

Why the Right to Elective Abortion Fails *Casey*'s Own Interest-Balancing Methodology and Why It Matters

Stephen G. Gilles

ABSTRACT: Under *Casey*, the right to elective abortion rests on an interest-balancing judgment that the woman's specially protected interest in terminating her pregnancy outweighs the State's interest in protecting the life of her pre-viable fetus. Yet, although *Casey*'s own methodology calls for doing so, the Court has never explained or defended that judgment on the merits. This article argues that this foundational interest-balancing judgment is unsound when evaluated on *Casey*'s own terms and using *Casey*'s own methodology and should therefore be relied on only when strictly required by *Casey*'s re-affirmation of *Roe*'s "essential holding."

IN *PLANNED PARENTHOOD of Southeastern Pennsylvania v. Casey*, a five-Justice majority, relying heavily on *stare decisis*, re-affirmed the Supreme Court's earlier holding in *Roe v. Wade* that a woman has a constitutional right to an elective abortion prior to fetal viability.¹ In re-affirming that holding, however, *Casey* also re-structured the right and placed it on a different foundation. *Roe* had declared that the right to elective abortion was "fundamental," that only a compelling State interest could justify overriding it, and that the State's interest in protecting fetal life was not compelling until viability.² Subsequent decisions strongly suggested that state laws regulating pre-viability

¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); see also *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

² *Roe*, 410 U.S. at 152-53 on "fundamental right," quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *ibid.* at 155-56 on the compelling state interest test; *ibid.* at 163 on the State's interest in fetal life as compelling at viability; see also *Carey v. Population Services International*, 431 U.S. 678, 684-86 (1977).

elective abortions were subject to strict scrutiny.³ Under *Casey*, although the woman's liberty interest in an elective abortion is specially protected,⁴ the right to an elective abortion is not grounded in a judgment that it is "fundamental."⁵ Instead, it is grounded in an interest-balancing judgment that the woman's liberty interest in an elective abortion outweighs the State's interest in protecting pre-viable fetal life.⁶

Remarkably, however, the *Casey* Court did not affirm that interest-balancing judgment on the merits. Instead, it asserted that "the reservations [that] any of us may have in re-affirming the central holding of *Roe* are outweighed by the explication of individual liberty [that] we have given combined with the force of *stare decisis*."⁷ Moreover, in the belief that *Roe* had given too little weight to the State's interest in protecting fetal life, *Casey* rejected *Roe*'s trimester framework and strict scrutiny of pre-viability abortion regulations in favor of the less stringent undue-burden standard, which invalidates such regulations only if they have the purpose or effect of substantially interfering with women's

³ See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 774 n3 (1986); *City of Akron v. Akron Center for Reproductive Health, Inc.* (hereafter, *Akron I*), 462 U.S. 416, 427 (1983). But see *Akron I*, 462 U.S. at 461-64 (O'Connor, J., dissenting), arguing that in several post-*Roe* decisions prior to *Akron*, the Court had employed an "unduly burdensome" test rather than strict scrutiny.

⁴ See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), citing *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Casey*, 505 U.S. at 846, 851, citing *Casey* for the proposition that the right to abortion is within "the 'liberty' specially protected by the Due Process Clause."

⁵ See *Casey*, 505 U.S. at 954 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

⁶ See *ibid.* at 846 (majority opinion): "Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." See n26 below for an explanation of what constitutes *Casey*'s "majority" opinion as opposed to its "plurality" opinion.

⁷ *Casey*, 505 U.S. at 853. *Casey*'s "explication of individual liberty" stressed the vital importance of the woman's liberty interest and the intimate character of her decision whether to terminate her pregnancy (*ibid.* at 851) and argued that this interest should enjoy some degree of heightened constitutional protection (*ibid.* at 850-53).

access to elective abortions.⁸

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

In this article I argue that – setting aside *stare decisis* – the right to elective abortion is unsound in *Casey*’s own terms. Specifically, I assume the validity of *Casey*’s “reasoned judgment” approach to identifying unenumerated rights, including the interest-balancing methodology that *Casey* used to re-conceive the right to elective abortion.¹¹ Moreover, I assume that *Casey* (like *Roe* before it) is correct

⁸ *Ibid.* at 876-77 (plurality opinion). Although these rulings were joined by only a three-Justice plurality, they constitute holdings of the Court. See *infra* n26.

⁹ *Casey*, 505 U.S. at 952-53 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

¹⁰ *Ibid.* at 849-50 (majority opinion), quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961), (Harlan, J., dissenting).

¹¹ Five years after *Casey*, in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court treated *Casey* as good law (see *ibid.* at 720) but declined to adopt interest-balancing as its general approach in substantive due process cases. Instead, the *Glucksberg* Court adhered to what it described as the Court’s “established method,” under which unenumerated fundamental rights are recognized only if, when carefully described, they can be said to be “deeply

in characterizing the pre-viable fetus as “potential life” rather than as an actual, normatively human being.¹² These are obviously unfavorable premises on which to argue against a right to elective abortion. But that is precisely the point. My thesis is that even when an interest-balancing analysis is conducted on terms generally favorable to recognizing a constitutional right to elective abortion, a persuasive case can be made that the State’s interest in protecting the life of the pre-viable fetus outweighs the woman’s liberty interest in terminating her pregnancy.

Viewed as a contribution to reproductive-rights scholarship, my analysis develops a new line of argument about how best to interpret *Casey* and implement its interest-balancing approach as well as a new argument that the very right that *Casey* re-affirmed on *stare decisis* grounds is substantively unsound. Most scholarship challenging the right to elective abortion either denies the legitimacy of unenumerated rights not anchored in tradition¹³ or disputes the Court’s assumption that the pre-viable fetus cannot be shown to be a normatively human being.¹⁴

rooted in this Nation’s history and tradition” (ibid. at 721), quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977), (plurality opinion). After this article was accepted for publication, the Court issued its same-sex-marriage decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In an opinion by Justice Kennedy joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, the Court declared that while *Glucksberg*’s approach “may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy” (ibi. at 2602). While that declaration limits *Glucksberg*’s applicability in future cases, it remains to be seen whether *Obergefell* “effectively overrule[s] *Glucksberg*,” as Chief Justice Roberts suggested in dissent (ibid. at 2621), (Roberts, C.J., dissenting). Although a full attempt to synthesize *Obergefell*, *Casey*, and *Glucksberg* is beyond the scope of this article, it will briefly assess *Obergefell*’s likely implications where necessary.

¹² *Roe v. Wade*, 410 U.S. 113, 150 (1973); see *Casey*, 505 U.S. at 871 (plurality opinion).

¹³ See, e.g., Nelson Lund & John O. McGinnis, “*Lawrence v. Texas* and Judicial Hubris,” *Michigan Law Review* 102 (2004): 1555; Michael W. McConnell, “Ways to Think about Unenumerated Rights,” *University of Illinois Law Review* (1985): 2013.

¹⁴ See, e.g., Michael Stokes Paulsen, “Paulsen, J., Dissenting” in *What Roe*

This article, by contrast, contends that even if these premises are assumed to be correct, the right to elective abortion prior to viability is unsound in light of the importance of what *Casey* recognizes as the State's interest in enabling the fetus to "become [the] child" into which it is naturally developing.¹⁵

Nevertheless, viewed as an argument that the contemporary Supreme Court should consider, it is a fair question whether this entire exercise is futile. *Casey* relied on *stare decisis* and the importance of the woman's protected liberty to re-affirm the right to elective abortion, whether or not the interest-balancing judgment on which that right rests is correct on the merits.¹⁶ If we canvass today's Court, we find that two Justices (Ginsburg and Breyer) have endorsed the right to elective abortion on the merits,¹⁷ two more Justices (Sotomayor and Kagan) likely share that view,¹⁸ one Justice (Kennedy) accepts the right to elective abortion as a matter of *stare decisis*,¹⁹ two Justices (Roberts and Alito) would likely reject it as an original matter but could conceivably adhere to it as a matter of *stare decisis*,²⁰ and two Justices (Scalia and

v. Wade Should Have Said, ed. Jack M. Balkin (New York NY: New York Univ. Press, 2005), p. 196.

¹⁵ *Casey*, 505 U.S. at 846.

¹⁶ See *ibid.* at 853. For trenchant criticism of these aspects of *Casey*, see Michael Stokes Paulsen, "The Worst Constitutional Decision of All Time," *Notre Dame Law Review* 78 (2003): 998.

¹⁷ See *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting; joined by Justice Breyer, among others); *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 918 (2000), citing *Roe*, 410 U.S. at 113; *Casey*, 505 U.S. at 833), (Justice Breyer writing for the Court, joined by Justice Ginsburg, among others).

¹⁸ As of this writing, neither Justice Sotomayor nor Justice Kagan has written or joined a Supreme Court opinion on the merits in a case involving the right to elective abortion.

¹⁹ See *Casey*, 505 U.S. at 853.

²⁰ Chief Justice Roberts and Justice Alito joined Justice Kennedy's opinion for the Court in *Carhart II*, 550 U.S. at 130, 132, which applied *Casey*'s principles without stating that *Casey* was correctly decided (see *ibid.* at 145). Chief Justice Roberts joined Justice O'Connor's unanimous opinion in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), which

Thomas) reject it as an original matter and would overrule *Roe* and *Casey* regardless of *stare decisis*.²¹ Given this lineup, it seems clear that, as was true in *Casey*, Justice Kennedy provides the fifth vote to preserve the right to elective abortion – in his case, for reasons of *stare decisis*. Why bother, then, to make the constitutional case that the State’s interest in “potential human life” outweighs the woman’s interest in an elective abortion?

My answer has two parts. First, the composition of the Court could shift sufficiently that a majority of the Justices would be willing to consider overturning the right to elective abortion.²² Were they to do so, the arguments presented in this article might persuade Justices who agreed with *Casey*’s “reasoned judgment” approach to substantive due process but were uncertain whether the balance of State versus individual interests truly supports a right to elective abortion. By contrast, the arguments against the right to elective abortion advanced by the dissenters in *Casey* would fail to persuade any such Justice, because they are predicated on a more restrictive conception of the Court’s role in recognizing unenumerated substantive due process rights.

Second, although Justice Kennedy appears committed to preserving the right to elective abortion, it does not follow that he would be unwilling, in an appropriate case, to re-examine the validity of the interest-balancing judgment on which the right to elective abortion now rests. As we will see, the evidence from *Casey* strongly suggests that Kennedy harbors grave doubts about whether the woman’s interest in an elective abortion actually outweighs the State’s interest in protecting the

declined to “revisit our abortion precedents” and addressed only a remedial question presented by a successful challenge to an abortion regulation (*ibid.* at 323).

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

²² If Chief Justice Roberts and Justice Alito are willing to consider overruling the right to elective abortion, there are already four votes to re-examine *Casey* with that possibility in mind. Were Justice Kennedy or any of the liberal Justices to be replaced by a Justice open to overruling *Roe* and *Casey*, there would be a potential majority to do so.

life of her pre-viable fetus.²³ In *Casey*, however, he and the other authors of the joint opinion (Justices O'Connor and Souter) declined to explain how each of them would have ruled on this issue had it come before them as an original matter.²⁴ It is too late for Justices O'Connor and Souter to explain their views as sitting Justices, but not for Justice Kennedy to explain his. Nor would any such explanation require him to vote to overrule *Casey* or overturn the right to elective abortion. Kennedy could simultaneously adhere to his position that *stare decisis* requires preserving the right to elective abortion and write or join a "reasoned judgment" explaining why the State's interest in protecting the pre-viable fetus outweighs the woman's interest in an elective abortion.²⁵

Doing so, of course, would expose Justice Kennedy to intense criticism from both defenders of the right to elective abortion (for publicly undermining it), and from its opponents (for nevertheless preserving it as a matter of *stare decisis*). On the other hand, as I will now explain, this approach would also enable Kennedy to make common cause with the four generally conservative Justices in crafting an abortion jurisprudence that more persuasively justifies the

²³ My interpretations of *Casey*, *Roe*, and the Court's other decisions are based on the opinions of the Court in those cases, which constitute the judge-made constitutional law arising out of them, and on the dissenting and concurring opinions, which stake out the official, public positions of the Justices who signed them. I have not relied on sources such as the papers of individual Justices, which might shed light on the Justices' motivations and deliberations, but cannot alter the public meaning of their opinions.

²⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 871 (1992) (plurality opinion).

²⁵ Michael Stokes Paulsen has argued that "Congress may, by prospective legislation – for abortion cases or any others – direct the Court to decide constitutional or statutory interpretation issues without regard to prior precedent (aside from the precedent's persuasive value to the Court on the merits)." Michael Stokes Paulsen, "Abrogating *Stare Decisis* by Statute: May Congress Remove the Precedential Effect of *Roe and Casey*?" in *Yale Law Journal* 109 (2000): 1540. If Paulsen is right on this score and if Congress were to enact such legislation, it would no longer be possible for Justice Kennedy (or any other Justice) to declare the right to elective abortion to be erroneous, while voting to re-affirm it on *stare decisis* grounds.

interpretation of *Casey* that Kennedy has championed. And it would prevent the erroneous constitutional judgment on which the right to elective abortion now rests from distorting the Court's consideration of related issues involving state regulation that seeks to protect post-conception fetal life.

Just as the Court is deeply divided over the very survival of the right to elective abortion, it is deeply divided when it comes to interpreting *Casey*. No Justice disputes that the entire joint opinion in *Casey* is controlling law,²⁶ that *Casey* re-affirmed *Roe*'s "essential

²⁶ In the twenty-plus years since *Casey* was decided, all the Justices who have expressed an opinion have agreed that the joint opinion in *Casey*, including the portions joined only by its three authors (the "plurality opinion") as well as those joined by Justices Blackmun and Stevens (the "majority opinion"), constitutes the Court's authoritative ruling under the rule in *Marks v. United States*, 430 U.S. 188, 193 (1977), holding that when "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,'" quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion); see also *Carhart I*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting), citing *Marks*, 430 U.S. at 193), applying the rule in *Marks* to the plurality opinion in *Casey*. Parts I-III, V-A, V-C, and VI of the *Casey* joint opinion constitute the majority opinion because both Justice Blackmun and Justice Stevens joined them. Because neither Blackmun nor Stevens joined Parts IV, V-B, or V-D, and Blackmun did not join Part V-E, those parts constitute the plurality opinion. In *Ayotte v. Planned Parenthood of Northern New England*, a unanimous Court treated the *Casey* joint opinion's "significant health risks" test for the right to a health-preserving abortion as controlling law. See 546 U.S. 320, 327-28 (2006), quoting *Casey*, 505 U.S. at 879, and both the majority and dissenting opinions in the Court's two partial-birth abortion decisions purported to apply the *Casey* plurality's undue-burden standard. See *Carhart II*, 550 U.S. 124, 150, 156 (2007), rejecting undue-burden challenges to the Federal Partial-Birth Abortion Ban Act of 2003 (*ibid.* at 188-89), (Ginsburg, J., dissenting), finding an undue burden on the relevant class of women under *Casey*); *Carhart I*, 530 U.S. at 945-46, holding that Nebraska's statute prohibiting partial-birth abortions imposed an undue burden (*ibid.* at 957), (Kennedy, J., dissenting), finding no undue burden (*ibid.* at 982), (Thomas, J., dissenting). Thus, subject to the usual rules distinguishing dicta from holdings and their supporting rationales, the entire joint opinion in *Casey* is binding law because on the issues it addresses the three-Justice "plurality" portions of that opinion allow more State regulation of abortion than Justices Blackmun and Stevens would have allowed, but less

holding,”²⁷ and that under *Casey*, regulations of pre-viability abortions are unconstitutional if they impose an undue burden on women’s access to elective abortions.²⁸ But apart from those core principles, the Court is for now divided into two camps. Justice Kennedy adheres unwaveringly to an interpretation of *Casey* that gives states much greater freedom to regulate pre-viability abortions than *Roe*’s strict-scrutiny regime did.²⁹ For Kennedy, a crucial feature of *Casey* was the plurality’s conclusion that *Roe* and later decisions seriously undervalued the State’s “legitimate and substantial interest in preserving and promoting fetal life.”³⁰ Chief Justice Roberts and Justices Scalia, Thomas, and Alito agree with this interpretation of *Casey*, thus creating a five-Justice coalition that interprets and applies the “balance” struck in *Casey* to give states substantial leeway to regulate (but not to prohibit) elective abortions in ways designed to persuade women – directly or indirectly – not to have

regulation than the four dissenters (Chief Justice Rehnquist and Justices White, Scalia, and Thomas) would have permitted. Put less technically, there were five votes in *Casey* to strike down any law that is inconsistent with the plurality opinion’s strictures, and seven votes in *Casey* to uphold any law that complies with them.

²⁷ *Casey*, 505 U.S. at 846 (majority opinion), re-affirming that a woman has a right to elective abortion prior to viability, that States may prohibit post-viability abortions unless necessary to preserve the health of the mother and that the State has a legitimate interest in protecting fetal life throughout pregnancy.

²⁸ *Casey* also indicates that regulations of pre-viability abortions must be “reasonably related” to the State’s interest in protecting fetal life (*ibid.* at 878, plurality opinion). Although *Casey* does not expressly say so, this “reasonably related” requirement presumably applies to regulations that are justified on maternal-health grounds—as the undue burden test unquestionably does. See *ibid.*: “Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” *Carhart II*, however, implies that the “reasonably related” test entails only rational basis review. See 550 U.S. at 158: “Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power...in furtherance of its legitimate interests...”

²⁹ See *Carhart II*, 550 U.S. at 146 (majority opinion) (authored by Justice Kennedy); *Carhart I*, 530 U.S. at 956-57 (Kennedy, J., dissenting).

³⁰ *Carhart II*, 550 U.S. at 145; see also *Carhart I*, 530 U.S. at 956-57.

them.³¹

Justices Ginsburg and Breyer anchor the other camp. They accept *Casey*'s re-affirmation and modifications of *Roe* as authoritative, but in practice their interpretation of *Casey* stresses the former and downplays the latter: they would give far less latitude to States to regulate pre-viability abortions in the name of protecting fetal life than Kennedy and the conservatives.³² Although Justices Sotomayor and Kagan have yet to declare their views, it seems likely that they would join forces with Ginsburg and Breyer in tilting *Casey*'s balance toward "close scrutiny" of regulations that seek to protect pre-viable fetal life by restricting "a woman's reproductive choices."³³

The upshot is that there is neither a realistic prospect that today's Court will overrule *Roe* and *Casey*, nor that it will reinstate *Roe*'s strict scrutiny. Consequently, the battle is over how *Casey* should be interpreted, and whether the right to elective abortion should be treated as a dubious but established doctrine that ought not be extended, or instead as one manifestation of a vital principle of reproductive liberty that trumps State concern with protecting fetal life.

Suppose, then, that Justice Kennedy – while continuing to uphold the right to elective abortion and the undue-burden test on *stare decisis* grounds³⁴ – were to join the four conservative Justices in explicitly

³¹ *Carhart II*, 550 U.S. at 146, asserting that *Casey* "struck a balance" that "was central to its holding"; *ibid.* at 168 (Thomas, J., concurring), stating that the Court's opinion "accurately applies current jurisprudence," including *Casey*.

³² Justice Ginsburg's dissent in *Carhart II* treats *Casey* as concerned above all with removing doubts about the scope and validity of the right to elective abortion (550 U.S. at 169); Ginsburg, J., dissenting, claims that *Carhart I* exhibited "fidelity to the *Roe-Casey* line of precedent" (*ibid.* at 170) and treats all the Court's pre-*Carhart II* abortion decisions, including *Casey*, as engaging in "close scrutiny" of "State-decreed limitations on a woman's reproductive choices" (*ibid.* at 171).

³³ *Ibid.* at 171.

³⁴ Alternatively, the hypothetical ruling could preserve the ban on State laws prohibiting pre-viability elective abortions on *stare decisis* grounds while abandoning the undue-burden test for pre-viability abortion regulations. Space does not permit me to explore this intriguing possibility, which would require the Court to craft a substitute for the undue-burden test.

affirming that the State's interest in protecting pre-viable fetal life outweighs the woman's interest in an elective abortion. What would be the effects of such a ruling?

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

Two examples will illustrate the impact this change would have in the field of reproductive rights within which *Casey* is likely controlling.³⁵ Consider first a case challenging a hypothetical statute that forbids the destruction of cryopreserved embryos and requires that, if not implanted in the biological mother or a surrogate within twenty years after they are created, they must be transferred to the State for attempted implantation in a willing gestational mother.³⁶ The newly

³⁵ Although Justice Kennedy's opinion for the Court in *Obergefell v. Hodges* does not discuss or even cite *Casey*, it endorses and applies a "reasoned judgment" approach to substantive due process that plainly bears some resemblance to *Casey's* own version of "reasoned judgment." Compare 135 S. Ct. 2584, 2598 (2015), with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 849-50 (1992). *Obergefell* marks the first substantive due process decision since *Casey* in which five Justices expressly invoked the "reasoned judgment" formulation. Their four dissenting colleagues were united in rejecting that approach and adhering to the tradition-centered *Glucksberg* test. See 135 S. Ct. at 2618 (Roberts, C.J., dissenting); *ibid.* at 2640 (Alito, J., dissenting).

³⁶ Although no State currently has such a statute, Louisiana prohibits the

applicable interest-balancing judgment – that the State’s interest in pre-viable, post-conception fetal life outweighs the woman’s interests in an elective abortion³⁷ – implies *a fortiori* that the State’s interest in the cryopreserved embryo outweighs the woman’s interest in preventing its further development. A woman’s interest in preventing her cryopreserved embryo from becoming a child is clearly less weighty than her interest in an elective abortion, because the latter includes her parallel interest in preventing her fetus from becoming a child *plus* her interest in avoiding the burdens of pregnancy and childbirth. The State’s interest, which by hypothesis outweighs both of the woman’s interests in an elective abortion, must therefore outweigh her interest in preventing the development of her cryopreserved embryo.

Here is a second – albeit as yet futuristic – hypothetical. Imagine that artificial wombs become available, as do fetus-sparing abortion methods³⁸ that enable aborted fetuses safely to be transferred to, and gestated in, artificial wombs at reasonable expense at any stage of pregnancy.³⁹ In the aftermath of these developments, suppose that a State enacts a fetal-rescue law prohibiting fetus-killing abortions and requiring that aborted fetuses be transferred to the State for gestation in

intentional destruction of cryo-preserved embryos, *Louisiana State Annals* §9:129 (2008), and requires that cryo-preserved embryos be made available for adoption by other IVF patients if the biological parents renounce their parental rights to *in utero* implantation (ibid. § 9:130).

³⁷ Under *Roe* and *Casey*, the State’s important interest in protecting fetal life extends to all post-conception fetal life. See *infra* Part II. As I argue elsewhere, it should therefore encompass cryo-preserved embryos. See Stephen G. Gilles, “Does the Right to Elective Abortion Include the Right to Ensure the Death of the Fetus?” in *University of Richmond Law Review* 49 (2015): 1055-63.

³⁸ By “fetus-sparing abortion method” I mean a procedure in which the physician attempts prematurely to terminate a pregnancy by removing the fetus from the woman’s body intact and alive. Currently, elective abortions almost always employ fetus-killing abortion methods that ensure the death of the fetus before it is removed from the woman’s body. See *Carhart I*, 530 U.S. 914, 923-29 (2000), describing first- and second-trimester abortion methods.

³⁹ It is unclear whether or when artificial wombs will become practicable, let alone whether they will be reliably effective and not prohibitively expensive. See Gilles, *supra* n37, at 1011-12.

artificial wombs at State expense. In a case challenging this hypothetical fetal-rescue statute, the relevant interests to be balanced would be the State's interest in protecting pre-viable fetal life and the woman's interest in ensuring the death of her fetus lest it become a child. As in the previous example, the woman's interest is unquestionably less weighty than her combined interests in an elective abortion, which include both her interest in ensuring the death of her fetus and her interest in avoiding pregnancy and childbirth. Given that the State's interest in pre-viable fetal life outweighs the woman's combined interests in an elective abortion, the constitutionality of a fetal-rescue program follows *a fortiori*.⁴⁰

Yet another important consequence concerns the meaning and application of *Casey*'s undue-burden standard. In his dissent in *Stenberg v. Carhart* (*Carhart I*), Justice Scalia asserted that what one considers an "undue burden" is ultimately "a value judgment, dependent upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it."⁴¹ This is an exaggeration: under the undue-burden standard, *any* regulation that imposes a "substantial obstacle" to women's access to elective abortions is unconstitutional, no matter how many fetuses it may save.⁴² Nevertheless, one's view about what constitutes a

⁴⁰ A fetal-rescue program could be challenged on other grounds as well. In particular, it could be argued that the right to an elective abortion encompasses both a woman's right to terminate her pregnancy and a distinct right to ensure the death of her pre-viable fetus, or alternatively that such a statute would impose an undue burden on women's access to elective abortions. Elsewhere I evaluate and reject these challenges to fetal-rescue programs. See Gilles, *supra* n37, at 1022-25. As I also argue there, fetal-rescue programs should survive an interest-balancing analysis even assuming that the woman's combined interests in an elective abortion outweigh the State's interest in protecting pre-viable fetal life (*ibid.* at 1025-55). Obviously, however, a declaration by the Court that the State's interest in the pre-viable fetus outweighs the woman's combined interests in an elective abortion would strengthen the constitutional case for upholding fetal-rescue programs.

⁴¹ 530 U.S. at 954-55 (Scalia, J., dissenting).

⁴² See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion), explaining that no law imposing an

“substantial obstacle” may be influenced by the comparative value judgment that Scalia describes. To someone who thinks the woman’s interest in an elective abortion is disproportionately greater than the State’s interest in protecting fetal life, a State regulation that makes access to abortions modestly more difficult is likely to seem unduly burdensome even if it saves many fetal lives. To one who thinks the State’s interest outweighs the woman’s, the burden may seem insubstantial because it is clearly justified.

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

In short, a Supreme Court ruling that the State’s interest in pre-

undue burden “could be constitutional.” The Courts of Appeals are currently split on whether balancing plays a role in undue burden analysis. Compare, e.g., *Whole Woman’s Health v. Lakey*, 769 F.3d 285, 297 (5th Cir. 2014), vacated in part, 135 S. Ct. 399 (mem.) (2014), which, in applying the undue-burden test, states that “we do not balance the wisdom or effectiveness of a law against the burdens the law imposes”), with *Planned Parenthood of Arizona, Inc. v. Humble*, 753 F.3d 905, 912 (9th Cir. 2014): “The more substantial the burden, the stronger the state’s justification for the law must be to satisfy the undue burden test; conversely, the stronger the State’s justification, the greater the burden may be before it becomes ‘undue’” (cert. denied), 135 S. Ct. 870 (2014) (mem.). That question is beyond the scope of this article. The Supreme Court may have occasion to address it in *Whole Women’s Health v. Cole*, No. 15-274, 2015 WL 5176368 (U.S. Nov. 13, 2015).

viable fetal life outweighs the woman's interest in an elective abortion as an original matter would put some real teeth in *Casey*'s assurances that the States may legislate "to promote the life of the unborn and to ensure respect for all human life and its potential,"⁴³ without disturbing *Casey*'s *stare decisis*-based re-affirmation of *Roe*'s essential holding. *Casey* adopted a new, interest-balancing framework for the right to elective abortion while preserving the core of that right. But by declining to address whether the right to elective abortion can be justified in interest-balancing terms, *Casey* opened the door to unduly stringent applications of the undue-burden standard and, no less importantly, to future extensions of the right. By ruling that the State's interest in protecting pre-viable fetal life outweighs the woman's interest in an elective abortion, while preserving that right on *stare decisis* grounds, the Court could ensure that the balance it struck in *Casey* – and that "was central to its holding"⁴⁴ – is maintained and consistently enforced.

I. *Casey*'s Interest-Balancing Methodology

It is not generally appreciated that *Casey* re-invented the doctrinal foundation of the right to elective abortion while simultaneously re-affirming that right – or that this reinvention is crucial to understanding *Casey*'s implications. *Roe* and subsequent pre-*Casey* decisions had declared that the woman's right to elective abortion is fundamental, that only a compelling State interest can override such a right, and that the State's legitimate interest in protecting fetal life does not become compelling until the fetus is viable.⁴⁵ In *Casey*, a five-Justice majority

⁴³ *Carhart I*, 530 U.S. at 957 (Kennedy, J., dissenting); see also *Casey*, 505 U.S. at 871-73 (plurality opinion).

⁴⁴ *Carhart II*, 550 U.S. 124, 146 (2007).

⁴⁵ The pre-*Casey* Court did not always characterize the right to elective abortion as a fundamental right that triggers strict scrutiny. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 640 (1979), asking whether an abortion regulation "unduly burden[s] the right to seek an abortion," without mentioning strict scrutiny. In *Casey*, however, eight Justices joined opinions characterizing the Court's overall pre-*Casey* approach as "strict scrutiny" (505 U.S. at 871; *ibid.* at 929-30) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); (*ibid.* at 953-54), (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice Stevens was silent on this issue.

re-affirmed *Roe*'s holdings that there is a constitutional right to elective abortion, that this right extends until viability, and that the State "has legitimate interests from the outset of the pregnancy in protecting...the life of the fetus that may become a child."⁴⁶ Yet only Justice Blackmun, in a separate opinion, defended *Roe*'s treatment of the right to elective abortion as a fundamental right that triggers "strict scrutiny," meaning that it can be infringed only by legislation that is narrowly tailored to advance a compelling State interest.⁴⁷ The majority opinion in *Casey*, co-authored by Justices O'Connor, Kennedy, and Souter, and joined by Justice Blackmun and Justice Stevens, jettisoned *Roe*'s fundamental right/compelling State interest framework in favor of an interest-balancing one.⁴⁸ On the strength of its "explication of individual liberty...combined with the force of *stare decisis*,"⁴⁹ the *Casey* Court re-affirmed the right to elective abortion in explicit interest-balancing terms: "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."⁵⁰

The same interest-balancing approach is evident in the three-Justice plurality portion of the *Casey* joint opinion, which, as previously noted, represents the holding of the Court on the issues it addresses.⁵¹ Rather than framing their re-affirmation of the viability line in *Roe*'s compelling State interest terms, Justices O'Connor, Kennedy, and Souter simply held that viability is the time when "the State's interest in life has sufficient force so that the right of the woman to terminate the

⁴⁶ *Casey*, 505 U.S. at 846 (majority opinion).

⁴⁷ *Id.* at 934 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁴⁸ *Casey*'s interest-balancing approach was not unprecedented. See *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 279 (1990): "[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests'" (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 [1982]).

⁴⁹ *Casey*, 505 U.S. at 853 (majority opinion).

⁵⁰ *Ibid.* at 846.

⁵¹ See *supra* n26.

pregnancy can be restricted.”⁵²

Interest-balancing likewise played a central role in the *Casey* plurality’s abandonment of *Roe*’s trimester framework and strict-scrutiny approach. The *Casey* plurality argued that *Roe*’s recognition of the State’s legitimate interest in fetal life had “been given too little acknowledgment and implementation by the Court in its subsequent cases” and that “in practice” the trimester framework “undervalues the State’s interest in the potential life within the woman.”⁵³ In its place, the plurality adopted the undue-burden standard, under which a state regulation seeking to protect fetal life is unconstitutional if it has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.”⁵⁴ Whether or not interest-balancing plays a part in applying the undue-burden standard,⁵⁵ that standard is not a balancing test, because *any* regulation that imposes a “substantial obstacle” to women’s access to elective abortions is unconstitutional.⁵⁶ The undue-burden standard is, however, the *result* of interest-balancing, as the plurality confirms by describing it as “the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”⁵⁷

⁵² *Casey*, 505 U.S. at 869 (plurality opinion); see also *ibid.* at 861 (majority opinion), describing viability as “the point at which the balance of interests tips.”

⁵³ *Ibid.* at 871, 875 (plurality opinion).

⁵⁴ *Ibid.* at 877.

⁵⁵ See *supra* n42.

⁵⁶ See *Casey*, 505 U.S. at 877, stating that no law imposing an undue burden “could be constitutional.”

⁵⁷ *Ibid.* at 876; see also *Carhart II*, 550 U.S. 124, 126 (2007), stating that in adopting the undue-burden standard “*Casey* struck a balance.” The *Casey* plurality’s implicit interest-balancing logic presumably goes something like this: the right to elective abortion now rests on an interest-balancing judgment that the woman’s overall interest in an elective abortion outweighs the State’s interest in protecting pre-viable fetal life. A law seeking to protect fetal life by *prohibiting* elective abortions before viability is therefore unconstitutional. Consequently, any law whose purpose or effect is to erect a substantial obstacle to women’s access to abortion – thereby effectively prohibiting a significant number of women from obtaining elective abortions – must also be uncon-

Thus, in the very act of re-affirming the woman's right to elective abortion before viability, the *Casey* joint opinion established a less protective form of heightened scrutiny for the woman's liberty interest in terminating her pregnancy and a new, interest-balancing foundation for the right to elective abortion.⁵⁸ Like *Roe*, *Casey* argued that the woman's liberty interest was entitled to heightened constitutional protection in light of the intimate nature of the woman's abortion decision and the heavy burdens prohibitions on abortion impose on women facing unwanted pregnancies.⁵⁹ But instead of classifying the right to elective abortion as "fundamental" and then asking when the State's interest becomes compelling, *Casey* characterized the right to

stitutional: even if the law advances the State's interest in protecting fetal life, that interest is outweighed by the liberty interests of the women whose access to elective abortion it forecloses.

⁵⁸ Of course, each of the Court's familiar levels of scrutiny (strict, intermediate, and rational-basis) involves *some* balancing of interests. See Alan Brownstein, "How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine," *Hastings Law Journal* 45 (1994): 909 n171: even "[s]trict scrutiny review involves balancing" because "[t]he determination of what constitutes a compelling State interest inevitably requires a value judgment by the reviewing court." But rather than directly comparing the respective weights of the competing interests, each level of scrutiny specifies the requisite quality the government interest must possess to ensure that the law is constitutional. Thus, a State law that burdens a fundamental right must be narrowly tailored to advance a *compelling* State interest, while a State law that burdens ordinary social and economic liberties need only be rationally related to a legitimate State interest. Intermediate scrutiny comes closest to direct interest-balancing, but typically requires a showing that the interference with protected liberty is necessary to substantially advance an *important* State interest. See, e.g., *Sell v. United States*, 539 U.S. 166, 180-81 (2003). The interest-balancing utilized in *Cruzan* and *Casey*, by contrast, simply requires the Court to determine whether the specially protected liberty interest is weightier than the important State interest. That task is carried out not by classifying the State interest (e.g., as "compelling") but by a careful evaluation and comparison of the competing interests. For example, *Cruzan* describes *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905), as a case in which "the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease." *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 278 (1990).

⁵⁹ See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

elective abortion as grounded in a judgment that the woman's specially protected liberty interest in terminating her pregnancy outweighs the State's interest in protecting pre-viable fetal life.⁶⁰

Nevertheless, the *Casey* majority pointedly refrained from endorsing that interest-balancing judgment on the merits. Instead, it explained that "the reservations any of us may have in re-affirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."⁶¹ As Section II.D will explain, *Casey*'s reliance on *stare decisis* has important implications for the interest-balancing question on which the validity of the right to elective abortion now depends: does the State's interest in protecting the pre-viable fetus outweigh the woman's interests in terminating her unwanted pregnancy? The joint opinion in *Casey* leaves no doubt that its co-authors framed the question in this way, that they seriously considered the arguments on both sides,⁶² and that they had grave doubts as to whether it could be answered in favor of the woman's liberty. The joint opinion refuses to reveal just how its authors would have answered that question, or what reasons they would have relied on in doing so. Without pretending to speak for any of them, this article will present an interest-balancing analysis that conforms to *Casey*'s methodology and that proceeds on the terms stated or implied by the joint opinion.

Before turning to that task, it is necessary to consider how an interest-balancing analysis should proceed in light of *Casey*. The *Casey* plurality did not explain how interest-balancing should be carried out in future cases involving reproductive rights.⁶³ This much, however, seems

⁶⁰ Cf. *ibid.*, at 165, declaring that the Court's "holding...is consistent with the relative weights of the respective interests involved."

⁶¹ *Casey*, 505 U.S. at 853 (majority opinion).

⁶² *Ibid.*: "[W]e appreciate the weight of the arguments made on behalf of the State...which in their ultimate formulation conclude that *Roe* should be overruled..."

⁶³ The *Casey* Court made no attempt to supply an overarching theory that would explain why it substituted interest-balancing for fundamental-rights analysis. As Cass Sunstein has suggested, *Casey* is thus a leading example of an "incompletely theorized" decision in a watershed constitutional case. Cass

clear: interest-balancing calls for a comparison of the respective individual and governmental interests and a “reasoned judgment” about their relative weights.⁶⁴ As applied to the right to elective abortion, that entails an examination of the woman’s liberty interests in terminating her pregnancy, a parallel examination of the State’s interest in protecting pre-viable fetal life, and a judgment – in the form of an explanation, not merely a conclusion – about the comparative weight these competing interests should receive.⁶⁵

The next question is what types of evidence should be considered in assessing the relative strengths of the State’s interest in protecting the pre-viable fetus and the woman’s interests in terminating her pregnancy. One important source of judgments about the strength of these conflicting interests is the Court’s own opinions, and the inferences that

R. Sunstein, “Incompletely Theorized Agreements,” *Harvard Law Review* 108 (1995): 1742-43. The fact remains that interest-balancing is central to *Casey*’s rationale for the right to elective abortion that it re-affirms. Accordingly, without trying to construct a comprehensive theory to account for *Casey*’s interest-balancing methodology, this article employs that methodology to evaluate the interest-balancing judgment that *Casey* re-affirmed on *stare decisis* grounds.

⁶⁴ *Casey*, 505 U.S. at 849, explaining that the “adjudication of substantive due process claims” requires the Court to exercise its “reasoned judgment”; see also *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997), (Souter, J., concurring in the judgment): “This approach calls for a court to assess the relative ‘weights’ or dignities of the contending interests....”

⁶⁵ The Court’s recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), also provides little guidance about the workings of its “reasoned judgment” approach to substantive due process. Space does not permit me to explore *Obergefell*’s version of “reasoned judgment” in depth, but a barebones summary is in order. The Court’s initial holding that “same-sex couples may exercise the fundamental right to marry” (135 S. Ct. at 2605) rests on the importance of marriage to persons, including homosexual persons, as well as the various harms gays and lesbians (and their children) suffer from laws prohibiting same-sex marriage (ibid. at 2599-602). The opinion then asks whether there is “a sufficient justification for excluding the relevant class from the right” (ibid. at 2602) and finds that there is not because (in the Court’s view) same-sex marriage will not harm same-sex couples, third parties, or “marriage as an institution” (ibid. at 2606-07). Although this reasoning does not expressly balance interests, it can readily be characterized as a form of interest-balancing.

can reasonably be drawn from them. As we will see, the joint opinion in *Casey* made extensive use of *Roe* for this purpose, and important inferences can also be drawn from *Casey* itself. By contrast, the joint opinion in *Casey* conspicuously did *not* rely on *Roe*'s controversial account of the history of Anglo-American abortion law,⁶⁶ electing instead to present a fuller version of *Roe*'s account of the contemporary importance of abortion liberty to women. Moreover, by substituting an interest-balancing approach for *Roe*'s fundamental-rights methodology, *Casey* avoided the question whether the right to elective abortion has the requisite grounding in our nation's history and traditions to qualify as "fundamental." Under *Casey*'s approach, the woman's interests, even if lacking strong support in history and tradition, might nevertheless outweigh the State's.

Still, as Part IV will explain in more depth, it does not follow that history and tradition are irrelevant. Rather than balancing the woman's interests against the State's, *Casey* re-affirmed the right to elective abortion by giving decisive weight to *stare decisis*, including closely related considerations of "institutional integrity."⁶⁷ Had the *Casey* plurality engaged in a full interest-balancing analysis, history would presumably have informed the Justices' comparative assessment of the competing interests, whether or not they gave it controlling weight.⁶⁸

⁶⁶ *Roe*'s history of abortion law is comprehensively and devastatingly critiqued in Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham NC: Carolina Academic Press, 2005). See *infra* Part IV.

⁶⁷ 505 U.S. at 845-46. The *Casey* Court used "institutional integrity" as a shorthand for its claim that in the "rare" cases in which "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," the Court's "decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation" (*ibid.* at 867), (majority opinion). In substance, that is an argument for giving *stare decisis* "rare...force" as applied to the right to elective abortion (*ibid.*).

⁶⁸ The two leading examples of post-*Casey* substantive due process decisions declining to follow the tradition-centered *Glucksberg* approach are *Obergefell* and *Lawrence*. In both cases, Justice Kennedy's opinions for the Court considered the relevant history and traditions, while refusing to be bound by or restricted to them. See *Obergefell*, 135 S. Ct. at 2598: "History and

Accordingly, Part IV will address the history of Anglo-American abortion law and critique *Roe*'s claims about that history insofar as it bears on the comparative strength of the State's interest in pre-viable fetal life and the woman's interests in terminating her pregnancy.

In short, the version of interest-balancing that seems most consistent with *Casey*, and that will be presented in this article, is one that (1) analyzes and applies the Court's precedents (particularly *Roe* and *Casey*) dealing with those interests (Part II); (2) provides thorough descriptions – and evaluations – of the State's interest in protecting the pre-viable fetus and of the woman's interests in an elective abortion, and presents arguments bearing on which interest is stronger as a matter of “reasoned judgment” (Part III); and (3) considers what the Anglo-American legal tradition implies about the value of pre-viable fetal life as compared with the woman's interests in terminating her pregnancy (Part IV).

II. Precedent: The State's Interest in *Roe* and *Casey*⁶⁹

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

A careful description of the State's interest in pre-viable fetal life must begin with *Roe*'s often-overlooked treatment of that interest. *Roe*'s account comes in two stages: a preliminary discussion in the context of possible justifications for laws prohibiting abortions (Part VII of the opinion) and a later dispositive treatment focusing on whether, when, and why the State may claim a compelling interest in protecting fetal life (Part IX-B).

In Part VII of its opinion, the *Roe* Court contrasted two versions of the State's interest in protecting fetal life throughout pregnancy. The strong version – on which Texas relied and which the Court ultimately

tradition guide and discipline this inquiry but do not set its outer boundaries.” See also *Lawrence v. Texas*, 539 U.S. 558, 565-71 (2003), discussing the history of laws regulating homosexual conduct, while giving greater weight to “our laws and traditions in the past half century.”

⁶⁹ An abridged version of Part II previously appeared in a companion article that I originally anticipated would be published after this one. See Gilles, *supra* n37, at 1031-39.

rejected – claimed that the State has an overriding interest in “protecting prenatal life...on the theory that a new human life is present from the moment of conception.”⁷⁰ On this view, “the interest of the embryo or fetus” should prevail unless the woman’s life is “at stake, balanced against the life she carries within her.”⁷¹ The weaker version, which the Court ultimately permitted States to invoke, relied on “the less rigid claim that as long as at least potential life is involved,” the State has a “legitimate” interest in protecting the fetus.⁷²

The *Roe* Court viewed the strong version of the State’s interest as “rigid” because that theory holds that the fetus is *normatively* (as well as biologically) human regardless of its stage of development (that is, from conception on).⁷³ *Roe* did not suggest – nor could it have – that there is any serious debate about whether a fertilized ovum, an embryo, or a fetus is a living organism or about whether that organism is biologically human (that is, belongs to the species *homo sapiens*) or about whether it is genetically distinct from its parents.⁷⁴ The debate, rather, is about *when* in its development this living being becomes “a new *human life*,”⁷⁵ by which the *Roe* Court plainly meant an entity worthy of the same respect and protection we generally accord to normatively human beings. The “less rigid” view that from conception on “at least *potential* life is involved”⁷⁶ resolves that debate by positing that new, normatively human life is not present until some later point in

⁷⁰ *Roe v. Wade*, 410 U.S. 113, 150 (1973).

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Of course, many people who subscribe to this theory believe that every living organism that is biologically human is *ipso facto* normatively human, and for them this distinction is itself an artificial one. The formulation in text is meant to capture the character of their disagreement with developmentalists (i.e., those who think we become normatively human only at some post-conception stage in our development) in language that is congenial to the latter.

⁷⁴ See *Carhart II*, 550 U.S. 124, 147 (2007): “[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.”

⁷⁵ *Roe*, 410 U.S. at 150 (emphasis added).

⁷⁶ *Ibid.*

biological human development.⁷⁷ As *Roe* elsewhere emphasized, there is a range of opinions (including “mediate animation,” quickening, viability, and birth) about when this point is reached.⁷⁸ All these views, however, agree that prior to whatever stage is thought to be critical, the living fetus is only potentially human, and accordingly that the State’s interest in protecting it cannot be as strong as the State’s interest in protecting a normatively human being.

Roe’s terminology confirms this analysis. The opinion interchangeably employs the terms “potential life,”⁷⁹ “potential human life,”⁸⁰ and “the potentiality of human life,”⁸¹ and it uses them in contradistinction to the terms “new human life,”⁸² “life, as we recognize it,”⁸³ and “persons in the whole sense.”⁸⁴ Thus, when *Roe* refers to “potential life,” it is using the word “life” to refer to normatively human life, not biologically human life. *Roe*’s statement that “recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone,”⁸⁵ must be read in light of this usage: the State may claim an important interest in protecting the pre-viable fetus because it is “at least” a living organism that is biologically human, and

⁷⁷ Christopher Kaczor calls this the “gradualist view of human moral worth” and describes gradualists as holding that “[t]he right to life is a right one attains sometime between conception and birth.” Christopher Kaczor, “Equal Rights, Unequal Wrongs,” *First Things* (July 2011) at 1-2, <http://www.firstthings.com/article/2011/07/equal-rights-unequal-wrongs>. Although *Roe* does not mention the opinion that we do not become persons until well after birth, some contemporary writers have not hesitated to defend it. See, e.g., Peter Singer, *Practical Ethics*, 2d ed. (New York NY: Cambridge Univ. Press, 1993), p. 171.

⁷⁸ See *Roe*, 410 U.S. at 160.

⁷⁹ *Ibid.* at 154.

⁸⁰ *Ibid.* at 159.

⁸¹ *Ibid.* at 162.

⁸² *Ibid.* at 150.

⁸³ *Ibid.* at 161.

⁸⁴ *Ibid.* at 162.

⁸⁵ *Ibid.* at 150.

that will naturally become a normatively human being if allowed to develop. That is what it means to be “potential human life.”⁸⁶

⁸⁶ Jed Rubenfeld argues that *Roe* means something very different by “potential life”: that the fetus is to be “considered solely as a ‘potential’ person” and not as a living entity in itself. See Jed Rubenfeld, “On the Legal Status of the Proposition that ‘Life Begins at Conception,’” *Stanford Law Review* 43 (1991): 600. According to Rubenfeld, “[t]o understand the fetus as a ‘potential life’ is not to understand it as an actual, but less than human, animal” (ibid. at 609). Indeed, Rubenfeld claims that an unfertilized ovum “also represents a potential human life” and therefore rejects the argument that “an ‘actual potential’ human life, or some such thing, does not come into existence until conception” (ibid. at 612). Unsurprisingly, he concludes that “[w]e cannot ascribe to potential life an actual interest in anything – and certainly not in its own life” (ibid.). Rubenfeld misunderstands both the relevant facts about human development and the construction that the *Roe* Court put on those facts. The fetus is different from sperm and egg because, unlike them, it is a complete living *organism* (a word that does not appear in Rubenfeld’s article). Rubenfeld rejects the possibility that the embryo is “more ‘concrete’” or “somehow ‘more actual’” than sperm and egg because the “cells” of “pre-conception potential lives...can be as biologically real and identifiable as those of a blastocyst” and because an embryo, no less than sperm and egg, “requires external resources and certain acts by actual persons before it can become an actual life” (ibid. at 613). But the claim that the fetus is a new, “actual” life is not a claim that every new cell is a new life. It is a claim that every new organism with the complete genetic endowment of its species is a new life. Similarly, the importance of fertilization is not that it involves an “act by actual persons” (ibid.); it is that a complete organism is present only when the two gametes combine. Rubenfeld gives the game away when he asserts that an embryo cannot “become an actual life” without gestation (ibid.). Biologically speaking, an embryo *is* an actual life. Rubenfeld also argues that sexual intercourse is no less a “natural process” than “gestation and delivery” and that therefore “interference with sex” by contraception “would prevent a potential life’s ‘natural’ progress toward actualization in the very same way that abortion does” (ibid.). This argument misses the point. Although both contraception and abortion disrupt natural processes, abortion causes the death of a biologically human organism, and contraception does not. As for the law, Rubenfeld ignores *Roe*’s recognition that abortion differs from contraception because the pregnant woman “carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus” and that as a result, “[t]he woman’s privacy is no longer sole” (*Roe*, 410 U.S. at 159). This entity – the fetus – is the entity to which *Roe* refers in the same paragraph as “potential human life” (ibid.). Contra Rubenfeld, *Roe* views the fetus as a second biological life that is not yet normatively human. Rubenfeld’s interpretation also ignores the link

At the same time, however, *Roe's rhetoric* seems calculated to distract attention from what, on this view, the fetus *is* to what it supposedly is *not* (at least early in its development): an actual, normatively human being. By repeatedly calling the fetus “potential life,” the *Roe* Court invited readers to conclude that normatively human life is the dog, and biologically human life the tail. Worse yet, *Roe's* trio of shorthands – “potential human life,” “potential life,” and “the potentiality of human life” – can readily be misunderstood in a way that further devalues the fetus by treating it as only potentially *alive*.⁸⁷ To guard against this misunderstanding, I will sometimes use a different shorthand: that the fetus is “new life whose nature is to become human.” This and similar formulations are also meant to make clear that the fetus is not merely “potentially” human in the loose sense that it could possibly undergo some radical transformation that would result in a human being. It is “potentially” human in the more precise sense that, unless deprived of the sustenance on which its continued life depends, its own nature will cause it to develop into a being that everyone agrees is normatively human.

Roe's second (and decisive) treatment of the State's interest in fetal life comes in Part IX-B of the opinion, after Part VIII's holding that there is a fundamental right to an elective abortion, and Part IX-A's holding that “the unborn” are not Fourteenth Amendment persons.⁸⁸ Having acknowledged that the latter holding “does not of itself fully

between the nature of the pre-viable fetus and *Roe's* recognition that the State has an important and legitimate interest in “potential life.” If Rubinfeld's interpretation of *Roe* were correct, the State would have an important and legitimate interest in protecting “potential life” by prohibiting contraception. *Carey v. Population Services, International*, 431 U.S. 678, 690 (1977), however, holds – relying on *Roe*, 410 U.S. at 163-64 – that “the interest in protecting potential life” is not “implicated in state regulation of contraceptives.”

⁸⁷ The risk of misunderstanding is even greater with regard to the Court's later references to the state's “interest in the potential life of the fetus.” See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 386 n7 (1979); *Maher v. Roe*, 432 U.S. 464, 472 (1977) (same).

⁸⁸ *Roe*, 410 U.S. at 158.

answer the contentions raised by Texas,”⁸⁹ the *Roe* Court turned at last to the merits of the State’s contention that “life begins at conception and is present throughout pregnancy.”⁹⁰ The Court conceded that abortion is “inherently different” from contraception and that the State could reasonably “decide that at some point in time” its interest in “potential human life, becomes significantly involved.”⁹¹ *In so doing, the Roe* Court recognized that the State could assert an “important and legitimate interest” in protecting fetal life at conception or any time thereafter.⁹² The Court’s rationale for this concession – that “the woman’s privacy is no longer sole” because “she carries an embryo and, later, a fetus”⁹³ – makes clear that the State may base its asserted interest on the “less rigid” theory that we have already encountered: that each fetus is a new life whose nature is to become human if the pregnancy is not aborted.

Roe thus permitted the State to “adopt” in law the theory that “potential human life” begins at conception and to assert an important interest in protecting fetal life, so understood. But because the *Roe* Court had already declared the right to elective abortion to be fundamental, this concession was not enough to save Texas’s prohibition of elective abortions. Only a *compelling* State interest can trump a fundamental right. Texas, of course, contended that new, normatively human life is present at conception, and the *Roe* Court agreed that the State’s interest would qualify as compelling if this theory could be established.⁹⁴ Yet

⁸⁹ *Ibid.* at 159.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.* at 162 (emphasis added). *Casey* similarly describes *Roe*’s “scope” as encompassing “postconception potential life.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 813, 859 (1992) (majority opinion); see also, e.g., *Akron I*, 462 U.S. 416, 428 (1983): the State’s interest in protecting fetal life exists throughout pregnancy). In accord with Jack M. Balkin, “How New Genetic Technologies Will Transform *Roe v. Wade*,” *Emory Law Journal* 56 (2007): 848, describing *Roe* as holding that “[a]lthough embryos and fetuses are not constitutional persons, States have legitimate and important interests in their development and potential for personhood.”

⁹³ *Roe*, 410 U.S. at 159.

⁹⁴ *Ibid.*

having framed the issue, the *Roe* Court famously responded that it “need not resolve the difficult question of when life begins” – indeed, that “the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”⁹⁵ Instead, the Court reasoned that the widespread disagreement about when normatively human life begins, and the various respects in which Anglo-American law – including the Fourteenth Amendment – had supposedly refused to recognize “the unborn” as “persons in the whole sense,”⁹⁶ were inconsistent with recognizing a compelling State interest in fetal life throughout pregnancy.

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

In light of its holding that the State does not have a compelling interest in protecting “potential human life” throughout pregnancy, one might have expected *Roe* to hold that the woman has a right to elective abortion at any time prior to live birth. Instead, the *Roe* Court asserted that the State’s interest “grows in substantiality as the woman

⁹⁵ *Ibid.* By “the difficult question of when life begins,” the *Roe* Court must have meant the difficult question of when normatively human life begins. See *supra* text accompanying nn74-88.

⁹⁶ *Roe*, 410 U.S. at 162. As I read it, the Court’s claim that “the law” has never recognized fetuses as “persons in the whole sense” rests on its view of Anglo-American law’s treatment of the fetus in the contexts of criminal abortion, tort, and property law, together with its conclusion that the word “person” in the Fourteenth Amendment excludes the unborn. Part X of the opinion begins with this cryptic statement: “In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake” (*ibid.*). I interpret “all this” to include Part IX-A, which holds, in part on the strength of the Court’s account of the history of Anglo-American abortion law, that fetuses are not Fourteenth Amendment persons, as well as Part IX-B, which discusses the lack of consensus about when human life begins and the law’s treatment of the fetus in “areas other than criminal abortion” (*ibid.* at 161) but ends without a holding; and, because Part IX-A relies on the Court’s history of abortion law in Part VI, also to include the Court’s historical claim that “throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today” (*ibid.* at 158).

approaches term”⁹⁷ and becomes compelling at viability because the fetus has then acquired “the capability of meaningful life outside the mother’s womb.”⁹⁸ Read in light of *Roe*’s reasons for rejecting the claim that the State has a compelling interest in fetal life at conception, *Roe*’s unstated reason for accepting that the State *may* assert such an interest at viability becomes apparent: by the time the fetus has developed enough to survive outside the womb, the resemblance between its capabilities and those of a newborn child is sufficiently strong – and sufficiently widely acknowledged to be strong – to warrant recognition of a compelling State interest should the State elect to assert it.⁹⁹ Once the fetus has developed sufficiently to be viable,¹⁰⁰ the State can reasonably regard it as having *become* normatively human. In sum, although the *Roe* Court purported not to answer the question “when does new human life begin?” its holding that the State may assert a compelling interest in the viable fetus implies that the State may adopt

⁹⁷ *Ibid.* at 162-63.

⁹⁸ *Ibid.* at 163.

⁹⁹ See Nancy K. Rhoden, “Trimesters and Technology: Revamping *Roe v. Wade*,” *Yale Law Journal* 95(1986): 643, arguing that *Roe* implicitly adopted “the assumption that a viable fetus was one that was substantially developed and had reached ‘late’ gestation, and the ethical precept that late in gestation a fetus is so like a baby that elective abortion can be forbidden.” As Rhoden suggests, the “dichotomy between late and early abortion...is perhaps the closest this society has come to a consensus about the morality of abortion” (*ibid.* at 669). By the time the fetus has developed sufficiently to survive indefinitely outside the woman’s womb, the great majority of Americans would view it as “new human life.” Understood as presupposing substantial fetal development, the viability line dovetails with *Roe*’s argument that the absence of consensus about when normatively human life begins precludes recognition of a compelling State interest in fetal life prior to viability.

¹⁰⁰ As this formulation implies, and as I argue elsewhere, fetal viability under *Roe* and *Casey* includes an implicit developmental requirement. See Stephen G. Gilles, “The Puzzles of Fetal Viability” (unpublished manuscript, on file with author). The Court has had no occasion to identify just what the required level of development is, but at a minimum the fetus must have developed sufficiently to survive outside *any* womb – natural or artificial – even if it initially needs the less comprehensive forms of artificial aid currently used to treat extremely premature newborns (see *ibid.*).

with the force of law the theory that “new human life” begins at viability.¹⁰¹

Although *Roe*’s characterization of the fetus as “potential human life” explains why the State has an important interest in fetal life beginning at conception, it appears to be in considerable tension with *Roe*’s holding that this interest becomes compelling at viability (but not before). If the fetus’s “potential” to become normatively human is the *only* fetal attribute on which the State may base an interest in protecting fetal life, one would expect that interest to have the same weight at conception as at any point later in pregnancy. As Justice O’Connor put it in her 1983 dissent in *City of Akron v. Akron Center for Reproductive Health*, “potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward.”¹⁰² That being so, she argued, the viability line is “arbitrary,”¹⁰³ and *Roe*’s recognition that the State has a compelling interest in protecting the viable fetus applies to the pre-viable fetus with equal force.

Roe implicitly answers Justice O’Connor’s challenge by appealing to the idea that the stage of fetal development weighs in the balance.¹⁰⁴ As we have seen, *Roe* argues that the State’s interest grows weightier as the fetus develops and becomes compelling when the fetus’s capabilities permit it to live outside the womb.¹⁰⁵ Thus, *both* the fetus’s potential to

¹⁰¹See Rubinfeld, *supra* n86 at 635: “[D]espite its vocabulary of potential life, the Court in all essential respects made a determination about when the States could deem the fetus a person” (i.e., at viability). In my view, the superficially puzzling reference to even viable fetuses as “potential life,” see *Roe*, 410 U.S. at 163, reflects the fact that at birth, the fetus becomes a child who *must*, by virtue of the Fourteenth Amendment, be treated as a person. The viable fetus, by contrast, *may* be treated as “new human life” (in other words, a person) if the state so chooses – but the State may decide otherwise, because under *Roe*, even viable fetuses are not Fourteenth Amendment persons.

¹⁰² 462 U.S. 416, 461 (1983) (O’Connor, J., dissenting).

¹⁰³ *Ibid.*

¹⁰⁴See Richard A. Posner, *Sex and Reason* (Cambridge MA: Harvard Univ. Press, 1992), p. 333, asserting that under *Roe*, the State’s interest in preventing abortion grows stronger “[t]he later the abortion is performed...because the fetus is more nearly a child.”

¹⁰⁵ *Roe*, 410 U.S. at 163.

become a normatively human being and its already developed capabilities, which vary with its stage of development, weigh in the constitutional balance.¹⁰⁶ In this respect, *Roe*'s usage of the term "potential human life" is misleading because *actual* fetal capabilities also count in *Roe*'s constitutional calculus.

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

C. The Controlling *Casey* Plurality Opinion

Like *Roe*, *Casey* does not deny that the State could assert an overriding interest in protecting fetal life if it could demonstrate that normatively human life begins at conception. Also like *Roe*, *Casey* denies that any such demonstration is possible.¹⁰⁷ *Casey*'s account of the woman's liberty argues that the abortion decision "originate[s] within the zone of conscience and belief,"¹⁰⁸ that reasonable persons can disagree about when new human life begins,¹⁰⁹ and that the State cannot by law "resolve th[is] philosophic question in such a definitive way that a woman lacks all choice in the matter."¹¹⁰ If the "philosophic question"

¹⁰⁶ Many people agree with *Roe* on this point. See, e.g., Kent Greenawalt, *Religious Convictions and Political Choice* 131-32 (New York NY: Oxford Univ. Press, 1988), pp. 131-32, suggesting that "the intuitive moral sense of most people in our culture is that both potential capacity and present or past characteristics matter."

¹⁰⁷ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992): "Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage."

¹⁰⁸ *Ibid.* at 852.

¹⁰⁹ *Ibid.* at 851.

¹¹⁰ *Ibid.* at 850.

of when new human life begins *could* be definitively answered by human reason – and if the answer were “at conception” – it would be absurd to claim, as *Casey* does, that “the right to define one’s own concept of...the mystery of human life” is “[a]t the heart of liberty.”¹¹¹ “*What mystery?*” would be sufficient refutation. The burdens involved in pregnancy and motherhood would be no less heavy, intimate, and life-changing, but the State’s interest in protecting the fetus throughout pregnancy would assuredly prevail.¹¹²

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

Yet, although the *Casey* joint opinion re-affirmed that the State has a “legitimate interest from the outset of the pregnancy in protecting...the life of the fetus that may become a child,”¹¹³ the *Casey* majority fractured when it came to the character of this interest and the weight to be accorded it. The three-Justice *Casey* plurality argued that *Roe*’s recognition of the State’s “important and legitimate interest” in fetal life was “given too little acknowledgment and implementation by the Court in its subsequent cases,” and it elected to “rely upon *Roe*, as against the

¹¹¹ *Ibid.* at 851.

¹¹² But see Judith Jarvis Thomson, “A Defense of Abortion,” *Philosophy and Public Affairs* 1 (1971): 48, arguing that a woman often has no moral duty to continue her pregnancy even if the fetus is assumed to be a person. Although Thomson’s famous article has spawned a large scholarly literature in defense of her thesis (see, e.g., David Boonin, *A Defense of Abortion* [New York NY: Cambridge Univ. Press, 2003], pp. 133-281), so far as I know, no Justice has ever expressed any interest in adopting it as a matter of constitutional law.

¹¹³ *Casey*, 505 U.S. at 846.

later cases.”¹¹⁴ The plurality proceeded to reject *Roe*’s trimester framework, holding that “in practice it undervalues the State’s interest in the potential life within the woman,”¹¹⁵ and replacing it with the undue-burden test. And whereas *Roe* treated the State’s interest as at most “important,” the plurality described it as “profound.”¹¹⁶ In short, the plurality opinion held that the State may assert a very weighty interest in the pre-viable fetus *on the same theory* *Roe permitted* – that new life whose nature is to become normatively human is present at conception (or such time thereafter as the state specifies).

With all this, Justices Blackmun and Stevens disagreed. In his separate opinion Justice Stevens argued for a radically different view of the State’s interest in pre-viable fetal life, according to which that interest has nothing to do with protecting the fetus for its own sake. Rather, as Justice Stevens explained, the State has “an indirect interest supported by both humanitarian and pragmatic concerns,” namely, “expanding the population” and minimizing the “offense” to persons who believe abortion “reflects an unacceptable disrespect for potential human life.”¹¹⁷ Without mentioning that his own opinion in *Roe* explicitly recognized a very different basis for the State’s interest – namely, *protecting* “potential human life,” Blackmun agreed.¹¹⁸

Justice Stevens’s recasting of the State’s interest in the pre-viable fetus as “indirect” leads ineluctably to the conclusion that the woman’s interest in an elective abortion greatly outweighs the State’s interest in protecting “potential life.” By completely removing the fetus from the equation, this approach pits the woman’s concrete, constitutionally protected interests in avoiding pregnancy, childbirth, and the burdens of raising or relinquishing an unwanted child against a nebulous State interest in avoiding “offense” to those who oppose abortion and a

¹¹⁴ *Ibid.* at 871 (plurality opinion), quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973).

¹¹⁵ *Ibid.* at 875.

¹¹⁶ *Ibid.* at 878.

¹¹⁷ *Ibid.* at 914-15 (Stevens, J., concurring in part and dissenting in part).

¹¹⁸ *Ibid.* at 932 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

moribund State interest in increasing population growth. On this account, the soundness of the interest-balancing judgment on which the right to elective abortion now rests seems as clear as that of the parallel interest-balancing judgment on which the right to contraception would rest under *Casey*'s methodology.¹¹⁹ No wonder, because Justice Stevens's approach effectively denies the qualitative difference between pre-conception gametes and the post-conception fetus. *Roe*, on the other hand, treated that difference as central to its holding that the State has an important interest in pre-viable fetal life.¹²⁰ On this issue, the *Casey* plurality opinion sides with *Roe* and against Justice Stevens.

The *Casey* majority divided along the same lines with regard to the rationale for (and implications of) the viability line. Like *Roe*, the *Casey* plurality opinion implicitly distinguishes between the fetus's inherent *potential* to become a human being, which is present from conception on, and its developing *capabilities*, which tip the scales in the State's favor at viability. But whereas *Roe* implies that there is a great difference between the State's "important" interest in pre-viable fetal life and its "compelling" interest in viable fetal life, the plurality opinion draws no such distinction. The *Casey* plurality's position was that, *assuming without deciding* that the woman's interest in an elective abortion is greater than the State's interest in the pre-viable fetus, the balance tips in the State's favor at viability.¹²¹ If the State's interest in the pre-viable fetus is almost as great as (if not greater than) the woman's interest in an elective abortion, as Part II-D will argue the Justices in the plurality believed, even a modest increase in the strength

¹¹⁹ Referring to the Court's cases that recognize a right to use contraception, the *Casey* majority stated that "[w]e have no doubt as to the correctness of those decisions" but provided no account of the doctrinal foundation of the right to contraception (*ibid.* at 852-53), (majority opinion), citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carey v. Population Services International*, 431 U.S. 678 (1977).

¹²⁰ See *Roe v. Wade*, 410 U.S. 113, 159 (1973), distinguishing prior substantive due process decisions, including the contraceptive cases, on the grounds that "[t]he pregnant woman cannot be isolated in her privacy," because she "carries an embryo and, later, a fetus."

¹²¹ See *infra* n147.

of the State's interest at viability would yield an interest-balancing judgment in the State's favor.

Justice Blackmun – who, like Justice Stevens, declined to join the plurality's account of why the viability line should be re-affirmed – asserted in his separate opinion that viability “marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman.”¹²² This formulation is obviously intended to suggest that the State's interest in pre-viable fetal life is dramatically inferior to the woman's interest in an elective abortion. If the pre-viable fetus is incapable of having an interest in its own life that is “distinct” from (let alone “paramount to”) the interests of the pregnant woman, it is difficult to see what possible basis the State could have for vetoing her decision that an abortion is in her best interests.

Justice Blackmun's characterization of the pre-viable fetus, which for all practical purposes treats it as merely part of the woman's body, is clearly inconsistent with the *Casey* plurality opinion.¹²³ Rather than echoing Blackmun's claim that the pre-viable fetus cannot be “a subject of rights or interests distinct from” the pregnant woman's, the plurality opinion, citing his opinion in *Roe*, asserts that, at viability, “the independent existence of the second life can in reason and all fairness be the object of State protection that now overrides the rights of the woman.”¹²⁴ As this formulation implies, the plurality recognized that even before it becomes viable (and thus “independent” of the woman)

¹²² *Casey*, 505 U.S. at 932-33 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), quoting *Webster v. Reproductive Health Services*, 492 U.S. 490, 553 (1989) (Blackmun, J., concurring in part and dissenting in part).

¹²³ Justice Blackmun is correct in one respect: under *Roe* and *Casey* the “rights or interests” of the pre-viable fetus are not “paramount to” the woman's interests in having an elective abortion. The *Casey* plurality, however, affirmed that ruling on *stare decisis* grounds, not on the merits.

¹²⁴ *Casey*, 505 U.S. at 870 (plurality opinion), citing *Roe*, 410 U.S. at 163; *ibid.* at 933 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), quoting *Webster*, 492 U.S. at 553 (Blackmun, J., concurring in part and dissenting in part).

the fetus is a “second life” that *can* be “the object of State protection,” so long as that protection does not “override” the woman’s rights.¹²⁵ What changes at viability is not whether the fetus can be the object of State protection, but whether that protection can take the form of outright prohibitions of elective abortions.¹²⁶

Were it otherwise, the plurality could not possibly have adopted the undue-burden standard, which allows the State to enact regulations protective of pre-viable fetal life provided they impose no “undue” burdens on women seeking abortions.¹²⁷ Consider, for example, the plurality’s ruling that States may require that the woman be informed, prior to an abortion, of the procedure’s effect on the fetus. The plurality upheld this requirement for two independent reasons: because it advanced the legitimate purpose of ensuring that women would not suffer the “devastating psychological consequences” of uninformed decisions to have abortions¹²⁸ and because it furthered the State’s interest in informing women of “*the consequences to the fetus, even when those consequences have no direct relation to [maternal] health.*”¹²⁹ In support of this rationale, the plurality offered the following analogy: “We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself.”¹³⁰ This reasoning demonstrates beyond cavil that the plurality viewed the State’s interest as involving the protection of the pre-viable fetus, understood as a new life that has an interest in its own continued development.

In sum, the controlling *Casey* plurality opinion confirms that the State’s interest in pre-viable fetal life is grounded in an understanding

¹²⁵ Ibid. at 870 (plurality opinion).

¹²⁶ See *ibid.* at 944-45 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part), distinguishing between prohibitions and regulations of abortions.

¹²⁷ Ibid. at 877-78 (plurality opinion).

¹²⁸ Ibid. at 882.

¹²⁹ Ibid. (emphasis added).

¹³⁰ Ibid. at 882-83.

that the fetus is new life that is becoming normatively human and has an interest in its own future development; that this State interest is profoundly weighty after conception and throughout pregnancy; and that the State's interest does not dramatically increase in strength at viability.¹³¹ Each of these points – which the four dissenters in *Casey* either agreed with or would have modified in ways even *more* favorable to the state¹³² – lends additional support to the proposition that the State's interest in protecting pre-viable “potential human life” likely outweighs the woman's interests in an elective abortion.

D. Assessing the State's Interest in *Casey*

Although it characterized the right to elective abortion as resting on a judgment that the woman's liberty interest outweighs the State's interest in protecting pre-viable fetal life, the *Casey* majority specifically declined to endorse that judgment on the merits. Instead, it explained that “the reservations any of us may have in re-affirming the central holding of *Roe* are outweighed by the explication of individual liberty that we have given combined with the force of *stare decisis*.”¹³³ As that explanation implies, one or more members of the *Casey* majority had grave doubts about the soundness of *Roe*'s central holding and voted to

¹³¹ In *Carhart I*, Justice Breyer's opinion for the Court, which Justice O'Connor and Justice Souter joined, but from which Justice Kennedy dissented, stated that “[t]he State's interest in regulating abortion previability is considerably weaker than post-viability,” 530 U.S. 914, 930 (2000). The sole authority cited for that proposition was the *Casey* plurality opinion's discussion of viability. See *Casey*, 505 U.S. at 870 (plurality opinion). But although the *Casey* plurality opinion necessarily implies that the State's interest in protecting fetal life is *sufficiently* greater after viability to tip the balance, it does not follow that this increase is a large one.

¹³² Justice Scalia's dissent in *Casey*, which was joined by Chief Justice Rehnquist, Justice White, and Justice Thomas, criticized Justice O'Connor for abandoning her earlier position that the State has a compelling interest in protecting fetal life throughout pregnancy and asserted that her prior criticism of the viability line as “arbitrary” was correct (*ibid.* at 989-90, 989 n5), (Scalia, J., concurring in the judgment in part and dissenting in part). Clearly, then, the four dissenters were of the view that the State's interest outweighs the woman's interests before as well as after viability.

¹³³ *Casey*, 505 U.S. at 853 (majority opinion).

re-affirm it only after weighing “the force of *stare decisis*” in the balance.¹³⁴ Indeed, of the five Justices in the *Casey* majority, only Justices Blackmun and Stevens defended on the merits¹³⁵ the majority’s affirmation that “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion.”¹³⁶ Unsurprisingly, the four dissenting Justices in *Casey* argued, *inter alia*, that the State’s interest outweighed the woman’s.¹³⁷

That leaves *Casey*’s co-authors – Justices O’Connor, Kennedy, and Souter. What was the nature of their “reservations” about re-affirming *Roe*’s central holding? The answer can be found in Part IV of their joint opinion, in which they acknowledged that “the difficult question faced in *Roe*” was “[t]he weight to be given this State interest” in “protecting

¹³⁴ Ibid.

¹³⁵ See *ibid.* at 932 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part): “[T]he *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State’s interest in potential human life,” quoting *Webster v. Reproductive Health Services*, 492 U.S. 490, 553 (1989) (Blackmun, J., concurring in part and dissenting in part)); *ibid.* at 912 (Stevens, J., concurring in part and dissenting in part): “*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.”

¹³⁶ *Ibid.* at 846 (majority opinion).

¹³⁷ The dissenters’ primary argument was that contrary to the Court’s usual substantive due process jurisprudence (and to any defensible understanding of the Fourteenth Amendment’s Due Process Clause), *Roe* recognized an unenumerated fundamental right to elective abortion despite the fact that “the longstanding traditions of American society have permitted it to be legally proscribed,” *ibid.* at 980 (Scalia, J., concurring in the judgment in part and dissenting in part); see also *ibid.* at 952-53 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). But the dissenters also argued that *Roe* was wrong even in interest-balancing terms, because it simply assumed that “what the State is protecting is the mere ‘potentiality of human life’,” *ibid.* at 982 (Scalia, J., concurring in the judgment in part and dissenting in part), quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973). As they saw it, the *Roe* Court should have deferred to the State’s reasonable judgment that the fetus *is* “a human life” whose claim to protection from the State outweighs the woman’s interest in terminating the pregnancy (*ibid.* at 982, emphasis omitted).

the potentiality of human life.”¹³⁸ Moreover, the plurality repeatedly asserted that *Roe* and later cases had undervalued the State’s interest in pre-viable fetal life. That was the principal reason why it rejected *Roe*’s trimester framework and strict scrutiny.¹³⁹ Read as a whole, the joint opinion strongly suggests that, after correcting for that undervaluation, each Justice in the *Casey* plurality found it difficult to conclude that the woman’s interest in an elective abortion outweighs the State’s interest in pre-viable fetal life.

Nevertheless, the *Casey* plurality declined on *stare decisis* grounds to say “whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.”¹⁴⁰ In isolation, this declaration might suggest that Justices O’Connor, Kennedy, and Souter, having determined that *stare decisis* was controlling, simply had no reason to re-examine whether or not the State’s interest outweighs the woman’s. If so, no reliable inferences about their views on the merits could be drawn from their refusal to address them.

This interpretation, however, cannot account for the *Casey* majority’s elaborate argument that *Roe*’s central holding should be re-affirmed for reasons of “institutional integrity” and “the rule of *stare decisis*.”¹⁴¹ The central themes of that argument were: (1) that a “normal *stare decisis* analysis” favored “affirming *Roe*’s central holding,”¹⁴² (2) that there was no “special reason over and above the belief that a prior

¹³⁸ *Ibid.* at 871 (plurality opinion), quoting *Roe*, 410 U.S. at 162.

¹³⁹ See *ibid.*, asserting that the State’s interest in potential life, recognized as “important and legitimate” in *Roe*, 410 U.S. at 163, “has been given too little acknowledgment and implementation by the Court in its subsequent cases”; *ibid.* at 873, arguing that the trimester framework “undervalues the State’s interest in potential life.”

¹⁴⁰ *Ibid.* at 871.

¹⁴¹ *Ibid.* at 845-46 (majority opinion).

¹⁴² *Ibid.* at 861.

case was wrongly decided”¹⁴³ for overruling *Roe*, and (3) that *Roe*’s central holding should have “rare precedential force” because *Roe* was a “watershed decision” that “call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”¹⁴⁴ Had Justices O’Connor, Kennedy, and Souter each believed that the woman’s interest outweighed the State’s, it seems almost inconceivable that they would have gone to such unprecedented lengths to enhance and amplify “the force of *stare decisis*.”¹⁴⁵ To be sure, they would presumably have invoked *stare decisis* to buttress their re-affirmation of *Roe* on the merits. But a “normal” *stare decisis* analysis would have sufficed for that purpose. Instead, having declared that they could not re-affirm *Roe* without relying on *stare decisis*, they proceeded to argue that *stare decisis* should be given extraordinary weight in *Roe*’s case.¹⁴⁶ We are entitled to infer that, for at least one of them, this extraordinary additional “force” was *necessary* to overcome what must have been a judgment that *Roe*’s central holding was erroneous.¹⁴⁷

Moreover, had all three of *Casey*’s coauthors believed that *Roe* was correctly decided, they would surely not have relied exclusively on their “explication of individual liberty...combined with the force of *stare*

¹⁴³ *Ibid.* at 864. On its face, this statement suggests that at least one of the Justices in the plurality held such a belief.

¹⁴⁴ *Ibid.* at 867.

¹⁴⁵ *Ibid.* at 853.

¹⁴⁶ *Ibid.* at 853, 866-67.

¹⁴⁷ Alternatively, it is conceivable that one or more of *Casey*’s co-authors believed that the woman’s interests in an elective abortion and the State’s interest in protecting the pre-viable fetus were so closely balanced--in equipoise, as it were--that it would be wrong either to re-affirm the right to elective abortion on the merits or to declare it unsound. See Gilles, *supra* n37, at 1039, arguing that *Casey*’s co-authors believed the critical interest-balancing judgment was “either erroneous or, at best, a very close call.” But if this were the case, one would have expected the joint opinion to make this judgment *dubitante* an explicit part of its *stare decisis* argument. For at a minimum, *stare decisis* must mean that the Court will adhere to a prior decision when the Court cannot conclude that it was erroneous.

*decisis.*¹⁴⁸ They would have joined forces with Justices Blackmun and Stevens and expressly re-affirmed *Roe*'s central holding on the merits.¹⁴⁹ A majority opinion forthrightly declaring that the woman's interest in an elective abortion outweighs the State's interest in protecting the pre-viable fetus would have been far more likely to achieve the joint opinion's declared objective of ensuring that *Roe*'s central holding remains settled law.¹⁵⁰ Notwithstanding the joint opinion's attempt to claim extraordinary precedential force for *Roe*, the American people are much less likely to "accept a common mandate rooted in the Constitution"¹⁵¹ when the Justices who announce that mandate cannot bring themselves to say that it truly *is* rooted in the Constitution.

The bottom line is this: in *Casey*, a majority of five Justices re-affirmed the right to elective abortion prior to viability on the basis of an interest-balancing judgment that only two Justices were willing to endorse on the merits and that at least five (and as many as seven) Justices believed was erroneous on the merits. These views were not mere dicta. The dissenters' conviction that *Roe*'s central holding was erroneous, combined with the plurality's "reservations" about the soundness of that holding, altered the structure and reasoning of the majority opinion in *Casey*.¹⁵² Because only two Justices were prepared

¹⁴⁸ *Casey*, 505 U.S. at 853.

¹⁴⁹ That is exactly what the Court had done in *Akron I*; see 462 U.S. 416, 420 & n1 (1983), re-affirming *Roe* on *stare decisis* grounds; *ibid.* at 426-27, re-affirming *Roe* on the merits.

¹⁵⁰ *Casey*, 505 U.S. at 844: "Liberty finds no refuge in a jurisprudence of doubt."

¹⁵¹ *Ibid.* at 867.

¹⁵² The plurality's "reservations" about the validity of *Roe*'s central holding also altered its re-affirmation of *Roe*'s viability line (*ibid.* at 853). Having concluded that the woman's specially protected liberty includes "some freedom to terminate her pregnancy," *ibid.* at 869 (plurality opinion), the plurality gave two reasons for limiting that freedom at viability: "the doctrine of *stare decisis*" and the reason given in *Roe* (that viability establishes the "independent existence of the second life"), *ibid.* at 870, citing *Roe v. Wade*, 410 U.S. 113, 163 (1973). Only *after* declaring, for these reasons, that it must preserve "[t]he woman's right to terminate her pregnancy before viability," did the plurality reveal that its members declined to say whether they "would have

to affirm *Roe*'s soundness on the merits, the *Casey* majority was forced to rely heavily on *stare decisis* and "principles of institutional integrity."¹⁵³ For that reason, one might argue that the plurality's reservations form part of *Casey*'s *ratio decidendi*, and are therefore entitled to *stare decisis* effect. But even if not, the judgment of a majority of the *Casey* Court on an issue that was fully considered by it should be given substantial weight in the interest-balancing deliberations of a later Court applying *Casey*'s approach.

III. Evaluating the State's Interest in *Casey*'s Terms

A. The State's Overriding Interest in Protecting the Life of the Fetus¹⁵⁴

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

concluded, as the *Roe* Court did, that [the] weight [of the State's interest in the fetus] is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions" (ibid. at 871). Thus, the plurality's re-affirmation of the viability line, rather than a true defense on the merits, is contingent on its *stare decisis*-based assumption that the woman's interest in an elective abortion outweighs the State's interest in protecting the pre-viable fetus.

¹⁵³ Ibid. at 845 (majority opinion).

¹⁵⁴ An abridged version of Part III-A previously appeared in a companion article that I originally anticipated would be published after this one. See Gilles, *supra* n37, at 1039-47.

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

[h]owever one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize...that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others.¹⁵⁵

As a living human organism that is developing into a normatively human being, the fetus is qualitatively different from sperm or egg, and the fact that abortion "involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place."¹⁵⁶

In *Thornburgh* Justice White used this reasoning as a platform from which to argue that restrictions on the woman's liberty to elect an abortion should receive only rational basis scrutiny, and that the State's interest in pre-viable fetal life is indistinguishable from what *Roe* conceded to be its compelling interest in *viable* fetal life.¹⁵⁷ There is no reason to revisit those arguments here because they are effectively foreclosed by *Casey*, which treats abortion liberty as specially protected and adheres to the viability line (albeit largely for reasons of *stare decisis*).¹⁵⁸ Instead, I will restate and further develop White's thesis using the language of *Casey's* interest-balancing methodology, which

¹⁵⁵ 476 U.S. 747, 785 (1986) (White, J., dissenting).

¹⁵⁶ *Ibid.* at 792.

¹⁵⁷ *Ibid.* at 792 n2.

¹⁵⁸ *Ibid.*, arguing that the difference between contraception and abortion – the destruction of the fetus – goes both to "the weight of the State interest in regulati[on]" and "the characterization of the liberty interest itself" (*ibid.* at 795), arguing that the State's interest is compelling throughout pregnancy.

calls for a “reasoned judgment”¹⁵⁹ about the weight of the competing State and individual interests.¹⁶⁰

To arrive at a reasoned judgment on this question, it is necessary to describe the grounds on which one’s judgment is based, to explain why one values pre-viable fetal life more or less highly than the woman’s interests in an abortion and to critically examine why those who disagree arrive at a different judgment. The difficulty with any such attempt, of course, is that there is widespread and wide-ranging disagreement among reasonable people about how much weight the State’s interest in “potential human life” should receive and about the relative weight of the woman’s conflicting interest in an elective abortion. It is undoubtedly true that such value judgments, no matter how “reasoned,” will frequently be more debatable and subjective than legal judgments anchored in textual meaning or tradition.¹⁶¹ Nevertheless, to refuse to engage in this inquiry on the grounds that it ultimately comes down to value judgments about which reasonable people can disagree would be to abandon the possibility of showing that the interest-balancing judgment on which the right to elective abortion now rests is unsound in *Casey*’s own terms.

How, then, should we think about the pre-viable fetus, understood as a living organism that is biologically but not yet normatively human? The following account of the fetus lays the foundation for the argument that its life – and its interest in living that life – should be accorded great intrinsic value.¹⁶²

¹⁵⁹ See *supra* n152.

¹⁶⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 849 (1992): “The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.”

¹⁶¹ The arguments that I present also support the conclusion that the State’s interest in protecting pre-viable fetuses is a compelling one. Thus, those arguments would remain relevant even if, contrary to this article’s interpretation of *Casey*, the right to elective abortion is a fundamental right that can be trumped only by a compelling State interest.

¹⁶² See *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997), arguing that a tradition-centered methodology is superior to interest-balancing because it

To evaluate the life of the fetus, we must start with the event that begins its life: the completion of the process of fertilization, which yields the zygote that is the first stage of fetal life. As Justice White argued, this event marks a dramatic, qualitative change – the beginning of a new, biologically human life. Unlike sperm and egg, the pre-viable fetus is a genetically complete, biologically human organism. It is perhaps debatable whether sperm and egg are better viewed as specialized parts of the men and woman whose gametes they are, or as distinct organisms “whose existence...is fundamentally oriented toward *uniting* with another gamete.”¹⁶³ What is *not* debatable is that neither sperm nor egg is a genetically *complete* organism belonging to our species. Sperm and egg each have only half the forty-six chromosomes that every somatic cell of every member of our species contains. “This haploidy of the gamete cells distinguishes them from whole human beings.”¹⁶⁴ No such distinction exists between the cells of a fetus, regardless of its stage of development, and those of any other biologically human being. Once fertilization is complete, the zygote contains the full complement of forty-six chromosomes necessary for a complete, biologically human organism.

Possessing forty-six chromosomes, of course, is necessary but not sufficient to qualify the fetus as a human *organism*. Every somatic cell

“tends to rein in the subjective elements that are necessarily present in due process judicial review.”

¹⁶³ My account of the fetus is greatly indebted to Robert P. George & Christopher Tollefsen, *Embryo: A Defense of Human Life* (New York NY: Doubleday, 2008). Unlike their book, however, this article does not argue that “the human embryo is a human person worthy of full moral respect” (ibid. at 4).

¹⁶⁴ Ibid. at 38-39. That sperm and egg play a functional role in the lives of the human beings whose gametes they are – enabling those beings to reproduce – argues for considering them as parts, rather than distinct organisms. See ibid. at 34, arguing that sperm and egg are “parts of the human organism, the sperm a part of the male, the egg a part of the female.” That sperm and egg are genetically distinct from all other cells of the human beings whose gametes they are--not only because they are haploid rather than diploid, but because their chromosomes are genetically different as a result of chromosomal crossover during meiosis, see ibid. at 31-32--argues for considering them as distinct, haploid organisms that will either die or, if fertilization occurs, combine to become a single diploid embryo (ibid. at 36-37).

has forty-six chromosomes, but although each cell is biologically human, it is not an organism. Rather, it is a *part* of a single human organism--a living human body. What distinguishes each human being, viewed as an organism is that it is an integrated whole that "has the capability to sustain itself as an independent entity."¹⁶⁵ The fetus possesses that capability as soon as it comes into being at the completion of fertilization: if it can obtain "the resources needed by all organisms, namely, nutrition and a reasonably hospitable environment, it will continue (assuming adequate health) to grow and develop."¹⁶⁶ Beginning at fertilization, the fetus is "a whole living member of the species *Homo sapiens* in the earliest stage[s] of his or her natural development."¹⁶⁷

What's more, the fetus's capability to grow and develop¹⁶⁸ is inherent in its nature,¹⁶⁹ for "it contains within itself the 'genetic programming' and epigenetic characteristics necessary to direct its own biological progress. It possesses the active capacity for self-development toward maturity using the information it carries."¹⁷⁰ More than that, the nature of the fetus is to exercise this capacity: "The human embryo, from conception onward, is fully programmed and has the active disposition to use that information to develop himself or herself to the mature stage of a human being, and, unless prevented by disease or violence, will actually do so..."¹⁷¹

And develop it does. When it comes to the capability for physical growth and development, we are the dwarfs, and the fetus the giant.

¹⁶⁵ *Ibid.* at 40-41.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*, p. 41.

¹⁶⁸ *Ibid.* at 50.

¹⁶⁹ In this respect as well, the embryo is radically different from sperm and egg, or from the nucleus of a non-zygotic cell and an enucleated egg, none of which can grow and develop without first combining (or being combined) to become an embryo. And even when fertilization (or somatic-cell nuclear transfer, in the case of cloning) occurs, the gametes (or cellular components) "do not survive; rather, their genetic material enters into the composition of a new organism" (*ibid.* at 53).

¹⁷⁰ *Ibid.* at 41.

¹⁷¹ *Ibid.* at 50.

Stuart Campbell, M.D., summarizes the events of the first trimester as follows:

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

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

Overall growth is fast and highly coordinated. External features such as the face, eyes, ear, arms, and legs appear first. Internally, the heart is one of the first organs to be recognized. It starts beating at about the 22nd day following fertilization. The brain and spinal cord, and the respiratory, gastrointestinal, and genitourinary systems start to develop simultaneously. The musculoskeletal system will start developing during the second half of the first trimester. By ten weeks (eight weeks gestation), the [fetus]...contains all the organs and structures found in a full-term newborn but in an immature state.¹⁷²

The fetus's natural – and, as the preceding description shows, astonishingly powerful – “disposition” to grow and develop does not end with the first trimester, or when it becomes viable, or when it is born: its dynamic, self-directed biological development continues (though at a slower pace) through infancy, childhood, adolescence, and adulthood. In this regard, *Roe*'s characterization of the fetus as “potential human life” is misleading. *Roe* implicitly authorizes the state to specify fetal viability, when the fetus is capable of surviving indefinitely outside the womb, as the earliest stage at which actual, normatively human life is present.¹⁷³ One might infer that the fetus's

¹⁷² Stuart Campbell, *Watch Me Grow* (London UK: Carrol & Brown, 2004), pp. 12-13. Fetal development continues at a rapid pace throughout the second trimester as well (see *ibid.* at 32).

¹⁷³ *Roe* indicates that a fetus is viable if it can survive outside the womb “with artificial aid,” *Roe v. Wade*, 410 U.S. 113, 160 (1973). Fetuses today are not viable before twenty-two weeks at the earliest. See Pam Belluck, “Premature Babies May Survive at 22 Weeks if Treated, Study Finds,” *The New York Times* (May 6, 2015), <http://www.nytimes.com/2015/05/07/health/premature-babies-22-weeks-viability-study.html>, describing a recent study

“potential” to become normatively human is fully realized at viability because it then becomes “*actual* human life.” But if we ask what *caused* the fetus to develop to the stage at which it is viable, the superficiality of this reasoning becomes evident. Over a period of roughly twenty-three weeks, this “potential human life” developed from a zygote to a viable fetus because its own nature – including its innate genetic endowment – directed its development. That same nature will *continue* to drive the development of the viable fetus, before and after birth, throughout its entire life-span. Thus, the “potential” with which the fetus is endowed does not disappear when the developing fetus becomes a normatively human being, whether that event is deemed to occur at viability or birth.

The pre-viable fetus is also the *same* living organism that will eventually become an adult if its development is not cut short for one reason or another.¹⁷⁴ Consequently, the pre-viable fetus, no less than the viable one, has what Don Marquis famously termed a “future like ours,”¹⁷⁵ in which it will have developed into a conscious, normatively human being who can actively seek his or her happiness. Like every living being, the fetus has an interest in its own good – and it is good for the fetus to develop into a normatively human being, and bad for it to be killed before it can do so.¹⁷⁶

finding that some babies born at twenty-two weeks survive, but prior to twenty-two weeks, intervention still appears futile.

¹⁷⁴ In the special case of monozygotic twinning, which can occur only in the first two weeks after conception, the embryo becomes two embryos, each of which will develop into a normatively human being. Some writers argue that until the possibility of monozygotic twinning can be excluded (around fourteen days after conception) the embryo cannot be regarded as an individual. See, e.g., Bonnie Steinbock, *Life before Birth: The Moral and Legal Status of Embryos and Fetuses* (New York NY: Oxford Univ. Press, 1992), pp. 50-51. Strictly speaking, that seems true enough, but it also seems myopic from the standpoint of valuing the life of the early embryo. The possibility that the embryo will become *two* normatively human beings if twinning occurs would seem to make it *more* intrinsically valuable, not less.

¹⁷⁵ Don Marquis, “Why Abortion Is Immoral,” *Journal of Philosophy* 86 (1989): 192.

¹⁷⁶ Contrary to the common-sense view that every living being has an

Granted, under *Roe* and *Casey* the life of the pre-viable fetus must be regarded as less valuable than that of a “person in the whole sense” (as *Roe* puts it).¹⁷⁷ But the key question is this: “How much less valuable?” Here, following Justice White’s lead, I want to challenge the popular belief that, once it is accepted that the pre-viable fetus is not normatively human, it necessarily follows that its life is *drastically* less valuable than the life (and other important interests) of a human being. This belief sometimes stems from an assumption that human beings are the *only* living beings the State can have an overriding interest in protecting on account of their intrinsic worth. That premise is highly dubious: many observers would endorse intelligent mammals such as dolphins and chimpanzees as counter-examples.¹⁷⁸ It is true that a mature

interest in its own good, some writers on abortion have asserted that pre-viable fetuses are inherently incapable of having interests because they are not conscious and thus incapable of having desires or feeling pain. See, e.g., Ronald Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York NY: Knopf, 1993), pp. 15-19; Steinbock, *supra* n174, at 40-41. Because both *Roe* and *Casey* treat the pre-viable fetus as a living being that has an interest in its own life, I will not present an independent argument in defense of the common sense view. Nor will I explore whether, even if pre-viable fetuses do not yet have interests in their own lives, the State has an overriding interest in protecting them because “human life has an intrinsic, innate value” that “begins when its biological life begins, even before the creature whose life it is has movement or sensation or interests or rights of its own” (Dworkin, *supra*, at 11).

¹⁷⁷ *Roe*, 410 U.S. at 162.

¹⁷⁸ See, e.g., Peter Singer, *Animal Liberation*, 2d ed., (New York NY: Avon Books, 1990), pp. 17-20; Stephen Wise, *Drawing the Line: Science and the Case for Animal Rights* (Cambridge MA: Perseus Books, 2002), pp. 144-54. The legal protection of endangered species supplies additional reason to question the claim that the State may not protect other lives at the expense of normatively human beings. Protecting endangered species often imposes great costs on human beings, thereby demonstrating that the lives of non-human beings can in some circumstances outweigh weighty human interests. See, e.g., *TVA v. Hill*, 437 U.S. 153, 172 (1978), holding that the Endangered Species Act “require[s] the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million” to ensure “the survival of a relatively small number of three-inch fish among all the countless millions of species extant.”

member of those species has far greater capabilities than a pre-viable fetus. On the other hand, no dolphin or chimpanzee can match the fetus's innate potential to develop the full capabilities of a mature human being. If we are prepared to grant great intrinsic value to members of other intelligent species, we should assign at least as much value to pre-viable fetuses.

For argument's sake, however, let's assume that the State cannot claim an overriding interest in protecting non-human beings while continuing to assume that the pre-viable fetus is not normatively human. Even on these assumptions, it does not follow that the pre-viable fetus can appropriately be classified as a non-human being. On the contrary: whereas every other living being that is not presently a human being will *never* be a human being, the fetus's own nature impels it to *become* a human being. The fetus is *sui generis*: it is the one and only living being that is *not-yet-human* rather than *non-human* because it is in the process of becoming human. Moreover, this process is driven by the fetus itself: that is what it means to say that its nature is to become human. It therefore seems incumbent upon us to assign *greater* value to the nascently human pre-viable fetus than we would to any non-human animal.

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

Once we attempt to specify these capabilities, the weakness of this argument becomes apparent. Given that *Roe* and *Casey* (as well as public opinion) effectively recognize the viable fetus as a new, normatively human being, it cannot be argued that being normatively human requires the already developed abilities to speak, reason, or

exhibit more than the most rudimentary awareness.¹⁷⁹ Unlike, say, a newly implanted embryo, the viable fetus is fully formed, and many of its organs (such as its heart and kidneys) are already functioning. But that describes the pre-viable second-trimester fetus as well. What distinguishes the viable fetus from fetuses earlier in the second trimester is primarily its more advanced lung and brain development. Because there is nothing distinctively human about our lungs, whereas consciousness, cognition, language, and emotion are seated in our “big brains,” it is not surprising that some defenders of the viability line have tried to turn it into a proxy for brain development.¹⁸⁰ The difficulty with that move is that the brain development that is crucial for *viability* is the brain’s ability to maintain homeostasis, rather than its ability to support higher-order activities such as awareness and thought.¹⁸¹

Nevertheless, by viability the fetus’s cerebral cortex has developed sufficiently that it may have periods of alertness and be capable of responding to music or human voices.¹⁸² Yet these capabilities, divorced from the viable fetus’s potential for further development, seem less impressive than those of many wild and domestic animals.¹⁸³ As Kent

¹⁷⁹ Because newborn infants also lack these abilities, the argument in text does not turn on whether the threshold for becoming normatively human is set at viability or full term.

¹⁸⁰ See, e.g., Rubenfeld, *supra* n86 at 623-24. Others have proposed that the right to elective abortion should end when the fetus becomes capable of organized cortical brain activity. See Boonin, *supra* n112 at 116-29, arguing that, even erring on the side of caution, this capability does not occur prior to the twentieth week.

¹⁸¹ This is confirmed by the fact that profoundly retarded human beings can live for many years.

¹⁸² See Boonin, *supra* n112 at 110-11, 128, arguing that “organized cortical brain activity” probably first occurs between twenty-five and thirty-two weeks of gestation; cf. “The Science, Law, and Politics of Fetal Pain Legislation,” *Harvard Law Review* 115 (2002): 2014, observing that fetuses “can respond to sound from 20 weeks and discriminate between different tones from 28 weeks,” quoting Vivette Glover & Nicholas M. Fisk, “Fetal Pain: Implications for Research and Practice,” *British Journal of Obstetrics & Gynecology* 106 (1999): 882.

¹⁸³ See Singer, *supra* n77 at 150-51.

Greenawalt has suggested, “If the great majority of babies never developed capacities beyond those that newborn babies have, and the members of this majority were identifiable at birth,” it is unlikely that “*all* newborn babies would be regarded as having the inherent worth of developed human beings.”¹⁸⁴ It seems accurate to say, therefore, that when we treat the viable fetus (or the full-term infant) as a normatively human being, we must be giving greater weight to its “potential” to further develop its rudimentary capabilities than to those capabilities as they then are. And if this is so, consistency requires us to give equally great weight to the “potential” of the pre-viable fetus, which currently lacks those rudimentary capabilities, but whose future development will gradually perfect them.

This point can be generalized: we value every biologically human life – whether that of a viable fetus, an infant, or an adult – not only for its present capabilities but also for the continued development and future life that still lies ahead of it. At least in the cases of fetuses and young children, the lion’s share of what we value is their inherent, self-directed “potential” to continue developing and live a full human life. If the fetus is aborted before viability, it will never realize its potential to become normatively human and will have been deprived of a “future like ours.”¹⁸⁵ For that reason, even assuming the validity of *Roe*’s holding that the State cannot claim normatively human status for pre-viable fetal life, the State should be able to assign great value to the fetus beginning at conception and to assert an interest in protecting the pre-viable fetus that is almost as great as its interest in protecting the viable fetus or the full-term infant.

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

I have argued that, even accepting *Roe*’s characterization of the pre-viable fetus as “potential human life,” the State’s interest in protecting that life is almost on a par with the State’s interest in viable fetal life, which *Roe* and *Casey* hold outweighs the woman’s interest in terminating her unwanted pregnancy. The next step in the analysis is to

¹⁸⁴ Greenawalt, *supra* n106 at 132.

¹⁸⁵ Marquis, *supra* n175 at 192.

discuss the nature of the woman's interests at stake and the weight they should receive. A woman who is legally required to carry her pregnancy to term must endure both the prenatal burdens of continued pregnancy and childbirth and the post-natal burdens of raising her child or relinquishing it to be raised by others. *Roe* and *Casey* make plain that the woman's specially protected liberty encompasses her interests in avoiding both the pre- and post-natal burdens, and thus both must figure in an interest-balancing analysis.

The burdens of pregnancy and childbirth are serious and invasive even when the pregnancy is wanted. The common ones include faintness, nausea and vomiting, tiredness, insomnia, shortness of breath, tender breasts, constipation, frequent need to urinate, backache, edema of the feet, leg cramps, varicose veins, hemorrhoids, mastitis, dry skin, irritability, depression, loss of sexual desire, weight gain, the often severe pain of labor if delivery is vaginal, and the risks, pain, and scarring of a C-section if it is not.¹⁸⁶ Moreover, as Donald Regan points out, these "pains and discomforts...are likely to be significantly aggravated when the entire pregnancy is unwanted."¹⁸⁷

For some women, choosing abortion may simply be a matter of avoiding the physical and emotional burdens of pregnancy and childbirth. But very often the phrase "unwanted pregnancy" is a euphemism for "unwanted *child*"--that is, a child the woman is unwilling (or unable) to raise after it is born. Unsurprisingly, *Roe* treated the burdens of child-raising as an important part of the case for recognizing that the woman's liberty to choose to terminate her pregnancy is encompassed by the "right of privacy."¹⁸⁸ An unwanted pregnancy, the Court said, "may force upon the woman a distressful life and future," in which her "health may be taxed by child care," she may experience "the distress...associated with the unwanted child," and she may have to wrestle with "the problem of bringing a child into a family

¹⁸⁶ Donald H. Regan, "Rewriting *Roe v. Wade*," *Michigan Law Review* 77 (1979): 1579-81.

¹⁸⁷ *Ibid.* at 1582.

¹⁸⁸ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

already unable, psychologically and otherwise, to care for it.”¹⁸⁹ Similarly, *Casey*’s account of abortion liberty stresses both the burdens of pregnancy and the life-altering importance of the woman’s decision to accept or reject our culture’s “vision of the woman’s role” – that is, motherhood, which traditionally includes child-rearing as well as child-bearing.¹⁹⁰ The burdens of motherhood, in turn, include both the expense of raising a child and the curtailment of the mother’s freedom. Like the burdens of pregnancy, they are presumably harder to bear when the child is unwanted.

Oddly, neither *Roe* nor *Casey* discusses the fact that the laws of every State give the woman an alternative way to avoid child-rearing: after giving birth, she can formally relinquish her parental rights, in which event her child will be cared for by adoptive or foster parents.¹⁹¹ Perhaps the omission is explained by the fact that most women are extremely reluctant to relinquish their newborn children even if they were initially unwanted.¹⁹² When *Roe* was decided only twenty percent of *single* mothers put their children up for adoption, and that percentage has since declined.¹⁹³ As Reva Siegel suggests, several factors work in tandem to make adoption an unattractive alternative: “A woman is likely to form emotional bonds with a child during pregnancy; she is likely to

¹⁸⁹ *Ibid.*

¹⁹⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

¹⁹¹ See Nancy D. Polikoff, “The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?” in *Santa Clara Law Review* 36 (1996): 389: “Every State provides some irrevocable mechanism for both biological parents to relinquish their legal status.”

¹⁹² Although the Court made no mention of the raise-or-relinquish dilemma, its allusion to “the distress” associated with the unwanted child may be a veiled reference to it.

¹⁹³ In 1973, roughly twenty percent of unwed mothers placed their children up for adoption. By 1982, that figure had fallen to twelve percent. Jack Darcher, “Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees,” *Seattle Journal of Social Justice* 8 (2010): 732. Even if, as seems likely, a significant subset of unwed mothers may have wanted their pregnancies, the generalization in text would still be warranted.

believe that she has moral obligations to a born child that are far greater than any she might have to an embryo/fetus; and she is likely to experience intense familial and social pressure to raise a child she has borne.”¹⁹⁴ When women *do* relinquish their infants, they frequently grieve for years over their separation from them.¹⁹⁵ Moreover, whether she raises or relinquishes the unwanted child, the child’s father or members of her family may disagree with her decision, which may adversely affect her relationships with them.

In sum, the woman who is pregnant with an unwanted child finds herself in this situation: the very fact that she does not want the child makes the burdens of pregnancy and childbirth harder to bear, and once she gives birth she must either accept the multi-faceted burdens of raising her newborn child, or the emotional and relational burdens of relinquishing it. A pre-viability abortion enables her to avoid these heavy and long-lasting burdens by terminating her pregnancy and ending the life of the pre-viable fetus.

C. *Casey*’s Murky Interest-Balancing Standard

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

¹⁹⁴ Reva Siegel, “Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection,” *Stanford Law Review* 44 (1992): 372; see also Kyle Wier, “Promoting Adoption as a Solution to Teen Pregnancy: A Study and Model,” *Journal of Law and Family Studies* 5 (2003): 320, stating that teenage mothers are deterred from adoption by “family dynamics, peer pressure, organizational funding, counseling/educational practices, ‘system’ avoidance trends, and notions of ‘responsibility’.”

¹⁹⁵ See Anne B. Brodzinsky, “Surrendering an Infant for Adoption: The Birthmother Experience in *The Psychology of Adoption*, ed. David M. Brodzinsky & Marshall D. Schechter (New York NY: Oxford Univ. Press, 1990), pp. 300-06, describing the intense and often long-lasting grief many birth mothers experience after giving up a child for adoption.

of “reasoned judgment”?

Dissenting in *Casey*, Justice Scalia objected that *Casey*’s interest-balancing approach ultimately turns on “a value judgment” that, insofar as it is not dictated by constitutional text or tradition, simply cannot be “determine[[d]...as a legal matter.”¹⁹⁶ Scalia’s point is axiomatic if the Court’s role is confined to determining and enforcing value judgments that are authoritatively embedded in the Constitution or anchored in our traditions. But if we assume, as *Casey* does, that the Due Process Clause authorizes the Justices to adopt new value judgments in order to define the scope of the liberty it substantively protects, then the Court must either make that value judgment as *it* thinks best, or else adopt a standard that the *State*’s value judgment against elective abortions must satisfy.

Casey is silent on this score – understandably so, given its failure to address the merits of the interest-balancing judgment on which it re-established the right to elective abortion. Justice Souter’s concurring opinion in *Glucksberg*, however, glosses *Casey* by adopting a requirement that the State’s value judgment not be *arbitrary*. Like the *Casey* joint opinion, Souter’s concurrence invoked Justice Harlan’s famous description of substantive due process as including “a freedom from all substantial arbitrary impositions and purposeless restraints” and as recognizing “that certain interests require particularly careful scrutiny of the State needs asserted to justify their abridgment.”¹⁹⁷ But whereas the *Casey* Court had no occasion to operationalize Harlan’s account of substantive due process, Justice Souter argued that it should be applied as follows:

¹⁹⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 982 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Scalia also objected that *Roe* had arrived at its decisive value judgment—that “the human fetus is in some critical sense merely potentially human”—in a highly unreasonable way, “begging the question...by assuming that what the State is protecting is the mere ‘potentiality of human life’” (ibid.). Scalia did not explain whether, in his view, the Court could have arrived at the requisite value judgment in a way that *would* qualify as a “reasoned judgment.”

¹⁹⁷ Compare ibid. at 848-49, quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961), with *Washington v. Glucksberg*, 521 U.S. 702, 765-66 (1997) (Souter, J., concurring in the judgment).

The weighing or valuing of contending interests...is only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of State and individual.... It is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.¹⁹⁸

Under the Harlan/Souter approach, the Court should recognize a right to elective abortion only if the State's interest in protecting pre-viable fetal life is "so far from being commensurate with" the woman's interest in an elective abortion that it falls outside "the zone of what is reasonable" and is thus arbitrary.¹⁹⁹ As an original matter, a State law prohibiting elective abortions should readily satisfy this version of interest-balancing scrutiny. It would be eminently reasonable and far from "arbitrary" for a State to decide that the good achieved by saving the life of a fetus that will naturally become a human being and a person outweighs the heavy burdens its mother must bear while she is pregnant and after she gives birth.

Whether or not the *Casey* plurality would have adopted this standard had it reached the question, a powerful argument can be made that the Court *should* do so when it applies *Casey*'s interest-balancing methodology. The right to elective abortion is an unenumerated right that lacks the "deeply rooted" grounding in the Anglo-American legal tradition that the Court has often required in substantive due process cases²⁰⁰ and that its subsequent decision in *Glucksberg* took to be its "established method."²⁰¹ In departing from that method, *Casey* adopted the most plausible alternative methodology for judicial recognition of such rights: interest balancing, which, whatever its drawbacks, at least prompts the Court to engage in a serious inquiry into the strength of the competing State and individual interests, and to articulate the reasons

¹⁹⁸ *Glucksberg*, 521 U.S. at 768.

¹⁹⁹ See *ibid.*

²⁰⁰ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting) (collecting cases).

²⁰¹ *Glucksberg*, 521 U.S. at 720-21, opinion of the court.

why one outweighs the other. The *Glucksberg* Court declined Justice Souter's invitation to adopt interest-balancing as its general method in substantive due process cases, arguing that its tradition-centered approach is superior because it "tends to rein in the subjective elements that are necessarily present in due process judicial review" and "avoids the need for complex balancing of competing interests in every case."²⁰² Strikingly, however, both of *Glucksberg's* criticisms of interest-balancing apply with greater force to de novo interest-balancing – in which the Court decides which interest it finds more weighty – than to interest-balancing that is tied to a standard of arbitrariness. As Souter explained, the requirement that the statute be shown to be arbitrary before being declared unconstitutional is an important constraint that helps ensure that the Court is engaged in "constitutional review, not

²⁰² *Ibid.* at 722. *Glucksberg* could be read more aggressively, as confining *Casey's* interest-balancing methodology to the right to elective abortion, thereby implying that new reproductive-rights claims must be subjected to *Glucksberg's* tradition-centered methodology. See, e.g., Paulsen, *supra* n25, at 1557-60, arguing that *Glucksberg* repudiates *Casey's* methodology. Cutting back on *Casey* in this way would have effects similar to those of a holding that, under *Casey's* interest-balancing methodology, the State's interest in protecting the pre-viable fetus outweighs the woman's interests in aborting it. But, even though this is a possible reading of *Glucksberg*, it is unlikely that today's Court would adopt it—particularly after having in *Obergefell* rejected *Glucksberg's* applicability to claims involving, inter alia, "marriage and intimacy" (*Obergefell*, 135 S. Ct. at 2602). *Obergefell* aside, *Glucksberg* does not claim that *Casey* was wrong to rationalize the right to elective abortion in interest-balancing terms. Instead, it argues that *Casey* did not adopt a new general approach to unenumerated-rights claims that would supplant *Glucksberg's* tradition-centered approach (*Glucksberg*, 521 U.S. at 722). Moreover, *Casey* did not re-affirm *Roe solely* because of *stare decisis*; it also relied on the Court's "explication" of the woman's liberty interests in an elective abortion, 505 U.S. 833, 853 (1992), which implies that State interference with those particular interests triggers categorical interest-balancing scrutiny. Both of the examples discussed in the Introduction involve statutes that burden one of the interests protected by the right to elective abortion: the woman's interest in ensuring the death of the fetus lest it become a child she must raise or relinquish to be raised by others. One would predict, therefore, that the Court will apply *Casey's* interest-balancing methodology to those (and similar) reproductive-rights issues.

judicial lawmaking.”²⁰³ As for “complex balancing,” an arbitrariness standard enables the Court to avoid making finely calibrated judgments in all those cases in which the legislature’s resolution falls within “the zone of what is reasonable.”²⁰⁴

Thus, as between *de novo* interest-balancing and interest-balancing subject to an arbitrariness standard, *Glucksberg* suggests that *Casey* should be interpreted as authorizing only the latter, less subjective mode of heightened scrutiny. Nevertheless, because *Casey* contains no indication to this effect and because the Court’s recent decision in *Obergefell* employs a “reasoned judgment” approach without explicitly invoking a standard of arbitrariness,²⁰⁵ I will assume that *Casey* calls for a *de novo* interest-balancing approach. That makes it considerably harder to argue that the interest-balancing question we are considering should be resolved in favor of the State’s interest in protecting fetal life. In my view, the initial descriptions I have provided of the competing interests strongly suggest that the balance tips in the State’s favor, but I recognize that others could reasonably disagree. In an attempt to break the impasse, I will next present two thought experiments, followed by an argument that re-frames the interest-balancing analysis in terms of the woman’s overall reproductive liberty. Part IV will then argue that history and tradition powerfully confirm that the State’s interest in protecting pre-viable fetal life outweighs the woman’s interest in an elective abortion.

²⁰³ *Glucksberg*, 521 U.S. at 768 (Souter, J., concurring in the judgment).

²⁰⁴ *Ibid.*

²⁰⁵ See *Obergefell*, 135 S. Ct. at 2598. *Obergefell*, however, can readily be seen as resting on an implicit finding of arbitrariness. *Obergefell*’s holding that the Constitution requires States to recognize same-sex marriages is based on (1) the importance to same-sex couples of the liberty to marry and the magnitude of the burdens the inability to marry imposes on them and any children they may have (*ibid.* at 2599-602) and (2) the Court’s conclusion that the States failed to establish that recognizing same-sex marriages would occasion *any* harm to same-sex couples, third parties, or “the institution of marriage” (see *ibid.* at 2606-07). Given these premises, it seems undeniable that the State’s “justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrar[[y].” *Glucksberg*, 521 U.S. at 768 (Souter, J., concurring in the judgment).

D. Two Thought Experiments

The familiar Rawlsian “veil of ignorance” heuristic²⁰⁶ suggests that the interest of the fetus in its future life and development outweighs the woman’s interest in terminating her pregnancy and ensuring that the fetus does not develop further. Behind the veil of ignorance, knowing that we would be conceived but not knowing whether we would be aborted, would we prefer a rule prohibiting elective abortion or not? Any of us might be born as a woman and would be at risk of bearing the heavy burdens of an unwanted pregnancy. But the risk of not being born at all, and thus forfeiting the human life each of us could have lived if not aborted, would trump that downside.

The obvious objection to my use of the veil of ignorance is that it assumes, contrary to *Roe* and *Casey*, that we who are choosing the rules of our society behind the veil are persons, not merely fetuses. On the contrary: the assumption is that we, as persons who might be born into our society, but who also might be aborted before we become persons, are choosing whether abortion should be permitted or prohibited. The alternative is a conjurer’s trick, in which only those who know that they will be born rather than aborted are allowed, behind the veil of ignorance, to vote on whether elective abortion should be legal for women in our society. No doubt some would still oppose the practice on moral or altruistic grounds, but if we are simply voting our risk-averse self-interest we would prefer the regime of legalized abortion. The only way to internalize the harms to fetuses, and thereby be in a position intuitively to compare them to the benefits to women, is to run the thought experiment as I have suggested.²⁰⁷

²⁰⁶ See John Rawls, *A Theory of Justice* (Cambridge MA: Harvard Univ. Press, 1971), pp. 136-41.

²⁰⁷ Rawls’s *A Theory of Justice* antedates *Roe* and does not address the question of abortion. In later work, Rawls evaluated the legal treatment of abortion from the standpoint of persons who have already been born. See John Rawls, *Political Liberalism* (Cambridge MA: Harvard Univ. Press, 1993), p. 243 n32. Yet, as Walter Murphy argues, “(1) Questions about the value of human life and when it begins are more politically (and morally) significant than allocations of property; and, therefore, (2) the veil of ignorance should obscure the vision of decision makers so that, when constructing their basic constitutional order, none of them would know whether he or she would be

To lay the foundation for the next thought experiment, I must make a modest claim about the relative weight of the life of a pre-viable fetus and the life of a normatively human being. Although the life of the fetus is significantly less valuable because it is only “potential human life,” their values are of the same order of magnitude. *By assumption, then, the life of a pre-viable fetus is at least one-tenth as valuable as the life of a normatively human being (that is, any one of us).* Although I cannot demonstrate the truth of this claim, my submission is that the account of the fetus presented earlier--as new, biologically human life whose nature is to become normatively human--more than justifies this estimate of the value of pre-viable fetal life.

Now imagine that a pandemic virus emerges that triggers an autoimmune reaction in any pregnant woman whose pregnancy is terminated artificially and that 1 in 10 (ten percent) of cases this reaction will be fatal (i.e., in the other ninety percent of cases the symptoms will be mild). Putting aside the possibility that States could (and would) constitutionally prohibit elective abortions under these circumstances to protect maternal health, how many pregnant women who would otherwise opt for abortion would still do so when it unavoidably exposed them to a ten percent risk of death? I do not predict that the answer would be “none,” but it seems clear that in contemporary America the answer would be “very few.” We can infer from these hypothetical revealed preferences that the burdens imposed on women by a law prohibiting elective abortions are, in the vast majority of cases, more than an order of magnitude smaller than the value they attach to their own lives. If so, they must also be less weighty than the value of a pre-viable fetal life.

E. The Right to Elective Abortion as a Component of the Right to Decide Whether to Bear or Beget a Child

among the born or the aborted.” Walter F. Murphy, “Transitions to Constitutional Democracy and the Fate of Deposed Despots,” *Denver University Law Review* 81 (2003): 437 n72; cf. Luke M. Milligan, “A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process,” *Brigham Young University Law Review* 87 (2007): 1228: “The right to abortion, when juxtaposed with the current set of legal protections afforded fetuses, is politically and morally unsustainable from a Rawlsian perspective.”

Consider next an illuminating reframing of the interest-balancing analysis. To this point, the argument has assumed that unwanted pregnancies are a given, and consequently that by prohibiting elective abortions the state imposes weighty pre- and post-natal burdens on unwilling mothers. *Casey* reminds us, however, that the right to elective abortion can be seen as one branch of a broader right to decide “whether to bear and beget a child.”²⁰⁸ The other branch, of course, is the right to use contraception.²⁰⁹ As *Casey* points out, abortion provides fallback protection against having an unwanted child “in the event that contraception should fail.”²¹⁰ But the fact is that even if the right to elective abortion were overruled – and even if, contrary to all expectations, the States universally enacted legislation prohibiting elective abortions – women’s liberty to decide “whether to bear and beget a child” would remain quite robust. Contraception prevents millions of unwanted pregnancies per year in the United States, and if the right to elective abortion did not exist, it would prevent substantially more. Women (and men) would seek to avoid the heavy burdens of unwanted pregnancies by taking greater contraceptive precautions—a task made easier by the incremental improvements in the efficacy and safety of some contraceptive methods since *Roe*.²¹¹ These precautions would not always succeed, but they would very often succeed, and the result would be a much smaller reduction in women’s average reproductive liberty than a static analysis suggests.

It is true, as Jed Rubenfeld observed in an important pre-*Casey* discussion of this issue, that all methods of contraception have some failure rate, that roughly half of women who have abortions report using some form of contraception during the month when they became pregnant, and that women who are very young, poor, or ill-informed are

²⁰⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 859 (1992); see also *Carey v. Population Services, International*, 431 U.S. 678, 685 (1977).

²⁰⁹ See *Casey*, 505 U.S. at 852.

²¹⁰ *Ibid.* at 856.

²¹¹ See Louise Tyrer, “Introduction of the Pill and Its Impact,” *Contraception* 59 (Issue 1 Supp. 1 (1999): 11S-16S, describing improvements in the efficacy and safety of the birth-control pill since its introduction in 1960.

less likely to “employ contraception effectively.”²¹² But there is an obvious solution to the failure-rate problem: use *two* methods. (For example, using a method that has a five-percent failure rate in conjunction with an independent method that has a ten-percent failure rate yields a net failure rate of half a percent.) The high rate of women who have abortions despite using some form of contraception is inflated by the availability of elective abortion: if abortion were unavailable, many of them would use contraception more consistently,²¹³ or reduce their levels of sexual activity.²¹⁴ And it is quite clear that were the constitutional right to elective abortion overturned, advocates of family planning would redouble their efforts to empower young, poor, or ill-informed women to make more effective use of contraceptives.

Nor is better contraception the only available strategy. Episodic abstinence is another – and one that, over time, is not mutually exclusive of using contraception²¹⁵ – and in a State that banned elective abortions the practice of abstinence would increase. For those who have concluded that they do not wish to have more (or any) children, sterilization provides yet another option.²¹⁶

²¹² Rubinfeld, *supra* n86 at 629.

²¹³ See Josephine Jacobs & Maria Stanfors, “State Abortion Context and U.S. Women’s Contraceptive Choices, 1995-2010,” *Perspectives on Sexual and Reproductive Health* 47 (2015): 71, women who lived in States with more restrictive abortion laws were more likely to use highly effective contraceptives.

²¹⁴ See Jonathan Klick, “Econometric Analyses of U.S. Abortion Policy: A Critical Review,” *Fordham Urban Law Journal* 31 (2004): 764, “The most clear-cut finding of these econometric studies of the relationship between abortion policy and sexual behavior is that individuals, even young individuals whose sexual behavior is often considered to be driven more by emotion than by calculation, are sensitive to the costs of their sexual activity. When those costs increase, as predicted by the law of demand, individuals engage in less risky sex.”

²¹⁵ The probability that a woman will become pregnant over a given time interval (for example, a year) is a function both of the failure rate of whatever contraceptive she (or her partner) uses and of the frequency with which she has sexual intercourse.

²¹⁶ Sterilization is among the most widely used methods of contraception. See William D. Mosher and Jo Jones, *Use of Contraception in the United*

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

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

The obvious objection to this proposed re-framing of the interest-balancing analysis on which the validity of the right to elective abortion depends is that the Court in *Casey* viewed abortion as a practically indispensable fallback for women whose efforts at contraception are ineffective.²¹⁷ Granted, once a woman is pregnant, neither contraception, nor sexual abstinence, nor sexual substitution will help her avoid the burdens of an unwanted pregnancy. But the line of cases from *Griswold* to *Casey* is ultimately about the freedom of women and men to have non-procreative sexual intercourse, and the factors that I have described have made the right to elective abortion substantially less important in ensuring that freedom than when *Roe* was decided. *Casey* contains no holding that would preclude the Court from taking account of that fact

States: 1982-2008 (Washington, D.C.: U.S. Department of Health & Human Services, 2010), p. 7, stating from 2006 through 2008, of women “currently using a method of contraception,” 16.7% of those aged fifteen through forty-four and 6.1% of their male partners used sterilization as a method of contraception.

²¹⁷ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 853 (1992), describing the predicament of the woman who has become pregnant “perhaps despite her attempts to avoid it”; *ibid.* at 856, describing individuals’ “reliance on the availability of abortion in the event that contraception should fail.”

in evaluating the strength of the woman's interest in an elective abortion.

IV. Supports from the Legal Tradition

We turn now from “reasoned judgment” apart from history and tradition to “reasoned judgment” as informed by them. The joint opinion in *Casey* entirely ignored the history of abortion in Anglo-American law (including *Roe*'s version of that history).²¹⁸ Instead, *Casey* focused on the life-changing character of the woman's decision about whether or not to have an abortion, which it describes as one of “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,”²¹⁹ and on the burdens and sacrifices inherent in becoming a mother.²²⁰ Nevertheless, in applying *Casey*'s interest-balancing methodology and “reasoned judgment” standard, the Court is free to re-examine that history for whatever light it sheds on the competing interests at stake. *Casey*'s reliance on *stare decisis* is no obstacle to that inquiry: “*stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history.”²²¹

Under *Casey*'s “reasoned judgment” approach, the right to elective abortion is justified provided that the woman's interest in an elective abortion outweighs the State's interest in protecting the pre-viable fetus. The question at hand is what role, if any, history and tradition should play in that interest-balancing inquiry. Given that the *Casey* joint opinion makes no mention of the history of Anglo-American abortion

²¹⁸ *Casey* does rely on the “tradition” of judicial opinions that employ “reasoned judgment” in deciding substantive due process claims (505 U.S. at 849), and its account of the woman's liberty invokes “the tradition of the precedents...granting protection to substantive liberties of the person” (ibid. at 853). *Roe* aside, however, those precedents do not speak to whether the woman's liberty interest outweighs the state's interest in protecting the pre-viable fetus. Beyond that, as Nelson Lund and John McGinnis have suggested, such “bootstrapping” reliance on a tradition that is attributable to the Court's own decisions does not establish a longstanding tradition in the sense called for by *Glucksberg*. See Lund & McGinnis, supra n13 at 1610-11.

²¹⁹ *Casey*, 505 U.S. at 851.

²²⁰ Ibid. at 852.

²²¹ *Wallace v. Jaffree*, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting).

law, one might infer that the *Casey* majority thought that history was simply irrelevant. But this inference is fallacious, because the *Casey* majority did not engage in an interest-balancing analysis of the right to elective abortion on the merits. *Casey*'s history-free explication of the specially protected character of the woman's liberty to decide whether to terminate her pregnancy implies that support in historical tradition is not *necessary* to trigger heightened interest-balancing scrutiny of State restrictions on that liberty. It does not follow, however, that the weight the Anglo-American legal tradition has given to the competing State and individual interests would have been irrelevant had the *Casey* Court undertaken an interest-balancing analysis of the right to elective abortion. On the contrary, under *Casey*'s methodology, history and tradition provide important evidence the Court will evaluate in arriving at its own "reasoned judgment."

That this is so can be inferred, once again, from *Glucksberg*.²²² Two of *Casey*'s co-authors – Justice O'Connor and Justice Kennedy – joined Chief Justice Rehnquist's majority opinion, which declared that the Court's "established method of substantive-due-process analysis" asks whether an asserted right or liberty interest is "deeply rooted in this Nation's history and tradition" and refused to replace it with *Casey*'s interest-balancing approach.²²³ By contrast, Justice Souter, relying on *Casey* and on Justice Harlan's famous dissenting opinion in *Poe v. Ullman*,²²⁴ argued for an across-the-board "reasoned judgment" approach involving "close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value."²²⁵ As Souter's formulation makes plain, although the interest-balancing approach he advocated does not treat tradition as a *sine qua non*, it emphatically includes an examination of history and tradition.²²⁶ Similarly, Harlan argued – in

²²² *Washington v. Glucksberg*, 521 U.S. 702 (1997), holding that there is no fundamental right to commit suicide with another's assistance.

²²³ *Ibid.* at 720-21.

²²⁴ 367 U.S. 497, 542-44 (1961) (Harlan, J., dissenting).

²²⁵ *Glucksberg*, 521 U.S. at 769 (Souter, J., concurring in the judgment).

²²⁶ See *ibid.* at 764, stating that the "clashing principles" whose legislative

language *Casey* quoted approvingly – that the Court’s substantive due process judgments must conform to “the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”²²⁷ Indeed, I am not aware that *any* Justice has expressed the view that history and tradition are irrelevant in deciding whether to recognize an unenumerated right.²²⁸ It seems clear, then, that by re-establishing the right to elective abortion on the foundation of an interest-balancing judgment, *Casey*’s co-authors did not intend to suggest that this judgment should be arrived at without reference to history and tradition.

Under *Glucksberg*’s tradition-centered methodology, of course, it is quite clear that the right to elective abortion would not qualify as a *fundamental* substantive due process right.²²⁹ Although the *Roe* Court claimed that Anglo-American women enjoyed substantial liberty to elect

resolution is evaluated in substantive due process review are “to be weighed within the history of our values as a people.”

²²⁷ *Poe*, 367 U.S. at 542; see also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992), quoting this language.

²²⁸ See *supra* n68 and accompanying text.

²²⁹ Notwithstanding its inconsistency with *Lawrence v. Texas*, 539 U.S. 558 (2003), *Glucksberg* has remained good law in the sense that the lower courts have generally adhered to the “deeply rooted in tradition” test when evaluating new substantive due process claims. See Brian Hawkins, “Note: The Glucksberg Renaissance: Substantive Due Process since *Lawrence v. Texas*,” *Michigan Law Review* 105 (2006): 411-12. Justice Kennedy’s opinion for the Court in *Carhart II*, which cited *Glucksberg* and did not refer to *Lawrence*, led some observers to predict that *Glucksberg*’s approach would become the rule and *Lawrence*’s more free-wheeling approach the exception. See Steven G. Calabresi, “Substantive Due Process after *Gonzales v. Carhart*,” *Michigan Law Review* 106 (2008): 1518. Kennedy’s subsequent majority opinion in *Obergefell*, however, makes clear that *Lawrence* (recast in the form of *Obergefell*’s version of “reasoned judgment”) is now controlling precedent, at least in cases involving “marriage and intimacy.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). Strikingly, however, although the majority opinion in *Obergefell* treats contraception as a fundamental right and an exemplar of “intimate choices that define personal identity and beliefs” (*ibid.* at 2597), it is utterly silent about the right to elective abortion.

abortion prior to the late nineteenth century,²³⁰ it did not dispute that by the time of the adoption of the Fourteenth Amendment, the overwhelming majority of American States had criminalized abortion throughout pregnancy under almost all circumstances and continued to do so for well over a century.²³¹ That undeniable fact enabled Justice Rehnquist to argue cogently in dissent that “the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”²³²

In *Casey* Chief Justice Rehnquist renewed that argument as part of the case for overruling *Roe*.²³³ By declining to characterize the right to elective abortion as fundamental, however, the *Casey* majority avoided much of the force of this criticism. *Casey*’s message is that the right to elective abortion arises because the woman’s liberty to terminate her pregnancy, even if not sufficiently rooted in tradition to qualify as fundamental, should nevertheless enjoy special protection in the form of categorical interest-balancing scrutiny. In considering history and tradition under *Casey*, therefore, the question is not whether the right to elective abortion satisfies *Glucksberg*’s “deeply rooted” standard. Rather, the question is what history and tradition teach about the relative value our society has attached to the woman’s interest in avoiding the burdens of an unwanted pregnancy and the State’s interest in protecting the life of the pre-viable fetus.

This brings us to the crucial point: if *Roe*’s history of abortion law were factually and legally accurate, it would arguably support a

²³⁰ See *Roe v. Wade*, 410 U.S. 113, 140 (1973), asserting that “at common law, at the time of the adoption of our Constitution, and throughout the major portion of the nineteenth century,” American women had a “right to terminate a pregnancy” in “the early stage of pregnancy, and very possibly without such a limitation.”

²³¹ See *ibid.* at 174-75 (Rehnquist, J., dissenting): “By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by State or territorial legislatures limiting abortion.”

²³² *Ibid.* at 174, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

²³³ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 952-53 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

judgment that the Anglo-American legal tradition attached greater weight to the pregnant woman's interest in an elective abortion than to the State's interest in protecting pre-viable fetal life. *Roe's* history of Anglo-American abortion law includes three key claims that lend credence to that conclusion: (1) that the Anglo-American legal tradition had for centuries given women greater liberty to have legal abortions (at least prior to quickening, and perhaps even thereafter) than they enjoyed under nineteenth-century statutes such as the Texas law struck down in *Roe*;²³⁴ (2) that the primary purpose of the restrictive nineteenth-century abortion laws was to protect *women* from the grave health dangers of elective abortions in an era without antibiotics and antiseptics, rather than to protect fetal life; and (3) that the unborn are not "persons" within the meaning of the Fourteenth Amendment.²³⁵ Taken together, these propositions suggest that our legal tradition placed the woman's interests in an abortion above the State's interest in protecting prenatal life.

Standing alone, the adoption of the strict nineteenth-century statutory prohibitions on elective abortion throughout pregnancy is not enough to dictate a contrary judgment. If the common law long permitted elective abortion throughout much of pregnancy, if both the criminal law and the Fourteenth Amendment treated fetal life as qualitatively less valuable than normatively human life, and if even the nineteenth-century statutes were primarily intended to protect women from abortion-related health hazards that modern medicine has virtually eliminated, the tradition as a whole might well support an inference that the woman's interest in an elective abortion outweighs the State's interest in protecting the pre-viable fetus. It is therefore necessary to examine whether *Roe's* characterization of the Anglo-American legal tradition is accurate.

²³⁴ *Roe*, 410 U.S. at 140.

²³⁵ See *ibid.* at 157-58, explaining that the Court's analysis of the Fourteenth Amendment, "together with our observation...that throughout the major portion of the nineteenth century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." As the quoted language indicates, *Roe's* Fourteenth Amendment holding rests in part on its historical conclusion that women enjoyed substantial abortion liberty prior to the late nineteenth century.

As we will see, *Roe*'s history of abortion law is rife with serious errors and fallacious inferences. That said, a comprehensive counter-presentation of the history of Anglo-American abortion law would require a full article of its own.²³⁶ My treatment here will necessarily be selective, focusing on those issues that are most directly relevant to the key question: on the whole, does the Anglo-American legal tradition imply that the woman's interests in an elective abortion outweigh the State's interest in protecting the fetus until it becomes viable late in the second trimester?

A. *Roe*'s Claim about a Substantial Abortion Liberty at Common Law

According to *Roe*, the common law allowed abortion early in pregnancy and very possibly even after quickening, thereby indicating that the woman's interest in an elective abortion outweighs the protection of early fetal life.²³⁷ Post-quickening abortion, if a crime at all, was not homicide at common law, but "at most, a lesser offense."²³⁸ Moreover, many of the American statutes enacted in the first half of the nineteenth century followed the common law in being "lenient" with pre-quickening abortion.²³⁹ Thus, for most of our history, women enjoyed substantial liberty to have elective abortions, from which we can infer that our tradition valued their interests more highly than the lives of pre-viable fetuses.

This account is wildly inaccurate. To begin with, *Roe* was wrong to suggest that there was any doubt about whether abortion after quickening was a crime at common law.²⁴⁰ Coke and Blackstone, whose

²³⁶ Joseph Dellapenna has written a landmark book on this and related topics. See Dellapenna, *supran66*. My critique of *Roe*'s history is deeply indebted to his indispensable work.

²³⁷ 410 U.S. at 134.

²³⁸ *Ibid.*

²³⁹ *Ibid.* at 139.

²⁴⁰ Moreover, since *Roe*, Philip Rafferty and others have discovered a number of early English criminal abortion cases that show that even pre-quickening abortion was a crime in medieval times. See Philip Rafferty, *Roe v. Wade: The Birth of a Constitutional Right* (U.M.I. Dissertation Abstracts, 1992) (No. LD02339), pp. 163-74; see also Dellapenna, *supran66* at 134-43.

influence on early American courts and lawyers was unparalleled, both declared unequivocally that post-quickening abortion was a crime (though by their times no longer a felony).²⁴¹ As Joseph Dellapenna has shown, even before Coke, the English courts “entertained no doubts regarding the criminality of abortion,”²⁴² and Coke’s authority ensured that abortion was “well established” as a common law crime by the late seventeenth century.²⁴³

Roe’s treatment of the common law’s reception in the United States compounded its mischaracterization of the English common law. According to *Roe*, it was “doubtful that abortion was ever firmly established as a common-law crime” in the United States even after quickening.²⁴⁴ “Apparently,” *Roe* claimed, “all the reported cases” in which an American court stated that abortion of a quick fetus was a crime were “dictum,” supposedly on account of “the paucity of common-law prosecutions.”²⁴⁵ Missing from this account is any acknowledgment that no American court ever suggested – *in dictum* or otherwise – that abortion after quickening was not a crime at common law. As for the statements of appellate courts affirming that post-quickening abortion was a crime, they were *rationes decidendi*, not *dicta*: the courts ruled that pre-quickening abortion was *not* a common law crime based on their understanding of the reason why post-quickening abortion *was* such a crime. Taking as their starting point Blackstone’s pronouncement that “life...begins in contemplation of law as soon as an infant is able to stir in the mother’s womb,”²⁴⁶ American courts defined the common law crime as abortion of a fetus after

²⁴¹ See William Blackstone, *Commentaries* *129; Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (William S. Hein & Co. reprint ed. 1986 [1644], p. 50.

²⁴² See Dellapenna, *supra* n66 at 201-02 (footnotes omitted).

²⁴³ *Ibid.* at 200; see also *ibid.* at 204 n158, collecting and describing indictments and convictions for abortion in seventeenth-century England.

²⁴⁴ 410 U.S. at 136.

²⁴⁵ *Ibid.*

²⁴⁶ Blackstone, *supra* n241 at *129.

quickening.²⁴⁷

Roe was also wrong to attribute the paucity of common law prosecutions for post-quickening abortion to uncertainty about the very existence of the common law offense.²⁴⁸ There is no evidence that an American court ever rejected a common law indictment for post-quickening abortion as legally insufficient. Early American prosecutions for post-quickening abortion have been documented in at least five colonies (Connecticut, Delaware, Maryland, Rhode Island, and Virginia),²⁴⁹ as have trials and presentments in several States in the late eighteenth and early nineteenth centuries.²⁵⁰ And if prosecutions were indeed uncommon, that is attributable to the difficulty of obtaining a conviction at a time when it was often impossible to prove that the fetus had quickened or that its death resulted from abortion rather than natural causes.²⁵¹

The fact that the common law protected all quickened fetuses – and explicitly did so on the ground that they were living human beings – demonstrates that the State’s interest in protecting fetal life was thought to outweigh the woman’s interest in an elective abortion long before viability.²⁵² Nevertheless, one might argue, the common law’s failure to criminalize pre-quickening abortions shows that *Roe* was substantially correct in claiming a tradition of abortion liberty *early* in pregnancy (when the overwhelming majority of abortions are performed nowadays). This inference is fallacious on both practical and legal grounds. The practical barriers to what the *Roe* Court wishfully imagined to have been pre-1850 abortion liberty were enormous. Prior to the development of the first crude pregnancy tests in the early twentieth century, a woman could not know she was pregnant until she

²⁴⁷ See, e.g., *Commonwealth v. Parker*, 50 Mass. (1 Met.) 263 (1845).

²⁴⁸ See *Roe*, 410 U.S. at 136.

²⁴⁹ See Dellapenna, *supra* n66 at 228.

²⁵⁰ See, e.g., *ibid.* at 264-66, 269 on Virginia and Connecticut.

²⁵¹ See *ibid.* at 437.

²⁵² Quickening usually occurs between the sixteenth and eighteenth week of gestation. See *Roe*, 410 U.S. at 132. Prior to the twentieth century, fetal viability would not have occurred prior to the twenty-eighth week.

felt the fetus move.²⁵³ Even if she risked a possibly needless abortion in the belief that she was pregnant, every available abortion method was extremely dangerous,²⁵⁴ and none of them were reliable until the late nineteenth century.²⁵⁵ Thus, the liberty *Roe* posits was almost entirely illusory in practice.

On the legal side, there were compelling difficulties with criminalizing pre-quickening abortion. Prior to quickening, it would frequently have been impossible to prove that the woman had actually been pregnant.²⁵⁶ Beyond that, insofar as the quickening rule expressed

²⁵³ The so-called “rabbit test” for detecting human chorionic gonadotropin in a woman’s blood to establish pregnancy was not developed until 1927 and yielded frequent false results until the 1960s. Dellapenna, *supra* n66 at 191.

²⁵⁴ *Ibid.* at 332-33. The dangers of intrusion methods in an era without anesthesia, antiseptics, or antibiotics are self-evident. Ingestion methods were also highly dangerous, as well as less effective than intrusion ones. In the 1800s (as throughout history), women ingested a wide range of dangerous substances that were believed to cause abortions, the vast majority of which were ineffective—and the remainder of which worked by poisoning both mother and fetus. See *id.* at 37-51. Modern techniques for inducing labor involve the intravenous administration of oxytocin (or synthetic oxytocin, i.e., pitocin), a hormone that was not discovered until 1909 and first used by physicians to stimulate labor in 1911. Louisa Dalton, “Oxytocin,” *Chemical & Engineering News* at <http://pubs.acs.org/cen/coverstory/83/8325/8325oxytocin.html> (last visited Nov. 24, 2015).

²⁵⁵ Dellapenna, *supra* n66 at 230, 333. As Dellapenna shows, prior to the eighteenth century, the only generally available abortion methods involved ingesting poisons or physically assaulting the woman’s body in ways designed to kill the fetus. See *ibid.* at 230-37. Ingestion methods sometimes succeeded, but generally did so not by inducing premature labor, but “by so debilitating the woman (often through attacks on her lower digestive tract) that she could no longer sustain the pregnancy” (*ibid.* at 43).

²⁵⁶ See *ibid.* at 432-33. A similar evidentiary rationale underlies the much-misunderstood common law “born-alive” rule, which held that the killing of an unborn child was homicide only if the child was born alive and subsequently died from its prenatal injuries. As Clarke Forsythe has shown, “at common law the rule was entirely an evidentiary standard, mandated by the primitive medical knowledge and technology of the era, and...in its origin was never intended to represent any moral judgment on the criminality of killing an unborn child *in utero.*” Clarke D. Forsythe, “Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms,” *Valparaiso University Law Review* 21

a judgment about fetal life, that judgment stemmed from widely held beliefs that the fetus began to live when it began to move, and that it began to move when its mother could feel it moving.²⁵⁷ The theory was not that early fetal life was unworthy of legal protection – it was that the fetus was not alive (or at least, not known to be alive). Not until the nineteenth century was it established that the fetus begins to move many weeks before its mother can detect its movements and that it is a living, biologically human organism from conception on.²⁵⁸ Interpreted in light of subsequent embryological discoveries, the rationale behind the quickening rule arguably supports a ban on abortions either after the eighth week, when fetal movement begins, or at any time after conception, when fetal life begins.²⁵⁹ What it obviously does *not* support is a judgment that the woman’s interest in elective abortion outweighs the State’s interest in protecting pre-viable fetal life.

B. *Roe*’s Claim about Nineteenth-Century Statutes

Roe erred again in intimating that the primary (if not the sole) “original purpose”²⁶⁰ of the restrictive nineteenth-century abortion statutes was to protect the pregnant woman by “restrain[ing] her from submitting to a procedure that placed her life in serious jeopardy” in that pre-antiseptic, pre-antibiotic era.²⁶¹ Although the “serious jeopardy” that *Roe* refers to was all too real, this account of the statutes’ “original purpose” has matters backwards. To see why, it is necessary to begin with two developments that *Roe* ignores but that drove nineteenth-

(1987): 564.

²⁵⁷ See Dellapenna, *supra* n66 at 257-58.

²⁵⁸ *Ibid.*

²⁵⁹ See Michael Stokes Paulsen, “The Plausibility of Personhood,” *Ohio State Law Journal* 74 (2013): 28, pointing out this ambiguity.

²⁶⁰ *Roe v. Wade*, 410 U.S. 113, 151 (1973).

²⁶¹ *Ibid.* at 149. *Roe* refrains from expressly endorsing this characterization of the restrictive nineteenth-century statutes, which it attributes to “[p]arties challenging state abortion laws” (*ibid.* at 151). Instead, *Roe* summarizes the case for that characterization, asserts that there is scholarly and case law support for it, and mentions no evidence or argument to the contrary. See *ibid.* at 151-52. That treatment can fairly be read as an implicit--albeit cautious--endorsement.

century American legislatures to replace the common law with statutes criminalizing abortion throughout pregnancy. The first was technological: the gradual spread and refinement throughout the nineteenth century of “intrusion” abortion methods that would reliably terminate a pregnancy and the resulting increase in the incidence of abortion.²⁶² The second was scientific: the discovery in the early nineteenth century of sperm, ova, and mammalian fertilization, which “led to a new consensus among scientists on the nature of human gestation.”²⁶³ Gradually, physicians and the educated public became aware that conception meant the union of sperm and egg, and with it the formation of a new organism that would in time become a child. Thus, during the same decades when abortion was becoming reliably efficacious for the first time, the scientifically recognized view that the life of a new human organism begins at conception was eclipsing the quickening view.

The legislative reaction to these developments--criminalizing abortion from the outset of pregnancy--leaves no doubt that not only pre-viable but pre-quickening fetuses were then viewed as entitled to legal protection from abortion. By the time the Fourteenth Amendment was ratified, thirty of the thirty-seven states had enacted abortion statutes, and twenty-seven of those statutes prohibited abortion before as well as after quickening.²⁶⁴ Contrary to *Roe*'s claim that “[m]ost of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening,”²⁶⁵ twenty of the thirty-seven “punished all abortion equally regardless [of] the stage of pregnancy.”²⁶⁶ Thus, at the time of the adoption of the Fourteenth Amendment, the predominant view was that protecting fetal life outweighed the woman's interests in an elective abortion *throughout* pregnancy.

The fact that abortions remained very dangerous throughout the nineteenth century undoubtedly contributed in some measure to the overwhelming success of the mid-century campaigns for more restrictive

²⁶² See Dellapenna, *supra* n66 at 332-33.

²⁶³ *Ibid.* at 259-60.

²⁶⁴ *Ibid.* at 315.

²⁶⁵ *Roe*, 410 U.S. at 139.

²⁶⁶ Dellapenna, *supra* n66 at 315-16.

abortion laws.²⁶⁷ But although prominent advocates of restrictive abortion laws often argued that abortion endangered the life of the woman as well as took the life of the unborn child,²⁶⁸ they “always advanced the protection of fetal life as the primary reason for the statutes.”²⁶⁹ The design of these statutes reflected the same focus on protecting fetal life. By the time of the adoption of the Fourteenth Amendment in 1868, many state statutes (1) provided for enhanced punishment if it were proven that an attempted abortion caused the death of the fetus,²⁷⁰ (2) declared abortions causing the death of the fetus to be manslaughter,²⁷¹ (3) referred to the fetus as a “child,”²⁷² and (4) prohibited attempted abortions only if performed on a pregnant woman.²⁷³ None of these provisions is concerned with maternal health and safety, and each of them bespeaks an intent to protect fetal life.

²⁶⁷ Because the health risks of abortion were even greater than those of pregnancy and childbirth throughout the nineteenth century, one cannot rule out the possibility that some States would have adopted less restrictive statutes had abortion been as safe as (or safer than) pregnancy over that time-span. But the fact that restrictive nineteenth-century abortion laws typically passed by overwhelming margins, *see* James S. Witherspoon, “Re-examining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment,” *St. Mary’s Law Journal* 17 (1985): 69, coupled with the evidence that protecting fetal life was the primary goal of the anti-abortion movement, strongly suggests that legislation criminalizing *elective* abortion throughout pregnancy would have prevailed even under these circumstances.

²⁶⁸ See Dellapenna, *supra* n66 at 368.

²⁶⁹ *Ibid.* at 297.

²⁷⁰ Witherspoon, *supra* n267 at 36. In many States, the maximum prison term for attempted abortion exceeded one year, and in many States, the maximum prison term for abortion resulting in the death of the fetus was five years or greater. *See ibid.* at 53 n70, listing statutory punishment ranges.

²⁷¹ *Ibid.* at 42-44.

²⁷² *Ibid.* at 48.

²⁷³ *Ibid.* at 56. Generally speaking, it would have been as dangerous to perform an attempted abortion on a non-pregnant woman as on a pregnant one. To give a woman poison to drink is equally dangerous whether or not she is pregnant, and to invade her uterus, in an era without antisepsis or antibiotics, opens a pathway to infection whether or not she is carrying a fetus.

The statutes' overriding concern with protecting fetal life is apparent even with regard to the limited circumstances in which they *permitted* abortions. Rather than authorizing abortion whenever it would have been safer for the mother than continued pregnancy and childbirth, the nineteenth-century statutes almost universally authorized abortion only when necessary to save the *life* of the mother – a narrower exception presupposing that fetal life outweighs maternal health.²⁷⁴ *Roe* itself recognized as much in characterizing the theory on which Texas defended its statute (which dated to 1857)²⁷⁵: “Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail.”²⁷⁶

To bolster the theory that the overriding concern of nineteenth-century abortion statutes was to protect the lives and health of pregnant women, *Roe* intimated (1) that there is an “absence of legislative history” supporting the view that protection of fetal life was a purpose of restrictive abortion laws,²⁷⁷ (2) that “[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State’s interest in protecting the woman’s health rather than in preserving the embryo and fetus,”²⁷⁸ and (3) that in many states “the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.”²⁷⁹ Only the third of these contentions is true, and on closer examination it proves to be entirely consistent with a judgment in favor of fetal life.

As James Witherspoon has shown, the legislative histories of several abortion statutes indicate that they were enacted in response to the efforts of state medical societies urging that the fetus is a living human being entitled to legal protection throughout pregnancy.²⁸⁰ The

²⁷⁴ See *ibid.* at 45-46.

²⁷⁵ See *Roe v. Wade*, 410 U.S. 113, 119 & n.3 (1973).

²⁷⁶ *Id.* at 150.

²⁷⁷ *Id.* at 151.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ Witherspoon, *supra* n267 at 65. Even *Roe* acknowledged that the “anti-abortion” attitude of “the medical profession” in the late nineteenth century

comparatively full legislative history of the 1867 Ohio statute confirms that the legislators themselves shared this fetal-protective view. The committee report on the statute argued that “[p]hysicians have now arrived at the unanimous opinion that the foetus in utero is alive from the very moment of conception,”²⁸¹ and the legislature specified the same range of punishment for abortion killing the fetus at any stage of pregnancy as for abortion killing the mother.²⁸²

Roe’s claim that the “few State courts” to address the issue focused on the State’s interest in protecting women rather than fetuses is also demonstrably false. As Joseph Dellapenna has shown, the *only* case *Roe* cited for that proposition – the New Jersey Supreme Court’s 1858 decision in *State v. Murphy*²⁸³ – acknowledged that New Jersey’s common law made abortion a crime in order to protect the fetus, while opining that its 1850 abortion statute *supplemented* the common law by adding protection for the woman.²⁸⁴ Furthermore, Dellapenna identifies at least “17 other nineteenth-century decisions...indicat[ing] that the protection of fetal life as well as the health of the mother was a purpose of their state’s recently adopted abortion statutes.”²⁸⁵

“may have played a significant role in the enactment of stringent criminal abortion legislation during that period” and was based on the view that the fetus constitutes new human life worthy of legal protection throughout pregnancy. *Roe*, 410 U.S. at 141-42.

²⁸¹ Witherspoon, *supra* n267 at 62-63. Only after making the case against “child-murder” did the committee discuss the dangers abortion posed to women (*ibid.* at 63).

²⁸² *Ibid.* at 64.

²⁸³ *New Jersey Law Journal* 27 (1858): 112.

²⁸⁴ Dellapenna, *supra* n66 at 286-87, discussing *Murphy*, *New Jersey Law Journal* 27 (1858): 114.

²⁸⁵ *Ibid.* at 286 & n198 (collecting cases). If one includes twentieth-century State court decisions, the number is even greater. See Paul Benjamin Linton, “*Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court,” *St. Louis University Public Law Review* 13 (1993): 110 & nn35-36, collecting “thirty-one decisions from seventeen jurisdictions expressly affirming that their nineteenth-century statutes were intended to protect unborn human life, and twenty-seven other decisions from seventeen additional jurisdictions strongly implying the same”).

Contra *Roe*, the failure of many states to hold pregnant women criminally responsible for abortions to which they consented does not support an inference that abortion law was not concerned with protecting the fetus. As Dellapenna argues, the lenient treatment of women served to *protect* fetal life by making it easier to convict abortionists – a result for which the woman’s testimony was usually essential. If the woman’s conduct in agreeing to an abortion was illegal, she was an accomplice of the abortionist, and “then as now, a criminal could not be convicted by the uncorroborated testimony of an accomplice.”²⁸⁶ To be sure, many nineteenth-century courts and legislatures also treated women as victims rather than criminals, in recognition of the grave risks abortion posed to them and the presumably urgent reasons that would have impelled them to run those risks.²⁸⁷ But that lenience reflected a judgment that abortionists were far more culpable than pregnant women, not that fetal lives were unworthy of protection. In fact, as abortion gradually became less dangerous, a surprising number of states made it a crime for a woman to seek or agree to an abortion.²⁸⁸

C. Fourteenth Amendment Personhood and the Value of Fetal Life

Notwithstanding *Roe*’s holding to the contrary, several scholars, including Philip Rafferty, James Witherspoon, and most recently Michael Paulsen, have forcefully argued that at least from quickening on, and possibly throughout pregnancy, the unborn *are* Fourteenth Amendment persons.²⁸⁹ If so, the state’s interest in protecting the pre-viable fetus manifestly outweighs the woman’s interest in an elective abortion.²⁹⁰ (*Roe* even suggests that, so interpreted, the Amendment would *compel* the states to criminalize abortion throughout

²⁸⁶ Dellapenna, *supra* n66 at 300.

²⁸⁷ *Ibid.* at 298.

²⁸⁸ *Ibid.* at 298 & n295, noting that nineteen States ultimately made a woman’s participation in an abortion a crime.

²⁸⁹ See Paulsen, *supra* n259; Rafferty, *supra* n240 at 226-50; Witherspoon *supra* n267.

²⁹⁰ See *Roe v. Wade*, 410 U.S. 113, 156-57 (1973): “If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.”

pregnancy.²⁹¹) For present purposes, however, it is unnecessary to take up this complex and momentous question. Even if *Roe*'s holding that the unborn are not Fourteenth Amendment persons is correct, that holding does not entail an interest-balancing judgment adverse to pre-viability prohibitions on elective abortions.

For one thing, *Roe* itself held that the State's interest in *viable* fetal life outweighs the woman's interests in an elective abortion. But viable fetuses are no less "unborn" than pre-viable ones and thus equally non-persons within the meaning of the Fourteenth Amendment. Therefore, the fact that pre-viable fetuses are not Fourteenth Amendment persons does not foreclose the possibility that the State could have an overriding interest in protecting their lives. The *Roe* Court acknowledged as much when, after ruling against Texas on the Fourteenth Amendment personhood issue, it explained that "[t]his conclusion...does not of itself fully answer the contentions raised by Texas" and proceeded to address the State's alternative claim that "life begins at conception."²⁹²

Moreover, *Roe* and its defenders fail to consider *why* the framers of the Fourteenth Amendment would have chosen not to categorize the unborn as persons (if in fact that was their intent). In light of the historical evidence I have already summarized, the answer cannot possibly be that they thought Anglo-American law afforded the unborn only minimal protection from abortion. Given what *Roe* conceded to be "[t]he anti-abortion mood prevalent in this country in the late 19th century,"²⁹³ it would be equally fanciful to suggest that they *intended* to deprive the unborn of the legal protections that they already enjoyed. Nor, given the absence of any discussion in Congress about the status of the unborn under the Amendment, is it credible that the framers had any inkling that it might deprive them of those protections.²⁹⁴

²⁹¹ See *ibid.* at 157 n54.

²⁹² *Ibid.* at 159.

²⁹³ *Ibid.* at 141.

²⁹⁴ See *ibid.* at 177 (Rehnquist, J., dissenting), inferring from the absence of any "question concerning the validity" of the numerous restrictive State abortion laws in existence in most States "when the Fourteenth Amendment was adopted" that "the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."

Why, then, did the framers not unambiguously *include* the unborn as Fourteenth Amendment persons, thereby entitling them to due process and equal protection, and eliminating the risk of erroneous interpretation that eventually materialized in *Roe*? Because including the unborn would have constitutionalized a set of legal issues that lay within the traditional domain of State law and as to which there was absolutely no reason to think that federal intervention was necessary.²⁹⁵ When the Amendment was ratified, no less than “when the Constitution was adopted[,] the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.”²⁹⁶ A similar understanding prevailed with regard to the general criminal law, including offenses against the person.²⁹⁷ Abortion law, which lies at the intersection of family law and criminal law, was thus quintessentially a matter for the states. Federalizing these issues would have seemed not only radical, but superfluous: when the Amendment was adopted, most States had recently revised their criminal laws in the direction of even *greater* protection for the unborn than they enjoyed at common law, and the law of property treated the unborn child as if it were already “in being” for all purposes from which it might benefit.²⁹⁸

²⁹⁵ This argument does not depend on determining just what the framers of the Amendment would have thought those issues were. It suffices that an Amendment explicitly classifying the unborn as persons would have restricted the States’ discretion with regard to the legal treatment of fetuses, and might well have imposed affirmative obligations on the States to protect them. The framers would not have wanted to “go there” and would have seen no need to do so.

²⁹⁶ *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930); see also *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013): “[R]egulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States’,” quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

²⁹⁷ See *Engle v. Isaac*, 456 U.S. 107, 128 (1982): “The States possess primary authority for defining and enforcing the criminal law.”

²⁹⁸ *Hall v. Hancock*, 32 Mass. (1 Pick.) 255, 257-58 (1834): “[In] cases of descents, devises and other gifts...a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered.” Notwithstanding this rule, *Roe* asserted that property law did not recognize the unborn as “persons in the whole sense”

Under these circumstances, the exclusion of the unborn from Fourteenth Amendment personhood, if in fact intended, was meant to leave their juridical status and the extent of their legal protection through the criminal law where it had always been – with the States.²⁹⁹

D. The Anglo-American Legal Consensus that Pre-Viable Fetal Life Should Be Protected by the Criminal Law

Roe famously declined to “resolve the difficult question of when life begins,” on the ground that “[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”³⁰⁰ As *Roe*’s own history enables us to see, however, for centuries there *was* a consensus in Anglo-American law and culture that human life begins not later than quickening, when the fetus can be perceived by its mother to be moving.³⁰¹ One widely held rationale for this position was that the

because “[p]erfection of the interests involved...has generally been contingent upon live birth,” *Roe*, 410 U.S. at 162 (majority opinion). The short answer to this contention is that an unborn child who died before birth could not possibly “benefit” from being indefeasibly vested in a property interest.

²⁹⁹ See Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (New York NY: Encounter Books, 2013), p. 113, asserting that “from colonial times,” the States used “their traditional police powers” to “protect the unborn child” through the common law of crimes, torts, and property.

³⁰⁰ *Roe*, 410 U.S. at 159.

³⁰¹ As *Roe* describes it, from the various theological, philosophical, and legal views on when human life begins, “[a] loose consensus evolved in early English law that [the fetus became formed and animated] at some point between conception and live birth” (ibid. at 133). There was disagreement about precisely when this occurred. *Roe* mentions three candidates: when the fetus becomes recognizably human (roughly the eighth week), mediate animation (supposedly “40 days for a male and 80 days for a female”), and quickening (roughly the sixteenth week) (ibid. at 132-34). The upshot, according to *Roe*, was that “Bracton focused upon quickening as the critical point,” and “[t]he significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country” (ibid. at 134). Although *Roe* does not draw the inference, we can: there was a “loose consensus” not only that human life begins before birth, *but that it begins no later than*

fetus should be accorded the status of new, fully human life as soon as it could be determined to be alive.³⁰² When combined with the scientific discovery of fertilization in the early nineteenth century, this rationale led a great many people to embrace the theory that new human life begins at conception.³⁰³ Whether or not that theory ever achieved consensus status, it was an important stratum in a broader Anglo-American consensus from roughly 1840 to 1960, holding that the unborn were entitled to *legal* protection against abortion from the earliest stages of pregnancy. That consensus also included those who, recognizing that conception marked the beginning of new, biologically human life, believed all post-conception life to be worthy of legal protection even if full personhood attaches at some later point in human development.³⁰⁴

*quicken*ing, and the common law accordingly criminalized abortions after that point in gestation.

³⁰² Michael Paulsen argues convincingly that this was Blackstone's view. See Paulsen, *supra* n259 at 26-28; see also Linton, *supra* n285 at 103: "Both the English common law, as received by the American colonies, and the abortion statutes enacted by state legislatures in the nineteenth century, sought to protect unborn human life to the extent that contemporary medical science could establish the existence of that life."

³⁰³ Dellapenna, *supra* n66 at 463.

³⁰⁴ Paulsen asserts that "[t]he distinction that some posit today--and that was an inarticulate premise of *Roe*--between biological human life and legal personhood is a recent, post-modern philosophical distinction alien to both the scientific and legal worldview of the eighteenth and nineteenth centuries." Paulsen, *supra* n259 at 27 (footnote omitted). I agree that this distinction, which corresponds to the one I have drawn between biologically and normatively human life, was less commonly invoked in the nineteenth century. But it clearly had some following at that time, both among proponents of restrictive abortion laws, see *Mills v. Commonwealth*, 13 Pa. 631, 632 (1850), holding that the common law crime of abortion may be committed "[t]he moment the womb is instinct with embryo life," on the ground that "[i]t is not the murder of a living child, which constitutes the offence, but the destruction of gestation, by wicked means and against nature"), and among likely skeptics of such laws, see *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16 (1884) (Holmes, J.), rejecting a wrongful death claim by the administrator of a child who was born alive, but prior to viability, on the ground that the fatal injury had been "transmitted from the actor to a person through his own organic substance, or through his mother, *before he became a person*" (emphasis added).

By the time of the adoption of the Fourteenth Amendment, this consensus had found expression in laws making abortion unlawful throughout pregnancy in the overwhelming majority of States, unless the pregnancy endangered the mother's life.³⁰⁵ These laws unmistakably implied that the woman's interest in an elective abortion was outweighed by the State's interest in pre-viable fetal life.³⁰⁶ For purposes of substantive due process interest-balancing, *that* consensus should

³⁰⁵ By 1868, thirty of the thirty-seven States prohibited abortion by statute, twenty-seven of these States extended the prohibition to pre-quickening abortions, and twenty (a majority) punished abortions equally before and after quickening. Dellapenna, *supra* n66 at 315-16. Moreover, "the statutes were passed unanimously or nearly so" (*ibid.* at 462).

³⁰⁶ Mark Graber has argued that these laws were weakly enforced, or enforced only against women who could not obtain abortions from private physicians, and that the apparent consensus expressed in "abortion law on the books" was thus belied by "abortion law in action." Mark Graber, *Rethinking Abortion* (Princeton NJ: Princeton Univ. Press, 1996), p. 39. Space does not permit me to address this issue in depth, but two brief responses are in order. First, the Court's assessment of our legal tradition has often assigned considerable weight to the laws on the books without inquiring into the vigor or consistency with which they were enforced. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 710-16 (1997), describing our tradition of longstanding prohibitions on suicide and assisted suicide without inquiring into enforcement practices. This makes good sense because it is frequently impossible to determine with any accuracy the extent to which particular laws were enforced throughout our history (let alone the degree to which possible under-enforcement is attributable to societal tolerance of the conduct in question rather than to competing prosecutorial priorities, difficulties of proof, or other factors). Abortion laws are a case in point. See Dellapenna, *supra* n66 at 532: "[A]ny assertion about the overall frequency or success of the efforts to detect and prosecute criminal abortion [[during the period from 1875 to 1945] remains largely speculative." Second, although abortion has always been a challenging crime to prove (see *ibid.* at 533), "prosecutions for illegal abortions occurred in every decade in every major metropolitan area throughout the nineteenth and first half of the twentieth century" (*ibid.* at 532). Moreover, the revocation of medical licenses provided an important additional mode of enforcement against physician-abortionists, one that was more likely to succeed than a criminal prosecution because it required a lesser burden of proof (*ibid.* at 535-36). In short, "abortion law in action" *did* serve to reduce the incidence of abortion and thereby to protect fetal life, although its "overall success" in doing so remains uncertain (and debatable).

carry far greater weight than the absence of a consensus (then or now) among physicians, philosophers, and theologians on when normatively human life or “personhood” begins.

It is no answer to this argument that American law (common and statutory) did not place the unborn on a completely equal footing with those who were born alive and thus unquestionably persons. Although this observation is correct, it is also beside the point. I am not arguing that the Anglo-American legal tradition has always expressed a consensus that normatively human life begins at conception. How could it have, when the nature of “conception” was not understood until well into the nineteenth century? Beyond that, even after quickening, the common law did not take the position that the fetus is a human being whose life was entitled to exactly the same legal protections the criminal law accorded to persons born alive.³⁰⁷ According to Blackstone, even the ancient common law treated abortion as manslaughter, not murder, and by his time post-quickening abortion had become a misdemeanor rather than a felony at common law. These differences in treatment cannot be explained as a matter of leniency to the woman, because they ensured leniency to the *abortionist*. And the classification of abortion as a misdemeanor seems facially inconsistent with the theory that the fetus was a full-fledged person in the eyes of the law as soon as it was known to be alive. On the other hand, it is entirely consistent with the position for which I have argued within the terms set by *Casey*: that the fetus is new, biologically human life that is *becoming* (if not already) normatively human, and that the state may accordingly protect it by criminalizing elective abortion.

Once it was discovered – and generally understood – that the fetus is alive beginning at conception, Anglo-American law greatly increased the protection accorded to fetal life. The common law was gradually replaced, in both England and the United States, by statutes that criminalized abortion throughout pregnancy, treated it as a felony, and typically imposed severe prison sentences on the abortion provider. Even then, however, only a few States classified abortion as murder

³⁰⁷ See Reva B. Siegel, “Siegel, J., Concurring” in *What Roe v. Wade Should Have Said*, supra n14 at 63, 80: “Criminal abortion statutes enacted in the past century have *not* regulated abortion as murder.”

(though a number did restore the common law's original severity by treating it as manslaughter).³⁰⁸ Thus, it remained true that the lives of the unborn were not accorded the full legal protection extended by the law of homicide to those born alive. Nevertheless, nineteenth- and early twentieth-century American law incontrovertibly assigned greater weight to the protection of *all* pre-viable fetal life than to women's interests in obtaining elective abortions.

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

Still, might not the Court give even greater weight to the more recent history of abortion in American law, which saw about one third of American states liberalize their abortion laws in the decade before *Roe* was decided?³⁰⁹ Anyone familiar with Justice Kennedy's substantive due process opinions for the Court in *Lawrence v. Texas* and *Obergefell v. Hodges* must acknowledge that this is a very real possibility.³¹⁰ Yet even if those pre-*Roe* developments were given great weight, that would not alter the historical bottom line. *Roe* itself relied far more heavily on

³⁰⁸ See Witherspoon, *supra* n267 at 44: "[S]eventeen States and the District of Columbia at some time had a statute denominating acts causing the death of an unborn child 'manslaughter,' 'murder,' or 'assault with intent to murder.'" Because the unlawful killing of a human being is an element of the crime of manslaughter, the statutes designating abortion as manslaughter imply that fetuses are human beings throughout pregnancy. Yet the lesser culpability – and, generally, the lesser penalties – associated with manslaughter as compared with murder arguably suggest a legislative judgment that the lives of the fetuses are not of equal value with the lives of human beings who have been born.

³⁰⁹ See *Roe v. Wade*, 410 U.S. 113, 139-40 (1973).

³¹⁰ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015): "[C]hanged understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process"; *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003): "[O]ur laws and traditions in the past half century are of most relevance...."

its flawed theory that the Anglo-American legal tradition gave women extensive abortion liberty prior to the late nineteenth century than on the post-1960 trend toward liberalization³¹¹ – *because that trend lent virtually no support to a right to elective abortion*. The vast majority of the recently liberalized State abortion statutes did not recognize a right to elective abortion. Fourteen States, following the template set out in the Model Penal Code,³¹² permitted pre-viability abortions only when “there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse.”³¹³ Only four States had true elective-abortion statutes permitting the woman to terminate her pregnancy for any reason in the first months of pregnancy.

Thus, as *Roe* explicitly acknowledged, in 1973 there was far *less* support for a right to elective abortion than *Roe* found (erroneously, as we have seen) in the early Anglo-American legal tradition’s failure to criminalize pre-quickening abortions.³¹⁴ When *Roe* was decided, a majority of the States still allowed abortions only to save the life of the mother, and the fourteen Model Penal Code jurisdictions allowed abortions only in three narrow categories in which the burdens of pregnancy on the woman were deemed extraordinarily great. And although four States had recently adopted elective-abortion statutes, attempts to legalize elective abortion had been rejected in several others.³¹⁵ The legal consensus that had emerged in the United States

³¹¹ *Roe*, 410 U.S. at 140.

³¹² See *ibid.* at 140 n37, collecting statutes adopting “some form of the ALI statute.”

³¹³ *Doe v. Bolton*, 410 U.S. 179 app. at 205 (1973), quoting *Model Penal Code* §230.3(2) (American Law Institute, 1962).

³¹⁴ *Roe*, 410 U.S. at 140: “It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century...a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”

³¹⁵ In the early 1970s, bills repealing restrictive abortion laws were defeated in Illinois, Maine, Ohio, and North Dakota, see David J. Garrow,

once the nature of conception was understood – that the State’s interest in protecting fetal life outweighs the woman’s interest in an elective abortion, even in the first trimester of pregnancy – remained remarkably intact, until the Court demolished it in *Roe*.

Conclusion

Under *Casey*, the right to elective abortion rests on an interest-balancing judgment that the woman’s specially protected interest in terminating her pregnancy outweighs the State’s interest in protecting the life of her pre-viable fetus. Yet, although *Casey*’s own methodology calls for doing so, the Court has never explained or defended that judgment on the merits. In *Roe*, the Court posited that the right to elective abortion was fundamental and consequently had no occasion to engage in direct interest-balancing. It sufficed to declare that the State’s interest was not compelling until viability. In *Casey*, three of the five Justices who joined the majority opinion re-affirming “*Roe*’s essential holding” declined to address the soundness of the interest-balancing judgment they derived from *Roe*. Instead, they insisted that this judgment survives, whether or not it is wrong as an original matter, by virtue of *Casey*’s “explication of individual liberty...combined with the force of *stare decisis*.”³¹⁶

Others have argued that Justices O’Connor, Kennedy, and Souter were wrong to conclude that *stare decisis* and related considerations of “institutional integrity” warranted re-affirming the right to elective abortion regardless of the soundness of the interest-balancing judgment on which it now rests.³¹⁷ This article has instead argued that that foundational interest-balancing judgment is unsound when evaluated on *Casey*’s own terms and using *Casey*’s own methodology and should therefore be relied on only when strictly required by *Casey*’s re-

Liberty and Sexuality (New York NY: Macmillan, 1994), pp. 495-96, and voters in Michigan and North Dakota rejected elective abortion referenda in 1972 (ibid. at 577).

³¹⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 853 (1992).

³¹⁷ For a powerful critique of *Casey*’s reliance on *stare decisis*, see Paulsen, supra n25 at 1543-67.

affirmation of *Roe*'s "essential holding." I have also suggested that Justice Kennedy should join forces with his conservative colleagues in an explicit ruling to that effect.³¹⁸ Doing so would not preclude those Justices who believe the right to elective abortion should be overruled from adhering to their position, any more than it would preclude other Justices (including Kennedy) from adhering to the view that *stare decisis* requires otherwise. Were a majority of the Justices to hold that the right to elective abortion is unsound in interest-balancing terms, the Court could coherently explain why *Casey*'s undue-burden test should give States broad leeway to regulate pre-viability abortions and why no additional reproductive rights should be recognized by analogy to the unsound – but entrenched – right to elective abortion. Moreover, a holding that the right to elective abortion fails *Casey*'s interest-balancing standard would back that interpretation of *Casey* with "the force of *stare decisis*," thereby making it more difficult for a future Court to reinstate the pre-*Casey* regime of strict scrutiny of pre-viability abortion regulations.³¹⁹

³¹⁸ Nothing in Justice Kennedy's opinion for the Court in *Obergefell* is inconsistent with this proposed holding. Like *Casey*, *Obergefell* includes a lengthy "exposition" of the importance of the liberty in question. Unlike *Casey*, *Obergefell* considers and rejects *on the merits* the state's claimed justification for restricting protected liberty, on the grounds that the State has failed to show that same-sex marriage will harm "third parties" or "marriage as an institution." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606-07 (2015). Prohibitions on elective abortion, by contrast, directly advance the State's interest in protecting "third parties" – fetuses – from the irreparable harm of premature death. Nor would a holding that this State interest outweighs the woman's interests in an elective abortion imply an answer to the interest-balancing question not reached in *Obergefell*: supposing a State *could* prove that same-sex marriage substantially harmed "third parties" or "the institution of marriage," would a ban on same-sex marriage still be unconstitutional?

³¹⁹ As matters stand now, *stare decisis* would pose no serious impediment to a return to *Roe*: there is ample pre-*Casey* authority employing *Roe*'s approach, see *Casey*, 505 U.S. at 926 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), and *Casey*'s undue-burden standard has been endorsed (rather than assumed for purposes of decision) by a majority of the Court on at most one occasion. See *Carhart I*, 530 U.S. 914, 921 (2000), characterizing the undue-burden standard as an "established principle."

The arguments this article has presented also provide an additional basis for challenging the validity of the right to elective abortion in the courts of legal academia and public opinion. In arguing that the right to elective abortion fails to withstand a *de novo* interest-balancing analysis, even on the assumption that the pre-viable fetus is only “potential human life,” I do not suggest that the other arguments commonly deployed against the right to elective abortion are wrong. This article neither affirms nor denies that *all* unenumerated substantive due process rights are bereft of any basis in the Constitution; that, if there is to be a category of unenumerated rights, it should include only those that meet *Glucksberg*’s “deeply rooted in tradition” standard; or that every fetus is a normatively human being from the time when fertilization is complete.

This article *does* argue that if the Due Process Clause is assumed to authorize the Court to recognize unenumerated rights that lack a “deeply rooted” pedigree, the “weighing or valuing of contending interests in this sphere [[should be] only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of State and individual.”³²⁰ Under that approach, proposed by Justice Souter in *Glucksberg*, the interest-balancing arguments I have presented should prevail unless the State’s interest is “so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied.”³²¹ I hope that some readers who remain inclined to think that the woman’s interest in an elective abortion is weightier will nevertheless agree that the State’s interest in the pre-viable fetus is not so greatly or clearly inferior as to fail this arbitrariness standard.

This article’s core thesis, however, does not depend on making interest-balancing more deferential to State regulation by means of an arbitrariness standard. On the contrary, this article argues that a careful evaluation of the conflicting interests leads to the conclusion that the State has an overriding interest in protecting the pre-viable fetus, understood (consistently with *Roe* and *Casey*) as a new, biologically

³²⁰ *Washington v. Glucksberg*, 521 U.S. 702, 768 (1997) (Souter, J., concurring in the judgment).

³²¹ *Ibid.*

human life that is naturally becoming normatively human. The woman has weighty interests in avoiding the pre- and post-natal burdens of an unwanted pregnancy, but those interests do not justify depriving the fetus of its future as a fully human being. Although this argument does not require recourse to history, it is fortified by the Anglo-American legal tradition's consistent insistence on protecting fetal life once that life could be shown to have begun – originally at quickening, and throughout pregnancy once the basic facts of embryology were discovered in the nineteenth century. Interest analysis and tradition both show that the State's interest in protecting "potential human life" outweighs even the heavy burdens a woman endures when she is required by law to carry an unwanted pregnancy to term. Accordingly, even if *stare decisis* prevents its abolition, the right to elective abortion should be confined to the parameters laid down in *Casey* and deprived of generative force in all other contexts involving state regulation that protects "postconception potential life."³²² Only if that is done will the Court make good on *Casey*'s commitment that "[t]he political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential."^{323,324,325}

³²² *Casey*, 505 U.S. at 859 (majority opinion).

³²³ *Carhart I*, 530 U.S. at 957 (Kennedy, J., dissenting); *see also Casey*, 505 U.S. at 871-73 (plurality opinion).

³²⁴ The author thanks former Dean Brad Saxton and Dean Jennifer Brown for research support, and to Laurie Feldman, Nelson R. Lund, participants in faculty workshops at Quinnipiac, and participants in the 2015 University Faculty for Life Conference at the University of St. Thomas School of Law, for helpful comments.

³²⁵ The article appeared in the *Notre Dame Law Review* 91 (2015): 691ff. It is here reprinted with permission.