

## Pro [Whose?] Choice: How the Growing Recognition of a Fetus' Right to Life Takes the Constitutionality out of *Roe*

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If this suggestion of personhood is established, the [case for abortion rights] of course, collapses, for the fetus' right to life is then guaranteed specifically by the [Fourteenth] Amendment.<sup>1</sup>

### INTRODUCTION

*Roe v. Wade*'s<sup>2</sup> granting of constitutional protection for the right to terminate an unwanted pregnancy was, in many ways, just the beginning of the true abortion rights debate.<sup>3</sup> The rights of the unborn are a main issue in this debate—mainly whether they have rights as a human person that could protect their lives from ending before birth. While the Court has since declined to officially and fully address the issue, there is a growing recognition of the personhood of the unborn child both from a medical<sup>4</sup> and social<sup>5</sup> standpoint. One cannot help but wonder what impact the expanding recognition of fetal rights will have on the already shaky future of *Roe*.

This Comment will argue that recent trends in legislation and modern scientific development call for the fulfillment of *Roe*'s own acknowledgement that the right to life will “collapse” the right to an abortion. Part I lays out the history of abortion

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113, 156–57 (1973).

<sup>2</sup> *Id.* at 113.

<sup>3</sup> Amy Lotierzo, *The Unborn Child, a Forgotten Interest: Reexamining Roe in Light of Increased Recognition of Fetal Rights*, 79 TEMP. L. REV. 279, 279 (2006) (pointing out that it was the landmark decision that spurred the “increasing recognition and expansion of the rights of unborn children in the various areas of the law”).

<sup>4</sup> See Robert L. Stenger, *Embryos, Fetuses, and Babies: Treated as Persons and Treated with Respect*, 2 J. HEALTH & BIOMEDICAL L. 33, 38 (2006) (showing how modern advances in the medical and scientific fields have led to conclusory evidence that human life is present from first existence).

<sup>5</sup> This Comment uses state and federal laws that give rights to the unborn to gauge the current societal values. See *infra* note 81.

jurisprudence, from the cases predating *Roe*, the *Roe* decision itself, and finally the cases following *Roe*. Part II establishes the widespread acceptance of fetal humanity and rights in both science and law, as well as the likelihood that abortion jurisprudence is ripe for upheaval. Part III then calls attention to the unavoidable competing interests of mother and child which the Court must address, as well as preliminary solutions anticipated by others. Part IV concludes that, when weighing these conflicting interests, the right to life must prevail over the right to an abortion.<sup>6</sup>

### I. HISTORY: *ROE V. WADE* AND ITS PROGENY

#### A. The Road to *Roe*

Historically, the road leading to the Court's landmark decisions in *Roe v. Wade*<sup>7</sup> and *Doe v. Bolton*<sup>8</sup> was built upon the Fourteenth Amendment's right of privacy.<sup>9</sup> Eight years before *Roe* officially constitutionalized the practice of abortion, the Court extended the right of privacy to the use of contraceptives by married couples in *Griswold v. Connecticut*.<sup>10</sup> This decision marked the first time the Court expanded this right to reproductive decisions.<sup>11</sup> The Court defended the right of privacy within the context of a private activity between spouses within their home, but never addressed practices independent of marriage or outside the home.<sup>12</sup>

The leap from scrutinizing contraceptive restrictions to abortion laws came six years later when the Court addressed a statute that criminalized abortions unless it was "necessary for

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<sup>6</sup> It is important to understand at the outset that this Comment discusses the conflicting interests of the right to life versus the right of liberty associated with abortion, as opposed to the conflicting rights to live arising from potentially-fatal pregnancies. Because the right to abortion is currently based on the liberty-over-life reasoning, the latter "self-defense" argument is a topic best reserved for another day. It should also be noted that a statute with an exception to save the woman's life was precisely the type of law struck down in *Roe*. See *infra* note 189.

<sup>7</sup> 410 U.S. 113 (1973).

<sup>8</sup> 410 U.S. 179 (1973).

<sup>9</sup> Martin Rhonheimer, *Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy*, 43 AM. J. JURIS. 135, 157 (1998). The concept of a constitutional right of privacy was first introduced in a Harvard Law Review article by Samuel Warren and Louis Brandeis, where it was suggested that "each individual had the right to choose to share or not to share with others information about his or her 'private life, habits, acts, and relations.'" Dorothy J. Glancy, *The Invention of the Right of Privacy*, 21 ARIZ. L. REV. 1, 2 (1979) (quoting Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

<sup>10</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* The Court called the invasion of privacy "repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 486.

the preservation of the mother's life or health."<sup>13</sup> In *United States v. Vuitch*, the Court held that a District of Columbia statute was not vague and broadened permissible abortions by expanding the term "health" to include both physical and psychological well-being.<sup>14</sup> The majority did not delve into a privacy rights analysis for this particular statute.<sup>15</sup> However, Justice Douglas' dissent suggested that a "compelling personal interest in marital privacy" also included "the limitation of family size," thus giving the *Griswold* holding a new possible application.<sup>16</sup>

While a decision in *Roe* was pending, the Court briefly turned back to contraceptive restrictions in *Eisenstadt v. Baird* and expanded *Griswold* to include the use of contraceptives by unmarried individuals.<sup>17</sup> *Eisenstadt* was also significant for abortion rights, as the Court laid groundwork for extending the right of privacy from simply *preventing* a pregnancy to *terminating* a pregnancy by asserting that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>18</sup>

Building on these principles, the Court delivered its decisions in *Roe v. Wade* and *Doe v. Bolton* in 1973. In this pair of cases handed down on the same day, the Court granted constitutional protection for abortions and rejected the notion of an unborn child's status as a person under the Fourteenth Amendment, and hence, its right to life.<sup>19</sup>

## B. The Landmark Decisions: Constitutional Right of Abortion Solidified

*Roe v. Wade* and *Doe v. Bolton* arose out of state statutes that, similar to the one upheld in *Vuitch* and found in the majority of the states, prohibited abortions except in situations

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<sup>13</sup> *United States v. Vuitch*, 402 U.S. 62, 68 (1971).

<sup>14</sup> *Id.* at 72; Karen J. Lewis, *Abortion: Judicial Control*, in *ABORTION-MURDER OR MERCY?: ANALYSIS AND BIBLIOGRAPHY 1, 2* (Francois B. Gerard ed., 2001).

<sup>15</sup> *Vuitch*, 402 U.S. at 73.

<sup>16</sup> *Id.* at 78 (Douglas, J., dissenting).

<sup>17</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972). The Court acknowledged that the *Griswold* holding was based on the state having no business to enter into the sacred marital relationship, but nevertheless deemed this right to be inherent in individuals as well. *Id.* at 453.

<sup>18</sup> *Id.* (emphasis omitted).

<sup>19</sup> *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Doe v. Bolton*, 410 U.S. 179, 201 (1973).

where it was necessary to save the mother's life.<sup>20</sup> In a 7–2 vote, the *Roe* Court invalidated the statute and held that the “right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . [or] in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”<sup>21</sup> Thus, the constitutional right to an abortion was established.

But what about the constitutional right to life? The competing interest of fetal life turned on the Court's decision as to whether the fetus was a person and therefore also had protection under the Fourteenth Amendment.<sup>22</sup> One might expect that the right to live becomes inherent once that life begins. However, Justice Blackmun specifically declined to address the issue, writing that the absence of a consensus in scientific and sociological ideology meant that the Court “need not resolve the difficult question of when life begins.”<sup>23</sup> Instead, the Court simply held that the use of the word “person” within the Fourteenth Amendment referred to only post-birth.<sup>24</sup> As such, any interest in the protection of the fetus could not be considered compelling enough to legitimize restrictions through the entire pregnancy.<sup>25</sup>

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<sup>20</sup> *Roe*, 410 U.S. at 117–118; *Doe*, 410 U.S. at 182–83 n.4. *Roe* was a challenge to a Texas statute that made it a crime to “procure an abortion” at any stage of pregnancy, subject to up to five years in prison with an exception only to save the mother's life. *Roe*, 410 U.S. at 117 n.1. The class action lawsuit was spearheaded by a pregnant single woman, Jane Roe, along with her physician, James Hubert Hallford, who asserted that the statute was unconstitutionally vague and infringed upon the woman's individual right of privacy under the First, Fourth, Fifth, Ninth and Fourteenth Amendments. *Id.* at 120. *Doe* was a challenge to a similar Georgia statute, distinguishable from *Roe* in that it provided for more exceptions—serious threats to the mother's health, likely grave birth defects, and pregnancies resulting from rape—and proscribed a sentence of up to ten years. *Doe*, 410 U.S. at 183.

<sup>21</sup> *Roe*, 410 U.S. at 153.

<sup>22</sup> *See id.* at 156–57.

<sup>23</sup> *Id.* at 159. One scholar has pointed out that just a few pages later, Justice Blackmun referred to the unborn child as “the *potentiality* of human life,” thereby indicating that a judgment call was in fact made as to whether the unborn was “human.” Michelle Haynes, *Inner Turmoil: Redefining the Individual and the Conflict of Rights Between Woman and Fetus Created by the Prenatal Protection Act*, 11 TEX. WESLEYAN L. REV. 131, 135 (2004) (quoting *Roe*, 410 U.S. at 162 (emphasis added)).

<sup>24</sup> Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death*, 48 ST. LOUIS U. L. J. 425, 431 (2004). Rather than rely on information provided by the Defense regarding fetal development, the Court declined to find a clear definition of “person” within the Constitution. Instead, the Court focused on the Constitution's use of the word “citizen” which referenced a postnatal state. Despite the fact that “person,” not “citizen,” was used in the Fourteenth Amendment, and despite the fact that state statutes expressly defined unborn children as human beings, the Court held that the unborn child had no rights under the Fourteenth Amendment. *Id.*; *Roe v. Wade*, 410 U.S. 113, 157–58 (1973).

<sup>25</sup> *Roe*, 410 U.S. at 162.

While the unborn child could not assert any rights, the Court recognized that this newly-established “fundamental right” to an abortion was qualified and therefore subject to possible restrictions that served a compelling state interest.<sup>26</sup> The Court again refused to use the beginning of life as a threshold and instead held that any state interest in preserving the life of the unborn would not be sustained until the fetus reached the point of what Justice Blackmun called “viability”—when the child could “live outside the mother’s womb and ultimately function as a contributing member of society.”<sup>27</sup>

Although science at that time was unclear as to when “viability” began, the Court set standards based on “present medical knowledge” of the trimester progress of the pregnancy and declared that viability was reached only after the first trimester.<sup>28</sup> Within the first trimester, no state interference was permissible; any decision to abort the pregnancy was left to the mother and her physician.<sup>29</sup> In the second trimester, the state may begin to assert regulations, but only if reasonably related to the mother’s physical well-being.<sup>30</sup> Even into the third trimester when the state interest becomes compelling, any regulations must contain an exception “to preserve the life or health of the mother.”<sup>31</sup>

Significantly, however, the Court left the door open to revisit the issue upon more scientific evidence as to the personhood of the fetus, stating that “[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”<sup>32</sup> Moreover, the Court stated that if the personhood of the fetus were established, the case for abortion

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<sup>26</sup> *Id.* at 154; Lugosi, *supra* note 24, at 431–32. Because the unborn child had just been deemed a non-person, the compelling state interest was in the protection of “potential life.” See Michael S. Robbins, *The Fetal Protection Act: Redefining “Person” for the Purposes of Arkansas’ Criminal Homicide Statutes*, 54 ARK. L. REV. 75, 85 (2001).

<sup>27</sup> Robbins, *supra* note 26, at 85; Lewis, *supra* note 14, at 4.

<sup>28</sup> *Roe*, 410 U.S. at 163.

<sup>29</sup> *Id.*; Lugosi, *supra* note 24, at 432.

<sup>30</sup> *Roe*, 410 U.S. at 163; Haynes, *supra* note 23, at 135–36.

<sup>31</sup> Lugosi, *supra* note 24, at 432 (quoting *Roe v. Wade*, 410 U.S. 113, 163–64). As will be shown in the concurrent opinion of *Doe v. Bolton*, to preserve the “health” of the mother means “all factors, physical, emotional, psychological, familial, and the woman’s age.” *Doe v. Bolton*, 410 U.S. 179, 192 (1973). See *infra* note 35 for further analysis of the combined holdings.

<sup>32</sup> *Roe*, 410 U.S. at 159. The modern consensus of these areas is discussed in Part II, *infra*.

rights “of course, collapses, for *the fetus’ right to life is then guaranteed* specifically by the [Fourteenth] Amendment.”<sup>33</sup>

In *Doe v. Bolton*, the Court built upon *Roe’s* newly-founded principles and expanded *Vuitch* to define “health” as including “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”<sup>34</sup> The significance of this holding is that states were now severely limited in establishing any compelling interest in restricting *Roe’s* constitutional right.<sup>35</sup>

### C. The Aftermath: Regret and Calls for a Re-Visitation

In the decades that followed *Roe* and *Doe*, the Court continued to expand abortion rights based on the unquestioned principles of the right of privacy and non-person fetal character. These expansions included striking down requirements of spousal or parental notification,<sup>36</sup> scrutinizing attempts to restrict public funding for non-therapeutic abortions<sup>37</sup> and narrowing the requirements for informed consent.<sup>38</sup> Within a few years, the Court again addressed the viability issue, reiterating

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<sup>33</sup> *Id.* at 156–57 (emphasis added). The fulfillment of this acknowledgement or “promise” by the *Roe* Court is discussed further in Part IV, *infra*.

<sup>34</sup> *Doe*, 410 U.S. 179, 192.

<sup>35</sup> JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 695 (2006). Many states had restricted abortions to that which was necessary to preserve the health of the mother, with the intent that abortions be permitted only in life-or-death situations. With *Doe* giving “health” such an expansive definition, such statutes were now unconstitutional. Instead, a woman was entitled to what scholars have called “abortion on demand.” FRANCIS J. BECKWITH, DEFENDING LIFE: A MORAL AND LEGAL CASE AGAINST ABORTION CHOICE 20 (2007).

<sup>36</sup> See *Planned Parenthood v. Danforth* 428 U.S. 52, 69, 74–75 (1976) (holding that a married woman need not secure her husband’s consent to get an abortion as this would constitute an unconstitutional veto power of a third party; likewise, a minor need not secure consent of a parent to get an abortion); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (affirming *Danforth’s* invalidation of blanket parental consent requirements); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 441–42 (1983) (affirming *Danforth* and *Bellotti*). But see *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 492–94 (1983) (approving a parental consent statute because it contained a provision for judicial bypass).

<sup>37</sup> *Beal v. Doe*, 432 U.S. 438, 443–47 (1977); *Maher v. Roe*, 432 U.S. 464, 470 (1977); see also *Harris v. McRae*, 448 U.S. 297, 302, 322 (1980) (upholding the Hyde Amendment, which placed a limit on federal funding for abortions through HHS programs such as Medicaid to cases where an abortion would be necessary to save the woman’s life, when pregnancy has resulted from rape or incest, or situations where the pregnancy caused the woman “severe and long-lasting physical health damage”).

<sup>38</sup> See *City of Akron*, 462 U.S. at 450 (invalidating a 24-hour waiting period after consent); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759–60 (1986) (striking down an informed consent statute that provided for disclosure of fetal development, possible psychological side effects and alternatives to the procedure on the grounds that this information might discourage the patient).

that the health of the woman would always prevail over the life of the unborn child.<sup>39</sup>

Even in affirming *Roe* and *Doe*, the holding and reasoning began to be questioned by the Court itself. A decade after *Roe*, medical technology had advanced enough to detect “viability” as early as twenty weeks.<sup>40</sup> As a result, in *City of Akron v. Akron Center for Reproductive Health*,<sup>41</sup> three Justices—O’Connor, White and Rehnquist—voted to discard the use of *Roe* as a precedent. Justice O’Connor criticized the trimester framework as “completely unworkable” because the stages of pregnancy would always “differ according to the level of medical technology available.”<sup>42</sup>

Another significant criticism of *Roe* arose in *Thornburgh v. American College of Obstetricians & Gynecologists*.<sup>43</sup> Chief Justice Burger, who had concurred in *Roe*, now filed a dissenting opinion in which he called for its reexamination.<sup>44</sup> Chief Justice Burger expressed his regret that the concerns listed in the *Roe* dissents—endorsement of “abortion on demand” and the invalidation of any interest to protect fetal life—had now become an unwanted reality.<sup>45</sup> Justice White attacked *Roe*’s illogical viability standard, pointing out that “the State’s interest, if compelling after viability, is equally compelling before viability.”<sup>46</sup> Justice Stevens, though concurring in the majority opinion, took the opportunity to explain further that the right to

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<sup>39</sup> *Colautti v. Franklin*, 439 U.S. 379, 386–87 (1979). In *Colautti*, the Court considered whether to uphold a statute that required physicians to “preserve the life and health of the fetus [as though it were] intended to be born and not aborted” when the fetus is viable or if there is “sufficient reason to believe that the fetus may be viable.” *Id.* at 380–81 n.1. The Court found the statute was unconstitutionally vague because the term “may be viable” was not distinguishable from *Roe*’s definition of “viability.” *Id.* at 390. It also reaffirmed that the health of the woman must always prevail over the life of the fetus. *Id.* at 400–01.

<sup>40</sup> BECKWITH, *supra* note 35, at 20. *Roe* had declared viability occurring only after twenty-four to twenty-eight weeks. *Id.*

<sup>41</sup> *City of Akron*, 462 U.S. 416, 418. Here, the majority acted characteristically in striking down an ordinance that required all second-trimester abortions to be performed in a hospital because it failed to serve the state’s interest of protecting the woman’s health. *Id.* at 449–52.

<sup>42</sup> *Id.* at 452, 454 (O’Connor, J., dissenting). Justice O’Connor went so far as to admit that if viability kept getting pushed back all the way to conception, the right to have an abortion would disappear. BECKWITH, *supra* note 35, at 20.

<sup>43</sup> *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). Here, the Court invalidated a statute requiring physicians to disclose alternative procedures, fetal development and possible psychological side-effects when obtaining informed consent and called for a second physician to be present in situations where the fetus might survive. *Id.* at 759–64.

<sup>44</sup> *Id.* at 785 (Burger, C.J., dissenting).

<sup>45</sup> *Id.* at 783–84 (Burger, C.J., dissenting).

<sup>46</sup> *Id.* at 795 (White, J., dissenting).

life would trump the right to abortion in all states if the personhood of a fetus were to be recognized, stating:

[I]ndeed, if there is not such a difference [between a child and a fetus], the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures. And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection—even though the fetus represents one of “those who will be citizens”—it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences.<sup>47</sup>

This logical reasoning seems to have resonated when the Court found itself addressing the viability issue again only a few years later in *Webster v. Reproductive Health Services*.<sup>48</sup> The Court adopted the *City of Akron* and *Thornburgh* dissents in admitting that its constitutional construction of *Roe*'s trimester system was “unsound in principle and unworkable” and thus *stare decisis* should not be invoked to uphold it.<sup>49</sup>

The Court stopped short, however, of overruling *Roe*.<sup>50</sup> In admonishing the majority for failing to do so, Justice Scalia pointed out that *Roe* itself precluded any state from attempting to enact an identical statute, and therefore *Roe* would only ever

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<sup>47</sup> *Id.* at 779 (Stevens, J., concurring) (internal footnotes omitted).

<sup>48</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Here, the preamble to the challenged Missouri statute provided that the State recognized human life from conception and therefore all unborn children had rights as full citizens. MO. REV. STAT. § 1.205 (2000). Though this was contrary to its characterization of the fetus in *Roe*, the Court declined to determine the constitutionality of the preamble on the grounds that it did not in itself place regulations on abortion. *Webster*, 492 U.S. at 506. The Court asserted that it would place “no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.” *Id.* (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

<sup>49</sup> *Webster*, 492 U.S. at 518. According to the Court, the “rigid *Roe* framework” of trimesters and viability was inconsistent with the Constitution’s general terms and principles. The resulting effect of *Roe* was therefore a “web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.” *Id.* The Court also echoed Justice White’s dissent in *Thornburgh* by stating “we do not see why the State’s interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.” *Id.* at 519.

<sup>50</sup> BECKWITH, *supra* note 35, at 33. The reason cited by the Court was that the differing facts of the two cases made a complete reversal inappropriate: in *Roe*, the Court was considering a Texas statute that criminalized all abortions, while in the present case Missouri had merely determined that potential human life must be safeguarded at viability. *Webster*, 492 U.S. at 521.

“be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.”<sup>51</sup>

One of these disassembled “doorjamb” came with *Planned Parenthood v. Casey*.<sup>52</sup> The plurality opinion rejected *Webster’s* outlook on *stare decisis* and announced that *Roe* was not “unworkable” despite its “engendered disapproval” and thus upheld *Roe’s* viability standard.<sup>53</sup> Yet, its refusal to overturn *Roe* was based solely on “precedential force” rather than the “soundness of *Roe’s* resolution of the issue;” the *Casey* opinion never affirmed that *Roe* was a correct constitutional interpretation.<sup>54</sup> Such an omission subtly, but quite tellingly, distances the Court from *Roe’s* reasoning and provides evidence of its recognition of the landmark decision’s flaws.

Most significant to abortion jurisprudence applicability, the *Casey* Court did not label abortion as a “fundamental” right.<sup>55</sup> Instead, the Court acknowledged that *Roe’s* progeny had vastly ignored the state’s legitimate interest in protecting potential life because the rigid trimester framework made it nearly impossible for any regulation to be imposed within the first twelve weeks of pregnancy.<sup>56</sup> The Court attempted to repair this flaw by replacing *Roe’s* strict scrutiny standard with an “undue burden” test.<sup>57</sup> This new standard permits states to enact regulations with the “purpose or effect” to protect potential life insofar as it does not place a “substantial obstacle in the path of a woman’s choice.”<sup>58</sup> As a result, state regulations are more likely to pass scrutiny.<sup>59</sup>

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<sup>51</sup> *Webster*, 492 U.S. at 537 (Scalia, J., concurring).

<sup>52</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Court evaluated the constitutionality of a Pennsylvania Act with the usual categories of restrictions: informed consent, parental approval and spousal notification. 18 PA. CONS. STAT. §§ 3203–3209 (2000). The Court upheld four of the five provisions in the Act and struck down the spousal notification requirement. BECKWITH, *supra* note 35, at 33.

<sup>53</sup> *Casey*, 505 U.S. at 860–61. Interestingly, this joint opinion included Justice Kennedy, who had just three years prior joined Chief Justice Rehnquist’s *Webster* opinion that asserted exactly the opposite. *Webster*, 492 U.S. at 496. After outlining the ramifications of overturning such a landmark decision, the *Casey* Court admitted that its decision was in part due to the fear that such an overruling would cause a loss of confidence in the Judiciary. *Casey*, 505 U.S. at 867.

<sup>54</sup> *Casey*, 505 U.S. at 871; PAUL BENJAMIN LINTON, ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS 6–7 n.13 (2008).

<sup>55</sup> LINTON, *supra* note 54, at 6 n.13.

<sup>56</sup> *Casey*, 505 U.S. at 872. The Court pointed to *Thornburg* and *City of Akron* as examples. *Id.*

<sup>57</sup> BECKWITH, *supra* note 35, at 33–34; Lewis, *supra* note 14, at 14.

<sup>58</sup> *Casey*, 505 U.S. at 877. See also *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (modifying the two-pronged *Casey* test of “purpose or effect” to just “effect”).

<sup>59</sup> Lewis, *supra* note 14, at 14. The Court further elaborated that a state’s interest in protecting the unborn meant that it could enact rules to ensure that the woman was fully informed of her options. Under this standard, a state may even enforce measures to

*Casey's* first major application by the Court was in *Stenberg v. Carhart*.<sup>60</sup> Here, the Court struck down a partial-birth abortion ban on the grounds that it placed an undue burden in the woman's path to getting the abortion.<sup>61</sup> Because this procedure, known as Dilation and Extraction ("D&X"),<sup>62</sup> could be performed pre-viability,<sup>63</sup> and because the language of the statute could be confused for a permissible pre and post-viability procedure called Dilation and Evacuation ("D&E"),<sup>64</sup> the Court found that the statute posed an undue, and thus unconstitutional, burden.<sup>65</sup> The Court ignored the obvious viability issue, even though the child would have survived out of the womb *had the doctor not killed her* before delivery was complete.<sup>66</sup>

In response to *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act of 2003, which remedied the flaws in the Nebraska statute by clearly describing the procedure so as not to be confused with D&E.<sup>67</sup> Congress also provided an exception to

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persuade a woman to choose childbirth over abortion. This includes philosophic and social arguments, even during the first trimester. *Casey*, 505 U.S. 872–73, 878.

<sup>60</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>61</sup> *Id.* at 929–30. The Nebraska statute at issue restricted the practice of the partial delivery of "a living unborn child before killing the unborn child and completing delivery." NEB. REV. STAT. ANN. § 28-326(9) (LexisNexis 2008). The Court also invalidated the statute because it made an exception only to *save the life* of the mother, rather than the *Casey*-required exception to *promote the health* of the mother. *Stenberg*, 530 U.S. at 930.

<sup>62</sup> The D&X procedure, also known as "intact D&E," is accomplished by the physician first dilating the woman's cervix and then using forceps to rotate the child to the breach position and pull the legs, body and arms through the cervix and vagina. Once the head is visible and lodged in the cervix, the physician forces scissors into the base of the skull and makes a large opening, in which he inserts a suction catheter to suck out the child's brains and collapse the skull. Once all contents of the brain are sucked out, the physician completes delivery by pulling out the emptied head. The partially-born child has been observed clasping her fingers and kicking her feet until the physician begins to use the suction tube, at which point the body goes limp. *Gonzales v. Carhart*, 550 U.S. 124, 137–39 (2007).

<sup>63</sup> Even the Plaintiff physician admitted that the D&X procedure would never be attempted before the sixteenth week but instead was actually intended for later-term pregnancies. *Stenberg*, 530 U.S. at 927–28.

<sup>64</sup> The D&E procedure consists of the physician first dilating the woman's cervix and then inserting forceps, which are used to grab the unborn child and pull it through the cervix and vagina. In the process, the friction of the forceps causes the child to be torn apart, and the physician removes the body piece by piece until completely removed. It typically takes the physician 10–15 passes to remove all pieces of the dismembered body. *Gonzales*, 550 U.S. at 135–36.

<sup>65</sup> *Stenberg*, 530 U.S. at 938–40.

<sup>66</sup> The separate dissenting opinions of Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas, however, did not let the issue slide. Each found that the very description of the procedure itself lent to an undisputable finding of protectable life and suggest how close the Court had been to overturning *Roe*. *Stenberg*, 530 U.S. at 952 (Rehnquist, C.J., dissenting); *Id.* at 953–56 (Scalia, J., dissenting); *Id.* at 956–79 (Kennedy, J., dissenting); *Id.* at 980–1020 (Thomas, J., dissenting).

<sup>67</sup> 18 U.S.C. § 1531 (2006).

save the mother's life<sup>68</sup> and, unlike the state legislature, successfully cited findings that the procedure would never be medically necessary to preserve the woman's health.<sup>69</sup> Thus, when challenged in *Gonzales v. Carhart*, the Court was obliged to find the undue burden in *Stenberg* remedied and upheld the ban.<sup>70</sup> In addition to making strides towards protecting the unborn child, *Gonzales* also disassembled another *Roe* "doorjamb" by accepting the absence of a health exception.<sup>71</sup> The Court found the exception to save the mother's life sufficient, even though it essentially requires the woman to go to court first.<sup>72</sup> This is a far cry from *Roe*'s establishment of abortion on demand.<sup>73</sup> While concurring in the majority, Justice Thomas—joined by Justice Scalia—reiterated that "the Court's abortion jurisprudence, including *Casey* and *Roe* . . . has no basis in the Constitution."<sup>74</sup>

It is apparent that the abortion issue is as ripe as it has ever been. *Casey* has re-opened the door to fetal rights, and *Roe* itself admitted that the legal status of abortion rights should change upon a better understanding of "when life begins."<sup>75</sup> Thus, an understanding of today's scientific progress and the state's acceptance of the unborn child's personhood has a profound impact on the abortion issue.<sup>76</sup> With the trend moving toward recognition of fetal humanity, a fundamental issue arises which cannot be ignored in an inevitable reevaluation of *Roe*: does a woman's right to privacy truly outweigh a child's right to live?<sup>77</sup>

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<sup>68</sup> 18 U.S.C. § 1531(a) (2006) (stating that the prohibition on the procedure "does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered").

<sup>69</sup> Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(13), 117 Stat. 1201 (2003).

<sup>70</sup> *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

<sup>71</sup> *Id.* at 161-65.

<sup>72</sup> 18 U.S.C. § 1531(d)(1) (2006); *Gonzales*, 550 U.S. at 168.

<sup>73</sup> See *supra* note 35 and accompanying text.

<sup>74</sup> *Gonzales*, 550 U.S. at 169 (Thomas, J., concurring).

<sup>75</sup> *Roe v. Wade*, 410 U.S. 113, 159 (1973); Lugosi, *supra* note 24, at 437 (arguing that *Casey* "suggest[s] that it is time to think 'outside the box' and directly answer two questions: whether, as a matter of law, the unborn are living human beings and whether the law should confer constitutional personhood on unborn human beings from the time of conception until the time of natural death").

<sup>76</sup> The scientific data and trends in state laws have been pointing toward a widespread recognition that the unborn child is not only a living human being, but also a citizen entitled to protection. The analysis of this data will be discussed immediately proceeding in Part II, *infra*.

<sup>77</sup> This issue, its resolution among scholars and this author's solution will be discussed in Parts III and IV, *infra*.

## II. CURRENT DEVELOPMENTS: THE REJECTION OF *ROE* AND ACCEPTANCE OF FETAL PERSONHOOD

Within the *Roe* opinion itself, Justice Blackmun's majority admitted that its rejection of the personhood of—and the constitutional protection for—the life of the fetus was related to the fact that “those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus.”<sup>78</sup> While there may not have been such a consensus at that time, the passing of thirty-six years has allowed the expansion of medical technology and social understanding to close this gap. Today, there is a trend toward recognizing the unborn as both a *human* as well as a *person* afforded lawful protection.<sup>79</sup> Modern scientific advances in the understanding of human development show that the fetus is indeed a human being from her first day of existence.<sup>80</sup> Societal values as reflected in current state laws<sup>81</sup> show trends towards fetal personhood and citizenship—thirty-six states consider the killing of the fetus a form of homicide.<sup>82</sup> This is an increase from twenty-seven states just five years ago.<sup>83</sup> Further, even several Supreme Court Justices who dissented in *Stenger* have expressed recognition of fetal humanity.<sup>84</sup> These developments, coupled with the ongoing cumulative criticism of *Roe*'s reasoning,<sup>85</sup> call for a reevaluation of the abortion rights issue with new consideration given to the life of the unborn.

### A. The Widespread Criticisms of Wrongful Reasoning

An argument for fetal personhood would be moot if *Roe* and its progeny were universally hailed as an accurate constitutional

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<sup>78</sup> *Roe*, 410 U.S. at 159.

<sup>79</sup> The recognition of both humanity and personhood is important in a reevaluation of *Roe*. Scientific proof of the moment the unborn becomes a human being is key; however, it means nothing if the Constitution does not protect this human as a “person” under its law. This is where trends in both state and federal law become essential, as each have given protection to the unborn child as a person and a citizen.

<sup>80</sup> *Stenger*, *supra* note 4, at 38.

<sup>81</sup> While “philosophy” by its very nature may never be conclusive, societal value trends are the best gauge of the philosophical climate of the times. This Comment uses current trends in state laws to measure the values of society as a whole, and as will be discussed, *infra* Subsection C, the results are quite telling.

<sup>82</sup> Americans United for Life, *Fetal Homicide: Model Legislation & Policy Guide for the 2009 Legislative Year*, available at [http://www.aul.org/xm\\_client/client\\_documents/LegislativeGuides/AUL\\_Fetal-Homicide-2009-LG.pdf](http://www.aul.org/xm_client/client_documents/LegislativeGuides/AUL_Fetal-Homicide-2009-LG.pdf) (outlining the states with such provisions and specifying when in the gestation period these rights are realized).

<sup>83</sup> M. Todd Parker, *A Changing of the Guard: The Propriety of Appointing Guardians for Fetuses*, 48 ST. LOUIS U. L.J. 1419, 1428 (2004).

<sup>84</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 952 (Rehnquist, C.J., dissenting); *Id.* at 953–56 (Scalia, J., dissenting); *Id.* at 956–79 (Kennedy, J., dissenting); *Id.* at 980–1020 (Thomas, J., dissenting).

<sup>85</sup> BECKWITH, *supra* note 35, at 23.

application. As discussed above, however, the opinion sparked regret and calls for an overturning by the Justices themselves.<sup>86</sup> Congress attempted to take matters into its own hands and tried to pass constitutional amendments to overrule and reverse the case.<sup>87</sup> While both governmental attempts have yet to be successful, scholarly criticism continues to unravel the constitutional flaws. Scholars have overwhelmingly shown that the history of abortion law laid out by Justice Blackmun in *Roe* is inherently flawed.<sup>88</sup> The grounding for *Roe* is said to be “untrustworthy and essentially worthless.”<sup>89</sup> Scholars are nearly unanimous in recognizing that the primary purpose of anti-abortion laws was to provide protection for the unborn.<sup>90</sup> For *Roe* to conclude otherwise was “fundamentally erroneous.”<sup>91</sup> Moreover, notable constitutional law scholars have asserted that *Roe* has no constitutional foundation.<sup>92</sup>

Indeed, Justice Blackmun’s conclusion that a fetus is not a constitutional “person” was based on his assertion that the State failed to cite a case where the fetus was given such status.<sup>93</sup> However, there was in fact a federal case holding just that—a

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<sup>86</sup> See *supra* Part I.C for a recap of *Roe*’s immediate aftermath.

<sup>87</sup> Karen J. Lewis, et. al., *Abortion: Legislative Response*, in ABORTION—MURDER OR MERCY?: ANALYSIS AND BIBLIOGRAPHY 17, 24 (Francois B. Gerard ed., 2001). The 94th Congress alone introduced almost eighty such amendments, although each encountered difficulty reaching the floor of the Senate and the House. The 98th Congress, however, debated and voted on a constitutional amendment that stated “[a] right to abortion is not secured by this Constitution.” This amendment was defeated with a vote of 50–49. *Id.* at 24–25.

<sup>88</sup> BECKWITH, *supra* note 35, at 23; Lotierzo, *supra* note 3, at 280; Gregory J. Roden, *Roe v. Wade and the Common Law: Denying the Blessings of Liberty to Our Posterity*, 35 UWLA L. REV. 212, 256 (2003) (demonstrating that there is no basis in pre-*Roe* common law that would allow the Court to bind the states in 1973 to what it believed was the English common law at the founding of the Country).

<sup>89</sup> BECKWITH, *supra* note 35, at 23.

<sup>90</sup> See, e.g., James S. Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L. J. 29, 70 (1985) (“[T]he primary purpose of the nineteenth-century antiabortion statutes was to protect the lives of unborn children is clearly shown by the terms of the statutes themselves.”); Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 310 (2006) (noting that there are sixty-four cases from forty states establishing that the objectives of such state laws were for the protection of the unborn child); BECKWITH, *supra* note 35, at 23.

<sup>91</sup> BECKWITH, *supra* note 35, at 24 (quoting James S. Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L. J. 29, 70 (1985)). In Justice Blackmun’s defense, it has been suggested that his reasoning was flawed because he relied on articles written by a scholar whose work was not discredited until after the Court’s opinion. *Id.*

<sup>92</sup> Forsythe & Presser, *supra* note 90, at 314–15. Such scholars include Alexander Bickel, Archibald Cox, John Hart Ely, Philip Kurland, Richard Epstein, Mary Ann Glendon, Gerald Gunther, Robert Nagel, Michael Perry, and Harry Wellington. *Id.*

<sup>93</sup> BECKWITH, *supra* note 35, at 26–27.

case cited in the *Roe* opinion itself.<sup>94</sup> The case was *Steinberg v. Brown*, where the federal district court in the Northern District of Ohio had declined to extend the *Griswold* reasoning to abortion rights because at that point, “the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.”<sup>95</sup> Moreover, there were more than fifty cases on the books, both federal and state, recognizing that the unborn child had explicit or implicit personhood.<sup>96</sup> The Court had, and still has, no constitutional prohibition to declare a fetus a person.<sup>97</sup>

Thus, *Roe* and its progeny sit on shaky ground. If a consensus on fetal humanity can be established, then the Court must stay true to Justice Blackmun’s admission and not only revisit, but also overturn, the infamous opinion.

#### B. Scientific Evidence of Fetal Humanity

To grasp the true significance of scientific developments, one must first become familiar with the state of the medical understandings before *Roe*. Historically, the commonly accepted signifier of human life was known as “quickening,”<sup>98</sup> the point at which the mother could feel the baby move.<sup>99</sup> The belief was that once quickening was detectible, the unborn must have received a soul.<sup>100</sup> The only reason quickening was ever a standard was because this was the point at which people could determine that the fetus was alive—and because it was alive, it was considered human.<sup>101</sup> As more biological facts of human development were discovered, the quickening theory was dismissed.<sup>102</sup> Instead, scientific technology has led to the medical conclusion that human life starts at conception.<sup>103</sup>

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<sup>94</sup> *Id.* Justice Blackmun cited *Steinberg v. Brown* as an example of a District Court upholding an abortion restriction that was not void for vagueness or overbroad. *Roe v. Wade*, 410 U.S. 113, 154–55 (1973).

<sup>95</sup> *Steinberg v. Brown*, 321 F. Supp. 741, 746–747 (N.D. Ohio 1970).

<sup>96</sup> Gregory J. Roden, *Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence*, 16 ST. THOMAS L. REV. 207, 270 (2003).

<sup>97</sup> Lugosi, *supra* note 24, at 438.

<sup>98</sup> BECKWITH, *supra* note 35, at 24.

<sup>99</sup> BabiesOnline.com, *Baby, Pregnancy, and Parenting Information: What is Quickening?*, <http://www.babiesonline.com/articles/pregnancy/quickening.asp> (last visited September 29, 2009). It is now known that quickening is unreliable because, although the baby actually starts moving by the eighth or ninth week, it could take the woman up to 26 weeks before she can detect it. *Id.*

<sup>100</sup> BECKWITH, *supra* note 35, at 24.

<sup>101</sup> *Id.* at 25.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

### 1. The Beginning of Life

Functions that have traditionally been used to define “life” have been discovered to occur well within the first trimester, before the mother may even know that she’s pregnant.<sup>104</sup> The baby’s heartbeat is detectable by the eighteenth day.<sup>105</sup> Brain cells are developed within the child’s first two weeks, while actual brain activity has been monitored by the fifth week.<sup>106</sup> There is evidence that an unborn child can feel pain within eight weeks—meaning that the child can, in fact, feel pain during even the earliest abortions.<sup>107</sup>

### 2. Life that is Human

Today, the scientific and medical community has widely recognized the existence of human life from the very moment of conception. Many contemporary human embryologists maintain that a new human being comes to be at syngamy (fertilization), which is the point at which the maternal and paternal chromosomes merge to form a set.<sup>108</sup> Indeed, research shows that even after initial fertilization, “[n]o substantial changes take place . . . [the child] is the same individual organism as the adult into whom it later develops.”<sup>109</sup> This means that once the chromosomes have merged in syngamy, there is no further genetic information needed to “make” the unborn child into an individual human being.<sup>110</sup> The only things she needs for growth and development are oxygen, food, water and healthy interaction with her environment.<sup>111</sup>

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<sup>104</sup> It is interesting to note that *Casey* defined the beginning of life at respiratory function, which seems quite arbitrary when considering that loss of such function has never signified death. 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, 125–126 (2007).

<sup>105</sup> *See id.*

<sup>106</sup> *Id.* at 125 n.28.

<sup>107</sup> Kerby Anderson, *Arguments Against Abortion*, LIFEWAY, Feb. 13, 2004, <http://www.lifeway.com/> (search for “Kerby Anderson”; then follow “Arguments Against Abortion” hyperlink.) This finding directly rebuts assertions in previous cases that abortion is permissible because the fetus can feel no pain. *See, e.g., Webster v. Reproductive Health Services*, 492 U.S. 490, 569 (1989) (Stevens, J., concurring in part and dissenting in part) (“There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist.”).

<sup>108</sup> BECKWITH, *supra* note 35, at 66.

<sup>109</sup> Lugosi, *supra* note 104, at 123 (quoting Angelo Serra and Robert Colombo, *Identity and Status of the Human Embryo: The Contribution of Biology*, in IDENTITY AND STATUTE OF HUMAN EMBRYO: PROCEEDINGS OF THIRD ASSEMBLY OF THE PONTIFICAL ACADEMY FOR LIFE 128, 159 (Juan De Dios Vial Correa & Elio Sgreccia eds., 1998)).

<sup>110</sup> BECKWITH, *supra* note 35, at 67; LAURENCE H. TRIBE, ABORTION: THE CLASH OF THE ABSOLUTES 117 (1990).

<sup>111</sup> BECKWITH, *supra* note 35, at 67–68; TRIBE, *supra* note 110, at 117.

The evidence of human life continues to mount in the early stages of development. Within five or six days of conception, the child has entered the “blastocyst” stage in which she has fully unique human DNA.<sup>112</sup> A study of the blastocyst stage shows that the cells are capable of becoming only the specialized cells in the human body.<sup>113</sup> While it may be tempting to simply brush off the presence of human DNA as merely “potential life,” biologists have refuted this position.<sup>114</sup> Instead, the modern understanding of biologists is that the discovery of human DNA after just a few days irrefutably demonstrates that the child, no matter how small, “is *human life*; it is not potential life or potentially human life.”<sup>115</sup>

Thus, “[i]t is scientifically correct to say that an individual human life begins at conception, when egg and sperm join.”<sup>116</sup> This is no theory: scientific proof of a separate embryonic personhood is an indisputable and fundamental truth—a human being exists from conception.<sup>117</sup> The official labels of “blastocyst” or “fetus” matter not—the terms are descriptive of a stage of human life development, similar to the labels of “infant” or “adolescent.”

Science can only go so far in the argument for constitutional protection for the unborn. While it can establish *humanity*, the law itself must recognize a *personhood* deserving of protection. As will be shown next, an increase in scientific biological knowledge of the development of the unborn has historically led to more and more restrictive abortion prohibitions.<sup>118</sup>

### C. Societal Recognitions of Fetal Personhood

Historically, common law explicitly recognized that the killing of an unborn child was homicide.<sup>119</sup> The crime was, however, generally placed within the realm of manslaughter rather than of murder.<sup>120</sup> The reason for this downgrading is that prior to modern scientific developments, the popular theory

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<sup>112</sup> Stenger, *supra* note 4, at 37.

<sup>113</sup> James A. Thomson, *Human Embryonic Stem Cells*, in *THE HUMAN EMBRYONIC STEM CELL DEBATE: SCIENCE, ETHICS, AND PUBLIC POLICY* 15, 17 (Suzanne Holland et al. eds., 2001).

<sup>114</sup> Stenger, *supra* note 4, at 38.

<sup>115</sup> *Id.* (emphasis added). This is the contemporary accepted understanding of biologists. *Id.*

<sup>116</sup> BECKWITH, *supra* note 35, at 68.

<sup>117</sup> Lugosi, *supra* note 104, at 123 (“Human embryology is so advanced there is no doubt that a new human being is created at the time of conception.”).

<sup>118</sup> BECKWITH, *supra* note 35, at 24.

<sup>119</sup> Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 WM. MITCHELL L. REV. 767, 777 (2007).

<sup>120</sup> *Id.* at 778.

of quickening was applied.<sup>121</sup> Contemporary laws have, however, reflected an expansion in the rights of the unborn, including the classification of fetal homicide as murder.<sup>122</sup> If *Roe* was right, one might expect the opposite trend. The growing rate speaks for itself. In 2004, twenty-seven states deemed the killing of a fetus to be criminal homicide.<sup>123</sup> By the following year, that number had risen to thirty-one.<sup>124</sup> Today, thirty-six states have such laws.<sup>125</sup> At this rate, every state could have such a law in less than a decade. Such fetal endangerment prosecutions reflect a desire to protect the unborn.<sup>126</sup> This trend has manifested itself in both state and federal laws.

### 1. State Criminal Laws

After *Roe* held that a pre-viable unborn child is not a person under the Constitution, the opposite occurred in state criminal law.<sup>127</sup> In refusing to take guidance from the Supreme Court's viability standard for human recognition, twenty-four states have extended legal protection for the life of the unborn, regardless of the stage of pregnancy.<sup>128</sup> Arizona acted first, amending its criminal law provisions to include protection for the fetus without any viability requirements.<sup>129</sup> Twenty-three other states have since followed, the majority of which acting after *Casey's* re-opening of the door to the state's interest.<sup>130</sup> Thirteen more grant protection once the child has reached a specified stage of development of anywhere from seven weeks to viability.<sup>131</sup>

California's murder statute is a good example of side-stepping *Roe's* findings to recognize the killing of a fetal

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<sup>121</sup> *Id.* at 777. See *supra* Subsection B for an explanation of the quickening theory.

<sup>122</sup> Lotierzo, *supra* note 3, at 285–86.

<sup>123</sup> Parker, *supra* note 83, at 1428.

<sup>124</sup> Lotierzo, *supra* note 3, at 284.

<sup>125</sup> Americans United for Life, *supra* note 82 (listing the thirty-six states with criminal laws prohibiting fetal homicide).

<sup>126</sup> TRIBE, *supra* note 110, at 235.

<sup>127</sup> Magnuson & Lederman, *supra* note 119, at 779.

<sup>128</sup> *Id.*

<sup>129</sup> ARIZ. REV. STAT. ANN. § 13-1103(A)(5), (B) (LexisNexis 2008). The statute deems manslaughter committed when a person causes “the death of an unborn child by any physical injury to the mother” during “any stage of its development.” *Id.* at (B). To comply with *Roe*, it makes exceptions for abortion procedures. *Id.* at (B)(1).

<sup>130</sup> In addition to Arizona, the other states granting fetal protection under criminal laws at all stages of the pregnancy include Idaho, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, and Wisconsin. Lotierzo, *supra* note 3, at 284–85 n.52.

<sup>131</sup> *Id.* These states include Arkansas, California, Florida, Georgia, Indiana, Massachusetts, Michigan, Nevada, New York, Rhode Island, South Carolina, Tennessee and Washington. *Id.*

person.<sup>132</sup> The State's fetal protection against criminal acts extends to the unborn child of at least seven weeks old.<sup>133</sup> The original statute had no reference to the unborn, but was added to correct a California Supreme Court ruling that did not allow a defendant to be found guilty of murder for killing a fetus.<sup>134</sup> While California's courts initially followed *Roe's* viability requirement and defined fetal murder as occurring only when the child would be able to survive on its own,<sup>135</sup> in 1994 this position was abandoned with a recognition that *Roe's* principals were "simply inconsistent" with fetal homicide statutes.<sup>136</sup>

Such a trend is truly a modern movement with society "moving briskly toward the recognition of the personhood of the unborn."<sup>137</sup> As biologists established a better understanding of human science, it is no wonder that criminal liability has followed suit.<sup>138</sup> The states' respect for the humanity of the fetus has transcended both criminal and tort law: thirty states have laws in place that will immediately make abortion illegal should the Court reverse *Roe*.<sup>139</sup>

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<sup>132</sup> CAL. PENAL CODE § 187 (West 2008).

<sup>133</sup> *People v. Davis*, 872 P.2d 591, 599 (Cal. 1994).

<sup>134</sup> Monica Mendes, *A Low Threshold of Guilt: Interpreting California's Fetal Murder Statute in People v. Taylor*, 39 LOY. L.A. L. REV. 1447, 1449 (2006).

<sup>135</sup> Katharine B. Folger, *When Does Life Begin . . . or End? The California Supreme Court Redefines Fetal Murder in People v. Davis*, 29 U.S.F. L. REV. 237, 247 (1994); Mendes, *supra* note 134, at 1449–50.

<sup>136</sup> *Davis*, 872 P.2d at 597; Mendes, *supra* note 134, at 1449, 1451.

<sup>137</sup> Magnuson & Lederman, *supra* note 119, at 777. Some commentators assert that fetal homicide laws are in harmony with abortion because they merely preserve the woman's exclusive choice to continue with or terminate her pregnancy. See, e.g., Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 725 (2006); cf. Mary Beth Hickcox-Howard, *The Case for Pro-Choice Participation in Drafting Fetal Homicide Laws*, 17 TEX. J. WOMEN & L. 317, 319–22 (2008) (explaining that fetal homicide laws are flawed and need to be re-drafted to avoid conflicts with abortion rights). But this Comment focuses on the significance of the status these laws give to the unborn child: homicide is the killing of a *person*. If the states wanted to preserve the non-personhood of a fetus, the offense would have been no more than criminal assault or the like. In fact, pushing for this lower-level type of crime as a substitute is the very thing that Pro-Choice groups often lobby for when opposing the passage of a new fetal homicide law. *Id.* at 319. Thus, fetal homicide laws are crucial because what follows is the reasoning that since homicide is the killing of a *person*, the unborn child should always be considered a *person* under the law.

<sup>138</sup> It should be noted that tort law, in addition to criminal law, has increasingly recognized fetal personhood. This is evidenced by the disregarding of the traditional "born alive" rule, which allowed for civil remedies only when the child was born alive and could thus bring the action herself. Magnuson & Lederman, *supra* note 119, at 778. Most states have abandoned this rule because it made tortfeasors liable only if the child dies rather than if the child was only injured by the same act. Beth Driscoll Osowski, *The Need for Logic and Consistency in Fetal Rights*, 68 N.D. L. REV. 171, 175 (1992). Instead, courts have recognized that there is a "trend in state courts toward greater legal rights for the unborn." *Id.* at 183.

<sup>139</sup> Associated Press, *Many States Would Ban Abortion if Roe Overturned*, CHARLESTON DAILY MAIL, Oct. 6, 2004, at 11A.

## 2. Federal Laws Following Suit

Despite failures to legislatively overturn *Roe*,<sup>140</sup> Congress successfully passed the Partial-Birth Abortion Ban Act of 2003 (“the Ban”).<sup>141</sup> The Ban was passed in response to *Stenberg v. Carhart*’s striking down of Nebraska’s ban on the D&X procedure.<sup>142</sup> The Ban criminalized abortions that deliberately and intentionally begin to deliver the child until a significant portion of the live infant is born and then “performing an overt act that the [physician] knows will kill the partially delivered living fetus.”<sup>143</sup> Where the Court in *Stenberg* had declined to address the live birth issue, Congress recognized that to allow such a procedure would be to confuse the “medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life.”<sup>144</sup>

In calling the procedure “gruesome and inhumane,” Congress explained that a purpose for the Ban was to protect unborn children, as future citizens, from experiencing “the pain associated with piercing his or her skull and sucking out his or her brain.”<sup>145</sup> Here, there is a congressional admission that the fetus is a citizen in need of protection, that having “potential life” and being a “future citizen” means that one is entitled to current rights. Also significant is that Congress outlawed the procedure due to the pain inflicted on the unborn child. If pain is the threshold for human life and protection, the fetus would be a human at least at the point in which she has sensory abilities.<sup>146</sup>

The second major federal fetal rights law is the Unborn Victims of Violence Act of 2004 (“the Act”).<sup>147</sup> Also known as “Laci and Conner’s Law,”<sup>148</sup> the Act makes it a separate federal

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<sup>140</sup> Congress’s attempts to overturn *Roe* through a constitutional amendment are discussed *supra* note 87 and accompanying text.

<sup>141</sup> 18 U.S.C. § 1531 (2006).

<sup>142</sup> *Stenberg v. Carhart*, 530 U.S. 914, 938–40 (2000).

<sup>143</sup> 18 U.S.C. § 1531(b)(1)(A) (2006); Lotierzo, *supra* note 3, at 279.

<sup>144</sup> Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108–105, §§ 2(1), 2(14)(J), 117 Stat. 1201, 1206 (2003).

<sup>145</sup> *Id.* at 2(14)(L), (M).

<sup>146</sup> Recall from *supra* Subsection B that an unborn child can feel pain even in the first trimester.

<sup>147</sup> 18 U.S.C. § 1841 (2006).

<sup>148</sup> The law is named after Laci Peterson and her unborn son, Conner, the victims in a 2003 California case in which a husband was convicted of killing his eight-months pregnant wife. Scott Peterson was convicted of double-murder and given the death penalty. Though the Act had been pending in Congress, the highly-publicized case gave it the significant support necessary to pass. Magnuson & Lederman, *supra* note 119, at 780–81.

crime to cause death or bodily harm to an unborn child.<sup>149</sup> Thus, the murder of a pregnant woman constitutes a double homicide. Moreover, the law recognizes two victims, even if the mother survives the offense.<sup>150</sup> Significant to the fetal rights movement is the fact that the Act defines “a child in utero” as “a member of the species homo sapiens, at *any stage of development*, who is carried in the womb.”<sup>151</sup> This gives the unborn child protection under federal law as a separate person from the moment of known pregnancy—viable or not. This “advances the theory that unborn children should be afforded legal rights and protections under the Constitution.”<sup>152</sup>

It is not surprising that scholars immediately noted the conflict between this legislation and the reasoning in abortion jurisprudence.<sup>153</sup> And yet, the Act reflects the social climate of the country: the legislative history notes that eighty-four percent of Americans believe that separate homicide charges are necessary for an unborn child.<sup>154</sup> Congress cited its purpose for the Act was to “respond to [the] overwhelming desire of the American public to provide, under Federal law, that an individual who injures or kills an unborn child . . . will be charged with a separate offense.”<sup>155</sup>

#### D. The Time is Right to Correct the Wrong

Science and legislatures are not the only entities recognizing the personhood of the fetus: the Court is getting close as well. As notable constitutional law scholar, Erwin Chemerinsky, has noted, “[t]here is no area of constitutional law that cannot be changed by one or two appointments to the [C]ourt.”<sup>156</sup> The anti-*Roe* trend was certainly accelerated by Justices Brennan and Marshall resigning and being replaced by Justices Souter and

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<sup>149</sup> 18 U.S.C. § 1841(a)(1) (2006); Lotierzo, *supra* note 3, at 281–82. The Act only applies to harm inflicted to the unborn child during the commission of a federal crime; it exempts the practice of abortion from liability. *Id.* at 283.

<sup>150</sup> Lotierzo, *supra* note 3, at 303.

<sup>151</sup> 18 U.S.C. § 1841(d) (2006) (emphasis added).

<sup>152</sup> Lotierzo, *supra* note 3, at 303.

<sup>153</sup> See, e.g., Amanda K. Bruchs, *Clash of Competing Interests: Can the Unborn Victims of Violence Act and Over Thirty Years of Settled Abortion Law Co-Exist Peacefully?*, 55 SYRACUSE L. REV. 133, 156–57 (2004) (proposing a modification to the legislation that would change “child in utero” to be only viable fetuses and make the offense only an enhanced crime against the woman rather than a separate crime).

<sup>154</sup> Lotierzo, *supra* note 3, at 304 (citing to H.R. REP. NO. 108-420(I), at 5). The Congressional findings were based on a poll by Princeton Survey Research Associates and indicated that more than half of the public supported separate charges regardless of how far along the pregnancy was. *Id.* at n.249.

<sup>155</sup> *Id.* at 304 (quoting H.R. REP. NO. 108-420(I), at 5).

<sup>156</sup> Jill Schachner Chanen, *Senate Is Hurdle for Next Supreme Court Pick*, 3 ABA J. E-REPORT, Oct. 29, 2004.

Thomas.<sup>157</sup> Three of the Justices appointed by Presidents Reagan and George H.W. Bush made up the plurality opinion in *Casey*.<sup>158</sup> Though the Court upheld abortion rights, this case marked a significant turning point as the Court upheld an abortion restriction similar to those it had struck down less than a decade earlier.<sup>159</sup> More recently, the additions of Chief Justice Roberts and Justice Alito seem to have significantly quickened the pace towards fetal rights, with Justice Alito supplying the crucial fifth vote in *Gonzales v. Carhart*<sup>160</sup> and Chief Justice Roberts procuring the first unanimous vote in the Court's abortion jurisprudence in *Ayotte v. Planned Parenthood*.<sup>161</sup> Indeed, with these appointments, the Court is currently only one vote shy of completely overturning *Roe*.<sup>162</sup>

With the Supreme Court "in flux,"<sup>163</sup> a reconsideration of *Roe* is an unavoidable possibility. When that day comes, the Court will have to take into account all of the current scientific and sociological developments.<sup>164</sup> It would not be the first time the Court has reversed itself to correct a false assumption.<sup>165</sup> This is especially true when one is reminded that at one time, women

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<sup>157</sup> MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 127 (1996). Justices Brennan and Marshall were part of the *Roe* and *Doe* majorities, while Justices Souter and Thomas lean towards pro-life. *Id.*

<sup>158</sup> BECKWITH, *supra* note 35, at 31–32; GRABER, *supra* note 157, at 127.

<sup>159</sup> GRABER, *supra* note 157, at 127. The law upheld in *Casey*, as discussed *supra* Part I.C, required informed consent and a mandatory waiting period; such laws had been previously struck down by *City of Akron* and *Thornburgh*. See *supra* note 38.

<sup>160</sup> *Gonzales v. Carhart*, 550 U.S. 124, 130 (2007). See also Christopher E. Smith, et al., *The Roberts Court and Criminal Justice at the Dawn of the 2008 Term*, 3 CHARLESTON L. REV. 265, 287 (2009).

<sup>161</sup> *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 321 (2006); John F. Basaik, Jr., *The Roberts Court and the Future of Substantive Due Process: the Demise of "Split-the-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861, 901–902 (2007). *Ayotte* is significant because the Court unanimously declined the chance to strike down a state law that lacked a health restriction, and instead decided the case on the basis of remedy. *Id.*

<sup>162</sup> Scott A. Moss, *The Courts Under President Obama*, 86 DENV. U. L. REV. 727, 731–32 (2009) (pointing out that because of the Justices likely to retire within the next four years, the most that President Obama's appointments will do is preserve the status quo).

<sup>163</sup> Megan Fitzpatrick, *Fetal Personhood After the Unborn Victims of Violence Act*, 58 RUTGERS L. REV. 553, 566 (2006).

<sup>164</sup> It is true that no Supreme Court Justice has officially taken the position that the fetus is a constitutional "person." TRIBE, *supra* note 110, at 125. However, this Comment takes the position that the day is inevitably coming when the Court must acknowledge the science of humanity and the recognition of fetal personhood as a genuine third party in the abortion debate. As this section has shown, the Court itself is becoming more and more open to the idea of admitting its faulty reasoning and correcting its mistake.

<sup>165</sup> See, e.g., *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) (overturning a progeny of earlier rulings dating back to *Plessy v. Ferguson* in 1896 which had allowed for the segregation of public schools due to a false assumption about the extent of equal protection). At least one scholar has suggested that *Roe* should be overturned on equal protection grounds just as *Brown* was. Lugosi, *supra* note 104, at 120, 287.

and slaves were also considered less than a “person” for the purpose of constitutional protection.<sup>166</sup>

If the time is right, then this begs the question—now what? If *Roe* is reversed and constitutional protection is granted to unborn children, how does this affect a woman’s right to terminate an unwanted pregnancy? The next two sections address the conflict of interests and explore compromises before proposing a solution that is consistent with constitutional jurisprudence.

### III. THE PROBLEM: RIGHT TO LIFE V. RIGHT TO PRIVACY

#### A. Stating the Obvious: Recognizing the Conflicting Interests

The law of non-contradictions necessitates a conclusion that “an unborn child cannot be a person and a non-person at the same time and in the same respect.”<sup>167</sup> Recognizing that the unborn child is a person and yet unequal under the law is simply unjust.<sup>168</sup> Instead, an unborn child who is granted recognition as a person is entitled to legal protection.<sup>169</sup> Thus, if the fetus is finally given a classification as a constitutional person, then any legislature that permits abortion is allowing others to deprive the unborn child of life without due process of law and without equal protection—a completely unconstitutional allowance.<sup>170</sup>

While the right to privacy has long been considered a sacred right,<sup>171</sup> it is not an absolute right and can be limited by the conflicting right of the unborn.<sup>172</sup> No matter where one stands on the abortion issue, simple logic dictates that it is wrong to continue to allow the absolute right of abortion in light of the “accelerating of protections for the rights of the unborn.”<sup>173</sup> Rather, there is a conflicting interest between the right to an abortion and the right to life that must be resolved.

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<sup>166</sup> TRIBE, *supra* note 110, at 119–20.

<sup>167</sup> Magnuson & Lederman, *supra* note 119, at 786.

<sup>168</sup> See Lugosi, *supra* note 24, at 438.

<sup>169</sup> See Heather M. White, *Unborn Child: Can You Be Protected?*, 22 U. RICH L. REV. 285, 288 (1988). It has also been pointed out that when the fetus is recognized as a human being, the furthering of the unborn child’s rights is necessary in protecting the rights of born children. Charlene Quint Kalebic, *Children, the Unprotected Minority: A Call for the Reexamination of Children’s Rights in Light of Stenberg v. Carhart*, 15 REGENT U. L. REV. 223, 228 (2003).

<sup>170</sup> TRIBE, *supra* note 110, at 115.

<sup>171</sup> *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) (noting that the right of privacy is more “carefully guarded” than any other right).

<sup>172</sup> White, *supra* note 169, at 292.

<sup>173</sup> Magnuson & Lederman, *supra* note 119, at 785.

### B. Preliminary Solutions: Why They are Not Enough

While many scholars have come to a consensus that the unborn child has a right to life, few have taken it a step further and offered a solution to the conflicting interests.<sup>174</sup> Some have recognized that the unborn child is entitled to protection from tortious acts under the law and yet refrain from extending this conclusion to protect the child from death by abortion.<sup>175</sup> However, a law that protects the fetus from abuse or neglect<sup>176</sup> would be inconsistent if it then allows the even more grievous tortious act of inflicting involuntary death.

Other scholars argue that the conflicting interests should be solved by leaving it up to the states to decide whether the fetus is a person.<sup>177</sup> However, this is not *solving* the underlying issue—it is merely delegating the decision.<sup>178</sup> Moreover, even if it were left to the states, more issues would arise as a result of inconsistent laws. Consider the obvious problem that will arise when citizens of an anti-abortion state cross into a pro-abortion state in order to get the procedure.<sup>179</sup> If the fetus is a protected citizen of one state, would this status change simply because her mother traveled into another state?<sup>180</sup> What if the child is conceived in a state that deems the child a person, yet his mother is a resident of a state (or later moves to a state) where no personhood is recognized until birth? Federalism simply cannot be relied on in this context because the truth as to the beginning of human life is not discretionary. History dictates that personhood is not something that can change based on geographic location: the Thirteenth Amendment was passed precisely to remove the state's power of deeming a class of citizens non-persons simply because of their race.<sup>181</sup> In the same way, there should be no

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<sup>174</sup> See, e.g., *id.* at 785–86 (pointing out the illogic of abortion rights but refraining from calling for a solution); Lugosi, *supra* note 24, at 437 (arguing that the fetus has constitutional protection but leaves it up to the states to pass laws that outlaw abortion to spur a reversal of *Roe*).

<sup>175</sup> See, e.g., White, *supra* note 169, at 288 (arguing that the fetus may have protection under the law from abuse and neglect, as long as this does not “overste[p] the parameters of the Supreme Court’s decision in *Roe v. Wade*”).

<sup>176</sup> *Id.*

<sup>177</sup> TRIBE, *supra* note 110, at 126.

<sup>178</sup> Furthermore, *Roe* specifically stated that should personhood be established, then the unborn child’s right to life would be protected by the Fourteenth Amendment, thus preventing *any* state from making the decision to allow abortions. *Roe v. Wade*, 410 U.S. 113, 156–57 (1973). For a further discussion, see Part IV, *infra*.

<sup>179</sup> *Id.* at 127.

<sup>180</sup> *Id.*

<sup>181</sup> See Alexander Tsesis, *Principled Governance: the American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 706–708 (2009) (explaining that the legislative intent behind the Thirteenth Amendment was to guarantee that the states would not be able to undermine equality under the law).

state-by-state determination of personhood based on the arbitrary factors of age, size and economic status. There needs to be consistency among all of the states to prevent such disputes, as they subject the existence of human life to varying degrees of interpretation when it is instead a question of fact.

At least one scholar has suggested that deeming a fetus a person is problematic because it treats women as incubators, inferring that this alone should preserve the right to an abortion.<sup>182</sup> This, however, has nothing to do with addressing the conflict between the interests. Even if the woman is an “incubator,” this argument does not adequately address the right to life versus the right to be free from being an “incubator.”<sup>183</sup> Instead, it is merely a restatement of the conflict between a woman’s liberty interest of being free from carrying an unwanted child and that child’s interest in living. But hardship on a woman’s liberty interest has no bearing on the actual physical personhood of the child she is carrying; while it may make some more comfortable with the idea of abortion, it does not diminish or resolve the underlying issue.

Another scholar has suggested that the conflict of interests is three-fold: state, child and mother.<sup>184</sup> To resolve these interests, a balancing test is proposed in which the “interests of unborn children should be weighed alongside those of pregnant women and the state in legislative enactments and judicial review of abortion laws.”<sup>185</sup> Because this scholar concludes that this would be a case-by-case analysis, there is no suggestion of how to apply this balancing test.<sup>186</sup> A case-by-case analysis is unworkable. In every case, the fundamental interests are the same: interest in protecting future citizens versus interest in saving one’s life versus interest in obtaining an abortion. Without offering a solution of how to weigh the competing interests, all that is present is, again, an acknowledgement of the problem.

Thus, scholars have generally left an actual solution still wanting. Below is a proposal that is more consistent in applicability and resolving of the underlying issue.

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<sup>182</sup> TRIBE, *supra* note 110, at 130.

<sup>183</sup> Moreover, it is worth noting that in most cases, the woman either consciously or negligently became this “incubator.”

<sup>184</sup> Lotierzo, *supra* note 3, at 311–12.

<sup>185</sup> *Id.* at 281.

<sup>186</sup> *Id.* at 312.

## IV. SOLUTION: RIGHT TO LIFE MUST PREVAIL

The solution to the conflicting interests comes from what one might find an unlikely source: *Roe* itself. The opinion suggests that the right to life would prevail over the right to privacy.<sup>187</sup> Recall *Roe*'s own admission that once "personhood is established, the [case for abortion rights] of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."<sup>188</sup> Here, Justice Blackmun does not state that when fetal personhood is accepted, the right to life becomes inherent only at a certain point in the pregnancy. Nor does he state that when fetal personhood is accepted, a balancing test must be employed. To the contrary, the fetus' life is constitutionally protected and the entire case for abortion rights *collapses*. This means that abortion's right of privacy cannot be sustained against the right of life. Simply put, the right of a human being to live, in any analysis, must always trump the liberty right to terminate that life.<sup>189</sup>

Merely because the unborn child lacks the capacity to assert her rights and equal protection under the law is not an excuse to ignore and deny those rights.<sup>190</sup> Clearly, the unborn child would benefit from exercising her Fourteenth Amendment right to live, her right to prevent involuntary death.<sup>191</sup> The unborn child has the right to choose life for herself. The fact that she cannot express it for herself does not diminish this right. Normally, the child's guardian would represent this right, but here this is the very person with the conflicting interest. Thus, it is necessary for the state to step in and protect the child's rights.<sup>192</sup>

Abortion supporters will likely rebut this proposition by asserting that the right of privacy gives the woman autonomy over her own body without government interference; that a woman will be subjected as an "incubator" if not given the choice

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<sup>187</sup> *Roe v. Wade*, 410 U.S. 113, 156–57 (1973); Lotierzo, *supra* note 3, at 300.

<sup>188</sup> *Roe*, 410 U.S. at 156–57.

<sup>189</sup> It is important to note here that abortions necessary to save the mother's life are purposely left out of this analysis. This is because when the mother's life is actually threatened, the conflicting interests change to the right to life versus the right to life, rather than the right to *liberty* versus the right to life. This Comment focuses on the latter because abortion jurisprudence has allowed for abortions essentially on demand, regardless of the condition of the mother. See *supra* note 6.

<sup>190</sup> Rhonheimer, *supra* note 9, at 161.

<sup>191</sup> *Id.*

<sup>192</sup> This reasoning has been applied in European countries such as Germany that protect the life of the unborn except in situations where the mother's life is truly at stake. The German court not only held that criminalizing abortion was permitted, but constitutionally required in order to protect the lives of the unborn. Stephen Gardbaum, *State and Comparative Constitutional Law Perspectives on a Possible Post-Roe World*, 51 ST. LOUIS U. L.J. 685, 691 (2007).

whether to carry her child to term.<sup>193</sup> The proposed solution is not meant to discriminate against women's rights, but rather to promote the rights of the unborn human being who has no choice but to be carried by her mother for the first nine months of her existence.

Moreover, the right of privacy assumes that the actions one is taking affect only oneself. As soon as the actions have a negative impact on another person, the actions transcend from private to social.<sup>194</sup> The unborn child is only lacking in independence because her age requires her mother's womb to assure survival. This is no different from a post-birth child who depends on her parent's provisions of food and clothing to survive. For that matter, it is no different from any disabled or incapacitated adult.

A fundamental truth of human rights is that the value of human life cannot be measured by age, size or desirability. To deny an unborn child equal protection as a person simply because she is small and young is scientifically incorrect. To permit a mother to end the life of her developing baby simply because she does not want the inconvenience of a pregnancy or parenthood is constitutionally wrong. *Roe* itself called for the recognition of fetal personhood in light of an expansion of medical and social developments,<sup>195</sup> and once recognized, this person's life must be protected above another's lesser right. While it may not be the easiest solution to swallow and would take a humble Court ready to correct more than three decades of embarrassing missteps, it is the right thing to do.

#### CONCLUSION

Immediate and constant criticisms of *Roe* and its progeny, together with the Court's own admission that the issue must be readdressed when more information is known, make reconsideration inevitable. The Court cannot forever hide from the scientific truths that have been discovered, nor the trends in legislation. Thus, the recognition of fetal personhood is no longer an "if" but a "when." And when that day comes, the Court must

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<sup>193</sup> Some scholars have anticipated that the time of recognizing fetal personhood is drawing near and have made this argument. See, e.g., TRIBE, *supra* note 110, at 130.

<sup>194</sup> See, e.g., Lugosi, *supra* note 24, at 438 ("[T]here is a limit to personal liberty when its exercise is incompatible with not just the liberty of another, but the life of another person.").

<sup>195</sup> Recall that Justice Blackmun asserted that the reason for failing to determine fetal personhood was because "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus." *Roe v. Wade*, 410 U.S. 113, 159 (1973); see *supra* Part I.B. Now that there is such a consensus, the Court must be compelled to recognize personhood as well. See *supra* Part II.

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render a solution to the competing interests between mother and child. To stay consistent with both constitutional and human rights principals, the Court should stay true to its admission in *Roe* and let the right to abortions “collapse.”