RATIONALIZING THE ABORTION DEBATE: LEGAL RHETORIC AND THE ABORTION CONTROVERSY

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Roe v. Wade[1] is a unique decision in the 180 year history of judicial review. No other case, not even *Brown v. Board of Education*,[2] caused such a loud and sustained public outcry. Even now, a decade after the decision, the abortion controversy shows no signs of abating. Political pressure remains strong for a constitutional amendment to end legalized abortion.[3] Nor has the debate been confined to the political arena. There have been literally hundreds of law review articles about *Roe v. Wade* and its progeny.[4] In fact, *Roe v. Wade* has been credited with touching off a renewed scholarly interest in the proper role of judicial review in a democracy.[5] The United States Supreme Court's decision to protect a right nowhere stated or implied in the Constitution, invalidating laws existing in almost every state,[6] has led to a reexamination of how the

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1. 410 U.S. 113 (1973). Doe v. Bolton, 410 U.S. 179 (1973), was decided simultaneously with Roe v. Wade.

2. 347 U.S. 483 (1954); 349 U.S. 294 (1955). For a discussion of the controversy surrounding *Brown*, *see* J. BASS, UNLIKELY HEROES (1981); R. GRAGLIA, DISASTER BY DECREE (1976); R. KLUGER, SIMPLE JUSTICE 751-78 (1975); J. WILKINSON, FROM BROWN TO BAKKE (1979).

3. Resolutions proposing a constitutional amendment to ban abortions have been introduced into each session of Congress since Roe v. Wade. *See, e.g.*, S.J. Res. Nos. 17, 18, 19, 97th Cong., 1st Sess. (1981). There is strong pressure, especially by religious groups, for such an amendment. F. JAFFE, B. LINDHEIM & P. LEE, ABORTION POLITICS 90 (1981).

4. Between September 1973 and August 1976, over 140 articles were published in legal periodicals on the abortion issue. L. WARDLE, THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES xii, n.7 (1980).

5. Meeks, *Symposium: Judicial Review v. Democracy*, 42 OHIO ST. L.J. 1, 2 (1981) ("I believe the current interest in judicial review can be traced rather directly to *Roe v. Wade*.").

6. "*Roe* invalidated every abortion statute then in effect in the United States, and, in practical effect, legalized abortion on demand in this country." Moore, *Moral Sentiments in Judicial Opinions on Abortion*, 15 SANTA CLARA LAW. 591, 633 (1975).

Court should go about its task of interpreting the Constitution.[7]

Unfortunately, absent from all of this discussion is the simple realization that the Court had to make a decision.[8] Whether restrictive abortion laws were to be sustained or struck down, inescapably some conclusion based on the Constitution had to be reached. Logically then, an analysis of *Roe v. Wade*, and its implications for modes of constitutional interpretation, must begin with a consideration of the limited number of approaches potentially available to the Court. Only by recognizing that the options for dealing with the abortion issue are limited, and by considering the assumptions and implications of each, can one come to any conclusions about the wisdom or appropriateness of the decision in *Roe v. Wade*. In section one of this Article, therefore, five possible approaches to the abortion issue are detailed and analyzed.

Understanding why the Court chose the approach that it did requires the further realization that not every one of these alternatives could have been adopted by the Supreme Court. The obligation to write an opinion justifying its conclusion as being principled, not arbitrary, and consistent with precedent, substantially limited the Court in deciding this issue. Section two of this Article examines the often overlooked constraint imposed on the Court because of its need to publicly explain its decision and argues that *Roe v. Wade* is understandable in light of this rhetorical constraint.

The question in thinking about the ruling in *Roe v. Wade*, therefore, is whether there was an alternate explanation for the decision that would have been superior to that given by the Court.

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7. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980); Meeks, *supra* note 5.

8. Some commentators have suggested that the Court could have avoided the question of whether states may prohibit abortions by dismissing Roe v. Wade on justiciability grounds. *See, e.g.*, Epstein, *Substantial Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 160-67. But this approach only postpones the issue until a justiciable case raising the abortion issue reaches the Court. The Court would then have to decide the question. If no such case could ever exist (a possibility if the Court would dismiss any case as moot if the plaintiff were no longer pregnant by the time the case reached the Supreme Court), the Court would be making an implicit decision to defer to the legislative process. *See* Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40, 48-51 (1961) (defending the Supreme Court's use of justiciability doctrines to avoid constitutional decisions); Gunther, *The Subtle Vices of the Passive Virtues*, 64 COLUM. L. REV. 1, 3 (1964). Such deference to the legislative process, either directly on the merits or indirectly through justiciability, is difficult to justify. *See infra* text accompanying notes 45-58 and 159-88.

Section three attempts to provide and defend such an alternative: regarding abortion as a private moral judgment. A key advantage to this alternative is that it would provide a principled way to deal with other aspects of the abortion controversy, as is explained in the final section of this Article.

The abortion debate has become an area of impasse, not argument. There are two sides, labeling themselves as "pro-life" and "pro-choice," each righteously fighting for their convictions. But "most of the armament consists of the repetition of the original intuition, suitably disguised as neutral argument."[9] Rationalizing the abortion debate requires a comparative analysis of the options and an examination of what approaches were realistically possible for the Court to adopt.

I. ABORTION AND THE CONSTITUTION: ANALYZING THE OPTIONS

Prior to the Supreme Court's decision in *Roe v. Wade*, abortion was illegal in forty-six states.[10] Fourteen states[11] had laws similar to the provisions of the Model Penal Code, allowing abortion if necessary to protect a pregnant woman's life or health, if a fetus would be born with a "grave physical or mental defect," or if pregnancy resulted from rape or incest.[12] Thirty-two states prohibited abortion except when necessary to save the woman's life.[13] The political realities were such that it was highly unlikely that state legislatures would repeal these laws.[14] This fact, together with the Supreme Court's earlier decisions invalidating state statutes restricting the use of contraceptives,[15] made it inevitable that re-

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9. Manier, *Abortion and Public Policy in the U.S.*, in ABORTION: NEW DIRECTIONS FOR POLICY STUDIES 27 n.6 (E. Manier, W. Liu & D. Solomon eds. 1977) (quoting A. Rorty).

10. Four states, Alaska, Hawaii, New York and Washington, repealed criminal penalties for abortions performed in early pregnancy by a licensed physician. ALASKA STAT. § 11.15.060 (1970); HAWAII REV. STAT. §§ 453-516 (1970); N.Y. PENAL LAW § 125.05 (McKinney 1970); WASH. REV. CODE §§ 9.02.060 to 9.02.080 (1970). The Alaska, Hawaii, and Washington statutes contained residency requirements limiting access to abortion to residents of those states.

11. A list of these fourteen state statutes is found in Roe v. Wade, 410 U.S. at 140 n.37.

12. MODEL PENAL CODE, § 230.3 (Proposed Official Draft 1962).

13. Roe v. Wade, 410 U.S. at 139-40.

14. In part, the intensity and political power of supporters of restrictive abortion laws created "unusual legislative rigidity" and made reforms unlikely. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 929 (1978). In part, too, because abortion was available to the relatively wealthy, there was much less pressure for repeal of restrictive laws. *Id* at 930.

15. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965). While Roe v. Wade was

form efforts would turn to the federal courts.[16]

There were five possible approaches the Supreme Court could have taken in deciding the constitutionality of statutes prohibiting abortion. First, the Court could have upheld the laws, holding that under the Constitution, human life begins at or near conception, and therefore fetuses are persons protected by the Fifth and Fourteenth Amendments' guarantees of equal protection of the laws. Alternatively, the Court could have refused substantive review of the laws, concluding that the issue of abortions should be decided by democratically accountable state legislatures. Third, the Court could have declared the restrictive laws unconstitutional as a denial of equal protection on the ground that they operate to discriminate against indigent women who, unlike the more wealthy, cannot afford to travel to areas where abortions are legal or pay for safe illegal abortions. Fourth, the Court could have held that a woman's right of privacy includes the right to determine whether to terminate her pregnancy and that the state does not have a compelling interest sufficient to justify interfering with this privacy right until the fetus reaches viability. Finally, the Court could have held that the absence of social or legal consensus as to when human life begins requires that the legitimacy of abortion should be regarded under the Constitution as a private moral judgment which the government may not control.

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pending before the Court during the 1971 Term (it was reargued and decided during the 1972 Term), the Court decided Eisenstadt v. Baird, 405 U.S. 438 (1972). In declaring unconstitutional a Massachusetts law making it a felony to distribute materials for prevention of conception except by registered physicians or pharmacists to married persons, the Court held: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis in original); *see infra* text accompanying notes 192-94. It has been suggested that this language in *Eisenstadt* was deliberately chosen by Justice Brennan to "help establish a constitutional basis under the right to privacy for a woman's right to abortion." B. WOODWARD & S. ARMSTRONG, THE BRETHREN 176 (1979).

16. Between 1970 and 1972 there were a large number of constitutional challenges to restrictive abortion laws in federal and state courts. *See, e.g.*, Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973); YWCA v. Kugler, 342 F. Supp. 1048 (D. N.J. 1972), *cert. denied*, 415 U.S. 989 (1974); Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *rev'd*, 402 U.S. 62 (1971); State v. Munson, 86 S.D. 663, 201 N.W.2d 123 (1972), *vacated and remanded*, 410 U.S. 950 (1973); Rogers v. Danforth, 486 S.W.2d 258 (Mo. 1972) (en banc); People v. Belous, 71 Cal.2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

Each of these approaches rests on assumptions which are difficult to justify, and each has implications which are hard to accept. As John Hart Ely observed, "[a]bortion is too much like infanticide on the one hand, and too much like conception on the other, to leave one comfortable with any answer."[17] A search for an answer must begin by analyzing the assumptions and implications of each approach.

A. *Approach 1: The Fetus is a Human Person*

Had the Court chosen to uphold state laws prohibiting abortion on the grounds that the fetus is a live human being and, as such, a person protected by the Constitution,[18] it would have had to premise its decision on a definition of "human life" and "persons" that includes fetuses during early pregnancy. The most likely definition is conception, recognizing the moment of fertilization as the beginnings of human existence.[19] This is the position of the Catholic Church[20] and the standard contained in many of the proposed constitutional amendments which have been introduced in Congress to overturn *Roe v. Wade*.[21] Alternatively, the Court under this approach could define life as beginning with the zygote's implantation into the uterine wall which occurs six or seven days after fertilization.[22] Or the Court could conclude, as the West Ger-

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17. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 927 (1973).

18. This approach is advocated in Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 813, 839-52 (1973).

19. Noonan, *An Almost Absolute Value in History*, in THE MORALITY OF ABORTION 57 (J. Noonan ed. 1970) ("at conception the new being receives the genetic code. It is this genetic information which determines his characteristics, which is the biological carrier of the possibility of human wisdom, which makes him a self-evolving being. A being with a human genetic code, is a man."). *But see* ABORTION: NEW DIRECTIONS FOR POLICY STUDIES 170 (E. Manier, W. Liu & D. Solomon eds. 1977).

20. *See* D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 409-47 (1970).

21. *See, e.g.*, H.R.J. Res. 504, 97th Cong., 1st Sess. (1982) (proposing to amend the Constitution to establish legislative authority in Congress and the states to regulate abortion); H.R.J. Res. 872, 94th Cong., 2d Sess. (1976) (proposing that the Constitution be amended to state "with respect to the right to life, the word 'person' as used in this article and in the fifth and fourteenth Articles of Amendment . . . applies to all human beings irrespective of age, health, function or condition of dependency, including their unborn offspring at every stage of their biological development.") *See also*, H.R.J. Res. 796, 94th Cong., 2d Sess. (1976); S.J. Res. 119, 93rd Cong., 1st Sess. (1973).

22. Ramsey, *Reference Points in Deciding About Abortion*, in THE MORALITY OF ABORTION 69-70 (J. Noonan ed. 1970).

man Constitutional Court recently ruled, that human life begins on the fourteenth day after conception when individualization occurs.[23] Any of these three definitions of when human life begins could be used by the Court to hold that the fetus is a person during almost the entire first trimester of pregnancy.

A Supreme Court decision declaring that life begins at conception would be based on the assumption that there is some basis for concluding that under the Constitution, life starts at conception, or shortly thereafter. There are many different points at which it can be argued that human life begins.[24] In addition to conception, implantation, and individualization, alternate definitions of the initial point of life include quickening—the first movement of the fetus felt by the woman, viability—the point at which the fetus is able to live outside the mother's womb, and even birth.[25] A Supreme Court holding that fetuses are human lives during the first weeks of pregnancy must defend selecting one of the first three definitions and not one of the latter group.[26]

If the Court decides that human life starts at or near conception, then all state laws allowing abortion, other than to save the life of the mother, are unconstitutional. Once it is determined that the fetus is a person, then laws which allow for its destruction deny the fetus equal protection in violation of the Fourteenth Amendment.[27] If personhood begins at conception, then the state may not discriminate against persons who are fetuses by offering them less

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23. Kommers, *Abortion and the Constitution: The Cases of the United States and West Germany*, in ABORTION: NEW DIRECTIONS FOR POLICY STUDIES 94 (E. Manier, W. Liu, & D. Solomon eds. 1977). The West German Constitutional Court determined that "[l]ife in the sense of the historical existence of a human individual exists according to a definite biological-physiological knowledge in any case from the 14th day after conception." On the basis of this determination, the Court held that all abortions were unconstitutional. *See infra* note 30 and text accompanying notes 27-30. The West Germany Court's decision is *reprinted in* English in Gorby and Jonas, *West Germany Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MAR. J. PRAC. & PROC. 551 (1976).

24. Englehardt, *The Ontology of Abortion*, 84 ETHICS 217, 228-32 (1974).

25. Roe v. Wade, 410 U.S. at 132, 160. The Court in *Roe* discusses each of these possible starting points for the beginning of human life at some length. Ultimately, however, the Court concludes that there is no scientific, religious, or legal basis for choosing any one of these definitions over the others. *Id.* at 159.

26. For a discussion of the problems with justifying such a definition *see infra* text accompanying notes 156-62.

27. Louisell & Noonan, *Constitutional Balance* in THE MORALITY OF ABORTION 244-46 (J. Noonan ed. 1970).

protection than other individuals in society.[28] Thus, not only would statutes which permitted abortion on demand be unconstitutional, but even restrictive statutes based on the Model Penal Code (allowing abortions in case of rape or incest), would be impermissible. If the fetus is a person, there is no basis for discriminating against those conceived during rape or incest.[29] Simply put, by defining life as beginning at conception, the Court would be compelled to require that all abortions be prohibited, unless the mother's life is in danger.[30]

Furthermore, once it is assumed that the fetus is a person, then there is no legal basis for punishing abortion differently than homicide.[31] Traditionally, the penalties for criminal abortion in states prohibiting abortion were significantly less than the maximum penalties for murder.[32] But "[i]f the fetus is a person, may the penalties be different?"[33] Does not such a difference deny the fetus equal protection of the laws? Finally, if the Court defines life

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28. L. TRIBE, *supra* note 14, at 929. Some have challenged this contention arguing that "[t]here is no reason to suppose that the performance of an abortion by a private physician must constitute state action under the Constitution." Epstein, *supra* note 8, at 179. This argument misses the point because the state laws which do not punish abortion as homicide would be declared unconstitutional as a denial of equal protection to those persons who are fetuses. It is well established that state laws permitting discrimination constitute state action. Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

29. Symposium, *Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 423 (1968). *Cf.*, Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Levy v. Louisiana, 391 U.S. 68 (1968) (discrimination on the basis of illegitimacy).

30. This is precisely what the West German Federal Constitutional Court held after defining individualization as the beginning of human life. *See supra* note 23. West Germany's law originally provided that a woman who destroyed her fetus, or permitted it to be destroyed, would be punished by imprisonment. The Parliament repealed these criminal sanctions against abortion and permitted abortion during the first twelve weeks of pregnancy by a licensed physician, but on February 25, 1975, the High Court invalidated the Abortion Reform Act. The Court concluded that "abortion is an act of killing that the law is obligated to condemn," and directed Parliament to reestablish abortion as a crime under the Penal Code. 39 B. VERF. G. 1-95 (1975); *reprinted in* English in Gorby and Jonas, *supra* note 23; *see also* Kommers, *supra* note 23. The dissenters on the West Germany Court did not disagree with the majority's conclusion that abortion was unconstitutional. Rather, the dissenters criticized the majority for ignoring principles of judicial review by substituting its judgment for the legislature's. The dissenters maintained that the "question is a matter of legislative responsibility." Gorby and Jonas, *supra* note 23, at 551. This, of course, is exactly the basis for the dissent in Roe v. Wade, 410 U.S. at 171-78.

31. Roe v. Wade, 410 U.S. at 157 n.54.

32. *See, e.g.*, N.J. REV. STAT. § 2A:87-1 (1953) punishing abortions as a "high misdemeanor" with a maximum penalty of seven years in prison.

33. Roe v. Wade, 410 U.S. at 157 n.54.

as beginning at conception, then birth control methods such as the intrauterine device and the "morning after pill" would also be homicide since they act after fertilization and thus kill human lives.[34]

An additional implication of defining life as beginning at conception is that the state could enact laws discriminating against women because of its compelling interest in protecting life, and thus fetuses at every stage of their development. For example, scientific research has confirmed that alchohol and tobacco consumption by a pregnant woman harms the fetus.[35] Because women rarely know that they are pregnant until at least a month or two after conception, only a total ban on alchohol and tobacco consumption by women during their fertile years can insure protection of fetuses. Though such laws would be discriminatory, there is no doubt that states have a compelling interest in protecting the life and health of persons within their jurisdiction.[36] As Professor Richard Epstein explains:

> Let it be accepted that the unborn child is a person (or even is to be treated like one), and it is clear beyond all question that abortion cases fall not within the general rule that protects the liberty of each person to do as he pleases but within the exception that governs the infliction of harm to others.[37]

In fact, a state's failure to enact measures of this sort to protect fetuses might in itself be challenged as a denial of equal protection.[38]

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34. Comment, *The Morning Pill and other Pre-Implantation Birth Control Methods and the Law*, 46 OR. L. REV. 211 (1967).

35. Oullette, Rosett, Rosman & Weiner, *Adverse Effects of Maternal Alcohol Abuse During Pregnancy*, 297 NEW ENG. J. MED. 528 (1977); Steissguth, Landesman-Dwyer, Martin & Smith, *Teratogenic Effects of Alcohol in Humans and Laboratory Animals*, 209 SCI. 353 (1980); *Smoking Imperils the Unborn*, 115 SCI. NEWS, Jan. 27, 1979 at 55.

36. Similarly, the state could bar women from working in environments that might endanger the health of the fetus. *See* Andrade, *The Toxic Workplace: Title VII Protection for the Potentially Pregnant Person*, 4 HARV. WOMEN'S L.J. 71 (1981); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity under Title VII*, 69 Geo. L.J. 641 (1981).

37. Epstein, *supra* note 8, at 171.

38. The argument that neglect by the state constitutes a denial of equal protection is developed in Michelman, *The Supreme Court, 1968 Term—Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); *see also* Wright, *The Role of the Supreme Court in Democratic Society—Judicial Activism or Restraint*, 54 CORNELL L. REV. 1,15 (1968) ("[The Court must protect minorities] not simply from governmental persecution but from governmental neglect as well.")

B. *Approach 2: Deference to the Legislative Process*

Many commentators have suggested that the Supreme Court should have left the abortion issue entirely to the political process. Under this approach, state legislatures would be allowed to proscribe or regulate abortions as they see fit.[39] Texas' statute prohibiting abortions except to save the life of the mother would be constitutional,[40] but so would New York's law, permitting abortion on demand during early pregnancy.[41] Advocates of this approach believe that it was inappropriate for the Court to create an additional zone of individual autonomy.[42]

If the Court were to adopt this approach it would need to justify why the abortion issue rests exclusively with the legislature, without any substantive judicial review. The fact that popularly elected state legislatures adopted laws prohibiting abortion does not, by itself, make it inappropriate for the Court to review the constitutionality of the statutes. The position that in a democracy courts should always accept legislative choices, is intellectually defensible,[43] but contrary to two hundred years of American history. Ever since John Marshall declared that "[it] is emphatically the province and duty of the judicial department to say what the law is,"[44] judicial review of legislative choices has been part of this country's democracy. The Court could not uphold state authority to regulate abortion on the ground that courts may never overturn legislative choices.

Instead, deference to the legislature must be defended on the assumption that a woman's right to an abortion is not protected by the Constitution. This position in turn, assumes that the right to an abortion can be distinguished from other rights which the Court

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39. *See, e.g.*, Henken, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1427 (1974).

40. TEXAS PENAL CODE ANN. §§ 1191-94, 1196 (Vernon 1925), *represented in* Roe v. Wade, 410 U.S. at 117-18 n.1.

41. N.Y. PENAL CODE § 125.05 (McKinney Supp. 1972-73).

42. Ely, *supra* note 17, at 943.

43. *See, e.g.*, Eakin v. Raub, 12 Serg. & Rawle 330, 340 (Pa. 1825) (Gibson, J., dissenting); McCloskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 360-61 (1966); *cf.*, A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962); L. HAND, THE BILL OF RIGHTS 10-18 (1958); Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830-32 (1974); *see supra* note 8 for a discussion of the argument that the Court should have dismissed Roe v. Wade on justiciability grounds.

44. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

has protected.[45] There are only two possible ways to distinguish this alleged right from other rights. One would be to hold that in cases protecting individual liberties the Court was safeguarding a right enumerated in the text of the Constitution or clearly intended by the framers.[46] Abortion, by contrast, is nowhere mentioned in the text and certainly the drafters did not intend to protect a constitutional right to abort.[47] Alternatively, the Court could rule that while it may protect rights not mentioned in the Constitution, it may only do so if the right is "fundamental."[48] Abortion, the argument would go, is not such a fundamental right.[49] Neither of these assumptions is easily justified in light of numerous Supreme Court cases protecting similar rights, no more important, nor more clearly stated or implied in the Constitution, such as the right to contraceptives,[50] the right to procreate,[51] the right to family autonomy,[52] and so on. Yet unless the Court could justify one of these assumptions, the matter could not be left to the legislature.[53]

Furthermore, if the Court were to decide that the abortion issue should be left to state legislatures on the basis of one of the aforementioned assumptions, then one implication is that the Court must also allow the states to regulate and even ban contraceptives. The Constitution is just as silent about privacy and the right to use contraceptives as it is about abortion. As Yale Professor Charles Black explains: "[N]othing in the Constitution said . . . that the state might not make contraception a crime . . . . [M]any believed that no provision or set of provisions written in

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45. The impossibility of distinguishing the right of abortion is discussed *infra* in the text accompanying notes 184-88.

46. This approach to judicial review, that the Court should follow the literal language of the Constitution or the framers' intent, is often referred to as "interpretivism." *See*, J. ELY, DEMOCRACY AND DISTRUST (1980); Perry, *Abortion, the Public Morals, and the Police Power: the Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 709 (1976).

47. Ely, *supra* note 17, at 939. ("The Constitution has little to say about contract, less about abortion, and those who would speculate about which the framers would have been more likely to protect may not be pleased with the answer.").

48. A. BICKEL, THE LEAST DANGEROUS BRANCH 24-27 (1962).

49. *See generally* A. BICKEL, THE MORALITY OF CONSENT 27-28 (1975).

50. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

51. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

52. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

53. *See infra* text accompanying notes 159-88.

the Constitution could by any far-reaching process of 'interpretation' be thought to refer to contraception."[54] In fact, laws prohibiting the sale of contraceptives and statutes forbidding abortion were struck down based on the same non-interpretivist premise: that the right of privacy includes "the decision whether to bear or beget a child."[55] Consequently, if the Court takes the position that it must defer to the legislatures on abortions because it is not a right contained or implied in the Constitution's text, then it must also overrule the decisions invalidating restrictions on contraceptives and defer to the legislatures on that subject as well.[56]

Finally, if the Court grants the legislatures authority to permit or prohibit abortions, it must also allow the legislatures to enact laws requiring abortions. It is conceivable that a state might someday choose to compel pregnant women to undergo amniocentesis and abort defective children.[57] If the Court may only protect rights stated in the Constitution, leaving all else to the political process, then it would be powerless to halt mandatory abortion.[58]

C. *Approach 3: Equal Protection*

It has long been recognized that restrictive abortion laws operate to discriminate against indigent women.[59] The relatively wealthy can persuade a friendly doctor to perform the minor surgi-

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54. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 32-33 (1970); *see also* G. HUGHES, THE CONSCIENCE OF THE COURT: LAW AND MORALS IN AMERICAN LIFE 72 (1975).

55. Eisenstadt v. Baird, 405 U.S. at 453; Roe v. Wade, 410 U.S. at 153.

56. Ely argues that *Griswold* can be justified because the framers intended to protect a privacy that can be reasonably interpreted to include the marital bedroom. Ely, *supra* note 17, at 929 n.68. At most, this would allow the Court to strike down statutes forbidding the *use* of contraceptives. States still could prohibit the sale and distribution of contraceptives; regulations which the Court struck down in *Eisenstadt* and Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

57. Byrn, *supra* note 18, at 858 n.306; Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1329 (1975) ("Therefore, it does not seem unreasonable to predict that, under certain conditions, the state might very well be in a position to demand that a woman be aborted as a 'lesser' sacrifice in order to prevent her bringing 'deficient' children into the world.").

58. Such an implication, that states could even compel abortions, also would flow from the proposed constitutional amendment which has been introduced into Congress to leave abortion regulations entirely to state legislatures. *See* H.R. Res. 261, 94th Cong., 1st Sess. (1975) ("Nothing in this Constitution shall bar any State or territory or the District of Columbia . . . from allowing, regulating, or prohibiting the practice of abortion.").

59. Worsnop, *Abortion Law Reform* in EDITORIAL RESEARCH REP. 543 (1970).

cal procedure or can afford to travel to one of the states that allows abortion on demand.[60] Even when abortion was illegal in all states, wealthier women still had access to abortion by travelling to foreign countries which allowed abortion.[61] For example, between 1968, when Great Britain liberalized its abortion laws, and 1970, when New York repealed its criminal ban, making legal abortions available in the United States, it is estimated that 5,000 abortions a year were performed on American women in Great Britain.[62]

Poor women desiring an abortion and unable to afford the costs of travel to say nothing of paying for the procedure itself, face a cruel dilemma. On the one hand, they can carry the pregnancy to term and give birth to an unwanted child they cannot afford. Alternatively, they can "subject themselves to the notorious 'back-street' abortion . . . fraught with the myriad possibilities of mutilation, infection, sterility and death."[63] Prior to *Roe v. Wade*, all too many women made the latter choice and faced exactly those consequences. It is estimated that prior to 1973, one million illegal abortions were performed each year in the United States.[64] Though white women were as likely to have illegal abortions, the death rate from illegal abortions was far higher among minority women. For example, one study indicated that in New York City there were 0.8 abortion deaths for every 10,000 live births by white women. Among black women there were 7.1 abortion deaths per 10,000 births and for Puerto Rican women the figures were 4.5 deaths for every 10,000 births.[65] Altogether, it has been estimated that perhaps as many as 8,000 women a year were killed in criminal abortions,[66] and these figures do not even speak of the injuries and ill-

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60. Guttmacher, *Law, Morality and Abortion*, 22 RUTGERS L. REV. 415, 421 (1967).

61. Worsnop, *supra* note 59, at 553. Since more than 60% of the world's population lives in countries where abortion is legal during the first trimester, [Liu, *Abortion and the Social System*, in ABORTION: NEW DIRECTIONS FOR POLICY STUDIES 144 (E. Manier, W. Liu. & D. Solomon eds. 1977)], it is inevitable that rich women will have access to safe abortions while indigent women will not.

62. Worsnop, *supra* note 59, at 553.

63. YWCA v. Kugler, 342 F. Supp. 1048, 1074 (D.N.J. 1972).

64. Worsnop, *supra* note 59, at 554; Guttmacher, *supra* note 60, at 420. *But see* Louisell & Noonan, *supra* note 27, at 241-42 (disputing the one million figure).

65. Guttmacher, *supra* note 60, at 421.

66. Rossi, *Public Views on Abortion* in THE CASE FOR LEGALIZED ABORTION NOW 27 (A. Guttmacher ed. 1967). *But see* Tietze & Lewit, *Abortion* in SCI. AM., January 1969 at 54 (arguing that under 1,000 women die a year from illegal abortions). Even this lesser number is, of course, still quite significant.

nesses caused by illegal abortions, to say nothing of women permanently sterilized.[67] That these deaths and injuries are a result solely of illegality is indicated by the fact that there has been a 40% decrease in abortion-related deaths since *Roe v. Wade*.[68]

Arguably the women who "suffer most from prohibitions on abortion are likely to be the same women who have suffered most from other sorts of discrimination or injustice: . . . poor women and women who want to pursue careers outside the home."[69] Such women can easily be characterized to constitute a "discrete and insular minority" who cannot rely on the "operation of the political processes" and deserve special protection from the courts.[70] Prior to *Roe v. Wade*, well-funded, politically powerful groups opposing legalized abortion, possessing far more influence than the disadvantaged poor women, insured that restrictive laws would stay on the books.[71]

Thus, the Court could find state laws forbidding abortion unconstitutional as a denial of equal protection. A class lacking political access, poor women, is disadvantaged and harmed, while others, notably middle-class and wealthy women, can avoid the burdens of the laws.[72] This approach to the abortion issue makes two assumptions: that poverty can be a suspect classification and that the state does not have a compelling interest in protecting the fetus. Unfortunately, neither of these assumptions is easily

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67. S. J. KLEEGMAN & S. A. KAUFMAN, INFERTILITY IN WOMEN 301 (1966).

68. *Abortion Related Deaths Down 40% Since 1973 Supreme Court Rulings Overturning Restrictive State Abortion Laws*, 5 FAM. PLAN. PERSP., Mar.-Apr. 1975, at 54.

69. Regan, *Rewriting Roe v. Wade*, in THE LAW AND POLITICS OF ABORTION 66 (C. Schneider & M. Vinovskis eds. 1980).

70. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938); *see also* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1315 (1976):

> [O]ne may ask whether democratic theory really requires deference to majoritarian outcomes whose victims are prisoners, inmates of mental institutions, and ghetto dwellers. Unlike the numerical minorities that the courts protected under the barrier of economic due process, these have no alternative access to the levers of power in the system.

71. L. TRIBE, *supra* note 14, at 929; Blake, *The Abortion Decisions: Judicial Review and Public Opinion:* in ABORTION: NEW DIRECTIONS FOR POLICY STUDIES 52 (E. Manier, W. Liu & D. Solomon eds. 1977); Ely, *supra* note 17, at 935 n.89.

72. Guttmacher, *supra* note 60, at 420-21 ("illegal abortion is a horribly discriminatory process . . . . [A] fat pocketbook will buy a safe abortion and . . . an empty pocketbook means either one has to do it herself or one has to go to some para-medical person who is ill-equipped to perform an abortion").

defended.

The Burger Court has consistently rejected the argument that laws which have the effect of discriminating against the poor should be "strictly scrutinized."[73] In *Dandridge v. Williams*[74] the Court reviewed a Maryland welfare statute which set an upper limit on the total amount of benefits any family could receive, regardless of its size. The effect was that children born to families over a certain size would receive no assistance. The Court held that there was no basis for using any form of strict scrutiny, concluding that the Maryland law constituted "economic and social welfare" legislation which was sustained under a rational basis test.[75] Likewise, the Court has upheld state laws which burden poor people by restricting their access to the judicial process[76] and by allowing for their eviction from dwellings in summary proceedings.[77]

In *San Antonio Independent School District v. Rodriguez*[78] the Supreme Court explicitly rejected the contention that laws which burden poor people must be justified by a compelling state interest. In *Rodriguez* the plaintiffs challenged Texas' system of financing public schools largely through the property tax, which enabled wealthy school districts to tax at a low rate and spend a great deal on education, whereas poor districts taxing at high rates still had little revenue for schools. The Court held that allocation

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73. Until recently equal protection analysis involved a two-tier test. Suspect classifications, such as race, and classifications burdening fundamental rights, such as travel, are strictly scrutinized; that is, they must be justified by a compelling state purpose. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 524 (1978). By contrast, classifications which are employed in economic and general social welfare legislation will be upheld so long as "they arguably relate to a legitimate function of government." *Id. See generally* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). A third type of review referred to as "intermediate scrutiny," reflecting something more than a rational basis test and something less than strict scrutiny, has been used by the Court in some sex discrimination cases. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); L. TRIBE, *supra* note 14, at 1065-66. *See also* Perry, *Modern Equal Protection: A Conceptualization and an Appraisal*, 79 COLUM. L. REV. 1023, 1054 (1979).

74. 397 U.S. 471 (1970).

75. *Id.* at 485.

76. Ortwein v. Schwab, 410 U.S. 656 (1973) (sustaining a filing fee to file an appeal from a decision terminating welfare benefits); United States v. Kras, 409 U.S. 434 (1971) (sustaining a filing fee to file for bankruptcy). *But see* Boddie v. Connecticut, 401 U.S. 371 (1971) (striking down a filing fee to file for a divorce).

77. *See* Lindsey v. Normet, 405 U.S. 56 (1972) (upholding an Oregon statute permitting landlords to bring an expedited action for possession).

78. 411 U.S. 1 (1973).

of educational opportunities based on the wealth of the district in which a child resided did not violate equal protection: there was no basis for strict scrutiny merely because the law burdened poor people in the allocation of benefits which could not be considered to be a fundamental constitutional right.[79] Thus, the Court has never recognized poverty that constitutes a suspect classification. It would, therefore, be difficult to justify striking down abortion laws on the grounds that they discriminate against poor women.

Furthermore, even if the Court strictly scrutinized restrictive abortion laws, it would have to sustain those laws if a compelling state interest could be identified.[80] Protecting the fetus would be such an interest, unless the Court were also to hold that the state could not regard the fetus as a person. If the fetus may be considered a human life, then legislative protection is especially appropriate under the equal protection clause since fetuses are the ultimate insular minority. As John Hart Ely observed: "I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate a) women or b) fetuses as one, I'd expect no credit for the former answer."[81]

Simply put, determining that abortion laws operate to discriminate against poor women cannot be dispositive in ascertaining their constitutional validity. There also must be a determination that the state does not have a legitimate interest in protecting fetuses. Another difficulty with this third equal protection approach therefore, is that it does not provide any basis for deciding whether or not fetuses are persons which states may protect.

Moreover, does this approach mean that any criminal statute which burdens the poor more than the rich denies equal protection?[82] If the argument is that wealthy women can get safe illegal abortions while poor women cannot, shouldn't the inequality be eliminated by attempting to restrict the access of the wealthy? States could enact stricter penalties against doctors who perform illegal abortions or could criminalize leaving the state to obtain an

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79. *Id.* at 28.

80. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (sustaining a law despite use of strict scrutiny because of the existence of a "compelling interest").

81. Ely, *supra* note 17, at 935.

82. As Ely puts it, it is a strange argument for the unconstitutionality of a law that those who endure it suffer. *Id.* at 923 n.26.

abortion. In other words, achieving equality does not necessitate legalizing abortion; the state could try to make it equally difficult for rich and poor to get illegal abortions. If there is not *substantive* objection to abortion laws, the equal protection approach will not necessarily lead to legalization.[83]

D. *Approach 4: Privacy—Roe v. Wade*

The approach chosen by the Court in *Roe v. Wade* held that a woman's right of privacy includes the right to terminate a pregnancy. This fundamental right may not be infringed by the government absent a compelling state interest. The state does not have such an interest until the fetus reaches viability.

Justice Blackmun, writing for a 7-2 majority, authored the opinion in *Roe v. Wade*. He began by acknowledging "the sensitive and emotional nature of the abortion controversy" and the Court's obligation "to resolve the issue by constitutional measurements free of emotion and of predilliction."[84] After holding that the case was justiciable,[85] Justice Blackmun engaged in a detailed review of the history of abortion laws, concluding that: "The restrictive criminal abortion laws in effect in a majority of States today . . . are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century."[86] The primary purpose of the abortion laws was not to save potential lives, but to protect the pregnant woman's health,[87] an interest that "has largely disappeared."[88]

Justice Blackmun then examined restrictive abortion laws in light of the constitutionally protected right of privacy. Although the right of privacy was first explicitly recognized in *Griswold v.*

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83. The Equal Protection approach, however, can suppplement other approaches by indicating a major undesirable feature of restrictive statutes: discrimination against poor women.

84. 410 U.S. at 116.

85. *Id.* at 120-29; *see generally supra* note 8.

86. 410 U.S. at 129. Justice Blackmun noted that at common law "abortion performed before 'quickening' — the first recognizable movement of the fetus *in utero*, appearing usually from the sixteenth to the eighteenth week of pregnancy — was not an indictable offense" and that it is "doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus." *Id.* at 135-36.

87. *Id.* at 151.

88. *Id.* at 149.

Connecticut,[89] where the Court declared unconstitutional a state statute forbidding use of contraceptives, the Court noted that a number of earlier cases protected personal autonomy in family matters.[90] The physical and psychological burdens of pregnancy are so great that the Court concluded that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[91]

While recognizing that the "right of personal privacy . . . is not unqualified and must be considered against important state interests in regulation,"[92] the Court held that the state lacked a sufficient interest to justify banning abortions until the fetus reaches viability.[93] During the first trimester of pregnancy the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.[94] The state may not proscribe or regulate abortions during this period.[95] After the first trimester and until the fetus reaches viability, the state may adopt regulations to protect the pregnant woman's health, but it may not prohibit abortion.[96]

The Court concluded that the state only has a compelling interest in prohibiting abortion after the fetus reaches viability:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[97]

Thus, the Court held that a woman's right to terminate her pregnancy is such that the state may not prohibit abortion until the

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89. 381 U.S. 479 (1965).

90. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

91. 410 U.S. at 153.

92. *Id.* at 154.

93. *Id.* at 163.

94. *Id.*

95. *Id.* at 164.

96. *Id.* at 163.

97. *Id.* at 163-64.

fetus reaches viability.

This approach is based on the unstated assumption that human life does not begin until viability. Though the Court says that it "need not resolve the difficult question of when life begins,"[98] it does just that by concluding that the state's interest in the fetus does not become compelling until the fetus reaches viability and is able to survive outside the womb. Holding that a woman has a fundamental right to privacy does not decide the abortion question because it "does not preclude the possibility that the state's interest in preserving the fetus might override the woman's claim."[99] If the fetus is regarded as a human life then the state has a legitimate interest in its protection even if such protection would infringe upon a woman's right to privacy.[100] Society does not allow parents to kill infants even though infants are a burden and an infringement of privacy. Thus, only by assuming that the fetus is not a human person until viability can the Court justify allowing abortions prior to viability based on a privacy rationale.[101] Professor Richard Epstein notes: "The Justice simply cannot strike the balance for the first trimester unless he has some theory of life of his own which shows there is no 'compelling' interest of the unborn child."[102]

The Court tries to avoid confronting its tacit choice that life does not begin until viability by concluding that the fetus is not a "person" within the Constitution, but that the state's interest in *potential* life becomes compelling at the point of viability.[103] It attempts to justify this conclusion by looking to the intent of the constitutional provisions using the term "person."[104] But such an analysis is, at the very least, disingenuous. Why should the intent of the Constitution be controlling in deciding whether "persons" includes fetuses, if intent is not controlling in deciding whether the Constitution intended to protect a right to abortions?[105] The Court

98. *Id.* at 159.

99. L. TRIBE, *supra* note 14, at 927.

100. Many commentators have criticized the Court for simply assuming that the fetus is not deserving of protection without explaining the basis for this premise. *See, e.g.*, L. TRIBE, *supra* note 14, at 927; Regan, *supra* note 69, at 75.

101. Roe v. Wade, 410 U.S. at 156-59.

102. Epstein, *supra* note 8, at 182.

103. *Id.* at 163.

104. *Id.* at 158.

105. Ely, *supra* note 17, at 926.

then claims that state protection of the fetus after viability has both logical and biological justification since the fetus is then capable of meaningful life outside the womb.

This is an implicit choice that personhood begins at that point and not sooner.[106] As noted earlier, there are many competing standards for when human life starts: conception, implantation, individualization, viability, or birth.[107] The Court does not explain why, of these standards, only viability, the capacity for life outside the womb, provides a logically and biologically justifiable point at which the state's interest becomes compelling.

An implication of the determination that the state's interest in the fetus becomes compelling at viability is that medical progress may virtually eliminate all abortions. Scientific advances might make a fetus viable at an early stage of pregnancy.[108] If technology is available to enable the fetus to survive outside the womb after the first month or six weeks of pregnancy, then no abortions would be allowed after that time. The result would be an almost total ban on abortions.

One effect of the Court's decision that a woman's right of privacy allows her to have an abortion is that no one else, however much interested in the pregnancy, may have a say in her decision.[109] Privacy is a personal right. Statutes which allow others to veto an abortion would infringe on the protected right. Thus, in *Planned Parenthood of Central Missouri v. Danforth*,[110] the Court, though conceding that the husband has a legitimate interest in his wife's pregnancy and in the fetus, held that "since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that period."[111] In fact, the Court has even

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106. *Id.* at 924-25.

107. *See supra* text accompanying notes 24-26.

108. S. SCHNEIDER & G. VINOVSHIS, THE LAW AND POLITICS OF ABORTION xxxviii (1980).

109. Viera, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HASTINGS CONST. L. Q. 867, 875 (1974).

110. 428 U.S. 52 (1976).

111. *Id.* at 69. Justice Stewart in a concurring opinion wrote that he found the issue of whether husbands can veto abortions to be "a rather more difficult problem than the Court acknowledges." *Id.* at 90. He, however, agreed with the Court: "Since it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . the balance weighs in her favor." *Id.*

held that despite the constitutionally protected right of parents to control the upbringing of their children,[112] parents may not exercise an absolute veto over their minor daughter's right to an abortion.[113]

E. *Approach 5: Abortion as a Private Moral Judgment*

This approach is premised on the fact that there is no legal,[114] social,[115] or religious[116] consensus as to when life begins.[117] While everyone in society agrees that a two day old infant is a person, such agreement simply does not exist as to a two week old fetus. The Court could conclude that because it is equally defensible to consider a fetus a human life or not, the question of abortion's legitimacy should be left to each woman to decide on the basis of the Constitutional right to privacy.[118] Those women who believe that life begins at conception would never seek abortions. Other women, choosing different starting points for human life, would be able to obtain safe, legal abortions. The entire matter would be viewed as a moral question to be left to the individual.[119]

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112. *See, e.g.*, Parham v. J.R., 442 U.S. 584 (1979); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Chemerinsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions*, 18 J. FAM. L. 79, 95-101 (1979).

113. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979). A detailed consideration of a minor's right to obtain an abortion without parental consent is beyond the scope of this article. *See* Note, *Parental Consent Requirements and the Privacy of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1974).

114. *See* Note, *The Law and the Unborn Child: the Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971).

115. *See* Blake, *supra* note 71, at 23; Isaacson, *The Battle Over Abortion*, TIME, Apr. 6, 1981, at 20.

116. F. JAFFE, B. LINDHELM, & P. LEE, ABORTION POLITICS: PRIVATE MORALITY AND PUBLIC POLICY 87 (1981) ("Organized religious groups hold radically different theological beliefs about the morality of abortion and the circumstances, if any, under which it is permissible.").

117. Roe v. Wade, 410 U.S. at 160-61; Manier, *Conclusion*, in ABORTIONS: NEW DIRECTIONS FOR POLICY STUDIES 169 (E. Manier, W. Liu & D. Soloman eds. 1977).

118. Roe v. Wade, 410 U.S. at 159.

119. D. CALLAHAN, *supra* note 20, at 493, 497-98 (1970):

> Whatever one may think of the morality of abortion, it cannot be established that it poses a clear and present danger to the common good. Thus, society does not have the right to decisively interpose itself between a woman and an abortion she wants. It can only intervene where it can be shown that some of its own interest are at stake *qua* society . . . . [A]bortion decisions should be private decisions.

Id. at 493.

In part, the issue should be regarded as a private moral judgment because it inevitably is one. Society can do nothing to stop a woman determined to have an abortion from getting one. Instances of self-induced abortions by the most primitive means are well known and reflect the fact that so long as the fetus is in a woman's body there is ultimately nothing society can do to stop her from removing it. In this sense, laws restricting abortion are like those prohibiting suicide. Both are totally unenforceable because they prevent a person from inflicting harm to one's own body, something society can never stop absent constant monitoring of every individual's conduct.

Not only *is* abortion inevitably a private moral judgment, society should regard it as one. A ban on abortions is, in effect, a state requirement that women carry pregnancies to term. The state is compelling the woman to use her body as an incubator.[120] It is "difficult to imagine a clearer case of bodily intrusion."[121] Thus, in the absence of any consensus as to when life begins, society should not force women to endure the physical and psychological burdens of pregnancy, or choose between an unwanted child or an unsafe abortion. Instead, society should allow each woman to make the choice as to whether to bear a child.[122] This would not represent a social decision in favor of abortions, but rather a decision to leave the matter to the pregnant woman.[123]

Such an approach makes the assumption that the political process may not choose a definition of when life begins if many disagree with that definition. Undoubtedly society adopts many laws which are unpopular. Does the absence of a social consensus combined with the fact that such statutes impose burdens make the laws unconstitutional? Consider, for example, laws requiring conscription. Some believe that all conscription is immoral.[124] Ultimately laws requiring conscription, like laws prohibiting abortion, are unenforceable because individuals who wish to avoid the laws can leave the country. Conscription places a tremendous burden on those drafted; it may even cost them their lives. While such argu-

120. *See* Regan, *supra* note 69, at 3.

121. L. TRIBE, *supra* note 14, at 924.

122. Regan, *supra* note 69, at 23-25.

123. L. TRIBE, *supra* note 14, at 933.

124. *See* Meiklejohn, *Conscientious Objection in the Supreme Court: Welsh and Gillette*, 8 CUM. L. REV. 1, 6 (1977).

ments strongly support a volunteer army, they are hardly enough to enable the Court to declare all conscription unconstitutional. The point is that legislatures often make controversial moral judgments that burden individuals. One implication of a Court decision holding that abortion is a private moral judgment is, therefore, that the Court must explain why abortion is constitutionally an improper subject for a public moral judgment.

An additional implication of regarding abortions as a private moral judgment is that a pregnant woman would be able to remove the fetus from her body at *any* point during the pregnancy. Otherwise, the state would be forcing the woman to endure the burdens of pregnancy and be an incubator. The woman even could separate the fetus from her body during the third trimester.

The state, however, could require that the removal of the fetus be accomplished in the manner most likely to enable its survival.[125] The state may also take whatever steps necessary to keep the fetus alive once outside the woman's body and would care for a living fetus, at that point usually called a baby, as it would any unwanted infant. This approach is markedly different than that taken by the Court in *Roe v. Wade* because the state may not prohibit removal of a fetus at any stage of pregnancy, even after viability. The state, under this approach, may only act to keep the fetus alive.

This approach, like each of the other four alternatives, is in theory defensible, but difficult to justify and accept. Since none of the possible approaches to the abortion issue is unassailable, the inquiry must be whether the Court's choice in *Roe v. Wade* is any more or less defensible than the other alternatives. Why from among the various options did the Court select the approach that it used? Ultimately, the answer to this question, the inability to rhetorically justify most of the alternatives, demonstrates both the

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125. For example, Minnesota enacted a statute providing: "To the extent consistent with sound medical practice the abortion [must be] performed under the circumstances which will reasonably assure the live birth and survival of the fetus." MINN. STAT. §§ 145-412, subd. 3 (3) (1974). *See* Hodgson v. Anderson, 378 F.Supp. 1008 (D. Minn. 1974), *appeal dismissed*, 420 U.S. 903 (1975). Such statutes are unconstitutional under Roe v. Wade to the extent that they limit abortions during the first two trimesters of pregnancy. *See, e.g.*, Collauti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 85-86 (1976). In *Roe*, the Court determined that regulation of abortion during the second trimester could be justified only on the basis of the state's compelling interest in the health of the mother. Therefore the abortion procedure could be regulated only in ways reasonably related to the health of the mother. Roe v. Wade, 410 U.S. at 163.

strength and weakness of the Court's decision in *Roe v. Wade.*

II. Understanding Roe v. Wade: Rhetorical Constraints on Supreme Court Decision-Making

A. *The Requirements for a Written Opinion as a Limit on Judicial Decision-making*

There is a popular fiction, prevalent especially among law students, that the Supreme Court does whatever it wants in deciding cases. While, of course, the Court theoretically can reach any conclusion it chooses,[126] there is a powerful limit on judicial decision-making: the requirement that the Court hand down a written opinion articulating reasons for its decision.[127] Although neither the Constitution nor any statute compels the Court to write and publish opinions, publicly stated reasons for decision are embedded in the American legal system.[128] In fact, it long has been recognized that the "traditional means of protecting the public from judicial fiat . . . [is] that judges give reasons for their results, and the consequent disqualification of certain types of reasons as nothing more than illegitimate statements of personal prejudice."[129] As the philosopher John Dewey wrote over a half century ago:

> courts not only reached decisions; they expound them, and the exposition must state justifying reasons . . . . Exposition implies that a definitive solution is reached . . . . Its purpose is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so that it will

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126. It must be emphasized that the Court's total freedom to decide the cases in any way it wants exists only in theory. Many commentators have identified limits on judicial decision-making. *See, e.g.*, Braden, *The Search for Objectivity in Constitutional Law*, 57 Yale L.J. 571, 574 (1948):

> [T]here are only 4 absolute limitations on their power. First, a possible constitutional issue must be brought before them . . . . A second absolute limitation is the probability of obedience. A majority of the Court will not follow a course of action which *they* believe will openly and literally be flaunted . . . . Thirdly, they will not follow a course of action which *they* believe will lead to a successful court-packing or similar plan aimed at them. Finally, they will not follow a course of action which *they* believe will lead to their impeachment."

Id. (emphasis in original).

127. White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 Va. L. Rev. 279, 285 (1973).

128. *See generally* The Speeches of the Right Honorable Edmund Burke on the Impeachment of Warren Hastings 200-01 (H.G. Bohn ed. 1901). *Cf.*, Raden, *The Requirement of Written Opinions*, 18 Calif. L. Rev. 486 (1930) (the requirement in state constitutions and common law for written opinions).

129. White, *supra* note 127, at 299.

> indicate a rule for dealing with similar cases in the future. It is highly probable that the need of justifying to others conclusions reached and decisions made has been the chief cause of the origin and development of logical operations in the precise sense; of abstraction, generalization, regard for consistency of implications. It is quite conceivable that if no one ever had to account to others for his decisions, logical operations would never have developed, but men would use exclusively methods of inarticulate intuition and impression, feeling.[130]

Thus, the rhetorical obligation to publicly explain a decision constrains what the Court may do: even if all judicial decisions are merely reflections of a judge's hunches or personal predilictions,[131] the judge nonetheless must justify those rulings as based on legal principles.[132] Courts may only come to those conclusions which can be justified in legally acceptable terms.

Specifically, the Supreme Court must write an opinion that demonstrates that its choice is not arbitrary, but instead is based on a legal principle and is consistent with precedents.[133] Each of these requirements is an independent limitation on judicial decision-making. First, and above all, the Court, through its opinion, must demonstrate that it has not made an arbitrary ruling. If there are a number of possible ways to deal with a legal problem, the Court must indicate that there is a rational reason for selecting one approach over the others.[134]

Second, the Court must be able to present its decision as being justified by a legal principle.[135] That is, the Court must articulate a

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130. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24 (1924). *See also* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 75-76 ("unexplained decisions tend to substitute judicial fiat not only for the rule of a democratic majority but also for the rule of law").

131. Many have suggested that judicial decisions are merely public rationalizations for hunches. *See, e.g.*, W. DOUGLAS, THE COURT YEARS 8 (1980); J. FRANK, LAW AND THE MODERN MIND 148 (1930); Hutcheson, *The Judgment Intuitive: The Function of Hunch in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

132. R. WASSERSTROM, THE JUDICIAL DECISION 25-30 (1961); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mill Case*, 71 HARV. L. REV. 1, 3, 6 (1957).

133. Although this discussion deals only with Supreme Court adjudication in constitutional litigation, these same limits obviously apply to all judicial decisionmaking, regardless of the level of government or the issue.

134. R. WASSERSTROM, *supra* note 132, at 96.

135. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). While many critics have suggested that "neutral" principles do not exist, *see, e.g.*, Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L.

rule of general applicability that determines the outcome of the case.[136] In the areas of constitutional law, the Court has to announce a principle grounded in the Constitution which leads it to decide the case in a particular way.

Finally, the Court must come to a decision which either is consistent with precedent or which legitimately can be distinguished from past decisions or which justifies overruling conflicting cases. Our legal system is based on the "presumption that a controlling precedent should determine the decision in a given case unless there is a good reason for departing from it."[137] The Court's decision-making is constrained by its need to either be consistent with precedent or justify overruling it.[138] Some might suggest that this limitation is meaningless; that courts ignore precedents whenever they want. However, even a cursory examination of Supreme Court cases shows the tremendous power the doctrine of stare decisis wields. For example, consider the *Slaughterhouse Cases* of over a century ago.[139] Why has the Court never reversed that decision's narrow interpretation of the "privileges or immunities" clause of the Fourteenth Amendment,[140] which virtually writes that provision out of the Constitution?[141] And why in so many instances does the Court redefine a precedent in a totally inaccurate manner rather than simply overrule it?[142] Clearly, the answer is that the

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REV. 571 (1960), all commentators certainly agree that the Court should articulate a principle for its decision.

136. Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 40-41 (1963); Wechsler, *supra* note 135, at 19.

137. P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING 1119 (1975).

138. Braden, *supra* note 126, at 576.

139. 83 U.S. (16 Wall.) 36 (1873).

140. Section 1 of the Fourteenth Amendment provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

141. L. TRIBE, *supra* note 14, at 423 ("The *Slaughterhouse* definition of national rights renders the fourteenth amendment's privileges or immunities clause technically superfluous"). As a result of the *Slaughterhouse* cases, the Court has not found a single right to be protected by the privileges or immunities clause. *See* Kurland, *The Privileges or Immunities Clause: Its Hour Come Round at Last?*, 1972 WASH. U. L. Q. 405, 414.

142. For example, consider Justice Douglas' majority opinion in Griswold v. Connecticut, 381 U.S. 479 (1965). In explaining the constitutional basis of the right of privacy, Justice Douglas states that Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), are First Amendment cases. However, clearly both decisions were substantive due process cases based on the liberty of the due process clause and not even remotely based on the First Amendment. *See* Pierce v. Society of Sisters, 268 U.S. at 535; Meyer v. Nebraska, 262 U.S. at 399. In fact, they could not have been First Amendment

Court realizes that its legitimacy depends on creating at least the appearance of consistency with precedents.

The importance of these limits on judicial decision-making cannot be overstated. The primary difference between a court and a legislature is not that only a legislature makes value choices.[143] Courts, too, cannot escape the need to make difficult choices among competing values.[144] Rather, the central difference between the judiciary and the legislature is that only the former must justify its decision with a written opinion.[145] A legislature is allowed, even expected, to make arbitrary choices, unsupported by a guiding principle. No one has ever suggested that Congress be obliged to follow stare decisis. A court, by contrast, must rhetorically justify every decision with a carefully constructed written explanation.

Furthermore, even if in theory courts could ignore this requirement for published opinions,[146] judges recognize that the legitimacy of their decisions depends on the persuasiveness of the justifications given for the rulings.[147] Especially in a highly controversial area, such as abortion, the Court's decision was limited to that which could be justified as being principled, consistent, and not arbitrary.

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decisions since the First Amendment was not applied to the states until after *Meyer* and *Pierce* were decided. *See* Gitlow v. New York, 268 U.S. 652 (1925).

143. Some commentators have suggested that in a democracy choices among conflicting values must be made by the people through their elected representatives. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 5, 103 (1980). *But see* Chemerinsky, Book Review, 17 WAKE FOREST L. REV. 701, 702 (1981).

144. As Herbert Wechsler points out: "courts in constitutional determinations face issues . . . that [inescapably] . . . involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone." Wechsler, *supra* note 135, at 15.

145. *Id.* at 15-16.

146. At times, the Court has handed down a series of opinions without explicit rationales. For example, during the 1950's the Supreme Court decided a number of desegregation cases with *per curiam* opinions. *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (segregation on buses in Montgomery, Alabama); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (segregation on public golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (segregation in public bathing facilities). Similarly, during the 1960's the Court reversed over 30 obscenity convictions with *per curiam* opinions. G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 1351-52 (10th ed. 1980).

147. P. BREST, *supra* note 137, at 3; M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 26-31 (1964).

B. *Rhetorical Limits and the Abortion Issue*

These limits on Supreme Court decision-making help explain why *Roe v. Wade* was decided as it was. Many of the approaches to the abortion issue which the Court in theory could have taken, could not have been rhetorically justified.

For example, the first approach outlined above, the Court holding that life begins at conception, could not have been legitimized as a non-arbitrary choice. For the Court to declare that the fetus is a person protected by the Constitution, the Court would need to articulate a constitutional principle for concluding that human life begins at or near the time of fertilization. Yet, it is "equally reasonable either to assert or to deny that human life begins at conception."[148] There is no scientific or technical,[149] let alone constitutional basis, for declaring that the fetus is a person under the Constitution from the moment of conception.[150] The Court could not rhetorically justify why life constitutionally begins at that instant, and not at implantation, individualization, quickening, viability, or birth.[151]

Nor could the Court avoid defining when life begins if it was to choose this first approach. Some commentators have suggested that the Court could have just recognized that the fetus is a potential life and therefore justified constitutional protection beginning at conception.[152] But what makes a fetus a "potential" rather than an "actual" life? The answer must be that *but for* an abortion a

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148. Manier, *supra* note 9, at 169. *Compare*, J. NOONAN, THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 57 (1970) ("at conception the new being receives the genetic code . . . . A being with a human genetic code is a man.") *with* Heymann & Barzeloy, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 776 (1973):

> But much that we associate with the value of human life is not present at earliest stages. There is no feeling or thought of which we know. There is no reciprocal relation to others that is reflected in need or love. There is no memory or fear. What most of us mean by life, what most of us care about when we think of protecting life is not true of the 12 or 16 cells present on the third or fourth day after pregnancy nor is present for sometime thereafter.

Id.

149. Manier, *supra* note 117, at 170 ("no amount of biological evidence can provide adequate warrant for any claim concerning the starting point of individual human life").

150. Manier, *supra* note 9, at 5.

151. Englehardt, *supra* note 24, at 228-32.

152. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1253 n.16 (1975); Ely, *supra* note 17, at 925.

human being will at some future time exist. However, *but for* the use of contraceptives, a human being also would exist. In fact, *but for* abstinence a human being would likely exist, too. The *potentiality* of life is always present in human beings after puberty. Abortion is condemned not because it stops a potential life from coming into being, but because some believe that it is murder of an actual human life.[153] Yet, there would be no principled basis for the Court to conclude that those who believe life begins at conception are right and all others, with differing definitions of when life begins, are wrong. Rhetorically, the Court had to reject the first approach defining life as beginning at conception, and conclude as it did that it "need not resolve the difficult question of when life begins."[154]

Furthermore, even if the Court were able to justify holding that the fetus is a person, the Court's rhetorical problems under the first approach would not be over. The conclusion that life begins at conception does not in itself justify banning abortion. The Court would also need to conclude that the fetus' right to life was constitutionally more significant than the woman's right to control her body.[155] It is difficult to imagine a greater invasion of individuals' control over their own bodies than compelling a woman to keep a fetus in her womb against her will.[156] It is not sufficient to simply say the infringement of body autonomy is justified because a life is at stake. Our legal system does not force people to donate their kidneys, even if they could be used to save other human lives.[157] The Court in dealing with the abortion issue would need to balance the woman's right to control her body with the fetus' right to life. Once the Court has concluded that life begins at conception, it is hard to imagine any principle the Court could articulate to resolve this value conflict.[158] The problems with drafting an opinion holding that life begins at conception are one reason why the Court

153. Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. L. REV. 978, 991 (1981) ("The life at stake, in the right-to-life view, is not 'potential', but actual. The fetus is seen as equivalent in its humanness to infants and children and adults since human life for them begins at conception.").

154. Roe v. Wade, 410 U.S. at 159.

155. Thomson, *A Defense of Abortion*, in THE RIGHTS AND WRONGS OF ABORTION 3 (M. Cohen, T. Nagel & T. Scanlon eds. 1974).

156. L. TRIBE, *supra* note 14, at 924.

157. Thomson, *supra* note 155, at 5.

158. In fact, "[i]s it possible to speak of principled judicial decision-making when more than one value is at stake . . . ?" Golding, *supra* note 136, at 48-49.

could not pursue that approach.

Similarly, the second approach, holding that regulation of abortion should be left to the legislature, could not be rhetorically justified in light of other recently decided cases. In order to conclude that abortion is a matter properly left to the political process, the Court would need to conclude either that it should only protect rights stated or implied by the Constitution, or that while it may protect some non-textual rights, abortion is not one of them. Neither of these conclusions could be reconciled with precedent.

Many constitutional commentators have argued that the Court should confine itself "to enforcing norms that are stated or clearly implicit in the written Constitution."[159] For example, Justice Black contended that constitutional disputes should be decided by the literal language of the Constitution.[160] Raoul Berger repeatedly has argued that a court in interpreting a constitutional provision should be limited to what its drafters intended.[161] Thus, the Court would conclude that because reproductive autonomy is nowhere mentioned in the Constitution it is not a proper subject for judicial review.[162] Robert Bork summarizes this position:

> Where constitutional materials do not clearly specify the value to be preferred there is no principled way to prefer any claimed human value to any other. The judges must stick close to the text and history, and their fair implications and not construct new rights . . . . Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in framing the Constitution.[163]

While this position is theoretically defensible, rhetorically the Court could not adopt it to justify refusing to rule on the abortion issue because it is inconsistent with two hundred years of Supreme Court decisions. The Supreme Court has never limited itself to

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159. J. ELY, *supra* note 7, at 1. Ely terms this approach to judicial review "interpretivism."

160. *See, e.g., In re* Winship, 397 U.S. 358, 377-78 (1970) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 508-09, 520-21 (1965) (Black, J., dissenting); H. BLACK, A CONSTITUTIONAL FAITH 33-34 (1969).

161. R. BERGER, GOVERNMENT BY JUDICIARY (1977); Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87 (1981).

162. Ely, *supra* note 17, at 939.

163. Bork, *Neutral Principles and Some First Amendment Problems*, 42 IND. L.J. 1, 8, 10-11 (1971).

protecting only those rights stated or implied in the text.[164] The right of association,[165] freedom of travel,[166] and the right to vote[167] have been safeguarded despite the fact that they are not stated or implied in the Constitution.[168] Most notable with regard to the abortion issue, the Court has protected many aspects of family autonomy,[169] including the right to marry,[170] to form a family,[171] to procreate[172] and to control the upbringing of one's children,[173] despite the fact that none of these rights can be found in the text of the Constitution. In fact, the Court has explicitly rejected the notion that it is confined to "interpretivism." Chief Justice Hughes, writing for the Court in *Home Building and Loan v. Blaisdell*,[174] stated:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day,

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164. For an excellent discussion of the Court's consistent refusal to take an interpretivist approach to constitutional questions, *see* Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257 (1982).

165. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958).

166. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

167. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 555 (1964); Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1886).

168. The list could go on and on of non-textual rights protected by the Court. *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 70-79 (1980); Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703, 716-17 (1975).

169. For a comprehensive review of the constitutional protection of family autonomy, *see* Burt, *The Constitution and the Family*, 1979 SUP. CT. REV. 329; *Developments in the Law — The Constitution and the Family*, 83 HARV. L. REV. 1156 (1980).

170. Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating a Wisconsin law that interfered with the "right to marry").

171. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating on substantive due process grounds a zoning ordinance that defined "family" so narrowly as to prevent a grandmother from living with her two grandsons who were first cousins rather than brothers).

172. Skinner v. Oklahoma, 316 U.S. 535 (1942) (declaring unconstitutional an Oklahoma statute providing for the sterilization of persons convicted of two or more "felonies involving moral turpitude"). The right to reproduce was held to be "one of the basic civil rights of man." *Id.* at 541.

173. Parham v. J.R., 442 U.S. 584 (1979) (the right of parents to institutionalize their children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the right of parents to control the upbringing of their children includes the right to send their children to private and parochial schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a Nebraska law which prohibited the teaching of foreign languages to elementary school students).

174. 290 U.S. 398 (1934).

> it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — "We must never forget that it is a *Constitution* we are expounding."[175]

Simply put, rhetorically the Court could not leave the abortion issue to the political process on the grounds that the Constitution is silent on the subject. Such an approach would be inconsistent with the language and effect of countless other decisions declaring rights to be fundamental despite the absence of textual language or framers' intent justifying such protection.

Furthermore, even if the Court wanted to depart from precedents and hold that it should be guided by interpretivism, rhetorically interpretivism is difficult to defend. John Hart Ely, himself a critic of *Roe v. Wade*,[176] has argued that interpretivism is an alluring impossibility.[177] Ely's argument against interpretivism is a familiar one.[178] He contends that the model is doomed to failure because in most important areas the Constitution is intentionally vague.[179] Phrases such as "equal protection" and "due process" are indeterminate and were "purposely left to gather meaning from experience."[180] Nor can the "framers' " intent provide much guidance to the Court in interpreting the Constitution, as it was their intent that the Constitution be defined, and redefined, in the light of experiences and exigencies of succeeding generations."[181] In addition, it is difficult to justify relying on the framers' intentions, even if they could be identified. A "nation wholly different from that existing in 1787, facing problems obviously not within the contemplation of the founding fathers, can scarcely be governed — except in broadest generality, by the concepts of yesteryear."[182] It would therefore be difficult, if not impossible, to justify the Court's deci-

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175. *Id.* at 442-43 (emphasis in original).

176. Ely, *supra* note 17.

177. J. ELY, *supra* note 7, at 1-41; Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978).

178. *See, e.g.*, Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Miller & Howell, *supra* note 135.

179. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting); A. BICKEL, *supra* note 48, at 103-10; J. ELY, *supra* note 7, at 11-41.

180. R. MCCLOSKEY, THE AMERICAN SUPREME COURT 15 (1960).

181. J. ELY, *supra* note 7, at 17.

182. Miller & Howell, *supra* note 135, at 683.

sion that the abortion issue should be left to the legislative process because it is a non-textual right.[183]

The other possible basis for judicial deference to the political process would be for the Court to conclude that while it may protect fundamental rights not enumerated in the Constitution, abortion is not such a right.[184] The Court would need to hold that a woman does not have a fundamental interest in deciding whether to carry a fetus in her body. This conclusion however, would be hard to justify in light of other recent Supreme Court decisions. For example, in *Eisenstadt v. Baird*,[185] the Supreme Court declared: "if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[186] This language, handed down just a year before the decision in *Roe v. Wade*, would make it rhetorically difficult for the Court to hold that the right to decide whether to bear a fetus is not fundamental.[187] Furthermore, since the right of access to contraceptives[188] has been deemed a fundamental right, could the Court possibly justify holding that the right to an abortion is not "fundamental?"

The third approach, that restrictive abortion laws deny equal protection to poor women, is the clearest example of an alternative that was not rhetorically possible. If the Court had followed this approach it would have concluded that because rich women were able to get safe abortions, while poor women could not, laws forbidding abortion denied equal protection.[189] As noted above, such a conclusion is inconsistent with recent Supreme Court cases explicitly holding that poverty is not a suspect classification.[190] That is, a denial of equal protection could not be proven simply because

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183. It should be noted that this is the most frequent criticism of Roe v. Wade: that the Court should not have protected a right to abortion because the Constitution is silent on the matter. *See, e.g.*, Ely, *supra* note 17, at 943.

184. *See, e.g.*, Epstein, *supra* note 8, at 180.

185. 405 U.S. 438 (1972).

186. *Id.* at 453.

187. There is speculation that Justice Brennan in writing for the majority in *Eisenstadt* used this language precisely to limit, or at least guide, the Court in deciding the abortion issue. *See* B. WOODWARD & S. ARMSTRONG, *supra* note 15, at 175-76.

188. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

189. *See supra* text accompanying notes 59-72.

190. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

the effect of the law was to disadvantage poor people.[191] Moreover, even if the Court had found that state statutes banning abortion violated the equal protection clause, the Court would then have had to justify concluding that the state did not have a compelling interest in protecting fetal life.

It is, of course, never possible to know why the Court decides as it does. The purpose of the above analysis is not to suggest a definitive explanation for why these alternatives were rejected. Rather, the point simply is that alternatives which were possible in theory could not have been justified rhetorically as principled, not arbitrary, and consistent with precedents.

C. *The Rhetoric of Roe v. Wade*

The Court's choice of approach in *Roe v. Wade* is understandable because it avoids many of the rhetorical problems inherent in the other alternatives. First, the Court was able to articulate a legal principle to justify its decision: that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictives upon state action, . . . or . . . in the Ninth Amendment's reservation of rights to the people is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[192] The right to privacy had already been found to be fundamental under the Constitution.[193] Thus the Court only needed to explain why a woman's choice of whether to have an abortion fits within her constitutionally protected right to privacy. The burden of an unwanted pregnancy is so great that the Court had little difficulty in demonstrating that the right to privacy includes the right to decide whether or not to have an abortion.[194] Justice Blackmun observed:

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191. Furthermore, in subsequent cases the Court has held that a discriminatory effect of a law is not sufficient to prove a violation of equal protection. *See* Mobile v. Bolden, 446 U.S. 55 (1980); Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976). Thus, under current standards, to demonstrate that restrictive abortion laws violate equal protection it would be necessary to prove that they were motivated by a discriminatory purpose. There is, however, no indication that abortion was banned to discriminate against poor women.

192. Roe v. Wade, 410 U.S. at 153-54.

193. *See, e.g.* Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Katz v. United States, 389 U.S. 347, 350 (1967); Griswold v. Connecticut, 351 U.S. 479 (1965).

194. *See* L. TRIBE, *supra* note 14, at 924; Regan, *supra* note 69, at 23.

> The detriment that the state would impose upon the pregnant woman by denying her this choice is altogether apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm might be imminent. Mental and physical health may be taxed by child care.[195]

If the right to privacy means anything, it surely includes the privilege of deciding whether one's body will be used to bring another life into the world.[196]

Second, the Court could avoid the appearance of making an arbitrary choice as to when life begins. In fact, the Court contended that its approach entirely avoided resolving the question of when life begins.[197] The Court concluded that "[W]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[198] Rhetorically, this is a far easier conclusion to justify than would be any attempt to identify a point when life begins.

Finally, the Court's approach in *Roe v. Wade* could be presented as consistent with precedent. Most obviously, it follows directly from the Court's declaration in *Eisenstadt* that the Constitution protects the "decision whether to bear or beget a child."[199] Less obviously, the Court's decision was consistent with traditional tort and criminal law principles which do not recognize the fetus as a person. The Court noted its consistency with these legal doctrines: "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."[200]

While the Court's approach is easier to justify than most of the alternatives, it has two major rhetorical problems. First, even if a woman has a right to privacy, why does this right outweigh a state's interest in protecting what it regards as human life? The

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195. Roe v. Wade, 410 U.S. at 153.
196. *See* L. TRIBE, *supra* note 14, at 923.
197. Roe v. Wade, 410 U.S. at 159.
198. *Id.*
199. Eisenstadt v. Baird, 405 U.S. at 453.
200. Roe v. Wade, 410 U.S. at 161.

conclusion that the right to privacy includes the right to terminate a pregnancy does not mean that the state does not have a compelling interest in protecting the life of the fetus.[201] The Court to complete its analysis had to justify why the woman's privacy interest deserved constitutional priority over the fetus' right to life. The Court needed to articulate some principle to indicate that it made other than an arbitrary choice to favor women over fetuses. However, "nothing in the Supreme Court's opinion provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability, particularly when a legislative majority chose to regard the fetus as a human being from the moment of conception."[202] Thus, one of the most frequent criticisms of *Roe v. Wade* is precisely this failure to justify rhetorically why the state did not have a compelling interest in protecting fetal life.[203]

Second, the Court failed to adequately justify why the right to abortion varied depending on the trimester of pregnancy. The Court held that during the first trimester of pregnancy the abortion decision must be left entirely to the woman and her physician.[204] During the second trimester the "State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."[205] And the state may even prohibit abortion after the fetus reaches viability, during the third trimester.[206] But what principle justifies the Court drawing the distinction between the second and third trimesters? Is not the choice of viability as the time after which abortion is prohibited just as arbitrary as banning abortion after conception? The Court has frequently been criticized for failing to articulate any principle justifying why it drew lines the way

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201. L. TRIBE, *supra* note 14, at 927.

202. *Id.*

203. *See, e.g.*, A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 53 (1976) ("[T]he opinion fails to even consider what I would suppose to be the most compelling interest of the State in prohibiting abortion: the interest in maintaining that respect for the paramount sanctity of human life which has always been at the centre of western civilization . . . .").

204. Roe v. Wade, 410 U.S. at 164.

205. *Id.* The Court determined that during the second trimester, the State's compelling interest in the health of the mother justified interference in the abortion *procedure*. Prior to the end of the first trimester, however, abortion mortality rates are as low or lower as those for normal childbirth. *Id.* at 149.

206. *Id.* at 164-65.

that it did.[207] Rhetorically, the Court's decision lacks legitimacy because it seems to be an arbitrary, unjustified set of choices.

Thus, the key question to be asked about *Roe v. Wade* is not whether the Court should have defined life as beginning at conception or left the matter for the legislature. The inquiry must be whether there was another, rhetorically more acceptable alternative that the Court should have chosen.

III. Abortion as a Private Moral Judgment: Repackaging Roe v. Wade

Rhetorically, the best approach to the abortion issue would have been for the Court to declare that the decision whether to have an abortion is a private moral judgment which the state may not encourage, discourage, or prohibit. The Court could have held that a woman has the right at any point during her pregnancy to remove the fetus from her body.[208] The state may set standards to insure that the fetus is removed in the manner most likely to guarantee its survival and it may require all steps necessary to keep the fetus alive once removed.[209] But whether the fetus will or will not survive removal is irrelevant to the legal status of a woman's right to terminate her pregnancy.[210] A state cannot constitutionally make the moral judgment for a woman as to whether abortion is right or wrong. This approach overcomes the problems of *Roe v. Wade*, and while it is not without flaws, it could be defended as principled, non-arbitrary, and consistent with precedents.

First, the Court could articulate a legal principle to support its decision: it is the right of a person to decide what happens in and to his or her body.[211] The state cannot compel a person to use her body to keep another person alive. A corollary of this principle is that it is a private moral judgment for each person to make as to whether and how her body will be used to sustain another life,

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207. Epstein, *supra* note 8, at 182.

208. *See* Thomson, *supra* note 155, at 22.

209. For a summary of the legal status of laws requiring steps to protect the potential life of an aborted fetus, *see*, C.D. Wardle, The Abortion-Privacy Doctrine: A Compendium and Critique of Federal Court Abortion Cases 181-96 (1980).

210. This "principle would permit her to remove the fetus, without damaging it, assuming that were possible, even if it were known that the fetus would die because no other carrier could be found." Regan, *supra* note 69, at 9.

211. Thomson, *supra* note 155, at 6.

which obviously decides the abortion question. The state cannot constitutionally compel a woman to use her body as an incubator.[212] In light of the burden imposed on a woman by forcing her to continue a pregnancy against her will,[213] the Court could hold that it is entirely for each woman to decide whether or not to have an abortion.

Second, such a principle avoids arbitrary line-drawing by the Court. There is no need to decide whether or not the fetus is a person or at what point life begins.[214] Even if the fetus is regarded as a human life, the state constitutionally may not compel a woman to give up her body for nine months to sustain that life. Just as parents can choose to give their children up for adoption, so may a woman at any point during her pregnancy remove the fetus from her body.[215] The state, however, as indicated earlier, may set standards to best insure the fetus' chance of survival outside the womb and may take any steps it chooses to sustain the infant once separated.[216]

Furthermore, under this approach there is no need for an arbitrary balancing of the woman's rights versus those of the fetus.[217] The fetus may have a right to life, but not a right to be kept in a woman's body against her will.[218] It is not a matter of arbitrarily favoring women as a group over fetuses. Rather, there is a principle of body control which can be rhetorically justified under the Constitution, and this principle makes abortion a private moral choice.

In fact, given the total lack of consensus as to when life begins,

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212. Some have suggested that abortion laws do not compel a woman to be an incubator because they did not compel a woman to become pregnant to begin with. *See* Warren, *On the Moral and Legal Status of Abortion*, in TODAY'S MORAL PROBS. 125 (R. Wasserstrom ed. 1979). It is impossible, however, to regard pregnancy as an entirely voluntary condition. Entirely apart from involuntary pregnancies due to rape, even "[i]f contraceptive methods of very high effectiveness, say 98%, were used carefully and consistently, there would be hundreds of thousands of pregnancies caused by contraceptive failure." Regan, *supra* note 69, at 28. As such, it is inaccurate and unjust to women to regard pregnancy as a purely voluntary condition. *Id.* at 66.

213. Many commentators have concluded that the burden of pregnancy is so great that "women should have complete control over pregnancy." Liu, *supra* note 61, at 147.

214. Regan, *supra* note 69, at 74.

215. Thomson, *supra* note 155, at 22.

216. *See, e.g.*, MINN. STAT. §§ 145, 412 subd. 3(3) (1974).

217. Epstein, *supra* note 8, at 182-83.

218. Warren, *supra* note 212, at 135.

it is only appropriate to leave the question entirely up to each woman.[219] Individuals and religious groups have sharply divergent and irreconcilable views on the morality of abortion.[220] While everyone can agree that an individual capable of surviving outside the uterus should be protected, consensus will never be reached as to the legitimacy of protecting a fetus by compelling continuation of a pregnancy.[221] The fact of disagreement is in itself relevant to the Court in justifying its opinion.[222] The Court simply could recognize that given the tremendous disagreement on the matter, it should be left to each woman to decide for herself whether abortion is right or wrong. The Court could find that abortion is not a proper subject for a public moral judgment expressed in the criminal law.[223] Professor Robert Bennett explains the distinction between criminal abortion statutes and other laws:

> First, criminal statutes often reflect values that are held with near unanimity in the society. Even most 'murderers' likely do not think that they are being treated unfairly if they are severely punished for their crimes. In contrast, doctors and women and others involved in abortions usually feel little culpability, because the society is sharply divided about whether substantial culpability attends an abortion. Second, outside the abortion context criminal statutes seldom burden innocent individuals, except perhaps incidentally . . . . Under criminal abortion statutes like that in Texas, however, the greatest burden fell upon women desiring abortions, whose own conduct in obtaining abortions was apparently not defined as criminal. . . . Third, and perhaps most importantly, even relatively unpopular criminal laws usually impose little in the way of burdens on those capable of obedience.[224]

Thus, the Court could rationally distinguish laws prohibiting abortion from other criminal statutes expressing a public moral judgment and hold that abortion is a matter of private, not public, morals.

Finally, such an approach to the abortion issue would be consistent with precedents. The Court would be following the holding of *Eisenstadt*: that it is a fundamental right to decide whether to

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219. Knowton, *Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 430 (1968). *See also* Blake, *supra* note 71, at 73.

220. *See generally* F. JAFFE, B. LINDHEIM & P. LEE, ABORTION POLITICS: PRIVATE MORALITY AND PUBLIC POLICY (1981).

221. D. CALLAHAN, *supra* note 20, at 493-94.

222. Knowton, *supra* note 219, at 430.

223. *Id.* at 429 ("purely moral solutions should not be enforced by criminal sanction unless there is widespread agreement on the solution").

224. Bennett, *supra* note 153, at 1007.

"bear or beget a child."[225] In fact, the Court's clear articulation of a person's right to make decisions concerning her body would help to clarify the meaning of the constitutional right to privacy.[226] Moreover, this approach would be consistent with traditional tort and criminal law principles. It "is a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or need of assistance: . . . our law does not require people to be Good Samaritans."[227] Just as the law does not require individuals to donate body organs to save other people's lives, so should the state not require a woman to donate her body, against her will, to house a fetus.[228]

The result would be the same as that of *Roe v. Wade*: state laws banning abortion would be overturned. In fact, it is even possible to read *Roe v. Wade* as endorsing the thesis of this approach. Professor Tribe observed: "*Roe v. Wade* represents less a decision in favor of abortion than a decision in favor of leaving the matter, however it might come out in particular cases, to women rather than legislative majorities."[229] What is different about this approach is its rhetoric. It avoids drawing arbitrary lines, such as the point of viability, after which abortions are not allowed. Furthermore, it overcomes the need to balance interests that can never be logically balanced. Rhetorically, it is the most defensible approach to an irresolvable problem. But most importantly, the advantage of viewing abortion as a private moral judgment is that it provides guidance for resolution of other questions in the abortion controversy.

IV. THE CONTROVERSY CONTINUES: TOWARDS PRINCIPLED RESOLUTION OF ABORTION ISSUES

Roe v. Wade did not by any measure end the legal debate over abortion issues. There has been at least one major abortion case before the Supreme Court in almost every term since 1973.[230] Re-

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225. Eisenstadt v. Baird, 405 U.S. at 453.

226. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 214, 216 (1980).

227. Regan, *supra* note 69, at 3.

228. *See* R. NOZICK, ANARCHY, STATE, AND UTOPIA 206-07 (1974).

229. L. TRIBE, *supra* note 14, at 933.

230. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398 (1981); Harris v. McRae, 448 U.S. 297

garding abortion as a private moral judgment would provide a principled way of dealing with other aspects of the abortion controversy. For example, consider three major abortion issues left unresolved by *Roe v. Wade*: is refusal to publicly fund abortions for indigent women unconstitutional; may Congress enact a law pursuant to section 5 of the 14th Amendment defining the fetus as a person; and may states impose requirements for "informed" consent or mandatory waiting periods? Each of these difficult questions could be more easily resolved if the Court were to regard the question of whether to have an abortion as entirely a matter for each woman to decide.

A. *The Abortion Funding Controversy*

1. *The abortion funding cases.* The question of whether legislatures can deny public funding of abortions has produced the greatest amount of litigation of all the abortion issues.[231] Since 1973, local, state and federal governments have enacted restrictions on the use of government funds to pay for abortions.[232] The Supreme Court considered the constitutional validity of these spending limits in two sets of cases decided in 1977 and 1980.

In 1977, in three cases handed down on the same day, *Beal v. Doe*, [233] *Maher v. Roe*,[234] and *Poelker v. Doe*,[235] the Supreme Court sustained restrictions on public subsidies of abortions. In *Beal v.*

(1980); Bellotti v. Baird, 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

231. C.D. WARDLE, *supra* note 209, at 214.

232. *See, e.g.*, Department of Labor and Health, Education and Welfare Appropriations Act of 1978, Pub. L. No. 95-480, §210, 92 Stat. 1586 (1978). Additionally, over 40 states enacted substantial abortion funding restrictions. C.D. WARDLE, *supra* note 209, at 215 n.285. The lower federal courts reviewing these restrictions consistently held that the denial of public funds for abortions was unconstitutional. *See, e.g.*, Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975); Doe v. Roe, 499 F.2d 1112 (10th Cir. 1974); Klein v. Nassau County Medical Center, 409 F. Supp. 731 (E.D.N.Y. 1976); Doe v. Westby, 383 F. Supp. 1143 (W.D.S.D. 1974); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. (E.D. Pa. 1975). Likewise, the lower federal court required public hospitals to pay for abortions. *See, e.g.*, Doe v. Mundy, 514 F.2d 1179 (7th Cir. 1975); Doe v. Hale Hosp., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); Nyberg v. City of Virginia, 495 F.2d 1342 (5th Cir.), *appeal dismissed*, 419 U.S. 891 (1974).

233. 432 U.S. 438 (1977).

234. 432 U.S. 464 (1977).

235. 432 U.S. 519 (1977).

Doe the Court held that Title XIX of the Social Security Act does not require Pennsylvania to fund non-therapeutic abortions as a condition of participating in the Medicaid program established by that Act.[236] Justice Powell, writing for the majority, concluded that the Federal Medicaid law "confers broad discretion on the States to adopt standards for determining the extent of medical assistance requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act."[237] Pennsylvania's refusal to fund non-therapeutic abortions was permissible because "it is hardly inconsistent with the objectives of the Act for a State to refuse to fund unnecessary — though perhaps desirable — medical services."[238] *Beal* focused primarily on the statutory question of whether failure to fund Medicaid abortions was a violation of the Social Security Act.

In *Maher v. Roe*, the Court held that Connecticut's refusal to publicly subsidize non-therapeutic abortions, while paying expenses incidental to childbirth, did not violate the Equal Protection Clause.[239] The Court reaffirmed the earlier holdings in *San Antonio School District v. Rodriguez*[240] and *Dandridge v. Williams*,[241] that financial need alone does not identify a basis for strict scrutiny under equal protection analysis.[242] The Court concluded that the "Connecticut regulation does not impinge upon the fundamental right [of privacy] recognized in *Roe*" that protects a woman from interference with her freedom to decide whether or not to terminate her pregnancy.[243]

Finally, in *Poelker v. Doe* the Court, in a per curiam opinion, held that the city of St. Louis did not violate the Constitution by providing publicly financed hospital services for childbirth but not for non-therapeutic abortions. Relying especially on the reasoning in *Maher*, the Court held that public hospitals are not obligated to provide abortions, even if they supply childbirth services.[244]

All three of these 1977 cases dealt with state and local refusals

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236. Beal v. Doe, 432 U.S. at 443-47.
237. *Id.* at 444.
238. *Id.* at 444-45.
239. *Id.* at 469-80.
240. 411 U.S. 1, 19 (1973).
241. 397 U.S. 471 (1970).
242. 432 U.S. at 471. *See supra* text accompanying notes 78-80.
243. *Id.* at 474.
244. Poelker v. Doe, 432 U.S. at 521.

to fund non-therapeutic abortions. In two 1980 decisions, the Court sustained federal and state denials of funding for even medically necessary abortions. In *Harris v. McRae*[245] the Court rejected a variety of constitutional challenges to the Hyde Amendment which drastically limited public funding for abortions. Since 1976, Congress has prohibited through the Hyde Amendment to the appropriations for the Department of Health and Human Services, the use of federal funds to reimburse the costs of abortions.[246] In *Harris* the Court, relying on the earlier decision in *Maher*, sustained congressional authority to deny funding of even medically necessary abortions.[247] Likewise, in a companion case, *Williams v. Zbaraz*,[248] the Court, in a 5-4 decision, upheld an Illinois law barring public funding for abortions except those "necessary for the preservation of the life of the woman seeking such treatment."[249] The Court held that the state had neither a constitutional nor a statutory duty to subsidize abortions.

The Court based its decisions in all five of these cases on identical arguments. First, the Court repeatedly stated that the Constitution "imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents."[250] That is, the fact that there is a right to abortions does not obligate the state to pay for them. Although the Constitution prevents the state from interfering with a woman's choice concerning abortion, "it does not confer an entitlement to such funds as may be necessary to realize all of the advantages of that freedom."[251] The Court analogized the right to abortion to other constitutional safeguards, such as the right to

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245. 448 U.S. 297 (1980).

246. *See, e.g.*, Department of Labor and Health, Education, and Welfare Appropriations Act of 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978):

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

247. Harris v. McRae, 448 U.S. 297, 300-27 (1980).

248. 448 U.S. 358 (1980).

249. *Id.* at 360-61.

250. Poelker v. Doe, 432 U.S. at 469.

251. Harris v. McRae, 448 U.S. 297 (1980).

use contraceptives and the rights of parents to send their children to parochial schools.[252] The fact that these rights are protected from government interference does not mean that the "government . . . has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools."[253] The Court concluded:

> To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter for constitutional entitlement.[254]

Second, in all of the cases the Court held that the legislature could choose to encourage childbirth by paying for it, while refusing to subsidize abortions. In *Beal* the Court noted that it was not "unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth" by paying for childbirth and excluding abortions.[255] Similarly, in *Maher* the Court held that a state may "make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds."[256] Most recently, in *Harris v. McRae*[257] the Court ruled:

> [The] Hyde amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life. . . . Nor is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but

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252. *Id.*; 432 U.S. at 477. In *Maher*, the Court emphasized the analogy to parochial schools: that while parents have a constitutional right to send their children to parochial school that does not create an affirmative obligation for the government to subsidize parochial schools. The Court observed that finding a public obligation to pay for abortions would by analogy require government subsidies of parochial education. ("Yet, were we to accept appellees' argument, an indigent parent could challenge the state policy of favoring public rather than private schools, or of preferring instruction in English rather than German, on grounds identical in principle to those advanced here.") 432 U.S. at 477.

253. Harris v. McRae, 448 U.S. at 318.

254. *Id.*

255. 432 U.S. at 446.

256. 432 U.S. at 474. *See also* Poelker v. Doe, 432 U.S. at 521 ("the Constitution does not forbid a state or city, pursuant to democratic processes, from expressing a preference for normal childbirth as St. Louis has done").

257. 448 U.S. 297 (1980).

> not for certain medically necessary abortions. Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.[258]

Thus, in all of the abortion funding cases the Court held that legislatures may use public funds to create an incentive in favor of childbirth and a disincentive to have an abortion.

Finally, in all of these decisions the Court held that there is a difference between prohibiting abortions and merely discouraging them by refusing to appropriate funds to pay for them. The Court ruled that the government's refusal to subsidize abortions "leaves an indigent woman with at least the same range of choice in deciding whether to have a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all."[259] While the government may not impose barriers preventing women from obtaining abortions, there is no obligation that the government alleviate those obstacles to obtaining abortions caused by indigency.[260] Even if the effect of not funding abortions is to limit their accessibility for poor women, refusal to subsidize abortions is not an unconstitutional interference with a protected right.

Ultimately, the Court decided that the question of whether or not the government should subsidize abortions is a matter for the legislature to decide:

> The decision whether to expend state funds for non-therapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided . . . . Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature.[261]

2. *Abortion as a private moral judgment and the abortion funding issue.* As the above discussion indicates, the Supreme Court's decisions in the abortion funding cases were premised on the assumptions that the government has a valid interest in discouraging abortion and that there is a difference between prohibiting abortion and creating an incentive in favor of childbirth. Neither of these assumptions would be consistent with the view that abortion is a private moral judgment. That is, had the Court held that the question of whether to have an abortion is entirely

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258. *Id.* at 325.
259. *Id.* at 316.
260. *Id.*
261. Maher v. Roe, 432 U.S. at 479; Harris v. McRae, 448 U.S. at 336.

for each woman to decide, then in order to be rhetorically consistent the Court would have had to decide the abortion funding cases differently.

Initially, it must be recognized that the distinction between discouraging abortions and prohibiting them is meaningless for many indigent women. The effect of the refusal to pay for abortion is to compel many women to bear and have children.[262] Even the Court recognized that failure to fund abortions under Medicaid programs meant that some women would be forced to forego abortions.[263] In fact, the undeniable purpose of the funding restrictions was to accomplish precisely such a decrease in abortions.[264] The government did not refuse to subsidize abortions as a way to save money: childbirth is much more expensive than abortion. Justice Stevens observed in his dissent in *Harris*, that one lower court found that while publicly funded abortions cost an average of less than $150, the average cost to the state of childbirth exceeded $1350.[265] Clearly then, "[a]bortion funding restrictions are not enacted for the sake of frugality or to encourage the welfare client to practice contraception or sexual self-restraint."[266] The sole purpose

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262. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1244 (1978) (the decisions "mean that some indigent women, perhaps many, will be unable to have abortions. These are the very same women *most* likely to have unwanted pregnancies and *least* able to accomodate additional children."). Empirically, studies have shown a decrease in abortions as a result of funding cutbacks. One study of the impact of the Hyde Amendment in Ohio and Georgia indicates that over twenty percent of the women Medicaid recipients who desired an abortion could not get one because of the absence of funds. Trussell, Menken, Lindheim & Vaughn, *The Impact of Restriction of Medicard Funds for Abortion*, 12 FAM. PLAN. PERSP. 120 (1980).

263. Maher v. Roe, 432 U.S. 464, 474 (1980).

264. Perry, *Why the Supreme Court was Plainly Wrong in the Hyde Amendment Cases: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113, 1125-26 (1980). It is possible to hypothesize other motives for the funding restrictions other than an attempt to decrease abortions. For example, one possible purpose of prohibiting government funds from being used for abortions would be to protect taxpayers from having their dollars spent for something they abhor. *See* Hardy, *Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams*, 18 ARIZ. L. REV. 903, 937-38 (1976). Such a purpose, however, was at best secondary in the minds of legislators whose primary objective was to decrease abortions. *See generally* Note, *The Effect of Recent Medicaid Decisions on a Constitutional Right: Abortions Only for the Rich*, 6 FORDHAM URB. L.J. 687 (1978). Furthermore, taxpayers are not protected from subsidizing other programs they disagree with, even if they believe their dollars are being used for murder (*e.g.*, expenditures for the Vietnam War or foreign aid to totalitarian governments).

265. 448 U.S. 297, 355 n. 9 (Stevens, J., dissenting) (referring to Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979), *vacated and remanded*, 448 U.S. 358 (1980)).

266. Horan & Marzan, *The Moral Interest of the State in Abortion Funding: A Com-*

of the funding restrictions was to decrease the number of abortions.[267]

The question, therefore, is whether the government may enact laws which have the purpose and effect of preventing abortions. If abortion is viewed as a private moral judgment, then the decision whether to bear or abort the fetus is to be left entirely to each pregnant woman. The state must adopt a position of neutrality.[268] The government may not take actions which have the purpose and effect of preventing abortions since those policies by definition deny a woman the right to make an autonomous decision.[269] The whole point of the fifth approach, regarding abortion as a matter of private and not public morals, is that the state may not involve itself in the choice of whether or not to have an abortion. The laws restricting use of government funds for abortion were intended to do exactly what should not be allowed: publicly interfere with a private decision. If the Court were to treat abortion as a purely private decision, then it could not consistently hold that the state has a legitimate interest in protecting "potential life."[270]

The point is not that the government has an affirmative duty to subsidize abortions, or any other medical procedure.[271] Rather, the point is that the government may not use its resources and power to prevent abortions.[272] The government is under no obligation to subsidize childbirth expenses. But if it chooses to do so, since childbirth and abortion are the *only* possible outcomes of pregnancy, it must also subsidize abortions. The state may not make the moral judgment about whether the fetus should be aborted, and it may not attempt to coerce decisions through its power of the purse.

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ment on Beal, Maher and Poelker, 22 ST. LOUIS U.L.J. 566, 573 (1978).

267. *Id.* at 573.

268. *See* Perry, *supra* note 264, at 1115-16, 1122 (the government may not enact policies based on the belief that abortion is morally objectionable).

269. Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 HASTINGS CONST. L. Q. 313, 340-42 (1981).

270. *See* Harris v. McRae, 448 U.S. 297, 325 (1980) (abortion unique because it involves "potential" life).

271. *Cf.* Kurland, *The Privileges or Immunities Clause: Its Hour Come Round at Last?*, 1972 WASH. U.L.Q 405; Michelman, *supra* note 38; Tribe, *Unravelling Nat'l League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) (argument for a constitutional right to government services based on equal protection, privileges or immunities, and federalism).

272. Perry, *supra* note 264, at 1125-26.

This is hardly a novel conclusion. The Court repeatedly has held that "states burden fundamental interests involving freedom of choice when they threaten to withhold or withdraw such discretionary benefits unless a person exercises his or her constitutionally protected option in a particular way."[273] For example, in the area of free exercise of religion, the Court has rejected any distinction between prohibiting and discouraging religious conduct. In cases such as *Sherbert v. Verner*[274] and *Thomas v. Review Board of Indiana*,[275] the Court has rejected as unconstitutional state funding schemes that have the effect of discouraging individuals from following their religious beliefs.[276] Just as religion is a matter of individual conscience which the state may not try to influence, so must the abortion decision be left to each woman, uninfluenced by the state.[277] In fact, if the Court were to take the approach to the abortion issue suggested above, it would be declaring a right to "free exercise" in making abortion decisions. Government discouragement is *per se* inconsistent with individual free exercise.

This concept of "free exercise" in the area of abortion decisions shows the fallacy of the Court's analogy between the government's refusal to fund abortions and its failure to subsidize parochial schools. The Court rightly noted that while the state could not prevent children from attending private schools, that did not mean that the state has an obligation to pay for parochial education.[278] The Court drew the analogy to abortions, concluding that

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273. Simson, *Abortion, Poverty, and the Equal Protection of the Laws*, 13 GA. L. REV. 505, 509 (1979).

274. 374 U.S. 398 (1963) (worker who quit a job rather than work in contradiction to her religious belief requiring observance of Sabbath was entitled to unemployment compensation).

275. 450 U.S. 707 (1981) (worker who quit his job rather than work in a job requiring production of armaments was entitled to unemployment compensation).

276. *See* Wilcox, *Invasions of the First Amendment through Conditioned Public Spending*, 41 CORNELL L. Q. 12 (1955).

277. Justice Powell, writing for the majority, attempted to distinquish failure to fund abortions from refusing to pay unemployment compensation to workers who quit their jobs for religious reasons. Maher v. Roe, 432 U.S. at 478. Powell argued that *Sherbert* is not analogous because it involved withholding of benefits from persons who were otherwise entitled to the benefits on the ground that those persons exercised a fundamental right. 432 U.S. at 474-75 n.8. But this argument begs the key question: by funding childbirth and not abortion is not the state penalizing women who choose to exercise their fundamental right to have an abortion? *See also* Goldstein, *supra* note 269, at 327-34.

278. Harris v. McRae, 448 U.S. 297, 318; Maher v. Roe, 432 U.S. at 477, citing Norwood v. Harrison, 413 U.S. 455, 462 (1973).

while the state may not prohibit abortions, it has no obligation to subsidize them. Though this analogy seems plausible at first, it does not withstand critical analysis. First, private and public education are functionally the same. If a student cannot afford private education, the student still receives an education. By contrast, if a pregnant woman cannot afford an abortion, she has a baby. Abortion and childbirth obviously are not alike. The state's choice to fund public and not parochial schools has an effect different in kind from its choice to fund childbirth and not abortions.

Second, the purpose of the government's failure to fund parochial schools is different from its motive for not paying for abortions. At the very least, the state's failure to subsidize private schools is a simple resource allocation decision.[279] The state is not hostile to parochial education, but instead, chooses to put its scarce resources in a single school system.[280] The state's motive for funding only public education is not to prevent students from attending parochial schools. By denying funds for abortions, however, the government's purpose is to prevent, in the only way available to the state, abortions.[281] It is not a matter of resource allocation because the government is willing to pay for the more expensive medical procedures attendant to childbirth.[282] Especially in the last decade, the Court has made clear that the purpose of a law is relevant in deciding its constitutionality.[283] The purpose of denying funds for abortion while providing funds for childbirth is impermissible: interference with the "free exercise" of indigent women's decision-making authority.

Finally, the Court's analogy to funding of parochial schools is specious because the government could not constitutionally subsidize parochial education even if it wanted to do so. Government funding of parochial schools would violate the Establishment

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279. *See* L. TRIBE, *supra* note 14.

280. *Cf.* Jefferson v. Hackney, 406 U.S. 535 (1972) (state discretion to control resource allocation decisions).

281. F. JAFFEE, B. LINDHEIM & P. LEE, *supra* note 220, at 127.

282. One study suggests that if only one-third of the Medicaid women having abortions had to carry their pregnancies to term the increased cost to the government would be over $200 million a year. Lincoln, Daring-Bradley, Lindheim & Cotterill, *The Court, the Congress, and the President's Turning Back the Clock on the Pregnant Poor*, 9 FAM. PLAN. PERSP. 207 (1977).

283. *See* Personnel Administrator v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

Clause of the First Amendment.[284] Therefore, the failure to fund parochial schools is not at all similar to the failure to pay for abortions. In the former the state has no choice since it cannot act, whereas in the latter the state is making an impermissible choice to discourage abortions.

Simply stated, the ambiguous rhetoric of *Roe v. Wade* made it possible for the Court in the abortion funding cases to sustain bans of public subsidies while at the same time appearing to be consistent with *Roe v. Wade*. If, however, the Court took the position that abortion is a private moral judgment, it would be impossible to sustain statutes whose purpose was to prevent abortions. Again, it is clear that rhetoric does shape results and the best rhetoric for the abortion question would be to regard abortion as a private moral choice.

B. *Abortion as a Private Moral Judgment and the Human Life Bill*

While the abortion funding questions already have been decided by the Court, there looms in the future an even more troubling issue: can Congress by statute ban all abortions? The vehicle for accomplishing such a prohibition would be the so-called Human Life Bill.[285] Section five of the Fourteenth Amendment provides that "Congress shall have the power to enforce by appropriate legislation, the provisions of this article."[286] The Human Life Bill proposes that, pursuant to this authority, Congress define the fetus as a person from the time of conception.[287] As such, fetuses would be entitled to due process and equal protection of the laws from the moment of fertilization. The proposed bill provides:

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284. *See, e.g.*, Committee for Pub. Educ. v. Regan, 446 U.S. 646 (1980); Levitt v. Comm. for Public Educ., 413 U.S. 472 (1973); Lemon v. Kurlzman, 403 U.S. 602 (1971).

285. 127 CONG. REC. 9, S287-94 (daily ed. Jan. 19, 1981).

286. U.S. CONST. amend. XIV, § 5.

287. 127 CONG. REC. 9, S287-94 (daily ed. Jan. 19, 1981). Additionally, section two of the Act would prevent federal courts from issuing an injunction or declaratory judgment invalidating any state law protecting fetuses or restricting abortions. The constitutionality of such a limit on federal court jurisdiction is beyond the scope of this Article. *See generally* Eisenburg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975).

> The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception. The Congress further finds that the 14th Amendment to the Constitution was intended to protect all human beings. Upon the basis of these findings . . . the Congress hereby declares that for the purpose of enforcing the obligation of the states under the 14th Amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception . . . ; and for this purpose 'person' shall include all human life defined herein.[288]

Historically, congressional authority under section 5 of the Fourteenth Amendment was limited to legislation invalidating state laws deemed to violate section one of the Fourteenth Amendment or to provide remedies for state infringement of section one.[289] However, in *Katzenbach v. Morgan*,[290] the Supreme Court upheld broad congressional authority to expand the protections of the post Civil War amendments. *Katzenbach* involved a challenge to a federal statute which had the effect of overturning a Supreme Court decision. Previously, in *Lassiter v. Northampton County Board of Elections*,[291] the Court ruled that literacy tests as a voting qualification did not violate the Fourteenth or Fifteenth Amendment. A few years after the *Lassiter* decision, Congress, in the Voting Rights Act of 1965, provided that no person who has successfully completed the sixth grade in an accredited Spanish-language Puerto Rican school may be denied the right to vote because of an inability to read or write English.[292] A group of New York voters brought suit to challenge the congressional invalidation of that state's literacy test. The plaintiffs contended that Congress had no authority to act under the Fourteenth Amendment because the Court had already decided that there was no constitutional violation.

The Supreme Court rejected the plaintiffs' claim and sustained the federal statute. The Court held that Congress could justify striking down the literacy requirement in order to aid the Puerto Rican community to gain sufficient political clout to obtain

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288. S. 158, Ch. 101 § 1, CONG. REC. *supra* note 285, at S287.

289. Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. L. REV. 656 (1977); *see, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883); *Ex Parte* Virginia, 100 U.S. 339 (1879).

290. 384 U.S. 641 (1966).

291. 360 U.S. 45 (1959).

292. 42 U.S.C. § 1973(e)(1)(2) (1976).

non-discriminatory treatment in the provision of public services.[293] Additionally the Court concluded that Congress, on its own, could find that literacy tests violated the Fourteenth and Fifteenth Amendments and ban such tests under the grants of legislative authority contained in the Amendments.[294] This latter holding grants to Congress broad authority to interpret the meaning of the Fourteenth Amendment and to enact legislation to implement those interpretations.[295]

Proponents of the Human Life Bill contend that Congress may use this authority to define the meaning of the term "person" in the Fourteenth Amendment. The argument is that *Roe v. Wade* was premised on the Court's inability to define when human life begins.[296] Congress, therefore, according to the bill's sponsors, can remedy the situation by defining the fetus as a person, guaranteeing it full constitutional rights from the moment of conception.[297] The intended result is a total ban on all abortions.[298]

The Court's rhetoric in *Roe v. Wade* makes the arguments for the Human Life Bill at least plausible. The Court admitted that its decision depended on finding that the fetus was not a person.[299] Furthermore, the Court premised its conclusion on its inability to define when human life begins.[300] Advocates of the Human Life Bill suggest that Congress should step into the picture and use its authority to define life as beginning at conception. The result according to proponents would be that fetuses would be legally entitled to the status of persons and abortions would be banned.[301]

If, however, the Court took the rhetorical approach that abor-

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293. Katzenbach v. Morgan, 384 U.S. at 652-53. *See also* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

294. Katzenbach v. Morgan, 384 U.S. at 653-56. *See also* City of Rome v. United States, 446 U.S. 156 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970).

295. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 73, at 691-92.

296. Galebach, *A Human Life Statute, reprinted in* 127 CONG. REC. S287, S288 (daily ed. Jan. 19, 1981).

297. *Id.*

298. *Id.* at S297.

299. 410 U.S. at 156-57 ("If the suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment").

300. *Id.* at 159.

301. This assumes that "life" and "persons" are synonymous. For a thoughtful refutation of that assumption, *see* Kolb, *The Proposed Human Life Statute: Abortion as Murder,* 67 A.B.A.J. 1123, 1124 (1981).

tion is a private moral judgment, then the Human Life Bill would be clearly unconstitutional.[302] Recall that this approach would have the Court hold that the state may not command one person to use their body to help another.[303] If abortion is a private moral judgment, then women have the right to remove fetuses from their bodies even if the fetus is a person and even if removal will kill that person. Thus, even granting Congress authority under section five of the Fourteenth Amendment to define "person" as including a fetus,[304] the Human Life Bill would still be unconstitutional.

By declaring that bans on abortion are unconstitutional because they infringe on private moral decisions, the Court would make clear that its decision was based on a normative judgment and not on an empirical inability to decide when life begins. This is crucial because the "familiar words of *Marbury v. Madison* that it is the judicial department's province to 'declare the law' mean[s] . . . that Congress cannot alter the normative component of a judicial decision.[305] At most, *Katzenbach v. Morgan*[306] allows Congress to change the 'empirical component' of a Court decision."[307] Thus, Congress would be powerless to overturn the Court's judgment that each woman has the right to control her body, including the right to remove a fetus. The point is not that invalidation of the Human Life Bill is only possible under the approach suggested here.[308] Rather, the argument is that it is clearer and rhetorically

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302. It should be noted that a statute virtually identical to the Human Life Bill was enacted by Rhode Island and declared unconstitutional. Doe v. Israel, 358 F. Supp. 1193 (D.C.R.I.) *aff'd mem.*, 482 F.2d. 1156 (1st Cir. 1973); *cert. denied*, 416 U.S. 993 (1974).

303. See *supra* text accompanying notes 208-13.

304. Strong arguments can be advanced that Congress does not have such authority under section 5. *See, e.g.*, Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 620 (1975):

> If there is a new round of debate in the Court concerning the limit of congressional power under section 5 of the 14th Amendment, it is most likely to arise in the context of a congressional attempt to clip the wings of an unpopular due process or equal protection decision of the Court . . . . Recognizing the functional distinction betweeen judgments drawing lines as to allocation of power within the federal system and those establishing the minimum content of constitutionally protected liberty leaves no room for congressional dilution of the Bill of Rights.

305. Gordon, *supra* note 289, at 631.

306. 384 U.S. 651 (1966).

307. Gordon, *supra* note 89, at 671.

308. It is quite likely that the Court would come to the same result if the Human Life Bill was enacted and challenged. *See* 127 CONG. REC. E2267 (daily ed. May 12, 1981) (reprinted letter from Prof. Henkin to Rep. Don Edwards).

easier to justify why the Human Life Bill is unconstitutional if abortion is viewed as a private moral choice.

C. *State Laws Requiring "Informed Consent" and Mandatory Waiting Periods*

In addition to the issues discussed above, regarding abortion as a private moral judgment would provide guidance for resolution of challenges to a number of state and local statutes restricting access to abortions which are currently pending before the Supreme Court.[309] Perhaps the most important issues to be decided are the constitutionality of state imposed "informed consent" and mandatory waiting period requirements. Sixteen states have enacted laws requiring that women be provided detailed information before undergoing an abortion.[310] The woman is required, by statute, to sign a statement that she has been informed and voluntarily chooses to have an abortion understanding the information provided. In addition, eleven states have enacted statutes requiring that there be a twenty-four or forty-eight hour waiting period between the time a woman signs the informed consent and the time the abortion is performed.[311] If abortion is viewed as a private

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309. Simopoulous v. Virginia, 221 Va. 1059, 227 S.E.2d 205 (1981), *cert. granted*, 50 U.S.L.W. 3927 (May 25, 1982) (No. 86-212). (*Simopoulous* involves the constitutionality of the state statute which requires that all abortions past the first trimester be performed in a hospital). *See* Planned Parenthood Ass'n. v. Ashcroft, 655 F.2d 687 (8th Cir. 1981); *supplemented*, 664 F.2d 687 (8th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3920 (May 25, 1982) (No. 81-1255) (*Ashcroft* involves challenges to a parental consent provision for minors, a requirement that a second physician be present during all second trimester abortions, a requirement that all abortions past the twelfth week be performed in a hospital, and a requirement that a pathology report be done on all medically aborted fetuses); Akron v. Akron Center for Reproductive Health, Inc., 651 F.2d 1198 (6th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3928 (May 25, 1982) (No. 81-746) (*Akron* involves challenges to a municipal ordinance requiring the physician to disclose information concerning the fetus to the woman and requiring a 24 hour waiting period between the time the woman signs the informed consent and the time the abortion is performed).

310. ARK. STAT. ANN. § 41-2555 (1969); DEL. CODE ANN. tit. 24, § 1794 (1979); IDAHO CODE, § 18-609 (1973); ILL. REV. STAT. ch. 38, § 81-23(2) (1975); 1980 MASS. GEN. LAWS ch. 112, § 12(s); (Michiel Law Coop); MINN. STAT. ANN. § 145.412, subdiv. 1(4) (West 1974); MO. REV. STAT. § 188.039 (1974); MONT. REV. CODE ANN. § 50-20-104(3) (1974); NEBR. REV. STAT. § 28-326(8) (1977); N.D. CENT. CODE § 14-02.1-02(5) (1979); PA. STAT. ANN. tit. 35, § 6602 (Purdon); R.I. GEN. LAWS § 23-4-2 (1981); S.D. COMP. LAWS ANN. § 34-23A-10.1 (1980); TENN. CODE ANN. § 39-302 (1979); UTAH CODE ANN. § 76-7-305.5 (1981); VA. CODE § 18.2-76 (1975).

311. DEL. CODE tit. 24, § 1794(b) (1979) (24 hour waiting period); ILL. REV. STAT. ch. 38 § 81-23.2 (1975) (24 hour waiting period); IND. CODE ANN. § 35-1-58.5-2 (Burns 1977) (24

moral judgment, as advocated in this Article, then it is clear that such restrictions on access to abortions are unconstitutional.

The challenged informed consent requirements can be divided into two categories: "general" and "detailed." The first type are general provisions which require the woman seeking an abortion to certify in writing that she voluntarily consents to the abortion and has been advised of the nature of the procedure used, the possible risks of that procedure, and the risks of abortion in general.[312] The second type require that the woman be informed of much more detailed information, such as the physiological characteristics of the fetus,[313] the fetus' sensitivity to pain,[314] agencies which will assist her in carrying the fetus to term,[315] and the like. Some of these more detailed informed consent requirements also provide that the woman be told that the fetus is a human life,[316] that she waives all parental rights in the event of a live birth,[317] and that she cannot be denied welfare benefits merely for refusing to undergo an abortion.[318]

The general informed consent provisions have been consistently upheld because they do little more than codify existing tort law principles concerning what a physician should disclose to a patient.[319] By contrast, the detailed informed consent requirements

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hour waiting period); MASS. GEN. LAWS ch. 112 § 12(5) (1974) (24 hour waiting period); MO. REV. STAT. § 188.039 (1974) (48 hour waiting period); NEBR. REV. STAT. § 28-327 (1977) (48 hour waiting period); N.D. CENT. CODE § 14-02.1-03.1 (1979) (48 hour waiting period); R.I. GEN. LAWS § 23-4.7-2 (1981) (24 hour waiting period); S.D. COMPILED LAWS ANN. § 34-23A-108.1 (1980) (24 hour waiting period); TENN. CODE ANN. § 39-302 (1979) (2 day waiting period); UTAH CODE ANN. § 76-7-305.5 (1981) (24 hour waiting period).

312. *See* Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981); Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542 (D. Me. 1979); Women's Services, P.C. v. Thone, 483 F. Supp. 1022 (D. Neb. 1979); Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978); Doe v. Deschamps, 461 F. Supp. 682 (D. Mont. 1976).

313. *See, e.g.*, Planned Parenthood League v. Bellotti, 641 F.2d 1006 (1st Cir. 1981); Charles v. Carey, 627 F.2d 772 (7th Cir. 1980); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980); Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978).

314. *See, e.g.*, Charles v. Carey, 627 F.2d 772 (7th Cir. 1980).

315. *See, e.g.*, Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980).

316. *See, e.g., id.*

317. *See, e.g.*, Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978).

318. *See, e.g.*, Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1008 (1st Cir. 1981).

319. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Planned Parenthood League v. Bellotti, 641 F.2d 1006 (1st Cir. 1981); Wolfe v. Schroering, 541 F.2d 523 (6th Cir.

clearly intrude on a woman's right to make the decision whether to have an abortion. First, such requirements are undoubtedly motivated by the state's desire to discourage abortion. This purpose is impermissible because, as explained earlier,[320] the state must take a neutral position on the abortion issue. Laws with the purpose and effect of discouraging abortion are unconstitutional. Second, detailed informed consent statutes impinge on the requirement that first trimester abortions are a matter to be left entirely to the woman and her physician.[321] As Justice Blackmun explained in *Planned Parenthood v. Danforth*:[322]

> [W]e are content to accept, as the meaning [of informed consent] the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.[323]

A physician is put in a "straitjacket" when required to inform a woman of irrelevant, medically inadvisable or medically unproven information, or when required to provide moral as opposed to health-related messages. Finally, the state's interest in assuring that consent is truly informed is adequately served by the general doctrine of informed consent, as is the case with all other medical procedures. The state could compel a woman to know of the physiological and anatomical characteristics of the fetus for only one purpose: to discourage abortions.

If abortion is to be considered a private moral judgment, then the state cannot require that information relating to the *morality* of the decision be given to every woman who seeks an abortion. The state could only require that information which a reasonable person would find to have a significant or material effect on the *medical* aspects of the abortion decision be given. In fact, lower courts reviewing the constitutionality of informed consent requirements "have upheld the requirements which coincide with the gen-

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1976); Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1981); Women's Services, P.C. v. Thone, 483 F. Supp. 1022 (D. Neb. 1979); Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978); Doe v. Deschamps, 461 F. Supp. 682 (D. Mont. 1976); Planned Parenthood Ass'n. v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975).

320. *See supra* text accompanying notes 267-77.

321. *See* Roe v. Wade, 410 U.S. at 163.

322. 428 U.S. 52 (1976).

323. *Id.* at 67 n.8.

eral law of informed consent and have invalidated the portions which do not contribute to the goal of autonomous self-determination."[324] Lower courts have consistently struck down detailed informed consent requirements as infringing on the woman's right to make a private moral decision.[325] The approach advocated in this Article is entirely consistent with these precedents.

The requirements for a twenty-four or forty-eight hour waiting period before a woman can undergo an abortion also unconstitutionally infringe on a woman's right to make an autonomous decision. Why would a state require such a waiting period for abortions but not for any other medical procedures? The obvious goal of such statutes is the hope that some women will change their minds during the waiting period and a law with the purpose and effect of restricting abortions is unconstitutional. A state imposed waiting period intrudes on the woman's right to make the decision exclusively with her physician. Again, this conclusion is supported by precedents because virtually all lower courts considering the issue have invalidated waiting period requirements.[326]

Viewing abortion as a private moral judgment compels the rejection of detailed informed consent laws and waiting period requirements. Lower courts have already ruled in this direction; hopefully, the Supreme Court will follow.

CONCLUSION

Roe v. Wade will soon celebrate its tenth birthday. Is there

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324. Note, *Abortion Regulation: The Circumscription of State Intervention by the Doctrine of Informed Consent*, 15 GA. L. REV. 681, 702 (1981).

325. Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981) (physiological characteristics); Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (physiological characteristics, sensitivity to pain, copy of test results); Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978) (waiver of parental rights); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980) (physiological characteristics, "including, but not limited to . . .", human life from conception, major surgical procedure, birth control, assistance agencies); Women's Services, P.C. v. Thone, 483 F. Supp. 1022 (D. Neb. 1979) ("reasonably possible medical and mental consequences resulting from an abortion, pregnancy and childbirth"); Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978) (physiological characteristics, "such as, but not limited to . . .").

326. Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981); Charles v. Carey, 627 F.2d 772 (7th Cir. 1980); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542 (D. Me. 1979); Women's Services, P.C. v. Thone, 483 F. Supp. 1022 (D. Neb. 1979). *But see* Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976).

any value, other than academic hindsight, to rethinking the decision or re-evaluating the alternative approaches the Court might have taken? The continuing fervent debate over abortion assures the need for repeated decisions in both the courts and the political arena. A comparative approach, emphasizing the need to rhetorically justify the outcome, can guide both the courts and the legislatures in their future deliberations.

First, it is inevitable that the Supreme Court will have numerous opportunities to reconsider its holding in *Roe v. Wade*. Perhaps in the context of the Human Life Bill or when science advances the time of viability, the Supreme Court will need to again explain the constitutional status of abortion. For the reasons given above, the Court should explain *Roe v. Wade* as, ultimately, a decision that abortion is a private moral choice. The trimester divisions and the choice of viability as the time after which abortion can be banned are not integral to *Roe v. Wade*. Future Supreme Court decisions should be guided by the core thesis of *Roe v. Wade*: that the right of privacy protects a woman's decision as to whether or not to terminate her pregnancy. Simply put, the approach advocated in this Article is still possible, even a decade after *Roe v. Wade*.

Second, the debate in the political arena should be a comparative one. The public debate over abortion should advance past each side merely restating their arguments. Advocates should be required to justify the assumptions and implications of their positions. After such a dialogue, it is likely that the legislatures and the public will realize that it cannot be decided when life begins; that the issue is *where* in society the abortion decision should be made. That is, it should become evident that there is no rational way to choose a single point, be it conception or viability, after which abortions should not be allowed. Rather, the issue becomes who should decide whether a fetus is to be regarded as a human person. Ultimately, the question to be debated is whether the decision is one of public morals for society to make, or private morals to be left to each individual woman. A debate over this question can be useful in guiding decisions on many other issues where a choice must be made as to whether a decision should be left to the individual or the community.

Finally, it is hoped that the analysis in this Article begins to suggest the importance of evaluating the rhetoric of Supreme

Court decisions. The justifications given for a decision are crucial. Since there is rarely a "right" answer to a constitutional problem, at the very least we can ask whether the Court has adequately justified the approach it has taken. After all, does the Supreme Court have any power other than its ability to persuade other branches of government to go along with judicial decisions? And if all judicial authority is premised on its rhetorical powers, should not analysis begin, especially in considering a controversial case like *Roe v. Wade*, by analyzing that rhetoric?