No. 88-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*

The Knights of Columbus files this brief *amicus curiae* with the consent of the parties.

The Knights of Columbus is an international Catholic fraternal organization of 1.4 million members dedicated to advancing the ideals of charity, unity, fraternity, and patriotism through its activities around the world. While the Knights of Columbus engages in a broad range of social action programs aiding the sick, the handicapped, and the less fortunate, it devotes a considerable portion of its resources and volunteer effort to protect and

strengthen the family and to promote pro-life values. Thus, the Knights have a long-standing, substantial interest in the issues presented in this case, and their participation as *amicus curiae* will bring an important, and broader, perspective to bear.

SUMMARY OF ARGUMENT

The present case is an appropriate vehicle for overruling *Roe v. Wade* even if the case could be decided under the *Roe* framework. As precedents like *Garcia v. San Antonio Metropolitan Transit Authority* and *Erie R.R. Co. v. Tompkins* illustrate, when this Court has found an analytical framework, of short or long duration, to be flawed, it has not hesitated to abandon that framework —even if the case before the Court could be decided under its prior analysis, and even if the parties to the case have not argued that earlier precedent must be overruled.

As a practical matter, *Roe*'s analytical framework is flawed beyond repair because it rests on "viability"—the point at which an unborn child can survive outside of the womb with artificial aid—to determine when a state may protect the life of "the developing young in the human uterus." As Justice O'Connor has pointed out, because viability is almost solely defined by ever-progressing technology, it is a constantly moving point that cannot be a neutral and stable basis for long-term constitutional adjudication.

More fundamentally, viability is an invalid benchmark for construing the meaning of "person" in the Fourteenth Amendment because it has nothing to do with attributes of personhood, or a particularized state of being, but only the state of medical technology. Viability's true utility lies in its insight that a viable infant is certainly a person and that only limitations on technology prevent all unborn children from being viable. If a "viable" unborn

child is a person, then so are all unborn children, viable or not.

Roe's justifications for excluding the unborn from the Fourteenth Amendment are unpersuasive. Before *Roe*, in equity, property, crime, and tort, the law recognized the unborn as persons of legal consequence, reckoning that consequence in terms of the particular circumstances of the unborn. Upon examination, neither the Constitution's other uses of the word "person," the punishment provided for abortion, the traditional status of the mother of the aborted child as a victim, not an accomplice, nor 19th century abortion practices provides any principled basis on which to exclude the unborn from the protections of the Fourteenth Amendment.

In view of the logic and history of the Amendment, and this Court's traditional liberal construction of constitutional protections for personal rights, the only reasonable reading of the word "person" is one that includes an unborn child. The framers of the Amendment explicitly intended to extend its protections to "every human being." Their expansive design for the Amendment, combined with the predominant anti-abortion sentiment and legislation of the time in which it was proposed and ratified, inexorably leads to inclusion of the unborn as "persons" under the Fourteenth Amendment.

Indeed, this Court's understanding of the word "person" has been flexible enough to hold business corporations to be Fourteenth Amendment "persons." If the word can extend the fundamental protections of law to "beings" that are mere legal constructs, no rule of interpretation or principle of law can justify excluding unborn human beings.

ARGUMENT

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR OVERRULING *ROE*, EVEN IF THE MISSOURI STATUTE AT ISSUE COULD ITSELF BE UPHELD UNDER *ROE*'S ANALYSIS.

This case provides the Court with an appropriate vehicle for overruling *Roe v. Wade*, 410 U.S. 113 (1973). Indeed, the present case would provide the Court with such a vehicle even if appellants did not ask the Court to overrule *Roe*, and even if the case could be decided under the framework of *Roe* itself. When faced with similar circumstances in the past, the Court has overruled similar precedents.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held that the Tenth Amendment prohibited Congress from intruding upon "traditional government functions" of the States. Neither of the parties in *Garcia* had asked the Court to reconsider *National League of Cities*; they simply debated whether or not setting the pay scale of municipal transit employees was a "traditional government function." Nevertheless, while considering that question, a majority of this Court apparently concluded that the entire *National League of Cities* framework was suspect. Consequently, the Court set the case for reargument, specifying as a new question presented whether *National League of Cities* should be overruled. 468 U.S. 1213 (1984) (mem.) Then, after rehearing, the Court voted 5-4 to overrule *National League of Cities*. Writing for the Court, Justice Blackmun explained that:

> Our examination of this "function" standard applied in . . . cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional government function" is not only unworkable but is also

> inconsistent with . . . [the] principles on which *National League of Cities* purported to rest.

Garcia, 469 U.S. at 531. *Garcia*, therefore, demonstrates the willingness of the Court to overrule precedent even when it has not been asked to do so, and even when only a bare majority of the Court considers the precedent unsound.

The Court has not hesitated to abandon even long-standing precedents, and even at the cost of great resulting turmoil. Thus, in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which held that federal courts, sitting in diversity cases, should apply federal "general" common law, but state "local" common law. There was nearly a century of judicial precedent elaborating and refining *Swift*'s distinction between "local" and "general" law. The Court could have decided *Erie* simply by further refining that standard and holding that certain state tort law was "local," not "general." Nevertheless, the Court completely overruled *Swift*. Justice Brandeis explained that:

> Experience in applying the doctrine of *Swift v. Tyson* has revealed its defects, political and social; . . . [T]he impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

Erie, 304 U.S. at 74.

In sum, when the Court has found an analytical framework, of short or long duration, to be flawed, it has not hesitated to abandon that framework—even if the case before the Court could be decided under its prior analysis, and even if the parties to that case have asked the Court to so decide it. So too here.

II. *ROE*'S ANALYTICAL FRAMEWORK IS FLAWED BEYOND REPAIR.

Roe v. Wade is both inherently unworkable, and inherently wrong. Its analytical framework rests on two judgments. First, that beginning "at approximately the end of the first trimester," a state may reasonably regulate abortion in the interest of motherhood health. *Id.* at 163. This is so, *Roe* explains, because in 1973 "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Ibid.* *Roe*'s second judgment is that, for "the stage subsequent to viability," the State may proscribe all abortions, except those necessary for the life or health of the mother. *Id.* at 164-65. Viability is the demarcation, *Roe* announces, because "the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163.

That analytical system, even if it were otherwise valid, could never serve as the basis for long-term constitutional analysis.

> The *Roe* framework . . . is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . . ."

Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (citation omitted).

More fundamentally, however, *Roe*'s use of viability as a constitutional benchmark could never be valid. As Justice White has noted, a viability standard has almost nothing to do with attributes of personhood, or a particularized state of being, and everything to do with the "state of medical practice and technology" that allows an unborn child to survive at an ever earlier point in gestation. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting).[1]

Moreover, the quality of medical technology varies not only with time, but also with locale. Many unborn children who are "viable" on any given day in a major metropolitan center would not be viable in a more rural setting. If constitutional personhood were pegged to the quality of medical technology in a given state, it would lead to the absurd result of the same unborn child being a "person" in some states, but not in others. Such an unborn child would then periodically gain, lose, and regain constitutional "personhood" whenever his or her mother traveled across state boundaries.

To be sure, the idea of "viability" does have some analytical utility, but a utility completely at odds with the result in *Roe*. Referring to the point at which an unborn child could survive outside the womb, "albeit with artificial aid," *Roe*, 410 U.S. at 160, viability provides a standard by which to find when an unborn child

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[1] *See* Krimmel and Foley, *Abortion: An Inspection Into the Nature of Human Life and Potential Consequences of Legalizing Its Destruction*, 46 U. Cinn. L. Rev. 725, 740 (1977) (a seven month old fetus 100 years ago was not viable, while it generally is today); W. Prosser, *The Law of Torts* 369 (5th ed. 1984) (viability is "a most unsatisfactory criterion [for the legal existence of the fetus], since it is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development"). *See also* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1312 (1975).

becomes "equal" to a child already born. And no one would seriously argue that an infant—even one born prematurely—was not a "person" whose right to life was protected by the Fourteenth Amendment.

Viability's value, however, lies not in its ability to draw the line at when one "becomes" a person, but rather in its insight that a viable infant is certainly a person, and that only limitations on technology prevent all unborn children from being viable. In short, if a "viable" unborn child is a person then so are all unborn children, viable or not.[2]

A. There Is No Principled Basis by Which to Exclude the Unborn From the Protections Given to Persons By the Fourteenth Amendment.

Nevertheless, "the unborn," *Roe* announced, "have never been recognized in the law as persons in the whole sense." *Roe*, 410 U.S. at 162. This point is, at the same time, both mistaken and irrelevant. Women and blacks were not treated as persons "in the whole sense" for significant periods of Anglo-American legal history, yet that fact hardly disqualifies them from personhood. Minors are not legally capable "in the whole sense" and often have legal interests that are contingent on future events, notably coming of age. Yet they most assuredly are persons.

Roe is, moreover, simply mistaken. Contrary to the *Roe* majority's belief otherwise, "[i]n equity, property, crime, and tort the unborn has received and continues to receive a legal personality."[3] And as Dean Ely has observed, even "[t]o the extent they are not entirely con-

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[2] Indeed, it is doubtful whether there is any such thing as a "viable" infant at all. Born or unborn, every infant is utterly dependent upon its parents and society. So are many other "non-viable" persons—the elderly and the handicapped, for example.

[3] Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639 (1980).

clusive, the bodies of doctrine to which the Court adverts respecting the protection of fetuses under general legal doctrine tend to undercut rather than support its conclusion."[4] In the law of property, for example, an unborn child is considered a person in being for all purposes that are to his or her benefit, including taking by will or descent.[5] Equally noteworthy is the extension in equity of *parens patriae* protection to unborn children regardless of gestational age, illustrated by cases compelling blood transfusions for pregnant women to protect their unborn children.[6]

Roe's discussion of tort law, *Roe*, 410 U.S. at 161-62, is also "largely inaccurate."[7] Far from exhibiting *Roe*'s skepticism, the "ideological history of prenatal injury law, and the more recent development of prenatal death law has consistently moved toward the affirmation of the unborn as a 'person' in the law . . . ."[8] Even in 1973,

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[4] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 925 (1973).

[5] Prosser, *supra* note 1, at 368; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame Law. 349, 351-54 (1971) ("The property rights of the unborn child are as old as the common law itself."). For example, an 18th century English court, replying to the contention that a devise for the life of a child *en ventre sa mere* was void because the child was a nonentity, wrote this succinct rejoinder to the *Roe* Court's notion:

> Let us see what this non-entity can do. He may be vouched in recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions . . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian.

Thellusson v. Woodford, 311 Eng.Rep. 117, 163 (Ch. 1798).

[6] *See* Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807, 844-48 (1973); Note, *supra* note 5, at 360-62.

[7] Kader, *supra* note 3, at 652.

[8] *Id.* at 640. Before *Roe*, common legal authorities did not shrink from acknowledging the personhood of the unborn. Dean Prosser, for example, observed that "medical authority has recognized long

it was well established that a child born alive could recover for prenatal injury.[9] Moreover, the trend in tort is towards permitting recovery for prenatal injury when the child is stillborn. Again, at the time of *Roe*, of the jurisdictions that had addressed the issue, 17 allowed such recovery, while 12 did not.[10]

In short, the "sense" in which the law has recognized the unborn outside of the abortion context is as persons of legal consequence, reckoning that consequence in terms of the particular circumstances of the unborn. That sense is not only consistent with the status of persons under the Fourteenth Amendment, but, given the broad scope of the Amendment, requires inclusion of the unborn within its protections.

Ultimately, however, *Roe*'s conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," 410 U.S. at 158, was premised on three more precise notions: first, that no other use of the word "person" in the Constitution has a "prenatal application," *id.* at 157; second, that aspects of "the typical abortion statute," such as permitting abortion to save the

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since that the child is in existence from the moment of conception. . . ." Prosser, *supra* note 1, at 367. *See also* 42 Am. Jur. 2d *Infants* § 2, at 9 (1969) ("Biologically speaking, the life of a human being begins at the moment of conception in the mother's womb . . . .").

[9] *Id.* at 642; Prosser, *supra* note 1, at 367-68; Note, *supra* note 5, at 354-60.

[10] Kader, *supra* note 3, at 654. Though Prosser noted the practical "difficulties of proof of causation and damages" by allowing such recovery, Prosser, *supra* note 1, at 369, neither he nor the other authority cited by *Roe* as examples of commentators who opposed this development, *Roe*, 410 U.S. at 163, were in fact critics of this trend in the law. *See* Kader, *supra* note 3, at 652-53. Indeed, Prosser generally was critical of arbitrary distinctions that might circumscribe the duty owed to the unborn. *E.g.* Prosser, *supra* note 1, at 369 ("Viability . . . does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty . . . .").

life of the mother, are inconsistent with "Fourteenth Amendment status," *id.* at 157 n.54; and third, that "throughout major portion of the 19th century prevailing legal abortion practices were far freer than they are today," *id.* at 158. None of these propositions compels *Roe*'s conclusion. The first is irrelevant; the second and third, simply mistaken.

1. *The Constitutional Text Does Not Exclude the Unborn.*

As *Roe* noted, neither the Constitution as a whole nor the Fourteenth Amendment in particular defines the word "person." *Id.* at 157. Reviewing the uses of that word elsewhere in the Constitution, however, the *Roe* majority pronounced that the word nowhere else admitted of any prenatal application. And that, the majority inferred, meant that the word "person" did not embrace the unborn within the meaning of the Fourteenth Amendment. *Id.* That inference is transparently unwarranted.

It is now a common criticism of this analysis that most of the provisions of the Constitution noted by the Court plainly had adults in mind when employing the word "person." [11] This does not mean that children are not persons under the Fourteenth Amendment. The Twenty-Second Amendment, for another example, prohibits any "person" from being elected to the Office of President more than twice. Such a use of the word hardly precludes application of "person" in the Fourteenth Amendment to a human being who is not a natural-born citizen and not yet 35. Clearly, "[i]n 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." [12]

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[11] *E.g.*, Ely, *supra* note 4, at 925-6.

[12] Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. Ill. L. Rev. 1, 11-12.

Perhaps more strikingly, few of the usages cited by the *Roe* Court have any application to corporations. Yet the Fourteenth Amendment's "person" is expansive enough to encompass the business corporation, an entity that exists solely in the imagination of the law. *See Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886).[13] And in the words of two commentators, when *Roe* is considered in light of *Santa Clara*, it takes on a "hauntingly Orwellian" character: "something can be a person without being human, and can be human without being a person." [14] If the word "person" can be extended to embrace a corporation, it surely must include living human beings, like the unborn, whom it meets along the way.

2. *Pre-Roe Abortion Statutes Are Not Inconsistent With the Status of the Unborn as Persons Protected By the Fourteenth Amendment.*

None of the aspects of statutes regulating abortion, thought by the *Roe* majority to be inconsistent with "Fourteenth Amendment status" for the unborn, *Roe*, 410 U.S. at 157 n.54, is in fact at loggerheads with such status. One "inconsistency" *Roe* identified was an exception for abortions done to save the life of the mother.

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[13] As critics of *Santa Clara* have noted, the Court so stretched the term "person" in establishing corporate personhood that it went far beyond the purposes of the Fourteenth Amendment. Justice Black, for example, emphasized that "the amendment was intended to protect the life, liberty, and property of *human* beings." *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting) (emphasis in original). Nevertheless, the Court subsequently found constitutional categories to be so flexible that it has held the corporation to have First Amendment rights to freedom of speech. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

[14] East and Valentine, *Reconciling Santa Clara and Roe v. Wade: A Route to Supreme Court Recognition of Unborn Children as Constitutional Persons* in *Abortion and the Constitution* 90 (D. Horan, E. Grant, P. Cunningham eds. 1987).

But that exception is no more inconsistent with the personhood of the unborn than an exception from murder for homicides committed in self-defense [15] or out of legal necessity [16] is inconsistent with the personhood of the victim.[17] Indeed, it is hornbook law that "[o]ne human life may legally be terminated when doing so is necessary to preserve or protect another or others." *Steinberg v. Brown*, 321 F.Supp. 741, 747 (N.D. Ohio 1970).

The *Roe* majority also noted that the criminal penalty for abortion in the statute before the Court was less than the penalty for murder. *Roe*, 410 U.S. at 157 n.54. But that is hardly startling. The law has always distinguished among types of homicide and degrees of culpability of the actor.[18] Manslaughter, for example, is a distinct offense, and not a degree of murder. Yet a victim of manslaughter is no less a person because his killer ultimately is convicted of manslaughter instead of murder. Indeed such distinctions continue to develop with respect to "new" crimes, such as vehicular manslaughter, which is generally punished less severely than traditional manslaughter.[19]

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[15] *See* Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 180. *See also* Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. Rev. 1059, 1081-82 (1976); Destro, *supra* note 1, at 1256 n.30.

[16] *See* J. Hall, *General Principles of Criminal Law* 426 (2d ed. 1960). *See also* Byrn, *supra* note 6, at 853-54.

[17] Most abortion statutes, including the one at issue here, do not distinguish between direct abortion and indirect abortion resulting from, say, treatment of ectopic pregnancies.

[18] R. Perkins and R. Boyce, *Criminal Law* 46-139 (3d ed. 1982).

[19] W. LaFave and A. Scott, *Handbook on Criminal Law* at 593 (1972). *See also* Horan & Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in *Abortion and the Constitution*, *supra* note 14, at 73; Byrn, *supra* note 6, at 855; *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F.Supp. 1217, 1227 n.8 (E.D. La. 1970), *vacated for reconsideration in light of Roe v. Wade*, 412 U.S. 902 (1973) (the fact that murder and abortion are distinct offenses in Louisiana does not mean the legislature considered the unborn not to be "forms of human life").

The fact that, traditionally, the mother has rarely been considered a principal or accomplice in the crime of abortion, *Roe*, 410 U.S. at 157 n.54, is likewise beside the point. Not holding the mother as a principal of, or accomplice in, abortion has pragmatic, evidentiary roots. Working with only a primitive understanding of gestation, common law judges had difficulty determining if the child was alive before the abortion, or if the abortion caused the miscarriage. Obviously, if the mother was the defendant, rather than a witness, it could be very hard to prove that point.[20] And, in any event, the law has long tolerated "accomplices" who act under duress.[21] In sum, the status of the woman in criminal law hardly provides a reasoned basis for *Roe*'s conclusion that the Fourteenth Amendment cannot be read to embrace the unborn.

3. *Throughout Most of the 19th Century Abortion Was a Crime and Subject to Penal Sanctions.*

The *Roe* majority also believed that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Roe*, 410 U.S. at 158. That conclusion, however, misapprehends the state of 19th century abortion law and its relationship to scientific knowledge and technology.[22]

At the outset of the 19th century, abortion law was based entirely on the received English common law, under which abortion of a woman "quick with child" was

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[20] Byrn, *supra* note 6, at 845-55; Dellapenna, *The History of Abortion: Technology, Mortality, and Law*, 40 U. Pitt. L. Rev. 359, 379 (1979).

[21] *See e.g.*, R. Perkins and R. Boyce, *supra* note 18, at 1054-72 (3d ed. 1982); J. Hall, *supra* note 16, at 415-552.

[22] *See* Dellapenna, *supra* note 20, at 363-64 (noting the failure of the Court to discuss the levels of technology at relevant stages of history). The ovum would not even be discovered until 1827. *Id.* at 370.

a common law crime.[23] The underlying principle was clear: "Life is . . . a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 W. Blackstone, *Commentaries* 129.

Early 19th century American case law, faithful to Blackstone's precept, considered abortion of a quickened fetus to be a common law crime. For example, in a Mississippi case holding that a slaveowner could be prosecuted for the murder of a slave, the court observed:

> The taking away of the life of a reasonable creature under the King's peace, with malice aforethought, express or implied, is murder at common law. Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase reasonable creature is a human being, for the killing of a lunatic, an idiot, *or even a child unborn*, is murder, as much as killing a philosopher, and has not the slave as much reason as a lunatic, an idiot or an unborn child.

State v. Jones, 2 Miss. (1 Walker) 39 (1820) (emphasis added).[24]

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[23] *See* E. Coke, *Third Institute* 50 (1644) (abortion of a woman "quick with child" is a "great misprison"); 1 M. Hale, *History of Pleas of the Crown* 433 (1736) (abortion, though not murder or manslaughter, is a "great crime"); 1 W. Hawkins, *A Treatise of the Pleas of the Crown*, ch. 31, § 16 (7th ed. 1795) (agreeing with Coke); 4 W. Blackstone, *Commentaries* 198. *See generally* Byrn, *supra* note 6, at 819-24.

Relying on an article by Prof. Cyril Means analyzing the fragmentary record of two 14th century cases, the *Roe* majority doubted that post-quickening abortion was "firmly established as a common law crime" even in the face of this historical record. *Roe*, 410 U.S. at 135-37. Prof. Means' analysis has since been discredited. *See* Byrn, *supra* note 6, at 817-19; Dellapenna, *supra* note 20, at 366-67, 369-71, 387-89; Destro, *supra* note 1, at 1268-71.

[24] *See also Mills v. Commonwealth*, 13 Pa. 630, 633-34 (1850) ("The moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . . There was therefore a crime at common law sufficiently set forth and

Subsequent scientific developments, notably the discovery of the ovum in 1827, convinced the medical profession that a distinct human life was formed at conception.[25] These physicians quickly mounted a highly-successful campaign to tighten abortion laws to protect the unborn. Thus, "[t]he anti-abortion policies sustained in the United States through the first two-thirds of the twentieth century had their formal legislative origins, for the most part, in the wave of tough laws passed in the wake of the doctors' crusade and the public response their campaign evoked."[26] Consequently, most states enacted strict abortion laws,[27] with the preservation of unborn life as one of their major purposes.[28]

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charged in the indictment."); *State v. Slagle*, 83 N.C. 630, 632 (1880). For a review of the 19th century case law, *see* Gorby, *supra* note 12, at 15.

[25] Dellapenna, *supra* note 20, at 404. Indeed, more modern technological developments appear only to have confirmed this judgment. *See* Editorial, *A New Ethnic for Medicine and Society*, California Medicine, Sept. 1970, at 68, quoted in Destro, *supra* note 1, at 1255 (pointing out that the argument over abortion smacks of "a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous, whether intra- or extra-uterine until death.").

[26] J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 200 (1978). *See also* Bryn, *supra* note 6, at 832 (1867 condemnation by the Medical Society of New York of abortion at every stage of gestation as murder); *Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., Vol. 1, at 679-84 (1982); *Roe*, 410 U.S. at 141-42.

[27] For a list of the statutes enacted at the time of the adoption of the Fourteenth Amendment, see *Roe*, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting). *See also* J. Mohr, *supra* note 26, at 200 ("[M]ost of the legislation passed between 1860 and 1880 explicitly accepted the [regular physicians'] assertions that the interruption of gestation at any point in a pregnancy should be a crime and that the state itself should try actively to restrict the practice of abortion.").

[28] J. Noonan, *A Private Choice* 51-52 (1979); Gorby, *supra* note 12, at 15-19 (reviewing abortion caselaw, including cases apply-

Properly understood, history provides no basis for *Roe*'s belief that 19th century abortion practices were "far freer" than those of the early 1970's. To be sure, the 19th century saw significant change in abortion laws, but that change, spurred by scientific discovery, was in the direction of protecting the unborn at every stage of gestation.

B. The Letter and Intent of the Fourteenth Amendment Mandate Protection of the Unborn as Persons.

The text of the Fourteenth Amendment itself sets out only two classes of individual: "citizens," who must be born or naturalized in the United States and for whom the privileges and immunities of citizenship are assured, and "persons," a broader class not circumscribed by any specified criteria and for whom the fundamental rights of life, liberty, and property are guaranteed. U.S. Const. amend. XIV, § 1. Lacking any affirmative command to exclude unborn human children from the Fourteenth Amendment's guarantee of the right to life, the Court should apply "the rule that constitutional provisions for the security of person and property should be liberally construed," *Boyd v. United States*, 116 U.S. 616, 635 (1886), and give the word "person" in the Fourteenth Amendment the broadest possible reading.[20] *Cf. Levy v. Louisiana*, 391 U.S. 68, 70 (1968) ("We start from the premise that illegitimate children are not 'nonper-

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ing statutes, and concluding that concern for the unborn was at least one motivating factor in each case); Dellapenna, *supra* note 20, at 400 (observing that surgical procedures other than abortion had comparable mortality rates from the same causes as abortion, infection and shock, but were not banned).

[20] Such a construction seems most fitting in a case involving the right to life, that most fundamental "right to have rights." *Furman v. Georgia*, 408 U.S. 238, 272 (1972) (Brennan, J., concurring). *See also* J. Noonan, *supra* note 28, at 18 (All rights are premised on humanity, and so "[n]o discrete and insular minority is safe if all its liberties can be removed by defining it as subhuman.").

sons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."); *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968) ("To say that the test of equal protection should be the 'legal' rather than the biological relationship [of illegitimate children to their parents] is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.").

Moreover, such a construction of the word "person" in Section 1 of the Fourteenth Amendment is consistent with the intent of the Amendment's framers and ratifiers. Congressman John Bingham, the sponsor of Section 1 in the House of Representatives, intended it to have "universal" application, *Cong. Globe*, 39th Cong., 1st Sess. 1089 (1866), guaranteeing the rights of "any human being." *Id.* The Amendment would thus extend the protections of the law to "common humanity." *Cong. Globe*, 40th Cong., 1st Sess. 514 (1868). Bingham's test for the law's coverage was straightforward: "the only question to be asked of the creature claiming its protection is this: Is he a man?" *Cong. Globe*, 40th Cong., 1st Sess. 542 (1867). Similarly, the Amendment's Senate sponsor, Senator Jacob Howard, felt that it would apply to the "humblest, the poorest, the most despised of the human race." *Cong. Globe*, 39th Cong., 1st Sess. 2766 (1866). Congress contemplated the broadest scope for the word "person" in the due process and equal protection clauses, postulating neither a class of humans that could be excluded nor any governmental power to make such exclusions.[30]

To be sure, the legislative history of the Amendment makes no explicit reference to the unborn or to abortion.

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[30] *See Hearings on S.158, supra* note 26, at 479 (statement of Prof. Victor Rosenblum), 663-67; Destro, *supra* note 1, at 1286-91.

Yet by its adoption in 1868, every state used its criminal law to regulate abortion, and generally regarded the unborn as legal persons.[31] In that legal milieu, the Amendment's authors, if asked, would almost certainly have considered the word "person" to include an unborn child.[32] At a minimum, the expansive language its framers used both in the Amendment and in their explanations of what they were trying to accomplish suggests the opposite of an intent to exclude any particular class of persons from coverage, much less to overturn in one stroke newly-tightened state abortion laws.[33] On the

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[31] The courts recognized this strong anti-abortion attitude. *See, e.g., Smith v. State*, 33 Me. 46 (1851); *State v. Howard*, 32 Vt. 380 (1859). *See generally*, Destro, *supra* note 1, at 1289-91. Even a 19th century case cited by *Roe* as an early right of privacy precedent, *Union Pacific R.R. v. Botsford*, 141 U.S. 250 (1891), is consistent with the 19th century concern for the unborn child. *Botsford* held that the privacy of a female plaintiff in a personal injury action precluded a court from ordering a medical examination of her without statutory authority. The Court pointed to two exceptions in which a court has inherent authority to order such an examination, one of which is relevant here. "The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother." *Id.* at 253.

[32] J. Noonan, *supra* note 28, at 6-7. Other legislation passed by the Congress in the 1860's and 1870's, when many of the leading proponents of the Thirteenth and Fourteenth Amendments were still serving, suggests affirmative congressional participation in the anti-abortion mood and legislation so common in the 19th century. Particular examples are the 1866 Assimilative Crimes Act, 14 Stat. 13 (1866), which made state law, including abortion statutes, applicable in federal enclaves, and the 1873 "Act for the Suppression of Trade in, and Circulation of . . . Articles of immoral Use," 17 Stat. 598 (1873), which made it a misdemeanor to sell in those enclaves, federal territories, and the District of Columbia drugs or articles "for causing unlawful abortion." *Hearing on S.158*, *supra* note 26, at 686-90.

[33] *See* Destro, *supra* note 1, at 1289-90 ("In light of the contemporary feeling that abortion involved the taking of human life,

contrary, the anti-abortion feeling of the period in which the Fourteenth Amendment was proposed and ratified is hard to overstate. "[N]ot one statement by any nineteenth-century commentator can be found which was in any way sympathetic to women desiring abortions." [34]

Ultimately, then, *Roe*'s effort to build an analytical framework on an unborn child's "capability of meaningful life outside the mother's womb," *Roe*, 410 U.S. at 163, injects into judicial decisionmaking an analysis alien to the Fourteenth Amendment. When a human life becomes "meaningful," or when it loses its "meaning," [35] are subjective questions of value that look beyond the physical existence of a human being.[36] However illuminating such philosophical inquiry may be, the framers embodied in the Fourteenth Amendment a more fundamental threshold of value that must be applied by the courts and that is not subject to *ad hoc* modification under the influence of such extrinsic value systems.

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it would be incongruous to claim that the authors of the fourteenth amendment intended to exclude the unborn, and that they considered abortion to be part of the liberty protected by the amendment.").

[34] Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 Population Studies 53, 56 (1974). *See also Hearings on S.158, supra* note 26, at 478 (statement of Prof. Rosenblum) (there was no organized opposition to the physicians' crusade to tighten abortion laws).

[35] For an example of such a discussion of the "meaningfulness" of human life, *see* Destro, *supra* note 1, at 1330 (summarizing the Senate testimony of a state legislator, supporting legalization of euthanasia, who questioned the "benefit" of the lives of 1500 retarded individuals in his state's mental institutions, individuals "who never had a rational thought").

[36] For a discussion of the distinction between the "scientific question" and the "value question," *see* Staff of Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess., *Report on the Human Life Bill—S.158* at 3-5 (Comm. Print 1981).

Securing the interest of the unborn in life on the same Fourteenth Amendment foundation as the right to life of all human beings would return this Court to the neutral and balanced framework of adjudication provided by the Constitution. It would harmonize this Court's understanding of human beings and of Fourteenth Amendment "persons." And it would do so on the strength of a simple insight: if a being is human, as an unborn child is, he is a person protected by the terms of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Eighth Circuit should be reversed, and *Roe v. Wade* should be overruled.

Respectfully submitted,

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