

Conforming to the Rule of Law: Person and Human Being in 14th Amendment Jurisprudence

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ABSTRACT

All human beings qualify as persons within the meaning of the Fourteenth Amendment of the U.S. Constitution. Nothing less will satisfy the rule of law. The current non-recognition of unborn human beings as persons is the result of discrimination, and its consequences include a denial of equal protection and due process. A legal system that creates a class of depersonalized human beings who may be exploited as subjects for scientific experiments or simply terminated for the benefit of those human beings who are chosen to be born substitutes rule by law for the rule of law. The text of the Fourteenth Amendment and constitutional jurisprudence both support the reversal of *Roe v. Wade* and *Planned Parenthood v. Casey* on the basis that all human beings are persons who cannot be denied constitutional personhood by any society that values life, liberty, justice and equality.

INTRODUCTION

I am certainly not an advocate for frequent changes in laws and constitutions.... But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change in circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain under the regimen of their barbarous ancestors.¹

¹ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *The Writings of Thomas Jefferson*, ed. Paul L. Ford (1899), vol. 10, p. 42. This quote is also inscribed on the wall of the statue chamber of the Jefferson Memorial in Washington, D.C.

Since fetuses and embryos on an objective modern scientific basis are biologically human beings, it may be argued that it is morally wrong to deny unborn human beings the status of personhood.² If it is accepted that the unborn members of the human species are human beings, as there is

² The Fourteenth Amendment analysis that follows is premised on the assertion that scientific evidence proves fetuses and embryos are biologically human beings. While it is beyond the scope and objective of this article to engage in a scientific debate, two years before the *Roe v. Wade* decision, a group of 220 distinguished physicians, scientists, and professors submitted an amicus curiae brief to the Supreme Court expressing that science had established that “human life is a continuum...” and that “the unborn child from the moment of conception on is a person....” Motion and Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees at 29-30, *Roe v. Wade*, 410 U.S. 113 (Nos. 70-18, 70-40), 1971 WL 128057. For more information on the scientific and medical community’s view that life begins at conception, see *The Human Life Bill: Hearing on S. 158 and H.R. 900 Before the Subcomm. on Separation of Powers of the S. Judiciary Comm.*, 97th Cong. 7, 14 (1981) (Statement of Micheline Mathews-Roth, Principal Research Associate, Harvard Medical School), where Professor Micheline Mathews-Roth, of Harvard University’s Medical School, stated that “In biology and in medicine, it is an accepted fact that the life of any individual organism reproducing by sexual reproduction begins at conception....” Similarly, Jerome Lejeune, M.D., Ph.D., and former professor of genetics at the University of Paris, Sorbonne has stated that “each of us has a unique beginning, the moment of conception...when the information carried by the sperm and by the ovum have encountered each other, then a new human being is defined because its own personal and human construction is entirely spelled out. The information which is inside the first cell obviously tells this cell all the tricks of the trade to build himself as the individual this cell is already...to build that particular individual which we will call later Margret or Paul or Peter, it’s already there, but it’s so small we cannot see it.... It’s what life is, the formula is there...if you allow the formula to be expanded by itself, just giving shelter and nurture, then you have the development of the full person.” Jerome Lejeune, *The Concentration Can: When Does Human Life Begin? An Eminent Geneticist Testifies* (San Francisco: Ignatius Press 1992), p. 145. Even leading advocates of abortion are compelled to accept the premise that a fetus is a human being or person from the time of conception in order to make their strongest arguments. See, e.g., Judith Jarvis Thomson, “A Defense of Abortion,” *Phil. & Pub. Affairs* 1 (1971): 47-66. Finally, this author has also written previously about the biological evidence demonstrating the fact that fetuses and embryos are human beings. See generally Charles I. Lugosi, “Respecting Human Life in 21st Century America,” 48 *St. Louis U. L.J.* 425 (2004).

no proof they are not, then it is arguable that as human beings they are natural persons. If all this is true, I contend that it is immoral and legally wrong to exclude the unborn human being at any age prior to birth from the constitutional meaning of person under the Fourteenth Amendment to the U. S. Constitution. It is my position that American constitutional law will not conform to the rule of law and will fail to honor the basic doctrines of equal protection under the law and substantive human rights until the legal meanings of “human being” and “person” are identical and are mutually recognized as a matter of constitutional law when a new human being is created at the time of conception.

Denial of constitutional personhood to the unborn human being segregates an entire class of the human family, making the unborn human being legally separate and unequal to those members of the human family who have been born. The result is that only those wanted children who are chosen to live and who are in fact born become legally recognized as people following live births. For it is birth that marks the current legal boundary when a legal person is recognized in the United States of America, and birth therefore bestows the constitutional rights of life, liberty and citizenship.

Unlike legally recognized persons, the unborn members of the human family who are not chosen for live birth have a different destiny. These unborn human beings are non-persons in law, and as such, are subject to the will of physically mature and legally empowered persons, normally their mothers. As non-persons, these unborn human beings may be legally treated as commodities and property, for they are not legal constitutional persons. Millions of these healthy non-persons are aborted while they are alive in the womb or in the birth canal.³ Their physical body parts, such as fetal brain tissue, may be harvested as living commodities for use in commercial scientific experiments designed to cure diseases of mature persons, such as Alzheimer’s disease in elderly

³ Lawrence B. Finer & Stanley K. Henshaw, The Alan Guttmacher Inst., “Estimates of U.S. Abortion Incidence in 2001 and 2002” (2005), http://www.guttmacher.org/pubs/2005/05/18/ab_incidence.pdf. The Institute estimates that 1,303,000 abortions were performed in the U.S. in 2001. Id. at 2.

adults.⁴ Many non-persons are thus destroyed and forced into the role of disposable slaves designated to advance medical, reproductive and scientific goals such as embryonic stem cell research, cloning, and in vitro fertilization (“IVF”).⁵ Other non-persons who are the product of IVF are created outside the human womb and will also never be born, for millions of these non-persons are frozen indefinitely until used for science or ultimately destroyed as waste.⁶

Non-persons have no constitutional right to life. Prior to birth, all non-persons, both wanted and unwanted, have no legal rights other than those specifically bestowed by positive law. Prior to actual birth, a non-person’s destiny may change at any time. An unwanted human being may become chosen for birth, and a previously wanted human being may become unwanted. Even after birth there are no guarantees that constitutional personhood will endure, for a transition from person to non-person is possible if positive law and legal definition make it so. This transition of a human being from person to non-person after birth may be triggered by a physical disability or disease.⁷

⁴ New neurons arise from neural stem cells in both the fetal and adult brain. See Stem Cell Information National Institutes of Health, “Stem Cell Basics,” Sept. 2002, <http://stemcells.nih.gov/staticresources/info/basics/StemCellBasics.pdf>. These undifferentiated cells resemble cells in a developing fetus that give rise to the brain and spinal cord. Id., see generally Stem Cell Information: The Official National Institutes of Health Resource for Stem Cell Research, <http://stemcells.nih.gov/info/basics> (last visited Mar. 31, 2006). Researchers at Johns Hopkins University recently reported preliminary evidence that cells derived from embryonic stem cells can restore movement in an animal model of amyotrophic lateral sclerosis (ALS). D.A. Kerr et al., “Human Embryonic Germ Cell Derivatives Facilitate Motor Recovery of Rats with Diffuse Motor Neuron Injury,” *J. Neuroscience* 23 (2003): 5131.

⁵ It is argued that it is ethical to do embryonic stem cell research from spare embryos created in the IVF process. See John A. Robertson, “Ethics and Policy in Embryonic Stem Cell Research,” 9 *Kennedy Inst. of Ethics J.* 109 (1999).

⁶ See A.D. Gurmankin et al., “Embryo Disposal Practices in IVF Clinics in the United States,” 22 *Pol. & Life Sci.* 4 (2004), available at <http://www.politicsandthelivesciences.org/Contents/Contents-2003-9/PLS2003-9-22-02-0004.pdf>.

⁷ Helga Kuhse argues that the loss of psychological continuity renders adult persons into non-persons, as well as affects their identity. Helga Kuhse, “Some Reflections on the Problem of Advance Directives, Personhood and Personal Identity,” *Kennedy Inst. of Ethics J.* 9 (1999): 347-64.

As a matter of current American constitutional law, the word “person” does not have the same meaning as “human being” until the process of live birth has been completed. Until then, legalized abortion permits parents, doctors, scientists, and judges, amongst others, to openly discriminate between human beings that are chosen for birth and those that are not. Even though in the United States the Fourteenth Amendment to the Constitution offers a right of equal protection and due process so that no person is deprived of his or her life or liberty, this right is denied to any human being who is not defined a person—all unborn human beings.

I contend that the Fourteenth Amendment is not confined to its historical origins and purposes, and was always available to protect all human beings that are defined as non-persons, including all unborn human beings, individually and as a class.⁸ It is a matter of judicial interpretation. The Supreme Court can define “person” to include all human beings, born and unborn, the justices simply choose not to do so.

In the following discussion, I will show that common law, history and tradition establish that the unborn from the time of conception, are both persons and human beings, thus strongly supporting an interpretation that the unborn meet the definition of “person” under the Fourteenth Amendment.

I maintain that there cannot be the “rule of law” if the Constitution is interpreted to perpetuate a legal caste system of “separate and unequal,” where there is no justice for the unborn. I contend there is no justice for the unborn human being so long as there is denial of equality, respect, dignity, liberty, life and due process of law. Since the word “person” in the Fourteenth Amendment is capable of being interpreted liberally in an objective manner consistent with the rule of law to include all human beings, not to do so violates the spirit of the Declaration of Independence, natural law, and the core liberal ideals of equality and human dignity.

Finally, I will argue that all unborn human beings, whether wanted or not, have a right to equal protection and due process under the Fourteenth Amendment. If I am right, then the Constitution gives all

⁸ Charles I. Lugosi, “Beyond Personhood: Abortion, Child Abuse and Equal Protection,” 32 *Okla. City U. L. Rev.* (2005) (forthcoming 2006).

embryos and fetuses the right to life and the inherent right to be born free from the current and future threats of unnatural death and involuntary sacrificial exploitation and death as subjects in medical experiments.

Relying on the reasoning of the Supreme Court in *Brown v. Board of Education*,⁹ I will show by analogy and the use of paraphrase that the U.S. Supreme Court can overrule *Roe v. Wade*¹⁰ just on the grounds of equal protection. Such a result would not return the matter of abortion to the various states. The Fourteenth Amendment would thereafter prohibit abortion in every state. What follows is a blueprint for constitutional change that will show that the jurisprudence and constitutional text exists for interpreting “person” to mean the same thing as a natural human being.

The Supreme Court has the power to reverse flawed precedent and can now do justice according to the rule of law. There is simply no place in American society for a caste system¹¹ that discriminates against non-persons.

I. DIVIDING HUMAN BEING INTO PERSONS AND NON-PERSONS

Does the word “person” in the Fourteenth Amendment include unborn human beings? If it does, then embryonic stem cell research, cloning, the destruction of IVF embryos and abortion are unlawful.¹² If it does not, as a matter of logic and consistency, then cloning, embryonic stem cell research, the freezing and destruction of embryos and abortion should be lawful activities subject to rational regulation.

The legal question of whether an unborn child is a constitutional person was decided in 1973, when the Supreme Court in *Roe v. Wade*¹³ ruled that a fetus was not a person until it was born. Justice Blackmun, who authored the majority opinion, avoided answering the question of when human life begins:

⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹ *Plyler v. Doe*, 457 U.S. 202, 213 (1982): “The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”

¹² *Roe*, 410 U.S. at 159.

¹³ See *id.* at 158.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. *We need not resolve the difficult question of when life begins.* When 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.¹⁴

It was unnecessary to decide this question, as the answer did not matter, since the Court specifically held that “the word ‘person,’ as used in the Fourteenth Amendment, did not include the unborn.”¹⁵ An unborn human being was therefore not a “person” and had no right to life. Personhood was to be conferred by operation of law only after a baby was fully born. The constitutional right to life was thus reserved for those children chosen by love or fate to be born. Justice Blackmun admitted that if the unborn were constitutional persons, the case for abortion would collapse.¹⁶

Roe v. Wade declared that unborn human beings were not “persons” and accordingly did not have any constitutional right to life and liberty.¹⁷ This result was in line with the Court’s review of history that disclosed “the unborn have never been recognized in the law as persons in the whole sense.”¹⁸ The decision also fully restored the freedom to have an abortion prior to quickening that existed at the time the Constitution was adopted.¹⁹

To decide whether an unborn human being is a “person” in the constitutional sense, the first logical step is to decide what a human being is, and when a human being begins its existence as a living organism. The next steps are to discover what a person is, to decide whether a human being is equivalent to a person, and to decide whether a person in the constitutional sense ought to be confined to natural persons born and unborn—that is human beings that are fully human and are not artificial beings or any derivative or hybrid of any non-human animal species.

¹⁴ Id. at 159 (emphasis added).

¹⁵ Id. at 158.

¹⁶ See id. at 156-57.

¹⁷ See id. at 158.

¹⁸ Id. at 162.

¹⁹ See id. at 140.

A. Human Being

What is a human being? Science informs us as to the answer. Putting aside philosophical differences, biology supplies the lowest common denominator of agreement between reasonable people. Human embryology is so advanced it can be assumed that a new human being is created at the time of conception.²⁰ This new human being, provided it survives natural and externally induced hazards, will develop according to its own genetic blueprint long after its birth until the process of development and degeneration cause this organism to die of natural or external causes. This scientific search for the biological truth is entirely objective and reliable. I therefore assume all zygotes, embryos, and fetuses are human beings from the time of conception until the time of natural death.²¹

B. Person

What is a person? Law informs us as to the answer. Scientific evidence of humanity is irrelevant. A person may be a human being after birth but not before. A person may be a human being after birth, but that human being may not be denied life, by application of positive law, because of race, disability or religion. The lawmakers' use of the word "person" is analogous to that of an elastic band, being stretched or retracted to accomplish a political agenda. If a human being is included in the definition of person then there is legal sanctuary for that individual. If a human being is not included in the definition of a person, then there is

²⁰ See Erich Blechschmidt, *The Beginnings of Human Life* (Transemanatics, Inc. trans., 1977), pp. 16-17: "It is now manifest; the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum."

²¹ I am confining my discussion to "embryos" that are living organisms and a product of the union of sperm and egg. Outside the scope of the discussion is the status of a "parthenote," the result of activating an egg with its own chromosomes, which has no potential to develop into a human being. The status of an "ovasome," the result of transplanting chromosomes from a somatic cell into an ovoplast, which may develop in the same way as a normal embryo, is assumed to be the same as an embryo. See generally Ann A. Kiessling, "What is an Embryo? A Rejoinder," 37 *Conn. L. Rev.* 1 (2004).

no legal safe place for that individual. This process is entirely subjective. Dr. Edmund D. Pellegrino, currently Chairman of the President's Council on Bioethics, rejects the claim of those who argue that the personhood is a matter of mere definition: "If personhood is a social construct and conforms to no objective nature, then we are free to define humans into and out of humanity as well as personhood at will. Some already classify retarded persons, patients in permanent vegetative states, persons who have poor quality of life or infants who have cerebral damage as nonpersons. A further malignant step of this social construction could allow differences in ethnicity, political belief, color, or religion to be used to define someone out of personhood. The recent history of genocide, ethnic cleansing, racial segregation and enforced sterilization makes this danger abundantly clear."²²

II. DEFINING PERSON

I contend that a human being is a person from the time of conception. I define a person as a living organism of the species *Homo sapiens*. My definition applies to all persons living both inside and outside the womb. This definition draws a bright line intended to give constitutional legal protection to all human beings from the beginning to the very end of life.²³

This protection includes the inalienable rights to life, liberty and

²² Edmund D. Pellegrino, "The Pre-Embryo: An Illusory Category of Convenience," *Pediatrics in Rev.* 20 (1999): 32-34, available at <http://pedsinreview.aappublications.org/cgi/content/full/20/8/e32>.

²³ I accept the constitutional interpretation of Professor Charles L. Black who believed that the Declaration of Independence, the Ninth Amendment, and the privileges and immunities clause of the Fourteenth Amendment together lay out a comprehensive framework of human rights in American jurisprudence. Black argues that all government bodies in America have the general duty to "secure" the rights to life, liberty, and the pursuit of happiness. I accept, as he does, that the Declaration is "embodying 'law' in the full sense." The Ninth Amendment refers to unspecified "other" rights retained by the people. Both Black and I maintain this reference to "other" incorporates the specified rights explicitly named thirteen years earlier in the Declaration. Thus the self-evident natural law rights enumerated in the Declaration of Independence are by a simple rule of construction compelled by the ninth Amendment a part of the Constitution, and binding upon every state. Charles L. Black Jr., *A New Birth of Freedom* (1999), pp. 44-45.

the pursuit of happiness that are foundational to natural law from which the American Declaration of Independence drew its origin. In 1825, Supreme Court Justice Bushrod Washington, the nephew of President Washington, in *Cornfield v. Coryell*, was called upon to explain the meaning of Art. IV, Sec. 2 of the original Constitution, which reads, “The Citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several states.”²⁴ Justice Washington stated:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and pursue and obtain happiness and safety, subject to such restraints as the government may justly prescribe for the general good of the whole.²⁵

The Declaration of Independence and its principles of natural law, the right to life, liberty, and the pursuit of happiness, was thus used to explain the meaning of the words “privileges and immunities of citizens.” Significantly, *Cornfield v. Coryell*, clarified that it is the duty of the government to protect the enjoyment of life, and to accomplish this goal the government may impose legal restraints upon those people who try to exercise unrestrained liberty to take away the enjoyment of another’s life.

Not only do citizens enjoy the right to life, but since the adoption of the Fourteenth Amendment in 1868, it may be argued that the natural law rights proclaimed in the Declaration of Independence extend to persons who are not citizens, for no state may “deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²⁶ Because

²⁴ U.S. Const. art. IV, § 2.

²⁵ *Cornfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1925). See also Black, *supra* 23, at 49-50.

²⁶ U.S. Const. amend. IX.

citizenship is acquired by birth or naturalization, it may be assumed that the unborn human being is not a citizen and has no claim under any state or national privileges and immunities clause to protection of his or her life. If I am right that “person” means the same thing as “human being,” then all human beings have a right to life. In my view, unborn human beings are persons and are entitled to government protection once the unborn are judicially determined to be persons from the first moment of their creation.²⁷ All this flows from Professor Black’s premise that the Declaration of Independence has the force of law and its natural law principles are incorporated into the Constitution.²⁸

III. EQUALITY AND SELF-EVIDENT TRUTHS

What is truth? Are there “self-evident truths”?²⁹ Are “all men . . . created equal”?³⁰ Are all men “endowed by their Creator with certain inalienable rights”?³¹ Do these inalienable rights include at a minimum, the rights to “Life, Liberty and the pursuit of Happiness”?³² Are these words mere expressions of wishful thinking or discoverable objective truths? Did Thomas Jefferson, author of the Declaration of Independence, know the difference between the injustice that is caused by arbitrary will of a tyrannical King using law and fear to coerce obedience and the eternal laws of the Judeo-Christian God that is the foundation of the rule of law? I believe he did, as did those fifty-five other delegates from various American colonies who risked their lives and property in order to eventually sign this revolutionary document.

²⁷ For a contrasting view, see generally Jens David Ohlin, Note, “Is the Concept of the Person Necessary for Human Rights?” 105 *Colum. L. Rev.* 209 (2005). Ohlin argues that personhood is a cluster concept comprised of biology, rational agency, and conscious unity. *Id.* at 229. These components are divisible and may be used to justify the denial of constitutional personhood to embryos and fetuses. *Id.*

²⁸ “[W]e ought now to recognize that the Declaration of Independence has the force of law, and that the States are bound by the law of the Declaration.” Black, *supra* note 23, at 52.

²⁹ The Declaration of Independence, para. 2 (U.S. 1776).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

Thomas Jefferson used the moral authority of natural law to assert that all members of the human family are created equal and possess the fundamental right to life:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station *to which the Laws of Nature and of Nature's God entitle them*, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights*, that among these are *Life, Liberty and the pursuit of Happiness*. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, –That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.³³

The ideas expressed in the Declaration of Independence were revolutionary. The dissolution of political ties between the English Crown and the Colonies was necessary to achieve the separation and equality to which Americans were entitled by the “Laws of Nature and of Nature’s God.”³⁴ It is the “Creator” who endows “all men” at the point of creation with equality and the self-evident rights to life and liberty. Thus, the source of basic human dignity and the eternal inalienable rights to life and liberty are found in natural law from the moment of creation. These rights are a gift from God, an indispensable part of human nature, and a sacred trust of governments to safeguard from abuse. Every human being is regarded with equal worth in a society where law is fused with Christian morality. What is this Christian morality?

A. *Christian Morality*

At the heart of Christian morality are the teachings of Jesus. The

³³ Id. (emphasis added).

³⁴ Id. at para. 1.

Pharisees³⁵ tested Jesus by asking “what is the greatest commandment in the Law?”³⁶ Jesus answered: “Love the Lord your God with all your heart, with all your soul, with all your mind. That is the greatest commandment. It comes first. The second is like it: Love your neighbor as yourself. Everything in the Law and the prophets hangs on these two commandments.”³⁷ Jesus gave a new commandment: “Love one another; as I have loved you, so you are to love one another.”³⁸ The only thing that matters is love. God himself is love.³⁹ The greatest love is to give up one’s own life to save the life of another human being.⁴⁰ Love is not a matter of words or talk; if it is genuine, it is demonstrated by actions.⁴¹ Love means following the commands of God,⁴² to let those commands be our rule of life.⁴³ Love in action is proof Christians belong to the realm of truth.⁴⁴

Justice is love in action. The history of the common law and its development suggests that the conception of justice inherited by America from England is the Christian teaching of love.⁴⁵ For example, in *Donoghue v. Stevenson*, Lord Atkin took the Christian commandment to love your neighbor as a legal duty extending a duty of care to one’s neighbor.⁴⁶ Principles of justice are thus discovered by judges in the

³⁵ Jesus had harsh things to say about lawyers and Pharisees: “Alas for you lawyers and Pharisees, hypocrite...you have paid tithes...but you have overlooked the weightier demands of the Law, mercy, justice, and good faith. It is these you should have practiced without neglecting the others.... How can you escape being condemned to hell? ...On you will fall the guilt of all innocent blood spilt on the ground.” *Matthew* 23:23-24, 33-35.

³⁶ *Matthew* 22:35-36.

³⁷ *Matthew* 22:37-40.

³⁸ *John* 13:34-35; see *John* 15:12-13; 17.

³⁹ *1 John* 4:9, 16.

⁴⁰ See *John* 15:13-14.

⁴¹ See *1 John* 3:18.

⁴² See *2 John* 6.

⁴³ See *2 John* 6.

⁴⁴ See *1 John* 3:18-20.

⁴⁵ See Lord Alfred Denning, *The Changing Law* (1953), p. 107.

⁴⁶ *Donoghue v. Stevenson*, 1932 S.C. (H.L.) 31, 44 (1932) (U.K.): “The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply.”

common law and are thus derived from the Christian commandment of love. Natural justice is not automatically recognizable by anyone, but by those whose thinking is imbued with habits of Christian thought and behavior passed down through generations. The principle of natural justice found in the English common law “has been molded for centuries by judges brought up in the Christian faith.”⁴⁷

“The Christian religion has always stressed the importance of... absolute truth....”⁴⁸ Jesus taught, “I am the way; I am the truth and I am life.”⁴⁹ The Holy Spirit, known as the Spirit of Truth, was promised by Jesus to be with his believers forever.⁵⁰ God’s word is truth, and Christian believers are consecrated by the truth.⁵¹ To establish truth and justice in a country, there must be rule of law founded upon a religious and moral foundation. Lord Alfred Denning, considered by many to be the greatest English jurist of the past century, observed: “Religion concerns the spirit in man whereby he is able to recognize what is truth and what is justice; whereas law is only the application, however imperfectly, of truth and justice in our everyday affairs. If religion perishes in the land, truth and justice will also.”⁵²

President George Washington also knew this truth, for he reminded his audience in his Farewell Address of 1796 that a religious and moral foundation to law was vital to achieving justice, good government and political success:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men & citizens. The mere Politician, equally with the pious man ought to respect & to cherish them. A volume could not trace all their connections with private & public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the Oaths, which are the instruments of investigation in Courts

⁴⁷ Denning, *supra* n45 at 108-09.

⁴⁸ *Id.* at 100.

⁴⁹ *John* 14:6.

⁵⁰ See *John* 14:16-17; 15:26.

⁵¹ See *John* 17:17-19.

⁵² Denning, *supra* n45 at 122.

of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure—reason & experience both forbid us to expect that National morality can prevail in exclusion of religious principle.

'Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of Free Government. Who that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric.⁵³

B. *Inalienable Rights*

If all men are created equal, then it must follow that the living human organism, at the time of conception, is politically and legally endowed with the inalienable rights of life, liberty and the pursuit of happiness.⁵⁴ On this basis, the right of the unborn to life (no abortion, no harvesting of embryonic stem cells, no cloning), liberty (the right to be left alone, freedom from harm) and the pursuit of happiness (the right to autonomy, self-determination, development of full potential) is assured. Human beings are endowed at creation with an inalienable right to life. This natural right cannot be removed or conferred, as it is the common heritage of human beings that all are created equal. This right can be discovered in existing constitutional law or explicitly restated as a constitutional amendment.⁵⁵

I agree with the late Professor Charles L. Black Jr. that the doctrines of the Declaration should be taken to have the force of constitutional law.⁵⁶ The words of the Declaration “demolish one legal authority and set up another” and as such, are “constitutive words” and “the root of all political authority among us, of all legitimate exercise of

⁵³ Farewell Address of George Washington, President of the United States (Sept. 19, 1796), available at <http://gwpapers.virginia.edu/documents/farewell/transcript.html>.

⁵⁴ See Mark Trapp, “Created Equal: How the Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn,” 28 *Pepp. L. Rev.* 819, 824 (2001).

⁵⁵ See James Bopp, Jr., “An Examination of Proposals for a Human Life Amendment” in *Restoring the Right to Life: The Human Life Amendment* ed. James Bopp, Jr. (1984), p. 352.

⁵⁶ Black, *supra* n23, at 18.

power.”⁵⁷ The “inalienable rights” at the heart of the Declaration were implicitly incorporated into the Constitution in 1791 with adoption of the Ninth Amendment,⁵⁸ which states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁵⁹ Thus, the inalienable rights to life, liberty and the pursuit of happiness are rationally consistent with the text of the Ninth Amendment that refers to the rights retained by the people. In addition, according to Professor Black, the inalienable rights to life, liberty and the pursuit of happiness are the “certified cardinal values of our political morality.”⁶⁰

C. Harmony

The legal grievances that led to the reasons for the American War of Independence offer hope that the United States is a nation founded upon the rule of law, and that at the root of the American Constitution is the objective truth that human beings and persons are indistinguishable from one another. For it is only when there is harmony and proper alignment in the meaning of human being and person that our universe will be free of discrimination and inequality that inevitably result so long as objective truth is ignored. If all of humanity is created equally at conception, and if each member of the human race has the inalienable right to life, liberty and the pursuit of happiness, there is no place in today’s world for extinguishing embryonic and fetal life.⁶¹ There is a link between freedom and truth:

When freedom is detached from objective truth it becomes impossible to establish personal rights on a firm rational basis; and the ground is laid for society to be at the mercy of the unrestrained will of individuals or the oppressive totalitarianism of public authority.... Where God is denied and people live as though he did not

⁵⁷ Id. at 9.

⁵⁸ Id. at 38.

⁵⁹ U.S. Const. Amend. IX .

⁶⁰ Black, *supra* n23 at 38.

⁶¹ Some scholars rely on the Declaration of Independence as authority to protect unborn human life. See Paolo Torzinni, “Reconciling the Sanctity of Human Life, the Declaration of Independence and the Constitution,” *Cath. Law.* 40 (2000): 197; See also Trapp, *supra* n54.

exist, or his commandments are not taken into account, the dignity of the human person and the inviolability of human life also end up being rejected or compromised.⁶²

Until the legal definition of person and human being merge, resulting in harmony between science and the law, the current dissonance between truth and fiction will increase, rather than diminish. The cruel paradox will continue that as science adds more convincing proof that human life begins at conception, judges will continue to decide that healthy babies in healthy mothers may be killed with legal immunity as a matter of choice. It is law that must conform to the objective truth of science, so the meanings of person and human being are identical in both law and science.⁶³

IV. NO JUSTICE IS POSSIBLE WITHOUT MORALITY

In his letter from the Birmingham Jail, Dr. Martin Luther King Jr. stated:

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly.... We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed...[T]here are two types of laws: There are *just* and there are *unjust* [laws].... I would agree with Saint Augustine that "An unjust law is no law at all." ...Now, what is the difference between the two? How does one determine when a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas: An unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority, and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher, Martin Buber, substitutes an "I-it" relationship for an "I-thou" relationship, and ends up relegating persons to the status of things. Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and awful.... Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to

⁶² Pope John Paul II, *The Gospel of Life (Evangelium Vitae)*, (1995) §96..

⁶³ Intellectual relativism is the archenemy of objective truth. See Robert Ivan Martin, *The Most Dangerous Branch* (Montreal: McGill-Queens Univ, Press, 2003), pp. 11-12.

disobey segregation ordinances, for they are morally wrong.⁶⁴

I adopt Dr. King's idea that, "a just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law."⁶⁵ St. Thomas Aquinas held a similar view, distinguishing between just and unjust laws that either conformed to the natural law, or were corruption of the law:

Human law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when law is contrary to reason, it is called an unjust law; but in this case it ceases to be a law and becomes instead an act of violence.... Every law made by man can be called a law insofar as it derives from the natural law. But if it is somehow opposed to the natural law, then it is really not a law but rather a corruption of the law.⁶⁶

Thomas Aquinas believed when a law is contrary to reason it is unjust and lacks moral authority.⁶⁷ If a law is "at variance with natural law, it will not be law, but spoilt law."⁶⁸

Lord Denning observed: "Although religion, law and morals can be separated, they are nevertheless still very much dependent on each other. Without religion there can be no morality: and without morality there can be no law."⁶⁹ Professor Patrick Devlin warned of impending social disintegration when law is divorced from Judeo-Christian morality.⁷⁰ Lord Howe agreed, "while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure...."⁷¹

I believe that the legal segregation of unborn human beings from

⁶⁴ See Martin Luther King, Jr., "Letter from a Birmingham Jail," Apr. 16, 1963, available at http://www.sas.upenn.edu/African_Studies/Articles_Gen_Letter_Birmingham.html.

⁶⁵ Id.

⁶⁶ Thomas Aquinas, *Summa Theologiae* I-II, q. 95, art. 2.

⁶⁷ See Thomas Aquinas, *Summa Theologiae* I-II, qq. 99–107.

⁶⁸ Id. at q. 105.

⁶⁹ See Denning, *supra* n45, at 99.

⁷⁰ See generally Patrick Devlin, *The Enforcement of Morals* (London UK: Oxford Univ. Press, 1959, 1996).

⁷¹ *Regina v. Howe*, [1987] 1 A.C. 417, 430 (H.L. 1987).

the rest of the human family degrades and depersonalizes the humanity of the unborn, stigmatizing non-persons as inferior to persons, who assert legal but not moral superiority over non-persons. This legal segregation substitutes an “I-it” relationship between a mother and her unborn child, relegating her baby to the status of a thing that may be killed with impunity. As legally inferior human beings, non-persons are at the mercy of those legally superior human beings who literally hold an arbitrary power of life or death over the unborn. Civil liberty is interpreted by persons as natural liberty—unrestrained freedom to exercise one’s absolute will even if it is detrimental to other human beings and society-at-large. This kind of corrupt thinking is repugnant to a just society governed by the rule of law where every human life is treasured and unborn babies are welcomed as persons.

V. DEFINING THE RULE OF LAW

I define the “rule of law” as government by laws that people of moral conscience are willing to obey because the laws are inherently just. The ideal of the “rule of law” is to live in a democratic society that places constitutional limits on the power of government, permanently protects inalienable human rights and fundamental freedoms from undue encroachment and provides equality before laws administered by an independent judiciary. I define “rule by law” as the antithesis of the “rule of law,” meaning to be governed by unjust laws in any society, including democratic societies, where the government may exercise arbitrary powers and may abridge inalienable human rights at will and remove from constitutional protection the inalienable civil rights of any human being, such as creating a class of non-persons. The main difference between these opposite concepts is that *justice* is the defining characteristic in a society governed by “rule of law,” and *deferential coerced obedience* is the defining characteristic in a “rule by law” society. Without a moral component that squares with the eternal and natural law of God that objectively sets up a standard of righteousness, there can be no rule of law, but the tyrannical imposition of rule by law.

Linkage of the rule of law and the supremacy of God is foundational for

the flourishing of truth and justice.⁷² Truth and justice do not exist in a vacuum; they exist in a society of human beings, organized into a political state. Unfortunately, a state may become tyrannical such that truth and justice can disappear or be stifled. The solution is respect for every human being as a person. The person becomes paramount, not the state. The state exists for the benefit of every human being; not that every human being exists for the benefit of the state.

America was founded upon the rule of law, anchored in the common law infused with Christian morality,⁷³ but has of late lost her moral compass and is no longer a nation of religious people thirsting for universal justice. The resolution to the current cultural, political and legal war over abortion, and the derivative battles over embryonic stem cell research and cloning, is found in the universal truth anchored in the concept of the rule of law that we are all created equal and that we all possess an inalienable right to life and liberty. Explicitly interpreting “person” in the Fourteenth Amendment to mean all human beings, including the unborn, from the time of conception to the time of natural death will fulfill the promise and vision of the signers of the Declaration of Independence. For there can be no rule of law, so long as the word “person” is legally manipulated to exclude and segregate classes or individuals from the human family and to discriminate against legally created castes in order to legally justify the killing or enslavement of human life. Not until then will there exist the rule of law in America.

VI. MISLABELLING RULE BY LAW AS THE RULE OF LAW

The U.S. Supreme Court in *Planned Parenthood v. Casey* displayed its fundamental misunderstanding of what the rule of law should mean, equating it with the doctrine of *stare decisis*.⁷⁴ Justice O’Connor equated abortion law jurisprudence built upon a questionable substantive due

⁷² See Denning, *supra* n45 at 122.

⁷³ See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

⁷⁴ *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).

process right of privacy,⁷⁵ now expanded to personal autonomy,⁷⁶ to the “rule of law:” “The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”⁷⁷ Whether conceived as “judicial legislation”⁷⁸ or a “judicially derived rule”⁷⁹ a constitutional right to an abortion is not the same thing as the “rule of law” as I have defined it, but its antithesis. The act of abortion, in and of itself, is repugnant to the rule of law. That is why many people intuitively refuse to accept as legitimate pronouncements by the Supreme Court in favor of abortion.⁸⁰ A judicial declaration that there is a constitutional right to an abortion, in the face of undisputed evidence that abortion unjustly kills innocent unborn children, is actually rule by law. There is no moral component to the license to abort. That a mother may arbitrarily exercise her liberty and take the inalienable life of a very young human being who belongs to the class of non-persons is not equality before the law. Coercion and force are the hallmarks of rule by law.

The rule of law cannot exist when law is divorced from morality. Yet that is exactly what the Supreme Court accomplished in *Casey*, by voiding state criminal laws that prohibited immoral conduct (abortion) and by elevating the personal liberty of one class of human beings (mothers) over the life and liberty of another class of human beings (unborn

⁷⁵ See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), finding a substantive right of privacy.

⁷⁶ See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003), citing *Casey*, 505 U.S. at 851.

⁷⁷ *Casey*, 505 U.S. at 871 (emphasis added).

⁷⁸ See *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting): “The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment” (emphasis added).

⁷⁹ *Casey*, 505 U.S. at 866.

⁸⁰ See, e.g., Carrie Gordon Earll, “Focus on Social Issues—What’s Wrong with Abortion?” in *Family.org*, Sept. 9, 2003, <http://www.family.org/cforum/fosi/bioethics/abortion/a0027679.cfm>, discussing the widespread opposition to abortion on moral grounds.

children).⁸¹ Justice O'Connor wrote that "[the Supreme Court's] obligation is to define the liberty of all, not to mandate [its] own moral code."⁸² The rule of law is thus ousted in that "realm of personal liberty which the government may not enter."⁸³ Judeo-Christian moral and ethical beliefs, once the very foundation of the common law for hundreds of years, will no longer rationally justify criminal laws that affect individual autonomy and the intimate choices of individuals that touch on personal dignity.⁸⁴ The individual member of the class of persons who have matured in their personhood can define his or her own meaning in life, and choose his or her own values, whether or not that person or those values are moral. The decision to bear or not to bear a child that has been conceived⁸⁵ is one of those choices that are at the heart of liberty:

[T]he most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.* Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁸⁶

⁸¹ See *Casey*, 505 U.S. 833 (1992), elevating the personal liberty of women by striking down several restrictions on abortion.

⁸² *Id.* at 850.

⁸³ See *id.* at 847.

⁸⁴ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting): "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . ."; *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003), adopting Justice Stevens's *Bowers* dissent as controlling for Due Process cases. Moral disapproval will also not survive a constitutional challenge under the Equal Protection Clause. See *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring): "Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."

⁸⁵ In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), an equal protection case, Justice Brennan extended the right of privacy to include an individual's choice to get pregnant (beget) and to terminate a pregnancy (bear): "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

⁸⁶ See *Casey*, 505 U.S. at 851 (emphasis added).

In commenting on the above passage, Justice Scalia recognized that the creation of a zone of personal privacy free from legislated morality to legally engage in immoral conduct that goes beyond sexual preferences to include the killing of human beings destroys the rule of law: “I have never heard of a law that attempted to restrict one’s ‘right to define’ certain concepts; and if the passage calls into question the government’s power to regulate *actions based on* one’s self-defined ‘concept of existence, etc.,’ *it is the passage that ate the rule of law.*”⁸⁷ One characteristic of a rule of law society is that moral choices that promote justice, respect and the dignity of all human life lie at the heart of all legislation and judicial decisions. This is no longer the case in American society, for in its political goal to legalize abortion, the Supreme Court attained the result it wanted but at the cost of the rule of law. The precedent set in the abortion cases validates new principled constitutional attacks upon laws that presently outlaw same sex-marriage, polygamy, bigamy, prostitution, adult incest, bestiality, assisted suicide and active euthanasia.⁸⁸ In a new age of relative morality, there are no standards of right and wrong based upon God’s laws. This means the beginning of “the end of all morals legislation,”⁸⁹ where individual liberty prevails over the collective wisdom of elected representatives who espouse moral values.

When the Supreme Court wants to, it can act in the name of the rule of law. For example, in *Romer v. Evans* it has purged a discriminatory state constitution that targeted as a class, politically powerful gay men and women.⁹⁰ The second amendment to the Colorado State constitution prohibited all legislative, executive or judicial action designed to protect gays and lesbians as a class.⁹¹ Justice Kennedy, writing for the majority, invoked the rule of law to invalidate that amendment.⁹² First, Justice

⁸⁷ See *Lawrence*, 539 U.S. at 588 (2003) (Scalia, J., dissenting), (second emphasis added).

⁸⁸ *Id.* at 590 (Scalia, J., dissenting), listing sexual offenses, such as adultery and fornication, that are now in jeopardy.

⁸⁹ *Id.* at 599.

⁹⁰ *Romer v. Evans*, 517 U.S. 620 (1996).

⁹¹ *Id.* at 624.

⁹² *Id.* at 632.

Kennedy noted that the target class was identified by a single trait—sexual orientation.⁹³ Second, he noted that it was this identified single trait that disqualified an entire class of human beings from legal protection and equality before the law.⁹⁴ This was unprecedented, and called for reversal, for the second Amendment created a caste system of human beings that is foreign and repugnant to the notion of the rule of law:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.... “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at very least mean that a bare...desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁹⁵

The most odious aspect of the offending state constitutional amendment was that it was a status based classification of persons designed to make one group of human beings unequal to everyone else: “A State cannot so deem a class of persons a stranger to its laws.”⁹⁶ “Class legislation... [is] obnoxious to the prohibitions of the Fourteenth Amendment...”⁹⁷

Romer is instructive for it compels us to ask analogous questions about the plight of the unborn human being. Are not embryos and fetuses, being unborn, also identified by this single trait? Are the unborn unable to seek legal protection because they fall outside the judicial definition of “person”? By virtue of their age and condition, are not unborn human beings unable on their own to seek the court’s assistance? Are not unborn human beings, as a class of unpopular people, the target of harm? Is not the classification of unborn human beings to depersonalize them as a matter of legal definition a deliberate choice to make them embryos and fetuses unequal and so deprive them of legal protection?

⁹³ Id. at 633.

⁹⁴ Id.

⁹⁵ Id. at 633-34, quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

⁹⁶ Id. at 635-36.

⁹⁷ Id., citing *United States v. Stanley*, 109 U.S. 3, 24 (1883).

Yet, when the Supreme Courts wants to create a caste system, as it did in *Roe* and *Casey*, it has done so by depersonalizing the politically powerless class of unborn human beings. Justice Stevens in *Casey* accounts for the predicament in which the unborn human being is placed, laying the responsibility upon all the members of the Supreme Court, for not one Justice has ever declared that an unborn human being is a “person” within the meaning of the Fourteenth Amendment:

The Court in *Roe* carefully considered, and rejected, the State’s argument “that the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment.” After analyzing the usage of “person” in the Constitution, the Court concluded that that word has application only postnatally.” Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: “Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense. Accordingly an abortion is not “the termination of life entitled to Fourteenth Amendment protection.” From this holding, there was no dissent, indeed, *no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a “person” does not have what is sometimes described as a “right to life.”*⁹⁸

For these reasons, Justice Stevens stated that the state’s obligation to protect the life and health of the mother has to take precedence over any duty to the unborn, which is literally defined out of constitutional existence.⁹⁹ Anticipating that some states might try to return the unborn back into constitutional existence, Justice Stevens turned to the arguments of Professor Ronald Dworkin, to reject such possibility: “If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women.”¹⁰⁰

To reverse *Roe v. Wade* and *Casey*, all that is needed is to equate

⁹⁸ See *Casey*, 505 U.S. 505 U.S. 833, 913 (1992) (emphasis added), citing *Roe*, 410 U.S. at 113 (citations omitted).

⁹⁹ *Id.* at 912-13.

¹⁰⁰ See *id.* at 914 (citing Ronald Dworkin, “Unenumerated Rights: Whether and How *Roe* Should Be Overruled,” 59 *U. Chi. L. Rev.* 381, 400-01 (1992).

unborn human beings with born human beings. The unborn will remain unequal until a majority of the members of the Supreme Court rules unborn human beings are “persons” within the language and meaning of the Fourteenth Amendment to the U.S. Constitution. When that defining moment arrives, the case for abortion collapses.¹⁰¹

Until then, tyranny governs unborn human beings who now live in a world of slavery and death, subject to the supreme arbitrary will of a master class, which in matters of personal autonomy, is free from any law imbued with moral principles.¹⁰²

Justice O’Connor suggested the Supreme Court’s legitimacy would be seriously weakened to admit it was wrong in *Roe v. Wade* and overrule it.¹⁰³ It is conceivable that a reversal would throw into disarray the status quo, confuse people who just abide by the law and possibly create guilt in those who once had doubts about aborting their children but resolved them by relying on the wisdom of the Supreme Court. Justice O’Connor refused to overrule *Roe v. Wade* not only because of reasons established pertaining to judicial precedent, but because “it would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law.”¹⁰⁴ O’Connor correctly observed that the Supreme Court’s power lies in its legitimacy as perceived by the people.¹⁰⁵ Overruling *Roe v. Wade*, according to Justice O’Connor, would damage much more than the Court’s legitimacy—it would damage the “Nation’s commitment to the rule of law.”¹⁰⁶

Nothing could be further from the truth. The point of this discussion is to justify the overruling of *Roe v. Wade* and *Casey* to restore the Supreme Court’s legitimacy and to correct Fourteenth Amendment jurisprudence by equating “human being” with “person” in order to bring

¹⁰¹ See *Roe*, 410 U.S. at 156-57.

¹⁰² “Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” per Justice Kennedy, in *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

¹⁰³ *Casey*, 505 U.S. at 866-67.

¹⁰⁴ See *id.* at 865.

¹⁰⁵ See *id.* at 865.

¹⁰⁶ *Id.* at 869.

American constitutional law into conformity with the rule of law. Legitimacy is derived by comporting to the Constitution, and not by acting as a non-elected super-legislature caving in to political pressure or exercising personal predilections.¹⁰⁷

Our next task is to discover what the rule of law is, why morality is inseparable from it, and to understand how the current absence of the rule of law threatens judicial integrity and social harmony.

VII. THE GENESIS OF THE RULE OF LAW IN AMERICA

The origin of the rule of law in American constitutional law may be traced back to June 15, 1215, when King John of England needed to appease his Barons at Runnymede, as they were angry with him over unfair taxes, abuse of royal power, and unjust laws.¹⁰⁸ Under duress, King John submitted to the Great Charter, known as the Magna Carta, and thereby surrendered some of his royal prerogative and sovereign power.¹⁰⁹ This event marked the commencement of a government of laws and not of men. It was a modest beginning to the separation of powers, guarantees of political liberty, limitations on the authority of government officials and legal reform consistent with justice. The absolute power of the English monarch was forever lost. In England there was now the humble beginning of an early form of rule by law.

The great English barrister and jurist, Lord Edward Coke, an advocate of the rule of law, greatly influenced the development of American constitutional law.¹¹⁰ Over the course of his life, Lord Coke, in his quest for justice, fought for the following principles: no human being

¹⁰⁷ See generally *id.* at 963 (Rehnquist, C.J., dissenting in part, concurring in part).

¹⁰⁸ See generally William Swindler, "Magna Carta: Law and Legacy" (1965); "Magna Carta" (1215), <http://www.fordham.edu/halsall/source/magnacarta.html>.

¹⁰⁹ See generally "Magna Carta," *supra* n108.

¹¹⁰ Lord Coke, as author of the Institutes of the Laws of England, influenced generation of American lawyers who looked to him for guidance in matters of civil liberties and constitutional law. See Jim Powell, "Edward Coke: Common Law Protection for Liberty," 47 *Freeman* (Nov. 1997), <http://www.fee.org/publications/the-freeman/article.asp?aid=4799>; U.S. National Archives & Records Administration, Magna Carta and Its American Legacy, http://www.archives.gov/exhibits/featured_documents/magna_carta/legacy.html (last visited Mar. 16, 2006).

may by sheer will and might govern another human being, for both were equal under the law and under the sovereign authority of God; an unjust law (statute) violating the common law was no law at all, and may be declared void by a court of law (Dr. Bonham's case, decided in 1610);¹¹¹ the law must be a certain, reliable guide and preserve fundamental liberties from arbitrary deprivation (stability and freedom under law); and that no one on order of the King may be indefinitely detained without charge (origin of habeas corpus).¹¹² These were just four significant contributions he made to the evolving concept of the rule of law.

In his capacity as Chief Justice of the Court of Common Pleas, Coke fearlessly asserted the independence of the judiciary, much to the dismay of King James I who expected judges to act as submissive servants.¹¹³ Coke's loyalty to the English Crown was not in question, for he had previously served as Attorney General during the reign of Queen Elizabeth I, and had successfully prosecuted Sir Walter Raleigh for treason.¹¹⁴ After the death of Elizabeth I, King James was publicly asserting rule by law, equating himself with God, and claiming it was his divine right to substitute his reasoned judgment for judicial decisions with which he disagreed.¹¹⁵ On November 13, 1608, Lord Coke confronted and rebuked the King, quoting Bracton, saying, "The King ought to be under no man, but under God and the law."¹¹⁶ The King was predictably furious. The King not only believed he was above the law; he believed he was the

¹¹¹ In Dr. Bonham's case, Lord Coke declared void an Act of Parliament that gave the Royal College of Physicians the power to be a party and judge in the same case. This was contrary to the common law principle that no one was to be a judge in his or her own cause. This case was a forerunner to the development of the power of judicial review. Bonham's Case, (1610) 77 Eng. Rep. 638 (C.P.), available at http://press-pubs.uchicago.edu/founders/documents/amendV_due_process1.html.

¹¹² Edward Coke, "The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of the Courts" 26, 37 (W. Clarke & Sons 1817) (1644).

¹¹³ Henry Roscoe, *Lives of Eminent British Lawyers* (1830), pp. 8-10.

¹¹⁴ *Id.* at 2, 4.

¹¹⁵ *Id.* at 9.

¹¹⁶ See Swindler, *supra* n108 at 172.

law.¹¹⁷

Attorney James Otis Jr. knew the difference between rule of law and rule by law.¹¹⁸ Following the death of King George II in 1760, Writs of Assistance became vigorously exercised in the colonies.¹¹⁹ Otis delivered a legal submission on February 24, 1761, in the council chamber of the Old State House in Boston in defense of his clients, Boston merchants, who challenged the unchecked legal authority of customs officers to search for smuggled goods.¹²⁰ Otis condemned Writs of Assistance as unconstitutional contrary to natural law and human rights.¹²¹ He declared that the power of these general search warrants was contrary to the rule of law because a man's home was his castle.¹²² To search a person's home was an invasion of privacy and a threat to individual liberty, for Writs of Assistance were unchecked governmental authority exercised at the suspicious whim and mere will of the executive who did not require any legal judicial standard to be met such as probable cause under oath.¹²³ In the audience was John Adams who recalled Otis referred to the colonies as "my country" and inspired the flame of independence to burn in the heart of patriots.¹²⁴

In 1764, Otis published *The Right of the British Colonies Asserted*

¹¹⁷ Roscoe, supra n113 at 10. Over the next four years, King James would issue Proclamations that purportedly had the force of law in furtherance of his divine will. In the Privy Council, Lord Coke successfully challenged this practice, observing that all indictments concluded with the words, "against the law and custom of England" or "against laws and statutes." There was never a practice of concluding with the words, "against the King's proclamation." Eventually King James dismissed Lord Coke from the judiciary, while he was serving as Chief Justice of the King's Bench and as a member of the Privy Council. Id. at 12, 14-15, 22-23.

¹¹⁸ Monty Rainey, "Founder of the Month: James Otis, Jr.," The Junto Society, Nov. 2002, <http://www.juntosociety.com/founders/jamesotis.html>.

¹¹⁹ See id.

¹²⁰ See id.

¹²¹ See id.

¹²² See id.

¹²³ See id.

¹²⁴ See Marc M. Harrold, "Computer Searches of Probationers—Diminished Privacies, 'Special Needs' & 'Whilst Quiet Pedophiles'—Plugging the Fourth Amendment into the 'Virtual Home Visit,' 75 *Miss. L.J.* 273, 333 n.203 (2005).

and Proved.¹²⁵ In the section entitled “Of the Natural Rights of Colonists,” he denounced the institution of slavery, stating, “The colonists are by the law of nature freeborn, as indeed all men are, whether black or white.”¹²⁶ He explained slavery was contrary to the rule of law and inseparable from the supremacy of God:

Does it follow that 'tis right to enslave a man because he is black? Will short curled hair like wool instead of Christian hair, as 'tis called by those whose hearts are as hard as the nether millstone, help the argument? Can any logical inference in favor of slavery be drawn from a flat nose, a long or a short face? Nothing better can be said in favor of a trade that is the most shocking violation of the law of nature, has a direct tendency to diminish the idea of the inestimable value of liberty, and makes every dealer in it a tyrant, from the director of an African company to the petty chapman in needles and pins on the unhappy coast. It is a clear truth that those who every day barter away other men's liberty will soon care little for their own.

Let no Man think I am about to commence advocate for *despotism*, because I affirm that government is founded on the necessity of our natures; and that an original supreme Sovereign, absolute, and uncontrollable, *earthly* power *must* exist in and preside over every society; from whose final decisions there can be no appeal but directly to Heaven. It is therefore *originally* and *ultimately* in the people. I say supreme absolute power is *originally* and *ultimately* in the people; and they never did in fact *freely*, nor can they *rightfully* make an absolute, unlimited renunciation of this divine right. It is ever in the nature of the thing given in *trust*, and on a condition, the performance of which no mortal can dispense with; namely, that the person or persons on whom the sovereignty is confer'd by the people, shall *incessantly* consult *their* good. Tyranny of all kinds is to be abhor'd, whether it be in the hands of one, or of the few, or of the many. And tho' "in the last age a generation of men sprung up that would flatter Princes with an opinion that *they* have a *divine right* to absolute power"; yet "slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that 'tis hard to be conceived that an *englishman*, much less a *gentleman*, should plead for it."¹²⁷

¹²⁵ See Rainey, *supra* n118.

¹²⁶ See James Otis, “The Rights of the British Colonies Asserted and Approved” in *Pamphlets of the American Revolution 1750-1776*, ed. Bernard Bailyn (1965), pp. 439-40, available at <http://www.pbs.org/wgbh/aia/part2/2h18.html> (last visited Mar. 16, 2006). But see Rainey, *supra* n118; he later publicly repudiated these comments.

¹²⁷ See James Otis, “The Rights of the British Colonies Asserted and Approved” in *The Founder's Constitution: Popular Bases of Political Authority* (1987), pp. 308-11, available at http://press-pubs.uchicago.edu/founders/print_documents/

Otis continued, arguing that legal precedent was not a justification for tyranny to persist when law is in conflict with the laws of nature given by God.¹²⁸ Where law deviates from truth and justice, it is the duty of the electorate in a democracy to exercise the right to vote and remove any tyrannical government that rules by law:

But if every prince since *Nimrod* had been a tyrant, it would not prove a *right* to tyrannize. There can be no prescription old enough to supersede the law of nature, and the grant of God almighty; who has given to all men a natural right to be *free*, and they have it ordinarily in their power to make themselves so, if they please.... The same law of nature and of reason is equally obligatory on a *democracy*, an *aristocracy*, and a *monarchy*: Whenever the administrators, in any of those forms, deviate from truth, justice and equity, they verge towards tyranny, and are to be opposed; and if they prove incorrigible, they will be *deposed* by the people, if the people are not rendered too abject. Deposing the administrators of a *simple democracy* may sound oddly, but it is done every day, and in almost every vote.¹²⁹

It was this same quest for the rule of law that fueled the passion and moral outrage by those whom Otis motivated that led to the Declaration of Independence. King George III ruled by law and revolution was the result. The rebellion was morally justified because the God given inalienable rights of life, liberty and the pursuit of happiness belonged to the people and rule by law had deprived Americans of natural justice and just laws. The situation had become so desperate that patriot Patrick Henry declared, "Give me liberty or give me death."¹³⁰

VIII. HOW HUMAN SLAVERY RUINED THE RULE OF LAW

A. *Political Compromise*

The hope of replacing the rule by law imposed by the British Crown with natural justice bestowing upon all Americans the inalienable rights of life, liberty and the pursuit of happiness was replaced by a pragmatic compromise that was necessary to preserve a fragile union that

[v1ch2s5.html](#) (last visited Mar. 16, 2006), emphasis in original.

¹²⁸ See *id.*

¹²⁹ See *id.* (emphasis in original).

¹³⁰ Patrick Henry, "Give Me Liberty or Give Me Death" (Mar. 23, 1775) in "The Avalon Project: Yale Law School" (1997), <http://www.yale.edu/lawweb/avalon/patrick.htm> (last visited Mar. 16, 2006).

was divided on the issue of human slavery. The Constitution adopted in 1787 expressly provided for the continuation of the slave trade.¹³¹ The importation of African slaves was to continue until 1808, fugitive slaves were to be captured and returned to their owners and the apportionment of representatives to Congress counted three-fifths of each slave to allocate representation by population.¹³² In the days leading up to the Civil War, representatives from the State of Georgia admitted that, “The question of slavery was the great difficulty in the way of the formation of the Constitution.”¹³³ Without the inclusion of the fugitive slave clause, South Carolina would have never agreed to the Constitution.¹³⁴ Rule by law thus continued after 1787 because legal equality did not extend to human slaves who remained the property of their masters.

It is well known that the Declaration of Independence, the Constitution of 1787, and the Bill of Rights were political compromises that were also blatantly hypocritical of the noble words in the Declaration of Independence proclaiming the promise of universal equality. On the 200th anniversary of the U.S. Constitution, former Supreme Court Associate Justice Thurgood Marshall, a descendant of slaves, delivered an address celebrating the Constitution as a living document and not for the racist and discriminatory document it was intended to be.¹³⁵ In the final draft of the Declaration of Independence, political compromise resulted in the omission of criticism of the King of England for suppressing legislative attempts to end the slave trade and for encouraging slave rebellions.¹³⁶ Once the Revolution succeeded, the southern states made a deal with the northern states that resulted in the granting of power to Congress to regulate commerce in exchange for the right of the southern states to carry on the slave trade.¹³⁷ Both the north and the south prospered

¹³¹ “Declarations of Causes of Seceding State,” <http://sunsite.utk.edu/civil-war/reasons.html> (last visited Mar. 16, 2006).

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ Thurgood Marshall, “The Constitution’s Bicentennial: Commemorating the Wrong Document?” in 40 *Vand. L. Rev.* 1337 (1987).

¹³⁶ *Id.* at 1339.

¹³⁷ *Id.* at 1339-40.

by this arrangement.¹³⁸ Free white males constituted “We the People” because slaves and women were denied civil rights and equality before the law. The drafters of the Constitution avoided using the word “slave” and replaced it with the term “other persons.”¹³⁹

B. The Remnant of Rule of Law

Yet, a remnant of the notion of the rule of law continued in the narrow sense that rule by a government, limited by delegated powers, preserved liberty and protected society from a despotic ruler. The language of rule of law thus emerged. In the Province of Massachusetts Bay, the consent of the governed was exchanged in a social compact for a republican form of government in which the phrase “rule of law” was undefined in the context of the explicit separation of powers written into Part 1, Article XXX of the Massachusetts Constitution:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.¹⁴⁰

This was the beginning of the rule by law form but not its substance. Even though the Massachusetts Constitution recognized that “[a]ll men are born free and equal, and have certain natural, essential and unalienable rights,” including those of life, liberty, property, safety and happiness, slavery was not abolished.¹⁴¹ It was left to the judiciary to interpret this provision, and in 1783 slavery was held unconstitutional in Massachusetts.¹⁴²

This idea of a “government of laws and not of men” has nothing to do with morality, mere laws, or rule by law, as I have defined it. A “government of laws, and not of men” is, after all, not necessarily rule of law. It is a mistake to label mere legality as compliance with the rule of

¹³⁸ Id. at 1338.

¹³⁹ Id. at 1338-39.

¹⁴⁰ Mass. Const. pt. 1, art. XXX.

¹⁴¹ Mass Const. pt. 1, art. I (replaced by Mass. Const. amends., art. CVI).

¹⁴² See “Civil Rights and the American Negro: A Documented History,” ed. Albert P. Blaustein & Robert L. Zangrando (1968), pp. 44-46.

law. For example, totalitarian regimes can be fastidiously legal, pass unjust laws and maintain the separation of executive, legislative and judicial powers. The history of apartheid in South Africa is a classic example of rule by law under the guise of rule of law. Racist laws are invalid according to the rule of law and, as unjust laws, are not laws at all. A morally just law that invalidates racial segregation is worthy of obedience; a morally unjust law compels civil disobedience.

Professor Ronald A. Cass, former dean at the Boston University School of Law, contends that the rule of law is not anchored in concepts of justice or natural law.¹⁴³ He argues that law is divorced from morality and that rule of law merely fulfils the need for “power-constraining rule-fidelity.”¹⁴⁴ He cites America’s acceptance of slavery and abortion as examples of how governments may adopt laws that are immoral.¹⁴⁵ However, Cass maintains that immoral laws are nevertheless valid laws, having passed judicial, legislative, and executive scrutiny in a democratic society.¹⁴⁶ Cass suggests that respect for the rule of law mandates obedience to immoral laws.¹⁴⁷

In my view, Cass fails to recognize that a government of good laws that accord with justice and natural law is entirely consistent with a republican constitutional democracy. What Cass terms “rule of law” is by my definition “rule by law,” in the truncated sense, as it was generally understood by the Supreme Court prior to *Brown v. Board of Education*.¹⁴⁸ The idea of the rule of law is universally misunderstood and is normally assumed to be a way to describe binding legal rules of general application.¹⁴⁹ A significant exception faithful to my definition of the rule of law is the common law tradition of trial by jury and the doctrine of jury nullification, which prioritizes justice over precedent and the letter of the law.

¹⁴³ Ronald A. Cass, *The Rule of Law in America* (2001), pp. 15-17.

¹⁴⁴ *Id.* at 15.

¹⁴⁵ *Id.* at 16.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 16-17.

¹⁴⁸ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁴⁹ See Richard H. Fallon, Jr., “The Rule of Law as a Concept in Constitutional Discourse,” 97 *Col. L. Rev.* 1 (1997); see also Margaret Jane Radin, “Reconsidering the Rule of Law,” 69 *B.U. L. Rev.* 781 (1989).

C. Jury Nullification

The community jury is the ultimate defender of the rule of law. A jury has the legal authority to refuse to convict a defendant who is factually guilty of violating an unjust or immoral law.¹⁵⁰ This doctrine of jury nullification is vital to ensuring the survival of the rule of law, for juries composed of lay people from the local community that may be ignorant of the complexities of legal rules know in their hearts and minds what is morally right and just. The English governing the American colonies knew this too, for when King George III exercised his will unjustly, trial by jury was denied.¹⁵¹ The Declaration of Independence specifically listed many reasons why revolution was preferable to rule by law, including, “For depriving us in many cases, of the benefits of Trial by Jury: For transporting us beyond Seas to be tried for pretended offences.”¹⁵²

For example, the Constitution appeased the slave owning states with the fugitive slave clause.¹⁵³ Against this provision was the right to trial by jury, enshrined in the Constitution¹⁵⁴ and the Bill of Rights.¹⁵⁵ As explained in the preamble to the Constitution, the right to trial by jury was so “We the People” would “establish justice.”¹⁵⁶ Accordingly, it is the right as well as the duty of citizens serving on any hypothetical jury trying Harriet Tubman to acquit her, in spite of her plain disobedience to legally

¹⁵⁰ See *Jones v. United States*, 526 U.S. 227, 248 n.8 (1999).

¹⁵¹ The Declaration of Independence, para. 20 (U.S. 1776).

¹⁵² *Id.*

¹⁵³ U.S. Const. art. IV, § 2, cl. 3.

¹⁵⁴ U.S. Const. art. III, § 2 states: “The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed within any State, the Trial shall be at such place or places as the Congress may by Law have directed.”

¹⁵⁵ “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand jury...” (U.S. Const. amend. V). “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...” (U.S. Const. amend. VI). “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be reexamined in any Court of the United States than according to the rules of the common law” (U.S. CONST. amend. VII).

¹⁵⁶ U.S. Const. preamble

enacted fugitive slave laws, in order to attain the higher goal of rule by law. Jury nullification is essential to the functioning of the rule of law, so disobedience to unjust laws is rewarded and not punished. Perhaps if Cass had served on such a jury he might have rejected the idea of jury nullification and voted to convict the famous Underground Railroad heroine Harriet Tubman of violating fugitive slave laws.¹⁵⁷

The importance of trial by jury as the defender against rule by law cannot be overstated, for it is to trivialize trial by jury as simply a form of procedure used to arrive at a verdict. Trial by jury is a constitutional institution essential to maintaining the rule of law.¹⁵⁸ Jury nullification is the means by which justice is accomplished, in spite of a biased judge or an immoral and unjust law that is no law at all. Lord Devlin observed:

[t]he first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.¹⁵⁹

At a minimum, the American constitutional right to a jury was to prevent oppression by government;¹⁶⁰ in its fullest sense, the right to a jury trial, including the power of nullification, has been since the Magna Carta, a constitutional institution that evolved over time that has preserved the rule of law.¹⁶¹

¹⁵⁷ Harriet Tubman Biography Page, citing The Civil War Society's *Encyclopedia of the Civil War* (1997), <http://www.civilwarhome.com/tubmanbio.htm>.

¹⁵⁸ See generally *The Federalist* No. 81 (Alexander Hamilton).

¹⁵⁹ See Devlin, *supra* n70 at 164.

¹⁶⁰ See *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Singer v. United States*, 380 U.S. 24, 31 (1965).

¹⁶¹ Along with the executive, legislative, and judicial branches of government, the people retain the power to prevent tyranny and to preserve the rule of law by express provisions in the Constitution to vote politicians out of office, to impeach judges and presidents, to keep and bear arms, and to have trial by jury in all criminal cases. The people thus are an integral part of the separation of powers doctrine, fundamental to which is the rule of law, which is at the core of our history, values and traditions.

D. Law v. Justice

In 1787, the legal institution of slavery, characterized by injustice and immorality, made it impossible for any flourishing of my defined concept of the rule of law. The language of “rule of law” was limited to the basic idea that a government of laws with limited powers had replaced the unchecked arbitrary will of monarchs and their representatives. This permitted freedom from the will of others and guaranteed personal liberty from tyranny. Beyond this idea, there was no discussion on the meaning of rule of law until the case of *Marbury v. Madison*.¹⁶²

Chief Justice Marshall relied upon Professor Blackstone’s *Commentaries on the Laws of England* to resolve the question of whether there must always be a remedy whenever a legal right is violated.¹⁶³ In concluding there was, he stated, “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”¹⁶⁴ This reference to the idea of rule of law imports the concept that a legal finding of a violated right merits access to justice, for a right is meaningless without a remedy. This observation by Chief Justice Marshall instinctively comes close to the core idea that justice is the defining characteristic of a society ruled by law.

Despite these insights, the Marshall Court did not anchor the concept of the rule of law to justice. Contrary to the reliance on natural law infused into the Declaration of Independence, the Marshall Court saw its duty to apply the relevant law derived from legal positivism, even if that law was repugnant to the law of nature.¹⁶⁵ In 1825, a ship called the *Antelope*, carrying over 280 African slaves were captured by American authorities and brought into the port of Savannah Georgia for adjudication.¹⁶⁶ The slaves claimed their freedom. In ordering the slaves

¹⁶² 5 U.S. 137 (1803).

¹⁶³ *Id.* at 163.

¹⁶⁴ *Id.*

¹⁶⁵ “The *Antelope*,” 23 U.S. 66 (1825).

¹⁶⁶ “The Slave Ship *Antelope*: 120 Africans sent to Liberia, and 37 enslaved in the United States,” <http://pages.prodigy.net/jkess3/Antelope.htm> (last visited Mar. 17, 2006).

be returned to their owners, Chief Justice Marshall stated: “In examining claims of this momentous importance; claims in which the sacred rights of liberty and of property come in conflict with each other...this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law.”¹⁶⁷ In looking to the mandate of the law, Chief Justice Marshall looked to Admiralty law, rather than to the Constitution.¹⁶⁸ To his way of thinking, law was not equal to morality, for he asserted, “[w]hatever might be the answer of a moralist to this question, a jurist must search for a legal solution....”¹⁶⁹ Rule by law triumphed over rule of law in this case, for legality and not justice was the guiding force that returned the Africans to a life of slavery.

In his reasons, Chief Justice Marshall ignored the opposite result reached in an English case cited to him by Mr. Key, counsel for the appellants.¹⁷⁰ That precedent was the 1771 decision of Lord Mansfield in *Somerset’s Case*.¹⁷¹ James Somerset, an African slave was brought to England by his master Charles Steuart on a business trip. Somerset refused to serve and escaped, but was captured and held aboard his master’s ship pending departure for Jamaica where slavery was legal, human beings were legally goods and chattels, and Somerset would be sold.¹⁷² Somerset sought his freedom by the writ of habeas corpus, alleging his arrival onto English soil made him a free man.¹⁷³ Lord Mansfield agreed and set Somerset free, observing that while positive law legalized human slavery, the state of slavery was so odious that it was incapable of being introduced on any reasons, moral or political.¹⁷⁴ Lord Mansfield understood that rule of law incorporated morality and to return Somerset to a life of slavery was unjust. For Lord Mansfield, “the eternal principles of natural religion are part of the common law.”¹⁷⁵

¹⁶⁷ “The Antelope”, 23 U.S. at 114.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 121.

¹⁷⁰ *Id.*

¹⁷¹ *Somerset v. Stewart (Somerset’s Case)*, (1772) 98 Eng. Rep. 499, 20 Howell’s State Tr. 1.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Evans v. Chamberlain of London*, 2 Burn. Eccl. Law, 9th ed. 218 (1767).

The contrast is striking between these two judicial decisions, especially when one considered the similar environment and similar facts. Both judgments were issued when slavery was legal in the United States and in England. Both countries viewed themselves as Christian nations, even though the Atlantic slavery was flourishing and both countries prospered by it. Today, in more enlightened times when human rights and natural law are preferred to positive law promoting slavery, Lord Mansfield's decision shines like a beacon of light while the *Antelope* case dwells in shameful obscurity.

Following the *Antelope* case, the Supreme Court confirmed that slaves were property, this right of property existed independent of the Constitution and slaves were articles of commerce.¹⁷⁶ The rule of law was non-existent for slaves were repeatedly denied justice in the courts.¹⁷⁷ The case of *Dred Scott*¹⁷⁸ illustrates the complete abdication by the United States Supreme Court of the rule of law. Chief Justice Taney's opinion is a model of rule by law reasoning. It revealed that the Supreme Court could not be counted on to dispense justice, for it refused to declare void laws that were an affront to human decency and dignity.

E. *Entrenching Rule By Law: The Case of Dred Scott*

Dred Scott was a descendant of African slaves who sued for the freedom of his family in the circuit court of St. Louis County in the State of Missouri. The agreed statement of facts set forth a history of Dred Scott being a Negro slave and the property of army surgeon Dr. Emerson who took Scott from the State of Missouri into the Upper Louisiana Territory at Fort Snelling. While there, Scott married Harriet, a newly acquired slave of Dr. Emerson. A daughter Eliza was born on a steamboat on the Mississippi River north of the Missouri state line. After two years in the

¹⁷⁶ *Groves v. Slaughter*, 40 U.S. 449 (1841), refuting dissenting Justice McClean, who unsuccessfully tried to prove by the text of the Constitution that while certain states treated slaves as property, "the Constitution acts upon slaves as persons, and not as property."

¹⁷⁷ See *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

¹⁷⁸ *Dred Scott v. Sandford*, 60 U.S. 393 (1856), superceded by constitutional amendment, U.S. CONST. amend. XIII.

territory that later became the State of Illinois, the Scott family returned to Missouri where another daughter Lizzie was born. Dr. Emerson then sold the Scott family to Sanford, who “laid his hands” on the girls, Harriet and Scott and then imprisoned the entire family. In 1854, the case reached the Supreme Court of the United States where it was argued twice before a divided court.¹⁷⁹

Chief Justice Taney’s reasoning was based upon rule by law; justice was irrelevant. What mattered was the letter of the law. In deciding that Dred Scott was not entitled to file suit because he was ineligible as a matter of law to be a citizen on account of his race and property status, Taney justified his position:

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.¹⁸⁰

Taney reviewed the Declaration of Independence and the Constitution and found that African American slaves and their descendants were not constituent members of the sovereign “people of the United States,” and were not, nor ever intended to be, citizens.¹⁸¹ While the words of the Declaration of Independence seem to embrace the whole human family, Taney found that there were two classes of persons: one comprised of free white men and their progeny who were recognized as citizens; and one comprised of members of the enslaved black race, who were excluded from citizenship and not counted as a portion of “we the people.”¹⁸² As a separate class, this “population”¹⁸³ was considered “a subordinate and inferior class of beings”¹⁸⁴ and “had no rights or privileges but such as those who held the power and the Government might choose to grant

¹⁷⁹ Id. at 399.

¹⁸⁰ Id. at 405.

¹⁸¹ Id. at 404, 407.

¹⁸² Id. at 410.

¹⁸³ Id. at 403.

¹⁸⁴ Id. at 404-05.

them.”¹⁸⁵ Individual members of this “class of persons” were regarded as ordinary articles of merchandise, to be bought and sold for profit.¹⁸⁶ Slavery was for the Negro’s own good, for members of this race were universally considered to be:

beings of an inferior order, and altogether unfit to associate with the white race, either in social or political situations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.¹⁸⁷

Legal segregation of this “unhappy” and “unfortunate” race was intended to be perpetual and impassable.¹⁸⁸ The master class governed the slave class with absolute and despotic power. Inter-marriages between white persons and Negro or mulattoes, free or slave, was a crime.¹⁸⁹ On the scale of created beings, no one was lower than the Negro or mulattoe, free or slave, for the entire race was burdened with a stigma of the “deepest degradation.”¹⁹⁰

Taney argued that early legislation enacted by states, such as Connecticut, to abolish slavery, was motivated by a policy to protect poor whites from “injury and inconvenience.”¹⁹¹ Only in the State of Maine were African Americans granted equality in civil and political rights with the white race.¹⁹² The structure of American federalism gave the various states the power to deal with slavery as they wished. The national government had no authority beyond the enumerated powers of the Constitution—and the Constitution protected and permitted slavery by clauses that sanctioned the future importation of slaves and the return of fugitive slaves.¹⁹³ Taney refused to be swayed by popular sentiment to

¹⁸⁵ *Id.* at 405.

¹⁸⁶ *Id.* at 407.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 407, 409.

¹⁸⁹ *Id.* at 409.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 414.

¹⁹² *Id.* at 416.

¹⁹³ *Id.* at 425-26.

interpret the Constitution liberally.¹⁹⁴ The Constitution had an amending formula, and if the Constitution were to be amended, that procedure would have to be followed. It was not the duty of the court to in effect amend the Constitution, and thus become the “mere reflex of the popular opinion of the day.”¹⁹⁵ Like Justice O’Connor in *Casey*, Chief Justice Taney attempted to settle for all time the divisive issue before the Court. Taney ruled that the meanings of “people” and “citizen” were now “settled.”¹⁹⁶

Rather than resting his opinion at this point, Taney gratuitously proceeded to judicially review the Missouri Compromise, the 1820 Act of Congress that prohibited slavery in the Territory north of Missouri.¹⁹⁷ That law meant that any person who brought his or her slave into that Territory thereby freed that slave. This legislation was found by Taney to be void, as a violation of the Fifth Amendment to the Constitution, which provides that “no person shall be deprived of life, liberty and property without due process of law.”¹⁹⁸ Because slaves were property belonging to persons, there was a violation of due process when slaves were automatically freed without compensation of any kind.¹⁹⁹ Taney held that “the right of property in a slave is distinctly and expressly affirmed in the Constitution.”²⁰⁰ Congress was obliged to guard and protect the slave owner’s rights, not to violate them. The Missouri Compromise was therefore ruled unconstitutional.²⁰¹

In vain, the dissenting Justices relied upon *Somerset* and cited it for the proposition that “the state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws.”²⁰² Justice McLean denied Lord Stowell ever overruled *Somerset* in 1827 in the case of the former slave Grace who was again enslaved after leaving English jurisdiction and returning to Antigua. In

¹⁹⁴ Id. at 426.

¹⁹⁵ Id.

¹⁹⁶ Id.

¹⁹⁷ Id. at 432.

¹⁹⁸ U.S. Const. amend. V; see also *Dred Scott*, 60 U.S. at 450, 452.

¹⁹⁹ *Dred Scott*, 60 U.S. at 450, 452.

²⁰⁰ Id. at 451.

²⁰¹ Id. at 452.

²⁰² Id. at 534 (McLean, J., dissenting); see also *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499, 20 Howell’s State Tr. 1.

England, there was no law prohibiting slavery, but also no law authorizing it.²⁰³ Justice McLean asked, “Does not this show that property in a human being does not arise from nature or from the common law, but, in the language of this court, ‘it is a mere municipal regulation, founded upon and limited to the range of territorial laws?’”²⁰⁴ McLean continued, “A slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.”²⁰⁵ McLean cited to his unreceptive brethren numerous precedents from the Missouri courts that freed slaves that had temporarily been taken into Illinois,²⁰⁶ and so in principle reached the same result as *Somerset’s case*. Dissenting Justice Curtis agreed that slavery was “contrary to natural right,” and is “created only by municipal law.”²⁰⁷ Curtis and McLean both referred to the judgment of the Supreme Court of Appeals for Kentucky in *Rankin v. Lydia*²⁰⁸ as authority for the unchallenged doctrine that slavery is a creature of positive law and is not found in the law of nature or in the common law: “Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law.”²⁰⁹ These arguments by McLean and Curtis suggest these justices intuitively knew slavery was unjust and contrary to the rule of law.

The reality was, as stated by Justice Campbell in his concurrence with Justice Taney, that “the American revolution was not a social revolution,” but a political one: “The American Revolution was not a social revolution. It did not alter the domestic condition or capacity of persons within the colonies, nor was it designed to disturb the domestic relations existing among them. It was a political revolution, by which

²⁰³ *Dred Scott*, 60 U.S. at 548 (McLean, J., dissenting); *Ex parte Grace*, 2 Hag. Adm. R. 94 (1827).

²⁰⁴ *Dred Scott*, 60 U.S. at 548.

²⁰⁵ *Id.* at 549.

²⁰⁶ *Id.* at 550-55.

²⁰⁷ *Id.* at 624 (Curtis, J., dissenting).

²⁰⁸ 9 Ky. (2 A.K. Marsh.) 467 (1820).

²⁰⁹ See *Dred Scott*, 60 U.S. at 536, 624 (1857) (McLean, J., & Curtis, J., dissenting) (citing *Rankin*, 9 Ky. at 467).

thirteen dependent colonies became thirteen independent states.”²¹⁰

On the eve of the Civil War, there were at least three classes of persons²¹¹ in the United States. There were white adult males who were citizens that enjoyed full civil and political rights; there were second class citizens in the middle of the scale comprised of the women and children of these white males who lacked full civil and political rights; and there were the persons at the lowest end of the scale, members of the Negro race, who were slaves, and had no citizenship. However despised and inferior these slaves were, they were described in the Constitution as “persons” even though they were not “persons in the whole sense” as were white males, and no one suggested for a moment they were anything less than human beings. Circuit Justice Taney confirmed that even female African slaves were persons subject to the law.²¹² Sitting as a circuit court judge, Justice Taney found Amy, a young African-American woman slave, guilty of theft after rejecting her defense that she could not be guilty of a crime because only “persons” were within the jurisdiction of the court.²¹³

IX. ATTEMPTING TO RESTORE THE RULE OF LAW: THE 14TH AMENDMENT

According to the late professor Charles Black, the Reconstruction Amendments, together with the Ninth Amendment and the Declaration of Independence, were intended to provide a complete code of human rights protection that would guarantee equal protection to all former slaves.²¹⁴ The Thirteenth, Fourteenth and Fifteenth Amendments were adopted to give effect to President Abraham Lincoln’s dream that human rights in America were finally here to stay and that America was to experience a new birth of freedom. All forms of slavery were abolished, citizenship

²¹⁰ *Dred Scott*, 60 U.S. at 502 (Campbell, J., concurring).

²¹¹ The class status of other persons, such as Native American Indians and Asians, is beyond the scope of this article. Dissenting Justice McLean noted, in contrast to the treatment of the Negro in the recent treaty with Mexico, “we have made citizens of all grades, combinations and colors.” *Dred Scott*, 60 U.S. at 533.

²¹² *United States v. Amy*, 24 F. Cas. 792, 809-10 (C.C.D. Va. 1859) (No. 14,445).

²¹³ *Id.*

²¹⁴ Charles L. Black, *A New Birth of Freedom: Human Rights, Named & Unnamed* (1997).

was acquired by all upon birth, every person had the right to life, liberty and property that could not be taken without due process of law, and most significantly, every person was entitled to equal protection of the laws. The Fourteenth Amendment was passed by Congress on June 13, 1866 and ratified on July 9, 1868.²¹⁵

The word “person” in the Fourteenth Amendment is not qualified by words such as “born” or “unborn” or any equivalent language, leaving open the interpretation that the meaning of “person” includes all human beings, born or unborn. The abolition of human slavery and the abolition of abortion during the same era were consistent with society’s quest for justice and basic human rights for all members of the human family.

In 1867, at the same time it ratified the Fourteenth Amendment, Ohio made abortion at any stage of pregnancy illegal.²¹⁶ The same year, Illinois also ratified the Fourteenth Amendment and passed laws stiffening penalties for committing abortion.²¹⁷ In 1869, in the same session that Florida ratified the Fourteenth Amendment, Florida also passed laws prohibiting abortion at any stage of gestation.²¹⁸ Vermont and New York each passed laws that increased protection of unborn human beings after they ratified the Fourteenth Amendment.²¹⁹ By 1875, sixteen of the twenty-eight ratifying states had in place tough laws against abortion at any stage of gestation, allowing for abortion only when the life of the mother was in real danger.²²⁰ Congress complemented the action of the various states by enacting the Comstock Laws in 1873 to prevent the dissemination of literature that promoted abortion.²²¹ The legal protection of unborn human beings at the time the Fourteenth Amendment was ratified was consistent with the guarantee of equal protection and the right to life to every “person,” whether born or unborn.

When considering the debates concerning the drafting of the

²¹⁵ The National Archives Experience, The Constitution: Amendments 11-27, http://www.archives.gov/national_archives_experience/charters/constitution_amendments_11-27.html.

²¹⁶ James C. Mohr, *Abortion In America* (1978), pp. 207-10..

²¹⁷ *Id.* at 205.

²¹⁸ *Id.*

²¹⁹ *Id.* at 210-11, 215-19.

²²⁰ *Id.* at 201-25.

²²¹ *Id.* at 196-97.

Fourteenth Amendment, it may be assumed that there was no difference in meaning between the words “person” and “human being.” Representative John A. Bingham, author of the Fourteenth Amendment made these remarks during the debates among the framers of the Fourteenth Amendment:

The Constitution of the United States...declared that “no person shall be deprived of life, liberty, or property without due process of law.” By that great law of ours it is not inquired whether a man is free by the laws of England; it is only to be inquired if he is a man...endowed with the rights of life and liberty. Before that great law the only question to be asked of a creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares all men are created equal.²²²

Representative James Brown put the matter plainly, equating the word “person” with a human being: “Does the term “person” carry with it anything further than a simple allusion to the existence of the individual?”²²³ Senator Sumner earlier observed, “in the eyes of the Constitution, every human being within its sphere...from the President to the slave, is a person.”²²⁴ Representative Windom noted, “rights to life, liberty, and pursuit of happiness” are “rights of human nature,” and the most basic right of human nature is “the right to exist.”²²⁵ Representative Thaddeus Stevens said, “equal rights to all the privileges of Government is innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.”²²⁶

Representative Bingham explained to Congress that the meaning of the equal protection clause came from the 40th clause of the Magna Carta, which states “to no one will we sell, to no one will we refuse or delay, any man right or justice.”²²⁷ It was the Magna Carta, explained Bingham, that “when faithfully enforced,” abolished slavery: “in

²²² *Cong. Globe*, 40th Cong., 1st Sess. 542 (1867).

²²³ *Cong. Globe*, 38th Cong., 1st Sess. 1753 (1864).

²²⁴ *Cong. Globe*, 37th Cong., 2d Sess. 1449 (1862).

²²⁵ *Cong. Globe*, 39th Cong., 1st Sess. 1159 (1866).

²²⁶ *Cong. Globe*, 38th Cong., 2d Sess. 74 (1865).

²²⁷ *Cong. Globe*, 42d Cong., 1st Sess. 83 (1871), quoting “Magna Carta,” available at <http://www.fordham.edu/halsall/source/magnacarta.htm>.

England...the moment a slave set foot upon her soil, his fetters turned to dust and he was free.”²²⁸ By linking *Somerset* and the Magna Carta to the equal protection clause, Bingham sent a clear message that the rule of law had finally arrived, and that the old bondage to human slavery and rule by law symbolized by the *Dred Scott* case was intended to be relegated to the dust bin of antiquity.

Yick Wo v. Hopkins,²²⁹ decided in 1886, illustrates the impact of the Fourteenth Amendment. Yick Wo’s licensed Chinese laundry business of 22 years was destroyed when the City of San Francisco passed an ordinance requiring Yick Wo to obtain special consent from the county board of supervisors, which he was unable to obtain. Of the 320 laundries in the city and County of San Francisco, about 240 were owned and operated by Chinese. All Chinese applications for permits were denied and virtually all those from Caucasians were granted, pursuant to the arbitrary will of the board of supervisors. The result was the relocation of Chinese laundries to remote locations outside the county, the closure of others, the prosecution and imprisonment of Chinese who defied the ordinance and continued to operate their business, and a monopoly enjoyed by Caucasian-run laundry establishments.²³⁰ Circuit Court Judge Sawyer asked, “Can a court be blind to what must necessarily be known to every intelligent person in the state?”²³¹ In spite of this observation, Judge Sawyer dismissed Yick Wo’s application for habeas corpus, and remanded him back into custody.²³² The Supreme Court unanimously reversed.²³³

Justice Matthews noted that the ordinance in question violated the Fourteenth Amendment for it conferred a “naked and arbitrary power to give or withhold consent...as to persons.”²³⁴ This tyrannical power over persons, conferred by law, gave unlimited authority to give or withhold consent over the life of each business pursuant to the untrammelled

²²⁸ *Id.*

²²⁹ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²³⁰ *Id.* at 359.

²³¹ *Id.* at 363 (citing *In re Wo Lee*, 26 F. 471, 475 (C.C.D. Cal. 1886)).

²³² *Wo Lee*, 26 F. at 477.

²³³ *Yick Wo*, 118 U.S. at 374.

²³⁴ *Id.* at 365.

arbitrary will of the powerful over the helpless. The result was the division of businesses into two classes, the “wanted” run by Caucasians whose businesses were allowed to survive, and the “unwanted” owned by the Chinese, whose businesses were closed by the “mere will and pleasure” of the administrative authority.

Justice Matthews refused to accede to any arguments to dismiss the case on the basis that Yick Wo was an alien and a subject of the Emperor of China, because the Fourteenth Amendment was not confined to the protection of American citizens, but extends to every person within the territorial jurisdiction of the Court, without discrimination:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.... These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.²³⁵

Justice Matthews then breathed life into the Supreme Court’s narrow conception of the rule of law, which regained much of its lost meaning when he broadly portrayed the rule of law to go beyond the idea of law and order to include natural justice. Matthews stated:

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And law is the definition and limitation of power.... But the fundamental rights to life, liberty and pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth “may be a government of laws and not of men. For, *the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems*

²³⁵ Id. at 369.

*to be intolerable in any country where freedom prevails, as being the essence of slavery itself.*²³⁶

The San Francisco ordinance, even though on its face appearing to be benign and impartial, was inoperative and void for it conflicted with the Fourteenth Amendment and denied equal justice, not only within the framework of the Constitution, but also under the rule of law. The discrimination against the Chinese was not only unjustified, but illegal, and a denial of the equal protection of the laws.

In 1938, Associate Justice Hugo Black of the Supreme Court wrote a strong dissent in *Connecticut General Life Insurance v. Johnson*,²³⁷ wherein he concluded that the purpose of the Fourteenth Amendment was to protect the life and liberty of weak and helpless human beings. His words just as easily apply to unborn children, as well as enslaved African Americans:

The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. The Fourteenth Amendment followed the freedom of a race from slavery. Justice Swayne said in the *Slaughter House Cases*, *supra*, that "by 'any person' was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color." Corporations have neither race nor color. He knew the Amendment was intended to protect the life, liberty and property of *human* beings.²³⁸

In this manner, Justice Black equated the word "person" with "human being." A natural person is in fact a human being. As long a human being is in existence, it is a person under the Fourteenth Amendment and entitled to equal protection of the law and to life and liberty. Justice Black explained that the purpose of the Fourteenth Amendment is to "prevent discrimination by the states against classes or race."²³⁹

All natural human beings can be thus viewed within the meaning

²³⁶ Id. at 369-70 (emphasis added).

²³⁷ *Conn. Gen. Life Ins. v. Johnson*, 303 U.S. 77 (1938).

²³⁸ Id. at 87 (Black, J., dissenting), emphasis in original.

²³⁹ Id. at 89.

of “person” in the Fourteenth Amendment. To qualify as a person, all that is required is to be a living human being, born or unborn—a member of the species *homo sapiens*. All persons under the Fourteenth Amendment are equal. Without equality, there could not be justice, and without justice, there cannot be the rule of law. However, so long as there was segregation, there can never be justice.

X. SEGREGATION

One argument that could be made by those in favor of excluding unborn human beings from the meaning of “person” is based on the premise that the framers of the Fourteenth Amendment did not contemplate the unborn and hence excluded unborn children from the equal protection of the law. It is immaterial that the unborn are human beings consisting of flesh and blood. While in theory it may be conceded that the unborn are just as human as those people who are born, the reality is that the unborn are segregated from the born. They are invisible and inferior to those who are born. The unborn, particularly in their earliest stages of development, do not look human because we cannot readily psychologically identify with an object that does not look like us when we look in the mirror. The unborn, and indeed newborns, are helpless creatures because they cannot survive on their own without maternal and/or medical assistance. The unborn are penniless, powerless and, depending on their age and stage of development, socially, culturally, physically, and mentally different and inferior from the rest of humanity. The unborn, and even the newborn, do not meet the global personhood criteria of segregationist philosophers who sanction the destruction of embryos and fetuses.

Those prescribing to this argument must conclude that the unborn are thus separate and unequal. The unborn are not just segregated from the constitutional rights to life, liberty and equality guaranteed by the Fourteenth Amendment—they are excluded. It is thus permissible to discriminate against the unborn individually and as a class, for until they are born, the unborn do not attain legal protection under the Constitution. It is only over time and with continued physical development that children gain with maturity and age, political, physical, social and legal power.

This kind of segregationist mentality is reminiscent of the

reasoning of the majority of the Supreme Court in *Plessy v. Ferguson*.²⁴⁰ Only this time the discrimination is not based on race, but on age, condition and status. Moreover, in the case of the unborn, there is no pretense that the unborn are equal. The unborn are depersonalized and dehumanized, not fit for classification on the lowest rung of social hierarchies reserved for born human beings. To understand the mentality that perpetuates this segregation of the unborn from the human family, it is instructive to review the 1896 *Plessy* decision because those who support discrimination against the unborn, are entrenched in the same kind of thinking that brought about racial segregation and the Jim Crow laws.²⁴¹

In *Plessy*, Justice Brown ruled that enforced segregation between the white and black races did not deny the equal protection of the laws.²⁴² Political equality, such as the right to serve on a criminal jury,²⁴³ was constitutionally protected, unlike social or moral equality that could not be attained without mutual voluntary natural affinities and consent. It was reasonable to provide for enforced segregation to promote public peace and societal order. Segregation laws enacted in good faith for the foregoing purposes were constitutional, provided there was no covert attempt to oppress a particular class or bestow arbitrary and unjust discrimination upon the mere exercise of individual will.²⁴⁴ Segregation alone did not imply a badge of inferiority, nor should such a badge be assumed. If one race were inferior to the other, the Constitution could not rectify the imbalance.²⁴⁵

Applying these *Plessy* principles to the case of unborn children leads to the following line of reasoning, as well as alarming conclusions. It is plain that mothers cannot be forced to love their babies, and therefore if babies are unwanted, the mothers can arbitrarily exercise their will to

²⁴⁰ 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), rejecting the Court's finding that separate but equal facilities are permissible under the 14th Amendment.

²⁴¹ See generally C. Vann Woodward, *The Strange Career of Jim Crow*. 3rd ed. (1974), pp. 97-109, noting the spread and application of Jim Crow laws and segregationist policies both before and after *Plessy*.

²⁴² *Plessy*, 163 U.S. at 548.

²⁴³ *Strauder v. West Virginia*, 100 U.S. 303 (1880).

²⁴⁴ See *Yick Wo v. Hopkins*, 118 U.S. 356, 396 (1886).

²⁴⁵ See *Plessy*, 163 U.S. at 552.

have the babies' lives terminated, for babies are legally inferior human beings. Conferring constitutional legal equality to the fetus and removal of the live birth boundary that separates the classes would result in great social upheaval and protests, for abortions can no longer be legal if the unborn are protected by the Fourteenth Amendment. This line of argument continues that in the interests of maintaining public order and social stability, the present system of legally segregating the unborn from the born ought to be preserved to allow a mother to have freedom of choice to take the life of her child and to allow society to exploit for the common good embryos and fetal body parts in the interests of science and medicine.

The answer to this kind of prejudice is the vision of the first Justice Harlan, who courageously dissented in *Plessy*:

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings....²⁴⁶

On the facts before him, Justice Harlan considered the plight of an adult who was conferred citizenship under the Fourteenth Amendment. There is no reason why the noble principles he declared could not apply to the unborn human being. Why should there be a difference because of surroundings—being in the womb? Are not the child in the womb and the child outside the womb both part of the family of man? By what authority does the Constitution permit the creation of a caste system, whereby the unborn human being is the slave and subject property of its master—the mother? Are not all human beings persons and equal before the law?

XI. *BROWN V. BOARD OF EDUCATION*: A MODEL

In the 1950s, the Supreme Court, in a decision authored by Chief Justice Warren, ruled in *Hernandez v. Texas*²⁴⁷ that the protections of the

²⁴⁶ Id. at 559 (Harlan, J., dissenting).

²⁴⁷ 347 U.S. 475 (1954).

Fourteenth Amendment were not confined to a two-class theory (white and black), but extended to every distinct class of human beings that suffer discriminatory treatment caused by prejudice:

But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.²⁴⁸

*Brown v. Board of Education*²⁴⁹ soon followed and overruled the doctrine of “separate but equal” established in *Plessy*.²⁵⁰ In *Brown*, Chief Justice Warren authored a unanimous opinion that remarkably models the triumph of the rule of law over prejudice, discrimination and caste.

In approaching the difficult issue of how to overrule *Plessy*, Chief Justice Warren could not take an originalist position because the history and suggested interpretations of the meaning of the Fourteenth Amendment pertaining to public education were at best “inconclusive”²⁵¹ and could not be determined “with any degree of certainty.”²⁵² The Court held it could not “turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”²⁵³ The plight of children who were segregated and denied equal opportunity for success in life in present day society was settled upon as the proper test to determine whether or not there was a deprivation of the equal protection of the laws.²⁵⁴

Vigorous efforts by the various defendant school districts during the course of this litigation to “equalize” tangible factors such as public school facilities, curricula, qualifications and salaries of teachers were

²⁴⁸ Id. at 478.

²⁴⁹ 347 U.S. 483 (1954).

²⁵⁰ 163 U.S. 537 (1896).

²⁵¹ *Brown*, 347 U.S. at 489.

²⁵² Id.

²⁵³ Id. at 492.

²⁵⁴ See id. at 492-93.

dismissed by Chief Justice Warren as not relevant to the ultimate question.²⁵⁵ Instead, refusing to be diverted, Chief Justice Warren reached the rule of law issue underlying the doctrine of “separate but equal” by examining the “effect of segregation itself.”²⁵⁶ Having neutralized the obstacle of tangible equality, Chief Justice Warren focused on the inherent immorality of segregation that harmed children by stamping them with a badge of inferiority “that may affect their hearts and minds in a way unlikely ever to be undone.”²⁵⁷

The Court then turned to modern science for an answer. Graciously excusing the *Plessy* Court from not having before it scientific knowledge available to the *Brown* Court, Chief Justice Warren took judicial notice that the effect of segregation, bolstered by the sanction of law, stunted the ability of the black children to develop and reach their full potential as human beings.²⁵⁸ This life altering harm to the destiny of innocent children was unjust and immoral. The proof of this permanent harm was rooted in truth, evidenced by the objective findings of trained reputable psychologists.²⁵⁹ The Court concluded that segregation, in and of itself, amounted to inherent inequality.²⁶⁰ Segregation in the public schools was thus declared unconstitutional for offending the Equal Protection Clause.

In the companion case of *Bolling v. Sharpe*, the same Court ruled unanimously that segregation of public school children in the District of Columbia violated the Due Process Clause of the Fifth Amendment.²⁶¹ Chief Justice Warren found implicit in the concept of due process the principle of fairness.²⁶² When the Court finds unfairness in its moral judgment it may prohibit unjustifiable discrimination that unconstitutionally constrains the exercise of liberty:

²⁵⁵ Id. at 492.

²⁵⁶ Id.

²⁵⁷ Id. at 494.

²⁵⁸ Id.

²⁵⁹ Id. at 494 n11.

²⁶⁰ Id. at 495.

²⁶¹ See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

²⁶² See id. at 498.

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the *concepts of equal protection and due process, both stemming from our American ideal of fairness*, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, *discrimination may be so unjustifiable as to be violative of due process....*

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. *Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.*²⁶³

The line of cases that followed *Brown* continued the battle for racial equality and legitimized the birth of the civil rights movement of the 1960's—led by Dr. Martin Luther King Jr. and others—that demanded rule by law through the immediate expansion of desegregation to all social conditions and contexts.²⁶⁴ In one of these cases, *Green v. New Kent County School Board*, the Supreme Court unanimously rejected the school board's plan to give parents a "freedom of choice" plan so the school board could evade its responsibility under *Brown II* to achieve desegregation.²⁶⁵ In three years of operation under the plan, not one white child "chose" to attend the all-black school.²⁶⁶ Speaking on behalf of the entire court, Justice Brennan incorporated the opinion of Judge Sobeloff,

²⁶³ See *id.* at 499-500 (emphasis added).

²⁶⁴ See, e.g., *Brown v. Bd. of Educ. of Topeka, Kan. (Brown II)*, 349 U.S. 294 (1955); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Griffin v. Prince Edward County Sch. Bd.*, 377 U.S. 218 (1964); *Green v. New Kent County Sch. Bd.*, 391 U.S. 430 (1968); *Swan v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes v. Sch. Dist. No. 1, Denver Colorado*, 413 U.S. 189 (1973).

²⁶⁵ *Green v. New Kent County Sch. Bd.*, 391 U.S. 430, 437 (1968).

²⁶⁶ See *id.* at 441.

who noted “freedom of choice” is “not a sacred talisman.”²⁶⁷ While “freedom of choice” may not be per se unconstitutional, its use could never justify or prop up the existence of a class system and perpetuate segregation, discrimination and inequality among human beings. “Freedom of choice” is valid only if used as a means to attain equality, and may not be used as a means to justify inequality. If “white supremacy” cannot be used to separate classes of people by the color of their skin,²⁶⁸ can “freedom of choice” be used in the name of “feminist supremacy” to justify the segregation of human beings from other human beings based on their tender age and dependant condition in or out of the womb?

XII. THE ROAD TO *ROE*

A. *Protecting Children under the First Amendment*

Historically, the Supreme Court protected the life and health of born and unborn children. In *Reynolds v. United States*, Chief Justice Waite rejected a claim by a polygamist of the Mormon faith that the First Amendment gave a constitutional right to engage in personal conduct exempt from legal regulation so long as that conduct was exercised in accordance with the doctrines of one’s religion.²⁶⁹ Chief Justice Waite asked, “[s]uppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?”²⁷⁰

²⁶⁷ See *id.* at 439-440 (1968): “‘Freedom of choice’ is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a ‘unitary, nonracial system’,” quoting *Bowman v. County Sch. Bd.*, 382 F. 2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring).

²⁶⁸ *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

²⁶⁹ *Reynolds v. United States*, 98 U.S. 145 (1878).

²⁷⁰ See *id.* at 166. This is a pertinent example for in ancient times, newborn children in Israel were sacrificed to the god Molech by being burned alive as part of a pagan religious ritual. It was recorded by Moses in the Book of Leviticus that God hated this evil and sanctioned the death penalty against anyone who

Chief Justice Waite subordinated an individual's constitutional right under the First Amendment to the free exercise of religion to laws that protected all the members of society. He drew a bright line between belief and practices: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."²⁷¹ Perhaps he feared that if he upheld the supremacy of religious doctrine, the rule of law would disappear and be replaced by individual anarchy: "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."²⁷²

By 1964, the law was settled that a mother, in the exercise of her constitutional rights to the free exercise of religion under the First Amendment, could not destroy the life of her unborn child.²⁷³ Willimina Anderson, a devout member of the Jehovah Witnesses, refused blood transfusions that were needed to save her life and that of her 32-week-old unborn child. A hospital initiated court action to obtain a judicial order that would force Mrs. Anderson to receive the needed blood. A panel of five New Jersey appellate judges unanimously decided "the unborn child is entitled to the law's protection"²⁷⁴ and ordered the transfusions. The New Jersey Supreme Court emphasized it had "no difficulty"²⁷⁵ in its decision to protect the unborn child.

Curiously, this line of authority is still valid after *Roe v. Wade*.

sacrificed his child: The LORD said to Moses, "Tell the Israelites: Anyone, whether an Israelite or an alien residing in Israel, who gives any of his offspring to Molech shall be put to death. Let his fellow citizens stone him. I myself will turn against such a man and cut him off from the body of his people; for in giving his offspring to Molech, he has defiled my sanctuary and profaned my holy name. Even if his fellow citizens connive at such a man's crime of giving his offspring to Molech, and fail to put him to death, I myself will set my face against that man and his family and will cut off from their people both him and all who join him in his wanton worship of Molech. *Leviticus* 20:1-5 (New American Bible).

²⁷¹ See *Reynolds*, 98 U.S. at 166.

²⁷² See *id.* at 167.

²⁷³ *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 42 N.J. 421 (N.J. Sup. Ct. 1964).

²⁷⁴ *Id.* at 423.

²⁷⁵ *Id.*

Courts in New York, Georgia, Florida, and the District of Columbia respectively dismissed one objection to blood transfusions and three objections to caesarian section deliveries primarily based on religious faith arguments relying on the First Amendment.

In *Jamaica Hospital*, even though the unborn child was not viable, the New York judge found that the state's interest in protecting the life of a mid-term fetus outweighed the patient's right to refuse a transfusion on religious grounds.²⁷⁶ In ordering the transfusion, Judge Lonschein stated, "[f]or the purpose of this proceeding, therefore, the fetus can be regarded as a human being..."²⁷⁷

In *Jefferson v. Griffin Spalding County Hospital*, the Supreme Court of Georgia upheld an order compelling a competent adult who was an expectant mother in her 39th week of pregnancy to submit to a caesarian delivery.²⁷⁸ In his concurrence, Judge Hill found that the right of the mother to practice her religion and her right to refuse surgery on herself was outweighed by her unborn child's right to live, who faced almost certain death without the surgery.²⁷⁹ Judge Smith also concurred and relied upon *Reynolds* for the proposition that liberty to follow one's personal religious faith is restrained by law when personal choices affect the life of an unborn human being: "Under these circumstances, I must conclude that the trial court's order is not violative of the First Amendment, notwithstanding that it may require the mother to submit to surgery against her religious beliefs."²⁸⁰

A balancing test was also employed in *Pemberton v. Tallahassee Memorial Regional Medical Center*, by federal Judge Hinkle, who considered the First, Fourth, Eighth and Fourteenth Amendment rights of Laura Pemberton, who refused consent for a caesarian delivery even though her physicians believed that a natural home delivery would risk the

²⁷⁶ *In re Jamaica Hosp.*, 491 N.Y.S.2d 898 (N.Y. Spec. Term 1985).

²⁷⁷ *Id.* at 1008.

²⁷⁸ *Jefferson v. Griffin Spalding County Hosp.*, 274 S.E.2d 457 (Ga. Sup. Ct. 1981) (per curiam).

²⁷⁹ See *id.* at 461 (Hill, P.J., concurring).

²⁸⁰ See *id.* at 461 (Smith, J. concurring).

death of her full term unborn child.²⁸¹ Judge Hinkle held that the life of the unborn child whose life was in danger was paramount to the constitutional rights of the mother.²⁸²

Judge Levie in the District of Columbia reached the same result in the case of Ayesha Madyun, a devout Muslim.²⁸³ Citing the Supreme Court's decision in *Prince v. Massachusetts*,²⁸⁴ Judge Levie stepped in to act on behalf of the unborn child's best interests. Finding that the state had a "compelling interest" in the life of the unborn child and that parental control, authority, and rights were limited, Judge Levie ordered the hospital to take whatever steps were necessary to protect the birth and life of the fetus.²⁸⁵

When courts deviated on two occasions from the balancing approach and used a test of "substituted judgment," the mother's constitutional rights triumphed over her unborn child's interest in living for the judge considered only the mother's self-interest and ignored the interest of the unborn child.²⁸⁶ So far, these deviations have not changed the general unbroken trend of using a balancing test in blood transfusion and obstetrical cases of regarding the unborn child as a human being that has a right to life.

While the precedent of *Reynolds* restrains the religious liberty of the pregnant woman under the First Amendment in favor of the unborn child, the authority of *Prince* for a time restrained the liberty of parents under the due process clause of the Fourteenth Amendment.²⁸⁷ In *Prince*, a mother took her children with her to engage in street preaching to actively promote the teachings of the Jehovah Witness faith contrary to state labor laws that prohibited underage children from selling and distributing publications.²⁸⁸ In appealing her criminal conviction, Sarah

²⁸¹ *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr.*, 66 F. Supp.2d 1247 (N.D. Fla. 1999).

²⁸² *Id.* at 1254.

²⁸³ *In re Madyun*, 114 *Daily Wash. L. Rptr.* 2233 (D.C. Super. Ct. 1986).

²⁸⁴ 321 U.S. 158 (1944).

²⁸⁵ *Madyun*, 114 *Daily Wash. L. Rptr.* at 2240.

²⁸⁶ See *In re Baby Doe v. Mother Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994); *In re A.C.*, 573 A.2d 1235 (D.C. 1990).

²⁸⁷ See *Prince*, 321 U.S. at 164.

²⁸⁸ *Id.* at 161-62.

Prince joined her defense of First Amendment religious liberty rights to a claim of parental rights secured by the due process clause of the Fourteenth Amendment.²⁸⁹ Justice Rutledge, without using the word “privacy,” described the mother’s “sacred private”²⁹⁰ due process interest as “authority in her own household and in the rearing of her children.”²⁹¹ Competing with the mother’s right are the “interests of society to protect the welfare of children”²⁹² for “it is the interest of youth itself, and of the whole community, that children be safeguarded from abuses and given opportunities for growth into free well-developed men and citizens.”²⁹³

Justice Rutledge concluded, “the family itself is not beyond regulation in the public interest.”²⁹⁴ State intrusion into family private life is justified to protect children, for “neither rights of religion nor rights of parenthood are beyond limitation.”²⁹⁵ Personal private family choices made by parents are limited when those choices affect the life or health of children. Parents thus do not possess unrestrained personal liberty under the Fourteenth Amendment to make decisions that harm their children.

Prince established that the state’s authority over children is broader than over adults. If a competent adult decided to harm herself by exercising her liberty to do so, that was one thing; causing harm to a child who does not have a choice in the decision is another: “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”²⁹⁶

Neither of the dissenting Justices found an unrestricted right in the parents to do whatever they wished. Justice Murphy saw no evil in the handing out of religious tracts in the public forum that was harmful to the children.²⁹⁷ Justice Jackson agreed that there were limits to constitutional

²⁸⁹ *Id.* at 164.

²⁹⁰ *Id.* at 165.

²⁹¹ *See id.*

²⁹² *Id.*

²⁹³ *Id.* at 165.

²⁹⁴ *Id.* at 166.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 170.

²⁹⁷ *See id.* at 175.

liberties which began when there was a collision with or an affect upon the constitutional rights of others: “I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”²⁹⁸ The conviction of Sarah Prince was affirmed.

B. *Using Privacy as Justification*

In the 1960's, a series of test cases were filed in federal courts challenging the constitutionality of state laws restricting abortion.²⁹⁹ The Fourteenth Amendment of the U.S. Constitution became the battleground of “choice.” It did not matter that “freedom of choice” entailed the creation of dual classes of persons, one born and the other unborn. In the context of abortion, “freedom of choice” was, and still is, used as a means to justify inequality between the mother and her unborn child. Personal autonomy, personal privacy and reproductive liberty were claimed to be fundamental rights within the substantive meaning of the due process clause. The decision to abort one’s own child was argued to be part of one’s constitutional right to unrestrained personal liberty conferred by the Fourteenth Amendment.

*Griswold v. Connecticut*³⁰⁰ revived the previously discredited doctrine of unrestrained personal liberty made famous by *Lochner v. New York*³⁰¹ and believed put to rest by *West Coast Hotel Co. v. Parrish*.³⁰² *Griswold* began the modern era of a constitutional right to privacy, which included the unrestrained personal liberty to make reproductive decisions about contraception.³⁰³

In 1961, the Supreme Court revisited the issue of restrictions on the liberty of individuals to make personal and private choices under the due process clause.³⁰⁴ While the challenge to Connecticut’s laws banning

²⁹⁸ Id. at 177 (Jackson, J., dissenting).

²⁹⁹ See *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970); *Abele v. Markle*, 351 F. Supp. 224 (D.C. Conn. 1972); *Bryn v. N.Y. City Health & Hosps. Corp.*, 38 A.D. 2d 316 (N.Y. App. Div. 1972).

³⁰⁰ 381 U.S. 479 (1965).

³⁰¹ 198 U.S. 45 (1905).

³⁰² 300 U.S. 379 (1937).

³⁰³ *Griswold*, 381 U.S. 479.

³⁰⁴ *Poe v. Ullman*, 367 U.S. 497 (1961).

the use of contraceptives was dismissed because it did not present a genuinely justiciable controversy, the case of *Poe v. Ullman* signaled the beginning of a shift from the balance struck in *Prince v. Massachusetts* in favor of granting unrestrained liberty to married couples in matters of family planning.³⁰⁵

Justice Douglas dissented, for he wanted to decide the case on its merits and was willing to find a right of privacy in the meaning of liberty, taking judicial notice of the requirements of a free society, asserting “the regime of a free society needs room for vast experimentation.”³⁰⁶ Raising the image of the police entering the inner sanctum of the marital bedroom to enforce a criminal law against the use of contraceptives, Justice Douglas denounced this as “an invasion of the privacy that is implicit in a free society.”³⁰⁷

Justice Harlan too dissented, for he was troubled by the potential of the criminal prosecution of married persons who could not enjoy the privacy of their marital relations free of legal supervision.³⁰⁸ Justice Harlan declared that the Connecticut laws violated the Fourteenth Amendment: “I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustified invasion of privacy in the conduct of the most intimate concerns of an individual’s personal life.”³⁰⁹ According to Justice Harlan, the due process clause has substantive meaning that includes privacy, for since the Magna Carta, the guarantees of due process protected against arbitrary legislation, and the reach of due process embraces fundamental rights that belong to the citizens of all free governments.³¹⁰ Due process cannot be reduced to a formula, for the meaning of due process is derived from judgment and restraint.³¹¹ The content of due process is derived from tradition, “a living thing” having regard to the balance between “respect for the liberty of the

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 517-518.

³⁰⁷ *Id.* at 520-521.

³⁰⁸ *See id.* at 536.

³⁰⁹ *Id.* at 539.

³¹⁰ *See id.* at 541.

³¹¹ *See id.* at 542.

individual” and the “demands of organized society.”³¹² Liberty is more than specific points about selected topics, for liberty is “a rational continuum” in the context of history and purposes, and includes freedom from all “substantial arbitrary impositions and purposeless restraints.”³¹³ In matters of marital privacy, the Court is obligated to use sensitivity and reasonableness and use “careful scrutiny” to decide whether personal freedom may be lawfully restrained.³¹⁴ When there is a novel claim, the Court must exercise “limited and sharply restrained judgment” and “follow closely well-accepted principles and criteria.”³¹⁵

Laws that reflect a collective legislative moral judgment that intrude into marital privacy ought to be subject to strict scrutiny.³¹⁶ The privacy of the home is not limited to the quartering of soldiers therein³¹⁷ or protection from search and seizure by agents of the state unless judicially authorized by a warrant.³¹⁸ Rather, the concept of privacy embodied in the Due Process Clause “is part of the ‘ordered liberty’ assured against state action by the Fourteenth Amendment.”³¹⁹ Referring to the dissenting judgment of Justice Brandeis in *Olmstead v. United States*,³²⁰ Justice Harlan expanded the scope of liberty from a spatial dimension to a spiritual, emotional and intellectual construct that conferred upon an individual, as against the government, the “right to be let alone.”³²¹ Justice Harlan envisioned a “bubble zone” of personal privacy grounded in liberty, free from government restraint and moral judgment that permitted the constitutional pursuit of happiness.

Justice Harlan was careful to confine his opinion to the intimacies of marriage between a husband and his wife.³²² He deferred to the authority of *Prince v. Massachusetts*, conceding that the family is not

³¹² See *id.*

³¹³ See *id.* at 543.

³¹⁴ See *id.*

³¹⁵ See *id.* at 544.

³¹⁶ *Id.* at 548.

³¹⁷ U.S. Const. amend. III.

³¹⁸ U.S. Const. amend. IV.

³¹⁹ See *Poe*, 367 U.S. at 549.

³²⁰ 277 U.S. 438, 478 (1928).

³²¹ See *Poe*, 367 U.S. at 550.

³²² See *id.* at 553.

beyond state regulation and that “the right of privacy most manifestly is not absolute.”³²³ For example, there is no sanctuary for criminal offenses committed against another person in the home³²⁴ Nor is the state prohibited from protecting the moral welfare of its people.³²⁵ Prosecution for murder of one’s child or spouse in the bedroom thus cannot be avoided by raising a constitutional claim of privacy and unrestrained personal liberty. Justice Harlan agreed with Justice Jackson in *Skinner v. Oklahoma* that there were limits to the extent a legislatively represented majority may conduct experiments at the expense of the dignity and personality of the individual.³²⁶

Poe v. Ullman predictably resulted in another test case to challenge Connecticut’s laws banning the use of contraceptives.³²⁷ Griswold, the Executive Director of the Planned Parenthood League in Connecticut, and Dr. Buxton, a professor of medicine at Yale Medical School, were found guilty of counseling married persons to use contraceptives. This time, Justice Douglas, in *Griswold v. Connecticut*, delivered the opinion of the Court. He found that a constitutional right to privacy existed in the “penumbras” of the various guarantees of the Bill of Rights that “give [it] life and substance.”³²⁸ These implied zones of privacy are created by the various guarantees.³²⁹ The state law was unconstitutional, being repulsive to the sanctity and privacy of the marriage relationship.³³⁰

Justices Goldberg, Brennan and Chief Justice Warren concurred, agreeing “that the concept of liberty protects those personal rights that are fundamental rights, and is not confined to the specific terms of the Bill of Rights.”³³¹ The concept of liberty includes the right of marital privacy, and this is a fundamental personal right that may be found in the Ninth Amendment. In deciding what is a fundamental personal right, the Court

³²³ See *id.* at 552.

³²⁴ See *id.*

³²⁵ See *id.* at 553.

³²⁶ See *id.* at 555.

³²⁷ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³²⁸ *Id.* at 484.

³²⁹ See *id.*

³³⁰ See *id.*

³³¹ See *id.* at 486-87.

is not permitted to be influenced by its own personal predilections, but must follow an orderly inquiry, having regard to the principles established in jurisprudence:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there]...as to be ranked as fundamental.” The inquiry is whether a right involved “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’...” “Liberty” also “gains content from the emanations of...specific [constitutional] guarantees” and “from experience with the requirements of a free society.” In light of the tests enunciated in these cases it cannot be said that a judge’s responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion.³³²

Failing to protect marital privacy, the *Griswold* Court argued, would permit the state to regulate the future use of contraception, including compulsory birth control. Such control by the state could lead to the undesirable result of decreeing “all husbands and wives must be sterilized after two children have been born to them.”³³³ Both scenarios are unacceptable invasions of marital privacy.

The concurring opinions in *Griswold* relied heavily on precedent for the constitutional basis for a right to privacy. Justice Harlan concurred in the result, for the detailed reasons he earlier expressed in *Poe v. Ullman*, that the state’s laws violated the basic values implicit in the concept of ordered liberty.³³⁴ Justice White based his concurrence on the deprivation of liberty under the Due Process Clause of the Fourteenth Amendment.³³⁵ He was satisfied that the prior decisions of the Court in *Meyer v. Nebraska*,³³⁶ *Pierce v. Society of Sisters*,³³⁷ *Skinner v.*

³³² See *id.* at 493-94. (citations omitted).

³³³ See *id.* at 496-97.

³³⁴ See *id.* at 500; *Poe v. Ullman*, 367 U.S. 497, 518 n.9 (1961).

³³⁵ See *Griswold*, 381 U.S. at 508-10.

³³⁶ 262 U.S. 390 (1923).

³³⁷ 268 U.S. 510 (1925).

Oklahoma,³³⁸ and *Prince v. Massachusetts*³³⁹ all established that ““there is a realm of family life which the state cannot enter without substantial justification.”³⁴⁰

Justice Black wrote a strong dissent stating unequivocally there is no right to privacy in the Constitution.³⁴¹ He criticized his Brethren for resurrecting *Lochner*'s ideology to empower the Court to decide which personal rights now qualify as fundamental constitutional rights encompassed within the meaning of liberty and henceforward may not be interfered with by the state as a matter of privacy.³⁴² The use of the Due Process Clause to hold legislation unconstitutional, thereby substituting the Court's views for that of elected representatives, wrongly shifts the power from the people to the judiciary, which becomes a self-appointed super-legislature, thereby upsetting the delicate balance in the separation of powers.³⁴³ While judicial review has its proper place, the Court has a responsibility to exercise restraint and defer whenever possible to the legislative branch of government:

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.³⁴⁴

³³⁸ 316 U.S. 535 (1942).

³³⁹ 321 U.S. 158 (1944).

³⁴⁰ See *Griswold*, 381 U.S. at 502.

³⁴¹ See *id.* at 508.

³⁴² See *id.* at 522-23.

³⁴³ See *id.* at 520-21.

³⁴⁴ See *id.*

Justice Black rejected the notion that the Court had a duty to keep the Constitution “in tune with the times.”³⁴⁵ If change must occur, there is an amending formula in the Constitution to follow.³⁴⁶ While Justice Black admitted he liked his own privacy³⁴⁷ and personally deplored the wisdom of Connecticut’s law,³⁴⁸ he saw that his task was to interpret the law and not to exercise a self-anointed power of veto.³⁴⁹ The government has a right to regulate private choices made by married couples “unless prohibited by some specific constitutional provision.”³⁵⁰ Justice Stewart agreed with Justice Black, adding that it was not the function of the Court to decide cases based on community standards and that judges must subordinate their own personal views about the wisdom or folly of the impugned legislation.³⁵¹

For all its importance in reviving judicial activism and establishing a constitutional right to privacy, *Griswold* did not cross the line with respect to the impact personal choices made in the lives of others because genuine contraception did not harm a third party. Assuming there is a substantive due process right of personal privacy, this right in *Griswold* did not extend to an unfettered license to kill or enslave another human being. What the Court considered in *Griswold*, explained Justice Douglas years later in *Doe v. Bolton*,³⁵² was “that the States may not preclude spouses from attempting to avoid the joinder of sperm and egg.”³⁵³ There was no issue of taking the life of a newly created human being.

What *Griswold* accomplished was to move the Court to the brink of establishing a constitutional right to abortion. The precedent of a constitutional right to personal privacy in matters of reproductive choice set the stage for the Court’s departure from the rule of law to rule by law.

³⁴⁵ See *id.* at 522.

³⁴⁶ U.S. Const. art. V.

³⁴⁷ *Griswold*, 381 U.S. at 510.

³⁴⁸ *Id.* at 507.

³⁴⁹ *Id.* at 513.

³⁵⁰ *Id.* at 510.

³⁵¹ *Id.* at 530-31.

³⁵² 410 U.S. 179 (1973).

³⁵³ *Id.* at 217.

The constitutional right to an abortion became the goal of this new orthodoxy.

No longer subjugated by men, liberated feminists refused to be baby incubators and sought equality with men, who were not physically burdened with carrying a fetus and enjoyed sexual freedom. The right to make reproductive choices was no longer to be the privilege of married couples, but the constitutional right of every individual, married or single. Most important, what women wanted was the right to choose not only to “beget” or “conceive children, but the unfettered right to choose not to “bear” or carry a child until its birth. In plain language, the right to “bear and beget” meant the right to conceive or abort another human being. These goals were attained in *Eisenstadt v. Baird*.³⁵⁴

In *Eisenstadt*, William Baird was convicted of an offense under Massachusetts state law for giving away a package of Emko vaginal foam, a contraceptive, at the close of his lecture on contraception to a group of students at Boston College.³⁵⁵ It was against the law to give away any article used for the prevention of conception.³⁵⁶ Only married persons were eligible to obtain contraceptives from doctors or pharmacists by prescription.³⁵⁷ The social policy behind this law was to promote marital fidelity, deter premarital sex, and prevent the transmission of sexual diseases. Unlike in *Griswold*, the use of contraception was legal in Massachusetts. The constitutional attack focused on the state’s scheme of control and distribution.

The Supreme Court held that the legislative aims were unreasonable and that the statute, in its effect, was a prohibition on contraception per se.³⁵⁸ Viewed from this perspective, the law was unconstitutional for it violated the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.³⁵⁹ Justice Brennan, in an opinion joined by Justices Douglas, Marshall and Stewart, took this opportunity to stretch the doctrine of marital privacy and transformed it

³⁵⁴ 405 U.S. 438 (1972).

³⁵⁵ *Id.* at 440.

³⁵⁶ *Id.* at 440-41.

³⁵⁷ *Id.* at 442.

³⁵⁸ *Id.* at 443.

³⁵⁹ *Id.*

into individual privacy for “a marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”³⁶⁰ In this statement, Justice Brennan brushed aside the teachings of Jesus about marital privacy and the spiritual indivisibility of a husband and wife.³⁶¹

His next statement was even more gratuitous and unnecessary to resolve the dispute before the Court. Justice Brennan linked the right of contraception—henceforth a matter of personal individual choice free from government interference—to the right of abortion, which he implicitly predicted would become a matter of personal individual choice free from government interference.³⁶² Justice Brennan declared that the right of privacy included the fundamental right to choose to “bear” a child, thereby extending an invitation to feminists to bring on a test case to establish a constitutional right to an abortion: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to *bear or beget* a child.”³⁶³

According to Justice Brennan, the right to be let alone was the most important right needed to enable an individual to attain happiness.³⁶⁴ Free from government restrictions, any woman could prevent conception from occurring and now could extinguish the new life within her.

The line established by Justice Jackson in *Prince v. Massachusetts*³⁶⁵ had now been crossed. Personal happiness could now be attained at the cost of another’s life and future happiness. Personal liberty could be exercised without restraint at the cost of trampling another’s liberty to be let alone to mature and thrive.

³⁶⁰ *Id.* at 453.

³⁶¹ “Have you not read that from the beginning the Creator ‘made them male and female’ and said, ‘For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh’? [*Genesis 2:24*] So they are no longer two, but one flesh. Therefore, what God has joined together, no human being must separate. *Matthew 19:4-6* (New American Bible).

³⁶² *Eisenstadt*, 405 U.S. at 453.

³⁶³ *Id.* (emphasis added).

³⁶⁴ *Id.*

³⁶⁵ 321 U.S. 158 (1944).

Chief Justice Burger dissented, troubled by the Court's invasion of the constitutional prerogatives of the states by the use of substantive due process.³⁶⁶ Baird's lecture on birth control was protected speech, and the giving of a contraceptive tool to a member of the audience was an extension of the use of a visual aid that constituted conduct that was permitted by the First Amendment.

Justice Brennan and those who allied with Baird had a choice to avoid the topic of individual privacy and abortion. They did not. Instead, they extended the constitutional right of personal privacy to suggest an implied license to take the life of an unborn child, a right that has no mooring in the text of the Constitution and is contrary to history and tradition.

C. The Conflict Between the First and Fourteenth Amendments

Justice Brennan's decision in *Eisenstadt* contradicted Justice Douglas' views on the constitutional rights of children expressed in *Wisconsin v. Yoder*.³⁶⁷ In that case, Justice Douglas, in dissent, stated that minor children of school age have constitutionally protectible interests to control their own destiny and to have a say independent of their parents' dictates whether or not they wanted to attend high school, contrary to Old Amish religious practices and belief:

These children are "persons" within the meaning of the Bill of Rights. We have so held over and over again. In *Haley v. Ohio*, we extended the protection of the Fourteenth Amendment in a state trial of a 15-year-old boy. In *In re Gault*, we held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In *In re Winship*, we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment.

In *Tinker v. Des Moines School District*, we dealt with 13-year-old, 15-year-old, and 16-year-old students who wore armbands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged....

In *Board of Education v. Barnette*, we held that schoolchildren, whose religious beliefs collided with a school rule requiring them to salute the flag,

³⁶⁶ *Id.* at 467.

³⁶⁷ 406 U.S. 205 (1972).

could not be required to do so.... On this important and vital matter of education, I think the children should be entitled to be heard.... It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.³⁶⁸

If school age children are persons within the meaning of the Fourteenth Amendment and ought to have their interests in education protected by the state, then unborn children too are persons within the meaning of the Bill of Rights because they have a vested interest in their future destiny and deserve a say in whether they will live or die.

However, the force of this argument diminishes when one considers that the majority opinion in *Yoder* upheld the right of the parent on First Amendment grounds to decide the future education of Amish children, despite the state interest recognized by the Court.³⁶⁹ Chief Justice Burger exempted the Amish from state regulation intended to curb parental authority that was not exercised in the best interests of children, thereby blurring the previous bright line between action and belief:

Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to

³⁶⁸ See *id.* at 243-46 (Douglas, J., dissenting in part) (citations omitted).

³⁶⁹ See *id.* at 234.

the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. This case, therefore, does not become easier because respondents were convicted for their “actions” in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments.³⁷⁰

This was a major departure from *Reynolds*, which has since been reaffirmed by *Employment Division, Department of Human Resources of Oregon v. Smith*.³⁷¹

Presumably, if secular humanism is viewed as a religion and practice of abortion is one of the features of that religion, *Yoder* might be used to justify the practice of abortion as necessary part of one’s pursuit of happiness. After all, religion can be defined to be thoughts and actions that spring from a sincere and meaningful belief based upon a power or being or faith, to which all else is ultimately dependent or to which all else is subordinate.³⁷² In a hypothetical technologically advanced secular and godless society, abortion can become a form of modern day child sacrifice that conceivably qualifies as a part of a quasi-religious ritual characterizing a new orthodoxy institutionalizing feminist reproductive supremacy.³⁷³

Chief Justice Burger suggests that *Yoder* should be restricted to its facts, for in that case, no child’s life or welfare was in jeopardy: “This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”³⁷⁴

In another case involving the sexual abuse and exploitation of children, Justice White, speaking for the majority of the Supreme Court, stated, “[i]t is evident beyond need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is

³⁷⁰ See *id.* at 219-20 (citations omitted).

³⁷¹ 494 U.S. 872 (1990).

³⁷² See generally, *United States v. Seeger*, 380 U.S. 163 (1965).

³⁷³ See generally Martin, *supra* n63.

³⁷⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972).

‘compelling.’”³⁷⁵ Provided an unborn child survives the risk of abortion, legal protection awaits at the end of the nine-month journey to birth.

D. Steinberg v. Brown: The Precedent Ignored in Roe

A collision was inevitable between the competing forces of segregationists whose goal was to promote inequality and remove the unborn from constitutional protection and those liberals with classical liberal beliefs who believe in equality for all human beings, regardless of age or condition.

Supporting equal protection for the unborn was the common law, history, tradition and laws that generally outlawed abortion.³⁷⁶ Until *Roe v. Wade*, abortion was never a fundamental right in American jurisprudence.³⁷⁷ Supreme Court jurisprudence had held that the term “person,” whether used in the Fifth or Fourteenth Amendment, was “broad enough to include any and every human being under the jurisdiction of the republic.”³⁷⁸

Opposing equal protection for the unborn is secular humanism, moral relativism, and selfishness, which claim the unfettered liberty to kill another human being that has been legally depersonalized, as an exercise of a legally protected person’s legal claim to personal privacy, reproductive freedom, fundamental liberty and due process.

Acting on the Supreme Court’s open invitation in *Eisenstadt* to challenge the constitutionality of state laws restricting abortion, Dr. Steinberg and others sought a declaratory judgment that Ohio’s anti-abortion statute was unconstitutional in *Steinberg v. Brown*.³⁷⁹ District court Judge Don Young and circuit court Judge Weick dismissed the application.³⁸⁰

Judge Young found the asserted privacy rights, even assuming they were located in the penumbras of the provisions of the Bill of Rights,

³⁷⁵ *New York v. Ferber*, 458 U.S. 747, 756 (1982).

³⁷⁶ See *Roe v. Wade*, 410 U.S. 113, 174-78 (1973) (Rehnquist, J., dissenting).

³⁷⁷ See *id.*

³⁷⁸ *Wong Wing v. United States*, 163 U.S. 228, 242-43 (1896) (Field, J., dissenting).

³⁷⁹ 321 F. Supp. 741 (N.D. Ohio 1970).

³⁸⁰ *Id.*

conflicted with the Fifth and Fourteenth Amendments, which guaranteed that no person shall be deprived of life without due process of law.³⁸¹ There was a permanent gulf between the situations in *Griswold*, where the only lives involved are that of two competent adults, and in *Steinberg*, where there is unborn human life incapable of defending itself or consenting to be killed.³⁸² Contraception is a private and personal decision that is “concerned with preventing the creation of a new and independent life.”³⁸³ The decision to use a contraceptive to prevent the union of egg and sperm is immune from government interference.³⁸⁴ Citing the scientific evidence, Judge Young determined that once fertilization and conception has occurred, a new human life has begun.³⁸⁵ On balance, the rights of the unborn human being to live and have an opportunity to survive are paramount to the claimed right of the mother or anyone else to abort the unborn child except in self-defense to preserve the mother’s own life.³⁸⁶

This reasoning was premised on the objective truth and the laws of nature that human life begins at conception: “Biologically, when the spermatozoon penetrates and fertilizes the ovum, the result is the creation of a new organism which conforms to the definition of life just given.”³⁸⁷ In addition, Judge Young held that if the law conforms with science for the purpose of protecting property rights or the most important right of all, the right to life, without which no one could ever enjoy property or anything else, here too the law must accord with science.³⁸⁸ While Judge Young did not confront the meaning of “person” in the Fourteenth Amendment, he dealt indirectly with the matter by observing the State of Ohio never followed the error of Justice Holmes in *Dietrich* and the tort law always protected a child born alive that was injured prior to its birth.³⁸⁹

³⁸¹ See *id.* at 745-46.

³⁸² See *id.* at 746.

³⁸³ *Id.*

³⁸⁴ See *id.*

³⁸⁵ See *id.* 746-47.

³⁸⁶ See *id.* at 746.

³⁸⁷ *Id.*

³⁸⁸ See *id.* at 747.

³⁸⁹ See *id.*

In dissent, Judge Ben Green also failed to comment whether or not the unborn human being was a constitutional person.³⁹⁰ Judge Green did not contest the biological facts because it did not affect his analysis of the case that a new human life was at stake.³⁹¹ Judge Green sided with the interests of the pregnant mother over that of the non-viable embryonic human life, in which he found no “compelling state interest.”³⁹² Judge Green unabashedly offered a personal opinion, and in doing so adopted the language of Justice Brennan in *Eisenstadt* “that a woman has the private right to control her own person, which necessarily encompasses the fundamental right to choose whether to *bear* children.”³⁹³ Judge Green further offered the opinion that the choice to have an abortion in the early stages of pregnancy and at any time prior to viability “should be a private matter between a woman and her physician.”³⁹⁴ Judge Green defined a viable unborn child “being one that would be capable of sustaining life if removed from the womb.”³⁹⁵

XIII. RULE BY LAW V. RULE OF LAW

The direct question of whether the unborn were persons under the Fourteenth Amendment arose in *Bryn v. New York City Health & Hospitals Corp.*³⁹⁶ Extensive examination of this case is merited because the themes of rule of law and rule by law emerge in the approaches taken by the judges.

A. *Bryn*

Robert Bryn, by an ex parte order of a Supreme Court judge, was appointed guardian ad litem for the infant Roe and for the entire class of unborn infants aged less than twenty-four weeks who were scheduled to have their lives terminated by abortion in public hospitals operated by the

³⁹⁰ See id. at 748-59.

³⁹¹ See id. at 752.

³⁹² See id.

³⁹³ Id. at 759 (emphasis added).

³⁹⁴ Id. at 760.

³⁹⁵ Id. at 754.

³⁹⁶ 329 N.Y.S.2d 722, 729 (N.Y. App. Div. 1972).

defendant.³⁹⁷ Bryn sought a declaratory judgment and permanent injunction to stop all abortions by the defendant, except those necessary to save the life of the mother.³⁹⁸ A motion for a preliminary injunction was granted on January 7, 1972 on the basis that there was a strong likelihood the plaintiff would ultimately prevail.³⁹⁹

The Appellate Division of the Supreme Court of New York vacated the injunction.⁴⁰⁰ Judge Christ conducted a cursory review of the legal history of abortion and its regulation by New York State. He placed much general reliance on a law review article written by a law professor, Cyril Means Jr., that was sympathetic to the position of abortion rights activists.⁴⁰¹ Means argued that the intent behind abortion laws was to protect the health of mothers and not to save the lives of unborn babies.⁴⁰² It was no coincidence that Means was legal counsel to the National Association for the Repeal of Abortion Laws (NARAL) at the time. At least one scholar has since debunked Means's article as a misleading revisionist history of the laws outlawing abortion.⁴⁰³

Judge Christ faced the substantial question of whether a human being that was less than twenty-four weeks old was a person within the meaning of the Fifth and Fourteenth Amendments to the Constitution.⁴⁰⁴ There were no factual issues for all parties agreed that "in the contemporary medical view, the child begins a separate life from the moment of conception."⁴⁰⁵ There was no case directly on point to assist

³⁹⁷ Id. at 723.

³⁹⁸ Id. at 724.

³⁹⁹ Id.

⁴⁰⁰ Id. at 736.

⁴⁰¹ See Cyril C. Means, "The Phoenix of Abortional Freedom: Is a Penumbra or Ninth Amendment Right About to Rise from the Nineteenth-Century Legislative Ashes of a Fourteenth Century Common Law Liberty?" in 17 *N.Y. L. Forum* 335 (1971).

⁴⁰² See id. at 382-83.

⁴⁰³ See Clarke D. Forsythe, "The Effective Enforcement of Abortion Law Before *Roe v. Wade*" in *The Silent Subject*, ed. Brad Stetson (1996), p. 183; Clifford Stevens, "The Rights of the Unborn from Common Law to Constitutional Law," *Priests for Life*, <http://www.priestsforlife.org/government/stevens3.htm> (last visited Mar. 31, 2006).

⁴⁰⁴ *Bryn*, 329 N.Y.S.2d at 729.

⁴⁰⁵ Id.

the Court. From a review of tort and property cases affecting the rights of the unborn, Judge Christ concluded that “legal personality is not synonymous with separate and vital existence within the womb; that, depending on the circumstances involved, public policy and other factors, legal personality will be accorded or withheld as these extrinsic considerations demand.”⁴⁰⁶

In other words, if the court wanted to confer personhood, it could have chosen to do so. Implicit in Judge Christ’s opinion was that designating an unborn child as legal person was a result-oriented decision that had nothing to do with principle and everything to do with personal predilection. This observation is completely at odds with the common law history discussed earlier in this essay, which strongly makes the case that until the abortion cases of the 1960’s, the law regarded the unborn human being from the time of its known existence as a legal person, and as scientific knowledge increased about when human life began, so did legal protection for the unborn.⁴⁰⁷

Judge Christ failed to examine the history of the Fourteenth Amendment to see if the meaning of person included unborn human life. Without examining the debates of the framers of the Fifth Amendment, Judge Christ summarily concluded that he doubted whether there was any thought whether an unborn child was a person within the meaning of that amendment.⁴⁰⁸ Applying the presumption of constitutionality, Judge Christ upheld the New York laws permitting abortion, deferring to the wisdom of the legislature to make a value judgment that determines at what point human life should be protected.⁴⁰⁹ However, Judge Christ recognized he was obliged to consider *Levy v. Louisiana*⁴¹⁰ and to decide whether the state’s laws constituted “invidious discrimination” against the unborn.

In *Levy*, Justice Douglas dealt with the issue of whether illegitimate children were persons under the Constitution and, if so,

⁴⁰⁶ Id. at 734.

⁴⁰⁷ See supra nn269-395 and accompanying text.

⁴⁰⁸ *Bryn*, 329 N.Y.S.2d at 735.

⁴⁰⁹ See id. This is the approach Justice Scalia advocated in *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 1001-02 (1992).

⁴¹⁰ 391 U.S. 68, 72 (1968).

whether state laws could exclude them from inheriting property.⁴¹¹ Justice Douglas had no difficulty deciding that a live human being was a “person” within the meaning of the equal protection clause of the U.S. Constitution:

We start from the premise that illegitimate children are not “nonpersons.” *They are humans, live, and have their being. They are clearly “persons” within the meaning of the Equal Protection Clause of the Fourteenth Amendment.* While a State has broad power when it comes to making classifications, *it may not draw a line which constitutes an invidious discrimination against a particular class.* Though the test has been variously stated, the end result is whether the line drawn is a rational one.⁴¹²

Had Judge Christ applied the test in *Levy*, he could have easily concluded the unborn human being is a person.

Even in the case of pregnancy resulting from rape or incest, the *Levy* case provided guidance to protect the unborn from invidious discrimination, for the unborn cannot be blamed for any harm caused to the mother:

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would. We conclude that *it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.*⁴¹³

Judge Christ skipped the question of whether the unborn child was a constitutional person. Instead, he moved directly to the question of whether the state law was rationally based. Judge Christ refused to engage the topic of invidious discrimination and simply concluded that the laws permitting abortion were rationally based.⁴¹⁴ In this manner, Judge Christ evaded the question before him regarding the personhood of the unborn

⁴¹¹ *Id.* at 70.

⁴¹² *Id.* at 70-71 (emphasis added) (citations omitted).

⁴¹³ *Id.* at 72 (emphasis added).

⁴¹⁴ See *Bryn v. N.Y. City Health & Hosps. Corp.*, 329 N.Y.S.2d 722, 735-36 (N.Y. App. Div. 1972).

child and ruled in favor of the defendant.⁴¹⁵

Bryn appealed to the full New York Court of Appeals and lost.⁴¹⁶ Cyril C. Means Jr. appeared as amici curiae for NARAL. Relying on Means's article, Judge Breitel adopted Means's arguments, noting they were "evidently to protect the mother from injury and dangerous practices."⁴¹⁷

Judge Breitel further suggested "unborn children have never been recognized as persons in the law in the whole sense."⁴¹⁸ In one sentence he explained why "[i]n ancient days it was even said [unborn children] were not in *rerum natura*."⁴¹⁹ As discussed earlier, this assertion is flatly wrong, for the history of the common law proves the opposite. Even if Judge Breitel were correct, he could have used the example of American women and the descendents of African American slaves as examples to prove the point that these classes of people were not barred from being recognized as persons under the Fourteenth Amendment even though historically these groups were once not persons in the whole sense of the word.

Judge Breitel indicated that modern science ultimately matters more than history.⁴²⁰ Judge Breitel conceded that, as a matter of biology, it was not contradicted that "a fetus has its own independent genetic 'package' with potential to become a full-fledged human being."⁴²¹ Moreover, the fetus "has autonomy of development and character although it is for the period of gestation dependent upon the mother."⁴²² Thus, Judge Breitel concluded, the fetus "is human, if only because it may not be characterized as not human, and it is unquestionably alive."⁴²³ The fetus therefore is a human life in being with potential to become fully matured.

Judge Breitel correctly concluded that the "real" legal question is

⁴¹⁵ See *id.* at 736.

⁴¹⁶ See *Bryn v. N.Y. City Health & Hosps. Corp.*, 286 N.E.2d 887(N.Y. 1972).

⁴¹⁷ *Id.* at 888.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ See *id.* at 889.

⁴²¹ *Id.* at 888.

⁴²² *Id.*

⁴²³ *Id.*

whether a human entity, conceived, but not yet born, is and must be recognized as a person in the law.⁴²⁴ If the answer is yes, then unborn human beings are entitled to constitutional protection. If the answer is no, then unborn children could be treated as any other article of property.

Is it sufficient to be human, be in being and be alive, in order to constitute a legal person? Not so, according to the doctrine of rule by law, which Judge Breitel followed. If the law says a human being is a person, it is. If the law says a human being is no longer a person, then that same human being is not a person. It all comes down to circular reasoning, based purely on definition. A person may be defined in or out of personhood, and thus defined in or out of existence, at the will of the maker of the definition. Policies of inclusion or exclusion are subjective decisions, bearing no resemblance to natural law, and unconnected to the objective truth of science. Justice and morality are irrelevant to the entire process and result. All that matters is that the letter of the law is followed.

Judge Breitel's reasons demonstrate a classic rule by law mentality:

What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person. The process is, indeed, circular, because it is definitional. Whether the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject again of course to the Constitution as it has been "legally" rendered. That the legislative action may be wise or unwise, even unjust and violative of principles beyond the law, does not change the legal issue or how it is to be resolved. The point is that it is a policy determination whether legal personality should attach and not a question of biological or "natural" correspondence.⁴²⁵

Judge Breitel criticized guardian Bryn for his willingness to permit the killing of an unborn child to save the life of its mother for "[b]efore the law, one life is as good as another."⁴²⁶ If abortion was wrong, then there must be no exceptions. The lives of all unborn and born children are

⁴²⁴ Id.

⁴²⁵ *d.* at 889 (emphasis added) (citations omitted).

⁴²⁶ Id. at 890.

innocent. If unborn children were persons, they were entitled to natural justice and constitutional due process:

Necessity may justify in the law every kind of harm to save one's life, except to take the life of an innocent. Before the law one life is as good as another, saint or sinner, genius or imbecile, child or adult. Besides, if the contrary were true, should not the one to lose his life be entitled to notice and hearing through a guardian ad litem, as would be done with any child's property rights, born or unborn?⁴²⁷

In conclusion, Judge Breitel held that the question of the constitutional personhood of the unborn was not one for the courts to decide.⁴²⁸ The real issues were neither justiciable nor legal because they are issues outside of the law.⁴²⁹ Finding that the Constitution did not confer or require legal personality for the unborn, Judge Breitel suggested that the state legislature might confer full personhood or do something less, short of conferring full protection.⁴³⁰ Judge Breitel affirmed the order of the lower court and dismissed the appeal.⁴³¹

Concurring, Judge Jasen targeted his remarks at dissenting Judges Burke and Scileppi. Judge Jasen quoted from Justice Holmes to bolster the credibility of the majority opinion,⁴³² anticipating that its findings and opinions may be “novel and even shocking”⁴³³ to those who believe that biological and legal life commence as an indivisible status at conception.

Dissenting Judge Burke’s opinion joined issue on the question of constitutional personhood and took a model rule of law approach.⁴³⁴ Judge

⁴²⁷ Id.

⁴²⁸ See id.

⁴²⁹ See id.

⁴³⁰ See id.

⁴³¹ Id.

⁴³² See id. at 891 (Jasen, J., concurring): “[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States,” quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

⁴³³ Id.

⁴³⁴ See Id. at 892-97 (Burke, J., dissenting).

Burke argued that: (1) the rule of law does not permit any state to be so supreme that it may destroy the inalienable right to life of a defenseless unwanted human being;⁴³⁵ (2) it is to natural law that positivist law must conform, not the other way around;⁴³⁶ (3) to exclude human beings from legal personhood conflicts with the Declaration of Independence and the belief there is a superior source of authority to which the government must submit and to which the Constitution must conform;⁴³⁷ (4) the right to life is inalienable and means just that;⁴³⁸ (5) is it not consistent with genocide to classify any group of human beings as subjects fit for annihilation?;⁴³⁹ (6) abortion is not only immoral, but is irrational from a medical scientific objective basis;⁴⁴⁰ (7) the arguments of the majority are the same ones used by the Nazi lawyers to justify the actions of their clients at Nuremberg;⁴⁴¹ (8) laws that permit abortion violate the sanctity of life and establish a State religion that values hedonism over the value of human life;⁴⁴² and (9) to classify a living human being as a non-person is a suspect classification that cannot withstand strict scrutiny, as is accordingly unconstitutional.⁴⁴³

Judge Burke strongly disagreed with the majority that the conferring of legal personhood was a matter of policy or of legal definition. He stated:

This argument was not only made by Nazi lawyers and Judges at Nuremberg, but also is advanced today by the Soviets in Eastern Europe. It was and is rejected by most western world lawyers and Judges because it conflicts with natural justice and is, in essence, irrational. To equate the judicial deference to the wiseness of a Legislature in a local zoning case with the case of the destruction of a child in embryo which is conceded to be "human" and "is unquestionably alive" is an acceptance of the thesis that the "State is supreme," and that "live human beings" have no inalienable rights in this country. The most basic of these rights is the

⁴³⁵ See *Id.* at 892.

⁴³⁶ See *Id.*

⁴³⁷ See *id.* at 893.

⁴³⁸ See *id.*

⁴³⁹ See *id.*

⁴⁴⁰ See *id.*

⁴⁴¹ See *id.* at 892, 895.

⁴⁴² See *id.* at 895.

⁴⁴³ See *id.* at 896.

right to live, especially in the case of the “unwanted” who are defenseless. The late Chief Judge Lehman once wrote of these rights: “The Constitution is misread by those who say that these rights are created by the Constitution. The men who wrote the Constitution did not doubt that these rights existed before the nation was created and are dedicated by God’s word. By the Constitution, these rights were placed beyond the power of Government to destroy.” In other words, what the Chief Judge was saying was that *the American concept of a natural law binding upon government and citizens alike, to which all positive law must conform*, leads back through John Marshall to Edmund Burke and Henry de Bracton and even beyond the Magna Carta to Judean Law. Human beings are not merely creatures of the State, and by reason of that fact, our laws should protect the unborn from those who would take his life for purposes of comfort, convenience, property or peace of mind rather than sanction his demise. Moreover, if there is a confiscation of property through a zoning law, it is “constitutionally” invalid. Recently, the United States Supreme Court held that the taking of a life of a murderer by a State was constitutionally invalid, and in the words of one Justice, was found to be “immoral and therefore unconstitutional.”⁴⁴⁴

The depersonalization and dehumanization of human beings so they can be aborted violates the core values of American constitutional law. In a free society, where there is liberty and justice for all, government by rule of law forbids human authority in any circumstances to deprive any class of human beings of their inalienable right to life. Judge Burke explained:

The unconstitutionality stems from its inherent conflict with the Declaration of Independence, the basic instrument which gave birth to our democracy. The Declaration has the force of law and the constitutions of the United States and of the various States must harmonize with its tenets. The Declaration when it proclaimed “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness” restated the natural law. It was intended to serve as a perpetual reminder that rulers, legislators and Judges were without power to deprive human beings of their rights.....

We began our legal life as a Nation and a State with the guarantee that these were inalienable rights that come not from the State but from an external source of authority superior to the State which authority regulated our inalienable liberties and with which our laws and Constitutions must now conform. That authority alone establishes the norms which test the validity of State legislation. It also tests the Constitutions and the United Nations Convention against genocide which forbids any Nation or State to classify any group of living human beings

⁴⁴⁴ See *id.* at 892 (emphasis added) (citations omitted).

as fit subjects for annihilation. In sum, there is the law which forbids such expediency. It is the inalienable right to life in the nature of the child embryo who is “a human” and is “a living being.” Inalienable means that it is incapable of being surrendered. Thus, the butchering of a foetus under the present law is inherently wrong, as it is an illegal interference with the life of a human being of nature.⁴⁴⁵

The alternative choice of an expedient pragmatic rule by law approach to give effect to abortion on demand sets a dangerous precedent, for a person’s former inalienable rights become insecure, with the denial of natural law, like a transient entity that is here today and gone tomorrow.⁴⁴⁶ If the state is supreme to decide who is a person and who is a non-person, the state no longer serves the individual, but the individual the state. The state’s historic role in protecting and preserving human life is replaced by a new goal to permit legal persons to dominate the lives of non-persons.

Justice and morality were indispensable to the vision of Judge Burke. Equating the meaning of person in the Fourteenth Amendment with a live human being made perfect sense. To do otherwise violates the rule of law and transformed it into a kind of rule by law regime that characterizes fascist and communist governments. Failure to conform to the rule of law results in judicially legislated inequality designed to legally justify mass genocide of innocent human beings who have no say in their destiny and whose lives are devalued by operation of law.

B. *The Aftermath of Bryn*

Bryn was followed a month later by U.S. District Court Judge McCune in *McGarvey v. McGee Womens Hospital*.⁴⁴⁷ In denying the argument that the unborn were constitutional persons under the Fourteenth Amendment, Judge McCune noted that neither the debates pertaining to the Constitution nor the Civil Rights Act passed after the Civil War suggested any intent to protect unborn children.⁴⁴⁸ Instead, the recent decision by the U.S. Supreme Court in *United States v. Vuitch*⁴⁴⁹ implied

⁴⁴⁵ Id. at 893 (citations omitted).

⁴⁴⁶ See id. at 894.

⁴⁴⁷ 340 F. Supp. 751 (W.D. Pa. 1972).

⁴⁴⁸ See id. at 753.

⁴⁴⁹ 402 U.S. 62 (1971).

that the unborn were not entitled to constitutional protection.⁴⁵⁰ To give the unborn a constitutional right to life would amount to judicial legislation, something that Judge McCune was unwilling to do.⁴⁵¹

In *Vuitch*, the only issue that reached the Supreme Court was whether law passed in 1952 by Congress that permitted abortion in the District of Columbia to preserve the life or health of the mother was unconstitutionally vague.⁴⁵² In upholding the legislation, the Court was silent on the issue of the unborn child's constitutional status.⁴⁵³

Even though the majority opinion in *Bryn* expressly stated that the state legislature could confer personhood upon the unborn, or do something less to provide limited protection by placing some restrictions on abortion, the U.S. District Court in *Abele v. Markle* disagreed:

The initial inquiry is whether the fetus is a person, within the meaning of the fourteenth amendment, having a constitutionally protected right to life. If it is, then a legislature may well have some discretion to protect that right even at the expense of someone else's constitutional right. But if the fetus lacks constitutional rights, the question then becomes whether a legislature may accord a purely statutory right at the expense of another person's constitutional right.

Our conclusion, based on the text and history of the Constitution and on cases interpreting it, is that a fetus is not a person within the meaning of the fourteenth amendment.... If the fetus survives the period of gestation, it will be born and then become a person entitled to the legal protections of the Constitution. But its capacity to become such a person does not mean that during gestation it is such a person. The unfertilized ovum also has the capacity to become a living human being, but the Constitution does not endow it with rights which the state may protect by interfering with the individual's choice of whether the ovum will be fertilized.

⁴⁵⁰ See *McGarvey*, 340 F. Supp at 753. In *Roe v. Wade*, Justice Blackmun proved Judge McCune's intuition was right: "Indeed our decision in *United States v. Vuitch*...inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection." *Roe v. Wade*, 410 U.S. 113,159 (1973).

⁴⁵¹ *McGarvey*, 340 F. Supp. at 754.

⁴⁵² See *Vuitch*, 402 U.S. 62.

⁴⁵³ See *id.* at 72-73. Justice Douglas dissented in part, finding that the statute was vague, not meeting the requirements of procedural due process. He raised the possibility that every unwanted pregnancy met the "health" precondition to a legal abortion, simply on the basis of the mother's anxiety. *Id.* at 78.

Of course, the fact that a fetus is not a person entitled to fourteenth amendment rights does not mean that government may not confer rights upon it. A wide range of rights has been accorded by statutes and court decisions. These include the right to compensation for tortious injury, the right to parental support, and the right to inherit property. *But the granting of these rights was not done at the expense of the constitutional rights of others.* A tortfeasor has no constitutional right to inflict injury on a fetus. When government acts through legislation to confer upon a fetus the absolute right to be born contrary to the preference of a pregnant woman, it abridges her constitutional right to marital and sexual privacy. Whether it may do so cannot be established by the fact that other protections can be accorded which do not abridge another's constitutional rights.

It is one thing to permit a legislature some discretion in adjusting conflicting rights between groups of people, each of whom has a claim to constitutional protection. *It is altogether different to suggest that a legislature can accord a statutory right to a fetus which lacks constitutional rights when doing so requires the abridgement of a woman's own constitutional right.* No doubt a right to be born is of greater significance than the right to receive compensation for tortious injury or other pecuniary or property rights. But it is doubtful whether the constitutional right of the mother can be totally abridged by a legislative effort to confer even a significant statutory right upon a fetus which does not have any fourteenth amendment rights.⁴⁵⁴

The gist of Judge Newman's reasoning was that a woman's constitutional right to privacy established in *Eisenstadt* and *Griswold* included a right to an abortion and cannot be restrained by state laws regulating abortion. This is because there cannot be a compelling state interest to protect an inferior creature (an unborn child that is a non-person) that lacks constitutional rights.⁴⁵⁵ It is unfair to expect a superior creature (the mother that is a person) possessing constitutional rights to give them up in preference to imperfect and limited statutory rights conferred by state law upon an inferior being (the unborn child).

*Roe v. Wade*⁴⁵⁶ and *Doe v. Bolton*⁴⁵⁷ then followed. The Supreme Court now had before it the assistance of recent jurisprudence that clearly depicted the stark choice of siding with the rule of law and the opportunity to declare the unborn human being a person within the meaning of the

⁴⁵⁴ *Abele v. Markle*, 351 F. Supp. 224, 228-30 (D. Conn. 1972) (emphasis added) (citations omitted), vacated as moot by *Markle v. Abele*, 410 U.S. 951 (1973).

⁴⁵⁵ See *id.* at 229-31.

⁴⁵⁶ 410 U.S. 113 (1973).

⁴⁵⁷ 410 U.S. 179 (1973).

Fourteenth Amendment, or to exclude an entire class of human beings from constitutional protection, leaving the unborn at the mercy of laws sanctioning their destruction in accordance with rule by law.

I contend there can be no rule of law when one class of human beings is legally empowered to play the role of gatekeeper to life or death to an inferior caste of human beings. The Constitution was never intended to bestow a constitutional right of privacy to legally permit one person to take the life of an innocent human being stripped of constitutional protection.

Justice Jackson reminded us in *Prince v. Massachusetts* that there are limits to constitutional liberties, which begin when there is a collision with or an effect upon the constitutional rights of other human beings.⁴⁵⁸ These limits can be removed by dehumanizing those other human beings by impersonal language (e.g., pre-embryo, embryo, fetus) and by legally redefining persons as non-persons. Once reclassified and removed from legal protection, the judiciary or the government is free to legislate and permit either a restricted or unrestricted license to kill or enslave an entire class of depersonalized human beings, just like any other class of non-persons, whether animal or vegetable. This is what happened in *Roe v. Wade*, when the Supreme Court ruled unconstitutional the criminal laws of the State of Texas which had prohibited abortion except when necessary to save the life of the mother.⁴⁵⁹ An era of unrestrained personal liberty had begun.

XIV. ABANDONING THE RULE OF LAW: *ROE* AND *DOE*

A. *Roe*

In *Roe v. Wade*, Justice Blackmun, joined by Chief Justice Burger, and Justices Douglas, Brennan, Stewart, Marshall and Powell abandoned the rule of law, holding “that the word “person,” as used in the Fourteenth Amendment, does not include the unborn.”⁴⁶⁰ This was the real central holding in the case. It cannot be emphasized enough that, if the

⁴⁵⁸ See *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring).

⁴⁵⁹ *Roe*, 410 U.S. at 164.

⁴⁶⁰ *Id.* at 158.

youngest of all human beings (the unborn) are persons with in the meaning of the Fourteenth Amendment, then the case for abortion collapses, for the right to life of the unborn human being will always take priority in a collision with the liberty rights of any other constitutional person, including the mother's right to privacy.⁴⁶¹

What if the Supreme Court legislated the removal of women from personhood? After all, historically, American women were not always persons in the whole sense. What if men were given the legal license to kill any wife that was legally a non-person whose life was not protected by law. Could men successfully argue they could kill their wives as a matter of choice and unrestrained personal freedom? If full personhood can be gained, it could presumably be one day lost. What about granting adult children a license to kill their elderly incompetent parents once they are no longer able to look after themselves? Or what about offering bounties and granting a license to kill any human being who is of a different race, color or other genetic disposition such as was permitted by various governments, including American, with respect to indigenous people?⁴⁶² The difference between the unborn and women, old people and indigenous people is that the unborn cannot fight back when they are the victims of abortion.

Seen from this perspective, the decision in *Roe v. Wade* is so odious to the rule of law that those who believe that a new human being is created at conception, and also value due process and equality for all human beings, would press for its immediate reversal, for its consequences, the deaths of millions of human beings, remains a bloodstain upon the white garment of justice. Repugnant to the rule of law, *Roe v. Wade* offends the natural laws and values that lie at the root of the Declaration of Independence.

⁴⁶¹ See *id.* at 156-57.

⁴⁶² See Benjamin Madley, "Patterns of Frontier Genocide 1803-1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia," 6 *J. Genocide Res.* 167 (2004), available at <http://www.yale.edu/gsp/colonial/adley.pdf>, arguing that competition for limited resources, legal inequality, unwillingness to share political power, abuse of basic human rights, discriminatory attitudes and segregation are all indicators that conditions are ripe for genocide.

Once the unborn human being is no longer viewed as human being, but as a depersonalized “fetus” which has no greater legal status than an animal or tree,⁴⁶³ it is easy for the Court to declare there is a constitutional right to an abortion, for no “person” is being killed in the private act of abortion.⁴⁶⁴ The Court held that right of personal privacy includes the freedom of choice to terminate the life of an unborn baby.⁴⁶⁵ Justice Blackmun cautioned this constitutional right to kill human life was not absolute: “[T]his right is not unqualified and must be considered against important state interests in regulation.”⁴⁶⁶ While the Court founded this right to privacy in the concept of liberty and restrictions upon state action located in the Fourteenth Amendment, the Court left open the alternative possibility that the Ninth Amendment is broad enough to include the right to an abortion.⁴⁶⁷

Justice Blackmun’s opinion was strongly in accord with the majority judgment in *Bryn*.⁴⁶⁸ Without engaging in much critical analysis, Justice Blackmun simply accepted the conclusion that the unborn child was never a person “in the whole sense” of that word.⁴⁶⁹ Justice Blackmun selectively relied on the biased scholarship of Professor Means, whose articles were part of his political agenda as counsel for NARAL to promote abortion on demand.⁴⁷⁰ Like Judge Jasen in *Bryn*, Justice Blackmun attempted to deflect criticism by quoting from Justice Holmes,

⁴⁶³ Since trees and other natural things might have standing to sue in court for their own preservation, presumably so would the unborn non-person. See *Sierra Club v. Morton*, 405 U.S. 727, 741-53 (1972) (Douglas, J., dissenting); Christopher D. Stone, “Should Trees have Standing? Toward Legal Rights for Natural Objects,” 45 *S. Cal. Rev.* 450 (1972).

⁴⁶⁴ Ultrasound technology reveals what happens in the darkness of the womb. See *Silent Scream* by Bernard Nathanson, <http://www.silentscream.org/video1.htm> (last visited Mar. 31, 2006), a film by a founder of NARAL and repentant former abortion activist.

⁴⁶⁵ See *Roe*, 410 U.S. at 154.

⁴⁶⁶ See *id.*

⁴⁶⁷ See *id.* at 153.

⁴⁶⁸ *Bryn v. N.Y. City Health & Hospitals Corp.*, 329 N.Y.S.2d 722, 729 (N.Y. App. Div. 1972).

⁴⁶⁹ See *Roe*, 410 U.S. at 162.

⁴⁷⁰ See *id.* at 132 n.21, 135 n.26, 139 n.33, 148 n.42, 151 n.47.

anticipating there would be shock and revulsion over his decision.⁴⁷¹

Blackmun's opinion was riddled with errors and myth. He was wrong when he stated that at common law an unborn child was part of the body of its mother.⁴⁷² He was wrong when he stated that a live human being was merely "potential life," rather than a life with potential.⁴⁷³ He was wrong when he stated there was no scientific consensus on when human life began.⁴⁷⁴ He was wrong when he concluded that the unborn were never legal persons "in the whole sense."⁴⁷⁵ Therefore, he was wrong when he failed to equate the unborn human being with full constitutional personhood.

The bestowing of any legal protection, however limited, upon a "non-person" was transformed from a basic human right to life into a value judgment determined by judicial opinion. In *Roe v. Wade*, the Court created judicial legislation that took the form of the now abandoned trimester system to arbitrarily divide the continuous development of the maturing unborn human being prior to its natural time to be born into three equal segments.⁴⁷⁶ In the first trimester, the mother may abort her child without interference from the state.⁴⁷⁷ In the second trimester, state regulation of abortion is permitted to preserve and protect maternal health.⁴⁷⁸ In the third trimester, the state's interest in protecting "potential life" becomes "compelling" once the fetus becomes viable, when it "presumably has the capability of meaningful life outside the mother's womb."⁴⁷⁹ Even after the point of viability, the mother retains her right to abort a viable fetus, so long as it is necessary to "preserve" her "life" or "health."⁴⁸⁰ As to what is meant by "health," the Court indicated that the vagueness of the word was not a problem for the Court will defer to the professional judgment of a physician who is entitled to take into

⁴⁷¹ See *id.* at 117.

⁴⁷² See *id.* at 134.

⁴⁷³ See *id.* at 159.

⁴⁷⁴ See *id.*

⁴⁷⁵ See *id.* at 162.

⁴⁷⁶ See *id.* at 153.

⁴⁷⁷ See *id.* at 163.

⁴⁷⁸ See *id.*

⁴⁷⁹ See *id.*

⁴⁸⁰ See *id.*

consideration a mother's psychological as well as physical well being.⁴⁸¹

The Court gave no explanation what it meant by "meaningful" life. However, the use of the word "meaningful" sent a strong signal that a "quality of life" philosophy had replaced a "sanctity of life" ethic. The corresponding implied message was that the quality of life of the fetus was to be measured from the perspective of the mother and not the viable living infant, whether in or out of the womb.

The dissent of Justice Rehnquist was weak and off the mark, for he failed to focus on the principal issue of personhood. Instead, Justice Rehnquist concentrated on the secondary issues, questioning the constitutional right to an abortion⁴⁸² and the impropriety of the Court to enact judicial legislation.⁴⁸³ Justice Rehnquist must have agreed that the unborn were not persons under the Fourteenth Amendment for he stated the majority's opinion "commands my respect,"⁴⁸⁴ that he was in disagreement with only "those parts of it that invalidate the Texas statute in question"⁴⁸⁵ and he said nothing at all about constitutional personhood, the key to the outcome of the case.

Justice White's dissent was similarly weak.⁴⁸⁶ He too said nothing about the question of constitutional personhood. While Justice White complained that the Court acted improperly, abusing its power of judicial review,⁴⁸⁷ he did not complain about abortion laws that permitted abortion to benefit women to protect their life or health. What Justice White found obnoxious was the total absence of regulation in the first trimester that allowed abortion as a matter of pure personal convenience.⁴⁸⁸ Justice White preferred that the legislatures, rather than the Court, decide the appropriate balance between the state's interest to protect human life and the mother's right to exterminate it.⁴⁸⁹ Not one Justice championed the

⁴⁸¹ See *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973).

⁴⁸² See *Roe v. Wade*, 410 U.S. 113, 175-77 (1973) (Rehnquist, J., dissenting).

⁴⁸³ *Id.* at 173-74.

⁴⁸⁴ *Id.* at 171.

⁴⁸⁵ *Id.*

⁴⁸⁶ Justice White's dissent, published in *Doe v. Bolton*, applied to *Roe v. Wade* as well. See *Doe*, 410 U.S. at 221-23 (White, J., dissenting).

⁴⁸⁷ *Id.* at 222.

⁴⁸⁸ See *id.* at 221.

⁴⁸⁹ See *id.*

case on behalf of the unborn.

B. Doe

In *Doe v. Bolton*, Justice Blackmun, joined by Chief Justice Burger, and Justices Douglas, Brennan, Stewart, Marshall and Powell, confirmed that the Court had departed from the rule of law.⁴⁹⁰ In contrast to Texas, Georgia's legislature had enacted new abortion legislation modeled after recommendations made by the American Law Institute.⁴⁹¹ Despite this attempt to bring Georgia legislation into conformity with social reality, the new legislation was found unconstitutional.⁴⁹² Designed to ensure accountability and to prevent capricious or fraudulent justifications for abortion, procedures regarding hospital accreditation, abortion committee approval, documentation, two-doctor concurrence, and state residency were all struck down and replaced by the judicial legislation decreed in *Roe v. Wade*. While an equal protection claim was raised, the Court saw no need to advance that ground once the Georgia legislation was invalidated.

Chief Justice Burger concurred. He did not believe abortion on demand would be the practical result of *Roe v. Wade* and *Doe v. Bolton*:

I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.⁴⁹³

Was Chief Justice Burger naïve? It is now 2006 and since the decisions in *Roe* and *Doe*, 47,282,293 lives have been terminated by abortion.⁴⁹⁴

⁴⁹⁰ *Id.*

⁴⁹¹ See *id.* at 192.

⁴⁹² See *id.* at 201.

⁴⁹³ See *id.* at 208.

⁴⁹⁴ This figure does not include deaths of the unborn caused by contraceptives that destroy embryos or the deaths of embryos in scientific or medical experiments or procedures. See National Right to Life Committee, "Abortion in the United States: Statistics and Trends," <http://www.nrlc.org/abortion/facts/abortionstats.html> for updated numbers (last visited Mar. 12, 2006).

Justice Douglas, on the other hand, was sympathetic to any mother who under Georgia law would meet the legal tests and be forced to have an unwanted child. He hinted that the qualified right to an abortion could be transformed into abortion on demand and suggested ways to curb the police powers of the States:

The Georgia statute is at war with the clear message of these cases—that a woman is free to make the basic decision whether to bear an unwanted child. Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships....

The “liberty” of the mother, though rooted as it is in the Constitution, may be qualified by the State for the reasons we have stated. But where fundamental personal rights and liberties are involved, the corrective legislation must be “narrowly drawn to prevent the supposed evil,” and not be dealt with in an “unlimited and indiscriminate” manner. Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties.⁴⁹⁵

Justice Douglas further cited with approval a passage from an article written by former Supreme Court Justice Clark, who disputed the biological fact that a new human life began at conception.⁴⁹⁶ Justice Clark suggested that social conventions and practices confirmed his belief: “The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. *No prosecutor has ever returned a murder indictment charging the taking the life of a fetus. This would not be the case if the fetus constituted human life.*”⁴⁹⁷

⁴⁹⁵ See *Doe*, 410 U.S. at 214, 216 (1973) (Douglas, J., concurring) (citations omitted).

⁴⁹⁶ See *id.* at 217.

⁴⁹⁷ Tom Clark, “Religion, Morality, and Abortion: A Constitutional Appraisal,” 2 *Loy. L.A. L. Rev.* 1, 9-10 (1969) (emphasis added).

When Justice Clark wrote his article, the California Supreme Court had recently held that a child must be born alive before a charge of homicide can be sustained.⁴⁹⁸ Justice Clark would be astonished to learn that the Penal Code of California now includes a fetus as a potential victim of murder unless the unborn child dies as a result of an abortion,⁴⁹⁹ and even more shocked to discover that a jury actually convicted a father of the second-degree murder of his already-named unborn son.⁵⁰⁰

Justice Douglas deferred to Justice Clark's advice that the answer to the question of when human life begins ought to be primarily left to medical experts.⁵⁰¹ This reliance on Justice Clark's article suggests that Justice Douglas did not believe human life began at conception. This may be a possible explanation why Justice Douglas did not fight for the civil liberties of the unborn. Would he have changed his position in light of today's medical knowledge? He might have, given his opinion that the answer to the question of when human life begins ought to be left to medical experts.

XV. DEFENDING THE RULE OF LAW FOR MURDERERS

Leaving an innocent unborn human being to the mercy of others willing

⁴⁹⁸ *Keeler v. Superior Court*, 470 P.2d 617 (1970).

⁴⁹⁹ *Cal. Penal Code* §§ 187(a), (b) (2006).

⁵⁰⁰ Connor Scott was murdered at the age of eight months. He had not yet been born. A leader of the National Organization for Women, Mavra Star, pondered, "[i]f this is murder, well, then anytime a late-term fetus is aborted, they should call it murder." See Cal Thomas, "The Scott Peterson Conundrum," *Townhall*, Apr. 22, 2003, <http://www.townhall.com/columnists/calthomas/printct20030422.shtml>. On November 12, 2004 Scott Peterson was convicted of the first-degree murder of his pregnant wife and the second-degree murder of his unborn son Connor. He now faces the death penalty, having been found guilty of murdering his son while committing a felony, the murder of Conner's mother, 27-year-old Laci. See Associated Press, "Scott Peterson Convicted of Murder: First Degree Verdict Could Bring Death Penalty," Nov. 13, 2004, <http://www.msnbc.msn.com/id/6385208/>. For a discussion of fetal homicide laws, see Alison Tsao, "Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?" 25 *Hastings Const. L.Q.* 457 (1998); Katherine B. Folger, "When Does Life Begin...or End? The California Supreme Court Redefines Fetal Murder in *People v. Davis*," 29 *U.S.F.L. Rev.* 257 (1994).

⁵⁰¹ See *Doe*, 410 U.S. at 220.

to take its life is a glaring contrast to the moral certainty exhibited by the exact same Court when it blocked the death penalty from being carried out on convicted murderers and rapists who deserved punishment.⁵⁰² Less than a year before *Roe* and *Doe* the same Court decided, in *Furman v. Georgia*, that the imposition and the execution of the death penalty violated both the Eighth and Fourteenth Amendments.⁵⁰³

The Eighth Amendment, ratified in 1791, presumably applied then and now to all human beings, slave or free, person or non-person. The text of the Eighth Amendment omits any reference to “person”: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”⁵⁰⁴ Is it cruel and unusual punishment for the judiciary in *Roe* and *Doe* to impose the death penalty upon innocent human beings because they are still too young to be born? Not at all, under the Fourteenth Amendment because the Court has stripped the unborn of personhood. However, could the unborn human being claim the protection of the Eighth Amendment since the text contains no stipulation that protection is limited to persons or citizens? Justice Douglas left no doubt that due process forbids cruel and unusual punishment. The Constitution forbids both the legislature and the judiciary from imposing cruel and unusual punishment,⁵⁰⁵ with or without due process. Drafters of the Fourteenth Amendment intended the privileges and immunities of citizens protect them from cruel and unusual punishments.⁵⁰⁶ What about human beings that are not so privileged? After all, the history of the Eighth Amendment suggests that its forerunner, the English Bill of Rights of 1689, was enacted to ban “arbitrary and discriminatory penalties.”⁵⁰⁷ Is not abortion an arbitrary and

⁵⁰² See *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵⁰³ See *id.* at 239. Eventually, the death penalty was reinstated in states where legislation was passed to require consideration of special aggravating and mitigating circumstances. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). Recently the Supreme Court decided it was unconstitutional to execute anyone under the age of 18. See *Roper v. Simmons*, 543 U.S. 541 (2005).

⁵⁰⁴ U.S. Const. amend. VIII.

⁵⁰⁵ See *Furman*, 408 U.S. at 241.

⁵⁰⁶ See *id.*

⁵⁰⁷ See *id.* at 242.

discriminatory penalty exacted upon the innocent for the mere fact of their existence?

At a minimum, a cruel and unusual punishment includes barbaric treatment of another human being. However, there is more to the meaning of that expression for it contemplates the idea that the outnumbered, unpopular outcasts of society endure suffering that the rest of society would not accept for them. Justice Douglas observed:

The words “cruel and unusual” certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is “cruel and unusual” to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.⁵⁰⁸

Equal protection is implicated when the Eighth Amendment is violated against people in an arbitrary and discriminatory way.⁵⁰⁹ The desire for equality was the impulse behind the desire for the Eighth Amendment.⁵¹⁰ Judges and juries in criminal cases exercised their freedom of choice to execute unwanted members of the human race and revealed in their prejudice the existence of castes in American society:

In a Nation committed to equal protection of the laws there is no permissible “caste” aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.⁵¹¹

Justice Douglas concluded that discretionary death penalties were unconstitutional in their operation for they were “pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and

⁵⁰⁸ Id. at 244-45.

⁵⁰⁹ See id. at 249.

⁵¹⁰ Id. at 255.

⁵¹¹ See id.

unusual' punishments."⁵¹²

In his concurring opinion, Justice Brennan rejected a narrow historical interpretation of the Eighth Amendment, pointing out that the imprecise words and dynamic scope of the Cruel and Unusual Punishments Clause draws meaning from the evolving standards of decency that mark a maturing society.⁵¹³ The interpretation of the clause is "progressive," and acquires meaning as "public opinion becomes enlightened by humane justice."⁵¹⁴ The basic concept at the foundation of the clause is respect for the inherent dignity of man. Where there is justification for punishment, that punishment must meet civilized standards of decency and humaneness. Justice Brennan summarized the purpose and meaning of the clause:

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.⁵¹⁵

The evil that is the target of the Eighth Amendment goes beyond the infliction of horrible pain and suffering. It is the dehumanization of the victim that most deeply offends against human dignity and respect for members of the human family. Justice Brennan deplored the treatment of human beings as non-humans who were things to be abused and killed:

More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, "punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like," are, of course, "attended with acute pain and suffering." When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. *The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.* They are thus inconsistent with the fundamental

⁵¹² Id. at 256-57.

⁵¹³ See id. at 269-70.

⁵¹⁴ Id.

⁵¹⁵ Id. at 270.

premise of the Clause that *even the vilest criminal remains a human being possessed of common human dignity*.⁵¹⁶

If the vilest criminal deserves to be given common human dignity, why is there no respect for the dignity of the unborn human being that is the victim of abortion? Is the subjection of the innocent unborn to inhuman and barbarous methods of painful and violent methods of killing a violation of the Eighth Amendment?

Not one Justice raised the possible application of the Eighth Amendment in the cases of *Roe* and *Doe*. Why not? After all, the case of *Furman v. Georgia* was recently decided. Was the failure to consider the Eighth Amendment sheer hypocrisy, a faultless omission or because the Court was captive to the arguments placed by counsel before it?

The fact remains that the same Court that so nobly stopped judges from making their choice to impose the death penalty upon the guilty has imposed the death penalty upon the innocent. A court so conscious of the rule of law in one case sacrificed it upon the altar of rule by law in another.

XVI. THE IMPOSITION OF RULE BY LAW: *CASEY*

After *Roe* and *Doe*, there began a body of case law emanating from the Supreme Court that stopped numerous attempts by various states to restrict abortion.⁵¹⁷ Legal scholars became immersed in the abortion

⁵¹⁶ *Id.* at 272-73 (emphasis added) (citations omitted).

⁵¹⁷ *Hodgson v. Minnesota*, 457 U.S. 417 (1990); *Ohio v. Akron Cent. for Reprod. Health*, 457 U.S. 502 (1990), striking down parental notification unless judicial bypass available; *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989), coming closest to revisiting the constitutional validity of the right to an abortion in *Roe*, but the opportunity lapsed when the majority of the Court decided to reaffirm or declined to deal with that issue; *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), striking down informed consent and mandatory reporting requirements; *Belotti v. Baird*, 432 U.S. 622 (1979), striking down dual parental consent without judicial bypass; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976), striking down spousal and parental consent.

controversy and wrote countless articles and books either denouncing⁵¹⁸ or praising⁵¹⁹ the Court's imprimatur of a constitutional right to an abortion. Other scholars wrote about the vexing issue of personhood, and examined why in various circumstances the law allowed some non-persons to become persons, and, conversely, how some persons could become non-persons.⁵²⁰ One scholar urged the Court to develop a comprehensive theory of personhood to meet future challenges posed by the possible development of a transgenic humanoid species.⁵²¹ Others took up the Court's challenge and answered the question of when human life begins.⁵²² Another group of scholars deplored the inconsistency of how the law treats the unborn as persons in various circumstances, including

⁵¹⁸ See W. Van Alstyne, "Closing the Circle of Constitutional Review from *Griswold v. Connecticut* to *Roe v. Wade*: An Outline of a Decision Merely Overruling *Roe*," 1989 *Duke L. J.* 1677 (1989); John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale L. J.* 920 (1973); Kelly J. Hollowell, "Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis," 14 *Regent U. L. Rev.* 67 (2001-2002); John T. Noonan, *A Private Choice: Abortion in America in the Seventies* (1979).

⁵¹⁹ See Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1994); Lawrence Tribe, *The Clash of Absolutes* (1990); Sylvia Law, "Rethinking Sex and the Constitution," 132 *U. Pa. L. Rev.* 955 (1984); Donald H. Regan, "Rewriting *Roe v. Wade*," 77 *Mich. L. Rev.* 1569 (1979); Jed Rubenfeld, "The Right of Privacy," 102 *Harv. L. Rev.* 737 (1989).

⁵²⁰ See Jean R. Schroedel, *Is the Fetus A Person?* (2000); Kahan Parsi, "Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos," 2 *DePaul J. Health Care L.* 703 (1999); Elizabeth G. Patterson, "Human Rights and Human Life: An Uneven Fit," 68 *Tulane L. Rev.* 1527 (1994); Jed Rubenfeld, *supra* n519; "Note, What We Talk About When We Talk About Persons: The Language of a Legal Fiction," 114 *Harv. L. Rev.* 1745 (2001).

⁵²¹ Michael D. Rivard, "Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species," 39 *U.C.L.A. L. Rev.* 1425 (1992).

⁵²² See Kelly J. Hollowell, "Cloning: Exposing Flaws in the Pre-Embryo/ Embryo Distinction and Redefining When Life Begins," 11 *Regent U. L. Rev.* 319 (1998-1999).

under 42 U.S.C. § 1983.⁵²³ A constitutional amendment to reverse *Roe* was promoted by advocates for the unborn.⁵²⁴

Despite these differences, scholars generally recognized that by deviating from the rule of law, the Supreme Court in *Roe* and *Doe* created a confused state of the law, inspired civil disobedience and created a deep division in society.⁵²⁵ Furthermore, the litmus test for future appointments to the Supreme Court has arguably become the candidate's position on *Roe v. Wade*.⁵²⁶

It was widely expected because of new judicial appointments by Republican presidents that the Court in *Casey* would reverse *Roe*. However, this was not the result due largely to the newly appointed Justice Souter.⁵²⁷

Recalling that *justice* is the defining characteristic in a society governed by "rule of law," and *deferential coerced obedience* is the defining characteristic in a "rule by law" society, Justices O'Connor, Souter and Kennedy chose to entrench rule by law. There was no longer any "jurisprudence of doubt"⁵²⁸ over the issue of whether there is a realm of personal liberty in which the government may not regulate the abortion of unborn children. To end the national controversy over abortion, the Court invoked in the name of the rule of law that it was setting the "mother of all precedents" to forever end the doubt over the right to an

⁵²³ See William E. Buelow III, "To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus," 71 *Temple L. Rev.* 963 (1998); Murphy S. Klasing, "The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide and Abortion Cases," 22 *Pepp. L. Rev.* 933 (1995); Julie E. Rice, "Fetal Rights: Defining Person Under 42 U.S.C. § 1983," 1983 *U. Ill. L. Rev.* 347 (1983).

⁵²⁴ See Bopp, *supra* n55.

⁵²⁵ For a history of the Operation Rescue Civil Rights Movement of the 1980s and 1990s, see <http://www.forerunner.com/forerunner/X0408.html> (last visited Mar. 30, 2006).

⁵²⁶ See "Bush Dismisses Court Speculation," Nov. 6, 2004, <http://www.cnn.com/2004/ALLPOLITICS/11/05/bush.court/>.

⁵²⁷ Michael Stokes Paulsen, "Government Lawyering: Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits," 61 *Law & Contemp. Prob.* 83 (1998).

⁵²⁸ "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 844 (1992).

abortion.⁵²⁹

Acknowledging that the pressure to overrule *Roe* had “grown more intense” since 1973,⁵³⁰ the Court chose not to re-examine the rightness or wrongness of its decision to deny personhood to the unborn, and instead, resolutely proclaimed its right to be wrong: “We are satisfied that the immediate question is not the soundness of *Roe*’s resolution of the issue, but the precedential force that must be accorded to its holding.”⁵³¹ Something more than being wrong is required before the Court is compelled to overrule itself: “[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”⁵³² Arrogant, prideful obedience to legal precedent (the doctrine of *stare decisis*) substituted for a humble self-examination of whether justice was done in *Roe*. Form of law triumphs over substance of law. Rather than using *stare decisis* as a tool to advance the rule of law, *stare decisis* is here used as a tool to dismantle it. The doctrine of *stare decisis* is not the rule of law; it is its servant. *Roe* and *Doe* survive not because they were “just” or morally righteous decisions, but because the *Casey* Court demands deferential obedience. This is nothing less than rule by law. Professor Michael Stokes Paulsen agrees: “For the *Casey* Court, the rule of law is obedience—obeisance—to the authoritarian rule of the Court.”⁵³³

The continuous cries made for nearly twenty years by many on behalf of the unborn fell on deaf ears for the Court was more concerned with forcing social consensus by wielding its power to quell dissent. Now, women could not be told they had been legally wrong to abort their babies and could not be forced to give up a lifestyle. Women were to be equal with men in both economic and social life. This was made possible by their new constitutional right to control how many and which of their unborn children should live or die. Personal autonomy, bodily integrity and personal liberty are all part of the same package of privacy rights that

⁵²⁹ See *id.* at 867.

⁵³⁰ See *id.* at 869.

⁵³¹ *Id.* at 871.

⁵³² *Id.* at 864.

⁵³³ Michael Stokes Paulson, “The Worst Constitutional Decision of All Time,” 78 *Notre Dame L. Rev.* 995, 1037-38 (2003).

today's generation has assumed is part of its god-given (read Court given) rights as American citizens.⁵³⁴

In *Casey*, the Court judicially amended its abortion legislation by substituting in place of the trimester system a value judgment that fetal respiratory viability marks the end of a mother's unrestrained right to an abortion.⁵³⁵ Even after viability, the mother may override the state's interest in protecting human life if an abortion is "necessary, in appropriate medical judgment, to preserve [her] life or health."⁵³⁶ A state is permitted to enact regulations throughout the pregnancy so long as these laws do not impose an "undue burden" on the liberty of the mother to choose an abortion.⁵³⁷ An "undue burden" results when a state regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus."⁵³⁸ The "means" selected by the state to further its interest in human life, must be designed to assist the woman to make an "informed choice" (or informed consent) and not to "hinder" it.⁵³⁹ An undue burden means an undue constitutional burden.⁵⁴⁰

These rules serve two fundamental principles: (1), "there is a realm of personal liberty which the government may not enter,"⁵⁴¹ and (2), "our obligation is to define the liberty of all, not to mandate our moral

⁵³⁴ See *Casey*, 505 U.S. at 860.

⁵³⁵ *Id.* at 860, 873.

⁵³⁶ See *id.* at 879.

⁵³⁷ See *id.* at 874.

⁵³⁸ See *id.* at 877.

⁵³⁹ See *id.* This idea has not taken root in tort law. New Jersey Superior Court Judge Amy Chambers held lack of informed choice is proper medical practice when it comes to giving informed consent for an abortion. Rose Acuna sued Dr. Sheldon Turkish after abortion because she was very upset when she discovered he had lied to her. She had asked, "is there a baby [meaning "human being" or "life"] in there?" to which he relied, "Don't be stupid, its only blood." See *Acuna v. Turkish*, 808 A.2d 149, 150 (N.J. Super. Ct. App. Div. 2002); see Damon Adams, "New Jersey Obstetrician-Gynecologist Wins Informed Consent Case," *Amednews.com*, Jan. 5, 2004, <http://www.ama-assn.org/mednews/004/01/05/prsc0105.htm>.

⁵⁴⁰ See *Casey*, 505 U.S. at 877.

⁵⁴¹ See *id.* at 847.

code.”⁵⁴² As non-persons, the unborn are off the radar screen when it comes to defining the liberty of all constitutionally recognized persons. Even as it allowed the immoral destruction of non-persons to continue, the Court preached that it was not in the business of making moral judgments or imposing its own morality.⁵⁴³

Applying these rules in *Casey*, the Court struck down the legislative scheme for spousal notification as an undue burden.⁵⁴⁴ No longer was having a child an intimate family decision involving the father of the child, it was an exclusive decision made by the mother. The Constitution shields the mother from both the influence of the state and from the private influence of individual members of society, including her own spouse.⁵⁴⁵ The mother is now insulated from the unwanted free speech of her own untrustworthy spouse and she is able to exercise her right to choose the death of her unwanted child.⁵⁴⁶

The Court now called abortion a legitimate form of contraception⁵⁴⁷ to be used when regular contraception fails.⁵⁴⁸ Abortion, the birth control pill, condoms, jellies, foams and implanted devices share the same goals of family planning and birth control. The distinction between the use of devices or chemicals to prevent the creation of life and the use of methods to destroy newly created life has been ignored and abandoned. The central holding of *Roe* was not disturbed by *Casey*. The destruction of unborn human life is not murder, for these human beings are not defined as legal persons.

⁵⁴² See *id.* at 850.

⁵⁴³ Years later, Justice Scalia criticized this posture, arguing that law is based on notions of morality and moral choices are integral to both judicial decisions and legislation. See *Lawrence v. Texas*, 539 U.S. 558, 589-91 (2003) (Scalia, J., dissenting).

⁵⁴⁴ See *Casey*, 505 U.S. at 895.

⁵⁴⁵ *Id.*

⁵⁴⁶ This result is consistent with the Court’s suppression of free speech by peaceful sidewalk counselors outside of an abortion clinic and distortion of First Amendment jurisprudence. See *Hill v. Colorado*, 530 U.S. 703 (2000); Charles Lugosi, “The Law of the Sacred Cow: Sacrificing the First Amendment to Defend Abortion on Demand,” 79 *Denv. U.L. Rev.* 91 (2001).

⁵⁴⁷ See *Casey*, 505 U.S. at 852.

⁵⁴⁸ See *id.* at 856.

Again, not one Justice became the champion of the unborn and the cornerstone of *Roe* and *Doe*, the denial of constitutional personhood to the unborn, remained undisturbed. Justice Scalia, the great hope of moral conservatives, greatly disappointed many by avoiding any bold pronouncement that fetuses were unborn human beings and, in fact, constitutional persons. Rather, he suggested that the answer to the question of whether a fetus was a human life was not a matter of law, but a value judgment that was the responsibility of the elected representatives of government. Thus the legal status of the fetus could vary with the prevailing views of those in power. For adopting such a position, Justice Scalia was criticized for his “frightening moral and epistemological agnosticism.”⁵⁴⁹

XVII. RESTORING THE RULE OF LAW

Thirty years after *Roe*, there is a widely held assumption by students entering law school today that the word “person” in the Fourteenth Amendment applies only to human beings that are born alive. Personhood is identified with citizenship, which is conferred upon natural human beings by operation of law at birth. Interestingly, those who were born after 1973 are all abortion survivors, for they all could have been aborted, but were chosen for birth. As survivors, they have been indoctrinated by the legacy of *Roe*, *Doe* and *Casey*. They assume a human being becomes a person and a citizen only upon birth. No thought is given to fact that at one time, an unborn human being was, at common law, a person too. The very suggestion of the idea upsets some students and evokes hostility from others.

In today’s society, some pregnant women deny the biological fact that they are mothers until their babies are born. Late-term abortion is justified as a form of self-defense to get rid of involuntary servitude caused by pregnancy.⁵⁵⁰ Health is no longer the reason why abortion is justified:

⁵⁴⁹ Nathan Schlueter, “Constitutional Persons: An Exchange on Abortion,” 129 *First Things* (Jan. 2003): 28-36.

⁵⁵⁰ See Nancy J. Herschmann, “Abortion, Self-Defense and Involuntary Servitude,” 13 *Tex. J. Women & L.* 41 (2003).

The notion of involuntary servitude makes clearer than the notion of self-defense why late-term abortions are morally acceptable, and why the new ban on them is wrong. It does not matter how long one has been in involuntary servitude—two months, or eight—nor does it matter that one's involuntary servitude has helped the purple silk fetishist achieve inner peace or personal development. The servitude is wrong because it is involuntary. Similarly, if a woman does not wish to be pregnant; if her condition pushes her beyond the limit she is willing to go and she changes her mind about the risks involved in pregnancy; or if she is no longer willing to put her body in servitude to the fetus, she should have a right to terminate the pregnancy.⁵⁵¹

As non-persons, the unborn today have less legal protection than slaves had prior to the adoption of the Fourteenth Amendment. It is both tragic and ironic that after the passage of the Fourteenth Amendment, not only has the Supreme Court with the *Roe*, *Doe* and *Casey* decisions permitted the substitution of one form of slavery for another, but it has granted legal immunity to those who kill the unborn with impunity. Legal immunity, once granted, is political dynamite to revoke.

For the restoration of the rule of law, there is no alternative; faithfulness to the Constitution demands nothing less. Nothing in the text of the Constitution gives anyone the private unrestrained liberty to violently override another human being's inalienable and inherent right to life. Abortion is not yet beyond the reach of the law, but it soon may well be.⁵⁵² Consensus may be possible if reason prevails and a common denominator is found, such as the desirability of living in a society governed by the rule of law. America is the envy of the world because of its commitment to the principles of justice, equality and human rights. But when rule by law does violence to those principles, society pays the price and injustice triumphs. The social war on abortion among Americans will be resolved only when opponents of the personhood of the unborn recognize the truth that the only hope for resolution is to abide by the Golden Rule⁵⁵³ and conform to the rule of law so that "human being" and

⁵⁵¹ Id. at 53.

⁵⁵² Charles E. Rice, "Abortion, Euthanasia, and the Need to Build a New 'Culture of Life,'" 12 *Notre Dame J. L. Ethics & Pub Pol'y* 497, 509-12 (1998).

⁵⁵³ This is a universal code all people in a diverse and pluralistic society can support, for it transcends religious affiliations. Christian: "Do to others whatever you would have them do to you" *Matthew* 7:12 (New American Bible); Buddhist:

“person” mean the same thing.⁵⁵⁴ In an 1842 case, Hambly, an attorney for the Commonwealth of Pennsylvania, prophetically predicted the Civil War was inevitable unless the Golden Rule was observed: “Let the south and the north remember, that he who lives by the sword today, may die by the sword tomorrow. Then indeed we may read the Constitution in the benign spirit of the golden rule, to do ‘unto others, as we would that they should do unto us.’”⁵⁵⁵

If one class of human beings can be deprived of personhood, so could any other class. Those who advocate abortion today may find themselves the victim of involuntary euthanasia tomorrow. Unless unborn human beings are recognized as constitutional persons, the immediate future promises the continuation of abortion, the patenting and ownership of human life, the creation of chimeras, the destruction of embryos to serve the surging demand for embryonic stem cell research and human clones to serve as organ donors. Prospects for the future enslavement of the unborn appear real.⁵⁵⁶

Even members of the personhood class have reason to fear. Lack of respect for the human rights of the unborn may lead to lack of respect for the human rights of those who are born. In America and Canada, babies that survived an attempted abortion have been abandoned with the intent that they die.⁵⁵⁷ Children up to the age of 12, who are in pain or

“Hurt not others in ways that you yourself would find hurtful” *Udana-Varga* 5, 1; Hindu: “This is the sum of duty; do naught to others what you would not have them do to unto you” *Mahabharata* 5, 517; Muslim: “No one is a believer until he desires for his brother that which he desires for himself” *Sunnah*; JewishL “What is hateful to you, do not do to your fellow man.” *Talmud, Shabbat* 3id. See “The Universality of the Golden Rule in the World Religions,” available at <http://www.teachingvalues.com/goldenrule.html> (last visited Mar. 30, 2006).

⁵⁵⁴ See generally Robert P. George, “Public Reason and Political Conflict: Abortion and Homosexuality,” 106 *Yale L.J.* 2475 (1997).

⁵⁵⁵ *Prigg v. Pennsylvania*, 41 U.S. 539, 606 (1842).

⁵⁵⁶ See generally Esther Slater McDonald, “Patenting Human Life and the Rebirth of the Thirteenth Amendment,” 78 *Notre Dame L. Rev.* 1359 (2003).

⁵⁵⁷ One infant that survived an attempted abortion won an \$8 million dollar settlement. See *Ximena Renaerts v. Vancouver Gen. Hosp.*, 1998 *B.C.T.C. Lexis* 2214 (B.C.S.C. Dec. 4, 1998), No. C937086. See also Ximena Renaerts, <http://www.vanderbilt.edu/SFL/renaerts.htm> (last visited Mar. 31, 2006); Celeste McGovern, “The Dreaded Complication,” *B.C. Report Mag.*, Feb. 22, 1999,

disabled, are unwilling victims of euthanasia in the Holland.⁵⁵⁸

These developments are consistent with the views of some of the greatest names in philosophy, law and jurisprudence. Ethics Professor Peter Singer, of Princeton's Center for Human Values, publicly supports the killing of disabled infants.⁵⁵⁹ Professor Ronald Dworkin has used his enormous influence to justify abortion,⁵⁶⁰ as did the late Professor John Rawls, who tersely dismissed the unborn from his theory of justice.⁵⁶¹ One survey of philosophers found that those who support abortion also support infanticide.⁵⁶² Michael Tooley is representative of this school of thought.⁵⁶³ If these giants of academia have their way, birth will no longer be the safe harbor it once was.

Learned scholars have rebutted many of these segregationist arguments,⁵⁶⁴ but the propaganda, media, cultural and court battles appear to be won by those opposing the personhood of the unborn. Public pressure for embryonic stem cell research and cloning is stronger than

<http://www.geneticcleansing.org/bcwomens1.html>.

⁵⁵⁸ Toby Sterling, "Netherlands Hospital Euthanizes Children," Assoc. Press, Nov. 30, 2004, <http://apnews.myway.com/article/20041130/D86MEAA80.html>.

⁵⁵⁹ Statement of Marca Bristo, Chairperson National Council on Disability, regarding the Hiring of Peter Singer, Apr. 17, 1999, http://www.ncd.gov/newsroom/testimony/ncd_4-17-99.html.

⁵⁶⁰ See Ronald Dworkin, "Unenumerated Rights: Whether and How *Roe* Should Be Overruled," 59 *U. Chi. L. Rev.* 381, 395-431 (1992).

⁵⁶¹ In the early stage of a woman's pregnancy, Rawls states "the political value of the equality of women is overriding." He says nothing about the moral worth of the fetus. Instead, Rawls states that it would be "cruel and oppressive," to the woman to deny her the right to an abortion. John Rawls, *Political Liberalism* (1993), p.243 n32.

⁵⁶² Don Marquis, "Why Abortion is Immoral," 86 *J. Phil.* 183, 195-201 (1989).

⁵⁶³ See generally Michael Tooley, "Abortion and Infanticide," *Phil. & Pub. Affairs* 2 (1972): 37

⁵⁶⁴ See Richard Stith, "On Death and Dworkin: A Critique of His Theory of Inviolability," 56 *Md. L. Rev.* 289 (1997). Professor Stith suggests that Professor Dworkin "has perhaps done more to advance human inequality in the law. 'The less profitable effort invested in each human being, the less regrettable the killing of that being' paraphrases an inegalitarian notion that Dworkin applies long after as well as before birth." Id.

ever.⁵⁶⁵

In 1842, Hambly, in a valiant but losing effort in *Prigg v. Pennsylvania*, eloquently stated, “[b]ut even great names cannot sanctify wrong; time cannot supply the want of constitutional authority.”⁵⁶⁶ That observation is as valid now as it was then. It took time for slavery to be abolished and equality applied to African-Americans. It will take time for abortion to be abolished and for the killing to stop. Once the constitutional personhood of the unborn is recognized, abortion and its derivative evils, cloning and embryonic stem cell research, will all be illegal. Professor Dworkin concedes, “If a fetus is a constitutional person, then states not only *may* forbid abortion but, at least in some circumstances, *must* do so.”⁵⁶⁷

Among Western European nations, Germany’s Constitution is one that guards against devaluing the dignity of the unborn human being.⁵⁶⁸ The Basic Law of Germany is a “rule of law” constitution that can serve as a working model for the United States:

⁵⁶⁵ On November 2, 2004, California residents overwhelmingly supported a referendum, Proposition 71, to spend \$3 billion in public funds to pursue embryonic stem cell research. See Jonathan Knight, “California Says Yes to Stem Cell Research,” Nov. 3, 2004, <http://www.nature.com/news/2004/041101/full/041101-11.html>.

⁵⁶⁶ *Prigg v. Pennsylvania*, 41 U.S. 539, 597 (1842).

⁵⁶⁷ Dworkin, *supra* n560, at 398-99.

⁵⁶⁸ “The right to life is guaranteed to everyone who ‘lives;’ no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life.” *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE [Federal Constitutional Court] Feb. 25, 1975, 39, 1 (F.R.G.), translated in Robert E. Jonas and John D. Gorby, “West German Abortion Decision: A Contrast to *Roe v. Wade*,” 9 *Marshall J. Pract. & Proc.* 605, 638 (1976). For analysis of the German decision, see Edward J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (2002); Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997), pp. 349-56; Donald Kommers, “The Constitutional Law of Abortion in Germany: Should Americans pay Attention?” 10 *J. Contemp. Health L. & Pol’y.* 1 (1994); Mark Chase McAllister, “Human Dignity and Individual Dignity in Germany and the United States as Examined by Each Country’s Leading Abortion Cases,” 11 *Tulsa J. Comp. & Int’l L.* 491 (2004); Gerald Neumann, “*Casey* in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany,” 43 *Am. J. Comp. L.* 273 (1995).

“Thus, we can conceive of the Basic Law as a value-oriented constitution that obligates the state to realize a set of objectively ordered principles, *rooted in justice and equality*, that are designed to restore the centrality of humanity to the social order and thereby secure a stable democratic society on this basis. These values are *not to be sacrificed* for the exigencies of the day, as they had been during the Nazi time. Thus the Basic law provides a new avenue of substantive moral vision to check human passion and self-interest...”⁵⁶⁹

In Germany, humans are always treated as ends in themselves, never as means to an end.⁵⁷⁰ Every person is entitled to equal worth as a matter of basic human dignity and equality.⁵⁷¹ The guarantee of human dignity is inalienable.⁵⁷² In Germany, the constitutional right to life and physical integrity begins for each human being from the time of conception.⁵⁷³ Where human life exists, human dignity attaches, for human dignity does not depend on birth or a developed personality because life is a continuum beginning at conception.⁵⁷⁴

XVIII. JUDICIAL REVIEW

What happens when the Supreme Court abuses its power? In *In re Winship*, Justice Black warned the “law of judges” would replace the rule of law:

Our ancestors’ ancestors had known the tyranny of the kings and the rule of man and it was, in my view, in order to insure against such actions that *the Founders wrote into our own Magna Carta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase “due process of law.”* The many decisions of this Court that have found in that phrase a blanket authority to govern the country according to the views of at least five members of this institution have ignored the essential meaning of the very words they invoke. *When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends the majority’s own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the “law of the land”*

⁵⁶⁹ Eberle, supra n568 at 19 (emphasis added).

⁵⁷⁰ See id. at 45.

⁵⁷¹ See id. at 50.

⁵⁷² See id. at 42.

⁵⁷³ See id. at 52; see BVerfGE, supra n568 at 269.

⁵⁷⁴ See Eberle, supra n568 at 165-66.

and instead becomes one governed ultimately by the “law of the judges.”⁵⁷⁵

The prophecy of Justice Black has become true. Can the power of judicial review be used constructively as a tool to restore the rule of law instead of as a tool to destroy it? The Supreme Court was intended to be the least dangerous branch of government to the political rights of the Constitution,⁵⁷⁶ not the most dangerous branch as it arguably has become.⁵⁷⁷ What options are there when the Supreme Court perverts justice and destroys the rule of law with regard to the unborn? The judicial branch put itself above the rule of law and has denied equal protection of the laws to an entire class of human beings by defining them out of constitutional existence. Unless the Court demonstrates a willingness to overrule itself, Congress and the President must explore ways to achieve justice for the unborn in spite of the Court.

The Supreme Court is not the only branch of government entrusted to preserve and protect the U.S. Constitution; the executive and the legislative branches of government share this same trust. Former Attorney General Edward Meese III contended that constitutional interpretation is the business of all branches of government, not just the judicial branch.⁵⁷⁸ Judicial supremacy is a myth.⁵⁷⁹ Chief Justice Marshall never claimed judicial supremacy: “The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land ‘anything in the constitution or laws of any State to the contrary notwithstanding.’”⁵⁸⁰

The Supreme Court is vulnerable to revocable appellate

⁵⁷⁵ *In re Winship*, 397 U.S. 358, 387 (1970) (Black, J., dissenting) (emphasis added).

⁵⁷⁶ *The Federalist* No. 78 (Alexander Hamilton).

⁵⁷⁷ Michael Stokes Paulsen, “The Most Dangerous Branch: Executive Power to Say What the Law Is,” 83 *Geo. L. J.* 217 (1994). For a comparative view, see Martin, *supra* n63.

⁵⁷⁸ See Louis Fisher, *American Constitutional Law*, 5th ed. (2003), p. 492.

⁵⁷⁹ See Michael Stokes Paulsen, “Judging Judicial Review: *Marbury* in the Modern Era: The Irrepressible Myth of *Marbury*,” 101 *Mich. L. Rev.* 2706, 2706 (2003).

⁵⁸⁰ *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819).

jurisdiction.⁵⁸¹ It has irrevocable original jurisdiction to limited cases, but Congress controls the Supreme Court's appellate jurisdiction "with such exceptions and under such regulations that Congress may make."⁵⁸² The precedent for this has been established.⁵⁸³ There is nothing stopping a Republican controlled Congress and a Republican President from removing from the Court's jurisdiction the power to define who is a "person" within the meaning of the Fourteenth Amendment. Congress may define "person" to be a living human organism that is in being from the time of conception and genetically 100% of human origin, whether conceived in or outside of a human womb. In a future case involving abortion, the Supreme Court may find itself bound by a definition of "person" thrust upon it by Congress.

Congress can also remove jurisdiction from the Supreme Court by elevating the question of constitutional personhood above any "case or controversy" disputed by litigants. The Supreme Court has no power where there is no case or controversy to resolve.⁵⁸⁴ It is a fundamental political question whether or not one class of human beings will have their physical integrity invaded for the selfish purposes of another class of human beings. Assuming that equality is a fundamental foundational element integral to the political garment of America, it may not be stripped away by Justices swayed by contemporary expedient social practices under the guise of personal liberty. A political question is non-judicial; it is outside of the jurisdiction of the Court. "Questions in their

⁵⁸¹ See U.S. Const. art. III, § 2.

⁵⁸² The Exceptions Clause is set out in U.S. Const. art. III, § 2: "[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations, as the Congress shall make."

⁵⁸³ See *Ex Parte McCardle*, 74 U.S. 506 (1868); The "Francis Wright," 105 U.S. 381, 385 (1881): appellate jurisdiction is "confined to within such limits as Congress sees fit to prescribe"; *United States v. Bitty*, 208 U.S. 393, 399-400 (1908), the establishment of exceptions and regulations must give "due regard to all the provisions of the Constitution"; "Creation of the Federal Judiciary," S. Doc. No. 91, 75th Cong., 1st Sess., at 269-73 (1938); Robert H. Jackson, *The Supreme Court in the American System of Government* (1955), p. 11; William W. Van Altyne, "A Critical Guide to Ex Parte McCardle," 15 *Ariz. L. Rev.* 229 (1973). See generally Fisher, *supra* n578 at 474-77.

⁵⁸⁴ Jackson, *supra* n583 at 12.

nature political...can never be made in this court.”⁵⁸⁵

Congress also has the power to determine the size of the Supreme Court.⁵⁸⁶ If the Supreme Court refuses to abdicate its “rule by judges” and refuses to voluntarily return to the rule of law, and thereby promote equality and justice, Congress has the authority to expand the number of Justices by another 10 Justices if that is what it takes to stop the present judicial runaway train. In 1937, President F.D. Roosevelt (FDR) embarked on this course until he met stiff political opposition⁵⁸⁷ and ultimately the swing in position by Justice Roberts in *West Coast Hotel Co. v. Parrish* was “the switch in time that saved nine.”⁵⁸⁸ Unfortunately, this technique of “court packing” is a double-edged sword, for it can and has been used to reverse a court intent on preserving the rule of law.⁵⁸⁹

Another option is to press ahead with a renewed attempt to pass an updated version of the Human Rights Bill pursuant to Section 5 of the Fourteenth Amendment, which states: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”⁵⁹⁰ In 1981, Stephen Galebach argued before the Senate Committee on the Judiciary that Congress has the power to enforce the Fourteenth Amendment by declaring that unborn children are constitutional persons. Relying on the narrowest construction of Congress’s power under Section 5—advanced by Justice Harlan in *Katzenbach v. Morgan*—at the very least Congress may make legislative

⁵⁸⁵ *Marbury v. Madison*, 5 U.S. 137, 170 (1803); cf. *Baker v. Carr*, 369 U.S. 186 (1962).

⁵⁸⁶ Judiciary Act of 1789, § 1. Originally there were five associate members of the court and one Chief Justice. The size of the court has fluctuated over time, with the last change made in 1869, setting the number at nine. Fisher, *supra* n578 at 116-18.

⁵⁸⁷ The Senate Judiciary Committee saw through the superficial reasons offered by FDR to add members to the Court, and denounced the court packing scheme as a threat to the independence of the judiciary and an attack on the rule of law. “Its ultimate operation would be to make this government one of men rather than one of law.” S. Rept. No. 711, 75th Cong., 1st Sess. (1937), reprinted in Fisher, *supra* n578 at 474.

⁵⁸⁸ Fisher, *supra* n578 at 470.

⁵⁸⁹ Erwin Griswold, “The Colored Vote Case in South Africa,” 65 *Harv. L. Rev.* 1361 (1952).

⁵⁹⁰ U.S. Const. amend. XIV, § 5.

findings of fact that may be binding on the Supreme Court: “To the extent ‘legislative facts’ are relevant to a judicial determination, Congress is well-equipped to investigate them, and such determinations are entitled to due respect.”⁵⁹¹

The most expansive interpretation of Congress’s power under Section 5 is to exercise equivalent powers to the “necessary and proper” clause granted under Section 8 of Article I to the Constitution: “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁵⁹²

One would thus expect today’s Supreme Court to give heed to Chief Justice Marshall’s wisdom in *McCulloch v. Maryland*, wherein he gave deference to Congress to enact laws most beneficial to all the people consistent with the letter and spirit of the Constitution:

But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.⁵⁹³

If Congress were to enact legislation pursuant to Section 5 to protect the unborn, this law would be consistent with the fundamental precept of American justice that “all men are created equal,” which is the breath that fans the spirit of the Constitution. Such a law would “enforce” Congress’ remedial power under Section 5⁵⁹⁴ and “secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the

⁵⁹¹ *Katzenbach v. Morgan*, 384 U.S. 641, 668 (1966).

⁵⁹² U.S. Const. art. I, § 8, cl. 18. For an expansive interpretation of Congress’s power, see Justice Brennan’s majority opinion in *Katzenbach*, 384 U.S. at 650-51.

⁵⁹³ *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

⁵⁹⁴ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

laws against State denial or invasion.”⁵⁹⁵ The power under Section 5 is there to enforce the equal protection of the laws and to guarantee due process to all persons, not just to those who for the moment are defined as persons. The Constitution is “intended to endure for ages to come” and is “to be adapted to the various crises of human affairs.”⁵⁹⁶ In considering the powers of Congress, “we must never forget that it is a constitution we are expounding.”⁵⁹⁷

In *Tennessee v. Lane*, Justice Stevens further explained the Court’s view of Congress’ power under Section 5:

This enforcement power, as we have often acknowledged, is a “broad power indeed.” It includes “the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” We have thus repeatedly affirmed that “Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.” ...When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.⁵⁹⁸

One purpose of the Constitution is to secure for the people and “to their posterity” the blessings of liberty.⁵⁹⁹ As a nation, America has denied blessings of life, liberty and the pursuit of happiness “to their posterity.”⁶⁰⁰ Another purpose is to “establish justice.”⁶⁰¹ With the denial of equal justice for the unborn, there is no “domestic tranquility,” which is another goal of the hope for a “more perfect union.”⁶⁰² Conferring constitutional personhood upon the unborn certainly conforms to the text of the Fourteenth Amendment, whereby all persons are guaranteed equal protection and due process.

⁵⁹⁵ *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880).

⁵⁹⁶ See *McCulloch*, 17 U.S. at 415.

⁵⁹⁷ See *id.* at 407.

⁵⁹⁸ *Tennessee v. Lane*, 541 U.S. 509, 518-20 (2004) (citations omitted).

⁵⁹⁹ See *McCulloch*, 17 U.S. at 403-04.

⁶⁰⁰ See U.S. Const. preamble.

⁶⁰¹ See *id.*

⁶⁰² See *id.*

XIX. CONCLUSION

The crisis brought on by the denial of personhood to the unborn has to rank as the worst human rights atrocity in American history when one considers the forty-six million deaths caused by abortion are far more than the 1,234,882 Americans who died from all causes in the Civil War, World War I, World War II, Korean Conflict, and Vietnam War.⁶⁰³ Where there have been other crises created by the judiciary, the country has on four prior occasions responded by passing a constitutional amendment to reverse the Supreme Court.⁶⁰⁴

Congress should recognize that the elimination of one crisis must not lead to another. In anticipation of the reversals of *Roe*, *Doe* and *Casey*, legislation needs to be passed to care for the needs of pregnant mothers and their families so that no one will be lacking in medical care, shelter and nutrition. Government is with the consent and for the benefit of the people, and the people are our national treasure.

There is no doubt that for anyone who values equality and respect for the inherent dignity of all human beings, that the need for the word “person” to mean all human beings, including unborn human beings from the time of conception, is “the defining constitutional controversy of our age and one that affects all other aspects of our jurisprudence, much as slavery was the defining constitutional issue of nineteenth century America.”⁶⁰⁵

The national government has an obligation to ensure that it carries into effect all the rights and duties imposed on it by the Constitution. The Fourteenth Amendment, properly interpreted, is America’s Magna

⁶⁰³ “Death Tolls for the Man-made Megadeaths of the 20th Century, American War Dead,” <http://users.erols.com/mwhite28/warsusa.htm> (last visited Mar. 14, 2006).

⁶⁰⁴ The Eleventh Amendment overruled *Chisholm v. Georgia*, 2 U.S. 419 (1793), denying states immunity from lawsuits by citizens of other states; the Fourteenth Amendment overruled *Scott v. Sandford*, 60 U.S. 393 (1856), denying citizenship to slaves; the Sixteenth Amendment overruled *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895), denying Congress the power to collect income tax; and the Twenty-Sixth Amendment overruled *Oregon v. Mitchell*, 400 U.S. 112 (1970), denying Congress the authority to grant 18 year-olds the right to vote in state and local elections.

⁶⁰⁵ Paulson, *supra* n533 at 1002.

Carta.⁶⁰⁶ Its language is unqualified in its scope.⁶⁰⁷ A plain reading of “person” is broad enough to encompass all living human beings in every state and condition, born and unborn, within the jurisdiction of the United States.⁶⁰⁸ The Supreme Court must “execute the law, and not make it.”⁶⁰⁹ The Court had no constitutional authority to “interpolate a limitation” on the meaning of “person” that is “neither express nor implied.”⁶¹⁰ The Court did a great evil when it used the Fourteenth Amendment as an “engine of oppression” instead of a “bulwark of defense.”⁶¹¹

Equal protection of the laws and due process of law belong to all human beings, not just to legally defined persons: “Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. *Beyond that line lies the domain of usurpation and tyranny.*”⁶¹² The Supreme Court has crossed that line. It is long overdue that the Court exercises self-restraint and restrain the liberty of mothers to forever end the tyranny of abortion and the usurpation of the constitutional rights of unborn human beings.

It would be prudent for the Supreme Court to reconsider the matter of overruling *Roe, Doe* and *Casey* before other avenues are implemented by Congress to overrule the Court. Granting certiorari to hear one more case like *New Jersey v. Loce*⁶¹³ and conferring constitutional personhood upon the unborn is all that the Court needs to restore the rule of law so that “human being” and “person” will finally mean the same thing in Fourteenth Amendment jurisprudence.

If the experience of *Brown v. Board of Education* means anything, it at least means that when used properly, judicial review can restore the

⁶⁰⁶ See *The Slaughter-House Cases*, 83 U.S. 36, 125 (1872) (Swayne, J., dissenting).

⁶⁰⁷ *Id.* at 128.

⁶⁰⁸ *Cf. id.* at 128-29.

⁶⁰⁹ *Id.* at 129.

⁶¹⁰ See *id.* at 129.

⁶¹¹ See *id.* at 128.

⁶¹² See *id.* at 127 (emphasis added).

⁶¹³ 630 A.2d 843 (N.J. Super. Ct. Law Div. 1991), *aff'd*, 630 A.2d 792 (N.J. Super. Ct. App. Div. 1993), *cert. denied*, 636 A.2d 520 (N.J. 1993), *cert. denied*, 510 U.S. 1165 (1994).

rule of law when the Supreme Court has grievously erred in a prior case. In the aftermath of *Brown*, Yale Law Professor Alexander Bickel in 1962 approved of the Supreme Court's use of judicial review to restore justice to the law.⁶¹⁴

It can happen again. Law is intended to serve justice; injustice must never define or serve the law.

XX. EQUAL AT LAST

Proposed Opinion of this Honorable Court: 2006

Before this court are cases that arise in different ways, premised on different facts and unique personal circumstances. A common legal question justifies their consideration together in this consolidated opinion.

In each of these cases, embryos and fetuses, unborn members of the human race, through their legal representatives, seek the right to life and admission to birth, which carry with it the conferring of citizenship and legal personhood. In each case, the unborn are denied the right to life, and face the risk of death, depending on whether the unborn are chosen for birth.

Until birth, the unborn are segregated from the rest of the human race, and are inferior to those who have been born, because of their pre-born physical condition, stage of biological development and denial of constitutional rights. Until birth, the unborn are not only separate, but also are also unequal to those already born, who exercise their constitutional rights of liberty to decide the fate of the unborn. This segregation prior to the time of birth is alleged by the plaintiffs to deny them equal protection of the law, and the right to life contrary to the Fourteenth Amendment of the United States Constitution.

In previous cases, notably *Roe*, *Doe* and *Casey*, this court has denied relief to the unborn on the basis they are not persons and thus do not merit protection under the United States Constitution. The court has justified denying relief to the plaintiffs on the basis of abortion law jurisprudence that recognizes a right to privacy in the pregnant woman that gives her preferential legal rights over any person and over any non-person child that she carries within her womb. This right to privacy, together with the right to liberty, grants the pregnant woman in effect the legal license to kill her unwanted unborn human progeny for any or no reason at all. The uncertainty of unborn human beings to the continuation of their existence until birth is common to all the unborn that are similarly situated. In this respect, the law treats all the unborn equally.

The plaintiffs contend that human life prior to birth in a state of "separate and unequal" is immoral, contrary to the inherent dignity of every human being,

⁶¹⁴ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (1962), pp. 237-38.

and violates the spirit of the Declaration of Independence, which declares that people are “created” equal⁶¹⁵ and not merely “born” equal. Because of the importance of this issue, this court assumes jurisdiction to consider whether the unborn are to be granted constitutional personhood pursuant to the Fourteenth Amendment.

In approaching this problem, we cannot turn the clock back to 1868 when this Amendment was adopted, or even to 1973 when *Roe* and *Doe* were decided. We must consider the status of the unborn in light of scientific knowledge of when human life begins. We also need to recognize the millions of deaths caused by abortion, in vitro fertilization, cloning and contraceptives, and the present place of the biotechnological industry in American society that utilizes live fetal tissue harvested from abortions and the mass destruction of embryos for stem cell research, the development of new vaccines, and cloning.

Does the segregation and unequal treatment of unborn human beings deprive the unborn of the right to life and equal opportunity to be born? We believe that it does.

We conclude that in this matter of human dignity and respect for others, there is no place for the doctrine of “separate and unequal” to discriminate against the unborn, to take their lives prior to birth, and to treat their bodies as the property of others to be utilized for the advancement of science and for the betterment of those already born. Only by conferring constitutional personhood from the moment of conception until natural death, will all human beings enjoy the equal protection of the laws guaranteed to all persons. This disposition makes it unnecessary to determine whether being “separate and unequal” violates the Due Process Clause of the Fourteenth Amendment.

Let us hope the Supreme Court of the United States discovers the truth, equates the meaning of human being with person in the Fourteenth Amendment, and conforms to the rule of law. “All truths are easy to understand once they are discovered; the point is to discover them.”⁶¹⁶

⁶¹⁵ The Declaration of Independence, para. 2 (U.S. 1776).

⁶¹⁶ Galileo Galilei, available at http://www.brainyquote.com/quotes/authors/g/galileo_galilei.html.