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## *Roe v. Wade*: No Justification in History, Law, or Logic

### I. *Roe* and Its Critics

IN THE HISTORY of American constitutional jurisprudence, few Supreme Court decisions have come to be recognized as so faulty, and with such damaging social consequences that history has branded them not only as controversial or erroneous but also as watersheds of ignominy.

*Dred Scott v. Sanford* ruled that blacks were not citizens, *Plessy v. Ferguson* upheld racial segregation, and *Lochner v. New York* said that legislatures could not enact maximum hour laws to protect workers from the superior bargaining power of employers. *Roe v. Wade* is in this unenviable tradition.<sup>1</sup> It is difficult to find a contemporary decision whose reasoning is more universally questioned by the community of legal scholars. It is attacked by thinkers who, like John Hart Ely, support legal abortion as a matter of legislative policy, and criticized by those who support its result as a matter of constitutional law.<sup>2</sup>

After surveying the decision, editors of the *Michigan Law Review*, introducing a Symposium on the Law and Politics of Abortion, wrote that “the consensus among legal academics seems to be that, whatever one thinks of the holding, the opinion is unsatisfying.”<sup>3</sup> Richard Morgan notes:

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

some who approve of *Roe's* form of judicial review concede that the opinion itself is inscrutable.<sup>4</sup>

Joseph Dellapenna has asserted that the opinion is so poorly written that even its defenders begin by apologizing for the difficulties in following the reasoning of the Court.<sup>5</sup> Heymann and Barzelay, although they defend *Roe's* consistency with "principles that are justified in both reason and precedent," regret that "these principles were never adequately articulated by the opinion of the Court." "This failure," they write, "leaves the impression that the abortion decisions rest in part on unexplained precedents, in part on an extremely tenuous relation to provisions of the Bill of Rights, and in part on a raw exercise of judicial fiat."<sup>6</sup>

The Court's articulation of its position is so embarrassing that the invariable approach of legal scholars writing in support of *Roe's* holdings is to "rewrite" the opinion, suggesting some constitutional rationale not proffered by the Court which attempts to justify its conclusions.<sup>7</sup> Archibald Cox speaks for many: "The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of child-birth and abortion or new advances in providing for the separate existence of a foetus."<sup>8</sup>

Virtually every aspect of the historical, sociological, medical, and legal arguments Justice Harry Blackmun used to support the *Roe* holdings has been subjected to intense scholarly criticism. The unprecedented extremity of the Court's opinion is well known. After Justice Blackmun announced the Court's opinion on January 22, 1973, not a single abortion statute in any state of the Union still stood. Even the law of New York, the "abortion capital of the country," which allowed abortion on demand through the twenty-fourth week of pregnancy, was too protective of the unborn for the majority of the United States Supreme Court.<sup>9</sup> For under *Roe*, it is constitutionally impossible for any state to prohibit abortions at any time during pregnancy.

The Court held:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother,

may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.<sup>10</sup>

On the same day that the Court decided *Roe*, it also decided the companion case *Doe v. Bolton*. The Court emphasized, in *Roe*, “That opinion and this one, of course, are to be read together.” In *Doe*, the Court, making reference to its earlier decision in *United States v. Vuitch*, construed the meaning of “mother’s life or health.”

That . . . has been construed to bear upon psychological as well as physical well-being. . . . [T]he medical judgment 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. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.<sup>11</sup>

In *Roe* the Court expanded on the factors the physician might consider.

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases . . . the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.<sup>12</sup>

Thus it is clear that, under the Supreme Court’s abortion decisions, no state may constitutionally prohibit abortion at any time during pregnancy. After the end of the first trimester (first three months), it may make some regulations to protect *maternal* health, but not to impede abortion. After viability, the state may “proscribe” abortion only when the woman considering abortion can find no physician willing to say that her mental health would, for example, be “taxed by child care” or suffer “distress . . . associated with the unwanted child.”<sup>13</sup> In effect, “[t]he statutes of most states must be unconstitutional *even as*

applied to the final trimester. . . . [E]ven after viability the mother's life or health (which presumably is to be defined very broadly indeed, so as to include what many might regard as the mother's convenience . . .) must, as a matter of constitutional law, take precedence over . . . the fetus's life. . . . "<sup>14</sup>

The lower courts have followed this analysis. In *American College of Obstetricians and Gynecologists v. Thornburgh*, a federal court of appeals was quite explicit:

[A] physician may perform an abortion even after viability when necessary "to preserve maternal life or health." It is clear from the Supreme Court cases that "health" is to be broadly defined. As the Court stated in *Doe v. Bolton*, the factors relating to health include those that are: "physical, emotional, psychological, familial, [as well as] the woman's age." 410 U.S. at 192.

. . . [I]t is apparent that the Pennsylvania legislature was hostile to this definition. Section 3210(b) [of the state's abortion law] contains the statement, "The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother." Had the legislature imposed this qualification on the language "maternal . . . health." . . . we would have no hesitation in declaring that provision unconstitutional.<sup>15</sup>

Similarly, in *Schulte v. Douglas*, a federal district court declared unconstitutional a Nebraska statute that attempted to prohibit abortion after viability unless it was necessary to protect the woman from imminent peril substantially endangering her life or health. This, Judge Warren Urbom held, prevents postviability abortions "even when in the physician's judgment a different course should be undertaken to preserve the mother . . . from a non-imminent peril that endangers her life or health less than substantially . . . This the state has no authority to do."<sup>16</sup>

In effect, as long as a woman can find a physician willing to perform the abortion, she has a constitutional right to obtain an abortion at any time during pregnancy. When the Court asserts that such an extreme position is required by the Constitution, one expects an especially compelling rationale. Few have found *Roe* convincing.

## II. Historical Critiques of *Roe*

AFTER JUSTICE BLACKMUN recited the case history and disposed of the procedural questions of justiciability, standing, and abstention, he did not launch directly into analysis of the substantive issues at stake.

Instead, he began with a lengthy discussion of the history of legal and societal attitudes toward abortion. Why? Justice Blackmun maintained that, until the mid-nineteenth century, abortion was generally and freely available and not forbidden by the law and should be recognized as an aspect of the liberty the framers of the Fourteenth Amendment intended to protect.<sup>17</sup> Thus, a historical discussion must be seen as a predicate for the Court's holding that the right of privacy incorporated by the Fourteenth Amendment into the U.S. Constitution should be deemed to encompass abortion as a time-treasured right.<sup>18</sup>

Before considering Justice Blackmun's version of the history of abortion, it is worth putting that history in perspective. Today, virtually all who oppose abortion do so because abortion kills unborn human life. Therefore, in examining the history of abortion it is natural to focus our understanding on the attitudes of previous historical eras toward the child in the womb. To what extent, and at what point in gestation, did each epoch recognize the child as a human person? Did they, on that ground, condemn abortion as a form of homicide?

Regarding these important questions, scholarly research reveals that recognition of the unborn as "persons in the whole sense" was largely determined by the biological and medical knowledge of each historical era. The ovum and the actual nature of fertilization were discovered in the nineteenth century. Prior to this, scientists and contemporaneous jurists supposed that human life commenced at "formation," "animation," or "quickening." Abortion was seen as unquestionably homicidal only after the gestational point at which, in light of the science of the time, human life was finally understood to be present.

Justice Blackmun's conclusion that in prior eras abortion in early pregnancy was not seen as homicidal is irrelevant. Indeed, an approach coinciding with historical continuity, *pace* Blackmun, would be to protect the unborn from the time of fertilization because that is when modern science teaches us that the life of an individual human organism comes into being.<sup>19</sup>

Another aspect important to an historical analysis of abortion is that there was widespread disapproval and prohibition of abortion during early pregnancy before, in the view of the science of the time, human life had been infused. The motives for this repudiation of early abortion may not be the same as those that would appeal to today's society as justifying legal interdiction.<sup>20</sup>

Our ancestors' biologically incorrect notions of when human life begins led Blackmun to assert that, historically, "abortion was viewed with less disfavor than under most American statutes currently in

effect” (in January, 1973) and “[p]hrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does ... today.”<sup>21</sup> Examination of the condemnation of abortion, apart from views on the beginning of human life, proves this conclusion incorrect.

#### A. ANCIENT AND MEDIEVAL ATTITUDES

BLACKMUN’S RECOUNTING of the history of abortion began with ancient attitudes and the Hippocratic oath. Relying exclusively for both areas on the dated work of historian Ludwig Edelstein, he concluded that the ancient Greeks and Romans had resorted to abortion with great frequency and that it had met with widespread approbation.<sup>22</sup> Conversely, Martin Arbagi demonstrates that temple inscriptions and other ancient writings disclose considerable opposition to abortion in the Greco-Roman world. Opposition spread and intensified from earlier to later ancient times—a tendency which manifested itself long before Christianity had any influence.<sup>23</sup>

Apart from remarking that the Persian Empire banned abortion, Justice Blackmun’s survey of the ancient world was limited to Greece and Rome. Yet, it is significant that abortion was condemned in the twelfth century B.C. by Assyrians, Hittites, early Hindus, Buddhists of India, and Indian law. There is some evidence that the ancient Egyptians took a similar attitude. Most of this information was available in the epical work of Eugene Quay, which Blackmun cited but failed to incorporate into his opinion.<sup>24</sup>

Justice Blackmun recognized that the oath of Hippocrates, composed in ancient Greece, forbade the practice of abortion. Apparently, in view of the longstanding honor paid to the Hippocratic oath, Blackmun felt the need to diminish its importance. In fact, he brought this question up *sua sponte*, because, “Although the Oath is not mentioned in any of the principal briefs in this case or in [the companion case of] *Doe v. Bolton*... , it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day.”<sup>25</sup> Citing Edelstein, Blackmun argued that the oath, rather than establishing significant pre-Christian opposition to abortion, was merely the manifesto of an idiosyncratic and unrepresentative sect of Pythagoreans. However, as noted in Professor Arbagi’s chapter, the oath’s condemnation is not out of step with ancient attitudes.<sup>26</sup> Harold Brown makes a further point:

The unspoken implication of the Court’s argument seems to be that the Hippocratic Oath need not be taken seriously as an expression of medical

ethics because, at the outset, it was the view of a minority . . . and later, when it came to enjoy majority acceptance, this only took place because the majority by that time had embraced Christianity. Edelstein's conclusion is somewhat different. . . In all countries, in all epochs, in which monotheism, in its purely religious or its more secularized form, was the accepted creed, the Hippocratic Oath was applauded as the embodiment of truth. Not only the Jews and the Christians, but the Arabs, the medieval doctors, men of the Renaissance, scholars of the enlightenment and scientists of the nineteenth century embraced the ideals of the oath.<sup>27</sup>

In short, the Court's discussion of the oath amounts to a *non sequitur*: even were its scholarship and conclusions about the oath's origins unassailable, the Court did not diminish the significance of the Hippocratic oath as a longstanding and near universal condemnation of abortion by the organized medical profession.<sup>28</sup>

Despite the fact that studies and commentaries on that period were available to the Court, Justice Blackmun left a historical gap of more than a thousand years when he leaped directly from ancient attitudes and the Hippocratic oath to Anglo-American common law; John Noonan, in 1970, wrote about the rejection of abortion as *An Almost Absolute Value in History*.<sup>29</sup> During that period, the ethics and law of Western civilization were dominated by the Judeo-Christian perspective; in fact, every adequate survey of historical attitudes toward abortion has to come to terms with the longstanding opposition to abortion by Jews and Christians. True, there was both ignorance and debate, appropriate to the science of the time, about "ensoulment" and what was viewed as the coming of full humanity to the fetus. But opposition to abortion, with minor exceptions, was constant.

The Septuagint, the Greek version of the Hebrew Bible used by third century B.C. Jews of the Diaspora, contained a version of Exodus which decreed capital punishment for one who aborted a formed fetus.<sup>30</sup> The Didache (first century A.D.), known as the "Teaching of the Twelve Apostles," proclaimed to the early Christian Church, "You shall not slay the child by abortions. You shall not kill what is generated." Other early Christian writings such as the Epistle of Barnabas and the Apocalypse of Peter contained similar prohibitions.<sup>31</sup> In the West, the Fathers of the Church, from second century Clement of Alexandria through Tertullian and Jerome to Augustine, condemned abortion. In the East, St. John Chrysostom and St. Basil of Cappadocia preached against all abortion. These early teachings were concretized in the prohibitions of penitentials and of canons enacted by synods and councils which, in turn, found their way into the law of the state, such as the Frankish kingdom of Charlemagne. These were

followed by canon law. A decretal of Gregory IX grouped the penalty for abortion with that for means of sterilization. Of both it was said, “[l]et it be held as homicide.”<sup>32</sup>

This treatment of abortion and contraception as crimes demanding severe punishment was coupled with a general attitude that abortion was not “true” homicide until the fetus was “ensouled”—something held to occur at formation or quickening.<sup>33</sup> That distinction, taken from Aristotle, was introduced by theologians in the fifth century and was dominant until the seventeenth century.<sup>34</sup> John Connery describes Aristotle’s essentially biological theory of “delayed animation”:

To Aristotle... life at conception came from a vegetative soul. After conception, this would eventually be replaced by an animal soul, and the latter finally by a human soul. The difficult question was when this human soul was infused, or as it is sometimes put, when the fetus became a human being. Aristotle held that this occurred when the fetus was formed, 40 days after conception for the male fetus and 90 days for the female. Aristotle also used the criterion of movement. If the aborted fetus showed signs of movement, it was considered human. But since this coincided with the time of formation, the time estimate was the same ... It was easy to argue for delayed animation when one thought that semen gradually turned into blood and then into flesh and bone and eventually into a human fetus.<sup>35</sup>

Through the Middle Ages, civil law on the continent of Europe was based on the Roman law. Connery notes that from the end of the second century through the thirteenth century, that law applied the same punishment to abortion throughout pregnancy. In the thirteenth century, the Italian jurist Accursio first interpreted the law to impose a higher punishment for abortion after formation: such abortion was classified as homicide and incurred capital punishment.<sup>36</sup> This late application to the civil law of the Aristotelian view that had long dominated church penitential discipline did not eliminate or lessen the penalty for preformation abortion; it only heightened it for postformation abortion.

## B. THE COMMON LAW ON ABORTION

IGNORING THIS CIVIL law background, which was important for its relation to the beginnings of the English common law, the Supreme Court paid considerable attention to the content of English common law. From the thirteenth through the sixteenth centuries, the common law courts coexisted with the ecclesiastical courts in England—much as state courts coexist with federal courts today. Just as

state and federal courts have independent jurisdiction over some matters and concurrent jurisdiction over others, so it was with the medieval, royal, and church courts. The ecclesiastical courts dealt with many secular matters such as wills, slander, and informal contracts.<sup>37</sup> As Dellapenna's research discloses, "at least prior to 1600, royal courts did not concern themselves about abortion, but... royally-sustained ecclesiastical courts did."<sup>38</sup>

Justice Blackmun's view of the common law focused almost exclusively on the royal courts. He followed the position of Cyril Means, legal counsel to the National Association for the Repeal of Abortion Laws, and concluded that it is "doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus."<sup>39</sup> Means's and Blackmun's position has been resoundingly refuted in articles by Dellapenna, Robert Byrn, and Robert Destro.<sup>40</sup> Essentially, Means's position rests on his attribution of deceit and distortion to Chief Justice Sir Edward Coke. He was the great sixteenth and seventeenth century jurist who successfully led the fight to capture, for the common law courts, most of the jurisdiction exercised up to then by the ecclesiastical courts. In the process, Coke was a leader in systematizing, expanding and recording the common law. In his famous *Institutes* he declared that, while not "murder," abortion of a woman "quick with childe" was a "great misprision."<sup>41</sup>

Means, based upon his interpretation of two fourteenth century cases he called *The Twinslayer's Case* and *The Abortionist's Case*, and two sixteenth century commentaries, Sir William Stanford's *Les Plees del Coron* and William Lamborde's *Eirenorcha, or of The Office of the Justice of the Peace*, concluded that Coke was mistaken.<sup>42</sup> He asserted that these sources established that abortion was never a crime at common law. He brushed aside the earlier evidence of the thirteenth century commentators Bracton and Fleta, who described abortion of a formed and animated fetus as homicide.<sup>43</sup> He scornfully accused Coke of distorting the law to fit the view of abortion he had taken as attorney general in a case argued in 1601; and he dismissed Blackstone, whose name was synonymous with "law" for eighteenth and nineteenth century American lawyers, as an uncritical follower of Coke.<sup>44</sup> Blackstone's work, well known by the framers of the Constitution and the architects of the Fourteenth Amendment, called it a "great misprision" "[t]o kill a child in its mother's womb."<sup>45</sup>

The intricacies of legal history and the explication of the scanty texts of these decisions and commentaries are complex. Means's interpretation of *The Twinslayer's Case* and *The Abortionist's Case* rested on the assumption that the dismissals of charges brought against abortion-

ists in those cases were due to the fact that abortion was not a crime at common law. Instead, as Byrn, Dellapenna and Destro have demonstrated, the dismissals were clearly based on problems of proof.<sup>46</sup> Robert Destro argued from the text of the cases, and included a key paragraph in *The Twinslayer's Case* ignored by Means. He concluded, and the documents affirm, that as a matter of substantive law, post-quickening abortion was a common law crime. The same can be said of Stanford's commentary.<sup>47</sup>

The primitive nature of biological knowledge and abortion technology made it next to impossible to prove that the child was alive before the supposed abortion *and* that the abortion was the cause of death. It was compounded by rigidly technical procedural requirements, and led to the conclusion by the sixteenth century commentary that abortion was not punished as a crime.<sup>48</sup>

In the 1601 *Sims Case*, a solution to some of these difficulties in proof was offered: when a child was born alive, but showed the marks of an abortion, and subsequently died, murder could be proved.<sup>49</sup> This position was adopted by Coke and carried through to Blackstone. There is a plethora of cases since Coke holding postquickening abortion a common law crime—cases ignored by Means or dismissed by him as being based on Coke's "distortion."<sup>50</sup> Yet, as Destro asks, "[e]ven assuming that Coke's view was completely at variance with the earliest common law precedents... one question remains to be answered: Why did Coke's view persevere and gain acceptance by virtually every court which considered the matter?"<sup>51</sup> Suppose someone were to contend today that racial segregation was "never" unconstitutional because *Brown v. Board of Education* was inconsistent with *Plessy v. Ferguson* and other precedents, and that the many subsequent desegregation cases in the Supreme Court and other federal courts were based on an uncritical acceptance of *Brown*. Justifiably, the argument would be laughed out of court.<sup>52</sup>

Coke's views became so firmly established from the seventeenth through the nineteenth century that it takes a remarkably selective vision to deny that abortion of a quickened fetus was a common law crime at the time of the adoption of the Constitution or the Fourteenth Amendment. In the words of Robert Byrn, "For the Supreme Court in *Roe v. Wade* to cite the 'lenity' of the common law as a basis for holding that unborn children do not possess a fundamental right to live and to the law's protection at any time up to birth, is a perversion of Bracton, Coke, Hawkins and Blackstone. The whole history of the common law cries out against the jurisprudence of *Wade*."<sup>53</sup>

### C. NINETEENTH CENTURY STATUTORY REFORM

AFTER EVALUATION of the common law, Justice Blackmun described the nineteenth century English and American statutory enactments on abortion. Then, after charting the changing positions of the American Medical Association, the American Public Health Association, and the American Bar Association on abortion, he analyzed reasons behind the nineteenth century enactment of statutes against abortion throughout pregnancy.<sup>54</sup>

Following Cyril Means's thesis, Blackmun maintained that the nineteenth century's statutory prohibitions of abortion, even back to the moment of conception, were enacted not to aid prenatal life but to protect maternal health against the danger of unsafe operations.<sup>55</sup> Blackmun made several key factual errors and completely failed to mention the important scientific developments that prompted the statutory changes. As Victor Rosenblum has noted:

Only in the second quarter of the nineteenth century did biological research advance to the extent of understanding the actual mechanism of development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research finding which persuaded doctors that the old “quickening” distinction embodied in the common and some statutory law was unscientific and indefensible.<sup>56</sup>

Beginning about 1857, the American Medical Association (AMA) led a “physicians’ crusade” to enact laws protecting the unborn from the time of conception.<sup>57</sup> These vigorous physicians rested their argument primarily upon the living nature of the fetus in early pregnancy, and it was their efforts that passed the laws. As Dellapenna noted, twenty-six of thirty-six states had prohibited abortion by the end of the Civil War, and six of the ten territories. “The assertion by Justice Blackmun that such legislation did not become widespread until after the ‘War Between the States’ is simply wrong.”<sup>58</sup> Justice Blackmun ignored this clear history—an extraordinary omission in light of his quotation, in *Roe*, of statements from the principal resolutions of the AMA during “the ‘physicians’ crusade.”<sup>59</sup>

Blackmun gave three reasons for the notion that the laws were enacted to protect maternal health rather than the child. All have been rebutted. First, citing only one New Jersey decision, he said: "The few state courts called upon to interpret their laws in the late nineteenth and early twentieth century did focus on the state's interests in protecting the woman's health rather than in preserving the embryo and fetus."<sup>60</sup> To the contrary, John Gorby has demonstrated that there are eleven state court decisions explicitly affirming that protection of the unborn was a purpose of their nineteenth century abortion statutes, and nine others that imply the same position. Robert Destro and Gorby have both independently demonstrated that the isolated New Jersey citation misstates the purpose even of that jurisdiction's law.<sup>61</sup>

Second, Blackmun argued: "In many States . . . by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another."<sup>62</sup> John Gorby replies:

The explanation for this legal phenomenon is that there are special circumstances surrounding the commitment of an act, circumstances which the lawmaker may properly and reasonably consider in formulating means to protect state interests and values. . . in the abortion situation, the assumed stresses on the woman burdened by an unwanted pregnancy. These factors may justify and explain different treatment of the woman or even the physician in the abortion context, just as they justify or explain different treatment of the child of tender years or even of one who kills another under severe provocation.<sup>63</sup>

Finally, Blackmun contended: "Adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazard inherent in late abortion and impliedly repudiates the theory that life begins at conception."<sup>64</sup> Robert Sauer demolishes this notion:

Although a number of the initial state laws contained a distinction based on quickening which gave lower value to early foetal life, the large majority of state laws never made this distinction, and most of these laws referred to a woman as "being with child" or some similar phrase which attributed a human status to the foetus. Furthermore, many of the states which initially had this distinction written into their law later dropped it and also referred to a woman at any period of her pregnancy as "being with child."<sup>65</sup>

Common law was not the only means available or used to prevent abortion. In the ecclesiastical courts and in church law, the notion,

based on the inaccurate biology of the time, that the fetus became a human being only at formation or quickening did not prevent the authorities from condemning abortion during all stages of gestation. Although problems of proof prevented the common law from punishing abortion of an unquickened fetus, they allowed society to use other endeavors to prevent abortion throughout pregnancy.

Professor Dellapenna has made a valuable contribution to accurately understanding the history of abortion by pointing out the varying technical methods used to attempt abortion at different periods in history. Historically, these methods involved the use of drugs, potions (often either ineffectual or fatally poisonous), beatings, or other risky efforts to induce trauma that would trigger abortion. After 1750, methods involving the insertion of objects into the uterus were introduced; and surgery, initially highly dangerous, was used sometime later.<sup>66</sup>

Today, we naturally think of abortive surgical procedures being performed by physicians. Yet into the nineteenth century, midwives attended women during childbirth and pregnancy and performed most abortions.<sup>67</sup> Following the institution of similar systems in continental Europe in the fifteenth century, England developed a system of regulating and licensing midwives in the early sixteenth century. These regulations required midwives' oaths swearing that they would not give advice or medicines to women enabling them to abort. No distinction was made on the basis of the stage of pregnancy. A similar practice was instituted in colonial America: records exist of a New York City ordinance requiring midwives to take such an oath as early as 1716.<sup>68</sup> Possibly the nineteenth century "physicians' crusade" extended the protection of statutory law back to conception because midwives had lost their prominence as abortion providers.

Evidence is overwhelming that the Court's abortion history is fatally flawed. Contrary to Justice Blackmun's assertion that "restrictive criminal abortion laws ... are of relatively recent vintage ... not of ancient or even of common-law origin," abortion was condemned even in ancient times and the consensus of Western civilization was opposed to abortion throughout the duration of pregnancy.<sup>69</sup> True, the precise penalties varied, depending on what science held to be the point at which human life began. As the result of nineteenth century biological discoveries the existence of human life from the time of conception became clear. Members of the American medical community were aware of new evidence and the increasing frequency of abortion resulting from technological developments in abortion methodology. They successfully led a reform movement which extended the full protection of the criminal law to the time of fertilization. These statutory amendments were neither anomalous

nor explained by motivations other than fetal protection; they were the logical outgrowth of the interaction of “an almost absolute value in history” and the teachings of evolving science.<sup>70</sup>

History provides no excuse for Justice Blackmun’s conclusion that “at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century . . . a woman enjoyed a substantially broader right to terminate a pregnancy” than in most states immediately before *Roe v. Wade*.<sup>71</sup> That “right” was *never* present in America until 1973. That erroneous conclusion is of paramount importance, since it is from its misguided version of abortion history that the Court implicitly draws what meager support it can for the notion that abortion is time-treasured and incorporated into the Fourteenth Amendment.

### III. Abortion as a Constitutional Right

IMMEDIATELY AFTER HIS historical survey, Justice Blackmun turned to the essence of what he found to be the abortion right. “The Fourteenth Amendment’s concept of personal liberty,” the Court ruled, “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>72</sup> This textually unsupported assertion has been subjected to an avalanche of criticism—some of it from the most respected legal minds in the country. Indeed, this portion of the opinion has stimulated more negative jurisprudential evaluation than any other section and the critique comes from various parts of the ideological spectrum.

Listing cases recognizing some form of a “right of privacy,” Justice Blackmun acknowledged that “[t]hese decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ . . . are included in this guarantee of personal privacy.” What makes abortion “implicit” in the very nature of “ordered liberty”? Justice Blackmun wrote that the right of privacy has been deemed to encompass marriage, procreation, contraception, family relationships, and child rearing and education. Without abortion a woman may suffer direct harm, distressful life and/or psychological harm. Mental and physical health may be taxed by child care, also the distress associated with the unwanted child and the additional difficulties and continuing stigma of unwed mothers.<sup>73</sup>

This is the entirety of Blackmun’s argument. Norman Vieira, one of many critics, said in response:

No elaborate discussion is required to expose the glaring non sequitur in the Court’s argument. Plainly the fact that *some* family matters are constitutionally protected does not demonstrate that abortion is constitutionally

protected. Nor does the added fact that abortion laws disadvantage pregnant women establish their invalidity. Legal restrictions are placed on family autonomy in fields ranging from divorce to euthanasia despite the heavy costs thereby exacted from the individuals concerned.<sup>74</sup>

In 1973 John Ely made an early and telling attack on *Roe's* postulation of this right. Referring to the Court's delineation of the difficulties of undesired pregnancy, he wrote:

All of this is true and ought to be taken very seriously. But it has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests . . . What is unusual about *Roe* is that the liberty involved is accorded . . . a protection more stringent, I think it is fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment. What is frightening about *Roe* is that this super-protected right is not inferrable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis a vis the interest that legislatively prevailed over it. And that, I believe . . . is a charge that can responsibly be leveled at no other decision of the past twenty years.<sup>75</sup>

Remember that Ely has written that, were he a legislator, he would vote for a bill legalizing abortion nearly to the the extent allowed by the Supreme Court.

Vieira and Ely are not alone. Archibald Cox wrote, "The Court failed to establish the legitimacy of the decision by not articulating a principle of sufficient abstractness to lift the ruling above the level of a political judgment."<sup>76</sup> Judge Richard Posner warns that "*Wade* raise[s] . . . the question whether we have a written Constitution, with the limitations thereby implied on the creation of new constitutional rights, or whether the Constitution is no more than a grant of discretion to the Supreme Court to mold public policy in accordance with the Justices' own personal and shifting preferences."<sup>77</sup>

At least two commentators have noted the incoherence of the striking contrast between the Court's treatment of privacy with regard to abortion, which the justices clearly like, and with regard to sexually explicit material, which they just as clearly do not.<sup>78</sup> Indeed, the very notion that abortion should be subsumed under a right of "privacy" is strange. As Joseph O'Meara objects, "[T]here is nothing private about an abortion." It occurs not at home, like sex or the reading of obscenity, but in a public clinic.<sup>79</sup>

#### IV. Abortion and Human Personhood

HAVING READ INTO the Constitution a right that was not in the text, Justice Blackmun then proceeded to read out of the Constitution the application of a right basic to that text. Recognizing that if the Fourteenth Amendment's protection of the right to life is extended to the unborn the case for abortion collapses, he developed the argument for his conclusion that "the word 'person' . . . does not include the unborn."<sup>80</sup> As John Hart Ely has noted, after employing the most imaginative possible construction of the Fourteenth Amendment to find a right of abortion, the Court resorted to the most literalistic possible form of strict construction to avoid finding the unborn to be persons.<sup>81</sup>

Professors Byrn, Destro, and Gorby have independently provided comprehensive, point-by-point rebuttals of the Court's objections to unborn personhood.<sup>82</sup> The opinion argued that the word "person," as used in clauses elsewhere in the Constitution, has application only postnatally.<sup>83</sup> Ely wrote that the Court "might have added that most of them were plainly drafted with *adults* in mind, but I suppose that wouldn't have helped."<sup>84</sup> As John Gorby has pointed out:

[T]hese other clauses . . . do not provide an answer to the question of the scope of constitutional personhood. In the clauses mentioned by the Court, the concept of "person" was broad and undefined and the function of the specific constitutional clause was to limit the broader class of persons for a particular purpose. For example, for a person to be . . . a representative, a senator or the President, he must be twenty-five, thirty and thirty-five years of age respectively . . . The fact that a 24-year-old is not qualified for these offices suggests only that there are "persons" who are not qualified for the House, Senate or the Presidency . . . ; it does not suggest when the 24-year-old became a "person," or that he became a person at birth.<sup>85</sup>

For example, the Court says, "[w]e are not aware that in the taking of any census a fetus has ever been counted."<sup>86</sup> As one commentator put it:

The Court seems to be saying that, because a word is narrowly defined in the context of a practical application (census taking) due to the impracticability or susceptibility to large error of including fetuses within the meaning of the term, that it should also be narrowly defined, to the exclusion of an entire class of potential "persons," when determining what persons are deserving of constitutional protection of the right to life.<sup>87</sup>

The Court fails to recognize that the Apportionment Clause merely provides for a decennial census “in such manner as [Congress] shall by law direct.”<sup>88</sup> “Although Congress has never done so, it would be neither irrational nor unconstitutional for it to direct that account also be taken of the unborn whenever the census-taker is made aware of their existence,” writes Destro. “The fact that Congress has never done so is irrelevant.” He and Byrn observe that corporations are not counted in the census, yet they are Fourteenth Amendment persons.<sup>89</sup>

Blackmun objects that, under the challenged Texas law, the existence of an exception to save the life of the mother is inconsistent with regard to the unborn as persons entitled to equal protection with their mothers.<sup>90</sup> But the doctrines of self-defense and legal necessity allow persons acting out of self-protection to kill another human being, releasing themselves from the liability for killing a born person. “Balance of interest’ tests are commonplace,” Epstein points out. “That process of balancing can take place even if the unborn child is treated as a person under the Due Process Clause.... We might as well conclude that self-defense should never be treated as a justification for the deliberate killing of another person under the law of either crime or tort. No one could believe that the constitutional right to life extends that far.”<sup>91</sup>

Blackmun raises what the Court regards as “two other inconsistencies between Fourteenth Amendment status [of the unborn as a person] and the typical abortion statute.”<sup>92</sup> The first is that the woman who submits to an abortion is not liable for punishment for the abortion. But this says nothing about the personhood of the unborn child; it represents a societal judgment about the degree of culpability of the mother. The law provides very different penalties for the secretive, hardened assassin who kills for cash, the angered spouse who kills during a family quarrel, the driver who causes the death of another by accident, or the individual whom duress or disturbance has made incapable either of avoiding the killing or of appreciating the significance of the act. The punishment ranges from death to probation to nothing at all; but this represents no judgment by the legislature or the judiciary that any of the victims were other than persons equal before the law.

In the context of abortion, society may reasonably conclude that most women who seek it are in a situation of immense stress and pressure, and that few of them are aware of the full humanity of the child within the womb.<sup>93</sup> It may reasonably choose to regard the woman as a second victim rather than a perpetrator and instead punish the professional who performs abortions for money. Since anyone who performs an abortion is culpable, this does not diminish

protection for the unborn child. Indeed, as a practical matter it may increase that protection for it allows a prosecutor to employ the woman's testimony against the abortionist.<sup>94</sup>

The second "inconsistency" is explained by the response to the first. Justice Blackmun objected that the penalty for abortion is less than that for murder. "If the fetus is a person, may the penalties be different?"<sup>95</sup> As Byrn responds:

The law recognizes "degrees of evil" and states may treat offenders accordingly. Killing an unborn child may, in legislative judgment, involve less personal malice than killing a child after birth even though the result is the same—just as, for instance, a legislature may choose to categorize, as something less than murder, intentional killing under the influence of extreme emotional disturbance or intentionally aiding and abetting a suicide. Such legislative recognitions of degrees of malice in killing have nothing to do with the fourteenth amendment personhood of the victims.<sup>96</sup>

The Court opined that together with its observation that "throughout the major portion of the nineteenth century prevailing legal practices were far freer than they are today," these four arguments led to the conclusion that the unborn are not Fourteenth Amendment persons.<sup>97</sup> The Court's historical flaws have been amply documented and, as shown, the four arguments that comprise its "strict constructionist" approach to the Fourteenth Amendment's use of "person" fail on their own grounds.

How *should* the Court have construed the term "person" in the Fourteenth Amendment? It could have referred to the test for personhood it had previously enunciated in *Levy v. Louisiana*: persons are those who "are humans, live, and have their being."<sup>98</sup> It could have looked at the legislative history of the Fourteenth Amendment and to the words of its sponsor, John Bingham. Under the Amendment, he said during the congressional debates, "[a] State has not the right to deny equal protection to every human being."<sup>99</sup> In reaction to the exclusion of blacks from constitutional protection, the post-Civil War Congress sought to establish once and for all that every biological human being within the national jurisdiction could be entitled to the equal protection of the laws, without allowing any other discriminating criteria. A number of law review articles have carefully argued this point.<sup>100</sup> Unfortunately, all of this argument and evidence was totally ignored by the Supreme Court.

## V. The Beginning of Human Life

JUSTICE BLACKMUN ACKNOWLEDGED that even if the unborn lack Fourteenth Amendment protection, a legislature might still assert a compelling interest in prenatal life. In response he argued that no consensus exists on the temporal origin of human life. His effort “to note. . . the wide divergence of thinking” on “when life begins” is sprinkled with factual errors: incorrect citation of a medical textbook concerning the range of gestational ages associated with viability,<sup>101</sup> a mistaken statement of “Roman Catholic dogma,”<sup>102</sup> a rendering of the decision of certain influential medical advocates of abortifacients who wanted to redefine “conception” to mean “implantation” as “new embryological data that purport to indicate that conception is a ‘process’ over time,” and thus posing “substantial problems” for the view that life begins at conception.<sup>103</sup>

Its larger failure lies in a basic misunderstanding of the nature of the debate. Two pages purporting to summarize the views of the Stoics, various religions, and physicians, together with a cursory summary of the treatment of the unborn in various areas of the law, constitute the evidence mustered in support of what are probably the two best known sentences in *Roe*:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.<sup>104</sup>

The Court’s conclusion, together with the jumbled “divergence of thinking” it cites on the matter, confuse two distinct questions.<sup>105</sup> One is the strictly scientific question of when a human being comes into existence. The other is the ethical, sociological, and legal question of what value to place on that existence: whether all human beings ought to be regarded as equal in their entitlement to rights or whether those rights should be accorded only to human beings who possess certain qualities such as certain levels of self-consciousness, societal interaction, or the like. The first question was a subject of legitimate dispute before the scientific discoveries of the nineteenth century— which explains some of the “diversity” Justice Blackmun recounts. The second question is admittedly being disputed today, and that accounts for the bulk of the “diversity.”

The first question is now settled, however. There is an unequivocal consensus among informed scientists that fertilization constitutes the coming into existence of an individual human organism.<sup>106</sup> And the second question, although far from settled in contemporary America, ought as a legal matter to be regarded as settled by the value judgment incorporated in the Fourteenth Amendment that all biological human beings are to be accorded equal protection of law. As Dr. Harrison has warned, “[t]o substitute consensus for soundness as the criterion by which to decide the worth of an argument is to admit a principle of irrationality into the decision-making process. That the issue being decided is as far-reaching in its consequences as is the abortion problem only compounds the damage.”<sup>107</sup>

Even taking the Court at its word about the unsettled and unsellable nature of the controversy, a number of commentators have found the implications of its reasoning extraordinary and its derived holdings inconsistent. One commentator writes:

What the Court does seem to have said is that the question of when life begins is an extremely unsettled and controversial issue, and for that reason alone, any legislative purpose that is based on a purported resolution of the issue is irrational.... This is an extremely strict requirement that affords the judiciary a powerful weapon to use against legislation that it finds offensive in some manner, for few issues that reach the Supreme Court are demonstrably non-controversial.<sup>108</sup>

Taking note of Blackmun’s ultimate conclusion, that no legislature may “by adopting one theory of life ... override the rights of the pregnant woman that are at stake,” Richard Epstein protests “this formulation of the issue begged the important question; because it assumes that we know that the woman’s rights must prevail even before the required balance takes place. We could as well claim that the Court, by adopting another theory of life, has decided to override the rights of the unborn child which the law of Texas tries to protect.... [I]t is simple fiat and power that gives his position its legal effect.”<sup>109</sup>

Indeed, Blackmun’s laconic assumption that the lack of consensus means not that the matter must be left to the legislatures, but that abortion must be permitted has been subject to as much criticism as the initial holding that the right of privacy includes abortion. Commentator after commentator has noted that his balancing as presented by the Court is quite arbitrary, and has no warrant in the Constitution.<sup>110</sup> “[T]he Court’s decision lacks legitimacy,” writes Erwin Chemerinsky, who is sympathetic to its result, “because it seems to be an arbitrary, unjustified set of choices.”<sup>111</sup> “The quintessence of a balancing test,” Elliott Silverstein points out, “is the

formulation of the rights and interests on both sides. If one side is ignored or slighted, the judicial process becomes a mere exercise in sophistry. . . . If the Court really means, when it says it need not decide when life begins, that it need not recognize the State's valid interest in instilling respect for life, then Roe is, indeed, a dangerous precedent."<sup>112</sup>

## VI. The Trimester Approach: Judicial Legislation

THE FINAL PORTION of the decision, with its line drawing by convenient trimesters, and its weighting of state interests by medical statistics, has been almost universally recognized as legislation pure and simple. "Neither historian, layman, nor lawyer," says Archibald Cox, "will be persuaded that all the details prescribed in *Roe v. Wade* are part of either natural law or the Constitution."<sup>113</sup>

The decision is an excellent example of the problems with the judiciary as legislature. As Ely says, the opinion draws "lines with an apparent precision one generally associates with a commission's regulations. A commissioner can readily redraw regulations on the basis of a better understanding of the facts or purely for administrative convenience. However, what the Court writes is graven in constitutional stone and can only be altered by constitutional amendment or Court reversal. The Court's lines in *Roe*, where they are not arbitrary, are grounded in questionable or changeable data."<sup>114</sup>

Why did the Court conclude that the state could regulate on behalf of maternal health only after the second trimester? Apparently because it was persuaded that abortion is safer than childbirth during the first trimester.<sup>115</sup> Yet, Hilgers and O'Hare have shown that the mortality statistics relied upon by the Court give an inaccurate measure of the comparative safety of abortion and childbirth.<sup>116</sup> The Court's exclusive reliance on mortality figures quite ignored the question of morbidity and there is abundant evidence of physical and psychological problems short of death associated with abortion.<sup>117</sup> Even were they correct, the assumptions provide no basis for concluding that there is no state interest in health regulations during the first trimester. "The Court gave no reason why it should make a difference whether it is safer to undergo an abortion or carry the pregnancy to full term," writes one commentator. "[T]hough it may be safer for a particular patient to undergo open heart surgery than to forego the operation and do nothing, the state still has an interest in ensuring that if the patient chooses to have the operation, it is performed as safely as possible."<sup>118</sup> Thus, as Arnold Loewy says, "[t]he fact that abortion [during the first trimester] is safer than childbirth is irrelevant unless the Court is also holding that such regulation in

regard to childbirth would be unconstitutional.”<sup>119</sup> John Hart Ely’s comment is written in tones of astonishment: “[e]ven a sure sense that abortion during the first trimester is safer than childbirth would serve only to blunt a state’s claim that it is, for reasons relating to maternal health, entitled to *proscribe* abortion; it would not support the inference the Court draws, that *regulations designed to make the abortion procedure safer* during the first trimester are impermissible.”<sup>120</sup>

The only plausible basis for the Court’s ruling that the first trimester remain free of health regulation is what Robert Destro calls, “the Court’s concern that state health regulations might turn into ‘roadblocks’ barring access to legalized abortion.”<sup>121</sup> Because medical practices and skills change over time, a practical effect of the Court’s analysis is to render this aspect of the constitutional test of abortion statutes subject to a variable technological standard. An abortion statute that is constitutional today may be unconstitutional tomorrow as a result of changes in medical techniques.<sup>122</sup>

The Court went on to choose viability as the point in pregnancy after which states could actually prohibit abortion, unless a physician then judged it necessary for the life or health of the mother.<sup>123</sup> As we have seen, this distinction is illusory; with “health” as broadly defined as the Court requires, there is no practical difference between it and abortion on demand. However, the Court clearly sought to give the impression that viability does make a difference, and commentators have persistently observed that Justice Blackmun did not, or could not, say *why*.<sup>124</sup> The opinion says that “the fetus then presumably has the capability of meaningful life outside the mother’s womb” and therefore drawing a line at viability “thus has both logical and biological justifications.”<sup>125</sup> The ruling made no attempt to detail what “meaningful life” is, why the capability for it is significant, or what the “logical and biological justifications” might be. If the capacity for independent life was to be the criterion, that capacity certainly does not occur at viability. Any newborn infant is totally dependent on others for food, shelter and care. Certainly, when the Court recognized that “artificial means” might be used to make a newborn “viable,” it contemplated incubators and other extraordinary medical support systems on which the child would be utterly dependent.<sup>126</sup>

The changeability of the capacity of medical science is even more pronounced in the case of viability than in that of abortion and childbirth safety. Remarkable progress has been made in recent decades in pushing back the time of viability.<sup>127</sup> This means that a child of the same intrinsic development is subject to disposal or protection depending solely upon when he or she is conceived.<sup>128</sup> Such an arbitrary dependency on things wholly extrinsic to the individual in

determining whether the individual has value and is worthy of protection is wholly indefensible.

## VII. Conclusion

THE COURT'S MAJORITY opinion in *Roe v. Wade* is riddled with factual errors and logical incongruities. Its analysis is as poor as its results are tragic. The thoroughness and breadth of the criticisms directed at *Roe* fully justify the conclusion of Justice Sandra Day O'Connor that "*Roe*... is clearly on a collision course with itself... [It has] no justification in law or logic."<sup>129</sup>

## Notes

1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905); *Roe v. Wade*, 410 U.S. 113 (1973).

Compare Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 926 (1973), with Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. Rev. 765 (1973), see also Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L. A. L. Rev. 689 (1976); Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979); Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973). The volume of legal commentary on *Roe* is massive. The Index to Legal Periodicals through May 1984 lists 107 law review articles largely devoted to substantive criticism of *Roe v. Wade*. This does not encompass commentary in books or in articles which cover *Roe* along with other topics. There are also a number of articles and notes which merely report on the decision and its implications, without engaging in meaningful analysis of its reasoning. These include: Uda, *Abortion: Roe v. Wade and the Montana Dilemma*, 35 Montana L. Rev. 103 (1974); Swan, *Compulsory Abortion: Neit Challenge to Liberated Women?*, 3 Ohio N.U.L. Rev. 152 (1975); Young, *Supreme Court Report*, 59 A.B.A.J. 407 (1973); Note, *Abortion Cases: A Return to Lochner, or a New Substantive Due Process?*, 37 Alb. L. Rev. 776 (1973); Note, *Criminal Law—Texas Abortion Statute—Criminality Exceptions Limited to Life-Saving Procedures on Mother's Behalf Without Regard to Stage of Pregnancy Violates Due Process Clause of Fourteenth Amendment Protecting Right to Privacy*, 2 Am. J. Crim. L. 231 (1973); Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 Colum. L. Rev. 237 (1974); Comment, *Abortion: The Five Year Revolution and Its Impact*, 3 Ecology L.Q. 311 (1973); Note, *Abortion Decisions: Roe v. Wade, Doe v. Bolton*, 12 J. Family L. 459 (1972-1973); Notes and Comments, *Perspectives on the Abortion Decision*, 9 N.M.L. Rev. 175 (1978-1979); Comment, *Landmark Abortion Decisions: justifiable Termination or Miscarriage of Justice? Proposals for Legislative Response*, 4 Pac. L.J. 821 (1973); *The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 1, 75 (1973); and Comment,

*Constitutional Law—Abortion—Right of Privacy—State Statutes Permitting Abortion Only for Life Saving Procedure on Behalf of Mother Without Regard for Other Interests Violate Due Process Clause of the Fourteenth Amendment*, 3 *Memphis State U.L. Rev.* 359 (Spring 1973).

3. *Editors Preface, Symposium on the Law and Politics of Abortion*, 77 *Mich. L. Rev.* unpaginated preceding 1569 (1979).

4. *Morgan, Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 *Mich. L. Rev.* 1724, 1724 (1979) (footnotes omitted).

5. *Dellapenna, The History of Abortion: Technology, Morality, and Law*, 40 *U. Pitt. L. Rev.* 359, 361 n. 11 (1979).

6. *Heyman and Barzelay, supra note 2*, at 784. *See also Perry, supra note 2*, at 690 (“[I]t is difficult to find a case that raises methodological problems as severe as those left in the wake of *Roe*”); *Regan, supra note 2*, at 1569; *Silverstein, From Comstockery Through Population Control: The Inevitability of Balancing*, 6 *N.C. Cent. L.J.* 8, 36 (1974); *Tribe, supra note 2*, at 7 (“One of the most curious things about *Roe* is that behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”); and *Wheeler & Kovar, Roe v. Wade: The Right of Privacy Revisited*, 21 *U. Kan. L. Rev.* 527, 527 (1973) (“Unfortunately, the decisions themselves fail to yield a reasonable justification of the constitutional basis for protection of the woman’s interest in terminating her pregnancy.”).

7. *See Chemerinsky, Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 *Buffalo L. Rev.* 107 (1982); *Heymann & Barzelay, supra note 2*; *Perry, supra note 2*; *Regan, supra note 2*; *Tribe, supra note 2*; *Wheeler and Kovar, supra note 6*. Analysis and criticism of these “rewritings” of *Roe* is beyond the scope of this article. For brief critical analyses of *Heymann & Barzelay, Tribe, and Perry*, see *J. Noonan, A Private Choice* 20-32 (1979).

8. *Cox, The Role of the Supreme Court in American Government* 113-114 (1976); *see also Epstein, Substantive Due Process by Any Other Name*, 1973 *Sup. Ct. Rev.* 159, 184; *Ely, supra note 2*, at 947.

9. *N.Y. Penal Law §125.05 (3)* (1977). Commentators emphasizing how extreme the Court was, include *Chering, Abortion Decision—A Qualified Constitutional Right in the United States—Whither Canada*, 51 *Can. B. Rev.* 643, 646 (1973); *Moore, Moral Sentiments in judicial Opinions on Abortion*, 15 *Santa Clara L. Rev.* 591, 627, 633 (1975); *Note, Haunting Shadows From the Rubble of Roe’s Right to Privacy*, 9 *Suffolk U.L. Rev.* 145, 152-53 (1974); *Comment, Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy*, 47 *Temple L.Q.* 715, 726 (1974).

10. *Roe*, 410 U.S. at 164-65 (emphasis added).

11. *Doe v. Bolton*, 410 U.S. 179, 191-192 (1973), *citing, United States v. Vuitch*, 402 U.S. 62, 71-72 (1971).

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

13. *Doe*, 410 U.S. at 191-92; In *Colautti v. Franklin*, 439 U.S. 379, 388 (1979), the Court held, “Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus’ sustained survival outside the womb, with or without artificial support.”

14. *Ely, supra note 2*, at 921 n. 19 (emphasis in original).

15. American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 299 (3rd Cir. 1984), *aff'd*, 106 S. Ct. 2169 (1986).

16. 567 F. Supp. 522, 526 (D. Neb. 1981) (emphasis in original). See also Margaret S. v. Edwards, 488 F. Supp. 181, 196 (E.D. La. 1980) (holding unconstitutional a Louisiana statute permitting postviability abortions only if necessary to prevent “permanent impairment” of maternal health).

17. Tribe offers this interpretation of the Court’s intent. Tribe, *supra*, note 2, at n. 13. Some scholars have deemed the historical excursus quite irrelevant. “The Court does not seem entirely clear,” writes Ely, “as to what this discussion has to do with the legal argument... and the reader is left in much the same quandary. It surely does not seem to support the Court’s position....” Ely, *supra* note 6, at 925 n. 42. According to Professor Epstein, “It is difficult to see what comfort [Justice Blackmun] could draw from his researches, for at no point do they lend support for the ultimate decision to divide pregnancy into three parts, each subject to its own constitutional rules. All that the study accomplished was to prove what we already knew, that legal rules and social attitudes on the question of abortion vary much by place and time.” Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 167. Accord, Riga, Bryn and Roe: *The Threshold Question and Juridical Review*, 23 Cath. Law 309, 311 (1978). See also Dellapenna, *supra* note 11, at 424 (“The Court’s discussion of history is... unrelated to its later conclusions.”); Note, *Roe and Paris: Does Privacy Have a Principle*, 26 Stan. L. Rev. 1161, 1181 & n.110 (1974) (“[T]he Court’s labored historical sketch ... is most remarkable for its failure to relate the discussion to the Court’s analysis.”).

Elizabeth Moore goes so far as to suggest that the Court’s “gratuitous historical references” were primarily a “public relations technique” to “calm the predictable excited reaction to the result [Roe] reached” by demonstrating “that abortion was not the universally condemned act which many opponents had believed”—that “certain Christians seem to be the only deviates in the whole history of abortion.” Moore, *supra* note 9, at 626-27.

18. Some have found even the Court’s version of abortion history to point in the opposite direction from that holding. “The Court ... seemed to ignore ‘the “traditions and [collective] conscience of our people,”’” wrote one commentator. “[T]he Court’s holding was decidedly more lenient than the American attitudes indicated by the legislative trends and professional opinions discussed in the course of its opinion.” Comment, *Roe v. Wade and In Re Quinlan: Individual Decision and the Scope of Privacy’s Constitutional Guarantee*, 12 U.S.F.L. Rev. 111, 142 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 493 [1965], quoting *Powell v. Alabama*, 287 U.S. 45, 67 [1932]). See also Regan, *supra* note 2, at 1621 (“[T]he Court has rarely overturned as much history all at once as it did in *Roe v. Wade*. That surely ought to give us pause.”).

19. See Lewis, *Homo Sapienism: Critique of Roe v. Wade and Abortion*, 39 Alb. L. Rev. 856, 865 n. 5 (1975). For the discovery of the ovum see, L. Arey, *Developmental Anatomy* 3-6 (Rev. 7th ed. 1974); Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 Population Stud. 53, 58-59 (1974).

20. Soranos, *Gynecology*, in 4 *Corpus Medicorum Graecorum* 1.19.60 (J. Ilberg ed. 1927), cited in Noonan, *An Almost Absolute Value in History*, in *The Morality of Abortion* 5 n.5 (J. Noonan ed. 1970).

21. 410 U.S. at 140.

22. 410 U.S. at 130-132.

23. See Arbagi's chapter; and also consult S. Krason & W. Hollberg, *The Law and History of Abortion: The Supreme Court Refuted* (1984); and Special Project, *Survey of Abortion Law*, 1980 Ariz. St. L. J. 67, 77.

24. Quay, *Justifiable Abortion—Medical and Legal Foundations* (Pt. 2), 49 Geo. L. J. 395 (1961), cited in *Roe*, 410 U.S. 130 n.9. For accounts of ancient attitudes largely compatible with that expressed by Justice Blackmun, see Joling, *Abortion—The Breath of Life*, 22 Med. Tr. T.Q. 199,199-201,202-206 (1975), and Littlewood, *Abortion in Perspective* (Pt. 1), N.Z.L.J. 488,488-89 (1974). See generally de Agullo, *Abortion Polemic: A Restatement of Pros and Cons*, 42 Rev. Jur. U.P.R. 247, 249-51 (1973).

25. 410 U.S. at 131.

26. See also Brown, *What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion*, 1 Human Life Rev. 5, 11 (1975).

27. Brown, *supra* note 26, at 13, quoting L. Edelstein, *The Hippocratic Oath*, in *Supplements to the Bulletin of the History of Medicine*, No.1, 10, 64 (1943).

28. Cf. Ely, *supra* note 2, at 925 n. 42.

29. Noonan, *supra* note 20.

30. See Arbagi's discussion on pp. 167-168 of this volume.

31. Noonan, *supra* note 20, at 9,10.

32. *Id.* at 11-21.

33. For a careful and comprehensive history of the attitude of medieval Christendom toward abortion, see J. Connery, *Abortion: The Development of the Roman Catholic Perspective* (1977).

34. See Special Project, *Survey of Abortion Law*, 1980 Ariz. St. L. J. 67, 84.

35. See Connery, *The Ancients and the Medievals on Abortion*, *infra* at 124. Quotation is from text delivered at Americans United For Life conference in Chicago, March 31, 1984.

36. *Id.*

37. Dellapenna, *supra* note 5, at 367 & n. 46 (1974).

38. *Id.* at 368.

39. 410 U.S. at 136; Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth Amendment Right About to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971). See also Dellapenna, *supra* note 5, at 366 n. 37.

40. Dellapenna, *supra* note 5, at 366-89; Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford L. Rev. 807, 815-27 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1267-73 (1975). See also article cited at p. 261, n.54, at 105-109.

41. E. Coke, *Third Institute* \*50; Dellapenna, *supra* note 5, at 381-82, 384-86.

42. Cited in Means, *supra* note 39, at 337-341.

43. 2 H. Bracton, *The Laws and Customs of England* 279 (Twiss ed. 1879); Fleta, Book I, c. 23 (Selden Soc. ed. 1955).

44. Means, *supra* note 39, at 345-48.

4 W. Blackstone, *Commentaries* \*198.

45. Byrn, *supra* note 40, at 817-19; Dellapenna, *supra* note 5, at 366-67, 369-71, 387-89; Destro, *supra* note 40, at 1268-71.

46. Destro, *supra* note 40, at 1269-70.
47. Byrn, *supra* note 40, at 819 & n. 88.
48. R. v. Sims, 75 Eng. Rep. 1075 (K. B. 1601).
49. Means, *supra* note 39, at 348-49.
50. Destro, *supra* note 40, at 1273.
51. Plessy v. Ferguson, 163 U.S. 537(1896); Brown v. Bd. of Education, 347 U.S. 483 (1954).
52. Byrn, *supra* note 40, at 827.
53. As Morgan, *supra* note 4, at 1726, notes, the Court's own discussion demonstrated that the AMA and ABA had only recently changed from a policy of opposition to abortion, and those changes were controversial within their memberships.
54. 1410 U.S. at 151-52, citing Means, *supra* note 39, and Means, *The Law of New York Concerning Abortion and the Status of the foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968).
55. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 474 (statement of Victor Rosenblum, Professor of Law, Northwestern Univ.); see also Dellapenna, *supra* note 5, at 402-404.
56. J. Mohr, *Abortion in America, The Origins and Evolution of National Policy* 200 (1978).
57. Dellapenna, *supra* note 5, at 389.
58. 410 U.S. at 141-42.
59. *Id.* at 151 n. 48, citing *State v. Murphy*, 27 N.J.L. 112, 114 (1858).
60. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood" and the Supreme Court's Birth Requirement*, 1979 So. Ill. L. Rev. 1, 16-17 n. 84; Destro, *supra* note 40, at 1273-75.
61. 410 U.S. at 151.
62. Gorby, *supra* note 61, at 20.
63. 410 U.S. at 151-52.
64. Sauer, *supra* note 19, at 58.
65. Dellapenna, *supra* note 5, at 371-76, 394-95.
66. Horan & Marzen, *Abortion and Midwifery: A Footnote in Legal History*, in *New Perspectives on Human Abortion* 199, 200 (Horan & Mall, ed. 1981).
67. "Minutes of the Common Council of the City of New York" 3 (1712-1729) reprinted in Horan & Marzen, *supra* note 67, at 199.
68. Blackmun's quote is found at 410 U.S. at 129.
69. Noonan, *supra* note 20.
70. 410 U.S. at 140.
71. *Id.* at 153.
72. *Id.* at 152-53.
74. Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 *Hastings L. J.* 867, 873 (1974).
75. Ely, *supra* note 2, at 932, 935-36 (footnotes omitted).
76. Cox, *supra* note 8, at 113.

77. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 199 (footnotes omitted).

78. Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C.L. Rev. 223 (1973); Note, *Roe and Paris: Does Privacy Have a Principle*, 26 Stan. L. Rev. 1161 (1974).

79. O'Meara, *Abortion: The Court Decides a Non-Case*, 1974 Sup. Ct. Rev. 337, 340.

80. 410 U.S. at 156, 158. Blackmun began by stating that the attorney for Texas was unable to cite any case holding the unborn to be persons under the Fourteenth Amendment. In fact, *Steinberg v. Brown*, 321 F. Supp. 741, 746-47 (N.D. Ohio, 1970), stated, "Once human life has commenced, the constitutional protection found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it." The court cited medical authority that this occurs "at the moment of conception." *Id.* at 747.

81. Ely, *supra* note 2, at 926. Accord, Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 Buffalo L. Rev. 107, 124 (1982) ("Why should the intent of the Constitution be controlling in deciding whether 'persons' includes fetuses, if intent is not controlling in deciding whether the Constitution intended to protect a right to abortions?"); Destro, *supra* note 40, at 1338; Morgan, *supra* note 4, at 1737 ("irony of the Court's sudden allegiance to the letter of the Constitution"); Notes and Comments, *Roe v. Wade and Doe v. Bolton: Compelling State Interest Test in Substantive Due Process*, 30 Wash. & Lee. L. Rev. 628, 637 (1973).

82. Byrn, *supra* note 40, at 852-57; Destro, *supra* note 40, at 1283-86; Gorby, *supra* note 61, at 11-13.

83. 410 U.S. at 157.

84. Ely, *supra* note 2, at 925-26.

85. Gorby, *supra* note 61, at 11-12.

86. 410 U.S. at 157 n. 53.

87. Comment, *Roe v. Wade—The Abortion Decision—An Analysis and Its Implications*, 10 San Diego L. Rev. 844, 855 (1973).

88. U.S. Const. art. I, Sec. 2, cl. 3, 4.

89. See *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886); Destro, *supra* note 40, at 1284; Byrn, *supra* note 40, at 852-53.

90. 410 U.S. at 157-58 n. 54.

Epstein, *Substantive Due Process by Any Other Name*, 1973 Sup. Ct. Rev. 159, 180. See also Byrn, *supra* note 40, at 853-54; Destro, *supra* note 40, at 1256 n.

30. Charles Rice argues that the defense of necessity does not justify killing another who is innocent to save one's own life, but that the right of self-defense does, as when the attacker is insane. Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. Rev. 1059, 1081-82 (1976). But see the more nuanced discussion in his earlier article, making clear his individual view that the unborn should not "be considered an aggressor so as to justify the use of such principles of defense against him" but noting that "where the abortion is allegedly performed to save the life of the mother, there is a parity of values: one life for another." Rice, *Overruling Roe v. Wade: An Analysis of the Proposed Constitutional Amendments*, 15 B.C. Ind. & Com. L. Rev. 307, 326-327 (1973). See generally, Conley & McKenna, *Supreme Court on Abortion—A Dissenting Opinion*, 19 Cath. Law. 19, 26 (1973).

91. 410 U.S. at 158 n. 54.

92. See Gorby, *supra* note 61, at 20.

93. See Byrn, *supra* note 40, at 854-55; Destro, *supra* note 40, at 1256 n. 30; Moore, *Moral Sentiments in judicial Opinions on Abortion*, 15 Santa Clara L. Rev. 591, 598-599 (1975).

94. 410 U.S. at 158 n. 54. See also Chemerinsky, *supra* note 7, at 113.

95. Byrn, *supra* note 40, at 855. See also Destro, *supra* note 40, at 1256 n. 30; andl Gorby, *supra* note 61, at 20.

96. 410 U.S. at 158.

97. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

98. Cong. Globe, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham).

100. Boyle, *That the Fetus Should Be Considered a Legal Person*, 24 Am. J. Juris, 59 (1979); Destro, *supra* note 40, at 1332 n. 399, 1334 & n. 406; Gorby, *supra* note 61, at 22-24; Rice, *The Dred Scott Case of the Twentieth Century*, *supra* note 91, at 1063-72, 1074-76; Rice, *Overruling Roe v. Wade: An Analysis of the Proposed Constitutional Amendments*, *supra* note 91, at 313-19; Riga, *supra* note 17, at 315-16, 319-20, 330; Note, *Haunting Shadows From the Rubble of Roe's Right of Privacy*, *supra* note 9, at 148-49.

101. 410 U.S. at 160-161. Blackmun wrote, "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks," *Roe*, 410 U.S. at 160 n. 59, citing L. Hellman & J. Pritchard, *Williams Obstetrics* 493 n. 59 (14th ed. 1971). In fact, the text describes viability as varying from 20, not 24, to 28 weeks. This error has been remarked by Note, *Haunting Shadows from the Rubble of Roe's Right of Privacy*, *supra* note 9, at 151-52 n.39 and Note, *Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy*, 47 Temple L.Q. 715, 736 (1974).

102. Blackmun describes the Roman Catholic Church as holding "until the 19th century" the "Aristotelian theory of 'mediate animation'" as "dogma." 410 U.S. at 160. In fact, according to Connery, the Church has never taken a position as a matter of dogma on either "mediate animation" or "immediate animation"; it has, however, always condemned abortion for all stages of pregnancy throughout its history. *Infra* at 126.

The Court is misleadingly partial concerning the "attitude of the Jewish faith," in which it describes the "view that life does not begin until live birth" as being "predominant." *Roe*, 410 U.S. at 160. While Jewish law (Halakah) does make a sharp distinction between the status of the fetus and the newborn infant, in the predominant view of the rabbis it condemns abortion except when the mother's life or perhaps her health is threatened. There is disagreement concerning the abortion of a handicapped fetus. Bleich, *Abortion and Jewish Law*, in *New Perspectives on Human Abortion* (Hilgers, Horan & Mail, eds. 1981) 405-419. Rabbi Bleich writes, "It should be clearly understood that the question of whether or not a fetus is a 'person' or a 'full human being' is largely irrelevant in a halakhic context. Judaism regards all forms of human life as sacred.... It is the nature of the prohibition and the specific regulations which are significant, not matters of nomenclature which have no halakhic significance." *Id.* at 418.

For a more detailed account of the Protestant perspective than that given by the cursory sentence in *Roe*, 410 U.S. at 160, see B. Nathanson, *Aborting*

America, 294 (1979); Nelson, *The Divided Mind of Protestant Christians*, in *New Perspectives on Human Abortion supra* at 387-404 (1981).

103. 410 U.S. at 161. Littlewood, *supra* note 24, at 104, echoes Blackmun's argument. Joseph Lewis observes:

It is perfectly legitimate and, in fact, logically necessary to define the first meeting of the egg and sperm as the point of both legal as well as biological conception.... The Court's contention that conception is a process over time... cannot be confirmed by embryologic observation. The Court is not observing but defining.... Development, not conception, occurs over time. Conception occurs when the sperm first penetrates the egg. When penetration of the egg by the sperm is accomplished, conception has ended and development has begun.

Lewis, *supra* note 19, at 870. The Court was entirely unclear about why "new medical techniques such as menstrual extraction, the 'morning after' pill, implantation of embryos, artificial insemination, and even artificial wombs" were held to be "[s]ubstantial problems for precise definition" of the view that individual human life begins at conception. *Roe*, 410 U.S. at 161. See Harrison, *The Supreme Court and Abortion Reform: Means to an End*, 19 N.Y.L.F. 685, 687-688 (1974). Did the Court perhaps really mean it the other way around: that acceptance of such a view would pose "substantial problems" for societal acceptance of the new techniques, and hence would be expedient?

104. 410 U.S. at 159.

105. *Id.* at 160.

106. The evidence for the existence of individual human life from the time of fertilization has been set forth in cogent detail in the 1981 report of the Senate Judiciary Committee's Subcommittee on Separation of Powers on the Human life Bill. Subcomm. on Separation of Powers, Senate Comm. on the Judiciary, *The Human Life Bill—S. 158*, 97th Cong., 1st Sess. 7-13 (1981).

107. Harrison, *supra* note 103, at 691 n. 32.

108. Comment, *Roe v. Wade—The Abortion Decision—An Analysis and Its Implications, supra* note 87, at 850-51.

109. Epstein, *supra* note 91, at 182.

110. In addition to the authors quoted below, critical commentary on the Court's striking of the balance and its justification (or lack thereof), much of which is from scholars who support *Roe's* results, includes: Boyle, *supra* note 100, at 61; Cincotta, *The Quality of Life: From Roe to Quinlan and Beyond*, 25 *Cath. Law.* 13, 20, 24-25, 27 (1979); Destro, *supra* note 40, at 1251, 1261 n. 45; Ely, *supra* note 2, at 21, 946-47; Loewy, *supra* note 78, at 229, 232, 233-34, 241-43; Moore, *supra* note 94, at 609-12, 629; Morgan, *supra* note 4, at 1740, 1742-48; Regan, *supra* note 2, at 1141-42; Rice, *The Dred Scott Case of the Twentieth Century, supra* note 91, at 1076-77; Rubin, *The Abortion Cases: A Study in Law and Social Change*, 5 *N.C. Central L. J.* 215, 218-19, 245-47; Tribe, *supra* note 2, at 5; Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 *N.Y.L. Sch. L. Rev.* 1221, 1260 (1982); Comment, *Roe v. Wade—The Abortion Decision—An Analysis and Its Implications, supra* note 87, at 856; Note, *Roe and Paris: Does Privacy Have a Principle, supra* note 17, at 1183-84; Note, *Haunting Shadows From the Rubble of Roe's Right of Privacy, supra* note 9, at 151; Note, *Abortion Decision: Right of Privacy Extended*, 27 *U. Miami L. Rev.* 481, 486 (1973).

111. Chemerinsky, *supra* note 7, at 142.

112. Silverstein, *supra* note 6, at 39-40.

113. Cox, *supra* note 8, at 114.

114. Ely, *supra* note 2, at 921 n. 19 (emphasis in original).

115. 410 U.S. at 163.

116. Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in *New Perspectives on Human Abortion* *supra* note 102 at 69-91. See also Destro, *supra* note 40, at 1296-98 n. 245, 1301-1303; Hellegers, Wade and Bolton: *Medical Critique*, 19 *Cath. Law.* 251, 253-54 (1973). Cf. Ely, *supra* note 2, at 942 n. 117 (pointing out Court's assumptions about relative safety not shared by all physicians).

117. See Destro, *supra* note 40, at 1298-1301.

118. Comment, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 *U.C.L.A. L. Rev.* 1194, 1199 n. 41 (1982). See also Tribe, *supra* note 2, at 4.

119. Loewy, *supra* note 78, at 233 n. 58.

120. Ely, *supra* note 2, at 942 n. 117 (emphasis in original). *But see* Jones, *Abortion and the Consideration of Fundamental, Irreconcilable Interests*, 33 *Syracuse L. Rev.* 565, 578 (1982) (attacking as paternalistic Supreme Court's willingness to allow state regulation of abortion for maternal health at any stage of pregnancy).

121. Destro, *supra* note 40, at 1294.

122. Comment, *Roe v. Wade—The Abortion Decision—An Analysis and Its Implications*, *supra* note 87, at 848. See also Moore, *supra* note 94, at 621; Notes and Comments, *Roe v. Wade and Doe v. Bolton: Compelling State Interest Test in Substantive Due Process*, *supra* note 81, at 643-44. Indeed, this is exactly what happened in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), where the Court struck down a second trimester hospitalization requirement on the basis of developments in the safety of clinic abortions since *Roe*, in which the Court had expressly indicated that states might require hospitalization for second trimester abortions. *Roe*, 410 U.S. at 163.

123. 410 U.S. at 163-64.

124. See Chemerinsky, *supra* note 7, at 125; Ely, *supra* note 2, at 924 (The Court "seems to mistake a definition for a syllogism"); Erickson, *Women and the Supreme Court: Anatomy is Destiny*, 41 *Brooklyn L. Rev.* 209, 250 (1974); Gorby, *supra* note 61, at 32; King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 *Mich. L. Rev.* 1647, 1656 (1979) ("The Court offered no justification for this position, perhaps because any justification would have exposed the thinness of its claim that it was taking no position on when life begins."); Tribe, *supra* note 2, at 4 ("One reads the Court's explanation several times before becoming convinced that nothing has inadvertently been omitted.... [I]t offers no reason at all for what the Court held."); Special Project, *Survey of Abortion Law*, *supra* note 34, at 128; Comment, *Fetal Viability and Individual Autonomy: Resolving Medical and Legal Standards for Abortion*, 27 *U.C.L. A.L. Rev.* 1340, 1341 (1980). *But see* Perry, *supra* note 2, at 734 ("The fact that this distinction does not proceed inexorably from textually demonstrable first principles is beside the point; the distinction is drawn by the existing moral

culture [at least arguably] and the Court, in assaying conventional moral culture, should be sensitive to such distinctions.”).

125. 410 U.S. at 163.

126. *Id.* at 160.

127. “A review of outcome studies on infants born over the past 20 years indicates a significant decline in the mortality of very low birthweight infants. In the 1960s and early 1970s, the survival rate of infants with birthweights between 1000 g and 1500 g increased greatly. Since 1975, there has been an important rise in the percentage of survivors who are less than 1000 g (extremely low birthweight).” Ross, *Mortality and Morbidity in Very Low Birthweight Infants*, 12 *Pediatric Annals* 32, 32 (1983). See, e.g., Saigal, Rosenbaum, Stoskopf, and Milner, *follow-up of infants 501 to 1,500 gm birth weight delivered to residents of a geographically defined region with perinatal intensive care facilities*, 100 *J. Fed.* 606, 608 at Table II (1982) (survival rate of approximately 38% for infants weighing 501-750 grams); Kopelman, *The Smallest Preterm Infants: Reasons for Optimism and New Dilemmas*, 132 *Am. J. Diseases Children* 461 (1978) (survival rate of 42% for infants with weight of 1000 g or less).

128. Law review articles taking note of the dependency of the viability criterion on changing medical technology include: Byrn, *supra* note 40, at 807 n. 5; Chemerinsky, *supra* note 7, at 125; Cincotta, *supra* note 110, at 30 n. 109; Dellapenna, *supra* note 5, at 360 n. 10; Destro, *supra* note 40, at 1311-13; Ely, *supra* note 2, at 924 n. 34; Erickson, *supra* note 124, at 254-55; Gorby, *supra* note 61, at 32 n. 151; Hughes, *Who is a Victim?*, 1 *Dalhousie L. J.* 425, 433; King, *supra* note 124, at 1684-86; Note, *Genetic Screening, Eugenic Abortion, and Roe v. Wade: How Viable is Roe’s Viability Standard?*, 50 *Brooklyn L. Rev.* 113, 128 (1983); Comment, *Towards a Practical Implementation of the Abortion Decision: The Interests of the Physician, the Woman and the Fetus*, 25 *De Paul L. Rev.* 676, 678, 692-95 (1976); Comment, *Viability and Abortion*, 64 *Ky. L. J.* 146, 146, 160-63 (1975-76); Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, *supra* note 110, at 1258; Comment, *Fetal Viability and Individual Autonomy: Resolving Medical and Legal Standards for Abortion*, *supra* note 124, at 1359-61; Comment, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, *supra* note 118, at 1202; Notes and Comments, *Roe v. Wade and Doe v. Bolton: Compelling State Interest Test in Substantive Due Process*, *supra* note 81, at 643-45.

129. *City of Akron*, 462 U.S. at 458 (O’Connor, J., dissenting).