

OF PERSONS AND PRENATAL HUMANS: WHY THE
CONSTITUTION IS NOT SILENT ON ABORTION

by
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Many jurists and legal commentators have concluded that the Constitution does not protect a woman's right to terminate a pregnancy because nothing in the Constitution's text and no principle or rule derived from its structure, internal logic, or propositions supports striking down restrictive legislation on abortion. In short, Roe v. Wade, Planned Parenthood of Southeastern Pennsylvania v. Casey, and their progeny have been wrongly decided because the Constitution has absolutely no bearing on abortion other than to leave it to the legislative branch.

The conclusion that the Constitution is silent on abortion is false because the Constitution, in the text of the Fourteenth Amendment pertaining to the basic rights of persons and their entitlement to the equal protection of the laws, does have something to say about abortion. The Fourteenth Amendment grants only persons basic rights to life, liberty, property, and the equal protection of the laws. Pregnant females undoubtedly are constitutional persons. The prenatal humans they gestate may or may not be constitutional persons, but they must be one or the other. Consequently, prenatal humans either have the same basic rights on equal terms with born constitutional persons or they do not.

If prenatal humans are not constitutional persons, then they lack basic constitutional rights. The constitutional status of pregnant women who are persons with basic rights, then, is necessarily superior to that of nonpersons, and this superior status entitles them to have an abortion if necessary to preserve their lives or avoid significant damage to their health. It also entitles them to end their pregnancies to some extent as an exercise of their liberty.

If prenatal humans are constitutional persons, then the Fourteenth Amendment grants the unborn the same right to life possessed by all other persons and requires the State to afford that life the same protection it gives

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to all other persons. As the State cannot justify the routine killing of one class of blameless persons by another, the Constitution requires the State to ban all abortions. Therefore, regardless of whether prenatal humans are or are not constitutional persons, the Constitution significantly affects the State's power to regulate abortion, and the conclusion that the Constitution is silent on abortion must be false.

However, the ascription of constitutional personhood to unborn humans results in women losing their fundamental rights to maintain bodily integrity and refuse medical treatment, to exercise autonomy over the conduct of their daily lives on the same basis as all other persons, and to avoid subordination of their vital interests in order to preserve the interests of another. This creates a dangerous constitutional anomaly and results in an unacceptable destruction of the Constitution's commitment to equality with respect to the basic rights of all persons. This Article argues that the only way to avoid this anomaly is not to regard prenatal humans as constitutional persons. Nevertheless, the State has a morally legitimate interest in valuing and protecting prenatal humans—even a moral obligation to do so, and it may enforce that interest, provided that it does not violate the fundamental rights and interests of persons.

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I. INTRODUCTION

Both *Roe v. Wade*¹ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*² hold that a woman's right to terminate her pregnancy is grounded in the Federal Constitution. The single most common and, if true, devastating criticism of these holdings is that the Constitution does not protect a woman's right to terminate a pregnancy because it is altogether silent on this matter. If the Constitution says nothing about abortion either pro or con, the legal determination of whether or when a woman may have an abortion belongs solely to the political process. Any legal resolution of the seemingly intractable abortion controversy, then, must come from the people and their elected representatives and not at all from the judiciary's interpretation of the Constitution.

In his dissent to both *Roe* and *Doe v. Bolton*,³ Justice White first formulated the claim that the Constitution provides no support to *Roe*'s invalidation of state abortion regulation.

I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. . . . This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.⁴

Justice Scalia has reached the same conclusion with characteristic certainty.

The issue is whether [the power of a woman to abort her unborn child] is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.⁵

Justice Thomas has reached a similar conclusion.

[The] decision [in *Roe*] was grievously wrong. . . . Abortion is a unique act, in which a woman's exercise of control over her own body ends, depending on one's view, human life or potential

¹ 410 U.S. 113, 153 (1973) (right to privacy).

² 505 U.S. 833, 846–53 (1992) (right to liberty).

³ *Doe v. Bolton*, 410 U.S. 179 (1973).

⁴ *Id.* at 221–22 (White, J., dissenting).

⁵ *Casey*, 505 U.S. at 980 (Scalia, J., concurring in the judgment in part and dissenting in part).

human life. Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.⁶

Many constitutional scholars and commentators have reached the same basic conclusion about *Roe's* lack of constitutional foundation. John Hart Ely famously characterized *Roe* as “a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”⁷ Specifically, Professor Ely criticized *Roe's* “super-protected right” to an abortion as “not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.”⁸ Robert Bork has equally unkind words for *Roe's* constitutional underpinnings.

Unfortunately, in the entire opinion there is not one line of explanation, not one sentence that qualifies as legal argument. Nor has the Court in the sixteen years since ever provided the explanation lacking in 1973. It is unlikely that it ever will, because the right to abort, whatever one thinks of it, is not to be found in the Constitution.⁹

Professor Paulsen has also argued that the Constitution does not contain anything remotely related to a right to have an abortion.

The Constitution quite obviously does not contain a right to abortion. No rule or principle supplied by a fair reading of the text of the Constitution; no rule or principle fairly derived from the Constitution’s structure or internal logic or deducible from other clear propositions contained therein . . . remotely supports [striking down restrictive abortion laws].¹⁰

However, those who for whatever reason claim that the Constitution has absolutely no bearing on abortion, other than to leave its legal management to the political branch (hereinafter collectively referred to as the “Constitutional Silence Argument”), are mistaken. The conclusion

⁶ *Stenberg v. Carhart* (*Carhart I*), 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) (citations omitted); *Gonzales v. Carhart* (*Carhart II*), 127 S. Ct. 1610, 1639 (2007) (Thomas, J., concurring) (citations omitted) (“[T]he Court’s abortion jurisprudence . . . has no basis in the Constitution.”).

⁷ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (footnote omitted).

⁸ *Id.* at 935–36 (footnote omitted).

⁹ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 112 (1990).

¹⁰ Michael Stokes Paulsen, *Paulsen, J., dissenting, in WHAT ROE V. WADE SHOULD HAVE SAID* 196, 196–97 (Jack M. Balkin ed., 2005) (writing as if he were a judge dissenting to a fictitious version of the majority position in *Roe* striking down restrictive abortion statutes).

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of the Constitutional Silence Argument is false because the Constitution, in the text of the Fourteenth Amendment pertaining to the basic rights of persons and their entitlement to the equal protection of the laws, *does* have something to say about abortion.

The Fourteenth Amendment grants only *persons* basic rights to life, liberty, and property against government interference and guarantees that all persons possess these rights equally. The females who become pregnant undoubtedly are constitutional persons. The prenatal humans¹¹ they gestate may or may not be constitutional persons,¹² but *they must be one or the other*. Consequently, prenatal humans either have the same basic rights on equal terms with born constitutional persons or they do not. “[T]he Fourteenth Amendment . . . uses the term ‘person’ in a crucial context: it declares that all persons must be treated as equals. The question is therefore inescapable whether a fetus is a person for the purposes of that clause—whether a fetus is a *constitutional* person.”¹³

If prenatal humans are not constitutional persons, then they lack a constitutionally protected right to life, liberty, and property, and they are not entitled to the equal protection of the laws. The constitutional status of pregnant women who are persons with basic rights is necessarily superior to that of nonpersons, and this superior status entitles them to have an abortion if necessary to preserve their lives and avoid significant damage to their health. It also entitles them to end their pregnancies as an exercise of their right to liberty, although not without limit. Correspondingly, this status prevents the State¹⁴ from asserting an interest in prenatal humans that outweighs the pregnant person’s right to preserve her life and significant health interests, or to exercise her right to liberty at least to some extent.

¹¹ I use the term “prenatal humans” to refer to all unborn human entities (zygote, pre-embryo, embryo, and fetus) within a human female’s body from the end of the process (it is not a “moment”) of conception to birth, rather than “fetuses” which is often used, albeit inaccurately, to identify all unborn humans.

¹² My discussion is limited to the constitutional status of natural “persons” (living, organic beings, such as born human beings), and the legal status of natural nonpersons (living, organic beings other than persons, such as nonhuman animals and plants). Artificial (nonliving, nonorganic) persons, such as corporations, exist in our constitutional scheme and have rights under the Fourteenth Amendment. *E.g.*, *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897); *Smyth v. Ames*, 169 U.S. 466, 522 (1898). However, corporations are constitutionally and practically quite different from natural persons. For example, they lack the Fifth Amendment right to avoid self-incrimination, *Bellis v. United States*, 417 U.S. 85, 90 (1974), which all natural persons must possess. In any event, corporations have no stake in the present discussion of constitutional personhood and abortion like that of natural persons, especially females.

¹³ RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 23 (1993).

¹⁴ Hereinafter, “State” will refer collectively to governmental entities that have authority to regulate abortion.

On the other hand, if prenatal humans are constitutional persons, then the Fourteenth Amendment grants the unborn the same right to life possessed by all other persons, and requires the State to afford that life the same protection it gives to all other persons. However, laws allowing abortion as it is practiced today would then permit one class of persons (pregnant women) to routinely and intentionally kill another class of persons (prenatal humans) with impunity, a result literally at odds with the Constitution's demand that all *persons* receive the *equal* protection of the laws. Unless the State can fairly justify the killing of unborn persons by another means (such as self-defense, necessity, duress, or the law of Samaritanism) that comports with the Constitution's guarantee of the equal personhood of the unborn, due process, and other relevant constitutional considerations, the Constitution requires the State to ban all abortions.

Therefore, regardless of whether prenatal humans are or are not constitutional persons, the Constitution significantly affects the State's power to regulate abortion. As the conclusion of the Constitutional Silence Argument must then be false, the basic constitutional debate must shift to the proper interpretation of the meaning and significance of Fourteenth Amendment personhood for State regulation of abortion. It is important to note that none of this Article's arguments about constitutional personhood directly rest upon the precedential validity of either *Roe* or *Casey*.¹⁵

Part II develops the structure of constitutional personhood as it arises out of the text of the Fourteenth Amendment's Due Process and Equal Protection Clauses. The basic elements of this structure are: (1) constitutional persons have the highest form of legal status; (2) the most important right constitutional persons have is the right to life; (3) all constitutional persons have equal value and basic rights, and they must be treated by the State in accordance with the formal principle of justice; (4) constitutional personhood must be a categorical concept; and (5) when the State protects the lives of persons from being wrongfully taken, it must protect all persons equally. This section provides the foundation for the later arguments about the significance of constitutional personhood for State regulation of abortion.

Part III assumes that prenatal humans *are not* constitutional persons and contends that the structure of constitutional personhood as established by the Fourteenth Amendment requires the State to permit abortion if necessary to preserve the life of a pregnant woman, protect her significant health interests, or exercise her liberty at least to some extent. It argues that in the absence of the Constitution giving nonpersons any rights, the State cannot completely subordinate the constitutionally guaranteed rights to life and liberty of persons to any

¹⁵ I do not herein defend the account of either Court as to how the Constitution addresses abortion.

legitimate interests it has in prenatal humans or to any rights the State may choose to give them.

Part IV assumes that prenatal humans *are* constitutional persons and claims that the Equal Protection Clause requires the State to ban all abortions if it otherwise prohibits murder or child endangerment. It argues that under the assumption that unborn humans are constitutional persons, no other standard legal doctrine such as self-defense, necessity, duress, or the law of Samaritanism can be properly utilized by the State to justify abortion.

Part V also assumes that prenatal humans are constitutional persons and that the unborn are children who have not yet been born. Unborn children are entitled under the Equal Protection Clause to the same protection the State offers to born children by means of laws prohibiting medical neglect and other behavior of parents that illegally endangers their offspring. Consequently, the State is constitutionally required to intervene to protect the life and health of unborn children in the same way it intervenes to protect born children, even though its intervention to protect the unborn requires invasion of the mother's bodily integrity if the mother refuses to consent to the intervention. However, granting unborn children the equal protection of medical neglect and child endangerment laws raises serious constitutional problems with respect to the rights of the mothers of unborn children to bodily integrity and to refuse medical treatment.

Part VI claims that the constitutional problems identified in the previous section actually constitute a dangerous constitutional anomaly and result in an unacceptable destruction of the Constitution's commitment to equality in basic rights for all persons, and argues that the only way to avoid this anomaly is not to regard prenatal humans as constitutional persons. The ascription of the status of constitutional personhood to unborn humans results in women losing their fundamental rights to maintain bodily integrity and refuse medical treatment, to exercise autonomy over the conduct of their daily lives as all other persons, and to avoid subordination of their vital interests in order to preserve the interests of another. Part VI concludes with a discussion of how the State has a morally legitimate interest in valuing and protecting prenatal humans—even a moral obligation to do so, provided that it does not then violate the fundamental rights and interests of persons.

II. THE STRUCTURE AND SIGNIFICANCE OF CONSTITUTIONAL PERSONHOOD

The Fifth and Fourteenth Amendments respectively forbid the federal government and the states from depriving any "person" of "life,

liberty, or property, without due process of law”¹⁶ While only the Fourteenth Amendment forbids denying “any person within its jurisdiction the equal protection of the laws,” the Supreme Court has held that the equal protection guarantee applies to the federal government through the Due Process Clause of the Fifth Amendment,¹⁷ and that equal protection analysis is the same under both constitutional provisions.¹⁸ Expressed affirmatively, the Constitution requires the State to grant each individual person substantive and procedural due process rights to life, liberty, and property, and to afford each person the equal protection of the laws.

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” It is settled beyond question that the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.”¹⁹

In this way the Constitution explicitly recognizes persons as having the highest form of constitutional and legal status. Only the life, liberty, and property of persons are protected from State interference; only persons must receive the equal protection of the laws. The Constitution does not grant these fundamental rights to other entities.

The single most important legal (or moral) right any living entity can have is the right to life. Death irrevocably takes away “the right to have rights,”²⁰ and extinguishes the very possibility of being benefited or harmed. “[T]he State, by the Fourteenth Amendment, is bound to respect” “the primacy of the [person’s] interest in life”²¹ Persons suffer the ultimate harm by being prematurely deprived of life.

[A]n untimely death is a deprivation of a quite fundamental and irreversible kind. It is irreversible because, once dead, always dead. It is fundamental because death forecloses *all* possibilities of finding satisfaction. Once dead, the individual who had preferences, who could find satisfaction in this or that, who could exercise preference

¹⁶ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

¹⁷ U.S. CONST. amend. XIV, § 1; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

¹⁸ *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

¹⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (citations omitted).

²⁰ *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). Accordingly, “death is the ultimate sanction.” *Id.* at 286.

²¹ *County of Sacramento v. Lewis*, 523 U.S. 833, 857–58 (1998) (Kennedy, J., concurring); *Washington v. Glucksberg*, 521 U.S. 702, 746 (1997) (Stevens, J., concurring in the judgment) (The State’s “‘unqualified interest in the preservation of human life’ . . . which is equated with ‘the sanctity of life’ . . . not only justifies—it commands—maximum protection of every individual’s interest in remaining alive”) (citations omitted).

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autonomy, can do this no more. Death is the ultimate harm because it is the ultimate loss—the loss of life itself.²²

Only constitutional persons have a presumptive right to life as against the State,²³ although the State should be obligated to take minimal reasonable steps to protect this right from invasion by private parties as well.²⁴ Because living nonpersons lack a right to life and may be killed by the State for any reason without offending the Constitution (putting aside their status as property), their legal status is necessarily subordinate to that of constitutional persons. It follows that the lives of constitutional persons must take precedence over the lives of nonpersons if the two come into conflict, or if the sacrifice of a nonperson's life is necessary to save the life of a person.

The Fourteenth Amendment expressly establishes that all persons are equal and allows no differences or classes among persons in their entitlement to the fundamental rights to life, liberty, and property.

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle²⁵

²² TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 100 (2d ed. 2004).

²³ The State has the constitutional power to deliberately end the life of persons who have committed certain serious crimes after providing them with due process. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

²⁴ Persons have “no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). Consequently, the State is not required by the Constitution “to protect the life, liberty, and property of its citizens against invasion by private actors.” *Id.* at 195. However, the Constitution's express grant to persons of a prima facie right to life against the State is by itself insufficient to make this most fundamental and important right meaningful: everyone should be prohibited by the State from taking the life of a person in a morally unjustifiable manner. “[T]he States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime.” *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280 (1990). Yet *DeShaney* effectively holds that criminal homicide laws could constitutionally be repealed. It is likewise anomalous for the Court to uphold State assisted-suicide bans as “longstanding expressions of the States' commitment to the protection and preservation of all human life,” *Glucksberg*, 521 U.S. at 710, and to hold that “a State may properly . . . assert an unqualified interest in the preservation of human life” *Cruzan*, 497 U.S. at 282, and yet simultaneously hold that the State is not constitutionally obligated to protect that life from being wrongfully taken by private agents. If only State agents have a constitutional duty to refrain from wrongfully killing persons, the right to life of persons has little meaning.

²⁵ *Romer v. Evans*, 517 U.S. 620, 623 (1996) (citations omitted). In his dissenting opinion in *Plessy*, Justice Harlan uses the term “citizens” to designate those who may not be categorized with respect to their possession of fundamental rights, while the *Romer* Court uses the term “persons.” *Id.* at 631; *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Although the same point about equal rights applies to

Furthermore, the constitutional guarantee of equal protection for persons requires the State to abide by the formal principle of justice.²⁶ “The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike.”²⁷ Persons must be treated similarly when they are similarly situated because each has equal value and dignity. The Fourteenth Amendment declares that “all persons . . . shall stand equal before the laws of the States”²⁸

The text of the Fourteenth Amendment mandates that constitutional personhood be a categorical concept, one that does not admit degrees or conditions. The Amendment specifies that all persons have the fundamental rights it lists: the State may not deprive “*any* person of life, liberty, or property, without due process of law; nor [may it] deny to *any* person within its jurisdiction the equal protection of the laws.”²⁹ The text of the Amendment allows no conditions to attach to the individual’s possession of the fundamental rights it guarantees, and no constitutional person possesses fundamental rights partially or only to a certain degree. “One either has [personhood], or one does not. There are no in-betweens. Moreover, all those who have it, have it equally. It does not come in degrees.”³⁰

The structure of constitutional personhood in the Fourteenth Amendment is incompatible with the notion that some persons who possess certain virtues, talents, or wealth are owed different or better fundamental rights than those who possess these to a lesser extent, or even lack them entirely. Consequently, a claim such as Aristotle’s that “some human beings are slaves by nature” whose “function is to serve” their superiors³¹ is utterly incompatible with constitutional personhood. A non-categorical concept of constitutional personhood would be “morally pernicious, providing . . . the foundation of the most objectionable forms of social, political, and legal discrimination—chattel

both, the two groups are not coextensive. Although all citizens are constitutional persons, not all constitutional persons are citizens. A foreign visitor to the United States is not a citizen, but she nevertheless is a person entitled to fundamental rights to life, liberty, and property.

²⁶ See REGAN, *supra* note 22, at 128 (“The idea of impartiality is at the heart of what sometimes is referred to as the *formal principle of justice*, the principle that justice is the similar, and injustice the dissimilar, treatment of similar individuals.”).

²⁷ *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 439 (1985) (citation omitted).

²⁸ *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879) (emphasis added).

²⁹ U.S. CONST. amend. XIV, § 1 (emphasis added).

³⁰ REGAN, *supra* note 22, at 240–41 (referring to inherent value as a categorical concept) (footnote omitted).

³¹ *Id.* at 234.

slavery, rigid caste systems, and gross disparities in the quality of life available to citizens in the same state”³²

Consequently, the Constitution requires constitutional persons’ most important right, the right to life, to be protected equally against wrongful State deprivation. Moreover, once the State criminalizes the wrongful taking of the lives of persons by private parties, it likewise requires the State to protect their lives equally from deprivation by them as well. Accordingly, the law protects each person from being wrongfully deprived of life regardless of his or her circumstances or the quality or extent of life. “[T]he lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy”³³ Constitutional persons have fundamental rights quite apart from considerations such as their native intelligence, social productivity, race, age, national origin, relative state of health, physical abilities, gender, or wealth, and their possession of them does not vary with an individual’s utility to society or relationship with others.

III. PRENATAL HUMANS AS CONSTITUTIONAL NONPERSONS AND ABORTION

If unborn humans are not constitutional persons and pregnant women are, the structure of constitutional personhood has direct consequences for the State’s power to regulate abortion because the Constitution requires the State to place the basic rights and interests of persons above any value the State may choose to attribute to nonpersons. Consequently, in this case the Constitution grants pregnant women some access to abortion precisely because they are persons and the unborn are not, and the conclusion of the Constitutional Silence Argument is false.

While persons have full constitutional status and fundamental rights, nonpersons lack any constitutional status. The State has no obligations whatsoever toward them and is not required to grant them any protections or rights. Nonpersons lack a constitutionally guaranteed right to life, liberty, and property, and the State can treat them unequally. Putting aside any consideration of whether they are some person’s property, nonpersons may be killed or have their liberty (if they have

³² *Id.* Regan is attacking what he calls perfectionist theories of justice and is not referring to either constitutional or moral personhood, but his argument nevertheless logically applies to constitutional personhood as I am developing it.

³³ *Washington v. Glucksberg*, 521 U.S. 702, 732 (1997); *id.* at 714–15 (citing *Blackburn*); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 295–96 (1990) (Scalia, J., concurring) (citing *Blackburn*); *Blackburn v. State*, 23 Ohio St. 146, 163 (1873) (“The lives of all are equally under the protection of the law, and under that protection to their last moment. The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life’s enjoyment, and anxious to continue to live.”).

such) restricted at will by the State without offending the Constitution. In short, nonpersons must have a constitutional and legal status inferior to that of persons.

Due to their exclusive constitutional status as express bearers of rights and their possession of the highest form of legal status, the constitutionally guaranteed right to life of persons cannot be sacrificed for the sake of nonpersons. More precisely, the State cannot, consistent with the Constitution, require persons to suffer the ultimate harm of death in order to vindicate any interest it has in nonpersons. This is so regardless of the interest the State asserts in nonpersons; the State cannot transform nonpersons into persons by asserting some interest in them that trumps the constitutionally guaranteed basic rights of persons.

The right to life of persons has such a privileged place in our constitutional scheme that the State cannot, consistent with the Constitution, enforce a law requiring a person to sacrifice her life for a nonperson if the latter poses any “real and identifiable” threat to the life of the person.³⁴ Medical conditions, such as heart disease and hyperemesis gravidarum, pose such a risk to pregnant women.³⁵ Consequently, because prenatal humans are not constitutional persons, the State cannot ban the performance of abortions necessary to preserve a pregnant woman’s life, who undoubtedly is a constitutional person, to vindicate its interest in the unborn—regardless of gestational age or developmental stage.

Furthermore, a similar analysis applies to abortions necessary to prevent the infliction of significant harm³⁶ to the health of pregnant women. Constitutional persons have a fundamental interest in the preservation of their health because health is inextricably linked with maintaining their personal well-being and exercising their liberty. Typically, persons deeply want to avoid not only the loss of their lives, but also damage to their health through pain, suffering, dysfunction, and disability. “[P]ain and suffering are . . . experiences that people have strong desires to avoid, both because of the intrinsic quality of the experience and because of their effects on the capacity to pursue and

³⁴ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 807 (1986) (White, J., dissenting) (referring to health risks); *id.* at 832 (O’Connor, J., dissenting).

³⁵ Ashraf Yacoub & M. Jocelyne Martel, *Pregnancy in a Patient with Primary Dilated Cardiomyopathy*, 99 *OBSTETRICS & GYNECOLOGY* 928 (2002) (pregnancy in patients with primary dilated cardiomyopathy can be extremely hazardous, resulting in cardiac failure and even death); Victor Charlin et al., *Parenteral Nutrition in Hyperemesis Gravidarum*, 9 *NUTRITION* 29 (1993) (hyperemesis gravidarum threatens the mother’s life when the severity of symptoms almost completely prevents the intake of food).

³⁶ *Compare Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006) (abortion law unconstitutional if it subjects women to “significant health risks”).

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achieve other goals and purposes.”³⁷ Health, understood conservatively as the absence of pain, suffering, and serious dysfunction or disability, is a primary good³⁸ for all, that is, “there is no need to know what a particular person’s other ends, preferences, and values are in order to know that health is good for that individual.”³⁹ However persons may wish to live out their lives, whatever values they may wish to embrace, they must rationally accept the basic importance of health, even if they do not assign the same weight to good health or even understand it in the same way.⁴⁰

Serious health problems obviously can diminish or destroy the ability of constitutional persons to exercise their liberty:

to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁴¹

The health and well-being of persons is thoroughly protected both by the civil law, which gives persons a cause of action for negligently and intentionally caused personal injury, and by the criminal law, which prohibits knowingly harming persons in any substantial manner. For example, the criminal prohibition on mayhem is meant to protect persons’ health by preserving the integrity and functioning of persons’ bodies.⁴² Aggravated mayhem, the intentional permanent disabling or disfigurement of a person or depriving a person of a limb, organ, or member of his or her body, is an even more serious crime.⁴³ Nonhuman animals, having no protections or rights under common law and only the

³⁷ PRESIDENT’S COMM’N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. AND BIOMED. AND BEHAV’L RESEARCH, SECURING ACCESS TO HEALTH CARE 16 (1983).

³⁸ “[P]rimary goods . . . are things which it is supposed a rational man wants whatever else he wants. Regardless of what an individual’s rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less. With more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be.” JOHN RAWLS, A THEORY OF JUSTICE 92 (1971).

³⁹ PRESIDENT’S COMM’N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. AND BIOMED. AND BEHAV’L RESEARCH, *supra* note 37, at 16.

⁴⁰ *Id.*

⁴¹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citations omitted).

⁴² *E.g.*, CAL. PENAL CODE tit. 8, § 203 (2008) (“Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.”). Mayhem is punishable by two, four, or eight years in state prison. CAL. PENAL CODE tit. 8, § 204 (2008).

⁴³ *E.g.*, CAL. PENAL CODE tit. 8, § 205 (2008) (punishment by life with possibility of parole).

protection of statutory anticruelty laws, are routinely legally killed when they pose a threat to persons.⁴⁴

Consequently, when a woman's health would be significantly harmed by continuing a pregnancy and she wishes to avoid this harm by ending her pregnancy, the Constitution forbids the State from denying her access to an abortion by criminalizing this procedure to protect unborn humans who are not constitutional persons. For example, hyperemesis gravidarum is a disease of pregnancy resulting in unrelenting, excessive nausea and/or vomiting that prevents an adequate intake of food and fluids. It is associated with complications such as gastric ulcers, esophageal bleeding, malnutrition, debilitating fatigue, renal failure, and Wernicke encephalopathy.⁴⁵ In some rare, severe cases, medical treatment of this condition fails, and the woman is faced with undergoing hyperalimentation to provide her with nutrition,⁴⁶ having an abortion to end the pregnancy and avoid these and other dangerous or debilitating symptoms, or starving to death. Out of deference to the constitutionally unique value of persons, the State must allow women to protect their health by electing to have an abortion in this and other situations where their significant health interests are at stake, regardless of the gestational age of the prenatal humans at issue. "Significant health interests" should be understood to include those related to mental⁴⁷ as well as physical health.

In addition to protection from their life being taken and their significant health interests being damaged by State enforcement of an interest in nonpersons, the Fourteenth Amendment guarantees persons a broader right to liberty. The case for allowing women the liberty to terminate their pregnancies is familiar. The Constitution affords protection:

to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a

⁴⁴ *E.g.*, PENN. STAT. tit. 3, § 459-302(a) (2008) (State agents may kill dogs running at large if they "constitute a threat to the public health and welfare.").

⁴⁵ *See* Her Foundation, Hyperemesis Education and Research, Overview, <http://www.helper.org/hyperemesis-gravidarum/>; James B. Hill, Nicole P. Yost & George D. Wendel, Jr., *Acute Renal Failure in Association with Severe Hyperemesis Gravidarum*, 100 OBSTETRICS & GYNECOLOGY 1119 (2002).

⁴⁶ Hyperalimentation involves the surgical insertion of a catheter into a peripheral or central vein to the heart, through which an electric pump infuses fluid containing the proper balance of calories, protein, and electrolytes to sustain life. Its complications include sepsis, vein thrombosis, liver toxicity (which may lead to the need for a liver transplant), and overhydration. Rebecca Dresser, *Feeding the Hunger Artists: Legal Issues in Treating Anorexia Nervosa*, 1984 WIS. L. REV. 297, 310 n.110 (1984).

⁴⁷ *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) ("It cannot be questioned that psychological well-being is a facet of health.").

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child. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.⁴⁸

More specifically, “the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.”⁴⁹ In short, the liberty of pregnant women can be uniquely and severely curtailed by a State ban on abortion because of the myriad hardships pregnancy can impose. It is outside the State’s proper constitutional power to force women to be mothers even if it sees this as her natural or morally mandated role.

Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.⁵⁰

The State’s denying women all access to abortion and forcing them to be mothers for the sake of a nonperson, however morally valuable, places too great a burden on their liberty as constitutional persons to be constitutionally justifiable.

These arguments could lead to the conclusion that the State must always place the constitutional rights (whether to life or liberty, the latter including persons’ right to reproductive freedom⁵¹), interests, and preferences of constitutional persons ahead of any value the State might attribute to nonpersons because the former have constitutional status and the latter have none whatsoever. Although the Constitution grants full and equal status only to persons and requires the State to recognize and enforce this status, nothing in the Constitution precludes the State from having an interest in nonpersons and protecting them in some manner when it reasonably finds such entities have value, even if some burden is thereby placed on persons. Persons do have superior constitutional status to nonpersons, and their fundamental rights and interests cannot be subordinated to rights statutorily or otherwise granted to nonpersons by the State. The very important question of what

⁴⁸ *Id.* at 851 (citations omitted).

⁴⁹ *Id.* at 852; *accord*, *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.”).

⁵⁰ *Casey*, 503 U.S. at 852.

⁵¹ JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 21–42 (1994).

the Constitution may permit the State to do to protect prenatal humans if they are not constitutional persons will be put aside for now and addressed in Section VI(D) below.

IV. PRENATAL HUMANS AS CONSTITUTIONAL PERSONS AND ABORTION

If prenatal humans are constitutional persons, the conclusion of the Constitutional Silence Argument is also false because the text of the Fourteenth Amendment, combined with other standard legal doctrines, would require the State to ban all abortions—even those necessary to save the life of the mother. As constitutional persons, each individual prenatal human would personally possess the same basic rights to life, liberty, and property and the right to the equal protection of the laws on an identical basis with born persons. “It is settled beyond question that the ‘rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.’”⁵² All existing criminal homicide laws that apply to born persons would have to apply equally to the unborn. “[T]he Constitution itself certifies the responsibilities of states to protect equally all constitutional persons.”⁵³ If the unborn are constitutional persons with rights and interests of their own, “abortion violates someone’s right not to be killed, just as killing an adult is normally wrong because it violates the adult’s right not to be killed.”⁵⁴

A. *Abortion as Criminal Homicide or Child Endangerment*

If prenatal humans are constitutional persons, then “[f]irst and foremost, the state would be compelled to treat all abortion as *murder*.”⁵⁵ As induced abortions are obviously deliberate, premeditated acts and all previability⁵⁶ abortions necessarily result in the death of the prenatal human, the State would be required to treat such abortions as murder.⁵⁷ Postviability abortions performed by methods such as intact D & E (so-called “partial birth abortions”)⁵⁸ which directly kill the prenatal human would have to be considered criminal homicide by the State as well for the same reason.

⁵² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978).

⁵³ DWORKIN, *supra* note 13, at 109.

⁵⁴ *Id.* at 11.

⁵⁵ LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 121 (1990).

⁵⁶ Viability is “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992). By definition, then, a previable prenatal human would have no such possibility for living outside the womb.

⁵⁷ See WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 565–70 (2003).

⁵⁸ *Carhart II*, 127 S. Ct. 1610, 1621–24 (2007).

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Other methods of terminating a pregnancy involving a postviable prenatal human, such as prostaglandin induction or hysterotomy,⁵⁹ do not necessarily kill the prenatal human,⁶⁰ but they could put him or her at risk of harm from, for example, premature birth.⁶¹ If prenatal humans were constitutional persons like born children, the use of such methods could violate criminal laws prohibiting child endangerment. Pregnant women would be the mothers of these children and, like all other mothers, would be prohibited from doing something that endangered the lives of their children. Using California's child endangerment statute⁶² as an example, someone who willfully performed a postviability abortion would be guilty of a felony if the abortion was likely to produce great bodily harm or death, would cause the unborn child to suffer, or would inflict upon him or her unjustifiable physical pain or mental suffering. The pregnant woman, who has the "care and custody" of the unborn child she is gestating, would likewise be guilty of a felony if she, by consenting to an abortion, willfully permitted the unborn child to be injured or put him or her in a situation where his or her person or health is endangered in any way forbidden by the relevant statute.

Indeed, the Equal Protection Clause would require the State to treat abortion as criminal homicide even if the woman (and the unborn person as well) would die if the pregnancy continued. According to the Constitution, all persons have the same value and the same right to life, and the State is obligated to protect the value and basic rights of all persons evenhandedly. No person's value or basic rights are greater or more important than those of any other person. For example, assume a legislature passed a statute creating an open hunting season on previously convicted but now released child molesters and precluding application of the murder law to this particular class of persons. Undoubtedly such a statute is, given the fundamental importance of the right to life, the most literal denial of equal *protection* of law imaginable to a class of persons.

Most people think (and our laws certainly insist) that people have an equal right to life, and that the murder of a depressive handicapped octogenarian misanthrope is as heinous, and must be punished as seriously, as the murder of anyone younger or healthier

⁵⁹ *Id.* at 1623.

⁶⁰ Live births can and do follow postviability abortions, particularly late in pregnancy. Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L.J. 1451, 1457 (1984).

⁶¹ The major complications of premature birth include respiratory difficulties and apnea, intracranial hemorrhage, hydrocephalus, cerebral palsy and other neurological problems, vision problems, intestinal pathologies such as necrotizing enterocolitis, developmental delays, and learning disabilities. MayoClinic.com Premature Birth, <http://www.mayoclinic.com/health/premature-birth/DS00137/DSECTION=6>.

⁶² CAL. PENAL CODE tit. 9 § 273a (2008) (prohibiting endangerment of children by, inter alia, anyone "having the care or custody of any child").

or more valuable to others. Any other view would strike us as monstrous.⁶³

When those attacking New York's liberalized abortion law in the early 1970's conceded that the law justifiably allowed abortion to save the woman's life "because it is one life for another,"⁶⁴ the New York Court of Appeals rightly rejected the validity of this concession precisely because it violates the foundational constitutional and legal principle that the lives of all persons are of equal value. "Before the law one life is as good as another, saint or sinner, genius or imbecile, child or adult."⁶⁵

The Equal Protection Clause forbids the State to sacrifice one blameless person's life in order to save the life of another person. While no analogy to pregnancy and abortion is perfectly apposite, the intentional killing of one conjoined twin for the sake of the other offers a roughly comparable situation. Professor Laurence H. Tribe has used such a case, "in which there undeniably *are* two distinct people within a single, continuous bodily space,"⁶⁶ to reach the same conclusion about equal protection.

We would likely conclude that a conjoined twin who asked to be separated from his brother while his brother slept—so as to spare himself grave physiological injury or severe emotional trauma—and who asked to keep all the organs they shared that were necessary for life knowing that his sleeping twin would never survive such separation, would be asking for our help in committing murder. Such a twin would be asking for something that would *have to be denied by a state* bound by the Fourteenth Amendment to accord all "persons" the "equal protection of the laws."⁶⁷

Only one court⁶⁸ has ruled on the legality of a surgical separation of conjoined twins that would result directly in the death of one. The English Court of Appeal affirmed an order allowing the infant twins Jodie and Mary to be surgically separated even though this would directly end the life of Mary who was much physically weaker than Jodie and mentally impaired as well,⁶⁹ but would "give Jodie the opportunity of a separate

⁶³ DWORKIN, *supra* note 13, at 85.

⁶⁴ *Byrn v. N.Y. City Health & Hosps. Corp.*, 286 N.E.2d 887, 890 (N.Y. 1972), *appeal dismissed for want of substantial federal question*, 410 U.S. 949 (1973).

⁶⁵ *Id.*

⁶⁶ TRIBE, *supra* note 55, at 121.

⁶⁷ *Id.* (emphasis added).

⁶⁸ Jennifer N. Sawday, Note, *Separating Conjoined Twins: Legal Reverberations of Jodie and Mary's Predicament*, 24 LOY. L.A. INT'L & COMP. L. REV. 65, 66 (2002).

⁶⁹ *Re A (children) (conjoined twins)* (2000) 4 All E.R. 961, 969 (EWCA (Civ.)) ("[T]he operation will kill the weaker twin, Mary."); *id.* at 998 ("One cannot blind oneself to the fact that death for Mary is the certain consequence of [this] operation."); *id.* at 975 (Mary "has a very poorly developed 'primitive' brain.").

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good quality life.”⁷⁰ Without the surgery, both would “die within three to six months, or perhaps a little longer.”⁷¹

Although expressly acknowledging that the children were separate persons⁷² who each had equal inherent value and an equal right to life,⁷³ the Court nevertheless ruled the separation was lawful because the conflict of the duty to respect the right to life of each child required it to choose “the lesser of two evils” and find the least detrimental alternative, i.e., one dying rather than both dying.⁷⁴ The “balance [was] heavily in Jodie’s favour” because the surgery will give her “the prospects of a normal expectation of relatively normal life” while Mary was “doomed for death” anyway and the surgery would only “accelerat[e] certain death” for her.⁷⁵ The Court also justified its decision by appealing to self-defense.

The reality here—harsh as it is to state it, and unnatural as it is that it should be happening—is that Mary is killing Jodie. . . . Mary uses Jodie’s heart and lungs to receive and use Jodie’s oxygenated blood. This will cause Jodie’s heart to fail and cause Jodie’s death a surely as a slow drip of poison. . . . I can see no difference in essence between [the] resort to legitimate self-defence and the doctors coming to Jodie’s defence and removing the threat of fatal harm to her presented by Mary’s draining her life-blood.⁷⁶

Even though the Court rejected “the American terminology which would paint her to be ‘an unjust aggressor,’” it still oddly asserted that “the child is not morally innocent.”⁷⁷ The Court also claimed that “Mary may have a right to life, but she has little right to be alive” inasmuch as she is alive “because and only because, to put it bluntly, but none the less accurately, she sucks the lifeblood of Jodie and she sucks the lifeblood out of Jodie.”⁷⁸

The Court of Appeal is not taking the *equal* inherent value and *equal* right to life of each child seriously. Any “balancing” or comparing of the children’s rights, interests, characteristics, or prospects for the purpose of determining who lives and who dies ignores, indeed destroys, that equality. Consequently, it is irrelevant that Mary is dying, physically weaker, mentally abnormal, or dependent on her sister; it is likewise irrelevant that Jodie has a “normal expectation of relatively normal life” if her sister is separated and dies and irrelevant that otherwise she will die.

⁷⁰ *Id.* at 977. Jodie’s brain was normal. *Id.* at 973.

⁷¹ *Id.* at 969.

⁷² *Id.* at 994.

⁷³ *Id.* at 1000, 1010, 1026 (“in the eyes of the law Mary’s right to life must be accorded equal status with her sister Jodie’s right to life”).

⁷⁴ *Id.* at 1016.

⁷⁵ *Id.* at 1010.

⁷⁶ *Id.* at 1016, 1017; *id.* at 1010 (“Mary’s parasitic living will be the cause of Jodie’s ceasing to live.”).

⁷⁷ *Id.* at 1017.

⁷⁸ *Id.* at 1010.

“If we accept that both Mary and Jodie had equal rights to life, then we could not take Mary’s life even to save Jodie’s.”⁷⁹

The Court never even contemplates the possibility of respecting their equal worth and right to life by denying permission to perform the surgery and allowing the sisters to live—and ultimately die—together. Yet this possibility was squarely before them as the twins’ parents advocated it. “The parents cannot bring themselves to consent to the operation. The twins are equal in their eyes and they cannot agree to kill one even to save the other.”⁸⁰ But they were not truly equal in the eyes of the State or, at least, in the assessment of these three judges as representatives of the State. Like the hospital and physicians who could not “see children in their care [both] die when they know one was capable of being saved,”⁸¹ the Court failed to respect the principle of equality of persons in the face of the admittedly heavy cost of doing so in this case.

Finally, consider two explorers trapped in a small side cave after a landslide.⁸² One is unconscious, but the other is able to communicate with their companions outside and determine that rescue is many hours off, their cave is sealed so that no fresh air may enter, the available air will surely not be sufficient to support them both until rescue, and there may be enough air for one to survive. While in a sense both threaten each other with certain death because of their mere presence together, the conscious person has no legal justification to kill the other person to save her own life. If she does kill the other and lives to be rescued, the State is required to consider it a criminal homicide. The equal value of the lives of each person and the equal respect owed to each requires the admittedly tragic outcome of both living for awhile and then dying together, the same result as should have occurred in the case of Mary and Jodie.

B. The Inadequacy of the Appeal to Self-Defense, Necessity, or Duress

In response to the claim that the Fourteenth Amendment requires the State to ban all abortions if prenatal humans are constitutional persons, one could argue that the State may permit abortion, at least in some circumstances,⁸³ by expressly invoking the traditional justification

⁷⁹ Lori P. Knowles, *Hubris in the Court*, HASTINGS CENTER REPORT, Jan.–Feb. 2001, at 50, 52.

⁸⁰ *Re A*, (2000) 4 All E.R. at 969; “We believe that nature should take its course. If it’s God’s will that both our children should not survive then so be it.” JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 6 (2003) (quoting the parents).

⁸¹ *Re A*, (2000) 4 All E.R. at 987.

⁸² Compare Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949); David L. Shapiro, *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834 (1999).

⁸³ *McRae v. Califano*, 491 F. Supp. 630, 760 (E.D.N.Y. 1980) (quoting Senator Helms as stating the “doctrine of self-defense” applies to abortions necessary to save the mother’s life).

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defense of self-defense.⁸⁴ This defense legally justifies the act of one person intentionally killing another person when the former is placed in imminent danger of death or serious harm by the latter's attack. Self-defense could be said to apply to abortion when the pregnancy endangers the pregnant woman's life or threatens to inflict serious harm upon her, and the prenatal human could be characterized as an attacker. Necessity could also be seen as justifying abortion because a previability abortion would produce the least harm when she was faced with a choice of two evils:⁸⁵ either she complies with the criminal law that protects the life of the prenatal person and continues the pregnancy and her life is lost along with her unborn child, or she has the abortion and does the lesser harm by saving the life of a person already existing in the world with a personal identity and multiple human relationships. If the pregnancy truly threatens the life of the pregnant woman prior to viability, the failure to have an abortion dooms both persons to death. Performing the abortion saves one person's life, and the unborn child is no worse off as he or she dies in either event. Duress could be understood as excusing abortion because the woman was the victim of a threat to her life or health that "a person of reasonable moral strength could not fairly be expected to resist."⁸⁶

However, none of these traditional defenses can rightly be applied to abortion.⁸⁷ To be justified in using lethal force in self-defense, a person has to be in immediate danger of being killed or seriously harmed by the threatened action of another.⁸⁸ Prenatal humans obviously lack the mental and physical ability to engage in *any* action in this sense. It is the mere presence of the unborn person in her womb which endangers her, like a malignant tumor. If prenatal humans can accurately be characterized as attacking their mothers in cases where the woman is contemplating an abortion to preserve her life or health, "then all fetuses attack their mothers, and the only difference is whether the attack results in great bodily harm, or de minimis harm."⁸⁹

Furthermore, "it is necessary that the adversary's force be, or at least that the [one acting to protect herself] reasonably believe it to be, 'unlawful' force—meaning, in general, that it be a crime or tort (generally assault and battery) for the adversary to use the force."⁹⁰ The

⁸⁴ Beard v. United States, 158 U.S. 550 (1895).

⁸⁵ LAFAVE, *supra* note 57, at 395.

⁸⁶ *Id.* at 373 (internal quotation marks omitted).

⁸⁷ See generally Herbert J. Krimmel & Martin J. Foley, *Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing Its Destruction*, 46 U. CIN. L. REV. 725, 771–80 (1977).

⁸⁸ LAFAVE, *supra* note 57, at 407.

⁸⁹ Krimmel & Foley, *supra* note 87, at 775 n.261.

⁹⁰ LAFAVE, *supra* note 57, at 407; United States v. Peterson, 483 F.2d 1222, 1229 n.42, n.43 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1007 (1973) (threat must be unlawful; collecting cases at n.42); MODEL PENAL CODE § 3.04(1) (1985) (self-defense allowed only where one is defending himself "against the use of unlawful force").

unborn cannot engage in any act, much less a crime or a tort, or be blameworthy for behavior dangerous to others, and the unborn person is in no way blameworthy or responsible for being in the womb. While it is surely justifiable to defend oneself against a blameless attacker such as a psychotic person,⁹¹ the unborn cannot be attackers; they cannot set upon another in a threatening manner, and the very concept of self-defense itself logically requires an *attack*.⁹² As it is impossible for the unborn to engage in wrongful, threatening behavior, the doctrine of self-defense does not justify a woman taking the life of her unborn child to protect her own life or health interests.

Self-defense applies no more in the case of Mary, who could *do* nothing to threaten Jodie's life unjustly or otherwise, than in the case of the unborn child. Mary is not attacking Jodie or otherwise doing her wrong. She is not "using" Jodie's heart and lungs or "sucking" her blood like a vampire any more than she is slowly administering poison to her sister. Mary cannot do anything blameworthy, nor can she waive or forfeit her right to life as she is incapable of being a moral agent. Mary is a "threat" to Jodie simply because nature, fate, or God put her there, attached to her sister in an unusual way. Tellingly, the Court of Appeal denied it was conducting a "balancing of the quality of life in the sense that [it] value[d] the potential of one human life above another," yet also admitted, "it is . . . impossible not to put in the scales of each child the manner in which they are individually able to exercise their right to life."⁹³ Neither person is "exercising" her right to life in any way, much less a way that wrongs the other or alters the moral and legal equality they share.

Eileen McDonagh is the most outspoken advocate for conceptualizing abortion as a legitimate means of self-defense. She characterizes the prenatal human as "the direct cause of pregnancy, and if it makes a woman pregnant without her consent, it severely violates her bodily integrity and liberty."⁹⁴ For her, "preborn human life is a powerful intruder upon a woman's body and liberty which requires the use of deadly force to stop it by removing it," and "the law must hold it accountable for what it does."⁹⁵ While it is undoubtedly true that some women experience unwanted pregnancy as a threatening, physical

⁹¹ Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1611 (1979); Jane English, *Abortion: Beyond the Personhood Argument*, 315, 318–19, in *THE ABORTION CONTROVERSY* (Louis P. Pojman & Francis J. Beckwith eds., 1998) (mindless zombies as blameless attackers).

⁹² See *Parker v. District of Columbia*, 478 F.3d 370, 383 (D.C. Cir. 2007), aff'd *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) ("[T]he right of self-preservation . . . was understood as the right to defend oneself against attacks by lawless individuals.").

⁹³ *Re A* (children) (conjoined twins) (2000) 4 All E.R. 961, 1010 (EWCA (Civ.)).

⁹⁴ EILEEN L. MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 6 (1996).

⁹⁵ *Id.* at 141, 7.

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intrusion (especially if they have been raped), it is likewise true that an unborn human cannot fairly be considered an “agent of coercion” for purposes of self-defense. Nothing in my argument about the inapplicability of self-defense to abortion should be interpreted as denying or failing to take seriously women’s experience of unwanted pregnancy as an attack on their lives. Nevertheless, the characterization of prenatal humans as attackers for purposes of fitting abortion into the traditional legal category of self-defense is not conceptually valid.

Despite their relevance to the lesser evil analysis, neither the justification of necessity nor the excuse of duress can properly be applied to the killing of blameless unborn persons by means of abortion. First, the standard view of necessity requires that the pressure on someone to violate the criminal law “must come from the physical forces of nature (storms, privations) rather than from other human beings. (When the pressure is from human beings, the defense . . . is called duress rather than necessity.)”⁹⁶ A prenatal human is no physical force of nature, but an unborn human being. Duress cannot apply to abortion because the one applying the duress must make an “unlawful threat,”⁹⁷ and prenatal humans cannot do anything purposeful or unlawful.

Second and even more on point, the traditional and well-settled view is that neither necessity nor duress justifies intentionally killing a blameless person in response to a threat.⁹⁸ Necessity was rejected as a defense to intentional killing in the famous and venerable case *Regina v. Dudley and Stephens*.⁹⁹ Two seamen adrift in a lifeboat with two others following a shipwreck killed a dying companion for sustenance when they had been without food and water for many days and were convicted of murder. A unanimous Queen’s Bench affirmed the conviction and observed that saving one’s own life as a justification for killing a blameless person is a “proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy.”¹⁰⁰ The court also acknowledged that preserving one’s own life is “generally speaking a duty, but it may be the plainest and highest duty to sacrifice it” as well.¹⁰¹ In another extraordinary lifeboat case, *United States v. Holmes*,¹⁰² a seaman was convicted for manslaughter for throwing some passengers out of the lifeboat to lighten its burden in heavy seas which threatened to sink it. The court affirmed the conviction and noted that while seamen not needed to keep a lifeboat afloat should be sacrificed before any

⁹⁶ LAFAVE, *supra* note 57, at 395; *United States v. Dorrell*, 758 F.2d 427, 430 n.2 (9th Cir. 1985).

⁹⁷ LAFAVE, *supra* note 57 at 372.

⁹⁸ Krimmel & Foley, *supra* note 87, at 774 n.257 (collecting cases).

⁹⁹ (1884) 14 Q.B.D. 273.

¹⁰⁰ *Id.* at 281; George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 1019–21 (1999).

¹⁰¹ *Regina*, 14 Q.B.D. at 287.

¹⁰² 26 F. Cas. 360 (E.D. Pa. 1842).

passenger, people “in equal relations” should be sacrificed by lot, clearly in order to formally recognize the equal value of their lives.¹⁰³ Likewise, duress does not justify the intentional killing of a blameless person either.¹⁰⁴ “At common law, the general rule was, and still is today, what Blackstone stated: duress is no defense to killing an innocent person.”¹⁰⁵

Finally, the woman’s killing of her prenatal human cannot be properly characterized as a “lesser evil” when the two lives in question are of equal value according to the Fourteenth Amendment. As the New York Court of Appeals argued in *Byrn*, “[n]ecessity may justify in the law every kind of harm to save one’s life, except to take the life of an innocent. Before the law one life is as good as another, saint or sinner, genius or imbecile, child or adult.”¹⁰⁶ The “choice of evils” rationale for the duress defense has been judicially rejected as well. The choice of evils rationale necessarily presumes that the threatened harm to the defendant is greater than the resulting harm from the defendant’s commission of the crime. When the defendant commits murder under duress, the resulting harm (i.e. the death of an innocent person) is at least as great as the threatened harm (i.e. the death of the defendant). For this reason, the common law rejected duress as a defense to murder.¹⁰⁷

Under the Equal Protection Clause and the law that has developed around the worth of persons, the lives of all persons are of equal value. Killing one blameless person who is not an attacker to save another blameless person cannot be a *lesser* harm or evil. If the unborn are persons, then their lives must be considered to have the same value and be as worthy of protection as the lives of born persons.

C. *The Law of Samaritanism and Abortion*

A final possible justification for the State allowing at least some abortions if prenatal humans are constitutional persons is based upon “the law of Samaritanism,” the “deeply rooted principle of American law that [a person] is ordinarily not required to volunteer aid to another [person] who is in danger or in need of assistance,” a claim most

¹⁰³ *Id.* at 367.

¹⁰⁴ LAFAVE, *supra* note 57, at 372 (no such defense exists if the crime consists of killing an innocent third person).

¹⁰⁵ *People v. Anderson*, 50 P.3d 368, 370–71 (2002) (footnote omitted); *accord* *United States v. LaFleur*, 952 F.2d 1537, 1541 (9th Cir. 1991) (listing state statutes and cases that adopt the common law rule). The most prominent, albeit plainly anomalous, authority to the contrary is the official commentary to section 3.02 of the Model Penal Code which states that homicide is not excluded from the scope of the duress defense, but this commentary offers no argument for this radical departure from the well-settled common law rule and no answer to the equal protection objection. MODEL PENAL CODE § 3.02 cmt. 3 (1985).

¹⁰⁶ *Byrn v. N.Y. City Health & Hosps. Corp.*, 286 N.E.2d 887, 890 (N.Y. 1972).

¹⁰⁷ *LaFleur*, 952 F.2d at 1541 (citations omitted).

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famously explored by Professor Donald H. Regan¹⁰⁸ The constitutional argument here is that the Equal Protection Clause prevents the State from imposing on pregnant women the duty to assist unborn persons by gestating them because the State does not impose on any other person burdens “which are as extensive and as physically invasive as the burden of pregnancy and childbirth.”¹⁰⁹ Professor Tribe has endorsed this conclusion as well.

There should be no “woman’s exception” to our traditional regard for individualism and autonomy. As long as these values remain at the core of our legal system, there is thus a powerful case for the conclusion that laws prohibiting abortion—even if the fetus . . . is regarded as a person—deny women the equal protection of the laws guaranteed to all by the Fourteenth Amendment. And if this is so . . . [the *Roe*] Court could instead have said: Even if the fetus *is* a person, our Constitution forbids compelling a woman to carry it for nine months and become a mother.¹¹⁰

The main difficulty with the Samaritanism argument is that it rests on a legally and morally problematic analogy: a pregnant woman who wishes to end her pregnancy by means of an induced abortion is just like a woman (or any other person) who could save the life of another person by making a similar personal and bodily sacrifice, such as providing a segment of liver to a little girl who needs a liver transplant.¹¹¹ Interestingly, neither Professor Regan nor Tribe finds the analogy entirely convincing. The former observed the “basic problem is that the situation of the pregnant woman is *sui generis*. If we regard the pregnant woman as a potential samaritan, there is no other potential samaritan whose situation is not in some important way distinguishable.”¹¹² The latter has called the Samaritan justification for abortion (as well as that based on self-defense) “extraordinarily disturbing” and criticizes it for seeking:

to fit the relationship between a pregnant woman and the fetus she carries into the pigeonholes framed to deal with other problems in the law. We do not get much farther by comparing abortion to a nonculpable omission or a justifiable homicide than we would by analogies to property law that might try to place a fetus within a framework of uterine invitees, licensees, and trespassers. The relationship of woman and fetus is unique; it requires a unique legal analysis.¹¹³

The Samaritan analogy is of very doubtful applicability. First, its basic relevance turns on characterizing abortion as an omission, a refusal to

¹⁰⁸ Regan, *supra* note 91, at 1569.

¹⁰⁹ *Id.* at 1572.

¹¹⁰ TRIBE, *supra* note 55, at 135.

¹¹¹ *Id.* at 133.

¹¹² Regan, *supra* note 91, at 1570.

¹¹³ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1356–57 (2d ed. 1988).

provide assistance, rather than an act that causes harm to another person. Yet the dominant legal view accepts the validity of the distinction between act and omission in the related context of medically induced death¹¹⁴ and considers abortion an act.¹¹⁵ It is a mighty conceptual stretch to consider what physicians do when performing surgical or medical abortions, or what women do in arranging abortions, as failures to act. If the pregnant woman does not act to seek an abortion and none is performed, the status quo will likely prevail, and the prenatal person will continue to live. In the paradigmatic refusal to aid case, the person in need of aid is harmed or perishes.

Second, unlike a typical refusal to aid case, the purported omission of abortion is always fatal to the previable unborn person. Abortion seals the fate of the unborn person; no one else can possibly provide the needed life-saving assistance, and unborn persons are always unable to help themselves in any way. Third, judicially created and statutory exceptions to this common law doctrine exist, and all of them could reasonably apply to pregnant women.¹¹⁶ Consequently, the no-duty-to-aid rule is hardly constitutionally required. In addition, the constitutional limits on these exceptions are very unclear. While the State could not constitutionally impose on persons a duty to assist others by being crash test “dummies” in order to obtain the best evidence about vehicle safety, it may well be constitutionally entitled to require persons to assist others even if this would “interfere[] with important duties owed to others”¹¹⁷ or expose them to some risk of harm.

If prenatal humans are constitutional persons, then not only is the State obligated to ban all abortions, but it is also required to extend the equal protection of all other laws pertinent to immature children to the unborn because the two groups cannot be meaningfully distinguished.

The consequent constitutional demand to apply laws equally to born and unborn children will further illuminate the implications of attributing constitutional personhood to prenatal humans.

¹¹⁴ *Vacco v. Quill*, 521 U.S. 793, 800–04 (1997).

¹¹⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (“Abortion is a unique act. . . . Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances.”); *Carhart I*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) (“Abortion is a unique act . . .”).

¹¹⁶ Jean Braucher, *Tribal Conflict over Abortion*, 25 GA. L. REV. 595, 614 (1991) (reviewing LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990) (“[T]he common law has developed exceptions, creating a duty to help in certain circumstances, based on (1) a relationship of dependence and power, (2) a breach of a duty undertaken or (3) a ‘special relationship,’ including that of parent and child.”). Statutory exceptions to it exist as well, although none require the Samaritan to sacrifice any serious interest or take any personal risk. *E.g.*, VT. STAT. ANN. tit. 12, § 519 (2002); R.I. Gen. Laws § 11–56–1 (2002); Wis Stat. § 940.34(2) (a) (2005).

¹¹⁷ VT. STAT. ANN. tit. 12, § 519 (2002).

V. PRENATAL HUMANS AS CONSTITUTIONAL PERSONS AND EQUAL TREATMENT OF ALL CHILDREN

Prenatal humans cannot grow on trees or in the ground, nor can they develop in machines or nonhuman animals, although perhaps one day they could.¹¹⁸ Only individual women can gestate them, and they cannot survive outside that individual woman's womb until they have reached about 22 weeks of gestational age.¹¹⁹ Consequently, in order to have any possibility of surviving to birth and living for a significant period of time, a prenatal human must develop inside the body of a particular woman for at least some five and a half months. Assuming, as this Section does, that prenatal humans are constitutional persons, then they must be legally considered to be children who possess the same fundamental rights as all other children, even though they happen to exist inside another person's body for the earliest portion of their lives.

The State requires parents to provide their children with necessary medical care (as well as other necessities of life) and intervenes to protect children who are being medically (or otherwise) neglected or endangered by their parents. Unborn children are entitled under the Equal Protection Clause to the same protection the State offers to born children in this regard. Consequently, the State is constitutionally required to intervene to protect the life and health of unborn children in the same way it intervenes to protect born children, even though its intervention to protect the unborn requires invasion of the mother's bodily integrity and even if the mother refuses to consent to the intervention. However, granting unborn children the equal protection of medical neglect and child endangerment laws raises serious, unavoidable constitutional problems with respect to the rights of the mothers of unborn children to bodily integrity and to refuse medical treatment.

A. *The State and Medical Neglect of Children by Parents*

Prince v. Massachusetts recognized that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare," including "to some extent, matters of conscience and religious conviction."¹²⁰ The State has an interest in protecting the welfare of children that "is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community,

¹¹⁸ See STEPHEN COLEMAN, *THE ETHICS OF ARTIFICIAL UTERUSES: IMPLICATIONS FOR REPRODUCTION AND ABORTION* 1, 5–18 (2004) (discussing the scientific possibility of creating ectogenesis, i.e., a "device or process that would allow a foetus to develop to maturity without having to spend any time inside the body of a woman").

¹¹⁹ Sadath A. Sayeed, *Baby Doe Redux? The Department of Health and Human Services and the Born-Alive Infants Protection Act of 2002: A Cautionary Note on Normative Neonatal Practice*, 116 *PEDIATRICS* e576–e585 (2005), available at <http://www.pediatrics.org/cgi/content/full/116/4/e576>.

¹²⁰ 321 U.S. 158, 167 (1944).

that children be both safeguarded from abuses and given opportunities for growth into free and independent . . . citizens.¹²¹ It is one thing for adults to put themselves at risk of “psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”¹²² The State’s interests in child protection are “really no more than a reflection of the child’s interests,”¹²³ but, because children lack the ability to protect their own interests and rights, they need the State to defend them.

The law “vests [medical] decisional responsibility in the parents, in the first instance,” but the exercise of this responsibility is not decisive as it is “subject to review in exceptional cases by the State acting as *parens patriae*”¹²⁴ Medical neglect occurs when a parent willfully fails to seek appropriate medical attention for a child’s serious health problem or refuses to consent to necessary medical treatment for the child. State intervention to protect such children is authorized by statute in all states,¹²⁵ usually through the courts appointing a guardian authorized to secure the necessary treatment. Federal law requires all states receiving child abuse prevention funds to have procedures in place for responding to reports of medical neglect.¹²⁶

Although the statutory standards for determining parental medical neglect of their children are different,¹²⁷ “courts have exercised their

¹²¹ *Id.* at 165.

¹²² *Id.* at 170.

¹²³ John E.B. Myers, *Neglect of Children’s Health: Too Many Irons in the Fire*, 8 J.L. FAM. STUD. 317, 321 (2006).

¹²⁴ *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 627 (1986); *Development in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1199 (1980) (“The *parens patriae* power . . . is the state’s limited paternalistic power to protect or promote the welfare of certain individuals, like young children . . . who lack the capacity to act in their own best interests.”); see *Newmark v. William*, 588 A.2d 1108, 1116 (Del. 1991) (“All children indisputably have the right to enjoy a full and healthy life.”).

¹²⁵ *Making and Screening Reports of Child Abuse and Neglect*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILD WELFARE INFORMATION GATEWAY 1 (2006), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/repproc.cfm.

¹²⁶ 42 U.S.C. § 5106a (b)(2)(B) (2007).

¹²⁷ *E.g.*, ALA. CODE § 26–14–1 (2) (“failure to provide adequate . . . medical treatment”); ALASKA STAT. § 47.17.290 (2006) (“failure . . . to provide necessary . . . medical attention”); ARIZ. REV. STAT. ANN. § 8–201(21) (2004) (“inability or unwillingness . . . to provide [the] child with . . . medical care if that inability or unwillingness cause substantial risk of harm to the child’s health or welfare”); KAN. STAT. ANN. § 38–1502(cc)(3) (2000) (“failure to use resources available to treat a diagnosed medical condition if such treatment will make a child substantially more comfortable, reduce pain and suffering, correct or substantially diminish a crippling condition from worsening”); ME. REV. STAT. ANN. tit. 22, § 4002(6)(B) (2001) (deprivation of adequate health care when the deprivation cause a threat of serious harm); N.Y. JUDICIARY LAW § 1012(f)(i)(A) (2003) (“‘neglected child’ means a child . . . whose physical, mental or emotional condition has been impaired or is in

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authority to appoint a guardian for a child . . . when [parents] have made decisions that evidence substantial lack of concern for the child's interests."¹²⁸ Although all courts do not intervene consistently when parents deprive their children of medical care important to well-being but not essential to life,¹²⁹ they "uniformly have decided that State intervention is appropriate where the medical treatment sought is necessary to save the child's life."¹³⁰ If the child dies as a result of a parent's failure to provide necessary medical treatment, the State may charge her or him with some form of criminal homicide.¹³¹

In addition to taking civil action to ensure the child receives appropriate prophylactic treatment, the State may criminally prosecute for child endangerment¹³² a parent who intentionally fails to secure necessary medical treatment of her child or who otherwise acts or fails to act in a manner that creates a substantial risk of harm to the child. It is important to note that endangerment statutes require the State to prove that the child's life or health was placed in danger of probable harm and not that the child was actually injured.¹³³

imminent danger of becoming impaired as a result of the failure of his parent . . . in supplying the child with adequate . . . medical . . . or surgical care.") TEXAS FAM. CODE ANN. § 261.001(4)(B)(ii) (2006) (neglect includes "failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child.").

¹²⁸ *Bowen*, 476 U.S. at 627–28 n.13 (citing The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (1983)).

¹²⁹ See Myers, *supra* note 123, at 42–50.

¹³⁰ Custody of a Minor, 379 N.E.2d 1053, 1062 (Mass. 1978) (footnote omitted with supporting authority).

¹³¹ *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988) (conviction upheld for involuntary manslaughter and felony child endangerment for medical neglect); *Commonwealth v. Nixon*, 761 A.2d 1151 (Pa. 2000) (conviction upheld for involuntary manslaughter and endangering the welfare of a child); W. VA. CODE ANN. § 61–8D–2 (West 2008) (parent who maliciously and intentionally fails to supply child with necessary medical care resulting in child's death is guilty of murder in the first degree).

¹³² All states except Georgia have a criminal child endangerment statute. Mary M. Oliver & Willie L. Crossley, *Survey of Child Endangerment Statutes*, 7 GA BAR J., Dec. 2001, at 8, 11 (2001); see, e.g., *People v. Rippberger*, 231 Cal. App. 3d 1667 (Cal. Ct. App. 1991) (conviction of felony child endangerment upheld for withholding necessary medical treatment). However, Georgia does make the endangerment of the bodily safety of any person a misdemeanor "by consciously disregarding a substantial and unjustifiable risk that his act will . . . endanger the safety of the other person," and the disregard is grossly negligent. GA. CODE ANN. § 16–5–60(b) (West 2008).

¹³³ *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), cert. denied, 523 U.S. 1145 (1998) (post conviction relief denied on charge of criminal child neglect of viable fetus due solely to cocaine ingestion during pregnancy); *People v. Wilkenson*, 635 N.E.2d 463, 467 (Ill. App. Ct. 1994) (conviction upheld for holding a butter knife to a baby's throat though the child was unharmed). Ms. Whitner's child was born in good health.

Like medical neglect statutes, child endangerment statutes vary in form: some specifically criminalize endangering a child, some define criminal child abuse broadly to include endangerment, some create separate offenses for abuse and endangerment, and others have a single provision permitting a criminal charge of either endangerment or abuse.¹³⁴ The reach of these statutes is often quite broad. For example, Illinois makes it unlawful for any person “to willfully cause or permit the life or health of a child under the age of 18 to be endangered or to willfully cause or permit a child to be placed in circumstances that endanger the child’s life or health.”¹³⁵ Wisconsin makes it a misdemeanor to “intentionally contribute[] to the neglect of the child” through actions or a failure to act.¹³⁶ South Carolina makes it a felony for a parent to “place the child at unreasonable risk of harm affecting the child’s life, physical or mental health, or safety.”¹³⁷ In contrast to these broad injunctions, Arkansas criminally prohibits only reckless conduct which creates a “substantial risk of serious harm to the physical or mental welfare” of a child.¹³⁸

B. Unborn Children and Maternal Medical Neglect and Endangerment

Unborn children can now be medically treated directly in the womb for a number of different disorders and in a variety of ways.¹³⁹ One such method, open fetal surgery, “involves surgically opening the uterus, just as in a caesarian section, and performing the procedure directly on the fetus. In this procedure, the fetus is actually partially out of the womb for a time and exposed to the open air.”¹⁴⁰ Fetal surgery is the “surgical treatment of a fetus with certain life-threatening congenital abnormalities. Surgical intervention during pregnancy on the fetus is meant to correct problems that would be too advanced to correct after birth.”¹⁴¹ Currently, medical science has established that unborn children suffering from at least two congenital anomalies (cystic adenomatoid malformation and sacrococcygeal teratoma) can receive “unequivocal, life-saving benefit from open fetal intervention.”¹⁴²

Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1030 (1999).

¹³⁴ Oliver & Crossley, *supra* note 132, at 10 (collecting statutes).

¹³⁵ 720 ILL. COMP. STAT. ANN. § 5/12-21.6 (2002).

¹³⁶ WIS. STAT. ANN. § 948.21 (2005).

¹³⁷ S.C. CODE ANN. § 20-7-50(A)(1) (2007).

¹³⁸ ARK. CODE ANN. § 5-27-207(a)(1) (West 2007).

¹³⁹ See generally MARK I. EVANS ET AL., *PRENATAL DIAGNOSIS* (2006).

¹⁴⁰ Jonathan Dyer Stanley, *Fetal Surgery and Wrongful Death Actions on Behalf of the Unborn: An Argument for a Special Standard*, 56 VAND L. REV. 1523, 1526 (2003) (footnotes omitted).

¹⁴¹ Children’s Hospital Boston, *Fetal Surgery*, <http://www.childrenshospital.org/az/Site891/mainpageS891P0.html>.

¹⁴² Michael W. Bebbington et al., *Open Fetal Surgery*, in *PRENATAL MEDICINE* 493, 497 (John M.G. van Vugt & Lee P. Shulman eds., 2006).

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Once an unborn child is diagnosed as suffering from one of these anomalies, the attending physician would be legally required to advocate treatment for this child just like she would for any born child faced with a similar life-threatening, treatable condition. If the mother refused the treatment, the physician would be legally required to report this to the State as child neglect.¹⁴³ Given that the “State has a duty to see children receive proper care and treatment”¹⁴⁴ and if the mother refuses the intervention, the State should protect the unborn child’s life by requiring the mother to undergo the surgery. If the mother’s refusal of fetal surgery put the unborn child at serious risk of harm or resulted in its death, the State should prosecute the mother for child endangerment or criminal homicide just as if she had, for example, willfully failed to secure medical attention which would have provided life-saving antibiotics to a seriously ill, born child.¹⁴⁵

Unborn children can also be put at risk of harm if pregnant women engage in certain behaviors that may prove detrimental to the life or health of the unborn. Maternal cigarette smoking leads to an increased risk of Sudden Infant Death Syndrome, congenital defects such as cleft palate, tumors of the central nervous system, low birth weight (which in turn creates risk for severe health problems throughout a child’s life), and IQ deficits.¹⁴⁶ Maternal alcohol consumption can lead to low birth weight, developmental and behavioral abnormalities, spontaneous abortion, and still birth; heavy alcohol use can result in Fetal Alcohol Syndrome, the leading known preventable cause of mental retardation in children.¹⁴⁷ Maternal obesity has recently been associated with significantly increased risks of seven types of structural birth defects for children.¹⁴⁸ A pregnant woman who engages in yoga¹⁴⁹ might run afoul of the law. Even a pregnant woman’s consumption of fish can pose risk

¹⁴³ All states have laws that specify procedures for making and responding to reports of suspected child abuse or neglect; all states require mandated reporters (such as physicians) to make an immediate report when they suspect or know of abusive or neglectful situations. U.S. DEP’T OF HEALTH AND HUMAN SERVICES,, *supra* note 125, at 1.

¹⁴⁴ *State v. Karwath*, 199 N.W.2d 147, 150 (Iowa 1972).

¹⁴⁵ This is what caused the death of four-year old Shauntay in *Walker v. Superior Court*, 763 P.2d 852, 855 (Cal. 1988).

¹⁴⁶ Cori S. Annapolen, *Maternal Smoking During Pregnancy: Legal Responses to the Public Health Crisis*, 12 VA. J. SOC. POL’Y & L. 744, 746–51 (2005).

¹⁴⁷ Katherine Sikich, *Peeling Back the Layers of Substance Abuse During Pregnancy*, 8 DEPAUL J. HEALTH CARE L. 369, 374 (2005).

¹⁴⁸ D. Kim Waller et al., *Prepregnancy Obesity as a Risk Factor for Structural Birth Defects*, 161 ARCH PEDIATR. ADOLESC. MED. 745, 748 (2007).

¹⁴⁹ *Yoga and Pregnancy*, http://yoga.org.nz/benefits/physiological_benefits/yoga_pregnancy.htm (after first trimester of pregnancy doing yoga poses on the back should be avoided as blood flow to the uterus can be cut).

significant risks of harm to the unborn.¹⁵⁰ In short, given the intimate physical connection between the two, nearly anything a pregnant woman does or fails to do might put her unborn child at some risk of harm.

[V]irtually anything the pregnant woman does potentially has some effect on the fetus. A wide variety of acts or conditions on the part of the pregnant woman arguably could pose some threat to her fetus, including: failing to eat “well”; using nonprescription, prescription, or illegal drugs; exercising, not exercising; suffering physical harm due to accident or disease; working or living near possibly toxic substances; smoking; drinking alcohol; engaging in sexual intercourse; ingesting caffeine; being overweight; being underweight; and residing at high altitudes.¹⁵¹

Consequently, a pregnant woman could face criminal prosecution for child endangerment for any of these behaviors, as well as many others, if her prenatal human were a constitutional person because the State is obligated to protect the lives and health of the unborn to the same extent it protects the lives of born children.

A critic of the foregoing analysis might object that it is ultimately unimportant because the State has no constitutional duty to protect *any* person from the life-threatening acts or omissions of private parties. Under *DeShaney*, the State owes no constitutional duty to protect minor children from the medical neglect or endangering behavior of their parents because it has no duty to protect the lives of persons generally from “invasion by private actors.”¹⁵² However, once the State offers statutory protection to the lives of children from parental medical neglect and endangerment (as all states should and do in one way or another), then the Equal Protection Clause forbids the State from routinely or systematically denying this protection to any identifiable subclass of children.¹⁵³ For example, if, in the plain text of a statute or in actual practice,¹⁵⁴ the State refused to protect the lives of children under three years of age from parental abuse or neglect but did protect all older children, it would violate the Constitution by denying the equal protection of the laws to that subclass of persons “in the most literal sense.”¹⁵⁵ While it is true *DeShaney* permits the State to repeal child protection laws and not engage in any practice of child protection, the

¹⁵⁰ Pamela D. Harvey & C. Mark Smith, *The Mercury's Falling: The Massachusetts Approach to Reducing Mercury in the Environment*, 30 AM. J.L. & MED. 245–55 (2004) (exposure to mercury poses risk of neurological toxicity to the unborn).

¹⁵¹ Dawn Johnsen, *A New Threat to Pregnant Women's Autonomy*, HASTINGS CENTER REPORT, Aug./Sept. 1987, at 33, 35 (1987).

¹⁵² *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

¹⁵³ The State's differentiation between unborn and born children in this regard could not survive strict scrutiny as age would be an arbitrary basis for the distinction.

¹⁵⁴ If a statute is neutral on its face but is in fact applied unequally by the State to a subclass of persons, the State violates the Equal Protection Clause. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁵⁵ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

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Equal Protection Clause forbids the State from routinely denying whatever protections it does offer from *any* subclass of children, including children who happen to be unborn.

Likewise, this analysis cannot be dismissed by a proponent of the constitutional personhood of prenatal humans on the ground that unborn and born children are not similarly situated for equal protection purposes because the former exist in the body of another person and the latter do not. To hold that prenatal humans are constitutional persons is to concede that their being in a womb is irrelevant to the validity of this conclusion because prenatal humans cannot possibly exist elsewhere. To conclude that prenatal humans ought to be treated as constitutional persons is to surrender from the outset the notion that they can be distinguished from other persons for purposes of constitutional analysis because they are not yet born. Therefore, one cannot argue that unborn and born children are *not* similarly situated for equal protection purposes because the former exist only in a woman's womb.

C. Constitutional Problems and the Unborn as Persons

If unborn children are constitutional persons, they are constitutionally entitled to treatment from the State equal to that given to born children. As the State utilizes child abuse, child neglect, and child endangerment laws to protect born children, it must likewise protect unborn children. Therefore, when unborn children have life-threatening medical conditions that can be successfully treated by fetal surgery, the State should intervene by requiring the surgery to be performed. Likewise, if a pregnant mother's acts or omissions threaten the life, health, or safety of her unborn child in a way that violates child endangerment laws, the State should prosecute her for such wrongful behavior.

When enforcing medical neglect law to prevent harm to an unborn child, the State cannot act by ensuring that she undergo surgery (or other form of therapeutic medical intervention) without simultaneously invading the mother's body.

Only in pregnancy is the organic functioning of one human individual biologically inseparable from that of another. This organic unity makes it impossible for others to provide the fetus with medical care or any other presumed benefit, except by doing something to or for the woman.¹⁵⁶

State mandated treatment of unborn children also cannot occur without exposing the woman who refuses the treatment to some risk of harm.¹⁵⁷ Consequently, the State intervenes in the lives and bodies of

¹⁵⁶ Mary Anne Warren, *The Moral Significance of Birth*, 4 HYPATIA 46, 61 (1989).

¹⁵⁷ Women undergoing open fetal surgery, for example, face risks such as surgical bleeding and infection, anesthesia complications, uterine rupture and dehiscence in this and future pregnancies, spontaneous miscarriage, preterm delivery; they also

pregnant women and exposes them to some risk of harm when it acts to protect the lives and health of the children they carry in their wombs. "If the State is to enforce legal rights of a fetus (and enforcement is what makes legal rights meaningful), then it must necessarily do so by significantly affecting the mother's legal rights and interests as well."¹⁵⁸

Medical treatment of the unborn person by means of surgery compelled by the State would seem to be presumptively objectionable from the mother's point of view because it "involves a virtually total divestment of [the person's] ordinary control over surgical probing beneath [her] skin."¹⁵⁹ The Supreme Court has:

long recognized rights of privacy and bodily integrity. As early as 1891, the Court held, "no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."¹⁶⁰

When the State requires a person to undergo treatment for the sake of another person, it would be compromising the "constitutionally protected liberty interest in refusing unwanted medical treatment" possessed by all competent persons.¹⁶¹ In *Cruzan*, the Court "concluded that the right to refuse unwanted medical treatment [is] so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment."¹⁶² Justice Brennan agreed: "The right to be free from medical attention without consent, to determine what shall be done with ones own body, is deeply rooted in this Nation's traditions, as the majority acknowledges."¹⁶³ Justice O'Connor has elaborated on the link between constitutionally protected liberty and bodily integrity.

[T]he liberty interest in refusing medical treatment flows from decisions involving the State's invasions into the body. Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the

face the need for cesarean delivery in this and all future pregnancies. Future pregnancies are also at risk from uterine weakness created by the surgery. Bebbington et al., *supra* note 142, at 506.

¹⁵⁸ Lawrence J. Nelson, *The Mother and Fetus Union: What God Has Put Together, Let No Law Put Asunder?*, in *THE BEGINNING OF HUMAN LIFE* at 301, 304 (Fritz K. Beller & Robert F. Weir eds., 1994).

¹⁵⁹ *Winston v. Lee*, 470 U.S. 753, 765 (1985) (refusing to allow the State to compel surgery of a criminal suspect in an effort to secure evidence of his criminal activity).

¹⁶⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926 (1992) (citation omitted).

¹⁶¹ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

¹⁶² *Washington v. Glucksberg*, 521 U.S. 702, 721-22 n.17 (1997); *Cruzan*, 497 U.S. at 342 (Stevens, J., dissenting) ("The sanctity, and individual privacy, of the human body is obviously fundamental to liberty.")

¹⁶³ *Cruzan*, 497 U.S. at 305 (Brennan, J., dissenting).

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Due Process Clause. Our Fourth Amendment jurisprudence has echoed this same concern. See *Schmerber v. California* (“The integrity of an individual’s person is a cherished value of our society”); *Winston v. Lee* (“A compelled surgical intrusion into an individual’s body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime”). The State’s imposition of medical treatment on an unwilling competent adult necessarily involves some form of restraint and intrusion. . . . [F]orced treatment may burden that individual’s liberty interests as much as any state coercion.¹⁶⁴

In short, “as this Court’s cases make clear, involuntary medical treatment raises questions of clear constitutional importance.”¹⁶⁵

Consequently, when it enforces medical neglect laws in cases of unborn children, the State invades the pregnant women’s constitutionally protected liberty rights at the same time as it honors and enforces the constitutional right of prenatal humans to the equal protection of its laws. Although traditional doctrine recognizes certain state interests that may weigh against a competent person’s right to refuse medical treatment¹⁶⁶ and though no court has held this right to be absolute, the leading treatise states that actual outcomes of the contemporary cases “lead[] to the conclusion that the right of a competent person to refuse medical treatment *is* virtually absolute.”¹⁶⁷ To protect the unborn child’s rights, the pregnant woman’s “virtually absolute” constitutional right is necessarily suspended when she refuses treatment, and the State is in the very odd position of infringing upon the constitutional rights of one person in order to preserve the constitutional rights of another person.

In addition, women’s constitutionally protected right to liberty would be seriously threatened when their behavior is subject to State scrutiny under criminal child endangerment law. “Without doubt, [constitutional liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”¹⁶⁸ Having the autonomy to make basic decisions about how to conduct one’s daily life, choosing one’s job, food, mode of exercise, place of residence, and balancing competing values without interference by the State is surely protected by the Constitution as “an

¹⁶⁴ *Id.* at 287–88 (O’Connor, J., concurring) (citations omitted).

¹⁶⁵ *Sell v. United States*, 539 U.S. 166, 176 (2003).

¹⁶⁶ ALAN MEISEL & KATHRYN L. CERMINARA, *THE RIGHT TO DIE: THE LAW OF END OF LIFE DECISIONMAKING* 5-35–36 (3rd ed. 2004) (“The state interests generally mentioned are the preservation of life, the prevention of suicide, the protection of third parties, and the ethical integrity of the medical profession.”).

¹⁶⁷ *Id.* at 5–7.

¹⁶⁸ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citations omitted).

interest traditionally protected by our society,” a result that upholds “the basic values that underlie our society.”¹⁶⁹

Because a prenatal person is physically attached to and literally encased within a pregnant woman, the unborn can be affected by nearly anything she does or fails to do as well as by whatever happens to her body.

[V]irtually anything the pregnant woman does potentially has some effect on the fetus. A wide variety of acts or conditions on the part of the pregnant woman arguably could pose some threat to her fetus. . . . [W]ide ranging, everyday types of behavior inevitably would become suspect under laws aimed at protecting fetuses from pregnant women.¹⁷⁰

Common activities like eating, drinking, working, engaging in sexual relations, playing sports, smoking, living in unhealthful surroundings, and driving could pose a risk of harm to the unborn person.¹⁷¹

Given that almost all states have statutes prohibiting endangering a child, that many of these have a broad reach,¹⁷² and that the Equal Protection Clause requires the State to protect all children, born or unborn, in the same manner, pregnant women who engage in these and other activities on a daily basis and make a host of decisions that could negatively affect the unborn persons they gestate would be routinely at risk of violating the criminal law. A specific intent to put the child at risk is not a necessary element of this crime; an act done of the woman’s own will, “knowingly . . . not by mere accident or inadvertence” is sufficient to create liability.¹⁷³ Actual harm to the child need not result; “it is ‘sufficient that the defendant act in a manner which is *likely* to result in harm to the child, *knowing* of the likelihood of such harm coming to the child.’”¹⁷⁴ Furthermore, the conduct need not be specifically directed at the child; the woman “must simply be *aware* that the conduct may likely result in harm to a child, whether directed at a child or not.”¹⁷⁵ Even in a jurisdiction that poses a higher standard to establish child endangerment,¹⁷⁶ an act like driving while intoxicated or very sleepy

¹⁶⁹ Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1984).

¹⁷⁰ Johnsen, *supra* note 151, at 35.

¹⁷¹ See Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty*, 43 HASTINGS L.J. 569 (1992).

¹⁷² *E.g.*, New York prohibits “knowingly act[ing] in a manner likely to be injurious to the physical, mental or moral welfare of a child.” N.Y. Penal Law § 260.10(1) (McKinney 2007).

¹⁷³ *People v. Benu*, 385 N.Y.S.2d 222, 226 (N.Y. Crim. Ct. 1976).

¹⁷⁴ *People v. Johnson*, 740 N.E.2d 1075, 1076 (2000).

¹⁷⁵ *Id.*

¹⁷⁶ *E.g.*, TEX. PENAL CODE § 22.041(c) (person with custody, care, or control of a child younger than 15 years commits an offense if he intentionally, by act or omission, engages in conduct that places a child in “imminent danger of death, bodily injury, or physical or mental impairment.”). “‘Imminent’ means ‘ready to take place, near at hand, impending’ It is not sufficient that the accused placed the child in a

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could expose a pregnant woman to criminal liability for endangerment even if the child was unhurt.¹⁷⁷

VI. WHY PRENATAL HUMANS SHOULD NOT BE CONSTITUTIONAL PERSONS

Section V established the existence of serious constitutional problems under the assumption that the unborn are constitutional persons when medical treatment is necessary to preserve the life or health of prenatal persons and when commonly encountered behavior of pregnant women threatens the well-being of unborn children in contravention of existing law. But the analysis should not, indeed cannot, stop there. The attribution of constitutional personhood to prenatal humans creates a distinctive conflict of constitutional principles and values. It does not add one more garden variety conflict of rights to the constitutional arena which can be solved by application of a balancing test. This *sui generis* conflict is so fundamental, so intolerable, and so damaging to the integrity of other settled parts of the law that the only conclusion of constitutional law worthy of approval or acceptance is that prenatal humans cannot be constitutional persons.

Constitutional personhood for prenatal humans is, in the last analysis, simply incompatible with the personhood of pregnant women. “[I]t is probably the *only* case in which the legal personhood of one human being is necessarily incompatible with that of another.”¹⁷⁸ Holding the unborn to be constitutional persons with equal constitutional rights “is necessarily to deprive pregnant women of the rights to personal autonomy, physical integrity, and sometimes life itself. *There is room for only one person with full and equal rights inside a single human skin.*”¹⁷⁹

The State cannot simultaneously treat both pregnant women and prenatal humans as constitutional persons possessing equal basic rights. In many common situations involving pregnant women and the protection of unborn children under current law, the State will have no choice but to violate the Equal Protection Clause or violate another fundamental right guaranteed by the Due Process Clause. If both pregnant women and prenatal humans are constitutional persons and consistently treated as such by the State, then the Constitution’s traditional, express, and steadfast commitment to equal personhood, i.e., the equal possession of fundamental rights by all persons, would be

situation that is potentially dangerous.” *Millslagle v. State*, 81 S.W.3d 895, 898 (Tex. Ct. App. 2002) (citation omitted).

¹⁷⁷ See *Pittman v. State*, No. 14-03-01296-CR, 2005 Tex. App. LEXIS 3724 (Tex. Ct. App. May 17, 2005).

¹⁷⁸ Warren, *supra* note 156, at 61.

¹⁷⁹ *Id.* at 63. Warren’s conclusion is best thought of as referring to one “person” being fully encased within the body of another person. In contrast, dicephalic conjoined twins, who have two heads and share a single body, share a single “skin”; one is not encased within the body of another.

vitiated. In this case, a dangerous, unacceptable anomaly, an invidious inconsistency, would exist in the very heart of constitutional law. If a person's entitlement to the equal protection of the laws is sacrificed, then a "pervasive constitutional value"¹⁸⁰ that governs executive, administrative, judicial, and legislative behavior has been disregarded. If a woman's liberty and self-determination is sacrificed by treating prenatal humans as constitutional persons, then she has lost a fundamental right that all persons ought to possess and has been treated unjustly. When prenatal humans are constitutional persons, the constitutional losses pregnant women—and only pregnant women—suffer are so heavy as to become unacceptable in a free society. Nevertheless, although prenatal humans cannot be treated as constitutional persons, the State should recognize prenatal humans as having significant moral status and provide them with certain legal protections.

A. *The Loss of Pregnant Women's Fundamental Rights*

If an unborn child needs surgery, for example, to save her life or to prevent serious harm and her mother refuses the surgery in contravention of laws prohibiting parental medical neglect, the State would be obligated to intervene to protect the child by having the surgery performed. As statutes protect all children from neglect and the State has in fact intervened to prevent harm to born children from medical neglect, unborn children are equally entitled to this same form of State intervention. As "the Constitution 'neither knows nor tolerates classes among citizens'"¹⁸¹ and requires that "all persons similarly situated should be treated alike,"¹⁸² the State cannot de jure or de facto routinely fail to intervene in cases of medical neglect of unborn children while intervening in cases of born children. The status of persons as unborn cannot possibly ground a constitutionally acceptable distinction between them and born children any more than the State could refuse to apply its medical neglect laws to children with an abnormal number of chromosomes (such as trisomy 21) or to children under three years of age. All of these distinctions would be arbitrary, invidious, and constitutionally invalid.

The State's failure to protect all children equally from death or harm at the hands of their parents' preferences or neglect would violate the right of all persons to equal moral worth and equal dignity. Professor Tribe has described the Equal Protection Clause as grounding the right of all persons to treatment as an equal which "requires government to treat each individual with equal regard as a person"¹⁸³ and as having the

¹⁸⁰ TRIBE, *supra* note 113, at 1482.

¹⁸¹ *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting)).

¹⁸² *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 439 (1985).

¹⁸³ TRIBE, *supra* note 113, at 1438.

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“goal . . . to guarantee a full measure of human dignity for all.”¹⁸⁴ This comports with the common philosophical notion that “equality means that all persons are to be thought of as having the same moral worth and are entitled to equal respect and consideration in the treatment of their interests.”¹⁸⁵ The State would not be according unborn children the same worth and respect if it did not protect them from death or serious harm occasioned by the behavior of a parent on an equal basis with other children. It would be fundamentally unjust for the State to protect the born but not the similarly situated unborn.

The only alternative to treating both classes of children equally would be to repeal the medical neglect statutes which authorize the State to prevent harm to children. Although constitutionally permissible under *DeShaney*, repeal would be utterly morally indefensible. In the absence of such laws, the State would lack the authority to prevent parents from depriving vulnerable and defenseless children of life or from seriously harming them by neglect or acting on values inimical to the child’s welfare.¹⁸⁶ Of course, the State could still impose criminal penalties on the parents after the fact, but at a terrible and cruel cost in terms of the very lives and the well-being of helpless children. Without the protection of medical neglect statutes, children could be subjugated to the wishes, whims, or inattention of their parents somewhat like slaves once were to their masters. Their equal worth as persons would be nothing but inconsequential rhetoric.

When the State enforces the equal right of unborn children to the protection of medical neglect laws, it must require that unborn children receive the needed treatment even over the refusal of a pregnant woman just as it would impose the treatment over the objections of a parent of a born child. However, in the case of an unborn child, the State would necessarily violate the woman’s fundamental constitutional right to refuse medical intrusion into her body, to maintain her bodily integrity, and to be free of the risk treatment of her unborn child poses to her. When a fundamental liberty interest like the right of a competent adult to refuse medical treatment and maintain her bodily integrity is at stake, the Fourteenth Amendment forbids the State from interfering with that interest “unless the infringement is narrowly tailored to serve a compelling state interest.”¹⁸⁷ But this vital qualification on the power of the State to invade fundamental rights would not apply to these pregnant women because the State *must* ensure that the child receive treatment in

¹⁸⁴ *Id.* at 1516.

¹⁸⁵ Albert Weale, *Equality*, in 3 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 392, 393 (1998).

¹⁸⁶ *See, e.g.*, *Custody of a Minor*, 393 N.E.2d 836 (Mass. 1979) (parental provision of laetrile and metabolic therapy to their child with leukemia harmful and medically ineffective).

¹⁸⁷ *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Reno*).

order to avoid violating the Equal Protection Clause. In essence, the authority of the Constitution would take away from pregnant women who refuse necessary medical treatment for the unborn the fundamental right given to them by the Constitution to refuse physical intrusion.

Therefore, if prenatal humans are constitutional persons, the Fourteenth Amendment is put at war with itself. The Equal Protection Clause requires the State to do one thing (protect unborn children from medical neglect like it protects born children) while the Due Process Clause simultaneously requires it do something else incompatible with the first (protect the fundamental right of pregnant women to refuse physical invasion unless the infringement is narrowly tailored to serve a compelling state interest). It bears repeating here that it is illogical to argue that this analysis cannot be correct because unborn children are not similarly situated to born children for constitutional purposes. The conferring of personhood status on the unborn must itself make their existence in the womb irrelevant for purposes of constitutional analysis because they cannot exist elsewhere until they are born alive, the point at which their status as constitutional persons is as indisputable as that of their mothers. The presence of prenatal persons in the womb of another person cannot limit their fundamental rights or somehow be only partially fatal to their status as constitutional persons because personhood is a categorical concept.

Finally, no legitimate analogy exists for the forfeiture of a basic constitutional right like the liberty to refuse unwanted bodily invasion and avoid any associated risk of harm which constitutional personhood for the unborn would require of pregnant women. Conscription into the armed services, which limits liberty and places persons at direct risk of bodily harm and death, is a power the Constitution has explicitly granted to Congress,¹⁸⁸ which is utilized for the “pursuit of public purposes”¹⁸⁹ and not for the benefit of any individual person. The State does have the constitutional power to require by statute that persons be vaccinated for public health reasons (i.e., to protect others from infectious diseases),¹⁹⁰ but it does not do so to benefit an individual person. Moreover, the sanctions for noncompliance with mandatory vaccinations appear to be a fine or imprisonment for adults and exclusion from school for minors and do not include forced vaccination itself.¹⁹¹ In addition, the mandatory nature of vaccinations is seriously diluted by the fact that forty-seven states allow for religious exemptions, and seventeen states

¹⁸⁸ U.S. CONST. art. I, § 8.

¹⁸⁹ *Gillette v. United States*, 401 U.S. 437, 459 (1971).

¹⁹⁰ *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174 (1922).

¹⁹¹ Nelson, *supra* note 158, at 311.

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allow for philosophical exemptions.¹⁹² While the Supreme Court has recognized the “great importance” of the “community’s interest in fairly and accurately determining guilt or innocence” and allowed a case-by-case determination of the constitutional propriety of court orders forcing a criminal suspect to undergo surgery to obtain evidence of a crime,¹⁹³ it also acknowledged that a “crucial factor” in the analysis “is the extent to which the procedure may threaten the safety or health of the individual.”¹⁹⁴ Furthermore, even given probable cause, “a search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect.”¹⁹⁵

B. The Loss of Pregnant Women’s Autonomy

When prenatal humans are deemed constitutional persons, the necessary application of child endangerment law to pregnant women’s behavior further demonstrates how their constitutional personhood is ultimately incompatible with such personhood for the unborn. If the unborn were persons, pregnant women would be subject to criminal prosecution in an unprecedented and intrusive manner based on the conduct of their daily lives.¹⁹⁶ Acts like drinking alcohol, eating fish, or working at a job that exposes them to fetotoxic substances¹⁹⁷ could readily be found criminal although otherwise legal for all other persons, including the parents of born children. Pregnant women would be deprived of the right to make “countless important judgments critical to personal autonomy,”¹⁹⁸ a right all other persons—including parents of born children—can exercise by and large without legal restriction. While women certainly are morally obligated to consider the adverse effects of their behavior and situation on the prenatal humans they gestate, they

¹⁹² Alicia Novak, Comment: *The Religious and Philosophical Exemption to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1101 n.2 (2005).

¹⁹³ *Winston v. Lee*, 470 U.S. 753, 762 (1985). “The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual’s interests in privacy and security are weighed against society’s interests in conducting the procedure. In a given case, the question whether the community’s need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.” *Id.* at 760.

¹⁹⁴ *Id.* at 761.

¹⁹⁵ *Id.*; see, e.g., *United States v. Garcia-Ortiz*, 261 F. Supp. 2d 56 (D. P.R. 2003) (motion to remove bullet from suspect denied because of disputed health risk).

¹⁹⁶ Women might be responsible to their children in tort as well given that many states have abrogated full parental tort immunity. Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW. ENG. L. REV. 1161, 1164–66 (1991).

¹⁹⁷ E.g., *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (occupational exposure to lead entails risk of harm to fetuses).

¹⁹⁸ Johnsen, *supra* note 171, at 586.

should be permitted by the State to make decisions about their lives on the basis of other values as well. Pregnant women make:

countless decisions in the context of their rest of their lives, with all of the attendant complexities and pressures. Pregnant women do not decide in a vacuum how well they will eat, or how far into a pregnancy they will work, or when they should seek or follow the advice of a physician. They should not and cannot make these decisions solely on the basis of what is most likely to reduce the chances of harming the fetus. Among the many factors that influence a pregnant woman's behavior are her economic status, her employment situation, her access to prenatal care, her physical and mental condition prior to and during pregnancy, whether she has other children or a husband and the demands they make on her, whether her husband is supportive or abusive, and whether before or during her pregnancy she was addicted to cigarettes, alcohol or drugs.¹⁹⁹

The Constitution should not be interpreted to allow the State to “transform a pregnant woman into an ideal baby-making machine”²⁰⁰ by taking away the kind of decisions that free women are entitled to make.

Furthermore, once a woman became pregnant regardless of her intent or fault, she would be unable legally to do anything to escape State scrutiny of her behavior imposed upon her by her pregnant state—other than to hope for a spontaneous miscarriage. “[Women] cannot walk away from the fetus and thereby avoid any restrictions or liabilities that the law might impose.”²⁰¹ Intentionally inducing or arranging an abortion for any reason would be a serious crime for her, while maintaining the pregnancy would subject her to a serious risk of criminal liability as well. Once pregnant, a woman would become a mother with a much more extensive and exacting array of legally enforceable duties toward her child than a parent in any other situation.

Once child endangerment (as well as tort) law applied to the behavior of pregnant women when it adversely affected their unborn children, legally defined standards of care would have to be devised and enforced. However, it would be extremely difficult, if not impossible, to create fair and objective standards with “her every act or omission while pregnant subjected to State scrutiny.”²⁰² In addition, there would be a very serious risk that “prejudicial and stereotypical beliefs about the reproductive abilities of women”²⁰³ would determine whether she had placed her child at “unreasonable risk of harm affecting the child's life, physical or mental health, or safety”²⁰⁴ or “willfully cause[d] or

¹⁹⁹ Johnsen, *supra* note 151, at 36.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1988).

²⁰³ *Id.*

²⁰⁴ S.C. CODE ANN. § 20-7-50(A)(1) (2007).

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permit[ted] the life or health of a child . . . to be endangered”²⁰⁵ Given the wide variety of common actions of pregnant women that could endanger an unborn child, endangerment statutes as applied to them would be unconstitutionally vague as frustrating the reasonable opportunity for a “person of ordinary intelligence . . . to know what is prohibited, so that he may act accordingly.”²⁰⁶ Furthermore, the Due Process Clause prohibits the enforcement of criminal laws that “fail[] to establish guidelines to prevent ‘arbitrary and discriminatory enforcement’ of the law.”²⁰⁷ It is very difficult to see how broad child endangerment laws would not be unconstitutionally vague when applied to the myriad of things a pregnant woman could do or fail to do on a daily basis that might endanger her unborn child.

C. The Loss of Immunity from Subordination

American law has traditionally allowed the State little, if any, power to invade the body and will of an individual constitutional person in order to benefit another person as this would improperly subordinate the vital interests of an individual in controlling her own person to the interests of another. In this regard the Supreme Court has observed that the Constitution protects the “right of every individual to the possession and control of his own person”²⁰⁸ and that the “integrity of an individual’s person is a cherished value of our society.”²⁰⁹ Neither the Supreme Court nor any other court has explicitly recognized a compelling State interest in physically invading the body of an individual in order to medically benefit another person as outweighing the constitutional right to refuse treatment and maintain bodily integrity. “[C]ourts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person’s health.”²¹⁰ In fact, several courts have expressly rejected the proposition that the State has the authority to compel one person to undergo bodily invasion for the purpose of benefiting another, even to save his life,²¹¹ although none of them rested their decision squarely on constitutional grounds.

²⁰⁵ 720 Ill. Comp. Stat. 5/12–21.6 (2002).

²⁰⁶ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

²⁰⁷ *City of Chicago v. Morales*, 527 U.S. 41, 64–65 (1999) (O’Connor, J., concurring) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

²⁰⁸ *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (Fourth Amendment search and seizure); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269–70 (1990) (Fourteenth Amendment liberty and bodily integrity when refusing medical treatment); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 927–28 (1992) (Blackmun, J., concurring in part and dissenting in part) (Fourteenth Amendment privacy and bodily integrity as applicable to abortion).

²⁰⁹ *Schmerber v. California*, 384 U.S. 757, 772 (1966).

²¹⁰ *In re A.C.*, 573 A.2d 1235, 1243–44 (D.C. 1990) (en banc) (citations omitted).

²¹¹ *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (1978) (legally enforceable duty to undergo the bodily invasion of tissue compatibility testing and bone marrow “donation” for the benefit of a dying relative “would defeat the sanctity of the

A few courts have required pregnant women to undergo medical intervention (such as cesarean delivery) for the benefit of their fetuses, but none of them have offered any substantial constitutional justification for their conclusion, and some have offered none at all.²¹² More to the point, recent cases have soundly rejected the validity of such judicial action²¹³ and scholarly criticism of State enforced medical treatment to benefit another has been massive and withering.²¹⁴ A few other courts have claimed that the State may restrict the right of competent adult persons to refuse medical treatment by asserting an interest in the protection of “innocent third parties” such as dependent children and prenatal humans, but they have presented no appreciable constitutional justification for restricting the fundamental right to refuse medical treatment.²¹⁵ Furthermore, legal reluctance to invade a human’s body to save the life of or assist another extends, oddly enough, even more stringently to the dead: no statute or court order has ever authorized, contrary to the prior wishes of the decedent or the next-of-kin, the removal of vital organs from a corpse, most certainly a nonperson, to save the life of a dying person, despite the fact that persons die every day for lack of a transplantable organ.²¹⁶

individual, and would impose a rule which would know no limits”); *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990) (refusal to order tissue compatibility testing and compulsory “donation” of bone marrow of twin half-siblings for the benefit of a dying half-sibling); *In re Fetus Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (state may not invade the bodily integrity of a pregnant woman for the benefit of her prenatal human, even by a blood transfusion as it is “an invasive medical procedure that interrupts a competent adult’s bodily integrity”); see *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941) (“the very nature of rights of personality is freedom to dispose of one’s own person as one pleases”).

²¹² *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981); Nelson, *supra* note 158, at 301 n.1 (collecting reported and unreported cases). A detailed discussion of these cases is beyond the scope of this Article.

²¹³ *In re A.C.*, 573 A.2d at 1275; *In re Baby Boy Doe*, 632 N.E.2d 326, 326 (Ill. App. Ct. 1994) (“a woman’s competent choice to refuse medical treatment as invasive as cesarean section during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus”); but see *Pemberton v. Tallahassee Mem’l Reg’l Med. Ctr.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

²¹⁴ E.g., Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951 (1986); Lawrence J. Nelson, Brian P. Buggy & Carol J. Weil, *Forced Medical Treatment of Pregnant Women: “Compelling Each to Live as Seems Good to the Rest”*, 37 HASTINGS L.J. 703 (1986); Johnsen, *supra* note 151.

²¹⁵ *In re President of Georgetown Coll.*, 331 F.2d 1000 (D.C. Cir. 1964), *rehearing en banc denied with opinions*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964); *Raleigh Fitkin-Paul Morgan Mem’l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964), *cert. denied*, 377 U.S. 985 (1964) (single judge decided case at circuit court). None of these cases recognize the constitutional right of the parent to refuse treatment. A detailed discussion of this line of cases is beyond the scope of this Article.

²¹⁶ Nelson, *supra* note 158, at 312. Seventeen people die every day while waiting for a transplant of a vital organ, and over 6,000 persons die each year who meet the criteria for organ donation who do not become donors. National Kidney Foundation,

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The profound and abiding reluctance of American law to allow the State to commandeer the body and will of one to benefit another is also reflected in the “deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or in need of assistance.”²¹⁷ This principle is reflected in the criminal law which has long held that persons generally are not criminally responsible for what they fail to do, particularly in the absence of a statute defined in terms of failure to act: persons are typically punished for their actions, not their non-actions.²¹⁸ Likewise, tort law generally does not recognize a cause of action for failing to come to the aid of another.²¹⁹ The law typically does not require persons to be good Samaritans to others, even if they are in great need.

The law of Samaritanism is much better understood as providing direct support to my contention that prenatal humans ought not be considered constitutional persons than to the claim that the State must give women access to abortion. Although Professor Regan acknowledged that the situation of pregnant women is *sui generis*, he still claimed that laws forbidding abortion “subject pregnant women to treatment [by the State] which is at odds with the general spirit of samaritan law.”²²⁰ By this he meant that “laws forbidding abortion impair constitutionally protected interests . . . in non-subordination and in freedom from physical invasion.”²²¹ Likewise, Professor Tribe has argued that the State’s imposition of “virtue on *any* person [by requiring the sacrifices entailed in pregnancy] demeans that person’s individual worth” and that “our traditional regard for individualism and autonomy” ought to include pregnant women as well.²²²

If prenatal humans are constitutional persons, the constitutional mandate of equality for all persons requires the State to subordinate some of the basic rights and interests of pregnant women to its protection of the basic rights of the persons they gestate. “[When the interests of a mature, born person conflict directly with those of an unborn human,] it is impossible to resolve the conflict satisfactorily without subordinating the interests of one of the parties.”²²³ The only way for the State to treat unborn children like born children is to invade women’s freedom from bodily invasion as there is no other avenue for it

²¹⁵ *Facts About Organ Donation and Transplantation*, http://www.kidney.org/news/newsroom/fs_new/25factsorgdon&trans.cfm.

²¹⁷ Regan, *supra* note 91, at 1569.

²¹⁸ See generally Joshua Dressler, *Some Brief Thoughts (Mostly Negative) about “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971 (2000).

²¹⁹ See, e.g., *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959); *Handiboe v. McCarthy*, 151 S.E.2d 905 (Ga. Ct. App. 1966).

²²⁰ Regan, *supra* note 91, at 1570.

²²¹ *Id.* at 1571.

²²² TRIBE, *supra* note 55, at 135.

²²³ Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1673 (1979).

to enforce the rights of the unborn. A pregnant woman's refusal to be subordinated and physically invaded would be irrelevant to the determination that the prenatal person has claims to the State enforcing that subordination and invasion. Our collective "traditional regard for individualism and autonomy" and respect for the worth of individuals would have to be discarded in the case of pregnant women in order for the State to treat the unborn as constitutional persons. In this way, the argument for abortion rights based on the law of Samaritanism is not about the application of this doctrine to pregnancy, but rather about the preservation of the core legal and constitutional values that it reflects. But these values can be truly preserved only if prenatal humans are not deemed to be constitutional persons.

Before she joined the Supreme Court, Ruth Bader Ginsburg suggested that *Roe*'s constitutional justification for abortion rights focused too much on a "medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."²²⁴ In her dissent in *Carhart II*, Justice Ginsburg returned to this idea. "[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."²²⁵ My argument in this section has centered on this same essential notion: women cannot enjoy equal personhood stature as guaranteed by the Constitution if prenatal humans are also persons. When the State denies women all access to abortion, as it must if prenatal humans are constitutional persons, then pregnant women lose the fundamental rights to autonomy and bodily integrity persons must have to protect their lives and their health and to determine what happens to themselves. If prenatal humans are constitutional persons, the constitutional guarantee that all persons, including pregnant women, have equal basic rights is destroyed.

D. *The State's Legitimate Interests in Nonpersons and Prenatal Humans*

If history is a reliable guide, then it should be uncontroversial that the State is constitutionally permitted to assert interests in nonpersons and afford them legal protection. Most notably, animals have received some legal protection for over a century. All fifty states recognize that nonhuman animals have some legal status by criminalizing willful cruelty to animals.²²⁶ Courts have upheld the facial constitutionality of such

²²⁴ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985).

²²⁵ *Carhart II*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (citations omitted).

²²⁶ Note, *The Massachusetts Anti-Cruelty Statute: A Real Dog—A Proposal for a Re-draft of the Current Law*, 35 NEW ENG. L. REV. 1003, 1010 (2001); David S. Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH L. REV. 333, 341 (2005).

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statutes²²⁷ and repeatedly rejected claims that they are unconstitutionally vague and overbroad.²²⁸ Laws forbidding cruelty to animals should not be considered unconstitutional as violating the liberty or property rights of persons because no person has a legitimate interest in harming a sentient creature unnecessarily or being cruel to it. Yet the State has no constitutional obligation to protect nonhuman animals in any manner or give them legal standing for any purpose.²²⁹

Similarly, Congress has extended a variety of protections to nonpersons. The federal Endangered Species Act²³⁰ protects certain groups of living, nonhuman entities (both sentient and nonsentient) from extinction. Congress' findings note that "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."²³¹ This Act has been upheld as a valid exercise of Congress' Commerce Clause power.²³² The federal Animal Welfare Act²³³ establishes a regulatory scheme to ensure that certain mammals are housed and treated in an appropriate manner and even requires that covered primates have "a physical environment adequate to promote [their] psychological well-being."²³⁴ The federal Chimpanzee Health Improvement, Maintenance, and Protection Act²³⁵ created retirement facilities for chimpanzees that had been used in federally funded research as an alternative to euthanizing them. The Wild Free-Roaming Horses and Burros Act protects those animals from "capture, branding, harassment, or death."²³⁶ The protection of these animals on public land has been upheld as a proper exercise of Congressional power.²³⁷

²²⁷ *People v. Rogers*, 703 N.Y.S.2d 891, 893 (N.Y. Watertown City Ct. 2000).

²²⁸ *E.g.*, *Commonwealth v. Craven*, 817 A.2d 451 (Pa. 2003) (statute criminalizing attendance of a person as a spectator at an animal fight upheld); *Wilkerson v. State*, 401 So. 2d 1110 (Fla. 1981) (conviction upheld for unnecessarily or cruelly harming a raccoon), *Moore v. State*, 107 N.E. 1 (Ind. 1914) (conviction upheld for starving a horse and keeping it in filthy conditions); *State v. Haffle*, 367 N.E.2d 1226 (Ohio Ct. App. 1977) (conviction upheld for failure to feed and care for cattle, sheep, and a horse); *but see Cinadr v. State*, 300 S.W. 64 (Tex. Crim. App. 1927) (statute prohibiting "needlessly killing" an animal unconstitutionally vague).

²²⁹ Many commentators have made a moral case for the duty to protect nonhuman animal life. *See generally* REGAN, *supra* note 22; PETER SINGER, *ANIMAL LIBERATION* (2d ed. 1990).

²³⁰ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

²³¹ 16 U.S.C. § 1531(a)(3).

²³² *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1048 (D.C. Cir. 1997).

²³³ Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2006).

²³⁴ 7 U.S.C. at § 2143(a)(2)(B).

²³⁵ 42 U.S.C. § 287a–3a (2006).

²³⁶ 16 U.S.C. § 1331 (2006).

²³⁷ *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (under the Property Clause). Federal authority to protect wildlife has also been upheld under the Constitution's

Although prenatal humans should not be considered persons with basic constitutional rights, and the Constitution does not require the State to grant them any legal status whatsoever, the State has a legitimate interest in prenatal humans because they are beings with significant moral status who deserve respectful treatment consistent with that status.²³⁸ First, prenatal humans are in fact “those who will be citizens [and persons] if their lives are not ended in the womb.”²³⁹ Each one is a “fetus that may become a child.”²⁴⁰ Prenatal humans undeniably are alive, genetically human, and have potential to grow and be born as constitutional persons, although this potential cannot be realized in the absence of the particular women who gestate them.²⁴¹ Persons do not spring forth fully formed into the world as Athena from the head of Zeus: every existing person was a zygote, an embryo, and a fetus within the womb of an individual woman. It makes no sense for the State to have the highest constitutional regard for persons once they are born but to have none whatsoever for these same beings while they are in the unavoidable process of developing into persons, particularly as they approach birth.²⁴²

Second, prenatal humans are often valued very highly by the women and men who create them. Many, perhaps most, of them consider prenatal humans as their children-to-be. Regardless of whether a particular gestational mother or particular father may wish the prenatal human to be born, the assumption of all others, including the State, ought to be that the pregnancy is wanted prior to actual termination following informed consent and that no third party ought to wrongfully interfere with or terminate the pregnancy. Prenatal humans exist only in the body of a particular woman, and her relationship to the prenatal human she gestates is unlike any other. Even though the decision to end a pregnancy legally should belong to the woman, some fathers have a valid moral claim to be engaged in the decision making process.²⁴³

treaty-making power, *Missouri v. Holland*, 252 U.S. 416 (1920), and the commerce power, *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977).

²³⁸ Michael J. Meyer & Lawrence J. Nelson, *Respecting What We Destroy: Reflections on Human Embryo Research*, HASTINGS CENT. REP., Jan.–Feb. 2001, at 16–17 (2001).

²³⁹ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting).

²⁴⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (2000).

²⁴¹ Lawrence J. Nelson & Michael J. Meyer, *Confronting Deep Moral Disagreement: The President's Council on Bioethics, Moral Status, and Human Embryos*, 5 AM. J. BIOETHICS 33, 35–37 (2005).

²⁴² “[I]f distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection . . . it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences.” *Thornburgh*, 476 U.S. at 779 (Stevens, J., concurring) (footnote omitted).

²⁴³ See generally George W. Harris, *Fathers and Fetuses*, 96 ETHICS 594 (1986).

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Third, many people with differing philosophical and religious convictions sincerely, even passionately, believe that prenatal humans have the moral value and rights of persons and that abortion ought to be proscribed or allowed only in strictly limited circumstances.²⁴⁴ Although many others do not agree with this evaluative judgment, they should nevertheless carefully consider the reasons given in its defense and show some reasonable respect for it. “Respecting other people’s ascriptions of moral status is part of respecting persons, part of caring for and about them . . .” even though we are entitled to reject those ascriptions that are incompatible with the basic rights of persons (as they are in the case of pregnant women) or are otherwise objectionable.²⁴⁵ Consequently, the State ought to recognize prenatal humans as having some significant moral status out of respect for its many citizens who value them as highly as persons,²⁴⁶ even though the State ultimately cannot treat them as constitutional persons and also maintain the coherence of the Constitution.

These same considerations can be understood as grounding a moral obligation on the part of the State to offer prenatal humans protection from violence perpetrated against them by third parties. Many states use the criminal law to directly protect the life of prenatal humans, although not uniformly—something constitutionally impermissible if prenatal humans were constitutional persons. Twenty-five states have statutes which make the unborn at any stage of development victims of criminal homicide while one extends only its murder statute to include only fetuses of 8 weeks gestation; one state brings fetuses of 12 weeks or greater gestation under the protection of its criminal homicide laws, while three protect the unborn only at quickening and five only at viability.²⁴⁷ Congress has also criminalized the killing of prenatal humans in the Unborn Victims of Violence Act.²⁴⁸ One state, Minnesota, punishes behavior constituting the first degree murder of “unborn children” just as severely as it punishes the first degree murder of persons.²⁴⁹ One defendant prosecuted under this statute claimed that it violated the

²⁴⁴ See generally FRANCIS J. BECKWITH, *DEFENDING LIFE: A MORAL AND LEGAL CASE AGAINST ABORTION CHOICE* (2007).

²⁴⁵ MARY ANNE WARREN, *MORAL STATUS: OBLIGATIONS TO PERSONS AND OTHER LIVING THINGS* 170–71 (1997).

²⁴⁶ “Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more than a million abortions each year is intolerable; many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in minimizing such offense.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 914–15 (2000) (Stevens, J., concurring and dissenting).

²⁴⁷ National Right to Life, *State Homicide Laws That Recognize Unborn Victims*, http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (listing statutes).

²⁴⁸ 18 U.S.C. § 1841 (2006).

²⁴⁹ MINN. STAT. § 609.2661, § 609.185 (West 2005). “‘Unborn child’ means the unborn offspring of a human being conceived, but not yet born.” MINN. STAT. § 609.266 (West 2005).

Equal Protection Clause of the Fourteenth Amendment when it equated fetuses with persons in contravention of *Roe*, and the Minnesota Supreme Court correctly rejected this argument because “defendant has failed to show that the statutory classification impinges upon any of his constitutional rights.”²⁵⁰ No court has found state laws protecting the unborn in this manner to violate the Constitution.²⁵¹

The Supreme Court has repeatedly held that the State does have a legitimate interest in unborn human beings²⁵² even though they are not constitutional persons.²⁵³ *Roe* acknowledged that the State has an “important and legitimate interest in protecting the potentiality of human life,” an interest “separate and distinct” from its concern with the woman’s health.²⁵⁴ In light of this interest, the woman’s right to abortion “cannot be said to be absolute.”²⁵⁵ *Casey* “reaffirmed” (actually, reinterpreted) the holding of *Roe* “that the State has legitimate interests from the outset of the pregnancy in protecting the . . . life of the fetus that may become a child”²⁵⁶ and noted that “it is an overstatement to describe [the nature of the abortion right] as a right to decide whether to have an abortion ‘without interference from the State.’”²⁵⁷ Recently *Carhart II* upheld the State’s regulatory interest “in protecting the life of the fetus that may become a child” and allowed the State to “use its regulatory power to bar certain [abortion] procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”²⁵⁸

Starting with *Roe* itself, the Court has never questioned the constitutional propriety of the State having some enforceable interest in protecting unborn humans, although the ground for this interest has been poorly articulated.²⁵⁹ Perhaps my argument for the moral status of

²⁵⁰ *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990).

²⁵¹ All jurisdictions ought to afford the unborn some protection from third party harm not only because they have significant moral value, but also because it sustains the woman’s own reproductive choice. *People v. Davis*, 872 P.2d 591, 604 (Cal. 1994) (Kennard, J., concurring) (“The state has an interest in punishing violent conduct that deprives a pregnant woman of her procreative choice.”).

²⁵² This claim has substantial historical support. See generally, JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006).

²⁵³ “[We are persuaded] that the word ‘person,’ as used in the Fourteenth Amendment, does *not* include the unborn.” *Roe v. Wade*, 410 U.S. 113, 158 (1973). (emphasis added).

²⁵⁴ *Id.* at 162.

²⁵⁵ *Id.* at 154.

²⁵⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (2000).

²⁵⁷ *Id.* at 875.

²⁵⁸ *Carhart II*, 127 S. Ct. 1610, 1633 (2007).

²⁵⁹ See *Casey*, 505 U.S. at 914 (Stevens, J., concurring and dissenting) (“Identifying the State’s interests—which the States rarely articulate with any precision—makes clear that the interest in protecting potential life is not grounded in the Constitution.”).

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prenatal humans might help explicate the Supreme Court's cryptic references to the State's interest in protecting "the potentiality of human life"²⁶⁰ and the "substantial state interest in potential life throughout pregnancy."²⁶¹

However, once the State's morally justifiable interest in prenatal humans is advanced as a constitutionally adequate ground for regulating abortion or even prohibiting it under some circumstances, resolving the conflict between women's constitutional status and rights and the State's interest in prenatal humans becomes more difficult and contentious. On the one hand, if women were constitutionally entitled to end their pregnancies for any reason and at any point, even shortly before term birth was expected, then the State's interest in the life and well-being of prenatal humans, even those soon to become constitutional persons, would be meaningless. Thus, the State must be able to regulate abortion to some extent and place some burdens on pregnant women since its interest in the unborn is legitimate and important. On the other hand, if the State can, as a consequence of its interest in the unborn, heavily regulate or ban some (or all) abortions in contravention of pregnant women's fundamental rights, then their superior constitutional status as persons would be meaningless. In short, the theory of constitutional personhood does not preclude some balancing of the twin values of the unborn and pregnant women. While a comprehensive discussion of the possible structure of such balancing is beyond the reach of this article, I will offer a few preliminary comments on it.

First, I have argued both that the Constitution prevents the State from prohibiting abortions necessary to preserve the woman's life or her significant health interests at any point in gestation and that the State must give considerable deference to the woman's liberty to end an unwanted pregnancy. Simultaneously, the State has a morally compelling interest in the unborn. But if "health" is given an expansive meaning such as it was in *Doe v. Bolton*—"the medical judgment [about abortion] may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being

²⁶⁰ *Roe*, 410 U.S. at 162. *Roe's* characterization of prenatal humans as the "potentiality of human life" has unfortunately obscured the true nature of the central constitutional issue which is *not* whether prenatal humans have "life" in the biological sense because they undoubtedly are alive in this sense. Nor is the central issue whether prenatal humans are "human" because they obviously are of the species *Homo sapiens*. It is whether living humans in the process of gestation have the status of constitutional persons. In *Roe*, Texas argued that the unborn had "life" as a property that conferred upon them a constitutional or legal status sufficient to entitle the State to shelter them from a pregnant woman's desire to have an abortion. *Id.* at 159. However, having life and being human does not give an entity basic constitutional rights. If these properties were sufficient for constitutional personhood, then human cells living in culture would be persons—an absurd result.

²⁶¹ *Casey*, 505 U.S. at 876.

of the patient,”²⁶² the State’s interest in the unborn could well become “mere shallow rhetoric.”²⁶³ Acknowledging that the State has an important and legitimate interest in prenatal humans and simultaneously holding that this interest is necessarily subordinate to *any* health or liberty related interest of a woman eviscerates the State’s interest and the moral value of the unborn upon which that interest rests. Even Justice Blackmun, the Court’s most ardent supporter of a woman’s constitutional right to terminate a pregnancy, rejected the notion that this right is absolute.²⁶⁴

However, the State cannot be permitted to narrowly define “health” so that the woman’s substantial health interests are disregarded as they would be if an abortion were not legally available to a woman suffering from heart disease or a serious case of hyperemesis gravidarum. While the Constitution does forbid the State from sacrificing a woman’s life or substantial health interests in order to protect her prenatal human, the State is not forbidden by Fourteenth Amendment personhood from enforcing some kind of balance between its legitimate interests in protecting prenatal humans and the less-than-substantial health interests of constitutional persons.

This issue of the State’s interest in protecting prenatal human life being destroyed by a health exception is already controversial in abortion jurisprudence. For example, Justice Kennedy has objected to the holding of *Carhart I*, requiring that a health exception to a ban on a certain method of abortion be triggered by a physician’s claim that this method is necessary to preserve the woman’s health because it frustrates the State’s interest. “A ban which depends on the ‘appropriate medical judgment’ of Dr. Carhart is no ban at all. He will be unaffected by any new legislation. This, of course, is the vice of a health exception resting in the physician’s discretion.”²⁶⁵ Three Justices have also questioned whether *Doe v. Bolton* constitutionally requires a mental exception to a state’s postviability ban on abortion.²⁶⁶

Second, the preceding analysis of why the unborn have significant moral status strongly suggests that viability is a point in pregnancy at which the State’s interest in the value of prenatal human life takes on additional significance. To be sure, a constitutional person comes into existence only at birth, and “[a]ll persons born . . . in the United States

²⁶² *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *see also* *United States v. Vuitch*, 402 U.S. 62, 71–72 (1971).

²⁶³ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 784 (Burger, C.J., dissenting).

²⁶⁴ The woman’s right “cannot be said to be absolute” in light of the State’s “important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.” *Roe*, 410 U.S. at 154.

²⁶⁵ *Carhart I*, 530 U.S. 914, 972 (2000) (Kennedy, J., dissenting).

²⁶⁶ *Voinovich v. Women’s Med. Prof’l Corp.*, 523 U.S. 1036, 1039 (1998).

... are citizens of the United States”²⁶⁷ as well. However, once prenatal humans reach the point of viability, i.e., “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb,”²⁶⁸ they are birth-able. They now have the capacity to be born alive and stay alive outside the womb as a person separate from their mothers for some period of time.²⁶⁹ Consequently, it can be justifiable to conclude that at this point in development prenatal humans are sufficiently close to birth and becoming a constitutional person that the State could ban abortions other than those necessary to preserve the woman’s life or significant health interests. This conclusion not only allows the State to enforce its legitimate interest in the value of prenatal human life, but also treats the pregnant woman fairly by allowing her a considerable amount of time during which she can terminate her pregnancy.²⁷⁰

VII. CONCLUSION

The conclusion of the Constitutional Silence Argument cannot justify the Supreme Court overruling or substantially qualifying *Roe* and *Casey* because this conclusion is false. The text of the Fourteenth Amendment regarding personhood has unavoidable implications for the State’s authority to regulate abortion regardless of whether prenatal humans are constitutional persons or not. Although *Roe* expressly held that the unborn are not constitutional persons and it is true that “no Member of the Court has ever questioned [the] fundamental proposition [that the fetus is not a constitutional person],”²⁷¹ the Court needs to revisit the constitutional personhood of unborn humans if its abortion jurisprudence is to be straightened out at its constitutional roots. All of our country’s people, and especially its women, regardless of whether they are pro-choice, pro-life, or somewhere in between, deserve a coherent account of the constitutional personhood of unborn humans from the Court because so very much turns on it.

²⁶⁷ U.S. CONST. amend. XIV, § 1.

²⁶⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992).

²⁶⁹ The personhood of an individual born alive would not turn on how long she lived or what her “quality of life” was any more than it would on how little time or quality of life a dying individual might have; both are equally entitled to basic constitutional rights. It seems to me as if all born, living human beings are constitutional persons, even if not “persons” in other senses of the word. For insightful comment on the philosophical problems with the meaning of “person,” see Tom Beauchamp, *The Failure of Theories of Personhood*, 9 KENNEDY INST. ETHICS J. 309–24 (1999).

²⁷⁰ See *Casey*, 505 U.S. at 870 (“[T]he State has a legitimate interest in promoting the life or potential life of the unborn” which justifies limiting women’s liberty, and the “viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.”).

²⁷¹ *Id.* at 913–14 (Stevens, J., concurring in part and dissenting in part) (citations and footnote omitted).