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Slavery and abortion: the paradox of american liberalism

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SLAVERY AND ABORTION: THE PARADOX OF AMERICAN LIBERALISM

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DEDICATION

To my loving wife Mary, without whose patience, support, and grammatical assistance this would not have been possible.

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PREFACE

Abortion is a volatile topic in American politics and as a way to examine its existence in American political thought I present an historical comparison this issue to the existence of slavery. It is my contention that America's liberal tradition allows for illiberal institutions to appear in our history and it is only through public debate that these illiberal institutions can be eliminated.

In chapter 2 I lay out the legal history of slave law and its adjudication. This is followed in chapter 3 by the demonstration of the use of liberal language to both defend and excoriate this institution. Then in chapters 4 and 5 I lay out the legal and philosophical thought surrounding abortion and make the claim that this institution mirrors slavery in both idea and application.

Chapter 6 is where I introduce John Rawls theory of distributive justice as a way to eradicate abortion from America while upholding our liberal tradition. My conclusion is that a paradox exists in American political thought that both defends the rights of people while simultaneously allowing for the limitation of rights for certain groups. Slavery and abortion illustrate this paradox and as slavery was removed from America through civil war, abortion can extinguished using America's liberal tradition.

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Chapter 1

Introduction

Louis Hartz proposed in 1955 that America was born with a liberal tradition that determines the path of our political behavior.[1] Hartz also claimed that our devotion to Locke created an aura of certainty in American political thinking. This certainty destroys any middle ground in public debate as those who are marked as illiberal are shut out of the discussion. Hartz' thesis has been challenged by many scholars who have been confounded by the illiberal behavior that has also been a part of America's history.[2] The existence of illiberal behavior within the liberal fabric of America has created a paradox that has often made America's liberal tradition appear inconsistent and Hartz's thesis misguided. However, what must be realized is that illiberal behavior exists in all societies. What makes America unique is that our liberal tradition allows America to address these illiberal impulses and continue to work toward the liberal society that Hartz identified.

Alexis de Tocqueville wrote in the 19th century that, A great advantage of the American is that he had arrived at a state of democracy without having to endure a democratic revolution and that he was born free without having to become so.[3] Tocqueville also spoke of the American fascination with equality as he stated, "Men therefore hold on to equality not only because it is precious to them; they are also attached to it because they think it will last forever."[4] In other words American liberalism means that society can and should be improved. This continual attempt to improve society is accomplished by applying human intelligence to social and economic problems; in this way the historical fascination with being born free and equal is cultivated. For Americans freedom is a birthright that has emerged as the presumption that this

is how our society would be perpetuated. Any thought process or movement that can be viewed as retarding social or economic progress is rejected by Americans as illiberal. Examples of the rejection of illiberal impulses in American history would be the elimination of slavery and the inability of socialism to gain a foothold in American thought. In a more narrow sense, liberalism in America has been defined as, "a general set of ideas that appeal to personal freedom, equal worth, consent by the governed, and private ownership of property that are defined as core human values."[5] The upshot of these definitions is that Americans view themselves as liberal because we attempt to pursue the greatest amount of freedom and equality for all through the process of representative democratic government. In the American mind any behaviors that are interpreted as counter to the expansion of these core values is labeled illiberal and must be removed.

An important idea is that the existence of illiberal behavior does not discount the dominance of a liberal tradition. Illiberal behavior exists because men are imperfect and their behaviors will always be influenced by things such as money, power, and reputation. This desire for fame and fortune encourage illiberalism; nonetheless, I contend that America's liberal tradition has, and will, prevail. American liberalism is a process that does not project a continual upward slope on its way to the perfect liberal society, but rather it follows an uneven path of progress. These apparent ebbs and flows in liberal behavior are not the multiple traditions as argued by some,[6] but rather the unique American behavior that is constantly striving for expanded freedoms. This is what allows seemingly illiberal behavior to exist for periods in American history and is what I call the paradox of liberalism. If a group can present their position in liberal language and then defend it by demonstrating connections to our founding documents, they are welcomed into the discussion. As Hartz tells us, these groups might even

enjoy some success. Nonetheless, they will be conquered by America's liberal ethos.[7] While at first glance this might appear hypocritical, it is in fact the greatest support of the liberal notion of free expression. If a political position can be expressed in liberal terminology then it must be heard and through the process of public debate the citizenry will decide if indeed it is liberal or in fact illiberalism hiding in the accepted thinking of the nation. The difficulty is that this process takes time to ensure all sides receive a fair hearing. This application of the liberal tradition can be seen in the debates over slavery and abortion in America. The issue of keeping people in bondage as chattel slaves played out in America only to be "crushed by a great civil war."[8] The battle over abortion continues in America today and I argue that it too can be eliminated; however, in 21st century America, abortion can be removed by liberalism instead of battlefield conflict.

Whether it was like awaiting a "fire bell in the night" or akin to "holding a wolf by the ears"[9] slavery was viewed as an irresolvable conflict in antebellum America. What made this debate so visceral was both sides had roots in American liberal thinking. In chapter two, I discuss the evolution of slave law and demonstrate how this debate placed property rights squarely at odds with liberty rights. Slaves were property and property rights were supreme in 18th century America. The reality of the day was even if one would concede that slaves were indeed human, they certainly were not equal to white America. This can be seen in the writings of two of the ardent defenders of liberty, Thomas Jefferson and Abraham Lincoln.[10] What becomes obvious is that the creation, enforcement, and adjudication of slave laws contradict each other as the humanness of the slave enters the debate. Historians Thomas Morris[11] and Mark V. Tushnet[12] explain the ramifications that existed during the antebellum period as these convoluted laws and decisions were applied. The law wrestled with how to classify slaves as different types

of property as each had distinct requirements. The law was not so much perplexed with designating slaves as property, it was more a legal issue of how to adjudicate property claims. The purpose of law during this period was to ensure the slave was classified as a possession without any human designation. In this way the slave was no different than a piece of furniture or livestock. An example would be to call a slave immoveable property which had very different legal repercussions than claiming a slave was realty. Slaves classified under immovable property were designated as chattels and were adjudicated under a separate set of civil laws as opposed to slaves that were designated as realty or part of the master's estate. Regardless the designation, the purpose of keeping slaves listed as property undermined any moral argument made against the peculiar institution because these cases dealt with possessions and not humans.

By the 1830s the humanness of the slave moved to the forefront of the slave debate as contract law issues became more common as well as disciplinary procedures against recalcitrant slaves. In the realm of contract law, civil suits were being brought against slaves for property damage. In order to make a claim of this sort the petitioner must be able to show negligence and to do so requires a level of competence. An argument of this sort cannot be made against an animal to request compensatory damages, only against a person. In another legal vein when attempting to hold a slave accountable for harm to another person requires culpability and proof of intentional actions. The ability to plan out and follow through on a plan of action are behaviors that are part and parcel of what makes one human. By making the slave accountable for their actions, slave owners were indirectly recognizing the humanity of the slave.

Liberalism demands a connection to the founding documents of our nation as evidence of an ongoing liberal thought. As local and state courts struggled with this prerequisite, the Supreme Court of the United States entered the fray in an attempt to settle this debate. Slave

owners appealed to the Court because they could claim that the Constitution (a founding document) both supported and allowed slavery within the nation. Abolitionists could also ask the Court to intercede because the Slave Trade and Commerce Compromise (that was part of creating the Constitution) had allowed for the elimination of the slave trade by the year 1808. To anti-slavery supporters this meant that slavery was only intended to be temporary in America. As all students of American history are aware, the Court sided with slave owners when handing down its opinion in Dred Scott v. Sanford (1857). However, rather than ending the slave debate, this opinion exacerbated the struggle.

This can be seen in the newspaper responses that emerged following the decision. In the North, newspapers such as The Watchman and The Reflector were assailing the decision as a tragic day for America. They were quoted in the Liberator on March 27, 1857 as saying, "If this decision be submitted to, there is no longer a free state"… "We are to become a province of Carolina." The Zion's Herald called the decision "horribly wicked", and should "excite a more determined opposition." In The N.Y. Evangelist the claim was made that, "This is a gigantic stride of the Slave Power towards universal domination. And we are afraid this is not the end."[13] Response in support of the opinion was just as vehement. The Daily Union wrote, "We cherish a most ardent and confident expectation that this decision will meet a proper reception from the great mass of our intelligent countrymen." While The Cincinnati Daily Enquirer pointed out that "few would escape attack and censure from disappointed and embittered partisans."[14]

The two most prominent politicians of the day also felt the effects of this decision. Both Lincoln and Douglas attempted political end runs around the Dred Scott decision further demonstrating that the Court had not solved this difficult question. In his speech given after Dred Scott was decided, Lincoln offered the following words, "But we think the Dred Scott

decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no resistance to it."[15]

Douglas offered a more tactical response to this decision by claiming, "territorial citizens could circumvent the letter of the decision by refusing to pass legislation that supported and protected the institution," consequently he reasoned "slave owners would not venture into a territory where their investment in slaves was insecure.[16] Thus as newspaper accounts described the citizens dissatisfaction with the Court's decision, it became clear the debate would not end here. Also, and possibly more significantly, both Lincoln and Douglas did not support the Court's opinion thereby adding fuel to the fires of this debate.

The question put forth is, why did Americans not accept the Court's opinion in Dred Scott? In chapter three I use the model put forth by David Ericson to illustrate how both sides in the slavery debate used the language of liberalism to defend their respective positions to the American public.[17] The liberal logic of slavery is parceled into three camps, the deontological, the contextual, and the consequential. I argue that it is the deep seated belief in liberalism that actually allows for eruptions of illiberalism because illiberal behaviors benefit from the use of liberal language as part of their defense. This is possible because as Hartz points out, since Americans lack a history of feudalism they focus their understanding on liberalism and its language.[18] Here is the paradox of liberalism as slavery is defended as a positive good or tolerated as a necessary evil. Americans defend their liberal tradition yet illiberal behavior that sporadically comes to the forefront is also defended as being liberal. This is necessary because Americans will reject all other political thought as un-American. I develop this line of thinking by examining the writing of the illiberal thinker George Fitzhugh and juxtapose his work with that of Stephen Douglas and Abraham Lincoln. All three men use the language of liberalism to

defend their positions, Fitzhugh one of pro-slavery, Lincoln one of abolition, and Douglas a position of compromise.

What I develop in chapter three is that George Fitzhugh was a man who not only supported the institution of slavery but made elaborate efforts to validate his cause through the use of America's omnipresent liberal ideology. The writings of George Fitzhugh present a struggle for the 21st century American mind. We ask ourselves; how can anyone logically support the institution of human slavery? We must then step back and attempt to approach the struggle over slavery with the mindset of 19th century thinkers, which is not a simple task because of our advantage of knowing the ramifications of this struggle.

Fitzhugh did not manipulate the language of American liberalism in an effort to convince the fence-sitters to support his cause. He applied what he believed to be very liberal premises in order to explain why slavery should be allowed to continue to exist and how the institution of slavery itself was in fact a liberal institution. Fitzhugh put forth several arguments to substantiate his case and it was his ability to move the defense of slavery beyond purely racial grounds that showed the liberal content of his thought.

Two major points in Fitzhugh's thought on slavery was that slavery was in fact a protective institution and the institution was a good fit for the South as well as the Negro who was an inferior being. For Fitzhugh, slavery allowed the Negro maximum freedom by allowing him to exist within a limited world that rewarded work ethic. Conversely, he criticized the North's free labor society as a misrepresentation of a repressive society that created a perpetual servitude for the white laborer. As a way to allow for the coexistence of slavery and free labor, Fitzhugh created the concept of antinomic pathology which simply put proclaims no universal

right or wrong exists. In this way individual regions of the nation should be allowed to create solutions to specialized social issues. The fatal flaw for Fitzhugh's logic was that although he attempted to demonstrate his reasoning as liberal, in the end he supported a type of southern feudalism which he called socialism. As a result, this was seen as a rejection of Lockean liberalism by Americans and doomed his argument.

Alternately, I show Stephen Douglas who saw slavery as a "curse beyond computation" that must be accepted as a necessary evil for a time; however, he still regarded the issue as manageable through his belief in popular sovereignty. He pointed out that slavery had existed for twelve years in Illinois and then the people of that state chose to eliminate it and became a free state, thus popular sovereignty prevailed. Using this logic Douglas was similar to Fitzhugh in that both men espoused the need to offer balance. The difference was that Fitzhugh was willing to allow governmental power to assert its will over the people and Douglas assumed citizens would progress to logical conclusions of their making. For Douglas, arguing from a position of moral certainty made solutions to intersectional disputes like slavery impossible. The logical political path was rooted in legal and constitutional procedures not in the substantive world of right and wrong. Douglas focused on the written law and procedural due process to buttress his argument.

Finally I explain how Lincoln took a view of slavery antithetical to that of Fitzhugh. For Lincoln, slavery was an illiberal institution that was not to be thrust upon others against their will. He viewed slavery as a necessary evil that was forced upon the nation under the compromises of 1787 that were rationalized by the belief that slavery was on the road to extinction. Lincoln believed the institution of slavery was a moral wrong and although the framers were incorrect with their timetable for its elimination because of unforeseen events,

Lincoln saw slavery as on its way to gradual elimination. This was a political reality for Lincoln that he used repeatedly in his debates with Stephen Douglas in 1858. A basic concept for Lincoln was that the nation had to decide whether it was going to be nationally free or nationally slave. He did not see how it could continue on its current path without destroying the nation because as was mentioned, he felt slavery to be illiberal and contrary to certain founding principles. Lincoln would turn to the Declaration of Independence as the founding document to support his liberalism.

In the end Americans reject the arguments of Douglas and Fitzhugh as demonstrated by the election results of 1860. I contend that it is Hartzian logic that dictates thinkers like Fitzhugh were and will be defeated because their approach to liberalism conflicts with the majority of Americans. What helped contribute to Fitzhugh's rejection was that his philosophy at times appeared to try and place a foot in both the liberal and conservative camps. Much of his writing is replete with liberal language, but his ultimate stance on slavery smacked of aristocracy and permanent class division. This was not a liberalism that Americans could embrace.

Looking at the defeat of Douglas is more complex because he did not subscribe to the reactionary enlightenment philosophy of Fitzhugh, yet he did not push for the abolition of slavery. The reason Douglas was not embraced by the South is straightforward; his popular sovereignty model placed the institution of slavery in a tenuous position that most of the South was not willing to embrace and his efforts to defeat the Lecompton Constitution placed him in the camp with "Black Republicans."[19] However, in the North, Douglas was not viewed as the standard bearer of American liberalism and this can be attributed to his work on the Kansas-Nebraska Act.[20] The distrust generated in the North by his actions stayed with Douglas into 1860 and beyond.

Douglas' dilemma was his contorted attempt to play the middle ground in the slavery debate. By 1860, America was essentially two nations co-existing in an uneasy alliance. Douglas' compromise position called upon state's rights and national supremacy simultaneously with end result being was that Douglas in reality was not a national candidate, but rather a candidate hoping to patch together the next compromise to a national problem.[21] Assuming Hartz's theory is correct and the followers of Fitzhugh were in fact repudiated in the North, by virtue of being associated with these men, then Douglas would have suffered the same fate. Once the electoral power shifted to the North, Douglas sealed his demise by not cutting all ties with these men. In the end only one could emerge victorious and that winner was Lincoln, who firmly supported American liberalism.

The idea that began to erode the liberal defense of slavery was the fact that the slave was in reality human and a person. Once this conception was accepted the pro-slave argument lost its liberal support and was doomed to fail. In a vain attempt to justify slavery once the humanness argument was exposed as illiberal, pro-slavery supporters focused on the inferiority of the slave. In this way slavery could be argued as a necessary evil as the slave was not capable of independent thinking. As a way to carve out a defense on liberal ground the supporters of this line of thinking were no longer slave masters but instead they become benevolent caretakers of a disadvantaged species. While this might hold some intuitive sway with some people (mainly in the South) the daily interaction with free negroes in the North discounted this line of thinking.[22] Slavery is the classic historical example of how American liberalism is applied to existing practices. There is no question that the institution of slavery is illiberal. Yet rather than just allow this illiberal behavior to continue unabated in society, Americans challenged this institution from its inception. America's liberal DNA kept a focus on this illiberal institution and

allowed for its destruction (even if by civil war). The eradication of slavery is the American liberal tradition in action. This tradition is not a perfect liberalism, instead it is an imperfect system that nonetheless recognizes the frailties of men and allows for the correction of illiberal behavior.

A modern example of this process can be applied to the issue of abortion. While the debate over abortion may look like an intractable problem, we must not forget that slavery was also thought to be irresolvable. In chapter four, the creation of abortion laws are examined. What is interesting is that similar to the debate over slavery, the abortion debate also places core liberal beliefs at odds. When arguing abortion, liberty rights are placed in opposition to the right to life. An interesting feature of the abortion debate is that unlike slavery, abortion had always been eschewed in America as demonstrated by the infusion of Coke and Blackstone into colonial law. Both of these jurists condemned the act of abortion as a "serious misprision" after quickening had occurred.[23] As opposed to slave laws that were contorted and convoluted, abortion laws were consistent although not uniform in America, with all states enforcing some type of prohibition on the procedure. Beginning with the first documented abortion laws of the early 19th century in the states of Connecticut, Maryland, and Illinois, abortion was deemed a crime even without quickening. The states of New York and Massachusetts made quickening a requirement before the act would be prosecuted.[24] Court cases dealing with abortion beginning with the 19th century are examined to illustrate this consistency. Life quickly becomes the key element in this debate and as early as 1812 with a ruling in Commonwealth v. Bangs courts were clear that quickening must be proved if a case was to be brought.[25] This remained the standard until the 1960s when the courts began to discount life as secondary to liberty interests of the woman. I argue the catalyst for the judicial shift on abortion was both emotional and social

issues. This can be seen with the growing women's movement and population control concerns that began to gain credibility with America during this era. Also, the idea of the quality of life gained immediate support with the media coverage of the Sherri Finkbine case.[26]

The women's rights movement that emerged in the 1960s has its roots in the suffrage efforts that were prevalent in the 19th century. It can be argued that the catalyst for a women's movement were the illiberal practices that had been common during this era. A woman being denied the right to vote until the passage of the Nineteenth Amendment serves as an example. Valid historical evidence suggests that for a time women and blacks were simultaneously engaged in efforts to create liberal equality. Frederick Douglass and Elizabeth Cady Stanton as well as others were leading supporters of these movements that exposed the treatment of women as second class citizens.[27]

There is no doubt that women have a history of unequal treatment in America as witnessed by hiring practice, family law and as some might argue, a general attitude of male superiority exhibited within our society.[28] Nonetheless, the women's movement can be viewed as another example of the paradox of liberalism that was being corrected by the liberal tradition of America. While this movement is an effort to correct illiberal practices another piece to the women's rights story exists. Abortion supporters often attempt to combine the women's movement with their belief in abortion rights. It is true that the two may have a connection, but I am examining abortion from the position that the life of the unborn child has priority over the liberty claims of the woman. In this way, prohibitions on abortion are not unequal treatment, but rather efforts to the contrary.

According to Alvin Gouldner a factor that played a significant role in the public discussion over abortion was that a new narrative of personal behavior was being espoused during this time. This narrative claimed that a never before seen prosperity had taken place in America that altered employment expectations and created a managerial class that was focused on self-fulfillment. This new class was willing to sacrifice others to achieve their desired level of self expression.[29] This unprecedented behavior was particularly strong within women and as a result traditional gender roles were challenged. Within this economic movement abortion opinions were also being questioned because as a byproduct of economic improvements the concept of children and family were also affected.[30] This promotion of individual supremacy and changing gender roles had a hand in what became the women's liberation movement. My contention is not that the women's movement is a negative action. What I have stated is that this movement is seen as a liberal movement to combat past illiberal behaviors. However, the narcissistic element that Gouldner called the "managerial class" has influenced the illiberal promotion of abortion within this movement.

A result of this thought process was people sought ways of justifying not only abortion but limits on population as well. A population control movement was prevalent during this time and in conjunction with the rise of a growing women's movement, abortion was a component of both groups.[31] The idea of population control dovetailed with abortion support because by citing population concerns abortions can be argued as a necessary evil in American society. This would also allow the quality of life arguments to enter the discussion.[32]

All of the aforementioned factors contributed to the shift in public discussion over abortion. These opinions began as separate ideas, yet they had a hand in promoting the practice of abortion. What these things combined to do was to place the life of the unborn child in a

subservient position to the liberty of the mother just as slavery placed the life of the slave in a position of inferiority to the property claims of the slave owner. Even though the unborn was life, it was not equal to the concerns of the woman.

Similar to the slavery debate the Supreme Court intervened in hopes of ending the conflict. Like Dred Scott, the Court's ruling in Roe v. Wade (1973) served only to enflame the debate as the Court introduced the concept of privacy into an already controversial discussion. The Court's opinion in Dred Scott was designed to end the ongoing debate by claiming constitutional supremacy for the institution of slavery and solidify an illiberal practice; however, by this time the populations of the North and West were beginning to dwarf the South and the abolitionist view was growing in strength. More Americans were of the belief that an error had occurred at the Constitutional Convention that allowed for the continuance of an illiberal practice and it was time to correct this mistake.[33] The decision in Roe was designed to grant constitutional supremacy to the institution of abortion. The difference was that abortion was being dealt with through the democratic process and the Court interposed themselves between the people and their legislatures in support of an illiberal institution, thus creating a controversy. The Court in both instances did not allow the democratic process to play out thereby muting the higher law of the people. To further muddy the waters, after the Court's opinion in Roe states began introducing and applying fetal homicide laws that acknowledged the life of the unborn child and attempted to create legal protections for the fetus.

In State v. Merrill (1990)[34] the Minnesota Supreme Court offered a three part ruling when deciding on the repercussions of fetal homicide as they tried to cover both the unborn and the mother under Fourteenth Amendment protections. The 1993 fetal homicide case of Commonwealth v. Welch[35] had the courts of Kentucky claiming that it was the unborn that took

precedence as a matter of established civil law thus using the notion that all men (persons) are created equal under the law. The Constitution and the Declaration of Independence were evoked as a defense for both sides of the case Commonwealth v. Bullock (2005).[36] Supporters of the fetal homicide law claimed that life was a process that all men are entitled to. Opponents looked to the Fourteenth Amendment and applications of equality under the law. Again both sides were attempting to stake a claim to America's founding documents to support their positions. I argue that abortion legislation suffered from the same affliction as did laws regulating slavery, once the issue of life is no longer ignored the illiberal institution can no longer cloak itself in America's liberal language. Modern medical technology has made the nonlife argument untenable for pro-abortionists just as supporters of slavery found themselves, yet the debate continues. This begs the question, why?

To address this question, in chapter five I examine the writings of Robert Bork[37] and Lawrence Tribe.[38] There are several writers and theorists to choose from when researching abortion. I chose Judge Bork to explain the liberal thought of the anti-abortion argument because he is thought of as one of, if not the best legal mind as it applies to abortion and constitutionalism. Robert Bork, a conservative icon, who was nominated to the Supreme Court by President Ronald Reagan in 1987 is the cofounder of The Federalist Society. His confirmation battle for a seat on the Supreme Court, which he eventually lost, mainly because of his pro-life stance is regarded as one of the bitterest fights ever witnessed on the Senate floor.[39]

At age 76, in 2003, Bork converted to Catholicism. He joined the faculty of the Ava Maria School of Law, funded by Catholic philanthropist Thomas Monaghan. According to Bork's bio on the law school's web-site, "Judge Bork has served with distinction as a judge,

lawyer, scholar, government official, law professor, and supporter of life." Bork is described as "the legal and moral conscience of America, reminding us of our founding principles and their cultural foundation." During the 1970s, Judge Bork held the positions of United States Solicitor General and Acting Attorney General. He subsequently served as a United States Court of Appeals judge for the District of Columbia Circuit. Formerly a scholar with the American Enterprise Institute, Judge Bork is currently a Distinguished Senior Fellow at the Hoover Institute and is the author of numerous books and articles supporting the pro-life movement."[40]

To illustrate the opposite side in this debate I chose Professor Tribe because he is the perfect foil to Judge Bork and offers an alternative liberal view on abortion. Laurence Tribe is a professor of constitutional law at Harvard Law School and the Carl M. Loeb University Professor at Harvard University. Tribe is widely recognized as a leading liberal scholar of constitutional law and supporter of the pro-choice movement.[41] He is the author of *American Constitutional Law* (1978), a treatise in that field, and has argued before the U.S. Supreme Court 35 times. Tribe served as a law clerk to Matthew Tobriner on the California Supreme Court from 1966–67, and as a law clerk to Potter Stewart of the U.S. Supreme Court from 1967–68. He joined the Harvard Law School faculty as an assistant professor in 1968, receiving tenure in 1972. In addition to his record as a scholar, Tribe is noted for his extensive support of liberal legal causes. He is one of the co-founders of the liberal American Constitution Society, the law and policy organization formed to counter the conservative Federalist Society.[42]

These scholars demonstrate the schism in abortion thought and at the same time both men profess to espouse liberalism. What I show is that just as was the case in the 19th century, these 21st century scholars use liberal language to defend their position on abortion and both men can

be viewed as the standard bearer for their side of this debate. Similarly as Fitzhugh and Lincoln sparred over the liberal logic that would support their positions, Bork and Tribe engage in a similar intellectual dance. What I argue is that while Tribe is an ardent supporter of abortion, he uses the concepts of liberalism to make his points and sway his audience. Bork, who sees abortion as a factor in the destruction of society in America, uses these same concepts to substantiate the alternate position. These men are aware that in order to draw the American public over to support their cause, citizens must be convinced that your cause supports the consensus of liberal logic.

Another consideration is that both of these men view their positions as liberal and think of themselves as furthering liberal ideology. It is this process that makes the compromise position impossible. With Tribe and Bork both claiming that they are defending American liberal thought, there is no middle ground because they see their position as the only one acceptable in a liberal world. The difference is that to date Americans have not fully come to grips with the life argument that anti-abortionists have created. This process of a society coalescing around one unified idea often takes a great deal of time. Considering the slave debate took Americans over 200 years to find resolution, the 37 years since Roe v. Wade is a comparatively short time and to discount the debate as intractable or solved because there is no immediate solution, rejects our history of deliberation. As of now both sides of the abortion debate appear to make sound liberal arguments to support their position and the Supreme Court's vacillation on this issue since its Roe opinion furthers this conflict. After its decision in Roe the Court has offered Planned Parenthood v. Danforth[43] that struck down as unconstitutional spousal consent, thus adhering to Roe. In a similar vein the Court in Bellotti v. Baird[44] struck down parental consent as unconstitutional. The Court then alters its view when in Dandridge v.

Williams[45] when they questioned the Court's authority to set social policy and in H.L. v. Matheson[46] the Court began to limit a woman's autonomy in abortion cases. But the inconsistency did not end there; in Thornburgh v. American College of Obstetricians and Gynecologists[47] the Court made overtures in the concurring opinions that Roe could be overturned if the laws were properly crafted. The opinion in Webster v. Reproductive Health Services[48] upheld a Missouri law that claimed life began at conception. Most recently the Court's dilemma was illustrated in Stenberg v. Carhart[49] where the Court ruled the procedure of partial-birth abortion to be constitutional, then in Gonzales v. Carhart[50] the Court reversed itself.

America is in a type of post-Dred Scott world in its thinking about abortion. The life issue can be made to support the eradication of abortion, yet other liberal elements have clouded the picture. Since abortion is not a purely sectional issue and because succession is not a reasonable option to be offered as resolution, this example of the paradox of liberalism cannot be solved with civil war. That being the case how can such a visceral problem be dealt with in America?

What I argue in Chapter six is that while both sides of the abortion polemic appear to stand on liberal ground, by using John Rawls' theory of distributive justice the pro-abortion stance is exposed as illiberal and like slavery it can be eliminated using America's liberal tradition. Rawls' theory makes this possible because he attempts to apply the American tradition of liberal thought through a workable philosophy. His theory honors the American liberal tradition by applying the social contract without succumbing to utilitarianism or transient political influence. The foundation of the ability to do this rests on the belief that people are reasonable and rational.

To deal with an issue such as abortion, any form of justice that is applied has to be understood as fair by the citizens. This is also true with any other use of the coercive power of government. Within Rawls' theory he elucidates the idea of procedural justice and its connection to fairness. For Rawls the types of procedural justice are perfect, imperfect, pure, and quasi-pure. Rawls explains that perfect procedural justice is excellent theory; however, it is unattainable in a democratic society.[51] Since perfection is not possible a society must choose from the available alternatives that will best lead to a just and effective legal order. Procedures or rules must be framed to create a just outcome (legislation) that accord with the principles of justice and not simply utility. Imperfect procedural justice is the form of justice that America implements in our criminal and civil trial processes. The reason this is imperfect is that we know what justice demands, that the guilty should be punished. Yet this is an imperfect system because while we are able to obtain a proper outcome most times, there are still occasions where the guilty go free (or worse the innocent are convicted). Nonetheless, a procedure that is understood as fair by the citizens was applied and this constitutes the best of the available possibilities. What the use of such system accomplishes is that while democratic procedures may not yield perfection it will still create a legitimacy of the law.[52]

The application of perfect and imperfect procedural justice works well with established legal principles; however, within a democratic society there are personal behaviors that must be subject to community approval and no definitive or noncontroversial method exists to either allow for a certain behavior or its limitation. Rawls addresses this when he explains pure and quasi-pure procedural justice. Within the realm of pure procedural justice people adhere to the "rules of the game" the society puts forth because they have chosen to be part of the process. In this way it can be compared to an athletic event because while there is no way to determine

without a doubt who the better team is, participants still engage in the competition and accept the outcome because they believe the rules to be fair.[53] The difficulty with applying this notion of pure procedural justice to a democratic society is that citizens do not choose to be part of the society as they are born into it.

As a way to solve this problem Rawls proposes the idea that if citizens could be part of the process that would publicly explain or clarify the rules being applied then people would have a reason to accept the rules as fair and just. This is the application of Rawls original position. Within the original position all voices are heard. Equal citizens offer their perspective of fairness as they freely participate behind the veil of ignorance so that their decisions will not be hindered by selfish interest and political manipulation. Through the original position emotion is replaced with logic and consequences are evaluated from a whole society approach. The by-product of natural behavior is no longer viewed as a societal curse, but instead as a societal obligation. People will accept the decisions made within the original position because this process is seen as fair provided these decisions comport with the two principles of justice.[54] Rawls understood the limits of the democratic process and explained this was why the legislative workings of a democratic society that were outside of the original position are "quasi-pure." Similar to imperfect justice, a fair democratic legislative process can create unjust laws. It is then the duty of the citizens to apply the reasoning of the original position and judge these decisions based upon the two principles of justice. This indeterminacy is not a defect because it shows that justice as fairness is a good theory that defines a range of justice in accordance with considered judgments as well as pointing out the wrongs that society should avoid. This would be a society's political conception of justice.[55]

Working from the considered judgment that the unborn is a life worthy of respect, the application of Rawls' original position places the fetus on equal footing with all others in society. Once this is done the discussion between reasonable and rational people within the original position will lead Americans to apply a type of quasi-pure procedural justice that will demonstrate denying life is clearly illiberal. If the fetus is viewed as a moral equal, then like the slave in the antebellum debate, the unborn can no longer be relegated to an inferior status. The only way that the liberty interest of the mother can take precedent over the life interest of the unborn is to demonstrate somehow the unborn is not worthy of respect because they are less than human. This was the same dilemma that slave holders faced when the slave's humanness could no longer be denied. Their liberal argument was no longer a cogent argument for Americans. Through the process of public reason the debate over abortion will lead citizens to an overlapping consensus that the unborn is life based on a conception that Americans understand. This will then create a reflective equilibrium as those who support abortion will realize that the life of the unborn has a priority in the lexicon of rights that liberalism protects. At this point the institution of abortion will be seen as illiberal and will no longer be defended. Mirroring the slave debate, the liberal defense of life exposes claims to rights that deny life as illiberal.

Chapter 2

Slavery and the Law

An underlying problem for liberal theorists is the difficulty when explaining the need for obedience in society. The necessity of political obligation and therefore, limitations on individual freedoms places this at cross purposes with pure liberal thought. Nonetheless, every society must have structure or it will fall victim to anarchy. If this societal structure is to prosper then the citizens must respect the laws and accept them as legitimate. The issue of slavery tested this belief in political obligation.[1] The language of antebellum America at first attempted to dehumanize Negro slaves and the laws of this era reduced these people to items of personal property. Chattel slavery had a long history in American society and it permeated essentially all types of law before its elimination with the 13th amendment. This institution existed for over 250 years in America because ironically, America had allowed illiberal social and legal practices to take root. The Hartzian liberal tradition in America is tainted by this paradox that allowed for the suppression of human rights.[2] Slavery was accepted as part of civilized society and consequently the American colonies tolerated its existence. Once America embarked upon a path of Lockean based freedom from Britain the issue of slavery took on new meaning and therefore it had to be dealt with on different terms. Slave laws were challenged by abolitionists as barbaric and violations of the liberal promise made at the founding of the nation. The laws of a society are designed to represent the philosophy of the society; what took place in American jurisprudence was an attempt to justify slavery in liberal terminology. This effort demonstrates the paradox of liberalism in America as legislators tried to deal with this issue by denying the humanity of the slaves and defining their existence as one of property.[3]

Whether before the revolution or after, a uniform understanding on the institution of slavery did not exist and citizens in all regions of the nation were divided on the acceptability of such a practice. It was the liberal thought of Americans that created this division as people on both sides of the slave issue could justify or reject slavery based upon liberal principles. For reasons of economy and practicality the institution of slavery became a southern issue as chattel slavery was eliminated in the North both in practice and by statutory law; consequently, over time it became a wedge between northern and southern liberal thought as abolition societies encouraged civil disobedient behavior. It was this schism over slavery that highlighted the paradox of liberalism as Americans began to speak of the acceptance or abolition of this practice. Before the signing of the Declaration of Independence and during the revolutionary period there existed a degree of anti-slavery sentiment that coincided with the tenets of the declaration. This is reasonable as it appeared illogical to declare the exploitive nature of the monarch as grounds for revolution while simultaneously holding men in bondage. This point was not lost on the British when Samuel Johnson stated, "How is it we hear the loudest yelps for liberty among the drivers of Negroes?"[4] Johnson's point was valid and Americans had a philosophical dilemma that they needed to address. This need to square liberal principles with the acceptance of slavery was the motive force behind legal attempts to define Negroes as property, thus adhering to the basic principles of Locke that had been espoused in the Declaration of Independence. In this chapter I will examine how the legal system in America struggled with its inability to rectify these contrary positions.

For reasons that are beyond the scope of this legal investigation, the anti-slavery spirit that existed before the revolution was mitigated after a successful military effort and the new focus of American thinking was more commercial.[5] Abolitionists were branded as religious

zealots; however, the law did not totally forget the prerevolutionary concerns for the humanity of the Negro slave. This was demonstrated at the North Carolina ratifying convention when the argument was made that although slaves were property, they may be rational beings that require representation in the new government.[6] The Lockean principles of life, liberty, and property were to be squarely at odds and the American legal system was assigned the task of reconciling this inconsistency. The problem for America was that liberal thought could be used to justify any of these rights claims and consequently there existed no progression to a single liberal solution. Nonetheless in 1787, the deal was struck and slavery became part of the new Constitution. The point was that the men of the era accepted the evil of slavery as part of the Constitutional bargain to keep the new nation from splintering into multiple factions.[7]

With the creation of the Constitution in 1787 slavery was woven into the legal fabric of America. Now state legislatures would have to create laws to deal with this peculiar institution. The national government would not be free from controversies dealing with slavery and as a result the Supreme Court would hand down decisions in an attempt to eliminate what became a never ending source of irritation for 19th century America. This irritation was exacerbated by abolitionists who challenged the property argument of slave law and who continually made the liberal case that slaves were human and entitled to the liberties of the nation. Southern slave laws were not blind to the reality of the slave as human, thus the laws of southern slavery were inconsistent and truncated by the need to consciously adapt statutes in an attempt to defend the property rights of slave owners.

The liberal struggle with American slave law:

While remnants of the liberal notion that the Negro was human existed in American legal thought, the focus of law in the Constitutional era was on the property rights of the slave owner. Citing historical precedent slave codes were crafted in a language that attempted to deny the humanness of the slave. "Slaves soon became regarded, in the law and in fact, as chattels; the punishment for crime normally took the form of whipping, since execution deprived the owner of valuable property."[8] The focus of southern slave codes followed this legal tract as illustrated in the Alabama code that remained in place until 1852 that stated that the slave was property and the owner had total right to their "time, labor, and services." This belief was further supported in Louisiana slave code that claimed as slaves, "They had no rights, and the owner's ability to sell, give away, or devise by will the disposition of this property admitted of virtually no restrictions."[9] This complete control over the dominion of the slave was a common theme of most southern slave law and it was this type of legislation that slave owners did not want challenged because they had invested large amounts of money into the slave market. Any acquiescence to abolitionists would not only lead to the loss of slave investments but also a loss of land productivity.[10] Yet the slave laws written in America were bifurcated as liberal thinkers that supported property rights were being challenged by the liberal thinkers who claimed that slaves were human. This legal joust continued for decades as laws dealing with slavery in America evolved and took shape.

The legal history of American slave law is convoluted and it does not follow a path that can be easily traced from the complete oppression of Negroes to their emancipation. This is because of the liberal claims both slave owners and abolitionists were making in an attempt to influence law. As early as 1688 there is documentation of public protests against slavery and the difficulties with indentured servitude in Virginia. Bacon's rebellion also contributed to

inconsistencies with racializing slave laws.[11] What was occurring was the dual application of liberal thought. Americans were able to use liberalism to justify the institution of slavery while others used this same logic to rail against slavery's denial of life and liberty. This dual application is why a clear chronological evaluation of slave laws is not possible. The most glaring inconsistency that helped divide attitudes over slave law may have been the beliefs espoused by the giants of the founding era. This was elucidated through the evaluation of Jefferson, Madison, and Washington and their inconsistent handling of the slavery situation as it applied to their private lives. The contention was that these powerful men did not act definitively on this issue and consequently this fueled the ambivalence over slave laws and the position of Negroes in American society. All three of these men acknowledged the injustice of slavery; all advocated its abolition; and all personally held slaves, yet none in his lifetime did anything to promote the emancipation of slaves.[12]

Jefferson was the most well read on this subject and he penned several explanations of these innate differences. It was Jefferson who wrote of "the elegant symmetry of form" of whites and the "strong disagreeable odor" of Negroes. He also believed that Negroes were "much inferior" and "whether originally a distinct race, or made distinct by time and circumstances, are inferior to whites in the endowments both of body and mind."[13] This was the legacy of American slave law. It was a law that attempted to protect historic property rights and simultaneously wrestled with the understanding that this property was human. Since these two diametrically opposed ideas could never be reconciled, southern slave law was forced to amend itself in an ever changing battle to defend property rights.

When examining slave laws in America one must proceed from the position that the majority of people within the nation did not view Negroes as equals even if they believed that

Negroes were more than property. The three aforementioned great men were adamant that Negroes were inferior to whites. Even Abraham Lincoln, the "great emancipator" made this clear in his famous debates with Stephan Douglas when he stated at several campaign stops in Augusta, Macomb, and Greenville that abolition did not include amalgamation. He emphasized this point during his speech in the Charleston debate when he said; "physical differences between white and black races forever forbid the two from living together on terms of social or political equality."[14] This is underscored by scholarship that contends that the unresolved tension of southern slave law was the black man as human versus the black man as property.[15] It is in this light that slave laws were being crafted in America and it is in this same light that the discontent with slavery was being fomented.

For southern society race was not an issue in the slave debate; it was *the* issue. Social order as well as financial gain played significant roles in the application and creation of slave laws. Yet it must be understood that the majority of people, especially early in southern history, believed that Negroes were simply a type of property. Most Americans applied ideas of English Common Law as articulated by Sir Moses Finley who claimed, "Far too often we have fallen into the trap of assuming that statutes on slavery were designed to control black slaves as human beings. What is missing from this analysis is the notion that "juristically" the idea of "property" is the key to the definition of slavery."[16] It was Finley's notion that the essence of slavery "is the totality of powerlessness in principle, and for that the idea of property is juristically the key - hence the term chattel slavery."[17] When understood from this perspective, logic dictated that the colonial Englishmen would apply these English rules of property law to slaves.[18] It was not until later in the seventeenth century that law attempting to control slaves as humans began to appear.

The famous jurist Blackstone also supported the property argument of owners of chattel slavery. In the mid-eighteenth century he wrote, "Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that 'partus sequitur ventrem' in the brute creation, though for the most part in the human species it disavows the maxim."[19] The point that Blackstone was making was that this rule determined not the status of something, but rather the ownership of something. Slave law boiled down to application of English common law that had determined that slaves were property and nothing more. However, there still existed some inconsistencies in slave law because even though slaves were property, the question arose for legal purposes as to what type of property slaves really were.

In Virginia from 1705 to 1792 slaves were defined as real estate for some purposes. South Carolina also attempted to categorize slaves as real estate in 1690 and in Louisiana slaves were designated as 'immovables' although at times the term real estate was used. Slaves were also designated as real estate in Kentucky from 1798 to 1852 and in Arkansas from 1840 to 1843.[20] What these designations do, is to cloud the application of slave law without changing the intent. Freehold slaves were attached to the land whereas chattel slavery attached the slave to the master. No matter the specific legal definition, "the thing" as chattel personal or as realty, if anything, was developed to clarify the status of the owner and not the slave. Different rights, powers, or incapacities were attached to the owner by virtue of any conceived legal fiction. The core concept was that as an object of property rights, a slave had no legal interest in whether he was defined as a chattel person or a piece of real estate as far as status was concerned.[21] This seemingly odd argument was necessary as property was the foundation of wealth and the disposition of wealth was an important legal principle.

An issue that was relevant to this discussion over slaves as chattel or realty was that of wills and inheritance. If slaves were tied to the master then a legal problem ensued when the master died because the question was raised if dominion over the slave died with the master or could this be passed on to heirs? This was less of an issue when slaves were thought of as realty because land rights had always been passed from generation to generation. This issue was addressed in Kentucky in 1840 when the state courts attempted to merge these two ideas into one legal application. Thomas A. Marshall who presided over an estate case in which slave possessions were the issue ruled that whether chattel or realty, the concept of bare title belonged to the master and the master alone. Therefore upon his death the master may pass both his realty and his property personal (the chattel), to anyone he chooses; this would even include emancipation of the slave.[22] In this way slave laws of the South defined slaves as property that could be mortgaged or passed on through inheritance. Laws in the states of Louisiana, Florida, and Arkansas were "to place that species of property upon an equal footing with realty."[23]

Also in 1840 other states tried to deal with the multiple definitions of slaves. In Arkansas and Louisiana the legal codes applied the terms of moveable and immoveable property to slaves. Historically in these states, slaves were considered moveable property; however, legal inconsistencies appeared as moveable property was defined as property that was temporary and could perish. Again death, inheritance, and estate laws needed to be applied and moveable property created some difficulties. What occurred was the evolution of slave status to the category of immoveable property. The difference being that immoveable property "are things which are everlasting and which produce annual income; perpetuity and the issue of production characterize immoveables even more than the important fact of immobility; it is these two qualities which make up their value."[24] Regardless of the legal wrangling the intent of such

discussions was to secure the property rights of the slave owner from intrusion. As sentiment toward slavery became more sectional and hostile, southern legislatures were attempting to find a classification or liberal defense for their property that would be unassailable. "For this purpose the concept of property, the notion of a person as 'a thing,' was obviously the central 'incident' in slavery. Whether the person was defined as a chattel or as realty had no real moral dimension, and it did not raise the status of the slave."[25]

Property law has always occupied a significant place in American jurisprudence so it was only logical for slave owners to connect their most valuable asset to a type of law that all liberal thinkers could respect. That being said, the reality of the humanness of the slave could never be totally ignored and by the middle of the nineteenth century this issue crept into the law at an ever increasing rate. While slave owners were aware in their private life that they were dealing with human beings, they continued to attempt to deny this reality when creating or applying public law. Some slave owners did take the humanness of the slave into consideration when making dispositions that applied to the slave, but seldom to the degree of recognition that would lead to emancipation. More common were arrangements of an estate that took the humanity of the slave into account but this recognition stopped short of granting them their freedom.[26]

Nonetheless, in a Washingtonian fashion more slave owners were thinking in terms of emancipating their slaves after their death. If full emancipation was not part of the will the testator would often allow the slave to choose a new master. This may appear to be an insignificant concession, but it does show a level of recognition of the slave's humanity.[27] Testators were not in a position to emancipate slaves at the expense of potential heirs, nor would they impoverish the family because of personal feelings. Records show that while there did exist the nascent acknowledgement of the humanness of slaves as individuals applied the law, there is

scant evidence to support that this recognition of the slave as a human undermined the rightness of the slave system.[28] What it does indicate is that on the personal level the humanity of slavery was becoming an issue for America.

At the same time the humanness of slavery was beginning to emerge, liberal capitalism was rapidly expanding in America. This economic system introduced the slave to contract law and thus reinforced the property element of slavery. Contract law attempted to preserve the property element of slavery and at the same time it could undermine the human aspect of slavery because it reintroduced the indentured servant mentality. Since a person could enter into contracts, the humanity aspect of slavery was addressed without denying property considerations. Contracts are promises that the law will enforce and they are basically centered on risk allocation. The risk element introduced the notion of consideration into the contract and this worked to promote the belief of the slave as property. Since not all promises are enforceable it is necessary that the promise give something in exchange for the promise that is either a detriment to the promisee or a benefit to the promisor. It is here that the slave becomes the item of exchange.[29]

In the instances of contract law the humanity of the slave was overlooked in order to protect the financial investment of the slave owner. Also when dealing with the trading or sale of slaves the issue of warranty was of paramount interest. Any damaged goods (the slave) would be grounds for legal action or rescinding of the contract.[30] This denial of humanity was not just the belief of slave owners but it was also the practice of southern society as a whole. During this era there existed in the workplace a law code known as the "fellow servant rule." This quasi-legal belief was that individual employees were responsible for each other in the workplace. To prevent accidents, it was the duty of the employee to both ensure their safety and to monitor their

personal behavior so as not to cause harm to another employee. Yet even this understanding between fellow workers did not apply to slaves because when disputes did occur, judges were free to apply their understanding of property (the slave) "complain they dare not, leave they can not."[31]

Under contract law slaves were subject to the issues of warranty as slave owners could be and were sued over the health and potential physical condition of slaves. Two South Carolina judges applied the concept of warranty when they decreed in the case of Timrod v. Shoolbred (1793) that, "in every contract all imaginable fairness ought to be observed, especially in the sale of negroes, which are a valuable species of property in this country."[32] However, even as the application of warranty law appeared to solidify the slaves as property other judicial decisions offered differing views. When warranty law was challenged to decide if mental capacity was also contained within the umbrella of the physical soundness of slaves more contradictions emerged. In the case of Caldwell v. Wallace (1833) Alabama judge John M. Taylor held that a general warranty did include mental soundness, although he did not offer a definition. He wrote that, "the best lexicographers give the word 'person' as meaning the whole man…it is a term used to contradistinguish rational from irrational creatures, and thus applied, seems to refer peculiarly to the mind."[33] With this definition it appears that the humanness of the slave was having an impact on the law. This is not to say that judges were recognizing slaves as human with rights, because when judicial rulings were applied and the humanity of the slave was the focus of the judicial argument it was most often applied to protect the sellers (the masters) under remedial contract law.[34] However, the humanity of the slave was being recognized in legal opinions and this was a seismic shift.

The separation of slave families was another issue that forced the legal community to confront the humanness of the slave. As laws evolved that allowed for the mortgaging of slave property, the destruction of the slave family became more common. While judicial application of such laws was inconsistent, the recognition of any form of "partus sequitur ventrem" as it applied to mother and child suggested humanity. When laws were challenged as inhumane for destroying families then the humanity of slaves is difficult to deny. Nevertheless, this was to be a slow process and while the humanity of the slave did skew a few decisions it was not to be the rule as laws were continuing to be created to protect the property aspect of a liberal capitalist system.

While the laws of property claimed slaves were less than human, a contradiction arose as laws dealing with the treatment and punishment of slaves began to imply human qualities. Laws governing the disciplining of slaves throughout the South attached fines to the unnecessary physical harm to slaves. Unless slaves resisted or died during moderate correction their killing would be placed on a level with the homicide of whites.[35] These types of laws show that a level of humanity did exist and a level of liberty was available for slaves. As the law continued to evolve and manumission was more common the slave was even allowed certain very limited rights with respect to trials and other court proceedings. This may have been the most glaring inconsistency of slave laws because at the same time that a county court in Alabama was adjudicating a property dispute that involved placing a slave in the legal position of property, in another state a county judge in Georgia may offer a slave limited protections as a person.[36] The laws created to define the slave as a type of property evolved to meet the increasing challenges from everyday life that claimed slaves were human and these definitional laws began to experience success.

Another inconsistency that emerged in slave law was how to define punishment administered to the slave for behavior outside of the rules governing work expectations. English law covering homicide initially did not concern the master-slave relationship, but as slavery continued to be a force in American jurisprudence and the number of slaves increased in America more and unique situations began to occur. Murderers of slaves were not prosecuted. This was the norm as the law was applied to slaves; nonetheless, legal remedies would be needed if someone other than the master killed the slave or if the slave was to commit murder. Like most slave laws, the application depended upon many circumstances, such as who the killer was, as well as local values, attitudes, and fears. It also mattered as to whether the redress sought was to be civil or criminal. To seek civil damages against another white person for damages done to your black property was logical, but to seek to criminally punish a black for their personal actions tears away at the façade of nonhuman status.[37]

Early slave laws were careful to separate wanton disregard for the law and the acceptable correction of a slave. In the never ending attempt to categorize the slave as property these laws made the death of a slave by someone other than the owner punishable by a fine. This reimbursement squared with the property value concerns of slave owners. Masters would not be held liable for the death of a slave because no logic existed to assume that a slave owner would willfully destroy his own property. These laws were created to eliminate any challenge to the master-slave relationship but the humanness of slavery continued to haunt slave laws. As early as 1723, Virginia law would allow for a murder indictment in the death of a slave if one lawful and credible witness would swear an oath that the homicide was committed, "willfully, maliciously, or designedly."[38] While the application of this law was ended shortly after 1723 it had still created a potential legal precedent.

As post-revolutionary slave law evolved the term homicide was more frequently applied to cases involving the death of slaves. The legal remedies were always decided in monetary terms, but the use of the legal term homicide further cemented the notion that a human life had been taken. By 1771, North Carolina law was being interpreted to mean (in some cases) "a negro slave is a reasonable creature, it must be murder in anyone that shall feloniously slay him."[39] What is remarkable about this idea is not that it was made public, but rather that individuals were in fact tried and punished for these homicides. The significant change in law, if not attitude, began in the late eighteenth century in Virginia, North Carolina, and Tennessee. By 1788, persons indicted and convicted for the murder of a slave could be punished. In 1791, North Carolina made the willful killing of a slave murder, unless the slave had been resisting moderate correction. These homicides were to be punished as if the victim were white. What occurred were these laws and others brought to the surface what had been an understood reality for many years, "The criminality between the murder of a white person and one who is equally an (sic) human creature, but merely different by complexion, is disgraceful to humanity and degrading in the highest degree to the laws and principles of a free, Christian and enlightened country."[40]

Correction was still an acceptable alternative for the slave owner and laws allowed dominion over the slave. What had begun to occur in the eighteenth century was the liberal recognition of the slave as human which conflicted with the historic liberal defense of the slave as property. This conflict created severe and often irresolvable issues within the slave-master relationship. Once the slave acquired legal status, complete dominion would be lost and the progression would lead to accepting the slaves as human. While this progression did occur it was not without a complex legal fight. Historical precedent was still on the side of the slave

owners as the belief existed that even if slaves were human, they certainly were not equal. This conflict would open the next legal door in the evolution of slave laws that would require the laws to address the issues of dependency and quality of life. Both of these situations had legislation on the books and slave owners appealed to existing law that applied to other dependents in society to reclaim their position of superiority.

While the slave owner did have obligations to other inferiors in society such as women and children, the slave was an anomaly because to recognize the slave in a similar legal light as women or children would further promote their human quality. As a result of this dichotomy southern slave law created a separate legal category to deal with this problem. This new category called "human property" was designed to both recognize the humanity of the slave yet still allow the slave owner to treat slaves as property. This was Jeffersonian beliefs applied at the legal level. These laws were designed to punish the slave and also "degrade and undermine" their humanity so as to distinguish them from human beings who were not property.[41] Similar to homicide laws, these new property laws were designed to keep slaves outside of the society but still recognize their ability as human, capable of committing criminal acts. Seventeenth century laws against treason in South Carolina demonstrate this convoluted point because the ability to commit treason can only be perpetrated by a human. Therefore when southern law attempted to increase the punishment for planning or attempting insurrection by defining it as treasonous they inadvertently furthered the humanity argument for slaves.[42]

In the end while slaves were recognized as a person under the law it was more a matter of legal interpretation of what rights the slaves possessed rather than a discussion over the existence of rights. "The humanitarian sensibility and the liberal individualism associated with liberal capitalism did create tensions within slavery jurisprudence, but precisely because slave owners

never did possess an absolute property right or a total power at law."[43] This was seen in the application of southern criminal justice. It was the understanding that the American criminal system relied on the notion of "mens rea" or the guilty mind. Thus if slaves were to be tried in a court of law the principle of mens rea must be applied and by doing so southern law was recognizing the liberty of conscience that existed in all men. Even though it may be a temporary or partial recognition it was a double edged sword because while it was a victory for human recognition, it also allowed the court to punish Negroes as human creatures, who received no other type of human respect.[44]

During the colonial period a few very limited rights were written into legislation, "Significant statutory amelioration of slavery and the creation of rights, however, began in the late eighteenth century and were most notable after about 1830."[45] The clearest recognition of this humanity of slaves can be found in local statutes and this became most prominent in the nineteenth century as both southern and northern law viewed slaves as persons. This was the paradox of liberalism being played out in state legislatures. Liberalism was being used by many to continue their historic property claims, while simultaneously others were using longstanding meanings to define the humanity of the slave. As these laws evolved over time the onus of responsibility now fell upon the courts to apply these laws. The difficulty for the court was how to balance the changing social attitudes with the proper application of the law. While it might be politically expedient for a legislator to pass laws that ignored the humanity of slaves, it was not as easy for the courts and as rogue judicial decisions began to appear, legal precedent was being created. The slave now had a legal link to make their liberal case to the public.

Thomas R.R. Cobb in his study of slave law offered an interpretation of the difficulty of parsing the difference between human and property.

> "Absolute or pure slavery is the condition of that individual, over whose life, liberty, and property another has unlimited control. The former is termed a slave; the latter is termed the master. Slavery, in its more usual and limited signification, is applied to all involuntary servitude, which is not inflicted for the punishment of a crime. The former exists at this day in none of the civilized nations of the world; the latter has, at some time, been incorporated into the social system of every nation whose history has been deemed worthy of record. In the former condition the slave loses all personality, and is viewed merely as property; in the latter, while treated under the general class of things, he possesses various rights as a person, and is treated as such by the law."[46]

It was the definition of slavery that made crafting slave laws so difficult and these inconsistencies in the South coupled with the rejection of slavery in the North made any inconsistency political fodder for public debate. What was occurring in southern society was that the illogical subjugation of one class of people was becoming transparent. Persons are not property, property can not become persons and the legal community was wrestling with these incongruencies. However, instead of an evolution to a liberal solution, the South seceded from the Union because they had committed themselves to a comprehensive doctrine of chattel slavery. As inconsistencies in the laws became more pronounced, the South chose to eschew public reason and instead attempted to close off debate on the topic of slavery.

The adjudication of slave laws:

Attempts to interpret slave law along exclusively property lines met with the same difficulties that plagued them when they were being written as the obvious humanity of the slave had to be addressed. If we attempt to follow any sort of chronological timeline we will be disappointed because southern judicial decisions follow the same schizophrenic path as their legislative brethren. Rather than frustrating the investigation, what this demonstrates is the liberal paradox throughout the history of American slavery. This interminable problem continued to highlight the difficulty with slave law, as no legal solution existed to apply laws with a definition of the slave that would accommodate the liberal interpretation of the slave as a person and as property. Nonetheless, the examination of these cases will shed light on the

judicial schism that took place at different times in several regions of the South. When examining southern slave laws these judicial decisions must be categorized as dealing with the slave as property or dealing with the slave as a person.

While Thomas R.R. Cobb was able to articulate the difficulty associated with the creation of slave laws he was also a defender of slavery and in his treatise on slavery he demonstrated how racial theories intertwined with the law made the adjudication of the law as it applied to the humanity of the slave problematic. Cobb applied the positive good defense of slavery when he claimed that, "the negro was in deed a man and endowed with reason" but in order to justify his subjection, "the African race are promoted by a state of slavery" in this way their enslavement is consistent with the law.[47] What Cobb was attempting to do was to explain why slave laws were both acceptable and applicable in America. He dismissed the incongruencies by claiming that every nation on earth that had allowed slavery had also accepted the mental inferiority of slaves. He was dismissing the humanness of slaves even though he acknowledged slaveholding states recognized that the homicide of a slave as murder.

When cases were brought before the courts the concept of a slave as human property was exposed as inconsistent at best and illogical at worst. Several legal theories now came into conflict over the adjudication of slave law. At the legislative level legal positivism held sway. Using this logic slave laws had been crafted by humans using contemporary logic and state legislatures were the repository of the general will. With this as a foundation, state legislatures then would possess sole authority for the creation of slave law. Concern with validity or morality was secondary to the efficiency or practicality of a law. Government bodies decide written laws and in this way all citizens are aware of the law that in turn will give order as well as supporting obedience in society. Order comes from citizen awareness of laws and obedience

arises from the belief that representatives of the people create the law. Any unpopular law can be amended or repealed by popularly elected legislatures.

When judges were asked to interpret slave law this introduced both legal formalism and legal realism into the slavery debate. Under formalism judges apply the law as it is written. Historic legal rules and precedent serve as a guide for judges as they apply the law. The essence of this theory is that judges merely apply the law as it was written by the legislature. Courts should not make law or interpret controversial law based on their personal idea of appropriateness. However, judges are human and as the slave debate became more visceral individual judges found the human property argument more difficult to apply. Given these difficulties judges began to apply legal realism. Using realism, judges look at laws individually and make rulings on a case by case basis; in this way judges could apply the law as dictated by the times. To legal realists this gave life to laws and prevented man-made laws from becoming stale and outdated. In the South a consistent theory of interpretation did not exist and in the courtroom formalism and realism conflicted creating diverse rulings.

The state of North Carolina offers a look into this difficulty of applying slave law as it was written. Beginning in 1801 a series of cases illustrate the courts efforts to deal with human property. The issue of the humanity of the slave came into question in State v. Boon (1801) when the majority opinion of this court applied the theory of legal formalism and refused to prosecute a slave owner for killing a slave because of the ambiguities in the laws as they applied to the killing of slaves. In dissent, Samuel Johnson argued that the murder of a slave was the same as the murder of a white person.[48] While the majority was not willing to address the humanity of the slave (because North Carolina law asserted that the slave was a form of property), the dissent was able to place this issue into the legal record and further establish legal

ground for a defense. Rulings from 1826 to 1848 in several Southern states issued completely contradictory rulings as one court stated that slaves were human and other courts argued that slaves were a type of property or at least a lesser human not worthy of rights. Even still other courts claimed that the laws were not clear enough to ever issue an accurate legal decision.[49] Simple assault was an open issue as a court could agree that killing a slave was a crime but then deny that the criminal offense of assault and battery could be committed upon a slave because of common law limitations.[50] Even as slave law allowed for "correction" of slaves, in some southern courts there were limits. These limits were not consistently applied as formalism and realism both affected judicial decisions and thus the liberal debate over slavery was able to perpetuate itself.

This attitude was witnessed in the case of State v. Mann (N. C.1829) when the decision issued by Judge Thomas Ruffin decreed, "The power of the master must be absolute, to render the submission of the slave perfect." Again legal formalism prevailed, yet Ruffin went on to show the problem with applying this type of law when he states, "I most freely confess my sense of the harshness of this proposition." The grand hypocrisy is exposed when Ruffin claimed that in the condition of things there was no other remedy.[51] Other judges shared the same concerns as Ruffin and applied the laws with a nod toward legal realism and the humanity of the slave. Ten years later in the State of North Carolina v. Hoover (1839) the ultimate penalty was paid by the slave owner as he was sentenced to be hanged for murdering his slave. Ruffin in this case appeared to dismiss his beliefs in Mann with the claim that "A master may lawfully punish his slave; and the degree must, in general, be left to his own judgment and humanity, and cannot be judicially questioned. *State v. Mann*…But the master's authority is not altogether unlimited. He must not kill.[52] This is the classic inconsistency with slave cases, the law may at times be able to

deny the liberal freedoms of the slave; yet, judges suffered from their own version of selective liberalism. In Virginia in the case of Souther v. Commonwealth (1851) a white slave owner was indicted for murdering his own slave. In a unanimous decision the court affirmed Souther's five year sentence for manslaughter rather than a more severe penalty for murder.[53] While abolitionists would be appalled by such a light sentence, the sentence nonetheless held the master accountable for the life of the slave and again recognized the liberal defense of life. This case demonstrates how the judiciary at times tried to blend formalism and realism in order to square logic with the law.

In a very archaic fashion slaves were often compared to animals or beasts of burden in an effort to show the inferiority of the slave to further the liberal property premise of the slavery argument. This comparison was rejected as often as it was affirmed as demonstrated in Wright v. Weatherly (1835) that ruled the slave was not an animal but instead an intelligent moral agent liable for his own wrongs. While this appears to be a positive ruling for slaves it at the same time allowed for harsh punishments because the slave no longer could plead ignorance.[54] In order to impose strict penalties, southern legal systems were being forced to deal with the humanity of the slave. If this was to be the precedent to drive the legal argument then the slave masters would be liable for the actions of slaves. This would occur because the slave at that point must be classified as dependents similar to children. While this allowed the slave owner potentially more control over the slave it also continued to solidify the humanness of the slave in the eyes of the law. Negligence cases such as Maille v. Blas 1860 issued rulings that supported the humanness of the slaves because in cases of this type slaves were recognized as aware of their actions and this supported the ruling in Wright that also claimed slaves were indeed human.[55] There were also cruelty cases that were adjudicated by the courts that again offered

conflicting decisions with one court claiming unlimited authority of the master and another asserting the slaves must be free from abusive behavior.[56]

Cases that attempted to focus on slaves as property also suffered from the affliction of disparate judicial philosophies. As demonstrated in Mitchell v. Wells (1859) not only courts but private citizens with legal responsibilities also wrestled with the notion of a slave's humanity. This case dealt with the disposition of a slave upon the death of the master. Edward Wells when living in Ohio emancipated his slave who was his daughter by a slave mistress, he then returned with his family to Mississippi and when Wells died he left his emancipated daughter $3000 and property. The executor of the will refused to pass on the estate property to the daughter (Nancy), so the daughter sued and won at appeal. The case then was argued in front of Mississippi's highest court. The majority opinion and the dissent illustrate the dilemma faced by slave societies as Justice William Harris speaking for the majority argued that society can not interfere with the actions of the master. Justice Alexander Handy claimed in dissent once a slave lives in Mississippi they are always a slave and enjoy no status beyond property.[57] This case illustrated how the racial attitudes ingrained in slave law were not always compatible with judicial interpretation. This was the battle of formalism and realism played out. Not only were decisions in slave cases struggling to find consistency in their interpretation, but they also exposed the schism in liberalism as it was being applied to slavery.

In Maria v. Surbaugh (1824) Judge John Green wrote the lead opinion and ruled that before 1662 slaves were held to be the absolute property of their master and by virtue of the precedent of this law any opinion to the contrary would be illogical. It is obvious here that the judge was content with adhering to English common law, although referencing 17th century law that had been altered hundreds of times to adjudicate a 19th century case does appear to deny

legal logic.[58] Then in 1827 in Dunlap v. Crawford the court attempted to define statutes as to the type of property that the slave had become. This court ruled that the difference between personal or real property had begun to break down in America and therefore to make a legal claim on behalf of the slave by claiming either real or personal property had no legal value.[59] What the court was attempting to do was reinforce the master's property claim by citing that laws over property were in a state of flux that excluded the court from issuing an opinion. This then was a matter for the state legislature to decide as the court deferred to legal positivism. In Girard et al. v. City of New Orleans et al. (1847) judges analogized the slave with land and adopted rules to reflect this interpretation.[60] So in another attempt to solidify the property rights of slave owners, this court assumed the authority to interpret the meaning of a local law and applied its own version of appropriate guidelines. Unlike the decision in Dunlap the court determined that legal realism was a more appropriate course.

The property argument carried the day in certain legal circles as demonstrated in Snead v. David (1840) when the laws of trespass were refined to help clarify the holding of title and then not only to determine who owned the slave but the law could ascertain who had authority of disposition. As these types of property arguments were being made, counter arguments had already been made.[61] In 1837, the case of Tennent v. Dendy the court attempted to mix the property and person argument when stating, "They were also human beings, and even as property they were not exactly like other personal property."[62] Later in McLeod v. Dell (1861) this argument is further clouded by the decision that slaves were a special species of property that was on an equal footing with realty.[63] Warranty law as a version of the interest in property was also tested by the courts as in Caldwell v. Wallace (1833) when not only the physical capabilities of the slave were challenged in court, but also the mental capacity of the slave.

These types of decisions also went to support the property argument in the slave dispute.[64] What these court opinions were attempting was to create a coherent decision on how to claim property rights in the slaves while still acknowledging the slave's humanity.

The right of absolute disposition was again brought into question when decisions must be rendered as to the ownership/obligation of the offspring of slaves. If the child belongs to the slave then they have a level of freedom and humanity. If the child belongs to the master then the right of absolute disposition is the master's and this is a powerful claim. The court offered an inconclusive opinion on this issue in Giles v. Mallicotte (1738) however, and slave owners took this to mean that their right to increase was solely their property to dispose of as they wished.[65] The differences among judges was evidence of a social order under severe stress. It was precisely because they were adapting the laws of slavery, or considering modifications and amelioration, that it is possible to see some movement toward changing chattel slavery into some other form of dependent labor.[66] The shift was to attempt to define slavery in the form of human property thereby eliminating the humanity argument and focusing the debate on the inferiority of the slave. This then allowed proponents of slavery to define the slave debate as a quality of life issue and from here it is a short step to defending slavery as a positive good or a necessary evil. In the liberal tradition, judges were attempting to apply liberal logic in issuing their opinions; however, without any form of an overlapping consensus a consistent answer to the slave question was impossible. Regardless of judicial opinions that may have opened some doors to the minimal acquiescence of a slave's humanity, southern slave owners were undaunted because they believed the peculiar institution would always be protected by referencing the Constitution.

The Constitution and Slavery:

The Constitution of the United States is the law of the land, but during the antebellum era it was not the liberal solution the country needed as it applied to slavery. For the framers of the Constitution to allow the illiberal institution of slavery to become part of the document appears to fly in the face of claims that America is rooted in a liberal tradition. At first glance this seems logical, but upon further examination several factors impacted this decision in 1787. In the spirit of utilitarianism the men who created the Constitution accepted the institution of slavery as a trade off with an illiberal evil to ensure the political success.[67] This decision to ignore the illiberalism of slavery for political expediency occurred because these men did not apply the tenets of liberal distributive justice. At the Constitutional Convention the framers allowed self interest to infiltrate the thinking of the original position; thus, a completely liberal system was not enacted. Several groups and most specifically the slaves were exempted from these discussions; consequently, slavery could then be allowed. Without slaves being represented then a true public reason can not be created and when conflicting political issues are to be debated, no overlapping consensus will emerge. The system the framers created was one of sectional vetoes that would protect the political interests of all regions of the new nation in an effort to weld a lasting compromise over numerous philosophical issues. The framers were aware of the Constitutional evil they were making part of the new government and the issue was not if slavery should be allowed, it was more an issue of how much slavery to allow. The idea that slavery would have to be tolerated in the new government was a bitter pill to swallow; however, there existed the belief that slavery would be eradicated naturally over time.[68] In this way the framers could mollify their concerns by defending this support of slavery as the best political option available.

This Constitutional dilemma further illustrates the paradox of liberalism as citizens are unable to agree on what constitutes evil behavior. This then fuels the debate since one definition of unacceptable behavior is not possible and both sides will appeal to liberal ideology to justify their position. "Alleged Constitutional imperfections are ratified, maintained, or proposed only when many people regard those Constitutional provisions or interpretations as necessary evils or positive goods."[69] This mentality played out when shortly after the Constitution was ratified international demand for cotton, concerns over maintaining local political hegemony, and multiracial issues led "Southern state legislatures that once inched toward abolition to now speak of the evil and pernicious practice of freeing slaves."[70]

The human property argument that was part of the southern defense of slavery was constitutionally defended and elaborated in Federalist #54, Prigg v. Pennsylvania as well as the Dred Scott decision. In Federalist #54 Madison spoke to the issue of slaves as both property and person. In an almost apologetic fashion Madison attempts to explain the issue of representation and slavery. As he outlined both sides of the debate he emphasized that slaves had a unique position of possessing both the characteristics of property and the quality of humanness. He refers to this "mixed character" as acceptable under current law and as an attempt to defend the three-fifths compromise he stated that the only other choice would be to exclude the slaves totally from representation. For Madison this is unacceptable because (possibly out of naiveté or political calculation) he was inferring that the laws could/would be altered at a later time and without this compromise the slave would be excluded from the rights of representation. Nonetheless the political reality of the time was clear, the North wanted the South to be taxed for slaves and the South only wanted slaves counted for representation. The three-fifths compromise was the best way to ensure an accurate census count while simultaneously placing a financial

accountability on the South. "Let the compromising expedient of the Constitution be mutually adopted which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants; which regards the slave as divested of two fifths of the man."[71]

In 1842 the Supreme Court issued its ruling in Prigg v. Pennsylvania. This case was an attempt by the court to clarify which level of government had the authority to make the decisions about slavery and to superficially undercut the disobedient behavior of abolitionist groups. In other words, this was one of the first attempts by the court to enter into the foray over state's rights and slavery. The court's opinion as written by Justice Story was that the federal Constitution made the Fugitive Slave Act constitutional and therefore state authorities were prohibited from interfering with the right of the master to secure his property. Justice Story wrote; "in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave." He went further to address the property issue but ignored the humanity of the slave by claiming that men had a right and title of ownership in their slaves as property, and states had conferred this title of property upon them by local law. "The full recognition of this right and title was indispensable to the security of the species of property in all the slaveholding states."[72] This was an issue to be determined by the courts using legal formalism because the issue of slavery was validated in the Constitution.

In the Dred Scott decision issued by Justice Taney he did address the humanity of the slave and attempted to make it clear that there was an understood right to bring property into the territories and this entailed the right to bring "human property" (or in this case persons who had been imported as slaves) into the territories. He stated in his opinion that the issue between Republicans and Southerners was whether "there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the

United States."[73] The reality was that there existed no constitutional provision that excluded slavery from any other constitutional property right. Taney asserted, "no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description."[74] In these two cases the Supreme Court discounted the debate over the humanness of the slave and attempted to end the discussion by claiming slaves were property.

The Constitutional argument over property rights was frequent in Congressional debates and many southern senators appealed to the 5th amendment due process and eminent domain clauses to bolster their cause. Abolitionists claimed the same due process protections as well as essential liberty granted under the Declaration of Independence. Unfortunately for American abolitionists the Congressional groups that supported slavery won the political debate when the Prigg v Pennsylvania and Dred Scott opinions were handed down. The irony here was that both sides accused the other of violating the original constitutional agreement. But what neither side understood was that the system created in 1787 was merely one that was designed to compromise on questions of constitutionality as they arose that would hold the sections of the nation together politically. This was a system designed to facilitate the bargaining over slavery; it was not a system designed to offer a permanent solution to this problem.[75]

This lack of a definitive constitutional solution contributed to the difficulties with southern slave law. Since slavery was not prohibited by the Constitution and the fugitive slave clause implied that slaves were property, the South believed that their argument was legally superior.[76] The North countered that the slave trade could be eliminated after 1807 and the Northwest Ordinance allowed Congress to prohibit slaves in the territories as part of article five of the Constitution regardless of the Dred Scott decision. With this as their base, both sides

could make a claim using liberal language that they were defending their basic rights of property or their rights to life and liberty. This was the crux of the slavery argument; liberalism could be used as a defense to both prohibit and at the same time allow slavery. The inconsistency in the way slave laws were written and the contradictory fashion in which they were carried out by the courts illustrate the never ending battle that raged over attempts to define the slave as merely property. In the end it was the humanness of the Negro that could not be ignored. It is important to examine the language of liberalism because it was this language that Americans understood and it is this language upon which our revolution was based. If both abolitionists and proponents of slavery could successfully use liberalism to defend their positions then a legal or Constitutional solution would not be possible. Southern slave laws in the way that they were written, the way that they were adjudicated, and the way in which the Constitution allowed them were all couched in this language, "the framers bequeathed to their descendents a set of Constitutional institutions they hoped would facilitate future bargaining over the Constitutional status of slavery. Constitutional exegesis was supposed to resemble renegotiation as much as interpretation."[77] What was being argued is that instead of compromising to an amicable solution over slavery, both sides seized the liberal tradition of American politics and attempted to build an impenetrable fortress from which to assail their political opponents. Southern law and the Constitution were unable to solve the crisis over slavery because the liberal tradition entrenched in America gave both sides fertile liberal ground from which to make an argument.

Chapter 3

Liberal Language and Slavery

Language is an important part of any political argument and I propose that it was America's use of liberal language (and thought) throughout her history that has allowed for slavery as well as its prohibition. David F. Ericson has written several works dealing with slavery and liberalism in America and in his work he demonstrates how the nation was able to use language of the liberal argument to both argue for and against slavery in America. Ericson argues in *"The Debate over Slavery; Antislavery and Proslavery Liberalism in Antebellum America"* that the two sides of the slavery debate in America were actually united by their attempt to defend opposing positions using American liberal thought. Slavery was arguably the most controversial political issue of American history and a topic that was both visceral and intense, yet according to Ericson the roots of this polemic are born not in racism, but rather the pervasive liberal thought of America. This led to a collapse of the middle ground and eliminated any hope of a bloodless solution.[1]

Ericson's argument rests upon the assumption that the theory of liberalism as proposed by Louis Hartz is the reason for this consensus of thought. The Hartzian notion is that America had no feudal past and therefore all Americans are as Tocqueville said, "born equal." This allows them to attempt to apply an "irrational Locke" and view them as possessing the same fundamental rights based on the same fundamental precepts. It is this notion of the defense of rights that encapsulates the paradox of liberalism and American liberal thought.[2]

Erickson defines liberalism as "a general set of ideas that appeal to personal freedom, equal worth, government by consent, and private ownership of property as core human values."

His theory is that both sets of political actors in the antebellum period used this common set of liberal ideas to defend or attack racial slavery. Ericson is careful to point out that it is irrelevant if people in this debate have referred to these ideas as liberal. In fact Ericson states that this liberal universe is an "amorphous" one of loose definitions that reflected how people of this time used political ideas. He then makes it clear that while the abolition argument is easier to make because liberal ideas are prima facie antislavery, abolition can still be refuted using liberal ideology. The proslavery forces did not see themselves as defending a hopeless cause because they too believed that the liberal arguments they made were supported by American principles.[3]

The debate over slavery was divided into three categories; deontological, contextual, and consequential. Ericson points out that in the deontological argument both sides attempted to claim the moral high ground in an effort to show that their behavior squared with the biblical teachings that the nation was founded upon. His contextual approach examines how the two sides used the liberal idea of America as the exemplar for the world and the model for human progress. Finally, his consequential theme focuses on the attempts to show slavery at first as a positive good, then its evolution to a necessary evil, with its conclusion being what Ericson refers to as the "worst-case scenario" of both the effects of continued slavery and abolition.[4] The cause of the Civil War was not that two sides, diametrically opposed, had no middle ground upon which to compromise, but instead the conflict was rooted in opposing sides that philosophically were fighting the same fight. Without distributive justice no solution other than war or secession was possible.

Louis Hartz has posited the notion that a "liberal consensus" of thought has existed in America since its inception and this stream of liberalism has determined the path of our political behavior. Rogers Smith has been the main challenger of Hartz's theory and has offered up his

own idea that America has existed through a series of "multiple traditions" that have influenced and shaped our political behavior.[5] Hartz succinctly outlines his thesis early in his work *The Liberal Tradition in America* when he writes;

> One of the central characteristics of a nonfeudal society is that it lacks a genuine revolutionary tradition, the tradition which Europe has been linked with the Puritan and French revolutions: that it is "born equal," as Tocqueville said. And this being the case, it lacks also a tradition of reaction: lacking Robespierre it lacks Maistre, lacking Sydney it lacks Charles II. Its liberalism is what Santayana called, referring to American democracy, a "natural" phenomenon. But the matter is curiously broader than this, for a society which begins with Locke, and thus transforms him, stays with Locke, by virtue of an absolute and irrational attachment it develops for him, and becomes as indifferent to the challenge of socialism in the later era as it was unfamiliar with the heritage of the feudalism in the earlier one. It has within it, as it were, a kind of self-completing mechanism, which insures universality of the liberal idea.[6]

The institution of human slavery is undoubtedly an illiberal concept, yet it endured in America until 1865. Hartz attempted to explain the existence of this illiberal institution in a liberal society by referencing what he termed a "reactionary enlightenment." The essence of this idea for Hartz was that the South had attempted a "great conservative reaction" to the abolition of slavery and the North had crushed it with a great civil war.[7] Scholars such as Rogers Smith take issue with this explanation of the existence of slavery in America and use the continued toleration of human bondage to argue that Hartz's theory is incorrect when applied to American history. In response to this and similar critiques of Hartz, Ericson argues that Republicanism was indeed part of American thought as was a multiple thought approach (pluralism). However, for Ericson these two types of political thinking are not independent ideas that have come and gone as American political thought evolved. Rather, republicanism and pluralism are pieces of the American liberal tradition that are located on opposite ends of the continuing spectrum of liberalism. In other words, while there may appear to be shifts in American thought, these apparent shifts are only movements along the scale of the American liberal tradition. Ericson points out that his interpretation is not an over simplified exercise in semantics; instead, he is showing that these two seemingly disparate political ideologies share the same philosophical roots.[8]

Philip Abbott also responds to the Smith critique, but from the view of challenging Smith on his interpretation of the American Thermidor. In his evaluation of the Hartz thesis as it applied to the 1960s, Abbott challenges Smith's belief that American history is ripe with examples of Thermidors that were created by "racists, misogynists, and ethnic ideologues." Smith believes that the conflict of the Civil Rights movement exposes the 1960s liberal reform to a threat so serious from the left that it "awakens illiberal impulses" in Hartz's American democrat that leads him to embrace several Therimdorian projects. Smith cites the Christian coalition, the Los Angeles riots and English-only agitation as a few examples. Abbott suggests that while these examples are troubling, these instances are more economically and persuasively explained by Hartz's American democrat and his use of "charm and terror" in much the same fashion as they were applied to threats by the Whigs of the 19th century.[9] So while the Hartz thesis has been and will continue to be debated, there is no debate that some form of a liberal tradition exists in America. This chapter will examine the writings and speeches of George Fitzhugh, Abraham Lincoln, and Stephen Douglas and illustrate how Hartz's liberal consensus theory is correct even when confronting the issue of slavery.

What I will show is that even though Fitzhugh worked ferociously to defend slavery (as a positive good) and Lincoln eloquently supported its destruction (while tacitly accepting that it was being tolerated as a necessary evil), both men applied the principles of liberalism to defend their opposing views. They did this because they both realized that liberalism was the driving force of American political thought; consequently, the only way to be successful in such a polemic is to capture the liberal high ground. While on the surface this may seem perverse, these men had no other political option if they wished to appeal to the majority of Americans. With liberalism guiding American beliefs about equality, property, and freedom, Fitzhugh and Lincoln

had to use the vocabulary of liberalism in order to appeal to the psyche of America. This was the "irrational Locke" that is embedded in the Hartz theory that he believed was the philosophical origin of American liberal thought.

A point that must be addressed is that it is not significant whether these men actually believed that slavery was acceptable or that blacks were equal. What is important is that both men knew that they must present their argument in the prose of the liberal language in order to appeal to the liberal ethos that most Americans could understand. It is here that the thoughts of Stephen Douglas must be introduced. Douglas, unlike Fitzhugh or Lincoln, does not take a definitive stand on the issue of slavery (although his argument can be seen to fit within the context of a necessary evil), rather he attempted to traverse the middle ground and offer a compromise position. Instead of defending or abhorring slavery, Douglas tried to push the issue into the realm of an "inconvenient nuisance" that would reconcile itself through his concept of popular sovereignty.

While Douglas' attempt to ameliorate this issue may be viewed as nothing more than political gamesmanship in an effort to position himself for the White House, his political acumen cannot be ignored. Douglas also realized that in order to make popular sovereignty a workable proposition to the American public he too must couch his terms in liberalism; therefore, all three men illustrate that a liberal consensus of thought was prevalent in America. The comparisons of the works available by these three men on the issue of slavery will demonstrate through their defense, repudiation, and compromise positions that Hartz was correct and it is liberalism that is the tradition in American thought.

The writings of George Fitzhugh, Abraham Lincoln, and Stephen Douglas present a picture of a very American dynamic in political thought. All three men use the language of liberalism while at the same time defending different positions on the issue of slavery. The choice of analyzing the writings of Fitzhugh and Lincoln was fairly simple as it can be argued both men were the standard bearer for their respective camps on this issue. Fitzhugh with his most well-known works, *The Sociology of the South* and *Cannibals All* are often quoted and are seen as the premier proslavery writings of this era. Lincoln is best known for his speeches in his debates with Stephen Douglas as he campaigned for the U.S. Senate in 1858. The choice of Douglas was not because he is the perfect foil for Lincoln but rather, because he was one of the most prominent politicians of the era and he attempted to occupy the middle ground between the extremes of Fitzhugh and Lincoln.

Douglas' quest to find compromise became a victim of Hartz's reactionary enlightenment, because at the very time that he was espousing compromise in traditional liberal terms the nation was moving towards a more liberal attitude about slavery; therefore, compromise was not the solution for most Americans. According to Hartz, the American South was struggling with a type of conservative movement that was attempting to establish a feudal system that had never existed in America, a type of "planter hierarchy." In the North, an ideological movement was gradually building that continued along the liberal path of the expansion of rights and the inclusion of all people into the social contract.[10] A brief examination of the popular vote totals from the presidential election of 1860 in northern states reveals that Douglas was not repudiated by an overwhelming majority exclusively because of his stance on slavery and popular sovereignty, instead was defeated because Lincoln's liberal arguments were

more in line with the advancing liberalism that was taking place in the upper North of America and Lincoln's ability to avoid the slave issue in the lower tier of northern states.[11]

What I attempt to show is that while Fitzhugh was an ardent racist and a complete supporter of slavery, he nonetheless used the concepts of liberalism to make his points and sway his audience. Lincoln, who saw slavery as a cancer on the body politic of America, used these same concepts to substantiate the alternate position. Finally, Stephen Douglas emphasized the liberal thought of America as he navigated the water of compromise in an effort to "solve" the question of slavery. While Lincoln and Douglas both take a softer stance than Fitzhugh on slavery, it is relevant to address that both of these men had racist notions as well. Consequently, what we see is that the issue of slavery which was primarily about race and social status was being defended or assailed using the same language. The men in this fight knew that in order to draw the American public over to support their cause, citizens must be convinced that your cause supports the consensus of liberal logic that dominates American political thought.

A second consideration is that all three of these men viewed their positions as liberal and thought of themselves as truly furthering the liberal ideology. It is this process that makes the Douglas compromise position so difficult to obtain. With Fitzhugh and Lincoln both claiming that they were defending American liberal thought, there was no middle ground because they saw their positions as the only acceptable one in a liberal world. Hartz would argue that this is the complexity and confusion of the slavery issue as it is tied into Lockean philosophy. One side used Locke to defend their capitalistic beliefs that property is the soul of individual success and the other side used Locke to show that there can be no equality without freedom. This argument would remind Hartz of "two boxers, swinging wildly, knocking each other down with accidental punches."[12] Both sides become conflicted because their opponent hurls back each charge with

the same history and ideology that they had just used to substantiate their contentions. In this way they become embroiled in an argument with themselves, constantly contradicting their own thoughts as they defend their position.

The middle ground does not exist when people argue from a position of moral certainty; therefore, the Douglas argument does not resonate because he had no majority audience in the North or the South. America and her Constitution was created using consensus as the method of governing and when the logistics of America changed, this consensus was no longer a viable alternative and compromise was no longer available. The signers of the Constitution were attempting to incorporate a system of bi-sectionalism to the American political process. The concurrent veto power that was created ensured each section of the country would have the ability to nullify legislation that would infringe on purely sectional issues.[13] There were several flaws in this concept, the first being that slavery was not on the road to extinction as many at the convention believed and second the demographics of the nation changed in ways unforeseen by anyone of the era. It was thought that Virginia would be the dominant power in American politics for an extended period and people thought that the population increases in the nation would happen in the South and West. The consensus created by the framers was in reality forced compromise rather than a social solution. In this situation Rawls', overlapping consensus would be most useful, because when dealing with these types of issues compromise is only for the short term. By 1787 slavery had become a comprehensive doctrine. The Constitutional convention had served as the nation's original position, but several groups were not invited to the table and this forced compromise over the slave issue, not overlapping consensus. The Framers were faced with the political reality of compromise in order to create a process that could be applied to allow for the rational creation of a temporary solution rather than dismembering the nation.[14]

The upshot of these miscalculations was that the North achieved an electoral superiority and soon was able to put legislation out of the reach of a southern veto as well as acquiring sufficient electoral college votes to decide the presidency regardless of southern input.[15] This bi-sectional government created in 1787 evolved into more of a majoritarian form by 1860, thus the consensus characteristics of compromise that were necessary to determine political outcomes were no longer relevant. Douglas did not alter his political approach to be successful in dealing with the voting realities of this era.

While contrasting the writing and speeches of Lincoln, Fitzhugh, and Douglas, special attention will be paid to how all three men use the ideas of constitutional equality, founding principles and philosophy, inequalities of people, and the slippery slope argument to illustrate their liberalism in order to obtain legitimacy with the American public.

George Fitzhugh:

The writings of George Fitzhugh present a struggle for the 21st century American mind. We ask ourselves; how can anyone logically support the institution of human slavery? We must then step back and attempt to approach the struggle over slavery with the mindset of 19th century thinkers, which is not a simple task because of our advantage of knowing the ramifications of this struggle. Nonetheless, George Fitzhugh was a man who not only supported the institution of slavery but made elaborate efforts to validate his cause through the use of America's omnipresent liberal ideology.

Fitzhugh did not manipulate the language of American liberalism in an effort to convince the fence-sitters to support his cause. He applied what he believed to be very liberal premises in order to explain why slavery should be allowed to continue to exist and how the institution of

slavery itself was in fact a liberal institution. This latter point is the most difficult for modern thinkers to grasp, but Fitzhugh put forth several arguments to substantiate his case and it was his ability to move the defense of slavery beyond purely racial grounds that showed the liberal content of his thought.

Ericson has written that Fitzhugh attempted a two-pronged argument in his defense of slavery that allowed him to be both liberal and racist. According to Ericson, Fitzhugh's first prong was to defend slavery as one of the many protective institutions in a liberal society and the second prong was to show slavery was a unique institution that was a good fit for the South and an inferior people. Ericson states that Fitzhugh attempted to blend these two ideas in order to obfuscate the argument. Fitzhugh used terms interchangeably, such as free society, slave society, and government in an attempt to "blur" the difference between a protective institution and a racist institution. Ericson for example, points out that Fitzhugh used the term slave to mean black slaves in the South or anyone in society he believed to have an equivalent status. By promoting slavery as a protective institution Fitzhugh hoped to shift thinking away from race and center it on issues of families and other protective institutions in society. This polemical approach allowed Fitzhugh to better argue from a liberal perspective and shields the innate differences between slavery and the other protective institutions of America.[16]

While Ericson does promote the idea that Fitzhugh defended slavery with liberal language he also suggests that Fitzhugh was attempting to be deceptive by masking overtly racist views that Northern society could not support. I offer up the idea that while Fitzhugh was a racist as defined by 21st century thinking, the majority of people in the North would also be viewed as racist through a 21st century lens. The technicality with this terminology can be summed up in the question; can you be free without being equal? People in the North (Lincoln

included) did not openly support total equality between blacks and whites, so what the North was offering was freedom without equality that by 21st century attitudes would be racist and it is here that Fitzhugh suggested that slavery was a better liberal alternative.

Fitzhugh summed up his philosophy when he claimed, "What is falsely called a free society, is a recent invention. It proposes to make the weak, ignorant and poor, free, by turning them loose in a world owned exclusively by the few to get a living."[17] Fitzhugh was attacking the abolitionists with this statement and asserting that the so-called freedom that was being offered by the elimination of slavery was a "straw man" that in reality was pushing blacks into the free market world of America where they would be abused and taken advantage of by the wealthy in society. Fitzhugh used English history to support his contention and pointed out that the working class in England, since their liberation have suffered at the hands of the factory owners and they no longer had representation in government because their freedom has severed ties there as well. He pointed out,

> "All writers agree there were no beggars or paupers in England until the liberation of the serfs… Until the liberation of the villains, every man in England had his appropriate situation and duties, and a mutual and adequate interest in the soil… The old Barons were not the representatives of particular classes in parliament, but the friends, and faithful and able representatives of all classes…As slaves, they were loved and protected; as pretended freemen, they were execrated and persecuted."[18]

For Fitzhugh this type of oppression is illiberal because it places people who are in need of protection in a helpless position of exploitation without any redress and this was exactly what the North was doing to free laborers. Thus he concluded that slavery was in fact a positive good for the nation. With this as a base Fitzhugh could explain why slavery as it was instituted in the South was a superior type of society, because the Negro slaves were afforded the protection they needed. Here was where Fitzhugh must address what were perceived as racist notions dressed in protective clothing. He did this by side stepping the race issue and couching all references to

slaves in the liberal cloak of paternalism. Here again Fitzhugh appealed to history and suggested that throughout history it has been the obligation of society to defend the less fortunate among them. Not unlike a family in which the father must protect his wife and children, the master has the same obligation to protect and defend his slaves. Fitzhugh believed blacks were inferior and unable to cope in the free labor society that existed in the North; consequently, they were better off in slavery because their basic needs were met.

> "The negro slaves of the South are the happiest, and, in some sense, the freest people in the world…The children and the aged and infirm work not at all…The women do little hard work and are protected from the despotism of their husbands by their masters. The negro men and stout boys work, on the average, in good weather, not more than nine hours a day." The premise here is that the slave has security in knowing that he will always have food, clothing, and shelter and this frees his mind so when his workday is over he can enjoy the liberties that come with this security. The wage laborer in the North does not enjoy this security and therefore he has no liberty. Free laborers have not a thousandth part or the rights and liberties of negro slaves."[19]

Fitzhugh took this logic one step further by proposing that the North was engaged in "white slavery" because the wage laborer had no security and was constantly at the mercy of the business owner who may fire him at any time. This constant fear reduced the liberties of the laborer because they must always work harder for lower wages or they will lose their employment. This attitude prevailed according to Fitzhugh, because the employer had no investment in the laborer. He had no attachment to him and will use him up as a commodity of the trade. Fitzhugh said that this white slavery was crueler than Negro slavery because it exacted more from white labor but did not return nearly what blacks received in protection and sustenance. His contention was that both the North and the South were engaged in a type of "property in men." The difference was that at the end of the day, the master in the South took better care of his property than did the business owner in the North. "Now, under the delusive name of liberty, you work him, 'from morn to dewy eve'-from infancy to old age-then turn him out to starve."[20] This was Fitzhugh's ultimate condemnation of free labor in the North: the

freedom that they propose for the Negro slave will in reality become a more cruel form of repressive servitude and the liberties of all people will decline.

Continuing along this line of logic Fitzhugh claimed that slavery in the South was in reality more liberal and offered more freedom than free labor in the North. This line of thinking by Fitzhugh was a liberal analysis of what he saw as the paradox that slaves are really free and free persons were not. It was Fitzhugh's desire to defend slavery by using the logic that no one, even the wealthiest capitalist is truly free. The idea of complete freedom was an illusion that did not exist; there were only degrees of freedom that were limited by the government.

> Fitzhugh imagines that slaves have traded their liberty for security but that they have not traded away all their liberty and also have gained a certain amount of liberty through the greater security they now enjoy…Finally, Fitzhugh assumes that slaves are better off for having made an "additional" trade of liberty for security than are free laborers who have not. Alternatively, he insists that free societies verge on states of nature, as if the proponents of such societies and their underlying laissez-faire philosophies had not learned the valuable liberal lesson that governments and other protective institutions can actually increase the aggregate practical liberty of the members of a given society.[21]

So in this way slavery was both a protective institution that improved the quality of life for black slaves, and an institution that offered more liberty than the northern free society, thus making it a more liberal way of life.

The abolitionists of the North attempted to argue their case from the moral high ground and Fitzhugh believed that showing the oppressive conditions of the free laborer of the North this would minimize their advantage because what is moral about enslaving another in financial dependency? Since the duty of protecting the weak (according to Fitzhugh) is necessitated by enslaving them at some level and because the North's political thought had been appropriated by abolitionists who repudiated this concept, Fitzhugh was forced to search for a rationale that would both allow slavery to exist in the South and tolerate its antipathy in the North. To

accomplish this Fitzhugh introduced a concept called "Antinomic Pathology." For Fitzhugh this was defined as:

> "Antinomic Pathology" proposes, then, from time to time, to adjust the balance between moral antinomies, as either, or any of them, tend to excess. It differs from philosophy in this that philosophy is the search after the "right or true," whilst "Antinomic Pathology" is founded on the premise or assumption, that the "right or true" never has been discovered, and never, from the limited nature of his faculties, can be discovered by man, and that, therefore he must be satisfied with proximate right or truth, with the expedient, the right under circumstances, and give up the hopeless pursuit of absolute, universal, unvarying right or truth."[22]

What Fitzhugh was able to accomplish with his theory of antinomic pathology was to justify his stance on slavery. Since according to his beliefs there are no absolute rights or wrongs only proximate truths, abolitionists were being extremists because they argued from a position of moral certainty and were attempting to force their idea of right on the whole nation. Fitzhugh took the stand that if the North wished to challenge slavery in their section of the country, then they should be allowed to because that was their understanding of right. However, the North should not be allowed to force the South to end slavery because the South did not believe the need to eliminate slavery was right or true for them and according to antinomic pathological thought absolute truth can never be discovered. So abolitionists were assuming a position of superiority that did not exist. The solution then was to allow the North to question slavery in the North and allow slavery to continue in the South, in this way each section applied their understanding of right. The over-arching idea of antinomic pathology was to minimize the excesses in society and Fitzhugh saw the wage labor system in the North as excessive and illiberal. Antinomic pathology was more than just one group's abstract beliefs in right or wrong, what this belief system did was call into account the duality of human nature. In doing this Fitzhugh brought attention to the concern of the framers over the excesses of democracy or as Madison might say, "The oppressive majority."[23]

Fitzhugh's antinomic pathology stressed a type of universal balance that the framers were also concerned with. This was the struggle over the nature of man between the Calvinists (or Federalists) who viewed man as inherently possessing bad tendencies and the beliefs of those like Roger Williams who accepted man as naturally a good being.[24] Remnants of this thought can be found in both *Federalist #10* where Madison tells us that ambition must be made to counteract ambition and *Federalist #51* where we learn, "if men were angels no government would be necessary."[25] What Fitzhugh had done was to appeal to the logic of the framers of the Constitution as the credible foundation for his theory. If Fitzhugh can convince Americans that abolition is an excess and slavery is a way to counter this excess, then he is on equal footing with Madison and Hamilton, thus giving his argument historical credence and he has opened the door to claiming a founding document upon which to rest his case.

The end result of this quasi-philosophical argument was that Fitzhugh ended up making a very similar plea to that of Stephen Douglas in his debates with Abraham Lincoln. Douglas attempted to paint Lincoln as an extremist when discussing the slave issue and Fitzhugh was using a similar application in his indictment of the North. Since sectional slavery was the status quo, national elimination or national acceptance would be excessive; the solution was to let local governments decide their idea of right when dealing with slavery and this would restore or continue the balance necessary for society. Fitzhugh was promoting what sounds like popular sovereignty except that his position allowed for increased governmental authority to make local decisions not the majority of citizens.

Fitzhugh's Liberalism Rejected:

For Fitzhugh's ideology to resonate with America it first must be liberal, but as Hartz told us it must contain a blind loyalty to John Locke and a complete repudiation of socialism and this is where Fitzhugh fails. While he worked to demonstrate that his logic was liberal, he at the same time dismissed Locke and supported socialism.

As mentioned earlier, Hartz viewed this era before the Civil War as a time he called the "Reactionary Enlightenment" where the South attempted to engage in a conservative revolution. This is an important idea because this placed Fitzhugh in a philosophical box as he used liberalism to defend conservatism and this helped illustrate why Fitzhugh's argument was repudiated by the North. According to Hartz, the liberal consensus of American thought moves forward in the application of liberal ideas and will not allow a backtracking to anything viewed as illiberal. Fitzhugh espoused a need to defend conservative principles of the South and assailed the North as a failed attempt at what they called a free society. He commented that the North was in the midst of an illiberal social revolution and like all revolutions it would cease its perceived progress and retreat to its former state or worse. "It is falsely said, that revolutions never go backwards. They always go backwards, and generally farther back than where they started."[26] The abolitionists according to Fitzhugh were attempting to remake society, not just eliminate slavery. "Abolitionists did not prate about liberty and dignity in the North, and Fitzhugh did not argue that they did so. On the contrary, abolitionists attacked the North, especially the 'factory system', private property, and the market, all of which they certainly called horrible".[27] What Fitzhugh was attempting to do was show that the North by its elimination of slavery had opened the door to the excesses of democracy that the framers feared and now the abolitionists were trying to put the genie back into the bottle. According to Hartz, this was Fitzhugh's trump card that demonstrated the superiority of his argument. With men

such as Garrison and Greeley who were leading abolitionists both advocating social reform, this proved to Fitzhugh that the free society of the North was a failure and the anarchistic possibilities were unlimited.[28]

Fitzhugh then summed up the entirety of the conservative principles of the South by describing the sectional differences of the North and the South as a conflict between radicalism and conservatism. He believed that all of the entrepreneurial spirit of the North was running unchecked, so while these ideas may be necessary to a functional society, unless they are balanced with conservative principles then the excesses of licentiousness and depravity will prevail. Again, Fitzhugh was demonstrating how antinomic pathology will contain the excesses of Northern behaviors while at the same time preserving the Southern conservative way of life.

> Their necessary opposing and balancing force or antimone, the Conservatives are studious observers of the history and experience of the past, and treasure up and heed the lessons which it preaches, because they believe that, human nature never changing, the religion, the laws, and the political institutions adapted to it in the past will be equally well adopted to it in the future.[29]

It is here that Fitzhugh's argument loses traction, because while he was harkening to the past as a way to preserve American liberal values (which he viewed as Conservative in nature) he openly discredited Locke. A critical portion of the Hartz thesis is that Americans have an irrational reverence for all things Lockean; therefore, to ignore Locke is to turn your back on the core of American liberal thought.

Throughout his major writings Fitzhugh went to great lengths to show that Negro slavery was a liberal institution that supported the tenants of freedom in a civil society. Much of his criticism of the North revolved around his contention that the North was engaged in their own type of slavery and this type of "white slavery" was in fact more degrading and illiberal than the negro slavery of the South. Unfortunately for Fitzhugh, he did not comprehend the power of

Locke in American liberal thought. Locke's validation of government by consent that would empower citizens and allow them more control over their lives was very appealing in America and it coincided nicely with the expanded electorate and frequent elections in the North. Fitzhugh attempted to discredit this belief by focusing on what he saw as a long history of governments that were created and maintained by force. He challenged the North by stating that women, children, and many without property were excluded from consultation on the revolution, so they did not give their consent. "We do not agree with the authors of the Declaration of Independence that governments derive their just powers from the consent of the governed.[…]Those governments originated by force, and have been continued by force. All governments must originate in force, and be continued by force."[30] By rejecting the Declaration of Independence, Fitzhugh was both appealing to the protection of slavery contained within the Constitution and subverting any claim by abolitionists that the elimination of slavery could be upheld by a founding document.

Fitzhugh trips on his own words as he attempts to elaborately parse the ideas of force and consent. Whether white America believed that they were directly consulted about their opinion as to the need for revolution in 1776 or if the majority of persons were able to directly participate in elections were not the main points. Fitzhugh was probably correct from a philosophical perspective about the history of government, but he did not grasp the idea that the majority of people in the North believed they were benefiting from the current form of government. Also, from a capitalist view, Fitzhugh's white slavery argument was specious because the opportunity was always there for the laborer to improve. The Negro slave was locked in to a level of existence from which he could not escape. Fitzhugh furthered his error by proclaiming that the natural condition of man was enslavement and that no state of nature with complete freedom

ever existed. Locke was misguided in his faith in reason because man is a gregarious animal who is both social and "unfree."[31] Fitzhugh was returning to his antinomic pathology by claiming that if total freedom existed, then total slavery must also exist and both of these would be extreme conditions that would violate the balance that a society needs. The basis for this line of thinking by Fitzhugh was that man is inherently evil, and his evil passions must be controlled by government which is the only institution with the level of force necessary to do so.

What began for Fitzhugh as a sound argument on behalf of liberalism to defend the institution of slavery ends with an indirect appeal to "southern feudalism" and what he called socialism. For Fitzhugh the idea of socialism was a leveling process that would allow all people in society an opportunity to achieve a comfortable level of existence and the government would be responsible for the application of this process. In the South, slavery was socialism because it protected the black slave from pitfalls of the economic world that he was not capable of surviving. The free society of the North that Fitzhugh had attacked as a failure and a more oppressive society must be replaced by socialism as the only means to establish a more secure existence for the Northern laborer.[32] In the North, abolitionists were socialists (according to Fitzhugh) because they proposed a series of social reforms that would end the "total freedom" of capitalism and introduce government limitations that again would improve the lives of free laborers.[33]

This call for a socialist solution to the conflict over slavery was in reality a case for the complete change of the capitalist system in the North and this was not palatable to the people of the North. As Hartz made clear the "American dream" has been an enormous part of the ethos of American thoughts and this belief in a chance to move up the social ladder has always outweighed the promise of social equality. The people of 1860 may not have been aware of the

dreams of Horatio Alger, but the lack of, or repudiation of, a feudal system allowed an Alger-type mentality to exist. In the North while the free laborer may be struggling, he still believed he had an opportunity to improve and did not suffer through life with a predetermined fate.[34] As a result Fitzhugh's thesis failed to capture the appeal of Americans in the North.

Stephen Douglas:

While Douglas saw slavery as a "curse beyond computation" that must be accepted as a necessary evil for a time, he still regarded the issue as solvable through his belief in popular sovereignty. As a way to apply this political condition to the institution of slavery, Douglas used the state of Illinois as an example of how this could work, as a natural equilibrium would be obtained. He pointed out that slavery had existed for twelve years in Illinois and then the people of that state chose to eliminate it and became a free state, thus popular sovereignty prevailed. Using this logic Douglas was similar to Fitzhugh in that both men espoused the need to offer balance. The difference was that Fitzhugh was willing to allow governmental power to assert its will over the people and Douglas assumed citizens would progress to logical conclusions of their making. For Douglas, arguing from a position of moral certainty made solutions to intersectional disputes, like slavery impossible. The logical political path was rooted in legal and constitutional procedures not in the substantive world of right and wrong. Douglas focused on the written law and procedural due process to buttress his argument.

In his speech given in the Alton debate with Lincoln, Douglas put forth his contention that the slavery question was one to be answered only by those whom it directly affected. Douglas stated that since he did not own slaves this issue was none of his business and then in not so many words he made it clear that he did not care whether slavery was voted up or down.

This was a decision to be left to the people of the individual states. It was his logic that the Constitution which was the law of the land contained provisions that must be followed regardless of their popularity in certain regions. It was regional differences that Douglas saw as the lynchpin in the slavery issue and this is why he took a very federalist approach and pushed his plan for popular sovereignty.[35]

Using this legal line of thinking Douglas proclaimed that the Constitution of the United States was the most important document for the nation and the words as well as the intent of the framers must be honored. According to Douglas since slavery was contained within the Constitution the framers must have intended for the individual states to determine its fate. Douglas understood that the slavery compromises of 1787 were necessary at the time to ensure a Constitution could be agreed to; therefore, he reasoned that it was interstate comity that was the most important issue for the framers and to force the country to be nationally free or nationally slave as Lincoln proposed violated this founding principle. In fact, Douglas went as far as to accuse Lincoln of undermining this founding principle and conspiring to destroy the liberal idea of constitutional peace. Douglas illustrated his beliefs in his peroration to a speech at the debate with Lincoln in Ottawa, Illinois, "Mr. Lincoln and the Republican party set themselves up as wiser than these men who made this government, which has flourished for seventy years under the principle of popular sovereignty, recognizing the right of each state to do as it pleased."[36] Here Douglas put forth his belief that the nation must be ruled by consensus agreements and not by majoritarian decrees. By focusing the argument on the need for a consensus of opinion Douglas was furthering his support of founding principles through compromise.[37] What Douglas was unable to do was promote an overlapping consensus because sections of society had been excluded from the original position, thus public reason was eliminated from the discussion.[38]

Popular sovereignty also allowed Douglas to address the problem of the inequality of people. While Douglas supported the decision in Dred Scott that blacks were not citizens, he nonetheless believed that blacks did possess a claim to some rights (as did Lincoln) but continued to promote interstate comity by claiming that it was an issue for each state to decide. By keeping this issue of rights (as well as the issue of slavery in general) in the realm of popular sovereignty, Douglas was placing union above all else in constitutional importance. Douglas believed that if local issues were to be decided by national majorities, disunion was inevitable and this would be a disservice to the framers and the nation because according to his thinking these were the same arguments that were made and compromised on in 1787. Consensus or compromise were the only rational and procedurally moral solutions to slavery and these could only be achieved through popular sovereignty. For Douglas the end of slavery could only be obtained through a shift in public opinion, not by public confrontation.[39]

In Douglas' mind the only issue of equality was equality of the states. To force a national opinion upon individual states was a violation of the principle of federalism and would start the nation down a slippery slope of national oppression. If the states could be forced to adhere to national majorities that were violating the words and intent of the Constitution over slavery, then it was only a matter of time before majorities would enforce their next moral decision on powerless individual states. Majoritarian democracy was not what the framers had intended for the nation and unless consensus democracy was applied then impending crisis loomed. Majoritarian ideals were the antithesis to liberalism and liberty was best preserved in the states in Douglas' view because the popular will of the people would best serve each locality. This notion of liberty was best supported through popular sovereignty because it appealed again to the framers' understanding of classical republicanism and small uniform communities. These more

homogeneous settings would allow greater liberty than a large national government with multiple interests. This type of application would also further the United States "world mission" of demonstrating how a nation grows by allowing its citizens the most liberty available in a pluralistic society.[40]

Paradoxically, where Lincoln and Fitzhugh elevate liberty to the moral plain, Douglas brings it back to the level of practical application through the law and historical precedent. The twist in the rationale of Douglas is that he did not attempt to label the institution of slavery as liberal or illiberal; instead, he wanted to concentrate on government authority and viewed local political power as the expression of liberal thought.[41] Douglas was the more polished politician and appeared to offer the "safest" position in the debate over slavery as compared to Lincoln or Fitzhugh, so this begs the question, Why was he rejected by the voters in 1860?

Rejection of Douglas:

Insight into this question is provided by James McPherson in his epic work *Battle Cry of Freedom.* McPherson points out that while Douglas is often touted as the only national candidate in the presidential election of 1860, this is a misnomer and there are several reasons why. The first was Douglas' stand on the Lecompton Constitution. This crisis in the Congress shredded any feelings of good will left between North and South over the slave issue and Douglas lead the opposition to the Lecompton Constitution along with Republicans from the North. This was seen as heresy by the Deep South who was led by South Carolina and the believers in Fitzhugh's style of liberalism as it pertained to slavery. Douglas was vilified and his electoral chances evaporated in the firestorm that followed his criticism of Lecompton. "He was at the head of the Black column…stained with the dishonor of treachery without parallel…patent

double dealing…filth of his recreancy…away with him to the tomb which he is digging for his political corpse."[42] This outcry against Douglas from the Deep South, coupled with his already shaky footing because of his defense of his "Freeport Doctrine," was more than these southern states were able to accept.

The next section of the country to reject Douglas was the upper North, which was dominated politically by abolitionists. These states were much more in tune with Lincoln's brand of liberalism as it applied to the slave question and found his support of eventual elimination more politically satisfactory than Douglas' popular sovereignty model. In the upper northern states, popular sovereignty not only allowed the continuation of slavery's existence, it also opened the door to the potential of slavery spreading into the territories and this was an untenable position. As a result, Douglas found his presidential candidacy in jeopardy as he was excluded from two major regions of the country. When the Southern Democrats nominated John Breckinridge as their candidate, the Democrat party split in two and sealed Douglas' electoral fate. With the Deep South and Upper North firmly against him, the conservative remnants of the old Whig party nominated John Bell on the new Constitutional Union ticket. All that was left for Douglas was to appeal to were the border states who did not have enough electoral college votes to carry an election. The die was cast and to his credit, once Douglas knew his campaign was lost he turned his energies toward the avoidance of secession.[43]

Abraham Lincoln:

Lincoln took a view of slavery antithetical to that of Fitzhugh. For Lincoln, slavery was an illiberal institution that was not to be thrust upon others against their will. He viewed slavery as a necessary evil that was forced upon the nation under the compromises of 1787 that were

rationalized by the belief that slavery was on the road to extinction. As early as 1837, Lincoln was speaking out against the evils of slavery.[44] Lincoln believed the institution of slavery was a moral wrong and although the Framers were incorrect with their timetable for its elimination because of unforeseen events, Lincoln saw slavery as on its way to gradual elimination. This was a political reality for Lincoln that he used repeatedly in his debates with Stephen Douglas in 1858. As he stated in the now famous House Divided speech, "A nation can not long endure half slave and half free."[45] It was a basic concept for Lincoln, the nation had to decide whether it was going to be nationally free or nationally slave. He did not see how it could continue on its current path without destroying the nation because as was mentioned, he felt slavery to be illiberal and contrary to the founding principles of American liberalism. Lincoln would turn to the Declaration of Independence as the founding document to support his liberalism.

Abraham Lincoln was aware of the framers' historical knowledge and he interpreted their application of Locke very differently from Fitzhugh's. While Fitzhugh rejected Locke and thought the government should limit certain people in order to expand their liberty, Lincoln believed the framers understood Locke's philosophy to promote the social contract and expand the expression of rights (such as the acquisition of property), and in this way the government would be allowing the benefits of equal liberty without undue intrusion into private lives. Lincoln saw slavery as withholding a type of personal control from Negroes that they should enjoy in regard to their own lives.

> At bottom, Lincoln believes the institution of slavery wrongs the slaves by depriving them control over their own lives. It blocks their "right to rise" through the fruits of their own labor. Accordingly, the institution violates three of the fundamental tenets of liberalism: that every man is rational enough to control his own life; that all men are created equal in that basic respect; and that each man should have the same opportunity to demonstrate any greater rationality he might possess and rise to his appropriate level in society.[46]

It was the duty of the government to work in conjunction with the citizenry to ensure that each was protected and their rights were guaranteed. In other words, people would need to petition the government if they desired assistance. This was not something to be forced upon citizens. So while Lincoln and Fitzhugh did appeal to the basic philosophy of the framers that all of America knew and understood, Lincoln used a different interpretation of this liberal ideology and focused on the prospect that the government must allow individuals to determine what level of liberty they wished to achieve in their private lives. From this position Lincoln can juxtapose slavery and free labor. In slavery the Negro had no choice about his liberty, the master (government) determined this for him, whereas the free laborer had choices about free movement and although these freedoms are not unlimited, they are the greatest available under a "Lockean" form of the social contract. Lincoln's filiopiety was highlighted in the debates with Douglas as Lincoln attempted to tarnish his opponent with the label of being hostile to attempts to restore "an America which had been lost or subverted." This was an effort to show that Douglas was not being true to the intentions of the Founding Fathers. Lincoln's logic was that Douglas was causing needless agitation over slavery with ideas such as the Kansas-Nebraska bill and actions like this would promote slavery and not allow it to die, as was the framers intent.[47]

A very liberal phrase uttered by Lincoln was the famous quote he lifted from the Declaration of Independence, "all men are created equal." These brief few words sum up American liberal thought and Lincoln played upon the meaning of these words to strengthen his argument. Lincoln (like Fitzhugh) also thought people were unequal and he stated on more than one occasion that black people were inferior to white people. He attempted to parse the words of the declaration, thereby rationalizing to the existence of the belief that there were the "rights of a person," which every living human enjoyed (even blacks), as well as what he called the "rights

of citizens" which the majority of the people could decide to bestow upon each other. In the Charlestown debate with Stephen Douglas, Lincoln emphasized that certain rights of a citizen, such as jury duty, holding office, or even marriage can be decided by the majority, but the basic rights of a man to eat the bread created from his labor was protected by God given authority.[48] This very "Lockean" idea that a man was entitled to the efforts of his labor was a very important part of Lincoln's argument because it emphasized the notion of levels of equality among humans that must be recognized for the attack on slavery to move forward.

It was clear that like Fitzhugh, Lincoln conceded that there were differences in the capacity of people.[49] Where he differs from Fitzhugh was that Lincoln was not prepared to allow an oppressive faction in government complete control over the lives of private citizens. He had outlined certain limits on issues such as voting and jury duty in previous debates with Douglas, so Lincoln was acquiescing to some control over the lives of citizens by the government. Yet this was still consistent with his filiopiety and supported a notion of the common good. For Lincoln, it was the common good through the application of public opinion and actions that would eventually end slavery in America.[50] Lincoln believed the majority opinion in America was beginning to move against slavery and by allowing the majority to act toward its end this would increase liberty throughout the nation. In this way he was indirectly answering Fitzhugh's proposition that slavery increases the liberty of the total society. This being said, Lincoln saw the only stumbling block as, how to eradicate this institution from our nation? With the elimination of slavery, Negros would be able to enjoy the liberties they are due as humans and possibly the rights of a citizen if their locality was so inclined. While Fitzhugh promoted slavery as the liberal answer to increase the liberties of the less fortunate in American society, Lincoln promoted the end of slavery to accomplish the same liberal goal. Lincoln did not address the

claim of Fitzhugh that free white labor was not really free, instead he concentrated on the moral aspect of slavery.

Here the schism in thought between these two men became rather obvious; Fitzhugh saw blacks as inherently inferior and a class of people who would need to be protected for all eternity, therefore slavery was a positive good. He also placed free white labor in a similar position by claiming that the free laborer would never be able to rise to the level of equality with the business owner. In reality they were in a worse situation than the Negro slave because the capitalist boss had no investment in him. Lincoln too saw blacks as less than equal, but he did not relegate them to an inferior status into perpetuity. What he did understand was that prejudice existed in white America (his own included) and he believed its effects would recede over time, so slavery was for the moment a necessary evil. Lincoln knew this would not be a simple task but one that must be done. In a speech given in Peoria and then repeated in later debates with Douglas, Lincoln addressed this issue and made reference that slavery was a dilemma for the South that Jefferson called "holding a wolf by the ears" and "while this need to end slavery would be a …tortuous, cross-country journey," Lincoln insisted on sustaining progress toward a society without racial slavery even though no consensus existed on what form such a society would take."[51]

For Lincoln this was a subtle difference because to be inherently inferior you can never be independent and you must always rely on another for some level of survival. Victims of prejudice may be placed in a disadvantaged position, but they still have many liberties enjoyed by all Americans and therefore the ability to be self sufficient. This fine variation of thought allowed Lincoln to promote constitutional tenets while bypassing the Constitution and calling on the Declaration of Independence. He had to do this because thinkers such as Fitzhugh had seized

the constitutional high ground and attempted cite the three-fifths and fugitive slave clauses as well as Dred Scott and Prigg v Pennsylvania to support their position. Lincoln had to undercut this legal argument and appeal to founding principles to support his position. What Lincoln attempted to do was show that the nation had veered from its founding principles and it was time to recapture the intent of the revolution.

Gordon Wood in his classic work *The Radicalism of the American Revolution* demonstrated how the revolution in 1776 did not just change the political nature of America, but it changed the society into the most equalitarian nation on earth.[52] Lincoln's appeal to the Declaration of Independence on numerous occasions shows that he was in agreement with this interpretation and believed that it was the intent of the founders to create just such a liberal nation. The growth of slavery and its inherent illiberality led Lincoln to see this as a destruction of the founding principles because the nation was not progressing towards a more liberal society as the founders had intended. Lincoln thought he understood the founding principles as outlined in the Declaration of Independence and this gradual expansion of rights to all men who were created equal was being violated. In this way Lincoln saw the misappropriation of the intent of constitutional compromises as a type of Thermidor that was actually taking the nation backwards and undermining the principles of the revolution.

Fitzhugh was no Robespierre, but Lincoln was of the belief that the founders saw slavery as a dying institution, so they were willing to compromise in 1787 on this issue as a matter of political necessity. When the South reneged on this understanding and attempted to expand slavery as seen in events like Bleeding Kansas and the Lecompton Constitution, Lincoln felt this was unacceptable and this is why he pursued the house divided course and denounced slavery as morally wrong and a "cancer" on the nation in his debates with Stephen Douglas. Furthermore,

he viewed the Dred Scott decision as additional proof of the destruction of the founding ideas and could classify this case as thermidorian as it opened the door for more court battles that would further move the country from its founding principles.[53]

For the nation to continue to allow slavery would be to ignore the liberal principles of the revolution and placed the nation upon a slippery slope to monarchy. Lincoln believed that to allow the continuance of slavery would lead to the breakdown of our liberties. As more and more government is needed to promote and protect slavery, the more power the government will demand and assume. This growth of governmental power would end in absolute monarchy and complete enslavement of the people.[54] The impact would be the opposite of Fitzhugh's belief that this would lead to a positive liberal expansion of individual liberties. Lincoln shuddered at the thought of increased governmental authority and proclaimed that this would return America to the days of rule by a foreign king. So while both Lincoln and Fitzhugh argue from the same premises, their expected results are both liberal and very different.

The Acceptance of Lincoln:

The election of Abraham Lincoln in 1860 is as much a result of political conditions as it was an adherence to the liberal consensus of America. Louis Hartz might say that Fitzhugh was dismissed because of his rejection of Locke and his courtship with socialism both of which smacked of his "reactionary enlightenment."[55] Douglas was victim of consensus as he tried to meld the Lincoln liberals of the upper North with the Fitzhugh liberals of the Deep South and ended up being ignored by both camps. Lincoln on the other hand incorporated a measure of politics and philosophy into his campaign as he appealed to the abolitionists when necessary and avoiding the subject of slavery when prudent. Speaking about Lincoln, McPherson says, "And

in the lower North generally, Republicans played down the issue of moral slavery while emphasizing other matters of regional concern. In Pennsylvania and New Jersey they talked about the tariff; from Ohio to California the Republicans portrayed themselves as a homestead party, an internal improvements party, a Pacific Railroad party. This left the Democrats with less opportunity to exploit the race issue."[56]

To add further to the Republican election strategy, the Democrats were awash in scandal. The Buchanan administration was under investigation for government "kickbacks," bribes, and other irregularities that reached into the highest level of the White House. Consequently, these events coupled with Lincoln's reputation tainted the entire Democrat party, as "Honest Abe" was the perfect remedy for this political problem.[57] Lincoln showed his political savvy by seizing the Dred Scott decision as the first step toward a nationally mandated slave policy. He supported the notions being discussed in state legislatures around the country that the issue of Dred Scott did not end with the Taney court ruling. Instead, what it did was open the entirety of the North to slave intrusion under the premise of a slaveholder's right to travel. There was a case pending in New York court that had originated in 1852 (Lemmon v. The People) where the judge granted the slave owner rights of transit or temporary sojourn with their slaves. The reason for concern was it was the "foot in the door" argument, "If a man can hold a slave one day in a free state, why not a month, why not a year?" Would his transit be indefinite and his visit permanent? The Lemmon case might have then become Lincoln's Dred Scott II.[58] The implication was that Dred Scott was an aberration to the founding principles and Lincoln furthered his romance with the framers when he gave an address at the Cooper's Union in February of 1860. In this speech Lincoln attempted to assuage the fears of the South by professing compliance with the writers of the Constitution and his devotion to republican principles. He informed the crowd that 21 of the

39 signers of the Constitution believed that Congress should control slavery in the territories and not allow it to expand. Thus, the Republican stance was not revolutionary but instead similar to that of the founding fathers.[59]

These theoretic allusions in conjunction with the political problems of the Democrats may have been enough to elect Lincoln, but the "Hartzian" trump card that assuredly helped Lincoln was his "rags to riches" appeal. His campaign worked to promote Lincoln as born in a log cabin and growing up on the frontier, a simple rail-splitter who was self educated and made good. He was an early form of Horatio Alger and the embodiment of the American dream. How could a man who was achieving the success that every American aspired not be the best choice for president and how could his liberal interpretation not be the correct one?

Conclusion:

Fitzhugh's positive good argument was to lose out in the battle that was the presidential election of 1860 as the nation elected Abraham Lincoln. Lincoln's supporters in the upper tier of northern states moved the slavery argument from necessary evil to moral abomination. The states of the lower north chose Lincoln's position on issues like the tariff and internal improvements over those offered by other candidates (Bell, Breckenridge, and Douglas) and civil war soon followed. This is not to blame the war on Lincoln supporters, but rather to illustrate how the supporters of Fitzhugh's beliefs were overrun. In the end it was the schism between these two camps that made civil war inevitable and oddly demonstrated that Douglas and his supporters were better at evaluating this issue and its consequences. After all it was Douglas who campaigned in the South to avoid secession once he understood that the election was to be Lincoln's.[60]

David Ericson also speaks to this when he analyzes Lincoln's beliefs about the outcome of his house divided position. He points out that Lincoln believed there were three potential outcomes of pursuing a unification of thought over slavery. The first was national slavery, the second option was national freedom, and the third was a continued division. According to Ericson, Lincoln never believed that people would choose a fourth option of secession. It is on this fourth option that Douglas demonstrates his superiority of understanding, because he saw secession as a very real possibility in the minds of many in the South.[61]

In the election of 1860 Stephen Douglas is often seen as the only truly national candidate. While this is not completely accurate, his attempt to be the only national candidate ironically led to his defeat. His belief in popular sovereignty or allowing individual states to determine their fate did him in once the electoral system was dominated by regional coalitions with significant electoral votes to decide the presidential election. But why did the 1860 election turn out as it did? Why did voters not rally around Douglas (the only candidate on the ballot in both the North and the South)? How did Lincoln's liberalism trump both Fitzhugh and Douglas?

Hartzian logic dictates that thinkers like Fitzhugh were defeated because their approach to liberalism conflicted with the majority of Americans. What helped contribute to Fitzhugh's rejection was that his philosophy at times appeared to try and place a foot in both the liberal and conservative camps. Much of his writing is replete with liberal language, but his ultimate stance on slavery smacked of aristocracy and permanent class division. This was not a liberalism that Americans could embrace.

The nomination of Breckenridge by Southern Democrats illustrates this as the leaders of the Southern "reactionary enlightenment" chose to divide their party and support a candidate that

would only appeal to the lower South. These thinkers espoused being "conservative" and were attempting to reclaim a liberal birthright that never existed in America. They were harkening back to a day of feudalism and class structures that were not part of the American history that we were all "born equal." These men were actually challenging traditional American thought, but this type of thinking was illogical to most Americans because the liberal tradition was so well ingrained. Instead of arguing this point, Americans simply ignored it. Hartz pointed out that this is the ultimate pronouncement of failure because the entire argument is not deemed worthy of discussion. As Hartz described when assessing the debate between abolitionists and slaveholders, "Where in the whole history of American thought is the sublime assurance of that opinion better expressed than in the words of Garrison: "Argument is demanded-to prove what?" Garrison's refusal to even dignify the slave position with a comment, symbolizes the utter dominance of liberal thought over the American mind.[62]

Looking at the defeat of Douglas is more complex because he did not subscribe to the reactionary enlightenment philosophy of Fitzhugh, yet he did not push for the abolition of slavery. The reason Douglas was not embraced by the South is straightforward; his popular sovereignty model placed the institution of slavery in a tenuous position that most of the South was not willing to embrace and his efforts to defeat the Lecompton Constitution placed him in the camp with "Black Republicans." However, in the North, Douglas was not viewed as the standard bearer of American liberalism and this can be attributed to his work on the Kansas-Nebraska Act. This piece of political gamesmanship created an agitation over slavery by repealing the Missouri Compromise and opened the door to the unchecked spreading of slavery into the territories. The distrust generated in the North by his actions stayed with Douglas into 1860 and beyond.

Douglas' dilemma was his contorted attempt to play the middle ground in the slavery debate. By 1860 America was essentially two nations co-existing in an uneasy alliance. Douglas' compromise position called upon state's rights and national supremacy simultaneously and this was unworkable for most Americans. Depending on which part of the polemic one was involved, they could argue, both national supremacy to protect or limit slavery, as well as state's rights to accept or reject national decisions. The end result was that Douglas in reality was not a national candidate, but rather a candidate hoping to patch together the next compromise to a national problem.[63]

Another possibility for the failure of Douglas is that he did not openly reject the feudal ideas of the reactionary enlightenment as most people did in the North. Douglas may have been seen as politically tolerant of these Southern ideas because of his unwillingness to publicly condemn slavery along with cautioning others to avoid the issue on grounds that it was undemocratic.[64] If this did occur, then he was cast in the same light as these reactionary thinkers and consequently he too was "ignored" by the voters in the 1860 presidential election. Assuming Hartz's theory is correct and the followers of Fitzhugh were in fact repudiated in the North, by virtue of being associated with these men, then Douglas would have suffered the same fate. Once the electoral power shifted, Douglas sealed his demise by not cutting all ties with these men. So by attempting to achieve the middle ground in the slavery debate, Douglas destroyed his chance at electoral victory because compromise was no longer needed and he was seen as giving credence to what the North believed was an illogical thought process.

In the end while all three men attempted to appeal to founding documents and the liberal consensus of American thought, only one could emerge victorious. That winner was Lincoln,

the only one of the three who would not veer from the liberalism set forth at the founding of our nation.

Chapter 4

American Abortion Law:

Prohibitions on abortion have existed in some fashion in the United States since its beginning and, similar to slave law, they centered on a mix of liberal ideas. Where slave law struggled with the dichotomy of the humanity of the slave and claims of the slave as property, the basis for law dealing with abortion was the protection of life, be it the mother or the unborn child, juxtaposed to elements of liberty. However, while the laws dealing with abortion and slavery cover identical philosophical ground they argue their cases in a reverse order to get to the same conclusion. Slave law was argued as protecting a positive good because slaves were freer as captive labor in the South rather than enslaved by the wage labor of the North. Also, southern society property rights of the slave owner took precedent over the autonomy of the slave. In this way a liberal defense of this institution could claim to increase the liberty of slaves and simultaneously deny their humanity. Over time this argument began to unravel and the humanness of slaves could no longer be ignored. This altered the focus of the defense of slave law as a need to continue a necessary evil. It was then argued that to free all Negroes into the wilds of American society would have detrimental effects on the ill-prepared Freemen and society as a whole. The newly freed slaves would be helpless victims to be preyed upon by the realities of modern society and the society would be threatened by the influx of a large number of illiterate and unemployed. The laws of slavery, while clinging to property rights, attempted to claim that the quality of life of the slave was made superior in bondage.

The abortion debate travels the reverse path. Challenges to abortion laws began as defending abortion as a necessary evil that society must endure and this was logical as long as

the humanness of the unborn child was ignored. Once medical advances betray this legal defense then challenges are created to show that abortion can be defended as a positive good and part of America's liberal tradition. Some courts appear to have supported this notion when in Baird v. Eisenstadt the United States Court of Appeals, First Circuit said; "To say that contraceptives are immoral as such, and are forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support."[1] It was being implied that the quality of life of the child and society would be improved if the child were aborted. By allowing abortion the child is not forced into an unwanted, impoverished home or burdened with disabilities. Society would also be saved from expending its limited resources on abandoned or unwanted children. Both abortion and slavery use the positive good and necessary evil argument to defend laws or beliefs that promoted these institutions and both camps end up trapped within the jeremiad of explaining how the quality of life of the unborn and the slave would be better if retarded by law.

During the colonial period and into the founding era abortion laws in America were based upon English Common Law. The historical definition of abortion began as harm to a formed fetus and warranted capital punishment and this served as the rule until abortion was redefined by Sir Edward Coke in the 16th century. Coke altered the definition so that murder would not be considered unless the child was born alive and then died from wounds received during the abortion procedure. This made murder easier to prove than if it occurred within the womb because of the limits in the medical field of this era, yet Coke still thought the act of killing a child within the womb as a 'serious misprision,' or a very serious misdemeanor.[2] Thus the

beginning of any study of abortion jurisprudence must recognize the very essence of abortion law, from its beginnings, did recognize the unborn as life.

Coke's definition became an integral part of English Common Law and increased in significance when William Blackstone included a portion of Coke's law in his famous *Commentary on the Laws of England*. Blackstone called abortion a "severe misprision to kill a child in its mother's womb."[3] It was Blackstone who was most quoted and referred to when abortion cases came before the early courts of the United States. The medical term that defined life in early abortion cases was 'quickening,' when a pregnant woman first feels the child move. This event occurs most often within the first four months. Blackstone explained that using common law, a quickened fetus was life and destruction of the fetus was punishable by loss of a limb, confiscation of property or life in prison.[4] With this as the starting point for American law it becomes clear that the identification and protection of life was the lynchpin of abortion statutes. All laws concerning abortion began with the determination of life at quickening and subsequent laws were forced to deal with this reality.

Here is the common ground upon which slave law and abortion law were built. In order to justify slavery, the law was forced to deny the humanness of the slave and to justify abortion the law is forced to deny the humanness of the unborn child. Ironically, as medical technology improved this ability to deny the humanness of the unborn child became more difficult just as the humanness of the slave could not be denied as Americans became more attentive to the slave condition. Similarly as with slave law, judges presiding over abortion cases were forced to wrestle with either denying the obvious humanity of one person to benefit another or act in deference of the humanity of the individual. In a similar fashion to slave law, pro-abortion statutes once enacted were reinterpreted and contorted in an attempt to ignore the humanness of

the fetus. Also, just as slave law was forced to adjust their property defense into a quality of life issue, pro-abortion claims moved in a like fashion as viability and privacy became the focus of their argument. It is from here that American abortion laws must be examined.

In 1787, slavery was tolerated as part of the constitutional compromise with the belief it would be eradicated over time.[5] The cotton gin and changes in technology altered this plan and America was forced to address the realities of the slave issue. The 19th century ushered in advancements in medical technology that began to alter abortion thought. In 1827, the human egg was discovered and in 1839 the cell was discovered as the building block of life.[6] Medical discoveries made it difficult to discount the understanding of the humanness of the unborn child; consequently, abortion practices that were once thought of as eliminating a benign substance took on new meaning. Also the improving surgical techniques also made obtaining safe abortions more common; this is where the abortion discussion becomes more complicated. At the same time the unborn could be identified as life, the ability of a woman to safely free herself from pregnancy was becoming a reality. As the debate was beginning to unfold, once again the property argument was resurrected, but on this occasion it was clothed in the sanctity of privacy rights. This was the 20th century's version of Dred Scott. The debate over slavery began at the state level because this was an issue contained within the Constitution and there was great inconsistency in case law, so these situations justified Supreme Court intervention. With abortion law, there was great consistency within the law and no mention of abortion within the Constitution. So when the Supreme Court hands down its opinions in Griswold v. Connecticut (1965) and Roe v. Wade (1973), the abortion debate becomes fully enflamed and can no longer be decided using public reason at the state level; instead, it is played out on the national scene.

As I argue in this chapter and again in Chapter Six, court decisions bypassed the use of public reason and interrupted society's effort to find an overlapping consensus.

Creation of Abortion Law:

The first documented abortion laws to appear in America were in the early 19th century in Connecticut (1821), Maryland (1825), and Illinois (1827). In these three states any attempt to induce abortion was made a crime even if there existed no 'quickening.' These states also expanded the crime of abortion beyond the common law requirement of 'quickening' as the life of the mother became a concern for law makers.[7] Because of archaic surgical procedures and questionable medical methods, women seeking abortions put their lives in danger. In other states such as New York (1828) and Massachusetts (1843) 'quickening' was the benchmark upon which abortion legislation was crafted and by 1910 every state had enacted an anti-abortion statute except Kentucky whose courts had declared abortion at any stage of gestation illegal.[8] What is apparent within these laws is the life of the mother is a concern as well as the unborn child, thus all laws advocating abortion are forced to address the unenviable task of either ranking in importance one life over another or attempting to draw an arbitrary line of when life begins with limited medical technology. Quickening was used because historically this was understood to be the defining moment when a life could be detected. Prior to quickening the medical technology of the time was not able to determine life.

It had come to the attention of the legislatures in the 19th century that individuals who were performing abortions often used some form of poison as the abortifacent as well as unregulated surgical procedures. While these procedures may induce abortion of the 'unquickened' fetus, it could also result in the death of the mother.[9] This concern for the safety of the mother led these states to expand anti-abortion law in another attempt to preserve life. As

a way to further the ability to enforce these laws, state legislatures rarely cited the mother as criminally responsible. The doctor, or as in most cases, the layperson who performed the actual abortion, was the one almost exclusively brought to trial. The reason for mothers seeking an abortion is a discussion better left for another inquiry. It is my purpose to examine how abortion laws were written and adjudicated in order to make a comparison to the issue of slavery as it pertains to human life.

The historical motivation for the anti-abortion laws was always the protection of human life. As previously stated, at their inception states followed English Common Law that made the killing of a 'quickened' fetus a crime and once law makers saw that the lives of mothers were potentially in jeopardy they adjusted the laws to protect her life as well. This concern for life was illustrated in the 1949 case of Miller v. Bennett where a Virginia judge ruled that the legislature had created the Virginia anti-abortion statute to protect the child because it was contrary to public interest to allow the destruction of life. In this ruling the court declared that life must be guarded as an interest by the state.[10]

New York courts took this concern for life one step further when they became the first state to create a life exception for the mother in cases of abortion. Beginning in 1930, legislation was enacted that when the life of the mother was in peril that an abortion could be prescribed. The state still kept intact its law that made abortions that did not harm the life of the mother a crime. It was a misdemeanor with punishment of one year in prison for an abortion before the child was 'quick' and it was deemed a felony of 2nd degree manslaughter if the abortion was done after 'quickening.'[11] Nonetheless, protection of life remained the focus of the law. What is often referred to in the contemporary abortion debate as a fundamental recognition of liberty, is

challenged by the historical reality of support for abortion prohibitions as well as an overall defense of life.

What had evolved beginning in the 18th century to the early 20th century were abortion laws that took a very similar shape in all states. A review of abortion laws that existed in America before 1960 demonstrates a great concern not only for the mother, but also for the unborn child. Quickening was still used as the benchmark for statutes that were created to protect the unborn, yet the life of the mother was not ignored. Abortion at any stage of gestation was usually made a criminal offense. In Ohio the death of the mother or the fetus was determined to be a felony if the action took place after quickening and by 1937 Arkansas made abortions attempted before quickening a felony as well.[12]

Since most abortions took place in early pregnancy, states continued to require proof of quickening (as in New York) and whether the abortion took place before or after quickening determined the level of punishment. Some states rejected the quickening distinction and established the same penalty for all abortions. States that used the quickening distinction to determine the level of punishment usually treated destruction of a quickened fetus as manslaughter. A small number of states treated the destruction of a fetus at any stage of pregnancy as manslaughter.[13]

In some states, the pregnant woman who procured her own abortion was treated expressly as a guilty party; however, this was a largely symbolic condemnation as the woman was almost never prosecuted. Indeed, criminalizing her conduct could complicate prosecution of the abortionist because of evidentiary rules prohibiting compulsory self-incrimination and requiring the testimony of an accomplice to be corroborated. Most statutes punished attempted abortions as well as completed abortions in order to sidestep the problems involved in having to prove

pregnancy as an element of the crime. Liability turned on whether the defendant acted with intent to destroy a fetus. Yet some of these statutes applied only when the woman in fact was pregnant. A few other states permitted abortion to preserve the mother's health as well. Otherwise, the prohibition of abortion was absolute.[14] Intent is an important legal concept and the medical vagarities of this early era made intent difficult to prove. Because of limited medical technologies, defendants in abortion cases could claim they were assisting another medical concern of the woman, thus sidestepping the abortion prohibition.[15]

As medical technology continued to improve, an irony emerged in the arena of abortion. While technology had made the ability to determine life much more accurate than 'quickening' it also made the procedure of abortion much safer. As aforementioned, it was with an eye toward the safety of the mother's health that early exceptions and prosecutorial procedures were developed. The American Law Institute's Model Penal Code (1962) provided an important catalyst. The 'tentative draft' of the code's section on abortion (§ 230.3) was first published in 1959. It proposed that abortion should be a felony, with the level of punishment to depend on whether the abortion took place up to or after the twenty-sixth week of pregnancy. However, it added that "[a] licensed physician is justified in terminating a pregnancy if he believes there is a substantial risk (1) that continuation of the pregnancy would gravely impair the physical and mental health of the mother or (2) that the child would be born with grave physical or mental defect, or (3) that the pregnancy resulted from rape, incest, or other felonious intercourse."[16]

This proposal by the American Law Institute was an effort to identify and expand protections to both the mother and the unborn child; it was not designed as a process to overturn abortion laws en toto. Evidence seems to support the idea that the majority of society was satisfied with their local abortion laws. This is important because it demonstrates how local

jurisdictions were dealing with this issue through the Tenth Amendment and the concept of federalism as enshrined in the Constitution. By the 1960s, what was in place was an almost uniform recognition in over 40 states where laws that proscribed abortion were both acceptable and constitutional. This attitude of acceptance and consistency can be seen in the penultimate year of 1972. One year before the Supreme Court handed down its decision in Roe v. Wade three states placed the issue of abortion before the voters by way of initiatives or legislative action. In the state of North Dakota a proposal was on the ballot that asked voters if their preference was to have the prohibition of abortion removed. By an unquestionable majority of 78% the people of North Dakota voted to keep their laws in place that restricted abortions.[17]

A similar proposal was placed before the voters of Michigan in 1972 and the response was a 63% majority that also wanted to keep restrictions on abortions. In the state of New York the legislature passed an amendment to repeal its law that allowed abortions, but Governor Nelson Rockefeller vetoed this act and before the legislature could override his veto in 1973, the Supreme Court handed down Roe.[18] What had developed by 1973 in the United States was similar to what occurred in the 19th century. The nation was faced with a difficult moral issue, but unlike slave laws that were full of ambiguity that created inconsistency in judicial rulings, abortion statutes were almost uniform in creation and application. It was not until 1969 when state courts began applying the Supreme Court's opinion in Griswold v. Connecticut that this common understanding was discarded.

The Adjudication of Abortion Law:

Investigations into the application of abortion laws find that from 1821 to the mid-1960s judicial decisions were not unanimous; however, they were logical in regard to the way local

abortion laws were written. The bench adhered to a more legal formalist approach by applying the law as it was written by the state legislatures. Only in a minority of cases did judges attempt to interpret abortion law that conflicted with the intent of the statute. As early as 1812 the state of Massachusetts applied the principle of quickening, when in the case of Commonwealth v. Bangs, the defendant was acquitted because the state could not show that quickening had occurred and therefore the issue of pregnancy was moot.[19] This standard was consistently applied in most states and in 1849 a New Jersey court was faced with the same legal question. This court also found the defendant to be free of responsibility because quickening was not proven.[20] When quickening was demonstrated the courts applied the will of the legislature and handed down manslaughter convictions. An example of this occurred in State v. Giedicke (1881) when the New Jersey court found that the woman was quick with a child and the defendant had aborted the child.[21] The critical legal element was again intent. If it was proven the woman was pregnant and that a conscious effort was made to kill the unborn child, this was punishable under the law.

In all except the rarest of cases the woman was not prosecuted for violation of abortion laws. This was a common law tradition that had always viewed the woman as a victim because elective abortions were so rare and the effects so dangerous it was assumed that a woman would not risk her life and that of her child unless some form of coercion had taken place.[22] Jeremy Bentham had argued that the dangers of abortion were punishment enough for the woman to endure and laws were crafted with this mentality.[23] This concern was demonstrated in Hatfield v. Gano (1863)[24] and again in People v. Commonwealth (1898).[25] In both of these cases the court ruled that the woman was not to be prosecuted and in fact she was to be compensated for any harm because she was in fact a victim in these cases. The legal logic for using post-

quickening as the standard and not attempting to prosecute the mother was both compassionate and realistic.

Writing in 1644, Edward Coke explained the evidentiary problems associated with trying to convict a person of the crime of abortion before the fetus was quick. He stated that the person performing the abortion must be dissuaded from attempting this act. To free the mother from legal responsibility not only was driven by compassion but also the realities of the legal system. As previously stated the need for corroborated testimony is eliminated when the mother is not on trial.[26] Protection of the mother and prosecution of the abortionist was clarified in State v. Owens (1875) where the Court ruled that the Minnesota law which demanded intent must be present to prosecute the crime was legally valid. This was not added to the statute to protect the abortionist, but rather to make the law more clear so the state could prosecute people who carried out an abortion.[27] This precedent was applied in New York (People v. Blank 1940) when the court declared that the woman was not an accomplice in the attempted abortion; consequently, her uncorroborated testimony could be used to convict the abortionist.[28]

This legal notion of treating the woman as a victim was applied in Hancock v. Hullett (1919) when the court stated that the woman was not able to assent to an unlawful act against herself and they allowed the father to sue for malpractice because of the injury sustained by the mother during the abortion procedure.[29] While the idea of viewing the woman as a victim had a compassionate tone, it was also a legal strategy that was used to prevent third persons from offering the service of abortion. The idea that the woman was a victim was not universally accepted as seen in Nash v. Meyer (1934).[30] In this case the court decided that women make the choice for abortion and therefore they can not be excused as a victim in the crime. Courts also went so far as to disallow life insurance claims if the woman died during the procedure. This

was not to say that the woman was guilty of a legal transgression, but rather the court was recognizing the moral guilt of her actions.[31]

What existed in abortion law was a bi-level system of concern that encompassed both the mother and the unborn child. While these two concerns could come into conflict, it was the focus of the law to protect both entities. In State v. Moore (1868) the court ruled that the law was explicit and it was created to protect fetal life with the only exception being the need to protect the life of the mother.[32] In a more extreme example of concern for fetal life the court claimed in Herman v. Turner (1925) that abortion statutes were designed not for the protection of the woman, but rather the concern was for the unborn child and through the child the law was protecting society.[33] The most common application of abortion law was one that spoke for both the mother and the unborn child. In People v. Lovell (1963) the New York City court declared that abortion statutes were adopted to protect both fetal life and the health of the mother.[34] The reality of abortion until the late 1960s was that laws were developed to defend the life of all involved. They were not designed to pit the life of the mother against the life of the child.

In 1968 the New Jersey State Supreme court decided the case of State v. Moretti. This was the first time a defendant offered as a defense the notion that a woman had a right to abortion on demand without regard to any other condition other than she found the pregnancy to be inconvenient. In the majority opinion the court stated, "It is beyond comprehension that the defendants could have believed that our abortion statute envisioned lawful justification to exist whenever a woman wanted to avoid having a child. The statutes of no jurisdiction in this country permit such an excuse for abortion."[35] The next year in New York the State Court of Appeals upheld the revocation of a medical license of a physician that performed an abortion who had also been convicted of assault because of his actions.[36] Early attempts to shift the

thinking about abortion were met with a firm rebuke from the courts. Even though rulings such as these were being handed down, later in other jurisdictions judges applied what they believed to be a more contemporary reading of the law. While stare decisis does not have an interstate application in regard to state law this shift in the thinking within some states shows a nascent inconsistency in the adjudication of abortion law. Similar to the rulings on slavery in the 19th century, a type of legal realism began to cloud the picture.

In 1969 a California court ignored past precedent when in the case of People v. Belous the Moretti opinion was completely dismissed. The Court in Belous took an historic step and decreed that a fundamental right of women to beget children existed. "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a "right to privacy" or "liberty" in matters related to marriage, family, sex .... That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right."[37] This landmark decision declared that the California abortion law was unconstitutional based upon the right of privacy even though as the decision itself made clear, this right was not enumerated in the state constitution. This opinion went beyond realism and entered the realm of substantive due process.

A Wisconsin court used the decision in Belous to bolster its opinion in Babbitz v. McCann (1970) to strike down this state's abortion statute as unconstitutional under the guise that a privacy right had been violated. The court decided that they believed the mother's interests were superior to the "unquickened embryo" because it was unclear whether this embryo was merely protoplasm or in fact a human being.[38] Just as with slavery, these words in the abortion debate serve as the foundation of the argument that the unborn may be alive but it is less than human. In 1971, the North Dakota Court of Appeals expanded this right in Doe v. Scott.

Once again relying on the unwritten right of privacy that had been articulated in Griswold the court claimed, "A woman's interest in privacy and in control over her body is just as seriously interfered with by a law which prohibits abortions as it is by a law which prohibits the use of contraceptives."[39] Again the Court was ignoring the life of the unborn and had stretched the idea of a privacy right to use contraception to create a right to abortion. This application of substantive due process was the rewriting of state law at the judicial level.

There are several reasons for this judicial shift in attitude during this era that include, advances in medical technology, the politicization of pro-abortion arguments, and an altering of societal values. The medical improvements have been discussed, language that attempted to explain the political and values differences will be covered in the next chapter. What I claim here is that with these changes, not only did the laws dealing with abortion become altered but they did so because the attitudes from the bench also changed. No longer were laws to be decided based upon the application of the written law. From this point forward, judges' interpreted statutes based upon the perception of changing attitudes and often embedded their opinions in the liberal idea of privacy.

Yet there was not a consistent pattern in judicial decisions and again like the interpretation of slave law, courts wrestled with conflicting opinions. Keeping in mind the difference with slave law was the way the law was written. In abortion law the difference was that judges were applying a variety of liberal interpretations from state to state. This can be seen as Ohio courts offered an opinion on abortion law in the case Steinberg v. Brown (1970). Here the court ruled that life begins at conception and the unborn child was afforded protections of the Fifth and Fourteenth Amendments. The majority wrote, "once a human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state

the duty of safeguarding it.[40] However, in two similar cases in Pennsylvania and New York the courts rebuked the Ohio court. The court found in McGarvey v. Magee Womens Hospital that the Pennsylvania constitution did not require judicial rights for the unborn[41] and in New York the Court of Appeals claimed that the protections of the Fourteenth Amendment did not include fetuses.[42] So again, it was not the way the law was written, but it was the way the Court interpreted the law.

This lack of continuity may best be exemplified in the court decisions of Able v. Markle (1972). In the first of two Markle decisions the Connecticut court struck down the state anti-abortion statute as too restrictive because the law prohibited abortions without a clear declaratory statement about its concern for the mother nor did it provide a reason why fetal life was the main concern of the legislature.[43] The Connecticut legislature immediately convened to rewrite the law with the appropriate alterations and placed it in public record; however, the court struck down this attempt by the legislature as well. In this new opinion the Court expanded a woman's privacy rights to include a right to be free from social embarrassment. The court declared, "The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. The unmarried mother will suffer the stigma of having an illegitimate child. Thus, determining whether or not to bear a child is of fundamental importance to a woman."[44] Oddly enough the Court by holding out the unwed mother as a social pariah they inadvertently contradict the logic applied in Eisenstadt v. Baird[45] and this may best illustrate the troubles of applying a form of judicial realism in the abortion issue. It is difficult to demonstrate a concise constitutional basis for judicial opinions. Therefore the foundation for judicial decisions on abortions attempt to cover a wide swath of philosophical liberal beliefs, many of which appear contradictory .

There is no debate that abortion laws were altered to allow for greater access to abortion when the health of the mother was involved. As late in the debate as 1973 the Oklahoma Court of Appeals upheld a statute that prohibited the abortion of a "quick" child unless the procedure was necessary to preserve the life of the mother.[46] Even in states like New York and Colorado where most prohibitions were removed by 1970, there always existed the understanding that the fetus was an unborn person and all states had a timetable in place that restricted abortions. In other words 'abortion on demand' did not exist and it was still the obligation of the mother or her doctor to demonstrate why the abortion was necessary to save the mother from harm. The American Law Institute model law that was the basis for many of the changes in abortion law included a caveat for the unborn. In this code abortion would be allowed if the child was to be born with severe defects and this admitted concern for the future of the unborn tacitly confirms that the unborn is a person with a future that must also be considered. Whether intentional or not it opened the door to the quality of life issue that would be applied later in the abortion debate. Continuing into 1973 state courts were still using the terms "quickened" and "unquickened" as a sort of benchmark for life.[47] Every state in America until 1973 had a statute that recognized the personhood of the unborn child and at the state level the abortion debate centered on when it would be allowable for the mother to kill her unborn child, not if the unborn was a person. In the 1960s judges at the appellate level began to apply various constitutional interpretations that challenged state abortion laws. This judicial attitude found its way into the Supreme Court when abortion was the issue. The question that must be examined is why did changes in public opinion occur?

Before 1950 the concept of abortion rights was minimal and no significant movement existed; nonetheless, societies change and America is no different. Beginning in the 1950s a

movement arose that included the ability to abort an unborn child as socially acceptable. The reasons for this social change are many and while it may be impossible to identify one as the cause for this change in thought, together these opinions form the early stages of public reason that can lead to reflective equilibrium.

I have argued that the lack of medical knowledge was a factor in the allowing of abortion in pre-1950s America and this was also a contributor to the pro-abortion movement. If medically the unborn can be explained away as inanimate or less than human, then the destruction of this thing carries no more moral weight than discarding an unwanted house plant. This was the state of medical opinion in the minds of the layman in America; consequently, when a woman sought an abortion many could accept this action because little medical data existed to support the life of the child. This I believe serves as the core of the pro-abortion movement, just as slave owners were able to justify their actions by ignoring the humanity of the slave, abortion supporters also had the ambiguity of life on their side. Coupled with this was the improving medical technology that made the procedure of abortion much safer for women and together these moved abortion into the public discussion.

Another factor that played a significant role in that public discussion was that a new narrative of personal behavior was being espoused during this time. This narrative claimed that a never before seen prosperity had taken place in America that altered employment expectations and created a managerial class that was focused on self-fulfillment. This new class was willing to sacrifice others to achieve their desired level of self expression.[48] This unprecedented behavior was particularly strong within women and as a result traditional gender roles were challenged. Within this economic movement abortion opinions were also being questioned because as a byproduct of economic improvements the concept of children and family were also

affected. "Reformed or repealed abortion laws served the interests of the managerial class by freeing men and women alike of familial responsibilities so they could spend ever longer periods in educational settings or working at managing society and its institutions."[49]

This promotion of individual supremacy and changing gender roles had a hand in what became the women's liberation movement. Within this movement was a focus on the freedom of sexual behavior that previously had been unaccepted openly in society. Open relationships and diverse sexual orientation were now part of public debate and ensconced in this debate on sexual freedom was the inevitable fact that pregnancy could result. Pregnancy was the one thing that was sure to remove a woman from the work-force and place her back into the home where it would be easier to subject her to traditional gender responsibilities. If this were to occur then all of the economic benefits made available as a member of the managerial class would be lost. This desire for improved economic potential and self interest made children not only expendable but a burden.[50]

As a result of this thought process people sought ways of justifying not only abortion but limits on population as well. A population control movement was prevalent during this time and in conjunction with the rise of a managerial class, abortion was a key component of both groups.[51] The idea of population control dovetailed with abortion support because by citing population concerns abortions can be argued as a necessary evil in American society. This would also allow the quality of life arguments to enter the discussion. The quality of life contention has three elements; first, if the unborn child was deformed or otherwise impaired then abortion supporters argued that to abort the child not only saved the child from enduring a horrific life but also the family would be spared the crippling economic costs. Second, the costs to society of having to support an ever increasing population were argued as unsustainable, not to

mention the public assistance needed to care for children born into families without the economic ability to care for them. This leads to the third element that questioned the logic of allowing the birth of a child to a family that does not want that child, either because of medical or economic conditions.[52]

All of the aforementioned factors contributed to the shift in public discussion over abortion and while all of these opinions began as separate ideas, they all had a hand in promoting the practice of abortion. As the debate over abortion began to grow the need for public support was crucial and as a way to garner this support the pro-abortion supporters coalesced around the liberal idea of privacy.

Privacy and the Supreme Court:

An understanding of privacy exists in the minds of all Americans and any liberal society will accept privacy as an important individual concept. The difficulty with privacy as it applies to the debate over abortion is the question of, what is the essence of privacy as part of the thought of the American liberal. The most common belief may be as simple as the right to be left alone;[53] however, this basic phrase has a sophisticated meaning that belies its elementary tone. When attempting to define this idea of being 'left alone' it is the government and intrusions by the state into our personal lives that we are looking to minimize. While this may appear to be an easy thing to define it is not because as part of any social contract the citizenry has invited the government in as a way to protect the most essential of rights -- the rights we deem to be fundamental.

The notion of fundamental rights is critical to the abortion debate and the issue of privacy. For a right to be considered fundamental it must be a right that without it life within a

free society would not be possible. Or stated another way, fundamental rights are necessary for ordered liberty to prevail.[54] Fundamental rights are the backbone of a liberal society because at the same time they enhance the rights of all people, they simultaneously limit government authority. Yet rights are not absolute and the framers who used the writings of John Locke as well as other liberal thinkers were aware of this.[55] The task is then to determine what limitations a liberal society will allow as a trade-off for governmental protections. In order to establish these boundaries it must be decided if privacy is indeed a fundamental right.

While privacy is not specifically claimed as a right in the Constitution, certain provisions are accepted to show that an understanding of privacy was important to Americans of the founding era. The Fourth Amendment with its provisions against unreasonable search and seizures is an example of attempts to limit government intrusions into the private sphere. Yet the amendment does not prohibit all government intrusion, only those that are unreasonable; therefore, it is apparent that the Framers were willing to allow for some government interaction. Simply put, not all activities carried on within the confines of the home can be considered private and free from government purview.[56] The First Amendment contains no reference to association or conscience; however, in a free society these freedoms are necessary. Nonetheless, even your ability to associate is not absolute and your Fifth Amendment freedom to be free from self incrimination that is contained within the scope of privacy is not immune from state action.[57] While privacy does appear to be fundamental to a free society many layers of privacy exist and some deserve more consideration than others. The essence of privacy can be defined as limitations on governmental intrusion into the private actions of citizens that do not infringe on the rights of others. Abortion does not fit within this definition of fundamental privacy because first, it involves an action that is detrimental to another person and second, the procedure of

abortion is not a private act, especially if abortion advocates want government funding or other state sponsored provisions.[58]

Abortion supporters, in an attempt to circumvent these difficulties with the privacy argument, claim that a separate right to abortion exists within the unenumerated rights retained by the people in the Ninth Amendment. At first glance this may seem to be a logical claim, but what is ignored is why this amendment was inserted within the Bill of Rights. While there is no disagreement that James Madison and others knew that all rights people would need could not be contained within a single comprehensive list, they were also aware that these rights were negative rights and designed as a way to limit the power of the state. The confusion over the meaning of the Ninth Amendment is that people who support abortion claim that this amendment is some fount of hidden knowledge that creates rights in a positive sense that heretofore had not existed. By examining the ratification debates it is clear that the Ninth Amendment, like the complete Bill of Rights, was created to limit the power of government not to leave open an avenue to create new rights at a later date.[59] Keeping in mind that abortion had always had prohibitions in America, to claim the Ninth Amendment was intended to recognize this right that had been overlooked for 200 years is suspect.

When the Supreme Court deemed that a sphere of martial privacy existed in Griswold v Connecticut[60] and then expanded this privacy to cover abortion in Roe v. Wade[61] the debate was divided into two philosophical camps. In one camp were those who declared themselves to be loyal to the words of the Constitution and excoriated the Court for finding rights that did not exist and creating social policy rather than issuing legal opinions. In Justice Hugo Black's dissent in Griswold v. Connecticut he stated:

> "Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter. The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home". [62]

The other camp was those who proclaimed the Constitution was a living document that must grow and breathe to remain relevant in an ever-changing world. It was Justice Douglas who in the Court's opinion in Griswold offered;

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred [p485] in Mapp v. Ohio, 367 U.S. 643, 656, to the Fourth Amendment as ***creating*** (emphasis mine) a "right to privacy, no less important than any other right carefully an particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup.Ct.Rev. 212; Griswold, The Right to be Let Alone, 55 Nw.U.L.Rev. 216 (1960).[63]

While both camps can make solid arguments, the language of scholars who support abortion as a right use language (as the Court did in Griswold) that undermines the argument that the right to abortion has always existed. A review of pro-abortion literature is ripe with the phrases of the Supreme Court "discovering," "finding," and "creating," the right to abortion.[64] So while the abortion supporters will claim that the right to abortion has always been part of the American liberal culture their words betray them and the privacy argument becomes not an historical precedent but rather an attempt to alter social policy. The Supreme Court fell into the trap of interpreting the Bill of Rights as a series of positive rights that could be expanded without end, rather than as a list of negative rights that both limit the government and protect all citizens. No

right enunciated in the Bill of Rights has a direct negative impact on another person and this is the essence of fundamental rights within a liberal society. Abortion hidden within a layer of privacy does not meet this requirement and this is why the Supreme Court is so divided on this issue.

The Supreme Court and Abortion Law:

The purpose of public reason and judicial interpretation is the ability to bring finality to an issue of conflict. With this being said, an examination of the Supreme Court's decisions when dealing with abortion (as with slavery) demonstrates failed attempts. The slavery opinion was rejected because Americans viewed the Court's definition of a person as illiberal and even though the process was ugly, a liberal solution was being worked out. The reason for increased conflict being the end result of Supreme Court abortion decisions instead of resolution is that once the Court handed down its opinion this interrupted the public debate in much the same way it did with Dred Scott. The higher power of the will of the people had been placed in a subservient position as well as undermining the ordinary power of the majority of State legislatures.[65]

Abortion is not the first issue that the Court has failed to apply the accepted conception of life; America's history with chattel slavery has been discussed. The real issue with slavery was not that the Supreme Court created new constitutional rights; rather, it was an issue of the application of public reason. Americans saw Dred Scott as bad law and they believed this decision was illiberal. What Rawls proposed was that when the nation is in a state of reflective disequilibrium the Court can provide assistance by properly applying the accepted conception. This can be seen in cases such as Brown v. Board of Education[66] and Gideon v. Wainright.[67]

However, when the court is not helpful as in Dred Scott v. Stanford[68] or Prigg v. Pennsylvania[69] then the disequilibrium continues until the higher power of the people is applied through the amending process. The difficulty in abortion cases is that the Court has interposed themselves between the people and their state legislatures. At the time of the decision in Roe v. Wade forty-six states had restrictions on abortion; this is a clear sign of the application of the will of the people because the existence of this supermajority ruled out small factious influences.

What transpired in Roe was the validation of the vague and ambiguous language passed on in Griswold v. Connecticut.[70] In Griswold the court veered from well understood constitutional precedents and applied an entirely new set of rights and Constitutional principles that the Court believed was prudent. This liberal judicial interpretation of the Constitution as a living document may be explained if it eliminated a modern evil that the framers were unable to foresee. The question in this case was whether the Court's opinion in Roe had actually created a new evil by denying the conception of life instead of eliminating one. This interpretation of the Constitution impeded evolving public reason and it set off nearly forty years of protest and polemical arguments that had not existed before this decision. It seems that if no national problem existed before a Supreme Court decision, yet one materializes after a decision, then it is the decision and not the established issue that must be called into question. In 1973, only three years had passed in what was becoming a national debate on abortion. Many of the aforementioned cases were part of this nascent social interplay and when the Supreme Court entered the fray in an attempt to 'solve' this social issue they abridged the nations' attempt to achieve reflective equilibrium. Even if it was argued that the Court had intervened for the purpose of interstate comity, later decisions showed that this was mostly rhetoric.[71]

"All this, together with our observation, [supra,] that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn."[72] With these words Justice Blackmun relegated the status of the unborn to little more than a commodity owned by the mother to do with as she pleases. It is interesting that the prevailing conception of life was seemingly discounted by Blackmun and the Court in Roe. This disregard for the historical conception of life in order to create a judicial solution to a social problem echoed liked the words of Roger Taney when he declared that slaves were property, and not persons with rights entitled to privileges and immunities.[73] Blackmun had no historical basis for such claims yet he went to great lengths to try and discover historical cover for his findings.[74] If the Court was truly looking for historical precedent to protect constitutional rights one might inquire why the unborn were not contained with the category of "discrete and insular minorities."[75]

Roe was the first abortion case decided by the Supreme Court and with this decision the Court placed two significant liberal claims at cross purposes. The liberal belief in the right to life was now assigned a contrary position to the liberal belief in personal autonomy. In Roe the Court used the standard of strict scrutiny and declared that the right of a woman to choose to abort her child was a fundamental right. However, fundamental rights up to this point in American history had been defined as rights deemed essential to ordered liberty.[76] By promoting the extermination of life the Court appears to be contradicting this logic. The Court attempted to sidestep the life issue by adding the trimester caveat and stating that viability was a crucial factor. It was not until after viability that the state did have an obligation to protect the unborn. This viability argument was questionable in 1973 and as medical technologies continued to

improve this argument became weaker. Like the reality of Dred Scott, once the personhood of the unborn (or the slave) is recognized then the Court's logic collapses upon itself and the unborn (and the slave) must be given constitutional protections. This is why the denial of life is critical to the pro-abortion argument.

Just as in Dred Scott, what the justices had hoped for, a judicial solution to a difficult social problem was not the legacy of Roe. To the contrary, similar to Dred Scott, the Roe decision unleashed a firestorm of controversy.[77] This dissension was created by the Court's questionable application of the conception of life as well as the lack of consistency in previous judicial rulings. The Civil War decided the slave issue where Dred Scott could not; however, the nation was very different in the 1970s and civil war on the battlefields was not an option. Instead, Americans have engaged in a political civil war in the courts and state legislatures in an effort to finalize this dispute. There have been over a dozen challenges both direct and indirect by states to the Roe decision at the Supreme Court and over one hundred at the state level. What materialized from Roe was that many states (like in the aftermath of Dred) questioned the liberalism of the Court's decision and rather than acquiesce in obedience, people began to challenge this legal opinion.

In Planned Parenthood v. Danforth the Court struck down a Missouri law that included spousal consent as part of the state abortion regulations.[78] Again adhering to the standard begun in Roe, the Court declared that the woman alone had the authority to choose to abort and she did not need approval from her spouse. Also in 1976 the Court heard Bellotti v. Baird and they once again struck down a state restriction on abortion as unconstitutional.[79] In this case the Court held that a Massachusetts law requiring written parental permission for minors seeking abortions was again a constitutional violation of personal autonomy. This law had required an unmarried

minor to get the permission of both parents; if they refused then a judge could allow the abortion if the minor was mature in her character. Justice Powell speaking for the Court said that the state may intervene in cases where immaturity was an issue, but any evidence that the woman is responsible in her behavior would lead to a presumption for the woman instead of the parents. The logic of the Court was that the state could not delegate a power that it did not itself possess.[80] What was unique is that the Court was ignoring the conception of life of the unborn child that clearly had legal, social, and historical precedent. The autonomy argument contained within the abortion debate is synonymous to the property argument in the slavery debate as both of these ideas attempted to supplant the conception of life as the primary liberal conception and this was beginning to hold sway with the Court. Then in 1980 and again in 1981 the Court veered from its staunch defense of the Roe conception when in Dandridge v. Williams the Court declared that it was not the duty of the Court to set social policy.[81] Then in H.L. v. Matheson the Court began to question the complete autonomy of the woman in all cases. The Court upheld as constitutional a requirement that doctors notify the parents or guardian of a minor who was either living at home, economically dependent, or not completely emancipated.[82] The importance of these cases was the Court was appearing to step back and allow legislatures to write law based upon the will of the people.

The Court was deciding abortion on a case by case basis and consequently no clear policy dealing with a conception of life was being developed. In Thornburgh v. American College of Obstetricians and Gynecologists (1986) the Court struck down a very restrictive Pennsylvania law. Yet what was revealing was that the vote was 5-4 and no longer a solid 7-2 that had previously supported Roe. In the dissents and even the concurring opinions the justices made overtures that the rights of women found in Roe could possibly be limited if the laws were

properly written. The notion of fetal life and thus its protection especially in the 2nd and 3rd trimesters was gaining judicial support.[83] Again in a mirror image of slavery, the liberal conception of life could not be ignored forever.

In 1983 the Court heard two similar cases where states had attempted to limit access to abortion through a number of legislative restrictions. In Akron v. Akron Center for Reproductive Health[84] and Planned Parenthood Association of Kansas City v. Ashcroft[85] the Court found the limiting of abortions in the second trimester to hospitals and the mandatory dissemination of materials to women seeking an abortion that explained what happens to a fetus during the abortion procedure to be unconstitutional. It was the opinion of the Court that these restrictions were a veiled attempt to pressure women not to have abortions. Thus, while the Court appears to be reaffirming its commitment to Roe a significant term enters into the abortion debate. In previous cases the use of the phrase "undue burden" was used in passing as a way to clarify items as a matter of semantics. What took place in Akron and Ashcroft was the attempt to apply the notion of an undue burden as a constitutional standard.[86] While this was not the key element of these decisions it did establish the ability to question the strict scrutiny standard established in Roe. This decision allowed the Court to revisit the notion of a fundamental right to abortion by lowering the standard. This then begs the question, is abortion a fundamental right, because in another twist, a key component of the Roe opinion was that any restrictive law must embody a level of reasonableness. Yet on the same day the Court handed down Roe they also ruled that reasonableness was not always needed for a law to be considered constitutional.[87] The Court was exhibiting the difficulty in its thought process as it vacillated back and forth on constitutional fundamentals and the conception of life.

If a right is fundamental then the state has an obligation to protect it. Consequently, what Roe was claiming was that the state must have an obligation to protect women from unwanted pregnancies. As odd as this sounds another difficulty arises because in the Roe opinion the Court had used cases for its historical precedents that demonstrated rights existed beyond the reach of the state when making decisions about promoting the family. These previous opinions used to defend the logic of Roe were all cases that had worked to promote the family as necessary in a liberal society, but now the Court's logic seemed to support the belief that these rights were conceived to allow for the destruction of the family. The outcome of Roe was that the Court was claiming that laws that promote an activity are the same as laws that may prohibit activity and legally this is not the case. In DeShaney v. Winnebago County the Court addressed this when it ruled that the due process clause of the Fourteenth Amendment was a negative right and does not obligate the state to intervene except in cases where the state is the cause of the harm. In abortion cases the burden of proof falls to the woman to demonstrate the harm. It is not the responsibility of the state to protect us from all elements outside of their control. Yet the state is obligated to protect the unborn because a duty to defend the lives of citizens does exist.[88]

In Webster v. Reproductive Health Services (1989) the fracturing of court opinion and inconsistency in the application of the conception of life coupled with the adjudication of abortion law comes to the forefront. In this decision Justice O'Connor develops more fully her undue burden criteria for abortion restrictions. The 5-4 majority upheld the major elements the Missouri law that claimed in its preamble that the life of each human begins at conception and required all state statutes to provide unborn children with the same protections as all other persons. This law also mandated that doctors perform viability tests if the pregnancy was at least 20 weeks and also prescribed that these findings would be used to determine if the fetus was

viable.[89] This law also banned the use of public facilities and public employees for abortions. In a separate opinion from the majority Justice O'Connor agreed with the majority but stopped short of specifically looking to overturn Roe. Instead she supported the Chief Justice's belief that the trimester system established in Roe was unworkable and said the only state abortion statutes that could be interpreted as unconstitutional were those that created an "undue burden" on the woman's right to choose an abortion. So while not overturning Roe, what the Court had done was to reverse itself on Akron and Ashcroft and the question now was how to apply the term undue burden that the court defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[90]

At this point the Court was floundering with how to deal with abortion laws, public opinion, its previous decisions, the ever changing medical technology, and the conception of life. In Planned Parenthood of Southeastern Pennsylvania v. Casey (1992) this struggle was magnified. While doggedly refusing to overturn Roe, the Court further brought into question the trimester system and fetal viability that were the key elements of Roe. "The law seemed to include nearly every restriction that abortion opponents could think of to burden the procedure to the point of making it impossible for a woman to elect to have an abortion."[91] The majority while accepting that before viability a woman could obtain an abortion and after viability the state could prohibit abortions (because the state did possess an interest in the value of potential life), the Court did not apply the strict scrutiny standard of Roe. What the Court had done was move this right of abortion from the privacy elements of the Fourth and Ninth amendments and centered this right to abortion within the liberty element of the Fourteenth Amendment under the umbrella of a "realm of personal liberty" as well as the due process clauses of the Fifth and Fourteenth Amendments.[92] This enabled the Court to allow further restrictions on abortion

without either claiming a woman has an unfettered right to an abortion, or to claim that the right of abortion did not exist. So in its own convoluted way the Court had gutted Roe without reversing Roe. Justice Scalia pointed out in his opinion that the Court was headed down a dangerous path with its contorted rulings on abortion. He quoted Justice Curtis from his dissent in Dred Scott who said,

> "When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, 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."[93]

What the Court had come to realize was the social policy created in Roe was now exposed as incoherent by the increasing awareness of fetal viability. However, in a vain attempt to play the political middle the Court concocts ways to uphold and ignore Roe. This was the same political dilemma that Stephen Douglas found himself in over slavery when promoting his concept of popular sovereignty. While the plurality decision was satisfied with applying stare decisis to a degree, they simultaneously demonstrated what they believed to be a new standard of undue burden as it applied to liberty interests. If Roe was Dred Scott revisited then Casey was Prigg v. Pennsylvania incarnate because it upheld the federal authority of the law but undercut any state enforcement and thereby encouraged disobedience. This also demonstrates that when the Court challenged the historical understanding of the conception of life the ultimate result is that the liberal understanding of its opinion is in doubt with the public.[94]

In 2000 the Supreme Court applied their standard of the undue burden in a different manner to a new set of facts. Stenberg v. Carhart was a case that dealt with a Nebraska law that had outlawed partial birth abortions unless the procedure was necessary to save the life of the mother who might be endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

Violation of this law was punishable by up to 20 years in prison, a fine of $25,000, and if the perpetrator was a doctor the automatic revocation of the license to practice medicine.[95] Justice Stephen Breyer wrote the opinion for the Court that declared this law unconstitutional because no "health" exception existed for the mother. Justice Breyer said that this was necessary to allow the physician to, "select the best or most appropriate procedure for protecting the health of a woman when a substantial medical authority supports the choice."[96] According to the majority the Nebraska law created an undue burden on the mother's right to choose. This was a complete reversal of the standards decided in Casey as it seems to ignore the conception of life and the state's interest in protecting fetal life. Also, if minimal health risks or the rare barring of the abortion procedure was all that was necessary to create an undue burden then regulations (such as mandatory waiting periods) that were approved in Casey would be illogical, yet the Court did not address these issues. The Court seemed to be saying viability no longer mattered, only this "right to choose" again placing abortion rights in the camp of property rights.[97]

Before this apparent contradiction could be rationalized the Court reversed itself in Gonzales v. Carhart (2007). After the Stenberg decision the United States Congress passed the Partial-Birth Abortion Act of 2003 that was virtually the same as the Nebraska law except that the wording of this law made it a crime only if the doctor performed this procedure when it was not necessary to save the life of the mother. This act did not include a health exception for the mother.[98] In Gonzales the Court once again reversed itself and applied the historical conception of life and the standards of Casey upholding the state's interest in preserving and promoting fetal life. The Court also made the assertion that the fetus was "a living organism within the womb, whether or not it is viable outside the womb." Furthermore, the Court expressed the state's

ability to use its regulatory authority to show its profound respect for the life within the woman.[99]

The Court went on to declare that this was a traditional understanding that was consistent with Casey which had confirmed the state's interest in the respect for life in all stages of the pregnancy. Also the Court said that law did not have an obligation to give doctors unfettered choice of their medical practices.[100] Justice Kennedy made the bold claim in his writing of the majority opinion that even the health exception was not a necessary element of abortion laws because to do so would, "strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is to exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession."[101] The Court in this instance was prepared to allow individual states to engage in public reason to set their own abortion law in an effort to find reflective equilibrium, just as things were before Roe.

Fetal Homicide Laws in the United States:

As of 2011 the Supreme Court had no better success in applying abortion statutes than did the courts that applied the laws that governed slavery 150 years earlier, the courts were awash in conflicting opinions as to how to proceed. To further add confusion to the abortion issue was the creation of fetal homicide laws. These laws criminalized the death of the unborn child by anyone other than the mother. Mothers were excluded because of both history and previous Supreme Court rulings. The problem that arises here is that to punish someone for a crime there must be harm. It is one thing to charge a person with assault for injuring a woman (pregnant or not). However, when an attempt is made to prosecute another for the death or

injury to an unborn child then the law must recognize that unborn child as life with all the protections granted under the Fourteenth Amendment and this is exactly what Roe claimed did not exist. The conception of life was being readdressed using public reason.

Using this conception a problem springs forth; how to prosecute a person for killing the fetus yet still deny the fetus' humanness in order for abortion rights to prevail under the umbrella of liberty protections? Fetal homicide laws expose the inconsistency of what are claimed as abortion rights. If a society wants to protect women from an assault on their unborn child then the unborn must be given constitutional protections, if not then the fetus may be classified as merely property. Subsequently, abortion laws would be claiming that a woman who aborts the child is not killing a person, but a third party who kills the fetus is killing a person and this is illogical. If history does repeat itself then these were the cumbersome homicide laws of the slave era dressed in the clothes of personal choice. This double standard can not be made to square with any legal precedent and in fact to follow this path places the abortion advocate in the unenviable position of relying on a type of property rights claim as a way to defend her actions as they apply to the fetus. At this point abortion laws are reduced to the same argument that slaveholders made in the 19th century, that personal property trumps life. Through the paradox of liberalism this polemic that was once discredited, had returned to the American political scene.

Currently thirty-seven states have some form of fetal homicide law and all thirty-seven punish the third party for harm done to the unborn.[102] What these laws imply is that the unborn child is indeed entitled to constitutional protections thus undercutting the conception of life used in Roe. Significantly, even in Roe the Court stated that the Texas law would be upheld, "if the fetus were a person who was not to be deprived of life without due process of law."[103] With this

as the precedent, the medical advancements since 1973 place the conception used in Roe in question. This issue of personhood is critical to Roe just as it was critical in Dred Scott. The need to deny the personhood of the unborn child is the core of the pro-abortion argument because without this abortion becomes infanticide. Judith Thomson attempted to tease out some middle ground when she wrote that, "the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly."[104] In this way fetal homicide laws would not challenge abortion rights because in her view abortion is a just killing. The flaw in Thomson's logic is that the only way to accept her premise is to deny the personhood of the unborn child. If the fetus is a person then abortion does not meet her criteria of a just killing because the unborn child is being deprived of due process rights.

To further prop up the pro-abortion cause in reference to fetal homicide laws, viability becomes important as a way to deny the personhood of the unborn. The difficulty was that because of the inconsistency with the use of this term (as previously discussed) both the Supreme Court and state courts had been less than coherent on this point and had often ruled in favor of the unborn. In State v. Merrill (1990) the Minnesota Supreme Court was asked to consider a case where a man had shot and killed a pregnant woman as well as her 28 day old fetus. The defendant asserted that Minnesota law did not distinguish between viable and nonviable fetuses so the law exposed him to murder charges of an unborn child in the first trimester, while a woman who chooses abortion and obtains the services of a doctor to perform this procedure are not charged.[105] The Court was faced with a legal conundrum of allowing one person to kill an unborn child but restricting another. In its ruling the Court issued a contradictory opinion as it perverted the law to allow abortion but still punish the assailant when an unborn child was harmed. In other words the Court was attempting to distinguish abortion

from fetal homicide. The Court issued a three part ruling that said causing the death of a fetus without the mother's consent differs markedly from the decisions and actions of a pregnant woman and her doctor. They based this claim on their contention that, the constitutional right of a woman to terminate her pregnancy "does not protect, much less confer on the assailant, a third-party unilateral right to destroy the fetus."[106] Apparently the fetus was the property of the mother who obtained total dominion over the unborn. Second, the Supreme Court of the United States had ruled the fetus was not a person under the Fourteenth Amendment and third, even in the context of abortion, the state's interest in protecting fetal life precedes viability.[107] What had transpired was that in an effort to uphold the ruling in Roe, the Minnesota court denied the personhood of the fetus, yet in the same opinion in order to punish the attacker, the court claims an interest in protecting previable life. If this truly is an interest of the state then abortion can not be a fundamental right excluded from state restrictions, nor can abortion be different from fetal homicide.

In 1994 a California court was faced with another fetal homicide issue. The case of People v. Davis involved an armed robber who was convicted of murdering a pregnant victim's fetus. The defendant claimed that he could not have reasonably been aware of the pregnancy because the woman was severely overweight; however, the Court ruled, "that the murder statute applied to any unborn, human offspring at least seven or eight weeks after fertilization, regardless of viability."[108] This ruling brings most abortion decisions into question and places viability again at the forefront. In another attempt to sidestep the personhood of the unborn, abortion supporters made the claim that there existed a difference between a human being and a person. Even if pro-abortionists concede that the fetus is life and the fetus may in fact be human, they then claim the unborn lacks the essentials such as consciousness, reason, feelings as they

relate to others, and the ability to communicate that makes one a person. This was the Court's opinion in Roe when ruling on the fetus and the Fourteenth Amendment.[109] Yet this brings to the surface a series of ethical and moral questions about the validity of abortion that will be addressed in the next chapter.

The Davis opinion was supported in Commonwealth v. Bullock (2005) when a Pennsylvania court decreed, "To have life, as that term is commonly understood, means to have the property of all living things to grow, to become. It is not necessary to prove, nor does the statute require, that the living organism in the womb in its embryonic or fetal state be considered a person or a human being to be protected by law."[110] If decisions such as Bullock and Davis are to be accepted on their face as valid, then these rulings raise questions about the conception of life and ask, what is this thing inside the woman if not a person?

The upshot of these abortion decisions was that judges resisted using bright line law to interpret issues of life. Coupled with this difficulty was the knowledge that the fundamental rights acknowledged by the Supreme Court in Roe were in conflict with recent medical advances and the intuition of the American public.[111] The State of Kentucky appeared to also question this logic and the logic of Roe when its court ruled that,

> "Civil law has long recognized that an unborn child is a person. 42 Am.Jur.2d *Infants*§2 states that biologically speaking, the life of a human being begins at the moment of conception in the mother's womb, and as a general rule of construction in the law, a legal personality is imputed to an unborn child for all purposes which would be beneficial to the infant after birth. Adopting this accepted rule for interpreting the law, the court should hold that the term 'person' includes an unborn child. If so, a pregnant woman has a duty of care to her fetus that is violated by any act of child abuse."[112]

As medical technology continues to advance, the denial of fetal personhood becomes more difficult. Heartbeats can be detected within the first six weeks of the pregnancy and ultrasound with 4-D imaging makes the contents of the womb very recognizable.[113] Whatever term abortion supporters assign to the fetus, by denying the personhood of the unborn and attempting to alter

the conception of life, they place their reasoning for the right to abortion within the confines of a woman's private decision of what she may do with her property. Thus, rather than resting their argument on the constitutional principle of life, abortion proponents couch their claims in autonomy and attempt to attach this to the Fourteenth Amendment. Instead of securing the moral high ground in defense of women's rights, they find themselves in the same camp with the supporters of slavery who defended their rights to property as superseding the life of the slave (who was a nonperson). The paradox of liberalism had again taken center stage in American political life. But how does this occur? The answer is American liberalism. As with slavery, both sides of the abortion debate bathe themselves in the waters of liberal language and just as in the mid 19th century, Americans can defend both sides of their argument.

Chapter 5

Abortion and Liberalism:

Language continues to be an important part of political arguments and in a like fashion to my proposition about slavery and liberalism, I argue that it is America's continued use of liberal language (and thought) that has allowed for abortion as well as its prohibition until the Supreme Court intervened. Using Ericson's thesis that was applied to slavery in Chapter three, I propose that America continues to use language of the liberal argument to both argue for and against abortion in America. Ericson argued that the two sides of the slavery debate in America were actually united by their attempt to defend opposing positions using American liberal thought. I will argue that abortion being one of the most controversial political issues of post 19th century American history and a topic that is both visceral and intense, has its polemical roots born in the pervasive liberal thought of America. This devotion to liberal thought is leading to a collapse of the middle ground and eliminates any hope of a political solution under current philosophical applications. If we accept Hartz's liberal consensus theory, then the abortion debate is the continual application of "irrational Locke" as both sides view themselves as possessing the same fundamental rights based on the same fundamental precepts. As stated in chapter three, it is this notion of the defense of rights that encapsulates the paradox of liberalism and American liberal thought.[1]

Continuing to use Ericson's definition of liberalism as "a general set of ideas that appeal to personal freedom, equal worth, government by consent, and private ownership of property as core human values" we once again see both sets of political actors using this common set of liberal ideas to defend or attack abortion. Ericson was careful to point out during the slave

debate that it was irrelevant if people involved referred to these ideas as liberal and I argue that this is also true in the abortion fight. As Ericson stated, the liberal universe is an "amorphous" one of loose definitions that reflected how people of this time used political ideas.[2] This continues to be true of today's abortion debate as both sides claim that fundamental rights, privacy, and due process support their positions. Yet, the two sides do not agree on the interpretation of these terms. While it may appear that the issue of life makes the prohibition of abortion a more valid argument because to end innocent life is inherently illiberal. Abortion supporters can claim the liberal principle of liberty to support their cause thereby giving credibility to their claim. By applying Ericson's definition of the American liberal tradition with that of Louis Hartz we can then demonstrate their influence upon the abortion debate.

Abortion is an institution with historical roots in America; however, it differs from slavery because it was never an overtly public act with popular approval. Nonetheless, portions of the public could abhor this act and still tolerate its existence, as they did with slavery. Unlike slavery, abortion is neither mentioned nor implied in the Constitution. Consequently, it was never promoted or protected by the government as slavery had been. This leads the abortion battleground to focus on claims of Constitutional intent. The slavery debate was one of historical precedent and Constitutional authority (that changed with the passage of the Thirteenth and Fourteenth Amendments); the abortion controversy attempts to traverse similar ground by using the Ninth and Fourteenth Amendments. For pro-abortion supporters the Ninth Amendment allows for the expansion of rights thus upholding the intent of the founding document. Anti-abortion foes claim that the Ninth Amendment was not intended to create new rights that did not exist, rather it limited government power and these limitations would protect fundamental rights.

The application of the Fourteenth amendment then becomes an argument over procedural and substantive due process. Pro-abortionists claim that the Constitution is a living document that must grow with the times in order to be relevant. Anti-abortionists counter with the contention that abortion rights were never considered to be protected by the Constitution. It is their position that slavery existed at the time of the Constitution and the Framers compromised to allow for it. Even though abortion did exist during the founding period, no such compromise was considered to allow for it nor did significant governmental concerns exist about the procedure. Without a Rawalsian application of the original position or an overlapping consensus a solution appears impossible.

This chapter will examine the writings of Laurence Tribe and Robert Bork to illustrate how Hartz's liberal consensus theory is correct even when confronting the issue of abortion. What I will show is that even though Tribe works to defend abortion and Bork supports its destruction, both men apply the principles of liberalism to defend their opposing views. They do this because they both realize that liberalism is the driving force of American political thought; consequently, the only way to be successful in such a debate is to capture the liberal high ground. While on the surface this may seem disingenuous, these men have no other political option if they wish to appeal to the majority of Americans. With liberalism guiding American beliefs about equality, liberty, and fundamental freedoms, Tribe and Bork use the vocabulary of liberalism in order to appeal to the psyche of America. This is the "irrational Locke" that is embedded in the Hartz theory that he believed was the philosophical origin of American liberal thought.

The writings of Laurence Tribe and Robert Bork present a picture of a very American dynamic in political thought. Both men use the language of liberalism while at the same time

defending different positions on the issue of abortion. The choice of analyzing the writings of Tribe and Bork was done because it can be argued both men have significant credibility in their respective camps on this issue. Tribe with his well-known works, *Abortion: The Clash of Absolutes, On Reading the Constitution, and Constitutional Choices* (these are only a few of his works) is often quoted by legal experts and scholars who support abortion. Bork may be best known for his rejection as a justice on the Supreme Court which gave him more significance within the pro-life community. However, he has penned such works as *Coercing Virtue, Slouching Toward Gomorrah, and The Tempting of America* that have been viewed as foundational thought in the anti-abortion camp.

What I attempt to show is that while Tribe is an ardent supporter of abortion, he uses the concepts of liberalism to make his points and sway his audience. Bork, who sees abortion as a factor in the destruction of society in America, uses these same concepts to substantiate the alternate position. The men in this fight know that in order to draw the American public over to support their cause, citizens must be convinced that your cause supports the consensus of liberal logic that dominates American political thought.

A second consideration is that both of these men view their positions as liberal and think of themselves as furthering liberal ideology. It is this process that makes the compromise position so difficult to obtain. With Tribe and Bork both claiming that they are defending American liberal thought, there is no middle ground because they see their positions as the only acceptable one in a liberal world. Hartz would argue that this is the complexity and confusion of the abortion issue as it is tied into Lockean philosophy. One side used Locke to defend their beliefs that liberty is the soul of individual freedom and the other side uses Locke to show that there can be no freedom without life. Once again we have what would remind us of Hartz's

"two boxers, swinging wildly, knocking each other down with accidental punches or the narcissist who hates what he sees, but can not look away."[3] They are again conflicted because their opponent hurls back each charge with the same logic that they had just used to substantiate their contentions. In this way they become embroiled in an argument with themselves, constantly contradicting their own thoughts as they defend their position. A middle ground can not exist when people argue from a position of moral certainty.

While contrasting the writings of Bork and Tribe, special attention will be paid to how both men use the ideas of Constitutional equality, founding principles and philosophy, inequalities of people, and the slippery slope argument to illustrate their liberalism in order to obtain legitimacy with the American public. The liberal argument over abortion places the right to life and the right of liberty in opposition. While both Bork and Tribe address the difficulty with life as it applies to abortion, they both offer a second strand in their abortion positions that focuses on the Constitutional interpretations of liberty. With that being said an overview of how the assessment of life impacts this debate must be the starting point.

Allowing for the taking of a life makes it difficult for a liberal society to claim that sanctity of life exists or to claim that life is sacred. These claims are very broad as they can lead to the defense of ants, micro-organisms and an endless array of declarations. Yet to limit the definition to encompass only the human community is too narrow because those not thought to be part of this community (such as the severely impaired, or those in a vegetative state) may also be excluded. To search for a universal definition that would cover all concepts of life goes beyond what I am arguing here. However, within the abortion debate the focus has been narrowed to determine if the unborn child deserves the same moral respect as those persons who have been born. The value of life for the fetus can rely on whether people take a derivative or

detached view of fundamental rights.[4] Pro-abortionists argue that these views are not clearly understood and therefore; abortion is acceptable because there are circumstances where not all life has value and consequently, some life is not entitled to moral respect. Anti-abortionists claim the derivative view and state that rights are part and parcel of being alive. However, a detached view may be what many believe. According to the pro-life position, all life derives rights by being human and while exceptions do exist, the right to life is an endowment not an achievement.[5]

The Debate Over Life:

Anti-abortionists claim that (just as with slavery) once the pro-abortion side concedes that the unborn is life then their argument becomes assailable. If the unborn is a life, then abortion supporters must minimize the value of that life in order to support their position. This is why the argument over viability has become significant when discussing abortion. The burden for the supporters of slavery was to explain how Negroes were less than human and therefore were improved by slavery. In a similar vein, abortion supporters attempt to deny the humanness of the unborn. The crux of their issue is an effort in semantics to justify their actions. Pro-abortionists need to demonstrate that the fetus is less than human or is an inferior being not worthy of respect. In this way the unborn is not entitled to Constitutional protections.

Today this is a core idea of pro-abortion supporters. If the fetus can be denied as being human, then liberty rights and privacy arguments can not be made on their behalf. Arthur Riss addresses this idea when he directly raises the issue of "what is a person?" According to Riss, the slavery debate hinged on the issue that Negroes may be a human being but they were not "persons." This torturing of words shows how those in the pro-slavery movement were working

to justify their oppression of blacks based upon an obscure idea of humanness which only they understood and could therefore deny to others.[6] This is why you hear such terms as fetal matter and uterine tissue from current abortion supporters. If the unborn are elevated to a status as equal human beings (as slaves finally were) then they can no longer be assigned the status of inferior.

This is an essential point for pro-abortion supporters and the reason why they create analogies like human spores that float into your house or waking up one morning inextricably connected to the greatest violin player in the world.[7] The need to dehumanize the unborn makes their argument work and rationalizes their behavior. This is very similar to the pro-slavery argument that tried to equate genetic and biological differences between blacks and whites in America to substantiate their position. Just as the need to dehumanize slaves was the lynchpin in the pro-slave argument and emancipation was seen as an encroachment upon property rights, the dehumanizing of the unborn is an important element of the pro-abortion cause as privacy claims allow the woman domain over her person and property. The same difficulties that engulfed this position during the slavery debate may also be the fate for abortion supporters because, "If abortion can only be justified on those terms, with the images of the unborn as intruders upon our rights, then abortion does indeed lessen our own humanity."[8]

Anti-abortionists state that from a medical perspective, the process of life is well defined, so when dealing with abortion the anti-abortion supporters argue that a few facts must be examined. "The first important question to consider is: what is killed in an abortion? It is obvious that some living entity is killed in an abortion. And no one doubts that the moral status of the entity killed is a central (though not the only) question in the abortion debate … a human embryo- is indeed a human being…"[9] An examination of biological and medical texts shows

that life is a process that include sperm, eggs, ova, zygotes and numerous other stages and pieces. It is clear that the medical and academic communities define life as the beginning of this process and explain that these distinct cells that form are different from the mother and the father giving the unborn an individual identity. These cells then grow toward their own survival unless interrupted. These early stages of development have the genetic makeup of humans and at this point they are complete and whole though immature and they will develop into individuals.[10] Thus the idea of life can not be ignored because if these "cells" were not life why do we bury the unborn who die within the process of miscarriages? Also if a child survives an abortion attempt there is no attempt to label the survivor as anything but a child.[11]

Finally, the growth of the embryo is not extrinsically determined. The embryo is different from the sperm or the ova because it is a complete organism and it is not somatic cells (skin cells etc.) because these cells are only part of a larger organism. Therefore, the humanness of the unborn can not be denied only its stage of development.[12] Consequently, not only is the unborn life but it is a human deserving of moral respect.[13] This moral respect is deserved regardless of viability because the life process leads to a human that is entitled to rights. To interrupt the process and use viability as the justification is akin to exposing undeveloped film to light and then asserting there were no pictures on the film. The real question to be considered is what could justify limiting the rights of the unborn.[14] This concept mirrors the slavery debate that tried to justify limiting the rights of the slave. The viability issue is also similar to the argument made that the Negro was too immature to be given rights.[15] In this way the acceptable level of maturity could be decided by those who were oppressing the Negro. Using viability determined by those who support abortion places the unborn in the same linguistic trap. What is ignored is the idea that all humans are equal moral agents that must be placed on equal footing.[16]

Science bears out that the fetus is alive and it is human; if the process is allowed to move to its conclusion, nothing will be created except a human. The biology is clear and no competent scientist will claim otherwise, so the next element to be addressed is what constitutes a person. This notion of a person is critical because the Fourteenth Amendments' use of the word person is an essential feature of the liberal pro-abortion argument.

Supporters of abortion rights focus their argument on the guarantee of the liberty of the woman and attempt to minimize the life aspect of this debate. Their premise is that the issue of life centers more on psychological factors than on the basic biological realities. It is the pro-abortion position that the fetus is alive, but it is not a person and it deserves no moral respect.[17] Their claim is that the fetus has no desire to live and in order to be considered worthy of respect you must possess a desire to continue your experiences.[18] In Roe the Court appeared to support this line of thinking and focused on the lack of viability for the fetus within the first trimester.[19] The opinion of the Court was that the state had no moral obligation to the unborn in the first trimester thus making the fetus less than human.[20] Even though the courts can not determine when life begins, pro-abortionists claim that science offers little consistency on this issue because there exists contradictory scientific studies and changing standards that confuse more than clarify this issue.[21] What abortion supporters are trying to do is create a nuanced argument that being alive is different than possessing life, even claiming that the purpose of using the term life in the abortion debate is to apply a level of guilt on women.[22] In order to promote their cause pro-abortionists alter the focus of their beliefs from biological life to the psychological humanness of the fetus.

Without a clear definition of when a fetus becomes human then it becomes possible to deny personhood as well.[23] For pro-abortionists, connected to the idea of viability is the concept

of early fetuses.[24] These early fetuses exist previability and consequently possess no moral value. Thus even if anti-abortionists are correct and the definition of life is biological, then it is a genetic experience and this merely makes the fetus a grouping of cells and not a human. The fetus only has the potential for humanness and rights can be reserved based upon development.[25] Supporters of abortion claim that at best the scientific definition of human is debatable and similarly a perfect definition of person does not exist. Therefore, the woman has a right to be free from the fetus because it may not be a human or a person.[26] According to abortion supporters even the Church offers no clear doctrine on what constitutes a person so the real question is should the fetus have rights.[27] Even if a concession is made that the fetus may possess some rights, the overriding interest is still with the woman.[28] Here constitutional liberties prevail over the suspect rights of the non-person.

This denial of humanness is a difficult argument to support and places this thinking in a similar position of slaveholders who also denied the humanness of their property. However, the pro-abortionists cling to the psychological argument of the fetus not being a person because the Court supported this idea in Roe just as the Supreme Court did in Dred Scott. These opinions claimed that the fetus and the slave were not considered persons worthy of protections under the Fourteenth Amendment.[29] Using this logic pro-abortionists can declare the liberty of the woman superior to the non-existent rights of a non-person. Nonetheless, if the life argument can be clarified to demonstrate that the fetus is human and it is a person, then the life of innocents must be protected because life does hold intrinsic value.[30] If this can not be done, then it is not a prima facie wrong to take a life of one who is not part of the human community.[31]

Robert Bork and the Anti-abortion Life Argument:

Robert Bork contends that the unborn is indeed a life and should be considered a human worthy of respect when he states;

> "The question of weather abortion is the termination of a human life is a relatively simple one. It has been described as a question requiring no more than a knowledge of high school biology. There may be doubt that high school biology courses are clear on the subject these days, but consider what we do know. The male sperm and female egg each contains twenty-three chromosomes. Upon fertilization, a single cell results containing forty-six chromosomes, which is what all humans have, including, of course, the mother and the father. But the new organism's forty-six chromosomes are in a different combination from those of either parent; the new organism is unique. It is not an organ of the mother's body but a different individual… when it enters the world, it will be recognizably a human baby… It is impossible to draw a line anywhere after the moment of fertilization and say that before this point the creature is not human but after this point it is."[32]

For Bork the unborn that is destroyed is in fact a human worthy of respect and this is a fact that can not be denied. He points out that the attempts to deny the humanness of the unborn are made possible by the inability to see the fetus or to obtain visual accounts of the birth process. The fact that birth is a process and early in this process the baby does not possess all the distinct features of a post-birth child (in the embryonic stage the unborn has been described as looking like a guppy) allows abortion supporters to claim therefore this "thing" is not human.[33] What this line of thinking illustrates is the slave argument reborn. Those in the North were able to ignore the slave issue because it was foreign to their daily existence; however, in the South the physical features of the slave were used to offer reasons why they were less than human.

Bork takes this line of thinking to another level when he suggests that sentience or lack of is not sufficient to determine life. If this attribute is what you need to define what is human, then how do we account for the elderly and the impaired? If an elderly man is in a coma then he is not sentient and can not live without life support. Killing him would be considered a moral wrong, but how is this different from the unborn. Both cases are a matter of time as the unborn will become sentient and will be recognizable, yet to kill the elderly is only to lose a few years at most and to kill the unborn is to eliminate a lifetime. The oddity is that abortion supporters will opt to kill the unborn rather than the elderly. This logic demonstrates that abortion is not, "one

of appearance, sentience, or anything other than the prospective life that is denied the individual by abortion."[34] What Bork is arguing is that the debate over abortion is not about the ability to live without assistance, appearance, or sentience. But rather this is an issue of moral respect and how that moral respect will allow you to keep living. Since the fetus is alive and has a prospect of a future, the unborn deserves respect because it possesses the needed characteristics.

Other scholars support this line of thinking and apply the idea that using a rights model places humanity beyond the zygote, embryo, etc. and is designed to incorporate future generations.[35] As a society we have a responsibility to children and while abortion is argued as necessary in some circumstances, to allow abortion creates a greater harm for the society than the harm that is avoided.[36] Enlightenment philosophers saw a need to defend future generations and even though Hobbes and Locke exempted children from societal agreements, both saw family as important.[37] It appears difficult to square the demand for abortion with the rights models offered by Hobbes or Locke as both of these thinkers thought the protection of future generations was necessary. While abortions may not be linked to the immediate destruction of a society they can be connected to a moral and physical decline and this runs counter to the model of rights the Framers understood.[38] Bork claims that we must adhere to the intent of the Framers.

The pro-abortionists who offer a defense for abortion by arguing that the fetus is not a person because it lacks sentience and therefore is exempted from the rights model are attempting to reject Hobbes and Locke. The justification for abortion is made by stating that the fetus is forcing itself upon the mother, so the woman can abort the child to stop this intrusion because she did not consent to this pregnancy.[39] This is fiction because, if the fetus lacks sentience (as abortion supporters claim) then it also lacks the ability to consciously act and this discounts the pro-abortion claim of a premeditated violation, not to mention the specious claim of consent.

Also the pro-abortion claim that the fetus is an unwelcome intruder does not justify the killing of the unborn because in contemporary legal circles and even in a state of nature, there exists an understanding that there is a difference between not doing something to help another and committing an act that will harm another. Pro-abortionists want to say that abortions are merely refusing to assist the fetus, but without the help of other persons to eliminate the fetus, a medical abortion can not occur.[40] Therefore, an act of aggression is being perpetrated upon the unborn that violates the model of rights and any notion of natural law.

Bork supports this rights model and similar to Locke's belief of the continuation of society, others have proposed defending the unborn by claiming abortion we would be depriving not only society, but also the unborn of a future.[41] This is why a society must understand why and when we kill a fetus we have deprived that person of their life without due process of law.[42] The death penalty as allowed in America is the taking of a life only after due process has been observed and equal protection considerations have been taken into account. When this process has been questioned this form of punishment has been limited.[43] In this light Bork is claiming that abortion is nothing more than the death penalty unconstitutionally applied against a person who has committed no transgression against society. As the rights model implies, the future is an important consideration for any organized society. With this in mind it is not necessary for the fetus to value its future because abortion impacts the future. To kill a fetus is to lose the future and since as a society we value our future we must assign moral weight to the future of the unborn.[44]

Laurence Tribe and The Pro-abortion Life Argument:

Laurence Tribe supports a line of thinking that furthers the belief that the personhood of the unborn is immaterial because the liberty element of the Fourteenth Amendment takes precedence. For Tribe far too many questions about life and the viability of the fetus exist to limit the behavior of the mother. He states, "Even if the fetus is a person, our Constitution forbids compelling a woman to carry it for nine months and become a mother."[45] What Tribe is doing is an attempt to discount the life argument entirely and thereby undercut the moral element of the anti-abortion position. Basing his logic on the decision of the Court in Roe, Tribe put forth the idea that fetuses should not be thought of as persons because the distinct and difficult question of when life begins does not need to be decided by the Court nor does the Court possess this ability. This being the case, it is the duty of the Court not to enforce an "Orwell-like" definition because pregnancy involves the woman and no other living person.[46] Using this logic the Court can justify less protections for the unborn because to prohibit aborting these beings would be to elevate them over "persons" who are protected by the Constitution.[47]

Tribe supports the previous claim that the fetus does not experience or have activities, so it may be alive but it is not human.[48] In other words one must be rational to have a claim to rights.[49] To be human in a moral sense is to have the ability to be a holder of rights. To be a holder of rights one must pass the test of individuality and in this the fetus fails.[50] In this way the fetus has no rights claim and no moral dimension. This argument is expanded by Tribe who argues further when stating that even if fetuses did have rights the rights of the women outweigh these; consequently, it is not seriously wrong to destroy the fetus.[51]

What Tribe is arguing is that the fetus lacks potential and even if it did have potential (as the Court implies) the fetus can not engage others so it possesses no interests. In this way the early fetus lacks all the attributes necessary to give life personal value.[52] This challenges the

future like ours argument espoused by the anti-abortionists and turns this notion into a theory of frustration over not what the life is worth, but rather it laments what might have been.[53] If it can not be determined what makes us human then no claim to rights can be made.[54] According to Tribe an important factor is that one must have a concept of self to both appreciate and demand rights. This begs the question; when are we conscious of ourselves?[55] This lack of fetal personhood also eliminates the claim of moral respect and this makes the fetus no more a person than a fish. The claim to rights can only be applied to actual life not potential life and until viability there is only potential life.[56]

Offering a rebuttal to Hobbes and Locke, it was David Hume's contention that nothing had value unless someone wants it.[57] In this way the fetus has no value because the mother does not want it. Here the abortion debate becomes based upon the subjective and instrumental views of life.[58] This thinking illustrates the reality that all life is not deemed to be sacred in our society. We only need to look to the issues of euthanasia, physician assisted suicide and our application of the death penalty to understand this. Also, since the Court has determined that the first trimester fetus is a non-person, then the woman can refuse to donate her body to the birth process. To force her to do so would be a type of slavery.[59] What follows is that since the fetus is a non-person there is no victim; therefore, abortion can not be a crime.[60] Abortion is then thought of as a form of self defense. To continue along this line of thinking places the fetus in a position of non-person that lacks both sentience and mentation. This can then lead to the concept that the unborn possesses a complete lack of human features and therefore humanness.[61]

While both sides of the abortion debate offer differing logic to support their contentions, it must be noted that all parties concede that a process exists. The key distinction is if the process goes undisturbed, it leads to the birth of a human being and a member of society worthy

of respect. At this point it is not my intent to become mired in the technicalities of the process of human creation. Rather, I argue that once the medical terminology is stripped away and the parsing of words has ended, those who support abortion cannot deny that without outside intervention, a healthy pregnancy leads to a child being born. From here the debate becomes an attempt on the pro-abortion side to ignore the life element of the debate and instead focus on determining who possesses greater Constitutional merit for their claim to fundamental rights.

Robert Bork and Liberalism:

Bork claims that the unborn being a person must be protected by the Constitution and the Fourteenth Amendment. John S. Putka agrees with Bork and demonstrates in his research that the Framers of the Fourteenth Amendment understood the terms "person" and "fetus" to mean the same thing. He argues that using syllogistic logic, the men of this era believed, since a "fetus" was understood to be a "child" and a "child" is a "person," then a "fetus" would have to be judged a "person."[62] If Putka's research is accurate then as Bork claims, the fetus must be a Constitutional person. As a person the fetus is entitled to protection of its fundamental right to life. Life gives one a moral status, it is not something that is bestowed upon you.[63] By being defined as life this unborn person has a claim to the rights any person could claim under the Constitution because even though early in the process the fetus may lack intentional action, it still has reflexive movements and this further demonstrates qualities of a person.[64]

Robert Bork views the liberal tradition of America as assigning the authority for the interpretation of rights to the citizens. Bork is critical of the Supreme Court for moving from a position of interpretation to a position of legislative creation. Bork contends that the Court has moved from interpreting law into the realm of transcendental politics.[65] This violates the intent

of the Framers because the Court has no authority to dictate morality as this is a task that was assigned to the legislature. According to Bork, all laws in America are based upon morality and it is the people acting through their elected officials that determine what this morality should be.

Bork is also critical of the idea of the Constitution being a "living document" because in his opinion this is simply a way for a disgruntled minority to circumvent the legitimate process of the American Constitutional system. If America is a democracy then the interests of the majority must prevail or the government will lose its legitimacy. The Madisonian fear of an oppressive majority has been replaced by an oppressive judicial minority.[66] In this way any popular idea that the Court favors can replace long standing societal precedent and this violates the founding principles of the Constitution. What this behavior leads to is that the sacred institutions of a society are replaced by transient concepts with no historical foundation and this in turn can lead to the collapse of society.[67]

Contrary to Laurence Tribe, Bork argues that liberal ideas are best defended by the legislature rather than through the Courts. He writes that if the Court is allowed such authority, that they soon become Platonic guardians with unchecked power and this runs counter to all founding principles. Consequently, if one is to ascribe to the notion of the "living Constitution" then it is the legislature that must possess the authority to interpret the intent of the document, because this group is directly accountable to the citizenry. To allow the Court this power is a move toward tyranny.[68] Justice Antonin Scalia supports this logic as can be evidenced by his statement in 1996 when he said, "Only people possess the ability to change laws. When people decide the law we have liberty, when the Court creates law there is tyranny."[69]

When dealing with the issue of abortion it is Bork's opinion that the Court is usurping the authority of the legislature and thereby claiming to have the power to deviate from history. By doing this the Court loses its legitimacy as evidenced by the continual challenges to its decision in Roe.[70] Simply put, in Judge Bork's opinion Roe was a case of social engineering and not law.[71] Roe is not a legal argument but instead it is a perverse history lesson that attempts to offer justification to an opinion that contained no relevance to the Constitution.[72] The cases offered by the Court as precedent for their decision contain no textual support only specious correlations that take a form of judicial contortionism to find rights that do not exist. The great paradox of the cases used by the Court to explain the constitutionality of abortion, were all opinions that were interpreted to promote family and the historical support of the sanctity of marriage.[73] What the Court did in Roe was to force their concept of privacy into the Constitution rather than recognize its existence from the wording of the document.[74]

Citing the Court's decision in Griswold, it is Bork's contention the Court "invented" a right to privacy involving sexual freedom that does not exist or if it does it can not be found in the Constitution.[75] In other words the Court is unable to relate its opinion in Roe to any portion of the text or anything that resembles precedent.[76] What you have is the illegitimate use of power by the judiciary in an attempt to legitimize abortion by couching their opinion in legal "mumbo jumbo" by twisting ideas such as ordered liberty[77] and choosing to ignore the precedent of stare decisis that the current Court clings to in an effort to defend Roe.[78] The claim of stare decisis holds little appeal as the Court has shown no consistency as to when so called private behavior is upheld or discarded.[79] Again Bork argues, all Court decisions in this arena seem to hinge on a judge's personal feelings that demonstrate unabashed judicial activism hiding behind the façade of the illegitimate concept of substantive due process.

Bork views this seismic shift in judicial thought as it applies to abortion as an unprecedented power grab that set into motion the idea that judges could replace the law with their own personal philosophies.[80] The guardians of Plato's society had been recreated. What the guardians had done was to shift from defending the historical importance of the sanctity of marriage, to creating sanctity of individual desires. Not only had the Court discounted 200 years of legal and social precedent, they also chose to apply the Constitution (specifically the Ninth Amendment) to an area of personal life that here to for had been the domain of the legislature. Bork claims the Constitution does not address issues of sexual behavior and to claim it does is laughable. The duty to regulate or monitor such behavior belongs to the people and not the Court.[81] Any attempt to justify the need to have rule by the judiciary is tantamount to being fearful of rule by the people and this would be the most illiberal of principles set into motion.[82]

The overriding idea in the abortion debate is the concept of privacy. As discussed in the previous chapter all Americans understand this idea and all citizens believe that it does exist. The Constitutional dilemma that exists is in being able to discern what type of privacy is protected by the document. People on both sides of this issue believe that different types of privacy exist, whether it is "zones of privacy" or even the idea of public and private behavior.[83] However, Bork states that no Constitutional basis exists for the privacy the Court created in Roe.[84]

Bork's contention is that the claim of privacy the Court "found" in the Ninth Amendment as a fundamental right is to begin down a slippery slope. The recognition of this type of sexual privacy as it applies to abortion creates an illiberal movement toward radical individualism. The Court created a type of privacy to defend the sanctity of the marital bedroom but soon after, this marital privacy developed into individual autonomy and from here it was a short step to extra-

constitutional individualism.[85] The Court's opinion in Planned Parenthood v. Casey appears to validate Bork's concerns. When writing in the majority opinion, the Court stated a constitutional right to personal dignity and autonomy now existed. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."[86] Then speaking for the minority in Bowers v. Hardwick, Justice Blackmun underscored this concept by claiming, "The concept of privacy embodies the moral fact that a person belongs to himself and not others nor to society as a whole."[87] What this "court made" privacy does, is place the nation on the road to return to a Hobbesian state of war where no limits exist to personal behavior to encroach upon one another. To allow the Court to create rights without historical precedent opens the door to social anarchy.[88]

As stated earlier, examination of Court opinions on privacy reveal that they are less than consistent or compelling. A reading of the Glucksburg opinion dealing with assisted suicide is a classic example. In this case the Court decided that no right to assisted suicide existed, but why? Why does ones privacy right not extend to a personal decision to end their life if they have the privacy right to end the life of another?[89] But beyond this, to allow indiscriminant applications of multiple variations of privacy leads to the belief that the person belongs only to themselves and they are not accountable to society.[90] Bork claims that the Court is pushing a moral relativism by dressing it in the clothes of individual liberty.[91] What this collectivist mentality will lead to is a type of moral depravity. Once this occurs, instead of the expansion of rights, we will in reality have an actual loss of liberty as any behavior can be declared unconstitutional depending on the personal proclivities of the Court.[92] This "court invented" privacy leads to an extreme individualism by misinterpreting the Fourth Amendment. The Fourth Amendment protects persons and possessions within the home from unreasonable government intrusion. It

was not created to apply in all cases to all things because the Framers knew that total autonomy was anarchy.[93] Bork points out that abortion is not a private act,[94] so even if the Court's privacy interpretation was correct it still would not be applicable in abortion cases. Also if abortion is used as a form of birth control, as it often is, then it deserves no special privacy protections. It is not illiberal to limit birth control as is demonstrated every day in local law.[95]

The often quoted idea that persons possess a right to be "left alone," is great rhetoric but it has no historical basis nor does it make sense in an ordered society. What Bork claims is that privacy while it may exist, it is not absolute.[96] He is also falling back on his main premise that if nothing is stated in the Constitution about an action that a group of citizens' desire, then the determination of the legitimacy for that action must be left to the democratic process. If not, then special interests and special cases become the driving force of law. This would then lead not to the protection of rights but rather rights would become an evanescent concept that changes with the political winds.[97] Bork's liberalism is that to protect rights it is also necessary to limit rights. Without such limitations the arbitrary use of privacy makes any judicial idea possible and perceived rights are endangered because rights cannot be retained by people if the people do not possess the rights to begin with.[98]

In Judge Bork's opinion the Court has attempted to apply this notion of privacy using the concept of substantive due process. Bork claims that substantive due process is another ruse by the Court to expand their authority under the guise of protecting rights. The idea that it is the duty of the Court to determine if a legitimate government interest exists in a law is pure fiction.[99] The duty of the Court is to explain how their legal logic squares with the Constitution since they are overturning the will of the people.[100] The purpose of due process as outlined in the Constitution is to ensure fair protection, not to create an avenue for advancing socially popular

ideas. Due process does not enshrine certain rights with untouchable status. All rights constitutionally specified or not are subject to appropriate social restrictions as no rights are absolute. This is a common understanding in all liberal societies.[101]

Using substantive due process, Bork states that the Court is attacking the morality of society. To allow this is illogical and illiberal because all law is based upon societies' determination of morality and by making decisions such as Roe, the Court is replacing their interpretation of morality for that of society and in this way the Court is participating in its own version of morals creation.[102] The morality of a society is sufficient to support law because when we look at laws such as those prohibiting genocide or the killing of animals the only objection to such actions is moral aversion. Without morality Bork suggests that we again fall into a moral bankruptcy that becomes social anarchy.[103] For Bork morality is the engine of constitutional reform, so any decisions that alter the original document must be premised in a moral context. This can only be done by the citizenry, thus giving legitimacy to these actions because they are premised on the liberal idea of the consent of the governed.[104]

The idea that abortion may be an equal protection issue protected by the Fourteenth Amendment is also addressed by Bork.[105] Judge Bork states that biology is the destiny of us all and it is not equal or even fair; therefore, it is not the province of the Court to alter biological realities as these are not Constitutional issues. For Bork there exists a difference between the liberal expansion of rights and the economic and social engineering applied by the court.[106] According to Bork, the Court is applying illiberal ideas, all the while taking cover under the liberal umbrella of providing greater individual freedom. The upshot of this is, in the aggregate, the rights of citizens will be reduced.

Laurence Tribe and Liberalism:

Tribe's view of the fetus as stated earlier is that it is life; however, to kill a fetus is not murder.[107] He proposes that to argue abortion in terms of fetal life is a bad argument. The concern over life or personhood is a straw man that is promoted primarily by religious groups in order to interject emotion into the debate and help them carry the day in the abortion fight.[108] Tribe acknowledges the fact that a biological process exists that leads to the creation of a child; however, his contention is that this is an irrelevant point. There are two questions that he believes are really what should be asked when dealing with abortion. The first is, "What is the right at stake?" The second question is, "How is the life of the mother to be weighed against the life of the unborn?" What he is proposing is not that there exists definitive answers to this difficult issue, but rather the solution is to decide who should answer these questions. It is Tribe's belief that the Court is the institution that holds this authority and it is only through the Court that constitutional equality can be achieved. By taking this position Tribe states that the Court has answered the first question by defending personal autonomy that they have labeled as privacy and the second is addressed in regards to the health of the mother.[109] What Tribe is suggesting is that the fetus is life, but the state can intervene. If not, then the state would be compelling the woman to save the unborn and this type of obligation runs counter to our legal history. As good as we think the assisting of other may be, "a bedrock legal premise upon which our system is built: that our society, whatever its moral aspirations toward altruism and sharing, imposes no routine legal duty upon any of its members to rescue another."[110] In the same vein no law exists that would compel a parent to donate an organ even if it was the only way to save their child.[111] For Tribe the focus of abortion discussions should be on appropriate constitutional application and nothing else.

Tribe believes appropriate constitutional application is through the Supreme Court. He argues that the Court is politically neutral in its decisions and by design it is better equipped to protect the rights of citizens because it has no constituency to appease. In the same light, the legislature is in a position to undermine the rights of the minority or those without political power based upon their powers to create statutes.[112] Since the Constitution is a document of vague language and clauses it needs to be interpreted, Tribe states that the Framers placed that interpretive power in the hands of the judiciary in order to protect the citizenry from egregious governmental interference.[113] In this way the Court will clarify the language of the Constitution and not create inequalities based on political need. Keeping the Court out of the political process was both the intent and the genius of the Framers because this allows judges to apply the law without fear of electoral repercussions.[114] What Tribe has done is to elevate the judiciary to a level of Lakatos's "lemma-incorporators" in order to eliminate personal interest.[115] From here Tribe attempts to show what rights are being protected in the abortion debate by these politically neutral judges.

Tribe wrote that to prohibit abortion is essentially an act of government dominion over the lives of its citizens. "When a government requires a person to act, it is necessarily interfering more seriously with his liberty than when it places limits on his freedom to act-to make a man serve another is to make him a slave, while to forbid him to commit affirmative wrongs is to leave him still essentially a free man."[116] Tribe's point is that to require a woman to carry a pregnancy to term is tantamount to making childbirth a duty. From here he claims that it is a logical progression to be able to compel women to ingest fertility drugs in order to promote a successful pregnancy or mandate the use of any pharmaceutical that might prevent miscarriages. Tribe sees this as a violation of personal liberty, because even if one opposes abortion that same

individual can not make a constitutional claim that the state can artificially impose a successful pregnancy upon a woman. This would put the government in a position of being able to intervene in the personal and private process of childbirth.

The foundation upon which Tribe builds his argument is the liberal belief in personal autonomy. Tribe believes the ability of a person to do as they please with their body without state interference is a fundamental right that liberal societies must promote. It is within the confines of the Ninth Amendment and it is using this concept of privacy that this autonomy can be found. Tribe writes that individual autonomy is a fundamental constitutional right that must be protected and it is inherent within the Fourth and Ninth Amendments.[117] Tribe claims, "The value of the Constitution as an evolving repository of the nation's core political ideals and as a record of the nation's deepest ideological battles; significantly on the limitation of its substantive content or to what all (or nearly all) perceive to be fundamental; (*is superior to)* a document cluttered with regulatory specifics that could command no such respect."[118] His point is that the interpretive value of the Constitution allows for the protection of fundamental rights. The Constitution is a higher law that supersedes any transient desires of a temporary political majority. In this way the Bill of Rights presumes the existence of a substantive body of rights (or preferred freedoms) not enumerated but contained within the concept of liberty. It is even possible to assume that individuals may claim rights that exist beyond the Bill of Rights.[119] Tribe is arguing that the Ninth Amendment was designed to expand the rights of citizens.[120]

Beginning with the basic liberal idea of "being left alone,"[121] Tribe asserts that the right to privacy has always been part of America's liberal thought even beyond the Fourth Amendment's guarantee that, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[122] A cursory examination of

American history shows that forms of privacy have been at the forefront of American concerns about governmental authority.[123] This being said, Tribe asserts that privacy is not a one dimensional idea that remains stagnant. Instead, ideas of privacy may evolve as does a society. Traditions change within a society and it is logical to suggest that perceived rights may be altered to match the changes in society.[124] This is Tribe's definition of the living Constitution. He believes that the Framers did not craft a document that could withstand all logical interpretation of it regardless of the evolution of society. Rather, he claims that the Framers inserted the separation of powers to include judicial review as a way to properly allow for the expansion of individual rights without formally amending the Constitution. This interpretation places freedom on a rational continuum that allows for its expansion as the needs of society change.[125]

It is Tribe's belief that privacy can not be defended solely as a negative right because this idea is too limiting and will not compensate for societal changes.[126] As societal standards evolve so must the law and in this way the Constitution must contain an element of flexibility. This flexibility was outlined by the Court in Griswold v. Connecticut when it was recognized certain "zones of privacy" exist in private life that the Constitution of 1787 was not capable of addressing in specific language.[127] Even the United States Congress recognized this defect in the Constitution when it declared a constitutional right to privacy exists and passed the Privacy Act of 1974. In this act the Congress implied that the Court must define and defend rights against intrusion independent of the will of the majority.[128] This was an attempt to address the ancient dilemma of liberalism, how to balance the public will against individual desires.[129]

Once Tribe finishes his claim of the Ninth Amendment's ability to expand unenumerated rights he must explain how the Supreme Court is vested with the authority to apply such a concept. For Tribe it is logical for judicial application of substantive due process through the

Fourteenth Amendment. His rationale is that the Framers intended for a constitutional balance to exist between the power of government and individual liberties. Consequently, the Constitution must be read in light of historical precedent, original language, clauses, and emerging community standards.[130] As Justice Oliver Wendell Holmes stated in Missouri v. Holland, "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago… We must consider what the country has become in deciding what the Constitution means."[131] Tribe further illustrates his point by citing Justice William Rehnquist who wrote;

> "The Framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live…Where the Framers…used general language, they gave latitude to those who would later interpret the instrument to make that language applicable to cases that the Framers might not have foreseen."[132]

What Tribe has done is to place the Fourteenth Amendment on the same rational continuum as the Ninth in order to create a sliding scale of justice in a very liberal way to defend individual freedoms from external harms. In this way a system of unifying principles is established.[133] Due process is a restraint on the government that disallows any government action that unduly infringes upon individual freedoms. Due process is also a restraint on legislative as well as judicial and executive power, so this prohibits the Congress or the States from making any arbitrary process, due process. It is significant to remember that Bork used this identical logic to discount substantive due process. Tribe is claiming that two types of due process exist. The first is intrinsic due process that encompasses the procedural aspects of the law or "the right to be heard." The second form is instrumental due process that is applied by the courts in such a way that it addresses anticipated consequences. A democratic Constitution allows for such applications of conceptual due process to deal with societal changes. Or stated

another way, the U.S. Constitution is a "living Constitution."[134] The Court must interpret due process because it is a constitutional guarantee not a legislative gift.[135]

There is another aspect to due process that Tribe contends may have more significance in the debate over abortion and this is that due process also guarantees equal protection of the laws.[136] This is an important point because Tribe suggests that abortion laws make men and women unequal.[137] He writes that abortion is an issue of equality. Any law prohibiting abortion is to mandate a sacrifice of the individual liberties of the woman and therefore a type of involuntary servitude. Pregnancy affects women in ways that make her unequal before the law. Abortion can also be about sexual and economic domination rather than the singular issue of privacy. To prohibit abortion is to force the woman into a position of conscription. She is required to aid another and this violates all previous tenants of common law as well as ignoring contemporary legal precedent.[138]

Tribe believes that during the pregnancy process the woman is in a dependent position and must ask for assistance; in this way women are subordinate to men who never endure such a hardship.[139] In judicial terms, this places an undue burden upon women and violates all concepts of fairness.[140] This demand that a woman donate her body for nine months against her will can not pass constitutional muster and since this is a law that applies only to women it clearly is an unconstitutional action based on sexual discrimination.[141] Any laws prohibiting abortion makes biology a woman's social destiny and transfers any natural act into a legal mandate. Therefore, any attempt to make abortion illegal must demonstrate some level of constitutional justification.[142] This belief ties into Tribe's idea of expanded rights through the Ninth Amendment, because here he is also claiming that if the government cannot demonstrate constitutional authority then they possess no legitimate authority to limit individual rights. This

is where the Court must intervene on behalf of the woman. Tribe is arguing that the limitation of abortion is an illiberal restriction on personal autonomy. It is the Court who must defend our fundamental right to privacy and thereby continuing the American liberal tradition.

Conclusion:

The liberal clash over abortion is divided into two liberal categories, the debate over life and the definition of constitutional rights. The life argument is becoming clearer as technologies allow science to better understand when life begins and as I have argued, this places attempts to justify abortion by ignoring life on shaky ground. Once people are comfortable with the scientific definition of life, it will be impossible to deny that the unborn is life. At this juncture, pro-abortionists ask citizens to ignore this fact (or at least discount it) and focus on the constitutional protections of the mother. This is why Tribe and others attempt to discount life as a significant issue in this debate or move their attention to the constitutional principles they believe are defendable. By attempting to re-focus this debate on shifting definitions of what constitutes a person or what it means to be human, pro-abortionists open a Pandora's Box because science demonstrates the fetus is life and like slavery, this life can not be ignored. This forces pro-abortionists to make technical philosophically based arguments that are justified by the parsing of words.

Anti-abortionists use the basic understanding of life as held by most Americans as a springboard to assault the practice of abortion. Polling data indicates that most Americans believe the fetus to be both a life and a person.[143] However, that same data also indicates that while most Americans claim that they would not have an abortion themselves because that would be killing a child, they are ambivalent about preventing another person from having an

abortion.[144] This is the grand paradox of the abortion debate in a liberal society. On one hand the liberal defense of life is important to people personally, yet they also support the liberal idea of autonomy as it applies to others.

Whether it is the "golden rule" or attempts to apply Mill's principle of harm, Americans believe that no act to injure another is acceptable without provocation.[145] This is an important feature in all liberal societies as demonstrated within the concepts of the social contract. In this context anti-abortion advocates ground their position on the notion that abortion is unprovoked harm to an innocent child and this violates the liberal principle of equal worth. By seizing this moral high ground they can both defend the liberal right to life and minimize the pro-abortion liberal claim of liberty. The first part of their argument centers on the fact that without life all other rights are null and void. But the anti-abortion claim then moves into the constitutional realm with the writings of men such as Bork.

Bork argues that beyond life there exists a constitutional defense for prohibiting abortion. This defense is respect for the Framers and the document they created in 1787 that would uphold the liberal idea of consent by the governed. By appealing to the founding document Bork offers legitimacy to his claim that while privacy does exist, the type of privacy that professes to allow abortion does not. Asserting that the Fourth Amendment has been perverted by the Court in an attempt to create social policy through the use of an illegitimate concept of substantive due process, Bork is upholding the founding document and challenging the legitimacy of the Court. But more important to Bork is the "creation" of nonexistent rights by the Court and here he turns his attention to the Ninth Amendment.

He makes the liberal argument that the Ninth Amendment is a guarantee of negative rights upon governmental power. He again references the Framer's fears of government authority and proposes that this amendment was not designed to create arbitrary rights of a plenary nature. Instead this amendment was added to the Constitution to pacify Anti-Federalist fears that the vague wording of the Constitution could lead to potential increases in governmental power.[146] Bork asserts that to view the Ninth Amendment as a grant of positive rights would be to dishonor the Framers, yet the real danger of such action would be to create an illiberal atmosphere where rights would be placed in the hands of temporary judicial majorities and this would be Madison's factions at their worst. Rights are things all persons have a just and moral claim to and in a liberal society these rights are possessed by all people.[147] Using the Ninth Amendment in the positive rights mode limits the rights of citizens by giving preference to the groups that are favored by the temporary majority and this is anything but liberal.

The morality of a society must be decided by its citizens and not by undemocratically appointed officials who are insulated from the people. If all laws are based on morality, (as Bork claims) and rights are things that people have a moral claim upon, then liberal thought would lead people to see that the citizens through their legislatures must interpret the Constitution. This is the only way to expand the liberties of people as a liberal society deems necessary and further promote the liberal belief in consent of the governed.

Laurence Tribe and abortion proponents concede that the unborn may be life which is why the core of their argument is based on personal autonomy. Using the same data as anti-abortionists, the pro-abortion supporters point to the fact that citizens would not impose their values upon other citizens and they use this as the basis for allowing abortion procedures. They claim that some life has greater value than others as demonstrated by the use of the death penalty

in America. They also point to the great hardships such as those that are placed upon a family of a severely impaired child as justification for ending the life of the unborn.[148] While this argument may espouse a level of logic, it violates the liberal claim of the equal worth of all individuals.

Regardless of their motivation, it is the position of pro-abortionists that the Court was created by the Framers for just such constitutional conflicts. Tribe proposes that the Framers were concerned about the abuse of rights by majorities in the legislature who were dependent upon transient whims of temporary majorities. If rights were to be protected then only the non-political Court could accomplish this. Also, he claims that the Constitution was a document designed to be interpreted in ways to fit the changes of the nation. It was not "carved in stone" never to be altered and this is why substantive due process is necessary. For Tribe, people make a claim for the rights they believe they have and the government must respect these individual demands. Barring a compelling state interest, the government must allow citizens as much liberty as they desire and this is how a liberal society functions. The pro-abortion position may defend the liberal belief in personal freedom; however, it consequently assigns the responsibility for this freedom to the Court instead of the legislature. The difficulty with this is, by claiming that privacy evolves to meet the changes in society, Tribe discounts the changes in the legislature to meet these shifts in societal beliefs. Instead, he claims that a court whose members change at a glacial pace better understand the will of the people.

What we have in America is the slavery argument recreated as both sides of the abortion debate claim the liberal history of America as supporting their contentions and they appeal to American liberal thought to win the day. Both pro-abortionists and anti-abortionists claim connections to our founding documents and appeal to the American desire for liberty and a

constitutional protection of rights. This debate appears to be irresolvable because both camps appear to have liberal logic on their side. As with slavery, the current system of adjudication is ill-equipped to deal with this type of conflict and just as the Court's attempt to quash discontent over slavery failed, they have again met the same fate when dealing with abortion. Civil War is no longer an option and abortion can not be reduced to a sectional conflict. At the same time judicial and legislative powers are working in opposition. Given these particulars of the abortion debate, I propose that the application of John Rawls' theory of distributive justice holds the key to upholding the liberal application of rights as well as the liberal principles that are buried within American political thought that can offer a solution to this seemingly intractable problem. In the next chapter I will discuss how this process can be used to eradicate abortion and still respect the liberal tradition of America.

Chapter 6

The Theory of Justice and Abortion

I have argued in Chapters Two and Three, that slave law evolved and this evolution was part of the society's participation in the process of public reason. It was during this time that the law and society were wrestling with the conception of the person. When reason could no longer support the archaic notion that slaves were not persons a growing anti-slave movement emerged. Nonetheless, liberal thought was used on both sides of the debate. The intervention by the Supreme Court only exacerbated the argument and did not bring resolution.

In the abortion debate, the evolution of law was also surrounded by the use of public reason. In Chapters Four and Five I demonstrated that several variables were introduced into this debate that made public reason necessary, and liberal language was used to again defend both sides. When the Supreme Court intervenes, the discussion is not halted but heightened.[1] Abortion supporters would argue that government limits on abortion violate the liberal tradition of America by not just limiting the liberty of the woman but also enslaving her within the pregnancy. I contend that similar to the slave debate, once the liberal conception of life is recognized, then a liberal defense of abortion can no longer be maintained. From here, application of Rawls' original position will demonstrate how the prohibition of abortion will be chosen by society as opposed to forced upon them. Within the application of the original position will be two discussions. The first will be over the moral value of life and the conception of life; the second will be over self-interest which will lead to what I call the paradox of liberalism. When an agreement is made on the conception of life and the issue of self-interest is addressed, then abortion can be voluntarily removed from American society while simultaneously defending America's liberal tradition.

Rawls' theory of government is based on contract theory. He explains in his work A *Theory of Justice* that government is legitimate when authority is "exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational".[2] A key element of Rawls (as he outlines in *Political Liberalism*) is that the participants must have a capacity for a sense of justice and they must also embrace a capacity for a conception of good.[3] This then allows for the understanding of societal obligation and stability. The difficulty with societal obligation is that it may appear to place liberal thought in a precarious position of how to maintain a commitment to liberal tenants yet simultaneously espouse practices that limit personal behavior. This is the apparent dilemma with abortion and the issue many scholars have attempted to either minimize or rationalize, yet a satisfactory explanation appears to have eluded them.[4] I propose that the notion of societal obligation is not an issue that liberal thinkers need to shrink from because my contention is that obligation is part and parcel of all societies. To attempt to minimize the need for societal obligation is to ignore the humanity of society and the basis of the social contract. The underlying idea that has been overlooked is that a liberal society is a just society, and a just society is accepted as legitimate in the liberal world because it is fair. This is where Rawls' theory of justice and his work with political liberalism can be applied to abortion because just and legitimate societies accept the need for societal obligation as created in the original position as a counterweight to the negative ambitions of men. My claim is that abortion is an illiberal institution that has been defended using liberalism and like slavery it can be eliminated.

Rawls develops the idea that citizens within a liberal society must have an equal share of the available authority or at least they must believe that the opportunity to acquire this authority

is available to them. In this way, citizens develop a moral motivation that as Rousseau claimed; "citizens have a capacity to acquire conceptions of justice and fairness and a desire to act as these conceptions require; when they believe that institutions or social practices are just, or fair, they are ready and willing to do their part in those arrangements provided they have reasonable assurance that others will also do their part." These are the duties and obligations owed to their fellow citizens.[5]

While Rousseau offered a classic philosophical explanation of the ability of citizens to respect the rights of others, Rawls takes aim at the need for authority in a liberal society. He states that the exercise of authority is only legitimate when used from a political perspective, "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of the principles and ideas acceptable to their common human reason."[6] What Rawls offers here is the concept that coercive authority is a focused political authority overriding emotional desires. For Rawls, it is emotional decisions based upon unreasonable comprehensive doctrines that undermine the legitimate use of authority that normally allows for the rational acceptance of political obligation as determined in the original position.[7]

But what about unjust laws that history has shown will be created? Does Rawls believe that men are powerless to resist the political power of others so long as a glimmer of hope exists that they might some day be in the position to exercise political authority and repair the damage to society? While Rawls is anything but definitive on this issue, he does offer up the ideas of a duty of civility and an obligation of fairness. The duty of civility is a natural duty not to "invoke the faults of social arrangements as a too ready excuse for not complying with them…"[8] So while the application of some societal decisions may not be perfect, this does not condemn the

credibility of all action by the community. Rawls defines the obligation of fairness as, "a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just (or fair), that is, it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangement …"[9] I will show that the institution of abortion does not satisfy the two principles of justice and the unborn would not voluntarily accept this arrangement. What Rawls has done is to promote his belief that citizens do have obligations and duties to one another and through the adherence to these obligations and duties, they will minimize the faults in a society.[10] While this may appear to be the introduction of obligations through the back door, it is so only if one views America's liberal tradition in a purely Hartzian form. While I have argued that America has a devotion to Locke that Hartz claimed is the foundation of our liberal tradition, I propose that while scholars such as Smith attempt to discredit Hartz's model as failing to explain all of the inconsistencies in America's history, they too are victims of a limited perspective. I argue that America's liberal tradition while following Hartz's model is not yet a perfect liberal society.

Rather, America's liberalism is a process that first emerged with the founding generation and has continued to move toward perfecting a liberal society. This goal has yet to be achieved because of the inherent difficulties that lie within the egos of men as I will elaborate on shortly; nonetheless, liberalism is the driving force behind American thought. Machiavelli might contend that America is the prudent archer that has set her bow at so high a target that many see that target as unattainable. The great project of creating a liberal based society is a difficult task and not unlike the theory of natural law, it is the goal that must always be pursued. Liberalism is not perfectionism, but rather it is a vehicle to pursue it. These Rawlsian ideas of the duty of civility and the obligation of fairness may be Tocqueville's enlightened self-interest of the 21st century.

This may indeed be the virtue that many scholars have argued does not exist in a liberal society.[11] The ideas of rights and duties go hand in hand because without one you cannot have the other. As Americans are much more comfortable with rights talk rather than discussions of obligations, Rawls explains the difference between duty and obligation which he believed would create the expansion of human respect that would reinforce America's liberal tradition. Using the theory of Rawls we can understand in a liberal society that obligations are welcomed as necessary by citizens rather than viewed as obtrusively coercive. In this way, the elimination of abortion is another step toward the improvement of America's liberal society.

The Application of Rawls' Philosophy:

To apply Rawls' theory, society must at some level be organized in the original position. The original position is the philosophical meeting of members in society where participants gather to create solutions to societal issues. Once citizens gather in the original position, their decision-making ability is shrouded by the veil of ignorance. This will counter potential for bias and generate fundamental fairness of condition to allow for a just, pluralist society. Rawlsian theory does not attempt to apply utilitarian principles because Rawls was looking to achieve more than just compromise to satisfy the most of society. But self-interest is a part of society and this is why the veil of ignorance is necessary. The original position through the veil of ignorance leads people to discover solutions that are just. Using conceptions of justice, decisions are chosen not bargained for. "Notably, when placed behind a veil, agents will rarely disagree on the governing conception; thus, conceptions are chosen, rather than bargained for, at the original position".[12]

In the original position, no one knows how alternatives will impact their individual case. "In the original position, the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent." The veil of ignorance then prevents the agents from accessing information to assess the probabilities of who might be beyond the veil and how they may benefit. "Parties have no reliable basis for estimating the probabilities of the possible social circumstances that affect the fundamental interests of the persons they represent."[13] Everyone has access to the same information; consequently, agents in the original position will decide a uniform set of primary goods that would include life. Rawls claimed primary goods are the fundamental needs/rights of a society. These primary goods allow citizens to develop the two moral powers that determine their conception of good, and the desire to protect these primary goods allows people to reach an agreement on the sense of justice.

The purpose of the original position is to create social stability, and according to Rawls, this stability or unity is possible when, "doctrines making up the consensus are affirmed by society's politically active citizens and the requirements of justice are not too much in conflict with citizens' essential interests as formed and encouraged by their social arrangements."[14] This then places citizens in an arrangement where they can choose their conception of justice that appears to best defend their list of primary goods. Rawls states that these choices are limited to "those political conceptions that are reasonable for a constitutional democratic regime."[15] Rawls asserts that people will weigh the risk of their choices and will choose what they feel to be best without harming their basic rights. Ultimately people will never concede to actions that would place their life or other basic rights in jeopardy for the greater good.[16] Instead what they must do is attempt to assure that persons have a sufficient supply of primary goods that would allow people to be able to pursue what they deem to be good. Primary goods are supposed to be

uncontroversially worth seeking that provide the social basis of self-respect.[17] Life definitely falls within this definition and therefore must be a primary good to be promoted and protected in a liberal society. Within the original position Rawls espouses the application of the two principles of justice as well as the two moral powers of a sense of justice and a conception of good.

> "A sense of justice is the capacity to understand, to apply, and to act from the public conception of justice which characterizes the fair terms of social cooperation." Given the nature of the political conception as specifying a public basis of justification, a sense of justice also expresses a willingness, if not a desire, to act in relation to others on terms that they also can publically endorse. The capacity for conception of the good is the capacity to form, to revise, and rationally to pursue a conception of one's rational advantage or good."[18]

So where does the original position take place? Rawls would respond, it can be wherever people choose to send representatives to rectify societal issues. The choosing of a moment in time and claiming it to be the original position of America may seem arbitrary. And this may in fact be true. However, my purpose is not to find that moment in time, but rather by selecting a moment in American history, I will argue that Rawls' theory is applicable and can be applied to the issues of slavery and abortion. For this purpose, the Constitutional Convention held in 1787 in Philadelphia will serve as a model for America's original position. With the creation of the Constitution, America's liberal history was made public and since that time, Americans always point to this document as the grantor of liberties. The Constitution is the founding document of America and has remained relatively unchanged in the more than 220 years of its existence. Within this document, the fundamental institutions of government were formed and as will be illustrated by the paradox of liberalism, some of these institutions were illiberal.

Regardless of the positive liberal institutions created by the Framers, the legitimacy of the original position can be challenged because of the nagging historical problem that emerged from Philadelphia: why was slavery accepted as part of America's liberal foundation? The answer

can be found in the paradox of liberalism, which I define as the toleration of illiberal institutions that are defended using liberal ideas. The fight over the recognition of Negro slaves as human, then as men and finally as citizens has been explained earlier in chapters two and three. It is this fight that illustrates the paradox. Some men placed their illiberal self interest over the liberal betterment of the nation. During this period in history illiberal groups were able to defend their position with enough liberal language to gain an audience and the political reality was that they had the leverage to carry the day.[19] Because the illiberal institution of slavery was woven into the fabric of American life, it was tolerated, and it took decades before the conception of justice could penetrate this institution. Nevertheless, once conversation was begun on this topic, it was only a matter of time before this institution was eradicated.[20] I am not apologizing for the existence of slavery, nor am I ignoring the potential shortcomings of the original position; instead I argue that this illiberal practice demonstrates the imperfections of men and how politically active citizens can address a conception of justice that does not fit a constitutional democracy. It also illuminates how America will always continue to improve on its just and liberal society.

Justice as fairness is also a conception that solidifies the content of basic rights and eliminates them from the political agenda. For Rawls there are two principles of justice as fairness. The first principle is designed to deal with issues within the constitutional structure and states that all people have an equal right to the most extensive liberties that are enjoyed by all others in society. The second principle deals more with the distribution of opportunities and social advantages. Within this principle Rawls is addressing the idea of equality of opportunity as it applies to economic improvement. Also within this principle is what Rawls defined as the "Difference Principle" that is his design which places an economic obligation upon society to

assist the least advantaged.[21] Citizens will prefer justice as fairness as opposed to basic utilitarianism because people care about rights and liberties. In this way justice as fairness is better equipped to promote social stability, mutual respect, and social unity.[22] All parties agree that these basic rights are necessary for political justice. Rawls stated, "All reasonable doctrines affirm such a society with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and the freedom of religion. On the other hand, comprehensive doctrines that cannot support such a democratic society are not reasonable."[23] The belief in the institution of abortion would be classified as a comprehensive doctrine because it violates the first principle of justice by denying the fetus equal basic rights and liberties. This is a significant point because all concepts must embrace the criterion of reciprocity in order for this doctrine to apply. Reason makes it clear that the defense of life fits within the criteria of reciprocity. By adhering to this conception of justice as fairness, primary goods-such as life-are now beyond the calculus of social interests and thoughtful reflection becomes the catalyst of any discussion.

A necessary portion of Rawls' theory is public reason. This critical element of the political conception of the principle of justice allows parties in the original position (who are uncertain of their ultimate position in a pluralistic society) to deal with positions that can be both valuable and offensive in society. The way to deal with these types of issues is through public reason once the veil of ignorance is lifted. "Thus when, on a constitutional essential or matter of basic justice, all appropriate government officials act from and follow public reason, and when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment expressing the opinion of the majority is legitimate law."[24] From here, Rawls contends that citizens will come to appreciate what the liberal conception achieves.

He asserts that citizens will identify with these conceptions, and a strong allegiance will develop over time. People will realize the logic in affirming the principles of justice that will express political values and make democracy possible. This acceptance of principles (or what Rawls terms as higher law) outweighs other values that may oppose them, and in working through these difficult issues to an acceptable conclusion replaces the notion of wholehearted acceptance and supplants it with what Rawls called the "overlapping consensus."[25] Americans were attempting this Rawlsian process in the public discussion over abortion before the Supreme Court interjected itself into the debate. What the overlapping consensus allows for is a realization by society of the best decision that adheres to the principles of justice. This is the acceptance of political obligation because it is self-imposed. The contentious nature of the Court's decision in Roe is because as Rawls' stated, the ultimate powers cannot be left to the legislature or even to a Supreme Court because the holders of the powers of government are responsible to the people. The decisions of the Court must reasonably accord with the Constitution, its amendments, or politically mandated interpretations.[26] To claim that the Roe decision is compatible with Rawls definition lacks historical evidence and demonstrates how the Court's interference in the process of public reason has impeded society's ability to achieve an overlapping consensus.

Public reason is successful when reciprocity is applied. Citizens must feel that their decisions will be met with the same concern for their beliefs that they are offering to others in society. Rawls identifies reciprocity as used by free and equal citizens having criterion that when they propose conceptions, they will incorporate reasonableness and fairness coupled with a belief that other citizens would behave in the same way. When dealing with abortion, the conception is life and reciprocity applies as citizens feel that everyone in society will act to defend not only their life, but the life of others. No one feels manipulated or dominated by the

pressure of inferior political or social positions. Yet what of the comprehensive doctrines that Rawls claimed had no place in the original position? Rawls addresses this reality in all societies with a concept he terms the "proviso." His idea allows for individuals holding policy views based on unreasonable political values to participate in public reason so long as they can use acceptable values in their effort to persuade others. What will occur is the presentation of some comprehensive doctrines, provided they give proper public reason to support principles and policies.[27] In Rawls' model, the principles of justice can be implied by the conception of justice if the principle is inherent to the conception or they are the product of public reason founded on the values endorsed by the conception.

As in any debate the terms and language must be defined. As it applies to abortion I am defining the concept of life as the replication of the form through a cycle of reproduction that results in the creation of a human being. The conception of life is the application of the concept and this conception is that people are aware that once the woman becomes pregnant, a human is being created. The difficulty is that the concept of life is a process; consequently early medical technology was unable to assist society in its understanding of how the concept evolved from beginning to end. This lack of understanding about the process of life lead to a conception that early in the process, the cycle could be disrupted without harm to life. Once medical advancements discounted this line of thinking and it became clear that interfering with the cycle was indeed ending human life, the conception of life was now altered. The new conception is once a fertilized egg is implanted in the uterine wall, the cycle cannot be disrupted without ending life. This change in the conception was possible as people were now able to understand the process and thus were better able to grasp the concept. The principle that defends this modern conception is that in a liberal society, life is the foundation of society, and therefore, it

must be protected. In a more social application, the definition of life can and is a product of public reason because medical technology allows us to identify life, and life is assigned moral worth because life has value as part of the liberal conception.

To be able to put public reason into practice, Rawls claimed that it was necessary for people to apply what Rawls identified as "reflective equilibrium." For Rawls, the conception of justice chosen in the original position need not comport with the considered judgments of everyone. Rawls refined the idea of judgment by parsing this concept into two parts: judgments and considered judgments. "Considered judgments are judgments that seem clearly to be correct under conditions conducive to making good judgments of the relevant kind; that is, when one is fully informed about the matter in question, thinking carefully and clearly about it, and not subject to the conflicts of interest or other factors that are likely to distort one's judgment."[28] Rawls claimed here that our principles chosen in the original position will promote examination of our considered judgments. Therefore, as we evaluate our judgments, they must adhere to the principles of justice or these judgments must be reformed.

The anti-abortion position better fits Rawls' model because life has value and the principle of life is it must be protected. To allow abortion violates the principle. If the judgment violates the conception of justice, it will be exposed through the process of public reason (as abortion has) and must be discarded. This reflective equilibrium would allow the alignment of our conception of justice with our judgments. "It is equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments form and the premises of their derivation."[29] By engaging in a back and forth dialogue, a satisfactory way of making up one's mind about an issue is achieved. The idea is to correct or revise our views that we at first may find acceptable if we come to see them as incompatible with

rules we generally accept and refuse to reject because they, in turn, best account for a range of other inferences.[30] Pro-abortion supporters have fought against this notion even though the conception of life has been clarified. This internal discussion is an evaluation of personal beliefs that Rawls claims is necessary for people and society to seek equilibrium, which is in their nature to do. Consequently, as society sorts out its difficult situations, reflective equilibrium will be a necessary component. It was Rawls' belief that unjust ideas will be abolished using public reason and reflective equilibrium allowing society to create higher law.

Rawls illustrated this point by using the example of American slavery. He claimed American society was in a reflective disequilibrium during the antebellum era because slavery would never be agreed to in the original position if a liberal conception was the driving force of the discussion and overlapping consensus was the goal rather than self-interest. What occurred was that illiberal ideas forced their way into the debate, thus retarding the liberal discussion that would lead to an overlapping consensus. Instead, what occurred was an illiberal institution that assigned the nation to a state of perpetual reflective disequilibrium placing the support of slavery and the core American belief in a principle that all people are equal at cross purposes. It was not until the emancipation of the slaves that an attitude shift began to occur that brought America more in line with our conception of justice.[31]

We know the questions that were debated over slavery.[32] However, the question of abortion was not an issue that was of significance during this era. As was discussed in chapters four and five abortions did occur during this era, yet this behavior was not openly thought of as being acceptable. Abortion is illiberal and cannot fit within the confines of a liberal society once the conception of life is determined. By examining the institution of abortion as it was created and the attempts at finding an overlapping consensus, we will see the process of public reason

used in an effort to create reflective equilibrium as a society engages in the public discussion over abortion. Once the conception of life is identified, it then falls under the umbrella of liberal protection. From here, the paradox of liberalism should be addressed.

The paradox of liberalism, institutions, obligations, and duties:

The paradox of liberalism is that men possess self interest and in all liberal societies, this self interest has led to certain groups being subjected to illiberal acts. The great philosophers of liberal theory while not specifically addressing this paradox nonetheless realized the faults of men and have attempted to explain them in several ways. Both Locke and Hobbes believed that men possess the capacity to improve, and few thinkers from either antiquity or the modern era argue against this idea.[33] Philosophers have argued that there exists within men a propensity to seek improvement in their lives; however, there are times when this improvement comes at the expense of others. This natural inclination toward improvement may be viewed as a positive attribute that can benefit all of society, yet at the same time, it harbors some negative effects if the methods used to obtain improvement are less than liberal. If we assume that the state of nature is a starting point of all liberal societies, then both Hobbes' and Locke's support of social contract theory appears to be an attempt to deal with the potential illiberal behavior of men. The genius of the social contract is that while on the surface it appears to be a coercive method to limit negative behavior, at another level, the agreement by men to both enter into and then continue the contract demonstrates man's innate desire for a more perfect liberal society. That being said, people must be reminded that illiberal impulses are inherent in all men, and it is within the social contract that individuals recognize the need for political obligation to minimize the effects of illiberal behavior. The use of legitimate authority is recognized as liberal and necessary to improve the lives of individuals and society as a whole.[34]

Slavery is the example that I have emphasized as the quintessential illiberal behavior of America; however, slavery was not the first and will not be the last illiberal institution to impact American society. A brief recounting of our history with Reconstruction and Civil Rights illustrates this point, yet the illiberal behaviors of both of these eras were destroyed as well. My point is that the existence of illiberal behavior does not discredit the belief in a liberal society, it merely exposes the imperfections of human nature. The recognition of such behaviors and the constant attempts to eliminate them demonstrates the process of the American liberal tradition as it continually seeks improvement. Rawls does not ignore this fact of self interest and states, "There may be several minorities who have suffered persistent and significant injustice and whose political appeals have been to no avail."[35] Rawls further demonstrates understanding of the imperfections in liberal societies by recognizing that there are groups in what he defines as "nearly just" societies that are intolerant and only pursue personal, comprehensive doctrines. It is even possible that people within these groups have obtained positions of authority within the government. When this occurs, then the reality of the society is that some individuals or groups will suffer because of the intolerance of these groups.[36] It is the liberal belief in toleration that at times sets the stage for the intrusion and countenance of illiberal ideas. The solution for this paradox is the liberal DNA inherent in Americans. Rawls argues that in constitutional regimes such as America, the "power of the public" defined as the power of free and equal citizens exercised through their institutions have "deep and long-term social effects and in fundamental ways shape citizens' character and aims, the kinds of persons they are and aspire to be."[37] This liberal institutionalism positively impacts most citizens, nonetheless Rawls does not claim this will totally eliminate illiberal acts. Instead, this institutionalism guides citizens toward liberal behavior that the majority of people aspire to. In doing so, the reality of illiberalism that exists is

minimized, and the goal of its eradication may be pursued. This is the capacity for improvement about which both Hobbes and Locke wrote.

Stability is also a feature in a liberal society, and this plays into the dilatory pace by which illiberal actions are often removed. The application of social contract theory helps create stability within a society. Jefferson spoke of the desire for a stable society and the hesitation of men to change their institutions when he claimed, "that evils are sufferable and governments are not changed for light and transient causes."[38] The need for reasonable and rational citizens to accept the institutions of a society as legitimate predisposes all behaviors to careful scrutiny by the citizen population, and this acts both to support liberal behavior and insulate illiberal behavior from immediate action. Thus, even if an institution is challenged by many as illiberal it takes time to thoroughly examine this charge because to change institutions hastily destroys the stability of society. It was Rawls' contention that the public culture allows and in fact encourages these pluralist doctrines because this is what supports the expansion of liberalism. The goal of liberalism is to give all sides a voice, and this promotes stability because within the process of public reason, an overlapping consensus will form that will end any conflict. Resolution must be the end result because without it, stability cannot be achieved. This is a process that creates solutions not merely compromise when there are competing comprehensive doctrines.[39] A difficulty exists as there are times when illiberal ideas defended with liberal language may be successful. This explanation demonstrates that the paradox of liberalism is not a fatal flaw in a philosophical theory, but rather it is a description of the learning curve that all men and all liberal societies must navigate.

Moreover, institutions are a vital piece of the liberal society because of their significance in behavior modification. Institutions will be defined as focusing on rules rather than resource

endowments because, in the broadest sense, institutions are simply rules. As such, they are the foundation of all political behavior. Some are formal (like constitutional rules) while some are informal (like cultural norms), but without institutions, there can be no organized political behavior. Institutions structure politics because they define who is able to participate in the political arena, they shape various political strategies by various actors, and they influence what these actors believe to be both possible and desirable.[40] Douglass North defines institutions as "the rules of the game in society" or humanly devised constraints shaping human interaction. Institutions provide the structure for exchange that determines the cost of transacting and the cost of transformation. The success or failure of institutions to solve problems of coordination and production is determined by the motivation of the players and the complexity of the environment. In other words, is the behavior being examined liberal? If liberal behavior is pursued, then the institution will succeed; if illiberal behavior is the end result, then over time, that institution will fail (as seen with the institution of slavery). The importance of institutions is that while 90 percent of our daily lives is made up of choices that require no reflection and is little more than repetitive actions, the existence of a set of embedded institutions has made it possible for us not to have to think about problems in order to make choices. Institutions exist to reduce the uncertainties involved in human interaction and this creates stability in society.[41]

Citizens are obligated to abide by the rules of fair institutions because it is through the institution that the liberalism of a society is applied. The institutions "define offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden,… institutions are the basic structures of society and are the system of public rules."[42] These are fiduciary obligations that begin with the creation of the social contract and are based on the premise that fairness exists in society.

The liberal society is a reasonable society, not an altruistic society; nor is it based on the self with the ends justifying the means. This creates a society of equals that pursue rational ends. It is not a society of saints or the self-centered, rather, it is people with a moral power to, "propose, or to endorse, and then to be moved to act from fair terms of cooperation…"[43]

One of the significant institutions that make this internalization of liberal logic possible is the family. Rawls claimed that from within the family, an understanding of justice will be fostered that he called a "moral authority" that will override external influences of group behavior. His contention is that people will realize their obligation to others and understand that their personal behavior is limited. This understanding leads citizens to see that everyone benefits from the success of others. I am defining success as the application of expanding liberal principles. "The collective activity of society, the many associations and the public life of the largest community that regulates them, sustains our efforts and elicits our contribution… within a just social union of social unions in which all can freely participate as they so incline."[44] Rawls maintains that through this liberal institutionalism with emphasis on the family, justice is used as a tool of socialization promoting the liberal tradition.[45] The upshot of this is that while illiberal behavior exists, it is identified as illiberal and thus can be eliminated. While this process may take an extended period of time as it did with slavery it does exist and demonstrates how the paradox of liberalism is addressed by liberal institutionalism to work toward attaining the perfectly just society. This liberal conception will also allow abortion's elimination while still preserving the liberal tradition because the institution of abortion is illiberal and as such, it can be ended using Rawls' liberal theory.

The question that must now be addressed is, Why do citizens follow Rawls' line of thinking? The answer to this question is the notion of duties and obligations. Obligations are the

voluntary acts that are performed that both support and have a direct connection to societal institutions. Obligations may vary depending upon the situation or the institution, yet they are essential for the continuance of institutions in society. Duties are actions that must be done. These may be separate from the institution, yet these actions apply to everyone in society. These duties hold to all irrespective of any institutional relationship. Rawls spoke of both positive and negative duties. A positive duty would be that of mutual aid to others in society. The importance of a positive duty is that even if one never is in a position to directly benefit from such a duty, the society nonetheless is better for its existence.

In this way, it can be related to a local fire department. One never wishes to use the service; however, citizens are grateful for its existence. As Rawls claims, "Once we try to picture the life of a society in which no one had the slightest desire to act on these duties, we see that it would express an indifference if not disdain for human beings that would make a sense of our own worth impossible."[46] The argument could be made that the existence of such duties prevents the degradation of a society into a type of Hobbesian hell.[47]

Negative duties also exist, and these duties hold even greater moral authority. Rather than an understanding of assistance, these duties prevent harm to others. These negative duties aim first, not to harm or injure another and second, not to cause unnecessary suffering. In this way these duties reflect the duty of respect for all people within society. Here again, the practice of abortion is called into question as the killing of an unborn child obviously brings harm to that child. Rawls proposed that duties apply to all people regardless of their institutional affiliation, since the act of abortion undermines the basic duty of not injuring another as well as the duty of respect it must be halted even if one believes in the institution of abortion.

Adhering to the principle of justice is another duty that promotes the support of just institutions.[48] This rule is applied to all just institutions that follow the two principles of justice and the duty is significant because it is through just institutions that liberalism is applied. Citizens in a liberal society must engage in a political relationship where an understanding of equal power is shared among citizens with the belief that all doctrines will be treated equally in the court of public opinion.[49] One of the core concepts of the American liberal tradition is that of reciprocity and through the use of just institutions citizens believe that any loss in a political struggle will be accepted as legitimate because an understanding exists that other political challenges will emerge and in those fights they have an opportunity to be victorious.[50]

As I previously argued, Americans historically have adhered to the tradition of Locke and when we drift from the spirit of liberalism, political problems develop. This occurs when men pervert the institutions created in the original position or create unjust institutions within or outside of the original position. Our ugly history with the institution of slavery serves as evidence of this when the rule of law was altered to allow for the peculiar institution. Currently we have once again temporarily cut the moorings from our liberal history with the creation of the institution of abortion that some have tried to justify within the doctrine of personal privacy. Similar to the slave debate, regardless of the word-play of abortion supporters they cannot ignore that abortion (as did slavery) violates Rawls' first principle of justice. The paradox of liberalism is again upon us, and not unlike past experiences with illiberalism, using public reason, reflective equilibrium, and the overlapping consensus, we can return America to the conceptions of its original position and the illiberal institution of abortion can be discarded.[51]

Rawls and Abortion:

The initial discussion over abortion begins in the original position and with an understanding of primary goods. Rawls defined primary goods as, "everything a rational man is presumed to want." Rawls went on to explain that primary goods, "normally have a use whatever a person's rational plan of life."[52] Life must be a primary good because all people want life and without this any rational plan of life cannot exist. For Rawls the original position consists of contemporary conversation over significant topics. "It is not a gathering of all actual or possible persons. To conceive of the original position in either of these ways is to stretch fantasy to (sic) far; the conception would cease to be a natural guide to intuition."[53] In this way, the original position may be viewed as a metaphor for civil discourse. As long as the conditions of the original position are met, then these collective arrangements may take place at different time's thus allowing societal authority to maintain pace with societal conditions. I have posited the idea that using the Constitutional Convention as an example of the nation's original position illustrates the point that as needed society can use this model to engage in debates like abortion and connect them to rational deliberations that could be held within a 21st Century original position.

This way of viewing the original position allows for intergenerational justice and allows consent by rational people to fit the necessary element of consent. For Rawls, later generations could challenge principles in the original position if they were able to demonstrate another conception that those in the original position were lacking while upholding the essentials of the original position. The debate over slavery illustrates this. Rawls is not a laundry list of "just" policies but rather he offers a unique theoretical approach to describe and evaluate the justness of policy determinations as they shift over time.[54] In this way, the original position retains the force

of a contract as adjustments can be made to fit certain conditions and restrictions without slipping into merely deciding moral questions on an act-by-act basis.[55]

The discussion in the original position when dealing with abortion should begin by inviting the fetus into the conversation. Reasoning to support this can be that the conception of life has changed since 1972 and this conception holds a major place in the debate. The modern conception of life is that once the fertilized egg has been implanted in the uterine wall, development begins that can be both traced and identified using current medical technology. All sides in the abortion debate concede this fact; this is why current arguments over abortion have degenerated into a perverse word play that attempts to parse the words human and person into contradicting categories. Human rights are not created by the use of public reason, but instead must be inherent within the conception.

What has happened since Roe is that the concept of life has been altered by the improvements in medical technology allowing people to endorse the moral worth of life. Once this occurred then the conception of life became the focus of the discussion and as I have shown liberal language becomes critical. When this occurs, then the discussion must move toward finding reflective equilibrium and it is here that the pro-abortion argument crumbles. Philosophically, this occurs because this group claims an unrestricted right to abortion at any time and is unyielding on this point. This type of thinking is within the realm of a comprehensive doctrine and must be considered logic of the background culture; thus no longer part of the considered judgments of a liberal society. Therefore the right of abortion that they claim actually is not within the package of primary goods a society must provide. The pro-abortion groups couch their demands in the principle of personal sovereignty and it could be argued that this is a primary good. However, by claiming the unquestionable authority to

personal sovereignty, the pro-abortion groups are attempting to eliminate debate rather than to have a rational discussion that can lead to an overlapping consensus. The pro-abortion supporters fail to recognize that drug usage, prostitution, and suicide are all limits placed upon what a woman can or cannot do with her body. These accepted societal limitations fly in the face of the comprehensive pro-abortion stance demonstrating how the attempt to mute debate over abortion on these grounds violates public reason.

Of course the question of abortion does not end here as the veil of ignorance must be lifted to allow for public reason to be applied. It must be reiterated that compromise is not the goal of public reason. Instead, it is through public reason that an acceptable resolution to an issue is developed with reflective equilibrium. This is done by the application of public reason as the debate unfolds keeping in mind the conceptions that were part of the original position. In this way, society applies its considered judgments through the back and forth process of examining an issue from all sides. Considered judgments may have to be altered when presented with information that contradicts personal opinion and it is through this process of an overlapping consensus that an equilibrium is created and a stable society exists.[56] In the abortion debate, the significant conception is life, and when the veil of ignorance is removed, all discussion must include that conception or they must be a product of public reason founded on values endorsed by the conception.[57] If we evaluate the abortion debate in terms of the conception of life described above and apply the principles of Rawls' theory, we can reach an overlapping consensus that prohibits abortion.

This solution to the abortion problem will happen voluntarily, and people will voluntarily accept it because of the liberal obligation of fairness. The concept of fairness is reinforced by Rawls' notion of the negative duties of not harming others and the prohibition of inflicting

unnecessary harm. When in the original position and using public reason, agents will apply these negative duties and understand that abortion violates both. Support for this thinking is the overriding liberal belief in the moral worth of life.[58] In this way, the prohibition of abortion is both reasonable and rational.

In his work *Political Liberalism* when Rawls refined his application of the use of comprehensive doctrines by way of the proviso, Rawls made a case that reasonable comprehensive doctrines could be part of the public discussion with the application of public reason. Rawls believed that only those doctrines that cannot support a reasonable balance of political values should be excluded. This is where abortion enters, because in a famous footnote contained within *Political Liberalism* Rawls wrote;

> "As an illustration, consider the troubled question of abortion. Suppose first that the society in question is well-ordered and that we are dealing with the normal case of mature adult women. It is best to be clear about this idealized case first; for once we are clear about it, we have a guide that helps us to think about other cases, which force us to consider exceptional circumstances. Suppose further that we consider the question in terms of three important political values; the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens. Now I believe that any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the *first trimester*.(emphasis mine) The reason for this is that at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force… Thus, assuming that this question is either a constitutional essential or a matter of basic justice, we would go against the ideal of public reason from a comprehensive doctrine that denied this right. However, a comprehensive doctrine is not as such unreasonable because it leads to an unreasonable conclusion in one or even several cases. It may still be reasonable most of the time."[59]

It might appear that Rawls by virtue of this statement is claiming a right to abortion within a well-ordered liberal society and therefore the debate has been decided by the use of public reason; however, in *Public Reason Revisited* Rawls steps back from this apparent renunciation when he states;

> "Some have quite naturally read the footnote in Rawls, *Political liberalism*, as an argument for the right to abortion in the first trimester. I do not intend it to be one. (It does express my opinion, but my opinion is not an argument.) I was in error in leaving it in doubt whether the aim of the footnote was only to illustrate and confirm the following statement in the text to which the footnote is attached: "The only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance [or ordering] of political values [on the issue]."To try to explain

> what I meant, I used three political values (of course, there are more) for the troubled issue of the right to abortion to which it might seem improbable that political values could apply at all. I believe a more detailed interpretation of those values may, when properly developed in public reason, yield a reasonable argument. I don't say the most reasonable or decisive argument; I don't know what that would be, or even if it exists."[60]

I contend that Rawls did not do enough to clarify the debate over abortion with this philosophically sterile retraction. It is my position that using Rawls' theories of justice and reason it is possible to explain how the eradication of abortion from society fits the American liberal model.

Rawls' struggle with the issue of abortion is not surprising; however, it does demonstrate how an apparent stalemate in competing liberal thoughts creates difficulty within a liberal society. Both sides in this debate offer comprehensive doctrines that make resolution seem impossible. Nevertheless, using Rawls' model, competing comprehensive doctrines can be part of public reason if these doctrines support a reasonable balance of political values,[61] which the argument against abortion does. The side of this argument that supports abortion will contend that women as equal citizens have privacy rights and protections under the Fourteenth Amendments' due process and equal protection clauses. Those who oppose abortion claim that the unborn must be afforded the respect of life and with this respect comes protections under the Fifth and Fourteenth Amendments. Since both sides offer the requisite criteria to enter the debate, it is through public reason that a solution to this unruly problem can be found.

Before applying public reason to this discussion, the words of Rawls' footnotes must be examined. In his original footnote, Rawls appealed to three political values: respect for human life, the ordered reproduction of society, and equality of women. It was Rawls' opinion that within the first trimester that the equality argument took precedence and therefore giving the impression that the procedure of abortion was acceptable. If the fetus is not life then this

position might carry the day; however, as I have shown, medical technology has discredited this argument and the unborn cannot logically be denied life status. With this information now available, the conception of life has been clarified and respect for human life must assume a position of priority within this debate because all liberal thinkers recognize a society cannot exist without the basic protections of one's life. This can be deemed the very reason for the creation of the social contract. The ordered reproduction of society may; however, introduce a series of economic questions that can be addressed by the application of the difference principle or a series of social welfare programs. It is outside of my focus to examine these economic and social necessities, yet this is a topic that would merit further investigation at another time.

When Rawls stepped back from his original footnote, he claimed that he did not intend his previous writing to imply a first trimester abortion was the correct liberal position. His intent was merely to show that if a comprehensive doctrine was unable to support political values, then it was not to be part of the debate.[62] While Rawls took the position personally that first trimester abortions were acceptable, he stated that his opinion was not an argument, and in order for the abortion debate to enter into civil discussion, a detailed interpretation of values was necessary. The values of both sides have been presented in chapters four and five, so at this point, I will apply Rawls' logic and theories to demonstrate that through public reason abortion can be prohibited in a liberal society.

The abortion debate has centered on the moral distinction of life, and while abortion supporters will begrudgingly acquiesce that the unborn may be life, they focus their acceptance of this on the notion that this unborn life does not deserve moral recognition. Although Rawls was not definitive in his writings on the morality of personhood, he does state the following;

> "I have said that the minimal requirements defining moral personality refer to a capacity and not to the realization of it. A being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice. Since infants and children are thought to have basic rights (normally exercised on their behalf by parents and guardians), this interpretation of the requisite conditions seems necessary to match our judgments. Moreover, regarding the potentiality as sufficient accords with the hypothetical nature of the original position, and with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies. Therefore it is reasonable to say that those who could take part in the initial agreement, were it not for fortuitous circumstances, are assured equal justice."[63]

In this powerful statement Rawls shows that the capacity for moral personhood is a sufficient condition to claim equal justice and he has welcomed the fetus into the argument. In other words, anyone who is owed just treatment is a moral person or at least has the potentiality to be a person and as such must be recognized as receiving justice in due course.[64] The fetus would be accorded this protection if we look at the reality of the birth process. Without abortions, the fetus will develop into a moral person, and there does not exist a moment in time that can be pointed to as the definitive moment not to allow the fetus to continue this natural development; therefore, rationale does not exist that would deny the unborn status as Rawlsian moral persons.[65] Also, by virtue of being represented as agents in the original position, fetuses must be thought of as persons in a Rawlsian sense.[66] Rawls seems to address the mysteries of life and lack of exact scientific data when it comes to the polemical question of "when does life begin" when he states;

> "As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position. We try to get for him the things he presumably wants whatever else he wants. We must be able to argue that the development or the recovery of his rational powers the individual in question will accept our decision on his behalf and agree with us that we did the best thing for him."[67]

I argue that based on this, agents would not conclude in the original position that ending their life would be the rational choice, nor can the conception of life be discounted using public reason. Thus, in much the same way slavery was abolished, once the conception of life is evaluated using a citizen's two moral powers, liberal institutions cannot support the disregarding of life. As

a result, abortion can no longer be tolerated in a liberal society because the institution of abortion is exposed as clearly illiberal.

This is supported by Rawls focus on the institution of family when he argued through his concept of paternalism that parents have a duty to protect children rather than possessing an arbitrary authority to exercise over children at the parents' convenience. The economic insecurity argument often made to support abortion now becomes moot and again Rawls' basic duties of mutual respect, not injuring others, and not causing others to suffer are applied.[68] While it can be claimed that the pregnancy causes the mother to suffer, the choice to engage in sexual activity with the potential outcome negates this claim. The hard case of rape can be explained by the duty of civility that cautions people not to disregard the entire system because it lacks perfection.

> "It is argued that in these tragic cases the great value of the mental health of a woman who becomes pregnant as a result of rape or incest can be best safeguarded by abortion. It is also said that a pregnancy caused by rape or incest is the result of a grave injustice and that the victim should not be obligated to carry the fetus to viability. This would keep reminding her for nine months of the violence committed against her and would just increase her mental anguish. It is reasoned that the value of the woman's mental health is greater than the value of the fetus. In addition, it is maintained that the fetus is an aggressor against the woman's integrity and personal life; it is only just and morally defensible to repel an aggressor even by killing him if that is the only way to defend personal and human values. It is concluded, then, that abortion is justified in these cases."[69]

While intuitively this appears to be the application of liberal logic, this line of thinking is actually illiberal as it is not the abortion that solves the difficulties of the woman but rather there exists a hope that the actions of others after the abortion will alleviate her pain. The tragic crime of rape serves as the example. If a woman is raped, to allow for an abortion does not punish the man who committed the crime. In a perverse way it is the child who is punished for a crime committed by their father. To punish children for the crimes of the father smacks of the antiquated notion of the corruption of the blood that has been prohibited in the Constitution. To

kill the child (who has done no harm) and then punish the father (who has committed a crime) not only defies traditional jurisprudence but it is illiberal.[70]

The emotional trauma cannot be discounted; however, to argue that abortion relieves the woman from the emotional pain of a rape is not borne out by logic or real life. To follow this logic to its conclusion would allow the destruction of any life that appeared to infringe on the emotional state of a woman. Consider the situation where a woman and her 14 month old child are alone in their home and a man breaks in who then rapes the woman as well as physically assaulting the child. While the woman is not impregnated, the child is horrifically scared. Using the logic of abortion, the woman should be allowed to kill her child as the child's disfigurement will be a constant reminder of her trauma. The reason this argument fails and is clearly illiberal is that the unborn child is not the aggressor and therefore should not be punished. This is the same reason abortions cannot be defended even in rape cases because it is the rapist who is the aggressor and it is the rapist that has forced the woman to become pregnant. The child is an innocent victim as is the woman.[71]

Part of the support for abortion in rape cases is the belief that most women want to abort their child and by eliminating the child then the trauma of the rape will disappear. These thoughts do not hold up under closer scrutiny. The reality of this situation is that most women who are raped do not have abortions[72] and research data indicates that of those who did abort, 87% claimed to have been pressured by family or friends. Statistics also challenge as suspect the belief that if a woman has an abortion her emotional trauma will end. The majority of women surveyed stated that in reality the trauma either never ended or was exacerbated by the abortion.[73] This demonstrates that while several factors may be in play in the abortion debate, it is not purely the choice of the woman driving the discourse.

Rawls' contention that the basic duties supersede institutional relationships demonstrates that solutions need not be the perfect fit and counterexamples will always be offered. Nonetheless, objections made by the way of counterexample are to be made with care because checking a theories fit to one's considered judgment is only a way-station on the route to reflective equilibrium. The object is to formulate a conception of justice regardless of its impact on our personal desires and in this way bring our considered judgments to convergence.[74] Here again, Rawls' theory meets the supporters of abortion head-on. With the contemporary debate cloaked in individual desires of personal sovereignty and privacy, Rawls (and in a similar way JS Mill with his harm principle) is able to transcend the standoff. By ordering rights in much the same way as Rawls talks of a lexical order of primary goods, the duties of a well-ordered and just society protect the unborn.[75] Life is the foundation of society and thus it must be defended in order for society to continue. To degrade life is a slippery slope that leads to the elimination of civil society.

The fetus is dependent upon the mother for life; consequently, the duty of the mother to aid the fetus is primary to all others duties, as a just society mandates parents must provide for all children. If parents are negligent, then the liberal society will assume some form of responsibility. Even if one might take issue with the ordering of these duties, it is obvious that the duties of mutual respect and the prohibition of injury to others would place the practice of abortion on immoral ground. It is within the original position that this hierarchy is created, and by using public reason a society may refine additions to this scheme. Yet no society built upon the social contract would deny the natural rights that Jefferson enshrined in the Declaration of Independence and all men are entitled to. Without life, no other rights have meaning or value

and so life must be placed at the top of any hierarchy. Challenges to this must be able to explain how life can be a secondary concern.

Conclusion:

If the original position is applied to the abortion debate, then this ongoing discussion can focus on relevant liberal ideas and emotional or personal interests can be minimized. Within the original position under the veil of ignorance, the concept of life can be agreed upon using current medical data because personal feelings based upon special circumstances are eliminated. Focus can then turn to the conception of life, and with the pro-abortion argument built upon denying the moral value of the unborn the application of Rawls' liberal principles are the key. As all sides are invited into the discussion, reflective equilibrium becomes overlapping consensus on this issue. By focusing on natural and negative duties, the obligation to protect the unborn becomes paramount. Moreover, when applying Rawls' contention of the individuals' need to honor the potential of life as well as societies obligation to protect and defend potential life, then the elimination of abortion can be explained as liberal.

I have argued that the modern pro-abortion argument attempts to support abortion by centering on privacy and what these groups have coined as choice. However, the prohibition of abortion is not a limit on choice; rather it is the liberal defense of life. The choice that is contained within the abortion debate is the liberal choice to engage in sexual activity. To argue that the potential consequence of this behavior creates the ability to end the life of the unborn child does not comport with American liberal thought. Birth control is available to prevent pregnancy. Thus the choice not to use available methods does not create a validation to end the life of the unborn child, nor does the failure of contraception because the potential of failure is

well known. The biological reality of sexual activity is that pregnancy can result. Efforts to stifle this process *before* (emphasis mine) life begins using methods of birth control, such as the pill or an IUD are not contrary to liberal thought. However, once the fertilized ovum is implanted in the uterine wall, then the process of human life has begun, and to end this life is illiberal. Arguments to the contrary focus on economics, medical conditions, and criminal activity. These situations can all be classified as hard cases, and while they are difficult, they nonetheless can be addressed using liberal thought.

With the discussion centered on the modern conception of life, an acceptable resolution to hard cases can be created. These hard cases can be placed into three categories: economic hardship, medical conditions of the child and/or mother, and criminal act of rape. The economic hardship argument would not pass muster in the original position because it is both illiberal and illogical to claim the killing of a child is an acceptable solution to a family's economic woes. If economic hardship is the reason for a lack of proper birth control, this is best handled by Rawls' difference principle which is a separate issue to be addressed by the original position; regardless, the placing of a dollar value on human life is undoubtedly illiberal.

Medical conditions are a more difficult issue to consider, but it can be done. If the medical situation is such that the mother's life is in danger by the pregnancy, then she may act in a way to protect her life. Most liberal philosophers have made the argument that no one must die for the good of another. In fact, this desire for self-preservation is the driving force behind the decision to prohibit abortion because without knowledge of who will be aborted or why, those within the original position will not agree to extinguish a life. As I have argued, the mental or psychological health of the mother is a straw man designed more to evoke sympathy than elicit facts. The health of the child is a more complicated issue.

The improvement of medical technologies that have made the recognition of life so accurate has also brought to the forefront the ability to detect a number of birth defects that bring into question the quality of life. It was the Sherri Finkbine case that acted as a catalyst for early abortion support.[76] These are precisely the types of problems that make the original position necessary because the possibility of an impaired child is a very emotional issue. The original position allows for the discussion to focus purely on the issue, and it removes emotional vitriol from the conversation. Potential impairment is both a quality of life issue and an economic issue. The economic difficulties as previously mentioned would be a consideration for the difference principle and the focus of a different debate. The quality of life argument can be addressed within the original position, and as Robert Bork explained, what is argued in the current public debate as compassion for the unborn quickly can deteriorate into a Nazi-like philosophy on who is worthy of life.[77] This illiberal idea could not be supported by a liberal society, so while the possibility of impairments at birth are always possible, they cannot be used as a reason to end life. We only need to look to the number of successful members within our society who have an impairment of some type for validation of this point. It could also be argued within the original position that continuing medical technology will eradicate or minimize these impairments; therefore, this destruction of life is also impractical. While both the economic and potential medical difficulties can be addressed by resource allocation within society, the criminal aspect of pregnancy is a more difficult problem.

When dealing with a criminal act, I have asserted all liberal societies attempt to punish the person who is responsible for the crime committed. To allow for abortion in response to a pregnancy brought on by rape is to punish the child for the actions of the father. If a man robbed a bank, the authorities would not punish the children of the bank robber. What makes this issue

such a hard case is that the woman must endure the pregnancy and then bear the responsibility for the child after its birth. Some might attempt to make the argument that the woman is being enslaved by the pregnancy and this is illiberal. The response to this challenge is Rawls' notion of the duty of civility. While the mother is placed in a difficult situation, it is the man who has committed the transgression, not the unborn child. Talk that the child would be unwanted or that the hardship of the economic burden that would be placed upon the woman can be addressed by society, yet these problems pale in comparison to the defense of life. Again, within the original position, an overlapping consensus can be obtained by eliminating comprehensive doctrines.

The discussion in the original position would focus on when it is acceptable to eliminate life. When seen in this light, it becomes difficult to explain how killing an unborn child is an acceptable response to a crime committed against the mother. There is no question that this crime poses the most difficult dilemma for those who wish to eliminate abortion. Yet as Rawls explained with his notion of the duty of civility, because the solution is not perfect, does not mean it is not a liberal solution. Rational people think of humans as persons, and persons have life; consequently, even while maintaining the veil of ignorance, it is not reasonable to assume using a modern conception of life that persons within the original position would choose to extinguish their own existence. The rationale on an individual basis is that people are risk-adverse and they could not accept a procedure that potentially could cause risk to themselves.[78] By allowing society to address the economic problems of pregnancy, applying the basics of the harm principle to the medical issues, then holding the criminal responsible for his crime, a reasonable balance of political values is met. Based upon this, in order for a liberal society to maintain its highest principles, life must be protected and as Rawls' theories have demonstrated, abortion can be eliminated as was slavery in America's liberal society.

Chapter 7

Conclusion

I have argued that within the American liberal tradition illiberalism exists. This does not condemn American thought, but rather exposes the limits of men. In liberal societies, liberal ideas can conflict. If we look at the history of free speech in America we see these conflicts and attempts at resolution.[1] I have argued that rights are not absolute and even in a liberal society some rights must be limited for the greater good of the community. What a democratic society must do is to determine what rights are most important for the continued improvement of society. This is not to be confused with the acceptance of illiberal behavior because illiberalism is the use of liberal institutions and language to justify self interest that would work against the liberal principles of the society. It has been my contention that abortion is illiberal because the focus is on the woman's self interest violating the liberal principle of defending life. A brief recounting of history shows that self interest has motivated attempts to control institutions through the corruption of political power. Robespierre and Cromwell may come to mind as examples of such a use of self interest.[2] Madison and the other founding fathers were aware of potential manipulation when they were creating the institutions of 1787. In Federalist Number 10 Madison makes his now famous observation that the "latent causes of factions are sown in the nature of men" and they are indeed dangerous to a democratic society as they promote self interest that works in opposition to the common good.[3] Having said this, by holding to our liberal tradition the illiberal institutions that have been created and will be created can be identified and subsequently eliminated. American liberalism consists of a pattern of liberal progression that is interrupted by illiberal interludes that must be eliminated in order for progress to continue. Applying a Rawlsian original position allows a type of enlightened self interest or public reason

to create an overlapping consensus that will correct for illiberal self interest in order to increase liberties.[4] The illiberal institution of slavery was such an interlude that was identified and eventually rejected by America even though a civil war was required as part of this process. In the same vein I have claimed that the institution of abortion is also an illiberal interference with liberal progress. Although abortion has been defended with liberal language, the application of Rawlsian theory allows us to see this institution for what it is; the slavery of the 21st century.

Abortion, like slavery is an attempt to constrict liberties under the guise of liberalism. As mentioned above, conflicting liberal ideas exist as with free speech; however, within these conflicts, the goal remains the expansion of liberties. Abortion mirrors slavery because the life of the fetus (like the slave) is at the mercy of another. They are subject to arbitrary decisions based on a plethora of emotional issues and economic concerns. The fetus (like the slave) never has a voice in the debate; therefore, the institution of abortion places the fetus in the same position as the slave, forever at the whim of others with no process to redress grievances and no opportunity for improvement. This permanent retardation of liberty is what places abortion outside of the liberal/illiberal dichotomy and locks the unborn into a feudalistic class of subservience; in her liberal history America has never accepted this type of thinking. Unlike the slavery of the 19th century it will not take a civil war to remove it from America. Instead, by applying the theory of distributive justice, abortion can be abolished using public reason and the application of an overlapping consensus thereby refocusing America on her liberal path.

I have further proposed that a series of similarities exist in both the debates over slavery and abortion. First, within these debates a property argument is made. The slave owner claimed their property in the slave and the woman makes a claim of the property of her body. However, this argument fails because while the slave owner may have had a contractual claim to the body

of the slave, the slave had a human rights claim to do as they wished with their body. This line of thinking is even more specious when applied to abortion because even though the woman has a just prior claim to her body, the child also has the same just prior claim and the institution of abortion requires the laying of hands on and manipulating the child's body; therefore, violating the basic rights of the child.[5] This property argument is further brought into question when it is realized that for a property right to petition for legitimacy it must be able to demonstrate some form of a breach of duty. A breach of duty is defined by Barron's dictionary of legal terms as, "failure to perform some contracted-for or agreed-upon act, or to comply with a legal duty owed to another or to society."[6] Following this line of thinking the law allows for action against someone who has a duty not to do what they are in fact doing or against one who is present where they are not to be. The unborn does not fit either legal example.

The pro-abortion argument is built upon the premise that the unborn has no right to "be there," so the fetus can be removed without consequence. Pro-abortion supporters have often compared this to the scenario of a burglar who breaks into a house.[7] The logic is that the burglar has no right to enter the home and still does not possess this right even if a window is left open thereby giving legal justification to their cause. What is overlooked is that both the fetus and the slave have not entered into any contract by choice nor was either given an option as to their personal circumstances. The flaw in the logic is that burglar has a strict duty *not* to enter the home and this is the breach that the law addresses. In the abortion struggle the unborn child is not in breach of any identifiable duty and has no strict duty, so again pro-abortionists are left with needing to discount the life of the unborn as insignificant. Consequently, this is why the need to classify this argument in terms of property becomes so important.[8]

This legal thinking can be applied in the hard case of rape and I analogize this to the situation of a southerner who inherits a slave, assuming this southerner did not want the slave. What has occurred is that the southerner has had a slave thrust upon them against their will and must now decide what to do with it. I suggest that no one would support the idea of killing the slave because the southerner did not want it or because the slave had no right to be there. Nor would the slave be killed to eliminate potential financial hardship for the southerner. Like the unborn, the slave is in a situation created by others. Instead, what would likely occur is that the southerner would find a way to transfer the slave to another master. Even if the slave refused to leave the southerner's employ, the southerner would expedite a transfer rather than kill the slave. So while inconvenient and possibly at some expense, using liberal legal thought, the life of the slave would be preserved rather than extinguished.

Both slavery and abortion have their roots in economic concerns; however, to support these illiberal institutions the denial of life is crucial and eventually becomes the lynchpin of their arguments. Within the slavery debate the slave owners would claim that their slaves had been purchased under American contract law and cost thousands of dollars. To emancipate African slaves would create an enormous hardship for the slave owner and his family. This argument was often coupled with the explanation that the South was a cotton economy and slave labor was an integral part of the success of the Southern economy.[9] Contemporarily, abortion supporters claim that families who already are suffering from financial burdens will be further harmed economically by adding an unwanted child to the household. They claim that the medical cost for both the child and the mother along with day to day expenses will prove too great and the family will suffer excessive economic burdens. Another pro-abortion economic tenet is, should the child be born with any type of impairment then the family will be obligated to

incur enormous medical costs for the needed specialized treatment.[10] The problem of course, is to place monetary concerns before the defense of life violates American liberal thought. Embedded within both the economic claims that supported slavery and the modern voices that support abortion is the allegation that the life of the fetus or the slave would be in jeopardy without these institutions and paradoxically the proponents of abortion defend a need to end life as a way to protect life.

The second similarity is the quality of life argument dovetails from the economic argument as both debates use the rationale that each institution was at one time a positive good or a necessary evil. When a society violates a basic good (such as life), to justify this behavior the focus becomes the consequences of the act and not the action itself. Rawls proposes that as a coherent society we must pursue what is right and just. To focus only on the consequences of an action is to neglect basic human good. Within a well ordered society agreements must be made between citizens that deal with what might be thought of as incompatible doctrines. In order to compensate for these differences Rawls proposes that through society's political conception of justice an overlapping consensus of reasonable comprehensive doctrines will be created.[11] Abortion is based on expected consequences as the results are not brought about by the abortion but rather by the action of others. This is why apologists for abortion speak about financial hardships created by the pregnancy or the social repercussions of an unwanted child. This then leads to claims of horrible deformities and potential life threatening situations. The underlying argument is that the unwanted babies must be exterminated to prevent them from a life of hardship much in the same way it was claimed that slaves were better served in bondage then subjected to the evils of the capitalist system. So now we must examine what is the reason for the act. If the intent of the action is to kill then we must expose this action as illiberal regardless

of the potential consequences. In this way the abortion debate is not about a right to life but instead it is about the right not to be intentionally killed.

While killing another is definitely illiberal many societies have defended policies such as the death penalty in liberal terms. My claim as it applies to capital punishment is that this debate emphasizes the political rather than the philosophical nature of how people view issues. Among supporters of the death penalty are significant numbers of people who view abortion as illiberal.[12] Juxtaposed to this is that many within the anti-death penalty contingent are the same people who support the woman's ability to seek an abortion.[13] Further illustrating the need to use liberal language, death penalty proponents argue that to kill a criminal will actually protect the liberties of a free society and that the convicted has relinquished their rights once they have transgressed upon another in society. Oddly, these are often the same people who argue that basic rights are unalienable and cannot be given or taken away when defending their abortion stance. In a like fashion, the logic of opponents of the death penalty claim that to kill another person is not the solution to the problem nor will it prevent similar transgressions in the future. The inconsistency of their argument is clear when their pro-abortion stance is examined to find that killing the unborn is exactly their solution to an unwanted pregnancy. What exposes these positions as political is the way they are presented to the public under the umbrella of political party platforms. Seldom will you find a politician who will challenge their party's political position on life issues to remain consistent in their philosophy.[14] The real issue of abortion is the intention of the act against the value of human life. To allow political motivation to be the driving force of society's stance on life issues would be to put the lives of everyone in danger because as a byproduct of this political thinking, life would have a fluctuating value based on the current political winds.

Third, and the fundamental reason illiberal institutions do occur, is that liberal language is used as a defense. The American devotion to liberalism as Hartz first argued and Ericson supported makes the use of liberal language a powerful tool and consequently the eradication of illiberal institutions is difficult. This is why within the slave debate the liberal defense of property was argued as being supreme to the liberal belief in liberty. Americans of this era understood the importance of property rights and had to come to understand liberty rights as they pertained to the Negro slave. George Fitzhugh was clear that the Negro was property and little more than a child even if the human element was taken into account. Both of these classifications made bondage the optimal choice. Even Abraham Lincoln made several public statements that the Negro was human but not of equal standing to white Americans.[15] Within the abortion debate the liberal defense of liberty is claimed to occupy a position of primacy over the liberal defense of life as Americans are well versed in the importance of liberty rights but the life of the fetus has yet to become thoroughly conceptualized. Lawrence Tribe serves as an example of this thinking when he argues that various types or levels of life exist. The unborn may subsist within an inferior level, so even if the unborn is life it is not worthy of respect because it has not attained the highest level of life. Consequently there is no standing for a moral or liberal argument against abortion. Similar illiberal thought was used historically to justify discrimination against slaves who were viewed as inferior.[16] Tribe's philosophy is similar to other pro-abortion thinkers who claim, the fetus is nothing more than a type of inferior or pre-life. Using this definition, the killing of the unborn is no different than killing a house plant.[17]

Robert Bork counters this thinking by illustrating that the moral worth of the unborn must be recognized in order for civil society to exist.[18] To deny the life of the unborn is to reject modern medical facts and the logic that accompanies liberal thinking. The explanation for the

existence of illiberalism is a paradox in America but explained by our liberal tradition. This liberal tradition is so ingrained within the minds of Americans that the language of liberalism can make abortion appear liberal. Just as Fitzhugh and other supporters of slavery were forced to use liberal language (whether they believed it or not) in order to be thought of as legitimate in the slave debate, supporters of abortion are forced to follow the same strategy. The crucial element within both debates is life. As with slavery, once the humanness of the unborn is accepted (even if not by everyone) the institution of abortion will perish.

The fourth similarity incorporates my fundamental explanation for the recognition of abortion as illiberal. It is the acknowledgment of the humanness of the fetus. When the denial of the humanness of the slave was no longer defensible, the property argument crumbled and American liberal society focused on the preservation of the life of the slave. Since life is of fundamental value, a similar process is happening within the abortion debate as the medical identification of the humanness of the unborn belies the liberty claim of the woman and Americans will realize basic human value must recognized by all. America is unique in that life is the primary liberal concern and a basic good of society that has been defended in the social contract.

What helps makes the liberal tradition possible is what many have termed "American Exceptionalism." This is the belief that America is somehow different from other cultures and this superiority can be traced back to Alexis de Tocqueville who described the special character of Americans and their institutions. "A democratic social state is common to all the nations of America. But only the Anglo-Americans maintain democratic institutions." Tocqueville then continues, "Nevertheless, democratic institutions prosper in the United States alone."[19] It was his belief that America was a uniquely free nation with its foundation built upon democratic

ideas and individual liberty. What has supported this understanding of American Exceptionalism are the basic institutions of America.[20] I have argued that Americans possess an innate attachment to the premise of exceptionalism and the liberal thought that promotes its existence. This is why there exists in America a reverence for our institutions. The institutions of America support the individual liberties that Americans accept as the bedrock of our exceptional society, with life resting at the apex of our understanding of liberty. After all, what is the value of democracy or freedom without life?[21] This core belief can be seen within the writings of the great liberal philosophers that our founding fathers read, studied, and cited when creating our nation. An examination of the work of Thomas Hobbes[22] and John Locke[23] exposes the depth and breadth of the understanding that the men of the founding era had of this liberal way of thinking.

When Hobbes wrote about his view of the laws of nature he was clear that life was the essential concept. "A Law of Nature, is a Precept or generall (sic) Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved."[24] Hobbes also denounced the idea that one should allow another to injure them. "Whatsoever is done to a man, conformable to his own Will signified to the doer, is no Injury to him."[25] Because of Hobbes belief that life was "short and brutish" he created a theory that an all powerful sovereign was necessary to protect life. Yet for Hobbes life was so important to the contract of society that not only was it to be protected, but it could not be given away because there was no way to be compensated for such an act. "And therefore there be some Rights, which no man can be understood by any words, or other signes, (sic) to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life;

because he cannot be understood to ayme (sic) thereby, at any Good to himselfe. (sic)[26] This was Jefferson's use of unalienable rights in the Declaration of Independence.

Locke espoused a similar reverence for life and like Hobbes he too believed that government authority was created to preserve it. In his treatise on civil government Locke claimed that a state of equality existed that prohibited any person from having dominion over another.[27] Further supporting Hobbes' belief in the unalienable right to life Locke said, "though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession,"[28] Everyone is familiar with Locke's statement that no one should harm another's life, liberty, or property, but Locke took his belief of life one step further. Not only was one obligated to do no harm to others and defend their own life, but persons have an obligation to society. "Every one, as he is bound to preserve himself, and not to quit his station wilfully, (sic) so, by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind."[29] What Locke is arguing is that members of society have an obligation to perpetuate that society. This is part of the rationale used by Madison and others to call for the Constitutional Convention of 1787 in order to defend the principles of the Revolution of 1776. In the Fifth Amendment Madison penned the words, "nor be deprived of life, liberty, or property, without due process of law."[30]

My argument has been that the unborn is life at the moment the fertilized egg is implanted in the uterine wall and therefore a person who should not be discriminated by factors that are irrelevant to basic human values. I have proposed that once the acceptance of this position is placed within the abortion debate then the institution of abortion can no longer be defended even with liberal language. It has also been one of the premises of my argument that

the recognition of the humanness of the slave was the tipping point in the slavery debate. The reason I have offered Rawls as a potential solution to this visceral fight is because his theory of distributive justice affords a type of social rubric by which to measure our actions. The application of the original position coupled with public reason is not a talisman that will forever eliminate illiberal institutions, but rather it allows Americans the ability to challenge institutions as illiberal in our never ending quest for a just liberal society. Being human places demands on us and forces us to ask, what is the content of our responsibility? In other words, what is morally required of society and what must we do?

In Chapter six I discussed Rawls' concept of the natural duty of individuals toward one another as with mutual aid and the duty of mutual respect, but there also exists a natural duty to support just institutions. Abortion cannot be classified as a just institution because it violates both principles of justice. It is the two principles of justice that allow citizens to determine if an institution is truly just or merely utilitarian in nature.[31] Within the theory of justice there exists imperfections; however, the lack of perfection is no reason to discard or ignore the potential for useful application. What I have shown is that from a philosophical perspective of "all things equal" the prima facia arguments for abortion appear reasonable and it is this intuitive nature of the argument that I have attempted to address. Using liberal language and thought, the abortion debate must be moved into the philosophical realm of "all things considered." This better demonstrates the complete evaluation of the debate beyond only intuition. What an "all things considered" analysis does is to open the debate to the logic of the original position. When this occurs the argument no longer is one of emotion and sympathy but instead is one of considered judgments. By assessing abortion in this fashion the difficulty with seemingly contrary lines of action become coherent.[32] This is the goal, to introduce coherence into the idea of justice and

when we do we can see that the institution of abortion is incoherent.[33] While this will not completely eliminate the moral dilemma, it will create an agreement in judgments (an overlapping consensus).

One difficulty some may have with my theory is the issue of priority as it applies to intuitionism. The notion of considered judgments is good, yet a superior way of thinking about these issues is by applying a lexical order to social goods or rights.[34] I understand that by making life the core component of my theory I have elevated it to a status of superiority above all other rights. While this is true and no lexical ordering of rights is without limitations I believe that this designation is both accurate and difficult to ignore. What the placement of life in a position of primacy does is to create a reasonable line of thinking that limits ethical judgments and replaces them with rational prudence.[35]

To date America has not fully accepted or has not completely acknowledged publically the life of the unborn. However progress is being made as more Americans realize that the unborn is life.[36] Here abortion supporters engage in a type of Wittgenstein word play challenging ideas such as, what is life, what does it mean to be human, and what really defines a person? These are the same arguments made in the 19th century and while it took time, the fallacies within these premises were understood to be illiberal and America rejected them with the election of Lincoln and contemporary America can do the same with abortion.

The political realities of the liberal tradition are that even though the majority may realize the illiberalism of previous acts, human flaws may motivate the minority to entrench themselves. In the 19th century the political scene was such that succession was possible and civil war probable. Today political choices have changed and I have offered Rawls as a substitute for civil

war and a solution to the abortion debate. What Rawls' theory does is to allow Americans to reorganize its original position and as I have shown, the illiberal institution of abortion can not only be understood, but renounced. A minority may always exist that clings to illiberal ideas; however, using Rawls America can again reconnect to her liberal tradition.

Working from the premise that people are reasonable and rational, America can exist without abortion. Legislation is possible to eliminate abortion once America experiences a change in her mind set and accepts what I have described as the conception of life. I do not claim that this change would be immediate or without criticism. Nonetheless, as the conception of life becomes more common then the realities of dealing with a pregnancy will be accepted as were free black citizens after the end of slavery. As part of America coming to grips with abortion no longer being acceptable, the availability of birth control must be possible. It is my claim that within my definition of life, birth control methods that are effective prior to implantation in the uterine wall are acceptable and in this way society can address those who are skeptical about having a child. The effectiveness of birth control will eliminate the major concern about accidental pregnancy. Society must provide services for those who do become pregnant and require financial assistance. Many such services currently exist and the need to alter or expand these services would be addressed by what Rawls explained as the difference principle.[37] By doing so eliminates the idea of pregnant women being punished for their economic inequality or being made to accept the repercussions of a bad decision.

With the exception of the crime of rape, pregnancy results from choice whether that is the conscious decision to have a child or the consensual act of intercourse. When this choice is combined with the conception of life then people will alter their personal behavior. Again, I do not argue this will be a simple transition, but I do argue that it is the correct liberal decision. In

today's society there still exists a minority of people who do not accept free blacks as equal; however, our liberal tradition has applied legislation to support equality because it is the correct liberal choice even if not unanimous. There will always be those who flout the law and if abortion was eliminated abortion would still occur. However, I contend that to eliminate abortion from America would not create an abnormal spike in the number of illegal abortions. Pre-1970s statistics are suspect, but they do imply that the number of illegal abortions would not be exceptional after enacting anti-abortion legislation. I make this claim because the number of legal abortions performed in states after Roe were significantly less than the assertions made by pro-abortion groups.[38] Once the acceptance of the conception of life permeates society, illegal abortions will be minimized because those who previously made abortions available would no longer view this as appropriate behavior. In this way the number of abortion providers also diminishes.

A reason that made pre-1970s America different was that birth control was not to the level of efficiency or availability that exists today. By applying Rawls original position and supporting these decisions with public reason the elimination of abortion in modern America is not making value judgments on who should engage in sexual intercourse, rather it gives society a consistent understanding of the process on when life begins and promotes defending the liberal principle of life.

NOTES

Chapter One

1)Hartz, Louis. The Liberal Tradition in America. New York: Harcourt Brace and Company, 1955.

2)Several scholars have offered up challenges to Hartz thesis because of the reoccurrence of seemingly illiberal institutions within American society. While these works offer an interesting counterpoint, they all miss the mark by claiming liberalism is less than pervasive in American thought. As I have pointed out, these men focus on perfectionism rather than the dominating force of liberalism. The following scholars all offer similar critiques of Hartz. Ellis, Richard. "Radical Lockeanism in American Political Culture" *The Western Political Quarterly*, Vol. 45, No. 4 (Dec 1992). Smith, Rogers. "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America" *The American Political Science Review*, Vol. 87, Issue 3 (Sep., 1993). Kloppenberg, James. "In Retrospect: Louis Hartz's Liberal Tradition in America" *Reviews in American History*, Vol. 29, No. 3 (Sept. 2001).

3)Tocqueville, Alexis de. Democracy in America. Edited by J. P. Mayer. New York: Harper and Row, 1969. In chapter 4 on political associations Tocqueville writes about America's expectation of freedom that is part of her uniqueness.

4)Tocqueville, Alexis de. Democracy in America. pp. 504.

5)Ericson, David F. The Shaping of American Liberalism: The Debates over Ratification, Nullification and Slavery. Chicago: University of Chicago Press, 1993. pp. 2-21. 6) Smith, Rogers. "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America" *The American Political Science Review*, Vol. 87, Issue 3 (Sep., 1993).

7)Hartz, Louis. The Liberal Tradition in America. pp. 114-128.

8)Hartz, Louis. The Liberal Tradition in America. pp. 172-177.

9)Thomas Jefferson letter to John Holmes, www.loc.gov/exhibits/jefferson/159html

10)Cunningham, Jr., Noble E., In Pursuit of Reason: The Life of Thomas Jefferson, Louisiana University Press, Baton Rouge, Louisiana. 1987. Cunningham explains in detail using personal correspondence and the writings of Jefferson to illustrate his belief that Negros were not equal to the white race. Zarefsky, David. Lincoln, Douglas and Slavery: In the Crucible of Public Debate. Chicago: University of Chicago Press, 1990. Zarefsky uses the speeches made by Lincoln during his debates with Stephen Douglas in 1858 to show how Lincoln publically defended his position that black and white Americans were not equal.

11)Morris, Thomas. Southern Slavery and the Law 1619-1860. Chapel Hill: The University of North Carolina Press.

12)Tushnet, Mark V. The American Law of Slavery 1810-1860: Considerations of Humanity and Interest.

13)The website The Liberator Files offers excerpts from local newspapers of the day. http://www.theliberatorfiles.com/response-to-dred-scott-decision/

14)Lisa Cozzens describes the effects of the Dred Scott decision on political behavior and personal attitudes immediately after the Court handed down its opinion. http://www.let.rug.nl/usa/E/dred_scott/scott04.htm

15)Lincoln gave this speech to a crowd in Springfield Illinois on June 26, 1857. He attempted to both honor the authority of the Court and offer hope that the decision was not the final word on the slave issue. http://www.freemaninstitute.com/lincoln.htm

16)Douglas offered a different concept when he implied in this speech that the economic interests of slave owners and the political behavior of territorial citizens would work to minimize the negative impact of Dred Scott. http://elections.harpweek.com/1860/bio-1860-Full.asp?UniqueID=6&Year=1860

17)Ericson, David F., The Debate over Slavery: Antislavery and Proslavery Liberalism in Antebellum America. Chicago: University of Chicago Press, 1993.

18)Hartz, Louis. The Liberal Tradition in America. pp. 5-14.

19)Milton, George Fort. Douglas' Place in American History *Journal of the Illinois State Historical Society,* Vol. 26, No. 4 (Jan. 1934). Milton discusses the dilemma that engulfed Douglas during the fierce slavery debate in Kansas.

20)Eyal, Yonatan. With His Eyes Open: Stephen A. Douglas and the Kansas-Nebraska Disaster of 1854 *Journal of the Illinois State Historical Society*, Vol. 91, No. 4 (Winter 1988). Eyal explains how Douglas was unable to articulate his motives as to why he helped craft the Kansas-Nebraska Act. Eyal demonstrates from the moment of its passage Douglas was forever on the defensive and never could regain his political luster.

21)Zarefsky, David. Lincoln, Douglas and Slavery: In the Crucible of Public Debate. Chicago: University of Chicago Press, 1990. pp. 124.

22)Haggard, Dixie Ray. African Americans in the Nineteenth Century: People and Perspectives. Santa Barbara: ABC-CLIO, 2010. In chapter 2 "Free Blacks in Antebellum America" Haggard explains how the attitudes towards blacks were beginning to evolve. She does not argue that racism was eliminated, rather she suggests that even though white America was not ready to accept blacks as equals, a shift was occurring that no longer allowed blacks to be dismissed as inferior beings not worthy of some type of respect.

23)Horan, Dennis J., Edward R. Grant, Paige C. Cunningham. Abortion and the Constitution: Reversing Roe v Wade through the Courts. Georgetown University Press, Washington D. C. 1987 and Blackstone, William. Commentaries on the Laws of England. Book I, Childs and Peterson, Philadelphia. 1859. p 129-130.

24)Young, Brian. *A Brief Survey of US Abortion Law Before the 1973 Decision.* http://www.ewtn.com/library/PROLIFE/LIFBFROE.TXT

25)Commonwealth v**.** Bangs, 9 Mass. 387, 388 (1812)

26)The Finkbine case was the first abortion case to receive national media attention and it can be argued that it was the coverage of this tragic case and Mrs. Finkbine's medical difficulties that helped sway public opinion in support of abortion. It was also during these years that population control issues were on the rise as witnessed by the creation of groups like Planned Parenthood.

27)Frederick Douglass was a staunch supporter of women's rights as he too agreed that women were being placed in a subservient role in America. However, in his efforts to elevate the Negro to equal status in America he was willing to allow women's concerns to be delayed because he believed that that the violence and prejudice against the Negro made this a more pressing issue. Another factor for Douglass was he did not think enough political capital existed to attack both illiberal positions. Two sources that discuss with Douglass' efforts to deal with illiberalism are, Waldo E. Martin, The Mind of Frederick Douglass, University of North Carolina Press, Raleigh, North Carolina, 1985 and Philip S. Foner, Frederick Douglass on Women's Rights, Da Capo Press, Cambridge, Massachusetts, 1976. Elizabeth Cady Stanton's work on behalf of women is well known and her public disagreement with Douglass over his willingness to postpone women's suffrage until after Negro voting rights had been secured may offer a different glimpse into the paradox of liberalism. The passion and efforts of Stanton to correct illiberalism as it applied to women can be seen in her personal writings. Elizabeth Cady Stanton: As Revealed in her Letters, Diary and Reminiscences. Edited by Theodore Stanton and Harriet Stanton Blatch, Harper and Brothers, New York, New York, 1922.

28)An excellent historical account of this type of illiberalism as applied to women can be found in Hendrik Hartog, *Man and Wife in America: A History,* Harvard University Press, Cambridge, Massachusetts, 2000.

29)Gouldner, Alvin Ward. The Future of the Intellectual and the Rise of the New Class. The Seabury Press, New York, New York. 1979.

30)Garrow, David T. Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade. University of California Press, Berkley, California. 1994.

31)Risen, James and Judy L. Thomas. Wrath of Angels: The American Abortion Wars. Basic Books, New York, New York. 1998.

32)Dellapenna, Dispelling the Myths of Abortion History. Carolina Academic Press, Durham, North Carolina. 2006.

33)The population of the United States was 31.5 million (U.S. Census 1860) and of this number only 9 million people were located in the South. To further the disparity was the fact that of the 9 million southern residents, 3.5 million were slaves. Leon F. Witlack proposes that there was a growing attitude in support of the abolitionist movement in America and these growing numbers were applying pressure to the social thinking of 1860. Witlack, Leon F. *"*The Abolitionist Dilemma: The Antislavery Movement and the Northern Negro*"* The New England Quarterly. Vol. 34, No. 1 (Mar. 1961).

34)State v. Merrill, 450 NW 2d 318 (Minn. 1990)

35)Commonwealth v. Welch, Ky., 864 SW. 2nd 280 (1993)

36)Commonwealth v**.** Bullock**,** 868. A.2d 516, 521 (Pa. Super. 2005**)**

37)The works of Bork that were reviewed were; The Tempting of America, Slouching Towards Gomorrah, and Coercing Virtue.

38)The works of Tribe that were reviewed were; Abortion: The Clash of Absolutes, American Constitutional Law 2nd Edition, and Constitutional Choices.

39)Burch, Philip H. Research in Political Economy: Reagan, Bush, and Right-Wing Politics, Supplement 1 Part B (Greenwich, Ct. : JAI Press), 1997 pp. 16-19.

40)Ava Maria School of Law, "*Faculty Profiles: Judge Robert H. Bork,"* http://www.avemarialaw.edu/index.cfm?event=faculty.profiles.

41)Gregory, Vanessa Indefensible, *The American Prospect* 12-06-2010.

42)Johnson, Carrie "Prominent Harvard law professor joins Justice Department." *The Washington Post* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/25/AR2010022505697.html.

43)Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)

44)Bellotti v**.** Baird**,** 443 U.S. 622 (1979)

45)Dandridge v. Williams, 397 U.S. 471 (1970)

46)H. L. v**.** Matheson, 450 U.S. 398 (1981)

47)Thornburgh v**.** American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)

48)Webster v**.** Reproductive Health Services, 492 U.S. 490 (1989)

49)Stenberg v. Carhart, 530 U.S. 914 (2000)

50)Gonzalez v. Carhart, 550 U.S. 124 (2007)

51)Rawls, John. A Theory of Justice, The Belknap Press of Harvard University Press, Cambridge, Massachusetts. 1971 On pages 83 to 87 Rawls lays out his concept of perfect procedure justice and points out the supremacy of the process. He also points out that this perfect system is unattainable.

52)Rawls, John. A Theory of Justice. In the section entitled, Fair Equality of Opportunity and Pure Procedural Justice, Rawls explains imperfect procedural justice and concludes that since pure procedural justice is not possible, citizens will apply an imperfect procedural justice with the understanding that inequalities may occur but that the system still creates legitimate law. pp. 85-88

53)Rawls, John. A Theory of Justice. Rawls continues in chapter four (Equal Liberty) with the idea that in an institutional setting, people will accept imperfect law provided they know the rules of the game and they perceive these rules to be fair.

54)Rawls, John. A Theory of Justice. By adhering to the two principles of justice (First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty of others. Second: social and economic inequalities are to be arranged so that they are both a)reasonably expected to be to everyone's advantage, and b)attached to positions and offices open to all. pp. 60) Rawls presents his belief that these conceptions of procedural justice can be accomplished if applied through the creation of an original position coupled with the veil of ignorance. pp. 198-199

55)Rawls, John. A Theory of Justice. For Rawls the best case scenario in daily life is the application of quasi-pure procedural justice. While not a perfect form of procedural justice it allows citizens to create a range of justice that will adhere to the two principles of justice and in this way bypassing the problem of indeterminacy and replacing it with reasonable and rational law. pp. 195-201.

Chapter Two

1)The difficulty with political obligation and liberalism is explored by Phillip Abbott (1976). The Shotgun Behind the Door. Athens: The University of Georgia Press as he explains the dilemma of liberal theorists who over centuries have tried to reconcile personal autonomy with the need for societal discipline. It is Abbott's contention that liberal theorists have "justified government by the only appeal available to him, prudence." This leads the liberal to try and justify the paradox of having personal freedom and a moral obligation to obey. However, it is an inability to trust governmental authority that undermines any moral imperative that one may hope exists and therefore the notion of political obligation vanishes if founded upon this principle.

2)The historical usefulness of Hartz's theory is defended by David F. Ericson (2000). The Debate over Slavery; Antislavery and Proslavery Liberalism in Antebellum America. New York: New York University Press he proposes Hartz is not an exclusive theory on the political thought of Americans, but rather it is the theory that affords us the clearest explanation about American political thought. Using a definition of liberal that asserts the virtues of personal freedoms Ericson claims that the single tradition approach (although not without faults) is the best at integrating intrapersonal and interpersonal decisions made by people of the antebellum era. Ericson challenges the multiple traditions theorists to give more that just bits and pieces of obscure historical thought and to explain why political actors made the choices they did. For Ericson, it is the single tradition of Hartz that while limited in methodology, still offers the historian the most coherent picture of American political thought.

3)In this situation Americans turned to legal positivism in hopes of solving this conflict. Within the constraints of legal positivism the moral aspect of the law can be excluded and law can be justified as man made constructions that may be imperfect while at the same time serving a societal purpose.

4)Samuel Johnson, quoted in Donald L. Robinson (1971). Slavery in the Age of Revolution, 1765-1820, (New York; Harcourt, Brace, Jovanovich. pp 80.

5) David L. Robinson in his work "Slavery in the Structure of American Politics; 1765-1820, (New York; Harcourt, Brace, Jovanovich, 1971), claims that slavery was not irreconcilable because of a shared liberal thought that was in conflict, but rather it was racist beliefs that were unwilling to see Negroes as equal. There also existed a refusal to admit Negroes as such into the community as well as the growing need for chattel slavery to support an expanding cotton industry. Robinson breaks the American history of slavery into three major time frames. He begins with the founding era to demonstrate the paradox of a nation founded on the proposition that "all men are created equal" which continued to allow slavery. He then focuses on the constitutional convention to point out that in little over a decade America had shifted from a nation that trumpeted equality, to a nation that codified slavery into its main document. Finally Robinson examines the era leading up to the Missouri Compromise. It is here that the nation must openly admit to the moral evil of slavery, yet it continues to negotiate temporary racist solutions rather than solve this dilemma because of economic growth. Robinson's thesis is that America at the founding was influenced by racial discrimination and economic progress in the cotton industry that allowed all regions, north and south to be committed to this belief of racial superiority.

6)Kaminski, John P. (1995). A Necessary Evil? Slavery and the Debate Over the Constitution Wisconsin: Madison House Publishers. pp 197

7)Graber, Mark. (2006). Dred Scott and the Problem of Constitutional Evil. New York: Cambridge University Press. pp 3-6

8)Urofsky, Melvin I. (1988). A March of Liberty: A Constitutional History of the United States. New York: Alfred A. Knopf. pp 26

9)Urofsky, Melvin I. A March of Liberty. pp 341

10)A Marxist analysis of this era argues that the Southern land owners were creating a neo-latifundia type society with the goal of separating the labor of the worker from the land. Mark Tushnet (1981). The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest Princeton: Princeton University Press. Tushnet claims that substantive economic and social rights were withheld from the slave and this discrimination rendered any attempt at procedural or legal safeguards meaningless.

11)Hall, Kermit. (2005). American Legal History: Cases and Materials. New York: Oxford University Press. p 55. The impact of Bacon's rebellion on racializing slavery became more apparent as both Bacon himself and Virginia law isolated Indians as an inferior group. Then once statutes eliminated the possibility of baptism elevating either Indians or Negroes to moral equivalency the development of slavery would now be squarely on a racial foundation. Edmund S. Morgan (1975). American Slavery, American freedom: The Ordeal of Colonial Virginia New York: W.W. Norton & Company, Inc. pp 328-329.

12)Kaminski, John P. A Necessary Evil. p 243 Kaminski documents what several other historians have argued, that Washington, Jefferson, and Madison all publically denounced or at least spoke against the institution of slavery, yet all three of these men held slaves. This public face contrasts with their private life as all three held slaves and only Washington emancipated his property upon his death. This goes to support the contention that while many people felt slavery was a moral wrong they did not view negroes as equal citizens.

13) Morris, Thomas D. (1996). Southern Slavery and the Law 1619-1860. Chapel Hill: The University of North Carolina Press. pp 17

14)Zarefsky, David. (1990). Lincoln Douglas and Slavery: In the Crucible of Public Debate. Chicago: The University of Chicago Press. pp 183

15)Morris, Thomas D. Southern Slavery and the Law. pp 19. Virtually every scholar that has penned an investigation of slavery has wrestled with this dichotomy and to date no one has been able to offer a satisfactory explanation of how people were able to separate these two inseparable traits. This is why the designation of human property becomes important for southern law and southern liberal thought.

16)Morris, Thomas D. Southern Slavery and the Law. pp 42

17)Morris, Thomas D. Southern Slavery and the Law. pp 42

18)Morris, Thomas D. Southern Slavery and the Law. pp 42. What was taking place was the combination of English common law with historical references to Roman civil law. The law makers were using any and all historical support to explain the liberal logic of slavery. Here it is necessary to keep in mind that it was the obligation to explain such actions in the language of liberalism that was important. If the men who crafted these laws were actually liberal thinkers is irrelevant because they understood that all explanations must be couched in liberal terms to square with the thinking of the populous.

19)Finkelman, Paul. Slavery & the Law. pp 395

20)Morris, Thomas D. Southern Slavery and the Law. pp 64

21)Tushnet, Mark V. The American Law of Slavery 1810-1860: Considerations of Humanity and Interest. pp 166-167.

22)Morris, Thomas D. Southern Slavery and the Law. pp 73

23)Morris, Thomas D. Southern Slavery and the Law. pp 79

24)Girard et al. v. City of New Orleans et al., 2 La. Ann. 901 (1847)

25)Morris, Thomas D. Southern Slavery and the Law. p 80. Because the antislavery supporters had the moral high ground in this debate this is where the notion of some type of human property definition becomes helpful. If slave owners were able to eliminate the moral aspects of slavery from the discussion then their argument is on more solid liberal ground.

26)Morris, Thomas D. Southern Slavery and the Law. pp 99

27) Tushnet, Mark V. The American Law of Slavery 1810-1860: Considerations of Humanity and Interest. pp 196-198.

28)Morris, Thomas D. Southern Slavery and the Law. pp 101

29)Morris, Thomas D. Southern Slavery and the Law. pp 102

30)Morris, Thomas D. Southern Slavery and the Law. pp 121-130

31)This inconsistent interpretation of law as it applied to slaves is well documented by Paul Finkelman (1986) The Law of Freedom and Bondage: A Casebook, New York: Oceana Publications, Inc. Another source on the difficulty in assessing slave laws is Thomas D. Morris, Southern Slavery and the Law. pp 158

32)Timrod v. Shoolbred, 1 Bay 324 (S. C. 1793)

33)Caldwell v. Wallace, 4 Stewart and Potter 282 (Ala. 1833)

34)Morris, Thomas D. Southern Slavery and the Law. pp 120

35)Morris, Thomas D. Southern Slavery and the Law. pp 172-174

36)The rules of evidence varied from state to state and often from county to county, consequently it was not enough to understand if the case was to be civil or criminal, one had to also be aware of substantive and procedural rules that shifted with the legal interpretations of the judges. Paul Finkelman explains this in detail in Slavery & The Law (Madison: Madison House Publishers, Inc. 1997) in the part III Criminal and Civil Law of Slavery.

37)Morris, Thomas D. Southern Slavery and the Law. pp 162

38)Hening, William Waller, Hening's Statutes at Large. http://vagenweb.org/hening/ Vol. 4 pp. 132-133. This is a comprehensive site that catalogs and documents the creation of the statutes of Virginia beginning in 1619.

39)Morris, Thomas D. Southern Slavery and the Law. pp 169

40)Morris, Thomas D. Southern Slavery and the Law. pp 172

41)Morris, Thomas D. Southern Slavery and the Law. pp 182

42)Morris, Thomas D. Southern Slavery and the Law. pp 268

43)Morris, Thomas D. Southern Slavery and the Law. pp 439

44) Goodell, William. The American Slave Code in Theory and Practice: Its Distinctive Features Shown by Its Statutes, Judicial Decisions, and Illustrative Facts. New York: American and Foreign Anti-Slavery Society, 1853. pp. 289-290.

45)Morris, Thomas D. Southern Slavery and the Law. pp 437

46) Morris, Thomas D. Southern Slavery and the Law. pp 425

47)Hall, Kermit. American Legal History. pp 218

48)State v. Boon, N.C. 106-108 (1801)

49)Morris, Thomas D. Southern Slavery and the Law. pp 179

50)Morris, Thomas D. Southern Slavery and the Law. pp 185

51)State v. Mann, 13 N. C. 263 (N. C. 1829)

52)State v. Hoover, 20 N. C. 500 (1839)

53)Souther v. Commonwealth, 7 Gratten 673 (1851)

54)Wright v. Weatherly, 7 Yerg. 367 (Tenn. 1835)

55)Maille v. Blas, 15 La. Ann. 100 (1860)

56)Commonwealth v. Richard Turner, 5 Rand. 686-90 (Va. 1827)

57)Mitchell v. Wells, 35 Miss. 235 (1859). This case is discussed by Kermit Hall in his work American Legal History. pp. 226-227

58)Maria v. Surbaugh, 2 Rand., 229 (Va. 1824)

59)Dunlap v. Crawford, 2 McCord Eq., 171 (S. C. 1827)

60)Girard et al. v. City of New Orleans et al., 2 La. Ann. 901 (1847)

61)Morris, Thomas D. Southern Slavery and the Law. pp 73

62)Tennent v. Dendy, 16 Dudley 85 (S.C. 1837)

63)Morris, Thomas D. Southern Slavery and the Law. pp 79

64)Morris, Thomas D. Southern Slavery and the Law. pp 109

65)Giles v. Mallicotte (1738), as cited in Virginia Colonial Decisions Vol. II, the reports by Sir John Randolph and Edward Barradall of the decisions of The General court of Virginia 1728-1741. Edited by R. T. Barton, The Boston Book Company, Boston, Massachusetts. 1909.

66)Morris, Thomas D. Southern Slavery and the Law. pp 442

67)Graber, Mark. Dred Scott and the Problem of Constitutional Evil. pp 1

68)Graber, Mark. Dred Scott and the Problem of Constitutional Evil. pp 6-7 It is Graber's contention that liberalism was not being sacrificed for the greater good. Instead he is arguing that the complexity of American liberalism was too much to be dealt with during this critical summer. Anti-slave advocates could still accept the existence of slavery as permissible in a liberal society and sectional limitations would allow a dual liberalism to exist.

69)Graber, Mark. Dred Scott and the Problem of Constitutional Evil. pp 9

70)Graber, Mark Dred Scott and the Problem of Constitutional Evil. pp 128

71)Federalist Papers, Garry Wills edited. Bantam Books, New York, New York 1982.

72)Hall, Kermit. American Legal History. pp 230-233.

73)Dred Scott v. Sandford, 60 U. S. 393 (1857) at 451.

74)Dred Scott v. Sandford, 60 U. S. 393 (1857) at 452.

75)Graber, Mark. Dred Scott and the Problem of Constitutional Evil. pp 171

76)Kaminski, John P. A Necessary Evil. pp 65

77)Graber, Mark. Dred Scott and the Problem of Constitutional Evil. pp 171

Chapter Three

1) Ericson, David F. (2000). The Debate over Slavery: Antislavery and Proslavery Liberalism in Antebellum America. New York: New York University Press. pp. 35-36

2) Hartz, Louis. (!955). The Liberal Tradition in America. New York: Harcourt Brace and Company. pp. 54-60

3) Ericson, David F. (1993). The Shaping of American Liberalism: The Debates over Ratification, Nullification and Slavery. Chicago: University of Chicago Press. pp. 2-21

4) Ericson, David F. The Debate over: Slavery, pp. 23-28. What Ericson explains in this work is that the major arguments both for and against slavery were based on the premises of liberal thought and he claims that both sides of the debate were forced to explain their positions from this understanding. Ericson then goes on to develop the idea that while most public opinion eschewed slavery, racism was a significant factor when searching for a solution to this issue. Many people feared the worst if thousands of uncivilized Negroes were to be released into American society. Still others did not embrace the total equality promoted by the abolitionists.

5) Smith, Rogers. "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America" *The American Political Science Review,* Vol. 87, Issue 3 (Sep., 1993), pp. 549-566. In this article Smith challenges Hartz thesis of liberal hegemony as being too narrow. Smith argues that inegalitarian ideologies exist in America that promotes institutions of ascriptive hierarchies. Smith claims that what really exists in America is a multiple political traditions and he uses the civil rights movement, the failure of reconstruction, and women's suffrage as evidence of these multiple traditions.

6) Hartz, Louis. The Liberal Tradition in America. pp. 5-6

7) Hartz, Louis. The Liberal Tradition in America. pp. 172-177. In this section titled "Oblivion and Defeat" Hartz summarizes his chapter of the reactionary enlightenment and its conclusion.

8) David F. Ericson, The Shaping of American Liberalism*;* pp. 10-26.

9) Hartz, Louis. The Liberal Tradition in America. pp. 114-128. In his chapter (The American Democrat: Hercules and Hamlet) Hartz illuminates his idea of the American Democrat who is this strange mix of aristocrat, laborer, and farmer. Then on pages 203-211 he explains the charm and terror associated with Whiggery. While Hartz does not directly address the issue of reoccurring illiberal movements, he explains here that these attempts at illiberalism do experience some success but they are always conquered by America's liberal ethos. Powerful personalities may be able to galvanize groups for a time or the American public may experience a temporary setback in their liberal beliefs; nonetheless, liberal ideas have always reassumed their place of prominence as Americans live out their neurotic fear of the majority.

10)Hartz, Louis. The Liberal Tradition in America. pp.145-158. Here Hartz explains the inconsistencies of the "reactionary enlightenment" Southerners such as Fitzhugh were promoting with there confused conservative thought. He summarily dismisses this movement by arguing that this movement was contradictory at best and failed to impress anyone.

11) Wikipedia, "Election results of 1860", <//en.wikipedia.org/wiki/United_States_presidential_election,_1860>. I included this cite to demonstrate that the 1860 election may not have been a total renunciation of all that Douglas espoused. The vote total from the states north of the Mason-Dixon Line were 1million 928 thousand for Lincoln and 1 million 213 thousand for Douglas a solid victory, however; if the states of Pennsylvania and Massachusetts are removed from the total then the election is much closer. The final vote count without these two states is Lincoln 1 million 553 thousand and Douglas 1 million 162 thousand. Without doing a statistical analysis it appears that Lincoln won a solid victory but a total rebuke of Douglas may be to strong a term.

12) Hartz, Louis. The Liberal Tradition in America. pp. 89-90

13) Graber, Mark A. (2006). Dred Scott and the Problem of Constitutional Evil New York: Cambridge University Press. pp. 226-236. Graber offers his thesis that the constitution could no longer effectively cope with the institution of slavery because the nation had changed in ways the framers could never have imagined. Maybe more importantly the people assigned to the halls of Congress no longer looked for compromise and constitutional peace, instead they preferred to fight to the death in the name of justice. According to Graber, democratic societies must be willing to accept policies they regard as violating basic human rights and sacrificing important interests in the short term, in order to achieve a lasting settlement over the long term.

14) Graber, Mark A. Dred Scott and the Problem of Constitutional Evil pp. 219-220. Graber furthers his thesis that slavery was an evil that the framers saw no hope of eliminating in 1787. Their solution was to create a consensus democracy based upon sectional vetoes or a pact with constitutional evil in hopes of allowing a natural solution to come to fruition at a later date. The evil existed, but it must be allowed to exist if the perceived benefits outweigh the evil itself.

15) Graber, Mark A. Dred Scott and the Problem of Constitutional Evil pp. 186-198.

16) Ericson, David F. The Debate Over Slavery, pp. 107-108

17) Fitzhugh, George. (1960). Ante-bellum; Cannibals All ed. Harvey Wish, New York: Capricorn Books. pp. 140

18) Fitzhugh, George. Cannibals All, pp. 143-144

19) Fitzhugh, George. Cannibals All, pp. 113-114

20) Fitzhugh, George. Cannibals All, pp. 11

21) Ericson, David F. The Debate over Slavery, pp. 113-114

22) Lowenberg, Robert J. "John Locke and the Antebellum Defense of Slavery," *Political Theory* Vol. 13, No. 2 (May 1985), pp.280.

23) Federalist Papers, Clinton Rossiter edited. Federalist No. 10, pp. 77-84

24) Leavelle, Arnaud B. and Thomas I. Cook, "George Fitzhugh and the Theory of American Conservatism," *The Journal of Politics* Vol. 7, No. 2 (May 1945), pp.150.

25) Federalist papers, Clinton Rossiter edited.

26) Fitzhugh, George. Cannibals All, pp. 153

27) Lowenberg, Robert J. John Locke and the Antebellum Defense of Slavery pp. 272

28) Hartz, Louis. The Liberal Tradition in America. pp. 187

29) Leavelle, Arnaud B. and Thomas I. Cook, "George Fitzhugh and the Theory of American Conservatism," pp. 149

30) Fitzhugh, George. Cannibals All, pp. 151. In this chapter Fitzhugh goes into detail on his belief in the need of force, in order for a society to naturally flourish. It is his opinion that

consent is a fiction and that the society must have people in positions of leadership that may use force as necessary in the best interest of society (common good). In this chapter he attempts to explain why slavery will always be necessary and in reality, slavery has always been needed in all societies. The civilizations that have ignored this precept throughout history, Fitzhugh says have collapsed into anarchy.

31) Lowenberg, Robert J. John Locke and the Antebellum Defense of Slavery pp. 273

32) Fitzhugh, George. (1960). Ante-bellum; Sociology for the South ed. Harvey Wish, New York: Capricorn Books. pp. 63-67. In this essay Fitzhugh discounts free labor as a workable solution in a market economy and explains how socialism is the only adequate solution to the inequalities which exist. He attempts to show that slavery is a form of socialism and abolitionists in the North are attempting to apply socialist (protective) reforms thereby validating his concept.

33) Lowenberg, Robert J. John Locke and the Antebellum Defense of Slavery pp. 271

34) Hartz, Louis. The Liberal Tradition in America pp. 244-248. In the chapter entitled; Progressive and Socialists, Hartz lays out the history of America and socialism. He explains that Socialists and Progressives suffered the same fate as the Southern "feudalists" because they could not grasp the entire picture of America. As long as financial success was held up as the American ideal, then there would be no way to apply principles that would undermine this, regardless of any altruistic desires. Americans were driven by the notion that they could be the next Carnegie and to tell them that they couldn't was "un-American."

35) Zarefsky, David. (1990). Lincoln, Douglas and Slavery: In the Crucible of Public Debate, Chicago: University of Chicago Press. pp. 170-171.

36) Zarefsky, David. Lincoln, Douglas and Slavery: In the Crucible of Public Debate pp. 144

37) Graber, Mark A. Dred Scott and the Problem of Constitutional Evil pp. 186-191. Graber here explains how majoritarianism became the norm in American politics by the 1850's and this worked to breakdown the system of bi-sectional compromise that the Framers had created. He claims that consensus democracy was replaced by majoritarian democracy that no longer looked to achieve constitutional peace. It is interesting that Douglas also seemed to understand this political dilemma.

38) It is here where Rawls' theories would be useful because instead of just settling for compromise or the temporary solution of the sectional veto, the application of discussion during the original position would have allowed for a permanent decision.

39) Ericson, David F. The Shaping of American Liberalism, pp. 126-127

40) Ericson, David F. The Shaping of American Liberalism, pp. 122-123

41) Zarefsky, David. Lincoln, Douglas and Slavery: In the Crucible of Public Debate pp. 164

42) McPherson, James. (1988). Battle Cry of Freedom: The Civil War Era, New York: Ballantine Books. pp. 167-168.

43) McPherson, James. Battle Cry of Freedom: The Civil War Era pp. 219-231. McPherson discusses the collapse of the Democrat party in the South over Douglas' position on Lecompton and the Republican's very astute assessment on how to achieve electoral victory in 1860. He outlines the unyielding position of the Deep South and how the Republicans courted the abolitionists of the Upper North and then played politics with the lower tier of Northern states to carry enough Electoral College votes. McPherson also implies that Douglas knew a Lincoln victory would bring crisis, so once Douglas believes Lincoln will win, he jeopardizes his health (to campaign in the South against secession) in an effort to keep the nation united.

44) Abraham Lincoln, *Letter to the Illinois General Assembly*, March 3, 1837. <www.nps.gov/archive/litho/slavery/a102.htm>

45) Abraham Lincoln, *A House Divided,* June 16, 1858. <www.abrahamlincoln200.org/uploadedFiles/Lincolns_Life/Words_and_Speeches/a-house-divided.pdf >

46) Ericson, David F. The Shaping of American Liberalism, pp. 160

47) Zarefsky, David. Lincoln, Douglas and Slavery: In the Crucible of Public Debate pp. 152-154. Zarefsky shows how Lincoln used the phrase "all men are created equal" to demonstrate that the framers understood slavery would disappear from the American landscape. Lincoln then takes this phrase to make the plea that this has set into motion a process whereby over time all persons (to include blacks) would be afforded the rights outlined in the Constitution. Further in this chapter Zarefsky (pp. 175-176) elaborates on Lincoln's ability to turn the slave argument into a moral argument and then reach back to the Declaration of Independence to gain credibility from the Founding Fathers. This allowed Lincoln to argue from a position of moral superiority and kept Douglas on the defensive. It also gave Lincoln an opportunity to side step the issue of equality by claiming that this was a proposition and not an immediate fact.

48) Zarefsky, David. Lincoln, Douglas and Slavery: In the Crucible of Public Debate pp. 183. David F. Ericson, The Shaping of American Liberalism, also covers this important "Sweat of the Brow Argument". pp. 152-153.

49) Locke, John. *2nd Treatise on Civil Government*, <//www.constitution.org/jl/2ndtrog.htm> In the second chapter of Locke's work entitled "The State of Nature" he speaks of the differences in people, the role of society while interacting with different people and the rights people possess. Locke claimed that equal rights were to be preserved for people of equal faculties. This statement opens the door to a school of thought that might attempt to limit the rights of some in society (citizens with special needs etc.) because they have been deemed to possess unequal faculties.

50) Zarefsky, David. Lincoln, Douglas and Slavery: In the Crucible of Public Debate pp. 184-185. Both Lincoln and Douglas knew public opinion would have to be with you or any political argument was lost. Douglas believed that public opinion was a gauge that directed the politician to act on behalf of the people. The politician was not to attempt to change or sway the public opinion, he was merely to be guided by it. Conversely, Lincoln felt that it was the duty of the politician to manage public opinion, especially if the public opinion supported an immoral cause. In Lincoln's view slavery fell into this category; therefore, the public must be aware that slavery

was a moral wrong. Since no one has the right to do wrong, the public must be made to see this and change their behavior. This was Lincoln's job as a politician. David Ericson also spends time explaining Lincoln's awareness of the need to capture public opinion in his book The Shaping of American Liberalism, pp. 168-170.

51) Ericson, David F. The Shaping of American Liberalism, pp. 153-154

52) Wood, Gordon S. (1991). The Radicalism of the American Revolution, New York: Vintage Books. The thesis of this classic is that the American revolution set into motion an ideology that did more than just free a people from a monarchy. This revolution unleashed the individualism and capitalist spirit that would mold the fledgling nation into the most equalitarian nation on earth, rife with all its self serving flaws and lacking in republican virtue, yet striving to assist everyone who had been born equal.

53) Zarefsky, David. Lincoln, Douglas and Slavery: In the Crucible of Public Debate pp. 111-140. Zarefsky dedicates an entire chapter to what he calls the legal argument put forth by Lincoln and Douglas. In this section he explains how Lincoln attempted to pull blacks in to the sphere of humanity with God given rights, yet still wanted to differentiate between natural rights and rights of citizens.

54) Ericson, David F. The Shaping of American Liberalism, pp. 161

55) Hartz, Louis. The Liberal Tradition in America The reactionary enlightenment is explained in great detail in chapter six.

56) McPherson, James. Battle Cry of Freedom: The Civil War Era pp. 225

57) McPherson, James. Battle Cry of Freedom: The Civil War Era pp. 226

58) McPherson, Battle Cry of Freedom: The Civil War Era pp. 180-181

59) Abraham Lincoln, *Cooper Union Address*, New York, February 27, 1860 <//showcase.netins.net/web/creative/Lincoln/speeches/cooper.htm>

60) McPherson, James. Battle Cry of Freedom: The Civil War Era pp. 246

61) Ericson, David F. The Shaping of American Liberalism, pp.136-142. The idea of secession escaped Lincoln because of his profound belief in America's mission to eliminate slavery and his underlying belief that the nation could be united on substantive principles.

62) Hartz, Louis. The Liberal Tradition in America pp. 176

63) Zarefsky, David. Lincoln, Douglas and Slavery: In the Crucible of Public Debate pp. 124

64) Ericson, David F. The Shaping of American Liberalism, pp. 162-163. Zarefsky also addresses the dilemma for Douglas of never publicly condemning slavery. His "noncommittal" popular sovereignty position and public announcement of not caring how slavery was to be decided certainly placed him in alignment with accepting slavery rather than working for its elimination.

Chapter Four

1) United States Court of Appeals, First Circuit, Baird v Eisenstadt. No. 7578. 429 F. 2nd 1398, 1970.

2) Horan, Dennis J., Edward R. Grant, and Paige C. Cunningham. (1987). Abortion and the Constitution: Reversing Roe v Wade through the Courts. Georgetown University Press, Washington D. C.

3) Blackstone, William. (1859). Commentaries on the Laws of England. Book I, Childs and Peterson, Philadelphia. pp. 129-130.

4) Blackstone, William. Commentaries on the Laws of England. The passage appears on page 100 in this edition and Blackstone included a footnote which stated: "The distinction between murder and manslaughter, or felonious homicide, in the time of Bracton, was in a great deal nominal. The punishment of both was the same; for murder as well as manslaughter, by the common law, had the benefit of clergy." While modern interpretations of the law may see manslaughter and murder as different thus affecting their view on abortion, Blackstone saw no such distinction.

5) Farrand, Max. (1911). The Records of the Federal Constitution of 1787. Vol. II, Yale University Press, New Haven. pp. 371. Whether Mr. Ellsworth's claim is genuine or a political statement to move the slave issue to a conclusion is debatable. Nonetheless, some people would have believed slavery to be on a road to extinction (both Madison and Jefferson inferred this) and the technologies that gave the cotton industry new life were unforeseen at this time.

6) Templeton, Alan R., *When Does Life Begin? An Evolutionary Genetic Answer to a Central Ethical Question.* Scientific Discovery and Medical Ethics. 2005. pp. 1-20.

7) Young, Brian. *A Brief Survey of US Abortion Law Before the 1973 Decision.* http://www.ewtn.com/library/PROLIFE/LIFBFROE.TXT

8) Young, Brian. *A Brief Survey of US Abortion Law Before the 1973 Decision.* http://www.ewtn.com/library/PROLIFE/LIFBFROE.TXT

9) Horan, Dennis J., Edward R. Grant, and Paige C. Cunningham. Abortion and the Constitution: Reversing Roe v Wade through the Courts. Georgetown University Press, Washington D. C.

10) Miller v. Bennett, 190 Va. 162 (1949), 56. S.E. 2nd. 217.

11) Dellapenna, Joseph W. (2006). Dispelling the Myths of Abortion History. Carolina Academic Press, Durham, North Carolina. pp. 315-325.

12) Dellapenna, Joseph W. Dispelling the Myths of Abortion History. pp. 330-337. An examination of state abortion laws during this era show a remarkable similarity from state to state. So instead of an issue with inconsistency and interstate comity as was the case with slave laws, abortion laws illustrate a consistency in both written word and intent.

13) Mohr, James C. (1978). Abortion in America: The Origins and Evolution of National Policy, Oxford University Press, New York. In chapters one and two Mohr lays out the penalties assessed for abortion in early America and outlines the abortion laws that existed during this era.

14) Dellapenna, Joseph W. Dispelling the Myths of Abortion History. pp. 532-538

15) Abortion in American Law: The Nineteenth Century http://law.jrank.org/pages/446/Abortion-Abortion-in-America-law-nineteenth-century.html#ixzz0pLg70GpS

16) Abortion: Twentieth Century Abortion Law Reform http://law.jrank.org/pages/447/Abortion-Twentieth-century-abortionin-law-reform.html#ixzz0qp81BEsc

17) Noonan, John Jr., A Private Choice: Abortion in America in the Seventies.

18) Noonan, John Jr., A Private Choice: Abortion in America in the Seventies.

19) Mohr, James C. (1978). Abortion in America: The Origins and Evolution of National Policy, Oxford University Press, New York. pp. 5.

20) Abortion in American Law: The Nineteenth Century http://law.jrank.org/pages/446/Abortion-Abortion-in-America-law-nineteenth-century.html#ixzz0pLg70GpS

21) State v. Herman W. Giedicke 43 NJ Law 86 Reporters Summary. Joseph Dellapenna also covers this case and explains the nuances of abortion law and the difficulties with prosecution in Dispelling the Myths of Abortion History on pages 284-288.

22) Clark, William L. (1894). Handbook of Criminal Law. West Publishing, St. Paul Minnesota. In chapter eight (Offenses against the person) Clark describes what was used as legal precedent when dealing with homicide and murder.

23) Benthem, Jeremy. (1931). The Theory of Legislation CK Ogden Ed. pp. 493-494.

24) Hatfield v. Gano, 15 Iowa 177 (1863).

25) Mohr, James C. (1978). Abortion in America: The Origins and Evolution of National Policy, Oxford University Press, New York. p 311.

26) Dellapenna, Joseph W. Dispelling the Myths of Abortion History. pp. 274

27) State v. Owens, 22 Minn. 238 (1875)

28) People v. Blank, 29 N.E. 2nd. 73 (N.Y. 1940)

29) Hancock v. Hullett, 82 So. 522 (Ala. 1919)

30) Nash v. Meyer, 31 P 2nd. 273 (Idaho 1934)

31) Dellapenna, Joseph W. Dispelling the Myths of Abortion History. pp. 301

32) State v. Moore, 25 Iowa 128 (1868)

33) Imber, Jonathan. *Abortion Policy and Medical Practice,* Society. July/Aug 1990. pp. 27-28.

34) People v. Lovell, 242 N.Y. 2nd. 958 (N.Y. Cty. Ct. 1963)

35) Morgan, Richard Gregory, *The Politics of Abortion* HeinOnLine—77Mich.L.Rev 1749, 1978-1979. pp. 1727-1729.

36) Morgan, Richard Gregory, *The Politics of Abortion* HeinOnLine—77Mich.L.Rev 1749, 1978-1979. pp. 1730-1731.

37) Morgan, Richard Gregory, *The Politics of Abortion* HeinOnLine—77Mich.L.Rev 1749, 1978-1979. pp. 1733. What the California court had done was to continue to apply the 'new' right of privacy as the United States Supreme Court had created in Griswold and Ullman and expanded it to encompass pregnancy as well. The Supreme Court had penned the words "bear or beget children" and now this court was using these words as a constitutional reason to allow the destruction of the unborn child. In Griswold v Connecticut and Poe v Ullman the Supreme Court had not addressed abortion, yet this California decision was the beginning of a path down the slippery slope that anti-abortion advocates had been railing against.

38) Morgan, Richard Gregory, *The Politics of Abortion* HeinOnLine—77Mich.L.Rev 1749, 1978-1979. pp. 1741.

39) Morgan, Richard Gregory, *The Politics of Abortion* HeinOnLine—77Mich.L.Rev 1749, 1978-1979. pp. 1733.

40) Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis) appeal dismissed per curiam 400 U.S. 1 (1970)

41) McGarvey v. Magee-Women's Hospital, 340 F. Supp. 751, 752 (W.D. Pa. 1972)

42) Morgan, Richard Gregory, *The Politics of Abortion* HeinOnLine—77Mich.L.Rev 1749, 1978-1979. pp. 1737.

43) Able v. Markle, 351 F. Supp. 244, 227 (D. Conn. 1972) Vacated and Remanded 410 U.S. 951 (1973)

44) Morgan, Richard Gregory, *The Politics of Abortion* HeinOnLine—77Mich.L.Rev 1749, 1978-1979. pp. 1734.

45) In Eisenstadt the Court asserted that private thoughts are beyond the purview of the government and inferred that individual desires were not an issue for society as a whole. By limiting access to contraception the state was trying to regulate sexual behavior and in the Court's opinion, society was not interested in such things. However, it appears as though the Court had shifted from this position in Markle and it is the Court that is claiming that a "social stigma" is somehow a condition in which the Court has jurisdiction. Had the Court's logic in Eisenstadt been valid no "social stigma" would have existed. The Markle ruling goes well beyond any idea of privacy and demonstrates that the Court has no clear idea of how to

distinguish between private actions deserving of protection and social conditions that the Court finds irrational.

46) Vestal, Christine, *States Probe Limits on Abortion Policy,* June 22, 2006. www.stateline.org/live/details

47) Dellapenna, Joseph W. Dispelling the Myths of Abortion History. pp. 749-752

48) Gouldner, Alvin Ward. (1979). The Future of the Intellectual and the Rise of the New Class. The Seabury Press, New York, New York. Gouldner argues that a psychological shift was taking place in America that placed individual need above both the family and society. A major contributor to this movement was a changing economy that was becoming more lucrative for working men and more tolerant of working women. Standard of living expectations were part of this changing mentality as well. Americans were more focused on improving their economic position rather than concentrating on familial obligations.

49) Garrow, David T. (1994). Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade. University of California Press, Berkley, California. pp. 720-724. The idea that Garrow was promoting was that women were now attempting to wrest control of their lives away from a male dominated society. Given the lack of female representation in states and the federal legislature, it was believed that women's views were not being considered during the debate over and creation of abortion laws. He also posits the notion that the freedom to choose abortion was a step toward being able to manage society as well as the family.

50) Swiss, Deborah J. and Judith P. Walker. (1993). Women and the Work Family Dilemma: How Today's Professional Women are Finding Solutions. John Wiley and Sons Inc., New York, New York.

51) Risen, James and Judy L. Thomas. (1998). Wrath of Angels: The American Abortion Wars. Basic Books, New York, New York.

52) Dellapenna, Joseph W. Dispelling the Myths of Abortion History. Carolina Academic Press, Durham, North Carolina. 2006. pp. 595.

53) Olmstead v. U.S., 277 U.S. 438 (1928)

54) Palko v. Connecticut, 302 U.S. 319 (1937)

55) Locke, John. (1689). The Two Treatises of Civil Government (Hollis Ed.). In chapter five Locke defines the importance of his fundamental right of property and within this explanation he lays out his theory of the fair use doctrine. This doctrine states that while all men have a right to property, that right can and must be limited for the betterment of the society within the social contract. If this most important right of property can be limited then it can be deduced that lesser rights whether fundamental or not can also be limited.

56) Child abuse, prostitution, and drug use are all examples of behaviors that can be conducted in private yet all are subject to government intrusion and are not sanctioned by society. Within the abortion debate rape and incest are crucial elements that must be addressed and both of these

actions can occur within the privacy of the home yet no civil society will tolerate such behavior. These behaviors show that privacy while significant can and must be limited.

57) Kastigar v. U.S., 406 U.S. 441 (1972) In this case the Court determined that with a promise of immunity the defendant's Fifth Amendment right to be free from self-incrimination could be overridden regardless of the potential impact of testimony upon the defendant or his family. So while the rights contained within the Bill of Rights are seen as fundamental, even these 'sacred' rights have from time to time been transgressed by the Court. This offers further support to the idea that rights, while important, have never been considered absolute or totally free from government intervention.

58) Abortion supporters can not ask for government support and also claim an act to be private even if that act is a fundamental right. Fundamental rights such as the right to counsel have been held to be deserving of public funding but this right is not claimed as a private act. To simultaneously claim an act is private and also entitled to public funding is illogical. By definition private acts happen both without public knowledge and support.

59) Krason, Stephen M. (1984). Abortion Politics, Morality and the Constitution: A Critical Study of Roe v. Wade and Doe v. Bolton and a basis for change, University Press of America, Lanham, Maryland. pp. 239-246. Krason offers a history of the thinking of the founding era and supports this with original documentation. His conclusion is that in an effort to procure more freedoms, contemporary thinkers have ignored the original arguments for including the Ninth Amendment in the Bill of Rights. While it can easily be read with modern language to offer an 'anything goes' mentality about individual rights, Krason argues that the true intent of this amendment was to create another layer of citizen sovereignty. His claim is that this amendment allows the citizens recourse if the government attempts to infringe on fundamental rights, it is not an open door for citizens to create individual rights of their choosing. This is a significant point because the intent of the framers was that any alterations to the founding document would come from citizens and their representatives through the amending process. This would ensure any changes would be a collective decision of the permanent population and not the evanescent desires of temporary majorities or powerful minorities.

60) Griswold v. Connecticut, 381 U.S. 479 (1965)

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

62) Griswold v. Connecticut, 381 U.S. 479 (1965)

63) Griswold v. Connecticut, 381 U.S. 479 (1965) I emphasized the word "creating" in this opinion because without realizing it, the Court had undermined its' argument (and pro-abortionists) that the right to this level of privacy had always existed.

64) Every prominent scholar that writes in support of abortion have all used language that both illustrates the fact that abortion is not part of the Constitution and the Supreme Court has created this right by judicial fiat. Laurence Tribe, *Abortion: The Clash of Absolutes*, Mark A. Graber, Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics, and Ronald Dworkin, Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom all serve as examples. Even a light reading of these works shows that the authors understand the Court created an abortion right, but they accept it as a logical condition of a "living constitution."

This is supported by the writing of Justice Douglas who in Griswold v. Connecticut used the word created in his opinion. It is the position of anti-abortionists that this is both a dangerous precedent to allow and it dishonors the original intent of the framers.

65) Rawls, John. (2005). Political Liberalism, Columbia University Press, New York. pp. 231-240. Rawls argues that the will of the citizenry is the "higher law" of a society. The action of the legislatures is the "ordinary law" and the courts are designed to apply public reason after it has been determined through the deliberative process by the citizens and their representatives. It is not the duty of the courts to interpose themselves between the people and their legislatures.

66) Brown v**.** Board of Education of Topeka, 347 U.S. 483 (1954) In this case the Court overturned the opinion of separate but equal that was codified in Plessy v**.** Ferguson, 163 U.S. 537 (1896) as the Court by this time had come to understand the conception of equal that was being mocked by the application of the Plessy decision.

67) Gideon v. Wainwright, 372 U.S. 335 (1963) While this case deals with the right to counsel, it shows that a fundamental right was being withheld because of financial limitations and the Court stated that such restrictions on fundamental rights violated the intent of the Constitution. Overwhelming public support of this opinion is an example of the Court applying public reason.

68) Dred Scott v. Sanford, 60 U.S. 393 (1857) As all historians know, this decision did not end the slavery debate.

69) Prigg v. Pennsylvania, 41 U.S. 539 (1842) It can be argued that the Court did take the proper constitutional stance in this case; however, by gutting the enforcement mechanism the Court exacerbated the conflict rather than minimizing it.

70) Griswold v. Connecticut, 381 U.S. 479 (1965) Even though the Court does acknowledge that privacy is not explicitly mentioned in the constitution, they nonetheless claimed that there does exist a right to personal privacy and within this there are zones of privacy that are protected by the First, Fourth, and Fifth Amendments. From here the Court stretches these privacy protections and determined that these unwritten rights are contained within the emanations and penumbras of the Bill of Rights. The difficulty is, what do these lofty words mean? Also much of the discussion about privacy was based on the seminal article (*The Right to Privacy*) written by Samuel Warren and Louis Brandeis in the 1890 Harvard Law Review (Vol. IV No. 5); however, this article focused on a citizen's right of privacy to be free from intrusions by the press not the government. Nonetheless, this concept was taken out of context and expanded to mean the government's ability to regulate behavior must be truncated.

71) Rulings in one state that seem to contradict the laws of another will always exist. This is the nature of federalism and state sovereignty can only be transgressed by the Court when fundamental rights are being infringed. The San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) school funding case that was decided by the Court in the same year as Roe is an example of judicial restraint and showed that while some may claim a want as a fundamental need, not all inconsistencies among states create a lack of comity. States vary on many issues and the concept of federalism allows for this state independence. In Rodriguez the Court ruled that states have complete authority to determine issues contained within their borders. In order for the Court to claim jurisdiction to overrule state actions they must

demonstrate a conflict exists between states that interferes with clear constitutional guidelines, such as Gibbons v. Ogden, 22 U.S. 1 (1824). While Roe claimed such jurisdiction no interstate conflict existed.

72) Roe v. Wade, 410 U.S. 113 (1973) at page 17.

73) Irons, Peter. (1999). A People's History of the Supreme Court, Penguin Books, New York, New York. pp. 174. Irons explains that the life, liberty, and property protections of the Fifth and Fourteenth Amendments only apply to persons, so just as Taney had swept away the personhood of slaves with questionable interpretation of the term person, Blackmun does the same with the unborn and his denial of personhood based on questionable history.

74) The Court used the following cases as historical support for the basis of the privacy claim in Roe. Loving v. Virginia, 388 U.S. 1 (1967), Skinner v. Oklahoma, 316 U.S. 535 (1942), Eisenstadt v. Baird, 405 U.S. 438 (1972), Prince v. Massachusetts, 321 U.S. 158 (1944), Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923). It has been argued by Robert Bork (The Tempting of America), John Hart Ely (The Wages of Crying Wolf: A Comment on Roe v. Wade) and others that while these cases do deal with personal rights, they all cover different issues none of which can be connected to abortion or unrestricted privacy. At best these cases can be connected to due process which had been deemed fundamental to ordered liberty in Palko v. Connecticut (302 U.S. 319 1937).

75) U. S. v. Carolene Products Company, 304 U.S. 144 (1938) The notion of discrete and insular minorities was developed in an effort by the Court to offer constitutional protections to those who had no voice in government or those relegated to perpetual minority status. The unborn certainly would fit within this definition.

76) Palko v. Connecticut, 302 U.S. 319 (1937)

77) Lazarus, Edward. (1998). Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court, Penguin Books, New York, New York. pp. 360.

78) Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)

79) Bellotti v. Baird, 443 U.S. 622 (1979)

80) Urofsky, Melvin I. and Paul Finkelman. (2002). A March of Liberty: A Constitutional History of the United States Volume II from 1877 to the Present, Oxford University Press, New York, New York. pp. 915.

81) Dandridge v. Williams, 397 U.S. 471 (1970)

82) Urofsky, Melvin I. and Paul Finkelman, A March of Liberty. pp. 915

83) Thornburgh v**.** American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) This ruling is also discussed by Urofsky, Melvin I. and Paul Finkelman, in A March of Liberty. pp. 915.

84) City of Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 416 (1983)

85) Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983)

86) The difficulty with the undue burden standard is that like many Supreme Court terms there exists no common understanding and therefore it can be applied in an arbitrary fashion. Consequently, when attempting to apply this standard to a fundamental right no benchmark exists from which to work or any court precedent that can be cited to bolster the claim of a right being fundamental.

87) United States v Dionisio, 410 U.S. 1 (1973) In this case dealing with compulsory grand jury appearances the Court ruled, "Since neither the summons to appear before the grand jury nor its directive to give a voice exemplar contravened the Fourth Amendment, the Court of Appeals erred in requiring a preliminary showing of reasonableness before the respondent could be compelled to furnish the exemplar." This ruling is in contradiction to the standard in Roe and now places the standard of reasonableness under suspicion because the Court offered no direction as to how to determine when reasonableness would be required, only the cursory mention of violating of the Fourth Amendment.

88) DeShaney v Winnebago County, 489 U.S. 189 (1989) Here the Court was setting a standard that the government is not obligated to defend citizens from every possible threat, not because they have no concern but rather because it is not practical. Any threat created by the state must be addressed; however, solutions to other threats must be worked out in a civil manner by the citizens involved. If pregnancy is a choice, the state would have no obligation to intervene. If the pregnancy was forced (rape etc.), then another person has violated established law and the state has an obligation to act on behalf of the assault. Yet there exists no obligation for the state to intervene in the pregnancy if one results from this act. Abortion advocates may claim the woman is defending herself from an unwanted birth, but this is a questionable argument. Applying the harm principle, the state can not become involved without knowledge of a legitimate threat to ones physical wellbeing because to do so would be to elevate one person over another and put the state at odds with their duty to defend fundamental rights.

89) Dellapenna, Joseph W. Dispelling the Myths of Abortion History. pp. 839

90) www.milestonedocuments.com/document/full-text/sandra-day-oconner-in-webster-health-services

91) Urofsky, Melvin I. and Paul Finkelman, A March of Liberty. pp. 967

92) Dellapenna, Joseph W. Dispelling the Myths of Abortion History. pp. 851

93) Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) www.cornelllawschool.edu Scalia dissent.

94) Gibson, James L., Gregory A. Caldeira, and Lester Kenyata Spence, *Measuring Attitudes Toward the United States Supreme Court,* American Journal of Political Science. Vol. 47, No. 2, (Apr., 2003). Historically, GSS survey and opinion data of the American public have always demonstrated a rather high level of support for the Supreme Court. Further investigation shows that while people do support the Court as an institution their opinion of the Court changes and becomes rather volatile when attitudes are measured on issue specific rulings. What this demonstrates is that while Americans have a great deal of loyalty for the Court, the opinions

issued are often challenged as illegitimate. The majority of the decisions seen as questionable involve issues of social concern as opposed to the mundane decisions that are clearly outlined by the words of the Constitution. It is also probable that continued bad decisions or those viewed as illegitimate will lead to an erosion of the loyalty for the Court. Valerie J. Hoekstra (2007) Public Reaction to Supreme Court Decisions, Columbia University Press, argues that when citizens view a court decision as inappropriate the typical reaction is evasion and non-compliance. She also claims that it is cases that deal with social issues that most often draw the ire of the population. Danette Brickman and David A. M. Peterson, *Public Opinion Reactions to Repeated Events: Citizen Response to Multiple Supreme Court Abortion Decisions*, Political Behavior. Vol. 28, No. 1, (Mar., 2006) used opinion survey data to study the public reaction to the decisions in Roe v. Wade, Planned Parenthood v. Danforth, and Planned Parenthood v. Casey. Their results were that public opinion changed in a statistically significant way after each of the Court decisions. Each of these cases served to undermine support for abortion or polarized the American public in a social or political manner. What all of these studies indicate is that while Americans see the Supreme Court as an important institution they do not think of it as an omnipotent or all knowing group that exists to solve the conflicts within society. On the contrary, when the Court ventures too far a field and applies substantive rather than procedural constitutional procedures the American public recoils and looks for avenues to rebuke the Court.

95) Stenberg v. Carhart, 530 U.S. 914 (2000)

96) Stenberg v. Carhart, 530 U.S. 914 (2000) www.cornelllawschool.edu Breyer opinion.

97) Dellapenna, Joseph W. Dispelling the Myths of Abortion History. pp. 935. If the Court was denying the importance of viability as a constitutional standard then they were elevating the right to choose to a fundamental level and this is not constitutionally sustainable. From here it is a short step to all private behavior being beyond the reach of government and no legal scholar of significance has ever supported this position. More importantly is that by making choice the preeminent right then everything becomes a property argument because the person with the choice owns the decision and therefore has dominion over any other actors. In this way the slave master has been reborn to decide life or death over the unborn regardless of personhood.

98) Gonzalez v. Carhart, 550 U.S. 124 (2007) The difficulty with the term 'health of the mother' is that it lacks one definition. Many may believe it means only if the mother's physical life is in danger, others may feel the psychological or mental health of the mother justifies abortion, and still others may think the financial health of the mother takes precedent. Without clarity, the term 'health of the mother' becomes emotional political rhetoric.

99) Gonzalez v. Carhart, 550 U.S. 124 (2007)

100) Gonzalez v. Carhart, 550 U.S. 124 (2007)

101) Gonzalez v. Carhart, 550 U.S. 124 (2007)What the Court was saying in this decision was that health exceptions for the mother do not equal abortion on demand because this would create too great a burden on the legislatures to construct reasonable laws that would both pass constitutional muster as well as being practical in the medical industry.

102) http://www.cnn.com/interactive/allpolitics/0104/fetus.laws/frameset.exclude.html

103) Ramsey, Carolyn B. *Restructuring the Debate over Fetal Homicide Laws,* Ohio State University Law Journal. Vol. 67, No. 4, (2006) pp. 724.

104) Thompson, Judith Jarvis. *A Defense of Abortion,* Philosophy and Public Affairs. Vol. 47, (1971) pp. 57.

105) State v. Merrill, 450 NW 2d 318 (Minn. 1990)

106) State v. Merrill, 450 NW 2d 318 (Minn. 1990)

107) Ramsey, Carolyn B. *Restructuring the Debate over Fetal Homicide Laws.* pp. 753

108) People v. Davis, 872 P. 2d (Cal. 1994)

109) Ramsey, Carolyn B. *Restructuring the Debate over Fetal Homicide Laws.* pp. 738.

110) Commonwealth v. Bullock, 868 A. 2d (Pa. Super. Ct. 2005)

111) This lack of concern for the unborn was a mirror image of the Court's attitude toward Negroes during the era of slavery. While the vast majority of Americans knew that Negroes were indeed human, the Court attempted legal acrobatics to justify the continuance of slavery. In much the same way, the modern Court continues to struggle with defining life and viability in direct contradiction to public opinion. While no significant public opinion data exists that asks the question; "Do you believe a fetus is a person," what does exist is American opinion on the acceptable timeframe for abortions. Also the use of the term viability implies that life exists and therefore the unborn must be a person. CNN/USA Today/Gallup Polls from 1996 to 2009 indicate that American public opinion was such that 64% found abortion within the first trimester acceptable because people believed this was before fetal viability. In the second trimester when fetal viability is very certain the approval rating drops to 25% which indicates that when Americans believe a person is involved they no longer find abortion acceptable. In the third trimester when most people believe the fetus is viable life the approval rating is only about 10%. These numbers indicate that while the Court may be willing to ignore that the unborn is life, the public realizes the facts of this issue and like slavery, when the Court ignores public opinion it works to undermine the loyalty people have for the Court.

112) Wellman, Carl. *The Concept of Fetal Rights,* Law and Philosophy. Vol. 21, No. 1 (Jan., 2002) pp. 77. Referenced from, Commonwealth v Welch, Ky., 864 SW.2nd 280 (1993).

113) Ramsey, Carolyn B. *Restructuring the Debate over Fetal Homicide Laws.* pp. 749.

Chapter Five

1) Hartz, Louis. (1955) The Liberal Tradition in America New York: Harcourt Brace and Company. pp. 54-60.

2) Ericson, David F. (1993). The Shaping of American Liberalism: The Debates over Ratification, Nullification and Slavery Chicago: University of Chicago Press. pp. 2-21.

3) Hartz, Louis. The Liberal Tradition in America, pp. 90

4) Dworkin, Ronald. (1993) Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom, Alfred A. Knopf, New York. pp. 11-24. What Dworkin claims is that two views on the prohibiting of abortion exist. The first is what he calls the derivative view that states, "fetuses are creatures with interests of their own right from the start." This idea is that the unborn have rights that have been derived from the same rights and interests that all humans possess. The fetus being human falls within the protections of this category. For this group abortion is wrong in principle because the fetus has in interest in being alive and all life has intrinsic value. The detached view in Dworkin's opinion is one that claims abortion is wrong because the act itself is bad, not because the fetus is a person with rights. In fact the fetus' humanity can be ignored in this view because the focus is on the procedure and the reasons the procedure is being performed. So while both views are espoused by the anti-abortionists, Dworkin believes that the detached view is the actual understanding of most people even though they may claim otherwise. From the detached view abortion may be abhorred but at the same time it can be allowed because special circumstances may dictate its acceptance.

5) Abbott, Philip. Philosophers and the Abortion Question, *Political Theory,* Vol. 6, No. 3. (Aug., 1978), pp. 331.

6) Riss, Arthur (1999). Race, Slavery, and Liberalism in Nineteenth-Century American Literature. Retrieved October 19,2006 from *Cambridge Studies in American Literature and Culture Series* Web site: http://www.cambridge.org/catalouge.asp?isbn=0521856744&ss=exc

7) Thomson, Judith Jarvis, A Defense of Abortion, *Philosophy and Public Affairs,* (Fall, 1971), pp. 47-66. What Thomson does here is an attempt to move the pro-abortion argument beyond the nuances of life. Her point is, that even if a human is present, there exist circumstances where a person cannot be obligated to assist another. While her logic is valid, her analogies are so farfetched that her point becomes moot. For her argument to carry more philosophical weight it must be explained in terms of reality. If not, then moral philosophers are reduced to being writers of science fiction.

8) Abbott, Philip, Philosophers and the Abortion Question, *Political Theory,* pp. 332.

9) George, Robert P. and Patrick Lee, "The Wrong of Abortion" *from Andrew I. Cohen and Christopher Wellman, eds.,* Contemporary Debates in Applied Ethics *(New York: Blackwell Publishers, 2005)* pp. 2

10) George, Robert P. and Patrick Lee " The Wrong of Abortion " pp. 3 and Warren Quinn, Abortion: Identity and Loss, *Philosophy and Public Affairs,* Vol. 13, No. 1. (Winter, 1984), p. 24-54. The core concept of this line of thinking is that birth and the creation of a human being is a process. Pro-abortionists want to focus of a specific point in the process and disregard the overall effects. By limiting the discussion to a small window within the process, the claims of the fetus being less than human or lacking the ability to claim rights appear logical. This is why the process of life must be made part of the debate as this changes the focus from one moment in time to the end product that is a child.

11) Selzer, Richard, Ethics of Abortion, Robert M. Baird and Stuart E. Rosenbaum (editors) 1993.

12) George, Robert P. and Patrick Lee " The Wrong of Abortion " pp. 3

13) Cudd, Ann E., Sensationalized Philosophy: A Reply to Marquis's "Why Abortion is Immoral," *The Journal of Philosophy,* Vol. 87, No. 5. (May, 1990), pp. 263.

14) Callahan, Sidney, Ethics of Abortion, Robert M. Baird and Stuart E. Rosenbaum (editors) 1993.

15) Quinn, Warren. Abortion: Identity and Loss, *Philosophy and Public Affairs*, Vol. 13, No. 1. (Winter, 1984), pp. 1.

16) Quinn, Warren. Abortion: Identity and Loss, pp. 49.

17) Harmon, Elizabeth, Creation Ethics: The Moral Status of Early Fetuses and the Ethics of Abortion, *Philosophy & Public Affairs*, Vol. 28, No. 4. (Autumn, 1999), pp. 310-324.

18) Marquis, Don, Why Abortion is Immoral, *The Journal of Philosophy,* Vol. 86, No. 4. (Apr., 1989), pp. 195-198.

19) Potts, Malcolm, Perspectives on Abortion, Paul Sachdev (editor) 1985. pp. 28-29.

20) Hadley, Janet, Abortion: Between Freedom and Necessity, Virago Press, London, 1996. pp. 60.

21) Finlay, Barbara Agresti, Perspectives on Abortion, Paul Sachdev (editor) 1985. pp. 180

22) Hadley, Janet, Abortion: Between Freedom and Necessity, pp. 196

23) Hadley, Janet, Abortion: Between Freedom and Necessity, pp. 60-76

24) Harmon, Elizabeth, Creation Ethics: The Moral Status of Early Fetuses and the Ethics of Abortion, pp. 310-324 and Ronald Dworkin, Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom, pp. 73. Harmon defines an early fetus as, "a fetus before it has any intrinsic properties that themselves confer moral status on the fetus." What these two scholars are attempting to do is clarify the birth process in pro-abortion terms. They begin by agreeing that the fetus is life and that a human is the end result of the process, then they move to differentiate when this potential life has moral value.

25) Hartshorne, Charles, Ethics of Abortion, Robert M. Baird and Stuart E. Rosenbaum (editors) 1993. pp. 111-114.

26) English, Jane, Ethics of Abortion, Robert M. Baird and Stuart E. Rosenbaum (editors) 1993. pp. 187.

27) Paynter, Roger, Ethics of Abortion, Robert M. Baird and Stuart E. Rosenbaum (editors) 1993. pp. 149.

28) Callahan, Joan C., Ethics of Abortion, Robert M. Baird and Stuart E. Rosenbaum (editors) 1993. pp. 118.

29) Roe v. Wade 410 U.S. 113 (1973) and Dred Scott v. Sanford 60 U.S. 393 (1857)

30) Dworkin, Ronald. Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom, pp. 47/97/110.

31) Marquis, Don, Why Abortion is Immoral, pp. 18.

32) Bork, Robert H., Slouching Towards Gomorrah: Modern Liberalism and American Decline, Regan Books, New York. 1996. pp. 174-175.

33) Bork, Robert H., Slouching Towards Gomorrah: Modern Liberalism and American Decline, pp. 175.

34) Bork, Robert H., Slouching Towards Gomorrah: Modern Liberalism and American Decline, pp. 177.

35) Abbott, Philip, Philosophers and the Abortion Question, pp. 331.

36) George, Robert P. and Patrick Lee "The Wrong of Abortion" pp. 12.

37) Schocet, Gordon J., "Thomas Hobbes on the Family and the State of Nature" *Political Science Quarterly*, Vol. 82, (Sept. 1967), pp. 442. Also, John Locke, *Two Treatises on Government,* Peter Laslett (editor) 1960. pp. 352.

38) Abbott, Philip, Philosophers and the Abortion Question, pp. 325. What Abbott claims is that while Hobbes and Locke struggled with the place of children and others of diminished capacities they nonetheless worked for philosophical resolution. Both men saw the need for society to perpetuate and children are the main element in this idea. Where Hobbes found resolution in his fourth law of nature, "the nature of gratitude," Locke worked off of the notion that the "privilege of his nature to be free" is grounded parental obligation. So while both of these men do not specifically address abortion the act of infanticide is condemned and this protection of young life is the connection to the philosophical argument that abortion must also be eschewed in a liberal society. Ronald Dworkin also speaks to this point in Life's Dominion *(pp. 77-78),* when he writes about what he terms the justice between generations. His point is that our concerns for future generations is not an issue of justice as people think, but rather, "our instinctive sense that human flourishing as well as human survival is of sacred importance."

39) West, Robin, Liberalism and abortion, *Georgetown Law Journal*, Jun. 1999. http://findarticles.com/p/articles/mi_qa3805/is_199906/ai_n8877364/ pp. 1-21. Thomson, Judith Jarvis, A Defense of Abortion, pp. 47-66. While West makes this assertion the focus of her argument justifying abortion, Thomson's argument uses the same logic but instead of a legal argument, it is one of analogy.

40) George, Robert P. and Patrick Lee "The Wrong of Abortion" pp. 10.

41) Marquis, Don, Why Abortion is Immoral, *The Journal of Philosophy*, pp. 189.

42) By the Court allowing abortions and maybe more to the point late-term abortions, the due process of the Constitution is completely discounted. Here again the recognition of life is significant, but as many pro-abortionists are willing to state, only at some specific point in the process is the unborn life. This being said, in order for a life to be taken, the person whose life is in peril must be afforded due process protections and a trial in a court of law. Such an ending of a life in a death penalty case without the application of due process would never be allowed. It is the position of the anti-abortion side that the fetus deserves the same legal representation because in essence, the unborn is being placed on trial. One could also make the case that laws that allow abortion are in reality bills of attainder. However, if the unborn were to get this representation, due process would be upheld as both parties in the case would have their right to be heard protected.

43) Marquis, Don, Why Abortion is Immoral, pp. 190. It appears odd that many of the same people who deplore the death penalty are the same people who support the act of abortion.

44) Quinn, Warren. Abortion: Identity and Loss, *Philosophy and Public Affairs*, Vol. 13, No. 1. (Winter, 1984), pp. 41-53.

45) Tribe, Laurence H. Abortion: The Clash of Absolutes, W. W. Norton & Co. New York. 1990. pp. 135.

46) Tribe, Laurence H. Constitutional Choices, Harvard University Press. Cambridge, Massachusetts. 1191. pp. 308. Tribe claims that to accept one theory of life over another arbitrarily overrides the woman's rights. Life is a non-empirical matter and challenges to the contrary are attempts to usurp the woman's right to choose.

47) Tribe, Laurence H. Constitutional Choices, pp. 306. The Court assumed in Roe that to recognize the fetus as a person would require the same vigorous protections as adults and other children. Tribe proposes that this is not the case as "there are compelling justifications for giving… less protection" to beings, whether or not considered persons whose destruction can only be prevented by a severe imposition on the woman and this is a greater burden than what is required for the protection of children.

48) Marquis, Don, Why Abortion is Immoral, pp. 195.

49) Marquis, Don, Why Abortion is Immoral, pp. 187.

50) Abbott, Philip, Philosophers and the Abortion Question, pp. 321.

51) Cudd, Ann E., Sensationalized Philosophy: A Reply to Marquis's "Why Abortion is Immoral," *The Journal of Philosophy,* Vol. 87, No. 5. (May, 1990), pp. 263.

52) Dworkin, Ronald. Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom, pp. 16-18.

53) Dworkin, Ronald. Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom, pp. 70. Dworkin claims that people of all types are frustrated when results they expect do not materialize. As this applies to abortion, what he is claiming is that people have hope that all children will be healthy, but this is not reality. So the same frustration over a

child born with severe defects is expressed by anti-abortionists. Dworkin's point is that anti-abortionists are not really claiming that the unborn is life and worthy of respect, but rather they are disappointed by what might have been. In this way their concern is not actually for life, but instead a concern about their personal feelings and hopes.

54) Tooley, Michael, Ethics of Abortion, Robert M. Baird and Stuart E. Rosenbaum (editors) 1993. pp. 48-49.

55)Abbott, Philip, Philosophers and the Abortion Question, pp. 330-331. Abbott infers that to focus the debate on when we become conscience of ourselves is a flawed idea because by implementing the rights model to its logical conclusion "extends the humanity beyond the fetus, beyond the zygote and regards future generations on a par with existing individuals."

56) Warren, Mary Anne, Ethics of Abortion, Robert M. Baird and Stuart E. Rosenbaum (editors) 1993. pp. 77-80.

57) Hume, David, A Treatise of Human Nature, e-book Guttenberg Project http://www.gutenberg.org/ebooks/4705

58) Dworkin, Ronald. Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom, pp. 71. Dworkin proposes that something has instrumental value depending upon its usefulness or ability to help people get something they want. Subjective value is similar to Hume in that something has value only if people happen to desire it. Since abortion does help a woman get what she wants it has instrumental value and because the mother does not want the child, the fetus lacks subjective value. Put another way, the unwanted fetus works against the interests of the mother, consequently it lacks both intrinsic and subjective value.

59) Hadley, Janet, Abortion: Between Freedom and Necessity, pp. 61. Thomson, Judith Jarvis, A Defense of Abortion, pp. 47-66.

60) Marquis, Don, Why Abortion is Immoral, pp. 200.

61) Marquis, Don, Why Abortion is Immoral, pp. 199.

62) Krason, Stephen M., Abortion: Politics, Morality and the Constitution – A Critical Study of Roe v. Wade and Doe v. Bolton and a basis for change, University Press of America. Lanham, Maryland. 1984. pp. 164-165. What Putka is pointing out is that a difficulty exists when trying to define a person using a simplistic dictionary definition. Webster's definition is, "a human being, any individual or incorporated group having certain legal rights and responsibilities." This definition offers little clarity to the debate and this is why the intent and words of the men who created our founding document must be adhered to. If not, then the true meaning of the document is lost and we are unable to apply its principles in a consistent manner.

63) George, Robert P. and Patrick Lee "The Wrong of Abortion," pp. 5.

64) Quinn, Warren. Abortion: Identity and Loss, pp. 28.

65) Bork, Robert H., "A Country I do not Recognize:" The Legal Assault on American Values. Hoover Institution Press, Stanford University, Stanford, California. 2005. pp. XVII.

66) Bork, Robert H., "A Country I do not Recognize:" The Legal Assault on American Values. pp. XXX.

67) Bork, Robert H., "A Country I do not Recognize:" The Legal Assault on American Values. pp. XXVII.

68) Bork, Robert H., Coercing Virtue: The Worldwide Rule of Judges, The AEI Press. Washington D. C. 2003. pp. 79-84.

69) Bork, Robert H., Coercing Virtue: The Worldwide Rule of Judges, pp. 77.

70) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, Simon and Schuster Inc., New York, New York. 1990. pp. 119.

71) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 83-84

72) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 112-113

73) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 113

74) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 114

75) Bork, Robert H., Coercing Virtue: The Worldwide Rule of Judges, pp. 70

76) Bork, Robert H., Individual Liberty and the Constitution, *American Spectator*, June, 2008. pp. 32.

77) The notion of ordered liberty as put forth in Palko v. Connecticut (1937) as Justice Cardozo wrote, "[The Due Process Clause of the Fourteenth Amendment protects those rights which are] of the very essence of a scheme of ordered liberty. To abolish them is ... to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Bork's belief is that well worded phrases such as these that appear to offer a logical protection of rights that people expect are in reality a slippery slope that the Court uses to give credibility to its arbitrary use of substantive due process. He offers as evidence the "mystery passage" put forth by Justice Kennedy in Planned Parenthood v. Casey (1992) "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Bork states that while it is a nice sounding phrase it has no legal or textual meaning, in other words, "pretty vaporous stuff." Using definitions that cannot be linked to any Constitutional phrase or clause allows the Court to create out of whole cloth, Constitutional decrees of their choosing. This is hardly liberal behavior and flies the in face of American liberalism.

78) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 116-118

79) We only need to look to the cases of Bowers v. Hardwick, 478 U.S. 186 (1986) and Lawrence v. Texas, 539 U.S. 558 (2003) to expose the inconsistent nature of the Court. If stare decisis is truly a bedrock principle as is claimed by supporters of Roe, then why was it discarded in Lawrence? The fact that these two cases are very similar and since no Constitutional wording exists to guide the Court, it must be assumed that it was a "change of heart" by the Court rather than Constitutional application that carried the day.

80) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 220

81) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 111

82) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 125

83) The Court have determined and Americans agree that citizens possess a reasonable expectation of privacy as put forth in Katz v. U.S. (1967). However, the definition of a reasonable expectation is not clear. This is why we require warrants, probable cause, and other legal limitations on the government, yet few Americans believe that any type of behavior must be protected as private especially when other persons are involved. Spouse abuse and child endangerment examples highlight this idea. Drug laws offer another view on privacy, because even though certain drug use is illegal, the logic for overturning these laws is personal autonomy. What people do in the confines of their home should be freer from government intrusion than behavior conducted in public. What the Court did in Roe was to blur the line between public and private behavior as well as ignore the reality that abortion impacts several persons. Charles E. Moylan offers an excellent explanation of this in, The Reasonable Expectation of Privacy: Putting Katz back in the Bag, The Judicial Institute of Maryland (1984).

84) Bork, Robert H., Slouching Towards Gomorrah: Modern Liberalism and American Decline, Regan Books, New York. 1996. pp. 103

85) Bork, Robert H., Slouching Towards Gomorrah: Modern Liberalism and American Decline, pp. 103

86) Bork, Robert H., Slouching Towards Gomorrah: Modern Liberalism and American Decline, pp. 103

87) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 121

88) Bork, Robert H., Coercing Virtue: The Worldwide Rule of Judges, pp. 74

89) Bork, Robert H., Individual Liberty and the Constitution, pp. 35

90) Bork, Robert H., Slouching Towards Gomorrah: Modern Liberalism and American Decline, pp. 104

91) Bork, Robert H., Individual Liberty and the Constitution, pp. 34

92) Bork, Robert H., Individual Liberty and the Constitution, pp. 33-36.What Bork is saying is that to follow this path may at present appear to be liberal, but in reality, to allow the Court this kind of authority is to place rights in jeopardy because they are no longer grounded on the concepts of our founding documents. Instead they are determined to exist by the will of the sitting Court majority. This is a return to Medieval times where rights were not inalienable but were gifted by decrees of the aristocracy. These decisions were unable to be challenged by the common people because they lacked any autonomous claims to rights.

93) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 110

94) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 115

95) Bork, Robert H., Slouching Towards Gomorrah: Modern Liberalism and American Decline, pp. 113

96) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 120-123

97) Bork, Robert H., Slouching Towards Gomorrah: Modern Liberalism and American Decline, pp. 173-174

98) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 126. And Bork, Individual Liberty and the Constitution, pp. 37.As argued earlier, if the Court creates the right, then the Court has the power to eliminate rights as well. This line of thinking is premised upon the belief that the Court possesses the ability to understand the true intent of the Constitution in light of any other facts or information provided and most importantly, the Court has the power to know what the Framers missed and should have included in the document.

99) Griswold v. Connecticut, 381 U.S. 479 (1965), It was Justice Stewart who said the Connecticut law was, "an uncommonly silly law," yet it was not the duty of the Court to determine if laws are logical. It is only the duty of the court to determine if a law violates the Constitution and the law in question in Griswold did not. Alexander Hamilton appears to support this thinking when he penned in Federalist #78, "It can be of no weight to say, that the courts on the pretense of a repugnancy, may substitute their own pleasure to the Constitutional intentions the legislature."

100) Bork, Robert H., Coercing Virtue: The Worldwide Rule of Judges, pp. 69

101) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 73

102) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 122

103) Bork, Robert H., The Tempting of America: The Political Seduction of the Law, pp. 123-124

104) Bork, Robert H., Individual Liberty and the Constitution, pp. 31

105) Bork, Robert H., Coercing Virtue: The Worldwide Rule of Judges, pp. 73-78. Here Bork says that equal protection is another ruse by the Court to apply their radical individualism. In this section he cites homosexuality, radical feminism, and socialism as examples of the Court contorting the law to fit their personal beliefs. His contention is that these subjects can be connected to Roe vis-à-vis privacy and again the Court has used the slippery slope of popular social issues to create illegitimate legal rulings.

106) Bork, Robert H., Coercing Virtue: The Worldwide Rule of Judges, pp. 183

107) Tribe, Laurence H., American Constitutional Law 2nd. Edition, The Foundation Press, Inc. Mineola, New York. 1988. pp. 1356.

108) Tribe, Laurence H. Abortion: The Clash of Absolutes, pp. 107

109) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 1352

110) Tribe, Laurence H. Abortion: The Clash of Absolutes, pp. 130

111) Tribe, Laurence H. Abortion: The Clash of Absolutes, pp. 133

112) Tribe, Laurence H., Constitutional Choices, p. 53-60. And God Save this Court: How the Choice of Supreme Court Justices Shapes our History, Random House. New York. 1985. pp. 18-21.

113) Tribe, Laurence H. Abortion: The Clash of Absolutes, pp. 83. And Laurence H. Tribe with Michael C. Dorf, On Reading the Constitution, Harvard University Press. Cambridge, Massachusetts. 1991. pp. 33.

114) Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, pp. 19 and pp. 59

115) Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, pp. 111. Tribe borrows from Imre Lakatos's mathematical lemma-incorporators dealing with proofs to show that judicial lemma-incorporators "should preserve not only the holding of a prior case but also its rationale." He is arguing that court decisions must be based on more than just prior rulings because the rationale for these ruling is really the essential legal element. In this way abortion decisions by the Court may run counter to previous rulings; however, these abortion decisions are based on the rationale of the previous decisions. If the rationale for past decisions has been to preserve or expand privacy then current court decisions that continue along this path are logical even if they appear to contradict previous rulings. This is why the Court was able to use Pierce v. Society of Sisters (1925) and Meyer v. Nebraska (1923) to justify Roe.

116) Tribe, Laurence H. Abortion: The Clash of Absolutes, pp. 131

117) Tribe, Laurence H. Abortion: The Clash of Absolutes, pp. 134

118) Tribe, Laurence H., Constitutional Choices, pp. 26. The emphasis is mine.

119) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 774. And Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, p. 67.

120) Tribe, Laurence H., God Save this Court: How the Choice of Supreme Court Justices Shapes our History, Random House. New York. 1985. pp. 45.

121) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 1309. Tribe argues that the Court in Olmstead v. U.S. (1928) established a long understood idea that people expect to have the right to be free from government intrusion into their private lives as long as their behavior does not directly harm another person. This is why the Court can claim emanation and penumbral rights within the First, Third, Fourth, and Fifth amendments of the Constitution.

122) U.S. Const., Fourth Amendment.

123) Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, pp. 60

124) Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, pp. 101

125) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 774. Tribe defines a rational continuum as, "broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints… and which also recognizes,… that certain interests

require particularly careful scrutiny of the state needs asserted to justify their abridgement." Tribe adds to this idea by saying, "[The] Bill of Rights presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty and so numerous and so obvious as to preclude listing them."

126) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 1305

127) Tribe, Laurence H. Abortion: The Clash of Absolutes, pp. 94

128) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 1311. "The Congress finds that … the right of privacy is a personal and fundamental right protected by the Constitution of the United States." Privacy Act of 1974, P.L. 93-579, 5 U.S.C. 552a.

129)This was a concern addressed by both Madison and Hamilton in The Federalist as they attempted to assuage the concerns over increased government authority. A cursory review of any legal text will reveal that this is the central theme of all statutory decisions. Hans Kelsen explains this legal dilemma in *General Theory of Law and State*, Harvard University Press, Cambridge, Mass. (2009).

130) Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, pp. 6

131) Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, pp. 9

132) Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, pp. 13

133) Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, pp. 77 and pp. 108

134) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 664-670

135) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 707-709

136) Tribe, Laurence H., God Save this Court: How the Choice of Supreme Court Justices Shapes our History, pp. 44

137) Tribe, Laurence H., Constitutional Choices, pp. 243

138) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 1353-1354

139) Tribe, Laurence H., American Constitutional Law 2nd. Edition, pp. 1355

140) Tribe, Laurence H. Abortion: The Clash of Absolutes, pp. 105 and pp. 132

141) Tribe, Laurence H. and Michael C. Dorf, On Reading the Constitution, pp. 61

142) Tribe, Laurence H., Constitutional Choices, pp. 238-242

143) Gallup, CNN/USA Today, and Quinnipiac all conducted public opinion polls multiple times since 2003 on the issue of late-term abortions. In all of these polls the majority of people (greater than 80% in all polls) oppose the legalization of "partial-birth abortions. By comparison when polled on other abortion concerns the statistics are different. Whether people believe that abortion should be legal fluctuates from 45% to 55% both for and against its prohibition. When

the health of the mother is inserted into the question, then approval for abortion rises to majority levels. While it is difficult to assess the meaning of poll numbers when abortion is the issue, it is clear that the overwhelming majority of Americans must believe that the fetus is a living person because this is the only area when support does not statistically vary. If it is not a belief in life why would the numbers supporting first term abortions be so different? (Over 60% approve of abortion at this time in the pregnancy). While this may appear to strengthen the pro-abortion argument that the fetus is not life until a certain undetermined point it nonetheless demonstrates that the process does lead to life and most Americans understand this fact. The following cites were used to acquire abortion poll data; http://www.abortionpolls.com, http://www.gallup.com/poll/9904/public-opinion-about-abortion-indepth-review.aspx, and http://pollingreport.com.

144) The ambivalence over abortion as it applies to one's self and when it applies to others is seen as Americans respond that abortion is a moral wrong (approximately 50%), yet less than 20% believe that abortion should be illegal in all circumstances and less than 15% see abortion as morally correct. http://www.abortionpolls.com, http://www.gallup.com/poll/9904/public-opinion-about-abortion-indepth-review.aspx, and http://pollingreport.com.

145) In On Liberty Mill explains that the harm principle allows one to act as freely as they wish provided their behavior does not have negative impact on another person. This was an attempt to limit government authority into personal lives. At the same time Mill also would allow for state intervention to prohibit actions that were detrimental to the moral fabric of the community as well as gross physical harms. This is the basis for litigation whenever a claim of "self-defense" is made in court. This affirmative defense has the burden of demonstrating that the force used was appropriate to the presumed threat. One cannot kill merely because one was afraid or even threatened. The law specifies that in order to use deadly force, a perceived and real imminent threat of death must exist. http://www.law.justa.com/michigan/codes/2006/mcl.../mcl-328-1931-xxxvii.htmk.

146) This concern and demand by the Anti-Federalists has been well documented by scholars such as Herbert J. Storing and John P. Kaminski. In Storings' What the Anti-Federalists were for: The Political Thought of the Opponents of the Constitution, University of Chicago Press, (1981), he explains that the Anti-Federalists were firm on their opposition until an agreement on a bill of rights was created. Kaminski with Richard Leffler in Federalists and Antifederalists: The Debate Over Ratification of the Constitution, Madison House Publishers, (1998), cite writings of Richard Henry Lee et.al. to demonstrate the passion with which these men argued to secure a bill of rights

147) In his "Two Treatises on Civil Government" Locke addresses the idea of the moral value of rights. It was his contention that in a state of nature every person had to protect themselves and their property to the best of their ability. Respect for others was the basis of the moral duty that would be the foundation of the social contract. Moral rights are intrinsic and (as Bork argues) morality makes law. In this way, all who consent to the social contract enjoy a moral claim to rights by virtue of being a competent member of the society.

148) When the question is posed asking Americans if abortion is acceptable when the child would be born with a life-threatening illness or severe deformity, the acceptance of abortion ranges from 48% to 60%. http://www.abortionpolls.com, http://www.gallup.com/poll/9904/public-opinion-about-abortion-indepth-review.aspx, and http://pollingreport.com.

Chapter Six

1) Roe did not end the debate and in fact once this decision was handed down a stream of cases came before the Court. Examples of other cases that came before the Court were those that dealt with the funding of abortion procedures. Court has consistently declared that public funding was not part of a woman's right to abortion. Two of these were Maher v. Roe 432 U.S. 464 (1977) and Harris v. McRae 448 U.S. 297 (1980). In Maher the court upheld a Connecticut law that excluded non-therapeutic abortions that were medically unnecessary from receiving Medicaid funding. Justice Powell speaking for the Court stated that withholding funds did not constitute an intrusion by the government into a woman's choice to seek an abortion. It was his position that Roe had prohibited states from barring access to abortions and that was very different from requiring states to fund such choices. The Harris case was a challenge to the Hyde Amendment that excluded federal funds from being used to procure abortions. Justice Stewart speaking for the Court claimed, "although the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category." While the Court appears to be consistent on their rulings that deal with the funding of abortions it had always been the position of the Court that any fundamental right could not be withheld from a person because of financial status. One would only need to look as far as Gideon v. Wainwright 372 U.S. 335 (1963) to see this. If this was the case then the notion that abortion is a fundamental right was now in question and to ask for public support negates the claim that abortion is a private act. The attempt to apply strict scrutiny to abortion cases was always questionable because in order to do this the Court must demonstrate that the offended group is a suspect classification. Paradoxically, the after year Roe v. Wade 410 U.S. 113 (1973), the Court issued their opinion in Geduldig v. Aiello 417 U.S. 484 (1974) that asserted that pregnant women were not a suspect class. Using this as precedent, the legal moorings of Roe were clearly questionable.

2) Rawls, John. (1971). A Theory of Justice, The Belknap Press of Harvard University Press, Cambridge, Massachusetts. pp. 9-10.

3) Rawls, John. (1993). Political Liberalism, Columbia University Press, New York, New York. pp. 19-20.

4) Abbott, Philip. With Equality & Virtue for All: John Rawls & the Liberal Tradition, *Polity*, Vol. 8, No. 3 (Spring, 1976), pp. 339-357. Abbott argues that within the liberal society there exists a "suspicion of equality… as well as the liberal rejection of virtue." There is also a lack of fraternity that places society only a "breath from the unrestrained pursuit of self-interest" and these things combine to place the polity of Rawls purely within only one's imagination.

5) Rawls, John. Political Liberalism, 1993 pp. 186

6) Rawls, John. Political Liberalism, 1993 pp. 137

7) Rawls, John. Political Liberalism, 1993 pp. 138

8) Rawls, John. A Theory of Justice, 1971 pp. 355

9) Rawls, John. A Theory of Justice, 1971 pp. 111-112. Rawls addresses the theory of civil disobedience by both defining its existence in a just or near just society and outlining when use of this behavior is acceptable to defend the duty of justice. pp. 366-377.

10) Rawls, John. A Theory of Justice, 1971 pp. 355-377

11) Abbott, Philip. With Equality & Virtue for All: John Rawls & the Liberal Tradition, *Polity*, Vol. 8, No. 3 (Spring, 1976), pp. 339-357. Abbott argues that a liberal suspicion of equality exists as well as a liberal rejection of virtue that works to undermine any liberal theory of justice as these two concepts act in opposition of each other.

12) Rawls, John. A Theory of Justice, 1971 pp. 118-119

13) Rawls, John. Political Liberalism, 1993 pp. 47 and 79

14) Rawls, John. A Theory of Justice, 1971 pp. 17-22

15) Rawls, John. The Idea of Public Reason Revisited, *The University of Chicago Law Review*, Vol. 64, No. 3 (Summer, 1997), pp. 581.

16) Milligan, Luke M. A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process, *Boston University Law Review*, Vol. 87, No. 5 2007. pp. 1220.

17) Internet Encyclopedia of Philosophy, www.iep.utm.edu/rawls/

18) Rawls, John. Political Liberalism, 1993 pp. 19

19) During the Constitutional convention there existed support for the illiberal institution of slavery and as I discussed in chapter three, men of George Fitzhugh's ilk defended this institution with liberal language. This allowed the toleration of its existence as part of the liberal spectrum in order to achieve the greater goal of a new constitution. It is widely know that the Constitution is considered a "bundle of compromises" and this highlights the difference between resolution as seen with the concern over national power in article one, section eight and compromise as witnessed in the debate and final decision over slavery (commerce compromise). Using the Constitutional Convention as a type of original position demonstrates that resolution on troubling issues is possible; however, the paradox of liberalism can infiltrate the process.

20) Some can argue that Rawls' claim that there does exist an obligation to obey an unjust law runs counter to liberal logic; however, the duty to obey an unjust law as a way to maintain order in a just society does not imply that change is not possible or desired. Rawls spoke of the right to act and the wisdom of the action. In A Theory of Justice (pp. 373-375) Rawls explains how civil disobedience can be acceptable but there must be an understanding of how this can be a short step from revolution. There must exist within the act of public reason a way to bring attention to your cause if the paradox of liberalism has limited civil discourse. Rawls does not

require citizens to stand by and accept oppression, because just as compromise is not the goal of the original position, it is an understanding within a just society that reciprocity must be part of the agreement.

21)Rawls, John. A Theory of Justice, 1971 pp. 60-61

22) Rawls, John. Political Liberalism, 1993 pp. 317-324

23) Rawls, John. The Idea of Public Reason Revisited, *The University of Chicago Law Review*, Vol. 64, No. 3 (Summer, 1997), pp. 608-609.

24) Rawls, John. The Idea of Public Reason Revisited, *The University of Chicago Law Review*, Vol. 64, No. 3 (Summer, 1997), pp. 578. It appeared as though state legislators were attempting to apply public reason in order to achieve some sort of reflective equilibrium until the Supreme Court intervened in the process by handing down their decision in Roe.

25) Rawls, John, Political Liberalism, 1993 pp. 150-154. A review of the nation's early abortion statutes reveal that these laws were created with both the pregnant woman and the unborn child in mind. This process demonstrates that citizens do understand the idea of reciprocity and were willing to examine all possible conclusions in order to create the best law for a pluralist society.

26) Rawls, John, Political Liberalism, 1993 pp. 231-234. As I have argued, the Court's decision in Roe was just as flawed as it was in Dred Scott because both of these opinions appear to be judicial decrees that were based on personal beliefs rather that reasonable justice. As Timothy S. Huebner claimed, in the Dred Scott decision it has been argued that Roger Taney's pro-slavery beliefs worked to not only influence him, but these feelings were the motivation for his opinion. Huebner states; "Instead of confining himself to the specific question of Scott's status and standing to sue, Taney delivered a proslavery diatribe that revealed his deep devotion to slavery and the values of southern society." The Taney Court: Justices, Rulings, and Legacy, ABC-Clio Inc., Santa Barbra, California. 2003 pp. 40. In the Roe opinion, a similar attitude was investigated by Kermit Hall who stated, "Blackmun was also the former legal counsel for the Mayo Clinic, where had had worked closely with doctors, an experience that shaped his approach to Roe." Kermit L. Hall and John J. Patrick. (2006). The Pursuit of Justice: Supreme Court Decisions That Shaped America, Oxford University Press, New York, New York. p. 183.

27) Rawls, John. Political Liberalism, 1993 pp. 584

28) Rawls, John. A Theory of Justice, 1971 pp. 40-42

29) Rawls, John. A Theory of Justice, 1971 pp. 16-18

30) Rawls, John. A Theory of Justice, 1971 pp. 17-18

31) Rawls, John. Political Liberalism, 1993 pp. 122-125

32) A review of Max Farrand's The Records of the Federal Convention of 1787, Yale University Press, New Haven, Connecticut (1911), or John Kaminski's A Necessary Evil? Slavery and the Debate Over the Constitution, Madison House Publishers Inc., Madison, Wisconsin (1995), both explain with original documents and language the conversations and debates over slavery that the men of the founding era were struggling with.

33) In his Two Treatises on Civil Government John Locke speaks to the potential of men and uses this as the foundation for the ability of men to create a social contract. The ability of men to improve leads to the betterment of all in society and then allows a society to continue into perpetuity because it has the ability to adjust when circumstances call for it. In *Leviathan* Thomas Hobbes is less optimistic about men but nonetheless supports the idea that men will work to better their situation. Once a government is put into place that secures the society then the citizens will work toward improvement.

34) All the social contract theorists promote the need for government and stability. The question that is most often put is what constitutes legitimate. In A Theory of Justice, Rawls defines legitimate authority as that power assigned to institutions created within the original position that can be viewed as reasonable and support the constitutional essentials of the society.

35) Rawls, John. A Theory of Justice, 1971 pp. 373-374

36) Abbott, Philip. With Equality & Virtue for All: John Rawls & the Liberal Tradition, *Polity,* Vol. 8, No. 3 (Spring, 1976), pp. 350.

37) Rawls, John. Political Liberalism, 1993 pp. 68

38) Jefferson, Thomas. *The Declaration of Independence.*

39) Rawls, John. *Political Liberalism*, 1993 pp. 142-143

40) For a detailed examination of the impact of institutions on society and political culture, Almond and Powell offer an excellent discussion. Almond, Gabriel A. and G. Bingham Powell. (1978). Comparative politics: System, process, and policy, Brown and Little, Boston, Massachusetts. March and Olsen offer a different approach, nonetheless they continue to support institutions as important to political life. "Political democracy depends not only on economic and social conditions but also on the design of political institutions." They present a study on the resurgence of interest as applied to institutions. James G. March and Johan P. Olsen, The New Institutionalism: Organizational Factors in Political Life, *The American Political Science Review*, Vol. 78, No. 3 (Sep., 1984), pp. 734-749.

41) North, Douglass C. (1990). Institutions, Institutional Change and Economic Performance, Cambridge University Press, New York, New York.

42) Rawls, John. A Theory of Justice, 1971 pp. 54-55

43) Rawls, John. Political Liberalism, 1993 pp. 54

44) Rawls, John. A Theory of Justice, 1971 pp. 529

45) Abbott, Philip. With Equality & Virtue for All: John Rawls & the Liberal Tradition, *Polity*, Vol. 8, No. 3 (Spring, 1976), pp. 355.

46) Rawls, John. A Theory of Justice, 1971 pp. 339

47) Hobbes, Thomas. (1651). Leviathan, Barnes and Noble, New York, New York. pp. 105-108. In Chapter Seventeen Hobbes elaborates on the degradation of society into a constant state of war without the application of the social contract through the sovereign.

48) Rawls, John. A Theory of Justice, 1971 pp. 110-115

49) Rawls, John. *Political Liberalism*, 1993 pp. 217-218

50) Much has been written about the legitimacy of the democratic process and the role of the "losers" within this process. Significant scholarly works point to the fact that in successful political systems those who are defeated both work within and challenge the constraints of the established institutions to find a way to remain relevant with the hope of victory at a later date. See, Christopher J. Anderson et. al, (2005). Loser's Consent: Elections and Democratic Legitimacy, Oxford University Press, New York, New York. Adam Przeworski. (1991). Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America, Cambridge University Press, Cambridge, United Kingdom. William H. Riker. (1986). The Art of Political Manipulation, Yale University Press, New Haven, Connecticut.

51) Milligan, Luke M. A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process, *Boston University Law Review,* Vol. 87, No. 5 2007. pp. 1214.

52) Rawls, John. A Theory of Justice, 1971 pp. 62

53) Rawls, John. A Theory of Justice, 1971 pp. 139

54) Milligan, Luke M. A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process, *Boston University Law Review,* Vol. 87, No. 5 2007. pp. 1197.

55) Rawls, John. A Theory of Justice, 1971 pp. 138

56) Rawls, John. A Theory of Justice, 1971 pp. 16-18 and 48-51. Again Rawls relies on the notion of reciprocity. The public discussions that take place on any topic will only be resolved when both sides believe that to lose a political battle is all part of a healthy society. Equilibrium occurs because both sides are aware that the debate can be taken up again if times change and new constitutional principles become relevant; therefore, the losing side is not completely shut out of any further debate. In fact, more discussion is welcomed as a healthy growth process of society.

57) Milligan, Luke M. A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process, *Boston University Law Review,* Vol. 87, No. 5 2007. pp. 1203.

58) Opinion polls in America show that the majority of citizens oppose the death penalty and support euthanasia because as a society we respect the moral value of life. In fact many supporters of abortion will contend that if the fetus is deformed that it is morally right to end the life out of respect and dignity of the unborn's moral worth. Gallup Polls found in 2010 that 61% of Americans would not support the death penalty if another form of punishment (such as life without parole) was available. Gallup showed in 2006 that 89% of Americans support what they believe to be a patient's ability to choose to end their life. www.gallup.com

59) Rawls, John. Political Liberalism, 1993 pp. 243-244

60) Rawls, John. The Idea of Public Reason Revisited, *The University of Chicago Law Review*, Vol. 64, No. 3 (Summer, 1997), pp. 798.

61) Rawls, John. Political Liberalism, 1993 pp. 243

62) Rawls, John. The Idea of Public Reason Revisited, *The University of Chicago Law Review*, Vol. 64, No. 3 (Summer, 1997), pp. 798. Rawls may have thought abortion was permissible when he made this statement because of a lack of medical information; however, as I have argued this is no longer the case and medical technology supports a different conception of life. Rawls goes on to say that the debate must be centered on essential rights and ideas that can be supported by constitutional principles, so if anti-abortion groups can present their argument with these parameters then they have a viable argument. Merely because a belief is unreasonable in one area does not mean that the idea has no reasonable value.

63) Rawls, John. A Theory of Justice, 1971 pp. 509

64) Evers, Williamson M. Rawls and Children, *Journal of Libertarian Studies*, Vol. 2, No. 2, pp. 110.

65) Evers, Williamson M. Rawls and Children, *Journal of Libertarian Studies*, Vol. 2, No. 2, pp. 111.

66) Milligan, Luke M. A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process, *Boston University Law Review*, Vol. 87, No. 5 2007. pp. 1215.

67) Rawls, John. A Theory of Justice, 1971 pp. 249

68) The point here is that the duty to protect children overrides any economic difficulties that childbearing may create. This would fall under Rawls' concept of natural duties. The economic issues are better dealt with under the difference principle as I have previously mentioned.

69) Varga, Andrew. (1984). The Main Issues in Bioethics, Paulist Press, New York, New York. pp. 67-68.

70) It was determined in the evolution of English common law that the family and its reputation would not be held legally responsible for act committed by the father. Americans furthered this belief by placing a prohibition on the corruption of the blood as punishment for treason. In article three, section three, clause two it states, "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." To allow abortion as a consequence of the action of the father creates the implication or fear that either the child will also become a rapist or the reputation of the family will be harmed. These antiquated ideas have not had a place in American thought or jurisprudence since 1789.

71) It must be remembered that I have shown how pro-abortion supporters claim the unborn deserve no moral worth because they lack sentience and mentation; therefore, it is not a person or human. If they truly believe this argument, then how can the unborn be the aggressor if it

lacks the qualities to be so? Supporters of abortion cannot argue for acceptance of abortion because the fetus has no sense of existence and then also claim that fetus can commit and overt act of aggression. By offering these contradicting ideas the pro-abortion argument is demonstrating the need to speak with liberal language while simultaneously exposing itself as incoherent as it tries to justify this illiberal position.

72) Mahkorn, Sandra. (1979). Pregnancy and Sexual Assault, University Publications of America, Washington, D. C. pp. 55-69.

73) Reardon, David C. (1987). Aborted Women, Silent No More, Loyola University Press, Chicago, Il. pp. 204-210. This outside pressure seems to coincide with familial embarrassment and therefore abortions resulting from rape are more about family reputation then a concern for the woman.

74) Rawls, John. A Theory of Justice, 1971. Rawls outlines the concept of basic duties as they correspond to a conception of justice on page 45, he then more thoroughly examines and explains this on pages 354-355.

75) The ordering of rights is not an original concept but is one that must be clarified as a way to explain that a hierarchical understanding exists in liberal thought. This hierarchy also goes to explain why the abortion debate does not devolve into a zero sum game between the mother and the unborn child, but rather demonstrates the conception necessary to preserve a liberal understanding of rights. Rank ordering rights can be seen throughout the liberal history of America as citizens claim a right to an education but these same citizens would not place education on par with their right to life.

76) Maloy, Kate and Maggie Jones Patterson. (2002). Birth or Abortion: Private Struggles in a Political World, Perseus Publishing. pp. 274-276. Regardless the political beliefs of the owners and publishers of the national media, the Finkbine case was the first abortion story that was picked up by the national news services in an attempt to garner support for what was a very emotional issue.

77) Bork, Robert H. (1996). Slouching Toward Gomorrah: Modern Liberalism and the American Decline, Harper Collins Publishers, New York, New York. pp. 163-165.

78) Milligan, Luke M. A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process, *Boston University Law Review*, Vol. 87, No. 5 2007. pp. 1200. Logic dictates and history has shown us that humans act in a way that will protect their life and will avoid actions that promote ending it.

Chapter Seven

1) There have been hundreds of cases involving free speech argued before the Supreme Court and while many of these cases have limited speech; such as Schenck v**.** United States, 249 U.S.

47 (1919) and Hazelwood School District et al. v**.** Kuhlmeier et al., 484 U.S. 260 (1988) for various reasons, the underlying logic is that some speech is provided lower levels of protection in deference to the best interest of the community. Other cases have demonstrated the liberal belief in the expansion of liberties to the greatest extent possible as evidenced by cases such as, Texas v**.** Johnson, 491 U.S. 397 (1989), Virginia v**.** Black et al., 538 U.S. 343 (2003), and Snyder v**.** Phelps , 562 U.S. 206 (2011).

2) History is replete with examples of men who have attempted to use the political workings of society and an appeal to liberalism in order to place themselves in a position of power for their own gain. I illustrate this because it demonstrates the illiberalism that I argue exists and brings to the forefront America's ability to eliminate such behavior.

3) Madison wrote, "By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed (sic) to the rights of other citizens, or to the permanent and aggregate interests of the community. There are two methods of curing the mischiefs (sic) of faction: the one, by removing its causes; the other, by controlling its effects. There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests." http://www.constitution.org/fed/federa10.htm What Madison is telling us is that illiberal behavior will always exist, thus flaws in human nature will not allow the cause of factions to be eliminated. But rather than give up and deny the liberties of men, a liberal society must create ways to limit the effects of factions, thereby promoting liberal thought.

4) Within the original position behind the veil of ignorance citizens cannot anticipate personal gain as it applies to the decisions made, so within this environment the greater good of the community is the focus. In this way negative self interest is replaced with a type of enlightened self interest that places the good of society at the forefront promoted by liberal ideas.

5) Finnis, John.(1977). The Rights and Wrongs of Abortion: A Reply to Judith Thomson. *The Philosophy of Law*, edited by R. M. Dworkin. Oxford University Press Inc., New York pp. 148.

6) Gifis, Steven H., *Barron's Dictionary of Legal Terms*, Third Edition. 1998.

7) Thomson, Judith Jarvis. A Defense of Abortion. *From Philosophy & Public Affairs*, Vol. 1, no. 1 (Fall 1971). This may be one of best know essays in the defense of abortion and the burglar is one of a series of analogies that Thomson offers as a way to justify a woman's right to abortion.

8) Finnis, John. The Rights and Wrongs of Abortion: A Reply to Judith Thomson. pp. 149

9) Many historians have offered explanations as to the impact of the development of the cotton economy as it applied to slavery. A consensus exists that the South did come to depend on African slaves for the existence of their cash crop. Both Wright and Rodriguez offer thorough accounts of this behavior and thought process. Wright, Gavin.(2006). Slavery and American Economic Development, Louisiana University Press, Baton Rouge, Louisiana. pp. 84-85. Rodriguez, Junius P. Editor. (2007). Slavery in the United States: A Social, Political, and Historical Encyclopedia.(Vol. 1). ABC-CLIO Inc., Santa Barbara, California. pp. 374-375.

10) Dellapenna, Joseph W. (2006). Dispelling the Myths of Abortion History, Carolina Academic Press, Durham, North Carolina. In chapter 13 Dellapenna does an in-depth analysis of the mentality surrounding the abortion debate in America. He focuses on changing attitudes as both the cost and inconvenience of a disabled child become part of the debate.

11) In his seminal work Rawls contends that there will exist differences in what people think of as good; however, reasonable and rational people will not differ on what is right. For Rawls, good is focused on personal gain and right is designed to apply the principles of justice through just institutions. Rawls, John. (1971). A Theory of Justice, The Belnap Press of Harvard University Press, Cambridge, Massachusetts. pp. 446-452. Rawls later revised his thinking as he saw the political realities of society. While the original position is logical philosophically it seems less than practical. What Rawls did in Political Liberalism is to focus on an explanation of how the intent of the original position could be upheld within the workings of a democratic society. In this way he moved his argument from the purely philosophical into the realm of practical application. He lays out the idea of society and fair cooperation as well as the need for public reason in his second work. Rawls, John A.(1996). Political Liberalism, Columbia University Press, New York, New York. Lectures No. 1 pp. 3-46 and No. 6. pp. 212-254.

12) The platform of the Republican Party supports the death penalty and is firmly opposed to abortion. http://www.deathpenaltyinfo.org/gallup-poll-who-supports-death-penalty and http://www.diffen.com/difference/Democrat_vs_Republican

13) The platform of the Democrat Party does not view the death penalty as a necessity for society and it supports a woman's right to abortion. http://www.deathpenaltyinfo.org/gallup-poll-who-supports-death-penalty and http://www.diffen.com/difference/Democrat_vs_Republican

14) Republicans will not waver from the party stance on life issues because of the repercussions that come from challenging the party line. This is seen in the interest group scorecards that are made public and the money these groups pour into election campaigns. http://www.nrlc.org/Federal/scorecard/Scorecardexplaination.html Also, when a politician does dare to challenge the dogma of the party they pay a heavy political price. This is often referred to as the political litmus test and there has not been a contemporary republican to win his party's nomination who has not taken a pro life stance while at the same time defending the death penalty. Democrats find themselves in a similar political conundrum as no modern democrat has won his party's nomination without adhering to a pro choice position. However, the Democrat Party is less demanding of their candidates as it applies to the death penalty. http://washingtonexaminer.com/politics/2011/04/democrats-will-yield-everything-abortion

15) Lincoln's belief that Negros were not equal to whites was well known although he also believed that this inequality did not excluded Negros from certain rights and constitutional protections. Statements made throughout his debates with Stephen Douglas in 1858 illustrate this. David Zarefsky. (1990). Lincoln, Douglas and Slavery: In the Crucible of Public Debate, Chicago: University of Chicago Press.

16) Haggard, Dixie Ray. (2010). African Americans in the Nineteenth Century: People and Perspectives, ABC-CLIO Inc., Santa Barbara, California. pp. 227-228. Ms. Haggard gives an elaborate explanation of the social attitudes and the attempts at scientific racism that existed in America during this period.

17) Tribe's attitude about the condition of the unborn mirrors that of Elizabeth Harmon who claims the unborn has no moral value. Harmon, Elizabeth, Creation Ethics: The Moral Status of Early Fetuses and the Ethics of Abortion, *Philosophy & Public Affairs*, Vol. 28, No. 4. (Autumn, 1999), pp. 310-324.

18) Bork, Robert H.(1996). Slouching Towards Gomorrah: Modern Liberalism and American Decline, Regan Books, New York. The thesis of Bork's work is that to deny the moral worth of unborn life is the beginning of the end of civilized society.

19) Tocqueville, Alexis de, Democracy in America, J. P. Mayer editor, Harper & Row, New York, New York. 1969 pp. 305-306.

20) Shafer, Byron E. *'Exceptionalism' in American Politics?* PS: Political Science and Politics, Vol. 22, No. 3 (Sep., 1989), pp. 588-594. Shafer proposes that what makes American exceptionalism is our adherence to democratic institutions that link citizens to government. He further argues that it is the operation of these institutions that makes America different from other nations. His focus is on the separation of powers within the institutions of American government, primary elections, and what he calls the "connecting theme" of populism. It is the opinion of Shafer that the institutions of America is what makes America unique.

21) At this point I am reiterating my main idea that all other rights pale in comparison to life and if your life is insecure than regardless of any other rights that society may profess to respect, they have no value.

22) Hobbes, Thomas. Leviathan, Barnes and Noble Publishing, 2004, originally published 1651.

23) Locke, John. The Second Treatise on Civil Government and A Letter concerning Toleration. Edited with an Introduction by J. W. Gough. (Basil Blackwell. Oxford. 1946. pp. xxxix + 165. 8s. 6d. net.)

24) Hobbes, Thomas. Leviathan, Barnes and Noble Publishing, 2004, originally published 1651. pp. 79.

25) Hobbes, Thomas. Leviathan, pp. 92

26) Hobbes, Thomas. Leviathan, . 81

27) Locke, John. The Second Treatise on Civil Government and A Letter concerning Toleration. p. 4.

28) Locke, John. The Second Treatise on Civil Government and A Letter concerning Toleration. pp. 5

29) Locke, John. The Second Treatise on Civil Government and A Letter concerning Toleration. pp. 5

30) US Const., amend. V. and Wood, Gordon. (1969). Creation of the American Republic, W.W. Norton & Company, New York, New York. pp. 393-403. Gordon Wood explains in part four entitled, The Critical Period, that the months prior to the Constitutional Convention were arguably some of the most important in American history. His contention is that the promises and expectations of 1776 were seen by many as in danger of being lost. If these fears we realized then, "the consequence will be, that the fairest experiment ever tried in human affairs will miscarry…" (Richard Price, Observations on the Importance of the American Revolution (Dublin, 1785), 85.) Wood further illustrates that there was a belief that the evils the Revolution was designed to eliminate were being perpetuated and if the Articles of Confederation were not improved than the revolution of 1776 would be a tragic misfortune, "It is a favorite maxim of despotick (sic) power, that *mankind are not made to govern themselves"*- a maxim which the Americans had spurned in 1776. "But Alas!" many were now saying, "the experience of the ages too highly favours (sic) the truth of the maxim." (Boston Independent Chronicle, Mar. 1, 1787, in Seth Adams, ed., Works of Fisher Ames with a Selection from His Speeches and Correspondence, Boston, 1854).

31) Rawls, John. A Theory of Justice, pp. 335

32) Assessing abortion in this light allows Americans to see that alternatives exist for the pregnant mother and she is not a persecuted victim. Discussions in search of coherence are able to balance issues of the responsibility of the mother and the inconveniences of motherhood without claiming these ideas are at cross purposes.

33) Rawls, John. A Theory of Justice pp. 45

34) Rawls, John. *A* Theory of Justice pp. 34

35) Rawls, John. *A* Theory of Justice pp. 44

36) The following public opinion polls appear to demonstrate that a shift in attitude about the recognition of the unborn is taking place in America. Poll data: A 1998 NYTIMES/CBS POLL showed that 61% of Americans polled said that no abortion should be allowed after brain waves are detected (6 weeks). This indicates the recognition of life. In a 2000 HARRIS INTERACTION ELECTION POLL 48% of respondents claimed that life begins at conception. Then a 2003 FOX NEWS POLL showed that 55% of those polled responded that life begins at conception. Finally in a 2010 4FORUMS.COM POLL 62% of those polled said that life begins at conception.

37) The second principle of justice is what is known as the difference principle. Rawls defines this as, "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all." For Rawls this means that if the framework of a society's institutions requires equal liberty and fair equality of opportunity, the position of the most well off in society can only be justified if their betterment is part of a scheme that is designed to improve the least advantaged in society. Rawls, John. A Theory of Justice. On page 60 Rawls defines the difference principle and then he devotes pages 75 to 83 as an elaboration of this concept.

38) Pro-abortion groups were making claims that upwards of 1,000,000 illegal abortions were being performed annually in the United States. While these numbers are impossible to corroborate, if we look at the numbers of legal abortions performed after Roe they are far below these figures. Taking California as an example; early abortions were made legal in 1967 and in 1968 only 5,000 legal abortions took place. To get to the number promoted by pro-abortion advocates 100,000 would have been the anticipated number. Dellapenna, Joseph W. (2006). Dispelling the Myths of Abortion History. Carolina Academic Press, Durham, North Carolina. pp. 548-558. Dellapenna outlines the statistics available on abortion in the United States from 1950 to 1970 to reach his conclusions. It is important to keep these statistics in mind because part of the pro-abortion argument centers on the ill-conceived notion that making abortions illegal will not stop them. Abortion supporters are correct in one sense; a legal decree cannot stop people who do not respect the decree. I have not argued that making a law will end abortion instead what I have proposed is that once Americans recognize a new conception of life, then a voluntary extinction of abortion will occur for most people.

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ABSTRACT

SLAVERY AND ABORTION: THE PARADOX OF AMERICAN LIBERALISM

by

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Major: Political Science

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Louis Hartz proposed that America possesses a liberal tradition that works toward a Lockean equality for all people. I argue that Hartzs' theory is still applicable to America even though illiberal institutions have and do exist. My contention is that it is the paradox of liberalism that allows for this. Slavery is the quintessential illiberal institution, yet liberal concepts allowed it to exist in America for over 200 years. It is my contention that abortion is another illiberal institution that is being promoted by the paradox of liberalism. With the use of John Rawls theory of distributive justice abortion can be eradicated from American society while upholding the American liberal tradition.

AUTOBIOGRAPHICAL STATEMENT

I am a public school teacher of American History, World History, Government, Economics, Philosophy, and Law in Richmond Michigan. I married my high school sweetheart Mary 33 years ago and we have shared a life together that includes the raising of our daughters Amanda and Elizabeth. I received my bachelors degree in education from the University of Michigan-Dearborn in 1989 after completion of my military service in Europe. My career in public education began in the Richmond Community Schools in 1994 and while teaching there I obtained a Masters degree in American History from Oakland University in Rochester Michigan.