I. MODERN CONSTITUTIONAL ABORTION LAW

A. Roe v. Wade:

The landmark case, *Roe v. Wade*, decided by the Supreme Court in 1973, was the first Supreme Court decision that contributes to what we know today as modern abortion law.

In *Roe*, a single, pregnant woman brought a class action lawsuit that challenged the constitutionality of criminal abortion laws in Texas. The Texas laws made it a crime for physicians to perform abortions on women at any stage of pregnancy unless the abortion was in order to save the life of the mother. Justice Blackmun was the author of the Court’s opinion in the case. He began, rightly, by pointing out the Court’s sensitivity to the issue that was before it:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion. In addition, population growth,
pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.¹

Of course the Court’s duty, as Justice Blackmun next stated in so many words, is not to let personal convictions, sentiments, or life experiences inform their views on the issue.² Instead, their job as a judicial body, is to step back and take an objective approach - to examine the Nation’s current sentiments as a whole, the sentiments and practices of our forefathers and modern medical knowledge, in order to balance differing views, protecting for whom what they can consistently with our Constitution and its history.

** The Court began by addressing the District Court’s ruling on standing issues. Several other plaintiffs had attempted to intervene in Roe. The Texas District Court had allowed all of the plaintiffs (including a physician and a childless married couple who were not pregnant at the time) to continue in the litigation. But the Supreme Court decided that everyone, except for Roe, did not have standing to proceed. Roe was different. The Court addressed Texas’s argument that there was no actual case or controversy with Roe because she was pregnant at the time the litigation began, but was not now pregnant. The Court stated that Roe’s situation fell under the well-recognized exception to mootness: “capable of repetition, yet evading review.”³ The Court pointed out that human gestation is too short to survive the time frame of the

² Id. at 116-17.
³ Id. at 125.
usual appellate process. If the conclusion of a pregnancy were allowed to render a case moot, then “pregnancy litigation seldom [would] survive much beyond the trial stage, and appellate review [would] be effectively denied.”

Pregnancy thus must be allowed to come under the mootness exception, and the Court proceeded to the merits of the case before it.

The Court began with a survey of the history of abortion and its treatment in ancient Greece and Rome, our predecessors of law in many ways, as well as in Europe and the United States. The Court pointed out that abortion had been common practice in the Greek and Roman empires and that Greek and Roman law afforded little protection to the unborn. However there was opposition to these practices, specifically the Pythagoreans and Hippocrates, the author of the famous Hyppocratic Oath in medicine.

Moving on to early common law the Court noted that the consensus was that the time of “quickening” of a fetus was significant. Before quickening, abortion was apparently not considered homicide because the fetus was viewed as “part of the mother.” This was even somewhat consistent with Christian theology at the time, which posited that the point of “animation” was significant, a somewhat similar

4 Id.

5 Id. at 130.

6 Id. at 133

7 Id. at 134.
concept. Although the point of animation occurred earlier than “quickening,” according to Christian theology, fetuses did not become recognizably “human” or “infused with a soul” until the point of animation. (Interestingly, in Christian theology, the point of animation was at different times for males and for females – males apparently were “animate” at 40 days, while females did not become animate until 80 days).

English law kept the quickening distinction in a statute passed in 1803 which made it a capital crime to abort a quick fetus but provided lesser penalties for abortion of a fetus before the point of quickening. English law evolved to a 1929 law making it a felony to perform any abortion if it was not done for the purpose of saving the life of the mother. But the most recent statute passed in 1967 is quite a bit more liberal than the 1929 statute, allowing physicians to abort if (a) the continuance of the pregnancy would involve risk to the life, physical or mental health of the woman or other children in her family, that is greater than the risk to their lives or physical or mental health were the pregnancy terminated, or (b) if there is a large risk that the child will suffer from physical or mental abnormalities if born.

\*probably take this whole part out out

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8 Id.

9 Id. at 133-34.

10 Id. at 134.

11 Id. at 137.
The Court described how American states did not pass abortion statutes right away. Some states who adopted early legislation kept the quickening distinction. After the Civil War many more states adopted legislation and kept the quickening distinction. However, by the 19th century most state laws had gotten rid of quickening and were imposing much harsher penalties on all abortions unless they were done to preserve the life of the mother. It has only been recently that some states have begun to liberalize their abortion statutes moderately. The Court in *Roe* concluded that in comparing modern statutes with common law at the time of the formation of the country and the adoption of the Constitution, it is clear that a woman “enjoyed a substantially broader right to terminate a pregnancy” two hundred years ago than she does today.12

The Court next moved to describing the sentiments of some different modern groups. They began by pointing out that the American Medical Association in the 1800’s had followed the majority trend and had adopted a fairly severe “anti-abortion” view. However, they have recently moved toward a more liberal approach and have promulgated some general liberal principles that include things like “best interests of the patient,” “sound clinical judgment,” “informed patient consent.” The American Public Health Association stated in the 1970’s that “rapid and simple abortion referral must be made readily available through state and local public health departments, medical societies, or other non-profit organizations.”13

12 *Id.* at 140.

13 *Id.* at 144-45.
Finally the American Bar Association approved the Uniform Abortion Act in 1972, which recommended that states adopt laws that allow for abortions to be performed by licensed physicians in clinic or hospital settings within the first twenty weeks of the pregnancy, and that allow for abortions after twenty weeks if: there is a risk to the physical or mental health of the mother, the child could be born with disabilities, or the pregnancy was the result of rape or incest.14

Finally, the Roe Court proceeded to discuss and apply modern constitutional law in an effort to find a legal standard that could possibly reconcile the current sentiments of different groups of Americans while at the same time respecting Constitutional history and protecting the parties’ respective rights. They began by addressing the argument presented by Texas and certain amici of the state – “that the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment.”15 In support of this assertion, Texas went into what the Court described as “the well-known facts of fetal development.”16 The Court acknowledged that were this argument to be accepted – that a fetus was a person – then the fetus would enjoy a right to life under the Fourteenth Amendment just as all other Americans do. The Supreme Court thoroughly rejected this argument.17

14 Id. at 146.
15 Id. at 156
16 Id.
17 Id. at 157-58.
First of all, the Court pointed out, the Constitution does not define the word “person.” Therefore, one has to look to the context in which the word is used in the Constitution, historical context and prior case law. The word "person" is used in several places in our Constitution. However, the Court points out, in none of these places does the context indicate that the word is meant to apply prenatally. The word “person” is used to define citizens, it is used in the provisions for qualifications of Representatives and Senators, in the provision describing the qualifications of the President, etc. None of these uses indicate that the term is meant to include those not born. Then when one looks at historical treatment of abortion – the fact that abortion has not consistently been punished as murder, a felony, or sometimes not even punished at all - leads to the conclusion that at that the time the Fourteenth Amendment was adopted, the word person was not meant to include the unborn. Further, the unborn have not historically been provided with any other types of rights in this country. For example, traditional tort law does not allow recovery for prenatal injuries, even when the child is born alive. Also, unborn children have been treated as acquiring some interest in property inheritance, but the “perfection of interests involved...has generally been contingent upon live birth.” Lastly, when

18 Id. at 157.
19 Id.
20 Id. at 161-62.
one looks to case law, absolutely “no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.”

Finally the Supreme Court moved on to discussing the case law that does exist, and what that case law has found implicit in the Constitution that could grant certain rights to women in the arena of abortion and reproductive choice. By this point, the Court pointed out, a long line of cases had found that certain rights of privacy, or “zones of privacy” exist under the Constitution. The Court, over the last hundred or more years, had found these privacy rights to be rooted in the concepts and language of various Amendments. Particularly here, the Court chose to focus on the Fourteenth Amendment’s concept of liberty and its restrictions on state action, as the source of a right to privacy that “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” However, the Court rejected Roe’s argument that the right of privacy should extend to her the right to terminate her pregnancy at whatever time she chooses. The Court instead found that that privacy right exists, but it is not absolute.

Instead, the Court explained, past decisions showed that rights of privacy were not impenetrable spheres into which state regulation could not reach. According to the Court, some state regulation is appropriate when the state has

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21 Id. at 158.

22 Id. at 152.

23 Id. at 153.

24 Id.
properly asserted state interests. The right to privacy, however, has been found to be fundamental in nature. The limitations imposed on fundamental rights must not only be justified by a *compelling* state interest, but the limitation imposed must be “narrowly drawn to express only the legitimate state interests at stake.”\(^{25}\) The Court stated that it agreed with Texas that its interest in protecting health and potential life are legitimate interests, but only where those interests become significant enough to outweigh the pregnant woman's interest in her privacy, only where they become compelling, can the state impose any limitation on her decision to terminate.

The Court decided that Texas's legitimate interest in the health of the mother only outweighs the woman's right to privacy after the end of the first trimester. In light of medical knowledge, the risk of mortality resulting from an abortion is even less than the risk of mortality from normal childbirth before the end of the first trimester. After the first trimester, the State may regulate the abortion procedure in ways that are narrowly tailored to protect the mother’s health. The state may protect the mother’s health by requiring certain qualifications of physicians conducting the abortions, certain facility qualifications and licenses, etc. However it is clear that the State interest in protecting the mother's health cannot be used to forbid an abortion, even at the later stages of pregnancy. The state's interest in protecting the mother's health is never so compelling: abortions, even at later

\(^{25}\) *Id.* at 155.
stages of pregnancy, do not present such great risks as can only be alleviated by forbidding abortions, only regulating them.

The second legitimate interest that Texas asserted that was recognized by the Court was an interest in potential life. This interest, the Court stated, becomes significant enough – becomes compelling – at the point that the fetus becomes viable. Viability is the point at which the fetus is presumably capable of living outside of the mother. Wrapping this point up quickly, the Court simply stated that there are “both logical and biological justifications” for state regulation protecting fetal life after viability, and that after the fetus is viable, the state may go so far as to forbid an abortion, except where necessary to preserve the life or health of the mother.

In conclusion the Supreme Court said, “[t]his holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day.”

Shortly after the Supreme Court decided Roe, they issued a fairly short opinion in the case of Harris v. McRae. In Harris the Court addressed the question of whether Medicaid’s refusal to publicly fund certain medically necessary abortions violates women’s constitutional rights as they were recently established. The

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26 Id. at 165

27 Harris v. McRae, 448 U.S. 297, 300 (1980).
Court concluded that although the government cannot place obstacles in the path of the woman attempting to exercise her right to choose to have an abortion before viability, choosing not to publicly fund these abortions was not an obstacle created by the government. The obstacle here was indigence. Indigence was not governmentally created or imposed, and the government “need not remove those [obstacles] not of its own creation.” 28 The woman is still left with the same choices, even when the state decides to withhold funding for one of them.

In 1989 the Court decided *Webster v. Reproductive Health Services*. This case upheld several Missouri statutes that placed restrictions on abortion procedures such as a statute requiring viability testing prior to abortion and also one banning use of public funds and facilities for abortion services. 29 The case was not very significant for its ultimate holding, however. It was more significant for the deep split that it revealed forming within the Supreme Court regarding whether *Roe v. Wade* should be overruled. 30 It was apparent in *Webster* that four justices thought that *Roe* should no longer be allowed to stand. Thus, there was an atmosphere of anxiety and expectation when the Court took its next abortion case: *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

**B. Planned Parenthood of Southeastern Pennsylvania v. Casey:**

28 Id. at 316.


30 Id.
The Court in *Casey* surprised many. It did not overrule *Roe*. Rather it upheld *Roe*’s “essential holding.” The *Casey* court viewed *Roe*’s essential holding as consisting of three parts. First, a woman has a right to choose to have an abortion before viability without undue interference from the state. Second, after viability, the state has power to prohibit abortions or place substantial obstacles in the way of getting them. And third, the Court found that *Roe* had held that the state has legitimate interests from the outset of the pregnancy in protecting the health of the mother and the life of the fetus. The Court in *Casey* took this last statement and built on it in order to make a change to the *Roe* framework.

The Supreme Court stated very clearly in *Casey* that it was rejecting the trimester framework used in *Roe* because it did “not consider [it] to be part of the essential holding...” Instead, the Court determined that the State could act on its legitimate interests in protecting the mother’s health and the potential life of the fetus starting from the outset of the pregnancy. The state may act as long as the regulations it creates are “reasonably related”31 to its interests and as long as they do not impose an undue burden on the woman’s ability to choose to have an abortion. That is, the state need not wait on its legitimate interests to reach the “compelling” point before it can pass legislation aimed at promoting those interests, as long as it is not creating undue obstacles that interfere with the woman’s right to choose an abortion before viability. At a later point, at viability, the state’s interest

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in the life of the unborn “has sufficient force” so that it completely trumps the
woman’s right to abort, but again, the state need not wait until then to pass
legislation promoting that interest. And it also need not wait until the end of the
first trimester, when the risks to women’s health from an abortion procedure
becomes at all significant (as Roe noted), to pass legislation promoting that interest.
Ultimately, Casey upheld an informed consent requirement, a parental consent
requirement with an alternative for judicial bypass, and record-keeping provisions,
but struck down as an “undue burden” a spousal notification requirement and a
reporting requirement.32

Although women’s right to abortion came out of Casey intact, the decision
opened the door for states to pass many, many more statutes concerning abortion.
The state no longer had to wait until its interest became “compelling” to act. Casey
dictated that the state had legitimate interests in both maternal health and pre-natal
life that began virtually at conception. Therefore, the state could pass all kinds of
legislation based on either its interest in pre-natal life or its interest in maternal
health that applied to both early and late stages of pregnancy. Additionally, Casey
had not reinforced Roe’s requirement that the state regulation be “narrowly drawn
to express only the legitimate state interests at stake.”33 Instead there is language in

32 Feminist Jurisprudence: Cases and Materials, 4th Ed., Bowman, Rosenbury,
Tuerkheimer and Yuracko, 440.

33 Roe, 410 U.S. at 155.
Casey such as “reasonably related,” and “designed to foster.”34 Additionally the Court’s definition of “undue burden” was ambiguous, like most constitutional standards are, and was one that would obviously have to be fleshed out through litigation, (an “undue burden” is a regulation that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of nonviable fetus”).35 “[T]he Casey opinion virtually invited the states to test whether one after another abortion-restrictive law constituted an ‘undue burden.’”36

It is important to note that the Casey Court majority did not even feel the need to readdress the Roe Court’s holding that a fetus is not a person within the meaning of the Fourteenth Amendment. However, Justice Stevens in his partial concurrence, did address the issue. He started by pointing out that a reaffirmation of Roe’s holding on fetal personhood was “implicit in the Court’s analysis” here.37 He went on to point out that, in Roe, “there was no dissent” from the majority’s conclusion that the unborn are not persons and that “an abortion is not ‘the termination of life entitled to Fourteenth Amendment protection.’”38 Additionally, Stevens stated that,

34 Casey, 505 U.S. at 878.
35 Id. at 877.
37 Casey, 505 U.S. at 912 (Stevens’ partial concurrence).
38 Id. at 913 (Stevens’ partial concurrence) (quoting Roe, 410 U.S. at 159).
Indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a “person” does not have what is sometimes described as a “right to life.” This has been and, by the Court’s holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.39

II. FETAL PERSONHOOD BILL THWARTED WHEN FOUND UNCONSTITUTIONAL UNDER ROE AND CASEY

Very recently, a group called Personhood Oklahoma filed a ballot initiative with the Secretary of the State seeking to amend the Oklahoma Constitution. Personhood Oklahoma is a state affiliate of a larger national group called Personhood USA.40 This group has apparently targeted Oklahoma as a favorable forum in which to try to push its agenda. The ballot initiative submitted by Personhood Oklahoma has been referred to as “The Fetal Personhood Bill.” The bill was shortly challenged in a lawsuit filed on March 29th of this year, claiming that the bill was facially unconstitutional. The Oklahoma Supreme Court reviewed the bill pursuant to a code provision adopted by the Oklahoma Legislature in 2009. The code provision requires a “pre-submission determination” of the constitutionality of

39 Id. at 913-14.

40 Morice-Brubaker, Sarah. Oklahoma Supreme Court Unanimously Blocks Personhood Ballot Initiative, 1.
a proposed petition that is facially unconstitutional, so that a futile and costly election may be avoided.41

The groups filing the lawsuit submitted their Protestants’ Brief to the Supreme Court in connection with the filing. These groups included: the Center For Reproductive Rights and the American Civil Liberties Union Foundation, both located in New York City, the ACLU of Oklahoma Foundation, the Hardwick Law Office from Tulsa, and attorneys from Andrew Davis Attorneys and Counselors at Law. Their Brief explained that the proposed bill sought to amend the Oklahoma Constitution in two ways. The first thing it sought to do was to define “person” to include fertilized eggs, and additionally it sought to specifically confer due process rights on every “person” as it had just defined the term.42 Second, the bill sought to expand the basis of equal protection to include age, place of residence, and medical condition – apparently in an effort to make sure that fertilized eggs also received equal protection of Oklahoma’s laws by not allowing discrimination against them on account of their age (zero?), their residence (the mother’s womb?) and their medical condition (developing? dependent?). In its preliminary statement the Brief highlighted the alarming and far-reaching effects that this Fetal Personhood Bill would have on women’s decisions concerning procreation.

The Fetal Personhood Bill, as it was proposed, would completely ban abortion, it would completely ban common contraceptive methods such as

41 Id.
42 Id.
intrauterine devices and hormonal birth control, and it would restrict doctors’
abilities to provide care for women with life-threatening conditions and to provide
fertility treatments to couples trying to have children. The problems with this
legislation were obvious. In a succinct and powerful argument section, the
Protestants cited to forty years of Supreme Court precedent articulating and
protecting the liberties granted to citizens by the Due Process Clause, including, the
right to use contraceptives, to engage in intimate conduct with consenting adults,
and to have an abortion.43 The Fetal Personhood Bill in other words, would “be in
direct and inescapable conflict with the federal Constitution.” Roe and Casey’s
holdings most clearly prohibit the bill. Those opinions establish that the Due
Process Clause protects a right to privacy, which encompasses a woman’s choice
whether to abort a pregnancy pre-viability. Additionally, the Roe opinion explicitly
considers and rejects the concept of a fetus as a person, and Justice Stevens in Casey
stated that the majority in that case too, was implicitly affirming that aspect of the
Roe opinion.

The Oklahoma Supreme Court did not take long to issue an order in the
matter. About thirty days after the lawsuit was filed the Court stated its findings.
The findings mainly included that the “United States Supreme Court has spoken on
the issue” and that the measure is “clearly unconstitutional” pursuant to Casey.44
One has to wonder what this group was thinking in attempting to pass a ballot
initiative like the Fetal Personhood Bill. Surely Oklahomans know that current

43 Id. at 4.
Supreme Court case law would absolutely prohibit such an amendment. Indeed it seems that Personhood Oklahoma was aware. The ballot initiative is suspected to be part of the group’s bigger plan – to “fast track” the issue to the Supreme Court of the United States. The group, according to a Personhood USA press release, intends to appeal the decision to the U.S. Supreme Court, and once there, hopes to obtain a ruling overturning the now almost forty-year-old Roe v. Wade decision.45

This seems fanciful to say the least. Many pro-life attorneys and supporters are even upset about it, warning that the plan may backfire and “the Supreme Court may adopt an even more pro-choice posture.”46

It is not solely Roe's and Casey's articulation of fundamental privacy rights (and their explicit holdings that a fetus is not a person) that clearly stand in the way of fetal personhood being adopted by the Supreme Court. Even older and more established cases describing and affirming privacy rights cannot be reconciled with fetal personhood, such as Griswold v. Connecticut. In Griswold the Supreme Court found a right of privacy implicit in the “penumbras” of the Bill of Rights (or alternatively, in the opinion of the concurrence, in the Ninth Amendment or the Due Process Clause) that allowed married couples to choose to use contraceptives.47 This right is inconsistent with a fetal personhood framework because use of any

45 Morice-Brubaker, Sarah. Oklahoma Supreme Court Unanimously Blocks Personhood Ballot Initiative, 3.

46 Id.

47 Cushman, Claire. Supreme Court Decisions and Women’s Rights, 2nd Ed., 192.
contraceptive that prevents a fertilized egg from implanting in the uterus would constitute destruction of a “person,” and presumably could be prosecuted as murder. An argument might even be made that the rights described in a 1942 case that originated in Oklahoma, *Skinner v. Oklahoma*, in which the Supreme Court decided that “one of the basic civil rights of man,” is the right to have children, are inconsistent with idea of fetal personhood. That case declared the forced vasectomy of a criminal unconstitutional on the grounds that he had a basic and fundamental right to have children. Arguably implicit in that holding is the holding that a man - a person - has a right to choose whether or not he or she wants to have children. Just like forced sterilization takes a choice about having children away, being raped, but not being allowed to abort the pregnancy, (as would be the case if the Court were to adopt a fetal personhood regime), would also take the choice to have children away.

The Court’s decisions establishing fundamental privacy rights for women (and men) to make choices about reproduction stand as a strong shield against any adoption of a fetal personhood framework. To adopt such a framework would completely undermine these rights. It would not only completely take away the right to choose an abortion and the right to use most contraception, but it would also undermine the general right to choose whether or not to have children that has been articulated by the Supreme Court in several cases.

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48 *Id.* at 189.
III. OTHER PROTECTION WE MAY HAVE AGAINST FETAL PERSONHOOD, OR, ALTERNATIVEY, TO THE RIGHT TO CHOOSE AN ABORTION

It seems highly unlikely that the Supreme Court would throw away such a strong line of precedent establishing and reaffirming over and over again certain fundamental liberty and privacy rights implicit in the Constitution. However, in the event that a Supreme Court decision ever issues that overturns Roe, Casey, and other fundamental privacy right cases, and holds that a woman’s right to choose an abortion pre-viability (or even her right to freely use contraception) is not a part of any privacy right implicit in the Constitution (or even that there are no privacy rights implicit in the Constitution), would we have other legal arguments to make that could possibly prevent the adoption of a fetal personhood framework, or in the alternative, at least protect the right to choose an abortion?

One alternative argument has been presented by Judith Jarvis Thomson, Ellen Willis, Sylvia Law, and others. They use the theory of self-defense to justify abortion. It is an interesting argument, however there are limits to the logic that are quick to come to the surface. These limits prevent the self-defense theory from providing the extent of protection that Roe and Casey’s privacy rights have provided. Additionally, the self-defense theory may protect a woman’s right to have an abortion in some important instances, but it is not inconsistent with a fetal personhood framework – it actually reinforces the idea of a fetus as a person. Therefore it would likely not act as a barrier to the adoption of such a framework.

Most clearly, the self-defense theory would allow a woman whose life was being threatened by her fetus to have an abortion. She could do this by relying on simple principles of self-defense, which would allow her to use deadly force when she was faced with a deadly threat.\textsuperscript{50} This theory would at least provide a defense to an abortion that was necessary in order to save the woman's life. But would it allow an abortion for anything less? It can be argued that no, it does not. It is a logical argument that unless the woman is objectively fearful that she faces death or great bodily harm, that the traditional law of self-defense cannot help her.

Eileen L. McDonagh however, elaborates on the theory of self-defense in a way that may expand its protection. She argues that the fetus' implantation could be analogized to rape in that it is a forced bodily intrusion.\textsuperscript{51} Again, the fetus “is analogized to an assailant” and the right to abortion can be defended “under the liberal theory to defend oneself against nonconsensual invasion.”\textsuperscript{52} This would seem to require distancing the consent (assuming there was any) to a sexual act from the consent to the actual implantation of the embryo. Some would no doubt argue that consent to sex is consent to pregnancy – that one follows the other. However that is not always true. Sex does not always result in pregnancy. Thus a woman who consents to sex does not expect to or consent to become pregnant every time. Further, if we are viewing the fetus as a person, the implantation becomes an

\textsuperscript{50} Id. at 477.

\textsuperscript{51} Id. at 480.

\textsuperscript{52} Id.
entirely separate act from sex, by an entirely separate person. Surely consent given to one intrusion by one person cannot carry over and give consent to an intrusion by an entirely different person.

The self-defense theory, despite its interesting analogies, does not seem to be a very strong argument to protect a woman’s decision in all but the most dire circumstances – when the woman’s life is threatened. In other circumstances it is vulnerable to arguments consistent with the traditional rules of self-defense and consent. Additionally, it clearly reinforces the idea of a fetus as a person. By using an area of law that traditionally involves two interacting people – an attacker and a victim – the fetus is put into a role traditionally filled by a living person. Because the theory places the fetus in this role, it reinforces the idea of fetal personhood. This theory therefore does not seem like an especially desirable alternative argument for pro-choice advocates opposed to fetal personhood. It actually mounts no real barrier to the adoption of a fetal personhood regime, it merely gives a justification for abortion in certain limited circumstances in spite of that regime.

A second theory that has been suggested as an alternative legal argument for women’s right to choose an abortion has been based on equal protection. Kathleen M. Sullivan and Susan R. Estrich put forth a convincing argument that restrictive abortion laws are classifications based on sex and that they cannot stand absent a compelling justification.53 They posit that a “classification based on pregnancy is, by

53 Id. at 481-82.
biological definition, a classification based on gender.”\textsuperscript{54} Additionally they pointed out that abortion restrictions are a result and a reinforcement of gender stereotyping and old notions about women’s roles in society. These stereotypes, they argue, are precisely those which have “over and over again been the focus of [the] Court’s modern equal protection cases.”\textsuperscript{55}

Because they argue that restrictive abortion laws are classifications based on sex, then those laws must withstand the most exacting scrutiny – they can only be upheld if they are supported by an “exceedingly persuasive justification.”\textsuperscript{56} However, could there be proffered justifications by pro-life groups that meet this requirement? It would seem that in light of the Court’s recognition and reaffirmance of states’ legitimate interests in potential life and maternal health that those justifications may be viewed as meeting the standard of “exceedingly persuasive.” But, it is important that in the Court’s opinions it has explained that these interests may not become compelling until certain points in a pregnancy.

In \textit{Roe} the Court clearly stated that the state’s interest in potential life did not become compelling enough to justify a prohibition on the woman’s right to choose an abortion until the point of viability. \textit{Casey} did not explicitly reiterate this holding, but it kept the point at which the state could prohibit an abortion at viability, which

\textsuperscript{54} \textit{Id.} at 482.

\textsuperscript{55} \textit{Id.} at 483.

\textsuperscript{56} \textit{Id.} at 482 (quoting \textit{Mississippi University for Women v. Hogan}, 458 U.S. 718, 724 (1982)).
seems to imply that the Court still agreed that a state’s interest was not compelling enough, up until that time, to justify such an intrusion. To put it in Casey’s language, the Court believed that a prohibition on abortion up until the time of viability was an undue burden. The conclusion that it was “undue” before viability, but “due” after, implies that the state’s interest became more important at that point, important enough that it seemingly “outweighed” the woman’s right to choose.

It seems that the equal protection theory may be a good alternative to the fundamental privacy right theory in the absence of a fetal personhood bill. It appears that the argument that pregnancy statutes classify on the basis of sex is logical and strong, justifying the application of strict scrutiny. And although there may sometimes be compelling justifications and statutes that are narrowly tailored enough to those justifications for the statutes to be upheld, it seems that this would only be the case in circumstances where fundamental privacy theory has also allowed restrictive legislation. In fact, “feminist legal scholars have been urging the adoption of a sex equality approach to reproductive rights for some time.”

However this theory does not necessarily protect against the adoption of fetal personhood. Yes, women would have arguments that they cannot be discriminated against, (forced to carry babies to term), but it may be difficult to argue that their entitlement to equal protection under the laws actually prevents fetuses from being deemed “persons.” And, if fetal personhood were adopted, it would throw a wrench in equal protection theory and reduce the scope of its

57 *Id.* at 485.
protection for the decision to have an abortion. If fetal personhood is adopted and fetuses start to be considered “persons” under the Constitution, the Court may be forced to find that saving the life of a fetus (pre or post viability) is always a compelling justification. Thus as long as legislation was narrowly tailored to protecting prenatal life, the Court would be forced to uphold those statutes.

It seems that after a review of these alternative theories, that the fundamental right to privacy – the Court’s articulation that a woman (and a man) have certain well-established rights to reproductive choices – is the strongest defense to an attempt to pass a fetal personhood bill. Passing such a bill would, very clearly, infringe on these rights. Other theories may be available that could provide a barrier to the adoption of a fetal personhood bill, or in the alternative, could provide protection of women’s rights to choose an abortion even in the face of a fetal personhood bill. More exploration and creative applications of existing law to the arena of reproduction would surely give rise to several other convincing arguments.

IV. FETAL PERSONHOOD’S THREAT TO FEMINIST GOALS FROM A DOMINANCE THEORY PERSPECTIVE

- McKinnon argues that most of today’s inequality results from treating differences differently58
- We devalue women’s traits that are different from men’s
- This leads to a society where men are dominant and controlling – an utterly patriarchal society
- Men exert their dominance over women in a multitude of ways, but one is sexually
- Reproductive choices have given women more of an opportunity to counteract this exertion of dominance; they can free themselves of some of

58 Id. at 130.
the results of sexual dominance (pregnancy and child bearing) which have only tended to exacerbate male domination and control by creating dependence
- Fetal personhood would severely limit reproductive choice and undoubtedly it would result in more women being forced to continue in unwanted pregnancies
- More unwanted pregnancy leads to more dependence by women on men
- This counteracts the goals of dominance feminism: to promote changes in society that give women power and lessen their dependence on and dominance by men