

***Roe v. Wade* Inverted: How the Supreme Court Might Have Privileged Fetal Rights Over Reproductive Freedoms**

by **Jack Wade Nowlin***

I. INTRODUCTION

In *Roe v. Wade*,¹ the United States Supreme Court privileged reproductive freedoms over fetal rights,² but what if the Court had done the reverse in resolving the question of abortion under the Constitution—elevating fetal rights over reproductive freedoms? How might the Supreme Court have justified such a holding? What arguments, doctrines, and cases would the Court have invoked? What might concurring and dissenting opinions have said in response? A full analysis of these questions requires an exploration of a range of issues: the basis of constitutional personhood, the suspect nature of birth-status classifications, the fundamentality of access to the protections of the criminal law, and the application of heightened scrutiny to permissive abortion regimes. The resolution of these issues turns on cross-cutting questions concerning the appropriate methods of constitutional

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1. 410 U.S. 113 (1973).
2. *See id.* at 152, 162.

interpretation, the proper judicial role, and the rights and wrongs of abortion policy.

This Article examines these questions and demonstrates, as a conceptual matter, that the Supreme Court could have established a fetal right to the equal protection of the criminal laws as plausibly as it established a right to abortion in *Roe*, but that such a decision would have been subject to the very same kinds of substantive objections as the decision in *Roe*—grounded in commitments to historically-oriented interpretive methods, judicial restraint, and rival abortion policies.³ The central purpose of this Article is to advance the debate over the constitutional status of abortion by moving that debate outside of its familiar *Roe*-centered analytical grooves. This Article will show that the range of reasonable argument on the question of abortion under the Constitution is broader than is commonly conceived and extends well beyond familiar choices—protecting a right to abortion or deferring to legislative prohibitions of abortion—to protecting the rights of the unborn from a denial of the equal protection of the criminal laws embodied in permissive abortion laws. This Article builds on the perennial project of “rewriting” *Roe v. Wade*, but it broadens that project to include a fundamental “reimagining” of the Court’s encounter with abortion as an equal protection challenge in defense of fetal rights. The “inversion” in the title of this Article refers to the studied use of points of argument from the original *Roe* opinions to support their mirror-image opposites in an equal protection analysis.

This Article also follows Lon Fuller’s classic article *The Case of the Speluncean Explorers*⁴ in taking the imaginative format of a hypothetical case set in a hypothetical jurisdiction with a series of fictional judicial opinions addressing the issues: a majority opinion, a concurrence, and a dissent. This unconventional format allows the Article to reimagine *Roe v. Wade* in a particularly vivid fashion that closely tracks the Court’s original opinions and analyses. The Article’s hypothetical case involves an equal protection challenge to a permissive abortion regime. The hypothetical jurisdiction is a variation on the United States in which the Court in *Roe v. Wade* upheld, rather than invalidated, anti-abortion legislation. The fictional judicial opinions advance with equal vigor arguments for and against expansive protections for the unborn under the Equal Protection Clause.⁵ Part II of this Article discusses in more detail the recurrent project of rewriting *Roe* and the aims of this Article in reimagining *Roe*; Part III provides background on the Article’s

3. See *id.* at 129-62.

4. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

5. See U.S. CONST. amend. XIV, § 1.

hypothetical jurisdiction and sets out the hypothetical opinions of the justices; and Part IV offers a conclusion.

II. ROE V. WADE REWRITTEN AND REIMAGINED

Abortion remains an issue of perennial controversy, and it regularly surfaces as such in the world of politics and in the news—as we are reminded once again by recent headlines involving efforts by House Republicans to defund Planned Parenthood⁶ and allegations that an abortion doctor in Philadelphia performed “abortion” procedures in which he killed several babies with scissors *after* they were born alive.⁷ Elected officials, judges, lawyers, and citizens more generally continue to debate the merits of the Supreme Court’s landmark decision in *Roe v. Wade*⁸—the case that first declared a constitutional right to abortion.⁹ A majority of the Justices of the Supreme Court have adhered to the core of the abortion jurisprudence established by *Roe*—reaffirming the central holding of *Roe* in *Planned Parenthood of Southern Pennsylvania v. Casey*¹⁰ in 1992 and applying *Casey*’s modification of *Roe* in recent cases.¹¹ Off the Court, the central holding of *Roe* continues to find substantial support among a wide range of individuals—from academic commentators¹² to ordinary citizens.¹³ Additionally, some government officials have even contended that *Roe*’s central holding is a form of “super precedent[.]” entitled to greater respect as a matter of stare decisis

6. See Dana Milbank, *Serious Budget Cutting? The House Has Other Fish to Fry*, WASH. POST, Feb. 20, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/02/18/AR2011021804020_pf.html.

7. See Linsey Davis & Seniboye Tienabeso, *Philadelphia Abortion Doctor Accused of Killing Babies With Scissors, Charged With 8 Murders*, ABC NEWS (Jan. 19, 2011), <http://abcnews.go.com/Health/philadelphia-abortion-doctor-accused-killing-babies-scissors-charged/story?id=12649868>.

8. 410 U.S. 113 (1973).

9. See *id.* at 154.

10. 505 U.S. 833, 879 (1992).

11. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

12. For instance, eight of eleven prominent academics asked to “rewrite” the Court’s opinion in *Roe v. Wade* concluded that a right to abortion should exist under the Constitution. See WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL OPINION 18-22 (Jack M. Balkin ed., 2005).

13. See, e.g., Lydia Saad, *Public Opinion About Abortion—An In-Depth Review*, GALLUP.COM (Jan. 22, 2002), <http://www.gallup.com/poll/9904/public-opinion-about-abortion-indepth-review.aspx#3>.

than ordinary precedents—given the Court’s reaffirmation and continued application of its core doctrines over several decades.¹⁴

However, it is also clear that supporters of *Roe* and the constitutional right to abortion are often dissatisfied with Justice Blackmun’s original majority opinion—both as to its rationale and scope.¹⁵ Moreover, the opponents of *Roe* and a constitutional right to abortion—both on the Court and off—continue to assert that *Roe* was mistaken as originally decided, that *Roe*’s central holding should be overruled, and that the question of abortion should be returned to Congress and the fifty states for resolution in the political process.¹⁶

This anti-*Roe* view has had substantial representation on the Supreme Court in the decades since *Roe* was decided—including the four Justices who voted to overrule *Roe* in 1992¹⁷—and continues today to maintain substantial support among academics,¹⁸ elected officials,¹⁹ and ordinary citizens.²⁰ Thus, both supporters and opponents of the constitutional right to abortion often agree that the Court’s opinion in *Roe* is problematic, even as they continue to disagree over the central question *Roe* confronted: the constitutionality of anti-abortion legislation.

This debate over the merits of *Roe*, including both its central holding in favor of a broad right to abortion and its rationale in justification of that central holding, has sparked a continuing academic project: the “rewriting” of the majority opinion in *Roe*. In many cases, this rewriting takes the conventional form of articles defending²¹ or attacking²² the

14. Senator Arlen Specter, *Bringing the Hearings to Order*, N.Y. TIMES, July 24, 2005, <http://query.nytimes.com/gst/fullpage.html?res=940CE1DE153FF937A15754c0A9639C8B63&pagewanted=print>.

15. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (suggesting the Court should have grounded the right to abortion in gender equality norms and issued a narrower opinion invalidating a more limited range of anti-abortion laws in order to avoid political backlash and facilitate change through the political process).

16. See, e.g., *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting).

17. See *id.* These Justices were Chief Justice Rehnquist, Justice White, Justice Scalia, and Justice Thomas. *Id.*

18. See, e.g., Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2002) (contending that *Planned Parenthood v. Casey* is the worst constitutional decision of all time).

19. For instance, John McCain, Senator from Arizona and the most recent Republican presidential nominee, is pro-life and committed to overturning *Roe v. Wade*. See Teresa Stanton Collett, *Advancing the Culture of Life Through Faithful Citizenship*, 2 U. ST. THOMAS J.L. & PUB. POL’Y 20, 42-43 n.133 (2008).

20. See Saad, *supra* note 13.

21. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) (contending that “the right to abortion (although not the precise reasoning in *Roe* itself) . . . [is] based on the constitutional text of the Fourteenth Amendment and

holding or rationale of *Roe*. Often, these conventional articles function as rewritten “shadow” opinions, asserting how the Court in *Roe* should have ruled and how it should have justified its ruling.²³ In short, the *Roe* opinion’s perceived inadequacy has led many scholars to attempt to craft better justifications for a constitutional right to choose abortion and also to craft refutations of those justifications.

One of the most recent and valuable additions to the project of rewriting *Roe* takes the explicit form of a collection of hypothetical judicial opinions confronting the question the Court faced in 1973: *What Roe v. Wade Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Most Controversial Opinion*.²⁴ This volume, edited by Jack M. Balkin, contains eleven rewritten *Roe* “opinions” by prominent scholars variously styled as the “judgment of the Court,” “concurrences,” “concurrences in the judgment,” and “dissents.”²⁵ As the title suggests, the project of the book is the explicit and formalized academic endeavor of rewriting *Roe*. This book also deploys an imaginative conceptual device: positing a hypothetical situation in which the eleven contributors to the book serve as the Justices of the Supreme Court in 1973 and must decide *Roe v. Wade* on the facts and law as they existed when *Roe* was actually decided.²⁶ The result, unsurprisingly, is a set of stronger justifications for the right to abortion than appeared in *Roe*—as well as a stronger set of arguments that the Constitution does not protect abortion rights.²⁷

This Article is intended to build on this perennial project of rewriting *Roe*, but it examines this question with a different purpose and from a different perspective than the typical rewriting of *Roe*. This difference in purpose and perspective allows the Article to probe dimensions of the question of abortion and the Constitution that conventional exercises in rewriting *Roe* have generally failed to explore in substantial detail. The

the principles that underlie it”).

22. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (stating *Roe v. Wade* is “bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be”).

23. See, e.g., Ginsburg, *supra* note 15; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 349-77 (1992) (contending that *Roe v. Wade* should have been resolved on gender equality and equal protection grounds).

24. See WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 12.

25. See *id.* at 18-22. The opinions are written by Jack M. Balkin, Reva B. Siegal, Mark Tushnet, Anita L. Allen, Jed Rubenfeld, Robin West, Cass R. Sustein, Akhil Reed Amar, Jeffery Rosen, Teresa Stanton Collett, and Michael Stokes Paulsen. *Id.*

26. See *id.* at 18.

27. See WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 12.

purpose of this Article, unlike nearly all rewritings of *Roe*, is not to advocate directly any particular viewpoint on the constitutional issues raised by the abortion debates. Thus, this Article is not intended to rewrite *Roe* in order to demonstrate the best answer to the question of abortion and the Constitution.

Rather, the chief goal of this Article is that of any work of critical theory more broadly: the exploration of legal possibilities. As Jack Balkin has observed: “[T]he goal of a critical theory is not to develop a series of true factual propositions, but to achieve enlightenment and emancipation,” a goal whose achievement is “confirmed . . . through a . . . complicated process of self-reflection.”²⁸ This Article aims to explore more fully the range of plausible arguments open to the Supreme Court on the question of abortion, a range that moves well beyond the conventional arguments and counter arguments found in the familiar *Roe*-centered abortion debates to less familiar territory: the equal protection arguments defending the rights of the unborn to the equal protection of the criminal laws. This Article is intended to produce a broader and deeper understanding of legal alternatives the Supreme Court could have pursued—and could pursue in the future—in the area of abortion for the purposes of promoting critical reflection as both a good in itself and as a necessary predicate for meaningful reform in whatever direction that reform may occur.

The critical purposes of this Article are best advanced by the adoption of a non-traditional perspective from which to confront the question of abortion and the Constitution rather than adherence to the traditionally *Roe*-centered perspective of whether, or under what circumstances, a state may prohibit abortion. The non-traditional perspective of this Article involves not just rewriting *Roe*, but also more broadly *reimagining* the Court’s encounter with the issue: What if the Supreme Court had to decide a challenge to permissive abortion laws raised by an opponent of abortion claiming that such laws violate the Equal Protection Clause of the Fourteenth Amendment²⁹ by denying the equal rights of the unborn as constitutional persons? This hypothetical abortion case presents legal issues closely related to, though in important ways different from, those presented in *Roe v. Wade*. With this reimagined setting for the Court’s confrontation with abortion in place, this Article rewrites *Roe* by using the original *Roe* opinions as the inspiration for a set of fictional judicial opinions—a majority opinion, a concurrence, and a dissent—examining the question of abortion and the Constitution from

28. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 765 (1987).

29. U.S. CONST. amend. XIV, § 1.

the alternative perspective of an equal protection challenge to a permissive abortion regime. In these opinions, this Article advances with equal vigor arguments for and against expansive interpretations of fetal rights under the Equal Protection Clause.

This alternative perspective on the constitutional questions surrounding abortion also provides the context for the use of a common “deconstructive” technique, “the inversion of hierarchies,” to invert the hierarchical relationships in *Roe v. Wade*.³⁰ The hypothetical case upends these hierarchies in ways that promise to promote deeper insights into the perennial question of abortion and the Constitution. First, this approach allows for a hypothetical majority opinion that privileges fetal rights over reproductive freedom and reverses *Roe*’s central privileging of reproductive freedom over fetal rights. This inversion involves the self-conscious use of legal arguments from the original *Roe* opinions and *Roe*’s progeny cases to support mirror-image opposites in this piece’s fictional equal protection case, a process that places these points in a new perspective and promotes freer thought uncanalized by ingrained political reactions shaped by *Roe* and the present debate.

Second, this approach allows for hypothetical majority and dissenting opinions in which expansive judicial power and living constitutionalism are associated with pro-life political goals (invalidating permissive abortion laws as violative of the Equal Protection Clause), and judicial restraint and historic constitutionalism are associated with respect for the political processes, which, in the fictional world of the hypothetical case, have produced pro-choice abortion laws in many of the states. This inversion promotes critical analysis by upsetting reflexive hierarchical assumptions associated with *Roe*, such as the common view that expansive judicial power is better (or worse) than restrained judicial power because expansive judicial power underlies *Roe v. Wade*’s right to abortion. In sum, this Article places *Roe* in an inverted perspective that generates new thoughts and may jar the reader into thinking about the issues presented by *Roe* in a fundamentally different light. This Article, then, should be of interest to anyone concerned with the questions surrounding abortion under the Constitution.

30. The “inversion of hierarchies” is an analytical method that identifies a hierarchical opposition (such as reproductive freedom privileged over fetal rights) and inverts it (articulating, after careful reflection, why many of the reasons for privileging reproductive freedom over fetal rights could also be thought to justify privileging fetal rights over reproductive freedom) in order to derive new insights into the nature of the hierarchical relationship and the qualities and attributes of the things hierarchically ordered. For more on inverting hierarchies, see Balkin, *supra* note 28, at 746-51.

In addition to the traditional scholarly project of rewriting *Roe*, part of the inspiration for this Article is found in Lon L. Fuller's celebrated article *The Case of the Speluncean Explorers*,³¹ in which Fuller uses a hypothetical jurisdiction similar in many ways to the United States (The Republic of Newgarth); a hypothetical "hard" case (speluncers who become trapped in a cave and resort to homicide and cannibalism to survive until rescued, who are prosecuted for murder, and who assert a form of the necessity defense); and a set of hypothetical judicial opinions to explore various theories of judging in a hard case, including "activist" and "restrained" approaches to judging.³² The central portion of this Article follows Fuller's approach in taking the form of a hypothetical jurisdiction based on the United States, a hypothetical hard case (an Equal Protection Clause challenge to permissive abortion laws), and a set of hypothetical judicial opinions reflecting various common theories of judging—from the highly active to the highly restrained. Thus, this Article should also be of interest to scholars interested in traditional jurisprudential debates concerning theories of judging and interpretive approaches.

III. *ROE* INVERTED: THE CASE OF *FAIRCHILD V. NORTH PACIFICA*

A. *A Hypothetical Case in a Hypothetical Jurisdiction*

The hypothetical jurisdiction in which the case of *Fairchild v. North Pacifica* occurs is essentially identical to the contemporary United States—with one major exception: The Court's decision in *Roe v. Wade*,³³ in this counter-factual world, declined to extend the right to privacy to the area of abortion, and abortion has remained a question chiefly for state legislatures and the political process. In this hypothetical jurisdiction, the majority of the Supreme Court in *Roe* adhered to a restrained historical analysis³⁴ to determine the content of substantive due process in the area of abortion and determined that the tradition of criminalizing abortion in most American jurisdictions dating back to at least the second half of the nineteenth century precluded any recognition of a constitutional right to abortion as "deeply rooted in this Nation's history and tradition."³⁵

31. Fuller, *supra* note 4.

32. *See id.*

33. 410 U.S. 113 (1973).

34. *See* *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

35. *Id.* (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)) (internal quotation marks omitted); *see Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

In this hypothetical jurisdiction, during the decades following the counter-factual *Roe v. Wade* (upholding the Texas anti-abortion law), about half the states adopted permissive abortion laws similar to the abortion regime the Court actually did set forth in *Roe v. Wade*.³⁶ The hypothetical case of *Fairchild v. North Pacifica* involves a fictional litigant, James Fairchild, suing a fictional state, North Pacifica, and alleging that the state's permissive abortion law violates the Fourteenth Amendment's Equal Protection Clause³⁷ by denying the equal protection of the laws to unborn children. The Supreme Court responds to this case by invalidating North Pacifica's permissive abortion regime by a vote of 6 to 3. A majority opinion, a concurrence in the judgment, and a dissent explore the legal issues raised by the case and advance opposing arguments.

A final note about footnoting: proper citation in an argument taking the form of hypothetical judicial opinions presents something of a challenge, requiring one to balance the integrity of the hypothetical opinions as a heuristic device with the reasons behind conventional standards of attribution. This challenge is presented because the sources cited by the fictional justices in their opinions fall into four possible categories: (i) actual sources that exist in the real world and are also posited as existing in the hypothetical world of the Court in some fashion, such as *Washington v. Glucksberg*,³⁸ and that the justices in their hypothetical opinions are imagined to cite; (ii) actual sources that exist in the real world and are also posited as existing in the hypothetical world of the Court in some fashion,³⁹ and that the justices in their hypothetical opinions are imagined *not* to cite; (iii) actual sources that exist in the real world, but are posited as not existing in the hypothetical world of the Court (e.g., *Roe v. Wade*, which declared a constitutional right to abortion, a case that does not exist in the fictional jurisdiction imagined by this Article),⁴⁰ sources that would, thus, not be cited in the hypothetical opinions by the fictional justices, but that need to be cited by the Author of this Article for purposes of proper attribution of words

36. See *Roe*, 410 U.S. at 164-66.

37. U.S. CONST. amend. XIV, § 1.

38. 521 U.S. 702 (1997).

39. I say "in some fashion" because cases, such as *Glucksberg*, cited in this elaborate hypothetical are imagined to exist in an altered form consistent with the hypothetical jurisdiction's main counter-factual point: *Roe v. Wade* upheld anti-abortion laws rather than struck them down. Of course, the point of this article—and its use of a hypothetical case and hypothetical opinions as a heuristic device—is to promote a deeper insight into the issues surrounding abortion and the Constitution, not to construct a coherent "alternative world" scenario.

40. *Roe*, 410 U.S. at 166.

and ideas and for proper comparison of the hypothetical opinions with real opinions; and (iv) fictional sources that do not exist in the real world, but are posited to exist in the fictional world of the hypothetical (e.g., a counterfactual *Roe v. Wade* that upholds anti-abortion legislation), sources that the fictional justices may cite in their opinions and that may confuse the unwary reader as to their “real-world” status.

In an effort to meet this challenge, this Article will follow these conventions of citation: sources that fall into category one (actual sources that are also imagined to exist in some form in the hypothetical jurisdiction and are imagined to be cited by the fictional justices) are cited in ordinary bluebook form without any additional elaboration. Sources that fall into category two (actual sources that are also imagined to exist in some form in the hypothetical jurisdiction and are imagined not to be cited by the justices) are cited in ordinary bluebook form, but are placed within “editorial” brackets to indicate that they are analogous to editorial interpolations into the hypothetical opinions. Thus these sources are imagined to be cited by the Author of this Article functioning as the equivalent of an “external” editor of the hypothetical opinion, not by the fictional justices.

Sources that fall into category three (actual sources that are imagined not to exist in the hypothetical jurisdiction) are cited in brackets, again, to indicate they are analogous to editorial interpolations into the hypothetical opinions cited by the Author of this Article as an external editor of the hypothetical opinions, but not cited by the fictional justices in their opinions. Finally, sources that fall into category four (sources imagined to exist in the hypothetical jurisdiction, but that do not actually exist in the real world) are not cited in footnotes at all in an effort to avoid any possible confusion as to their status as fictional sources. Thus the counter-factual *Roe v. Wade* opinion upholding the Texas anti-abortion statute, the North Pacifica abortion statute, and references to the fictional abortion regimes of the various hypothetical states are mentioned in the text of the opinions without any placement of fictional citations in the footnotes. These citation conventions should allow the reader to simultaneously enter into the world of the fictional justices largely as they are imagined to see it (by ignoring the bracketed materials) and to remain firmly in the world in which we live (by attending to the bracketed materials and to the absence of citations to fictional sources).

B. Justice Tallis's Majority Opinion

Justice Tallis delivered the opinion of the Court.

1.

This appeal involves a constitutional challenge to a North Pacifica state law that legalizes abortion and, thereby, excludes the unborn from the full protections of the criminal law. This permissive abortion statute is typical of the statutes passed in about half of the fifty states in the decades since this Court first declined to invalidate anti-abortion legislation in *Roe v. Wade*. This statute is representative of a legislative trend in a number of states in the direction of legalizing abortion and is no doubt a product of changing social attitudes toward sex, procreation, gender roles, and the sanctity of human life.

We recognize that the question of the balance of interests between the life of an unborn child and the liberty of an expectant mother who wishes to have an abortion presents a deeply divisive question that affects not only the rights of the individual but also the very kind of nation we aspire to be—one dedicated to the founding principles of natural rights articulated in the Declaration of Independence: that all persons “are created equal” and “endowed by their Creator with certain unalienable Rights . . . [to] Life, Liberty and the pursuit of Happiness.”⁴¹ The American people today are divided over the question of abortion. Their views range from absolute positions both for and against an unborn child’s right to life to various middle-ground positions that would allow the termination of some pregnancies for some reasons. The various beliefs of our citizenry are informed by their diverse perspectives—theological, philosophical, moral, economic, sociological, and medical.

The aim of this Court is not to “sit as a super-legislature”⁴² and enforce on the nation our preferred policy position on the question of abortion. The Constitution is the supreme law of the land,⁴³ and our objective today is to interpret its broad commands faithfully. This project inescapably requires that this Court exercise reasoned judgment,⁴⁴ judgment constrained by the methods of analysis established

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

42. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

43. U.S. CONST. art. VI, cl. 2.

44. [*Cf. Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 849 (1992) (stating “adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment”).]

in our legal traditions and by a proper respect for the limited but essential role this Court plays in our system of government under the Constitution's separation of powers and the federal design.⁴⁵

We must exercise that judgment with humility, recognizing the full weight of Justice Holmes's observation in his celebrated dissent in *Lochner v. New York*⁴⁶: "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."⁴⁷ The purpose of this decision is not to mandate our own moral code, but to declare the equal rights of all persons under the Constitution.⁴⁸

2.

North Pacifica first enacted a criminal abortion statute in 1858, codifying and expanding its common law prohibition against killing a "quicken" unborn child. North Pacifica law made it a crime to "perform" or "procure" an abortion, thus killing an unborn child, unless the purpose of the abortion was to "save the life of the mother." This law survived in one form or another until North Pacifica repealed it in 1975 and passed new legislation that prohibited abortion only in the third trimester of pregnancy and allowed abortion even in the last stages of pregnancy if necessary to preserve a woman's "health" in the "medical judgment" of the physician performing the abortion.⁴⁹ The North Pacifica courts have generally treated the "health exception" to the third trimester abortion ban as an essentially unreviewable exercise of the physician's discretion, thus, effectively establishing a regime of abortion on demand.⁵⁰

James Fairchild, an individual residing in North Pacifica, instituted this action on behalf of his deceased unborn child, alleging that North

45. See *Griswold*, 381 U.S. at 501-02 (Harlan, J., concurring); see also U.S. CONST. arts. I-III.

46. 198 U.S. 45 (1905).

47. *Id.* at 76 (Holmes, J., dissenting). [*Cf. Roe*, 410 U.S. at 117 (quoting from Justice Holmes's *Lochner* dissent).]

48. [*Cf. Casey*, 505 U.S. at 850 (stating "[o]ur obligation is to define the liberty of all, not to mandate our own moral code").]

49. [*Cf. Doe v. Bolton*, 410 U.S. 179, 192 (1973) (stating that health exceptions in the abortion context are a matter of "medical judgment" and "may be exercised in the light of all factors-physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient").]

50. [*Cf. Paulsen, supra* note 18, at 1022 (stating that *Roe v. Wade* in combination with *Doe v. Bolton* created a "regime of abortion-on-demand").]

Pacifica's failure to prohibit abortion and punish it as a serious crime violated the Fourteenth Amendment⁵¹ rights of his unborn daughter. The following facts are not in dispute: James Fairchild was married to Judy Fairchild, his wife of seven years, who was pregnant with their child, a daughter to whom we shall refer in this opinion as Baby Girl Fairchild. James and Judy Fairchild were experiencing serious marital difficulties and contemplating divorce. Judy Fairchild wished to terminate her pregnancy by an abortion in about the thirty-fourth week of the pregnancy. She was able to get a legal abortion in the State of North Pacifica in the third trimester of her pregnancy without spousal consent or notification, procuring the death of Baby Girl Fairchild. The medical justification for her abortion was the threat to her "emotional health" posed by having an unwanted child by a man to whom she was no longer sure she wished to be married.

The decision as to the medical necessity of the abortion was made by Dr. Joseph Newhart, an abortion specialist, and, under North Pacifica law, was an unreviewable exercise of his medical discretion. Baby Girl Fairchild is estimated to have been approximately fifteen (15) inches in length and approximately five (5) pounds in weight at the time of her death. Dr. Newhart performed an intact dilation and extraction abortion, in which he partially delivered Baby Girl Fairchild feet-first until only her head remained within her mother's body. He then pierced her skull with a sharp instrument, evacuated the contents of her cranium with a suction device, collapsed the cranium, and completed the delivery of Baby Girl Fairchild's now lifeless body.⁵² James Fairchild claims North Pacifica's permissive abortion laws abridged the right of Baby Girl Fairchild and all unborn children, as persons, to the equal protection of the criminal laws in violation of the Fourteenth Amendment.⁵³

The district court determined that James Fairchild had standing as a parent to sue on behalf of his deceased unborn child and held on the merits that "unborn children, as persons, are entitled to the equal protection of the law, including the law of homicide" and that "the North Pacifica abortion regime denied them that protection in violation of the Fourteenth Amendment." The Thirteenth Circuit reversed on appeal, holding that an unborn child is not a "person" within the meaning of that word in the Fourteenth Amendment.

51. U. S. CONST. amend XIV.

52. [*Cf. Stenberg v. Carhart*, 530 U.S. 914, 959-60 (2000) (Kennedy, J., dissenting) (describing a dilation and extraction or "partial birth" abortion procedure).]

53. *See also* U.S. CONST. amend. XIV, § 1.

3.

The main thrust of the petitioner's challenge to North Pacifica's permissive abortion law is that it denies the right of unborn children, such as Baby Girl Fairchild, to the equal protection of the criminal laws. The threshold question this case presents is whether an unborn child is a "person" within the meaning of the Fourteenth Amendment. If an unborn child is a "person" within the meaning of this Amendment, then the Constitution requires the state to extend to the unborn child the equal protection of the laws. If an unborn child is not a "person" within the meaning of this Amendment, the child is not entitled to its protections.

The text of the Fourteenth Amendment does not define the word "person," and, therefore, this Court must interpret that broad term in order to determine its meaning in this case. North Pacifica contends that the definition of "person" in the Fourteenth Amendment should be fixed by reference to uses of the term "person" in other provisions of the Constitution and that the other uses of the term "person" in the Constitution seem to contemplate application only to post-natal persons.⁵⁴ While this latter point is plausible enough, it is also easily explained as a simple result of the purposes of those provisions, many of which also use the term "person" to refer only to adult persons rather than children.⁵⁵ For instance, the use of the word "person" in the qualification clauses for Representatives and Senators quite naturally refers to persons who are both born and adult since only those persons can serve as members of Congress.⁵⁶ We are unwilling to exclude children, born or unborn, from the protections of the Fourteenth Amendment upon such a slender reed of inference.⁵⁷

We prefer instead to define the word "person" according to its public meaning in the 1860s, which, in turn, is a function of its common usage in the English language in the nineteenth century. We conclude that the term "person" was commonly understood then, as now, to refer to a living individual human being, a meaning attested to by authoritative

54. [*Cf. Roe*, 410 U.S. at 157 (observing that the use of the word "person" in various provisions of the Constitution "is such that it has application only postnatally" and no use "indicates, with any assurance, that it has any possible prenatal application").]

55. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 5 (listing qualifications for office of President, which requires that the office-holder must have attained the age of thirty-five).

56. *See* U.S. CONST. art. I, § 2, cl. 2, and art. I, § 3, cl. 3 (Representatives must have attained the age of twenty-five and Senators, thirty.).

57. [*See* FRANCIS J. BECKWITH, *DEFENDING LIFE: A MORAL AND LEGAL CASE AGAINST ABORTION CHOICE* 27 (2007).]

dictionaries in common use in the 1800s.⁵⁸ We have no reason to suppose that the framers and ratifiers of the Fourteenth Amendment understood the term “person” within the framework of the Amendment to mean anything other than this plain-language definition held in common by both ordinary Americans and the members of the legal profession in the mid-nineteenth century. This definition also accords with the purpose of the Fourteenth Amendment, which was surely to guarantee basic rights to all members of the human family, rather than arbitrarily exclude some individual human beings as nonpersons.⁵⁹

The question then arises as to whether an unborn child such as Baby Girl Fairchild is a “living human being.” We can see no basis for concluding otherwise. An unborn child is clearly “living” (alive rather than dead), “human” (a member of the species *homo sapiens* rather than a member of another species), and in “being” (existent rather than nonexistent).⁶⁰ The State, however, contends that a “fetus,”⁶¹ especially at early stages of development is merely “potential life,” rather than actual human life.⁶² This is a question of biological fact, and this Court is quite willing to defer to the indisputable scientific consensus reflecting the view that the fetus is in fact alive, not merely potentially alive. No serious person actually disputes the fact that the fetus begins its existence as a single living cell—the fertilized egg or zygote—and then grows into a larger cluster of living cells that, in the natural course of

58. See, e.g., WEBSTER'S DICTIONARY (1st ed. 1828) (defining a “person” as an “individual human being” and noting that the word is applied “to living beings only”).

59. For instance, Representative John Bingham of Ohio, one of the principal framers of Section 1 of the Fourteenth Amendment, stated in the context of the Amendment that “[e]very man is entitled to the [equal] protection of American law, because its divine spirit of equality declares that all men are created equal.” CONGR. GLOBE, 40th CONG., 1st Sess. 542 (1867). [See Michael Stokes Paulsen, *Dissenting Opinion, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 12, at 205 n.9; Nathan Schlueter, *Constitutional Persons: An Exchange on Abortion*, in ROBERT H. BORK, *A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS* 356 (2008).]

60. [Cf. *Keeler v. Super. Ct.*, 470 P.2d 617, 642 (Cal. 1970) (Burke, C.J., dissenting) (stating that a fetus is a “human” in the sense of being a member of the species *homo sapiens* and, a “being” in the sense of existing rather than not existing), *superseded by statute*, CAL. PENAL CODE § 187 (2008), *as recognized in* *People v. Taylor*, 86 P.3d 881, 885 (2004).]

61. We shall follow the state in using the term “fetus” in a broad sense to include the unborn child at all stages of development from conception until birth.

62. [Cf. *Roe*, 410 U.S. at 150 (characterizing the state interest in the protection of prenatal life as the protection of “potential life”).]

time, will eventually form the body of an ordinary adult human being.⁶³ Thus, the unborn child is actually alive from the moment of conception.

North Pacifica further contends that the fetus, if living, is not an individual human being, but rather a *part* of another human being, the mother of the unborn child.⁶⁴ The State, thus, appears to contend as an empirical matter that a fetus is like the mother's appendix or gall bladder rather than a new individual human organism contained within the mother's womb. This is also a question of biological fact, and this Court is quite ready to defer here as well to the clear and undisputed understanding of medical science and the medical profession: The fetus from the moment of conception is a new and distinct member of the species *homo sapiens* formed with its own individual genetic code and self-directing biological processes that are distinct from those of his or her mother.⁶⁵ In short, while the fetus is physically dependent upon his or her mother and contained within the mother's body, he or she is a distinct organism and thus a distinct member of the species *homo sapiens*.

The State further contends that even if an unborn child such as Baby Girl Fairchild is a human being, the personhood of human beings under the Fourteenth Amendment should be understood as extending only to some specified subclass of human beings, those who possess certain

63. See JAN LANGMAN, *MEDICAL EMBRYOLOGY* 3 (1975) ("The development of a human being begins with fertilization, a process by which two highly specialized cells, the *spermatozoon* from the male and the *oocyte* from the female, unite to give rise to a new organism, the *zygote*.").

64. Cf. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884) (holding that the "unborn child" of a woman between four and five months pregnant "was a part of the mother at the time of the injury" and, therefore, could not be the victim of a tort for whom the mother could recover as next of kin). Of course, today, every jurisdiction recognizes a right to recover for prenatal injuries to an unborn child if the child is born alive, and most allow recovery for injuries to a preivable unborn child. *RESTATEMENT (SECOND) OF TORTS* § 869(1) cmt. d (1977).

65. See RONAN O'RAHILLY & FABIOLA MÜLLER, *HUMAN EMBRYOLOGY & TERATOLOGY* 8 (2d ed. 1996) ("[F]ertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed."); KEITH L. MOORE, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 1 (3d ed. 1982) (The zygote "results from fertilization of an oocyte . . . by a . . . spermatozoon, and is the beginning of a human being."); BRUCE M. CARLSON, *PATTEN'S FOUNDATIONS OF EMBRYOLOGY* 3 (6th ed. 1996) ("The time of fertilization represents the starting point in the life history, or *ontogeny*, of the individual."); see also ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* 69-74 (2001); ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, *EMBRYO: A DEFENSE OF HUMAN LIFE* 27-42 (2008); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 *ISSUES L. & MED.* 119, 123-25 (2006-2007).

mental attributes that may be thought common to normal physically-developed human beings—such as consciousness, self-awareness, rationality, and the capacity for moral choice.⁶⁶ The State argues that it is mental attributes such as these, rather than membership in the human family, that endow an organism with intrinsic worth and unalienable rights, properties the recognition of which we signify by the term “person.”⁶⁷ On this view, only some subclass of human beings may avail themselves of the protections of the Fourteenth Amendment.

This argument fails on several grounds. First, it has no basis in law. This Court has never once denied the constitutional personhood of a class of human beings on the grounds that the class lacked certain mental attributes such as rationality or moral agency.⁶⁸ Such a decision would be unprecedented. Second, this position would sink the Court in a metaphysical quagmire. What degree of what mental attributes, *if any*, are required to demonstrate that a member of the human family is also a person who possesses rights as a matter of political morality? This is a question that divides theologians, moral philosophers, and ethicists, and thus is surely a question no court of law can hope to answer with moral certainty or authority.⁶⁹ Third, this position would put the Court in the precarious position of potentially denying the constitutional personhood—and thus the constitutional rights—of many of the most vulnerable members of our community. Not just the unborn, but the newborn, small children, the mentally retarded, the mentally ill, the aged, the physically disabled, and the infirm—all would be at risk. A newborn child can hardly be said to display self-awareness, and many persons suffering from brain damage, mental illness, senile dementia, or the mental effects of a serious physical illness may lack the requisite degrees of consciousness, self-awareness, rationality, or moral agency thought to be required for personhood on the respondent’s view. For this Court to rely upon inherently and irreducibly controversial metaphysical speculations to deny the personhood and

66. [Cf. PETER SINGER, PRACTICAL ETHICS 150-51 (2d ed. 1993) (distinguishing membership in the species *homo sapiens* from personhood and defining the latter in terms of the possession of “rationality, self-consciousness, awareness, [and] capacity to feel”).]

67. [See *id.*]

68. [Cf. *Roe*, 410 U.S. at 158 (rejecting the Fourteenth Amendment “personhood” of the “unborn” on textual and historical grounds); Schlueter, *supra* note 59, at 357 (observing that the Supreme Court has never defined Fourteenth Amendment personhood to exclude any class of human beings aside from *Roe v. Wade*’s exclusion of the unborn).]

69. [Cf. *Roe*, 410 U.S. at 159 (stating that the judiciary is not “in a position to speculate as to the answer” of “when life begins” because “those trained in . . . medicine, philosophy, and theology are unable to arrive at any consensus”).]

rights of these most vulnerable of human beings in our communities is ultimately unthinkable.

Finally, both North Pacifica and Justice Sharpe in dissent draw upon history to contend that even if unborn children such as Baby Girl Fairchild are actual persons in both (or either) a biological and a moral sense, they are not constitutional persons within the narrow historical meaning of the Fourteenth Amendment. The principal contention here is that our legal traditions have not always treated unborn children as persons under the law, and therefore this Court may not declare them so under the Fourteenth Amendment today. While we do not agree that the narrow question of the specific treatment of the unborn in American law is controlling,⁷⁰ neither do we view it as irrelevant to the question we must decide in this case. It is therefore worth discussing the historical evolution of abortion law from the English common law to contemporary state practice. We believe a careful examination of the path of this law reveals a clear trajectory: a long-standing and evolving tradition of legal recognition of the value of the life of unborn children as persons, a tradition that rightfully culminates in our decision today holding that an unborn child is a person within the meaning of our Constitution.

The precise contours of the English common law of abortion are not completely clear, and the law of abortion in England undoubtedly changed over time. Even so, this much is largely undisputed: Commentators on the English common law from the thirteenth century through the eighteenth century recognized that abortion, if properly proved, could be a crime (a “great misprision”) and constituted homicide (“murder”) in some cases. Henry Bracton explained the common law as follows: “If there be some one, who has struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed or animated, and particularly if it be animated, he commits homicide.”⁷¹ Edward Coke stated the common law of England in the following way:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion,

70. [Cf. *id.* at 158 (stating that the history of more permissive abortion practices in the nineteenth century in combination with textual uses of the word “person” in the Constitution to refer to postnatal persons justify narrowly interpreting the word person in the Fourteenth Amendment to exclude the unborn).]

71. 2 H. BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 279 (Sir Travers Twiss ed., 1879).

battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.⁷²

William Blackstone similarly stated the law: “To kill a child in its mother’s womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them.”⁷³

As the authoritative sources above indicate, at English common law, inducing an abortion of an unborn child that resulted in the child’s being born alive and then dying was murder. Importantly, the “born-alive” limitation on liability for murder for abortion rested not on the insupportable belief that a child became a person only when born alive, but rather served a specific evidentiary purpose: Before the English common law would hold an abortionist liable for the murder of an unborn child, the law demanded the child be born alive and then die as a result of the abortionist’s actions in order to provide greater certainty that the child was living at the time of the *actus reus* of the crime and was actually killed by act of the abortionist.⁷⁴ Given the primitive state of forensic science available for proving causes of death in this period and the very high rates of stillborn children, this rule served as an understandable limit on criminal liability for murder.⁷⁵

Additionally, inducing an abortion of a fetus that resulted in the birth of a dead child, while not murder, could still be a criminal offense, a great misprision. It is not completely clear whether the killing of an unborn child prior to quickening was considered a criminal offense at common law, and commentators have differed on this point.⁷⁶ “Quickening” in this context refers to the stage of fetal development when the mother first begins to feel the movements of her unborn child (usually between the sixteenth and eighteenth weeks of fetal development), and quickening could mean literally that stage at which the fetus is thought to “come to life.” It is significant that any quickening limitation on liability for abortion that may have existed at common law was likely an

72. EDWARD COKE, *THE THIRD PART OF THE INSTITUTE OF THE LAWS OF ENGLAND* 50 (William S. Hein Co. 1986) (1644).

73. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *198 (1769) (punctuation omitted).

74. See JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 199-200 (2006).

75. See *id.*

76. Coke’s phrase “quick with child” is ambiguous on this point. See COKE, *supra* note 72. The phrase broadly construed could mean simply carrying (“alive with”) an unborn child or, narrowly construed, could mean carrying a quickened fetus. See DELLAPENNA, *supra* note 74, at 282.

artifact of primitive medical knowledge giving rise to the belief that the fetus “comes to life” as an organic matter at some period after conception.⁷⁷ Alternatively, a quickening limitation, if one existed, may have simply served an evidentiary purpose similar to that of the born-alive rule, helping to ensure that a person punished for the great misprision of abortion actually killed a living fetus, rather than merely induced the expulsion of a dead fetus destined to be stillborn.⁷⁸

In the nineteenth century, both in England and in the United States, anti-abortion laws were codified in statutes and reformed in light of evolving medical knowledge and technology. Most jurisdictions extended criminal liability to the abortion of unquickened unborn children so that abortion of an unborn child at any stage of development was clearly criminalized.⁷⁹ The medical profession stood at the forefront of this movement to expand and enforce legal protections for unborn children. For instance, the American Medical Association Committee on Criminal Abortion issued a report in 1859 “with a view to [the] general suppression” of abortion and listed among the reasons for the continuance of the “fearfully extended crime” of abortion in the United States:

[The] wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.

[T]he fact that the [medical] profession themselves are frequently supposed careless of foetal life

[T]he grave defects of our laws . . . [in failing to recognize fully] the independent and actual existence of the child before birth, as a living being . . . [a failure which is] based, and only based, upon mistaken and exploded medical dogmas.⁸⁰

The reform efforts of the medical profession and others, premised correctly on the medical facts that the fetus is a living being who exists as an “independent and actual . . . child before [either] birth” or quickening, was met with increasing success.⁸¹ By the time the Fourteenth Amendment was ratified in 1868, at least thirty-six laws had been enacted by state and territorial legislatures that codified proscrip-

77. See *infra* note 80 and accompanying text.

78. DELLAPENNA, *supra* note 74, at 191-93.

79. *Id.* at 282-83.

80. *American Medical Association on Criminal Abortion Report*, 12 TRANS. AM. MED. ASS'N 75-76 (1859) (emphasis omitted). [*Cf. Roe*, 410 U.S. at 141-42 (1973) (quoting this language from the AMA Report at length as part of a discussion of the historical evolution of attitudes towards abortion in the U.S.).]

81. [*Roe*, 410 U.S. at 141.]

tions of abortion and punished the killing of an unborn child as a crime.⁸² Cases and commentators during this period also referred to the fetus as an unborn child and grounded the prohibition of abortion expressly in respect for unborn human life.⁸³ This trend continued throughout the end of the nineteenth and into the twentieth century so that by the 1950s all but a handful of states in the United States effectively banned abortion unless it was necessary to preserve the health of the mother.⁸⁴ Moreover, states in this era actively prosecuted abortionists and imprisoned them as criminals.⁸⁵

We conclude from this historical survey that the evolving Anglo-American legal tradition from the thirteenth century until the 1960s was a tradition founded upon an evolving understanding of the value of unborn human life and the personhood of the unborn child, resulting in increasing protections for unborn persons, such as Baby Girl Fairchild, through the instrument of strict anti-abortion laws. This Court recognized that tradition when we upheld anti-abortion laws in our landmark decision in *Roe v. Wade*, and we are faithful to and fulfill that tradition today by holding that an unborn child from the moment of conception is a person within the meaning of the Fourteenth Amendment and thus entitled to the equal protections of the law.⁸⁶

4.

Respondents contend that the tradition on which we rely has been undermined by recent developments in a number of states favoring permissive abortion laws, and it is true that exceptions to our legal tradition of protecting unborn human life have emerged from the social upheavals of the late 1960s and that a number of jurisdictions in the United States have made the choice to deny unborn children many of the

82. [*Id.* at 174-75 (Rehnquist, J., dissenting).]

83. See, e.g., *State v. Moore*, 25 Iowa 128, 136 (1868); *State v. Murphy*, 27 N.J.L. 112, 113 (1858); DELLAPENNA, *supra* note 74, at 281-88; COKE, *supra* note 72, at 50.

84. DELLAPENNA, *supra* note 74, at 539; [*Roe*, 410 U.S. at 140 & n.34 (observing that “[b]y the end of the [1950s] a large majority of the [states] banned abortion, however and whenever performed, unless done to save or preserve the life of the mother”).]

85. DELLAPENNA, *supra* note 74, at 543-47, 672-74.

86. It is worth noting here that the “viability” standard favored by the concurrence has no basis in either the text or history of the Fourteenth Amendment, and it also fails to provide the coherent ground imagined by the concurrence for distinguishing persons from so-called “potential persons” since the viability standard ultimately turns on the advancement of medical technology rather than the stage of fetal development. When medical science develops an “artificial womb,” the point of viability will be the moment of conception.

traditional protections our law has historically extended to them.⁸⁷ However, this counter-trend is recent and narrow in scope compared to the sweep of Anglo-American law over the last seven hundred years in favor of protecting the unborn child. If we are to rely upon tradition, we prefer to follow the great current of our law rather than an isolated and perhaps ephemeral eddy.

Further, this Court must be concerned not just with our legal practices but with the reasons that animate them. Our great tradition of anti-abortion legislation is grounded in a concern for protecting innocent human life that goes to the very moral foundations of our form of government, which is founded on human equality and unalienable rights. We are concerned that recent pro-abortion trends are driven by a darker purpose inconsistent with those foundations. The cultural disruption that reached its apex in the 1960s is associated with a new permissiveness in sexual behavior, and this new permissiveness has led to a dramatic increase in more casual forms of sexual conduct outside of marriage.⁸⁸ The conception of a child in these casual relationships is often viewed not as the gift of life, but as a social catastrophe. Persons engaging in such sexual conduct cannot avoid the risk of pregnancy because even the most reliable forms of contraception have significant failure rates, which are increased by human error and further exacerbated by human passion.⁸⁹

These persons then must face the possibility that they will conceive an unwanted child and must confront a range of serious consequences—emotional, familial, social, and economic—flowing out of parenthood if that eventuality occurs. The risk of becoming an unwilling parent places obvious practical constraints on the sexual freedom of the individuals, and there can be no doubt that the decision to legalize abortion provides the parents of an unborn child with a way out of the responsibilities of parenthood.⁹⁰ Legal abortion, as a practical matter, reduces the risk of parenthood that itself deters the exercise of sexual freedom. Further, the psychic cost of the decision to abort an unborn child is dramatically reduced when individuals—and entire societies—can convince themselves that the abortion of a fetus is not the killing of an

87. As early as 1970, four states—Alaska, Hawaii, New York, and Washington—legalized early-term abortions. [*Roe*, 410 U.S. at 140 & n.37.]

88. See MAURICE ISSERMAN & MICHAEL KAZIN, *AMERICA DIVIDED: THE CIVIL WAR OF THE 1960S* 293-300 (2000); DELLAPENNA, *supra* note 74, at 661-65.

89. See DELLAPENNA, *supra* note 74, at 660-61.

90. [*Cf. Casey*, 505 U.S. at 856 (observing that “people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail”).]

unborn human child but something else entirely: the mere termination of a pregnancy similar in nature either to preventing the pregnancy in the first place or to the removal of a minor part of the mother's body, such as a tonsil or an appendix. Obviously, the unconscious mischaracterizing of the decision to abort a fetus as something far less serious in nature than killing a human being further enhances sexual freedom.

Our concern, then, is that the natural human tendency to pursue and rationalize one's self-interests can easily lead those who place a high value on permissive, consequence-free sexual conduct to advocate legal abortion as a counter-measure to the risk of unplanned pregnancy and to mischaracterize the decision to abort as something less grave than the decision to take an innocent human life. This Court is, thus, concerned that late twentieth century trends in abortion law in some American states are not the result of a careful re-evaluation of the moral issues surrounding abortion but rather are a self-interested rationalization of abortion as a means to facilitate the new sexual permissiveness.⁹¹

In this regard, this Court sees a potentially dire parallel with another fundamental issue of human equality and self-interest: slavery. At the founding of our nation, slavery was widely viewed as an evil by the nation's leaders even in the Southern states. However, once technological advances, such as the invention of the cotton gin, dramatically increased the profitability of the Southern slave economy, white Southerners began to rationalize and defend the institution of slavery and advocate its expansion into new territories.⁹² Clearly, the new economic interests of the Southern planter class in slavery led to their vigorous defense of an institution that many Southerners of the same class had seen as wrongful just a generation earlier.

91. [*Cf. Roe*, 410 U.S. at 148] (noting the argument that the nineteenth century tradition of restrictive anti-abortion laws do not justify upholding contemporary anti-abortion laws because the nineteenth century laws were motivated by an illegitimate "Victorian social concern to discourage illicit sexual conduct" rather than by a careful moral decision to protect unborn human life); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 86-118 (1978).]

92. Justice McLean in his celebrated dissent in *Dred Scott v. Sandford* observed that "it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation" because the South was "influenced" by its own economic "interests." 60 U.S. 393, 538 (1856) (McLean, J., dissenting). Of course, the Court's holding in *Dred Scott* represents the principal constitutional expression of this interest-driven expansion of support for slavery, and it is well known that the proponents of abortion have sought a similar constitutional expression of their views in the form of a holding in this Court in favor of a substantive due process right to abortion. [*Cf. Roe*, 410 U.S. at 164 (declaring a broad right to abortion as a matter of substantive due process).]

It is quite possible that the new interests in sexual permissiveness in the most liberal parts of our nation have been the motivating force behind the new trend to legalize abortion, a position that rejects the view, virtually unanimous among the fifty states a mere generation ago, that abortion is a serious crime inconsistent with the proper respect for human life. Of course, it is not the place of this Court either to deplore or approve these recent trends in sexual conduct or to suggest that conceiving a child, whatever one's circumstances, is ultimately an occasion for joy rather than remorse. On the other hand, this Court is required to inform its decision with due regard for our traditions and to evaluate the reasons that underlie those traditions. We choose today to follow our seven hundred year tradition of valuing the life of the unborn child rather than a recent counter trend in a handful of jurisdictions, one quite possibly motivated by the selfish and unreflective choice of adults to favor the facilitation of their sexual freedoms over the right of their unborn children to live.

The concept of personhood, which this Court has extended even to corporate entities,⁹³ is broad enough to encompass unborn children such as Baby Girl Fairchild.⁹⁴ As Justice Harlan wrote in *Plessy v. Ferguson*,⁹⁵ there are no "caste[s]" in America; we do not "know[] nor tolerate[] classes" among our people; we recognize instead that all persons are "equal before the law."⁹⁶ Today we refuse to take the unprecedented step of creating such a caste among our people—a class of human beings who would remain wholly outside the protections that our Constitution grants to all the persons subject to its laws.⁹⁷ In sum, we hold that an unborn child from the moment of conception is a person within the meaning of the Fourteenth Amendment.

93. *Cnty. of Santa Clara v. S. Pac. R. Co.*, 118 U.S. 394, 396 (1886); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.15 (1978) (stating "[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment").

94. [*Cf. Roe*, 410 U.S. at 153 (stating that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").]

95. 163 U.S. 537 (1896).

96. *Id.* at 559 (Harlan, J., dissenting).

97. The fact that this step would be unprecedented also highlights the pro-abortion politics of the dissent, which lurk behind the stalking horse of judicial restraint. If this Court were to approve the killing of Baby Girl Fairchild under the Equal Protection Clause simply because she had not been fully born at the time of her death, we would be taking a controversial stand along side the furthest political fringes of the pro-abortion movement in this country, not exercising anything that could be fairly called "restraint."

5.

The Equal Protection Clause's command of equality before the law has never been read to require absolute equality, an unattainable goal. Laws by their very nature classify persons into groups, and all the Equal Protection Clause has ever been read to require is that such classifications are properly justified by the state under the appropriate level of scrutiny determined by this Court. Our precedents have established two main strands of Equal Protection Clause jurisprudence since the ratification of the Fourteenth Amendment. One strand of our law concerns the nature of the state's classification.⁹⁸ The other strand concerns the nature of the interests affected by the classification.⁹⁹ Both strands of our Equal Protection Clause jurisprudence are at issue in this case.

This Court has held that certain classifications, such as classifications by race, are "suspect" or strongly suggestive of invidious discrimination.¹⁰⁰ Therefore, these classifications are invalid under the Fourteenth Amendment unless they meet the severe requirements of strict scrutiny, which requires that the classification be narrowly tailored to achieve a compelling state interest.¹⁰¹ Other classifications, such as classifications based on gender, are "quasi-suspect" classifications suggestive of possible invidious discrimination; therefore, these classifications are invalid unless they meet the requirements of intermediate scrutiny, requiring that the classification be substantially related to an important state interest.¹⁰² Finally, many classifications, such as classifications based on age or disability, are "nonsuspect" classifications, classifications not suggestive of invidious discrimination.¹⁰³ These classifications need meet only the minimal requirements of rational basis review, meaning they must be rationally related to a legitimate state interest.¹⁰⁴ Our Equal Protection Clause jurisprudence, then, has traditionally fallen into tiers of scrutiny based upon the degree of "suspiciousness" of the classification at issue.

The Court has determined the suspiciousness of the classification, in part, by the reference to the specific history of the Fourteenth Amendment—as in the case of racial classifications affecting African-Americans

98. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

99. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

100. *See, e.g.*, *Korematsu*, 323 U.S. at 216.

101. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

102. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976).

103. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442, 446 (1985).

104. *Id.* at 446.

or other racial minorities¹⁰⁵—but more commonly in light of common-sense indicia of invidious discrimination drawn from parallels with the American history of race discrimination: whether a class of persons has experienced a history of government discrimination;¹⁰⁶ whether the class has historically been stigmatized, branded as inferior, or stereotyped;¹⁰⁷ whether the class is a “discrete and insular” minority generally lacking in the political power to protect itself in the democratic process;¹⁰⁸ whether the characteristic that defines the class is an “immutable” trait over which its members have no control;¹⁰⁹ and whether the characteristic that defines the class is one that is generally irrelevant to governmental decision-making.¹¹⁰

This Court has held repeatedly that the presence of some combination of these indicia of invidious discrimination is a sufficient ground to declare a classification suspect or quasi-suspect under the Fourteenth Amendment, whatever the original understanding of the protection of that classification under the Amendment may have been. This Court, for example, has held that gender classifications are a quasi-suspect classification triggering intermediate scrutiny precisely because gender classifications present multiple indicia of invidious discrimination as described above,¹¹¹ even though it is quite clear from the historical record that the framers and ratifiers of the Fourteenth Amendment did not consider any strict requirement of gender equality within its commands.¹¹² Further, this Court has held that the once traditional legal classifications favoring legitimate or marital children over illegitimate or nonmarital children are quasi-suspect classifications because such

105. *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (stating “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States”).

106. *Frontiero v. Richardson*, 411 U.S. 677, 685-87 (1973) (observing the parallels between the history of American gender discrimination and American race discrimination).

107. *Id.* at 685 (observing that American statute books in the nineteenth century reflected “stereotyped distinctions” between men and women).

108. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that a more searching judicial inquiry may be directed toward legislation affecting “discrete and insular minorities”).

109. *Frontiero*, 411 U.S. at 686 (observing that gender, like race, is an “immutable characteristic”).

110. *Id.* (observing that gender, like race, “frequently bears no relation to ability to perform or contribute to society”).

111. *See Craig*, 429 U.S. at 197-99.

112. *See Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (approving in dicta gender discrimination in jury selection under the Equal Protection Clause); ELEANOR FLEXNER, *CENTURY OF STRUGGLE* 147-48 (1975) (discussing the prominent feminist opposition to the Fourteenth Amendment provoked by its express gender discriminatory language).

classifications present multiple indicia of invidious discrimination.¹¹³ This holding also expanded the protections of the Fourteenth Amendment beyond the narrow confines of those contemplated by its framers and ratifiers in the 1860s and originally recognized by this Court in the years immediately following ratification.¹¹⁴

The classification at issue in this case is a birth-status classification. The State of North Pacifica extends the full protections of its criminal laws to children once they are born, but prior to birth the state provides only minimal legal protections to shield children, such as Baby Girl Fairchild, from the violent death they may experience at the hands of private actors like Dr. Newhart. We hold today that birth-status classifications are invidious suspect classifications, and they are, thus, invalid unless they can meet the most exacting standard of review: strict scrutiny. This conclusion is squarely in line with our decisions concerning gender and “(il)legitimacy” classifications, and is based upon the same solid grounding: the presence of clear indicators that birth-status classifications are invidious in nature.

Unborn children have experienced a history of invidious government discrimination in the United States. While we have recounted at length the admirable American legal tradition reaching back to the founding of our nation of protecting the rights of unborn children by criminalizing abortion, it is also true that the rights of the unborn have never been protected fully or equally under our law. Most importantly, our predominant legal traditions have never classified the act of aborting an unborn child at all stages of development as a crime equal in nature to the killing of a newborn child.¹¹⁵ Even in the states most solicitous of the rights of unborn children, the deliberate killing of a newborn child, absent mitigating circumstances, constitutes the offense of murder, while the deliberate killing of an unborn child by an abortionist typically constitutes only the lesser offense of “abortion.” The difference in punishment between these two offenses is often substantial and may reflect the view that the lives of unborn children are at least somewhat

113. See *Clark v. Jeter*, 486 U.S. 456, 463-64 (1988).

114. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 181 (1972) (Rehnquist, J., dissenting).

115. New York’s statute dating from 1828 is typical in this respect. The killing of an unquickened fetus was classified as a misdemeanor, and the killing of a quick fetus was second degree manslaughter. N.Y. REV. STAT. pt. 4, ch.1, tit. 2, art. 1, § 9, and pt. 4, ch.1, tit. 6, § 21, (1829). The killing of a newborn child in the same circumstances would obviously be viewed as murder and punished much more severely. [See *Roe*, 410 U.S. at 138-39 (discussing the New York anti-abortion statute of 1828 as a “model” statute influencing codification and statutory reform in many other states).]

less worthy of protection simply because of their birth status.¹¹⁶ It is also notable here that in many states the criminal assault of a pregnant woman that results in the killing of the woman's unborn child has been treated not as a homicide, but rather simply as a crime against the mother, such as aggravated assault.¹¹⁷ In these same states, a similar attack on a mother that killed the newborn child she was holding in her arms would be treated as a homicide of the child as well as an assault against the mother. Finally, as discussed above, a significant number of states in the United States over the last few decades have legalized abortion, depriving unborn children of virtually all their legal protections against the threat of violent death.

This history of invidious discrimination against the unborn appears to be premised on the social prejudice that unborn persons are somehow inferior in nature to persons who have been born, even though both born and unborn persons are equally members of the human family sharing the same ultimate human characteristics and reflecting simply different stages of the cycle of life all human beings experience who are fortunate enough to grow to maturity. The basis of this prejudice is likely found in the unborn person's early stage of physical development and high degree of physical dependence upon his or her mother, including the physical presence within the mother's body. This view, at its base, is a mere irrational bias against those human beings who have not achieved an arbitrary degree of physical maturation or bodily separation from their mothers and is likely driven by social stereotypes about who "counts" as a real person whose human dignity and rights are worthy of recognition.

The bigoted proponents of negative stereotypes typically value persons like themselves while denigrating those who are different. Thus, persons prejudiced against the unborn are convinced that the only persons who are deserving of equal concern and respect are the persons who resemble themselves—who are physically well developed and bodily separate from their mothers—not the persons who look different, are not so well developed, and are still contained within their mothers' bodies. In sum, our praiseworthy tradition of protecting the unborn through anti-abortion legislation has unfortunately coexisted with a history in which unborn persons have been granted less than full equality under

116. [*Roe*, 410 U.S. at 157 n.54 (observing the significant difference between penalties under the Texas Penal Code for abortion and murder).]

117. Only thirty-four states have fetal homicide statutes and even those states do not uniformly offer the unborn child protection as a homicide victim from the moment of conception. See Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77, 87-88 (2009).

the law and, instead, have often been implicitly stigmatized and branded as inferior in status as a result of irrational social prejudices and stereotypes.

Unborn children also constitute a “discrete and insular” minority who, as a class, are politically powerless.¹¹⁸ The number of pregnancies each year in the United States is routinely equal to about two or three percent of the total population,¹¹⁹ and so it is obvious that unborn children make up a very small numerical minority of Americans at any given time. As a minority, the unborn are discrete and insular in nature for a number of obvious reasons: they are unable to participate in general social discourse because their early stage of physical development renders them unable to communicate; they are physically and socially isolated from numerical majorities because they are contained within their mothers’ bodies; and they have special needs, different from those of the general population, for protections of their bodily integrity against acts of violence, resulting from their physical helplessness and from the incentives that adults who seek to avoid the burdens of parenthood have in denying their personhood and killing them. Finally, the unborn are politically powerless for a number of obvious reasons: they cannot articulate their rights and interests or speak in their own defense; they cannot form or join political associations; they cannot protest any violations of their rights; they cannot petition the government for a redress of grievances; they cannot claim citizenship status until they are born; they cannot vote in any election; they cannot sue on their own behalf in court; they cannot run for political office; and they cannot occupy any position of any kind in government—not in the federal executive branch, Congress, the federal courts, or in any state or local government. Baby Girl Fairchild, like millions of unborn children each year, was absolutely helpless in the face of the self-interested decisions of those around her to take her life. In sum, few, if any, minority groups in the U.S. are as politically isolated or as powerless as the class of unborn persons.

The birth status of the unborn is also an immutable trait as that term is properly understood in our law. Unborn persons do not choose their birth status, and they cannot choose to change that status, though of course the passage of time will, in the natural course of events, lead to

118. [See Ely, *supra* note 22, at 933-34 (quoting *Carolene Products*, 304 U.S. at 152 n.4) (internal quotation marks omitted).]

119. See *U.S. Pregnancy Rate Down from Peak; Births and Abortions on the Decline*, CDC.GOV (Oct. 31, 2003), <http://www.cdc.gov/nchs/pressroom/03facts/pregbirths.htm>. The Center for Disease Control estimates that there were 6.28 million pregnancies in the United States in 1999 among a population of approximately 270 million. *Id.*

their eventual birth. Thus, at any given time, an unborn child's birth status is an immutable characteristic—unchosen and beyond his or her control. Finally, the birth status of an unborn child is routinely irrelevant to governmental decision-making. We can, for instance, see no reason why the vast majority of government laws touching the lives of individuals need make any distinction whether that individual is, say, an unborn child or a newborn child. While the application of some laws—such as those against child abuse—could differ depending on whether a child was unborn, and thus biologically linked to his or her mother's body, or born and not so linked, we see no reason why the underlying substance of laws protecting children from the myriad forms of abuse they may experience need be any different.

The undeniable presence of so many indicators of invidious discrimination against the unborn, such as Baby Girl Fairchild, force this Court to conclude that birth-status classifications are suspect and, therefore, must be necessary to achieve a compelling government interest in order to survive this Court's review.

6.

Since strict scrutiny is the highest of the three tiers of scrutiny under our Equal Protection Clause jurisprudence, we could end our analysis of the level of scrutiny at this point. Even so, there remain persuasive reasons for proceeding to the second strand of Equal Protection Clause analysis and examining what has sometimes been called the “fundamental right or interest” aspect of equal protection law, that which concerns the nature of the right or interest that a classification substantially infringes or affects.¹²⁰ This strand of Equal Protection Clause jurisprudence holds that classifications affecting the exercise of a fundamental right or interest may be “suspicious” in nature and, thus, may face heightened scrutiny,¹²¹ and an analysis of this question is important to understanding the full scope of the issues that this case presents.

A threshold question, then, is whether the access to the protections of the criminal law is a fundamental right or interest warranting further Equal Protection Clause analysis since the birth-status classification at issue clearly and substantially limits that access, generally denying the protections of the criminal law to the unborn. First, we may ask whether access to the protections of the criminal law is a fundamental constitutional right guaranteed to all individuals by the substantive

120. See *Skinner*, 316 U.S. at 541; *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

121. See *Skinner*, 316 U.S. at 541; *Shapiro*, 394 U.S. at 627.

component of the Due Process Clause.¹²² Does an unborn person have any individual substantive due process right under the Fourteenth Amendment to the protections of the criminal law? Certainly, the government's provision of the protections of the basic instruments of law and order—criminal laws, law enforcement personnel, prosecutors, trial courts, and institutions of correction—are “deeply rooted in the Nation's history and tradition,”¹²³ and therefore access to these protections might appear to be a good candidate for a tradition-based fundamental right to which each individual person is entitled under the substantive component of the Due Process Clause. However, this Court has been reluctant to create classes of positive rights or entitlements to government actions as opposed to classes of negative rights or freedoms from government action. Our precedent in *DeShaney v. Winnebago County Department of Social Services*¹²⁴ rejected a substantive right to police protection from private violence under the Due Process Clause, and while we have serious reservations about our holding in that case, we adhere to it today.¹²⁵ Therefore, we conclude that there is no substantive fundamental right to the protections of the criminal law under the Due Process Clause.

Second, we may turn to a sometimes-neglected part of our jurisprudence and ask whether access to the protections of the criminal law is a fundamental interest under the Equal Protection Clause. A fundamental interest, as has been understood in our Equal Protection Clause jurisprudence, is an interest that the government is free to choose not to grant to persons, but that must be granted to all persons equally, if it be granted at all; otherwise, any law infringing on such an interest is subject to heightened scrutiny under the Equal Protection Clause. For instance, this Court has never held that there is a federal constitutional due process right to appeal from state criminal trial courts to state appellate courts.¹²⁶ State appellate court review of state trial court convictions is, thus, not a fundamental right under our Constitution, and states are free under our precedents as they stand today to choose not to grant a right of appeal to its criminal defendants.¹²⁷ However, this Court has held that state appellate review of state criminal trials is a

122. U.S. CONST. amend. XIV, § 1.

123. *Glucksberg*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503) (internal quotation marks omitted).

124. 489 U.S. 189 (1989).

125. *Id.* at 202-03.

126. *McKane v. Durston*, 153 U.S. 684 (1898).

127. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

fundamental interest as a matter of equal protection.¹²⁸ If a state grants such review to criminal defendants by statute or under its state constitution, the right must be granted to all defendants equally or face heightened review under the Equal Protection Clause.¹²⁹ Therefore, as we held in *Griffin*, if a state creates a right of appeal, but also creates an implicit wealth classification affecting that right by charging fees for aspects of the appeal that have a discriminatory impact on the class of indigent persons, the state must meet a more exacting standard of scrutiny because of the classification's substantial effect on the exercise of the fundamental interest by a class of persons, the poor.¹³⁰

This Court has not settled on any satisfactory test for determining whether an interest is fundamental in nature, but the obvious implication of the word "fundamental," our precedents recognizing fundamental interests, and the logic of Equal Protection Clause review in this context is this: "fundamentality" turns on the importance of the interest to the rights of the individual. The main thrust of our law in this context is that when the government chooses to extend a right that is fundamental to the protection of other rights, any classifications substantially limiting the exercise of that right by particular classes of persons is suspicious and suggestive of invidious discrimination.¹³¹ This suspiciousness and suggestion of wrongful discrimination warrants heightened review and thus heightened protection for minorities under the Equal Protection Clause.

We have held that both voting and access to courts are fundamental under the Equal Protection Clause. Voting is a fundamental interest in part because of its overarching importance to other rights: Voting is "preservative of all rights,"¹³² and "[o]ther rights . . . are illusory if the right to vote is undermined."¹³³ The same is true of access to courts, which preserves other rights through the judicial process. The protection and relief courts can provide ensure that other rights are real rather than illusory.

128. *See id.* at 18-20.

129. *Id.* at 18.

130. *Id.* at 18-20.

131. *See id.* at 17-20 (stating that "[a]ppellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant" and that the state, in criminal trials, "can no more discriminate on account of poverty than on account of religion, race, or color"). *Cf.* *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (rejecting education as a fundamental right); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that the importance of education is relevant to equal protection analysis).

132. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

133. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

We believe the protection of the criminal justice system is also a fundamental interest that is of paramount importance and ultimately preservative of other rights. In fact, we can think of no interest more fundamental in nature than access to the basic protections of the criminal law, protections that ordinary Americans take for granted as the primary means the state deploys to protect their lives, liberties, and property from the private violence of other persons. If the state withdraws from a class of persons the basic protections of the criminal law that shield the rest of the population from private violence, any other rights granted to that class of persons would be essentially worthless.¹³⁴ Granting a class of persons any rights, including the rights to vote and to sue in court, would be of little or no value if persons opposed to the rights of that class could simply kill its members without fear of legal consequence. The protections of the criminal law, therefore, constitute a fundamental interest.

Of course, the state must be allowed flexibility in writing its criminal laws so that it is free to pursue social goals, such as offering special legal protections to vulnerable victims. The state must also be allowed an equal freedom in its decisions to deploy law enforcement resources, say, to combat law-breaking in high crime areas and set other reasonable enforcement priorities. However, recognition of the need for a degree of flexibility and discretion in the area of criminal law is a far cry from approving a governmental classification that deliberately leaves an entire class of persons unprotected by that law. Governmental conduct of this sort is extremely suspicious and highly indicative of invidious discrimination.

We believe, for instance, that a state choosing to legalize infanticide (defined as, say, the killing, by a humane method, of a child under the age of twelve months with the permission of the child's parents) should face more than the minimal scrutiny of rational basis review for classifying persons based upon their age;¹³⁵ rather, it should face some form of rigorous heightened scrutiny since the age classification substantially limits the fundamental interest of the class of infants in receiving the protections of the criminal law that are necessary to preserve their lives. To conclude otherwise would grossly distort the fundamental purpose of the Equal Protection Clause, which is to protect vulnerable minorities from wrongful acts of state discrimination. We hold, then, that access to the basic protections of the criminal law is a

134. Cf. *DeShaney*, 489 U.S. at 197 n.3 (1989) (“The [s]tate may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”).

135. See, e.g., *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976).

fundamental interest under the Equal Protection Clause and that the legislative classification at issue in this case—which denies the most basic protections of the criminal law to the entire class of unborn persons such as Baby Girl Fairchild—is a substantial infringement on that fundamental interest and is, therefore, subject to heightened scrutiny.

7.

North Pacifica's permissive abortion statute is a suspect birth-status classification, and it also implicates the fundamental interest in receiving the basic protections of the criminal law in order to protect life and limb from private violence. As such, it is subject to strict scrutiny, this Court's highest tier of scrutiny, on two independent doctrinal grounds. North Pacifica, therefore, must meet the high hurdle of establishing that its pro-abortion regime is necessary to achieve a compelling state interest, or this Court must declare the regime invalid under our Constitution.

The State of North Pacifica asserts two state interests that it believes are sufficiently compelling to justify its exclusion of unborn children from the equal protection of the laws. The first is a liberty interest in what the State variously terms bodily integrity, sexual privacy, or reproductive freedom. The second is a gender equality interest in protecting women as a class from unfair gender discrimination. We will discuss both of these state interests in turn.

North Pacifica's claim that protection of a liberty interest justifies its permissive abortion law takes two basic forms. First, the State argues there is a substantive due process right under the Fourteenth Amendment that encompasses abortion and protection of this federal constitutional right is a compelling state interest justifying the state's birth-status classification. Second, the State argues in the alternative that, even if there is no substantive due process right to abortion, there is still a subconstitutional liberty interest in abortion, and the protection of that interest by the state is a compelling state justification for its law.

We may dispose of the first liberty interest claim by citing our authoritative precedent in *Roe v. Wade*, which held there is no substantive due process right to abortion.¹³⁶ Today we reaffirm the central holding of *Roe* and its basic reasoning,¹³⁷ which we retrace in our

136. [*Cf. Roe*, 410 U.S. at 153 (holding that the substantive due process right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").]

137. [*Cf. Casey*, 505 U.S. at 879 (stating that the "adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding").]

opinion today. This Court has observed more than once that we must tread lightly in our declarations of unenumerated rights in order to show a proper respect for our limited role in the framework of government created by the Constitution. Therefore, we have held that any recognition of a substantive due process right must be well grounded in a finding that the right, as “carefully descri[bed],” is both (i) fundamental and (ii) “deeply rooted in this Nation’s history and tradition.”¹³⁸ We reaffirm today that abortion is not such a right for the following reasons.

First, the right asserted by the State, “carefully described,” is clearly the right to abortion. While the State seeks to place the right to abortion under broader rubrics such as reproductive autonomy or sexual freedom, we believe that a careful description of the right actually being asserted by the state is the concrete “right to abortion” rather than a broader right. This is so because other interests—such as the right of a married couple to use contraceptives in the privacy of the marital bedroom¹³⁹ or the right to intimate association or sexual privacy more broadly¹⁴⁰—are not involved in this case. Rather, this is an issue of abortion, not a broader interest, and only confusion can come from the State’s attempt to alter the description of the asserted right from the actual right that they are asserting. Whatever restrictions are placed on abortion, individuals remain free to make the basic choices central to their sexual and reproductive behavior: to abstain from sex, engage in inherently nonprocreative forms of sexual behavior, engage in contracepted sex, or even attempt to conceive a child. While it is true that abortion has some practical relation to some of these broader freedoms, it is also true that abortion must be analyzed in light of the specific legal issues it presents.

Second, we very much doubt the interest in abortion is sufficiently fundamental in nature to qualify as a substantive due process right, given the counter-balancing interest of the right to life of the unborn child on the other side of the abortion equation; but, in any case, the right to abortion, as carefully described, is clearly not “deeply rooted in this Nation’s history and tradition.”¹⁴¹ As our earlier extensive discussion of the history of abortion law in the United States establishes beyond doubt, our predominant legal tradition has been one of criminalizing abortion, not exalting it as some form of right entitled to legal

138. *Glucksberg*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503) (internal quotation marks omitted).

139. *Griswold*, 381 U.S. at 499.

140. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

141. *Glucksberg*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503) (internal quotation marks omitted).

protection.¹⁴² Indeed, until recent decades one would have been hard pressed to find any legislature, court, or commentator asserting that access to abortion is or should be a constitutional right.¹⁴³ Nor do we believe that recent trends recognizing abortion rights by statute in some states come close to overbalancing the combined weight of continuing opposition to abortion in other states and our long national history of treating it as a serious crime inconsistent with proper respect for human life. Since access to abortion is not deeply rooted in the nation's history and tradition, it is not a federal constitutional right.

Additionally, if we were to fabricate today a substantive due process constitutional right to abortion, that holding would create a "clash" of constitutional rights that we would then have to adjudicate further. The State argues that respect for the putative substantive due process right to abortion is a compelling state interest justifying the denial of the equal protection of the criminal laws to unborn persons under strict scrutiny, but one could easily reverse this argument and contend that respect for the equal protection rights of unborn persons is a compelling state interest justifying the denial of the substantive due process rights of pregnant women under the strict scrutiny standard that would apply there. Our role under the separation of powers as authoritative interpreter of the Constitution would not permit us simply to leave to individual states the decision to recognize a substantive due process right at the expense of an equal protection right or the reverse. Thus, even if we were to declare abortion a substantive due process right, we would still have to weigh that right against the Equal Protection Clause rights of unborn persons to determine the Constitution's proper settlement of the balance of rights. As our analysis below will demonstrate, we would ultimately have to conclude that the balance of rights favors the right to life of the unborn child over the right of the mother to choose abortion.

The State of North Pacifica's next contention is that access to legal abortion, even if not a constitutional right, is a liberty interest of such great importance to the individual that its recognition by the state is a compelling interest justifying the denial of the equal access of unborn persons to the protections of the criminal law under the Equal Protection Clause. We disagree and hold today that recognition of the individual liberty interest in abortion is not a compelling state interest overriding the rights of unborn persons.

142. [Cf. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) (observing that "[t]he fact that a majority of the States . . . have had restrictions on abortions for at least a century is a strong indication" that a right to abortion is not deeply rooted in history and tradition).]

143. See generally DELLAPENNA, *supra* note 74, at 539.

We recognize that laws protecting unborn children from abortion require the children's parents to shoulder enormous responsibilities. Carrying a child, giving birth to a child, and rearing a child affect every aspect of the lives of the child's parents—from the physical and emotional to the economic and social—and they involve some of the most serious obligations anyone can ever assume. At a minimum, the mother of an unborn child must carry the child to term, go through the rigors of childbirth, and put the child up for adoption. Not every mother can do so without experiencing severe hardships. Moreover, if the mother decides to keep the child, the heavy responsibilities of parenthood will continue for eighteen years and perhaps far longer. For those who do not want them, the interest in avoiding the weighty responsibilities of parenthood is no doubt tremendous.¹⁴⁴

But the interest on the other side is the most fundamental interest imaginable: the right of the individual to live his or her life to its natural end rather than have that life arbitrarily and prematurely extinguished by the violent act of another person acting without fear of legal punishment. This individual right to life is plainly of more importance than any other single right simply because it is the ultimate foundation of all other rights. Without life, one can enjoy no other right or liberty. In a contest, then, between the right to life and any other right or liberty, the right to life, and the experience of all the rights and liberties that life ultimately makes possible, must prevail. Thus, in balancing the rights at stake in our decision today, we must favor the foundational right to life over a particular nonfoundational right to liberty, the unborn child's right to life over the parent's liberty interest in the freedom to choose abortion to avert the burdens of parenthood.

Therefore, we do not believe the parental liberty interest in avoiding parenthood can justify a state's refusal to protect the right to life of the parents' child. As important as the interests of the parents are in this context, they simply cannot justify abortion, the killing of an unborn child, any more than they can justify infanticide, the killing of a newborn child. We cannot accept the view that it is better for our children, born or unborn, to die than it is for their parents to experience the undeniable detriments flowing from unwilling parenthood. An unwanted child may be a tragedy for all involved, but killing an innocent child is an immeasurably greater tragedy, and one this Court cannot be expected to approve under our Constitution. We hold that North Pacifica may not override the rights of unborn children such as Baby

144. [*Cf. Roe*, 410 U.S. at 153 (discussing the range of detriments imposed on a pregnant woman who is denied the choice to terminate her pregnancy).]

Girl Fairchild by invoking the parental interest in reproductive liberty.¹⁴⁵

8.

The State's next contention is that permissive abortion laws are necessary to secure a proper respect for gender equality. This claim also takes two forms. The first is a claim by the State that permissive abortion laws satisfy strict scrutiny under the Equal Protection Clause because they are necessary to serve the compelling state interest of avoiding an unconstitutional gender classification, which the State contends arises from government restrictions on abortion and which would be invalid under the Equal Protection Clause.¹⁴⁶ The second is a claim, in the alternative, that even if anti-abortion laws are not unconstitutional on gender equality grounds, the State still has a subconstitutional gender equality interest in providing women with legal avenues for obtaining abortion, an interest that is sufficiently compelling in nature to justify permissive abortion laws denying legal protections to the unborn under strict scrutiny.¹⁴⁷

We must first determine whether the governmental restrictions on abortion flowing from the extension of the equal protection of the criminal laws to unborn persons result in a gender classification triggering intermediate scrutiny under the Equal Protection Clause. We hold that they do not. At the risk of stating the obvious, gender classifications must, by their very definition, classify on the basis of gender and, therefore, must make gender distinctions between men and women as distinct classes. This Court first held decades ago that a pregnancy classification is not a gender classification on its face because it does not distinguish classes of persons along gender lines.¹⁴⁸ Rather, pregnancy classifications distinguish between the class of pregnant persons (all of whom are women) and the class of nonpregnant persons (who include the vast majority of women at any given time, as well as

145. [*Cf. Roe*, 410 U.S. at 162 (stating that "by adopting one theory of life, Texas may [not] override the rights of the pregnant woman").]

146. [*Cf. Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part) (stating that "a [s]tate's restrictions on a woman's right to terminate her pregnancy also implicate[s] constitutional guarantees of gender equality" because such restrictions rest upon a "conception of [a] wom[a]n's role" as a mother owing duty to the fetus to bring it to term).]

147. [*Id.* (stating that "[b]y restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care").]

148. *See Geduldig v. Aiello*, 417 U.S. 484, 494-97 (1974).

all men).¹⁴⁹ Since pregnancy classifications, on their face, distinguish between the class of pregnant women and the class of nonpregnant persons made up of both many women and all men, rather than between a class of women and a class of men, they simply cannot be considered gender classifications. Similarly, anti-abortion laws do not distinguish between men and women but, rather, presumably, between persons who are pregnant and wish to have abortions (all of whom are women) and persons who are not pregnant or who are pregnant but do not wish to have abortions (a class that includes the vast majority of women at any given time, as well as all men).

Of course, we have never held that race and gender classifications triggering forms of heightened scrutiny must be apparent on the face of the law. Our Equal Protection Clause review is intended to prevent subtle and hidden forms of discrimination as well as the blatant and obvious forms. Therefore, this Court has repeatedly held that even a facially race- or gender-neutral law must meet the rigors of heightened scrutiny if the law has both a race- or gender-discriminatory purpose and a discriminatory effect.¹⁵⁰ Obviously, pregnant persons are the class most directly affected by laws criminalizing abortion, and the class of pregnant persons is a class made up entirely of women, a significant number of whom wish to have an abortion and who will experience its prohibition as a serious adverse effect. While no doubt the fathers of unborn children are also affected by abortion laws, we believe laws restricting abortion have a sufficiently discriminatory impact on women as a class—by virtue of their effect on the subclass of pregnant women who wish to have an abortion—to meet the historical threshold we have set under our equal protection jurisprudence for declaring laws to have a discriminatory effect.

We do not believe, however, that such laws have a gender discriminatory purpose, which would be required in addition to a discriminatory effect to trigger heightened scrutiny. We have repeatedly held that a discriminatory purpose under our equal protection clause jurisprudence requires that a law be enacted “because of” its discriminatory effect, not merely “in spite of” that discriminatory effect, even when the state has clear knowledge that the discriminatory effect will result from its

149. *Id.* at 496 n.20 (stating that “[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis, just as with respect to any other physical condition”).

150. *See* *Washington v. Davis*, 426 U.S. 229, 241-48 (1976).

legislative action.¹⁵¹ Therefore, as we have held, a state may institute a program of standardized tests for state employees that measure reading and writing ability and that affect employment decisions, such as promotion, without necessarily having to meet the requirements of heightened scrutiny merely because the state knows the testing program will have a racially discriminatory effect.¹⁵² Our precedents establish that if the state instituted the testing program for a race-neutral purpose, such as improving the job-related skills of its work force, and despite, rather than because of, a racially discriminatory effect, the program need meet only the minimal scrutiny of rational basis review.¹⁵³

We have no reason to believe the purpose of governmental action restricting abortion and protecting the unborn is to discriminate against women. This is so because state actors have a clear gender-neutral purpose for implementing anti-abortion laws—providing protection for the equal right to life of the class of unborn persons. This governmental purpose is so obvious and compelling on its face that it negates any inference that anti-abortion laws are implemented because of their disparate impact on a subclass of pregnant women, rather than despite that disparate impact and in order to achieve the greater good of protecting innocent human life. We conclude that anti-abortion laws, as a general matter, are enacted for the purpose of protecting unborn children, not for the purpose of imposing a discriminatory effect on a subclass of pregnant women.

This conclusion is further reinforced by reliable surveys of gender attitudes towards abortion over the last several decades. While many of the self-identified leaders of various women's movements have made support for legal abortion a cornerstone of their political agenda as a "woman's issue,"¹⁵⁴ public opinion polling continues to show no significant differences between the attitudes of men and women on the question of legal access to abortion and the rights of unborn children to live.¹⁵⁵ In short, women do not support legalized abortion at signifi-

151. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotation marks omitted).

152. *Davis*, 426 U.S. at 232-48.

153. *See id.* at 248.

154. *See generally* KRISTIN LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* (1985); THE NATIONAL ORGANIZATION OF WOMEN, <http://www.now.org/> (last visited Oct. 18, 2011).

155. *See* Lydia Saad, *Four Moral Issues Sharply Divide Americans*, GALLUP.COM (May 26, 2010), <http://www.gallup.com/poll/137357/four-moral-issues-sharply-divide-americans.aspx>. A recent Gallup Poll is typical: 38% of those polled viewed abortion as "morally acceptable," while 50% viewed it as "morally wrong." Broken down by gender, 41% of men viewed abortion as "morally acceptable" while only 36% of women took this position. *Id.*

cantly higher rates than men. This fact should eliminate any lingering concern that the continuing over-representation of men and the under-representation of women in proportion to their percentage of the general population in positions of governmental authority has produced governmental action on the question of abortion that is hostile to or oppressive of women as a class. Rather, this polling data strongly suggests that if a vote on the question of abortion in our political processes today were limited exclusively to women, we would experience roughly the same spectrum of views and of governmental action that we now have before us.

Since anti-abortion laws neither classify on the basis of gender nor combine a gender discriminatory purpose with a gender discriminatory effect, such laws need only pass rational basis review. They are required merely to be rationally related to a legitimate state interest. Anti-abortion laws are plainly rationally related to the legitimate state purpose of protecting the lives of unborn children and, therefore, clearly meet this standard. Finally, we should add that if we were to determine that a gender classification is at issue here, thus triggering a heightened form of scrutiny, the equal protection rights of the class of unborn persons would still outweigh any equal protection rights of women in this context. This is so for the same reasons the rights of unborn persons to live outweigh any potential substantive due process right of their parents to legal abortion. The right to life is a foundational right in a way these other interests in liberty and equality are not; therefore, the foundational right must triumph over the non-foundational interests where there is a clash between the two. This point also disposes of the State's last claim: that a subconstitutional gender equality interest provides a compelling state interest justifying the denial of the equal protection of the criminal laws to the unborn. We understand this gender equality interest as principally the interest in avoiding the disparate effect anti-abortion laws place on women as a class through their effect on the subclass of pregnant women who wish to have an abortion. While we believe this equality interest is quite significant, it simply cannot outweigh the foundational equality right of unborn children, such as Baby Girl Fairchild, to the equal protection of the criminal laws to protect their lives and bodily integrity.

[See also Saad, *supra* note 13 (stating that “[a]bortion is often thought of as a women’s [sic] issue, but polling data suggest, to the contrary, that the depth of ones [sic] religious beliefs, not gender, is what drives attitudes on abortion”).]

9.

In sum, we hold that North Pacifica's permissive abortion regime denied Baby Girl Fairchild and all unborn persons the equal protection of the criminal laws in violation of the core principles of the Fourteenth Amendment. We further hold that the state laws proscribing abortion must offer unborn children protections substantially equal to those the state offers newborn children. We need not—and do not—address questions surrounding the precise form the legal protection of the unborn must take, questions we will leave for the time being to legislatures and lower courts. We also need not—and do not—resolve the difficult question of whether the Equal Protection Clause permits a state to legalize abortion in cases involving a serious threat to the physical health or life of the mother. We merely observe that any health exception that purports to justify the killing of an unborn child on grounds of medical necessity must meet the rigors of strict scrutiny both facially and as applied in individual cases. Whether protecting the mother's life or physical health from a serious threat is a sufficiently compelling state interest is a question we decline to resolve today. We merely hold that the North Pacifica abortion regime, which grants physicians the discretion to take the life of unborn children on putative medical necessity grounds with no provision for review to ensure the actual presence of a serious threat to the physical health of the mother and which allows the killing of the unborn on nebulous mental health grounds, cannot satisfy the demands of the Fourteenth Amendment.¹⁵⁶

We are fully aware that our decision today will prove divisive. When the political questions that divide us as a people implicate the overarching principles of our evolving constitutional order “conceived in liberty and dedicated to the proposition that all [persons] are created equal,”¹⁵⁷ such divisiveness is inevitable. The role of this Court is to interpret the Constitution's rights and structures for the American people, and our constitutional order both presupposes this august authority for the Court and could not long exist without it.¹⁵⁸ We may not retreat from constitutional questions because they are difficult or

156. Justice Sharpe asserts that we have decided “implicitly” the very questions we have explicitly declined to decide at all. We trust that legislators and lower courts will understand that we mean what we say and seek to resolve these open questions in good faith.

157. Abraham Lincoln, *The Gettysburg Address* para. 1 (1863) (internal quotation marks omitted).

158. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

abdicate our constitutional responsibilities because they are burdensome.¹⁵⁹ Nor can we share this solemn obligation with another branch of government, with the states, or with the voting public. This Court accepts its duty under the Constitution, and we will not shrink from enforcing the mandate of our basic law to protect the rights of unborn persons from states that would deny those rights. We enforce today not our personal preferences on this difficult moral question, but rather the fundamental legal equality of all persons under the Constitution.¹⁶⁰ This Court asks partisans on all sides of the issue of abortion to put aside their political passions, recognize our final authority “to say what the law is”¹⁶¹ and accept our decision today as grounded in the supreme law of the land.¹⁶² Our Constitution, a covenant running from one generation of Americans to the next,¹⁶³ requires no less than this from the American people if it is to endure as the embodiment of liberty for “ourselves and our Posterity.”¹⁶⁴

B. Justice Sattler and the Concurrence in the Judgment
Justice Sattler, concurring in the judgment.

1.

I concur in the Court’s judgment because I believe a state that legalizes the abortion of viable fetuses violates the Equal Protection Clause by denying the right of unborn children to the same legal protections the state affords newborn children under its criminal laws. However, I do not believe the Fourteenth Amendment requires the state to prohibit abortion previability, and in fact the Constitution requires recognition of a woman’s fundamental right to choose abortion at this early stage of prenatal development as a matter of both individual

159. The dissent’s overheated contentions to the contrary, we fulfill rather than erode the separation of powers and the federal design when we interpret the Constitution to protect the rights of the individual from the injustices advanced by majoritarian legislatures. The protection of vulnerable minorities is precisely the role of this Court under the Constitution in accordance with the Founders’ plan for republican self-government.

160. [*Cf. Casey*, 505 U.S. at 850 (stating “[o]ur obligation is to define the liberty of all, not to mandate our own moral code”).]

161. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

162. [*Cf. Casey*, 505 U.S. at 867 (stating that “the Court’s interpretation of the Constitution [in *Roe* and *Casey*] calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution”).]

163. [*Cf. id.* at 901 (stating the “Constitution is a covenant running from the first generation of Americans to us and then to future generations”).]

164. U.S. CONST. pmb1.

liberty and gender equality. I write separately to state these views in detail.

2.

The Court is correct in its decision today to turn to our legal traditions and their ultimate philosophical underpinnings to resolve the question of fetal personhood under the Fourteenth Amendment, but the Court fundamentally misreads an important aspect of those traditions. Dating back to the English common law, our legal traditions have made profound distinctions in the level of legal protection extended to prenatal life based upon the stage of its development. In fact, the common law extended substantial legal protection only to “quickened” fetuses, and the killing of such a fetus was, at a minimum, a “great misprision” subject to punishment and was even considered murder if the requirements of the “born-alive” rule were met.¹⁶⁵ The common law deliberately declined to extend such protection to unquickened prenatal life, and the killing of a fetus prequickening was not a crime at common law.¹⁶⁶ This distinction between nascent human life at different stages of development was central to the common law and determined whether that life received significant legal protection or no legal protection at all. Our earliest legal traditions on the protection of prenatal life are also in accord with contemporary legal trends in the law of abortion—trends toward preserving restrictions on late-term abortions while legalizing early-term abortions.

Moreover, such distinctions based on fetal development dating back over seven hundred years cannot be dismissed as a result of simple medical ignorance. Quite the contrary: they rest on the soundest of foundations. Whether a fetus should be considered an actual unborn child entitled to strict legal protection or merely a potential unborn child not entitled to such protection logically turns on the degree to which the fetus has achieved a stage of physical development comparable to a typical newborn child. A fetus in the last weeks of a normal pregnancy is physically indistinguishable from a newborn child and may actually be more advanced in its development than many prematurely born infants who will survive to maturity. There is no sound reason for treating the unborn child as a nonperson unprotected by the criminal laws while treating the newborn child—including the prematurely born

165. COKE, *supra* note 72.

166. I can see no ambiguity in the phrase “a woman quick with child.” See *supra* note 76 and accompanying text. It plainly refers to a woman carrying a quickened fetus. [*Roe*, 410 U.S. at 132 (observing that at common law performing an abortion before quickening was not an indictable offense).]

child—as persons constitutionally entitled to such protection. Additionally, an artificial legal distinction between unborn and newborn children raises questions of the personhood of the child during the birth process itself, which further highlights the dubiety of the distinction. This last point has produced cases under the law of fetal homicide in some states¹⁶⁷ and is implicated by the partial-birth abortion procedure in this very case.¹⁶⁸ In sum, this Court cannot be expected to embrace the arbitrary denial of the personhood of one child because it is contained in its mother's body while recognizing the personhood of a child at an even earlier stage of physical development because it has passed through the birth canal.

On the other hand, a fetus in the first weeks of pregnancy is essentially a cluster of cellular material with no brain, central nervous system, or other organic structure comparable to that of the average newborn child or prematurely born child at an advanced enough stage of development to survive *ex utero*. The fetus at this early stage of development can scarcely be considered an unborn child—that is, an actual child who has not yet been born but who is otherwise indistinguishable from children who have been born and whose legal personhood is unquestioned under our laws and traditions. Rather, the early-stage fetus is logically a mere potential child, an organism that may in the future become an unborn child through natural biological processes but that has not yet achieved that crucial status. The early-stage fetus is, thus, a potential person or “preperson,” not an actual person protected by the Fourteenth Amendment. The difference here is directly analogous to that between an acorn and an oak—or at least an acorn and an oak sapling. The fact, of no small importance, that an acorn has the potential to become an oak sapling at a point in the future does not justify ignoring the equally important fact that its potential has not yet been realized in the present. The acorn, whatever its potential for further development, is still an acorn.

Thus, both our legal traditions and common sense dictate that our interpretation of the word “person” in the Fourteenth Amendment

167. See, e.g., *People v. Chavez*, 176 P.2d 92, 95 (Cal. Dist. Ct. App. 1947) (holding that a viable child in the process of being born is a human being within the meaning of the California homicide statute).

168. Strictly speaking, Baby Girl Fairchild was a partially-born child—midway between the unborn child and the newborn child—when her life was extinguished by Dr. Newhart. That point demonstrates just how extreme the dissent's position is on the question of abortion and respect for human life: The dissenters can see no constitutional objection to a state law permitting the intentional killing of what is essentially a fully developed and partially born human baby with what amounts to a 100% chance of surviving outside the womb. That is truly shocking.

incorporate a distinction based upon the physical development of the fetus. I do not think we must adhere to our oldest legal traditions in a wooden fashion, and therefore do not think we need adopt the common law's imprecise distinction based upon the concept of quickening or fetal movement in utero. I propose we adopt viability as our standard.¹⁶⁹ The medical community¹⁷⁰ and our recent traditions—reflected today in the laws of many of the states¹⁷¹—have drawn on this sound concept, grounding what amounts to the recognition of a form of fetal personhood on the physical capacity of the fetus to survive outside of the womb. A previable fetus, one with little or no chance for survival apart from its mother, is too far removed in its physical development from a newborn child to justify an assertion of constitutional personhood. A viable fetus, one with a significant chance for survival outside the womb, is close enough in terms of its biological structure to a newborn child to justify a recognition of its personhood. Thus, the viability distinction should be the touchstone for fetal personhood under the Fourteenth Amendment.¹⁷²

I would add that the Court's stated concern, that the recognition of distinctions among different classes of fetuses will sink the Court in a "metaphysical quagmire," may have some merit in response to the respondent's philosophical arguments basing personhood on self-awareness, rationality, and moral agency, but the concern scarcely applies to the familiar viability distinction, which is grounded in both law and simple logic. Indeed, recognition of the viability distinction in

169. A fetus may attain viability during the twenty-third or twenty-fourth week of pregnancy, though this date will no doubt continue to shift as advancements in technology to assist neonatal life occur. [*Casey*, 505 U.S. at 860.]

170. See, e.g., LOUIS M. HELLMAN & JACK A. PRITCHARD, *WILLIAMS' OBSTETRICS* 493 (14th ed. 1971) (discussing viability standard). [*Cf. Roe*, 410 U.S. at 160 (observing that "[p]hysicians and their scientific colleagues have regarded [quickening] . . . with less interest [than the common law] and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid") (footnote omitted).]

171. See, e.g., R.I. GEN. LAWS § 11-23-5 (2010), available at <http://www.rilin.state.ri.us/statutes> (fetal homicide offense of "[t]he willful killing of an unborn quick child" defined in terms of fetal viability as an unborn child "so far developed and matured as to be capable of surviving the trauma of birth with the aid of usual medical care and facilities available in this state"); [*Cf. Casey*, 505 U.S. at 860 (stating that fetal "attainment of viability may continue to serve as the critical fact [in the regulation of abortion], just as it has done since *Roe* was decided").]

172. The Court seems to think the fact that the point of viability is technology-dependent and will change over time is a basis for rejecting the standard, but it fails to explain why this is a serious problem. In any event, I see no reason to base our decision today on the science-fiction hypotheticals posed by the majority rather than the emerging consensus in the states and the medical community in favor of the viability standard.

Fourteenth Amendment law requires no metaphysical argument at all, as I think I have demonstrated, but rests instead on our most recent legal traditions, on the similar concept of quickening found in our earliest legal traditions, and on a simple analogy rooted in the question of the physical similarity of a fetus to the newborn children who are already recognized as constitutional persons under the law. Alternatively, if one believes that the viability distinction, as an argument about what human beings should count as persons under the Constitution, must have a supporting metaphysical argument, then the same is true for the Court's confident assertion that new human life in the form of a single cell, a fertilized egg, constitutes a person with the same rights as the typical newborn child. The merits of that conclusion are far from self-evident and the path of defending it as a philosophical proposition will lead straight into the quagmire the Court seeks to avoid.

3.

Finally, I write separately to express my disagreement with the Court's perfunctory dismissal of North Pacifica's arguments in favor of a constitutional right to abortion grounded in substantive due process and equal protection. I agree with the majority that no such rights can outweigh the foundational right of a viable unborn child under the Equal Protection Clause to live and have its life protected by the criminal law, but I believe such rights do outweigh the limited state interest in protecting the potential personhood of the fetus previability.

As a matter of substantive due process, I believe the word "liberty" in the Fourteenth Amendment is entitled to as expansive a definition as the word "person." There is no principled basis for interpreting the word "liberty" in a blinkered historical fashion obviously designed to confine its meaning within the narrowest possible bounds while interpreting the word "person" in a sweeping manner grounded in text and evolving traditions as a "majestic generality"¹⁷³ in order to justify a broad interpretation, allowing the Court to invalidate pro-abortion regimes in almost half the states. The fact that the Court makes no effort to justify this double standard suggests a lack of attention to interpretive principle that calls into question the very legitimacy of the Court's analysis.¹⁷⁴

173. On the "majestic generalities" of the Constitution, see Justice William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification*, Address Before the Georgetown University Text and Teaching Symposium (Oct. 12, 1985), in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 13 (Sanford Levinson & Steven Mailloux, eds., 1988).

174. [*Cf. Roe*, 410 U.S. at 153-54, 156-57 (defining the right to privacy as a due process liberty under the Fourteenth Amendment broadly to reflect evolving legal tradition and

There should be no doubt: The word "liberty" under the Fourteenth Amendment is also one of the Constitution's "majestic generalities," and it requires a broad interpretation rooted in our evolving legal traditions and in the moral principles of justice and fairness at the heart of the Constitution.

A flexible interpretive approach is necessary to achieve the framers' ultimate aspiration, reflected in the text of the Fourteenth Amendment: protecting the fundamental rights of the individual from the tyranny of the majority.¹⁷⁵ If we take this approach and interpret the word "liberty" broadly in order to protect the rights that are truly fundamental, a woman's right to choose to terminate her pregnancy previability surely will qualify as a liberty.¹⁷⁶ Few choices a woman will make in her life are as intrinsically important, consequential, or deeply personal as that one. Any suggestion to the contrary reveals an incapacity to appreciate what an abortion means and what it—or its alternative—entails for the woman involved.

I recognize, of course, that the Court refused to follow this path in *Roe v. Wade* when it rejected a constitutional right to abortion even in the earliest stages of pregnancy, but that case was wrongly decided and should be overruled. As the dissenters in *Roe* recognized, the right to privacy established in *Griswold v. Connecticut*¹⁷⁷ is broad enough to encompass a woman's right to choose whether to abort a previsible fetus or to allow the fetus to develop into an unborn child.¹⁷⁸ *Griswold*, broadly read, as it was intended to be and has been by this Court in *Eisenstadt v. Baird*,¹⁷⁹ stands not for a narrow right to use contraceptives, but for a broader right to reproductive liberty—the right to choose whether or not to "bear or beget" a child.¹⁸⁰ It is this principle that *Griswold* established.

Further, even a narrow interpretation of *Griswold* fixated on its specific holding on the use of contraceptives still supports a right to abortion, since many contraceptives can and do double as abortifacients

controversial public policy judgments while defining the term "person" under the Fourteenth Amendment narrowly as a matter of text and original understanding.)]

175. See U.S. CONST. amend. XIV, § 1.

176. [Cf. *Roe*, 410 U.S. at 153 (holding that the substantive due process right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").]

177. 381 U.S. 479, 499 (1965).

178. [Cf. *Roe*, 410 U.S. at 153.]

179. 405 U.S. 438, 453 (1972) (holding that the right to privacy established in *Griswold* extends to "the decision whether to bear or beget a child").

180. *Id.*

for early-stage pregnancies.¹⁸¹ Thus, the right to use contraceptives logically extends to the right to use contraceptives as abortifacients to terminate early-stage fetuses and, thus, to a right to abortion more generally.¹⁸² Both these points suggest that the right established in *Griswold*, a case the Court purports to respect in its decision today, encompasses a general right to prevent the development of an unborn child—one that logically extends from preventing the conception of a prenatal life in the first place through contraception to preventing its development once conceived from a potential unborn child into an actual unborn child through abortion. That conclusion is further reinforced by the trends in state law in recent decades toward adopting more permissive abortion regimes. In the decades since the middle 1960s, almost half the states have legalized abortion in the early stages of pregnancy.

As a matter of equal protection, I do not believe our precedent in *Geduldig v. Aiello*¹⁸³ is correct or that we should stand by it. I cannot see the point in extending heightened scrutiny to gender classifications under the Equal Protection Clause in order to protect women (as well as men) from invidious gender discrimination, and then invoking a crabbed formalism on the question of gender classifications that leaves such discrimination in place. The gender-protective principles of the Fourteenth Amendment are triggered by pregnancy and abortion classifications simply because such classifications distinguish between one class made up entirely of women and a second class that includes all men, and do so on the basis of a condition, pregnancy, that also distinguishes women from men. That is a sufficiently suspicious classification separating men and women into different classes largely along gender lines to warrant the protections of intermediate scrutiny under our equal protection doctrines.¹⁸⁴ We have recognized that pregnancy-based classifications constitute gender discrimination in the statutory context of Title VII,¹⁸⁵ and we should extend that view to the Equal Protection Clause.¹⁸⁶

181. [RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 107 (1993) (contending that a right to use contraceptives entails a right to abortion because many contraceptives are abortifacients).]

182. [*Id.*]

183. 417 U.S. 484 (1974).

184. *See id.* at 501 (Brennan, J., dissenting) (stating that “by singling out for less favorable treatment a gender-linked [condition] peculiar to women, the State has created a double standard . . . constitut[ing] sex discrimination”).

185. 42 U.S.C. § 2000e to e-17 (2006 & Supp. III 2009).

186. *See UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding that a policy that excluded women capable of bearing children from employment involving exposure to

Further, I believe the concern the Court rightly shows for the rights of unborn children under the Fourteenth Amendment should continue to protect those children from other forms of invidious discrimination once they are born and grow to maturity. Had Baby Girl Fairchild not had the extreme misfortune to fall under the jurisdiction of a state that denied her personhood and facilitated her unnatural demise, she would in the likely course of events have grown up to become Ms. Fairchild, and I hope this Court would have then respected her right to gender equality under the Fourteenth Amendment. The Equal Protection Clause's mandate of gender equality, in my view, provides a second foundation for a constitutional right to previability abortion.

While I join the Court's conclusion that the State of North Pacifica denied Baby Girl Fairchild and all viable unborn children the equal protection of the laws, I cannot join the Court's untenable view that a nonviable fetus is a constitutional person entitled to the equal protection of the laws or its ill-considered conclusion that the Fourteenth Amendment fails to protect the rights of women, as a matter of fundamental liberty and equality, to choose whether to terminate a pregnancy prior to the point of fetal viability.

C. Justice Sharpe's Dissent

Justice Sharpe, with whom Chief Justice Truepenny and Justice Keen join, dissenting.

1.

Because I can see no constitutional basis for this Court's removal of the divisive public policy question of abortion from the political processes of the fifty states, I dissent.

2.

The linchpin of the Court's analysis in this case is the assertion of fetal personhood under the Constitution, and it comes in the narcotic form of a deceptively simple syllogism: The major premise is defining the word "person" under the Equal Protection Clause as a "human being." The minor premise is defining a "human being" to include prenatal life from the moment of conception.¹⁸⁷ The conclusion that follows—as night follows the day—is that a person for purposes of equal protection

lead created a facial gender classification in violation of Title VII).

187. [Cf. Schlueter, *supra* note 59, at 354 (advancing the syllogistic argument that Fourteenth Amendment personhood extends to all human beings, that the unborn are human beings, and thus that Fourteenth Amendment personhood extends to the unborn).]

analysis includes prenatal life from its first moment of existence as a single cell. On this conclusion, the Court justifies its forced march through our equal protection doctrines, and its ultimate invalidation of the permissive abortion regimes of almost half the states.

But what authority is cited for the major premise? A dictionary. And what authority is cited for the minor premise? A series of medical textbooks on embryology. What, then, is conspicuous by its absence? Any citation to the actual *legal* authorities on which this Court is supposed to base its resolution of cases: text, history, tradition, and precedent. In particular, the Court presents no evidence—not a single shred—on what should be the central point of inquiry: whether the framers or ratifiers of the Fourteenth Amendment understood that amendment to speak to the question of abortion and unborn human life as opposed to, say, the Black Codes and the newly freed slaves.¹⁸⁸ Devotees of Dr. Johnson and Hippocrates may find value in this strange form of legal analysis, but to me, as a judge, it is a dog's dinner.

The best this Court can do in terms of actual legal analysis on this question is to recite a tendentious account of the history of the Anglo-American law of abortion, one which over-emphasizes the historical concern for protecting prenatal life and under-emphasizes historical concern for protecting women from hazardous medical procedures at a time when abortions were unsafe.¹⁸⁹ Additionally, the Court prefaces this account with a statement that this history does not actually control the Court's decision, and therefore, I think, we are free to conclude that the Court intends it simply as smoke-blowing to distract us from the rabbit being pulled out of the hat. The smoke, however, blows in the wrong direction. What the Court's historical account demonstrates beyond doubt is that at no time in our history—from Colonial America to the present day—has abortion been condemned in any fashion other than

188. See *Slaughter-House Cases*, 83 U.S. 36, 71 (1872) (observing that the “one pervading purpose” of the Fourteenth Amendment was the protection of newly freed slaves from unfriendly state action); *Bell v. State of Md.*, 378 U.S. 226, 303 (1964) (Goldberg, J., concurring) (observing that the “Framers of the Fourteenth Amendment” were reacting to Southern “Black Codes” designed to reduce the freedmen to a state of servitude resembling slavery when they sought to create new constitutional guarantees of citizenship and equality). [Cf. Robert H. Bork, *Constitutional Persons: An Exchange on Abortion*, in ROBERT H. BORK, *A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS* 361-63 (2008) (noting the complete absence of any historical evidence supporting the view that the framers and ratifiers of the Fourteenth Amendment thought that it would restrict abortion and protect the unborn).]

189. [Cf. *Roe*, 410 U.S. at 148-49 (observing that until the twentieth century abortion was a hazardous procedure and, thus, it has been argued that a concern with women's health was a major motivation for anti-abortion laws).]

as a simple social evil criminalized by common law courts and some legislatures in some (but by no means all) circumstances, as a matter of simple public policy.

By the Court's own account, fetal life was never granted special constitutional protection under state constitutions, colonial charters, or other documents of similar fundamental standing, and in the overwhelming majority of instances—as the majority admits today—abortion has not been treated as a crime equivalent to the killing of a newborn child. The Court ends its walk down this winding historical path by recognizing the circumstances that produced this case: Almost half the states in recent decades (representing more than 150 million Americans acting through their elected representatives) have legalized abortion because they believe, presumably, that a woman's interest in reproductive freedom outweighs any interest in prenatal life. The Court darkly condemns this legislative trend as a rationalization of sexual self-interest (to paraphrase H.L. Mencken's definition of a "puritan," the Court seems haunted by the fear that someone, somewhere, may actually be having sex without intending to procreate),¹⁹⁰ but a progressive reconsideration of the balance between reproductive liberty and nascent human life in a time of social, economic, and technological change is precisely what any rational person wants from his or her legislature. In sum, the Court's own historical summary confirms precisely why its decision today is wrong: There has never been a legal consensus in favor of the view that a prenatal human life is a person entitled to the equal protection of the criminal laws—not today, not fifty years ago when virtually all states broadly prohibited abortion, not in 1868 when the Fourteenth Amendment was ratified, and not in 1787, 1776, or even 1607. Thus, there is no legal basis for the Court's conclusion that a prenatal life should be considered a constitutional person.

Further, the Court's exhaustive invocation of established equal protection doctrines may lull the unwary reader into imagining that the balance of interests the Court strikes in this case carries some legal weight beyond the brute exercise¹⁹¹ of this Court's authority to settle constitutional questions under *Marbury v. Madison*,¹⁹² but this is simply not so. The Court's decision to elevate a prenatal right to life over the interests of pregnant women in reproductive liberty and gender equality is purely political in its substance despite the grand parade of

190. H.L. MENCKEN, *THE VINTAGE MENCKEN* 233 (Alistair Cooke ed., 1955) (defining puritanism as "[t]he haunting fear that someone, somewhere, may be happy").

191. [*Cf. Roe*, 410 U.S. at 222 (White, J., dissenting) (characterizing the Court's decision in *Roe* as an exercise in "raw judicial power").]

192. 5 U.S. 137, 177 (1803).

legal principles and precedents. On a divisive social question, such as abortion, there can be no satisfactory legal answer to the question of how to balance one set of social interests against the interests on the other side absent a specific textual or historical resolution of the balance, which is why this issue should be left to the states. The question is political to its very core, and it has been resolved that way by this Court today, despite the solemn recitation of cases and doctrines.

I shall limit myself to one point concerning Justice Sattler's concurrence. The viability-based mitigation he proposes to the majority's venture in judicial policymaking is more than counter-balanced by his unfounded assertions that a constitutional right to abortion exists previability. This nation's predominant view of abortion throughout our history has been that it is usually a wrongful act and should be criminalized in a broad range of circumstances, a view that survives in half the states to this day. While I disagree with that view as a matter of public policy, the historical record must be accepted for what it is, and it clearly precludes any recognition of a constitutional right to abortion under a serious substantive due process or equal protection methodology grounded in text, original meaning, and tradition.¹⁹³

3.

The casual reader of the Court's opinion might imagine that the Fourteenth Amendment is the only part of the Constitution at issue in this case and that state legislatures are the only institutions posing a threat to the principles of our constitutional order. That is quite mistaken. In addition to the Fourteenth Amendment, this case (and, indeed, all of our cases) implicates the proper scope of this Court's authority under Article III of the Constitution. Our Article III powers, in turn, must be read in the context of the Constitution's foundational structural principles: the separation of powers and the federal balance between national and state authority. In particular, the Constitution grants "legislative [p]owers" to Congress in Article I¹⁹⁴ and reserves the police power over questions of public policy to the states through our basic law's federal design as confirmed by the Tenth Amendment.¹⁹⁵ Legislative and police powers are not granted to the federal judicial branch, and no part of Article III confers on this Court the authority to exercise such powers by invalidating state legislative action simply

193. [*Cf. Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) (concluding the broad historical tradition of criminalizing abortion in the U.S. precludes finding a constitutional right to abortion).]

194. U.S. CONST. art. I, § 1.

195. *Id.* amend. X.

because we believe it is unjust or unwise.¹⁹⁶ Quite the contrary, the Constitution plainly recognizes the final authority of the governments of the fifty states to resolve ordinary public policy questions such as abortion as they see fit.

The Court today concludes that the State of North Pacifica has violated the Fourteenth Amendment, but I believe the Court has exceeded the judicial power under Article III in violation of the federal structure of the Constitution.¹⁹⁷ The Court not only misreads the Fourteenth Amendment, it also contravenes the constitutional limits of the judicial power in violation of the Tenth Amendment. We cannot expect the states to adhere to the Constitution if we on this Court will not,¹⁹⁸ and we should not be too quick to count on the voters' continued respect for our authority to interpret the Constitution in the judicial process if we in turn are not willing to respect their authority to make public policy in the political process.

4.

The Court is determined to impose a uniform abortion policy on the nation, and the implications of that policy should disturb everyone but the fiercest anti-abortion partisans. I won't dwell on the most obvious effects this decision will have on the pregnant women who face difficult circumstances in an imperfect world—the Court at least has its eyes open to the harsh realities of unplanned parenthood—except to point out that no legal prohibition of abortion will be fully effective, and some women, no doubt, will feel compelled to resort to illegal abortions. These

196. While I believe Justice Harlan's concurrence in *Griswold* better captures the meaning of the Fourteenth Amendment than Justice Black's dissent, Justice Black was undoubtedly correct to recognize that "no provision of the Constitution . . . either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational." *Griswold*, 381 U.S. at 520-21 (Black, J., dissenting). I do not believe the Court exercised such an illegitimate power in *Griswold*, but it certainly has done so in our decision today.

197. *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., concurring in part and dissenting in part) ("When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.") (footnote omitted). [*Cf. Roe*, 410 U.S. at 222 (White, J., dissenting) (stating that "the Court perhaps has authority" to declare a constitutional right to abortion, but that it is an "improvident and extravagant exercise of the power of judicial review").]

198. *Cf. Mapp v. Ohio*, 367 U.S. 643, 686 (1961) (Harlan, J., dissenting) (observing that "in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes").

abortions will often be unsafe, and a significant number of women will die from botched “back-alley” abortions—all as a result of the Court’s decision today. Many of those deaths will be every bit as grisly as the abortion procedure in this case that the Court is so careful to describe in detail. That is a sad and sobering fact to set beside the Court’s pietistic invocation of the Declaration of Independence and the Preamble.

The Court also takes care to avoid telling the states precisely what they must do to comply with this decision’s newly minted equal protection right for prenatal life. I suspect this studied imprecision is intended both to soften the blow of today’s decision and obscure its full radicalism. Three questions stand out as particularly portentous. Will legislatures have to punish feticide as actual homicide, or will merely criminalizing it as the lesser offense of “abortion” suffice?¹⁹⁹ Will states have to punish women who have abortions as conspirators, accomplices, or perpetrators, or will the traditional practice of exempting women from prosecution and punishment as a “victim” of the abortionist suffice?²⁰⁰ Will states have to criminalize abortion even when the pregnancy threatens the life or health of the mother, or will states be allowed to show some solicitude for pregnant women as well as for prenatal life?²⁰¹

I pose these as open questions, but in fact I think the answers are already implicit in the Court’s analysis: Since prenatal life is an unborn child in the Court’s view, abortion must be classified and punished as homicide, not as a lesser offense; for the same reason, a woman who has an abortion is the instigator of the murder of her unborn child, so there is no basis for exempting her from prosecution as a victim of the abortionist who, after all, simply does what the woman asks. Finally, since abortion is the deliberate killing of an innocent unborn child, any health or life exception will have to be exceedingly narrow to justify resort to such an extreme measure. The Court, in short, is not on a path simply to constitutionalize the traditional prohibition of abortion that

199. [*Cf. Roe*, 410 U.S. at 157 n.54 (observing the “significant[]” difference between penalties under the Texas Penal Code for abortion and murder).]

200. [*Cf. id.* at 151 (observing that under Texas law the pregnant woman herself “could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another”).]

201. [*Cf. id.* at 157 n.54 (observing that the State of Texas asserted protecting the life of the unborn child as a constitutional person as its compelling state interest in *Roe*, but that the State itself did not consistently follow its stated view because it classified and punished abortion as a less serious offense than homicide, exempted the pregnant woman from prosecution under its anti-abortion law, and recognized a health exception to its prohibition of abortion).]

prevails in about half the states, but rather to advance a radical shift in the laws of all fifty states.

5.

The political consequences of this case for our constitutional order are easy enough to forecast. Partisans on one side of the abortion debate will likely react to this decision with glee. They have been relieved of the political scut work of persuading their fellow citizens in the democratic process that their view of abortion is the right one, and they have been insulated from the disappointments of ordinary political defeat in the legislative process. They can bask in the combined glow of the Court's imprimatur and the sanctification of their viewpoint in the form of a new constitutional right. They can even persuade themselves, if they try hard enough, that the Court's newly revised and edited version of the Constitution is better than the now out-of-fashion Constitution bequeathed to us by generations of framers and ratifiers who left the question of abortion to elected legislatures.

Partisans on the other side of the abortion debate will react to this decision with bitter disappointment. They have been disenfranchised—deprived of any effective right to vote and make public policy on this important issue—and they are not stupid. They will understand what has happened. They will view this Court as an enemy of justice, both an opponent of the individual rights at stake in the abortion debate and a hypocritical adversary of the Rule of Law and our constitutionally-mandated democratic form of government. They will protest. They will plot to overturn the decision. They will turn their attention to the selection of new justices, further politicizing the nomination and confirmation process. Some of them will likely even come to question this Court's supreme authority to resolve constitutional questions,²⁰² as Lincoln and others did in the wake of *Dred Scott*.²⁰³

Perhaps the political power of the partisan allies we have acquired today will outweigh that of the enemies we have made. And perhaps not. It may happen that we are able to preserve this decision and continue to impose our political will on the nation, or it may be that we have to retreat under fire²⁰⁴ and return this question to its rightful place in the political processes of the states. But whatever the ultimate outcome of the Court's abortion putsch today, of this much we can be

202. See *United States v. Nixon*, 418 U.S. 683, 705 (1974); *Cooper*, 358 U.S. at 18.

203. See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

204. [*Cf. Casey*, 505 U.S. at 867 (observing that “to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question”).]

sure: We have seriously damaged the integrity of the Court, and we have broken faith with the Constitution we took an oath to uphold. For these reasons, I dissent.

IV. CONCLUSION

The question of abortion presents a series of interlocking issues concerning foundational moral principles and concepts: liberty, equality, and personhood. Thus it is no surprise that abortion is so often seen as a difficult moral question and that we continue to debate the rights and wrongs of abortion today. As difficult as abortion is as a question of simple political morality, it becomes that much more difficult when raised as a question of law under the Constitution. This is so because the constitutional setting raises additional difficult questions that are themselves the subject of perennial dispute: the legitimacy of various methods of constitutional interpretation and the ambit of the proper judicial role within the constitutional design. As a result, we continue to rewrite and reimagine the holding and opinion in *Roe v. Wade* and its progeny, reexamining and refining our views of the issues it raises and attempting to build a consensus on its proper resolution. We need to convince ourselves, as well as others, that we have finally gotten it right.

The aim of this Article in taking up these questions and in articulating alternative and conflicting answers to them—found in the majority opinion, concurrence, and dissent—has not been the direct advocacy of any one viewpoint on how to resolve the abortion question under the Constitution. Rather, the goal of this article in rewriting *Roe* from a nontraditional perspective with a careful emphasis on the analytical inversion of its arguments has been to provide a fuller exploration of a wider range of legal possibilities in order to establish a richer context for our ongoing debates. These lines of analysis have been worth exploring because they are important in their own right, because they illuminate by contrast many of the arguments found in *Roe*, and because they may be a predicate for meaningful reform.

In particular, what this Article demonstrates, as a conceptual matter, is that a fetal right to the equal protection of the homicide laws is as plausible a way of reading the Fourteenth Amendment as the Court's actual reading in *Roe* establishing a right to abortion, but that it is also subject to the very same kinds of moral and legal objections grounded in commitments to rival abortion policies, historically-oriented interpretive methods, and judicial restraint. More generally, this Article has hoped to contribute, in a vivid fashion, some detailed arguments both for and against an expansive recognition of the equal protection rights of the unborn. These arguments should be a central part of any comprehensive discussion of the constitutional dimension of the abortion debates.

Writing an article in which one advances rival arguments on a controversial topic to stimulate thought and debate without offering one's own considered conclusions has its precedents. Lon Fuller's classic article "The Case of the Speluncean Explorers"²⁰⁵—a major source of inspiration for this Article's use of fictional judicial opinions as a heuristic device—has been praised, in part, because Fuller's judges are such able advocates for their individual views that one cannot be sure from the article alone which position is closest to Fuller's own view.²⁰⁶ I cannot hope to have the same success as Fuller, but this Article's uncompromising presentation of each of three starkly opposed views was aided by the fact that none of the judicial opinions represents with any precision my own thinking on the issues raised by the intersection of abortion and the Constitution. As a pro-life proponent of judicial restraint,²⁰⁷ I have major points of agreement and disagreement with each of the three opinions in this Article, and I believe that both the strengths and the weaknesses of the case for broad fetal rights under the Equal Protection Clause deserve our careful attention. If we are to be confident that we have fully addressed all the important questions raised by *Roe v. Wade* after all these years, we must engage that issue as well as others.

205. Fuller, *supra* note 4.

206. See David L. Shapiro, *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium Foreword: A Cave Drawing for the Ages*, 112 HARV. L. REV. 1834, 1839 (1999) (observing that "if one were unfamiliar with [Fuller's] other works, one would be hard-pressed to identify his own preferred approach" from the opinions).

207. See generally Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171 (2002).