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WYOMING FETAL RIGHTS—WHY THE ABORTION “ALBATROSS”¹ IS A BIRD OF A DIFFERENT COLOR: THE CASE FOR FETAL-FEDERALISM

I should like to know if taking this old Declaration of Independence, which declares that all men are equal upon principle, and making exceptions to it, where it will stop. If one man says it does not mean a Negro, why not another say it does not mean some other man? — President Abraham Lincoln²

[T]he word “person,” as used in the Fourteenth Amendment, does not include the unborn. — Justice Harry Blackmun³

Abortion is a subject which quickens the pulse of Americans like no other. What a particular Presidential candidate campaigns and says about abortion often becomes a determinative issue. Supreme Court nominees are grilled ruthlessly on CNN regarding their “views” on abortion.⁴ Protestors have sunk to levels of terror and intimidation by bombing and blockading abortion clinics and murdering clinic doctors, while abortion advocates spit and yell at anti-abortion proponents.⁵ Americans on both side of the issue are frustrated.⁶

With all the controversy surrounding the abortion issue, it must be questioned why this civil liberty issue is resolved and decided in the once hallowed halls of the United States Supreme Court.⁷ Arguably, the Supreme Court’s venture into abortion jurisprudence has

1. “Albatross” was the term for the abortion issue used by Professor John Hart Ely in his article, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 946-47 (1973) (predicting that *Roe* would be a lasting decision because state legislatures wanted to rid themselves of the “albatross” of the abortion issue). “Albatross” was also used by David J. Zampa in his article, *The Supreme Court’s Abortion Jurisprudence: Will the Supreme Court Pass the “Albatross” Back to the States?* 65 NOTRE DAME L. REV. 731 n.1 (1989) (predicting that the United States Supreme Court would use *Casey v. Planned Parenthood* to reverse *Roe v. Wade*, and thus return the abortion issue to the states).

2. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 500 (Roy P. Basler, ed., 1953).

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

4. *A Quota for Abortion Questions?*, N.Y. TIMES, Sept. 15, 1991, § 4 at 16.

5. Todd J. Gillman, *Vigil Held for Slain Florida Doctor*, DALLAS MORNING NEWS, March 13, 1993, at 32A; *Minnesota: Terry Attracis Counter-Demonstrators*, AM. POL. NETWORK, May 5, 1992 (Pro-choice demonstrator pushed and spit on abortion opponent); Claudia Rosenbaum, *Protests at Clinics get 307 Arrested*, WASH. TIMES, Jan. 24, 1993, at A1; Gene Warner, *Rescue Leaders Promise to Fight - Jail Doesn’t Deter Pastors from Anti-Abortion Work*, BUFFALO NEWS, Dec. 11, 1992, at 4 (Pro-Lifers want to welcome Clinton into office by predicting the increase of bombing and burning of abortion clinics in the coming year).

6. See, e.g., Thomas Sowell, *Judicial Policy-Makers Pander to Public at Expense of the Law*, ROCKY MOUNTAIN NEWS, Feb. 21, 1993 at 42.

7. *Id.*

corrupted both executive politics and the Supreme Court confirmation process.⁸ Many Americans disregard the important economic and foreign policy issues of a Presidential campaign and vote solely on the abortion issue.⁹ The predominant factor in confirming a Supreme Court nominee is the abortion issue, while other important areas of American jurisprudence are ignored. Surely a more competent and efficient forum exists in which to resolve the issue. In fact, that forum clearly does exist—state legislatures.¹⁰ Allowing the state legislatures to decide the abortion issue permits advocates from both sides to lobby and participate in the traditional political process.¹¹

The purpose of this comment is not to discuss whether abortion is or is not socially desirable. Rather, the objective of this comment is to explain why the United States Supreme Court is not the proper governmental body to settle this important issue. This explanation will be developed in a four-fold manner. First, the comment will show that fetuses¹² are currently entitled to various protections and rights

8. *Id.*

9. See *Catholic Bishops: Abortion Issue "Could Cause Cold War,"* AM. POL. NETWORK, Jan. 13, 1993 (stating that the Presidential campaign unambiguously identified itself with abortion rights); Laurence I. Barrett, *Abortion: The Issue Bush Hopes will Go Away*, TIME, July 13, 1992, at 28 (stating that one-third of citizens would vote for pro-choice politicians "regardless of the candidate's position on other issues").

10. Sowell, *supra* note 6. Even abortion advocates agree that legislative decisions would further their cause, as opposed to Supreme Court "legislation:"

[T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents. At the same time, Roe may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus.

Case R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766 (1991).

11. See *id.* One state legislature has expressed its frustration with not being able to adequately deal with the abortion issue:

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the rights of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, *that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State.* Further, the General Assembly finds and declares that the longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible *only because of the decisions of the United States Supreme Court* and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

ILL. ANN. STAT. ch. 720, para. 510(1) (Smith-Hurd 1992) (emphasis added).

12. Due to the confining doctrine of political correctness and the inherent inconsistencies of the law, it is difficult to determine exactly what a fetus should be called. When confronted

under Wyoming and other states' laws. Second, it will observe that these protections and rights appear inconsistent with the tenet that fetal development can be legally terminated simply because a fetus is not considered a person for purposes of the Fourteenth Amendment of the United States Constitution. Third, it will demonstrate that the abortion controversy at the national level has been caused by an ever-expanding United States Supreme Court usurpation of state legislative functions. Finally, the comment will observe that this judicial usurpation has resulted in a substantial erosion of traditional principals of federalism, and will suggest remedial measures which would return the abortion issue to the state legislatures.

RIGHTS OF THE UNBORN

Wyoming recognizes a variety of fetal rights. A fetus in Wyoming is afforded property rights, welfare and worker's compensation benefits, tort law remedies, and criminal protections. Traditionally, Wyoming also provided fetuses with constitutional protections and the right to life. However, these constitutional protections were taken away in large measure through the seminal decision of *Roe v. Wade*.¹³ Though the scope of *Roe* has been limited by recent Supreme Court abortion jurisprudence,¹⁴ Wyoming's legislature and judiciary still cannot furnish fetuses with a level of state constitutional protections that are consistent with the other Wyoming fetal rights and remedies.¹⁵

An overview of Wyoming law demonstrates an inherently inconsistent legal treatment of fetuses. A newly conceived zygote may be afforded property rights,¹⁶ yet a woman may abort a fetus of

with the same problem, another commentator stated:

It must be noted that in attempting to define the legal status of the unborn child, one is immediately confronted with semantic problems. Perhaps the use of the phrase "unborn child" is somewhat imprecise and even indicative of preconceived conclusions. But the use of terms like "embryo" or "fetus," which may be medically precise, is grammatically awkward since they refer only to specific stages of gestation; and such words as "quick" or "viable" are equally unclear since the law's use of such words reflects little, if any, consistency with current medical theories or even with the actual definitions of the words themselves.

William J. Maledon, Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 350 (1971).

13. 410 U.S. 113 (1973). *Roe v. Wade*, through the Fourteenth Amendment, established the right for a woman to choose to receive an abortion. As a result of this United State Supreme Court decision, states were prohibited from enacting legislation forbidding abortions. *Roe v. Wade* is discussed in greater detail *infra* text accompanying notes 75 through 94.

14. See *infra* notes 96 through 110 and accompanying text (discussing *Webster v. Reproductive Health Services* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*).

15. *Doe v. Burke*, 513 P.2d 643, 645 (Wyo. 1973). The Wyoming Supreme Court stated: "The regulation of abortions in this State is beyond the power of the courts and is solely a matter for the legislature, which must, of course, give heed to the pronouncements of the United States Supreme Court, particularly the summary appearing in *Roe v. Wade*." *Id.* (citation omitted).

16. See *infra* notes 21 through 23 and accompanying text.

several months.¹⁷ One who kills a fetus by attacking the pregnant woman or injures her as a result of driving while intoxicated, may be deprived of his or her liberty,¹⁸ yet a physician who terminates a pregnancy in the same stage remains unfettered.¹⁹ Of the rights that are granted, some are defined statutorily, while others are based in common law. With the exception of the right to live, a fetus is granted personhood comparable to a born person.²⁰

Property, Entitlement and Worker's Compensation Rights of the Unborn

The Preamble to the Wyoming Constitution states, "We, the people of the State of Wyoming, grateful to God for our civil, political and religious liberties, and desiring to secure them to ourselves and perpetuate them to our posterity, do ordain and establish this Constitution."²¹ One of the rights the Wyoming people desire to perpetuate to their posterity is that "no person shall be deprived of life, liberty or *property* without due process of law."²² This due process right has not been extended to fetuses before depriving them of life, yet ironically due process does protect a fetus' rights in intestacy, welfare, worker's compensation, tort, and criminal law.

Wyoming intestacy law recognizes that a fetus holds property rights. For example, the Wyoming intestacy statute recognizes that a fetus, from the time of conception, holds property rights in its father's estate on equal grounds with the fetus' potential siblings, as

17. Wyoming statutes provide that "[a]n abortion shall not be performed after the embryo or fetus has reached viability except when necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment." WYO. STAT. § 35-6-102 (1988). "Viability" is defined in Wyoming as "that stage of human development when the embryo or fetus is able to live by natural or life-supportive systems outside the womb of the mother according to appropriate medical judgment." WYO. STAT. § 35-6-101(a)(vii) (1988).

18. WYO. STAT. § 6-2-502(a)(iv) (1988) (stating that "[a] person is guilty of aggravated assault and battery if he: [i]ntentionally, knowingly or recklessly causes bodily injury to a woman he knows is pregnant."). This statute is a recodification of section 6-4-507 of the Wyoming Statutes, which provided that "[w]hoever unlawfully kills an unborn child, or causes miscarriage, abortion or premature expulsion of a fetus, by any assault or assault and battery willfully committed upon a pregnant woman, knowing her condition, is guilty of a felony and shall be imprisoned in the penitentiary not more than fourteen (14) years." WYO. STAT. § 6-4-507 (1977). Section 31-5-233 of the Wyoming Statutes allows for an elevated penalty if a drunk driver "causes serious bodily injury to another person . . ." WYO. STAT. § 31-5-233(h) (1988). "Serious bodily injury" exists when the injury "causes miscarriage . . ." *Id.*

19. However, a *non-physician* who performs an abortion can be prosecuted. Section 35-6-111 of the Wyoming Statutes provide that "any person other than a licensed physician who performs an abortion is guilty of a felony punishable by imprisonment in the penitentiary for not less than one (1) year nor more than fourteen (14) years." WYO. STAT. § 35-6-111 (1988).

20. See *infra* notes 24 and 25 and accompanying text.

21. WYO. CONST. pmb1.

22. WYO. CONST. art. I, § 6 (emphasis added).

if the fetus had been born.²³ Even prior to the enactment of the intestacy statute, Wyoming had adopted English common law,²⁴ which traditionally recognized a fetus as a person.²⁵ This important common law recognition of fetal personhood which was equivalent to the fetus' potential siblings, is incorporated into Wyoming's intestate succession laws.²⁶

Not surprisingly, welfare entitlements are not contingent upon birth. In Wyoming, a fetus is recognized as a child for purposes of welfare entitlements, and is defined as a dependent child for public assistance purposes.²⁷ This definition entitles a fetus to welfare ben-

23. WYO. STAT. § 2-4-103 (1980). This statute addresses a posthumous person's inheritance rights, providing that "[p]ersons conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent." *Id.*

24. Under English common law, an unborn child was recognized as equal to a born child. See generally *Burns v. Burns*, 224 P.2d 178 (Wyo. 1950).

25. *Id.* The *Burns* court stated: "[T]here is no doubt that children born before or after the execution of a testament stood on exactly the same footing insofar as the annulment of the testator's will is concerned." *Id.* at 181. In the earlier Texas case of *Nelson v. Galveston, H. & S. A. Ry. Co.*, the court stated that:

[A] child in the mother's womb is a person in *rerum natura* [natural person], and that by the rules of the civil and common law "she was, to all intents and purposes, a child, as if born in her father's life-time." Speaking of the civil law, which limits the operation of this rule to cases where it is for the benefit of the child to be considered as born, he says it is to be considered as living for all purposes. Many old English cases are cited in the case referred to deciding that such a child was held to be living at the death of the testator; and that an unborn child was entitled, under the "description of 'children born,'" as being within the reason and motive of a gift. In *Doe v. Clarke*, 2 H.B.1. 399, it was held "that wherever such consideration would be for his benefit, a child *en ventre sa mere* [in its mother's womb] should be considered as absolutely born." *Goodtitle v. Wood*, 7 Term R. 103, is to the effect that there is no difference between a child actually born and a child *en ventre sa mere*. Again, in *Lancashire v. Lancashire*, 5 Term R. 49, it is said: "No agreement founded on law and natural justice is in favor of the child born during the father's life that does not equally extend to a posthumous child." . . . Such is the doctrine of cases decided in 1798, almost a century since, establishing the rights of such children to that character of property, real estate. . . .

Galveston, 14 S.W. 1021, 1022-23 (Tex. 1890) (second emphasis added) (cited in S. Jeffery Gately, Comment, *Texas Fetal Rights: Is There a Future for the Rights of Future Texans?*, 23 ST. MARY'S L. J. 305, 307 n.21 (1991)). See also *Thellusson v. Woodford*, 31 Eng. Rep. 117, 163 (Ch. 1798). The English High Court of Chancery refuted the argument that a devise could not be appointed for a fetus because it was a non-entity:

Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.

Id. (citations omitted). See also *Maledon*, *supra* note 12, at 362.

26. Section 2-10-102 of the Wyoming Statutes defines a person interested in the estate as "any person entitled to receive or who has received from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate." WYO. STAT. § 2-10-102(a)(iv) (1980). Section 2-4-103 declares that a posthumous child is entitled to inherit as if it had been born. WYO. STAT. § 2-4-103 (1980). See *supra* note 23 for the text of the statute.

27. Section 42-2-104 of the Wyoming Statutes provides that ". . . For purposes of this subsection, a dependent child includes any: (i) Unborn Child." WYO. STAT. § 42-2-104(b) (1991).

efits which cannot be restricted without due process of law.²⁸ In addition to welfare benefits, a fetus is also indirectly entitled to medical care.²⁹ The classification of a newly conceived fetus as a person, with due process rights, has caused further inconsistency in fetal law,³⁰ where a fetus does not have due process rights under the Fourteenth Amendment.³¹

Moreover, under Wyoming's worker's compensation scheme, a fetus is a dependent for purposes of collecting death benefits. In *Wyoming Workers' Comp. v. Halstead*,³² the State Fund argued that an illegitimate child, born after the putative father's death,³³ was not a statutory dependent of the father at the time of his injury or death. Therefore, the Fund argued that the child was not entitled to benefits arising from his father's death.³⁴ The Wyoming Supreme Court rejected this argument as unconstitutional.³⁵ The court held that discrimination based on the status of a child was not allowed under both the Wyoming Constitution³⁶ and the United States Constitution.³⁷ The court stated: "As a matter of law, the prospective child is a dependent of the putative father if in fact the child, when born, is actually his child."³⁸ Though the court's holding is premised upon unconstitutional classifications of the legitimacy of the child, the court implicitly recognizes that a fetus is entitled to dependency benefits under Wyoming's worker's compensation law.

When considering tort law, a fetus, besides being entitled to dependent benefits under worker's compensation, may apparently also

28. *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970) ("The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits"). *Id.*

29. WYO. STAT. §§ 42-4-101 to -103 (1991). The Wyoming administrative regulations declare that a pregnant woman is an eligible person for purposes of the Family and Children Medicaid Programs. Though this does not make a fetus "an eligible" person, it does demonstrate Wyoming's concern that a fetus receive proper medical attention. WYO. REG. II.IV § 8(a).

30. See e.g., Maledon, *supra* note 12, at 369. See also *infra* notes 89 and 90 and accompanying text.

31. See *supra* note 3 and accompanying text.

32. 795 P.2d 760 (Wyo. 1990).

33. *Id.* at 761. The child was born May 1, 1986. The child's father was injured September 24, 1985 and died on December 4, 1985. There is no evidence that the father knew before he died that he had impregnated the mother. *Id.* n.2.

34. *Id.* at 766-67. In order to receive death benefits, the child had to qualify under the statutory definition of a child as found in section 27-12-102 of the Wyoming Statutes. That provision provided that a child "means any individual excluding a parent or spouse of the employee, who receives substantially all of his financial support from the employee preceding injury or death of the employee" WYO. STAT. § 27-12-102(a)(ii) (1977) (repealed 1986). This statute has been amended to include the child, which was born posthumously, as a dependent. WYO. STAT. § 27-14-102(a)(iii) (1991).

35. *Halstead*, 795 P.2d at 767.

36. *Id.*

37. *Id.*

38. *Id.*

maintain a cause of action under Wyoming's Wrongful Death Statute.³⁹ Implied from the Wyoming Supreme Court's holdings in *Wetering v. Eisele*,⁴⁰ *Butler v. Halstead*,⁴¹ and *Wyoming Workers' Comp. v. Halstead*,⁴² is the notion that fetuses are included as valid wrongful death claimants. In *Wetering*, the Wyoming Supreme Court held that the language found in the Wrongful Death Statute that defines who is a valid claimant under the statute, "[e]very person for whose benefit such action is brought,"⁴³ was meant to include persons defined in Wyoming's intestacy statute.⁴⁴ As discussed above, a fetus is defined as a person in the intestacy statute,⁴⁵ and therefore ostensibly should have a cause of action under Wyoming's Wrongful Death Statute for the death of relatives through which the fetus could inherit.⁴⁶

In many states, the expansion of tort remedies to fetuses for their own injuries is a growing area of law,⁴⁷ though Wyoming has

39. Section 1-38-101 of the Wyoming Wrongful Death Statute provides that:

Whenever the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action to recover damages if death had not ensued, the person who would have been liable if death had not ensued is liable in an action for damages, even though the death was caused under circumstances as amount in law to murder in the first or second degree or manslaughter. . . .

WYO. STAT. § 1-38-101 (1988). Section 1-39-102 provides that:

(c) The court or jury, as the case may be, in every such action may award such damages, pecuniary and exemplary, as shall be deemed fair and just. *Every person for whose benefit such action is brought* may prove his respective damages . . . to which it considers such person entitled, including damages for loss of probable future companionship, society and comfort.

WYO. STAT. § 1-38-102(c) (1988) (emphasis added).

40. 682 P.2d 1055 (Wyo. 1984).

41. 770 P.2d 698 (Wyo. 1989) (involving the same fetus discussed in *Wyoming Workers' Comp. v. Halstead*, 795 P.2d 760 (Wyo. 1990)). Though this case did not deal with the issue of whether a fetus could maintain a wrongful death action, it did deal with whether the post-humously born child was the only person who could maintain the action. *Id.* This is consistent with the court's holding in *Wetering v. Eisele*, 682 P.2d. 1055 (Wyo. 1984).

42. 795 P.2d 760 (Wyo. 1990).

43. WYO. STAT. § 1-38-102(c) (1988).

44. *Wetering*, 682 P.2d at 1062. For Wyoming's intestacy statute, see WYO. STAT. § 2-4-101 (Supp. 1992). For partial text of the statute, see *infra* note 88.

45. WYO. STAT. § 2-4-103 (1980). See text of statute, *supra* note 23.

46. This proposition was certainly not rejected by the Wyoming Supreme Court in *Butler v. Halstead*, 770 P.2d 698 (Wyo. 1989). See *supra* note 41 and accompanying text. See also David A. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965).

47. See, e.g., Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 600 (1986). Some authors suggest that "[t]he intention in granting recovery in cases of [prenatal injury] is . . . to compensate the postnatal child for the affliction it must bear. Recovery is not, therefore, a recognition that the prenatal child has legal rights." See Karen G. Crockett & Miriam Hymas, Note, *Live Birth: A Condition Precedent to Recognition of Rights*, 4 HORSTRA L. REV. 805, 825 (1976). Yet this nonrecognition of "legal rights" is inconsistent with the property rights granted and the appointment of guardians ad litem and trustees to protect the interests of the unborn. See *supra* note 25 (*Thellusson* case stating fetus may have a guardian).

not yet addressed the issue.⁴⁸ Other states have begun to offer fetuses a wide range of tort remedies for injuries suffered in the womb. Some states allow suits for injury caused by the use of *in utero* drugs.⁴⁹ Many states allow wrongful death actions for the death of a fetus, explicitly allowing for the "compensation for the loss of life."⁵⁰ This expansion of fetal tort remedies manifests itself also in the area of criminal protections and sanctions.

Criminal Sanctions for Injuring the Unborn

From its very inception as a territory, Wyoming provided substantial protection for fetuses through its criminal laws.⁵¹ Prior to *Roe*, persons who performed⁵² or provided abortion equipment were criminally culpable.⁵³ Additionally, women who sought to have an abortion performed could be charged for committing a misde-

48. See *infra* note 49. The expansion of tort remedies to fetuses has been explained by some as a state backlash resulting from *Roe v. Wade*. See Johnsen, *supra* note 47, at 611.

49. See, e.g., *Grodin v. Grodin*, 301 N.W.2d 896 (Mich. App. 1980).

50. *Volk v. Baldazo*, 651 P.2d 11, 15 (Idaho 1982) (fetus killed in a car accident); *Dunn v. Rose Way, Inc.*, 333 N.W. 2d 830, 832-33 (Iowa 1983); *Danos v. St. Pierre*, 402 So. 2d 633, 639 (La. 1981) (noting the "state's interest and general obligation to protect life"); *Vailancourt v. Medical Center Hosp.*, 425 A.2d 92, 95 (Vt. 1980); *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 357 (Ala. 1974) (allowing suit for wrongful death of fetus "because the punitive nature of our wrongful death statute demands the punishment of the tortfeasor"). For further discussion of these cases and expanding fetal tort remedies, see Johnsen, *supra* note 47, at 602-04.

51. Congress established the Wyoming territory in 1868. Act of July 25, 1868, ch. 235, 15 Stat. 178. The first statutes enacted in the Wyoming Territory included the following: . . . any person who shall administer, or cause to be administered, or taken, any such poison, substance, or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary, and fined in a sum not exceeding one thousand dollars

GEN. LAWS OF WYO. ch. 3, § 25 (1869).

52. Section 6-77 of the 1957 Wyoming Statutes provided that:

Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine, or substance whatever, with intent thereby to procure the miscarriage of such woman; or with like intent uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be imprisoned in the penitentiary not more than fourteen years.

WYO. STAT. § 6-77 (1957).

53. Section 6-105 of the 1957 Wyoming Statutes provided that:

Whoever prints or publishes any advertisement of any drug or nostrum with intent to obtain utilization of such drug or nostrum for procuring abortion or miscarriage; or sells or gives away, or keeps for sale or gratuitous distribution, any newspaper, circular, pamphlet, or book containing such advertisement, or any account or description, of such drug or nostrum with intent to obtain utilization of such drugs or nostrum to procure abortion or miscarriage, shall be fined not more than one hundred dollars, to which may be added imprisonment in the county jail for not more than six months.

WYO. STAT. § 6-105 (Supp. 1975).

meanor.⁵⁴ Subsequent to *Roe*,⁵⁵ the Wyoming Supreme Court took notice of that decision, and declared that even though the regulation of abortion is a legislative decision, Wyoming's abortion statutes must be held unconstitutional.⁵⁶ Following *Roe*, Wyoming enacted new abortion statutes.⁵⁷ Under those statutes, an abortion is prohibited after the point of viability.⁵⁸ Furthermore, if a fetus survives an abortion, it must receive acceptable medical treatment.⁵⁹

Wyoming further provides indirect protection for a fetus through the criminal statutes. A person is guilty of aggravated assault and battery if that person "[i]ntentionally, knowingly or recklessly causes bodily injury to a woman whom he knows is pregnant."⁶⁰ In *Goodman v. State*,⁶¹ the Wyoming Supreme Court extended to fetuses Wyoming's homicide statutes.⁶² The *Goodman* court upheld the defendant's convictions for both the murder of the pregnant woman and the subsequent death of the fetus caused by the assault and battery upon the mother.⁶³ The court held that the two convictions did not violate the defendant's right against double jeopardy.⁶⁴

Additionally, indirect fetal protection is provided by the Wyoming Driving While Under the Influence statute⁶⁵ which provides penalties for one who kills a fetus. The statute calls for elevated punishment for an intoxicated driver who "causes serious bodily in-

54. Section 6-78 of the 1957 Wyoming Statutes provided that:

Every woman who shall solicit of any person any medicine, drug or substance or thing whatever, and shall take the same, or submit to any operation or other means whatever, with intent thereby to procure a miscarriage (except when necessary for the purpose of saving the life of the mother or child), shall be fined not more than five hundred dollars and imprisoned in the county jail not more than six months; and any person who, in any manner whatever, unlawfully aids or assists any such woman to a violation of this section, shall be liable to the same penalty.

WYO. STAT. § 6-78 (1957). The statute applied to women who solicited abortions for female companions or relatives, but apparently did not penalize men who were similarly situated. *Id.* This distinction was recognized and declared unconstitutional in *Doe v. Burke*, 513 P.2d 643, 644-45 (Wyo. 1973). The court stated: "We see no logical reason why these statutes should not also be held unconstitutional and void in their application to all women." *Id.*

55. 410 U.S. 113 (1973).

56. *Doe v. Burke*, 513 P.2d 643, 645 (Wyo. 1973). See also *supra* note 15.

57. Statute reprinted in full, *supra* note 17.

58. "Viability" is the point in fetal development at which the fetus can live outside the woman's uterus. In *Roe v. Wade*, the United States Supreme Court held that a state may prohibit an abortion after the point of viability. *Roe*, 410 U.S. at 164-65. For the text of Wyoming's post-*Roe* abortion statute, see *supra* note 17.

59. Section 35-6-104 provides that "[t]he commonly accepted means of care shall be employed in the treatment of any viable infant aborted alive with any chance of survival." WYO. STAT. § 35-6-104 (1977).

60. WYO. STAT. § 6-2-502(a)(iv) (1988).

61. 601 P.2d 178 (Wyo. 1979).

62. See generally WYO. STAT. §§ 6-2-101 to -107 (1988).

63. *Goodman*, 601 P.2d at 180.

64. *Id.* at 185.

65. WYO. STAT. § 31-5-233 (1989).

jury to another person.”⁶⁶ “Serious bodily injury” is defined to include an injury which “causes miscarriage”⁶⁷ This statute, though dealing with the woman carrying the fetus, provides further sanctions for the death of a fetus caused by one’s drunk driving.

A cursory review of other states shows that statutory criminal laws offer the widest range of fetal protections.⁶⁸ Many states have feticide statutes which provide that the murder of a fetus be treated in the same manner as the murder of a person.⁶⁹ Other states protect fetuses by expressly including them in the state’s homicide laws.⁷⁰ Furthermore, some states prosecute pregnant drug users for delivery of a controlled substance to a minor.⁷¹ However, in recognition of the United States Supreme Court’s holding in *Roe*, some states offer no protection to a fetus.⁷² Wyoming, through *Goodman*,⁷³ is a state which provides criminal protection for its unborn from conception to birth through its homicide statutes.⁷⁴

Fetal Rights Do Not Include The Right to Life

All of the rights and protections discussed above are contingent upon one decision—whether or not the woman terminates her preg-

66. *Id.* (h).

67. *Id.*

68. See Gately, *supra* note 25, at 317-18.

69. Margaret Phillips, Comment, *Umbilical Cords: The New Drug Connection*, 40 BUFF. L. REV. 525, 543 n.108 (1992). See, e.g., GA. CODE ANN. § 16-5-80 (1992); ILL. ANN. STAT. ch. 38, § 9-1.1 (Smith-Hurd Supp. 1985); IND. CODE ANN. § 35-42-1-6 (Burns 1985); IOWA CODE ANN. § 707.7 (West 1979); LA. REV. STAT. ANN. §§ 14:32.5-.8 (West Supp. 1991); MICH. COMP. LAWS ANN. § 750.322 (West 1991); MISS. CODE ANN. § 97-3-37 (1972); N.H. REV. STAT. ANN. § 585:13 (1986); OKLA. STAT. ANN. tit. 21, § 713 (West 1983); WIS. STAT. ANN. § 940.04 (West 1988).

70. See e.g., ARIZ. REV. STAT. ANN. § 13-1103 (1989) (causing death of fetus through reckless injury to mother is manslaughter); CAL. PENAL CODE § 187 (West Supp. 1986) (defines murder as “unlawful killing of a human being, or a fetus.”); N.Y. PENAL LAW § 125.00 (McKinney 1987) (includes a fetus of twenty-four week gestational period within statutory definition of homicide); UTAH CODE ANN. § 76-5-201 (1989) (includes fetus within homicide statute); WASH. REV. CODE ANN. § 9A.32.060 (West 1988).

71. Bringing charges against pregnant drug users for dealing drugs to their fetuses is a relatively new prosecutorial strategy which can be charged because:

the woman’s cocaine or crack use introduces the drug into the blood stream, and the drug is ultimately “delivered” to the fetus via the placenta or the umbilical cord.

Prosecutors have defined “delivery” to the fetus as drug delivery to a minor — conduct that is prohibited under criminal narcotics laws.

Phillips, *supra* note 69, at 525. See also David H. Montague & Sharon E. McLaughlin, *Drug Exposed Infants: En Venire Sa Mere - And In Need of Protection*, 44 BAYLOR L. REV. 485 (1992); Sam S. Balisy, Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209 (1987); Elizabeth L. Thompson, Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357 (1988-89); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of “Fetal Abuse,”* 101 HARV. L. REV. 994 (1988); Ted Gest, *The Pregnancy Police, On Patrol*, U.S. NEWS & WORLD REP., Feb. 6, 1989, at 50.

72. *Showery v. State*, 690 S.W.2d 689, 692 (Tex. App. 1985) (the Texas murder statute gives no protection until live birth); *Hollis v. Commonwealth*, 652 S.W.2d 61, 62 (Ky. 1983) (a live birth is required for conviction under Kentucky murder statute).

73. 601 P.2d 178 (Wyo. 1979).

74. *Supra* notes 60-67 and accompanying text.

nancy. Though a fetus is entitled to due process rights in fetal property, welfare, worker's compensation and tort law, a fetus has no due process to protect its life. Such an arbitrary standard seems inconsistent with even a relaxed understanding of due process. Yet this nation's Supreme Court has repeatedly held that the right to choose an abortion is necessary for the protection of a woman's fundamental right to privacy. Clearly the United States Supreme Court has usurped the state legislatures' function of balancing these two competing interests.

Though it is commonly recognized that *Roe v. Wade*⁷⁵ is the case which legalized abortion in the United States, the legal underpinnings of *Roe* began in the earlier contraception case of *Griswold v. Connecticut*.⁷⁶ In *Griswold*, the United States Supreme Court expanded its interpretation of the Constitution to include a right to an individual zone of privacy which must be free from state regulation.⁷⁷ In *Roe*, the Supreme Court determined that the zone of privacy announced in *Griswold* was large enough to encompass a woman's decision to have an abortion.⁷⁸

Roe announced a trimester approach for determining the allowable level of state intrusion during the various stages of pregnancy.⁷⁹ The gestational period was divided into three-month intervals.⁸⁰ The first three months must remain free of any state regulation of abortion.⁸¹ During the second three months, the state was allowed to regulate abortion procedures only to protect the health of the woman.⁸² Throughout the final three months, the state could regulate to protect the "potential life"⁸³ of the fetus.⁸⁴ Although the *Roe* Court rec-

75. 410 U.S. 113 (1973).

76. 381 U.S. 479 (1965) (right to privacy emanates from the penumbras of the Bill of Rights).

77. *Id.* at 485. *But see id.* at 508 (Black, J., dissenting) ("The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not."); *id.* at 527 (Stewart, J., dissenting) ("But we are not asked in this case to say whether we think this law is unwise or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.")

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

79. *Id.* at 162-64. The constitutionality of the trimester system has been questioned by scholars. See Henry M. Holzer, *Texas v. Johnson*, 30 SANTA CLARA L. REV. 649, 655 (1990) ("there is no way—as a matter of grammar, syntax, or rhetoric—that a single sentence in Amendment Fourteen can be read to divide the period of human gestation into trimesters, and to prescribe in some detail differing abortion rights in each of them.") (quoting Mendelson, *Raoul Berger on The Fourteenth Amendment Corno Copia*, 3 BENCHMARK NOS. 4 & 5, 205 (1987)).

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

81. *Id.*

82. *Id.*

83. See *infra* text accompanying notes 122 through 126 (Justice Scalia criticizing the *Roe* Court for assuming that fetal life is only potentially human).

84. *Roe*, 410 U.S. at 163-64.

ognized a state's interest in protecting "potential life,"⁸⁵ the Court decided that the unborn are not "persons" for the purposes of the Fourteenth Amendment.⁸⁶ This created the paradox of allowing a state to recognize fetal property rights and fetal tort and criminal protections, while forbidding a state from recognizing a fundamental right to fetal life.⁸⁷

The paradoxical recognition of fetal personhood for purposes of inheritance rights directly conflicts with a woman's right to an abortion. Wyoming's probate code provides that the wife of an intestate receives one half of her husband's estate if they have children, yet stands to receive the entire estate if there are no children.⁸⁸ Thus a widow could gain another half of her husband's estate simply by

85. *Id.* at 162.

86. *Id.* Some post-*Roe* federal courts have not been so quick to dispel the notion that a fetus may enjoy constitutional rights. In *Douglas v. Town of Hartford*, the federal district court of Connecticut held that a fetus was a "person" as defined by Title 42, Section 1983 of the United States Code. 542 F. Supp. 1267, 1270 (D. Conn. 1982). Section 1983 allows an individual to recover in damages for governmental violation of a constitutional right. The court allowed the child to bring suit under Section 1983 for injuries sustained by the fetus *en ventre* from police brutality. What is remarkable about this holding is that since being enacted in 1871 as the Ku Klux Klan Act, Section 1983 has provided a federal forum for "anyone" who has suffered constitutional injury at the hands of "any person" acting under color of official government sanction. 42 U.S.C. § 1983. In *Graham v. Connor*, the United States Supreme Court clarified that Section 1983 does not in itself provide substantive rights, but only provides the forum vindicating one's federal civil rights. 490 U.S. 386, 393-94 (1989). Section 1983, which is entitled *Civil Action For Deprivation of Rights*, provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988). By holding that a fetus was "a person" entitled to constitutional redress in *Douglas*, the court in turn recognizes constitutional rights in the fetus. 542 F. Supp. at 1270. *See also* *Crumpton v. Gates*, 947 F.2d 1418, 1421-23 (9th Cir. 1991) (defining a posthumously born child as "a person" and allowing the child to bring suit for the death of its father from police brutality). *See also* Richard P. Shafer, J.D., Annotation, *Fetus as Person on Whose Behalf Action May be Brought Under 42 USCS § 1983*, 64 A.L.R. FED. 886 (1983).

87. At least one federal judge has recognized the paradox created by denying personhood for purposes of the Fourteenth Amendment. *See* Gary-Northwest Indiana Woman's Servs. v. Bowen, 421 F. Supp. 734, 737 (N.D. Ind. 1976) (Sharp, J., concurring) ("we ought to reexamine the denial of personhood to all unborn children. . . . the Court has now invited itself into a medical and moral thicket.").

88. Wyoming Statutes provide:

(a) Whenever any person having title to any real or personal property having the nature or legal character of real estate or personal estate undisposed of, and not otherwise limited by marriage settlement, dies intestate, the estate shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts, in the following course and manner:

(ii) If the intestate leaves husband or wife and *no child* nor descendants of any child, then the real and personal estate of the intestate shall descend and vest in the surviving husband or wife.

WYO. STAT. § 2-4-101 (Supp. 1992) (emphasis added).

aborting his unborn child.⁸⁹ This conflict was addressed two years prior to the United States Supreme Court's holding in *Roe*:

The unborn child, under the law of property in most jurisdictions, can, among other things, inherit and own an estate, be a tenant-in-common with his own mother, and be an actual income recipient prior to birth. The new liberalized abortion laws, however, present a dilemma in this area. Is it a crime for a woman to misappropriate the estate of her unborn child, and yet no crime for her to kill that child? Can a woman, who has inherited an estate as a tenant-in-common with her unborn child, increase her own estate 100 percent simply by killing the child? Will the law which has recognized the unborn child as an actual income recipient prior to birth allow the child's heir (the mother) to kill the child for her own financial gain? Will the law that has specifically said that an unborn child's *estate* cannot be destroyed where the child has not been represented before the court allow the child himself to be destroyed without being represented before the court?⁹⁰

89. See *infra* note 90 and accompanying text.

90. Maledon, *supra* note 12, at 369. See also Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 265 (1982) (addressing section 2-108 of the Uniform Probate Code, which provides that, "[r]elatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."): Parness and Pritchard also articulate the conflict in these terms:

[U]pon closer examination, however, it is apparent that the state's interest in promoting the unborn's potential for life may be undermined by treating the unborn's interest as only contingent upon birth. For example, if an intestate is wealthy, there might be a substantial incentive for a pregnant mother to abort the unborn child she is carrying. By aborting her unborn child, the pregnant woman, as "surviving spouse," could take the entire estate, while failure to abort would require her to share the estate with the posthumously born "surviving issue." Thus, the Code inconsistently treats some unborn as "relatives" of an intestate decedent in order to procure certain inheritance rights but provides an incentive to at least some mothers to abort the potential lives of those "relatives." The state's legitimate interest in "protecting the potentiality of human life" would warrant elimination of the incentive to abort, especially because elimination of such an incentive would not provide the pregnant woman with an additional obstacle to abortion. The Code could eliminate this incentive simply by excluding, under certain circumstances, the inheritance that otherwise would have gone to the aborted child.

Id. at 265. The conflict of interest is magnified by Wyoming's Felonious Death statute, which does not permit one who feloniously takes the life of another to inherit from the deceased: "No person who feloniously takes or causes or procures another to take the life of another shall inherit from or take a devise or legacy from the deceased person any portion of his estate." WYO. STAT. § 2-14-101(a) (1980). This statute expressed the legislature's intent to codify the common law principle that, "no man shall be permitted to profit by his own wrongful act." See also *Dowdell v. Bell*, 477 P.2d 170, 173 (Wyo. 1970). This statute only applies to those slain intentionally and wrongfully. Though it was not a felony for a woman to receive a non-emergency, or "convenience" abortion under Wyoming's pre-*Roe* abortion statute, it was a felony for a doctor to perform such an abortion. WYO. STAT. § 6-77 (1957). It is plausible,

Furthermore, courts have had difficulty reconciling the conflict between fetal welfare benefits and the *Roe* decision. This inconsistency led one federal court to decide that:

An unborn child's lack of status as a "person" for Fourteenth Amendment purposes does not affect the status of an unborn child as a "child" within the meaning of the [Social Security] Act; that a fetus is not constitutionally *entitled* as a person to claim certain benefits in no way affects the right or power of Congress to *extend* benefits to unborn children by appropriate legislation.⁹¹

This holding further demonstrates the incongruity that a fetus is entitled to due process in social security law,⁹² yet is entitled to none in its right to life.

Though the United States Supreme Court granted to women a fundamental right to an abortion which trumps any due process or property rights a fetus may possess in other areas of law, *Roe* made it clear that states have compelling interests in the health of the woman and the "potential life" of a viable fetus.⁹³ However, subsequent United States Supreme Court cases dealing with state regulations governing the second and third trimesters applied a strict-scrutiny level of review to all abortion-related regulation and struck down legislation which should have been allowed under the trimester guidelines of *Roe*.⁹⁴ Indeed, abortion at any stage of pregnancy up to the point

therefore, that under Wyoming's pre-*Roe* statute, an abortion was: (1) an intentional act as applied to the mother, and (2) a felonious act as applied to the doctor. Both requirements having been met, such an abortion should have prevented a mother from receiving the inheritance of her aborted fetus. *See, e.g.*, George M. Apostolos, Recent Case, *Disposition of Property Held by Entirety Where One Spouse Murders the Other*, 6 Wyo. L.J. 266 (1951), for further discussion of felonious death rule.

91. *Parks v. Harden*, 504 F.2d 861, 864 (5th Cir. 1974), *vacated*, 421 U.S. 926 (1975). *See also*, Parness & Pritchard, *supra* note 90, at 263.

92. *See Parks*, 504 F.2d at 864; *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970).

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

94. *See, e.g.*, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (informed consent law places unreasonable obstacles to obtaining abortion); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (striking down a Pennsylvania law which required a post-viability abortion to be performed in the manner most likely to result in a live birth). Chief Justice Burger dissented in *Thornburgh*, and stated:

The Court's ruling in this respect is not even *consistent* with its decision in *Roe v. Wade*. In *Roe*, the Court conceded that the State's interest in preserving the life of a viable fetus is a compelling one, and the Court has never disavowed that concession. The Court now holds that this compelling interest cannot justify *any* regulation that imposes a quantifiable medical risk upon the pregnant woman who seeks to abort a viable fetus: if attempting to save the fetus imposes any additional risk of injury to the woman, she must be permitted to kill it.

Id. at 808 (Burger, C.J., dissenting) (emphasis in original).

of birth seemingly took on the cloak of an unconditional, fundamental, and inalienable right.⁹⁵

Yet beginning in 1989, with *Webster v. Reproductive Health Services*,⁹⁶ the absolute right to an abortion from conception-to-birth has begun to show signs of retreat.⁹⁷ In *Webster*, the Court upheld a Missouri statute banning all public employees from performing or assisting in abortions and the usage of public buildings for abortions.⁹⁸ Moreover, in *Ohio v. Akron Center for Reproductive Health*,⁹⁹ the Court upheld a parental consent statute mandating that an abortionist inform a parent twenty-four hours before an abortion is performed on a minor.¹⁰⁰ Most recently, Justice O'Connor announced the Court's joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁰¹ which essentially rewrote all Supreme Court abortion jurisprudence.

In *Casey*, Justice O'Connor adhered to *Roe* under principles of *stare decisis*, but in actuality, only select portions of *Roe* survived the *Casey* decision.¹⁰² Justice O'Connor held that a woman's fun-

95. See Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 783 (Burger, C.J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent"). See also *id.* at 814 (White, J., dissenting) ("the majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*").

96. 492 U.S. 490 (1989).

97. See *supra* text accompanying note 94. For a discussion of how states are expanding their roles in protecting the unborn, see Stephanie R. Bryant, Note, *Due Process: Minor's Abortion Rights - Ohio's Parental Notification Statute - An Anti-abortion Statute in Disguise?*, 27 LAND & WATER L. REV. 605, 607-16 (1992). But see *infra* note 169 (discussing the Freedom of Choice Act).

98. *Webster*, 492 U.S. at 511.

99. 497 U.S. 502 (1990).

100. *Id.* at 506-07.

101. 112 S. Ct. 2791 (1992). *Casey* proved to be an immediately controversial decision which angered people on both sides of the abortion controversy. See Wanda Franz, *A Confused and Arrogant Supreme Court Reaffirms the "Right" to Abortion*, NATIONAL RIGHT TO LIFE NEWS, July 21, 1992 at 3; Sarah Gorin & Lorna Johnson, *Reproductive Rights*, THE ADVOCATE, August 1992 at pp. 2-3 ("[t]he Wyoming Chapter of the American Civil Liberties Union is deeply distressed over the *Casey* decision and the consequent loss of protection for each individual's fundamental right of privacy.').

102. *Casey*, 112 S. Ct. at 2818 (trimester approach is unnecessary to ensure a woman's right to choose an abortion). However, Justice Scalia questioned the Court's application of *stare decisis*, and said:

[The Court] insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. . . . I am certainly not in a good position to dispute that the Court has saved the "central holding" of *Roe*, since to do that effectively I would have to know what the Court has saved, which in turn would require me to understand (as I do not) what the "undue burden" test means. I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the court today retains. It seems particularly ungrateful to carve the trimester

damental right to a pre-viability abortion remained intact,¹⁰³ but she discarded the trimester approach articulated in *Roe*.¹⁰⁴ She reaffirmed that a woman has a right to an abortion, free from any “undue burden,” up to the point of viability.¹⁰⁵ After viability, a state may regulate in such a manner as to protect the interest that it has in pre-natal life.¹⁰⁶ Justice O’Connor suggested that “[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.”¹⁰⁷

The joint opinion defined the restrictions which the state can impose upon a woman after this implied consent occurs. Before viability, a state can regulate to protect the health and safety of the woman, as long as the regulation does not impose an “undue burden” on her right to have an abortion.¹⁰⁸ Furthermore, states may protect

framework out of the core of *Roe*, since its very rigidity (in sharp contrast to the utter indeterminability of the “undue burden” test) is probably the only reason the Court is able to say, in urging *stare decisis*, that *Roe* “has in no sense proven ‘unworkable.’” . . . I suppose the Court is entitled to call a “central holding” whatever it wants to call a “central holding”—which is, come to think of it, perhaps one of the difficulties with this modified version of *stare decisis*.

Id. at 2881 (Scalia, J., concurring in part and dissenting in part).

103. *Id.* at 2818.

104. *Id.*

105. *Id.* at 2819. Justice O’Connor stated: “there is no line other than viability which is more workable.” *Id.* at 2817. Yet broad notions of viability waiver with time., *See Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting):

The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.

Id. Conception is a line that allows for no error.

106. *Id.* at 2817.

107. *Id.*

108. *Id.* at 2820. What remains unclear, however, is what constitutes an “undue burden.” Justice Scalia indicates that the undue burden test applied by the joint opinion was not a test, but was, rather, a fact-specific inquiry. He said:

To the extent I can discern any meaningful content in the “undue burden” standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence. The joint opinion repeatedly emphasizes that an important factor in the “undue burden” analysis is whether the regulation “prevent[s] a significant number of women from obtaining an abortion,” . . . whether a “significant number of women . . . are likely to be deterred from procuring an abortion,” . . . and whether the regulation often “deters” women from seeking abortions, . . . We are not told, however, what forms of “deterrence” are impermissible or what degree of success in deterrence is too much to be tolerated. If, for example, a State required a woman to read a pamphlet describing, with illustrations, the facts of fetal development before she could obtain an abortion, the effect of such legislation might be to “deter” a “significant number of women” from procuring abortions, thereby seemingly allowing a district judge to invalidate it as an undue burden. Thus, despite flowery rhetoric about the State’s “substantial” and “profound” interest in “potential human life,” and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful.

Casey, 112 S. Ct. at 2880 (Scalia, J., concurring in part and dissenting in part) (citations omitted) (alteration in original).

their interest in potential human life after viability by regulating and proscribing abortion if they choose.¹⁰⁹ However, in promoting its interest in fetal life, a state cannot require a husband's consent before an abortion is performed.¹¹⁰ While *Casey* returned some autonomy to the states, it did not return the authority to draw the line at conception, rather than viability.

JUDICIAL USURPATION—THE ABORTION ISSUE

In many aspects of Wyoming law, a fetus is clearly treated as a "person."¹¹¹ The obvious inconsistency lies in Wyoming's abortion laws, which were written in light of *Roe*. Because of United States Supreme Court opinions, Wyoming has been forbidden from assuring its unborn, that in "their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."¹¹²

Value judgments, such as abortion, are best left to the state legislatures to address through the political process.¹¹³ Yet this traditional legislative function has been usurped by the United States Supreme Court. In assuming itself to be a competent body to solve the national division created by the abortion issue, the *Casey* Court only perpetuated the problem created by *Roe*.¹¹⁴

Not since the days of slavery has any single issue polarized this nation as powerfully as the issue of abortion. The nation is now divided because of a right which is not specifically enumerated in the United States Constitution; a mere "penumbral"¹¹⁵ right forced upon the states by the Supreme Court through the auspices of the Four-

109. *Casey*, 112 S. Ct. at 2817-18.

110. *Id.* at 2829-30.

111. See *supra* notes 14-64 and accompanying text.

112. WYO. CONST. art. 1, § 2. The Wyoming Constitution also provides that

Since equality in the enjoyment of *natural and civil rights* is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or *any circumstance or condition whatsoever* other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

WYO. CONST. art. 1, § 3 (emphasis added). A fair reading of this provision suggests that a child cannot be deprived of its "natural and civil rights" simply because of its "circumstance or condition," *i.e.* that it has not yet moved from inside its mother's body to outside its mother's body.

113. See *infra* text accompanying note 126 (Justice Scalia stating that *Roe v. Wade* was not based on any legal determination, but rather upon a value judgment). See also *Casey*, 112 S. Ct. at 2885 (Scalia, J., concurring in part and dissenting in part) ("Value judgments, after all, should be voted on, not dictated . . .").

114. Justice Scalia said "by foreclosing all democratic outlet for the deep passions this issue arouses . . . the Court merely prolongs and intensifies the anguish." *Casey*, 112 S. Ct. at 2885 (Scalia, J., concurring in part and dissenting in part).

115. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (penumbras of the First, Third, Fourth and Fifth Amendments emanate a liberty interest in privacy).

teenth Amendment.¹¹⁶ The debate and hostility still prevalent twenty years after *Roe* clearly demonstrates that the right to an abortion was not deeply rooted upon a universally accepted freedom.¹¹⁷ This section will discuss how the Supreme Court, through *Roe*, created the national division over abortion, and how the *Casey* decision will only prolong the controversy.

The *Roe* Court declared: “[W]e need not resolve the difficult question of when life begins.”¹¹⁸ Rather than brushing past that “difficult question,” the Court should have focused on it as the threshold judicial inquiry. Indeed, Wyoming, as well as many other states,¹¹⁹ long ago decided the difficult question of when life begins,¹²⁰ yet the United States Supreme Court simply chose to overlook that fact. How can it be that one who has property rights and rights for redress of injuries can be deprived of the right to life itself, which has been called “the right to have rights?”¹²¹ An overview of Justice Scalia’s

116. Actually, the will of the people of the various states was usurped by seven individuals in *Roe*. But in *Casey*, it was down to a majority of only five life-appointed judges who chose to impose their views on this nation, rather than allowing the elected legislatures to determine whether or not a fetus deserves protection.

117. In its amicus brief for *Planned Parenthood v. Casey*, Utah argued that: The continuing furor over *Roe v. Wade* demonstrates that the decision did not articulate a principle that is deeply rooted in the history and tradition of American society.

Abortion remains a preeminently troublesome issue in the United States. In the past year alone, thousands of demonstrators took to the streets to protest the regime of abortion on demand erected by *Roe v. Wade*. Other thousands crowded public squares to voice a contrary view. Ironically, all of this controversy flows from a decision announcing a principle that is supposedly so “fundamental” as to be beyond reasonable debate in American society.

Brief for the State of Utah as Amicus Curiae at 12-13, *Planned Parenthood of Southeast Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) [hereinafter Utah Brief] (quoting *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986)) (rights qualifying for heightened judicial protection include those fundamental liberties that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if sacrificed).

118. *Roe v. Wade*, 410 U.S. 113, 159 (1973). However, what became apparent from *Roe* and its progeny is that the United States Supreme Court had indeed decided when Fourteenth Amendment life begins—it begins after live-birth. See *supra* note 94 and accompanying text (discussing prohibition on abortion regulation throughout all stages of pregnancy). *But see*, RONALD R. REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION 22 (1984) (“The real question today is not when human life begins, but, *What is the value of human life?* . . . The real question for [the abortionist] and for all of us is whether that tiny human life has a God-given right to be protected by the law—the same right we have.”) (emphasis in original). See also, John A. Eidsmoe, *A Biblical View of Abortion*, J. CHRISTIAN JURISPRUDENCE 18 (1983) (“The difficult questions, however, are (1) Does abortion involve the killing of a human being and (2) if so, when if ever is it justifiable?”). See also *Casey*, 112 S. Ct. at 2875 (Scalia, J., concurring in part and dissenting in part) (“The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a *human life*.”).

119. “Most other western nations that have dealt with abortion have done so as a matter of political give and take.” Utah Brief, *supra* note 117, at 14 (citing MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987)).

120. See *supra* notes 51 through 54 and accompanying text.

121. *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

opinion in *Casey*, which was joined by Justices Rehnquist, White, and Thomas, provides a helpful discussion.¹²²

Justice Scalia criticized the *Casey* Court's reliance on "reasoned judgment" in reaffirming the *Roe* Court's presumption that fetal life is merely potentially human.¹²³ He said: "reasoned judgment" does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere 'potentiality of human life.'¹²⁴ He went on to note that "whatever answer *Roe* came up with after conducting its 'balancing' is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human."¹²⁵ He concluded by saying that "[t]here is of course no way to determine that as a legal matter; it is in fact a *value judgment*."¹²⁶

The *Roe* Court claimed to be announcing a constitutional decision founded upon the notion that abortion is a liberty interest which is protected by the United States Constitution.¹²⁷ In *Casey*, Justice Scalia stated that "[t]he issue is whether [abortion] is a liberty protected by the Constitution of the United States."¹²⁸ He concluded that "it is not."¹²⁹ Justice Scalia went on to say that he reached "that conclusion not because of anything so exalted as [his] views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life.'¹³⁰ Rather, he reached that conclusion for the same reason "that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely noth-

122. Justice Scalia both concurred with and dissented from the opinion written by Justice O'Connor. In his opinion, Justice Scalia made four significant points in support of allowing state legislatures to decide the abortion issue rather than the Supreme Court: (1) abortion is a value judgment, (2) *Roe v. Wade* was wrongly decided, (3) the "Undue Burden" test is completely unworkable, and (4) the joint opinion in *Casey* relied on an improper application of the doctrine of *stare decisis* to reach its result. *Casey*, 112 S. Ct. at 2873-85 (Scalia, J., concurring in part and dissenting in part).

123. *Casey*, 112 S. Ct. at 2875 (Scalia, J., concurring in part and dissenting in part).

124. *Id.*

125. *Id.*

126. *Id.* (emphasis added).

127. *Roe*, 410 U.S. at 153. However, Justice O'Connor has clearly stated that the United States Supreme Court's abortion decisions are not founded upon the Constitution. In *Thornburgh* she said:

This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. . . . Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. . . . That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe v. Wade*.

Thornburgh, 476 U.S. at 814-15 (O'Connor, J., dissenting) (citations omitted).

128. *Casey*, 112 S. Ct. at 2874 (Scalia, J., concurring in part and dissenting in part).

129. *Id.*

130. *Id.*

ing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."¹³¹

Indeed, *Roe* itself was decided after a series of "substantive due process"¹³² cases in which the Supreme Court virtually exploded the meaning of Fifth and Fourteenth Amendment "liberty."¹³³ The meaning of "liberty" which the *Roe* Court used would be unrecognizable to the people who wrote the constitution.¹³⁴ "Liberty," as that word was used in the context of the Fifth Amendment, had a narrow and specific meaning; it stood for freedom from physical restraint, or that "[n]o freeman shall be taken or imprisoned."¹³⁵ The "life, liberty,

131. *Id.* Indeed, some commentators suggest that the original concept of liberty of which the Fifth and Fourteenth Amendments speak did not contemplate anything more than the freedom from restraint or imprisonment without due process of law. See Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365, 373 (1891). See also ROBERT H. BORK, *THE TEMPTING OF AMERICA* 32 (1990) ("'due process of law' descended from the Magna Carta's guarantee that no freeman should be deprived of his liberty except by the law of the land.'").

132. Substantive due process is a judicially created doctrine of the United States Supreme Court which allows the Court to determine the wisdom of legislation. The Court must "be convinced that the law—not merely the procedures by which the law would be enforced, but its very purpose—is fair, reasonable, and just." J.W. PELTASON, CORWIN & PELTASON'S UNDERSTANDING THE CONSTITUTION 199 (1985). See also BORK, *supra* note 131, at 31 ("Though [Justice Taney's] transformation of the due process clause from a procedural to a substantive requirement was an obvious sham, it was a momentous sham, for this was the first appearance in American constitutional law of the concept of 'substantive due process,' and that concept has been used countless times since by judges who want to write their personal beliefs into a document that, most inconveniently, does not contain those beliefs."). One pro-choice author has observed that *Roe* cannot be defended under due process terms. He said:

[t]here have been attempts to defend that decision in what amount to process terms, arguments that the democratic process is incapable of dealing responsibly with the excruciating clash of values abortion entails. Such attempts have foundered—in fact the most notable has been repudiated—for the obvious reason that the genuine source of trouble in the abortion context is not that the issue is peculiarly unsuited to democratic decision but rather that democratic decision quite consistently generates value choices with which many of us, myself included, rather fervently disagree.

John Hart Ely, *Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 11 (1978) (citations omitted).

133. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (liberty includes the right to a divorce); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (penumbras of the First, Third, Fourth and Fifth Amendments emanate a liberty interest in privacy which includes the right to use contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (liberty includes the right to attend private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (liberty includes the right to acquire knowledge).

134. The words in the phrase "life, liberty, or property" had specific meanings when they were incorporated into the Fifth Amendment. That phrase had been used for several hundred years with no change in the understood meaning of each of its terms. The meaning of the phrase traces its origins back to before 1215 A.D. when the concept was incorporated into the thirty-ninth article of the Magna Charta. Shattuck, *supra* note 131, at 373. The due process clause has likewise been perverted by the Supreme Court. See Bruce E. Fein, *Comment on Mathias*, 47 MD. L. REV. 196, 202 (1987) ("As Alexander Hamilton declared on the eve of the Convention: 'the words "due process" have a precise technical import, and are only applicable to the process and proceedings of courts of justice; they can never be referred to the act of the legislature.'").

135. *Id.* It seems unlikely that the states would insist on the inclusion of all of the first

or property” phrase of the Fourteenth Amendment is identical to the one found in the Fifth Amendment, and had the same meaning when the Fourteenth Amendment was ratified.¹³⁶ *Roe* was decided as it was because the doctrines of substantive due process and incorporation¹³⁷ allowed the Court to *find* a right to privacy in “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.”¹³⁸

Though *Roe* established a “constitutional right” to an abortion, *Casey* has essentially rewritten all prior abortion decisions, including *Roe*.¹³⁹ If abortion is not a liberty interest which is protected by the Fourteenth Amendment, the analysis of *Roe* should end there, and the matter turned back over to the states.¹⁴⁰ However, rather than saying that *Roe* was wrong when it was decided, which is what Justice O’Connor intimated,¹⁴¹ the joint opinion half-heartedly relied on *stare decisis* to reaffirm the constitutional right to an abortion.¹⁴² It seems

ten amendments, when they could have used only the “liberty” aspect of the Fifth Amendment to encompass the provisions of the other amendments. Clearly, “liberty” did not equate with “civil liberty.” See *id.* at 380. See also Fein, *supra* note 134 at 202-03.

136. *Id.* at 383. The due process clause of the Fourteenth Amendment “was used in the same sense and to no greater effect than was its use in the Bill of Rights.” Fein, *supra* note 134, at 202-03 (citing *Hurtado v. California*, 110 U.S. 516, 534-35 (1884)). But see, Ely, *supra* note 1, at 935 (“Of course a woman’s freedom to choose an abortion is part of the ‘liberty’ the Fourteenth Amendment says shall not be denied without due process of law.”).

137. The incorporation doctrine suggests that certain judicially selected protections found in the Bill of Rights control state actions to the same extent as the United States Government because they are “incorporated” through the Fourteenth Amendment’s due process clause. In *Williams v. Florida*, 399 U.S. 117 (1970), Justice Stewart described the incorporation doctrine and his opinion of that doctrine. He said:

The “incorporation” theory postulates the Bill of Rights as the substantive metes and bounds of the Fourteenth Amendment. I think this theory is incorrect as a matter of constitutional history, and that as a matter of constitutional law it is both stultifying and unsound. It is, at best, a theory that can lead the Court only to a Fourteenth Amendment dead end. And, at worst, the spell of the theory’s logic compels the Court either to impose intolerable restrictions upon the constitutional sovereignty of the individual States in the administration of their own criminal law, or else intolerably to relax the explicit restrictions that the Framers actually did put upon the Federal Government

Id. at 143, (Stewart, J., concurring in part and dissenting in part).

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

139. *Casey*, 112 S. Ct. at 2818 (removing the trimester approach and establishing viability as the focal point of abortion regulation).

140. See *supra* note 131 (discussing the original meaning of Fifth and Fourteenth Amendment liberty).

141. *Casey*, 112 S. Ct. at 2812. See also *supra* note 127 (Justice O’Connor stating that the Court’s abortion decisions had “worked a major distortion in the Court’s constitutional jurisprudence”). See also *Casey*, 112 S. Ct. at 2860 (Rehnquist, C.J., concurring in part and dissenting in part) (“The joint opinion of Justices O’CONNOR, KENNEDY, and SOUTER cannot bring itself to say that *Roe* was correct as an original matter . . .”).

142. Justice O’Connor’s reliance on *stare decisis* was half-hearted because the only similarity between the abortion right which *Roe* established and the right which *Casey* redefined is that before viability, a woman has a fundamental right to an abortion. *Id.* at 2821. The doctrine of constitutional *stare decisis* has been suspect for some time. See EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 253 (1966) (citing cases ranging from 1932 to 1944, Professor Corwin said, “in the field of constitutional law the doctrine of *stare decisis* is today very shaky.”).

that the *Casey* decision was little more than the Court's attempt to find a political middle-ground which would placate both sides of the abortion controversy.¹⁴³

In searching for this middle-ground, the *Casey* Court rewrote the *Roe* decision. *Roe* had some very distinct characteristics, which included the trimester framework, and the varying degrees of state interest throughout pregnancy. *Casey*, under the auspices of *stare decisis*, brushed past the clear and unambiguous language of *Roe* and essentially stated that what *Roe* really stood for, that is, its "central holding," was that a woman has a fundamental right to an abortion.¹⁴⁴ Justice Scalia said that the Court's re-affirmance of *Roe*'s central holding and the "Court's reliance upon *stare decisis* can best be described as contrived."¹⁴⁵ *Casey* provided the Supreme Court with an opportunity to return the explosive issue of abortion to the states. However, through an innovative application of *stare decisis*,¹⁴⁶ the Court chose to retain control of an issue which it usurped from the states nearly twenty years earlier.

THE DISAPPEARANCE OF TRADITIONAL FEDERALISM

Since it is clear that the Supreme Court is unwilling to rectify the predicament created by *Roe*, another viable and long-lasting solution to the abortion dilemma must be found.¹⁴⁷ Traditional federalism, though it is not currently in vogue, must be re-examined in light of the current and future needs of this nation.¹⁴⁸ This section

143. *Casey*, 112 S. Ct. at 2885 (Scalia, J., concurring in part and dissenting in part) ("[the authors of the joint opinion] believe they are bringing to an end a troublesome era in the history of our Nation and of our Court.>").

144. *Id.* at 2821. Perhaps *Casey* signals the existence of a new judicial doctrine which might be known as the "living opinion" theory. Such a concept should easily gain acceptance among judges, for it would free them from the shackles of *stare decisis*. No longer would they need to overrule a prior case in order to reach the result they desire. Under the living opinion theory, they could merely "interpret" the discussion found in a previous case to mean whatever they need it to mean in order to achieve the result that they desire. If the Constitution should evolve to meet political ideals and government practices, should not Supreme Court opinions, which are inferior to the Constitution, have only evolutionary value as well?

145. *Casey*, 112 S. Ct. at 2881. Justice Scalia also said:

[The Court] insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version.

Id.

146. *Id.* at 2855 (Rehnquist, C.J., concurring in part and dissenting in part) (stating that the joint opinion's version of *stare decisis* is "newly-minted").

147. See Sunstein, *supra* note 10, at 766.

148. The concept of federalism rapidly deteriorated in this nation as a result of the New Deal era. Though controversy about the authority which the Supreme Court has granted itself has existed since its inception, see, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the New Deal Era seems to mark a turning point in the Court's willingness to consistently "interpret" the constitution in favor of ever-expanding central authority. See, e.g., CORWIN,

will review the purposes of the Constitution and the Fourteenth Amendment, and will observe that those intended purposes have been distorted by the Supreme Court in an attempt to centralize power in the national government.

In *Roe*, the Court claimed to be making a decision founded upon constitutional law.¹⁴⁹ The truth or falsity of that assertion depends on how the Constitution is viewed. Some commentators suggest that the Constitution is a "living document" which constantly evolves to meet the needs of society as societal needs change.¹⁵⁰ The other view, termed original intent, asserts that the Constitution is a static law—that its various delegations of authority have the same meaning today that they had when the constitutional provisions were ratified.¹⁵¹

A comprehensive discussion of the philosophical and practical differences of the views regarding constitutional interpretation is beyond the scope of this comment. For purposes of this comment, the authors simply embrace the position enunciated by Thomas Jefferson, that the original intent of the framers is the proper method of constitutional analysis.¹⁵² Jefferson cautioned against judicial construc-

supra note 142, at vi ("The first of the crises . . . was the necessity which palpably confronted the official guardians of the Constitution . . . of providing the New Deal safe habitation within the Constitutional fold, a necessity which they met by returning to Chief Justice Marshall's sweeping conception of national supremacy, thereby discarding the century-old theory that the reserved powers of the States, or at least some of them, formed an independent limitation on national power."). Professor Corwin went on to characterize the actions of the New Deal Supreme Court as the "Constitutional Revolution of 1937." *Id.*

149. *Roe*, 410 U.S. at 153. *But see* Ely, *supra* note 1, at 947:

[*Roe v. Wade*] is, nevertheless, a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.

Id.

150. *See, e.g.*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* vii (2d ed. 1988) ("the constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and government practices."). *See also* Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104, 1126 (S.D. Ala. 1983) (finding that the incorporation doctrine amounts to constitutional amendment by judicial fiat, and that the First Amendment does not apply to the states).

151. This philosophy has been termed "Original Intent" or "Originalism." *See generally*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). *See also* ROBERT BORK, *THE TEMPTING OF AMERICA* (1990), and RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987). Original intent is so firmly established in American jurisprudence, that even the two leading legal encyclopedias state that it is the correct manner of constitutional interpretation. *See* 16 AM. JUR. 2D *Constitutional Law* § 92 (1979) ("The fundamental principle of constitutional construction is that effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions . . ."); 16 C.J.S. *Constitutional Law* § 20 (1984) ("The function of the court, in construing a constitutional provision or an amendment, the importance of which has been variously characterized, is to ascertain and give effect to the intent of the framers and of the people who adopted it.").

152. In explaining his view of the Constitution, Jefferson said:

On every question of construction, carry ourselves back to the time when the Con-

tion, stating that when the Court has the opportunity to expand its power at the expense of the Constitution, the Court should exercise restraint.¹⁵³ Supreme Court abortion jurisprudence will be analyzed from this perspective.

The Original Constitution

The federal form of government described by the original Constitution, and envisioned by those who wrote it, established separation of powers both horizontally and vertically.¹⁵⁴ Only specific enumerated areas of control were delegated to the United States government,¹⁵⁵ while the states were forbidden from regulating only a few limited activities.¹⁵⁶ When the states considered ratifying the original

stitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.

15 THE WRITINGS OF THOMAS JEFFERSON 499 (A. Bergh ed., 1903). As President, Jefferson also said:

The Constitution on which our Union rests shall be administered by me according to the safe and honest meaning contemplated by the plain understanding of the people of the United States at the time of its adoption—a meaning to be found in the explanations of those who advocated, not those who opposed it. . . . These explanations are preserved in the publications of the time.

10 THE WRITINGS OF THOMAS JEFFERSON 248 (A. Bergh ed., 1903).

153. Thomas Jefferson said:

When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.

10 THE WRITINGS OF THOMAS JEFFERSON 418-19 (A. Bergh ed., 1903). In 1897, the Wyoming Supreme Court adopted this manner of constitutional interpretation.

In American constitutional law the word "constitution" is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or any one of the states, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it.

Rasmussen v. Baker, 50 P. 819, 823 (1897) (citations omitted). See also Dred Scott v. Sandford, 60 U.S. (19 How.) 395 (1856) ("the constitution speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of the Court and make it the mere reflect of the popular opinion or passion of the day.")

154. "Horizontal separation" is the separation of power between the various branches of the national government. Vertical separation was established by vesting only specific enumerated powers in the national government, while reserving all others for the states. See W. CLEON SKOUSEN, THE MAKING OF AMERICA 183-88 (1985). A "federal" form of government involves at least two distinct sovereign entities, i.e. state and national, which operate together to regulate society. Each is supreme in its own realm. See generally 1 THE FOUNDER'S CONSTITUTION 243 (Philip B. Kurland et al. eds., 1987); RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN (1987); WALTER HARTWELL BENNETT, AMERICAN THEORIES OF FEDERALISM (1964); F. MORLEY, FREEDOM AND FEDERALISM (1959).

155. See U.S. CONST. art. I, § 8; art. II, §§ 2-3; art. III, § 2.

156. U.S. CONST. art. I, § 10.

Constitution, they initially rejected it.¹⁵⁷ It was their opinion that the Constitution did not sufficiently restrict the power of the United States government.¹⁵⁸ The Constitution was ratified only after the states received assurances that a Bill of Rights would be amended to the Constitution.¹⁵⁹

The purpose of the Bill of Rights was to protect individual rights from an oppressive central government by specifically restricting its authority.¹⁶⁰ The Tenth Amendment makes it clear that any authority not specifically given to the United States, and not denied to the states by the Constitution, is left to the states to regulate.¹⁶¹ In no way did the Bill of Rights encumber the authority of the states to legislate in the manner they deemed appropriate for their constituents.¹⁶²

The Fourteenth Amendment

The Supreme Court's interpretation of the Fourteenth Amendment has substantially eroded the separation of power between the national government and the states.¹⁶³ Shortly after the time of its ratification, courts understood that the recognized "purpose of the Fourteenth Amendment was to establish the citizenship of the negro; to secure to the colored race the benefit of the freedom previously accorded to them."¹⁶⁴ However, as a result of the Court's adherence to the living document theory, the purpose of the Fourteenth Amendment has been altered.¹⁶⁵ The Fourteenth Amendment now seems to

157. PELTASON, *supra* note 132, at 135.

158. *Id.*

159. *Id.*

160. *Id.*

161. The Tenth Amendment says: "The powers not *delegated to the United States* by the Constitution, nor prohibited by it to the States, are *reserved to the States* respectively, or to the people." U.S. CONST. amend. X (emphasis added).

162. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) ("These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."). Though the Bill of Rights is clearly intended to confine the reach of only the national government, it is the Bill of Rights which the United States Supreme Court relies on to justify its intrusion into areas which are exclusively matters of state police power. See *supra* note 137 and accompanying text.

163. See Walter J. Suthon, Jr., *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22 (1953) (suggesting that the Fourteenth Amendment was never properly ratified by the states); Joseph L. Call, *The Fourteenth Amendment and Its Skeptical Background*, 13 BAYLOR L. REV. 1 (1961); Pinckney G. McElwee, *The 14th Amendment to the Constitution of the United States and the Threat That it Poses to Our Democratic Government*, 11 S.C. L. Q. 484 (1959).

164. *Le Grand v. United States*, 12 F. 577, 582 annot. (C.C.E.D. Tex. 1882). See also *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (the Fourteenth Amendment was not "designed to interfere with the power of the state, sometimes termed its police power . . .").

165. As Justice Rehnquist observed in his dissent in *Roe v. Wade*, "[t]o reach its result, the Court necessarily . . . had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting). See also Bruce E. Fein, *Comment on Mathias*, 47 Mo. L. REV. 196, 203 (1987) ("evidence is overwhelming that the framers of the fourteenth amendment did not conceive of the due process clause as an open-ended grant of power to apply the Bill of Rights to the states.").

stand for the proposition that the United States Supreme Court is responsible for dictating the social policies of every state in this nation.¹⁶⁶

The idea that the United States Supreme Court alone can fairly legislate and adjudicate social policies violates traditional federalism.¹⁶⁷ This violation manifests itself in decisions such as *Roe* and *Casey*. The members of state legislatures and judiciaries are no less capable than their counterparts at the national level of determining the wisdom and fairness of legislation. The fact that opinions may differ between various levels of government does not *ipso facto* prove that the policy of the national government is correct.

HARMONIZING FETAL RIGHTS IN THE STATES

Since *Roe* and *Casey* were decided as constitutional cases, what alternatives are left to Wyoming in its desire to resolve the abortion

166. In discussing the Supreme Court's expanded supervision of police powers, Professor Corwin quoted other commentators who suggested that the Supreme Court had become something of an autocrat. He indicated his agreement, and said:

[T]he late Professor Kales once suggested that attorneys arguing "due process cases" before the Court ought to address the justices not as "Your Honors," but as "Your Lordships." Similarly Senator Borah, in the Senate debate on Mr. Hughes's nomination for Chief Justice, declared that the Supreme Court had become, under the Fourteenth Amendment, "economic dictator in the United States"; and Justice Brandeis characterized the Court as "a superlegislature," while similar views were expressed by the late Justice Holmes shortly before his retirement from the Court.

No doubt there was an element of exaggeration in some, or even all, of the expressions—no doubt, too, it would be rather difficult to indicate very precisely just wherein the exaggeration lay.

Corwin, *supra* note 142, at 252. Indeed, some believe that it is the duty of the Supreme Court to expand the meaning of the Fourteenth Amendment to ridiculous extremes. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (Fourteenth Amendment "liberty" must include the freedom not to conform."). But see Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853, 867 (1991) (Justice Brennan's "idea that due process was intended to protect nonconformist groups or acts against laws imposing accepted national norms is simply irreconcilable with a great body of precedent and the clear intent of the Framers of the Constitution and the Fourteenth Amendment.").

167. The evolution toward central paternalism which this nation has experienced is the natural result of a judiciary which is willing to "interpret" a new meaning from a constitutional provision based on what that same court said the provision stood for in a previous case. James Madison lamented about judges tendency to expand their powers, and said:

It is to be regretted that the Court is so much in the practice of mingling with their judgments pronounced, comments & reasonings of a scope beyond them; and that there is often an apparent disposition to amplify the authorities of the Union at the expense of those of the States. It is of great importance as well as of indispensable obligation, that the constitutional boundary between them should be impartially maintained.

9 THE WRITINGS OF JAMES MADISON 56 (G. Hunt, ed. 1910). See also *The Passenger Cases*, 48 U.S. (7 How.) 283, 478 (1848) ("If in this court, we are at liberty to give old words new meaning when we find them in the constitution, there is no power which may not, by this mode of construction, be conferred on the general government, and denied to the state.") (Taney, C.J., dissenting).

dilemma? The authors suggest that there are two solutions which should be considered by Wyoming and other states: The *Casey* Solution and the Federalism Solution. The *Casey* Solution will merely require the mobilization of traditional law-making procedures.¹⁶⁸ However, this will only provide a partial and temporary solution to the problem of unregulated abortion.¹⁶⁹ The Federalism Solution, which takes a longer-term approach, will re-establish traditional federalism by amending the Constitution.

The Casey Solution

Five provisions of the Pennsylvania Abortion Control Act were challenged in *Casey*; the Court upheld four. The permissible provisions include: (1) a statutory definition for "medical emergency,"¹⁷⁰ (2) requirement of informed consent,¹⁷¹ (3) requirement of parental consent,¹⁷² and (4) recordkeeping and reporting requirements for facilities which perform abortions.¹⁷³ The Court struck down a requirement that husbands be notified before a married woman could receive an abortion.¹⁷⁴ Though *Casey* did not clearly overrule *Roe*, it will provide Wyoming legislators some latitude in forming a state abortion policy. Meager as that protection may be, Wyoming should take advantage of *Casey*, and further review Wyoming's current position regarding fetal rights.

The current Wyoming abortion statutes, though inconsistent with post-*Roe* abortion jurisprudence, are consistent with *Casey*.¹⁷⁵ In ad-

168. Some have suggested that Wyoming's Abortion Statutes were already harmonious with the outcome of *Casey*, though written well before that case. See Laurie Brooke Seidenberg, *President's Report*, THE ADVOCATE, August 1992, p. 1.

[I]t appears the Supreme Court has decided to allow states to place restrictions on women and their doctors, restrictions such as waiting periods, mandatory lectures by doctors on the development of a fetus, and, as we already see in Wyoming, parental consent mandates, and prohibition of abortion at public expense.

Id.

169. This solution is partial because states are still forbidden from protecting the unborn before the point of viability. It is temporary because the Supreme Court will someday be comprised of a different group of justices. It is not too fantastic to suggest that a future court, with a political agenda similar to that of the *Roe* Court, would overturn *Casey*, and return abortion to its previous status of total unregulability. Additionally, Congress has before it the Freedom of Choice Act, which would return abortion to its pre-*Casey* status. Though the authors of this comment believe that such a law is unconstitutional, for the same reasons discussed in *supra* notes 154 through 165 and accompanying text, it is unlikely that such a law would be held unconstitutional under existing Supreme Court precedent. See also 136 CONG. REC. E1485-01 (May 10, 1990) (Extension of Remarks of Rep. Dannemeyer) ("The Freedom of Choice Act is unconstitutional. . . . The core principle of federalism, enshrined in the Tenth Amendment and at the heart of the American system of constitutional limited government, is directly at stake.").

170. *Casey*, 112 S. Ct. at 2822.

171. *Id.* at 2822-26.

172. *Id.* at 2832.

173. *Id.* at 2832-33.

174. *Id.* at 2826-32.

175. See *supra* note 168.

dition to the existing anti-abortion statutes, several new provisions for the protection of fetuses have also been proposed, though none have yet survived the full legislative process. First, a bill entitled the *Wyoming Human Life Protection Act* was introduced during the 1991 session of the Wyoming Legislature.¹⁷⁶ Second, a bill which would have required a forty-eight hour waiting period before an abortion could be performed was also introduced during the 1993 legislative session.¹⁷⁷ Finally, during 1992, enough signatures were received from Wyoming voters to require an anti-abortion statute to be considered on the ballot in the 1994 general election.¹⁷⁸ These proposals indicate that Wyoming is still concerned with the rights of its fetuses.

The Federalism Solution

The decision announced in *Casey* indicates that the justices of the United States Supreme Court are still unwilling to restrict their authority to the boundaries of the written Constitution. Without a doubt, the safest way to re-establish federalism in this nation is for the Supreme Court to admit its error, and overrule those cases which have resulted in usurpation of state police powers. However, the safest path back to federalism also seems to be the least likely. Amending the United States Constitution, as radical as that may seem,¹⁷⁹ may be the only way to bring the balance of power between state and nation back into its proper relationship.¹⁸⁰

While the United States Constitution was intended to be the supreme law of the land,¹⁸¹ judicial legislation has become an accepted,

176. The *Wyoming Human Life Protection Act* died in the house judiciary committee. Telephone Interview with Richard H. Honaker, retired State Representative from Sweetwater County (Mar. 8, 1993).

177. The bill died in committee because "it was poorly written." Pamela Dickman, *Abortion Bill Dies in Legislature, Student Groups React*, UNIVERSITY OF WYOMING BRANDING IRON, Feb. 17, 1993, at 1. An amended version of the bill is expected to be reintroduced in a future session of the Wyoming Legislature. *Id.*

178. Pro-choice groups have challenged the initiative in state court and are attempting to keep it off of the 1994 ballot. Telephone Interview with Richard H. Honaker, retired State Representative from Sweetwater County (Mar. 8, 1993).

179. The founders of this nation did not perceive constitutional amendment to be a radical act. It was usurpation which they feared. In his Farewell Address, George Washington said: If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

35 THE WRITINGS OF GEORGE WASHINGTON 229 (John C. Fitzpatrick ed., 1940).

180. The authors do not suggest that abortion is the only social issue which would be affected by such constitutional reform.

181. U.S. CONST. art. VI, cl. 2. See also Brief for the United States As Amicus Curiae Supporting Respondents at 33, *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1991) ("The ultimate source for constitutional rights is the text of the Constitution. That text, of course, is silent with respect to abortion; the Constitution leaves this matter to the States, since only the States possess a general, regulatory police power.") [hereinafter Brief of the United States of America].

in some circles a respected, method of deciding cases.¹⁸² Nearly 200 years ago, Thomas Jefferson predicted that this transmutation would occur.¹⁸³ No longer is the written Constitution revered as the final legal authority in this nation; United States Supreme Court opinions are now held out as the supreme law of this land.¹⁸⁴ The authors of this comment do not suggest that the Supreme Court should cease to act as the guardian of the Constitution, but rather, that the Supreme Court has misinterpreted the meaning of the Constitution, and an appropriate adjustment is now needed.¹⁸⁵

Thomas Jefferson suggested that federal judges must somehow become accountable to the people for their decisions.¹⁸⁶ Judicial ac-

182. A survey of more than 200 federal and state judges conducted about three years after the *Roe* decision reported that "[m]any judges . . . labeled *Roe v. Wade* massive 'judicial legislation.' For these judges, the justices' opinions on abortion in *Roe* lacked sufficient reasoning to justify this judicial excursion into the field of morals." Greg A. Caldeira, *Judges Judge the Supreme Court*, 61 JUDICATURE 208, 212 (1977) (cited in Utah Brief, *supra* note 117, at 15). See also Henry Mark Holzer, *Texas v. Johnson*, 30 SANTA CLARA L. REV. 649 (1990):

Unfortunately, too often constitutional analysis and decision-making is informed not by text, intention, and precedent but rather by emotion, desire, and anecdote. When that happens, as it has in this case, we do more than simply make bad constitutional law; we step beyond our role as judges and tread upon political prerogatives. In addition, when we do so in a case such as this one which involves the social policy of a constituent state of these United States, we undermine a structural pillar of American constitutionalism: Federalism.

Id.

183. Thomas Jefferson was adamant in his distrust of the judiciary. He predicted that the United States judiciary would eventually centralize governmental power. He said:

It has long, however, been my opinion, and I have never shrunk from its expression, . . . that the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body, (for impeachment is scarcely a scare-crow) working like gravity by night and by day, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one. To this I am opposed; because, when all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the centre of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated.

15 THE WRITINGS OF THOMAS JEFFERSON 331-32 (A. Bergh ed., 1903).

184. See, e.g., THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 143 (D. Danelski & J. Tulchin, eds. 1973) ("the Constitution is what judges say it is."). But see, Brief of United States of America, *supra* note 181, at 33 ("The ultimate source for constitutional rights is the text of the Constitution.'). See also Simms v. Oedekoven, 839 P.2d 381, 385 (Wyo. 1992) ("In American constitutional law the word 'constitution' is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or any one of the states, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it.") (quoting Rasmussen v. Baker, 50 P. 819, 823 (1897)).

185. When the Supreme Court interprets a federal statute in a manner which is inconsistent with congressional intent, Congress can simply amend the statute in order to clarify how the Supreme Court should interpret it. Likewise, when the Supreme Court misinterprets the Constitution, the people can amend it in order to rectify the problem. See *supra* note 179.

186. 1 THE WRITINGS OF THOMAS JEFFERSON 120-21 (A. Bergh ed., 1903).

countability at the national level can only occur through a constitutional amendment.¹⁸⁷ However, while such an amendment in the past might have deterred the Supreme Court from usurping state autonomy, it seems unlikely that judicial accountability at this late date would directly aid the reinstatement of traditional federalism.¹⁸⁸ It may well be that the damage done to the federal system in this nation can only be corrected by amending the Constitution with an eye toward directly annulling those aspects of the Constitution which have been created out of whole cloth by the Supreme Court.

Repealing the Fourteenth Amendment has been suggested,¹⁸⁹ but taking such a broad swipe at the problem is both unnecessary and undesirable.¹⁹⁰ An amendment which would simply de-incorporate the Bill of Rights would be a better approach to re-establishing traditional federalism in this nation.¹⁹¹ Criticism of the incorporation doctrine has been common since its inception, and commentators have at-

There was another amendment of which none of us thought at the time, and in the omission of which, lurks the germ that is to destroy this happy combination of National powers in the General government, for matters of National concern, and independent powers in the States, for what concerns the States severally. . . . I deem it indispensable to the continuance of this government, that they should be submitted to some practical and impartial control; and that this, to be imparted, must be compounded of a mixture of State and Federal authorities. It is not enough that honest men are appointed Judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias add that of the *esprit de corps*, of their peculiar maxim and creed, that "it is the office of a good Judge to enlarge his jurisdiction," and the absence of responsibility; and how can we expect impartial decision between the General government, of which they are themselves so eminent a part, and an individual State, from which they have nothing to hope or fear?

Jefferson also said:

It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law.

15 THE WRITINGS OF THOMAS JEFFERSON 213 (A. Bergh ed., 1903). See also MICHAEL A. MUSMANNO, PROPOSED AMENDMENTS TO THE CONSTITUTION 84-85 (1976).

187. Federal judges are appointed for life, and may be removed only by impeachment. The Constitution provides that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . ." U.S. CONST. art. III, § 1.

188. However, the nation should plan today for the needs of tomorrow. If past judicial accountability would have prevented the current state of affairs, it seems reasonable to suggest that it will also deter the development of new methods of judicial usurpation.

189. MUSMANNO, *supra* note 186, at 209.

190. The Fourteenth Amendment has had the very desirable effect of requiring states to treat all people equally, regardless of their race. This aspect of the Fourteenth Amendment exists independently of the incorporation doctrine and should remain undisturbed.

191. *Roe v. Wade* was decided under the doctrine of substantive due process, see *supra* note 132 and accompanying text. However, the fundamental right to privacy protected by substantive due process, which the Supreme Court identified in *Griswold* and later expanded in *Roe*, was found in "penumbras, formed by emanations" from the Bill of Rights. *Griswold*, 381 U.S. at 483. But see *infra* notes 193 through 195 and accompanying text (observing that *Roe* can be interpreted to establish, out of whole cloth, a privacy right which is quite separate from the privacy established by the line of cases leading up to *Roe*).

tacked the validity of the doctrine, and called on the Court to abandon it, but to no avail.¹⁹²

The apparent difficulty with simply de-incorporating the Bill of Rights is that *Roe* can be interpreted to mean that the liberty clause of the Fourteenth Amendment now has judicially-enhanced meaning which is separate from the incorporation doctrine. In writing for the *Roe* Court, Justice Blackmun observed that the "Constitution does not explicitly mention any right of privacy."¹⁹³ He went on to say that "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." He then cited a series of cases which relied on various aspects of the Bill of Rights for the development of a right to privacy.¹⁹⁴ He concluded that *Roe* was decided upon a right to privacy found in the Fourteenth Amendment.¹⁹⁵

It may well be that a very specific constitutional amendment will be needed in order to counteract the Supreme Court's sweeping interpretation of the liberty aspect of the Fourteenth Amendment. Such an amendment could come in the form of a Right-to-Life Amendment, which recognizes personhood from the moment of conception.¹⁹⁶ However, from a federalism perspective, this would be undesirable. Constitutional recognition of fetal personhood would take the pendulum to the opposite extreme, and would still forbid a state

192. See, e.g., Michael Kent Curtis, *Conceived in Liberty: The Fourteenth Amendment and the Bill of Rights*, 65 N.C. L. REV. 889 (1987).

193. *Roe*, 410 U.S. at 152.

194. *Id.* Among those cases, Justice Blackmun cited *Meyer v. Nebraska*, 262 U.S. 390 (1922), for the assertion that "the concept of liberty guaranteed by the first section of the Fourteenth Amendment" establishes "at least the roots of" the right to privacy. *Roe*, 410 U.S. at 152. However, *Meyer* had nothing to do with a right to privacy. See *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in part and dissenting in part) (stating that the cases relied on to establish a right to privacy "do not endorse any all-encompassing 'right of privacy.'"). In *Meyer*, the state forbade the teaching of foreign languages in public schools until the eighth grade. *Meyer*, 262 U.S. at 397. The Court in *Meyer* stated that the liberty aspect of the Fourteenth Amendment encompasses

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399. No privacy interest was challenged in *Meyer*. The issue argued and decided in *Meyer* was the authority for a state to forbid the teaching of foreign languages in public schools before the eighth grade.

195. *Roe*, 410 U.S. at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.") (emphasis added).

196. See Charles E. Rice, *Issues Raised by the Abortion Rescue Movement*, 23 SUFFOLK U. L. REV. 15 (1989) (quoting Newsweek) ("the right-to-lifers aim at a national movement in the next few years, dramatic and disruptive enough to force the adoption of a right-to-life amendment to the Constitution.").

from balancing the interests of the woman and the fetus. A better approach would be to narrowly define Fourteenth Amendment liberty. This would allow the state legislatures and courts to determine which civil liberties shall be allowed and which shall be prohibited within the jurisdiction of that state. Placing the resolution of civil liberties back at the local level would eliminate the national schism that has occurred as a result of decisions such as *Roe v. Wade*.

CONCLUSION

Wyoming law, with the exception of the United States Supreme Court imposed abortion jurisprudence, recognizes that a fetus is granted personhood with its inherent rights, privileges, and remedies. These rights should not be primarily contingent upon the value which the fetus' mother places on its life. Abortion is a civil liberty which is important to a great many people, yet the Supreme Court has unjustifiably elevated this civil liberty to the status of a fundamental right. The critical defect with elevating this civil liberty to the level of a fundamental right is that it ignores the fact that a woman's civil liberty is not the only interest involved. The woman's interest in an abortion and the fetus' interest in life are diametrically competing interests. The appropriate forum for balancing these interests is in the state legislatures.

Rather than asking the United States Supreme Court to exercise restraint, the time has come to force the Court to recognize the traditional bounds of federalism by amending the Constitution. The Constitution *was* an agreement between the states and the national government whereby the former created the latter, and agreed to confer certain powers upon it. Agreements between parties should be construed in light of their intent and understanding at the time that they entered into the agreement. An agreement between the states and the national government is no less of an agreement simply because it is called a "Constitution."

Allowing the judiciary to apply their perception of societal norms rather than the intent of the parties allows the judiciary to subject the parties to any terms or conditions that the judiciary chooses to fashion.¹⁹⁷ In effect, it places the judges above the Constitution.¹⁹⁸

197. Thomas Jefferson said: "The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." 15 THE WRITINGS OF THOMAS JEFFERSON 213 (A. Bergh ed., 1903).

198. See *Casey*, 112 S. Ct. at 2876 (Scalia, J., concurring in part and dissenting in part) (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting)) ("[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.").

Those who ratified the Constitution and the Fourteenth Amendment did not intend to divest the states of their traditional police powers. That fact should be clarified for the United States Supreme Court. The Supreme Court "should get out of this area, where [it does] neither [itself] nor the country any good by remaining."¹⁹⁹

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199. *Casey*, 112 S. Ct. at 2885 (Scalia, J., concurring in part and dissenting in part).