ABORTION AND THE VIABILITY STANDARD—TOWARD A MORE REASONED DETERMINATION OF THE STATE'S COUNTERVAILING INTEREST IN PROTECTING PRENATAL LIFE

In *Roe v. Wade*,[1] the United States Supreme Court invalidated a Texas criminal statute proscribing all abortions except where the procedure is necessary to protect the mother's life.[2] The Court's holding in *Roe*, together with its ruling in the companion case of *Doe v. Bolton*,[3] delivered the same day, invalidated the criminal abortion laws of a majority of states.[4]

The *Roe* Court held that the right to privacy, a derivative of the fourteenth amendment's concept of liberty recognized in *Griswold v. Connecticut*,[5] protects a pregnant woman's decision regarding the termination of her pregnancy.[6] Regulations which impede the exercise of a fundamental right such as abortion, in order to be sustained, must advance a compelling state interest in the least restrictive manner necessary to advance that interest.[7] The Court identified two legitimate interests in pursuit of which a state might regulate abortion: (1) the protection of maternal health, and (2) the protection of the potentiality of human life.[8] These interests increase in importance during pregnancy and ultimately become compelling.[9] Prior to the conclusion of the first trimester, neither interest is considered compelling and therefore, the State may not regulate abortion in a manner which impedes a woman's ability to obtain an abortion.[10] Subsequent to the first trimester, however, the state's interest in protecting maternal health is considered compelling.[11] At this point, a state

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1 410 U.S. 113 (1973).

2 *Id.* at 117-18, 170.

3 410 U.S. 179 (1973). Doe v. Bolton involved a Georgia criminal abortion statute modeled after section 230.3 of the Model Penal Code. *Id.* at 182 (citing MODEL PENAL CODE § 230.3 (1962)). The statute proscribed abortions except where the pregnancy endangered the mother's life or health, the fetus would likely be born severely handicapped, or where the pregnancy was the result of a rape. *Id.* at 183 (citation omitted).

4 *See Roe*, 410 U.S. at 118 & n.2; *see also Doe*, 410 U.S. at 182 n.3.

5 381 U.S. 479 (1965).

6 *Roe*, 410 U.S. at 153.

7 *Id.* at 155.

8 *Id.* at 162.

9 Id. at 162-63.

10 *Id.* at 163.

11 *Id.*

may regulate abortion in a manner which advances this interest.[12] After the second trimester, the state's interest in protecting the potential for human life becomes compelling and a state then may regulate and even proscribe abortions except where the procedure is necessary to protect the life or health of the pregnant woman.[13]

Under the *Roe* Court's analysis, the question of whether the United States Constitution guarantees a right to abortion involves a bipartite inquiry: (1) whether state regulation of abortion infringes upon a constitutionally protected liberty interest, and (assuming the first question is answered in the affirmative) (2) whether, and under what circumstances, the state's countervailing interest in protecting prenatal life is sufficient to override that liberty interest.[14] These questions are distinct.[15] An examination of abortion decisions delivered by the United States Supreme Court subsequent to *Roe*, however, indicates that these concepts have not remained distinct.[16] Two common errors reoccur: (1) upon resolution of one question, failing to recognize the existence of the other,[17] and (2) allowing its opinion with re-

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[12] *Id.*

[13] *Id.* at 163-64.

[14] *See id.*, at 154-55 (holding that the liberty to obtain an abortion is a constitutionally protected fundamental right, while at the same time acknowledging that states can place limits on fundamental rights if they advance a compelling state interest); *see also* L. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 96 (1990) ("The Supreme Court has [a] . . . long tradition of asking *first* about the [constitutional] right that is asserted, to see whether it is a fundamental liberty, and only *then* turning to the reasons, such as protection of the fetus's right to life, that might nonetheless justify that liberty's abridgement.") (emphasis in original).

[15] *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 796 (1986) (White, J., dissenting). Consistent with the Supreme Court's analysis in other substantive due process cases, the *Roe* Court overtly avoided any type of balancing equation. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 923 n.28 (1973). With respect to any countervailing interest advanced by the state, a finding that such an interest is compelling is both necessary and sufficient to sustain a regulation which impedes the exercise of a fundamental right. *See Roe*, 410 U.S. at 155; Shapiro v. Thompson, 394 U.S. 618, 634 (1969). This is assuming—and no one has argued to the contrary—that the regulation is well-crafted to advance that interest. *Id.*

[16] *See infra* notes 19 & 20.

[17] This phenomenon is evidenced by the manner in which various Supreme Court Justices have framed the issue. *Compare* Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3072 (1989) (Blackmun, J., dissenting) ("The true jurisprudential debate underlying this [abortion] case [is] whether the Constitution includes an 'unenumerated' general right to privacy . . . and to what extent such a right to privacy extends to matters of childbearing and family life, including abortion.") *with Thornburgh*, 476 U.S. at 796 (White, J., dissenting) ("Both the characterization of the abortion liberty as fundamental and the denigration of the State's

gard to one question prejudice its analysis of the other.[18] In order to focus on the countervailing interests and avoid similar confusion, it will be presumed in this comment that restrictions on abortion impede a constitutionally protected liberty interest.[19] The examination will be confined solely to the second question—whether the state's interest in protecting prenatal life is of sufficient importance to override abridgement of this liberty.

Part I of this comment will examine the *Roe* Court's reasoning which supports the conclusion that the state's interest in protecting prenatal life does not become compelling until the fetus is viable. Part II will attempt to look behind the rationale advanced by various members of the Court in order to identify the inferences and presumptions which underlie this sentiment. In this section, it will be argued that the viability standard is a surrogate for a different standard which links the value of life with cognitive ability. Part III will examine the Court's continued failure to ground its jurisprudential framework for adjudicating abortion

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interest in preserving the lives of nonviable fetuses are essential [in order to] . . . limit the state's power to regulate abortion."). In *Webster*, it is evident that Justice Blackmun's articulation of the constitutional issue regarding abortion reflects little or no recognition of the state's countervailing interest in protecting prenatal life. In contrast, Justice White's characterization of this same issue in *Thornburgh* reflects a clear delineation of the two distinct questions.

18 *Compare Thornburgh*, 476 U.S. at 792 n.2 (White, J., dissenting) ("That the abortion decision, like the decisions protected in *Griswold*, *Einstadt*, and *Carey*, concerns childbearing (or more generally, family life) in no sense necessitates a holding that the liberty to choose abortion is 'fundamental.' That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place.") *with id.* at 776 (Stevens, J., concurring) ("Justice White abruptly announces that the interest in 'liberty' that is implicated by a decision not to bear a child that is made a few days after conception is *less* fundamental than a comparable decision made before conception. There may, of course, be a significant difference in the strength of the countervailing state interest, but I fail to see how a decision on childbearing becomes *less* important the day after conception than the day before."). Clearly, the existence of the countervailing interest represented by the fetus colors Justice White's characterization of the liberty interest implicated by abortion regulations. In sharp contrast, Justice Stevens characterization of the nature of this liberty interest is unaffected by the existence of any countervailing interest although he acknowledges that this interest may need to be subordinated to the state's interest in protecting prenatal life.

19 There is, however, deep division on this question among legal scholars. *Compare, e.g.*, Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudications*, 83 YALE L.J. 221, 310-11 (1973) (maintaining that abortion is not constitutionally protected) *and* Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 167-72 (1973) (maintaining that the abortion cases cannot be included in the right to privacy) *with* Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 773 (1973) (maintaining that abortion regulations impede a constitutionally protected privacy interest).

cases into a conceptual model from which the value of prenatal life can be derived from morally relevant criteria. The comment will conclude with an argument in support of conducting a re-examination of *Roe v. Wade*.

PART I

The Nature of the State's Countervailing Interest

It is difficult to articulate precisely why states attempt to preserve prenatal life. One may question why a fetus should be regarded as an object of moral concern worthy of state protection. Frequently, the terms "life" and "person" are invoked to describe the unborn as if this should somehow clarify the matter.[20] For instance, the abortion issue is often framed as "when life begins"[21] or "whether the fetus is a person."[22] Inquiries which utilize the terms "life" and "person" do more to obfuscate than to illuminate one's understanding of the issues underlying the abortion debate.[23]

The abortion issue tends to focus on the word "life."[24] The question "when does life begin," however, invites only one answer—at conception.[25] The proposition that abortion results in the destruction of human life is beyond dispute.[26] Pro-choice advocates, who adamantly advance the proposition that science cannot determine the beginning of human life,[27] are actually advancing a conceptually distinct argument that some fetuses do not possess the intrinsic worth and value which give rise to the government's general obligation to protect life.[28] Rather than

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20 *See* Macklin, *Personhood and the Abortion Debate*, in ABORTION: MORAL AND LEGAL PERSPECTIVES 81 (1984); Wikler, *Concepts of Personhood: A Philosophical Perspective*, in DEFINING HUMAN LIFE: MEDICAL, LEGAL, AND ETHICAL IMPLICATIONS 14 (1983).

21 Wikler, *supra* note 20, at 14.

22 Macklin, *supra* note 20, at 81-82.

23 *See infra* notes 33-53 and accompanying text.

24 Wikler, *supra* note 20 at 14.

25 *See* B. MILBAUER, *infra* note 40, at 111.

26 *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1348-49 (1988) ("Nor can we get anywhere on this issue by debating whether 'fetal life' is 'human life:' what other form or species of life could it be?"). *But see* C. YOUNG, THE LEAST OF THESE 25 (1983) ("Whether the fetus is or is not a human being is a matter of definition, not fact; and we can define any way we wish.") (quoting Hardin, *Abortion—or Compulsory Pregnancy?*, 30 JOURNAL OF MARRIAGE AND THE FAMILY 246, 250 (1968)).

27 *See* S. REP. No. 158, 97th Cong., 1st Sess. 49-52 (1981).

28 *See* Horan and Balch, *Roe v. Wade: No Justification in History, Law or Logic*, in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS 75 (1987). This is not to suggest that the injection of normative concepts into the

redefine the issue from that of life to value, pro-choice advocates have opted instead to redefine the word "life" by subtly injecting into the definition normative concepts which suggest value.[29] From the point of view of facilitating dialogue, the choice was unfortunate.

Resolution of the abortion question does not depend on a determination of whether the fetus is a living organism and a member of the homo sapien species [hereinafter the scientific question]. If such resolution did, the question could have been easily answered by those trained in science and medicine.[30] The almost universally accepted fact that life begins at conception is not necessarily dispositive of whether a fetus is worth protecting [hereinafter the value question]. Science is of limited value in resolving this second question.[31] These two questions are distinct[32] and permitting the term "life" to do double-duty obscures this distinction. The Court's complicity in this enterprise has not only contributed to the confusion but has needlessly prolonged the nation's division over this issue.

Roe v. Wade: A Study in Obfuscation

The *Roe* Court began its analysis by observing that the word "person", as utilized in the fourteenth amendment, does not include the unborn.[33] Essentially, semantics were substituted for reasoned analysis. The fact that a fetus is not a person under the

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definition of "life" is deliberately misleading. A fair argument can be made that a value-laden definition is the more common usage. As Justice Stevens observed in a slightly different context, a reader who picked up a book entitled "The Life of John Marshall" would be surprised to find that it contained only biological data. *See Cruzan v. Director, Mo. Dept. of Health*, 110 S. Ct. 2841, 2887 n.20 (1990) (Stevens, J., dissenting).

29 *See generally*, Veatch, *Definition of Life and Death: Should There be Consistency?*, in DEFINING HUMAN LIFE: MEDICAL, LEGAL, AND ETHICAL IMPLICATIONS 102-03 (1983).

30 *See infra* note 40.

31 The Senate Subcommittee on Separation of Powers concluded that "science . . . is not relevant to [this] . . . question." S. REP. No. 158, *supra* note 27, at 3. This, however, overstates the point. Science may or may not be relevant to determining fetal worth, depending on the criteria one adopts. If the presence of brain waves or the ability to feel pain are relevant criteria, science clearly can be of assistance in resolving this question. *See, e.g.*, Callahan, *The Role of Science in Moral and Societal Decision Making: The Human Life Bill as a Case Study*, in DEFINING HUMAN LIFE: MEDICAL, LEGAL, AND ETHICAL IMPLICATIONS 320 (1983) (illustrating numerous examples where moral and policy goals are mixed with scientific evidence to formulate reasonable judgments).

32 S. REP. No. 158, *supra* note 27, at 3.

33 Roe v. Wade, 410 U.S. 113, 158 (1973) (citation omitted).

definition embodied in the fourteenth amendment is irrelevant.[34] The issue before the *Roe* Court was not the state's constitutional *obligation* to protect prenatal life, in which case the fact that a fetus is not a person entitled to fourteenth amendment protection might have been highly relevant.[35] Rather, the question in *Roe*

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[34] *See* Ely, *supra* note 15, at 925-26. Professor Ely observed that the word "person" in its various constitutional contexts frequently does not include children or adolescents. *Id.* at 925-26. Further, Professor Ely maintained that "it has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person." *Id.* at 926 (emphasis in original) (citation omitted). For example, the state can protect animals even where animal sacrifice is mandated by a citizen's religion. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D.Fla. 1989) (upholding against a first amendment challenge, an anti-animal cruelty ordinance regulating ritual animal sacrifice mandated by the plaintiffs' religion). Moreover, the state can protect private property from defacement by punishing individuals who place burning crosses on another's front lawn or who paint swastikas on the front doors of private residences. *See, e.g.*, State v. Frazier, 278 N.C. 458, 180 S.E.2d 128, 130 (1971) (court held that "[n]o constitutional questions are raised" on the appeal of a conviction for unlawfully placing a burning cross on another's property without first obtaining the owner's permission); State v. Fahy, 149 Conn. 577, 183 A.2d 256 (1962), *rev'd on other grounds sub nom.*, Fahy v. Connecticut, 375 U.S. 85 (1963) (court upheld a conviction for willfully injuring public property where defendant allegedly painted a swastika on a synagogue). This state protection exists despite the attending burden placed on the free expression rights of white supremacists. Presumably, the courts could have reached these conclusions without first determining that animals and private property constitute "persons" possessing constitutional rights.

Professor Tribe, finding this reasoning unpersuasive, argued that the pursuit of a fundamental right need not entail any of these violations whereas "a woman's fundamental liberty of reproductive autonomy and bodily integrity *necessarily* collides with fetal survival prior to viability: that is what the dispute is all about." L. TRIBE, *supra* note 26, § 15-10, at 1349 n.79 (emphasis in original).

Professor Tribe has, however, blurred the distinction between whether a statute impedes the exercise of a fundamental right and whether it advances a compelling state interest. The fact that fetal survival and the woman's reproductive autonomy are unavoidably in conflict does not in any way make the state's interest in protecting pre-natal life less compelling. Thus, regardless of any other legal significance fetal personhood may have, the issue of whether the intended beneficiary of the legislation is a "person" or has constitutional rights is irrelevant to whether the state's interest is compelling.

[35] There is language in *Roe* and subsequent abortion cases suggesting that a finding that a fetus is a "person" under a fourteenth amendment definition would, by that fact alone, end legalized abortion. *See* Roe v. Wade, 410 U.S. 113, 156-57 (1973); *see also* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring); Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3083 & n.13 (1989) (Stevens, J., dissenting). Recognition of fetal personhood, however, would not have this effect because the fourteenth amendment applies only to state action. NOWAK, ROTUNDA AND YOUNG, CONSTITUTIONAL LAW 421 (1986). Actions of individuals are not governed by the fourteenth amendment unless the activity is somehow linked to the actions of the state. *Id.* Thus, if private individuals sought to end the lives of fetal persons and the

was the extent to which states are permitted to protect prenatal life when this can be done only at the expense of limiting a woman's liberty to obtain an abortion.[36] The *Roe* Court ultimately contradicted itself by forbidding states to proscribe the abortion of a pre-viable fetus while, oddly enough, allowing states to proscribe an abortion of a viable fetus.[37] The Court disregarded the fact that both pre-viable and viable fetuses are considered nonpersons under the fourteenth amendment definition.[38]

Having had some success in obscuring the central issue in the abortion debate by miring it in semantic distinctions of the word "person," the *Roe* Court undertook a similar effort in the word "life." Justice Blackmun wrote: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer."[39]

It is essential to determine in what sense (value or science) the Roe Court used the term "life." If the term was used in reference to the scientific question then, as previously indicated, the question of "when does life begin" is not difficult to resolve and a consensus certainly exists as to the fact that life begins at conception.[40] If, as is more likely,[41] the term "life" was used in refer-

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state had no objection, there would be no due process issue presented by these facts.

36 *See Roe*, 410 U.S. at 150-65; Epstein, *supra* note 19, at 168.

37 *Roe*, 410 U.S. at 163-64.

38 *Id.* at 157-58 (the *Roe* court construed the word "person" in the fourteenth amendment as having only post-natal application).

39 *Id.* at 159.

40 Scientists discovered that life begins at conception as early as 1827. B. MILBAUER, THE LAW GIVETH: LEGAL ASPECTS OF THE ABORTION CONTROVERSY 111 (1983). Prior to that time, it was widely believed that life began at "quickening," the point at which the mother could sense fetal movement. *Id.* These scientific findings have enjoyed universal acceptance in the scientific and medical community. *See* S. REP. NO. 158, *supra* note 27, at 7-10.

This position has been attacked by several biologists who assert that the beginning of life predates conception. Dr. Josuah Lederberg, while testifying before a Senate subcommittee in opposition to the Human Life Bill, argued that "[t]here is no single, simple answer [as] to [when life begins]. . . . In contemporary experience, life in fact never begins—it is a continuum from generation to generation." Wikler, *Concepts of Personhood*, *supra* note 20, at 15 (quoting Lederberg, J., *Human Life Bill: Hearings on S. 158 Before the Subcommittee on the Judiciary*, 97th Cong., 1st sess. 48, 50 (1982)). *See also* Grobstein, *A Biological Perspective on the Origin of Human Life and Personhood*, in DEFINING HUMAN LIFE: MEDICAL, LEGAL AND ETHICAL IMPLICATIONS 320 (1983).

It is not entirely clear where this line of reasoning leads. It is unlikely that its proponent is arguing that because life begins before conception, the state has a

ence to the value question, the Court correctly stated that no consensus exists as to the value which should be placed on prenatal life.[42] Justice Blackmun erred, however, by concluding that the Court need not resolve the question of when life begins (the value question).[43] To the contrary, what intrinsic value is possessed by prenatal life is precisely the question which the Court must answer in order to determine if a state's interest in protecting that life is compelling. Despite the *Roe* Court's claim to the contrary,[44] it did nothing less than attempt to resolve the question of when life beings when it announced that the state's interest in protecting fetal life does not become compelling until viability.[45]

By attaching a nebulous definition to the word "life", the *Roe* Court avoided exposing its underlying belief—that some human lives are of limited value and thus unworthy of state protection. The Court buried this value judgement beneath the fiction that fetuses are not human life at all. An acknowledgment that abortion results in the destruction of human life would have forced the Court to recognize the fact that abortion has disturbing conceptual similarities to infanticide.

In order to separate abortion from infanticide, it was essential that the Court first separate fetuses from infants. The reasons for this are clear. In an abortion, procedures are performed

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compelling interest in regulating contraception. Once it is determined that the beginning of life precedes abortion, there is no profit in making finer distinctions. This argument should be viewed as an indirect attack on the relevancy of the beginning of life.

41 The *Roe* Court makes no attempt to challenge scientific findings which indicate that life begins at conception. *See generally* Roe v. Wade, 410 U.S. 113 (1973). These findings have enjoyed universal acceptance for 150 years. *See* S. REP. No. 158, *supra* note 27 and accompanying text.

42 *Roe*, 410 U.S. at 159.

43 *Id.*

44 *Id.* at 159.

45 *Id.* at 163. *See* Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe*, 1989 DUKE L.J. 1677, 1680-81 (1989). Professor Van Alstyne noted that:

> Justice Blackmun [in *Roe*] . . . quite rightly observed [that] . . . it was not for the Court to substitute *its* view . . . as to how [it] might measure the calculus of fetal life. . . . Yet . . . despite that clear and well stated position for the Court, Justice Blackmun ended by doing *exactly* that which the Court disclaimed [when he] . . . declare[d] that *no* legislative [position on abortion] . . . would be regarded by the Court as acceptable unless [that position] . . . selected as the earliest date [for which the fetus was] worthy of general protection from death by abortion . . . the twenty-fourth week of [gestation]. . . .

Id. at 1680-81 (emphasis in original).

on a fetus which, if performed on an infant, would be unconscionable.[46] Proscriptions on infanticide, however, like those on abortion, restrict a woman's ability to escape parenthood and thus do similar damage to a woman's autonomy.[47] Nevertheless, the state's authority to protect postnatal life has never been seriously questioned.[48] This is true regardless of whether the child is conceived as a result of rape or incest, is severely deformed, has a genetic disease, or the parents are poor or have other children.[49] Thus, in order to maintain that the state's interest in protecting the fetus is not compelling, a mechanism was employed which removed the fetus from the group of living human beings almost universally recognized as proper objects of moral concern and state protection. The Court engaged in a variety of rhetorical mechanisms which allowed it to avoid acknowledging the disturbing similarities between infanticide and abortion.[50] The result, according to one commentator, has been:

> [a] curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not put forth under socially impeccable auspices.[51]

The Court could have inquired as to whether and at what point the factors which compel legal restraints on infanticide are present in gestation. This, however, would have involved a discussion of when life begins (or as defined here—when value attaches). But because theologians, doctors and philosophers failed to reach any con-

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46 Epstein, *supra* note 19, at 176.

47 It will not suffice to argue that the option of placing a child into the adoption process will protect the woman's autonomy interest. This conclusion would "ignore[] the emotional pressures that make it difficult to abandon one's offspring as well as the legal constraints society imposes upon such a choice." *See* L. TRIBE, *supra* note 26, § 15-16, at 1340 n.21 (1988). *See also* L. TRIBE, *supra* note 14, at 104. ("Pregnancy is not . . . a minor and temporary imposition whose burdens are limited by the availability of adoption. . . . Pregnancy does not merely inconvenience a woman for a time; it gradually turns her into a mother and makes her one for all time.).

48 Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 678 (1988).

49 Epstein, *supra* note 19, at 177-78.

50 *See* Tribe, *The Supreme Court, 1972 Term-Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 27-28 (1973); Ely, *Crying Wolf*, *supra* note 15, at 927.

51 C. YOUNG, *supra* note 26, at 25 (quoting *A New Ethic for Medicine and Society*, 113 CALIFORNIA MEDICINE 67, 68 (1970)).

sensus concerning this inquiry, the Court was disinclined to follow their lead.[52] Any fair analysis of the state's interest in protecting prenatal life, however, must begin with an acknowledgment that fetuses are human beings and abortion results in their destruction. By continually disputing this point—a dispute which cannot be resolved because it is illusory—the debate is deflected away from the real issue regarding abortion on which there is legitimate room for dispute—how strong is the state's interest in protecting prenatal life?[53]

Denigration of the Fetus

The method by which the Supreme Court in *Roe* evaded this essential question deserves some examination. In *Roe*, Justice Blackmun concluded, after a lengthy historical exegesis, that "restrictive criminal abortion laws [were] of relatively recent vintage."[54] He noted that "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th Century, abortion was viewed with less disfavor than under most American statutes currently in effect."[55] The Court acknowledged that the state's interest in protecting prenatal life was among the reasons commonly advanced to explain the criminalization of abortion during the late 19th Century, as well

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52 *See* Roe v. Wade, 410 U.S. 113, 159 (1973).

53 This is not meant to suggest that the adverse effects which may befall a woman who is prevented from aborting an unwanted pregnancy are irrelevant. To the contrary, these adverse effects constitute an essential premise to the pro-choice position and in large part are undisputed. *See* Wertheimer, *Philosophy on Humanity*, ABORTION: PRO AND CON 108-09 (1974) (rejecting the pro-abortionists' claim that the abortion dispute reflects a differing emphasis on bodily integrity and welfare, and concluding that the disagreement actually involves differing perceptions as to fetal humanity). To the extent that there is any dispute on this matter, resolution would affect only the issue of whether abortion regulations implicate a constitutionally protected privacy interest and not whether the state's countervailing interest is compelling.

54 *Roe*, 410 U.S. at 129.

55 *Id.* at 140. The *Roe* Court devotes approximately one-half of its opinion to an historical survey of criminal abortion laws. *See id.* at 129-52. The Court never clearly indicates the legal significance of this historical review. *See id.* In several substantive due process cases the Court based the recognition of a fundamental right on whether the liberty in question had been enjoyed throughout Anglo-American law. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Duncan v. Louisiana, 391 U.S. 145, 151 (1968). The historical analysis presented by the *Roe* Court, however, reveals little more than the fact that different cultures, at different times, had different ideas as to the value of prenatal life, the point at which life begins, and the moral turpitude to be attached to abortion. *See Roe*, 410 U.S. at 129-62. *See also* Epstein, *supra* note 19, at 167. Why this should be viewed as an historical mandate has not been explained. *See* Ely, *supra* note 15, at 925 n.42.

as justification for its continued existence.[56] The Court stated that this view rests on the theory that a new human life is present from the moment of conception.[57] Justice Blackmun conceded that one need not embrace the view that "life begins at conception or at some other point prior to live birth" in order to recognize the state's interest in protecting prenatal life.[58] One can hold to a "less rigid" view that the state has an interest in protecting "potential life."[59] At some point, this legitimate interest becomes sufficiently compelling so as to permit states to regulate abortion notwithstanding the privacy right[60] - that point occurs at viability.[61]

In what appears to be a reasonable concession, the Court acknowledged that a finding that life begins at conception or sometime thereafter is not essential for a determination that a state has an interest in protecting prenatal life, because the fetus clearly has the potential for life.[62] The Court then proceeded to evaluate the efficacy of that interest under the assumption that the fetus is potential life rather than life.[63] By the time the reader reaches the final conclusion, he has forgotten that the line of reasoning is predicated upon that assumption that a fetus is only potential life, and not life in the value sense.[64] After concluding that the state's interest in protecting potential life is insufficient to uphold the statute, the Court should have proceeded to evaluate whether the fetus was life (in the value sense) and whether that would affect the sufficiency of the state's interest in its protection. By failing to do so, the Court begged the essential question.

The Court in *Roe*, by attaching to the fetus the dehumanizing

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56 *Roe*, 410 U.S. at 150. Other explanations posited by the Court were (1) the desire to discourage illicit sexual activity, and (2) the protection of pregnant women from the hazards of primitive abortion procedures. *Id.* at 148-150.

57 *Id.* at 150.

58 *Id.*

59 *Id.*

60 *Id.* at 162-63.

61 *Id.* at 163. Viability is the point at which the fetus has a reasonable chance of survival outside the womb. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 63 (1976). It is generally acknowledged that this point occurs as early as the twenty-fourth week of gestation. *Roe*, 410 U.S. at 160; Colautti v. Franklin, 439 U.S. 379, 387 (1979) (citation omitted). At the point of viability, however, the infant can survive only if provided with extensive artificial life support. *Colautti*, 439 U.S. at 387.

62 *Roe*, 410 U.S. at 150.

63 *Id.* at 150-64.

64 *See id.*

label of "potential life", subtly leads the reader into believing that abortion does not result in the destruction of human life. The inescapable but unstated inference is that the state's interest in regulating abortion is similar to its interest in regulating contraception and dissimilar to its interest in regulating infanticide. By utilizing this reason-by-labeling technique, the Court further effected this conceptual separation of fetuses and infants without subjecting the logic behind such a classification scheme to any real scrutiny. Perhaps more disturbing is the fact that the original dissenting Justices in *Roe*, as well as those Justices who joined the Court subsequent to *Roe* (and who dissented from the Court's opinions invalidating abortion regulations), have adopted the potential life label in reference to prenatal life.[65]

It has been noted that the inhibitions against killing ones own kind "are generally so strong that the victims must first be deprived of their human status if systematic killing is to proceed. . . ."[66] Dehumanizing metaphors are frequently employed in reference to certain population groups to further this end:[67] "[once] dehumanized, principles of morality no longer apply to them and moral restraints against killing are more readily overcome."[68] The term "potential life" has had precisely this effect. The widespread use of the term potential life has given *Roe* ad-

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[65] *See* Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3057 (1989). In a plurality opinion, authored by Chief Justice Rehnquist and joined by Justices White and Kennedy, the Court stated, "[W]e do not see why the State's interest in potential human life should come into existence only at the point of viability. . . ."); *see also id.* at 3062 (O'Connor, J., concurring) ("No decision of this Court has held that the State may not directly promote its interest in potential life. . . ."); *id.* at 3084 (Stevens, J., dissenting) ("No one argues . . . that Missouri can assert a societal interest in increasing its population as its secular reason for fostering potential life."); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) ("I . . . remain of the view[] . . . that [t]he [s]tate has compelling interests in . . . protecting potential human life. . . .); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting) ("I believe that the State's interest in protecting potential human life exists throughout the pregnancy.") (cited with approval in *Webster*, 109 S. Ct. at 3064 (Scalia, J., dissenting)); Harris v. McCrae, 448 U.S. 297, 328 (1980) (White, J., concurring) ("At an appropriate stage in a pregnancy . . . abortion could be prohibited to implement the governmental interest in potential life."); *but see Thornburgh*, 476 U.S. at 794 (White, J., dissenting) ("[T]he State's countervailing interest in protecting fetal life—or as the Court would have it, 'potential life,'—becomes compelling at the point which the fetus is viable.").

[66] *See* L. KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 87 (1981).

[67] *Id.* at 84-88.

[68] *Id.* at 87.

herents a decided rhetorical advantage and should not have occurred without protest.

The Magic Moment of Viability: An Illogical Criterion

The *Roe* Court concluded that the point at which a state's interest in protecting potential life becomes compelling is viability.[69] Interestingly, the *Roe* Court did not hold that a viable fetus is no longer merely potential life as opposed to actual life, a distinction which would have permitted the fetus to receive state protection. Rather, the Court appears to hold the view that even a viable fetus is still only potential life.[70] For reasons which are not entirely clear, however, a state's interest in protecting viable potential life, in contrast with nonviable potential life, is compelling.[71]

The seemingly contradictory concept of "viable potential life"[72] has been used in reference to prenatal life not only by the Justices who comprised the *Roe* majority but also by those Justices who generally vote to uphold statutes restricting abortion.[73] It is difficult to understand why viability should be relevant to, much less control, the measure of a state's interest in protecting prenatal life. The only reason that the state's interest in protect-

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

70 *Id.* at 164-65. ("[S]ubsequent to viability, the State in promoting its interest in the *potentiality of human life* may . . . proscribe abortion. . . .") (emphasis added).

71 The Court's rationale for this distinction is simply inadequate. *See Roe*, 410 U.S. at 163 ("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."). This, however, is nothing more than a mere restatement of the definition of viability and should not be viewed as an acceptable substitute for reasoned analysis. *See* Ely, *supra* note 15, at 924 ("Exactly why this is a magic moment is not made clear . . . the Court . . . mistake[s] a definition for a syllogism.").

72 Potential life is the concept of prenatal life that one holds if one rejects the idea that life begins at conception. *Id.* at 150. Thus, it follows that viable potential life must be life which is capable of immediate survival but in which life has not begun.

73 *See, e.g.*, Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3057 (1989). Justice Rehnquist stated that, "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability. . . ."; *id.* at 3063 (O'Connor, J., concurring) ("[T]he State's compelling interest in potential life post-viability renders its interest in determining the critical point of viability equally compelling."); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 784 (1986) (Burger, J., dissenting) ("[T]his Court meant what it said in *Roe* concerning the 'compelling interest' of the states in potential life after viability. . . .); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting) ("The State's interest in protecting potential human life exists throughout pregnancy.").

ing potential life, viable or otherwise, would ever be compelling[74] is because a fetus had already acquired the intrinsic value associated with human life and thus could no longer be described as potential life.

Furthermore, even if it is conceded that a fetus is only potential life and not life, it is unclear why viability should have this profound effect upon the calculus of the state's countervailing interest in protecting potential life. The point of viability says much about medical technology, little about fetuses, and has no apparent logical connection to the two interests which compete in the abortion equation—the woman's autonomy interest and the intrinsic worth of the fetus.[75] This logical difficulty led Justice White, in his dissenting opinion in *Thornburgh*, to observe that:

> The substantiality of [the state's] interest [in protecting prenatal life] is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.[76]

Professor Tribe, taking issue with Justice White's analysis, contends that:

> Justice White is surely mistaken when he argues that fetal viability and the state of medical technology are 'morally and constitutionally irrelevant,' since [the fetus's] continued existence requires an enormous sacrifice by another—and only *one* other human being. Unlike the others who lay claim to society's resources 'the sustenance the non-viable fetus needs is not society's to give. It can only be provided by a particular pregnant woman.' But once the fetus 'has the capability of meaningful life outside the mother's womb' . . . the responsi-

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74 One can easily conceive of contexts where viability might be relevant to an abortion related issue. For instance, in determining the constitutionality of a statutory requirement on abortionists to perform procedures designed to enhance the fetus's chances for survival, relevance of fetal viability is obvious. If the fetus cannot be saved, life saving procedures are pointless and should not be required. *See* Fost, Chudwin and Wikler, *The Limited Moral Significance of 'Fetal Viability'*, HASTINGS CENTER REP. 10, 12 (Dec. 1980).

75 *Id.* at 11-13.

76 *Thornburgh*, 475 U.S. at 795 (White, J., dissenting) (citation omitted).

> bility for the nurture that is essential to life can be assumed by others. . . ."[77]

The fact that others can assume the burden of caring for the viable fetus might have been relevant had the Court in *Roe* required that a woman, carrying a viable fetus, have the option to terminate her pregnancy in a manner which preserves the life of the fetus. To the contrary, it is the very possibility of providing this option that is the rationale advanced for permitting states to prohibit abortions.[78] Prior to viability, the state's interest in protecting fetuses cannot be advanced without denying the pregnant woman control over her reproductive autonomy.[79] Since both interests cannot be accommodated simultaneously, the Court deemed the reproductive autonomy interest superior and struck down laws prohibiting abortions of previable fetuses.[80] After viability, the state's interest in preserving prenatal life and the woman's reproductive autonomy interest can be advanced simultaneously.[81] Oddly enough, however, it is after viability that states are permitted to completely disregard the woman's reproductive autonomy (previously considered paramount) in its efforts to protect prenatal life.[82] Thus, a state is prohibited from abridging a woman's purported constitutional right when such abridgment is necessary to advance the state's interest, yet is permitted to abridge this right when such action is unnecessary. This logic is analogous to permitting a police officer to search a suspect when he poses no threat to the officer while prohibiting a similar search when the officer believes the suspect is carrying a concealed weapon.

Contrary to what Professor Tribe suggests, the justification for discriminating between viable and nonviable fetuses cannot be derived from any *decrease* in the dependency of the fetus on its mother. No sense can be made for such discrimination unless one first presumes that a viable fetus is inherently more valuable than a nonviable fetus.

The Court has had some difficulty articulating this lack of relevancy between viability and the state's interest in protecting fetuses. In *Akron v. Akron Center for Reproductive Health, Inc.*,[83] Justice

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77 *See* L. TRIBE, *supra* note 26, § 15-10, at 1357-58.

78 *Id.* at 1358-59.

79 *See id.* at 1341.

80 *See id.*

81 *See id.* at 1357-59.

82 *See id.*

83 462 U.S. 416 (1983). In *Akron*, the Court invalidated an ordinance requiring all second trimester abortions to be performed in a hospital. *Id.* at 431-33. The

O'Connor, in a dissenting opinion, observed that "improvements in medical technology inevitably will move *forward* the point at which the State may regulate [abortion] for reasons of maternal health [while] different technological improvements will move *backwards* the point of viability at which the State may proscribe abortion. . . ."[84] This observation led the Justice to conclude that "[t]he *Roe* framework . . . is clearly on a collision course with itself[]"[85] and was thus "an unworkable means of balancing the fundamental right and the compelling state interests that are indisputably implicated."[86] This observation has been frequently cited in subsequent legal commentaries criticizing the *Roe* trimester scheme.[87]

It is somewhat curious that several Justices, as well as several legal commentators, have found this situation problematic. Even if technology were to move the critical elements in the *Roe* trimester scheme to the point where they collide or even pass one another and swap positions in the gestational continuum, this would present no discernable difficulty. Under this scenario, viability would be achievable after the first trimester and abortion would be safer than child birth before the end of the second trimester. Under the reasoning in *Roe*, a state could restrict abortions after the first trimester in order to protect potential life because the point at which the state's interest is compelling has been moved forward. After the second trimester, states could regulate abortions (assuming a state did not opt to criminalize them after the first trimester) in ways which advance its interest in protecting maternal health. This would be workable in practice. It would also be sound in theory *if one believes that viability is relevant to determining the intrinsic worth of pre-natal life*.

The criticism that the *Roe* trimester scheme is on a collision

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Court conceded that under *Roe*, the state's interest in protecting maternal health becomes compelling at the end of the first trimester because at that point in gestation the health risks of abortion were less than the risks of completing the pregnancy. *Id.* at 429 & n.11. The Court noted, however, that post-*Roe* scientific developments made at least some second trimester abortion procedures safe in a properly equipped clinic. *Id.* at 435-36. Accordingly, the Court determined that the state statute was overbroad. *Id.* at 435-38.

84 *Id.* at 456-57 (O'Connor, J., dissenting) (emphasis in the original).

85 *Id.* at 458 (O'Connor, J., dissenting).

86 *Id* at 458-59 (O'Connor, J., dissenting).

87 *See, e.g.*, Rhoden, *supra* note 48, at 641; Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375, 381 (1985); Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L.J. 1451, 1491-92 (1984). Comment, *The Supreme Court's Abortion Jurisprudence: Will the Supreme Court Pass the "Albatross" Back to the States?*, 65 NOTRE DAME L. REV. 731, 760 & n.153 (1990).

course with itself reflects an underlying difficulty with the logical link between viability and the intrinsic worth of prenatal life. This disquietude is stimulated upon contemplation that technology may move the point in gestation at which fetuses are viable. The value and intrinsic worth of prenatal life should not be affected by scientific advances. Under modern technology, viability is not achieved until the twenty-fourth week of gestation.[88] In 1939, however, viability did not occur until the twenty-ninth week of gestation.[89] The idea that the state's interest in protecting the life of a fetus at twenty-seven weeks of gestation was in some way less compelling in 1939 than in 1989 makes one suspicious of this entire inquiry. If a twenty-seven week old fetus is worth protecting at a time when science could enable its extra-uterine survival, then it is worth protecting prior to obtaining such technological capabilities. The reverse, of course, is also true.[90]

In *Webster v. Reproductive Health Services*,[91] Justice Blackmun, dissenting from a plurality opinion upholding a Missouri abortion statute,[92] responded to Justice O'Connor's dissent in Akron, arguing that:

> [Justice O'Connor's] critique has no medical foundation. . . . [T]here is an 'anatomical threshold' for fetal viability of about 23-24 weeks gestation. . . . Moreover, no technology exists to bridge the development gap between the three day embryo culture and the 24th week of gestation. Nor does the medical community believe that . . . such technology is possible. In other words, the threshold of fetal viability is and will

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88 *See supra* note 61.

89 Potter & Adair, *Factors Associated with Fetal and Neonatal Deaths*, 112 J. A.M.A. 1549, 1549 (1939).

90 Professor Tribe defends the viability standard by arguing that:

> [A]s technology enhances the ability to relieve the pregnant woman of the burden of her pregnancy and transfer nurture of the fetus to other hands, the state's power to protect fetal life expands-*as it should*. A viability rule thus allows society to optimize the protection of women and their unborn children by choosing how much to invest in the technologies pushing viability toward conception.

L. TRIBE, *supra* note 26, § 15-10, at 1357-58 (emphasis in original) (citation omitted).

This argument fails to address the issue. A viability rule may have the effect described by Professor Tribe, but a rule which prohibited all abortions except those where the fetus had a better than fifty percent chance of surviving the procedure would also have this effect. This, however, does not help one to determine the value of prenatal life and the state's interest in protecting it, which was the only reason that the Court undertook this inquiry.

91 109 S. Ct. 3040 (1989).

92 *See id.* at 3067.

> remain, no different from what it was at the time *Roe* was decided. Predictions to the contrary are pure science fiction.[93]

The conclusion that the *Roe* trimester scheme is not on a collision course with itself simply will not follow from this argument. Justice Blackmun ignores the fact that technology continues to advance the point where abortion is safer than birth.[94] Thus, even if viability is frozen at the 24th week, the collision that Justice O'Connor forewarned is still approaching.[95] However, unlike scientific developments regarding viability which have no overt logical relationship to the state's interest in protecting prenatal life, advances in abortion procedures which make them safer at later stages of pregnancy are logically related to the state's interest in protecting maternal health.[96] Thus, the first trimester milestone in the *Roe* scheme seems to pass without objection despite the fact that it also changes with technology.

The Court has not adequately articulated the logical defect in the viability standard. The trimester scheme is attacked for minor difficulties which are common to other bodies of constitutional law and are not overly troublesome. For instance, critics charge that (1) the trimester scheme utilizes intricate rules more germane to a regulatory code than a constitutional framework,[97] (2) the key elements, trimester and viability have no cognizable roots in the text of the Constitution,[98] and (3) the Court is not qualified to make such determinations of medical issues.[99] If these were the only flaws of the viability standard it would not be deserving of much attention.[100]

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93 109 S. Ct. at 3075-76 n.9 (Blackmun, J., dissenting) (citations omitted).

94 In Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 435-36 (1983), Justice Blackmun joined the Court in recognizing that "the safety of second trimester abortions ha[d] increased dramatically" since the time of *Roe*. *Id.* *See also Rhoden*, *supra* note 48, at 668 ("The threshold of viability is approaching week 23 [of gestation] but abortion is safer than childbirth past week 21.").

95 Rhoden, *supra* note 48, at 675.

96 See *id.* at 656 ("If the state's true motivation is to protect her health, the regulation should seldom seriously conflict with the woman's right to choose a common and relatively safe medical procedure."). *See also* Fost, Chudwin & Wikler, *supra* note 74, at 13 ("The viability criterion is puzzling in its logic. Why should a fetus's capacity to live independently be a reason to forbid the mother from forcing it to live independently").

97 *See* Ely, *supra* note 15, at 922.

98 *Id.* at 934-39.

99 *See* Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 454-58 (1983) (O'Connor, J., dissenting).

100 Numerous areas of constitutional jurisprudence embody fine distinctions approaching fairly detailed rules which are not derived from the Constitution's text. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (detailing specific disclosure requirements to be applied to defendants in custody before interrogation will be

While several members of the Court have criticized the *Roe* framework's viability standard as arbitrary,[101] such an argument only proves a trifle. It is one thing for a standard to be arbitrary; for it to be illogical, however, is a far more serious matter. Our bodies of law tolerate a great deal of arbitrariness and constitutional jurisprudence is no exception. Whether one has reached the age of eighteen quite often determines whether, and to what extent, one possesses constitutional rights.[102] The peculiar vulnerability and immaturity of minors, which enables the state to interfere with the exercise of their constitutional rights, is presumed to disappear on one's eighteenth birthday. This patently arbitrary classification is quite logical, however, assuming one believes, as do most persons, that vulnerability and immaturity are inversely related to one's age. If, however, the classification were changed to one based on criteria generally regarded as irrelevant to one's capacity to exercise constitutional rights, such as race, gender, social status, or wealth, any

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deemed lawful and statements therefrom admissible into evidence); *compare* Williams v. Florida, 399 U.S. 78 (1970) (upholding a criminal conviction handed down by a six member jury against a 6th Amendment challenge) *with* Ballew v. Georgia, 435 U.S. 223 (1978) (reversing criminal conviction based on verdict of five member jury); *compare* Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding convictions where jury vote supporting verdict was 11-1 and 10-2) *with* Burch v. Louisiana, 441 U.S. 130 (1979) (reversing misdemeanor conviction based on jury vote of 5-1).

Terms not found in the Constitution's text but which describe significant constitutional distinctions include: commercial speech, *see* Bd. of Trustees of State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3033 (1989) (entitled to less First Amendment protection than other types of speech); curtilage, *see* California v. Ciraolo, 476 U.S. 207, 212-13 (1986) (area near one's home entitled to greater fourth amendment protection than other private property outside one's dwelling); and suspect class, *see* Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 457-58 (1988) (statutes disadvantaging members are more rigorously scrutinized than statutes disadvantaging other population groups).

The Court frequently involves itself in areas where it has little or no expertise, such as education, *see* Brown v. Board of Education, 347 U.S. 483, 494-95 (1954); sociology, *see* Wisconsin v. Yoder, 406 U.S. 205, 218-19 (1972); ethics, *see* Ohrailik v. Ohio State Bar Assn., 436 U.S. 447, 460-62 (1978); and economics, *see* Southern Pacific Co. v. Arizona, 325 U.S. 761, 773 (1945). Moreover, *Roe v. Wade* was not the Court's initial entry into areas touching medicine. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (Court upheld statute requiring individuals to submit to smallpox vaccination).

101 *See, e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 794 (1986) (White, J., dissenting); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting).

102 *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (trial by jury in juvenile proceedings is not constitutionally required); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding application of child labor statute which prevented a child from distributing religious literature); Moe v. Dinkins, 533 F.Supp. 625 (S.D.N.Y. 1981), *aff'd* 669 F.2d 67 (2d Cir. 1982) (upholding statute which prohibited minors form marrying without parental consent).

claims to legitimacy collapse. Thus, an attack upon the viability standard for its arbitrariness only serves to deflect criticism from its more serious logical flaw.[103]

PART II

The Value of Prenatal Life, Cognitive Ability and Viability's Significance

The *Roe* Court was faced with three options. It could have: (1) permitted states to protect all fetuses, (2) prohibited states from protecting any fetuses, or (3) allowed states to protect some, but not all, fetuses. In selecting the third option, the Court was in need of some mechanism for excluding some fetuses from state protection. The rationale behind the Court's choice of the viability standard is unclear. Viability was, however, something of a scientific concept, thereby bearing science's imprimatur. This, in turn, added credibility to the viability standard.[104] The fact that science's answer (viability is achieved at the twenty-fourth week of gestation) was not germane to the abortion question (which fetuses are valuable) — either went unnoticed by the *Roe* Court or was not considered significant.

The impression one derives from *Roe* is that viability is determinative of whether the state's interest is compelling and the fact that this occurs at the twenty-fourth week of gestation is an irrelevant coincidence.[105] In a widely quoted article, Professor Rhoden argues that what the Court really meant or would have meant had it thoroughly analyzed viability's significance,[106] was that the twenty-fourth week itself was the determinative factor, and viability was merely the irrelevant coincidence.[107] Professor Rhoden claims that viability denotes two separate concepts, one technological and one normative.[108] The technological concept (fetal survivability) is not a relevant measure of the state's interest.[109] In contrast, the normative concept which "encompasses

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103 The *Roe* Court asserted that the viability standard had a "logical as well as biological" justification. Roe v. Wade, 410 U.S. 113, 163 (1973). This assertion has been rejected by numerous commentators. *See, e.g.*, Rhoden, *supra* note 48, at 664-65; Wertheimer, *Understanding Blackmun's Argument: The Reasoning of Roe v. Wade*, in ABORTION: MORAL AND LEGAL PERSPECTIVES 120 (1984); Robertson, *Medicolegal Implications of a Human Life Amendment*, in DEFINING HUMAN LIFE: MEDICAL, LEGAL AND ETHICAL IMPLICATIONS 166 (1983).

104 *See* Rhoden, *supra* note 48, at 668-69.

105 *Id.* at 670.

106 *Id.* at 671-72.

107 *Id.* at 669-70.

108 *Id.* at 671.

109 *Id.*

the idea that the fetus is so substantially developed that it has a claim to societal protection" is relevant.[110]

Professor Rhoden uses the separate terms "Viability$_1$" (technological survivability) and "Viability$_2$" (substantial fetal development) to avoid confusion which inevitably ensues when separate concepts are denoted by a single word or phrase.[111] She contends that Viability$_2$ is a " 'cluster concept'—a concept made up of *several important components*, none of which is sufficient to define it."[112] Thus, she concludes that the sole merit of the viability standard is that it divides pregnancy (under 1973 medical technology) in a manner which approximates the division mandated by a standard based on these "several important components."[113] Stated another way, the viability standard camouflages a different standard which as yet remains undefined.

These "Several Important Components"

In order to understand the problems arising from operating under a rule of law based on unspecified criteria, it might be helpful to first speculate as to what constitutes these several important components. If not viability, what is it that leads the Court to believe that only those fetuses which have reached the twenty-fourth week of gestation are rightful subjects of the state's protection? The Court's reticence in discussing the alleged syllogistic defects of the viability standard makes it difficult to answer this question.[114] What can be gleaned from the cases, however, particularly the Court's response to criticism from its own members, is that fetal cognitive ability plays a dominant role.[115]

Criticisms of the viability standard first centered on arbitrary distinctions between viable and nonviable fetuses.[116] This led several members of the Court to reject the viability standard altogether and hold that the state's interest in protecting prenatal life is compelling throughout pregnancy, and not merely after the point of viability.[117] This conclusion, however, does not neces-

110 *Id.*
111 *Id.*
112 *Id.* at 672 (emphasis supplied).
113 *Id.* at 670-73.
114 *See infra* notes 165-177 and accompanying text.
115 *See infra* notes 117-145 and accompanying text.
116 *See supra* note 101 and accompanying text.
117 *See, e.g.*, Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3057 (1989) ("The State's interest, if compelling after viability, is equally compelling before viability.") (quoting Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting)); *Thornburgh*, 476

sarily follow from its premise. The mere fact that viability is not a useful indicator of the intrinsic worth of prenatal human life, and therefore a poor measure of the state's interest, does not necessarily mean that at every point in gestation the state's interest is considered compelling.

In *Thornburgh v. American College of Obstetrics and Gynecology*,[118] Justice Stevens, responding to the dissent's contention that the state's interest is compelling throughout pregnancy, argued the following:

> The State's interest . . . in the protection of an embryo . . . increases dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus—and pregnancy itself—are not static conditions, and the assertion that the government's interest is static simply ignores this reality . . . . There is a fundamental and well-recognized difference between a fetus and a human being. . . . Recognition of this distinction is supported, not only by logic, but by history and our shared experiences.[119]

Justice Stevens's observation strongly challenges the dissent's contention in *Thornburgh* that the state's interest in prenatal life is equally compelling throughout pregnancy.[120] Rather than vindicate the viability standard, however, this argument does more to undermine its validity. Justice Stevens enumerated four factors which he viewed as relevant to the strength of the state's interest.[121] Three of the four factors relate to the fetus's cognitive ability and are wholly

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U.S. at 828 (O'Connor, J., dissenting) ("I remain of the view [] . . . [that the] State has [a] compelling interest in . . . protecting potential human life and that interest exists throughout pregnancy."); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 460 (1983) (O'Connor, J., dissenting) ("the State's interest in potential life is . . . extant throughout pregnancy").

118 476 U.S. 747 (1986).

119 *Id.* at 778-79 (Stevens, J., concurring). Justice Stevens' statement was quoted by Justice Blackmun in his dissenting opinion in *Webster*, in which Justices Brennan and Marshall joined. *See Webster*, 109 S. Ct. at 3075 (Blackmun, J., dissenting).

120 The strength of the argument depends on how one determines the value to be attached to human life. If one bases this value on membership in the species, this interest will not increase during pregnancy and the state's interest is indeed compelling throughout pregnancy. If, however, one bases this value on factors that vary during gestation, the measure of the state's interest will change, presumably increase, as pregnancy progresses. Professor May argued that:

> The major area of disagreement between those who defend abortion and those who oppose abortion . . . comes down to the question: Is humanity, in the sense of being an entity that is the subject of rights, an endowment or an achievement?

May, *Abortion and Man's Moral Being*, in ABORTION: PRO AND CON 23-24 (1974).

121 *See Thornburgh*, 476 U.S. at 778-79 (Stevens, J., dissenting).

unrelated to viability. The reader is left wondering whether viability or the fetus's development of higher cognitive ability is determinative of when the state's interest becomes compelling.

The link between the intrinsic worth of human life and the unique cognitive ability of humans is perhaps more visible in the analysis by several Court members of life's value at its opposite extreme. In *Cruzan v. Director, Missouri Department of Health*,[122] the Court was presented with the question of whether a state can prevent the guardians of Nancy Cruzan, a permanently comatose ward, from effecting the ward's death by discontinuing artificial nutrition and hydration.[123] In a plurality opinion authored by Justice Rehnquist, the Court held that the Constitution does not proscribe a state from demanding clear and convincing evidence that death comports with an incompetent ward's wishes before it permits conduct which will result in the ward's death.[124] The plurality neither decided the question of whether the right to discontinue essential medical treatment is constitutionally protected nor whether the state would have a compelling interest in protecting life to an extent sufficient to override that privacy interest.[125]

The *Cruzan* Court was splintered along the same lines as it was in the more recent abortion cases.[126] Four members of the *Cruzan* Court—the same four members who consistently vote to strike down state abortion statutes—dissented from the Court's opinion and held that the guardians' efforts to discontinue artifical nutrition and hydration were constitutionally protected.[127] In addition to finding that the state's conduct impeded a constitutionally protected privacy interest,[128] the dissenting Justices found that the state's in-

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122 110 S. Ct. 2841 (1990).

123 *Id.* at 2846.

124 *Id.* at 2856.

125 *See id.* at 2851-52.

126 *Compare Cruzan*, 110 S. Ct. 2841 (1990) (Chief Justice Rehnquist delivered a plurality opinion joined by Justices White, O'Connor, Scalia and Kennedy. Justices O'Connor and Scalia wrote separate concurring opinions. Justice Brennan dissented in an opinion joined by Justices Marshall and Blackmun, and Justice Stevens wrote a separate dissenting opinion) *with* Webster v. Reproductive Health Services, Inc., 109 S. Ct. 3040 (1989) (Plurality opinion upholding a Missouri statute which, by restricting certain abortion procedures, arguably contravened the Court's holding in *Roe*. Chief Justice Rehnquist delivered a plurality opinion joined by Justices White, O'Connor, Scalia (in part), and Kennedy. Justices O'Connor and Scalia wrote separate concurring opinions. Justice Blackmun dissented in an opinion joined by Justices Brennan and Marshall and Justice Stevens wrote a separate dissenting opinion).

127 *See Cruzan*, 110 S. Ct. at 2863-2878 (Brennan, J., dissenting); *id.* at 2878-92 (Stevens, J., dissenting).

128 *See id.* at 2864 (Brennan, J., dissenting); *id.* at 2878-79 (Stevens, J., dissenting).

terest in protecting the life of Nancy Cruzan was insufficient to overcome this privacy interest.[129]

Not surprisingly, the *Cruzan* dissents' analysis of the state's countervailing interest in protecting human life had some interesting parallels with those accompanying the abortion decisions.[130] Justice Stevens, in his dissenting opinion, attempted to merge the definition of the word "life" with the more abstract concept of personhood by injecting normative concepts suggesting value.[131] In contrast with the *Roe* Court, however, Justice Stevens at least acknowledged that he was doing this.[132] Moreover, the dissent (as well as the plurality) repeatedly described Nancy Cruzan's condition as a "persistent vegetative state."[133] Thus, as in *Roe*, the Court enlisted the aid of a metaphor to dehumanize the object whose termination was the subject of the litigation in order to overcome the innate predilection against killing one's own kind.[134] In addition, there was a curious avoidance of the word "kill" throughout both dissenting opinions.[135] The dissenting Justices maintained that the

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129 *See id.* at 2861 (Brennan, J., dissenting); *id.* at 2889 (Stevens, J., dissenting). This is the paradigm used by the Court to evaluate whether a statute violates the fourteenth amendment due process clause. The Court first determines whether the law significantly interferes with the exercise of a fundamental right. If this inquiry is answered in the affirmative, the Court proceeds to evaluate whether the statute advances a sufficiently important state interest. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (holding that a statute which interferes with the fundamental right of marriage cannot be upheld unless supported by a sufficiently important state interest); Carey v. Population Services Int'l, 431 U.S. 678, 690 (1977) (requiring a compelling state interest in order to uphold a statute restricting the availability of contraceptives); Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (determining that an ordinance which interferes with one's basic right to co-habitate with blood relatives must be invalidated unless supported by an overriding governmental interest); Roe v. Wade, 410 U.S. 113, 155 (1973) (holding that abortions may be restricted only for the purpose of advancing a compelling state interest).

130 *See infra* notes 131-37 and accompanying text.

131 *See Cruzan*, 110 S. Ct. at 2887 (Stevens, J., dissenting) ("absent some theological abstraction, the idea of life is not conceived separately from the idea of a living person."); *id.* at 2891-92 (Stevens, J., dissenting) ("The consequence of the Court's theory [recognizing the state's unqualified interest in preserving life] is to deny . . . personhood of those whose lives are defined by the State's interests rather than their own.").

132 *Cruzan*, 110 S. Ct. at 2886 (Stevens, J., dissenting) ("Nancy Cruzan is obviously 'alive' in a physiological sense. But for patients . . . who have no consciousness . . . there is a serious question as to whether the mere persistence of their bodies is 'life' as that word is commonly understood . . . .").

133 *Id.* at 2863-78 (Brennan, J., dissenting); *id.* at 2878-92 (Stevens, J., dissenting).

134 *See supra* notes 66-68 and accompanying text.

135 *See Cruzan*, 110 S. Ct. at 2863-78 (Brennan, J., dissenting); *id.* at 2878-92 (Stevens, J., dissenting).

guardians merely wished to let "nature . . . take its course"[136] which in this case involved letting Nancy Cruzan die of starvation and dehydration.[137] To their credit, none of the dissenting justices in *Cruzan* maintained that the dispositive issue was "when life ends."

Both the dissent and the plurality made repeated references to Nancy Cruzan's lack of cognitive ability,[138] yet never indicated the legal significance of this reference.[139] One must presume that a lack of cognitive ability bears on the efficacy of the state's countervailing interest in preserving Nancy Cruzan's life.[140] The dissent maintained that "no State interest could outweigh the [constitutional] rights of an individual in Nancy Cruzan's position [to be free of unwanted medical intervention]."[141] The dissent never squarely addressed the potential implications of this statement. If the patient's choice to reject treatment is always more important than the state's interest in protecting the patient's life, a person who suffers from a life threatening but easily curable infirmity has an equally compelling constitutional right to discontinue treatment and accept death.[142] Only a distinction between medical treatment and nontreatment[143] prevents this "liberty" from being extended to persons who suffer no infirmity whatsoever but nonetheless wish to die.[144]

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136 *Id.* at 2863 (Brennan, J., dissenting) (quoting Rassmussen v. Flemming, 154 Ariz. 207, 211, 714 P.2d 674, 678 (1987) (*en banc*).

137 *See id.* at 2845-46. The absurdity of this position becomes apparent if one considers what would happen if the guardians had won their case but the doctor removed the feeding tube from a recovering patient, mistaking her for Nancy Cruzan. The doctor would have difficulty explaining that he had not killed the patient, but that death resulted from the underlying infirmity.

138 *See id.* 110 S. Ct. 2845-56; *id.* at 2863-78 (Brennan, J., dissenting); *id.* at 2878-92 (Stevens, J., dissenting).

139 *See id.*

140 The only other alternative presumption would be that the Court views those who lack higher cognitive ability as having greater rights under the fourteenth amendment. The Court, however, rejected this position. *See Cruzan*, 110 S. Ct. at 2852.

141 *Id.* at 2869.

142 The petitioners in *Cruzan* were quite explicit on this point. *See Cruzan*, 110 S. Ct. at 2852 ("[A]n incompetent person should possess the same right [to refuse life saving treatment] as is possessed by a competent person.").

143 *Id.* at 2865-67 (Brennan, J., dissenting) (recognizing a fundamental right to avoid life essential medical treatment).

144 Justice Scalia, in a separate concurring opinion, noted that:

> The dissents of Justices Brennan and Stevens . . . embrace[] . . . [a] principle that the State[] . . . has no legitimate . . . interest in someone's life . . . that could outweigh the person's choice to avoid medical treatment. [B]ut the proposition cannot logically be so limited. . . . One who accepts it must also accept . . . that the State has no such legitimate interest that could outweigh the person's choice to put an end to her life. . . . For insofar as balancing the relative interests of

This line of reasoning will inexorably lead to the judicial sanction of suicide unless it is implicitly understood that the state has a lesser interest in preserving the life of Nancy Cruzan than it has in preserving the lives of other members of the community. The only distinction between Nancy Cruzan's situation and that of any other person is the deterioration in her cognitive ability. Thus, any jurisprudential approach which would proscribe a state's efforts to prevent severely brain injured persons from terminating their lives, but would permit such efforts with respect to other persons, must presume that the lives of those who lack higher cognitive abilities are of lesser value.

With respect to the criteria for measuring the value of human life, the position taken by the dissenting Justices in *Cruzan* is entirely consistent with their position in abortion cases: the state's interest in protecting the life of the severely brain injured individual is not compelling for the same reason that its interest in protecting the nonviable fetus is not compelling - both brain injured individuals and nonviable fetuses lack the appropriate measure of cognitive ability and for that reason lack sufficient value.[145]

Thus, the viability standard appears to be derived from a philosophy which equates the value of human life with human beings' higher cognitive ability. Merely to equate human value with cognitive ability, however, will not yield a viability standard unless this philosophy is combined with a presumption that, at approximately the same time at which science enables extra-uterine survival, the fetus has developed sufficient cognitive ability to justify the state's protective efforts. Is this presumption valid? This question cannot be answered and thus the hazard of leaving these several important components undefined and relying upon the viability standard merely because it comports with intuitions about when in gestation

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> the State and the individual . . . there is nothing distinctive about accepting death through the refusal of 'medical treatment,' as opposed to accepting it through the refusal of food. . . . Suppose that Nancy Cruzan were in precisely the condition she is in today, except that she could be fed and digest food and water without artificial assistance. How is the State's 'interest' in keeping her alive thereby increased, or her interest in deciding whether she wants to continue living reduced? [J]ustice Brennan's position ultimately rests upon the proposition that it is none of the State's business if a person wants to commit suicide. Justice Stevens is explicit on the point: 'Choices about death touch the core of liberty . . . and that alone is reason enough to protect the freedom to conform choices about death to individual conscience.'

Cruzan, 110 S. Ct. at 2862 (Scalia, J., concurring) (citations and emphases omitted).

145 *See infra* notes 28-32 and accompanying text.

life becomes valuable, is apparent.[146]

These unexpressed components may have no more relevance to the value of prenatal life than viability. There is reason to suspect that some of the criteria considered for measuring fetal worth have little to do with the fetus and more to do with the availability of abortions.[147] For instance, in attempting to ascertain the proper point in gestation at which the state can assert its interest is protecting the fetus, one legal commentator argued that this point should not precede the twenty-second week of gestation because certain birth defects can only be discovered immediately prior to that time.[148] Justice Blackmun expressed similar sentiments when, in *Webster*, he defended the viability standard as a proper determinant of the state's interest because it provided a pregnant woman ample time to obtain an abortion.[149]

Notwithstanding the practical merit of these considerations, it must be recognized that the right which is being asserted in these arguments is different from the one created by the *Roe* Court. In *Roe*, the Court recognized a right to obtain an abortion except where this would derogate from a compelling interest which the state opted to assert.[150] The foregoing statements suggest that this right is being redefined to protect a woman's ability to obtain an abortion, compelling countervailing interests notwithstanding, with sloth on the part of the woman constituting the only exception.[151] While this approach avoids the central problem—that of determining when to regard a fetus as worthy of protection—there are compelling reasons militating against allowing the effect on the ability to obtain an abortion to prejudice one's analysis of the state's interest. As Professor Devine aptly stated:

> Whatever the extent to which the interest of a given person might legitimately be sacrificed for the good of the commu-

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146 *See supra* notes 111-113.

147 *See infra* notes 146-47 and accompanying text.

148 *See* Rhoden, *supra* note 48, at 682-83.

149 Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3075 (1989) (Blackmun, J., dissenting). In *Webster*, Justice Blackmun noted that viability follows quickening, the point when the pregnant woman can sense fetal movement. *See id.* The fetus actually has been moving vigorously for a substantial period prior to its hosts detection. *See* S. KITZINGER, THE COMPLETE BOOK OF PREGNANCY AND CHILDBIRTH 63 (1982). What relevance can quickening have except to resolve doubt in the woman as to whether she is pregnant, thus providing her one last chance to procure an abortion?

150 *See* Roe v. Wade, 410 U.S. 113, 163-64 (1973).

151 *See* Rhoden, *supra* note 48, at 683 (Professor Rhoden candidly characterizes the judicial function as "protecting women's privacy rights for a substantial portion of pregnancy.").

> nity, it seems intolerable that a creature should be regarded as not a person—and hence of next to no account in moral deliberation—simply because it is . . . in the interests of others to so regard that creature. . . . To proceed in such a manner would be to overthrow some of the most fundamental elements of our moral tradition.[152]

Furthermore, there is reason to suspect that any analysis of the state's interest in protecting prenatal life is heavily prejudiced by the more nearly human appearance and resulting emotional identification[153] with the mature fetus.[154] For example, Professor Cahill noted that "the increasingly human appearance of offspring during gestation may be relevant to their developing status in the human community."[155] Unlike others, however, who are made the object of discrimination by virtue of their appearance, the fetus is not in a position to plead its worth. As a result, the norms and values which govern the proper treatment of a mature fetus may be abrogated for less developed fetuses where differences in their intrinsic value, when measured by more relevant criteria, would not warrant such disparate treatment.[156]

Finally, even if it is assumed that this undefined standard is somehow based on morally relevant criteria, there still exists the risk that the data on which any conclusions as to fetal worth is based is inaccurate. While such a risk exists in any adjudication, it is particularly acute where the operative rule of law is based on unspecified criteria. Since the information that the Court finds important in evaluating fetal worth is never indicated, it is impossible to determine whether the information on which the Court relies for its understanding of the nature and attributes of the fetus at various points in gestation is accurate. It is noteworthy that although Justices Blackmun and Stevens have indicated that they find the fetus's capacity to feel pain, experience pleasure, and to react to its surroundings indicative of the fetus's value,[157] neither Justice examines

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152 P. DEVINE, THE ETHICS OF HOMICIDE, 80-81 (1978).

153 "Appearance" is used here in the general sense of how one is perceived in contradistinction to strictly observable appearance.

154 P. DEVINE, *supra* note 152, at 81. One study noted that when women who were seeking an abortion were shown an ultrasonogram of their fetus, they frequently declined to undergo the procedure. *See* J. Fletcher and M. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 7 NEW ENG. JOUR. OF MED. 308, 392 (1983).

155 Cahill, *Abortion, Autonomy, and Community*, in ABORTION: UNDERSTANDING DIFFERENCES 270 (1984).

156 P. DEVINE, *supra* note 152, at 81.

157 See Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3075 (1989)

whether the fetus has any of these capabilities prior to viability.[158]

What Might Have Been

It is important to compare the current abortion jurisprudential model with that which would have existed had the Court inquired into and reached a consensus on whether the fetus's development of some measure of higher cognitive ability, rather than viability, was the determinant of when the state's interest in protecting prenatal life is compelling. The Court would be called upon to justify its selection of cognitive ability as the criterion for fetal worth, as well as determine what measure of cognitive ability would indicate that the fetus has attained sufficient value and thus qualify to receive protection from the state. The Court could enlist the aid of science to provide information (which could be tested in court) from which it could be determined at approximately what point in gestation the fetus is possessed of this measure of cognitive ability. From this, the Court could fashion a value threshold beyond which states may proscribe abortion. Assuming the Court placed this value threshold at the twenty-fourth week of gestation, the fact that the fetus had reached this value threshold at approximately the same point in gestation when modern science could enable the fetus to survive outside the womb would be regarded as nothing more than a coincidence. This coincidence has not occurred in the past nor need it occur in the future. Because attributes of fetal cognitive development at various points in gestation remain constant even though medical science may enable extra-uterine survival at earlier points in gestation, the value threshold would remain fixed at one point in gestation although it might one day no longer coincide with viability. The point in gestation at which the fetus is technologically viable, for the purposes of measuring the state's interest, would be irrelevant.

Adoption of such a methodology would essentially be the rejection of the viability standard as it is currently understood in favor of a cognitive ability standard. Interestingly, modern philosophical commentary on the dilemma posed by abortion and abortion regulation has focused on fetal cognitive ability for

(Blackmun, J., dissenting); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S., 747, 778-79 (1986) (Stevens, J., concurring).

158 *See Webster*, 109 S. Ct. at 3075 (Blackmun, J., dissenting); *Thornburgh*, 476 U.S. at 778-79 (Stevens, J., concurring).

quite some time.[159] Within this apparent consensus, however, there is great variance among contemporary philosophers as to the minimum quantum of cognitive ability required for personhood. This is evidenced by the various indicators of personhood which are being proffered. They include: (1) capacity for thinking, (2) awareness of consciousness, (3) onset of brain waives, (4) sentience, (5) development of the concept of self, (6) development of the capacity for pleasure or pain, (7) reasoning ability, (8) capacity for self-motivated activity, and (8) capacity to communicate in some form.[160]

Adoption of any of these standards for fetal worth would entail some rather interesting problems. For example, some of the proposed attributes of higher cognitive ability are not attained until long after birth. Furthermore, some adult members of the community, such as the mentally handicapped, may never possess some of these attributes. The embarrassing result which logic requires reflects poorly upon the underlying philosophical premise that value should be linked to cognitive ability. While there are some philosophical commentators who possess the intellectual honesty to carry their theories to their logical conclusions,[161] no legal commentators openly advance the idea that the state does not have a compelling interest in regulating infanticide.[162] But since the introduction of a newborn into one's life can interfere with one's autonomy in ways that a fetus never could, it must be recognized that definitions of value which are applied to fetuses may be extended to infants.[163]

Adoption of a cognitive ability standard will not be without its critics. First, there are many who vigorously protest basing

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159 Commentary suggesting that viability or membership in the species is particularly relevant to the abortion dilemma is scarce. Wikler, supra note 20, at 19.

160 *See* Wikler, *supra* note 20, at 20; Macklin, *Two Persons, One Body*, in DEFINING HUMAN LIFE: MEDICAL, LEGAL AND ETHICAL IMPLICATIONS 230 (1983).

161 *See, e.g.*, M. TOOLEY, ABORTION AND INFANTICIDE 407-19 (1983). Professor Tooley argues that since newborn infants lack higher mental capacities, infanticide, like abortion, is not morally wrong. *Id. See also* G. BALL, CHRISTIANITY IN CRISIS 274 (Oct. 19, 1981). Professor Ball believes that "consciousness of self" is the litmus test for humanness and describes those who do not possess this ability as mere animals. *Id.* Thus, he concludes that "a newborn infant is not a human being."

162 Wikler, *supra* note 20, at 21.

163 *Id.* ("The pro-choice advocate cannot simultaneously use a psychological concept of personhood to declare fetuses to be nonpersons, yet abandon that same concept when applied to infants."). *Id. See also* M. TOOLEY, *supra* note 161, at 423. (Professor Tooley maintained that "if one discusses . . . the morality of abortion in isolation from the question[] of the morality of infanticide, . . . one would wind up with a combination of views that is not rationally tenable. . . . Either abortion is morally suspect, or infanticide is morally permissible. . . .").

one's value on one's cognitive ability.[164] Second, even if consensus existed among the public that the value which society attaches to human life is grounded in a human being's unique cognitive ability, there is no prevailing consensus as to what measure of cognitive ability should form the value threshold.[165]

These issues cannot be resolved here. Collective wisdom and reason may ultimately resolve them in favor of placing the threshold for fetal worth either before or after the twenty-fourth week of gestation or even rejecting cognitive ability entirely as a valid measure of the value of life. But as long as the Court insists that viability is the only relevant standard, far from being discussed or resolved, these issues will not even be raised. By insulating the Court from these issues, the adoption of the viability standard has effectively placed constitutional abortion adjudication under secret law.

PART III

The Need to Re-examine the Value of Prenatal Life - From Roe to Webster

If the Court were to achieve consensus on the controlling philosophy in the abortion debate, the debate would probably end. The determination of whether abortion more closely resembles infanticide or contraception would quickly render the other arguments for and against abortion either insufficient or unnecessary.[166] Nonetheless, since its 1973 abortion decisions,

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164 *See* Wikler, *supra* note 20, at 19. Professor Wikler observed that the principle that one's value is predicated on membership in the species has deep roots in our value structure. He noted that:

> [W]hatever its origin, the principle seems to be assumed or imbedded in much of our ordinary thinking about morality. So called "human Rights", for example, are rights ascribed to humans on no other basis than membership in our species. We demonstrate our respect for these rights in countless ways (though they are, of course often violated). For example, profoundly retarded humans are protected from the same dangerous medical experiments that we routinely perform on relatively intelligent animals.

Id.; *see also* May, *supra* note 120, at 23-24.

165 *See* Wikler, *supra* note 20, at 20-21. Professor Wikler noted: "We find in philosophical writing not one but many distinct psychological concepts of personhood. This unwelcome variety would not matter for the abortion debate if the several versions implied similar starting points for development of personhood in fetuses. This, however, is not . . . the case." *Id.* Observe the vast disparity among philosophers regarding the requisites for personhood. *See supra* note 161 and accompanying text.

166 Epstein, *supra* note 19, at 176 (discussing the psychological, mental, physical

the Court has directed very little discussion toward the underlying philosophy by which it determines the strength of the state's countervailing interest in protecting prenatal life. Part of the Court's failure to reconsider the viability standard can be explained by the fact that in many post-*Roe* abortion decisions the interest, at least overtly advanced by the state, was something other than the protection of prenatal life. Post-*Roe* statutory impediments to abortion were enacted in order to protect the rights of the father,[167] the pregnant minor's parents,[168] or even the pregnant woman.[169] Having been told by the Court in *Roe* that protecting prenatal life was an insufficient justification for restricting abortions,[170] states unsuccessfully attempted to advance alternative justifications as a pretext.[171] In most cases, the extent

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and economic consequences attending an unwanted pregnancy and noting that none of these reasons would justify infanticide).

167 *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 69-70 (1976) (invalidating a statutory requirement that married women obtain spousal consent prior to undergoing an abortion).

168 *See* Hodgson v. Minnesota, 110 S. Ct. 2926, 2930-31 (1990) (invalidating a statute which required notification of both parents prior to performing abortion upon woman under age 18); Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2977 (1990) (upholding a statute prohibiting abortions upon women under age 18 absent notice to one parent or a court order granting approval); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 439-40 (1983) (invalidating an ordinance requiring women under the age of 15 to obtain parental consent prior to obtaining an abortion, for failure to contain a judicial bypass provision); H.L. v. Matheson, 450 U.S. 398, 409 (1981) (upholding a statutory requirement that parents be notified before a minor can receive an abortion); Bellotti v. Baird, 443 U.S. 622, 646-47 (1979) (upholding a statute requiring parental consent or a court order granting approval before a minor could obtain an abortion); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 69-70 (1976) (invalidating a statutory requirement that unmarried women obtain spousal consent before receiving an abortion).

169 *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 764 (1986) (invalidating an ordinance requiring detailed information to be disclosed to pregnant woman prior to obtaining an abortion); Planned Parenthood Association v. Ashcroft, 462 U.S. 476, 481-82 (1983) (invalidating a statutory requirement that all abortions performed after the twelfth week of pregnancy be performed in hospitals); *Akron*, 462 U.S. at 435-36 (limiting an ordinance requiring all second trimester abortions to be performed in hospitals, so as to exclude from the ordinance those abortions which could be performed safely in an outpatient clinic); *id.* at 448-49 (invalidating informed consent requirements); *Danforth*, 428 U.S. at 67 (upholding prior written consent requirements).

170 *See* Roe v. Wade, 410 U.S. 113, 163-64 (1973).

171 The Supreme Court has demonstrated an unusual hostility toward state regulations which, although not prohibiting abortions, increase the burdens of obtaining one. *See, e.g.*, *Thornburgh*, 476 U.S. at 762 (holding that informed consent requirements, designed to dissuade women from exercising their rights to obtain abortions, are overinclusive); *Akron*, 462 U.S. at 444 (invalidating informed consent requirements as a pretext to deter abortions); Beal v. Doe, 432 U.S. 438, 454-55

of the analysis offered by the members of the Court consists of either an incantation of the holding in *Roe*[172] or the contrary assertion that the interest in a nonviable fetus is compelling.[173]

The sole effort by any member of the Court to add to the *Roe* Court's rationale for discriminating among fetuses based on viability is found in Justice Blackmun's dissent in *Webster*. In defending the viability standard, Justice Blackmun argued that:

> viability . . . marks that threshold moment prior to which a

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(1977) (Marshall, J., dissenting) ("Since efforts to overturn [*Roe v. Wade* and *Doe v. Bolton*] have been unsuccessful, the opponents of abortion have attempted every imaginable means to circumvent . . . the Constitution.").

172 *See, e.g., Ashcroft*, 462 U.S. at 482; *Akron*, 462 U.S. at 428; Harris v. McRae, 448 U.S. 297, 313 (1980); Colautti v. Franklin, 439 U.S. 379, 386 (1979); Maher v. Roe, 432 U.S. 464, 472 (1977); *Danforth*, 428 U.S. at 61.

In *Thornburgh*, 476 U.S. 747 (1986), this reason-by-assertion further deteriorated to *argumentum ad hominem*. Justice Stevens, in a concurring opinion, engaged the dissenting Justice White in a colloquy as to whether the state's interest in protecting the fetus was compelling throughout pregnancy. *Compare Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring) (arguing that the state's interest in protecting prenatal life increases as gestation advances) *with id.* at 795 n.4 (White, J., dissenting) (arguing that the state's interest is equally compelling before and after viability). Justice White claimed that the government's interest in protecting the fetus is compelling from the moment of conception. *Thornburgh*, 476 U.S. at 795 n.4 (White, J., dissenting). Justice Stevens responded that this was a religious or theological argument and that the Court's jurisdiction was limited to the evaluation of secular interests. *Id.* at 778 (Stevens, J., concurring) (citation omitted). Justice White countered that this is no more a religious view than was the Court's view that the state's interest did not become compelling until the fetus is viable. *Id.* at 795 n.4 (White, J., dissenting). As Justice White noted, it is well settled that a statute is not invalid merely because it happens to comport with the beliefs of one or more religious groups' dogmas. Harris v. McRae, 448 U.S. 297, 319-20 (1980) (*citing* McGowan v. Maryland, 366 U.S. 420, 442 (1961)). Attempts to characterize the competing views as "religious" are therefore peculiar. *Thornburgh*, 476 U.S. at 795 n.4.

Justice Stevens reasserted this view with more direct force in *Webster* where he held, in a separate dissenting opinion that the preamble to a Missouri statute declaring that life begins at conception served no secular purpose and thus violated the establishment clause of the first amendment. Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3082 (1989) (Stevens, J., concurring in part, dissenting in part). Interestingly, neither party nor the United States as *amicus curiae* suggested either in their briefs or at oral argument that the Missouri statute implicated the establishment clause. *See generally* Brief for Appellant, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989); Brief for Appellee, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989); Brief for the United States as *Amicus Curiae* Supporting Appellants, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989); *Transcript of Oral Argument Before Court on Abortion Case*, The N.Y. Times, April 27, 1989, at B12-B14 [hereinafter *Transcript*]. Further, the plaintiffs would not have standing to assert any such rights under the establishment clause. *See* Doremus v. Board of Education, 342 U.S. 429, 434-35 (1952) (dismissing appeal for want of standing where appellant alleged an establishment clause violation but failed to demonstrate a direct financial injury resulting from the state's action).

173 See *supra* note 117.

> fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time . . . it establishes an easily applicable standard for regulating abortion while providing a pregnant woman ample time to exercise her fundamental right . . . to terminate her pregnancy.[174]

There are four separate claims to be distilled here. According to Justice Blackmun, the viability standard properly segregates those fetuses in which the state has a compelling interest in protecting because prior to viability:

(1) the fetus cannot survive separate from the woman
(2) the fetus cannot be regarded as a subject of interests distinct from those of the pregnant woman
(3) the fetus cannot be regarded as a subject of rights paramount to those its mother and
(4) a woman might not have had ample opportunity to obtain an abortion.[175]

The first claim is merely a repeat of the definition of viability offered by the *Roe* Court in lieu of the required syllogism.[176] With respect to the second claim the interests of the fetus and its mother who seeks to abort it are in fact adverse. The third claim, that a fetus cannot be regarded as a subject of interest paramount to those of the pregnant woman, is no more than a restatement of the conclusion. Finally, Justice Blackmun argued that viability "establishes an easily applicable standard for regulating abortion while providing a pregnant woman ample time to exercise [her] fundamental right . . . to terminate her pregnancy."[177] More can be discerned from this statement than perhaps was intended. A state's interest in protecting a particular group of fetuses either is or is not compelling. Whether this determination affords the pregnant woman the opportunity to obtain an abortion does not make that interest any more or less compelling. The trimester scheme was originally advanced as a means for determining whether the state's interest in protecting the fetus is compelling in order to determine whether the state could prohibit abortions.[178] It was never intended, at least overtly, as a means for guaranteeing the availability of an abortion to the pregnant woman regardless of any countervailing interests.

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174 *Webster*, 109 S. Ct. at 3075 (Blackmun, J., dissenting).
175 *See id.* at 3075-79.
176 *See supra* note 71 and accompanying text.
177 Webster, 109 S. Ct. at 3075 (Blackmun, J., dissenting).
178 Roe v. Wade, 410 U.S. 113, 162-64 (1973).

Thus, the Court, from the time of *Roe* until the present, has failed to provide a satisfactory explanation for why the state's interest in fostering prenatal life is not compelling prior to viability.

CONCLUSION

In *Roe*, the Supreme Court evaded a forthright analysis of the central question in the abortion issue—how is the value of life measured and when does it attach to the fetus. Instead, the Court fashioned a viability standard. Since *Roe*, the Court has not reconsidered the viability standard despite continuous criticism of the *Roe* decision itself and the viability standard in particular. The Court's insistence on adhering to the viability standard represents a failure to carry out its obligations "which include not merely reaching just decisions and doing so for good and sufficient reason, but also adequately informing the nation's citizenry . . . of the rationale for the legal order it imposes."[179] The only avenue for advancing the jurisprudential debate regarding abortion is to attempt to redefine the criteria by which the value of prenatal life is determined.

Such a jurisprudential debate would more closely match the true social dilemma posed by abortion and abortion regulations. While reversal of *Roe v. Wade* is frequently advocated,[180] the line of cases upon which it is based—recognizing unenumerated fundamental rights—is often carefully distinguished.[181] The American public places an unusually high value on personal autonomy and believes that there are certain areas of life where the government has no rightful place. Public opposition to mandatory seatbelt laws, for instance, can be explained in no other way.[182] Statements that the United States Constitution contains no right to privacy are not in accord with that sentiment. But for the effect abortion has on the fetus, few would be troubled by abortion on demand. The real sentiment which underlies the hostility to *Roe* is that the Court unduly denigrated the fetus.

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179 Wertheimer, *supra* note 103, at 106.

180 In *Webster*, the appellants and the United States as amicus curiae requested that the Court re-examine and reverse *Roe v. Wade*. *Webster*, 109 S. Ct. at 3058.

181 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Appellants at 11-15, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989); Brief for United States as Amicus Curiae in Support of Appellants at 25-30; Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

182 *See* Buckle or Bag?, The Economist, December 6, 1986, at 50 (Massachusetts and Nebraska repealed mandatory seatbelt laws, reflecting "widespread resistance to government regulation.").

Further, it is unlikely that the Court will discard the substantive due process doctrine, for "the doctrine has been embraced by conservative as well as liberal justices for quite some time."[183] Consideration of a cognitive ability standard (or any other standard based on relevant criteria) would at least squarely confront the single issue on which this nation is so profoundly divided—what value is to be accorded to fetuses and what rights should states have to protect them given the indisputably burdensome consequences. By moving the focus in the abortion debate from fundamental rights to countervailing interests the arguments advanced by anti-abortion advocates would at least be congruent with their true sentiments.

The purpose of this comment is not to advocate the adoption of a cognitive ability standard for the constitutional jurisprudence of abortion regulations. Rather, its purpose is to demonstrate that in many ways cognitive ability already is the standard and lies a scratch beneath the surface of the viability standard. The cognitive ability standard should be stripped of its viability facade and scrutinized to determine if it indeed is a desirable standard. In any case, the viability standard is useless as an indicator of the strength of the state's interest in protecting prenatal life and should be discarded.

Since its 1973 abortion decisions, the Court has not ruled on the constitutionality of a statute which conflicts with the central holding of *Roe*.[184] Litigation has centered on peripheral issues, some of which were alluded to in *Roe*.[185] These cases functioned

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183 R. Meyers, *Prolife Litigation and the American Civil Liberty Tradition*, in ABORTION AND THE CONSTITUTION 36 (1987); *See also* Cox, *The Role of the Supreme Court in American Government* 113 (1976) ("The Court's persistent resort to notions of substantive due process for almost a century attests to the strength of our natural law inheritance in Constitutional adjudication and I think it unwise, as well as hopeless, to resist it.").

184 Recently, a federal court enjoined a Guam statute which would have outlawed virtually all abortions. *See* Guam Society of Obstetricians and Gynecologists v. Ada, No. 90-00013 (D. Guam Aug. 23, 1990) (Lexis 11910). The case has been appealed to the Ninth Circuit Court of Appeals. *See Guam to Appeal Striking Down of Abortion Curbs*, The N.Y. Times, September 22, 1990, at A8.

185 For a brief review of the case law discussing these issues, *see supra* notes 167-169 and accompanying text. *See also* Harris v. McRae, 448 U.S. 297, 321-23 (1980) (upholding medicaid restrictions which precluded funding abortions while providing funding for all other pregnancy related medical procedures); Simopoulos v. Virginia, 462 U.S. 506, 510-19 (1983) (upholding Virginia statute restricting abortions to hospitals or licensed outpatient care facilities); *Planned Parenthood of Central Missouri v.* Danforth, 428 U.S. 52, 75-79 (1976) (invalidating Missouri statute proscribing the use of the saline-amniocentesis method of abortion); *Webster*, 109 S. Ct. at 3054-56 (upholding regulations mandating procedures to be performed prior to

more as fora for vindicating[186] or assailing[187] the validity of *Roe* than for application of the *Roe* principles to the particular statute under review. As one commentator noted, adherence to the *Roe* precedent among the members of the Court has steadily eroded.[188] A review of *Webster v. Reproductive Health Services, Inc.*,[189] the Court's most recent opportunity to reconsider viabil-

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performing an abortion to determine whether the fetus is viable); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-71 (1986) (invalidating Pennsylvania statute requiring that the selected abortion technique be that which maximizes the chance of the fetus's survival unless this procedure significantly increased the risk to the life or health of the pregnant woman); Colautti v. Franklin, 439 U.S. 379, 397-401 (1979) (invalidating Pennsylvania statute requiring the abortionist to select the abortion technique which maximizes the chance of fetal survival on the grounds that the statute did not clearly state that the pregnant woman's life or health must always prevail over that of the fetus).

186 *See, e.g.*, *Webster*, 109 S. Ct. at 3075-76 (Blackmun, J., concurring in part, dissenting in part) (in defense of *Roe* Court's holding). Justice Powell, in his opinion in Akron v. Akron Center For Reproductive Health, 462 U.S. 416 (1988) noted that:

> There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*. T hat case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by The Chief Justice and six other Justices. Since *Roe* . . . the Court repeatedly and consistently has accepted and applied the basic principles that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy."

Id. at 420 n.1.

187 *See, e.g.*, Hodgson v. Minnesota, 110 S. Ct. 2926, 2960-61 (1990) (Scalia, J., dissenting in part, concurring in the judgment) (claiming that the Court overstepped its authority in insulating abortion decisions from state regulation); Ohio v. Akron Center For Reproductive Health, 110 S. Ct. 2972, 2984 (1990), (Scalia, J., concurring) (claiming that there is no constitutional right to abortion); *Webster*, 109 S. Ct. at 3064-67 (Scalia, J., concurring in part, concurring in the judgment) (calling for an overruling of *Roe*); *Thornburgh*, 476 U.S. at 783 (Burger, J., dissenting) ("I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate [concurring] opinion [in *Roe*] have been realized."); *id.* at 833 (O'Connor, J., dissenting) ("The 'undesired and uncomfortable straightjacket in this case . . . is not the one the Court purports to discover in Pennsylvania's statute; it is the one the [*Roe*] Court has tailored for the 50 States."); *Akron*, 462 U.S. at 459 (O'Connor, J., dissenting) ("[T]here is no justification in law or logic for the trimester framework adopted in *Roe*. . . .").

188 *See* L. TRIBE, *supra* note 26, § 15-10, at 1347 (1988) (footnote omitted) (margin by which Justices endorse principles of Roe v. Wade has decreased from original 7-2 to precarious 5-4). This observation was made without considering the effect upon this thin majority, of the departures of Justices Powell and Brennan, both of whom were supporters of *Roe*.

189 109 S. Ct. 3040 (1989). *Webster* involved a constitutional challenge to a Missouri statute which regulated the performance of abortions. Mo. Ann. Stat. §§ 1.205, 188.010 (Vernon 1983 & Supp. 1990). The statute, in its preamble, provides that " '[t]he life of each human being begins at conception,' and that unborn children have protectible interests in life. . . ." *Id.* at 3047; (quoting Mo. Ann. Stat.

§ 1.205-(1)(1)-(2) (Vernon 1990)). The Statute requires that Missouri laws be interpreted to provide unborn children at every stage of development the same rights enjoyed by other persons, subject only to the federal Constitution and Supreme Court precedents. *Webster*, 109 S. Ct. at 3049 (citing MO. ANN. STAT. § 1.205(2) (Vernon 1990)). Section 188.029 of the statute requires that prior to performing an abortion on a woman whom the attending physician has reason to believe carries a fetus of 20 or more weeks gestational age, the physician must perform those medical procedures which he deems are necessary to ascertain whether the fetus is viable. *Id.* at 3054 (citing MO. STAT. ANN. § 188.029 (Vernon 1983)).

In a plurality opinion authored by Chief Justice Rehnquist, the *Webster* Court determined that section 188.029 conflicted with the Court's holding in *Roe*, as well as with subsequent abortion cases. *See id.* at 3054-56. The plurality recognized that to the extent that section 188.029 controls the method for determining fetal viability, it "undoubtedly does superimpose state regulation on the medical determination of whether a particular fetus is viable." *Id.* at 3056 (citing Colautti v. Franklin, 439 U.S. 379, 390-401 (1979)). Moreover, the Court conceded that the increased costs of viability tests (in fact second-trimester abortions), may be deemed invalid. *Id.* at 3056 (citing Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 434-35 (1983)). The plurality contended, however, that any doubt cast upon the Missouri statute is in actuality reflective of the *Roe* Court's "rigid" and "unsound" trimester scheme and not a result of a constitutional flaw in the statute itself. *Id.* The *Webster* Court concluded that the required viability tests "permissibly further[ ] the state's interest in protecting potential human life," thus demonstrating the constitutional validity of section 188.029 of the Missouri statute. The *Webster* Court declined, however, to overrule *Roe v. Wade*. *See generally id.* at 3058. The plurality determined that because the statute under review differed from that struck down in *Roe*, the present case presented the Court with no occasion to review *Roe v. Wade*. *Id.*

In a concurring opinion, Justice O'Connor reasoned that section 188.029 steered clear of any constitutional limitation required by *Roe* and subsequent cases. *Id.* at 3060 (O'Connor, J., concurring). Therefore, the Justice noted, there was no reason to re-examine the constitutional validity of *Roe*. *Id.* at 3061 (O'Connor, J., concurring). The Justice concluded by stating that, "[w]hen the constitutional invalidity of a state's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully." *Id.* at 3061 (O'Connor, J., concurring).

Justice Scalia, also concurring in the Court's judgment, held that the viability testing mandated by the Missouri statute directly conflicted with the holding in *Roe*. *Id.* at 3064 (Scalia, J., concurring). In contrast with the plurality, Justice Scalia advocated overruling *Roe* rather than merely limiting its application. *Id.* (Scalia, J., concurring). The Justice declined to set forth his reasons for perceiving *Roe* to be bad law. *Id.* (Scalia, J., concurring). This Justice did indicate, however, that abortion was essentially a political issue of which the Court had little business. *Id.* (Scalia, J., concurring).

Justice Blackmun, in a dissenting opinion joined by Justices Brennan and Marshall, held that the viability testing procedures not only conflicted with the Court's holding in *Roe* but would not even pass constitutional muster under prior Court precedents. *See id.* at 3070 (Blackmun, J., dissenting). The Justice charged that the statute required performance of all enumerated procedures even if all were not necessary to determine fetal viability. *Id.* at 3069-70 (Blackmun, J., dissenting). Thus, Justice Blackmun contended that the statute bore no rational relation to the state's interest in protecting prenatal life. *Id.* at 3070. In addition, the Justice ar-

ity and the value of pre-natal life in an abortion context[190] would suggest that *Roe* adherents no longer constitute a majority.[191]

The Court in *Webster*, as in other abortion cases, was asked to rule on the facial validity of a statute for which no prosecution had yet commenced.[192] Because no state court had construed the statute there was considerable dispute between the litigants as to its intended effect.[193] At least some of the differences expressed in the Court's five separate opinions reflected divergent constructions of the relevant statutory provisions rather than differences over the constitutionality of abortion regulations.[194] The constitutional analysis was diverted away from a re-examina-

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gued that the preamble could only be construed so as to have a chilling effect on the performance of abortions. *Id.* at 3068 n.1 (Blackmun, J., dissenting).

Justice Blackmun accused the plurality of misconstruing the statutory provisions relative to viability testing procedures in order to precipitate a conflict with *Roe*. *Id.* at 3069-70 (Blackmun, J., dissenting). The Justice criticized the plurality for summarily rejecting the *Roe* Court's trimester framework without attempting to analyze *Roe*'s alleged flaws. *Id.* at 3072 (Blackmun, J., dissenting). Justice Blackmun further chastised the plurality for failing to address "the true jurisprudential debate underlying [the] case: whether the Constitution includes an 'unenumerated' general right to privacy [which] . . . extends to . . . abortion." *Id.* at 3072 (Blackmun, J., dissenting).

In a separate dissenting opinion, Justice Stevens agreed with Justice Blackmun's analysis of the statute's preamble and the viability testing procedures. *Id.* at 3079-80 (Stevens, J., dissenting). In addition, the Justice held that the preamble, stating that life begins at conception, served no secular purpose and thus violated the establishment clause of the first amendment. *Id.* at 3082-85 (Stevens, J., dissenting).

190 The two cases subsequent to *Webster*, in which the Court ruled upon the constitutionality of abortion regulations, involved parental consent requirements which arguably impeded a woman's ability to obtain an abortion. *See* Hodgson v. Minnesota, 110 S. Ct. 2926, 2930-31 (1990) (discussed *supra* note 168 and accompanying text); Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2977 (1990) (discussed *supra* note 168 and accompanying text). Since the statutes challenged in those cases were enacted to advance an interest of the pregnant woman's parents, rather than that of the fetus, the cases presented no opportunity to reevaluate the state's interest in protecting prenatal life.

191 *See supra* note 189.

192 The statute did become effective until after the case had been filed. *Compare* Mo. Ann. Stat. § 1.205(2) (Vernon 1990) (effective January 1, 1988) *with Webster*, 109 S. Ct. at 3047 (suit filed in July 1986). The district court enjoined enforcement pending the Supreme Court's ruling. *Webster*, 109 S. Ct. at 3048.

It is quite frequent for abortion litigation to involve facial challenges seeking injunctive and declaratory relief, rather than reversal of a conviction. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 752 (1986); Akron v. Akron Center for Reproductive Health, 462 U.S. at 425-26 (1983); Planned Parenthood Association v. Ashcroft, 462 U.S. 476, 478 (1983); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

193 *See, e.g., Webster*, 109 S. Ct. at 3049-50, 3053, 3054; *id.* at 3059, 3061 (O'Connor, J., concurring).

194 *See Webster*, 109 S. Ct. at 3067-71 n.1 (Blackmun, J., concurring in part, dis-

tion of the principles of *Roe v. Wade* in order to address issues relevant to statutory construction and other issues which were only peripheral to the central holding of *Roe*.[195] Accordingly, *Webster*, like other abortion cases, provided a poor vehicle through which to re-examine *Roe*. The plurality's opinion, calling into question the validity of the trimester scheme without expressly overruling *Roe*, leaves the state of the law of abortion muddled. Several of the Court's members have observed that the trimester scheme is essential to the vitality of *Roe*.[196] Justice Blackmun predicted that states will enact progressively more intrusive statutes which will test further the vulnerability of *Roe*.[197] Preliminary indications suggest Justice Blackmun is indeed correct.[198] The unfortunate consequences of this will be that state legislators will focus on how far the Court will permit them to go rather than what is the best law.[199] Recognition of these difficulties lead to only one conclusion—reargue *Roe v. Wade*.

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senting in part); *id.* at 3079, 3084-85 (Stevens, J., concurring in part, dissenting in part).

195 *See generally Transcript, supra* note 172, at B12-14. Oral argument centered on issues peculiar to the Missouri statute to the exclusion of matters central to the holding in *Roe*.

196 *See Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part, concurring in the judgment); *id.* at 3077 (Blackmun, J., concurring in part, dissenting in part).

197 *Id.* at 3067 (Blackmun, J., concurring in part, dissenting in part).

198 *See* Lewin, *States Testing the Limits on Abortion*, N.Y. Times, April 2, 1990, at A1.

199 Some of the more recent legislative efforts to regulate abortion have included provisions that allegedly would yield anomalous, even perverse, results. *See* Hodgson v. Minnesota, 110 S. Ct. 2929, 2930-31 (1990) (invalidating statute which prohibited abortions for women under age 15 absent notification to both parents including noncustodial divorced parent); Ciolli, *It's No to Abortion Bill; Louisiana Veto Cites Lack of Safeguard to Rape Victims*, Newsday, July 28, 1990 (criticizing vetoed Louisiana abortion statute which allowed women, whose pregnancies resulted from rape, to obtain an abortion only within seven days of the crime); *Idaho's Laws and Rapist's Rights*, N.Y. Times, April 2, 1990, at, A16, Col. 1. (critic of vetoed Idaho abortion statute alleged that statute granted rapists the right to obtain a court order enjoining the victim's abortion).