Why Roe v. Wade Is Wrong

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I. Introduction

A. The Objective of the Article

As a Roman Catholic the author is aware of one of his church’s tenets to the effect that birth begins at conception. He proposes that such conclusion be adopted by the U.S. Supreme Court, forbidding the performance of abortions, except when necessary for the protection of the life and/or health of the pregnant mother. His reason for such suggestion is not because it is a tenet of his church, for that would be a violation of the First Amendment of the U.S. Constitution’s requirement that there be a separation of church and state. Rather he concludes that while such principle is not uniformly held by all people, it is the most sensible approach to the subject of dealing with unwanted children and may reduce the controversy that now abounds in connection with the Supreme Court’s permission to abort their birth. He supports his suggestion by (1) determining whether the Supreme Court in *Roe v. Wade*, unintentionally, though assuredly sanctioned the commission of murder upon unborn children by referring to the Congressional definition of murder; (2) analyzing in depth the *Roe* Opinion of the Court; (3) examining Roe’s companion case, Doe v. Bolton; (4) reviewing how the decision was received; (5) asserting that the *Roe* progenies have attempted, but failed in their attempts to correct the errors of *Roe*; and (6) concluding with a summary of the points made in the article.

B. Has the Court Sanctioned Murder?

Why is *Roe v. Wade*¹ wrong? *Roe v. Wade* is wrong because it is a United States Supreme Court decision which permits the killing of children whose only wrong is that

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they were conceived. And that killing is murder, if one abides by a definition of “murder” composed by the United States Congress which has been codified as 18 U.S.C. § 1111, and which proclaims that:

Murder is the unlawful killing of a human being with malice aforethought. 2

Congress clarified its definition of murder by providing that:

[e]very murder perpetrated by ... willful deliberate, malicious, and premeditated killing ... child abuse; ... or perpetrated as part of a pattern or practice of assault ... against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is a murder in the first degree. 3

Congress further added the following clarification:

Any other murder is murder in the second degree. 4

The Supreme Court’s decision in Roe v. Wade has saved abortion from being murder by its resemble clearly indicating that under certain circumstances, even though it may be maliciously performed, such procedure is not “unlawful.”

In 1791 the framers of the Bill of Rights made certain that there shall be no “cruel and unusual punishments inflicted” in this country. 5

Congress, using its definition of murder, has provided penalties for such crime. 6

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2 18 U.S.C § 1111(a). “Malice aforethought” has been defined as “[t]he requisite mental state for common law murder, encompassing any one of the following: (1) the intent to kill...” Black’s Law Dictionary. 8th Ed. (2004).

3 18 U.S.C § 1111(a).

4 Id.

5 U.S. Const. amend VIII.

If a person who, while in furtherance of a major drug offense, or while trying to escape detection thereof, fires a weapon into a group of 2 or more persons, and in the course of such conduct kills any person, that offender shall be punished by death or imprisonment for any term of years or for life, or both if the killing is a first degree murder.\(^7\) If the killing is a second degree murder the penalty shall be punished by imprisonment for a term of years or for life.\(^8\)

If a murder is committed in connection with the use of armor piercing ammunition the penalty is death or sentence to a term of years or for life.\(^9\)

A person, who while confined to a federal correctional institution under a sentence for a term of life imprisonment, commits a murder of another shall be punished by death or by life imprisonment.\(^10\)

Any Indian who commits murder upon the person of another Indian or other person shall be subject to the same law and penalties of all other persons committing any such offense within the exclusive jurisdiction of the United States.\(^11\)

The statute dealing with the laundering of monetary instruments provides penalties for murder in connection therewith.\(^12\)

The crime of murder is included within the definition of “racketeering activity” within the statute dealing with racketeer influenced and corrupt organizations.\(^13\)

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12 18 U.S.C. § 1956(c)(7)(B)(ii), and (c) (7)(D).
The part of the statute dealing with terrorism, which specifies penalties, provides that whoever kills a national of the United States while such national is outside the United States shall be punished by death or imprisonment for any term of years or for life, or both if the killing is murder.\textsuperscript{14} Separate penalties are imposed where the murder is committed in an attempt or conspiracy with respect to homicide.\textsuperscript{15}

In the statute dealing with acts of terrorism transcending national boundaries the term “federal crime of terrorism” means an offense that is a violation of 18 U.S.C. § 956(a)(1) which relates to conspiracy to murder, 18 U.S.C. § 1116, which relates to the murder of foreign officials, official guests, or internationally protected person.\textsuperscript{16}

The statute dealing with authorization for interception of wire, oral or electronic communication contains punishment for murder.\textsuperscript{17}

Persons who have been convicted of murder are prohibited from serving certain specified positions.\textsuperscript{18}

If a parent is receiving child support from a state, but has murdered another of its children the state must file a petition to terminate the parental rights of the parent who committed murder, or join as a party in such proceeding if a petition therefore been filed by another person.\textsuperscript{19}

\textsuperscript{13} 18 U.S.C. § 1961(1)(A), (B).
\textsuperscript{14} 18 U.S.C. § 2332(a)(1).
\textsuperscript{15} 18 U.S.C. § 2332(b)(1), (2).
\textsuperscript{16} 18 U.S.C. § 2332b(g)(5)(B)(i).
\textsuperscript{17} 18 U.S.C. § 2516(1)(b), (c), (2).
\textsuperscript{18} 29 U.S.C. § 1111.
\textsuperscript{19} 42 U.S.C. § 675(5)(E).
Despite this plethora of so many federal statutes proscribing and providing punishment for murder, why has Congress not provided applicable statutory material forbidding and punishing the murder of a child in a mother’s womb? The answer to that question is clear. In *Roe v. Wade* the United States Supreme Court declared that the killing of a child who has not remained in its mother’s womb for longer than “approximately” three months is not murder. Is such not murder? Those who believe in the bible know that David, centuries before Christ, said that the wicked man murders the innocent; his eyes spy upon the unfortunate. This does not proclaim that the participants in an abortion procedure are dissolute, but their actions are, even though they may not be aware of it.

C. How Did the Case get to the Supreme Court?

The procedural facts of the case, with the exception of those relating to persons whose positions lie outside the scope of the question posed – Is *Roe v. Wade* wrong – are as follows. Jane Roe, a pregnant lady bearing a pseudonym in this case, sued Henry Wade, the District Attorney of Dallas County, Texas in Federal Court of that county, seeking (1) a declaratory judgment that the Texas statutes dealing with abortions were

20 Justice William O. Douglas, in his concurring Opinion in *Roe* noted that no prosecutor had ever returned a murder indictment charging the taking of the life of a fetus. *Roe*, 410 U.S. at 218. All that such proves is, as pointed out in *Keeler v. Amador County*, 87 Cal. Rptr. 481, 494 (1970), also cited by Justice Douglas, stands for the proposition that those whose function it is to enforce statutes are not supposed to extend them past what the legislative bodies have enacted. The state court in that case held that the killing of an unborn, but viable fetus is not a “human being” within the meaning of the statute under which a defendant was being tried. The reason there had been no enactment criminalizing the murder of a fetus, even before *Roe*, if such be the case, reflects the same unsettled state of opinion about abortion, as is exemplified by *Roe*, and virtually unanimous agreement that statutes are not to be extended past their legislative import. *Roe v. Wade* was the first U.S. Supreme Court decision clearly and without equivocation, giving pregnant women the right to kill their unborn children. Any legal controversy prior to Roe is really of no significance.

21 Psalm 10:8.

22 *See Roe*, 410 at 120-123.
unconstitutional and (2) an injunction restraining defendant Wade from enforcing them.

A three-judge federal court held that the Texas statutes violated the 9th Amendment, applicable through the 14th Amendment, but that the court’s abstention was warranted regarding the application for the injunction. That court entered a judgment declaring the Texas statutes unconstitutional, but dismissed the Complaint and application for the injunction. Both parties appealed to the Supreme Court under 28 U.S.C. § 1253. Both sides took protective appeals to the Fifth Circuit Court of Appeals, which withheld decision until the Supreme Court ruled. The Supreme Court ruled in one of the most controversial decisions since Dred Scott v. Sandford and Lochner v. New York in a 7-2, incorrect, decision.

II. The Court’s Opinion

A. Introduction

The Opinion of the Court in the Roe decision comprises fifty one of the sixty five pages dealing with the case in the United States Reporter. Thirteen pages are devoted to the procedural parts of the case. Part V of the Opinion is a short summary of the position taken by the Appellant, Ms. Roe. Part VI of the Opinion deals with an

23 28 U.S.C. § 1253 is the federal Code provision allowing direct appeals to the Supreme Court from rulings of three-judge District Courts.

24 See Roe 410 U.S. 120-123.


27 The seven majority members were: Chief Justice Warren Earl Burger, and Justices William O. Douglas, William J. Brennan, Jr., Potter Stewart, Thurgood Marshall, Harry A. Blackmun, and Lewis S. Powell, Jr. The two dissenting Justices were Byron R. White and William H. Rehnquist.

28 From page 116 to just past page 129 of the Opinion.

29 From just after the beginning of page 129 to almost the beginning of page 130.
exhaustive summary of the positions taken on abortion by ancient peoples, the Hippocratic Oath, the common law, the English statutory law, the American law, the American Medical Association, the American Public Health Association, and the American Bar Association. Part VII\(^{31}\) of the Opinion gives the three theories often stated as the reasons for statutes proscribing abortion. The first was a Victorian social concern to discourage illicit sexual behavior.\(^{32}\) The second reason was to protect the pregnant woman from the dangers to her from the abortion procedure.\(^{33}\) The third reason was a religious one; popular thinking held that the life of a human being began at conception.\(^{34}\)

The principal position taken by the Court in its majority Opinion appears in Parts VIII, IX, and X,\(^{35}\) in which Justice Harry A. Blackmun discusses two points.

B. Part VIII of the Opinion of the Court

1. Blackmun’s first point – in Part VIII. Even though the Constitution does not explicitly mention a right of privacy, in varying contexts the Court or individual Justices have found “at least the roots of that right” in the First Amendment, in the Fourth and Fifth Amendments, “in the penumbras of the Bill of Rights,” in the Ninth Amendment, and “in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.”\(^{36}\) He states that the cases cited by him to substantiate that

\(^{30}\) Slightly in excess of eighteen pages – from almost page 130 to almost page 148.

\(^{31}\) From almost page 148 to halfway through page 152.

\(^{32}\) See page 148.

\(^{33}\) See pages 148, 149.

\(^{34}\) See about the middle of page 150 to the end of that page.

\(^{35}\) See pages 152.5 to 164.5

certain provisions of the constitution do guaranty privacy “make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’... are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, ... procreation, ... contraception, family relationships, ... and child rearing and education. ...”37

Whether the right of privacy is founded upon the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as the Court thinks it is, or upon the Ninth Amendment’s reservation of rights, as the District Court concluded, that right, he submits, is broad enough to authorize the murder of her child. He finds that the privacy right is sufficiently strong to avoid the following distasteful aspects of pregnancy: (1) “specific and direct harm medically diagnosable even in early pregnancy;” (2) “[m]aternity, or additional offspring, may force upon the woman a distressful life and future, “ (3) “[p]sychological harm,” (4) “[m]ental and physical health may be taxed by child care,” (5) “distress, for all concerned associated with the unwanted child,” (6) “the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it, (7) “the additional difficulty and continuing stigma of unwed motherhood.”38 These reasons for doing away with the child, though not recognized by Blackmun as such, are all matters that deal with the mother’s conveniences. Not one of them deals with protecting the mother’s life or well being; and certainly not one of them deals with the life or well being of her child. Not only did Justice Blackmun fail to specifically detail his assertion of the problems which might be caused by an unwanted

37 Id.
38 Id. at 153, as to all seven “problems” as seen by Justice Blackmun.
pregnancy, but he did not even consider how they might be handled, without the murder of the child. He failed, moreover, to examine the cases he cited in support of his assertion that, though not specifically mentioned in the Constitution, “at least the roots of that right” may be found there. *Union Pacific R. Co. v. Botsford*[^39] simply found that the extent to which a trial court is empowered to require a personal injury plaintiff to submit to a physical examination is governed by constitutional principles. *Stanley v. Georgia*[^40] held that the First and Fourteenth Amendments prohibit the making mere possession of obscene material a crime.[^41] *Terry v. Ohio*[^42] found reasonable a search for weapons on one suspected of a daylight robbery.[^43] *Katz v. United States*[^44] held that the government’s actions in electronically listening to and recording one suspected of interstate transmission of bets and wagers violated the privacy of the suspect using a telephone booth.[^45] *Boyd v. United States*[^46] was a suit for fraud in connection with the importation of goods where the Court found that a state statute requiring the importer to produce


[^41]: Justice Thurgood Marshall, in writing the Opinion of the Court, said “fundamental is the right to be free, except in very limited circumstances, from unwarranted government intrusions into one’s privacy.” *Id.* at 564.

[^42]: *Terry v. Ohio*, 392 U.S. U.S. 1

[^43]: Chief Justice Earl Warren, writing the Opinion of the Court said “wherever an individual may harbor a reasonable expectation of privacy he is entitled to be free from unreasonable governmental intrusion.” *Id.* at 9.


[^45]: Justice Potter Stewart, writing the Opinion of the Court, said that “[t]he government ‘s activities in electronically listening to and record the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and this constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.” *Id.* at 353.

papers by which he was convicted of fraud violated the Fourth Amendment.\footnote{47}{\textit{Olmstead v. United States}, 277 U.S. 438 ((1928)).} affirmed a conviction under the National Prohibition Act.\footnote{49}{\textit{Griswold v. Connecticut}, 381 U.S. 470 (1965).} found that a state statute which criminalized counseling and other professional treatment to married persons for the purpose of preventing conception and the use of contraceptives, violated the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution.\footnote{51}{Justice William O. Douglas, writing the Opinion of the Court, noted that the Court has protected the freedom to associate and the privacy of one’s association, and that the First Amendment has a “penumbra” where privacy is protected from governmental intrusion. \textit{Id.} at 483. Justice William J. Brennan, Jr. in \textit{Eisenstadt v. Baird}, 405 U.S. 438, 455 (1972) said that the \textit{Griswold} case found that the Connecticut statute unduly invaded the zone of marital privacy which is protected by the Bill of Rights.} \textit{Meyer v. Nebraska}\footnote{52}{\textit{Meyer v. Nebraska}, 262 U.S. 390 (1923).} held that a state statute which forbade the teaching of a foreign language until a student had passed the eighth grade violated the Fourteenth Amendment.\footnote{53}{Justice James C. McReynolds, in writing the Opinion of the Court, said that the constitutionally guaranteed “denotes not merely freedom from bodily restraint but also to right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of one’s own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” \textit{Id.} at 399.} \textit{Palko v. Connecticut}\footnote{54}{\textit{Palko v. Connecticut}, 302 U.S. 319 (1937).} held that the prohibition of double jeopardy by the Fifth Amendment was not absorbed by the

\footnote{47}{Justice Bradley, writing the Opinion of the Court said that “[t]he principles laid down in this opinion effect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.” \textit{Id.} at 629.}

\footnote{48}{\textit{Olmstead v. United States}, 277 U.S. 438 ((1928)).}

\footnote{49}{Chief Justice William H. Taft, writing the Opinion of the Court, made it clear that a compulsory production of a man’s private papers to establish a criminal charge against him, or to forfeit his property is within the scope of the Fourth Amendment in all cases in which a search and seizure would be made. \textit{See Id.} at 459.}

\footnote{50}{\textit{Griswold v. Connecticut}, 381 U.S. 470 (1965).}

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\footnote{54}{\textit{Palko v. Connecticut}, 302 U.S. 319 (1937).}
Fourteenth.\textsuperscript{55} \textit{Loving v. Virginia}\textsuperscript{56} in an Opinion of the Court written by Chief Justice Earl Warren, made it clear that state statutes which prevent the marriage of persons based solely on racial classifications violate the Privileges and Immunities Clause as well as the deprivation of liberty clause of the Fourteenth Amendment. \textit{Skinner v. Oklahoma}\textsuperscript{57} held that a state order compelling the acquisition of a compulsory mastectomy violates the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{58} \textit{Eisenstadt v. Baird}\textsuperscript{59} held that a state statute which permits married persons to obtain contraceptives to prevent pregnancy, but prohibits distribution to unmarried persons, violates the Equal Protection Clause of the Fourteenth Amendment. \textit{Prince v. Massachusetts}\textsuperscript{60} stands for the proposition that the right to practice one’s religion does not permit one to violate the law by delivering magazines to a minor which he or she permits the minor to sell.\textsuperscript{61} \textit{Pierce v. Society of Sisters}\textsuperscript{62} held that a state statute which required children from ages 8 to 16 to attend public, as as opposed to private schools, violated the protection of liberty guaranteed

\textsuperscript{55} Justice Benjamin N. Cardozo, in his Opinion of the Court, said that the exclusion of these immunities and privileges from the immunities and privileges protected against the actions of the States has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning and essential implications of liberty itself. \textit{Id}.
\textsuperscript{at} 326.

\textsuperscript{56} \textit{Loving v. Virginia}, 388 U.S. 1 (1967).


\textsuperscript{58} Justice William O. Douglas, in writing the Opinion of the Court, said the one suffering such ignominy is deprived of his basic liberty. \textit{Id}.
\textsuperscript{at} 541.


\textsuperscript{60} \textit{Prince v. Massachusetts}, 321 U.S. 158 (1944).

\textsuperscript{61} Justice Wiley B. Rutledge, in writing the Opinion of the Court, expressed the point that such a religious right does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. \textit{Id}.
\textsuperscript{at} 166.

the parents of those children by the Fourteenth Amendment. These cases may establish that while the right of privacy is not specifically mentioned in the Constitution, it has constitutional underpinnings through the “liberty” guaranteed by the Fourteenth Amendment. These cases, however, certainly do not establish that such “liberty” interest gives a mother the right to murder her unborn child who she thinks is the cause of some or all of her problems. While the “roots” of a privacy right may be strong, neither morally nor legally, are they that strong.

After citing the cases he relied upon, Justice Blackmun stated that the pregnant woman and “her responsible physician” will consider these problems “in consultation.”

This argument is similar to the argument of certain “pro choice” adherents who state that while they consider abortion a sin, they do not have the right to require that the pregnant woman likewise consider it a sin. Both arguments miss the inescapable point that what makes abortion operable is not the decision of the pregnant woman or her “responsible physician,” but the decision of the Supreme Court to permit pregnant women to have the choice of an abortion, if that is their decision. The action of the Supreme Court giving mothers the right to abort the birth of a child is just as wrong as is the action of legislators not giving parents of school-age children the right to send their children to private schools, as was determined in *Pierce v. Society of Sisters*.

2. Blackmun’s second point – in Part VIII. The Court does not agree with the Appellant that she has the right to “terminate her pregnancy at whatever time, in

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63 Justice James C. McReynolds made it clear that private schools, even though corporate entities, were guaranteed the same Fourteenth Amendment liberty as non-incorporated entities. *Id.* at 535.

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

65 *See supra* text accompanying note 62.
whatever way, and for whatever reason she alone chooses.\textsuperscript{66} Blackmun introduces “the compelling state interest” test here, to be referred to again in Part IX of his Opinion.\textsuperscript{67} Just as the mother has an interest in her pregnancy, the state has an interest therein. “At some point in pregnancy, these respective interests become sufficiently compelling to regulate the factors that govern the abortion decision.”\textsuperscript{68} “We, therefore conclude,” wrote Justice Blackmun, “that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”\textsuperscript{69} He recognized “prenatal life” as one of the reasons for which this state interest is justified.\textsuperscript{70}

C. Part IX of the Opinion of the Court

Having previously introduced the “compelling state interest” test,\textsuperscript{71} in Part IX of his Opinion Blackmun mentioned it again with little elucidation when he stated that the Court disagrees with the Appellant, Ms. Roe, and the Appellee, Mr. Wade. Ms. Roe took the position that her abortion right bars any imposition of criminal penalties which may have been allegedly justified by “compelling state interests.” Mr. Wade’s position was that the State’s determination that its recognition and protection of prenatal life from and after conception\textsuperscript{72} constitutes a “compelling state interest.” Blackmun stated that the

\textsuperscript{66} Id. at 153.

\textsuperscript{67} See id. at 156.

\textsuperscript{68} Id. at 154.

\textsuperscript{69} Id. at 154.

\textsuperscript{70} Id. at 155, 156.

\textsuperscript{71} See id. at 155.

\textsuperscript{72} It must be remembered that the Court had not the slightest inking of when conception took place, it having chosen not to inquire as to that date. See infra text accompanying note 86.
District Court held that the Texas statutes “outstripped” justification for the positions taken by the parties and “swept ‘far beyond any areas of compelling state interest.’”\(^{73}\)

1. Part IX A. of the Opinion. This part deals with the quintessential question of whether the fetus in the mother’s womb is a “person;” but it is not answered. The Opinion acknowledged that Ms. Roe’s attorney admitted during oral argument of reargument of the case that if a fetus is a “person” within the Fourteenth Amendment Ms. Roe’s case “collapses,” because the fetus’ right to life would be guaranteed by that Amendment.\(^{74}\) This is just another way of admitting that if life begins at the moment of conception then the murder of such life is constitutionally forbidden. Blackmun felt compelled to state that no case could be furnished by the state in support of that conclusion.\(^{75}\) This point made by the Justice is a forewarning of his next thesis – that the definition of “person” must come from a governmental source, rather than from a spiritual one. First – he felt comfortable in the knowledge that the framers of the Constitutional amendment did not define “person” in their work.\(^{76}\) Second, he asserted that the Court is not aware of any census counting a fetus.\(^{77}\) His third position is that virtually all of the state statutes permitting abortion, do so on the basis of saving the mother’s life, if doing away with fetus’ life is needed. At the same time he points out that in those states which proscribe abortion, the punishment differs from that metered out for

\(^{73}\) Id. at 156.

\(^{74}\) Id. at 156, 157.

\(^{75}\) Id. at 157.

\(^{76}\) Id. at 157.

\(^{77}\) Id at 157, n.53.
what is generally considered as murder. The defect in Blackmun’s analysis of both items of his thesis is that he is leaving to governmental edicts, rather to spiritual teachings, the answer to that profound question of when life begins. While this nation is committed to the belief in separation of church and state, such thinking is not identical to the secularist position that government should be separate even from religious beliefs. The separation of church and state simply requires that no religion shall dictate its tenets into the governing edicts of a nation. It neither forbids nor requires that spiritual thinking be freely adopted by the government of a country or its functionaries. On July 4, 1776 the Declaration of Independence recognized the right of people to form “a separate and equal station to which the laws of Nature and of Nature’s God entitle them.” The framers of the First Amendment to the Constitution in 1791 forbade Congress from establishing a religion, and simultaneously therewith forbade Congress from prohibiting the free exercise thereof, and placed both prohibitions in equal dignity with freedom of the press, freedom of speech, the right of peaceful assembly and the right to petition the Government for a redress of grievances.  

On the “Flag Day” of June 14, 1954, the hero of World War II, President Dwight D. Eisenhower purposed that “under God” be added to the words of this Nation’s Pledge of Alliance, and those words have remained in the Pledge ever since.  

On July 30, 1956 Congress added “In God we trust” to the United States Code as the national motto of the United States.  

The framers of the federal Constitution in

78 U.S. Const. amend I.

79 The Pledge was first seen in a September 8, 1892 Boston magazine; modified slightly on October 12, 1892, and June 23, 1923. Congress included it in Title 36 of the United States Code on June 22, 1942, as 36 U.S.C. § 172, which has been presently codified as 4 U.S.C. § 4.

Article VII thereof declared that their work was done on the Seventeenth day of September in “the Year of our Lord one thousand seven hundred and Eighty seven.” When Barack Obama took his oath of office as the 44th President of the United States he placed his hand on the bible used by President Abraham Lincoln at his swearing-in ceremony. Many pregnant women, out of love for their fellow man, refuse to use the “right” given them by Roe v. Wade. Neither of these choices conflict with the separation of church and state doctrine. None of the spiritual statements referred to above, in fact, offend that doctrine, but they unquestionably recognize that this nation believes in the existence of God, the Father Almighty.

While it cannot be said that the United States is a country which has adopted any certain religion or its teachings as its law, it also cannot be said that the United States has rejected any certain religion or its tenets. Though there are some dissenters, the United States, as a nation, has adopted the concept that there is God, a supreme power. While the extent of that supreme power is not uniformly recognized in the United States, would it have been so bizarre for the Supreme Court in 1973 to have accepted the proposition, beheld by many Americans, that God creates all people, from the moment of their conception? What was bizarre instead, is that seven members of the Court in 1973 adopted a position that not until “subsequent to approximately the end of the first trimester”81 does a human being, a person, come into existence, but that prior to that imprecise event what exists in the mother’s womb is an “embryo,” which will become a “fetus”82 with a “potentiality of human life” 83 but in the interim is not even a mass of

81 Roe, 410 U.S. at 164.

82 Id. at 159.
protoplasm, but at most is something, no one knows exactly what, which may, having “a potentiality of human life,” become a human being. The concept that life begins at conception, though not scientifically proved, has the attribute of preventing murder, if it is, in fact, proved. It disabuses the vague theory adopted by the Court in *Roe* which permits murder if life, in fact, begins prior “to approximately the end of the first trimester.” That is a risk too dire to countenance.

2. Part IX B. of the Opinion. This part is concerned with the issue of when a State may enact laws which control the pregnancy and the mother’s right to terminate it. Blackmun says that that point is when “the health of the mother or that of potential human life, becomes significantly involved.” He does not state whether there is any degree of important distinction between “the health of the mother” and “that of potential human life” and if so which takes priority. He is content to state that “[t]he woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.” In speaking for the Court, Justice Blackmun writes: “[w]e need not resolve the difficult question of when life begins.” He gave as reason for this abdication of a vital role of inquiry, that the judiciary is not in the position to speculate on an answer when those trained in medicine, philosophy, and theology are unable to arrive at any consensus. He apparently did not realize that it is not the function of those trained in such discordant disciplines as medicine, philosophy and theology to construct a

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83 Id. at 162.
84 Id. at 159.
85 Id.
86 Id.
87 Id.
consensus as to the subject of when life begins. Perhaps he realized the vast difference between the specialties he mentioned. Rather, he chose to address, as he did on the following page of his Opinion, “the wide divergence of thinking on this most sensitive and difficult question.”

That is what became his excuse for not choosing a more creditable authority. The Opinion of the Court, while not delving into the question of when life begins, considered at length the doctrine of “viability” - a real contretemps. That discussion was more confusing than the beginning of life probably would have been.

The Opinion of the Court does again mention the beginning of life, but not in depth of any degree. Blackmun states that there has always been strong support for the view that life does not begin until live birth. He claims such was the view of the Stoics. With utterly no attempt to document his authority, he asserts that such thinking (1) appears to be the predominant view, but not unanimous attitude, of the Jewish faith; (2) “it may be taken to represent also the position of a large segment of the Protestant community;” (3) “organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.” The last statement does not appear to be even an attempt to establish a specific time of the beginning of life.

The Court’s Opinion then tends to drift among several observations. We are informed that physicians and their “scientific colleagues tend to consider that birth begins at conception, upon live birth or upon an interim point at which the fetus becomes

88 Id. at 160.

89 See id. at 131, 160, 163, and 164.

90 Id at 160.

91 Id. at 160.
“viable,” i.e. “potentially able to live outside the mother’s womb, albeit with artificial aid.” In a statement hardly even paralleled for its imprecision Blackmun states that “[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.” The Aristotelian theory of “mediate animation, which held sway during the Middle Ages and Europe’s Renaissance, are next mentioned. We are then informed that the Roman Catholic Church, “and many non-Catholics as well” believe in life from the moment of conception. “Substantial problems” for this view are posed, states the Justice, by embryological data that purport to indicate that conception is a “process over time” rather than an “event” Even if such theory were accurate, no one knows exactly at what point the “process” begins. Are we to feel comfortable adopting this theory, not knowing whether life may begin at a very early stage of the pregnancy when the object of the mortal wound is a living person? Since the pregnancy, no matter when life began, was the result of a voluntary act on the part of the child’s mother, without taking any precautions to prevent pregnancy, is it unfair to ask her to reject her “right” which is based on such a flimsy hypothesis? Justice Blackmun, moreover, fails to even venture a guess as to what the fetus is before it springs into life at the time of its movement or its birth. Later in his Opinion Blackmun appears content to think of a

92 Id. at 160.

93 Id. at 160.

94 Id. at 160, 161.

95 Id. at 161. Blackmun fails to inform us, however, as to the length of time that the process might take to fruition. It is accepted knowledge that some biological processes, i.e. the withdrawal of a hand from flame, though the result of a process, takes less than a second.

96 Its movement through “quickening,” to which he devotes a considerable amount of time. See id. at 132, 134-139, 141, 151 and 160.
fetus before it is alive, as a thing having “only the potentiality of life,” without offering the slightest hint as to the modality of the substance which has only such vague dimensions.

He concludes Part IX B. of his Opinion with an examination of what courts have done with claims made on behalf of unborn fetuses. He says that “the law has been reluctant to endorse any theory that life, as we recognize it, begins before “life birth” or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon “life birth.” We are furnished with no elucidation as to the exceptions, to which he refers. His last sentence is “[i]n short, the unborn have never been recognized in the law as persons in the whole sense,” again without an explanation of what a person in the “whole sense” would look like, or be like.

D. Part X of the Opinion. of the Court

Having previously conceded that a state has not only a right, but a duty, to promulgate and enforce restrictions against the abortion process, in Part X of the Opinion the Court, Blackmun attempted to define the point during the pregnancy at which those regulations would be appropriate: “the compelling point,” as referred to by the Court. The closest the Court came to arriving at such a point was: “at approximately the end of the first trimester.” The reason for this conclusion, as vague as it is,

97 Id. at 162.
98 Id. at 161.
99 See id at 154, in which the following statement was made: “[the right of personal privacy includes the abortion decision, but this right is not unqualified and must be considered against important state interests in the regulation.”
100 See id at 163.
101 See id. .
is that as was mentioned earlier in the Opinion\(^{102}\) “the state retains a definite interest in protecting the woman’s own health and safety when an abortion is proposed at a late stage of pregnancy.”\(^{103}\) Justice Blackmun wrote that “[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.”\(^{104}\)

Part X of the Opinion leaves us with two conclusions, e.g. the time of the pregnancy at which the state may regulate the abortion procedure, is “the compelling point,” to use the Court’s wording. This definition is vague, at best: the reason offered by the Court for there being such a point for it to accept, is to protect the health of the mother, not the child. To make Part X of the Court’s Opinion more confusing, a second “compelling point” was created. It is in connection with what the Court refers to as “the State’s important and legitimate interest in potential life.”\(^{105}\) The Courts says that this “compelling point” is “at viability,”\(^{106}\) which we assume means when the fetus is “capable of living; having attained such form and development as to be normally capable of surviving outside the mother’s womb.”\(^{107}\) The designation of this “compelling point” is a bit less vague than the “compelling point” vis-a-vis the mother’s health, but it suffers from two defects. Since it forms a part of the composite “compelling point” vis-a-vis the mother’s chances of mortality and the survival of the fetus, the first defect is that

\(^{102}\) See Id. at 149, 150. the page referred to by Blackmun was actually 725 of the Supreme Court Reporter..

\(^{103}\) See id. at 150 (Sup. Ct. Reporter at 725).

\(^{104}\) Id. at 149.

\(^{105}\) Id. at 163.

\(^{106}\) Id.

\(^{107}\) Merriam-Webster Online Dictionary.
confusion is created as to whether there are more than one “compelling points,” and if there are more than one “compelling points,” does one take preference, and if so, which one. Secondly, the Court holds that such point must be established by the opinions of medical practitioners: 108 but such may vary from time to time, and there may never be identity of theory between or among the various practitioners rendering their opinions. Blackmun acknowledges this dichotomy by stating that at viability “the fetus presumably has the capability of meaningful life outside the mother’s womb.” 109 In other words, it is not at a precise point in the development of the fetus, but a point at which it “presumably” has the capability of surviving on its own, outside the mother’s womb.

Since Justice Blackmun acknowledges that a considerable number of people, regardless of their religions, believe that life of a human being is formed at the moment of conception, 110 would it not be appropriate and reasonable to adopt that event as the “compelling point,” rather than relying upon constructed points none of which is subject to absolute proof? This is not to suggest that the tenets of any specific religion be adopted as the law of the nation, 111 but that harmonious spiritual concepts be espoused by

108 In his personal analysis of his creation, Blackmun admits his virtually complete reliance upon medical expertise in determining the “compelling points” he attempts to establish. He states:

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment: up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 207, 208 (2005)

109 Id. at 163. (Emphasis added).

110 See id. at 160, 161.

111 As far as can be discerned the religious affiliations of the nine Justices played no part in their voting on the issue involved in Roe. Chief Justice Warren Earl Burger, Justices William O. Douglas and Lewis Powell were Presbyterians, though Douglas attended services in a Unitarian church in Washington, D.C. William Brennan was a Roman Catholic. Thurgood Marshall and Byron White were Anglican Episcopalians. Harry Blackmun was a Methodist, and William Rehnquist was a Lutheran. It is not known whether Potter Stewart was a member of any church, but it has been said of him that “[h]e believed that a
the law of the country unless and until such with greater authority or acceptance might be adopted. It can be said that none of the Justices on the Roe v. Wade majority panel relied upon religious tenets, but unfortunately neither did any even remotely rely upon spiritual concepts. ¹¹²

E. Part XI of the Opinion of the Court

Part XI of the Court’s Opinion was simply the following summary of the other Parts of the Opinion.

The provision of the U.S. Constitution violated by “a state criminal abortion statute” such as that of Texas, which “excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved” is the Due Process Clause of the Fourteenth Amendment. ¹¹³

The “abortion decision and its effectuation” for the stage of pregnancy “approximately the end of the first trimester . . . must be left to medical judgment of the pregnant woman’s attending physician.” ¹¹⁴

For the stage of pregnancy “subsequent to approximately the end of the first trimester the State, in promoting its interest in the health of the mother may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.” ¹¹⁵

judge should remove from his work, his own political, religious, and social beliefs and decide cases only on the basis of the law and the Constitution.” See CLARE CUSHMAN, THE SUPREME COURT JUSTICES, 459 (1995).

¹¹² In fact, Justice Blackmun said that “[w]e need not resolve the difficult question of when life begins.” Id. at 159.

¹¹³ Id. at 164, designated as “1.”

¹¹⁴ Id., designated as “1(a).”
For the stage of pregnancy “subsequent to viability, the State in promoting its interest in the potentiality of human life . . . may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”

So it can readily be seen that under paragraph 1(a) the decision of whether or not to abort the pregnancy is left exclusively to a physician. The time span within which this vital decision may be made is “prior to approximately the end of the first trimester.” We must assume that “prior to” must mean at any time from the beginning of pregnancy. The end of that period, however, is vaguely described. – “approximately the end of the first trimester.” We are not informed as to what length of time does “approximately” encompass; and furthermore, on what date does the first trimester “end.”

An initial reading of paragraph 1(b) appears to make sense. The maternal health is considered. Then again, however, those vague designations of time, “approximately the end of the first trimester” in what has previously been referred to twice as the first “compelling point,” and again as the second “compelling point” make judicial construction almost a complete impossibility.

In paragraph 1(c) Justice Blackmun compounds the obscurity of his presentation by returning to his second “compelling point” – “the stage subsequent to viability.” “Viability” has a definite meaning in medical parlance, but who can predict a “stage”

115 *Id.*, designated as “1(b).”
116 *Id.*, designated as “1(c).”
117 *See id.* at 163.
118 *See id.*
119 *See id.* at 164, 165.
which is “subsequent” to viability? It is in this portion of his summary that Blackmun also returns to that intriguingly incongruous phrase “the potentiality of life,” or “the potentiality of human life,” to which he had previously referred,\textsuperscript{120} without at any place describing the mechanism by which life has, in worldly context, the ability to spring into existence from nothing. Someone cannot even be cloned without a preexisting “one,” from which it emanates.

The seven member majority of the Court must have had qualms about the killing of a human being during pregnancy. That is why their spokesman, Harry A. Blackmun in his creation of the Opinion of the Court said that there was a second “compelling point.” The majority was not willing to give to Ms. Roe the leeway she wanted – the killing of her child at any time during her pregnancy.\textsuperscript{121} They made their mistake, however, in failing to recognize the time at which that child became a human being. Moses, 1400 years before Christ, told us that “God created man in his image; in the Devine image he created him; male and female he created them.”\textsuperscript{122} As to the birth of Isaac, Moses told us that “Sarah became pregnant and bore Abraham a son in his old age, at the set time that God had stated.”\textsuperscript{123} The seven members of the majority in \textit{Roe v. Wade}, as principled men as they were, did not heed those historical, inspired, statements, which were not learned from people of the medical profession, but from people who either saw, or learned from those who did see, the inspiring accounts about which they related.

\textsuperscript{120} See two uses of the term - \textit{id} at 162

\textsuperscript{121} \textit{Id.} at 153.

\textsuperscript{122} Genesis 1: 27.

\textsuperscript{123} Genesis 21:2.
F. Part XII of the Opinion of the Court

In this Part (XII) of the Opinion, the Court attends to some of the technical, procedural, matters involved.

G. Reviews of the Decision

The decision received some uncomplimentary reviews. As might be expected, Judge Robert H. Bork said it was “an unconstitutional decision, a serious and wholly usurpation of state legislature authority.” 124

Somewhat surprisingly, John Hart Ely, one of the most often quoted American constitutional scholars, and at the time a Professor at Yale Law School, said “it is . . . a very bad decision . . . because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.” 125

Justice Ruth Bader Ginsburg has criticized Roe in the following words: “[a] less encompassing Roe, one that merely struck down the extreme Texas law and went no further on that day, I believe . . . might have served to reduce rather than to fuel controversy.” 126

The remarks of Justice Scalia in his concurring Webster Opinion 127 to the effect that Roe represents a “self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not

124 LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 188, 188 (2005).

125 John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Y.L.J. 920, 947 (1973). Prof. Ely added that the constitution alone warrants judicial interference with sovereign operations of the State and “the basis of judgment as to the Constitutionality of state action must be a rational one.” Id. at 948. This is almost precisely the sentiments expressed by Justice Rehnquist in his Roe dissent. See Roe, 410 U.S. at 173, and by Chief Justice Rehnquist in his Carey dissent. See Carey, 505 U.S. at 972 and 975.


127 See Webster v. Reproductive Health Services, 492 U.S. 490, 532 (1989). See also, infra, text accompanying notes 186-199, concerning the Webster decision.
juridical” may at first glance seem off the mark; yet upon further reflection they reveal
themselves as being clearly “on the mark.”

H, Justice Rehnquist’s Dissent

In an unmarked first part of his dissenting Opinion Justice Rehnquist takes the
Court to task for having rendered a decision that may be broader than it should have been
under standard Supreme Court practice. Prior unidentified cases have indicated “that a
necessary predicate” for an Opinion of the Court about prohibiting first trimester
pregnancies requires a plaintiff “who was in her first trimester of pregnancy at some time
during the pendency of her lawsuit.”128 The reason for such a rule is that “a plaintiff may
vindicate his own constitutional rights, he may not seek vindication for the rights of
others.”129 The record is silent as to in what trimester Ms. Roe was in at the time of filing
her lawsuit. If she were not in her first trimester the Court would be making a ruling, at
her request, about a condition of pregnancy not her own. “In deciding such a hypothetical
lawsuit the Court departs from the longstanding admonition that it should never
‘formulate a rule of constitutional law broader than is required by the precise facts to
which it is to be applied.’”130

In Part II of his dissenting Opinion Rehnquist examines the Court’s fallacy in
finding constitutionally protected “privacy” even if there were a plaintiff in this case
capable of litigating the issue which the Court decides. The “privacy” involved in an
abortion is not a “private” matter in the ordinary sense of that word. It is, moreover, not

128 Roe, 410 U.S. at 171.
129 Id. at 171.
130 Id. at 172.
even a “distant relative” of the privacy found in Fourth Amendment cases such as *Katz v. United State*,131 and similar decisions of the Court.132

He next explores just what the Court meant by the term “privacy.” Is that “privacy” really a Fourteenth Amendment “liberty?” A Fourteenth Amendment “liberty” is simply the “liberty” to be free from unwanted state regulations of consensual transactions. Such “liberty” is not an unlimited “liberty” which the state is forbidden to deny under any circumstances. The Fourteenth Amendment “liberty” encompasses more than Bill of Rights guarantees.133 “But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law.”134 Without using the term “conveniences” of those affected by the regulation, Justice Rehnquist castigates what Justice Blackmun offered as reasons for Ms. Roe’s objection to the Texas abortion statute – her conveniences.135 He just cannot even consider them as the shields of privacy or reasons for liberty. Rather, he asserts that the only constitutional rationale for such a law as the Texas abortion statute, which he sees as “social and economic legislation,”136 is whether it has “a rational relation to a valid state objective,” and offers *Williamson v. Lee Optical Co.*137 as authority for his position. Instead of considering whether the Texas statute has a “rational relation” to a “valid [Texas] objective” the majority considered the

131 *See supra* text accompanying notes 44 and 45.

132 *Id.* at 172.

133 That proposition was brought out by Justice Potter Stewart in his Concurring Opinion in this case. *See id.* at 168.

134 *Id.* at 173.

135 *See supra* text preceding note 38.

136 *Id.* at 173.

mother’s conveniences, which Rehnquist calls “competing factors.”

These the Court “substitutes for the established test [which] is far more appropriate to a legislative judgment than to a judicial one.” In this criticism, thirty nine years ago, the man who would eventually become the Court’s Chief Justice dealt with a judicial weakness which has met recent criticism – judges writing the law rather than interpreting it.

Rehnquist next disapproves of the Court’s use of the “compelling state interest” test, which he says it has improperly transposed from the Fourteenth Amendment’s Equal Protection Clause to this case, which is a Fourteenth Amendment’s Due Process Clause case.

Roe v. Wade’s holding is more like the now discredited Lochner decision than Justice Holmes’ dissent in that case, the philosophical part of which Blackmun quotes.

In the same paragraph Justice Rehnquist returns to his disapproval of what he sees as judicial legislation of the law rather than a determination of the intent of the drafters of the Fourteenth Amendment.

138 Id. at 173, 174.
139 Id. at 173.
140 Id. at 156, 159.
141 Id. at 173.
143 See Ree, 410 U.S. at 117 where the Court quotes from Oliver Wendell Holmes, who in his dissent, said, in effect that since the Constitution is made for people of fundamentally differing views, the fact that some decisions may seem to their authors as “natural” may seem to others as “shocking” should not compel the authors to think that statutes embodying those “shocking” provisions are unconstitutional.
144 See supra text accompanying notes 136, 137.
145 Id. at 174.
Ms. Roe is not correct when she, through her legal representatives, proclaimed that the “right” to an abortion is “universally accepted.” “The fact that a majority of the States reflecting after all the majority sentiment of those States,\textsuperscript{146} have reservations on abortions for at least a century” is historically a refutation of the Appellant’s position. “Even today, when society’s views on abortion are changing, the very existence of the debate” is evidence of the error of her position.\textsuperscript{147} The first State law dealing directly with abortion was enacted by the Connecticut legislature in 1821, forty-seven years prior to the adoption of the Fourteenth Amendment, when 36 state or territorial statutes apposed abortion.\textsuperscript{148} As of 1970, August of that year, 21 of those states had the same laws on their books.\textsuperscript{149} Texas first enacted a criminal abortion statute in 1854, and Texas’ subject statute was enacted in 1857 which remained unmodified until attacked in \textit{Roe}.\textsuperscript{150} It is submitted that these facts attest to the conclusion that the drafters of the Fourteenth Amendment had no intention of having it “withdraw from the States the power to legislate with respect to this matter.”\textsuperscript{151}

Justice Rehnquist ended his dissent with Part III, which considers a technical defect of the \textit{Roe} decision. The Court struck down the Texas statute \textit{in toto} even though it conceded that as to later periods of pregnancy the very same provisions of the statute which were found to be unconstitutional, when referring to early pregnancy, were

\textsuperscript{146} This fact was admitted by Justice Blackmun in \textit{Doe v. Bolton}, 410 U.S. at 181.

\textsuperscript{147} \textit{See Roe}, 410 U.S. at 174.

\textsuperscript{148} \textit{See id.} at 175 where note 1 identifies those 36 states and territories.

\textsuperscript{149} \textit{See id.} at 176 where note 2 identifies those 21 states.

\textsuperscript{150} \textit{Id.} at 119.

\textsuperscript{151} \textit{Id.} at 178.
acceptable constitutionally if they referred to later periods of pregnancy. The Court’s usual practice in such circumstances would be to merely declare the statute unconstitutional as applied to the facts of the case rather than striking down the entire statute, as was done here.\textsuperscript{152}

While Justice Rehnquist mentioned several important technical deficiencies in the case it is unfortunate that he did not touch upon the quintessential issue – when does life begin.

I. Doe v. Bolton

On January 22, 1973, the same day as the Court decided \textit{Roe v. Wade}, it decided another abortion case, \textit{Doe v. Bolton}.\textsuperscript{153} Justice Blackmun said in \textit{Roe v. Wade} that in \textit{Doe v. Bolton} “some of the procedural requirements contained in one of the modern abortion statutes are considered”\textsuperscript{154} He added, that both decisions are to be read together.\textsuperscript{155}

Georgia had four abortion-regulating statutes which the U.S. Supreme Court, in the Opinion of the Court in \textit{Doe v. Bolton}, written by Justice Harry A. Blackmun, found to be unconstitutional on the basis of the Fourteenth Amendment. The first was a requirement that the hospital in which an abortion was to be performed must be accredited by the Joint Commission on Accreditation of Hospitals (JCAH). Blackmun

\textsuperscript{152} \textit{Id.} at 177, 178. While Rehnquist did not mention the point, it is possible that the reason the Court’s usual practice was not followed was that in this case the status of Ms. Roe’s pregnancy, as of the filing of her Complaint, was never established. \textit{See supra} text accompanying notes 127-129.

\textsuperscript{153} \textit{Doe v. Bolton}, 410 U.S. 179 (1973). The same 7-2 voting which occurred in \textit{Roe v. Wade} (\textit{see supra} note 27), was repeated in \textit{Doe v. Bolton}.

\textsuperscript{154} \textit{Roe}, 410 U.S. 165.

\textsuperscript{155} \textit{Id.}.
made it clear that its unconstitutionality was based on the facts of the case – as opposed to *Roe v. Wade*\(^\text{156}\) it had been established that this was truly a first trimester case.\(^\text{157}\) The Court spoke approvingly, however, of standards, “from and after the end of the first trimester,” if those standards are legitimately related to the objectives the State seeks to accomplish.”\(^\text{158}\) The requirement concerning hospitalization was not needed, and was unconstitutional, so said the Court.\(^\text{159}\) The additional requirements of the Georgia statute were rejected even for late term abortions: (1) advance approval by an abortion committee of not less than three members of the hospital staff;\(^\text{160}\) (2) written concurrence of the attending physician’s decision to abort, by at least two other Georgia-licensed physicians;\(^\text{161}\) and (3) a requirement that the patient be a resident of Georgia.\(^\text{162}\)

Perhaps considering it as settled, the Court did not deal with the quintessential question of *Roe* – when does life begin.

**J. Justice Byron R. White’s Dissent in *Doe v. Bolton***

Justice Byron White wrote that, according to the majority, “the Constitution of the United States values the convenience, whim, or caprice of the pregnant woman more than the life or potential life\(^\text{163}\) of the fetus.”\(^\text{164}\) On two additional occasions he stressed the

\(^{156}\) *See supra* text accompanying notes 128-130.

\(^{157}\) *Doe*, 410 at 199.

\(^{158}\) *Id.* at 194, 195.

\(^{159}\) *Id.* at 194.

\(^{160}\) *Id.* at 195-198.

\(^{161}\) *Id.* at 198.

\(^{162}\) *Id.* at 200.

\(^{163}\) The use of the term “potential life” by Justice White, probably was his simply borrowing the term from Justice Blackmun for emphasis purposes, rather than his acceptance of it.
fact that the basis of the pregnant woman’s request in this case was her “convenience,” rather than her vital need.\textsuperscript{165}

His following words are worthy of note:

I find nothing in the language or history of the Constitution to support the Court’s judgments. The Court simply fashions and announces a new constitutional right for pregnant women and with scarcely any reason or authority for its action, invests that right with sufficient substance to override the most existing state abortion statutes. The upshot is that the people and legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.\textsuperscript{166}

While he does not discuss that most important issue - when does life begin - with these words he recognizes that “human life” must be protected.

In a sensitive area, such as this, involving as it does issues over which reasonable men may easily and heatedly differ. I cannot accept the Court’s exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing women and doctors with the constitutionally protected right to exterminate it.\textsuperscript{167}

III. The \textit{Roe} and \textit{Doe} Aftermath

A. Planned Parenthood of Central Mo. v. Danforth,\textsuperscript{168} decided just

\begin{footnotesize}
\textsuperscript{164} \textit{Id.} at 221.

\textsuperscript{165} \textit{See id.} at 222.

\textsuperscript{166} \textit{Id.} at 221, 222.

\textsuperscript{167} \textit{Id.} at 222.

\textsuperscript{168} Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976). This was a 6-3 decision. Justice Stevens who had replaced Justice Douglas, joined the majority, except for a minor part of the Opinion of the Court. The two dissenters in \textit{Roe}, (White and Rehnquist), were joined by Chief Justice Burger, and dissented in this case.
\end{footnotesize}
three years after *Roe*, gave the Court and Justice Blackmun, writing for the Court, an opportunity to make definitive statements about several matters heretofore unstated, including, but not limited to, striking down a state requirement requiring that second trimester abortions take place in hospitals, but approving a number of restriction imposed by States upon persons desiring abortions.\footnote{\textsuperscript{169}}

B.. *Maher v. Roe*\footnote{\textsuperscript{170}} held that the Equal Protection Clause of the Fourteenth Amendment does not require a state to pay Medicaid expenses for non-therapeutic abortions\footnote{\textsuperscript{171}} even though the State pays for child birth expenses; and that *Roe* did not imply a limitation on a State’s authority to make a value judgment favoring childbirth over abortion.\footnote{\textsuperscript{172}}

C.. *Poelker v. Doe*\footnote{\textsuperscript{173}} was a Per Curiam holding that the decision of St. Louis, Missouri to provide public financed hospital services for child birth

\footnote{\textsuperscript{169} Provisions of the statute approved by the Court were the following. The state may require a pregnant woman to give her written consent \( (id. \text{ at } 67) \). A substantial governmental interest requires that a pregnant woman be apprised of the health risks of abortion and child birth \( (id. \text{ at } 66-67) \). Husbands of pregnant women have deep and proper concerns and interests in their wives’ pregnancy and the growth and development of the fetus, but the wife is not required to obtain the husband’s consent to an abortion \( (id. \text{ at } 69) \). If the husband and wife disagree about abortion the wife has the primary choice \( (id. \text{ at } 71) \). State required record keeping of hospitals is permitted if reasonable \( (id. \text{ at } 65-67) \). The only dissent of Justice Stevens, who had replaced Justice Douglas, was *Roe*’s first trimester standard. He thought that a state could constitutionally set “a chronological age” as a standard. \textit{Id.} at 105.}

\footnote{\textsuperscript{170} *Maher v. Roe*, 432 U.S. 464 (1977). Chief Justice Burger, and Justices White, Stewart, Powell, and Rehnquist comprised the majority of the Court. Dissenting were Justices Brennan, Marshall and Blackmun. The position taken by Justice Stevens was not reported.}

\footnote{\textsuperscript{171} A non-therapeutic abortion is one not required to protect the life of the mother, or the pregnancy was not caused by rape or incest of the mother reported to police authorities.}

\footnote{\textsuperscript{172} Justice Powell, who wrote the Opinion of the Court, by dictum, stated that until State courts have applied the preamble of one of its statutes to restrict the activities of abortionists in some concrete way it is inappropriate for federal courts to address a preambles’ meaning. \textit{Id.} at 507.}

\footnote{\textsuperscript{173} *Poelker v. Doe*, 432 U.S. 519 (1977).}
without like benefits for non-therapeutic abortions did not violate the Equal Protection Clause of the Fourteenth Amendment.\footnote{174 Id. at 522. Justices Brennan, Marshall and Blackmun dissented.}

D.. Harris v. McRae\footnote{175 Harris v. McRae, 448 U.S. 297 (1980).} held that a federal statute\footnote{176 Pub. L. 94-439, § 209, 90 Stat. 1434.} which withheld from states’ federal funding under Medicare to reimburse the cost of abortions “except where the life of the mother would be endangered if the fetus were carried to term” was not unconstitutional.\footnote{177 Id. at 325.} Justice Powell, in the Opinion of the Court, referred to the “rationality” test by stating the “Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life.”\footnote{178 Id. at 324. Dissenting Opinions were filed by Justices Brennan, Marshall, Blackmun and Stevens.}

E. Akron v. Akron Center for Reproductive Health, Inc.\footnote{179 Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).} decided ten years after Roe affirmed it with another six member majority,\footnote{180 Justice Powell wrote the Opinion of the Court. Chief Justice Burger returned to the majority. Justice O’Connor, the first woman member of the Court, replaced Justice Stewart, but joined the minority of Justices White and Rehnquist. She discussed at length her concept of “undue burden,” (id. at 461-473), was which was first mentioned, of all people, by Justice Blackmun in Bellotti v. Baird, 428 U.S. 132, 147 (1976), the case that introduced the “by pass” as an alternative procedure to obtain parents’ consent. See infra text accompanying note 205.} holding, inter alia, that a state statute which required the giving the pregnant woman truthful, non-misleading information about the nature of abortions, the health risks of an abortion, and of
childbirth and the probable gestational age of the pregnant woman’s fetus, impose significant obstacles upon the woman’s right to terminate her pregnancy.\footnote{Id at 452.}

F. Simopoulos v. Virginia\footnote{Simopoulos v. Virginia, 462 U.S. 506 (1983).} held that a State may require that second trimester abortions be performed in licensed clinics.\footnote{Id. at 519.}

G. Thornburgh v. American College of Obstetricians and Gynecologists,\footnote{Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1989).} decided thirteen years after Roe affirmed it with a five member majority,\footnote{Four members of the Roe majority who were now members of the Thornburgh majority were, to wit: Harry Blackmun, who wrote the Opinion of the Court in both cases, William Brennan, Thurgood Marshall, and Lewis Powell. The other Thornburgh majority member was Justice John Paul Stevens. The four dissenters were Chief Justice Burger, and Justices White, Rehnquist and O’Connor.} holding, \textit{inter alia} that a state’s regulation that the pregnant woman be advised that medical assistance benefits may be available and that the father is responsible for financial assistance in the support of the child is a poorly disguised element of discouragement for the abortion decision.\footnote{Id. at 763.}

H. Webster v. Reproductive Health Services.\footnote{Webster v. Reproductive Health Services, 492 U.S. 490 (1989).} The “old guard” holds, but cracks appear in Roe’s armor.\footnote{The “old guard,” Blackmun, Brennan, Thurgood Marshall and Stevens were quite satisfied with all the aspects of Roe.} Chief Justice Rehnquist wrote the Opinion of the Court in holding that the preamble to a Missouri statute which states that life begins at conception...
was merely the expression of a value judgment which it has the right to make.\textsuperscript{189} Rehnquist also made it clear that the issue of the statute’s constitutionality due to its prohibition of the use of public funds to encourage or counsel women to have non-therapeutic abortions was moot because the plaintiffs abandoned their quest for declaratory relief.\textsuperscript{190} With regard to the statute which prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother’s life, and declaring the use of public funds, employees or facilities for the purpose of encouraging or counseling women to have abortions not necessary to save her life, Rehnquist relied upon \textit{Maher, Poelker,} and \textit{McRae}\textsuperscript{191} which he represented established that it was unlawful to use the public coffers even if a profit were to be made from such use.\textsuperscript{192} Rehnquist wrote a plurality Opinion in which he said that the required testing of viability was not unconstitutional.\textsuperscript{193} In another plurality Opinion he refused a request of the Appellants and the United States to overrule \textit{Roe}, on the basis that that case concerned a Texas statute which criminalized the performance of all abortions, whereas this Missouri statute has determined that viability is the point at which its interest in potential life must be safeguarded. Hence since the holdings of the two cases were of a different nature, this case does not offer the court the opportunity to overrule the prior decision. It

\textsuperscript{189} \textit{Id.} at 506. He also referred to \textit{Maher v. Roe} (supra notes 169 to 171), which provided, \textit{inter alia}, that unless a State court applies a State statute’s preamble to specific factual matters a federal court has no authority to do so.

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{See supra} notes 170-172, 173-174, and 175-178, respectively.

\textsuperscript{192} \textit{Id.} at 511.

\textsuperscript{193} \textit{Id.} at 519, 520.
was the plurality’s position, however, that Roe should be modified as expressly indicated.\textsuperscript{194}

One of the most significant points of the case was the position taken by Justice O’Connor. She joined the majority because she felt that whether a state’s abortion statute was constitutional should be tested by whether it imposed an “undue burden” on the pregnant woman’s decision to abort (which she had discussed in her \textit{Akron} dissent;\textsuperscript{195} and that Roe’s “trimester framework” was “problematic.”\textsuperscript{196} In her opinion the state statute did not fail under the “undue burden” test, and Roe’s constitutionality was not before the Court. If it were, that would be the time to examine whether Roe passed constitutional muster. “And to do it carefully”\textsuperscript{197}

The dissents of Justices Blackmun and Stevens were also significant. Blackmun closed his dissent, which was joined by Justices Brennan and Marshall, with a most pessimistic message” “[f]or today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.”\textsuperscript{198}

Justice Stevens, after a discussion of the teachings of St. Thomas Aquinas, incorrectly said that were any state to enact an enforceable statute based upon a tenet of the Romans Catholic religion to the effect that life begins with conception, such would be

\textsuperscript{194} \textit{Id.} at 521.

\textsuperscript{195} See 462 U.S. at 453.

\textsuperscript{196} \textit{Id.} at 529.

\textsuperscript{197} \textit{Id.} at 525.

\textsuperscript{198} \textit{Id.} at 559.
a violation of the Establishment Clause. That statement is incorrect because even though life begins with conception is a tenet of the Roman Catholic religion, it is also simply a spiritual principle, believed by millions of people of various faiths. While an attempt to make religious tenets the law of the land may violate the Establishment Clause, that prohibition does not apply to spiritual principles, as has previously been pointed out in this article.

I. Hodgson v. Minnesota, struck down provisions of a State statute requiring that both parents be notified before their minor child has an abortion. In the Opinion of the Court, written by Justice Stevens the Court found that the provision did not reasonably further any legitimate State interest. With a plurality Opinion, written by Justice Kennedy, it was said that the Court held that a State requirement that both parents be notified of the decision to abort the birth of a minor’s child unless the minor had obtained a judicial bypass, did not violate the Constitution.

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199 *Id.* at 568.

200 *See supra* text accompanying notes 78 to 80.


202 Joined in by Justices Brennan, Marshall, Blackmun and O’Connor.

203 *Id.* 455.

204 Justice Kennedy had replaced Justice Powell.

205 A judicial bypass is a statutory provision that allows a minor to circumvent the necessity of obtaining parental consent by obtaining judicial consent. BLACK’S LAW DICTIONARY, (8th ed. 2004). *See supra* note 180.

206 *Id.* at 500.
J. Planned Parenthood of South Eastern Pennsylvania v. Casey, was a monumental case in the development of the point at which we are today in the issue of whether pregnant women retain the right to abortions or is that but a vestige of the past.

An Opinion written jointly by three Justices, O’Connor, Kennedy and Souter after acknowledging that the Court’s decisions after Roe have “cast doubt upon the meaning and reach of its holding,” saved Roe in a slightly modified condition, partially overruled two prior Supreme Court decisions, and then submitted a plurality Opinion on four issues.

The Opinion of the Court identified the “essential holding” of Roe v. Wade, which “should be retained and once again reaffirmed.” The essential holding of Roe, as identified by the plurality, is in three parts: (1) a recognition of the rights of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State; (2) a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the


208 Id. at 845.

209 Id. at 838. Those partially overruled decisions were: Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) supra note 179 and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1989), supra note 184, and supra notes 181 and 186 respectively regarding the holdings of those cases which were overruled. The basis of the Casey Court’s partial overruling of Akron and Thornburgh was its conclusion that those Courts undervalued the State’s interest in protecting life. See Casey, 505 U.S. at 881-883.

210 The three authors of the joint Opinion, O’Connor, Kennedy and Souter, were joined by Justices Steven and Blackmun, making up a five member majority of the Court.

211 Id. at 846.

212 Also referred to as “the central holding” (id. at 860), “the basic holding” (id. at 869) and “original decision” (id at 869).

213 Id.
woman’s life or health;\textsuperscript{214} (3) the State has legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child.\textsuperscript{215}

Having reaffirmed the essential holding of \emph{Roe}, the Court lost no time in doing away with \emph{Roe’s} “trimester framework . . . which we do not consider to be a part of the essential holding of \emph{Roe}.”\textsuperscript{216} In its place the “Undue Burden” test\textsuperscript{217} was approved. Such was not literally a “replacement” for the two are not identical concepts. The “trimester framework” refers to the time during the pregnancy that the State may regulate abortions, taking into consideration the wellbeing of both the mother and the fetus.\textsuperscript{218} “Undue burden” refers to a test made of such regulation in order that the State does not prevent the pregnant woman from making an unburdened decision as to whether or not to abort her child.\textsuperscript{219}

The Opinion of the Court, written by the three authors, concerned four issues.\textsuperscript{220} The most important of the four was contained in Part IV of their Opinion. It concerned viability. Their definition of viability was taken from \emph{Roe}.

The concept of viability, as we noted in \emph{Roe}, is the time at which there is a reasonable possibility of maintaining and nourishing a life outside the womb so that the independent existence of the second life can in reason

\textsuperscript{214} \textit{Id}.
\textsuperscript{215} \textit{Id}.
\textsuperscript{216} \textit{Id.} at 873.
\textsuperscript{217} \textit{See supra} note 180, and \textit{infra} note 227.
\textsuperscript{218} \textit{Roe}, 410 U.S. at 163.
\textsuperscript{219} \textit{Casey}, 505 U.S. at 874, and 876.
\textsuperscript{220} Only one of the other two members of the Majority joined in the Plurality Opinion. Justice Stevens joined in Part V-E, dealing with record keeping and reporting.
and all fairness be the object of state protection that now overrides the rights of the woman.\(^{221}\)

In their Part IV they gave “viability” even more importance than did Justice Blackmun in \textit{Roe}. They christened it with the verisimilitude of law.

The woman’s right to terminate her pregnancy before viability is the most central principle of \textit{Roe v. Wade}. It is a rule of law and a component of liberty we cannot renounce.\(^{222}\)

Before commencing Part IV, however, the three Justices dealt with viability in a crucial manner the significance of which might be lost if one’s attention to it is cursory. They pointed out that medical knowledge had advanced considerably since the year of the \textit{Roe} decision – 1973.\(^{223}\) Their preliminary conclusion was poignant:

Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since \textit{Roe} was decided, which is to say that no change in \textit{Roe}’s factual underpinnings has left its central holding obsolete, and none supports an argument for overruling it.\(^{224}\)

Viability of the fetus, therefore, was reestablished as the time frame which established whether a state was authorized to regulate the abortion procedure. To give it the semblance of certainty the authors of the tripartite Opinion referred to it as “a line,” and wrote that “the line should be drawn at viability.”\(^{225}\) They did not forget the liberty interest that was so important in establishing the constitutional authority of the ruling of

\(^{221}\) \textit{Id.} at 870.

\(^{222}\) \textit{Id.} at 871.

\(^{223}\) They said that viability at the time of \textit{Roe} occurred at 28 weeks, whereas at 23-24 weeks “as it sometimes does today.” \textit{Id.} at 860. “[A]t some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can sometimes be enhanced in the future.” \textit{Id.}

\(^{224}\) \textit{Id.} It should be noted, however, that the doctrine of stare decisis was not forgotten in this plea to save \textit{Roe}. \textit{See id.} at 861. The like amount of divisiveness which existed in 1973, and still exists today, was cited as ground for adhering to the “essence of the original decision as we do today.” \textit{Id.} at 869.

\(^{225}\) \textit{Id.} at 870.
the *Roe* majority, at least in their minds. That majority by now had been replaced, save for Justice Blackmun. They wrote that “‘liberty must not be extinguished for the want of a line that is clear.’” They used it in sanctioning the “undue burden” standard: that “‘only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of liberty protected by the Due Process Clause.’”

Before closing their discussion of viability the three Justices posed a question. Would a law which was designed to further a State’s interest in fetal life impose an undue burden on the woman’s decision before fetal viability, be constitutional? Their answer was a resounding “NO.” The other numbered Parts of the Plurality Opinion were: V-B, concerning Informed Consent, V-D, concerning parental consent, and V-E, concerning record keeping and reporting.

The four remaining members of the panel, Chief Justice Rehnquist, and Justices White, Scalia and Thomas, agreed with the judgment of the Court only in its not putting its stamp of approval on the Pennsylvania abortion statute under consideration. The remaining members thought that such was a function of the people of the state to decide

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226 *Id.* at 869.

227 *Id.* at 874. They added: “[i]n our view the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.” *Id.* at 876.

228 *Id.* at 944.

229 *Id.* at 977.

230 *Id.* at 881 to 887.

231 *Id.* at 899 to 900.

232 *Id.* at 900, 901. This is the Part of the Plurality Opinion to which Justice Stevens joined. *Id.* at 922.
whether those provisions met their Public Policy test. They found those provisions constitutionally sound. The most emphatic part of which was its beginning, which proclaimed: "[w]e believe that Roe was wrongly decided, and that it can and should be overruled," Which naturally raised Justice Blackburn’s pique to a considerable extent.

K. Stenberg v. Carhart

The Supreme Court has never ruled that abortions are wrong, and should be prohibited. In Roe, and its progeny, including, of course, Casey, the Court merely reached the lengths state legislatures could go in regulating, or even proscribing, abortion. And so the medical profession, Blackmun’s noblesse oblige, continued devising methods of killing unborn human beings. Certain of the methods, called “partial birth abortion” were so gross that Justice Stephen G. Breyer acknowledged in the Opinion of the Court of the Stenberg case that they might be seen as “horrifying” by some, and were seen by Justice John Paul Stevens in the same case as “gruesome,” and as horrible, brutal and barbaric by Justice Scalia, also in the same case. The

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233 Id. at 979.
234 Id. at 944.
235 See id. at 940.
236 Stenberg v. Carhart, 530 U.S. 914 (2000). The moving party, Petitioner, Stenberg, was the Attorney General of Nebraska, and the Respondent, Leroy Carhart, was a physician who performed such partial birth abortions.
237 See supra text accompanying notes 207 to 235.
238 Id. at 923.
239 Id. at 946.
240 Id. at 953.
241 Id.
State of Nebraska enacted a statute proscribing two versions of partial birth abortions, one of which was being used extensively in what has been called “previability second trimester abortions.” The Court held the statute unconstitutional, however, on two grounds. First that the statute dealing with removal of the child intact from the mother’s body (the dilation and extraction (D & X)) method, while allowing the procedure where necessary to preserve the mother’s life, failed to provide an exception for the preservation of the mother’s health, and second, that such statutory “defect” presented an “undue burden” to the mother’s free choice of having an abortion.

L. Ayotte v. Planned Parenthood of No. New England was the only progeny of Roe v. Wade in which the Supreme Court rendered a unanimous decision. Justice Sandra Day O’Connor proclaimed in the Opinion of the Court that if a state statute which regulates access to an abortion procedure would be unconstitutional in medical emergencies, it is not always necessary or justified to invalidate the statute entirely.

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242 Id. at 954.

243 The usual method of aborting a child in the first trimester of pregnancy is the “vaccum aspiration” method in which a vaccum tube is inserted into the uterus and the fetal parts are sucked out of the mother’s body. As the fetus grows in size that method becomes more difficult to perform, and another method has been devised, called the “Dilation & Evacuation” (D & E) method. It dilates the mother’s cervix to allow for the entry of surgical instruments with which the fetus is killed inside the mother’s body by removing the fetus of its parts. A variation of this method is called the “Intact D & E” or “Dilation and Extraction” (D & X), method, which also dilates the cervix to allow for the insertion of surgical instruments with which the fetus’ body is pulled or dragged, intact, from the mother’s body, and killed there; hence the generic name of “partial birth abortion.”

244 Id. at 922.

245 Id. at 945, 946.

because lower courts may be able to render narrower declaratory and injunctive remedies.\textsuperscript{247}

\textbf{M.. Gonzales v. Carhart}\textsuperscript{248} concerned the Partial –Birth Abortion Ban Act\textsuperscript{249} which Congress passed on November 5, 2003,\textsuperscript{250} making punishable physicians in or affecting interstate or foreign commerce, who knowingly performed a partial birth abortion, and “thereby kills a human fetus.”\textsuperscript{251} Congress’ findings stated that “[a] moral, medical and ethical consensus exists that the practice of performing a partial –birth abortion . . . is a gruesome and inhuman procedure that is never medically necessary and should be prohibited.”\textsuperscript{252} The Eighth Circuit Court of Appeals, which held the Nebraska statute in \textit{Stenberg}, unconstitutional, found this federal statute equally infirm, as did the Ninth Circuit. Both rulings were before the Court in this case, although the Second Circuit’s identical ruling was not. The Court, 5-4, with Justice Kennedy writing the Opinion of the Court,\textsuperscript{253} reversed.

\textsuperscript{247} \textit{Id.} at 246.

\textsuperscript{248} Gonzales v. Carhart, 550 U.S. 124. (2007). The Petitioner, Alberto Gonzales, was the Attorney General of the United States, since a federal statute was involved. The Respondent LeRoy Carhart was the same abortionist, LeRoy Carhart, who was the -Respondent in the \textit{Stenberg} case.


\textsuperscript{250} At about the time that the “D & X” method of abortion (\textit{see supra} note 242), was developed about 30 states enacted statutes to prohibit the procedure. One of those statutes, that of Nebraska, was invalided in \textit{Stenberg}. (\textit{see supra} text accompanying notes 236 to 245. In 1996 and 1997 Congress enacted statutes attempting to proscribe the D & X procedure, but Pres. William Clinton vetoed both, and Congress did not override the veto, in either situation. In 2003, after the \textit{Stenberg} decision Congress enacted a similar statute, which Pres. George W. Bush signed into law on Nov. 5, 2003. \textit{Id.} at 140, 141.

\textsuperscript{251} Justice Thomas, in his Concurring Opinion, observed that the issue of whether the Act constitutes a permissible exercise of Congress’ power under the Commerce Clause was not before the Court, not having been raised or briefed by the parties and the lower courts not having addressed it. \textit{Id.} at 168.

\textsuperscript{252} 18 U.S.C. § 1531 (2000 ed. Supp. IV p. 767 ¶ (1)).

\textsuperscript{253} The majority, in addition to Justice Kennedy, consisted of Chief Justice Roberts, and Justices Scalia, Thomas and Alito.
Justice Kennedy spent a considerable amount of time in examining the various abortion procedures\textsuperscript{254} as Justice Breyer did, in the \textit{Stenberg} Opinion of the Court. Kennedy made a number of definitive statements. The “D & E” procedure\textsuperscript{255} is not regulated by the Act.\textsuperscript{256} The Act “regulates and proscribes, with exceptions or qualifications . . . the intact D & E procedure.”\textsuperscript{257} The Act is not void for vagueness,\textsuperscript{258} and it does not impose an undue burden from any over breadth and it is not invalid on its face.\textsuperscript{259} The Act defines an unlawful abortion in explicit terms,\textsuperscript{260} The Act does not encourage arbitrary and discriminatory enforcement.\textsuperscript{261} Under the Act intent must be proved to impose liability.\textsuperscript{262}

Kennedy answered the dissenters’ argument to the effect that some doctors believe the “D & X” procedure is safer than the “D & E” method, not proscribed by the Act. He said that where there is medical uncertainty about two different procedures a legislative body is not obliged to choose one or the other.\textsuperscript{263}

\begin{footnotes}
\item[254] See \textit{id.} at 134 – 140.
\item[255] See \textit{supra} note 196.
\item[256] \textit{Id.} at 134.
\item[257] \textit{Id.} at 146, 147. \textit{See supra} note 196 regarding the “intact D & E” (or “D & X”) procedure.
\item[258] \textit{Id.} at 147, 148, 149.
\item[259] \textit{Id.} at 147.
\item[260] \textit{Id.} at 147.
\item[261] \textit{Id.} at 149.
\item[262] \textit{Id.} at 149. \textit{See supra} note 2, in which it was established that intent is a necessary element in the crime of murder.
\item[263] \textit{Id.} at 161-165.
\end{footnotes}
Regarding the absence of permission of the “D & X” procedure if it were necessary to preserve the health of the woman, which was one of the two reasons the State statute in *Stenberg* was declared unconstitutional, Justice Kennedy said that such an “exception” is not needed in instances where there is uncertainty about the necessity of “D & X” procedures to preserve a woman’s health. “The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other procedures that are considered to be safe alternatives.”

One surprising thing about the *Gonzales* case is that even though two of the five member majority, Justices Scalia and Thomas are on record as being in favor of overruling *Roe v. Wade*, no one in the majority here mentioned seeing whether stare decisis law would permit doing that at this time. It appears that Justice Kennedy believes that life begins at the moment of conception. He wrote that “by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.” “The Act proscribes a particular manner of ending fetal life.” He refers to a “living fetus.” He uses the term “unborn child” four times. He used the word “kill” or “kills” seven times in his Opinion of the Court.

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264 Id. at 166, 167.

265 See *Casey*, 505 U.S. at 944; supra note 234.

266 *Gonzales*, 550 at 147.

267 Id. at 132.

268 Id. at 151.

269 See *id.* at 134, 151, 152, and 159.

270 See *id.* at 151, 153, 154, and 164.
presumably aware that one does not “kill” an inanimate thing. He used the term “potential life” only once without it being directly quoted from other Supreme Court decisions.\textsuperscript{271} That time, however, concerned the Akron\textsuperscript{272} and Thornburgh\textsuperscript{273} cases and it is submitted that that reference was attributed to the Court’s use of the term in those cases.

One cannot help but wonder what is next in store for \textit{Roe v. Wade} and \textit{Doe v. Bolton}!

IV. Conclusion

The seven members of the majority in \textit{Roe} and \textit{Doe}\textsuperscript{274} were good men.\textsuperscript{275} They are not to be scourged. They made a mistake in that quintessential question, the answer to which was sought in \textit{Roe},\textsuperscript{276} and presumed in \textit{Doe} – when does life begin. These men did not want to permit the murder of innocent human beings. That is why they authorized States to regulate, and even proscribe, abortions after “viability,” where the State is

\textsuperscript{271} See id. at 145.

\textsuperscript{272} See supra notes 179-181.

\textsuperscript{273} See supra notes 184-186.

\textsuperscript{274} See supra notes 27 and 153.

\textsuperscript{275} Justice Thurgood Marshall opposed the death penalty because he thought that the sovereign should not take this “irreversible” step, where so many of the accused were not receiving a proper defense. Justices Brennan and Blackmun followed his thinking. MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW, Chapters 7 and 8 (1997). All three were members of the \textit{Roe} and \textit{Doe} majorities. Potter Stewart, another member of the \textit{Roe} majority, voted against imposition of the death penalty in \textit{Furman v Georgia}, 408 U.S. 238, 309, 310 (1972), as its being “cruel and unusual punishment.”

\textsuperscript{276} In \textit{Roe} on seven occasions they pondered the answer to the question of when life begins. See pages of the decision 133, 134 n.22, 150, 151, 159, 160 and 161. In the same case they discussed embryos eight times. See pages of the decision 118 n.1, 131, 133, 134 n.22, 150, 151, 159, 161. Also in \textit{Roe} they discussed fetuses twenty times. See pages of the decision 118 n.1, pages of the decision 133, 134 ns.21, 22, pages of the decision 134, 135, 136 n.23, pages of the decision 136, 138, 141, 147 n.40, pages of the decision 150, 151, 157 ns. 53, 54, and pages of the decision 160, 161, 162, 163.
interested in protecting fetal life.\textsuperscript{277} Even though Justice Blackmun wrote that “[w]e need not resolve the difficult question of when life begins,”\textsuperscript{278} the Court did make an attempt to take a position on that very subject; and therein they made two serious mistakes. Their first was to identify life with “viability.” The accepted definition of “viability” is “having attained such form and development as to be normally capable of surviving outside the mother’s womb.”\textsuperscript{279} The ability to survive outside the mother’s womb is not the equivalent of being alive. Many human beings of varying ages, though living, are not “viable” under that definition because they require the assistance of machinery and other medical aids in order to survive.\textsuperscript{280} The second mistake of the majority in those two cases was to consider the 13\textsuperscript{th} Century Doctrine\textsuperscript{281} of “Quickening,” which in Blackmun’s own words was described as “the first recognizable movement of the fetus in utero, appearing from the 16\textsuperscript{th} to the 18\textsuperscript{th} week of pregnancy,”\textsuperscript{282} He considered it sufficiently appropriate to discuss on eight occasions in his Opinion of the Court.\textsuperscript{283} Recognizable movement in a child as a test to determine whether he or she is alive is time wasting. Living human beings suffering from various forms of quadriplegia or tetraplegia, and

\textsuperscript{277} \textit{Roe}, 410 U.S. at 163.

\textsuperscript{278} \textit{Id.} at 159. Justice Douglas, in a concurring Opinion, said: “[w]hen life is present is a question we do not try to resolve.” \textit{Id.} 220. Then, he seemed to be content with letting the “medical experts” handle the question. \textit{Id.} Finally he made a comment that rendered unclear what he was trying to say in either of his comments: “it is, of course, caught up in matters of religion and mortality.” The last statement might have been acceptable if instead of using the words “religion and mortality” he used the word “spirituality.”

\textsuperscript{279} Merriam-Webster Online Dictionary.


\textsuperscript{281} See \textit{Roe}, 410 U.S. at 134.

\textsuperscript{282} See \textit{id.} at 132.

\textsuperscript{283} \textit{Id.} at 132, 134, 135, 136, 139, 141, 151, 160.
even some forms of multiple sclerosis, are often completely unable to move, yet they are alive.

Rather than relying upon a definition of life taken from a variety of mostly medical sources, of questionable authority, since no one actually knows the correct answer to that question, would it not have been better to adopt the answer from a spiritual source? Such a source need not be exclusively a religion. The Court admits that many recognized religions, and persons in general, in this country believe that birth begins at conception, though Blackmun stated that the members of the majority did not agree with that proposition. It is certainly not a new concept. The Court referred to it’s recognition by the Pythagoreans (in 1, 2 AD). It is certainly a hallmark of the Christian faith, though it did not originate there. It stems from Judaism.

If the child within the mother’s womb jeopardizes the mother’s health or mortality, or is the product of the mother’s rape or incest, there is cause for killing it; otherwise there is not. Would not such a rule, even if not specifically adopted by every one of the world’s religions, yet would not be offensive to billions, or at the very least, millions, of people who believe in the omnipotence of God, be an appropriate rule to

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284 See id. at 150, 159, 160, and 161.

285 Id. at 156.

286 Id. at 131.

287 See Psalms, Chapters 8, 19, 24, 104, John 1:3 and Colossians 1:15. See also Humani Generis (1950), by Pope Pius XII.

288 The Harpercollins Encyclopedia of Catholicism, 375 (1995); though Blackmun did not agree with that proposition. See supra text accompanying note 91.

289 It is a well known fact that not all of the world’s religions have as one of their tenets that life begins at conception, or even that there is the omnipotent creator whom they worship as the God of the universe. See JOHN B. NOSS, MAN’S RELIGIONS, 2 passim (1974).
adopt? Or would a better testing gage be the vague concept of “viability” adopted by seven, and often interpreted by as few as five, people in Washington, D.C. whose primary function it is to judge the constitutionality of the work of State legislatures? Since at the present time no one knows the answer to when life begins, is an estimate based upon a substantial number of the world’s populace in the belief in the existence of God be more reliable than an estimate based upon the teachings of fallible human beings learned in the medical profession? Is there really serious doubt as to the answer?

Of all the jurists who have written about abortion, Justice Antonin Scalia made the most sensible suggestion:

For those who share an abiding or moral or religious conviction (or for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice.

Is it impossible to show women, who have taken the blessed step toward bringing another person into the world, that it is wrong not to give that person a chance to live? Is all the help concerning the avoidance of pregnancy, and all the facilities for the care of unwanted children, or children who because of the death of their parents have become

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290 It must be acknowledged that not all of the world’s religions believe that life begins at conception or believe in the existence of the omnipotent power we call “God.” See supra note 289.

291 Most of the work performed by the Supreme Court in the abortion cases, is to ascertain the constitutionality of the legislative bodies of the states which have presumably enacted statutes complying with the wishes of their constituents. From such puissant position the Court, as a corollary to its primary function, will adopt a rule; but such rule-making is only adjunct to its primary function, that of judging the work of others. As Justice O’Connor said in Akron, 462 U.S. at 456 “[I]t is . . . difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area.” Or as Justice Scalia asked in Stenberg, 530 U.S. at 955, should a 5-4 majority of Supreme Court Justices overcome the judgment of 30 state legislatures?

orphans, such a waste of time? Are all mothers required to care and raise their children after birth? The correct answer to those questions is a resounding NO. Unless the presence of a child in the mother’s womb threatens the health and/or life of his or her mother, or was conceived by force upon her, is a child’s mother required to give birth to her child. The correct answer to that question is a resounding YES.

A good method of persuading the mother not to kill, or even run the risk of such irreversible action, would be to provide counseling to convince the pregnant woman that the tender feeling for the child, the existence of whom is, in large part, the acts of its mother, should, under normal conditions, at least equal the love of herself. The mother’s counseling, of course, should never forget to remind her that the only reason for killing the child is the mother’s survival, or the protection of her health, or both; or to blot out of her mind, if possible, the memory of a horrible experience forced upon her. These reasons are not unlike the reasons authorizing the death penalty for a capital offense, though even such punishment has not met with unanimous approval.293

The “old guard,” Justices Brennan, Marshall, Blackmun, and Stevens, all members of the Roe and Doe panels, except Justice Stevens, while not explicitly so stating, appear to be concerned that any state regulation of abortions will constitute a violation of the pregnant woman’s right to choose an abortion. By the same token, Justices White, Rehnquist, O’Connor, Scalia, Kennedy and Powell, appear to look at the state regulations with a less jaundiced eye. It would seem that the area of disagreement concerns that vital question of when life begins. Neither group of jurists has given much

293 See supra note 275.
time to a discussion of the real bone of contention, except Justice Stevens. It would appear that the present is the appropriate time to do so. An abandonment of a medical approach to the timing of such a significant event, and the acceptance of one that points to an exact time, is a reasonable resolution of the conflict of opinions that prevails at present. That such statement of an event happens to be a spiritual principle, or even a tenet of certain religions, does not make it objectionable; for such fact makes it more authoritative and acceptable.

As fine human beings and as brilliant legal scholars that the seven members of the majority in *Roe v. Wade* and *Doe v. Bolton* were, they made mistakes in determining when life begins, even though they said that they were not going to attempt such a determination. As their source for solving the mystery, instead of using the beliefs of people of spirituality they used the beliefs of some people of the medical world. Having made such a mistake it was well nigh impossible to extricate themselves from authorizing the murder of innocent human beings. They verily believed that the substance the destruction of which they were permitting, was not a living human being, but something, inanimate and undefined, which at most, had the “potentiality of life,” whatever that might mean. That, in essence, is why *Roe v. Wade* is wrong, as is *Doe v. Bolton*.

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294 See Justice Stevens’ dissenting Opinion in Webster, 492 U.S. at 567-570.

295 See supra notes 27 and 153.

296 See *Roe*, 410 U.S. at 159.

297 Blackmun so cherished his decision in *Roe v. Wade* that he delayed his retirement in order to protect it. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN, 232, 233 (2005).

298 It is significant that on the day this article was being completed U.S. President Barack Obama visited Pope Benedict XVI, where the Pope “pressed his case against abortion” and other matters of interest to his
One Last Word!

We know that complying with our request is not going to be easy. It is being made not as punishment for having sexual intercourse without taking the available precautions against childbirth. It is being made not only because it is right, but because of the joy and happiness it will bring to pregnant women in knowing that they have not killed an innocent person, whose only fault was that he or she was conceived, by a process in which he or she had utterly no participation. Our suggestion here includes the provision that rather than being encumbered with the continued presence of the unwanted child, that child be placed for adoption, so that that person may be raised and cherished in a home of loving parents. If Roe v. Wade be overruled, the only right of which pregnant women will be deprived is the right to kill, a right to murder, to which she was given them by a strange United States Supreme Court decision in 1973. Such is a “right” which gives pregnant women the right to kill those they have had a considerable part in bringing into existence, without making the slightest effort to prevent it, is indeed a strange “right” to clothe with the mantle of “law” of the United States.

See Stacy Meichtry and Davide Berretta, Pope Presses Obama On Contentious Points, The Wall Street Journal, July 11-12, 2009 at A 7.in which it was also stated that “Mr. Obama’s visit to the Vatican was an occasion to strengthen his credentials among religious voters, in particular the 67 million Roman Catholic Americans.”