

ESSAY

ABORTION—FROM PRIVACY TO EQUALITY: THE FAILURE OF THE JUSTIFICATIONS FOR TAKING HUMAN LIFE

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I. INTRODUCTION

In an earlier essay I explored the question of “What is equality?” within the context of the thoughts and objectives of the Framers of the American Republic.¹ I would now like to explore this question in the framework of a particular and challenging American political and legal debate that generates passion among participants, i.e., abortion. It would be useful here to return to a portion of my first essay where, after examining the views of Framers and contemporary political and legal theorists, I presented a synthesis of perspectives about equality and labeled it “a sustainable and practical theory for the American experiment.”² The initial essay and this one were written in part to address a growing concern about the importance of legal claims based on equality—that is, the making of the claim itself does not make two or more subjects the equal of one another, at least not in all respects.

It was my objective in this synthesis, therefore, to provide some useful insight into the idea of equality, which is a central legal concept permeating the law and having a foundation in the *Declaration of Independence*. The important idea of equality, I then noted, is “frequently relied upon to justify a strong legal claim to some position and other words fail in convincing the culture that it must correct an unwarranted treatment of human beings that emphasize their differences and ignore their similarities.”³ I then considered the crucial role of reason that relies on logic and fact in explicating the meaning of equality.⁴

Reason and fact (or evidence, if you will) are critical to the law’s vitality, meaning, and coherence. But as I stated in the earlier essay, “[W]hen the law deviates from this necessary path

1. See generally Robert John Araujo, S.J., *What Is Equality? Arguing the Reality and Dispelling the Myth: An Inquiry in a Legal Definition for the American Context*, 27 QUINNIPIAC L. REV. 113 (2009).

2. *Id.* at 119.

3. *Id.* at 161–62.

4. *Id.* at 161–69.

so that the logical justification is thin and the tribute that ought to be paid to reality is absent, the law becomes purely positivist—the law is whatever the law-maker says it is based on whatever the lawmaker, without any external reference, concludes is necessary to achieve some objective.”⁵ At this point, I will suggest that this kind of positivism is constitutive of a major flaw in the rationales promoted by pro-abortion (pro-choice) advocates when the attempt to justify the means to their objective (sustaining the “right to abortion”) and their objective itself. This is evident when the “equality” claims are offered in validation for pro-abortion regimes.

Saying, legislating, adjudicating, or otherwise concluding that something or someone is equal to something or someone else does not in fact make it so. To press this type of assertion weakens and destabilizes the integrity of a legal system and the supportive juridical structures. The point I wish to make here in the context of the present Essay is this: reliance on the “equality” argument to advance legal schemes supportive of the “right to abortion” does not make women the equal of men (or men the equal of women) when reason and fact state that they are equal in certain ways but not in other ways. As I argued in the previous essay,

As we properly come to acknowledge that the claim of equality has its limitations required by reason and fact, no one should assert that the law can make us precisely equal in these contexts. It simply cannot do that without becoming a totalitarian, positivist system. This type of egalitarianism is unsustainable because it conflicts with logic and with the certainty of natural distinctions. The hallmark of the strongly positivist machinery that fabricates the artificial, unsustainable, and irrational sense of equality is this: the law (and, therefore, its objectives) is whatever the lawmaker says it is, reality and reason to the contrary. The differences and distinctions that exist among human beings are real and unmistakable and should not be forced into some kind of strained, artificial, irrational, and unsustainable notion of “equality.”⁶

The equality argument advanced by those who promote pro-abortion statutes or judicial decisions is built on the thesis that “a woman is denied ‘equality’ with men if she cannot have the absolute right to abortion.”⁷ This may seem persuasive at first

5. *Id.* at 162.

6. *Id.* at 163.

7. *Id.* at 164; see also Anita L. Allen, *The Proposed Equal Protection Fix for*

blush for some people because this rationale suggests that pregnancy and motherhood make a woman less equal because she is much more affected by the obligations associated with carrying a child to term, whereas a man is not burdened by these biological obligations. But the justification for this argument needs to undergo a critical analysis that takes into account logic and facts.⁸

To assert this kind of justification for a legal regime which promotes this kind of “equality” is to substantiate the case for a purely positivist legal system that is regulated solely by the mind of the lawmaker and conditioned solely by what the lawmaker considers to be the end of the human purpose and therefore just. This positivism typically reflects the “dominant prejudices of the moment” and militates against the objective and moral compass that is essential to guiding democratic societies as Christopher Dawson argued.⁹ Such positivism disregards tradition; it ignores legal history; it defies logic and reason; and it flouts fact and reality. The foundation on which this form of legal system rests is but a shifting sand guided by whim or caprice.

In order to present my thesis, I begin with an introduction (Part I). I next proceed to an examination of some fundamental precepts regarding the legal notion of equality that was vital to the Framers (Part II). I then examine these fundamental ideas within the context of those important words from the *Declaration of Independence* stating that there are certain foundational and self-evident truths that “all men are created equal”¹⁰ (Part III). This portion of my investigation leads into consideration of how the contemporary American legal culture has transformed or, in some instances, disregarded the self-evident truths about

Abortion Law: Reflections on Citizenship, Gender, and the Constitution, 18 HARV. J.L. & PUB. POL’Y 419, 420 n.3 (1995) (providing examples of abortion arguments based on equality with men).

8. In spite of the biological differences and distinctions in the parenting responsibilities of fathers and mothers, some in the legal academy strive to avoid these differences and distinctions, particularly when their contentions are based on the equality argument. See, e.g., Silvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984) (analyzing the modern sex equality doctrine regarding biological differences). Professor Law insists that “sex equality doctrine must confront squarely the reality of categorical biological differences between men and women” so that women will be assured of legal equality with men. *Id.* at 962. The difficulty with this argument is that, sooner or later, the biological and other realities will confront and confound legal theories that defy these realities. For example, a law that insists on the age equality of men and women may be a noble pursuit; however, it will inevitably encounter the reality that women, biologically speaking, tend to have greater longevity than men.

9. CHRISTOPHER DAWSON, *CHRISTIANITY AND EUROPEAN CULTURE* 127 (Gerald J. Russello ed., 1998).

10. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

equality (Part IV). This component sets the stage for consideration of equality claims made in the advancement of abortion advocacy built upon the unstable privacy claims of *Roe* (Part V), how the constitutional claims of *Roe* failed (Part VI), and how the unsatisfactory constitutional claims of *Roe* led to consideration of claims from the Fourteenth Amendment (Part VII). My analysis reveals substantial flaws in these arguments that then prompted abortion advocates to search for new constitutional claims in *Casey* (Part VIII). These efforts led to the emergence of the equal protection claims in *Casey* (Part IX), which were further developed in subsequent litigation, specifically *Stenberg v. Carhart* and *Gonzales v. Carhart* (Part X). My final substantive component of this Essay concludes that the strengths of the equality argument lead to the inexorable conclusion that this vital constitutional claim demands fundamental equality for all and therefore defeats the pro-abortion positions that rely on equality and equal protection.

II. EQUALITY RECONSIDERED

In my previous essay I suggested that an alternative response to this positivist mentality exists.¹¹ It is based on the insights and understandings of the Framers who established our republican democracy and the legal institutions that sustain it. For them, equality, when it is truly expressed under the law, possesses rational and factual conditionings that intensify its soundness.¹² By way of illustrating an essential contrast, I earlier noted that the positivist theorist or practitioner may claim that a lump of coal and a polished diamond are the same since they are both forms of carbon deposits;¹³ but does this assertion about equality hold when one considers that the former is quite common and the latter quite rare? It is impossible to hold that they are equal in all regards. With the guidance of reason and fact, the inquiring mind reaches the inevitable conclusion about these two manifestations of carbon deposits that they are not equal in all regards.

What about human beings and their equality? What about men and women and their respective claims to equality? I wish to make it clear that when it comes to members of the human family, each is equal to the other in having aspirations for the future and for the opportunities to fulfill these hopes. This view

11. Araujo, *supra* note 1, at 161–69.

12. *Id.* at 165.

13. *Id.*

is, I think, consistent with the idea of equality that the Founders promoted. Moreover, there must be some sense of equality in the ability to make claims to the common stock of the things which are essential to sustaining human existence. This is a truth about human nature that the drafters of the *Declaration* asserted when they said “all men are created equal.”¹⁴ But are we equal in how we perceive these objectives? Moreover, are we equal in possessing the talents and skills that enable us to pursue the many activities found within human existence? In truth, some of us may have to expend a great effort to attain what it might take another little, if any, exertion, and if this be true, can it be said that we are equal in all respects? The answer is palpable.

At this point, we must think about the categories of ideas that lead to a sound and firm understanding of the meaning of equality in a legal sense when the idea of human equality is under consideration. In doing so, it is necessary to recall several points made in the previous essay. What each person is capable of doing and can contribute to society varies. Each person is distinct in their input or capability of participation. A vital Aristotelian insight is that it is not individual caprice or “tyrannical instinct” that determines what is just but, rather, “rational principle” that is applied by those charged with being guardians of both justice and equality.¹⁵ In developing this thought, Aristotle identified the “rational principle” that is reason tempered by empirical fact and metaphysical nature that convincingly demonstrates that there are distinctions among people that must be taken into consideration when human equality is under investigation.¹⁶

Illustrations of some human distinctions include these: Mozart’s music is superior to mine; the lumberjack’s entitlement to a larger quantity of food exceeds that of the infant; and the Olympic athlete will reach the end of the race course before the octogenarian. This does not mean that one of the people in this series of contrasts is superior to the other person in all regards; however, it means that there are differences between them, some of which the law must understand and acknowledge when claims of equality are being pushed where they should not go. In the juridical context, we may reflect on what Marcus Aurelius—“the same law for all”¹⁷—and H.L.A. Hart—“[t]reat[ing] like cases

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

15. Araujo, *supra* note 1, at 120–21 (citing ARISTOTLE, NICOMACHEAN ETHICS 134–43 (J.E.C. Welldon trans., London, MacMillan & Co. 1897)).

16. *Id.*

17. MARCUS AURELIUS ANTONINUS, THE MEDITATIONS 119–20 (R. Graves, M.A.

alike . . . [and] different cases differently”¹⁸—have to offer to our reflection: they bring some practical counsel in how to apply the important relation between claims to equality and the appreciation of distinctions between people.¹⁹

We come to realize that an individual who has some physical handicap might still be able to devise a means of leveling the playing field so that what could be achieved easily by another but only with great difficulty to one’s self can, nevertheless, still be attained. Illustrative of this point about leveling the “playing field” is the recent news story about a South African athlete. At an early age, he had to have his lower legs amputated. Over the years, his interest in becoming an athlete, in particular a runner, led him and engineers to design prosthetic blades that enable him not only to walk but to be a competitive runner. However, recently, the relevant international sports authorities concluded that his prosthetic blades give him a competitive advantage over traditional athletes. As a result, he has been disqualified from further participation in the Olympic trials.²⁰

trans., 1811).

18. H.L.A. HART, *THE CONCEPT OF LAW* 155 (1961).

19. In both contexts of Aristotle and Hart, the thoughts of Giorgio Del Vecchio provide a frame of reference:

After all these considerations, we are in a position to ask ourselves just what is meant by the constantly repeated formulas: “The law is equal for all” and “All citizens are equal before the law.” It is evident that if these sayings are taken literally, especially the first, they would lead to the most absurd consequences, as though both innocent and guilty should meet with the same treatment, or children and adults. But their real meaning is that no one in the state is above the law, no one is *legibus solutus*; and that the ancient privileges such as hereditary nobility have been abolished, all citizens must now be considered as being at the same level. The value of these formulas is rather limited, for they refer to the laws in general, and laws may be unjust. Yet even unjust laws have a general application.

Giorgio Del Vecchio, *Equality and Inequality in Relation to Justice*, 11 NAT. L.F. 36, 46 (1966). In his *On Laws and God the Lawgiver*, Francisco Suarez brings up in this context the idea of “distributive equity.” As he states, “[T]here remains to be proved only the assertion regarding . . . distributive equity. As to this factor, it is manifestly essential to the justice of law; since, if a law is imposed upon certain subjects, and not upon others to whom its subject-matter is equally applicable, then it is unjust, unless the exception is the result of some reasonable cause . . .” FRANCISCO SUAREZ, S.J., *On Laws and God the Lawgiver*, in 2 *THE CLASSICS OF INTERNATIONAL LAW: SELECTION FROM THREE WORKS* 117 (James Brown Scott ed., 1944).

20. See Joshua Robinson, *Ruling Halts Amputee Sprinter’s Olympic Bid*, N.Y. TIMES, Jan. 15, 2008, at D2.

III. EQUALITY'S SOURCE—
THE DECLARATION OF INDEPENDENCE

The reality of differences that distinguish one person from another (making them unequal) may also be offset by reciprocal duties that they owe to one another (making them equal). This important point does not enter the consideration of the strongly positivist regime that insists on equality in spite of what reason, fact, and plain old common sense say. It is society's and the government's responsibility to ensure that this balance is established and protected by using objective logic that takes account of the need to acknowledge simultaneously the similarities and the differences possessed by each member of the human family—and this seems to accord with the role of the state as articulated by the drafters of the *Declaration* when they said “governments are instituted” to secure these rights.²¹

These ideas affected the thoughts, writings, and proposals of the Framers. While they held differing views (sometimes complementary, sometimes conflicting on general principles, race, sex, privilege, and property), their thoughts intersected on fundamental points providing a common ground for understanding equality: people (men and women; members of different races and social and economic classes) are different in many ways. With that reality in mind, authentic progress can be made about equality claims that are just. Although these differences are a fact of life and human nature, they cannot exclude any person from participation in those characteristics of human life that are shared by each member of the human race. These fundamental and universal characteristics of human existence include: the right to live until natural death calls; the aspiration to enjoy some reasonable measure of prosperity; and the hope to leave a legacy that includes having a family, etc. Variety in expression is not the problem; the expectation or demand of uniformity is.

The *Declaration of Independence* is clear in this regard when it speaks of each person being endowed by the Creator—not by man, not by society, not by the state, not by special interest groups, not by political parties, not by corporations, not by international organizations—to inalienable claims and rights that include “life, liberty, and the pursuit of happiness.”²² Moreover, this endowment is a self-evident truth that exceeds human bias and partisanship. It is true and self-evident because

21. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

22. *Id.*

its source, its guarantor, is an objective, transcendent, and moral standard that escapes the vagaries of human whim or caprice. With the exercise of right reason, the human being can come to recognize the truth about human equality.²³ It is whimsical human nature that denies self-evident truth just as it is human caprice that tries to mask the distinctions and diversity of human beingness with artificial and exaggerated claims of equality.

IV. A CONTEMPORARY AND PROBLEMATIC UNDERSTANDING OF EQUALITY

But even if the source of equality is beyond human power, it is within the competence of human understanding, through the exercise of reason, to recognize the truth about equality that is self-evident. While it transcends human ingenuity and control, authentic equality can be known and enjoyed not just by some but by all. The self-evident truth about equality is based on the human person's ability to exercise right reason—a reason that takes the thinker beyond self-interest, bias, and the constriction of isolated autonomy endorsed by the problematic dicta from *Casey*: there is “a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”²⁴ But the liberty of which the *Casey* Court spoke is not ordered liberty; rather, it is the self-defined liberty of conflict that leads to chaos. The Court's formula for liberty in its theory and its practice does not nurture the right relationship of ordered liberty, but it promotes the conflict society in which exaggerated autonomies compete and clash with one another.

As the *Casey* Court continued, “At the heart of liberty is the right to define one's own concept of existence, of meaning, of the

23. In this regard, I think Professor John Coons has made a remarkable contribution that helps define the legal meaning of equality not just in the American context but the global, human context. He states:

Now, a countless number of things truly relate to one another as equals; yet among this horde there is one specific relation of equality that can be attributed to humans alone. It is theirs exclusively, because it is a relation based in a uniquely human property—that is, in a capacity shared by us but not by the rest of creation. This ‘host property’ (my [Coons's] term) is the moral freedom that is peculiar to members of our kind. We are equal to one another precisely because of our shared free individual capacity either to seek the good and the true or, instead, to ‘do it my way.’ There are correct ideas and correct possible outcomes, and we can choose to give them our allegiance, our intelligence and our energy.

John E. Coons, *Jeremy Waldron's God, Locke, and Equality: Christian Foundations in Locke's Political Thought*, 19 J.L. & RELIGION, 491, 493 (2003–2004) (book review); see also John E. Coons & Patrick M. Brennan, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT 23–24 (1999) (arguing the relational nature of human equality).

24. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992).

universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”²⁵ While it may not have been the Supreme Court plurality’s goal to grant the state this authority, this is precisely what has happened as a result of the *Casey* opinion—particularly when the Court’s abortion jurisprudence is reviewed and examined. The state, through the abortion “rights” rhetoric of the judicial branch, has developed an interesting concept about “equality.” In an effort to make women and men “equal,” some judges, including members of the Supreme Court, have failed to consider the equality of unborn children. This failure substitutes a sound understanding of equality with a false one that strikes at the heart of the equality of nascent human life. Some public officials and citizens in general, but some judges in particular, have disregarded the natural, human distinctions that make men and women unlike one another. By doing this, they could claim that men and women are equal to one another, perhaps in all regards. Unfortunately, this exercise of reason—which is flawed—ignored the most fundamental natural right which makes them and all other humans the equal of one another. This right, of course, is the right to life—a right mentioned by the *Declaration of Independence* and the Universal Declaration of Human Rights.²⁶

With these points in mind, it can be stated with some reliability that the equality of human beings is a critical issue in understanding human nature; thus, it exists at certain fundamental levels essential to defining human nature—the most basic would include the essential equality of the right to life: to live and to flourish in ways appropriate to each individual. It is not a coincidence that the *Declaration* asserts that we hold certain unalienable, nonderogable rights, the first of which is the right to life.²⁷

This collection of elements about our nature and the accompanying inalienable rights is essential for making a sensible and fundamental argument from equality that is legally justifiable in the American context—and beyond. These elements cannot claim nor do they guarantee that their manifestation will be the same for each claimant; however, each claimant is entitled to enjoy a reasonable claim that he or she can be the equal of all

25. *Id.* at 851.

26. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Universal Declaration of Human Rights, G.A. Res. 217A, art.3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

27. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

others in the right to live and to seek what is needed to thrive within sensible bounds—in other words, to have and exercise certain inalienable rights, which are inalienable because their source is no person, including Justices of the Supreme Court, or any human institution.

It becomes evident—self-evident, in fact—that authentic human equality incorporates the need to remain free from unwarranted intrusion into one's existence as long as this exercise does not interfere with anyone else's fundamental claims to enjoy human existence. (As will be seen, this is a particular challenge to the equality claim made to justify abortion, because it is the woman's claim to "equality" that is responsible for denying her unborn child's right to equality.) Other aspects of equality also need to be considered, including the ability to be free to come, know, and enjoy the truths about human nature, including the truth to live in the midst of others and be respected as a member of the same human family where differences and distinctions do exist among people. Finally, there is the need to consider the role of equality as the guarantor of expectations, opportunities, and claims that people make not only for themselves as individuals but for their families and for their posterity.

In the context of the *Declaration*, equality is the guarantor not of what some human may assert about or demand from it, but on what the Creator, identified by the drafters in the *Declaration*, has given to each member of the human family where their sameness and uniqueness are simultaneously recognized and protected. Regardless of one's social, economic, or political status, most members of the human family sooner or later ask the same questions and wish for the same fundamental benefits of life that are authentic to human nature. In this, they are very much alike; thus, we properly say that they are equal because the source of their equality claim is not subject to human caprice.

V. EQUALITY IN THE CONTEXT OF ABORTION "RIGHTS" CLAIMS— THE FOUNDATION OF *ROE*

As stated earlier, it is now my objective to explore the argument and claims that I presented in the previous essay by examining equality in the first subject where it is often raised and to which I just referred: abortion. In this examination, it is my intention to illustrate clearly and concretely that the claims based on the equality argument used to support abortion access and rights to abortion services relies on a problematic

understanding of equality. Moreover, the arguments used by advocates who rely on the equality argument to support abortion access and “rights” are self-defeating. They are self-defeating because they ultimately deny human existence to one set of humans. When this happens, these same arguments can be used to target and deny the equal rights of other humans. We can thus end with George Orwell’s assertion from *Animal Farm*: “All animals are equal but some animals are more equal than others.”²⁸

No discussion of abortion can ignore the significance of *Roe v. Wade*.²⁹ However, the subject of equality was effectively absent from the arguments made by the Court’s majority in support of the legalization of abortion. The one reference to equality appeared in the majority’s discussion of “person” in Section IX.A.³⁰ Here the majority began to address the legal status (personhood) of the unborn child by commenting on the position advanced by the State of Texas and some amici curiae that the fetus is a person in the context of the Fourteenth Amendment of the Constitution.³¹ In doing so, they, Roe, and Roe’s counsel (Sarah Weddington, counsel to Norma McCorvey),³² conceded that if, *in fact*, the unborn child is a person under the Fourteenth Amendment, Roe’s legal arguments would collapse.³³ But the majority saw to it that Roe’s arguments did not collapse, and its members ignored the scientific reality that the fetus is a human being³⁴ when they concluded that the State could cite no case holding “that a fetus is a person within the meaning of the Fourteenth Amendment.”³⁵ Of course, the majority offered no case that suggested the contrary either.³⁶ The majority did cite a

28. GEORGE ORWELL, *ANIMAL FARM* 88 (Alfred A. Knopf, Inc. 1993) (1946).

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

30. *Id.* at 157.

31. *Id.*

32. In her 1992 book *A Question of Choice*, Sarah Weddington states that the equal protection argument was not emphasized when “Roe’s” suit was filed in 1970 because it had not yet been applied by the Supreme Court to sex-based discrimination claims. SARAH WEDDINGTON, *A QUESTION OF CHOICE* 117 (1992).

33. *Roe*, 410 U.S. at 156–57.

34. *See, e.g., infra* notes 120–22 and accompanying text; *see also infra* note 213 and Appendix (explaining that life begins at conception).

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

36. In this context, Professor Charles Lugosi has prepared an extraordinary and immensely clarifying work that dispels the unscientific claims that embryos, fetuses, and unborn children are not humans and therefore not entitled to constitutional protection. *See* Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 *ISSUES L. & MED.* 119, 121 (2006–2007). In his careful examination, Professor Lugosi notes that while the Fourteenth Amendment was promulgated with the original intent to protect people

list of cases in which “the issue ha[d] been squarely presented,”³⁷ but the majority’s conclusion on this point is debatable. Moreover, as already noted, the majority conceded that its examination of the personhood of the fetus issue did not “fully answer the contentions raised by Texas,” so it moved on “to other considerations.”³⁸

As an important aside, the United States became a party to the International Covenant on Civil and Political Rights in 1992.³⁹ Article 6.1 of the Covenant states, “Every human being has the inherent right to life. This right shall be protected by law.”⁴⁰ This Covenant was completed in 1966 and open for

from racial discrimination, racism is not the only matter to which the Amendment’s protections apply. *Id.* at 120–21. As this Essay illustrates, it has been and continues to be relied upon by pro-abortion advocates. However, as Professor Lugosi’s careful study reveals, there is nothing to prevent its protections from being applied to all humans including those conceived but not yet born. He convincingly demonstrates how the judicial branch could define “person” so that all human beings, born and unborn, would be protected; however, as he indicates, most judges, including those who have developed the Supreme Court jurisprudence on abortion, have chosen not to do so. *Id.* at 121. As he argues, “We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain under the regimen of their barbarous ancestors.” *Id.* at 120 (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (inscribed on the wall of the statue chamber, Jefferson Memorial, Washington, D.C.)). He continues by stating:

If it is accepted, as I believe, that the unborn members of the human species are human beings, then it is arguable that as human beings they are natural persons as a matter of law. If all this is true, I contend that it is immoral and legally wrong to exclude the unborn human being at any age prior to birth from the constitutional meaning of person under the Fourteenth Amendment to the U.S. Constitution. It is my position that American constitutional law will not conform to the rule of law, and will fail to honor the basic doctrines of equal protection under the law and substantive human rights, until the legal meanings of ‘human being’ and ‘person’ are identical and are mutually recognized as a matter of constitutional law when a new human being is created at the time of *conception*.

...

I maintain that there is no rule of law if the Constitution is interpreted to perpetuate a legal caste system of ‘separate and unequal,’ where there is no justice for the unborn. I contend there is no justice for the unborn human being so long as there is denial of equality, respect, dignity, liberty, life, and due process of law. Since the word ‘person’ in the Fourteenth Amendment is capable of being interpreted liberally in an objective manner consistent with the rule of law to include all human beings, not to do so violates the natural law which is the foundation of the Declaration of Independence and the core liberal ideals of equality and human dignity.

Id. at 120, 122 (emphasis added).

37. *Roe*, 410 U.S. at 158.

38. *Id.* at 159.

39. See 102 CONG. REC. S4781 (daily ed. Apr. 2, 1992) (ratification resolution); see also International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

40. ICCPR at 174.

ratification or accession thereafter.⁴¹ In addressing the death penalty, Article 6.5 notes certain restrictions on the use of the death penalty.⁴² While the U.S. Senate, in ratifying the Covenant, made an exception to the provisions about the death penalty,⁴³ its reservations do not appear to conflict with the requirement that capital punishment “shall not be carried out on pregnant women.”⁴⁴ This provision does not of itself prevent capital punishment against women; rather, it prevents capital punishment against “pregnant women.” This important element of Article 6.5 strongly suggests that the child being born by the pregnant women who is under a death sentence must be spared because the child is a person in the sense of a human being who “has the inherent right to life” that “shall be protected by law” and protected by Article 6.1.⁴⁵

But let me put the cases mentioned by the majority into a favorable light for the moment. The first is *McGarvey v. Magee-Womens Hospital*.⁴⁶ After noting cases where the unborn child was offered legal protection in some contexts but not others,⁴⁷ the district court concluded it would not afford fetal life constitutional protection because this “would be to create a new administrative jungle”; moreover, in this court’s opinion, the question was one for the state legislatures to resolve and not for the courts to usurp the legislature’s responsibility.⁴⁸

In *Byrn v. New York City Health & Hospitals Corp.*, the court concluded that the Constitution is not a basis for conferring legal personality on the unborn (i.e., the Constitution is silent); rather, it is the responsibility of the legislature to prescribe or proscribe these rights (in *Roe*, Texas had in fact legislated).⁴⁹ But, it must be noted that in his dissent in *Byrn*, Justice Burke took a very different, and I suggest correct, view.⁵⁰ In its pre-*Roe*

41. *Id.* at 171.

42. *Id.* at 175.

43. 138 CONG. REC. 8070 (daily ed. Mar. 27, 1992) (statement of Rep. Wirth).

44. ICCPR, *supra* note 39, at 175.

45. *Id.*

46. *McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751 (W.D. Pa. 1972).

47. Professor Lugosi provides a sweeping catalog of cases where courts throughout the United States have protected the life of the unborn child under First Amendment theories, sometimes in contravention of the wishes of the mother. *See* Lugosi, *supra* note 36, at 220–23.

48. *McGarvey*, 340 F. Supp. at 754.

49. *Byrn v. New York City Health & Hosps. Corp.*, 286 N.E.2d 887, 890 (N.Y. 1972); *see also* *Roe v. Wade*, 410 U.S. 113, 119 (1973) (describing Texas’s legislative efforts to criminalize abortion).

50. As Justice Burke concluded, “Human beings are not merely creatures of the State, and by reason of that fact, our laws should protect the unborn from those who

decision, *Abele v. Markle*, the three-judge district court took the opportunity to legislate rather than interpret.⁵¹ This court reviewed a Connecticut statute that outlawed abortion except as necessary to save the mother's life; the statute also specified that its purpose was "to protect and preserve human life from the moment of conception."⁵² The court found the statute abridged the right to privacy of women.⁵³ With regard to the legal personality of the fetus, the court concluded that the fetus did not have constitutional status as a person because there is nothing in the history of the Fourteenth Amendment to support this conclusion.⁵⁴ But one must hasten to add that there is nothing in the Amendment or its history to deny the status of person to the fetus either. The *Abele* court then relied on *United States v. Vuitch* to reinforce its conclusion.⁵⁵ However, it was prudent enough to realize that *Vuitch* only interpreted a statute that was challenged on vagueness grounds, upholding a statute "permitting an abortion to protect a woman's mental health"; it did not render a judgment on the legal personality of the fetus.⁵⁶ As Justice Clarie noted in the dissenting opinion in *Abele*, the issue in *Vuitch*

was whether or not the District of Columbia Abortion Law was unconstitutionally vague, not whether fetal life should

would take his life for purposes of comfort, convenience, property or peace of mind rather than sanction his demise." *Byrn*, 286 N.E.2d at 892 (Burke, J., dissenting). He further noted,

There is no medical or scientific doubt that foetuses are a group of human beings not a part of his or her mother. Every respected doctor, specializing in this field, treats the unborn child as a second patient different and individually distinct from the mother. Unless we intend to indorse the totalitarian philosophy already practiced of destroying the elderly, the insane, the newly born defective child or other groups of "lesser quality" as defined by the "state," scrap the Declaration of Independence, distort the meaning of the Fifth and Fourteenth Amendments, we should find this legislation constitutionally invalid.

Id. at 895. Justice Scileppi declared in his dissent,

It is my firm moral and legal belief that life begins at conception. At that moment a foetus attains existence, both in fact and in legal contemplation; it is a person entitled to all of the protection accorded by our State and Federal Constitutions. To conclude otherwise is to countenance genocide and subject our population to what the majority so casually categorizes a legislative determination of policy. As Judge Burke incisively observes, our republic was fashioned to prevent such abuses.

Id. at 896 (Scileppi, J., dissenting).

51. See *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972).

52. *Id.* at 226.

53. *Id.* at 227.

54. *Id.* at 228.

55. *Id.* (discussing *United States v. Vuitch*, 402 U.S. 62 (1971)).

56. *Id.*; see also *Vuitch*, 402 U.S. at 71-72.

be constitutionally protected. Thus, *Vuitch* should not be viewed as a *sub silentio* constitutional adjudication, but rather a deliberate choice by the Court not to comment on fetal life in constitutional terms.⁵⁷

However, the *Abele* court insisted that “[s]urely the Court would have withheld even tacit approval of abortions in such circumstances if the consequence was the termination of a life entitled to fourteenth amendment protection.”⁵⁸ The *Abele* court then made a jump to equate fact with law and law with fact when it asserted that “the fact that a fetus is not a person entitled to fourteenth amendment rights does not mean that government may not confer rights upon it.”⁵⁹ The court curiously introduced an illustrative list of circumstances in which the fetus has been conferred rights by legislatures and courts, e.g., compensation for tortious injury, parental support, and property inheritance.⁶⁰ But under its decision, the majority in *Abele* concluded that the right to privacy (of the woman) trumps the right to life (of the unborn).

The *Roe* majority also relied on *Cheaney v. Indiana* to buttress its conclusion about fetal life.⁶¹ However, it is difficult to see how the *Cheaney* court supports the conclusion that the *Roe* majority sought because the *Cheaney* court concluded that “the State can and must strike a balance” when the interests of the unborn child conflict with those of the mother.⁶² As in other court decisions listed by the majority in *Roe*, the *Cheaney* court also recognized that certain decisions about the relevant issues were beyond judicial competence when it concluded that it did “not pretend to know where the balance should lie[,] for this involves a weighing of social values which is a legislative function and

57. *Abele*, 351 F. Supp. 2d at 234 (citation omitted).

58. *Id.* at 228.

59. *Id.* at 229 (emphasis added).

60. *Id.* The court then goes on to make a remarkable claim:

No doubt in the opinion of many people the nature of a fetus as a human being is a matter of absolute moral certainty. In their view, perhaps in the view of some of the legislators who enacted this statute, abortion is considered the deliberate killing of a human being. We do not doubt the sincerity of those who hold this view, nor minimize the depth of their conviction in this regard. But under the Constitution, their judgment must remain a personal judgment, one that they may follow in their personal lives and seek to persuade others to follow, but a judgment they may not impose upon others by force of law.

Id. at 231. The court did not take account of the opposite argument that it has imposed the views of the plaintiffs in this case “upon others by force of law.” The force of law here is the decision of the court, which asserts that since no constitutional protection of the fetus has been given in the past, none can be given now.

61. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

62. *Cheaney v. Indiana*, 285 N.E.2d 265, 269 (Ind. 1972).

properly outside the ambit of the judiciary.”⁶³ Moreover, while acknowledging that there were different views on the matter, the court concluded that the State had both a valid and compelling interest in a living being (and “potential human life”) from the moment of conception.⁶⁴

The *Roe* majority also relied on *Montana v. Rogers*, but reliance on this decision was misplaced.⁶⁵ *Montana* involved questions of statutory interpretation addressing issues of nationality and citizenship, not legal personhood. As the *Montana* court noted, the plaintiff, who had been conceived in the United States but was born in Italy, could not be considered “born . . . in the United States” for purposes of nationality and citizenship because the Fourteenth Amendment limited citizenship to persons born within the territory of the United States.⁶⁶ At no time did the *Montana* court suggest anything about how this interpretation could have a bearing on the meaning or status of legal personhood.

The *Roe* majority also thought *Keeler v. Superior Court* supported its dicta about legal personhood.⁶⁷ The California decision involved the construction of a statute defining murder and whether an unborn but viable fetus was a “human being” within the meaning of this statute.⁶⁸ In finding that it was not, the California court relied on its construction of legislative intent and concluded that an opposing construction “would exceed our judicial power.”⁶⁹ However, the California legislature reacted quickly to the *Keeler* decision and enacted legislation defining

63. *Id.*

64. *Id.* at 270.

65. *See Roe*, 410 U.S. at 158.

66. *Montana v. Rogers*, 278 F.2d 68, 72 (7th Cir. 1960) (emphasis omitted), *aff’d sub nom.* *Montana v. Kennedy*, 366 U.S. 308 (1961).

67. *Roe*, 410 U.S. at 158. The *Roe* majority also relied on another state statute involving homicide, in this instance, Ohio. *Id.* at 158–59. In *Dickinson*, the defendant was charged with vehicular homicide when he caused an accident in which a viable unborn fetus died. *Ohio v. Dickinson*, 275 N.E.2d 599, 600 (Ohio 1971). The statute, Section 4511.181, read, “No person shall unlawfully and unintentionally cause the death of another while violating section 4511.19 . . . of the Revised Code. Any person violating this section is guilty of homicide by vehicle in the first degree.” *Id.* The *Dickinson* court held that the viable unborn fetus was not a person within the meaning of the statute. *Id.* The court construed the meaning of person within this specific statute but did not consider its meaning within a constitutional framework. The *Roe* majority is therefore in error when it stated that this case “squarely presented” the issue “that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” *Roe*, 410 U.S. at 158.

68. *Keeler v. Superior Court*, 470 P.2d 617, 618 (Cal. 1970).

69. *Id.*

murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.”⁷⁰

Notwithstanding their consideration of these cases from diverse jurisdictions, the *Roe* majority confessed that “[t]he Constitution does not define ‘person’ in so many words.”⁷¹ However, after pointing out those provisions in the Constitution where the term “person” is used—but *not defined*—we need to remember that Native Americans (Indians, to rely on the constitutional term) were considered not to be persons at all.⁷² Moreover, the same provision states that “all other persons,” i.e., slaves, were only to be considered three-fifths of a person.⁷³ But with the development of the Civil War Amendments, it became clear that non-nationals would be considered persons under the Fourteenth Amendment even though they may not enjoy all the rights of citizenship.⁷⁴ However, the *Roe* majority relied on shaky justifications to conclude that the word person “does not include the unborn.”⁷⁵

VI. THE UNSATISFACTORY CONSTITUTIONAL ARGUMENTS OF *ROE*

While giving the majority’s argument the most favorable consideration possible, it remains necessary to examine the provisions of the Constitution upon which it relied to reach the odd conclusion. First of all, the majority took note of the following constitutional provisions containing the word “person” without any analysis or discussion whatsoever:

[I]n the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President,

70. See *People v. Davis*, 19 Cal. Rptr. 2d 96, 99–100 (1993), *rev’d*, 872 P.2d 591 (Cal. 1994) (describing the California legislature’s efforts to change the court’s holding in *Keeler*).

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

72. See U.S. CONST. art. I, § 2, cl. 3.

73. *Id.*

74. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Justice Matthews noted that “[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws”).

75. *Roe*, 410 U.S. at 158.

Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments⁷⁶

But as will now be shown, the majority's reliance on these provisions does not lead to or justify its odd conclusion about the legal personhood of the unborn.

I shall now demonstrate that these provisions using the term "person" refer to small or very specific populations. They do not refer to all in their majority or who have been "born or naturalized in the United States, and subject to the jurisdiction thereof, [and who] are citizens of the United States and of the State wherein they reside."⁷⁷ While they do not include the unborn, they also do not include many who have been born. Let me address and examine each of these constitutional provisions seriatim. As will be seen, they all apply to limited populations.

The provisions dealing with apportionment of representatives and senators would not have applied to slaves or Indians when the Constitution was adopted in 1789.⁷⁸ While these limitations on personhood have been cured (constitutionally for those previously held in slavery and through legislation for the Indians), those who are respectively under the ages of twenty-five (and citizens for at least seven years) or thirty (and citizens for at least nine years) are still not considered persons for some constitutional purposes.⁷⁹ But this exclusion of persons below the ages of twenty-five or thirty does not mean that they are not "persons" under the Constitution, nor does it mean that they are not persons under the law or in reality. It means that they are not the kind of "persons" who are the subject of these provisions.

76. *Id.* at 157 (footnote omitted).

77. U.S. CONST. art. XIV, § 1; *see, e.g.*, U.S. CONST. art. I, § 2, cl. 2 (declaring that any person under twenty-five years of age is ineligible to serve as a representative); U.S. CONST. art. I, § 3, cl. 3 (declaring that any person under thirty years of age is ineligible to serve as a senator).

78. *See* U.S. CONST. art. I, § 2, cl. 3 (providing that neither slaves nor Indians not taxed were fully counted for purposes of apportionment of representation in the House of Representatives).

79. *See* U.S. CONST. amend. XIII, § 1 (abolishing slavery); U.S. CONST. amend. XIV, § 1 (making all persons born and naturalized in the United States citizens); U.S. CONST. art. I, § 2, cl. 2 (making any person who is under twenty-five years of age or who has been a citizen less than seven years ineligible to serve as a representative); U.S. CONST. art. I, § 3, cl. 3 (making any person who is under thirty years of age or who has been a citizen less than nine years ineligible to serve as a senator); Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2006)) (granting citizenship to Native Americans born in the United States).

The Apportionment Clause argument is also not free from defect, as has already been pointed out. Although the Thirteenth Amendment constitutionally cured the legal personhood problems of those who were formerly held in slavery,⁸⁰ it says nothing about those who may be in a temporary status, e.g., questionable or illegal immigration condition, within the jurisdiction. This problem exists today within the contemporary context of those who are considered “illegal” and remain undocumented. This would not suggest that illegal or undocumented aliens are any less of a person in reality. It is surprising that the majority of the Supreme Court would have put any credence into the Migration and Importation Clause, which was inserted as a mechanism for dealing with the slavery issue. Interestingly, under this Clause, slaves who were only three-fifths of a person for purposes of the Apportionment Clause are now simply persons, period.⁸¹ This idea is reinforced by the fact that such “persons” could be taxed by the sum of “ten dollars for each Person.”⁸² But this exclusion of humans who do not comply with the meaning of the Apportionment and Migration and Importation provisions does not mean that they are not “persons” under the Constitution, nor does it mean that they are not persons under the law or in reality. It means that they are not the kind of “persons” who are the subject of these provisions.

Reliance on the Emolument Clause by the *Roe* majority is also a flawed justification when assessing the status of the unborn. Certainly the majority could not reasonably argue that this use of the term “person” would have very broad application because it would apply only to those who held an office of profit or trust from the United States. This would exclude many other human beings and persons who were not those “persons” discussed by this provision. This provision would not in any manner deny these others “personhood.” Similarly, the provisions addressing the election of the president apply to an extremely small group of humans, i.e., those who are seeking the presidency or vice presidency of the United States; therefore, they would not deny “personhood” to the vast majority of those present in the territory of the United States, regardless of their age or other status, who are not seeking election to either of these offices. Regarding the qualifications for those “persons” who could

80. U.S. CONST. amend. XIII, § 1.

81. See U.S. CONST. art. I, § 2, cl. 3 (counting three-fifths of “all other Persons” for apportionment of representation); U.S. CONST. art. I, § 9 (allowing the states to continue importing individuals until 1808, subject to a tax).

82. U.S. CONST. art. I, § 9.

become president of the United States, we again see well-defined limitations to the meaning of the term “person.” For example, a “person” who was neither a “natural born Citizen” nor “a Citizen of the United States, at the time of the Adoption of this Constitution” would not be eligible to serve as president.⁸³ But this does not mean that those people who did fall within these categories were not persons for other purposes.

This brings us to the Article IV provisions regarding extradition to which the *Roe* majority referred. Who a person is here would be defined by some independent statute of the federal or state sovereigns.⁸⁴ It is up to the legislatures of both sovereigns to determine who is a “person” in the application of this element of the Constitution. It is beguiling that the majority would rely on the repealed Fugitive Slave provision in sincerely bolstering its argument. As has been already pointed out, slaves for other provisions of the Constitution were not considered persons or were only fractions of a person. But, once again the exclusion of people under this phrase does not mean that they are not “persons” under the Constitution, nor does it mean that they are not persons under the law or in reality. It means that they are not the kind of “persons” who are the subject of this provision.

The argument based on the Fifth and Twelfth Amendments is again flawed. Initially, the Fifth Amendment both included and excluded slaves and Indians. They were likely considered as “persons” who could or did commit crimes, but it is unlikely that the due process of law provision would be extended to them under particular considerations in the early years of the Constitution. While the post-Civil War Amendments cured the problems for former slaves, they did not have any constitutional effect on native peoples.⁸⁵ The meaning of “person” in the context of the Twelfth Amendment is quite narrow in that it refers only to those persons being considered for election to the presidency and the vice presidency.⁸⁶ Excluded from “persons” in the context of the Twelfth Amendment would be most of the citizenry, those underaged, women, and certainly up to the enactment of the

83. See U.S. CONST. art. II, § 1, cl. 5 (establishing the eligibility requirements for the office of president).

84. See U.S. CONST. art. IV, § 2, cl. 2 (providing for the extradition of individuals charged with crimes).

85. See U.S. CONST. amend. XIII, § 1 (abolishing slavery); U.S. CONST. amend. XIV, § 1 (making all persons born and naturalized in the United States citizens); Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2006)) (granting citizenship to Native Americans born in the United States).

86. See U.S. CONST. amend. XII (laying out the procedures for electing the president and vice-president).

Civil War Amendments, slaves. Again, it is clear that a foreign-born adult who would otherwise qualify for election to the presidency and vice presidency could not be a "person" for purposes of this Amendment because of the prohibition of Article II, Section 1, clause 5.⁸⁷ In a similar vein, the understanding of "person" in the Twenty-Second Amendment is restricted to candidates for the presidency and would exclude the rest of the population, whether citizens or not.⁸⁸ But these exclusions do not mean that those not covered by the description of "persons" within the context of these texts are not "persons" under the Constitution, nor does it mean that they are not persons under the law or in reality. It means that they are not the kind of "persons" who are the subject of these provisions.

VII. *ROE* AND THE FOURTEENTH AMENDMENT

Examining the majority's consideration of constitutional provisions would be incomplete without taking stock of their discussion of the Fourteenth Amendment. The majority simply pointed out where the term "person" appears in the text of the Amendment without further discussion or analysis of the terms meaning.⁸⁹ Because I hold the view that words in legal texts do have important meaning, I shall take this opportunity to examine the Amendment's use of this crucial term. Professor Charles Lugosi has advanced a thesis paralleling the one I offer here.⁹⁰

As the *Roe* majority noted, Section 1 of the Amendment makes three references to the word "person."⁹¹ The first instance addresses the citizenship of "[a]ll persons born or naturalized in

87. See U.S. CONST. art. II, § 1, cl. 5 (making all persons not born in the United States ineligible for the presidency); U.S. CONST. amend. XII (making persons who are constitutionally ineligible to the presidency likewise ineligible for the vice presidency).

88. See U.S. CONST. amend. XXII, § 1 (limiting the number of times an individual may be elected to the presidency).

89. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

90. Professor Lugosi has argued:

Explicitly interpreting "person" in the Fourteenth Amendment to mean all human beings, including the unborn, from the time of conception to the time of natural death, will fulfill the promise and vision of the signers of the Declaration of Independence. For there can be no rule of law, so long as the word "person" is legally manipulated to exclude and segregate classes or individuals from the human family, and discriminate against legally created castes in order to legally justify the killing or enslavement of human life. Not until then will there exist the rule of law in America.

Lugosi, *supra* note 36, at 155.

91. U.S. CONST. amend. XIV, § 1.

the United States.”⁹² I submit that this is an important phrase meriting careful consideration because its language specifically talks about the birth of people. The phrase makes reference to two classes of persons who are citizens: (1) those born in the United States, and (2) those naturalized in the United States. The first class has, I submit, a special bearing on the present examination. The text asserts that those individuals born in the United States are automatically citizens; thus, the term “born” merits particular attention. The word “born” carries two meanings as defined by the *Oxford English Dictionary* (*OED*). The first is the transitive meaning: “[t]o cause to be born, to deliver (a child), to bring into existence.”⁹³ But the *OED* notes that this is a rare meaning. The more common meaning is the intransitive meaning: “[t]o come to birth, to be born.”⁹⁴ This would mean that the Fourteenth Amendment states that there is a type of person who comes to birth in a particular place, i.e., the United States, who then enjoys the status of citizen. But this examination of the meaning of the word “born,” in the context of defining “person” in Section 1, begs a question: is there such a thing as an “unborn” person? And, indeed there is if the *OED* is to be considered an authority that can assist in answering this question. Here we see that the term “unborn” (in the context of modifying the word “person”) means not yet born; still to be born; not born; or deprived of birth.⁹⁵ So, it would follow that a person could be unborn, that is not yet born, still to be born, or not born. And, in fact, we must concede that each of us who was born, whether the place of birth be the United States or somewhere else, had that state in his or her life when he or she was unborn, that is, not yet born, still to be born, or not born. Moreover, it is evident that there are those who through accident, miscarriage, or otherwise who would be born are deprived of birth because of one of these intervening events. Medical science reinforces this conclusion when various means of photographic imaging conclusively demonstrate that the fetus is new human life that will, if all goes according to nature, be born.⁹⁶

If we consider the intention of the drafters of this element of the Amendment, it would have made a great deal of sense for

92. *Id.*

93. OXFORD ENGLISH DICTIONARY 415 (2d ed. 1989).

94. *Id.*

95. *Id.* at 887.

96. Attached to this Essay is an Appendix containing a brief paper, *Life Issues—When Human Life Begins*, prepared by the American College of Pediatricians in 2004, which substantiates this point.

them to have differentiated between “born” and “unborn” persons in the context of the conferral of citizenship. An unborn person could have been within the United States while the pregnant mother was in its territory, but if his or her mother moved outside of this territory prior to the child’s birth, this unborn human would be born outside the United States and therefore would not be a citizen unless he or she became naturalized after birth. Conferring citizenship before birth would present a problem insofar as the unborn child would accompany a traveling mother who might have labor and delivery in the territory of another state, which would then have the right (and obligation) to confer citizenship.

Section 1 of the Fourteenth Amendment then goes on in the Due Process Clause to declare that no “person” (without any modifier specifying a state such as “born” or “unborn”) shall be deprived by any state of life, liberty, or property without due process of law; nor shall any state deprive any person within its jurisdiction of the equal protection of the laws.⁹⁷ Because this provision lacks any further modifier, it can be construed as applying to any person, regardless of being “born” or “unborn.” Being a person is not conditional upon being born; it is unconditional, especially when the word “person” goes unmodified, as it does in this phrase.

The term “person” also appears in Section 2 of the Amendment regarding the apportionment of representatives, which is to be based on “the whole number of persons in each State” with the exception of “Indians not taxed.”⁹⁸ Here, it would be difficult to consider including the unborn for the reason that a pregnant mother could absent herself from the jurisdiction. While she herself may be included in the census that determines “the whole number of persons in each State,” including her unborn child (or children where there is more than one child developing in her womb, i.e., twins, triplets, etc.) would be problematic in that their number may be (and would have been) unknown. And even if they were, they could be born somewhere else.

Although the term “person” does not further appear in Section 2, it is worth noting that the balance of the Section establishes a further discrimination among persons by mentioning, in the context of the franchise (without using the word “person”), male citizens being at least twenty-one years of

97. U.S. CONST. amend. XIV, § 1.

98. U.S. CONST. amend. XIV, § 2.

age.⁹⁹ These citizens, of course, are persons, but so are all female citizens regardless of age and all male citizens under the age of twenty-one. While being persons for other reasons (such as apportionment), women and men under the age of twenty-one would not be “persons” for purposes of having the ability to exercise the franchise, even though they are persons in other contexts.

Section 3 uses the term “person” once to indicate certain limitations on holding the offices of representative, senator, or other specified posts if the person had engaged in insurrection or rebellion against the United States or given aid or comfort to those so engaged.¹⁰⁰ Needless to say, these “persons” are not the only humans who are persons. Once again, the use of the word “person” here is for describing a rather small subset of humans who are the kind of “person” whom this Section of the Constitution addresses. This does not mean that other humans are not “persons”; rather, it simply means that these are the only “persons” whom this provision addresses.

There is a pronounced irony in the *Roe* majority’s opinion, and it is conspicuous by its absence in the privacy discussion pertaining to women’s rights. The majority did not even hint about another important consideration regarding the meaning of “person” under the Constitution—the status of women. Until the adoption of the Nineteenth Amendment in 1920, the personhood of women under the U.S. Constitution was not recognized in the context of the franchise, which was the threshold to citizenship.¹⁰¹ Interestingly, the Nineteenth Amendment, which granted the franchise to women, does not use the term “person.” Rather, it states, “The right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex.”¹⁰² It is vital, nevertheless, to take stock here that “persons” otherwise contributing to the good of society who were women were not “persons” under many elements of the Constitution. Thus, it would be feeble to consider that only the “unborn” are infirmed by constitutional exclusion from personhood when in fact many other humans, even though they were born, were not “persons” under a variety of constitutional provisions in which the term “person” or “persons” is used.

The *Roe* majority concluded its discussion of the constitutional provisions using the term “person” by stating, “But

99. *Id.*

100. U.S. CONST. amend. XIV, § 3.

101. *See* U.S. CONST. amend. XIX (giving women the right to vote).

102. *Id.*

in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application."¹⁰³ As I have demonstrated, this assertion made by the majority in defense of its odd conclusion cannot in fact be true, for as has been pointed out, the Constitution has excluded a number of other significant categories of human beings, e.g., blacks, Indians, women, and minors, from inclusion as "persons." To suggest, infer, or conclude that only the prenatal are so disqualified is not only incorrect, it is untrue.

The supporting architecture of *Roe* is founded on the privacy argument. As the majority stated at the outset, *Roe* "claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."¹⁰⁴ The emphasis on the privacy argument was confirmed elsewhere in the majority opinion.¹⁰⁵ Moreover, the majority asserted, "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁰⁶ However, the majority hastened to add that this privacy right "cannot be said to be absolute."¹⁰⁷ And yet, in subsequent decisions, the privacy claim solidified to the point where it seemed impossible to controvert—so the not absolute right became an absolute one.

The majority in *Roe* also asserted that the right of personal privacy includes the right to have an abortion, but they acknowledged that "this right is not unqualified and must be considered against important state interests in regulation."¹⁰⁸ The majority specifically noted that this privacy right covering abortion is limited by state interests such as protection of health, medical standards, and prenatal life, which can, at some point, "become dominant."¹⁰⁹ The majority exercised caution in delimiting this qualified privacy right to distinguish it from other forms of privacy by stating that the "pregnant woman cannot be isolated in her privacy" because she carries "developing young."¹¹⁰ But, as shall be seen in my subsequent discussion, her privacy

103. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

104. *Id.* at 120.

105. *See id.* at 129.

106. *Id.* at 153.

107. *Id.* at 154.

108. *Id.*

109. *Id.* at 155.

110. *Id.* at 159.

claim was intensified by dicta in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

VIII. THE SEARCH FOR NEW CONSTITUTIONAL ARGUMENTS—CASEY

Justice Blackmun's use of the phrase "developing young" merits a careful investigation, for here he acknowledges that the presence of another human life adds an important qualification to the woman's claim to privacy because the interests of this new human life must be taken into consideration. Medical science asserts without controversy that throughout our lives, we human beings develop—from the moment of our conception to the moments of our advanced years.¹¹¹ However, it is odd that Justice Blackmun elsewhere finds it necessary and convenient to use the term "potential life" to describe the child the woman carries rather than simply "human life," which medical science states that it is.¹¹² There is nothing potential about it: it lives, therefore it is; its life is potential before conception, but after conception is a certainty as it is a unique and new human life.

Nonetheless, Justice Blackmun promoted the use of this interesting term, "potential life," when he raised several justifications for the enactment of criminal abortion laws in Part VII of the majority opinion. He began his discussion by stating that the state has an interest, perhaps even a duty, in "protecting prenatal life."¹¹³ He then went on to note disagreement about the nature of the entity that the woman carries by stating that some of "the argument for this justification rests on the theory that a new human life is present from the moment of conception."¹¹⁴ He avoided expressing his definitive view on this position by presenting the "less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone."¹¹⁵

Blackmun did not retreat from using the phrase "potential life." In subsequent discussions in *Roe*, he conceded that the state may properly protect "potential life."¹¹⁶ But he also presented the perplexing view that the state's "important and legitimate interest in potential life" does not become compelling until the

111. See *infra* notes 119–21 and accompanying text.

112. See *Roe*, 410 U.S. at 150.

113. *Id.*

114. *Id.* (citation omitted).

115. *Id.*

116. See *id.* at 154, 156.

stage of “viability,” i.e., when the unborn child is capable of “meaningful life outside the mother’s womb.”¹¹⁷ However, reliance on the “viability” argument has been questionable because its rationale has come under greater scrutiny by medical science as methods for sustaining human life outside a mother’s womb have evolved.¹¹⁸ Moreover, Justice Blackmun based much of his rationale on the flawed argument that the embryo, fetus, or unborn is merely “potential life,” i.e., something having the capacity to become life but not life itself. As medical science attests, the embryo, the fetus, the unborn is life—it is human life without question, condition, or qualification.¹¹⁹ So it is essential that we are clear in our understanding about the nature of the embryo: “It is to be remembered that at all stages the embryo is a living organism, that is, it is a going concern with adequate mechanisms for its maintenance”¹²⁰ As O’Rahilly & Müller state, “[L]ife is continuous, as is also human life, so that the question ‘When does (human) life begin?’ is meaningless in terms of ontogeny. Although life is a continuous process, fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed.”¹²¹ In a similar fashion, the authors of another prominent medical textbook on human embryology note:

“The intricate processes by which a baby develops from a single cell are miraculous *Human development is a continuous process* that begins when an oocyte (ovum) from a female is fertilized by a sperm (spermatozoon) from a male. Cell division, cell migration, programmed cell death, differentiation, growth, and cell rearrangement transform

117. *Id.* at 163.

118. While these developments present grave ethical issues, the fact that scientists have developed methods of reproduction, including *in vitro* fertilization and surrogate motherhood, and advancement in ectogenesis research places into question the legal meaning of “viability” as it appears in abortion jurisprudence. See Hyun Jee Son, Student Scholarship, *Artificial Wombs, Frozen Embryos, and Abortion: Reconciling Viability’s Doctrinal Ambiguity*, 14 UCLA WOMEN’S L.J. 213, 217–18 (2005) (discussing medical advances and determining that impending technology displays the vulnerability of the viability doctrine).

119. For a very recent and highly informative discussion of this point and related issues, see ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, *EMBRYO: A DEFENSE OF HUMAN LIFE* (2008). See also Lugosi, *supra* note 36, at 123, which argues that “[h]uman embryology is so advanced there is no doubt that a new human being is created at the time of conception.”

120. RONAN O’RAHILLY & FABIOLA MÜLLER, *HUMAN EMBRYOLOGY AND TERATOLOGY*, at v (2d ed. 1996).

121. *Id.* at 8.

the fertilized oocyte, a highly specialized, totipotent cell—a zygote—into a multicellular human being.”¹²²

Justice Blackmun offered no scientific justification for his use of the term “potential life.” It is most doubtful that he could because scientific evidence inexorably denies the claims he advanced when he relied on the anomalous terminology “potential life.” Scientific error undermines his legal theory that the unborn child, which he acknowledged is carried in the “mother’s womb,” is at most “potential life.” It is not. It is a human life whose status Harry Blackmun shared in his first few months of life.

At the time *Roe* was decided, Justice Rehnquist registered his objection to the privacy claims made by Jane Roe and addressed by the Court.¹²³ The privacy argument continued and was intensified in subsequent abortion cases like *Thornburgh v. American College of Obstetricians and Gynecologists*.¹²⁴ But, with the passage of time and the progressive litigation involving abortion, the Supreme Court has relied less on the shaky privacy foundation for abortion and turned to the equality argument as an alternative that, unlike privacy, could make some claim to language appearing in the Constitution. This transition from the privacy theory to the equality scheme prompted Justice Blackmun, the author of *Roe*, to declare in his opinion in *Planned Parenthood v. Casey* that the Court “reaffirms the long recognized rights of privacy and bodily integrity.”¹²⁵ However, the privacy justification for abortion had faltered and could no longer be used to justify the privacy of the woman while ignoring the privacy of the unborn.

Evidence of this conversion began to appear in *Planned Parenthood v. Casey* and emerged in Justice Stevens’s opinion when he asserted, “The societal costs of overruling *Roe* at this late date would be enormous. *Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.”¹²⁶ It is hard to imagine that *Roe*

122. KEITH MOORE & T.V.N. PERSAUD, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 2 (7th ed. 2003).

123. See *Roe v. Wade*, 410 U.S. 113, 172–74 (1973) (Rehnquist, J., dissenting).

124. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (declaring that the challenged statutes “wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make”), *overruled by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992).

125. *Casey*, 505 U.S. at 926 (Blackmun, J., concurring in part and dissenting in part).

126. *Id.* at 912 (Stevens, J., concurring in part and dissenting in part) (emphasis added).

would remain in an independent class by itself when one asks about all the societal costs that would be experienced by leaving *Roe* undisturbed and by overruling it.

Although he made a brief reference to the old privacy argument, Justice Blackmun began his befriending of the equality argument when he declared that the state's "restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality."¹²⁷ He noted that these "restrictions" would permit the conscription of "women's bodies into [the state's] service."¹²⁸ As one considers his objections, it is crucial to acknowledge that the state is permitted to conscript the bodies of its citizens in a variety of contexts such as when it passes draft laws affecting the equality of men.

Elsewhere in this Essay, I discuss the "mystery of human life" passage from *Casey*.¹²⁹ This opinion of the plurality reflects an exaggerated personalism and autonomy. Moreover, it fails to recognize the equality of all—only the position of the mother is considered; the value of her life; the exercise of her autonomy; and the interests of her liberty. I have mentioned already that this passage establishes the framework for the inevitable conflict of competing claims. It should now be clear that this dicta from the *Casey* plurality opinion also militates against authentic equality rather than enhancing it—the life of the woman and the life of her unborn child are clearly unequal when the dicta of the plurality is critically examined.

IX. THE EMERGENCE OF THE EQUALITY ARGUMENT

In spite of this deep flaw of the equality argument, researchers have begun to advance the argument's cause in abortion-related jurisprudence. For example, Professor Gillian Metzger puts the matter succinctly when she states: "Abortion and equality are a common pairing; courts as well as legal scholars have noted the importance of abortion and a woman's ability to control whether and when she has children to her ability to participate fully and equally in society."¹³⁰ The core argument of her and other theorists sharing her views is that the regulation of abortion can be discriminatory if the regulation suggests something about women's "traditional" roles in society

127. *Id.* at 928 (Blackmun, J., concurring in part and dissenting in part).

128. *Id.*

129. *See infra* note 199 and accompanying text.

130. Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 865 (2007).

or if they restrict the ability of women to regulate their own “reproductive capacity,” which is essential to “women achieving full and equal status in society.”¹³¹

One of the most energetic proponents of the discrimination thesis that Professor Metzger mentions is Professor Reva Siegel, who has spent a considerable portion of her energy advancing arguments to support abortion and reproductive rights of women. In particular, Professor Siegel formulates a sophisticated sex equality argument, the thrust of which concentrates on gender discrimination rather than on equal protection.¹³² In her estimation, Professor Siegel argues that the sexual discrimination perspective provides a wider range of legal options than does a more narrow focus on the equal protection argument as such.¹³³ In essence, the sexual discrimination thesis has a broader capability of challenging laws where the “laws impos[e] gender-specific burdens on women’s sexual and parenting relations” and are therefore constitutionally suspect.¹³⁴ Professor Siegel by no means abandons the equality argument, but suggests it must take into consideration the customs and conventions that discriminate specifically against women “in ways that have gender-differentiated impacts on the standing and well-being of the sexes.”¹³⁵

131. *Id.* at 866. Reflecting aspects of these views presented by Professor Metzger are: Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POLY 419, 426 (1995); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382–83 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1010–11 (1984); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 999; and Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 32 (1992).

132. Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 826–27, 833–34, 842 (2007).

133. *Id.* at 815.

134. *Id.* at 816.

135. *Id.* at 817. A crucial part of Professor Siegel’s argument is found in this passage:

A similar reading of *Hibbs* and *Geduldig* appears in *Tucson Woman’s Clinic v. Eden*, a case involving an equal protection challenge to laws restricting access to abortion clinics. In considering whether laws singling out abortion clinics for regulation presented an equal protection question, the Ninth Circuit observed that *Geduldig* restricted equal protection claims involving pregnancy, but that *Hibbs* had limited *Geduldig*’s reach: “[T]he Supreme Court recently implied that laws which facially discriminate on the basis of pregnancy, even those that facially appear to benefit pregnant persons, can still be unconstitutional if the medical or biological facts that distinguish pregnancy do not reasonably explain the discrimination at hand.” The Ninth Circuit then quoted the passages of *Hibbs* discussing “pregnancy disability’ leave” that is longer than medically needed and observed, “*Hibbs* strongly supports plaintiffs’ argument that singling

However, in advancing the sex (or gender) discrimination argument to support abortion access, advocates cannot achieve their goal and sustain their claims for at least two reasons. The first emerges from the fact that legislation enacted to combat sex and other discrimination, e.g., the Civil Rights Act of 1964, takes account of differences and distinctions among people so that bona fide exceptions to “equality” laws and “antidiscrimination” claims can be sustained as fact and logic would require.¹³⁶ The second emerges from the realization that legal mechanisms designed to overcome sex discrimination can combat artificial distinctions and “level the playing field” so that women and men can be considered equal in the employment marketplace. For example, both women and men can claim maternity or paternity leave to care for newborn children. Male and female adults, regardless of their sex, can take time off from work without penalty to care for newborns, sick family members, etc. If persons of one sex had suffered a disadvantage previously because of certain cultural stereotypes (which affected women in some cases and men in others), they can now receive legal remedies designed to eliminate or diminish the effect of discriminatory practices. However, there are some issues that antidiscrimination laws are incapable of remedying regardless of the attempts made to eradicate distinctions. In this realm, the law should not be used

out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender.”

Id. at 832–33 (citations omitted). Professor Siegel interestingly uses the phrase “pregnant persons” in her discussion of facial discrimination. I suggest that this element of her article disregards the fact that only women can be pregnant; moreover, if there is discrimination pertaining to this reality, it is a discrimination that ought to pass constitutional muster if the regulation under scrutiny does not prevent women from otherwise engaging in activities that a man could. However, here we are discussing abortion and pregnancy, and these issues have a biological impact on women that they can never have on men. Abortion access is the pursuit of a medical practice that will abort a child that a person carries; but only a woman is the kind of person that can be pregnant and carry this second life. This is precisely the matter that must not be forgotten when considering any equality argument intended to advance access to abortion: the “discrimination” associated with the regulation of abortion affects only women because only they can be pregnant. This medical and biological fact indeed discriminates because it can do nothing else in order to remain true to medical and biological science and the reality based on this science. This fact only applies to one sex of the human race but not the other. In addition, it must not be forgotten that abortion, unlike other “medical procedures,” is designed to terminate another human life that can only be found in a woman, never in a man. When the matter at hand is abortion, the medical or biological facts that distinguish pregnancy do reasonably explain the discrimination at hand; they can do no other.

136. For example, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(e) (2000) makes such distinctions in the context of what is reasonably necessary to the normal operation of the particular business or enterprise.

to enable a parent, specifically the mother, to receive a license to kill her unborn child that she bears in order to eliminate the “discrimination” against her that is imposed not by human institutions or conventions but by the biological reality that only she can be pregnant. This is not an artificial discrimination having a negative impact on human nature, which the law can remedy; rather, this is a truth about human nature, which the law has no place in attempting to rectify.

Returning to Professor Metzger’s essay, she makes a striking claim in a footnote that addresses an article written by Professor Donald H. Regan and published in 1979 wherein he critiqued the legal reasoning of the majority in *Roe*.¹³⁷ In his essay, published six years after *Roe* was decided, Professor Regan identified what he considered was an “equal protection problem” with antiabortion legislation when he concluded that “[w]omen who want abortions are required to give aid in circumstances where closely analogous potential samaritans are not. And they are required to give aid of a kind and an extent that is required of no other potential samaritan.”¹³⁸

It is vital to recognize that there is an invalid assumption made by Professor Regan. His “closely analogous potential samaritan” is likely a man, but could this person be considered an “analogous potential samaritan” in the context of abortion? Clearly not, because as I have pointed out, the law can remedy some unequal distributions or treatments that society has generated, e.g., segregation being combated by civil rights legislation; however, when it comes to the biological distinction between men and women regarding who can and who cannot bear children, this natural reality, and the distinction it bears, inexorably demonstrates that a man cannot be an “analogous potential samaritan.” Inevitably, the Regan thesis designed to replace the fallible privacy argument with a more sustainable one is likewise vulnerable and, therefore, unsustainable.

Professor Metzger, nonetheless, refuses to surrender to the untenable argument when she attempts to extend Professor Regan’s thesis to the enactment by Congress in 1978 of the Pregnancy Discrimination Act, amending Title VII of the Civil Rights Act of 1964 with the goal of protecting pregnant women against discriminatory actions of their employers.¹³⁹ This legislation expanded the concept of sex discrimination by

137. Metzger, *supra* note 130, at 866 n.6 (discussing Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979)).

138. Regan, *supra* note 137, at 1622 (emphasis omitted).

139. Metzger, *supra* note 130, at 866 n.6.

including the phrase “because of or on the basis of pregnancy, childbirth, or related medical conditions.”¹⁴⁰ Her take on the Pregnancy Discrimination Act would extend this law into a realm where it is doomed to fail. The crux of Professor Metzger’s argument is that any regulation of abortion can be considered “gender discriminatory because it exclusively targets women.”¹⁴¹ This is a remarkable but unsustainable claim, because the law here was designed to remedy those human institutions and practices that distinguish between men and women where pregnancy should have no bearing on the ability of a woman to seek employment or to continue her employment (except for those situations in which maternity leave provisions would afford protection).

Thus, a practice that would deny a woman the right to work because she is pregnant or because she is a woman is of purely human construction and is subject to the 1978 amendment. This discriminatory practice can be remedied. However, the law’s application does not mean that the same remedial principle will apply to those realities that transcend human control and are responsible for making the natural distinctions that exist between men and women. Human laws can be made to rectify human made situations that have a disparate effect on different segments of the population. But it is neither wise nor prudent to use the force of the law to alter aspects of nature that surpass human control. For example, a law could be enacted declaring that all heavenly bodies are the same, even though the sun, the moon, and the Earth are not the same. Although this law declares equality of these bodies, it can do nothing to alter the actuality of their different natures. When it comes to using the equality or sex discrimination argument to justify abortion access, a parallel problem of enormous gravity begins to surface. The law of remedy no longer addresses artificial distinctions between men and women; rather, it becomes a camouflage for the state-sanctioned private execution of unborn human beings.

Perhaps because of the inherent difficulties of the theory she labors to justify, Professor Metzger offers a note of caution about the legal theories she advances when she states: “[W]hile courts may come to recognize the importance of reproductive rights to women’s equality, such recognition is more likely to come by integrating equality concerns into current due process frameworks than by independent equal protection challenges.”¹⁴²

140. 42 U.S.C. § 2000e(k) (2000).

141. Metzger, *supra* note 130, at 866.

142. *Id.* at 869.

The substance of her investigation into the equality justification for abortion rights then makes a distinction between two kinds of abortion regulation: by legislation, on the one hand, and by administrative regulation, on the other.

While she toils to minimize the distinction, she concedes that administrative regulations that restrict abortion access and procedures are subject to a less intense scrutiny than are legislative efforts designed to regulate abortion.¹⁴³ In the case of administrative regulation, the scrutiny of whether the regulations are permissible is determined by whether they are generally applicable or not.¹⁴⁴ As she states: “[T]he claim that abortion’s constitutionally protected status entitles it to special exemption from generally applicable requirements is less intuitively powerful than the claim that it should not be singled out for special burdens.”¹⁴⁵ This distinction can be attributed to the constitutionally permissible test that administrative agencies’ judgments based on their expertise, their assessment of factual records, and other considerations will largely be given deference when the administrative action implementing a statute is challenged under judicial review.¹⁴⁶ While not dispositive of all arguments used to justify access to abortion, Professor Metzger concedes that “biological realities,” i.e., facts, have a clear role in determining the limits of the equality argument.¹⁴⁷ As she states,

[E]qual protection is unlikely to offer advocates a way around the limitations of current protections under due process. This does not mean that equality concerns, particularly gender equality concerns, can play no role in the abortion context. But it suggests that if equality concerns gain judicial traction here, it will be through being integrated into the undue burden standard, as occurred in *Casey* itself, rather than through independent equal protection challenges. This conclusion seems only stronger outside of the health context, where biological realities of reproduction confound efforts to demonstrate the gender discriminatory aspect of abortion restrictions.¹⁴⁸

143. *Id.* at 893, 899–900.

144. *Id.* at 895–96.

145. *Id.* at 883.

146. See, for example, *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 844 (1984), wherein the Court stated, “We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations” when reconciling conflicting understandings.

147. Metzger, *supra* note 130, at 897–98.

148. *Id.*

Let me conclude this Part by offering a comment on the “undue burden” standard to which Professor Metzger refers. She rightly acknowledges the biological realities of reproduction, but she limits the meaning of this reality to “undue burdens” and impermissible restrictions on abortion which discriminate on the basis of gender.¹⁴⁹ Yet it is the very fact of these “biological realities” that warrant these restrictions; not because they are an undue burden; not because they unreasonably discriminate against one sex; but because they halt or reduce what would otherwise be state-sanctioned private decisions that destroy nascent human life. It is not the regulation that generates “undue burden”; rather, it is the equality and sex discrimination claims that are unjustifiable and onerous.

X. EQUALITY COMES OF AGE IN THE *CARHART* CASES

The issue of whether any regulation, particularly the legislative one that is more vulnerable to the scrutiny of judicial review, is unconstitutional continued to garner attention for the “undue burden” standard of *Casey*. This becomes evident as one considers a subsequent case—perhaps one of the last ones deferring to the claim that “abortion rights” merit constitutional protection—*Stenberg v. Carhart*.¹⁵⁰ For the context of abortion litigation, an “undue burden” was defined in *Casey* as “shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹⁵¹

In *Stenberg*, the majority took note of the equality challenge to abortion regulation, which it defined as the denial of “equal liberty.”¹⁵² However, this equality argument did not have a significant role in the majority’s disposition of this case. Instead, the majority concentrated on the issue of whether the Nebraska statute constituted an “undue burden” on the rights of women. The *Stenberg* majority concluded that the State of Nebraska’s regulation did constitute an “undue burden” under the following rationale:

The Eighth Circuit found the Nebraska statute unconstitutional because, in *Casey*’s words, it has the “effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” [*Casey*, 505 U.S.]

149. *Id.*

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

151. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

152. *Stenberg*, 530 U.S. at 920.

at 877. It thereby places an “undue burden” upon a woman’s right to terminate her pregnancy before viability. *Ibid.* Nebraska does not deny that the statute imposes an “undue burden” if it applies to the more commonly used D&E procedure as well as to D&X. And we agree with the Eighth Circuit that it does so apply.¹⁵³

In her concurring opinion, Justice O’Connor reiterated that the Nebraska statute posed an undue burden on women and therefore was unconstitutional because the state regulation not only covered the dilation and extraction method (partial birth abortion, also referred to as the D&X procedure), but also the dilation and evacuation method (the D&E procedure), which is a common method of dismemberment of the unborn child used in many abortions—“the most commonly used method for performing previability second trimester abortions.”¹⁵⁴

For Justice O’Connor, the ability to apply the D&X prohibition to the more common D&E method—the application of which she considered possible since some implementations of the latter procedure reproduce the execution of the D&X procedure—presented a “substantial obstacle to a woman seeking an abortion”¹⁵⁵ and therefore constituted an “undue burden on a woman’s right to terminate her pregnancy prior to viability.”¹⁵⁶ While she joined the *Stenberg* majority, Justice O’Connor offered this important qualification to the majority’s opinion on the Nebraska regulation under attack: “[A] ban on partial birth abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.”¹⁵⁷

In his *Stenberg* dissent, Justice Scalia did not hesitate to offer his disagreement with the “undue burden” discussion of the majority. His first point on this issue was that he and his judicial colleagues were in disagreement on the meaning of the undue burden standard and what it requires. As he said, “I never put much stock in *Casey*’s explication of the inexplicable.”¹⁵⁸ His reasoning for this view was based on what he considered was the fault of *Casey*: it was a “value judgment” that depends “upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or

153. *Id.* at 938.

154. *Id.* at 948 (O’Connor, J., concurring).

155. *Id.* at 949 (quoting *Casey*, 505 U.S. at 884).

156. *Id.* at 950.

157. *Id.* at 951.

158. *Id.* at 954 (Scalia, J., dissenting).

believes society ought to respect) the freedom of the woman who gave it life to kill it.”¹⁵⁹ In noting that the majority valued the former position less and the latter more, Justice Scalia concluded that the result was achieved by the process promised by *Casey*:

“a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is ‘undue’—*i.e.*, goes too far.”¹⁶⁰

In abortion cases decided by the Supreme Court, alignments of the Court’s members have been fairly predictable, and those allied with Justice Scalia’s views could generally be named with some precision. However, *Stenberg* altered the traditional configuration.

Stenberg brought Justice Kennedy’s evolving role in abortion jurisprudence to the forefront. He spared no words of disagreement with his colleagues who considered the state regulation unconstitutional as he declared in his dissent that “the [Nebraska statute] denies no woman the right to choose an abortion and places no undue burden upon the right.”¹⁶¹ In the

159. *Id.* at 954–55.

160. *Id.* at 955. Justice Scalia continued his critique of the majority view that was founded on *Casey* by stating:

While I am in an I-told-you-so mood, I must recall my bemusement, in *Casey*, at the majority opinion’s expressed belief that *Roe v. Wade* . . . had “call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,” *Casey*, 505 U.S.[] at 867, and that the decision in *Casey* would ratify that happy truce. It seemed to me, quite to the contrary, that “*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since”; and that, “by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court’s new majority decrees.” *Id.*[] at 995–996. Today’s decision, that the Constitution of the United States prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of criticism—as well it should. I cannot understand why those who *acknowledge* that, in the opening words of JUSTICE O’CONNOR’S concurrence, “[t]he issue of abortion is one of the most contentious and controversial in contemporary American society,” *ante*, at 947, persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed. *Casey* must be overruled.

Id. at 955–56.

161. *Id.* at 957 (Kennedy, J., dissenting).

past, Justice Kennedy sided with those members of the Court inclined to strike down laws regulating abortion.¹⁶² However, in *Stenberg*, he concluded that states do have the competence to regulate abortion, and he stated, “Nebraska’s law survives the scrutiny dictated by a proper understanding of *Casey*”¹⁶³ Although he asserted that Nebraska must “obey the legal regime which has declared the right of the woman to have an abortion before viability[.]”¹⁶⁴ he concluded that the Nebraska law violated no legal obligation protecting abortion access. But it cannot be forgotten that Justice Kennedy inserted something new into his jurisprudence that addressed a question of real equality and the reciprocity of interests necessitating that all receive their respective due.

He reminded advocates of “abortion rights” along with his fellow jurists that since *Roe* was decided twenty-seven years earlier, the states have always retained authority to regulate abortion, and this state authority was consistent within the *Roe* formulation that acknowledged the state’s right to protect nascent human life. As Justice Kennedy explained, “Nebraska instructs all participants in the abortion process, including the mother, of its moral judgment that all life, including the life of the unborn, is to be respected.”¹⁶⁵ As his detailed explanation of the medical procedures involved in various forms of abortion—including D&X and D&E—revealed, society cannot use “the natural delivery process to kill the fetus” because of the important and compelling moral considerations which serve “to promote respect for human life.”¹⁶⁶

Consequently, taking account of these points made by Justice Kennedy does not create an “undue burden” on anyone claiming a constitutional guarantee; moreover, these considerations mentioned by Justice Kennedy follow precisely what *Roe* permitted: the protection of human life. As the *Roe* majority stated:

State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.¹⁶⁷

162. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843 (1992).

163. *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting).

164. *Id.* at 963–64.

165. *Id.* at 964.

166. *Id.*

167. *Roe v. Wade*, 410 U.S. 113, 163–64 (1973). As Justice Thomas points out in his

Aware of the opinion rendered in *Stenberg*, Congress responded by drafting and promulgating a remedial statute to address the “undue burden” issues that *Stenberg* presented.¹⁶⁸ However, Dr. Carhart, one of the challenging parties to the Nebraska statute involved in *Stenberg*, then challenged the Congressional response in *Gonzales v. Carhart*.¹⁶⁹ However, in this subsequent judicial review, a majority of the Supreme Court finally comprehended more of the medical science sufficiently to conclude that the fetus that is the target of any abortion is not merely some “thing” but is assuredly a human life that is an independent life but dependent on the mother. As the five-member majority stated at the outset of *Gonzales*, “The Act proscribes a particular manner of ending fetal life”¹⁷⁰ The majority noted that it would be necessary in rendering a decision “to discuss abortion procedures in some detail” and indicated that “[a]bortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child’s development.”¹⁷¹ In describing a typical second trimester abortion as explained by medical doctors in the underlying litigation record, doctors apply friction within the mother’s body “to tear apart” the fetus—“[f]or example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman.”¹⁷² It is not the woman’s tissue that is being torn apart; rather, it is the leg, or the arm, or the head, or the trunk of an unborn child that is being removed piece by piece. This is not the method of abortion that was proscribed by Congress’s legislation challenged by Dr. Carhart and others; but it is a method commonly used.¹⁷³ The language here explains finally what the “thing” is that is being aborted: it is another human life found within, but not of, the mother.

The majority continued by describing the other “legal” methods of abortion including the injection of lethal chemicals, such as digoxin or potassium chloride, into the unborn child that “kill the fetus a day or two before performing the surgical

dissenting opinion in *Stenberg*, in *Casey* “seven Members of that Court, including six Members sitting today, acknowledged that States have a legitimate role in regulating abortion and recognized the States’ interest in respecting fetal life at all stages of development.” *Stenberg*, 530 U.S. at 981 (Thomas, J., dissenting).

168. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007).

169. *Id.*

170. *Id.* at 1620.

171. *Id.*

172. *Id.* at 1621.

173. *Id.* at 1621–22.

evacuation.”¹⁷⁴ It was essential to present the explanation of the medical community in order to explain clearly so that what happens during an abortion could be understood. Here is one pertinent excerpt:

Intact D&E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. Dilation and Extraction 110–111. In the usual intact D&E the fetus’ head lodges in the cervix, and dilation is insufficient to allow it to pass. Haskell explained the next step as follows:

“At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and ‘hooks’ the shoulders of the fetus with the index and ring fingers (palm down).

“While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.

“[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.

“The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.”

This is an abortion doctor’s clinical description. Here is another description from a nurse who witnessed the same method performed on a 26 1/2-week fetus and who testified before the Senate Judiciary Committee:

“Dr. Haskell went in with forceps and grabbed the baby’s legs and pulled them down into the birth canal. Then he delivered the baby’s body and the arms—everything but the head. The doctor kept the head right inside the uterus

“The baby’s little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby’s arms jerked out, like a startle reaction, like a flinch,

174. *Id.* at 1621.

like a baby does when he thinks he is going to fall.

'The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp

'He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.'

Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation. Another doctor, for example, squeezes the skull after it has been pierced "so that enough brain tissue exudes to allow the head to pass through." Still other physicians reach into the cervix with their forceps and crush the fetus' skull. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it.¹⁷⁵

These clinical descriptions of several brutal procedures used to perform abortions present the facts about what an abortion is and what happens as a result: the death of a human being. The presentation of these medical facts enabled the majority in *Gonzales* to agree with Justice Kennedy regarding the following:

The principles set forth in the joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), did not find support from all those who join the instant opinion. See *id.* at 979–1002, 112 S. Ct. 2791 (SCALIA, J., joined by THOMAS,

175. *Id.* at 1622–23 (citations omitted). As the majority elaborates:

After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on "partial birth abortion" proliferated. By the time of the *Stenberg* decision, about 30 States had enacted bans designed to prohibit the procedure. 530 U.S.[] at 995–996 & nn.12–13, 120 S. Ct. 2597 (THOMAS, J., dissenting); see also H. R. Rep. No. 108–58, at 4–5. In 1996, Congress also acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation, and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in *Stenberg*, Congress passed the Act at issue here. H. R. Rep. No. 108–58, at 12–14. On November 5, 2003, President Bush signed the Act into law. It was to take effect the following day. 18 U.S.C. § 1531(a) (2000 ed., Supp. IV).

Id. at 1623–24. Briefly, I would suggest that if indeed the description given by the nurse is an accurate one of what takes place—and there is no credible reason to think otherwise—one would have to consider the implications of the Eighth Amendment to this procedure, which some think the law ought to allow. See U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment). But, my investigation of the Eighth Amendment implications will have to wait for another day.

J., *inter alios*, concurring in judgment in part and dissenting in part). Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.¹⁷⁶

The Courts of Appeals, of course, continued the line of decisions that any regulation of abortion was an “undue burden.”¹⁷⁷ But with *Gonzales*, things were beginning to change, and so it becomes necessary to take the examination of what happens during an abortion a few steps further. The state's interest in “promoting fetal life” must be clarified so that the importance of “promoting fetal life” refers clearly to the protection of a human life, a life distinct from the mother who may claim a right to abort, i.e., kill, the life of another human being. Let us be quite clear on what occurs during an abortion—any abortion, for the instant point has an essential bearing on the equality claim now made by abortion advocates. Putting the concerns of abortion advocates in its most favorable light, Justice Kennedy stated that it would be necessary to ascertain whether the legislation under scrutiny “furthers the legitimate interest of the Government in protecting the life of the fetus *that may become a child*.”¹⁷⁸ As I have pointed out earlier, there is little question what the fetus is: it is a child in its early development—a life by any other name would be just as significant, just as *equal* as any other. In spite of Justice Kennedy's attempts to appease his critics (i.e., advocates for abortion), the majority reached the inevitable conclusion that the legislation passed judicial scrutiny.¹⁷⁹

XI. EQUALITY, YES—BUT EQUALITY FOR ALL

But the examination regarding the equality argument for justifying abortion presented in this Essay cannot stop here. The abortion advocates who participated in *Gonzales* asserted, based

176. *Gonzales*, 127 S. Ct. at 1626.

177. *See id.* at 1625–26.

178. *Id.* at 1626 (emphasis added). As Justice Kennedy stated:

Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

Id. at 1633.

179. *Id.* at 1627.

on some “medical experts,” that “D&E [a procedure not covered by the legislation under review] may result in the delivery of a living fetus beyond the Act’s *anatomical landmarks*” in some cases.¹⁸⁰ There are, however, several problems with this attempt to invalidate the statute. The first is that what exists prior to delivery is a living human being, regardless of whether we call it a fetus or something else—the name we give to a human life cannot disguise the reality of its ontology; it is living and it is human and its geographic location is not determinative of what it is. This geographic issue constitutes the second problem that illustrates the unstable house of cards on which abortion “rights” are based. Here, the particular question is that the live human remains the same regardless of where it is, regardless of its geography, regardless of the “anatomical landmark” where it is found within the mother. As was the case with *Dred Scott* and the geographic location (slave territory versus free territory) of Mr. Scott and his family,¹⁸¹ the matter of where either the slave or the fetus is located at any point does not determine either his or her humanity or his or her ontology.

As the majority noted, the Act under review in *Gonzales* “proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process.”¹⁸² If the child were to make it a few inches further in the realm of anatomical landmarks, the procedure would not be an abortion, it would be infanticide, i.e., murder. Perhaps inadvertently, the majority brought intensified meaning to the phrase “within inches of its life” as it considered the notion of “anatomical landmarks.” Perhaps the majority also unsuspectingly demonstrated the meaninglessness and the error of the phrase “potential life” first used by Justice Blackmun in *Roe* and continued in subsequent abortion jurisprudence. In line with a point just made a moment ago in discussion of the geographic location of the child, the majority suggested that there still may be “a bright line that clearly distinguishes abortion and infanticide.”¹⁸³ Still, reliance on terms such as “anatomical landmark” does not offer much assistance in making sense, legal and common, in proclaiming the significance of the demarcation between human and other.

In spite of its realization that the human life was the same human life regardless of its location in the world of “anatomical landmarks,” the majority would periodically lapse into a

180. *Id.* at 1631 (emphasis added).

181. *See Scott v. Sanford*, 60 U.S. 393, 517 (1856).

182. *Gonzales*, 127 S. Ct. at 1632–33.

183. *Id.* at 1633–34.

discussion that could support views that trivialize early human life. For example, consider this passage:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. *See, e.g., Nat. Abortion Federation*, 330 F. Supp. 2d, at 466[] n.22 (“Most of [the plaintiffs’] experts acknowledged that they do not describe to their patients what [the D&E and intact D&E] procedures entail in clear and precise terms”); *see also id.*[] at 479.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. *Casey, supra*, at 873, 112 S. Ct. 2791 (plurality opinion) (“States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning[.]”). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.¹⁸⁴

Here we see that the secrecy and misinformation or lack of information conceal the reality of what abortion is all about—the taking of human life by other humans. If a woman about to undergo an abortion is not given adequate information regarding the procedure she is about to undergo and the consequences for her unborn child, how can her consent be informed? It cannot. Moreover, how can it be said that the unborn child is able to give consent to the brutal termination of his or her life? It cannot. However, in reading the dissenting opinion written by Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, one would not reach these questions, let alone the conclusions to which they inescapably lead. Lest I be deemed too critical of the

184. *Id.* at 1634.

dissent, let me state that these four justices (Ginsburg, Stevens, Souter, and Breyer) and I have different views on human nature.

At the outset of their dissent, they focus on the “autonomy,” the “personhood,” the “destiny,” and the “place in society” of the woman.¹⁸⁵ They do not do the same for the child who is the target of the abortion. I share the concerns of the dissenters about the woman’s autonomy, personhood, destiny, and place in society, but I am *equally* concerned about those of the unborn child. They do not share these *equal* concerns about the two human lives involved in an abortion, and herein lays the distinction between these two views of human nature. As the dissenters argue:

Women, it is now acknowledged, have the talent, capacity, and right “to participate equally in the economic and social life of the Nation.” *Id.*[] at 856, 112 S. Ct. 2791. Their ability to realize their full potential, the Court recognized, is intimately connected to “their ability to control their reproductive lives.” *Ibid.* Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy [a concession that the privacy claim upon which *Roe* was based is no longer valid]; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature. *See, e.g.,* Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); *Law, Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002–1028 (1984).¹⁸⁶

But nowhere do the dissenters concede that the child whose life will be destroyed by the “reproductive choice” of the woman is valuable, let alone just as valuable. To go one step further, the dissenters dispute this when they assert:

The Court’s hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label “abortion doctor.” A fetus is described as an “unborn child,” and as a “baby”; second-trimester, previability abortions are referred to as “late-term”; and the reasoned medical judgments of highly trained doctors are dismissed as “preferences” motivated by “mere convenience.”¹⁸⁷

185. *Id.* at 1640 (Ginsburg, J., dissenting).

186. *Id.* at 1641.

187. *Id.* at 1650 (citations omitted).

While the dissenters express their disdain for the majority's use of terms such as those referring to physicians who perform abortions as "abortion doctors," it would follow from their objection that it would be just as pejorative to refer to cardiac specialists as "heart doctors," ophthalmologists as "eye doctors," and dermatologists as "skin doctors." But this escapes the critique of the dissenters who hold no quarter for those who challenge or question abortion "rights."

While the dissenters label the majority's decision "alarming" because it "refuses to take *Casey* and *Stenberg* seriously,"¹⁸⁸ I am puzzled by the fact that they express no alarm that any abortion, if successful, kills at least one human being most of the time (there are some abortions in which live children are delivered despite the attempt to destroy the life). Considering the relevant fact that *Roe* was decided in 1973, one might also think it is alarming that over forty million "legal" abortions have been conducted in the United States since the decision was issued.¹⁸⁹ Unfortunately and tragically, this disquieting fact has escaped the exacting scrutiny, let alone the acknowledgment, of many judges and abortion advocates since *Roe* was decided. Perhaps this is because judges and advocates get caught up in other issues that distract them from concentrating on this tragedy.

For example, in several instances the dissenters made the distinction between "pre-viable" and "post-viable" fetuses who are aborted.¹⁹⁰ The likely reason for this is that the "viability" distinction generates the impression that a "pre-viable" fetus is other than human because its life could not be sustained outside of the womb. However, with the advances in medical science and the ability to sustain human life by artificial means in a laboratory once the egg is fertilized (for example, *in vitro* techniques that sustain the embryo's life for years), this distinction retains little if any meaning. The dissenters also censured the majority for relying on certain medical evidence to support its position while ignoring other contradictory medical evidence where there is "division of medical opinion."¹⁹¹ However, one can and must question the "authorities" upon which the dissenters rely, including the denial by these experts that the aborted human is something other than human. In this context I am reminded of a statement attributed by Judge

188. *Id.* at 1641.

189. GUTTMACHER INSTITUTE, TRENDS IN ABORTION IN THE UNITED STATES, 1973–2005 (2008), <http://www.guttmacher.org/presentations/trends.pdf>.

190. *See Gonzales*, 127 S. Ct. at 1640, 1649–50 (Ginsburg, J., dissenting).

191. *Id.* at 1642–43, 1646–48.

Patricia Wald to the late Judge Harold Leventhal regarding the selective use of legislative history by judges in order to justify certain outcomes: making the choice of which history is to be used and which is not is akin to entering a crowded room at a cocktail party and surveying the gathered assembly in search of your friends.¹⁹² Once the survey of the room is complete, you go with your friends. In this case, those medical experts who consider the fetus something other than a human being would suit the objectives of the dissenters.

The dissenters also take to the judicial woodshed the members of the majority for failing to honor *stare decisis*. They do this in the context of their harsh criticism that the majority “dishonors our precedent” of *Casey*, et al.¹⁹³ While relying on *Lawrence v. Texas*,¹⁹⁴ they seem to forget that the majority there—which included the dissenters in *Gonzales*—displayed no concern for dishonoring the precedent of *Bowers v. Hardwick*, which was overruled with the stroke of a pen.¹⁹⁵ It may be that dishonor exists only in those cases where the precedent is to one’s

192. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

193. *Gonzales*, 127 S. Ct. at 1647 (Ginsburg, J., dissenting).

194. *Id.* at 1647–48. In spite of what some may think, it is not my intention nor is it my wish or purpose to objectify gay people. However, I must also be clear that I do not accept many of the current political and legal causes geared to advance “gay” rights, e.g., marriage. But it must be made extremely clear that I do not objectify them—for they share the same membership in the same human family that I and others claim. They are people; they are human beings; they have their rights, like any other, and they have their responsibilities, as well. I wish the same could be said for the newest and youngest members of our human family who have not yet achieved in the eyes of the law a parallel status. I hope (and, yes, pray) that one day soon they, too, shall share in this.

195. See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), wherein a majority of the Court, in a decision written by Justice Kennedy, stated, “Its continuance as precedent demeans the lives of homosexual persons.” Could it not also be said that the failure to overturn *Roe* demeans the lives of other persons—or at least, other human beings? In referring to the precedent of *Casey*, the Court in *Lawrence* said:

[W]e noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so.

Id. at 577 (citations omitted). From this, I gather that there is no compelling reason to stop the institutionalized and constitutionalized killing of young Americans whose total since 1973 is approaching fifty million and still climbing. Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. SEXUAL & REPROD. HEALTH 6, 9 (2008), available at <http://www.guttmacher.org/pubs/psrh/full/4000608.pdf>.

liking; however, when it is not, there is no need to follow precedent with exacting detail.¹⁹⁶

As previously mentioned, the dissenters have a fundamentally different perspective of human nature and the *res publicae* from that of this Author and what I believe were the views of the Framers. The Framers exercised a sensible understanding of the nature of the law that took account of facts within a principled and reasoned framework. They subscribed to self-evident truths about the human person—truths that included an understanding about equality, life, and the liberty of the human person.¹⁹⁷ The dissenters in *Gonzales*, however, substituted these self-evident truths regarding human nature with a popular but erroneous view that nascent human life does not merit the protection of the law that is founded on these self-evident truths.

Let me be clear about this point: nascent human life is not some “thing,” some group of undifferentiated cells, some entity that is, at best, “potential life.” It is real, it is alive, and it is human. Moreover, it ought not to be beyond the protection of the Constitution, and it ought not to be something that another human can eliminate with impunity in the exercise of her “liberty”—the liberty of *Casey* which is that “promise of the Constitution that there is a realm of personal liberty which the government may not enter.”¹⁹⁸ Had the Court plurality stopped

196. Professor Kim Buchanan has relied on *Lawrence* to develop another approach to the equality argument. Professor Buchanan develops a theory that mandates “that women enjoy rights to sexual autonomy equal to those of men.” Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1238 (2007). Consequently, state regulation of these rights, presumably including access to abortion, must meet a “stringent standard” if the regulation imposes “legal, social, financial, or health burdens on women’s sexual expression that are not imposed on that of men.” *Id.* In essence, *Lawrence*, in her estimation, restricts the limitations that *Geduldig* would impose on women’s rights. Otherwise, the state would have the ability to impose “crushing restraint” on the sexual expression of heterosexual women” who choose to abort their pregnancy. *Id.* at 1265.

197. In this context, see Lugosi, *supra* note 36, at 152 (citations omitted), where he states:

The legal grievances that led to the reasons for the American War of Independence offer hope that the United States is a nation founded upon the rule of law, and that at the root of the American Constitution is the objective truth that human beings and persons are one and the same, and are indistinguishable from one another. For it is only when there is harmony and proper alignment in the meanings of human being and person will our universe be free of discrimination and inequality which inevitably result so long as objective truth is ignored. If all of humanity is created equally at conception, and if each member of the human race has the inalienable right to life, liberty and the pursuit of happiness, there is no place in today’s brave new world for the extinguishing of embryonic and fetal life.

198. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992).

here, this dicta may not have become the enormous problem that exists today. But the Court did not stop there. The *Casey* plurality continued by declaring that this personal liberty is premised on something essential to it: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."¹⁹⁹ This characterization is not the ordered liberty that equally applies to all regardless of who they are. Rather it is the liberty of an exaggerated autonomy that can target, by abortion, the life of another human being without much, if any, consideration regarding its existence, its place in the universe, and its sharing in "the mystery of human life." But criticism of the majority opinion in *Gonzales* was not restricted to the opinion of the dissenters.

When *Gonzales* was decided, *The New York Times* published an editorial critiquing the majority and praising the dissenters.²⁰⁰ There is little doubt that the *Times* is a most influential journal having an extraordinary role in shaping public opinion. In its editorial, the *Times* asserted that *Gonzales* was about "a woman's right to make decisions about her health," and the majority's decision was fundamentally dishonest because it did not pay the proper deference to this important issue.²⁰¹ But the majority opinion was not primarily about "a woman's right," and it was most assuredly not dishonest, because it demonstrated that the abortion controversy is about much more than "a woman's right to make decisions about her health." As I stated earlier, abortion and the laws regulating it involve millions of young Americans whose lives were permitted to be terminated as the direct result of *Roe*. Like so many judges and advocates, the *Times* also failed to acknowledge the status of the target of abortion: a human being whose life is extinguished by the fictions on which *Roe* and its progeny rely—or as Justice White stated in his dissent in the companion case of *Doe v. Bolton*, "an exercise of raw judicial power."²⁰² When critics rely on the justification that the majority in *Gonzales* severely eroded legal reasoning and the rule of law, they might consider that it was, in fact, the majority opinion in *Roe* that should be the object of this critique.

199. *Id.* at 851.

200. See Editorial, *Denying the Right to Choose*, N.Y. TIMES, Apr.19, 2007, at A26.

201. *Id.*

202. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

Returning to the dissenters in *Gonzales*, they attempted to assert an objective and scientific basis for their concerns. As Justice Ginsburg argued in her critique of the majority,

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.²⁰³

Since the position of the American College of Obstetricians and Gynecologists (ACOG) had an influence on *Gonzales* dissenters,²⁰⁴ it would be useful to know precisely what were the positions and their accompanying justifications upon which Justice Ginsburg relied. At the outset, it is crucial to acknowledge that this association of physicians split hairs on what to call the procedures that were regulated by the Act of Congress; however, this exacting critique was not applied to the procedures themselves nor to their results—the destruction of a human life. The ACOG objected to the Act first of all on the grounds that the legislation “purports to ban so-called ‘partial-birth abortions;’ however, ‘partial-birth abortion’ is not a medical term and is not recognized in the field of medicine.”²⁰⁵ While their commentary on the nomenclature may be technically correct, the Act did accurately describe the methods by which the D&X or some D&E abortions are performed.²⁰⁶ Moreover, the Act's

203. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting).

204. *See id.*

205. News Release, Am. Coll. of Obstetricians & Gynecologists, ACOG Files Amicus Brief in *Gonzales v. Carhart* and *Gonzales v. PPFA* (Sept. 22, 2006), available at http://www.acog.org/from_home/publications/press_releases/nr09-22-06.cfm.

206. The applicable text of the Partial-Birth Abortion Ban Act of 2003 is codified at 18 U.S.C. § 1531 and states:

Partial-birth abortions prohibited (a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment. (b) As used in this section—(1) the term ‘partial-birth abortion’ means an abortion in which the person performing the abortion—(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the

description of the D&X procedure is consistent with that given to it by Martin Haskell, MD, the physician who developed the D&X methodology. In response to an interview question, "What led you to develop D&X?" Dr. Haskell stated,

I just kept doing D&Es because that was what I was comfortable with, up until 24 weeks. But they were very tough. Sometimes it was a 45-minute operation. I noticed that some of the later D&Es were very, very easy. So I asked myself why can't they all happen this way. You see the easy ones would have a foot length presentation, you'd reach up and grab the foot of the fetus, pull the fetus down and the head would hang up and then you would collapse the head and take it out. It was easy. At first, I would reach around trying to identify a lower extremity blindly with the tip of my instrument. I'd get it right about 30–50 percent of the time. Then I said, 'Well gee, if I just put the ultrasound up there I could see it all and I wouldn't have to feel around for it.' I did that and sure enough, I found it 99 percent of the time. Kind of serendipity.²⁰⁷

During the same interview when the doctor was asked, "Does it bother you that a second trimester fetus so closely resembles a baby?" the doctor responded,

I really don't think about it. I don't have a problem with believing the fetus is a fertilized egg. . . . It's never been an ethical dilemma for me. . . . My role is to provide a service and, to a limited degree, help women understand themselves when they make their decision. I'm not to tell them what's right or wrong.²⁰⁸

Returning to the position of the ACOG, the College states, The Act defines 'partial-birth abortion' in a way that encompasses a variation of dilatation and evacuation (D&E), the most common method of second-trimester abortion, in which the fetus remains intact as it is removed from the woman's uterus. The Act's definition also encompasses some D&E procedures in which the fetus is not removed intact.²⁰⁹

mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

18 U.S.C. § 1531(a), (b)(1) (2006).

207. *2nd Trimester Abortion: An Interview with W. Martin Haskell, MD*, CINCINNATI MED., Fall 1993, at 18, 19.

208. *Id.*

209. News Release, Am. Coll. of Obstetricians & Gynecologists, *supra* note 205. The ACOG statement continues by noting:

In spite of its protest over the name to be given the procedure regulated and prohibited by the Act, Congress's description of the prohibited procedures coincides with the explanation of it given by the College. However, another medical group, the American College of Pediatricians (ACP), has advanced a very different but important view about abortion that the dissenters either were not aware of or, if they were, did not mention in their opinion. Like the ACOG, the ACP is an association of physicians whose specialties focus on women and children; however, the views of each association stand in glaring contrast with one another.²¹⁰ However, it is significant to note that at one time the ACOG acknowledged, "[A] physician treating a pregnant woman in effect has two patients, the mother and the fetus, and should assess the risk and benefits attendant to each"²¹¹

The ACP has expressed the crucial medical view that *Roe*, however, "denied that a fetus might have interests equal to that of the mother."²¹² Unlike the dissenters, the ACP has

Over 95% of induced abortions in the second trimester are performed using the D&E method. The alternatives to D&E in the second trimester are abdominal surgery or induction abortion. Doctors rarely perform an abortion by abdominal surgery because doing so entails far greater risks to the woman. The induction method imposes serious risks to women with certain medical conditions and is entirely contraindicated for others.

The intact variant of D&E offers significant safety advantages over the non-intact method, including a reduced risk of catastrophic hemorrhage and life-threatening infection. These safety advantages are widely recognized by experts in the field of women's health, authoritative medical texts, peer-reviewed studies, and the nation's leading medical schools. ACOG has thus concluded that an intact D&E "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of the woman, and only the doctor in consultation with the patient, based on the woman's particular circumstances can make that decision." [ACOG Statement of Policy on Abortion (reaffirmed 2004)].

Id.

210. See American College of Pediatricians, About Us, <http://www.acpeds.org/?BISKIT=240661512&CONTEXT=cat&cat=10002> (last visited Jan. 30, 2009).

211. *In re A.C.*, 573 A.2d 1235, 1246 n.13 (D.C. Cir. 1990).

212. American College of Pediatricians, Termination of Pregnancy, <http://acpeds.org/index.cgi?CONTEXT=art&cat=10007&art=39> (last visited Jan. 30, 2009). An editor's note was attached as an addendum to this statement. In full it reads:

This statement is intended to answer an ethical question. How should pediatricians approach and manage a viable fetus who might be unintentionally or inadvertently delivered alive in a late-term abortion attempt? The ethical question of whether a legal right to an abortion implies a right to the termination (death) of the viable or near-term fetus is still important; but in the course of producing this statement, the legal question has been addressed in part. In August 2002, Congress passed and the President signed the "Born Alive Infants Protection Act." This new law extends the same protections to any infant born alive, including those survivors of an abortion procedure.

acknowledged the growth in medical science that has a major bearing on abortion jurisprudence and the medical knowledge upon which such jurisprudence *should* be based.²¹³ For example, the ACP has criticized the use of the term “viability,” which was key to *Roe*’s justification to legalize some abortions (i.e., a “balancing” of the respective interests in which the fetus’s “viability” was a factor).²¹⁴ In particular, the ACP emphasized that in a 1997 report, the American Medical Association (AMA) found:

Though the “Born Alive” law is a step in the right direction, it leaves unanswered the issue of the rights of the unborn. The pediatric community unfortunately has been influenced in policy development by personal perception of societal values and by existing civil law. Civil law cannot take the place of conscience or dictate moral norms. Societal standards must be characterized by a moral basis of respect for all and especially for the rights of the weakest and the most defenseless. The issue here is not viability but rather the inviolability of all human persons from conception to natural end. As pointed out by Paul Ramsey in 1975 (Ramsey P. Appendix, *Research on the Fetus*, National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, 1975), “The fetus is generally viable at all stages unless it is removed from its natural environment.” As we know, the limits of viability have undergone considerable change over the past 30 years and it is anticipated this change will continue. A court, society or the medical profession cannot define humanhood on the basis of such arbitrary measures.

Pediatricians must advocate for all children, not just for those determined “viable.” We should honor the advocacy proclaimed interestingly by the American Academy of Pediatrics in 1971, preceding *Roe v. Wade* by some thirteen months, to include pediatricians’ responsibility for the child from conception through young adulthood. We must uphold scientific integrity. We must speak out against further “sacrifice of the fetus.” The American College of Pediatricians shall not waiver from that commitment.

Id.

213. In a March 2004 paper, *When Human Life Begins*, the ACP developed these views. Here is the abstract of this paper:

The American College of Pediatricians concurs with the body of scientific evidence that human life begins at conception—fertilization. This definition has been expounded since prior to *Roe v. Wade*, but was not made available to the US Supreme Court in 1973. Scientific and medical discoveries over the past three decades have only verified and solidified this age-old truth. At the completion of the process of fertilization, the human creature emerges as a whole, genetically distinct, individuated zygotic living human organism, a member of the species *homo sapiens*, needing only the proper environment in order to grow and develop. The difference between the individual in its adult stage and in its zygotic stage is not one of personhood but of development. The Mission of the American College of Pediatricians is to enable all children to reach their optimal physical and emotional health and well-being from the moment of conception. This statement reviews some of the associated historical, ethical and philosophical issues.

American College of Pediatricians, *When Human Life Begins*, <http://acped.org/index.cgi?CONTEXT=art&cat=10007&art=53&BISKIT=2560078058> (last visited Jan. 30, 2009). It has been attached as an Appendix, with permission from the ACP, to this Essay.

214. *Id.*

Although third-trimester abortions can be performed to preserve the life or health of the mother, they are, in fact, generally not necessary for those purposes. Except in extraordinary circumstances, maternal health factors which demand termination of the pregnancy can be accommodated without sacrifice of the fetus, and the near certainty of the independent viability of the fetus argues for ending the pregnancy by appropriate delivery.²¹⁵

The ACP asserted that this development is relevant for pediatricians because it is vital to infants whose viability should not be an issue that remains in question or should lead to the destruction of the child's life.²¹⁶ That is why the AMA did not oppose the ending of the pregnancy, but this did not mean that the life of the child did not have to be terminated in the process of ending the pregnancy. The ACP further noted, "Refusing to take a stand in support of the infant requires denying, at minimum, a tradition spanning over thirty years, maintaining the pediatricians responsibility for the infant from conception. This indeed is a reason-for-being of the profession."²¹⁷ The ACP further indicated that the developments in neonatal medicine suggest that "termination of pregnancy does not automatically entail or imply termination of a fetus."²¹⁸ This appears to be consistent with the AMA statement to which I just referred. The ACP further argued that abortion of pre-viable fetuses can remain above suspicion. The ACP asserts:

Human life, irrespective of stage of development, or condition, is inviolable and worth pediatric defense despite some contrary societal opinion. We may, therefore, as pediatricians, accept a civil Court's definition of viable fetus to mean capable of meaningful life outside the womb, albeit with artificial aid, as determined by the physician. Yet, we understand that this concept of viability is in no way a reflection on the moral worth of the fetus, but rather reflects only the limitations of what medicine has to offer. All infants, before and after successful delivery, are dependent on support and care from others for their continued existence. As such, they are no less valued as persons.²¹⁹

215. American College of Pediatricians, *Termination of Pregnancy*, *supra* note 212 (citation omitted).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

Accordingly, the ACP has issued a number of recommendations relevant to the abortion debate—relevant in particular to the equality argument because they demonstrate in a convincing way that the meaning of equality is endangered unless the equality claimed by some can be claimed by all. These are:

1. In recognition of the constitutional principles regarding the right to an abortion articulated by the Supreme Court in *Roe v. Wade*, but with higher regard for the advance of science and the values of medicine, we recommend that elective abortions not be performed. Although some abortions are said to be performed to preserve the life of the mother, they are in fact, rarely necessary for those purposes. Maternal health factors that are said to demand termination of the pregnancy can also be accommodated without sacrifice of the fetus. When there is possibility of independent viability of the fetus, we argue for ending the pregnancy by appropriate delivery.
2. All pre-term deliveries should be done with the health and safety of both mother and infant in mind, and, whenever possible, with a second physician present to safeguard the life and health of the fetus.
3. Decisions regarding the provision of life-sustaining medical treatment for the newly born infant should then proceed as for any other infant or child.²²⁰

XII. CONCLUSION

So, what are we to conclude about justifications for abortion? We have witnessed a transformation in the rationales advanced for its legalization. At first, the proffered justification was the privacy argument that had its basis in *Griswold v. Connecticut*²²¹ and *Eisenstadt v. Baird*.²²² While the privacy argument worked in 1973 for *Roe*, it became unsustainable as more scrutinizing eyes considered what else could be protected from legal regulation through invocation of the privacy theory. Hence the legal

220. *Id.* (citations omitted).

221. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965), in which the Court declared that the right of privacy within the marital relationship allows the use of contraceptives in spite of state law.

222. See *Eisenstadt v. Baird*, 405 U.S. 438, 452–55 (1972), in which the Court declared, in following *Griswold*, that the privacy right inheres in the individual rather than the married couple, thereby prohibiting the state to interfere with the right to use contraceptives by unmarried persons.

rationale given to continue the right to abortion metamorphosed into the equality argument. But for any equality argument to be taken seriously in abortion jurisprudence, the rights and liberties of all reasonable claims to equality must be considered. Inevitably, this process necessitates consideration of the equality of the mother's interests along with those of the child she bears—each has claims to equality and other rights. But to allow the rights of the mother to always trump those of the child she bears will eventually undermine any claim to equality. To conclude otherwise is to enter into that problematic Orwellian dominion where all the animals in the barnyard are equal; however, as it turns out, some are more equal than others—and the futile efforts to enforce this exaggerated “equality” led to the demise of the premier claimants, the pigs. But if this problematic rationale (the equalities of some are more important than the equality of other claimants) is to be condoned, the important idea of equality is denied its meaning. This is amply demonstrated when the right to life—the first self-evident truth mentioned in the *Declaration of Independence*—is under attack. When lawyers, doctors, judges, and anyone else rely on the equality argument, it must retain the same essential meaning applicable to all who stand on reasonable grounds in making the claim.

But as we have seen, there can be, and in the context of abortion there is, a distortion in the practice of equality when the right to enjoy it is granted to some while denied to other fellow human beings. This kind of exercise in protecting equality is both false and dangerous; moreover, this is why the justifications for abortion access that rely on some kind of equality theory will fail. For any claim to equality to be authentic, sincere, and just, its content and practice must be reciprocal and mutual. And this is what the Framers intended.

APPENDIX A

LIFE ISSUES—WHEN HUMAN LIFE BEGINS^{*}

For hundreds of years physicians have pondered on the origin of human life. Aristotle's work on embryos is considered as the "beginning of the turning of man's mind away from superstition and conjecture, toward observation."¹

Even though Aristotle is generally regarded as the founder of the science of embryology, his work was actually preceded by that of Hippocrates in his writings about the development of the chick embryo. In the 15th century, Leonardo da Vinci published observations of embryonic and fetal development. In the following century, Marcello Malpighi, aided by the invention of the microscope, erroneously put forth the preformation theory of human development arising from the homunculus. It was the cell theory developed by Schleiden and Schwann in 1839 which recognized that a spermatozoon fuses with an oocyte and forms a zygote, the conception of a new human life.

For over thirty years pediatricians have been advocates for the child from conception.² Likewise, for over twenty years pediatricians have demanded the full recognition of the rights of the child before birth including "the right to be accepted by family and society, the right to be loved and cared for, and the right to grow and develop without environmental hazards or aggressions."³

Pediatricians assert the "inherent worth of all children," considering them as "our most enduring and vulnerable legacy,"⁴ and they affirm as their mission "to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents and young adults."⁵ For generations pediatricians

* The material in this Appendix is reprinted from the American College of Pediatricians' website and can be found in its entirety at Fred de Miranda, M.D., *When Human Life Begins*, Mar. 3, 2004, <http://www.acpeds.org/index.cgi?CONTEXT=art&cat=10007&art=53>.

1. Patten BM. *Embryology—Its Scope, Objectives, and Methods. Foundations of Embryology*. Chapter 1. McGraw-Hill (1964); p. 3.

2. Age Limits of Pediatrics. American Academy of Pediatrics. *PEDIATRICS* 1972;49(3):463. Revised 5/88 (note reference # 6 below). Reaffirmed 9/92, 1/97 and 3/02.

3. Preferred Images of the Future: Challenges for Planning the Future of the American Academy of Pediatrics. Reference No. 14. January 1981. Available from the AAP's Division of Library and Archival Services.

4. Core Values, Vision, and Mission Statement. *American Academy of Pediatrics* 2004.

5. *Ibid.*

have regarded the term “children” as inclusive of life from conception.⁶

In 1996, the American Academy of Pediatrics established as policy that it “supports diversity and equal opportunity and encourages the teaching of acceptance of diversity to children, it is opposed to discrimination in the care of any patient based on the race, ancestry, national origin, religion, gender, marital status, sexual orientation, age [underlined for emphasis], or disability of either the patient or the patient’s parents or guardians.”⁷ This pediatric organization encourages its members to follow this guideline consistently in the management of all patients. The definition of age, much like the use of the term “children,” had already been specifically addressed and affirmed in 1971.⁸ Therefore by logical inference, the policy of nondiscrimination extends to the unborn from conception.

In addition, it has been established as pediatric policy that a physician may consider “opposing the woman’s refusal of a recommended [fetal therapy] intervention” if “there is reasonable certainty that the fetus will suffer irrevocable and substantial harm without intervention” (as long as the intervention has been shown to be effective and the risk to the health and well-being of the pregnant woman is negligible).⁹

Approximately thirteen months following development of pediatric policy advocating responsibility for the child from conception, United States Supreme Court Justice Harry Blackmun, apparently unaware of these efforts, set in motion the legal challenge to unborn life by writing the majority opinion in *Roe v. Wade*.¹⁰ He wrote: “We need not resolve the difficult question of when life begins.” He referred to the “disciplines of medicine, philosophy and theology” as being “unable to arrive at any consensus.”¹¹ As, Professor Emeritus of Human Embryology of the University of Arizona School of Medicine, Dr. C. Ward Kischer stated: “Since 1973, when *Roe v. Wade* was adjudicated,

6. Age Limits of Pediatrics. American Academy of Pediatrics, *PEDIATRICS* 1988;81(5):736. Reaffirmed 9/92, 1/97 and 3/02.

7. Nondiscrimination in the Care of Pediatric Patients. American Academy of Pediatrics, *PEDIATRICS* 1996; 97(4):595.

8. Council on Child Health Revises Definition of Pediatrics as a Specialty. American Academy of Pediatrics. *Newsletter* 1971;22(18):5. Available from the AAP’s Division of Library and Archival Services.

9. Fetal Therapy – Ethical Considerations. American Academy of Pediatrics. *PEDIATRICS* 1999; 103(5):1061-1063.

10. Syllabus: *Roe v. Wade*, District Attorney of Dallas County. Supreme Court of the United States, No. 70-18. Decided January 22, 1973 in Kischer CW, *Linacre Quarterly* 2004, p. 331.

11. *Ibid*, p. 331.

there have been many socio-legal issues involving the human embryo. Abortion, partial-birth abortion, in vitro fertilization, fetal tissue research, human embryo research, [embryonic] stem cell research, cloning and genetic engineering are core issues of human embryology. Every one of these issues has been reduced to a question of when human life begins. And that question is as prominent in the public media today as it was when first posed in 1973.”¹²

The Supreme Court, in *Roe v. Wade*, denied personhood to the fetus due to its lack of “independent viability.” As stated by the Court: “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. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”¹³

The impetus behind the attempts to define human life based on viability was addressed by University of Wisconsin-Madison Professor of Ethics and Pediatrics Dr. Norm Fost, et al., in 1980. He stated, “Most attempts to define fetal viability are motivated by the need to predict the survival of the fetus in order to set policy in matters such as abortion, resuscitation, and intensive care.”¹⁴ An acceptance of a viability standard would imply one would cease to perform “the fetal therapies that have now emerged in the medical, surgical, and genetic fields offering hope of saving the lives of those suffering from pathologies which are either incurable or very difficult to treat after birth.”¹⁵ And as Dr. Fost further states, “If we define viability in light of what the most skillful physicians have been able to do, the time of viability will slip back inexorably toward conception.”¹⁶ In 1973, the presumed limit on viability was estimated at 28 weeks, an occasional infant surviving at 24 weeks. With the current technological advances, neonatologists report infants are surviving with few or any evident sequelae, as early as 22 weeks.

12. Kischer CW. When Does Human Life Begin? The Final Answer. *Linacre Quarterly* 2004;70(4):326-339.

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

14. Fost N, Chudwin D, Wikler D. *The Limited Moral Significance of Fetal Viability*. *Hasting Cent Rep* 1980;10(6):10-13.

15. Fetus as a Patient. *Discourse to the International Congress*. Pope John Paul II. April 3, 2000.

16. Fost N, et al. *Ibid*, p.13.

Adjudication of personhood based on viability raises the additional concern regarding sentience (state of elementary or undifferentiated consciousness). As Dr. Francis J. Beckwith, Associate Professor of Philosophy, Culture, and Law at Trinity International University, [now at Baylor] points out, “If sentience is the criterion for full humanness, then the reversibly comatose, the momentarily unconscious, and the sleeping would have to be declared non-persons.”¹⁷

All human persons are dependent on other persons and their environment (i.e., oxygen, food, warmth) for survival to varying degrees throughout the continuum of life—from fertilization until natural death. If one accepts viability (independent survival) as the standard, would not the physical dependence of the disabled or aged on family and/or society make for lives unworthy of life (Echoing the words *untermenschen*; *Lebens unwertenleben* suggested in the 1930s in Nazi Germany¹⁸)?

In the words of the ethicist Renée Mirkes: “At the completion of the process of fertilization when the male and female pronuclei of the human progenitors’ sperm and ovum are indistinguishable and lose their nuclear envelopes, the human creature emerges as a whole, genetically distinct, individuated zygotic human organism. This individuated human organism actually has the natural capacity for the person-defining activities of reasoning, willing, desiring, and relating to others. The human individual also possesses the actual, natural capacity to develop continuously into the mature (maximally differentiated) organism of a functional adult human being, the organic structural development of which is under the control of a sequence of primordial centers which begin with nuclear DNA or the genome, and eventually develops into the central nervous system, especially the fully developed brain with its cerebral cortex. . . The new zygote, a member of the species *homo sapiens*, with its particular (that is, genome-specific) bodily “matter” unified and organized, that is, formed or enlivened by means of its life principle—the soul and all of its person-defining natural powers—is a whole, living, human person. The difference between the individual in her adult stage and in her zygotic stage is not one of personhood but of development.”¹⁹

17. Beckwith FJ. *Arguments from Decisive Moments and Gradualism, In Politically Correct Death: Answering the Arguments for Abortion Rights*. Grand Rapids: Baker (1993); p. 103 in Sullivan DM. *Ethics & Medicine* 2003; p. 25.

18. Kischer CW. *Ibid*, p. 333.

19. Mirkes R. NBAC and Embryo Ethics. *The National Catholic Bioethics Quarterly* 2001;1(2):163-187.

Dr. Dennis M. Sullivan, Associate Professor of Biology at Cedarville University, concluded, "There are many forces driving a desire to redefine humanity. There are many apparent goods to be obtained, from the elimination of genetic defects to the cure of a whole host of diseases through embryonic stem cell manipulation. However, in all of our discussion about human nature, we must never succumb to the objectification or commodification of persons. We cannot allow the cold calculus of utilitarianism [to] influence our inherent, intrinsic understanding of who and what we are. . . . This age of moral confusion cries out for a reaffirmation of that which makes human beings unique and worthy. Such 'metaphysical pretensions' are not preposterous, as Ayn Rand would have us believe, but are the only basis for human dignity."²⁰

In 1975 The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research recommended that: the fetus, a human subject, is deserving of care and respect; that moral concern should extend to all who share human genetic heritage; and that the fetus, regardless of life prospects, should be treated respectfully and with dignity.²¹ As Dr. Kischer notes: "Virtually every human embryologist and every major textbook of human embryology states that fertilization marks the beginning of the life of the new individual human being."²²

The American College of Pediatricians concurs with the body of scientific evidence that human life begins at conception—fertilization. This definition has been expounded since prior to *Roe v. Wade*, but was not made available to the US Supreme Court in 1973. Scientific and medical discoveries over the past three decades have only verified and solidified this age-old truth.

20. Sullivan DM. The Conception View of Personhood: A Review. *Ethics & Medicine* 2003;19(1):11-33.

21. Report and Recommendations. Research on the Fetus. The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. US Dept of Health, Education, and Welfare Publication No. (OS) 76-127. 1975.

22. Kischer CW. *Ibid*, p. 328.

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APPENDIX B

ABOUT US—CORE VALUES OF THE COLLEGE*

The American College of Pediatricians:

1. Recognizes that there are absolutes and scientific truths that transcend relative social considerations of the day.
2. Recognizes that good medical science cannot exist in a moral vacuum and pledges to promote such science.
3. Recognizes the fundamental mother-father family unit, within the context of marriage, to be the optimal setting for the development and nurturing of children and pledges to promote this unit.
4. Recognizes the unique value of every human life from the time of conception to natural death and pledges to promote research and clinical practice that provides for the healthiest outcome of the child from conception to adulthood.
5. Recognizes the essential role parents play in encouraging and correcting the child and pledges to protect and promote this role.
6. Recognizes the physical and emotional benefits of sexual abstinence until marriage and pledges to promote this behavior as the ideal for adolescence.
7. Recognizes that health professionals caring for children must maintain high ethical and scientific standards and pledges to promote such practice.
8. Recognizes the vital role the College has in promoting quality education for parents, physicians, and other health professionals.

* The material in Appendix B is reprinted from the American College of Pediatricians' website and can be found in its entirety at About Us, Core Values of the College, <http://www.acpeds.org/index.cgi?BISKIT=6792&CONTEXT=art&art=8> (last visited Jan. 30, 2009).
