August 30, 2014

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Introduction

In Planned Parenthood of Southeastern Pennsylvania v. Casey, a five-Justice majority, relying heavily on *stare decisis*, reaffirmed the Supreme Court’s earlier holding in Roe v. Wade that a woman has a constitutional right to an elective abortion prior to fetal viability. In reaffirming that holding, however, Casey also restructured the right and placed it on a different foundation. Roe had declared that the right to elective abortion was “fundamental,” that only a compelling state interest could justify overriding it, and that the state’s interest in protecting fetal life was not compelling until viability. Subsequent decisions made clear that state laws regulating pre-viability elective abortions were subject to strict scrutiny. Under Casey, although the woman’s liberty interest in an elective abortion is specially protected, the right to an elective abortion is not grounded in a judgment that it is “fundamental.” Instead, it is grounded in an interest-balancing judgment that the woman’s liberty interest in an elective abortion outweighs the state’s interest in protecting pre-viable fetal life.

Remarkably, however, the Casey Court did not affirm that interest-balancing judgment on the merits. Instead, it asserted that “the reservations any of us may have in reaffirming the central holding of Roe are outweighed by the explication of individual liberty we have given combined with the force of stare decisis.” Moreover, in the belief that Roe had given too little weight to

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1 Professor of Law, Quinnipiac University School of Law. Thanks to Dean Brad Saxton and Dean Jennifer Brown for research support, to Jonathan Jacobson for valuable research assistance, and to Laurie Feldman and Nelson Lund for helpful comments.


3 Roe, 410 US at 152-153 (fundamental right), 155-156 (compelling state interest test), 163 (state’s interest in fetal life compelling at viability).

4 See Akron v Akron Center for Reproductive Health, Inc., 462 U.S. 416, 427 (1983-).

5 See Casey, 505 US at 954 (Rehnquist, C.J., dissenting) (pointing this out).

6 See Casey, 505 US at 846 (majority opinion) (“[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure”).

7 505 US at 853 (majority opinion). Casey’s “explication of individual liberty” stressed the vital importance of the woman’s liberty interest and the character of her decision whether to terminate her pregnancy as among the “most intimate and personal choices a person may make in a lifetime,” id. at 851, and argued that this liberty interest
the state’s interest in protecting fetal life, Casey rejected Roe’s strict scrutiny of pre-viability abortion regulations, as well as Roe’s trimester framework, in favor of the less stringent “undue burden standard,” which invalidates such regulations only if they have the intent or effect of substantially interfering with women’s access to elective abortions.\textsuperscript{8}

Under Casey, then, the right to elective abortion is an unenumerated substantive due process right that is not “fundamental” in the strict-scrutiny sense, that triggers a version of heightened scrutiny in the form of the undue-burden standard, and that rests on an interest-balancing judgment derived from Roe and used – but not affirmed on the merits -- in Casey. The Casey dissenters argued that the Constitution authorizes the Court to recognize “fundamental” substantive due process rights only if they are “deeply rooted” in our history and traditions, and that the right to elective abortion plainly fails that test.\textsuperscript{9} In reply, the Casey Court made no attempt to defend Roe’s much-criticized history of abortion in Anglo-American law, or Roe’s claim that the right to elective abortion is fundamental. Instead, Casey argued that, in adjudicating substantive due process claims, the Court is authorized – indeed, required – to arrive at a “reasoned judgment” as to “the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”\textsuperscript{10} Thus, the hallmark of Casey’s approach to substantive due process is a “reasoned judgment” arrived at through interest analysis, and informed but not dictated by history.

In this Article, I argue that – setting aside stare decisis – the right to elective abortion is unsound in Casey’s own terms. Specifically, I will assume the validity of Casey’s “reasoned judgment” approach to identifying unenumerated rights, including the interest-balancing methodology Casey used to reconceive the right to elective abortion. I will make this assumption even though, five years after Casey, the Court in Washington v Glucksberg declined to adopt interest-balancing as its general approach in substantive due process cases, adhering instead to its “established method,” under which unenumerated fundamental rights are recognized only if, when carefully described, they can be said to be “deeply rooted in this Nation’s history and tradition.”\textsuperscript{11} Moreover, I will assume that Casey (like Roe before it) is correct in characterizing should enjoy some degree of heightened constitutional protection. Id. at 850-853 (majority opinion). But it did not affirm that the woman’s liberty interest outweighs the state’s interest in protecting the pre-viable fetus. See 505 US at 871 (plurality opinion) (stating that “[t]he weight to be given this state interest, not the strength of the woman’s interest, was the difficult question faced in Roe,” and declining to say which interest is greater “as an original matter”).

\textsuperscript{8} 505 US at 876-877 (plurality opinion).

\textsuperscript{9} 505 US at 952-953 (Rehnquist, C.J., dissenting).

\textsuperscript{10} 505 US at 849-850 (majority opinion) (quoting Poe v Ullman, 367 US 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

\textsuperscript{11} 521 US 702, 721 (1997). Glucksberg treats Casey as good law, see 521 US at 170, but denies that Casey adopted interest-balancing as an across-the-board method to be used in all substantive due process cases, thereby “jettison[ing] our established approach.” 521 US at 722 n.17 (arguing that “to read such a radical move into the
the pre-viable fetus as “potential human life” rather than as an actual, normatively human being. These are obviously unfavorable premises on which to argue against a right to elective abortion. But that is precisely the point. My thesis is that even when an interest-balancing analysis is conducted on terms generally favorable to recognizing a constitutional right to elective abortion, a persuasive case can be made that the state’s interest in protecting the life of the pre-viable fetus outweighs the woman’s liberty interest in terminating her pregnancy.

Viewed as a contribution to reproductive-rights scholarship, my analysis develops a line of argument that should be of interest to anyone who is interested in determining how best to interpret Casey, how best to implement Casey’s interest-balancing approach, and in whether Casey’s premises, as I claim, can support an argument that the very right Casey reaffirmed on *stare decisis* grounds is substantively unsound. Most scholarship challenging the right to elective abortion either denies the legitimacy of unenumerated rights not anchored in tradition, or disputes the Court’s assumption that the pre-viable fetus cannot be shown to be a normatively human being. This Article, by contrast, argues that even if these premises are assumed to be correct, the right to elective abortion prior to viability is unsound in light of the importance of what Casey recognizes as the state’s interest in enabling the fetus to “become [the] child” into which it is naturally developing.

Nevertheless, viewed as an argument that the Supreme Court should consider, it is a fair question whether this entire exercise is futile. Casey relied on *stare decisis* and the importance of the woman’s protected liberty to reaffirm the right to elective abortion whether or not the interest-balancing judgment on which that right rests is correct on the merits. If we canvass today’s Court, we find that two Justices (Ginsburg and Breyer) have endorsed the right to elective abortion's opinion in Casey would seem to fly in the face of that opinion's emphasis on *stare decisis*”). For fuller discussion of the interplay between Casey and Glucksberg, see infra TAN 191.

12 Roe, 410 US at 159; see Casey, 505 US at 871 (plurality opinion) (“potential life”).


15 505 US at 846 (majority opinion).

abortion on the merits, two more Justices (Sotomayor and Kagan) likely share that view, one Justice (Kennedy) accepts the right to elective abortion as a matter of *stare decisis*, two Justices (Roberts and Alito) would likely reject it as an original matter, while possibly adhering to it as a matter of *stare decisis*, and two Justices (Scalia and Thomas) reject it as an original matter and would overrule Roe and Casey regardless of *stare decisis*. Given this lineup, it seems clear that, as was true in Casey, Justice Kennedy provides the fifth vote to preserve the right to elective abortion – in his case, for reasons of *stare decisis*. Why bother, then, to make the constitutional case that the state’s interest in “potential human life” outweighs the woman’s interest in an elective abortion?

My answer has two parts. First, the composition of the Court could shift sufficiently that a majority of the Justices would be willing to consider overturning the right to elective abortion. Were they to do so, the arguments presented in this Article might persuade a Justice who agreed with Casey’s “reasoned judgment” approach to substantive due process, but was uncertain whether the balance of state versus individual interests truly supports a right to elective abortion. Yet such a Justice would reject the arguments against the right to elective abortion

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18 As of this writing, neither Justice Sotomayor nor Justice Kagan has written or joined a Supreme Court opinion in an abortion case.

19 See Casey, 505 US at 853 (joint opinion of Justices O’Connor, Kennedy, and Souter).

20 Chief Justice Roberts and Justice Alito joined Justice Kennedy’s opinion for the Court in Carhart II, 550 US at 131, which applied Casey’s principles without stating that Casey was correctly decided. See 550 US at 145. Prior to Justice Alito’s arrival on the Court, Chief Justice Roberts joined the Justice O’Connor’s unanimous opinion in Ayotte v Planned Parenthood of Northern New England, 546 US 320 (2006), which declined to “revisit our abortion precedents” and addressed only a remedial question presented by a successful challenge to an abortion regulation that lacked a health exception. Id. at 323.

21 In Carhart II, Justices Scalia and Thomas joined Justice Kennedy’s opinion for the Court, but reiterated, in a concurring opinion by Justice Thomas, their position that “the Court’s abortion jurisprudence, including Casey and Roe v. Wade, has no basis in the Constitution.” 550 US at 169 (Thomas, J., concurring).

22 Chief Justice Roberts or Justice Alito might supply an additional vote or votes to uphold the right as a matter of *stare decisis*.

23 If Chief Justice Roberts and Justice Alito are willing to consider overturning the right to elective abortion, there are already four votes to reexamine Casey with that possibility in mind. Were Justice Kennedy or any of the liberal Justices to be replaced by a Justice open to overruling Roe and Casey, there would then be a potential majority to do so.

24 Now-retired Justice Souter might be an example of such a jurist. See Glucksberg, 521 US at 765-773 (1997) (Souter, J., concurring in the judgment) (arguing that a version of Casey’s “reasoned judgment” approach should be adopted as the Court’s general methodology in substantive due process cases). In Souter’s case, however, *stare
advanced by the dissenters in Casey, because those arguments are predicated on a more restrictive conception of the Court’s role in recognizing unenumerated substantive due process rights.

Second, although Justice Kennedy appears committed to preserving the right to elective abortion, it does not follow that he would be unwilling, in an appropriate case, to re-examine the validity of the interest-balancing judgment on which the right to elective abortion now rests. As we’ll see, the evidence from Casey strongly suggests that Kennedy harbors grave doubts about whether the woman’s interest in an elective abortion actually outweighs the state’s interest in protecting the life of her pre-viable fetus. In Casey, however, he and the other authors of the joint opinion (Justices O’Connor and Souter) declined to explain how each of them would have ruled on this issue had it come before them as an original matter, rather than almost twenty years after Roe recognized the right to elective abortion. It is too late for Justices O’Connor and Souter to explain their views as sitting Justices, but not for Justice Kennedy to explain his. Nor would any such explanation require him to vote to overrule Casey or overturn the right to elective abortion. Kennedy could simultaneously adhere to his position that stare decisis requires preserving the right to elective abortion, and write or join a “reasoned judgment” explaining why the state’s interest in protecting the pre-viable fetus outweighs the woman’s interest in an elective abortion.

Doing so, of course, would expose Justice Kennedy to intense criticism from both defenders of the right to elective abortion (for publicly undermining it by arguing against it on the merits), and from its opponents (for preserving it by means of stare decisis while acknowledging that the right rests on an erroneous constitutional judgment). On the other hand, as I will now explain, it would also enable Kennedy to make common cause with the four other generally conservative Justices in crafting an abortion jurisprudence that more persuasively justifies the interpretation of Casey Kennedy has championed. And it would prevent the erroneous constitutional judgment on which the right to elective abortion now rests from distorting the Court’s consideration of related issues involving state regulation that seeks to protect post-conception fetal life.

Just as the Court is deeply divided over the very survival of the right to elective abortion, it is deeply divided when it comes to interpreting Casey. No Justice disputes that the entire joint

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25 My interpretations of Casey, Roe, and the Court’s other abortion decisions are based on the opinions of the Court in those cases, which constitute the judge-made constitutional law arising out of them, and on the dissenting and concurring opinions, which stake out the official, public positions of the Justices who signed them. I have not relied on sources such as the papers of individual Justices, which might shed revealing light on the Justices’ motivations and deliberations, but cannot alter the public meaning of their opinions.

26 505 US at 871 (plurality opinion).
opinion in Casey is controlling law, that it reaffirmed Roe’s “essential holding,” and that under Casey regulations of pre-viability abortions are unconstitutional if they impose an undue burden on women’s access to elective abortions. But apart from those core principles, the Court is now divided into two camps. Justice Kennedy adheres unwaveringly to an interpretation of Casey that gives states much greater freedom to regulate pre-viability abortions than Roe’s strict-scrutiny regime did. For Kennedy, a crucial feature of Casey was the plurality’s

27 In the twenty-plus years since Casey was decided, all the Justices who have expressed an opinion have agreed that the joint opinion in Casey, including the portions joined only by its three authors (the “plurality opinion”) as well as those joined by Justices Blackmun and Stevens (the “majority opinion”), constitutes the Court’s authoritative ruling under the rule in Marks v United States, 430 US 188, 193 (1977) (when “no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’”). See also Carhart I, 530 US at 952 (Rehnquist, C.J., dissenting) (applying the rule in Marks to the plurality opinion in Casey). (Parts I-III, V-A, V-C, and VI of the joint opinion constitute the majority opinion, because both Justice Blackmun and Justice Stevens joined them. Because neither Blackmun nor Stevens joined Parts IV, V-B, V-D, and Blackmun did not join Part V-E, those Parts constitute the plurality opinion.) In Ayotte, a unanimous Court treated the Casey joint opinion’s “significant health risks” test for the right to a health-preserving abortion as controlling law, see 546 US at 327-328, and both the majority and dissenting opinions in the Court’s two partial-birth abortion decisions purported to apply the Casey plurality’s undue-burden standard. See Carhart II, 550 US at 150, 156 (rejecting undue-burden challenges to the federal Partial-Birth Abortion Ban of 2003); id. at 188 (Ginsburg, J., dissenting) (finding an undue burden on the relevant class of women under Casey); Carhart I, 530 US at 945-946 (holding that Nebraska’s statute prohibiting partial-birth abortions imposed an undue burden); id. at 957 (Kennedy, J., dissenting) (finding no undue burden), id. at 982 (Thomas, J., dissenting) (no undue burden under Casey’s standard). Thus, subject to the usual rules distinguishing dicta from and holdings and their supporting rationales, the entire joint opinion in Casey is binding law, because on the issues it addresses, the three-Justice “plurality” portions of that opinion allow more state regulation of abortion than Justices Blackmun and Stevens would have allowed, but less regulation than the four dissenters (Chief Justice Rehnquist and Justices White, Scalia, and Thomas) would have sanctioned. Put less technically, there were five votes in Casey to strike down any law that is inconsistent with the Casey plurality opinion, and seven votes in Casey to uphold any law that complies with its requirements. Nevertheless, to minimize confusion, my citations to Casey will not refer to the majority opinion and the plurality opinion as the “opinion of the Court.” Instead, I will refer to those parts of the opinion joined by a majority as the “majority opinion,” and the remaining parts as the “plurality opinion.”

28 State regulations of pre-viability abortions that do not impose an undue burden are constitutional provided that they are “reasonably related” to the state’s interests in protecting fetal life or maternal health. 505 US at 878 (plurality opinion).

29 This division traces to Casey itself: as we’ll see, the Casey majority also consisted of two camps – the joint authors (Justices O’Connor, Kennedy, and Souter) on the one hand and Justices Blackmun and Stevens, who joined the joint opinion insofar as it reaffirmed Roe, but for the most part refused to join it insofar as it deviated from Roe. See infra Part II-C.

30 See Carhart I, 530 US at 956-957 (Kennedy, J., dissenting); Carhart II, 550 US at 146-147 (opinion of the Court by Kennedy, J.).
conclusion that the state’s “legitimate and substantial interest in preserving and promoting fetal life” had been seriously undervalued by Roe and later pre-Casey decisions.\footnote{Carhart II, 550 US at 145. See also Carhart I, at 956-957.} Chief Justice Roberts and Justices Scalia, Thomas, and Alito agree with this interpretation of Casey, thus creating a five-Justice coalition that interprets and applies the “balance” struck in Casey to give states substantial leeway to regulate (but not to prohibit) elective abortions in ways designed to persuade women – directly or indirectly-- not to have them.\footnote{Carhart II, 550 US at 146 (opinion of the Court by Kennedy, J.) (Casey “struck a balance” that “was central to its holding”); id. at 169 (Thomas, J., concurring) (stating that the Court’s opinion “accurately applies current jurisprudence,” including Casey).}

Justices Ginsburg and Breyer anchor the other camp. They accept Casey’s reaffirmation and modifications of Roe as authoritative, but in practice their interpretation of Casey stresses the former and downplays the latter: they would give far less latitude to states to regulate pre-viability abortions in the name of promoting fetal life than Kennedy and the conservatives.\footnote{Justice Ginsburg’s dissent in Carhart II treats Casey as concerned above all with removing doubts about the scope and validity of the right to elective abortion, 550 US at 169, claims that Carhart I exhibited “fidelity to the Roe-Casey line of precedent,” id. at 170, and treats all the Court’s pre-Carhart II abortion decisions -- including Casey -- as engaging in “close scrutiny” of “state-decree limitations on a woman’s reproductive choices.” Id. at 171.}

Although Justices Sotomayor and Kagan have yet to vote or write in an abortion case, it seems likely that they would join forces with Ginsburg and Breyer in tilting Casey’s balance toward “close scrutiny” of regulations that seek to protect pre-viable fetal life by restricting “a woman’s reproductive choices” -- including (but not limited to) choices about abortion.\footnote{Carhart II, 550 US at 171 (Ginsburg, J., dissenting).}

The upshot is that there is neither a realistic prospect that today’s Court will overrule Roe and Casey, nor that it will reinstate Roe’s strict scrutiny.\footnote{The Casey center might not hold if a liberal replaces any conservative Justice or Justice Kennedy, or if a conservative replaces any liberal Justice or Justice Kennedy.} Consequently, the battle is over how Casey should be interpreted, and whether the right to elective abortion should be treated as a dubious but established doctrine that ought not be extended, or instead as one manifestation of a more general principle of reproductive liberty that trumps state concern with protecting fetal life.

Suppose, then, that Justice Kennedy – while continuing to uphold the right to elective abortion on \textit{stare decisis} grounds -- were to join the four conservative Justices in explicitly affirming that the state’s interest in protecting pre-viable fetal life outweighs the woman’s interest in an elective abortion. What would be the effects of such a ruling?

A first set of consequences concerns what we might call the domain of Roe’s central holding. Under the potential ruling we are considering, \textit{stare decisis} would preserve only the right to elective abortion prior to viability and the undue-burden standard, \textit{not the interest-balancing judgment underpinning that right}. As a result, for purposes of deciding reproductive-rights
issues other than prohibitions on elective abortions or regulations that burden women’s ability to terminate their unwanted pregnancies, the Court would employ the newer and contrary judgment. This difference would profoundly alter the Court’s reasoning in ways that favored state legislation to protect post-conception fetal life. In particular, if the interest-balancing judgment on which the right to elective abortion rests is erroneous, it should not be used as the basis for recognizing new reproductive rights; instead, the Court should engage in interest-balancing that takes into account the overriding weight of the state’s interest in pre-viable fetal life.

Two examples will illustrate the impact this change would have in the field of reproductive rights within which Casey is likely controlling.\textsuperscript{37} Consider first a case challenging a hypothetical statute that forbids the destruction of cryopreserved embryos and requires that, if not implanted in the biological mother or a surrogate within twenty years after they are created, they must be transferred to the state for attempted implantation in a willing gestational mother.\textsuperscript{38} The newly applicable interest-balancing judgment – that the state’s interest in pre-viable, post-conception fetal life outweighs the woman’s interests in an elective abortion\textsuperscript{39} – implies \textit{a fortiori} that the state’s interest in the cryopreserved embryo outweighs the woman’s interest in preventing its further development. A woman’s interest in preventing her cryopreserved embryo from becoming a child is clearly less weighty than her interest in an elective abortion, because the latter includes her parallel interest in preventing her fetus from becoming a child \textit{plus} her interest in avoiding the burdens of pregnancy and childbirth. The state’s interest, which by hypothesis outweighs both of the woman’s interests in an elective abortion, must therefore outweigh her interest in preventing the development of her cryopreserved embryo.

Here is a second -- albeit as yet futuristic -- hypothetical. Imagine that artificial wombs become available, as do fetus-sparing abortion methods\textsuperscript{40} that enable aborted fetuses safely to be transferred to, and gestated in, artificial wombs at reasonable expense at any stage of pregnancy.\textsuperscript{41} In the aftermath of these developments, suppose that a state enacts a fetal-rescue

\begin{itemize}
\item \textsuperscript{37} See infra note 191 (discussing the respective spheres of influence of Casey and Glucksberg).
\item \textsuperscript{38} Although no state currently has such a statute, Louisiana prohibits the intentional destruction of cryopreserved embryos, La. Rev. Stat. Ann. § 9:129 (2008), and requires that cryopreserved embryos be made available for adoption by other IVF patients if the biological parents renounce their parental rights to in utero implantation. Id. § 9:130.
\item \textsuperscript{39} Under Roe and Casey, the state’s important interest in protecting fetal life extends to all post-conception fetal life. See infra Part II. As I argue elsewhere, it should therefore encompass cryopreserved embryos. See Stephen G. Gilles, Rescuing Cryopreserved Embryos (unpublished manuscript on file with the author).
\item \textsuperscript{40} By “fetus-sparing abortion method,” I mean a procedure in which the physician attempts prematurely to terminate a pregnancy by removing the fetus from the woman’s body intact and alive. Currently, elective abortions almost always employ fetus-killing abortion methods intended to ensure the death of the fetus before removal from the woman’s body. See Carhart I, 530 US at 923-927 (describing first- and second-trimester abortion methods.
\item \textsuperscript{41} It is unclear whether or when artificial wombs will become practicable, let alone whether they will be reliably effective and not prohibitively expensive. Researchers have reported some progress in recent years, and some observers have predicted that artificial wombs will be developed within the next few decades. Jeremy Rifkin, The
law prohibiting fetus-killing abortions, and requiring that aborted fetuses be transferred to the state for gestation in artificial wombs at state expense. In a case challenging this hypothetical fetal-rescue statute, the relevant interests to be balanced would be the state’s interest in protecting pre-viable fetal life and the woman’s interest in ensuring the death of her fetus lest it become a child. As in the previous example, the woman’s interest is unquestionably less weighty than her combined interests in an elective abortion, which include both her interest in ensuring the death of her fetus and her interest in avoiding pregnancy and childbirth. Once again, if the state’s interest in pre-viable fetal life outweighs the woman’s interest in an elective abortion, it follows a fortiori that the state’s interest in protecting pre-viable aborted fetuses prevails.42

Yet another important consequence concerns the meaning and application of Casey’s undue-burden standard. In his dissent in Carhart I, Justice Scalia asserted that what one considers an “undue burden” is ultimately “a value judgment, dependent upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it.”43 This is an exaggeration: the undue-burden standard is not simply a balancing test, because any regulation that imposes a “substantial obstacle” to women’s access to elective abortions is unconstitutional.44 Nevertheless, Scalia has a point: one’s judgment about what constitutes a “substantial obstacle” is at least in part a function of the comparative value judgment he

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42 A fetal-rescue statute such as the one described here could be challenged on other grounds as well. For example, it could be argued that the right to an elective abortion encompasses both a woman’s right to terminate her pregnancy and a distinct right to ensure the death of her pre-viable fetus, and that such a statute would impose an undue burden on women’s access to elective abortions. Elsewhere, I evaluate and reject these and other challenges to fetal-rescue programs. See Stephen G. Gilles, Does the Right to Elective Abortion Include the Right to Kill the Fetus? (unpublished manuscript on file with the author). As I also argue there, fetal-rescue programs should survive an interest-balancing analysis even if it is assumed that the woman’s combined interests in an elective abortion outweigh the state’s interest in protecting pre-viable fetal life. Even if so, the fact remains that it would obviously be much easier to defend the constitutionality of fetal-rescue programs if the starting point for evaluating them were an authoritative judgment by the Court that the state’s interest in the pre-viable fetus prevails over the woman’s interest in an elective abortion.


44 See 505 US at 877 (plurality opinion).
describes. For example, if one thinks the woman’s interest in an elective abortion is disproportionately greater than the state’s interest in protecting fetal life, a state regulation that makes access to abortions modestly more difficult is likely to seem unduly burdensome even if it saves many fetal lives. To one who thinks the state’s interest is at least on a par with the woman’s, the burden is clearly justified as well as modest, and ought not qualify as a substantial obstacle.

To be sure, *stare decisis* requires that the undue-burden standard not be interpreted in a manner inconsistent with the interest-balancing judgment whose validity the Casey plurality assumed when it adopted that standard. But this requirement is no bar to interpreting the undue-burden standard as expressing an implicit judgment that the state’s interest in protecting pre-viable fetal life is *almost* as weighty as the woman’s interest in an elective abortion. (Indeed, I will argue that the Casey plurality opinion lends considerable support to such an interpretation of the undue-burden standard). Were the Court explicitly to adopt that interpretation of the undue-burden standard, it would provide much-needed guidance for the lower courts, more clearly convey the thrust of Justice Kennedy’s understanding of Casey (as expressed in his dissent in *Carhart I* and his majority opinion in *Carhart II*), and provide a foundation on which Kennedy and the conservative Justices could present a more convincing explanation than they have so far offered for interpreting Casey’s undue-burden standard to give substantial leeway to state regulation protective of pre-viable fetal life.

In short, a Supreme Court ruling that the state’s interest in pre-viable fetal life outweighs the woman’s interest in an elective abortion as an original matter would put some real teeth in Casey’s assurances that the states may legislate “to promote the life of the unborn and to ensure respect for all human life and its potential,” without disturbing Casey’s *stare decisis*-based reaffirmation of Roe’s essential holding. Casey adopted a new, interest-balancing framework for the right to elective abortion while preserving the core of that right. But by declining to address whether the right to elective abortion can be justified in interest-balancing terms, Casey opened the door to unduly stringent applications of the undue-burden standard and, no less importantly, to future extensions of the right. By ruling that the state’s interest in protecting pre-viable fetal life outweighs the woman’s interest in an elective abortion, while preserving that right on *stare decisis* grounds, the Court could ensure that the balance it struck in Casey – and that “was central to its holding” – is maintained and consistently enforced.

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45 *Carhart I*, 530 US at 957 (Kennedy, J., dissenting). See also *Casey*, 505 US at 871-873 (plurality opinion).

46 *Carhart II*, at 146.
I. Casey’s Interest-Balancing Methodology, and Casey’s Failure to Apply It to the Crucial Judgment on Which Casey Grounded the Right to Elective Abortion

It is not generally appreciated that Casey reinvented the doctrinal foundation of the right to elective abortion while simultaneously reaffirming that right — and that this reinvention has manifold implications. The Roe Court had declared that the woman’s right to elective abortion is fundamental, that only a compelling state interest can override such a right, and that the state’s legitimate interest in protecting fetal life does not become compelling until the fetus is viable.47 In Casey, a five-Judge majority reaffirmed Roe’s holding that there is a constitutional right to elective abortion, that this right extends until viability, and that the state “has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child.”48 Yet only Justice Blackmun, in a separate opinion, defended Roe’s treatment of the right to elective abortion as a fundamental right that triggers “strict scrutiny,” meaning that it can be infringed only by legislation that is narrowly tailored to advance a compelling state interest.49 The majority opinion in Casey, co-authored by Justices O’Connor, Kennedy, and Souter, and joined by Justice Blackmun and Justice Stevens, jettisoned Roe’s fundamental-right/compelling state interest framework in favor of an interest-balancing one.50 On the strength of its “explication of individual liberty . . . combined with the force of stare decisis,”51 the Casey Court reaffirmed the right to elective abortion in explicit interest-balancing terms: “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”52

The same interest-balancing approach is evident in the three-Judge plurality portion of the Casey joint opinion -- which, as previously noted, represents the holding of the Court on the

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47 See supra n. 3.


49 505 US at 934 (Blackmun, J., dissenting in part).

50 Casey’s interest-balancing approach was not unprecedented in substantive due process cases. See Cruzan v Missouri Dept. of Health, 497 US 261, 278 (1990) (“determining that a person has a ‘liberty interest’ under the Due Process Clause does not end the inquiry; ‘whether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests’”).

51 505 US at 853 (majority opinion).

52 505 US at 846 (majority opinion).
issues it addresses.\textsuperscript{53} Rather than framing their holding in Roe’s compelling-state-interest terms, Justices O’Connor, Kennedy, and Souter simply held that viability is the time when “the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.”\textsuperscript{54}

Interest-balancing likewise played a central role in the Casey plurality’s abandonment of Roe’s trimester framework and strict-scrutiny approach. The Casey plurality argued that Roe’s recognition of the state’s legitimate interest in fetal life had “been given too little acknowledgment and implementation by the Court in its subsequent cases,” and that “in practice” the trimester framework “undervalues the State’s interest in the potential life within the woman.”\textsuperscript{55} In its place, the plurality adopted the undue-burden standard, under which state regulation seeking to protect fetal life is unconstitutional if it has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”\textsuperscript{56} Although, as we shall see, interest-balancing plays a part in applying the undue-burden standard, that standard is not a balancing test, because \textit{any} regulation that imposes a “substantial obstacle” to women’s access to elective abortions is unconstitutional.\textsuperscript{57} The undue-burden standard is, however, the \textit{result} of interest-balancing, as the plurality confirms by describing it as “the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”\textsuperscript{58}

Thus, in the very act of reaffirming the woman’s right to elective abortion before viability, the Casey joint opinion established a different kind of heightened scrutiny for the woman’s liberty interest in terminating her pregnancy, and a new, interest-balancing foundation for the right to

\begin{footnotesize}
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\item \textsuperscript{53} See supra n.27.
\item \textsuperscript{54} 505 US at 859 (plurality opinion). See also 505 US at 861 (plurality opinion) (describing viability as “the point at which the balance of interests tips”).
\item \textsuperscript{55} 505 US at 875 (plurality opinion).
\item \textsuperscript{56} 505 US at 877 (plurality opinion).
\item \textsuperscript{57} See 505 US at 877 (plurality opinion) (no law imposing an undue burden “could be constitutional”).
\item \textsuperscript{58} Casey, 505 US at 877 (plurality opinion). See also Carhart II, 550 US at 146 (in adopting the undue-burden standard “Casey struck a balance”). The Casey plurality’s implicit interest-balancing logic, I suspect, goes something like this: Roe now stands for the interest-balancing judgment that the woman’s overall interest in an elective abortion outweighs the state’s interest in protecting pre-viable fetal life. A law seeking to protect fetal life by \textit{prohibiting} elective abortions before viability is therefore unconstitutional. Consequently, any law whose purpose or effect is to erect a substantial obstacle to women’s access to abortion – thereby indirectly prohibiting a significant number of women from obtaining elective abortions – must also be unconstitutional: even if the law advances the state’s interest in protecting fetal life, that interest is outweighed by the liberty interests of the women whose access to elective abortion it forecloses. Abortion regulations that do \textit{not} impose an undue burden will be upheld if “reasonably related” to the state's important goal of protecting fetal life. Casey, 505 US at 878 (plurality opinion).
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elective abortion. Like Roe, Casey argued that the woman’s liberty interest was entitled to heightened constitutional protection in light of the intimate nature of the woman’s abortion decision and the heavy burdens prohibitions on abortion impose on women facing unwanted pregnancies. But instead of characterizing the right to elective abortion as “fundamental,” and then asking whether prohibitions on abortion withstand strict scrutiny, Casey employed an interest-balancing methodology in which the right to elective abortion derives from a judgment that the woman’s specially protected liberty interest in terminating her pregnancy outweighs the state’s interest in protecting pre-viable fetal life.

At first blush, this seems highly paradoxical. On the one hand, the Casey plurality plainly indicated that the state’s interest in pre-viable fetal life should be given greater weight for constitutional purposes than it had been accorded by Roe and later cases. On the other hand, Casey reaffirmed that prohibitions on pre-viability abortions are unconstitutional even when the woman’s liberty interest in an elective abortion is protected by Casey’s less stringent interest-balancing approach rather than by Roe’s strict scrutiny. As I will now argue, the resolution of this paradox lies in Casey’s reliance on stare decisis – and in the reservations about the right to elective abortion that made that reliance necessary.

Despite having characterized the right to elective abortion as resting on a judgment that the woman’s liberty interest outweighs the state’s interest in protecting pre-viable fetal life, the Casey majority specifically declined to endorse that judgment on the merits. Instead, it explained that “the reservations any of us may have in reaffirming the central holding of Roe are outweighed by the explication of individual liberty we have given combined with the force of stare decisis.” Thus, the Casey majority’s assertion that the woman’s interest in an elective abortion

59 Of course, each of the Court’s familiar levels of scrutiny (strict, intermediate, and rational-basis) involves some balancing of interests (as well as varying degrees of means-ends fit). But rather than directly comparing the respective weights of the competing interests, each level of scrutiny specifies the requisite quality the government interest must possess to ensure that the law is constitutional. Thus, a state law that burdens a fundamental right must be narrowly tailored to advance a compelling state interest, while a state law that burdens the ordinary social and economic liberties of persons need only be rationally related to a legitimate state interest. Intermediate scrutiny perhaps comes closest to direct interest balancing, but typically requires a showing that the interference with protected liberty is necessary to substantially advance an important state interest. See, e.g., Sell v United States, 539 US 166, 180-181 (2003) (holding that an individual’s protected liberty interest in avoiding the involuntary administration of drugs may be overcome only if necessary to substantially advance an important government interest). The interest-balancing utilized in Cruzan and Casey, by contrast, simply requires the Court to determine whether the specially protected liberty interest is weightier than the important state interest. That task is carried out not by labeling the state interest (e.g., as “compelling”) but by a careful evaluation and comparison of the competing interests. For example, Cruzan describes Jacobson v Massachusetts, 197 US 11, 24-30 (1905), as a case in which “the Court balanced an individual’s liberty interest in declining an unwanted smallpox vaccine against the State’s interest in preventing disease.” 497 US at 278.

60 See 410 US at 152-153.

61 505 US at 853 (majority opinion).
abortion outweighs the state’s interest in protecting pre-viable fetal life was critically dependent on *stare decisis*.

This analysis is confirmed by the fact that only two of the five Justices in the Casey majority (Blackmun and Stevens) defended *on the merits* the majority’s affirmation that “[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion.”\(^{62}\) Unsurprisingly, the four dissenting Justices in Casey argued, *inter alia*, that the state’s interest outweighed the woman’s.\(^{63}\) In between these poles fell Casey’s co-authors – Justices O’Connor, Kennedy, and Souter. They revealed the nature of their “reservations” about reaffirming Roe’s central holding in their plurality opinion, in which they acknowledged that “the difficult question faced in Roe” was “[t]he weight to be given this state interest” “in protecting the potentiality of human life.”\(^{64}\) Notwithstanding those “reservations,” the Casey plurality declined on *stare decisis* grounds “to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the Roe Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.”\(^{65}\)

It turns out, then, that there is no paradox. The Casey joint opinion, which held that Roe and its successors undervalued the state’s interest in pre-viable fetal life, also chose to ground the right to elective abortion in an interest-balancing judgment, thereby making it more difficult to defend Roe’s central holding on the merits. But that can only have been because the authors of the plurality opinion were did not regard the right to elective abortion as “fundamental” – a judgment that was presumably colored by their high estimation of the strength of the state’s interest. Having reframed the issue in this way, however, Justices O’Connor, Kennedy, and Souter were unable or unwilling to affirm that the woman’s interest in an elective abortion outweighs the state’s interest in pre-viable fetal life. As a result, although they agreed that the

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\(^{62}\) 505 US at 846 (majority opinion). See 505 US at 932 (Blackmun, J., concurring in part) (“"the Roe framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life"”) (quoting Webster v Reproductive Health Services, 492 US 490, 553 (1989) (Blackmun, J., dissenting)); id. at 912 (Stevens, J., concurring in part) (“Roe is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women”).

\(^{63}\) The dissenters’ primary argument was that, contrary to the Court’s usual substantive due process jurisprudence (and to any defensible understanding of the Fourteenth Amendment’s Due Process Clause), Roe recognized an unenumerated fundamental right to elective abortion despite the fact that “the longstanding traditions of American society have permitted it to be legally proscribed.” 505 US at 980 (Scalia, J., dissenting). See also id. at 951-953 (Rehnquist, C.J., dissenting). But the dissenters also argued that Roe was wrong even in its own interest-balancing terms, because it simply assumed that “what the State is protecting is the mere ‘potentiality of human life.’” Id. at 982 (Scalia, J., dissenting). As the dissenters saw it, the Roe Court should have deferred to the state’s reasonable judgment that the fetus is “a human life” whose claim to protection from the state outweighs the woman’s interest in terminating the pregnancy. Id.

\(^{64}\) 505 US at 871 (plurality opinion).

\(^{65}\) 505 US at 871 (plurality opinion).
woman’s liberty was specially protected, they could not uphold Roe’s central holding – that that liberty gives rise to a right to elective abortion -- without relying on stare decisis.

I will have more to say later about the implications of the plurality’s unwillingness to endorse the right to elective abortion on the merits, and of the joint opinion’s resulting dependence on stare decisis. My principal goal in this Article, however, is to present the kind of interest-balancing analysis on which, under Casey, the validity of the right to elective abortion in principle depends. The question can be simply stated: does the state’s interest in protecting the pre-viable fetus outweigh the woman’s interests in terminating her unwanted pregnancy? The joint opinion in Casey leaves no doubt that its co-authors framed the question in this way, that they seriously considered the arguments on both sides, and that they had grave doubts as to whether it could be answered in favor of the woman’s liberty. But the joint opinion refuses to reveal how its authors would have answered that question, or what reasons they would have relied on in doing so. Without pretending to speak for any of them, I will present an interest-balancing analysis that conforms to Casey’s methodology, and that proceeds on the terms and premises stated or implied by the joint opinion.66

Before turning to that task, it is necessary to say a bit more about how an interest-balancing analysis should proceed in light of Casey. The Casey plurality did not explain how an interest-balancing analysis should be carried out in future cases involving reproductive rights. This much, however, seems clear: interest-balancing calls for a comparison of the respective individual and governmental interests and a “reasoned judgment” about their relative weights.67 As applied to the right to elective abortion, at a minimum that entails an examination of the woman’s liberty interests in terminating her pregnancy, a parallel examination of the state’s interest in protecting pre-viable fetal life, and a judgment – in the form of an explanation, not merely a conclusion – about the comparative weight these competing interests should receive.

The next question is what types of evidence should be considered in assessing the relative strengths of the state’s interest in rescuing the pre-viable fetus and the woman’s interests in

66 If there is a plausible alternative reading of Casey, which I doubt, it would run as follows: the joint opinion tacitly recognizes the woman’s liberty interest in an elective abortion as fundamental and the state’s interest in viable fetal life as compelling, while declining for reasons of stare decisis to re-examine whether the state’s interest in pre-viable fetal life is also compelling, and replaces strict scrutiny with the undue-burden standard in order to limit the sweep of the right to elective abortion in light of the plurality’s doubts about its validity as an original matter. In my judgment, the joint opinion’s formulations, and its failure to use the language of fundamental rights and compelling state interests, are inconsistent with this fundamental-liberty-but-not-fundamental-right interpretation. But even if I am wrong, and the latter interpretation is not only plausible but correct, the arguments presented in Parts III and IV of this Article would strongly support the proposition that the state’s interest in protecting pre-viable fetal life is compelling. A ruling by the Court endorsing that proposition, but declining for reasons of stare decisis to overturn the right to elective abortion, would have the same salutary effects as a similarly qualified ruling that the state’s interest in pre-viable fetal life outweighs the woman’s interest in an elective abortion as an original matter.

67 Casey, 505 US at 849 (explaining that “the adjudication of substantive due process claims” requires the Court to exercise its “reasoned judgment”). See also Glucksberg, 521 US at 767 (Souter, J., concurring in the judgment) (“[t]his approach calls for a court to assess the relative ‘weights’ or dignities of the contending interests”).
terminating her pregnancy. One important source of judgments about the strength of these conflicting interests is the Court’s own opinions, and the inferences that can reasonably be drawn from them. As we’ll see, the joint opinion in Casey made extensive use of Roe for this purpose, and I will argue that important inferences can also be drawn from Casey itself. By contrast, the joint opinion in Casey conspicuously did not rely on Roe’s controversial account of the history of Anglo-American abortion law, electing instead to present a fuller version of Roe’s account of the contemporary importance of abortion liberty to women. Moreover, by substituting an interest-balancing approach for Roe’s fundamental-rights methodology, Casey avoided the question whether the right to elective abortion has the requisite grounding in our nation’s history and traditions to qualify as “fundamental.” Under Casey’s approach, the woman’s interests, even if lacking strong support in history and tradition, could in principle outweigh the state’s.

Still, it does not follow that history and tradition are irrelevant. Rather than balancing the woman’s interests in an elective abortion against the state’s on the merits, Casey reaffirmed the right to elective abortion by giving decisive weight to stare decisis, including closely-related considerations of “institutional integrity.” Had the Casey plurality engaged in a full interest-balancing analysis, history would presumably have informed the Justices’ comparative assessment of the competing interests, whether or not they gave it controlling weight.

Although space forbids a comprehensive treatment of the subject, Part IV will therefore discuss and critique Roe’s historical claims insofar as they bear on the comparative strength of the state’s interest in pre-viable fetal life and the woman’s interests in terminating her pregnancy.

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68 Roe’s history of abortion law is comprehensively and devastatingly critiqued in Joseph Dellapenna, Dispelling the Myths of Abortion History (Carolina 2006). See infra Part IV.

69 505 US at 845-846. The Casey Court used “institutional integrity” as a shorthand for its claim that in the “rare” cases in which “the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,” the Court’s “decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation.” 505 US at 866-867 (majority opinion). In substance, that is an argument for giving stare decisis “rare . . . force” as applied to the right to elective abortion.

70 Even in Lawrence v Texas, 539 US 558 (2003), the leading example of an important post-Casey substantive due process decision declining to follow the tradition-centered Glucksberg approach, Justice Kennedy’s opinion for the Court considered the history of laws regulating homosexual conduct, id. at 565-568, while giving greater weight to “our laws and traditions in the past half century.” Id. at 572. See also McDonald v City of Chicago 130 S.Ct. 3020, 3118 (2010) (Stevens, J., dissenting) (acknowledging that history and tradition are important even under his approach to substantive due process, which treats Lawrence as a canonical precedent). Similarly, Justice Souter’s concurrence in Glucksberg emphasized that the “conflicting principles” whose legislative resolution is evaluated in substantive due process review are “to be weighed within the history of our values as a people.” 521 US at 764. Justice Harlan’s dissenting opinion in Poe v Ullman, 367 US 467, (1961), on which Souter heavily relied, see id. at 765-766, as did the joint opinion in Casey, see 505 US at 848-849, likewise stresses the role of history and tradition. See 367 US at 542 (arguing that in conducting substantive due process review the Court must adhere to “the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke”); Casey, 505 US at 850 (majority opinion) (quoting this language from Harlan’s dissent).
In short, the version of interest-balancing that seems most consistent with Casey, and that will be presented in this Article, will (1) analyze and apply the Court’s precedents dealing with those interests (particularly Roe and Casey); (2) provide thorough descriptions – and assessments – of the state’s interest in protecting the pre-viable fetus and of the woman’s interests in an elective abortion, and present arguments bearing on which interest is stronger as a matter of “reasoned judgment”; and (3) consider what the treatment of abortion and the fetus in Anglo-American law implies about the value of pre-viable fetal life as compared with the woman’s interests in terminating her pregnancy and ensuring the death of the fetus. I will argue that the interest-balancing judgment on which the right to elective abortion rests is wrong even on Casey’s own premises – that is, even if we grant (1) that the Court may as a matter of “reasoned judgment” recognize unenumerated substantive due process rights, and (2) that the state may not deem the pre-viable fetus to be “new human life” in the normative sense, but may treat it as new life that is potentially human in that sense.

II. The State’s Interest in Pre-Viable Fetal Life According to Roe and Casey

A. Roe’s View of the Fetus as “Potential Human Life”

In describing the state’s interest in pre-viable fetal life, it is necessary to begin with Roe’s often-overlooked treatment of that interest. Roe’s account comes in two stages: a preliminary discussion in the context of possible justifications for laws prohibiting abortions (Part VII of the opinion), and a later, dispositive treatment focusing on whether, when, and why the state may claim a compelling interest in protecting fetal life (Part IX-B).

In Part VII of its opinion, the Roe Court contrasted two characterizations of the state interest in protecting fetal life throughout pregnancy. The strong version -- on which Texas relied and which the Court ultimately rejected -- claims that the state has an overriding interest in “protecting prenatal life . . . on the theory that a new human life is present from the moment of conception.”71 On this view, “the interest of the embryo or fetus” should prevail unless the woman’s life is “at stake, balanced against the life she carries within her.”72 The weaker version -- which the Court ultimately permitted states to invoke -- relies on “the less rigid claim that as long as at least potential life is involved,” the state has a “legitimate” interest in protecting the fetus.73

The Roe Court viewed the strong version of the state’s interest as “rigid” because that theory holds that the fetus is normatively (as well as biologically) human regardless of its stage of

71 410 US at 150.
72 410 US at 150.
73 410 US at 150.
development (that is, from conception on). 74 Roe did not suggest – nor could it have – that there is any serious debate about whether a fertilized ovum, an embryo, or a fetus is a living organism, or about whether that organism is biologically human (that is, belongs to the species Homo sapiens), or about whether it is genetically distinct from its parents. 75 The debate, rather, is about when in its development this living being becomes “a new human life” – by which the Roe Court plainly meant an entity worthy of the same respect and protection we generally accord to human beings. The “less rigid” view that from conception on “at least potential life is involved” resolves that debate by positing that new, normatively human life is not present until some later point in biological human development. 76 As Roe elsewhere emphasizes, there is a range of opinions (including “mediate animation,” quickening, viability, and birth) about when this point is reached. 77 All these views, however, agree that prior to whatever stage is thought to be critical, the living fetus is only potentially human, and accordingly that the state’s interest in protecting it cannot be as strong as the state’s interest in protecting a human being.

Roe’s terminology confirms this analysis: the opinion interchangeably employs the terms “potential life,” “potential human life,” and “the potentiality of human life,” and uses them

74 Of course, many people who subscribe to this theory believe that every living organism that is biologically human is ipso facto normatively human, and for them this distinction is itself an artificial one. The formulation in text is meant to capture the character of their disagreement with developmentalists (i.e., those who think we become normatively human only at some stage in our development) in language that is congenial to the latter.

75 See Gonzales v Carhart, 550 US 124, 147 (2007) (“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”).

76 410 US at 150 (emphasis added).

77 410 US at 150.

78 Roe’s discussions of when normatively human life begins omit any mention of the possibility that personhood occurs at some post-natal stage of human development. Some contemporary philosophers have not hesitated to argue that we do not become persons until well after birth. See, e.g., Peter Singer, Practical Ethics 171 (2d ed. Cambridge 1993) (“If we can put aside the emotionally moving but strictly irrelevant aspects of the killing of a baby we can see that the grounds for not killing persons do not apply to newborn infants”). As a purely ethical matter, Singer doubts that those “grounds for not killing” apply to the typical two- or three-year old, who appears to lack “any coherent conception of death,” but acknowledges that there is a plausible argument that the law of homicide should apply at birth because it is “the only sharp, clear and easily understandable line.” Id. at 171-172.

79 See 410 US at 160.

80 410 US at 154.

81 410 US at 159.

82 410 U.S. at 162.
in contradistinction to the terms “new human life,”83 “life, as we recognize it,”84 and “persons in
the whole sense.”85 In short, when Roe refers to “potential life,” it is using the word “life” to
refer to normatively human life, not biologically human life. Roe’s statement that “recognition
may be given to the less rigid claim that as long as at least potential life is involved, the State
may assert interests beyond the protection of the pregnant woman alone,”86 must be read in light
of this usage: the state may claim an important interest in protecting the pre-viable fetus because
it is “at least” a living organism that is biologically human, and that will naturally become a
normatively human being if allowed to develop. That is what it means to be “potential human
life.”87

83 410 US at 150.
84 410 US at 161.
85 410 US at 162.
86 410 US at 150.
87 Jed Rubenfeld argues that Roe means something very different by “potential life”: that the fetus is to be
“considered solely as a ‘potential’ person,” and not as a living entity in itself. See Jed Rubenfeld, On the Legal
Status of the Proposition that “Life Begins at Conception,” 43 Stan. L. Rev. 599, 600 (1991). Thus, according to
Rubenfeld, “[t]o understand the fetus as a “potential life” is not to understand it as an actual, but less than human,
animal.” 43 Stan. L. Rev. at 609. Indeed, Rubenfeld claims that an unfertilized ovum “also represents a potential
human life;” although he concedes that conception “brings the ‘potential life’ an important step closer to
actualization.” Id. at 612. He therefore rejects the argument that “an ‘actual potential’ human life, or some such
thing, does not come into existence until conception.” Id. at 612. Unsurprisingly, he concludes that “[w]e cannot
ascribe to potential life an actual interest in anything – and certainly not in its own life – unless, of course, we are
covertly deeming it to be actual rather than potential life.” Id. at 612-613.

Rubenfeld misunderstands both the relevant facts about human development and the construction the Roe Court put
on those facts. The fetus is different from sperm and egg because, unlike them, it is not a cell that is part of a living
organism. The fetus is a living organism (a word that does not appear in Rubenfeld’s article). Rubenfeld considers
and rejects the possibility that the embryo is “more ‘concrete’” or “somehow ‘more actual’” than sperm and egg, on
the grounds that the “cells” of “pre-conception potential lives” “can be as biologically real and identifiable as those
of a blastocyst,” and that while “an unconceived potential life requires external resources and certain acts by actual
persons before it can become an actual life . . . that is equally true of an embryo.” 43 Stan. L. Rev. at 613. But the
claim that the fetus is a new, “actual” life is not a claim that every new cell is a new life. It is a claim that every new
organism is a new life. The claim that sperm and egg require acts enabling them to combine in fertilization does not
turn on the need for external resources or acts. It turns on the proposition that the result of the combination of these
two gametes is a new organism. Rubenfeld gives the game away when he asserts that an embryo cannot “become an
actual life” without gestation. Biologically speaking, an embryo is an actual life. Only by conflating life with
personhood (and the biologically human with the normatively human) could Rubenfeld suggest otherwise.

Rubenfeld also argues that sexual intercourse is no less a “natural process” than “gestation and delivery,” and that
therefore “interference with sex” by contraception “would prevent a potential life's ‘natural’ progress toward
actualization in the very same way that abortion does.” Id. at 613. This argument misses the point. No one disputes
that contraception disrupts a natural process. Contraception prevents the natural process whereby, when sperm are
deposited in the uterus of a woman who is ovulating, two cells from two distinct organisms may unite to form a new
organism that will naturally develop into a human being. Abortion prevents the natural process whereby that new,
biologically human organism will become a new, normatively human being. The difference is that abortion results
At the same time, however, Roe’s rhetoric seems calculated to distract attention from what, on this view, the fetus is to what it is not (at least early in its development): an actual, normatively human being. By repeatedly calling the fetus “potential life,” the Roe Court invited readers to conclude that normatively human life is the dog, and biologically human life the tail. Worse yet, Roe’s trio of shorthands – “potential human life,” “potential life,” and “the potentiality of human life” – can readily be misunderstood in a way the further devalues the fetus – namely, that it is only potentially alive. To guard against this misunderstanding, I will often use a different shorthand: that the fetus is ‘new life that is by nature becoming human.’ This and similar formulations are also meant to make clear that the fetus is not merely “potentially” human in the loose sense that it could possibly undergo some radical transformation that would result in a human being; it is “potentially” human in the more precise sense that, unless deprived of the sustenance on which its continued life depends, it will naturally develop into a being that everyone agrees is normatively human.

Roe’s second (and decisive) treatment of the state’s interest in fetal life comes in Part IX-B of the opinion, after Part VIII’s holding that there is a fundamental right to an elective abortion, and Part IX-A’s holding that “the unborn” are not Fourteenth Amendment persons. After acknowledging that the latter holding “does not of itself fully answer the contentions raised by Texas,” the Roe Court turned at last to the merits of the state’s contention that “life begins at conception and is present throughout pregnancy.” The Court conceded that abortion is in the death of a biologically human life -- that is, an organism with a complete human nature -- and contraception does not.

As for Rubenfeld’s interpretation of Roe: Rubenfeld ignores Roe’s recognition that abortion differs from contraception because the pregnant woman “carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus,” and that as a result “the woman’s privacy is no longer sole.” Roe’s concession that the state could in theory have a compelling interest in protecting fetal life although fetuses are not Fourteenth Amendment persons implies, among other things, that there may be some normatively human beings who are not Fourteenth Amendment persons. Who might those be? Viable fetuses.

The risk of misunderstanding is even greater with regard to the Court’s later references to the state’s “interest in the potential life of the fetus.” See, e.g., Maher v Roe, 432 US 464, 472 (1977); Colautti v Franklin, 439 US 379, 387 n.7 (1979) (same).

410 US at 158.

Id. at 159. Roe’s concession that the state could in theory have a compelling interest in protecting fetal life although fetuses are not Fourteenth Amendment persons implies, among other things, that there may be some normatively human beings who are not Fourteenth Amendment persons. Who might those be? Viable fetuses.

91 Id.
“inherently different” from contraception, and that the state could reasonably “decide that at some point in time” its interest in “potential human life, becomes significantly involved.”

In so doing, the Roe Court recognized that the state could assert an “important and legitimate interest” in protecting fetal life at conception or any time thereafter. The Court’s rationale for this concession -- that “the woman’s privacy is no longer sole” because “she carries an embryo and, later, a fetus” makes clear that the state may base its asserted interest on the “less rigid” theory we have already encountered: that each fetus is a new life whose nature is to become human if the pregnancy is not aborted.

Roe thus permitted the state to “adopt” in law the theory that “potential human life” begins at conception, and to assert an important interest in protecting fetal life, so understood. But because the Roe Court had already declared the right to elective abortion to be fundamental, this concession was not enough to save Texas’s prohibition of elective abortions. Only a compelling state interest can trump a fundamental right. Texas, of course, contended that new, normatively human life is present at conception, and the Roe Court agreed that the state’s interest would qualify as compelling if this theory could be established.

Yet having framed the issue, the Roe Court famously responded that it “need not resolve the difficult question of when life begins” – indeed, that “the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.” Instead, the Court reasoned that the widespread disagreement about when normatively human life begins, and the various respects in which Anglo-American law – including the Fourteenth Amendment – had supposedly refused to recognize “the unborn” as “persons in the whole sense,” were inconsistent with recognizing a

92 Id.

93 410 US at 162. Casey describes Roe’s “scope” as encompassing “postconception potential life.” 505 US at 859 (majority opinion). See also, e.g., City of Akron, 462 US at 428 (the state’s interest in protecting fetal life exists throughout pregnancy). Accord, Jack M. Balkin, How New Genetic Technologies Will Transform Roe v Wade, 56 Emory LJ 843, 848 (2007) (describing Roe as holding that “[a]lthough embryos and fetuses are not constitutional persons, states have important and legitimate interests in their development and potential for personhood”).

94 410 US at 159.

95 410 US at 159.

96 410 US at 159. By “the difficult question of when life begins,” the Roe Court must have meant the difficult question of when normatively human life begins. See supra TAN 74-87.

97 410 US at 162. As I read it, the Court’s claim that “the law” has never recognized fetuses as “persons in the whole sense” rests on its view of Anglo-American law’s treatment of the fetus in the contexts of criminal abortion, tort and property law, together with its conclusion that the word “person” in the Fourteenth Amendment excludes the unborn. Part X of the opinion begins with this cryptic statement: “In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.” 410 US at 162. I interpret “all this” to include Part IX-A (which holds, in part on the strength of the Court’s account of the history of Anglo-American abortion law, that fetuses are not Fourteenth Amendment persons) as well as Part IX-B (which discusses the lack of consensus about when human life begins and the law’s treatment of the fetus in “areas other than criminal abortion” but ends without a holding); and, because Part IX-A relies on the Court’s history of abortion
compelling state interest in fetal life throughout pregnancy. Accordingly, Roe held that the state could not “by adopting one theory of life . . . override the rights of the pregnant woman that are at stake.”

B. Under Roe, Both Fetal Potential and Fetal Capabilities Matter

In light of its holding that the state does not have a compelling interest in protecting “potential human life” throughout pregnancy, one might have expected Roe to hold that the woman has a right to elective abortion at any time prior to live birth. Instead, the Roe Court asserted that the state’s interest “grows in substantiality as the woman approaches term,” and becomes compelling at viability, because the fetus has then acquired “the capability of meaningful life outside the mother’s womb.” Read in light of Roe’s reasons for rejecting the claim that the state has a compelling interest in fetal life at conception, Roe’s reason for agreeing that the state may assert such an interest at viability becomes apparent: by the time the fetus has developed enough to be viable, the resemblance between its capabilities and those of a newborn child is sufficiently strong -- and sufficiently widely-acknowledged to be strong -- to warrant recognition of a compelling state interest should the state elect to assert it. Once the fetus is viable, the state can reasonably regard it as having become normatively human. In sum, although the Roe Court purported not to answer the question “when does new human life begin?,” its holding that

law in Part VI, also to include the Court’s historical claim that “throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today.” 410 US at 158.

98 410 US at 162.

99 410 US at 162-63.

100 410 US at 163.

101 See Nancy Rhoden, Trimesters and Technology: Revamping Roe v Wade, 95 Yale L J 639, 643 (1986) (arguing that Roe implicitly adopted “the assumption that a viable fetus was one that was substantially developed and had reached ‘late’ gestation, and the ethical precept that late in gestation a fetus is so like a baby that elective abortion can be forbidden”). As Rhoden suggests, the “dichotomy between late and early abortion . . . is perhaps the closest this society has come to a consensus about the morality of abortion.” 95 Yale LJ at 669. By the time the fetus is developmentally viable (that is, able to live outside any womb, though perhaps with artificial aid), the great majority of Americans would view it as “new human life.” The developmental viability line is therefore consistent with Roe’s argument that the absence of consensus about when normatively human life begins precludes recognition of a compelling state interest in fetal life throughout pregnancy.
the state may assert a compelling interest in the viable fetus implies that the state may adopt with
the force of law the theory that "new human life" begins at viability.\textsuperscript{102}

Roe’s characterization of the fetus as “potential human life” explains its holding that the state has
an important interest in fetal life beginning at conception, but not its holding that this interest
does not become compelling until viability. If the fetus’s “potential” to become normatively
human is the only fetal attribute on which the state may base an interest in protecting fetal life,
one would expect that interest to have the same weight at conception as at any point later in
pregnancy. As Justice O’Connor put it in her 1983 dissent in City of Akron v. Akron Center for
Reproductive Health, “potential life is no less potential in the first weeks of pregnancy than it is
at viability or afterward.”\textsuperscript{103} That being so, she argued, the viability line is “arbitrary,”\textsuperscript{104} and
Roe’s recognition that the state has a compelling interest in protecting the viable fetus
necessarily means the state has a compelling interest in the pre-viable fetus.

Roe implicitly answers Justice O’Connor’s challenge by appealing to the idea that the stage of
fetal development weighs in the balance.\textsuperscript{105} As we’ve seen, Roe argues that the state’s interest
grows weightier as the fetus develops, and becomes compelling when the fetus has acquired “the
capability of meaningful life outside the mother’s womb.”\textsuperscript{106} This position implies that both
the fetus’s potential to become a normatively human being and its already-developed capabilities –
which vary greatly depending on its stage of development – weigh in the constitutional
balance.\textsuperscript{107} In this respect, Roe’s usage of the term “potential human life” is misleading, because
actual fetal capabilities also weigh in Roe’s constitutional calculus.

Roe’s characterization of the fetus as “potential human life” is also misleading in another way.
If normatively human life does not begin at conception, it must begin at some later stage in

\textsuperscript{102} See Rubenfeld, supra n. 87, 53 Stan. L. Rev. at 635 (“despite its vocabulary of potential life, the Court in all
essential respects made a determination about when the states could deem the fetus a person” (i.e., at viability)). In
my view, the superficially puzzling fact that Roe refers to even viable fetuses as “potential life,” see 410 US at 163
(“[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability’’)
reflects the fact that at birth the fetus becomes a child who must, by virtue of the Fourteenth Amendment, be treated
as a person. The viable fetus, by contrast, may be treated as “new human life” (in other words, a person) if the state
so chooses – but the state may decide otherwise, because under Roe even viable fetuses are not Fourteenth
Amendment persons.

\textsuperscript{103} 462 US 416, 461 (1983), (O’Connor, J., dissenting).

\textsuperscript{104} Id. (O’Connor, J., dissenting).

\textsuperscript{105} See Richard A. Posner, Sex and Reason 333 (Harvard 1992) (under Roe the state’s interest in preventing abortion
grows stronger “[t]he later the abortion is performed . . . because the fetus is more nearly a child”).

\textsuperscript{106} 410 US at 163.

\textsuperscript{107} This perspective is not unique to Roe. See, e.g., Kent Greenawalt, Religious Convictions and Political Choice
131-132 (Oxford 1988) (suggesting that “the intuitive moral sense of most people in our culture is that both potential
capacity and present or past characteristics matter”).
human development. I have suggested that Roe implicitly authorizes the state to specify fetal viability, when the fetus is capable of surviving indefinitely outside the womb, as the earliest stage at which actual, normatively human life is present. One might infer that the fetus’s “potential” to become normatively human is exhausted at viability, because it then becomes ‘actual human life.’ But if we ask what caused the fetus to develop to the stage at which it is viable, the superficiality of this reasoning becomes evident. Over a period of roughly twenty-three weeks, the viable fetus developed from a zygote to a fetus weighing roughly a pound because its own nature – its innate genetic endowment -- directed its development. And this natural genetic endowment will continue to drive the development of the viable fetus, before and after birth, until it becomes a mature human being decades later. Thus, the true “potential” with which the fetus is endowed does not disappear when the developing fetus becomes a normatively human being, whether that event is deemed to occur at viability, full-term birth, or some time thereafter.

In sum, under Roe the state has an “important and legitimate interest,” beginning at conception, in protecting the life of the fetus, understood as “potential human life” that will naturally become human once its capabilities cross the threshold of viability. As we’ll now see, over the opposition of Justices Blackmun and Stevens, the controlling Casey plurality opinion not only adhered to this understanding – it ruled that the state’s interest was entitled to greater weight than Roe and subsequent cases had given it.

C. The Controlling Casey Plurality Opinion Increases the Weight of the State’s Interest in Pre-Viable Fetal Life

Like Roe, Casey does not deny that the state could assert an overriding interest in protecting fetal life if it could demonstrate that normatively human life begins at conception. Also like Roe, Casey denies that any such demonstration is possible. Casey’s account of the woman’s liberty argues that the abortion decision “originate[s] within the zone of conscience and belief,” that

108 Roe indicates that a fetus is viable if it can survive outside the womb “with artificial aid.” 410 US at 160. In other writing, I explore the question whether, if artificial wombs become available, fetuses that can survive in an artificial womb will qualify as viable regardless of their developmental stage. I argue that under Roe and Casey there is a developmental threshold for viability, and that this threshold can be expressed in a rule that a fetus is viable only if it can survive outside any womb. See Stephen G. Gilles, Does the Right to Elective Abortion Include the Right to Kill the Fetus? (unpublished manuscript on file with the author).

109 One could say that the pre-viable fetus is a “potential” viable fetus, that the viable fetus is a “potential” infant, that the infant is a “potential” child, and so on throughout the stages of human development. It seems equally true, however, to say that the pre-viable fetus is a “potential” viable fetus, infant, child, and adult.

110 505 US at 852 (majority opinion).
reasonable persons can disagree about when new human life begins,\(^{111}\) and that the state cannot by law “resolve th[is] philosophic question[] in such a definitive way that a woman lacks all choice in the matter, except perhaps in those circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.”\(^{112}\) If the “philosophic question[]” of when new human life begins \textit{could} be definitively answered by human reason – and if the answer were ‘at conception’ – it would be absurd to claim, as Casey does, that “the right to define one’s own concept of . . . the mystery of human life” is “[a]t the heart of liberty.”\(^{113}\) “What mystery?” would be sufficient refutation. The burdens involved in pregnancy and motherhood would be no less heavy, intimate, and life-changing, but the state’s interest in protecting the fetus throughout pregnancy would assuredly prevail.

Thus, for purposes of constitutional reasoning, Casey (like Roe) holds that the truth of the proposition that new human life begins at conception cannot be established with sufficient clarity and convincingness that the state can enact it into law by prohibiting pre-viability abortions. On the other hand, both Casey and Roe recognize that the truth of the proposition that “potential human life” begins at conception \textit{is} sufficiently clear that the state can assert a legitimate and important interest in protecting that life. Under Casey, that is the premise on which interest-balancing must be conducted: \textit{the pre-viable fetus is not a normatively human being, but the state may recognize it as “potential” human life, and may claim an important interest in protecting it.}

Yet although the Casey joint opinion reaffirmed that the state has a “legitimate interest[] from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child,”\(^{114}\) the Casey majority fractured when it came to the character of this interest and the weight to be accorded it. The Casey plurality argued that Roe’s recognition of the state’s “important and legitimate interest” in fetal life was “given too little acknowledgment and implementation by the Court in its subsequent cases,” and elected to “rely upon Roe, as against the later cases.”\(^{115}\) The plurality proceeded to reject Roe’s trimester framework, holding that “in practice it undervalues the State's interest in the potential life within the woman,”\(^{116}\) and replacing it with the undue-burden test. And whereas Roe treated the state’s interest as at most “important,” the plurality

\(^{111}\) 505 US at 851 (majority opinion).

\(^{112}\) 505 US at 850-851 (majority opinion).

\(^{113}\) 505 US at 851 (majority opinion). I am neither asserting nor denying that human reason is incapable of making a case with which no reasonable person could disagree for the proposition that normatively human life begins at conception. \textit{I am} asserting that the Casey majority accepted the truth of this proposition. See 505 US at 850 (majority opinion) (“Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage”).


\(^{115}\) 505 US at 871 (plurality opinion).

\(^{116}\) 505 US at 875 (plurality opinion).
also described it as “profound.”117 In short, the plurality opinion held that the state may assert a very weighty interest in the pre-viable fetus on the same theory Roe permitted -- that new life whose nature is to become normatively human is present at conception (or such time thereafter as the state specifies).

With all this, Justices Blackmun and Stevens disagreed. In his separate opinion, Stevens argued for a radically different view of the state’s interest in pre-viable fetal life, according to which that interest has nothing to do with protecting the fetus for its own sake. Rather, as Stevens explained, the state has “an indirect interest supported by both humanitarian and pragmatic concerns,” namely, “expanding the population” and minimizing the “offense” to persons who believe abortion “reflects an unacceptable disrespect for potential human life.”118 Without mentioning that his own opinion in Roe explicitly recognized a very different basis for the state’s interest – namely, protecting “potential human life” -- Blackmun agreed.119

Justice Stevens’ recasting of the state’s interest in the pre-viable fetus as “indirect” leads ineluctably to the conclusion that the woman’s interest in an elective abortion greatly outweighs the state’s interest in protecting “potential life.” By completely removing the fetus from the equation, this approach pits the woman’s concrete and constitutionally protected interests in avoiding pregnancy, childbirth, and the burdens of raising or relinquishing an unwanted child against a nebulous state interest in avoiding “offense” to those who oppose abortion, and a moribund state interest in increasing population growth. On this account, the soundness of the interest-balancing judgment on which the right to elective abortion now rests seems as clear as that of the parallel interest-balancing judgment on which the right to contraception would rest under Casey’s methodology.120 And no wonder, because Stevens’ approach implicitly denies the qualitative difference between pre-conception gametes and the post-conception fetus. Roe, on the other hand, recognized that difference and made it central to Roe’s holding that the state has an important interest in pre-viable fetal life.121 On this issue, the Casey plurality opinion sides with Roe, and against Stevens.

The Casey majority divided along the same lines with regard to the rationale for (and implications of) the viability line. Like Roe, the Casey plurality opinion implicitly distinguishes

117 505 US at 878 (plurality opinion).

118 505 US at 914-915 (Stevens, J., concurring in part).

119 See 505 US at 932 (Blackmun, J., concurring in part).

120 Speaking of the Court’s cases recognizing a right to use contraception, the Casey majority stated that “[w]e have no doubt as to the correctness of those decisions,” but provided no account of the doctrinal foundation of the right to contraception. 505 US at 852-853 (majority opinion) (discussing Griswold v. Connecticut, 381 US 479 (1965), Eisenstadt v. Baird, 405 US 438 (1972), and Carey v. Population Services International, 431 US 678 (1977)).

121 See Roe, 410 US at 159 (distinguishing prior substantive due process decisions, including the contraceptive cases, on the grounds that “[t]he pregnant woman cannot be isolated in her privacy,” because she “carries an embryo and, later, a fetus”).
between the fetus’s inherent potential to become a human being, which is present from conception on, and its developing capabilities, which tip the scales in the state’s favor at viability. But whereas Roe implies that there is a great difference between weights of the state’s “important” interest in pre-viable fetal life and its “compelling” interest in viable fetal life, the plurality opinion draws no such distinction. The Casey plurality’s position was that, assuming without deciding that the woman’s interest in an elective abortion is greater than the state’s interest in the pre-viable fetus, the balance tips in the state’s favor at viability. If the state’s interest in the pre-viable fetus is almost as great as (if not greater than) the woman’s interest in an elective abortion, as I will later argue the Justices in the plurality believed, even a modest increase in the strength of the state’s interest at viability would produce an interest-balancing judgment in the state’s favor.

Justice Blackmun – who, like Justice Stevens, declined to join the plurality’s account of why the viability line should be reaffirmed – asserted in his separate opinion that viability “marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman.” This formulation is obviously intended to suggest that the state’s interest in pre-viable fetal life is dramatically inferior to the woman’s interest in an elective abortion. If the pre-viable fetus is incapable of having an interest in its own life that is “distinct” from (let alone “paramount to”) the interests of the pregnant woman, it is difficult to see what possible basis the state could have for vetoing her decision that an abortion is in her best interests.

Justice Blackmun’s characterization of the pre-viable fetus – which for all practical purposes treats it as merely part of the woman’s body – is clearly inconsistent with the Casey plurality opinion. Rather than echoing Blackmun’s claim that the pre-viable fetus cannot be “a subject of rights or interests distinct from” the pregnant woman’s, the plurality opinion, citing his own

122 The Casey plurality’s discussion of viability is structured in a most peculiar way. Having concluded (in the majority opinion) that the woman’s specially protected liberty includes “some freedom to terminate her pregnancy,” 505 US at 869, the plurality gives two reasons for delimiting that freedom at viability: “the doctrine of stare decisis,” and the reason given in Roe (that viability establishes the “independent existence of the second life”), 505 US at 870. Only after affirming, for these reasons, that it must preserve “the woman’s right to terminate her pregnancy before viability,” does the plurality reveal that its members decline on stare decisis grounds to say whether, as an original matter, each of them “would have concluded, as the Roe Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.” 505 US at 871. Thus, the plurality’s defense of the viability line turns out to be predicated on its stare decisis-based assumption that the woman’s interest in an elective abortion outweighs the state’s interest in protecting the life of the pre-viable fetus.

123 Casey, 505 US at 932-933 (Blackmun, J., concurring in part) (quoting Webster, 492 US at 553-54 (Blackmun, J., dissenting)).

124 Justice Blackmun is correct in one respect: under Roe and Casey the “rights or interests” of the pre-viable fetus are not “paramount to” the woman’s interests in having an elective abortion. The Casey plurality, however, affirmed that ruling on stare decisis grounds, not on the merits.
opinion in Roe, asserts that, at viability, “the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”\textsuperscript{125} As this formulation implies, the plurality recognized that even before it becomes viable (and thus “independent” of the woman) the fetus is a “second life” that \textit{can} be “the object of state protection,” so long as that protection does not “override[]” the woman’s rights. What changes at viability is not whether the fetus can be the object of state protection, but whether that protection can take the form of laws that trump the right to elective abortion.

Were it otherwise, the plurality could not possibly have adopted the undue-burden standard, which allows the state to enact regulations protective of pre-viable fetal life provided the burdens they impose on the woman are not “undue.”\textsuperscript{126} Consider, for example, the plurality’s ruling that states may require that the woman be informed, prior to an abortion, of the procedure’s effect on the fetus, along with its gestational age. The plurality upheld this requirement for two independent reasons: because it advanced the legitimate purpose of ensuring that women would not suffer the “devastating psychological consequences” of uninformed decisions to have abortions,\textsuperscript{127} and because it furthered the state’s interest in informing women of “\textit{the consequences to the fetus, even when those consequences have no direct relation to [maternal] health}.”\textsuperscript{128} In support of this rationale, the plurality offered the following analogy: “We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself.”\textsuperscript{129} This reasoning demonstrates beyond cavil that the plurality viewed the state’s interest as involving the protection of the pre-viable fetus, understood as a new life that has an interest in its own continued development.

In sum, the controlling Casey plurality opinion confirms that the state’s interest in pre-viable fetal life is grounded in an understanding that the fetus is new life that is becoming human and that has an interest in its own future development; that this state interest is profoundly weighty beginning at conception and throughout pregnancy; and that the state’s interest does not dramatically increase in strength at viability.\textsuperscript{130} Each of these points -- which the four dissenters

\textsuperscript{125}505 US at 870 (plurality opinion).

\textsuperscript{126}505 US at 877-878 (plurality opinion).

\textsuperscript{127}505 US at 882 (plurality opinion).

\textsuperscript{128}505 US at 882 (plurality opinion) (emphasis added).

\textsuperscript{129}505 US at 882-83 (plurality opinion).

\textsuperscript{130}In Carhart I, 530 US at 930, Justice Breyer’s opinion for the Court – which Justice O’Connor and Justice Souter joined, but from which Justice Kennedy dissented – stated that “[t]he State’s interest in regulating abortion previability is considerably weaker than postviability.” The sole authority cited for that proposition was the Casey plurality opinion’s discussion of viability, 505 US at 870, which asserts no such thing. It is of course true that the plurality opinion necessarily implies that the state’s interest in protecting fetal life is \textit{sufficiently} greater after viability to tip the balance. But “sufficiently” need not mean “considerably.” In any event, even if Stenberg’s dictum accurately reflects the views of Justices O’Connor and Souter (and even if their views did not change
in Casey either agreed with, or would have modified in ways even more favorable to the state\textsuperscript{131} - lends additional support to the proposition that the state’s interest in protecting pre-viable “potential human life” is a profoundly weighty one.

D. A Majority of the Justices in Casey Judged that the State’s Interest in Pre-Viable Fetal Life Outweighs the Woman’s Interest in an Elective Abortion

Despite having characterized the right to elective abortion as resting on a judgment that the woman’s liberty interest outweighs the state’s interest in protecting pre-viable fetal life, the Casey majority specifically declined to endorse this judgment on the merits. Instead, it explained that “the reservations any of us may have in reaffirming the central holding of Roe are outweighed by the explication of individual liberty we have given combined with the force of \textit{stare decisis}.”\textsuperscript{132} This statement implies that one or more members of the Casey majority had grave doubts about the soundness of Roe’s central holding, and voted to reaffirm it only after taking into account “the force of \textit{stare decisis}.” Indeed, of the five Justices in the Casey majority, only two (Blackmun and Stevens) defended the majority’s affirmation that “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion”\textsuperscript{133} on the

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\textsuperscript{131} The central argument of Chief Justice Rehnquist’s dissent in Casey was that Roe erred in recognizing a fundamental right to elective abortion, and that laws restricting or prohibiting abortions should be upheld if “rationally related to a legitimate state interest.” 505 US at 966. Rehnquist thus had no occasion to discuss the viability line. Justice Scalia’s dissent in Casey, however, criticized Justice O’Connor for abandoning her earlier position that the state has a compelling interest in protecting fetal life throughout pregnancy, and asserted that her prior criticism of the viability line as “arbitrary” was correct. 505 US at 989-990 & n.5. It seems apparent, then, that the four dissenters (each of whom joined both dissents) would have agreed that the state’s interest is equally (and overridingly) weighty before and after viability.

\textsuperscript{132} 505 US at 853 (majority opinion).

\textsuperscript{133} 505 US at 846 (majority opinion). See 505 US at 932 (Blackmun, J., concurring in part) (“the Roe framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life”) (quoting Webster v Reproductive Health Services, 492 US 490, 553 (1989) (Blackmun, J., dissenting)); id. at 912 (Stevens, J., concurring in part) (“Roe is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women”).
merits. Unsurprisingly, the four dissenting Justices in Casey argued, inter alia, that the state’s interest outweighed the woman’s.  

That leaves Casey’s co-authors – Justices O’Connor, Kennedy, and Souter. What was the nature of their “reservations” about reaffirming Roe’s central holding? The answer can be found in Part IV of their joint opinion, in which Justices O’Connor, Kennedy, and Souter acknowledged that “the difficult question faced in Roe” was “[t]he weight to be given this state interest” “in protecting the potentiality of human life.” As we’ve already seen, the plurality believed that Roe and later cases undervalued pre-viable fetal life. This statement indicates that, after correcting for that undervaluation, each Justice in the Casey plurality found it difficult to conclude that the woman’s interest in an elective abortion outweighs the state’s interest in pre-viable fetal life.

Yet notwithstanding their “reservations,” the Casey plurality declined on stare decisis grounds “to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the Roe Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.” One might read this declaration to mean that Justices O’Connor, Kennedy, and Souter, having determined that stare decisis was controlling, simply had no reason to re-examine whether or not the state’s interest outweighs the woman’s. If true, no reliable inferences about their views on the merits could be drawn from their refusal to address them. But this interpretation conveniently overlooks the thrust of the Casey majority’s elaborate argument that Roe’s central holding should be reaffirmed for reasons of “institutional integrity” and “the rule of stare decisis.” The central themes of that argument were: (1) that a “normal stare decisis analysis” favored “affirming Roe’s central holding;” (2) that there was no “special reason over and above the belief that a prior case was wrongly decided” for overruling Roe; and (3) that Roe’s central holding should have “rare precedential force” because

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134 The dissenters’ primary argument was that, contrary to the Court’s usual substantive due process jurisprudence (and to any defensible understanding of the Fourteenth Amendment’s Due Process Clause), Roe recognized an unenumerated fundamental right to elective abortion despite the fact that “the longstanding traditions of American society have permitted it to be legally proscribed.” 505 US at 980 (Scalia, J., dissenting). See also id. at 951-953 (Rehnquist, C.J., dissenting). But the dissenters also argued that Roe was wrong even in its own interest-balancing terms, because it simply assumed that “what the State is protecting is the mere ‘potentiality of human life.’” Id. at 982 (Scalia, J., dissenting). As the dissenters saw it, the Roe Court should have deferred to the state’s reasonable judgment that the fetus is “a human life” whose claim to protection from the state outweighs the woman’s interest in terminating the pregnancy. Id.

135 505 US at 871 (plurality opinion).

136 505 US at 871 (plurality opinion).

137 505 US at 845-846 (majority opinion).

138 505 US at 861 (majority opinion).

139 505 US at 864 (majority opinion).
Roe was a “watershed decision” that “call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”

Had Justices O’Connor, Kennedy, and Souter each believed that the woman’s interest outweighed the state’s, it seems almost inconceivable that they would have gone to such unprecedented lengths to enhance and amplify “the force of stare decisis.” Had they felt the need to invoke precedent at all, a “normal stare decisis analysis” would have more than sufficed. Instead, having told us that their reservations about reaffirming Roe were outweighed by their “explication of individual liberty . . . combined with the force of stare decisis,” their joint opinion proceeded to argue that stare decisis should be given extraordinary weight in Roe’s case. We are entitled to infer that, for at least one of them, this additional “force” was necessary to overcome what can only have been a judgment that Roe’s central holding was erroneous.

Moreover, had all three of Casey’s co-authors believed that Roe was correctly decided, they would surely have joined forces with Justices Blackmun and Stevens and expressly reaffirmed Roe’s central holding on the merits. A majority opinion declaring that Roe was correct would have been far more likely to achieve the joint opinion’s declared objective of ensuring that Roe’s central holding remains settled law. Notwithstanding the joint opinion’s attempt to claim extraordinary precedential force for Roe, the American people are much less likely to “accept[] a common mandate rooted in the Constitution” when the Justices who announce that mandate cannot bring themselves to say that it truly is rooted in the Constitution.

The bottom line is this: in Casey, a majority of five Justices reaffirmed the right to elective abortion prior to viability on the basis of an interest-balancing judgment that only two Justices were willing to endorse on the merits and that at least five (and as many as seven) Justices believed was erroneous on the merits. These views were not mere dicta. The dissenters’ conviction that Roe’s central holding was erroneous, combined with the plurality’s “reservations” about the soundness of that holding, altered the structure and reasoning of the majority opinion in Casey. Because only two Justices were prepared to affirm Roe’s soundness on the merits, the Casey majority was forced to rely heavily on stare decisis and “principles of

140 505 US at 867 (majority opinion).

141 505 US at 861 (majority opinion).

142 505 US at 853 (majority opinion), 866-867 (majority opinion).

143 That is exactly what the Court had done in City of Akron v Akron Center for Reproductive Health, 462 US 416, 420 & n.1 (reaffirming Roe on stare decisis grounds), 426-427 (reaffirming Roe on the merits) (1983).

144 505 US at 843 (majority opinion) (“Liberty finds no refuge in a jurisprudence of doubt”).

145 The plurality’s “reservations” about the validity of Roe’s central holding as an original matter also altered the manner in which the joint opinion reaffirmed Roe’s viability line. Although the plurality opinion invokes both stare decisis and Roe’s own explanation of why viability is the tipping point when the state’s interest can override the woman’s, 505 US at 870 (plurality opinion), its defense of the viability line is contingent on the assumption that the woman’s interests outweigh the state’s interest in pre-viable fetal life – an assumption the plurality was unwilling to
institutional integrity.” For that reason, one might argue that the plurality’s reservations form part of Casey’s *ratio decidendi*, and are therefore entitled to *stare decisis* effect. But even if not, the judgments of a majority of the Casey Court on an issue which was fully considered by it should be given substantial weight in the interest-balancing deliberations of a Court that adheres to Casey.

III. Evaluating the State’s Interest in Pre-Viable Fetal Life in Casey’s Terms

A. Even Assuming that the Pre-Viable Fetus Is Not Yet Normatively Human, Its Intrinsic Value as New Life that Is Becoming Human Gives the State an Overriding Interest in Protecting Its Life

We’ve seen that Casey follows Roe in treating the fetus as “potential human life” rather than actual, normatively human life. Yet we’ve also seen abundant evidence that the Casey plurality opinion accords much greater weight to the state’s interest in protecting pre-viable fetal life than Roe did, that Casey’s co-authors were unable – apart from “the force of *stare decisis*” – to affirm that the woman’s interest outweighs that state interest, and that it can fairly be inferred that a majority of the Justices in Casey believed the state’s interest should prevail as an original matter. To many people, this juxtaposition will seem highly counterintuitive. How is it possible to accept for purposes of constitutional law that the fetus is not a normatively human being and yet to be persuaded that the state’s interest in protecting this “potential human life” outweighs the woman’s undeniably momentous interests in terminating her pregnancy?

We cannot tell from their joint opinion how Justices O’Connor, Kennedy, and Souter would have answered that question. What we do know is that Justice White’s 1986 dissent in Thornburgh v. American College of Obstetricians and Gynecologists sought to do so, and that Casey’s co-authors were undoubtedly familiar with his efforts. White argued that Roe was wrong to recognize a fundamental right to elective abortion, *even if Roe was right that the pre-viable fetus is not yet “new human life.”* His central thesis was that “[h]owever one answers the

defend on the merits. See 505 US at 871 (plurality opinion). The plurality opinion depicts the viability line as the most defensible way to *delimit* the right to elective abortion, assuming, without deciding, the validity of the interest-balancing judgment on which that right depends in the first instance.

146 505 US at 846 (majority opinion).

metaphysical or theological question whether the fetus is a ‘human being’ or the legal question whether it is a ‘person’ as that term is used in the Constitution, one must at least recognize . . . that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others . . . .”\textsuperscript{148} As a living human organism that is developing into a normatively human being, the fetus is qualitatively different from sperm and egg, and the fact that abortion “involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place.”\textsuperscript{149}

In Thornburgh, Justice White used this reasoning as a platform from which to argue that restrictions on the woman’s liberty to elect an abortion should receive only rational-basis scrutiny, and that the state’s interest in pre-viable fetal life is indistinguishable from what Roe conceded to be its compelling interest in viable fetal life.\textsuperscript{150} There is no reason to revisit those arguments here, because they are effectively foreclosed by Casey, which treats abortion liberty as specially protected and reaffirms the viability line. Instead, I will attempt to restate and elaborate White’s argument in the language of Casey’s interest-balancing methodology, which calls for a “reasoned judgment”\textsuperscript{151} about the weight of the state’s interest (and, of course, of the woman’s competing interests). In arriving at a reasoned judgment on such matters, it is necessary to describe the grounds on which one’s judgment is based, explain why one values pre-viable fetal life more or less highly, and critically examine why those who disagree arrive at a different value.

The difficulty with any such attempt, of course, is that there is widespread and wide-ranging disagreement among reasonable people about how much weight the state’s interest in “potential human life” should receive, and about the relative weight of the woman’s conflicting interest in an elective abortion. It is undoubtedly true that such value judgments, no matter how “reasoned,” will frequently be more debatable (and subjective) than legal judgments anchored in textual meaning or tradition.\textsuperscript{152} Nevertheless, to refuse to engage in this inquiry on the grounds that it ultimately comes down to value judgments about which reasonable people can disagree

\textsuperscript{148} Thornburgh, 476 US at 792 (White, J., dissenting).

\textsuperscript{149} 476 US at 793 n.2 (White, J., dissenting).

\textsuperscript{150} 476 US at 793 n.2 (White, J., dissenting) (arguing that the difference between contraception and abortion -- the destruction of the fetus -- goes both to “the weight of the state interest in regulation” and “the characterization of the liberty interest as fundamental”); id. at 795 (arguing that the state’s interest is compelling throughout pregnancy).

\textsuperscript{151} Casey, 505 US at 849 (majority opinion) (“The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.”)

\textsuperscript{152} See Glucksberg, 521 US at 722 (arguing that a tradition-centered methodology is superior to interest balancing because it “tends to rein in the subjective elements that are necessarily present in due-process judicial review”).

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would be to abandon the possibility of showing that the interest-balancing judgment on which the right to elective abortion now rests is unsound in Casey’s own terms. 153

How, then, should we think about the pre-viable fetus, understood as a living organism that is biologically human but not yet normatively human? The following account of the fetus lays the foundation for the argument that its life – and its interest in living that life -- should be accorded great intrinsic value: 154

To evaluate the life of the fetus, we must start with the event that begins its life: the completion of the process of fertilization, which yields the zygote that is the first stage of fetal life. As Justice White saw, this event marks a dramatic, qualitative change – the beginning of a new, biologically human life. Unlike sperm and egg, the pre-viable fetus is a genetically complete, biologically human organism. It is perhaps debatable whether sperm and egg are better viewed as specialized parts of the men and woman whose gametes they are, or as distinct organisms “whose existence is fundamentally oriented toward uniting with another gamete.” 155 What is not debatable is that neither sperm nor egg is a genetically complete organism belonging to our species. Sperm and egg each have only half the forty-six chromosomes that every somatic cell of every member of our species contains. “This haploidity of the gamete cells distinguishes them from whole human beings.” 156 No such distinction exists between the cells of a fetus, regardless of its stage of development, and those of any other biologically human being. Once fertilization is complete, the zygote contains the full complement of forty-six chromosomes necessary for a complete, biologically human organism.

Possessing forty-six chromosomes, of course, is necessary but not sufficient to qualify the fetus as a human organism. Every somatic cell has forty-six chromosomes, but although each cell is biologically human it is not an organism. Rather, it is a part of a single human organism – the biologically human beings that constitute our physical selves. What distinguishes each human being, viewed as an organism, is that it is an integrated whole that “has the capability to sustain

153 Chief Justice Rehnquist’s majority opinion in Glucksberg rejected an interest-balancing approach in favor of what Rehnquist describes as the Court’s “restrained methodology,” 521 US at 722, but did not argue that interest-balancing is impracticable.

154 My account of the fetus is greatly indebted to Robert P. George and Christopher Tollefsen, Embryo: A Defense of Human Life (Doubleday 2008). Unlike their book, however, this Article does not argue that “the human embryo is a human person worthy of full moral respect.” Id. at 4.

155 Embryo 39. The fact that sperm and egg play a functional role in the lives of the human beings whose gametes they are – enabling those beings to reproduce – argues for considering them as parts, rather than distinct organisms. See Embryo 34 (arguing that sperm and egg are “parts of the human organism, the sperm a part of the male, the egg a part of the female”). The fact that sperm and egg are genetically distinct from all other cells of the human beings whose gametes they are – not only because they are haploid rather than diploid, but because their chromosomes are genetically different as a result of chromosomal crossover during meiosis, see Embryo 31-32 – argues for considering them as distinct, short-lived organisms that will die unless they are transformed through fertilization “into a single entity, the human embryo.” Id. 37.

156 Embryo 40-41.
itself as an independent entity.”\textsuperscript{157} The fetus possesses that capability as soon as it comes into being at the completion of fertilization: if it can obtain “the resources needed by all organisms, namely nutrition and a reasonably hospitable environment, it will continue (assuming adequate health) to grow and develop.”\textsuperscript{158}

The fetus’s capability to grow and develop is inherent in its nature:\textsuperscript{159} “It contains within itself the ‘genetic programming’ and epigenetic characteristics necessary to direct its own biological progress. It possesses the active capacity for self-development toward maturity using the information it carries.”\textsuperscript{160} More than that, the nature of the fetus is to \textit{exercise} this capacity: “The human embryo, from conception onward is fully programmed and has the active disposition to use that information to develop himself or herself to the mature stage of a human being, and, unless prevented by disease or violence, will actually do so . . . .”\textsuperscript{161}

And develop it does. When it comes to the capability for physical growth and development, we are the dwarfs, and the fetus the giant. Stuart Campbell, M.D., summarizes the events of the first trimester as follows:

During the first trimester (weeks 1-12), the fetus develops from a single fertilized egg into a complete, and very complex, organism. This is a period of frantic development: cells multiply, migrate, and re-group; forming layers of tissues that fold and unfold. In just three to six weeks, a basic body plan is laid down.

Once the initial ball of cells implants in the uterine wall, a remarkable chain of events is set into motion. The embryo’s three germ-layers begin to differentiate into specialized cells that are critical for life such as blood cells, nerve cells, and kidney cells.

Overall growth is fast and highly coordinated. External features such as the face, eyes, ears, arms, and legs appear first. Internally, the heart is one of the first organs to be recognized. It starts beating at about the 22\textsuperscript{nd} day following fertilization. The brain and spinal cord, and the respiratory, gastrointestinal, and genitourinary systems start to


\textsuperscript{158} Embryo 41.

\textsuperscript{159} In this respect as well, the embryo is radically different from sperm and egg, or from the nucleus of a non-zygotic cell and an enucleated egg, none of which can grow and develop without first combining (or being combined) to become an embryo. And even when fertilization (or somatic-cell nuclear transfer, in the case of cloning) occurs, the gametes or (or cellular components) “do not survive: rather, their genetic material enters into the composition of a new organism.” Embryo 53.

\textsuperscript{160} Embryo 41.

\textsuperscript{161} Embryo 50.
develop simultaneously. The musculoskeletal system will start developing during the second half of the first trimester. By ten weeks (eight weeks gestation), the [fetus] . . . contains all the organs and structures found in a full-term newborn but in an immature state.162

The fetus’s natural – and, as the preceding description shows, astonishingly powerful -- “disposition” to grow and develop does not end with the first trimester, or when it becomes viable, or when it is born: its dynamic, self-directed biological development continues (though at a much slower pace) through infancy, childhood, adolescence, and adulthood. Thus, beginning at fertilization, the fetus is “a whole living member of the species Homo sapiens in the earliest stage[s] of his or her natural development.”163

The pre-viable fetus is also the same living organism that will later become an infant, child, adolescent, and adult if its development is not cut short for one reason or another.164 Consequently, the pre-viable fetus, no less than the viable one, has what Don Marquis famously termed a “future like ours,”165 in which it will have developed into a conscious, normatively human being who can actively seek his or her happiness. Like every living being, the fetus has an interest in its own good – and it is good for the fetus to develop into a normatively human being, and bad for it to be killed before it can do so.166

162 Stuart Campbell, M.D., Watch Me . . . Grow! 12-13 (St. Martins 2004). Fetal development continues at a rapid pace throughout the second trimester as well. See id. at 32.

163 Embryo 50.

164 In the special case of monozygotic twinning, which can occur only in the first two weeks after conception, the embryo becomes two embryos, each of which will develop into a normatively human being. Some writers argue that until the possibility of monozygotic twinning can be excluded (around 14 days after conception) the embryo cannot be regarded as an individual. See Bonnie Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 50-51 (Oxford 1992). Literally speaking, that seems true enough, but it also seems myopic from the standpoint of valuing the life of the early embryo. That embryo is a new living organism that will in most cases become one normatively human being, but that will become two normatively human beings if twinning occurs. That possibility would seem to make it more intrinsically valuable, not less. And even if the argument from twinning made a difference, it would have no relevance after the first two weeks of pregnancy.

165 Don Marquis, Why Abortion is Immoral, 86 J. Phil. 183 (1989).

166 Contrary to the common-sense view that every living being has an interest in its own good, many writers on abortion have asserted that pre-viable fetuses are inherently incapable of having interests (or rights), because they are not conscious and are thus incapable of having desires or preferences or of feeling pain. See, e.g., Ronald Dworkin, Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 15-19 (Vintage 1993); Bonnie Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 40-41 (Oxford 1992). Because both Roe and Casey treat the pre-viable fetus as a living being that has an interest in its own life, this Article will not present an extended argument in defense of the common-sense view, or against the revisionist
Granted, under Roe and Casey the life of the pre-viable fetus must be regarded as less valuable than that of an actual human – “a person[] in the whole sense,” as Roe puts it\(^\text{167}\) -- because its already-present capabilities are not yet sufficiently advanced. But the key question is “how much less valuable”? Here, following Justice White’s lead, I want to challenge the popular belief that, once it is accepted that the pre-viable fetus is not a normatively human being, it necessarily follows that its life is drastically less valuable than the life (and other important interests) of a human being. This belief often stems from an assumption that human beings are the only living beings the state can have an overriding interest in protecting on account of their intrinsic worth. That premise is highly debatable: many observers would endorse intelligent mammals such as dolphins and chimpanzees as counter-examples.\(^\text{168}\) It is true that a mature member of those species has far greater capabilities than a pre-viable fetus. On the other hand, no dolphin or chimpanzee can match the fetus’s innate potential to develop the full capabilities of a mature human being. If we are prepared to grant great intrinsic value to members of other intelligent species, we should assign at least as much value to pre-viable fetuses.

Let’s assume for argument’s sake, however, that the state cannot claim an overriding interest in protecting non-human beings, while continuing to accept that the pre-viable fetus is not normatively human. Even on these assumptions, it does not follow that the pre-viable fetus can appropriately be classified as a non-human being. On the contrary: whereas every other living being that is not presently a human being will never be a human being, the fetus’s own nature impels it to become a human being. The fetus is sui generis: it is the one and only living being that is not-yet-human rather than non-human, because it is in the process of becoming human. Moreover, this process is driven by the fetus itself: that is what it means to say that its nature is one. Nor will I explore the related question whether, even if pre-viable fetuses do not yet have interests in their own lives, the state can assert an overriding interest in protecting them on the grounds that “human life has an intrinsic, innate value; that human life is sacred just in itself; and that the sacred nature of a human life begins when its biological life begins, even before the creature whose life it is has movement or sensation or interests or rights of its own.” Dworkin, Life’s Dominion 11.

\(^{167}\) 410 US at 162.

\(^{168}\) See, e.g., Peter Singer, Animal Liberation 17-20 (2d ed. Harper Collins 1990); Stephen Wise, Drawing the Line: Science and the Case for Animal Rights 144-154 (Perseus 2002). The legal protection of endangered species -- which is not predicated on a judgment about the intelligence of each species’ members -- supplies additional reason to question the claim that the state may protect the lives only of human beings. Protecting endangered species often imposes great costs on human beings, and thereby demonstrates that the lives of non-human living beings can in some circumstances outweigh even weighty human interests. See, e.g., Tennessee Valley Auth. v. Hill, 437 U.S. 153, 172-73 (1978) (holding that Endangered Species Act “require[s] the permanent halting of a virtually completed dam for which Congress has expended more than $100 million” to ensure “the survival of a relatively small number of three-inch fish among all the countless millions of species extant”).
to become human. It therefore seems incumbent upon us to assign greater value to the nascently-human pre-viable fetus than we would to any non-human animal.

Thus, consistent with our assumptions, it is open to us to assign this not-yet-human being a value that is only modestly lower than the value we assign to an already-human being (that is, one of us). Within the conceptual framework established by Roe and Casey, whether we should do so turns on the relative weight we assign to the “potential” of a human being as against his or her already-developed “capabilities.” Those who would assign a much lower value to the pre-viable fetus will argue that it lacks the capabilities that make a human being normatively human, and that those capabilities, precisely because they are what distinguishes us as humans and persons, are worthy of much greater weight and respect.

Once we attempt to specify these capabilities, the weakness of this argument becomes apparent. Given that Roe and Casey (not to mention public opinion) effectively recognize the viable fetus as a new, normatively human being, it can’t be argued that being normatively human requires the already-developed abilities to speak, reason, or exhibit more than the most rudimentary awareness. Unlike, say, a newly implanted embryo, the viable fetus is fully formed, and many of its organs (such as its heart and kidneys) are fully functioning. But that describes the pre-viable second-trimester fetus as well. What distinguishes the viable fetus from fetuses earlier in the second trimester is primarily its more advanced lung and brain development. Because there is nothing particularly “human” about our lungs, whereas consciousness, cognition, language, and emotion are seated in our ‘big brains,’ it isn’t surprising that some defenders of the viability line have tried to turn it into a proxy for brain development. The difficulty with that move is that the brain development that is crucial for viability is the brain’s ability to maintain homeostasis, rather than its ability to support higher-order activities such as awareness and thought.

Nevertheless, by the time of viability the fetus’s cerebral cortex has developed sufficiently that it may have periods of alertness and may be capable of responding to experiences such as hearing music or human voices. Yet these capabilities, divorced from the viable fetus’s potential for

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169 Much the same could be said of full-term newborn infants, and consequently the argument made here does not turn on whether the threshold for becoming normatively human is set at viability or full term.

170 See, e.g., Rubenfeld, supra n. 87, 43 Stan. L. Rev. at 623-624. Others have proposed that the right to elective abortion should end when the fetus becomes capable of organized cortical brain activity. See David Boonin, A Defense of Abortion 116-129 (Cambridge 2003) (arguing that, even erring on the side of caution, this capability does not occur prior to the 20th week, and probably not before the 25th week).

171 This is demonstrated by the fact that profoundly retarded human beings can live for many years.

172 See Boonin, supra n. 170, at 110-111, 128 (arguing that “organized cortical brain activity” probably first occurs between 25 and 32 weeks of gestation, and almost certainly does not occur prior to 20 weeks); Note, The Science, Law, and Politics of Fetal Pain Legislation, 115 Harv. L. Rev. 2010, 2014 (2002) (fetuses “can respond to sound from 20 weeks and discriminate between different tones from 28 weeks”).
further development, seem less impressive than those of many wild and domestic animals. Indeed, as Kent Greenawalt has suggested, “[i]f the great majority of babies never developed capacities beyond those newborn babies have, and the members of this majority were identifiable at birth,” it is unlikely that “all newborn babies would be regarded as having the inherent worth of developed human beings.” It seems accurate to say, therefore, that when we treat the viable fetus (or, for that matter, the full-term infant) as a normatively human being, we must be giving much greater weight to its “potential” to further develop its rudimentary capabilities than to those capabilities as they then are. And if this is so, consistency requires us to give equally great weight to the “potential” of the pre-viable fetus, which currently lacks those rudimentary capabilities, but whose future development will confer and then gradually perfect them in the same order and on the same timetable.

This point can be generalized: we value every biologically human life—whether that of a viable fetus, an infant, or an adult—not only for its present capabilities, but also for the continued development and future life that still lies ahead of it. At least in the cases of fetuses and young children, the lion’s share of what we value is their inherent, self-directed “potential” to continue developing and live a full human life. If the fetus is aborted before viability, it will never realize its potential to become normatively human, and will have been deprived of “a future like ours.” For that reason, even assuming the validity of Roe’s holding that the state can’t claim normatively human status for pre-viable fetal life, the state should be able to assign great value to the fetus beginning at conception, and to assert an interest in protecting the pre-viable fetus that is almost as great as its interest in protecting the viable fetus or the full-term infant.

B. The Woman’s Weighty Interests in An Elective Abortion

I’ve argued that, even accepting Roe’s characterization of the pre-viable fetus as “potential human life,” a strong case can be made that the state’s interest in protecting that life is almost on a par with the state’s interest in viable fetal life, which Roe and Casey hold outweighs the woman’s interest in terminating her unwanted pregnancy. The next step in the analysis is to discuss the nature of the woman’s interests at stake and the weight they should receive. It seems undeniable that a woman who is legally required to carry her pregnancy to term must endure both the pre-natal burdens of continued pregnancy and childbirth and the post-natal burdens of raising her child or relinquishing it to be raised by others. For interest-balancing purposes, I will

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173 See Peter Singer, Practical Ethics 150-151 (2d ed. Cambridge 1993).


175 Don Marquis, Why Abortion is Immoral, 86 J. Phil. 183 (1989).
assume, as Roe and Casey do, that the woman’s specially protected liberty encompasses her interests in avoiding the post-natal burdens as well as the pre-natal ones.

The burdens of pregnancy and childbirth are serious and invasive even when the pregnancy is wanted. A partial enumeration of the common ones would include faintness, nausea and vomiting, tiredness, insomnia, shortness of breath, tender breasts, constipation, frequent need to urinate, backache, edema of the feet and ankles, foot and leg cramps, varicose veins, hemorrhoids, mastitis, dry skin, irritability, depression, loss of sexual desire, weight gain, the often severe pain of labor if delivery is vaginal, and the risks, pain, and scarring of a C-section if it is not.\textsuperscript{176} Moreover, as Donald Regan points out, these “pains and discomforts are likely to be significantly aggravated when the entire pregnancy is unwanted.”\textsuperscript{177}

For some women, choosing abortion may simply be a matter of avoiding the physical and emotional burdens of pregnancy and childbirth. But very often the phrase “unwanted pregnancy” is a euphemism for “unwanted child” – that is, a child the woman is unwilling (or unable) to nurture and raise after it is born. Unsurprisingly, Roe treats the burdens of child-raising as an important part of the case for recognizing that the woman’s liberty to choose to terminate her pregnancy is encompassed by the “right of privacy.”\textsuperscript{178} An unwanted pregnancy, the Court said, “may force upon the woman a distressful life and future,” in which her “health may be taxed by child care,” she may experience “the distress . . . associated with the unwanted child,” she may have to wrestle with “the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it,” and she may also experience “the additional difficulties and continuing stigma of unwed motherhood.”\textsuperscript{179} Similarly, Casey’s account of the woman’s protected liberty stresses both the burdens of pregnancy and childbirth and the life-altering importance of her decision to accept or reject our culture’s “vision of the woman’s role” – that is, motherhood, which traditionally includes child-rearing as well as child-bearing.\textsuperscript{180} The burdens of motherhood, in turn, include both the expense of raising a child and the curtailment of the mother’s freedom. Like the burdens of pregnancy itself, they are likely to be considerably harder to bear when the child is unwanted.

Oddly, neither Roe nor Casey discusses the fact that the laws of every state give the woman an alternative way to avoid child-rearing: after giving birth, she can formally relinquish her parental rights, in which event her child will be cared for by adoptive or foster parents.\textsuperscript{181}


\textsuperscript{177} Id. at 1581.

\textsuperscript{178} 410 US at 153.

\textsuperscript{179} 410 US at 153.

\textsuperscript{180} 505 US at 852 (majority opinion).

\textsuperscript{181} See Nancy D. Polikoff, The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?, 36 Santa Clara L. Rev. 375, 389 (1996) (“Every state provides some irrevocable mechanism for both biological parents to relinquish their legal status”).
Perhaps the omission is explained by the fact that most women are extremely reluctant to relinquish their newborn children even when they were (or are) unwanted. Indeed, in 1973 only 20% of single mothers put their children up for adoption – and that percentage has declined since Roe. As Reva Siegel suggests, several factors work in tandem to make adoption an unattractive alternative: “Once compelled to bear a child against their wishes, most women will feel obligated to raise it. A woman is likely to form emotional bonds with a child during pregnancy; she is likely to believe that she has moral obligations to a born child that are far greater than any she might have to an embryo/fetus; and she is likely to experience intense familial and social pressure to raise a child she has borne.” And when women do relinquish their infants, they frequently grieve for years over their separation from them. Moreover, whether she raises or relinquishes the unwanted child, the woman’s decision may harm her reputation in the community, and the child’s father or members of her family may disagree with her decision, which may adversely affect her relationships with them.

In sum, the woman who is pregnant with an unwanted child finds herself in this situation: the very fact that she does not want the child makes the burdens of pregnancy and childbirth much harder to bear, and once she gives birth she must either accept the multi-faceted burdens of raising her newborn child, or the emotional and relational burdens of relinquishing it. A pre-

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182 Although the Court made no specific mention of the raise-or-relinquish dilemma, its allusion to “the distress” associated with the unwanted child may be a veiled reference to it. In any event, Roe’s description of the burdens of giving birth to an unwanted child, which assumes that raising the child is the norm, leaves no doubt that the Court did not view adoption as an ‘easy way out’ for pregnant women.

183 In 1973, roughly 20% of unwed mothers placed their children up for adoption. By 1982, that figure had fallen to 12%. Jack Darcher, Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees, 8 Seattle J. Soc. Justice 729, 732 (2010). Even if, as seems likely, a significant subset of unwed mothers may have wanted (or even planned) their pregnancies, the generalization in text would still be warranted.


186 See Catherine Sakach, Note, Withdrawal of Consent for Adoption: Allocating the Risk, 18 Whittier L Rev 879, 896, 899 (1997) (describing the ostracism women who place their children for adoption often face). Kyle Wier, Promoting Adoption as a Solution to Teen Pregnancy: A Study and Model, 5 J. Law and Fam. Stud. 319, 320 (2003) (arguing that “teen mothers are constrained into child-rearing pregnancy resolution strategies and deterred from adoptive placement strategies due to several social factors, including family dynamics, peer pressure, organizational funding, counseling/educational practices, “system” avoidance trends, and notions of “responsibility””). Judith Freedman, The Lifelong Experience of Adoption, ARTL Mass CLE 8-1 (2000)(“the taboo now seems to be against placing a child for adoption. Particularly for teenage mothers, there is tremendous peer pressure to keep their babies, and adoption is often seen as a selfish and ‘bad’ act.”)
viability abortion enables her to avoid these heavy and long-lasting burdens by terminating her pregnancy and ending the life of the pre-viable fetus.

C. Casey’s Murky Interest-Balancing Standard

As we’ve just seen, the woman’s interests in an elective abortion are weighty indeed. To end the life of the pre-viable fetus, on the other hand, is to prevent the continued development of a biologically human being whose nature is actively directing its development into a normatively human being -- and thereby to deprive it of a future like ours. We have, then, especially weighty interests on both sides of the constitutional balance. How are we to decide which prevails?

In his dissent in Casey, Justice Scalia objected that Casey’s interest-balancing approach ultimately turns on “a value judgment” that, insofar as it is not dictated by constitutional text or tradition, simply cannot be “determine[d] . . . as a legal matter.” Scalia’s point is axiomatic if the Court’s role is confined to determining and enforcing the value judgments authoritatively embedded in the Constitution or anchored in our traditions. But if we assume, as Casey does, that the Due Process Clause authorizes the Justices to make such value judgments in order to define the scope of the liberty it substantively protects, then the Court must either make that value judgment as it thinks best, or else adopt a standard that the state’s value judgment against elective abortions must satisfy.

Casey is silent on this score – understandably so, given its failure to address the merits of the interest-balancing judgment on which it reestablished the right to elective abortion. Justice Souter’s concurring opinion in Glucksberg, however, provides some reason to read Casey as implicitly adopting a requirement that the state’s value judgment not be arbitrary. Like the Casey joint opinion, Justice Souter invoked Justice Harlan’s description, in Poe v Ullman, of substantive due process as including “a freedom from all substantial arbitrary impositions and purposeless restraints” and recognizing “that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”

But whereas the Casey Court had no occasion to operationalize Harlan’s account of substantive due process, Justice Souter argued that it should be applied as follows:

\[187\] 505 US at 983 (Scalia, J., dissenting). Justice Scalia also objected that Roe had arrived at its decisive value judgment -- that “the human fetus is in some critical sense merely potentially human” -- in a highly unreasonable way, “begging the question . . . by assuming that what the State is protecting is the mere ‘potentiality of human life.’” Id. Scalia did not explain whether, in his view, the Court could have arrived at the requisite (and on his account extra-legal) value judgment in a way that would qualify as “reasoned judgment.” Cf. Carhart I, 530 US at 954-955 (Scalia, J., dissenting) (what constitutes an undue burden is “a value judgment” and a “pure policy question” that “cannot be demonstrated true or false by factual inquiry or legal reasoning”).

\[188\] Casey, 505 US at 848-849 (quoting Poe v Ullman, 367 US at 543); Glucksberg, 521 US at 765 (Souter, J., concurring in the judgment).
“[T]he weighing or valuing of contending interests . . . is only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of state and individual. . . It is only when the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.”

Under the Harlan/Souter approach, the Court should recognize a right to elective abortion only if the state’s interest in protecting pre-viable fetal life is “so far from being commensurate with” the woman’s interest in an elective abortion that it falls outside “the zone of what is reasonable” and is thus arbitrary. As an original matter, a state law prohibiting elective abortions should readily satisfy this version of interest-balancing scrutiny. It would be eminently reasonable, and far from “arbitrary,” for a state to decide that the good achieved by saving the life of a fetus that will naturally become a human being and a person outweighs the heavy burdens its mother must bear while she is pregnant and after she gives birth.

Even if the Casey Court did not intend to adopt this standard, a powerful argument can be made that the Court should do so when it applies Casey’s interest-balancing methodology. The right to elective abortion is an unenumerated right that lacks the “deeply rooted” grounding in the Anglo-American legal tradition that, according to the Glucksberg Court, is required by the Court’s “established method” in substantive due process cases. In departing from that method, Casey adopted the most plausible alternative methodology for judicial recognition of such rights: interest balancing, which, whatever its drawbacks, should at least prompt the Court to engage in a serious inquiry into the strength of the competing state and individual interests, and to articulate the reasons why it judges one to outweigh the other. The Glucksberg Court declined Justice Souter’s invitation to adopt interest-balancing as its general method in substantive due process cases, arguing that its “deeply rooted” standard is superior because it “tends to rein in the subjective elements that are necessarily present in due-process judicial review,” and “avoids the need for complex balancing of competing interests in every case.”

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189 Glucksberg, 521 US at 768 (Souter, J., concurring in the judgment).

190 521 US at 720-721.

191 521 US at 722 (opinion of the Court). It is important to note that Glucksberg could be read more aggressively, as confining Casey’s interest-balancing methodology to the right to elective abortion, thereby implying that even new reproductive-rights claims must be subjected to Glucksberg’s tradition-centered methodology. Cutting back on Casey in this way would have effects similar to those of a holding that, under Casey’s interest-balancing methodology, the state’s interest in protecting the pre-viable fetus outweighs the woman’s interests in aborting it. To take the same two examples discussed in the Introduction, it seems clear that there is no deeply-rooted tradition recognizing a woman’s liberty to destroy or permanently prevent the development of her cryopreserved embryos, and equally clear that there is no deeply-rooted tradition recognizing a woman’s liberty to direct that her pre-viable fetus be killed to prevent the state from rescuing it via an artificial womb after she safely terminates her pregnancy using a fetus-sparing abortion method.
of Glucksberg’s criticisms of interest-balancing apply with greater force to de novo interest-balancing – in which the Court decides which interest it finds more weighty – than to interest-balancing that is tied to a standard of arbitrariness. As Souter explained, the requirement that the statute be shown to be arbitrary before being declared unconstitutional is “an important constraint” that helps ensure that the Court is engaged in “constitutional review, not judicial lawmaking.” As for “complex balancing,” an arbitrariness standard enables the Court to avoid making finely calibrated judgments in all those cases in which, although it can “identify a reasonable resolution of contending values that differs from the terms of the legislation under review,” the legislature’s resolution falls within “the zone of what is reasonable.”

Thus, as between de novo interest-balancing and interest-balancing subject to an arbitrariness standard, Glucksberg suggests that Casey should be interpreted as authorizing only the latter, more restrained (and less subjective) form of heightened scrutiny. Nevertheless, in an abundance of caution, and because Casey contains no unambiguous indication to this effect, I will assume that Casey calls for a de novo interest-balancing approach. That makes it considerably harder to argue that the interest-balancing question we are considering should be resolved in favor of the state’s interest in protecting fetal life. In my view, the initial descriptions I have provided of the competing interests strongly suggest that the balance tips in the state’s favor, but I recognize that others could reasonably disagree. In an attempt to break the impasse, I will next present three thought experiments, followed by an argument that reframes the interest-balancing analysis in terms of the woman’s overall reproductive liberty. Then, in Part IV, I will argue that history and tradition powerfully confirm evidence that the state’s interest in protecting pre-viable fetal life outweighs the woman’s interest in an elective abortion.

D. Three Thought Experiments

But although this is a possible reading of Glucksberg, it is not the most natural one. Glucksberg does not state that Casey was wrong to justify the right to elective abortion in interest-balancing terms. Instead, Glucksberg argues that Casey did not intend to adopt a new general approach to unenumerated-rights claims that would supplant what Glucksberg asserts has been the Court’s “established method.” Provided Casey’s methodology is applied only in reproductive-rights cases involving interests cognate with those presented in the contraception and abortion cases, that “established method” would not be supplanted -- it would continue to serve as the Court’s general approach in the run of unenumerated-rights cases.

Moreover, Casey did not reaffirm Roe solely because of stare decisis; it also relied on the Court’s “explication” of the woman’s liberty interests in an elective abortion, which implied that state interference with those interests triggers interest-balancing scrutiny. Both of the examples discussed in the Introduction involve statutes that burden one of the interests that is protected by the right to elective abortion: the woman’s interest in ensuring the death of the fetus lest it become a child she must raise, or relinquish to be raised by others. For that reason, applying Casey’s interest-balancing methodology to those (and similar) reproductive-rights issues seems the more natural way to harmonize Casey and Glucksberg.

192 521 US at 767-768 (Souter, J., concurring in the judgment).
193 Id. at 768 (Souter, J., concurring in the judgment).
The familiar Rawlsian “veil of ignorance” heuristic suggests that the interest of the fetus in its future life and development outweighs the woman’s interest in terminating her pregnancy and ensuring that it does not develop further. Behind the veil of ignorance, knowing that we would be conceived but not knowing whether we would be aborted, would we prefer a rule prohibiting elective abortion or not? Any of us might be born as a woman, and would be at risk of bearing the heavy burdens of an unwanted pregnancy. But the risk of not being born at all, and thus forfeiting the human life each of us could have lived if not aborted, would trump that downside.

The obvious objection to my use of the veil of ignorance is that it assumes, contrary to Roe and Casey, that we who are choosing the rules of our society behind the veil are persons, not merely fetuses. On the contrary: the assumption is that we, as persons who might be born into our society, but who also might be aborted before we become persons, are choosing whether abortion should be permitted or prohibited. The alternative is a conjurer’s trick, in which only those who know that they will be born rather than aborted are allowed, behind the veil of ignorance, to vote on whether elective abortion should be legal for women in our society. Perhaps some altruists would still oppose the practice, but if we are simply voting our risk-averse self-interest most of us would prefer the regime of legalized abortion. The only way to internalize the harms to fetuses, and thereby be in a position intuitively to compare them to the benefits to women, is to run the thought-experiment as I have suggested.

But what of the objection that neither form of the thought experiment is valid – my version, because fetuses are not persons, and the version that excludes fetuses, for the reason I have given? I agree that the veil of ignorance doesn’t readily cross the boundaries of species, because non-human animals are incapable of becoming persons and citizens. But fetuses are biologically human beings that are by nature capable of becoming persons and citizens if their natural development is not cut short. Behind the veil of ignorance as Rawls deploys it, we don’t know whether we will be rich or poor, strong or weak, lucky or unlucky. Why can’t we add “unwanted by our mothers after our biological lives begin, but before we become viable” to the list of accidents against which we might want our society to protect us?

To lay the foundation for the next thought experiment, I must make a modest claim about the relative weight of the life of a pre-viable fetus and the life of a normatively human being

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195 Rawls’ A Theory of Justice antedates Roe and does not address the question of abortion. In later work, Rawls evaluated the legal treatment of abortion from the standpoint of persons who have already been born. Political Liberalism 243 n.32 (Columbia 1993). Yet as Walter Murphy argues, “[i]t would seem that: (1) Questions about the value of human life and when it begins are more politically (and morally) significant than allocations of property; and, therefore, (2) the veil of ignorance should obscure the vision of decision makers so that, when constructing their basic constitutional order, none of them would not know whether he or she would be among the born or the aborted. Walter F. Murphy, Transitions to Constitutional Democracy and the Fate of Deposed Despots, 81 Denv. U. L. Rev. 415, 448 (2003).

196 Because gametes are not biologically human beings, we need not subject the right to contraception to a parallel thought experiment.
(whether that human being is a viable fetus, a child, or a pregnant woman does not matter): although the life of the fetus is significantly less valuable because it is only “potential human life,” its value is of the same order of magnitude as the life of a normatively human being. By assumption, then, the life of a pre-viable fetus is at least one-tenth as valuable as the life of a normatively human being (that is, any one of us). Although I cannot demonstrate the truth of this claim, my submission is that the account of the fetus presented earlier – as new, biologically human life whose nature is to become normatively human – more than justifies this conservative estimate of the value of pre-viable fetal life.

Now imagine that a pandemic virus emerges that triggers an auto-immune reaction in any pregnant woman whose pregnancy is terminated artificially, and that in 1 in 20 (5%) of cases this reaction will be fatal. (In the other 95% of cases, the symptoms will be mild). Putting aside the possibility that states could (and would) constitutionally prohibit elective abortions under these circumstances to protect maternal health, how many pregnant women who would otherwise opt for abortion would still do so when it unavoidably exposes them to this serious risk of death? I do not predict that the answer would be “none,” but it seems clear that in contemporary America the answer would be “very few.” We can infer from these hypothetical revealed preferences that the burdens imposed on women by a law prohibiting elective abortions are, in the vast majority of cases, more than an order of magnitude smaller than the value they attach to their own lives. If so, they must also be less weighty than the value of a pre-viable fetal life.

Here is the final thought experiment: Suppose science discovered a chemical ‘development-accelerant’ that safely enabled a fetus treated with it to become viable in fourteen hours and to reach full term in twenty-four hours. Continuing to grant that a fetus is not normatively human until it becomes viable, imagine that a newly-implanted fetus has been treated with this chemical. Would anyone think that the newly-implanted fetus should be assigned a much lower value until the hour of viability arrived? If not, why should a fetus that has not been treated with this chemical be valued any differently? The differences in the actual capabilities of the newly-implanted fetus and the viable fetus are exactly the same. All that has changed is the time interval that separates one stage of human development from a later and much more advanced stage.

It might be objected that, as stated, this thought experiment suggests that the new chemical would make the burdens of pregnancy much smaller for the woman, and that this difference renders our intuitions unreliable. Let’s assume that the premise of this objection is correct, and that the development-accelerant would significantly reduce the burdens of pregnancy. Although that difference marginally strengthens the interest-balancing case against the right to elective abortion, the point of this thought experiment is not to appeal to that difference. Instead, the comparison on which I am relying is between the values we should assign to the life of the just-implanted fetus and the life of its viable counterpart. This thought experiment suggests that the difference in value should be minimal. Yet Casey, like Roe, recognizes that the state’s interest in protecting the viable fetus outweighs the woman’s interest in aborting it. If the state’s interest in the pre-viable fetus is almost as great, we can infer that it too very likely outweighs the woman’s interest.
E. The Right to Elective Abortion as a Component of the Right to Decide Whether to Bear or Beget a Child

Consider next an illuminating reframing of the interest-balancing analysis. To this point, the argument has assumed that unwanted pregnancies are a given, and consequently that by prohibiting elective abortions the state imposes weighty pre- and post-natal burdens on unwilling mothers. Casey reminds us, however, that the right to elective abortion can be seen as one branch of a broader right to decide “whether to bear and beget a child.”197 The other branch, of course, is the right to use contraception.198 As Casey points out, abortion provides fallback protection against having an unwanted child “in the event that contraception should fail.”199 But the fact is that, even if the right to elective abortion were overruled, women’s liberty to decide “whether to bear and beget a child” would remain quite robust. Contraception prevents millions of unwanted pregnancies per year in the United States, and if the right to elective abortion did not exist it would prevent substantially more. Women would seek to avoid the heavy burdens of unwanted pregnancies by taking greater contraceptive precautions – a task made easier by the incremental improvements in the efficacy and safety of some contraceptive methods since Roe.200 These precautions would not always succeed; but they would very often succeed, and the result would be a much smaller reduction in women’s average reproductive liberty than a static analysis indicates.

It is true, as Jed Rubenfeld observed in an important pre-Casey discussion of this issue, that all methods of contraception have some failure rate, that roughly half of women who have abortions were using some form of contraception during the month when they became pregnant, and that women who are very young, poor, or ill-informed are less likely to “employ contraception effectively.”201 But there is an obvious solution to the failure-rate problem: use two methods. (For example, using a method that has a 5% failure rate in conjunction with an independent method that has a 10% failure rate yields a net failure rate of .5%). The high rate of women who have abortions despite using some form of contraception is inflated by the availability of elective abortion: if abortion were unavailable, many of them would use contraception more consistently, or reduce their levels of sexual activity.202 And it is quite clear that, were the constitutional right

197 505 US at 859 (majority opinion).
198 See 505 US at 852 (majority opinion).
199 505 US at 856 (majority opinion).
200 Cite on contraceptive efficacy.
201 Rubenfeld, supra n.87, 43 Stan. L. Rev. at 629.
202 See Jonathan Klick, Econometric Analyses of U.S. Abortion Policy: A Critical Review, 31 Fordham Urb. L.J. 751, 764 (2004) (“The most clear-cut finding of these econometric studies of the relationship between abortion policy and sexual behavior is that individuals, even young individuals whose sexual behavior is often considered to
to elective abortion overturned, advocates of family planning would redouble their efforts to empower young, poor, or ill-informed women to make more effective use of contraceptives.

Nor is better contraception the only available strategy. Rubenfeld asserts that “[d]espite the freedom to abstain, men and women always have engaged and always will engage in sexual intercourse, often at the risk of severe consequences.” But at that level of generality the opposite is equally true: the risk of severe consequences has deterred and always will deter men and women from engaging in sexual intercourse on some occasions. Episodic abstinence is another available strategy – and one that, over time, is not mutually exclusive of using contraception – and in a state that banned elective abortions the practice of abstinence would increase.

And then there are the sexual substitutes for vaginal sexual intercourse. Suffice it to say that millions of heterosexual American couples, married and unmarried, in long-term relationships, transient relationships, or no relationships at all, currently resort with some regularity to alternatives such as oral sex, manual sex, anal sex, “sexual-aids” sex, Internet sex, sexting, and more. In a state that banned elective abortions, one would predict significant substitution of these forms of sexual gratification for vaginal sexual intercourse.

An interest-balancing analysis that ignored these various methods of avoiding the burdens of unwanted pregnancy would seriously overstate the burdens elective-abortion bans generally impose on women’s reproductive liberty. Taking them into account provides additional support for a “reasoned judgment” that the state’s interest in pre-viable fetal life outweighs the woman’s interests in avoiding the pre- and post-natal consequences of an unwanted pregnancy.

The obvious objection to my proposed reframing of the interest-balancing analysis on which the validity of the right to elective abortion depends is that the Court in Casey viewed abortion as a practically indispensable fallback for women whose efforts at contraception are ineffective. It is true that once a woman is pregnant, neither contraception, nor sexual abstinence, nor sexual substitution will help her avoid the pre- and post-natal burdens of an unwanted pregnancy. But it is also true that the line of cases from Griswold to Casey is ultimately about the freedom of women and men to have non-procreative sexual intercourse, and the factors I have described have made the right to elective abortion a small – and shrinking – part of that freedom. Casey

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be driven more by emotion than by calculation, are sensitive to the costs of their sexual activity. When those costs increase, as predicted by the law of demand, individuals engage in less risky sex”).

203 Id. at 632.

204 The probability that a woman will become pregnant over a given time interval (for example, a year) is a function both of the failure rate of whatever contraceptive she (or her partner) uses and of the frequency with which she has sexual intercourse.

205 See 505 US at 853 (majority opinion) (describing the predicament of the woman who has become pregnant “perhaps despite her attempts to avoid it”); id. at 856 (majority opinion) (describing people’s “reliance on the availability of abortion in the event that contraception should fail”).

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contains no holding that would preclude the Court from taking account of that fact in evaluating the strength of the woman’s interest in an elective abortion.

IV. Our Legal Tradition Supports a “Reasoned Judgment” that the State’s Interest in Pre-Viable Fetal Life Outweighs the Woman’s Interest in an Elective Abortion

We turn now from “reasoned judgment” apart from history and tradition to “reasoned judgment” as informed by them. The joint opinion in Casey entirely ignored the history of abortion in Anglo-American law (including Roe’s claims about that history). Instead, Casey focused on the life-changing character of the woman’s decision about whether or not to have an abortion, which it describes as one of “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” and on the burdens and sacrifices inherent in becoming a mother. Nevertheless, as I’ll now argue, in applying Casey’s interest-balancing methodology and “reasoned judgment” standard, the Court should re-examine that history for whatever light it sheds on the competing interests at stake. Casey’s reliance on stare decisis should be no obstacle to that inquiry: “stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history.”

Under Casey’s “reasoned judgment” approach, the right to elective abortion is justified provided that the woman’s interest in an elective abortion outweighs the state’s interest in pre-viable fetal life. The question at hand is what role, if any, history and tradition play in that interest-balancing inquiry. Given that the Casey joint opinion makes no mention of the history of Anglo-American abortion law, one might infer that the Casey majority thought that history was simply irrelevant. But that inference is fallacious, because the Casey majority did not engage in an interest-balancing analysis of the right to elective abortion on the merits. Casey’s history-free explication of the specially protected character of the woman’s liberty to decide whether to

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206 This is not to say that Casey makes no use of history and tradition. The joint opinion relies on the “tradition” of judicial opinions that employ “reasoned judgment” in deciding “substantive due process claims,” 505 US at 849 (majority opinion), and its account of the woman’s liberty follows Roe in “invoke[ing] the reasoning and the tradition of the precedents . . . granting protection to substantive liberties of the person,” id. at 853 (majority opinion), a category that encompasses “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” Id. at 851 (majority opinion). That tradition and those precedents, however, do not speak to whether the woman’s liberty interest outweighs the state’s interest in protecting the pre-viable fetus – and Casey does not suggest otherwise. (For criticism of Casey’s reliance on a “tradition” that is attributable to the Court’s own decisions, see Lund & McGinnis, supra n. 13, 102 Mich. L. Rev. at 1610-1611 (arguing that this constitutes “bootstrapping,” and that the cases constituting this “tradition” were themselves wrongly decided)).

207 505 US at 851 (majority opinion).

208 505 US at 852 (majority opinion).

terminate her pregnancy does suggest that support in historical tradition is not necessary to trigger heightened interest-balancing scrutiny of state restrictions on that liberty. It does not follow, however, that the weight the Anglo-American legal tradition has given to the competing state and individual interests would have been irrelevant had the Casey Court undertaken an interest-balancing analysis of the right to elective abortion. On the contrary, under Casey’s methodology, history and tradition provide important evidence the Court must evaluate in arriving at its own “reasoned judgment.”

That this is so can be inferred, once again, from Glucksberg.210 Chief Justice Rehnquist’s majority opinion, which was joined by two of Casey’s co-authors (Justice O’Connor and Justice Kennedy), declared that the Court’s “established method of substantive-due-process analysis” asks whether an asserted right or liberty interest is “deeply rooted in this Nation’s history and tradition,” and also requires “a ‘careful description’ of the asserted fundamental liberty interest.”211 In so doing, the Glucksberg Court refused to adopt Casey’s interest-balancing approach as its general “method of substantive-due-process analysis,” while treating Casey itself as good law.212

By contrast, Justice Souter, relying on Casey and on Justice Harlan’s famous dissenting opinion in Poe v. Ullman,213 argued instead for an across-the-board “reasoned judgment” approach involving “close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value.”214 As Souter’s formulation makes plain, although the interest-balancing approach he advocated – like Casey’s – does not treat tradition as a sine qua non, it emphatically includes an examination of history and tradition.215 Similarly, in language quoted in Casey, Harlan’s Poe v Ullman dissent argued that the Court’s substantive due process judgments must conform to “the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”216 Indeed, I am not aware that any Justice has expressed the view that history and tradition are irrelevant in deciding whether to recognize an

210 521 US 702 (1997) (holding that there is no fundamental right to commit suicide with another’s assistance).

211 Glucksberg, 521 US at 720-721.

212 See 521 US at 720 (citing Casey for the proposition that the right to abortion is within “the ‘liberty’ specially protected by the Due Process Clause”).


214 521 US at 769 (Souter, J., concurring).

215 See also 521 US at 764 (Souter, J., concurring) (stating that the “conflicting principles” whose legislative resolution is evaluated in substantive due process review are “to be weighed within the history of our values as a people”).

216 Poe v Ullman, 367 US at 542; Casey, 505 US at 850 (majority opinion) (quoting this language from Harlan’s dissent).
unenumerated right. It seems clear, then, that Casey’s co-authors did not intend, by re-establishing the right to elective abortion on the foundation of an interest-balancing judgment, to suggest that that judgment should be arrived at without reference to history and tradition.

Under Glucksberg’s tradition-centered methodology, of course, it is quite clear that the right to elective abortion would not qualify as a *fundamental* substantive due process right. Although the Roe Court claimed that Anglo-American women enjoyed substantial liberty to elect abortions prior to the late 19th century, it did not dispute that by the time of the adoption of the Fourteenth Amendment the overwhelming majority of American states had criminalized abortion throughout pregnancy, and continued to do so for well over a century. That undeniable fact enabled Justice Rehnquist to argue cogently in dissent that “the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”

In Casey, Chief Justice Rehnquist renewed that argument as part of the case for overruling Roe. By declining to characterize the right to elective abortion as fundamental, however, the Casey majority avoided much of the force of this criticism. Casey’s message is that the right to elective abortion arises because the woman’s liberty to terminate her pregnancy, even if not sufficiently rooted in tradition to qualify as fundamental, does enjoy special protection in the form of interest-balancing scrutiny. In considering history and tradition under Casey, therefore, the question is not whether the right to elective abortion satisfies Glucksberg’s deeply-rooted

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217 See supra n. 70, and cases cited therein.

218 Indeed, their opinion relied on the “tradition” consisting of the Court’s substantive due process decisions “granting protection to substantive liberties of the person.” 505 US at 853 (majority opinion). For discussion of this “tradition,” see supra n. 206.

219 Notwithstanding its inconsistency with Lawrence v Texas, Glucksberg remains good law in the sense that the Supreme Court (usually) and the lower courts (with rare exceptions) adhere to the “deeply rooted in tradition” test when evaluating new substantive due process claims. See Brian Hawkins, Note, The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas, 105 Mich. L. Rev. 409, 411-412 (2006). This Article will accordingly not try to ascertain under what circumstances the Court will adopt the more free-wheeling approach to substantive due process Justice Kennedy employed in his opinion for the Court in Lawrence. For a notable attempt to do so, see Steven G. Calabresi, Substantive Due Process After Gonzales v. Carhart, 106 Mich. L. Rev. 1517, 1518 (2008) (predicting that “the overwhelming majority of future substantive due process cases are going to be decided, as Gonzales was, with citation to Glucksberg and without reference to Lawrence”).

220 See Roe, 410 US at 140 (asserting that “at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century,” American women had a “right to terminate a pregnancy” in “the early stage of pregnancy, and very possibly without such a limitation”).

221 See Roe, 410 US at 174-175 (Rehnquist, J., dissenting) (“[b]y the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion”).

222 410 US at 174 (Rehnquist, J., dissenting) (quoting Snyder v Massachusetts, 201 US 97, 105 (1934)).

223 See 505 US at 952-954 (Rehnquist, J., dissenting).
standard. Rather, the question is what history and tradition teach about the relative value our society has attached to the woman’s interest in avoiding the pre- and post-natal burdens of an unwanted pregnancy and the state’s interest in protecting the life of the pre-viable fetus.

This brings us to the crucial point: if Roe’s history of Anglo-American abortion law were factually and legally accurate and complete, it would arguably support a judgment that the woman’s interests in an elective abortion have traditionally been viewed as more important than the life of the pre-viable fetus. The adoption of the strict 19th-century statutory prohibitions on elective abortion throughout pregnancy is not enough, standing alone, to dictate a contrary judgment -- because Roe intimates that these statutes were intended to protect maternal health, not fetal life. Thus, to determine whether the Anglo-American legal tradition as a whole supports the protection of fetal life through the criminal law or the woman’s liberty to obtain a legal elective abortion, it is necessary to look more closely at Roe’s historical account.

As we’ll see, Roe’s history is anything but accurate and complete. That said, a comprehensive counter-presentation of the history of Anglo-American abortion law would require a full article of its own. My treatment here will necessarily be selective, and will focus on those issues that are most directly relevant to the key question: on the whole, does the Anglo-American legal tradition imply that the woman’s interests in an elective abortion outweigh the state’s interest in protecting pre-viable fetal life? In so doing, I will when necessary restate Roe’s arguments in interest-balancing terms, and will follow the same approach in making the case against them.

As recast by Casey, Roe holds that the state’s interest in protecting fetal life does not outweigh the woman’s interest in an elective abortion until the fetus becomes viable late in the second trimester. That holding rests on four claims, which I summarize here in the order in which I will address them:

1. The historical claim that the Anglo-American legal tradition had long given women greater liberty to have legal abortions than they enjoyed under 19th-century statutes such as the Texas law struck down in Roe.

2. The historical claim that, outside the area of abortion, Anglo-American law has never treated the unborn as “persons in the whole sense.”

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224 Joseph Dellapenna has written a landmark book on this and related topics: Dispelling the Myths of Abortion History (2006). My critique of Roe’s history is deeply indebted to his indispensable work.

225 Part X of the opinion in Roe begins: “In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.” 410 US at 162. The “all this” to which the Court refers includes, at a minimum, Part IX, which contains the claims numbered (2)-(4) in text. Claim (3), in turn, expressly relies on the Court’s exposition in Part VI of claim (1).

226 410 US at 140.

227 410 US at 162.
(3) The Court’s holding (based in part on claim (1)) that the unborn are not persons within the meaning of the Fourteenth Amendment.\textsuperscript{228}

(4) The lack of consensus among physicians, philosophers, and theologians on when normatively human life begins.\textsuperscript{229}

1. \textit{Roe’s History of Anglo-American Abortion Law}

Roe’s history of the treatment of fetal life in Anglo-American abortion law boils down to two core contentions. First, the common law allowed abortion early in pregnancy and very possibly even after quickening, thereby implying that the woman’s interest in an elective abortion outweighs the protection of early fetal life.\textsuperscript{230} Even post-quickening abortion did not constitute homicide at common law, but “at most, a lesser offense.”\textsuperscript{231} Moreover, many of the American statutes enacted in the first half of the 19\textsuperscript{th} century followed the common law in being “lenient” with pre-quickening abortion.\textsuperscript{232} Thus, Roe concludes, “at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century . . . a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”\textsuperscript{233}

Second, although more restrictive statutes became prevalent in the latter half of the 19\textsuperscript{th} century, their prohibitions on abortion throughout pregnancy did not embody a judgment that fetal life trumps the woman’s interest in an elective abortion. Instead, their primary -- perhaps sole -- purpose was to protect women from what were then the much greater mortality risks of abortion as compared to pregnancy and childbirth.\textsuperscript{234}

In sum, when we read Roe in interest-balancing terms, its thesis is that the Anglo-American legal tradition has \textit{always} held that the woman’s interest in an elective abortion outweighs the state’s

\textsuperscript{228} See 410 US at 158 (explaining that the Court’s analysis of the Fourteenth Amendment, “together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”).

\textsuperscript{229} 410 US at 159.

\textsuperscript{230} 410 US at 134.

\textsuperscript{231} 410 US at 134.

\textsuperscript{232} 410 US at 139.

\textsuperscript{233} 410 US at 140.

\textsuperscript{234} 410 US at 151. Roe does not expressly state that this characterization of the restrictive 19\textsuperscript{th}-century statutes -- which it attributes to “[p]arties challenging state abortion laws,” 410 US at 151 -- is correct. Instead, Roe summarizes the case for that characterization, asserts that there is scholarly and case-law support for it, and mentions no evidence or argument to the contrary. See id. at 151-152. That treatment can fairly be read as a guarded endorsement.
interest in protecting fetal life, at least early in pregnancy and very possibly at all times before birth. The restrictive abortion statutes enacted in the 19th century do not prove otherwise, Roe would have us believe, because their principal motivation was to protect maternal health, not fetal life. As I will now argue, this characterization of our legal tradition is wildly inaccurate.

To begin with, Roe was simply wrong to suggest that there was any doubt about whether abortion after quickening was a crime at common law. Coke and Blackstone – whom Roe treated as “the great common-law scholars,”235 and whose influence on early American courts and lawyers was pervasive – both declared unequivocally that post-quickening abortion was a crime (though by their times not a felony).236 Roe identifies no common-law decision that disputed Coke or Blackstone on this point. Instead, Justice Blackmun – following a trail blazed by law professor Cyril Means, on whose revisionist law review articles237 he heavily and uncritically relied238 – suggested that Coke’s view was contradicted by the common law precedents as they stood in his day, and that “even post-quickening abortion was never established as a common-law crime.”239 As Joseph Dellapenna has documented, however, “English courts before Coke’s time entertained no doubts regarding the criminality of abortion, whether inflicted on a woman against her will, induced at her request, or even self-induced.”240 Buttressed by Coke’s authority, “by the close of the seventeenth century, the criminality of abortion under the common law was well established.”241

Having accepted Means’s specious contention that Coke mischaracterized English law,242 Roe turned to the common law’s reception in the United States. The Court claimed that while American courts generally agreed that “abortion of an unquickened fetus was not criminal under their received common law,” it “now appear[s] doubtful that abortion was ever firmly

235 410 US at 134.

236 See E. Coke, Institutes III *50; 1 W. Blackstone, Commentaries *129-130.


238 Roe cites one or both of Means’s articles a half-dozen times. See Roe, 410 US at 132 n.21, 133 n.22, 135 n.26, 139 n.33, 148 n. 42.

239 410 US at 135.

240 Dellapenna, Myths, at 201-202 (footnotes omitted).

241 Dellapenna, Myths, at 200. See also id. at 204 (collecting and describing indictments and convictions for abortion in seventeenth-century England).

242 See Roe, 410 US at 135 n. 26. For refutation of Means’s criticisms of Coke, see Dellapenna, Myths, at 198-203.
established as a common-law crime even with respect to the destruction of a quick fetus.\textsuperscript{243} The sole basis for this assertion was Roe’s suggestion that “apparently all the reported cases” in which an American court stated that abortion of a quick fetus was a misdemeanor were “dictum (due probably to the paucity of common-law prosecutions for post-quicking abortion). . .”\textsuperscript{244}

Missing from this account is any acknowledgement that no American court ever suggested – in dictum or otherwise -- that abortion after quickening was not a misdemeanor at common law. That fact alone strongly suggests that post-quicking abortion was an established common-law crime in the United States. As for the statements of appellate courts reiterating that post-quicking abortion was a crime, they were \textit{rationes decidendi}, not dicta: the courts ruled that pre-quicking abortion was not a common-law crime based on their understanding of the reason why post-quicking abortion was such a crime. Taking as their starting point Blackstone’s pronouncement that “life . . . began in contemplation of law as soon as an infant was able to stir in the mother’s womb,”\textsuperscript{245} American courts limited the common-law crime to abortion of a quick child.

Chief Justice Shaw’s well-known opinion for the Massachusetts Supreme Court in Commonwealth v Parker is a case in point.\textsuperscript{246} The defendant challenged her conviction on the ground that it was not an indictable offense at common law to induce an abortion without alleging and proving that the “woman was quick with child.”\textsuperscript{247} Quoting Blackstone on when life begins in the eyes of the law, the Massachusetts Supreme Judicial Court agreed: “It was only considered by the ancient common law that the child had a separate and independent existence, when the embryo had advanced to that degree of maturity designated by the terms ‘quick with child,’ although, to many purposes, in reference to civil rights, an infant \textit{in ventre sa mère} is regarded as a person in being. 1 Bl. Com. 129.”\textsuperscript{248}

Roe would have us believe that the Parker court, had a challenge to an indictment for performing an abortion on a woman who was “quick with child” come before it, would have viewed the question presented as one to which the common law offered no “firmly established” answer. No competent lawyer reading Parker (or the many decisions like it) could possibly have believed any such thing. Whether as an original matter Coke and Blackstone were right or wrong about the ancient common law is beside the point (though they were almost certainly right).\textsuperscript{249} For

\textsuperscript{243} 410 US at 135-36 (footnotes omitted).

\textsuperscript{244} Id.

\textsuperscript{245} 1 Blackstone at *129-130.

\textsuperscript{246} See, e.g., Commonwealth v Parker, 50 Mass. 263 (1845).

\textsuperscript{247} 50 Mass. at 265.

\textsuperscript{248} 50 Mass. at 266.

\textsuperscript{249} Joseph Dellapenna carefully analyzes the precedents discussed by Means, and argues convincingly that Means misunderstood or twisted them to suit his agenda. See Myths, at 144-152. In addition, Dellapenna discusses a
purposes of determining how our legal tradition viewed abortion, what matters is that American courts overwhelmingly accepted Coke’s and Blackstone’s descriptions of the common-law crime of abortion, and Blackstone’s explanation of the quickening distinction that limited it, as definitive statements of established law.

There were, to be sure, some American courts who disagreed in part with Coke and Blackstone. But their disagreement led them to expand the common-law crime of inducing an abortion, not to deny its existence. The leading example of this minority view was the Pennsylvania Supreme Court’s 1850 decision in Mills v Commonwealth, which held that an indictment for performing an abortion need not charge “that the woman had become quick.” Its reasoning confirms that, within the sphere of common-law authority, the only question was whether the crime of abortion should apply even before quickening:

It is not the murder of a living child, which constitutes the offence, but the destruction of gestation, by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated.

It is also doubtful that Roe was correct in suggesting that there was a “paucity of common-law prosecutions for post-quickening abortion.” True, appellate decisions reviewing convictions for post-quickening abortion at common law are few and far between. Yet notwithstanding the incomplete records of trial proceedings in colonial and post-Revolutionary America, prosecutions have been documented in at least five colonies (Connecticut, Delaware, Maryland, Rhode Island, and Virginia), as have trials and presentments in several states in the late eighteenth and early nineteenth centuries. If prosecutions were indeed rare, that was surely attributable in large part, as Joseph Dellapenna contends, to the infrequency of abortion in an era in which every available method was both dangerous and unreliable. Moreover, when abortion or attempted abortion did occur, it was difficult to prosecute at a time when it was often impossible to prove that the woman had been pregnant, that the fetus had quickened, and that the death of the fetus resulted from abortion rather than natural causes. In any event, whatever the number of English criminal abortion cases that have been discovered since Roe by Philip Rafferty and others, which establish that even pre-quickening abortion was a crime in medieval England. See Dellapenna, at 134-143. See also Philip Rafferty, Roe v Wade: The Birth of a Constitutional Right 163-174, U.M.I. Dissertation Abstracts (1992) (No. LD02339).

250 13 Pa. 631 (1850).

251 13 Pa. at 631.

252 410 US at 136.

253 But not non-existent. See, e.g., State v Reed, 45 Ark 333 (1885).

254 Dellapenna, Myths 228.

255 See, e.g., Dellapenna, Myths at 264-266 (Virginia), 269 (Connecticut).

256 See Dellapenna, Myths at 244, 270.
frequency of prosecutions for abortion at common law, there is no evidence that any American court ever rejected a common-law indictment for post-quickening abortion as legally insufficient. And of course, as the 19th century progressed, statutory prosecutions for abortion, both before and after quickening, increasingly supplanted those at common law.\footnote{See, e.g., State v Van Houten, 37 Mo. 357 (1856) (sustaining an indictment under Missouri’s abortion statute); People v Jackson, 3 Hill 92 (N.Y. Sup. Ct. 1842) (upholding a misdemeanor conviction under New York’s pre-quickening abortion statute); State v Vawter, 7 Blackf. 592 (Indiana 1845) (sustaining an indictment under Indiana’s abortion statute).} The fact that the common law protected all quickened fetuses — and explicitly did so for \textit{their} sakes, not to protect their mothers from the grave dangers of abortion -- demonstrates that the state’s interest in protecting fetal life was thought to outweigh the woman’s interest in an elective abortion long before viability.\footnote{Quickening usually occurs between the 16th and 18th week of gestation. See Roe, 410 US at 132. Prior to the 20th century, fetal viability would not have occurred prior to the 28th week.} Nevertheless, one might argue, the common law’s failure to criminalize pre-quickening abortions shows that Roe was substantially correct in claiming a tradition of abortion liberty \textit{early} in pregnancy (when the overwhelming majority of abortions are performed nowadays). This inference is wrong for both practical and legal reasons. The practical barriers to what the Roe Court wishfully imagined to have been abortion liberty were enormous. Prior to the development of the first crude pregnancy tests in the early 20th century, a woman could not know she was pregnant until she felt the fetus move.\footnote{The so-called “rabbit test” for detecting human chorionic gonadotropin in a woman’s blood to establish pregnancy was not developed until 1927, and yielded frequent false results until improved in the 1960s. Dellapenna, Myths 191.} Even if she risked a possibly needless abortion in the belief that she was pregnant, every available abortion method was highly dangerous,\footnote{Dellapenna at 332-333. The dangers of intrusion methods in an era without anesthesia, analgesia, antisepsis, and antibiotics are self-evident. Ingestion methods were also highly dangerous, as well as less effective than intrusion ones. In the 1800s (as throughout history), women ingested a wide range of dangerous substances that were believed to cause abortions, the vast majority of which were ineffective – and the remainder of which worked by poisoning both mother and fetus. See Dellapenna, Myths, at 37-50. Modern techniques for inducing labor involve the intravenous administration of oxytocin (or synthetic oxytocin (pitocin)), a hormone that was not discovered until 1909, and first used by physicians to stimulate labor in 1911. Louisa Dalton, Oxytocin, Chemical & Engineering New, available online at http://pubs.acs.org/chemcoverstory/83/8325/8325oxytocin.html.} and none of them were reliable prior to the late 19th century.\footnote{Dellapenna at 230, 333. As Dellapenna shows, prior to the 18th century the only generally available abortion methods involved ingesting poisons or physically assaulting the woman’s body in ways designed to kill the fetus. Dellapenna at 230-237. Ingestion methods sometimes succeeded, but generally did so not by inducing premature labor, but “by so debilitating the woman (often through attacks on her lower digestive tract) that she could no longer sustain the pregnancy.” Id. at 43. The most popular supposed abortifacients were volatile oils (e.g., savin and tansy) or alkaloids (e.g., ergot). The volatile oils were dangerous poisons, while the alkaloids “produce dangerous side} Thus, the liberty Roe posits would have been almost totally illusory in practice.
On the legal side, the common law’s failure to criminalize pre-quickening abortion cannot be attributed to a judgment that fetal life was unworthy of legal protection before quickening. There were compelling pragmatic reasons not to criminalize pre-quickening abortion: prior to the mid-19th century, it was impracticable in most cases to prove that the woman had been pregnant, and it was impossible to prove that the unquickened fetus had ever been alive. Consequently, prior to quickening it could not be shown that an attempted abortion had killed a living fetus.

Beyond that, insofar as the quickening rule expressed a judgment about fetal life, that judgment was predicated on what were then widely-held beliefs that the fetus began to live when it began to move, and that it began to move when its mother could feel it moving. The theory was not that early fetal life was unworthy of legal protection—it was that the fetus was not alive (or at least, not known to be alive). Not until the 19th century was it established that the fetus begins to move weeks before its mother can detect its movements, and that it is a living, biologically human organism from conception on. In light of this new embryological knowledge, the rationale behind the quickening rule would arguably support either a ban on abortions after the eighth week, when fetal movement begins, or at any time after conception, when fetal life begins.

Let’s turn now to Roe’s intimations that the primary (if not the sole) “original purpose” of the restrictive 19th-century abortion statutes was to protect the pregnant woman by “restrain[ing] her from submitting to a procedure that placed her life in serious jeopardy” in that pre-antiseptic, pre-antibiotic era. Although the “serious jeopardy” Roe refers to was real enough, this account of the statutes’ “original purpose” is totally off-base. To see why, it is necessary to note the effects when taken in quantities sufficient to induce labor significantly earlier than the natural term of the pregnancy.”

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262 See Dellapenna, Myths 432.

263 A similar evidentiary rationale underlies the much-misunderstood common-law “born-alive” rule, which held that the killing of an unborn child was homicide only if the child was born alive and subsequently died from its pre-natal injuries. As Clarke Forsythe has shown, “at common law the rule was entirely an evidentiary standard, mandated by the primitive medical knowledge and technology of the era, and . . . in its origin was never intended to represent any moral judgment on the criminality of killing an unborn child in utero.” Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Valparaiso L. Rev. 563, 564 (1987).

264 See Dellapenna at 257.

265 Dellapenna at 259-260.

266 See Michael Stokes Paulsen, The Plausibility of Personhood, 74 Ohio St. L.J. 14, 28 (2012) (“[i]t is a nice question whether Blackstone, given his unequivocal endorsement of legal personhood for the unborn, would have chosen conception rather than discernible bodily movement as the correct line had eighteenth century medical and biological knowledge been so advanced”).

267 410 US at 151.

268 410 US at 148-149.
begin with two developments Roe ignores, but which drove 19th-century American legislatures to replace the common law with statutes criminalizing abortion throughout pregnancy. The first was technological: the gradual spread and refinement throughout the 19th century of “intrusion” abortion methods that would reliably terminate a pregnancy, and the resulting increase in the incidence of abortion.  The second was scientific: the discovery in the early 19th century of sperm, ova, and mammalian fertilization, which “led to a new consensus among scientists on the nature of human gestation.” For the first time, physicians and the educated public became aware that conception meant the union of sperm and egg, and with it the formation of a new organism that would in time become a child. Thus, during the same decades when abortion was becoming reliably efficacious for the first time, the scientifically-recognized view that the life of a new human organism begins at conception triumphed over the quickening view.

The legislative reaction to these developments – criminalizing abortion from the outset of pregnancy – leaves no doubt that not only pre-viable, but pre-quickening fetuses were now viewed as entitled to legal protection from abortion. By the time the Fourteenth Amendment was ratified, thirty of the thirty-seven states had enacted abortion statutes, and twenty-seven of those statutes prohibited abortion before as well as after quickening. Contrary to Roe’s claim that “[m]ost of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening,” twenty of those twenty-seven states “punished all abortion equally regardless [of] the stage of pregnancy.” Thus, at the time of the adoption of the Fourteenth Amendment, the predominant view was that protecting fetal life outweighed the woman’s interests in an elective abortion throughout pregnancy.

The fact that abortions remained very dangerous throughout the 19th century presumably played some part in the overwhelming success of the mid-century campaigns for more restrictive abortion laws. But although prominent advocates of restrictive abortion laws often argued

269 See Dellapenna at 332-333.

270 Dellapenna at 259-260.

271 410 US at 139.

272 Dellapenna at 315-316.

273 Because the health risks of abortion were much greater than those of pregnancy and childbirth throughout most or all of the 19th century, one could speculate that this disparity was a decisive factor in the enactment of restrictive abortion laws during that period. Even if society also attached some value to the life of the fetus, the argument would go, it would not have adopted such restrictive abortion laws were it not for the grave risks abortion posed to maternal health. One cannot rule out the possibility that some states would have adopted somewhat less restrictive statutes had abortion been as safe as pregnancy in the 19th century. But the fact that restrictive 19th-century abortion laws typically passed by overwhelming margins, see Witherspoon at 59, coupled with the evidence that protecting fetal life was the primary goal of the anti-abortion activists, strongly suggests that legislation criminalizing elective abortion throughout pregnancy would have prevailed even under these circumstances.
that abortion endangered the life of the woman as well as took the life of the unborn child.\textsuperscript{274} they “always advanced the protection of fetal life as the primary reason for the statutes.”\textsuperscript{275} The design of these statutes reflected the same focus on protecting fetal life. For example, we would expect legislatures seeking to restrict elective abortions solely out of concern for maternal health to have permitted abortion whenever that procedure would have been safer for the mother than continued pregnancy and childbirth. The 19th-century statutes, however, almost universally authorized abortion only when necessary to save the life of the mother—a narrower exception presupposing that fetal life outweighs maternal health.\textsuperscript{276} Roe itself recognized as much in characterizing the theory on which Texas defended its statute (which dated to 1857)\textsuperscript{277}: “Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail.”\textsuperscript{278}

Several other features of the 19th-century abortion statutes confirm that their primary purpose was the protection of fetal life throughout pregnancy. By the time of the adoption of the Fourteenth Amendment in 1868, many state statutes (1) provided for enhanced punishment if it were proven that an attempted abortion caused the death of the fetus,\textsuperscript{279} (2) declared abortions causing the death of the fetus to be manslaughter,\textsuperscript{280} (3) referred to the fetus as a “child,”\textsuperscript{281} and (4) prohibited attempted abortions only if performed on a pregnant woman.\textsuperscript{282} None of these provisions is concerned with maternal health and safety, and each of them bespeaks an intent to protect fetal life.

\textsuperscript{274} See Dellapenna at 368 (discussing the views of Horatio Robinson Storer, “perhaps the most important leader of the anti-abortion movement in nineteenth-century America”, id. at 359).

\textsuperscript{275} Dellapenna at 297.

\textsuperscript{276} See Witherspoon, at 45-46.

\textsuperscript{277} See Roe, 410 US at 119 n.3.

\textsuperscript{278} 410 US at 150.

\textsuperscript{279} Witherspoon at 36. In many states, the maximum prison term for attempted abortion exceeded one year, and in many states the maximum prison term for abortion resulting in the death of the fetus was five years or greater. See Witherspoon at 53 n.70 (listing statutory punishment ranges).

\textsuperscript{280} Witherspoon at 42-44. Witherspoon adds that “a significant number of states enacted a law providing that acts other than acts intended to produce abortion would constitute manslaughter (or murder, in New Mexico) if they killed an unborn child.” Id. at 43.

\textsuperscript{281} Witherspoon at 48.

\textsuperscript{282} Witherspoon at 56. Generally speaking, it would have been almost as dangerous to perform an attempted abortion on a non-pregnant woman as on a pregnant one. To give a woman poison to drink is equally dangerous whether or not she is pregnant, and to invade her uterus, in an era without antisepsis or antibiotics, opens a pathway to infection whether or not she is carrying a fetus.
Moreover, by the latter half of the 19th century improvements in abortion techniques, along with gradual recognition of the need for antisepsis and the dangers of infection, substantially reduced the mortality risks of abortions (though they remained highly dangerous by today’s standards).283 Yet the overwhelming majority of states did not respond to these developments – or the even greater improvements in abortion safety that accompanied the introduction of antibiotics in the 1940s – by legalizing elective abortions. Even in 1973, by which time it was widely believed (and the Roe Court concluded) that first-trimester abortion was safer than pregnancy,284 a majority of states adhered to their restrictive 19th-century statutes. This longstanding resistance to liberalizing abortion laws suggests that the general public continued to value the protection of fetal life more highly than the woman’s interest in an elective abortion, notwithstanding the dramatic reduction in abortion’s risks to maternal life and health in the decades prior to Roe.

Although it fails to address the foregoing arguments, Roe notes with implicit approval four specific contentions in support of the theory that the overriding concern of 19th-century abortion statutes was to protect the lives and health of pregnant women:285 (1) that there is an “absence of legislative history” supporting the view that protection of fetal life was a purpose of restrictive abortion laws;286 (2) that “[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State’s interest in protecting the woman’s health rather than in preserving the embryo and fetus;”287 (3) that in many states “the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another;”288 and (4) that the adoption of the quickening distinction at common law and in many state statutes “tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.”289 Again, if each of these claims were true, that would lend considerable support to the proposition that the restrictive 19th-century abortion statutes were intended to protect women’s health, and did not reflect a judgment that the state’s interest in protecting fetal life outweighs the woman’s interest in an elective abortion.

283 Dellapenna 333-334.

284 See Roe, 410 US at 149, 163. For criticism of the evidence and inferences on which this conclusion about the relative safety of first-trimester abortion and pregnancy is based, see Clarke D. Forsythe, Abuse of Discretion: The Inside Story of Roe v Wade 155-180 (Encounter 2013).

285 Although the Roe Court did not unqualifiedly assert that each of these claims was well-founded, its discussion implies that the state interest in protecting fetal life has a very weak historical pedigree: as Roe presents it, there is scant evidence that protecting fetal life was in fact an important purpose of these laws, and Roe gives no indication that there is any plausible answer to any of the contentions listed in text. See 410 US at 151-152.

286 410 US at 151.

287 410 US at 151.

288 410 US at 151.

289 410 US at 152.
abortion. In fact, only the third claim is true, and on closer examination it proves to be entirely consistent with a judgment in favor of fetal life.

First, James Witherspoon has demolished Roe’s suggestion that there is no legislative history supporting the view that protecting fetal life was a central purpose of the 19th-century abortion laws. Witherspoon focuses on Ohio, whose legislature enacted a more restrictive abortion statute shortly after voting to ratify the 14th Amendment. When the bill that became law was first introduced, it was referred to a select committee of three state senators, who produced a committee report that, as Witherspoon notes, “constitutes the clearest statement of the purposes underlying the enactment of an antiabortion statute yet found.” The committee report noted the increasing frequency of abortion, criticized the quickening distinction because “physicians have now arrived at the unanimous opinion that the foetus in utero is alive from the very moment of conception,” and urged that “that the willful killing of a human being, at any stage of its existence, is murder.” After making the case against “child-murder,” the committee went on to discuss the dangers abortion posed to women – asserting that abortion was fatal more often than childbirth, and that it often caused sterility and illness.

The Ohio Legislature as a whole agreed with the select committee’s characterization of abortion as the wrongful killing of a human being: the 1867 statute expressly provided the same range of punishment for attempted abortion killing the child at any stage of pregnancy as for attempted abortion killing the mother. Moreover, the legislative histories of abortion statutes in several other states indicate that they were enacted at the request of state medical societies. As Witherspoon observes, it is well-established that these societies took the position that the fetus is a living human being entitled to legal protection from abortion throughout pregnancy, and “it can be reliably inferred that legislatures enacting these statutes shared their views on the matter.”

Second, Roe’s claim that the “few state courts” to address the issue focused on the state’s interest in protecting women rather than fetuses is demonstrably false. Roe cited precisely one case for

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291 Witherspoon 62-63.

292 Witherspoon 63.

293 Witherspoon 64.

294 Witherspoon 65.

295 Even Roe acknowledges that the “anti-abortion” attitude of “the medical profession” in the late 19th century “may have played a significant role in the enactment of stringent criminal abortion legislation during that period,” and that this attitude was based on the view that the fetus constitutes new human life worthy of legal protection even before quickening. 410 US at 141.

296 Witherspoon 67-69.
that proposition: the New Jersey Supreme Court’s 1858 decision in State v. Murphy.\footnote{297}{297 27 N.J.L. 112 (1858).} As Joseph Dellapenna has shown, Murphy does not stand for the proposition that New Jersey’s abortion laws protected only the woman and not the fetus. On the contrary, Murphy acknowledged that New Jersey’s common law – then still in effect -- made abortion a crime in order to protect the fetus, while opining that the State’s 1850 abortion statute \textit{supplemented} the common law by adding protection for the woman.\footnote{298}{298 Dellapenna at 286-287 (discussing Murphy, 27 N.J.L. at 114).}

Furthermore, Dellapenna identifies at least “17 other nineteenth-century decisions . . . indicat[ing] that the protection of fetal life as well as the health of the mother was a purpose of their state’s recently adopted abortion statutes . . . .”\footnote{299} Astonishingly, several of these cases were cited in Roe itself (though for different propositions). One example will suffice to show the magnitude of Roe’s mischaracterization of the 19th-century case law. In 1887, by which time the vast majority of states had adopted restrictive abortion statutes criminalizing abortion before as well as after quickening, the Maryland Court of Appeals offered this overview of 19th-century American thinking (judicial and legislative) on abortion:

\begin{quote}
By the ancient common law, according to Lord Coke, “if a woman be quick with child, and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child,--this is a great misprision, and no murder.” But as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by courts of high character that abortion is a crime at common law without regard to the stage of gestation. In this state, however, the change has been effected by the action of the legislature, and not by the decisions of the courts.\footnote{300}{300 Lamb v State, 10 A. 208, 208 (Md. 1887) (cited in Roe, 410 U.S. at 136 n. 28, as stating, on Coke’s authority, that at common law abortion after quickening was a misdemeanor).}
\end{quote}

\textit{Third,} contra Roe, the failure of many states to hold pregnant women criminally responsible for abortions to which they consented does not support an inference that criminal abortion law was not concerned with protecting the fetus. The facts that the abortionist was subject to criminal liability whether or not the woman died or was injured as a result of the abortion, and that in many states punishment for an attempted abortion was more severe if the attempt resulted in the death of a fetus, speak plainly of the law’s concern for fetal life.\footnote{301}{301 Many states increased the range of punishment if the woman died, but the great majority of these states \textit{also} increased the range of punishment if the attempted abortion resulted in the death of the fetus. Witherspoon 40–42.} Beyond that, as Dellapenna
argues, the lenient treatment of the woman was in large part intended to protect fetal life more effectively. The availability of intrusion abortions depended on abortionists, and convicting abortionists was ordinarily impracticable without the testimony of the woman who underwent the abortion. But if her conduct in agreeing to an abortion was illegal, she was an accomplice of the abortionist – and in most states, “then as now, a criminal could not be convicted by the uncorroborated testimony of an accomplice.”\footnote{Dellapenna 300.} Thus, exempting women from criminal liability greatly increased the chances of convicting abortion providers, and thereby protecting fetuses.

This is not to deny that many 19\textsuperscript{th}-century courts and legislatures also treated women as victims rather than criminals in recognition of the grave dangers abortion posed to them, and the presumably urgent reasons that would have impelled them to run those risks.\footnote{See Dellapenna 298.} But as abortion gradually became less dangerous, a surprising number of states made it a crime for a woman to seek or agree to an abortion.\footnote{Dellapenna at 298 & n. 295 (nineteen states ultimately made a woman’s participation in an abortion a crime).} Even in those states, however, the primary goal remained to convict the abortionist, not the woman, as is shown by grants of immunity from prosecution for women who testified against their abortionists,\footnote{See Dellapenna 300 (describing New York’s statutory grant of immunity).} and by occasional judicial rulings that a woman undergoing an abortion was not an accomplice of that crime.\footnote{See Dellapenna at 307 & n. 307.} The more lenient treatment of women who underwent abortions, rather than stemming from lack of concern for fetal life, reflected the judgment that abortionists were far more culpable than pregnant women, and should be the primary targets of the criminal law of abortion.

\textit{Fourth}, Roe’s suggestion that the common law and some 19\textsuperscript{th}-century statutes prohibited only post-quickening abortions because pre-quickening abortions involved fewer maternal “health hazards” is refuted by the case law we have already seen, in which courts adhered to the quickening line because that is when the fetus was deemed alive “in contemplation of law.” Roe cites no case, and I am aware of none, in which a court drew a connection between quickening and enhanced maternal health risks from abortion. In addition, this surmise rests on anachronistic and highly improbable factual assumptions. In the 19\textsuperscript{th}-century, \textit{all} intrusion abortions were highly dangerous for lack of anesthesia, antisepsis, and antibiotics.\footnote{See Dellapenna at 230-231. Dilators that could safely force open the cervix to give access to the uterus were not invented until the 1880s. Id. at 333. Only then did the most widespread early abortion method of the 20\textsuperscript{th} century – dilation and curettage (a “D&C”) -- become feasible. Prior to that time, more violent methods of forcing open the cervix would have been necessary, and such methods (e.g., iron rods or wires) would have been no less dangerous before than after quickening.} Likewise, all ingestion abortions were dangerous because there were no drugs that could induce premature

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\item \footnote{Dellapenna 300.}
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\item \footnote{See Dellapenna 300 (describing New York’s statutory grant of immunity).}
\item \footnote{See Dellapenna at 307 & n. 307.}
\item \footnote{See Dellapenna at 230-231. Dilators that could safely force open the cervix to give access to the uterus were not invented until the 1880s. Id. at 333. Only then did the most widespread early abortion method of the 20\textsuperscript{th} century – dilation and curettage (a “D&C”) -- become feasible. Prior to that time, more violent methods of forcing open the cervix would have been necessary, and such methods (e.g., iron rods or wires) would have been no less dangerous before than after quickening.}
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labor or poison the fetus without posing serious risks to the woman’s life and health. Moreover, because a 19th-century woman seeking a pre-quickening abortion could not know she was pregnant, she might suffer the health dangers of an early abortion needlessly. For all these reasons, the supposition that those few 19th-century statutes that retained the quickening line did so because early abortion was materially less dangerous to maternal life and health is utterly fantastic.

2. The Treatment of the Fetus in other areas of Anglo-American law

As we’ve seen, Roe’s two most important historical claims – that women enjoyed a broad abortion liberty prior to the late 19th-century, and that the laws restricting that liberty were primarily enacted to protect maternal lives and health rather than fetuses – can fairly be included among “the myths of abortion history.” Let’s turn now to Roe’s one-paragraph argument that, outside the context of criminal abortions, Anglo-American law has traditionally been reluctant to accord legal rights to the unborn. To make this case, Roe draws exclusively on examples from tort and property law, and I will discuss them in that order. Before refuting Roe’s characterizations of the status of “the unborn” in these branches of the common law, however, I’ll briefly explain why that status would not be decisive even if Roe’s account were accurate.

The general issue we are exploring is how the Anglo-American legal tradition values the state’s interest in protecting fetal life as compared with the interests of the women who are pregnant with them. The criminal law’s treatment of abortion provides us with the most directly relevant evidence on that issue, and establishes that our legal tradition assigned great weight to the protection of fetal life – initially after quickening but eventually throughout pregnancy – at the expense of women’s ability to obtain abortions. That unbroken criminal-law tradition conclusively shows that, even if tort law and property law gave the unborn no rights or interests of any kind, Anglo-American law treated the protection of fetuses known to be alive as outweighing the woman’s interest in an elective abortion – and increased that protection once the basic facts of human embryology were finally ascertained. In fact, however, tort and property

308 See Dellapenna at 37.

309 The phrase is taken from the title of Joseph Dellapenna’s book Dispelling the Myths of Abortion History (Carolina 2006).

310 Roe’s account pays virtually no attention to the criminal law protecting fetuses from third parties who injure or kill them without the pregnant woman’s consent. At common law, if the child-victim was born alive and subsequently died of its injuries, the attacker was guilty of homicide. If the child-victim was stillborn, the attacker was guilty of the offense of abortion without the woman’s consent, as well as of assault on the woman herself. This treatment carried over into the restrictive American abortion statutes. (For example, the Texas abortion law struck down in Roe encompassed cases in which a violent attack on a pregnant woman caused the death of her fetus, and doubled the punishment if this “abortion” was “done without her consent.” 410 US at 118 n.1.) By the time of Roe, some ten states had abolished the born-alive rule, thereby enabling prosecution for homicide even if the child was stillborn. As Clarke Forsythe has recently shown, in the years since Roe this trend has continued: thirty-eight states have abolished the born-alive rule, and twenty-eight of these states treat the killing of a fetus at any stage of pregnancy as homicide. Forsythe, supra n.284, at 284-285.
law have accorded far more legal rights to the unborn than Roe would have us believe (although fewer than those enjoyed by children born alive). In so doing, they necessarily increased the civil obligations of those subject to tort liability for wrongs to the unborn and reduced the property rights of those persons whose claims to property were adverse to those of the unborn. Thus, both tort and property law confirm that the interests of the unborn can outweigh the often weighty interests of those about whose status as persons there is no dispute.

a. Tort Law

Roe offers two examples of tort law’s supposed reluctance to “accord legal rights to the unborn.” Here is the first:

[T]he traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. On its face, this argument is shaky: a “traditional rule” that has been repudiated in almost every jurisdiction, one might think, tells us less about the values underlying Anglo-American law than the rule that replaced it. That is particularly true because this alleged tradition did not begin until the late 19th century, when such claims were first presented to courts in England and the United States, and because its overthrow in the 1940s was, in Prosser’s words, “up till that time the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts.”

By the time Roe was decided “the trend . . . [was] to allow recovery without regard to whether or not the child was viable at the time the injury was inflicted.” That trend continues apace notwithstanding Roe: as of 2011 twenty-nine states allow recovery for prenatal injuries regardless of gestational maturity, while another eighteen allow recovery provided the child was viable when the injury was inflicted. In short, Roe’s first example proves the contrary of what it was offered to show: children who are born alive after suffering prenatal injuries can recover

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311 410 US at 161.
312 410 US at 161-162 (footnotes omitted).
313 See Dietrich v Inhabitants of Northampton, 138 Mass. 14 (1884) (rejecting a wrongful death claim by the administrator of a child who was born alive, but prior to viability, when its mother miscarried after falling due to the defendant’s negligence). Although Dietrich’s reasoning was tantamount to a denial that a non-viable fetus qualified as a person, and was influential in some jurisdictions, other courts reached the same result by a different path, arguing that evidentiary problems and the risk of fraudulent claims justified refusing to recognize a cause of action in such cases. See W. Prosser, Handbook of the Law of Torts 335 (4th ed. 1971).
314 Prosser, supra n. 313, at 336.
316 Forsythe, Abuse of Discretion, supra n. 284, at 283 figure 7.
for those injuries, under a tradition that had already emerged when Roe was decided, and is now of longer duration than the short-lived one that first arose in the 1880s.

Roe’s second torts example shifts from claims for prenatal injuries by a surviving child to claims for wrongful death attributable to prenatal injuries:

In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents’ interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. 317

This example collapses upon examination. The premise of a wrongful death claim under a typical American wrongful-death statute is precisely that a “person” has been wrongfully killed, 318 and the statutorily specified relatives of that deceased person may bring a derivative cause of action against the wrongdoer for whatever types of damages the statute authorizes them to seek. 319 The wrongful death cause of action may vindicate “the parents’ interest,” but it presupposes that their fetus was a person subject to being wrongfully killed, and as such is obviously inconsistent with the view that the fetus “represents only the potentiality of life,” at least so far as tort law is concerned. 320 As of 2011, forty states allowed wrongful death suits for the killing of an unborn child, and nine of those states do not require that the fetus have been viable when it was killed. 321

Nevertheless, even today most states do not allow claims for the wrongful death of a pre-viable fetus, and it might be objected that this is evidence that those jurisdictions do not regard the pre-viable fetus as normatively human beings and persons. 322 This objection overlooks the

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317 410 US at 162.

318 See, e.g., Neb. Rev. Stat. sec. 30-809 (Reissue 1985) (“Whenever the death of a person shall be caused by the wrongful act, neglect, or default, of any person . . . “).

319 See Goldberg, Sebok, & Zipursky, Tort Law: Responsibility and Redress (Aspen 3d ed. 2012) 396 (“Wrongful death and loss of consortium actions each claim that the plaintiff – usually a relative of the victim of the underlying tort – suffered an injury as a result of an act that was wrongful to someone else, and not wrongful as to the plaintiff herself”).

320 Roe, 401 US at 162.

321 See Forsythe, Abuse of Discretion, supra n. 284, at 284 fig. 8.

322 Even if this objection were well-founded, that would not save Roe’s claim that tort law treats all of “the unborn” – including viable fetuses as well as pre-viable ones – as non-persons. Even Holmes’s famous opinion in Dietrich v Inhabitants of Northampton, 138 Mass. 14 (1884), which held that a pre-viable fetus who was born alive was not a “person” within the meaning of Massachusetts’ wrongful-death statute, implied that “an infant dying [after] it was able to live separated from its mother” would qualify as a “person” whose estate could seek compensation for prenatal injuries causing its death. Id. at 16. Yet as Joseph Dellapenna has written, the Dietrich opinion is “[t]he
possibility that our legal tradition might recognize pre-viable unborn fetuses as persons in the
bedrock sense that the criminal law protects their lives from destruction at the hands of others
(including their mothers), while declining to afford them the less exigent protections of tort and
property law for perfectly sensible reasons that do not suggest that their lives are of little worth.
As I’ll now show, that is exactly the message implicit in contemporary wrongful death law.

To put in perspective the contemporary denial by many states of survivors’ claims for the
wrongful death of a pre-viable fetus, recall that the common law infamously rejected all
wrongful death claims by survivors or executors, whether the deceased was born or unborn.323
That rule was overturned in England by Lord Campbell’s Act in 1846, and in the United States
by state statutes mostly enacted between 1860 and 1890.324 These statutory wrongful death
actions were originally limited to pecuniary losses suffered by the close relatives of the decedent,
and “[p]ecuniary loss was unusual in the death of any young child and would have been
unthinkable for an unborn child.”325 In recent years, some courts have interpreted the category
of pecuniary losses broadly to include damages for loss of companionship “because they
constitute services which have a financial value to the next of kin,”326 while others have
abandoned the pecuniary loss rule on the ground that “[t]he real loss sustained by a parent is not
the loss of any financial benefit to be gained from the child, but is the loss of love, advice,
comfort, companionship and society.”327 These rationales would enable the parents of a young
child who was wrongfully killed to recover damages for the loss of their already-established
relationship with that child, but would be of little help in prenatal wrongful death cases. Perhaps
the parents of a viable fetus could recover for the loss of a nascent relationship with their unborn
child, but in the early stages of pregnancy no such relationship is possible.328

There is thus an alternative explanation for the disfavored treatment of wrongful death claims by
survivors of pre-viable fetuses: the damages wrongful death law seeks to redress have little if
any application to their deaths because – *whether or not pre-viable fetuses are persons for
purposes of tort law* – their parents have never enjoyed their “love, advice, comfort,
companionship, and society.” The denial of parents’ claims for the wrongful deaths of their pre-

closest one comes in the nineteenth century to a serious questioning of the underlying moral and legal notions” that
informed that era’s restrictive abortion statutes. Dellapenna at 463.

323 Baker v Bolton, 1 Camp. 493 (K.B. 1808).

324 See Goldberg et al, supra n. 319, at 385-387.

325 Dellapenna at 465.


327 Sanchez v Schindler, 651 SW2d 249 (Tex. 1983).

328 Many parents would grieve for the death of a pre-viable fetus, but most courts do not allow recovery for grief in
wrongful death cases, although there appears to be a recent trend in favor of doing so. See Sonya Harrell Hoener,
viable fetuses thus emerges as a pragmatic policy, not a judgment that no wrong is done to a pre-viable fetus when someone negligently or intentionally kills it.

But what of tort law’s failure to compensate for the harm to the pre-viable fetus itself? A pre-viable fetus that is wrongfully killed is deprived of the future life it would otherwise presumably have enjoyed, and tort law’s failure to compensate for it seems to assign a much lower value than this Article has argued is appropriate. This anomaly, however, is illusory. To this day, American wrongful death law generally treats the victim’s lost enjoyment of life as a non-compensable injury, even when the victim’s survivors are allowed to bring wrongful death claims for the compensable injuries to them. 329 For better or worse, in this respect tort law treats the pre-viable fetus no worse than a child or adult who is wrongfully killed.

In short, Roe’s account of tort law’s treatment of the unborn ignores the steadily *increasing* protection of their interests throughout the twentieth century and mischaracterizes the legal landscape as of 1972. Authority to the contrary is simply ignored. For example, in the paragraph we are considering, Roe cites the 1971 edition of William Prosser’s treatise on tort law three times,330 yet in the cited section Prosser paints an entirely different picture than Roe:

> [M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. After its birth, it has been held that it may maintain a statutory action for the wrongful death of the parent . . . . All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof.”331

329 See Andrew Jay McClurg, It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 66 Notre Dame L. Rev. 57 (1990). See also Hoener, n. 328 supra, at 81 (noting that “hedonic damages” for the decedent’s loss of life are allowable in only five jurisdictions). Consequently, even in jurisdictions that allow a wrongful death claim based on the killing of a pre-viable fetus, the fetus’s lost enjoyment of its future life would typically not be recoverable.


331 Prosser, The Law of Torts 336 (4th ed. 1971). Roe ignored the cases Prosser alludes to in this excerpt, which hold that a child may sue for the wrongful death of its parent, even if the parent is killed before the child is born. See, e.g., Nelson v. Galveston, H. & S.A. Ry. Co., 78 Tex. 621, 626, 14 S.W. 1021, 1023 (1890) (holding that the plaintiff, “although unborn at the time of his father’s death, was in being, and one of his surviving children” within the meaning of the wrongful death statute). Whether or not one should infer from such holdings that the fetus is a person, surely they imply that the fetus is a new, biologically human being that has interests of which it can wrongfully be deprived.
b. Property Law

Roe devotes a mere two sentences to property law’s supposed refusal to recognize the unborn as “persons in the whole sense”:\(^{332}\):

Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem. Perfection of the interests involved, again, has generally been contingent upon live birth.

This argument is intended to make good on the opinion’s claim, earlier in the same paragraph, that the common law has been reluctant “to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.”\(^ {333}\) Yet the first sentence of this excerpt concedes that property law \textit{has} accorded both substantive interests and procedural rights to the unborn. The necessary implication is that, whether or not the unborn are “persons in the whole sense,” property law has traditionally treated them as “persons” in \textit{some} sense and for some purposes.

As for the paragraph’s earlier claim that these practices are limited to “narrowly defined situations,” this passage fails to support it, and neither does our legal tradition. As Chief Justice Shaw explained in 1834, “the distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases; . . . it does not apply to cases of descents, devises and other gifts; and . . . generally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered.”\(^ {334}\) Accordingly, Anglo-American courts routinely construed testamentary provisions to “living children” – and even to children “born in the lifetime” -- as including the child \textit{en ventre sa mere}.\(^ {335}\) In particular, the inheritance rights of posthumously-born children have often been held to vest immediately upon the death of the testator, even though the child was unborn at the time of death. For example, courts have ruled that a remainder (vested or contingent) vests in an unborn child “when the particular estate determine[s],”\(^ {336}\) that an unborn child’s interest as a tenant in common “vested immediately in [it], while \textit{en ventre sa mere}, upon

\(^{332}\) 410 US at 162.

\(^{333}\) 410 US at 161.

\(^{334}\) Hall v Hancock, 32 Mass. 255, 257-58 (1834). See also Thellusson v Woodford, 31 Eng. Rep. 117, (Ch. 1798) (“Why should not children \textit{en ventre sa mere} be considered generally as in existence? They are entitled to all the privileges of other persons”).

\(^{335}\) Hall, 32 Mass. at 257-258 (“children living”); Trower v Butts, 57 Eng. Rep. 72, 74 (Ch. 1823) (“born in the lifetime” as well as “living at the death” both include a child \textit{en ventre sa mere}).

\(^{336}\) Aubouchon v Bender, 44 Mo. 560, 568 (1869).
the death of the father,” and that a posthumous child is “entitled to share in the income of a trust from the date of her father’s death rather than from the date of her subsequent birth.”

What is true – and what Roe may have meant by suggesting that the interests of the unborn are not “perfect[ed]” unless they are born alive – is that any interest that vests in the fetus is defeasible if it is not subsequently born alive. But while the fact that the fetus’s interests are in this sense “contingent on live birth” lends some support to Roe’s claim that property law does not treat fetuses as “persons in the whole sense,” the critical issue for our purposes is a different one: does property law recognize that the fetus is a new life in being that, if not yet a person, is becoming a person, and whose interests should be protected beginning when it is conceived? The answer to that question is unquestionably “yes.” The fetus can acquire vested interests in utero, and those interests are perfected when it is born. Prior to birth, the fetus would rarely if ever benefit from having perfected property interests, so the formal imperfection of its interests causes it no harm. Nor will the legal rule cause any harm to the fetus if it dies before being born: the interests it acquired en ventre sa mere will be extinguished, but the fetus cannot possibly have formed any testamentary preferences that would be frustrated by their forfeiture.

The general pattern, then, is one in which property law recognizes the fetus, throughout pregnancy, as presently capable of acquiring substantive and procedural property rights. To be sure, although Roe did not bother to cite them, there are cases taking a more restrictive view.

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337 Deal v Sexton, 56 SE 691, 692 (N.C. 1907).

338 Maledon, at 353 (describing Industrial Trust Co. v Wilson, 200 A. 467 (R.I. 1938)).

339 In Deal v Sexton, 144 NC 157, 56 SE 691 (1907), the North Carolina Supreme Court held that a posthumous child inherited equally with her siblings as a tenant in common and that the pre-partum partition and sale of the property without the consent of the unborn child was ineffective as against her rights. Remarkably, this holding came in an action brought by the child, after attaining her majority, against a subsequent purchaser in good faith. The court reasoned that because, under established law, “the inheritance vested immediately in the plaintiff, while en ventre sa mere, upon the death of the father, the conclusion must follow that such inheritance must not be divested and the child’s estate destroyed by judicial proceedings to which it was in no form or manner a party, and for which not even a guardian ad litem was appointed.” 56 SE at 692. In a post-Roe decision many years later, the North Carolina Court of Appeals argued that this decision and others like it rest on the legal fiction that a child en ventre sa mere is treated “as if” already born alive, and that “[l]ive birth, the event which the “legal fiction” anticipates, is a condition precedent to the exercise of the property rights of the child en ventre sa mere.” Stam v State, 267 SE 2d 335, 341 (N.C. App. 1980), rev’d on other grounds, 275 S.E.2d 439 (N.C. 1981). This conclusion seems wrong: in Deal, for example, the Court plainly thought that a court could have appointed a guardian to “exercis[e]” the property rights of the child en ventre sa mere by consenting (or refusing to consent) to the partition and sale of the property of which that child was a tenant in common.

340 Roe, 410 US at 162.

341 For example, in In Re Peabody, 158 NE2d 841 (NY 1959), the New York Court of Appeals held that a statute providing that a trust may not be revoked without the consent of all “persons beneficially interested” does not require the consent of a child en ventre sa mere. Asserting that a contrary holding would give rise to many practical difficulties, the Peabody court refused to “impute to the legislature an intent to require the impossible.” Id. at 842.
Nevertheless, as between the two extremes – that the law of property unqualifiedly treats fetuses as persons, or that it unqualifiedly refuses to treat them as persons – the former is much closer to the truth. Testators sought to leave property to children conceived but as yet unborn because they cared about the lives and future well-being of those very fetuses, and the courts agreed with them in regarding the unborn as capable of having (and receiving) interests.

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In sum, as with the law of criminal abortion, so with the common law of tort and property: before viability, and increasingly even before quickening, the Anglo-American legal tradition recognized the separate existence of new life that was either human or becoming human, and implicitly assigned great value to the lives and interests of the unborn.

3. *Fourteenth Amendment Personhood and the Value of Fetal Life*

As Justice Stevens was fond of pointing out, in the years since Roe no Justice has ever questioned its holding that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” It seems never to have occurred to Stevens that this might reveal more about the habits of thought of Supreme Court Justices than about the correctness of Roe’s holding. Several scholars, including Philip Rafferty, James Witherspoon, and most recently Michael Paulsen, have made forceful arguments that at least from quickening on, and possibly throughout pregnancy, the unborn are Fourteenth Amendment persons. If so, the state’s interest in protecting an unborn Fourteenth Amendment person manifestly outweighs the

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Although that holding would have sufficed to decide the case, the Peabody court then turned to the infant’s guardian’s argument that “since a child *en ventre sa mere* is deemed ‘in being’ or ‘alive’ for purposes of taking property, it should likewise be so regarded under [the statute].” Id. at 844. It asserted that this rule was a legal fiction, and that in the law of property “a child *en ventre sa mere* is not regarded as a person until it sees the light of day.” Id. at 844. As the discussion in text shows, the weight of authority had long been to the contrary.

342 See Casey, 505 US at 913 (Stevens, J., concurring in part); Webster, 492 US at 569 n.13 (Stevens, J., concurring in part); Thornburgh, 476 US at 779 n.8 (Stevens, J., concurring).

343 410 US at 158.

woman’s interest in an elective abortion.\textsuperscript{345} Roe even suggests that, so interpreted, the Amendment would \textit{compel} the states to criminalize abortion throughout pregnancy.\textsuperscript{346}

For present purposes, however, it is unnecessary to take up this complex and momentous question. Even if Roe’s holding that the unborn are not Fourteenth Amendment persons is correct, that holding does not entail an interest-balancing judgment adverse to pre-viability prohibitions on elective abortions.

First, Roe itself acknowledged that the state’s interest in viable fetal life outweighs the woman’s interests in an elective abortion. But viable fetuses are no less “unborn” than pre-viable ones, and are equally non-persons within the meaning of the Fourteenth Amendment. It cannot be the case, therefore, that the mere fact that pre-viable fetuses are not Fourteenth Amendment persons precludes the possibility that the state’s interest in protecting their lives outweighs women’s interests in elective abortion. Indeed, Roe recognized that its holding that the unborn are not Fourteenth Amendment persons did not foreclose the possibility that the state could have a compelling interest in protecting fetal lives throughout pregnancy. After ruling against Texas on the Fourteenth Amendment issue, the Court acknowledged that “[t]his conclusion . . . does not of itself fully answer the contentions raised by Texas,” and proceeded to address the state’s alternative claim that “life begins at conception” and thus the state has a compelling interest in protecting it from that point forward.\textsuperscript{347}

Second, Roe and its defenders fail to consider why the framers and ratifiers of the Fourteenth Amendment would have chosen not to categorize the unborn as persons, if in fact that was their intent. In light of the historical evidence I have already summarized, the answer cannot possibly be that they thought Anglo-American law viewed the unborn as entitled to no legal protection from abortion. Given what even Roe conceded to be “[t]he anti-abortion mood prevalent in this country in the late 19th century,”\textsuperscript{348} it would be equally fanciful to suggest that they \textit{intended} to deprive the unborn of the legal protections they already enjoyed. Nor, given the absence of any discussion in Congress or in the state legislatures about the status of the unborn under the

\textsuperscript{345} See Roe, 410 US at 156-157 (“If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment”). To be sure, it might be argued that the woman has an equal protection right not to be required to ‘rescue’ her unwanted fetus even if the fetus is a person. See Regan, supra n. 176, at 1641 (“The personhood of the fetus, even if it be conceded, is not an adequate reason (indeed it is no reason at all) for treating the pregnant woman differently from other potential Samaritans”). This Article will not undertake to critique the arguments for recasting abortion rights in equal protection terms advanced by Regan and others. See generally Erika Bachiochi, Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights, 34 Harv. J. L. & Pub. Pol. 889 (2011).

\textsuperscript{346} See Roe, 410 US at 157 & n.54.

\textsuperscript{347} 410 US at 159.

\textsuperscript{348} 410 US at 141.
Amendment, is it credible that the framers and ratifiers had any inkling that it might deprive them of those protections.  

Why, then, didn’t the framers of the Fourteenth Amendment unambiguously include the unborn as Fourteenth Amendment persons, thereby entitling them to equal protection and due process of law, and eliminating the risk of erroneous interpretation that eventually materialized in Roe?  In my judgment, the answer is that including the unborn would likely have constitutionalized a set of legal issues that lay within the traditional domain of state law, and as to which there was absolutely no reason to think that federal intervention was necessary.  When the Amendment was ratified, no less than “when the Constitution was adopted[,] the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States,” and a similar understanding prevailed with regard to the general criminal law, including offenses against the person. Abortion law, which lies at the intersection of family law and criminal law, was thus quintessentially a matter for the states.  Federalizing these issues would have been both superfluous as well as radical: when the Amendment was adopted, most states had recently revised their laws in the direction of greater protection for the unborn; modern tort law was in its infancy, and claims for prenatal injuries or for the wrongful death of a fetus were as-yet unheard of; and the law of property treated the unborn child as if it were already born alive for all purposes from which it might benefit.  Under these circumstances, the exclusion of the unborn from Fourteenth Amendment personhood was meant to leave their juridical status and the extent of their rights where it had always been – with the states, which

349 See Roe, 410 US at 177 (Rehnquist, J., dissenting) (inferring from the absence of any “question concerning the validity” of the numerous restrictive state abortion laws in existence in most states “when the Fourteenth Amendment was adopted” that “the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter”).

350 Just what the framers of the Amendment would have thought those issues were is a complicated question I will not attempt to answer.  This much seems clear: an Amendment that explicitly protected the unborn through the Due Process Clause, the Privileges or Immunities Clause, and the Equal Protection Clause would have placed some restrictions on the states’ discretion with regard to the legal treatment of fetuses, and would likely have imposed some affirmative obligations on the states to protect them. The argument in text does not depend on knowing precisely what those ramifications would have been (or would have been thought to be). To put the point in colloquial terms, the framers of the Amendment would not have wanted to “go there,” and would have seen no reason to do so.


remained free to treat the unborn as legal persons for all state-law purposes, for some, or for none.

4. The Lack of Consensus On When Normatively Human Life Begins

In declining to “resolve the difficult question of when life begins,” Roe claims that “[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.” But Roe never explains why the judiciary’s inability to determine when normatively human life begins could support its holding that a state may not adopt the theory that human life begins at conception, and claim a compelling interest in protecting that life. On this issue, the most defensible interpretation of Roe is that the Supreme Court is responsible for determining what counts as a compelling or overriding state interest, and that the lack of consensus about when normatively human life begins precludes recognizing such an interest at conception. Case’s reworking of the right to elective abortion in interest-balancing terms, however, makes the lack of medical-philosophical-theological consensus about when normatively human life begins largely irrelevant. After Casey, the question is not whether the state’s interest in protecting pre-viable fetal life is “compelling”; it is whether that state interest outweighs the woman’s interests in an elective abortion. The lack of consensus about when normatively human life begins does not preclude an affirmative answer to that question, provided the Court can arrive at a “reasoned judgment” one way or the other.

Even assuming that the presence or absence of consensus about when normatively human life begins has some relevance to the interest-balancing question, Roe’s account of “the wide divergence of thinking on this most sensitive and difficult question” (when human life begins) misses the mark. Roe identifies five competing answers, presented in the following order: (1) live birth, (2) quickening, (3) viability, (4) “the Aristotelian theory of mediate animation,” under which the fetus did not begin to live until 40 days after conception for a male, and 80 days for a female; and (5) conception. The bottom line, Roe implies, is that there has never been a

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353 410 US at 159.
354 410 US at 160-161.
355 See Roe, 410 US at 134 n.22.
356 In addition to these theories, Roe had previously noted a sixth: that human life begins when “the embryo or fetus became ‘formed’ or recognizably human.” 410 US at 133. Philip Rafferty argues that there was a longstanding consensus in favor of this view in England, that fetal formation, rather than quickening, was the common-law test for being pregnant with a “quick” (that is, living) child, and that it was not until the early 1800s that “quickening” supplanted being “quick with child” as the criterion for whether an abortion was a crime at common law. Rafferty, supra n. 249, at 114-192. If Rafferty is correct, the common-law crime of abortion protected fetuses even before “quickening,” because “the process of fetal formation . . . was thought to occur at about forty or so days after conception.” Id. at 128.
consensus that human life begins at conception: that theory is but one of a handful of theories that have had substantial support throughout history.

Given that each of Roe’s other major historical claims is wrong, one would have to be especially credulous to rely on this one. Even if Roe were to prove accurate in this regard – an issue I cannot pursue here\(^3\) -- the lack of consensus it describes among theologians, philosophers, and physicians should count for relatively little. As Roe itself implicitly acknowledges, for centuries there was a consensus in Anglo-American law and culture that human life begins \textit{not later than} at quickening, when the fetus can be perceived by its mother to be moving.\(^4\) One widely-held rationale for this position was that the fetus should be accorded the status of new, fully human life as soon as it could be determined to be alive.\(^5\) When combined with the scientific discovery of fertilization in the early 19\textsuperscript{th} century, this rationale led many people to embrace the theory that new human life begins at conception. Whether or not that theory ever achieved consensus status, it was an important stratum in a broader Anglo-American consensus from roughly 1840-1960 that the unborn were entitled to \textit{legal} protection against abortion from the earliest stages of pregnancy. That consensus also included those who, recognizing that conception marked the beginning of new, biologically human life, believed all post-conception life to be worthy of legal protection even if full personhood attaches at some later point in human development.\(^6\) By the time of the adoption of the Fourteenth Amendment, this consensus had

\(^3\) Doing so would require a careful evaluation of what philosophers, theologians, and physicians have believed, over the course of Western civilization, about when human life begins, as well as of the factual premises on which their beliefs were bases.

\(^4\) Roe’s treatment of the common law concerning abortion includes a historical explanation of “the absence of a common-law crime for pre-quickening abortion.” 410 US at 132-33. Unsurprisingly, that same history also explains the \textit{presence} of a common-law crime for post-quickening abortion. As Roe describes it, from the various theological, philosophical, and civil and canon law views on when human life begins, “a loose consensus evolved in early English law that [the fetus became formed and animated] at some point between conception and live birth.” 410 US at 133. There was disagreement about precisely when this occurred. The three candidates Roe mentions are when the fetus becomes recognizably human (roughly the 8\textsuperscript{th} week), mediate animation (thought to be “40 days for a male and 80 days for a female”), and quickening (roughly the 16\textsuperscript{th} week). Id. at 134. The upshot, according to Roe, was that “Bracton focused upon quickening as the critical point,” and “the significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country.” Id. at 134. As this account implies, there was “a loose consensus” not only that human life begins before birth, \textit{but that it begins no later than quickening}, and the common law accordingly criminalized abortions after that point in gestation.

\(^5\) Michael Stokes Paulsen argues cogently that this was Blackstone’s view. See Paulsen, supra n.266, 74 Ohio St. LJ at 26-28.

\(^6\) Paulsen asserts that “[t]he distinction that some posit today— and that was an inarticulate premise of Roe— between biological human life and legal personhood is a recent, post-modern philosophical distinction alien to both the scientific and legal worldview of the eighteenth and nineteenth centuries.” Id. at 27. I agree that this distinction – which corresponds to the distinction I have drawn between biologically human life and normatively human life -- was less commonly invoked in the nineteenth century than it is today, but I disagree that it had no following at that time. Holmes, for example, would certainly have been familiar with the biological evidence that the life of a new human organism begins at conception. Yet his 1884 opinion in Dietrich leaves little doubt that Holmes thought that
found expression in laws making abortion unlawful throughout pregnancy in the overwhelming majority of states. Stemming as they did from a consensus that the lives of the unborn should be protected by the criminal law unless the pregnancy endangered the mother’s life, these laws necessarily implied that the woman’s interest in an elective abortion is outweighed by the state’s interest in pre-viable fetal life. That consensus should carry far greater weight than the absence of a consensus (then or now) among physicians, philosophers, and theologians on when normatively human life or “personhood” begins.

It is no answer to this argument that American law (common and statutory) did not place the unborn – even the post-quickening unborn – on a completely equal footing with those who were born alive and thus unquestionably persons. Although this observation is correct, it is also beside the point. I am not arguing that the Anglo-American legal tradition has consistently expressed a consensus view that normatively human life begins at conception. How could it have, when the nature of “conception” was not understood until well into the 19th century? Beyond that, even after quickening, the common law did not take the position that the fetus is a human being whose life is entitled to exactly the same legal protections the criminal law accorded to those who have been born alive. As we’ve seen, according to Blackstone, even the ancient common law treated abortion as manslaughter, not murder, and by Coke’s time the criminality of abortion had been further downgraded to that of “a great misprision.” The upshot is that post-quickening abortion was a misdemeanor rather than a felony at common law. This difference in treatment cannot be explained as a matter of leniency to the woman, because it ensured leniency to the abortionist. It is obviously inconsistent with the theory that the fetus is a normatively human being or a full-fledged person in the eyes of the law beginning at quickening, let alone at conception. On the other hand, it is entirely consistent with the pragmatic view for which I have argued within the terms set by Casey: that once the fetus is known to be alive, it must be recognized as new life that is naturally becoming human and should accordingly be protected by the criminal law – though not necessarily to the full extent that a normatively human being is.

Once it was discovered -- and became generally understood -- that the fetus is alive beginning at fertilization, Anglo-American law greatly increased the level of protection accorded to fetal life.

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a pre-viable fetus was not a person, but should rather be considered “a part of the mother.” 138 Mass. at 17. See also id. at 16 (emphasis added) (considering and rejecting the argument that “on general principles, an injury transmitted from the actor to a person through his own organic substance, or through his mother, before he became a person, stands on the same footing as an injury transmitted to an existing person through other intervening substances outside him”). And as Justice Coulter’s 1850 opinion for the Pennsylvania Supreme Court’s in Mills v Commonwealth shows, some persons who distinguished between the pre-viable fetus or embryo and a “living child” nevertheless viewed abortion as criminal. See 13 Pa. at 633 (“It is not the murder of a living child, which constitutes the offence, but the destruction of gestation, by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated”).

By 1868, thirty of the thirty-seven states prohibited abortion by statute, twenty-seven of these states extended the prohibition to pre-quickening abortions, and twenty (a majority) punished abortions equally before and after quickening. Dellapenna at 315.
The common law was gradually replaced, in both England and the United States, by statutes that criminalized abortion throughout pregnancy, treated it as a felony, and typically imposed severe prison sentences on the abortion provider. Even then, however, the states did not classify abortion as murder (though a number did restore the common law’s original severity by treating it as manslaughter). Thus, it remained true that the lives of the unborn were not accorded the full legal protection extended by the law of homicide to those born alive. Nevertheless, 19th- and early 20th-century American law incontrovertibly assigned greater weight to the protection of all pre-viable fetal life than to women’s interests in obtaining elective abortions.

Overall, then, both in its earlier and later stages, the Anglo-American legal tradition supports a “reasoned judgment” contrary to the one on which, under Casey, the right to elective abortion now rests. Casey does not tell us how much weight the verdict of history and tradition should receive for interest-balancing purposes. But given the unequivocal character of that verdict, it seems fair to expect that a “reasoned judgment” would give it very substantial weight.

Conclusion

Under Casey, the right to elective abortion rests on an interest-balancing judgment that the woman’s specially protected liberty interest in an elective abortion outweighs the state’s “profound” interest in protecting the life of her pre-viable fetus. Yet although Casey’s own methodology calls for doing so, the Court has never explained or defended that judgment on the merits. In Roe, the Court posited that the right to elective abortion was fundamental, and consequently had no occasion to engage in direct interest-balancing; it sufficed to declare that the state’s interest was not compelling prior to viability. In Casey, three of the five Justices who joined the majority opinion reaffirming “Roe’s essential holding” declined to address the soundness of the interest-balancing judgment they derived from Roe. Instead, they insisted that that judgment survives, whether or not it is wrong as an original matter, by virtue of Casey’s “explication of individual liberty . . . combined with the force of stare decisis.”

Others have argued that Justices O’Connor, Kennedy, and Souter were wrong in concluding that stare decisis and related considerations of “institutional integrity” warranted reaffirming the right to elective abortion regardless of the soundness of the interest-balancing judgment on which it now rests. In this Article, I have instead argued that that foundational interest-balancing judgment is wrong even when evaluated using Casey’s own methodology, and should therefore be relied on only to the limited extent required by stare decisis. I have also suggested that

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362 See Witherspoon, Re-Examining Roe, supra n. -- at 44 (“In all, seventeen states and the District of Columbia at some time had a statute denominating acts causing the death of an unborn child “manslaughter,” “murder,” or “assault with intent to murder”).

363 505 US at 853 (majority opinion).

364 For a powerful critique of Casey’s reliance on stare decisis, see Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?, 109 Yale L.J. 1535 (2000).
Justice Kennedy should join forces with his conservative colleagues in explicitly holding that, for the reasons presented in this Article, the right to elective abortion is unsound in Casey’s own terms, even if it remains binding law because of *stare decisis*. Doing so would not preclude those Justices who believe Roe and Casey should be overruled from adhering to their position, any more than it would preclude other Justices (including Kennedy) from adhering to the view that *stare decisis* requires otherwise. Were a majority of the Justices to endorse this interest-balancing judgment, the Court could do a far better job of explaining why Casey should be interpreted to give states broad leeway to regulate pre-viability abortions, and why no additional reproductive rights should be recognized by analogy to the unsound -- but for now ineradicable - - right to elective abortion.

No less importantly, a holding that the right to elective abortion fails Casey’s interest-balancing standard would back that interpretation of Casey with “the force of *stare decisis.*” As noted in the Introduction, it isn’t difficult to construct a scenario in which five Justices are willing to reexamine Casey with a view to possibly overruling the right to elective abortion, and their cause could only be helped by such a holding. On the other hand, it is at least as easy to construct an alternative scenario in which five Justices are willing to reexamine Casey with a view to reinstating Roe’s strict scrutiny of pre-viability abortion regulations. As matters stand today, such a pro-Roe majority could simply explain that it approved of Casey’s reaffirmation of the right to elective abortion, but agreed with Justice Blackmun’s separate opinion in Casey that Roe’s strict scrutiny was appropriate. In light of the ample pre-Casey authority employing Roe’s approach, and the fact that the Casey plurality’s undue-burden standard has been endorsed (rather than assumed for purposes of decision) by a majority of the Court on only one occasion, *stare decisis* would pose no serious impediment to a return to Roe. By contrast, if a different majority of the Court had previously held that the state’s interest in pre-viable fetal life outweighs the woman’s interest in an elective abortion, and applied that holding in subsequent cases, the new majority would need to overturn those decisions to have its way. Whether or not that would prevent a ‘Roe restoration,’ it would at least raise the institutional costs of undoing one of Casey’s “central premise[s]” – that “the government has a legitimate and substantial interest in preserving and promoting fetal life.”

Whatever their effect (if any) on the Supreme Court, the arguments this Article has presented provide an additional basis for challenging the validity of the right to elective abortion in the courts of legal-academic and public opinion. In arguing that the right to elective abortion fails to

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365 See Carhart II, 550 US at 171 (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting) (asserting that Casey, no less than Roe and later decisions, engaged in “close scrutiny” of “state-decreed limitations on a woman’s reproductive choices”).

366 See Casey, 505 US at 926 (Blackmun, J., dissenting in part) (“Our precedents and the joint opinion's principles require us to subject all non-de-minimis abortion regulations to strict scrutiny”).

367 See Carhart I, 530 US at 921 (characterizing the undue-burden standard as an “established principle”).

368 Carhart II, at 145.
withstand a *de novo* interest-balancing analysis, even on the assumption that the pre-viable fetus is only “potential human life,” I am in no way suggesting that the other arguments most often deployed against the right to elective abortion are wrong. This Article neither affirms nor denies that *all* unenumerated substantive due process rights are bereft of any basis in the Constitution; that, if there is to be a category of unenumerated rights, it should include only those that meet Glucksberg’s “deeply rooted” in tradition standard (which the right to elective abortion plainly does not); or that every fetus is a normatively human being and a person from the time when fertilization is complete.

This Article *does* argue that, if the Due Process Clause is assumed to authorize the Court to recognize unenumerated rights that lack a “deeply rooted” pedigree, and to do so on the strength of an interest-balancing analysis, “[t]he weighing or valuing of contending interests in this sphere [should be] only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of state and individual.”369 Under that approach, advanced by Justice Souter in Glucksberg, the interest-balancing arguments I have presented should prevail even if the woman’s interest in an elective abortion arguably outweighs the state’s interest in protecting the pre-viable fetus, provided that the state’s interest is not “so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied.”370 Even some readers who are not convinced that the state’s interest in protecting pre-viable “potential human life” outweighs the woman’s interest in an elective abortion will agree, I hope, that the state’s interest is not so greatly inferior as to fail this arbitrariness standard.

The core of my argument, however, does not depend on making interest-balancing more deferential to state regulation by means of an arbitrariness standard. On the contrary, I have argued that a careful description and evaluation of the conflicting interests leads to the conclusion that the state has an overriding interest in protecting the pre-viable fetus, understood (consistently with Roe and Casey) as new life that is naturally becoming human, but is not yet normatively human. Although the woman has weighty interests in avoiding the pre- and post-natal burdens of an unwanted pregnancy, they do not justify depriving the fetus of its future as a normatively human being. Although this argument does not require recourse to history, it is strongly supported by the Anglo-American legal tradition’s consistent insistence on protecting fetal life once that life could be shown to have begun – originally at quickening, and subsequently (once the basic facts of embryology were discovered in the 19th century) throughout pregnancy. Interest-analysis and tradition both show that the protection of “potential human life” is a state interest that outweighs even the heavy pre- and post-natal burdens a woman endures when she is required by law to carry an unwanted pregnancy to term. Accordingly, even if *stare decisis* prevents its abolition, the right to elective abortion should be confined to the parameters laid down in Casey and applied in Carhart II, and should be deprived of generative force in all other contexts involving state regulation that protects post-conception

369 Glucksberg, 521 US at 768 (Souter, J., concurring).

370 Id.
fetal life. Only when that is done will the Court fully honor Casey’s commitment that “[t] political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential.”

371 Carhart I, 530 US at 957 (Kennedy, J., dissenting). See also Casey, 505 US at 871-873 (plurality opinion).