ROE AND THE NEW FRONTIER

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INTRODUCTION

Sitting under a tent in an audience filled with lawyers, judges and constitutional scholars, I listened to long-time United States Supreme Court correspondent Nina Totenberg describe a very interesting—and apparently intimate—conversation with Supreme Court Justice Lewis Powell.[1]

"Nina, have I ever told you why I voted as I did in *Roe v. Wade*?" Justice Powell recounted a story about a young man whose married lover had become pregnant. Desperate to keep the affair and ensuing pregnancy a secret, the man requested the help of his employer, then-attorney Powell, who followed him to the scene of a horribly performed abortion. Powell saw the woman as she helplessly lay bleeding in a small apartment. Ms. Totenberg never connected the story to any particular aspect of Justice Powell's ideology, but the significance of the story was not lost on anyone in the audience.[2]

From a friend, I heard a totally different kind of story—one that occurred not in the 1960s or 1970s, but in the year 1999. The central character in my friend's story was an unborn fetus in his mother's womb, undergoing a spinal operation to control the effects of spina bifida. Samuel Armas was only twenty-one weeks old at the time of the operation,[3] so the surgical instruments were specially designed to work in miniature.[4]

1. Nina Totenberg gave the luncheon address at a Constitutional Law symposium, "The Supreme Court's Most Extraordinary Term," held at Pepperdine University Law School in October, 2000. I seem to recall the story having been told with reference to Justice Blackmun rather than Justice Powell; nonetheless, a version of the story is also told in a biography by a former clerk and law school dean in JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 347 (1994), and Nina Totenberg confirms that she is the source of the story found in Powell's biography.

2. Justice Powell voted with Justice Harry Blackmun and the majority to strike down the abortion statute in *Roe v. Wade*, 410 U.S. 113 (1973).

3. At twenty-one weeks, Samuel Armas had not yet reached a point known as "viability," meaning that the state could not prohibit an abortion. *See* Section I, *infra*; *see also* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 860 (1992) (stating that viability occurs at around twenty-three to twenty-four weeks, or "at some moment even slightly earlier in pregnancy").

4. *See* Robert Davis, *Hand of a Fetus Touched the World: Photo Shakes Up Abortion Debate*, USA TODAY, May 2, 2000, at D8. According to a website detailing the story, the

During the operation, a photograph was taken that showed a surgeon's hands on the outside of the womb, and a tiny hand protruding from the incision in the womb—clutching one of the surgeon's fingers.

These stories identify pieces of the abortion debate that resound with the adherents of one or more schools of thought on the subject.[5] Although legally settled by the Supreme Court in 1973, the abortion debate has grown with an unabated momentum ever since, gathering together and pulling apart people of different ages, races, sexes, and faiths.[6] While the abortion debate rages on the terms of a right to fetal life and an opposing right to a woman's choice, outside of the context of abortion, advances in reproduction and technology outpace the assumptions underlying those positions. Precisely for this reason, I argue that courts have erroneously imported the Supreme Court's conclusion in *Roe v. Wade*[7] that a fetus is not a constitutional person into areas of law outside the context of abortion. Beginning with *Roe v. Wade*, Part I of this article surveys the considerations underpinning four of the Court's major abortion decisions in an attempt to provide some context for *Roe*'s conclusions. To that end, Part I also evaluates certain popular and legal thought surrounding the abortion debate, painting a more complete picture of the Court's abortion jurisprudence. Part II discusses some practices of the new frontier and suggests that concerns raised by developments in science and reproduction militate against the application of *Roe* to those practices. Part III examines the tenability of a judicial

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sutures used to close the incisions were thinner than a human hair. Paul Harris, *Holding Hands*, IRISH INDEP., Mar. 2, 1999, http://www.tripod.com/~joseromia/samuel.html. A similar photograph was taken of Sara Marie Switzer at twenty-four weeks. *Pictures of the Year 1999*, LIFE MAG. April 15, 2000, at 32. For a recent picture of Armas, see Claudia Kalb, *Treating the Tiniest Patients*, NEWSWEEK, June 9, 2003, at 48.

5. These stories do not purport to summarize the entirety of the abortion debate. Justice Breyer's majority opinion in the Supreme Court's 2000 term partial-birth abortion case, however, suggests that many view the competing issues as precisely those encapsulated in the stories:

> We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child . . . Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering.

Stenberg v. Carhart, 530 U.S. 914, 920 (2000).

6. *See generally* LAURENCE H. TRIBE, ABORTION: A CLASH OF ABSOLUTES (2d ed. 1992).

7. 410 U.S. 113 (1973).

solution to this problem and particularly the concerns raised by any corrective action by the Supreme Court. I leave the reader to decide whether the Supreme Court should ultimately take such action.

I. *ROE*'S LEGACY: OF RIGHTS AND PERSONHOOD

Roe ignited an ongoing debate about the proper regulation of abortion. What many regard as the nation's most divisive issue has taken on a language of its own, based on the Court's decision in *Roe*, subsequent cases, and prevailing social and legal thought. Seizing on the Court's pronouncement of a woman's right to abortion and a fetus' lack of a corresponding personhood right, lawyers and commentators have framed their positions on abortion almost exclusively in those terms. But outside of the abortion context, any analysis of *Roe*'s application—specifically *Roe*'s conclusions about fetal personhood—should be tempered by an examination of the reason, purpose, and logic of those conclusions.[8]

The concept of a right to abortion was, no doubt, entered into popular culture and parlance through *Roe v. Wade* and its progeny, as well as the many discussions about whether and how abortion is protected under the United States Constitution. Mary Ann Glendon posits that most contemporary Americans hold a radicalized view of rights, encompassing "the right to do whatever you want."[9] In the abortion debate, Glendon contends that this preoccupation with the rights belonging to each individual has reduced the conversation to a competition

8. *Cf.* Jed Rubenfeld, *On the Legal Status of the Proposition That "Life Begins at Conception,"* 43 STAN. L. REV. 599, 601 (1991) (arguing that a fetus cannot be deemed a person without consideration of the context in which that decision is being made). Likewise, it seems that *Roe*'s personhood conclusion should not be imported into other areas of law without consideration of the context of the Court's decision in *Roe*.

9. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 8 (1991). In my first year Contracts class, in response to an exam question exploring the "pros" and "cons" of the enforcement of surrogacy contracts, many students expressed the "pros" with ideas similar to those conveyed in one student exam:

> If they [contracted] for it, they should be able to enforce it. The surrogate mother has rights and she can do what she wants like have an abortion. She has ability to do what she wants with her body. If she wants to have a child to help another couple, she should be able to do this as long as there is a valid contract. Even if she wants to make [money] off of it, she has the freedom to [contract] for it. Our country is about freedom and liberty.

(on file with author) (copied with permission).

between the opposing "rights" to life and to choice.[10] Thus if the fetus has no right to life then the right to abortion remains. If the fetus is in fact a person with such a right, however, then the abortion right cannot coexist. This was the apparent position taken by the Supreme Court in *Roe*, as evidenced by its conclusion that if the fetus is a person, then Roe's case "collapses."[11] But the Court's conclusion does not necessarily follow from the premise. As John Hart Ely has aptly explained:

> [I]t has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person.[12]

From a practical perspective, Justice Ruth Bader Ginsburg has criticized the opinion in *Roe* for having gone too far, creating unnecessary political turmoil.[13] If Ely and Ginsburg are correct, however, and the *Roe* Court's personhood determination was doctrinally and practically unnecessary, then what does that mean for the survival of that aspect of *Roe*? Certainly, to decide whether that portion of the opinion *should* have any precedential effect (either vertically or horizontally)[14] in future contexts, we must consider the reason for its existence. If Justice Blackmun's statements on behalf of the Court were mere *obiter dictum*,[15] then courts are not bound to follow them. On the other hand, if the personhood determination was central to the Court's analysis, then it will be difficult to undo.[16]

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10. *See* Glendon, *supra* note 9, at 66.

11. *See Roe*, 410 U.S. at 156.

12. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 926 (1973).

13. *See, e.g.*, Ruth Bader Ginsberg, Essay, *Some Thoughts on Autonomy And Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985). Justice Ginsberg opines that *Roe* could have been justified under a theory of equal protection. *See id.* at 382-83, 386. Others have shared her view. *See, e.g.*, Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); TRIBE, *supra* note 6.

14. I emphasize "should" because it is clear that, as discussed *infra* at Section III, this aspect of the opinion currently has considerable vertical precedential effect.

15. Black's Law Dictionary defines *obiter dictum* as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).". BLACK'S LAW DICTIONARY 1100 (7th ed. 1999).

16. Of the appropriate reasons for reversal outlined in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), perhaps the prong concerning factual or legal developments making the rule obsolete would be applicable. *See id.* at 854-60.

Since *Roe*, the Supreme Court has not opined on the status of fetal personhood. In *Thornburgh v. American College of Obstetricians and Gynecologists*, Justice Stevens declared that "[n]o Member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment."[17] For Justice Stevens, the significance of his observation lay in his belief that, were the fetus a person, the Court could not constitutionally sanction abortion.[18] Although Stevens' observation remains true, no Supreme Court Justice has affirmed the correctness of *Roe*'s personhood analysis as an original matter or applied it outside the bounds of abortion doctrine.

Nonetheless, many lower courts have applied *Roe* in all sorts of situations assessing the value of life or potential life. In disputes over cryogenically preserved embryos and in cases involving claims brought by embryos against researchers and hospitals, courts have based their analyses on the premise that, according to *Roe*, fetuses and embryos are not constitutional persons.[19] This has led to conclusions that are questionable on the law and troubling as a matter of policy. An examination of *Roe*, the seminal cases following *Roe*, and several paradigms explaining the positions taken in *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[20] provides a background against which to consider *Roe*'s future application. It is also the appropriate starting point for an assessment of whether courts should apply *Roe*'s personhood conclusion to other areas of the law.

A. Framework of Roe *and Its Progeny*

1. Roe v. Wade

In 1973 the Supreme Court decided the companion cases of

17. 476 U.S. 747, 779 n.8 (1986).

18. *See id.* at 779 ("[Were the fetus a person] the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures.").

19. *See, e.g.*, Kass v. Kass, 91 N.Y.2d 557, 564 (1998) (dispute over cryogenically preserved embryos); Doe v. Shalala, 862 F. Supp. 1421, 1426 (D. Md. 1994) (class of embryos suing to enjoin research); Doe v. Irvine Scientific Sales Co., 7 F. Supp. 2d 737, 742 (E.D. Va. 1998) (embryos in tort action against laboratory); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (dispute over cryogenically preserved embryos) (discussed *infra* at Section II.A).

20. 505 U.S. 833 (1992) (discussed *infra* at Section I.A.3).

Roe v. Wade and *Doe v. Bolton*,[21] in the culmination of a debate that had been growing for many years prior to those decisions.[22] Justice Blackmun, writing for the Court, analyzed the constitutionality of a Texas statute that criminalized the procurement of abortion except where necessary to save the mother's life.[23] Among other things, the Court surveyed historical understandings of abortion, as well as English and American common law and statutory law, to discern the justifications for criminal abortion laws in the nineteenth and twentieth centuries.[24] The Court also reviewed the official American Medical Association and American Bar Association views on the subject.[25]

Justice Blackmun began the Court's analysis by recognizing a fundamental right of privacy that protects a woman's decision to choose to terminate her pregnancy, and the Court found the right to be a matter of personal liberty embodied in the Due Process Clause of the Fourteenth Amendment.[26] The Court identified the detriment to the pregnant woman if she was not

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21. 410 U.S. 179 (1973).

22. In 1967, a conference sponsored by the Joseph P. Kennedy Foundation and the Harvard Divinity School was held in Washington, D.C., to promote public debate on the moral issues involved in abortion. *See* ELIZABETH MENSCH AND ALAN FREEMAN, THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE? 110-11 (1993). About one year later, the Association for the Study of Abortion hosted a conference promoting the liberalization and repeal of restrictive abortion laws. *See id.* at 118. Both conferences featured speakers and attendees who were central figures in the abortion debate. The first conference produced and the second conference featured prominent works respectively advocating pro-life and pro-choice positions. *See id.* at 110-24.

23. *See Roe*, 410 U.S. 113. Under the statute, a woman who obtained an abortion could not be prosecuted. *Id.* at 151. In *Doe v. Bolton*, 410 U.S. 179, a companion case decided at the same time as *Roe*, the Court invalidated a Georgia law which prohibited abortion except where abortion would endanger the life or health of the mother, where the fetus would likely be born with a birth defect, or where the pregnancy was the result of rape. *See id.* at 179-80.

24. *See Roe*, 410 U.S. at 130-52. The Court explained the significance of its examination of history as a part of its effort to approach the issue of abortion without emotion:

> Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries.

Id. at 116-17.

25. *See id.* at 141-47. These materials appear to be the source of the trimester framework adopted by the Court.

26. *See id.* at 152-53. The Court opined, without deciding, that the right of privacy might also be found in the penumbra of the Bill of Rights, as explained in *Griswold v. Connecticut*, 381 U.S. 479 (1965), or in the Ninth Amendment as one of the rights reserved to the people, as the District Court had determined. *See Roe*, 410 U.S. at 152-53.

permitted to obtain an abortion:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[27]

The Court acknowledged, however, that the right protecting the pregnant woman's interests could not exist in a vacuum, but must be balanced against the state's interests in safeguarding health and medical standards (including the health of the mother) and in protecting potential human life.[28] The only remaining issue for the Court, then, was to determine at what point the state's interests become compelling.[29] By choosing fetal viability as the deciding line, the Court rejected the state's position that life begins at conception.[30] This led the Court to perhaps the most controversial aspect of its decision—its conclusion that an unborn fetus is not a "person" within the meaning of the Fourteenth Amendment.[31] But the opinion itself gives no real clue as to the significance of the personhood of the fetus. Justice Blackmun raised the issue as a failing argument by the state, but spent little time evaluating the merits of the argument.

The Court began with a textual analysis of various constitutional provisions, explaining that the word "person" had never been understood to include a fetus.[32] The Court noted

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

28. *See id.* at 153-54.

29. *See id.* at 154-56.

30. *See id.* at 163-64. Viability refers to the point at which the fetus has the capability of "meaningful life" outside the mother's womb. *Id.* at 163. At the time of the *Roe* decision, viability was thought to occur at around twenty-eight weeks, in the third trimester. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 872 (1992). In *Casey*, the Court recognized that viability occurs at around twenty-three to twenty-four weeks, or perhaps slightly earlier. *Id.* at 860.

31. *See Roe*, 410 U.S. at 158-59.

32. *See id.* at 157-58. The Court recognized that the Fourteenth Amendment uses the word "person" three times. *Id.* The Court then listed other places in the Constitution where the word "person" is used, concluding that none indicate any prenatal application. *See id.* (referencing the listing of qualifications for Representatives and Senators, the Migration and Importation Provision, the Emolument Clause, Electors provisions,

what it perceived to be a telling inconsistency between Texas' position that the fetus is a person and the statutory exception for cases in which the woman's life is in danger, reasoning that if the fetus were a person then apparently no justification would support its destruction—not even preservation of the mother's life.[33] These observations, combined with an earlier discussion of the history of abortion regulation in the United States, led the Court to conclude "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[34] The Court declined to accept Texas' assertion of a compelling interest in protecting life from the moment of conception apart from the Fourteenth Amendment, stating that the Court was not in a position to speculate as to when life begins.[35]

The Court's textual analysis of fetal personhood, however, seems especially lacking in light of the Court's treatment of the competing interests of the pregnant woman. Rather than merely inquire, for example, whether the word "liberty" as used in the Fourteenth Amendment includes the practice of abortion, the Court began its constitutional analysis with a distinctly extra-textual proposition: "The Constitution does not explicitly mention any right of privacy."[36] This glaring asymmetry in analysis suggests that the personhood determination was neither seriously researched nor heavily pondered by the Court. And the Court's lack of engagement in the issue of personhood would seem logical if, perhaps, Justice Blackmun was merely working backward from the proposition that the right to abortion is

provisions outlining qualifications for the Presidency, Extradition provisions, the Fugitive Slave Clause, and the Fifth, Twelfth and Twenty-second Amendments).

33. *See id.* at 157 n.54.

34. *Id.* at 158.

35. *See id.* at 159. Discussing state tort and property laws, the Court noted some protection for fetuses, but ultimately concluded that fetuses had not been legally recognized as persons "in the whole sense." *Id.* at 161-62. Critics of the opinion in *Roe* have observed that the Court, in establishing viability as the point at which states may regulate abortion to protect fetal life, necessarily "resolve[d] the difficult question of when life begins." *Id.* at 159. Yet others have seized on the language of the opinion to conclude that the personhood determination does not bind the states or Congress in determining fetal personhood outside the area of abortion. *See, e.g.*, *The Unborn Victims of Violence Act of 1999: Hearing on S.1673 Before the Senate Comm. On the Judiciary*, 106th Cong. (2000) (Testimony of Gerald V. Bradley, Professor of Law, University of Notre Dame [hereinafter "Bradley"]. Support for this position is found in the Court's further statement that Texas could not override the rights of the pregnant woman simply "by adopting one theory of life." *Roe*, 410 U.S. at 162. Thus, the argument proceeds, a state *may* adopt a theory of life that recognizes fetuses as persons, so long as it does not override the right to abortion. *See* Bradley, *supra*.

36. *Roe*, 410 U.S. at 152.

guaranteed under the Constitution.[37]

In any event, as might have been expected, the battling forces on either side of *Roe* did not view the Court's decision as a compromise position. Pro-choice advocates have largely claimed it as a total victory, while pro-life advocates have taken it as a devastating loss.[38]

2. Webster v. Reproductive Health Services

After a fairly consistent line of cases strictly following *Roe*, the Supreme Court decided *Webster v. Reproductive Health Services*,[39] narrowing *Roe* in several respects. *Webster* was particularly significant at the time it was decided because it was thought to signal the Court's willingness to eventually overrule *Roe*.[40] At issue in *Webster* was Missouri's amended abortion statute, which contained a preamble seemingly at odds with *Roe*.[41] The preamble contained findings by the state legislature that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health and well-being."[42] The preamble further stated that all Missouri laws should be "interpreted to provide unborn children with the rights enjoyed by other persons," subject to the United States Constitution and Supreme Court precedent.[43]

In evaluating the statute's preamble, the Supreme Court disagreed with the Eighth's Circuit's interpretation of an earlier Supreme Court case, confirming that a state may make a value

37. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1759 (2001) ("The absence of any coherent theory [of personhood] raises an inference that courts' determinations of legal personality are strongly result driven, with judges selecting whatever theories of personhood suit the outcomes they desire.").

38. In the words of law professor and legal philosopher Ronald Dworkin, a strident proponent of abortion rights, "[pro-life advocates] felt they had been kicked in the stomach: a distant court had told them they had to condone what their instincts and religions told them was the wholesale murder of innocent unborn children." RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 7 (1993).

39. 492 U.S. 490 (1989).

40. *But see* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 119-22 (1989) (arguing that predictions about *Roe*'s future were largely "spun" by pro-choicers to galvanize feminists into action, and similarly used by pro-lifers to hearten their constituency).

41. *See Webster*, 492 U.S. at 501.

42. *Id.*

43. *Id.*

judgment favoring childbirth over abortion.[44] The Court declined to decide whether the preamble was constitutional under *Roe*, noting that it had not yet been interpreted by the State of Missouri.[45] Rather, the Court found that the preamble could be read to do no more than provide protection to unborn children in tort and probate law.[46]

As to a provision in the statute requiring certain tests prior to viability, the Court found that the provision permissibly furthered the state's "important and legitimate" interest in protecting potential human life throughout pregnancy, affirmatively acknowledged in *Roe*.[47] To reach its decision on this point, however, the Court criticized the trimester framework and viability doctrine found in *Roe*.[48] In rather strong language, Justice Rehnquist argued that *stare decisis* has less power in constitutional cases where no other body of government is empowered to make necessary changes.[49]

Although aspects of its opinion in *Webster* narrowed *Roe*, the Court refused to explicitly overrule it—pointing only to a factual difference between the law in *Webster* which prohibited only post-viability abortions, and *Roe*, which prohibited all abortions except where the mother's life was at stake.[50] The Court's opinion in *Webster* contained no justification of *Roe* or its personhood analysis, and the Court's brief statement declining to overrule *Roe* seemed to suggest that it perhaps would be willing to do so given the right set of circumstances.[51] Justice Scalia complained that the plurality opinion had "finessed" *Roe* to implicitly overrule its holding without explicitly doing so—which he would have done.[52] Justice Blackmun, on the other hand, agreed that *Webster* had tacitly overruled *Roe* and dissented on that ground.[53]

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44. *See id.* at 504-06.

45. *See id.* at 506-07.

46. *Id.* at 506.

47. *Id.* at 515-16, 519-20.

48. *See id.* at 517-19.

49. *See id.* at 518. This premise was revisited at length by the joint opinion of Justices O'Connor, Kennedy and Breyer in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 866 (1992).

50. *See Webster*, 492 U.S. at 521.

51. *See id.* at 521.

52. *See id.* at 532 (Scalia, J., concurring).

53. *See id.* at 537-60 (Blackmun, Brennan & Marshall, JJ., concurring in part and dissenting in part).

3. Planned Parenthood of Southeastern Pennsylvania v. Casey

Planned Parenthood of Southeastern Pennsylvania v. Casey[54] is perhaps the most significant case applying *Roe*. In *Casey*, the Court substituted the current "undue burden" analysis for strict scrutiny, an idea previously mentioned only in dissent by Justice O'Connor.[55] More importantly, the Court offered a compromise between the pro-life and pro-choice positions and provided what appear to be the Court's strongest justifications for accepting its proposed truce. Faced with another request to overrule *Roe*, the Supreme Court, in a rare joint opinion by Justices O'Connor, Kennedy, and Souter, explained that the "essential holding" of *Roe* would be, once again, retained.[56]

Reviewing its substantive Due Process and privacy decisions, the Court explained its role as interpreter of the Constitution so as to protect a "realm of personal liberty" beyond that provided explicitly in the Bill of Rights.[57] In a somewhat cryptic passage, the Court expanded *Roe*'s discussion of the woman's interests in obtaining an abortion to include the freedom to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[58] The Court then identified the interests of a woman seeking an abortion in more concrete terms:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race

54. 505 U.S. 833 (1992). At issue in *Casey* were several provisions of the Pennsylvania Abortion Control Act which required that a woman provide informed consent prior to having an abortion and that she be provided with information at least twenty-four hours prior to the procedure. *See id.* at 844. In the case of a minor, the Act provided that she must obtain a parent's consent, but could bypass that requirement by appearing before a judge (if consent could not be obtained). *See id.* The Act further required a married woman to sign a statement indicating that she had notified her husband. Each of these provisions contained an exemption for situations deemed to be medical emergencies under the Act. *See id.* The Act also imposed certain reporting requirements for abortion clinics. *See id.*

55. Justice O'Connor first introduced the undue burden standard in her dissent in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452-75 (1983) (O'Connor, J., dissenting).

56. *Casey*, 505 U.S. at 846. The Court stated the essential holding in three basic parts: (1) a recognition of the right of the woman to choose to have an abortion before viability without undue interference from the State, (2) a confirmation of the State's power to restrict abortions after fetal viability provided that the law excepts pregnancies that endanger the woman's life or health, and (3) the principle that the State has legitimate interests in protecting the health of the woman and the life of the fetus from the beginning of the pregnancy. *Id.*

57. *See id.* at 846-53.

58. *Id.* at 851.

> been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[59]
>
> . . . We have no doubt as to the correctness of [*Griswold vs. Connecticut*,[60] *Eisenstadt v. Baird*,[61] and *Carey v. Population Services International*[62]]. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations . . . The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.[63]

The Court explained that any reservations it had about reaffirming *Roe* were outweighed by its discussion of individual liberty combined with *stare decisis*.[64] The Court then launched into an analysis of the role of *stare decisis*, evaluating the acceptable bases for departing from the doctrine—when a rule is unworkable, when it has not been significantly relied upon, or when developments in law or fact have made the rule practically obsolete—and concluded that *Roe* need not be overruled.[65] Going even further, in what appeared to be a civics lesson on the importance of *stare decisis* in cases responding to national controversies, the Court warned that any decision to overrule *Roe* would be viewed as a surrender to political pressure, which

59. *Id.* at 852.
60. 381 U.S. 479 (1965).
61. 405 U.S. 438 (1972).
62. 431 U.S. 678 (1977).
63. *Casey*, 505 U.S. at 852-53.
64. *See id.* at 853. For the opinion that *stare decisis* was the Court's only reason for retaining *Roe*, see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000).
65. *See Casey*, 505 U.S. at 854-61.

would undermine the legitimacy of the Court and result in the eventual downfall of the nation.[66]

The Court maintained viability as the point at which states may regulate abortion, but suggested that previous cases had gone too far in ignoring the state's interest in protecting potential life.[67] For that reason, the Court again denounced the trimester framework and in its place supplied the undue burden standard, holding that if a regulation places an undue burden on the woman's ability to make a decision regarding abortion at any time during pregnancy, then it is *per se* unconstitutional.[68]

To reach the result of affirming *Roe*'s essential holding—as re-written by the joint authors of the opinion in *Casey*—the Court abandoned strict scrutiny in favor of the undue burden standard, overruled two post-*Roe* decisions, demoted abortion from the status of a fundamental right,[69] and made no mention of fetal personhood. After *Casey*, it certainly seemed that the Court had thoroughly overhauled *Roe*.[70]

4. Stenberg v. Carhart

In a recent abortion case, the Supreme Court addressed the controversial issue of partial birth abortion.[71] *Stenberg* is significant both because it represents a recent application of the

66. *See id.* at 861-69. The Court actually said that to the extent that the Court would lose its legitimacy by overruling *Roe*, so would the country be undermined in its ability "to see itself through its constitutional ideals." *Id.* at 868.

67. *See id.* at 870-71.

68. *See id.* at 872-78. The Court defined an undue burden as a regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. The Court upheld the provisions of the Pennsylvania Abortion Control Act that required a woman to provide informed consent prior to having an abortion and that required that she be provided with information at least twenty-four hours prior to the procedure. *See id.* at 881-87. To reach this conclusion, the Court explicitly overruled two post-*Roe* cases finding similar requirements unconstitutional, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). *Casey*, 505 U.S. at 882-83. The Court also upheld provisions requiring a minor to obtain the consent of at least one parent or a judge if parental consent was not feasible. *See id.* at 899-900. The Court, however, found the provision requiring spousal notification to be invalid, discussing the problem of domestic violence and concluding that such a requirement would impose a substantial obstacle for many women. *See Casey*, 505 U.S. at 893-94.

69. The Court retreated from the right of privacy discussed in *Roe*, speaking exclusively in terms of "liberty" guaranteed by the Fourteenth Amendment. *See Casey*, 505 U.S. at 846-52. *But see id.* at 926-27 (Blackmun, J., dissenting in part).

70. *See, e.g.*, Nadine Strossen & Ronald K.L. Collins, *The Future of an Illusion: Reconstituting* Planned Parenthood v. Casey, 16 CONST. COMMENT. 587 (1999).

71. Stenberg v. Carhart, 530 U.S. 914 (2000).

undue burden standard, and because the nation is still stinging from the escalation of the already volatile abortion debate.[72] In *Stenberg*, the Court had to decide whether, under *Casey*, Nebraska's partial birth abortion law constituted an undue burden on a woman's abortion decision.[73] The Nebraska statute completely banned partial birth abortion except where necessary to save the life of the mother, and defined partial birth abortion as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."[74] Justice Breyer, writing for the majority, found the statute unconstitutional under *Casey* because it did not contain an exception for the health of the mother.[75] The Court agreed with the Eighth Circuit's interpretation that the statute's ban on partial birth abortions included the D&X as well as the D&E abortion procedure—D&E being one of the most common procedures for second trimester previability abortions.[76] Because the statute could be read to prohibit D&E abortions, the Court predicted that abortionists would fear criminal prosecution for performing routine second trimester abortions, thus creating an undue burden on a woman's right to an abortion as established in *Roe* and *Casey*.[77]

Justice Stevens concurred with the result but opined that statutes like the Nebraska statute were unprincipled in that the two abortion procedures were "equally gruesome," and thus

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72. This issue may return to the U.S. Supreme Court, as Congress has recently enacted and the President has signed the Partial Birth Abortion Act of 2003. 108 P.L. 105, 117 Stat. 1201 (2003); Richard W. Stevenson, *Bush Signs Ban on a Procedure for Abortions*, N.Y. TIMES, Nov. 6, 2003, at A1. As of the day the Act was signed, a federal district judge in Nebraska had already declared the law unconstitutional as applied to the plaintiffs in the case, and federal district judges in San Francisco and New York were also considering the issue. *See id.*

73. *See Stenberg*, 530 U.S. at 914.

74. *Id.* at 921-22.

75. *See id.* at 937-38.

76. *See id.* at 924, 938-46. According to the Nebraska Attorney General, the partial birth abortion law was designed to prohibit only the D&X (dilation and extraction) procedure, which essentially entails breech delivery of the fetus up to the head, followed by "partial evacuation of intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus." *Id.* at 928 (quoting Am. Coll. of Obstetricians & Gynecologists Exec. Bd., Stmt. on Intact Dilation & Extraction (Jan. 12, 1997), App. 599-660.); *see also id.* at 940. Because the D&E (dilation and evacuation) procedure often involves a foot or arm being drawn through the cervix, the Court found that the statute's definition of partial birth abortion included D&E. *See id.* at 939.

77. *See id.* at 938-39, 945-46.

Nebraska could not have a genuine interest in respect for potential life by banning one in favor of the other.[78] Justice Ginsberg, citing a supporting position from Judge Posner of the Seventh Circuit analyzing a similar law, regarded the statute as no more than an attempt to "chip away" at the decision in *Roe v. Wade.*[79]

In a separate dissent, Scalia regarded *Stenberg* as precisely what should be expected under the undue burden standard of *Casey*—that justices would decide what is undue not based on the text of the constitution or on historical understanding, but on their own personal philosophy about the sanctity of life or potential life.[80] And although a signer of the joint opinion in *Casey,* Justice Kennedy vigorously dissented on the grounds that the *Stenberg* decision misapplied *Casey,* which acknowledged that states do have an interest in protecting life and potential life before and after viability.[81] As to the creation of an undue burden, Kennedy read the statute as prohibiting only D&X abortions and found that the state had a legitimate interest in declaring a moral difference between D&X and other procedures, likely deeming the former much closer to infanticide.[82] Kennedy concluded with harsh criticism: "The Court's refusal to recognize Nebraska's right to declare a moral difference between the procedure[s] is a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire

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78. *See id.* at 946-47 (Stevens & Ginsburg, JJ., concurring).

79. *Id.* at 951-52 (Ginsburg, J., concurring) (quoting Hope Clinic v. Ryan, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, J., dissenting)). Many have taken this view of partial birth abortion statutes, as well as other regulations aimed at abortion clinics and providers. *See infra* note 181; *see also* Janet Benshoof, *The Truth About Women's Rights,* 6 WM. & MARY J. WOMEN & L. 423 (2000); Barry Yeoman, *The Quiet War on Abortion,* MOTHER JONES, September/October 2001, at 47.

80. *See Stenberg,* at 954-55 (Scalia, J., dissenting).

81. *See id.* at 956-57 (Kennedy, J., dissenting).

82. *See id.* at 960, 962-63. Citing from the record, Justice Kennedy explained the D&X procedure in simpler but more graphic terms:

> In the D&X, the abortionist initiates the woman's natural delivery process by causing the cervix of the woman to be dilated, sometimes over a sequence of days. The fetus' arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body moving outside the woman's body. . . . With only the head of the fetus remaining in utero, the abortionist tears open the skull. . . . The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found in the skull. . . . The abortionist next completes the delivery of a dead fetus, intact except for damage to the head and the missing contents of the skull.

Id. at 959-60 (citations omitted).

case."[83]

O'Connor's concurrence was loyal to the majority, although she opined that if a similar statute were more narrowly drawn and a health exception present, she would uphold its constitutionality.[84] The majority opinion lacked any such promise, opening with its refusal to revisit the principles announced in *Roe*.[85] *Stenberg* demonstrates that *Roe* remains intact post-*Casey*, though the Court's asserted commitment to a unified front appears to have unraveled.

B. Understanding Roe *and* Casey*: Four Paradigms*

That talk of rights and personhood has filtered into the social conversation about abortion has had implications for abortion jurisprudence. Popular and legal thought both before and after *Roe*—drawing heavily on the concepts of rights—is often reflected in the abortion cases. An examination of four popular paradigms, both pro-life and pro-choice, sheds light on the various considerations in *Roe* and *Casey*, and together with those cases suggests the appropriate setting for *Roe*'s future application, if any, outside of the context of abortion.

1. Life as an Absolute

In his book, *The Morality of Abortion*, published three years prior to the *Roe* decision, Judge John T. Noonan and others explore the issue of abortion from a distinctly pro-life point of view.[86] According to Noonan, popular acceptance of abortion was fueled by concerns of overpopulation and a cultural desire for sexual autonomy.[87] In describing the change in public opinion toward favoring abortion, he observes that "[t]he desire to be free of a code of morality fed on a distrust of any abstract formulation of an 'absolute,' a conviction that many such

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83. *Id.* at 962. In *Hill v. Colorado*, 530 U.S. 703 (2000), decided the same day as *Stenberg*, the Court rejected a group of abortion protestors' First Amendment challenge to a statute that criminalized their conduct. Kennedy dissented in that case as well, regarding the Court's decision as no less than insensitive given the asserted compromise reached in *Casey*. *See id.* at 791-92. Read together, *Hill* and *Stenberg* suggest that Justice Kennedy might not be so approving of *Roe* if the issue of abortion were revisited, notwithstanding his participation in the joint opinion in *Casey*.

84. *See id.* at 951.

85. *See id.* at 921.

86. THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (John T. Noonan, Jr., ed., 1970).

87. *See id.* at xiii-xvii.

formulations in the past had actually harmed human beings, and a disbelief in the existence of any authority capable of promulgating universal rules."[88] In Noonan's view, however, those promoting abortion failed to see the real issue of whether the fetus has a right to live.[89]

Noonan describes the view that life begins at conception as "[a]n almost absolute value in history," surveying traditions of the Catholic and Protestant churches.[90] Although he notes exceptions in cases of rape and incest, Noonan found that most religions and ancient societies recognized life in the womb prior to birth and agreed that abortion was akin to murder. In the pro-life formulation, the right of the fetus to continue its life (in most cases) outweighs consideration of the impact of the pregnancy on the woman involved. Hence the life of the fetus becomes an absolute that must be protected, not destroyed. This position is and has been the central tenet of the pro-life movement.[91]

2. A "Distressful Life and Future"

Pro-choice advocates, on the other hand, have framed the issue of abortion as involving the right of women to control their bodies. Pro-choice advocates emphasize the right of a woman to determine whether or not she should be bound to carry the fetus to term and give birth, since to do so involves changes in a woman's body, her health, and her range of life choices. Some have described this view of the right to abortion as a woman's right not to become an incubator for the state.[92]

At the time that *Roe* was decided, this line of argument contained what many consider to be a potent social justice

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88. *Id.* at xv.

89. *See id.* at xvii.

90. *Id.*

91. Dworkin has theorized that pro-life advocates do not actually recoil at the thought of a fetus dying in an abortion because they believe that the fetus is a person with full moral rights equal to others, but because they believe that all life has intrinsic value which should not be disturbed. *See* DWORKIN, *supra* note 38, at 11-13. Still, pro-life advocates have not relented from their position that a fetus is a life, a person, and a member of a politically unrepresented minority with an interest not to be killed. *Cf., e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 310 n.6 (1993) (responding to Dworkin's assessment of pro-life beliefs with simply, "I disagree.").

92. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 789 (2d ed. 2002).

component—namely the assertion that poor and minority women, faced with the choice of obtaining health-threatening illegal abortions or raising children for which they cannot provide, are the ones most adversely impacted by restrictions on abortion. Justice Blackmun clearly seems to have been a proponent of this view.[93] Some have questioned this premise,[94] but the pro-choice movement has not relied solely on the social justice argument in the debate about abortion. Rather, the pro-choice position rests on the larger proposition that a woman should be permitted to obtain an abortion regardless of her particular circumstances. And while earlier pro-choice rhetoric characterized the fetus as a mere "clump of cells," later pro-choice advocates maintained that their position was sound even if the fetus was a living human.[95]

Many proponents of this position have adopted an analogy described by the ethicist Judith Jarvis Thomson to support their view of the unintended or undesired pregnancy and its consequences.[96] In her analogy, Thomson invites the reader to

93. *See, e.g.*, Webster v. Reproductive Health Services, 492 U.S. 490, 557-58 (1989). Justice Blackman stated:

> The result [of overruling *Roe*] . . . would be that every year hundreds of thousands of women, in desperation, would defy the law, and place their health and safety in the unclean and unsympathetic hands of back-alley abortionists, or they would attempt to perform abortions upon themselves, with disastrous results. Every year, many women, especially poor and minority women, would die or suffer debilitating physical trauma, all in the name of enforced morality or religious dictates or lack of compassion, as it may be.

Id.

94. Graciela Olivarez, National Organization for Women member and the highest-ranking Latina in President Carter's administration, was appointed vice-chair of the President's Commission on Population and the American Future. In the commission's 1972 report, Olivarez denounced the view that abortion constitutes an act of beneficence toward the poor:

> I am not impressed nor persuaded by those who express concern for the low-income woman who may find herself carrying an unplanned pregnancy and for the future of the unplanned child . . . because the fact remains that in this affluent nation of ours, pregnant cattle and horses receive better health care than pregnant poor women. The poor cry out for justice and equality and we respond with legalized abortion.

THE COMM'N ON POPULATION GROWTH AND THE AM. FUTURE, POPULATION AND THE AMERICAN FUTURE 162 (1972) (separate statement of Grace Olivarez), *quoted in* Mary Krane Derr, *Herstory*, AM. FEMINIST, Summer 1998, at 18.

95. *See, e.g.*, Estrich & Sullivan, *supra* note 40, at 146 ("Imposing any 'undue burdens,' or indeed any burdens at all, on a woman's right *prior* to viability in the name of preserving life, though, is to say that a woman has a right and then to take it away. By definition, her right is to control her bodily autonomy *even at the expense of potential human life.*").

96. *See* Judith Jarvis Thomson, *A Defense of Abortion*, 1 J. PHIL. & PUB. AFF. 47 (1971). For a discussion and critique of Thomson's view in a slightly different context, see

imagine waking up one morning with a celebrated violinist attached to his or her body. The violinist has a kidney disorder that requires him to be attached to the reader's body for nine months or so, but if the reader unplugs the violinist prematurely, the violinist will die. The question then becomes, notwithstanding that the violinist is a person with rights, is the reader required to remain attached to the violinist or can the reader unplug him? Thomson concludes, and many have agreed, that you would be "within your rights" to unplug the violinist.[97] In reaching her conclusions, Thomson relies on the fact that the American legal tradition generally has not required individuals to be "Good Samaritans" and give of themselves to rescue another.[98]

The natural challenge to Thomson's position is that, except in cases of rape or other forced sexual relations, one does not "wake up" pregnant.[99] Thus where sex is voluntary, the pregnant woman has at least tacitly consented to the possibility of pregnancy.[100] Thomson anticipates this general objection with another analogy, apparently referring to situations in which attempts at contraception have failed. She invites the reader to suppose that:

> [P]eople-seeds drift about in the air like pollen, and if you open

Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 FORDHAM L. REV. 93, 165-84 (2001).

97. THOMSON, *supra* note 95, at 49; TRIBE, *supra* note 6, at 130. In Tribe's view, requiring this sacrifice of a woman and not a man because of a woman's unique reproductive capability amounts to gender discrimination in violation of the Fourteenth Amendment. *See id.* at 132-35.

98. *See* Thomson, *supra* note 96, at 62-64. The term "Good Samaritan" is fairly common in the American legal tradition and refers to a person who gives his time and energy for another without compulsion of law or the expectation of remuneration. Taking Thomson's analogy to an even further extreme, one law professor has argued that in any given pregnancy, the fetus commandeers a woman's body to make her a "captive Samaritan," that is, one who does not have a choice of whether to become a Good Samaritan. EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK, FROM CHOICE TO CONSENT 11 (1996). The story of the good Samaritan appears in *Luke* 10:25-37.

99. Recognizing that this fact poses an obstacle to acceptance of Thomson's theory, McDonagh attempts to conceptually divorce pregnancy from any conscious choice by the man or woman involved. To that end she makes the somewhat specious claim that a fertilized ovum, and not sex, causes pregnancy. *See* MCDONAGH, *supra* note 98, at 40.

100. For a direct response to the "tacit consent" theory, see David Boonin-Vail, *A Defense of "A Defense of Abortion": On the Responsibility Objection to Thomson's Argument*, 107 ETHICS 286, 288-300 (1997). It should be noted that some feminists assert that little or no sex can be presumed voluntary given societal, cultural, and physical pressures on women to succumb to sexual intercourse. *See, e.g.*, MacKinnon, *supra* note 13, at 1312 ("Women are socially disadvantaged in controlling sexual access to their bodies through socialization to customs that define a woman's body as for sexual use by men. Sexual access is regularly forced or pressured or routinized beyond denial.").

> your windows, one may drift in and take root in your carpets or upholstery. You don't want children, so you fix up your windows with fine mesh screens, the very best you can buy. As can happen, however, and on very, very rare occasions does happen, one of the screens is defective . . ."[101]

She concludes that the person-plant who develops as a result would not have a right to the use of your house.[102] Thomson's conclusion seems to rest on the apparent harshness of the protective measures society would require of the homeowner in order to avoid responsibility—in her example, that the homeowner could only have avoided her predicament by living "with bare floors and furniture, or with sealed windows and doors."[103] Likewise, a woman could completely avoid pregnancy resulting from rape either by "having a hysterectomy, or anyway by never leaving home without a (reliable!) army."[104] Though not stated by Thomson, it would follow that a woman could completely avoid a pregnancy resulting from voluntary sex only by abstinence.[105]

Yet critics of Thomson's argument do not focus on how difficult it would be to completely avoid the risk of pregnancy, but on the voluntariness with which a person may be said to have encountered that risk at the outset. For example, Richard Langer compares pregnancy with the predicament of the person who

> freely chooses to join the Society of Music Lovers, knowing that there [i]s a 1 in 100 chance of being plugged into the violinist if she joins the society. . . . She goes ahead and joins, and much to her chagrin, her name is selected as the person to be plugged into the violinist.[106]

In response to his own rhetorical question of whether it is unreasonable to conclude that the hypothetical Society member

101. Thomson, *supra* note 96, at 59.

102. *See id.*

103. *Id.*

104. *Id.*

105. *See, e.g.*, MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 27 (1996) ("Barring rape, sexual abstinence is an infallible form of birth control."). Graber challenges pro-choice arguments regarding reproductive autonomy, noting that "pro-choice claims that early cutoff dates for abortion deny women the time necessary to make responsible abortion decisions do not take seriously anti-*Roe* assertions that most persons are already free to consider at length 'ethical and personal issues arising from marriage and procreation.'" *Id.* (citation omitted).

106. Richard Langer, *Abortion and the Right to Privacy*, 23 J. SOC. PHIL. 23-51 (1992).

has waived control over her own body, Langers responds, "I think not."[107]

3. *"Human Responsibility"*

In striking contrast to the bodily autonomy line of argument, some pro-choice advocates have acknowledged that the abortion decision involves a distinctly moral choice about not only what happens to a woman's body but whether a baby lives or dies.[108] One pro-choice commentator has argued that the future medical possibility of an artificial womb to sustain unwanted pregnancies means that pro-choice advocates must shift their focus from women's decisions regarding their bodies to women's decisions regarding whether their children should be born.[109]

Leslie Cannold criticizes the pro-choice movement for its focus on individual freedom and privacy rights to the exclusion of moral responsibility. Cannold responds to the helpless violinist analogy, pointing out the differences between the analogy and women's real life pregnancy experience, and concludes that Thomson's position in effect divorces women from the debate regarding the morality of abortion.[110] A few years before the publication of Cannold's work, renowned feminist Naomi Wolf similarly observed that the pro-choice movement would fare better by acknowledging the moral choices involved in abortion.[111] Cannold's conclusion, however, that the abortion right includes a woman's right to determine life or death of her child where there is no pregnancy, has not been adopted by the Supreme Court in any of its abortion decisions.[112]

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107. *Id.*

108. LESLIE CANNOLD, THE ABORTION MYTH: FEMINISM, MORALITY, AND THE HARD CHOICES WOMEN MAKE (1998). Cannold catalogs her survey of forty-five women regarding their answers to questions involving the morality of certain hypothetical abortion situations. Cannold sets out to prove that in most cases, women have abortions to prevent the birth of a child under circumstances that would not be good for the child—that women kill their babies out of love. *See id.* at xviii, 126-36.

109. *See id.*

110. "While there are clearly some abortions that make feminists distinctly uncomfortable, the language of rights, and the belief that the only wrong in abortion lies in denying a woman the freedom to have one, makes it difficult for them to say why." *Id.* at 44-45.

111. Naomi Wolf, *Rethinking Pro-Choice Rhetoric: Our Bodies, Our Souls*, THE NEW REPUBLIC, October 16, 1995, at 26.

112. *Cf.* TRIBE, *supra* note 6, at 224-25.

4. *The "Wonder of Creation"*

Twenty-two years after the Court's decision in *Roe v. Wade*, Norma McCorvey, who sued under the pseudonym of Jane Roe, changed her position on abortion.[113] After converting to Christianity, McCorvey started a ministry entitled "Roe No More" to combat abortion and provide a mobile counseling center for pregnant women in Dallas.[114] Many, like McCorvey, oppose abortion on the grounds that the practice conflicts with their religious values.[115]

Others voice their opposition on the grounds that permissive abortion laws represent a step backward for women and families. A group of women and men have combined the terms "feminist" and "pro-life" in their stand against abortion and other practices, including infanticide, euthanasia, and human cloning and embryo destruction for stem cell research.[116] These feminists depart from some of the traditional views held by pro-life conservatives, but otherwise oppose abortion on social justice grounds, reclaiming feminist figures such as Susan B.

> If, on reflection, one's pro-choice views rest on a sense that a woman should be allowed to prevent her fetus from becoming a child even if it could become one without the woman's having to undergo a prolonged pregnancy, then perhaps, in a technologically transformed world, those views would have to yield to the claim to life of all but the most undeveloped fetus.

Id.

113. *See CNN Special Report,* Roe v. Wade *25 Years Later: Who is 'Jane Roe'?*, CNN.COM (1998), *at* http://www.cnn.com/SPECIALS/1998/roe.wade/stories/roe.profile.

114. *See id.*

115. For this reason, some have argued that questions regarding the existence of life in the womb and the morality of abortion are inherently religious and thus should not be part of any court decision, state regulation, or public discussion on the issue. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 565-66 (1989) (Stevens, J., dissenting) ("Our jurisprudence . . . has consistently required a secular basis for valid legislation."). Others have disagreed, however, acknowledging that the Constitution does not exclude deeply held religious beliefs from the realm of public discourse. *See* CARTER, *supra* note 91, at 254-55; TRIBE, *supra* note 6, at 116 (reversing an earlier expressed view).

116. *See Hearing on Human Cloning Before the Senate Comm. On Commerce, Science, and Transportation, Subcomm. on Science, Technology, and Space* (statement of Ms. Margaret Colin, Actress) (May 2, 2001), http://www.commerce.senate.gov/hearings/0502col.PDF; *see also* Feminists For Life Homepage, *at* http://www.feministsforlife.org (last visited Nov. 5, 2003) (Feminists for Life describes itself as a "nonsectarian, nonpartisan, grassroots organization that seeks equality for all human beings and champions the needs of women."). Recently, Feminists for Life launched a campaign entitled "Women Deserve Better" to promote the desirability of social programs designed to help pregnant women and mothers. *See* Women Deserve Better Homepage, *at* http://womendeservebetter.com (last visited Nov. 5, 2003); *see also* Press Release, National Women's Coalition for Life, National Women's Coalition for Life Statement of Commitment (April 3, 1992), *at* http://www.priestsforlife.org/articles/nwclstmt.html (describing views of organization of several nonsectarian pro-life organizations) (last visited Nov. 5, 2003).

Anthony and Fannie Lou Hamer as champions of the cause against abortion.[117] These groups speak less in terms of a right to life and more in terms of the value of life itself, with regard to both the pregnant woman as well as the fetus.

II. SOME PROBLEMS OF THE NEW FRONTIER

In thinking about *Roe* and the massive body of commentary that has developed, one questions whether it is almost obsolete in the discussion of issues raised by the specter of the new frontier. The world has changed a great deal since *Roe* was decided, and so has the concept of reproduction. Whereas in the 1970s many feared overpopulation and scarce resources, today many couples focus on ways to combat infertility.[118] Pro-life and pro-choice advocates continue to argue about the validity of their respective positions, but a critical issue is whether *Roe*, as modified by *Casey* and the understandings upon which it is based, can logically be applied to solve today's increasingly complex problems.

Two examples of the practices creating problems that I have collectively termed the "new frontier" are embryo disposition and embryonic stem cell research,[119] though others may immediately come to mind.[120] The issues of embryo disposition as well as embryonic research seem to invoke *Roe*'s explication of the value to be accorded preborn or potential life.[121] But a

117. *See* Press Release, National Women's Coalition for Life, National Women's Coalition for Life Statement of Commitment, (April 3, 1992), *available at* http://www.priestsforlife.org/articles/nwclstmt.html (last visited Nov. 5, 2003) (on file with author).

118. *See, e.g.*, Francis Kissling & Denise Shannon, *Abortion Rights in the United States: Discourse and Dissension*, *in* ABORTION LAW AND POLITICS TODAY 150 (Ellie Lee ed., 1998) ("These days, couples and doctors are focused on treating infertility, not on avoiding pregnancy.").

119. I use the term "embryonic stem cell research" to refer to the harvesting of stem cells from living embryos for the purpose of research and, in some cases, implantation into other individuals, resulting in the destruction of the embryos.

120. The abortifacient drug RU 486, available in France for several years, was approved by the FDA in 2000, and will no doubt continue the heated debate about abortion. *See Debate Heats up With Approval of Abortion Pill*, CNN.COM (Sept. 28, 2000), *at* http://www.cnn.com/2000/HEALTH/women/09/28/abortion.pill.reax/index.html. Additionally, it is difficult to mention stem cell research without raising the specter of both therapeutic and non-therapeutic human cloning, though neither is discussed here. Other practices such as selective abortion and ultimately "gene" selection for hair and eye color and sexual orientation have been predicted but to date are not a part of mainstream reality. *See* FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE 72-82 (2002).

121. In this article, I use the terms preborn life, prenatal life, human life, and potential human life interchangeably. Following the Supreme Court's implicit example in *Roe v.*

simple comparison between the circumstances and understandings surrounding these practices and those underlying *Roe* reveals quite plainly that *Roe* and its conclusions about personhood should not apply. When courts have applied *Roe*, the convenience of *Roe*'s conclusive answer has only created further problems of definition and value.

A. Embryo Disposition

When couples engage in assisted reproductive technologies such as in vitro fertilization, many fertilized embryos are created but not all are used in the processes.[122] Issues arise as to the disposition of the embryos, though to date no such case has been heard by the United States Supreme Court. In the now well-known case of *Davis v. Davis*,[123] the Supreme Court of Tennessee considered a divorce dispute between Mary Sue and Junior Davis over the disposition of cryogenically preserved embryos. At the time the case reached the Tennessee Supreme Court, Mary Sue desired to donate the embryos to a couple who wanted a child, but Junior Davis did not want the embryos to

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Wade and its progeny, I use the term "potential" simply to indicate the significant disagreement on the issue. *See* 410 U.S. 113 (1973); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

122. The following is a helpful description of the in vitro fertilization ("IVF") process, which explains the developmental stages of the embryo:

> One sperm fertilizes one ovum. The result of this cellular fusion is a single cell known as a "zygote." . . . The zygote proceeds to multiply by cellular replication.
>
> . . .
>
> If fertilization is accomplished outside the body [by IVF], the cellular mass is cultured until it reaches the eight cell stage (about seventy-two hours after fertilization.) At this point, the cellular structure (now called a blastomere) may be placed into a uterus or into a fallopian tube in hopes that it will implant into the uterine wall and continue developing.
>
> Alternatively, at the eight cell stage, the blastomere can be frozen in liquid nitrogen. If frozen, the mass is generically termed a frozen embryo. The frozen embryo can later be thawed and placed into a fallopian tube or into a uterus to enable implantation and development into a human fetus. . . .
>
> Medical nomenclature changes from an eight cell blastomere to a cystic blastocoele and then to an embryo. Biologically the blastocoels becomes an embryo when a condensation of cells, known as the "primative streak" appears; the primative streak develops about ten to twelve days after fertilization.
>
> When the developing embryo reaches a crown-rump length of five centimeters (roughly two inches), it weighs approximately eight grams. This occurs at the end of the eighth week when the embryo has developed into a fetus.

Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern That Technology*, 48 DEPAUL L. REV. 825, 832-33 (1999).

123. 842 S.W.2d 588, 589 (Tenn. 1992). The U.S. Supreme Court denied review in *Stowe v. Davis*, 507 U.S. 911 (1993).

become children.[124]

To determine what should happen to the embryos, the Tennessee Supreme Court first had to consider how to term the embryos, since, according to the court, language determines status that can affect legal rights.[125] The Supreme Court noted that the embryos could be treated in three different ways: (1) as full constitutional persons, (2) as the property of Mr. and Mrs. Davis, or (3) as an interim category of potential human life deserving of "special respect."[126] The problem the court undertook to resolve in *Davis* involved a conflict between three competing positions, depending upon one's view of the embryos. The genetic mother, Mary Sue Davis, claimed a right to determine the embryos' disposition; the embryos, if persons, possessed a right to be implanted and develop into children;[127] and Junior Davis claimed a right not to become a genetic father outside of marriage. The court analyzed Tennessee law and then applied *Roe*, concluding that the embryos could not be "persons" under federal law, being far less developed than fetuses.[128] Thus the only rights left to balance were those of Mary Sue and Junior, and the court ultimately held that Mrs. Davis could not override Junior Davis' desire not to become a genetic parent.[129]

Since *Davis*, other state courts have adjudicated cases involving similar dilemmas.[130] The application of *Roe* in these cases is problematic for reasons that may not be immediately obvious. Under *Roe*, fetuses are not persons with constitutional rights, and as such, are deserving of no special protection apart from the state's interest in potential life. Applying *Roe* to *Davis* means that the embryos must be something less than persons. The *Davis* court assigned the embryos to a category of

124. *See Davis*, 842 S.W.2d at 590. When the case began in the trial court, Mary Sue Davis desired to have the embryos implanted and give birth to them herself. By the time the case reached the Tennessee Supreme Court, however, she was remarried and no longer wanted the embryos.

125. *See id.* at 592.

126. *Id.* at 596-97.

127. Relying on medical testimony, the trial court viewed the embryos as "children in vitro," and thus held that it was in the best interest of the children to be born rather than destroyed. *Id.* at 594.

128. *See id.* at 595.

129. *See id.* at 604.

130. *See* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass v. Kass, 673 N.Y.S.2d 350 (N.Y. 1998).

beings entitled to "special respect." Yet the court in *Davis* did not consider whether Junior's prevention of the embryos' implantation in fact afforded the special respect required or what that special respect would entail. What this means in practice is that little weight is accorded to the value of the embryos.[131] Hence, *Roe*'s conclusion about the lack of fetal personhood has spilled over into areas arguably not imagined by the Supreme Court at the time of *Roe*.

I say "arguably," because in one sense the Court in *Roe* clearly rejected the view of life as an absolute from the point of conception. Thus one could make the case that the Court simply intended that in all future disputes, fetuses, embryos, and other preborn or potential life should not be legally recognized. Yet, given the issue before the Court in *Roe*, it is difficult to assume that such a sweeping result was intended. The *Roe* Court faced the issue of abortion, which has as its necessary consequence the destruction of the fetus. The Court deemed its balancing to be an all or nothing proposition—either the fetuses' interests or the woman's must prevail. Any serious discussion about the value of human life or potential life would have only made the Court's task more difficult and, to some extent, less palatable to the public. In the case of embryos, however, where an asserted human life is at stake and there is no countervailing abortion right to be jeopardized, it would seem that some consideration of the value of the embryos is in order.[132]

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131. *See* Daniel I. Steinberg, Note, *Divergent Conceptions: Procreational Rights and Disputes Over the Fate of Frozen Embryos*, 7 B.U. PUB. INT. L.J. 315, 330 (1998) (noting that "special respect" designation yields the same results as a "pure property" designation).

132. One writer who rejects the "person" designation but agrees that the "special respect" category is appropriate for embryos offers the following advice:

> It may be too much to expect the law to be responsive to all these ambiguities—at least immediately; but our ethical thinking in this area needs to take them into account. We are dealing here with issues in which our thinking must be stretched to provide nuanced, sensitive ethical guidance. It would be too heaving handed to prohibit development of this technology because we do not have a ready set of rules for dealing with its ethical dimensions. It is simplistic to thrust these decisions into the procrustean bed of our moral rules for dealing with already born children. Instead, we must undertake the task of sorting through the complexities and ambiguities of these unprecedented human dilemmas and attempt to come to consensus on the courses of action that maximize all the values involved. Casuistry (in the best sense) is called for, since we have a moral landscape before us that has been heretofore uncharted and that must be filled in through the most careful and sensitive analysis of all of its features.

Glen C. Graber, *The Moral Status of Gametes and Embryos: Storage and Surrogacy*, *in* HEALTH CARE ETHICS: CRITICAL ISSUES FOR THE 21ST CENTURY 8, 13 (John F. Monagle & David C. Thomasma eds., 1998) (adopting the conclusions of the Ethics Committee of

The application of *Roe* to *Davis* and similar cases also reveals an analytical problem. Though not explicitly revealed, *Roe* seems to make some marked assumptions about how and why the fetus had come to exist in the first place. Justice Blackmun distinctly stated that maternity threatened to "force upon the woman a distressful life and future."[133] The joint opinion in *Casey*, too, references the woman who, perhaps despite efforts at contraception, has become pregnant.[134] Thomson's story of the violinist is analogous, supposing that the reader woke up with a violinist attached to her body after having been kidnapped by the Society of Music Lovers.[135] In *Davis*, however, Mary Sue and Junior deliberately participated in a process to create the embryos that were later frozen. At best, *Roe* is not squarely on point with *Davis* and similar cases. At worst, the Court in *Davis* misapplied *Roe*, the only similarity between the two being the fact that *Davis* involved embryos and *Roe* involved a fetus.

At this point one might respond that *Roe* does not depend on whether the woman has intentionally become pregnant. One could compare *Davis* to a situation in which a married couple successfully conceives a child after several attempts, but days later the husband dies in a tragic accident. In this scenario, the woman intentionally became pregnant but changed circumstances in her relationship affect her pregnancy and may nonetheless cause her a distressful future. Certainly this situation would fit within one of the "infinite variations"[136] envisioned by the Court in *Roe* and *Casey*. Yet the embryo case is not quite the same. The couple in *Davis* surely realized that during the course of a long term proposition like marriage, feelings and circumstances are subject to change. Intentionally creating embryos that can live outside of the body for several years involves the deliberate assumption of the risk that one partner may no longer desire to have a biological child with the other. And perhaps the most significant difference between this situation and the one in *Davis* is that the woman whose

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the American Fertility Society regarding the status of the preembryo). It seems equally simplistic to apply *Roe*'s assumptions about personhood to determine the value of the life of the embryo and the consequences for its treatment.

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

134. *See* 505 U.S. at 852-53; *see also supra* Section I.A.3.

135. *See* Thomson, *supra* note 96, at 48-50.

136. *Casey*, 505 U.S. at 853; *see also supra* Section I.A.3.

circumstances have changed is physically affected by the pregnancy. *Roe* and *Casey* clearly emphasize the mental and physiological effects of carrying a pregnancy to term as justifications for abortion.[137] In *Davis* and similar disputes, the decision will not result in a woman being required to carry an unwanted pregnancy to term. This conclusion can be avoided only if one accepts the extreme position that the right to abortion encompasses the right to decide whether a child lives or dies.

It remains to be seen what value the United States Supreme Court would assign the embryo that has been deliberately created but for some reason is no longer deemed necessary or desirable. This was not the case in *Roe* or in the Court's subsequent abortion decisions. Although some may assume that the Court assumes that the why of the embryo's existence is meaningless, it is problematic to make such an assumption in light of the marked differences between the world in 1973 and the one that we know today.[138]

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137. *See supra* Sections I.A., I.C.; *see also* TRIBE, *supra* note 6, at 130 ("A woman denied the right to decide whether or not to end a pregnancy is not merely being asked to refrain from killing another person but being asked to make an affirmative sacrificed, and a profound one at that, in order to save that person.").

138. Newer forms of surrogacy utilizing assisted reproductive technologies contravene *Roe*'s assumptions and raise similar concerns. Since 1973, when *Roe* was decided, surrogacy involving in-vitro fertilization has increased dramatically. *See* Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 409 n.9 (2002) (noting first birth resulting from IVF technology was in 1979). Though no court has explicitly decided the issue, it would seem that under *Roe*, a contractual provision precluding a surrogate from a pre-viability abortion would not be enforceable. *See* Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993), *cert. dismissed*, 510 U.S. 938 (1993) (noting that because a contract gave the surrogate the "absolute right to abort" the Court did not consider the issue); *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 903 n.23 (Cal. Ct. App. 1994) (raising the question but not deciding); *cf.* Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and The Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, 118-22 (1998) (classifying surrogate's right to abortion as an inalienable privacy right); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986) (same). Yet as Yamamoto & Moore explain, the violinist analogy used to explain *Roe* makes little sense in this instance, the pregnant woman having contractually agreed to provide life support to the violinist. *See* Yamamoto & Moore, *supra* note 96, at 167-69. Further, a bizarre impact of *Roe* is that the option of abortion in this context seems to have created an insidious contractual environment in which the intended parents control their own reproductive futures by demanding abortion of someone else—the surrogate. *See* Beasley v. Wheeler, San Francisco Superior Court, sealed file, Case No.401717 (surrogate claiming that a couple accused her of breach of contract when she refused to undergo a "selective reduction" of one of the twin fetuses she was carrying) (pending as of June 19, 2002); *see also* Kelly St. John, *Couple Hand Off Contract In Surrogate Case / Lawyer Says Twins' Custody Set*, S. F. CHRONICLE, Aug. 13, 2001, at A13 (reporting on same). Bioethicist John Robertson suggests that this result is optimal, but a diligent reader of the

B. *Embryonic stem cell research*

1. *A Temporary Compromise*

Just one step beyond embryo disputes is the issue of embryonic stem cell research, which has for years been extensively discussed in limited scientific and legal communities. The stem cell debate concerns frozen, leftover, or discarded embryos, as in *Davis*, but also involves the prospect of embryos being created solely for research. The issue of embryo research recently moved to the forefront of national attention when President George W. Bush announced that he would make a decision on whether the federal government would fund embryonic stem cell research.[139] Those opposed to stem cell research, largely pro-life advocates, maintain that such research involves the intentional destruction of life or potential life that cannot be tolerated.[140] Supporters of the research hail the enormous potential for medical advances, including possibly accelerated cures for various diseases, and contend that the benefit to society outweighs any loss or harm to the embryos. For months after the President's announcement, the opposing sides debated their positions in the media. In a long-awaited speech President Bush announced the official federal stem cell research policy—that the federal government would not fund research involving the destruction of embryos, but would continue funding for research on existing cell lines, where, in his words, the "life and death" decision had already been made.[141] The President's decision was praised by many on the

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opinions in *Roe* and *Casey* should wonder whether this is what the Court had in mind. *Compare* JOHN ROBERTSON, CHILDREN OF CHOICE (1994) (arguing that the right announced in *Roe* guarantees procreative choice which includes genetic screening and selective abortion), *with Casey*, 505 U.S. at 852-53 (acknowledging that key precedents for the decision incorporate concerns for "not only the meaning of procreation but also human responsibility and respect for it . . .").

139. The issue of federal funding for stem cell research has been a back-and-forth proposition throughout the terms of the last three presidencies. *See* Havins & Dalessio, *supra* note 122, at 843-45.

140. This is not to suggest that all religious and other groups that are pro-life with respect to abortion are unanimous in objection to stem cell research. *See* Robert E. McGough, *Comments: A Case for Federal Funding of Human Embryonic Stem Cell Research: The Interplay of Moral Absolutism and Scientific Research*, 18 J. CONTEMP. HEALTH L. & POL'Y 147, 188-91 (2001) (discussing religious groups in support of stem cell research).

141. *See Bush to Allow Limited Stem Cell Funding*, CNN.COM (Aug. 10, 2001), *at* http://www.cnn.com/2001/ALLPOLITICS/08/09/stem.cell.bush/index.html (containing video of speech given on August 9, 2001).

right and the left as a fair decision that did no harm to their respective positions on the issue of abortion.[142] But it is unclear how long this perceived compromise on the stem cell issue will last.[143] It is difficult to imagine a set of facts in which the Supreme Court, faced with the same basic issue, could reach such a Solomonic result. Meanwhile, the potential for litigation involving these practices increases.[144]

Roe is not explicitly at issue in the embryonic stem cell debate, but many have predicted that the Court's decision in *Roe* would ultimately be called upon to draw the defining line of life in such difficult situations.[145] *Roe* does not purport to define life in every conceivable application; yet the *Davis* court and later courts have persisted in applying *Roe* to situations assessing the value of prenatal life, including ex-utero embryos.[146] Some commentators have correctly noted that the perceived conflict in *Roe*—between a woman and the fetus—is not present in the embryonic research debate.[147] There is simply no plausible reason why a definition of life created for use in the

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142. *See id.*

143. The President's Council on Bioethics will continue to review practices raising similar issues. *See* Mary Leonard, *Bush Begins Talks on Human Cloning Panel Expected to Back President*, BOSTON GLOBE, Jan. 17, 2002, at A6.

144. *See* Shiels v. Univ. of Pa. Med. Ctr., 1998 WL 134220 (E.D. Pa. 1998) (dismissing suit to enjoin regulations prohibiting embryo research and human cloning by couple claiming infringement of their constitutional rights to reproductive choice); Doe v. Shalala, 862 F. Supp. 1421 (D. Md. 1994) (granting defendants' summary judgment motion against class action brought on behalf of embryos to enjoin deliberations of National Institutes of Health Human Embryo Research Panel).

145. *See* TRIBE, *supra* note 6, at 220-22.

146. *See* Doe v. Irvine Scientific Sales Co., 7 F. Supp. 2d 737 (E.D. Va. 1998) (holding that embryos are not persons under *Roe*, and therefore could not assert tort action against laboratory); Doe v. Shalala, 862 F. Supp. at 1428-29 (denying embryo standing to represent class of embryos because an embryo is not a "person" under *Roe*); Kass v. Kass, 673 N.Y.S.2d 350 (N.Y. 1998) ("Like the Appellate Division, we conclude that disposition of these pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice; nor are the pre-zygotes recognized as 'persons' for constitutional purposes (citing *Roe* and New York authority)."); Davis v. Davis, 842 S.W.2d 558 (Tenn. 1992) (holding that embryos are not "persons" under Roe); Steinberg, *supra* note 131, at 331 ("The *Roe* and *Casey* decisions still govern the Constitutional right-to-life aspects. The frozen embryo should have no legal status and no 'right' to be implanted.").

147. *See* R. Alta Charo, *The Hunting of the Snark: The Moral Status of Embryos, Right-to-Lifers, and Third World Women*, 6 STAN. L. & POL'Y REV. 11, 25-26 (1995) (explaining the deliberations and conclusions of the National Institutes of Health Human Embryo Research Panel, and defending the Panel's determination against accusation that recognition of a significant moral change in the embryo due to appearance of "primative streak" at approximately fourteen days undermines *Roe*); *see also* Bradley, *supra* note 35 (reading *Roe* as limiting its personhood conclusion to situations involving the right of a pregnant woman to an abortion).

case of a woman with an unwanted pregnancy should be applied to human embryos created for research.

Further, the rights approach of *Roe* subverts the question of value when dealing with the problems of the new frontier. With embryo research, the rights of the pregnant woman and/or intended parents largely disappear, and instead scientists advocate a right to freely conduct research.[148] The scientist's claim might not seem entirely plausible, but with a rights approach, the only real question is whether the scientist's claim is stronger than the right to which it is compared. Many people perceive life to exist on a continuum, with the value of life increasing as the preembryo turns into the embryo, which becomes the fetus, and when born, the baby.[149] If *Roe* made the case for the fetus seem weak, how then can one successfully advocate a right to life for each of several thousand frozen embryos? The basic understanding of a right is that it must belong to a cognizable rights holder. Pro-life advocates and others taking a rights approach against embryonic research, however, find themselves assigning a right to beings that, quite literally, do not yet exist.[150]

But even if one maintains that embryos, like fetuses, have no rights as juristic persons, the conclusion that proposed research involving their destruction is constitutionally permissible does not automatically follow. To be sure, *Roe*'s personhood analysis

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148. This has led some to argue that scientists have a First Amendment right to conduct research. *See,e.g.*, John A. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1281 (1978). *Contra* Stephen L. Carter, *The Bellman, The Snark, and the Biohazard Debate*, 3 YALE L. & POL'Y REV. 358 (1985) (questioning the textual basis for any right of research and characterizing the assertion of such a right as an attempt to end-run around public opinion).

149. *Cf. Davis*, 842 S.W.2d at 592-93 (stating that the legal status of an "adult" differs from that of a "child," a "child" differs from that of a "fetus," and the legal status of a fetus must necessarily be distinguished from that of an "embryo").

150. *See* Christine L. Feiler, Note, *Human Embryo Experimentation: Regulation and Relative Rights*, 66 FORDHAM L. REV. 2435 (1998) (urging uniform legislation recognizing a negative right of embryos not to be created for the purpose of research); *cf.* John Finnis, *Public Reason, Abortion, and Cloning*, 32 VAL. U. L. REV. 361, 382 (1998).

> It is the issue of equality in dignity—an equality compromised in these technological choices and procedures much more subtly, of course, than in the barbarism of death-intending abortions, but compromised and violated nonetheless. As the unborn child has a right not to be made the object of such an intention to kill, so it has the right not to have been conceived, brought into being, *as* a product. The right avails, in moral truth if not in positive law and practice, whether the technique is straightforward IVF, or the cloning of embryos by "twin fission," or the cloning of *adult* sources . . . .

Id.

suggests that legislatures and courts in their common law capacity need not recognize or protect embryos until they become viable fetuses.[151] Yet *Roe* did not purport to consider the possibility of embryos being used or created for research purposes.

2. *Future Challenges*

Philosopher Francis Fukuyama, after contemplating a "Brave New World"[152] in which research has evolved to the point of cloning, genetic selection, cross-breeding humans with other species and the seeming elimination of the distinctiveness of humanity, concludes that actions should be taken today to limit the research capabilities of tomorrow:

> We do not have to accept any of these future worlds under a false banner of liberty, be it that of unlimited reproductive rights or of unfettered scientific inquiry. We do not have to regard ourselves as slaves to inevitable technological progress when that progress does not serve human ends. True freedom means the freedom of political communities to protect the values they hold most dear, and it is that freedom that we need to exercise with regard to the biotechnology revolution today.[153]

Fukuyama's imperative addresses legislators and the public, but any legislation bearing on asserted reproductive freedoms will at some point have to pass constitutional muster. While many scientists and commentators plead lawmakers to avoid the thorny nettle of *Roe* and constant political turmoil, its application seems inevitable.[154] The Supreme Court will be called upon to decide whether this application continues to be

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151. On this point, the Court in *Casey* was less enthusiastic than the Court in *Roe*:

> We do not need to say whether each of us, had we been Members of the Court when the valuation of the state's interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability . . . .

Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 871 (1992).

152. *See* ALDOUS HUXLEY, BRAVE NEW WORLD (1932).

153. FUKUYAMA, *supra* note 120, at 218. Nonetheless, Fukuyama criticizes as myopic the views of religious conservatives who lament the destruction of life involved in stem cell research but have seemingly little concern for what may be created with the cells. *See id.* at 91.

154. Professor Sunstein proposes two alternate Supreme Court opinions deciding a hypothetical future challenge to state and federal bans on cloning based on claims of reproductive choice. *See* Cass R. Sunstein, *The Constitution and the Clone*, *in* CLONES AND CLONES 207 (Martha C. Nussbaum & Cass R. Sunstein eds., 1998). While Sunstein's proposed opinions do not discuss *Roe*'s personhood analysis, both treat *Roe* as direct precedential authority.

warranted, or whether there is a better means with which to resolve these weighty issues. The stem cell debate is just one example of how *Roe* looms large in the background of many challenges. In *Roe*, Justice Blackmun rejected the view that life begins at conception, in part because technologies such as the morning-after pill, embryo implantation, and artificial insemination would create seemingly intractable difficulties.[155] Today, some of those technologies are posing the very problems to which he alluded, but *Roe* offers little help in resolving them.

In light of the increasing prevalence of such practices—several of which I have discussed and others that may be on the horizon—it is likely that a case involving these issues will come before the Supreme Court. When such a case appears, it will be difficult for the Court to ignore the personhood conclusion in *Roe*. When the Court does decide the hypothetical case, the Court can affirm the entirety of *Roe* as decided in 1973, distinguish *Roe*, or reconsider the personhood conclusion in light of the problems of today. The common theme between the *Roe* Court's considerations and the practices discussed here is a simple one—whether and how the state can regulate the destruction of potential human life. And with the practices I have highlighted, the countervailing consideration of the impact on the pregnant woman, the reason that the asserted life has come to be, and the reason for the proposed destruction of life are all quite different from the foundation upon which *Roe* has been built.

IV. A NEW APPROACH

Having outlined some problems with the application of *Roe* in today's world, I will suggest how the Supreme Court may confront such a case.[156]

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155. *See Roe*, 410 U.S. at 160-61.

156. I do not propose a solution that is believed will bring the pro-life and pro-choice sides together, as others have done. *See* DWORKIN, *supra* note 38; MENSCH & FREEMAN, *supra* note 22; TRIBE, *supra* note 6. Such offerings usually amount to a one-sided approach with few appealing concessions of fact or logic. *See* TRIBE, *supra* note 6, at 239 (noting the disdain held by many pro-choice advocates for pro-lifers, regarding the latter as prejudiced, superstitious and backward); *see also* Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 426-28 (1992) (noting that there are legitimate reasons for pro-life advocates to be concerned about the abortion practices of others, and that "liberals who count [pro-lifers] as deranged busybodies are insensitive as well as wrong"); Richard A. McCormick, *Abortion: The Unexplored Middle Ground*, *in* HEALTH CARE ETHICS: CRITICAL ISSUES FOR THE 21ST

A. Redefining Roe

1. Not Going Back to the Legislatures

It may be useful to start with what I am not proposing. The fact that sensitive issues relating to the value of life are inextricably intertwined with the ongoing dispute over abortion leads many to conclude that any issue of the value of preborn life must be determined by the state legislatures. It is said that the legislatures are better able to respond to the views and desires of the people—to reflect their moral judgments in a way that the Supreme Court is neither empowered nor qualified to do. A major criticism of the decision in *Roe* is that it interrupted the compromise inherent in the legislative process, and continues to preclude society from moving forward on the issue of abortion.[157]

Nevertheless, a determination that the opinion in *Roe* sweeps too broadly need not necessarily lead to the conclusion that the Supreme Court must take no position, and instead send the issue of prenatal value back to the legislatures.[158] If the scope of

CENTURY 60, 64 (John F. Monagle & David C. Thomasma eds., 1998) (conceding that restricting abortion at the point of conception would be difficult to regulate because of problems with proof).

157. Some have proposed legislative compromises that would move abortion restrictions earlier into pregnancy and provide more social aid to single mothers and families. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 15-21 (1987); *see also* M. Cathleen Kaveny, *Toward a Thomistic Perspective on Abortion and the Law in Contemporary America*, 55 THOMIST 343, 393 (1991), *quoted in* Michael J. Perry, *Religion, Politics, and Abortion*, 79 U. DET. MERCY L. REV. 1, 4 n.11 (2001).

158. A new decision by the Supreme Court need not be simply the result of majority forces strengthened by the addition of a new Justice, sometimes called the rule of five. Yet many opposing abortion have determined that if the issue is to be won or lost before the United States Supreme Court, then the most important goal should be to persuade the President to appoint and the Congress to confirm pro-life justices. For example, "Shake the Nation," a joint project of more than thirty pro-life advocacy groups, collectively sent approximately 40,000 baby rattles to U.S. Senators urging them to support pro-life Court nominees. *See* Shake the Nation Homepage, *at* http://www.shakethenation.org. (last visited Nov. 5, 2003). Conversely, *Roe* supporters fear that the 5-4 majority that presumably would affirm *Roe* would be lost with the appointment of a conservative justice, leaving them to resort to the same methods to prevent confirmation. For example, a Feminist Majority project calls for a filibuster of any pro-life judicial nominee and offers supporters the opportunity to send 5,000 metal coat hangers to President George W. Bush. *See* Million4Roe Homepage, *at* http://www.million4roe.com (last visited Nov. 5, 2003). Given the strong language from the Supreme Court in *Casey*, however, it remains to be seen whether the appointment of a new justice alone would result in the reversal of *Roe*. Professor Paulsen views *Casey* as an example of a situation in which relatively new Court appointees who otherwise would have voted to overrule *Roe*—O'Connor and Kennedy—did not do so because of "political and psychological pressure" created by an influential political constituency's support of *Roe*. Paulsen, *supra* note 64, at 1601 n.176.

Roe's reach has been proved to have gone too far, then there is no reason that the Court cannot simply fix its mistake.[159] *Casey* proves that the Court is capable of making major changes to *Roe* while ostensibly maintaining *Roe*'s "essential holding" intact. And although the Court could conceivably accomplish this goal without making any grand pronouncement about the value of embryos, saying nothing on the subject would leave the states free to take differing approaches to their valuation and treatment.[160] To the extent that a given legislature's regulation of embryos would be said to impinge on the reproductive rights of individuals and couples, the Court would be required to determine (eventually, if not in the instant hypothetical case) whether such a law is constitutional. In doing so, the Court would be squarely faced with the question of the valuation of the embryo. Granted, one could make the case that here, as with *Roe*, a declaration on the status of the embryo would be unnecessary. But it seems rather implausible for the Court to rule on the constitutionality of, say, embryonic research,[161] without making some statement about the value of the embryos.

2. *"Special Respect" (or Other Intermediate Category)*

Assuming that Parts I and II show that the application of *Roe* in the new frontier leads to a serious valuation problem, and that the Supreme Court must remedy this problem, the next logical question is what standard must be used in the place of *Roe*'s zero-value conclusion. The "special respect" designation, as used in *Davis* and as adopted by the National Institutes of Health Human Embryo Research Panel,[162] promises to supply some symbolic significance to the status of human embryos and similar forms of life or potential life. As shown earlier, however, the "special respect" designation has never been fully

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159. *Cf.* William W. Van Alstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade: *An Outline of a Decision Merely Overruling* Roe, 1989 DUKE L.J. 1677, 1683 n.19 (noting over 130 past overrulings of constitutional precedent by the Supreme Court).

160. *See* Lori B. Andrews, *Regulation of Experimentation on the Unborn*, 14 J. LEGAL MED. 25, 40-44 (1993) (cataloging the approaches of 24 states' fetal research laws).

161. *Cf.* Shiels v. Univ. of Pa. Med. Ctr., 1998 WL 134220 (E.D. Pa. 1998) (dismissing suit to enjoin regulations prohibiting embryo research and human cloning by couple claiming infringement of their constitutional rights to reproductive choice).

162. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); *see* Charo, *supra* note 147, at 25-26 (discussing the National Institutes of Health Human Embryo Research Panel's view that an embryo's moral status entitles it to "respect").

explored in a judicial setting, and the practical application of the term tends to lead to the same result as *Roe*'s personhood conclusion.[163]

This leaves the Supreme Court with the task of explaining what "special respect" or any other intermediate category between "full constitutional person" and "nothing" actually means. The Court could look to science, philosophy, religion, or some combination for an answer, but any of these approaches would potentially be vulnerable to the criticism that a value-laden judgment had been made.[164] Of course, that is *exactly* what is going on, and that is what makes *Roe* itself so controversial thirty years later.[165] To avoid this criticism, the Court could remain in its sphere of relative comfort, finding in the Constitution some resolution to this question. This time, the Court would no doubt be careful to avoid the strained analysis of *Roe*, and instead might find that human life or potential human life has value—not necessarily because it is guaranteed an absolute or almost absolute right to life, but because it is in the interest of those reading and living by the Constitution to say that it does.[166]

A fundamental challenge to the search for a standard of value

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163. *See supra* Section II.A; *see also* Daniel Callahan, *The Puzzle of Profound Respect*, 25 HASTINGS CENTER REP. 39, 39 (1995) (observing that the NIH panel's report offered respect to embryos while at the same time suggesting that they be destroyed for research), *cited in* Charo, *supra* note 147, at 12, 27 n.6.

164. Some argue that science conclusively dictates the answer to the question of value. Even in the scientific community, however, disagreement exists over whether life is present at fertilization, implantation, three or fourteen days after fertilization, or at some point later in pregnancy. *Compare On Human Embryos and Medical Research: An Appeal for Ethically Responsible Science and Public Policy*, 16 ISSUES L. & MED. 261, 264-65 (asserting in a joint statement of doctors, scientists, law professors, academicians and interested organizations that embryos are biologically human at fertilization), *with* Charo, *supra* note 147, at 25 (representing the National Institutes of Health Human Embryo Research Panel's view that moral difference exists between fertilization and fourteen-day embryo). By choosing one particular view as the basis for its opinion, the Supreme Court would be no less vulnerable to the charge that it has chosen according to its values, rather than according to a clear consensus.

165. *See* discussion *infra* Section III.B.1; *see also* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2011 (2002) (observing that the balancing required in constitutional cases involves inherent value choices).

166. Some have found recognition for the life of the unborn in places other than the text of the Constitution. Note, for example, the Declaration of Independence, which provides that all men are *created* equal. Others have observed that the preamble to the Constitution states, "We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves *and our Posterity*, do ordain and establish this Constitution." U.S. CONST. pmbl., *quoted in* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 113 (2000) (emphasis added); *see also* Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (noting this same Constitutional language).

is the way in which we think about these issues. One reason that the absolute rights approach is so entrenched in the minds of so many is because it appears to be the only way to adequately protect life. *Roe* teaches the value of the fetus changes according to its development, particularly in its ability to breathe. But it also teaches, by implication, that the value of the fetus depends on the circumstance of the pregnant woman. A wanted child, born to an expectant couple, is a joy—it may continue its existence and be born into the world. An unwanted pregnancy resulting from bad circumstances is a burden and a hardship—it may be terminated. In the embryo dispute cases, the partner who seeks to preserve the embryos claims that the embryos should be given the chance to continue to exist, and perhaps, be born to one of the parents or to another couple. The contesting partner claims that it would be too uncomfortable to know that genetically related children exist somewhere in the world; thus, the embryos should be destroyed. In our jurisprudence, the value of life or potential life seems to be intrinsically tied to something we do or do not want, rather than being something that *is*. Yet those who believe that life or potential life *is*, either because of their belief in a Divine Creator, or in the primacy of Nature, or because of their views that all should be treated equally, or for any other of a number of reasons, simply reject the idea that a life should be valued according to the caprice of those who are most closely connected with it.[167] Any intermediate standard crafted to recognize the value of life should reflect this objection.

B. Concerns About Tampering with Roe

Some final thoughts are warranted on the issue of the

167. Perhaps to convince pro-lifers that a right to life approach does not accurately reflect their concerns, Dworkin has argued that most people who oppose abortion believe that an unborn life has a certain "intrinsic value," rather than rights and interests of its own. *See* DWORKIN, *supra* note 38, at 73; *see also* discussion *supra* note 91. But Dworkin's theory misses the mark when he compares the loss of unborn human life with the destruction of a valuable painting, such as Van Gogh's *Café Terrace*, or the destruction of a tree. Putting aside the case of the tree, the Van Gogh would seem to have little value if there were no one to view it, or at least know that she owned it as part of her art collection. *Cf.* Eric Blumenson, *Who Counts Morally?*, 14 J. L. & RELIGION 1, 13-14 (1999-2000) (commenting on Dworkin's distinction between *intrinsic* human value, which compels inviolability, and *personal* human value, which may not). The Van Gogh, like many other things, is valuable for its utility—what Dworkin terms an *instrumental* value. To put unborn life in the same category with such things is to seriously underestimate the weight of the pro-life point of view.

significance of *Roe* and why it may be difficult for the Court to do anything that would appear to disturb what is left of *Roe* after *Casey.*

1. Moral Disagreement on the Question of Value

In talking about the value of human life, one cannot escape the issue of morality. In the majority opinion in *Roe*, Justice Blackmun acknowledged that

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[168]

Although the authors of the joint opinion in *Casey* disavowed any reference to morality, a judgment about the regulation of abortion is necessarily a moral one—pertaining to "principles of right and wrong in behavior."[169] The fact that such a huge moral disagreement exists about the issue of abortion, and therefore, on the issue of the value of preborn life or potential life, poses a significant challenge to the Court. The Court would be understandably reticent to issue another decision that will be fervently opposed by at least half of the American population.

But insight may be gained by considering *why* the regulation of abortion—and particularly whether the Supreme Court chooses to call the fetus a person—mean so much to so many people on all sides of the issue. Many pro-choice advocates defend abortion on the grounds of justice for women, the poor, and the oppressed classes. Legalized abortion means safer abortion for those who lack the means to go beyond the standard channels.[170] It is also said that less restrictive abortion laws give women more control over their reproductive lives, increasing opportunities for improvement and self-fulfillment.

168. *Roe*, 410 U.S. at 116.

169. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (2002) (defining "moral"). Wrote Justices O'Connor, Kennedy, and Souter: "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code." Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 850 (1992). *But see* GLENDON, *supra* note 156, at 36 ("The notion that abortion is an individual and private decision is itself a moral notion. The problem is, which version of morality should prevail?").

170. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 557-58 (1989) (Blackmun, J., dissenting).

On this view, to exalt the symbolic value of the fetus or embryo above these practical concerns is myopic, even cruel. And although there are arguments against the assertions that liberal abortion laws are necessary to secure reproductive autonomy,[171] the subtext may be more important than the text. Law can dictate mores that make us more or less comfortable in the world.[172] In this way, law takes on an expressive function that speaks about what we, as a society, represent.[173] Particularly in the case of Supreme Court decisions, the judiciary is often deemed to be "speaking on behalf of the nation's basic principles and commitments."[174] That being so, pro-choice advocates likely feel that less restrictive abortion laws epitomize a world with more equality and individual freedom. Indeed, abortion has been a popular cause among liberal scholars, judges, lawyers, and advocacy groups.[175] Likewise, any challenge to the reproductive and scientific advancements offered by the new frontier would probably be viewed as a direct assault on this equality and freedom.[176] Pro-choice advocates likely perceive themselves as battling in a culture war of sorts, against an enemy whose obsession with *Roe* and the

171. *See* GRABER, *supra* note 105, at 27 (citing arguments that "[p]ersons who cannot decide whether they want children may postpone this decision indefinitely by avoiding heterosexual intercourse").

172. *See* GLENDON, *supra* note 157, at 61-62 ("In the long run, the way in which we name things and imagine them may be decisive for the way we feel and act with respect to them, and for the kind of people we ourselves become.").

173. *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (exploring the expressive function of law, i.e., "the function of law in 'making statements' as opposed to controlling behavior directly").

174. *Id.* at 2028. Viewed in this way, perhaps the Court's agenda in *Casey* makes more sense. In declining to overrule *Roe*, the Court identified their audience as the entire nation, a people whose "belief in themselves . . . is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals." Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 868 (1992).

175. *See* Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731, 741 (1997)

> Hardly a month goes by during the 1990s without some "new" defense of abortion coming out in a law review. New books providing alternative grounds for *Roe* clutter bookshelves and bookstores. Most significantly for present purposes, abortion and privacy rights play prominent roles in grand constitutional theory, the central enterprise of the contemporary legal academy.

Id.

176. For example, in an essay on the potential regulation of cloning, Laurence Tribe posits that to ban cloning human beings simply because society deems it unnatural would stigmatize an entire class of persons created by cloning and limit society's capacity to grow. *See* Laurence Tribe, *On Not Banning Cloning for the Wrong Reasons*, *in* CLONES AND CLONES, *supra* note 154, at 226-31.

unborn is based upon one thing: the imposition of its morality upon society.[177]

Pro-life advocates, on the other hand, likely feel that they are increasingly trapped in a society that does not reflect their values—a world in which millions of unborn children are dying with the sanction of the state and the nation's highest Court.[178] *Roe* symbolizes a distinct rejection of those values, with the Court's conclusion that the fetus is not a person under the Fourteenth Amendment as the crowning affront. The opinion in *Roe* purports to qualify what is meaningful life, deserving of constitutional protection, and so offends those who believe that all life should be regarded with the utmost value.[179] Virtually every strand of the *Roe* opinion dooms the pro-life position to the background.[180] In the legislative arena, relatively recent attempts to enact fetal pain legislation, fetal homicide statutes, and prohibitions on partial-birth abortion can well be seen as efforts to redeem the pro-life world view.[181] Still, those efforts

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177. *See, e.g.*, Benshoof, *supra* note 79, at 423 ("The goal of the religious right is . . . to substitute one religious viewpoint as the state-sponsored ideology."). Note also a mass solicitation letter from the American Civil Liberties Union proclaiming the following:

> You see, the battle we are waging against the likes of Pat Robertson, Jesse Helms and the others isn't just about *semantics* — about whose definition of morality gets to be in the dictionary . . . <u>It's about whose definition of morality will be the measuring stick for what our country will become over the next few years</u> . . . .

Letter from ACLU Executive Director Ira Glaser (October 2000) (on file with author).

178. According to a study published in 2003 based on survey data collected by the Alan Guttmacher Institute, the current yearly number of abortions in the United States in 1999 and 2000 was approximately 1.3 million. Lawrence B. Finer & Stanley K. Hinshaw, *Abortion Incidence and Services in the United States in 2000*, 35(1) PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, at 6 (January/February 2003), *available at* http://www.agi-usa.org/pubs/journals/3500603.pdf.

179. *See supra* Section I.B.4. For a pro-life discussion of *Roe*'s facilitation of eugenics, see Hunter Baker, *Storming the Gates of a Massive Cultural Investment: Reconsidering* Roe *in Light of Its Flawed Foundation and Undesirable Consequences*, 14 REGENT U. L. REV. 35, 55-57 (2002).

180. In their book considering the possibility of compromise between pro-life and pro-choice advocates, Mensch & Freeman surmise that for many pro-lifers who were religionists, *Roe* represented a larger secular world view threatening to eradicate the Judeo-Christian viewpoint from society. *See* MENSCH & FREEMAN, *supra* note 22, at 128.

181. *See* Amar, *supra* note 166, at 112 (arguing that the majority in *Stenberg* was wrong to overlook the growing consensus on the cruelty of partial-birth abortion). Still, many pro-choice advocates view these efforts as incremental attempts to undermine *Roe*, and they may have precisely that effect. *See* Stenberg v. Carhart, 505 U.S. 914, 951-52 (2000) (Ginsburg, J., concurring); *see also* Tara Kole & Laura Kadetsky, Recent Development, *The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 216 (2002) ("[B]y treating a fetus as a person for the purposes of federal criminal law, the [Unborn Victims of Violence Act] may lead some to question *Roe*'s assessment of fetal life. Coupled with improvements in prenatal medicine and technology, the Act may in fact serve ultimately to undermine abortion rights."); Note, *The Science, Law and Politics of*

are not likely to sideline the debate about *Roe*, given that many pro-life advocates view *Roe* as no less than a mirror into the soul of American culture.[182] The challenges of the new frontier build upon the collective unease of those who believe that too much life has already been lost in favor of a vision of freedom and autonomy.

Perhaps the expressive factor is one reason why neither side will relinquish its vice grip on its position regarding abortion. With both sides competing for the Supreme Court's endorsement, it would seem difficult for the Court to decide a case in a way that would jeopardize *Roe*, even if the hypothetical future case cries out for such a decision.[183] But in recognizing the concerns of pro-choice and pro-life advocates, not all of which have been summarized here, as simultaneously practical and expressive, the Court might be better able to craft an opinion that actually addresses these concerns. If *Roe*'s approach made an unpopular decision even worse, then the Court should give serious thought to any decision altering the opinion in *Roe*. This seems to have been the Court's design in its *Casey* opinion, although there was too much emphasis on *stare decisis*, with too little discussion of the competing interests presented by *Roe* and why the Court was choosing to affirm *Roe*'s "essential holding." Nonetheless, in the thirty years since *Roe*, the twenty years since *Webster*, and the thirteen years since *Casey*, the Court has not succeeded (even a little) in dousing the flames of the abortion debate.[184] Thus the Court might well conclude that no matter how astute its opinion, it is completely powerless to control the extent of public disagreement with its decisions.

Fetal Pain Legislation, 115 HARV. L. REV. 2010, 2033 (2002) (urging that fetal pain legislation be enacted notwithstanding political implications for pro-life and pro-choice positions).

182. *See, e.g.*, Baker, *supra* note 179, at 65 ("If we abandon the principle of respect for human life by making the value of a life depend on whether someone else thinks that life is worthy or wanted, we will become one sort of people.").

183. The Court may see itself in the role of a peacemaker, more engaged in keeping the warring factions from destroying each other rather than in articulating a collective national morality. *Cf.* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 253 (2d ed. 1984) (arguing that the Court must execute this role "by displaying a fairness which consists in even-handedness in its adjudications").

184. Not for a lack of trying. *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 861-69. On why the Court failed in *Stenberg*, see Amar, *supra* note 166, at 110-13.

2. *Concerns About the Legitimacy of the Court*

Finally, in modifying *Roe*, the Court would necessarily be concerned about its legitimacy, both with respect to *stare decisis* and the existence of a "national controversy."[185] The *stare decisis* question seems fairly simple, given the Court's opinion in *Casey*. The Court could distinguish *Roe* and *Casey* from the future case on the ground that abortion involves a special conflict not present in other settings—the conflict between a pregnant woman and a fetus. Under this outcome, the doctrine of *stare decisis* would not be implicated, and the Court's *Roe* and *Casey* decisions would remain intact. In a bolder move, the Court could declare that the personhood conclusion of *Roe* was mere *dicta* and not part of the holding of that case. Doctrinally this would not be very difficult, given the fact that the Court has not since *Roe* relied on the personhood conclusion. Further, the Court did not include fetal personhood as part of its summary of *Roe* in either *Casey* or *Stenberg*. Thus, in some ways, the Court would be merely explaining a step that it has already taken. The problem with this approach is that many assume that the personhood conclusion was critical to the outcome in *Roe* and believe that any alteration of that conclusion would seriously undermine *Roe*. Unless the Court is prepared to completely overrule *Roe* based on one of the three reasons given in *Casey* for overruling precedent,[186] then the Court must simply respond with its best case that the personhood conclusion was not part of *Roe*'s "essential holding."

As explained in *Casey*, the Court's legitimacy concerns extend beyond the issue of when the Court may overrule precedent. *Roe* is not the ordinary case, having been compared with *Lochner v. New York*[187] and *Brown v. Board of Education*.[188] The Supreme Court's view of its role in cases dealing with national controversies, as explained in *Casey*, may influence the Court's approach. In *Casey*, the Court seemed to suggest that it would not disturb controversial precedent so as to

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185. *See Casey*, 505 U.S. at 861-69.

186. The Court stated that it may overrule precedent when a rule is unworkable, when it has not been significantly relied upon, or when developments in law or fact have made the rule practically obsolete. *Id.* at 854-60; *see also supra* Section I.A.3.

187. 198 U.S. 45 (1905).

188. 347 U.S. 483 (1954); *see Casey*, 505 U.S. at 861-64.

prove that the Court is impervious to political pressure.[189] If the Court maintains this position, and if it deems a limitation of the personhood conclusion to be a retreat from *Roe*, then this could be a significant obstacle. Ultimately, the Court should evaluate whether the substance of the change to be made is worth making, aside from whether it will signal some imperfection in the original decision, or some weakness in the face of extreme reaction to the decision.

CONCLUSION

The Supreme Court considered and decided *Roe v. Wade* in the context of a particular problem: the unintended or unwanted pregnancy.[190] And although the Court recognized that the boundaries of its decision reached out to potentially related issues such as artificial wombs, embryo implantation, and artificial insemination, the Court did not purport to resolve issues created by those technologies. Today society is much closer to the new frontier than in 1973, and it promises many changes in the way we think about life and reproduction. Two examples of the application of new frontier technologies—embryo disposition disputes and embryonic stem cell research—demonstrate that the assumptions underlying the Court's abortion decision in *Roe* are very different from the ones that underlie such new technologies. Nonetheless, lower courts persist in applying *Roe* and its conclusion that the fetus is not a person to all sorts of situations involving preborn or potential life. It is reasonable to suppose that in time, the Supreme Court will be faced with a decision that requires the Court to take a position on whether this application of *Roe* should continue. This presents the Court with the choice of renouncing or affirming the personhood conclusion of *Roe*, or completely distinguishing *Roe* from cases that do not involve abortion. Either way, there is considerable potential for controversy in the Court's decision.

So what might cause the Court to take the monumental step toward curtailing what many assume to be *Roe*'s "essential holding"? Presumably not a change in the Court's composition, creating a "doctrinal disposition to come out differently from

189. *See Casey*, 505 U.S. at 867-69.
190. *See supra* Section I.A.1.

the Court of 1973."[191] But perhaps the Court would be moved by a case or series of cases signaling that a change of approach is required.

191. *Casey*, 505 U.S. at 864.