No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF CERTAIN AMERICAN STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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BRIEF OF CERTAIN AMERICAN STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICI

Amici Curiae are more than 250 state senators and representatives.* *Amici* do not all share the same convictions regarding the manner and extent to which the practice of abortion should be regulated. But all are in agreement that the regulation of abortion is properly a matter for the legislative, not the judicial, branch of government, and that the States should have the constitutional authority to protect unborn human life throughout pregnancy. By virtue of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), however, that authority can no longer be exercised in any meaningful fashion.

The regulation of abortion poses difficult and complex legal, moral, social, medical, technological and political problems which the judiciary is uniquely ill-suited to resolve. From 1787 until 1973, these questions were raised, freely debated and answered in the public forums of the state legislatures, where the will of the people could be expressed through their popularly elected representatives. hat debate has been silenced and those forums have been closed for more than sixteen years. The voice of the people will not be heard until *Roe v. Wade* is overruled and the authority to regulate abortion is restored to the States.

SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that "[the] right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. The Court acknowledged that "[t]he Constitution does not explicitly mention any right of privacy." *Id.* at 152. Nevertheless, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones

* See List of *Amici* in the attached Appendix.

of privacy, does exist under the Constitution." *Id.* However, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.*

In determining that abortion is a "fundamental right," the Court in *Roe* discussed at length the treatment of abortion in English and American law. 410 U.S. at 129, 132-41, 147-52. Based upon that review, the Court came to the following conclusions:

> It is . . . apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

Id. at 140-41.

Amici Curiae respectfully submit that these conclusions, which are central to the Court's decision in *Roe*, are erroneous. The Court's historical excursus was seriously flawed and failed to take into account the medical and technological context in which the law of abortion evolved. As this brief attempts to demonstrate, both the English common law, as received by the American states, and the anti-abortion statutes enacted by state legislatures in the nineteenth century, sought to protect unborn human life to the extent that contemporary medical science could establish the existence of that life. This evidence undermines the foundations of *Roe* and suggests that abortion has never been regarded as a "right" in English or American law. Accordingly, abortion cannot be considered a "fundamental right" under the Constitution.

ARGUMENT

> Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. *Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling *Roe v. Wade.*

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 at 796-97 (1986) (White, J., dissenting).

I. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE RIGHT OF PRIVACY.

This Court has recognized that there are certain fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. Due process of law protects those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

For any right to be considered fundamental, it must be grounded in the history and traditions of our society and be basic to our civil and political institutions. *See Palko v. Connecticut*, 302 U.S. 319, 328 (1937), and *Meyer v. Nebraska*, 262 U.S. 390, 400-02 (1923). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), for example, the Court, in holding that the right to jury trial is fundamental, emphasized the historical role of jury trials in the

"Anglo-American regime of ordered liberty." *Id.* at 149 n.14.

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court forcefully reiterated these principles in rejecting the claim that the Constitution confers a fundamental right upon homosexuals to engage in sodomy. The Court noted that "the Due Process Clauses of the Fifth and Fourteenth Amendments . . . have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription." *Id.* at 191. The Court has often recognized "rights that have little or no textual support in the constitutional language." *Id.* To guard against the danger of "the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection." *Id.*

Thus, in *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), the Court stated that this category of rights includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A broader formulation of fundamental liberties was set forth in Justice Powell's opinion in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.* at 503 (Powell, J.). In *Roe v. Wade*, 410 U.S. 113 (1973), this Court acknowledged that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.* at 152.

In responding to the argument that homosexuals have a fundamental right to engage in acts of consensual sodomy, the Court in *Bowers* noted that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill

of Rights." 478 U.S. at 192. The Court noted further that in 1868, when the Fourteenth Amendment was ratified, "all but 5 of the 37 States in the Union had criminal sodomy laws." *Id.* at 192-93. Finally, the Court pointed out that until 1961, "all 50 States outlawed sodomy, and today, 25 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults." *Id.* at 193-94. In light of the law's longstanding prohibition of sodomy, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty,' is, at best, facetious." 479 U.S. at 194.

In *Bowers*, the Court declined to take a more expansive view of its authority "to discover new fundamental rights imbedded in the Due Process Clause." 478 U.S. at 194.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be . . . great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

478 U.S. at 194-95

When the well-established principles of constitutional analysis enunciated by this Court in *Bowers v. Hardwick* are applied to the question of abortion, it becomes clear that *Roe v. Wade* was wrongly decided. Contrary to the Court's conclusion in *Roe*, there was no "right" to an abortion at common law or under the statutes enacted by the State legislatures in the nineteenth century. The uniform and consistent condemnation of abortion as a crime in English and American law contradicts the

critical historical findings on which *Roe v. Wade* was based and calls for reappraisal and rejection of the "abortion right."

II. THE COMMON LAW OF ENGLAND PUNISHED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE.

An understanding of the development of the common law crime of abortion in England is essential to any analysis of the status of abortion in American law prior to the gradual replacement of common law crimes by statutory crimes in the nineteenth century. Those statutes were enacted because the English common law, as received by the American states, was unable to keep pace with the medical and technological advances in the nineteenth century. Although a comprehensive review of this history is beyond the scope of this brief, the following is offered as a summary.[1]

The thirteenth century commentators Bracton and Fleta classified abortion as homicide if the fetus was "formed and animated." 2 H. Bracton, *The Laws And Customs Of England* 279 (Twiss ed. 1879); 2 Fleta 60-61, Book I, ch. 23 (Selden Soc. ed. 1955). Neither Bracton nor Fleta expressly required that the child be born alive for the killing to constitute a homicide. The sixteenth and seventeenth century jurist, Sir Edward Coke, declared that, while not "murder," abortion of a woman "quick with childe" was a "great misprision." E. Coke, *Third Institute of the Laws of England* at 50 (1644). If, however, "the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive." *Id.* In his *Commentaries On The Laws Of England*, William Blackstone closely followed Coke:

> [T]he person killed must be *"a reasonable creature in being and under the king's peace,"* at the time of the killing . . . To kill a child in its mother's womb, is now no murder, but a great misprision; but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.

4 W. Blackstone, *Commentaries On the Laws Of England* 198 (emphasis in original). Blackstone held that the killing of a child in the womb was "a very heinous misdemeanor." 1 W. Blackstone at 126.

"Quickening" (*i.e.*, the point in a pregnancy at which the mother begins to detect fetal movement) was used in the common law as a practical evidentiary test to determine whether the abortion had been performed upon a live human being in the womb and whether the abortion had caused the child's death. Byrn, *An American Tragedy: The Supreme Court On Abortion*, 44 Fordham L.Rev. 807, 815-16 (1973); Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U.L. Rev. 563, 580-92 (1987). "[T]his evidentiary test was never intended as a judgment that before quickening the child was not a live human being." *Byrn* at 816.

In *Rex v. Bourne*, 1 K.B. 687 (1939), Justice Macnaghten recognized that "long before then [the enactment of the first English abortion statute of 1803], before even Parliament came into existence, the killing of an unborn child was by the common law of England a grave crime . . . . The protection which the common law afforded to human life extended to the unborn child in the womb of its mother." 1 K.B. 687, 690. A recent review of the English cases and commentaries concludes that "the common law prohibited abortion and did so predominantly for the protection of fetal life." J. Keown, *Abortion, doctors and the law: Some aspects of the legal regulation of abortion in England from 1803 to 1982* at 11 (Cambridge University Press 1988). This was the status of the common law crime of abortion in England at the time of the American Revolution.

[1] The Court is referred to the brief of Value of Life Committee, *et al.*, as *amici curiae* in support of Appellants, for a fuller presentation of this history.

III. THE AMERICAN COLONIES AND STATES ACCEPTED THE COMMON LAW OF ENGLAND AND PUNISHED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE.

Notwithstanding the attempts of some scholars to disparage the authority of Coke and Blackstone (*see* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality* (pt. 1), 14 N.Y.L.F. 411 (1968); and Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971)), what is important is that their views were accepted by American courts in the nineteenth century as accurate statements of the common law regarding the criminality of abortion. *See, e.g., Abrams v. Foshee*, 3 Iowa 274, 278-80 (1856); *Smith v. State*, 33 Me. 48, 55 (1851); *Lamb v. State*, 67 Md. 524, 533, 10 A. 208 (1887); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845); *People v. Sessions*, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886); *State v. Cooper*, 22 N.J.L. 52, 53-58 (1849).

In conformity with those views, state courts uniformly recognized abortion after quickening as a common law crime.[2] At least two state courts determined

[2] *Smith v. Gaffard*, 31 Ala. 45, 51 (1857) (*dictum* in slander case); *State v. Reed*, 45 Ark. 333, 334-36 (1885) (reversing dismissal of indictment charging defendant with post-quickening abortion); *Eggart v. State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898) (*dictum* in case decided under statute abolishing quickening distinction); *Abrams v. Foshee*, 3 Iowa 274, 278-80 (1856) (*dictum* in slander case); *Mitchell v. Commonwealth*, 78 Ky. 204, 205-10 (1879) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Smith v. State*, 33 Me. 48, 55 (1851) (*dictum* in case decided under statute abolishing quickening distinction); *Lamb v. State*, 67 Md. 524, 532-34, 10 A. 208, 208-09 (1887) (*dictum* in case decided under statute abolishing quickening distinction); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Commonwealth v. Bangs*, 9 Mass. 387, 387-88 (1812) (arresting judgment where indictment failed to allege that "the woman was quick with child"); *State v. Emerich*, 13 Mo. App. 492, 495-98 (1883) (*dictum* in case decided under statute); *State v. Cooper*, 22 N.J.L. 52, 54-58 (1849) (*dictum* in case upholding indictment charging defendant with assault); *Evans v. People*, 49 N.Y. 86, 88 (1872) (*dictum* in case reversing conviction under manslaughter statute).

Four of these decisions acknowledged the arbitrary nature of the quickening distinction and recommended corrective legislative action. *See Mitchell v. Commonwealth*, 78 Ky. 204, 209-10 (1879); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 268; *State v. Emerich*, 13 Mo. App. 492, 495 (1883); *State v. Cooper*, 22 N.J.L. 52, 58 (1849).

that abortion at any state of pregnancy was a common law crime. *State v. Slagle*, 83 N.C. 630, 632 (1880) (*dictum*); *Mills v. Commonwealth*, 13 Pa. 630, 632-33 (1850) (indictment need not allege that woman had become quick). The Maryland Court of Appeals may have had these cases in mind when it recorded widespread abandonment of the medically obsolete quickening distinction:

> [A]s the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offence to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime *at common law* without regard to the stage of pregnancy.

Lamb v. State, 67 Md. 524, 533, 10 A. 208, 208 (1887) (emphasis added).

These decisions, together with the dozens of abortion prosecutions reported in the Century Digest and each volume of the Decennial Digests, lay to rest the doubt expressed in *Roe* that "abortion was never firmly established as a common-law crime even with respect to the destruction of a quick fetus." 410 U.S. at 136. No

American court ever held that post-quickening abortion was not a crime at common law.

Moreover, there is evidence that abortion was prosecuted as a common law crime in the colonial period. Julia Cherry Spruill, in her study of women in the South, cites the 1652 case of Captain Mitchell, who "was accused of a number of crimes, among which was attempted abortion," and of Elizabeth Robins, who was accused of "taking medicine to destroy her child." J. Spruill, *Women's Life and Work in the Southern Colonies* at 325-26 (1938). Another historian, Lyle Koehler, records the case of Deborah Allen, who was indicted on September 4, 1683, by the "Gen. Attorney . . . for, fornication, and for Indeavoringe the Dithruction of the Child in her womb." L. Koehler, *A Search For Power: The "Weaker Sex" in Seventeenth-Century New England* at 329, n.132 (1980).

Admittedly, there are few reported cases of prosecutions for abortions in America prior to the mid-nineteenth century. This was not because abortion was not regarded as a crime at common law, however, but because "[f]ew [women] tried to limit their pregnancies by birth control or abortion," (C. Scholten, *Childbearing In American Society 1650-1850* at 9 (1985)), and because primitive medical understanding prevented proof of abortion until after quickening and unless there were direct witnesses who would testify. J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* at 72 (1978). Mohr notes that abortion after quickening, "late in the fourth or early in the fifth month," was a common law crime in the United States. *Id.* at 3. In *Evans v. People*, 49 N.Y. 86 (1872), the New York Court of Appeals confirmed the evidentiary basis of the quickening rule:

> But until the period of quickening there is no evidence of life; and whatever may be said of the foetus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the foetal movements are the first clearly marked and well defined evidences of life.

Id. at 90.

Prior to the codification of common law crimes in the nineteenth century, regulations on midwives prohibited abortions. In 1716, for example, New York City adopted an ordinance directed at midwives which provided:

> You Shall not Give any Counsel or Administer any Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should Destroy or Miscarry of that she goeth withall before her time.

Horan and Marzen, "Abortion and Midwifery: A Footnote in Legal History," in *New Perspectives on Human Abortion*, at 199 (T. Hilgers, D. Horan, and D. Mall, eds. 1981). Violation of this ordinance, which remained in effect at least until 1776, was punishable by fines, forfeiture or jail. *Id.* at 199-200. Virginia, in the seventeenth century, passed an ordinance by which "[m]idwives were pledged to expose infanticide, to summon other midwives in suspicious cases and not to induce abortion or charge exorbitantly." S. Massengill, *A Sketch of Medicine and Pharmacy* at 294 (2d ed. 1942).

The law could not prove pregnancy before quickening because of the primitive state of medical technology. But as a prophylactic measure it sought to prevent the induction of abortion throughout pregnancy by regulating the practices of midwives. This regulation is significant because well into the nineteenth century, midwives, not physicians, attended women during pregnancy and childbirth and performed most abortions. Horan and Marzen, "Abortion and Midwifery: A Footnote in Legal History," in *New Perspectives on Human Abortion*, at 200 (T. Hilgers, D. Horan, and D. Mall, eds. 1981).

Abortion was not a "right" at common law, either in England or America. Abortion was a crime and was punished accordingly.

IV. THE ABORTION STATUTES ENACTED BY THE STATE LEGISLATURES IN THE NINETEENTH CENTURY, WHICH ABOLISHED THE QUICKENING DISTINCTION AND PROHIBITED ABORTION THROUGHOUT PREGNANCY EXCEPT TO SAVE THE LIFE OF THE MOTHER, WERE INTENDED TO PROTECT UNBORN HUMAN LIFE.

In *Roe v. Wade*, the Court found that "the pre-existing English common law" of abortion remained in effect in this country "in all but a few States until [the] mid-19th century" and that "[i]t was not until after the War Between the States that legislation began generally to replace the common law." 410 U.S. at 138-139. These findings do not appear to be supported by the historical record. By the end of 1849, eighteen of the thirty States had enacted statutes restricting abortion, and by the end of the Civil War, twenty-seven of the thirty-six States had done so.[3] By the end of 1868, the year in

[3] *See*, generally, Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29, 32 *et seq.* (1985). The following eighteen states adopted anti-abortion statutes before 1850: Alabama, Ala. Acts, ch. 6, sec. 2 (1840); Arkansas, Ark. Rev. Stat., ch. 44, div. III, art. II, secs. 5, 6 (1838); Connecticut, Conn. Stat., tit. 22, sec. 14 at 152 (1821) (in 1860 this statute was replaced by Conn. Pub. Acts, ch. LXXI, secs. 1, 2, p. 65 (1860), which made abortion at any stage of pregnancy a crime); Illinois, Ill. Rev. Crim. Code, div. 5, sec. 46, p. 131 (1833) (this statute was replaced by a subsequent enactment in 1867, Act of Feb. 28, 1867, Ill. Pub. Laws, p. 89 (1867)); Indiana, Ind. Rev. Stat., sec. 3 at 224 (1838) (by 1859, this statute had been superseded by a subsequent enactment, Ind. Laws ch. LXXXI, sec. 2 at 130-31 (1958)); Iowa (admitted to statehood Dec. 28, 1846), Iowa (Terr.) Rev. Stat. ch. 49, secs. 10, 13 at 167 (1843 (an act of March 15, 1858, made abortion at any stage of pregnancy a crime, Iowa Rev. Stat., sec. 4221 (1860)); Maine, Me. Rev. Stat., ch. 160, secs. 11-14 (1840); Massachusetts, Mass. Acts & Resolves, ch. 27 (1845); Michigan, Mich. Rev. Stat., ch. 153, secs. 32-34, p. 662 (1846); Mississippi, Miss. Code, ch. 64, secs. 8, 9, p. 958 (1848); Missouri, Mo. Rev. Stat., art. II, secs. 9, 10, 36 at 168-69, 172 (1835); New Hampshire, N.H. Laws, ch. 743, sec. 1, p. 708 (1848); New Jersey, N.J. Laws, pp. 266-27 (1849); New York, N.Y. Laws, ch. 22, sec. 1, p. 19 (1846), N.Y. Laws, ch. 260, secs. 1-6 at 285-86 (1845); Ohio, Ohio Gen. Stat., ch. 35, secs. 111, 112 at 252 (1841); Vermont, Vt. Acts No. 33, sec. 1 (1846); Virginia, Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848); Wisconsin, Wis. Rev. Stat., ch. 133, secs. 10, 11 (1849) (by 1858, this statute had been superseded by a subsequent enactment, Wis. Rev. Stat., ch. 164, sec. 11, ch. 169, secs. 58, 59 (1858)).

which the Fourteenth Amendment was ratified, *thirty of the then thirty-seven States had enacted such statutes*, including twenty-five of the thirty-ratifying States,[4] to-

The following nine states adopted such statutes between 1850 and 1865: California (admitted to statehood Sep. 9, 1850), Cal. Sess. Laws, ch. 99, sec. 45, p. 233 (1849-1850) (section 45 was amended by an act of May 20, 1861, ch. DXXI, 1861 Cal. Stat. 588); Kansas (admitted to statehood Jan. 29, 1861), Kan. (Terr.) Stat., ch. 48, secs. 9, 10, 39 at 238, 243 (1855) (by 1859, this statute had been superseded by a subsequent enactment, Kan. (Terr.) Laws, ch. 28, secs. 9, 10, 37 (1859)); Louisiana, La. Crimes & Offences, sec. 24 at 138 (1856); Minnesota (admitted to statehood May 11, 1858), Minn. (Terr.) Rev. Stat. ch. 100, secs. 10, 11, p. 493 (1851); Nevada (admitted to statehood Oct. 31, 1864), Nev. (Terr.) Laws, ch. 28, div. 4, sec. 42, p. 63 (1861); Oregon (admitted to statehood Feb. 14, 1859), Act of Oct. 19, 1864, Ore. Gen. Laws, Crim. Code, ch. 43, sec. 509, p. 528 (1845-1864); Pennsylvania, Pa. Laws No. 374, secs. 87-89 (1860), 1860 Pa. Laws 404-05; Texas, Tex. Gen. Stat. Dig., ch. VII, articles 531-536, p. 524 (Oldham & White 1959); West Virginia (admitted to statehood June 20, 1863), *see* Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848), W. Va. Const., art. XI, par. 8 (1863).

[4] In addition to the twenty-seven states listed in note 3, the following three states adopted anti-abortion statutes between 1865 and 1868: Florida, Fla. Acts, 1st Sess., ch. 1637, No. 13, ch. 3, secs. 10, 11, ch. 8, secs 9-11 (1868), 1868 Fla. Laws 64, 97; Maryland, Md. Laws, ch. 179, sec. 2, p. 315 (1868); Nebraska (admitted to statehood March 1, 1867), Neb. (Terr.) Stat., tit. 4, ch. 4, sec. 42 (1866). Of the thirty states ratifying the fourteenth amendment as of July 21, 1868, all but Georgia, North Carolina, Rhode Island, South Carolina and Tennessee had adopted such statutes.

gether with six of the ten federal territories.[5] The territorial enactments are significant because laws passed by territorial legislatures were subject to Congressional annulment. U.S. Const., art. IV, sec. III, cl. 2; *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880). No abortion statute enacted by any territorial legislature was ever nullified by Congress, including the 39th Congress which approved the Fourteenth Amendment in June 1866.

The widespread adoption of these laws prior to the ratification of the Fourteenth Amendment in 1868 undermines the Court's conclusion in *Roe* that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. As Justice Rehnquist observed in dissent, "[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." *Id.* at 174 (Rehnquist, J., dissenting). After reciting the statutory history set out above, Justice Rehnquist stated:

> There apparently was no question concerning the validity of this provision [the Texas statute] or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

Id. at 177 (Rehnquist, J., dissenting).

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[5] The following federal territories adopted anti-abortion statutes by the end of 1868: Arizona, Ariz. Code, ch. 10, div. 5, sec. 45 (1865); Colorado, Act of Nov. 5, 1861, div. 4, sec. 42, 1861 Colo. Laws 296-97, Colo. Rev. Stat., ch. XXII, sec. 42 (1868); Idaho, Act of Feb. 4, 1864, ch. 4, sec. 42, 1864 Idaho Laws 443; Montana, 1864 Mont. Laws 184; New Mexico, Act of Feb. 15, 1854, No. 28, ch. 3, secs. 10, 11, 1854 N.M. Laws 88; Washington, Wash. (Terr.) Stat., ch. 2, secs. 37, 38 at 81 (1854).

The Court dismissed the importance of this legislation, concluding that the nineteenth century statutory prohibitions of abortion were enacted not to protect prenatal life but to guard maternal health against the dangers of unsafe operations. 410 U.S. at 151-52. Three reasons were offered in support of this conclusion, all of which have been shown by "the lessons of experience and the force of better reasoning," (*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandies, J., dissenting)), to be erroneous.

First, citing only one New Jersey decision, the Court stated that "[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus." 410 U.S. at 151 & n. 48, citing *State v. Murphy*, 27 N.J.L. 112 (1858). The Court not only misread the holding in *Murphy* (*see* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1273-74 (1975)),[6] but also overlooked eighteen decisions from thirteen jurisdictions expressly affirming that protection of the unborn was a purpose of their nineteenth century statutes,[7] and

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[6] In *Murphy*, the court recited the common law rule that "the procuring of an abortion, or the attempt to procure an abortion, by the mother herself, or by another with her consent, was not indictable, unless the woman were quick with child." 27 N.J.L. at 114. The court noted that "[t]he act was purged of its criminality, so far as it affected the mother by her consent. It was an offence only against the life of the child. . . . [T]he *statute* does not make it criminal for the woman to swallow the potion, or to consent to the operation or other means to procure an abortion. . . . Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child." *Id.* at 114 (emphasis added). *See State v. Gedicke*, 43 N.J.L. 86 (1861), discussed in the text, and *State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956).

[7] *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); *Dougherty v. The People*, 1 Colo. 514, 522-23 (1872); *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942); *Nash v. Meyer*,

twelve other decisions from ten additional jurisdictions strongly implying the same position.[8] In every decade since the 1840's, there has been at least one American state court decision recognizing this purpose.

Thus, in 1849, the Supreme Court of Vermont held that "the preservation of the life of the child" was one of the "important considerations" underlying the state's 1846 abortion statute. *State v. Howard*, 32 Vt. 380, 399 (1859).

In 1851, the Supreme Court of Maine explained that its 1840 abortion statute had abolished the common law quickening distinction:

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54 Idaho 283, 301, 31 P.2d 273, 280 (1934); *State v. Alcorn*, 7 Idaho 599, 613-14, 64 P. 1014, 1019 (1901); *Joy v. Brown*, 173 Kan. 833, 839-40, 252 P.2d 889, 893 (1953); *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913); *State v. Watson*, 30 Kan. 281, 284, 1 P. 770, 771-72 (1883); *State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956); *State of Gedicke*, 43 N.J.L. 86, 89-90, 96 (1881); *State v. Hoover*, 252 N.C. 113, 133, 135, 113 S.E.2d 281, 283 (1960); *State v. Tippie*, 89 Ohio St. 35, 39-40, 105 N.E. 75, 77 (1913); *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936); *State v. Ausplund*, 86 Ore. 121, 131-32, 167 P. 1019, 1022-23 (1917); *State v. Howard*, 32 Vt. 380, 399-401 (1859); *Anderson v. Commonwealth*, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950); *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949); *State v. Cox*, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938). But see *State v. Carey*, 76 Conn. 342, 352-53, 56 A. 632, 636 (1904); *People v. Nixon*, 42 Mich. App. 332, 335-41, 201 N.W.2d 635, 638-41 (1972); *State v. Jordan*, 227 N.C. 579, 580, 42 S.E.2d 674, 675 (1947); *Foster v. State*, 182 Wis. 298, 300, 196 N.W. 233, 234 (1923) (*contra*).

[8] *McClure v. State*, 214 Ark. 159, 170, 215 S.W.2d 524, 530 (1949); *Montgomery v. State*, 80 Ind. 338, 345 (1881); *State v. Moore*, 25 Iowa 128, 131-32, 135-36 (1866); *Abrams v. Foshee*, 3 Iowa 274, 278 (1856); *Smith v. State*, 33 Me. 48, 57-59 (1851); *Worthington v. State*, 92 Md. 222, 237-238, 48 A. 355, 356-57 (1901); *Lamb v. State*, 67 Md. 524, 532-33, 10 A. 208 (1887); *People v. Sessions*, 58 Mich. 594, 595-96, 26 N.W. 291, 292-93 (1886); *Edwards v. State*, 79 Neb. 251, 254-55, 112 N.W. 611, 612-13 (1907); *Bennett v. Hymers*, 101 N.H. 483, 484-85, 147 A.2d 108, 109-110 (1958); *State v. Powell*, 181 N.C. 515, 106 S.E.133 (1921); *State v. Crook*, 16 Utah 212, 216-17, 51 P. 1091, 1093 (1898).

> There is a removal of the unsubstantial distinction, that it is no offence to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unseccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.

Smith v. State, 33 Me. 48, 57 (1851).

In 1868, the Supreme Court of Iowa affirmed a conviction of murder for causing the death of a woman by an illegal abortion under an 1858 anti-abortion statute, and approved of the following charge to the jury as an accurate statement of the law:

> To attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act. It is known to be a dangerous act, generally producing one and sometimes two deaths,—I mean the death of the unborn infant and the death of the mother."

State v. Moore, 25 Iowa 128, 131-32 (1868).

In *Moore*, the court condemned abortion as "an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child." *Id.* at 136.

In 1872, the Supreme Court of the Territory of Colorado held that its 1868 abortion statute was "intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other." *Dougherty v. The People*, 1 Colo. 514, 522.

In 1881, the Supreme Court of New Jersey declared that its original 1849 abortion statute had been amended in 1872 "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die." *State v. Gedicke*, 43 N.J.L. 86, 89-90 (1881). The court described abortion as "a heinous

crime, which in almost every case endangers the life and health of the woman, and the destruction of the foetus or child, which may be quickened or instinct with the beginning of life." *Id.* at 90.

In 1898, the Supreme Court of Utah characterized abortion under its 1876 statute as "the criminal act of destroying the foetus at any time before birth." *State v. Crook*, 16 Utah 212, 217, 51 P. 1091, 1093 (1898).

In 1901, the Maryland Court of Appeals explained that American anti-abortion statutes had been strengthened and the penalties for their violation increased precisely because the medical procedures for inducing abortions had become safer:

> It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother . . . more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered, by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to the great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense. The woman takes her life in her hands when she submits to an abortion . . . but her death is no necessary element in the procuring of an abortion, and the application of the harsh rule here contended for [that defendant should have been indicted for murder instead of manslaughter] would have no effect in the repression of that abhorrent crime, which can ony be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child.

Worthington v. State, 92 Md. 222, 237-38, 48 A. 355, 356-57 (1901).

In 1916, the Alabama Court of Appeals held that the "manifest purpose" of its anti-abortion statute, first adopted in 1840, was "to restrain *after conception* an unwarranted interference with the course of nature in the propagation and reproduction of human kind . . . ." *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916) (emphasis added). Quoting from the 1911 Transactions of the Medical Association of Alabama, the court asked, "'[D]oes not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?'" *Id.* at 488, 73 So. at 836.

In a 1917 case, a defendant convicted under Oregon's 1864 abortion statute argued that he could not be prosecuted for performing an abortion on a woman prior to quickening because an abortion at that stage of pregnancy was not a crime at common law. After noting that common law crimes had been abolished in the State, the Oregon Supreme Court rejected this argument, stating:

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well. The Legislature did not waste time with refinements about quickening, but applied the law to all stages of pregnancy, and we would usurp its prerogative

if we read into the statute something not found there.

State v. Ausplund, 86 Ore. 121, 131-32, 167 P. 1019, 1022-23 (1917).

In 1921, the Supreme Court of North Carolina held that "[t]he essential fact charged [under an 1881 statute], is that the defendant advised the woman to take the drug, or other substance, with intent thereby to destroy the child." *State v. Powell*, 181 N.C. 515, 515, 106 S.E. 133, 133 (1921). The court added that the act "denounced by the statute" is the administration of a drug with the intent "to destroy the child." *Id.*

In 1934, the Supreme Court of Idaho determined that the state abortion statute, first adopted in 1854, was designed "not for the protection of the woman, but to discourage abortions because thereby the life of a human being, the unborn child, is taken." *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934). In 1936, the Oklahoma Supreme Court expressly held that "the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and, through it, society." *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936). And in 1938, the Washington Supreme Court acknowledged that the state anti-abortion statute, first adopted in 1854, was "designed to protect the life of the mother as well as that of her child." *State v. Cox*, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938).

In 1942, the Supreme Court of Georgia declared that in enacting its anti-abortion statute in 1876, "the legislature was undertaking to provide by penal law appropriate penalties for the destruction of an unborn child." *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942). In 1950, the Virginia Supreme Court of Appeals, interpreting its 1849 abortion statute, explained that the "[t]he intention of the lawmakers was to protect the health and lives of pregnant women and their unborn children from those who intentionally and not in good faith would thwart nature by performing or causing

abortion and miscarriage." *Anderson v. Commonwealth*, 190 Va. 665, 673, 58 S.E.2d 72, 75.

In 1953, the Kansas Supreme Court held that the next of kin of a woman who had died as a result of a negligently performed abortion could sue the abortionist for damages. *Joy v. Brown*, 173 Kan. 833, 252 P.2d 889 (1953). Rejecting the defendant's argument that the decendent's consent to an illegal act barred recovery, the court said, "[w]e are of the opinion that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life." *Id.* at 839-40, 252 P.2d at 892. And in 1960, the Supreme Court of North Carolina declared that its abortion statute, which had remained essentially unchanged since it was first enacted in 1881, was "designed to protect the life of a child *in ventre sa mere*." *State v. Hoover*, 252 N.C. 133, 135, 113 S.E.2d 281, 283 (1960).

State court decisions affirming the protection of unborn human life as one purpose of their statutes prohibiting abortion continued to be handed down until *Roe v. Wade*. In the fifteen months before *Roe v. Wade* was decided, no less than six state courts upheld the constitutionality of their respective abortion statutes, expressly holding that their laws were intended to protect the lives of unborn children.[9]

[9] *See Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz. App. 142, 505 P.2d 580 (1973), *modified on rehearing* pursuant to *Roe*; *Cheaney v. State*, 259 Ind. 138, 140-47, 285 N.E.2d 265, 266-70 (1972), *cert. den. for want of standing of petitioner, sub nom. Cheaney v. Indiana*, 410 U.S. 991 (1973); *Sasaki v. Commonwealth*, 485 S.W.2d 897, 900-04 (Ky. 1972), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Sasaki v. Kentucky*, 410 U.S. 951 (1973); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972); *Thompson v. State*, 493 S.W.2d 913, 917-20 (Tex. Cr. App. 1971), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Thompson v. Texas*, 410 U.S. 950 (1973); *State v. Munson*, 86 S.D. 663, 201 N.W.2d 123 (1972), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Munson v. South Dakota*, 410 U.S. 950 (1973). *But see People v. Belous*, 71 Cal.2d 954, 458 P.2d 194 (1969), *cert.*

In sum, more than thirty-five decisions from almost thirty States recognized that their abortion statutes were enacted primarily to protect unborn human life. These opinions forge an unbroken chain of precedent linking the 1840's to the early 1970's. Given this wealth of case authority, the Court's belief that state court decisions "focus[ed] on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus," (410 U.S. at 151), is ill-founded.

Further evidence of the legislatures' intent to protect fetal life may be found in the report of the American Medical Association's Committee on Criminal Abortion to the Twelfth Annual Meeting of the AMA in 1859, from which the Court in *Roe* quoted extensively. 410 U.S. at 141-42. That report, and the subsequent action taken by the AMA, supports the view that in restricting the availability of abortions, the nineteenth century legislatures intended to recognize the humanity of unborn children and protect them from the violence of abortion.

The Committee on Criminal Abortion was appointed in 1857 to investigate criminal abortion "with respect to its general suppression." In its report, the Committee deplored abortion and its frequency and listed three causes of "this general demoralization":

> The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> The second of the agents alluded to is the fact that the profession[s] themselves are frequently supposed careless of foetal life . . . .
>
> The third reason of the frightful extent of this crime is found in the grave defects of our laws, both

den., 397 U.S. 915 (1970), and *State v. Barquet*, 262 So.2d 431 (Fla. 1972) (striking down abortion statutes on vagueness grounds); and *People v. Nixon*, 42 Mich. App. 332, 201 N.W.2d 635 (1972) (holding that statute could not constitutionally be applied to a licensed physician performing an abortion before quickening in an antiseptic clinical environment).

> common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowleges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection.

12 Trans. of the Am. Med. Assn. 75-76 (1859).

The American Medical Association adopted resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.* at 28, 78. The Committee submitted another detailed report in 1871 which concluded with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). In *Roe*, the Court acknowledged that "the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period." 410 U.S. at 141.

That the nineteenth century abortion statutes were enacted, at least in part, to protect the lives of unborn children is evident from the therapeutice exception to the absolute ban on abortions. Almost all of the States prohibited abortions except those that were necessary to save the life of the mother. 410 U.S. at 139. Abortions were not allowed for health reasons, unless the life of the mother was endangered. This narrow exception, which was consistent with the common law rule (*People v. Sessions*, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886)) suggests that the laws were not designed solely to guard women against the dangers of unsafe medical and surgical procedures:

> By prohibiting all abortions except those necessary or thought to be necessary to preserve the life of the mother, the state legislatures manifested their belief that no lesser beneficial consequence could justify the destruction of the unborn child. If the legislatures did not consider the child to be a person in the whole sense, undoubtedly they would not have required the mother to bear serious health risks and heavy burdens in order to preserve the life of the child. Furthermore, if the legislatures had not considered the child to be a "person," surely their overriding concern in regulating abortion would have been to protect the health of pregnant women. Legislatures would have defined the thereapeutic exception so as to minimize the number and gravity of injuries to women resulting from pregnancy, childbirth, and induced abortion. If it would have *reduced* the number and severity of such injuries to permit physicians, after due consultation, to perform abortions found necessary to prevent serious health injury to the woman, and not just those necessary to save her life, the legislatures would have done so.

Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29, 45-46 (1985) (emphasis in original).

As a second reason offered in support of its conclusion that the nineteenth century abortion statutes were intended solely to protect maternal health and not prenatal life, the Court in *Roe* observed that "[i]n many States . . . by statute or judicial interpretation, the pregnant women herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another." 410 U.S. at 151. The Court, however, failed to note that at least seventeen states enacted statutes which expressly incriminated the woman's participation in her own abortion.[10]

[10] Arizona, Ariz. Pen. Code, sec. 455 (1887); California, Act of May 20, 1861, ch. DXXI, 1861 Cal. Stat. 588; Act of February 14, 1872, Cal. Pen. Code, sec. 275 (1872); Connecticut, Conn. Pub. Acts, ch. LXXI, sec. 3, pp. 65-66 (1860); Idaho, Idaho Rev. Stat., sec. 6795 (1887); Indiana, Act of April 14, 1881, ch. XXXVII, sec. 23, 1881 Ind. Laws 177; Minnesota, Act of March 10, 1873, ch. 9, 1873 Minn. Laws 117-19; Montana, Mont. Rev. Code, sec. 94-402 (1947); Nevada, Act of Feb. 16, 1869, ch. 22, sec. 1, 1869 Nev. Laws 64-65; Nev. Rev. Stat., sec. 200.220 (1959); New Hampshire, Act of Jan. 4, 1849, ch. 743, sec. 4, 1848 N.H. Laws 708-09; New York Act of May 13, 1845, ch. 260, sec. 3, 1845 N.Y. Laws 285-86; Act of April 6, 1872, ch. 181, sec. 2, 1872 N.Y. Laws 509-10; North Dakota, Dak. Pen. Code, sec. 338 (1877); Oklahoma, Okla. Stat., sec. 2188 (1890); Okla. Rev. Laws, sec. 2437 (1910); South Carolina, Act of March 24, 1883, No. 354, 1883 S.C. Acts 547-58; South Dakota, Dak. Pen. Code, sec. 338 (1877); Utah, Utah Code Ann., sec. 86-2-2 (1953); Wisconsin, Wis. Rev. Stat., ch. 169, sec. 59 (1859); Wyoming, ch. 73, sec. 32, 1890 Wyo. Laws 131.

Moreover, with respect to those States that did not criminalize the woman's conduct, the Court did not consider the reasons why the woman was exempt from prosecution. Traditionally, abortion was viewed as an assault upon the woman because she "was not deemed able to assent to an unlawful act against herself . . . ." *State v. Farnam*, 82 Ore. 211, 217, 161 P. 417, 419 (1916). As a result, the woman was seen as a victim, rather than an accomplice in, the abortion. *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *Dunn v. People*, 29 N.Y. 523, 527 (1864). Moreover, as a practical matter, conviction of the abortionist often depended upon the testimony of the aborted woman. Absent a grant of immunity, however, her testimony could not be compelled if she were regarded as an accomplice in the offense. *People v. Nixon*, 42 Mich. App. 332, 343, 201 N.W.2d 635, 646 (1972) (opinion of Burns, J., concurring in part and dissenting in part). In most States, a criminal conviction cannot be based on the uncorroborated testimony of an accomplice. Thus, for both principled and practical reasons, the woman who underwent an abortion was considered a victim, not a perpetrator, of the offense. *See*, Annot., *Woman Upon Whom Abortion Is Committed As Accomplice For Purposes Of Rule Requiring Corroboration Of Accomplice Testimony*, 34 A.L.R.3d 858 (1970).

Finally, the Court stated that "most of [the] initial statutes dealt severely with abortion but were lenient with it before quickening." 410 U.S. at 139. The Court concluded that "adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception." *Id.* at 151-52. Again, the history of the nineteenth century statutes restricting abortion calls this conclusion into question.

As of the end of 1868, thirty of the then thirty-seven States had enacted anti-abortion statutes. All but three of those States—Arkansas, Minnesota and Mississippi—prohibited abortions *at any stage of pregnancy.* Although seven of the twenty-seven States that prohibited abortions throughout pregnancy punished post-quickening abortions more severely than pre-quickening abortions, the other twenty States with such laws punished abortions equally, regardless of the stage of pregnancy.[11] By the end of 1883, twenty-seven of the thirty-six States that had enacted anti-abortion statutes had abolished any distinction between pre-quickening and post-quickening abortions in determining the range of possible penalties.[12]

[11] The statutes are set forth in notes 3 and 4, *supra.*

[12] Alabama, Ala. Code, sec. 3605 (1867); California, Act of May 20, 1861, ch. DXXI, 1861 Cal. Stat. 588; Colorado, Colo. Rev. Stat. ch. XXII, sec. 42 (1868); Connecticut, Conn. Gen. Stat., tit. XII, ch. II, sec. 22-25 (1866); Delaware, Act of February 13, 1883, ch. 226, secs. 1, 2, 1883 Del. Laws 522; Georgia, Act of February 25, 1876, ch. CXXX, sec. I-III, 1876 Ga. Laws 113; Illinois, Act of February 28, 1867, sec. 1, 1867 Ill. Pub. Laws 89; Indiana, Ind. Laws, ch. LXXXI, sec. 2; Iowa, Act of March 15, 1858, sec. 1, Iowa Rev. Stat., sec. 4221 (1860); Louisiana, La. Crimes & Offences, sec. 24 at 138 (1856); Maine, Me. Rev. Stat., tit. XI, ch. 124, sec. 8, at 685 (1857); Maryland, Md. Laws, ch. 179, sec. 2, p. 315 (1868); Massachusetts, Mass. Gen. Stat., ch. 165, sec. 9-11 (1860); Minnesota, Act of March 10, 1873 Minn. Laws 117-19; Nebraska, Neb. Rev. Stat., tit. 4, ch. 4, sec. 42 (1866); Nevada, Nev. (Terr.) Laws, ch. 28, div. 4, sec. 42, p. 63 (1861); New Jersey, N.J. Laws 266-67 (1849); North Carolina, Act of March 12, 1881, ch. 351, 1881 N.C. Laws 584-85; Ohio, Act of April 13, 1867, 1867 Ohio Laws 135-36; Oregon, Act of October 19, 1864, Ore. Gen. Laws, Crim. Code, ch. 43, sec. 509, p. 528 (1845-1864); South Carolina, Act of December 24, 1883, No. 354, secs. 1-3, 1883 S.C. Acts 547-58; Tennessee, Act of March 26, 1883, ch. CXL, 1883, ch. CXL, 1883 Tenn. Acts 188-89; Texas, Tex. Pen. Code arts. 531-536 (1856), 1858 Tex. Gen. Laws 172; Vermont, Act of Nov. 21, 1867, No. 57, secs. 1, 3 (1867), 1867 Vt. Acts 64-66; Virginia, Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848); West Virginia, Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848); W. Va. Const., art. XI, par. 8 (1863); Wisconsin, Wis. Rev. Stat. ch. 164, sec. 11, ch. 169, secs. 58, 59 (1858).

Rather than the occurrence of quickening, "the crucial factor which determined the range of punishment applicable to an attempted abortion was whether the attempt caused the death of the child." Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29, 36 (1985). Twenty of the thirty-six States that had enacted abortion statutes by the end of 1883 provided for a higher range of punishment if it were proved that the abortion caused the death of the unborn child.[13] This con-

[13] Arkansas, Ark. Rev. Stat., ch. 44, div. III, art. II, secs. 5, 6 (1838); Act of Nov. 8, 1875, No. 4, 1875 Ark. Acts 5-6; Florida, Fla. Acts, 1st Sess., ch. 1647, no. 13, ch. 3, sec. 11, ch. 8, sec. 9, 1868 Fla. Laws 64, 97; Georgia, Act of Feb. 25, 1876, ch. CXXX, secs. I-III, 1876 Ga. Laws 113; Indiana, Act of April 14, 1881, ch. XXXVII, sec. 22, 1881 Ind. Laws 177; Maine, Me. Rev. Stat., tit. XI, ch. 124, sec. 8 at 165 (1857); Michigan, Mich. Rev. Stat., ch. 153, secs. 33-34 (1846); Minnesota, Act of March 10, 1873, ch. 9, 1873 Minn. Laws 117-19; Missouri, Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, secs. 10, 34 at 778-79, 781 (1866); Nebraska, Act of March 4, 1873, Neb. Gen. Stat., ch. 58, secs. 6, 39 at 720, 727-28 (1873); New Jersey, Act of March 25, 1881, CXCI, N.J. Gen. Pub. Laws, ch. CXCI at 240; New York, Act of July 26, 1881, N.Y. Pen. Code, ch. 676, tit. 9, ch. 2, secs. 191, 194, tit. 10, ch. 4, sec. 295, ch. 7, secs. 318-21, 3 N.Y. Rev. Stat., at 2478-80 (1881); Ohio, Act of April 13, 1867, 1867 Ohio Laws 135-36; Oregon, Act of Oct. 19, 1864, Ore. Gen. Laws, Crim. Code, ch. 43, sec. 509, p. 528 (1845-1864); Pennsylvania, Pa. Laws, No. 374, tit. 6, secs. 87-88, (1860), 1860 Pa. Laws 404-05; South Carolina, Act of Dec. 24, 1883, No. 354, secs. 1-3, 1883 S.C. Acts 547-58; Tennessee, Act of March 26, 1883, ch. CXL, 1883 Tenn. Acts 188-89; Texas, Tex. Pen. Code, arts. 531, 535 (1856), 1858 Tex. Gen. Laws 172; Virginia, Act of March 14, 1878,

tradicts the theory that the laws were passed only for reasons of maternal health.

> The death of the fetus is totally irrelevant to the health of the mother. If the state antiabortion statutes were intended solely to protect the health of the pregnant woman, there would be no reason whatsoever for the state legislatures to authorize the judge or jury to assess a greater punishment if it were proven that the attempted abortion killed the fetus.

Id. at 36.

Witherspoon concludes that "[t]he only explanation of this element of these statutes is that the enacting legislatures attributed value to the life of the unborn child." *Id.*

Abortion can be regarded as a "fundamental right" only if it is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Abortion, however, was a crime at common law and under the laws of all fifty States until *Roe v. Wade* was decided. Jesse Choper has noted that "[a]s recently as 1967, just six years before the foundational ruling in *Roe v. Wade*, no state in the nation permitted an abortion except to save the life of the mother." J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* at 118 (1980). Although, prior to *Roe*, fourteen States had relaxed their restrictions on abortion and had adopted some form of the American Law Institute's Model Penal Code (*Roe v. Wade*, 410 U.S. at 140 & n.37), a clear majority of the States continued to prohibit all abortions except those necessary to save the life of the mother. *See* Note, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*,

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ch. 311, ch. 2, sec. 8, 1878 Va. Acts 281-82; West Virginia, ch. 118, sec. 8, 1882 W. Va. Acts; Wisconsin, Act of May 17, 1858, Wis. Rev. Stat., ch. 164, sec. 11, ch. 169, sec. 58 (1858). Of these states, only Arkansas, Florida, Michigan, Missouri, New York and Pennsylvania also required proof of quickening.

1972 U. Ill. L. Forum 177, 179-80 & nn. 21-30. And no State had adopted the "trimester" approach enunciated in *Roe*.

In his dissent in *Roe v. Wade*, Justice Rehnquist noted the significance of this uniform and consistent condemnation of abortion:

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication . . . that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

410 U.S. at 174 (Rehnquist, J., dissenting).

Abortion is not mentioned in the Constitution and there is no evidence that either the framers or ratifiers of the Fourteenth Amendment intended to incorporate a right of abortion into the Constitution. Under this Court's analysis in the Due Process Clause cases, culminating in *Bowers v. Hardwick*, abortion cannot be considered a "fundamental right." Accordingly, *Roe v. Wade* should be overruled and the authority to regulate the practice of abortion should be returned to the States.

CONCLUSION

Amici respectfully submit that *Roe v. Wade* was an unfortunate venture in substantive due process which should be recognized and discarded as constitutional error. By its decision, the *Roe* Court, without textual or historical support, reached out and struck down the abortion laws of all fifty States, thereby establishing as a constitutional right what had long been regarded in English and American law as a serious crime—the intentional destruction of unborn human life. The *Roe* Court misapprehended the development of the common law on abortion and, as this brief has attempted to demonstrate, misinterpreted the reasons underlying the enactment of the nineteenth century statutes prohibiting abortion. Those laws were passed to protect unborn human life. The Constitution does not deprive the people of their rightful authority, acting through their State legislatures, to restrict the practice of abortion. That authority should be restored to its legitimate source—the American people. *Roe v. Wade* should be overruled.

Respectfully submitted,

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February 23, 1989

APPENDIX

APPENDIX

LIST OF *AMICI*

Delaware

Sen. Robert T. Connor	(R)	12th District
Sen. Ruth Ann Minner	(D)	18th District
Rep. Al O. Plant, Sr.	(D)	2nd District
Rep. Joseph G. DiPinto	(R)	4th District
Rep. Jeffrey G. Mack	(R)	17th District
Rep. Terry A. Spence Speaker of the House	(R)	18th District
Rep. Robert F. Gilligan	(D)	19th District
Rep. Steven C. Taylor	(R)	21st District
Rep. Richard F. Davis	(R)	26th District
Rep. G. Wallace Caulk	(R)	33rd District
Rep. Gerald A. Buckworth Majority Whip	(R)	34th District
Rep. V. George Carey	(R)	36th District
Rep. Clifford F. Lee	(R)	40th District
Rep. Charles P. West	(D)	41st District

Illinois

Sen. Forest D. Etheredge	(R)	21st District
Sen. Richard F. Kelly, Jr.	(D)	39th District
Sen. George Ray Hudson	(R)	41st District
Sen. William L. O'Daniel	(D)	54th District
Sen. Frank Watson	(R)	55th District
Rep. Ralph C. Capparelli	(D)	13th District
Rep. Jeremiah E. Joyce	(D)	14th District
Rep. John P. Daley	(D)	21st District
Rep. Andrew J. McGann	(D)	29th District
Rep. James R. Stange	(R)	44th District
Rep. Kathleen L. Wojcik	(R)	45th District
Rep. Donald N. Hensel	(R)	50th District
Rep. Bernard E. Pedersen	(R)	54th District
Rep. Penny Pullen	(R)	55th District
Rep. E.J. "Zeke" Giorgi	(D)	68th District
Rep. Marcel "Bob" DeJaegher	(D)	72nd District
Rep. Robert P. Regan	(R)	80th District
Rep. Thomas J. McCracken, Jr.	(R)	81st District
Rep. Edward Petka	(R)	82nd District
Rep. Larry Wennlund	(R)	84th District

Rep. Gerald C. "Jerry" Weller	(R)	85th District
Rep. J. Philip Novak	(D)	86th District
Rep. Gary Hannig	(D)	98th District
Rep. Michael D. Curran	(D)	99th District
Rep. Charles A. Hartke	(D)	107th District
Rep. Ron Stephens	(R)	110th District
Rep. David D. Phelps	(D)	118th District

Indiana

Sen. Richard W. Worman	(R)	14th District
Sen. Thomas J. Wyss	(R)	15th District
Sen. Richard A. Thompson	(R)	24th District
Sen. Joseph V. Corcoran	(R)	44th District
Sen. Lindel O. Hume	(D)	48th District
Rep. Philip T. Warner	(R)	4th District
Rep. Michael A. Dvorak	(D)	8th District
Rep. John S. Matonovich	(D)	11th District
Rep. Paul J. Hric	(D)	11th District
Rep. Jerome J. Reppa	(R)	15th District
Rep. Robert K. Alderman	(R)	19th District
Rep. Claire M. Leuck	(D)	25th District
Rep. Richard M. Dellinger	(R)	38th District
Rep. Frank Newkirk	(D)	65th District
Rep. David G. Cheatham	(D)	69th District

Kansas

Sen. James Francisco	(D)	26th District
Sen. Eric Yost	(R)	30th District

Kentucky

Sen. William L. Quinlan	(D)	7th District
Sen. Delbert S. Murphy	(D)	8th District
Sen. Arthur L. Schmidt	(R)	11th District
Sen. H. Edward O'Daniel, Jr.	(D)	14th District
Sen. David Williams	(R)	16th District
Rep. Louis E. Johnson	(D)	13th District
Rep. Richard A. Turner	(R)	22nd District
Rep. Mark O'Brien	(D)	31st District
Rep. Bob Heleringer	(R)	33rd District
Rep. Carl A. Nett	(D)	35th District

Rep. Tom Riner	(D)	41st District
Rep. James B. Yates	(D)	44th District
Rep. John Harper	(R)	49th District
Rep. Kenneth F. Harper	(R)	63rd District
Rep. Tom Kerr	(D)	64th District
Rep. James P. Callahan	(D)	67th District
Rep. Bill Donnermeyer	(D)	68th District
Rep. Tommy Todd	(R)	83rd District

Massachusetts

Sen. Francis D. Doris	(D)	Suffolk, Essex, Middlesex Counties
Rep. Marie J. Parente	(D)	10th District
Rep. Gregory W. Sullivan	(D)	12th District

Michigan

Sen. Jack Welborn	(R)	13th District
Sen. Ed Fredricks	(R)	23rd District
Sen. Fred Dillingham	(R)	30th District
Sen. James Barcia	(D)	34th District
Rep. Joseph Palamara	(D)	30th District
Rep. Michael Grffiin	(D)	50th District
Rep. Margaret O'Connor	(R)	52nd District
Rep. William VanRegenmorter	(R)	55th District
Rep. Joanne Emmons	(R)	99th District

North Carolina

Rep. Frank Sizemore III	(R)	27th District
Rep. Paul Stam, Jr.	(R)	62nd District

Ohio

Sen. Ben M. Gaeth	(R)	1st District
Sen. Robert R. Cupp	(R)	12th District
Sen. Richard P. Schafrath	(R)	19th District
Sen. Robert Ney	(R)	20th District
Sen. Grace Drake	(R)	22nd District
Sen. Gary C. Suhadolnik	(R)	24th District
Sen. Scott W. Oelslager	(R)	29th District

Rep. William Thompson	(R)	1st District
Rep. William G. Batchelder	(R)	4th District
Rep. Randall Gardner	(R)	5th District
Rep. Rocco J. Colonna	(D)	7th District
Rep. Patrick A. Sweeney	(D)	9th District
Rep. Ronald Mottle, Sr.	(D)	10th District
Rep. Troy James	(D)	12th District
Rep. Suzanne Bergansky	(D)	17th District
Rep. Ronald J. Suster	(D)	19th District
Rep. Thomas A. Pottenger	(R)	20th District
Rep. Jerome F. Luebbers	(D)	21st District
Rep. Louis W. Blessing, Jr.	(R)	22nd District
Rep. Jacquelyn O'Brien	(R)	26th District
Rep. Dale N. VanVyven	(R)	27th District
Rep. E. J. Thomas, Jr.	(R)	28th District
Rep. Bill Schuck	(R)	35th District
Rep. Robert E. Hickey	(D)	39th District
Rep. Russell E. Guerra, Jr.	(R)	40th District
Rep. Barney J. Quilter	(D)	47th District
Rep. Charles Red Ash	(R)	49th District
Rep. David W. Johnson	(R)	51st District
Rep. John V. Bara	(D)	54th District
Rep. John A. Boehner	(R)	57th District
Rep. Daniel P. Troy	(D)	60th District
Rep. Raymond Sines	(R)	61st District
Rep. Samuel T. Bateman, Jr.	(R)	66th District
Rep. James G. Bucky	(R)	73rd District
Rep. Robert W. Clark	(R)	74th District
Rep. Joseph E. Haines	(R)	75th District
Rep. Steven O. Williams	(R)	78th District
Rep. Larry W. Manahan	(R)	79th District
Rep. Lynn R. Wachtmann	(R)	80th District
Rep. James D. Davis	(R)	81st District
Rep. John P. Stozich	(R)	82nd District
Rep. Corwin M. Nixon	(R)	84th District
Rep. Larry J. Adams	(R)	86th District
Rep. Michael C. Shoemaker	(D)	88th District
Rep. Richard E. Rench	(R)	90th District
Rep. Paul P. Mechling	(D)	91st District
Rep. Ronald D. Amstutz	(R)	93rd District
Rep. Thomas W. Johnson	(R)	96th District
Rep. Jerry Krupinski	(D)	98th District

Texas

Sen. Ted Lyon	(D)	2nd District
Sen. Gene Green	(D)	6th District
Sen. Bob McFarland	(R)	10th District
Sen. John Leedom	(R)	16th District
Sen. J.E. "Buster" Brown	(R)	17th District
Sen. Ken Armbrister	(D)	18th District
Rep. Bill Hollowel	(D)	5th District
Rep. Jerry Yost	(R)	7th District
Rep. L.B. Kubiak	(D)	13th District
Rep. Keith Valigura	(R)	16th District
Rep. Billy Clemons	(D)	17th District
Rep. Mark Stices	(D)	21st District
Rep. John Willy	(R)	28th District
Rep. Tom Uher	(D)	29th District
Rep. Robert Saunders	(D)	30th District
Rep. Phyllis M. Robinson	(D)	31st District
Rep. Steve Holzheauser	(R)	32nd District
Rep. M.A. Taylor	(R)	55th District
Rep. Jim Horn	(R)	59th District
Rep. Ben Campbell	(R)	61st District
Rep. Sam Johnson	(R)	60th District
Rep. Pat Haggerty	(R)	71st District
Rep. Tom Craddick	(D)	76th District
Rep. Bob Hunter	(R)	79th District
Rep. Warren Chisum	(D)	84th District
Rep. John Smithee	(R)	86th District
Rep. Carolyn Park	(R)	92nd District
Rep. Kent Grusendorf	(R)	94th District
Rep. Kim Brimer	(R)	96th District
Rep. Anna Mowery	(R)	97th District
Rep. Ken Marchant	(R)	99th District
Rep. Glenn Repp	(R)	104th District
Rep. Bill Blackwood	(R)	105th District
Rep. Bill Hammond	(R)	109th District
Rep. Fred Hill	(R)	112th District
Rep. A.R. Ovard	(R)	113th District
Rep. Barry Connelly	(R)	126th District
Rep. Dan Shelley	(R)	127th District
Rep. Tony Polumbo	(D)	128th District
Rep. Mike Jackson	(R)	129th District

Rep. Erwin W. Barton	(D)	144th District
Rep. Talmadge Heflin	(R)	149th District
Rep. Paul Hilbert	(R)	151st District

Washington

Sen. Leo Thorsness	(R)	11th District
Sen. Linda Smith	(R)	18th District
Sen. Ellen Craswell	(R)	23rd District
Sen. Brad Owen	(D)	35th District
Rep. Bill Day	(D)	3rd District
Rep. Charles R. Wolfe	(R)	4th District
Rep. Mike Padden	(R)	4th District
Rep. Duane Sommers	(R)	6th District
Rep. Steve Fuhrman	(R)	7th District
Rep. Clyde Ballard	(R)	14th District
Rep. Glyn Chandler	(R)	13th District
Rep. Jeannette Wood	(R)	21st District
Rep. John Beck	(R)	21st District
Rep. James Hargrove	(D)	24th District
Rep. Jim Youngsman	(R)	40th District
Rep. Michael E. Patrick	(R)	47th District

Wisconsin

Sen. Alan J. Lasee	(R)	1st District
Sen. John R. Plewa	(D)	7th District
Sen. Lloyd H. Kincaid	(D)	12th District
Sen. Timothy Weeden	(R)	15th District
Sen. Richard Kreul	(R)	17th District
Sen. Carol A. Buettner	(R)	18th District
Sen. Donald K. Stitt	(R)	20th District
Sen. Marvin J. Roshell	(D)	23rd District
Sen. Walter J. Chilsen	(R)	29th District
Sen. Jerome VanSistine	(D)	30th District
Sen. Brian D. Rude	(R)	32nd District
Rep. Larry J. Swoboda	(D)	1st District
Rep. Dale J. Bolle	(D)	2nd District
Rep. Alvin R. Ott	(R)	3rd District
Rep. Richard Grobschmidt	(D)	21st District
Rep. Thomas A. Hauke	(D)	23rd District
Rep. Margaret Krusick	(D)	24th District

Rep. Vernon W. Holschbach	(D)	25th District
Rep. Wilfrid J. Turba	(R)	27th District
Rep. Thomas D. Ourada	(R)	35th District
Rep. Robert G. Goetsch	(R)	39th District
Rep. Robert T. Welch	(R)	41st District
Rep. Charles W. Coleman	(R)	43rd District
Rep. Wayne W. Wood	(D)	44th District
Rep. Dale W. Schultz	(R)	50th District
Rep. Joseph E. Tregoning	(R)	51st District
Rep. Judith Klusman	(R)	56th District
Rep. Steven Loucks	(R)	58th District
Rep. Michael A. Lehman	(R)	59th District
Rep. Susan B. Vergeront	(R)	60th District
Rep. Cloyd A. Porter	(R)	66th District
Rep. Leo Richard Hamilton	(D)	67th District
Rep. Heron A. VanGorden	(R)	69th District
Rep. Donald W. Hasenohrl	(D)	70th District
Rep. David J. Lepak	(R)	83rd District
Rep. Marc Duff	(R)	84th District
Rep. Robert J. Larson	(R)	87th District
Rep. John Gard	(R)	88th District
Rep. Cletus Vanderperren	(D)	89th District
Rep. Terry M. Musser	(R)	92nd District
Rep. John D. Medinger	(D)	95th District
Rep. DuWayne Johnsrud	(R)	96th District
Rep. Margaret A. Farrow	(R)	99th District

Wyoming

Sen. James Applegate	(D)	Laramie County
Sen. Elizabeth Byrd	(D)	Laramie County
Sen. Jim Geringer	(R)	Platte County
Sen. Winifred Hickey	(D)	Laramie County
Sen. Allan Howard	(R)	Laramie County
Sen. Kelly Mader	(R)	Campbell & Johnson Counties
Sen. James Norris	(D)	Laramie County
Sen. John Turner	(R)	Sublette-Teton County
Rep. Douglas Chamberlain	(R)	Goshen County
Rep. Rory Cross	(R)	Converse County
Rep. Richard Honaker	(D)	Sweetwater County

Rep. Bill McIlvain	(R)	Laramie County
Rep. Ron Micheli	(R)	Vinta County
Rep. Dorothy Perkins	(R)	Natrona County
Rep. Mary Kay Schwope	(D)	Laramie County
Rep. William Tibbs	(R)	Congress County
Rep. Clyde Wolfley	(R)	Lincoln County
Rep. Melvin L. ZumBrunnen	(R)	Niobrara County