. at 153, the Court in Casey noted the physical and psychological burdens of pregnancy. 112 S. Ct. at 2807. See also id. at 2846 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part). While these burdens should not be discounted or minimized, they should not be offered to explain why women seek abortions, either. In a survey taken by the Alan Guttmacher Institute, more than 90% of the women interviewed gave socio-economic reasons as their principal reasons for having an abortion but only 3% said that problems relating to their health were most important. Aida Torres & Jacqueline Darroch Forrest, Why Do Women Have Abortion?, 20 FAM. PLAN. PERSP. 169, 170 & Table 1 (July/Aug. 1988). And only 7% of the women surveyed even mentioned health as one of the factors that entered into their decision to have an abortion. Id. The Joint Opinion admits that abortions performed to preserve the mother's life or health are "rare," 112 S. Ct. at 2806, alludes to familial and other reasons for abortion, id. at 2808, and recognizes that most abortions are sought because birth control was not used, or failed, id. at 2809 ("[a]bortion is customarily chosen as an unplanned response to the consequences of unplanned activity or to the failure of conventional birth control"). See also id. at 2808 (noting concerns present "when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant"), id. at 2809. Abortion is a medical procedure but seldom represents a medical judgment.

61. "Roe . . . may be seen not only as an exemplar of Griswold liberty, but as a rule (whether or not mistaken) of personal autonomy and bodily integrity ...." 112 S. Ct. at 2810 (emphasis added).

62. One aspect of personal autonomy which the Court stresses is family decisionmaking. According to the Court, "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and
ed a number of cases that, taken together, could be said to recognize an interest in "bodily integrity," it is not at all clear how a law forbidding abortion (as opposed to one mandating abortion) contravenes that interest. "[C]ases recognizing limits on governmental power to mandate medical treatment or bar its rejection," have little, if anything, to do with the power to prohibit a given medical procedure. Moreover, it is difficult to reconcile either a generalized right of personal autonomy or bodily integrity with the well-established authority of the State to require medical vaccinations, even though such vaccinations entail a statistical risk of death or serious

parenthood," 112 S. Ct. at 2806, and protects "personal decisions relating to ... family relationships." Id. at 2807. See also id. at 2824 (referring to "the right to make family decisions"). It is difficult to see how a specific right to abortion can be derived from these broad generalizations. As Justice White said in his dissent in *Thomburgh*:

That the abortion decision, like the decisions protected in *Griswold, Eisenstadt* and *Carey*, concerns childbearing (or, more generally, family life) in no sense necessitates a holding that the liberty to choose abortion is "fundamental." That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself.

476 U.S. at 792 n.2 (White, J, dissenting). It is also difficult to square the Court's concern to protect "family relationships" with its decisions striking down laws requiring parental notice or consent, and spousal notice or consent. See *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2945-47 (1990) (two-parent notice without judicial bypass); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67-75 (1976) (parental consent (without a judicial bypass mechanism), spousal consent); *Casey*, 112 S. Ct. at 2826-31 (spousal notice). See *Smolin*, supra note 37.


64. The Court, however, sees no difference between the two. "If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." *Casey*, 112 S. Ct. at 2811. To suggest, as the Joint Opinion does, that retaining a right to abortion is necessary to protect a right not to have an abortion "shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death." Id. at 2874 n.1 (Scalia, J., concurring in the judgment in part and dissenting in part). See infra note 349 regarding coerced abortions.

illness, or the power of the Federal Government to draft men and women into the armed forces where their "personal autonomy" is severely restricted and their "bodily integrity" may be gravely jeopardized. As the Court said in \textit{Jacobson v. Massachusetts},

\begin{quote}
The liberty secured by the Fourteenth Amendment . . . consists, in part, in the right of a person "to live and work where he will," \textit{Allgeyer v. Louisiana}, 165 U.S. 578 [1897]; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.\textsuperscript{68}
\end{quote}

In light of the holdings in these cases, it cannot be said that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."\textsuperscript{69}

In his concurring opinion in \textit{Griswold v. Connecticut}, Justice Harlan said:

\begin{quote}
Judicial self-restraint . . . in the "due process" area . . . will be achieved . . . only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.\textsuperscript{70}
\end{quote}

In first creating and later confirming a right to abortion, the Supreme Court in \textit{Roe} and \textit{Casey} failed to exercise the "self-restraint" of which Justice Harlan so eloquently spoke. The Court ignored "the teachings of history" that abortion has always been regarded as a serious crime in English and American law, rejected "the

\begin{footnotes}
\begin{itemize}
\item 68. 197 U.S. at 29. Based upon this language, and the principle set forth in \textit{Jacobson}, Justice White concluded that "a compelling state interest may justify the imposition of some physical danger upon an individual, . . . ." \textit{Thornburgh v. American College of Obstetricians \\& Gynecologists}, 476 U.S. 747, 809 (1986) (White, J., dissenting). Of course, as the Joint Opinion itself notes, circumstances are rare "in which the pregnancy is itself a danger to [the woman's] life or health, . . . ." \textit{Casey}, 112 S. Ct. at 2806. The author is unaware of any reported case in which the law was invoked to deny a woman an abortion that was necessary to save her life. It should also be noted that, with two exceptions which did not result in conviction, women have never been prosecuted, much less convicted, for undergoing abortions or for self-abortion. See Paul Benjamin Linton, \textit{Enforcement of State Abortion Statutes after Roe: A State-by-State Analysis}, 67 U. DET. L. REV. 157, 163 n.31 (1990).
\item 69. \textit{Casey}, 112 S. Ct. at 2810.
\item 70. 381 U.S. at 501 (opinion of Justice Harlan, concurring in the judgment).
\end{itemize}
\end{footnotes}
basic values that underlie our society" that human life should be protected at all stages of development, and violated "the doctrines of federalism and separation of powers," by withdrawing from the States their rightful authority to restrict the practice of abortion. The Court's most recent effort to persuade the American people that Roe was anything other than "an exercise of raw judicial power" is ultimately unconvincing.

II. DOES THE RULE OF STARE DECISIS REQUIRE REAFFIRMATION OF ROE?

"... the doctrine of stare decisis .... is not ... an imprisonment of reason."


A. What the Joint Opinion Left Behind

After sketching its "explication of individual liberty," the Joint Opinion takes up consideration of the rule of stare decisis. Does that rule, properly understood, require reaffirmation of Roe? The Court's answer to this question, that Roe must be reaffirmed, is seriously undermined by its near total abandonment of Roe. A chart summarizing the principal respects in which Casey differs from Roe is set forth below. Briefly stated, Roe was based on an implied right of privacy, whereas Casey is based on the liberty language of the Due Process Clause of the Fourteenth Amendment. Roe sought support for its ruling from our history and traditions; Casey eschews recourse to such sources, relying instead upon "reasoned judgment." Roe described the right to choose abortion as "fundamental;" Casey does not characterize the nature of the right at all. Roe identified governmental interests in preserving maternal health and protecting the "potentiality of human life," which interests become "compelling" at various stages of pregnancy, whereas Casey

72. Casey, 112 S. Ct. at 2808-14 (Parts III(A) and (B) of the Joint Opinion).
73. 410 U.S. at 152-53.
74. 112 S. Ct. at 2804-08.
75. 410 U.S. at 140-41.
76. 112 S. Ct. at 2804-06.
77. 410 U.S. at 152-53.
78. But see supra note 30.
79. 410 U.S. at 162-64.
downgrades these interests to "legitimate" and "substantial." Roe held that regulation limiting the exercise of the right of abortion had to be "narrowly drawn to express only the legitimate state interests at stake;" Casey holds that such regulation, if otherwise valid, need only be "reasonably related" to those interests. Roe effectively employed the "strict scrutiny" standard of review; Casey substitutes the "undue burden" standard. Roe divided pregnancy into trimesters; Casey divides pregnancy into "bi-mesters" (before and after viability). The Joint Opinion also overruled, in part, two earlier Supreme Court decisions applying Roe.

80. 112 S. Ct. at 2804 ("the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child"), id. at 2808, 2817-18, 2820 ("there is a substantial state interest in potential life throughout pregnancy").
81. 410 U.S. at 155.
82. 112 S. Ct. at 2821.
83. 410 U.S. at 155.
84. 112 S. Ct. at 2817, 2820-21.
85. 410 U.S. at 162-65.
86. 112 S. Ct. at 2821.
87. Id. at 2823-24 (overruling, in part, Akron Center I, and Thornburgh).
Comparison of *Roe v. Wade* with *Planned Parenthood v. Casey*

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<th>Theory:</th>
<th>Roe</th>
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<th>&quot;Reasoned judgment&quot;</th>
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<th>Weight of countervailing interests:</th>
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<th>Division of pregnancy:</th>
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Considering the Joint Opinion's rejection of major portions of *Roe* (as well as *Akron Center I* and *Thornburgh*), it is hard to give much credence to its pronouncements on the importance of precedent. The authors of the Joint Opinion, however, try to finesse this difficulty by repeatedly referring to the viability distinction as "essential" or "central" and "reject[ing] the trimester framework which we do not consider to be part of the essential holding of *Roe*." By characterizing the viability distinction as "central" and "essential," the Joint Opinion in effect dismisses the rest of the trimester structure as "peripheral" and "superfluous." That characterization, however, strikes one as arbitrary. There is no reason to believe that the Court in

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88. "The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion—the 'undue burden' standard." *Casey*, 112 S. Ct. at 2866 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

89. *Id.* at 2804, 2808, 2809, 2810, 2811, 2812, 2813, 2816, 2817, 2818, 2821.

90. *Id.* at 2818.

91. As Justice Scalia said in dissent, "I must . . . confess that I have al-
Roe regarded any one element of the trimester scheme as more important than any other. In light of the Joint Opinion's "selective disdain for precedent," its appeal to the rule of *stare decisis* almost appears contrived. That appearance is strengthened by the Joint Opinion's freehanded treatment of the "undue burden" standard previously articulated by Justice O'Connor.\(^93\)

There are two key differences between Justice O'Connor's previous formulations of the "undue burden" standard and the Joint Opinion's (which she co-authored). First, in earlier opinions, Justice O'Connor stated that a statute imposes an "undue burden" only if it imposes "absolute obstacles or severe limitations on the abortion decision."\(^94\)

Under the Joint Opinion's reformulation of this standard, an "undue burden" exists even if the statute imposes only a "substantial" obstacle to the effectuation of the abortion decision.\(^95\) Second, in earlier opinions, Justice O'Connor expressed the view that a regulation of abortion that imposes an "undue burden" may be upheld if it "reasonably relate[s] to the preservation and protection of maternal health" or "reasonably relates" to "the State's compelling interests in maternal physical and mental health and protection of fetal life."\(^97\)

Under the Joint Opinion's reformulation of the standard, "undue burdens" imposed before viability are never constitutional.\(^98\) Finally, it is ironic that the authors of the Joint Opinion tenaciously cling to the one part of the trimester framework—viability—which one of them so severely criticized in earlier dissents.\(^99\)

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\(^93\). Despite the Joint Opinion's effort to give the "undue burden" standard a legal pedigree (112 S. Ct. at 2819-20), it remains a foundling. The standard has never been employed by a majority of the Court in any abortion case (see id. at 2876-79 nn.3, 4 (Scalia, J., concurring in the judgment in part and dissenting in part)), but was "largely created out of whole cloth by the authors of the joint opinion." *Id.* at 2866 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).


\(^95\). *Casey*, 112 S. Ct. at 2804, 2820-21, 2829, 2833.


\(^97\). *Akron Center I*, 462 U.S. at 473-74 (O'Connor, J., dissenting) (24-hour waiting period requirement).

\(^98\). *Casey*, 112 S. Ct. at 2820-21.

\(^99\). See *Akron Center I*, 462 U.S. at 453-61 (O'Connor, J., dissenting);
B. The Court's Understanding of Precedent

Having stripped Roe v. Wade of all but the viability rule, the Joint Opinion devotes several pages of its opinion to explaining why principles of stare decisis require its reaffirmation. On any account, that explanation is unconvincing. Notably absent from the Court's stare decisis discussion is any claim that Roe (or what remains of it) was correctly decided as a matter of original constitutional interpretation.

1. The Viability Rule in Roe

In Part IV of the Joint Opinion, which holds onto the viability rule while letting go of the rest of the trimester framework, the authors of the Joint Opinion assert that Roe's selection of viability as the point in pregnancy when the State may prohibit abortion was "a reasoned statement, elaborated with great care," and "twice reaffirmed." But this simply is not accurate.

The Texas statutes challenged in Roe prohibited abortion except to save the life of the mother. They did not distinguish among different stages of pregnancy. And the State of Texas did not argue that its interest in protecting prenatal life was more substantial at viability than it was at conception. Rather, Texas "argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest," Jane Roe, on the other hand, did not admit that the State's interest became compelling at viability. She "claim[s] an absolute right that bars any state imposition of criminal penalties in this area." Neither of the parties in Roe briefed, argued or attached any significance to viability. The Court's reference to viability as the point at which abortion could be prohibited, therefore, was unnecessary to a determination of whether Texas could prohibit virtually all abortions as provided by statute.

Ashcroft, 462 U.S. at 505 (O'Connor, J., concurring in the judgment in part and dissenting in part); Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting). Justice O'Connor's critique of viability is set forth below, see infra note 109 and accompanying text.

100. Casey, 112 S. Ct. at 2808-14. It is, perhaps, worth noting that the discussion of stare decisis in the Joint Opinion comes before, not after, the abandonment of the trimester framework.

101. Id. at 2816 (citing Akron Center I, and Thornburgh).

102. Roe, 410 U.S. at 156.

103. Id.

104. The majority opinions in Akron Center I and Thornburgh reaffirmed Roe
Moreover, the Court's treatment of viability in *Roe* was very abbreviated. After acknowledging that the State has an "important and legitimate interest in protecting the potentiality of human life," the Court stated that this interest "grows in substantiality as the woman approaches term and, at a point during pregnancy, . . . becomes 'compelling.'" No satisfactory explanation as to why this might be so can be found in *Roe.* The full extent of the explanation for choosing viability as the point when the State's interest becomes compelling is contained in three short sentences in *Roe*:

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.

Perhaps the most trenchant criticism of the "logical and biological justifications" of *Roe's* viability concept may be found in Justice O'Connor's dissent in *Akron Center I*:

In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At

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on the basis of *stare decisis* but neither opinion defended the rationale upon which the choice of viability had been made. See *Akron Center I*, 462 U.S. at 419-20 & n.1; *Thornburgh*, 476 U.S. at 759. This is not surprising since none of the parties in either case asked the Court to reconsider or overrule *Roe*. See *Akron Center I*, 462 U.S. at 452 (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting).

106. *Id.* at 162-63.
107. In his concurring opinion in *Thornburgh*, Justice Stevens attempted to provide some greater explanation by stating that it is "obvious that the State's interest in the protection of an embryo increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day." 476 U.S. at 778 (Stevens, J., concurring). Three of the four "capacities" mentioned—to feel pain, to experience pleasure, and to react to its surroundings—do not coincide with viability, its capacity "to survive." Justice Stevens' proposal that the State's interest in protecting the unborn child's life must increase as he or she develops cannot be correct. It if were correct, then the State's interest in protecting the newborn as well as the mentally incompetent and disabled would be less than its interest in protecting competent adults who are arguably better capable of interacting with society, experiencing pleasure and reacting to their surroundings. Such a notion is clearly contrary to existing laws and principles of equality under the law.

any stage of pregnancy, there is the potential for human life. Although the Court refused to "resolve the difficult question of when life begins," [Roe, 410 U.S.] at 159, the Court chose the point of viability—when the fetus is capable of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.109

2. The Court's Stare Decisis Criteria

Part III of the Joint Opinion sets forth four separate criteria for determining whether the doctrine of stare decisis precludes reconsideration of Roe.110 Careful examination of each of these criteria suggests that they do not.

a. workability

The first of these criteria is "workability."111 The Court dismisses concerns about the "workability" of Roe in a single sentence, saying that Roe represents "a simple limitation beyond which a state law is unenforceable."112 But the Court does not examine the concept of viability under this criterion, nor does it explain how viability is a workable concept. As discussed below, viability does not appear to be "workable," either as a legitimate choice for balancing the competing interests of the woman and the State, or for purposes of enforcement.

As a practical matter, whether a particular unborn child is "viable" depends not only upon advances in neonatal care, but also upon advances in medical technology that enable physicians to assess accurately fetal age, weight, and lung maturity—factors that must be taken into consideration in estimating the child's chances of survival if removed from the womb.113 In addition, viability presumably depends on the availability of such technology within a particular com-

110. Casey, 112 S. Ct. at 2809-12.
111. Id. at 2809.
112. Id. Needless to say, the Court's defense of the "workability" of Roe is made easier by the Joint Opinion's abandonment of the trimester framework. See, e.g., id. at 2856-58 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (detailing the problems experienced in applying the trimester standard).
113. Webster, 492 U.S. at 530-31 (O'Connor, J., concurring in part and concurring in the judgment).
munity. Finally, it also depends on the skill of those utilizing such techniques. For example, the accuracy of an ultrasound determination of gestational age may depend on the quality of the machine, as well as the skill of the technician. In sum, whether a particular child is "viable" depends on all of these factors and also on the skill of the physician who must use his best medical judgment based upon the available medical technology and data to estimate the child's chances for survival. Even with due diligence, a significant margin of error can be expected.\(^{114}\) Thus, the determination of whether a particular unborn child is "viable" is, at best, an imprecise medical judgment.

Reliance on viability as the constitutional benchmark for balancing the woman's liberty interest and the State's interest in protecting the child's life is wholly arbitrary from the perspective of the woman, the child, and the State.\(^{115}\) This is true because the determination of whether an unborn child is or is not "viable" may differ solely as a result of the skill of the examining physician whom the woman chooses and the technology available in the community where the abortion is sought. The woman's liberty interest would not be protected where a nonviable child is erroneously determined to be viable. And the interests of both the State and the child would be violated where a viable child is erroneously determined to be nonviable. Thus, viability appears to be arbitrary and, therefore, unworkable.

In addition, if the Court in *Roe* had simply selected a specific point in pregnancy (e.g., twenty-four weeks, which corresponds roughly with its choice of viability), after which States could prohibit abortion, its ruling would have been "more workable" for purposes of enforcement. However, as it stands, the Court has prevented the States from relying on any "bright lines" regarding viability.\(^{116}\) Thus, they have been deprived from adopting any statutory cutoff for abortion that is subject to meaningful enforcement capability.\(^{117}\)

\(^{114}\) *Id.* at 516 ("there may be a 4-week error in estimating gestational age") (opinion of Rehnquist, C.J.).

\(^{115}\) The Court refers to the viability line as "seemingly somewhat arbitrary." *Casey*, 112 S. Ct. at 2816. The Court also states that "there is no line other than viability which is more workable" *id.* at 2817 (emphasis added), implying, at least, that viability is not entirely workable.

\(^{116}\) See *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979) (States may not rely on any single factor to determine viability).

\(^{117}\) Prosecutions under this basically standardless definition of viability have proven to be virtually impossible. In order to enforce a prohibition of abortion after viability, the State must generally prove that the abortionist acted in bad faith, not simply negligently, in erroneously determining gestational age. For insight into other prosecutorial problems, see *Floyd v. Anders*, 440 F. Supp. 535, 537 (D. S.C. 1977), *vacated and remanded*, 440 U.S. 445 (1979) (state prosec-
Another potential problem with the "workability" of the viability definition is raised in the Joint Opinion itself. The Court notes the possibility that viability may occur "at some moment even slightly earlier in pregnancy [than twenty-three to twenty-four weeks], ... if fetal respiratory capacity can somehow be enhanced in the future."\textsuperscript{118} Ten years earlier, Justice O'Connor suggested that "fetal viability in the first trimester of pregnancy may be possible in the not too distant future."\textsuperscript{119} What does that development portend for a woman's "liberty" interest in obtaining an abortion? Or, in view of the \textit{Doe} mandated exception for "life and health,"\textsuperscript{120} does it make any difference when viability occurs?

b. reliance

"Reliance" is the second criterion set forth in the Joint Opinion for determining whether the rule of \textit{stare decisis} requires reaffirmation of \textit{Roe}.\textsuperscript{121} "The inquiry into reliance," the Court explains, "counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application."\textsuperscript{122} The Court readily acknowledges that reliance interests weigh heavily in the commercial context "where advance planning of great precision is most obviously a necessity."\textsuperscript{123} And the Court apparently concedes that any specific reliance interest in the availability of abortion (following a pregnancy resulting from unplanned intercourse or a failure of conventional birth control) would be \textit{de minimis}, because "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."\textsuperscript{124}

\textsuperscript{118.} \textit{Casey}, 112 S. Ct. at 2811.
\textsuperscript{119.} \textit{Akron Center I}, 462 U.S. at 457 (O'Connor, J., dissenting).
\textsuperscript{120.} See supra note 45.
\textsuperscript{121.} \textit{Casey}, 112 S. Ct. at 2809-10.
\textsuperscript{122.} \textit{Id.} at 2809.
\textsuperscript{123.} \textit{Id.} (citing Payne v. Tennessee, 111 S. Ct. 2597, 2610 (1991)).
\textsuperscript{124.} \textit{Id.} Contrary to what some may think (and the Court may believe), the "sudden restoration of state authority to ban abortions" would not return the United States to the legal \textit{status quo ante} of 1973. \textit{See generally} Linton, supra note 68. More than 30 States have repealed their pre-\textit{Roe} laws and only a handful of these States have enacted post-\textit{Roe} laws which, if enforced, would prohibit most abortions (Arkansas, Louisiana, Rhode Island, South Dakota, and Utah). Of the States that have not repealed their pre-\textit{Roe} laws, several allow abortion on demand through an advanced stage of pregnancy (Alaska, Hawaii, and New
In what is probably the key passage to the entire Joint Opinion, the Court denies that "cognizable reliance" on the availability of abortion can be limited to "specific instances of sexual activity."\(^{125}\)

[T]o do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.\(^{126}\)

This, it is suggested, is the heart of the Joint Opinion and the real reason the Court did not overrule \textit{Roe v. Wade} in \textit{Casey}. There are, however, several problems with the Court's reasoning. First, having effectively conceded that there is no reliance interest in the availability of abortion in "specific instances of sexual activity," it is difficult to perceive how there could be any general reliance interest, either. Second, the Court apparently attributes to \textit{Roe} "two decades of economic and social developments," a claim unsupported by any facts. As Chief Justice Rehnquist said in dissent:

Surely, it is dubious to suggest that women have reached their "places in society" in reliance upon \textit{Roe}, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved for men.\(^{127}\)

Much of the "economic and social developments" to which the Court refers have resulted from a nationwide commitment to equal rights for women that has little to do with abortion. As two authors have observed recently:

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\(^{125}\) Id. at 2809. \textit{See also} id. at 2844-45 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part).

\(^{126}\) Id. If \textit{Roe} were overruled, women would not lose their ability to control their "reproductive lives." Even if abortion laws were enacted and enforced, abstinence, contraception and sterilization would remain options legally available to them.

\(^{127}\) Id. at 2862 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
Roe is rarely cited as a precedent for women’s rights in any area other than abortion. Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from Roe v. Wade.128

Whatever progress has been made in the law in combatting sex discrimination is attributable to other, independent constitutional doctrines129 or to Congressional130 or state action,131 rather than to

129. See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (invalidating state law giving preference to men in issuing letters of administration to probate estate) (decided under Equal Protection Clause of Fourteenth Amendment); Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down federal laws requiring dependents of servicewomen, but not servicemen, to prove their dependence to receive quarters allowances and medical and dental benefits) (equal protection component of Due Process Clause); Cleveland Board of Education v. LeFleuer, 414 U.S. 632 (1974) (mandatory pregnancy leave policy for public school teachers violated Due Process Clause because policy had no valid relationship to State's interest in preserving continuity of instruction and was based upon an impermissible irrebuttable presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (striking down provisions of Social Security Act that allowed benefits to be paid to widow and minor children of deceased husband and father covered by the Act but only to minor children and not widower of deceased wife and mother) (Due Process Clause of Fifth Amendment); Stanton v. Stanton, 421 U.S. 7 (1975) (striking down state law establishing different ages of majority for males and females) (Equal Protection Clause); Craig v. Boren, 429 U.S. 190 (1976) (same, with respect to statutes setting different ages at which men and women could purchase beer); Califano v. Goldfarb, 430 U.S. 199 (1977) (provision of Social Security Act denying benefits to widow who could not prove that he was receiving at least one-half of his support from his deceased wife but did not require same evidence of dependency from widow violated Equal Protection Clause of the Fourteenth Amendment); Caban v. Mohammed, 441 U.S. 380 (1979) (statute which required consent of natural mother, but not natural father, to adoption of child born out-of-wedlock and never legitimized violated Equal Protection Clause); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (striking down, on equal protection grounds, state statute that allowed husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent).
any particular reliance on Roe. 132


131. Seventeen States have included equal rights provisions in their state constitutions: ALASKA CONST. art. 1, § 3 (1972); COLO. CONST. art. II, § 29 (1973); CONN. CONST. art. I, § 20 (1974); HAW. CONST. art. I, §§ 3, 5 (1972); ILL. CONST. art. I, § 18 (1970); LA. CONST. art. I, § 3 (1974); MD. CONST. art. XLVI (1972); MASS. CONST. part 1, art. CVI [§ 252] (amending § 2) (1976); MONT. CONST. art. II, § 4 (1973); N.H. CONST. part 1, art. II (1974); N.M. CONST. art. II, § 18 (1973); PA. CON. art. I, § 28 (1971); TEX. CONST. art. I, § 3a (1972); UTAH CONST. art. IV, § 1 (1896); VA. CONST. art. I, § 11 (1971); WASH. CONST. art. XXXI, § 1 (1972); WYO. CONST. art. I, §§ 2, 3 & art. VI, § 1 (1890). Many States also have "mini-EEOC" laws that prohibit discrimination on account of sex. Other significant state laws against sex-based discrimination are cited in Cunningham & Forsythe, supra note 128, at 155-56 & nn.347-56.

Third, and most importantly, the Court seems to suggest that women can be made "equal" to men only if they are given the right to destroy their own children through abortion. But it is an offensive and sexist notion that women must deny what makes them unique as women (their ability to conceive and bear children), in order to be treated "equally" with (or by) men.\textsuperscript{133} Genuine equality between the sexes will be reached on that day when women can affirm what makes them unique as women and still be treated fairly by the law and society. By not overruling \textit{Roe}, the \textit{Casey} Court has delayed the arrival of that day.

c. change in law

The third criterion of the Joint Opinion's \textit{stare decisis} discussion requires an examination of the "evolution of legal principle."\textsuperscript{134} The Court asks whether "\textit{Roe's} doctrinal footings" are "weaker [now] than they were in 1973," and whether any "development of constitutional law since the case was decided has implicitly or explicitly left \textit{Roe} behind as a mere survivor of obsolete constitutional thinking."\textsuperscript{135}

In light of the Joint Opinion's refusal to place its judicial impatur on \textit{Roe}, these questions come as a surprise. If the authors of the Joint Opinion cannot bring themselves to say that \textit{Roe} was correctly decided as a matter of original constitutional interpretation,\textsuperscript{136} what possible difference can it make whether \textit{Roe} has been undermined by later decisions? Another peculiarity about this criterion is its unstated assumption that only a decision that becomes less defensible over time is left unprotected by the rule of \textit{stare decisis}. As Chief Justice Rehnquist said in dissent:

\begin{quote}
[s]urely there is no requirement, in considering whether to depart from \textit{stare decisis} in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.\textsuperscript{137}
\end{quote}


\textsuperscript{133} This argument is developed is much greater detail in \textit{Smolin, supra} note 37, at 1001-13 and in his article appearing in this Symposium issue. \textit{See also} Cunningham & Forsythe, \textit{supra} note 128, at 100-58.

\textsuperscript{134} \textit{Casey}, 112 S. Ct. at 2810.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.} at 2817.

\textsuperscript{137} \textit{Id.} at 2861 (Rehnquist, C.J., concurring in the judgment in part and
Justice White made the same point six years earlier in his dissent in *Thornburgh*,

"[I]f an argument that a constitutional decision is erroneous must be novel in order to justify overruling that precedent, the Court's decisions in *Lochner v. New York*, 198 U.S. 45 (1905), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), would remain the law, for the doctrines announced in those decisions were nowhere more eloquently or incisively criticized than in the dissenting opinions of Justices Holmes (in *Lochner*) and Harlan (in both cases). That the flaws in an opinion were evident at the time it was handed down is hardly a reason for adhering to it."

But the law has changed. By focusing narrowly on constitutional law, the Court manages to avoid viewing the broader legal landscape which, with regard to the protection of the unborn child, has changed dramatically since *Roe*. Judicial and legislative developments in areas outside of abortion have increasingly recognized that neither viability nor live birth is a relevant factor in defining public wrongs (criminal law) or redressing private injuries (tort law). These developments cast doubt on the reasonableness of the choice of viability as an appropriate constitutional standard.

For example, in a trend *Roe* missed and *Casey* overlooked, a majority of state courts (twenty-eight) have expressly or impliedly rejected viability as an appropriate cutoff point for determining liability for nonfatal prenatal injuries and allow actions to be brought for such injuries without regard to the stage of pregnancy when they were inflicted. Many of these decisions were handed down before
Roe. A minority of jurisdictions (twelve States and the District of Columbia) recognize a cause of action for prenatal injuries sustained after viability but have not yet decided whether the action will lie for injuries suffered before viability. An even smaller minority of
States (ten) have not yet been asked to recognize a cause of action for prenatal injuries.\textsuperscript{143} No state court has rejected a cause of action for prenatal injuries in twenty-five years.\textsuperscript{144} And where prenatal injuries result in death after live birth the modern cases appear to reject any requirement of viability as a condition of recovery under wrongful death statutes.\textsuperscript{145}

*Roe* also minimized the emerging case law allowing wrongful death actions for stillborn children.\textsuperscript{146} The overwhelming majority of jurisdictions (thirty-six States and the District of Columbia) now allow recovery under wrongful death statutes for prenatal injuries that result in stillbirth where the injury causing death (or at least the death itself) occurs after viability.\textsuperscript{147} (Few of those jurisdictions,
however, have allowed recovery where both the injury and the death occur before viability. A minority of States (ten) have denied wrongful death actions for prenatal injuries unless the death followed a live birth. And a handful of States (four) have not yet decided


whether a wrongful death action will lie for prenatal injuries resulting in stillbirth.150

Both the common law action for prenatal injuries and the statutory action for the wrongful death of an unborn child recognize a duty of care that is owed to the unborn child.151 Duties, of course, are owed only to persons. Neither Roe nor Casey displayed any familiarity with the sustained critique of viability in the reported cases on prenatal injuries and wrongful death. As early as the 1920's, courts began to question its relevance in civil cases.

In an unreported decision from 1923, the Louisiana Court of Appeals refused to read either a live birth or a viability requirement into the wrongful death statute:

The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe that the infant is a child from the moment of conception, although life may be in a state of suspended animation, the subject of love, affection and hope and that the injury or killing of it in its mother's womb is covered by the [wrongful death statute] and gives its bereaved parents to a right of action against the guilty parties for their grief and mental anguish.152


The Court in Roe added gratuitously that the wrongful death action allowed in such circumstances, "would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." Roe, 410 U.S. at 162. Wrongful death actions can benefit only survivors, not the deceased, regardless of age. And the actions are brought in the name of the deceased or his estate, not the parent.

151. "All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof." W. PROSSER, LAW OF TORTS 336 (4th ed. 1971).

152. Johnson v. S. New Orleans Light & Traction Co., No. 9048 (Orleans Dec. 10, 1923) (unreported), writ refused, No. 266,433 (1923) (quoted with ap-
In 1942, the New Jersey Court of Errors and Appeals refused to recognize a cause of action for prenatal injuries because the child was not viable at the time the injuries were sustained.\footnote{Stemmer v. Kline, 26 A.2d 489 (N.J. 1942).} Chief Justice Brogan wrote a strong dissent joined by five other members of the court:

While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.\footnote{Id. at 687 (Brogan, C.J., dissenting).}

In 1953, the New York Supreme Court, Appellate Division, rejected a viability requirement in recognizing a cause of action for prenatal injuries, stating that "legal separability should begin where there is biological separability" and "separability begins at conception."\footnote{Kelly v. Gregory, 125 N.Y.S.2d 696, 697 (N.Y. App. Div. 1953).}

The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, postnatal as well as pre-natal.\footnote{Id. at 697.}

Other courts quickly began to follow suit and reject a requirement of viability in prenatal injury actions. In 1956, the Georgia Supreme Court rejected a viability requirement in prenatal injury cases, stating, "If a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover."\footnote{Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727, 728 (Ga. 1956).}

Two years later, the New Hampshire Supreme Court also discarded viability, adopting the opinion that "the
fetus from the time of conception becomes a separate organism and remains so throughout its life." In 1959, the Wisconsin Supreme Court, in *dicta*, questioned the viability distinction:

The viability theory has been challenged as unrealistic in that it draws an arbitrary line between viability and non-viability, and fails to recognize the biological fact there is a living human being before viability. A child is no more a part of its mother before it becomes viable than it is after viability. It would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her. The claim of a child injured before viability is just as meritorious as that of a child injured during the viable stage.159

In 1960, the New Jersey Supreme Court, after quoting extensively from Chief Justice Brogan's dissent in *Stemmer v. Kline*160 and noting that "[m]edical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body,"161 also abandoned viability:

We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. In the first place, age is not the sole measure of viability, and there is no real way of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born. Therefore, the viability rule is impossible of practical application .... In addition, . . . medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation. The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress.162

In the same year, the Pennsylvania Supreme Court recognized a cause of action for prenatal injuries, regardless of when inflicted.163 The court observed that viability has "little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception."164 In 1966, the

160. See supra note 153.
162. *Id.* at 504.
164. *Id.* at 96.
Rhode Island Supreme Court followed suit. The court noted "the medical fact that a fetus becomes a living human being from the moment of conception" and rejected viability as a "decisive criterion" because "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence." The trend continued with the Texas Supreme Court's rejection of viability in 1971, and the Alabama Supreme Court's rejection of viability in 1973, the latter court stating:

[T]he more recent authorities emphasize that there is no valid medical basis for a distinction based on viability, especially where the child has been born alive. These [decisions] proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.

In 1976, the Florida District Court of Appeals criticized retention of a viability requirement in prenatal injury cases:

Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.

In the same year, the Rhode Island Supreme Court rejected a live birth requirement in the wrongful death of a viable unborn child. In dicta, a plurality of the Court also sharply criticized the viability rule:

[V]iability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. If it seems that if live birth is to be characterized, as it so frequently has been, as an

166. Id. at 223-24.
169. Id. at 761.
arbitrary line of demarcation, then viability, when enlisted to serve that
same purpose, is a veritable *non sequitur.*

The following year the Connecticut Superior Court rejected a
viability requirement in wrongful death cases where death occurs after a
live birth: "The development of the principle of law that now permits
recovery by or on behalf of a child born alive for prenatal injuries
suffered at any time after conception, without regard to the viability of
the fetus, is a notable illustration of the viability of our common law."173

In 1980 the Louisiana Court of Appeals rejected a live birth
requirement in an action for the wrongful death of a viable unborn
child.174 In his concurring opinion, Justice Lottinger added that viability
is an arbitrary basis for denying recovery:

Viability has not been the controlling factor in some previous Louisiana
cases allowing recovery [for the wrongful death of a stillborn child], and
there is no need to make it a controlling factor in this decision. Just as live
birth is an arbitrary cutoff point for wrongful death purposes, viability is
equally arbitrary in deciding whether the fetus is a "person" whose wrongful
killing is compensable.175

Both state and federal judges have recognized that the rule limiting
recovery to post-viability injury resulted from the law's conservatism in
gradually moving away from a rule that had denied *all* recovery for
such injuries.176 The lead case denying recovery was Justice Oliver
Wendell Holmes' opinion for the Massachusetts Supreme Judicial
Court in *Dietrich v. Inhabitants of Northampton.*177 In *Dietrich*, a
wrongful death action, the decedent was a nonviable child injured *in utero*
who was born alive, lived a few minutes, then died. Justice
Holmes wrote that no civil duty was owed to an unborn child.178 The
holding was based on the lack of any common law precedent allowing
such an action, the remoteness of the injury from the negligent conduct,
and the Court's view that an unborn child was still a part of its
mother.179

(R.I. 1991)).
175. *Id.* at 1027 (Lottinger, J., concurring).
Construction Co., 341 F.2d 75 (4th Cir. 1964), discussed below, *infra* notes 180-85
and accompanying text.
177. 138 Mass. 14 (1884).
178. *Id.* at 245.
179. *Id.* at 243, 245.
In repudiating the viability rule in 1960, the New Jersey Supreme Court commented on the durability of the Dietrich rule:

Although the viability distinction has no justification, it is explainable historically. The Dietrich case announced a theory that an unborn child was part of its mother. The first dissent from this proposition, by Justice Boggs in the Allaire case [Allaire v. St. Luke's Hospital, 56 N.E. 638 (Ill. 1900)], pointed out that an unborn child who could sustain life apart from its mother could not be considered part of her. The logical appeal of Justice Boggs' approach, coupled with the understandable conservatism of the earlier courts who broke with the Dietrich theory, resulted in a rule of recovery limited by the viability distinction.180

These sentiments were forcefully echoed by Judge Haynsworth in his dissent in Todd v. Sandidge Construction Co.181 Judge Haynsworth criticized the selection of viability as an appropriate line of demarcation for prenatal injuries:

What in reason then has viability at the time of injury [citation omitted] got to do with the problem? The answer, plainly, is nothing. To one so concerned with the foreclosure of all possibility of fictitious claims as to feel compelled to draw arbitrarily an arbitrary line, the notion of viability at the time of injury as a limiting requirement might have some appeal, but quickness would be much more useful for his purpose. The mother knows and tells when the child quickens, but its attainment of viability is an event which passes unnoticed, and, unless birth follows soon after, cannot be later determined. Relevance of viability at the time of injury can rest only upon a peg of arbitrariness, and that not even the more manageable one. Use of viability at the time of injury as the touchstone of decision is without support in reason. It flies in the face of social considerations which cry for the allowance of a recovery for the benefit of a child born to go through life as a cripple.182

Viability, as Judge Haynsworth observed, does not have a recognized pedigree in the law:

Attributing relevance to viability at the time of injury is not only unreasoned; it is wholly without ancient precedent. Whether or not a fetus was quick when intentionally destroyed once bore upon the nature and degree of the crime, but for purposes of estates and inheritances the common law regarded the child as a person in being from the moment of conception, if in the child's interest to do so, but only if there followed a live birth. Viability, historically and in reason, is an irrelevance; viability, that is, at the time of injury or of another's

181. 341 F.2d 75 (4th Cir. 1964).
182. Id. at 78-79 (Haynsworth, J., dissenting).
death or of any other event than the live birth of the child.\footnote{183}

Judge Haynsworth’s explanation for the persistence of the viability rule closely followed that of the New Jersey Supreme Court in \textit{Smith v. Brennan}:

Treatment of viability at the time of injury as significant is a relic of a relatively modern misunderstanding. When Mr. Justice Holmes wrote for the Supreme Judicial Court of Massachusetts in 1884 [in the \textit{Dietrich} case] he advanced as one reason for not allowing recovery for prenatal injuries the notion that, until birth, the child was a part of its mother. That notion was inconsistent with what common law precedents there were and with medical facts as they are known today. Its expression, however, led those taking the first hesitant steps away from \textit{Dietrich} to say with understandable restraint that a viable child, at least, was not a part of its mother. Since we now know that a child is no more a part of its mother before viability than after, this relic of an invalid notion does not deserve preservation. Our steps away from \textit{Dietrich} need no longer be hesitant. Indeed, it has been observed that no court which has allowed recovery for prenatal injury to a viable fetus has later declined to allow such a recovery when the injury occurred before the child became viable.\footnote{184}

Concluding his critique of viability, Judge Haynsworth said:

It thus seems to be evident that limiting recovery in these cases to injuries suffered after the child becomes viable is a social perversion without support in reason or historical precedent. Viability of the child at the time of injury ought to be recognized as the imposter it is and sheared of all further influence upon our judgments.\footnote{185}

Commentators agree that "[a]s a test for the courts' use, viability has proven unsatisfactory in several respects."\footnote{186}

The first and perhaps most basic problem is that it often proves unworkable. In borderline factual circumstances there is no effective way of determining whether a fetus was viable at the time of the injury. Secondly, such a requirement is simply unrealistic, for it means that certain entire classes of prenatal injury will \textit{by definition} be completely excluded from potential recovery. This is unsatisfactory since from a biological or medical standpoint much of the potential risk of injury faced by a fetus inherently lies in that period of development prior to viability.\footnote{187}

\footnote{183. \textit{Id.} at 79.}
\footnote{184. \textit{Id.}}
\footnote{185. \textit{Id.}}
\footnote{186. Michael Morrison, \textit{Torts Involving the Unborn—A Limited Cosmology}, 31 \textit{BAYLOR L. REV.} 131, 141 (Spring 1979).}
\footnote{187. \textit{Id.} at 141-42 (emphasis in original).}
More recently, the leading authorities on the law of torts have offered their views on the viability distinction:

Viability . . . does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is therefore a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and logic is in favor of ignoring the stage at which the injury occurs. With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether.188

The criminal law also has evolved in favor of providing more protection for unborn children where the changes, for the most part, have been effected by legislation, not judicial decision, departing from the common law born alive rule. Thirty-three jurisdictions have held that an unborn child is not a "person," a "human being," or "another" within the meaning of their murder, vehicular homicide, or manslaughter statutes, absent an express direction from the legislature.189 In so ruling, state courts have relied upon the common law born alive rule, the rule of strictly construing criminal statutes against the State, a reluctance to extend the reach of criminal statutes by judicial decision, the legislative history of the particular homicide statute in question, and due process concerns regarding the retroactive application of an unforeseeable judicial enlargement of a criminal statute.190 Many of these opinions, however — especially

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190. See generally Clarke D. Forsythe, Homicide of the Unborn Child: The Born-Alive Rule and Other Legal Anachronisms, 21 Val. U. L. Rev. 563 (Spring 1987). The due process concerns posed by a judicial opinion abandoning the born-alive rule could be obviated by giving the opinion prospective effect only. See the cases cited in note 194 infra.
the more recent ones — have been issued over strong dissents sharply criticizing the born alive rule (the principal basis for these decisions) as a relic of the common law that should be discarded, and none has denied the biological fact that human life begins at conception or that States have the authority to define as homicide intentional, knowing, reckless, or negligent conduct causing the death of an unborn child. And notwithstanding strong resistance to


192. Vo v. Superior Court, 836 P.2d 408, 412 (Ariz. Ct. App. 1992) (court "not embarking upon a resolution of the debate as to 'when life begins'"); Keeler v. Superior Court, 470 P.2d 617, 624 (Cal. 1970) (granting that "the common law requirement of live birth to prove the fetus had become a 'human being' who may be the victim of murder is no longer in accord with scientific fact"); State v. McCall, 458 So. 2d 875, 877 (Fla. Dist. Ct. App. 1984) (not holding "that a viable fetus is not alive [or] that a person should not be punished for causing its death"); State v. Green, 781 P.2d 675, 683 (Kan. 1989) (not deciding "when life begins"); Hollis v. Commonwealth, 652 S.W.2d 61, 61 (Ky. 1983) (same); State v. Gyles, 313 So. 2d 799, 802 (La. 1975) (acknowledging that ";[o]ur decision does not at all question the undoubted existence of the unborn child for civil purposes"); People v. Guthrie, 293 N.W.2d 775, 780 (Mich. Ct. App. 1980), petition for leave to appeal denied, 334 N.W.2d 616 (Mich. 1983) (commenting that the born alive rule is "archaic and should be abolished"); In re A.W.S., 440 A.2d 1144, 1146 (N.J. Super. Ct. 1981) (admitting that, at least after viability, "emergence from the mother's body should no longer be the determinative factor in classifying the fetus as a human being for purposes of criminal homicide"); People v. Vercelatto, 514 N.Y.S.2d 177, 178 (N.Y. County Ct. 1987) (court not holding whether seven month old fetus "was a person in any philosophical, religious or even medical sense").

abandon the born alive rule, three state courts have rejected the rule by judicial decision.

Of greater significance, however, is that more than one-third of the States have defined by statute the killing of an unborn child (outside the context of abortion) as a form of homicide (or feticide), and nearly half of these statutes make it a crime to take the life of an unborn child at any stage of pregnancy. These laws have


One State defines the killing of an unborn child after the twenty-fourth week of pregnancy as a form of homicide: N.Y. PENAL LAW, § 125.00 (McKinney 1987) (homicide) (limited to acts performed in the course of an abortion by People v. Joseph, 496 N.Y.S.2d 328 (N.Y. County Court 1985), but see
Withstood constitutional challenge. 196 Even in those States which continue to follow the born alive rule and have not enacted fetal homicide statutes, courts have recognized, in conformity with the common law rule, 197 that a person may be convicted of homicide for causing prenatal injuries that result in death after a live birth, without apparent regard to whether the injuries were inflicted before or after viability. 198 The Joint Opinion betrays no awareness of these developments or whether they suggest that a distinction increasingly rejected in other areas of law should be retained as part of our constitutional jurisprudence. 199 Nor does it take cognizance of how


198. There is an emerging legal consensus that human life—actual, not potential—begins at conception. See Appendix B to this article. That consensus is
Roe has interfered with the rights of unborn children outside the context of abortion.

While, as previously noted, Roe has had only a minor effect on women's rights (outside of abortion), it has had a major impact on the law's recognition of the rights of unborn children. The Court's decision has influenced many state courts not to abandon the outdated common law born alive rule and to reject or limit wrongful death actions brought on behalf of unborn children who died in utero from the negligent or reckless acts of others, even in complete accord with the known scientific and medical facts of human conception and development.

The final report of the Subcommittee on Separation of Powers of the Senate Judiciary Committee on S. 158, the Human Life Bill, stated that "contemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete." S. REP. NO. 158, 97th Cong., 1st Sess. 7 (1981). The report dismissed contrary testimony as "misleading semantic[s]," id. at 12, explaining that "[t]hose witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question [whether the life of an unborn child has intrinsic worth and equal value with other human beings] rather than the scientific question [whether an unborn child is a human being, in the sense of a living member of the human species]. No witness challenged the scientific consensus that unborn children are 'human beings,' insofar as the term is used to mean living beings of the human species." Id. at 11.

200. See supra notes 128-32 and accompanying text.


though Roe itself says nothing about the power of the States to treat the killing of an unborn child (outside the context of an abortion) as a crime or a tort.\textsuperscript{203} Roe may have influenced courts to limit exercise of their equitable and statutory powers to intervene on behalf of unborn children in emergency situations.\textsuperscript{204} More directly, Roe has

\textsuperscript{203} Reproductive Health Services v. Webster, 851 F.2d 1071, 1085 (8th Cir. 1988) (Arnold, J., concurring in part and dissenting in part), rev'd on other grounds, 494 U.S. 490 (1989); Gentry v. Gilmore, 613 So. 2d 1241, 1246-47 (Ala. 1993) (Maddock, J., dissenting); Summerfield v. Superior Court, 698 P.2d 712, 722-23 (Ariz. 1985); People v. Davis, 19 Cal. Rptr. 2d 96, 102 (Ct. App. 1993) ("[i]n our view Roe's teachings do not apply to a situation where a third party kills a fetus without the mother's consent") (appeal allowed); Brinkley v. State, 322 S.E.2d 49, 53 (Ga. 1984); Smith v. Newsome, 815 F.2d 1386, 1388 n.2 (11th Cir. 1987); People v. Ford, 581 N.E.2d 1189, 1198-1200 (Ill. App. Ct. 1991); Group Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198, 1206-07 (Md. 1983); Commonwealth v. Lawrence, 536 N.E.2d 571, 583-84 (Mass. 1989) (Abrams, J., concurring); State v. Merrill, 450 N.W.2d 318, 321-22 (Minn. 1990) ("[t]he defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally entitled to perform the act"); Wallace v. Wallace, 421 A.2d 134, 140 (N.H. 1980) (Douglas, J., dissenting) ("[i]n whatever manner the United States Supreme Court chooses to define 'persons' for fourteenth amendment purposes, it is not binding on this Court with regard to [statutory] death actions") (emphasis in original); Lobdell v. Tarrant County Hosp. Dist., 710 S.W.2d 811, 813-14 (Tex. Ct. App. 1986), rev'd, 726 S.W.2d 23 (Tex. 1987). As one court stated, Roe "should not preclude...the states of the power to grant legal recognition to the unborn in non-14th Amendment situations." [Citation omitted]. In re Smith, 492 N.Y.S.2d 331, 334 (N.Y. Fam. Ct. 1985).

been cited in support of numerous decisions rejecting civil rights actions brought on behalf of unborn children under 42 U.S.C. § 1983. The Court in *Casey* shows no familiarity with any of these developments in the law, which certainly reveal a divergence between *Roe's* understanding of the constitutional rights of unborn children and the rights they have been acceded by criminal and tort law.

d. change of fact

The fourth *stare decisis* criterion the Court identifies is "changes of fact." The Court acknowledges that viability occurs earlier now than it did in 1973 when *Roe* was decided but denies that that change "render[s] its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed." "Viability," according to the Court, still "marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." And "the soundness or unsoundness of that constitutional judgment in no sense turns" on when viability occurs. In his dissent, Chief Justice Rehnquist dismissed this factor as of no consequence, noting that "what might be called the basic facts which gave rise to *Roe* have remained the same—women become pregnant, there is a point somewhere, depending upon medical technology, where a fetus becomes viable, and women give birth to children." But this comment

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207. *Id.* at 2811.

208. *Id.* at 2809.

209. *Id.* at 2811.

210. *Id.*

211. *Id.* at 2861 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
overlooks the real reason the Court even mentioned "changes in fact" as a criterion of stare decisis.

The one-paragraph discussion of "changes of fact" in Part III(A)(4) of the Joint Opinion is key to the development of the theme in Part III(B) that only a change in fact (or perceived fact) justifies overruling an earlier precedent. Because, according to the Court, there has been no material change in fact since 1973, overruling Roe would be inappropriate. This theme, most implausibly, is based on two landmark decisions of the Supreme Court overruling prior precedents. The thrust of the Joint Opinion is that the Court overruled Plessy and Lochner only because of the discovery of new "facts" in the interim that demonstrated that laissez-faire economics does not work and that racial segregation adversely affects the mental health of school children who are subjected to discrimination. As Chief Justice Rehnquist said in dissent, "[t]his is at best a feebly supported, post hoc rationalization for those decisions."

In West Coast Hotel, the Court did refer to "recent economic

212. Id. at 2812-14. The Court's reliance on Justice Brandeis' dissent in Burnet v. Coronado Oil Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), see 112 S. Ct. at 2809, for this proposition is misplaced. Justice Brandeis distinguished cases "applying" the Constitution, where "[t]he controversy is ... over the application to existing conditions of some well-recognized constitutional limitation," from those "interpreting" it, where the controversy is over the meaning of the Constitution itself. 285 U.S. at 410. The distinction, as Justice Brandeis understood it, was between "the determination of what in legal parlance is called a fact," and what is called a "declaration of a rule of law." Id. at 410-11. In the case of the former, "[w]hen the underlying fact has been found, the legal result follows inevitably." Id. at 411. According to Justice Brandeis, decisions of the Supreme Court that turn upon a "determination of fact" are not entitled to the same deference as those which are based upon a "declaration of law," because "the decision of the fact [may] have been rendered upon an inadequate presentation of the existing conditions," or "the conditions may have changed meanwhile." Id. The Casey Court's appeal to Justice Brandeis' dissent for a principle that a "declaration of a rule of law," even if erroneous, should not be overturned unless the "facts" supporting that rule have changed stands that dissent on its head. Nowhere in his dissent did Justice Brandeis argue that the Court must find a "change of facts" before overruling an error in a "declaration of law."

213. It may be asked what "changes in fact" since Roe justified abandonment of the trimester framework.


216. Id. at 2864 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
experience” and the then-current Great Depression, but this was only in the last paragraph of the opinion, which simply held that the Court had been mistaken when it embraced “freedom of contract” in *Lochner*. *Brown* did discuss the psychological impact of racial segregation upon minorities, but so did Justice Harlan’s dissent in *Plessy*. The actual holding of the Court in *Brown* was that the Equal Protection Clause forbids racial segregation, regardless of the public’s views of segregation or integration. The Court cited and relied upon cases decided shortly after the Reconstruction Amendments were ratified interpreting the Fourteenth Amendment “as proscribing all state imposed discrimination against the Negro race.” And cases decided subsequent to *Brown* left little doubt that *Brown* was based on the straightforward proposition that racial segregation is unconstitutional, and not on any newly discovered insight into the psychological impact of racial discrimination on school-age children. Contrary to the implications in the Joint Opinion, the errors of both *Lochner* and *Plessy* were identified in dissents in both cases.

Concluding its discussion of *stare decisis*, the Court cites the dissenting opinions of Justice Stewart in *Mitchell v. W.T. Grant*.

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217. 300 U.S. at 399.
218. *Id.* at 391-99.
220. 163 U.S. at 562 (Harlan, J., dissenting).
221. *Brown*, 347 U.S. at 490 & n.5 (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (striking down state law excluding blacks from serving on grand juries and petit juries)).
222. That *Brown* did not ultimately turn on the emotional effect of “separate but equal” educational facilities upon impressionable children is evidenced by the Court’s subsequent invalidation of segregated public beaches, *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (*per curiam*), golf courses, *Holmes v. Atlanta*, 350 U.S. 879 (1955) (*per curiam*), public parks, *New Orleans City Park Imp. Ass’n v. Detiege*, 358 U.S. 54 (*per curiam*), aff’d, 252 F.2d 122, 123 (5th Cir. 1958) (rejecting city’s request to remand the case “to determine whether such psychological considerations [that were present in *Brown*] are present in the denial of access” to public parks), and courthouses, *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (*per curiam*) (“it is no longer open to question that a State may not constitutionally require segregation of public facilities”). As Robert Bork has noted, “[r]acial segregation by order of the state was unconstitutional under all circumstances and had nothing to do with the context of education or the psychological vulnerability of a particular age group.” R. BORK, THE TEMPTING OF AMERICA 76 (1990).
and of Justice Harlan in *Mapp v. Ohio*, for the proposition that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." Is one to infer from the citations to *Mitchell* and *Mapp* that the *Casey* Court *would* have struck down the Louisiana sequestration statute upheld in *Mitchell* or that it would *not* have applied the exclusionary rule to the States as the Court did in *Mapp*? Indeed, Justice Blackmun, who joined the Joint Opinion's discussion of *stare decisis*, was one of the justices who concurred in *Mitchell*. Although a "change in fact" may justify a departure from precedent, there is no principle that requires proof of such a change as a condition to overruling. As Justice Black said more than fifty years ago, "[a] constitutional interpretation that is wrong should not stand."

3. Reason and Fairness

The Court notes that at viability, there is a "realistic possibility" that the unborn child can survive if removed from the womb. It then suggests that due to "the independent existence of the second life" at viability, "reason and all fairness" support recognition of the State's interest in protecting prenatal life at this stage in pregnancy. Yet neither "reason" nor "fairness" supports the destruction of unborn children up until the time when they are adjudged to be "viable" but not thereafter.

First, the concept of viability appears entirely irrelevant in the context of abortion. The child's capacity to survive outside the womb is undoubtedly relevant when one is contemplating *removing* the child from the womb and one is concerned about the safety of the child if this is done. That capacity seems entirely irrelevant, however, when the point of viability marks only the time at which the child can no longer be removed from the womb. Second, when viability is reached, the child presumably will not have "independent existence,"

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228. 416 U.S. at 601. As Justice Powell observed in Mitchell, "It is ... not only our prerogative but also our duty to reexamine a precedent where its reasoning is fairly called into question." *Id.* at 627-628 (Powell, J., concurring).
229. The Court has overruled its own interpretations of the Constitution on almost 150 occasions. *See infra* note 273. Few of those decisions turned on "changes of fact" (or perceived facts).
231. *Casey*, 112 S. Ct. at 2817.
232. *Id.* Whether this interest is actually strong enough to forbid most postviability abortions is doubtful. *See supra* note 45.
because the abortion (assuming that there is an enforceable law prohibiting post-viability abortions) cannot take place. Thus, the viable unborn child is as physically dependent upon her mother for the same nourishment as is the unborn child who is not yet viable. Accordingly, adherence to viability is not supported by "reason."

Moreover, the viability concept does not appear to be at all "fair" to the many children who are killed through abortion. Nor is it "fair" to those children who survive abortion but are damaged by the procedure—either by having their limbs severed\(^{233}\) or being blinded by the caustic solutions that are intended to cause death but fall short of doing so.\(^{234}\) Presumably, these children, once aborted, would be considered "persons" who are entitled to protection from further abuse. But why they were not considered sufficiently worthy of protection when their injuries were inflicted upon them is beyond all reason.

C. Is the Undue Burden Standard "Workable"?

As previously noted,\(^ {235}\) the Court identifies the "workability" of a rule of law as one of the criteria determining whether that rule should be followed or abandoned. Does the "undue burden" standard adopted by the Joint Opinion pass this test?

The Court holds that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure,"\(^ {236}\) but the authors of the Joint Opinion then vote to uphold a parental consent requirement,\(^ {237}\) which most assuredly places a "substantial obstacle" in the path of a minor who seeks an abortion. If the minor is unwilling to notify one of her parents of her decision to have an abortion and is unable to persuade a judge that she is mature enough to make that decision or that an abortion is in her best interests, she cannot obtain one. The Joint Opinion thus sustains the constitutionality of a statute that imposes an "undue burden" before viability.

The authors of the Joint Opinion distinguish their decision to

\(^{233}\) As in the case of Ana Rosa Rodriguez, who survived an attempted abortion, albeit without one of her arms which was severed during the procedure. Lisa Belkin, \textit{State Suspends Manhattan Doctor Accused of Botching Abortions}, \textit{N.Y. Times}, Nov. 26, 1991, at A12.

\(^{234}\) As in the case of children who survive instillation abortion techniques (\textit{e.g.}, saline amnio-centesis).

\(^{235}\) \textit{Casey}, 112 S. Ct. at 2809.

\(^{236}\) \textit{Id.} at 2804.

\(^{237}\) \textit{Id.} at 2832.
uphold the parental consent requirement from their decision to strike down the spousal notice requirement by saying that "these enactments [mandating parental notice or consent], and our judgments that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women." This may or may not be a correct judgment," Chief Justice Rehnquist noted in his dissent, "but it is quintessentially a legislative one," and "the 'undue burden' inquiry does not in any way supply the distinction between parental consent and spousal [notice] which the joint opinion adopts." 

Both Justice Blackmun and Justice Scalia characterize the "undue burden" test as "manipulable." This assessment appears to be accurate for several reasons. First, under the "undue burden" standard, a court must decide in what circumstances the challenged law is "relevant." Is the relevant group all persons to whom the law applies? Or only those persons who would not do what the law requires absent the law's compulsion? Or an even smaller set of persons who do not want to obey the law and for whom the law provides no exceptions? The Joint Opinion appears to give inconsistent answers to these questions. 

Second, the court must decide what is a "large fraction" of the relevant group. In striking down the Pennsylvania spousal notice provision, the Court "found" that the law (which had never gone into effect) would impose an "undue burden" on a "large fraction" of women "who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." This would include women who feared re-

238. Id. at 2830.
239. Id. at 2866 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
240. Id. at 2848 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part) ("the Roe framework is far more administrable, and far less manipulable, than the 'undue burden' standard adopted by the joint opinion"); Id. at 2877 (Scalia, J., concurring in the judgment in part and dissenting in part) ("the standard is inherently manipulable and will prove hopelessly unworkable in practice").
241. Id. at 2829-30.
242. In the case of the spousal notice provision, the "relevant" group is married women who would not otherwise notify their husbands of their intention to obtain an abortion and who fall within no statutory exception. 112 S. Ct. at 2829. But in the case of the parental consent provision, the "relevant" group appears to be all pregnant minors who may seek an abortion. Id. at 2830 (assuming that minors "will benefit from consultation with their parents"), id. at 2832.
243. Id. at 2829-30.
porting physical abuse or spousal sexual assault (two of the exceptions to the requirement of notice, but only if reported) or who feared psychological abuse or child abuse at the hands of their husbands if they told them of their intention to get an abortion (not within any exception).244 But in the context of this facial challenge, where the law had never taken effect, it was sheer speculation to suggest that a "large fraction" of women desiring not to notify their husbands would fear such consequences. It would be equally plausible to believe that a woman would not want to notify her husband "because of perceived economic constraints or her husband's previously expressed opposition to abortion."245 As Judge Alito observed in dissenting from the Third Circuit's invalidation of the spousal notice provision, "The Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husband's 'previously expressed' opposition—that may be obviated by discussion prior to the abortion.246

The danger in relying upon such speculation is that a constitutional law may be struck down on the basis of a hypothetical scenario that may never take place. In marked contrast to the "parade of horribles" advanced against the Pennsylvania spousal notice law,247 which never went into effect, is the experience of Utah, which enforced a similar law for almost twenty years without a single documented case of spousal abuse or any evidence that the law had prevented any woman from obtaining an abortion.248

A related problem with the "large fraction" of cases approach is that it tends to undermine the Court's well-established facial challenge rule. Under that rule, it is not enough to show that a given law "might operate unconstitutionally under some conceivable set of circumstances."249 Rather, it must be shown that "no set of circumstances exists under which [the law] would be valid,"250 a standard to which Justice O'Connor formerly subscribed.251 The facial chal-

244. Id. at 2828-29.
245. Id. at 2870 n.2 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
250. Id. See also Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984).
251. See Webster, 492 U.S. at 524 (O'Connor, J., concurring in part and
lenge rule has been applied in a wide range of abortion cases including *Webster*, Rust v. Sullivan and *Ohio v. Akron Center for Reproductive Health*. Although three lower federal courts have applied the facial challenge rule in considering attacks on abortion regulations after *Casey*, Justices O'Connor and Souter have indicated their view that the rule no longer applies in abortion litigation and have said that the relevant test is whether, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." But neither in *Casey* nor in the concurring opinion in *Schafer* does any member of the Joint Opinion define what constitutes a "large fraction" of cases. Is ten percent a "large fraction" of the "relevant" group? What about twenty percent? Or thirty percent? The Court does not say. This repudiation of a neutral principle of law (i.e., the facial challenge rule) will, if adopted by a majority of the Court, work a major change in how abortion cases are decided.

Third, under the "undue burden" standard, the court must speculate as to whether the law will create a "substantial obstacle" on the "large fraction" of the "relevant" group. What determines whether an obstacle is "substantial"? May the court simply examine the face of the statute itself? Or is it required to assess whether factors over which the State has no control (e.g., political, demographic, or economic) create a "substantial obstacle" to the effectuation of the abortion decision? Again, the Joint Opinion does not say.

The three-pronged analysis required by the "undue burden" test (defining the "relevant" group, deciding what is a "large fraction" of that group, and determining what is a "substantial obstacle") suggests

252. 492 U.S. 490 (restrictions on the use of public facilities for abortion services).
253. 111 S. Ct. 1759, 1767 (1991) (prohibition of abortion referrals and abortion counseling at Title X clinics).
254. 110 S. Ct. 2982, 2980-81 (parental notice law).
a fact-intensive inquiry which is more appropriate in an as-applied, not a facial, challenge.\textsuperscript{257} To apply the undue burden test in a facial challenge will simply yield inconsistent results among different States even if their laws are identical on their face.\textsuperscript{258} 

The undue burden test, then, is an uncertain guide and will make it virtually impossible for state legislatures to assess rationally the constitutionality of proposed abortion regulations that do not, on their face, impose an undue burden.\textsuperscript{259} The test is not susceptible of principled, even-handed application.\textsuperscript{260}

\section*{III. DO PRINCIPLES OF INSTITUTIONAL INTEGRITY REQUIRE REAFFIRMATION OF ROE?}

"the goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not."

— \textit{Webster v. Reproductive Health Services}, 492 U.S. 490, 521 (opinion of Chief Justice Rehnquist)

\textsuperscript{257} In voting to uphold various provisions of the Pennsylvania Abortion Control Act, the Joint Opinion repeatedly qualified its rulings by commenting on the "state of the record." 112 S. Ct. at 2824, 2825, 2826, 2833. This, of course, simply invites further litigation to challenge the facial validity of the statutes in question. See \textit{id.} at 2879-80 (Scalia, J., concurring in the judgment in part and dissenting in part).

\textsuperscript{258} A twenty-four-hour waiting period requirement might pass constitutional muster in a small State like Connecticut but might be invalided in a much larger State with fewer abortion providers.

\textsuperscript{259} Although the Court acknowledged that the "need for such review \textit{i.e.,} "judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement"] will remain as a consequence of today's decision," 112 S. Ct. at 2809, it turned down an opportunity to clarify whether the States (or territories) can enforce an abortion prohibition after viability, where the prohibition allowed exceptions for the life or health of the mother. See \textit{Ada v. Guam Society of Gynecologists and Obstetricians}, 113 S. Ct. 633 (1992) (order denying petition for \textit{certiorari}), \textit{id.} at 633-34 (Scalia, J., dissenting from denial of \textit{certiorari}).

\textsuperscript{260} 'The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as 'undue'—subject, of course, to the possibility of being reversed by a Circuit Court or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.' \textit{Casey}, 112 S. Ct. at 2880 (Scalia, J., concurring in the judgment in part and dissenting in part).
In Part III(C) of the Joint Opinion, the Court undertakes to explain why the institutional integrity of the Supreme Court requires reaffirmation of *Roe v. Wade*. But the reasons advanced in support of this conclusion would seem to point in an opposite direction.

The Court acknowledges that "a decision without principled justification would be no judicial act at all," and that "even when justification is furnished by apposite legal principle, something more is required." "Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute." In light of the Joint Opinion's refusal to endorse *Roe* (or what remains of *Roe*—the viability rule) as a proper understanding of the Constitution, the Court itself apparently does not regard *Roe's* reading of the Constitution as "beyond dispute." That in itself suggests that overruling *Roe*, not reaffirming it, would have been the appropriate course in *Casey*.

The Court, however, expresses concern that overruling might be viewed as a "compromise with social and political pressures," and "a surrender to political pressure." The difficulty with this line of reasoning is that the Court has been subjected to "political pressure" on both sides of the abortion issue, with marches and demonstrations by both opponents and proponents of *Roe*. The Joint Opinion candidly admits that "[w]hether or not a new social consensus is developing on that issue [i.e., "governmental power to limit..."]

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262. *Id.* at 2814.
263. *Id.*

Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions ... suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function .... Even some who approve of *Roe*'s form of judicial review concede that the opinion itself is inscrutable.

266. *Id.* at 2815.
personal choice to undergo abortion"], its divisiveness is no less today than in 1973, and pressure to overrule the decision, *as well as pressure to retain it*, has grown only more intense.\textsuperscript{267} Given that *any* decision on *Roe*—to overrule or to reaffirm—could be viewed, rightly or wrongly, as "political," perhaps the Court should have been less concerned with *how* its decision would be viewed and more concerned with making the *right* decision.\textsuperscript{268}

The Court recognizes that "the country can accept some correction of error without necessarily questioning the legitimacy of the Court."\textsuperscript{269} But "[i]n two circumstances ... the Court would almost certainly fail to receive the benefit of the doubt."\textsuperscript{270}

There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.\textsuperscript{271}

The Court describes this first circumstance as "hypothetical."\textsuperscript{272} The distinct impression left by this passage is that decisions of the Supreme Court overruling earlier decisions on matters of constitutional interpretation are rare and thus should not be too readily emulated, lest the "legitimacy" of the Court be called into question. But this impression is wrong. On more than 200 occasions, the Court has overturned previous decisions, and in nearly three-fourths of those cases, the Court overruled because the earlier decision had wrongly interpreted the Constitution.\textsuperscript{273} What does this remarkable track re-

\begin{footnotesize}
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\item \textsuperscript{267} Id. at 2816 (emphasis added).
\item \textsuperscript{268} In this connection, the Joint Opinion's selection of the decision in *West Coast Hotel* as one in which the Court was justified in departing from precedent seems peculiar. *West Coast Hotel* was decided while President Roosevelt's "court-packing" scheme was being considered in Congress. Upholding state minimum wage legislation (which signalled a less hostile view toward the legislative program of the New Deal) certainly could have been viewed as "political" and therefore inappropriate under the Joint Opinion's standards.
\item \textsuperscript{269} *Casey*, 112 S. Ct. at 2815.
\item \textsuperscript{270} Id.
\item \textsuperscript{271} Id.
\item \textsuperscript{272} Id.
\item \textsuperscript{273} An exhaustive study of the Supreme Court's decisions by Rutgers University Professor Emeritus Albert P. Blaustein and Carl Willner has yielded a total of 214 implicit and explicit overrulings to date, almost three-fourths of
\end{itemize}
\end{footnotesize}
cord of "judicial correction" mean? At the very least, that the "legitimacy" of the Court is not affected by its acknowledgement of prior error, even when that error involved an interpretation of the Constitution. Indeed, as in Brown and West Coast Hotel, the Court has often enhanced its credibility by overruling decisions that were wrong when originally decided. One more overruling decision, if otherwise appropriate, could not reasonably be expected to damage that credibility.

The second circumstance in which the Court's "legitimacy" would be damaged by overruling prior precedent is much rarer, according to the Court.

Where, in the peformance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.274

This has happened, according to the Court, only twice — in Roe in 1973 and in Brown v. Board of Education in 1954.275 The Court does not specify the criteria by which one may ascertain whether an


274. Notwithstanding her expressed concern about overfrequent overrulings, Justice O'Connor, one of the authors of the Joint Opinion, has acknowledged that "when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its powers to reexamine the basis of its constitutional decisions." City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458-59 (1983) (O'Connor, J., dissenting) (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

275. Id.
issue is "intensely divisive" and thus, presumably, beyond subsequent constitutional correction.\textsuperscript{276} Is not the debate over the constitutional rights of homosexuals "intensively divisive"? Or the debate over the validity of the death penalty? The Court does not say. This special category of constitutional decisions that are beyond the pale of criticism (or later correction) seems to have been invented for the occasion. Having said that a "conscientious claim of principled justification" must be "beyond dispute,"\textsuperscript{277} which \textit{Roe} most assuredly is not, the Court then insulates that precedent from reconsideration by tying its "legitimacy" to continued adherence to \textit{Roe}.

That the Supreme Court believes that its credibility with the American people is dependent upon its fealty to \textit{Roe v. Wade} is a sad commentary on the Court's self-image. But the Court's belief that our image of ourselves stands or falls with the Court's image of itself\textsuperscript{278} is very disturbing. There is a profoundly anti-democratic

\textsuperscript{276} Unlike \textit{Brown v. Bd. of Educ.} which, after initial resistance in some quarters, was rapidly accepted throughout the country as a legally and morally defensible repudiation of state-mandated segregation, \textit{Roe v. Wade}, whose legitimacy has never been accepted by large segments of the population, remains intensely controversial more than 20 years after it was decided. In fact, by preventing the political branches from acting, the Court \textit{created} the very division it claims to have \textit{healed}. Although it is too early to judge whether \textit{Casey} has laid the abortion issue to rest, the first returns are not encouraging. In the same week \textit{Casey} was decided, proponents of the proposed Freedom of Choice Act (H.R. 25, 103rd Cong., 1st Sess.) (1993), which would overturn much of the regulatory legislation the Court upheld in \textit{Casey}, pushed the bill through a House Committee. \textit{See also S. 25, 103rd Cong., 1st Sess.} (1993)). Barely two weeks later, the Territory of Guam filed a petition for \textit{certiorari} with the Court asking it to reevaluate the viability standard that it had just reaffirmed. 61 U.S.L.W. 3165 (U.S. SEPT. 8, 1992). As of the date of this writing (winter 1993), there is no indication that anyone on either side of the issue had heeded the Court's invitation to "end their national division." 112 S. Ct. at 2815.

\textsuperscript{277} \textit{Id.} at 2814.

\textsuperscript{278} After Justice O'Connor had announced the Court's ruling in \textit{Casey}, Justice Souter declared, "To overrule \textit{Roe} would subvert the Court's legitimacy beyond any reasonable question. If the Court were undermined, the country would also be so." Jeanne Cummings, \textit{Supreme Court Upholds Most of Pennsylvania Abortion Law}, \textit{ATLANTA J. CONST.}, June 29, 1992, at Al. And in its opinion, the Court said: "[The American people's] belief in themselves as ... a people ["who aspire to live according to the rule of law"] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country in its very ability to see itself through its constitutional ideals." 112 S. Ct. at 2816. Of course, the Supreme Court would have \textit{no} ability "to decide [our] constitutional cases and speak before all other for [our] constitutional ideals" if Congress had not conferred upon the Court appellate jurisdiction.

Was the Supreme court "speak[ing] before all others for [our] constitutional ideals" when it held that blacks were not citizens and could not bring suit in
tone to the Court's opinion,\(^{279}\) which refers to those who will be "tested by following\(^{280}\) and to a Nation which must "earn" its character.\(^{281}\) But "the American people love democracy and the American people are not fools."\(^{282}\) Ultimately, they will reclaim the authority which the Supreme Court has wrongfully usurped.

IV. WHAT HATH R O E  W R O U G H T ?

"... the present decision will turn out to be an isolated deviation from the strong current of precedents — a derelict on the waters of the law."


The impact \textit{Roe v. Wade} has had on the abortion policies of the United States is so great that it tends to obscure the relatively modest effect \textit{Roe} has had in other areas of the law. But in determining whether a precedent should be overruled, it is useful to consider the difference an overruling decision would have on the law generally. Part IV of this article undertakes to make this survey, which required reviewing more than 100 Supreme Court opinions and orders in which \textit{Roe} was cited and more than 2300 state and lower federal court decisions citing \textit{Roe}. To the author's knowledge, no such survey has been published previously.

A. \textit{Roe} in the Supreme Court

Through the end of the 1992 Term, \textit{Roe v. Wade} had been cited in 108 Supreme Court opinions and orders. Almost one-half of these dispositions (forty-six) concerned abortion statutes, ordinances, administrative regulations, and policies.\(^{283}\) Another twenty cited \textit{Roe} on a federal court to vindicate their claims of freedom? See Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Or when it said that Japanese-Americans could be forcibly resettled into concentration camps without any evidence of their disloyalty? See Korematsu v. United States, 323 U.S. 214 (1944). The Court makes mistakes and its judgments may be wrong. They should not be perpetuated.

\(^{279}\) Id. at 2814 ("[t]he root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court").

\(^{280}\) Id. at 2815.

\(^{281}\) Id. at 2816.

\(^{282}\) Id. at 2884 (Scalia, J., concurring in the judgment in part and dissenting in part).

variety of procedural points.\textsuperscript{284} \textit{Roe} has been cited in dissents from the denial of \textit{certiorari} in five cases (outside of abortion)\textsuperscript{285} and in


two other cases as part of a general discussion of *stare decisis*\(^ {286} \) or retroactivity.\(^ {287} \) *Roe* has been cited in another ten majority opinions, concurrences, and dissents for miscellaneous reasons.\(^ {288} \)

On only one occasion has the Supreme Court relied on *Roe* in recognizing a new substantive due process right. In *Moore v. City of East Cleveland, Ohio*\(^ {289} \), the Court cited *Roe*, along with numerous other authorities, in holding that a municipality could not prohibit first cousins from residing in the same household with their grandmother.\(^ {290} \) It is apparent from even a casual reading of the plurality opinion in *Moore*, however, that *Roe* did not control the outcome of the case. Other than this single opinion, the Court has never relied on *Roe* in recognizing any new constitutional right.\(^ {291} \)


290. *Id.* at 499.

291. *Roe* was also cited in *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978). In *Redhail*, the Court struck down a state statute forbidding, without court approval, remarriage of noncustodial parents who had support obligations to minor children. The decision was squarely based on the Equal Protection Clause of the Fourteenth Amendment, not the Due Process Clause. *Id.* at 382. The Court placed particular reliance on its pre-*Roe* decision in *Loving v. Virginia*, 388 U.S. 1 (1967), declaring unconstitutional Virginia's anti-miscegenation laws. *Redhail*, 434
Far more commonly, the Court has declined to enlarge the category of substantive due process rights, notwithstanding the arguments of parties (or of dissenting justices) that a contrary result was required by Roe. The Court, for example, has refused to recognize as "fundamental" asserted rights to engage in acts of homosexual sodomy,\textsuperscript{292} to refuse medical treatment,\textsuperscript{293} to visitation with the child born of an adulterous relationship,\textsuperscript{294} to exhibit obscene material commercially,\textsuperscript{295} to special accommodations or contact visits (for pretrial detainees),\textsuperscript{296} to continued public employment,\textsuperscript{297} to a particular style of personal grooming (police department),\textsuperscript{298} to public education,\textsuperscript{299} to continued enrollment in a state university degree program,\textsuperscript{300} to an unfettered choice of household companions

U.S. at 383-85. Justice Stewart would have decided the case under the Due Process Clause, \textit{id.} at 391-96 (Stewart, J., concurring in the judgment), and said that "to embrace the essence of that doctrine [substantive due process] under the guise of equal protection serves no purpose but obfuscation." \textit{id.} at 395-96. Roe was frequently cited in \textit{Carey v. Population Servs. Int'l}, 431 U.S. 678 (1977). In \textit{Carey}, the Court struck down limits on the sale and distribution of contraceptives. \textit{Carey} rested on the Supreme Court's pre-\textit{Roe} contraception cases. See \textit{Griswold}, 381 U.S. 479; \textit{Eisenstadt}, 405 U.S. 438. As the Court acknowledged in \textit{Casey}, 112 S. Ct. at 2811, those authorities would not be threatened by an overruling of \textit{Roe} ("\textit{Roe}'s scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under \textit{Griswold} and later cases"). Finally, \textit{Roe} was cited in \textit{Cleveland Bd. of Educ. v. LaFleur}, 414 U.S. 632, 640 (1974). In \textit{LaFleur}, the Court declared unconstitutional a mandatory pregnancy leave policy for school teachers. Under that policy, pregnant women could not work past the fourth month of their pregnancy and could not return to work after three months as they had given birth. The Court invalidated the policy on the ground it created irrational and arbitrary presumptions regarding the work abilities of pregnant women and women who had recently given birth. The theory of the case, that "irrebuttable presumptions" are unconstitutional, was later severely criticized by the Court. See \textit{Michael H. v Gerald D.}, 491 U.S. 110, 120-21 (1989); \textit{Weinberger v. Salfi}, 422 U.S. 749, 767-774 (1975).

\textsuperscript{292} \textit{Bowers v. Hardwick}, 478 U.S. 186, 189-91 (1986), \textit{id.} at 199-200, 204-06, 210 (Blackmun, J., dissenting).

\textsuperscript{293} \textit{Cruzan v. Director, Missouri Dep't of Health}, 497 U.S. 261, 277-79 & n.7 (1990) (recognizing "liberty interest" but not "fundamental" right to refuse unwanted medical treatment), \textit{id.} at 340-42 & n.12 (Stevens, J., dissenting).


\textsuperscript{298} \textit{Kelley v. Johnson}, 425 U.S. 238, 244 (1976).


\textsuperscript{300} \textit{Regents of the Univ. of Michigan v. Ewing}, 474 U.S. 214, 229-30
contrary to local ordinance), or not to be hospitalized for psychiatric treatment. The Court also has implicitly rejected Roe as authority for overturning immigration rules and has expressly questioned whether there is a "liberty interest" in "the foster family as an institution." Finally, the Court has held that the right of privacy does not permit parents to send their children to private schools that discriminate on the basis of race and has refused to characterize opposition to abortion as evidence of a "class-based" animus for purposes of the Ku Klux Klan Act of 1871.

It would be difficult to identify a single Supreme Court doctrine that depends upon Roe, other than the right to abortion itself. Of course, only a small fraction of cases interpreting the Constitution ever reaches the High Court. Thus, in measuring Roe's impact on the law (outside of abortion), it is important not to overlook how it has been viewed by other courts.

B. Roe in the lower courts

A Westlaw search disclosed more than 2300 state and lower federal court decisions citing Roe through the summer of 1993. Many of these decisions dealt with abortion or one of the procedural issues considered in Roe (e.g., standing, mootness) but few courts have relied on Roe to resolve substantive issues outside the area of abortion.

Roe has been cited in cases challenging laws forbidding obsceni-

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308. This number does not include those cases in which Roe was cited to, but not by, the court.
ty and child pornography,\textsuperscript{309} public indecency,\textsuperscript{310} fornication,\textsuperscript{311}


No court—state or federal—has invalidated an obscenity law on the authority of Roe. This is not surprising, however, because only five months after Roe v. Wade was decided, the Supreme Court held that the right of privacy recognized in Roe and Stanley v. Georgia, 394 U.S. 557 (1969) (right to view obscene material in the privacy of one's own home) did not extend to the commercial exhibition or interstate transportation of obscene material. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-67 (1973); United States v. Orito, 413 U.S. 139, 141-44 (1973).


Although the Supreme Court has not yet squarely decided whether there is a constitutional right to engage in premarital or extramarital heterosexual conduct, see Carey, 431 U.S. at 688 n.5, 694 & n.17, id., at 702-03 (White, J., concurring in part and concurring in the judgment), id. at 713 (Stevens, J., concurring in part and concurring in the judgment), it has strongly intimated that such conduct is not entitled to the protection of the Constitution. See Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("any claim that these cases [concerning child rearing and education, family relationships, procreation, marriage, contraception or abortion] . . . stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable"). id. at 195-96 (were Court to recognize right to engage in "voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed
to prosecution adultery, incest, and other sexual crimes even though they are committed in the privacy of the home. We are unwilling to start down that road”), id., at 209 n.4 (Blackmun, J., dissenting) (no right of privacy to engage in adultery or incest), id. at 217 (Stevens, J., dissenting) (no right to commit adultery); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 & n.15 (1973) (“"for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take," citing, inter alia, laws against fornication and adultery); Eisenstadt, 405 U.S. at 448 (tacitly admitting State's authority to prohibit "extramarital and premarital sexual relations"); Griswold, 381 U.S. at 498 (Goldberg, J., concurring) ("[t]he State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication") (emphasis added), id. at 498-99 ("it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct"); Poe v. Ullman, 367 U.S. 497, 545-48, 552-55 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (recognizing authority of State to prohibit fornication, adultery, homosexuality and incest); McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (Florida fornication and adultery statutes "express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not"); Southern Surety Co. v. Oklahoma, 241 U.S. 582, 586 (1916) ("[a]dultery is an offense against the marriage relation, and belongs to the class of subjects which each state controls in its own way").

313. Potter v. Murray City, 585 F. Supp. 1126, 1140 (D. Utah 1984), aff'd, 760 F.2d 1065, 1070-71 & n.9 (10th Cir. 1985) (upholding suspension of police officer for his practice of "plural marriage"). See generally, Reynolds v. United States, 98 U.S. 145 (1878) (upholding law banning polygamous marriages); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973) ("[statutes making bigamy a crime surely cut into an individual's freedom to associate, but few seriously claim such statutes violate the First Amendment or any other constitutional provision").


315. Only one court has cited Roe in support of a ruling recognizing a right to prostitution and that ruling was reversed on appeal. See In re P., 400 N.Y.S.2d 455, 462-69 (N.Y. Fam. Ct. 1977) (decided on state grounds), rev’d sub nom. In re Dora P., 418 N.Y.S.2d 597, 603-04 (N.Y. App. Div. 1979). All other courts have held that there is no right to engage in prostitution and that Roe does not support such a right. See Blake v. State, 344 A.2d 260, 262 (Del. Super. Ct. 1975); State v. Hicks, 360 A.2d 150, 151 (Del. Super. Ct. 1976),
rape, sexual exploitation of children, marriage of minors without parental consent, possession or delivery of marijuana or other drugs, manufacture, transfer, or possession of guns, and


317. Nelson v. Moriarity, 484 F.2d 1034, 1035-36 (1st Cir. 1973) (per curiam) (statutory rape prosecution) ("nothing in the [Supreme] Court's recent decisions clarifying the scope of procreational privacy . . . suggests that a state may no longer place the risk of mistake as to the prosecutrix's age on the person engaging in sexual intercourse with a partner who may be young enough to fall within the protection of the statute"); Goodrow v. Perrin, 403 A.2d 864, 865-66 (N.H. 1979) (same); Commonwealth v. Arnold, 514 A.2d 890, 892 (Pa. Super. Ct. 1986) (that sexual abuse of a child was not a "fundamental right" falling under cloak of family intimacies or privacy enjoying protection of Constitution); Kruger v. State, 623 S.W.2d 386, 390 (Tex. Crim. App. 1981) (Clinton, J., dissenting) (statutory rape); Scadden v. State, 732 P.2d 1036, 1039 (Wyo. 1987) (high school coach had no privacy right to engage in unconsented sexual relations with minor student victim). See also Fleisher v. City of Signal Hill, 829 F.2d 1491, 1497-99 (9th Cir. 1987) (probationary police officer's right of privacy did not extend to his sexual conduct with a minor); Jones v. State, 619 So. 2d 418 (Fla. Dist. Ct. App. 1993) (rejecting state privacy claim to engage in consensual sexual relations with a minor). In Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), the Supreme Court held that the California statutory rape statute did not violate the Equal Protection Clause even though it applied only to men.


319. Only one court has recognized a constitutional right to possess marijuana. See Ravin v. State, 537 P.2d 494, 497 n.4 (Alaska 1975) (decided on state constitutional grounds); but see Gray v. State, 525 P.2d 524, 528 n.11 (Alaska 1974) (no right to sell marijuana). All other courts that have considered such arguments have rejected them, notwithstanding the claim that possession (or delivery) of marijuana or other drugs is protected by Roe. See United States v. Kieffer, 477 F.2d 349, 352 (2d Cir. 1973) (possession of marijuana with intent to
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the unlicensed practice of medicine. As the accompanying notes 


indicate, most of these challenges failed, and the few that succeeded did not ultimately depend upon Roe. Roe also has been cited in a handful of cases attacking mandatory seat belt laws and laws requiring the wearing of motorcycle helmets.322 None of these challenges succeeded, either. Moreover, with a single exception, later reversed, Roe has not influenced courts to strike down mandatory drug testing laws or policies.323 Notwithstanding parties’ reliance on Roe, courts have held that the right of privacy does not prevent obtaining blood samples in criminal prosecutions or paternity cases.324 Although Roe


occasionally has been cited in support of decisions recognizing a right not to disclose highly personal data.\textsuperscript{325} Far more frequently it


Avenue Peace Parade Comm. v. Gray, 480 F.2d 326, 333-34 (2d Cir. 1973) (Oakes, J., dissenting) (FBI investigation into anti-war demonstration and dissemination of FBI reports failed to present justiciable controversy absent showing of any specific harm); Daury v. Smith, 842 F.2d 9, 13-15 (1st Cir. 1988) (no constitutional right to refuse to submit to psychiatric examination by employer); Fraternal Order of Police Lodge 92 v. Freeman, 372 So. 2d 945, 948 (Fla. Dist. Ct. App. 1979) (same); Redmond v. City of Overland Park, 672 F. Supp. 473, 481-84 (D. Kan. 1987) (probationary police officer had no constitutional right to privacy as to disclosures made by consulting psychiatrist to police department where officer had signed release allowing such disclosure); Walls v. City of Petersburg, 895 F.2d 188, 192-94 (4th Cir. 1990) (no violation of right of privacy in discharge of employee who refused to answer background questionnaire); Wilson v. Moss, 537 F. Supp. 281, 286-88 (S.D. Ohio 1982) (intrusion into professor's private activities did not state claim for violation of constitutional right of privacy); Gutierrez v. Lynch, 826 F.2d 1534, 1539 (6th Cir. 1987) (ordinance requiring public employees to provide medical information was valid); Smith v. Shimp, 562 F.2d 423, 425 (7th Cir. 1977) (no privacy interest in pre-trial detainees' nonprivileged mail); Hill v. Sands, 403 F. Supp. 1368, 1371 (N.D. Ill. 1975) (no privacy interest in receiving personal mail at place of employment); United States v. Allis-Chalmers Corp., 498 F. Supp. 1027, 1029-31 (E.D. Wis. 1980) (National Institute for Occupational Safety and Health subpoena directing employer to produce medical records it maintained on its employees in connection with health hazard evaluation did not violate right to privacy); St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369, 1374-75 (9th Cir. 1981) (no constitutional right of privacy violated by public disclosure of cost information of health care providers); Family Life League v. Dep't of Public Aid, 493 N.E.2d 1054, 1057 (Ill. 1986) (no protectible privacy interest in preventing disclosure of names of physicians performing publicly-funded abortions); State ex rel. Stephen v. Harder, 641 P.2d 366, 376 (Kan. 1982) (same); Minnesota Medical Soc'y v. State, 274 N.W.2d 84, 91-94 (Minn. 1978) (same); Shaffer v. Wilson, 383 F. Supp. 554, 560 (D. Colo. 1974) (business records not protected by right of privacy); Hearn v. Internal Revenue Agents, 623 F. Supp. 263, 268 (N.D. Tex. 1985) (no privacy interest in business records seized by IRS); United States v. Ginsburg, 376 F. Supp. 714, 716-17 (D. Conn. 1974) (reporting of bank transactions to detect tax fraud not violative of right of privacy); Jaffess v. Secretary, Dep't of Health, Educ. & Welfare, 393 F. Supp. 626, 629 (S.D.N.Y. 1975) (right of privacy "does not include within its compass the right of an individual to prevent disclosure by one governmental agency to another of matters obtained in the course of the transmitting agency's regular functions"); Greater Cleveland Welfare Rights Org. v. Bauer, 462 F. Supp. 1313, 1318-19 (N.D. Ohio 1978) (same); Provenza v. Rinaudo, 586 F. Supp. 1113, 1116 (D. Md. 1984) (no privacy interest in bank records); Sneirson v. Chemical Bank, 108 F.R.D. 159, 161-63 (D. Del. 1985) (same); In re Bell & Beckwith, 44 B.R. 661, 662 (N.D. Ohio 1984) (no right of privacy in nondisclosure of payments to be made to creditors of bankrupt brokerage); In re Sept. 1975 Special Grand Jury, 435 F. Supp. 538, 546 (N.D. Ind. 1977) (privacy right does not protect communications between husband and wife in business relationship); In re Hawkins, No. 3430, 1983 WL 4091, at *3 (Ohio Ct. App. May 11, 1983) (no right of privacy in parent-child communications); United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1040-45 (E.D.N.Y. 1976) (no right of privacy in communications between prisoner and psychiatrist who examined defendant at defense counsel's request); R.S. v. State, 459 N.W.2d 680, 689 (Minn. 1990) (state statute allowing reports of child abuse to be investigated without notice to or the consent of parents did not violate...
Apart from allowing wrongful birth and wrongful life claims in States where, prior to Roe, abortion was illegal, Roe's princi-

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"[T]he confidentiality interest ... has not fared as well as that of autonomy." Snyder v. Mekhjian, 593 A.2d 318 (N.J. 1991). This, perhaps, is not surprising in view of the Supreme Court's post-*Roe* decisions rejecting informational privacy claims. See, e.g., Paul v. Davis, 424 U.S. 693, 713 (1976) (rejecting privacy claim that "the State may not publicize a record of an official act such as an arrest"); Whalen v. Roe, 429 U.S. 589, 591 (1977) (State may "record, in a centralized computer file, the names and addresses of all persons who had obtained pursuant to a doctor's prescription certain drugs for which there is both a lawful and an unlawful market"); Nixon v. Admin'r of Gen. Serv., 433 U.S. 425 (1977) (upholding statute requiring archivists to review presidential papers, including those pertaining to the President's personal affairs).

327. One court has succinctly defined the difference between these two causes of action: "In a wrongful life action, an abnormal, unhealthy infant, or the parents on the infant's behalf, claim that but for the physician's negligent advice or treatment the child would not have been born to experience the pain and suffering associated with life in an impaired condition." Haymon v. Wilkerson, 535 A.2d 880, 883 (D.C. 1977). "In a wrongful birth action," on the other hand, "a parent of an abnormal, unhealthy child claims that the physician's negligent advice or treatment deprived the parent of the right to decide whether to avoid the birth of the child with congenital defects." *id.*


Most of these decisions, as well as the many wrongful birth and wrongful life cases that do not cite Roe, were based on common law negligence principles. Some cases seem to suggest that recognition of wrongful birth or wrongful life claims is required by Roe. See Proffitt v. Bartolo, 412 N.W.2d at 238 ("[a]s long as abortion remains an option allowed by law, the physician owes a duty to furnish patients with adequate information for them to be able to decide whether to choose that course of action. Those who would eliminate such right of recovery must first abolish the right to have an abortion"); Smith v. Cote, 513 A.2d at 346-48; Speck v. Finegold, 439 A.2d at 114 ("[w]here the plaintiff merely free to seek the abortion but unable to seek a remedy at law for injuries consequent upon the negligent performance of that abortion, the right would be hollow indeed"); Jacobs v. Theimer, 519 S.W.2d at 848. This, however, appears to be a misreading of Roe, as other cases have understood. See, e.g., Campbell v. United States, 962 F.2d 1579, 1581-84 (llth Cir. 1992) (denial of wrongful birth cause of action under Georgia law does not constitute "state action" violative of woman's right to choose abortion); Turpin v. Sortini, 174 Cal. Rptr. 128, 133 (Ct. App. 1981) (allowing wrongful birth action, denying wrongful life action) (wrongful life action "is [not] a necessary or even logical extension of Roe v. Wade .... There is nothing whatsoever in Roe v. Wade intimating that the ... [C]ourt had the intention of conferring a substantive right to sue theretofore nonexistent), rev'd and remanded, 643 P.2d 954 (Cal. 1982); Hickman v. Group Health Plan, 396 N.W.2d 10, 13-14 (Minn. 1986) (upholding statute barring wrongful birth, wrongful life actions); Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816, 818-19 (Pa. Super. Ct. 1993) (same); Bianchini v. N.K.D.S. Assoc., Ltd., 761 A.2d 700, 703, n.7 (Pa. Super. Ct. 1999) (same); Edmonds v. W. Pennsylvania Hosp. Radiology Assoc., 607 A.2d 1083, 1086-88 (Pa. Super. Ct. 1992) (same); Ellis v. Sherman, 478 A.2d 1339, 1344, n.7 (Pa. Super. Ct. 1984) ("Roe v. Wade and its progeny do not require that states provide for recovery in or recognition of a cause of action for 'wrongful life'"), aff’d, 515 A.2d 1327 (Pa. 1986).

Wrongful birth and wrongful life actions must be distinguished from "wrongful conception" or "wrongful pregnancy" actions where the gravamen of the complaint is negligence in the performance of a sterilization or abortion procedure. Roe has often been cited in such cases. See, e.g., Martinez v. Hartford
pal impact outside the law of abortion has been on the right to refuse medical treatment. But even here the influence of Roe has been far more modest than is generally realized. Roe has been cited in support of decisions recognizing a "right-to-die" in eight States. Most of these decisions, however, were also based on in-

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329. See, e.g., Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974) (prisoner stated cause of action for violation of his right to bodily integrity where medical officials performed operation upon him without his consent); Norwood Hosp. v. Munoz, 564 N.E.2d 1017, 1021 (Mass. 1991) (right to refuse blood transfusion).

dependent state grounds—constitutional or common law. And later decisions in three of these States appear to have retreated from their earlier reliance on federal privacy doctrine, preferring instead to base their holdings on state grounds. Courts in at least seven other States have expressly declined to rely on federal constitutional principles in postulating a right to die, and most "right-to-die"


331. Rasmussen, 741 P.2d at 671 ("[t]he right of privacy is protected by both the federal constitution and the Arizona Constitution"), id. at 683 ("[w]e hold that the Arizona Constitution also provides for a right to refuse medical treatment"); Saikewicz, 370 N.E.2d at 424 (common law right to refuse medical treatment); see also Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 633 (Mass. 1986) ("[t]he right of a patient to refuse medical treatment arises both from the common law and the unwritten and penumbral constitutional right to privacy"); Quinlan, 355 A.2d at 663 ("nor is such right of privacy forgotten in the New Jersey Constitution"); see also In re Farrell, 529 A.2d 404, 410 (N.J. 1987) ("a patient's right to refuse medical treatment . . . is primarily protected by the common law"); In re Doe, 45 Pa. D. & C. 3d at 381 ("the right of a competent individual to refuse medical care or to have it withdrawn is a right under the common law doctrine of self-determination and a constitutional right of privacy"); Colyer, 660 P.2d at 742 ("support for this holding is also found in our state constitution"); id., at 121, 660 P.2d at 743 ("[t]he common law right to be free from bodily invasion is an alternative basis for the right to refuse life-sustaining treatment"). As the Supreme Court noted later, "[s]tate courts have available to them for decision a number of sources—state constitutions, statutes, and common law—which are not available to us." Cruzan v. Director, Missouri Dept of Health, 497 U.S. 261, 277 (1990).

332. See John F. Kennedy Mem. Hosp. v. Bludworth, 432 So. 2d 611, 618-19 (Fla. Dist. Ct. App. 1983) (basing right to refuse medical treatment on recently adopted privacy amendment to state constitution), certified question answered in the negative, 452 So. 2d 921 (1984); In re Guardianship of Barry, 445 So. 2d 365, 370 (Fla. Dist. Ct. App. 1984) (same); Corbett v. D'Alessandro, 487 So. 2d 368, 370 (Fla. Dist. Ct. App. 1986) (same); In re Guardianship of Browning, 568 So. 2d 4, 10 (Fla. 1990) (same); In re Conroy, 486 A.2d 1209, 1222-23 (N.J. 1985) ("[w]hile this [constitutional] right of privacy might apply in a case such as this, we need not decide that issue since the right to decline medical treatment is, in any event, embraced within the common-law right to self-determination"); In re Jobes, 529 A.2d 434, 454, n.3 (N.J. 1987) (Handler, J., concurring) ("[t]he Quinlan court may have been mistaken in its choice to base the decision on constitutional grounds"); In re Guardianship of Crum, 580 N.E.2d 876, 880-81 (Ohio Misc. 1991) (statutory grounds).

333. McConnell v. Beverly Enterprises-Connecticut, Inc., 553 A.2d 596, 600-02 & n.7 (Conn. 1989); DeGrella v. Elston, 858 S.W.2d 698, 708 (Ky. 1993); In re Estate of Longeway, 549 N.E.2d 292, 296-97 (Ill.
cases do not even cite Roe. Three lower federal courts cited Roe in recognizing a federal constitutional right to refuse medical treatment, but when the Supreme Court acknowledged that such a right exists, it did so without mentioning Roe and refused to rest its decision on privacy grounds. Roe also has been cited in support of several state and federal opinions forbidding the forcible administration of psychotropic drugs or involuntary psychosurgery, but none of those decisions depends upon Roe.


337. In Riggins v. Nevada, 112 S. Ct. 1810 (1992), the Supreme Court held that forcing medication to render a defendant competent to stand trial requires an "overriding justification and a determination of medical appropriateness." Id. at 1815. The Court relied principally on its decision in Washington v. Harper, 494 U.S. 210 (1990), where it held that a person "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." id. at 221-22, and that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." Id. at 229. Harper, in turn, relied on the Court's earlier decisions in Vitek v. Jones, 445 U.S. 480 (1980) (involuntary transfer of prisoner to mental hospital implicates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment) (procedural due process), Youngberg v. Romeo, 457 U.S. 307 (1982) (involuntarily committed mental patients have right to safe conditions and freedom from bodily constraint) (substantive due process); Parham v. J.R., 442 U.S. 584 (1979) (setting standards for voluntary admission of minor children to mental hospitals by parents or guardians) (procedural due process); Winston v. Lee, 470 U.S. 753 (1985) (state could not compel defendant to undergo surgery under general anesthetic to re-
Roe has been cited in a handful of decisions recognizing a limited right of arrestees or inmates not to be viewed or photographed in a nude or semi-nude state or strip-searched by members of the opposite sex.338 But Roe does not support the right of a prisoner to starve himself to death.339


Roe, however, also has been cited in support of decisions recognizing the right of parents and guardians to sterilize minors and incompetents. See North Carolina Ass’n for Retarded Children v. North Carolina, 420 F. Supp. 451, 458.
It is doubtful, however, that any of these cases would have been decided differently without Roe. Finally, Roe has been cited in support of a number of decisions protecting family relationships.345


Roe was not controlling in any, 346 and has been rejected in others. 347

346. The Supreme Court appears not to have placed any emphasis on Roe in deciding such cases, either. In Santosky v. Kramer, 455 U.S. 745 (1982), the Court held that in proceedings to terminate parental rights, the "clear and convincing" evidence standard is required. Without citing Roe, the Court said that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Id. at 753. Other Supreme Court opinions involving family relationships have cited Roe along with many other cases. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 385-86 (1978) (right to remarry while supporting minor children); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (state regulation of housing for extended families) (plurality opinion). See supra notes 54, 289-90 and accompanying text for a discussion of Redhail and Moore. The landmark cases recognizing the constitutional rights of the family are Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state interference with education of children), and Meyer v. Nebraska, 262 U.S. 390 (1923) (same), discussed supra in note 54.

347. See Henne v. Wright, 904 F.2d 1208, 1212-15 (8th Cir. 1989) (upholding statute requiring children born in wedlock to be given father's surname); Vance v. Rice, 524 F. Supp. 1297, 1299-1300 (S.D. Iowa 1981) (pretrial detainee could be prevented from marrying, and thereby disqualifying, material witness until after criminal prosecution was completed); Wolfe v. N.M. Dep't of Human Serv., 575 F. Supp. 346, 351-52 (D. N.M. 1982) (no constitutional right to "a permanent, stable adoptive home"); In re Adoption of Kay C., 278 Cal. Rptr. 907, 910-13 (Ct. App. 1991) (same); People v. Sambo, 554 N.E.2d 1088 (Ill. App. Ct. 1990) (right of family integrity did not preclude conviction of parents for battery in disciplining their teenage daughter); People v. R.G., 546 N.E.2d
In sum, the Supreme Court's decision in *Roe v. Wade* has had a limited impact on the law outside of abortion. *Roe* has had no discernable effect on any of the three areas on which the Court in *Casey* relied in reaffirming *Roe*—personal autonomy, bodily integrity, and family decisionmaking. As a precedent, *Roe* has been rejected far more often than it has been accepted. Indeed, it would be difficult to identify a single legal doctrine or principle that is dependent upon *Roe*, other than the right to abortion itself. The Joint Opinion in *Casey* tacitly admitted as much when it cited only two cases (out of more than 2300) on why *Roe* should be retained. Both involved coerced or fraudulently induced surgical procedures, which would be illegal with or without *Roe* on a multitude of federal and state constitutional, statutory, and common law grounds. Neither the Supreme Court nor any other court appears to have placed any particular reliance on *Roe v. Wade* in deciding any case not involving abortion. This, in turn, strongly suggests that former Solicitor General

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348. *Casey*, 112 S. Ct. at 2811, citing *Arnold v. Bd. of Educ. of Escambia County*, Alabama, 880 F.2d 305, 311 (11th Cir. 1989) (relying upon *Roe* and concluding that government officials violate the Constitution by coercing a minor to have an abortion); *Avery v. County of Burke*, 660 F.2d 111, 115 (4th Cir. 1981) (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait). *See also* *People in Interest of S.P.B.*, 651 P.2d 1213, 1216 (Colo. 1982) (natural father of illegitimate child not excused from paying child support by his offer to pay for abortion); *In re Mary P.*, 444 N.Y.S.2d 545, 546-47 (Fam. Ct. 1981) (parents could not have minor daughter declared in need of supervision for refusal to have an abortion). The Court also cited a third case, *In re Quinlan*, 355 A.2d 647 (N.J. 1976), the landmark "right-to-die" case, as evidence of *Roe's* influence in the law. *Casey*, 112 S. Ct. at 2811. The citation seems peculiar. Although *Quinlan* was decided on both state and federal constitutional grounds, in later cases the New Jersey Supreme Court appeared to rest the right to refuse medical treatment on state grounds alone. *See supra* note 332 and accompanying text. Moreover, the Supreme Court itself, in recognizing the right of a competent person to refuse medical treatment, neither cited nor relied upon *Roe*. *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 277-79 (1990).

349. Depending upon the circumstances and the relationship of the actors to the Stat, performance of a coerced abortion (or sterilization) could constitute an unconstitutional seizure of the person, a deprivation of liberty without due process, an invasion of privacy, battery or malpractice (lack of informed consent) and professional misconduct. If the abortion was performed for reasons not allowed by the state abortion statutes, it could also constitute a criminal act. *See also supra* note 64.
Charles Fried was correct when he argued in *Webster* that the Supreme Court could "pull this one thread" (abortion) without "unravel[ing] the fabric of unenumerated and privacy rights" the Court has recognized.351

**CONCLUSION**

Ultimately, then, *Roe v. Wade* was reaffirmed, not because it was correctly decided as a matter of original constitutional interpretation, or because the rule of *stare decisis* requires it, or because the integrity of the Court demands it, or because other legal doctrines depend upon its continued viability, but because the Supreme Court simply could not imagine an America without legalized abortion. After more than twenty years of abortion on demand and almost thirty million abortions, it is clear that unborn children cannot live with abortion. The challenge to opponents of *Roe* is to demonstrate to the American people and to the Supreme Court that the rest of us can live without it.

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Appendix A

The Tradition of Prohibiting Abortion

In Roe v. Wade, the Supreme Court held that "[the] right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."1 The Court acknowledged that "[t]he Constitution does not explicitly mention any right of privacy."2 Nevertheless, "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."3 However, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy."4

In finding that there is a "fundamental right" to choose abortion, the Court in Roe reviewed the treatment of abortion in English and American law5 and came to the following conclusions:

[A]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.6

These conclusions, central to the Court's decision in Roe, are erroneous. The Court's examination of the history of abortion regulation was seriously flawed and failed to take into account the state of medical technology in which the law of abortion evolved. Both the English common law, as received by the American colonies, and the abortion statutes enacted by state legislatures in the nineteenth century, sought to protect unborn human life to the extent that contemporary medical science could establish the existence of that life. This evidence undermines the critical factual assumptions on which Roe was erected and suggests that English and American law never recognized a right to choose abortion.

1. 410 U.S. at 153.
2. Id. at 152.
3. Id.
4. Id.
5. Id. at 129, 132-41, 147-52.
6. Id. at 140-41.
The thirteenth-century commentators Bracton and Fleta classified abortion of a "formed and animated" fetus as homicide. The sixteenth- and seventeenth-century jurist, Sir Edward Coke, declared that, while not "murder," abortion of a woman "quick with childe" was a "great misprision." If, however, "the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive." In his classic *Commentaries On The Laws Of England*, William Blackstone closely followed Coke:

> [T]he person killed must be "a reasonable creature in being, and under the king's peace," at the time of the killing . . . To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them.

Blackstone held that the killing of a child in the womb was "a very heinous misdemeanor." "Quickening" (the point in a pregnancy at which the mother begins to detect fetal movement) was used in the common law as a practical evidentiary test to determine whether the abortion had been performed upon a live human being in the womb, and whether the abortion had caused the child's death. This test "was never intended as a judgment that before quickening the child was not a live human being."
The views of Coke and Blackstone were accepted by American courts in the nineteenth century as accurate statements of the criminality of abortion at common law. In conformity with those views, state courts uniformly recognized abortion after quickening as a common law crime. The courts of at least three States went further, holding that abortion at any stage of pregnancy was a common law crime. The Maryland Court of Appeals may have had these cases in mind when it reported widespread judicial abandonment of the medically obsolete quickening distinction:

[A]s the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offence to

which the common law afforded to human life extended to the unborn child in the womb of its mother. Comprehensive treatments of the English common and statutory law of abortion may be found in John Keown, Abortion, Doctors and the Law: Some Aspects of the Regulation of Abortion in England from 1803 to 1982 (1988); Joseph W. Dellapenna, The History of Abortion: Technology, Morality and the Law, 40 U. Pitt. L. Rev. 359 (1979); and Professor Dellapenna's Brief Amicus Curiae on behalf of the American Academy of Medical Ethics in support of Respondents in Planned Parenthood of Southeastern Pennsylvania v. Casey. These materials present extensive documentation, including voluminous cases dating back to the year 1200, that abortion was a crime at common law.


15. Smith v. Gaffard, 31 Ala. 45, 51 (1857) (dictum in slander case); Eggart v. State, 25 So. 144, 145 (Fla. 1898) (dictum in case decided under statute abolishing quickening distinction); Abrams v. Foshee, 3 Iowa 273, 278-80 (1856) (dictum in slander case); Mitchell v. Commonwealth, 78 Ky. 204, 205-10 (1879) (reversing conviction where indictment failed to allege that "the woman was quick with child"); Smith v. State, 33 Me. 48, 55-57 (1851) (dictum in case decided under statute abolishing quickening distinction); Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 264-68 (1845) (reversing conviction where indictment failed to allege that "the woman was quick with child"); Commonwealth v. Bangs, 9 Mass. 387, 387-88 (1812) (appealing judgment where indictment failed to allege that "the woman was quick with child"); State v. Emerich, 13 Mo. App. 492, 495-98 (1883) (dictum in case decided under statute), aff'd, 87 Mo. 110 (1885); State v. Cooper, 22 N.J.L. 52, 54-58 (1849) (dictum in case Upholding indictment charging defendant with assault); Evans v. People, 49 N.Y. 86, 88 (1872) (dictum in case reversing conviction under manslaughter statute); Arnold v. Gaylord, 18 A. 177, 178-79 (R.I. 1889) (dictum in loss of services case).

Four of these decisions acknowledged the arbitrary nature of the quickening distinction and, where appropriate, recommended corrective legislative action. See Mitchell v. Commonwealth, 78 Ky. 204, 209-10 (1879); Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 268 (1845); State v. Emerich, 13 Mo. App. 492, 495 (1883), aff'd, 87 Mo. 110 (1885); State v. Cooper, 22 N.J.L. 52, 58 (N.J. 1849).

commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of pregnancy.  

These decisions, together with the dozens of abortion prosecutions reported in the digests, lay to rest the doubt expressed in Roe that "abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." No American court ever held that abortion after quickening was not a criminal offense.

Moreover, there is evidence that abortion was prosecuted as a common law crime in the colonial period. Julia Cherry Spruill, in her study of women in the South, cites the 1652 case of Captain Mitchell, who "was accused of a number of crimes, among which was attempted abortion," and of Elizabeth Robins, who was accused of "taking medicine to destroy her child." Another historian, Lyle Koehler, records the Rhode Island case of Deborah Allen, who was convicted and punished in 1683 for fornication and "Indeavoringe the dithuchion [destruction] of the Child in her womb."  

Admittedly, there are few reported abortion prosecutions in America prior to the mid-nineteenth century. This was not because abortion was not regarded as a crime at common law, however, but because "[f]ew [women] tried to limit their pregnancies by birth control or abortion," and because primitive medical understanding prevented proof of abortion until after quickening and unless there were direct witnesses who would testify. Mohr notes that abortion after quickening, "late in the fourth or early in the fifth month," was


18. 410 U.S. at 136.


a common law crime in the United States. The decision to choose abortion was not a right at common law, in England or America. Abortion was a crime and was punished accordingly.

The Court's assertions in Roe that "the pre-existing English common law" of abortion remained in effect in this country "in all but a few States until [the] mid-19th century" and that "[i]t was not until after the War Between the States that legislation began generally to replace the common law" are simply wrong. By the end of 1849, eighteen of the thirty States had enacted statutes prohibiting abortion, and by the end of the Civil War, twenty-seven of the

23. Id. at 3.
24. 410 U.S. at 138-139.
thirty-six States had done so.26 By the end of 1868, the year in which the Fourteenth Amendment was ratified, thirty of the then thirty-seven States had enacted such statutes, including twenty-five of the thirty ratifying States,27 together with six of the ten federal territories.28
The widespread adoption of these laws prior to the ratification of the Fourteenth Amendment in 1868 undermines the Court's conclusion in Roe that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision whether or not to terminate her pregnancy."29 As then Justice Rehnquist observed in dissent, "[t]o reach its result, the Court necessarily . . . had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment."30 After reciting the statutory history set out above, Justice Rehnquist stated:

There apparently was no question concerning the validity of this provision [the Texas statute] or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.31

The Court dismissed the importance of this legislation, concluding that the nineteenth-century statutory prohibitions of abortion were enacted not to protect prenatal life but to guard maternal health against the dangers of unsafe operations.32 Three reasons were offered in support of this conclusion, none of which withstands scrutiny.

First, the Court stated that "[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus."33 The Court not only misapprehended the holding in the single case cited for this proposition,34


These enactments are significant because laws passed by territorial legislatures were subject to Congressional annulment. U.S. CONST. art. IV, § 3, cl. 2; National Bank v. County of Yankton, 101 U.S. 129, 133 (1880). No territorial abortion statute was ever nullified by Congress, including the 39th Congress, which approved the Fourteenth Amendment.

29. See 410 U.S. at 153.
30. Id. at 174 (Rehnquist, J., dissenting).
31. Id. at 177 (Rehnquist, J., dissenting).
32. Id. at 151-52.
33. Id. at 151 & n.48 (citing State v. Murphy, 27 N.J.L. 112 (1858) (N.J. 1858)).
34. The Court's reading of Murphy appears to be at odds with the New
but also overlooked thirty-one decisions from seventeen jurisdictions expressly affirming that their nineteenth-century statutes were intended to protect unborn human life,\textsuperscript{35} and twenty-seven other decisions from seventeen additional jurisdictions strongly implying the same.\textsuperscript{36}


35. Trent v. State, 73 So. 834, 836 (Ala. Civ. App. 1916); Hall v. People, 201 P.2d 382, 383 (Colo. 1948) ("offense described by the statute . . . is the criminal act of destroying the fetus at any time before birth"); Dougherty v. The People, 1 Colo. 514, 522-23 (1872); Passley v. State, 21 S.E.2d 230, 232 (Ga. 1942); Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934); State v. Alcorn, 64 P. 1014, 1019 (Idaho 1901); Joy v. Brown, 252 P.2d 889, 892 (Kan. 1953); State v. Miller, 133 P. 878, 879 (Kan. 1913) (statute "carries the facial evidence of the legislative intent to cover the criminal machinations and devices of the abortionist in order to protect the pregnant woman and the unborn child"); State v. Watson, 1 P. 770, 771-72 (Kan. 1883); Rosen v. La. Bd. of Medical Examiners, 318 F. Supp. 1217, 1222-32 (E.D. La. 1970) (three-judge court), vacated and remanded, 412 U.S. 902 (1973) (interpreting Louisiana law); State v. Siciliano, 121 A.2d 490, 495 (N.J. 1956); State v. Gedicke, 43 N.J.L. 86, 89-90, 96 (N.J. 1881); Endresz v. Friedberg, 248 N.E.2d 901, 904 (N.Y. 1969); People v. Lovell, 242 N.Y.S.2d 958, 959 (N.Y. Oneida County Ct. 1963); State v. Hoover, 113 S.E.2d 281, 283 (N.C. 1960); State v. Powell, 106 S.E. 133 (N.C. 1921); \textit{but see} State v. Jordon, 42 S.E.2d 674 (N.C. 1947) (\textit{contra} regarding pre-quickening abortion); Williams v. Marion Rapid Transit, 87 N.E.2d 334, 336 (Ohio 1949); State v. Tipple, 105 N.E. 75, 77 (Ohio 1913); Bowlan v. Lunsford, 54 P.2d 666, 668 (Okla. 1936); Mallison v. Pomeroy, 291 P.2d 225, 228 (Or. 1955) ("[i]n Oregon we have recognized by statute the separate entity of an unborn child by protecting him . . . against criminal conduct"); State v. Ausplund, 167 P. 1019, 1022-23 (Or. 1917); State v. Farnam, 161 P. 417, 419 (Or. 1916) (pregnant woman could not lawfully consent to the homicide of her unborn child); State v. Atwood, 102 P. 295, 297 (Or. 1909), \textit{aff'd on reh'g.}, 104 P. 195 (Or. 1909); State v. Steadman, 51 S.E.2d 91, 93 (S.C. 1948) (statute prohibiting pre-quickening abortion was intended to change the common law rule and prevent "the destruction of a child before it has quickened"); State v. Howard, 32 Vt. 380, 399-401 (1859); Anderson v. Commonwealth, 58 S.E.2d 72, 75 (Va. 1950); Miller v. Bennett, 56 S.E.2d 217, 221 (Va. 1949); State v. Cox, 84 P.2d 357, 361 (Wash. 1938); Puhl v. Milwaukee Auto Ins. Co., 99 N.W.2d 163, 170 (Wis. 1959); Hatchard v. State, 48 N.W. 380, 381 (Wis. 1891); State v. Dickinson, 41 Wis. 299, 309 (1877); \textit{but see} Foster v. State, 196 N.W. 233, 235 (Wis. 1923) (\textit{contra} regarding pre-quickening abortion but acknowledging that "[i]n a strictly scientific and physiological sense there is life in an embryo from the time of conception"). \textit{See also} People v. Belous, 458 P.2d 194, 209 (Cal. 1969) (Burke, J., dissenting) (abortion statute "was designed to protect not only the mother's life but also that of the child").

36. McClure v. State, 215 S.W.2d 524, 530 (Ark. 1949); Scott v. State, 117 A.2d 831, 835-36 (Del. 1955); State v. Magnell, 51 A. 606 (Del. 1901); Urga v. State, 20 So.2d 685, 687 (Fla. 1944) (approving jury instruction that "[t]he gist of the statutory offense is the intent to terminate the creation by nature of a child and the intent to bring about the miscarriage of a woman"); Weightogle v. State, 35 So. 856, 858-59 (Fla. 1903); \textit{but see} Walsingham v. State, 250 So.2d 857, 861 (Fla. 1971) ("[p]rotection of the mother from unsafe surgical procedures
In every decade since the 1850's, there has been at least one American state court decision recognizing this purpose.

In 1851, the Supreme Court of Maine explained that under its 1840 abortion statute, which abolished the common law quickening distinction, "the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not." In 1859, the Supreme Court of Vermont held that "the preservation of the life of the child" was one of the "important considerations" underlying the State's 1846 abortion statute.

In 1868, the Supreme Court of Iowa, affirming the defendant's conviction of murder for causing the death of a woman by an illegal abortion under an 1858 statute, condemned abortion as "an act highly
dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child." It was dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child.39 In 1872, the Supreme Court of the Territory of Colorado held that its 1868 abortion statute was "intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other."40

In 1881, the Supreme Court of New Jersey declared that its original 1849 abortion statute had been amended in 1872 "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die."41 In 1898, the Supreme Court of Utah characterized abortion under its 1876 statute as "the criminal act of destroying the foetus at any time before birth."42

In 1901, the Maryland Court of Appeals explained that American abortion statutes had been strengthened and the penalties for their violation increased precisely because the medical procedures for inducing abortions had become safer.

It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother . . . more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to the great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense.43

The court characterized abortion as an "abhorrent crime," which "can only be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child."44

In 1916, the Alabama Court of Appeals held that the "manifest purpose" of its abortion statute, first adopted in 1841, was "to restrain after conception an unwarranted interference with the course of nature in the propagation and reproduction of human kind . . . ."45

42. State v. Crook, 51 P. 1091, 1093 (Utah 1898).
44. Id. at 357.
Quoting from the 1911 Transactions of the Medical Association of Alabama, the court asked, "'[D]oes not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extra-uterine life?'"46

In a case decided in 1917, a defendant convicted under Oregon's 1864 abortion statute argued that he could not be prosecuted for performing an abortion on a woman prior to quickening because an abortion at that stage of pregnancy was not a crime at common law. After noting that common law crimes had been abolished in the State, the Oregon Supreme Court rejected this argument, stating:

The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well.47

In 1921, the New Mexico Supreme Court described the offense of abortion under its statute, first enacted as a territorial law in 1854 and later codified in 1915, as "the murder of a quick child, still in its womb, accomplished by means of the use of drugs or instruments upon the mother."48

In 1934, the Supreme Court of Idaho determined that the state abortion statute, first adopted in 1864, was designed "not for the protection of the woman, but to discourage abortions because thereby the life of a human being, the unborn child, is taken."49 In 1936, the Oklahoma Supreme Court expressly held that "the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and, through it, society."50

In 1942, the Supreme Court of Georgia declared that in enacting its abortion statute in 1876, "the legislature was undertaking to pro-

46. Id. at 836.
47. State v. Ausplund, 167 P. 1019, 1022-23 (Or. 1917).
48. State v. Bassett, 194 P. 867, 868 (N.M. 1921) (emphasis supplied). Seventeen States and the District of Columbia had statutes denominating acts causing the death of an unborn child (an abortion or other criminal act) as "manslaughter," "murder," or "assault with intent to murder". Witherspoon, supra note 25, at 44 & n.47.
vide by penal law appropriate penalties for the destruction of an unborn child."51 In 1949, the Virginia Supreme Court of Appeals stated that its abortion statute—enacted in 1848 and codified in 1849—"was passed, not for the protection of the woman, but for the protection of the unborn child . . . ."52

In 1953, the Kansas Supreme Court held that the next of kin of a woman who had died as a result of a negligently performed abortion could sue the abortionist for damages.53 Rejecting the defendant's argument that the decedent's consent to an illegal act barred recovery, the court said, "[W]e are of the opinion that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life."54 In 1959, the Wisconsin Supreme Court, in recognizing a cause of action for prenatal injuries, said "if a child is not a living entity, why should abortion be illegal? .... [The] public policy [of the criminal law] is based on the belief that it is wrong to deprive a living fetus of its right to be born."55

In 1960, the Supreme Court of North Carolina declared that its abortion statute, which had remained essentially unchanged since it was first enacted in 1881, was "designed to protect the life of a child in ventre sa mere."56 And in 1963, a New York court observed that the State's abortion legislation was "designed to protect the natural right of unborn children to life."57

State court decisions affirming the protection of unborn human life as one purpose of their abortion statutes continued to be handed down until Roe v. Wade. In the fifteen months before Roe v. Wade was decided, six state courts upheld the constitutionality of their respective abortion statutes, expressly holding that their laws were intended to protect the lives of unborn children.58

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54. Id. at 892.
In sum, at least sixty-four decisions from forty States have recognized that their nineteenth-century abortion statutes were enacted with an intent to protect unborn human life. Given this wealth of case authority, dating back more than 120 years before \textit{Roe v. Wade} was decided, the Court's conclusion in \textit{Roe} that state court decisions "focus[ed] on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus"\textsuperscript{59} is insupportable.

As a second reason offered in support of its conclusion that the nineteenth-century abortion statutes were intended solely to promote maternal health and not to protect prenatal life, the Court in \textit{Roe} observed that "[i]n many States ... by statute or judicial interpretation, the pregnant women herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another."\textsuperscript{60} The Court, however, failed to note that at least nineteen States enacted statutes that expressly incriminated the woman's participation in her own abortion.\textsuperscript{61} Although no prosecutions were reported under any of these statutes, their enactment certainly casts doubt on the conclusion that women possessed a legal "right" to

\textsuperscript{59} 410 U.S. at 151.

\textsuperscript{60} \textit{Id.}

choose abortion, or that safeguarding maternal health was the sole intention of the lawmakers.

The majority of States did not criminalize the conduct of a woman who attempted to perform the abortion herself or who submitted to an abortion performed upon her by another. Women were exempt from criminal prosecution in these States, not because protection of women was the sole purpose of these laws, but for other reasons.

Traditionally, abortion was viewed as an assault upon the woman because she "was not deemed able to assent to an unlawful act against herself . . . ."62 The woman was seen as a second victim of the abortion.63 Moreover, conviction of the abortionist often depended upon the testimony of the woman who underwent the abortion. Absent a grant of immunity, however, her testimony could not be compelled if she were regarded as an accomplice in the offense.64 And in most States, a criminal conviction cannot be based on the uncorroborated testimony of an accomplice. Thus, for reasons of both principle and practicality, the woman who underwent an abortion was considered a victim of the offense.65

Finally, the Court stated that "most of [the] initial statutes dealt severely with abortion but were lenient with it before quickening."66 From this premise, the Court drew the conclusion that "adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception."67 The Court's premise, as well as its conclusion, was flawed.

As of late 1868, thirty of the then thirty-seven States had enacted statutes restricting abortion. All but three of those States—Arkansas, Minnesota, and Mississippi—prohibited abortion at any stage of pregnancy. Although seven of the twenty-seven States that prohibited abortions throughout pregnancy punished post-quickening abortions more severely than pre-quickening abortions, the other twenty States with such laws punished abortion equally, regardless of

62. State v. Farnam, 161 P. 417, 419 (Or. 1916).
63. State v. Murphy, 27 N.J.L. 112, 114-15 (N.J. 1858); Dunn v People, 29 N.Y. 523, 527 (1864).
66. 410 U.S. at 139.
67. Id. at 151-52.
the stage of pregnancy. By the end of 1883, twenty-seven of the thirty-six States that had enacted abortion statutes had abolished any distinction between pre- and post-quickening abortions in determining the range of possible penalties.

Rather than the occurrence of quickening, "the crucial factor which determined the range of punishment applicable to an attempted abortion was whether the attempt caused the death of the child." Twenty of the thirty-six States that had enacted abortion statutes by the end of 1883 provided for a higher range of punishment if it were proved that the abortion caused the death of the unborn child. As

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68. See statutes cited in supra notes 25-27.


70. Witherspoon, supra note 25, at 36.

71. In addition to the statutes from Georgia, Maine, Minnesota, Ohio, Oregon, South Carolina, Tennessee and Wisconsin listed in note 69 may be added the following: ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1838); Act of Nov. 8, 1875, § 1, Ark. Acts., No. 4, p. 5 (1875); Act of Aug. 6, 1868, Fla. Acts,
Witherspoon has observed, "If the state . . . statutes were intended solely to protect the health of the pregnant woman, there would be no reason whatsoever for the state legislatures to authorize the judge or jury to assess a greater punishment if it were proven that the attempted abortion killed the fetus." 72 "The only explanation of this element of these statutes," he concludes, "is that the enacting legislatures attributed value to the life of the unborn child." 73

Abortion before quickening may not have been criminal at common law. And a few of the early American abortion statutes did distinguish between pre- and post-quickening abortions. But this distinction simply reflected the lack of scientific knowledge regarding the nature of human reproduction, and cannot be regarded as a repudiation of the theory that life begins at conception or an implicit acknowledgment that abortion statutes were enacted solely to safeguard women from dangerous surgical procedures:

Only in the second quarter of the nineteenth century did biological research advance to the point of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational 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 findings which persuaded doctors that the old "quickening" distinction embodied in the common and some statutory law was unscientific and indefensible. 74

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72. Witherspoon, supra note 25, at 38.
73. Id.
74. The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st
As the Supreme Court noted in *Roe*, the newly-formed American Medical Association relied upon this greater understanding of human development in promoting legislation extending the protection of the law to all unborn children.

The foregoing review of the nineteenth-century abortion statutes and the scores of cases interpreting them leads to one inescapable conclusion: They were enacted with an intent to protect unborn human life.

The decision to choose abortion cannot be regarded as a fundamental right unless it is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Abortion, however, was a crime at common law and under the laws of all fifty States until *Roe v. Wade* was decided. Justice Rehnquist noted the significance of this consistent and widespread condemnation of abortion in his dissent in *Roe*:

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication . . . that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Abortion is not mentioned in the Constitution, and there is no evidence that either the framers or ratifiers of the Fourteenth Amendment thought that they were incorporating a right to choose abortion into the Constitution. Accordingly, the decision to choose abortion cannot be considered a "fundamental right."

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75. 410 U.S. at 141-42.
79. 410 U.S. at 174 (Rehnquist, J., dissenting).
Appendix B

The Legal Consensus on the Beginning of Life

Alabama:

Trent v. State, 73 So. 834, 836 (Ala. Civ. App. 1916) (interpreting state abortion law) ("does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extra-uterine life?") (quoting from the 1911 Transactions of the Medical Association of Alabama).

Wolfe v. Isbell, 280 So.2d 758, 761 (Ala. 1973) (rejecting viability requirement in wrongful death action where death occurs after live birth):

[T]he more recent authorities emphasize that there is no valid medical basis for a distinction based on viability, especially where the child has been born alive. These [decisions] proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.


[A]pplies to the Congress ... to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution that would protect the lives of all human beings including unborn children at every stage of their biological development and providing that neither the United States nor any state shall deprive any human being, from the moment of fertilization, of the right to life without due process of law, nor shall any state deny any human being, from the moment of fertilization, the equal protection of the laws, except where pregnancy results from rape or incest; or where abortion is necessary to save the life of the mother; or where testing revealed abnormality or deformity of the fetus.

Arizona:


One cannot gainsay a legislative determination that an embryonic or fetal organism is "life." Once begun, the inevitable result is a human being, barring prior termination of the pregnancy.

ARIZ. REV. STAT. ANN., § 13-1103(A)(5) (1989) (defining offense of manslaughter to include "[k]nowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder"
if the death of the mother had occurred").

Arkansas:

ARK. CONST. amend. 68, § 2 ("[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, . . . ."").

Arkansas Constitutional Convention Call (Res. of Feb. 17, 1977, H.R.J. Res. 2):

Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right of life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

California:

CAL. PENAL CODE, § 187(a) (West 1988) ("[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought").

CAL. CIV. CODE, § 29 (West 1982) ("[a] child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth")

Scott v. McPheeters, 92 P.2d 678, 681 (Cal. App. 1939) (it is "an established and recognized fact by science and by everyone of understanding" that "an unborn child is a human being separate and distinct from its mother").

Connecticut:

CONN. GEN. STAT. ANN. § 53-3l(a) (West 1985) ("[t]he public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception") (rep. by P.A. 90-113, §4 (1990)).

Simon v. Mullin, 380 A.2d 1353, 1357 (Conn. Supp. 1977) (rejecting viability requirement in wrongful death action where death occurs after live birth) ("[t]he development of the principle of law that now permits recovery by or on behalf of a child born alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law").

Delaware:

Scott v. State, 117 A.2d 831, 835-36 (Del. 1955) (characterizing abortion law as one that defines an offense against the lives and persons of individuals).

Delaware Constitutional Convention Call (Res. of May 23, 1978,
H.R. Con. Res. 9):

Requests Congress to call a convention to propose a constitutional amendment that would protect the lives of all human beings, including unborn children at every stage of their biological development.

**District of Columbia:**

Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946) (recognizing cause of action for prenatal injuries) ("[f]rom the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception—which it is in fact").

**Florida:**


Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.

**Georgia:**

Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727, 728 (Ga. 1956) (rejecting viability requirement in case of prenatal injuries) ("[i]f a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover") (a dissent characterized majority opinion as holding, in effect, "that an infant becomes a 'person' from the moment of conception, with the right to sue for a tortious injury after its birth"); id. at 729.

Morrow v. Scott, 7 Ga. 535, 537 (1849) ("[i]n . . . general, a child is to be considered as in being, from the time of its conception, where it will be for the benefit of such child to be so considered").

**Idaho:**

Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934) (construing state abortion law) (criminal abortion statute intended "to discourage abortions because thereby the life of a human being, the unborn child, is taken").

Blake v. Cruz, 698 P.2d 315, 323 (Idah 1984) (Bistline, J., concurring in part and dissenting in part) ("[t]his Court recently committed itself to the proposition that an unborn child is a person
live birth requirement in wrongful death action where death occurs after
viability)).

Idaho Constitutional Convention Call (S. Con. Res. 132, 45th Legis.

[R]equest[s] that the Congress . . . call a constitutional convention for the
specific and exclusive purpose of proposing an amendment . . . [to provide
that]:
(a) From the moment of conception a person shall be guaranteed all
personal rights extended to all individuals under the constitution and laws of
the United States of America and the state or states of residence and only
under extreme circumstances shall it be otherwise; namely, to save the life of
the mother, or other extenuating circumstances where at least two consulting
physicians, one not having previously been involved in the case, and after
due and thorough consultation with all persons having the legal right to be
involved, find it is necessary and just that the life of the unborn shall be ter-
minated.
(b) Provide that the several states shall have the power to enforce such an
amendment, and establish priority of life by appropriate legislation.

Illinois:
720 ILL. COMP. STAT. ANN. § 510/1 (Smith-Hurd 1993)(preamble
to Illinois Abortion Law of 1975):

[T]he General Assembly of the State of Illinois do solemnly declare and
find in reaffirmation of the longstanding policy of this State, that the unborn
child is a human being from the time of conception and is, therefore, a legal
person for purposes of the unborn child's right to life and is entitled to the
right to life from conception under the laws and Constitution of this State.

740 ILL. COMP. STAT. ANN. § 180/2.2 (Smith-Kurd 1993)
(amending wrongful death statute to allow wrongful death action to be
brought on behalf of an unborn child without regard to the stage of
pregnancy when the child is injured or whether there is a live birth).
720 ILL. COMP. STAT. ANN. § 5/9-1.2(b)(l) (Smith-Hurd 1993)
(defining "unborn child" as "any individual of the human species from
fertilization until birth").
720 ILL. COMP. STAT. ANN. §§ 5/9-1.2, 5/9-2.1, 519-3.2, 5/12-3.2,
5/12-4.4 (Smith-Hurd 1993) (amending criminal CODE to define broad
range of crimes, including homicide, that can be committed against
unborn child, regardless of gestational age).

Indiana:

Kansas:
City of Wichita v. Tilson, Case No. 91 MC 108 (Sedgwick County Court, July 21, 1991) (accepting necessity defense) (slip op. at 22) ("the medical and scientific communities ... are of the opinion that life in homo sapiens begins at conception"), appeal sustained without discussion of this point, 855 P.2d 911, 918 (Kan. 1993), cert. denied, Nov. 16, 1993, 62 U.S. L.W. 3348 (Docket 93-467).
State v. Harris, 136 P. 264, 267 (Kan. 1913) (construing state abortion law):

The arbitrary refusal of the common law to regard the foetus as alive ... until quick[ening] was based on no sound physiological principle . . . . [T]he movement recognized by the mother, and which is supposed to prove that her unborn child is alive, is merely one evidence of life, whereas unless life had existed long before the most disastrous consequences to the mother must have already been suffered . . . . For many purposes the law regards the infant as alive from its conception.

Kentucky:
KY. REV. STAT. ANN, § 311.710(5) (Michie/Bobbs-Merrill 1990):
If . . . the United States constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored.

KY. REV. STAT. ANN. §§ 311.720(5), (6) (Michie/Bobbs-Merrill 1990) (abortion regulations) (defining "fetus" as "a human being from fertilization until birth" and "human being" as "any member of the species homo sapiens from fertilization until death").

Hollis v. Commonwealth, 652 S.W.2d 61, 66-67 (Ky. 1983) (Wintersheimer, J., dissenting) (noting that "[b]iologically speaking, human life begins at the moment of conception" and that "[m]edical authority has long recognized that the child is in existence from the moment of conception").

[R]equest[s] the Congress ... to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution . . . :

Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

**Louisiana:**

*LA. REV. STAT. ANN. § 14:2(7) (West 1986)* (defining "person" for purposes of criminal code to include "a human being from the moment of fertilization and implantation").

*LA. REV. STAT. ANN. §§ 14:32.5-32.8 (West 1992 Supp.)* (defining fetal homicide offenses).


This definition [*LA. REV. STAT. ANN. § 14:2(7) (West 1986)*] added to the Criminal Code in 1976, reflects a legislative intent to classify an unborn child as a "person" for purposes of violent criminal conduct like homicide and battery. The definition reveals an express recognition by the legislature that life begins at the moment of conception and that this form of life can indeed be the victim of a harm, i.e., a murder or battery.


It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.


The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe the infant is a child from the moment of conception although life may be in a state of suspended animation, the sub-
ject of love, affection and hope and that the injury or killing of it in its mother's womb is covered by the [wrongful death statute] and gives its bereaved parents to a right of action against the guilty parties for their grief and mental anguish.


Viability has not been the controlling factor in some previous Louisiana cases allowing recovery [for wrongful death of a stillborn child], and there is no need to make it a controlling factor in this decision. Just as live birth is an arbitrary cutoff point for wrongful death purposes, viability is equally arbitrary in deciding whether the fetus is a "person" whose wrongful killing is compensable.

Louisiana Constitutional Convention Call (Res. of July 16, 1976, S. Con Res. 70):

Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; requests state legislative bodies to apply to Congress to call a convention to propose this constitutional amendment; grants Congress and the states the power to enforce the amendment.

Maryland:

Damasiewicz v. Gorsuch, 79 A.2d 550, 559 (Md. 1951) (recognizing cause of action for prenatal injuries) ("from a medical point of view, a child is alive within the mother before the time arrives when it can live apart from her"), Id. at 560 (theory that "an unborn child is a part of the mother" is "an outworn point of view, now rejected by modern medicine").

Group Health Ass'n v. Blumenthal, 453 A.2d 1198, 1207 (Md. 1983) ("a cause of action lies for the wrongful death of a child born alive who dies as a result of injuries sustained while en venire sa mere") (rejecting viability requirement).

Massachusetts:

Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984) (viable fetus is a "person" within meaning of vehicular homicide statute):

In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered
to be other than a human being, and therefore a person, first within, and then in the normal course outside, the womb . . . . By the use of the term["person"] the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.


Massachusetts Constitutional Convention Call (Act of June 8, 1977, H.R. 5984):

Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Michigan:

Womack v. Buchhorn, 187 N.W.2d 218, 222 (Mich. 1971) (recognizing cause of action for prenatal injuries and rejecting viability requirement because "a child has a legal right to begin life with a sound mind and body").


Larkin v. Cahalan, 208 N.W.2d 176, 179 (Mich. 1973) (construing state abortion law) ("statutes proscribing manslaughter by abortion are designed to protect human life and carry the necessary implication that that life, the destruction of which is punishable as manslaughter, is human life").

Minnesota:

MINN. STAT. ANN. §§ 609.266, 609.2661 through 609.2665, 609.267, 609.2671, 609.2672, 609.268 (West 1987 & 1992 Supp.) (amending criminal code to include a broad range of crimes, including homicide, that can be committed against an unborn child, regardless of gestational age).

Verkennes v. Corniea, 38 N.W.2d 838, 840 (Minn. 1949) (rejecting live birth requirement in wrongful death action) (quoting with approval federal district court opinion in Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946), where court said "[f]rom the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception—which it is in fact").

Missouri:

MO. ANN. STAT. § 188.015(6) (Vernon Supp. 1992) (abortion regulations) (defining "unborn child" as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development").

Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. 1972) (construing criminal abortion law) (accepting stipulation that "unborn children have all the qualities and attributes of adult human persons differing only in age or maturity" and that "[m]edically, human life is a continuum from conception to death").

Missouri Constitutional Convention Call (Res. of Apr. 24, 1975, S. Con. Res. 7):

Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function, or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Montana:


The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extend the protection of the laws of Montana in favor of all human life.

MONT. CODE ANN. § 41-1-103 (1993) ("[a] child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth").

Nebraska:

NEB. REV. STAT. § 28-325 (1989) (legislative findings in statutes regulating abortion) (legislators "deplore the destruction of the unborn human lives which has and will occur ... as a consequence of the United States Supreme Court's decision," and lament their inability "to protect the life, health, and welfare of pregnant women and unborn human life").

Hans v. State, 22 N.W.2d 385, 389, (Neb. 1946) vacated on reh'g 25 N.W.2d 35 (Neb. 1946) (statute defining offense of "foeti-
"cide" meant "the unlawful destruction of an unborn child, in ventre sa mere, at any stage of gestation").

Nebraska Constitutional Convention Call (Res. of Apr. 21, 1978, Legis. Res. 152):

Legislature . . . petition[s] . . . Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution of the United States . . .

ARTICLE

Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

Section 2. No unborn child shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Nevada:

White v. Yup, 458 P.2d 617, 623 (Nev. 1969) (recognizing cause of action for prenatal injuries and for the wrongful death of a viable, stillborn child) (proposition that "[a]n unborn child is a part of its mother until birth and thus has no juridical existence" "has no scientific or medical basis in fact").


[L]egislature requests . . . Congress . . . to call a convention limited to proposing an amendment to the Constitution . . . to protect human life by restricting abortion [subject to exceptions in cases where the pregnancy results from rape or incest and where continuation of the pregnancy would seriously endanger the life of the mother].

New Hampshire:

Bennett v. Hymers, 147 A.2d 108, 110 (N.H. 1958) (rejecting viability requirement in cause of action for prenatal injuries) ("[w]e adopt the opinion that the fetus from the time of conception becomes a separate organism and remains so throughout its life").


New Jersey:

("[m]edical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body"):

We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. In the first place, age is not the sole measure of viability, and there is no real way of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born. Therefore, the viability rule is impossible of practical application . . . . In addition, . . . medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation. The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore, should be given the same opportunity for redress.

Id. at 504.

Gleitman v. Cosgrove, 227 A.2d 689, 696 n.3 (1967) (Francis, J., concurring) (rejecting cause of action for wrongful life) ("[i]t was noted 30 years ago that the increase in knowledge of embryology had revealed that the child has separate existence from the moment of conception"), overruled, Bermarr v. Allan, 404 A.2d 8 (NJ. 1979) (reorganizing action).

New Jersey Constitutional Convention Call (Act of Apr. 21, 1977, S. 1271):

Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

New York:


It is not effectively contradicted, if it is contradicted at all, that modern biological disciplines accept that upon conception a fetus has an independent genetic "package" with potential to become a full-fledged human being and that it has an autonomy of development and character although it is for the period of gestation dependent upon the mother. It is human, if only because it may not be characterized as not
human, and it is unquestionably alive.

Kelly v. Gregory, 125 N.Y.S.2d 696, 697 (N.Y. App. Div. 1953) (rejecting viability requirement in cause of action for prenatal injuries) ("legal separability should begin where there is biological separability" and "separability begins at conception"): The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, postnatal as well as prenatal.

*Id.* at 697.

**North Carolina:**

DiDonato v. Wortman, 358 S.E.2d 489, 496 (N.C. 1987) (recognizing cause of action for wrongful death of a viable unborn child) ("[t]he public policy of this state as expressed by the legislature in our statutes recognizes that an unborn infant is a person") (Martin, J., concurring in part and dissenting in part).


Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

**North Dakota:**

N.D. CENT. CODE §§ 12.1-17.1-02 through 12.1-17.1-06 (Supp. 1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age).

Statute providing that "[a] child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth" was intended "to ensure and to protect the interests of a child subsequent to its conception but prior to its birth," Hopkins v. McBane, 359 N.W.2d 862, 864 (N.D. 1984).
Ohio:

Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970) (construing criminal abortion law) (holding that human life is entitled to federal constitutional protection from conception) ("a new life comes into being with the union of human egg and sperm cells" and "[s]uch terms as 'quick' or 'viable', which are frequently encountered in legal discussion, are scientifically imprecise and without recognized medical meaning").

Williams v. Marion Rapid Transit, 87 N.E.2d 334, 340 (Ohio 1949) (recognizing cause of action for prenatal injuries):

To hold that the plaintiff in the instant case [a viable unborn child] did not suffer an injury in her person would require this court to announce that as a matter of law the infant is part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right [to a remedy] conferred by the [Ohio] Constitution upon all persons, by the application of a time worn fiction not founded on fact and within common knowledge untrue and unjustified.

The court also quoted with approval William L. Prosser, HANDBOOK OF THE LAW OF TORTS § 31, 189 (1941). Professor Prosser stated, "So far as duty is concerned, if existence at the time [of injury] is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law." Id. at 339.

Oklahoma:

OKLA. STAT. ANN. tit. 63, § 1-730(2) (West 1984) (abortion regulations) (defining "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth . . . ").

Evans v. Olson, 550 P.2d 924, 926 (Okla. 1976) (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions) ("there is no medical or scientific basis" for the proposition that "an unborn child has no judicial existence apart from its mother").

Oregon:

State v. Ausplund, 167 P. 1019, 1022-23 (Or. 1917) (construing criminal abortion law):

The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with
anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well.

Mallison v. Pomeroy, 291 P.2d 225, 228 (Or. 1955) (recognizing cause of action for prenatal injuries) ("[i]n Oregon we have recognized by statute the separate entity of an unborn child by protecting him in his property rights and against criminal conduct . . . ").


Pennsylvania:

18 PA. CONS. STAT. ANN. § 3203 (1992 Supp.) (abortion regulations) (defining "unborn child" and "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth").

Amadio v. Levin, 501 A.2d 1085, 1087 (Pa. 1985) (rejecting live birth requirement in wrongful death actions) ("a child en ventre sa mere is a separate individual from the moment of conception").

Sinkler v. Kneale, 164 A.2d 93, 96 (Pa. 1960) (rejecting viability requirement in cause of action for prenatal injuries) (viability has "little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception").


[A]pplication to the Congress . . . to call a convention for drafting and proposing an amendment to the Constitution . . . to guarantee the right to life to the unborn fetus by doing the following:

(a) With respect to the right to life guaranteed in the United States Constitution, provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life.

(b) Provide that Congress and the several states shall have concurrent powers to enforce such an amendment by appropriate legislation.

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(d) Nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Rhode Island:


It shall be conclusively presumed in any action concerning the construction, application or validity of sec. 11-3-1 [prohibiting abor-
tion], that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the Constitution . . . .

Sylvia v. Gobeille, 220 A.2d 222, 223-24 (R.I. 1966) (rejecting viability requirement in cause of action for prenatal injuries) (noting "the medical fact that a fetus becomes a living human being from the moment of conception" and rejecting viability as a "decisive criterion" because "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence").

Presley v. Newport Hosp., 365 A.2d 748, 751 (R.I. 1976) (rejecting live birth requirement in wrongful death of a viable unborn child) (citing with approval the civil law proposition that "from the moment of conception a separate organism with its own identity comes into existence" and the medical proposition that "an ovum, once it is fertilized, is a separate living entity"): [Viability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable non sequitur.

Id. at 753-54 (dicta in plurality opinion) (disapproved Miccolis v. Arnica Mutual Ins. Co., 587 A.2d 611 (R.I. 1991)).

Rhode Island Constitutional Convention Call (Act. of Apr. 21, 1977, H.R. 5150):

Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent power to enforce such an amendment.

South Dakota:


death statute to include "an unborn child" without regard to gestational age).

**S.D. CODIFIED LAWS ANN. § 22-17-6 (1988)** ("[a]ny person who intentionally kills a human fetus by causing an injury to its mother ... is guilty of a Class 4 felony").

**S.D. CODIFIED LAWS ANN. § 26-1-2 (1992)** ("[a] child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth").

**Texas:**


The State of Texas is committed to preserving the lives of its citizens so that no citizen "shall be deprived of life, ... except by the due course of the law of the land." [Citation omitted]. [The Texas abortion law] is designed to protect fetal life ... and this justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother.

Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820, 822 (Tex. 1967) (recognizing cause of action for wrongful death for prenatal injuries where death occurs after live birth), *rev'd* 413 S.W.2d 825 (Tex. Civ. App. 1967) (denying cause of action) and *app'g* dissenting opinion of Justice Cadena, 413 S.W.2d at 828 ("medical science ... consider[s] that life begins at conception"), *id.* at 829 ("legalistic concept that the unborn child is but a part of its mother" is "contrary to scientific fact and common sense").

Witty v. Am. Gen. Capital Distrib., Inc., 727 S.W.2d 503, 505 (Tex. 1987) (denying cause of action for wrongful death of viable child who was stillborn but recognizing "the fetus as having an existence separate from its mother").


**Utah:**

**UTAH CODE ANN. § 76-7-301.1(1) (1992)** (preamble to Utah abortion law):

It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Sections 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by
the state of Utah pursuant to the provisions of the Utah Constitution.

§ 76-7-301.1(2):

The state of Utah has a compelling interest in the protection of the lives of unborn children.

§ 76-7-301.1(3):

It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.

**Utah Code Ann. § 76-5-201(1) (1992 Supp.)** (defining offense of criminal homicide as causing “the death of another human being, including an unborn child”).


[A]pplies to the Congress ... to call a convention for the purpose of drafting and submitting for ratification by the states, ... an amendment to the Constitution that will guarantee to every human life, from the moment of fertilization throughout its natural existence, in every state, territory, and possession of the United States, the full protection of all laws respecting life, excepting an unborn child whose mother's life would otherwise be lost.

**Virginia:**

*Kalafut v. Gruver*, 389 S.E.2d 681, 683-84 (Va. 1990) (rejecting viability rule in cause of action for prenatal injuries or for wrongful death following live birth) (noting "developments in medical science, especially in the field of embryology," court held that "an action may be maintained for recovery of damages for any injury occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established").

**Wisconsin:**

**Wis. Stat. Ann. § 940.04(6) (West 1982)** (criminal abortion statute defining "unborn child" as "a human being from the time of conception until it is born alive")


The viability theory has been challenged as unrealistic in that it draws an arbitrary line between viability and nonviability, and fails to recognize the biological fact there is a living human being before viability. A child is no more a part of its mother before it becomes
viable than it is after viability. It would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her. The claim of a child injured before viability is just as meritorious as that of a child injured during the viable stage.

Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107, 111 (Wis. 1967) (rejecting born alive requirement in wrongful death actions) (assertion that "[a] child has no juridical existence apart from its mother" has "no scientific or medical basis in fact").