Two Ships Passing in the Night:
An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade

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AMERICANS UNITED FOR LIFE
343 South Dearborn Street, Suite 1804
Chicago, IL 60604

(312) 786-9494

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Two Ships Passing In The Night:  
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Dennis J. Horan*  
Clarke D. Forsythe**  
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I. INTRODUCTION

In the fourteen years since Roe v. Wade,\(^1\) that decision has had a profound impact on the Supreme Court as an institution, on American society, on constitutional scholarship, and on constitutional jurisprudence. Outside the Court, public criticism of the Court and its abortion doctrine is rekindled and intensified\(^2\) with each new abortion case.\(^2\) Inside the Court, abortion cases strain the relationships between the justices, because of their strong, contrary views on Roe.\(^3\) "The legal effects of the Roe decision were revolutionary" and the "social effects have been equally dramatic."\(^4\) The

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* Partner, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Chicago.  
** Allegheny College (B.A., 1980); Valparaiso University (J.D., 1983); Staff Counsel, Americans United for Life/AUL Legal Defense Fund, Chicago.  
*** Georgetown University (A.B. Magna cum laude, 1979); Northwestern University (J.D. Cum Laude, 1982); Associate, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Chicago.  
4. Wardle, supra note 2, at 232.
Roe decision substantially expanded the constitutional right of privacy, and the decision has been repeatedly expanded since 1973 to further restrict state regulation on the performance of abortions. For example, in 1986, the Court struck down a state statute which attempted to regulate the performance of third trimester (post-viability) abortions by requiring physicians to use “the abortion technique... which would provide the best opportunity for the unborn child to be aborted alive” unless that method would cause a “significantly greater medical risk to the life or health of the pregnant woman.” In constitutional scholarship, the Roe decision has frequently been the object of analysis by constitutional theorists in the ongoing debate over the scope of judicial review. Roe has been called “the paradigm of noninterpretivist review,” “the clearest example of noninterpretivist reasoning” in four decades.”

Roe has also been subjected to searching criticism since 1973 for its history, reasoning and sweeping scope. This criticism of Roe has now been joined by four justices of the Supreme Court. In Thornburgh v. American College of Obstetricians and Gynecologists, 9 justices White and Rehnquist, dissenters in the original Roe decision, urged that Roe be overruled and that abortion be returned to popular control through state legislatures. Chief Justice Burger, before his recent retirement, stated that he would “reexamine” Roe. Justice O’Connor contended that the constitutional standard of review enunciated in Roe and its progeny should be fundamentally changed in favor of greater deference to state regulation of abortion.

The aspect of Thornburgh that brings the debate over Roe into sharpest focus, however, is the extended colloquy between Justice Stevens’ concurring opinion and Justice White’s dissenting opinion. This colloquy, which embraced the scope of the constitutional right of privacy, the proper mode of constitutional interpretation, and the validity of Roe, is a major development in the history of Roe. Fourteen years after Roe was decided, it is a frank, vigorous, and public disagreement between two Supreme Court justices over a precedent of enormous importance for American society and constitutional jurisprudence. Although the colloquy raises fundamental arguments for and against Roe, Justices White and Stevens both failed to recognize many important questions, raised since 1973, about the validity of the legal and factual premises of Roe. Neither opinion reflected the large body of scholarly criticism of the decision that has mounted over the past fourteen years.


7. Garfield, supra note 6, at 323-24 (quoting J. Ely, Democracy and Distrust 2 (1980)).


The purpose of this article is to reassess the legal and historical premises of Roe and the substance of the White-Stevens colloquy, according to interpretivist principles. On the presumption that the White-Stevens colloquy will guide any future reconsideration of Roe by the Court, the holdings of Thornburgh and the substance of the White-Stevens colloquy will first be presented. Next, the principles of interpretivist review will be outlined and applied to the Thornburgh opinions of Justices White and Stevens. Finally, the legal and historical premises of the Roe opinion will be re-examined in order to illuminate those issues of constitutional interpretation that are critical to the debate over Roe but were left unexamined by the White-Stevens colloquy.

II. THE WHITE-STEVENS COLLOQUIY IN THORNBURGH

A. The Thornburgh Decision.

In Thornburgh, the Supreme Court addressed a facial challenge to the constitutionality of a comprehensive Pennsylvania abortion statute. Five specific issues were addressed by the Court on the merits. Sections 3205(a) and (b) of the statute required physicians to obtain the informed consent of women prior to an abortion. In so doing, physicians were required to provide the following information: the possibility of unforeseeable physical and psychological risks from abortion; specific risks of the particular abortion procedure used; the gestational age of the fetus; the risks of continuing the pregnancy to term; and the availability of public assistance for childbirth, pre-natal and neonatal care. Women were also to be given the opportunity to review materials prepared by the state on fetal development and alternatives to abortion, although the decision to review this material was entirely up to the woman (§ 3208). The Court struck down §§ 3205 and 3208, stating that “[t]he printed materials required by [these sections] seem to us to be nothing less than an outright attempt to wedge the Commonwealth’s message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician.” In addition, “[t]he requirements of [§ 3205] that the woman be advised that medical assistance may be available, and that the father be responsible for financial assistance in support of the child similarly are poorly disguised elements of discouragement for the abortion decision.” The Court concluded that the requirement “that the woman be informed by the physician of ‘detrimental physical and psychological effects’ and of all ‘particular medical risks’ of the abortion procedure ‘is the antithesis of informed consent.’”

Sections 3214 and 3111 required physicians to report data concerning abortions performed to the state department of health. A requirement that physicians file statistical reports on the performance of abortions was upheld in the 1976 case of Planned Parenthood v. Danforth. Such medical data are necessary to compile statistics on the mortality and morbidity of the medical procedure. Although the statute specifically mandated that the names of patients would be anonymous and not included on any form, the Court struck the reporting requirements down because the reports would be available to private researchers. The Court concluded that the “obvious purpose” of the statute was to expose the identity of the women who had abortions. The “reporting requirements (of those sections) raise the spectre of public exposure and harassment of women who choose to exercise their personal, intensely private right, with their physician, to end a pregnancy. Thus, they pose an unacceptable danger of deterring the exercise of that right, and must be invalidated.”

Section 3210(b) required that, for post-viable abortions performed in the third trimester, the physician must use “the abortion technique... which would provide the best opportunity for the unborn child to be aborted alive” unless that method would cause a “significantly greater medical risk to the life or health of the pregnant woman.” The district court judge endeavored to construe the term “significantly” in such a way as to uphold the statute as constitutional, and interpreted “significantly” to mean “capable of being measured.” The Court, however, struck down the provision. “Section 3210(b) is facially invalid as being unsucessible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus.”

Section 3210(c) required that, in third trimester (post-viable) abortions, the physician must secure the attendance of a second physician who would be responsible for any child born alive. In 1983, in Planned Parenthood v.

18. Id.
21. 106 S. Ct. at 2181-82.
22. Id. at 2182.
23. Id.
26. 106 S. Ct. at 2183.
Ashcroft, the Court upheld a similar Missouri provision and read into the statute an implied exception that a second physician would not be required in the case of a medical emergency. Although § 3210(a) stated that "it shall be a complete defense to any charge . . . for violating the requirements of this section . . . that the abortion was necessary to preserve maternal life or health," the Court struck § 3210(c), concluding that § 3210(c), by failing to provide a medical emergency exception for the situation where the mother’s health is endangered by delay in the second physician’s arrival, chills the performance of a late abortion. A five member majority of the Court joined in striking down these sections of the Pennsylvania statute.

B. The White Dissent

Four members of the Court — Chief Justice Burger, Justices O’Connor, White, and Rehnquist — dissented. Justice White, joined by then-Justice Rehnquist, wrote a thirty page dissent. Part I of Justice White’s dissent is a review of the jurisprudence of Roe and its progeny, while Part II of the opinion is an evaluation of the Pennsylvania statute in light of the standards of review promulgated in Roe. Only Part I is directly relevant to our discussion.

Roe is a "difficult and continuing venture in substantive due process," Justice White wrote. For several reasons, a decision like Roe is subject to reexamination. First, although the rule of stare decisis, cited by defenders of Roe, is a necessary rule of adjudication, it "is not the only constraint upon judicial decisionmaking." Second, although judicial review is not undemocratic per se — because it affirms the superiority of the Constitution which is ordained and established by the people — judicial review "usurp[s] the people’s authority" and becomes illegitimate when Supreme Court decisions are based on "principles and values that cannot fairly be read into that document . . . " Thus, White concluded, decisions that depart from the Constitution in this manner are subject to correction. Finally, Justice White did not contend that his arguments in support of reconsideration were either new or unconsidered by the Court in Roe, but he noted that the same was true in prior landmark reversals by the Supreme Court. The reasons for the reversal of Plessy v. Ferguson were first stated in Justice Harlan’s dissent in 1896 and the reasons for the reversal of Lochner v. New York were stated in Justice Holmes’ dissent in 1905.

Justice White in Thornburgh suggested that Roe “departs from a proper understanding of the Constitution” and should be overruled.

[The text obviously contains no references to abortion... and... it is highly doubtful that the authors of any of the provisions of the Constitution believed that they were giving protection to abortion. [But the Court] does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the plain meaning of the Constitution’s text or to the subjective intention of the Framers.

The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.

Hence, White noted, the Court has interpreted the Due Process Clause of the Fourteenth Amendment “to be broad enough to provide substantive protection against State infringement of a broad range of individual interests.” In so doing, the Court has employed a “rational basis” test, which defers to legislative action in analyzing certain individual interests. On the other hand, legislation affecting certain “fundamental rights” is analyzed under “strict scrutiny.”

Emphasizing this essential distinction, White contended that the first error in Roe was the holding that abortion was a “fundamental” right. While abortion is a “liberty,” he concluded, it is not a “fundamental” liberty, and, therefore, is not entitled to strict scrutiny.

I can certainly agree with the proposition — which I deem indisputable — that a woman’s ability to choose an abortion is a species of “liberty” that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so “fundamental” that restrictions upon it call into play anything more than the most minimal judicial scrutiny.

Rights are most clearly fundamental “when the Constitution provides specific textual recognition of their existence and importance.” But the Court must “act with more caution” when it defines as fundamental those

28. Id. at 483-86; Mo. Rev. Stat. § 188.030.3 (Supp. 1982).
30. 106 S. Ct. at 2184.
31. Id. at 2192 (White, J., dissenting) (quoting 428 U.S. at 92 (White, J., dissenting)). He had previously criticized the Court for discardng general principles of constitutional jurisprudence when reviewing abortion statutes. “Normal principles of constitutional adjudication apply even in cases dealing with abortion.” Sendak v. Arnold, 429 U.S. 968, 972 (1976) (White, J., dissenting).
32. Id. at 2192.
33. Id.
34. Id.
rights which "are present only in the so-called 'penumbras'..." 44 Otherwise, judicial review ceases to be a process by which the Court elucidates principles which the people have adopted through the Constitution and becomes a process by which the judges impose their own "controversial choices of value upon the people." 45

In the past, White stated, the justices have recognized these dangers and thus have carefully articulated various tests of "fundamental rights." In Palko v. Connecticut 46 and subsequent cases, the Court held that fundamental liberties are those "that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed, or that are 'deeply rooted in this Nation's history and tradition.'" 47 The function of these tests has been to "identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government..." 48

Although the Court has justified Roe as a continuation of earlier privacy cases, Justice White argued, abortion is different from each of these prior cases because abortion "involves the destruction of another entity: the fetus." 49

However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species Homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Given that the continued existence and development — that is to say, the life — of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as sui generis, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy. 50

The preceding privacy cases do not necessarily imply that abortion is a "fundamental" right. "That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place." 51 White analyzed these limits on the right of child-bearing to limits on the right of child-rearing, recognized by the Court as "fundamental" in Meyer v. Nebraska, 52 Pierce v. Society of Sisters, 53 and Moore v. City of East Cleveland. 54 While those cases decided that parents have a fundamental right "to make decisions with respect to the upbringing of their children," it could not be said that that fundamental right includes "assaults committed upon children by their parents." 55 This is so, Justice White reasoned, not because the state possesses a compelling interest in protecting children from such assaults, but because "such activities, by their very nature, should be viewed as outside the scope of the fundamental liberty interest." 56 For similar reasons, White concluded, the Court's previous privacy cases do not support Roe.

The abortion right can be "fundamental," White reminded his colleagues, only if it is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." 57 Both the Court's opinion in Roe and the "continuing and deep division of the people themselves over the question of abortion" 58 demonstrate that abortion satisfies neither test of "fundamental" liberties. Rather, White said, the Court through Roe engaged in "the unrestrained imposition of its own, extraconstitutional value preferences." 59

If deciding that the abortion liberty is "fundamental" was the first basic error of Roe, White suggested that the second basic error was the holding that the state's interest in the life of the fetus only becomes "compelling" at viability. This was "entirely arbitrary" according to White, as Justice O'Connor argued in her dissent in 1983 in City of Akron v. Akron Center for Reproductive Health. 60 Although the Court's rationale in Roe for this de marcation was that viability is the point at which the fetus "has the capacity of meaningful life outside of the mother's womb," White drew on John Hart Ely's criticism of Roe to respond that this "mistakes a definition for a syllogism." 61 Viability is irrelevant because the capability to survive outside the womb does not affect society's interest in protecting its citizens, espe-
cially since such survival is dependent on medical and technological factors which are "morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom."

If these two errors in Roe were reversed, White concluded, abortion would be subject to regulation by society. This is acceptable, he stated, because abortion is "a hotly contested moral and political issue" that has not been incorporated into the Constitution by the people and is thus most appropriately resolved by the exercise of popular will through the people's representatives. Contrary to the implications of Roe, the American people — "in 1787, 1791, 1868, or at any time since" — have not removed the subject from the public arena, from legislative restriction, by enshrining any abortion liberty in the Constitution. Thus, Justice White "would return the issue to the people by overruling Roe."66

C. The Stevens Concurrence and the White Response

The majority opinion in Thornburgh did not respond to, or even admit the existence of, the dissenting opinions of Justices Burger, White, O'Connor, and Rehnquist. Justice Stevens, however, wrote a lengthy concurring opinion, directed entirely at Justice White's dissent and his analysis of the constitutional right of privacy.67

Justice Stevens initially emphasized that while he had the "highest respect" for Justice White's views on the scope of the Due Process Clause of the Fourteenth Amendment, he believed that the liberty interest protected by that Clause was "significantly broader" than Justice White acknowledged in his Thornburgh dissent. In making his case, Stevens relied on earlier opinions on the right of privacy written by Justice White, opinions which, Stevens alleged, were inconsistent with White's position in Thornburgh. In Griswold v. Connecticut,Justice White, concurring, had criticized the "sweeping scope" of the application of the Connecticut contraceptive statute to married couples. In Eisenstadt v. Baird, White agreed with the invalidity of a Massachusetts contraceptive statute as applied to unmarried persons. In Carey v. Population Serv. International, Justice White, concurring, denied that Griswold was limited only to married persons and agreed that Griswold and Eisenstadt protected "the right of the individual... to be free from unwarranted government intrusion into... the decision whether to bear or beget a child." Finally, Justice White had conceded that the abortion liberty was "a species of liberty" under the Due Process Clause.

Justice Stevens found it strange that, on this basis, Justice White should "abruptly announce that the interest in 'liberty' that is implicated by a decision not to bear a child that is made a few days after conception is less fundamental than a comparable decision made before conception." Although he conceded that there might be a difference in the state interest before and after conception, Justice Stevens failed to see how the individual's interest in "child-bearing becomes less important the day after conception than the day before." The "post-conception decision" would seem to be "more 'fundamental' to the individual's freedom..." But if that decision commands the respect that is traditionally associated with the "sensitive areas of liberty" protected by the Constitution, no individual should be compelled to surrender the freedom to make that decision for herself simply because her "value preferences" are not shared by the majority.

Thus, Justice White erred in concluding that this liberty does not deserve strict scrutiny.

To this, Justice White responded that rights are not "fundamental" only "because those decisions are 'serious' and 'important' to the individual... but also because some value of privacy or individual autonomy that is somehow implicit in the scheme of ordered liberties established by the Constitution supports a judgment that such decisions are none of the government's business." The other privacy cases were different because the individual in the abortion situation "is not isolated in her privacy." The constitutional right of privacy, even if it includes a parental right in child-rearing, cannot be extended to include "assaults committed upon children

63. 106 S. Ct. at 2197 (White, J., dissenting).
64. Id.
65. Id. at 2198.
66. Id.
67. 106 S. Ct. at 2185 (Stevens, J., concurring).
68. Id.
70. 106 S. Ct. at 507 (Stevens, J., concurring).
72. Id. at 464-65 (White, J., concurring).
74. Id. at 678 (quoting 405 U.S. at 453).
75. 106 S. Ct. at 2187 (White, J., dissenting).
76. Id.
77. Id.
78. Id.
79. Id. Justice Stevens also implicitly chided the Solicitor General, Charles Fried, for filing an amicus brief, which argued for the overruling of Roe, when Fried had previously expressly strong arguments in favor of privacy in his scholarly writings. Id. at 2187 n.5 (citing C. Fried, Right and Wrong (1978); Fried, Correspondence, 6 Phil. & Pub. Aff. (1977)). See Brief for the United States As Amicus Curiae In Support of Appellants, Nos. 84-495, 84-1379. Such writings expressed what Justice Stevens evidently perceived to be a more libertarian notion of privacy.
80. 106 S. Ct. at 2195 n.2 (White, J., dissenting).
81. Id.
by their parents." The "very nature" of such acts excludes them from the domain of constitutional liberty.83

Justice Stevens likewise objected to Justice White's analysis of the status of abortion as a constitutional liberty. Stevens argued that Justice White contradicted himself by emphasizing the people's failure to place the abortion liberty in the Constitution "in 1787, 1791, 1868, or any time since" and by simultaneously rejecting the "simplistic view that constitutional interpretation" can possibly be limited to "the plain meaning of the Constitution's text or to the subjective intention of the Framers." 84

Justice White replied that the rejection of "clause bound interpretation . . . does not necessarily carry with it a rejection of the notion that constitutional adjudication is a search for values and principles that are implicit (and explicit) in the structure of rights and institutions that the people themselves have created." 85

The implications of those values for the resolution of particular issues will in many if not most cases not have been explicitly considered when the values themselves were chosen — indeed, there will be some cases in which those who framed the provisions incorporating certain principles into the Constitution will be found to have been incorrect in their assessment of the consequences of their decision. See, e.g., Brown v. Board of Education . . . Nonetheless, the hallmark of a correct decision of constitutional law is that it rests on principles selected by the people through their Constitution, and not merely on the personal philosophies, be they libertarian or authoritarian, of the judges of the majority. While constitutional adjudication involves judgments of value, it remains the case that some values are indeed "extraconstitutional," in that they have no roots in the Constitution that the people have chosen.86

Roe, like Lochner v. New York, 87 according to Justice White, rests on "extraconstitutional" values.88

Although Justice White suggested that the abortion liberty should be subject to restriction by "the will of the people," Justice Stevens contended that this ignored whether it should be the will of legislative majorities or that of individuals with unwanted pregnancies.89 Likewise, according to Stevens, it is inexplicable how Justice White can consider the Court to be imposing "extraconstitutional value preferences," when Justice White concedes that the Constitution's terms "leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it." 90

And it was irrelevant to Justice Stevens that "men and women of good will" should be in profound disagreement about Roe, since many constitutional controversies provoke such disagreement. 91

In reply, Justice White stated that he could not "conceive of a definition of the phrase 'imposing value preferences' that does not encompass the Court's action." 92 While Justice Stevens suggested that it is the legislature that is unrestrained in imposing its "extraconstitutional value choices," Justice White said, "a legislature, unlike a court, has the inherent power to do so unless its choices are constitutionally forbidden, which, in my view, is not the case here." 93

Justice Stevens suggested that White's characterization of the state interest as "protecting those who will be citizens if their lives are not ended in the womb" reveals his own value preferences.94 And if the notion is accepted that states must be allowed "to make the abortion decision," Justice Stevens reasoned, then "presumably the State is free to decide that a woman may never abort, may sometimes abort, or . . . must always abort . . . . 95

90. Id. Many constitutional scholars, even non-interpretativists who support the legalization of abortion, seem to agree with Justice White that the Court's decision adopted "extraconstitutional" values that have no cognizable roots in the text or history of the Constitution. See, e.g., M. Perry, supra note 6, at 1 (Roe "cannot be explained by reference to any value judgment constitutionalized by the framers."); A. Cox, supra note 8, at 113 ("The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations . . ."); A. Bickel, The Morality of Consent 27-29 (1975); Kurland, Public Policy, The Constitution, and the Supreme Court, 12 N. Ky. L. Rev. 181, 196 (1985) ("But for a capacity to make constitutional bricks without any constitutional straws, certainly no prior case can be equaled by that of the abortion decisions. However much I like the results — and I do — I can find no justification for their promulgation as a constitutional judgment by the Supreme Court."); Ely, supra note 8, at 932 ("All of this . . . has nothing to do with privacy in the Bill of Rights sense or any other the Constitutional suggests."); Lupu, Constitutional Theory and the Search for the Workable Form, 8 U. Dayton L. Rev. 579, 583 (1983) ("Roe cut fundamental rights adjudication loose from the constitutional text."); Symposium, Constitutional Adjudication and Democratic Theory, 56 N. Y. U. L. Rev. 525, 532 (1981) (comments of Dean Ely: "I don't think Lochner and Roe can be distinguished. It seems to me they are equally illegitimate uses of the Court's power."); Gunther, Some Reflections on the Judicial Role: Distinctions, Roots and Prospects, 1979 Wash. U. L. Q. 817, 819; Burt, The Constitution of the Family, 1979 Sup. Ct. Rev. 329 371-73; Wellington, Common Law Rules and Constitutional Double Standards: Some Notes and Adjudication, 83 Yale L.J. 221, 297-311 (1973).

91. 106 S.Ct. at 2187 n.4 (Stevens, J., concurring) (quoting 106 S. Ct. at 2196 (White, J., dissenting)).

92. 106 S. Ct. at 2196 n.3 (White, J., dissenting).

93. Id. (emphasis in original)

94. Id. at 2188 n.6 (Stevens, J., concurring) (quoting 106 S. Ct. at 2196 (White, J., dissenting)).

95. Id. at 2188 n.6 (Stevens, J., concurring). Justice Stevens' presumption here seems to disregard Justice White's essential point that the law protects the life of the unborn child. If the common law, or the Fourteenth Amendment, protects the life of the child, then the state cannot take that life by requiring that the mother "must always abort." Id. (emphasis in original). This
Justice White’s minimizing of the individual interest at stake, in Justice Stevens’ view, was compounded by his overestimation of the state interest at stake. White is “surely wrong in suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth.”96 Although White’s position could be supported by a “powerful theological argument,” the Court’s “jurisdiction is limited to the evaluation of secular state interests.”97 It is “obvious that the state’s interest ... increases progressively and dramatically as the organism’s capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increased day by day.”98 The state’s interest is not static because fetal development is not static.99 While it may be a “religious view” that a fetus is a person, “there is a fundamental and well-recognized difference between a fetus and a human being.”100 If the two are equal, then it could not be left to legislatures to decide whether to adopt liberal or restrictive abortion laws. These distinctions are supported, in Justice Stevens’ view, by logic, the history relied upon in Roe, or “by our shared experiences.”101

Justice White responded by contending that the position that the state’s interest is compelling at any state of viability “is no more a ‘theological’ position than is the Court’s own judgment that viability is the point at which the state interest becomes compelling.”102 What the Court identifies as a compelling interest — the protection of “potential human life — is present as well before viability .... [T]here is no basis for concluding that the essential character of the state interest becomes transformed at the point of viability.”103 Placing emphasis on the “state interest” in protecting fetal life is not a “religious” position simply because it coincides with the position of a certain religious group. The prohibition on murder is in the Ten Commandments but is not invalid for that reason. No matter what position the state takes on abortion, White noted, that position will coincide with some religious and conflict with others. The Court should defer to the legislative judgment, and if a state legislature asserts an interest in fetal life, there is “no satisfactory basis for denying that it is compelling.”104

Justice Stevens noted that White did not disavow “the ‘fundamental premises’ on which the decision in Roe v. Wade rests.”105 If one accepts those premises, their application to abortion “places the primary responsibility for decision in matters of childrearing squarely in the private sector of our society.”106 Roe “presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny.”107 The Founders “who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority,” Justice Stevens concluded.108

This colloquy is striking both for what was said and for what was left unsaid. The opinions reflect a frank and fundamental disagreement over the scope of judicial review. Because Roe is such a controversial precedent on the scope of judicial review, however, it is not surprising that the colloquy reflects such a basic disagreement. It is also striking that throughout their opinions neither Justice relied on any legal authority beyond Griswold and its progeny for the propositions stated. Rather, the argument focused on the rational extension or limitation of certain assumed principles derived from Griswold and its progeny. Justice Stevens assumed that a constitutional right of privacy encompasses those personal decisions or activities which are paramount to an individual. While White reexamined Roe in the particular result it reached, he did not reexamine the premises of Roe, but conceded most if not all of them. Neither Justice invoked history, except rhetorically.109 Justice Stevens clearly assumed that the history of abortion described in Roe was accurate, while Justice White did not refer to this history. Neither cited common law principles or caselaw that preceded Roe, as if both assumed that legal and moral principles regarding abortion began with Roe. Justice Stevens assumed that the decision to abort “commands the respect that is traditionally associated with the ‘sensitive areas of liberty’ protected by the Constitution.”110 He invoked “history” and “tradition” repeatedly, without examining any history or tradition that preceded Roe.

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96. 106 S. Ct. at 2188 (Stevens, J., concurring).
97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id. at 2197 n.4 (White, J., dissenting).
103. Id.
104. Id. (emphasis in original).
105. Id. at 2188 (Stevens, J., concurring).
106. Id. at 2189.
107. Id. at 2189-90.
108. Id. at 2190.
109. See, e.g., 106 S. Ct. at 2188, 2189 n.10, 2189 n.11 (Stevens, J., concurring). Justice White, however, implied that the history cited in Roe did not support the decision: “[t]he Court’s opinion in Roe itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people.” Id. at 2196 (White, J., dissenting).
110. 106 S. Ct. at 2187 (Stevens, J., concurring) (quoting 381 U.S. at 503 (White, J., concurring)).
Justice Stevens assumed that there is "a fundamental and well-recognized difference between a fetus and human being." Justice White assumed that it is "indisputable" that abortion is a "species of liberty" within the Fourteenth Amendment. It is evident that for both, the relevant constitutional principles begin with Griswold.

Clearly, the overriding theme of the Thornburgh colloquy was the nature of constitutional interpretation. Justice White contended that the Court violates fundamental principles of a written constitution and of democratic government when it applies "extraconstitutional values" — values that have no basis in the text or design of the Constitution. Justice Stevens, on the other hand, responded that state legislatures impose their own "extraconstitutional values" by interfering in the privacy of the abortion decision. Because the nature of constitutional interpretation is at the heart of both the controversy over Roe and the Thornburgh colloquy, a thorough analysis requires an examination of the rules of constitutional interpretation.

III. THE LEGITIMACY OF CONSTITUTIONAL INTERPRETATION: WHAT ACTIVITIES ARE PROTECTED AS "LIBERTIES" WITHIN THE SCOPE OF THE FOURTEENTH AMENDMENT'S LIBERTY CLAUSE?

In a debate that may largely be attributed to Raoul Berger's publication of Government By Judiciary in 1977, judges, politicians, and constitutional scholars over the past decade have vigorously debated the nature of constitutional interpretation and the legitimacy of judicial review. The two predominant positions in this debate have been termed "interpretivism" and "noninterpretivism." Interpretivism holds that constitutional interpretation — in order to have political and moral legitimacy in a democratic republic with a written constitution founded on majority rule and the rule of law — must take as its guideposts the faithful application of the original legislative intent of the constitutional provisions. Noninterpretivism, on the other hand, maintains that the original intent of the constitutional provision is not binding on the Supreme Court and that the Justices may adopt a number of different approaches to constitutional interpretation, as long as that analysis advances certain assumed norms of moral philosophy — for example, equality, democracy, liberty, human dignity, personal autonomy, minority rights, or political representation. If this description of noninterpretivism appears vague, it is because noninterpretivism is identifiable more by its rejection of the original intent of the Constitution as a binding rule of law than by any quantifiable content. While noninterpretivists agree in rejecting interpretivism, they widely disagree among themselves as to the proper, alternative approach to constitutional interpretation.

A. Rules of Constitutional Interpretation

Commentators frequently claim that interpretivism is a "new fangled theory" of constitutional interpretation. Given the longstanding and uni-

111. 106 S. Ct. at 2188 (Stevens, J., concurring).
112. Id. at 2194 (White, J., concurring).
115. Id. Professor Gunther has posed the issue in this way: "Are the fundamental values identified in such cases plausible extrapolations from constitutional text, history, or structure? Or are they ultimately extraconstitutional, noninterpretive judicial infusions?" G. GUNTHER, CONSTITUTIONAL LAW 502 (1980).

Interpretivism is sometimes confused with strict construction. See, e.g., L. Tribe, God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History 41-49 (1985). During the Founding era, "strict construction" referred to a strict, narrow, or literal construction of the powers of the federal government or Congress. D. MALONE, JEFFERSON AND THE RIGHTS OF MAN 341-49 (1951). Jefferson and other Republicans may be said to have married interpretivism to strict construction because they believed that the

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Framers in fact intended for the federal government's powers to be narrowly construed. Id. During the time of the Nixon presidency, "strict construction" came into popular use to refer to judges who rejected the "judicial activism" of the Warren Court. But interpretivism does not adopt a wholesale "strict construction" of the Constitution because the Framers may have intended some provisions to be liberally construed and other provisions to be strictly construed, and the means they used to convey that intention is the language. For example, Art. II, § 1, cl. 5 of the Constitution provides: "neither shall any person be eligible to... [the Presidency] who shall not have attained to the Age of thirty five Years." With little doubt, the Framers did not intend that clause to be read "liberally" to allow persons who are thirty years old to be eligible for the Presidency. A "liberal construction" would be noninterpretivist. On the other hand, Justice William Johnson held that the Framers intended a broad concept of commerce in the Commerce Clause. See supra note 152-53 and accompanying text. A "strict construction" would therefore be noninterpretivist. A good contrast between strict construction and interpretivism may be seen by comparing Chief Justice Taft's opinion for the Court (strict construction) and Justice Butler's dissenting opinion (interpretivist) in Olmstead v. United States, 277 U.S. 438 (1928). See supra note 154 and accompanying text.
116. Cf. ELY, supra note 8, at 944-49; M. Perry, supra note 6; Miller, The Elusive Search for Values in Constitutional Interpretation, 6 HASTINGS CONST. L.Q. 487 (1979).

These statements are completely unfounded in light of the historical evidence, which was collated by Professor tenBroek as long ago as 1939. He concluded: "Whenever the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the
form application of interpretivist rules in both federal\textsuperscript{119} and state\textsuperscript{120} courts to constitutional construction, however, the denial that these rules should apply to constitutional interpretation is peculiar. Perhaps one reason for this dichotomy between statutory and constitutional construction is the recognition that interpretivist rules bind and limit judicial power by limiting expansive or narrow interpretations of various provisions of the Constitution. For those who wish to achieve their social agendas through constitutional litigation, the application of interpretivist rules of construction would limit the matter of constitutional interpretation, it has insisted, with almost unbridled regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated it in instrument or of the people who adopted it.\textsuperscript{121} tenBroek, \textit{Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction}, 27 \textit{Cal. L. Rev.} 399 (1939). See also 26 \textit{Cal. L. Rev.} 287, 437, 664 (1939), 27 \textit{Cal. L. Rev.} 157 (1939).


121. This denial is also peculiar in light of the fact that the Supreme Court has, since its first decade, applied interpretivist rules to constitutional construction.\textsuperscript{122} These rules were drawn by the Court from Anglo-American legal culture and applied to the Constitution.\textsuperscript{123} They were followed by the Marshall, and Taney, and Waite Courts through the nineteenth century\textsuperscript{124} and are still employed by the Supreme Court through the current term.\textsuperscript{125} State supreme courts — from the 18th century through 1866 — have likewise held that the function of constitutional construction is to discern and apply the original intent of the Constitution.\textsuperscript{126} These rules have been increasingly disregarded, however, as noninterpretivism has been accepted by the legal culture, the law schools, and judges in the past forty years.\textsuperscript{127}

A second distorted criticism of interpretivism is to portray it as an oversimplified and unattainable search for the subjective intent of individual legislators. Although noninterpretivist critics would lead one to believe that there is only one principle of interpretivism — to apply the subjective intent of the individual framers — this is pure caricature.\textsuperscript{128} As the Founders and the early Supreme Court recognized, interpretivism is the application of complex and time-honored rules of construction to the interpretation of the state and federal constitutions. As Professor Goebel wrote, the Founders...
resorted "to the old English canons of statutory construction . . . . to the accepted rules of statutory interpretation to settle the intent and meaning of constitutional provisions . . . ." 129

In the Founding era, the basic rule of construction of statutes and constitutions was that the interpreter must seek to discern and apply the original intent of the law. As Professor Christopher Wolfe explains in The Rise of Modern Judicial Review, the application of the rules of interpretation had a "common purpose agreed upon by all, namely, ascertaining the will of the legislator." 130 The application of the rules was made "with a view to the evident intent of those who framed it." 131 Richard Grey, interpreting an English statute in his 1735 System of English Ecclesiastical Law, noted that "subserving Practice . . . and contemporary expositions upon the Meaning of the Statute, [show] the contrary Opinions of those that could best judge of the Intent and Design of our Legislators . . . ." 132 Likewise, Matthew Bacon's 1736 Abridgment of the Laws of England, 133 a basic textbook of Thomas Jefferson and other colonial lawyers, 134 and Thomas Rutherford's 1754 Institutes of Natural and Legal Intent, 135 taught that the end of construction was to discern and apply the original legislative intent. According to Rutherford, "the intention of the legislator is the natural measure of the extent of the law." 136 Bacon wrote that "[a] thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter." 137 Justice Wilson, a framer at the Federal Convention and an associate justice of the first Supreme Court, stated that "[t]he first and governing maxim in the interpretation of a statute is to discover the meaning of those who made it." 138 Justice Story wrote, in expounding the rules of constitutional interpretation, that "[t]he first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and intention of the parties." 139

Many commentators have erroneously focused on the phrase — "Framers' intent" — as if this referred to the subjective intent of individual legislators. 140 Since the legislative body drafts and enacts the law, however, the legislative intention may be reasonably referred to as the intention "of the legislature," "of the legislators," or "of the Framers." The early Supreme Court repeatedly referred to the intent of the Framers' "or of the Convention." 141 But the labels can be misleading. What is important is the substance of the legislative intention. In all cases, the task is to discern the legislative purpose of the law, not the subjective intent of individual legislators, because only the former reflects the corporate intent of the representative, lawmaking branch of government.

The task of discerning and applying that legislative intent is undertaken through a set of complex rules of construction that have evolved over the course of the common law. The first rule is that the plain language used by the authors in the document is the most authoritative guide to the authors' intention and thus controls the meaning of the document, absent a defect in the language. Justice Story wrote: "Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. It is only, when there is some ambiguity or doubt arising from other sources, that interpretation has its proper office." 142 If the plain language is defective (e.g., ambiguous), the interpreter may consult various intrinsic aids, which include the context of the language or the subject matter. For example, Blackstone wrote that "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law." 143 Story wrote that "if words happen to be dubious, their meaning may be established by the context, or by comparing them with other words and sentences in the same instrument." 144

If the plain meaning or intrinsic aids prove ambiguous, extrinsic aids may also be consulted. These extrinsic aids include an examination of the

130. C. WOLFE, supra note 122, at 18.
131. Id. at 24.
133. M. BACON, ABRIDGMENT OF THE LAWS OF ENGLAND (1736). A seventh edition was published in 1832.
134. D. MALONE, JEFFERSON THE VIRGINIAN 85 (1948); R. KIRTLAND, GEORGE WYTHE— LAWYER, REVOLUTIONARY, JUDGE 33, 198 (1986). Jefferson apparently gave a copy of Bacon to "D. Carr" in 1806, which is now in the Library of Congress, Madison Building, Rare Book Collection.
135. 2 T. RUTHERFORD, INSTITUTES OF NATURAL LAW 364 (1754-56).
136. Id.
137. M. BACON, supra note 97, at "Statute": 1 (5).
139. 1 J. STORY, supra note 129, at 383.
140. See, e.g., Bennett, Judges and Original Intent, 22 TRIAL 60, 63 (April 1986) ("subjective original intention").
141. See, e.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) ("contemplated by its framers") (Marshall, J., dissenting); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 223 (1824) ("the will of those who made it") (Johnson, J., concurring); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419 (1811) ("the intention of the convention") (Marshall, J.; Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137 (1810) ("the framers of the constitution"); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 469 (1793) ("an object of this kind was had in view by the framers of the Constitution") (Cushing, J.).
142. 1 J. STORY, supra note 129, at 384.
143. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 59 (1765).
144. 1 J. STORY, supra note 129, at 384.
preexisting problem for which the provision was adopted, the legislative history of the provision, or the contemporaneous expositions on the meaning of the provision. (Actually, legislative history may be seen as merely one type of contemporaneous exposition.) Story wrote: "Light may also be obtained in such cases from contemporary facts, or expositions, from antecedent mischiefs, from known habits, manners, and institutions . . . ." 145 Thus, the "clause bound" interpretivism, which as depicted by Dean Ely views constitutional clauses as "self-contained units," is a strawman that finds no home in the actual rules of interpretation.146

Every rule of interpretation is directed to evidence of the original legislative intent.147 The importance of each rule of interpretation is ranked by the degree of authority that may be assigned to each type of evidence of the legislative intent. In both cases — where the words are clear and the plain language controls, and where the words are ambiguous and intrinsic or extrinsic aids may be used — the intention of the Framers is the end sought and those rules are only a means to that end. The use of one rule or another is dictated, depending on the context, by circumstances which indicate that one rule or another is the more reliable means to that end.148

The early Supreme Court consistently applied these rules of construction to the interpretation of the Constitution. Marshall applied the basic rule that the end of constitutional construction is to discern and apply the original intention of the Constitution. In Ogden v. Saunders, Marshall wrote:

To say that the intention of the instrument [the constitution] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers — is to repeat what has been already said more at large, and it all that can be necessary.149

Justice William Johnson, concurring in Gibbons v. Ogden,150 wrote that "when [the Constitution's] intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended." 151 Marshall and the other justices of the early Supreme Court followed the rules of construction by looking first to the words themselves, the plain language. In Brown v. Maryland,152 Marshall wrote that, in interpreting the Constitution, "it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general object [purpose, intention] to be accomplished by the prohibitory clause, or by the grant of power."153 Likewise, in Sturges v. Crowninshield,154 Marshall relied upon the basic principle that the plain language controls when the words are clear.

It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation . . . . [If, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.155

Marshall recognized, however, that words could be ambiguous or defective, due to the imperfection of human language. In Dartmouth College v. Woodward,156 Marshall held that a case falling within the plain language of the Constitution must be controlled by that language "unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument [constitution], as to justify those who expound the constitution in making it an exception."157 Interpretation should then be guided by intrinsic aids, including those "objects

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145. Id. at 385. See tenBroek, Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction, 27 Cal. L. Rev. 399 (1939).
146. See J. Ely, supra note 114, at 12-15.
147. In this sense, "legislative" is used broadly to encompass any lawmaking body — whether a legislative arm of a government that passes statutes or a constitutional convention drafting a constitution.
148. A good historical example of the application of these rules of interpretation is found in the debate between Hamilton, Madison, and Jefferson on the constitutionality of the National Bank in the 1790's. C. Wolfe, supra note 122, at 25-37. That Jefferson, Madison and Hamilton applied the rules of construction differently and reached different conclusions about the constitutionality of the National Bank does not demonstrate that the rules of interpretation are worthless. Quite the contrary. Given the diversity in human nature, the imperfection of human communication, and the fallibility of human intelligence, there will always be differences in interpretation. The rules of construction do not resolve all problems of interpretation. Interpretativists have never contended that rules of interpretation are a panacea for problems of construction or that they invariably lead to one clear, absolute interpretation. "Interpretation is obviously not a mechanical process," as Professor Wolfe says. C. Wolfe, supra note 122, at 37. Still, as Wolfe writes, rules nevertheless "narrow the range of differences greatly and provide a common standard for deciding issues." Id. They confine judicial power within certain limits. They impose a common starting point for individual interpretation. They thus promote stability in the law and preserve the rule of law. Most importantly, by guiding judges to effectively apply the legislative intent, the rules preserve democratic rule by the application of the will of the people through their representatives.
151. Id. at 223 (Johnson, J., concurring).
153. Id. at 437.
155. Id. at 203.
157. Id. at 645.
for which... [a power was] given."\textsuperscript{158} To ascertain the meaning of words (like "commerce" or "necessary") Marshall looked to the practice of the American government, prior congressional acts, approved authors, the common usage of the words, and their usage in other places in the Constitution. In construing a word, Marshall said in McCulloch, "the subject, the context, [and] the intention of the person using them [the words], are all to be taken into view."\textsuperscript{159}

Marshall resorted to extrinsic aids when the words were not clear, as in Sturges v. Crowninshield:

Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of the words, is justifiable.\textsuperscript{160}

Among the extrinsic sources that Marshall referred to was the history of the times in which the Constitution was formed. For example, in confining the Bill of Rights to a restriction on the federal government alone in Barron v. Baltimore,\textsuperscript{161} Marshall asserted that at the time of the Convention, the people were concerned with of power by the national government.\textsuperscript{162}

Marshall also relied on the extrinsic aid of treatises on law and politics which were followed by the Framers for the principles established in the Constitution. In Ogden v. Saunders, Marshall held that "[w]e must suppose, that the framers of our constitution took the same view of the subject [as these treatises], and the language they used confirms this opinion."\textsuperscript{163} The foremost treatise which the Supreme Court relied on as early as 1803 in Stuart v. Laird,\textsuperscript{164} and continues to rely on today,\textsuperscript{165} is The Federalist.\textsuperscript{166}

The Court relied on contemporary expositions of the Constitution for its construction in Martin v. Hunter's Lessee\textsuperscript{167} and Cohens v. Virginia.\textsuperscript{168} Justice William Johnson explained the rationale of this rule of construction by contemporary expositions:

[The contemporaries of the constitution have claims to our reference... because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them.\textsuperscript{169}

Some other contemporaneous expositions or treatises did not exist in the earliest years of the Supreme Court.\textsuperscript{170} Elliott's records on the debates in the state ratifying conventions were not published until 1836.\textsuperscript{171} Madison's notes on the Federal Convention were not published until 1840.\textsuperscript{172} But what is significant is that the Supreme Court immediately and repeatedly used these sources for construing the Constitution when they did become available.\textsuperscript{173}

Noninterpretavists commonly claim that Chief Justice Marshall himself established a method of interpretation that did not rely on the original intent of the Constitution.\textsuperscript{174} They cite his statement, in McCulloch v. Mary-

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\textsuperscript{158} Gibbons v. Ogden, 22 U.S. (9 Wheat.) at 188.

\textsuperscript{159} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Marshall looked to the immediate context of the phrase. A phrase can be construed within the context of an article of the Constitution or within the context of the Constitution as a whole. Among the intrinsic sources to which Marshall looked, was "the intention of the convention, as manifested in the whole clause." Id. at 419. Marshall appealed to intrinsic sources in giving the Necessary and Proper Clause, following Hamilton, a broad reading. He emphasized that the Clause was included in the powers granted to the Government and not in the restrictions or limits placed on the Government. Moreover, the Clause itself is a grant, not a restriction, of power.


\textsuperscript{162} Id. at 250. In Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), in construing the Contract Clause, Marshall contended that "the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment..." Id. at 137-138.

\textsuperscript{163} Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1805) (relying on and referring to The Federalist as a "practical exposition").


\textsuperscript{167} Martin v. Hunter, 14 U.S. (1 Wheat.) 304 (1816).


\textsuperscript{170} See generally, Wilson, supra note 166, at 74 n.26. See generally Pierson, supra note 166.

\textsuperscript{171} THE DEBATES IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliott ed. 1836-45); Wilson supra note 130, at 73.

\textsuperscript{172} THE PAPERS OF JAMES MADISON (1840); Wilson, supra note 130, at 74 n.26.

\textsuperscript{173} Wilson, supra note 166, at 129-135 (Appendix). Some critics of interpretivism have contended that interpretivism raises the question of a conflict between the intent of the framers in the Federal Convention of 1788 and the intent of the framers in the state ratifying conventions. Whose intent is to govern, they ask? See Address by Justice W. Brennan, Text and Teaching Symposium, Georgetown University (October 12, 1985). This problem is hypothetical. First, no case has been suggested in which such a conflict exists. Second, the Supreme Court throughout the nineteenth century used both the debates in the Federal Convention and Elliott's Debates without confronting such a conflict. See Wilson, supra note 166, at 129. This "conflict" is presented as if it was a novel or ingenious question, although the Court has dealt with the possibility of the problem (apparently without any outstanding conflict) throughout its history.

\textsuperscript{174} See e.g., L. Tribe, God Save This Honorable Court: How the Choice of Supreme
land. that "we must never forget that it is a constitution that were are expounding." This statement is taken completely out of context, however, when used to attribute to Chief Justice Marshall a belief that the Supreme Court had the authority to alter the Constitution's principles beyond the original legislative intent. The context of Chief Justice Marshall's statement is the interpretation of the necessary and proper clause — whether the word "necessary" means "absolutely necessary" or, more broadly, "appropriate." In his discussion of Congress' power, Chief Justice Marshall reasoned that the Constitution was only intended to set forth a set of principles, and that Congress' powers could not be listed in detail. But, Congress must have "discretion . . . which will enable that body to perform the high duties assigned to it . . . ." By stating that "it is a constitution that we are expounding," therefore, Chief Justice Marshall meant to emphasize that the necessary and proper clause must be interpreted broadly to allow Congress to effectuate the powers granted, since the Constitution could not set forth Congress' powers in detail.

A common attack on interpretivism is that the rules of construction foster a rigid constitution and are resistant to social change. In part, this is true. The rules of construction are intended, within certain limits commonly misunderstood, to maintain a constitution that is "rigid" in the sense that it does not change with each passing wave of public passion. Many who complain about the rigidity of interpretivism were presumably pleased that a "rigid" Constitution prevailed in United States v. Nixon and that the principle of Marbury v. Madison — that the President is under the law and subject to the interpretation of the law by the Judiciary — prevailed.

Beyond this sense, however, the contention that interpretivism promotes a rigid constitution is seriously flawed. Interpretivism recognizes that constitutional interpretation is not a narrow process, tied only to the particular facts before the legislative body, but is necessarily broader, since statutes and constitutions look to the future. For example, the Supreme Court noted in Sedima, S.P.R.L. v. Imrex Co., Inc., "The fact that RICO has been applied to situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." The judicial function is not to understand the past solely in its own fact-based terms, but to apply the principles or values adopted by the legislature in the law to new facts as they arise. It is for the judiciary to identify the sorts of evils against which the provision was directed and to apply it to their contemporary counterparts. Thus, the Court, in United States v. Classic, considering the primary election system, stated:

[In determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses.]

Under the process of case by case adjudication, each case presents a different fact pattern and thus, each case presents the opportunity to apply the general principles incorporated in the law to new factual patterns. Determining what sorts of evils the provision is directed at and applying the provision to their contemporary counterparts is the proper sense in which

States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is, pro tanto, the establishment of a new constitution. It is doing for the people, what they have not chosen to do for themselves. It is usurping the functions of the legislator, and deserting those of an expounder of the law. Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare, ita lex scripta est, to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice, than mere policy and convenience. Men on such subjects complexionally differ from each other. The same men differ from themselves at different times. Temporary delusions, prejudices, excitements, and objects have irresistible influence in mere questions of policy. And the policy of one age may ill suit the wishes, or the policy of another. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, today, and for ever.

1 J. Story, supra note 129, at 408-10.
182. Id. at 3287. It thus raises another strawman to suggest that interpretivism requires that the Constitution "outlaw only those practices [the framers] thought they were outlawing."
183. 313 U.S. 299 (1941).
184. Id. at 316.
constitutional principles are "organic."

The contention that interpretivism fosters a sterile constitution that is unresponsive to social change also overlooks the wisdom of the Framers in providing for certain flexibility in the provisions of the Constitution. A prime example is the Commerce Clause. This constitutional provision could spell chaos for the country if it was interpreted to apply only to the horse and buggy — only to those means of travel within the understanding of the Framers in 1787. Such a construction, in any case, would be contrary to the nature of legal interpretation that was practiced in the legal culture of the Founding era. Thus, Chief Justice Marshall stated in Sturges v. Crowninshield, that "[i]t would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation ...." More importantly, the Framers themselves created a Commerce Clause for an expanding republic and for factual situations that they could not foresee. The Supreme Court adopted a correspondingly broad interpretation of "commerce." In his concurring opinion in Gibbons v. Ogden, Justice Johnson affirmed a broad conception of "commerce."

Commerce, in its simplest signification, means an exchange of goods: but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Ship building, the carrying trade, and propagation of seaman, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects, could not possess power to regulate commerce. That such was the understanding of the framers of the constitution, is conspicuous from provisions contained in that instrument. 188

The objection that interpretivism fosters a rigid constitution also ignores the product of interpretivist review in recent constitutional jurisprudence. A prime example is the application of the Fourth Amendment search and seizure clause to wiretapping in Katz v. United States 190 in 1967. There, the police argued that the Fourth Amendment did not apply to wiretaps because the Framers could not have factually foreseen wiretaps when they created the Constitution. However, a wiretap, though a factual situation not envisioned by the Framers, is the functional equivalent of a "search." It would be an illegitimately sterile construction of the Constitution to hold that a wiretap can never be a "search" simply because it did not exist in 1787, when it is, by its very nature, a technologically advanced "search." Thus, to use Chief Justice Marshall's words, a wiretap presents "a case for which the words of [the constitution] expressly provide ...."

Likewise, in the 1986 term, in Tashjian v. Republican Party of Connecticut 192, Justice Marshall, writing for the Court, held that the Qualifications Clause of Article I, § 2, is applicable to primary elections in the same way that the Clause applies to general elections, even though the Framers did not specifically envision primary elections — the establishment of the party system followed the adoption of the Constitution. He reasoned that the purpose of the Clause applied to "the entire process by which federal legislators are chosen."

The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process. If primaries were not subject to the requirements of the... [Qualifications Clause], the fundamental principle of free electoral choice would be subject to... erosion....

In other words, by its nature, the primary election is an integral part of the electoral process in those elections where it exists, and since the Framers intended for the Clause to apply to the electoral process as a whole, the Clause applies to a part of the electoral process which is subsequently created, even if it was not specifically within the knowledge of the Framers.

Another example of interpretivist review is the recent opinion of Judge Titone of the New York Court of Appeals in SHAD Alliance v. Smith Haven

187. ld. at 203.
188. 22 U.S. (9 Wheat.) 1 (1824).
189. Id. at 229-30.
190. 389 U.S. 347 (1967). Some may contend that Chief Justice Taft's opinion in Olmstead v. United States, 277 U.S. 438 (1928), denying that the Fourth Amendment applied to wiretaps, is an interpretivist opinion because he referred to the Framers. More accurately, it is a strict or literal interpretation but not an interpretivist one. Taft avoided the fact that the wiretap was a functional search by contending that "[t]he evidence was secured by the use of the sense of hearing and that only ...." 277 U.S. at 464, 466. Cf. Katz v. United States, 389 U.S. 347 (1967) (Black, J., dissenting). Brandeis' statement is on point, "[A] principle to be vital must be capable of wider application than the mischief which gave it birth." ld. at 473. This was enough to decide the case, but Brandeis' opinion goes far beyond what was necessary to decide the case. His reference to "adapting" the Constitution was spurious, for there was no need to"adapt" the Constitution when the plain meaning of "search" applied to the case. In truth, Justice Butler's dissent should be viewed as the clearest statement of interpretivist reasoning in the case.

Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence...

The direct operation or literal meaning of the words used do not measure the purpose of scope of [the Constitution's] provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. Id. at 487-88. See Beaney, The Constitutional Right of Privacy in the Supreme Court, 1962 Sup. Ct. Rev. 212, 218-28.

191. See supra note 155.
193. Id. at 555.
194. Id.
The question there was whether the free speech clause of the New York State Constitution prohibited private property owners from establishing a ban on leafletting on private property. This question led to another: whether the free speech clause incorporated a state action component. Judge Titone’s opinion for a 5-2 majority, holding that the free speech clause contains a state action component and therefore does not apply to private property, is a classic example of interpretivist review. The plain language of the clause was ambiguous. Did the words of the first clause grant free speech rights anywhere? Did the second clause, with the phrase “no law,” encompass a state action component? Since the words were ambiguous, Judge Titone resorted to, among other things, extrinsic aids, including the Journal of the New York Convention of 1821. Although the framers of the 1821 Convention may not have “envisioned” shopping malls, Judge Titone determined that the framers did intend to incorporate a basic state action component. Constitutions are intended to bind governmental, as opposed to private, acts.

The dissent in the South Haven Mall case contended, as noninterpretavists are inclined to do, that Judge Titone viewed constitutional provisions “as flexible law to be interpreted precisely as the framers did at the time of their adoption.” This view is a red herring. There is a fundamental distinction between the argument that there are no free speech rights in malls because the framers did not foresee shopping malls, and the argument that the framers did not intend for a bill of rights to guarantee free speech in shopping malls because they did not intend for a bill of rights to restrict private action. Bans on free speech in shopping malls (as private property) are simple not contemporary counterparts to the evils which the Free Speech clause was directed. The former argument is a caricature of interpretivism — the latter is sound interpretivist reasoning. The difference is that the latter reasoning, as opposed to the former, recognizes that constitutions enact broad principles which are organic in the sense that they develop in their application to new, future facts. But the broad principle — here, a state action component — does not change with the facts, and cannot be changed by the judiciary. While the duty of the judiciary is to show how the broad principles do or do not apply to changing facts, only the people, through their representatives, have the moral and political authority to change the principles themselves.

B. The White-Stevens Colloquy and Interpretivist Review

The overriding issue of constitutional interpretation in the White-Stevens colloquy was whether the Fourteenth Amendment’s Liberty Clause encompasses a right to abortion. Even a quick reading of the opinions of Justices White and Stevens reveals that neither justice expressly relied upon established rules of constitutional construction. Justice Stevens’ method of construction was to start with the premise that a constitutional right of privacy was established in Griswold. That right was extended to single individuals in Eisenstadt. The rationale underlying those cases was that the individual should be free “from unwarranted governmental intrusion into individual decisions in matters of childbearing.” Griswold and Eisenstadt involved child-bearing. Abortion involves child-bearing, which has a tremendous impact on the individual woman. Therefore, abortion is protected from governmental intrusion, like contraception in Griswold and Eisenstadt.

In Justice Stevens’ line of reasoning, there was no consideration of the end of constitutional construction: the discernment and application of the original intention of the constitutional provision. There was no consultation of the plain language of the Liberty Clause of the Fourteenth Amendment or of intrinsic or extrinsic aids which might illuminate the original intention of that provision. Arguably, it might be said that Justice Stevens simply applied the plain language of the word “liberty” to encompass any activity or decision by an individual that is both personal and significant. But Justice Stevens seemed to bring to this inquiry a certain hierarchy of notions of liberty that are not derived from the Constitution. Economic liberties do not come to the Court with the same “momentum” with which child-bearing liberties come, he said. The Fourteenth Amendment may not enact Herbert Spencer’s Social Statics, but it apparently does enact John Stuart Mill’s On Liberty. This would seem to contradict the Court’s assertion in City of Newport, Ky. v. Iacobucci, that there is no “principled basis on which to create a hierarchy of constitutional values.”

196. Id. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. N.Y. Const. art. 1 § 8.
197. 488 N.E.2d at 1221 (Wachtler, C.J., dissenting).
198. Some commentators have contended that Roe v. Wade does not establish a right to abortion but only a right to decide in privacy. See, e.g., Garfield, supra note 6, at 318, 326 n.202. This artificial distinction might be true if society could restrict the implementation of the abortion decision as long as it did not attempt to regulate the decision. In reality, since society can restrict neither the decision nor its implementation, Roe must be seen to establish a right to implement the decision and therefore a right to abortion itself.
199. Thornburgh, 106 S. Ct. at 2186.
200. H. SPENCER, SOCIAL STATICs (1850). Justice Holmes’ famous line in Lochner v. New York, 198 U.S. 45 (1905), was that the “Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Id. at 75 (Holmes, J., dissenting).
201. J. MILL, ON LIBERTY (1859).
Justice Stevens' application of the Constitution to the question of abortion was based entirely on a balancing test of interests—the woman's versus the unborn child's. No inquiry was made into the status of either interest in the purpose of the Fourteenth Amendment or, more generally, in American law or tradition. This balancing analysis is, in its very nature, legislative in character. It is the judges, rather than the Constitution, who balance anew the interests of each new party in each particular dispute. Instead of identifying whether the intent of the Fourteenth Amendment was to protect either interest, the two interests of the competing parties are fashioned and then weighed in light of contemporary ideology, medicine, social conditions, political realities, and economic forecasts. It does not matter that the values animating Supreme Court decisions are not derived from the text or tradition of the Constitution, as long as a majority of justices agree that they should be there in light of such considerations. This is identical to the function that legislators play in sifting various interests in drafting, amending, and enacting legislation. It is noninterpretivism in its broadest form.

Moreover, Justice Stevens did not specifically inquire whether abortion has a tradition or respect in American law or history (unless he assumed that the *Roe* opinion demonstrated such a history), but examined "privacy" abstractly. Privacy, Justice Stevens reasons, is a constitutional right, and any activity which a majority of Justices determine is "private" is logically encompassed therein, regardless of the nature or history of the particular interest claimed. It is easier to extend privacy abstractly than to examine the asserted activity specifically.

However, this is not the analysis of the right of privacy that the Court has historically formulated. Rather, the Court has examined the particular right asserted to determine whether it was deeply rooted in American law and tradition. In *Meyer v. Nebraska*, the Court held that the Fourteenth Amendment's Due Process Clause protects the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." In *Griswold v. Connecticut*, Justice Goldberg, concurring with Chief Justice Warren and Justice Brennan, wrote that the Due Process Clause "protects those liberties that are 'so deeply rooted in the traditions and conscience of our people to be ranked as fundamental' ... The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those' fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Finally, in *Roe v. Wade*, the Court stated 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." Thus, the personal interests themselves must be "deeply vested in the traditions and conscience of our people" in order to fall within the constitutional right to privacy.

Proponents of a broad interpretation of the constitutional right to privacy call this analysis a "fragmented" approach to the right to privacy. The disregard of the status in American law of the particular right asserted and the rational extension of privacy to any "private" affair, greatly expands the legislative function of the judiciary and allows the judiciary to logically extend the constitutional right of privacy to encompass activities which have no protection in American law or tradition. The perfect example of this rationalistic analysis is Justice Blackmun's dissent in *Bowers v. Hardwick*, in which he would have overthrown the longstanding historical test for fundamental rights and would have protected homosexual sodomy as a fundamental right because homosexual relations are personally important. This analysis maximizes the opportunity for what Michael Perry has called "contra-constitutional policymaking."

In abandoning any method of interpretation in *Thornburgh* that relies on the original purpose of the Liberty Clause of the Fourteenth Amendment, Justice Stevens takes a position that is at odds with his respect for the intentions of the Framers in other constitutional contexts. Elsewhere, Justice Stevens has conscientiously, indeed passionately, sought to discern and apply the Framers' intent in construing a constitutional provision.

For example, two weeks after the decision in *Thornburgh*, the Court

205. 262 U.S. 390 (1923).
206. Id. at 399.
207. 381 U.S. 479 (1965).
208. Id. at 493.
209. 410 U.S. at 152.
212. M. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 9 (1982). Perry defines "contra-constitutional policymaking" as "constitutional policymaking that goes against the framers' value judgments." *Id.* (emphasis in original). We do not mean to suggest that Perry would consider the rational extension of the constitutional right of privacy to encompass abortion to constitute "contra-constitutional policymaking." He might consider it merely "extracomstitutional policymaking," which he defines as constitutional policymaking "that goes beyond the value judgments established by the framers of the written Constitution." *Id.* (emphasis in original). But insofar as the Court rationally extends "privacy" to protect activities which the framers left to the state or federal government to regulate, such decisionmaking, because it takes from the states the authority to regulate acts which the Constitution left to the states, would maximize the opportunity for decisionmaking that would reasonably fit within his definition of contraconstitutional lawmaking. For example, insofar as Justice White's evidence in *Bowers v. Hardwick*, 106 S. Ct. at 2844-45 & n. 5, 6 (1986), shows that the framers intended to leave sodomy to the states to restrict, the protection of sodomy as a constitutional right and the invalidation of state restrictions on sodomy would be contraconstitutional policymaking.
decided Press-Enterprise Co. v. Superior Court. At issue was whether there was any First Amendment right of access to transcripts of preliminary hearings in criminal proceedings. The California Supreme Court found no general First Amendment right of access and held that "the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial." Chief Justice Burger, writing for a 7-2 majority, could not disagree "in the abstract" with the California Supreme Court's balancing of "the defendant's right to a fair trial against the public right of access." But the majority reversed the California Supreme Court, holding that there is a qualified right of access, and that trial court must decide whether the rights of the accused override that qualified right of access in the particular circumstances.

In dissent, Justice Stevens emphasized that the asserted right at stake was not a right to publish or communicate information acquired, but the right to acquire access to information. "[T]he freedom to obtain information that the Government has a legitimate interest in not disclosing (citation omitted) is far narrower than the freedom to disseminate information ...." Turning to historical evidence for such a right of access, Justice Stevens noted that the evidence "in prior cases granting access to criminal proceedings" was more compelling, "[i]n those cases, a common law tradition of openness at the time the First Amendment was ratified suggested an intention and expectation on the part of the Framers and ratifiers that those proceedings would remain presumptively open." History was relevant in those cases, Justice Stevens noted, because the Bill of Rights was adopted "against the backdrop of the long history of trials being presumptively open" and "history mattered primarily for what it revealed about the intentions of the Framers and ratifiers of the First Amendment." History showed, in the present case, however, that "a common law of access did not inhere in preliminary proceedings at the time the First Amendment was adopted, and that the Framers and ratifiers of that provision could not have intended such proceedings to remain open." Justice Stevens concluded that the decision of the California Supreme Court was not in conflict with the First Amendment.

In City of Newport, Ky. v. Iacobucci, the Court addressed a municipal ordinance which prohibited nude dancing in local businesses licensed to sell liquor for consumption on the premises. In 1981, the Court, in New York State Liquor Authority v. Bellanca, upheld a similar state prohibition on nude dancing because it was within the State's broad power to regulate the sale of liquor under the Twenty-first Amendment. In Iacobucci, the Court held that Bellanca was controlling and upheld the municipal ordinance under the state's broad regulatory powers.

Justice Stevens, joined by Justice Brennan, dissented. He had previously disagreed with the decision in Bellanca as "blatantly incorrect," citing the language and the history of the Twenty-first Amendment. He emphasized that while the drafters of the Twenty-first Amendment clearly intended the Amendment to have some impact on the Commerce Clause, they did not intend such an impact on the First Amendment. In Iacobucci, Justice Stevens reiterated that "[n]either the plain language nor a fair construction of the purpose of the Twenty-first Amendment lends any support to the Court's holding that the Twenty-first Amendment shields restrictions on speech from full First Amendment review." He criticized the Court for "completely distort[ing] the Twenty-first Amendment" and for its trend of cases holding that the Twenty-first Amendment has slight effect in Commerce Clause cases but may be dispositive in First Amendment cases.

Finally, in the 1986 term, in Tashjian v. Republican Party of Connecticut, the Court considered the Qualification Clause for federal voters in Article I, § 2 of the Constitution. A Connecticut statute required voters in any party primary to be registered as members of that party. Subsequently, the Republican Party of Connecticut adopted a rule which permitted independent, registered voters to vote in the Republican state and federal primaries. The Party sought a declaratory judgment that the Connecticut statute was unconstitutional as a denial of associational rights under the First and Fourteenth Amendments. The district court held in favor of the Party, the court of appeals affirmed, and the Supreme Court affirmed.

Justice Marshall, for a five member majority, engaged in the ubiquitous balancing test, weighing "the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule." The Party argued that the rule infringed associational interests. The State argued that it had "compelling interests" in "ensuring the administrability of the primary system, preventing fraud, avoiding voter confusion, and protecting the responsibility of party government." The majority discounted all of the state's preferred interests.

The state also argued that implementation of the party rule would
violate the Qualifications Clause which provides that “Electors in each State” for the House of Representatives “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” 230 The Seventeenth Amendment has a parallel provision for Senate elections. 231 The court of appeals majority held that these constitutional provisions do not apply to primary elections, while the concurring opinion concluded that the provisions only require that “anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote” in federal legislative elections. 232 The Supreme Court adopted the rationale of the concurring opinion.

Justice Scalia dissented in an opinion joined by Chief Justice Rehnquist and Justice O’Connor. Justice Stevens, who dissented in an opinion joined by Justice Scalia, viewed the issue as whether a state may, consistently with the Constitution, “permit a voter to participate in elections to the Congress while preventing that same person from voting for candidates to the most numerous branch of the state legislature.” 233 He concluded that the answer to this question was no, “[i]f we respect the plain language of Article I, § 2 . . . the intent of the Framers, and the reasoning of . . . Oregon v. Mitchell . . . .” 234 Justice Stevens emphasized that the “plain language” of the Qualifications Clause states that voters in federal elections “shall have” the same qualifications as voters in state elections. But the Court separated “the federal voter qualifications from their state counterparts, inexplicably treating the mandatory ‘shall have’ language of the Clauses as though it means only that the federal voters ‘may but need not have’ the qualifications of state voters.” 235 He then carefully considered the evidence of the Framers intent on which the majority utilized and, by relying on Madison’s Journal of the 1787 Convention and the debates and different drafts of the Clause, he concluded that the Clause was intended to “ensure uniformity of electors’ qualifications within each State” 236 without imposing a uniform nationwide standard. He dissented form the Court’s “refusal to honor the plain language of the Qualifications Clause.” 237

In light of Justice Stevens’ strong reliance on the Framers’ intent in these three cases, why is there a complete disregard — even disdain — for the original intent of the Fourteenth Amendment in the area of abortion? Why did Justice Stevens ridicule reliance on “the plain language” in Thornburgh, but base his entire opinion on it in Tashjian? Why did he ridicule reliance on the “subjective intention of the Framers” — in reality a strawman — when he relied on the extrinsic aids of Madison’s Notes and various drafts of Article I, § 2 in Tashjian, and on the historical evidence for a right of access in Press Enterprise? Why the contradiction? If the Framers’ views are dispositive on one constitutional provision, as Stevens vigorously argues in other cases, why not when the Fourteenth Amendment Liberty Clause is at stake? The contradiction gives the appearance that the underlying principle for reliance on the original intent of a particular constitutional provision is what might be called, in Jesse Choper’s words, “whose-ox-is-gored.” 238 Thus, if reliance on the original intent supports the result one desires, emphasize that evidence, but if that evidence frustrates one’s designs, then ignore the evidence of the original intent. The problem with this is that “whose-ox-is-gored” is neither a principle of constitutional construction nor a principled manner of interpreting the Constitution.

Ironically, Justice White’s constitutional analysis in his Thornburgh dissent parallels Justice Stevens’ analysis, despite the fact that White’s conclusion is diametrically opposed to Stevens’. Like Justice Stevens, Justice White did not expressly apply established principles of constitutional construction. Yet, throughout his dissent, he emphasized certain themes of interpretivist review. The Court, he said, must “faithfully recognize only those rights or values which are reflected in the text or purpose of a constitutional provision. He expressed doubt that “the authors of any of the provisions of the Constitution” 239 intended to protect abortion as a right. He emphasized that constitutional values that are recognized by the Court must reflect “basic choices made by the people themselves in constituting their system of government.” 240 Liberties recognized by the Court must be “deeply rooted in the history or tradition of our people.” 241

Despite these themes, when Justice White sought to determine whether a right to abortion was protected by the Fourteenth Amendment, he did not apply established rules of construction or seek to determine whether abortion was “deeply rooted” in American history or tradition or whether “abortion rights” were part of the purpose of the Fourteenth Amendment. Rather, he engaged in the same balancing test as Justice Stevens.

Justice White’s conclusion was different from Justice Stevens’ because he weighed the interests of the woman and the unborn child differently. Justice Stevens was completely accurate in noting that Justice White seemed

231. U.S. CONST. amend. XVII.
232. 107 S.Ct. at 555 (citing Republican Party of State of Connecticut v. Tashjian, 770 F.2d 265, 286 (2d Cir. 1985) (Oakes, J., concurring)).
233. 107 S. Ct. at 557.
234. Id.
235. Id.
236. Id. at 558.
237. Id. at 559. But see Johnson v. Santa Clara County, 107 S. Ct. 1442, 1459 (1987) (Stevens, J., concurring), where Justice Stevens concluded that a statutory interpretation by the Court which contradicts the legislative intent takes precedence over that legislative intent. A contradicting interpretation can become “part of the fabric of our law” in eight years so as to override Congressional intent.
238. J. CHOPER, supra note 6, at 135; R. BERGER, supra note 113, at 312.
239. 106 S. Ct. at 2193.
240. 106 S. Ct. at 2194.
241. 106 S. Ct. at 2196.
to accept the basic premises of Roe, but nevertheless held that the right to abortion was not fundamental. By accepting without reservation the basic premises of Roe, and engaging in a balancing analysis which conceded that abortion was a “species of liberty” within the Fourteenth Amendment, Justice White engaged in an exercise of substantive due process as much as Justice Stevens, even though Justice White criticized the Court for its expansive use of substantive due process in Roe.

The premise that abortion is a “species of liberty,” within the Fourteenth Amendment, and the conclusion that it is not a “fundamental” liberty subject to strict scrutiny, necessitates the same balancing analysis that is at the heart of substantive due process. Despite Justice White’s contention that a “fundamental right” to abortion is an “extra constitutional” value, his contrary assertion that the value of the life of the unborn child is preeminent was not based on any explicit inquiry into whether that value was preeminent in American law, history or tradition.

Contrast Justice White’s balancing analysis in Thornburgh with his analysis for the majority in Bowers v. Hardwick, decided three weeks after Thornburgh.242 In Bowers, the issue was whether the constitutional right of privacy as part of the Liberty Clause of the Fourteenth Amendment included a fundamental right to engage in private homosexual conduct. Justice White recounted that the Court has historically said that such interests are fundamental rights, entitled to strict judicial scrutiny, only if they are rights “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed” or if they are “deeply rooted in this Nation’s history and tradition.”243 Hence, Justice White looked to one factor that the Court has historically relied upon as an extrinsic aid in constitution construction — the way that Anglo-America law has treated the particular interest — sodomy — throughout history.

[Sodomy was a criminal offense at common law and forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. . . . In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. (footnote omitted) In fact, until 1961, (footnote omitted) all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.244

Based on the text for fundamental rights that stretches back nearly 100 years, Justice White concluded that regardless of how significant an interest one may consider homosexual sodomy to be, “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, factious.”245

In Bowers, Justice White did not engage in a balancing analysis with its inherent legislative character. He did conclude that sodomy was neither right, nor a “fundamental” right. Rather, he looked at the nature of the specific activity in question — sodomy — and how it had been treated by Anglo-American jurisprudence. The evidence clearly indicated that sodomy was never considered a “right” in American law and tradition and could not be considered a “fundamental” right in constitution jurisprudence. Justice White’s analysis in Bowers, as opposed to his analysis in Thornburgh, is the only reasoning consistent with the established test for fundamental rights under the Constitution, and with a respect for the original intent of the Constitution and the traditional rules of constitutional construction.

Principled constitutional interpretation requires that these same rules of construction be faithfully applied to abortion. Most would concede that the broad phrase “liberty,” and the 119 years that have passed since the Fourteenth Amendment was ratified, have rendered the plain language of the Liberty Clause ambiguous. No justice would contend that the breadth of the word “liberty” dictates that any and every action is encompassed within the Liberty Clause. The Court has repudiated the idea that the Clause encompasses a liberty of contract which requires the invalidation of economic legislation,246 and we may assume that Justice Stevens and Justice White are not personally inclined to reverse that notion.

If the Liberty Clause is not to be read literally to include every asserted interest, it is ambiguous in its scope. Since it is ambiguous, interpreters must consult intrinsic aids, including the context of the Liberty Clause, and the subject matter. The subject of the Fourteenth Amendment was the protection of the rights of freed blacks.247 Even if the subject matter of the Fourteenth Amendment is taken broadly to protect the rights of all persons — black or white, male or female — it is still clear that the Fourteenth Amendment was not proposed to overturn the state statutes restricting abortion rights that existed in the great majority of the states that ratified the Fourteenth Amendment in 1868.248 A review of the debates on the Four-

243. Id. at 2844.
244. Id. at 2844-45.
245. Id. at 2846.
246. Lochner may be said to have been finally, though not explicitly, overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), which explicitly overruled Adkins v. Children’s Hospital, 261 U.S. 525 (1923). See also New Orleans v. Dukes, 427 U.S. 297 (1976) and Ferguson v. Skrupa, 372 U.S. 726 (1963).
247. In the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872), Justice Miller wrote that the purposes of the Reconstruction Amendments were “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free man and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” Id. at 71.
248. Witherspoon, supra note 8, at 33 n.15. As Jesse Choper noted, “[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, supra note 6, at 118.

In order for the Fourteenth Amendment to have overturned the abortion statutes which existed in an overwhelming majority of states, it would have been necessary for the Framers to have expressed that purpose in some manner. A constitutional provision does not invalidate
Feather Amendment, which are available through stenographic transcripts, indicates that abortion was never mentioned throughout the debates. This leads to the conclusion that the Framers did not consider it a purpose of the Fourteenth Amendment to overturn state abortion statutes. In fact, the evidence indicates that the Fourteenth Amendment was generally not intended to effect state criminal statutes unless those statutes were enforced against blacks in a discriminatory manner. More generally, there is no evidence that the Liberty Clause was intended to incorporate John Stuart Mill’s On Liberty or to encompass a libertarian conception of “moral autonomy.” Indeed, the evidence is directly to the contrary. Mill’s On Liberty is a conception of liberty that is fundamentally different from that of the original Founders. Mill recognized his notion of liberty to be radical when it was published in February, 1859. The themes of On Liberty were not a widely received in the United States until the early decades of the Twentieth Century. In the debates of the 39th Congress which adopted the Fourteenth Amendment, Mill’s name was apparently invoked only once — relating to his ideas on voting expressed in Representative Government. On a number of occasions, supporters of the Fourteenth Amendment attempted to define the term “lib-

constitutionally guaranteed right to a jury trial. In his plurality opinion, Justice Blackmun wrote: The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundament-
al...” It therefore is of more than passing interest that at least 29 states and the District of Columbia by statute deny the juvenile a right to a jury trial in cases such as these.

Id. at 548. See also Leland v. Oregon, 343 U.S. 790, 798 (1952). It cannot be legitimately speculated that the Framers may have had a secret, unexpressed intention to protect abortion as a “right.” The people ratify only what is disclosed. “A secret purpose on the part of the members of the Committee [which framed the Fourteenth Amendment], even if such be the fact, however, would not be sufficient to justify any such construction.” Connecticut General Co. v. Johnson, 303 U.S. 77, 87 (1938) (Black, J., dissenting).

251. R. BERGER, supra note 113, at 211-12. Representative James F. Wilson, Chairman of the House Judiciary Committee in the 39th Congress, stated during the debates on the Civil Rights Bill that “[w]e are not making a general criminal code for the States.” Cong. Globe, 39th Cong., 1st Sess. 1120 (1866). Avins, supra note 249, at 165. BERGER, supra note 113, at 143. See Maltz, supra note 249, at 965 (“The equal protection and due process clauses, by contrast, ensured that blacks would be subject only to those criminal penalties applicable to whites, and guaranteed blacks access to the courts.”). Most scholars agree the Fourteenth Amendment was intended to at least “constitutionalize” the civil rights bill. See e.g., H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 81 (1908) (“nearly all said that it was but an incorporation of the Civil Rights Bill...there was no controversy as to its purpose and meaning.”), Berger, supra note 113, at 23, Bond, supra note 249, at 444.


254. See infra note 258. On Liberty, however, was an “instant classic” in England and had an enormous impact on contemporary English thought. Id. at 34, 45 (Editor’s introduction).

erty'" incorporated therein. When they did so, they invariably referred to Blackstone’s conception of liberty,256 which was consistent with the Founders' notion of liberty, but which differed fundamentally from Mill's. The Court has relied on treatises such as Blackstone’s to define constitutional provisions when the Framers have relied on them in framing the Constitution.257 Thus, whether or not Mill's conception of liberty would encompass abortion, it is no part of the Fourteenth Amendment.258

This evidence — based on the plain language, the purpose of the Fourteenth Amendment, the debates, and the legal conditions at the time of ratification — should be sufficient to indicate that the Amendment was not intended to affect state abortion statutes in any way. An interpreter, however, might also consider further extrinsic evidence of the intent of the Fourteenth Amendment, including the history of the law’s treatment of abortion, which Roe extensively considered. Rather than balancing the woman’s interest in abortion and the unborn child’s in life, as Justices White and Stevens did, proper principles of constitutional construction require an inquiry into whether either interest is preeminent in American law and tradition. A reexamination of that history is justified.

IV. Is Abortion A Liberty Deeply Rooted In American Law And Tradition?

A substantial portion of the Court’s opinion in Roe is devoted to the history of abortion from ancient times through the 1960's.259 Some commentators have considered this historical review to be an obstacle in the Court’s analysis and have wondered why it was thought necessary to the opinion.260 But since the Court stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in [the constitutional] guarantee of personal privacy,"261 it seems that the historical analysis had two functions in the Court’s opinion. First, the history was thought to show that abortion was “freer” at the time of common law and the framing of the Constitution than at the time of the Roe decision and that the nineteenth and twentieth century abortion statutes restricted what was previously a common law right. "It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage."262 They are "not of ancient or even of common law origin," the Court wrote.263 Second, the history was examined to reveal "the state purposes and interests behind the criminal abortion laws."264 The history was thought to show that abortion was a dangerous procedure during the common law and the nineteenth century and that the purpose of the nineteenth century statutes was to protect the woman’s health and not to protect the life of the unborn child. Hence, with the safer abortion procedures of the 1970's, the Court reasoned, the purpose of the nineteenth and twentieth century abortion statutes had become meaningless and constituted an unconstitutional burden on the abortion liberty. Evidence available to the Court at the time and subsequent scholarship casts considerable doubt on whether the history of abortion in Anglo-American law justifies the conclusions of the Court in Roe.

A. Ancient Attitudes Toward Abortion

The Court began with a review of ancient attitudes toward abortion, suggesting at the outset that they were "not capable of precise determination."265 However, it concluded that "Greek and Roman law afforded little protection to the unborn,"266 noting that abortion "was resorted to without scruple." Any prosecutions in ancient law were premised on a "father’s right to his offspring," and not, the Court implied, on any concern for the unborn. Furthermore, the Court noted, "[a]ncient religion did not bar abortion."267

It is not quite apparent why the Court thought that ancient attitudes toward abortion were relevant to the history of abortion in Anglo-American law and tradition. Even the Court conceded that "with the end of antiquity a decided change took place. Resistance against suicide and abortion became common."268 In certain fields of law, moreover, it is quite clear that the English common law repudiated Greek and Roman law. For example, the

257. See supra notes 162-63 and accompanying text.
258. The libertarianism of John Stuart Mill was "not in the minds of those who wrote the constitution." Sandalow, Constitutional Interpretation, 79 Mich. L. Rev. 1033, 1038-39 (1981). "Mill’s extreme libertarianism has no traditional roots in American law and culture . . . ." R. Morgan, Disabling America 26 (1984). Justice Holmes’ denial that the Fourteenth Amendment encompassed Spencer’s, SOCIAL S TATICS applies fully to Mill’s On Liberty: "The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for certain well-known writers, is interfered with by school laws . . . ." Lochner v. New York, 198 U.S. 50, 51 (1905) (Holmes, J., dissenting).
260. Garfield, supra note 6, at 313; Della Penna, supra note 8, 6 Col. Hum. Rts. L. Rev. at 381.
261. 401 U.S. at 152.
262. Id. at 129.
263. Id.
264. Id.
265. Id. at 130.
266. Id.
267. Id.
268. Id. at 132.
common law differed markedly by granting women independent rights in marriage, and by ending the total domination, in Roman law, of the wife and her personal and property rights by the husband.\textsuperscript{269} In addition, in an area of law related to abortion — infanticide — it is clear that the common law repudiated the complete authority of the father in Greek and Roman law over the very life of the child. James Wilson, a Framer at the Federal Convention and an associate justice on the first Supreme Court, noted this change:

I shall certainly be excused from adducing any formal arguments to evince, that life, and whatever is necessary for the safety of life, are the natural rights of man. Some things are so difficult; others are so plain, that they cannot be proved. It will be more to our purpose to show the anxiety, with which some legal systems spare and preserve human life, the levity and cruelty which others discover in destroying or sparing with it; and the inconsistency, with which, in others, this, at some times, wantonly sacrificed, and, at other times, religiously guarded . . .

[In Sparta, if any infant, newly born, appeared, to those who were appointed to examine him, ill formed or unhealthy, he was, without any further ceremony, thrown into a gulph near mount Taygetus . . . At Athens, the parent was empowered, when a child was born, to pronounce on its life or its death . . . At Rome, the son held his life by the tenure of his father’s pleasure . . .]

With consistency, beautiful and undeviating, human life, from its commence-
ment to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger . . .\textsuperscript{270}

Wilson concluded that “[t]he formidable power of a Roman father is un-
known to the common law. But it vests in the parent such authority as is conduc-
tive to the advantage of the child.”\textsuperscript{271} Thus, whatever was the Greek and Roman attitude to the protection of human life, it was eclipsed by the common law and is quite irrelevant to American law and the American Constitution.

Even if the ancient attitudes toward abortion have some bearing on Anglo-American law, the Court’s description of this history is incomplete and full of error. John Conney has stated that “[o]ne of the most garbled and error-laden parts of Roe v. Wade is that dealing with the history surrounding the morality and legality of the practice of abortion in the Western world.”\textsuperscript{272}

An essential premise in the Court’s view of ancient history was that the legality of abortion in both the ancient world and western civilization was directly connected to ideas about when human life began or when a human soul was formed. The ancients themselves, however, did not make this connection, for, as Conney noted, “[e]ven though the Jews at that time held that human life did not begin until birth, they condemned abortion and penalties for it.”\textsuperscript{273} Also, contrary to the Court’s blanket assertion, Roman law did restrict abortion. In the third century, the Roman jurist Julius Paulus held that “if anyone gave to another an abortifacient . . . he would be sentenced to work in the mines or be exiled and lose part of his property. And if the victim died a capital sentence would be imposed. A decree of Severus and Antoninus also attached a penalty to a self-induced abortion,” the penalty of exile.\textsuperscript{274} Even if the concern of the law was for the mother and father, it was “because the fetus was considered something of value, and its loss a tragedy in their lives.”\textsuperscript{275} The Roman law reflected the legal axiom, conceptus pro iam nato habetur, under which the fetus was to be treated like a born person whenever some benefit to the fetus was at stake.\textsuperscript{276} This maxim was adopted

\textsuperscript{269} A. Smith, Lectures on Jurisprudence 47, 66 (R. Meek, D. Raphael, P. Stein, eds. 1978) (Liberty Classics Reprint 1982).


\textsuperscript{271} J. Wilson, supra note 270, at 604.

\textsuperscript{272} Conney, supra note 8. Those who casually assume that Aristotle permitted abortion on demand or promoted liberal abortion disregard the fundamental limitation in the principle that Aristotle enunciated. He wrote: “The proper thing to do is to limit the size of each family, and if children are then conceived in excess of the limit so fixed, to have miscarriage induced before sense and life have begun in the embryo. (Whether it is right or wrong to induce a miscarriage will thus depend on whether sense and life are still to come, or have already begun.)” The Politics of Aristotle 327 (1335b) (E. Barker ed. reprin 1977) (emphasis added). See generally, S. Krasof, supra note 8, at 349-59.

\textsuperscript{273} The Court in Roe cited this passage to support the proposition that “[m]ost Greek thinkers, on the other hand, condemned abortion, at least prior to viability.” Roe, 410 U.S. at 131 (emphasis added). A plain reading of this passage in the Politics demonstrates the clear and serious error in this statement. When Aristotle referred to “before sense and life have begun,” he was referring to what the common law called quickening, which generally occurs between the 16-18th weeks, six to eight weeks before viability, which generally obtains between the 22nd and 28th weeks. Aristotle was referring to the evidence of life in the womb, not the capability of survival outside the womb.

\textsuperscript{274} In addition, this passage indicates that Aristotle was promulgating a general principle, which was copied by the common law and which depended, like the common law, on available medical evidence — that the life of the unborn child should be protected when it first could be determined to be alive. Aristotle, in the fourth or fifth centuries, B.C., was forced to rely upon quickening as a sign of pregnancy, just like the common law did from 1300-1800 A.D. However, the principle established by Aristotle, and incorporated in the common law, changes in its application with advances in medical evidence. When Anglo-American law discovered, in the 19th century, that the life of the unborn child began at conception, not at quickening, the law changed to protect the unborn child from conception. The principle enunciated by Aristotle would lead to a similar result.

\textsuperscript{275} Id. Aristotle’s opinion that the fetus has first a vegetative and afterwards a rational soul was noted in.

\textsuperscript{276} Id. Paulus held: “A child in its mother’s womb is cared for just as if it were in existence. Wherever, therefore, its own advantage is concerned, although it cannot be of any benefit to anyone else before it is born.” 2 S.P. Scott, ed., Corpus Juris Civilis 228 (AMS Press ed. 1973). Marcianus, in his Institutes held:
by the English common law at least by the eighteenth century. In the early Christian era, the Church Fathers consistently condemned abortion in and of itself, without regard for any considerations of the time of pregnancy. "The basic judgment of the morality of abortion never hinged on the presence or absence of the human soul." Abortion was considered wrong without regard to the time of pregnancy.

The Roe Court also examined the history of the Hippocratic Oath in the ancient world. Although the Oath was not cited "in any of the principal briefs" in Roe as support for restriction abortion laws, the Court raised the issue of the Oath's relevance on its own, due in no small part to the considerable influence of the Oath in Anglo-American medical ethics. Based on one study — an 1943 monograph by Ludwig Edelstein — the Court consigned the Oath to the dustbin of history by concluding that the Oath was "not accepted by all ancient physicians" and was "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.'

The Court's reasoning on the Hippocratic Oath, like its review of ancient attitudes generally, is illogical, though for different reasons. The Court dismissed the Oath because it was "not accepted by all ancient physicians" and was merely "a Pythagorean manifesto." Even accepting this conclusion, what is relevant to American law is the place of the Oath in Anglo-American medical and legal ethics. The Oath has been the central ethical position of Anglo-American medical ethics for centuries. As Martin Arbagi has stated, the Oath "until recently has been held in almost religious awe by physicians as a timeless statement of medical ethics." The position of the Oath in Anglo-American medical ethics, and the Oath's prohibition against abortion, indicates that abortion was never considered a liberty in the history of Anglo-American medical ethics.

In addition, the Court's reliance on the study of Ludwig Edelstein is also open to considerable doubt. As note by Martin Arbagi, recent scholarship on the Oath casts considerable doubt on Edelstein's and the Court's conclusions. Although Edelstein's monograph was favorably received by some reviewers in the United States, one reviewer remarked that Edelstein "seems to attempt to prove too much." Another wrote that "the reader feels that he is being forced to accept a predetermined conclusion when alternative explanations might have some validity." For example, Edelstein wrote that "[a]ncient religion... remained indifferent to foeticide" (which the Court repeated), even though "Pythagoreanism was an 'ancient religion' and it prohibited abortion." Professor Arbagi emphasizes at least two problems with the Court's reliance on Edelstein. First, the Court relied on Edelstein both as an analysis of the Oath and as a general survey of classical attitudes toward abortion, even though abortion received only incidental treatment in Edelstein's monograph. Second, Edelstein's monograph was published 30 years before Roe, and subsequent scholarship casts doubt on the accuracy of Edelstein's thesis. Enzo Nardi's Procurato aborto nel mondo greco romano (Abortion in Classical Antiquity) was published in 1971 but has not been translated into English. Nardi "collected every extant passage from every Greek and Latin writer, from earliest times through the early Middle Ages — physician, poet, philosopher or playwright, lawyer, historian, canonist, theologian, or scientist, pagan, Jewish, or Christian — that has anything to do with abortion." Nardi concluded that after 300 B.C. "there was a growing and broadly-based opposition to abortion. It was not confined to Pythagorean or Christian circles. Even before the triumph of Christianity in the fourth century A.D., this increasing opposition had led to a gradual hardening of legal attitudes in the Roman empire."

In sum, Roe v. Wade's reliance on ancient attitudes toward abortion was misplaced. The history described in the opinion is in error in its basic conclusions. Moreover, even if the history is accurate its relevance to...
Anglo-American jurisprudence is doubtful, given the common law’s repudiation of many aspects of Greek and Roman jurisprudence.

B. The Treatment of Abortion at Common Law.

From the ancient world, the Court turned to the history of abortion at common law, noting that abortion performed before quickening was not an indictable offense at common law.293 The Court attributed this legal status of abortion to “a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins,”294 and concluded that religious ideas about animation and the soul were at the heart of the common law concept of quickening. The Court suggested that even post-quickening abortion was never a common law crime. The Court also emphasized that the killing of the unborn child was not treated as homicide until live birth. For these reasons and others, the Court concluded that the fetus was not treated as a human being or person by the common law.

Scholarship available at the time of Roe and published subsequently, demonstrates that the Court’s analysis of the common law was fundamentally wrong because the Court failed to consider the purpose of the common law of abortion in its technological and evidentiary context.295

The majority opinion contains many references to the existing state of technology relating to abortion. The majority does not, however, place its historical review of abortion in this or any technological or social context. Without such a context, the one-third of the opinion devoted to its historical survey seems pointless. If the purpose of the Court’s historical survey was to show an enduring consensus favoring abortion, it clearly fails. On the other hand, if its purpose was to expose the factors making for a changing societal attitude (and thus possibly a changing constitutionality), the necessary questions were not explored. There is neither discussion of the relevant levels of technology at any stage of history, nor of any other factors which might account for changing attitudes through time. Thus there is no means of relating the views on abortion of any previous period to today.296

Throughout the opinion, the Court deals with three phenomena in pregnancy without attempting to understand their function in the common law — quickening, live birth, and viability. Quickening is the first physical sensation by the mother that the fetus has moved in the womb.297 It commonly occurs between the 16th and 18th week of gestation, but may occur earlier and may not occur at all until labor.298 From the 14th through 19th centuries, quickening was the only reliable evidence that a woman was even pregnant or that the fetus in utero was alive. As late as 1800, Valentine Seaman in The Midwives Monitor and Mothers Mirror concluded that “there appears to be no unequivocal sign, whereby that state [pregnancy] can with certainty be determined, till between the fourth and fifth months, when the child quickens, that is, when its motions are distinctly felt.”299 An 1826 medical treatise likewise expressed the near impossibility of determining the existence of pregnancy for purposes of legal proof before the end of the sixth month:

We have taken a wide range in the examination of ‘authorities’ on the subject, and the result is that we can find no one invariable sign, nor can any combination of symptoms so unequivocal, as to enable us to pronounce its existence under oath, for all have occasionally proved deceptive. Before deciding, our examinations should be frequently repeated, and then, and then only should a final decision be seldom hazarded ‘before the end of the sixth month.’300

Before quickening, therefore, it was virtually impossible for either the woman, a midwife, or a physician to confidently know that a woman was pregnant, or, if it follows, that the child in utero was alive. As a result, it was impossible to prove that any pregnancy existed, that any fetus was alive in utero, or to prove that any pregnancy was aborted, until after quickening.

Consequently, based on the primitive medical knowledge of the day, the common law adopted the presumption that the fetus first became alive at quickening.301 Quickening was an evidentiary maxim, not a theological or moral concept in the common law.302 The evidentiary function of the quickening doctrine, as adopted by the common law, was highlighted in the 1872 New York case, Evans v. People303:

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.304

Consequently, the common law did not punish abortion before quickening because it presumed that the fetus was first alive at quickening, based on the primitive medical knowledge of the day. Furthermore, even if the common law suspected that the fetus was alive before quickening, it was a physical impossibility to prove that there was any life in utero before quickening. Hence, it would have been impossible as a matter of evidence to bring any

293. 410 U.S. at 132.
294. Id. at 133.
295. Dellapenna, supra note 8, at 361-65; Byrn, supra note 8, at 813-27; Destro, supra note 8, at 1267-73.
296. Dellapenna, supra note 8, at 363.
301. Forsythe, supra note 298, at nn. 39-53 and accompanying text.
302. Byrn, supra note 8, at 815; Dellapenna, supra note 8, at 377-78.
303. 49 N. Y. 86 (1872).
304. Id. at 90.
indictment for killing an unborn child before quickening, because it would be impossible to prove either that the woman was pregnant or that the fetus in utero was alive. A greater understanding of quickening among physicians was not evident until the middle of the nineteenth century. Thomas Denman, a widely cited authority on the subject, confirmed the more accurate understanding of quickening in 1829:

The changes which follow quickening have been attributed to various causes. By some it has been conjectured, that the child then acquired a new mode of existence; or that it was arrived to such a size as to be able to dispense with the menstrual blood, before retained in the constitution of the parent, which it disturbed by its quantity or malignity. But it is not now suspected, that there is any difference between the aboriginal life of the child, and that which it possesses at any period of pregnancy, though there may be an alteration in the proofs of its existence, by the enlargement of its size, and the acquisition of greater strength. 305

The Court in Roe also relied upon the concept of viability and concluded that only at this point did the state's interest in the life of the unborn child become compelling. Viability is the point at which the fetus has reached sufficient physiological development that it can survive outside the womb, and is commonly obtained between 24 and 28 weeks today. In contrast to the Court's complete reliance on viability, the common law placed no importance on the concept of viability. 306 At common law, if the unborn child was expelled from the womb alive (born alive) before viability, and died thereafter from injuries inflicted in utero, the killing was treated as homicide. 307 A.S. Taylor, in his 1861 treatise, stated that charges of homicide could be brought for the death of a child born alive before seven months gestation.

305. T. DENMAN, AN INTRODUCTION TO THE PRACTICE OF MIDWIFERY 287 (3d ed. 1829).
306. Forsythe, supra note 298, at n.30-36.
307. Further; the 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 it's mother 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 is murder in such as administered or gave them. But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. 1. c. 27 that if any woman be delivered of a child, which if born alive should by law be a bastard; and endeavors privately to conceal it's death, by burying the child or the like; the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead.
4 W. BLACKSTONE, supra note 143, at 198.

If a woman be quick with child, and by a Potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dies in her body, and she is delivered of a dead child, this is a great misprision, and no murder: but if 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.

The English law does not act on the principle that a child, in order to become the subject of a charge of murder, should be born viable, i.e., with the capacity to live. The capacity of a child continuing to live has never been put as a medical question in a case of alleged child murder; and it is pretty certain, that if a want of capacity to live were actually proved, this would not render the party destroying it irresponsible for the offense. 308

The 1848 English case, Regina v. West, 309 fully justifies Taylor's statement. There, the act of the defendant killed a child of six months gestation — "so much earlier than the natural time, that it is born in a state much less capable of living." 310 The evidence indicated that the child died after live birth due to its prematurity. Nevertheless, the judge, in applying the born alive rule, instructed the jury that this was "muder." 311 Thus, the common law of crimes did not consider the viability of the fetus.

The preeminent legal authorities on the common law were Edward Coke and William Blackstone. Both held that the killing of a fetus before quickening was not an indictable crime and that the killing of a child in the womb after quickening was not homicide but was a "great misdemeanour." Both adopted the born alive rule in holding that the killing of a fetus in the womb was homicide only if it was born alive and died thereafter. 312 Neither Coke nor Blackstone invoked any religious doctrine in affirming this to be the law. Rather, their exposition of the law was based on the simple proposition that the unborn child was a human life like any other. 313 American courts relied on Coke and Blackstone both for their decisions on post-quickening abortion 314 and the born alive rule in homicide. 315

The Court in Roe, however, relied on a well-timed article by Cyril Means, counsel for the National Association for the Repeal of Abortion Laws (NARAL), 316 to suggest that even post-quickening abortion, contrary

308. A. TAYLOR, MEDICAL JURISPRUDENCE 413 (7th ed. 1861).
310. Id. at 787, 175 Eng. Rep. at 330.
311. Id. The judge's conclusion was based on the born alive rule and not on any English statute, since no English statute up to that time had altered the born alive rule.
312. See supra note 308 and accompanying text.
313. Id.
314. See e.g., Evans v. People, 49 N.Y. 86, 89 (1872); State v. Moore, 25 Iowa (4 Stiles) 128, 134-135 (1868); Abrams v. Foshee, 3 Iowa (3 Coke) 273, 279 (1856) (citing Blackstone and Coke to effect post-quickening abortion was misprision or misdemeanor); Smith v. State, 33 Me. (3 Red. J.) 48, 55 (1851) (citing Coke).
315. See e.g., Keeler v. Superior, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970). Blackstone's Commentaries is "one of the most important legal treatise ever written in the English language. It was the dominant law book in England and America in the century after its publication (1765-1865) and played a unique role in the development of the fledgling American legal system." 1 W. Blackstone, supra note 143, at 111 (Introduction by Stanley N. Katz). Coke was "widely recognized by the American colonists as the greatest authority of his time on the laws of England..." Payton v. New York, 445 U.S. 573, 594 (1980).
316. Dellapenna, supra note 8, at 363-64.
to Coke and Blackstone, was not a common law crime. Means' premise was that abortion was not a constitutional right unless it was a common law liberty at the time of the adoption of the Constitution. His thesis—that Coke and Blackstone were wrong in holding that post-quickening abortion was a common law crime and that abortion was in fact a common law liberty—was based on two 14th century cases—denominated by Means, The Twinslayer's Case (1327), and The Abortionist's Case (1348). He interpreted these cases as establishing that abortion was no crime and further argued that this interpretation was affirmed by the 16th century authority, William Staunford. Based on his review of the fourteenth century cases, Staunford held that the killing of a child in utero was "not a felony, neither shall he forfeit anything." Because no forfeiture was required, Means interpreted this to mean that abortion was neither homicide nor any crime at all.

Since Roe was decided, Means' thesis, and his interpretation of the fourteenth century cases, have been repudiated. In The Twinslayer's Case, no resolution of the case against the defendant is reported and the report indicates merely that the defendant was bailed. Because the case was not resolved, the 1327 Twinslayer's Case cannot stand as authority for any conclusion on the law of abortion. It is authority for nothing except the unwillingness of the Court to let the abortionist go unpunished and the justices' puzzlement over how properly to deal with him. The subsequent 1348 Abortionist's Case also demonstrates, not that abortion was not a crime, but that evidentiary problems hindered the prosecution of abortion at common law. An English scholar in 1942 concluded that both of these cases were decided on evidentiary grounds—the difficulty of proving death and causation in utero without live birth—and that Staunford read them for this proposition. Others have reached the same conclusion. Because they were decided on evidentiary grounds, Coke was justified in holding that the Twinslayer's Case "was never holden for law," and that the Abortionist's Case was "but a repetition of that case." As one scholar has concisely concluded, "[a] dismissal due to problems of proof or procedure does not make the underlying conducts lawful."

The evidentiary factor is not the only problem with Means' interpretation. As one scholar, Shelley Gavignan, has pointed out in a recent study reviewing these 14th century cases, there is a "contradiction inherent in attempting to defend women's right to abortion at any stage of pregnancy by relying on a fourteenth century case in which a woman was beaten and her unborn infants killed as a result..." In addition, she criticizes Means' interpretation of Staunford's statement that no forfeiture was required. Means "made a fundamental error in interpretation," because he misunderstood "the implications of the felony/misdemeanor (misprision) categories within the old criminal law." Means interpreted the reference to no "forfeiture" as meaning that the act was not a misdemeanor, since, Means assumed, forfeiture was the penalty for a misdemeanor (misprision).
But, Means ignored “the historical relationship between felony and forfeiture” under which, according to Blackstone, “the true criterion of felony is forfeiture.”333 By saying that there was no forfeiture, Staunford was only confirming that the act was no felony. The act was no felony, because it was not a homicide, which was one of a handful of felonies at common law.334 Gavigan thus concludes that “Stanford and Coke did not differ at all in their statements of the law concerning abortion after quickening.”335

The Court, in Roe, also placed considerable emphasis on the born alive rule.336 At common law, the killing of the child in the womb was not a homicide unless the child was born alive and died thereafter.337 In other words, there could be no homicide in a stillbirth. Except for the 13th century authorities, Bracton and Fleta, who held that the killing of the child in the womb was homicide without any explicit requirement for live birth,338 the common law subsequently adopted the born alive rule. The Court in Roe cited this rule, in both criminal law and tort law, as indicating that the unborn child was not considered a person or human being. However, the Court never inquired into the purpose of the born alive rule, which was purely evidentiary.339

At common law and today, live birth does not mean birth at term,340 is not connected with any particular time in pregnancy, and may occur as early as the fourth month of pregnancy.341 Live birth means simply expulsion from the womb alive. At common law, the born alive rule served a function similar to the quickening doctrine.342 Without the technology that is now available to understand fetal development and to monitor fetal health, it was impossible to accurately determine fetal health in utero. Even after quickening, the common law could not prove that the child was alive in the womb at any point of pregnancy, unless the child was expelled from the womb alive and observed outside.343 Since the corpus delicti of homicide required proof of (1) a living human being, (2) death of the human being, and (3) proximate causation by the act of the defendant, it was necessary to prove that the human being was alive at the time of the acts in question. Because of the primitive medical knowledge of the day, and because of the high rate of infant mortality, it was impossible for the law to prove that the child was alive in the womb and that the acts were the proximate cause of death unless the child was expelled from the womb alive (born alive) and died thereafter from those acts.344

During the time of Edward Coke, the born alive rule, and its evidentiary foundation, were enunciated in the 1601 Sim’s Case,345 involving a charge of homicide for the death of a child, where it was stated:

[T]he difference is where the child is born dead, and where it is born living, for if it be dead born it is no murder, for non constat [it cannot be proved], whether the child were living at the time of the battery or not, or if the battery was the cause of the death, but when it is born living, and the wounds appear in his body, and then he dye, the batterer shall be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.346

The Sim’s Case has been relied on as authority for the born alive rule in American courts.347

The born alive rule indicates only that the common law could not prove homicide in a stillbirth. In other areas of law, the common law considered the unborn child to be a person, at least at the first evidence of life in the womb. Blackstone held that the unborn child was a person with a right to life at the

333. Id.
334. By the 1600’s, English judges had “created and defined the felonies of murder, suicide, manslaughter, burglary, arson, robbery, larceny, rape, sodomy and mayhem.” W. LaFave & A. Scott, Handbook on Criminal Law 58 (1972).
335. Gavigan, supra note 323, at 23.
336. 410 U.S. at 160, 161, 162.
337. See supra note 266.
338. Bracton wrote:
If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus was already formed and quickened, especially if it is quickened, he commits homicide.
He, too, in strictness is a homicide who has pressed upon a pregnant woman or has given her poison or has struck her in order to procure an abortion or to prevent conception, if the foetus was already formed and quickened, and similarly he who has given or accepted poison with the intention of preventing procreation or conception. A woman also commits homicide if, by a potion or the like, she destroys a quickened child in her womb.
2 H. Richardson & G. Sayles, Fleta 60-61 (Selden Society ed. 1955).
339. Forsythe, supra note 298, at 567-592; Dellapenna, supra note 8, at 370, 377-79.
342. Forsythe, supra note 298, at nn.37-139.
first sign of life in the womb, at quickening, but he also recognized that homicide could not be proven without live birth. In his section on the "Law of Persons," Blackstone wrote that "Persons also are divided by the law into either natural persons, or artificial." The most basic right of persons was the "right of personal security" which consists of "a person's legal and uninterrupted enjoyment of his life." Blackstone held that life was "a right inherent by nature in every individual." That right to life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb," or, in other words, by the time of quickening. Given the context of this passage in his section on the "Law of Persons," Blackstone affirmed that the unborn child was considered to be a person at quickening, when it was first determined to be alive. "Human being" and "person" were considered synonymous at common law.

Blackstone's discussion on the right to life of persons, as compared with his description of the law of homicide, indicates that the born alive rule was not a substantive element in the criminal law definition of a human being. An unborn child could not, on the one hand, be considered a "person" with a right to life and personal security at quickening, and yet, on the other hand, because of the born alive rule, not be considered a "human being" when that right to life and personal security was threatened by a hostile and deadly act. The apparent contradiction between Blackstone's affirmation of right of personhood for the quickened unborn child, and the denial in the "born alive" rule that the unborn child is a human being, arises only from the erroneous presupposition that the born alive rule was substantive in nature. When the born alive rule is recognized to be an evidentiary principle that was required by the state of medical science of the day, the contradiction disappears. Thus, Blackstone held that the unborn child was a "person" with a right to life at quickening, but recognized that proof of the denial of that right at common law could not be obtained without live birth.

Finally, the practical application of the born alive rule at common law also demonstrates that the rule was an evidentiary and not a substantive, moral definition of human being at common law. In practice, the born alive rule was applied to proscribe as homicide the killing of a child even if the mortal injuries were inflicted while the child was still in utero. If the rule was truly a substantive definition of "human being," and a fetus only became a human being at birth, then injuring an unborn child in utero would not be injuring a human being. In that case, the death of the child out of the womb could not satisfy the corpus delicti, because the criminal agency of the defendant — the moral connection between the infliction of the injury and the resulting death — would not exist. The child would not be a human being both at the time of the injury and the time of the death. If the born alive rule was a substantive rule, the homicide could only result from injuries inflicted after birth, because only then would they be inflicted on "a human being." The common law, however, did not adopt this proposition. Rather, the common law considered the injury of the child in utero to be a constituent part of the homicide of the unborn child, as long as it died out of the womb. The law necessarily found the injury to the child in utero to be an injury to a human being in order to find the subsequent death after birth to be a homicide.

The Court in Roe, however, never examined the medical context of the common law, nor the purpose of the quickening doctrine or born alive rule. The conclusion that abortion was a "right" prior to quickening or after quickening is simply unsupported. Coke and Blackstone thus accurately represented the principles of the common law. What is more important is that Coke and Blackstone became authority for the common law on abortion in the United States because they were adopted by American courts in the 19th century as authorities for the common law. The common law from England was not received wholesale in America, but American courts adopted the English common law as it fit American institutions. What the American courts adopted as the common law was the position of Coke and Blackstone that abortion after quickening was a grave offense.

C. Protection of the Unborn Child As A Secular Interest

The Court in Roe, and Justice Stevens in his concurring opinion in Thornburgh, concluded that protection of the life of the unborn child before viability is religious dogma and the view that the fetus is a human being is supportable only by religious and not secular interests. Beyond the fact that such a proposition rests on an idiosyncratic view of the relationship between...
moral principles and American law, the proposition betrays a great disregard for the status of the unborn child in the common law. The life of the unborn child was protected by the common law at the earliest point in pregnancy that the child could be determined to be alive. Blackstone and Coke clearly considered the unborn child — at least after evidence of life at quickening — to be a human being/person. These values were incorporated into the secular, common law, even if they also may have been reflected at one time in canon law.

Anglo-American law, and Anglo-American culture in general, has long regarded the unborn child to be a human being, and has not drawn the stark distinction that Justice Stevens has between the unborn child and the born child. This is demonstrated by the very term that the law has applied to the fetus: “child” or “unborn child.” This term has long been in use in the law by Fleta,359 Staunford,360 Lambarde,361 Dalton,362 Coke,363 Blackstone,364 Hawkins,365 and Hale.366 The 1348 Abortionist’s Case used the term “child.”367 This term was used to refer to a child in utero before and after quickening.368 Early texts on medicine and jurisprudence used the term “child.”369 The term “child,” in and of itself, affirms the humanity of the unborn child. In addition, the term “unborn child,” with the modifier “unborn,” shows that both the child born and the unborn child are considered to be children, with the unborn child distinguished not because it is a non-human being, as Justice Stevens suggests, but merely because it is unborn. The term “fetus” is primarily a medical, not legal, term. Although some early authorities used the term “fetus,” and the term “child” in the same passages, the term “child” or “unborn child” has been preferred overwhelmingly to the term “fetus” in legal authorities, statutes, and judicial opinions — until Roe v. Wade. Bracton used the term “fetus,”370 Fleta used both “fetus” and “child.”371 Staunford372 and Lambarde373 used “child” but not “fetus.” Neither Dalton,374 Coke,375 Hawkins,376 nor Hale377 used the term “fetus.” The phrase “being with child” likewise demonstrates that Anglo-American society has long viewed the unborn child as a child and therefore a human being.378

The principle that an unborn child is a human being is also expressed in modern medical science. In his text, Blechschmidt writes:

A human ovum possesses human characteristics as genetic carriers, not chicken or fish. This is now manifest: the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum.379

Moore defines zygote in his textbook, The Developing Human, as follows:

Zygote. This cell results from fertilization of an oocyte, or ovum, by a sperm, or spermatozoon, and is the beginning of a human being.380

359. See supra note 297.
360. See supra note 281.
361. Lambarde wrote:
If the mother destroy her child before born, this is felony of the death of a man, though the child have no name, nor be baptized. And the Justice of Peace may deal accordingly. But if a child be destroyed in the mother’s belly, it is no manslaughter nor Felony to be imprisoned upon this Statute.
362. Dalton held:
Note also in murder, or other homicide, the party killed must be in esse (. . . in rerum natura.) For if a man hurteth a woman with child, whereby he killeth the infant in his mother’s womb, by our law, this is no felony: neither shall be forfeit any thing for such offense: and whether (upon a blow or hurt given to a woman with child) the child die within her body, or shortly after her delivery, it maketh no difference . . . .
364. 1 W. Blackstone, supra note 143, at 129.
365. Hawkins wrote:
And it was ancienly holden, That the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child, was Murder: But at this Day, it is said to be a great Misprision only, and not murder, unless the Child be born alive, and die thereof, in which Case it seems clearly to be Murder, notwithstanding some Opinions to the contrary.
366. If a woman be quick or great with child, if she takes, or another gives her any potion to make an abortion, or if a man strikes her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in rerum natura. . . . But if a man procures a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kills the infant, this is murder.
1 M. Hale, Pleas of the Crown 433 (1778).
367. See supra note 279.
368. See e.g., Hall v. Hancock, 32 Mass. (15 Pick.) 255, 256 (1834) ("A child is not living, the mother is not quick, until the 16th or 18th week after conception."); See infra note 338.
369. As Prudence is necessary to enable a Chirurgeon or Midwife to assure a Woman that she is with child, or not, and of a true or false Conception; so it is likewise as much for them to know how far she is gone to the end they may be certain whether the Infant be yet quick or no, which is of great Moment: Because, according to the Law, if a big-bellied Woman miscarry by a Wound, he that struck her deserves Death, in case the Child were quick, otherwise he is only condemned in a pecuniary Punishment.
370. Bracton, supra note 338.
371. Fleta, supra note 338.
372. W. Staunford, supra note 321.
373. W. Lambarde, supra note 361.
375. E. Coke, supra note 307.
376. W. Hawkins, supra note 365.
378. See e.g., supra notes 366, 369.
Greenhill and Friedman state in their text, *Biological Principles and Modern Practice of Obstetrics*, that the term "conception refers to the union of the male and female pronuclear elements of procreation from which a new living being develops." 381 Patten emphasizes in his text on human embryology that "[t]he penetration of the ovum by a sperm and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual." 382 Likewise, Arey wrote in his classic on *Developmental Anatomy* that "[t]he formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into a combined cell, or zygote, which definitely marks the beginning of a new individual." 383 The moral significance of these medical facts is summarized by Professor Hadley Arkes.

The fetus may be a potential doctor, a potential lawyer, or a potential cab driver; but he cannot be considered merely a potential human being, for at no stage of his existence could he have been anything else. That is also why it is futile to pick out phases in the development of an embryo or fetus and suggest that the offspring is more human, say, at nine months than is at nine months and a day. The process of development is continuous; each step along the way will bring a further articulation of what is built into the nature of the offspring. But at not point will the fetus acquire features that are essential to its standing as a human being. 384

The common law may not have stated, with as much eloquence or knowledge of fetal development, the principle that the unborn child in utero is a human being with a right to life — but the common law nonetheless did incorporate the principle. The proposition that the unborn child, the fetus, is a human being, a person, is expressed throughout the common law. It is not religious dogma or merely a religious notion. The common law protected the life of the unborn child to the best of its ability, given contemporary medical knowledge and technology, as an extension of the protection of all other human life. But, of course, throughout his time, from Aristotle, to Blackstone, to the present, there has been no change in the nature of the fetus, only in man’s understanding, or misunderstanding, of the fetus. The unborn child is not becoming alive earlier in pregnancy; rather, mankind is only developing the technology which can measure that life earlier. Coke, Blackstone, and Hale treated the killing of the unborn child as a "secular" crime. 385 The Michigan Supreme Court, interpreting Hale in an 1886 abortion case, concluded

> [a]t common law life is not only sacred but it is unalienable. To attempt to produce an abortion or miscarriage, except when necessary to save the life of the mother under advice of medical men, is an unlawful act and has always been regarded as fatal to the child and dangerous to the mother. 386

Justice MacNaghten, in a 1939 English abortion case stated:

> But long before then [the English 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: see Bracton. Book III... The protection which the common law afforded to human life extended to the unborn child in the womb of its mother. 387

Even the Court in *Roe* acknowledged the rationale of the 1871 AMA Committee on Criminal Abortion, which proposed the strengthening of abortion laws: "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." 388 Protection of the life of the unborn child is simply an application of the secular interest in protecting human life, and the best authority for that secular interest is the common law.

D. The Treatment of Abortion in American Law

After examining English law, the Court in *Roe v. Wade* turned to the treatment of abortion in American law. Having previously concluded that English common law permitted abortion as a "right" before quickening and did not punish abortion after quickening as a crime, the Court stated that "[i]n this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law." 389 Implicitly, the Court assumed that abortion was thus also a "liberty" in America before quickening and no crime after quickening.

However, the Court did not examine the application of the common law in American in the years before the adoption of abortion statutes in the nineteenth century. Had the Court done so, it would have found no instance in which abortion was treated as a "liberty" in American history. It is fair to say that no social history of the United States of the seventeenth and eighteenth centuries contains any evidence that abortion, either before or after quickening, was treated as a liberty. Social histories show to the contrary that it was severely punished in several cases.

389. 410 U.S. at 138.
There were few prosecutions for abortion in early America for at least two reasons. First, "[f]ew tried to limit their pregnancies by birth control or abortion," Catherine Scholten concludes. Second, primitive medical understanding even through the middle of the nineteenth century prevented proof of abortion until after quickening and unless there were direct witnesses who would testify. Mohr reports that during the nineteenth century "[t]hroughout all the jurisprudence books ... ran the unanimous opinion that little could be done to combat" abortion because "abortion remained essentially impossible to prove at law on the basis of the knowledge and technology available to medical examiners in the nineteenth century." As a result, while it is possible to show that accidental or attempted intentional miscarriage occurred, the incidence of these miscarriages does not in any way show that this was accepted in law or morality. Thousands of murders, thousands of deaths through drunk driving, occur every year in the United States, yet no one could point to their occurrence alone and logically conclude that their occurrence — even if the incidents are increasing — indicates that such actions are considered a "right" or "legal."

A few prosecutions in early American history are documented and, in all such cases, abortion was punished as a crime. Julia Spruill, in her 1938 work *Woman's Life and Work in the Southern Colonies*, 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." Lyle Koehler, in her 1980 work, *A Search for Power — The "Weaker Sex" in Seventeenth-Century New England*, records the 1683 case of Deborah Allen in Rhode Island. Allen was indicted on September 4, 1683 by the "Gen. Attorney ... for, fornication, and for Indeavouring the Dethraction of the Child in her womb." She apparently pleaded guilty and was sentenced "to be Severely whipt in the Towne of Newport .... " Sauer, in his 1974 study, *Attitudes of Abortion in America, 1800-1973*, reports that "not one statement by any nineteenth-century commentator can be found which was in any way sympathetic to women desiring abortions." There simply is no evidence that abortion was viewed as a liberty in American during the seventeenth, eighteenth, or nineteenth centuries.

James C. Mohr, in his history, *Abortion in America*, repeatedly states that abortion was a "right" in America, at least before quickening. But Mohr's history does not commence until 1800. Furthermore, his thesis that the nineteenth century abortion statutes took away what was a common law right is not based on any historical investigation or evidence of Mohr's but entirely on one source — the same article by Cyril Means on which the

At the July 1663 Charles County Court, Jacob Lumbroso ... was charged ... with having brought on a criminal abortion upon ... Elizabeth Wild, who, subsequent to the time the alleged abortion occurred, but before he was brought into court, had married him. He was presented ... and the case was ordered up to the Provincial Court for trial []. As it did not come up in the higher court, it was probably dropped because he had disqualified the principal witness against by marrying her.

53 Maryland Archives at xxii. The authors are indebted to Philip Rafferty, Esq., Long Beach, California, for the reports and citations for these cases.

54. Id. at 329 n.132. The indictment, or report, in the case of Deborah Allen reads as follows:

On Indictment by the Gen. Attorney against Deborah Allen, Daughter of Mather Allen of the Towne of Dartmouth in the colony of New Plymouth for, fornication, and for Indeavouring the Dethraction of the Child in her womb: being brought into the Court, her Charge Read and asked whither Guilty or not, Owens Guilty: The Court do Sentence Deborah Allen for her Transgression forthwith to be severely whipt in the Towne of Newport with fifteen Stripes on the naked back and pay officer's fees.

GENERAL COURT OF TRIALS. NEWPORT COUNTY 1671-1724 (4 September 1683) (Providence, R.I., Providence College Phillips Memorial Library Archives; Rhode Island Court Records Collection). The authors are indebted to Philip A. Rafferty, Esq., Long Beach, California, for this source.

397. Id.
399. J. MOHR, supra note 391.
400. J. MOHR, supra note 391, at vii, 6, 22, 117, 119, 208, 248. Mohr provides no support for any of these statements beyond that fact that the common law did not punish abortion until after quickening and that some commentators noted that some Americans did not view abortion before quickening as any crime. Id. at 73. Mohr repeatedly provides evidence that it was impossible to prove abortion or pregnancy before quickening even into the middle of the nineteenth century. See infra notes 368-71 and accompanying text.
Court relied in Roe, and which has since been repudiated. Thus, Mohr's study is no more than a study of the establishment of the nineteenth century abortion statutes. His conclusion that these statutes took away a common law right is invalid, because his premise — that a common law right existed — is invalid.

Without examining this history of the application of the common law in America, the Court in Roe examined the nineteenth century abortion statutes. The Court stated in error that "the first state to enact abortion legislation" was Connecticut in 1821. In truth, the first abortion statutes in America were regulations on midwives. Until the middle of the nineteenth century, male physicians did not attend women during pregnancy, a function uniformly filled by female midwives. New York City in 1716 adopted an ordinance regulating midwives. Violation was punished by heavy fines, forfeiture, or jail. The ordinance 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 Mis-carry of that she goeth withall before her time."

The ordinance was in effect at least until 1776. Likewise, Virginia in the seventeenth century passed an ordinance by which midwives were pledged to expose infanticide, to summon other midwives in suspicious cases and not to induce abortion or charge exorbitantly.

James Mohr, in his history of abortion, provides abundant evidence that the law's regulation of abortion even in the nineteenth century was limited by fundamental evidentiary problems, especially before quickening. "In all cases, the laws contained either the need to prove pregnancy or the need to prove intent, neither of which could be determined beyond doubt without quickening." Mohr notes that although Illinois in 1827 and New York in 1828 passed abortion statutes, "in practice, indictments could not be brought under these laws before quickening because intent had to be proved and the only way that intent could be proved was to demonstrate that the person who administered the poison could have known beyond any doubt that the woman was pregnant." Mohr examines the New York revised statute of 1845 and notes that the law was "unenforceable in cases prior to quickening, because pregnancy could not be proved." For this reason, he concludes that although the law "theoretically" made prequickening abortions illegal, the judicial application of the law required a quickening doctrine in order to prove the requisite intent. Thus, the law in the United States, like the common law, protected the life of the unborn child to the fullest extent possible given contemporary medical technology.

The Court's suggestion in Roe that "it was not until after the War Between the States that legislation began generally to replace the common law" is also wrong. Recent scholarship has demonstrated that the majority of states moved to enact restrictive abortion statutes before the Civil War and thus before the adoption of the Fourteenth Amendment. "At the end of 1849, eighteen of the thirty states had enacted anti-abortion statutes, and by the end of 1864, twenty-seven of the thirty-six states had done so." Furthermore, "[o]f the thirty states ratifying the Fourteenth Amendment as of July 21, 1868, all but Georgia, North Carolina, Rhode Island, South Carolina, and Tennessee had enacted anti-abortion statutes." The Court in Roe also erred in stating that the primary purpose of these nineteenth century statutes was to protect women's health. In truth, an equal if not predominant purpose of the nineteenth century abortion statute was to protect the life of the unborn child. Mohr provides evidence that while the abortion statutes may have been intended to protect the lives of women, they were also enacted to protect the life of the unborn child. In the 1864 revision to the 1854 Oregon abortion statute, the revisers dropped the requirement that the fetus be "quick" and "made the purposeful destruction of any 'child' in utero a manslaughter offense whether the woman was harmed or not." In the 1872 revision of the 1849 New Jersey abortion statutes, the legislature made "the death of the fetus an offense equal to the death of the mother." The Colorado Supreme Court in 1872 interpreted the state law as intending to protect both the mother and the fetus from injury.

The Court in Roe assumed that no legislative history for these statutes existed. James Witherspoon has recently demonstrated that the legislative history expressed a purpose to protect the life of the unborn child as a

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401. J. MOHR, supra note 391, at 4 n.1.
402. See supra notes 293-388 and accompanying text.
403. 410 U.S. at 138.
404. Id.
405. Forsythe, supra note 298, at n.37.
406. Horan and Marzen, supra note 8, at 199.
407. Id. at 200.
408. S. MASSENGILL, A SKETCH OF MEDICINE AND PHARMACY 294 (2d ed. 1942).
409. J. MOHR, supra note 391, at 43.
410. Id. at 26.
411. Id. at 124.
412. Id.
413. 410 U.S. at 138-139.
414. Witherspoon, supra note 8, at 203.
415. Id.
416. 410 U.S. at 151.
417. J. MOHR, supra note 391, at 203.
418. Id. at 222.
419. Id. at 236 (citing Dougherty v. People, 1 Colo. 514 (1872)).
420. More specifically, the Court assumed, or adopted the contention of the plaintiffs, that no legislative history existed to support the contention that the purpose of the statutes was "to protect prenatal life." 410 U.S. at 151.
human being.\footnote{421} He examined the legislative history of one state — Ohio. In January, 1867, the Ohio legislature ratified the Fourteenth Amendment. On February 1, 1867, a bill was introduced to amend the 1834 Ohio abortion statute. The select committee report contained in the Ohio Senate Journal cited “the alarming and increasing frequency” of abortion, which the report referred to as “child-murder.”\footnote{422} The report criticized the “ridiculous distinction” between abortion before and after quickening because medical evidence indicated that “the foetus in utero is alive from the very moment of conception.”\footnote{423} The committee concluded that “the willful killing of a human being, at any stage of its existence, is murder.”\footnote{424} The revised statute made it a “high misdemeanor” punishable by one to seven years imprisonment to attempt, advise or devise instruments for an abortion which caused the death of a vitalized embryo, or foetus, or mother.\footnote{425}

Witherspoon’s findings support the previous conclusions of Sauer in his 1974 study.\footnote{426} Sauer concluded that “[o]ne can infer from an analysis of nineteenth century laws that the safety of the foetus was a major concern of many State legislatures.”\footnote{427}

A law which has maternal health as its sole or main consideration is not likely to be worded in such a way that the human status of the foetus is recognized, since such recognition would also require that the foetus be given human rights protected by law. In a law where the concern is with the woman’s health, a woman is likely to be labelled as “pregnant” rather than as “being with child” or some other phrase which gives a human status to the fetus. Although a number of the initial State laws contained a distinction based on quickening… the large majority of State laws never made this distinction, and most of these laws referred to a woman as “being with child” or some similar phrase which attributed human status to the foetus. Furthermore, many of the States which initially had this distinction written into their law later dropped it and also referred to a woman at any period of her pregnancy as “being with child.”\footnote{428}

Thus, even if it is assumed that one purpose of the statutes was to protect the health of women, the express purpose to protect the life of the unborn child cannot be ignored.

The Court in\textit{ Roe} also suggested that the manner in which the common law or statutes were enforced showed that abortion was not a crime.\footnote{429} The Court placed great emphasis on the fact that women were not punished for the abortion under some statutes.\footnote{430} But the Court disregarded the fact that, in many states, the statutes did apply to the woman who aborted.\footnote{431} In addition, the Court failed to inquire why other statutes were not applied to women who aborted. The primary reason, which is expressly stated in many judicial opinions interpreting these statutes, is that the women were considered to be victims as much as the child aborted. A second, corresponding reason is that if the women were considered accomplices, their testimony as an accomplice would not support a conviction of the performing physician without additional, corroborating evidence, and in many instances, the women’s testimony was the only evidence. Therefore, in order to obtain convictions of abortionists, women were exonerated from prosecution. A South Dakota court concluded in 1924, “She does not, by consenting to the unlawful operation, become an accomplice in the crime. She should be regarded as the victim of the crime rather than as a participant in it.”\footnote{432} Likewise, a Minnesota court stated in 1894, “It may seem to be an unusual rule that one who solicits the commission of an offense, and willingly submits… should not be deemed an accomplice... But in cases of this kind the public welfare demands the application of this rule, and its exception from the general rule seems to be justified by the wisdom of experience... She was the victim of a cruel act.”\footnote{433} “The abortee is considered the victim of the crime,” a California court stated in 1963.\footnote{434} “She is regarded as his victim, rather than an accomplice,” the District of Columbia Court of Appeals in 1908.\footnote{435}

Finally, the Court’s opinion in\textit{ Roe} completely ignored the substantial federal restriction on abortion that existed for many years before\textit{ Roe}. By the time the Congress proposed the Fourteenth Amendment in 1866, twelve federal territories — Iowa, Minnesota, Oregon, Washington, New Mexico, Kansas, Nebraska, Nevada, Colorado, Montana, Idaho — enacted rigorous antiabortion statutes.\footnote{436} The statutes of Minnesota, Oregon, Washington—
ton, and New Mexico provided that "the same range of punishment should apply to abortion causing the death of a 'quickened' child as to abortion causing the death of the mother." An 1843 statute of Iowa, which became a state in 1846, provided that "abortion causing the death of a 'child,' rather than a 'quick child,' constituted manslaughter." In 1871, Congress established a legislature for the District of Columbia. Within a year, the District passed an abortion statute which provided that "an attempted abortion of a woman 'in any condition of pregnancy' causing the death of the mother or her child was deemed manslaughter punishable by imprisonment by four to seven years." All abortions were prohibited except those induced "for the purpose of preserving the life" of the woman. Finally, in 1873, Congress adopted the Comstock Act, which prohibited the manufacture, importation, mailing, distribution and advertisement of abortifacients. In 1915, in Bours v. United States, the Seventh Circuit Court of Appeals interpreted this Act as reflecting "a national policy of discourteasing abortion as inimical to the national life." Congress, through its control over federal territories including the District of Columbia, continued to adopt legislation restricting abortion through the 1960's.

History demonstrates that American law sought to protect the life of the unborn child to the fullest extent possible.. As medical understanding improved, the law changed to give fuller protection to the unborn child. The life of the unborn child as a preeminent value is "deeply rooted" in American law and tradition.

E. The Rights of Persons Under the Fourteenth Amendment

After determining that there was a constitutional right to abortion, the Court addressed the issue raised by the state of Texas whether the unborn child could be considered a "person" within the confines of the Fourteenth Amendment and thus, possessed with a constitutional right to life. The Court conceded that "[i]f this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." The question of Fourteenth Amendment "personhood" for the unborn child was not a necessary issue in the case. It was raised as a defense against the claim of a constitutional right to abortion. If the Court had found that there was no constitutional right to abortion, it would not have been necessary to hold that the unborn child was a "person" within the Amendment in order to uphold state abortion statutes. If there was no constitutional right to abortion, there would be no constitutional impediment to state abortion statutes and no need to defend them with a countervailing constitutional right to life.

The Court's analysis of whether an unborn child was a person within the Fourteenth Amendment was supported by twisted reasoning and errors of law. It may be true that the framers of the Fourteenth Amendment intended to include only born persons within the protection of the Fourteenth Amendment, but that proposition cannot be supported by the Court's analysis in Roe.

The Court began its analysis by stating that Texas had conceded "on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." Perhaps the burden was on Texas to cite such a case, but the Court did not have to do much research to discover that the state's concession was wrong. Amid the federal court decisions that had been decided within the previous five years on the constitutionality of abortion statutes, one case, "Steinburg v. Brown," held that the unborn child was a person within the protection of the Fourteenth Amendment. Indeed, the Court cited Steinburg as one case that had upheld

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437. Id.

438. Id.


440. Id.

441. Witherspoon, supra note 436 (Act of March 3, 1873, ch. 258, 17 Stat. 598-600 (1873)).

442. 220 F. 964 (7th Cir. 1915).

443. Id. at 964.

The amendment, closing the mails to written or printed information 'where or by whom any operation for producing abortion will be performed,' was adopted by Congress under the same power that was exercised in passing the original section, the national power of controlling the mails. Congress has no power to penalize or to legalize the act of producing an abortion. That is a matter for the states. In applying the national statute to an alleged offensive use of the mails at a named place, it is immaterial what the local statutory definition of abortion, what acts of abortion are included, or what excluded. So the word "abortion" in the national statute must be taken in its general medical sense. Its inclusion in the statute governing the use of the mails indicates a national policy of discourteasing abortion as inimical to the national life. Thought the letter of the statute would cover all acts of abortion, the rule of giving a reasonable construction in view of the disclosed national purpose would exclude those acts that are in the interest of the national life. Therefore a physician may lawfully use the mails to say that an examination shows the necessity of an operation to save life he will operate, if such in truth is his real position.

state abortion statutes. The Court in Steinburg held that human life begins at conception and that "[s]ince human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose on the state the duty of safeguarding it." 

After assuming that no case had held the unborn child to be a person within the Fourteenth Amendment, the Court in Roe examined the use of the word "person" in other sections of the Fourteenth Amendment and concluded that "in nearly all these instances, the use of the word is such that it has application only postnatally." And the Court, following Means, noted that "we are not aware that in the taking of any census under [Art. I, § 2, cl. 3], a fetus has ever been counted." The Court's analysis did not take account of the purpose and limitations of those clauses, or the purpose of a census, and thus the conclusion drawn is not supported by the Court's analysis of these clauses. The plain fact is that is all of the uses of "person" cited in the Fourteenth Amendment and elsewhere in the Constitution have specific purposes and specific limitations that correspond to those purposes. "A thorough examination of the varied usages of the word throughout the text of the Constitution leaves little doubt that the meaning of the word is generally derived from the context in which it is used." Even though a human being is subject to those limitations, it does not logically follow that the human being is not a "person" in any sense. For example, Art. I, § 2, cl. 2 limits persons who may be congressional representatives to those who have reached the age of 25. Does this mean that all human beings below the age of 25 are not "persons" who may be protected by the criminal law? Art. I, § 3, cl. 3 limits persons who may be senators to those who have reached "the Age of Thirty Years." Does it follow that all human beings below the age of 30 are not "persons" who may not be protected by the criminal law?

The same is true with the Court's reference to the Apportionment Clause, Art. I, § 2, cl. 3. The Clause states that "Representatives ... shall be apportioned ... according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons ..." The Clause excluded "Indians not taxed," and "three-fifths of all other Persons," a reference to slaves. Does it follow that "Indians not taxed" and slaves were not "persons" protected by the criminal law? Ironically, a Mississippi court in 1821 held that the killing of a slave was a homicide, even murder, and, in dictum, the court concluded that slaves, "unborn children," and lunatics were all "reasonable creatures" who could be subject to homicide.

Finally, the purpose of a census, and the corresponding reason why the unborn child has historically been excluded, which the Court did not address, should have been considered. The plain purpose of a census is to tabulate the number of human beings who depend on society, work, need food and clothing, are subject to the jurisdiction of the laws and state, and will be subject to taxes in the future. Considering that nature spontaneously ends pregnancies for any number of reasons, and that in the eighteenth and nineteenth centuries the rate of infant mortality was very high, it would have been illogical to count in a census human beings who might not have been born alive and did not independently require food, water and clothing as do born human beings. In this sense, the census does not count the unborn child for the same reason it does not count persons who live outside the jurisdiction: the society is not directly affected by such persons until birth.

The issue of the census was somewhat beside the point, however, because the issue before the Court was not whether the unborn child should be counted in a census, but whether it had a right to life protected by the Fourteenth Amendment. Since the right to life in Anglo-American law, as recognized by William Blackstone and Justice Wilson, was the most basic right to which all other rights are subject, the right to life should be recognized to inhere in all human beings who can benefit from the right to life. An unborn child may not benefit from property rights or a right to liberty, but it can certainly benefit from a right to life. The basic right should be recognized for those who can benefit from it — conceptus pro iam nato habetur.

In this regard, the Court did not but should have consulted the common law, to see who the common law considered to be persons with a right to life. The Court has long recognized, from the Chief Justice of John Marshall, that the Constitution was adopted against the background of the common law and has consistently consulted the common law for an interpretation of words in the Constitution that have a common law content. In contrast to the Court's tortured distinction, the common law did not distinguish between human beings and natural persons. At common law, "human beings" and "persons" were taken as synonymous. The general rule at the common law was that the unborn child was a "person" for all purposes in which it could benefit. Blackstone held that the unborn child was a "person" with a right to life in the womb at the first indication that it was alive — at quickening. Life was "a right inherent by nature in every individual." That
right to life "begins in contemplation of law as soon as an infant is able to stir in the mother’s womb," or, in other words, by the time of quickening. Given the context of this passage in his section on the "law of persons," Blackstone affirmed that the unborn child was considered to be a person at quickening, when it was first determined to be alive.460 A reading of the right to life of a person under the Fourteenth Amendment, against the background of the common law, could reasonably have incorporated Blackstone’s recognition that the unborn child possessed a right to life at the earliest sign of life in the womb. Indeed, this broad conception of "person" as including any human being at common law is reflected in the legislative debates of the Fourteenth Amendment, where numerous legislators affirmed that the Amendment was intended to encompass all "human beings."461

Although the common law did not consider the unborn child to be a human being for purposes of homicide — because the evidentiary problems prevented proof of the criminal agency of the death of the unborn child — for other purposes, such as inheritance — where it was not necessary to prove with certainty that the child at the precise moment was dead or alive — the unborn child was recognized as a person in the womb.462 Likewise, for the same reason, the legal significance of quickening as evidence of life was limited to criminal cases and was not material in inheritance cases.463 In Wallis v. Hudson,464 the Lord Chancellor wrote that "the plaintiff was in ventre sa mere at the time of her brother’s death, and consequently a person in rerum natura, so that both by the rules of the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father’s

460. 1 W. BLACKSTONE, supra note 143, at 129.
461. Cong. Globe, 39th Cong., 1st Sess. 1089 (1866), Avins, supra note 249, at 157 ("If a State has not the right to deny equal protection to any human being under the Constitution of this country in the right of life, liberty, and property, how can State rights be impaired by penal prohibitions of such denial as proposed?") (statement of Cong. John Bingham in debate on 14th Amendment); Code. Globe, 39th Cong., 1st Sess. 514 (1868), Avins, supra note 249, at 288 (the Fourteenth Amendment was intended to protect "the rights which pertain to American citizenship or to a common humanity") (statement of Cong. John Bingham). Senator Allen A. Thurman (D. Ohio) stated in 1875 that the Equal Protection Clause of the Fourteenth Amendment "covers every human being within the jurisdiction of a State. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of the State from any deprivation of an equal protection of the laws." 3 Cong. Rec. 1794 (1875).

In Plyler v. Doe, 457 U.S. 202 (1982), the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibited a state from denying a free public education to illegal aliens. In reaching this result, Justice Brennan adopted the opinion of Justice Field in Wong Wing v. United States, 163 U.S. 228 (1896). 457 U.S. at 212 n.11. Justice Field wrote that the Fifth and Fourteenth Amendments adopted a broad definition of "person": "The term ‘person,’ used in the Fifth Amendment, is broad enough to include any an every human being within the jurisdiction of the republic." 163 U.S. at 242-43 (Field, J., concurring in part and dissenting in part).

462. See supra note 277 and accompanying text.

465. In light of the common law’s willingness to grant even property rights to the unborn child as a person in the womb if it would be to the child’s benefit, the Court took a long step in regression by refusing to recognize a right to life to the unborn child when such a right was considered the most fundamental right in Anglo-American jurisprudence.466

The Court did not consider any of these issues. It may be that the Fourteenth Amendment was not intended to encompass unborn children. But the proposition cannot be supported by the Court’s analysis in Roe.

F. The Treatment of The Unborn Child in Tort Law

In reaching the conclusion that the unborn child is not a "person" entitled to a right to life under the Fourteenth Amendment, the Court also considered other areas of law besides that of criminal abortion. "There has always been strong support for the view that life does not begin until live birth," the Court said.467 "The law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."468

As in the Court’s analysis of criminal law, so in tort law the Court never considered why some common law rights in certain instances were dependent on live birth. It did not take into consideration the medical context — the lack of medical knowledge and the primitive state of medical technology — in which the common law was formulated.469 Despite its attempt at a history of the law in this area, the Court’s analysis ignored the first principle of the legal historian. As George Haskins has written:

The task of the historian of law is not merely one of recounting the growth and jurisdiction of courts and legislatures or of detailing the evolution of legal rules and doctrines. It is essential that these matters be related to the political and social environments of particular times and places. Broadly conceived, legal history is concerned with determining how certain types of rules, which we call law, grew out of past social, economic, and psychological conditions, and how they acceded with or accommodated themselves thereto.470

The Court stated that "the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive."471 Although the Court in Roe noted that the rule against recovery for prenatal injuries "has been changed in almost every jurisdiction," the Court suggested that "in

466. 1 W. BLACKSTONE, supra note 143, at 129.
467. 410 U.S. at 160.
468. 410 U.S. at 161.
469. See supra note 296 and accompanying text.
470. G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS viii (1960).
471. 410 U.S. at 161.
most States' recovery was limited to the viable fetus ("or at least quick"). 472 The Court further suggested that some states had recently permitted a cause of action for the wrongful death of a stillborn child because of prenatal injuries, which, the Court said, was "generally opposed by the commentators." 473 This action was described by the Court as one to "vindicate the parents' interest" and thus, the Court implied, did not recognize any independent rights of the unborn child. In the Court's view, this supported the idea that "the fetus, at most, represents only the potentiality of life." 474 Finally, the Court noted that "perfection" of the property rights of the unborn child were "contingent upon live birth." 475 All this, in the Court's view, supported the notion that "the unborn have never been recognized in the law as persons in the whole sense." 476

Since 1973, scholars have noted that the Court's description of these developments in tort law was wrong. "The discussion was perfunctory, and unfortunately largely inaccurate, and should not be relied upon as the correct view of the law at the time of Roe v. Wade." 477 Another scholar concluded that the Court "understated the extent to which the law protects the unborn child." 478 Generally, the Court erred in construing the born alive rule to mean that the law did not consider the unborn child to be a "person." Dean Prosser explained both the evidentiary reasons for the born alive rule and the advancements in medical science that eliminated its rationale.

When a pregnant woman is injured, and as a result the child subsequently born suffers deformity or some other injury, nearly all of the decisions prior to 1946 denied recovery to the child. Two reasons usually were given: First, that the defendant could owe no duty of conduct to a person who was not in existence at the time of his action; second, that the difficulty of proving any causal connection between negligence and damage was too great, and there was too much danger of fictitious claims.

So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by law . . . So far as causation is concerned, there will certainly be cases in which there are difficulties of proof, but they are not so frequent, and the difficulties, are no greater, than to many other medical problems. All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the other, and in urging that recovery should be allowed upon proper proof. 479

Although the Court in Roe stated that courts had granted recovery for prenatal injuries only where the fetus was viable (at twenty-four to twenty-eight weeks gestation), or at least "quick" (at sixteen to eighteen weeks gestation), in fact most states permitted "recovery for prenatal injuries regardless of the stage of gestation in which the injuries are inflicted." 480 Although the Court cited Dean Prosser as support for its statement of the rule, Prosser says just the contrary.

Most of the cases allowing recovery have involved a foetus which was then viable. Many of them have said, by way of dictum, that recovery must be limited to such cases, and two or three have said that the child, if not viable, must at least be "quick." But when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick. 481

Reviewing the law in 1980, David Kader concluded that the division of case authority was fourteen to eleven favoring recovery in a wrongful death action for a stillborn child, and that between 1971 and 1973 four additional courts had allowed recovery, while one denied recovery. 482 Likewise, the Court's statement that the adoption of a wrongful death action for a stillborn child was "generally opposed by the commentators" was in error. For this, the Court cited Prosser. Although Prosser stated that such cases carried "obvious difficulties of proof of causation and damages," 483 Prosser stated, with respect to prenatal injuries, that "[s]o far as causation is concerned, there will certainly be cases in which there are difficulties of proof, but they are not so frequent, and the difficulties, are no greater, than to many other medical problems." 484 And Prosser cited "all writers" as joining to "condemn the old rule . . ." 485 Other authorities that the Court cited for opposing the trend in fact supported the trend. 486

Finally, the proposition that the wrongful death recovery "vindicate[s] the parents' interests" without (the Court implied) recognizing the unborn child as a separate individual, is also wrong. In order to allow recovery for wrongful death, the courts must find that the deceased is a "person," since the plain language of wrongful death statutes awards recovery for the death of a "person." 487

The clear trend in favor of suits for prenatal injuries has continued.

472. 410 U.S. at 161.
473. Id. at 162.
474. Id.
475. Id.
476. Id.
478. Comment, supra note 8, 47 TEMP. L. Q. at 723.
480. Id.
481. W PROSSER, supra note 479, at 337 (emphasis added).
482. Kader, supra note 8, at 654.
483. W PROSSER, supra note 479, at 338.
484. Id. at 336.
485. Id.
486. Kader, supra note 8, at 653-655: Comment, supra note 8, 47 TEMP. L. Q. at 723-24.
Today, virtually all states allow suits for prenatal injuries for children later born alive.488 The clear trend of law in favor of wrongful death actions for a stillborn child that existed at the time of Roe has also grown. Today, at least thirty-six jurisdictions allow wrongful death actions for a stillborn child,489 while a dwindling minority of nine states reject the action.490 The law in six states is uncertain.491

Finally, the Court also failed to inquire into the reason for the born alive rule in property law. The rule is simply one of common sense. "The fact that live birth was said to be required for perpetuation of the inheritance rights of the unborn merely evinces recognition that a stillborn infant is hardly in any position to assert its property rights."492 Thus, in property law, as in tort and criminal law, the born alive rule reflected a common sense, practical rule formed in the context of primitive medical understanding. As medical

488. "There appears to be unanimous agreement among the states that there exists a right to bring a common law action for a prenatal injury," HANDLING PREGNANCY & BIRTH CASES 343 (Family Law Series ed. 1985). See e.g., Leal v. CC Pitts Sand & Gravel Inc., 419 S.W.2d 820 (Tex. 1967).


492. See also S.D. Code § 21-5-1 (1984 Supp.).


492. Destro, supra note 8, at 1287 n.186; Rice, supra note 8, at 1073.

G. The History of Abortion and the Fourteenth Amendment Liberty Clause

The law of abortion of Anglo-American jurisprudence is directly contrary to the Court's "history" in Roe v. Wade. The Court not only made omissions of error but also continually made assumptions about the common law and American statutory law that, on examination, simply are contrary to the evidence. The notion that abortion is a right "deeply rooted" in American law and tradition is overthrown by the evidence. The notion that abortion is implicit in the concept of "ordered liberty" is overthrown by that evidence that the common law, from which "ordered liberty" originated, protected the life of the unborn child at the earliest possible point in pregnancy that it could be determined to be alive. The conclusion that abortion is a "fundamental liberty" in American jurisprudence is thus contrary to the test that the court has employed for nearly 100 years to determine which activities are fundamental liberties. To the contrary, it is the protection of the

knowledge and technology developed, the born alive rule was dropped in appropriate circumstances.

One of the great ironies, among many, in the Court's opinion in Roe is the Court's reliance on Union Pacific Railway Co. v. Botsford, 141 U.S. 250 (1891), for the proposition that the constitutional right of privacy encompassed abortion. Roe, 410 U.S. at 152. Botsford presented a "single question," whether in a personal injury suit, a court could order the plaintiff to submit to a surgical examination to show the extent of her injury. 141 U.S. at 251. The Court held that the United States trial court "had no legal right or power to make or enforce an such order." Id. The Court noted, in the often quoted passage, that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person . . . ." Id. The remainder of that sentence is less often quoted: "... free from all restraint or interference by others, unless by clear and unquestionable authority of law." Id. However, the Court also noted that the common law "allowed" the "right de ventre inspicinio. Id. at 253. This wrt was used to ascertain whether a woman convicted of a capital crime was quick with child . . . in order to guard against the taking of the life of an unborn child for the crime of the mother." Id. Under the common law practice, the wrt employed a jury of matrons to examine the pregnant woman. See Learned Hand's article, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 40-42 (1901). The Court emphasized that this wrt did not support the lower court's order because, in civil cases at common law, this wrt was only allowed in property law to prevent a claim of pregnancy "to produce a supposititious heir to the estate," and the Court doubted whether, for this purpose, it had been adopted by American courts "as suited to the habits and condition of the people." Id. See supra note 326 and accompanying text. Although the fact that the wrt was not used in civil cases at common law undermined the lower court order, in the Court's opinion, it is equally clear that the Court recognized the status of the wrt in the common law of crimes as the protection of "the life of an unborn child." One human life could not be taken because of the crime of another. Thus, Botsford cannot support Roe, since Roe did not incorporate in the Constitution as a "fundamental right" the very exception to the common law right "to be let alone" that Botsford recognized in criminal law — the taking of "the life of an unborn child."
life of the unborn child as a human being that is "deeply rooted" in American law. *Roe v. Wade* cannot be supported by any values that are protected by the Fourteenth Amendment.

V. **Conclusion**

Assessing *Roe v. Wade* in light of the history of abortion in Anglo-American law, it soon becomes clear that to accept that decision, one must also accept the legitimacy of "contraconstitutional lawmakering" by the judiciary — the protection of activities by the judiciary that were never previously considered as "rights" in American law, or by the framers of the Constitution, but were left to popular control through state legislatures. *Roe* is otherwise illegitimate if analyzed by the traditional rules of constitutional construction — the rules of interpretative review, followed by the Supreme Court from the founding through this century. The acceptance of noninterpretivism, or contraconstitutional lawmakering, both justifies *Roe* and insulates it. It justifies *Roe* because it assumes the validity of the right to abortion and utilizes noninterpretivist review to protect that value through the Constitution. And it insulates *Roe* from criticism because the rules of construction in interpretivist review that would indicate the error of *Roe* are simply an irrelevance. The ideology of noninterpretivist review can ignore evidence without confronting it because evidence of the text, history, and purpose of the constitutional provision is dismissed as irrelevant. If the text, purpose, and history of the constitutional provision are irrelevant to what the Court says the Constitution protects, then a text, purpose, or history which indicates that *Roe* is fundamentally flawed can be merely disregarded.

This is why the Stevens-White colloquy is like two ships passing in the night. The Stevens of *Thornburgh*, who simply adopts a broad notion of contraconstitutional lawmakering, is simply speaking a different language — a noninterpretivist language — from the White of *Thornburgh*, whose interpretivist review, though incomplete, conscientiously adheres to the Constitution by faithfully relying on its text, history and purpose. *Roe* will continue to be insulated from correction as long as noninterpretivist review insulates the Court from having to examine the overwhelming evidence that abortion was never a liberty in American law or tradition.