I. The Problem of Fetal Rights

The Supreme Court deliberates many contentious cases with lasting legacies. Most cases instead see a place for fetal rights, but instead get lost in language of "a compelling state interest," or the "life and health of the mother." Among the most controversial decisions are those from *Roe v. Wade* and *Planned Parenthood of S.E.P.A. v. Casey*. Although both cases allow state governments to curtail abortion in third trimester pregnancies and give greater state control over legislation regarding pre-viability fetuses, these cases construct rights for fetuses unconstitutionally. While there are current restrictions on third term abortions and suits based on injury to fetuses, pro-choice groups still insist that fetuses are not guaranteed Constitutional rights. If the fetus has no Constitutional rights and thus no standing in courts, the arguments for abortion restrictions and suits involving the unborn would no longer have any legal basis.

I believe that the fetus is not guaranteed rights under the Constitution. I do not believe that the fetus has any textual claim to rights, nor do I believe it was the intent of the founding fathers that claims could be made on behalf of the unborn. Although the constitution does not specifically address fetal rights, past cases and the Fourteenth amendment are clear enough on the matter. These sources do not create fetal rights.

II. Compelling Arguments in Favor of my Position

There several reasons for which I believe a fetus is not entitled to Constitutional rights. Textual evidence supports this claim. A citizen, as defined by the Constitution, cannot be expanded to include fetuses. Initially, the Constitution only protected the rights of white men, but this concept of rights was expanded following the Civil War. This new

identity of the citizen, as defined by amendments and the enfranchisement of women, should be our only conception of Constitutional rights. The Fourteenth amendment illustrates the current textual definition of a citizen, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[1] Whether or not "persons" excluded women, in 1918, they were given the right to vote, and from that moment given the same rights as all other citizens.

This text contends that only born persons are entitled to Constitutional rights. Fetuses clearly are excluded by the Fourteenth amendment. Case law supports this definition of citizenship and rights. In spite of the fact that *Plessy v. Ferguson* was the wrong decision and a blemish on the history of the Supreme Court, it does reveal the way that the court thinks about citizenship:

> "…we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow….no State can, by any cat or law of its own…introduce a new member into the political community created by the constitution of the United States."
> -Dred Scott V. Sanford (1857)[2]

Although this ruling has since been reversed, it leaves a legacy of who has rights and who does not. This decision indicates that the Supreme Court used the Fourteenth amendment in determining rights, and should form the basis for future considerations of rights. It is within the text of the law, and the Supreme Court can argue about this amendment's intention, but it cannot extend rights too far. Even if a state intended to give rights to a fetus, it cannot extend American Citizenship. This means that there is no Constitutional basis for fetal rights in spite of court rulings that have found certain rights. These

[1] CP, 150
[2] CP, 248

protections extended by *Roe* and *Casey*, and discussions of "compelling state interest in fetal life," have no legal basis.

III. Opposing Arguments and Conceptions of Fetal Rights

Legislators have tried to carve out legal protection for fetal life. Traditionally, legislators have determined that a "compelling state interest" existed to protect fetal life. One reason for the belief that fetal life is a "state interest" evolves from the concept of fetuses as "proto-persons." Due to this status lawmakers feel fetuses should have some rights. Pro-life law-makers use the same passage of the Fourteenth amendment to extend rights to proto-persons. They claim that, because this passage uses the term "all persons" the authors intended this to include persons about to be born.

The second half of the proto-persons argument denies the right of privacy found by the Supreme Court in the *Roe*... decision. Here pro-life advocates claim that the right to privacy did not include abortions. That due to the harm inflicted on other persons, women should not have a right to privacy with regards to abortion.

While the following argument compared fetuses to proto-persons, there exists another anti-abortion argument of comparison. This argument relies on a more emotional version of the proto-persons theory. The third trimester rule laid out in *Roe* and expanded in *Casey*, creates a problem for deciding when a fetus is too much like a child. If the fetus were outside the womb, such an act would be considered infanticide. Although a fetus may not survive outside the womb in its early stages of development, viability is occurring earlier and earlier due to medical advances. If this stage occurs before the third trimester, then this rule no longer works. We also should consider these earlier fetuses to

be like infants since medical advances make it possible for them to survive outside of the womb, fetuses should be protected at an earlier point.

Another problem for pro-choice activists stem from legal suits brought on behalf of people harmed while fetuses. Increasingly lawsuits have arisen based upon actions that have caused harm to a fetus. Suits for malpractice have been fought in the court by injured parties after birth. Some legal actions are even enacted before the birth of the child. These include incidences of pregnant women forced to undergo drug tests, and criminally prosecuted as a result. These instances illustrate how fetal rights can take precedence over the rights of pregnant women. Most of these cases result in the mother being charged with "delivering drugs to minors," and the removal of the infant from its mother's care, but there have been attempts to pursue charges of child abuse.[3] These types of lawsuits are only applicable if the victim is given Constitutional rights. Harm before birth, now receives similar treatment as harm inflicted on an infant. Such developments challenge the belief that fetuses are not constitutionally protected, and continue to restrict the actions of pregnant women. At the extreme end of this trend, there have been introduction of new laws protecting the fetus, e.g. Lacey's law which allows suit to be brought against the wrongful death of the fetus when the pregnant mother dies.

Another difficult argument stems from metaphysical beliefs about human life. Some pro-life supporters believe that a pre-viability fetus is no different than a later fetus, or an infant. According to this argument, at conception the fetus has a soul. At any point after conception the death of a fetus has moral weight, because no metaphysical difference between a grown adult and a three week old fetus exists. This religious argument draws the conclusion that the Constitution should protect this form of life,

[3] McGinnis

because life has meaning at any stage after conception. The Constitution, they argue, was written with the purpose of upholding Christian morality. Due to the fundamental purpose of the document, legislation should coincide.

IV. Response to the Argument in Favor of Fetal Rights

The first argument made in favor of fetal rights due to a "compelling state interest" commits a serious mistake in its reasoning. First, the state cannot have a compelling interest to create rights for an unprotected group when it restricts the rights of a constitutionally protected group. Fetuses are not constitutionally endowed with the rights of a citizen, if any at all. Women have Constitutional rights, so it should be within those rights not to be compelled by the state to carry unwanted pregnancies. Second, the extension of "all persons *born*…" to include any unborn person directly contradicts the meaning of that passage.

I also object to the reasoning of the second half of this argument. Women were given the right to privacy in *Roe v. Wade*, to deny this decision calls into question all decisions made by the court. To argue that the court did not actually mean to include abortion in the right to privacy, when it clearly states that to be their intent, seriously damages the credibility of Supreme Court decisions. Additionally, the decision to abridge the rights of a protected group on behalf of an unprotected group speaks to a blatant violation of women's rights. It is unequal treatment of a group, which is entitled to treatment equal to other groups under the law. Men can not be compelled to care for a fetus. To compel a pregnant woman to carry a fetus to term is unequal treatment under the law. Whether the Supreme Court found this right within enumeration of privacy, or

within the equal rights amendment, one group should not be made to suffer an unwanted pregnancy. The "compelling state interest" should not include compulsory childbirth. Instead, it should protect the rights of citizens, the right to privacy and equal treatment.

I also disagree with the validity of the second argument by comparison. Even if the fetus may survive outside the womb and appears like an infant, they are not guaranteed any rights. Once the fetus is born it is an infant, but not before. There is something emotionally compelling about this argument, but it has no legal basis. Norman C. Gillespie addresses this phenomenon of legal protection on the basis of comparison, in his description of the *Spectrum of Rights*.[4] As a society we conceive that an about-to-be born fetus has rights, because of its resemblance to an infant. The problem, Gillespie argues, lies in drawing a line between an about-to-be-born fetus and an infant. He suggests that we give rights on a comparative basis relative to the fetus' development.[5] While this attempts to recognize the real controversy of the portrayal of fetuses, there is no Constitutional basis for giving a fetus any rights. If we accept that late fetuses are considered to have rights within our society, we again face the problem of "drawing a line" and disparately affecting the rights of citizens.

Legal suits brought on behalf of harmed fetuses have no Constitutional basis, but enter the debate of the moral status of fetuses. The idea that fetuses harmed in utero that become persons should be compensated, strikes a chord even among pro-choice supporters. Elizabeth Harman attempts to reconcile this inconsistency with her Actual Future Principle, "An early fetus that will become a person has some moral status. An

[4] Gillespie, 239
[5] Gillespie, 239

early fetus that will die while it is still an early fetus has no moral status."[6] An early fetus here refers to a fetus that is not yet viable. This, she argues, is due to the moral implications of the choice of carrying a child to term, "failing to abort a pregnancy is morally significant. Creating a person always involves occurrences of great moral weight."[7]

An abortion has no moral consequences, but carrying a child to term is morally significant. It is not the idea that you intend to carry the child to term that gives moral weight, but the fact the child is actually born. This allows for a suit on behalf of an individual that was harmed in utero, because, once it is born, the harm done to the fetus has moral implications. It would be a false action, however heart felt, to mourn or place blame if an early fetus dies. This is because the fetus has no moral weight, but the concept of the fetus as an infant has caused this mistaken belief. This would not be enough to convince a strong believer in fetal rights that damage to an early fetus has no moral implications, but it is a philosophical argument supported by the Constitutional conception of rights.

One difficulty with Harman's argument, is the fact that it supports the notion that it is okay to legislate for the protection of the fetus. This would have major consequences for legislating the behavior of pregnant women. If legislators make laws due to these suits against the actions of pregnant women their rights will continue to be restricted. A ban on drinking could lead to legislation against smoking and even drinking caffeine. The problem would arise of where legislators should stop restricting the rights of pregnant women to protect the fetus.

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[6] Harman, 311
[7] Harman, 323

The final argument, in favor of fetal rights due to metaphysical beliefs, has no legal basis. One cannot rely on religion to carve out legal protection when no textual basis for this trend exists. Furthermore, the Constitution explicitly separates church and state in spite of the religious rights' strong conviction that such legislation is implicit. No legal theory in the United States can be based on religious belief, if there is no Constitutional basis for doing so. The strong feeling about metaphysical beliefs cannot be used to create legal protection.

V. Conclusion

The problem of fetal rights will continue to be fought at the state and federal level until science and religion can agree on the status of the fetus. While law forms the basis for our society, religion continues to control the morality of lawmakers and the Supreme Court. The moral majority controls the legislative decisions that favor fetal rights. Unfortunately, no amount of philosophical arguments in support of the current status of Constitutional rights will convince pro-life leaders to the contrary. Instead the law must satisfy the controversy of fetal rights. New conservative Justices, Roberts and Alito, may be forced to consider the question of abortion and fetal rights in the not so distant future. While they claim to be strict Constitutionalists, it would not be inconsistent for their moral qualms to contradict their legal philosophy. Moral beliefs will not be easily reconciled with the text of the Constitution. Regardless of the clarity of the Constitution in this matter, and lack of substance to the arguments for fetal rights, I do not foresee a unanimous resolution in the near future.

Works Cited:

Coursepack

Gillespie, N. (1977). "Abortion and Human Rights." Ethics **87**(3): 237-243.

Harman, E. (1999). "Creation Ethics: The Moral Status of Early Fetuses and the Ethics of Abortion." Philosophy and Public Affairs **28**(4): 310-324.

McGinnis, D. M. (1990). "Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory." University of Pennsylvania Law Review **139**(2): 505-539.