University of Arkansas at Little Rock Law Review

Volume 44 | Issue 4 Article 5

2022

Constitutional Law—Fourteenth Amendment and Fetal Personhood—Established Injustice: American Abortion Jurisprudence and the Irreducible

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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT AND FETAL PERSONHOOD—ESTABLISHED INJUSTICE: AMERICAN ABORTION JURISPRUDENCE AND THE IRREDUCIBLE

I. INTRODUCTION

A teacher gave his ninth-grade oral communications class the following assignment:

> *In a speech of three to five minutes, using any school-appropriate subject matter you feel supports your reasoning, explain to the class what makes you a person.*[1]

On the first day of presentations, the mood in the classroom was electric. The prompt had captured the interest of nearly every student—a rare enough circumstance. As the students presented, some themes emerged: I am a person because I am self-aware; I am a person because I have desires and a will; I am a person because I exist; I am a person because my beliefs confirm it; I am a person because of my genetic makeup; I am a person because I say so. It seemed there were nearly as many grounds to personhood as there were students.

At the close of the last day of presentations, the teacher thanked the students for a job well done. He explained that he had not expected them to answer the question definitively but rather only to grapple with a complex issue and speak clearly about it from a supported point of view. This was oral communications, after all, and not philosophy. After a moment one student raised her hand and asked the teacher what he thought made him a person. He responded, "Three things: I'm a human being and not a walrus or something. I'm alive at the cellular level. And I take up space other people don't. Anything else is subjective."

The Supreme Court of the United States, in the context of the Fourteenth Amendment, has addressed the question that oral communications teacher posed: *What is a person?*[2] This Note refutes the Court's answer. Justice requires objectivity where possible,[3] and it is possible to define "person" objectively under the Fourteenth Amendment and satisfy diverse modes of constitutional interpretation.[4] Because the Constitution means to "establish Justice,"[5] it—and all federal and state law[6]—must grant legal per-

1. The Author shares this story with permission.
2. *See* Roe v. Wade, 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").
3. *See infra* Section II.
4. *See infra* Section III.
5. U.S. CONST. pmbl.

sonhood and its resulting rights to the preborn. Doing so will require the Supreme Court to abolish abortion because *Roe v. Wade* grounds American abortion doctrine in a fundamentally unjust characterization of personhood that denies objective fact.

Section II of this Note considers the Constitution's general purpose to "establish Justice"[7] as an imperative, discusses interpretations of justice in an attempt to derive justice's fundamental, objective meaning,[8] and argues that justice requires that courts reason from irreducible, objective fact to the fullest possible extent.[9] Section III develops the irreducible, objective definition of "person" to align with fundamental justice.[10] Section IV discusses pertinent aspects of *Roe v. Wade* and subsequent decisions shaping American abortion law to the present day, arguing that the Supreme Court chose an unjust method of reasoning to pass on the personhood question in *Roe*.[11] Section V briefly surveys potential ramifications of abolishing abortion in the United States by overturning *Roe* on preborn personhood grounds and concludes that, ramifications notwithstanding, fundamental justice requires that the Supreme Court do so.[12]

II. TRUE NORTH: FUNDAMENTAL JUSTICE

Like that oral communications class did, the law also grapples with complex issues. Inevitably those issues raise questions that are not legal only.[13] Because the law regulates individuals', institutions', governments',

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6. *See* U.S. CONST. art. VI, cl. 2 (respectively binding federal and state governments regarding matters the Constitution addresses); U.S. CONST. amend. XIV, § 1 (binding state governments).

7. U.S. CONST. pmbl.

8. *See infra* Section II.

9. While this argument reaches every court deciding every kind of legal question, for this Note it operates mostly within constitutional law:

> [W]hen a strict interpretation of the Constitution . . . is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Scott v. Sandford, 60 U.S. 393, 621 (1857) (Curtis, J., dissenting).

10. *See infra* Section III.

11. *See* Roe v. Wade, 410 U.S. 113, 158 (1973); *infra* Section IV. The Court must overturn Roe on personhood grounds specifically; overturning Roe's central holding would only return abortion law to the auspices of the states, whose decisions would variously satisfy or thwart fundamental justice.

12. *See infra* Section V.

13. *See generally* Francis J. Mootz III, *Roundtable on Legal Hermeneutic: Law and Philosophy, Philosophy and Law*, 26 U. TOL. L. REV. 127 (1994). Defending interdisciplinary programs in which legal theorists argue from "philosophical perspective[s,]" Mootz rejected the "postmodern critique" that philosophy's utility to law is strictly rhetorical. *Id.* at 130–31. He also

and even its *own* behavior, courts cannot shirk their responsibility to make qualitative judgments. And the primacy of justice in law similarly encourages courts' dalliance with philosophical matters: what does "justice" mean?[14]

Though it may present itself according to context, the answer to that particular question appears to hinge on objectivity.[15] If a court can refer to some fixed outside standard justifying its decisions—whether an established law, a relevant precedent, or an abiding truth or principle—the people beholden to those decisions can more easily acknowledge the court's legitimacy.[16] This is not so with a decision whose rationale depends significantly on "[the court's] own moral code."[17] Any law such a decision might establish, and reliance on resulting precedent, could take the court progressively further from fundamental justice.[18] The preserving power of stare decisis then transforms into a kind of Montresor leading increasingly self-aggrandizing courts to the promised Amontillado, each affirming decision another fatal brick.[19] No court may indulge in philosophy with impunity.[20]

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questioned the sharpness of a distinction between legal scholarship and philosophy based on the authority of ideas and of institutions. *Id.* at 131–33; *cf.* Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191 (1991) (arguing there is largely *intellectual* authority in the humanities and *institutional* authority in the law).

14. *See infra* Section II.

15. *See infra* Sections II, III.

16. *See* Moore v. East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting). Justice White tempered fellow Justice Black's concerns regarding substantive due process by emphasizing the need for judicial restraint in that doctrine. *Id.* Justice White recognized the risk to the legitimacy of any court venturing into "the creation of new constitutional rights" springing from "judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." *Id.*; *see infra*, note 20. While Justice White's argument targeted the Supreme Court, substantive due process, and the Constitution, its premise could reasonably extend further. This Note argues that fundamental justice forms the very lowest foundation of what makes *all* jurisprudence legitimate, then narrows its focus: as the Constitution should bridle the Court, so too should fundamental "Justice" constrain the Constitution. U.S. CONST. pmbl.; *see infra* Section II.A.

17. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850 (1992) (joint opinion). This statement in *Casey* referred to the personal moral code of each of the Court's members, which the Court sought to avoid invoking. *Id.* But distinguishing individual assertions of morality from corporate ones ultimately proves irrelevant because the Court's holdings and judgments inevitably establish a moral code. *See infra* Section IV.B. For this reason, the Court must seek to align its moral code with fundamental justice where possible, in accordance with the purpose of the Constitution. *See infra* Section II.A.

18. *See infra* Sections IV.B, IV.C.

19. EDGAR ALLAN POE, *The Cask of Amontillado*, *in* EDGAR ALLAN POE: COMPLETE TALES AND POEMS 733, 733–38 (Fall River Press 2012) (1846) (To revenge a past slight, Montresor convinces drunk Fortunato to accompany him down into the catacombs beneath Montresor's home to settle a dispute about a quality wine supposedly stored there. Montresor supplies Fortunato with additional drink along the way, and the two eventually reach a dead

In the United States, the effect of judicial philosophizing finds its most salient expression in the decisions of the Supreme Court of the United States.[21] This is because the Supreme Court enjoys unparalleled precedential authority in the judiciary: every court and state official in the country must abide by the Court's interpretations of the Constitution.[22] When such interpretations foray into extrajudicial ideas, the Supreme Court runs a uniquely heightened risk of directing the nation's policy regarding those ideas.[23] Compound this risk with the exceptional weight of the Court's precedent, and the mistaken bearing of merely a few degrees can increase considerably over time.[24] Entrenched public confidence in the Court's legitimacy to decide constitutional questions—generally a useful and necessary confidence—can cause a cultural sea change.[25] The little rudder directs even the largest ship; eventually, the Court's decisions on a matter begin to smack of established truth.[26]

But the Supreme Court issues *opinions*. And cultural sea change, however great, cannot alter objective fact.[27] It is its very invulnerability to the

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end, where Montresor swiftly shackles Fortunato and confines him behind a new wall using masonry earlier staged for the purpose.).

20. *See id.* at 735. Montresor's family motto, "*Nemo me impune lacessit*[,]" translates to "none may harm me with impunity." *Id. See also* Griswold v. Connecticut, 381 U.S. 479, 511–21 (1965) (Black, J., dissenting). Justice Black considered the substantive due process doctrine a philosophical exercise in amorphous natural law, suitable for legislative rather than judicial bodies. *Id.* He would have limited judicial review to those cases involving laws "forbidden by the Federal Constitution" rather than extending it to laws violating "fundamental principles of liberty and justice." *Id.* at 519–20 (internal quotations omitted). But his distaste for the Court's reliance on those fundamental principles lay in what he perceived as their unavoidable subjectivity. *Id.* at 519. This Note hopes to validate the unchanging nature of justice partially rooted in irrefutable, irreducible fact, so to avoid the "personal and private notions[]" of jurists that Justice Black thought anathema. *Id.* at 519 (internal quotations omitted); *see infra* Sections II.B., III.

21. *See* RONALD DWORKIN, LAW'S EMPIRE 2 (Harvard Univ. Press 1986).

22. U.S. CONST. art. III, § 2, cl. 1.; *see also* Cooper v. Aaron, 358 U.S. 1, 18–20 (1958).

23. The great scope of Supreme Court decisions' impact arises naturally from the position the Constitution grants the Court. *See* U.S. CONST. art. III, §§ 1–2; *see also* Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

24. *See infra* Section IV.

25. Such cultural shifts could stem also from methods of legal scholarship that interpret the law through means historically associated with other disciplines. *See* Collier, *supra* note 13, at 194.

26. Collier recognized "intellectual authority" in reason and "institutional authority" in power. *Id.* at 209–12. The observer of venerated thinkers, or of institutions like the Supreme Court of the United States, might wrongly conflate their institutional authority with intellectual authority and, ultimately, with truth. *Id.* at 210–12. Such an observer could (perhaps dangerously) accept an argument for the identity of its deliverer rather than for the accuracy and sound rationale of its content. *Id.*

27. The adjective "objective" involves "expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations[.]" *Objective*,

passage of time, to conflicting conceptions of morality, and to competing schools of thought that makes objective fact the ideal foundation for the concept of justice.[28]

Yet, what is justice? From where does justice arise? What are its demands, and whom or what does it bind? Who decides whether an outcome has satisfied or betrayed justice? How and why do those who decide have authority to do so?

These questions merit volumes rather than the limited space available to the discussion here. But this Note's argument requires some work in them. It is necessary first to establish that arriving at the basic meaning of justice will best enable the Supreme Court to honor a primary purpose of the Constitution. Analyses of a few prominent conceptions of justice can provide insight to form a condensed theory of fundamental justice. Finally, considering the Holocaust and Nuremberg Trials—as case studies analogous to the death toll and moral implications of abortion law—will reinforce certain abstract principles of fundamental justice and contextualize the later argument directly addressing personhood and *Roe*.

A. Outfitting the Vessel: Supreme Court Justice is Both Title and Task

Though the Supreme Court has consistently held that the Preamble to the Constitution of the United States can confer on the government no positive powers, the Court nevertheless has acknowledged the Preamble's significance to constitutional law.[29] Despite its inability to grant authority, the

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MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/objective (last visited Apr. 9, 2022).

28. In this argument the "concept of justice" refers to the components and aims of justice at a high level of abstraction, without determining the best means to achieve those aims. More concrete expressions of justice fall into conceptions. *See, e.g.,* DWORKIN, *supra* note 21, at 70–72; *infra* Section II.B.

29. *See* Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) (explaining not only that the Preamble lacks substantive effect but also that arguments concerning the spirit of the Constitution must resort to the Constitution's express language); *see also* Estelle v. Jurek, 450 U.S. 1014, 1020 (1981) (arguing that the Preamble demonstrates "[o]ne of the principal goals of our Federal Government, . . . [to] 'insure domestic Tranquility[,]'" to support state policy) (quoting U.S. CONST. pmbl.); Gregory v. City of Chicago, 394 U.S. 111, 113 (1969) (Black, J., concurring) (pointing to the Preamble as indicative of the Constitution's promises toward the American people, which the Federal Government has bound itself to fulfill); *but see* Rhode Island v. Massachusetts, 37 U.S. 657, 731 (1838) (relying partly on the Preamble to justify the Court's exercise of jurisdiction over state boundary disputes). Finally, the Court quoted the Preamble in Doe v. Bolton, 410 U.S. 179, 210–11 (1973) (Douglas, J., concurring), invoking "the Blessings of Liberty" as conceptually encompassing the right to choose abortion. It prompts reflection that the Court would quote these words, followed immediately as they are by "to ourselves and our *Posterity*." U.S. CONST. pmbl. (emphasis added).

Preamble continuously presides over the Constitution as a lodestar,[30] prominently declaring that one clear purpose of the Constitution is to "establish Justice."[31]

Because the Supreme Court must expound on the Constitution for the nation, the deft use of reasoning to direct constitutional interpretations toward justice is the Court's first mandate.[32] But without ways to distinguish among them, all stars can look much the same, and the open ocean of "Cases" and "Controversies" can provide but few landmarks.[33] The Constitution alone could certainly verbalize grounding principles, but it could not provide those principles' detailed outworking.[34]

For the Framers to craft the Constitution to bring about justice, they must have held some abstract notion of justice as a desirable—and at least somewhat attainable—state of things.[35] And they must have held this notion respectively before drafting was complete as they debated the proper forms of, and means to realize, their aims.[36] That the Framers succeeded in reducing their compromises to writing demonstrates that they felt the resulting charter represented the best contemporary vision of their collective notions.[37] Though surely not entirely satisfied, the Convention must have pre-

30. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833).

31. U.S. CONST. pmbl.

32. *See id.*; U.S. CONST. art. III, § 1.

33. *See* U.S. CONST. art. III, § 2, cl. 1. It is one thing for a court to have the burden of handling disputes; it is another for a court to know how to shoulder that burden.

34. Nor should it do so:

> A constitution, to contain an accurate detail of all the subdivisions of . . . its great powers . . . and of all the means [of their] execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature . . . requires[ ] that only its great outlines should be marked, . . . and the minor ingredients . . . deduced from . . . the objects themselves.

McCulloch v. Maryland, 17 U.S. 316, 407 (1819). Courts work out constitutional principles through holdings and judgments that must conform to the Constitution. *See* Marbury v. Madison, 5 U.S. 137, 177–80 (1803).

35. *See* STORY, *supra* note 30, at §§ 459–60.

36. Notably, the Framers might not have thoroughly appreciated or even *understood* one another's perspectives. *See* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 611–16, 637–70 (1999) (discussing whether James Madison's ideas of an extended republic—despite the pivotal role some scholars have assigned them—fell on deaf ears at the Philadelphia Convention in 1787 because they were too subtly forward-looking). Nevertheless, they apparently shared a strong sense of purpose and mutual respect. *See* Derek A. Webb, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, 64 S.C. L. REV. 183, 188–91 (2012).

37. Concerning the question of whether the Constitution's ideals were conceived by the drafters, the people, or both, *see* Simon J. Gilhooley, *The Framers Themselves: Constitutional Authorship During the Ratification*, 2 AM. POL. THOUGHT 62, 64–71 (2013) (explaining the Federalists' dilemma following the Philadelphia Convention. Were the Convention's members mere clerks for the People, and the Constitution only so much paper until the People

ferred the universal disappointment of negotiation to blind self-interest or tribalism, either of which could have doomed the Constitution.[38] These considerations suggest an abstract, preexisting nature of justice—a yearned-for, discoverable ideal the Framers sought to realize.

The Constitution does not itself create justice, and it does not dictate justice's terms; otherwise, there could be no justice outside the Constitution's four corners.[39] In the same vein, properly interpreting and applying the Constitution depends first on properly conceiving of justice, but even the Framers' ideas of justice could prove too narrow:[40] the Framers, like their Constitution, did not invent justice—it preexisted them both. At the same time, the purpose to "establish Justice"[41] must remain impervious to contemporary whim, the immutable core of every Supreme Court decision.[42]

Finally, a proper understanding of justice will ground it in objective components, forming a fixed point from which human activity can be assessed and to which it can aim. And while fundamental justice will inform constitutional interpretation to guarantee conformity with the Framers' and conventions' ultimate goal as expressed in the Preamble, it will not require perfect adherence to their exact notion of justice to accomplish that goal. Having established these foundations, the following discussion of justice hopes to characterize central principles governing justice generally, to apply in Section III to the meaning of "person" in the Fourteenth Amendment in the context of abortion.[43]

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should approve of it? Or instead did members' personal and political clout lend legitimacy to the Constitution?).

38. *See id.* at 71–74.

39. Its untenable chauvinism aside, the idea that the Constitution of the United States holds a timeless monopoly on justice defies reason. But that idea reveals a central problem in the belief that power *by itself* can produce just laws—or even laws at all; in reaction to this problem, H.L.A. Hart argued for a more robust theory of law. H.L.A. HART, THE CONCEPT OF LAW 16–17 (Paul Craig ed., Oxford Univ. Press 3d ed. 2012); *see also infra* Sections II.B, II.C.

40. The premise of fundamental justice is not originalist because it exists independently of the Constitution; nevertheless, it always will conform to originalism because it comprises the source of the Constitution's purpose "to establish Justice," which the Framers wrote into the Preamble and the conventions later ratified. U.S. CONST. pmbl. Even if an outcome should differ from the Framers' expectations, if it is a fundamentally *just* outcome, it achieves their aim. *See* STORY, *supra* note 30, at § 462. Nevertheless, justice must present in as fixed a frame as possible. *See infra*, Sections II.B., III.

41. U.S. CONST. pmbl.

42. The fundamental justice theory does not espouse a living Constitution but instead presents justice as constitutional law's "supreme criterion of validity." HART, *supra* note 39, at 106–07.

43. U.S. CONST. amend. XIV, § 1.

B. Navigating the Waters: Truth and "Moral Symmetry"

As the idea of justice is broader than the Constitution, fundamental justice restrains all human activity while its foundational principles exist independent of that activity.[44] Distilling justice to its essential components can reveal how well decisions conform to it. Specifically, the Supreme Court's decision in *Roe v. Wade* to reject preborn personhood in reliance on precedent and a deficient range of evidence violated fundamental justice—and, therefore, the Constitution. It did so by failing to satisfy the two central components of fundamental justice: truth and what this Note calls "moral symmetry."[45]

Though the task of distilling justice is not simple, it need not remain mysterious. A brief—and admittedly superficial—survey of various conceptions of justice will offer enough to determine some features of the philosophical landscape. The analysis will then turn to the raw materials comprising those features, separating from every conception of justice what is not shared among them all and acknowledging the remaining principles as unifying. The result will be not justice in practice but rather what justice perhaps entails.[46]

For efficiency's sake, this analysis culls only a few conceptions of justice: "to each his own,"[47] "justice as fairness,"[48] the clarity of laws and their

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44. *See* JOHN RAWLS, A THEORY OF JUSTICE 4 (Rev. ed. 1999). "Being first virtues of human activity, truth and justice are uncompromising." *Id.* Rawls qualifies his own statement a few sentences later: "No doubt [it is] expressed too strongly." *Id.* But this Note will reject his qualification on reasoned grounds: truth and justice must be uncompromising or cease to be themselves, by definition. This is not equal to saying that truth and justice cannot provide answers to changing questions, nor that circumstances cannot affect which outcome will be just.

45. *See* Roe v. Wade, 410 U.S. 113, 158 (1973). "Truth" in this discussion refers to the recognition and expression of things *as they are*, and nothing more. "Moral symmetry" (the Author's coined term) is the goal of fundamental justice: the use of truth to *properly* regulate power, liberty, and outcomes. This discussion will not address moral symmetry except in a cursory manner, because to define preborn personhood is an amoral matter of truth. *See infra* Section III.

46. The process is common enough: A red apple is a fruit. A green pear is a fruit. A green celery stalk is *not* a fruit. Discerning what "fruit" means will involve comparing all of the objects to discover why one of them is excluded, and what characteristics the other two objects share. This proof of the meaning of "fruit," which society accepts and dictionaries record, analogizes to law. *See* HART, *supra* note 39, at 100–01 (reasoning that general acceptance and official application of rules ground the existence of systems of rules). This example is not meant to be facetious; because of justice's primacy in the law, it is not enough to mimic Justice Stewart in *Jacobellis v. Ohio*: "I know it when I see it[.]" 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

47. Russell Kirk, *The Meaning of Justice*, *in* THE HERITAGE LECTURES 2 (Heritage Foundation, The Heritage Lectures No. 457 (1993)). Kirk referenced the classical idea of justice in *suum cuique* ("to each his own") as contemplated by "Plato, Aristotle, Saint Ambrose, and

appeal to the ethical will,[49] the accomplishment of the "greater good,"[50] the pursuit of the presently attainable and discoverable through comparisons,[51] and laws' recognition of human embodiment.[52] None of these conceptions of justice concretely presents the whole. A single concrete representation of justice could not adequately address myriad human experiences.

But excluding the differences among these conceptions can reveal the root principles of the concept of justice.[53] The first step will involve the most of this exclusion, comparing two conceptions apparently very different from

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Saint Augustine of Hippo." *Id.* He also posited that people could "learn the meaning of justice by acquaintance with just persons[,]" such as those who "defend[] vigorously whatever is entrusted to [their] charge, and set [their] face[s] against the lawless[]" and who "[give] every man his due, without fear or favor." *Id.* at 2–3.

48. *See generally* RAWLS, *supra* note 44. "Justice as fairness" results from a social contract among members of a theoretical society who have begun from absolute ignorance of social status, skill, or interpersonal morality. *Id.* Rawls was careful to explain that "justice as fairness" did not make justice and fairness the same, any more than the phrase "poetry as metaphor" would equate those two concepts. *Id.* at 11.

49. *See generally* G.W.F. HEGEL, OUTLINES OF THE PHILOSOPHY OF RIGHT (Stephen Houlgate ed., T. M. Knox trans., Oxford World's Classics 2008). Hegel argued that a person's moral will (uninhibited conscience) calls each of its affirmed desires good, but the *ethical* will recognizes that true freedom must involve limitations imposed by the State and its institutions—so long as they, too, are ethical. *Id.*; *see infra* text accompanying notes 84–85. Hegel also lamented but accepted that the law as "a universal determination" could not precisely provide recompense for every wrong as an "individual case," though this is the goal of retributive justice. *Id.* at 202–03. For Hegel, the nature of justice provides problems too abstract for anything more than imperfect application of imperfect law. *Id.* Justice exists to restore right, regardless of whether laws can fully realize that restoration. *Id.*

50. *See* RAWLS, *supra* note 44, at 22–23. This utilitarian conception asserts that justice is whatever achieves the most satisfaction of the most desires in society. *Id.*; *see also infra* Section II.C.

51. Such an approach criticizes theories of justice that attempt to show ideal human relating but do not prescribe ways to bring about justice in the real world. *See* AMARTYA SEN, THE IDEA OF JUSTICE ix (2009). Sen aimed to form a broad, comparative theory of justice that could in part propose a "systematic procedure for correcting the influence of parochial values to which any society may be vulnerable when detached from the rest of the world[.]" *Id.* at 90. At least one mechanism to free societies from this parochialism was the robust exchange of "[i]nformation on interpersonal comparisons of well-being and relative advantages" during the making of democratic decisions. *Id.* at 93. This Note argues similarly that decisions are more likely to be just when they result from greater access to and use of information that is irreducible (or otherwise most reduced) and true. *See infra* Section II.B.2.b.

52. *See* O. CARTER SNEAD, WHAT IT MEANS TO BE HUMAN 176–85 (2020). Snead asserted that abortion law must recognize people in the reality of their existence as limited and dependent physical bodies. *Id.* This aligns closely with the initial argument that decisions must reason from what *is* in order to be just, and with an objective definition of personhood that strives to define people as they merely *are* rather than by what they can *do*. *See id.*; *infra* Section III.

53. Compare this approach to that of RAWLS, *supra* note 44, at 5, where Rawls argues that finding points of commonality among conceptions of justice would aid in forming a social contract conception of justice governing institutions. *Id.*

one another: "to each his own" and "the greater good." Subsequent comparisons will likely result in less exclusion but might provide greater focus to the remaining principles. The analysis will end by setting those principles respectively into the two central components of truth and moral symmetry.

1. *Initial Exclusions: "To Each His Own" and "The Greater Good"*

"To each his own" focuses on the individual, who must remain free of internal conflicts among his "reason, will, and appetite," and it extrapolates its focus to the State by characterizing rebellion against a *rightful* government as injustice.[54] Proponents of this view also have posited that people can do anything justly if not overstepping others and can justly receive whatever benefits society can rightly offer them.[55]

Justice as the greater good—the utilitarian view—"does not take seriously the distinction between persons"[56] but argues that justice is the maximizing of the good achieved through "the satisfaction of rational desire."[57] Under the classical utilitarian view, individual action or merit and the distribution of wealth do not concern justice inherently, but only insofar as they contribute to the overall welfare.[58] A utilitarian might not utterly reject the notions that individual people can deserve things or that justice can relate to merit, but he or she would argue that the idea of personal freedom or rights is an illusion and secondary to the common good.[59] Utilitarianism can call *any* activity just when its outcome satisfies the rational desires of society in the aggregate, whether in quantity or intensity.[60]

Juxtaposing these two conceptions of justice reveals that justice is more abstract than either conception would argue alone. Because justice as "to each his own" depends entirely on the rightness of individuals' owning or earning,[61] and utilitarian justice depends on the rightness of distributing wellbeing to the greatest extent in society at once,[62] *fundamental* justice must transcend competing considerations of the individual and of society. It

54. Kirk, *supra* note 47, at 5. What makes a government rightful is a separate question this Note addresses only indirectly. *See infra* Section II.C. It is needful merely to presuppose that a rightful government can exist. *See* THOMAS PAINE, *Common Sense*, *in* SELECTED WRITINGS OF THOMAS PAINE 8–9 (Richard Emery ed., 1945). Individuals have needs society exists to meet, and vices the State exists to discourage. *Id.*

55. Kirk, *supra* note 47, at 5.

56. RAWLS, *supra* note 44, at 24.

57. *Id.* at 22–23.

58. *See id.* at 23.

59. *See id.* at 25.

60. *See id.* at 27.

61. *See* Kirk, *supra* note 47, at 5.

62. *See* RAWLS, *supra* note 44, at 23, 27.

must reject both, or else encompass both without dissolving one into the other.

Because utilitarianism and "to each his own" both accept *merit*, it remains a unifying principle.[63] One may reasonably keep the idea of *wellbeing*, as it appears to be a shared aim. Finally, both conceptions recognize the *rightness* of some state of being relative to a *good*. Fundamental justice, then, will include the principles of *merit*, *wellbeing*, the *good*, and *rightness*. It will refuse to direct those principles toward *only* individuals or *only* society in the aggregate, and thus refuse to prioritize either personal freedom or general welfare over the other.

2. Further Exclusions and Refinements

a. "Justice as fairness"

Political philosopher John Rawls presented "justice as fairness,"[64] a conception built from the social contract recommending two principles by which institutions could justly distribute society's resources.[65] The first principle advocates for each person "to have an equal right to the most extensive total system of equal basic liberties" that could function while limited by "liberty for all."[66] The second principle argues that "[s]ocial and economic inequalities[,]"[67] which Rawls considered inevitable in any market,[68] should occur "to the greatest benefit of the least advantaged" and should connect with occupations to which all have equal access.[69] Rawls distinguished his conception from utilitarianism in a few ways: "justice as fairness" accepts the idea that individual freedoms supersede the common good to some extent;[70] it stems from an original hypothetical agreement among individuals acting solely in their own interests;[71] and it does not define the *right* as the

63. *See generally* David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171 (1992). Strauss discussed the interplay of merit and government action, considering the inequities naturally occurring among people with varying levels of talent and skill placed into a capricious market system. *Id.* at 172. He concluded that these somewhat arbitrary factors ultimately make market-based, meritocratic equality of opportunity tantamount to the democratic process of voting for social initiatives, or equality of *result*. *Id.* at 185–88.

64. *See* RAWLS, *supra* note 44, *passim*.

65. *See id.* at 266. Sen explains that transcendental theories like "justice as fairness" conceive of justice broadly but usually do not apply their conceptions to currently existing circumstances or real societies to draw comparisons. *See* SEN, *supra* note 51, at 96–98.

66. RAWLS, *supra* note 44, at 266.

67. *Id.*

68. *See id.* at 268–69.

69. *Id.* at 266.

70. *See id.* at 25.

71. *See id.* at 26.

maximizing of the *good*.[72] Rawls also denied a moral component to merit because—at least in the marketplace, where Rawls purposely placed "justice as fairness"—merit appears to depend on little more than supply and demand.[73]

In short, "justice as fairness" operates in a hypothetical closed society of people beginning from an "initial position" with no knowledge of themselves or others beyond realizing their existence,[74] who have agreed to certain rules of governance. It is a thorough and complex discussion of how the just distribution of resources might look, emphasizing achievement of an agreed-upon equilibrium that will endure incidental inequality.[75]

Because the "initial position" distinguishes "justice as fairness," fundamental justice will not require the initial position. The individuals comprising Rawlsian society are originally self-interested only,[76] while this restricted sensibility is somewhat absent from "to each his own" and certainly absent from utilitarianism. Fundamental justice accordingly excludes the *atomized* individual.[77] The principle of equality frequently appears in the fairness conception but need not arise separately from some combination of *right*, *good*, and *merit*. The characterization of equilibrium reasonably aligns with *wellbeing*. Fundamental justice will retain all of these. "Justice as fairness" does not, then, exclude any principles of fundamental justice but does help reveal their scope.

b. The clarity of laws and their appeal to the ethical will

To live cooperatively with others, individuals must regulate their behavior or else experience various kinds of separation.[78] The careful making

72. RAWLS, *supra* note 44, at 26.

73. *Id.* at 274 ("Surely a person's moral worth does not vary according to how many offer similar skills, or happen to want what he can produce."); *see also* Strauss, *supra* note 63, at 185–86. Those with the right skills, whether innate or trained, find work. *See* RAWLS, *supra* note 44, at 269. Work and skill determine wages, which eventually diverge from one another to create "social and economic inequalities[.]" *Id.* at 266. And yet more clearly, Rawls writes: "The essential point is that the concept of moral worth does not provide a *first* principle of distributive justice. . . . [M]oral worth can be defined as having a sense of justice[.]" *Id.* at 275 (emphasis added).

74. *See* RAWLS, *supra* note 44, at 15–19.

75. Rawls also affirmed "to each his own": "[A] just scheme gives each person his due: that is, it allots to each what he is entitled to as defined by the scheme itself. The principles of justice for institutions and individuals establish that doing this is fair." *Id.* at 276.

76. *See id.* at 26.

77. *See* SNEAD, *supra* note 52, at 86–87, 168.

78. *See* JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 352 (Paul Craig ed., 2d ed. 2011). The extremes of such separations can become abusive; the idea of abuse recognizes a departure from moral symmetry. *See id.*

of rules benefits those subject to them.[79] German philosopher G.W.F. Hegel considered it "a great act of justice" for the State to create laws the governed could read and comprehend.[80] This conception differs from one arguing the justice of a law's *content*; ultimately, it is grounded in the *rightfulness* principle. A clear understanding of law enables people to act according to duties, which are "the winning of *affirmative* freedom," and their fulfilling of those duties establishes "rectitude."[81] As Hegel writes, "the system of right is the realm of freedom made actual, the world of spirit [*Geist*] brought forth out of itself as a second nature[]"[82]—this second nature is the State and its institutions.[83]

It is within "the system of right" that the first component of fundamental justice, truth, most plainly appears: fundamentally just laws must be practicably clear and must depend on irreducible fact, or what Hegel would perhaps call a "universal."[84] If a law stems from such irreducible facts, individuals can understand their duties and how to exercise their freedom ethically, and they can have confidence that the law is just because it is first true.[85]

c. Human embodiment and comparative justice

The remaining conceptions are respectively the most pertinent and least pertinent to the argument that *Roe v. Wade*'s view of personhood was unjust. Snead's contention that bioethics law must acknowledge the life of people as limited physical bodies tracks directly with the truth component of fundamental justice:[86] the human body simply *is* limited and dependent on others, and laws based on a contrary premise are therefore disingenuous at best. Sen's theory speaks more broadly, asserting that it is possible to rectify injustice without first establishing a picture of perfect justice.[87] Section IV will refer to Snead's embodiment theory in greater depth. This Section concludes by substantiating the components of fundamental justice in light of the preceding comparisons among conceptions.

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79. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 19 (John Murray ed., 1832). Such rules speak to the legitimacy of authority, though illegitimate authority can still wield power. *Id.*

80. *See* HEGEL, *supra* note 49, at 204 (emphasis omitted). Hegel's "ethical will" offers no further exclusions to fundamental justice, but it reinforces the theory by exposing the crucial component of truth. *Id.* at 154.

81. *Id.* at 157.

82. *Id.* at 26.

83. *See id.* at 160. Hegel qualifies ethical life as submission to good laws only. *Id.*

84. *See* HEGEL, *supra* note 49, *passim*.

85. *See id.* at 26, 157.

86. *See* SNEAD, *supra* note 52, at 176–85.

87. *See* SEN, *supra* note 51, at ix.

3. Fundamental Justice as Stating Truth and Achieving Moral Symmetry

Conceptions of justice diverge on their means but converge on several ends. These ends have fallen into principles of *rightfulness*, the *good*, *merit*, and *wellbeing*. Fundamental justice governs both the individual and society and must not prioritize either individual freedom or aggregate benefit over the other. Because justice must deal with individuals, it must account for conflicting wills; because justice must deal with society, it must provide terms on which every individual can agree, where possible, to mitigate or prevent those conflicts. Therefore, fundamental justice will use irreducible facts—truth—where possible to establish what is *right* and *good* so that those with *merit* according to those facts receive what is due them. In this way, fundamental justice facilitates order and peace—or *wellbeing*. This process realizes moral symmetry.[88]

C. The Drogue: Nazis, Nuremberg, and Fundamental Justice as Natural Law

If a preborn human being is alive, abortion kills it. If a preborn human being is a living person, abortion kills a person. If a preborn human being is a living person who has committed no crime, abortion kills an innocent person. If a preborn human being is a living person who has committed no crime and whose killing the law allows because of the person's prenatal status, abortion doctrine justifies killing an innocent person for membership in a class.[89] These simple statements provoke arguments to reframe abortion, such as the claim that a fetus simply is not a person.[90] Since *Roe v. Wade* in 1973, over sixty-three million surgical abortions are estimated to have taken place in the United States.[91] Constitutional protection of the right to abort depends entirely on the accuracy of the *Roe* Court's personhood finding.[92]

The mass termination of human life has rested cyclically on dehumanizing positions. Of these positions, those prompting the Holocaust provide useful parallels, and the resulting Nuremberg Trials contributed to the for-

88. *See supra*, notes 45, 78.

89. *See* Roe v. Wade, 410 U.S. 113, 158 (1973). This equal protection question does not exist, however, while the preborn human being is not a person. *Id.*; *see also infra* Section IV.

90. *See Roe*, 410 U.S. at 158.

91. *Number of Abortions - Abortion Counters*, numberofabortions.com (last visited Nov. 14, 2021, 10:59 PM) (extrapolating from data furnished by the Guttmacher Institute and others).

92. *Roe*, 410 U.S. at 156–57 ("If this suggestion of [fetal] personhood is established, [Roe's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment. [Roe] conceded as much . . . .").

mation of international law and established the crime against humanity.[93] For three reasons, such examples serve well to exercise some aspects of fundamental justice concretely before addressing fetal personhood and abortion. First, the general beliefs predicating and sustaining the Holocaust comport with those enabling *Roe*—namely, that a group of people was considered subhuman, making its extermination a moral good as protection from a threat.[94] Second, the Holocaust's Jewish genocide stands in relief at approximately ten percent of abortion's American death toll since *Roe*.[95] Finally, particular testimony at and controversy surrounding the Nuremberg Trials demonstrated a schism in western legal thought that persists today and implicates abortion: The traditional underpinnings of natural law fly against a developing materialistic philosophy that has reduced law and morality to value judgments, the balancing of competing claims.[96] But power and public approval fail as bases for law—and more importantly, as bases for fundamental justice—because they cannot inherently produce moral symmetry.

As Adolf Hitler's power grew during the 1930s, his National Socialist (Nazi) Party enacted increasingly oppressive laws governing German citizens, particularly Jews.[97] By the end of World War II and the defeat of the Third Reich, enforcement of these laws had systematically imprisoned and murdered over six million Jews, among others.[98] The Allies sought to punish Nazi officials and other powerful German sympathizers, and the United

93. History.com Editors, *Nuremberg Trials*, HISTORY.COM, https://www.history.com/topics/world-war-ii/nuremberg-trials (updated June 7, 2019).

94. United States Holocaust Memorial Museum, *Introduction to the Holocaust*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust; *see also* United States Holocaust Memorial Museum, *Nazi Racism: In Depth*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/racism-in-depth. The Nazis propagated first the idea that Jews were an inferior race and later that they posed a threat to the purity of the German race. *Introduction to the Holocaust*, *supra*. American abortion doctrine propagates first the idea that the preborn are not persons, *Roe*, 410 U.S. at 158, and then that government recognition of their personhood would threaten the full exercise of "liberty." *Id.* at 156–57; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 852–53 (1992); *see also infra* Sections IV.B, IV.C., V.

95. Put another way, abortion in the United States has killed at the rate of approximately two Holocausts per decade since the *Roe* decision nearly fifty years ago. *See supra*, notes 91, 93. This conservative rate ignores non-Jewish deaths in the Holocaust and does not include chemical abortions.

96. "Justice as fairness" can demonstrate this shift in explaining morality's source in social contract theories. *See* RAWLS, *supra* note 44, at 40. Whereas natural law presupposes moral facts, they exist in Rawls's "original position" as a result of—rather than a cause of—choices. *Id.*

97. *See Nuremberg Trials*, *supra* note 93.

98. *Id.*; *see also* HEGEL, *supra* note 49, at 247. Contrary to the view of some regarding Hegel's perspective on the actions of the Nazi party, he roundly criticized "the fierce outcry raised against the Jews" because it ignored the fact of their humanity and embraced "folly." *Id.*

States convinced the Allies that a criminal trial would provide a written record justifying retributive action.[99] Yet, to form a body able to judge a *nation's* crimes against the *world* would be unprecedented—there had been no such trials in recorded history.[100]

In 1945, the Allies established the London Charter of the International Military Tribunal, which nineteen additional countries joined.[101] The Tribunal conducted its proceedings at the Palace of Justice in Nürnberg (Nuremberg), Germany.[102] A panel of judges representing respective Allied countries heard testimony, and defense counsel examined and cross-examined witnesses and presented arguments.[103] After the first trials of major war criminals ended in October 1946, the United States continued alone as a military tribunal for subsequent trials from 1947–1949.[104]

Some of these later trials involved German lawyers and judges who had enforced the Third Reich's laws.[105] Dr. Rudolf Aschenauer represented German judge Hans Petersen, one of the few the Tribunal would acquit.[106] At oral argument, Dr. Aschenauer summarized the developments in legal philosophy precipitating the Third Reich.[107] He argued that Hitler's policies had not suddenly departed from a traditional higher law but instead had developed from influences spanning hundreds of years and multiple continents.[108] These policies had left German judges in the "precarious position"[109] of having to balance competing notions of law as power and law as reason.[110] Aschenauer further explained that even before Hitler's rise, many parts of the western world had already rejected the concept of natural law and any resulting connection between the law and morality.[111] He concluded that German judges like Petersen could not be punished for dutifully apply-

99. History.com Editors, *supra* note 93.

100. *Id.*

101. *Id.*; The Editors of Encyclopaedia Britannica, *Nürnberg Trials*, BRITANNICA (Nov. 30, 2021), https://www.britannica.com/event/Nurnberg-trials.

102. The Editors of Encyclopaedia Britannica, *supra* note 101; History.com Editors, *supra* note 93.

103. The Editors of Encyclopaedia Britannica, *supra* note 101; History.com Editors, *supra* note 93.

104. History.com Editors, *supra* note 93.

105. *See id.*

106. *See NMT Case 3: The Justice Case*, HARV. L. SCH. NUREMBERG TRIALS PROJECT, http://nuremberg.law.harvard.edu/nmt_3_intro (last visited Mar. 6, 2022, 4:44 PM).

107. *NMT Defense (Nuremberg Military Trials), Final Plea for Defendant Hans Petersen*, *16 June 1947*, 10,218–20, HARV. L. SCH. LIBR. NUREMBERG TRIALS PROJECT, https://nuremberg.law.harvard.edu/transcripts/3-transcript-for-nmt-3-justice-case?seq=10259&q=Aschenauer (last reviewed Mar. 2022) [hereinafter *NMT Defense Plea*].

108. *Id.* at 10,218–19.

109. *Id.* at 10,221.

110. *Id.* at 10,220–21.

111. *Id.* at 10,218–20.

ing the internally valid laws of the Third Reich, even if they violated international law.[112]

Ironically, Aschenauer had derived his argument's support from the history of legal philosophy in a 1946 American Bar Association Journal article that had actually warned *against* embracing materialist positivism.[113] Its author, Ben W. Palmer, had called for a return to natural law principles, which he claimed would "give to the nations of the world that sense of moral unity which is the only foundation for lasting peace."[114] Yet, Dr. Aschenauer had used Palmer's article to defend Hans Petersen's judgments in Third Reich courts—judgments that had demonstrated the *rejection* of natural law.[115] Was there indeed any real, overarching *Law*, something greater than Germany's—or any other nation's—actual legal systems?

Controversy concerning the Nuremberg Trials arose even among members of the Supreme Court of the United States.[116] Two Justices (including the Chief Justice) respectively criticized the Trials as a "sanctimonious fraud" and the Allies' involvement as "substitut[ing] power for principle," though their fellow Associate Justice Robert H. Jackson was the Trials' chief American prosecutor.[117] While there was little doubt whether the defendants at Nuremberg should have been punished, there was apparent disagreement over precisely *why* and *how*.[118]

The Nuremberg Trials ushered in a global jurisprudence seemingly at odds with nationalism and utilitarianism.[119] Yet this same global jurisprudence paradoxically affirmed those doctrines by asserting the will of an international meta-State that could discipline individual nations for the world's benefit. And the concept of a worldwide justice to govern the nations posed a new problem for those theorists who would prefer to dismiss natural law: What basis could there be for managing whole countries' behavior toward one another, if not recognition of an ultimate authority to which all people *should* submit?

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112. *Id.* at 10,231–34.

113. Ben W. Palmer, *Defense Against Leviathan*, 32 A.B.A. J. 328 (1946). This Note uses the phrase "materialist positivism" to reflect a two-pronged legal theory: morality is not more than social acceptance aimed at human thriving, and law does not exist outside the rules society generally accepts.

114. *Id.* at 360.

115. *See NMT Defense Plea*, *supra* note 107, at 10,221.

116. *See* History.com Editors, *supra* note 93.

117. *Id.*

118. *See id.*

119. *See NMT Defense Plea*, *supra* note 107, at 10,218. The Trials defied nationalism because they sought to enforce an *international* law and eschewed utilitarianism by punishing genocide as an *objective* evil.

For the realist in the mold of a Justice Holmes or Cardozo,[120] an international tribunal's power would derive substantially from countries' willingness to recognize it, just as law generally stems from public acceptance.[121] But it does not follow that such a tribunal's laws would cease to be *just* if the world's sovereigns refused to abide by them. If murder is unjust, an increase in murders does not render it less unjust. Lawlessness does not vitiate law; indeed, lawlessness cannot exist without an embedded sense of what is lawful. This truth does not suddenly disappear when applied to nations' conduct.

The Nuremberg Tribunals could not avoid rendering decisions for reasons rooted in natural law.[122] They simultaneously could not avoid apparently using their power to assert their legitimacy, and even the legitimacy of international law, whether as a tool or weapon. The abstract issues posed here speak to fundamental justice, which analogizes to the natural law and necessarily strains against positivism: If no principles exist restricting the actions of sovereigns, then no concept of justice exists in a truly aggregate sense. If justice comes from authority, it is not the mere power in authority that qualifies laws as just, but rather the *rightfulness* of submitting to *legitimate* authority.[123] And asserting *rightfulness* and *legitimacy* returns justice to moral considerations rather than bare expressions of comparative levels of influence or approval.[124] If the Nuremberg trials were just, they were just

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120. *See* Palmer, *supra* note 113, at 328. Cardozo acknowledged "a field within which judicial judgment moves untrammeled by fixed principles[,]" where vagueness of law or custom or norms—or collisions among these—could justify judges' "exercise of a power frankly legislative in function." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 128 (1921). But he also recognized "innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment." *Id.* The personhood question presents such an instance. *See infra* Section III.

121. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1–2 (Project Gutenberg 2000) (1881) (ebook).

122. Even to the positivist, the premise of international law depends on the ready existence of principles granting a juridical body the authority to judge nations. HART, *supra* note 39, at 223–26. It is perhaps irrational to deny that the fashioning of international law is the involved nations' attempt to establish laws based on a shared comprehension of such principles. *Id.* What qualifies these principles as best is a normative matter not universally moral, *id.* at 228–30, but if they guide international law, they nevertheless spring from some superior source. *See* Russell Kirk, *The Case for and Against Natural Law in* THE HERITAGE LECTURES 1 (Heritage Foundation, The Heritage Lecture No. 469) (1993).

123. *See* HART, *supra* note 39, at 56–61 (discussing rightfulness of authority and the existence of rules in general).

124. Of course, should its law be unjust, the government can nevertheless hang you for violating it. *See* AUSTIN, *supra* note 79, at 279. Austin believed "the term superiority signifies might: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes." *Id.* at 19 (emphasis omitted). The American Revolutionary War sprang at least in part from the notion that even a government histori-

because the Tribunals' authority was *legitimate* and the laws they enforced were *right*.[125]

III. TRUE BEARING: OBJECTIVE PERSONHOOD

The Constitution of the United States presents general principles in necessarily broad terms in order to "establish Justice."[126] It is reasonable to prefer defining a word like "person" in harmony with this nature of the Constitution. This preference differs from arguing that the definition of "person" should match drafters' original intent;[127] it also eschews arguing that the definition should evolve. But even if the definition should match the Constitution's nature, it does not follow that it would be fundamentally just. Because justice exists outside of the Constitution,[128] the fundamentally just definition will consist of objective, irreducible fact.[129]

The definition of "person" must, therefore, present enough generality to maintain accuracy throughout history and into perpetuity and must simultaneously present enough specificity to provide discernible limits.[130] This generality and specificity, however, must be incidental to the definition's truth. An objective definition is not merely sufficiently descriptive; it is actually correct and universally indisputable.[131]

A counterargument claims that "personhood is not a matter of fact. It is not a thing or a concrete property inhering in a thing[,]" but merely a legal and moral status "we confer as a normative matter at a certain point in hu-

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cally perceived as blessed by divine right could devolve to tyranny. *See* PAINE, *supra* note 54, at 11.

125. *See* FINNIS, *supra* note 78, at 352. "[A]uthority is derived solely from the needs of the common good," and enacting laws for purposes aside from the common good amounts to a "radically defective" use of authority. *Id.*; *see also* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 41 (1893) (ebook). Law's root principle of achieving "true and substantial happiness[]" is "binding over all the globe in all countries, and at all times[.]" *Id.* (internal quotations omitted).

126. U.S. CONST. pmbl.

127. *See generally* Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539 (2017) (arguing that originalism supports Fourteenth Amendment personhood for the preborn).

128. *See supra* Section II.A., notes 35–42, and accompanying text.

129. Irreducible facts satisfy the truth component to fundamental justice, lending initial validity to court decisions based on them. *See supra* notes 20, 26, 51, and accompanying text.

130. Such neutrality serves in constitutional interpretation. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1, 7–8 (1971). This Note attempts to neutrally grasp justice and thereby remediate its status as a "fundamental value" Bork would initially reject. *Id.* at 8; *see also* Griswold v. Connecticut, 381 U.S. 479, 511–21 (1965) (Black, J., dissenting); *supra* note 20, and accompanying text.

131. *See* MERRIAM-WEBSTER DICTIONARY, *supra* note 27.

man development."[132] On this view, personhood can be abstractly equated to adulthood as a stage of life to which courts ascribe rights.[133] But this argument must discount objectively measurable biological markers that separate stages of human development from one another and render adulthood more than a "status conferred later in life[.]"[134] The argument also does not explain how its narrow conception of personhood as "a normative matter at a certain point in *human* development" squares with the legal fiction of corporate personhood.[135] Even conceding that "person" is often normatively defined,[136] this does not rebut the argument that it is fundamentally just, and possible, to define "person" in a way that is not normative.

At the essential level, a person is a human being[137]—a physically embodied creature conceived exclusively after the fusion of sperm and egg of the species *homo sapiens*.[138] This is the first requirement of personhood. Limiting personhood's species to *homo sapiens* achieves fundamental justice's required "universal"[139] because all human beings share the status of being *homo sapiens*. Rather than a characteristic's specific traits, it is the unbroken sharing of a characteristic that is crucial to fundamental justice. Should genetic traits of humanity change sufficiently over time to justify a classification different from *homo sapiens*, this would present inconsistency only if those changes should fail to be uniform across all people.

But a person is not a body alone; when a person dies, the body remains, but the person is no longer present. Observation shows spontaneous, self-perpetuating animation of the body's cells *from conception* until death.[140]

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132. Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception"*, 43 STAN. L. REV. 599, 601 (1991).

133. *Id.*

134. *Id.*

135. *Id.* (emphasis added).

136. *Id.* at 618–19.

137. The Court has recognized corporations as Fourteenth Amendment persons through a legal fiction. *See* Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 221–31 (2011) (outlining the development of constitutional corporate personhood). To consider that fiction's proper place in fundamental justice is a separate task. *See* David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643, 643 (2011) (arguing that the current view of corporate personhood under Citizens United v. FEC, 558 U.S. 310 (2010), is too broad).

138. It is needful to restrict conception in this way at the outset. *See Xenotransplantation*, FOOD & DRUG ADMIN., https://www.fda.gov/vaccines-blood-biologics/xenotransplantation (last updated Mar. 3, 2021).

139. *See* HEGEL, *supra* note 49, *passim*.

140. *See generally* Philip G. Peters, Jr., *The Ambiguous Meaning of Human Conception*, 40 U.C. DAVIS L. REV. 199 (2006). Peters recommends assigning conception to the point at which the new diploid genome activates rather than to the genome's mere assembly. *Id.* at 203–04. Because activation represents the first independent activity—and so, life—of the new genome, this Note adopts Peters's reasoning.

This animation—life—is personhood's second requirement. The term "conception" refers to a complex, gradual process; it is inaccurate to term conception as a "moment."[141] After insemination, when a sperm penetrates an egg, the male and female chromosomes join together and, for a time, repeatedly split with the assistance of the maternal cytoplasm in the egg.[142] But at a point between forty-eight hours after insemination and possibly "several days later[]" than the "six- to eight-cell stage[,]" "a single organism that is powered by its own diploid genome[]" comes into being.[143] This is "conception" for the purpose of defining personhood's second requirement of life. In light of these things, it is objectively reasonable to infer that gametes have always combined to form zygotes, which then always have split repeatedly in an organized, specialized manner during gestation to eventually develop the full human body.[144] In short, based on observation of conception as understood in this way, it is objectively reasonable to say that life has always begun then.[145]

A person is a *human*, *living* being. These two components would seem to complete the definition of personhood, but from them arises a third and final component, no less crucial for its being implicit: that of objective identity or uniqueness. Objective uniqueness does not lie in the act of living because all persons, by definition, must live. Uniqueness also cannot reside in DNA: identical twins or multiples share the same DNA from the same original zygote.[146] Requiring individual genetic uniqueness for personhood would arbitrarily render all identical twins and multiples non-persons. Uniqueness is surprisingly rudimentary: it is the objective reality of material existence.[147] A person occupies his or her own zone in the physical universe, which no other person can occupy.[148]

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141. *Id.* at 199–200.

142. *Id.* at 205–13.

143. *Id.* at 214–15. Before implantation the possibility the genome could split to create twins is still viable. *Id.* at 215–16. Some contend that until this "twinning" is no longer possible, conception has not occurred. *Id.* But for *personhood*, the guarantee that at least one independent being exists at the activation of the diploid genome is a sufficient and objective measure.

144. *See id.* at 205–16.

145. It is not necessary to the argument to characterize the event of activation as "conception." The terminology has no bearing on the events. The word "conception" serves for its familiarity.

146. Donna Krasnewich, *Identical Twins*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/genetics-glossary/identical-twins (last visited Apr. 9, 2022, 5:20 PM).

147. This requirement of personhood also relies on the moment of genome activation, but as the demonstration of distinct existence rather than of life. *See* Peters, Jr., *supra* note 140, at 213–15.

148. The same could perhaps be said of the inner life of thought, but a consciousness component to personhood would be subjective. *See infra* note 153, and accompanying text.

So, objective personhood requires life and genetic humanity. Incident and necessary to this definition is the concept of identity, rooted in simple physical existence in space. Each person uniquely exists in a living, physical human body. As life begins at conception,[149] it is correct to say that prenatal life is not a person only if this life does not take up its own space. Given that the DNA of a zygote is a unique blend of two gametes and the diploid genome after activation predictably splits independently of the actions of the mother's body,[150] this nascent life is not an extension of the mother any more than it is of the father.[151] Therefore, any space it takes up, it takes up uniquely. Even before activation of the diploid genome, the identity of a zygote is established as soon as the zygote comes into being because it then occupies space that the mother's body (and any other body) does not.[152]

Distinguishing characteristics such as intellect, appearance, socioeconomic status, and abilities have no role in objective personhood. This definition brooks no ideology or ulterior motive and owns no political or even moral underpinnings. It is objective fact stripped of everything extraneous; it is personhood in its root meaning, each remaining aspect necessary to the whole. Counterexamples may help clarify this point.

One might claim that personhood requires some level of consciousness or cognition over and above life, human physical embodiment, and uniqueness.[153] But this view quickly presents problems of vagueness. What *is* con-

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149. Life here is a biological state of independent activity, and nothing more. *See* Peters, Jr., *supra* note 140, at 213–15. The *Roe* opinion defended its choice not to address the life question, as if biological facts were unavailable and the matter required "consensus[]" of "those trained in the respective disciplines of medicine, philosophy, and theology" before the Court could decide. Roe v. Wade, 410 U.S. 113, 159 (1973). While avoiding philosophy is appropriate for the Court, *see supra* Section I, the Court's characterization of the life question as philosophical was unnecessary. The Court has more than once avoided nonexistent enemies of reason in its abortion doctrine. *See infra* Section IV.B.

150. *See* Peters, Jr., *supra* note 140, at 215.

151. At implantation, the embryo attaches to the uterine lining and the mother's immune system at first reacts as if to an invader:

> The human immune system is programmed to distinguish between "self" and "*nonself*" and to destroy the latter. . . . Yet the uterus, after initially swelling to engulf the embryo and marshaling white blood cells to dispose of it, suddenly turns receptive, even acquiescent. . . . Before the expectant mother knows she is pregnant, the basic relationship between mother and child is forged.

ALEXANDER TSIARAS & BARRY WERTH, FROM CONCEPTION TO BIRTH: A LIFE UNFOLDS 7 (2002) (emphasis added).

152. The zygote is the structure composed of the joined male and female chromosomes, dormant until activation. *See* Peters, Jr., *supra* note 140, at 210–12.

153. Contrary to Rubenfeld's position, the "humanness" of people can indeed be as simple a matter as their genetic makeup, and it is not "pure speciesist prejudice[]" to decide in this way. Rubenfeld, *supra* note 132, at 623. Moreover, it is not certain that our obligation to treat one another differently from our treatment of animals must reside in our "mental capacities[.]" *Id.* Rather, it *is* a kind of "speciesist prejudice[]" to consider people's "capacity for

sciousness? How is it measured? And concerning cognition, which brain activity—and how much—demonstrates personhood, and why? These lines of inquiry welcome divergent responses based on something other than the nature of the things themselves, rendering subjective any such elements to personhood. Under this requirement, a comatose individual might not be a person or might alternate between personhood and non-personhood while in recovery. For fundamental justice, it is not that a person should happen to be conscious or cognizant; it is that objectively, a person *need* not be.

Another counterargument could claim that a person must be viable—able to survive separately from another's body, or more specifically, from the mother's body.[154] Under this definition, no individual inseparably joined to another is a person. The problem here is similar to that involved with identical twins above, though rooted in dependency rather than genetics. To distinguish personhood by independence is arbitrary and renders all inseparably conjoined twins lifelong non-persons. As already discussed, dependency is an inevitable human state distinct from uniqueness.[155] And on another characterization, it is even possible for a person to move in and out of viability through life and so intermittently to enjoy personhood.[156]

Finally, it bears noting once again that this objective definition of personhood views people impartially, echoing truths the Founding Fathers held "to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life[.] . . ."[157]

IV. THE AMONTILLADO OF LIBERTY: ROE, PRECEDENT, AND RESTORATION

This discussion has considered how liberty and justice interact.[158] Abortion law constitutes possibly the most poignant struggle to reconcile these two ideas in modern times. The gradual rise of materialism has eroded foundations of moral reasoning,[159] and substantive due process doctrine has

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thought, . . . speech, self-consciousness, moral experience, certain forms of emotion or spirituality, and so on[]" to be the proper source of our obligation to treat one another differently from animals, while animals uniquely care for their own under no such requirements. *Id.*

154. This point of viability is problematic and can be understood in light of medical technology or in light of *in utero* development. *See* Rubenfeld, *supra* note 132, at 620–23; John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920, 924 (1973). A related argument asserting that there is no general right to occupy another's body ignores the personhood question, so it does not affect the definition of personhood.

155. *See* SNEAD, *supra* note 52, at 176–85.

156. *See* Rubenfeld, *supra* note 132, at 620–23.

157. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

158. *See supra* Sections II.A, II.B.

159. *See supra* Section II.C.

come to champion a vision of the individual that denies human weakness and mutual dependence.[160] Because this denial creates a legal framework based on unreality, abortion doctrine cannot satisfy the truth component of fundamental justice. Moreover, the failure to classify the preborn as persons violates the truth component *objectively*. By its nature, fundamental justice does not involve opinions when addressing existential questions whose facts are discernible and irreducible—such as the question of personhood. The following history will show the initial mistake of American abortion jurisprudence and its subsequent inconsistency.

A. Montresor Chains Fortunato: *Roe* Denies Fetal Personhood

Roe v. Wade presented the Supreme Court of the United States with an opportunity of nearly unprecedented magnitude. In a single opinion, the Court could interpret one word in the Fourteenth Amendment to the Constitution and—if the question did indeed involve human lives—either preserve or potentially condemn a population of unknowable size across the country. The Court was the only body legally capable of such action on that scale.[161] Its answer would determine the nature and posture of the case: if the preborn were persons within the meaning of the Fourteenth Amendment, then they would receive equal protection of the laws, and their right to life would supersede any other lesser rights of any other parties. If the preborn were not persons, the case would enter substantive due process via *Griswold v. Connecticut* and *Eisenstadt v. Baird*.[162]

The precedent establishing substantive due process and its dueling of claims, a formidable jurisprudential weight, persuaded the Court.[163] After an exposition of traditional attitudes, prior case law, and the vacillating opinions of contemporary professional bodies (medical and legal) concerning the preborn, the Court found that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn[,] . . . in accord with the results

160. SNEAD, *supra* note 52, at 168 ("[T]he Supreme Court's abortion jurisprudence and the legal framework that it has created [depends on] . . . expressive individualism."). Snead defines "expressive individualism" as "the atomized and isolated self, lacking any unchosen constitutive attachments, along with the obligations and benefits that might flow from them. . . . [T]he person [is] a lonely agent of desire, . . . whose highest thriving is self-definition . . . ." *Id.*

161. *See* U.S. CONST. art. III, § 1.

162. In *Griswold*, 381 U.S. 479, 485–86 (1965), the right of privacy, whether arising under the Bill of Rights or later Amendments, prohibited state law from preventing a married couple's use of contraceptives. *Eisenstadt*, 405 U.S. 438, 453 (1972), recognized the right of privacy as inhering in all individuals: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

163. *See* Roe v. Wade, 410 U.S. 113, 129–58 (1973).

reached in those few cases where the issue has been squarely presented."[164] And so, the Court's decision fueled the conflict between liberty and justice.[165]

B. Montresor Builds Despite His Misgivings: The Court Affirms *Roe*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court defended, even while it nearly dismantled, *Roe v. Wade*.[166] The joint opinion expressed that while the members of the Court may disagree "about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage," the Court's "obligation is to define the liberty of all, not to mandate [its] own moral code."[167] But these statements ironically present implicit normative claims.

First, by pointing to disagreement "*even* in [a pregnancy's] *earliest* stage," the joint opinion's authors revealed their belief that the stages of pregnancy could bear by degrees on abortion's "moral and spiritual implications," and that the "earliest stage" of pregnancy might present those implications at their most dubious.[168] Yet, "profound moral and spiritual implications" cannot lose profundity unless they first lose their subject: according to the joint opinion, a human being developing in the "earliest stage" of pregnancy lacks those qualities the Court feels merit recognition.[169] This opinion parallels the *Roe* holding that a human being is not a Fourteenth Amendment "person" until birth.[170]

Second, defining liberty inevitably establishes a moral code. Though *Casey*'s joint opinion strained against the outcome that the Court's members should personally influence the contours of "the liberty of all," it ultimately could not succeed.[171] The Supreme Court—like all courts—consists of *individuals* who conduct analyses and make decisions. The Supreme Court—as a bench of Justices—renders decisions according to *votes* for interpretations

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164. *Id.* Rather than beginning with what unarguably *is*, the Court relied on opinions and attitudes to answer personhood. *Id.* It then defended its answer by pointing to a precedent of nine cases, only two of which it had itself decided. *Id.* at 158–59. These methods failed to satisfy the truth component of fundamental justice.

165. And it is not clear why a finding that the fetus lacks personhood should have demanded that liberty (in the form of "the life plans of the mother") prevail over justice (in the form of "the state's desire to protect the fetus"). Ely, *supra* note 154, at 926.

166. The Court also changed the applicable standard of review and test. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (joint opinion). *See also infra* Section IV.C.

167. *Casey*, 505 U.S. at 850.

168. *Id.* (emphasis added).

169. *See id.*

170. Roe v. Wade, 410 U.S. 113, 158 (1973).

171. *Casey*, 505 U.S. at 850.

of the Constitution. And the Supreme Court—as the court of final jurisdiction in all federal matters[172]—explains the *standards* for constitutional behavior and consequences for violations on a national scale,[173] and its decisions bind state legislatures.[174] Those rights the Supreme Court finds within the protective womb of Fourteenth Amendment "liberty" lie at least somewhat beyond the reach of state regulatory instruments.[175] To the extent States consider behavior morally or spiritually implicated, the Supreme Court's decisions restricting state action toward that behavior effectively "mandate [a] moral code."[176] In the abortion context, the Supreme Court asserted in *Casey* its definition of "the liberty of all" and foreclosed moral or spiritual objections to a specific exercise of that liberty.[177] The Court expressly acknowledged this when it verbalized the "underlying constitutional issue" *Casey* presented: "whether the State can resolve these *philosophic* questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in . . . rare circumstances[.]"[178] But as in *Roe*, the Court in *Casey* engaged in its own philosophy by reasoning it was best to conditionally restrict state legislative action on philosophic questions *for the sake of liberty*.[179] Aside from the problems that philosophy in judicial opinions might pose, the Supreme Court's abortion doctrine wrongfully sets liberty above "Justice," which the Constitution aims to "establish," and whose realization involves *restraint*.[180]

C. Montresor Completes and Hides the Wall: The Court Continues to Modify *Roe*

If the standard of fundamental justice exists in true objectivity, it remains unchanging. If a court were to reach a fundamentally just decision through fundamentally just reasoning, any later departure from either decision or reasoning could risk injustice. How much greater an injustice might

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172. *See* U.S. CONST. art. III, § 2, cl. 1; *see also* Cohens v. Virginia, 19 U.S. 264, 379–83 (1821).

173. *See* Dodge v. Woolsey, 59 U.S. 331, 351–56 (1856).

174. Cooper v. Aaron, 358 U.S. 1, 18–20 (1958).

175. This is the function of substantive due process: the courts, and ultimately the Supreme Court, must delimit constitutional liberty so Americans can know its extent and the license the Constitution grants government to restrict it. *See* Marbury v. Madison, 5 U.S. 137, 177–80 (1803). This checks—but could also hamstring—state legislatures. *See Cooper*, 358 U.S. at 18–20.

176. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850 (1992).

177. *Id.*

178. *Id.* at 850–51 (emphasis added).

179. *Id.*

180. U.S. CONST. pmbl.

result from affirming an unjust decision? *Casey* and *Whole Women's Health v. Hellerstedt*[181] expose the Court's shifting away from *Roe*'s justification of abortion as the right to privacy and from *Roe*'s tiered strict scrutiny standard of review.[182] Even if *Roe*'s decision and reasoning had been fundamentally just, *Casey*'s and *Hellerstedt*'s subsequent revisions might have compromised justice.[183]

In *Casey*, the Court justified abortion through a woman's Fourteenth Amendment "protected *liberty*," a right somewhat weaker than *Roe*'s right of privacy.[184] The Court then instituted an "undue burden" test demanding less of the State and turning more significantly on the unborn human being's viability.[185] At least one motivation for affirming *Roe* was the Court's desire to not appear unduly subject to transient political pressures.[186] The Court rightly resisted a shifting standard, though perhaps for the wrong reasons, according to the late Justice Scalia: "The only principle the Court adheres to . . . [is that it] must be seen as standing by *Roe*. That is not a principle of law, . . . but . . . of *Realpolitik*—and a wrong one at that."[187] He continued: "[T]he notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening."[188]

Justice Scalia championed originalism; the concerns he expressed in *Casey* sound most readily in that school.[189] He felt that political pressures often have no bearing on the originalist's pillars of constitutional judgment—the Framers' intent, the discernible public meaning of language at ratification, and the "nature and purpose of a Constitution in a democratic system."[190] For this discussion's purposes, political pressures fail to adequately ground jurisprudence because they only incidentally align—if ever—with the objective principles of fundamental justice.

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181. 136 S. Ct. 2292 (2016).

182. Roe v. Wade, 410 U.S. 113, 153, 162–66 (1973). *See infra* notes 185–89, 192, and accompanying text.

183. Of recent decisions, June Med. Servs. L.L.C. v. Russo muddies the waters of abortion jurisprudence further by presenting to lower courts an uncertainty as to whether *Hellerstedt*'s balancing version of the *Casey* test is appropriate. 140 S. Ct. 2103, 2135–39 (2020) (Roberts, C.J., concurring). *See also* Hopkins v. Jegley, 968 F.3d 912, 914–16 (8th Cir. 2020) (instructing the lower court to apply Roberts' concurrence from *Russo* on remand and consider only how a state law burdened abortion access rather than weigh the law's benefits against those burdens).

184. *Casey*, 505 U.S. at 876 (emphasis added).

185. *Id.* at 878.

186. *Id.* at 864–69.

187. *Id.* at 997–98 (Scalia, J., concurring in the judgment in part and dissenting in part).

188. *Id.* at 998 (Scalia, J., concurring in the judgment in part and dissenting in part).

189. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862 (1989).

190. *Id.* at 856–57, 861–62.

Hellerstedt again modified (or perhaps *clarified*) abortion doctrine, swinging toward greater protection of *Casey*'s liberty interest through a balancing test.[191] The country now grapples with a vast, complicated abortion doctrine unique among its substantive due process siblings. Meanwhile, the non-person death toll rises daily.[192]

V. BRINGING THE WALL DOWN: CONCLUSION

Despite all the reasoning, arguing, and understandable passion infusing the issue of abortion in the United States, the solution remains radically simple (though not easy). The Supreme Court must acknowledge the objective reality before it: the preborn are undeniably persons because they are living human beings. Any argument that more is required of personhood fails the truth component of fundamental justice by reliance on subjectivity, which is dangerous territory for a judicial body with the power of the Supreme Court of the United States. Appeals to honor may fail, and convictions of the heart and soul, though noble, cannot persuade justice, which must first approach the world as it *is*. The Supreme Court, however, cannot shy away from the truth and still advance the Constitution's "Justice,"[193] a justice superior to liberty because it is liberty's very substance.

To recognize preborn personhood in the Fourteenth Amendment would prohibit state laws permitting abortion, whether as violations of due process or of equal protection.[194] Such limiting of state legislatures would indeed impose a moral code—that is an inevitable result of constitutional interpretation[195]—but that moral code would rest on an impartial, irreducible foundation aligned with fundamental justice.

Outlawing abortion in the United States would have other serious repercussions. To the extent abortion is a business, many industrious individuals would lose income and perhaps careers. To the extent abortion involves a right, many parents—for everyone who has conceived is a parent[196]—would lose it.[197] Multiple fields of law would struggle with novel ethical questions

191. Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).
192. *See Number of Abortions - Abortion Counters*, *supra* note 91.
193. U.S. CONST. pmbl.
194. *See* U.S. CONST. amend. XIV, § 1.
195. *See supra* Section IV.B.; *see also* U.S. CONST. art. VI, cl. 2.
196. *See* SNEAD, *supra* note 52, at 172–74.
197. Rubenfeld argued that it is constitutionally necessary to weigh the consequences of any determination of preborn personhood because the determination always involves a woman's constitutional right. Rubenfeld, *supra* note 132, at 601. But that position is inconsistent with *Roe v. Wade*: preborn personhood at conception does not *reduce* the right to elective abortion—it erases that right. *See* 410 U.S. 113, 158 (1973). Only a post-conception view of personhood *necessarily* must consider the constitutional right *Roe* interpreted the Constitu-

whose answers could disappoint many.[198] And the social effects of adopting a fundamentally just view of humanity would likely further embroil sex and gender in controversy.[199] But lives of dignity bear up beneath the weight of such duties and hardships, simultaneously unique and universal, whose bittersweet experience is the distinct—even fundamental—privilege of *persons*.[200]

> I grew impatient. I called aloud—"Fortunato!" No answer. I called again—"Fortunato!" No answer still. I grew impatient. I called—"Fortunato!" I thrust a torch through the remaining aperture and let it fall within. There came forth in return only a jingling of the bells. My heart grew sick—on account of the dampness of the catacombs. I hastened to make an end of my labor. I forced the last stone into its position; I plastered it up. Against the new masonry I re-erected the old rampart of bones. *For the half of a century* no mortal has disturbed them.[201]

For the half of a century, *Roe* has kept in anonymous darkness a hidden, voiceless multitude. The time has come to see and hear them, so to "establish Justice[]" by "secur[ing] the Blessings of Liberty to ourselves *and our Posterity*[.]"[202]

[*]*Geoffrey "Chip" Gross*

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tion to afford. Rubenfeld later discussed this inconsistency. Rubenfeld, *supra* note 132, at 616.

198. Laws concerning assisted reproduction techniques (ART) come to mind. *See* SNEAD, *supra* note 52, at 201–07 (broadly surveying ART procedures, use, and oversight in America), 208–10 (describing state courts' holdings on ART issues), 210–12 (observing ART's substantial self-regulation), 212–22 (explaining that American ART's focus on "procreative liberty" springs from the same "expressive individualism" grounding American abortion doctrine).

199. *See* Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 262–65, 267–80 (1992) (arguing that the Supreme Court's treatment of abortion regulations and other matters of pregnancy has largely neglected social norms and expectations of gender roles. Though some difficulties of pregnancy and motherhood are merely physiological, others result from society's views of women.). Snead proposed the refining of social values to reflect "embodiment as an indispensable aspect of human reality[]" and to encourage those practices essential to human flourishing. SNEAD, *supra* note 52, at 96–105, 170–72.

200. SNEAD, *supra* note 52, at 101.

201. Poe, *supra* note 19, at 738 (emphasis added).

202. U.S. CONST. pmbl. (emphasis added).

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