

*Colloquy*  
WEBSTER V. REPRODUCTIVE HEALTH  
SERVICES

ABORTION AND THE SUPREME COURT: THE RETREAT  
FROM *ROE v. WADE*

WALTER DELLINGER† AND GENE B. SPERLING††

The intense public interest in *Webster v. Reproductive Health Services*,<sup>1</sup> was understandable. If present rates continue, nearly half of all American women will have an abortion at some point in their lives.<sup>2</sup> The Supreme Court's decision, however, lacked almost any intimation of the social, economic, and health consequences of the course upon which at least four of the Justices have embarked. The Court's prevailing opinions, moreover, failed to meet the most minimal standards of sound judicial decisionmaking.

In *Roe v. Wade*,<sup>3</sup> the Supreme Court held that the right to have an abortion was a constitutional liberty of fundamental importance. Under *Roe*, a state could force a woman to continue a pregnancy only by demonstrating a compelling reason.<sup>4</sup> The *Webster* plurality abandoned this standard of judicial protection without any serious explanation of why, sixteen years after *Roe*, the right to have an abortion is no longer fundamental.

The *Webster* plurality's backdoor approach allowed it to eviscerate *Roe* without explicitly overruling the case. The opinion neither rejected the long line of decisions supporting a fundamental interest in critical aspects of family relations and procreation, nor distinguished those established rights from abortion. Moreover, the Court

---

† Professor of Law, Duke University. The Eugene T. Bost Research Professorship and the National Humanities Center supported Professor Dellinger's research for this Article.

†† A.B. 1982, University of Minnesota; J.D. 1985, Yale Law School. Mr. Sperling practices constitutional law.

<sup>1</sup> 109 S. Ct. 3040 (1989).

<sup>2</sup> See Forrest, *Unintended Pregnancy Among American Women*, 19 FAM. PLAN. PERSP. 76, 77 (1987).

<sup>3</sup> 410 U.S. 113 (1973).

<sup>4</sup> See *id.* at 152-54.

did not offer any reason to accord dispositive, overriding weight to a state's assertion of a compelling interest in all fertilized ova. The plurality only implicitly suggested that a woman's right to choose to terminate a pregnancy would no longer receive heightened judicial protection. In these ways, the Court avoided explicitly overruling *Roe*, or even confronting the arguments that have emerged over the past sixteen years in defense of *Roe*. The end result was that the *Webster* plurality rejected a decision recognizing a fundamental constitutional right without explaining what, if anything, was wrong with the decision.

### I. THE PLURALITY OPINION IN *WEBSTER*

Although dismantling *Roe* was not necessary to deciding the *Webster* case,<sup>5</sup> the plurality seized the occasion to suggest that the abortion right is no longer fundamental. Rather than requiring a narrowly tailored compelling governmental interest, the plurality opinion cryptically notes: "we are satisfied that the requirements of these tests *permissibly* furthers the State's interest in protecting potential human life, and we therefore believe [the viability testing requirements] to be constitutional."<sup>6</sup> Although this statement might have meant only that the state's regulation had not unduly burdened the fundamental right, the next paragraph suggests that the plurality now considers the abortion right less than fundamental.

The experience of the Court in applying *Roe v. Wade* in later cases . . . suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion, as the Court described in *Akron* a 'limited fundamental constitutional right,' as Justice Blackmun's dissent today treats *Roe* as having established, . . . or a liberty interest protected by the Due Process Clause, which we believe it to be.<sup>7</sup>

In the past, when the Supreme Court departed from principles of *stare decisis*, the change was usually due to major factual, economic, or social changes that had rendered a former opinion obsolete, or because courts or agencies administering the rules found them unworkable. At a minimum, the lack of such changes would seem to

<sup>5</sup> *Webster*, 109 S. Ct. at 3058 (O'Connor, J., concurring).

<sup>6</sup> *Webster*, 109 S. Ct. at 3057 (emphasis added).

<sup>7</sup> *Id.* at 3058 (citations omitted).

call for the plurality to provide a powerful explanation of *Roe*'s deficiencies.<sup>8</sup>

The plurality did not attack *Roe* itself, though, but rather its what it referred to as "rigid trimester framework." In five brisk paragraphs, four Justices deemed the framework "unsound in principle and unworkable in practice."<sup>9</sup> They suggested that the *Roe* "framework" was "unworkable in practice" because it resulted in a "web of legal rules that have become increasingly intricate resembling a code of regulations rather than a body of constitutional doctrine."<sup>10</sup> The "framework" was "unsound in principle" because its "key elements [could not be] found in the text of the Constitution," and because *Roe* failed to justify fetal viability as the point at which the state's interest in protecting potential human life becomes compelling.<sup>11</sup> These criticisms of *Roe* have been repeated so often in the popular media that many assume their accuracy; they cannot, however, withstand serious scrutiny.

#### A. *The Unworkability Assertion*

The plurality claimed that *Roe* is "unworkable" without comparing its "workability" to any other area of law, and without inquiring whether lower courts had had any difficulty applying *Roe*. Suggesting that *Roe* created a "rigid trimester framework," a "virtual Procrustean bed," and an "intricate" "web of legal rules" was rhetorical obfuscation. Once the Court establishes a constitutional principle, there are always questions about how specifically its opinion should guide legislators and lower courts. This is a prudential task, one calling for judicial discretion. It is not a matter that undermines the principle's legitimacy or functional workability.

---

<sup>8</sup> The Chief Justice is, of course, right in stating that *stare decisis* "has less power in constitutional cases." *Id.* at 3056. Still, as former Justice Lewis Powell noted:

There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by The Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

*Akron*, 462 U.S. at 420 n.1.

<sup>9</sup> *Webster*, 109 S. Ct. at 3056 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

<sup>10</sup> *Id.* at 3057.

<sup>11</sup> *See id.* at 3056-57.

The court decisions following *Roe* have involved little more than common sense application of constitutional principles that the *Webster* plurality did not dispute. *Roe* simply held that an individual's fundamental liberty "to bear or beget a child" extended to a right to abortion, and identified two governmental interests that, if compelling, might limit the right: the protection of a woman's own health, and an interest in a developing fetus.

Any review of post-*Roe* litigation would show that the decision has been as or more "workable" than most legal distinctions in spite of efforts by hostile state and local governments to pass laws and ordinances deliberately "close to the line of permissibility." Surely the plurality does not mean to suggest that dissatisfied groups can force the Court to abandon a constitutional principle simply by passing laws at the margin of its application, thereby creating an "intricate web of regulation." Judging a constitutional principle by the close calls it creates is not sound jurisprudence. The mere fact that several members of the Supreme Court do not agree with previous decisions of the Court does not make them "unworkable."<sup>12</sup>

#### B. *The Unsound In Principle Assertion*

The plurality's claim that *Roe* is unsound in principle is equally conclusory. The plurality asserted that because "key elements of the *Roe* framework are not found in the text of the Constitution," *Roe* is "hardly consistent with the notion of a Constitution cast in general terms."<sup>13</sup> This assertion is profoundly puzzling: there is *no area* of Constitutional law in which the key doctrinal elements come from "the text of the Constitution."<sup>14</sup>

---

<sup>12</sup> Abortion law is a far cry from the complete disorder that several Justices recognized only days before the *Webster* opinion in the term's RICO case, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989). In RICO law, the matrix of indefinite terms and phrases have led to near complete inability of the lower courts, over a two-decade period, to maintain any boundaries for its use. The problems led Justice Scalia, speaking for three other justices, to declare its main definitional test no more helpful to lower courts than the statement "life is a fountain." *Id.* at 2907. No one could make the same case against the workability of *Roe*. See also *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 523 (1985) (discussing severe complexity, confusion, and unworkability of *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

<sup>13</sup> *Webster*, 109 S. Ct. at 3056.

<sup>14</sup> For example, the first amendment provides only the foundation for rules that currently require judicial determination of whether a regulation is "content-based," "content-neutral," or "viewpoint-neutral." See, e.g., *Carey v. Brown*, 447 U.S. 455, 461 (1980) (holding unconstitutional a statute which accorded "preferential treatment to the expression of views on one particular subject"); *Police Dep't v.*

The plurality also concluded that there is a problem with *Roe's* discussion of the state's interest in the fetus, but did so in a most cursory way. The *Webster* plurality merely wrote: "We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."<sup>15</sup>

Without responding to either of *Roe's* central propositions,<sup>16</sup> or otherwise addressing *Roe's* constitutional principles, the plurality attacked a version of the "rigid trimester framework" that bore little resemblance to the actual case law. The plurality mentioned the sensible distinctions between permissible (because medically sound) and impermissible (because medically unnecessary) abortion regulations, and abruptly announced: "We do not think that these distinctions

---

Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (citations omitted)); see also G. GUNTHER, CONSTITUTIONAL LAW 1164 n.2 (11th ed. 1985) (reviewing academic literature concerning these distinctions). These sub-questions and ambiguities include whether a "public forum" or a "limited public forum" has been created, see, e.g., *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 569 (1988) (rejecting the claim that a high school newspaper is a public forum); whether an individual suing for libel is a "public official," a "public figure," or a "public figure for certain purposes," see, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 133-36 (1979) (holding that a recipient of federal research money is not a public figure); *Time, Inc. v. Firestone*, 424 U.S. 448, 452-55 (1976) (holding that a person involved in a public controversy is not necessarily a public figure); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (permitting states to set liability standards where the plaintiff is a private individual); and whether a publication is "obscene" or (merely) "indecent," see, e.g., *Sable Communications of California, Inc. v. F.C.C.*, 109 S. Ct. 2829, 2834 (1989) (holding unconstitutional that portion of a statute that restricted adult access to telephone messages which were indecent, but not obscene). Moreover, these points cover only a fraction of the "framework" that creates the "intricate regulatory web" of first amendment jurisprudence.

<sup>15</sup> *Webster*, 109 S. Ct. at 3057. *Roe's* "viability line" simply formally recognized an idea that many find intuitively plausible: a state's interest in fetal life becomes more important as the fertilized ova develops from a microscopic entity to a being that is in most respects a human infant. The difficult task for the *Roe* Court was to decide when the interest became sufficiently compelling to justify such an extraordinary imposition of the state's will on a pregnant woman.

Because there is no simple, logical deduction from a constitutional principle that produces the viability point, the *Roe* decision reflected an accommodation, based on the Court's best judgment, of the woman's fundamental liberty interest and arguably important state interests. Every area of constitutional law necessarily requires evaluating governmental and individual liberty interests, and exercising judgment and discretion to balance them.

<sup>16</sup> *Roe* held that women have a fundamentally important liberty to choose whether to give birth, and that, before viability, there is no clearly established overriding state interest.

are of any constitutional import in view of our abandonment of the trimester framework."<sup>17</sup>

Other than alleging the framework's "complexity" and citing the fact that it is not explicit in the Constitution's text, the plurality gave no reason for "abandoning" it. Nor did they clearly explain what abandoning the "trimester framework" means. Will the Court now allow legislatures, under the guise of "health," to design and pass illicit regulations that force a woman to continue a pregnancy, even though the restrictions have no basis in sound medical practice?

Abandoning the "trimester framework," in itself, does not justify sustaining a state statute which burdens, for no good medical reason, a fundamental liberty. The Court asserts that "the State's interest, if compelling after viability, is equally compelling before viability," without completely justifying the state's asserted interest as compelling at *any* point.

The plurality thus rejected *Roe's* accommodation without analysis and offered no suggestion for a better one. As a result, the plurality's criticism of the "viability line" is as consistent with protecting a woman's decision to choose abortion throughout pregnancy as it is with eliminating abortion choice entirely. In a future term, if and when the plurality gains the vote of an additional Justice, the Court may simply treat *Roe* as a "derelict on the waters of the law,"<sup>18</sup> a decision so eroded by *Webster* that a future Court will, at that point, find it unnecessary either to explain what was wrong with *Roe*, or to reconcile its overruling of *Roe* with its retention of other fundamental liberty cases. Respect for prior decisions should lead the Court to offer a meaningful argument to establish the error of a constitutional right to abortion before abandoning it. If the Court overrules *Roe*, it should at least provide a decent burial.

## II. RECONSIDERING *ROE V. WADE*: THE LIBERTY INTEREST IN DECIDING WHETHER TO BEAR A CHILD<sup>19</sup>

For a Court set on honestly reconsidering *Roe v. Wade*, there

---

<sup>17</sup> *Webster*, 109 S. Ct. at 3057 n.15.

<sup>18</sup> *Lambert v. California*, 335 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

<sup>19</sup> Some of the material drafted by the authors for this section subsequently appeared in a brief that Professor Dellinger filed as counsel of record for twenty-six Members of the United States Senate and 110 Members of the United States House of Representatives as Amicus Curiae in support of the appellees in *Turnock v. Ragsdale*, 841 F.2d 1358 (7th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3859 (U.S. July 3, 1989) (No. 88-790), the Illinois abortion case which was settled prior to oral argument before the United States Supreme Court.

appear to be three basic paths. The first is to conclude that the underlying source of the abortion right—that there is a fundamental right to procreative liberty and privacy—is an illegitimate interpretation of the Constitution. The second is to conclude that a woman's right to choose an abortion can be distinguished from, and should no longer be considered as part of, the established fundamental liberty to bear or beget a child. Finally, the Court could conclude that even though women have a fundamental constitutional liberty interest in choosing abortion, a state may nonetheless override the right by asserting a compelling interest in all fetal life.

The Court could overrule *Roe* by holding that the fourteenth amendment's due process clause did not provide any *substantive* protection for fundamental privacy rights. Whatever the ultimate merit of this argument, it is principled. It would, of course, have been possible to give a narrow reading to the fourteenth amendment, a reading that would have excluded any substantive limits on the legislative capacity of the states other than those specified elsewhere in the Constitution. The courts might have concluded, in David Currie's brisk words, "that 'process' means procedure, that 'liberty' means freedom from imprisonment, and that 'due process of law' means according to the law of the land."<sup>20</sup>

Such a limited reading, however, has not been the course of constitutional law in this century. It does not appear that the Court is prepared to overrule the now substantial line of cases holding that the fourteenth amendment protects important non-textual liberty interests from hostile state legislation.<sup>21</sup>

Those traveling down the second road bear the significant burden of establishing a principled means for distinguishing *Roe* from six decades of fundamental liberty and privacy cases. Former Solici-

---

<sup>20</sup> D. Currie, *The Constitution in the Supreme Court: The Second Century (1888-1986)* (forthcoming).

<sup>21</sup> Even Justice White has explicitly recognized the fact that such liberties are now substantively protected by the fourteenth amendment against state infringement. Writing for the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), he acknowledged that:

It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, *the cases are legion in which those Clauses have been interpreted to have substantive content*, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer*, *Prince*, and *Pierce* fall in this category, as do privacy cases from *Griswold* to *Carey*.

*Id.* at 191 (emphasis added).

tor General Charles Fried, representing the United States as amicus curiae in *Webster*, explicitly argued that the relevant earlier cases could be distinguished and should not be overruled. He began his submission with the assurance that, "[W]e are not asking this Court to unravel the fabric of unenumerated and privacy rights which this court has woven in cases like *Meyer* and *Pierce* and *Moore* and *Griswold*. Rather, we are asking the Court to pull this one thread."<sup>22</sup>

Retaining "the fabric of unenumerated and privacy rights" makes it difficult to extract abortion from the list of protected interests. One approach is to argue, as Chief Justice Rehnquist and Justice White have, that the Constitution's text "obviously contains no references to abortion, nor indeed, to pregnancy or reproduction generally; and it is highly doubtful that the authors of any of the provisions of the Constitution believed that they were giving protection to abortion."<sup>23</sup> The absence of any express constitutional mention of "abortion," though, cannot be dispositive of this issue.<sup>24</sup> The framers of the fourteenth amendment chose not to make a list of protected "liberties," but included instead a general principle that individuals should be free of unwarranted state interference. Accepting the "no [textual] reference" argument would not leave any fundamental rights case standing.

A less sweeping, but still broad, argument is that the abortion right is not fundamental because, at "the most specific level," abortion itself, it does not fit within a historical tradition of protection. Such an attack misconstrues the proper role of historical tradition in fundamental rights interpretation. The goal of constitutional jurisprudence cannot be to inquire whether the narrowest or most specific aspect of an activity in question has historical support. The task, rather, is to identify the historical values underlying the constitutional principle at stake and to inquire whether the current activity must be protected to realize those values.

---

<sup>22</sup> *Transcript of Oral Argument Before Court in Abortion Case*, N.Y. Times, Apr. 27, 1989, at B12, col. 5 [hereinafter *Transcript of Oral Argument*]. Fried's opening statement was widely quoted, as was the rejoinder from counsel for the appellees, Frank Susman: "It has always been my personal experience that when I pull a thread, my sleeve falls off." *Id.* at B13, col. 1.

<sup>23</sup> *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 789 (1986).

<sup>24</sup> Similarly, the absence of explicit text would not preclude a successful constitutional challenge to governmentally *compelled* abortions. See generally P. DIAMOND, *THE SUPREME COURT AND JUDICIAL CHOICE* (1988) (arguing that there is no escaping judicial choice where broad provisions of the fourteenth amendment authorize a range of choices).



The framers said nothing specific about hysterectomies and did not even contemplate the issue when drafting the fourteenth amendment, but concentrating on their opinion of reproductive surgery would be inappropriate when assessing a statute that unjustly compelled unnecessary hysterectomies or prohibited necessary hysterectomies. A court that invalidated such a law would not be “creating a new constitutional right to hysterectomy-choice,” but merely applying the established constitutional rule that deeply intrusive laws restricting liberty must be justified by a compelling governmental reason.

Arguing that a historical tradition of protection for a liberty must be found at the “most specific level” for fourteenth amendment protection is flatly contrary to decisions like *Loving v. Virginia*.<sup>25</sup> Before *Loving*, there had unquestionably been a long and intensely emotional tradition of attacking interracial marriage. The Court, though, applied more general constitutional principles, racial equality and the fundamental right to marry, and found anti-miscegenation laws both a violation of the equal protection clause and a violation of the due process clause.

When Congress passed the fourteenth amendment, the country accepted segregative laws because of deeply rooted prejudice toward blacks. Similarly, the right to control one’s reproductive capacity may not have appeared to be liberty-denying by generations that maintained archaic stereotypes about women’s roles. In both cases, an evolving understanding of the general value—the equality necessary for meaningful liberty—made it clear that the more specific activity had to be a protected element of the more general fundamental interest at stake.<sup>26</sup>

---

<sup>25</sup> 388 U.S. 1 (1967).

<sup>26</sup> In *Michael H. & Victoria D. v. Gerald D.*, 109 S. Ct. 2333 (1989), a case involving the visitation rights of the natural father where the mother was married to another man, the Justices’ dialogue suggested scant support for Justice Scalia’s “most specific level” test for determining the contours of fundamental rights. In a lengthy footnote, Justice Scalia set out the case for establishing what is fundamental by “refer[ring] to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Id.* at 2344 n.6. He went on to say that only where “there was no societal tradition, either way, regarding” the most specific tradition could one “consult, and (if possible) reason” at a more general level. *Id.* Only Chief Justice Rehnquist joined this footnote.

Justice O’Connor and Justice Kennedy, while joining the rest of Scalia’s opinion, specifically dissented from this footnote, stating that they found this mode “of identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment . . . somewhat inconsistent with . . . past decisions” such as *Griswold* and *Eisenstadt*. See *id.* at 2346 (O’Connor, J., concurring). Furthermore, O’Connor recognized that “[o]n occasion the Court has characterized relevant traditions

If the "narrow tradition" and "textual reference" arguments fail to distinguish the liberty interest in abortion from other fundamental ones, how can one make the case that the Court could withdraw the abortion right while keeping intact six decades of cases supporting a fundamental liberty interest in vital areas of privacy?

Since the Court is not prepared to abandon cases such as *Meyer v. Nebraska*,<sup>27</sup> *Skinner v. Oklahoma*,<sup>28</sup> *Griswold v. Connecticut*,<sup>29</sup> *Loving v. Virginia*,<sup>30</sup> *Eisenstadt v. Baird*,<sup>31</sup> and *Moore v. City of East Cleveland*,<sup>32</sup> the burden is on those who would suggest that a woman's personal decision to terminate a pregnancy is not a fundamentally important liberty of the same magnitude as the interests involved in those cases.<sup>33</sup> Restrictive state abortion laws require women, and only women, to endure government-mandated physical intrusions significantly more substantial than those the Court has held to violate the constitutional

---

protecting asserted rights at levels of generality that might not be 'the most specific level' available." *Id.* Justice O'Connor cited not only the due process clause portions of *Loving* but also the unanimous 1987 ruling by the Court in *Turner v. Safley*, 482 U.S. 78, 96 (1987), with *no* historical analysis, that prisoners have a right to marry, as well as a page from Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), which included the following passages:

Each new claim of Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come."

*Id.* 367 U.S. at 544 (1961) (Harlan, J., dissenting) (citation omitted).

<sup>27</sup> 262 U.S. 390, 400, 403 (1923) (overruling a state statute forbidding teaching in any language other than English and teaching foreign languages).

<sup>28</sup> 316 U.S. 535 (1942) (recognizing marriage and procreation as "fundamental to the very existence and survival of the race" and striking down a state statute providing for involuntary sterilization of "habitual criminals").

<sup>29</sup> 381 U.S. 479, 485-86 (1965) (striking down a state statute forbidding the use of contraceptives by married couples).

<sup>30</sup> 388 U.S. 1, 12 (1967) (striking down a state anti-miscegenation statute).

<sup>31</sup> 405 U.S. 438, 453-55 (1972) (striking down a state statute forbidding the distribution of contraceptives to any unmarried person).

<sup>32</sup> 431 U.S. 494 (1977) (plurality opinion) (striking down an ordinance limiting the occupancy of a dwelling to members of a single family).

<sup>33</sup> Phillip Heymann and Douglas Barzelay first proposed the argument that a substantial line of Supreme Court fourteenth amendment decisions prior to *Roe* created at least the presumption of a fundamental liberty interest in terminating a pregnancy. See Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765 (1973) (responding to Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973)).

principle of bodily integrity.<sup>34</sup> By imposing mandatory childbearing, the government itself creates significant risk of physical harm.<sup>35</sup> Abortion laws also give the state control over a woman's basic choices about reproduction and family planning,<sup>36</sup> a situation incompatible with a meaningful concept of fundamental "liberty." Because of its "total effect on the life and future of the one enjoined," Jed Rubenfeld argued recently, "[i]t is no exaggeration to say that mandatory childbearing is a totalitarian intervention into a woman's life."<sup>37</sup>

If *Griswold* is to remain good law, how can one fail to conclude that women have at least a presumptive fundamental liberty interest in deciding to terminate a pregnancy? The *Webster* opinions upholding the Missouri law virtually ignored this critical issue despite its significant place in the oral arguments. The Solicitor General's Brief in *Webster* argued that the right to choose an abortion is "inherently different" from other closely related areas of privacy because it

---

<sup>34</sup> Cf. *Winston v. Lee*, 470 U.S. 753 (1985). Here, the state sought to compel surgical removal of a bullet from beneath the skin of a murder suspect, a procedure the lower court concluded would pose "minimal" or "very low" risk. See *Lee v. Winston*, 717 F.2d 888, 900 (4th Cir. 1983). The Supreme Court held that "[a] compelled surgical intrusion into an individual's body . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." *Winston*, 470 U.S. at 759.

<sup>35</sup> It has not been fashionable to emphasize the extent to which *Roe* was a case concerning a person's right to decide among medical treatment options, but there are substantial health and medical risks for women compelled by law to forgo an abortion procedure. All pregnancies present a significant health risk, but women are willing to assume it when they desire to have a child. When the government imposes the risk, though, it creates an extraordinary imposition.

When the fetus is younger than eight weeks old, abortion is more than *twenty times* safer than childbirth. The American Medical Association and other health groups argued in *Webster* that "the health effects of pregnancy and abortion, by themselves, should be sufficient to support the holding in *Roe* that the woman's choice should be constitutionally protected." Brief Amici Curiae of the American Medical Association, et. al., in Support of Appellees at 28, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

<sup>36</sup> See R. PETCHESKY, ABORTION AND WOMAN'S CHOICE 5 (1984):

A woman's right to decide on abortion [and, it follows, on all childbearing issues] when her health and her sexual self-determination are at stake is "nearly allied to her right to be."

Reproduction affects women as women; it transcends class divisions and penetrates everything - work, political and community involvements, sexuality, creativity, dreams.

*Id.* (footnote omitted).

<sup>37</sup> Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 791 (1989); see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1352-55 (2d ed. 1988) (discussing why abortion laws cause enormous and unprecedented intrusions on privacy).

“involves the purposeful termination of potential life.”<sup>38</sup> Whatever the merits of this argument, it is not an argument about whether there is a fundamental right involved, but about whether the state’s asserted interest in protecting human life should constrain or override that right. It is difficult to justify concluding that there is a fundamental liberty interest in purchasing a condom, but no constitutional interest of similar magnitude in resisting government compulsion to bear a child.

Moreover, how would the plurality draw the “sound in principle” and “workable in practice” lines it seeks to impose in light of the fact that important methods of birth control operate as abortifacients of fertilized ova?<sup>39</sup> Would it be principled and workable for the Supreme Court to announce a fundamental right to bear a child that does not include the right to terminate a pregnancy, but includes the right to use a condom or a diaphragm, and possibly does not include the right to use an IUD or a morning after pill?

The United States, in its *Webster* amicus brief and in the oral argument of former Solicitor General Fried, argued that the Court could retain *Griswold* even if it overturned *Roe*. Squinting at *Griswold*, the United States noted a reference there to the possibility of “police searches of marital bedrooms for the tell-tale signs of the use of contraceptives,” and suggested that *Griswold* could be read as a narrow fourth amendment search and seizure case.<sup>40</sup> This reading would reduce the case to a largely inconsequential decision.

If *Griswold* only protects couples from police searches of marital bedrooms, states would be free to criminalize all manufacture, sale, and distribution of every kind of birth control device. National, state, and local governments would be free to deny American citizens access to birth control, as long as the government enforced its ban by means other than searching marital bedrooms.<sup>41</sup>

---

<sup>38</sup> Brief for the United States as Amicus Curiae Supporting Appellants at 14, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (quoting *Harris v. McRae*, 448 U.S. 297, 325 (1980)).

<sup>39</sup> See *Webster*, 109 S. Ct. at 3056; *Transcript of Oral Argument*, *supra* note 22, at B13, col. 2.

<sup>40</sup> Brief for the United States as Amicus Curiae, *supra* note 38, at 12 n.9; see also *Transcript of Oral Argument*, *supra* note 22, at B13, col. 1 (quoting Mr. Fried on the constitutional foundations of *Griswold*).

<sup>41</sup> This limited reading would obviously require the overruling of *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Carey v. Population Serv. Int’l*, 431 U.S. 678 (1977), cases protecting the sale and distribution of contraceptives. It is not the case that exercising the contraception right is necessarily more “private” than the exercise of abortion choice. Under Missouri’s definition of abortion, full enforcement of a ban

The case for viewing the abortion right as fundamental is perhaps most powerful after considering that if the choice is anything less than fundamental, even simply a liberty interest, states would need only a minimal justification to *require* women to undergo abortions. This issue appeared at oral argument, but the *Webster* opinions upholding the abortion restrictions ignored it.<sup>42</sup>

Former Solicitor General Fried argued in *Webster* that even if it held that abortion choice is not a fundamental liberty, the Court could still strike down a compulsory abortion law as an unconstitutional seizure. The state would be "violently taking hands on, laying hands on a woman and submitting her to an operation . . . ." <sup>43</sup> Fried's attempt to distinguish between forcing an abortion and forcing childbirth, a far more painful and dangerous procedure than first trimester abortion, is wholly inadequate. Fried's argument also fails to recognize that in spite of *Roe*'s declaration that the a woman's choice is fundamental, lower court judges have allowed states to violently lay hands on a woman by requiring some women to undergo forced cesarean section operations.<sup>44</sup>

---

on all abortions would involve the most intrusive searches conceivable for evidence of use of pills and intrauterine devices that function as abortifacients.

<sup>42</sup> This issue of compelled abortions is by no means hypothetical. The New York Times reported this year that: "[s]even present and former New York City correction officers contended . . . that the Correction Department regularly told pregnant officers to have abortions or resign." See N.Y. Times, May 24, 1989 at B3, col. 1; see also *Correction Officials Fined Over Abortions*, N.Y. Times, October 4, 1989, at B2, col. 6 ("A senior official of New York City's Department of Corrections has resigned and four others have been penalized in an investigation into charges that the department has told pregnant correction officers to have abortions or resign. "). Moreover, there are a number of contemporary circumstances where state or local governments might seek to force abortions: pregnancies likely to result in the birth of AIDS babies; inmate pregnancies; pregnancies of the mentally retarded; pregnancies of women in military or other security jobs.

<sup>43</sup> The entire exchange at oral argument proceeded as follows:

*Justice O'Connor:* Do you think that the state has a right to, if in a future century we had a serious overpopulation problem, has a right to require women to have abortions after so many children?

*Mr. Fried:* I surely do not. That would be quite a different matter.

*Justice O'Connor:* What do you rest that on?

*Mr. Fried:* Because unlike abortion, which involves the purposeful termination of future life, that would involve not preventing an operation but violently taking hands on, laying hands on a woman and submitting her to an operation and a whole constellation —

*Justice O'Connor:* And you would rest that on substantive due process protection?

*Mr. Fried:* Absolutely.

*Transcript of Oral Argument, supra* note 22, at B14, col. 5.

<sup>44</sup> See Kolder, Gallagher & Parsons, *Court-Ordered Obstretical Interventions*, 316 N.

Obviously, it would not be necessary to physically seize a woman to enforce a compulsory abortion law. The state could punish failure to undergo an abortion by after-the-fact civil or criminal fines, jail sentences, or other sanctions, including the punitive withholding of government benefits. In each case, the government would override a woman's decision about how to treat her pregnancy. It is simply unclear where the strong "substantive due process protection" Fried would invoke to prevent forced abortions would find its source if the Court overturned *Roe* and accepted the United States' exceedingly narrow reading of virtually every Supreme Court decision concerning fundamental liberties.<sup>45</sup>

Attempting to improve on Fried's answer to the compelled abortion question, Kenneth Starr, the new Solicitor General, revisited the issue in his brief in *Hodgson v. Minnesota*,<sup>46</sup> an abortion case the Court will hear in the 1989 Term. The new answer not only fails to distinguish compelled abortion adequately, it makes a startling concession that powerfully supports *Roe*'s basic holding.

After arguing that "it cannot reasonably be said that the right to abortion is fundamental[,]"<sup>47</sup> the Solicitor General proceeded nonetheless to argue that there is a fundamental liberty interest in being free from compelled abortion. He wrote: "By contrast, a state law *mandating* abortions would present a starkly different question. . . . Our nation's history and traditions establish that a competent adult may generally refuse unwanted medical intrusion. This right would, we believe, extend to an unwanted abortion."<sup>48</sup> Conceding that the "nation's history and traditions establish" a fundamental liberty interest in being free from "unwanted medical intrusion" is surely correct, and doing so just as surely supports a fundamental interest in terminating a pregnancy. A competent adult's decision to have an abortion in the early weeks is clearly a decision to "refuse unwanted medical intrusion." Compelled childbirth is a major medical event

---

ENG. J. MED. 1192 (1987) (discussing ten states where courts have ordered women to admit to cesarean sections).

<sup>45</sup> See Brief for the United States as Amicus Curiae, *supra* note 38, at 12 nn.7-9. In three remarkable footnotes, the Solicitor General's brief argues that most of the major cases involving fourteenth amendment liberty are "explicable in terms of some other constitutional command beyond the generalized interest in 'liberty' secured by the fourteenth amendment." *Id.* at 12.

<sup>46</sup> Nos. 88-1125, 88-1309.

<sup>47</sup> Brief for the United States as Amicus Curiae Supporting Respondents in No. 88-1125, *Hodgson v. Minnesota*, and Supporting Cross-Petitioners in No. 88-1309, *Minnesota v. Hodgson* at 14.

<sup>48</sup> *Id.* at 14 n.7.

and far more dangerous than aborting an early pregnancy. Moreover, a quarter of all pregnancies end with Cesarean section, a major medical procedure.<sup>49</sup> By denying women the right to elect early, medically simple abortion, and thereby forcing pregnant women to undergo childbirth, the United States government necessarily violates the principle that it concedes “[o]ur Nation’s history and tradition” establishes: “competent adult[s] may generally refuse unwanted medical intrusion.”

In the end, the *Webster* plurality neither distinguished freedom from state-compelled childbirth from the other fundamental rights, nor indicated a willingness to abandon the substantive protection of comparable liberties. Chief Justice Rehnquist’s entire defense of the plurality’s “failure to join in a ‘great issues’ debate as to whether the Constitution includes as ‘unenumerated’ general right to privacy as recognized in cases such as *Griswold* . . . and *Roe*” was simply to respond:

But *Griswold v. Connecticut*, unlike *Roe*, did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. As such, it was far different from the opinion, if not the holding, of *Roe v. Wade*, which sought to establish a constitutional framework for judging state regulation of abortion during the entire term of pregnancy.<sup>50</sup>

The plurality opinion thus ends where it began: hiding from the central issues behind an irrelevant criticism of “frameworks,” and never once suggesting why freedom from extraordinary state intervention into a woman’s life should no longer be considered a fundamental constitutional liberty.

### III. JUSTICE O’CONNOR: BURDENS ON LIBERTY THAT ARE NOT “UNDUE”

Even if the Court were to continue to hold that women have a fundamental liberty interest in deciding to terminate a pregnancy, many women could still be effectively deprived of the right to exercise their choice by the Court imposing an overly restrictive view of how burdensome state restrictions must be before they constitute an infringement of that liberty interest.<sup>51</sup> Justice O’Connor argued in

---

<sup>49</sup> See Placet & Taffel, *Recent Patterns in Caesarean Delivery in the United States*, 15 *OBST. GYNEC. CLIN., N.A.* 607 (1988).

<sup>50</sup> See *Webster*, 109 S. Ct. at 3057-58.

<sup>51</sup> In footnote 16 of his amicus brief, the Solicitor General takes the novel

*Akron* and *Thornburgh* that many restrictions on abortion may not burden women's choice of abortion sufficiently to trigger serious constitutional scrutiny. The notion that heightened governmental justification for a law is required only when the law burdens a fundamental right to some minimum degree is hardly controversial. What is troublesome, however, is Justice O'Connor's stringent interpretation, expressed in her earlier opinions,<sup>52</sup> as to what constitutes an "undue burden." Defining undue burden as an "absolute obstacle or severe limitation on the abortion right,"<sup>53</sup> Justice O'Connor has displayed an apparent willingness to sustain very significant limitations on access to abortion under this standard.<sup>54</sup>

---

position that the undue burden test can justify even criminalizing all abortions. The Solicitor General reaches this conclusion by first asserting that the liberty interest that must not be burdened is not the right to abortion, but the right to bear or beget a child. He then concludes that outlawing all abortions—except those by forcible rape or incest—would not deny women a meaningful opportunity to avoid pregnancy as long as they had "options" such as "abstinence and contraception" and presumably sterilization.

Even if one attempts *arguendo* that the proper analysis should focus on a "meaningful opportunity to avoid an unwanted pregnancy," the Solicitor General's argument falls short. This argument is based on the notion that as long as a woman's pregnancy is not due to rape or incest, she could have avoided it and thus does not need a right to choose abortion to have a meaningful right to decide whether to bear a child. One of the two "options" presented to secure this right is the absence of legal abortions, is contraception. Yet contraception is far from foolproof and some women have health risks that prevent them from using the most effective methods. Contraceptive failure, in fact, is so common that the *majority* of women who have abortions did use contraception. Thus, as long as contraceptive failure is one of the major causes of unwanted pregnancies, the only truly meaningful option under the Solicitor General's undue burden analysis is either sterilization or abstinence during the entire of the four decades of a woman's fertile life in which she does not desire to give birth.

<sup>52</sup> Justice O'Connor's *Webster* opinion was most notable for what it did not say. The tone of her opinion was significantly less hostile to *Roe* than any of her previous opinions. While she did not abandon her previous position that all state restrictions on abortion except those that impose an "undue burden" on a woman's choice are constitutionally permissible, it appears in *Webster* in a more muted guise. For an analysis of her previous positions, see Sperling, *Justice in the Middle*, THE ATLANTIC, March 1988, at 26-33.

<sup>53</sup> *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting *Akron*, 462 U.S. at 464). In *Akron*, while explaining the difference between an undue burden and those that simply "inhibit" abortion to some degree," *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting), Justice O'Connor cites in the text *Gibson v. Florida Legislative Comm.*, 372 U.S. 534, 545 (1963), because it shows that "even in the first amendment context" a fundamental right must be "infringed substantially." Yet, the *Gibson* opinion itself later describes the standard as one whose regulations "substantially intrude upon and severely curtail or inhibit constitutionally protected activities." *Gibson*, 372 U.S. at 555 (emphasis added).

<sup>54</sup> Besides being willing to uphold the regulations in *Webster*, O'Connor has suggested that valid state restrictions could include a mandatory twenty-four hour



Because this undue burden standard applies rational relationship review to the state interest unless the challenging party meets a certain threshold burden, the doctrine becomes less sound as the threshold gets higher. The Court should at least ensure that when a statute significantly implicates a fundamental right, the proffered governmental interest is clearly both legitimate and related to the state's interests. Thus, when examining a health regulation that implicates a fundamental right, the Court should at least be willing to look closely at whether or not that health regulation is medically necessary and promotes the asserted state interest.

#### A. *Practical and Cumulative Effects*

If the Court were to place such a strong emphasis on the exact degree such restrictions burden individual women, the Court bears a strong responsibility to avoid purely theoretical judgments and instead to make a practical inquiry about whether abortion regulations operate, alone or together, as a significant burden. Justice O'Connor's *Akron* and *Thornburgh* opinions suggest that particular findings or evidence could be relevant to determining when there is an undue burden. Her *Akron* dissent noted:

there [was] *no evidence* in this case to show that the two Akron hospitals that performed second-trimester abortions denied an abortion to *any* woman, or that they would not permit abortion by the D&E procedure. . . . In addition there was *no evidence* presented that other hospitals in nearby areas did not provide second-trimester abortions.<sup>55</sup>

In *Thornburgh*, O'Connor focused much of her dissent on the Court's willingness to find, by ruling before a trial on the merits:

[t]hat each of the challenged provisions [was] facially unconstitutional as a matter of law, and that no conceivable facts . . . could alter this result . . . [T]he mere possibility that some women

---

waiting period; a requirement that all abortions be performed in fully accredited hospitals; a hospital-committee approval requirement; and a requirement that two doctors concur in the abortion decision. Concerning a requirement in *Thornburgh* that there be a required description of fetal characteristics at two-week intervals, O'Connor does concede that "[i]f the materials were sufficiently inflammatory and inaccurate the fact that the woman must ask to see them would not necessarily preclude finding an undue burden, but there is no indication that this is true of the description of fetal characteristics that statute contemplates." *Id.* at 831 (O'Connor, J., dissenting).

<sup>55</sup> *Akron*, 462 U.S. at 466 (O'Connor, J., dissenting) (emphasis added).

[would] be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffice[d] to invalidate it.<sup>56</sup>

Because O'Connor's *Akron* and *Thornburgh* opinions were dissents, she was able to consider each regulation piecemeal and explain why she felt that each particular regulation by itself did not constitute an undue burden. Yet, the ultimate question for any reviewing court is not simply a specific regulation's impact, but rather the degree of burden that the entire regime of abortion regulations places on a woman. Courts will thus have to assess how a given regulation *incrementally* adds to the cumulative burden on the fundamental right. Any other method would allow a state to pile on "reasonable regulation" after "reasonable regulation" until a woman seeking an abortion first had to conquer a multi-faceted obstacle course.<sup>57</sup>

If Justice O'Connor's undue burden test is to become law, courts should assess the likely impact a challenged regulation will have in light of the context, community, and particular burdens that *all* women in the relevant state will face.<sup>58</sup>

---

<sup>56</sup> *Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting). Furthermore, in *Bates v. City of Little Rock*, 361 U.S. 516 (1960), one of the three non-abortion fundamental right cases Justice O'Connor cited affirmatively in her undue burden discussion, the Court did not base its finding of an undue burden on anything approaching a formal prohibition on associational rights, but on the basis of how a neutral law, in that case an occupation tax requiring membership disclosure, would operate effectively to deny or "discourage" the exercise of those rights in light of the context, community, expected private behavior and "fear of community hostility and economic reprisal that would follow public disclosure of the membership lists. . . ." *Id.* at 524.

<sup>57</sup> *Cf. Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("[C]umulative effect" of small license tax could crush religious practice when "exacted town by town").

<sup>58</sup> The judicial task in assessing the degree of burden would be especially crucial when determining whether a decrease in availability constitutes an undue burden. When deciding whether access to abortion services has been substantially infringed, courts will have to carefully assess the likely and foreseeable impact that regulations will have on the particular communities affected. The fact that others may at some point replace suppliers driven out by new or newly enforced regulations, thus restoring some of the lost availability, is speculative and of little consequence to those women whose rights are unduly burdened during the lag time before new providers fill gaps in services created by the regulations. In *Carey v. Population Servs. Int'l*, 431 U.S. 678, 689 (1977), on a page that O'Connor cites approvingly in her *Akron* undue burden discussion, the Supreme Court recognized that "limiting . . . distribution" can constitute an undue burden. The Court explained:

[t]he burden is, of course, not as great as that under a total ban on distribution. Nevertheless, the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase and lessens the

B. *Absolute Deprivations*

The Supreme Court has at times distinguished between relative and absolute deprivation when determining whether it should apply compelling governmental interest analysis. In *San Antonio Independent School District v. Rodriguez*,<sup>59</sup> the Court suggested twice that strict scrutiny would be inapplicable where the disadvantage was of a "relative-rather than absolute-nature."<sup>60</sup> The Court noted a significant constitutional difference between state action that somewhat burdens or dilutes the effective exercise of fundamental rights and those that lead to a complete denial to any of its citizens. In *Rodriguez*, there was no danger that *any* student would be effectively denied an education.<sup>61</sup> With abortion, however, regulations that restrict access to abortion effectively deny that right to some women: either a woman is able to overcome the governmental barriers to abortion or she is not. Where individual rights are at stake, the fact that such denials may affect only a portion of the populace should not be decisive.

The Court's opinion in *Maher v. Roe*<sup>62</sup> and *Harris v. McCrae*<sup>63</sup> are not to the contrary. There, the Court stressed that governmental failure to extend governmental benefits is constitutional as long as the government does not affirmatively place obstacles in women's path. In *Maher*, the Court found that Connecticut's decision to use Medicaid funding only for childbirth but not for abortion "place[d] no obstacles — absolute or otherwise — in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth . . . it has imposed no restraint or obstacle that was not already there."<sup>64</sup>

Thus, the Court found that when the government does not extend benefits necessary for a poor woman to have an abortion, the relevant or proximate cause of her inability to end pregnancy is her poverty. When, however, the government chooses to alter the cur-

---

possibility of price competition. Cf. *Griswold v. Connecticut*, 381 U.S. at 503 (White, J., concurring in judgment).

*Id.* at 689 (citations omitted).

<sup>59</sup> 411 U.S. 1 (1972).

<sup>60</sup> *Id.* at 19; see also *id.* at 37-38.

<sup>61</sup> In *Plyler v. Doe*, 457 U.S. 202 (1982), where this danger did exist—and was in fact before the Court—the Court clearly provided some form of heightened scrutiny.

<sup>62</sup> 432 U.S. 464 (1977).

<sup>63</sup> 448 U.S. 297 (1980).

<sup>64</sup> *Maher*, 432 U.S. at 474. See generally Tribe, *The Abortion Funding Conundrum: Inalienable Rights and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985) (questioning the obstacle/benefit distinction in abortion funding cases).

rent landscape relating to abortion access and foreseeably denies a woman the ability to have an abortion, then the government's affirmative act is the cause of the effective denial. Thus, where the state affirmatively acts in such a manner, the Court should find an undue burden.

The fact that such logic could be carried to inappropriate extremes should not blind the Court from making reasonable judgments as to when an affirmative act is likely to prevent some subset of the citizenry from effectively exercising its fundamental rights. As a result, where a state acts, through an abortion-neutral or abortion-specific regulation, and causes some women to "suffer[] [a] disadvantage as a consequence of [the] decision,"<sup>65</sup> the Court must be willing to consider carefully the impact on all women—including those who are most vulnerable—when judging whether a restriction constitutes an undue burden on access to abortion.

Many commentators assume that "moderate" restrictions on access to abortion—the sorts of restrictions that might be upheld under an "undue burden" standard—would constitute no more than "skirmishing around the edges"; "minor changes" that will not withdraw "basic rights."<sup>66</sup> Waiting periods, informational requirements, mandatory testing, excessive regulations of clinics, and the like, may not appear to impose an "absolute obstacle" to the exercise of choice for affluent women living in urban centers. But when such restrictions are considered cumulatively, their impact on availability may in fact constitute an absolute deprivation of the right to choose for many women who are young or poor or living in rural areas.

A forty-eight hour waiting period, for example, may not be an "undue burden" for affluent professional women, and a hospitalization requirement may only serve to make her abortion more expensive. But for an 18-year-old girl in the rural South, unmarried, pregnant, hoping to finish school and build a decent life, who has little or no access to transportation, a hospitalization requirement can mean an abortion that will cost nearly one-thousand dollars and involve a trip of hundreds of miles; a waiting period can mean two long trips and an overnight stay in a strange and distant city. For such a woman, the burden would be absolute. Likewise, while a parental notification law may amount to only an embarrassment for minors from the most loving families, for those who are among the

---

<sup>65</sup> *Maher*, 432 U.S. at 474.

<sup>66</sup> For example, see *As Pennsylvania Goes?*, Wash. Post, Oct. 30, 1989, at A14, col. 1.

six million children in our country who are victims of domestic violence or sexual abuse, a notification requirement can be the functional equivalent of an absolute obstacle to safe and legal health care for one wishing to terminate a crisis pregnancy. In all these scenarios, the fact that these regulations will serve as an absolute obstacle for a part of the female population is entirely foreseeable.<sup>67</sup>

It would be difficult to justify a constitutional test that permitted states to enact restrictions that wholly precluded choice for some women merely because those restrictions would not constitute an "undue burden" for other, more fortunate women. Such an approach would simply draw a social and economic line across society, above which women would be able to have safe and legal abortions, and below which women would be returned to illegal and dangerous alternatives.<sup>68</sup> Restrictions that preclude the exercise of procreative choice by even a small subset of women should be sustained only if necessary to advance a governmental interest of compelling importance.

#### V. RECONSIDERING *ROE V. WADE*: THE COMPELLING STATE INTEREST IN PROTECTING FETAL LIFE

Abortion presents a more difficult constitutional question than contraception because the state can assert a wholly plausible compelling governmental interest: protection of potential life from the moment of conception. Merely asserting a plausible compelling governmental interest is not in itself dispositive in fundamental liberty cases, though. Where a fundamental individual liberty is clearly at stake, a court must ascertain whether the statutory regime reflects and actually advances the asserted overriding community value.

---

<sup>67</sup> Cf. *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943) (noting that it was foreseeable that license taxes "either separately or cumulatively . . . are likely to restrict . . . religious activities" of religious minority).

<sup>68</sup> As former Justice Powell argued in 1983, "[i]t requires no great familiarity with the cost and limited availability of such hospitals to appreciate that the effect of [O'Connor's] views would be to drive the performance of many abortions back underground free of effective regulations and often without the attendance of a physician." *Akron*, 462 U.S. at 420 n.1. Certainly, the Court's finding in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), that a \$1.50 poll tax was an undue burden, was not based on the notion that the fee would affect the electorate as a whole. Rather, the Court recognized that the extra cost would foreclose some people's ability to vote. As with the Court's abortion decisions, there is no affirmative right to have the state provide the means to vote. At the same time, though, where the state chooses to enact an obstacle that foreseeably denies some citizens the effective exercise of their right, it must come forth with a compelling governmental interest to justify its restriction.

Making some constitutional liberties fundamental necessarily obligates courts to insist that states provide more than a bare assertion of an overriding public purpose.

The *Webster* plurality, however, assumes that a state's mere recitation of a plausible compelling interest fully discharges the burden of justification. Justice White, joined by Justice Rehnquist, previously stated that "if a state legislature asserts an interest in protecting fetal life, I can see no satisfactory basis for *denying* that it is compelling."<sup>69</sup> The *Webster* plurality added an equally undefended assertion that "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability. . . ."<sup>70</sup>

The *Webster* plurality's unwillingness to give any serious scrutiny to the states' mere assertion of a compelling governmental interest sharply contrasts with the same Justices' approach to another of last term's important cases. In *City of Richmond v. J.A. Croson Co.*,<sup>71</sup> the Court subjected the city's assertion of a compelling governmental interest in eradicating prior racial discrimination to "searching judicial inquiry" and "close examination of legislative purpose."<sup>72</sup> The *Croson* Court demanded specific, objective, concrete evidence not only to show the existence of a compelling governmental interest, but also to show that the government had considered less constitutionally problematic means to promote its interest, and that the measures they adopted were actually narrowly tailored to meet the stated objective.

In *Croson*, the Court reaffirmed its position that the government has the burden to establish the existence of interests that would justify encroaching upon a fundamental constitutional value. The Court added: "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."<sup>73</sup>

---

<sup>69</sup> *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 796 n.4 (1986).

<sup>70</sup> *Webster*, 109 S. Ct. at 3057.

<sup>71</sup> 109 S. Ct. 706 (1989). In *Croson*, the Court invalidated provisions of a Richmond plan that required city contractors to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises." For a discussion of other aspects of *Croson*, see *Constitutional Scholars Statement on Affirmative Action after City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711 (1989); Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement*, 99 YALE L.J. 155 (1989).

<sup>72</sup> *Croson*, 109 S. Ct. at 721.

<sup>73</sup> *Id.* at 722 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

Any other conclusion would eviscerate decisions like *Griswold v. Connecticut*.<sup>74</sup> If the judiciary accepted mere legislative assertions about values that trump individual liberties, Connecticut could reintroduce its contraception ban by declaring a fundamental interest in the potential life of each sperm and ovum even prior to fertilization. The state could conclude that all forms of contraception terminate potential life, and are prohibitable.

There is an additional basis to expect searching judicial scrutiny for abortion regulations: not only do these regulations implicate a fundamental right, they also affect only women. In the context of extending insurance benefits, the Court has stated that classifications referring to pregnant people are not sex-based. Even if this dubious notion was extended to abortion cases—where the issue is imposing obstacles and not extending benefits<sup>75</sup>—the Court has a serious obligation to review closely the states' motivation in passing and enforcing such laws. Where male-dominated legislatures pass laws affecting only women, at a minimum, courts must ensure that these kinds of laws do not reflect conscious or unconscious sex discrimination. As the Supreme Court noted in *Croson*, “[a]bsent searching judicial inquiry into the justification [for such classifications] there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions . . . .”<sup>76</sup> It may be that legislatures passed restrictive abortion legislation for the purpose of preserving the potential life of every fetus from fertilization. Those who would overrule *Roe*, however, have never asked the restricting states to substantiate that assertion.<sup>77</sup>

---

<sup>74</sup> 381 U.S. 479 (1965).

<sup>75</sup> In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), then Justice Rehnquist distinguished between “merely refus[ing] to extend to women a benefit men cannot and do not receive” and “impos[ing] on women a substantial burden that men need not suffer.” *Id.* at 142.

<sup>76</sup> *Croson*, 109 S. Ct. at 721.

<sup>77</sup> When only a discrete subset of the population will be adversely affected by a law, moreover, its passage by the legislature does not necessarily reflect a settled majoritarian consensus that the public value to be advanced would be worth pursuing if *all* were potentially subject to the law's burdensome impact. As Guido Calabresi commented in his recent Meiklejohn Lecture, “To say that a legislature can order kidney or marrow donations is *not* to say that a bureaucrat can, or that a hasty legislature can, or that such donations can be asked only of Jews, or blacks, or women.” G. Calabresi, *Between Brennan and Bork* (1989) (unpublished manuscript).

A. *Evaluating the State's Asserted Interests*

The most powerful justification a state could assert for partially or completely overriding a woman's fundamental right is an interest in protecting all potential human life. Yet, while states have been willing to enforce their abortion laws to deny the most vulnerable women access to safe and legal abortion, states have never maintained policies, statutes, or enforcement procedures that would display anything approaching a compelling interest in protecting all potential human life.<sup>78</sup>

States have never protected the potential life of all fertilized ova. Sixty-two percent of fertilized ova spontaneously and naturally abort, a figure that dwarfs the number of induced abortions.<sup>79</sup> If the state had an interest in protecting all fetal life that was weighty enough to justify eviscerating a woman's entire liberty interest in abortion, one would expect the state to treat the 62% figure as nothing short of an epidemic or national health crisis. The lack of concern about the fact that a majority of fertilized ova spontaneously abort suggests that the state's interest must be something other than a compelling interest in protecting all such life.

The lack of criminal penalties on pregnant women themselves also defies any notion that states have exhibited a compelling interest

---

<sup>78</sup> In 1983, Professor William Van Alstyne argued powerfully that the text, history, and enforcement of Texas' statute in *Roe* provided "an extremely strong reason for doubting the *bona fides* of the principle ("life-saving") defense" that Texas offered. As Van Alstyne put it, "the essence of the Texas statute was that (1) it effectively limited medically-safe abortions to reasonably well-to-do residents of Texas on (2) a currently counterfactual predicate of medical procedures concerned with women's safe treatment." Van Alstyne concluded that "[t]he constitutional criminalization of woman's choice on such a foundation (of zygote sanctity) was radically unconvincing." Van Alstyne, *The Fate of Constitutional Ipse Dixit*, 33 J. OF LEGAL EDUC. 712, 719 (1983).

<sup>79</sup> See Edmonds, et. al., *Early Embryonic Mortality in Women*, 38 FERTILITY & STERILITY 447, 451 (1982) ("[T]otal embryonic loss is very high, 62% of all detected pregnancies terminating prior to 12 weeks."). The generally accepted finding is that 15% of *clinically recognized* pregnancies terminate in spontaneous abortions. See *id.* at 447. When this figure "is combined with the percentage of patients who fail to have a successful pregnancy after a missed period, postimplantation embryo loss appears to be almost four times the figure accepted for spontaneous abortion." *Id.* Much of this embryo loss occurs before women are aware that they are pregnant. See also Cook, *Legal Abortion: Limits and Contributions to Human Life*, in ABORTION: MEDICAL PROGRESS AND SOCIAL IMPLICATIONS, CIBA FOUNDATION SYMPOSIUM 213 (1985). The natural process of reproduction is one of oversupply. During embryonic development a female has up to six million ova, each genetically unique. Hundreds will be ovulated. *Id.* at 214. Each male produces billions of sperm. As Dr. Malcome Potts notes, "The fact that not all fertilized eggs give rise to embryos seems to be ethically as well as biologically significant." *Id.* at 223.



in all potential life. The Texas law in *Roe* made it criminal for any person to "procure" an abortion for a woman, except for the purpose of saving her life.<sup>80</sup> It was not a crime for a woman to obtain an abortion. In a state with a true compelling interest in preventing all terminations of potential life, such a criminal law scheme would be bizarre if not irrational.

In addition, statutes restricting abortion often except pregnancy caused by rape or incest. Such exceptions are, of course, understandable, but by making this exception, the state acknowledges that there are some reasons that justify terminating a fertilized ova that have nothing to do with the moral or physical qualities of the fetus, but rather with the circumstances of the woman's pregnancy.<sup>81</sup> We do not suggest that laws prohibiting abortion become valid or invalid as states add or drop exemptions.<sup>82</sup> The statutory exceptions are simply one aspect of the social regime of abortion regulation that raises serious questions about the states' assertion that their laws rest on a carefully considered compelling interest in protecting all fertil-

---

<sup>80</sup> See TEX. PENAL CODE ANN. § 1191 (Vernon 1961).

<sup>81</sup> The fact that the rape exception has nothing to do with the quality of the fetus and its moral claims can be seen in the example of a woman who has been raped and brutalized by her husband or lover, and seeks to terminate her pregnancy. Under the theory of the rape exception, she is permitted to have an abortion if—but only if—she can show that the pregnancy resulted from the rape rather than from an earlier "voluntary" act of intercourse with him. Yet both her interest in terminating the pregnancy and the moral claims of the fetus are unaffected by the resolution of any inquiry into which act of intercourse produced the junction of his sperm and her ovum. The actual pattern of abortion laws might be seen as evidence of illicit motives or suggest that such laws were partially a product of conscious or unconscious stereotypical notions about women's proper roles. In making an exception for rape and incest, the state may perhaps reflect a less-than-fully-conscious "good girl/bad girl" distinction: a small group of women who can definitively demonstrate to government officials that they were not "at fault" in becoming pregnant may have an abortion, while others may not.

<sup>82</sup> It may be, in fact, that rape victims have an especially strong claim to a constitutional abortion right. A statute that forbids abortion generally but makes an exception for rape pregnancies, however, does not fully protect a rape victim's right to abort. Such a statute provides far less protection than *Roe*. Under *Roe*, any rape victim could choose to abort a pregnancy. With a "rape exception," victims would not have that right, but only the quite different "right" to seek to *prove* that she was "in fact" raped; often a difficult task. Proving rape, though, would only be the beginning.

Under the theory of the rape exception, a woman would be entitled to an abortion only if she could also prove that her pregnancy *resulted from* the rape and not from some other act of sexual intercourse. The privacy sacrifice in such a situation constitutes an additional argument against a statute that limits the permissible grounds for an abortion. Those hostile to *all* abortions are likely to seek appointment to committees that would decide these questions. In such a case, choice could be replaced by cross-examination.

ized ova. The point is simply that a statute that determines the legality of abortions based upon the woman's relative "blameworthiness" in becoming pregnant is not easily justified by the assertion that there is a compelling state interest in all potential life after fertilization.

Most abortion laws also contained an exception for cases where continuing the pregnancy threatened a woman's health. Yet, as many anti-abortion activists argue, why would a state that had a compelling interest in protecting all potential life choose in favor of the mother in this instance?

Regardless of how legislatures wrote pre-*Roe* statutes, no state ever enforced the laws in any consistent or coherent fashion. None took any steps to prevent affluent women from leaving the state to obtain abortions.<sup>83</sup> The pattern of exemptions and non-enforcement that characterized abortion regulation before *Roe* and determined which women could obtain abortions created a regime of manifest economic discrimination. Surely, knowing that the theoretical claims made for the human life principle in practice affected only women, and among them, only relatively poor and uneducated ones influenced the *Roe* Court. The exception based on the pregnant woman's mental health, for example, was often available in practice only to those who could afford a private psychiatrist. As Dean Calabresi has noted, "Compelled life saving is easier to enact (and for that very reason constitutionally suspect) when disfavored groups are forced to do the life saving."<sup>84</sup>

The fact that no state consistently acted upon its professed interest in protecting all fetal life suggests either that the interest was something less than compelling, or that there was a different interest altogether. In early right-to-privacy cases, the Supreme Court clearly looked to the consistency with which the state enforced its asserted interest as a significant factor in determining whether the interest was truly compelling.<sup>85</sup> In *Eisenstadt v. Baird*,<sup>86</sup> for example, the Supreme Court specifically rejected Massachusetts' assertion that its actual interest in prohibiting the distribution of contraceptives was to discourage pre-marital sex. The Court noted: "[T]he Massa-

---

<sup>83</sup> Five thousand American women had abortions in England alone in the year before *Roe* was decided.

<sup>84</sup> G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW, 103 (1985).

<sup>85</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 505-06 (1965) (White, J., concurring).

<sup>86</sup> 405 U.S. 438 (1972).

chusetts statute is thus so riddled with exceptions that deterrence of pre-marital sex cannot reasonably be regarded as its aim."<sup>87</sup>

Finally, there is the argument from history. Contrary to the Solicitor General's *Webster* Brief, this country historically has not recognized moral concern for life from the moment of conception as compelling. The Solicitor General based its compelling governmental interest argument on the assumption that the critical question to be decided was "what interests have been historically recognized as compelling."<sup>88</sup> The United States rests its *entire* case for the existence of a compelling interest on an historical conclusion that cannot be defended. After noting that state laws restricting abortion were common when Congress adopted the fourteenth amendment, the Brief offers a single sentence to substantiate its claim that "the historical record" shows that protection of potential fetal life was considered compelling. With but one general citation to J. Mohr's authoritative book on abortion, the Brief reads:

The tenor and contemporaneous understanding of the anti-abortion laws enacted from the mid-Nineteenth Century up to the time of the decision in *Roe v. Wade* leave little doubt that they were directed not only at protecting maternal health, but also at what was widely viewed as a moral evil comprehending the destruction of actual or nascent human life.<sup>89</sup>

It is generally agreed that Mohr's work is most authoritative on the history of abortion and its regulation,<sup>90</sup> but his research provides little support for the proposition that state abortion laws show a historical tradition of considering the need to protect all fetal life compelling. Abortion was legal when the framers adopted the ninth amendment and the rest of the Bill of Rights, and states passed early laws affecting abortion to protect women from the severe danger that accompanied surgical abortion during the nineteenth century.<sup>91</sup> Mohr further demonstrates that later abortion laws addressed factors

---

<sup>87</sup> *Id.* at 449.

<sup>88</sup> Brief for the United States at 16, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

<sup>89</sup> Brief for the United States as Amicus Curiae, *supra* note 38, at 13 (quoting J. MOHR, *ABORTION IN AMERICA* (1978)).

<sup>90</sup> Both the Brief for the United States as Amicus Curiae, *Webster v. Reproductive Services*, 109 S. Ct. 3040 (1989), and the Brief of 281 American Historians as Amicus Curiae supporting Appellees, *Webster v. Reproductive Services*, 109 S. Ct. 3040 (1989), rely on Mohr's work. Mohr himself, however, was one of the 281 historians who signed on to the latter brief opposing the historical interpretation suggested by the Solicitor General in his *amicus curiae* brief.

<sup>91</sup> See J. MOHR, *supra* note 89, at 3-45.

that are either now medically outmoded or recognized as discriminatory: restrictive views about women's sexuality and proper role;<sup>92</sup> health concerns concerning any surgical procedure;<sup>93</sup> nativist fears about declining birthrates among white Protestant women who were practicing birth control and having abortions at a time when immigrant populations were rising;<sup>94</sup> and an effort by the medical profession to secure its hegemony over reproductive medical procedures by preventing mid-wives who would induce abortion from practicing.<sup>95</sup>

The moral value of a fetus, while certainly important to some

---

<sup>92</sup> Mohr demonstrates that the drive for abortion laws was primarily lead by physicians and the newly created American Medical Association in the mid-to-late 1800s. *See id.* at 46-85. Yet the AMA's support for abortion laws seemed to have been as much infected by sexism as was other institutions at the time, such as the United States Supreme Court. *See Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring). In 1871, the AMA's Committee on Criminal Abortion described women who have abortion in the following manner:

She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures — but shrinks from the pains and responsibilities of maternity; and, destitute of all delicacy and refinement, resigns herself, body and soul, into the hands of unscrupulous and wicked men. Let not the husband of such a wife flatter himself that he possesses her affection. Nor can she in turn ever merit even the respect of a virtuous husband. She sinks into old age like a withered tree, stripped of its foliage; with the stain of blood upon her soul, she dies without the hand of affection to smooth her pillow.

Atlee & O'Donnell, *Report of the Committee on Criminal Abortion*, 22 TRANSACTIONS OF AM. MED. ASS'N 241 (1871), *quoted in* C. SMITH-ROSENBERG, *DISORDERLY CONDUCT* 236-37 (1985); *see also* Brief of 281 American Historians, *supra* note 90, at 17-19; L. GORDON, *WOMEN'S BODY, WOMEN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 414-18 (1976); K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 192-215 (1984); L. TRIBE, *supra* note 37, § 15-10, at 1355-56.

<sup>93</sup> *See* J. MOHR, *supra* note 89, at 22, 25-27; Brief of 281 American Historians, *supra* note 90, at 12. Even where the fetus was recognized by law, it was only in specific situations where the rights were contingent on a live birth. *See generally* Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 601 (1986) (authored by Dawn Johnsen) (historically, "[t]he fetus was not given any rights independent of its mother; rather, it was only after the fetus became a person at birth that it acquired legal rights as separate entity").

<sup>94</sup> "There can be little doubt that Protestant fears about not keeping up with the reproductive rates of Catholic immigrants played a greater role in the drive for anti-abortion laws in nineteenth-century America than Catholic opposition to abortion did." J. MOHR, *supra* note 89, at 167.

<sup>95</sup> *See id.* at 37. "[R]egular physicians saw in abortion a medical procedure that not only gave the competition [principally mid-wives] an edge but also undermined the solidarity of their own regular ranks. . . . The best way out of these dilemmas was to persuade state legislators to make abortion a criminal offense. Anti-abortion laws would weaken the appeal of the competition and take the pressure off the more

Americans during most of these periods, was never the primary motivation for abortion laws. Although we do not doubt that arguments based on the moral value of fetuses are sincerely advanced by many advocates of abortion restrictions, there are other indications that these arguments mask the influence of restrictive notions of women's sexual and gender roles in the abortion debate. First, interest in the fetus emerged as a principle justification for abortion laws only when original expressions of concern for pregnant women's health became outdated, and second, many proponents of restrictive abortion laws oppose contraception (a position that will surely increase the number of abortions). The United States based its *Webster* argument on the assumption that there was a long tradition of state action to protect a compelling interest in fetal life from fertilization. It turns out, however, that there is no substantial evidence of a settled consensus through American history that life begins at conception or that abortion laws traditionally reflect a primary or compelling interest in potential human life.

#### B. *Decisionmaker Preference*

Given that the historical argument fails, one might recharacterize the state's interest as one of transferring the power to decide when abortions are appropriate to someone other than the pregnant woman. The statutory exceptions, and those that arose in practice, can be seen as an acknowledgment by the state that the abortion decision is dependent upon context—coupled with a claim that only the state should decide what the appropriate circumstances are.

The state's interest supporting such laws would only be in transferring the power to decide from the woman to the legislature, or to the enforcement discretion of the executive branch, or, in cases like *Doe v. Bolton*,<sup>96</sup> to a hospital board. This approach reduces the state's interest from absolute protection of all potential life to a preference for a particular decisionmaker to determine when the circumstances for abortion are compelling. Yet, there is little to suggest that the state is more competent than the pregnant woman to set out what those individual circumstances might be. When it agrees that there are some reasons that justify aborting a healthy embryo or fetus, but simply has a preference for who narrows the list of such reasons, the state weakens the force of its assertion of the "human life" principle

---

marginal members of the regulars' own sect." A full account of the history of abortion may be found in the Amicus Curiae Brief for Historians in *Webster*.

<sup>96</sup> 410 U.S. 179 (1973).

and in the process may undermine any justification for imposing its judgment on a woman whose fundamental interests are at stake.

C. *A Less Absolute Interest in Potentiality of Life*

In light of many Americans' sincere beliefs about the sanctity of fetal life, one might argue that statutory exceptions, under-investment in prevention of spontaneous abortions, and lax and uneven enforcement of anti-abortion laws do not imply improper motives, but rather a laudable yet less absolute state interest in fetal life. Where such a less weighty interest is at stake, however, the Court may appropriately find the interest less than compelling, especially when it must be weighed against the individual right at stake. The Court took this approach in the 1986 affirmative action case, *Wygant v. Jackson Board of Education*.<sup>97</sup> The *Wygant* Court found that remedying societal discrimination, while important and appropriate, was not compelling when it conflicted other employees' individual rights.<sup>98</sup> Likewise, other recent opinions by the Supreme Court have demonstrated that laudable interests that clearly might be compelling in the abstract, may fail to be "compelling" in certain contexts when conflicting with certain competing rights.<sup>99</sup>

While the *Wygant* Court was simply willing to overrule the state's substantive judgment that remedying societal discrimination was a compelling interest, the Court would not have to make a similar value determination in the abortion context to find the asserted state interest less than compelling. The Court could simply reach the process-oriented conclusion that what the state itself consistently fails to treat as compelling is not compelling.

Consider, for example, a situation similar to *Wisconsin v. Yoder*.<sup>100</sup> In *Yoder*, the state of Wisconsin sought, unsuccessfully, to force the Amish to send their children to public schools despite the danger posed to Amish religious practices and traditions. The case was considered difficult because it pitted the state's compelling interest in "educating its citizens" against the Amish's free exercise rights.

---

<sup>97</sup> 476 U.S. 267 (1986).

<sup>98</sup> See *id.* at 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

<sup>99</sup> See *Coy v. Iowa*, 108 S. Ct. 2798, 2802 (1988) (finding that the state's interest in protecting victims of sexual abuse is not compelling enough in light of sixth amendment rights); *Boos v. Barry*, 108 S. Ct. 1157, 1165 (1988) (noting that a "powerful" national interest does not rise to the level of compelling when conflicting with first amendment rights).

<sup>100</sup> 406 U.S. 205 (1972).

Who could doubt, though, that *Yoder* would have been easy if Wisconsin undercut its asserted compelling interest by making exceptions to compulsory school attendance for farm family children, promising young baseball players, and the children of the elite. No matter how compelling in the abstract a state's interest in compulsory education may be, no court would have found it compelling enough to override important individual rights without consistent enforcement.<sup>101</sup> In fact, the judiciary's failure to scrutinize the asserted state interest in this fashion would allow a state to invoke any compelling interest—for example, national security, remedying discrimination, or stopping drugs—anytime it wished to pass a law invading fundamental rights.

---

<sup>101</sup> The Florida Supreme Court invoked similar reasoning in striking down, on state constitutional grounds, a parental consent statute. Floridians adopted the "privacy" provisions in a 1980 referendum. It provides:

Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. [The sole exception concerned the public records and public meeting law].

The Florida Supreme Court unanimously held in *In re T.W., A Minor*, No. 74-143, slip op. (Oct. 5, 1989) that this provision guaranteed adult women the right to terminate a pregnancy, noting, "[w]e can hardly conceive a few more personal or private decisions concerning one's body that one can make in the course of a lifetime. . . ." *Id.* at 10. By a vote of 4-3, the Court also held that under this provision the state could not require a minor to obtain parental consent, even under a statute that provided for a judicial by-pass of the consent requirement.

According to the Florida Supreme Court, the central question under the Florida Constitution, as under the fourteenth amendment, was whether the state could "prove that the statute [requiring parental consent] further[ed] a compelling state interest through the least intrusive means." *Id.* at 11. At issue was whether the state's asserted interests in "protection of the mature minor and preservation of the family unit" constituted a sufficiently compelling state interest to override a minor's privacy right.

In rejecting the state's argument, the Court relied upon the fact that the state did not generally and uniformly seek to promote such an interest. The Florida Court noted that under other provisions of Florida law, "a minor child may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child—no matter how dire the possible consequences—except abortion." *Id.* at 15. The Court continued:

"In light of this wide authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned."

*Id.*

Thus, the Florida Supreme Court concluded, the "selective approach employed by the legislature" undercut the state's asserted claim that its parental consent statute for abortion was in fact necessary to protect a compelling state interest. *Id.* at 16.

Some argue that the consideration appropriately given to fetal life gets stronger as the fetus develops because in the latest stages, abortions resemble infanticide, or at least, a lack of due societal respect for something so close to what we think of as a human infant.<sup>102</sup> Both of these interests are far less strong, however, where the fetus is in the earliest stage, and more likely than not to abort spontaneously. From this perspective, there is a strong reason to believe that the state's interest in fetal life is neither always compelling or never compelling, but may instead become compelling at some point in the pregnancy. The fact that there is no precise Euclidean formula for establishing definitely that viability is the point does not justify abandoning *Roe's* notion that the state's interest in the fetus becomes compelling at some point during pregnancy, but cannot be considered compelling from the moment of conception.

D. *Accommodating Compelling Governmental Interests in the Abortion Context: Less Restrictive Alternatives*

Even if the Court found a compelling interest in protecting the potentiality of life, it does not follow that this interest should always trump a woman's right to choose to terminate a pregnancy. Basic constitutional law tells us that where a compelling interest infringes upon a fundamental right, the state must pursue that interest by the least restrictive means.<sup>103</sup>

Some assume that there can be no least restrictive alternative in the abortion context. Where the state's interest is to protect *all* fetal life, the least restrictive alternative is the outright ban. As we suggested above, however, protecting all fertilized ova does not appear to have been the states' goal. If a state's objective is a more relative

---

<sup>102</sup> Ironically, the retreat from *Roe* may spawn restrictions on access to abortion that principally result in more late abortions. These delays may be substantial as young, poorly informed, and low-income women postpone securing the required permission and undertaking a complicated and expensive regulatory process. If there is a consensus that abortion is more morally troublesome as the entity develops from a microscopic fertilized ovum to the being that resembles a human infant, rules that delay abortion make little sense.

Largely as a result of *Roe*, late abortions have been reduced; 90% of all abortions now take place during the first twelve weeks of pregnancy. Those who are concerned by abortions late in pregnancy ought to support policies that promote contraception and facilitate abortion at the earliest possible stage. Upholding medically unnecessary state and local regulation leads to the opposite result.

<sup>103</sup> *City of Richmond v. J.A. Croson*, 109 S. Ct. 706 (1989), was merely the latest in a line of cases establishing that the government may not intrude on a fundamental constitutional value without exploring less intrusive means to accomplish its objective.



one of discouraging abortion, it could pursue the goal with far less intrusion on a woman's fundamental liberty.

The Court should expect any state wishing to reduce abortions to take all appropriate steps short of compelled continuation of a pregnancy first. It is no secret that the single most effective way to reduce the number of abortions is by making contraception and education about contraception more widely available: in countries where birth control is more easily accessible, there are far lower abortion rates than in the United States.<sup>104</sup> Some will say that making contraceptives more widely available will marginally encourage sex outside marriage, but even if that doubtful claim had some merit, that concern could hardly qualify as the compelling government interest that would allow the state to override a woman's fundamental liberty. According to the *Surgeon General's Report on Abortion*, greater funding for childbearing expenses and the costs of raising children from unplanned pregnancies will be necessary if we wish to reduce the number of abortions significantly.<sup>105</sup> Surely it is constitutionally dubious for a state to select coercive measures with the maximum destructive impact on women's autonomy as a *first* step to discourage abortion.

#### E. *The Limits of Compelling Interest*

Even a compelling governmental interest broad enough to directly and unavoidably clash with a fundamental right does not necessarily justify it completely trumping the individual right at stake. In *Wisconsin v. Yoder*,<sup>106</sup> the Court recognized that the state's interest in "[p]roviding public schools ranks at the very apex of the functions of a State,"<sup>107</sup> but because the Court recognized the "severe" impact on the "fundamental tenets of [the Amish's] reli-

---

<sup>104</sup> See Djerassi, *The Bitter Pill*, 245 SCIENCE 356 (1989). Djerassi writes:

Many people ignore the fact that incident of abortion reflects the state of contraception. In the Soviet Union, the country with the highest per capita abortion rate in the world, the quality of birth control is exceedingly poor and the pill is essentially unavailable. Japan, the country with the third or fourth highest abortion rate, the only industrialized country in which the pill is still not approved for contraceptive use. The United States, finally, has the highest pregnancy and teenage abortion rate of any industrialized country.

*Id.* at 358 (footnotes omitted).

<sup>105</sup> *Surgeon General's Report on Abortion*, reprinted in 135 CONG. REC. E906, at E909 (daily ed. March 21, 1989).

<sup>106</sup> 406 U.S. 205 (1972).

<sup>107</sup> *Id.* at 213.

gious beliefs,"<sup>108</sup> it insisted that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights . . . . [T]he State's interest in universal compulsory education, . . . is by no means absolute to the exclusion or subordination of all other interests."<sup>109</sup>

There is a parallel in the abortion context. Even if the Court accepted the state's assertion of a compelling interest in protecting all fetal life, a determination we find hard to justify, completely overriding the liberty interest in abortion would still be inappropriate because of its severe limitation on a woman's fundamental right to choose to bear a child.

Were the Court to refuse to seek *any* accommodation of a state's compelling interest with a woman's fundamental liberty interest, the effect on pregnant women's liberty could be devastating. Imagine, for example, that a state made the following findings: complete rest in the first three months of pregnancy reduced miscarriages by 9%, and working at video display terminals increased miscarriages by 4%. On these bases the state passed a law prohibiting all pregnant women from working at display terminals or working anywhere more than four hours a day during the first three months of pregnancy.

In both of these cases, if the state justified the imposition by asserting its compelling governmental interest in protecting all fetal life, it could contend that there was no less restrictive alternative to this seemingly Draconian measure. As long as the compelling interest was protecting all fetal life, a state or local government could assert that any attempt at a less restrictive alternative would unavoidably result in the loss of some early fetuses. Furthermore, if the plurality successfully pushes the Court to simply retracting the fundamental right to abortion, the hypothetical state or local government would only need to proffer a minimal, rational justification for these excessive burdens. It is hard to imagine that confronted with such a regulation, the Court would not feel compelled, in light of the excessive burden on women's liberty, to somehow seek an accommodation between these two conflicting values.

---

<sup>108</sup> See *id.* at 218.

<sup>109</sup> See *id.* at 214-15. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1945), the Court seemed affected by the fact that if it upheld the state's interest in the license tax, it could completely wipe out an integral practice of some religions. "The spread of religious ideas through personal visitations" can, by the widespread use of license taxes, "be crushed and closed out by the sheer weight of the toll . . . exacted town by town." *Id.* at 115.

## V. CONCLUSION

Justice Harlan once wrote: "[T]he mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes."<sup>110</sup> The burden rests on state and local governments to demonstrate the existence of a governmental interest sufficient to justify the massive intervention of compelled childbirth. The case has not been made. Indeed, states have barely attempted, in *Webster* or elsewhere, to establish that restrictive abortion laws actually effectuate a compelling governmental interest. Coercive abortion laws are unenforceable against the state's more affluent citizens and foreseeably create hundreds of thousands of criminals out of otherwise law-abiding citizens.<sup>111</sup> In reality, abortion regulation prior to *Roe* did not consistently protect potential life. Safe abortions were available, but only to women who were sufficiently wealthy or well-informed, and even for the wealthy, the alternatives were often traumatic. For those less well off, the choices were far bleaker. Stories of that period are painful to recount: tales of desperate women; of frantic searches to find someone willing to perform a criminal operation; of frightening trips to dangerous locations in strange parts of town; of whiskey as an anesthetic; of "doctors" who were often marginal or unlicensed practitioners, sometimes alcoholic, sometimes sexually abusive; unsanitary conditions; incompetent treatment; infection; hemorrhage; disfiguration; and death.<sup>112</sup>

The claim that restrictive abortion laws effectively advance a set-

---

<sup>110</sup> *Poe v. Ullman*, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting).

<sup>111</sup> In evaluating a state's asserted compelling interest, the Court has considered a state's unwillingness or inability to effectuate its interest because people will foreseeably violate or avoid any law. In *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 268 (1974), the Court found that the state's interest in using a waiting period to prevent fraud less than compelling because "[a]n indigent applicant intent on committing fraud could as easily swear to having been a resident of the county the previous year as to being one currently." In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court found that the state's asserted interest in banning advertising for pharmaceuticals was greatly undermined by the fact that "[t]here is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event." *Id.* at 769.

Surely, if the Court will consider the inevitability of welfare recipients and pharmacists cheating when determining what interests justify infringing on fundamental rights, the Court should consider the inevitability of affluent women flying to other jurisdictions, and more desperate women seeking dangerous back-alley abortions when deciding the abortion question.

<sup>112</sup> See Brief for the Amici Curiae Woman who have had Abortions and Friends of Amici Curiae in support of Appellees, at B1-B92, *Webster v. Reproductive Health*

tled state policy that there is a compelling interest in all fertilized ova from the moment of conception is not easily reconciled with the statutes themselves, with their inconsistent enforcement, and with a history showing that considerations other than human life prompted most 19th and early 20th century abortion laws. At oral argument in *Roe*, the attorney for the State of Texas conceded that he had "no idea" what the purpose of the Texas legislature had been when it enacted the state's restrictive abortion law.<sup>113</sup> Although many individuals believe that life begins at the moment of conception, defenders of restrictive abortion laws have failed to establish that there has ever been any such policy, stable over times and across boundaries, recognizing this belief. An interest pursued only by some states in some decades, and even then in an inconsistent and economically discriminatory fashion can hardly qualify as a compelling governmental interest. As one lower court noted when it struck down Connecticut's anti-abortion statute in 1972, "A compelling state interest has generally been one where the nature of the interest was broadly accepted . . . . No decision of the Supreme Court has ever permitted anyone's constitutional right to be directly abridged to protect a state interest which is subject to such a variety of personal judgments."<sup>114</sup>

None, that is, before now.

---

Services, 109 S. Ct. 3040 (1989) (letters from women or family members describing experiences with illegal abortions).

<sup>113</sup> 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 800 (P. Kurland & G. Casper eds. 1975).

<sup>114</sup> *Abele v. Markle*, 351 F. Supp. 224, 230 (D. Conn. 1972).