

# THE TRUE JURISPRUDENCE OF DOUBT: THE THRESHOLD QUESTIONS OF PERSONHOOD THAT THE SUPREME COURT WOULDN'T, COULDN'T, AND SHOULDN'T ANSWER

## INTRODUCTION

“Liberty finds no refuge in a jurisprudence of doubt.” This phrase opens the joint opinion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>1</sup> That case came nineteen years after the Court declared in *Roe v. Wade* that the fundamental right of personal privacy includes a woman’s right to abort her unborn child.<sup>2</sup> *Casey* reexamined and reworked parts of that holding, recognizing that *Roe* and decisions following it had left in their wake a “jurisprudence of doubt” due to *Roe*’s attempt to “draw[] a specific rule from what in the Constitution is but a general standard.”<sup>3</sup> With *Casey*, the Court sought to solve the problem by reaffirming the “central holding”<sup>4</sup> of *Roe*, but substituting its arbitrary trimester framework (designed to balance the mother’s right to have an abortion and the state’s interest in protecting the unborn) with a no less arbitrary viability standard.<sup>5</sup> The true cause of doubt and uncertainty engendered by *Roe* and unalleviated by *Casey*, however, is the fact that the Supreme Court has failed to properly address the threshold questions of life and personhood that must be answered before any rational judgment can be made between the rights of a mother and the rights of her unborn child.<sup>6</sup>

The purpose of this Note is twofold: first, it will establish that the Supreme Court has failed to properly answer the fundamental questions of personhood that must be answered before a sensible social policy regarding abortion can be adopted. Second, it will demonstrate why the Court, practically speaking, is the wrong branch of government to answer those questions in the first place.

Part One introduces the two threshold personhood questions that must be answered for our nation’s social policy on abortion to be logical and rational, and discusses how the Court treated these questions in its landmark abortion decisions. Part Two examines three departments of

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<sup>1</sup> 505 U.S. 833, 844 (1992) (plurality opinion).

<sup>2</sup> 410 U.S. 113, 154 (1973).

<sup>3</sup> *Casey*, 505 U.S. at 844, 869.

<sup>4</sup> *Id.* at 853.

<sup>5</sup> *Id.* at 853, 870.

<sup>6</sup> Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 813 (1973).

government—the federal judiciary, the federal legislature, and the state legislatures—to determine what branch is best suited to address these questions. Finally, Part Three offers a suggestion as to how our nation should proceed from here.

### I. THE TWO QUESTIONS

The old saying “don’t put the cart before the horse” reflects the inherent impracticability of taking a sequence of steps out of their proper and logical order. Skipping a step in any process is usually done to save time or to avoid doing something the actor does not want to do.<sup>7</sup> In legal analysis, however, and especially in the protection of legal rights, skipping logical steps is simply not acceptable. A judge cannot resolve a contract dispute after only reading the terms of the contract that are favorable to one side, ignoring the rest of the contract; nor can she grant a motion for judgment as a matter of law against a defendant after hearing only the plaintiff’s case.<sup>8</sup> Similarly, the Supreme Court has a general duty to examine and address any factual questions on which constitutional issues rest.<sup>9</sup>

In *Roe v. Wade* and *Planned Parenthood v. Casey*, the Supreme Court put the proverbial cart before the horse. The Court attempted to adjudicate between the rights of two parties without first properly establishing what rights one of the parties had.<sup>10</sup> The Fourteenth Amendment requires that lives of persons must be protected;<sup>11</sup> but, as recognized by the report of the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, in order to determine if the lives of the unborn should be protected, two fundamental questions must first be answered.<sup>12</sup> The first question is scientific: When does human life begin?<sup>13</sup> The second is legal: Is all human life deserving of value?<sup>14</sup> These two questions are connected, and follow one another in self-evident

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<sup>7</sup> STAFF OF S. COMM. ON THE JUDICIARY, 97th CONG., REP. ON HUMAN LIFE BILL 2–5 (Comm. Print 1981) [hereinafter HUMAN LIFE BILL REPORT] (showing how the Supreme Court followed this exact rationale in determining the abortion issue).

<sup>8</sup> See FED. R. CIV. P. 50(a)(1)(B) (stating that a motion for judgment as a matter of law can be granted against a party on an issue “[i]f [that] party has been fully heard on [the] issue”).

<sup>9</sup> Kern-Limerick v. Scurlock, 347 U.S. 110, 121 (1954).

<sup>10</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 2–3; Byrn, *supra* note 6, at 813.

<sup>11</sup> See U.S. CONST. amend. XIV, § 1 (“No State . . . shall . . . deprive any person of life . . .”).

<sup>12</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 3; see also Byrn, *supra* note 6, at 813 (discussing the threshold questions that should have been resolved in *Roe* before declaring a constitutional right to abortion).

<sup>13</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

<sup>14</sup> *Id.*

logical order: you cannot determine whether someone is a legal person without first determining if he or she is at least a living person. Any attempt to do so is irrational and arbitrary.<sup>15</sup> The Supreme Court failed to give either question the proper consideration and analysis it deserved.<sup>16</sup>

*A. The “Life Question”: When Does Human Life Begin?*

Perhaps the most fundamental duty of any government devoted to justice is the duty to protect life.<sup>17</sup> It seems no coincidence that the Declaration of Independence lists “Life” first in its famous delineation of unalienable rights.<sup>18</sup> Furthermore, the Fourteenth Amendment to the United States Constitution, ratified in 1868, enshrined in our nation’s written law the duty of the federal government to protect the lives of all persons from government intrusion.<sup>19</sup> As Congressman John Bingham of Ohio, the primary architect of the Fourteenth Amendment, stated before Congress: “Before that great [American] law the only question to be asked of the creature claiming its protection is this: Is he a man?”<sup>20</sup>

But the duty to protect life for all persons is meaningless if there are no operational definitions for the words “life” and “person.”<sup>21</sup> The Fourteenth Amendment, unfortunately, provides no answer to this difficult threshold question.<sup>22</sup> While the Amendment gives a definition of who qualifies as a United States citizen for the purpose of the Privileges

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<sup>15</sup> *Id.*; see also Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 REGENT U.L. REV. 67, 68 (2001) (“To avoid arbitrary enforcement of [the rights guaranteed by the Fourteenth Amendment], it is necessary to agree upon a definition of the word person.”).

<sup>16</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 4.

<sup>17</sup> Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 238 (2009); see also Herbert W. Titus, Lecture, *The Bible and American Law*, 2 LIBERTY U.L. REV. 305, 317 (2008) (“[T]he first duty of civil government is to protect the unalienable right to life, as the Declaration of Independence, the charter of our Nation, attests . . .”).

<sup>18</sup> “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>19</sup> “[N]or 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.” U.S. CONST. amend. XIV, § 1, cls. 3–4.

<sup>20</sup> THE RECONSTRUCTION AMENDMENTS’ DEBATES 274 (Alfred Avins ed., 1967).

<sup>21</sup> See Hollowell, *supra* note 15, at 68 (arguing that “it is necessary to agree upon a definition of the word person,” to “avoid arbitrary enforcement of” our rights under the Fourteenth Amendment).

<sup>22</sup> Jack Wade Nowlin, *Roe v. Wade Inverted: How the Supreme Court Might Have Privileged Fetal Rights over Reproductive Freedoms*, 63 MERCER L. REV. 639, 652 (2012).

or Immunities Clause,<sup>23</sup> it conspicuously changes terminology, within the very same sentence, to speak of “any *person*” when it guarantees life and equal protection under the law in the Due Process and Equal Protection Clauses.<sup>24</sup> The Court has traditionally interpreted this change of terminology to mean that the Fourteenth Amendment’s protections for “persons” encompass a broader category than its protections specifically designated for “citizens;” thus, these terms are not fungible alternatives.<sup>25</sup>

### 1. The Life Question in *Roe*

When the Supreme Court in *Roe* undertook to determine whether the unborn have any legal rights (which would need to be considered against and in conjunction with the right of a mother to have an abortion),<sup>26</sup> the first question that required answering was whether the unborn are *living* persons; that is, when does human life begin? Unfortunately, the Court expressly refused to answer this fundamental question. According to Justice Blackmun’s opinion, the Court “need not resolve the difficult question of when life begins. . . . [T]he judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”<sup>27</sup> Thus, this appropriately difficult question was simply pushed aside and treated as though it were unimportant for the mere fact that it was inconvenient. Taking the opinion as a whole, the Court implicitly held that the unborn are not alive, stating that “the unborn have never been recognized in the law as persons in the whole sense.”<sup>28</sup> This implied answer is problematic, given the Court’s frank admission of the judiciary’s incapability of providing a true answer.<sup>29</sup> By not addressing the question explicitly and directly, the Court did “speculate as to the answer,” even while claiming not to do so.<sup>30</sup>

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<sup>23</sup> U.S. CONST. amend. XIV, § 1, cl. 1 (“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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

<sup>24</sup> *Id.* at cls. 3–4 (emphasis added); see also Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 62 (2011) (contrasting the Bill of Rights, which “guarantees rights generally, without distinguishing citizens from other persons,” with the Fourteenth Amendment, which “sharply juxtaposes the privileges or immunities of ‘citizens’ with the due process and equal protection rights owed to ‘any person.’”).

<sup>25</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

<sup>26</sup> *Roe*, 410 U.S. at 155–57.

<sup>27</sup> *Id.* at 159.

<sup>28</sup> *Id.* at 162.

<sup>29</sup> *Id.* at 159.

<sup>30</sup> *Id.*

The Court actually predicated its dismissal-without-answer of the Life Question by first asserting what seemed a strong statement in favor of the state interest in protecting the unborn.<sup>31</sup> “Logically,” the Court surmised, a state’s interest in protecting prenatal life “need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth.”<sup>32</sup> In other words, so long as one accepts the premise that life begins *at some point* after conception and before birth, then it logically follows that the state has an interest or even a duty to protect that life; there is therefore no need, according to the Court, to pinpoint the exact point at which that life comes into being. The problem is that without establishing when life begins, there is no principled way to judge when a state must perform its duty to protect it.<sup>33</sup>

## 2. The Life Question in *Casey*

Nineteen years after the first refusal to answer in *Roe*, the Court’s holding in *Casey* recognized that the Life Question remained unanswered. The joint opinion of Justices O’Connor, Kennedy, and Souter referred to the unborn’s status rather ambiguously as being either “life or potential life,” “depending on one’s beliefs.”<sup>34</sup> Treating the question as if it were dependent upon the subjective beliefs of each person considering the question is unsatisfactory: life is a biological, scientific, factual matter.<sup>35</sup> By comparison, the joint opinion’s statement makes no more sense than the suggestion that the solar system is either geocentric or heliocentric, depending on one’s beliefs. At other times in history, the majority of the world believed that the solar system was geocentric; but you will never read a history book that claims the world *was* geocentric up until the point when scientists collectively changed their minds on the issue. Such a statement is ridiculous: the cosmic order of our solar system does not shift depending on how one feels about it, and neither does the biological point of distinction between life and nonlife alter based on one’s opinion. As surely as “[l]iberty finds no refuge in a jurisprudence of doubt,”<sup>36</sup> the laws of science do not operate based on subjective intuition. The logical mistake that the joint opinion made, however, is at least partially explicable: the Justices conflated the *factual* question of life with the *valuation* question of personhood, which

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<sup>31</sup> *Id.* at 150.

<sup>32</sup> *Id.*

<sup>33</sup> Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 17 (2013).

<sup>34</sup> *Id.*

<sup>35</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

<sup>36</sup> *Casey*, 505 U.S. at 844.

will be discussed below.<sup>37</sup> The confusion resulting from this improper merger is precisely why the two questions must be considered and answered separately, and in the proper logical sequence.

*B. The “Value Question”: Are the Lives of the Unborn Deserving of Value?*

While the Life Question is one that the Court refused to answer, the Value Question is one that the Court has attempted to avoid answering directly by reframing the question in terms less extreme. Rather than acknowledging that it has “extended to government . . . the power to decide the terms and conditions under which membership in good standing in the human race is determined,”<sup>38</sup> the Court has treated the question as though it were simply a matter of defining a legal category.<sup>39</sup> The Supreme Court stated frankly that the question of whether the unborn are persons for the purposes of the Fourteenth Amendment is material and central to the whole issue: “If this suggestion of personhood is established . . . the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>40</sup> However, the Court failed to recognize that the answer to the Life Question is material and central to answering the Value Question, and therefore it did not adequately address either.<sup>41</sup>

By not answering the Life Question first, the Court turned the necessary question of “Are all human lives deserving of value and protection under the law?”<sup>42</sup> into the more innocuous legal question of “Are the unborn included in the legal category of ‘Persons?’”<sup>43</sup>

1. The Value Question in *Roe*

In *Roe*, the Court jumped the gun by avoiding the first question and yet presuming to answer the second.<sup>44</sup> Without determining whether the unborn are living persons, the Court declared that the Fourteenth Amendment’s protection of legal persons does not extend to the unborn.<sup>45</sup> In this way, the Court placed the “cart” of legal personhood before the

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<sup>37</sup> See also *infra* Part I.B, I.C.

<sup>38</sup> 119 CONG. REC. 17,538 (1973) (statement of Sen. Buckley).

<sup>39</sup> *Roe*, 410 U.S. at 156–57.

<sup>40</sup> *Id.*

<sup>41</sup> Byrn, *supra* note 6, at 813–14.

<sup>42</sup> See *id.* at 859–60 (describing the value question at the heart of the abortion issue as “whether the life of a human being, distinguishable from other human beings only by kind and degree of dependency, is meaningful.”).

<sup>43</sup> See *Roe*, 410 U.S. at 156–58 (addressing the definition of “Person” as used in the Constitution).

<sup>44</sup> HUMAN LIFE BILL REPORT, *supra* note 7 at 4–5.

<sup>45</sup> *Roe*, 410 U.S. at 153.

“horse” of human life. Since the Life Question remained unanswered, the Court’s ruling essentially stands for the proposition that regardless of whether the unborn are living persons—indeed, *even if* they are living persons—their lives are not deserving of value and legal protection until at least the third trimester, and they are not legal persons entitled to full protection of the law until after live birth.<sup>46</sup>

The *Roe* decision, of course, did not expressly state that human life does not deserve to be valued until after live birth. Instead, Justice Blackmun presented the issue in a morally sterilized format, by simply asking the categorization question of whether the Fourteenth Amendment’s use of the word “person” includes the unborn.<sup>47</sup> He noted that there had been no cases or precedent stating that the unborn are included within the Fourteenth Amendment’s category of “persons,” and that nearly all other instances of the word “person” in the Constitution could have only post-birth application.<sup>48</sup> On those grounds the Court declared that the unborn are not included within the legal category of “persons.”<sup>49</sup>

Despite the fact that it dismissed the Life Question as irrelevant and categorically declared the unborn not to be legal persons under the Fourteenth Amendment, the Court still recognized that the “might-be-life” of the unborn was deserving of some value, which it termed as “the State’s interest[] in protecting . . . potential life.”<sup>50</sup> Its failure to properly address the foundational questions, however, left it with no principled standard by which it could determine how much value should be afforded “potential life,” or at what point in development the value of “potential life” becomes “sufficiently compelling to sustain regulation” of abortion.<sup>51</sup>

## 2. The Value Question in *Casey*

*Casey* had no need to retread the same ground regarding personhood, accepting that *Roe* had established the non-personhood of the unborn.<sup>52</sup> However, *Casey* did reexamine and completely rework *Roe*’s decision regarding when the state can place value on pre-birth life

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<sup>46</sup> *Roe*, 410 U.S. at 157–58, 160–61.

<sup>47</sup> *See id.* at 156–57 (presenting the issue of defining “person” without acknowledging potential moral or scientific sources for definition).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 156–58.

<sup>50</sup> *Id.* at 156.

<sup>51</sup> *Id.* at 154.

<sup>52</sup> *See Casey*, 505 U.S. at 846 (stating that “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”).

by enacting laws to protect it.<sup>53</sup> *Roe* infamously created a trimester framework for analyzing how compelling the state's interest is in protecting the "potential life" of the fetus, tying the value of unborn life to a point in prenatal development.<sup>54</sup> In *Casey*, however, the Court recognized that this trimester framework was flawed, in part because "it undervalue[d] the State's interest in potential life."<sup>55</sup> The Court also implicitly acknowledged that the original trimester framework was inherently arbitrary, by stating that "legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."<sup>56</sup>

However, *Casey* did no better job of justifying its judicial line-drawing than did *Roe*.<sup>57</sup> *Roe*'s trimester framework, which drew lines regarding the state's interest in the protection of life without first establishing any firm standards by which to judge the value of life,<sup>58</sup> was rejected by the Court, but replaced with a standard prohibiting the state from placing any "undue burden" on a woman's right to choose an abortion before viability.<sup>59</sup> Since the Court did not answer the fundamental Value Question, however, the line drawn at viability was as arbitrary as the trimester framework, and it has been criticized on these grounds.<sup>60</sup> Even Justice Blackmun, before delivering the opinion of *Roe v. Wade*, had acknowledged that viability would be an arbitrary standard, when he stated in a Supreme Court memorandum accompanying a draft of the *Roe* opinion: "You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary."<sup>61</sup>

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<sup>53</sup> *Id.* at 878.

<sup>54</sup> *Roe*, 410 U.S. at 162–65.

<sup>55</sup> *Casey*, 505 U.S. at 873.

<sup>56</sup> *Id.* at 870.

<sup>57</sup> *Id.* at 985–88 (Scalia, J., concurring in judgment in part and dissenting in part).

<sup>58</sup> *Roe*, 410 U.S. at 162–65.

<sup>59</sup> *Casey*, 505 U.S. at 874.

<sup>60</sup> See MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 774–75 (8th Cir. 2015) (discussing the serious problems with the Supreme Court's viability standard, because it "tied a state's interest in unborn children to developments in obstetrics," and is therefore based on a medical standard that is subject to change as science and medicine naturally advance); Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713, 740 (2007) (reviewing the viability standard established in *Casey* and concluding that "[i]n the decades since *Roe*, the Court has offered no adequate rationale for the viability standard, notwithstanding persistent judicial and academic critiques.").

<sup>61</sup> See DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 580 (1998) (quoting the cover memo that Justice Blackmun circulated to the eight other justices with a draft of the *Roe* opinion on November 22, 1972).



### C. The Court's Implied Answer

In sum, because the Court failed to properly address either of these fundamental questions, its analysis of the issue was flawed from the outset. As Professor Robert Byrn wrote in an article published shortly after the *Roe* decision:

[T]he Court reversed the inquiry, deciding first that the right of privacy includes a right to abort, then deciding that the unborn child is not a person within the meaning of the fourteenth amendment, and finally, refusing to resolve the factual question of whether an abortion kills a live human being. In effect, the Court raised a presumption against the constitutional personality of unborn children and then made it irrebuttable by refusing to decide the basic factual issue of prenatal humanbeingness.<sup>62</sup>

It is more convenient and less straining upon one's conscience to treat the Life Question as inconsequential and the Value Question as a mere cataloguing exercise. However, the mistreatment of these questions together promulgate a dangerous standard: if the unborn may be alive, but are not deserving of legal protection even if they are,<sup>63</sup> then it must be the case that not all human lives are deserving of value and full protection under the law. That is the answer that the Court has implicitly left us with.

## II. WHO SHOULD ANSWER?

In order to properly adjudicate between the rights of a mother and the rights of the unborn child within her, both the Life Question and the Value Question require complete and straightforward answers. As the Senate Subcommittee on Separation of Powers stated in its report on the 1981 Human Life Bill: "A government can exercise its duty to protect human life only if some branch of that government can determine what human life is. It can afford no protection to an individual without first ascertaining whether that individual falls within a protected class."<sup>64</sup> The natural follow-up question is: Which branch of government should address these fundamental questions? That question is at once a question of law, history, and practical functionalism.<sup>65</sup> There are three possible governmental entities that might address these questions: the Supreme Court, Congress, and the states. This section of this Note examines each in turn, to determine which is best suited to answer these threshold personhood questions.

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<sup>62</sup> Byrn, *supra* note 6, at 813.

<sup>63</sup> *Id.* at 861–62.

<sup>64</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

<sup>65</sup> See *infra* Part II.A., II.B., II.C.

### A. The Judiciary

As has been explored extensively above, the Supreme Court to this point has done an unsatisfactory job of addressing the central threshold questions regarding the life and personhood of the unborn.<sup>66</sup> It has addressed the questions out of logical sequence and it has expressly refused to resolve a necessary factual question.<sup>67</sup> What has yet to be explored is whether those questions are properly meant for the Court to answer at all.

There are three reasons why the Supreme Court is not the proper body to answer either question. First, the Court has expressly stated that it is not suited to answer the Life Question in particular. Second, the constitutional structure and design that the Framers intended the judicial branch to comport with does not allow it to answer these kinds of questions. Third, the Court is not competent to provide answers to these questions.

#### 1. The Court's Own Admission

The first consideration to be noted is the fact that the Court expressly admitted its own inability to properly answer the Life Question,<sup>68</sup> which necessarily must be answered before the Value Question can be properly addressed.<sup>69</sup> In writing the opinion of *Roe*, Justice Blackmun did not simply ignore the question of when human life begins: he expressly refused to answer it, and provided some compelling reasons for doing so. "We need not resolve the difficult question of when life begins," he said.<sup>70</sup> "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."<sup>71</sup> Although the Court's ultimate holding in *Roe* implicitly suggests as an answer that the unborn are not alive,<sup>72</sup> Justice Blackmun's description of the unsuitability of the Court to answer such a question is compelling and informative.

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<sup>66</sup> See *supra* Part I.

<sup>67</sup> Byrn, *supra* note 6, at 813.

<sup>68</sup> *Roe*, 410 U.S. at 159.

<sup>69</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 2-4.

<sup>70</sup> *Roe*, 410 U.S. at 159.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 160-62.

## 2. The Court's Constitutional Design

The second reason that the Supreme Court should not answer these questions is that it was not designed to do so. If the Court were to remain within its originally designated place in the intricately-arranged federal system, it would operate solely as an organ of judgment, not one of policymaking.<sup>73</sup> As Alexander Hamilton famously stated in Federalist No. 78:

The judiciary, [unlike the legislature and the executive], has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>74</sup>

The American founders established a unique form of government that is divided according to the three basic categories of governmental power—executive, legislative, and judicial.<sup>75</sup> The judicial branch of government was originally intended simply to have the power of applying the law and deciding cases and controversies brought before it,<sup>76</sup> while the general lawmaking powers were vested in the legislature.<sup>77</sup> This distinction between lawmaking powers and judicial powers is the underlying purpose for having an independent and unelected judiciary: federal judges are meant to be bound solely to the law, rather than accountable to the people, applying only those policies fairly found in a congressionally-enacted statute or in the Constitution.<sup>78</sup> The very nature of this divided system, therefore, with which most Americans are naturally very familiar, speaks against the idea of judicial policymaking.<sup>79</sup> The fundamental threshold questions of when life begins and whether all lives are deserving of value are not questions of legal

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<sup>73</sup> THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>74</sup> *Id.* at 464.

<sup>75</sup> U.S. CONST. art. I, § 1, cl. 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1, cl. 1.

<sup>76</sup> U.S. CONST. art. III, § 2; *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4 (1991) (“There is no faintest hint in the Constitution . . . that the judiciary shares any of the legislative or executive power. The intended function of the federal courts is to apply the law as it comes to them from the hands of others.”).

<sup>77</sup> U.S. CONST. art. I, § 1.

<sup>78</sup> BORK, *supra* note 76, at 4–5.

<sup>79</sup> *See* Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POLY 119, 119–20 (1994) (“[L]awmaking by judges is obviously inconsistent with the most basic principles of the Constitution: separation of powers, republican self-government, and federalism. . . . Policymaking by the Supreme Court in Washington, D.C., therefore, is the antithesis not only of representative self-government, but also of decentralized government.”).

interpretation or judgment: they are broad questions of policy that greatly affect the lives of every citizen in the nation.

It would be naïve, however, to think that the judicial institution existing today is the same creature that it was at the beginning of our nation, when Hamilton referred to it as the branch of government “least dangerous to the political rights of the Constitution.”<sup>80</sup> The Supreme Court today occupies a far grander role in our national system of government than it did at its inception.<sup>81</sup> This is in part due to the early acceptance of the Court’s power of judicial review, through which the Court has the power to strike down laws that conflict with the Constitution.<sup>82</sup> However, the kind of judicial review supported by Hamilton in Federalist No. 78<sup>83</sup> and proclaimed by Chief Justice John Marshall in *Marbury v. Madison*<sup>84</sup> was not inherently inconsistent with the idea of the judge’s role being one of simply applying law and abstaining from policymaking.<sup>85</sup> The earliest conceptions of judicial review envisioned its use in situations where a law was so clearly inconsistent with the requirements of the Constitution that no special interpretation of the Constitution would be required to discover the inconsistency.<sup>86</sup> The Framers never envisioned the power of judicial review as giving the judiciary supremacy over the other branches.<sup>87</sup> The broadening of judicial power instead occurred subtly, beginning in the mid-nineteenth century, as the judiciary began to exercise the power of judicial review more frequently and to base its invalidations more often “upon broad constitutional phrases rather than the comparatively definite provisions that had been used in the Marshall and Taney

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<sup>80</sup> THE FEDERALIST NO. 78, *supra* note 73, at 465 (Alexander Hamilton).

<sup>81</sup> JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 34–36 (1984); *see also* Graglia, *supra* note 79, at 120–21 (discussing the expanded scope and significance of judicial policymaking in America).

<sup>82</sup> *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803).

<sup>83</sup> “Limitations [on Congress’s power, set forth in the Constitution] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” THE FEDERALIST NO. 78, *supra* note 73, at 465 (Alexander Hamilton).

<sup>84</sup> *Marbury*, 5 U.S. at 177.

<sup>85</sup> *See* Graglia, *supra* note 79, at 122 (stating that judicial review, in theory, is simply “the disallowance of laws clearly prohibited by the text of the Constitution.”).

<sup>86</sup> *Id.*; *see also Marbury*, 5 U.S. at 179 (using as examples hypothetical laws passed by Congress that specifically contradict the Constitution, such as an *ex post facto* law or bill of attainder, or a law allowing a person to be convicted of treason on the testimony of one witness or a confession made out of court).

<sup>87</sup> Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2708 (2003).

periods.”<sup>88</sup> Thus, the modern epidemic of judicial policymaking, despite having roots that extend all the way back to the end of the eighteenth century,<sup>89</sup> is not in line with the original design of the judicial system.

### 3. The Court’s Inability to Change Social Policy Effectively

A third reason why these important questions should not be answered by the Court is simply that the Court, as a practical matter, is not competent to do so.<sup>90</sup> As the Court itself noted in *Roe*,<sup>91</sup> the fundamental questions that this Note has focused on involve complex questions of science, medicine, and morality, which the Court is not equipped to answer.<sup>92</sup>

Even acknowledging that the courts have taken upon themselves an expanded policymaking role, it is neither preferable nor desirable that important policy questions be decided by the branch of government that does not represent the people.<sup>93</sup> It must be remembered that a non-representative judiciary with the power to enact “good” or “wise” social policy also, by that same token, has the power to enact “bad” policies, and yet the independent nature of the judicial branch removes the ability of the people to determine what is “good” and what is “bad.”<sup>94</sup> In a 1994 article on judicial policymaking, Professor Lino A. Graglia explained clearly why judges are not well suited to answer difficult social policy questions: “Difficult issues of social policy are difficult, not because of a failure to discern a resolving principle, but because they involve conflicting principles, or conflicting interests that are recognized as legitimate.”<sup>95</sup> Because the issue requires more than mere application of a legal principle, judges can only answer such questions based on their own preferences and value judgments.<sup>96</sup> In a republican government

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<sup>88</sup> FRED V. CAHILL, JR., JUDICIAL LEGISLATION: A STUDY IN AMERICAN LEGAL THEORY 49 (1952).

<sup>89</sup> BORK, *supra* note 76, at 15.

<sup>90</sup> See Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1134–37 (1992) (discussing the fundamental risks associated with judicially derived policies).

<sup>91</sup> *Roe*, 410 U.S. at 159.

<sup>92</sup> See Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. 249, 250–51 (2003) (critiquing the inconsistent methodology of the Supreme Court’s use of science); Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 165–66 (2012) (describing the problems inherent in court-dictated morality); Graglia, *supra* note 79, at 125 (same).

<sup>93</sup> See AGRESTO, *supra* note 81, at 34–35 (asserting that the judiciary has indisputably expanded its policy-making role in America, but runs afoul of the democratic process because its policies are not directed by the will of the people).

<sup>94</sup> Graglia, *supra* note 79, at 124–25.

<sup>95</sup> *Id.* at 125.

<sup>96</sup> *Id.*

established on the principle of consent of the governed, however, that kind of decision-making should be left to the people.<sup>97</sup> Exactly as described by Professor Graglia, the fundamental personhood questions implicated by the subject of abortion involve significant conflicts between legitimate interests and principles, and therefore, the answers should not be mandated by judges without properly accommodating the consent of the governed.

Furthermore, even if one views judicial policymaking as a beneficial way to bring about progressive social policy change, the Court's attempts to affect a substantial change in national social policy often fail to do so in the way that advocates of that change desire, for the simple reason that the Court is not representative of the people and it does not truly have any ability to enforce its decisions without the cooperation of Congress and the Executive branch.<sup>98</sup>

By way of example, even Justice Ruth Bader Ginsburg, one of the most liberal members of the modern Court and a strong supporter of abortion,<sup>99</sup> has criticized the *Roe* opinion (though not its outcome) as having gone too far by proclaiming nationwide social policy, ultimately resulting in a cultural effect that was in some ways counterproductive to the pro-abortion cause.<sup>100</sup> In an interview conducted in July 2014, Justice Ginsburg stated: “[T]he problem with *Roe v. Wade* was it not only declared the Texas law . . . unconstitutional, but it made every law in the country, even the most liberal, unconstitutional. . . . [it created an effective target for pro-life advocates]; it was nine unelected judges making a decision that they argued should be made by the individual state legislatures.”<sup>101</sup> Thus, even though the policy embraced by *Roe v. Wade* was one that Justice Ginsburg believes was in the best interests of the nation and of positive societal progress, she acknowledges the

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<sup>97</sup> *Id.*; see also Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 322 (2005) (critiquing the antithetical relationship between the republican form of government and the power of judicial review).

<sup>98</sup> See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 15–16 (2d ed. 2008) (examining the history of the Supreme Court as an instigator of progressive social change, and how it has generally failed to bring about the intended change in the way that the advocates of that change desire).

<sup>99</sup> See Jeffrey Toobin, *How Justice Ginsburg Has Moved the Supreme Court*, NEW YORKER (Mar. 11, 2013), <http://www.newyorker.com/magazine/2013/03/11/heavyweight-ruth-bader-ginsburg> (referring to Justice Ginsburg as “the senior member of the Court’s liberal quartet,” and explaining her support for abortion rights and misgivings about *Roe v. Wade*).

<sup>100</sup> *Exclusive: Ruth Bader Ginsburg on Hobby Lobby, Roe v. Wade, Retirement and Notorious R.B.G.*, at 7:12, Yahoo NEWS, <https://www.yahoo.com/news/video/exclusive-ruth-bader-ginsburg-hobby-091819044.html?ref=gs> (last visited Aug. 27, 2016).

<sup>101</sup> *Id.*

inherent problem of such a policy being mandated by the Court. Because the Court is a body neither representative of nor accountable to the people, Supreme Court policymaking is simply not an effective means for changing the culture—let alone a proper one.

### *B. Congress*

The same aspects of our government's structure and function that make the judiciary an unattractive candidate to answer these fundamental questions of life and the value of life also serve to establish Congress as a better option. As described by the late Judge Robert Bork, "[l]egislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment."<sup>102</sup> In a society founded on the principle of the consent of the governed, it is ideal that questions of social policy—especially those involving competing interests and values that necessarily have a huge impact on the lives of the citizenry—be left to the branch of government that is most representative of the people.<sup>103</sup>

There are three reasons why Congress is well suited to address these threshold personhood questions. First, Section 5 of the Fourteenth Amendment expressly confers upon Congress the "power to enforce [the Amendment's provisions] by appropriate legislation."<sup>104</sup> Therefore, it is appropriate for Congress to answer the questions fundamental to the Amendment's protection of life. Second, it can better examine the scientific and medical data that underlies the Life Question. Finally, as a body more representative of the people, Congress can better respond to the social conscience and values of the citizenry. Because these questions involve complex and competing interests and values, the representative democratic process that exists in Congress is the ideal forum to provide the answers.

#### 1. The Fourteenth Amendment's Enforcement Clause

The Fourteenth Amendment was a product of the Reconstruction of the South, which occurred immediately following the American Civil War.<sup>105</sup> It was adopted primarily to empower Congress to enact the Civil Rights Act of 1866 and similar legislation.<sup>106</sup> That Act, which guaranteed full citizenship to all former slaves, had been vetoed by President

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<sup>102</sup> BORK, *supra* note 76, at 17.

<sup>103</sup> Graglia, *supra* note 79, at 119–20.

<sup>104</sup> U.S. CONST. amend. XIV, § 4.

<sup>105</sup> RANDY E. BARNETT & HOWARD E. KATZ, CONSTITUTIONAL LAW: CASES IN CONTEXT 770 (2d ed. 2013).

<sup>106</sup> *Id.* at 768–70.

Andrew Johnson and immediately challenged as unconstitutional.<sup>107</sup> Although Congress managed to pass the Civil Rights Act over the President's veto, the lingering concern over its constitutionality and the fear that it might be repealed by a future Congress instigated the formulation of the Fourteenth Amendment.<sup>108</sup> Thus, the Amendment's history as well as its text<sup>109</sup> demonstrate that the main thrust and purpose of the Fourteenth Amendment was to ensure that Congress would have the legislative authority to protect the fundamental rights of life and liberty.<sup>110</sup>

The Enforcement Clause of the Fourteenth Amendment, found in Section 5, states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>111</sup> Because resolution of the Life Question and the Value Question is essential to the government's ability to protect life under the Fourteenth Amendment, legislation directed toward resolving those questions is appropriate for Congress to enact.<sup>112</sup> Further, because the Supreme Court has expressly stated its inability to determine when life begins, and because defining when life begins and determining whether to value all life equally are necessary to enforce the Fourteenth Amendment's protection of life, it naturally falls to Congress to be the branch of the federal government that addresses these issues.<sup>113</sup>

According to *Katzenbach v. Morgan*, the enforcement power found in Section 5 of the Fourteenth Amendment is a very broad power, analogous to the power granted to Congress by the Necessary and Proper Clause.<sup>114</sup> *Katzenbach* held that the test for a law enacted under Section 5 is whether it is "plainly adapted" to a legitimate end, and whether the means adopted are allowed by the letter and spirit of the Constitution.<sup>115</sup> In *City of Boerne v. Flores*, the Court emphasized that when Congress enacts preventive rules under Section 5, "there must be a congruence

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<sup>107</sup> *Id.* at 768.

<sup>108</sup> *Id.*

<sup>109</sup> 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. 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.

U.S. CONST. amend. XIV, § 1.

<sup>110</sup> See *infra* notes 172–174 and accompanying text.

<sup>111</sup> U.S. CONST. amend. XIV, § 5.

<sup>112</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

<sup>113</sup> *Id.* at 21.

<sup>114</sup> 384 U.S. 641, 650 (1966).

<sup>115</sup> *Id.*



between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.”<sup>116</sup> Congress is thus authorized “to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,”<sup>117</sup> so long as that legislation is congruent and proportional to the harm being addressed.<sup>118</sup>

This grant of power under Section 5 allows Congress to address the important threshold questions of personhood underlying the abortion issue through congruent and proportional means. The “evil presented” in this case is serious: it is potentially the destruction and devaluation of human life.<sup>119</sup> A legislative determination of when life begins and when human life should be valued would certainly be congruent and proportional to the purpose of protecting human life.

## 2. Legislative Fact-Finding Ability

Congress is better equipped than the Supreme Court to answer the Life Question because it can use its legislative fact-finding processes to examine the foundational scientific and medical data that must be considered before an answer may be furnished.<sup>120</sup> Although Congress is generally not obligated to engage in fact-finding to support its legislation, it often does engage in extensive fact-finding, especially on difficult questions of social policy.<sup>121</sup>

Historically (although less so modernly), the Supreme Court gave substantial deference to legislative fact-finding, recognizing “Congress’ special competence as the fact-finding branch of the federal government.”<sup>122</sup> One prime example is *Katzenbach*, where the Court stated that “[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations” in

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<sup>116</sup> 521 U.S. 507, 530 (1997).

<sup>117</sup> *Katzenbach*, 384 U.S. at 651.

<sup>118</sup> *Boerne*, 521 U.S. at 530.

<sup>119</sup> *Id.*

<sup>120</sup> See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 23 (2009) (“As many commentators have observed, the Court (like all judicial bodies) lacks the fact-finding and information-gathering capacities of a legislature. The Court cannot hold hearings and consult those who may be affected by a particular legal rule, as can Congress.”).

<sup>121</sup> See Muriel Morisey Spence, *What Congress Knows and Sometimes Doesn’t Know*, 30 U. RICH. L. REV. 653 n.1, 655 (1996) (describing “the significant fact-finding value” of Congress).

<sup>122</sup> *Id.* at 655; see also Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 768–69 (2008) (“The Court has historically deferred to congressional factfinding, as is most evident in the Court’s Commerce Clause jurisprudence and Fourteenth Amendment [S]ection 5 jurisprudence.”).

determining that a New York voter literacy requirement had the effect of denying the right to vote to a large segment of New York's Puerto Rican community, and it was therefore appropriate for Congress to enact legislation under Section 5 of the Fourteenth Amendment to remedy that problem.<sup>123</sup> Even Justice Harlan in his dissent recognized Congress's important fact-finding role.<sup>124</sup>

Congress has several fact-finding tools at its disposal that it could use to extensively investigate the medical and scientific data that must be examined in order to properly answer the Life Question.<sup>125</sup> These include the ability to subpoena witnesses and documents to conduct congressional hearings and investigations, and "to assign to legislative committees and staff responsibility for detailed scrutiny of legislative proposals, their factual foundations, and their suitability as responses to social policy concerns."<sup>126</sup> Congress also has the assistance of support agencies, such as the Congressional Research Service of the Library of Congress, to facilitate the information-gathering and evaluation process.<sup>127</sup>

Thus, the various fact-finding tools at Congress' disposal, and its ability to consider the entire issue rather than just the case at hand, place it in a better position to address the Life Question.

### 3. Democratic Resolution of Difficult Societal Questions

As the representative assembly of the People, Congress is better able to respond to the sensitive questions of morality and conscience implicit in the Value Question, and indeed the Framers' original design was for Congress to have "an intimate sympathy with[] the people."<sup>128</sup> The Supreme Court itself has recognized that difficult social policy questions of the sort contemplated by this Note are properly resolved by legislative measures rather than by judicial decree.<sup>129</sup> In the 1977 case of *Maher v. Roe*, the Court reviewed a Connecticut law prohibiting state funding for nontherapeutic abortions.<sup>130</sup> Because the state legislature's

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<sup>123</sup> *Katzenbach v. McClung*, 384 U.S. 641, 653 (1966).

<sup>124</sup> *Id.* at 668 (Harlan, J., dissenting) ("To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.").

<sup>125</sup> Spence, *supra* note 121, at 653-55.

<sup>126</sup> *Id.* at 655.

<sup>127</sup> A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 386-87 (2001).

<sup>128</sup> THE FEDERALIST NO. 52, *supra* note 73, at 327 (James Madison).

<sup>129</sup> *Maher v. Roe*, 432 U.S. 464, 479-80 (1977).

<sup>130</sup> *Id.* at 478-80.

decision regarding whether to fund nontherapeutic abortions was naturally “fraught with judgments of policy and value over which opinions are sharply divided,” the Court affirmatively approved of leaving such decisions to be confronted by the legislature.<sup>131</sup>

[W]hen an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that “legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”<sup>132</sup>

Similarly, in his concurrence in judgment in *Webster v. Reproductive Health Services*, Justice Antonin Scalia argued that the difficult questions of social policy implicit in the abortion debate would be better left to Congress rather than the Court, both in terms of the proper governmental roles of each branch as well as simple practicality.<sup>133</sup>

The outcome of today’s case will . . . needlessly . . . prolong this Court’s self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.<sup>134</sup>

A contemporary example of Congress’s ability to respond to concerns of the citizenry, and one that intimately involves the topic of abortion, is the Congressional movement to defund Planned Parenthood. In July 2015, the Center for Medical Progress began releasing undercover videos that revealed statements of Planned Parenthood officials, made during private conversations with actors whom they believed were representatives of a biological research company, regarding the sale of fetal body parts for profit.<sup>135</sup> The videos showed Planned Parenthood personnel haggling over prices for fetal organs.<sup>136</sup> The reaction to the videos was visceral, and the outrage only grew as more videos were released, including unedited raw footage to combat the assertion that the

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (quoting *Mo., Kan. & Tex. Ry. Co. of Tex. v. May*, 194 U.S. 267, 270 (1904)).

<sup>133</sup> 492 U.S. 490, 532 (1989) (Scalia, J., concurring in judgment and concurring in part).

<sup>134</sup> *Id.*

<sup>135</sup> Sandhya Somashekhar & Danielle Paquette, *Undercover Video Shows Planned Parenthood Official Discussing Fetal Organs Used for Research*, WASH. POST (July 14, 2015), [https://www.washingtonpost.com/politics/undercover-video-shows-planned-parenthood-exec-discussing-organ-harvesting/2015/07/14/ae330e34-2a4d-11e5-bd33-395c05608059\\_story.html](https://www.washingtonpost.com/politics/undercover-video-shows-planned-parenthood-exec-discussing-organ-harvesting/2015/07/14/ae330e34-2a4d-11e5-bd33-395c05608059_story.html).

<sup>136</sup> *Id.*

videos had been deceptively edited.<sup>137</sup> The concern was not limited to those who were already in the pro-life camp, either: several self-proclaimed pro-choice voices chimed in to express disgust, queasiness, or at the very least concern over the way Planned Parenthood clinic personnel in the videos display such “cavalier attitude[s] toward the aborted fetuses.”<sup>138</sup> Only a few days after the release of the first video, the Energy and Commerce Committee of the House of Representatives launched an investigation into Planned Parenthood to “get to the bottom of this appalling situation.”<sup>139</sup> The Judiciary Committee and Oversight and Government Reform Committee also launched investigations and conducted several hearings, from July through October.<sup>140</sup> By October 2015, the House of Representatives passed a bill that would defund Planned Parenthood for one year.<sup>141</sup> Although the bill was ultimately vetoed by President Obama, a state-by-state campaign to defund Planned Parenthood gained significant traction in 2015 and 2016.<sup>142</sup>

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<sup>137</sup> Mark Hemingway, *Media Calls Planned Parenthood Videos ‘Highly Edited’ But Won’t Explain Why Editing Is Bad*, WEEKLY STANDARD (Aug. 4, 2015, 4:50 PM), [http://www.weeklystandard.com/blogs/media-calls-planned-parenthood-videos-highly-edited-wont-explain-why-editing-bad\\_1005205.html](http://www.weeklystandard.com/blogs/media-calls-planned-parenthood-videos-highly-edited-wont-explain-why-editing-bad_1005205.html).

<sup>138</sup> Bunnie Riedel, *The Solemnity of Abortion*, BALTIMORE SUN (Aug. 10, 2015, 8:00 AM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-pp-abortion-20150810-story.html>; see also Ellen Painter Dollar, *It’s Complicated: A Pro-Choice Christian Responds to the Planned Parenthood Scandal*, PATHEOS (July 29, 2015, 10:53 AM), <http://www.patheos.com/blogs/ellenpainterdollar/2015/07/its-complicated-a-pro-choice-christian-responds-to-the-planned-parenthood-scandal/>; Ruth Marcus, *Defunding Planned Parenthood Would Actually Increase Abortions*, WASH. POST (July 31, 2015), [https://www.washingtonpost.com/opinions/dont-cut-planned-parenthoods-funds-increase-them/2015/07/31/fe66aad8-379e-11e5-b673-1df005a0fb28\\_story.html?utm\\_term=.83f228861bc9](https://www.washingtonpost.com/opinions/dont-cut-planned-parenthoods-funds-increase-them/2015/07/31/fe66aad8-379e-11e5-b673-1df005a0fb28_story.html?utm_term=.83f228861bc9); Ruben Navarrette Jr., *I Don’t Know If I’m Pro-Choice After Planned Parenthood Videos*, DAILY BEAST (Aug. 10, 2015, 1:00 AM), <http://www.thedailybeast.com/articles/2015/08/10/i-don-t-know-if-i-m-pro-choice-anymore.html>.

<sup>139</sup> Press Release, Energy & Commerce Comm. Launches Investigation Following “Abhorrent” Planned Parenthood Video, Energy & Commerce Comm. (July 15, 2015), <https://energycommerce.house.gov/news-center/press-releases/energy-and-commerce-committee-launches-investigation-following-abhorrent/>; *House Investigation into Planned Parenthood*, HOUSE REPUBLICANS, [http://www.gop.gov/solution\\_content/plannedparenthood/](http://www.gop.gov/solution_content/plannedparenthood/) (last visited Oct. 21, 2016).

<sup>140</sup> *House Investigation into Planned Parenthood*, *supra* note 139.

<sup>141</sup> Kate Scanlon, *House Approves Bill That Dismantles Parts of Obamacare, Defunds Planned Parenthood*, DAILY SIGNAL (Oct. 23, 2015), <http://dailysignal.com/2015/10/23/house-approves-bill-that-dismantles-parts-of-obamacare-defunds-planned-parenthood/>.

<sup>142</sup> David Crary, *Though Congressional Republicans’ Bid to Defund Planned Parenthood Was Vetoed by President Barack Obama, Anti-Abortion Activists and Politicians Are Achieving a Growing Portion of Their Goal with an Aggressive State-by-State Strategy*, U.S. NEWS (Mar. 28, 2016, 1:57 PM), <http://www.usnews.com/news/us/articles/2016-03-28/state-by-state-strategy-wielded-to-defund-planned-parenthood> (“Over the past year, more than a dozen states have sought to halt or reduce public funding for Planned Parenthood.”).

In presenting this example, it is important to note that Congress does not provide a quick and efficient means for resolution of difficult policy questions. On the contrary, the legislative process is infamously difficult and time-consuming, due to the obstacles presented by partisanship, the intricacies of bicameralism and presentment, and the fundamental difficulty of resolving controversial issues.<sup>143</sup> Contention, debate, and deliberation are part of the inherent design that the Framers intended for Congress, believing that this process would distill and refine legislation to produce better laws than would be possible in a system in which the lawmaking process is simpler.<sup>144</sup> The example given does tend to show, however, that when the public becomes sufficiently concerned about an important issue, Congress, being the branch that the electorate can most directly influence and hold accountable, is naturally better able to respond than the Supreme Court, which must wait for an appropriate “case” or “controversy” to arise before it can act.<sup>145</sup>

### C. State Legislatures

Having made the case for these preliminary social policy questions to be addressed by a representative legislature instead of the Supreme Court, the remaining question is why Congress should do so rather than the state legislatures. This question implicates the important concept of federalism, which is as much a fundamental part of our nation’s underlying structure as separation of powers.<sup>146</sup> Federalism is rooted in the history of this nation’s birth.<sup>147</sup> The federal government was created by delegations of representatives formed by the states, which conferred

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<sup>143</sup> Jeff Jacoby, *Gridlock, or Democracy as Intended?*, BOS. GLOBE (Dec. 25, 2011), <https://www.bostonglobe.com/opinion/2011/12/25/gridlock-democracy-intended/EJlqriPsRHqeW9wxLAhtMK/story.html>.

<sup>144</sup> *Id.*; David G. Savage, *Justice Scalia: Americans ‘Should Learn to Love Gridlock,’* L.A. TIMES (Oct. 5, 2011), <http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005>.

<sup>145</sup> From as early as 1793, the “Case or Controversy Clause” of Article III, Section 2 of the Constitution has been interpreted by the Supreme Court to mean that the federal judiciary’s role is limited to applying the law in cases of live controversy. *Justices of the Supreme Court to George Washington*, in 6 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 755 (1998). It cannot, for example, issue advisory opinions at the request of the president. *Id.* It also cannot hear a case that is not yet “ripe,” i.e., where an injury has not yet occurred. *Doe v. Bush*, 323 F.3d 133, 137–38 (1st Cir. 2003). Nor can it hear a case that has become “moot,” i.e., where the situation has evolved such that judgment will no longer affect the rights of the parties. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). Further, litigation is often a very long and drawn out process that could take several years; for example, almost three years passed between the District Court decision in *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), and the final decision of the Supreme Court in 1973, *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>146</sup> Forsythe & Presser, *supra* note 97, at 322–23.

<sup>147</sup> *Id.* at 324.

limited powers to the government and reserved to the states all others.<sup>148</sup> Thus, combining the notions that the states preceded the union and that the federal government created was one of limited and enumerated power, one arrives at the structure of federalism, which requires that any power or authority not within the purview of the federal government is reserved to the states and should not be intruded upon by the federal government. The Framers viewed the states as the “reliable guardians of liberties” as is evidenced by the fact that the original Bill of Rights restricted only the federal government, not the state governments.<sup>149</sup>

Before *Roe v. Wade*, the abortion issue was wholly decided by individual state legislatures.<sup>150</sup> Further, as noted by advocates of a fully federalist approach to abortion policy, “[p]ublic health and medical regulation is an area generally left to the states in our federal system. . . .”<sup>151</sup> James Madison described his broad conception of state legislative authority in Federalist No. 45: “[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .”<sup>152</sup> All of this would seem to suggest that the abortion issue would be more properly left entirely to the states, rather than have a nationally-mandated abortion policy.<sup>153</sup>

The federal government, however, is not without purpose: both the design created by the Framers and the testimony of our nation’s history have demonstrated that some matters should rightly be determined on a national scale. For instance, the Constitution requires that commerce between the states should be controlled by Congress, not the states,<sup>154</sup> in order to ensure a degree of uniformity in regulation of the national economic marketplace and promote the free flow of commerce.<sup>155</sup> It also grants Congress the exclusive power of declaring war.<sup>156</sup> The

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<sup>148</sup> *Id.*

<sup>149</sup> Russell Hittinger, *Liberalism and the Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 449 (1990); see also *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833) (“[The first ten] amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”); Forsythe & Presser, *supra* note 97, at 327–28.

<sup>150</sup> Forsythe & Presser, *supra* note 97, at 326–27.

<sup>151</sup> *Id.* at 328.

<sup>152</sup> FEDERALIST NO. 45, *supra* note 73, at 292–93 (James Madison).

<sup>153</sup> Forsythe & Presser, *supra* note 97, at 329.

<sup>154</sup> “[Congress shall have the power to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

<sup>155</sup> *Parker v. Brown*, 317 U.S. 341, 363 (1943).

<sup>156</sup> “[Congress shall have power to] declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” U.S. CONST. art. I, § 8, cl. 11.

Constitution guarantees a republican form of government to each state of the Union,<sup>157</sup> removing the ability of the states to decide their own adherence to fundamental American values such as popular rule and rule of law, and granting to Congress the power and authority to determine if a state's government is republican in form.<sup>158</sup> Further, Article I, Section 10 of the Constitution provides a list of prohibitions and limitations upon the state governments: Thus, the states cannot grant titles of nobility, or pass "ex post facto" laws or laws "impairing the Obligation of Contracts," etc.<sup>159</sup> What all of these textual limitations have in common is the desire to ensure a national commitment to certain fundamental values at the very core of the American tradition, such as consent of the governed, rule of law, individual rights, and unity among the states. In fact, when James Madison proposed his original Bill of Rights, he included an amendment that would have added more limitations on the states to Section 10 in order to protect essential rights.<sup>160</sup> Although this proposal was not adopted in the end, Madison argued in its favor before Congress by reasoning that "[i]f there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments."<sup>161</sup>

It was in a similar spirit that the Thirteenth and Fourteenth Amendments were passed to allow Congress "to define and enforce freedom within state boundaries."<sup>162</sup> In the mid-1860s, after the greatest period of turbulence and disunity in our nation's history, the American people decided that the right of every person to be free from slavery, to not be deprived of life, liberty, or property without due process of law, and to receive equal protection under the laws was so fundamental that it must be guaranteed nationwide.<sup>163</sup> Three new amendments were added to the Constitution to accomplish this.<sup>164</sup>

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<sup>157</sup> "The United States shall guarantee to every State in this Union a Republican Form of Government . . ." U.S. CONST. art. IV, § 4.

<sup>158</sup> *Luther v. Borden*, 48 U.S. 1, 42 (1849).

<sup>159</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>160</sup> The proposed amendment stated that "no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases." 5 THE FOUNDER'S CONSTITUTION 93–94 (Philip B. Kurland & Ralph Lerner eds., Liberty Fund, Inc. 2000).

<sup>161</sup> *Id.*

<sup>162</sup> HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE 43, 64–65 (updated ed. 2000).

<sup>163</sup> Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808–09 (2010).

<sup>164</sup> *Id.*; U.S. CONST. amends. XIII, XIV, XV.

The protection of life is a primary duty of a just government, and the unalienable right to life is at the core of our nation's fundamental values.<sup>165</sup> It does not offend the structure of federalism to suggest that such a fundamental right should be protected nationally, which is one of the purposes and effects of the Fourteenth Amendment.<sup>166</sup> But in order to carry out that duty, there must be a determination made regarding when life begins and whether unborn life is deserving of value and protection, and that determination must be national.<sup>167</sup> If the individual states are free to define life in different ways, the result will be a grave inconsistency, where a human life protected in one state may be deemed undeserving of protection, and indeed sub-human, in another.<sup>168</sup> This would undermine completely the purpose of the Fourteenth Amendment.

The possibility and danger of this kind of inconsistency is described in *Casey*, although the Court itself unfortunately did not recognize the significance of its own statement. In that case, the Court stated:

It is conventional constitutional doctrine that where reasonable people disagree [a state government] can adopt one position or the other. . . . That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. . . . [In such cases] we have ruled that a State may not compel or enforce one view or the other.<sup>169</sup>

This statement has some truth to it; however, the Court made a mistake by recognizing only the mother's right to privacy as a protected liberty being intruded upon, and ignored the sacred right to life of the unborn.<sup>170</sup> This is counterintuitive: when a government chooses between "theories of life" regarding whether the unborn are living persons deserving a right to life, the right that is most immediately endangered by such a decision is, by very definition, the unborn's right to life. That is the right hanging precariously in the balance. Thus, while the exact laws regarding *how* a state will protect life should, to a great extent, be left to the individual states to decide, the ultimate issues of *what is life* and *what is its value* are so fundamental that principle requires the nation to have a unified answer.

Abortion is a complex and multifaceted issue, and there are roles to be played by both the state and federal governments. The threshold

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<sup>165</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (asserting that the purpose of the Bill of Rights was to protect fundamental rights such as life, and to withdraw them from political controversy).

<sup>166</sup> Balkin, *supra* note 163, at 1809.

<sup>167</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

<sup>168</sup> *Casey*, 505 U.S. at 851.

<sup>169</sup> *Id.*

<sup>170</sup> See *id.* at 852–53 (expressing "reservations" in affirming *Roe v. Wade*, but ultimately doing so because of the liberty interests of the woman and "the force of stare decisis").



personhood questions subsumed within—and preliminary to resolution of—the abortion issue should be addressed by the people represented as a national whole within Congress. That conclusion does not, however, remove the issue entirely from the states. Once we, as a nation, establish answers to these important threshold questions, it will still be up to the individual states to determine how to implement social policy based on those answers.<sup>171</sup> As it currently stands, the states have the ability and duty to define their own criminal and civil laws for the protection of postnatal life.<sup>172</sup> One thing that the states cannot and should not do, however, is adopt disparate ideas of what life is and when it should be protected.<sup>173</sup> A nation committed to the protection of liberty and individual rights cannot exist where a life is protected and valued in one state while wholly disregarded and denied value in another.

### III. WHAT NEXT?

In 1981, the Senate considered S. 158, also known as the Human Life Bill, which was specifically designed to answer the threshold personhood questions of when life begins and what value should be given to the lives of the unborn.<sup>174</sup> The bill answered the Life Question by stating that “[t]he Congress finds that the life of each human being begins at conception,” and answered the Value Question by stating that “the fourteenth amendment to the Constitution of the United States protects all human beings.”<sup>175</sup> Thus, pursuant to the Fourteenth Amendment’s Section 5 Enforcement Clause, the bill affirmed that “human life exists from conception . . . and for this purpose ‘person’ includes all human beings.”<sup>176</sup> After eight days of hearings and the testimony of fifty-seven witnesses,<sup>177</sup> the Senate Committee on the Judiciary’s Subcommittee on Separation of Powers issued a report on the bill, determining both that “unborn children are human beings” (the

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<sup>171</sup> See Forsythe & Presser, *supra* note 97, at 329 (asserting that states are in the best position to create abortion law enforcement policies).

<sup>172</sup> See *Maher v. Roe*, 432 U.S. 464, 472 (1977) (holding that the state may impose penalties to protect life once it becomes viable).

<sup>173</sup> See *Casey*, 505 U.S. at 851 (asserting that the state may not choose one side over another when the decision arguably invades a fundamental liberty). In *City of Akron v. Akron Center for Reproductive Health, Inc.*, the Supreme Court restated the holding of *Roe*, declaring that “a State may not adopt one theory of when life begins to justify its regulation of abortions.” 462 U.S. 416, 444 (1983). The inherent problem hinted at by the Court’s concern here, but not expressly acknowledged, is the inconsistency of separate states independently determining such a fundamental question as when life begins.

<sup>174</sup> HUMAN LIFE BILL REPORT, *supra* note 7, at 2.

<sup>175</sup> *Id.* at 1.

<sup>176</sup> *Id.* at 1–2.

<sup>177</sup> *Id.* at 7.

term “human being” defined as “including every living member of the human species”),<sup>178</sup> and “that the fourteenth amendment embodies the sanctity of human life and that today the government must affirm this ethic by recognizing the ‘personhood’ of all human beings.”<sup>179</sup> Although introduced in the Senate, the bill was not ultimately passed.

It has now been over forty years since the Court inappropriately mandated a nationwide social policy regarding abortion without addressing the fundamental issue of the value of unborn life. It is time for the people, through Congress, to remedy that problem by appropriately answering the threshold questions of personhood that the Court ignored. As the Senate Subcommittee on Separation of Powers stated in its report on S. 158:

The task of interpreting the Constitution in the context of specific cases is ultimately for the Supreme Court. But when the Supreme Court has professed an inability to address underlying questions that are fundamental to the interpretation of a constitutional provision, Congress is entirely justified in expressing its view on such questions, subject to Supreme Court review.<sup>180</sup>

Passing a bill similar to S. 158 would not immediately reverse the decision of *Roe*; it would instead force the Court, in reviewing the law, to properly adjudicate between the rights of the unborn and the rights of the mother, equipped with necessary answers to the underlying question.<sup>181</sup>

As discussed *supra*, Congress’s authority to enact this kind of legislation is found in Section 5 of the Fourteenth Amendment,<sup>182</sup> which empowers Congress to enforce the amendment “by appropriate legislation.”<sup>183</sup> The test for determining whether Section 5 legislation is appropriate was stated by the Supreme Court in *Katzenbach v. Morgan* to be the same as the test for legislation enacted under the Necessary and Proper Clause, as articulated by Justice John Marshall in *McCulloch v. Maryland*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>184</sup> Thus, the only questions to ask about this proposed legislation are whether it is plainly adapted to a legitimate end, and whether the means adopted

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<sup>178</sup> *Id.* 12, 18.

<sup>179</sup> *Id.* at 18.

<sup>180</sup> *Id.* at 21.

<sup>181</sup> *Id.*

<sup>182</sup> *See supra* Part II.B.1.

<sup>183</sup> U.S. CONST. amend. XIV, § 5.

<sup>184</sup> *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

are prohibited by the Constitution.<sup>185</sup> Examining S. 158 as an example, such legislation would plainly be adapted to the legitimate end of answering the necessary preliminary questions of human life and its value, for the purpose of establishing a basis for a sensible national policy. Further, the legislation is not prohibited by the Constitution, because it does not attempt to do anything other than state congressional findings of fact.

#### CONCLUSION

Twenty-four years ago, the Court attempted to make clear the “jurisprudence of doubt” that it had created and fostered for nineteen years by its abortion decisions beginning with and following *Roe*. Clearly, the attempt failed: the abortion issue is still a legally unsettled issue, as evidenced by recent circuit court cases questioning *Roe* and *Casey*’s central holdings,<sup>186</sup> and by the fact that the Supreme Court is still deciding abortion cases.<sup>187</sup> The true doubt that clouds this area of jurisprudence is the lack of answers to the fundamental questions underlying the abortion issue: when does human life begin, and should all human life be valued equally? These questions are difficult only because of the implications they carry for society, but that is no reason to leave them unanswered. The people of America, acting through their representatives in Congress, must answer these questions once and for all. Only then can the true jurisprudence of doubt be made clear.

*Noah J. DiPasquale\**

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<sup>185</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

<sup>186</sup> *See, e.g., MKB Mgmt. v. Stenehjem*, 795 F.3d 768, 773–74 (8th Cir. 2015) (“Although controlling Supreme Court precedent dictates the outcome in this case, good reasons exist for the Court to reevaluate its jurisprudence.”).

<sup>187</sup> *E.g., Whole Woman’s Health v. Hellerstedt*, No. 15-274, slip op. at 1–2 (June 27, 2016).

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