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## A Reexamination of the Constitutional Person

William R. Avery  
wavery@slu.edu

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## A REEXAMINATION OF THE CONSTITUTIONAL PERSON

### I. INTRODUCTION

Justice Blackmun declares, “the word ‘person’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>1</sup> In support, he references the use of person in § 1 of the Fourteenth Amendment and the appearance of ‘person’ in other parts of the body of the Constitution and its Amendments.<sup>2</sup> The language of the Fourteenth Amendment begins “All persons born or naturalized in the United States . . . are citizens.”<sup>3</sup> The due process clause states “nor shall any State deprive any person of life, liberty, or property,”<sup>4</sup> and the equal protection clause “nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>5</sup> This first section, and the comment in its entirety, asserts Justice Blackmun’s interpretation of ‘person’ excluding the unborn under the Fourteenth Amendment ignores the philosophical and legal conclusions of the Founders of the United States of America, legislative action, and biological facts.

The second section explores the legal definition of ‘person’ under the Constitution of the United States, drawing from *Roe*, an *amicus* appellate brief, legal precedent, and state legislative action. The *amicus curiae* brief for the appellee, submitted by the Association of Texas Diocesan Attorneys (“Diocesan Attorneys”), states: “The great issue in this case is whether the unborn child or foetus is a person within the meaning of the constitutional safeguards of the person contained in the Constitution of the United States, and especially in its Fourth, Fifth, Fourteenth, and Ninth Amendments.”<sup>6</sup>

In framing their argument, the Diocesan Attorneys asserted the concept of ‘person’ utilized in the Constitution and its first ten Amendments clearly included the unborn.<sup>7</sup> Regarding philosophy, the Diocesan Attorneys’ brief in

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1. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

2. *Id.* at 157.

3. U.S. CONST. amend. XIV, § 1, cl. 1.

4. U.S. CONST. amend. XIV, § 1, cl. 3.

5. U.S. CONST. amend. XIV, § 1, cl. 4.

6. Brief for Ass’n of Tex. Diocesan Attorneys as Amicus Curiae Supporting Appellee at 7, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134282 [hereinafter *Amicus Curiae Brief*].

7. *Amicus Curiae Brief*, *supra* note 6, at 8 (arguing the framers of the Constitution considered the unborn child the subject of rights which included the right to life and a duty on the part of society and the child’s parents to care for and support the unborn child)

*Roe* asserted the concept of ‘person’ in the Constitution and first ten Amendments included the unborn because of the religious motivation, philosophy of natural rights, and the views of the framers and adopters of the Constitution.<sup>8</sup> In contrast, the holding espoused by Justice Blackmun concludes all the instances where ‘person’ appears in the Constitution applies only post-natally, or after birth.<sup>9</sup>

The third section illustrates that certain areas of the law provide the unborn with protections despite the holding in *Roe*. It has been posited the application of Justice Blackmun’s personhood definition has mistakenly denied the unborn non-Fourteenth Amendment rights and limited the discretion of American lawmakers in characterizing personhood.<sup>10</sup> In California and other states, statutes criminalize the nonconsensual killing of an “unborn child” as murder or manslaughter, implying a definition for ‘person’ incongruous with that laid out by Justice Blackmun in *Roe*.<sup>11</sup> States continue to enact variations on fetal and pregnant woman assault.<sup>12</sup> Under most inheritance and trust laws the unborn are considered a ‘person’, despite no such consideration under the Fourteenth Amendment.<sup>13</sup> This continuing response by the states implies at least a form of emerging awareness in regard to the rights afforded to the unborn.

Lastly, the fourth section covers biological and moral evidence supporting the arguments provided by the Diocesan Attorneys, the appellee brief by Henry Wade, and the states, all of whom see something worth protecting despite the holding in *Roe*. Within the Diocesan Attorneys’ brief, the proposition was declared “Life begins, not at birth, but at conception”, applying scientific methods of the day.<sup>14</sup> Modern science confirms the biological identity of a new human individual is already constituted in the zygote resulting from fertilization.<sup>15</sup> Rule of law and rule by law is briefly examined in reference to

8. Amicus Curiae Brief, *supra* note 6, at 10–11.

9. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

10. Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not to Be: Protecting the Unborn’s Potentiality of Life*, 51 U. CIN. L. REV. 257, 258 (1982).

11. *People v. Davis*, 872 P.2d 591, 598–99 (Cal. 1994) (including Arizona, Illinois, Louisiana, Minnesota, North Dakota, and Utah, and the Judges of the California Supreme Court concluded “when the mother’s privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother’s womb from homicide”).

12. See *Monthly State Update: MAJOR DEVELOPMENTS IN 2014, Pregnancy and Birth, Fetal and Pregnant Woman Assault*, GUTTMACHER INST., (Dec. 31, 2014), <https://www.guttmacher.org/statecenter/updates/december.html#assault>.

13. Parness et al., *supra* note 10, at 257.

14. Amicus Curiae Brief, *supra* note 6, at 65 (a conclusion formed by Professor R. Ashley Montagu citing ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS: 1776–1791* 119–218 (1955)).

15. WILLIAM E. MAY, *CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE* 34 (3rd ed. 2013).

the *Casey* decision succeeding *Roe*. Lastly, *Evangelium Vitae*, a Catholic Church document, is referenced for its position that every innocent human being possesses a right to life.<sup>16</sup>

This comment asserts ‘person’ under the Fourteenth Amendment includes the unborn through support from the appellee briefs, reference to the thinking of the Founders, common law and legislative precedent, current state approaches concerning the unborn, and persuasive evidence of biology and philosophy. Depriving the unborn of rights under the Fourteenth Amendment, yet recognizing laws beyond the Fourteenth Amendment protecting the unborn, has established an untenable dichotomy. The Supreme Court must recognize the rights of all persons under the Constitution.

## II. THE LEGAL DEFINITION OF PERSONHOOD

### A. *Roe, the Fourteenth Amendment, and the Constitutional Articles*

Section 1 of the Fourteenth Amendment references ‘person’ three times: first in the requirements for a citizen, second in the due process clause, and third in the equal protection clause.<sup>17</sup> The phrase “persons born” makes a sole appearance in reference to the requirements for citizenship of the United States and of the state where said ‘person’ resides.<sup>18</sup> The due process and equal protection clauses of the Fourteenth Amendment mention ‘person’ without born as a descriptor.<sup>19</sup> Textually, this implies “persons born” is in reference to the requirements for citizenship, not that a Constitutional ‘person’ requires birth.

Justice Blackmun holds, however, ‘person’ only ever operates post-natally in the Fourteenth Amendment and the Constitution at large.<sup>20</sup> References by the Justice include the requirements for representatives and senators in Article I, and the Fifth, Twelfth, and Twenty-Second Amendments.<sup>21</sup> The sections where ‘person’ is mentioned in the Constitution seemingly affirm this post-natal status. For example, “No person shall be a Representative who shall not have attained the Age of twenty-five Years, and been seven Years a citizen of the United States.”<sup>22</sup> However, a pre-natal definition was argued by the Diocesan Attorneys in their *amicus curiae* brief in *Roe*.

16. Ioannes Paulus PP. II, *Evangelium Vitae*, VATICAN.VA (Mar. 25, 1995) point 71, [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html).

17. U.S. CONST. amend. XIV, § 1.

18. U.S. CONST. amend. XIV, § 1, cl. 1.

19. U.S. CONST. amend. XIV, § 1, cl. 3–4.

20. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

21. *Id.*

22. U.S. CONST. art. I, § 2, cl. 2.

*B. As the Founders Intended*

An appellee brief written by the Texas Diocesan Attorneys asserted as an originalist argument: “The concept of the person utilized in the Constitution of the United States and in its first ten Amendments had a well-defined meaning for those who framed and adopted their provisions that clearly included the unborn child.”<sup>23</sup>

To achieve this point, the Diocesan Attorneys pointed out rules of the Constitution must be considered “rules for the government of courts.”<sup>24</sup> The Diocesan Attorneys argued that this included rules of the Constitution safeguarding the ‘person’, including its appearances in the Fifth, Fourteenth, and Ninth Amendments.<sup>25</sup> As a result, the Court in *Roe* would be tasked with determining the appropriate meaning of person “used by the framers of the Constitution in establishing its fundamental safeguards of the person.”<sup>26</sup>

It is noted that the people of the United States, including John Adams and Thomas Jefferson, were so greatly concerned at the lack of a bill of rights guaranteeing the freedom of the person that the Federalists agreed to propose and submit a comprehensive Bill of Rights at the First Congress in 1789.<sup>27</sup> The Diocesan Attorneys insisted the religious motivation, philosophy of natural rights, and views of the ‘person’ on the part of the framers and adopters of the Constitution could not be disregarded by the Court.<sup>28</sup> *Boyd v. United States* is cited where Justice Bradley declared:

... constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.<sup>29</sup>

The implication was that restricting who is covered by the word ‘person’ in the Constitution dangerously threatens the rights of the people.

To further establish their originalist argument, the Diocesan Attorneys invoked James Wilson as an illustration. James Wilson helped formulate, voted

23. Amicus Curiae Brief, *supra* note 6, at 8.

24. Amicus Curiae Brief, *supra* note 6, at 9 (citing *Marbury v. Madison*, 5 U.S. 137, 179–80 for the proposition by Chief Justice Marshall “that the framers of the Constitution contemplated [the Constitution] as a rule for the government of courts, as well as of the legislature.”).

25. Amicus Curiae Brief, *supra* note 6, at 9.

26. Amicus Curiae Brief, *supra* note 6, at 9.

27. Amicus Curiae Brief, *supra* note 6, at 10.

28. Amicus Curiae Brief, *supra* note 6, at 10–11.

29. Amicus Curiae Brief, *supra* note 6, at 12 (citing 116 U.S. 616, 635 where notice to produce an invoice and the law supporting such notice resulting in self-incrimination was ruled unconstitutional).

for, and signed the Declaration of Independence, participated in the Constitutional Convention, signed the proposed Constitution of the United States, and served as an Associate Justice for the Supreme Court of the United States.<sup>30</sup> He was a professor of law at the College of Pennsylvania while serving on the Supreme Court, knowledgeable of the philosophy of natural law, and of a position to articulate the meaning and concept of ‘person’ generally shared by his fellow citizens, particularly as it was “woven into the sinews of the colonial and state Bill of Rights and finally into the Constitution of the United States.”<sup>31</sup>

Justice Wilson commented “Persons are divided into two kinds – natural and artificial. Natural persons are formed by the great Author of nature. Artificial persons are the creatures of human sagacity and contrivance; and are formed and intended for the purposes of society.”<sup>32</sup> The Constitutional Fathers did not see ‘person’ as something subject to man’s contrivance, like that of the corporation or state.<sup>33</sup> The Diocesan Attorneys stressed the Founders saw “The status of person was not something to be conferred by the state or even all the people of the state”, a ‘person’ simply is and has being by virtue of an act of creation by God himself.<sup>34</sup>

One of the most influential thinkers relied upon by the Founders, John Locke, expressed the view that men by nature being free, equal, and independent, cannot be put out of this state by another without his own consent.<sup>35</sup> Essentially, a person, whether child or adult, was deemed superior to the state and to its law, even that of the Constitution.<sup>36</sup> The original documents of the United States further make the relationship of man to the state clear. For example, the Declaration of Independence holds:

that all men are created equal, *that they are endowed by their Creator with certain inalienable 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 . . .<sup>37</sup>

As the Founders saw it, these rights were given by an authority greater than any manmade state, and the state existed by the grace of those whom it governed. In addition, if birth were seen as the beginning of life then they likely would have written “that all men are *born* equal.”

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30. Amicus Curiae Brief, *supra* note 6, at 14.

31. Amicus Curiae Brief, *supra* note 6, at 14.

32. Amicus Curiae Brief, *supra* note 6, at 14.

33. Amicus Curiae Brief, *supra* note 6, at 15.

34. Amicus Curiae Brief, *supra* note 6, at 15.

35. Amicus Curiae Brief, *supra* note 6, at 18.

36. Amicus Curiae Brief, *supra* note 6, at 18.

37. Amicus Curiae Brief, *supra* note 6, at 19 (emphasis added in original).

Thomas Jefferson was familiar with the laws of England as far back as the Laws of King Alfred, which penalized the killing of a pregnant woman and that of her unborn child, requiring payment for the killing of both.<sup>38</sup> This example and those listed above stand for the proposition that the Founders and colonial Americans respected and considered the unborn as persons created by God.<sup>39</sup> This approach was drawn from English thinking, as was noted with John Locke, and also from William Blackstone who cited in his *Commentaries*, “Life. This right is inherent by nature in every individual, and exists even before the child is actually born.”<sup>40</sup>

The Diocesan Attorneys observed a disregard for the “religious motivations, philosophy of natural rights, and the views of the person entertained by the framers and adopters of the Constitution . . .” is no basis to declare invalid the will of those who formed the foundation of the U.S. system of government, especially those parts which dealt with the safeguards of the person.<sup>41</sup> Following from the interpretation in *Boyd* by Justice Bradley, constitutional provisions dealing with the security of persons should be liberally construed, requiring ‘person’ in the Constitution cover not just those already born but those yet to be.<sup>42</sup> The Founders utilized natural law, which insists the natural person is a creation of God, not of man like a corporation would be, and this natural person exists before the arbitrary boundary of birth.<sup>43</sup> Once a limit is placed on the protections afforded one group of persons, the protections for all are put in jeopardy. If rights are not based on something permanent and absolute then they are subjective, and in this subjective state they are vulnerable to the mutable nature of popular opinion. The Declaration of Independence recognizes we are “created equal”, and if the Founders of the United States thought otherwise they likely would have written we are “born equal.”

### C. *As the Drafters Wrote*

Additionally, one can make a textual argument for the recognition of rights for the unborn. The Diocesan Attorneys assert in their appellee brief the citizenship clause of the Fourteenth Amendment recognizes the unborn child as a person.<sup>44</sup> Section 1 of the Fourteenth Amendment provides, “All persons born . . . in the United States and subject to the jurisdiction thereof, are citizens

38. Amicus Curiae Brief, *supra* note 6, at 22.

39. Amicus Curiae Brief, *supra* note 6, at 24.

40. Amicus Curiae Brief, *supra* note 6, at 24–25.

41. Amicus Curiae Brief, *supra* note 6, at 10–11.

42. Amicus Curiae Brief, *supra* note 6, at 27.

43. Amicus Curiae Brief, *supra* note 6, at 26; *see also* Amicus Curiae Brief, *supra* note 6, at 15 (discussing corporation and natural law).

44. Amicus Curiae Brief, *supra* note 6, at 33.

of the United States and of the State wherein they reside.”<sup>45</sup> Discussion by the draftsman, John A. Bingham of Ohio, concerning § 1 of the Fourteenth Amendment expressed:

By that great law of ours it is not to be inquired whether a man is ‘free’ by the law of England; it is only to be inquired is he a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life . . . endowed with the rights of life and liberty.<sup>46</sup>

This sentiment finishes, in words reminiscent of the Declaration of Independence, “Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are *created* equal.”<sup>47</sup>

A central purpose of the Citizenship clause of § 1 of the Fourteenth Amendment was to make certain that black Americans, and every other class of person, obtained the rights of citizenship in addition to those natural rights they received upon conception from God.<sup>48</sup> This purpose was considered so fundamental Representative William Lawrence of Ohio in 1866 believed it was unnecessary to put in writing, saying “This clause is unnecessary, but nevertheless proper, since it is only declaratory of what is the law without it.”<sup>49</sup> Even with the Citizenship clause explicitly written, Justice Blackmun found a means to disregard the draftsmen with a false analogy. He concluded because abortion practices were legal in some instances in the 19<sup>th</sup> century that ‘person’ could in no way include the unborn in the Fourteenth Amendment.<sup>50</sup> This is similar to proposing that because many people believed for years the sun orbited the earth, that the view the earth orbited the sun is invalid on its face. Existence of a mistaken belief does not suffice as definitive proof against the right conclusion.

The Diocesan Attorneys assert the Citizenship clause of § 1 of the Fourteenth Amendment fully includes the unborn, among others.<sup>51</sup> “The unborn child is the ‘person’ before birth who, by virtue of being ‘born’ in the United States, becomes a citizen of the United States,” they write.<sup>52</sup> As the unborn are included within the Citizenship clause, they too must be recognized to have the right to claim protection from the federal courts for their prospective status of citizenship upon birth.<sup>53</sup> Otherwise, the present status quo arises, which was predicted by the Diocesan Attorneys in their brief.

45. U.S. CONST. amend. XIV, § 1, cl. 1.

46. Amicus Curiae Brief, *supra* note 6, at 33–34.

47. Amicus Curiae Brief, *supra* note 6, at 34 (emphasis added).

48. Amicus Curiae Brief, *supra* note 6, at 34.

49. Amicus Curiae Brief, *supra* note 6, at 34–35.

50. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

51. Amicus Curiae Brief, *supra* note 6, at 36.

52. Amicus Curiae Brief, *supra* note 6, at 36.

53. Amicus Curiae Brief, *supra* note 6, at 36.



If the unborn cannot obtain protection from their prospective status as citizens, then citizenship becomes a precarious right.<sup>54</sup> Citizenship cannot be acquired by birth if a person is not allowed to be born.<sup>55</sup> If the rights of citizenship are to be effectively protected, an unborn child must be recognized to possess a prospective right to citizenship.<sup>56</sup>

The esteemed Court turned down the above reasoning in favor of an interpretation stating the obvious: 'person' does not indicate it has prenatal applications in the Constitution.<sup>57</sup> References to 'person' by the Court include the requirements for Representatives and Senators in Article I, the Fifth, Twelfth, and Twenty-Second Amendments.<sup>58</sup> For example, "No person shall be a Representative who shall not have attained the Age of twenty five Years, and been seven Years a citizen of the United States."<sup>59</sup> The use of 'person' here indeed applies after birth, but it also does not apply to children or adolescents. Yet to conclude this section makes children and adolescents nonpersons because it does not refer to them would be entertained by no one. But this is exactly what Justice Blackmun concluded in *Roe*; because 'person' in the Constitution is referring to someone after birth, and only after, those before birth are not included in the definition of 'person'.<sup>60</sup> As citizenship rights activate upon birth, denying citizenship today is as simple as ending a pregnancy prior to labor. The Diocesan Attorneys recognized when they wrote their brief that the prospective right of citizenship had to be recognized, otherwise citizenship means nothing.

### III. PERSONHOOD IN THE STATES

Areas outside the Fourteenth Amendment frequently afford the unborn protections. This raises important questions. Foremost is why the unborn are afforded protection outside the Fourteenth Amendment, but within it they are subject to the determination of the mother? This section will attempt to show the inherent contradiction of law present where protections are provided in one area but denied in another.

In *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, it is presented that a misunderstanding of the *Roe* decision caused courts to mistakenly deny the unborn non-Fourteenth Amendment protections to which

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54. Amicus Curiae Brief, *supra* note 6, at 36.

55. Amicus Curiae Brief, *supra* note 6, at 37.

56. Amicus Curiae Brief, *supra* note 6, at 37 (illustrating this argument using prospective jurisdiction of courts in judicial proceedings and the actions necessary to preserve that jurisdiction).

57. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

58. *Id.*

59. U.S. CONST. art. I, § 2, cl. 2.

60. *Roe*, 410 U.S. at 157.

they are entitled.<sup>61</sup> The author, Professor Jeffrey Parness, summarizes the *Roe* Court's position as treating the unborn not as persons in the whole sense, while recognizing the unborn can be treated as persons in many contexts.<sup>62</sup> As support, he noted the Fifth Circuit concluded:

An unborn child's lack of status as a 'person' for Fourteenth Amendment purposes does not affect the status of an unborn child as a 'child' within the meaning of the [Social Security] Act; that a fetus is not constitutionally entitled as a person to claim certain benefits in no way affects the right or power of Congress to extend benefits to unborn children by appropriate legislation.<sup>63</sup>

Even so, federal courts since *Roe* have failed to distinguish entitlement of benefits under the Fourteenth Amendment from the issue of extension of benefits to the unborn under other laws.<sup>64</sup> State laws provide the best examples of this dichotomy, and though numerous state laws affect the unborn, states have not fully recognized the unborn due to misplaced reliance on the *Roe* decision.<sup>65</sup> Areas of state jurisdiction include inheritance, trusts, criminal law and others.<sup>66</sup> The authors stress these areas need to be addressed to promote policies affecting the unborn.<sup>67</sup>

#### A. *Inheritance and Property*

An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth.<sup>68</sup> Similarly, if the testator had no child living when he or she executed a will, an omitted after-born child receives a share in the estate equal in value to that the child would have received if the testator died intestate.<sup>69</sup> Each of these sections of the Uniform Probate Code ("U.P.C.") recognize the unborn connected to the intestate decedent or as the child of a testator, and vests rights in the unborn contingent upon their live birth.<sup>70</sup>

Initially, this does not appear troubling as the argument can be made the state has no interest in transferring property to an unborn who will not be born.<sup>71</sup> However, Parness highlights the state's interest in promoting the

61. Parness et al., *supra* note 10, at 258.

62. Parness et al., *supra* note 10, at 261.

63. Parness et al., *supra* note 10, at 263 (citing *Parks v. Harden*, 504 F.2d 861, 864 (5th Cir. 1974)).

64. Parness et al., *supra* note 10, at 263.

65. Parness et al., *supra* note 10, at 263.

66. Parness et al., *supra* note 10, at 263.

67. Parness et al., *supra* note 10, at 263.

68. UNIF. PROBATE CODE § 2-104 (a)(2) (amended 2010).

69. *Id.* § 2-302 (a)(1).

70. Parness et al., *supra* note 10, at 264 (varying slightly in wording since Parness' original publication, where the relevant statute was U.P.C. § 2-108, but the argument remains unaffected).

71. Parness et al., *supra* note 10, at 265.

unborn's potential for life may be undermined by treating their interest as contingent upon birth.<sup>72</sup> Presumably, a wealthy, pregnant intestate might have substantial incentive to abort the unborn child she is carrying to establish her status as 'surviving spouse' to take the entire estate.<sup>73</sup> The state has a legitimate interest in "protecting the potentiality of human life" which warrants an elimination of incentives to abort, especially since eliminating such an incentive does not place an obstacle in the way of a pregnant woman's right to abortion.<sup>74</sup>

While Parness concludes the state's interest protects the potentiality of human life without interfering with a woman's privacy right, this still ignores the larger issue. The appellee brief submitted by the Diocesan Attorneys argued the concept of property in the Due Process Clauses of the Fifth and Fourteenth Amendment primarily deal with state law.<sup>75</sup> Because state law recognizes property rights for the unborn, the Due Process Clause of both the Amendments protect the unborn as a 'person'.<sup>76</sup> To provide otherwise establishes an irrational contradiction,<sup>77</sup> one observable today.

The handling exhibited by the U.P.C. above was inherited from the common law of England, and recognizes the unborn child's ability to take by inheritance, dependent upon their birth.<sup>78</sup> English courts recognized the unborn's rights in property law as early as 1795, and American courts utilized a similar approach in *Hall v. Hancock*.<sup>79</sup> Where it has been shown a state recognizes the unborn child may take real or personal property under will or statute of descent and distribution, there is a declaration the unborn is a 'person' to be protected with respect to their property right.<sup>80</sup> Prior to the holding in *Roe*, the Diocesan Attorneys insisted:

If the unborn child is a person protected as to its property under the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution

72. Parness et al., *supra* note 10, at 265.

73. Parness et al., *supra* note 10, at 265 (citing UNIF. PROBATE CODE § 2-102 (1)(A) (amended 2010), where an intestate share of a decedent's surviving spouse is entire if no descendant or parent of the decedent survives the decedent).

74. Parness et al., *supra* note 10, at 265 (citing *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

75. Amicus Curiae Brief, *supra* note 6, at 38.

76. Amicus Curiae Brief, *supra* note 6, at 38.

77. Amicus Curiae Brief, *supra* note 6, at 38.

78. Amicus Curiae Brief, *supra* note 6, at 38.

79. Amicus Curiae Brief, *supra* note 6, at 39 (citing *Doe v. Clark*, 2 H.B1. 399, 126 Engl Rep. 617 (1795) where the court held "children living at the time of [the life tenant's] decease" included unborn children, and *Hall v. Hancock*, 15 Pick, 255 (Mass., 1834) where Chief Justice Shaw held an unborn child fell within the meaning of a bequest to grandchildren "living at my decease").

80. Amicus Curiae Brief, *supra* note 6, at 41.

of the United States, the child must also be a person under the same clauses for the purpose of the protection of its life and liberty.<sup>81</sup>

They noted it would be a strange and bizarre doctrine that protected the property of the unborn child under these Amendments, but not its life and liberty.<sup>82</sup> Life precedes liberty and property where it is listed in the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States,<sup>83</sup> and life precedes liberty and the pursuit of happiness in the Declaration of Independence.<sup>84</sup> It may be reasonably inferred life was to take the ultimate priority among these most important rights, for without life no other right matters. “Thus, if any lesser right of the unborn child is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, the foundational right to life of the unborn child must also necessarily be protected by them.”<sup>85</sup>

Yet today it is seen that the unborn are recognized to inherit property,<sup>86</sup> but receive no protections under the Fourteenth Amendment after *Roe*.<sup>87</sup> It is truly a strange and bizarre doctrine the Court devised in *Roe*, where ‘person’ does not include the unborn, yet the unborn in areas of state law receive an interest in property. Naturally these are two different things, which justifies two different approaches. Or it is as the Diocesan Attorneys argued, that the unborn should be considered a ‘person’ for the protection of the life and liberty due a ‘person’ under the Fifth and Fourteenth Amendments?<sup>88</sup>

### B. Criminal Law

The unborn is not a ‘person’ under the Fourteenth Amendment to the Constitution, having no right to life, liberty, or property since *Roe*.<sup>89</sup> Presumably, this leads one to conclude there is nothing of value prior to birth. Yet California defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought.<sup>90</sup> This applies wherever an act resulting in the death of a fetus is not a therapeutic abortion, committed by a holder of a physician’s or surgeon’s certificate to preserve the mother’s life, or where the act was consented to by the mother of the fetus.<sup>91</sup> Fetus is separately listed from human being, implying these are two different things. But why then is the

81. Amicus Curiae Brief, *supra* note 6, at 41.

82. Amicus Curiae Brief, *supra* note 6, at 41.

83. U.S. CONST. amend. V, § 1, cl. 3; U.S. CONST. amend. XIV, § 1, cl. 3.

84. Amicus Curiae Brief, *supra* note 6, at 19.

85. Amicus Curiae Brief, *supra* note 6, at 41–42.

86. See UNIF. PROBATE CODE § 2-104 (a)(2) (amended 2010); *Id.* § 2-302(a).

87. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

88. Amicus Curiae Brief, *supra* note 6, at 46.

89. *Roe*, 410 U.S. at 158.

90. CAL. PENAL CODE § 187(a) (1872).

91. *Id.* § 187(b)(1–3).

crime of murder attached to the unlawful killing of a fetus? That implies a fetus is alive, because if nothing of value resides in a pregnant woman's womb it makes no sense to penalize someone on two counts of murder.

While *Roe* determined a state's interest in protecting potential human life arose at viability,<sup>92</sup> the state of California held viability was not an element of fetal murder.<sup>93</sup> Previous cases in California made reference to viability concerning § 187 of the California Penal Code ("§ 187"), interpreting *Roe*'s stricture to mean only a fetus that had met the viability threshold could support a conviction for fetal murder.<sup>94</sup> The Defendant in *Davis* argued because the fetus he killed could have been legally aborted under *Roe* it could not be protected under § 187.<sup>95</sup> But the California Supreme Court elaborated *Roe* principles are inapplicable to a statute such as § 187 where killing a fetus without the mother's consent is criminalized.<sup>96</sup> The Court plainly stated, "The *Roe* decision, therefore, forbids the state's protection of the unborn's interest only when these interests conflict with the constitutional rights of the prospective parent."<sup>97</sup> And the Court concluded, "When the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect the life inside a mother's womb from homicide."<sup>98</sup>

Interestingly, *Roe* causes confusion on the issue. As the Supreme Court of California said, state legislatures may determine when the life in the mother's womb is protected from homicide absent the woman's privacy interests. But if there is a life inside the womb, how is it permissible to end it? How is it a privacy right trumps a right to life? Indeed, the unborn is not a legal person, but a Supreme Court of a state here said a fetus was life. These confusions must be resolved.

In *People v. Taylor*, the California Supreme Court reviewed a case where the appellate court reversed a second degree murder conviction based on the death of a fetus.<sup>99</sup> The appellate court concluded the mental component of implied malice could not be met because the Defendant did not know his conduct endangered fetal life due to an unawareness the victim was pregnant.<sup>100</sup> The California Supreme Court did not agree, commenting "There is no requirement the defendant specifically know of the existence of each

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92. *Roe*, 410 U.S. at 163.

93. *People v. Davis*, 872 P.2d 591, 594 (Cal. 1994).

94. *Id.* at 595 (citing *People v. Apodaca*, 142 Cal. Rptr. 3d 830 (Ca. Ct. App. 1978) where § 187(a) was challenged as unconstitutionally vague for not specifying the required stage of development of the fetus).

95. *Id.* at 597.

96. *Id.*

97. *Id.*

98. *Davis*, 872 P.2d at 599.

99. 86 P.3d 881, 883 (Cal. 2004).

100. *Id.*

victim.”<sup>101</sup> In past cases, the Court did not indicate a defendant was required to have a subjective awareness of his particular victims for an implied malice murder charge to proceed.<sup>102</sup> The Court continued that nothing in the language of § 187 allowed for a different analysis for a fetus.<sup>103</sup> Just as a gunman firing through closed doors of an apartment building would be held liable for the murder of all the victims struck by his bullets, so too would he be held liable for the death of a fetus if one of the victims happened to be pregnant.<sup>104</sup> Again, despite the pronouncement in *Roe* that a fetus is not a ‘person’ under the Fourteenth Amendment,<sup>105</sup> a State provides individuals may be charged with two counts of murder when a woman is pregnant and not exercising a privacy right. Where a defendant may be held responsible for the death of a fetus, despite the lack of Constitutional personhood via *Roe*, there is an implied value placed on the unborn.<sup>106</sup> It seems a judicial system is out of synchronization with its constituencies when it announces the unborn have no fundamental rights to life, liberty, or property, and in the following days states find ways to circumvent the announcement.

### C. *Emerging Awareness and the Majority Stance of the States*

It can be argued whether the unborn should be recognized as persons under the Fourteenth Amendment is still an unsettled question forty-two years later. The Guttmacher Institute (“Institute”), originally formed within the corporate structure of the Planned Parenthood Federation of America,<sup>107</sup> reports in the last four years states have enacted 231 abortion restrictions.<sup>108</sup> Elizabeth Nash and her co-authors note 341 provisions aimed at restricting access to abortion were introduced in 2014 alone.<sup>109</sup> And while the Institute recognizes legislatures in seventeen states introduced ninety five measures to expand

101. *Id.* at 884.

102. *Id.* (citing *People v. Watson*, 637 P.2d 279 (Cal. 1981) where the defendant’s conduct, under the influence of alcohol, was sufficiently wanton to support two charges of second degree murder without any requirement that the defendant be subjectively aware of both victims).

103. *Id.*

104. *People v. Taylor*, 86 P.3d 881, 884 (Cal. 2004).

105. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

106. Parness et al., *supra* note 10, at 298; Mamta K. Shah, *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 HOFSTRA L. REV. 931, 969 (2000-2001).

107. *The History of the Guttmacher Institute*, GUTTMACHER INST., (Feb. 15, 2014), <https://www.guttmacher.org/about/history.html>.

108. Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2014 State Policy Review*, GUTTMACHER INST., (Feb. 15, 2014), <https://www.guttmacher.org/statecenter/updates/2014/statetrends42014.html>.

109. *Id.*

access to abortion,<sup>110</sup> the large number of recently enacted abortion restrictions dramatically reshaped the landscape.<sup>111</sup>

In 2000, thirteen states had four or five types of abortion restrictions in place, causing the Institute to deem them hostile to what they call abortion rights.<sup>112</sup> In 2010, twenty two states were considered hostile to abortion rights, with five of those states having six or more restrictions, resulting in a label of extremely hostile.<sup>113</sup> Ms. Nash and her colleagues reported in 2014, twenty seven states had enough restrictions to be considered hostile to abortion rights, with eighteen of those twenty seven being considered extremely hostile.<sup>114</sup> Twenty seven states make up more than half those in the entire Union. These twenty seven states possess stances against the widespread practice of the abortion privacy right protected in *Roe*. This is at least an emerging awareness of the value of unborn life since 2000, and now certainly a majority stance against what *Roe* declares.

Variations on abortion restrictions include a value placed on prenatal life through fetal murder statutes as showcased above in California. California, however, is not the only state acting in this realm. In 2014, Colorado, Florida, and Minnesota enacted variations on fetal and pregnant woman assault.<sup>115</sup> June of 2014 saw Colorado pass a measure allowing a woman to bring civil charges against a person responsible for the unlawful termination of her pregnancy at any point in gestation.<sup>116</sup> At the same time, a Colorado bill provided exceptions for actions by the pregnant woman and medical care,<sup>117</sup> meaning a woman, or abortion provider, may still obtain or provide an abortion and not be liable under the bill. It specifically prohibits granting personhood rights to a fetus, in line with the holding in *Roe*,<sup>118</sup> yet still allows a woman to hold someone responsible for terminating a wanted pregnancy. This supports the odd approach the law has provided where the unborn are not persons under the Fourteenth Amendment, yet are given some forms of protection that push against, but do not infringe, upon the privacy right proclamation from *Roe*.

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110. *Id.*

111. *Id.*

112. *Id.*

113. Nash et al., *supra* note 108.

114. Nash et al., *supra* note 108 (recording the twenty-seven hostile states include Idaho, Utah, Arizona, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Wisconsin, Missouri, Arkansas, Louisiana, Michigan, Indiana, Ohio, Kentucky, Tennessee, Mississippi, Alabama, Florida, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, and Rhode Island).

115. *Monthly State Update: MAJOR DEVELOPMENTS IN 2014, Pregnancy and Birth, Fetal and Pregnant Woman Assault*, GUTTMACHER INST., (Dec. 31, 2014), <https://www.guttmacher.org/statecenter/updates/december.html#assault>.

116. *Id.*

117. *Id.*

118. *Id.*; *Roe v. Wade*, 410 U.S. 113, 158 (1973).

Florida enacted a similar measure, making it a crime to cause the injury or death of a fetus at any point of development, with exceptions for abortion, medical treatment, and actions by the pregnant woman.<sup>119</sup> Florida's fetal homicide law currently applies only to viable fetuses.<sup>120</sup> But again, here is a state recognizing the essential holding of *Roe* while attempting to protect the unborn child. Yet Florida applies a definition outside the Fourteenth Amendment, making it a crime to injure or kill a fetus at least after the point of viability. Why is it a wanted unborn child is protected, but an unwanted unborn child may be aborted? Both situations terminate the pregnancy, but in one an individual potentially receives two counts of murder, while in the other the pregnancy is ended and the provider and once mother go separate ways with no legal sanction.

Lastly, Minnesota's governor signed into law a measure allowing individuals to be prosecuted for causing injury or death to a fetus while driving a vehicle negligently or under the influence.<sup>121</sup> Even the pregnant woman is not explicitly exempted from prosecution under the law, which goes into effect August 1<sup>st</sup> of 2015.<sup>122</sup> Again a state lines up with *Roe*, yet is providing whatever means it can around *Roe*'s holding to provide the unborn with some form of protection. It is apparent the law says the unborn are not persons under the Fourteenth Amendment, but the treatment of the unborn outside the Fourteenth Amendment says otherwise.

The twenty seven states enacting restrictions on abortion, and the examples of unborn life being valued by fetal murder statutes in California, Colorado, Florida, and Minnesota support the proposition that the unborn have a value, despite what the Supreme Court declared in 1973.<sup>123</sup> Neither are these approaches unprecedented, as penalties for the death of a fetus long predate these contemporary examples. In English Common Law, upon which the United States' system of law is based, during the lifetime of William Blackstone, legal protection of the fetus from homicide began at the "quickening", when it was assumed life began for the unborn.<sup>124</sup> Quickening was understood then, and now, as the first motion of the fetus in the uterus felt by the mother.<sup>125</sup> Thirteenth Century writers Bracton and Fleta ruled killing an

119. *Monthly State Update: MAJOR DEVELOPMENTS IN 2014, Pregnancy and Birth, Fetal and Pregnant Woman Assault*, GUTTMACHER INST., (Dec. 31, 2014), <https://www.guttmacher.org/statecenter/updates/december.html#assault>.

120. *Id.*

121. *Id.*

122. *Id.*

123. Nash et al., *supra* note 108; *Roe*, 410 U.S. at 158.

124. Charles I. Lugosi, *Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 Issues L. & Med. 119, 172 (2006-07).

125. MERRIAM-WEBSTER DICTIONARY, "quickening", available at <http://www.merriam-webster.com/medical/quickening> (last visited Oct. 6, 2015).



unborn child where there was evidence of quickening was homicide.<sup>126</sup> Blackstone, Bracton, Fleta, and others repeatedly referred to the unborn as “child” and not “potential life”.<sup>127</sup> Henry de Bracton in the Twelfth Century stated “If there is anyone who strikes a pregnant woman or gives her a poison which produces an abortion, if the foetus be already formed or animated, and especially if it be animated, he commits homicide.”<sup>128</sup>

Everything which has been cited above supports value being placed on the unborn as possessing a life, or something worth protecting. If indeed it was widely believed the fetus were nothing other than a collection of cells there would not be twenty seven states restricting abortion, states among that number supporting fetal murder statutes for wanted pregnancies, and provisions providing the unborn to take under intestacy and property laws. This opposition is due to the fact the unborn possesses life from the moment of conception, existing as a distinct biological person.

#### IV. BIOLOGICAL AND MORAL DEFINITIONS OF PERSONHOOD

Justice Blackmun wrote “justification [for the State’s duty to protect prenatal life] rests on the *theory* that a new human life is present from the moment of conception.”<sup>129</sup> The existence of life from the moment of conception is also denied because of claimed “problems for precise definition of this view . . . posed, however, by new embryological data that purport to indicate that conception is a ‘process’ over time, rather than an event.”<sup>130</sup> Justice Blackmun confidently continues, “There has always been strong support for the view that life does not begin until live birth.”<sup>131</sup> The Greek stoics’ medical knowledge is cited, as well as the prevailing belief for many centuries life did not begin until quickening.<sup>132</sup> Again, belief that life did not exist prior to quickening is akin to the belief the sun revolved around the earth prior to Copernicus’ scientific discovery. This section will show scientific proof conception is not an ongoing event and that human life beginning at conception is not a theory. It will also show beliefs that life did not begin until quickening were factually inaccurate and insufficient as proof to conclude the unborn are undeserving of personhood. This is offered as a persuasive tool, because if it can be shown life exists prior to birth, which it does, supporting an argument denying the unborn rights becomes indefensible.

126. Lugosi, *supra* note 124, at 172.

127. See Lugosi, *supra* note 124, at 172.

128. Lugosi, *supra* note 124, at 172.

129. *Roe v. Wade*, 410 U.S. 113, 150 (1973) (emphasis added).

130. *Id.* at 160–61.

131. *Id.* at 160.

132. *Id.*

### A. *Biological Definitions*

To provide a framework for discussing what should constitute a ‘person’, it is necessary to delve into what can be shown through scientific knowledge. The Merriam-Webster Dictionary defines person as “a human being”.<sup>133</sup> Determining what constitutes a human being is the next step.

In the brief for the appellee, Henry Wade, it was argued, “From conception the child is a complex, dynamic, rapidly growing organism.”<sup>134</sup> At fertilization a new and unique being is created unlike either parent.<sup>135</sup> As early as seventeen days after implantation in the uterus, the unborn child has blood cells and possibly a heart.<sup>136</sup> Development progresses from there, described by the Diocesan Attorneys in their brief as “a process of achieving, a process of becoming the one [the unborn] already *is*.”<sup>137</sup> The unborn child is separate from its mother and, “however dependent it may be before birth—and for some years after birth—it is a living being, with its separate growth and development, with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and hearing and vital organs.”<sup>138</sup>

The idea of legal separability [sic] from the mother for the unborn should begin where biological separability [sic] begins was expressed by a New York court in 1953.<sup>139</sup> The Court expressed “That it [the unborn] may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability [sic]; it is rather to describe conditions under which life will not continue.”<sup>140</sup> In essence, a two year old is not viable because it cannot feed itself. But this merely proves a two year old cannot provide for itself. This fact does not establish the two year old is not a human being or that it lacks personhood rights.

The appellee brief, after making an extensive medical review of the unborn, insists on the conclusive nature of the humanity of the fetus.<sup>141</sup> “Quickening is only a relative concept” the brief notes, “which depends upon the sensitivity of the mother, the position of the placenta, and the size of the

133. MERRIAM-WEBSTER DICTIONARY, “person”, available at <http://www.merriam-webster.com/dictionary/person>.

134. Brief for the Appellee at 32, *Roe v. Wade*, 410 U.S. 113, 159 (1973) (No. 70-18) 1971 WL 134281.

135. Brief for the Appellee, *supra* note 134 at 32.

136. Brief for the Appellee, *supra* note 134 at 32.

137. Witherspoon, *supra* note 6, at 65–66 (emphasis added).

138. Witherspoon, *supra* note 6, at 65.

139. Brief for the Appellee, *supra* note 134, at 31 (citing *Kelly v. Gregory*, 282 A.D. 542, 543 (N.Y. App. Div. 1953) where the New York Supreme Court’s appellate division, third department held a person may recover for a pre-natal injury in the third month of pregnancy).

140. Brief for the Appellee, *supra* note 134, at 31 (See *Kelly*, 282 A.D. at 544).

141. Brief for the Appellee, *supra* note 134, at 53 (citing pages 32 to 53 that extensively document fetal development from its first days to the final month of gestation).

child.”<sup>142</sup> “The child is as much a child in those several days before birth as he is those several days after.”<sup>143</sup> The appellee brief in support by the Diocesan Attorneys reflects similar conclusions. After providing their own scientific data, they conclude it:

Emphasizes [the unborn’s] individuality; its functional unity; its independent life; its striving, developing nature; its containment of all that it will ever be essentially in every cell, in every generally human attribute, and in every individual attribute; its mental growth from as early as the fourth week after conception; its ability to move its legs, feet, toes, fists, thumbs, head, and lips by the twelfth week of its existence; its ability to hear and recognize its mother’s voice in the fifth month of its existence . . . .<sup>144</sup>

The Diocesan Attorneys argued all this combined with the judgment made by the Founding Fathers, their citizen peers in the Common Law, and philosophers of natural rights required the unborn be recognized as a human person.<sup>145</sup> Each brief for the appellee supported a recognition of the biological humanity of the unborn. What was argued in 1971 continues to be supported in 2015.

Author William May notes in his book *Catholic Bioethics and the Gift of Human Life* that modern science recognizes the biological identity of a new human individual is present in the zygote resulting from fertilization.<sup>146</sup> The fusion of egg and sperm has two effects; first, by introducing paternally derived molecules into the network of maternally derived molecules, it initiates a new structure, an entirely new system or organism.<sup>147</sup> Before fertilization, the egg is a structured collection of *inert molecules awaiting activation* with a lifespan around twenty-four hours once it is expelled from the ovary.<sup>148</sup> The egg cannot maintain itself and soon depletes its energy source.<sup>149</sup> Fertilization, however, “triggers a change in the dynamics of the egg by reorganizing and reactivating the interconnected network of inert maternal molecules in its contents . . . trigger[ing] the chain of reactions and molecular interactions that drive cell division and differentiation.”<sup>150</sup>

“If left alone, this self-driven, self-perpetuating process of molecular interactions will continue for nine months and beyond, transforming the living

142. Brief for the Appellee, *supra* note 134, at 54.

143. Brief for the Appellee, *supra* note 134, at 53-54.

144. Witherspoon, *supra* note 6, at 72.

145. *Id.*

146. MAY, *supra* note 15, at 34.

147. *Id.* at 165 (May draws from an essay by Nicanor Pier Austriaco, O.P., *On Static Eggs and Dynamic Embryos: A Systems Perspective*, THE NATL. CATH. BIOETHICS Q. 2.4, WINTER 2002, 665 summarizing “a systems biology view of the beginning of human life”).

148. *Id.* (emphasis added to note the egg is a mere cell possessing no life).

149. *Id.*

150. *Id.*

system called an embryo into the living system called a . . . baby” May cites.<sup>151</sup> Directly quoting the author of the article, May notes:

Whereas the living system before fertilization only had a lifespan of twenty-four hours, the new living system after fertilization now has a span of seventy or eighty [years] for those who are strong. Furthermore, since this new system is capable of independent and self-sustaining existence, it is an organism. Fertilization is the paradigmatic example of cell-to-organism transition.<sup>152</sup>

When an individual human begins to exist is a biological or scientific question, not a moral one.<sup>153</sup>

Professor Lugosi similarly relies on science in defining ‘person,’ noting biology supplies the lowest common denominator of agreement between reasonable people.<sup>154</sup> Human embryology is so advanced there is no doubt a new human being is created at the time of conception.<sup>155</sup> Once the zygote has been formed, there is a new organism, different from the two gametes taken separately, but . . . the same individual organism as the adult into whom it later develops.<sup>156</sup> A law must conform to the objective truth of science, so the meanings of ‘person’ and human being are identical in both law and science.<sup>157</sup> Yet Justice Blackmun in *Roe* evaded determining when life began, claiming the judiciary could not decide until professionals in medicine, philosophy, and theology could arrive at a consensus.<sup>158</sup> Conveniently, this allows the judiciary to put off such a determination indefinitely if the Court is so inclined, because disagreement exists on the biological humanness of the unborn, despite clear proof to the contrary. And as long as disagreement exists the Court can claim a lack of consensus and wash its hands of the matter, rather than seek the truth.

The above sources, from the appellee briefs in *Roe* presenting embryological data, conclusively support the biological fact that a new human being exists from conception. Though it may be that when *Roe* was handed down there was some question as to how conception occurred, no such argument can be made today by a rational person. Conception is not an ongoing process and human life beginning at conception is not a theory.

### *B. Moral Approaches*

The final persuasive support for the unborn being recognized as persons rests with a moral argument. Justices O’Connor, Kennedy, and Souter, in

151. MAY, *supra* note 15, at 165.

152. *Id.*

153. *Id.* at 167.

154. Lugosi, *supra* note 124, at 123.

155. *Id.*

156. *Id.*

157. *Id.* at 152–153.

158. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

upholding the central holding of *Roe*, proclaimed the judiciary's obligation was to define the liberty of all, not mandate its own moral code.<sup>159</sup> Later the Justices refer to the importance of precedent, that rule of law under the Constitution places precedent in an indispensable place.<sup>160</sup> To overrule precedent would require a series of factors to be met: is the precedent's central rule unworkable, would the stability of society be damaged by removal of the precedent, has society moved beyond the precedent, and whether the premises of fact have changed since the laying of that precedent so as to be unrecognizable and irrelevant to the issue it addressed?<sup>161</sup>

The Justices elaborate that to have overruled *Roe* would reach an unjustifiable result under principles of *stare decisis* and would have seriously weakened the Supreme Court's ability to exercise the judicial power necessary for a nation dedicated to the rule of law.<sup>162</sup> The Supreme Court must act in a manner which allows the people to see the Court's decisions as grounded in principle and not the result of social or political pressures.<sup>163</sup> The Justices conclude it is a constitutional liberty of a woman to have some freedom to terminate her pregnancy, and that the basic decision in *Roe* was based on a constitutional analysis the Court could not repudiate.<sup>164</sup> This basic holding of *Roe* being the woman's right to terminate her pregnancy before viability, was now a rule of law and a component of liberty the court cannot renounce.<sup>165</sup>

Professor Lugosi provides a counterpoint to the rule of law reasoning by the *Casey* court. He writes:

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.<sup>166</sup>

In contrast, rule *by* law is the antithesis of a society practicing rule *of* law; rule by law is the state where the government exercises arbitrary powers and abridges at will the inalienable civil rights of any human being.<sup>167</sup> Justice is the defining feature in a rule of law society, whereas deferential, coerced obedience is the defining feature in a rule by law society.<sup>168</sup>

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159. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992).

160. *Id.* at 854.

161. *Id.* at 855.

162. *Id.* at 864–65.

163. *Casey*, 505 U.S. at 865–866.

164. *Id.* at 869.

165. *Id.* at 871.

166. Lugosi, *supra* note 124, at 154.

167. Lugosi, *supra* note 124, at 154–55.

168. Lugosi, *supra* note 124, at 155.

Professor Lugosi notes his definition of rule of law is not accepted in some legal circles,<sup>169</sup> and argues the Court's definition of rule of law in *Casey* is opposite to his own.<sup>170</sup> Justices O'Connor, Kennedy, and Souter believed to overturn *Roe* would damage the legitimacy of the Supreme Court and the rule of law,<sup>171</sup> but Professor Lugosi asserts "legitimacy is derived by comporting to the Constitution, and not by acting as a non-elected super-legislature, caving into political pressure or exercising personal predilections."<sup>172</sup> Similarly, William May points out civil law is subordinate to natural law, and the state has the obligation to protect the weak from the strong.<sup>173</sup> Lugosi cited the proposition that "[A]lthough 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."<sup>174</sup>

Penned only a few years after the decision in *Casey*, the Catholic Church document *Evangelium Vitae* presents a pertinent religious commentary on law and democracy. In it, Pope St. John Paul II wrote, "Democracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality."<sup>175</sup> The value of democracy rises or falls with the values it embodies and promotes.<sup>176</sup> "The basis of these values cannot be provisional and changeable 'majority' opinions," the former pontiff expressed, "but only the acknowledgement of an objective moral law which, as the 'natural law' written in the human heart, is the obligatory point of reference for civil law itself."<sup>177</sup>

It is conceded the purpose of civil law is more limited in scope than that of the moral law, but the "civil law must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the 'person', rights which every positive law must recognize and guarantee."<sup>178</sup> The foremost of these rights is the inviolable right to life of every innocent human being.<sup>179</sup> Pope St. John Paul II reaches back to St. Thomas Aquinas, a Doctor and philosopher of the Catholic Church to enumerate:

169. Lugosi, *supra* note 124, at 155.

170. Lugosi, *supra* note 124, at 156.

171. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 869 (1992).

172. Lugosi, *supra* note 124, at 160.

173. MAY, *supra* note 15, at 41.

174. Lugosi, *supra* note 124, at 154 (quoting the words of Lord Denning in his work *THE CHANGING LAW* 99 (1952)).

175. Ioannes Paulus PP. II, *Evangelium Vitae*, VATICAN.VA (Mar. 25, 1995) point 70, [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html).

176. *Id.*

177. *Id.*

178. Paulus PP. II, *supra* note 16, at point 71.

179. Paulus PP. II, *supra* note 16, at point 71.

[H]uman law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when a 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.<sup>180</sup>

The Catholic Church recognizes the fundamental right and source of all other rights is the right to life, and laws legitimizing the direct killing of innocent human beings through abortion or euthanasia are in complete opposition to the inviolable right to life proper to every individual.<sup>181</sup> Pope St. John Paul II warned that without an objective moral grounding, not even democracy is capable of ensuring a stable peace, especially since peace not built upon the dignity of every human individual frequently proves illusory.<sup>182</sup>

## V. CONCLUSION

Justice Blackmun's interpretation that 'person' did not include the unborn in the Constitution was incorrectly determined. The appellee briefs submitted by Henry Wade and the Diocesan Attorneys provided ample evidence of originalist, textual, and biological evidence supporting the personhood of the unborn. Behavior by the states to provide protections beyond the Fourteenth Amendment indicate the personhood of the unborn is still contested forty-two years later. Twenty-seven states as of last year restricted abortions to such an extent the Guttmacher Institute deemed them hostile to *Roe's* provided abortion rights. Embryological data, readily available to interested parties, insists human life begins at conception.

The pertinent point is not whether facts have changed but whether the facts as they have always existed will be recognized. For many years it was thought the sun orbited the earth. For many years it was thought life did not exist in the womb until quickening. That many people erroneously believed the sun orbited the earth did not make them right. What is right as to the unborn must be recognized.

The legal fiction that the unborn are not 'persons' and receive no rights under the Fourteenth Amendment, while benefiting from state provided protections, proves inconsistent. Either the unborn are persons and deserve protection in every area of the law, or they are not and the states must be forever barred from providing protections to the unborn. Of these two paths the former is the one right and just. Just law will not reign until the Court properly recognizes "all men are created equal . . . are endowed by their Creator with

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180. Paulus PP. II, *supra* note 16, at point 72 (citing St. Thomas Aquinas' *Summa Theologiae* I-II, q. 93, a. 3, ad 2um).

181. Paulus PP. II, *supra* note 16, at point 72.

182. *Id.* at 70.

certain inalienable rights,” and foremost among these rights is the right to life, without which no other right matters.

WILLIAM R. AVERY\*

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