something that respects the valid concerns of both those who care about women's equality and those who care about unborn human life. And that focal point, says Breyer, is doctrine: "[T]his Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. *Roe v. Wade*; *Planned Parenthood v. Casey*. We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case."[274]

There are several problems here. First, exactly where and how and why does "the Constitution" offer this basic protection? In other words, where is the first link in the chain of proper constitutional argument, connecting *Roe's* rules to something actually in the document? To properly apply "legal principles" to new facts, we need to know the reasons underlying the principles. In the year 2000, it is hardly a state secret that *Roe*'s exposition was not particularly persuasive, even to many who applauded its result. *Casey* built on *Roe* without ever explaining why *Roe* was right. Now *Stenberg* builds on *Casey* and *Roe*, and critics may justly feel that this is a shell game with no pea. If all sides are being invited to come together in good faith, it is hard to ask them to cohere around *Roe* simply because "this Court" keeps incanting it without justifying it constitutionally. "We shall not revisit those legal principles." Shut up, he explained. Because I said so.

Second, even if *Roe's* documentary weaknesses were not so obvious or important, what *Roe* said was not particularly wise or sensitive. The case contained very little about women's equality, more about the rights of doctors, and rather a lot about privacy. But to talk about privacy is to beg the question of the moral status of the fetus.[275] How can all be asked to come together around a discourse that fails to acknowledge the basic moral insight of one side — that the fetus is a moral entity? Even if the moral nothingness of the fetus were obvious to most right-thinking folk when the fetus is a near-microscopic clump of cells, the issue in *Stenberg* is very different — late second-trimester abortions of recognizable humans, with hands, organs, dimensions, senses, brains.[276] When you prick them, they bleed.

Thus, *Roe*'s privacy talk is not a promising way to find common ground. What about women's equality? Breyer's opinion contains ex-

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[274] *Id.* (citations modified).

[275] *Roe* itself acknowledged that a "pregnant woman cannot be isolated in her privacy" and that the issue before the Court was thus "inherently different" from true privacy cases involving issues like contraception. Roe v. Wade, 410 U.S. 113, 159 (1973). This acknowledgment renders the opinion's exposition of abortion as a "privacy" right rooted in these earlier cases, *id.* at 152–53, almost incoherent. For more analysis and criticism, see Amar, *Intratextualism*, *supra* note 17, at 773–78.

[276] *Cf.* Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception"*, 43 STAN. L. REV. 599, 617–27 (1991) (discussing fetal development in utero).