Nos. 91-744 and 91-902

In the Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, ET AL.,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, ET AL.,
Respondents and Cross-Petitioners.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF CATHOLICS UNITED FOR LIFE, ORTHODOX CHRISTIANS FOR LIFE, NATIONAL ORGANIZATION OF EPISCOPALIANS FOR LIFE, PRESBYTERIANS PRO-LIFE, AMERICAN BAPTIST FRIENDS OF LIFE, BAPTISTS FOR LIFE, LUTHERANS FOR LIFE, WELS LUTHERANS FOR LIFE, UNITED CHURCH OF CHRIST FRIENDS FOR LIFE, DISCIPLES FOR LIFE, NAZARENES FOR LIFE, TASK FORCE OF UNITED METHODISTS ON ABORTION AND SEXUALITY, CONCERNED WOMEN FOR AMERICA, THE AMERICAN CENTER FOR LAW AND JUSTICE, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND THE CHRISTIAN ACTION COUNCIL AS AMICI CURIAE IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

THOMAS PATRICK MONAGHAN
JAY ALAN SEKULOW
WALTER M. WEBER
(Counsel of record)
C. PETER THOMAS S. CORNELL
JAMES E. MURPHY
Free Speech Advocates
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

THOMAS A. GLESSNER
Christian Action Council
101 W. Broad St., Suite 500
Falls Church, VA 22046
Attorneys for Amici Curiae

Of Counsel:

CHARLES E. RICE
Notre Dame Law School
Notre Dame, IN 46556

MICHAEL J. LAIRD
608 S. Walnut Street
Arlington Heights, IL 60006

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Catholics United for Life

Catholics United for Life (CUL) is the pro-life apostolate of the St. Martin de Porres Dominican Community. Formed in 1974, CUL has twenty-two affiliates across the country, and promotes sidewalk counseling, a technique it developed for saving babies from abortion. Sidewalk counselors work to save each individual baby threatened by abortion — through prayer, persuasion, offers of assistance, and distribution of literature. CUL also supplies literature on a national level to promote respect for all human life.

Orthodox Christians for Life

Orthodox Christians for Life is a religious-educational prolife organization consisting of members from all jurisdictions of the Eastern Orthodox Church in the United States and Canada. It was founded and functions in a spirit of synergistic cooperation with the hierarchy, clergy, and laity of the Orthodox Church regardless of jurisdiction or geographical location. The organization supports the doctrines and canons of the Church. Its activities have included the recent coordination and creation of an Amicus Brief submitted to the United States Supreme Court on behalf of the Holy Orthodox Church in *Webster v. Reproductive Health Services* (No. 88-605).

In its moral teachings, the Orthodox Church has had a long and continuous history of outspoken condemnation of abortion which dates back to Apostolic times. In fact, the humanity of the unborn child, his "personhood," and his possession of a soul from the moment of conception have been universally understood in the Eastern Church from the earliest times; these understandings remain unchanged and unchallenged in Orthodox theology to this day.

The Holy Orthodox Church remains a unique witness to historical Christianity's understanding of the sacredness of human life: that the unborn are indeed "persons" and that abortion is considered an act of premeditated murder. Orthodox Chris-

tians for Life supports and advocates these historical positions and promotes them not only to the faithful, but to the secular culture at large.

National Organization of Episcopalians for Life

National Organization of Episcopalians for Life Research and Education Foundation, Inc. (NOEL), a non-profit Maryland corporation with national offices in Fairfax, Virginia, is a general organization of the Episcopal Church. NOEL's purposes affirm the sacredness and the right to life of all human beings from conception to natural death. NOEL supports the 1988 General Convention Resolution of the Episcopal Church which "emphatically oppose[s] abortion as a means of birth control, family planning, sex selection or any reason of mere convenience," promotes alternatives to abortion, including adoption, and assists those faced with problem pregnancies through its 121 chapters in 36 states.

Presbyterians Pro-Life

Presbyterians Pro-Life is organized within the Presbyterian Church (USA), a denomination with nearly three million members. Its objectives are to proclaim the Church's obligation to protect all innocent human life from conception to natural death and to support women in crisis pregnancies by offering alternatives to abortion. It is governed by a board of directors of lay men and women and pastors, all members of the Presbyterian Church (USA). It has a network of local chapters throughout the denomination and publishes a quarterly newsletter that reaches 25,000 families and churches.

American Baptist Friends of Life

American Baptist Friends of Life is a pro-life advocacy organization within the American Baptist Churches/USA, representing the pro-life position of a large percentage of American Baptists. Directed by an eight member executive committee, it publishes a regular newsletter and is taking leadership in the implementation of its new denominational resolution on abortion passed in June of 1988 which states, "as American Baptists, we oppose abortion as a means of avoiding responsibility for conception."

Baptists for Life

Baptists for Life is a Christian pro-life organization representing independent Baptist Churches throughout the United States with main offices in Grand Rapids, Michigan. Baptists for Life believes in the sacredness of human life at every stage of biological development and in its value throughout the life continuum. It exists to provide alternatives to abortion through the over 2,000 church congregations which it represents.

Lutherans For Life

Lutherans For Life is a national, pan-Lutheran, pro-life organization founded in 1978. In addition to individual members, there are some 280 local chapters across North America engaged in a wide variety of educational and compassionate efforts.

Lutherans For Life believes that the Church is compelled by God's Word to speak and act on behalf of those who are vulnerable and defenseless. The crisis of our time is the repudiation of Biblical truth manifested in the wanton destruction of innocent human life through legalized abortion-on-demand and the growing threat to the lives of others through legalized assisted suicide and euthanasia. Therefore, as Lutherans For Life, we strive together to give witness, from the Biblical perspective, to the Church and society on these and related issues such as chastity, postabortion healing and family living.

LFL assists Lutheran individuals and congregations to work and witness for life. We produce a wide-variety of educational materials; publish a newsletter and magazine; host a national convention and numerous seminars and workshops. State and local chapters support a wide range of compassionate outreaches such as the post-abortion outreach *Healing Hearts* or the crisis pregnancy support ministries *The Guide Program* and *The Tender Shepherd Program*. LFL also produces a nationwide pro-life radio program on the *Jubilee Network* (TM).

WELS Lutherans for Life

WELS Lutherans for Life is para-synod organization in fellowship with the 440,000 member Wisconsin Evangelical

Lutheran Synod (WELS). WELS Lutherans for Life consists of 26 chapters and 20 congregational branches throughout the United States. WELS resolved at its 1979 synod convention that "the Holy Scriptures clearly teach that the living yet unborn are persons in the sight of God . . . and that we continue to urge our membership to make God's will in this matter known." WELS Lutherans for Life is that specialized ministry which seeks to make known God's will of life and to provide assistance to others in all life issues.

United Church of Christ Friends for Life

United Church of Christ Friends for Life is a duly constituted special interest group recognized by the General Synod of the United Church of Christ. Since the General Synod has taken a pro-choice/pro-abortion stand, UCC Friends for Life upholds the sanctity of human life from conception to natural death and encourages the Church to protect unborn children while providing abortion alternatives to women in crisis pregnancy. This belief is proclaimed in quarterly newsletters and a recently published book, *Affirming Life*. A growing pro-life network within the denomination works to educate its members and provide compassionate ministry.

Disciples for Life

Disciples for Life is a pro-life advocacy organization made up of members of the Christian Church (Disciples of Christ). It provides a monthly column in the publication: 'Disciple Renewal,' supplies educational materials to the church, and is establishing chapters throughout the denomination. Disciples for Life promotes the sanctity of human life and opposes abortion on demand.

The structure of the Christian Church (Disciples of Christ) is such that the official statements and actions of the highest (or general) level does not necessarily reflect the diversity of its one million members; it is a denomination that emphasizes freedom and autonomy to its members and churches. Its general level endorsement for abortion on demand is a position at odds with many in the church.

Nazarenes For Life

Nazarenes For Life is composed of laymen who have come together to support the pro-life stand that we see the Scriptures reveal, and which the manual of the Church of the Nazarene supports. We therefore have accepted the challenge to become involved in educating the church on pro-life and pro-family issues, supporting existing pro-life organizations within our area, and providing a support network to women and families in need.

To fulfill this purpose, we have worked in many areas including the following:

1. Invited guest speakers, sponsored seminars, classes, and special presentations to large and small groups.
2. Supported homes for pregnant women and Crisis Pregnancy Centers.
3. Supplied literature and videos on abortion, abstinence, sexually transmitted diseases, and help for the post-abortal woman.
4. Actively counseled women in crisis pregnancy as well as women suffering from past abortions.
5. Worked to educate pastors, church leaders, and laymen on the realities of abortion in today's world, and on the personhood and humanity of the unborn.
6. Encouraged a more active role by the church body in taking a stand on the moral issues of our day.

Task Force of United Methodists on Abortion and Sexuality

The Task Force of United Methodists on Abortion and Sexuality is a national network of over 5,800 pastors, theologians, churches, and laity dedicated to minister to the deepening problems of abortion recidivism and abortion-as-contraception. The view that "life does not begin until live birth" does not represent the position of a large segment of the United Methodist Church. According to our Discipline, only our General Conference speaks the position of the Church, *not* our General Board of Church and Society *nor* our Women's Division. Furthermore, it is recognized that our *Book of Discipline* is the primary source of

order and purpose in the Church, not our *Resolutions*. Since 1972, General Conference has asserted in the *Book of Discipline* "our belief in the sanctity of unborn human life." Then in 1988, General Conference stated in *Book of Discipline* paragraph 71G that "We recognize tragic conflicts of life with life that may justify abortion and in such cases support the legal option of abortion under proper medical procedures. We cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection." That abortion involves human life before birth is signified by the phrase "conflicts of *life* with *life*" (emphasis added). That abortion should be restricted to minimize indiscriminate practice is signified by saying that "we cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection."

Concerned Women for America

Concerned Women for America ("CWA") is an national, nonprofit organization representing approximately 600,000 people. CWA's purpose is as follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

One of the foremost concerns and desires of CWA is to protect the lives of the unborn.

American Center for Law and Justice

The American Center for Law and Justice is a national public interest law firm, chartered to enter the legal arena on issues of a broad public interest. The American Center has members in all fifty States. Attorneys from every State of the Union have affiliated with the American Center, to assist in the restoration of pro-liberty, pro-life and pro-family values.

On behalf of its members, the American Center calls for an end to the systematic exploitation and victimization of women

by the abortion industry, and an end to the holocaust of the destruction of our progeny.

Catholic League for Religious and Civil Rights

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to combat all forms of religious prejudice and discrimination. The Catholic League is committed to ensuring the American people's continued enjoyment of the strong protection afforded religious liberty by the religion clauses of the First Amendment, and it supports the religious freedom rights of Catholics and others through a wide range of activities.

Christian Action Council

The Christian Action Council (CAC), founded in 1975 as a Protestant evangelical pro-life organization, is incorporated in the District of Columbia. Since its founding, the CAC has established 400 crisis pregnancy centers around the country. These crisis pregnancy centers serviced more than 200,000 women in 1990, providing them with support, encouragement, and necessary services to enable them to carry their babies to term. The CAC also counsels and supports women who suffer from the aftermath of abortion. CAC has 120 local CAC affiliate chapters that are activist-oriented and involved politically in promoting pro-life legislation and seeking a reversal of *Roe v. Wade.*

The parties to the present case have consented to the filing of this brief; letters granting consent are being filed with this Court.

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SUMMARY OF ARGUMENT

This case presents a challenge, by Planned Parenthood of Southeastern Pennsylvania and others (hereinafter, "Planned Parenthood"), to various Pennsylvania statutes alleged to violate a constitutional "right" to abortion. The threshold question, as the court below acknowledged, is the proper standard of review for analyzing alleged violations of a right to abortion. This standard, in turn, depends upon the status of the asserted abortion liberty and whether abortion is a constitutional right at all.

Planned Parenthood's challenge must fail. The fourteenth amendment secures no "right" to abortion. On the contrary, this amendment guarantees the right to life of all human beings, a right which is fundamentally inconsistent with any claim of an abortion right.

In *Roe v. Wade*, 410 U.S. 113 (1973), a majority of this Court held that unborn children are not "persons" with rights under the fourteenth amendment to the United States Constitution, and that the fourteenth amendment includes a right to abortion. As demonstrated in this amicus brief, the *Roe* Court erred on both counts. This Court should now repudiate the exclusion of unborn children from constitutional protection, and overrule *Roe v. Wade*.

The fifth and fourteenth amendments secure protection for the minimum human rights a state must respect: the rights to life,

liberty, and property. These amendments would be of little value, however, if those invoking their guarantees had to prove their explicit entitlement to constitutional protection. Rather, these amendments apply to all living human beings *by virtue of their humanity.*

No valid basis exists for excluding human beings conceived but not yet born from the protection afforded "persons" under the Constitution.

The *Roe* Court offered no defensible justification for such an exception. The alleged absence of precedents for the personhood of unborn children is not only incorrect, but also irrelevant in view of the similar dearth of such precedents for any other class of humans. The postnatal applicability of some provisions of the Constitution referring to "persons" does not imply that those excluded, e.g., from eligibility for Congress or for citizenship, are not persons; moreover, the assertedly ambiguous scope of other constitutional provisions referring to persons provides no basis for anything but circular arguments as to their scope. The alleged inconsistency of exceptions in state anti-abortion laws with the personhood of unborn children merely identifies possible constitutional defects in those laws; such defects do not justify the categorical exclusion, from all constitutional protection, of the class suffering discrimination. The supposed laxity of state abortion legislation in much of the nineteenth century is historically misleading because it ignores the fact that stringent anti-abortion legislation, largely representing a response to the scientific discovery of the humanity of unborn children from the moment of fertilization, preceded and accompanied passage of the fourteenth amendment. Furthermore, even prior to this legislation, abortion was illegal at common law and, until after the technical developments of the late eighteenth century, practically unavailable and virtually suicidal.

Contrary to *Roe*, history, science, logic, law, and justice all weigh in favor of including unborn children within the protection of the fifth and fourteenth amendments. The framers of those amendments clearly drew no distinction between "persons" and biological "human beings." Science demonstrates that each individual member of the human race begins life at the moment of fertilization. Logic supports no essential distinction between human beings on the basis

of their dwelling inside or outside the maternal womb, or on the basis of their status as "viable" or "nonviable" individuals. Legal consistency supports the rejection of distinctions, in matters of basic rights, between born and unborn children, as well as between "viable" and "nonviable" unborn children. Finally, the intrinsic sanctity of every human life compels the rejection of any arbitrary exclusion of unborn children from entitlement to the most basic of human rights.

This Court should overrule *Roe v. Wade*. Any challenge to the Pennsylvania statutes predicated upon a supposed right to abortion must accordingly fail.

A challenge to certain of the Pennsylvania statutes might rest on the basis that these statutes provide *insufficient* protection for unborn persons. Planned Parenthood has not raised or indicated any wish to raise such constitutional objections; nor would Planned Parenthood likely have standing to do so. The Attorney General of Pennsylvania, however, who is a party to this case, may have authority to vindicate the rights of unborn children. This Court should therefore uphold the personhood of children conceived but not yet born, and set this case for further briefing and reargument on the question of the proper disposition of this appeal.

ARGUMENT

Planned Parenthood challenges the state statutes at issue in this case on the basis of a supposed federal constitutional right to abortion under the fourteenth amendment. *See* Brief for Petitioners and Cross-Respondents §§ I, IV. The fourteenth amendment, however, contains no "right" to abort developing human offspring. On the contrary, that amendment explicitly secures the rights to life and to equal protection for every human being.

As demonstrated in this brief, the term "person" as used in the fourteenth and fifth amendments applies to all human beings, including those conceived but not yet born. Accordingly, there can be no "right" to abort such persons under either the fourteenth or the fifth amendments. Planned Parenthood's claim predicated upon such a nonexistent "right" must fail.

I. THE TERM "PERSON" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS INCLUDES ALL HUMAN BEINGS.

The fifth amendment to the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XI, § 1. These amendments secure protection for the basic, minimum human rights any government must respect. It is imperative that categories of human beings not be read out of the terms of these amendments.

The Constitution is not a legislative code designed to specify its application in every conceivable situation. "We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 532 (1870). Thus, the vitality of constitutional principles depends upon their straightforward and faithful application.

If there were ever a term whose broad scope demands unconditional respect, it is the term "person." For whoever is not a person lacks not only the privileges of citizenship, but even the barest minimum of human rights. A person need not have every right — prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution — but a non-person has *no* rights whatsoever. A non-person is no better off than property, entirely subject to the whim of the owner and whatever permissible regulation the government may deign to impose.

The constitutional protection for "persons" simply cannot function if each individual or class of human beings must prove explicit inclusion in some unwritten catalogue of "persons." Does the term "person" include mentally disabled individuals? There is not likely much, if any, explicit support for that particular proposition in the text, history, or early application of the fifth and fourteenth amendments. Yet these are certainly persons. *E.g., City of Cleburne v.*

Cleburne Living Center, Inc., 473 U.S. 432 (1985) (discrimination against mentally retarded persons triggers equal protection scrutiny). Does "person" include citizens of hostile nations? Children under the age of eighteen? Convicted misdemeanants or felons? Comatose individuals? Each of these classes of human beings lacks either the legal or physical ability to exercise certain rights, yet each is unquestionably a class of persons. This is so, not because members of each class can *prove* their particular inclusion under the fifth and fourteenth amendments, but because they are included *by virtue of their humanity*.[1] "They are humans, live, and have their being." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing illegitimate children). Therefore, "[t]hey are clearly 'persons'" within the meaning of the Constitution. *Id.*

Human offspring conceived but not yet born are likewise "humans, live, and have their being." They are "a form of human life," *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion), as are infants, toddlers, teens, adults, and the elderly. As human beings, prenatal children do not need to overcome any additional hurdles in order to establish their right to inclusion within the term "person" as used in the Constitution.[2] Nor

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[1] The importance of this fundamental point cannot be stressed enough:

> The idea of human rights is based upon the notion that certain rights obtain *by virtue of being human* and *may be conditioned upon no other requirement*. An attempt to restrict entitlement to those rights by the creation of criteria other than mere humanness is incompatible with the idea of "human rights" . . . .

Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1, 10 n.58 (emphasis added).

[2] As the Supreme Judicial Court of Massachusetts explained in a different context,

> In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb. . . . By the use of the term[] "person" . . . the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.

Commonwealth v. Cass, 392 Mass. 799, _____, 467 N.E.2d 1324, 1325 (1984) (construing vehicular homicide statute).

does any justification exist for the arbitrary exclusion of such children from the protection of basic human rights under the Constitution.

II. THERE IS NO JUSTIFICATION FOR EXCLUDING FROM THE TERM "PERSON" THE CLASS OF HUMAN BEINGS CONCEIVED BUT NOT YET BORN.

In *Roe v. Wade*, 410 U.S. 113, 158 (1973), a majority of this Court read into the term "person" in the fourteenth amendment an exception for unborn children.[3] There is no valid justification for the creation of such an exception.

A. *Roe v. Wade* Gave No Valid Basis for Creating an Exception for Unborn Children.

The *Roe* Court made several arguments to support its conclusion that the word "person" does not include the unborn. None of these arguments withstands analysis.

1. Alleged absence of precedent

First, the Court observed that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. at 157.

This observation is factually incorrect. In *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970) (three-judge court), the court rejected a challenge to Ohio's abortion laws, holding that the implied right to privacy

> must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amendments that no *person* shall be deprived of life without due process of law. The difference between this case and *Griswold* [overturning a ban on the use of contraceptives] is clearly apparent, for *here there is an embryo or fetus* incapable of protecting itself.

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[3] "The primary question presented in *Roe* was this: may the Court create substantive exceptions to the enjoyment of fundamental rights where none appear in the Constitution?" Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250, 1288 (1975).

Id. at 745-46 (emphasis added). As the court in *Steinberg* explained, "a new life comes into being with the union of human egg and sperm cells," *id.* at 746, and "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it," *id.* at 746-47.

Moreover, as a legal matter, an absence or dearth of case support for unborn personhood is irrelevant. There may well not be any cases, for example, holding newborn infants to be persons. This obviously does not mean, however, that such children are beyond the scope of the fourteenth or fifth amendments. As discussed above, such a cramped construction of the text would largely negate the effect of these amendments.

2. Postnatal application of other constitutional provisions

Second, the Court noted that the use of the word person in "nearly all" other parts of the Constitution "is such that it has application only postnatally. None [of these uses] indicates, with any assurance, that it has any possible prenatal application." *Roe*, 410 U.S. at 157 (footnote omitted). But this simply begs the question. Those provisions that *cannot* apply prenatally explicitly limit the class of human beings to which they apply. *E.g.*, U.S. Const. art. I, § 2, cl. 2 (person must be at least age twenty-five to be a Representative); *id.* art. I, § 3, cl. 3 (person must be at least age thirty to be a Senator); *id.* amend. XIV, § 1 (person who is born, if born in the United States, is a citizen). Such exclusions obviously do not imply that those excluded (e.g., with respect to Representatives, those under age twenty-five) are not persons. Moreover, those provisions — like the fifth and fourteenth amendments — that *can* apply to unborn children,[4] *e.g.*, *id.* art. I, § 9, cl. 1 (tax on importation of

[4] It bears mention that the holding of an office need not, in theory, be limited to competent adults. History, for example, has seen numerous infants wear the royal crown. Furthermore, unborn children have been explicitly recognized as capable of serving as the executor of an estate. H. Storer, *Criminal Abortion in America* 92 (1860) ("an infant in utero . . . at every stage of [gestation], no matter how early, . . . may be appointed executor . . . "). *Accord Thellusson v. Woodford*, 31 Eng. Rep. 117, 163 (Ch. 1798).

"persons"); *id.* amend. IV (security of the person against unreasonable searches and seizures), contain no exclusion for any particular class of children, born or unborn.

3. Apparent inconsistency of state anti-abortion laws with personhood of unborn children

Third, the Court pointed to allegedly fatal inconsistencies in the abortion laws of Texas and other states.

> [I]f the fetus is a person who is not to be deprived of life without due process of law, . . . does not the Texas exception [for abortion necessary to save the life of the mother] appear to be out of line with the Amendment's command? . . .
>
> . . . If the fetus is a person, why is the woman not a principal or an accomplice [to an unlawful abortion]? . . . If the fetus is a person, may the penalties be different [for abortion and first degree murder]?

Roe, 410 U.S. at 157 n.54.

Here the *Roe* Court confused two distinct issues: the constitutionality of the Texas abortion laws, and the constitutional personhood of unborn children.

The government, of course, may not exclude from the general protection of the criminal law a particular class of innocent persons.[5] This fundamental obligation does not disappear simply because the

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[5] Whether an exception for the life of the mother would entail a denial of equal protection would depend upon the scope of that exception. There is a grave moral and legal difference between, on the one hand, allowing a physician to remove an ectopic pregnancy or cancerous uterus from a pregnant woman, with the death of her unborn child occurring as an unintended effect of that necessary operation, and, on the other hand, giving permission for the direct, intentional killing of the unborn child whenever such is claimed to be necessary to save the mother's life.

The total exemption of the pregnant woman herself from the scope of criminal prohibitions against abortion would, like total parental immunity from prosecution for serious child abuse, be unconstitutional. *But cf.* Gorby, *supra* note 1, at 20 (lenient treatment of women who abort and reduced levels

(cont'd on next page)

government fails to comply with it. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), for example, it would have been outrageous to suggest that the long history and widespread practice of segregated public education meant that black people were not persons. On the contrary, this segregation represented a constitutional violation.

Similarly, the denial of equal statutory treatment to unborn children does not support a categorical denial of constitutional protection to such children. As the Court emphasized in *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*), "the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them." If the state or federal government in fact denies due process or equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny that members of the victimized class are persons. To hold otherwise would be to deny the possibility of unconstitutional action by government, and to turn civil rights litigation upside down.

4. Alleged laxity of nineteenth century abortion laws

Fourth, the Court cited its "observation" that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer" than in 1973, *Roe*, 410 U.S. at 158, presumably as evidence that the framers and those who ratified the fourteenth amendment did not regard unborn children as human persons.

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of punishment for offense of abortion not inconsistent with personhood of unborn victim of abortion); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (sustaining, against equal protection challenge, statutory rape law that only applied to male offenders). Prosecutorial discretion, of course, is fully capable of handling situations in which the mother is more accurately considered a victim instead of an offender.

The primary effect of holding the unborn child to be a person would be that the child could no longer be regarded as beyond the equal protection of the criminal law. In other words, if all of the elements of a statute defining an offense against a person were satisfied, the statute could not be held inapplicable simply because the victim was not yet born.

The state may properly create a separate and additional offense of abortion which could apply without proof of pregnancy or causation of fetal death. *See infra* note 14.

On this point the *Roe* opinion refutes itself. The fourteenth amendment was adopted in 1868, precisely the time when the scientific discovery of the humanity of the unborn had become widely known, and precisely at the time when this discovery prompted vigorous opposition to abortion by means of numerous statutory bans. *See* 410 U.S. at 129 (observing that abortion laws in effect in 1973 "derive from statutory changes effected, for the most part, in the latter half of the 19th century"); *id.* at 141 (noting the "anti-abortion mood prevalent in this country in the late 19th century"); *id.* at 141-42 (noting that the concern of the medical profession for prenatal human life destroyed by abortion "may have played a significant role in the enactment of stringent criminal abortion legislation during that period"); *see also id.* at 174-77 (Rehnquist, J., dissenting) (noting the multiplicity of state and territorial anti-abortion laws at the time of the adoption of the fourteenth amendment).

Furthermore, the assumption by the *Roe* Court that abortion was freely and legally available, even in the early part of the nineteenth century, simply ignores reality. As Professor Joseph W. Dellapenna has demonstrated, the primitive state of medical technology meant that, prior to the late eighteenth century, abortion techniques were either ineffective or so dangerous as to be practically suicidal. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 371-76 (1979).[6] Thus, while abortion was indeed unlawful at common law, prosecutions were infrequent because they were unnecessary. Dellapenna, "Abortion and the Law," in *Abortion and the Constitution* 137, 146 (D. Horan, E. Grant & P. Cunningham eds. 1987).

> During this period, techniques to induce abortions were either magical, and hence punishable as witchcraft (whether they were successful or not), or extremely crude invasions of the woman's body, likely to be fatal to the woman as well as to the fetus. In the few cases where an abortionist was punished, it was for killing the mother. In fact,

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[6] It would therefore be nonsensical to claim that women had a legal "liberty to abort" during the period preceding enactment of the fifth amendment.

> there is no evidence of voluntary abortion during this time. Abortions, if they occurred, seem to have resulted from assaults upon women rather than by their choice. Even then, abortion prosecutions were hampered by ignorance of medical knowledge about the gestation process. The net result of these circumstances was that abortion was rare and the law did not have to deal with it because hanging the abortionist for killing the mother was sufficient punishment for the few cases that did arise.

Id. at 145 (footnotes omitted). The disposal of "unwanted" children was effectuated instead by infanticide. *Id.* (citing numerous authorities). When new abortion techniques finally became available in the late eighteenth century, the result was the initiation of anti-abortion legislation. *Id.* at 146. This legislative movement subsequently expanded in response to embryological discoveries that identified fertilization as the beginning of human life. *Id.* at 147.[7]

B. No Other Basis Exists For Creating an Exception for Unborn Children.

Roe failed to give any justification for reading an exception for unborn children into the scope of the term "person" as used in the fourteenth amendment. Nor does any valid justification appear from other sources. On the contrary, history, science, logic, law, and justice all militate against the imposition of any such arbitrary limitation on personhood as birth or viability.

1. The framers of the fourteenth amendment did not distinguish between "human beings" and "persons."

Roe v. Wade distinguished between human beings and persons, holding that unborn children were not persons even if they

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[7] Another scholar has analyzed the scope, terminology, penalty provisions, statutory classification and context, and history of anti-abortion legislation in the nineteenth century to demonstrate that "the legislatures ratifying the fourteenth amendment did consider human fetuses to be persons." Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29, 31 (1985) (providing extensive legal and historical analysis).

were human beings. 410 U.S. at 159 ("We need not resolve the difficult question of when life begins"). Such a distinction, however, was foreign to the men who proposed and adopted the fourteenth amendment.[8]

If one thing is overwhelmingly clear from the record of the debates leading up to and surrounding the thirteenth and fourteenth amendments and the post-war civil rights legislation, it is that the legislators considered personhood and biological humanity to be interchangeable terms.

Thus Representative Thaddeus Stevens, on the day the thirteenth amendment was declared ratified, proclaimed:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.*

Cong. Globe, 39th Cong., 1st Sess. 74 (1865) (emphasis added).

Likewise Representative John A. Bingham, author of section one of the fourteenth amendment, declared in reference to the fifth amendment the principle he viewed as fundamental:

> [T]he Constitution of the United States . . . declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and there-

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[8] The same conclusion applies to the framers of the fifth amendment. The founding fathers considered even slaves to be persons. *See* U.S. Const. art. I, § 2, cl. 3 (distinguishing between "free Persons" and "other Persons" for purposes of apportionment of taxes and legislators). There is no reason to believe that these same men, when adding the fifth amendment, denied the personhood of certain human beings. Indeed, the framers of the fourteenth amendment, who clearly repudiated the notion of a distinction between "persons" and "human beings," *see infra*, saw their work as the vindication, not the rejection, of the political theory of the framers of the Bill of Rights.

> fore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867) (emphasis added).

Representative James S. Brown, similarly, denied the notion that personhood required something more than human life.

> [D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels.

Cong. Globe, 38th Cong., 1st Sess. 1753 (1864).

Indeed, examples are legion to demonstrate the basic assumption of the framers and their contemporaries that "in the eyes of the Constitution, every *human being* within its sphere . . . from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).[9]

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[9] *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 77 (1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution"); *id.* at 322-23 (Sen. Trumbull) ("great object of securing to every human being within the jurisdiction of the Republic equal rights before the law"); *id.* at 1159 (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of human nature," and the most basic "right of human nature [is] the right to exist"); *id.* at 1151 (Rep. Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, *be he old or be he young*, be he innocent or he criminal, be he learned or be he ignorant") (emphasis added).

There is, therefore, no warrant for the conclusion that a class of human beings might be excluded from the persons protected under the fourteenth amendment. As forcefully stated by Representative Joshua R. Giddings,

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live . . .
>
> . . . If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders?

Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (emphasis in original).

2. Science rejects the exclusion of unborn children from the class of human beings.

Science does not purport to identify the value society should place upon human life. Science does indisputably show, however, that each individual human organism begins life at the moment of fertilization. *See generally* Krimmel & Foley, *Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing its Destruction*, 46 U. Cin. L. Rev. 725, 744-62 (1977) (analysis of biochemical and genetic evidence shows that the life of a specific human being begins at conception). Thus science offers no valid basis for excluding prenatal human life from the category of "persons" protected under the Constitution.

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no

> nonarbitrary line separating a fetus from a child or, indeed, an adult human being.

Thornburgh v. American College of Obstets. & Gynecs., 476 U.S. 747, 792 (1986) (White, J., joined by Rehnquist, J., dissenting).

This principle of continuous development is not unique to human beings.

> In biology and in medicine, it is an accepted fact that the life of *any* individual organism reproducing by sexual reproduction begins at conception, or fertilization — the time when the egg cell from the female and sperm cell from the male join to form a single new cell, the zygote. The zygote is the starting cell of the new organism.
>
> . . . It is important to also remember . . . that like begets like. In other words, the zygote is always a member of the biological species of its parents from the time of fertilization throughout all of its life, before as well as after birth. No study or experiment has ever refuted these scientific facts, and no competent scientist denies them.

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. 14, 16 (1982) (testimony of Dr. Micheline Mathews-Roth, principal research associate, Dept. of Medicine, Harvard Medical School) (emphasis added). The conclusion in the case of human life rests, therefore, not only upon human embryological research, but upon the findings of a broad area of biological study.

> So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life.

Id. at 17. *Accord* W. Hamilton & H. Mossman, *Human Embryology* 14 (4th ed. 1972) ("the fusion of two germ cells . . . one, the spermatozoan from the male parent; the other, the ovum from the female parent . . . is the formation of the first cell of the new individual, the zygote"); L. Arey, *Developmental Anatomy* 55 (7th

ed. 1974) (union "of a male and female sex cell . . . definitely marks the beginning of a new individual"); K. Moore, *The Developing Human: Clinically Oriented Embryology* 1 (2d ed. 1977) (a zygote "results from fertilization of an oocyte by a sperm and is the beginning of human life").[10]

Science cannot identify a spiritual soul or assign a moral value to a given creature. Science does identify individual members of a particular species, such as homo sapiens. Unborn children are unquestionably individual members of this species, and thus the conclusions of science utterly reject the arbitrary exclusion of prenatal humans from the term "person."

3. Logic militates against the creation of an exception for unborn children in the term "person."

According to *Roe v. Wade*, unborn children are non-persons, and aborting such children is a constitutional right. But it is plainly absurd to draw so tenuous a border as birth (or, for that matter, viability) between what is a constitutional liberty and what is homicide.

First of all, the act of abortion itself cannot sensibly be what distinguishes between persons and non-persons. Presumably no member of this Court would deny that "a newborn infant, whether the product of a normal birth or an abortion," *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 503 n.10 (1983) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting), is a person under the fifth and fourteenth amendments.

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[10] *See also Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973):

> During fertilization, sperm and egg pool their nuclei and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

322 F. Supp. at 1252 (citations omitted). *Accord Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1223 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973); *Steinberg v. Brown*, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970) (three-judge court); *Presley v. Newport Hosp.*, 117 R.I. 177, ___, 365 A.2d 748, 751 (1976).

The point of detachment from the mother — whether by normal birth, induced delivery, or abortion — likewise fails as a logical point for creating an exception to personhood. For a considerable period prior to birth, the unborn child is viable, and thus capable of surviving premature delivery. The child of seven or eight months' gestation who still resides in the maternal womb is essentially indistinguishable from the child of identical age who has been born prematurely.

The fourteenth amendment does distinguish between born and unborn children of the same age for purposes of citizenship. *See* U.S. Const. amend. XIV, § 1 ("persons born . . . in the United States . . . are citizens"). But citizenship is a political classification the boundaries of which are necessarily arbitrary.

Personhood, in contrast, entitles an individual to the basic, minimal protections accorded to humanity. Whether the mother in labor while traveling interstate gives birth in Texas today or Mexico tomorrow is a question with political ramifications for the child; such incidental details, however, cannot reasonably determine whether the child may be slain. "No governmental power exists to say that a viable fetus should not have every protection required to preserve its life." *Thornburgh*, 476 U.S. at 784 (Burger, C.J., dissenting). As Senator Arthur S. Boreman explained in regard to the then recently enacted protections of the fourteenth amendment:

> This . . . is not confined to citizens of the United States, but it includes every person that is found within these States, and guaranties to all life, liberty, and property, and equal protection of the laws. . . . It is not restricted to guarantying the right of a "citizen" . . . but it extends to every "person," whether he has come from another State or not, to *every person residing anywhere, everywhere*, within the United States. So that while, before this amendment, if there was any question whether there were *any class of persons* in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject.

Cong. Globe, 42nd Cong., 1st Sess. App. 229 (1871) (emphasis added).

The total meaninglessness of birth as a criterion for personhood is more apparent today than ever, when induced, "scheduled" deliveries are commonplace, when babies are removed from the womb for surgery and then replaced within their mothers, and when irremediably harmed mothers are sustained on life support systems solely to await the delivery of the uninjured child within the womb.[11] Birth changes *where* the person is, not *what* the person is.

Nor does the concept of viability supply a logical alternative to birth as a boundary for excluding some unborn children from personhood.

> If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable *non sequitur.*

Presley v. Newport Hosp., 117 R.I. 177, ___, 365 A.2d 748, 754 (1976).

Members of this Court have already strongly criticized reliance upon the concept of viability for drawing constitutional lines. *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (plurality opinion). *See, e.g., City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 456-58 (1983) (O'Connor, J., joined by White and Rehnquist, JJ., dissenting) (point of viability is unstable because tied to contemporaneous

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[11] Already *in vitro* fertilization, embryonic transfer, and surrogate motherhood have demonstrated beyond all doubt the fundamental biological independence of the newly conceived child from any particular woman, genetic mother or not, and the capacity of an unborn child to live outside of the womb altogether, if only for the initial stages of development. It is now clear, in other words, that intrauterine gestation is not even the first stage of life, but is merely an intermediate stage subject to technical manipulation regarding both its duration and the identity of the woman who bears the child.

state of medical technology, and is therefore unsuitable as a basis for judicial decision making). Justice White, in his dissent in *Thornburgh*, elaborated upon this point with regard to the state interest in protecting human life:

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

476 U.S. at 795 (White, J., joined by Rehnquist, J., dissenting) (footnote omitted). The same rationale applies to constitutional personhood, i.e., the claim to minimal protection of basic human rights. One's capacity for survival is "constitutionally irrelevant" because "the character of the entity does not change at the point of viability."

The very notion of viability as a criterion for denying legal protection is gravely flawed. Viability is not a transcendent concept — it refers to conditional circumstances. The Arctic explorer is viable *if* sufficiently clothed. The serious diabetic is viable *if* properly treated. The newborn, full-term infant is viable *if* fed and nurtured. And the unborn child is viable *if* not prematurely expelled from the necessary environment, be it a petri dish or a womb. To deny protection on the basis of one's need for protection is no more sensible than to deny those who cannot swim the right to stay on board a ship. *Roe* stripped protection from precisely those who most need the minimum safeguards of the Constitution. This is topsy-turvy jurisprudence.

4. Legal consistency would not be served by the exclusion of unborn children from the protection of the fifth and fourteenth amendments.

The integrity of the law is not served, but rather is harmed, by the arbitrary exclusion of unborn children from constitutional protection.[12] The history of legal developments of the past century and a half regarding prenatal human life has been a history of increasing recognition and protection of unborn children. The creation of an exception to the fourteenth or fifth amendments which would deny protection to such children represents a reversion to outmoded and unworkable legal fictions, and leads to disrespect for the law.

The ordinary legal guardians of the civil rights to life, liberty, and property are the criminal law and the law of torts. In both of these areas of law, courts and litigants have struggled with, and to a large extent overcome, the absurdity and injustice of arbitrary distinctions between born and unborn children, and between viable and nonviable unborn children.

The common law is considerably older than contemporary knowledge of prenatal human development. Ignorance of fertilization and the nature of the human embryo consequently left its marks on the common law. In particular, the considerable problems of proof facing those alleging the perpetration of wrongs against unborn children led to the recognition of various arbitrary rules. These rules, for want of better guides, tied civil and criminal liability to observable phenomena such as quickening (the detection of the child moving in the womb) and live birth.

The criminal law has found it difficult to "outgrow" these arbitrary rules, presumably because of a combination of stare decisis, concern for advance notice to defendants of the criminality of particular conduct, and the rule of strict construction in favor of the defendant. *E.g., Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc). As a result, the general rule

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[12] Compounding the irony and absurdity of this arbitrary exclusion is the fact that this Court has held that *corporations* enjoy the status of "persons" under the fourteenth amendment. *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

today remains that the homicide of an unborn child cannot be established without proof that the mortally wounded infant survived, even if only momentarily, outside the womb. *See* Annotation, *Homicide Based on Killing of Unborn Child*, 40 A.L.R.3d 444 (1971).[13] States have responded to this archaic requirement, however, by amending their criminal codes and specifying that the destruction of an unborn child is a crime.[14]

The law of torts has demonstrated a greater ability to "keep pace with the sciences," *Bonbrest v. Kotz*, 65 F. Supp. 138, 143 (D.D.C. 1946) (allowing action for prenatal injuries), and to adjust its rules of liability in the face of increased scientific knowledge. Thus, for example, the courts have overwhelmingly recognized the right of a live child to recover for prenatal injuries, even if inflicted prior to viability. Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971). Likewise, the courts universally allow recovery for the wrongful death of a child born alive whose injuries were inflicted before birth. Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978). Similarly, after a protracted struggle over the issue, the

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[13] *But see Commonwealth v Lawrence*, 404 Mass. 378, 536 N.E.2d 571 (1989) (homicide laws apply to slaying of viable unborn child); *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984) (viable unborn child is "person" under vehicular homicide statute); *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984) (viable unborn child is "person" for purposes of criminal homicide); *State v. Burrell*, 237 Kan. 303, 699 P.2d 499 (1985) (applying involuntary manslaughter statute to death of viable unborn child).

[14] *E.g.*, Cal. Penal Code § 187 (West 1988) (murder); Ill. Ann. Stat. ch. 38, paras. 9-1.2, 9-2.1, 9-3.2 (Smith-Hurd Supp. 1991) (homicide and manslaughter of unborn child); La. Rev. Stat. Ann. §§ 14:32.5-32.8 (West Supp. 1992) (feticide); Minn. Stat. Ann. §§ 609.2661-609.2665, 609.268(1) (West 1987 & Supp. 1992) (murder, manslaughter, and felony death of unborn child); N.D. Cent. Code §§ 12.1-17.1-02 to 12.1-17.1-04 (Supp. 1991) (murder, manslaughter, and negligent homicide of unborn child).

One of the curious consequences of the difficulties in proving destruction of unborn children was that the lives of such children could better be protected by laws prohibiting abortion *without* proof of pregnancy, destruction of the unborn child, or intent to destroy such child. The American Medical Association incorporated precisely these features into its model anti-abortion statutes in the nineteenth century. *See* 13 Transactions of the American Medical Association 41-42 (1860); H. Storer, *Criminal Abortion in America* 94, 97-100 (1860).

courts of a clear majority of jurisdictions — thirty-five states and the District of Columbia, with eleven states opposed, and four undetermined — now allow recovery for the wrongful death of a viable unborn child who dies while still in the womb. *Id.*[15] And while few courts have addressed the issue, already one state supreme court has convincingly argued that wrongful death liability cannot sensibly be

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[15] The following decisions allow recovery for the wrongful death of a viable unborn child: *Eich v. Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Summerfield v. Superior Court*, 144 Ariz. 467, 698 P.2d 712 (1985) (en banc); *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986); *Gorke v. Leclerc*, 23 Conn. Supp. 256, 181 A.2d 448 (1962); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956); *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394 (D.C. 1984); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Wade v. United States*, 745 F. Supp. 1573 (D. Haw. 1990); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982); *Chrisafogeorgis v. Brandenberg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Polinquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar v. St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980); *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984), *appeal after remand*, 427 N.W.2d 85 (N.D. 1988); *Werling v. Sandy*, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, *reh'g denied, id.*, 520 P.2d 361 (1974); *Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085 (1985); *Presley v. Newport Hospital*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Re Certification of Question of Law from United States District Court*, 387 N.W.2d 42 (S.D. 1986); *Vaillancourt v. Medical Center Hosp. of Vermont, Inc.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen v. Hanson*, 85 Wash. 2d 597, 537 P.2d 266 (1975); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mutual Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967). One additional state, Tennessee, has legislated this result. *See* Tenn. Code Ann. § 20-5-106(c) (Supp. 1991) (legislatively overruling *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977)). Thus, thirty-seven jurisdictions now allow recovery for the wrongful death of a viable unborn child.

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limited to wrongs inflicted upon *viable* unborn children. *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976).[16]

Roe's imposition of birth and viability requirements (as predicates for personhood and a compelling state interest in protecting prenatal life, respectively) therefore represented a major setback in the law. *See generally* Bopp, Jr. & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 246-83 (1989) (survey of fetal rights in legal contexts other than abortion). *Roe* purported to constitutionalize the very same distinctions that the law of torts (and, to a lesser extent, crimes) was in the process of finally and completely repudiating.

The consequences in terms of respect for the law are all too obvious. The jealous ex-husband who forcibly aborts his pregnant ex-wife's child may be convicted of homicide, but the professional abortionist cannot be. A woman who is hit by a car and miscarries on the way to an abortion business may sue for the loss of the child she planned to destroy. A disabled child may recover large sums to compensate for harm suffered in the womb, but the mother could have had that same child killed because she did not want a handicapped baby.

Such contrasts make a mockery of the law. The malleable and uncertain lines separating viability from nonviability, or prematurity from pregnancy, simply cannot support the difference between con-

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Disallowing recovery are the following: *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971); *Milton v. Cary Medical Center*, 538 A.2d 252 (Me. 1988); *Kuhnke v. Fisher*, 683 P.2d 916 (Mont. 1984); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977); *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977), legislatively overruled, Tenn. Code Ann. 20-5-106(c) (Supp. 1991); *Witty v. American Gen. Capital Distribs., Inc.*, 30 Tex. Sup. Ct. J. 244, 727 S.W.2d 503 (1987); *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969).

The courts of Alaska, Arkansas, Utah, and Wyoming have not yet resolved the question.

[16] Another state has abolished the viability distinction by statute. Ill. Ann. Stat. ch. 70, para. 2.2 (Smith-Hurd 1989).

stitutional rights and crimes. The shifting sands of consent to abortion cannot support the distinction between homicidal torts and constitutional liberties.

Either the unborn child is a person, or he is not. While the law in theory can consider someone a person for some purposes and not for others, in practice such artificiality results in contempt for a legal system full of technicalities that contradict reality. The integrity of the legal system calls for inclusion, not exclusion, of the class of unborn children within the term "person" in the fifth and fourteenth amendments.

5. Justice demands the inclusion of unborn children within the term "person."

Finally, considerations of justice call for the renunciation of the arbitrary denial of equal protection to children who happen to reside within their mothers' wombs.

Not everyone has *every* right. But no one except a person has *any* rights. Thus *Roe v. Wade* asked the wrong question when it queried whether unborn children were "recognized in the law as persons in the whole sense," 410 U.S. at 162. The issue is not whether children conceived but not yet born should receive the full range of the rights of citizenship, such as the right to vote, but whether they may lay claim to the barest minimum of human rights: "the right to *survive* on a basis of equality with human beings generally," *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1226 (E.D. La. 1970) (emphasis added), *vacated*, 412 U.S. 902 (1973). The law prior to *Roe* had generally accorded that much recognition, and more, to the child in the womb. And in so doing the law recognized a difference in kind between unborn children and tonsils, worms, or trees. This difference is the difference of personhood.

This difference relates to "our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty." *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2708 (1990) (internal quotation marks and citation omitted). As Justice Brennan put it in another context,

> At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.

Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (overturning Georgia death penalty). If this observation holds true with regard to the life of a convicted felon, it is much more so for the innocent baby growing in the womb.

The answer to the fundamental moral issue is clear: society "must treat its members with respect for their intrinsic worth as human beings," for "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Id.* at 270, 303 (Brennan, J., concurring).

Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497 (1961), emphasized the central role of tradition and history in the interpretation of the Constitution. "A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." *Id.* at 542 (Harlan, J., dissenting).

Roe v. Wade represents precisely such a radical departure from the history, indeed the founding principles, of this nation. Like *Betts v. Brady*, 316 U.S. 455 (1942), overruled in *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Roe* "made an abrupt break" with what "seems to us to be an obvious truth," *Gideon*, 372 U.S. at 344: "We hold these truths to be self-evident: that *all* men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are *Life*, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

The fifth and fourteenth amendments represent an "assurance . . . that no man shall ever, in the coming future, as long as the Republic stands . . . be deprived of his life, of his liberty, or his property without due process of law." Cong. Globe, 37th Cong., 2d Sess. 1640 (1862) (Rep. Bingham). As this Court explained in *West*

Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943), the "very purpose" of a constitutional declaration of rights

> was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Roe v. Wade created an exception to personhood where none existed or could exist. This Court should now correct this fundamental injustice by overruling *Roe v. Wade* and upholding the right to life and equal protection of all human beings, regardless of age, size, health, or condition of dependency.[17]

III. THE PERSONHOOD OF THE UNBORN REQUIRES THE REJECTION OF PLANNED PARENTHOOD'S ATTACK UPON THE PENNSYLVANIA STATUTES.

The constitutional personhood of human beings conceived but not yet born dictates the rejection of Planned Parenthood's constitutional challenge to the Pennsylvania statutes at issue here.

Planned Parenthood predicates its challenge upon an alleged "abortion right," Brief for Petitioners and Cross-Respondents at 15. Such a "right," however, is fundamentally inconsistent with the right to life of persons conceived but not yet born. A "right" to abort, where the life of an unborn person is at stake, would make no more sense than "a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body," *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989) (plurality opinion). As this Court acknowledged in *Roe*, "[i]f this suggestion of personhood is established, the [challengers'] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." 410 U.S. at 156-57.

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[17] The Executive Branch has already recognized the "unalienable personhood" of unborn children as well as the fundamental importance of upholding the equal right to life of unborn children under the fifth and fourteenth amendments. Proclamation No. 5761, 3 C.F.R., 1988 Comp., p. 3. *See* Appendix (text of proclamation).

The personhood of unborn children imposes a duty upon the state to afford equal protection to humans conceived but not born. *Cf. DeShaney v. Winnebago Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) ("the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause") (citation omitted). "[L]egislation, which would remove the life of a person in the womb from the full and equal protection of the law, would be discriminatory, as 'irrational,' and as inimical to the equal protection clause as the legislative classification of races." Byrn, *Abortion in Perspective*, 5 Duq. U.L. Rev. 125, 135 (1966-67). As Justice Stevens observed in the *Thornburgh* case, unless there is a "fundamental" difference between unborn and born human offspring, "the permissibility of terminating the life of the fetus could scarcely be left to the will of the state legislatures." 476 U.S. at 779 (concurring opinion) (footnote omitted). "For the very idea that one may be compelled to hold his life . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). *See also Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2863 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me").[18]

Thus, in view of the general prohibition of homicide, a proper litigant could challenge the constitutionality of laws which did *not* provide at least the minimum equal protection demanded by the fourteenth amendment: the outlawing of all abortions.

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[18] Furthermore, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (footnote omitted). The fifth amendment, while lacking an explicit guarantee of equal protection, nevertheless also "contains an equal protection component." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (citation omitted). "This Court's approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* (internal quotation marks and citations omitted). *Accord Regan v. Taxation with Representation*, 461 U.S. 540, 542 n.2 (1983).

Planned Parenthood has not challenged the Pennsylvania statutes on this basis. Nor has Planned Parenthood indicated any desire to do so. Moreover, it is far from clear that this private entity, which is not a guardian of unborn children, and which promotes interests diametrically opposed to those of such children, could have standing to raise objections predicated upon the personhood of the unborn. The Attorney General of Pennsylvania, however, who is a party to this case, is a proper party to seek vindication of the rights of unborn persons. This Court should therefore hold that the fourteenth amendment protects unborn children as persons, and set this case for further briefing and reargument on the question of the proper disposition of this particular appeal.[19]

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[19] The challenged reporting requirements of the Pennsylvania statutes, 18 Pa. Cons. Stat. Ann. §§ 3207(b), 3214, are clearly constitutional. Such official gathering of information about abortion is entirely consistent with the constitutional rights of unborn persons.

On the other hand, statutes which affirmatively authorize abortions violate the fourteenth amendment. Any law which categorically permits the deliberate deprivation of an unborn child's life invidiously denies equal protection to such children. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989). Thus, the judicial bypass sections of the Pennsylvania parental consent statute, which provide that a judge "shall authorize" the abortion of a child under certain circumstances, 18 Pa. Cons. Stat. Ann. § 3206(c), (d), are unconstitutional.

Some of the challenged statutes expressly contemplate the commission of abortions, but may not in themselves affirmatively authorize abortions. *See* 18 Pa. Cons. Stat. § 3205 (informed consent), § 3206(a) (parental consent), § 3209 (spousal notice). If these laws were to be construed to authorize abortions, they would be unconstitutional. On the other hand, these laws could be construed to apply only to such abortions as are independently authorized under other provisions of law. Under this interpretation, the challenged sections would themselves pose no threat to the constitutional rights of unborn persons. Once laws permitting or authorizing abortions gave way to recognition of the constitutional rights to life and equal protection, laws merely assuming the legality of abortion would become, as applied to abortion, dead letters. Thus, a construction is readily available which saves, from facial unconstitutionality, laws which only presuppose the legality of abortion. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial constitutional challenge must establish that no set of circumstances exist under which statute is valid).

The statutory definition of a medical emergency, 18 Pa. Cons. Stat. § 3203, bears directly upon the circumstances under which abortions are

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This Court followed a similar course in the school desegregation cases. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), this Court declared that racial segregation in public education violated the fourteenth amendment. The Court then set further proceedings to consider the implications of *Brown I* for the resolution of the particular cases before it. *See Brown v. Board of Educ.*, 349 U.S. 295, 298-99 (1955) (*Brown II*). Recognition of the constitutional rights of unborn children would, like the holding in *Brown I*, represent a very significant vindication of fundamental human rights. Thorough review of the ramifications of this holding, as well as the proper means of upholding these rights in the case at bar, would therefore be wise.

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permitted under the other statutory sections. The constitutionality of this statute therefore depends upon the scope of the emergency exception. The phrase, "death or . . . serious risk of substantial and irreversible impairment of bodily function" might be interpreted narrowly to encompass only those actions — removal of an ectopic pregnancy or a cancerous uterus, for example — which do not directly destroy the unborn child, which seek to preserve the life of the child if possible, and which result in the death of the child, if at all, only as an unintended consequence of an independently justified operation. The availability of such a narrow, constitutionally permissible construction suffices to defeat a facial challenge to the statute. *Salerno*, 481 U.S. at 745.

CONCLUSION

There is no valid basis for excluding unborn children from the fundamental protections afforded all persons under the fifth and fourteenth amendments to the United States Constitution. This Court should therefore overrule *Roe v. Wade*, 410 U.S. 113 (1973), and set this case for further briefing and reargument on the issue of the proper disposition of this appeal.

Respectfully submitted,

Thomas Patrick Monaghan
Jay Alan Sekulow
Walter M. Weber
(Counsel of record)
C. Peter Thomas S. Cornell
James E. Murphy
Free Speech Advocates
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

Thomas A. Glessner
Christian Action Council
101 W. Broad St., Suite 500
Falls Church, VA 22046

Attorneys for Amici Curiae

Of Counsel:

Charles E. Rice
Notre Dame Law School
Notre Dame, IN 46556

Michael J. Laird
608 S. Walnut Street
Arlington Heights, IL 60006

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