

THE CONSTITUTIONALITY OF STATES EXTENDING PERSONHOOD TO THE UNBORN

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In 1992, Ronald Dworkin made a provocative argument that states cannot be given the liberty to declare fetuses to be persons.¹ The argument can be represented as follows: Federal constitutional law recognizes a fundamental liberty interest in controlling “whether to bear or beget a child.”² This liberty interest in choosing whether to bear a child implies that women have a legal right to choose whether to have an abortion *unless* the state has a compelling interest to the contrary. States have a compelling interest to the contrary if and only if either unborn humans are persons under the federal Constitution, or states can declare them to be, in effect, persons with rights under state law. Unborn humans are not persons under the federal Constitution. Moreover, if states had the power to declare unborn humans to be, in effect, persons in whose welfare they could take a compelling interest, they would thereby have the power to undermine federally protected constitutional rights. Such a power would be inconsistent with the supremacy of federal law. As Dworkin put it: “If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women.”³

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1. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 400–01 (1992). The argument is repeated in RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 113–14 (1993).

2. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

3. Dworkin, *Unenumerated Rights*, *supra* note 1, at 401.

This argument is no mere academic exercise. It was quoted at some length, that same year, by Justice Stevens in his concurring opinion in *Planned Parenthood v. Casey*.⁴ Justice Stevens quoted the argument in a note following his assertion that “as a matter of federal constitutional law, a developing organism that is not yet a ‘person’ does not have what is sometimes described as a ‘right to life.’”⁵ Given that Dworkin’s argument does not support, but rather rests on, Justice Stevens’s claim about federal constitutional law, Justice Stevens presumably offered it not as support for his claim about federal law, but as a warning to those who would suggest that states could unilaterally choose to declare unborn humans to be persons. Justice Stevens presumably meant to endorse the thought that states cannot “increase the constitutional population by unilateral decision [and thereby] decrease rights the national Constitution grants to others.”⁶

Although it has been fourteen years since Dworkin published this argument and Justice Stevens cited it, no one has yet subjected the argument to detailed critical analysis.⁷ The argument, however, should not be ignored. It may well come back into play as states, as well as the federal government, are passing laws that recognize unborn humans as persons for purposes other than restricting abortions. On April 1, 2004, President Bush signed into federal law the “Unborn Victims of Violence Act of 2004,” making the killing of an unborn person (other than as part of an abortion sought by a woman) a crime punishable as if a born person had been killed (with the exception that the death penalty is not available).⁸ A number of states have recently pursued basically the same legal strategy. For example, Texas’s “Prenatal Protection Act,” extends the protections of the entire criminal code to “an unborn child at every stage of gestation from fertilization until birth.”⁹ Utah’s criminal law,

4. 505 U.S. 833, 913 n.2 (1992) (Stevens, J., concurring).

5. *Id.* at 913.

6. *Id.* at 913 n.2 (quoting Dworkin, *Unenumerated Rights*, *supra* note 1, at 400).

7. The most extensive analysis I have seen was provided by Richard Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 444 (1992). But this analysis was given in a symposium put on by the University of Chicago, in which both Dworkin and Posner participated, and Dworkin has already taken it into account in his original piece.

8. 18 U.S.C.A. § 1841 (West 2006).

9. TEX. PENAL CODE ANN. §§ 1.07 (a)(26), 19.06 (1) and 19.06 (2) (2003). This law does not, however, apply to “conduct committed by the mother of the unborn child,” to “a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent,” or to “a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of assisted reproduction.” *Id.* §§ 19.06 (1)-(3).

with an exception carved out for abortion, treats the killing of an "unborn child" at any stage of pre-natal development like any other homicide.¹⁰ In addition, with exceptions carved out for abortions, 18 other states have laws that criminalize killing unborn humans from conception onwards, and seven other states have laws that criminalize killing unborn humans starting some time after conception but before viability.¹¹ Some states are even contemplating laws that directly challenge, for all purposes, the claim in *Roe* that unborn humans deserve fewer basic protections than born humans. For example, South Carolina's legislature is considering, at the time of this writing, a bill entitled the "Right to Life Act of South Carolina." According to this bill, "The right to due process, whereby no person may be deprived of life, liberty, or property without due process of law, and the right to equal protection of the laws, both of which rights are guaranteed by . . . the Constitution of this State, vest at fertilization."¹²

Laws of this sort could become the predicate for states and the federal government to challenge the claim in *Roe v. Wade* that "the unborn have never been recognized in the law as persons in the whole sense."¹³ Dworkin's argument, if sound, would deny states, as well as the federal government, the power to pursue this avenue for challenging *Roe*. My claim here is that Dworkin's argument does not actually help defend *Roe*. Rather, it presupposes what it purports to support—namely, that states, and the federal government, are constitutionally barred from recognizing unborn humans as persons with rights. As a result, it begs the question. As a further result, the substantive holding of *Roe*—that women have a fundamental right to choose an abortion—is in greater jeopardy than is generally acknowledged.

10. UTAH CODE ANN. § 76-5-201 (1)(a)-(b) (West 2005).

11. See National Right to Life Committee, State Homicide Laws That Recognize Unborn Victims, http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (last visited Mar. 9, 2006). For a general discussion of the possibility of using legal protection of the fetus to undermine *Roe*, see Aaron Wagner, *Texas Two-Step: Serving up Fetal Rights by Side-Stepping Roe v. Wade Has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 TEX. TECH L. REV. 1085 (2001).

12. South Carolina General Assembly, 115th Session, 2005-2006, available at http://www.scstatehouse.net/sess116_2005-2006/bills/3213.htm (last visited Mar. 9, 2006).

13. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

I. ROE AND THE STATUS OF UNBORN HUMAN LIFE

To appreciate how changes in state and federal law, providing greater protection to the unborn, could undermine the substantive holding of *Roe*, it is necessary to revisit the argument in *Roe*. *Roe*, at its core, is based on two premises. The first is that women have a fundamental liberty interest in controlling whether to beget and bear children; the second is that states do not have a compelling interest sufficient to override the woman's liberty interest. Many critics, including the two original dissenters in *Roe*, Justices Rehnquist and White, have assailed *Roe's* first premise. But I believe Dworkin is right. *Roe's* first premise is solidly grounded in a wide range of uncontroversial Supreme Court opinions.¹⁴ As a matter of constitutional law, *Roe's* second premise is more controversial.

The second premise, that states do not have a compelling interest sufficient to override a woman's liberty interest, turns on two further claims: first, that unborn humans are not persons under constitutional law, and second, that states do not have a compelling interest in protecting unborn human life, at least not until it reaches the stage of viability. The first claim seems sufficiently well supported by three kinds of reasons relied on in *Roe* itself. First, insofar as the text of the Constitution offers any evidence of what counts as a person, it treats them as "born" persons, and no case has ever treated an unborn human as a person under the Fourteenth Amendment.¹⁵ The Fourteenth Amendment starts: "All persons *born* or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹⁶ The impli-

14. *Roe* itself starts by grounding the right to privacy, citing *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (First Amendment); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (Fourth and Fifth Amendments); *Katz v. United States*, 389 U.S. 347, 350 (1967) (same); *Boyd v. United States*, 116 U.S. 616 (1886) (same); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (same); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (penumbras of the Bill of Rights or the Ninth Amendment); and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the concept of liberty guaranteed by the first section of the Fourteenth Amendment). 410 U.S. at 152. *Roe* then cites a number of cases to demonstrate the range of activities for which the privacy right had been deemed fundamental: *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (procreation); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54, 460, 463-65 (1972) (contraception); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (child rearing and education); and *Meyer v. Nebraska*, 262 U.S. at 399 (same). 410 U.S. at 152-53.

15. See *Roe*, 410 U.S. at 157.

16. U.S. CONST. amend. XIV, § 1, cited in *Roe*, 410 U.S. at 157 (emphasis added).

cation is that there are two routes to citizenship: birth and naturalization. It might be suggested that citizenship depends on birth, but that personhood status does not. Were that true, the Privileges and Immunities clause, which protects citizens of the United States, would protect only those who are born, while the Due Process and Equal Protection clauses, which protect persons generally, would apply even to the unborn.¹⁷ This, however, is clearly an implausible reading. There is no reason to distinguish these clauses in terms of the born and the unborn. The difference between these clauses is much more plausibly interpreted by reading the Due Process and Equal Protection clauses as providing an extra level of protection to citizens, who form a subset of persons, that is, born humans.

A second reason to think the unborn are not persons under the Constitution is that, from the drafting of the Constitution to the adoption of the Fourteenth Amendment, abortion was tolerated to a degree inconsistent with the belief that constitutional protections were afforded to the unborn.¹⁸ Arguably, under a framework different from that articulated in *Roe*, abortion can be justified in a fairly wide range of cases, even if the unborn humans who are killed have the legal status of born persons.¹⁹ If that is correct, then it cannot be argued that abortion was tolerated to a degree actually inconsistent with the unborn having the status of persons. But it would still make sense to say that, since most people would have (wrongly) thought abortion should be unavailable if the unborn were persons, the fact that abortion was generally available indicates the people did not conceive of the unborn as persons.

A third reason to think the unborn are not persons under the Constitution is that the rights of unborn humans under the law in general at the time of *Roe* was inconsistent with their having the status of persons under the Constitution. Even Texas, the state whose law was directly challenged in *Roe*, did not treat the killing of unborn humans as on a par with the killing of born persons. As the *Roe* Court noted, it is difficult to reconcile the claim

17. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws." (emphases added)).

18. I believe it was largely to make this point that Justice Blackmun engaged in his long, historical exploration of abortion. See *Roe*, 410 U.S. at 129-39.

19. See, e.g., Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051 (1997).

that unborn humans are persons under the Fourteenth Amendment with the fact that Texas, along with most other states, allowed abortions to save the life of the mother. “[I]f the fetus is a person who is not to be deprived of life without due process of law, and if the mother’s condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment’s command?”²⁰ This point may be less telling than the Court thought. Arguably, in the battle between two innocents, only one of whom can survive, the state could choose to side with the mother. But the Court followed up with a more persuasive point. It noted that “in Texas the woman is not a principal or an accomplice with respect to an abortion upon her.”²¹ In cases where her life is not at risk, if she is not thought to have a right to an abortion, and if the fetus is a person, then “why is the woman not a principal or an accomplice [in its murder]?”²²

The second claim, that states do not have a compelling interest in protecting human life from conception onward, is more problematic. To understand it correctly, we need to distinguish the two ways the Court approached this issue. First, the Court considered what was essentially a metaphysical claim, that human life from conception onward has a status such that states have a compelling interest in protecting it. Second, the Court examined legal practice to see whether states consistently treat the unborn as legal persons.²³

The Court refused to endorse the metaphysical claim, because there has long been and continues to be disagreement between “those trained in the respective disciplines of medicine, philosophy, and theology” as to the question whether life, in the relevant senses, “begins at conception.”²⁴ Noting this disagreement, the Court concluded that it “is not in a position to speculate as to the answer.”²⁵ The Court could have left Texas to make its own metaphysical judgment. But there is some sense in its refusal to do so. Given that a fundamental liberty interest

20. 410 U.S. at 157 n.54.

21. *Id.*

22. *Id.*

23. Logically a third option is available, namely that states could have a compelling interest in fetal life or in preventing abortion that is not grounded in the legal status of the fetus. For example, the state might claim a compelling interest in promoting respect for human life in general. Such a move would presumably face the same challenges as the move to treat fetuses as persons under the law, and I therefore leave it to the side.

24. 410 U.S. at 159.

25. *Id.*

hangs in the balance, the Court could not simply accept a claim about the status of human life without assessing it. If, however, the Court were to accept that, in some metaphysically relevant sense, "life begins at conception," then it would have to apply that claim generally. A metaphysical claim cannot be true for Texas but false for, say, New York. Texas can choose to take a metaphysical stand in a way that New York would not.²⁶ But again, a fundamental liberty interest hangs in the balance here. The Court could credit Texas's position as giving it a compelling reason to limit a woman's right to abortion only if it could credit Texas's claim that life begins at conception as true. That, however, would be inconsistent with also allowing New York to deny that life begins at conception. Thus, by arguing that life begins at conception, Texas was taking a stand much like the stand it took in arguing that fetuses are persons under the Fourteenth Amendment. The implications of accepting Texas's argument would be too strong, too limiting of the freedom of other states.

Declaring the metaphysical status of human life from conception onward legally out of bounds, the Court turned to legal practice with regard to unborn human life. It looked to see whether the law "endorse[d] any theory that life, as we recognize it, begins before life [sic] birth or . . . accord[ed] legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon life [sic] birth."²⁷ The Court found that the answer was no. It then concluded that "the unborn have never been recognized in the law as persons in the whole sense."²⁸

26. It is an interesting question whether a state can take a controversial metaphysical position, and ground criminal laws on that basis, without violating the restrictions the Court enunciated in *Lawrence v. Texas*, 539 U.S. 558 (2003). Reviewing a Texas law making same-sex sodomy a crime, the Court noted that condemnation of sodomy "has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id.* at 571. The Court did not dismiss the relevance of these sources of moral and ethical guidance for individuals. But it held that the issue for the Constitution "is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." *Id.* It answered this question in the negative. One could read this holding as implying that religious, and presumably metaphysical, beliefs cannot be the ground for criminal law. But, of course, the state must appeal to some sort of political morality to ground its laws, and arguably political morality cannot remain neutral on questions such as "What is a person?" This issue engages the debate concerning public reason and perfectionism, which is one of the central debates in contemporary political theory. It is therefore completely beyond the scope of this paper. For an overview of the debate, see WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* (2001), especially chapter 6.

27. 410 U.S. at 161.

28. *Id.* at 162.

Critically, the Court did not deny that Texas could have had a set of laws by which it “endorsed” a theory that life, for legal purposes, begins before birth. It did not deny that Texas could “accord” legal rights to the unborn in a wide range of circumstances, not contingent upon live birth. In other words, it did not deny that there are circumstances under which Texas could choose to take a compelling interest in the life of unborn humans. What it said, in essence, is that Texas, like the rest of the United States, does not, in fact, treat unborn humans as persons with rights. Were Texas to reform the way it treats the unborn in general, it could revisit the issue, and the Court would then have no legal basis for denying that Texas has a compelling interest in protecting the life of the unborn.

It could be objected that the Court in *Roe* did take a stand on when states have a compelling interest in fetal life, namely when fetuses become viable. The Court chose viability “because the fetus then presumably has the capability of meaningful life outside the mother’s womb.”²⁹ The Court then claimed that it followed that “[s]tate regulation protective of fetal life after viability . . . has both logical and biological justifications.”³⁰

The question is, are there really logical and biological justifications for saying that states have a compelling interest in fetal life at viability, and not sooner or later? The Court offers nothing to back up that claim. But it might seem plausible enough that viability is *the* important place to draw the line because it is the point after which a woman’s interest in terminating a pregnancy and a fetus’s interest in life can, at least in theory, *both* be accommodated. If a woman wants to terminate her pregnancy at that point, she normally *could* do so without the fetus having to die. But there are two reasons to doubt that viability really marks a logical and biological turning point. One reason has to do with the actual practical significance of viability for women who might want an abortion. The other reason has to do with the moral status of a fetus as it develops.

Turning first to the pragmatic issue, there is reason to doubt that a woman could abort her pregnancy in such a way to keep a viable fetus alive without extra costs to her. The obvious methods for ending a pregnancy early without killing the fetus all have their risks. Chemical induction of premature labor requires

29. *Id.* at 163.

30. *Id.*

constant monitoring, and only takes place in hospital settings.³¹ Hysterotomies are considered major surgery and are very rarely used.³² And using the technique of dilation and extraction, without collapsing the fetus's head, would require more dilation of the cervix than would typically be required for a dilation and extraction abortion in which the fetus's head is collapsed, with associated risks from extra artificial dilation.³³ This raises the question whether a woman who carries a potentially viable fetus and who wants to end her pregnancy could be legally required to undergo one of these procedures to maximize the chance that a live birth would result. The answer seems to be no. The case law from *Thornburgh v. American College of Obstetricians and Gynecologists*³⁴ to *Stenberg v. Carhart*³⁵ makes it clear that abortion procedures cannot be banned, nor others required, if the result would be to endanger the health of women seeking an abortion, even after fetal viability. The only question these cases leave open is whether these holdings apply to cases in which a woman seeks an abortion for reasons unrelated to her own health, such as the discovery that the fetus has some sort of birth defect.³⁶ If these holdings do not extend to such "elective" reasons for an abortion, then arguably states have a freer hand. If a woman has no health-based reasons to have an abortion, and she seeks an abortion when her fetus is at least potentially viable, and the state could require her either to carry the fetus to term or to end her pregnancy only in a way that would protect the potential for live birth, then viability would have some practical significance.³⁷ But it is unclear if the Court would read its prior cases that way, and thus unclear if the Court really does appreciate the pragmatic "logic" of viability.

31. See *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 963 (N.D. Cal. 2004) (discussing various forms of mid to late term abortions and their health risks, based on the testimony of numerous medical experts).

32. See *id.*

33. See *id.* at 989 (describing the risk of dilation). Note, however, that some medical authorities claim that there is no reason that live births could not generally be provided as easily as an abortion for viable fetuses. See excerpts of the Congressional Hearings on the Partial Birth Abortion Ban Act, available at <http://www.nrlc.org/abortion/pba/pbafact13.html> (last visited Mar. 9, 2006).

34. 476 U.S. 747 (1986).

35. 530 U.S. 914 (2000).

36. Amniocentesis to determine whether a fetus has birth defects that could give parents a reason to abort a pregnancy is usually done from 15 to 18 weeks of gestational development. See, e.g., http://my.webmd.com/hw/being_pregnant/hw1810.asp (last visited Mar. 9, 2006). But amniocentesis can be done later in term, and there is no reason to think that some women will not discover a birth defect using that, or some other, test only after the fetus is viable.

37. See *Carhart*, 530 U.S. at 1010 (Thomas, J. dissenting).

Even if the pragmatic logic of viability would be respected by the Court, it makes analytic sense to distinguish the question of when a state has a compelling interest in fetal life, because of its own moral status, from when the state can effectively do something to protect both fetal life and a woman's right to decide whether to bear a child. Focusing on the fetus alone, it would make as much if not more biological sense to draw the line at when it becomes conscious (and can feel pain),³⁸ or when it becomes a single indivisible entity,³⁹ or when it starts to develop as a life of its own (that is, from conception forward), than to draw the line at when it can live outside the womb. I am not suggesting that the Court should have relied on any of these points in development in place of viability. The moral relevance of all of these points can be debated,⁴⁰ and just as I think the Court was right to refuse to take a stand on the metaphysics of personhood, I think it should not have tried to settle this kind of moral debate. But that does not mean that the Court can defend using the viability line as grounded in "biological justifications" either.

Given that viability has no real "biological" significance, it seems that the most charitable way to read the Court's decision to draw a line at viability is to read the Court as moved by the

38. The point at which fetuses become sentient is the point in development at which Dworkin would consider fetuses to acquire rights. He argues that before that point, fetuses cannot have interests and therefore cannot have rights. See DWORKIN, *LIFE'S DOMINION*, *supra* note 1, at 16–19. Some have theorized that fetuses can feel pain as early as 13 weeks into gestation. See, e.g., Vivette Glover & Nicholas M. Fisk, *Fetal Pain: Implications for Research and Practice*, 106 *BRIT. J. OBSTETRICS & GYNECOLOGY* 881, 882 (1999). But the consensus view is that the ability to feel pain arises later in development. See *National Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 443 (S.D.N.Y. 2004) (citing expert testimony that the onset of fetal ability to feel pain is 20 weeks); *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 997–99 (N.D. Cal. 2004) (citing expert testimony that the onset of fetal ability to feel pain is between 22 and 26 weeks). This period from 20–26 weeks overlaps with the period at which fetuses are now considered viable. ("A fetus is generally viable between twenty-three and twenty-four weeks from the first day of the woman's last menstrual period." *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 440 n.3.) Further research, however, may show that the onset of fetal ability to feel pain is either a few weeks earlier or a few weeks later than when most fetuses are viable. Moreover, the ability to support fetuses outside the womb may reach earlier into pregnancy as technology develops; the time it take for a fetus to develop the ability to feel pain is fixed as a matter of biology.

39. Embryos become single, indivisible entities when the possibility of "twinning" ceases, at around 14 days into development. See THE PRESIDENT'S COUNCIL ON BIOETHICS, *HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY* 136 (2002), available at <http://www.bioethics.gov/reports/cloningreport/index.html> (last visited April 3, 2006).

40. For a discussion of the problems inherent in appealing to the criterion Dworkin invokes, the ability to have conscious experience, see DAVID BOONIN, *A DEFENSE OF ABORTION* 116–22 (2003).

pragmatic logic of viability. The Court presumably believed that by drawing a line at viability it could give the states some room to take a compelling interest in the life of unborn humans, and yet it could protect women's fundamental liberty interest in controlling their reproduction. But the analytic framework for this pragmatic logic is confused. It makes more analytic sense to distinguish when a state has a compelling interest in fetal life from when it can do something about that interest without infringing on a woman's liberty interests. Thus the pragmatic logic of viability in *Roe* does not provide a solid basis for resisting the claim that states can take a compelling interest in the lives of the unborn if they choose to treat the unborn as persons in the whole sense.

II. IS *ROE* REALLY THREATENED?

Some may think that, in reality, there is no need to worry about states undermining *Roe*. States, it may seem, are not about to treat the unborn as persons "in the whole sense." Even the recent Unborn Victims of Violence Act, despite generally treating the killing of a fetus as on a par with the killing of a born person, makes some exceptions. For one thing, the death penalty is not available for killing a fetus,⁴¹ though it is sometimes available for killing a born person. More significantly, it is clear that it would be nearly politically impossible for even the most socially conservative states to enact laws declaring, should *Roe* be reversed, that they will prosecute women who have abortions for murder.

At first blush, this seems to be an important limit on the anti-abortion agenda. If some states want to argue that their practice is now inconsistent with the claim in *Roe* that "the unborn have never been recognized in the law as persons in the whole sense,"⁴² then they must not give women who seek abortions a free pass. They may be able to recognize certain circumstances—say those in which a woman's pregnancy threatens her life or health⁴³—in which a woman is justified in having an abortion even if the unborn human she carries has the legal status of a

41. See 18 U.S.C.A. § 1841(a)(2)(D) (West 2004).

42. 410 U.S. 113, 162 (1973).

43. These are circumstances they may have to embrace if the argument is that they have a compelling interest in protecting the life of the unborn, since *Roe* does not allow states to prohibit abortions that are necessary for the life or health of a woman even if her fetus is viable, that is, even if the state has a compelling interest in its health. See *id.* at 163–64. If, however, *Roe*'s substantive holding were reversed, there is little reason to think that the health exception would be legally sacrosanct.

person. But in general, to undermine *Roe's* finding that states don't treat fetus as persons in the whole sense, states would have to rebut the rhetorical question framed in *Roe*: "If the fetus is a person, why is the woman [who seeks an abortion] not [criminally liable as] a principal or an accomplice [to a murder]?"⁴⁴

The fact that not even the most conservative state is likely to be politically ready any time soon to prosecute women who seek abortions as principals or accomplices to murder does not, however, show that *Roe* is on firm ground. Socially conservative states that want to claim that they are ready to treat unborn humans as persons in the whole sense can plausibly explain why they would not prosecute women as harshly for seeking an abortion as they would prosecute a third party for performing one.⁴⁵ They might start by marking an analogy between abortions and suicides. No state currently prosecutes those who attempt suicide.⁴⁶ But they all, with a narrowly drawn exception in Oregon,⁴⁷ do prosecute those who assist suicide. Indeed, the Model Penal Code suggests that assisting suicide should be a felony.⁴⁸ The analogy, of course, is not perfect. For one thing, presumably someone willing to kill himself cannot be deterred with threats; presumably, however, most women who consider abortions can be deterred with threats. But at a more general level, the analogy is apt. A state might with reason choose to focus its prosecutorial resources on those who would be serially involved in abortions, namely the abortion providers, and leave individual women who seek abortions subject to lesser charges. Moreover, states could argue that women should be subject to lesser penalties because carrying an unwanted pregnancy may constitute something like duress.⁴⁹

44. *Id.* at 157 n.54.

45. I am indebted to Dennis McGrath for pressing me on this point.

46. For rather obvious reasons, no state can prosecute someone for a successful suicide. Such prosecutions used to occur, but the punishment was meted out only to the "estate," i.e. the family of the suicide. All states eventually came to recognize that this was unfair. See *Washington v. Glucksberg*, 521 U.S. 702, 713 (1997).

47. See Oregon's Death with Dignity Act, OR. REV. STAT. § 127.800 (2003).

48. "A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor." Model Penal Code § 210.5(2) (Official Draft and Revised Comments 1980).

49. *But cf.* *Whitner v. State*, 492 S.E.2d 777, 778 (S.C. 1997) (upholding a conviction for criminal child neglect against a mother for taking cocaine during pregnancy); Nancy K. Schiff, *Legislation Punishing Drug Use During Pregnancy: Attack on Women's Rights in the Name of Fetal Protection*, 19 HASTINGS CONST. L.Q. 197 (1991) (reporting that mothers are being held criminally liable for harm they do to their babies in utero; focusing specifically on states such as Colorado, Georgia, Louisiana, and Ohio that have al-

In addition, for some states, if they see criminalizing a woman's choice to get an abortion as the key to escaping the constraints of *Roe*, they may be willing to indicate a willingness to do so as soon as the Supreme Court would allow them to do so. It is also unclear exactly how far a state would have to go to challenge the claim that it does not take a compelling interest in the life of unborn humans. Does it really have to treat unborn humans as persons "in the whole sense" in order to take a compelling interest in their lives? Perhaps it would be sufficient if it treated them as persons in most regards. Perhaps Texas has not yet gone far enough, but if pro-life forces continue to be dominant in the legislature, it may go that far in the next few years. Thus Dworkin's argument that states cannot overrule a national constitutional right is not merely an academic exercise.

III. DWORKIN'S ARGUMENT TO FILL THE GAP IN *ROE*

Dworkin's argument is meant to shore up *Roe* at this point where its rationale is most contingent. It is meant to show why states cannot escape *Roe*'s holding by taking a different attitude towards fetuses in general and claiming on that basis a right to impose new, perhaps strict, limits on abortions.

Recall that Dworkin's position is that if states could simply declare that fetuses were persons with rights, they would thereby "overrule" nationally guaranteed constitutional rights. Because of the supremacy of federal law over state law, states lack this power. Indeed, because of the supremacy of constitutional law over statutory law, even Congress may lack this power, except insofar as it plays its constitutional role, granted to it in Article V, in amending the Constitution.

With regard to the power of Congress, the Court in *Boerne v. Flores*⁵⁰ ruled that Congress cannot interpret the Constitution in a way that contradicts the Court's interpretation and use that interpretation to undermine a Court ruling about how to balance state power and individual rights. "[C]ongress does not enforce a constitutional right by changing what the right is."⁵¹ In the same spirit, it is clear that Congress could not overrule the Court's

ready made it a felony to give birth to a drug-addicted child). See generally Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

50. 521 U.S. 507 (1997).

51. *Id.* at 508.

holding that unborn humans are not persons under the Fourteenth Amendment. At most, Congress could declare unborn humans to be persons under federal statutory and regulatory law.⁵² But again, if Dworkin's argument is correct, Congress can no more declare unborn humans to be persons in a way that would "overrule" nationally guaranteed constitutional rights than states can.

Taking Dworkin's argument, then, to apply to both the states and Congress, the question is whether it works. An obvious objection to Dworkin's argument is that it is inconsistent with powers the states clearly do have. As Richard Posner put it:

[S]tates are allowed to decide what is property and (in the case of prisoners for example) what is liberty, for purposes of the Due Process Clause; why not what is a person? Can't a state decide that death means brain death rather than a stopped heart? And if it can decide when life ends why can't it decide when life begins?⁵³

Dworkin has a fairly convincing reply to this objection. States are not free to define such things at will. A state could not, for example, "change constitutional rights by its decisions about when . . . death happens."⁵⁴ A state "cannot escape its constitutional responsibilities to death-row prisoners by declaring them already dead, or improve its congressional representation by declaring deceased citizens still alive for that purpose."⁵⁵

52. Even if Congress were to use its power to declare unborn humans to be persons under federal statutory and regulatory law, much of the action in abortion rights would still be at the state level. After *Boerne*, it is clear that Congress cannot use its enforcement power under section 5 of the Fourteenth Amendment to enforce or protect rights that the Court does not recognize. See *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) ("Section 5 legislation reaching beyond the scope of § 1's actual guarantees must be an appropriate remedy for identified constitutional violations, not an attempt to substantively redefine the States' legal obligations.") (internal quotation omitted). Thus Congress would be limited to using the commerce clause or the spending power to restrict abortions. The commerce clause, however, would allow Congress to restrict abortions only insofar as they take place in or affect interstate commerce; an area that is presumably fairly small. See *United States v. Morrison*, 529 U.S. 598, 608–19 (2000); see also Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 CONST. COMMENT. 441 (2004). The spending power is superficially broader, allowing Congress to withhold federal funds from states that do not do what Congress wants. There are limits, however, on how Congress may condition state access to federal funds: "Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending, otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *New York v. United States*, 505 U.S. 144, 167 (1992) (internal citation omitted).

53. Posner, *supra* note 7, at 444.

54. Dworkin, *Unenumerated Rights*, *supra* note 1, at 402.

55. *Id.*

Indeed, imagine that a state wanted to declare prisoners dead upon sentencing. That would unacceptably undermine their right of appeal, not to mention their right to be free from cruel and unusual punishment while in prison awaiting execution. Constitutional law obviously has some implicit commitments regarding what counts as being alive and what counts as being dead. States may be free to define death at the margins, but not in a way that undermines the basic constitutional commitments.

The question in the abortion context is whether the Constitution not only has implicit commitments to women's liberty to control reproduction, but also has commitments to excluding unborn, pre-viable humans from the category of beings in whose welfare states can take a compelling interest. As we have seen, the problem with *Roe* is that it does not provide any reason for thinking the Constitution is so categorically inhospitable to pre-viable humans. And here is the problem with Dworkin's argument: it trades on what it is meant to shore up. His argument works only if it is independently clear that the Constitution is best interpreted to entail that unborn human life cannot be treated on a par with born human life. But that is exactly what is not clear.

In Dworkin's defense, the Constitution does implicitly contain some limits on what can count as a person. As Dworkin notes, states are not free to make corporations persons with a right to vote.⁵⁶ Though the Constitution nowhere sets down a positive right to vote—it lists only certain bases upon which citizens shall not be denied the right to vote: (1) race, color, or previous condition of servitude;⁵⁷ (2) sex;⁵⁸ (3) “by reason of failure to pay any poll tax or other tax”;⁵⁹ and (4) age (provided one has reached age 18)⁶⁰—it is clear from structure of the Constitution as a whole that the right to vote, at least in federal elections, is meant to be had by individual citizens, not artificial corporate “persons.” Were states to add corporations to the category of persons with a right to vote, they would thereby unconstitution-

56. DWORKIN, *LIFE'S DOMINION*, *supra* note 1, at 114.

57. U.S. CONST. amend. XV.

58. U.S. CONST. amend. XIX.

59. U.S. CONST. amend. XXIV. This amendment applies to the right to vote in federal elections. The Court declared the citizens cannot be denied the right to vote in state elections for failure to pay a poll tax in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

60. U.S. CONST. amend. XXVI.

ally undermine the national structure of proportional representation in the House of Representatives.⁶¹

Can Dworkin defend a similar argument about undermining the national structure of the right to an abortion? No. It is clear that a natural, biological notion of a person is presupposed in the constitutional concept of a citizen or a person in whose welfare states can take a compelling interest. But there is reasonable disagreement over whether states ought to be able to take a compelling interest in the lives of unborn humans, even prior to viability. Asserting that treating the unborn as persons in a whole sense would undermine federal constitutional rights would be putting the cart before the horse.

It may seem odd to suggest that states have the power to choose to do things that would limit federal rights. But the oddness here is a reflection of the misleading language used by the Court. The Court's language reads as though the Court gets to dictate exactly when states *have* a compelling interest in protecting human life. "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability."⁶² But the Court's language here does not mean that states *must* take a compelling interest in fetuses after viability. Rather, the Court has told states when they may choose to *take* a compelling interest in human life. "If the State is interested in protecting fetal life after viability, it *may* go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."⁶³

The important point here is that *if* a state chooses to do what *Roe* allows it to do, it does not undermine any federal constitutional rights. That is, if a state balances its interest in fetal life, an interest that it may choose to find compelling, against women's fundamental liberty interest in controlling whether to bear children, it simply shapes or limits constitutional rights as the Court says they may be shaped or limited.⁶⁴ As long as states

61. Proportional representation is guaranteed by the U.S. CONST. art. I, § 2, amended by U.S. CONST. amend. XIV, § 2. See *Wesberry v. Sanders*, 376 U.S. 1 (1964).

62. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

63. *Id.* at 163–64 (emphasis added).

64. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding race-based affirmative action on the ground that states have a compelling interest in providing diversity in educational settings, but not, of course, requiring states to *take* a compelling interest in diversity); see also *Coalition for Econ. Equal. v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997) ("The Constitution permits the people to grant a narrowly tailored racial preference only if they come forward with a compelling interest to back it up To hold that a democratically enacted affirmative action program is constitutionally permissible because the

can take a compelling interest in protecting the life of the unborn whenever they are ready to treat the unborn as persons "in the whole sense," that point applies just as well to regulations governing the abortion of pre-viable fetuses as to regulations governing the abortion of post-viable fetuses.

Ultimately, *Roe's* weakness derives from the fact that it provides no firm ground for saying that states are constitutionally prohibited from taking a compelling interest in the lives of unborn humans, even from conception. *Roe's* ground for denying that Texas and other states could prohibit abortion prior to viability was the contingent, historical-legal fact that states had not, at least not as of that time, treated the unborn as persons "in the whole sense." If that ground were to shift, and at least some states were to treat unborn humans as persons in the whole sense (or close enough to the whole sense), then those states should be permitted to take a compelling interest in the lives of unborn humans. And if they were to use that interest to shape and limit the right to an abortion, they would be acting just as states that prohibit abortion on post-viable fetuses already act under *Roe*.

It might be objected that ultimately the Court is responsible for setting the limits on what a state can take a compelling interest in. States cannot determine that they have a compelling interest in whatever they choose to protect as if they have a compelling interest in it. Imagine, for example, that a state wanted to take a compelling interest in the welfare of animals and treat their killing as on a par with the killing of humans. Could a state then limit federal constitutional rights as a result? Here's a test case that makes it fairly clear it could not. Suppose the state wanted to give the death penalty for the aggravated, malicious killing of animals.⁶⁵ It seems clear that if the Eighth Amendment does not allow a state to give the death penalty for the rape of a woman,⁶⁶ then it likewise would not allow a state to give the death penalty for the killing of an animal. No matter how much a state cares about animal life, it does not *have* a compelling interest in animal life for the purposes of the federal Constitution. It is not up to the state to elevate the killing of an animal to be on a par with the killing of a human, and the death penalty is reserved

people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.")

65. I am grateful to Thomas Ulen for raising this issue with me.

66. See *Coker v. Georgia*, 433 U.S. 584 (1977).

for the killing of humans. Likewise, we could imagine that there is a reason the federal Unborn Victims of Violence Act does not allow the death penalty for the killing of unborn humans: it would be unconstitutional because the Constitution does not allow states, or the federal government, to treat unborn humans as persons in the whole sense.

A proper response has to admit that the Court does have the ultimate authority and responsibility to determine whether a state can take a compelling interest in something. Moreover, it is surely true that a state cannot acquire a compelling interest simply by acting as though it takes one. Having a compelling interest does not imply taking one, but it is a necessary condition for taking one. Nevertheless, there is a middle space between those things that a state clearly has a compelling interest in and those things that a state clearly does not have a compelling interest in. In that middle space, I think *Roe* was right to look to the actual behavior of the states. In that middle space, if a state acts as though it takes a compelling interest in something generally, that should support its claim to take a compelling interest in that thing in a particular, narrow context. Likewise, if a state does not generally act as though it takes a compelling interest in something, that should undermine its claim to take a compelling interest in that thing in a particular, narrow context. The status of the life of unborn humans is a prime candidate to fall in this middle space.

It may seem that this argument has come too late. It has been settled law for over thirty years now that states do not have a compelling interest in the lives of the unborn prior to viability. The ground on which *Roe* sat may have been soft, but time can turn such soft ground firm.⁶⁷ But as the Court noted in *Casey*, “it is common wisdom that the rule of *stare decisis* is not an ‘inexorable command.’”⁶⁸ A number of things have to be true for *stare decisis* to govern a case. Among the relevant conditions for appealing to *stare decisis* in defense of *Roe* is, as the Court said in *Casey*, that “[n]o evolution of legal principle has left *Roe*’s doctrinal footings weaker than they were in 1973.”⁶⁹ The problem

67. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (upholding the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), because the warnings based on that case “have become part of our national culture,” and because the doctrinal underpinnings of the case are still sound).

68. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992).

69. *Id.* at 857.

for *Roe* is that the doctrinal footing rests on two feet. One foot is the claim that a woman has a fundamental liberty interest in choosing whether to bear a child. That foot is still strong. But the other foot is the claim that states do not have a compelling interest in the lives of unborn humans. My point here is that the changing behavior of states and the federal government may indeed leave this part of *Roe's* doctrinal footing weaker than it was in 1973.

In sum, the crucial premise for Dworkin is that states are constitutionally prohibited from taking a compelling interest in human life prior to viability. What makes Dworkin's argument at all plausible is the thought that states have been told that they lack a compelling interest in the welfare of human life prior to viability. But if the issue is shoring up the claim that states may not take, and thereby gain, a compelling interest in the welfare of human life prior to viability, it simply begs the question to argue as Dworkin does that by doing so states would overrule the federal constitutional order.

I conclude that *Roe* is vulnerable to a motion for reconsideration if and when states can demonstrate that they treat, or come sufficiently close to treating, the unborn, at some stage prior to viability, as persons more or less "in the whole sense." If *Roe* is reconsidered in this light, then any constitutional protection for abortion rights would have to be framed so that those rights are well grounded even if states do have, and do take, a compelling interest in the lives of unborn humans, even prior to viability.⁷⁰

70. I addressed this issue in an earlier piece, and stand by my discussion there. See Walen, *supra* note 19.